

**Minnesota Foundational Environmental Laws
Oral History Project**

**Narrator:
Gregg Downing (GD)**

**Interviewer:
Stephanie Hemphill (SH)**

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Stephanie Hemphill (SH): The following interview was recorded with Gregg Downing on behalf of the UMD [University of Minnesota Duluth] Kathryn A. Martin Library Archives for the Minnesota Foundational Environmental Laws Oral History Project. It took place on Wednesday, January 18, at Mr. Downing's home in St. Paul, Minnesota. The interviewer is Stephanie Hemphill.

SH: So, Gregg, thank you so much for your time.

Gregg Downing (GD): You're welcome.

SH: Let's start by getting some brief biographical information. Where were you born and where did you grow up?

GD: I was born in Minneapolis, Minnesota, and I grew up in St. Louis Park.

SH: Okay, right around here. And where did you go to college and what degrees did you get?

GD: Okay, I went to, graduated from the University of Minnesota Twin Cities, and I have a bachelor of chemistry degree, and I also have a master's in civil engineering with an environmental emphasis.

SH: Hmm. And give me a brief outline of your career, especially how you got into this business of environmental regulation.

GD: Okay. Actually, I answered an ad for a student intern at the Pollution Control Agency [PCA] in 1974, when I was just starting to take some environmental classes, and they were hiring people to work on some water quality management plans. And I luckily got hired to do that and so I worked there while I continued working on my master's degree and after a year or so, a permanent position opened up that I qualified for, so I started working as a full-time employee for the Pollution Control Agency in water

quality planning. And I stayed at the PCA for a number of years doing some water quality work and also in the solid waste division and ended up working in their environmental review office, which reviewed environmental documents and also prepared them; and my specialty was the solid waste area. And in 1982 a position opened at the Environmental Quality Board [EQB] for the program coordinator for environmental review. I applied for that and was lucky enough to be hired as the Environmental Review Coordinator there. And stayed there for the rest of my career until I retired in, um, I guess it was January of 2011.

SH: Well, you're just the person I should be talking to then, because this is really what I've been learning about.

[Both laugh]

GD: I was there for a long time, yes.

SH: Yes.

GD: Actually, the position that I filled opened up because just before then the agency had been involved in a major rule-making to overhaul the process—the biggest overhaul that's ever happened since it was started. And the people that worked on the rule revision I guess [laughs] got tired of it by the time it was all over and went off to other things, so the coordinator position opened up at that time.

SH: Oh, I see.

GD: So, I was there for the implementation of the program ever since that change.

SH: And that was in '82.

GD: Yes, the very end of '82 I started working there, yes.

SH: Okay, all right. Because I wanted to ask you about changes to the Minnesota Environmental Policy Act [MEPA] which, I had a list here, but I think the first one might have been in 1975.

GD: They did make some modifications in, I think, '75 or '76. But there was a major overhaul in—the 1980 legislature made some significant changes. That's the time when mandatory Environmental Impact Statements [EIS] came in, the role of the EQB was changed so they were no longer the appeal body for the decisions about the need for review. The petition process was, the citizen petition process was changed so that only twenty-five signatures were needed to get the process started, but you couldn't petition

directly for an Environmental Impact Statement, only for an Environmental Assessment Worksheet [EAW]. And let's see, there were some other changes at the time as well, but those were the major ones, kind of getting the EQB out of the central role of making the decisions.

SH: Okay, so that was quite a few different changes and it sounds like some of them might have been compromises.

GD: Yes.

SH: Could you talk about what the issues were that people saw that made them think they needed to change things?

GD: Okay, yes. Well, one was that the environmentalists—to call them that—were concerned that there weren't enough Environmental Impact Statements being done. And at that time, each one was ordered as a specific decision on the project; there were no mandatory requirements. So, one of the keys to this was that there were mandatory thresholds set so that projects over those thresholds would automatically start at the EIS process. Another was that the Environmental Quality Board which was supposed to, you know, had a wide variety of responsibilities, spent most of its time at board meetings dealing with citizen petitions, either to start review or challenging the decisions made by units of government. Because the petition process worked, that 500 people could petition, but it went right to the Environmental Quality Board, so the board spent an awful lot of time at its board meetings listening to arguments and then deciding did this project need a review or not. And they felt that it wasn't appropriate for them to be making these decisions and also it was taking up all their time and they couldn't work on, you know, other bigger-picture issues. So, I think it was the board's idea that they would be taken out of this decision-making role.

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SH: And it would be devolved onto local governments or state agencies?

GD: That's right, yes. Exclusively. And if you wanted to appeal one of those decisions, you head to court after that. No longer could you come to the EQB.

SH: So, how did those changes work out?

GD: Well, that would depend upon who you ask, I guess. Although even before that change was made, even when the EQB made decisions about whether EISs were needed, they didn't order many EISs either, I mean, people sometimes think that when the EQB made these decisions, all these EISs were ordered, and when they got out of it a

lot less were done; that wasn't really true. It wasn't really significantly different in terms of the numbers. There were somewhat more EISs but the thresholds were set pretty high for lots of kinds of projects so, unless you had a project over that threshold, it wasn't probably going to have an EIS. And developers were generally pretty opposed to having to do EISs, so sometimes they would size their projects in ways that they could be under the thresholds. So, it really didn't make a huge difference. There were more EISs done after then because of these mandatory requirements, but it wasn't like a huge increase. So, I think that some people were disappointed about that. Um, the citizen process though, again depending upon who you ask, I think it was a good change because it made it a lot easier for people to file a petition. You only needed twenty-five signatures instead of five hundred and since it wasn't a decision about the need for an EIS or not, just for an EAW, it sort of, it made things, the stakes weren't as high and it made, maybe the process to work a little more smoothly. I mean, people weren't nearly so opposed to having to do it. The citizens, because it was easier to file a petition, they weren't really all that worked up about it. If you had to get five hundred signatures, it was a pretty big deal, and by the time you'd done all that work, you're really pretty gung-ho to get your way. Whereas with twenty-five, it wasn't quite as polarized that way. And it gave people a chance, you know, if there was some development project in the area they were concerned about, it gave them an opportunity to at least slow things down and find out more about the project. Usually it didn't—most petitions were not successful. I think it was something like twenty percent of them, maybe one out of five that actually led to an EAW. But at least they got a hearing before the unit of government about the environment issues and they could make their case and most units of governments took the petitions pretty seriously and at least considered them. They may have turned it down but at least they listened to the citizens, not always, but in most cases. So, at least the people felt better about the situation, like they'd had an opportunity and they at least knew more about the project and they had done something, even if they didn't prevail, they felt that they had been listened to. So, I think it was valuable that way. In some cases, it probably eliminated lawsuits that might otherwise have been filed. If you couldn't have done this, what else were you going to do? You'd probably have to oppose the permits. You'd probably have to do that by going to court, so there may have been more lawsuits that resulted. Probably not a lot more, because filing a lawsuit is kind of a big deal, but in some cases it probably helped diffuse the need for a legal remedy.

SH: You think those changes may have contributed to fewer lawsuits?

GD: Probably.

SH: Hmm. Um-hmm. And what about the work of the board? That's one reason why they wanted to get rid of being the responsible body; they wanted more time to do other jobs they had.

GD: That's right.

SH: Did they do those other jobs?

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GD: Um. Yes, to some extent. Some people would probably think they still should have done more, but there were times when the board spent a lot of its time doing other more strategic planning efforts. One good example was in, I think, the latter part of the [Governor Arne] Carlson administration, the board spent several years working on a sustainable development initiative, as they called it, where they did quite a bit of work. They organized, I think, an environmental congress around that topic and they formed a bunch of task forces on various topics, like there was an agricultural sustainable development one and I think a manufacturing one, and several others, I forget all the names, but anyway, they got stakeholders involved and government agencies and there was a lot of talk, at least, and I think an actual plan was developed and endorsed by the board.

SH: When was this?

GD: I think this was in the late '90s, well, mid-late '90s, during the Carlson administration. It made, you know, significant effort and as I recall, the commissioners were pretty devoted to it and did their part to try to keep the effort going and try to reach a conclusion.

SH: So, tell me more about this sustainability effort. Did they have, did they want different laws to be passed or what was it?

GD: I'm not, I'm kind of fuzzy on the exact outcome. I think there were some fairly specific recommendations in the report and there were some more general things. I'm not sure exactly what came of it because there was a change of administration about the time that this got done, and it seemed like every time the administration would change, whatever the board had been working on sort of started all over again. [Laughs] The new people always, no matter what party they were, they were always skeptical that the last people had done such a good job and they kind of wanted to go back and do things their own way. So, that happened pretty much every time the governor changed, at least in my experience.

SH: That sounds a bit inefficient.

GD: Yes, yes. There are some problems with our system of government that way, yes.

[Laughs]

SH: Well, and then there were other changes over the years. There were some feedlot, you know, animal unit numbers that changed and so on. Can you characterize those changes in a general sense? Did they make things more liberal and easier for developers or the opposite? Or was it a mix?

GD: Well, with feedlots, feedlots was a very controversial topic throughout the '90s and in fact it got to the point where the Environmental Quality Board decided that they would do a Generic Environmental Impact Statement [GEIS] on animal agriculture and it was spearheaded by the heads of the Pollution Control Agency and the Department of Agriculture, and I think the Department of Health because the issues were so controversial that they felt that the state needed to do something beyond what they were doing, you know, on an individual, case-by-case basis, so they actually got the board to order this big Generic Impact Statement and got the legislature to fund it. And it was a big four-year effort to, you know, kind of really look into the issues and try to put some science on what the real impacts were and what could be done about it. But at the same time there was concern about the review of specific projects. And I think at the time this started, I think the threshold was two thousand animal units for an Environmental Assessment Worksheet. [Clears throat] Excuse me. And there wasn't any mandatory EIS category and the board did a rulemaking, including a bunch of public meetings and I think we had an administrative law judge involved and [laughs] the conclusion sort of was, "Well, the industry wants the threshold higher and less reviews and the environmentalists and the citizens want the threshold lower and they want more reviews." So, the board finally decided they'd cut the threshold to one thousand animal units and so we did a rulemaking and set the threshold there. So, it brought more projects in.

SH: For review.

GD: For review, for EAWs.

SH: Hmm.

GD: But the legislature was concerned about that and after a certain amount of wrangling the legislature actually intervened, I guess you would say, and in the statute, they changed the threshold back to, I think, two thousand units in certain circumstances. And that was, you know, nothing that the board was directly—I mean, we were aware of it, but I don't think they came and asked us what our opinion was about this; they just did it. And then we had to adjust the rules accordingly after that. Um, so, I don't know if they did that more than once? They might even have intervened more than once on the feedlot thresholds because it was definitely a real big issue with a lot

of the legislators.

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SH: In the late '90s, early 2000s?

GD: That's right, yes.

SH: Okay. When you do a GEIS like that—I'm more familiar with the forestry one—is part of the purpose to, uh, let's see, limit the number of individual EISs that eventually have to be done, I mean, is that part of a purpose of the GEIS or not?

GD: Not directly, because the law, or at least the rules, actually stated that just the fact that a Generic EIS was done for a topic didn't mean necessarily that individual projects didn't need their own reviews. Although there was a possibility that an outcome of a GEIS could be to change the thresholds, to say that, "Okay, after reviewing, it looks like not all these projects really do need review, maybe those that have these characteristics do and these don't." I don't think we actually did that in any of the two GEISs we did, but that's a possible outcome. So, although there were plenty of people that thought that if a GEIS was done that was going to eliminate the need for reviews in specific projects. And I think it was, at least the way we did the two, was more to provide information that could be used to facilitate those other reviews so that you didn't have to try to, you know, reinvent the wheel, relearn information that would go into the review, that like, "Here's a ready source of information." And you could even incorporate it by reference so you didn't have to even, you know, regurgitate that information. But, um—

SH: So, the GEIS is done on an area, a topic, that's very controversial?

GD: The two that were done, yes, were definitely very controversial, for forestry and then animal agriculture, yes. And they were somewhat successful. I mean, the forestry one did result in concrete results, the creation of the Forest Resources Council, which has done certain specific things in that area. I'm not sure the animal agriculture one—it at least helped calm things down for a few years, because everybody could sort of put their energies into participating in that process. Because we had, it was a, I think we spent over a million dollars just on the public participation aspects of that EIS.

SH: That's a lot of money.

GD: Yes. It cost three million bucks total.

SH: Yes.

GD: Yes, you know, [a] good deal of that went for running the advisory committee and then the other public outreach part.

SH: But it's hard for you to point to any specific outcome.

GD: You know, I forget exactly, I mean, there were specific outcomes, but whether or not they got implemented, I really am kind of vague on exactly what it was now.
[Laughs]

SH: You had a long career; you can't remember everything. Okay. Let's see, I wrote down here, "Reinvent the wheel." What did I mean by that, um, oh, so some of the discussion about environmental review has to do with how broad they are and complaints that, "Okay, we have to talk about everything and the bathroom sink, and we shouldn't have to do that because we know certain things already." Do you know what I mean?

GD: Yes, right, that was a constant and I guess, still today, a criticism of it and related to that, the idea that, "Well, if information has to be submitted for a permit application, you know, why do you have to submit similar information for the EAW or EIS?" And definitely there can be a tendency, especially in an EIS situation, and sometimes for EAWs for, like a, "Answer one question and you get another question," you've got to answer that. There's some validity to that complaint from industry, that you know, they like, are never done because there is always another question. But I think it's exaggerated, it's not, it doesn't happen in all cases and in some cases I don't think it's legitimate, but there is, when you're a practitioner in the field, there is, you know, you're responsible for an EAW or EIS, there is always that question, like "How far do we really need to go?" Especially on areas where the state doesn't have much experience, like if it was a new kind of project or something, or a project of a different nature, maybe in a different location. Um, I mean they do have that question, you know, "Is this enough information or do we need more? Is it really reasonable to ask the proposer to supply more than this?" And then connected with this is the question, you know as you learn more about things, you do find out there's other stuff you didn't worry about in the past that, gee, maybe we should have worried about. So, I mean, that's one reason why this kind of thing comes up. Like maybe the first project of a certain type, agencies can think of fifteen new questions to ask about it. Well, in the process of doing that review, they learn there's a bunch of stuff they didn't know. So the next project, now they have twenty things they have to address, and it kind of snowballs like that sometimes. And you've got to be careful that you don't let that get carried away.

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SH: Now, at some point there was the idea of a scoping process.

GD: Right, yes, the scoping process. With an EIS, the scoping process was intended, I mean it's still intended to be the way you decide, "Okay, this is what we need. This other stuff we're not going to look at." Scoping is not easy to do though, as I was involved in a number of EISs where we were trying to decide those issues and it's not an easy thing to do, you know. If you have some past similar EISs, that's kind of the guide you kind of work on, but if you're dealing with something new it can be real hard to decide how far to go. And there's always pressure, you know, the people opposed to the project or the environmental groups, they're pushing you to cover more stuff and the industry people or whoever is behind the project, you know, wants to limit it partly because it's going to cost them more and take more time. So, it's not an easy question.

SH: But part of the scoping process is that both sides have to agree at some point on what will be in the EIS, is that true?

GD: Well, the Responsible Governmental Unit [RGU], the agency that's in charge, they get to make the decision.

SH: But you take input?

GD: They take input, that's right. And it would be good if people could agree, or some general agreement, like, "Okay, everyone agrees this is what we're going to do." But sometimes, there isn't agreement and then they've just got to decide. And there are time limits, too, they're supposed to not drag this out. And sometimes the Responsible Governmental Unit would rather take more time, but they're under pressure to make a decision. So, there's a lot of uncertainty in doing an environmental review.

SH: Yes.

GD: And, you know, can either—a lot of it depends on how experienced and competent the people that are in charge actually are, you know.

SH: And wasn't that one of the worries about devolving it down to local governments? Because they don't have much experience sometimes?

GD: That's definitely so. On the other hand, they also are the ones that know more about the local conditions, too, so there's tradeoffs, pros and cons. My experience, most of the local units of government, even some fairly small ones, you know, at least took the job seriously and tried to do a good job. That didn't always, sometimes they really didn't have the competence to do very well, but they almost always tried. Sometimes they realized they needed help and they'd hire a consultant to help advise them on how

to go about it. So, I think overall they did a fairly decent job considering that you have all these different units of government in the state, so many different municipalities and the counties, sometimes townships, so the review was kind of uneven, but I mean, my opinion was that it was, you know, they didn't do that bad a job. And having it back at the time when the EQB did everything, EQB just got so bogged down in stuff. I mean, they had maybe half a dozen staff working on reviews at one time, but I mean, I, there were some projects, when I came in, as I said they'd changed the program so the EQB didn't make decisions anymore, but there were some projects left over that needed to be finished off under the old law, so I got involved in just a few of those cases and it took huge amounts of staff time to, you know, go to have a hearing and summarize all the comments for the board and put it together and try to advise the board on the pros and cons and how they should go. So, I don't think that was really a viable way to continue either; it had to have some decentralization. You can argue about whether it was decentralized too far and if the EQB should have retained some authority to overturn decisions so you didn't have to go to court. That was always an issue that was always out there, but it never got changed back. I think the board was probably reluctant to get back in making those decisions.

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SH: Um-hmm. You said it's hard to know how far to go deep into a question. And I think the question of climate change came up in some environmental reviews lately, uh, I don't know if it was for Keetac or Minntac or something, that environmentalists argued that we should be considering the output of climate changing gasses from this project. And I think that was rejected.

GD: Yes, that issue, whether or not, to what extent climate change needed to be incorporated into reviews was just kind of surfacing when I, the last few years before I left and I, it was up in the air, I don't think, I don't know if we ever had a serious discussion about that with staffs of any of the other agencies or at the attorney general's office. I don't think we reached a decision about what kind of guidance we might issue on that, so anything that's happened has been since I retired. But you could see, it was one of those things that was on the, had emerged and was going to need to be dealt with.

SH: This may be an example of what you mean when you say, "Sometimes we get into these things and learn the second time around that there's a lot more to think about."

GD: Yes, yes, right, because these issues come up and it takes a while for them to be incorporated into environmental review in a lot of cases. Unless they were sort of like at the heart of what the type of the industry was or something like that. I mean, those issues were usually known to the people doing the permits, but other issues of a more

general nature like climate change effects would be the kind of thing that would be, “Gee, how do we put this in here?” And it is kind of a scary topic because like, where do you draw the line on something like that? Does it apply to all sorts of projects, even fairly small projects that have a small carbon footprint or something? Are they going to have, how much are they going to have to do? Maybe it’s the kind of thing another Generic Environmental Impact Statement ought to be done about or something. Except they’re so expensive [laughs] I’m not sure you could ever do another one. [Laughs] I’m not sure the legislature would give us the money to do another one.

SH: Yes, and they probably get more expensive every time you think about–

GD: Probably they do, yes.

SH: You just said that having a hearing and summarizing and everything, “Gosh, it really takes an awful long time.” But, this is public input, this is how public input is included, so could you talk about the balance between efficiency and public participation?

GD: Yes, when I said that, I didn’t mean to indicate that it isn’t an appropriate thing, it’s just that it can take an awful lot of resources and so that has to be taken into account. Yes, one of the most important things about environmental review and one of its certainly most valuable things is the fact that it is a much more public oriented process than most—at least state agency permitting processes. And in some cases even more than local unit processes because there’s always an opportunity for some kind of public participation. In an EIS situation for a lot [of public participation], and the agencies are at least somewhat accountable for taking the comments into account and responding to them in some kind of reasonable way, letting people know what their response is and then taking that into account in making their decisions. So, and there’s even language in the rules about trying to write things in a way that the public can understand them. I’m not sure that always happens, but there’s definitely an effort that is more publicly accessible than say, like an air quality permit or something, you try to read some of those notices, even I couldn’t understand those notices and I had a scientific background and worked in the government for years, so–

SH: Yes. Do you know how Minnesota compares with other states in encouraging public participation?

GD: Um, I think we compare pretty well. In one respect, the environmental review process, having a citizen petition to bring up a review, we looked into that at some time, probably fifteen years ago or more now, and perhaps things have changed, although I doubt it, but at that time no other state that had environmental review had a similar citizen petition process. There were a couple of states that had what appeared on paper to be a process, but in actuality it was so cumbersome I don’t think they were ever used.

So, like in that respect Minnesota actually was more liberal than any of the other states, at least in a formal way that you could bring up the review and actually make some unit of government have to be accountable for a decision which you could challenge, if you wanted to, in court. Um, and in terms of having the public input on things, I think that Minnesota's process is probably at least as good as most other states anyway. A lot of other states don't have any environmental review at all. There were only, I don't know, maybe like fifteen that have anything that you could even count as similar and of those there's probably only half a dozen that were very comparable. And only really California and New York had programs that were really, you know, as wide reaching as Minnesota's.

SH: Really!?

GD: Yes.

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SH: Why do you think that is?

GD: Um, I guess it was, you know, back in the '70s when the National Environmental Policy Act [NEPA] was passed, you know some states sort of like said, "Hey, we need something like that, or maybe even better." I mean California, they really went out of control I think, most people, well maybe not most people [both laugh], but a lot of people would say California really went overboard, but other states like New York and Minnesota and Wisconsin, um, I forget which other ones adopted their own versions of it, but even some that adopted, have it on statutes, like never actually used it, or very little. Like, I think South Dakota was one that actually had a program that kind of looked the same, but like, it could only be invoked by the governor, or something like that. I don't know if they ever, ever used it or very, very sparingly. The other hand, New York, I mean when Minnesota, we do like maybe ten EISs a year on average, I mean, they were doing at least two hundred a year in New York, and no one could even count how many California did. [Both laugh] I mean, they do thousands of EIS type documents, I think they call them by something else, but they are EISs. And they don't even try to keep track of them; there's like, like I said, some people would think it was out of control.

SH: They must pour tons of resources into it then.

GD: Every unit of government in California apparently spends huge amounts of effort on these reviews of all kinds of stuff, way beyond stuff that we would ever review.

SH: I was wondering, too, about, lately, I've heard a conversation about how we should include permitting questions at the same time we're doing the environmental review.

Do I have that right?

GD: Yes, that's, the relationship is like an ongoing issue and a lot of the same questions are asked, a lot of the same information applies to both, but there are some differences. Like, some of the air or water permits you might get from the Pollution Control Agency, at some stage you need to get real detailed engineering information and, if you had to get that information before you did your EAW it would, I mean you would have to put a lot of effort into it and it probably it would be too technical to even be used in the EAW, except as maybe like an appendix or something. I mean, who's going to be able to review this stuff except engineers at the PCA or something like that. But things that are less technically detailed or sophisticated and a lot of issues that are of a broader scope are really appropriate to be handled in an environmental review stage and then carried over into the permit stage, so again, it's a question of you knowing just how far to go, at which stage.

SH: Right. And on the other hand there's, sometimes I get the impression that in an environmental review, the answer to a question is, "Well, we'll deal with that in the permitting stage."

GD: Yes, and generally speaking, I would say that's not a legitimate answer because for one thing, when you're doing an EAW, what if the thing is really a significant issue and because of it you need to do an Environmental Impact Statement? Well, if you just passed it off to the permitting, you've just avoided even making that decision with all the information in mind. If it's, if you're doing an Environmental Impact Statement, if it's a significant issue, maybe you need to look at some kind of alternative that would lessen or avoid that kind of impact. So, I mean, you need to know enough about it to know whether it's, it may be that it actually is appropriate to deal with only in the permit if it's like some technical detail, but you need to have enough information to know that as opposed to like, "We don't know. We'll just handle it later." It's like an empty promise I think, one of the court cases called that kind of thing. You just can't say, "Don't worry, trust us; we'll handle it later." That's definitely not good enough. It's like, "Trust us; we'll handle it later, because we know this much about it and we know the real issue is the size of the fermentation tanks or something, and that can only be figured out when we get to that engineering stage." Or something like that.

SH: Hmm.

GD: I just made that up, but—

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SH: Yes, sure. But you have seen this happen?

GD: Um, people generally don't, units of governments generally don't get away with that. I mean commenters would bring that up or, I think there have been a couple of court cases where that was at least part of the issue. Like, people basically ducked the issue and put it off to the future and it's clear that you've got to bite the bullet now and make a decision, you know.

SH: Hmm. Um-hmm. Okay well, let's move on a little bit and talk about— unless you have more of what we're talking about here?

GD: I don't think so, although it might come up again, so—

SH: Um-hmm. A big question when the law was passed, Minnesota Environmental Policy Act, was the make-up of the EQB. And I think they arrived at a compromise in '73 when it was passed and so it's made up of citizen, some citizens—three, I think—and then agency heads.

GD: Correct, yes.

SH: And what's your point of view on that? Because there's a lot of discussion still.

GD: Yes, that's always been a point of contention and there's always more commissioners than there were citizens. I believe there were four or five citizens when I was working with the board. Maybe it depended on whether the chair of the board was a citizen member or commissioner—maybe it was four-plus—if the chair was a citizen that made it five. Anyway, there always [were] like seven commissioners or something, the number varied over the years depending on how agencies were reorganized and things like that, but the commissioners always outweighed the citizens. So, there would occasionally be situations where the question, a certain agency had made a decision and the board was considering overturning or something, and generally what happens, what we always referred to as “circling the wagons”. The commissioners would very reluctantly vote against one of their members—agencies—so I suppose thinking like, “Well, this time it's the DNR [Department of Natural Resources] in the hot seat, but it might be my agency next time so maybe I don't want to get the DNR commissioner angry at me here today, so I'll vote with him and hope that he votes with me later,” or something. Um, we always speculated that that's what the thinking was because very seldomly could you get the EQB to act against one of the member agencies, and I figured that was probably the reason.

SH: And that was the concern of environmentalists right at the very beginning, when they were designing the law. The people who were proposing it said, “We'll have three citizens in charge of this thing and then the agencies will just be advising them.”

GD: Yes, if the citizens had a majority, I mean, chances are at least in some cases I think the outcome would have been different. Although it depended on who the citizens were, too, they didn't always agree with each other. Um, so and I don't know if there was ever a serious effort to change the statute, to change the composition of the EQB? I know there was always talk about it, but I don't know if anybody actually ever really tried to make the change. So, certainly that was one impediment to the board doing some fairly aggressive things. Another would be, that the citizens and the agency commissioners only had a limited amount of time to devote to EQB activities, I mean if you're running the PCA or the DNR, you don't have a lot of time to worry about EQB things, or other things that are kind of a minor part of your job description, so to speak. And the citizens, I mean, they all had lives outside of it and some of these things got pretty complicated and if they really wanted to get into it, I mean they would have to spend an awful lot of time and they may or may not have had an appropriate background, you know they maybe had to do a lot of research so I think a lot of times the citizens felt a little bit out of their depth and almost had to defer to some of the agency commissioners on some of this stuff. I mean, as a staff, we tried to provide a fairly in-depth and balanced briefing to the board about the issues and the views from both sides, and certainly people had the opportunity always to testify before the board, but I think a lot of times, people—board members—really didn't feel that they knew enough about it to do anything very drastic or make a big change or something that was like a really big step because they simply hadn't had enough time to really get into it.

0:40:13.9

SH: Yes, there was one reform review, one study that was conducted that said, "We really should either have three citizens who are paid significant amounts of money and can hire their own staff, or we should have—" I forget what the other option was, but that struck me as, it would have been quite different if that's how it was.

GD: I think it would have been, yes. And Massachusetts is another state that I didn't mention before that has a pretty strong environmental review program and there, there is a commissioner-level person that makes decisions and has, you know, a considerable staff. They, so, it's not a citizen, but it's somebody that's not directly beholden to anybody except the governor.

SH: Yes. You might call that an environmental czar.

GD: Yes, sort of, yes. And you know, the authority is, certain things they can do, but they can decide what needs review and whether or not it needs an EIS and what the level of analysis they need.

SH: So, do you think Minnesota would ever get to that point?

GD: Boy, I would be very surprised if the law could be changed that way now. I mean, in general, I think, well, I'll say this, the EQB did not initiate any significant changes to the statutes involving environmental review after 1980. And one reason was that we never felt comfortable—we could control what went into a bill, but we didn't think we'd be able to control what would come out—because there were, the balance of interests in the legislature, it was never clearly so pro-environmental that you could be pretty sure that something bad might not happen. No matter what the balance between the parties were, because not everybody in the same party had the same views either, especially on issues that involved, I mean issues of like, whether or not it was stifling jobs and that sort of thing. So, there were plenty of people who might be pretty pro-environment on some things but on some other stuff they might not be.

SH: Or the agriculture interests.

GD: The agriculture interests would be one. Some of the interests from northern Minnesota associated with mining. Um, we had a number of cases where, even in rulemaking, where we were doing something that we thought was pretty innocuous, where apparently certain mining-related interests thought, maybe they jumped to some conclusion that there was going to have some unintended consequence and apparently, you know, killed things off for us that we never even quite heard exactly how it happened, we just heard rumors, but [both laugh] like, we had one change we did send to the legislature, it passed the House 122 to nothing, with no discussion, but we could not get it heard in the Senate environment committee at all. They wouldn't even hear the bill. And we—

SH: What was that about, do you remember?

GD: You know, I don't even remember what it was. I mean, it was sort of like, it couldn't have been that controversial if nobody in the House even had a question about it and they all voted for it, but apparently somebody, and we heard it was some mining-related interest convinced the chairman of the committee that it was going to be contrary to their interests and they wouldn't hear it.

SH: Well, the Iron Range delegation has always had a lot of power.

GD: Um-hmm. Yes, it wasn't always the Iron Range people, but they were one of the groups that we knew would be concerned about some things, so we generally tried to fix things through rules and if, and beyond that, if we didn't, maybe if there'd been changes in the composition of the legislature perhaps the board would have sponsored some major changes, but we always thought that we're risking more than we're gaining

here by doing some of this, so we stayed away from the legislature when we could.

SH: That's one example of the legislature kind of interfering. Do you have other examples that you remember?

GD: Well, for decades, the legislature did not unilaterally intervene in the process by like setting thresholds for any categories; I mean they just left that to the EQB's rulemaking discretion. But, in the feedlot controversies starting in the '90s and the 2000s, the legislature actually made a couple of changes in the thresholds and such and then we had to incorporate into rules and after that, I kind of got the impression that somebody realized, "Gee, you did that for feedlots, maybe we could do that for other things." So, since then, I know for ethanol plants and other related things, they've had specific thresholds or exemptions set by the legislature without, you know, just telling the EQB to go ahead and fix things through rulemaking. And I think they've done some stuff with some of the energy facilities, they've just declared that certain things will need review or not need certain kinds of review.

0:45:32.7

SH: Hmm.

GD: And, like I said, for decades they never did any of that sort of stuff and now they seem to be more likely to. The ethanol plants and the feedlots are the two I can think of specifically, but there might be others also.

SH: Um-hmm. I have heard it said that a lot fewer EISs are conducted than was anticipated and you referred to this a little bit when you said that California and New York conduct a lot more than we do. And some people say that the EAW has essentially taken the place of the EIS, what do you think about all that?

GD: Well, it's true that we don't do very many EISs. As I indicated earlier, we never really have, even when the EQB itself ordered all the EISs. It's true that certain other states, like California and New York, do a lot of them. So, if you're expecting a lot of EISs, then I guess you'd have to say that EAWs have replaced some of those EISs, because that's what we tend to do. A couple things about that, one is I think the big difference why Minnesota never did very many and the other states like, especially New York—I know a certain amount about from talking to their staff people—in the early, I mean, if you look at their rules for doing an environmental review in New York, they're very, very similar to ours, the standards are essentially the same. The difference is, in the early days agencies there didn't order EISs either, but they were sued, quite frequently. And very early on there were some landmark cases set in New York, setting the legal standards for these things. And ever after that, you pretty much had to follow those, and if you

didn't, somebody else would sue you. I mean, staff people from New York said there were nastier people in New York [laughs] than in Minnesota.

[Both laugh]

GD: So, they would sue each other more often. Here, we had really very few lawsuits, you know, even after decades there's only really a handful of significant cases, especially ones that made it all the way to the Supreme Court. Chances are, if there'd been some other cases early on that, where the pro-environment side, or the side that wanted more environmental review had prevailed, you know, maybe we would have been forced down that same path. But it's sort of, the natural tendency is, I think, not to do EISs and you have to sort of be forced legally to do them. And in Minnesota there wasn't that much forcing.

SH: Hmm. Hmm.

GD: So, and sometimes, another factor is, especially if you compare our process to the federal process, the federal governments do lots of EISs, most of the federal EISs are about government actions, I mean, not like private projects being permitted, but actually government actions, the Department of Defense [DOD] building a facility, or implementing a new program that's going to have effects. I mean, they have to do environmental review on that and a lot of times, it's pretty clear [if] there's some big issues and broad alternatives that ought to be considered, they do EISs. Most of our reviews are about specific projects. The issues are narrower. A lot of times it's not really all that clear what the reasonable, if there are any reasonable alternatives. If somebody wants to build a shopping mall in a certain location, I think it's an open question in Minnesota, when would they have to look at building it at a different site? I mean, we don't really have any law that clearly indicates when you'd have to do that and you know, sometimes there might be an obvious other site that you'd think ought to be looked at, but sometimes, I don't know, do you need to look at different alternative site or do they just reconfigure their existing site or whatever? So, the fact that, probably the biggest thing you don't get when you just do an EAW is consideration of alternatives. As far as like the technical depth you might go to, I mean, some EAWs go into just as much depth as the EISs on issues—certainly not all of them, but sometimes they do—but they never look at alternatives. So, if the question of alternatives is the big issue, not doing EISs is probably a problem, or a deficiency. But in cases where it's not really all that clear that some other alternative really needs to be looked at, you know, maybe [it's] not so much of an issue.

0:50:01.1

SH: Well, talk to me more about alternatives; because that is a complaint of Chuck

Dayton, for instance, he says the EAW doesn't include alternatives. So, I suppose there are different kinds of alternatives, you mentioned different location, I think in some complex projects there'd be alternative treatment methods for waste water, for instance. But, isn't "no build" an alternative?

GD: Yes, you always have to consider the "no build" or the alternative of "no action" I think is what the statute calls it. Um, so that, the argument that you're missing that is, I mean, it's definitely true. Um, but— [pause] for, then the issue is, you know, how often is the, sort of the solution that, from a practical standpoint that we go to using the EAW is mitigation. Okay, well, mitigate the impacts. So, if you had a situation where even if you mitigate the impacts as much as you legally can or technically, feasibly can, or whatever, I mean, to go beyond that, those impacts that are left, are they significant enough that you really shouldn't build the project? They should go with the "no build" instead? In those cases then, not comparing it with the "no build" I guess is a problem, but which projects are those where you can't mitigate it down enough? That's sort of the issue there.

SH: Well, is that an assumption that we basically don't consider "no build" as an alternative?

GD: Yes, I think the, sort of the working assumption is that there's, it's very rare where the project would be so bad that the "no build" is the only alternative, or the only feasible and prudent alternative. I mean, that may not always be true. That may be one place where the way the process is played out in Minnesota is falling short of what the idea had been originally. But you know, probably if there had been some lawsuits along the way getting into those issues, we might have some clear guidance in law about that.

SH: Because I think the statute says that "No project shall go ahead that will harm the environment, unless there's no feasible and prudent alternative."

GD: Right.

SH: And economic considerations alone shall not be the deciding factor.

GD: Yes.

SH: I mean, obviously the environmentalists about the PolyMet project are arguing that if anything goes wrong, it's such a terrible result that it would be more feasible and prudent not to build it. [Laughs]

GD: Maybe that will be the legal case that gives us some clearer guidance on that. That question has been out there, I mean everybody that looks into this reads that in the

statute and that sounds really powerful, but when has it ever been invoked? Almost never. And then there's another section of the statute that actually gives the Environmental Quality Board essentially the authority to enforce that, could overturn or repeal a state permit on the grounds that there was a feasible and prudent alternative. The whole time I was at the EQB, the question of that only ever even came up I believe two times. We called it "the doomsday clause". Chuck Dayton did raise it with us one time and there was another case, but we kind of always wondered, "Why isn't anybody ever asking us about this?" Kind of hoping they didn't, because it was going to, kind of be an ugly issue for the staff to deal with, you know, and for the board, too because that would have been like, "Well, DNR commissioner, you shouldn't have issued that permit, we're going to suspend your permit, or actually void it."

SH: That would be a big step.

GD: They never actually came to that. I mean, both times it came up, it never actually— [In a whispering voice] No, one time it did actually come to the board, it did. What was that? I wonder if that was the Dakota County incinerator project? [Pause] [Spoken in a regular volume] Something like that, some, you know, big, high profile project.

SH: You called it the "doomsday clause" and what was the mechanism? Somebody would come to you and say, "You shouldn't be allowing this?"

GD: Yes. I mean, the statute just says that basically, the board can review and you know, modify or, I think, revoke any state agency permit that has to do with natural resources and the environment, basically on the feasible and prudent grounds.

0:55:11.9

SH: So, this is separate from reviewing an EIS?

GD: Yes, yes.

SH: Okay.

GD: It's in the same statute, but it's independent.

SH: Okay.

GD: It might even say that regardless of whether an EIS had been done, I'm not sure if that's in there, but yes, it was just an independent authority of the EQB that basically has never been invoked, or almost never.

SH: Hmm. But you said that there were two times when it came up?

GD: I think it did, but I think only one time did it ever come to an actual decision by the board. I think the board might have managed to duck the issue in the other case. I can only ever remember it ever being raised as a possibility by anybody on the outside a couple of times, which always surprised us.

SH: Well, you kind of have to read the statute don't you?

GD: Yes.

[Both laugh]

GD: It's not like the US tax code, I mean, there's only like two pages to the Environmental Policy Act, you know, I'm sure that there are plenty of lawyers that knew it, but, yes. Actually, in a way, it would have been kind of hellish to deal with, but it would have been very interesting, too, to get into it.

SH: Well, I mean, if the EQB as a board overall is reluctant to declare than an EIS is inadequate, that the DNR has conducted, for instance—

GD: Yes.

SH: This would be maybe even more critical?

GD: Maybe even more, yes, yes. That may have been people just thought, "Eh, we're not going to prevail; it's not worth trying."

SH: Hmm.

GD: Also, there was no procedures set forth as to how you'd go about it, so you know, I'm not sure how we would have dealt with it if it had come up.

SH: Hmm. Interesting. We haven't talked about the length of time it takes to do environmental reviews, but that certainly is a big complaint.

GD: That is a sore point, yes. It can be really fast, and they can be really, really, really long. And, I mean, there's obviously some correlation between the controversy level of the project and how long it takes. Um, and there's obviously correlation between what the issues are and how difficult it is to, you know, deal with them, in terms of doing some kind of scientific analysis or something. But, and the rules have lots of deadlines and time frames in there, but there's almost always a way to skirt that if you need to.

And it just, we kind of wrestled with, is there some way to make the process faster, and it's like, anything that we could ever think of that would actually force it to be faster had significant downsides, like, well okay, so time runs out and you don't have the information and then like, so you make the decision without knowing about the impact on, you know, the drinking water supply? That's probably not a very good idea, so it was always, seemed like, well okay, we'll just kind of fudge it here. We'll put a lot of encouragement in here and I guess, if developers really felt they were being slowed down, they could probably do some legal things to try to move it along. Of course, that would annoy the agency, it would probably find some other way to slow things down or ask them more questions that they didn't want to have to deal with. I mean, it's, the regulatory process is so full of all kinds of unintended consequences. You try to write things that are going to work real smoothly and efficiency, but they don't always work as you're dealing with people.

SH: Yes, and you mentioned the degree of A) complexity and B) controversy has a big impact, so I think there have been studies about [how] the EQB has reviewed how long it takes to do Environmental Impact Statements and EAWs and there's quite a range.

GD: Great range.

SH: And I think a lot of them are happening pretty fast.

GD: Yes, I think most of them do happen pretty fast. There are, sort of like, the ones that happen normally you don't hear about, because they're not very interesting. It's the ones like PolyMet that last maybe decades or the Stillwater Bridge, that one lasted forever, too. Those are the kind of things that make the news.

SH: And give ammunition to critics who want to simplify the process.

GD: Yes, exactly, yes, exactly. Yes, but most of the units of government and agencies try to do things in an expeditious fashion, at least most of the time. I mean, there are probably cases where things have been dragged out unnecessarily. You never know for sure, but you kind of—

1:00:04.3

SH: Why would an agency want to drag something out?

GD: Ah, I'm not sure if you asked the commissioner of the agency about it, I don't think they'd probably want to drag things out, but sometimes there are ways that if the staff doesn't want, maybe they think it's a bad project, and that maybe if they drag it out long enough it'll go away. That doesn't happen very often, but you sometimes suspect,

“I wonder if they were just, had to go that slow on that one?” You know, you just kind of—

SH: I’ve been wondering that about Minntac at the MPCA, they’ve been, Minntac has operated on an expired permit for, what, twenty-three years now? And they’ve had like four different schedules of compliance agreed to and all these different negotiations over the years, and [it] never happens.

GD: Yes, I mean, sometimes that kind of stuff can happen in an environmental review, too. Or sometimes there’s a dispute about whether some information is needed and like the company doesn’t want to spend the money and they decide that maybe they’ll hold out and see, maybe they can, maybe somebody else will take over the project, or maybe they can go see the commissioner and get things moving. In the meantime they don’t want to provide this information and then it turns out that their strategy doesn’t work and they’re like, “Oh, they still don’t have this information.” And they finally, grudgingly get it and then it’s got to be reviewed and in the meantime months have been lost, you know. I don’t know, especially with mining projects, just like the nature of the business is like such long-term stuff, it seems like nothing ever happens fast. I mean, even in the business planning part and the permitting and environmental reviews can also be really slow there, too.

SH: Yes. Well, we’ve talked about the court involvement a little bit, you said we haven’t had very many, at least not in the early years and maybe not since, court affirmations that EISs should be done, but what else have you observed about court actions on environmental review?

GD: Well, [laughs] I was just reading a case again today, I couldn’t remember how it, what happened in this case, but anyway, the Supreme Court basically read the law and said, “You know, the law says two different things here.” And, I mean, it was a thing where the rules were written sloppily back in the 80s, I think, and we knew there was different language in different places, but we always said, “Well, it means the same thing, you know, obviously.” Well, the Court said, “You know, it doesn’t obviously mean the same thing at all. It appears to us to mean two different things.” So, we had to do a rulemaking to basically clarify the language. That was a case where a lot of effort went in, we even filed an amicus brief in the case and then it did have an outcome in the real world, too, but from our viewpoint it meant that the Court pointed out that we hadn’t been careful enough in our language in the rules so we had to go back and fix that. I mean, it didn’t really change anything fundamental, but it meant a whole lot of work had to be done. [Laughs] And that was, like you know, you’ve got to be careful what you write because sometimes people are going to hold you to exactly what it says, not what you hoped it would say.

SH: Yes, yes. I've had some people tell me that the courts are too deferential to the agencies in cases of citizens complaining about environmental review not being adequate and the courts saying, "Eh, that's fine."

GD: The courts are pretty deferential to the agencies; I mean some of the cases they even basically state that like, "Hey, you know, you have to be pretty deferential to them." So they've got to clearly have screwed-up in some way that like a layperson can tell. Like, they had a bunch of information [and] they clearly disregarded it or they, or the legal standard they applied is not what the standard actually is in the law or something like that. But if they appear to have made a good faith effort to consider the stuff and say, "Well, we think we should issue the permit," it's pretty hard for the court to say, "Naw, you shouldn't have issued that." Because for one thing, does the court even understand what some of the issues were, you know? All the technical experts apparently agree that it should go this way. So, you know, if there's some red flag, it's fairly easy for the court to change, to overturn it. But if there isn't—

SH: And there must be a legal precedent for that. They point to an earlier case that says, "Here's how much deference you should give to the agency."

GD: Yes, I think so. I think they, I think there is a legal history on that that goes back.

1:05:05.9

SH: Okay. What else do you think is important to talk about in this regard?

GD: [Pause] Well, I know the EQB is still dealing with a lot of these same issues. I know they've got a rulemaking process, either they've just done or they're about to do, to revise the EAW and EIS thresholds again. Which is something that has been done periodically. And they've got a fair number of changes in some of the categories, which may be good or bad, but at least the board has not gone dormant on looking at the thresholds for what needs review.

SH: I didn't know that.

GD: Yes, I think, are they still doing it or did they do it? I can't remember, I've looked at so many things today I've confused myself.

SH: Earlier you said when people engage in an EAW at least it gives them a chance to, at least it calms things down for a few years, you said.

[Both laugh]

GD: Yes, well, the Generic EIS anyway did.

SH: Oh, that's right, the Generic EIS.

GD: Yes, hopefully that EAW petition doesn't take a few years. It should take, you know, a few weeks or a month or something like that.

SH: But, tell me what it was like to work at an agency where people outside the agency, the citizens, feel so strongly about something. Was there pretty emotional stuff going on sometimes?

GD: There sometimes was, yes. Feedlots was definitely the most emotional thing in terms of specific citizens, I mean, there were several times when people called to inquire about like, filing a petition on a feedlot project and people actually broke down and cried while talking to me, and that was the only topic that ever happened on, was feedlots. Feedlots really got people upset. It was, I mean, for the most part, while I was there, the board really had very little direct authority. I mean, we could basically, if someone called, we could say, "Okay, state law allows you to do certain things. There's a process here. We can tell you how to do that process and help you through it; but we don't make the decision. It's going to be the PCA or your county or whoever. But at least we'll help you understand things." A lot of times we would talk to citizens about stuff that probably really wasn't, you know, in our daily work, or just like, "Well how does the local unit of government approve a project? How do their ordinances work and stuff?" I mean, a lot of people had no idea whatsoever about how you had to get a permit for something and how it worked. So, we just provided some basic information, at least get them some things they could follow up on. Although they might be upset, they hardly ever were upset with us. I mean, myself and my colleague Jon Larsen, we talked to people all the time because we could help them a little bit anyway. At least we were pretty sympathetic, we'd listen to people probably more than some people would have listened to them. And we're pretty sure that the reason a lot of people filed citizen petitions was they were upset, they heard that somebody was going to build a campground down the lake from where they had their cabin or something and they were all up in arms about it. And like, "I got to do something!" Well, one thing they could do was they could do a citizen petition. They could get twenty-five signatures, they could, the content was not that hard, you know, any literate person if they thought about it for a while could probably come up with one or if a couple got together over the kitchen table they could probably come up with an acceptable petition and then they could go out and get signatures and they could send it in and they felt better because there was something concrete they could do. I mean, they may or may not have, it was something toward their objective, it might not have panned out in the end, but at least they didn't have to just sit there and stew about it without anything they could do at all. So, we think that was one of the [laughs], I mean it wasn't at all the

intended consequence of petitions, but we think that really did help quite a few people at least sort of feel better about the situation, for at least for a while.

SH: Hmm. Yes, it feels good to do something rather than just sit.

GD: Yes. And sometimes they got an EAW, which was helpful. Sometimes they didn't get an EAW but at least the unit of government said, "Well yes, maybe there are too many units here, or they should be moved back from the shore." Or something, at least they, it was a way to at least get some attention from the local unit or the state agency. I mean, they couldn't just be totally blown—well they could be blown off, but it was a lot harder to blow them off, they had some specific paper, you know document before them or something.

SH: Your colleague Jon Larsen, how do you spell his name?

GD: It's Jon, without the "H", and then Larsen, the Danish way with an "E" not an "O".

SH: I'm glad I asked. Well, maybe we should wrap this up.

GD: Okay.

SH: Thank you so much for your time.

GD: Well, that was actually interesting.

1:10:30.4

[End of interview]