

# STRATEGIES FOR ENVIRONMENTAL REVIEW & PERMITTING IN UPPER GREAT LAKES

Aleava Sayre

Greg Fontaine

# NEW OR EXPANDED FACILITIES AND OPERATIONS MAY TRIGGER ENVIRONMENTAL REVIEW AND PERMITTING

- **Certain business decisions may trigger regulatory processes that can significantly impact budgets, schedules, and outcomes**
- **These business decisions include:**
  - Construction of new facilities
  - Expansion of existing facilities
  - Significant changes in operations with environmental consequences
  - Proposals for new activities requiring federal or state commitments/actions
  - Acquisition of other entities (under certain circumstances)
- **Environmental review and permitting may be required for previously exempt activities**

# CURRENT REGULATORY ENVIRONMENT CAN BE DAUNTING

- **Litigation and public policy considerations have changed the regulatory landscape**
- **Regulatory trends across the country are adversely affecting business objectives**
  - Duration and expense of environmental review and permitting
  - Unexpected regulatory requirements create uncertainty in company planning (e.g., budgets, development)
- **Agencies may:**
  - Default to requiring environmental review or permitting
  - Refuse to exercise discretion favorably for project (e.g., limit scope of requirements or apply available exemptions)
  - Increase opportunities for public involvement
  - Respond to public involvement by imposing additional requirements
  - Delay in making controversial decisions



# REGULATORY TRENDS CAN CREATE PARTICULAR CHALLENGES IN UPPER GREAT LAKES

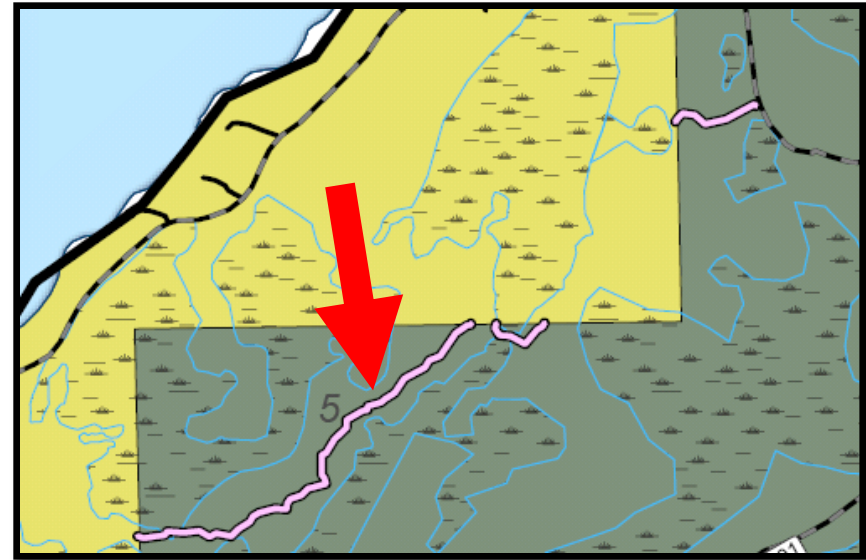
- **Upper Great Lakes Region's Environmental Setting:**
  - Abundant and highly valued water resources
  - International and interstate waters
  - Extensive wetlands
  - National forests and wilderness areas subject to unique laws
  - Proactive regulatory community with significant laws and guidance on environmental matters
  - High-profile environmental proceedings attract national attention and opposition
- **Projects in Upper Great Lakes May Be Subject to Additional Statutory and Regulatory Requirements**
  - Jurisdictional and procedural considerations (e.g., evidentiary hearings, federal-state coordination)
  - Substantive requirements (e.g., different standards, anti-degradation)

# FOUR KEY STRATEGIES TO IMPROVE BUSINESS OUTCOMES

- **Project Planning**
- **Understanding the Legal Framework**
- **Facilitating Agency Decision-Making**
- **Navigating the Process**

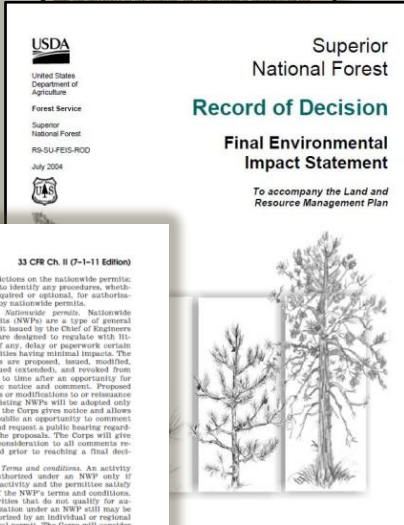
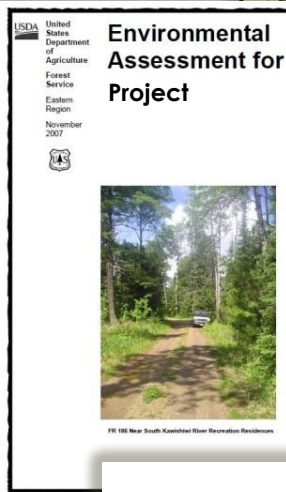
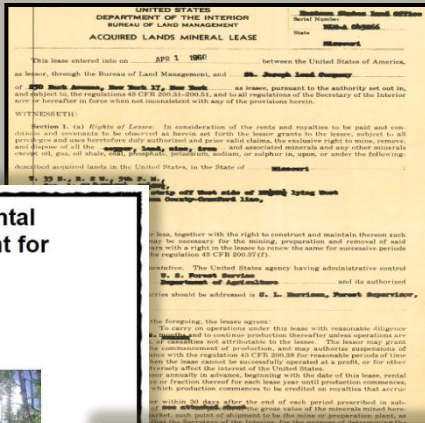
# PROACTIVE VS. REACTIVE PLANNING

- Do not assume that particular regulatory requirement will not apply due to previous agency decisions
- Carefully review proposed activity or project to ensure that no component is omitted from the planning process
- Ensure company expectations and commitments reflect realities of environmental review and permitting
- Once a company publicly proposes a project or activity, the regulatory process may be triggered and companies risk losing control of the process
- Strategic choices in deciding what activity to pursue may significantly affect environmental review and permitting requirements, including:
  - Whether certain regulatory approvals are required
  - The form, scope and duration of environmental review
  - Which federal or state agencies are involved and in what capacity
  - Degree of public involvement



# KNOWING IS HALF THE BATTLE

- Identify all potential environmental permit requirements
- Understand environmental review options (EIS, EA, CX)
- Assess which regulatory processes are likely to be critical path and the relationship between various permitting programs
- Be prepared to engage the agencies on the law, including their own regulations
- Develop early advocacy positions on key permitting issues
- Assemble favorable precedent



5329.16

33 CFR Ch. II (7-1-11 Edition)

can be assessed only after a determination whether (1) the waters are navigable waters of the United States or

(2) If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

**1329.16 Use and maintenance of lists of determinations.**

(a) The listed lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated listing should be forwarded to the division engineer; changes are not considered that result a determination has been made by the division engineer.

**PART 330—NATIONWIDE PERMIT PROGRAM**

Sec.

330.1 Purpose and policy.

330.2 Definitions.

330.3 Activities occurring below certain limits.

330.4 Conditions, limitations, and restrictions.

330.5 General authority, suspension, or revocation nationwide permits and authorizations.

330.6 Attribution by nationwide permit.

Authority: 33 U.S.C. 901 and 902; 33 U.S.C. 1341; 33 U.S.C. 1313.

Source: 33 FR 1924, Nov. 22, 1968, unless otherwise noted.

**1330.1 Purpose and policy.**

(a) Purpose: This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits, to identify conditions, limitations, and



STINSON  
LEONARD  
STREET

# HELP AGENCIES HELP YOU

- **Agencies identify various barriers to efficient environmental review and permitting processes:**
  - Insufficient technical information
  - Inadequate budgets
  - Limits to staff time and resources
- **Eliminate these barriers to reduce risks of project delay**
  - Listen to agency needs/concerns and adjust strategy accordingly
  - Negotiate cost recovery agreements
  - Submit technical information early in process
  - When appropriate, prepare draft documents and materials for agency consideration
  - Help define roles and responsibilities among different agencies
- **These strategies have other benefits:**
  - Develop productive partnership and credibility with key decision-makers
  - Persuade agencies that more limited scope is appropriate based on sound science and technical data



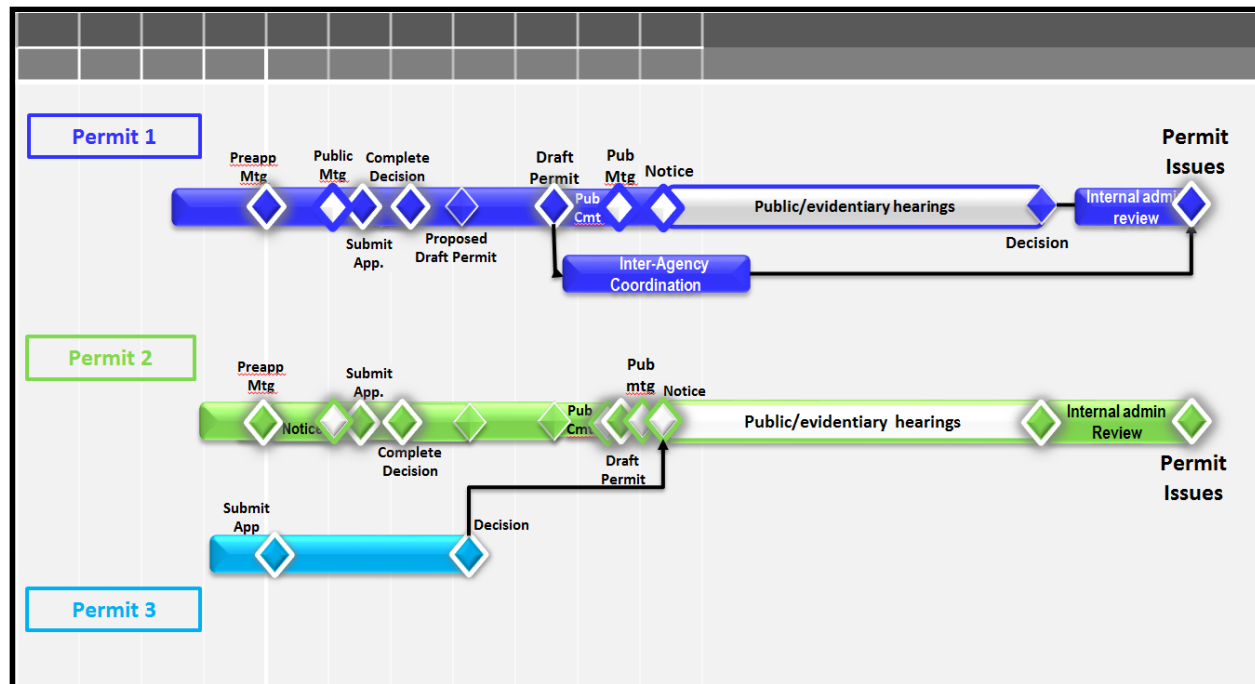


# CONTROL THE PROCESS OR THE PROCESS WILL CONTROL YOU

- Projects often involve both federal and state permits

- Careful coordination with all federal and state agencies is necessary to:

- Avoid duplicating work and activities
- Minimize risk of procedural defects
- Avoid delays while agencies determine next steps
- Prevent opponents from hijacking process



- **Key tactics include:**

- Align milestones & integrate procedures
- Facilitate exchange of information and coordination among agencies
- Consolidate opportunities for public involvement
- Identify and adhere to statutory/regulatory timeframes
- Develop administrative record to defend or challenge permit decision



## ALEAVA SAYRE

**STINSON LEONARD STREET**

Minneapolis, MN

612.335.1647

[aleava.sayre@stinson.com](mailto:aleava.sayre@stinson.com)



## GREG FONTAINE

**STINSON LEONARD STREET**

Minneapolis, MN

612.335.7114

[greg.fontaine@stinson.com](mailto:greg.fontaine@stinson.com)