Environmental Rights in Theory and Practice

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During the 1960's, when environmental causes suddenly became popular, legal scholars began to investigate the feasibility of using common law remedies to abate pollution and to force administrative agencies to be more responsive to environmental concerns. Most commentators concluded that various doctrines of administrative and tort law seriously and unduly handicapped plaintiffs seeking to protect the environment. Many also suggested or implied that, if these doctrines were liberalized, litigation would make a major contribution to improving environmental quality. The most elaborate and ingenious statement of this thesis was Professor Joseph Sax's *Defending the Environment: A Strategy for Citizen Action*, published in 1971. Sax argued that the courts should play an enlarged role in

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* Professor of Law, University of Minnesota. I am indebted to two students—Mark Shepard and Frederick W. Reindel—for their diligent assistance in ascertaining the facts about the cases described in Part III of this Article and to Teresa Boe and Karen Schaffer for helping with the footnotes. My colleagues John Cound and Donald Marshall offered astute comments about the manuscript; William Lockhart made equally valuable suggestions about organization of the Article. The empirical research was made possible by a generous grant from the Minnesota Law Alumni Association.


environmental protection and endorsed the Michigan Environmental Protection Act, which he had drafted, as an effective statutory means of modifying or abolishing most of the doctrinal impediments to successful environmental litigation.3

Although several states, including Minnesota, have passed similar statutes,⁴ we still know very little about their effects. Are the courts, freed from previous doctrinal constraints, now enjoining industrial emissions, pesticide spraying, power plants, and the other notorious causes of environmental degradation? What sorts of parties have made use of the changes wrought by these acts, how often have they prevailed, and how essential to their successes were the doctrinal reforms?

As a contribution toward answering such questions, this Article will examine the results of the first five years of litigation under the Minnesota Environmental Rights Act.⁵ We will begin by tracing briefly its intellectual genealogy: the perceived inadequacies of common law doctrines, Professor Sax's theories about environmental litigation, and finally the provisions of the statute itself. We will then examine previously published studies of litigation under the Michigan Environmental Protection Act. With this background, we will describe the cases that have arisen in Minnesota and compare their results with the expectations expressed in the literature about environmental rights.

I. THE GENEALOGY OF THE STATUTE

A. THE LIMITATIONS OF COMMON LAW CAUSES OF ACTION

Today it would be surprising to see a new article that discussed the possibility of suing polluters for such a traditional tort as trespass. But less than a decade ago the future of environmental law seemed full of exciting possibilities. The National Environmental Policy Act⁶ had not yet produced the numerous cases requiring environmental impact statements that are so familiar today. Air and water pollution control legislation was still in a relatively primitive state.⁷ The evolution of such state-imposed land use controls as coastal and shoreland zoning, power plant siting acts, and "critical areas" legislation had

5. MINN. STAT. §§ 116B.01-.13 (1976).
scarcely begun.8 No one knew what spectacular judicial decisions might be in the offing, but some hoped that the Supreme Court would take the lead, as it had done in civil rights and other areas of social reform.9

Concerned about the environment, scores of legal scholars posed the question: what common law remedies are available against polluters and administrative agencies that either fail to perform their regulatory tasks properly or even—as in the case of highway departments—appear as leading villains in the drama? The answers were, on the whole, rather discouraging. Suits against administrative agencies, for example, were often uncertain ventures.10 Although the federal courts were beginning to relax standing requirements so that environmental organizations were sometimes able to surmount that hurdle,11 the willingness of most state courts to follow these decisions had not been tested.12 Moreover, standing was only the threshold issue. Under the "substantial evidence rule," the courts would not reverse an administrative decision, even if they thought it wrong, if it rested upon some sort of rational basis.13 This limited scope of review, so eminently sensible to an earlier generation of New Deal reformers, was perceived as a major obstacle to environmental protection14 because the new reformers regarded the agencies as hostile or ineffective—more of a problem than a solution.

The law governing suits against private polluters was equally discouraging—more suitable, some said, for a frontier society than for contemporary conditions.15 For this type of suit, less restrictive stand-

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9. See, e.g., Esposito, supra note 2, at 45-51; Roberts, supra note 2, at 688-706.

10. See, e.g., Sive, supra note 1.


13. See Sive, supra note 1, at 617. Under the "substantial evidence rule" a court must affirm an administrative factual finding if it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

14. See Sive, supra note 1, at 617.

15. See, e.g., Berlin, Roisman, & Kessler, supra note 2, at 170; Krier, Environmental Litigation and the Burden of Proof, in Law and the Environment, supra note 1, at 105, 107-08. The historical accuracy of this proposition is open to question. Would it not be equally plausible to say that in a frontier society industry can more readily be required to avoid disturbing individual landowners? Cf. Campbell v. Seaman, 63 N.Y. 568, 586 (1876) ("An injunction need not therefore . . . interfere materially with the useful and necessary trade of brick making. . . . In this country there can be no trouble to find places where bricks can be made without damage to
ing requirements had not begun to evolve. By and large, the common law remedies against pollution are designed to protect property rights, not to vindicate ideological concern about ecological damage. Accordingly, the plaintiff's standing usually depends upon a showing that his proprietary interests have been adversely affected by the defendant's conduct. For nuisance law, the most useful of the common law remedies for environmental harm, even an injury to a proprietary interest might not be sufficient. If the nuisance is so widespread as to be "public," the plaintiff has no standing unless he can show that the injury to him differs "not only in degree but in kind" from the injury to other citizens. Although the government may bring suit against a public nuisance, its decision not to do so is often characterized as "discretionary," meaning that mandamus will not lie.

If the plaintiff established his standing to sue he still had to overcome other, often equally formidable, legal difficulties. There is, of course, no general common law tort of "environmental degradation." Depending upon the facts, any of several common law causes of action might suffice, but all of them except nuisance are of limited value even to property owners. Trespass, for example, is rarely helpful, since "[m]ost courts require an actual occupancy of space before a trespass will be recognized, and, therefore, have been reluctant to permit such actions in an air pollution case." Even nuisance law, though broader than trespass, is no panacea. Aside from the standing requirement, nuisance cases involve a two-step "balancing of the equities." First, to prove a private nuisance, the plaintiff must show that the defendant's pollution substantially and unreasonably interferes with his property rights. Such a showing may be impossible, for example, in a metropolitan area where contamination comes from

persons living in the community.

See also note 378 infra (discussing comparative injury doctrine).

Cf. Law and the Environment, supra note 1, at 71 (remarks of David Sive) (observing that the recent liberal standing decisions dealt mostly with organizations, not individual citizens, challenging administrative decisions).


See Jaffe, Standing to Sue in Conservation Suits, in Law and the Environment, supra note 1, at 123, 131.


many sources and the residents are expected to endure a certain amount of pollution.22 Second, even if the tort is established, injunctive relief—the most potent remedy—may be denied if the cost of abatement is regarded as greatly disproportionate to the harm being inflicted upon the plaintiff.23 Some scholars have noted that, in applying this "comparative injury" doctrine, the courts generally fail to take account of the effects of the pollution on nonparties, stressing instead the potential impact of expensive abatement measures upon jobs or the local economy.24

If he was able to meet these and other defenses,22 the plaintiff still had to contend with the ordinary burden of proof rule. Several authors have suggested that this is the most serious problem confronting a plaintiff in environmental cases.25 The effects of pollution are frequently so complex, gradual, and largely speculative26 that the party with the burden of proof will lose. Consider, for example, the manifest difficulty of proving by a preponderance of the evidence that the emissions of a nearby factory caused a respiratory disease or that the pollution of an urban river is, at any particular point, substantially due to effluent from a single plant located several miles upstream.

B. THE QUEST FOR SOLUTIONS

To some scholars, these doctrinal problems were just an aspect—and not the most fundamental one—of the inadequacy of litigation as a method for solving social problems. This view was ably stated by Dean (then Professor) Hines:

Aside from the difficulties encountered in the pleading and proof of a water pollution claim, several even more basic limitations restrict the utility of private litigation as a pollution control device. In the first place, court action is entirely too fortuitous an event to serve as the basis for a reliable pollution control program. Litigation is fortuitous in its timing, in the type of case that may arise, and in

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24. See, e.g., Juergensmeyer, supra note 18, at 232.
25. Other common law pitfalls for the environmental plaintiff included laches, sovereign immunity, and prescriptive rights.
26. See, e.g., Note, Private Remedies for Water Pollution, supra note 1, at 745. See also LAW AND THE ENVIRONMENT, supra note 1, at 76 (remarks of Joseph Sax, Victor YAnnaconne, and David Sive); Hines, Nor Any Drop to Drink: Public Regulation of Water Quality, 52 IOWA L. REV. 186, 198 (1966).
the quality of presentation that may be made for each side. An effective program of pollution control requires that the control agency possess considerable expertise in the area of regulation and that it have the capacity to plan ahead for anticipated problems. Courts manifestly are not endowed with either of these features. Further, to serve as an effective force in pollution control, the agency responsible must have the ability to administer a flexible program that involves remaining in contact with the party regulated to see that the agency's orders are complied with. The traditional reluctance of courts to issue an affirmative order under equity powers requiring the carrying out of some tasks demonstrates the limited effectiveness of a court centered pollution control program. Courts are simply not equipped for the surveillance, the policing and the preventive activities required for efficient pollution abatement.

Finally, and perhaps of most importance, the adversary system under which court proceedings are conducted does not adequately assure representation of the public interest in pollution control. The effect of an alleged pollution situation on the interests of the public frequently may not be a part of either side's case. To be sure, any judge worthy of his bench constantly considers the implications of his decisions to the welfare of the general community, but a judge is not omniscient and is generally limited in his knowledge of a problem to the evidence that has been produced in the cases tried before him. Considering the pollution problem in its totality, interests of the public in conserving and restoring the quality of the community's water may considerably overshadow the interests of the parties to any particular dispute. When such a situation occurs, a sound pollution control program requires that the facts relating to the public point of view be ferreted out and that these facts be judged in the light of the community's water quality policy. Even the most enlightened court, using all of the information gathering techniques at its disposal, is not well suited to this undertaking.28

The argument that the judicial role in protecting the environment must necessarily be relatively peripheral was unsatisfying to most of those who wrote about environmental law. Without directly disputing Hines, reformers reached different conclusions because they started from different premises: that administrative regulation had failed29 or, as some put it, that we could not afford to wait for improved legislative and administrative solutions because the sur-

29. This was supported, for instance, by the fact that despite administrative oversight Detroit's air was still badly polluted. See, e.g., Roberts, The Right to a Decent Environment: Progress Along a Constitutional Avenue, in Law and the Environment, supra note 1, at 134, 156 ("Anyone who has lived in the Midlands or tasted the air in Detroit, to say nothing of Los Angeles, must retain a certain amount of skepticism about the immediate efficacy of these [administrative] schemes.").
vival of mankind might be at stake.\textsuperscript{30}

The solutions proposed by many of these writers were not very convincing even if one accepts their premises. Some urged the courts to invent new doctrines, but there were few signs—except in the federal standing cases\textsuperscript{31}—that this would soon occur or that the doctrinal changes would be as comprehensive as environmentalists wished. Others, evidently distrustful of every political and legal institution except the United States Supreme Court, wanted that Court to fashion a constitutional right to a decent environment.\textsuperscript{32} One writer even hoped that the Court would require abolition of the internal combustion engine "with all due deliberate speed,"\textsuperscript{33} but this fantasy has faded from sight.\textsuperscript{34}

Those who sought judicial solutions to environmental problems needed a better strategy. It would have to promise quicker and more comprehensive results than piecemeal efforts to reform the common law; and yet, ideally, it would also be less palpably utopian and undemocratic than waiting for a bolt of lightning from the Supreme Court. Moreover, although many judges were regarded as sympathetic to environmental concerns,\textsuperscript{35} the judiciary had generally been distinguished more by its conservatism than by its bold social activism.\textsuperscript{36} So the ideal strategy could not rely entirely upon the judges. They needed guidance.

30. See Law and the Environment, supra note 1, at 101 (remarks of Victor Yannaconne) ("We have to go in right now and find a forum to do something about a great many pressing toxic insults to the environment or there isn't going to be any environment that we can do anything about."); id. at 250 (remarks of E. F. Roberts) ("[I]f we are going to get restructured before we are all dead, we can't wait for the administrative or the political solution."); Comment, supra note 2, at 1085 ("Man himself, as well as the natural resources upon which his life so intimately depends, is threatened with premature elimination.").

31. See note 11 supra and accompanying text.

32. See, e.g., Roberts, supra note 2.

33. Id. at 692.

34. An even more exciting idea has recently been proposed: a constitutional amendment that would give any citizen the right to sue in a federal court against any conduct that "threatens to cause or is causing substantial harm to the safety or happiness of a consequential number of people." M. Mintz & J. Cohen, Power, Inc.: Public and Private Rules and How to Make Them Accountable 579 (1976). Doubtless, the self-interest of law professors will lead us to oppose this one.

35. See text accompanying notes 49-50 infra.

36. See, e.g., Roberts, supra note 2, at 701-04 (discussing Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S. 312 (1970)); Sax, supra note 17, at 551 (discussing Rogers v. City of Mobile, 277 Ala. 261, 169 So. 2d 282 (1964)) ("a number of courts . . . persistently adhere to the belief that courts are not an appropriate forum in which to examine issues concerning public trust lands").
C. Defending the Environment

It was Joseph Sax who finally put the puzzle together, offering environmentalists a theory about the role of environmental litigation. The major premise of *Defending the Environment* is that "environmental questions are preeminently problems caused by powerful and well-organized minorities who have managed to manipulate governmental agencies to their own ends." True, "[n]ew statutes are abundant, but their rhetoric far exceeds their effect." Even the best agencies, staffed by conscientious and environmentally sensitive appointees, are gravely and inherently flawed. They have, says Sax, an insider perspective, meaning that their own bureaucratic self-interest often leads them (quite sensibly, from their point of view) to sacrifice environmental quality in one controversy in order to preserve their political capital for another battle tomorrow. Hence, agencies inevitably tend to make suboptimal decisions, yielding to pressure from a politician, for example, because they will later need his support for an appropriation. This bureaucratic perspective exacerbates the "nibbling phenomenon," the process by which "large resource values are gradually eroded, case by case, as one development after another is allowed." With powerful economic and political forces seeking administrative approval of a single project—to drain and fill a shoreland marsh, for instance—it is easy for an administrator to convince himself that "this is the last intrusion to be permitted, that no bad precedent is being set, and that the line will be drawn at the next case." After all, "[i]t is much easier to tell a developer that he cannot dam up the Grand Canyon than to tell each real estate investor, one by one over time, that he cannot fill an acre or two of marshy 'waste' land." Consequently, administrative regulation will not prevent insidious, cumulative degradation of the environment. "In these ways the administrative process tends to produce not the voice of the people, but the voice of the bureaucrat—the administrative perspective posing as the public interest."

Since these flaws of administrative regulation are attributable to the self-interest of the bureaucracy, Sax says that it is "romantic" to expect much from government reorganization, new commissions, re-

37. J. Sax, supra note 3, at 239.
38. Id. at 62.
39. Id. at 52-53, 87-89.
40. Id. at 53, 88.
41. Id. at 53.
42. Id. at 55.
43. Id.
44. Id. at 56.
45. Id.
requirements that projects be carefully planned, and similar efforts to improve the administrative process. Such reforms "fail because they do not change the balance of power—precisely what the development of a scheme of enforceable legal rights, backed by judicial power, can do."\(^4\)

Accordingly, the best solution is to expand the role of the courts in resolving environmental disputes: "Simply put, the fact is that the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. He is perfectly capable of fighting his own battles—if only he is given the tools with which to do the job.”\(^4\) The judges, though they have often been inhibited by "the mind-forged manacles of the law,"\(^5\) are talented decision-makers, potentially responsive to environmental complaints,\(^6\) and, like the citizen plaintiffs, outsiders. If the old-fashioned doctrines were abolished by a statute, Sax concluded, there would be a fundamental shift in the balance of power from bureaucrats to judges. Litigation would thus become the most important (albeit not the sole) technique for regulating environmental quality.\(^7\)

Much of the book is devoted to rebutting various reservations concerning the propriety of expanding the judicial role. Responding to the common objection that judges are unqualified to decide complicated scientific questions, Sax observes that courts often decide cases in which technical issues abound, such as those involving products liability or medical malpractice.\(^8\) Besides, the judicial function is not to decide what is the truth; it is to decide whether the party with the burden of proof has sustained it.\(^9\) Finally, in most environmental cases, contrary to popular belief, the basic issue has to do with "policy," not with science.\(^10\) Indeed, crucial administrative decisions are often made by politically appointed lawyers, sometimes against the advice of their expert staffs.\(^11\) Therefore, deference to the presumptive expertise of administrators is usually unfounded.\(^12\)

While the administrative process is infected by the "disease" of politics,\(^13\) judges are appointed without regard to their environmental

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46. Id. at 83.
47. Id. (emphasis in original).
48. Id. at 56.
49. Id. at 125.
50. Id. at 108, 147-48, 222-23.
51. Id. at 60-61, 63, 83.
52. Id. at 150.
53. Id. at 147.
54. Id. at 151.
55. Id. at 27, 29, 32, 110.
56. Id. at 29.
57. Id. at 82.
attitudes and thereafter are not subject to the political pressures that so often prevent administrators from reaching the right decisions. "[T]his, of course, is a tremendously liberating factor when one considers the political dimension that plays so important a role in the administrative process."  

Some may object that the judiciary should not be deciding such questions as whether jobs or prices are more important than environmental quality. Sax agrees that environmental preservation may conflict with other values and that in a democracy the proper balance should ultimately be determined by the legislature. But he replies that this principle, far from being a valid objection to citizen suits, is perhaps their major justification. Commonly, Sax says, the function of courts in environmental cases is to promote a thorough legislative analysis of the questions being litigated. For example, a highway department may decide to condemn some parklands for a highway. Although the legislature has conferred upon the department the power of eminent domain, it may also have expressed its approval of public parks, never explicitly addressing the question of which policy is superior. By enjoining the proposed condemnation, a court forces the highway department to seek specific legislative approval for its project. Admittedly, it is never easy to obtain passage of a controversial bill. But it seems fairer to place the burden of obtaining a legislative resolution upon the party with superior access to the legislature, which in environmental cases will usually be the industrial or governmental defendant, rather than the relatively powerless plaintiffs. Should the defendant decide that such efforts are not worth the trouble, then presumably the enjoined project was not very important in the first place. By enjoining projects that lack specific legislative authorization and that have substantial and often irreversible environmental consequences, the courts can achieve a sort of "legislative remand," making democracy "work in practice as well as in school book theory."  

The purpose of creating a public right to environmental quality is not, of course, solely to "make democracy work." Such a right will also arrest pollution:

Environmental quality is threatened so often because we have not put any price on it or marketed it as we do ordinary objects of

58. Id. at 109.  
59. Id. at 108.  
60. Id. at 109.  
61. Id. at 237-39.  
62. Id. at 57, 59-61, 113-14.  
63. Id. at 176-80.  
64. Id. at 202-04.  
65. Id. at 58.
private property. Clean air and water, public beaches, and open space, for example, are treated as essentially free goods, and for that reason it is little wonder that they have been used extravagantly. 

[Such resources are treated as free in large part because no one has been entitled to assert a right in the maintenance of those values: no member of the public has been permitted to claim a legal right to the maintenance of clean air or water in the sense that the owner of a specific tract of land may demand the protection of the values inherent in that tract.]]

Injunctions can help to rectify this situation by forcing the defendants to seek "some form of genuine public assent," presumably from the legislature.

D. THE MICHIGAN ENVIRONMENTAL PROTECTION ACT

Originally authored by Sax and passed by the Michigan Legislature shortly before Defending the Environment appeared, the Michigan Environmental Protection Act (MEPA) was the legal embodiment of Sax's theories and was cited by him as a model law. The Act eliminated or modified all of the common law doctrines that were supposed to have inhibited the courts. MEPA created a new cause of action, based simply upon conduct that "has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein . . . ."

Restrictions on standing were abolished. Under MEPA, anyone (including government agencies) may sue anyone else (again, including the government) for declaratory or injunctive relief. Prior recourse to an administrative agency is necessary only if the court, in unspecified circumstances, decides that this is desirable. If "there is involved a standard for pollution or for an

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66. Id. at 58-59.
67. Id. at 59-60.
70. Id. § 691.1202(1):

The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.
71. Id. § 691.1204(2):

If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may
anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof,"^{72} the court may "determine the validity, applicability and reasonableness of the standard."^{73} If the standard is found to be "deficient," the court may "direct the adoption of a standard approved and specified by the court."^{74}

The defendant may, of course, endeavor to rebut the plaintiff's prima facie case,^{75} but the only affirmative defense set forth in the Act requires a finding "that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."^{76}

Thus, the burden of proof is the only traditional doctrinal problem to survive intact, and even this is partly a matter of form rather than of substance. Although the plaintiff must establish a prima facie case of "pollution, impairment or destruction," he need not establish that the defendant's conduct is unreasonable because that issue is subsumed under the affirmative defense, on which the defendant has the burden of proof.\textsuperscript{77} In nuisance law, by contrast, the tort is defined as "unreasonable" interference with the plaintiff's rights.\textsuperscript{78} Accordingly, in some jurisdictions the plaintiff's burden of proof extends to the issue of reasonableness as well as the issue of harm.\textsuperscript{79} To this extent, the Act effectively shifts the burden of proof.

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\textsuperscript{72} Id. § 691.1202(2).
\textsuperscript{73} Id. § 691.1202(2)(a).
\textsuperscript{74} Id. § 691.1202(2)(b).
\textsuperscript{75} Id. § 691.1203(1).
\textsuperscript{76} Id.
\textsuperscript{77} "Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act." Id.
\textsuperscript{78} W. Prosser, supra note 21, at 580-82.
\textsuperscript{79} Id. at 581 n.6.
E. THE MINNESOTA ENVIRONMENTAL RIGHTS ACT

Despite several unique provisions, the Minnesota Environmental Rights Act (MERA), enacted in 1971, embodies the principal features of the Michigan Act. Every resident, government, or other entity within the state has standing to sue under MERA. The Act authorizes suits to enforce existing environmental standards and requirements; suits to enjoin conduct that "materially adversely affects or is likely to materially adversely affect the environment"; intervention in or judicial review of administrative proceedings that concern environmental matters; and suits challenging the adequacy of state environmental standards and actions. As in the Michigan Act, although the plaintiff has the burden of proving environmental harm, the issue of possible justifications is an affirmative defense. Unlike MEPA, however, MERA expressly provides that "[economic considerations alone shall not constitute a defense hereunder." This provision, while still rather ambiguous, clearly evinces an intent to limit the relative hardship doctrine even more than MEPA had done.

Predictably, the Minnesota Legislature was troubled by some of the bill's implications, and the sponsors had to accede to several amendments. In contrast to MEPA, compliance with relevant regulations or permits of certain state agencies (including the Pollution Control Agency) is a defense to a MERA suit, but the effect of this amendment is uncertain since another section of the Act entitles the plaintiff to attack the regulation or permit as inadequate. Therefore,

80. See text accompanying notes 88-96 infra (discussing the major differences between the MEPA and MERA).
81. MINN. STAT. §§ 116B.01-.13 (1976).
82. Id. § 116B.03(1).
83. Id. § 116B.02(5).
84. Id.
86. MINN. STAT. § 116B.10 (1976).
88. MINN. STAT. § 116B.04 (1976).
89. When are economic considerations "alone"? Are such issues as jobs, prices, and taxes simply "economic" or are they partly "social"?
90. Many of the lawyers who drafted MERA belonged to the Sierra Club. See Note, supra note 87, at 577 n.15. Because they were apprehensive that MEPA's affirmative defense of no "feasible and prudent alternative" might perpetuate the cost defense, see id. at 579, they persuaded the Minnesota Legislature to accept this provision.
91. Id. at 577-87.
92. MINN. STAT. § 116B.03(1) (1976).
93. Id. § 116B.10.
the defense of compliance with a regulation may be available only when the regulation itself is deemed to be strict enough. The sponsors also agreed to an amendment that precludes suits against landowners for conduct on their own land that "can not reasonably be expected to pollute, impair, or destroy any other air, water, land, or other natural resources located within the state . . . ."94 Again, this concession seems insubstantial because almost any controversial activity will affect resources beyond the defendant's property. Finally, in response to objections by rural legislators, an exemption was provided for farm-related activity,95 and suits based solely upon violations of odor regulations were disallowed.96

Whatever the significance of these amendments, however, MERA clearly achieves Sax's major goal: it frees the courts from most of the common law restraints, enabling them to articulate and enforce a public right to environmental quality.

II. EVALUATING THE EFFECTS OF ENVIRONMENTAL LITIGATION: SOME METHODOLOGICAL PROBLEMS

A. INTRODUCTION

Several studies of administrative agencies have revealed major discrepancies between, as Sax puts it, the "school book" version of their performance and the realities of administrative politics.97 When evaluating the effectiveness of an administrative agency, we are likely to ask, "Is it working? Are the rules being enforced? What, specifically, has it accomplished?" Such questions are asked much less often about environmental litigation; and, when they are asked, we often tacitly use different criteria in ascertaining the answer. If an administrative agency adopts new procedures or listens to the testimony of an environmental group, we are apt to reserve judgment, expressing considerable skepticism: "Yes, but how much good did it do? Did the bureaucrats eventually ignore the advice of the citizens? And what about all the other situations in which they are procrastinating?"98 If, on the other hand, a court decides that a citi-

94. Id. § 116B.03(1).
95. Id. § 116B.02(2) provides an exemption for "a family farm, a family farm corporation or a bona fide farmer corporation." In County of Freeborn v. Bryson, 243 N.W.2d 316, 320 (Minn. 1976), discussed at notes 338-53 infra and accompanying text, the Minnesota Supreme Court interpreted this exemption to apply only to "farming or farm-related activity."
96. See MINN. STAT. § 116B.02(5) (1976); Note, supra note 87, at 585-86 & n.45.
98. See, e.g., J. SAX, supra note 3, at 90-95. Although Sax states that the Environmental Quality Council "has been less than a smashing success during its first year
zens' group has standing to sue an administrative agency, this is hailed as a great victory for conservation, with scarcely any doubts expressed about the consequences of the decision, as if standing were the ultimate objective. 99

Of course, if one were chiefly interested in litigation as a means for resolving particular disputes justly, rather than for achieving other social objectives, such as conservation of natural resources, one could say that standing and other doctrinal questions are the ultimate issues. It may be just, for example, to allow the Sierra Club to sue the Environmental Protection Agency, irrespective of whether that decision affects environmental quality. From this point of view, we would measure the results of litigation differently from the results of other kinds of regulation because we expect it to serve different ends. The courts are to resolve certain kinds of disputes fairly; the legislatures and administrative agencies are to do that too, but they are also to establish the proper balance between environmental quality and conflicting objectives.

Much can be (and has been) said for this rather crude distinction.100 It is clear, however, that the distinction does not accurately reflect what many writers profess to expect from environmental litigation. The school of thought described above, culminating in Defending the Environment, maintains that lawsuits brought by aggrieved citizens will have a major impact on environmental quality, provided that the courts are not severely constrained by inherited doctrines.101 It is therefore appropriate to ask, what is the evidence for this proposition? As in most fields of law, the evidence is extremely meager. Basically, we presume that doctrines tend to be effective.

Doubtless, this presumption is partly due to the complexities of empirical research. It is extremely difficult to evaluate the effects of

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100. See, e.g., Krier, supra note 15, at 111-14. Of course, such praise may be deserved, and such decisions may eventually have salutary effects. But it does not make sense to presume that judicial rhetoric is more efficacious than bureaucratic rhetoric.

101. "Indeed, if we could get the courts to adapt the nuisance concept to public rights in environmental quality, we would be far down the road toward coping with the problems of environmental quality." J. Sax, supra note 3, at 169.
a doctrinal change, even in a single jurisdiction. The Minnesota Environmental Rights Act, for example, may affect conduct in three ways. First, there are the direct effects of litigation: a company either is ordered or agrees to stop discharging a certain pollutant into a lake. Second, there are threats of suits, which sometimes have effects similar to actual litigation. Finally, the doctrinal change may affect conduct in many situations where no one has yet even threatened to sue, just as an employer usually pays the minimum wage prescribed by law without expressed threats of litigation.

The inquiry becomes even more complex when we try to answer questions concerning the propriety (as opposed to the efficacy) of the doctrinal changes. We must then answer such questions as whether numerous frivolous suits are being brought under MERA, whether litigation under this Act is causing congestion of court calendars, and whether the judges are usurping legislative prerogatives or incompetently deciding complicated factual questions.

Perhaps because of these difficulties, there is a tendency to describe cases selectively for exhortative purposes: "Here's an example of how well litigation can solve a problem." This sort of Horatio Alger story—common in articles about environmental law—is legitimate only to the extent that one scrupulously avoids confusing the question of what is possible with the question of what is typical. 102

Notwithstanding these complexities, it is important to begin studying the actual consequences of doctrinal change in environmental law. The literature is already overburdened with unsubstantiated rhetoric and theory. The uncertainties of empiricism in this area are real. But they should lead us to keep our diction modest and our conclusions tentative, rather than prevent us from examining the problem at all.

With these thoughts in mind, we will now examine studies of litigation under the Michigan Environmental Protection Act.

B. The Michigan Studies

There have been three empirical studies of litigation under MEPA, two of which were co-authored by Professor Sax. 103 These...
studies, which cover the period from MEPA's enactment on October 1, 1970, to March 1, 1976,\textsuperscript{104} were undertaken with multiple purposes: to provide lawyers with information about unreported cases;\textsuperscript{105} "to help citizens assess the desirability of such legislation in [other] states";\textsuperscript{106} and to serve as experiments "in efficacy research."\textsuperscript{107}

During this five and one-half year period, MEPA was invoked in 120 cases or administrative proceedings.\textsuperscript{108} Somewhat surprisingly, permanent environmental groups with more than local concerns were plaintiffs or intervenors in only nine cases;\textsuperscript{109} local and ad hoc groups were similarly involved in 25 suits.\textsuperscript{110} The single most common plaintiff (twelve cases) was the Wayne County Health Department.\textsuperscript{111} Public agencies were plaintiffs or intervenors in 43 cases and defendants in 60 cases.\textsuperscript{112} The most frequent issue was land use (50 cases), ranging from homesite development to stream channelization, followed by air pollution (39 cases) and water pollution (17 cases).\textsuperscript{113} During the period covered by the studies, there were 47 successful MEPA suits and 28 unsuccessful ones; eleven suits were not pursued, and the rest were pending when the final study was published.\textsuperscript{114}

The authors conclude that the fears of MEPA's opponents were unwarranted. To begin with, "[w]hen the environmental issues have been presented, the courts have in the vast majority of cases understood them and been able to cope with them intelligently."\textsuperscript{115} Also, contrary to the fears of some opponents of the Act, defendants have not been harassed by multiple suits about the same environmental


104. Haynes, supra note 103, at 590, 591 n.4.
105. See Haynes, supra note 103, at 590-91; Sax & Conner, supra note 103, at 1004-06; Sax & DiMento, supra note 103, at 2-6 (introductory note from Professor Sax).
106. Sax & DiMento, supra note 103, at 2 (introductory note from Professor Sax).
107. Id. at 3.
108. Haynes, supra note 103, at 592 & n.8. Although the text says 119 cases, the footnote adds one case and suggests two additional cases involving MEPA claims.
109. Id. app. D, at 689-90. Such groups participated as amici curiae in five additional cases. Id.
110. Id. app. D, at 690-91. These local and ad hoc groups participated in 23 cases as plaintiffs, 1 as an intervenor, 1 as a defendant and 1 in which the role is not indicated. Id. See also id. at 582 n.8.
111. Id. app. D, at 689.
112. Id. app. D, at 686-89.
113. Id. app. E, at 692-95.
114. Id. app. F, at 696-98.
115. Sax & Conner, supra note 103, at 1009-10.
issue, and preliminary injunctions have not caused unjustifiable delays of projects.

Although many suggestive tidbits of information are offered concerning MEPA's impact on the environment, the treatment of this subject suffers from major defects. The authors chose to address several disparate topics, including how MEPA should be interpreted, whether the judges had performed competently, the role of lay witnesses, procedural issues, and security bonds. As a result, the articles move from pending cases to resolved cases, from a lengthy description of one case to a cursory reference to another, in a manner that compounds the intrinsic difficulties of gauging MEPA's substantive impact. More important, even the decisions that are fully described are difficult to evaluate because the authors rarely discuss whether the MEPA count was essential to the result in the case. It seems clear that other causes of action usually were or could have been joined with the MEPA counts, yet the "successful" cases are generally treated as indicative of MEPA's impact, even though no effort is made to demonstrate that they would not have been brought, or would have been decided differently, under more traditional theories.

The criteria used in these studies to evaluate the impact of litigation are far more charitable than those normally applied to administrative achievements. Professor Sax does acknowledge that the MEPA cases have been unspectacular:

Nothing that has occurred under the [M]EPA has approached the sort of big-time test litigation with which the legal literature is generally concerned. Indeed, with a few rather tentative exceptions, the [M]EPA has not been used in a major assault against the biggest actors in the state—the auto industry, agriculture, the electric generating utilities, or even the rapidly developing oil and gas or mining operations.

Despite this concession, the articles repeatedly attribute significant results to a rather unimpressive record. For example, after only thirteen cases had been resolved under MEPA, the first of these studies

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117. Haynes, supra note 103, at 651-58.
118. This observation is not meant to imply that another methodology would have been preferable, given the relatively large number of cases and the authors' multiple goals.
119. "The majority of cases in which MEPA is a cause of action also include other statutory, common law, or constitutional claims." Haynes, supra note 103, at 651; see id. at 645, 658; Sax & Conner, supra note 103, at 1025, 1030, 1064, 1066; Sax & DiMento, supra note 103, at 28, 35-36, 42. Only about one-third of the cases in which MEPA was invoked were based solely on MEPA. Haynes, supra note 103, at 651 n.248.
120. Sax & DiMento, supra note 103, at 5-6 (footnotes omitted)(introductory note from Professor Sax).
concluded that "enough cases have been resolved speedily and intelligently to mark the Act as a success." The authors treat even unsuccessful suits as achievements. For example, one suit was brought to challenge the Michigan Department of Natural Resources' plan to allow antlerless deer hunting. Although the article describing the case acknowledges that the Department's experts demolished the plaintiffs' case at trial, its authors nonetheless conclude that the litigation was a triumph for which MEPA deserves credit because it strengthened the Department's hand politically in dealing with a controversial issue of game management. Another losing suit was praised because it "brought the essential issues into the open with sufficient clarity that the court was able to handle them intelligently."

The articles also suggest that the success of the Act may be measured in terms of its broad educational achievements: partly the awareness imparted to lawyers, but mostly the effect that a greater awareness has had on "ordinary citizens." For instance, by learning that they can "successfully fight established interest groups... [citizens] are learning that citizenship means participation, which may involve far more than writing letters to the editor or signing petitions." In addition, the use of ordinary citizens as lay witnesses "has produced a sense of citizen involvement which may be obscured by the maps and technical reports of experts." One of the benefits of this citizen involvement is said to be a broadened understanding of the importance of proposed environmental legislation. Indeed, at one point Professor Sax states, "I have always viewed the [M]EPA largely as a tool for education and institution-building on the local level."

Such assertions about the effects of MEPA would hardly be taken seriously if they were cited as significant results of regulation by an agency whose mission was to improve environmental quality. Nowhere in these studies is a connection between MEPA and any specific large-scale improvement in environmental quality demon-

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121. Sax & Conner, supra note 103, at 1080.
122. Id. at 1031-35 (discussing Payant v. Department of Natural Resources, No. 1100 (Cir. Ct., Dickenson County, Mich., Oct. 7, 1971)(complaint filed July 13, 1971)).
123. See id.
125. Sax & Conner, supra note 103, at 1037.
126. Sax & DiMento, supra note 103, at 6 (introductory note from Professor Sax).
127. Id. at 25.
128. Id. at 13 n.48.
129. Id. at 5 (introductory note from Professor Sax).
130. See text accompanying notes 97-100 supra.
strated, and even the general attitudinal claims amount to little more than bare assertions. Although one should not belittle the importance of affording a hearing to aggrieved citizens, neither should one assume that a few lawsuits, initiated by a minuscule fraction of Michigan's people (and, one supposes, representing an almost equally small percentage of those with environmental grievances), have had much effect on the feelings of the vast majority of "ordinary citizens." It is doubtful whether citizens would be less aware of the importance of proposed legislation if they lacked the standing to sue conferred by MEPA, and it seems unlikely that much of the effective support for such legislation is attributable to MEPA suits.

The nebulous character of other conclusions makes them similarly questionable. The claim that MEPA has been responsible for "institution-building at the local level"131 is difficult to appraise because the nature and importance of the "institutions" attributable to MEPA are not described. The allegation that MEPA has had an educational impact is, standing alone, impossible to evaluate; just about everything—perhaps even a faculty meeting—can be called "educational."

In short, the authors exalt litigation under circumstances in which administrative regulation would be described as demonstrably feeble. It is with a view toward taking a somewhat more critical look at the effects of environmental litigation that the study reported in this Article was undertaken.

C. THE MINNESOTA STUDY

This study covers cases arising under the Minnesota Environmental Rights Act during the five-year period from its effective date, June 8, 1971, until June 8, 1976. The analysis will be confined to cases that were resolved during the study period. Since there were only 26 such cases,132 the results of each case in which the plaintiff even partially prevailed will be described, while the unsuccessful suits will be summarized in the Appendix.133 An attempt will also be made to

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131. See text accompanying note 129 supra.
132. The cases were obtained from five sources: (1) The Minnesota Pollution Control Agency (Rights Act plaintiffs must "cause a copy of the summons and complaint to be served upon the attorney general and the pollution control agency" within seven days after commencing the action. Minn. Stat. § 116B.03(2) (1976)); (2) county attorneys; (3) district court judges; (4) staff attorneys for the Pollution Control Agency and the Department of Natural Resources; and (5) prominent environmental lawyers. Since the PCA's file proved to be incomplete, some cases may have been omitted, especially ones in which the Rights Act count was relatively peripheral or in which a settlement was quickly reached. But it seems unlikely that the undiscovered cases, if any, are numerous or important enough to affect the Article's conclusions.
133. Pp. 221-28 infra.
determine whether MERA affected the result, relying largely upon the opinions of the attorneys who represented the parties. Although such opinions are fallible, they surely are more reliable than the assumption that every case in which MERA was one of the plaintiff’s legal theories is indicative of the Rights Act’s influence.

While these cases, taken as a whole, provide an adequate basis for some tentative conclusions about the impact of Rights Act litigation on Minnesota’s environment, a caveat is in order at the outset. First, the period covered is relatively short and the statute is relatively new. Consequently, any conclusions are inevitably preliminary. Second, the Act may have had some potentially significant indirect effects that will not be reflected in the cases themselves. For instance, with one exception,\textsuperscript{134} the study does not provide evidence about the effects of threats to sue under MERA because it is not feasible to determine how many such threats have been made or to appraise their impact accurately. We have also refrained from trying to measure the effect of the statute and of suits under it upon environmental decisions that were not litigated. That question, although enormously important, is difficult to answer, even in an article that does not endeavor to answer other questions as well. To date there have been very few cases under MERA in which the courts have laid down standards that are likely to affect the conduct of many nonparties. It therefore seems premature to determine whether MERA litigation or the statute itself has changed bureaucratic and corporate behavior.

III. THE MINNESOTA ENVIRONMENTAL RIGHTS ACT: FIVE YEARS OF LITIGATION

A. WATER POLLUTION

In eight MERA cases, water pollution was the major ground of the complaint. Three of these suits were unsuccessful;\textsuperscript{135} the plaintiffs prevailed in four; and in one case the effect of the suit is unclear.

1. \textit{State ex rel. Trierweiler v. Longhenry}\textsuperscript{136}

The parties owned adjacent tracts abutting a rural lake.\textsuperscript{137}

\textsuperscript{134} State \textit{ex rel.} Nature Conservancy v. Square Butte Elec. Coop., No. 10638 (Dist. Ct., Wilkin County, Minn., filed Oct. 9, 1975), \textit{discussed at notes} 308-22 \textit{infra} and accompanying text.

\textsuperscript{135} These cases are discussed in the Appendix at pp. 221-23 \textit{infra}.

\textsuperscript{136} This case abstract is based upon information obtained from the documents on file at the district court, \textit{State ex rel. Trierweiler v. Longhenry}, No. 11117 (Dist. Ct., Pine County, Minn., filed Aug. 28, 1974); Telephone Interviews with James Bodin, Attorney for Plaintiff Trierweiler (Aug. 12 & Nov. 10, 1976); Telephone Interview with Richard Hart, Attorney for Defendant (Oct. 25, 1976).

\textsuperscript{137} Island Lake in Pine County is 580 acres in size. \textit{University of Minnesota},
Longhenry and his wife operated a small resort on their tract. Their septic tank drainfield system was malfunctioning, and the discharge, instead of percolating underground, had formed a trench that cut through Trierweiler’s beach before draining into the lake. The odor from this trench had allegedly prevented Trierweiler from using his beach, and fecal coliform counts indicated a potential health hazard in his swimming area.

Trierweiler filed a complaint under MERA, seeking an injunction against further use of the septic tank system. The case was settled before trial, when the defendant agreed to replace the septic tank with a holding tank.

Although the activity in this case appears to have been an ordinary nuisance, the plaintiff’s lawyer considered MERA an adequate ground for relief and therefore did not add a nuisance count.

2. State v. Metropolitan Sewer Service Board

The Sewer Board’s employees, represented by a union, were engaged in a prolonged dispute with the Board concerning wages and failed to report to work for two days. As a result, the sewage from the Board’s treatment plant was discharged into the Mississippi River without proper treatment. The State of Minnesota and the City of St.

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138. See Affidavit of Trierweiler, State ex rel. Trierweiler v. Longhenry, No. 11117 (Dist. Ct., Pine County, Minn., filed Aug. 28, 1974).

139. See Plaintiff’s Complaint, Exhibit B, State ex rel. Trierweiler v. Longhenry, No. 11117 (Dist. Ct., Pine County, Minn., filed Aug. 28, 1974).

140. A holding tank is a sewage disposal system from which the effluent is periodically hauled away rather than allowed to percolate through the soil as with a septic tank drainfield system.

141. Nuisance actions have been successfully maintained to enjoin activities that create “noxious and unwholesome odors.” Robinson v. Westman, 224 Minn. 105, 112, 29 N.W.2d 1, 6 (1947); Lead v. Inch, 116 Minn. 467, 134 N.W. 218 (1912). It has also been held that the drainage of waste water upon another’s land so that his land was submerged and his vegetation killed constituted a nuisance. See Herrmann v. Larson, 214 Minn. 46, 7 N.W.2d 330 (1943); cf. Earl v. Clark, 219 N.W.2d 487 (Iowa 1974) (drainage of wastes from a cattle feedlot enjoined as a nuisance).

142. Bodin Interviews, supra note 136.

143. This case abstract is based upon information obtained from the documents on file at the district court, State v. Metropolitan Sewer Serv. Bd., No. 385056 (Dist. Ct., Ramsey County, Minn., Oct. 12, 1972) (complaint filed June 16, 1972); Telephone Interview with Daniel Flicker, Attorney for the City of St. Paul (Nov. 1, 1976); Telephone Interview with James T. Hansing, Attorney for Defendant Engineers Union (Oct. 25, 1976); Telephone Interview with Geoffrey P. Jarpe, Special Assistant Attorney General for the Minnesota Pollution Control Agency (Oct. 25, 1976); Telephone Interview with Jon Morgan, former Assistant Attorney General for the Minnesota Pollution Control Agency (Oct. 25, 1976); Telephone Interview with John Zwakman, Attorney for the Metropolitan Sewer Service Board (Oct. 26, 1976).
Paul sued the union, the employees, and the Board. They sought an injunction restraining the union and the employees from their allegedly illegal strike, on the ground that it had contributed to a violation of water quality standards promulgated by the Minnesota Pollution Control Agency (PCA) and thereby creating an enjoinable public nuisance under Minnesota statutes.\(^4\) In addition, the complaint asserted a cause of action under MERA and sought an order directing the Sewer Board to formulate a plan for similar emergencies.\(^5\)

The trial judge granted the injunctions against the union and the employees, mentioning MERA only by noting that the Act authorizes injunctions.\(^4\) The suit against the Sewer Board was settled by stipulation when the Board drafted an emergency plan.\(^5\)

Since state law authorizes injunctions against violators of PCA regulations,\(^4\) the PCA's lawyers normally do not add a Rights Act count to their complaints.\(^4\) They did so in this case, partly to ensure that no question could be raised about St. Paul's standing as coplaintiff, and partly because the lawyer who was primarily responsible for preparing the PCA's case thought that the time had come to acquaint the courts with MERA.\(^6\) None of the attorneys associated with the case, however, believes that MERA affected the outcome.\(^6\)

3. **Bergquist v. City of Detroit Lakes\(^5\)**

The city began condemnation proceedings against Bergquist and

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147. Id.


149. Jarpe Interview, supra note 143.

150. Id.

151. Flicker Interview, supra note 143; Hansing Interview, supra note 143; Jarpe Interview, supra note 143; Zwakman Interview, supra note 143.

152. This case abstract is based upon information obtained from the documents on file at the district court, Bergquist v. City of Detroit Lakes, No. 18586 (Dist. Ct., Becker County, Minn., filed Dec. 27, 1973); Telephone Interview with Grant Merritt, former Executive Director of the Minnesota Pollution Control Agency (Oct. 26, 1976); Telephone Interview with James O. Ramstad, Attorney for Defendant (Aug. 4, 1976); Telephone Interviews with Stephen Van Drake, Attorney for Plaintiffs (July 23, Aug. 4, & Oct. 26, 1976); Telephone Interview with Dale Wikre, Facilities Division, Minnesota Pollution Control Agency (Aug. 26, 1976); Telephone Interview with Mike Zagar, Engineering Review Unit, Minnesota Pollution Control Agency (Nov. 1, 1976).
others to obtain land for a new sewage treatment system. Most of the land in question was on the shores of a small lake that for many years had been used for sewage disposal. There were no homes around the lake, and although it served as a nesting area and refuge for ducks, it was generally unsuitable for recreation. A ditch connected the lake to a river and a chain of other waters. Under the city's old sewage disposal methods, the effluent was discharged into the lake, through which some of it made its way into the river.

The city proposed to close off the outlet, thereby transforming the lake into a closed storage basin for the sewage. Under this plan the water would be drawn off and used for spray irrigation during the summer. This plan involved some relatively new techniques, and because of various potential problems, including the possibility of pollutant seepage out of the lake, its precise effects on water quality were admittedly uncertain. Nevertheless, the basic issue was whether the lake should be sacrificed in order to prevent pollution from flowing into other waters in the chain.

The city sought to obtain title to all the shorelands around the lake so that it could control the water level without affecting private property. Despite the polluted condition of the lake, the undeveloped farmland around it was valuable because it lay in the path of expanding residential development around the city. Determined to resist condemnation, the landowners filed a suit under MERA, alleging that the property in question contained marshes that were valuable habitats for waterfowl and other wildlife. After retaining a professional engineer, they proposed an alternative disposal plan under which the lake would not be closed off, but instead the sewage would be more thoroughly treated before being discharged. Armed with this plan, the landowners gained support from some Pollution Control Agency officials, whereupon the city decided to adopt the

153. The lake was St. Clair Lake in Becker County. See generally Minnesota's Lakeshore, supra note 137, at 19.
154. Ramstad Interview, supra note 152.
155. Id.; Van Drake Interviews, supra note 152; Wikre Interview, supra note 152.
156. Ramstad Interview, supra note 152.
157. Id.; Van Drake Interviews, supra note 152.
159. Van Drake Interviews, supra note 152.
160. Id.
161. From talking with Agency officials, one gets the sense that the original plan was questionable on scientific grounds. In addition, there was political pressure from both sides. The prospect of protracted litigation may have been unattractive to everyone concerned; for one thing, the cost of the project was rising with every
The attorneys involved disagree about the effect of MERA on this controversy. While the landowners' lawyer is quite certain that the settlement could not have been obtained without the leverage conferred by MERA, the city's lawyer attributes the settlement more to the unforeseen, vigorous opposition than to the legal merits and therefore believes that the result probably would have been the same without MERA.

4. McBurney v. Loris

This suit was brought by several owners of riparian land on Christmas Lake and its primary tributary, Christmas Lake Creek, located in the suburbs of Minneapolis. Two months before the suit, the Minnesota Pollution Control Agency had studied Christmas Lake, concluding that its water quality, although still "excellent," had been steadily deteriorating, as evidenced by increasingly severe algal blooms. The PCA study identified various sources of the nutrients that were contributing to algal growth in Christmas Lake, including the defendants' horse stable and riding academy, situated on land abutting the creek.

The plaintiffs' complaint alleged that the defendants had failed to adopt adequate measures to minimize the drainage of nutrients from horse manure into the creek and argued that these malpractices violated the terms of a conditional use permit that the defendants had obtained from local zoning authorities, created a common law nuisance, and caused pollution and impairment of water resources in violation of MERA.

After a trial on the merits, the judge found that "the heavy loads of nutrients and phosphorus being discharged . . . have contributed to the increased algae production and nuisance blooms of aquatic organisms . . . so as to unreasonably interfere with the use and enjoy-

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162. Although this alternative was considerably more expensive, the impact was softened by federal funding. Van Drake Interviews, supra note 152.
163. Id.
164. Ramstad Interview, supra note 152.
165. This case abstract is based upon information obtained from the documents on file at the district court, McBurney v. Loris, No. 14411 (Dist. Ct., Carver County, Minn., June 27, 1975) (complaint filed July 26, 1973); Telephone Interview with Raymond Haik, Attorney for Plaintiff McBurney (Nov. 3, 1976); Telephone Interview with L. M. Schmithuber, Attorney for Defendant Loris (July 1, 1977).
ment of [Christmas Lake] by the plaintiffs . . . ." He therefore ordered the defendants to adopt corrective measures.149

Although the judge's order mentioned MERA briefly, he justified his decision primarily by reference to nuisance law.170 The attorneys believe that the outcome was not affected by the MERA count.171

5. State ex rel. Minnesota Public Interest Research Group v. Kjellberg Dayton Mobile Home Park172

The Minnesota Public Interest Research Group (MPIRG), a student organization,173 brought suit against the owner and operator of

169. The court ordered the defendants to fence the pasture area, to refrain from overgrazing the pasture, and to curtail the outside pasturing of horses during the winter. Id.
170. Id.
171. Haik Interview, supra note 165; Schmithuber Interview, supra note 165.
172. This case abstract is based upon information obtained from the documents on file at the district courts, State v. Kjellberg's Dayton Park, Inc., No. 723398 (Dist. Ct., Hennepin County, Minn., Apr. 27, 1977) (complaint filed Mar. 5, 1976); Kjellberg's Dayton Park, Inc. v. Minnesota Pollution Control Agency, No. 409303 (Dist. Ct., Ramsey County, Minn., filed Jan. 15, 1976); State ex rel. Minnesota Pub. Interest Research Group v. Kjellberg Dayton Mobile Home Park, No. 703475 (Dist. Ct., Hennepin County, Minn., filed Apr. 13, 1974); Kjellberg Mobile Home Park, Minnesota Pollution Control Agency (Aug. 12, 1975) (unpublished administrative decision); Kjellberg (Dayton) Mobile Home Park, Minnesota Pollution Control Agency (Jan. 21, 1975) (unpublished administrative decision); George Hedlund, Minnesota Pollution Control Agency (Apr. 13, 1970) (unpublished administrative decision) (unpublished administrative decisions are on file at Minnesota Pollution Control Agency, Division of Water Quality, Roseville, Minnesota); Minnesota Pollution Control Agency, Chronology of Events Concerning the Dayton Kjellberg Mobile Home Park, Dayton Township, Hennepin County (Apr. 1974) [hereinafter cited as Dayton Park Chronology] (unpublished report on file at Minnesota Pollution Control Agency, Division of Water Quality, Roseville, Minnesota); Telephone Interview with John T. Cardell, Attorney for Defendant (Aug. 6, 1976); Interview with James Early, Attorney for the Minnesota Pollution Control Agency, in Roseville, Minnesota (Aug. 6, 1976); Interview with Abner Fisch, Division of Water Quality, Section on Municipal Facilities, Minnesota Pollution Control Agency, in Roseville, Minnesota (Aug. 9, 1976); Telephone Interview with Thomas Idstrom, President of Concerned Citizens of Dayton (Aug. 4, 1976); Telephone Interview with Jon Jesvold, Attorney for Plaintiffs (Sept. 15, 1976); Telephone Interview with Tom Newberry, "Community Organizer" for the Minnesota Public Interest Research Group (Aug. 5, 1976); Telephone Interviews with Tim Scherkenbach, Division of Water Quality, Section of Compliance and Enforcement, Minnesota Pollution Control Agency (Aug. 11, 1976 & June 30, 1977); Interview with Dale Wikre, Staff Geologist of the Division of Water Quality, Minnesota Pollution Control Agency, in Roseville, Minnesota (Aug. 9, 1976).
173. The Minnesota Public Interest Research Group is a statewide organization engaged in research, lobbying activities, and litigation concerning "public interest" issues such as the environment, consumer protection, and housing. Supported by $160,000 a year in collections from fifteen Minnesota college campuses, MPIRG em-
a suburban mobile home park (MHP). Sewage effluent from the MHP, after being treated at the park's own facility, was discharged into a lake whose waters eventually merge with the Mississippi River above Minneapolis. In 1959, the Minnesota Pollution Control Agency had approved plans for a private sewage treatment system designed to serve the 100 units in the park. In 1963, however, the PCA, in order to maintain a level of water quality suitable for drinking in the metropolitan area, adopted a regulation (WPC 1) prohibiting discharge of any effluent, however well treated, into the portion of the Mississippi that eventually received the MHP's discharge. For about seven years, the MHP violated this regulation without requesting a variance. Furthermore, between 1966 and 1970, the number of mobile homes in the MHP increased to 240, without a corresponding increase in the capacity of the treatment facility. By 1974, the discharge of the sewage works had increased to 33,000 gallons per day, while the capacity of the plant was only 26,000 gallons per day. This problem had been exacerbated by substandard operation and maintenance procedures. According to complaining residents of the area, the effluent was unsightly and odoriferous and was contributing to the growth of algae in the lake.

Instead of attempting to shut down Kjellberg's operation, the PCA engaged in a lengthy and apparently futile effort to negotiate a mutually satisfactory sewage disposal plan, involving several proposals and counterproposals from the Agency, Kjellberg's, the Metropolitan Council, and the Town of Dayton. In 1970, Kjellberg's received a variance from the requirements of WPC 1, subject to various conditions, including a requirement that the owner submit plans for enlarged treatment facilities, which after being constructed were to be owned by the town. Rather than resolving the problem, the variance generated another series of negotiations, culminating in Kjell-
berg's formal request for PCA approval of a plan to dispose of the effluent through a spray system.\textsuperscript{180}

Meanwhile, MPIRG had organized several "citizen action groups" throughout the state to deal with local consumer and environmental issues. For a certain annual fee, MPIRG agreed to put the resources of its staff at each group's disposal.\textsuperscript{181} One such group, the Concerned Citizens of Dayton (CCD), began to urge the PCA Board to stop Kjellberg's pollution. Dissatisfied with the slow rate of progress, CCD and MPIRG brought suit under \textit{MERA},\textsuperscript{2} alleging that MHP's pollution violated an "environmental quality standard."\textsuperscript{183} Before the trial began, the PCA's staff apparently persuaded the plaintiffs to abandon their suit on the ground that pending PCA hearings would resolve the controversy.\textsuperscript{184} The CCD and MPIRG subsequently became parties to these hearings, which resulted in revocation of Kjellberg's variance, the revocation being stayed for one year pending compliance with several conditions designed to improve the treatment process.\textsuperscript{185} The spray irrigation proposal was rejected.

After Kjellberg failed to comply with the conditions of this and other orders, the PCA instituted an action without a Rights Act count to enforce its orders and regulations.\textsuperscript{188} This action seems to have resolved the dispute.\textsuperscript{187} Kjellberg agreed by stipulation to pay $8,000

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\item[180.] See Dayton Park Chronology, supra note 172, at 4-12.
\item[181.] Newberry Interview, supra note 172.
\item[183.] \textit{MINN. STAT.} § 116B.02(5) (1976) defines "pollution, impairment or destruction" to include any conduct that "violates, or is likely to violate, any environmental quality standard."
\item[184.] Scherkenbach Interview, supra note 172.
\item[185.] See \textit{Kjellberg (Dayton) Mobile Home Park}, Minnesota Pollution Control Agency (Jan. 21, 1975) (unpublished administrative decision on file at Minnesota Pollution Control Agency, Division of Water Quality, Roseville, Minnesota). Kjellberg subsequently petitioned for judicial review of these proceedings. \textit{Kjellberg's Dayton Park, Inc. v. Minnesota Pollution Control Agency}, No. 409303 (Dist. Ct., Ramsey County, Minn., filed Jan. 15, 1976). This action was dismissed, however, by the parties' stipulation concluding the PCA's suit against Kjellberg's mobile home park seeking compliance with the PCA's various orders. See sources cited at notes 187-88 infra.
in civil penalties and litigation expenses and to construct a sewage treatment facility that complies with the PCA's requirements.\textsuperscript{185}

B. AIR POLLUTION

Three MERA cases involved air pollution.\textsuperscript{188} In the first of these, water pollution was also an apparently secondary issue.

1. \textit{Anderson v. Kiecker}\textsuperscript{190}

Kiecker was a farmer who owned a tract of land bordering on a 5,670-acre lake.\textsuperscript{191} Although he had originally bought the land as an investment, he later decided to let relatives use it as a pig farm\textsuperscript{192} and applied to the Minnesota Pollution Control Agency for a feedlot permit. The proposed feedlot was to be located 1,200 feet from the lake.\textsuperscript{193} The surrounding area was unzoned and was devoted to a mixture of agricultural and residential uses. The plaintiffs, owners of nearby homes, opposed this project, evidently because they expected it to create offensive odors.\textsuperscript{194} While the feedlot application was pending at the PCA, they sued Kiecker, basing their complaint on MERA,\textsuperscript{195} PCA air pollution\textsuperscript{196} and solid waste disposal regulations,\textsuperscript{197} the state


\textsuperscript{*}189. There have been no unsuccessful cases under MERA in which air pollution was a major ground of complaint.

\textsuperscript{*}190. This case abstract is based upon information obtained from the documents on file at the district court, Anderson v. Kiecker, No. 30890 (Dist. Ct., Otter Tail County, Minn., filed Aug. 7, 1975); Telephone Interview with William King, Regional Officer for the Minnesota Pollution Control Agency (Aug. 6, 1976); Telephone Interviews with Stephen Van Drake, Attorney for Plaintiff Anderson (July 23, Aug. 4, & Oct. 26, 1976).

\textsuperscript{*}191. The lake is West Battle Lake, near the city of Battle Lake, in Otter Tail County. See generally MINNE\textsc{so}TA'S \textsc{LAKE\textsc{S}}HORE, supra note 137, at 48.

\textsuperscript{*}192. Van Drake Interviews, supra note 190.

\textsuperscript{*}193. King Interview, supra note 190.

\textsuperscript{*}194. The plaintiffs also alleged that runoff from the feedlot would pollute the lake. Plaintiff's Complaint at 5, Anderson v. Kiecker, No. 30890 (Dist. Ct., Otter Tail County, Minn., filed Aug. 7, 1975); Van Drake Interviews, supra note 190.

\textsuperscript{*}195. The complaint stated that if the "feedlot permit were granted, the effect of said action would materially and adversely affect . . . the environment of the County of Otter Tail . . . ." Plaintiff's Complaint at 3, Anderson v. Kiecker, No. 30890 (Dist. Ct., Otter Tail County, Minn., filed Aug. 7, 1975). See generally MINN. STAT. §§ 116B.02(5), .03(1) (1976).

\textsuperscript{*}196. Plaintiff's Complaint at 5, Anderson v. Kiecker, No. 30890 (Dist. Ct., Otter Tail County, Minn., filed Aug. 7, 1975) (citing MINN. REG. APC 9, 10 (1976) (to be codified in 6 MINN. CODE AGENCY RULES §§ 4.0009, 4.0010)).

\textsuperscript{*}197. Id. at 3-4 (citing MINN. REG. SW 51(7), (19), 52(2), (4), 53(3), (4), 54(1), (2)(b), (d), (e) (1976) (to be codified in 6 MINN. CODE AGENCY RULES §§ 4.6051(7), (19),...
Environmental Policy Act, 193 the Federal Water Pollution Control Act, 195 and nuisance law. 200

The PCA supported Kiecker, observing that the feedlot would be over one-half mile from the nearest concentration of ten dwellings as required by their regulations and concluding that no harmful runoff would reach the lake. 201

The trial judge granted an ex parte temporary restraining order enjoining the PCA from granting a permit and set a date for a hearing on the temporary injunction. 202 Thereafter, the defendant, who had previously denied the allegations of the complaint without the assistance of counsel, withdrew his application for a permit. According to the plaintiffs' attorney, "[i]t boiled down to the fact that he wanted to be a good neighbor. He hadn't anticipated that he would make so many enemies." 203

As a compromise, the neighbors agreed that the land could be used to pasture and feed cattle. 204 Whatever the environmental merits of this alternative may have been, it seems reasonably clear that MERA was not essential to the outcome. Because the defendant abandoned his plans in order to avoid a dispute with his neighbors, the plaintiffs' attorney believes that the other counts in the complaint would have produced the same result. 205 Not having retained counsel, Kiecker presumably made his decision without reference to the legal arguments. In any event, it would have been difficult for the plaintiffs to prevail on the MERA count, given the statute's exemption of noxious odors 206 and farm operations 207 from the reach of the Act.

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.6052(2), (4), .6053(3), (4), .6054(1), (2)(b), (d), (e)).
198. Id. at 5-6 (citing MN. STAT. § 116D.02 (1976)).
199. Id. at 6-7 (citing 33 U.S.C. § 1151 (1970)).
200. Id. at 5.
201. The PCA's regional officer informed Kiecker that no variance would be required. King Interview, supra note 190.
203. Van Drake Interviews, supra note 190.
204. Id.
205. Id.
206. MN. STAT. § 116B.02(5) (1976) provides that "pollution, impairment or destruction . . . shall not include conduct which violates, or is likely to violate, any such standard, limitation, regulation, rules, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air."
207. Id. § 116B.02(2). See County of Freeborn v. Bryson, 243 N.W.2d 316, 319-20 (Minn. 1978), discussed at notes 349-53 infra and accompanying text; note 95 supra.
2. *State v. Frost Paint & Oil Co.* 208

The defendant's plant, located in Minneapolis, had been discharging some of its wastes into the city's combined sanitary and storm sewer system. The sewer's effluent was apparently influenced by some kind of negative pressure that caused the flow to back up and form ponds within the sewer line.209 As a result, odors from the accumulating chemicals occasionally escaped through manholes and storm drains of the community sewer system, and residents of the area complained that odors were released through their sink drains and toilets.210

Frost never admitted that its activities had caused the odors.211 Nevertheless, the Minnesota Pollution Control Agency decided to bring suit against the company. The complaint was framed essentially around alleged violations of the PCA's odor regulations,212 which, if proved, would constitute an enjoinable public nuisance irrespective of MERA.213 However, the PCA also added two counts based on MERA.214 Although MERA does not permit suits based on conduct that violates a regulation solely by "the introduction of odor into the air,"215 the complaint avoided the exemption by alleging that the vapors created by Frost had caused choking, headaches, and nausea, thus constituting a "material adverse effect" on the "human" environment.216 The other Rights Act count charged that

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208. This case abstract is based upon information obtained from the documents on file with the district court, State v. Frost Paint & Oil Co., No. 708702 (Dist. Ct., Hennepin County, Minn., Mar. 31, 1976) (complaint filed Nov. 18, 1974); Interview with John Bonner, Jr., Attorney for Defendant Frost Paint, in Minneapolis (Aug. 12, 1976); Telephone Interview with James Early, Attorney for Minnesota Pollution Control Agency (July 22, 1976).


211. Frost's attorney stated that it was his client's "suspicion that the sewer flow was interrupted by the construction of [a] nearby [interstate highway]. There was never any complaint about the odors . . . until [the highway] was constructed." Bonner Interview, *supra* note 208.


213. *See Minn. Stat.* § 115.071(4) (1976) (authorizing injunctions against violators of the PCA's pollution regulations); text accompanying notes 148-49 *supra*.


Frost’s practice violated a Metropolitan Sewer Board regulation forbidding disposal into the metropolitan sewer system of substances likely to violate an “environmental quality standard.”

During the course of the litigation, the defendant’s engineers discovered that the problems could be alleviated by diverting Frost’s effluent to another sewer. This was done, and thereafter the parties stipulated to an injunction that forbade the previous disposal method and required the company to comply with applicable PCA regulations. The court’s accompanying memorandum did not mention MERA, and attorneys for both sides agree that it did not affect the outcome.


The defendants in this case were a petroleum refiner and two chemical manufacturers located on a 100-acre site near Pine Bend, Minnesota, just southeast of the Twin Cities. This is the largest petrochemical complex in the state, and its wastes cause three types of pollution. The most visible and controversial problem is the air pollution created by the sometimes enormous plumes of white and black smoke from the emission stacks. A second source of pollution

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218. Bonner Interview, supra note 208.


220. Id.

221. Indeed, neither side pursued the MERA theories. Bonner Interview, supra note 208; Early Interview, supra note 208.

222. This case abstract is based upon information obtained from the documents on file at the district court, State *ex rel.* Minnesota Pub. Interest Research Group *v.* North Star Chems., Inc., Nos. 74270, 74333 (Dist. Ct., Dakota County, Minn., filed June 27, 1972); Minnesota Public Interest Research Group, *The Role of the Pollution Control Agency in the Pollution of Groundwater at Pine Bend: A Report to the PCA Board* (June 6, 1972) [hereinafter cited as MPIRG Groundwater Report] (unpublished report on file at Minnesota Public Interest Research Group, Minneapolis, Minnesota); Interview with Charles Dayton, Attorney for Plaintiff Minnesota Public Interest Research Group, in Minneapolis (July 27, 1976); Telephone Interview with Kenneth Green, Attorney for Defendant Koch Refining Co. (Sept. 8, 1976); Interview with Will Hartfeldt, Attorney for Plaintiffs Mr. and Mrs. Thomas Savage, in St. Paul (July 28, 1976); Telephone Interview with Edward Schwartzbauer, Attorney for Defendant North Star Chemicals, Inc. (Sept. 8, 1976).

223. See MPIRG Groundwater Report, supra note 222, at 1.

224. See Defendants’ Motions, Exhibit A (Chronological Resume of Pollution Control Efforts of St. Paul Ammonia Products and Its Contacts with the Minnesota
has been the discharge of the plants' wastewater effluent into the Mississippi River.\textsuperscript{223} The final problem is seepage of the plants' liquid wastes from temporary holding ponds into the groundwater, allegedly contaminating it.\textsuperscript{224} Prior to the lawsuit, all three companies had been negotiating agreements with the Pollution Control Agency concerning pollution-abatement measures.\textsuperscript{225}

MPIRG's coplaintiffs were a citizens' group called Clean Air Clean Water Unlimited, the owners of the Pine Bend Ski Area, and other nearby residents. Their MERA claim alleged that each of the defendants was violating several of the PCA's air and water pollution control regulations\textsuperscript{226} and thereby adversely affecting the environment.\textsuperscript{227} In addition, the plaintiffs asserted causes of action in nuisance, trespass, and negligence.\textsuperscript{228} After preliminary motions,\textsuperscript{229} the plaintiffs surprised the defendants by asking the court to remit the case to the PCA,\textsuperscript{230} retaining jurisdiction for possible future proceedings. While this motion was pending, stipulation agreements concerning air pollution control were entered into between the PCA and all

\textsuperscript{225} MPIRG Groundwater Report, supra note 222, at 1.

\textsuperscript{226} Id.


\textsuperscript{229} \textsc{Minn. Stat. § 116B.03(1) (1976)} creates a cause of action for conduct causing "pollution, impairment, or destruction" of natural resources. Such conduct specifically includes the violation of pollution regulations. Id. § 116B.02(5).


\textsuperscript{231} These motions, on behalf of defendants, sought to stay all discovery until the preliminary hearing and to sever and strike certain claims. Defendants' Motions, State ex rel. Minnesota Pub. Interest Research Group v. North Star Chems., Inc., Nos. 74270, 74333 (Dist. Ct., Dakota County, Minn., filed June 27, 1972).

\textsuperscript{232} Motion for Remittitur, State ex rel. Minnesota Pub. Interest Research Group v. North Star Chems., Inc., Nos. 74270, 74333 (Dist. Ct., Dakota County, Minn., filed June 27, 1972) (motion for remittitur filed Aug. 23, 1972); Dayton Interview, supra note 222.
but one of the defendants.\textsuperscript{223} Thereafter, the parties agreed to a dismissal of the lawsuit without prejudice.\textsuperscript{224}

The plaintiffs’ attorneys have concluded that the lawsuit did not greatly change the terms of the stipulation agreements. They believe, however, that the suit expedited negotiations by providing the companies with an incentive to obtain the stamp of legitimacy that PCA approval of their abatement plans would confer.\textsuperscript{225} It is unclear whether, absent the MERA claims, the common law counts would have served this purpose as well.

C. LAND USE: ALTERATIONS OF LAKES

Land use disputes generated fourteen of the 26 MERA cases that were resolved during the study period. Of the seven successful land use suits,\textsuperscript{226} four involved alterations of lakes.

1. \textit{State ex rel. Tabaka v. Board of Supervisors}\textsuperscript{227}

Green owned an undeveloped peninsula\textsuperscript{228} on Woman Lake in Cass County and a sliver of the adjacent mainland. Although most of the peninsula was only about two to four feet wide, its tip, comprising about seven and one-half acres, was bulbous and therefore developable. Green had plans to subdivide it and sell lots to the public. To provide access to these lots, he would need a road, and so he filed a petition\textsuperscript{229} under the cartway statute, which provides:

\begin{itemize}
\item \textsuperscript{223} Dayton Interview, \textit{supra} note 222; Green Interview, \textit{supra} note 222; Hartfeldt Interview, \textit{supra} note 222; Schwartzbauer Interview, \textit{supra} note 222.
\item \textsuperscript{224} The claims of MPIRG and Clean Air Clean Water Unlimited were formally dismissed without prejudice on June 25, 1976, whereas the damage action brought by the Savages was dismissed with prejudice on July 1, 1976. \textit{State ex rel. Minnesota Pub. Interest Research Group v. North Star Chems., Inc.}, Nos. 74270, 74333 (Dist. Ct., Dakota County, Minn., filed June 27, 1972).
\item \textsuperscript{225} Dayton Interview, \textit{supra} note 222; Hartfeldt Interview, \textit{supra} note 222.
\item \textsuperscript{226} Of the seven unsuccessful land use suits, one concerned the drainage of marshland in rural areas, two involved the preservation of historic sites, and four sought to prevent planned construction. A final, unrelated MERA action concerned an issue of energy policy. These cases are discussed in the Appendix at pp. 223-28 \textit{infra}.
\item \textsuperscript{227} This case abstract is based upon information obtained from the documents on file at the district court, \textit{State ex rel. Tabaka v. Board of Supervisors}, No. 20124 (Dist. Ct., Cass County, Minn., filed Oct. 4, 1974); Telephone Interview with Wilbert Hendricks, Attorney for the Defendant Board (Oct. 26, 1976); Telephone Interview with Harlan Smith, Attorney for Defendant Green (Aug. 9, 1976); Interview with Arthur Walsh, Attorney for Plaintiff Tabaka, in Minneapolis (July 26, 1976); Telephone Interview with Arthur Walsh, Attorney for Plaintiff Tabaka (Oct. 26, 1976).
\item \textsuperscript{228} The parties could not agree whether the land Green sought to develop was a peninsula or an island. Smith Interview, \textit{supra} note 237; Walsh Interviews, \textit{supra} note 237.
\item \textsuperscript{229} A copy of the petition was attached to plaintiff’s complaint. Plaintiff’s
Upon petition presented to the town board by the owner of a tract of land containing at least five acres, who has no access thereto except over the lands of others, the town board by resolution shall establish a cartway at least two rods wide connecting the petitioner's land with a public road. . . . Damages, if any, shall be paid by the petitioner to the town before such cartway is opened.240

The area in question is part of what is known locally as the "Gold Coast," the wealthiest portion of Cass County.241 Unfortunately, Green's relations with the neighbors over whose land the cartway would pass were strained. They were millionaires, whose homes one observer described as "virtually castles on the lake,"242 and they were apprehensive that Green's development would spoil the atmosphere of their beautiful enclave. One of them tried unsuccessfully to outbid Green at the probate sale when he acquired the land, and subsequent efforts to induce him to sell were equally unavailing.243 While the cartway petition was still pending before the Board, Green's neighbors sued him and the Board to enjoin the project.244 One count, relying on MERA, alleged that the dumping of "literally thousands of cubic yards of fill . . . into Woman Lake" that would be necessary to make the isthmus wide enough for a road would cause various sorts of ecological damage and that on the mainland the cartway would "necessarily result in the displacement and destruction along its route of considerable wooded acreage."245 A second count asserted that the requisite filling along the isthmus would be illegal without a permit from the Minnesota Department of Natural Resources.246 Other counts requested an environmental impact statement and contended that there was no public purpose or necessity for the cartway.247

Complaint, Exhibit B, State ex rel. Tabaka v. Board of Supervisors, No. 20124 (Dist. Ct., Cass County, Minn., filed Oct. 4, 1974).

240. MINN. STAT. § 164.08(2) (1976). A "cartway" is simply a dirt road. Theoretically, the petitioner pays only the damages to the landowners whose property is traversed by the road, but since, despite the mandatory language of the statute, the petitions are sometimes denied because of a lack of money, the petitioner's offer to pay the initial expense of constructing the road helps to induce the board to approve the request. Hendricks Interview, supra note 237; Walsh Interview (Oct. 26, 1976), supra note 237.

241. Hendricks Interview, supra note 237; Walsh Interviews, supra note 237.


243. Walsh Interviews, supra note 237.

244. State ex rel. Tabaka v. Board of Supervisors, No. 20124 (Dist. Ct., Cass County, Minn., filed Oct. 4, 1974).


246. Id. at 4-6.

247. Id. at 6.
While the action was pending, Green concluded that, regardless of the outcome of the lawsuit, his influential opponents would prevail before the Board and that litigation to reverse this anticipated decision would be too expensive. He therefore withdrew his petition, and the case was dismissed without prejudice.

The attorneys for both sides believe that the same result would have been achieved without the MERA count.

2. In re Cron

Under Minnesota law, a permit from the Department of Natural Resources (DNR) is necessary for activities, such as dredging, filling, or damming, that affect the "course, current or cross-section of any public waters." Failure to obtain the permit is a misdemeanor, but the Minnesota Supreme Court has held that in order to obtain a conviction the state must prove that the project had harmful consequences, reasoning that otherwise the statute might be unconstitutionally vague.

Cron, who lived on Lake Vermillion, a large, beautiful, and popular lake in northern Minnesota, owned a U-shaped dock abutting his shoreland property. In 1974 he decided to repair the dock and build a new boathouse. Without having obtained a permit, he dismantled the old boathouse and began to reconstruct the dock.

When the project was interrupted by a game warden, Cron applied to the DNR for the requisite permit. The DNR granted a permit for the work on the dock, but refused to authorize an attached boathouse. Cron appealed to the local district court, asserting that the

248. Walsh Interviews, supra note 237.
249. Id.
250. Hendricks Interview, supra note 237; Smith Interview, supra note 237; Walsh Interviews, supra note 237.
251. This case abstract is based upon information obtained from the documents on file with the district court, In re Cron, No. 18451 (Dist. Ct., St. Louis County, Minn., July 27, 1976) (complaint filed Apr. 27, 1975); Telephone Interview with Don Paquette, Assistant Attorney General for the Department of Natural Resources (Nov. 5, 1975).
253. Id. § 105.541(1).
254. See State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699 (1963). Although the statute literally applies to such trivial activities as throwing a rock into a lake, common sense compels the conclusion that the legislature did not intend to cover such alterations of the cross-sections of public waters.
255. The petitioner claimed that he sought the advice of the Department of Natural Resources prior to construction of the dock, but received no response. See Brief for Petitioner at 2, In re Cron, No. 18451 (Dist. Ct., St. Louis County, Minn., July 27, 1976) (complaint filed Apr. 27, 1975).
256. Id. at 3; Brief for Respondent at 1, In re Cron, No. 18451 (Dist. Ct., St. Louis County, Minn., July 27, 1976) (complaint filed Apr. 27, 1975).
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proposed boathouse would be attractive, that boathouses were common in the area, and that his immediate neighbors approved his proposal.\textsuperscript{237} The DNR answered by stating that it was the Department's policy, and that of the county, to phase out existing on-water boathouses on Lake Vermillion. Since 1947 the Department had issued only five permits for such structures, and then only because suitable alternatives did not exist.\textsuperscript{238} In Cron's case, however, the DNR believed that either an on-land boathouse or a temporary shore station\textsuperscript{239} would be a feasible alternative, the latter being favored as less aesthetically obtrusive.\textsuperscript{240} Citing the permit statute, the Department argued that MERA, as subsequent legislation, demonstrated that aesthetic impacts were to be weighed when evaluating permit applications.\textsuperscript{241} The state's attorney also stressed that the DNR's boathouse policy was analogous to treatment of nonconforming uses in zoning law.\textsuperscript{242} Finally, he invoked the substantial evidence test as another reason for upholding denial of the permit.\textsuperscript{243}

The trial judge upheld the DNR's decision.\textsuperscript{244} After stating that the substantial evidence test should be applied, he relied on MERA, concluding that there was "relevant evidence of a substantial nature" that the boathouse would have a material adverse effect on "aesthetic resources" owned by the state,\textsuperscript{245} and that there were "feasible and prudent alternatives" to Cron's proposal.\textsuperscript{246} Conceding that this deci-
sion might cause some economic hardship to Cron, the court relied on MERA as authority for the proposition that "economic considerations alone" do not justify environmental degradation. 267

Although the court's language suggests otherwise, the DNR's lawyer believes that MERA was not necessary to the decision and that the limited scope of review of administrative decisions would have produced the same result. 268 Since denials of these permits have rarely been based on aesthetic grounds, the paucity of analogous pre-MERA cases makes his conclusion necessarily speculative. 269 On the other hand, the DNR's policy concerning boathouses on Lake Vermillion did antedate the Rights Act, 270 so that the administrative decision, if not the judicial one, would probably have been the same without it.

3. Congdon v. Metropolitan Council 271

The Metropolitan Council drafted a comprehensive plan for the collection, treatment, and disposal of sewage in the Twin Cities Metropolitan Area. 272 One objective of this plan was to eliminate septic tank drainfield systems around Lake Minnetonka, a large, important lake west of the Twin Cities. As part of this project, a sewage interceptor 273 was constructed in the town of Shorewood, near Mary Lake. 274

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268. Paquette Interview, supra note 251. See generally note 13 supra and accompanying text.

269. The only case interpreting MINN. STAT. § 105.42 (1976), prior to the enactment of MERA in 1971, was State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699 (1963).


271. This case abstract is based upon information obtained from the documents on file with the district court, Congdon v. Metropolitan Council, No. 703339 (Dist. Ct., Hennepin County, Minn., filed Mar. 3, 1974); Telephone Interview with Thomas Hay, Attorney for Defendants Metropolitan Council and Metropolitan Sewer Board (Aug. 16, 1976); Telephone Interview with Jon Jesvold, Attorney for Plaintiff Minnesota Public Interest Research Group (Sept. 15, 1976); Telephone Interview with Robert Junghans, Attorney for Defendant Engineers (Aug. 16, 1976); Telephone Interview with William F. Kelley, Attorney for Defendant City of Shorewood (Aug. 17, 1976); Telephone Interview with Lee H. May, Attorney for Plaintiffs Congdon and May (Oct. 25, 1976).

272. Under the provisions of its enabling legislation, the Metropolitan Council was directed to prepare and adopt a comprehensive plan for the collection, treatment, and disposal of sewage in the metropolitan area. MINN. STAT. §§ 473B.06(5a), 473C.06(3) (1974) (current version at MINN. STAT. §§ 473.146, 513 (1976)).

273. A sewage interceptor is an underground conduit necessary for the collection and disposal of sewage waste.

274. The sewage interceptor was built according to plans filed with and approved...
Two riparian landowners on the latter lake brought suit, contending that the interceptor had lowered the level of the lake. By constructing the pipelines too close to the lake, the defendants had allegedly caused the water to pierce the bottom shell of the lake and drain into and along the ditch that had been built for the interceptor. The complaint stated several causes of action. One count called for an environmental impact statement under the National Environmental Policy Act on the ground that the town had obtained federal funds for the project. Another count, based on MERA, claimed that by lowering the water level the defendants had disrupted the ecology of the shoreline. Other counts relied on theories of trespass and nuisance. The individual plaintiffs sought damages of $10,000 as compensation for diminution of the value of their land.

The defendants denied that the interceptor had lowered the lake's level but a year later the case was settled, with the defendant-engineers agreeing to construct a deep well capable of pumping fifty gallons of water per minute into Mary Lake to raise its water level. Each of the other defendants (except the town) agreed to pay the individual plaintiffs jointly $1,000. The defendants, according to their attorneys, decided that litigation would cost $30,000-$40,000, and "no one was going to spend that kind of money to prove a point." One of these attorneys also contends that the case "dealt with property values" and that MERA "played no part at all." Another says that the case was "really a nuisance case." Even so, a third defense attorney observes that the case helped to create a "heightened awareness" among government officials of the problem of lakebed seepage into pipeline channels, and the plaintiffs' attorney believes that the Rights Act was "instrumental" in achieving the favorable settlement.

by the Metropolitan Council pursuant to MINN. STAT. § 473C.06(3) (1974) (current version at MINN. STAT. § 473.513 (1976)).

275. Although the Minnesota Public Interest Research Group initially joined the landowners as a coplaintiff, it did not thereafter actively participate in the case.

276. See Plaintiff's Complaint at 7, Congdon v. Metropolitan Council, No. 703339 (Dist. Ct., Hennepin County, Minn., filed Mar. 3, 1974).

277. Id. at 5-6 (citing 42 U.S.C. §§ 4321-4361 (1970)).

278. Id. at 8.

279. Hay Interview, supra note 271; Junghans Interview, supra note 271; Kelley Interview, supra note 271.


281. Id.

282. Kelley Interview, supra note 271.

283. Junghans Interview, supra note 271.

284. Kelley Interview, supra note 271.

285. Hay Interview, supra note 271.

286. May Interview, supra note 271.
4. State v. Oscarson

The State Department of Natural Resources and Otter Tail County brought suit against an owner of riparian land on a lake in rural Minnesota. Oscarson, the defendant, had built a wooden retaining wall along his shoreline, but had failed to apply to the Minnesota Department of Natural Resources for a permit to alter the "cross section" of the lake. Two neighbors on one side of his property had previously erected similar structures, and Oscarson claimed that his project was necessary to preserve the shore that was gradually being eroded. A corner of Oscarson’s wall was catching debris, however, cluttering a neighbor’s beach. The neighbor complained to the County Zoning Administrator, and eventually the county and the state jointly sued Oscarson. The complaint cited his failure to obtain the permit, invoking public nuisance law and MERA as grounds for an injunction compelling the defendant to “remove so much of the fill and other materials placed below the normal ordinary high water level . . . [as] constitutes a change to the cross-section of the lake and current thereof detrimental to the public interest.” After discovery proceedings, the parties negotiated a settlement under which Oscarson was permitted to retain part of the structure, but was required to rebuild the sharp, L-shaped end that was catching debris.

The attorney who represented both the county and the state believes that a Rights Act count is useful because it informs the judge of a major state policy and looks formidable to defense attorneys. He has concluded, however, that in this case the plaintiffs could have obtained an injunction without MERA. It is also possible that the affected neighbor could have sued successfully on a private nuisance theory. Oscarson’s attorney simply says that “I think it could have been resolved” without the MERA count.

287. This case abstract is based upon information obtained from the documents on file at the district court, State v. Oscarson, No. 7464 (Dist. Ct., Otter Tail County, Minn., filed May 3, 1974); Telephone Interviews with Paul Grinnell, Attorney for Defendant Oscarson (Aug. 11 & Oct. 26, 1976); Telephone Interviews with Stephen Van Drake, Attorney for Plaintiff Otter Tail County (July 23, Aug. 4, & Oct. 26, 1976).
289. Van Drake Interviews, supra note 287.
290. Grinnell Interviews, supra note 287; Van Drake Interviews, supra note 287.
293. Grinnell Interviews, supra note 287; Van Drake Interviews, supra note 287.
294. Van Drake Interviews, supra note 287.
295. See Minn. Stat. § 561.01 (1976).
296. Grinnell Interviews, supra note 287.
D. LAND USE: EMINENT DOMAIN

The greatest discernible effect of MERA suits has been in eminent domain cases. Prior to MERA, judicial review of the propriety of condemnations in Minnesota—as in most other states—was very narrow. The traditional requirements that the taking be "necessary" for a "public purpose" are usually easy to satisfy. Courts rarely overrule administrative determinations of necessity, and a highway, for example, serves a public purpose even if the route will destroy valuable natural resources. The doctrine forbidding a condemnor to take land that is devoted to a "prior public use" does afford some protection to parks and the like, but it obviously does not protect natural resources on private lands. Moreover, courts often refuse to apply the doctrine when the condemnee is lower in the hierarchy of sovereigns than the condemnor. Thus, a county will be enjoined from building a road through a state park, but the state may build a road through a county park.


298. See Housing & Rede. Auth. v. Schapiro, 297 Minn. 103, 210 N.W.2d 211 (1973); Northern States Power Co. v. Oslund, 236 Minn. 135, 51 N.W.2d 808 (1952); Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N.W. 561 (1914); In re St. Paul & N. Pac. Ry., 37 Minn. 164, 33 N.W. 701 (1887).

299. The general rule is that the condemnor need not show an absolute or indispensable "necessity," but only that the proposed taking is reasonably necessary or convenient for the furtherance of a proper purpose. Kelmar Corp. v. District Court, 269 Minn. 137, 142, 130 N.W.2d 228, 232 (1964). See Metropolitan Sewer Bd. v. Thiss, 294 Minn. 228, 200 N.W.2d 396 (1972); Northern States Power Co. v. Oslund, 236 Minn. 135, 51 N.W.2d 808 (1952).

300. Minn. Stat. § 161.20 (1976) vests the Commissioner of Highways with broad authority to designate and acquire through condemnation proceedings lands needed for trunk highway purposes. See State v. Christopher, 284 Minn. 233, 170 N.W.2d 95 (1969), cert. denied, 396 U.S. 1011 (1970); Kelmar Corp. v. District Court, 269 Minn. 137, 130 N.W.2d 228 (1964); State v. Ohman, 263 Minn. 115, 116 N.W.2d 101 (1962); State v. Voll, 155 Minn. 72, 192 N.W. 188 (1923).

301. See Minnesota Power & Light Co. v. State, 177 Minn. 343, 225 N.W. 164 (1929); Independent School Dist. v. State, 124 Minn. 271, 144 N.W. 960 (1914); Minneapolis & St. L. R.R. v. Village of Hartland, 85 Minn. 76, 88 N.W. 423 (1901).

302. See Minnesota Power & Light Co. v. State, 177 Minn. 343, 225 N.W. 164 (1929) (public utility has no authority to condemn a perpetual easement through a state park for an electric power line).


304. See Minnesota Power & Light Co. v. State, 177 Minn. 343, 225 N.W. 164 (1929).

The broad language of the Rights Act has revamped eminent domain law so that now any taking may be challenged on the ground that it "materially adversely affects" natural resources. Unless the defendant can prove that there is no "prudent and feasible" alternative, the complainant should prevail.


The Nature Conservancy, a national, nonprofit organization, is dedicated to the conservation of rare and endangered natural areas. Sometimes it manages the area itself; in other instances, it holds title temporarily until a governmental unit can arrange to buy the land from the Conservancy.

The land involved in this case was 300 acres of "native prairie land," constituting a natural ecosystem of indigenous prairie grasses that had never been plowed. It also provided a choice habitat for the endangered Greater Prairie Chicken.

The power company asked the Conservancy to grant an easement for an electric transmission line through the middle of this tract. Refusing this request, the Conservancy went ahead with previous plans to lease the land to the state, under an arrangement whereby the Department of Natural Resources would maintain it as an official "scientific and natural area." After this lease was executed, the company brought condemnation proceedings against the

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307. Id. § 116B.04.
309. Flicker Interviews, supra note 308.
310. Id.
311. Id.
312. Id.
313. MINN. STAT. § 84.033 (1974), as amended, MINN. STAT. §§ 84.033, 86A.05 (1976), authorized the Commissioner of Natural Resources to acquire by lease "any interest in lands suitable and desirable for establishing and maintaining scientific and natural areas." The statute required that lands qualifying as scientific and natural areas possess "values inherent in the natural condition of the land." Id. The features that currently qualify an area as a state scientific and natural area are listed in section 86A.05(5).
Conservancy, as holder of the fee title, and the state, as lessee. The condemnees responded by suing the company under MERA. While this latter case was pending, however, the Conservancy successfully resisted the separate condemnation petition on the ground that the company lacked statutory authority to condemn land owned or leased to the state and used for public purposes. Having thus achieved its major objective, the Conservancy agreed to a dismissal of its MERA suit with prejudice. The power line was later constructed across nearby farmlands, avoiding the "scientific and natural area." 

Although MERA did not affect the outcome of the case, it apparently did affect the ultimate resolution of the underlying controversy. The decision in the condemnation case precluded the company from taking any of the 300-acre tract. But one of the Conservancy's main concerns was that the prairie chickens would kill themselves by flying into the transmission wires. This danger would have been exacerbated had the company laid its line along a more circuitous route, skirting the very edge of the property. The company threatened to do just that, but eventually relented and agreed to keep the line a minimum of one-quarter mile from the tract. The Conservancy's attorney attributes this concession to his own counterthreat to proceed with the Rights Act case. Under MERA, but not under the prior public use doctrine, the Conservancy would have had standing to challenge the siting decision irrespective of whether the line was to cross its land.

2. State ex rel. Reed v. County of Cass

Pleasant Lake, comprising about 910 surface acres, is located in

315. The condemnees requested a continuation of the condemnation proceedings until the MERA issues had been litigated and such further relief as might be proper under MERA. Plaintiff's Complaint, State ex rel. Nature Conservancy v. Square Butte Elec. Coop., No. 10638 (Dist. Ct., Wilkin County, Minn., filed Oct. 9, 1975).
318. Flicker Interviews, supra note 308; Johnson Interview, supra note 308.
319. Flicker Interviews, supra note 308.
320. Id.
321. Id.
322. See notes 82-86 supra and accompanying text.
323. This case abstract is based upon information obtained from the documents on file at the district court, State ex rel. Reed v. County of Cass, No. 20011 (Dist. Ct., Cass County, Minn., filed Jan. 14, 1974); Telephone Interview with John Plattner,
a sparsely settled, largely forested region in central Minnesota. It is a popular recreational lake, surrounded by about 56 seasonal homes, 16 permanent homes, and 7 resorts. A short distance south of the western portion of the lake, there is a small spring-fed pond. The Boy River, a small, shallow creek, runs into the eastern side of the lake. South of the pond, a county road proceeds in an east-west direction, then turns due north, running along the eastern shore of Pleasant Lake, and crossing the Boy River.

The county decided to reconstruct and improve this road. Without changing the route, it intended to grade, fill, and in some places widen the old dirt road. As a first step, eminent domain proceedings were brought against some of those who owned land abutting the road. Among these landowners were two exceptionally wealthy families whose vacation estates covered much of the land surrounding the south end of Pleasant Lake and all of the land enclosing the spring-fed pond. They brought suit to enjoin the condemnation proceedings. In addition to MERA counts, the plaintiffs alleged that an environmental impact statement was necessary under state law, that there was no public necessity for the project, that the route selection was arbitrary and capricious, and that a permit that had been obtained was inadequate under MERA because it failed to provide safeguards against pollution.

To buttress their case, the plaintiffs retained a consulting ecologist, whose "preliminary report" described several potential adverse consequences of the road work on the character of the pond. Addressing itself to the county's proposed filling and leveling of a sharp

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324. See generally MINNESOTA'S LAKESHORE, supra note 137, at 26.
325. See Plaintiff's Complaint at 3, State ex rel. Reed v. County of Cass, No. 20011 (Dist. Ct., Cass County, Minn., filed Jan. 14, 1974); Walsh Interviews, supra note 323.
328. A state environmental impact statement is required when there is "potential for significant environmental effects resulting from any major governmental action." MINN. STAT. § 116D.04(1) (1976).
329. See Plaintiff's Complaint at 5-14, State ex rel. Reed v. County of Cass, No. 20011 (Dist. Ct., Cass County, Minn., filed Jan. 14, 1974).
dip in the road where it passed south of the pond, 331 the report contended that the fill would raise the water level of the pond, thereby flooding the intermediate land and making the pond part of the lake itself. The flooding was also expected to destroy some of the trees on the surrounding land owned by one of the complainants and to reduce the value of the pond as a duck breeding ground. 332 In addition, the county's plans for regrading and widening the road in the vicinity of the Boy River would have necessitated installation of a new and longer culvert, which the plaintiffs asserted would hamper fish migration. 333 Faced with this suit, county officials almost immediately agreed to alter their plans so as to satisfy the plaintiffs 334 by using less fill and eliminating some proposed widenings of the road. 335

The plaintiffs' attorney says that the MERA cause of action was the core of his case and doubts the validity of the other legal theories. He attributes the prompt settlement to the novelty of MERA—"people weren't familiar with dealing with it"—and to the fact that "those [rural] counties don't have a lot of money, so they can't afford to spend the county attorney's time fighting what they envision [to be] a rather beastly lawsuit." 336 While not disputing this analysis, the attorney for the county claims that there "was really no need for a lawsuit. If they had just let us know they were unhappy, the county would have been more than happy to accommodate them." 337

3. County of Freeborn v. Bryson 338

The county filed a petition to condemn land for the purpose of relocating a county highway. To make the highway straighter, and therefore safer, it was necessary to acquire a strip across nineteen acres of Bryson's farm that he had set aside as an unofficial wildlife area. Of these nineteen acres, about seven and one-half were wet-
lands, including three open water ponds which were part of a larger slough area beginning south of the farm and continuing several miles north to Freeborn Lake. Bryson had developed the marsh and the surrounding area as a wildlife habitat by planting fir trees, excavating the open water ponds, and maintaining a one-acre unharvested food plot for wildlife. As a consequence of these efforts the marsh area supported abundant and varied plant and animal life.\textsuperscript{339}

The proposed highway would have crossed about 600 feet of the marsh area, eliminating approximately seven-tenths of an acre of marsh on the Bryson property, including one of the open water ponds and the surrounding vegetation. Various alternative routes considered by the county were rejected, principally because they were less safe and more costly.\textsuperscript{340}

The Brysons, joined by the Sierra Club and the State of Minnesota as intervenors, challenged the condemnation petition under MERA and sought to enjoin the county from taking the marshland.\textsuperscript{341} After both sides had presented their evidence, the trial court dismissed the MERA action. Despite the sweeping, unqualified language of the Rights Act, the judge decided that the legislature must not have intended to enlarge the traditionally narrow scope of review in eminent domain cases.\textsuperscript{342} Applying the traditional test, he concluded that the taking was not "arbitrary and capricious." He also held that the Brysons lacked standing to sue under MERA because, as owners of a family farm, they could not be sued under the Act.\textsuperscript{343}

On appeal to the Minnesota Supreme Court, this decision was reversed.\textsuperscript{344} The court held that the Brysons and the intervenors had standing, that MERA had altered the law of eminent domain, and that the complainants had made out a prima facie case of adverse environmental effects. Expressing concern about Bryson's immunity to suit under MERA, the court stated,

\begin{quote}
When the natural resource is located on land which would be exempt from suit against the landowner, such as a family farm, the fact that
\end{quote}

\begin{footnotes}
\item[339. ]\textit{See County of Freeborn v. Bryson, 297 Minn. 218, 220-21, 210 N.W.2d 290, 292-93 (1973).} \\
\item[340. ]\textit{Id. at 221, 210 N.W.2d at 293.} \\
\item[341. ]The plaintiffs alleged that the proposed condemnation would materially and adversely affect portions of a natural wildlife marsh, thus structuring their complaint around the language of MERA.\textit{See id. at 219, 210 N.W.2d at 292 (1973); Minn. Stat. \S\ 116B.02(5) (1976).} \\
\item[342. ]\textit{See County of Freeborn v. Bryson, 2 Env'tl L. Rep. (ELI) 20324 (Dist. Ct., Freeborn County, Minn., 1972), rev'd and remanded, 297 Minn. 218, 210 N.W.2d 290 (1973).} \\
\item[343. ]\textit{Id. at 20330.} \\
\item[344. ]\textit{County of Freeborn v. Bryson, 297 Minn. 218, 210 N.W.2d 290 (1973).} \\
\item[345. ]\textit{See note 95 supra and accompanying text.}
\end{footnotes}
there is no guarantee that it will be preserved by the landowner's future conduct may be balanced against a prima facie showing that a protectable natural resource presently exists.344

The case was remanded to the trial court for consideration of the county's defenses.

Before the case came up for trial again both parties sought to improve their legal positions, the Brysons by giving the state a perpetual wildlife easement over the marsh, and the county by changing the proposed route for the highway so that none of the marshland on Bryson's property would be taken. However, the marsh, which covered part of a neighbor's tract as well as Bryson's, would still be partially destroyed. Peterson, the farmer who owned the land through which the new route would pass, did not object to the proposal.347

Despite the fact that the marsh would still be damaged, the trial court again decided in favor of the county. The court conceded that an alternative route, suggested by Bryson, would not harm the marsh and probably would not result in significantly increased costs. But it would have shortened some of Peterson's crop rows, a factor that the judge decided outweighed the environmental advantages.348

On appeal, the Minnesota Supreme Court characterized the case as presenting two issues: (1) should the "family farm" exemption be construed so as to allow the county to benefit from Peterson's immunity? and (2) where a "feasible and prudent alternative" exists, may the court nevertheless authorize environmentally destructive conduct after weighing the alternatives? Concerning the former issue, the court construed the family farm exemption "to mean that the only conduct by a landowner which is immune from suit under the Act is farming or farm-related activity."349 It follows, said the court, that the possibility that Peterson might attempt to drain his marshland for farming purposes "is not relevant where the county proposes highway construction which would adversely affect proximate marshland in a different manner."350 Turning to the second issue, the court noted that "[t]he second proposed route still bisects the marsh"351 and would be just as harmful as the first. The question, therefore, was whether the county had established the affirmative defense of "no feasible and prudent alternative." To prevail on this defense, the court held that the defendant must show more than a balance of competing interests. There must be "a factor of unusual

346. 297 Minn. at 229, 210 N.W.2d at 298.
347. See County of Freeborn v. Bryson, 243 N.W.2d 316, 319 (Minn. 1976).
348. Id.
349. Id. at 320.
350. Id.
351. Id.
or extraordinary significance” that outweighs the environmental harm.\textsuperscript{352} Here the additional farmland needed to circumvent the marsh would probably not exceed an acre. While it is true that portions of the Peterson farm would be bisected, causing some inconvenience to Peterson in farming operations, there is nothing in the record to indicate that Peterson would be foreclosed from farming the land on either side of the highway any more than Bryson, whose farm also will be divided by the proposed road to the north of the marsh, in any event, whether the county's proposal or the feasible and prudent alternative is followed.\textsuperscript{353}

The court therefore directed entry of judgment against the county.

IV. CONCLUSION

Many questions might be asked about the drastic doctrinal changes embodied in a statute like the Minnesota Environmental Rights Act. Most of the literature has been concerned with the propriety, rather than the efficacy, of enlarging the judicial role in resolving environmental disputes. Although the question of propriety is important, we also need to learn more about the effects of doctrinal changes, partly in order to make the debate about propriety less speculative.

The common objections to this sort of legislation are not supported by the results of our study. Having been cited by complainants in only 26 cases resolved over five years, MERA certainly has not resulted in overcrowded court calendars, especially since many of the suits have been brought in rural areas; lengthy trials have been very rare; and much, if not all, of the litigation probably would have occurred even without MERA. Although there has been more litigation in Michigan than in Minnesota, the basic conclusion appears to be equally valid in both states: litigation under these acts has not overburdened the courts.\textsuperscript{354} Nor have MERA cases presented judges

\begin{itemize}
  \item \textsuperscript{352} Id.
  \item \textsuperscript{353} Id. at 321.
  \item \textsuperscript{354} See Haynes, supra note 103, at 593-96. Cf. Consumer Interests Foundation, Do Citizen Suits Overburden Our Courts (1973). The Foundation's findings concerning the number of suits in six states were as follows: Indiana, number of suits unknown (1971-1973); Connecticut, one suit (1971-1973); Florida, three suits (1971-1973); Massachusetts, six suits (1971-1973); Michigan, 33 suits (1970-1972); Minnesota, seven suits (1971-1973). For various reasons, these findings should be interpreted with caution. They may overstate the amount of "rights act litigation" because they do not distinguish between cases that would have been brought on some other theory even if there were no rights act and those that would not. On the other hand, the volume may be understated because (1) the authors of the Foundation's study obtained their infor-
with complex scientific questions that are clearly beyond their competence. Of the cases covered by our study, only two raised issues that were even arguably more complicated than those raised in ordinary nuisance or zoning litigation. In both cases, involving natural gas conservation and fluoridation, the judges refused to disturb the status quo.

The other major objections to environmental rights acts are more subjective and consequently more difficult to appraise. To determine, for instance, whether MERA has encouraged crank suits, one would need to know much more than we do about the merits of the cases, and the likelihood that some sort of lawsuit would have been brought even if MERA had not existed. One must also define the term. If by “crank suits” we mean cases in which the plaintiff’s failure was easily predictable, then the percentage, but not the number, of such suits under MERA may have been fairly high. But the same may be true of many traditional types of litigation. From the facts that this study has been able to adduce, only a few of the cases stand out as fairly obvious lost causes. More important, there is no evidence that protracted MERA suits have been delaying large, important projects.

There are, to be sure, some cases in which MERA has been invoked by landowners, sometimes very wealthy ones, who evidently wished to preserve their residential amenities against projects designed to serve a broader class of people. This phenomenon is not necessarily deplorable, unless one is prepared to demonstrate, for example, that the carway and the development it was intended to serve in Tabaka were in the public interest. Furthermore, in most, from state officers such as the attorney general who were, under some state rights acts, not required to be notified of such suits; (2) even in states that have such a notification requirement, plaintiffs do not always comply with it; and (3) it seems reasonable to suppose that as more lawyers become familiar with these acts the volume of litigation will rise.

Another interpretive problem is that the length and complexity of trials are likely to be more significant than the number of complaints filed. Even allowing for these factors, however, the reported volume of rights act litigation in all states is so low that one doubts that state courts will be congested with such suits in the foreseeable future. In this and other respects the consequences of a comparable federal act might, as some have supposed, be quite different. See Cramton & Boyer, Citizen Suits in the Environmental Field: Peril or Promise?, 2 Ecology L.Q. 407, 415-17 (1972).
if not all, of the cases with class overtones, the plaintiffs either lost or would have prevailed even without MERA. Our study thus reveals a danger—but only a danger—that the Rights Act will serve to fortify entrenched wealth at the expense of the less affluent.

Finally, one may argue that judges should not have as large a role in deciding major questions of public policy as the Rights Act was intended to give them. This, of course, is a matter of degree, and categorical answers are apt to be misleading. The record to date supports neither the apprehension that judges will usurp legislative functions nor Professor Sax's rejoinder that they will purify the democratic process by granting injunctions that prompt legislative consideration of dormant environmental issues.

If, however, the fears of Rights Act opponents have largely proved to be unfounded, so have the hopes of its advocates. Of the 26 MERA cases resolved within the study period, fifteen were, or may have been, at least partial successes for the plaintiffs. But, by a fairly generous tally, the Rights Act appears to have influenced the outcome in only about half of these cases, and in only two,

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360. So far as we have been able to ascertain, MERA cases have not produced any legislative action, perhaps because powerful vested interests, which Sax assumed would be affected by Rights Act litigation, see text accompanying notes 63-66 supra, have rarely been disturbed by these cases.

Bryson and Nature Conservancy, is it clear both that the suit achieved something and that MERA was essential to that achievement. Resolving all these doubts in favor of MERA's efficacy, one must still conclude that the direct, immediate effects of MERA litigation on the overall quality of Minnesota's environment have been insubstantial. After all, even in Bryson only a few of the many thousands of acres of wetlands in the state were directly affected by the decree.

Why have the direct effects of MERA litigation been so meager compared to the high expectations expressed in much of the literature about environmental litigation? One superficially plausible answer would be that not enough suits have been brought. Doubtless, the rather low volume of suits, especially by citizens' groups, is partly due to the expense of litigation. As a rule, none of the statewide environmental organizations can afford to pay all the expenses associated with even a single lawsuit. At most, they pay out-of-pocket expenses while in varying degrees the attorneys donate their time. Another possible reason for the paucity of cases is that many lawyers may still be unfamiliar with this relatively new statute. Hence, as familiarity with the statute increases, so may the volume of Rights Act litigation. But increased attorney familiarity will not alleviate the cost problem, and therefore the percentage of actions brought by ideologically moti-

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364. Interview with Charles Dayton, Attorney for the Sierra Club, in Minneapolis (Oct. 24, 1977). These cost considerations probably explain why MPIRG, with its full-time staff attorneys, subsidized by student fees, was the only organization that brought more than one suit during the study period.

According to Dayton, the Sierra Club is unique among Minnesota's environmental groups in that it usually compensates its attorneys for their time, although at lower rates than would be received from private clients.

MERA makes no provision for awarding attorneys' fees, costs, and disbursements. State law provides that attorneys' fees are generally not allowed, except where authorized by contract or statute. State v. Carter, 300 Minn. 495, 497, 221 N.W.2d 106, 107 (1974). There are exceptions to the general rule: for example, where a party is seeking to recover or protect a common fund, Bosch v. Meeker Coop. Light & Power Ass'n., 257 Minn. 362, 101 N.W.2d 423 (1960). In judicial proceedings generally, the prevailing party is allowed to recover disbursements, MINN. STAT. § 549.04 (1976), and a nominal amount as costs, id. § 549.02.

365. About half of the suits covered by the study were brought by the state or by private attorneys who had known about MERA since its enactment.
vated plaintiffs will probably not rise significantly. A statutory allowance of attorneys' fees might alleviate this problem, but if it were applied to defendants as well as plaintiffs it could do more harm than good.\footnote{366}

It would be a mistake, however, to treat the low number of MERA suits as critical. The effects of Rights Act cases would probably not have been much different if there had been twice as many cases and the plaintiffs had invariably prevailed. By and large, the suits brought under MERA were not ones that were likely to establish major principles, or at least they were not pursued with that end in view. The most obvious explanation is that, despite the abolition of standing requirements, the typical MERA plaintiff, like the typical common law plaintiff, has been an aggrieved property owner, less interested in establishing a principle than in preserving his own residential environment or saving some nearby resource about which he cares. Of course, such motives should not always be disparaged, but they do limit the Act's potential efficacy in resolving problems that do not directly and severely affect someone's economic interest and in establishing broad guidelines that will alter the behavior of non-parties. During the Act's first five years, there was only one appellate decision,\footnote{367} and MPIRG—the single most frequent MERA plain-

\footnote{366. In the 1973 session of the Minnesota Legislature there were three unsuccessful attempts to amend MERA to authorize a court to award attorneys' fees and costs to a successful plaintiff. See H.F. 150, 68th Minn. Legis., 1973 Sess., in MINNESOTA LEGISLATURE: HOUSE BILLS 339 (1973); H.F. 680, 68th Minn. Legis., 1973 Sess., in MINNESOTA LEGISLATURE: HOUSE BILLS 777 (1973); S.F. 2686, 68th Minn. Legis., 1973 Sess. Although one such bill was passed by the House, no comparable Senate bills were ever reported out of committee. No such amendments were offered in the 1975-1976 sessions. A bill authorizing such awards, however, has been referred to both House and Senate committees of the 1977 session. See H.F. 1561, 70th Minn. Legis., 1977 Sess.; S.F. 1333, 70th Minn. Legis., 1977 Sess. The bill may be acted upon when the legislature reconvenes in January 1978.

367. Three recent appellate decisions, outside our study period, should be noted. In \textit{In re City of White Bear Lake}, 247 N.W.2d 901 (Minn. 1976), the Minnesota Supreme Court upheld a decision by the Department of Natural Resources (DNR) to deny a permit for construction of a roadway that would have encroached upon a bay of Birch Lake. The DNR found that the encroachment would destroy valuable wetlands along the shoreline, reduce the water surface area of the lake, and accelerate eutrophication, consequences that could be avoided by "feasible and prudent" alternative routes. Sustaining this decision, the court cited both previous appellate decisions in \textit{Bryson}, as well as language of the Minnesota Environmental Policy Act, MINN. STAT. § 116D.04(5), (6) (1976), similar to that of MERA forbidding permits that are likely to cause "pollution, impairment, or destruction" of natural resources when there is a "prudent and feasible alternative." 247 N.W.2d at 906-07 & n.4.

The well-known Reserve Mining controversy provided the setting for a second appellate discussion of MERA. Reserve Mining Co., after protracted litigation, see generally United States v. Reserve Mining Co., 543 F.2d 1210, 1211 n.1 (8th Cir. 1976); Note, Reserve Mining—The Standard of Proof Required to Enjoin an Environmental}
tiff—never pursued a Rights Act case through a trial on the merits. Except perhaps for the Sierra Club in Bryson, even the ideological plaintiffs generally seem to have been more concerned with resolving specific problems, brought to their attention by affected landowners, than with creating new law. If the individual cases had had a more significant environmental impact, this failure would not be so serious. But the cases usually have been rather minor, and therefore the failure to establish general standards that may affect governmental or corporate conduct is a serious shortcoming of MERA litigation.3

To a degree, this failure is due to the fact that some of the

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Hazard to the Public Health, 59 Minn. L. Rev. 893, 894 n.4 (1974), was enjoined from further discharge of its taconite tailings into Lake Superior. See United States v. Reserve Mining Co., 417 F. Supp. 789 (D. Minn.), aff'd, 543 F.2d 1210 (8th Cir. 1976). Given until April 15, 1980, to “effect complete termination of taconite discharges,” United States v. Reserve Mining Co., 431 F. Supp. 1248, 1249 (D. Minn. 1977), Reserve sought state permits for an on-land disposal site at “Mile Post 7,” not far from its plant at Silver Bay. The Minnesota Pollution Control Agency and Department of Natural Resources rejected the permit applications, relying on a hearing officer’s findings that the Mile Post 7 site would “materially adversely affect the environment” and that a more remote site (“Mile Post 20”), creating fewer environmental dangers, would be a “prudent and feasible alternative.” On appeal, the Minnesota Supreme Court held that none of the findings of environmental danger at Mile Post 7 was supported by substantial evidence and that Mile Post 20 was a less desirable site from both environmental and economic standpoints. See Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977). The court gave several reasons for rejecting the agencies’ contention that MERA justified denial of the permits: the evidence of environmental harm was too speculative, id. at 829-30; the Mile Post 20 site would entail environmental problems that in the court’s opinion were more serious than those at Mile Post 7, id. at 831; and the court feared that Reserve would close its plant rather than use the more distant site, id. at 841. Concerning the legal relevance of the admittedly drastic economic impact that such a closure would have, the court concluded that “it is only where the likelihood of danger to the public is remote and speculative that economic impacts which are devastating and certain may be weighed in the balance to arrive at an environmentally sound decision.” Id. at 841. Since the court, contrary to the hearing officer, the agencies, and the several environmental organizations that had intervened, regarded Reserve as such a case, it ordered the agencies to issue permits for deposit of the tailings at Mile Post 7.

Finally, Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn. 1977), involved a trap-and-skeet shooting facility near a small lake in the Twin Cities area. This project was opposed by virtually all of the nearby landowners, who joined MPIRG in a suit under MERA to prevent it. The Minnesota Supreme Court upheld an injunction against the shooting because excessive noise would impair the “quietude” of the area—a protected “resource” under MERA, id. at 768-77—and lead shot would have toxic effects if ingested by wildlife, id. at 777-80. Since the defendant did not even endeavor to show that there was no prudent and feasible alternative site, the plaintiffs were entitled to an injunction. Id. at 781.

368. Doubtless, this shortcoming will eventually be rectified, after which such issues as the wisdom of the decisions and the extent to which they are altering conduct of nonparties will become more prominent.
greatest environmental cases in Minnesota, such as Reserve Mining\textsuperscript{369} and the efforts to curb logging and mining in the Boundary Waters Canoe Area,\textsuperscript{370} have been brought wholly or principally under federal law and were therefore not affected by MERA. Reserve Mining and the Boundary Waters cases had two characteristics in common: they arose out of exceedingly conspicuous kinds of environmental problems, in which the issues and the appropriate defendants were readily identifiable, and environmental organizations were parties.\textsuperscript{371} The point is not so much that federal law has preempted the important environmental issues as that it has preempted many of those that are sufficiently visible and controversial to provoke a suit by statewide citizens’ groups. Environmental degradation is generally cumulative, the result of thousands of relatively inconspicuous events, as when a marsh is filled by erosion or a river is gradually transformed by shore-land development. Federal law has not preempted state regulation of most such matters. But because there is rarely any single event in the process that is sufficiently visible and objectionable to provoke a lawsuit, cumulative degradation is difficult to resist by litigation. Consequently, the “nibbling phenomenon,” advanced by Professor Sax as a major justification for a public right to environmental quality,\textsuperscript{372} is precisely the kind of problem that litigation is least likely to solve.

There is, then, a nexus between property rights and environmental rights that is in large measure independent of doctrinal changes; it depends less on who has standing to sue than on who perceives an environmental intrusion and cares enough about it to bear the cost of litigation. Consider, for example, the eminent domain cases, which have produced the most tangible results so far under MERA.\textsuperscript{373} With-

\textsuperscript{369} United States v. Reserve Mining Co., 543 F.2d 1210 (8th Cir. 1976). Although the federal courts resolved the question whether Reserve may continue to discharge its taconite tailings into Lake Superior, the state courts decided where the new on-land disposal site should be located. Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977), discussed at note 367 supra.


\textsuperscript{371} Environmental concerns were represented in the logging cases by the Sierra Club and MPIRG; in the mining case by the Izaak Walton League; in the Reserve case by the Minnesota Department of Natural Resources, the Pollution Control Agency, the Attorney General, the Save Lake Superior Association, the Sierra Club, MPIRG, and the Minnesota Environmental Control Citizens Association.

\textsuperscript{372} See text accompanying notes 42-45 supra.

\textsuperscript{373} See notes 297-353 supra and accompanying text. The eminent domain cases include: five of the 26 suits covered by this study; four of the fifteen arguably “successful” suits; four of the eight suits in which MERA seems most likely to have
out meaning to belittle the "environmental" implications of these cases, it seems significant that they all involved direct, physical threats to private property, so that visibility was not a problem and the landowners were willing to pay the expense of litigation. What is more, eminent domain is one of the few areas of traditional law where, before MERA's enactment, landowners, including public or charitable ones like the Nature Conservancy, often lacked adequate legal doctrines to resist serious invasions of their domain. In short, the eminent domain cases were relatively successful because property interests were at stake and consequently the abstract doctrinal changes of MERA were readily enforceable.\footnote{7}

Environmental rights should be distinguished from environmental powers, with which they are often confused. Under MERA, one's rights no longer depend upon one's property; everyone has the equivalent of a "property right" to environmental quality. But the right to environmental quality is "public" only in a special sense. Its enforceability still depends on wealth. This analysis helps to explain the low number of suits challenging state agency permits and regulations as inadequate to protect the environment.\footnote{3} The provision in MERA that allows such suits\footnote{37} was a major departure from previous law under which standing to challenge administrative regulations was generally confined to affected property owners.\footnote{5} But so far the putative beneficiaries of the new right—ideologically motivated citizens—have not enforced it. One partial explanation is that some of the state agencies, for all their faults, generally regulate environmental quality about as strictly as the political climate and the courts will allow.\footnote{8} Still, there are many hundreds of regulations that could be influenced the outcome; both of the suits in which MERA clearly did influence the outcome; and the only MERA suit in which there was an appellate decision.

\footnote{374. This theory is necessarily rather speculative, especially in view of the paucity of empirical data from other states with rights acts. In Michigan, eminent domain cases are somewhat less prominent than in Minnesota, while understandably air pollution suits and, inexplicably, suits by and against state agencies are more common. See Haynes, \textit{supra} note 103, at 685-95. However, the general thesis advanced herein appears to be consistent with the Michigan data. For example, the small number of suits by statewide organizations and the relatively large number by government agencies probably reflect the latter's superior financial resources and their full-time involvement in environmental regulation. See generally notes 108-12 \textit{supra} and accompanying text.}

\footnote{375. The only suit to do so was \textit{State ex rel. Reed v. County of Cass}, No. 20011 (Dist. Ct., Cass County, Minn., filed Jan. 14, 1974), \textit{discussed at notes 323-37 supra} and accompanying text. A similar phenomenon has been observed in Michigan. \textit{See Haynes, \textit{supra} note 103, at 642.}}

\footnote{376. \textit{Minn. Stat.} § 116B.10 (1976).}

\footnote{377. \textit{See generally 2 F. Cooper, \textit{supra} note 12, at 531, 535-36, 539; Note, \textit{supra} note 87, at 575, 620.}}

\footnote{378. Indeed, some of the most important environmental decisions in Minnesota
attacked under MERA, and it is inconceivable that they are all satisfactory to the Sierra Club and similar groups. Such organizations, however, do not have the resources to monitor regulations as closely as industry does. This is particularly important with respect to pollution control standards, which are commonly expressed in technical jargon that is incomprehensible to laymen. Finally, even when they have perceived state regulations as too weak, the environmental groups have usually refrained from litigation under MERA, choosing instead to husband their scarce resources for legislative and administrative lobbying. Although their right to litigate has been expanded enormously, their power to do so is not much greater than it was before MERA.

What this Article counsels is not cynicism about environmental rights litigation but a sense of proportion about its limitations. So far, have curbed the regulatory power of state agencies. See, e.g., Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1976), discussed at note 367 supra; Schwermann v. Reinhart, 296 Minn. 340, 210 N.W.2d 33 (1973); Reserve Mining Co. v. Minnesota Pollution Control Agency, 294 Minn. 300, 200 N.W.2d 142 (1972); North Suburban Sanitary Sewer Dist. v. Water Pollution Control Comm’n, 281 Minn. 524, 162 N.W.2d 249 (1968); State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699 (1963). The literature about environmental litigation has generally ignored the conservatism of many state court judges, as if they were somehow unable rather than unwilling to abolish the traditional doctrinal obstacles in environmental litigation. Rather than being relics of a bygone age, preserved by the sheer weight of precedent, some of these doctrines appear to reflect contemporary judicial values. Perhaps the best example is the “comparative injury” doctrine, under which courts sometimes refuse to enjoin nuisances if the harm to the plaintiff is relatively slight and compensable by a money judgment, while the cost of abatement is very high. See notes 23-24 supra and accompanying text. In New York, the oldest case in point rejected the doctrine, but a more modern one reestablished it. Compare Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913), with Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). The Minnesota Supreme Court has ostensibly rejected the doctrine, but sometimes seems to be swayed by similar considerations. Compare Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919), and O’Malley v. Macken, 182 Minn. 294, 234 N.W. 323 (1931), with Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N.W. 820 (1920).

Most recently, the Reserve Mining case illustrates the reluctance of judges to create a risk of substantial unemployment for the sake of what are thought to be excessively speculative environmental benefits. See Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977), discussed at note 367 supra.

379. The Minnesota chapter of the Sierra Club has, with considerable effort, raised enough money to retain two environmental lawyers as part-time lobbyists. Ironically, these lobbyists have found that the most valuable provision of MERA to environmentalists is the one that gives citizens the right to intervene in administrative proceedings, MINN. STAT. § 116B.09(1) (1976), because as a rule they find that participation in the administrative process is more cost-effective than litigation. Dayton Interview, supra note 364; see notes 364-66 supra and accompanying text; cf. Haynes, supra note 103, at 594-95 (describing a similar trend in Michigan).
it seems that Hines was much nearer to the mark than Sax: in both Michigan and Minnesota, the role of Rights Act litigation has been essentially peripheral. Yet the Rights Act—still an infant compared to most legal institutions—has not failed in any absolute sense. Its most obvious effect has been to establish that condemnors must give considerable weight to the environmental results of their actions—a sensible rule, however much one may debate its application to individual situations. But the question remains, what is the effect of a decision like Bryson? Will it significantly alter the conduct of county highway departments? Of other condemnors? If so, at what cost to other values, such as highway safety? These questions are by no means wholly academic. Insofar as we mistakenly presume that doctrines are efficacious, we may be lulled into neglecting possible statutory and administrative solutions to problems that only seem to have been resolved by litigation. Although there is an endless flow of articles praising decisions that establish environmental rights, very few authors have attempted to determine the effects of these rights.

Without professing to resolve such questions, let us conclude by considering some reasons why the indirect effects of environmental rights may, like the direct ones, be less powerful than scholars usually suppose. For one thing, the Rights Act is very nebulous. In one respect, this quality is an obvious advantage: the Act could not be so comprehensive and flexible if it were much more precise. But from another perspective, MERA’s breadth and consequent opacity is a disadvantage because one rarely can predict whether it will induce a court to enjoin any particular activity that is otherwise lawful. When this consideration is coupled with the paucity of suits to enforce the Act and the fact that a successful suit leads only to an injunction, rather than a fine, a damage award, or imprisonment, it is far from clear that the Act’s deterrent effect is very strong even in those situations where a prospective defendant considers the Rights Act before making an environmental decision.

Of course, the deterrent effect of MERA probably differs among various classes of actors. Almost certainly, some types of people—farmers for instance—often make “environmental decisions” either without consulting an attorney, or after consulting one who takes account only of more specific and familiar regulations such as


381. See, e.g., sources cited in note 103 supra.

382. The evidence of indirect effects in the Michigan studies is sparse and anecdotal. See, e.g., Sax & Conner, supra note 103, at 1050-53.

383. It would surely have been unjust, if not unconstitutional, to include these sanctions in such a vague statute.
the local zoning ordinance. Industries that have obtained the necessary permits from local and state agencies and that have a strong financial incentive to choose a course of action that is relatively insensitive to environmental quality may also pay little attention to the Rights Act. Even those civil servants whose mission is to protect the environment and who might interpret the Act as authority for standing firm in some circumstances where they would otherwise be dubious about their legal right to do so are affected by so many other scientific, administrative, political, and legal constraints that one wonders whether more than a minute fraction of administrative decisions with environmental impacts can accurately be attributed to the Rights Act.  

Most likely, appellate decisions in MERA suits will be more influential than the bare statute because their commands are more definite. If so, the direct effects of MERA litigation will be the major determinant of the indirect effects. In other words, it is more plausible to suppose that Freeborn County's highway department will mend its ways after Bryson than, for example, that Northern States Power Company will make extra efforts to reduce thermal pollution in response to the general language of the act itself. There is, however, considerable evidence that—at least in the field of land use controls—nonparties, and even parties, often ignore or evade judicial decisions, so that even the rule in Bryson may not have much effect, especially outside Freeborn County, except to the extent that it is enforced by more litigation.

For all these reasons, a tentative skepticism concerning the efficacy of Rights Act litigation seems justifiable pending further studies that provide evidence about the effects of environmental rights on nonlitigants. If this Article helps to persuade scholars to undertake such research and to look critically at the claims made in behalf of environmental litigation, it will have served its purpose.

384. See text accompanying note 365 supra.
APPENDIX

UNSUCCESSFUL CASES BROUGHT UNDER THE MINNESOTA ENVIRONMENTAL RIGHTS ACT

A. Water Pollution

1. State ex rel. Minnesotans Opposed to Forced Fluoridation, Inc. v. City of Brainerd, No. 37168 (Dist. Ct., Crow Wing County, Minn., Aug. 30, 1973) (complaint filed Apr. 21, 1972). This case abstract is based upon information obtained from the documents at the district court and from the Minnesota Supreme Court’s opinion in a related case, Minnesota State Bd. of Health v. City of Brainerd, 241 N.W.2d 624, 626-27 (Minn. 1976) (City of Brainerd not barred by the doctrine of res judicata from litigating the constitutionality of the Minnesota Fluoridation Law, despite the trial court’s ruling in State ex rel. Minnesotans Opposed to Forced Fluoridation, Inc. v. City of Brainerd that the statute was constitutional).

Under MINN. STAT. § 144.145 (1976) (original version at ch. 603, § 1, 1967 Minn. Laws 1221), the Minnesota Legislature required fluoridation of municipal water supplies, so as to maintain a fluoride content to be prescribed by the State Board of Health. The most vigorous political and legal opposition to fluoridation came from a group of residents of the Brainerd area called Minnesotans Opposed to Forced Fluoridation. After Brainerd had installed the equipment necessary to fluoridate its water, this group brought suit to enjoin the project. The complaint set forth four causes of action, alleging that fluoridation is an unconstitutional invasion of privacy, that it is “arbitrary and capricious” and therefore unconstitutional, that the amount of fluoride required by the Board of Health would adversely affect the environment, violating MERA, and that the Board's regulation prescribing this amount fails adequately to protect the environment, again in violation of MERA. During the trial on the merits, the major factual issue was whether so many people are intolerant to fluoridation that other means should be used to prevent tooth decay. After listening to the testimony of numerous expert witnesses produced by both sides, the trial court dismissed the complaint. In the memorandum accompanying his order, the judge construed the word “environment” in MERA narrowly, excluding from the definition direct, harmful effects upon people. He also rejected the plaintiff’s argument that MERA had altered the traditional burden of proof. On the merits, the court found that only “a very small group of experts” oppose fluoridation, whereas the great majority of scientists and reputable organizations consider it safe.

2. State ex rel. Ludwig v. City of Bemidji, No. 23222 (Dist. Ct., Beltrami County, Minn., Oct. 27, 1972) (complaint filed Dec. 12,
1971), aff'd, 298 Minn. 27, 212 N.W.2d 876 (1973). This case abstract is based upon information obtained from the documents on file at the district court; Telephone Interview with George L. Duranske, Attorney for Plaintiff Ludwig (Nov. 10, 1976).

Plaintiff, the Director of the Center for Environmental Studies at Bemidji State College, owned riparian land on the Mississippi River, slightly less than a mile below the point at which the City of Bemidji discharges its sewage into the river. The city evidently was not treating its sewage adequately. The Minnesota Pollution Control Agency had revoked the city's sewage disposal permit, but improved treatment methods had not yet been adopted. Ludwig brought suit, alleging both a common law nuisance and a violation of MERA. The trial judge held that the PCA's revocation of Bemidji's permit was invalid because the Agency's notice of the revocation proceedings had been inadequate. In effect, then, Bemidji still possessed a PCA permit and was consequently not subject to suit under MERA. Accordingly, the trial court dismissed the MERA count, and the Minnesota Supreme Court affirmed. Thereafter, the nuisance claim was dismissed with prejudice by stipulation of the parties.

3. Paragon Land Dev. Corp. v. Girling, No. 686538 (Dist. Ct., Hennepin County, Minn., filed May 31, 1972). This abstract is based upon information obtained from the documents filed with the district court in the case cited above and in a companion suit brought by the plaintiff to obtain a rezoning, Paragon Land Dev. Corp. v. City of Robbinsdale, No. 685517 (Dist. Ct., Hennepin County, Minn., filed May 4, 1972); Telephone Interviews with Peter Ruffenach, Attorney for the City of Robbinsdale (July 29 & Aug. 1, 1977).

In Paragon a developer requested a rezoning by the City of Robbinsdale to allow construction of a motel on the shore of Crystal Lake. The request was denied, partly because Paragon was reluctant to spend the sum necessary to connect the proposed motel with existing sewer lines. Thereafter, Paragon brought two separate suits: one against the city to force a rezoning and another against Girling, whose house was adjacent to Paragon's land. Girling's sewage disposal system was not connected to the existing sewer lines; instead, she used a septic tank. If the city or Girling were required to extend the sewer lines to Girling's house, the cost of connecting the extended line to Paragon's motel would be substantially reduced. With this objective, Paragon—relying almost exclusively on MERA—sought injunctive relief against Girling and four other defendants, alleging that Girling's septic tank was polluting the lake while the other defendants polluted by discharges through, and inadequate construction of, storm sewers. But Paragon later abandoned both suits, largely on the ground that even if an injunction were obtained against Girling the
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court probably would not order construction of the sewer line extension.

B. LAND USE

1. State ex rel. Reinhart v. County of Nicollet, No. 17945 (Dist. Ct., Nicollet County, Minn., filed Nov. 1973). This case abstract is based upon information obtained from documents on file at the district court; Telephone Interview with Alwin Mueller, Attorney for Plaintiff Reinhart (Aug. 24, 1976); Telephone Interview with William G. Peterson, Special Assistant Attorney General for the Department of Natural Resources (Nov. 3, 1976).

MINN. STAT. §§ 106.011-.673 (1976) provides for public proceedings to drain wetlands, including the powerful prerogatives of eminent domain and special assessments. Although the drainage code requires that the county boards that approve such projects give due consideration to environmental values, id. § 106.021(6)(d)-(i), in practice the scales are heavily weighted in favor of the proponents of drainage. In Reinhart, a group of farmers petitioned the Nicollet County Board to establish a drainage ditch to drain about 2,700 acres of land, including 100 acres of marshland supported by a natural watercourse flowing through plaintiff’s property. The marshland provided habitat and nesting areas for waterfowl, and, when the Board approved the farmers’ project, the impending loss of this resource became the basis for plaintiff’s Rights Act suit against the county. The plaintiff did not pursue the Rights Act case, however, choosing instead to file a statutory appeal from the Board’s decision. That appeal was successful in the trial court; but the Minnesota Supreme Court reversed, Schwermann v. Reinhart, 296 Minn. 340, 210 N.W.2d 33 (1973), declaring that if wetlands are to be preserved, the government ought, under MINN. STAT. § 97.481 (1976), to buy them rather than to disallow drainage because of its environmental effects.

2. State ex rel. Save Our Sites, Inc. v. Murr, No. 77225 (Dist. Ct., Dakota County, Minn., June 1974) (complaint filed May 30, 1974). This case abstract is based upon information obtained from documents on file at the district court; Interview with Charles Dayton, Attorney for Plaintiff Save Our Sites, in Minneapolis (Nov. 1, 1976); Telephone Interview with Patrick Farrell, Attorney for Defendant Murr (Nov. 4, 1976).

Murr owned an undeveloped tract of land, comprising about five acres, on “Sunrise Hill,” near the Mississippi River south of the Twin Cities. To the north and west, the land abutted a large public park. Also in a northerly direction, and to the east, there was an attractive residential neighborhood.

Most of Murr’s land was zoned single-family residential, but a
small portion was zoned for multiple-family dwellings. Murr applied for a rezoning to allow multiple-family construction on the whole tract. After many of the neighbors spoke against this petition, it was denied. Murr then offered to sell the land to the neighbors (organized as “Save Our Sites”) for his acquisition price. They in turn solicited financial assistance from various charitable sources and tried to persuade local government officials to condemn the land for park purposes. Murr finally decided that these efforts were taking too long and proceeded with plans to build an apartment complex.

The opponents then brought suit to enjoin construction. Their admitted goal was to delay development long enough to persuade the government to buy the land. Aside from its value as an unofficial neighborhood park, the vacant land allegedly had once been the winter home of the Little Crow Band of Indians. It was thus alleged to be an “historical” resource within the meaning of MERA. The complaint suggested that the land might be attached to the adjoining Kaposia Park and serve as the location for a replica Indian village and a county historical museum. This resulting “historical and open space site” would also contain the nearby “Kochendorfer Home,” one of the oldest residences in South St. Paul. The plaintiffs also alleged that development would adversely affect the atmosphere around the park and that Murr had failed to obtain a required municipal excavation permit. The trial judge granted a temporary restraining order and required the plaintiffs to post a $1,000 bond. After a hearing, however, the restraining order was vacated, and the court awarded the bond to Murr, stating:

The Court is of the opinion that the interest sought to be protected by plaintiff does not come within the zones of interests contemplated by the legislature under the Minnesota Environmental Rights Act. Concern for the preservation of possible historic sites is a laudable goal but is insufficient to confer standing under the existing law.

It appears totally improper for a Court of Law to temporarily impede reasonable free use of property pending possible public acquisition . . . .

The matters raised with respect to zoning and permits should be directed to the City of South St. Paul.


Since MERA’s definition of natural resources explicitly includes historical resources, this reasoning is difficult to understand. Yet the plaintiff decided not to appeal because by the time the case reached the Minnesota Supreme Court the site would have been excavated, and it seemed unlikely that the judge would enjoin excavation pending the appellate decision.
3. O'Brien v. City of St. Paul, No. 398980 (Dist. Ct., Ramsey County, Minn., filed Aug. 6, 1974). This case abstract is based upon information obtained from documents on file at the district court.

The St. Paul Masonic Temple, a 60,000-square foot granite structure built about 65 years ago by James J. Hill, was "not architecturally distinguished from the outside and [had] little historical significance." Minneapolis Tribune, Oct. 6, 1974, § D (Arts), at 4, col. 4. The city bought the building for about $1,400,000, intending to demolish it in order to build an approach to a highway. O'Brien, a citizen whose interests include preservation of municipal landmarks and opposition to freeways, led the battle to save the Temple, joined by some of the smaller local performing arts group that lacked adequate facilities. Their case rested on the Temple's magnificent interior:

The showplace is the auditorium, very European. Many people think the intricate plaster work and hand painting were done by Italian craftsmen imported here in the Hill style. Floors are wood. The stage is approximately the same size as that at O'Shaughnessy Auditorium. The fly space is 60 feet high. A graceful, horseshoe-shaped balcony has 300 seats still in it and a working organ.

Off the auditorium, on each of two stories, are two smaller, more elegant rooms—O'Brien calls them Mozart Room One and Two—that have almost perfect acoustics and would be ideal for both rehearsals and chamber concerts.

Id., cols. 4-5.

Basing his claims on MERA and the Minnesota Environmental Policy Act, MINN. STAT. §§ 116D.01-.07 (1976), O'Brien sought temporary and permanent injunctions against demolition of the Temple as well as an order requiring preparation of an environmental impact statement. But the trial judge denied the motion for a temporary injunction, stating that the temple was not a protected "natural resource" within the meaning of MERA and that the plaintiff had not demonstrated a "material effect on the environment." O'Brien v. City of St. Paul, No. 398980 (Dist. Ct., Ramsey County, Minn., filed Aug. 26, 1974) (order denying temporary injunction). For other reasons, he also denied the request for an impact statement. Thereafter, the plaintiff dismissed the action with prejudice.

O'Brien finally found a sympathetic city administrator, and at last report it seems possible that private donations can be arranged to defray the colossal cost of moving the Temple out of the path of the highway. See Minneapolis Tribune, Oct. 6, 1974, § D (Arts), at 4, col. 3.

4. Loring Park Environmental Defense Fund v. City of Minneapolis, No. 708373 (Dist. Ct., Hennepin County, Minn., filed Oct. 25, 1974). This case abstract is based upon information obtained from
the documents on file at the district court.

The city had designated a "Loring Park Redevelopment Area," consisting of nine blocks in which all but eight buildings were to be demolished and replaced by high density housing containing 2,736 residential units. The Loring Park Environmental Defense Fund, an association of property owners, brought suit to enjoin the project on several grounds, including MERA. The court, acting under \textsc{Minn. Stat.} § 562.02 (1976), ordered the plaintiff to post a (surety) bond of $100,000 or the action would be dismissed. Thereafter, the parties stipulated that the defendants would waive all claims for costs in consideration of the plaintiff's agreement not to appeal, and the case was dismissed with prejudice.

5. Nokomis Community Organization v. City of Minneapolis Bd. of Parks & Recreation, No. 720757 (Dist. Ct., Hennepin County, Minn., filed Nov. 25, 1975). This case abstract is based upon information obtained from the documents on file at the district court.

The case arose out of a dispute about the location of a community recreational center for use by residents of the Minneapolis neighborhoods surrounding Lake Nokomis. In 1974, the Minneapolis Park Board announced its decision to build the center on park land owned by the city and managed by the Board on a bluff overlooking the lake. It was to be at least two stories high, containing indoor athletic facilities such as swimming pools and gymnasiums serving some 30,000-50,000 people.

The Nokomis Community Organization was an ad hoc group of nearby residents, formed for the purpose of opposing this project. They brought suit to prevent construction of the center at the bluff site. Citing the Rights Act, the complaint stated that the building would impair the beauty of the publicly owned bluff area and attract noisy traffic. The complaint also contended that an environmental impact statement was required by state law. Finally, the plaintiffs alleged irregularities in the process by which the site had been approved.

The trial court ordered the plaintiffs to post a $60,000 security bond under \textsc{Minn. Stat.} § 562.02 (1976) and, when they failed to do so, dismissed the action with prejudice.


The city began condemnation proceedings against Bisanz to acquire land for an indoor ice arena. The proposed site was a small public park owned by the city, subject to Bisanz's right to repurchase
it if the land was used for anything but a park. This land was "left over from all the apartment development" in the area, having been dedicated as a park because it was "too hilly to build on." Within this little preserve, there were aspen trees, cattail, foxes, rabbits, and various songbirds.

Although Bisanz did not contest the condemnation, residents of a nearby apartment intervened in the proceedings, arguing that the proposed taking was invalid both under traditional eminent domain law because the land had already been devoted to a "prior public use" and under MERA because the arena would disrupt natural resources and destroy the "quietude" of the environment. The trial court ruled for the city, finding that the proposed taking was for a necessary public use, that the city had exercised reasonable discretion, and that the project was not likely to impair natural values protected by MERA.

Having lost in the courtroom, the intervenors subsequently obtained a favorable political solution. The city agreed to paint the rink in earthen tones and to construct the associated parking lot in a place where it would interfere less with the objectors.

7. Citizens for a Better Hutchinson v. Minnesota Dep't of Natural Resources, No. 15017 (Dist. Ct., McLeod County, Minn., Mar. 23, 1976) (complaint originally filed in Ramsey County District Court, Citizens for a Better Hutchinson v. Minnesota Dep't of Natural Resources, No. 408082 (Dist. Ct., Ramsey County, Minn., filed Oct. 1975); change of venue to McLeod County District Court granted Dec. 17, 1975). This case abstract is based upon information obtained from documents on file at the Ramsey and McLeod County District Courts.

The Department of Natural Resources had granted two permits to the city for construction of a bridge across the South Fork of the Crow River. At the proposed site, the "river" is really a reservoir, connected with adjacent lakes, and is a popular recreation site. Opponents of the project appealed from the permit decisions, alleging nine causes of action, some of which were based upon MERA. The trial court dismissed every count except the one that treated the case as an ordinary appeal from a DNR decision, a decision that the complainants believed would result in a narrower scope of review than would have been available under the MERA counts. After starting to prepare an appeal to the Minnesota Supreme Court, they decided not to pursue the case.

C. Energy Policy

plaint filed Apr. 10, 1974). This case abstract is based upon information obtained from the documents on file at the district court.

This was a class suit by the Minnesota Public Interest Research Group, the Minnesota Environmental Control Citizens' Association, and individual users of natural gas against several users and suppliers of natural gas. Its purpose was to obtain an injunction against supplying and using natural gas for decorative outdoor lighting on the theory that this is a wasteful practice that depletes a valuable natural resource. Confronted with this large issue of public policy, the trial court dismissed the complaint for failure to state a claim, relying on a triad of debatable legal grounds: MERA protects only indigenous natural resources (the natural gas originates in another state); consumption of natural gas is not "pollution, impairment or destruction" within the meaning of MERA; and the landowners' exemption in MERA precludes an injunction against the users of the decorative lamps. In addition, the court concluded that the difficulties of proving that defendants' actions "materially adversely affect the environment are insurmountable."