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Environmental Law: Challenge to Power Line Routing Decision under the Minnesota Environmental Rights Act

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In accordance with the requirements of the Power Plant Siting Act (PPSA),[1] two electrical utility companies[2] applied to the Minnesota Environmental Quality Council (MEQC)[3] for a determination of the proper route for a new high voltage transmission line.[4] The MEQC ordered formation of a Citizens Route Evaluation Committee and preparation of an Environmental Impact Statement for the potential routes of the power line. The utility companies suggested five possible routes and the Citizens Route Evaluation Committee proposed two additional alternatives.[5] At the public hearings held to discuss the merits of the various routes,[6] the utilities and People for Environmental Enlightenment and Responsibility (PEER)[7] argued for the selection of Route 3, which closely paralleled an existing power line. The MEQC power line siting staff and the Citizens Route Evaluation Committee favored Route 7, which traversed a 130-acre virgin oak forest near a waterfowl breeding lake.[8] The hearing examiner, having

1. MINN. STAT. § 116 C.51-.69 (1978) (enacted in 1973).

2. The utility companies were Northern States Power Company and Minnesota Power and Light Company. People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 862 (Minn. 1978).

3. The official name of the MEQC was changed to Minnesota Environmental Quality Board in 1975 by Act of June 2, 1975, ch. 271, § 3(7), 1975 Minn. Laws 744. The court decided to use MEQC in its opinion—the name the body had during the initial proceedings in the case. 266 N.W.2d at 861 n.1.

4. In July, 1975, the MEQC had issued the two utilities a certificate of corridor compatibility, approving the general route, which was to run from Carlton County to the Twin Cities. A February, 1976 application sought approval for the actual route within that corridor. The transmission line in question is to make up one part of a line extending from Manitoba to the Twin Cities, allowing power sales between Canadian and Minnesota utilities. 266 N.W.2d at 862.

5. The seven routes were suggested for a portion of the transmission line that crossed Washington County. The utilities' five alternatives were covered in the draft Environmental Impact Statement (EIS) prepared by the MEQC siting staff. *Id.*

6. Six public hearings were held between April 15, 1976 and June 23, 1976. *Id.* at 863.

7. PEER is a citizens' organization that had as one of its purposes the protection of the Washington County area from the proliferation of high voltage transmission lines. *Id.* at 862.

8. The Citizens Route Evaluation Committee split its votes between Route 7 and Route 1. *Id.* at 863. The proposed Route 1 paralleled a highway and an existing power line but would have possibly crossed two public parks. *Id.*; Brief for Respondent MEQC at 28-29, People for Environmental Enlightenment and Responsibility

weighed the anticipated human and environmental effects of the two routes as required by the PPSA,[9] selected Route 7, because the selection of Route 3 would have required the condemnation of more homes.[10]

When the MEQC met to consider the hearing examiner's report, PEER alleged that Route 7 could not be selected because the Minnesota Environmental Rights Act (MERA)[11] prohibited choosing a route that was harmful to the environment when a "prudent and feasible alternative" was available.[12] The MEQC, however, approved the hearing examiner's recommendation of Route 7,[13] and this decision was affirmed by the district court.[14] On appeal, the Minnesota Supreme Court reversed, *holding* that MERA applies to power line siting decisions and thus, power line routes that have a "material adverse" effect on the environment cannot be selected if a "prudent and

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(PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978).

9. In accordance with MINN. STAT. § 116C.55(1) (1978), the hearing examiner stressed "the need to balance the interests of those directly impacted, the interest of the body politic in the protection and preservation of the environment, . . . [and] the efficient use of resources while . . . insuring that electric energy needs are met and fulfilled in an orderly and timely fashion." 266 N.W.2d at 863 (quoting MEQC Hearing Examiner Report, July 12, 1976).

10. 266 N.W.2d at 869-70.

11. MINN. STAT. § 116B.01-.13 (1978) (enacted in 1971).

12. At an August 4, 1976, meeting, PEER served each member of the MEQC with a pleading in intervention under MINN. STAT. § 116B.09(1) (1978). 266 N.W.2d at 863.

13. The MEQC vote was 7 to 3. The three members voting against the approval of Route 7 "expressed their concern over the proliferation of routes . . . and suggested that such proliferation was inconsistent with long-term land use planning . . . ." 266 N.W.2d at 863. PEER then brought suit in the district court under a MERA provision, MINN. STAT. § 116B.09(3) (1978), allowing appeal of an agency decision that affects the environment. PEER also sought review under MINN. STAT. § 116C.65 (1978), the PPSA's appeal provision. *See* 266 N.W.2d at 863.

14. District Court Judge Thomas Forsberg held:

> (1) That substantial evidence supported the selection of Route 7 over Route 3 and Route 1;
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> (2) That the effect of the [transmission line] on human settlement was not an improper criterion and was not overly weighted;
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> (3) That the findings of fact were sufficiently specific to permit judicial review;
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> (4) That the alleged procedural errors were either not demonstrated or not prejudicial;
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> (5) That it was unnecessary to inquire into the individual mental processes of the members of the MEQC; and
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> (6) That the balancing of social policies required by the PPSA was consistent with both MERA and the Environmental Policy Act (MEPA), [MINN. STAT. §§ 116D.01-.07].

266 N.W.2d at 863-64.

feasible alternative" is available. It further held that an alternative that avoids new incursions of human activity into the natural environment can be prudent and feasible even if it harms developed property.[15] *People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council,* 266 N.W.2d 858, 864 (Minn. 1978).

Prior to the adoption of MERA and other state environmental legislation, governmental agencies and utility companies in Minnesota were permitted to exercise the right of eminent domain with little regard for the environmental effects of their actions.[16] Like developed property, land in its natural state could be condemned so long as it was "reasonably necessary" to further a proper public purpose.[17] Under this standard, highways and power lines were routinely constructed despite damage to valuable natural resources. Because the common law afforded little or no basis for challenging condemnations on environmental grounds,[18] judicial review of such decisions

15. The court also held that Route 3 was a prudent and feasible alternative to Route 7 and thus should have been chosen as a matter of law. The court remanded the case, however, to allow Route 3 residents to present further evidence to the MEQC to aid its determination of whether Route 3 was an appropriate choice under the guidelines set forth in *PEER.* 266 N.W.2d at 864. *See* notes 69-70 and accompanying text *infra.* On remand, the MEQC selected Route 7. 3 EQB MONITOR 49 (1978); St. Paul Pioneer Press, Oct. 14, 1978, at 15, col. 1.

In addition to the environmental issues, the *PEER* decision establishes an important administrative law precedent. The court held that the legislature "clearly intended agency members to read the material presented to it [sic] prior to reaching their decision," 266 N.W.2d at 873, reasoning that "[u]nder the [Minnesota Administrative Procedure Act (MAPA)] the agency must review the evidence and findings amassed by a hearing examiner and come to an independent decision." *Id.*

Taken literally, the court appears to have interpreted MAPA to require that agency heads read all the materials that concern a particular decision. This requirement, of course, would place a tremendous burden on the administrative decisionmaker. Given the voluminous nature of administrative records, this burden makes the administrator's role impracticable. For a thorough discussion of the disturbing precedent that *PEER* may have set, see Auerbach, *Administrative Rulemaking in Minnesota,* 63 MINN. L. REV. 151, 190-96 (1979).

16. The power to grant the right of eminent domain to a governmental body or company lies solely with the legislature. *See, e.g.,* Kelmar Corp. v. District Court, 269 Minn. 137, 142, 130 N.W.2d 228, 232 (1964) ("ordinarily true that the power of eminent domain can be exercised only as authorized by the legislature").

17. *See* Bryden, *Environmental Rights in Theory and Practice,* 62 MINN. L. REV. 163, 203 (1978).

18. Until the late 1960's, when a significant number of citizens became concerned about environmental protection, condemnation law in the United States reflected the traditional American belief that natural resources should be freely available for use—or misuse. *See, e.g.,* N. WENGERT, NATURAL RESOURCES AND THE POLITICAL STRUGGLE 17 (1955) (describing this early thought as "a trust that everything will come out all right, that particular resources are limitless . . . ."). The New Jersey Supreme

was rarely sought.[19] In practice, roads and power lines were generally routed through natural areas because the cost was less than that of a route through a developed community.[20]

In response to the lack of common law remedies available to prevent environmental degradation, the Minnesota legislature enacted MERA in 1971.[21] MERA allows any citizen to seek judicial review of conduct that "materially adversely affects or is likely to materially adversely affect the environment."[22] Once a prima facie case of environmental harm is established in such a suit,[23] the Act

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Court, for example, allowed a gas pipeline to cross an area specifically set aside for wildlife preservation, even though a slightly more expensive alternative route was available. The court required only that the choice not be "arbitrary and capricious." Texas East. Trans. Corp. v. Wildlife Preserves, Inc., 49 N.J. 405, 230 A.2d 505 (1967).

19. *Cf.* Bryden, *supra* note 17, at 164-67 (limitations on the use of common law causes of acton for environmental challenges). The standard for the scope of judicial review in condemnation proceedings was that "[c]ourts may interfere only when the . . . actions are manifestly arbitrary or unreasonable." Housing and Redevelopment Auth. v. Minneapolis Metropolitan Co., 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960).

The Minnesota Supreme Court rejected only one proposed power line condemnation because of environmental concerns. In Minnesota Power and Light Co. v. State, 177 Minn. 343, 225 N.W. 164 (1929), the court held that a power line could not be routed through Jay Cooke State Park. The court relied on the "public use" exception to the right of eminent domain, reasoning that the condemnors could not take land dedicated to a public use that was inconsistent with the condemnors' proposed use. The court stated that, "it seems reasonably clear that the line is inconsistent with the purpose of maintaining the land as a park . . . ." *Id.* at 350-51, 225 N.W. at 167. *But see* State v. Christopher, 284 Minn. 233, 170 N.W. 2d 95 (1969), *cert. denied*, 396 U.S. 1011 (1970) (Minnesota State Highway Commissioner's decision to condemn twenty-three acres of Minnehaha Park in Minneapolis upheld despite availability of alternative route requiring condemnation of only three acres of parkland).

20. *See* note 46 *infra.*

21. MINN. STAT. § 116B.03(1) (1978). MERA's statement of purpose provides that

> [t]he legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof . . . . Accordingly, it is in the public interest to provide an adequate civil remedy to protect . . . [such] resources located within the state from pollution, impairment, or destruction.

Id. at § 116B.01.

22. MINN. STAT. § 116B.02(5) (1978) (defining "pollution, impairment or destruction" conduct). MERA authorizes civil actions "for the protection of the air, water, land, or other natural resources located, within the state . . . from pollution, impairment, or destruction . . . ." *Id.* at § 116B.03(1).

23. A prima facie case is established under MERA when the court finds "(1) [a] protectable natural resource, and (2) pollution, impairment, or destruction of the resource." County of Freeborn v. Bryson, 297 Minn. 218, 228, 210 N.W.2d 290, 297 (1973). Protectable natural resources "shall include but not be limited to, all mineral,

provides that

> the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no *feasible and prudent alternative* and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.[24]

By authorizing citizen suits to challenge actions that may have adverse environmental effects, MERA significantly altered the traditional law of eminent domain in Minnesota.[25]

Concern for Minnesota's natural environment was also one of the factors that led to the enactment of the PPSA in 1973. The basic purpose of the PPSA is to provide a centralized decision making process for the siting of power plants and transmission lines.[26] The

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animal, botanical, air, water, land, timber, soil, quietude, recreational, and historical resources." MINN. STAT. § 116B.02(4) (1978).

24. MINN. STAT. § 116B.04 (1978) (emphasis added). The "feasible and prudent alternative" standard also appears in the Department of Transportation Act, 49 U.S.C. § 1653(f) (1976) and the Federal-Aid Highway Act, 23 U.S.C. § 138 (1976), two statutes designed to protect parklands from highway construction. The Court of Appeals for the Second Circuit has defined that standard in the following manner: "A feasible alternative route is one that is compatible with sound engineering . . . and a prudent alternative route is one that does not present unique problems, that is, an alternative without truly unusual factors so that the cost or community disruption would reach extraordinary magnitudes . . . ." Monroe County Conservation Council, Inc., v. Volpe, 472 F.2d 693, 700 (2d Cir. 1972) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411, 412-13 (1971)). This standard must be applied when federal agencies submit impact standards as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 433z(2)(C) (1976). *See* Monroe County Conservation Council, Inc., v. Volpe, 472 F.2d at 700 & n.6.

25. *See* County of Freeborn v. Bryson, 309 Minn. 178, 188, 243 N.W.2d 316, 321 (1976) ("Until [MERA] was passed, the holder of the power of eminent domain had in its hands almost a legislative fiat to construct a highway wherever it wished . . . . The remaining resources will not be destroyed so indiscriminately because the law has been drastically changed by the Act"); Bryden, *supra* note 17, at 176 ("[MERA] frees the courts from most of the common law restraints, enabling them to articulate and enforce a public right to environmental quality.").

26. *See* No Power Line, Inc. v. Minnesota Environmental Quality Council, 262 N.W.2d 312 (Minn. 1977):

> Prior to May 24, 1973, the effective date of the Power Plant Siting Act (PPSA), the location and construction of electrical transmission lines were not regulated on a statewide basis. Instead, a public utility that wished to construct a power line had to secure permits from the local authorities of the counties and municipalities through which it proposed to locate its facilities. In an attempt to ensure that future development of power generating plants

Act requires the MEQC to choose sites and routes that "minimize adverse human and environmental impact while insuring continuing electric power system reliability and integrity . . . ."[27] Apart from this general balancing test, the PPSA sets forth a number of more specific criteria that the MEQC is required to consider when making power line siting decisions.[28] After the MEQC has made a decision based on these factors, the Act grants "[a]ny utility, party, or person aggrieved by the issuance of a . . . transmission line construction permit" the right to appeal the decision to a district court.[29]

PEER is the first case in which the Minnesota Supreme Court has considered the relationship of MERA to the PPSA. The MEQC argued that MERA should not apply to power line siting decisions. Since "the purpose of [MERA] is not to supplant specific environmental review processes, but to bring environmental considerations into administrative decision making where there is otherwise a void,"[30] and PPSA requires the MEQC to consider the environmental effects of alternative power line routes, the MEQC argued, MERA should have no application to power line routing decisions.[31]

The *PEER* court rejected this argument and held that a power line routing decision can be the subject of a lawsuit brought under MERA by the MEQC.[32] The court based this conclusion on three reasons. First, that the purpose of the PPSA was not to supersede MERA but rather to complement it by establishing a "coherent legislative policy"[33] designed "to harmonize the need for electric

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> and high-voltage transmission lines in the state would proceed in an orderly and rational fashion . . . the legislature passed the PPSA.

Id. at 317 (footnotes omitted).

> By enacting the PPSA, the legislature sought to ensure that the future siting of power plants and transmission lines would be carried out in an orderly fashion . . . rather than haphazardly, and possibly unnecessarily, at the whim of individual public utilities whose decisions might fail to consider or comport with the public interest.

Id. at 321 (footnotes omitted).

27. MINN. STAT. § 116C.53(1) (1978).

28. These criteria require the MEQC to examine a number of considerations before approving a transmission line route. Included in these criteria are the route's effect on human health, natural resources, agricultural lands, and future development, and the potential for transmission line proliferation. MINN. STAT. § 116C.57(4) (1978).

29. *Id.* at § 116C.65.

30. Brief of Respondent MEQC at 17, People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978).

31. *See* 266 N.W.2d at 866 & n.8.

32. *Id.*

33. *Id.* at 865. The court decided that MERA and the PPSA, coupled with the Minnesota Environmental Policy Act, MINN. STAT. § 116D.01-.07 (1978), form a coherent environmental policy. 266 N.W.2d at 865.

power with the equally important goal of environmental protection."[34] In the court's view, the PPSA was enacted to ensure that the siting of power lines is administered by the "environmentally skilled personnel" of MEQC, and MERA exists in part to permit private lawsuits if the MEQC does not give sufficient weight to environmental harm in its power line routing decisions.[35] Second, the court reasoned that since the PPSA was enacted subsequent to MERA, the legislature could have specifically provided that the MERA standard did not apply to PPSA deliberations. Based on the presumption that the legislature "acted with full knowledge of prior legislation on the same subject,"[36] the court found that the PPSA did not limit MERA. Finally, the court noted that "a statute adopted from another state . . . is presumed to have been taken with the construction there placed upon it."[37] MERA is modeled after the Michigan Environmental Protection Act[38] and since the Michigan courts had applied that statute to all agency decisions in that state, the court concluded that the Minnesota Act should have a similarly broad application.[39]

Having found MERA applicable to power line routing decisions, the court then examined the substantive standard of review applicable to a suit brought under MERA. The court determined that MERA's "prudent and feasible alternative standard is analogous to the principle of nonproliferation in land use planning."[40] The non-

34. 266 N.W.2d at 865.

35. *Id.*

36. *Id.* at 866 (citations omitted). The court also stated that "the general policy of statutory construction followed by this court [is to] harmoniz[e] statutes dealing with the same subject matter." *Id.* (citations omitted).

37. 266 N.W.2d at 866 & n.6 (citations omitted).

38. MICH. COMP. LAWS ANN. § 691.1201-.1207 (West Supp. 1977).

39. 266 N.W.2d at 866 nn.6, 7. The court also noted that MERA's broad grant of standing evidenced a legislative intent to have MERA apply in all situations. *Id.* at 866. MERA allows "any natural person" and almost any organization to seek judicial review. MINN. STAT. § 116B.09(1) (1978). The PPSA, on the other hand, limits review to "[a]ny utility, party or person aggrieved by the issuance of a . . . transmission line construction permit . . . ." *Id.* at § 116C.65 (1978).

Noting the broad scope of MERA's grant of standing, the *PEER* court stated:

> The encouragement of citizen suits to protect the environment from impairment or pollution reflects the legislature's conviction that while individuals will be vigilant in their attempts to prevent the destruction of their homes and private property, since the environment belongs to no one, no one will protect it unless private attorneys-general are permitted to sue on behalf of the public interest.

266 N.W.2d at 869 n.16.

40. 266 N.W.2d at 868. The court found support for its analogy in recent legislative and administrative actions dealing with the siting of high voltage transmission lines. In the 1977 amendments to the PPSA, the legislature ordered the MEQC to consider existing rights-of-way along highways and railroads and ordered studies of the

proliferation principle in land use planning requires that no new construction take place on land in its natural state if the same project could be undertaken on developed property.[41] According to the court, both the principle of nonproliferation and the "prudent and feasible alternative" standard seek to prevent future impairment of natural resources.[42] Thus, the court concluded "that in order to make the [power line] route selection process comport with Minnesota's commitment to the principle of nonproliferation, the MEQC must, as a matter of law, choose a pre-existing route unless there are extremely strong reasons not to do so."[43]

The court then enunciated what appears to be an alternative construction of MERA's prudent and feasible alternative standard. First, the court recognized the distinction between compensable and noncompensable harm. Harm to developed property is considered compensable since its owners can usually be adequately reimbursed financially. On the other hand, "[t]he destruction of protectible environmental resources . . . is non-compensable and injurious to all present and future residents . . . ."[44] Because the value of undeveloped property cannot be accurately expressed in terms of market

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feasibility of multiple circuiting so that a number of lines could be accommodated on a single set of towers. Act of June 2, 1977, ch. 439, § 10, 1977 Minn. Laws 1192-93. *See* note 8 *supra*. MEQC regulations on power line routing that were in effect at the time of the *PEER* decision described the use of existing and proposed rights-of-way as "preferred." Minn. Reg. MEQC 74(d)(3)(ee) (1977), *as amended by* 6 MCAR 3.073(H) (1978).

41. 266 N.W.2d at 868. The court relied on Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977), in determining that the principle of nonproliferation guides Minnesota land use planning. 266 N.W.2d at 868. In *Reserve,* the Minnesota Supreme Court found that the principles of nonproliferation and consolidated land uses required that the Mile Post 7 taconite tailings disposal site, which was closer to the mining company's plant and other human developments, be chosen over the Mile Post 20 site, which was completely within a national forest. 256 N.W.2d at 832-33. The *Reserve* court was not persuaded by the state's contention that a greater human health hazard was presented by disposal at Mile Post 7. The court characterized the scientific evidence as too ambiguous to base a decision on, concluding that "no risk has been proved by substantial evidence," *id.* at 840, and therefore intrusion into the Mile Post 20 area—being natural and recreational in character—was not justified. *Id.* at 841.

42. 266 N.W.2d at 868.

43. *Id.* The court explained that it reached

> this conclusion partly because the utilization of a pre-existing route minimizes the impact of the new intrusion by limiting its effects to those who are already accustomed to living with an existing route. More importantly, however, the establishment of a new route today means that in the future, when the principle of nonproliferation is properly applied, residents living along this newly established route may have to suffer the burden of additional powerline easements.

Id.

44. *Id.* at 869.

price, balancing the financial costs of alternatives would invariably lead to decisions having an adverse effect on the environment. The court concluded, therefore, that the prudent and feasible alternative standard generally prohibits attempts to balance, in monetary terms, alternative courses of development when one alternative requires condemnation of developed property and the other destruction of the natural environment.[45] An environmentally destructive action must be rejected unless the alternatives would cause "extraordinary disruption."[46] Although the court did not define what it meant by this exception, it stated that "the taking of seven or eight homes is not extraordinary disruption."[47]

Having concluded that the balancing of noncompensable harm to the environment against compensable harm to developed property was impermissible under MERA, the court attempted to reconcile this interpretation of the prudent and feasible alternative standard with the explicit wording of the PPSA requiring the MEQC to take both "human" and "environmental" impacts into account when making power line routing decisions.[48] The court resolved this apparent contradiction by reasoning that the "human impact" referred to in the PPSA must have been intended by the legislature to encompass only "noncompensable impairment of human resources."[49] Hence, in the court's view, a balancing of human and environmental impacts under the PPSA was permissible only in circumstances in which an owner of developed property demonstrates "unique irreplaceable characteristics . . . not reflected in market value" that would make the condemnation of the property noncompensable.[50]

Of all aspects of the court's reasoning in *PEER,* this attempt to reconcile the "human impact" language of the PPSA with the prudent and feasible alternative standard of MERA is the least convincing. The court's interpretation of the MEQC's duty to minimize the human impact of power line routing decisions is anomalous, because the language of the PPSA contains no suggestion that the legislature intended that only "noncompensable" harm to developed property

45. *Id.*

46. *Id.* at 870. The court stated that any other result would be contrary to Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) which interpreted the prudent and feasible alternative standard of two federal statutes as prohibiting any wide ranging balancing of compensable and noncompensable harms. The Supreme Court in *Volpe* reasoned that if such balancing were allowed, environmentally damaging routes would normally be chosen because construction costs are usually lower on undeveloped land. *Id.* at 411-12. *See* note 24 *supra.*

47. 266 N.W.2d at 870. *See* note 10 *supra* and accompanying text.

48. MINN. STAT. § 116C.53(1) (1978).

49. 266 N.W.2d at 870.

50. *Id.*

was to be taken into account. The Act does not in any way qualify the nature of the adverse human impacts that must be considered by the MEQC in making its routing determinations.[51] Moreover, the legislative history of the PPSA suggests that the Act was adopted to protect all property owners from the haphazard siting of power lines—not just those owning homes or other structures with "unique irreplaceable characteristics."[52] Thus, a reasonable reading of the PPSA is that it requires the MEQC to balance environmental harm against damage to all types of developed property when making power line siting decisions.

The court's refusal to accept this straightforward interpretation of the PPSA's "human impact" language suggests either that the court was mistaken in concluding that MERA and the PPSA can be consistently applied to power line siting decisions or that the court incorrectly interpreted MERA's prudent and feasible alternative standard. On the one hand, if the court was correct in holding that a balancing of environmental damage with compensable harm to developed property is impermissible under MERA, the PPSA and MERA appear to impose different standards for determining the proper routes for power lines. This conclusion seems to undercut the court's initial determination that the legislature did not intend the PPSA to supersede MERA with respect to power line routing decisions. On the other hand, if it is assumed that the two statutes were both intended to apply to power line siting decisions, the court's conclusion that MERA's prudent and feasible alternative standard does not permit the type of balancing contemplated by the PPSA appears to be mistaken.

From the standpoint of general statutory construction and policy, however, the two conclusions of the court appear correct. First, the conclusion that a power line routing decison by the MEQC can be the subject of a MERA suit is supported by the general purposes of MERA. Few decisions made by state agencies affect the environment as directly as power line routing determinations by the MEQC.[53] If citizens other than those directly affected were denied the right to challenge such decisions,[54] MERA's purpose of providing

51. *See* MINN. STAT. § 116C.53(1) (1978).

52. *See* note 26 *supra.*

53. For example, the transmission line route involved in the *PEER* case required that a 150-foot wide corridor be created through a virgin oak forest. Brief of Appellants at 6, People For Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978).

54. MINN. STAT. § 116C.65 (1978) limits standing to challenge the MEQC's decisions under the PPSA to "[a]ny utility, party, or person aggrieved . . . ." This could easily be interpreted to allow appeal of MEQC decisions only by those directly affected by property loss or destruction. *See* note 39 *supra.*

standing for citizen suits whenever an agency takes an action that adversely affects the environment[55] would be severely undermined. Moreover, there is nothing in the language or underlying purpose of the PPSA that is inconsistent with allowing any interested citizen to bring a MERA suit to appeal a MEQC power line routing decision. Although the PPSA invests the MEQC with the power to determine power line routes, it does not provide that such decisions are to be considered final and therefore not subject to appeal under MERA.[56]

Second, the court's conclusion that MERA's prudent and feasible alternative standard does not permit a traditional monetary balancing of the costs of condemning developed property against those of taking undeveloped land is consistent with the legislative purpose of MERA.[57] MERA was adopted in large part because such a balancing test often led to destruction of the environment since this result was usually less expensive than the alternative of compensating owners of developed property.[58] If the court had held that a monetary balancing test was consistent with MERA, the result would have marked a return to the pre-MERA law[59] that enabled "environmental considerations to be balanced out of the equation entirely."[60] The court's opinion thus has the virtue of rejecting the traditional balancing test as the interpretation of MERA's prudent and feasible alternative standard, while permitting a MERA suit to contest a power line routing decision.

The weakness of the court's opinion is that it unnecessarily and unsuccessfully attempts to reconcile the MERA standard with the PPSA's requirement that the MEQC consider human as well as environmental impacts when making power line routing decisions. The strained analysis was not necessary because, despite the fact that MERA and the PPSA seem to contemplate two different standards for judging the soundness of a power line siting decision, the two statutes are not necessarily inconsistent. The standards they enunciate are directed to two bodies serving different functions. Under the PPSA, the MEQC is required to consider many factors and then ultimately determine routes for power lines in a manner that "minimize[s] adverse human and environmental impact . . . ."[61]

55. *See* note 39 *supra.*

56. *See* MINN. STAT. § 116C.57 (1978).

57. In fact, a provision of MERA not cited by the court states that "[e]conomic considerations alone shall not constitute a defense [to a MERA suit]." *Id.* at § 116B.04.

58. *See* note 46 *supra.*

59. *See* notes 21-25 *supra.*

60. 266 N.W.2d at 869.

61. MINN. STAT. § 116C.53(1) (1978).

Once such a determination by the MEQC is challenged by a MERA suit, however, the decision must be reviewed by a district court under MERA's prudent and feasible alternative standard. The court is required to scrutinize the environmental effects of the decision even more closely than the MEQC and determine whether there exists a prudent and feasible alternative to a selected route that would cause environmental harm.[62] If the court had recognized the different functions of MERA and the PPSA, it could have held that a power line routing decision may be challenged by a MERA suit despite the fact that the MEQC's decision may be based on criteria different than those considered by the court reviewing the decision under MERA.

It might be argued, however, that it would be undesirable to have the MEQC spend considerable time and resources determining the proper route for a power line under the PPSA standard, only to have its decision overturned when the case was reviewed under the stricter standard of MERA. While such an argument has force, it can hardly justify the strained manner in which the court in *PEER* interpreted the PPSA's language requiring the MEQC to take human impact into account in its power line siting decisions. It seems quite probable that the legislature did not consider the interaction between MERA and the PPSA when the latter statute was passed.[63] Although statutory interpretation is an important aspect of judicial decisionmaking, the court's problematical treatment of MERA and the PPSA[64] indicates that, in this instance, the task of reconciliation may have been more appropriate for the legislature than the court.

Whatever the merits of the reasoning that led the court to conclude that power line routing decisions may be challenged by MERA suits, the *PEER* decision is significant in that it indicates that actions by state agencies that adversely affect the environment can be subject to a MERA suit. Ultimately, however, the true importance of the *PEER* opinion will probably lie in the court's interpretation of MERA's prudent and feasible alternative standard. *PEER* is the first case in which the Minnesota Supreme Court has discussed this standard in depth.[65] Obviously, a judicial explanation of the prudent and

62. *Id.* at § 116B.03-.04.

63. Under these circumstances, the tenet of statutory construction that the legislature, in enacting a statute, "acted with full knowledge of prior legislation on the same subject," 266 N.W.2d 866, would appear to be unrealistic.

64. *See* text accompanying note 49 *supra.*

65. The court was able to decide prior MERA cases, without significant explication of the prudent and feasible alternative standard. *See, e.g.,* Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn. 1977); Corwine v. Crow Wing County, 309 Minn. 345, 244 N.W.2d 482 (1976); County of Freeborn v. Bryson, 309 Minn. 178, 243 N.W.2d 316 (1976); County of Freeborn v. Bryson, 297 Minn. 218, 210 N.W.2d 290 (1973).

feasible alternative standard is desirable from the standpoint of giving state agencies and private parties a clearer understanding of what type of action is prohibited under MERA. As one comentator has argued, "[m]ost likely, appellate decisions in MERA suits will be more influential than the bare statute because their commands are more definite."[66] To some extent at least, the *PEER* opinion may be judged on the basis of whether it provides a more definite interpretation of the statute.

In an attempt to elucidate MERA's prudent and feasible alternative standard, the court first stated that the standard "is analogous to the principle of nonproliferation in land use planning."[67] In cases such as *PEER,* where a new road or power line may be routed through or alongside a pre-existing corridor, the "nonproliferation" principle is easily applied. In most cases, however, it appears doubtful that the concept of nonproliferation will provide useful guidance to lower courts or deter actions destructive to the environment. Taken literally, the nonproliferation principle would prohibit all further encroachments on the natural environment. Since this would result in a virtual halt to all new construction in the state, it is clear that the court did not intend such a meaning. Rather, the court stated that further proliferation is to be prohibited unless there are "extremely strong reasons not to do so."[68] This interpretation offers little insight into the MERA standard, however. Indeed, the court's nonproliferation principle offers no more concrete guidance than the bare statutory language of MERA, which prohibits environmentally harmful actions when there is a prudent and feasible alternative.

The critical question under MERA is when an alternative to an action causing damage to the environment is to be considered prudent and feasible. The court in *PEER* attempted to deal with this question by distinguishing the noncompensable nature of harm to the environment from the generally compensable nature of condemnations of developed property.[69] In general, the court concluded, an alternative to action that would cause environmental harm should be considered prudent and feasible unless the alternative results in noncompensable harm to developed property.[70]

66. Bryden, *supra* note 17, at 220.

67. 266 N.W.2d at 868.

68. *Id.*

69. *Id.* at 869. *See* text accompanying notes 49-50 *supra.*

70. *Id.* at 869-70. The court decided that the taking of a home would be noncompensable if the home contained features that could not be reflected in market value such as being "crafted in an unusual manner or constructed of rare materials . . . . Similarly, the establishment of some noncorporeal aspect of home ownership, such as proximity to a unique school system which could not be reproduced or converted to

The court's distinction between compensable and noncompensable harm seems overly simplistic. While it may be readily conceded that no monetary value can be placed on the natural environment, it may also be argued that few homeowners receive full compensation when their homes are condemned. The court's conclusion to the contrary ignores important subjective values associated with the retention of one's home and the difficulty of ascertaining the monetary equivalent of such values.[71]

Nevertheless, it seems clear that few homeowners, if any, could protect their houses from condemnation under the *PEER* requirement that the home be "unique [and] irreplaceable."[72] Thus, although the court's reasoning may oversimplify the value conflicts that arise in most MERA suits, its conclusion that the preservation of the natural environment cannot depend on a balancing of economic factors seems inescapable.[73] Realistically, however, the prospect of having to condemn large amounts of developed property will at some point force courts to permit environmental harm even under the MERA standard. Recognizing this, the court in *PEER* concluded that an alternative to environmental destruction would not be prudent and feasible if it resulted in "truly extraordinary disruption."[74] Precisely what the court envisioned by this standard is unclear, but its conclusion that the taking of seven or eight homes is not an extraordinary disruption[75] suggests that further impositions on Minne-

market value, could make the owner's interest in the property noncompensable." *Id.* at 870.

The *PEER* court made it nearly impossible to show that the taking of any house is noncompensable. The market value of homes generally reflects rare materials used or unique design employed.

71. Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation,* 60 MINN. L. REV. 883 (1976). In examining the deference of some courts to homeowners in nuisance cases, Professor Freeman observed that these courts recognize the "important subjective values associated with residential amenity—values whose monetary equivalents may be difficult or impossible to ascertain." *Id.* at 920 (footnote omitted).

72. *See* 266 N.W.2d at 870.

73. *See* text accompanying note 24 *supra;* note 57 *supra* and accompanying text.

74. 266 N.W.2d at 870.

75. *Id.* Despite the court's holding that MERA does not allow the balancing of human and environmental harms on an economic basis, the "extraordinary disruption" standard may introduce an element of balancing into the court's scheme. When the potential environmental impact is slight, courts would be more likely to find that the harm to compensable property constitutes extraordinary disruption. On the other hand, where the potential environmental harm is substantial, it would be more difficult to show extraordinary disruption. It is clear, of course, that in any case an extraordinary disruption would not be found unless there is an extreme disparity between the harm to the compensable property and the harm to the environment.

sota's natural environment will be allowed only in very rare circumstances.

Although the "extraordinary disruption" standard is somewhat nebulous, it is more definite than the bare statutory language and thus may deter some private parties and state agencies from taking actions that have environmentally destructive effects. Certainly *PEER* should have an important impact with respect to future power line routing decisions made by the MEQC. Whether or not the *PEER* decision will deter other state agencies and private citizens from taking actions that have adverse environmental consequences is more difficult to predict.[76] After *PEER,* however, it seems likely that both private and public condemnors will be required to give greater consideration to the environmental results of their actions.

Whatever the deterrent effect of an opinion such as *PEER,* the case may be regarded as the foremost example to date of MERA's efficacy in preventing environmental harm on a case-by-case basis. While the *PEER* opinion is consistent with the relatively small number of MERA cases decided by the Minnesota Supreme Court,[77] *PEER* gives the most expansive interpretation of the environmental protections afforded by MERA.[78] Obviously, the *PEER* decision makes a strong statement in favor of environmental protection and

76. Professor Bryden, in his study of the results of MERA litigation prior to *PEER,* noted that

> 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 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 [MERA]. 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 [MERA].

Bryden, *supra* note 17, at 219-20. (footnotes omitted).

77. *See id.* at 214 n.367; cases cited in note 65 *supra.*

78. Prior to *PEER,* the Minnesota Supreme Court's most significant decision interpreting MERA's "prudent and feasible alternative" standard was County of Freeborn v. Bryson, 309 Minn. 178, 243 N.W.2d 316 (1976). In that case, the court ordered that one acre of farmland be condemned to protect a marsh from the route of a highway. *Id.* at 187, 243 N.W.2d at 321. *PEER*'s condemnation of a number of dwellings to protect an oak forest is a much stronger precedent in favor of natural resource preservation.

represents a significant departure from the traditional view that condemnation of undeveloped land should be favored over the taking of developed property.