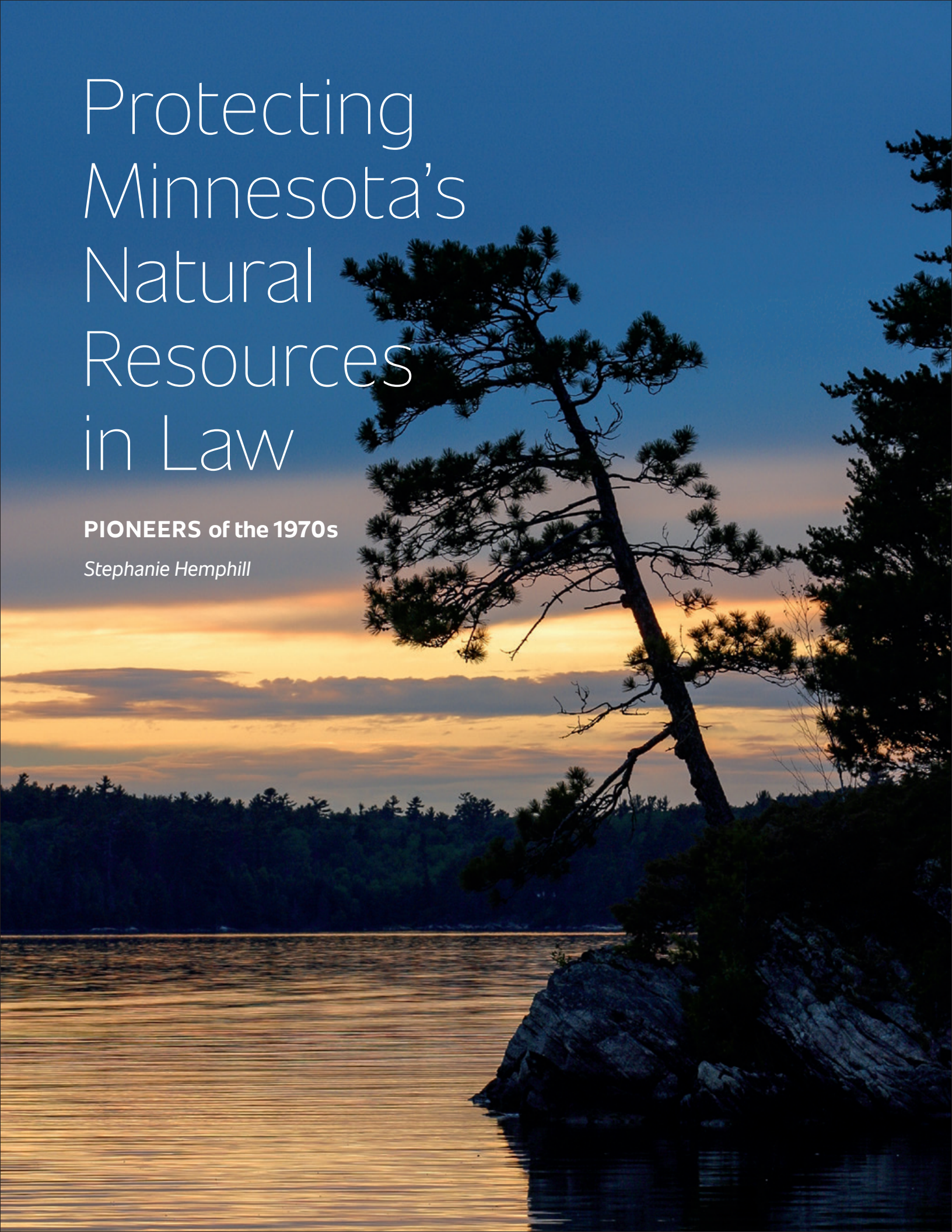
Protecting Minnesota's Natural Resources in Law

PIONEERS of the 1970s

Stephanie Hemphill



IN the mid-twentieth century, many Americans began to recognize the fragility of planet Earth. Rachel Carson's 1962 bestseller, *Silent Spring*, presented a persuasive new vision of the interconnected web of life. Photos taken by orbiting astronauts showed the Earth as a precious and vulnerable blue home in the vastness of cold, dark space. Mothers marched to protest radioactive fallout from atomic bomb testing, and television news viewers groaned at images of oil-soaked debris burning on Cleveland's Cuyahoga River. Spearheaded by Wisconsin senator Gaylord Nelson, the first Earth Day, in 1970, brought hundreds of thousands of Americans into a new and powerful movement.

Like other Americans, Minnesotans embraced this new environmentalism enthusiastically. Their raised consciousness gained expression in part through two landmark pieces of legislation: the Minnesota Environmental Rights Act (MERA) and the Minnesota Environmental Policy Act (MEPA). Enacted in the early 1970s, both acts resulted from extensive discussion, both in public forums and at the capitol, and bipartisan collaboration among legislators rarely seen today. This collaboration enshrined protection of Minnesota's resources in law, thereby establishing the principle that the natural world should be valued equally with the economy. MERA and MEPA continue to provide protections for Minnesota's resources today.[1]

MERA was first brought before the state legislature in 1969 by Senator Wendell Anderson. At the time, he also was in the midst of what would be a successful campaign for governor. Anderson's advisor on environmental issues, Grant Merritt, had introduced Anderson to the concept of allowing individuals to sue for protection of the environment. A descendant of the Merritt family whose iron ore discoveries led to the opening of the Mesabi Range to mining in 1890, Merritt had become involved in politics because he was concerned about Reserve Mining's dumping of taconite waste rock into Lake Superior. The bill Anderson presented was based on a measure under discussion in Michigan, which passed there in 1970. But his bill was introduced too late in the 1969 session to see significant action. Anderson took office as governor in January 1971.

Environmental ideas were swirling around the capitol in St. Paul. Legislators, who then caucused as Conservatives and Liberals (analogous to Republicans and Democrats), were proposing measures on everything from preserving wild and scenic rivers to imposing deposits on bottles, to maintaining open space in the Twin Cities metro area.[2]

Meanwhile, in Minneapolis a small group of idealistic young attorneys was meeting informally to discuss ways to protect the state's natural resources. One of those young lawyers, Dick Flint, was just beginning his 50-year career with the firm known today as Gray Plant Mooty. He and other young colleagues enjoyed hiking, paddling, and camping together, and they had long conversations about how lucky they were to live in such a beautiful place as Minnesota. The group included John Broeker, Will Hartfeldt, and Chuck Dayton, who was soon to leave Gray Plant Mooty for the Minnesota Public Interest Research Group (MPIRG), which had recently been established at the University of Minnesota. "We decided maybe we ought to do something to help protect these beautiful outdoors forever," Flint recalled in a 2016 oral history interview. The lawyers met on Saturday mornings at the law office, each of them recruiting other colleagues who might also be interested. "Eventually we had maybe seven or eight lawyers, and at that point we wondered what we should do," Flint said.[3]

The young lawyers group studied the new law enacted in Michigan, which addressed a perennial stumbling block for citizens trying to get courts to protect the environment. This was the issue of "standing," a legal doctrine that states that in order to bring a lawsuit to prevent or redress harm, a plaintiff had to demonstrate that they were being hurt personally by the issue in question. "Without standing, the judge would just dismiss the lawsuit," Flint explained, "but Joseph Sax, a law professor at the University of Michigan, had come up with this concept of allowing a person to sue on behalf of the state."[4]

> "We decided maybe we ought to do something to help protect these beautiful outdoors forever."

Some of the young lawyers read Sax's book and introduced the concept to others. It seemed like an approach that could have a significant impact, since people all over the state could use it to protect many different resources. Consequently, when they drafted MERA they modeled it on Sax's design. Essentially, the law they authored allows any person to sue the state or a private entity in order to protect the environment. A handful

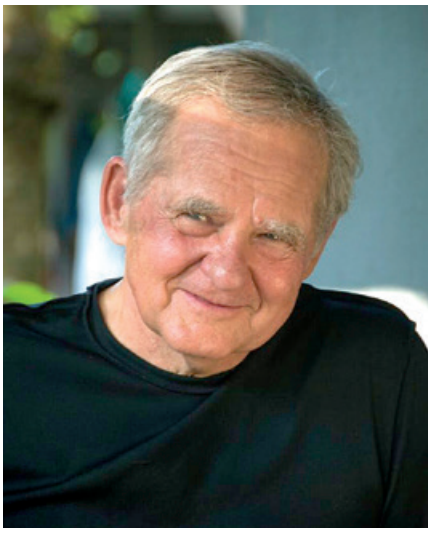
FACING: *Sunset at Namakan Lake in Voyageurs National Park*

of other states eventually followed Michigan's lead, but the Minnesota law is regarded by some scholars as more effective than most. "You couldn't pass these laws today," Dayton observed. "You couldn't even get a hearing. But this was a time when everybody wanted to be green."[5]

During the 1971 Minnesota legislative session, Conservatives held the majority in both houses. The lawyers tapped Conservative representative Rolf Nelson of Golden Valley and Conservative senator William Kirchner of Richfield to sponsor their bill in the house and senate, respectively.

Meanwhile, a separate environmental group called the Minnesota Environmental Control Citizens Association (MECCA) offered a competing bill that was more stringent. It included penalties for environmental damage and gave courts the power to set a plan forcing defendants to achieve a standard of non-pollution. That bill was introduced by Liberal representative Paul R. Petrafeso of St. Louis Park in the house and Liberal senator George Conzemius of Cannon Falls in the senate. MECCA's bill was hobbled from the start by being sent first to the House Environment Preservation Committee, chaired by Representative Wallace Gustafson of Willmar, who was a severe critic of the idea of citizen suits. Advocates of the MECCA bill accused the committee of being the "death trap of environmental bills" because Chairman Gustafson sat on their bill for months.[6]

The lawyers' MERA bill, on the other hand, was expertly shepherded by Representative Nelson through the House Judiciary Committee, where a subcommittee held several hearings and considered numerous amendments. Chuck Dayton was the first to testify, and he and the others made sure they showed up every time a committee discussed it. That wasn't always easy. "You never knew in



Chuck Dayton was legal director of the Minnesota Public Interest Research Group (MPIRG) from 1971 to 1973.

advance; you'd get a call at two o'clock saying that at four o'clock there was going to be a hearing," Flint recalled. "You'd hop in your car and go over and try and figure out what you were going to say. Mostly we explained how the law would work. If somebody had a trial that afternoon, obviously they couldn't go." Often after the hearings the lawyers would go to a nearby bar. "It was some of the most enjoyable time I've had in my practice of law," Flint said, "those times when we'd go out together to have a beer and discuss how it went, whether there were changes we should make in the law, or whether it was okay as is, and where do we go from here."[7]

THE DEBATE

Proponents of the stricter MECCA bill, notably attorney Howard Vogel, argued that the lawyers' MERA bill offered only a vague definition of pollution, did not provide penalties for environmental damage, and allowed alleged polluters to defend their actions by arguing that they had no "feasible and prudent alternative" and that projects were "reasonably required for the public health, safety and welfare." Vogel worried this provision would allow defendants to use economic arguments to avoid enforcement.[8]

The stringency of the MECCA bill probably made it easier for the MERA bill to pass. The young lawyers could position their measure as a middle course between, on one hand, the stricter proposals made by MECCA and, on the other, conservative arguments against both bills made by industry. Among groups supporting the MERA bill were the League of Women Voters, the Izaak Walton League, and the Citizens League. The MECCA bill initially had 11 other supporting groups, but as it remained mired in the House Environment Preservation Committee, its supporters participated in the debates over the MERA bill. Industry critics of both bills included the Minnesota Association of Commerce and Industry (a forerunner of the Chamber of Commerce), the Minnesota Timber Producers Association, and the League of Minnesota Municipalities.[9]

Grant Merritt, named early in the session as Governor Anderson's new director of the Minnesota Pollution Control Agency (MPCA), was a

Grant Merritt, about 1972. He was executive director of the Minnesota Pollution Control Agency (MPCA) from 1971 to 1975.

dogged advocate for MERA. Merritt had been active with MECCA prior to taking the government position, and in general favored the most rigorous approach possible. As it became clear that legislators generally favored the more moderate MERA bill, however, Merritt gave it his strong support.

As the MERA bill made its way through house and senate committees, many amendments were proposed, and some were adopted. Exemptions were made for farmers and people acting on their own land whose actions were unlikely to pollute other land. Odors were specifically exempted in the definition of pollution, another concession to agriculture. Defendants who could show they were abiding by a permit issued by one of four state agencies would be exempted from lawsuits. One amendment provided that individuals could not bring suit or be sued; only companies, organizations, or governments could.

A disagreement that dogged the measure throughout the process was over who should bear the burden of proof about whether pollution or environmental damage was occurring—the plaintiff or the defendant. Another problem was the definition of pollution, or harm to the environment: Should the term include only violation of an environmental quality standard or rule? Or should it also cover conduct that "materially adversely affects or is likely to materially adversely affect the environment"? The former would limit lawsuits to matters on which the state had enacted rules, while the latter would allow lawsuits on practically any matter that could be described as damaging the environment.[10]

Governor Wendell Anderson (second from right) with former governors Harold LeVander, Elmer L. Andersen, and Karl Rolvaag and Eighth District Representative John Blatnik (standing) at the passing of the Voyageurs National Park bill, 1971.

Amendments to the senate bill weakened it relative to the house bill. The senate measure only covered existing damage to the environment, while the house bill included conduct that "is likely to" harm the environment. The senate bill exempted natural persons from suing or being sued under the measure, limiting legal actions to organizations, industries, and government agencies. It restricted the definition of pollution to violation of agency standards, and it imposed a sunset on the legislation after four years. The senate passed its version by 64 to 0. The house passed its version by 98 to 33, with many rural legislators voting against it.

> In 1971 the environmental movement was so new opponents had not yet organized together to fight such measures.

The compromise bill that was negotiated in conference was a strong law without a sunset clause, that allowed individuals to bring suit and to be sued, and that placed the burden of proving there was no harm to the environment on the defendant. Those being accused could successfully defend their actions by showing that they were following existing laws and regulations, or by proving that they had "no feasible and prudent alternative," although "economic considerations alone" would not constitute a defense. The law also allowed people to challenge the adequacy of state environmental quality standards. In this case, the plaintiff had the burden of proving that the standard is inadequate to protect the resources. And, in a nod to industry concerns, courts were permitted to require a plaintiff to post a bond, up to $500, to compensate the defendant if a temporary injunction were reversed.[11]

This bill passed in the senate by 54 to 0 and in the house by 95 to 38, becoming law on June 7, 1971. Those generous margins support Dick Flint's

memory that MERA was much easier to pass than measures he worked on later, including the Minnesota Wild and Scenic Rivers Act in 1973 and, at the federal level, the Boundary Waters Canoe Area Wilderness Act of 1978. Flint explained the difference partly by pointing out that in 1971 the environmental movement was so new opponents had not yet organized together to fight such measures.[12]

Several of the young lawyers who worked on MERA were members of the Sierra Club. Flint recalled being invited to a meeting and immediately being elected president. "It goes to show how hard it was to get somebody to lead the Sierra Club: you took him to the meeting on other pretenses and then elected him chair," he said with a chuckle. But the success of MERA helped small groups like the North Star chapter of the national Sierra Club grow. The Minnesota chapter was founded in 1968, and six years later it started a foundation called Project Environment, which later morphed into the Minnesota Center for Environmental Advocacy—now a multimillion-dollar nonprofit addressing hot-button issues such as mining, clean water, transportation, and energy policy. In the old days, Flint recalled, he and the other lawyers worked pro bono; they didn't even get reimbursed for mileage to drive to meetings at the capitol.[13]

It wasn't long before the new law was put to the test. Within weeks after MERA was passed, Bill Bryson, a farmer near Albert Lea, used it to fight a proposed road. Bryson had been working to improve wildlife habitat on his 330-acre farm, and he didn't like Freeborn County's plan to straighten a road by running it through his wetland. The Minnesota Department of Natural Resources (DNR) and the Sierra Club supported Bryson. After an appeal process nearly five years long, the Minnesota

Arlene and Bill Bryson display news clippings in 2010 that document the successful fight to protect a marsh on their land. Their lawsuit was MERA's first court test.

Supreme Court upheld the law in 1976, and Bryson prevailed in his suit, setting a precedent that continues to influence court cases today. In the decision, supreme court justice Lawrence Yetka cited the "legislative intent to subordinate the county's interest in highways to the state's paramount concern for the protection of natural resources" and ended with a poetic endorsement of the value of marshes:

> To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction or improvement. However, to an increasing number of our citizens . . . a swamp or marsh is a thing of beauty. To one who is willing to risk wet feet to walk through it, a marsh frequently contains a springy soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It is quiet and peaceful, the most ancient of cathedrals antedating the oldest of manmade structures. More than that, it acts as nature's sponge, holding heavy moisture to prevent flooding during heavy rainfalls and slowly releasing the moisture and maintaining the water tables during dry cycles. In short, marshes and swamps are something to protect and preserve.[14]

A WATERSHED LEGISLATIVE SESSION

The election of 1972 set the stage for passage of further environmental legislation in Minnesota. The Democratic-Farmer-Labor Party (DFL) swept the fall elections and took control of both houses of the state legislature in 1973, winning a majority in the senate for the first time in more than 70 years. (Traditional party designations were returning to Minnesota politics as this time.) DFL governor Wendell Anderson was eager to fight for environmental and other reforms.[15]

The 1973 session proved to be a high-water mark for environmental legislation. Some of the proposed

laws championed natural resources by protecting wild and scenic rivers and "critical areas" and by requiring the DNR to scrutinize all wetland drainage proposals. Other bills strengthened state authority over power plant siting, mine-land reclamation, and groundwater resources. Still others addressed long-running water pollution problems by tightening sewage treatment standards and by providing money to build and upgrade sewage treatment plants. And a state budget proposal funded ambitious new recycling programs. But not all these environmental bills enjoyed clear sailing. The legislature weakened some of Anderson's proposals, and several key bills were rejected outright, including a proposed moratorium on nuclear power plants and mandatory deposits on beverage containers. The latter continues to provide fodder for legislative debate, most recently in 2014.[16]

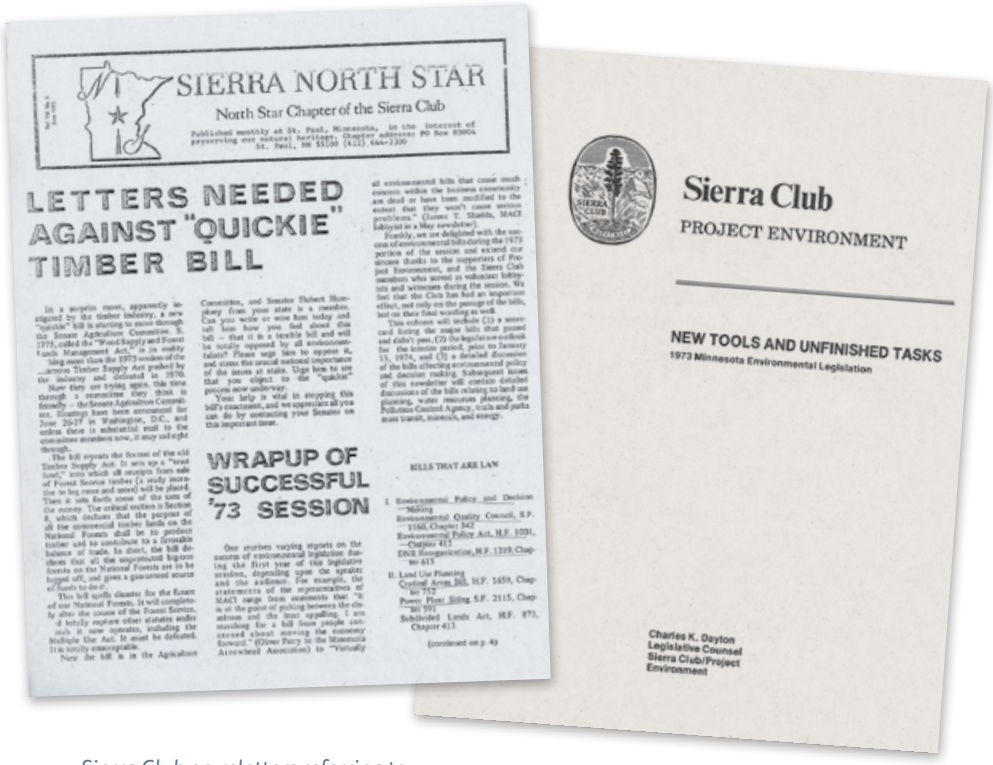
One bill made its way through the legislative process with far less trouble and press attention than its later impact would have justified. The Minnesota Environmental Policy Act (MEPA) established a broad policy elevating environmental concerns during routine governmental actions such as approving projects and granting permits; required study of environmental harms before government actions; and reduced fragmented decision-making by requiring state agencies to coordinate their work.

During the 1973 session, Anderson had two key staffers working to get his natural resources priorities passed: Ron Way, who had been an environmental reporter for the *Minneapolis Tribune* and had worked for Wisconsin senator Gaylord Nelson and for the US Department of the Interior in Washington, DC, and Peter Gove, who shortly would direct the Minnesota Pollution Control Agency.

In the early 1970s, according to an oral history interview with Way, power in the House was concentrated in committee heads. Of these, one of the most powerful was Democrat Willard Munger of Duluth, who chaired the Environment and Natural Resources Committee. "Whatever Willard wanted, Willard got," Way noted. "In lobbying anything through the house, you'd go see Willard Munger and if he liked it you got it, and if he didn't like it, you didn't." Way said Munger had "an uncanny way of getting along with everybody. He was very strong, very firm, but he could get along with people." People who opposed Munger often misjudged him, according to Way. "They thought he mumbled too much, he didn't articulate his thoughts very well. But Munger was effective at what you have to be effective at: talking with people throughout the legislative pathways. He was very effective behind the scenes."[17]

The senate was more fractured, with different power centers. Although many of the Democratic senators were strong, Way's go-to person turned out to be Republican senator Bob Dunn. "As with Munger, through the power of his personality he could move legislation through, and he was very easy to work with,"

Peter Gove succeeded Grant Merritt as executive director of the MPCA, seen here about 1975.



SIERRA NORTH STAR

North Star Chapter of the Sierra Club

LETTERS NEEDED AGAINST "QUICKIE" TIMBER BILL

WRAPUP OF SUCCESSFUL '73 SESSION

Sierra Club

PROJECT ENVIRONMENT

NEW TOOLS AND UNFINISHED TASKS

1973 Minnesota Environmental Legislation

Charles K. Dayton
Legislative Counsel
Sierra Club/Project Environment

Sierra Club newsletters referring to legislation in the 1973 session.

Way recalled. "Governor Anderson insisted that any piece of legislation had to have at least one Republican author, so we had to work with the Republican side, but guys like Bob Dunn made it easy."[18]

Dunn had championed environmental causes since his election to the house in 1964. During the months before the beginning of the 1973 session, Dunn and other legislators held a series of hearings to get expert and citizen input on a range of environmental challenges. The meetings, along with timely reports from the Citizens League, advocacy groups, and religious organizations, raised public awareness and moved legislators toward political agreement on key environmental issues. Particularly influential was an April 1972 report from the University of Minnesota's Water Resources Research Center, directed by William Walton. The report focused on the fragmentation of decision-making in a multitude of state, local, and federal offices; called for consolidation of major functions in the DNR; and pressed the need for "a comprehensive environmental policy." Another university-based committee, chaired by Dean Abrahamson, associate professor of public affairs, reported to the governor on needs for environmental legislation.[19]

Democrat Willard Munger of Duluth was the powerful chair of the House Environment and Natural Resources Committee.

As the 1973 session got underway, Governor Anderson and other Democrats were poised to promote an ambitious agenda, including labor and consumer protection, increased education funding, and more than three dozen environmental measures. Usually legislators from the majority party, in this case the Democrats, introduce bills, but Dunn had worked so hard to promote a broad environmental policy bill during the 1971 session and during the interim that the Democrats allowed him to introduce MEPA in the senate. "Here I was, a Republican, carrying this bill and working very hard on it," Dunn recalled, "and Majority Leader Nick Coleman let me go ahead with it."[20]

That's how Bob Dunn, a Republican, became the chief author of MEPA in a Democratic-run senate. In stirring language, the act promised that the state would encourage "productive and enjoyable harmony between man and his environment," spoke of the imperative to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations," and pointed out the need to "practice thrift in the use of energy . . . , preserve important existing natural habitats . . . , reduce wasteful practices which generate solid wastes . . . , [and] minimize wasteful and unnecessary depletion of non-renewable resources." One significant passage affirmed: "Environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision-making along with economic and technical considerations."[21]

In stirring language, MEPA promised that the state would encourage "productive and enjoyable harmony between man and his environment."

Major actions, public and private, that would significantly affect the quality of the environment were to be preceded by a detailed environmental study, and the proposed law included substantial detail on what these studies should cover. Echoing MERA, the basic requirement was: "No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit . . . be granted . . . [that] is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources . . . so long as there is a feasible and prudent alternative. . . . Economic considerations alone shall not justify such conduct."[22]

It's hard to imagine a bill containing such aspirational language passing today. But in the 1970s, environmentalism was a nonpartisan issue. Dunn said there was no serious opposition to his bill, although he recalled, "I did have one southern Minnesota Republican in the legislature come up to me and say, 'I'd like to vote for your bill but I'm against the environment!' How could that ever be? I had a hard time suppressing my laughter."[23]

The policy bill easily survived such mild opposition. Lawyers Chuck Dayton (representing the Sierra Club) and John Herman (representing MPIRG) worked closely with Ted

Republican Robert G. Dunn was chief author of MEPA in a Democratic-run senate; 1970 view.

Shields, lobbyist for the Minnesota Association of Commerce and Industry. "We would say to Ted, 'What are your problems? What don't you like? How could we do this differently?'" recalled Herman. "In many cases the laws were going to pass, because everybody wanted to pass environmental laws. But we absolutely worked with him and tried to come up with compromises." The measure appealed to legislators and others who complained that Minnesota's environmental oversight was fragmented and confusing. The senate passed MEPA on May 8, 1973, with 60 votes in favor and none opposed. The next day the house passed the bill by 119 to 7.[24]

The main controversy about MERA centered on the makeup of the Environmental Quality Council (later renamed the Environmental Quality Board, EQB)—the body designated to guide the achievement of the lofty goals proposed in MEPA. The fight over makeup of the EQB went on for weeks. Dunn wanted a small board composed of just three strong, independent, knowledgeable, and experienced citizens, who would be appointed by the governor and advised by relevant agency heads, such as the Pollution Control Agency, the Health Department, the Agriculture Department, and others.

"Some of the people who headed the agencies weren't very pleased with that," Dunn recalled. The agency heads, the governor, and the Minnesota Association of Commerce and Industry's Ted Shields all wanted to put agency heads in charge of the council. But for the activists pushing the legislation, that would be like putting the fox in charge of the henhouse. In the end, the players arrived at a compromise, with the board including both agency heads and citizen members.[25]

According to Gregg Downing, who later supervised environmental reviews at the EQB, the activists' worry about putting agency heads on the board was not unfounded. "We called it 'circling the wagons,'" he explained. Occasionally after an agency decision on whether to do an environmental review, for example, the EQB would consider overturning it, but Downing said EQB commissioners were very reluctant to vote against a colleague at another agency. "I suppose they were thinking, 'This time it's the DNR in the hot seat but it might be my agency next time; maybe I don't want to get the DNR commissioner angry at me today, so I'll vote with him and hope that next time he'll vote with me.'" Downing saw this scratch-my-back attitude as a brake on the effectiveness of the EQB. "Certainly that was one impediment to the board doing some fairly aggressive things," he said. In 2018, the EQB was made up of nine agency heads, five citizen members, and a representative of the Metropolitan Council.[26]

In a 2017 interview, Peter Gove, who had been Governor Anderson's assistant, said he believed the board makeup was a good compromise. "Environmental decisions have an economic impact," he noted, "so there's always been a desire to involve citizens who are broadly representative of major sectors in society, to try to get a consensus on things." As executive director of the MPCA, Gove was a member of the EQB from 1973 to 1976. "Very rarely did you have a split vote between the agency heads and the public members of the board," he said. "Of course, they were all appointed by the governor."[27]

MERA AND MEPA IN THE COURTS

Legal experts rate Minnesota's environmental rights and policy acts as among the broadest and most effective such laws in the country. One reason is the clear and specific definitions provided in the original language: definitions of natural resources, which have encouraged courts to rule that the laws can be used to protect scenic views, quietude, and historic buildings; definitions of who can sue and be sued under the law, which have prompted generous interpretations of standing; and definitions of "pollution,

impairment, or destruction" which go far beyond exceeding rules or standards to include "any conduct which materially adversely affects or is likely to materially adversely affect the environment."[28]

Citizens have used these laws to fight environmental degradation in court at least 70 times in the nearly five decades since they were enacted. Many of the cases focus on disputes over the level of environmental review required before projects are allowed to proceed. MEPA lays out a two-stage environmental review process: initially, the Environmental Assessment Worksheet (EAW) provides a quick checklist to determine if a project has the potential to harm the environment. If it does, the much more detailed Environmental Impact Statement (EIS) is required.[29]

Courts have varied in their interpretation of these requirements. During the bitter fights over routing of high-voltage power lines in the late 1970s, the Minnesota Supreme Court held state agencies to a high standard of thorough and public environmental review in a 1978 case, *People for Environmental Enlightenment and Responsibility (PEER), Inc., v. Minnesota Environmental Quality Council (EQC)*. The court ruled that the EIS was inadequate because it did not describe in sufficient detail the chosen route for a power line.[30]

Another case, *Trout Unlimited v. Minnesota Department of Agriculture* (1995), prompted the court of appeals to overturn a trial court's ruling that an irrigation project in Becker County could go ahead on the basis of an Environmental Assessment Worksheet prepared by the Department of Agriculture. The EAW concluded that possible erosion and nutrient pollution could be mitigated by "ongoing public regulatory authority." Trout Unlimited argued the more thorough EIS should have been prepared. The appeals court judges agreed, saying the purpose of an EIS is "to determine the potential for significant environmental effects before they occur."[31]

Governor Wendell Anderson surrounded by framers of historic environmental legislation of the early 1970s. From left: environmental lobbyists Chuck Dayton and John Herman; Rep. Willard Munger; Jackie Rosholt, aide to Munger; and Peter Gove, Anderson's environmental aide and later, director of the MPCA.

Courts have also been firm in upholding the laws' insistence that environmental protection should take precedence over financial concerns, that "economic considerations alone" cannot justify environmentally damaging conduct. For example, Ramsey County District Court ruled in 1974 that the state must issue the city of White Bear Lake a permit for a road to cross part of Birch Lake, because this route was the most effective traffic bypass among seven alternatives and "no other feasible, economical or prudent alternate route" existed. In 1976 the Minnesota Supreme Court reversed this decision, having determined that at least two alternate routes were both feasible and less environmentally damaging.[32]

A year later, the Minnesota Supreme Court underscored the primacy of environmental protection over economic considerations by prohibiting operation of a trap-and-skeet-shooting facility because the noise would impair the quietude of the area in Washington County, and the lead shot falling into wetlands would poison wildlife. In a much-cited case, *Minnesota Public Interest Group v. White Bear Rod and Gun Club* (1977), the court recognized the owner's substantial investment in the shooting range but said it could suitably operate in a different location.[33]

Two cases in which courts affirmed broad interpretations of the state's responsibility for environmental protection were *State of Minnesota by Powderly v. Erickson* (1979), in which the supreme court confirmed that row houses in Red Wing could be historical resources worthy of protection, and *Drabik v. Martz* (1990), in which the court of appeals confirmed the state's refusal to allow construction of a radio tower on private land

because it could damage the scenic and aesthetic resources of adjacent public land.[34]

Other court rulings have reflected more conservative views. Plaintiffs have frequently been frustrated by the propensity of judges to defer to the expertise of government agencies.

Trying to balance environmental protection with development has been a hallmark of court decisions during most of the life of the MERA and MEPA laws.

In a different power line fight, *No Power Line v. Minnesota Environmental Quality Council* (1977), plaintiffs asserted that an EIS should have been done earlier in the approval process for a high-voltage transmission line. The supreme court admitted that it "would have been preferable" to do the EIS earlier, but since plaintiffs could not show that the EIS was "untrue, inaccurate, or misleading . . . we are not persuaded that the EIS was fatally defective."[35]

In another case in which plaintiffs challenged the adequacy of environmental review, the court of appeals ruled that St. Louis County correctly decided that an EIS was not required for construction of the Giants Ridge Golf Course near Biwabik. In *Iron Rangers for Responsible Ridge Action v. Iron Range Resources* (1995), plaintiffs argued the project could harm migrating bird populations and risked damaging several rare plants and both surface water and groundwater. The court acknowledged that information was lacking on some of these questions, calling this deficiency a "technical uncertainty." This position seemed to ignore the administrative rule that when information is lacking but can be reasonably obtained, the government should either conduct an EIS to include the missing information or postpone a decision for up to 30 days to obtain the information. Further, the court allowed the county to rely on permit controls to mitigate the use of herbicides and pesticides rather than study their possible impacts in advance of construction.[36]

In a 1993 case, *State of Minnesota v. Brunkow Hardwood Corporation*, the court of appeals imposed a four-factor test designed to help courts determine what actions "materially adversely affect" the environment. These include: (1) whether the natural resource involved is rare, unique, or endangered or has historical significance; (2) whether the resource is easily replaceable; (3) whether the proposed action will have any significant consequential effect on other natural resources; and (4) whether the direct or consequential impact

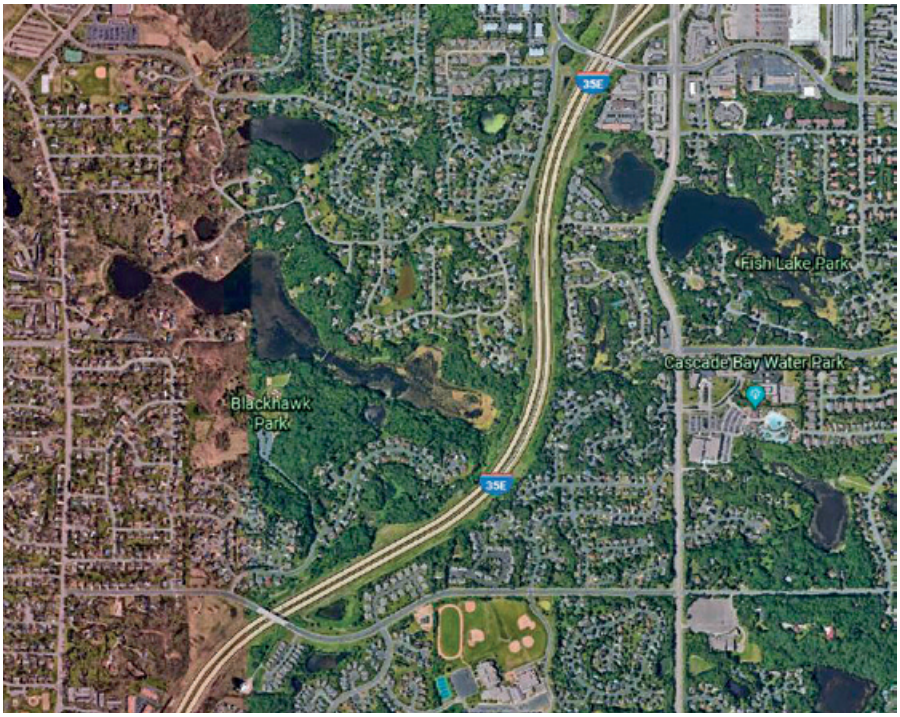
Minneapolis Armory, photographed in 2006. Built in 1935, the WPA moderne-style building was saved from demolition by the State Historic Preservation Office's use of the Minnesota Environmental Rights Act (MERA) in 1993.

on animals or vegetation will affect a critical number of these resources. Some advocates say this formulation improperly limits judicial consideration to only the most highly valuable, rare, and endangered resources. But subsequent courts have used it as a yardstick to determine whether an action would have a "materially adverse effect on the environment."[37]

This approach of trying to balance environmental protection with development has been a hallmark of court decisions during most of the life of the MERA and MEPA laws. Judges have assumed considerable leeway in interpreting what environmental harms should be allowed and how much attention should be given to the state's "paramount concern" for protecting the environment.[38]

An overarching frustration of those who work for environmental protection is the fact that so few full-blown EISs are conducted. The ratio of EISs to EAWs changes from year to year and has historically ranged from 7 to 30 shorter EAW assessments for each EIS conducted. In two recent years, for example, there were 67 EAWs and 4 EISs in 2016; and 85 EAWs and 3 EISs in 2017. Overwhelmingly, state agencies and local governments approve increasingly complex projects based on just EAWs.[39]

A key difference between the EAW and the EIS is that the more thorough review requires agencies to analyze possible alternatives to the proposed project, including a "no-build" alternative. Attorney Chuck Dayton and many other observers call this step the "heart" of the review process. "It requires you to ask how the goal of the project could be accomplished without having the adverse environmental impacts," he said. "It doesn't do you much good to look at just the impact without looking at how you could change it, how you could make it better."[40]



In 1980 the Minnesota Supreme Court ruled that MERA and MEPA required the Minnesota Department of Transportation to protect the environment by routing Interstate 35 around Blackhawk Lake in Eagan instead of crossing the lake on a bridge. The decision in Urban Council on Mobility v. Minnesota DNR *capped 20 years of planning and litigation.*

John Herman was an attorney for MPIRG in the early 1970s.

Dayton colleague John Herman agreed that looking at alternatives is key, but in the long term he said the emphasis on examining alternatives has had a positive influence on many aspects of public policy. He pointed to the state's decision to favor recycling over landfilling waste; the move to renewables in energy; and the analysis of multiple routes for construction of roads, pipelines, and transmission lines. "It doesn't mean everyone arrives at a consensus on what's the least environmentally harmful option," Herman explained. "But at least we've embodied in pretty much everything that we do now much more of an alternative analysis than previously, when we'd say, 'We've got to get from A to B, what's the straightest line?'"[41]

It took more than 10 years, from 2004 to 2015, to prepare the EIS for the proposed PolyMet copper-nickel mine in northeastern Minnesota. But such a lengthy, complicated process is not what the framers envisioned, according to Herman. "None of us conceptualized this as something that would stop everything; we thought of it as a law that would be pretty effective, and streamlined, and would help make decisions better," he recalled.[42]

The days of enthusiastic bipartisan support for legislation to protect the environment appear to be gone, at least for now. Passage of the Legacy Amendment in 2008 and results of public opinion surveys are evidence that most Minnesotans expect government and industry to treat natural resources with respect, and advocates continue to use MERA and MEPA, two key laws enacted nearly 50 years ago to achieve that goal.[43] ⊡

Notes

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1. This article draws from interviews conducted as part of the Minnesota Foundational Environmental Laws Oral History Project, housed at the Kathryn A. Martin Library at the University of Minnesota Duluth (hereinafter Oral History Project), https://lib.d.umn.edu/mn-foundational-environmental. The project was made possible in part by the people of Minnesota through a grant funded by an appropriation to the Minnesota Historical Society from the Minnesota Arts and Cultural Heritage Fund. Quoted remarks from Dick Flint, Chuck Dayton, Bob Dunn, John Herman, Ron Way, Peter Gove, and Gregg Downing were recorded as part of this project during 2016 and 2017.

2. Editorial, "The Governor's Environmental Message," *Minneapolis Tribune*, Apr. 3, 1971. From 1879 to 1972 the Minnesota legislature met in alternate years. In 1973, it moved to a "flexible biennial session," a single legislative session spread over both years of the biennium.

3. Flint interview, Oral History Project, 2, 3.

4. Flint interview, Oral History Project, 3; Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68 (1969): 471. This influential article argued that natural resources are a public trust requiring protection. Sax's classic *Defending the Environment: A Strategy for Citizen Action* (New York: Knopf, 1971) served as the model for laws in several US states and other countries.

5. Andrew J. Piela, "A Tale of Two Statutes: Twenty Year Judicial Interpretation of the Citizen Suit Provision in the Connecticut Environmental Protection Act and the Minnesota Environmental Rights Act," *Boston College Environmental Affairs Law Review* 21, no. 2 (1994): 402, 424–27, http://lawdigitalcommons.bc.edu/ealr/vol21/iss2/12; Dayton interview, Oral History Project, 7.

6. Jack Erwin, "Quirin: Chairman Delaying Environmental Rights Bill," *Rochester Post-Bulletin*, Apr. 1, 1971; "Spannaus for Action on Environment Bill," *St. Paul Pioneer Press*, May 1, 1971; Robert Whereatt, "Environment Committee Attacked," *St. Paul Dispatch*, May 10, 1971.

7. Flint interview, Oral History Project, 6, 8.

8. "Report of the House Judiciary Subcommittee on H.F. 284" (House Report), vol. 19, F3, minutes of House Judiciary Committee, Apr. 5, 1971, Committee Books 1971; "The Minnesota Environmental Rights Act," *Minnesota Law Review* 56 (1972): 575–87; Gerry Nelson, "Environmental Rights Act Gains Approval in House Subcommittee," *Rochester Post-Bulletin*, Mar. 24, 1971; Robert Whereatt, "Environmental Bill Diluted, Advanced," *St. Paul Dispatch*, May 4, 1971; Associated Press, "'Environmental Bill of Rights' Trimmed, Then Sent [to] House Floor," *Winona Daily News*, May 5, 1971; Jim Talle, "House Toughens Senate Ecology Bill, Passes It," *Minneapolis Star*, May 21, 1971. The debates are detailed in house and senate committee records in the Gale Family Library at MNHS.

9. House Report, 5; Nelson, "Environmental Rights Act Gains Approval."

10. House Report.

11. Minnesota Environmental Rights Act, Chap. 116B.07.

12. Details of bill passage at https://www.revisor.mn.gov/laws/1971/0/Session+Law/Chapter/952/pdf/; Flint interview, Oral History Project, 14.

13. Flint interview, Oral History Project, 13.

14. Editorial, "Environment Law Test," *St. Paul Dispatch*, Aug. 6, 1971; Bob Goligoski, "Road or Pond? Court to Decide," *St. Paul Pioneer Press*, Aug. 13, 1971; Associated Press, "Farmer Wins First Round in Environment Law Case," *The Forum*, Aug. 13, 1971; Associated Press, "Freeborn Marsh Suit Resumes," *St. Paul Pioneer Press*, Oct. 5, 1971; William Bryson, with comments by Arlene Bryson, interviewed by Margaret Robertson, MNHS, Feb. 29, 1988, http://collections.mnhs.org/cms/web5/media.php?pdf=1&irn=10215229. Justice Yetka's ruling can be found at Justia US Law, *County of Freeborn by Tuveson v. Bryson*, https://law.justia.com/cases/minnesota/supreme-court/1976/45601-2-0.html.

15. Wendell R. Anderson, "Special Message: Securing a Quality Environment in Minnesota," to the 68th Minnesota legislative session, Feb. 14, 1973, https://www.leg.state.mn.us/docs/pre2003/other/I690.pdf.

16. Gregory Gordon, "Anderson Mollifies Most Factions by Passage of Environmental Bills," *St. Cloud Daily Times*, May 22, 1973; Dee DePass, "State Considers 10-Cent Deposits on Recyclable Beverage Containers," *Minneapolis Star Tribune*, Jan. 13, 2014, http://www.startribune.com/jan-9-minn-considers-dime-fee-on-some-recyclables/239476461/; Elizabeth Dunbar, "Lawmakers Look for Ways to Increase Recycling, as Bottle Deposit Bill Is Taken Off the Table," Minnesota Public Radio News, Feb. 5, 2014, https://www.mprnews.org/story/2014/02/05/recycling-bottle-deposit-minnesota.

17. Way interview, Oral History Project, 7, 12.

18. Way interview, Oral History Project, 11.

19. "Minnesota 'Needs Environment Policy,'"

A loaded shelf at the Duluth Public Library holds the multi-volume Environmental Impact Statement (EIS) prepared to examine possible impacts of the proposed PolyMet (Northmet) copper-nickel mine in northeastern Minnesota. The document took 10 years to complete.

St. Paul Pioneer Press, Jan. 26, 1972; Dayton interview, Oral History Project, 16; William C. Walton, "Water Resources Administration in Minnesota, 1972," University of Minnesota, https://conservancy.umn.edu/handle/11299/92223.

20. Dunn interview, Oral History Project, 5.

21. Minnesota Environmental Policy Act, Chap. 116D.02.Subd.1 and 116D.03.Subd.2(3).

22. Minnesota Environmental Policy Act, Chap. 116D.04.Subd.6.

23. Dunn interview, Oral History Project, 8; Herman interview, Oral History Project, 10.

24. Herman interview, Oral History Project, 12; Bob Goligoski, "State Environmental Policies 'Confusing,'" *St. Paul Pioneer Press*, Mar. 8, 1972; "LaVoy Bill Urges Umbrella Agency on Environment," *Duluth Herald*, Mar. 22, 1973.

25. Dunn interview, Oral History Project, 5.

26. Downing interview, Oral History Project, 14; "11 Selected as EQC Advisers," *Sunday Pioneer Press*, Aug. 5, 1973.

27. Gove interview, Oral History Project, 11.

28. Alexandra B. Klass, "The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study," *Environmental Law* 45, no. 431 (2015): 434, 436, 441, 456; Piela, "A Tale of Two Statutes," 417, 421, 434; Jeffrey T. Renz, "The Coming of Age of State Environmental Policy Acts," *Public Land and Resources Law Review* 5, no. 31 (1984): 50; Office of the Legislative Auditor, "Evaluation Report on Environmental Review and Permitting," 2011, https://www.auditor.leg.state.mn.us/ped/pedrep/envir.pdf.

29. Klass, "The Public Trust Doctrine," 434, 436, 441, 456.

30. *People for Environmental Enlightenment and Responsibility (PEER), Inc., v. Minnesota Environmental Quality Council*, 266 N.W.2d 858m 863 (1978), https://law.justia.com/cases/minnesota/supreme-court/1978/47911-1.html. The Minnesota Supreme Court held the final EIS inadequate for failure to discuss, circulate, and receive comments on the selected alternative.

31. *Trout Unlimited v. Minnesota Department of Agriculture*, 528 N.W.2d 903 (1995), https://law.justia.com/cases/minnesota/court-of-appeals/1995/c3-94-1900.html. The court of appeals ruled that the DNR erred in failing to consider comments, failing to consider potential cumulative effects, and relying on future permitting to control or redress potential problems.

32. The supreme court ruled that the DNR was not required to permit an environmentally damaging road because alternatives were available. See https://law.justia.com/cases/minnesota/supreme-court/1976/46058-1.html; "In the matter of the Application of the City of White Bear Lake, Minnesota, for a permit to encroach upon a bay of Birch Lake as part of the 9th Street Extension Project," Ramsey County District Court Case #401419, 6/4/1975.

33. *Minnesota Public Interest Research Group v. White Bear Rod and Gun Club*, 257 N.W. 2d 762 (1977), https://law.justia.com/cases/minnesota/supreme-court/1977/46951-1.html. The supreme court ruled that "the gun club's economic considerations alone do not constitute a defense sufficient to rebut plaintiff's prima facie showing."

34. *State of Minnesota by Powderly v. Erickson*, 285 N.W.2d 84, 87-89 (1979), https://law.justia.com/cases/minnesota/supreme-court/1979/49708-1.html; *Drabik v. Martz*, 451 N.W.2d 893, 896-98 (1990), https://law.justia.com/cases/minnesota/court-of-appeals/1990/c6-89-1620.html. In *Powderly* the supreme court held that row houses were historical resources protected by MERA and the defendant did not sustain the burden of proving there was no feasible and prudent alternative to demolition. In *Drabik* the court of appeals ruled that MERA precluded a radio tower on privately owned land near the BWCA. Action on private land that affects the scenic value of government land is actionable.

35. *No Power Line v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (1977), https://www.courtlistener.com/opinion/1284866/no-power-line-v-minn-environmental-quality/. The supreme court said the "fullest extent practicable" standard of MEPA gave agencies discretion not to do an EIS at the earliest possible stage.

36. *Iron Rangers for Responsible Ridge Action v. Iron Range Resources*, 531 N.W.2d 874 (1995), https://www.courtlistener.com/opinion/1347927/iron-rangers-ridge-action-v-resources/; Minnesota Administrative Rules, 4410.1700, Decision on Need for EIS, https://www.revisor.mn.gov/rules/4410.1700/. In *Iron Rangers* the court of appeals ruled the agency's action was based on "substantial evidence in the record and was not arbitrary and capricious." According to state administrative rules, "If the RGU [responsible governmental unit] determines that information necessary to a reasoned decision about the potential for, or significance of, one or more possible environmental impacts is lacking, but could be reasonably obtained, the RGU shall either: A. make a positive declaration and include within the scope of the EIS appropriate studies to obtain the lacking information; or B. postpone the decision on the need for an EIS, for not more than 30 days or such other period of time as agreed upon by the RGU and proposer, in order to obtain the lacking information."

37. *State of Minnesota, ex rel. Wacouta Township, v. Brunkow Hardwood Corporation*, 510 N.W.2d 27 (1993), https://law.justia.com/cases/minnesota/court-of-appeals/1993/c1-93-1349.html. "Ex rel." (meaning "upon information" or "upon being related") indicates that the state brought the case on behalf of Wacouta Township. The court of appeals found that bald eagles and trees in which they roost are "natural resources" under MERA. It also borrowed a four-factor test used in Michigan to help determine whether the action in question "is likely to affect the environment so as to justify judicial intervention." In a 1997 case, *Schaller v. County of Blue Earth*, 563 N.W.2d 260, the supreme court modified the four-factor test, offering a fifth factor, and ruled that the test did not unreasonably limit implementation of MERA, emphasizing that "these factors are not exclusive and that each factor need not be met in order to find a materially adverse effect. Rather, the factors are intended as a flexible guideline for consideration as may be appropriate based on the facts of each case." See https://www.courtlistener.com/opinion/1876945/state-by-schaller-v-county-of-blue-earth/.

38. MERA, 116B.02 Subd.5; MEPA 116D.04 Subd.6.

39. Office of the Legislative Auditor, "Evaluation Report," 2011; Dan L. Risnes, Joen M. Schaefer, William S. Seeley, "Research Project: An Assessment of the Minnesota Environmental Impact Statement Process," *Hamline Law Review* 3, no. 63 (1980): 83. From 2007 to 2010, 229 EAWs were initiated, while 7 EISs were begun; between 1973 and September 1979, EQB ordered 72 EISs from approximately 503 proposed actions reviewed. Denise Wilson, director, Environmental Review Program, EQB, personal correspondence with author, Aug. 17, 2018.

40. John H. Herman and Charles K. Dayton, "Environmental Review: An Unfulfilled Promise," *Bench & Bar of Minnesota* (July 1990): 31; Kevin Reuther, "MEPA at 36: Perspectives on Minnesota's Little NEPA," *Environmental Law Reporter* 39, no. 7 (July 2009): 39 ELR 10663; Peder Larson and Julie Perrus, "Reforming Environmental Review," *Bench & Bar of Minnesota* 67, no. 1 (Jan. 2010), http://mnbenchbar.com/2010/01/reforming-environmental-review/; MPCA, "Environmental Review Streamlining: A Summary of Past Efforts, Current Ideas, and Stakeholder Input," Dec. 2009, https://www.leg.state.mn.us/docs/2010/mandated/100007.pdf; Dayton interview, Oral History Project, 18.

41. Herman interview, Oral History Project, 4.

42. PolyMet Mining, Environmental Review and Permits Timeline, http://polymetmining.com/project-status/environmental-review/; Herman interview, Oral History Project, 11.

43. Minnesota Environmental Partnership, "Minnesota Voters' Environmental Priorities in 2017," https://www.mepartnership.org/wp-content/uploads/2017/03/MEP-Poll-Public-Release-3.1.17.pdf. In 2008, Minnesota voters imposed a three-eighths of one percent tax on themselves for 25 years, until 2034, in the name of cleaner water, healthier habitat, better parks and trails, and sustaining arts and cultural heritage. By 2018, the tax had generated more than $2 billion for Legacy projects, https://www.legacy.mn.gov/arts-cultural-heritage-fund.