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THE MINNESOTA ENVIRONMENTAL RIGHTS ACT: PAST, PRESENT AND FUTURE
Wednesday, March 13, 2024 , 12 Noon to 2:00 p.m.
Approved for 2.0 standard CLE credit, Minn. Event Code No. 500985.

12 Noon to 12:30 p.m.	The History of MERA and Early Litigation	**Ann Cohen**, Consulting Attorney, Minnesota Center for Environmental Advocacy
12:30 p.m. to 1:00 p.m.	MERA – The Middle Years	**Max Kieley**, Legal Director, Friends of the Boundary Waters and Pete Surdo, Special Assistant Attorney General
1:00 p.m. to 1:30 p.m.	Deference in the Modern Era	**Pete Farrell**, Assistant Attorney General
1:30 p.m. to 2:00 p.m.	A Look At Other States and the Future	**Colin O'Donovan**, Assistant Attorney General

Ann Cohen

Consulting Attorney

Minnesota Center for Environmental Advocacy

Minnesota Environmental Rights Act: a new civil remedy

Minn. Stat. § 116B.01.

The 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. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. **Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.**

Why MERA?

- Common law is insufficient. Transitory pollution (such as air pollution) may not be trespass, and nuisance requires proof of an unreasonable interference with property rights. If a nuisance is so wide-spread as to be deemed a “public nuisance,” plaintiffs need to demonstrate an exceptional injury different from other citizens.
- Standing. Plaintiffs must show injury to a personal or proprietary interest

Why MERA continued…

- Public trust doctrine does not reach all resources.
- Can’t always trust the administrative state to act appropriately.
- Appeals of agency decisions subject to the “substantial evidence” standard, with courts deferring to the agency decision.

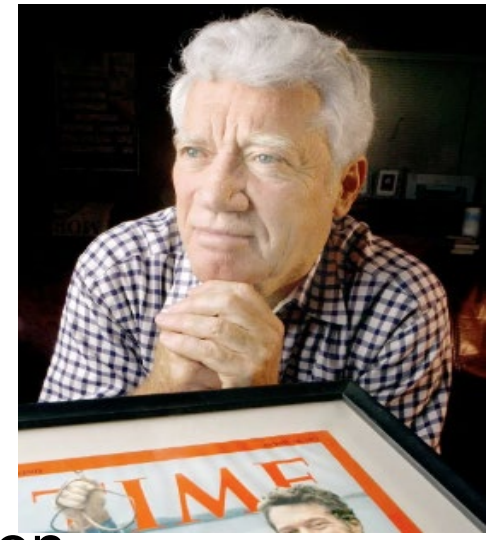
Wait– what about the Clean Water Act, etc.?

Professor Joseph Sax:

"….new [environmental protection] statutes are abundant, but their rhetoric far exceeds their effect. Even the best agencies, staffed by conscientious and environmentally sensitive appointees, are gravely and inherently flawed."

Prof. Sax, DEFENDING THE ENVIRONMENT (1971), quoted in David P. Bryden, Environmental Rights in Theory and Practice, Minn. L. Rev. 1978.

Legislative History of MERA



- Passed by Republican-controlled legislature.
- Governor Wendell Anderson, then a state senator, introduced the original bill in the 1969 legislative session.
- In 1970, a Bar subcommittee formed to address major controversies (such as whether damages would be available) and various legal defenses. The Bar ultimately did not endorse the draft bill ("lawyers bill"), but participants sought authors. A competing bill was drafted by an environmental organization.
- Both bills found authors in January 1971, and committees held hearings and various amendments were proposed. The dueling bills travelled a complicated parliamentary path.
- After various amendments and compromises, the legislation passed and Gov. Anderson signed it into law on June 7, 1971.

MERA: Three new rights created

Minn. Stat. § 116B.03: Civil action to protect natural resources (broadly defined but some ag-related exceptions) from pollution, impairment, or destruction (violation OR material adverse impact)

Minn. Stat. § 116B.09: Intervention in administrative, licensing, or similar proceeding involving conduct likely to cause pollution, impairment, or destruction of a natural resource

Minn. Stat. § 116B.10: Challenge to an "environmental quality" standard or decision that fails to protect natural resources

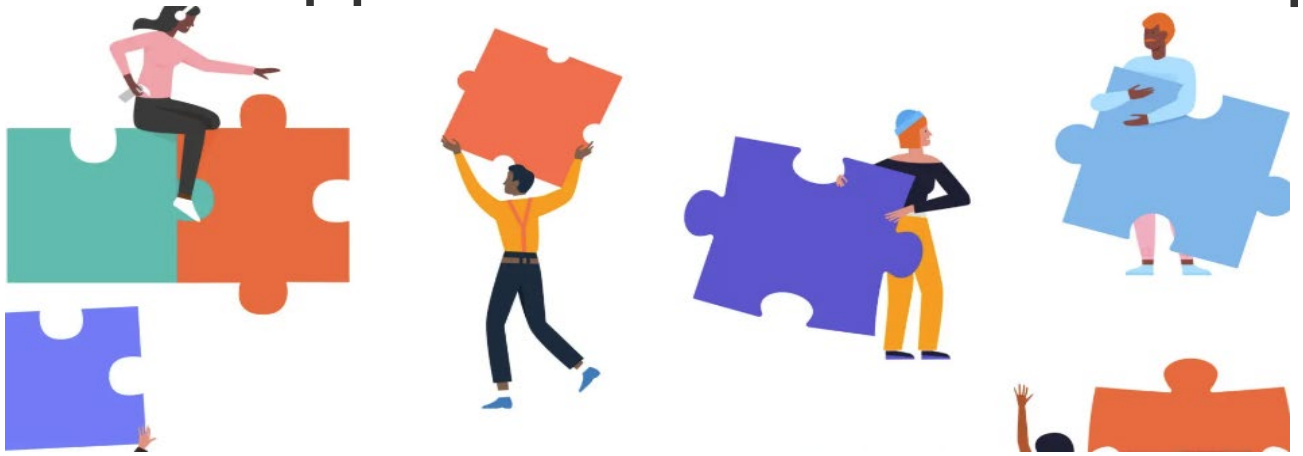
Minn. Stat. Sec. 116B.04—something for everyone?

…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.

CONCERNS RAISED DURING PASSAGE

MPCA

1. lack of finality of standards;
2. interfere with policy choices;
3. substitute court decision for agency decision;
4. piecemeal approach to environmental problems



MPCA: Are courts suited to resolve these problems?

MPCA: “Litigation is fortuitous [in timing and subject]….. the control agency [must] possess considerable expertise in the area of regulation and… plan ahead for anticipated problems. Courts manifestly are not endowed with either of these features…. Further … the agency responsible must have the ability to administer a flexible program that involves remaining in contact with the party regulated to see that the agency's orders are complied with…. Courts are simply not equipped for the surveillance, the policing and the preventive activities required for efficient pollution abatement.”

Industry concerns

1. would allow neighbor to regulate actions (cutting trees) being taken on another's property;
2. lack of certainty for regulated parties trying to make long-term plans, rely on permits;
3. add to already adequate due process under MAPA;
4. inconsistent decisions by district courts rather than one state agency.

Environmental activist concerns

1. Polluters will defend their activities on the basis that there is no feasible and prudent alternative
2. Court should be able to assess penalties
3. Court should be able to assess damages

How MERA addressed the issues raised during development of the legislation (or not)

- MPCA issues— gets notice, can intervene, MERA decision not estoppel against agency, but is res judicata if plaintiffs prove violation!
- Industry issues— plaintiffs have to make a “prima facie” case, ”material” language, permit shield, “own property exception,” no penalties, no damages, defense of no feasible/prudent alternative
- Environmental group issues--”pollution, impairment, destruction” and not just rule violations; can challenge agency rule, permit, etc.; can intervene

A flood of litigation?

- David P. Bryden analyzed early MERA cases in an article published in the Minnesota Law Review in 1978—essentially looking at the first 5 years.
- 25 cases: 8 water/sewage, 3 air pollution, 14 land use.
- **In most cases, the litigants largely concluded that the same result would have occurred regardless of the MERA claim**, although at least one litigant believed that the MERA cause of action was key to his success in obtaining a settlement with county officials with regard to a road development that the plaintiffs believed would have various negative environmental impacts on local waterbodies and wildlife.

KEY Early Cases

- **Freeborn County by Tuveson v. Bryson (Bryson I)**, 297 Minn. 218, 225-29, 210 N.W.2d 290, 297-98 (1973) (granting temporary injunction against the taking of .7 acres of a marsh out of a 7 acre tract).
- **Freeborn County by Tuveson v. Bryson (Bryson II)**, 309 Minn. 178, 188, 243 N.W.2d 316, 321 (1976) (noting that "it is the duty of the courts to support the legislative goal of protecting our environmental resources").
- **Corwine v. Crow Wing County**, 244 N.W.2d 482 (1976)--use of MERA intervention authority: Court holds that verified pleading claiming impairment of natural resource was enough to avoid summary judgment, and remands for trial on environmental impact.
- **MPIRG v. White Bear Rod & Gun Club** 257 N.W.2d 762 (Minn. 1977) --Def. failed to rebut prima facie case or make affirmative defense, so court enjoined operation of range.. Divided MSC affirmed, applying balancing test to justify relief.

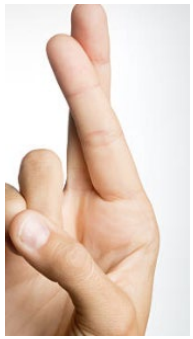
More early key cases....

- **People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council**, 266 N.W.2d 858 (1978)--Citizens intervene under MERA and then appeal decision on powerline. Court addresses MERA “overlay” on powerplant siting statute and holds that both apply; remand for findings regarding pollution, impairment, etc., and noted alternative route was available.

- **Floodwood-Fine Lakes Citizens Group v. Minnesota Envtl. Quality Council**, 287 N.W.2d 390, 399 (Minn. 1979) --noting state's policy of nonproliferation of power lines and stating that "paramount" concern for natural resources means "superior to all others."

MERA's limits….another early case.

Honored in the breach? [not the dam breach, I hope!]



Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn.1977)

- Review of agency decision to require Reserve to use an inland tailings basin as a "feasible and prudent alternative" to the Milepost 7 site, which was far closer to Lake Superior (and Reserve's Silver Bay existing taconite processing facility).
- Economic disruption (Reserve's closure threat) weighed on the court despite the statutory language regarding "economic considerations alone" not providing a basis to reject an alternative.
- Famous for creating deferential "substantial evidence" standard but in fact the court overturned the agency decision despite the agency rationale for using the inland site!

Dam safety issue

- **Agencies (DNR and MPCA):** "in the event of a catastrophe the damage to adjoining residences and to Lake Superior would be far greater at Mile Post 7 than at Mile Post 20, and consequently [the hearing examiner] concludes that prudence would dictate the choice of a safer site….The hearing officer…lacked confidence in … Reserve officials, and … questioned the likelihood of their building and maintaining the dam as designed."
- **Court:** "Under Minn. St. 116D.04, subd. 6, no permit will be granted where it is likely to cause impairment of natural resources "so long as there is a feasible and prudent alternative." We are of the opinion that this statute has no application where the safety of the proposed structure is undisputed. In other words, if the design, construction, and maintenance of the dams make it unlikely that they will impair natural resources, there is no need to consider feasible and prudent alternatives."

Sources

- David P. Bryden, Environmental Rights in Theory and Practice, Minn. L. Rev. (1978)
- Minn. L. Rev. Editorial Board, The Minnesota Environmental Rights Act (1972)
- https://lib.d.umn.edu/archives/charles-dayton-transcript
- William Mitchell Law Rev. 1979: Environmental Law—A Balancing Test Adopted Under MERA—MPIRG v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn. 1977)
- Andrew J. Pielaal, 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, 21 B.C. Envtl. Aff. L. Rev. 401 (1994)

MERA – The Middle Years 1979 - 2012

Max Kieley
Legal Director
Friends of the Boundary Waters Wilderness

Road Map of the Middle Years

- Courts grappled with MERA's inherent tension between promoting both the preservation and productive use of Minnesota's natural resources.

- This resulted in the expansion and contraction of: (A) what a Plaintiff must show to establish a prima facie case under MERA Section 3; and (B) when and how a Defendant can invoke MERA's "no feasible or prudent alternative" affirmative defense.

Traditional Prima Facie Showing

- Under MERA, a Plaintiff has the burden of proving: (1) the existence of a protectable "natural resource"; and (2) the "pollution, impairment, or destruction" of that resource. Minn. Stat. § 116B.03.

What is a Natural Resource?

Natural Resources, Defined

MERA defines natural resources broadly . . .

Subd. 4. **Natural resources.** "Natural resources" shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources. Scenic and esthetic resources shall also be considered natural resources when owned by any governmental unit or agency.

Expanding a Plaintiff's Prima Facie Case under MERA: Including Buildings and Open Spaces as "Historical Resources"

Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979)

- Row houses = historical resources = natural resources protected by MERA

- National Register of Historic Sites criteria are factors courts should consider when determining whether a structure qualifies as a "historical resource."

- Director of Minnesota Historical Society and State Preservation Officer presented evidence that row houses were historical resources and "would be" *eligible* for nomination to the National Register.

Powderly (cont.)

- District court and Minnesota Supreme Court found Plaintiff established prima facie MERA claim.

- Minnesota Supreme Court reversed district court's finding that defendant established affirmative defense under MERA.

- Defendant did not prove there was no feasible and prudent alternative or that demolition is consistent with and reasonably required for promotion of the public health, safety and welfare in light of paramount concern for protection of natural resources.

SST, Inc. v. Minneapolis, 288 N.W.2d 225 (Minn. 1979)

- "Scotties on Seventh" (f/k/a the Forum Cafeteria) was on the National Register of Historic Places
  - Inside = "Zig-Zag Moderne" or "Art Deco" architectural style
  - Outside = "one of the last remaining examples" of "Beaux Arts movie theatre façade in Twin Cities

- In the midst of extensive evidentiary hearing, trial was continued for settlement discussions whereby it was agreed that the inside would be preserved while the outside would be demolished for City Center project.

- Court upheld settlement as not being contrary to MERA or the evidence.

- "Friends of the Forum" moved to intervene

SST, Inc. (cont.)

- District court issued Findings of Fact and Conclusions of Law holding that only the interior of the building is a "natural resource" protectable under MERA and that the removal/reinstallation of the art deco interior would not have a material adverse impact on the architectural value.

- This legal conclusion was likely wrong under the reasoning in Powderly. In that case, even the *eligibility* to be included on the National Register was enough to be deemed a MERA protectable "natural resource."

- To be consistent with MERA, court could have only allowed destruction of exterior by finding defendants satisfied affirmative defense, which was problematic.

SST, Inc. (cont.)

- Because Scotties/Forum was *on* the National Register, and the National Register covers entire structures (not just the inside), the entire building should qualify as a "historical resource"/"natural resource" even despite Intervenor's failure to submit expert testimony or evidence challenging the settlement.

- This case and Powderly and its progeny underscore that MERA cases are fact intensive and often expert driven. Developing facts early and obtaining favorable factual findings from the district court is critical to success given that a district court's findings of fact are reviewed under the "clearly erroneous" standard.

Powderly's Baseline of a Defendant's Use of "No Feasible and Prudent Alternative" Affirmative Defense Prima Facie Case under MERA

Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979)

- The Powderly court found that "[i]n deciding whether defendants have established an affirmative defense under MERA, the trial court is not to engage in wide-ranging balancing of compensable against noncompensable impairments. Rather, *protection of natural resources is to be given paramount consideration*, and those resources should not be polluted or destroyed unless there are *truly unusual factors* present in the case or the cost of community disruption from the alternatives reaches an *extraordinary magnitude*."

- Powderly reversed the district court's finding that an affirmative defense was established and instead found that Erickson did not meet his burden and that the loss of 10 parking spots was an unusual circumstance and
- was not of such extraordinary magnitude

Expanding a Defendant's Use of "No Feasible and Prudent Alternative" Affirmative Defense Prima Facie Case under MERA

Krmpotich v. City of Duluth, 474 N.W.2d 392 (Minn. Ct. App. 1991) *overruled by* 483 N.W.2d 55 (Minn. 1992)

- District court found that wetland, creek and woody cliffs to be destroyed by development of a strip mall did not qualify as "natural resources" due to degradation and thus were not protected by MERA.

- District court also found that developer met its burden of establishing MERA's affirmative defense.

- Court of Appeals likely got it right (for the most part) and reversed, finding both existence of natural resources and that when considering defendants' affirmative defense, that "the balancing test must be done with
- significant emphasis on saving the environment."

Krmpotich v. City of Duluth (cont.)

- The Minnesota Supreme Court reversed and found that while the wetland was degraded it was nevertheless a "natural resource" but that the district court did not abuse its discretion in determining that the defendants established their "no feasible and prudent" affirmative defense.

- Minnesota Supreme Court failed to conduct balancing test with emphasis on saving the environment.

Krmpotich v. City of Duluth (cont.)

- How could there be no alternative site to building a strip mall or alternative design such that the natural resources were not impacted?
- Isn't this "economic consideration" alone?
- How does the development of a strip mall present "truly unusual factors"? How would siting the strip mall elsewhere or limiting its environmental impact cause "community disruption" to reach "an extraordinary magnitude"?
- Is "abuse of discretion" the correct standard of review for analyzing MERA's affirmative defense?

Contracting a Defendant's Use of the "No Feasible and Prudent Alternative" Affirmative Defense Prima Facie Case under MERA

Archabal v. County of Hennepin, 495 N.W.2d 416 (Minn. 1993)

- Director of Minnesota Historical Society and State Historic Preservation Officer sought to enjoin county from demolishing the Armory.

- District court agreed the Armory was a protectable natural resource given that it is "one of the best examples of the WPA Moderne style of architecture in the country . . . [and] on the National Register of Historic Places."

- District court found no MERA violation and agreed Armory could be torn down and a jail built on the site because the county met its no feasible/prudent affirmative defense.

Archabal v. County of Hennepin (cont.)

- Minnesota Supreme Court, while not mentioning Krmpotich, returns to the Powderly standard and notes paramount importance of preserving natural resources.

- Court found that caselaw "establish an extremely high standard for defendants to meet in establishing an affirmative defense."

- Minnesota Supreme Court found the district court erred by finding there was no feasible/prudent alternative when the county's own task force could not find one site that was clearly advantageous over others it considered.

Archabal v. County of Hennepin (cont.)

- Found that the trial court erred by placing primary emphasis on the needs of the criminal justice system rather than addressing whether siting a jail on a site other than the Armory would cause community disruption of an extraordinary magnitude.

- Trial court engaged in prohibited compensatory vs. noncompensatory balancing, similar to Krmpotich

- While it may cost more to transport prisoners, economic considerations alone cannot constitute a defense.

- Is Archabal correcting the weakening of affirmative defense analysis under MERA by Krmpotich?

McGuire v. County of Scott, 525 N.W.2d 583 (Minn. Ct. App. 1994)

- The Court of Appeals held that when a MERA lawsuit involves an action alleging violation of an environmental regulation, a defendant cannot raise an affirmative defense of "no feasible and prudent alternative."

- "MERA distinguishes between an action premised on the violation of a government environmental standard and one alleging a general material adverse effect on the environment."

- Plain language reading of Minn. Stat. § 116B.04 is supported by both legislative history (MPCA sought a private cause of action to enforce its rules and a corresponding defense limited to showing compliance)

McGuire v. County of Scott (cont.)

116B.04 BURDEN OF PROOF.

(a) In any action maintained under section 116B.03, where the subject of the action is conduct governed by any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the Pollution Control Agency, Department of Natural Resources, Department of Health, or Department of Agriculture, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant violates or is likely to violate said environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit, the defendant may rebut the prima facie showing by the submission of evidence to the contrary; provided, however, that where the environmental quality standards, limitations, rules, orders, licenses, stipulation agreements, or permits of two or more of the aforementioned agencies are inconsistent, the most stringent shall control.

(b) In any other action maintained under section 116B.03, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, 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.

Contracting a Plaintiff's Prima Facie Case under MERA: Schaller's 5-Factor Test to Determine whether Conduct Materially Adversely Affects the Environment

Schaller v. County of Blue Earth, 563 N.W.2d 260 (Minn. 1997)

- Homeowner brought action against county, seeking injunction against construction of highway under MERA.
- Count 1 alleged that projected traffic volumes would violate noise standards and Count 2 alleged the destruction of plaintiff's ravine would materially adversely impact the environment.
- The district court granted summary judgment to the County on Count 1 and granted a motion to dismiss after a hearing on Count 2.
- The Court of Appeals and Supreme Court both affirmed.

Schaller v. County of Blue Earth (cont.)

- The Minnesota Supreme Court found that Count 1 was properly dismissed because the projected violation was not to take place for 13 years, it assumed the same noise standards were in place and that there was no county variance, and that the projected noise violation was for 4 and not 2 lane highway.

- Two definitions of "pollution, impairment or destruction":

Subd. 5. **Pollution, impairment, or destruction.** "Pollution, impairment, or destruction" is any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred or is likely to occur or any conduct which materially adversely affects or is likely to materially adversely affect the environment; provided that "pollution, impairment, or destruction" shall not include conduct which violates, or is likely to violate, any such standard, limitation, rules, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air.

Schaller v. County of Blue Earth (cont.)

- District court applied the Wacouta 4-part best borrowed from Michigan state courts.

- Wacouta found that almost every human activity has some kind of adverse impact on a natural resource and "we cannot construe MERA as prohibiting virtually all human enterprise."

- Purpose behind both Wacouta and the modified test supplied by Schaller is to "give effect to the statutory limitation that conduct must 'materially adversely affect' the environment to be enjoined as pollution, impairment or destruction of natural resources" under Minn. Stat. § 116B.02, subd. 5.

Schaller v. County of Blue Earth (cont.)

The Supreme Court laid out the famous 5 factor balancing test:

(1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;

(2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;

(3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);

(4) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed);

(5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

Schaller v. County of Blue Earth (cont.)

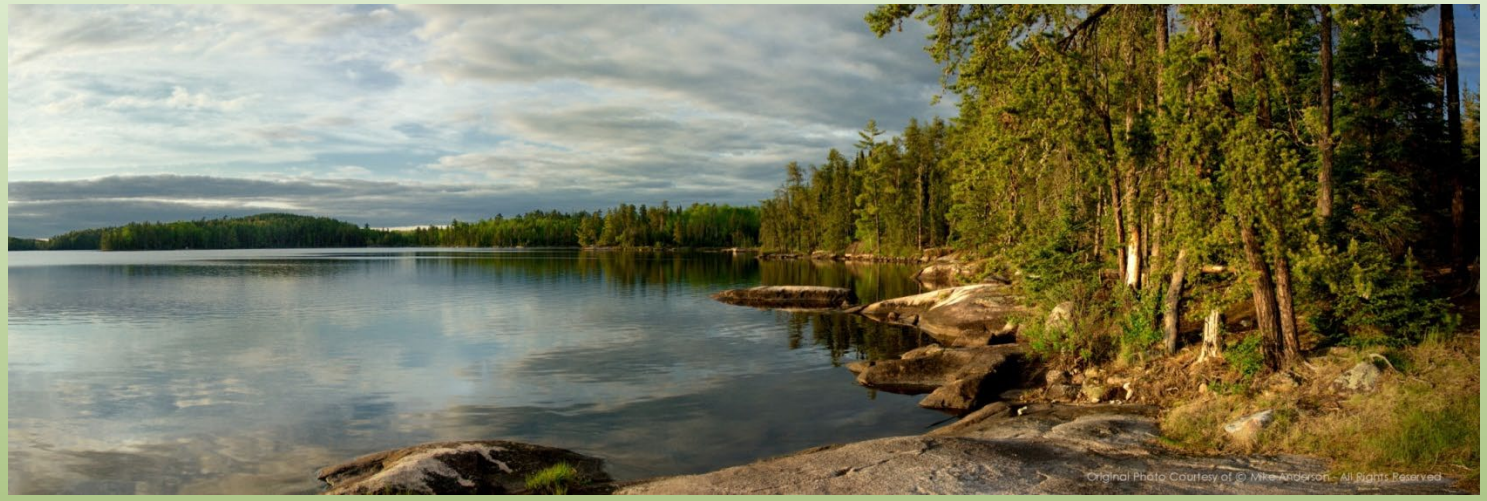
- In 1993, the Minnesota Supreme Court found in Archabal that satisfying MERA's affirmative defense required an "extremely high standard."
- Was that court looking to even the playing field in Schaller by making a Plaintiff's ability to set forth a prima facie MERA claim more difficult?
- The Court emphasized that the 5 factors were "not exclusive" and that "each factor need not be met in order to find a material adverse effect."
- Does a non-exclusive balancing test really set a standard? Pete Surdo will analyze this in the next section.

Takeaways

- Win at the district court!
- Focus not just on the facts but also basing claims on regulations to avoid MERA's affirmative defense.
- On appeal, consider whether it makes sense to argue for an abuse of discretion standard on any issues for which the district court employed a balancing test.
- Krmpotich has never been formally overruled on this point and was cited in 2016 by the Supreme Court in a non-MERA case and earlier this year by the Court of Appeals. See Melrose Gates, LLC v. Chor Moua, 875 N.W.2d 814, 819 (Minn. 2016); Pieper v. Carlson, 2024 WL 322668 (Minn. Ct. App. Jan. 29, 2024).

"This is the most beautiful lake country on the continent. We can afford to cherish and protect it."

Sigurd F. Olson



MERA Questions Presented

1. Was the Proposed Tower likely to have a material impact on the BWCAW's protectable natural resources?
2. Can AT&T make out an affirmative defense given "extremely high standard" of showing no feasible and prudent alternative?

The Proposed Tower's Impact is Material to the Boundary Waters

Schaller Factors

1. The Quality and Severity of Any Adverse Effects
2. Whether the Natural Resources Affected Are Rare, Unique, Endangered, or Have Historical Significance
3. Whether the Tower Will Have Long-Term Effects
4. Whether the Tower Will Have Significant Effects on Other Resources
5. Whether the Affected Resources Are Significantly Increasing or Decreasing in Number

Evidence

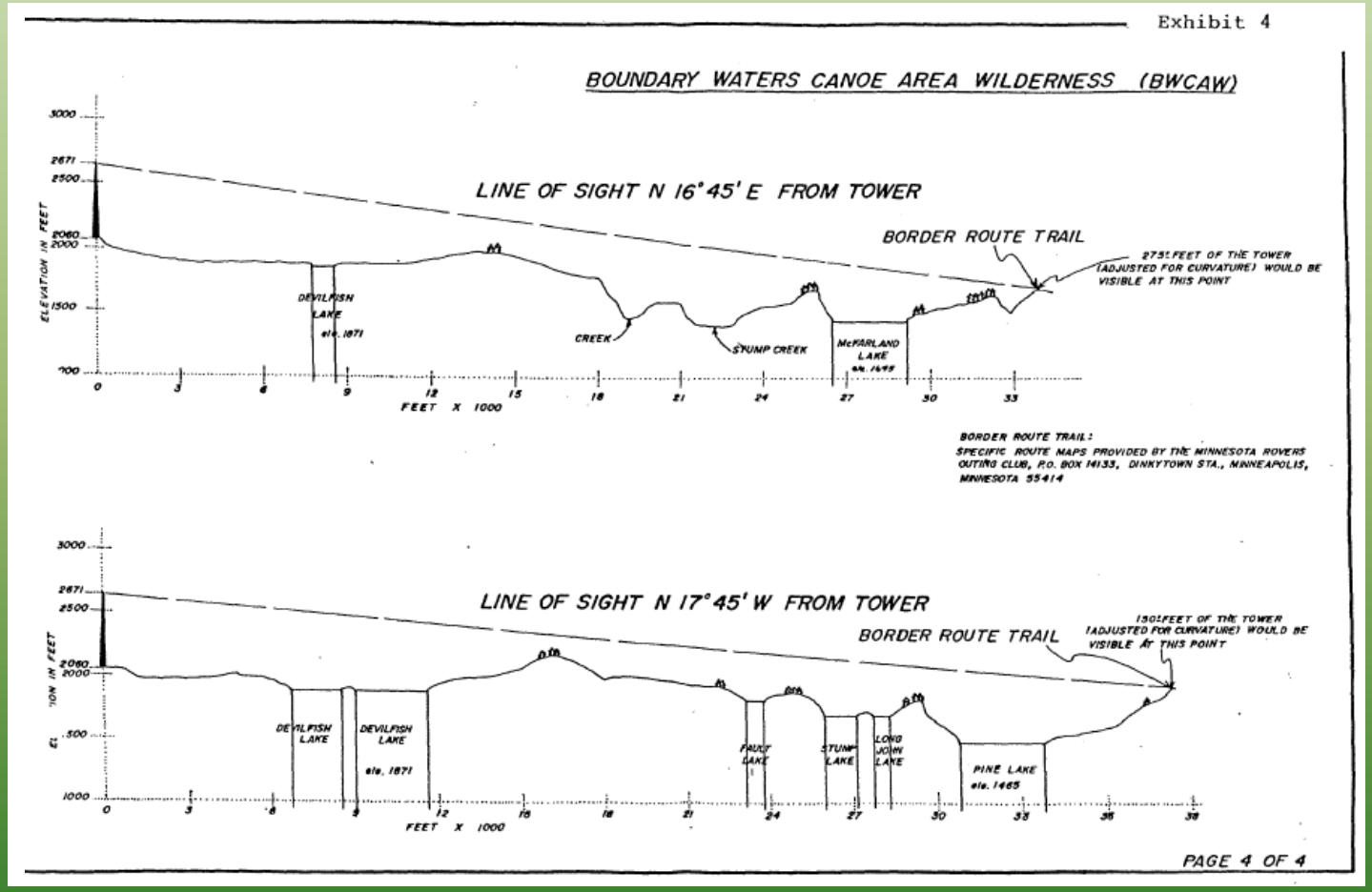
- Fact Witnesses: Wilderness users, birders
- Expert Witnesses:
  - Surveyor
  - Wilderness Business Interests (Both Sides)
  - Ornithologist
- Publications
  - U.S. Forest Service
  - Gov’t Surveys
  - Fish and Wildlife Service

State by Drabik v. Martz

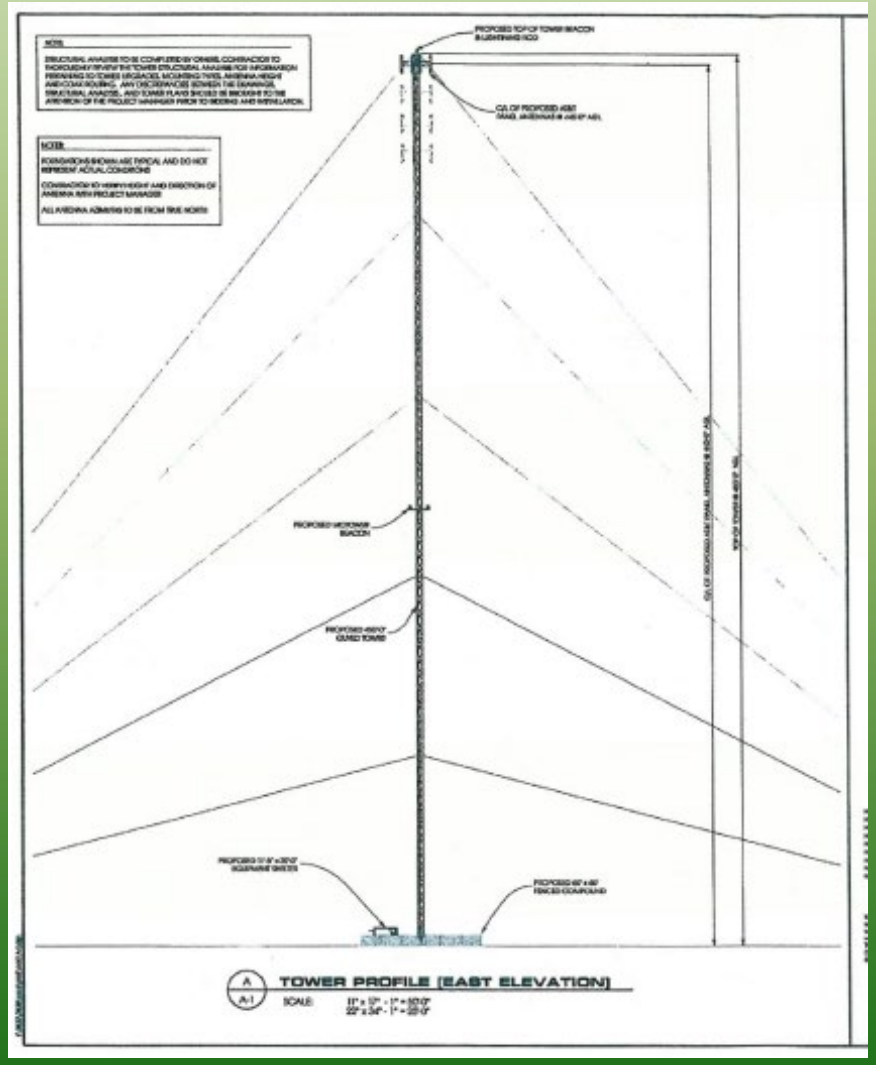
- Targeted to align with fact pattern
  - 600-foot radio tower visible from the BWCAW—at points 6 miles away—would violate MERA
- Concluded an FM tower's visibility "would materially diminish the wilderness experience for visitors" along the Border Route Trail
- Also, "[T]he tower and its guy wires could pose a risk of death and dismemberment to protected birds . . . . The lights required on top of these towers may attract migrating birds at night and cause major bird kills."

State by Drabik v. Martz

Visual Impact on BWCAW: 6 Miles Away



Schaller 1 - Quality and Severity of Effects



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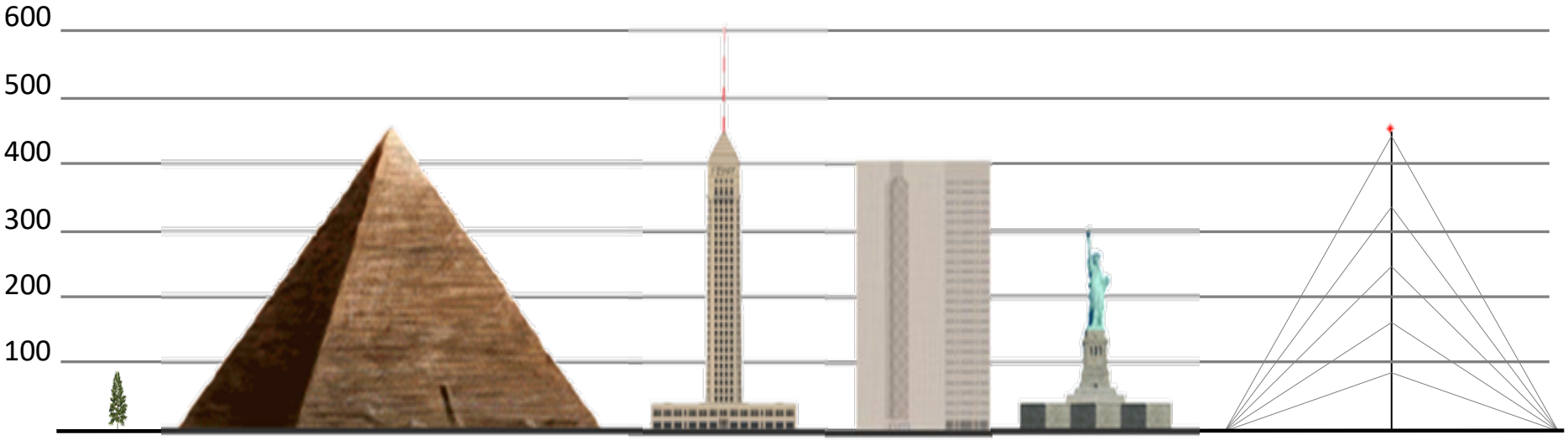
Quality and Severity of Effects



Minnesota White Pine
80

Great Pyramid of Giza
455

Foshay Tower
447

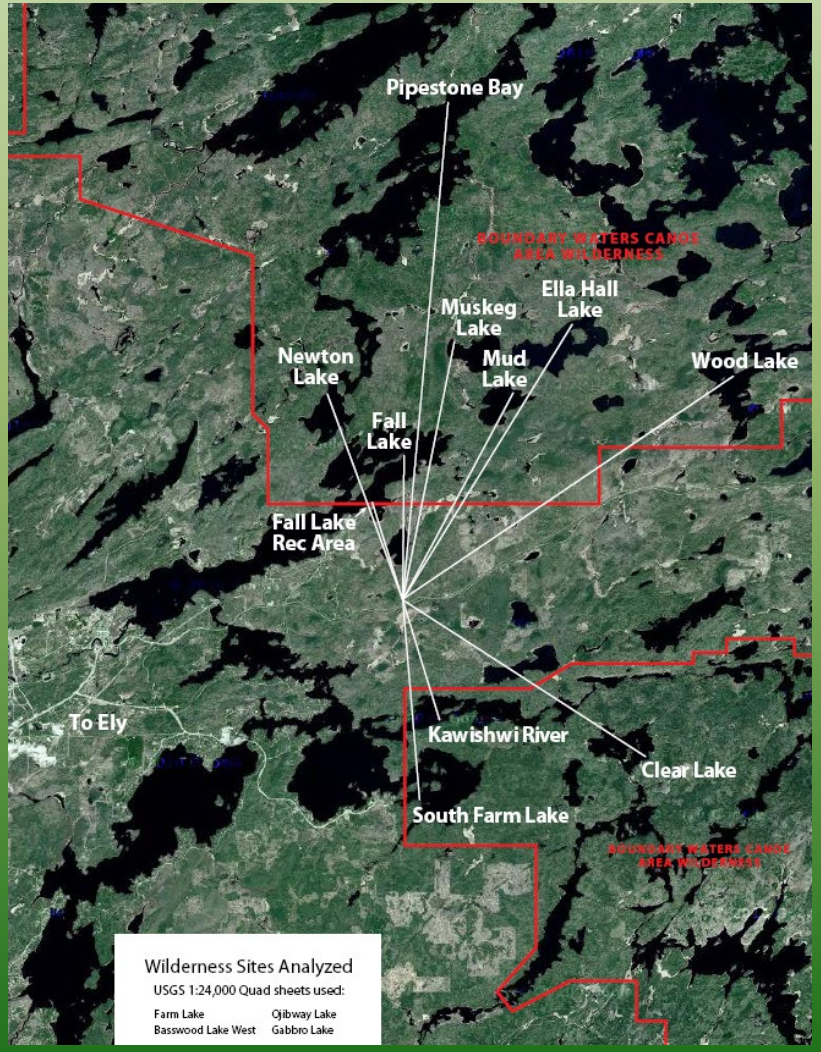
Hennepin County
404

Statue of Liberty
305

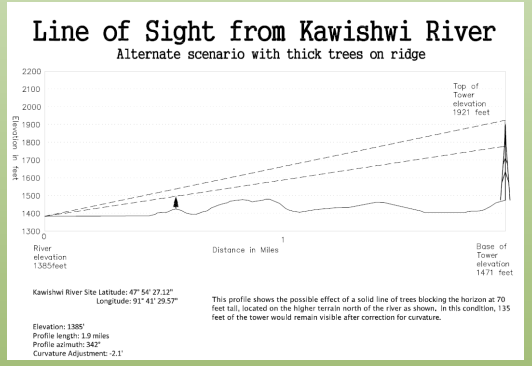
Proposed Tower
450

Visual Impact on BWCAW: 1.9 – 7.7 Miles Away

State by Friends v. AT&T

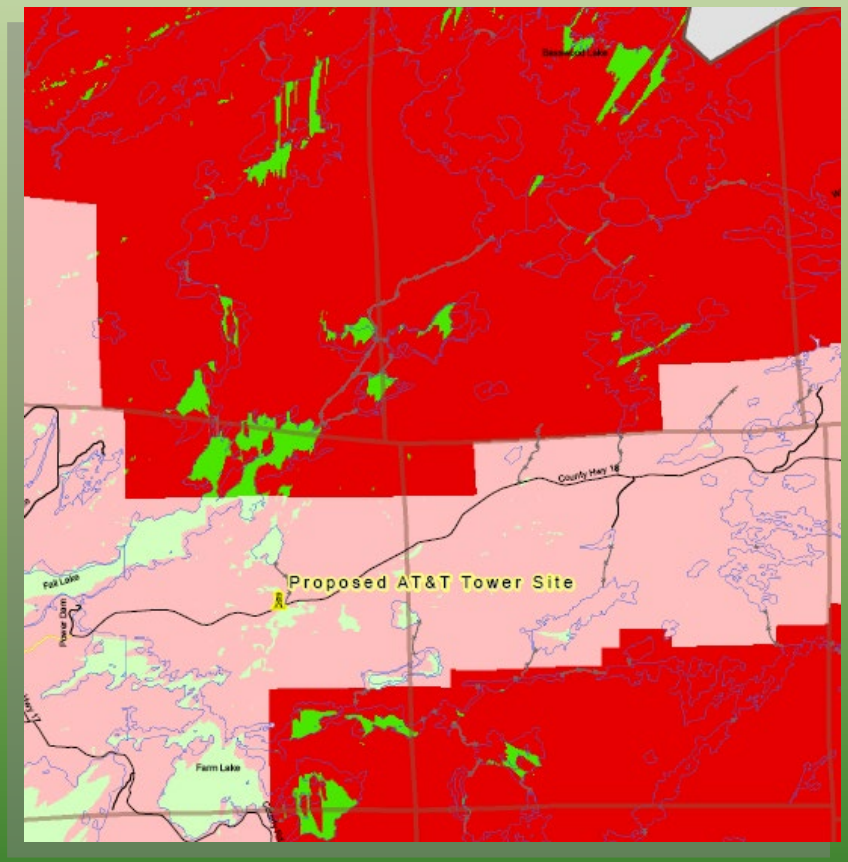


Visual Impact on BWCAW: Sample Sites Examined by U.S.G.S. Analysis and Physical Survey



Viewshed	Distance from Proposed Tower	Amount of Tower Visible	Method
Fall Lake Rec. Area	1.5 miles	217 feet	Physical Survey
Kawishiwi River	1.9 miles	146 feet	Physical Survey
Fall Lake	2.2 miles	114 feet	Physical Survey
South Farm Lake	3.0 miles	47 feet	Physical Survey
Newton Lake	3.4 miles	136 feet	Physical Survey
Mud Lake	3.6 miles	38 feet	Physical Survey
Muskeg Lake	4.0 miles	95 feet	Physical Survey
Clear Lake	4.4 miles	45 feet	U.S.G.S. Analysis
Ella Hall Lake	5.0 miles	65 feet	U.S.G.S. Analysis
Wood Lake	6.0 miles	90 feet	U.S.G.S. Analysis
Pipestone Bay	7.7. miles	180 feet	U.S.G.S. Analysis

Defendants' own Computer Simulation



Visual Impact of the Proposed Tower

TX284DK, Kawish Cotton Tower, 1.6 miles

Visibility of a Lighted Tower Significantly Affects the Wilderness Experience

- 2007 National Forest Service Survey Shows What is Material to Visitors
  - 96.7% Scenic Beauty
  - 93.0%: Remoteness, Solitude
  - 90.8%: Natural place, Lack of Human Evidence
- Currently unmarred vistas
- Witness testimony
  - Beauty, separation from civilization
  - Opportunities for solitude
- Scott Bunney's Boundary Waters Tour

Schaller 2 - The Boundary Waters' Scenic and Aesthetic Resources Are Rare and Unique

The Congress finds that it is necessary and desirable to provide for the protection, enhancement, and preservation of the natural values of the . . . Boundary Waters Canoe Area," and "protecting the special qualities of the area as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation."

BWCAW Act § 1

The Boundary Waters is "our nation's only lakeland canoe wilderness . . . One of the finest wilderness areas on our continent . . . drawing people from throughout the country who seek the solitude of a wilderness experience."

Minnesota v. Block, 660 F.2d 1240, 1245 (8th Cir. 1981).

"It was termed a gem, a jewel, and likened to a rare antique of ancient vintage. . . . [T]here is no area like it nor can there ever be another of its kind."

Minn. Pub. Interest Research Group v. Butz, 358 F. Supp. 584 (D. Minn. 1973).

Schaller 3

- The Proposed Tower is a Permanent Structure
- It will impair the Boundary Waters' scenic vistas and wilderness experience as long as it stands

Schaller 4 - Effect on Other Resources

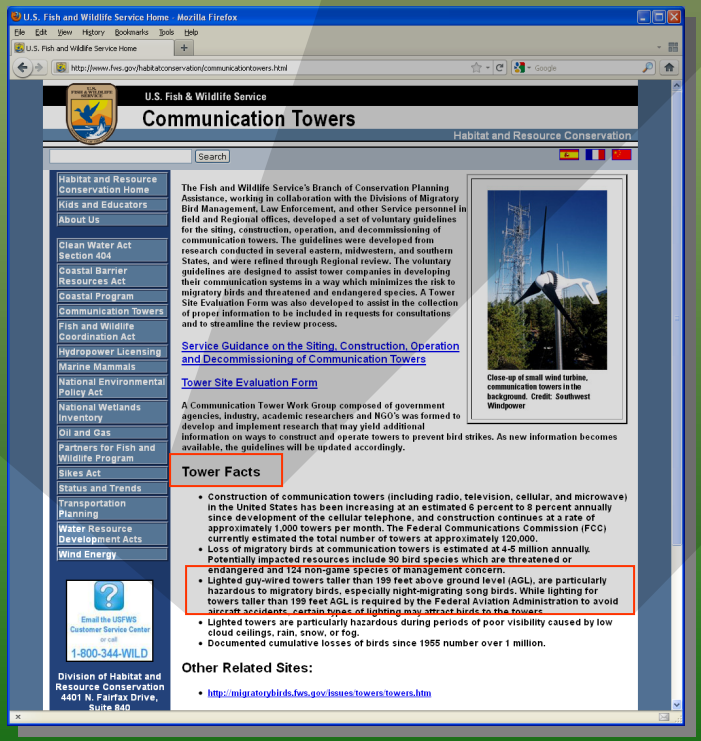
Impact on Migratory Birds

U.S. Fish & Wildlife Service

Communication Towers

Tower Facts

- **Lighted guy-wired towers taller than 199 feet above ground level (AGL), are particularly hazardous to migratory birds, especially night-migrating song birds.**



Impact on Migratory Birds

Of the 30 Species Most Frequently Killed by Towers, 28 Nest in the Boundary Waters

1. Ovenbird
2. Red-eyed Vireo
3. Tennessee Warbler
4. Common Yellowthroat
5. Bay-breasted Warbler
6. American Redstart
7. Blackpoll Warbler
8. Black-and-white Warbler
9. Philadelphia Vireo
10. Swainson's Thrush
11. Palm Warbler
12. Gray Catbird
13. Northern Waterthrush
14. Northern Parula
15. Magnolia Warbler

Impact on Migratory Birds

U.S. Fish and Wildlife Guideline	Proposed Tower
1. Collocate on existing structures	X
2(a). "no more than 199 feet above ground level"	X
2(b). "techniques which do not require guy wires"	X
2(c). "towers should be unlighted"	X
4(a). "Towers should not be sited in or near wetlands"	X
4(b). Not "in known migratory or daily movement flyways"	X

Impact on Migratory Birds

U.S. Fish and Wildlife Guideline	Proposed Tower
4(c). Not "in habitat of threatened or endangered species"	X
4(d). "Towers should not be sited in areas with a high incidence of fog, mist, and low ceilings"	X
5. "The use of solid or pulsating red warning lights at night should be avoided"	X
7. "[A] larger footprint is preferable to the use of guy wires"	X

Schaller 5 - Whether the Affected Resources Are Significantly Increasing or Decreasing in Number

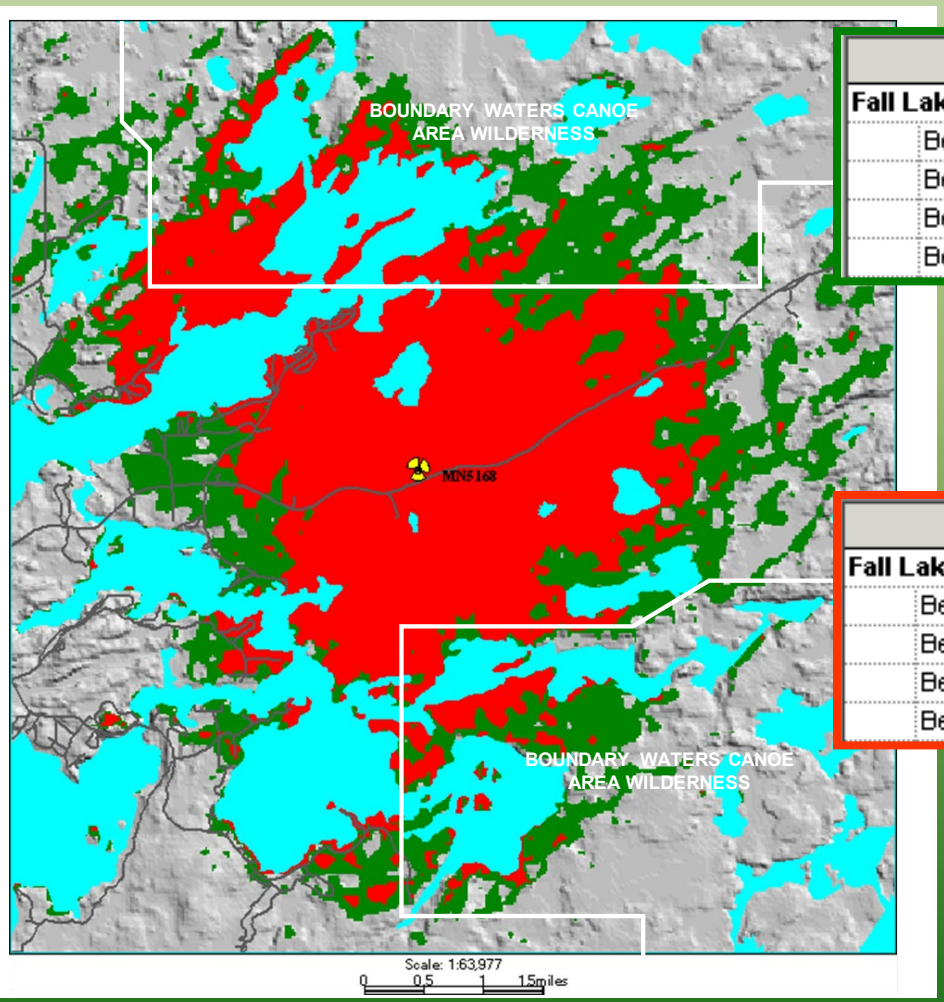
- The BWCAW's Scenic and Aesthetic Resources are Finite and Irreplaceable
- Bird populations in decline
- No dispute here

Affirmative Defense (Archabal/MERA)

- The project is "reasonably required for the promotion of public health, safety, and welfare in light of the state's paramount concern for the protection" of natural resources; and
- AND "there is no feasible and prudent alternative." Min. Stat. § 116B.04
- Archabal confirms this is a high standard

Feasible and Prudent Alternative

Single-Tower Alternative: In Building



Name	Surface (miles²)	% Computation Zone
Fall Lake 195 feet	**850.9615**	**80.7**
Best Signal Level (dBm) >=-74	68.3809	6.5
Best Signal Level (dBm) >=-84	218.4104	20.7
Best Signal Level (dBm) >=-92	434.8469	41.2
Best Signal Level (dBm) >=-104	850.9615	80.7

TX189, p. 6

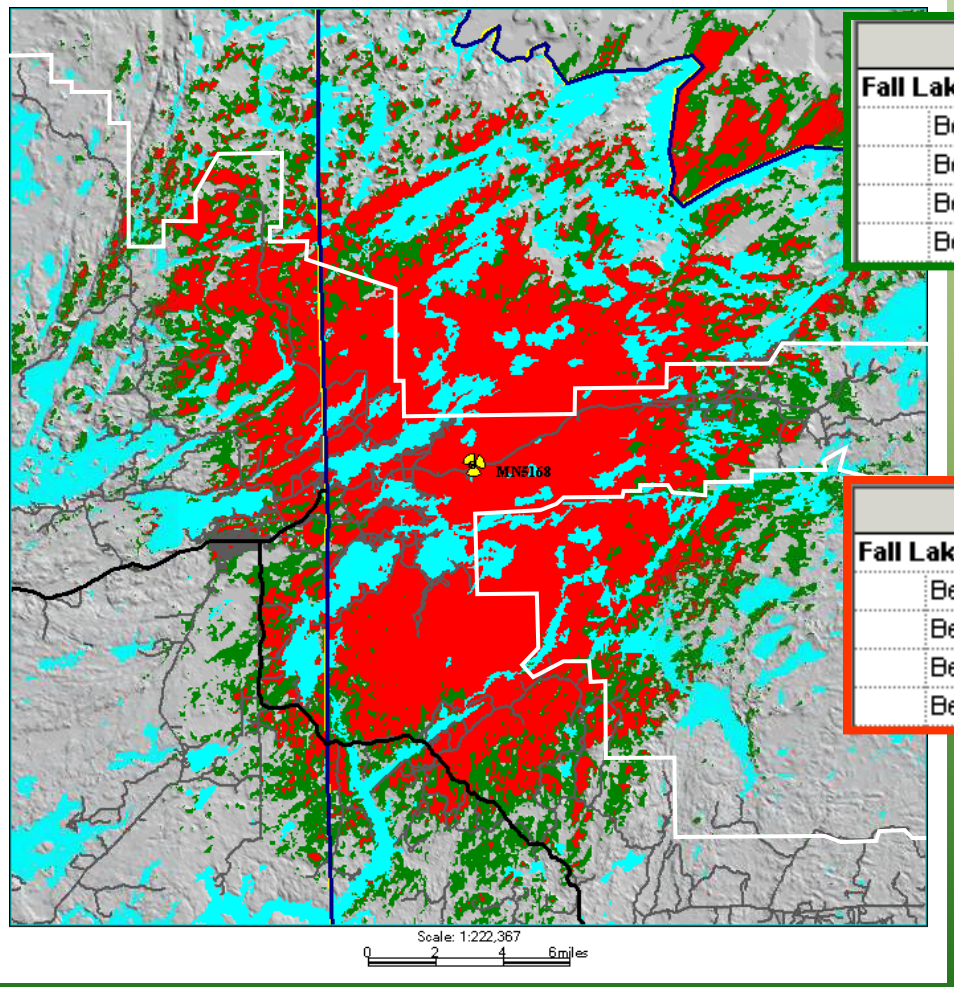
Name	Surface (miles²)	% Computation Zone
Fall Lake 450 feet	**944.8842**	**89.6**
Best Signal Level (dBm) >=-74	80.2295	7.6
Best Signal Level (dBm) >=-84	255.2193	24.2
Best Signal Level (dBm) >=-92	506.6197	48
Best Signal Level (dBm) >=-104	944.8842	89.6

TX189, p. 4

TX281

Feasible and Prudent Alternative

Single-Tower Alternative: On Street Portable



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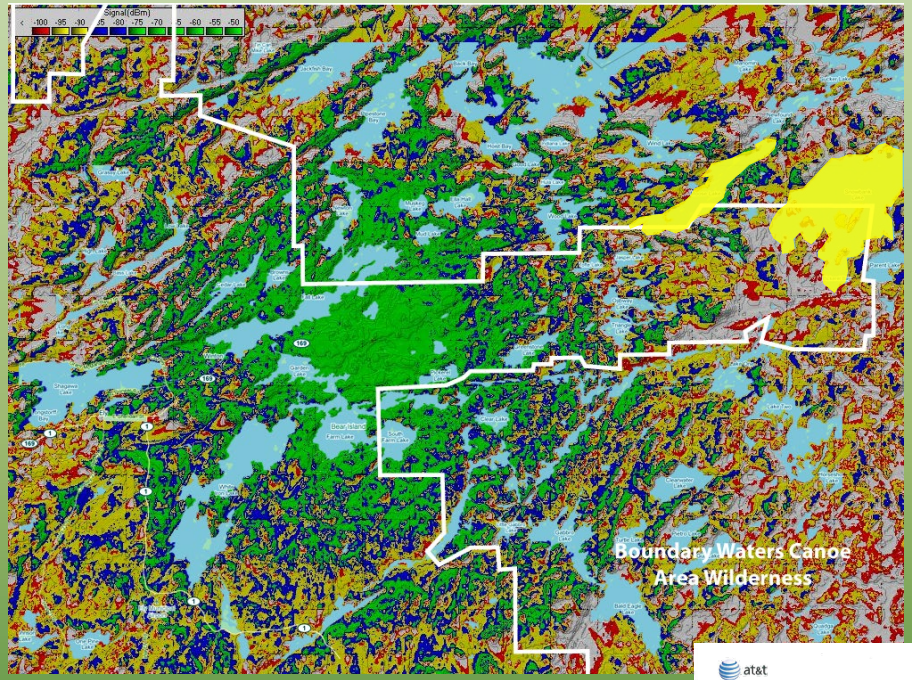
TX189, p. 4

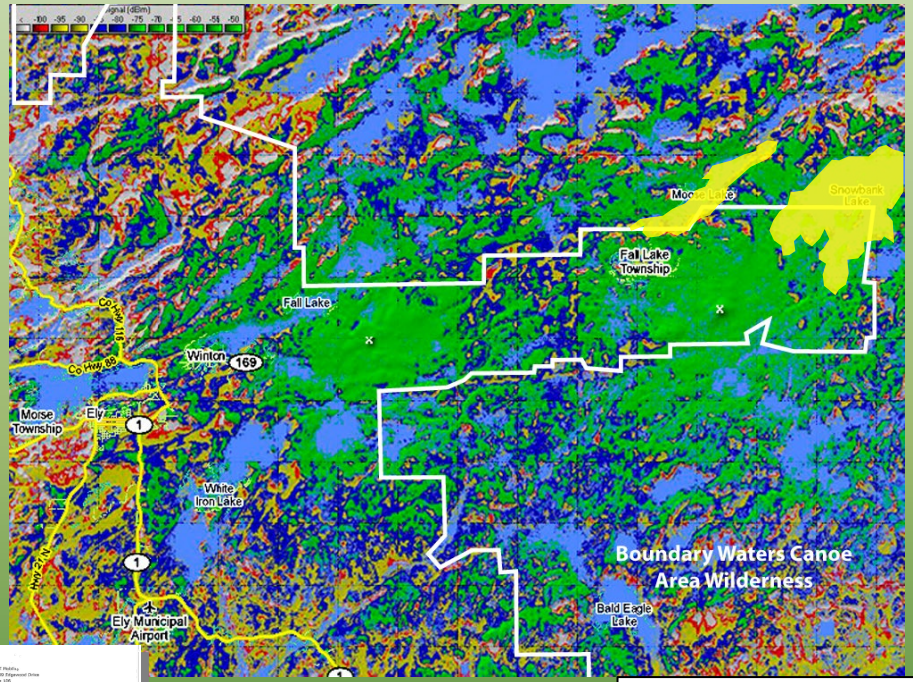
TX281

Feasible and Prudent Alternative

Proposed 450’ Tower



Two 199’ Tower Alternative



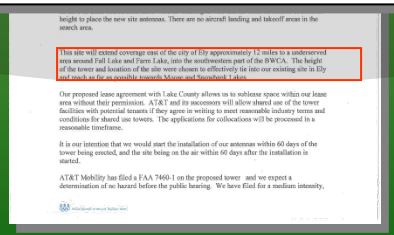
TX185


at&t

Tomas Hamlin
AT&T Mobility

The height of the tower and location of the site were chosen to effectively tie into our existing site in Ely and reach as far as possible towards Moose and Snowbank Lakes.

Tomas Hamlin
AT&T Mobility


height to place the new site antennas. There are no aircraft landing and takeoff areas in the search area.

This site will extend coverage east of the city of Ely approximately 12 miles to a underserved area around Fall Lake and Farm Lake, into the southwestern part of the BWCA. The height of the tower and location of the site were chosen to effectively tie into our existing site in Ely and reach as far as possible towards Moose and Snowbank Lakes.

Our proposed lease agreement with Lake County allows us to sublease space within our lease area without their permission. AT&T and its successors will allow shared use of the tower facilities with potential tenants if they agree in writing to meet reasonable industry terms and conditions for shared use towers. The applications for collocations will be processed in a reasonable timeframe.

It is our intention that we would start the installation of our antennas within 60 days of the tower being erected, and the site being on the air within 60 days after the installation is started.

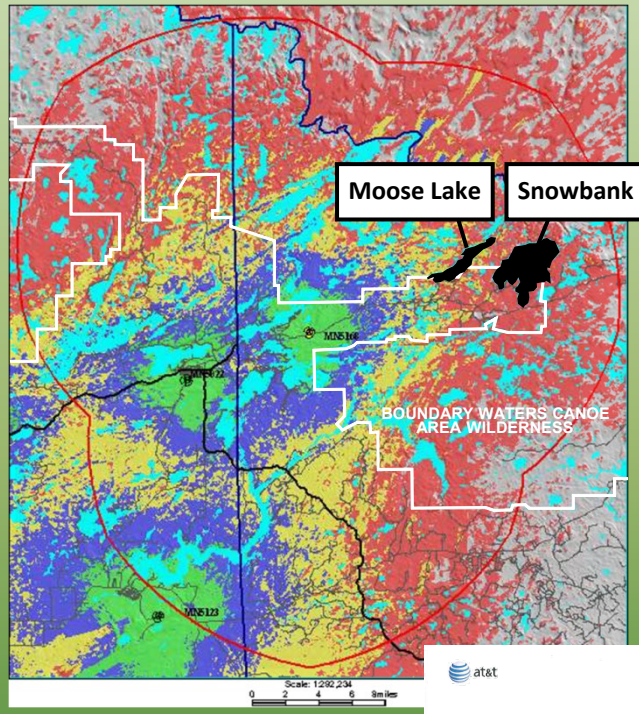
AT&T Mobility has filed a FAA 7460-1 on the proposed tower and we expect a determination of no hazard before the public hearing. We have filed for a medium intensity,

June 2, 2009

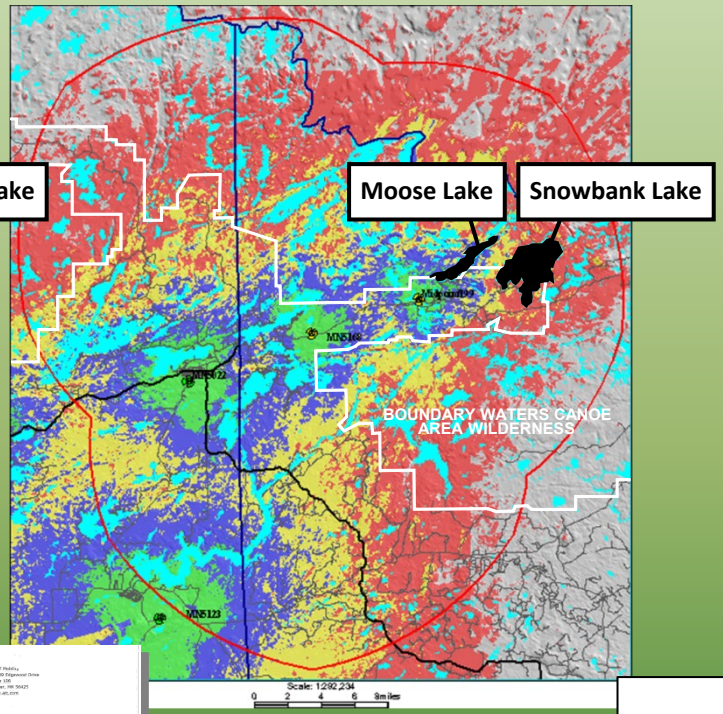
TX70

Feasible and Prudent Alternative

Proposed 450’ Tower



Two 195’ Tower Alternative



TX189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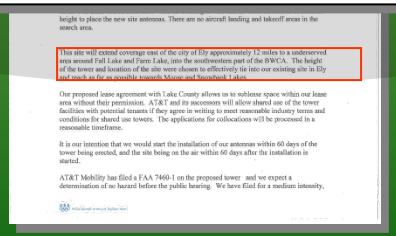
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June 2, 2009

TX70

Feasible and Prudent Alternative

Two-Tower Alternative

Coverage Level	Coverage Level	Current Coverage Area mi2	450' Tower Coverage Area mi²	450' Tower - % increase	Two 195' Tower Coverage Area mi²	Two 195' Towers - % increase
>= -85	In-Vehicle	174.8	255.2	**46%**	257.5	**47%**
>= -92	On Street Portable	371.5	506.6	**36%**	509.6	**37%**

TX189

Feasible and Prudent Alternative

Two-Tower Alternative

Capital Expenditure			
RAN Equipment Cost	$ 830,500	$ -	$ -
RAN Equipment Other Costs	$ 210,000	$ -	$ -
Civils	$ -	$ -	$ -
Additional Core costs (UMTS only)	$ -	$ -	$ -
Present Value of Capital Expenditure	$ 1,040,500	$ -	$ -
Additional Installation Costs	$ -		
Additional Design Costs	$ -		
Other Capitalized Costs	$ -		
Total Capitalized Costs (PV)	$ 1,040,500		
Discount Rate	9.5%		
Non-Capitalized Operational Expense			
One time expense for network modifications	$ -	$ -	$ -
Present Value of Non-Cap Operational Expense	$ -	$ -	$ -
Key Metrics		**Benchmark**	**B/W to Benchmark**
Discounted Project CF / Initial Cash Outlay	-14%		
Cost of Service in year 5	22%	27%	Better
Payback period in months	>60 months	60 months	Worse
Total cash cost (5 year)	$ 1,670,582		
NPV (5 years only)	$ (147,739)		

Even assuming vastly overstated capital costs

the project is within $147,739 at end of 5 years

and making $45,234 every month in year 5

Monthly Cash Contribution	$ 3,680	$ 8,812	$ 16,498	$ 28,006	$ 45,234
PV of annual cash flows	$ 41,965	$ 91,775	$ 156,922	$ 243,269	$ 358,831
Cost of Service as a % of Revenue (if available)	74%	55%	41%	30%	22%

Result – Trial Court

State of Minnesota v. AT&T Mobility, LLC, No. 27-CV-10-15150, 2011 WL 3360003 (Minn.Dist.Ct. Aug. 03, 2011)

- The proposed tower "would have a qualitative and severe adverse effect on the scenic views from at least 10 significant areas within the protected BWCAW."
- Schaller Factors weigh in favor of injunction

  In weighing all of the facts of this case, it is this Court's Conclusion that all five of the *Schaller* factors weigh against construction of the Proposed Tower. Some factors such as the rarity and uniqueness of the protected resource weigh very strongly against construction of the Proposed Tower while other factors weigh less strongly against construction of the Proposed Tower. None of the *Schaller* factors weigh in favor of the Proposed Tower
- Affirmative defense cannot be made.

Result – Court of Appeals

not reported, 2012 WL 2202984

We agree with appellant's contention that the district court erred as a matter of law by failing to weigh and analyze the relative severity of the proposed tower's adverse effect on scenic views as required under *Fort Snelling.* The district court's failure to do so is apparent when one attempts to reconcile the district court's factual findings with its conclusion that the proposed tower would have a severe adverse effect.

Result – Court of Appeals

- In sum, the district court's findings establish that less than fifty percent of the proposed tower will be visible from less than one percent of the BWCAW's 1,175 lakes, several of which have scenic views that include signs of human existence. And the district court made no findings as to what degree of visibility from the less-than one percent of the lakes reaches the “severe” threshold, that is, harsh or very serious.

Result – Court of Appeals

But the policies embodied in MERA cannot reasonably be applied on a subjective basis. Because the district court's findings do not sustain its legal conclusion that the proposed tower would have a severe adverse effect on scenic and esthetic resources in the BWCAW, the conclusion is erroneous as a matter of law, and this factor does not weigh against construction of the proposed tower.

Result – Court of Appeals

- Schaller 2 – resources are rare – no error
- Schaller 3 – long term: error because the tower could be removed
- Schaller 4 – impact on other resources: error because impact on migratory birds could not be quantified
- Schaller 5 – diminishing resources – erred because whether the diminishment is "significant" not addressed.

Result – Court of Appeals

- [We] hold that the district court's factual findings and legal analysis do not sustain its legal conclusion that respondent proved a prima facie case of a materially adverse effect on the scenic and esthetic resources in the BWCAW.

Deference in the Modern Era

Pete Farrell
March 2024

Today's Agenda

- General principles of agency deference
- How Section 10 of MERA is different
- How Section 3 and Section 10 of MERA now overlap
- How MERA's (old) skepticism of agency power aligns with (new) skepticism of agency power

Principles of agency deference

Minnesota has a well-developed body of case law that requires courts to gives substantial deference to agency decisions.

Courts assume that:

- Agency decisions enjoy a presumption of correctness.
- Agencies deserve deference in areas of their expertise, special knowledge, and training.
- Agencies deserve deference when they resolve conflicts in testimony or evidence.
- If a statute or rule is ambiguous, then the agency's interpretation should be upheld if it is reasonable.

Principles of agency deference

Many, if not most, decisions of environmental agencies are reviewed under section 14.69 of the Minnesota Administrative Procedure Act by writ of certiorari to the court of appeals.

The scope of judicial review under MAPA is narrow.

Principles of agency deference

A court may remand or reverse an agency decision only if the substantial rights of the petitioners are prejudiced and the agency's decision is:

- unconstitutional
- beyond the agency's statutory authority or jurisdiction
- made upon unlawful procedure
- affected by other error of law
- unsupported by substantial evidence
- arbitrary or capricious

Principles of agency deference

Substantial evidence

- More than a "scintilla"
- Some evidence
- Any evidence

Arbitrary or capricious

- Will, not judgment

Principles of agency deference

Judicial review of agency rulemaking is even narrower

- Section 14.44 and 14.45 of MAPA are the main vehicles for challenging the validity of agency rules.
- Those statutes authorize a petitioner to seek a declaratory judgment regarding the validity of rule.

But a court may only declare the rule invalid if it finds the rule:

- unconstitutional
- beyond the agency's statutory authority
- lack of compliance with statutory rulemaking procedures

Section 10 of MERA (116B.10)

Section 10 of MERA provides a very different model for challenging agency action.

- Different forum
- Different procedure
- Different standard of review

Section 10 of MERA: Nature of the Action

Section 10 authorizes "a **civil action in district court** for **declaratory or equitable relief** against **the state or any agency or instrumentality thereof** where the nature of the action is a challenge to an **environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit** promulgated or issued by the state or any agency or instrumentality thereof **for which the applicable statutory appeal period has elapsed**."

Section 10 of MERA: Mechanics

Plaintiff has the burden of proving that the environmental quality standard (etc.) is inadequate to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction.

If plaintiff makes a "prima facie" showing, then the district court "shall remit the parties to the state agency . . . to institute appropriate administrative proceedings to consider and make findings."

The district court "retain[s] jurisdiction for purposes of judicial review to determine whether the order of the agency is supported by the preponderance of the evidence."

Section 10: The Great Unknown(s)

Rarely used

As a result, lack of judicial guidance on several key terms

What is the "prima facie showing" necessary to require remitter?

What are "appropriate administrative proceedings"?

How does the "preponderance of the evidence" standard of review differ from the "substantial evidence" standard of review under MAPA?

Section 10: One Example

In 2020, Northeastern Minnesotans for Wilderness sued the DNR under Section 10, alleging that a DNR mine siting rule was inadequate to protect the Boundary Waters Canoe Area Wilderness from pollution, impairment, or destruction.

NEMW and DNR stipulated to a remand for public comment on the adequacy of the rule and a framework for administrative proceedings, i.e., an initial agency decision, the right for each party to petition for a contested case hearing, etc.

The litigation is currently in a contested case process.

MAPA vs. Section 10

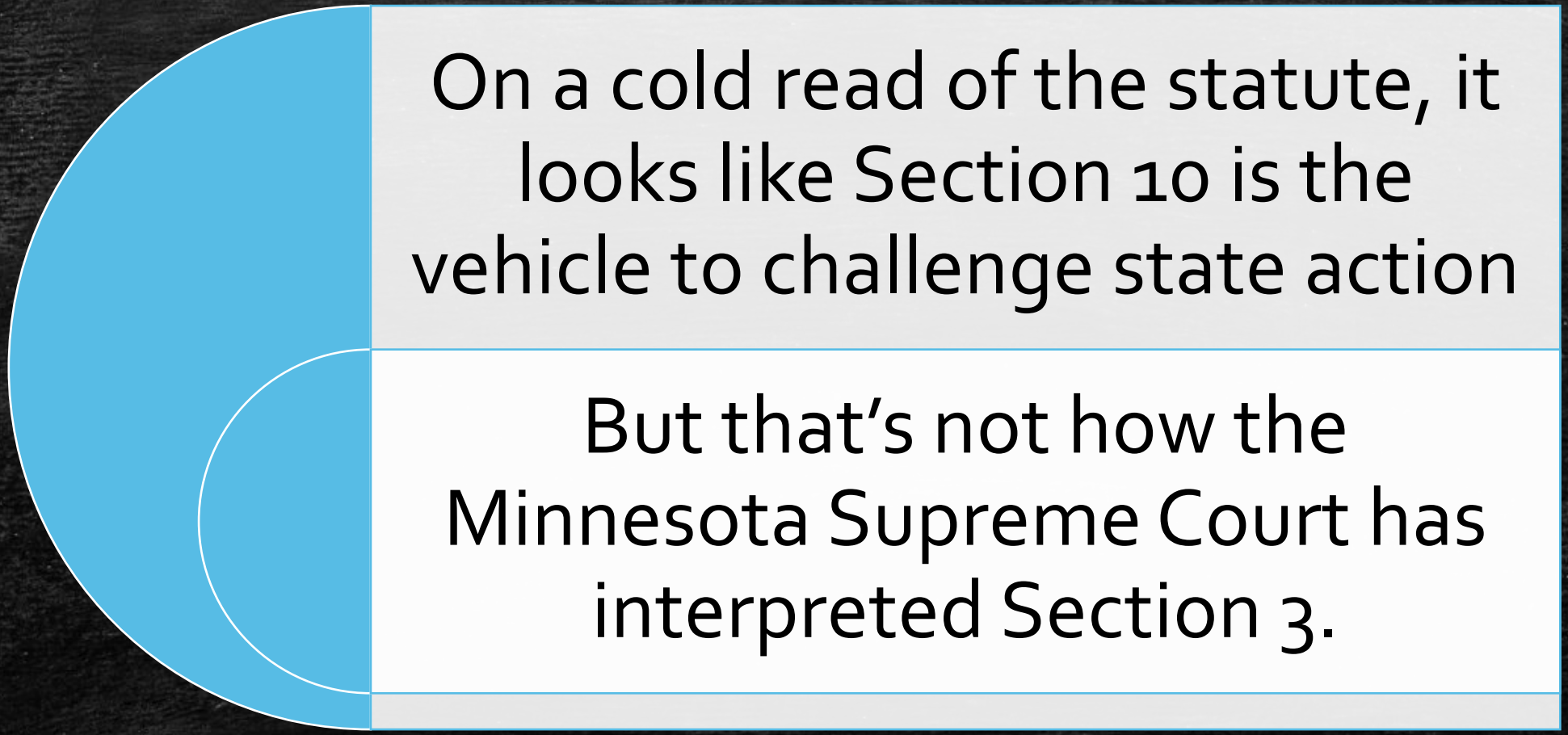
MAPA

- Court of appeals
- Strict time limit
- Principles of agency deference apply
- Substantial evidence or A+C
- Once submitted, judicial decision in 90 days

Section 10

- District court
- No time limit
- Unclear if principles of agency deference apply
- Preponderance of evidence
- You'll get a judicial decision, but it's not going to be in 90 days

Section 3 (§ 116B.03) and Section 10



Section 3 and Section 10

In *White Bear Lake Restoration Ass'n v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373 (Minn. 2020), two homeowner associations sued the DNR for pollution and impairment of White Bear Lake, alleging that the DNR had mismanaged the groundwater-appropriation permitting process.

The associations sued the DNR under Section 3 of MERA—not Section 10—alleging that "the conduct" of the DNR in the permitting process had caused pollution and impairment of the lake.

The DNR argued that the associations had to proceed under Section 10. The court of appeals agreed.

Section 3 and Section 10

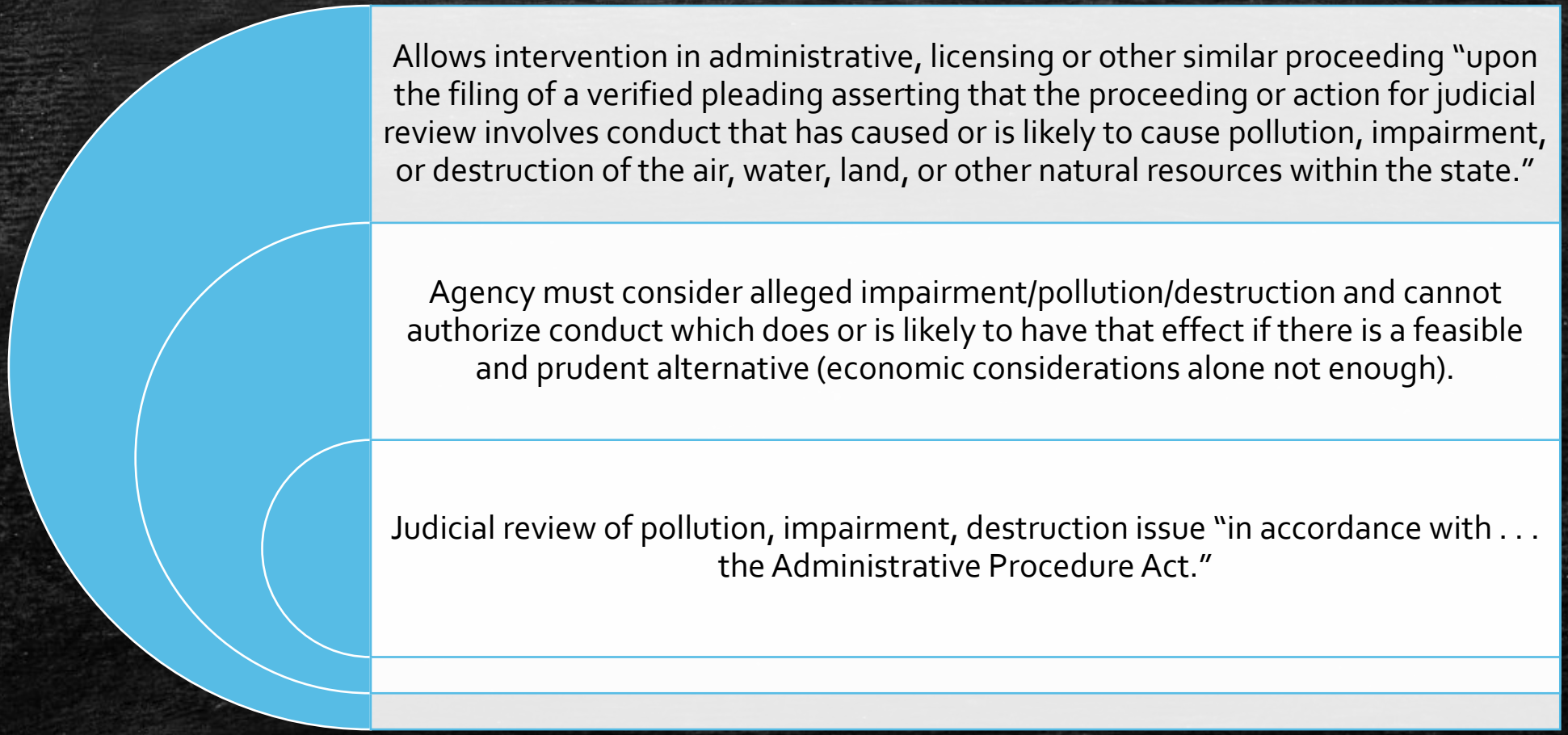
The supreme court did not.

The supreme court held, in relevant part, that

- Section 3 could be used to challenge "administrative action" of state agencies.
- No special deference is due to an administrative agency if administrative action is challenged under Section 3.
- Section 10 is not the exclusive remedy "for all claims that have something to do with permits."

The court concluded: "In the end, sections 116B.03 and 116B.10 are best read together as providing separate—and in some cases, alternative—causes of action."

A Brief Note on Section 9 (§ 116B.09)



MERA and Agency Deference

MERA departs from general principles of agency deference that often govern in challenges to agency action.

In Section 3 actions, the district court sits as a court of first impression, and no special deference is due to the agency.

In Section 10 actions, citizens can challenge all types of agency action, even if the appeal period has lapsed, and force agencies to institute administrative proceedings to re-justify their decisions, subject to further judicial review

MERA and Agency Deference

As one expert, in the context of discussing Michigan's similar statute, put it:

- "MEPA's thrust runs counter to the usual theme of deference to the expertise of administrative agencies, a theme that underlies many of the judicial decisions construing state environmental laws. MEPA explicitly authorizes courts to conduct a *de novo* review of administrative agency decisions to determine whether they have afforded sufficient protection to the environment . . . ."

Put another way, MERA and equivalent statutes in other states are less deferential to agency expertise, giving courts broad power to

- review agency action; and
- remedy violations to avoid environmental damage.

Agency Deference in the Federal Courts

MERA is an old statute. But that combination—skepticism of agency expertise and broad judicial review—aligns with current trends at the U.S. Supreme Court.

- *Chevron* deference is on the chopping block this term
- New (or, at minimum, revamped) major questions doctrine used to strike down agency action in big cases on the environment and student loans
- *Auer* deference survived, but barely, and in hobbled form

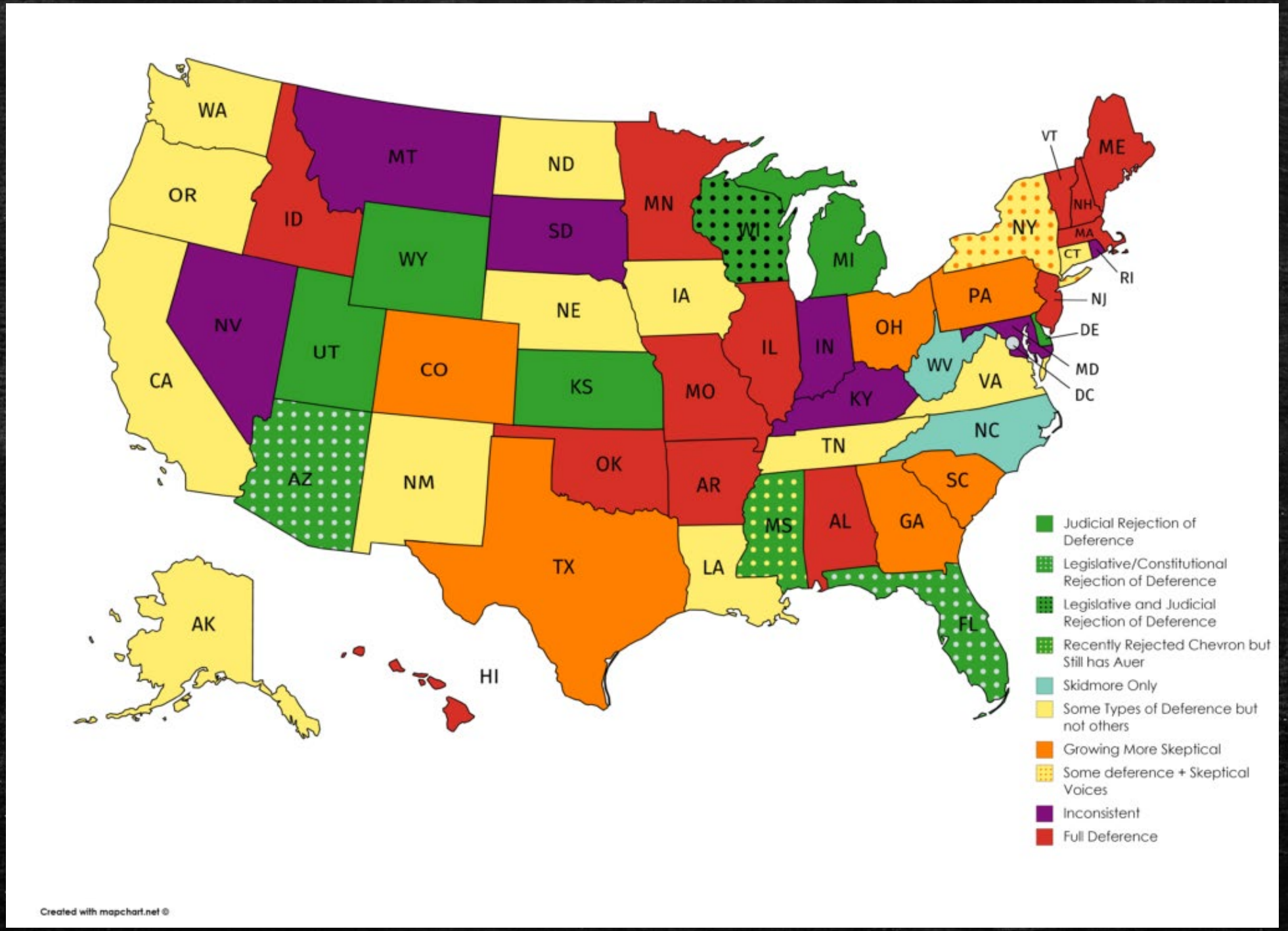
Agency Deference in States

Several state supreme courts have held that the judicial branch is never required to defer to an agency's interpretation of the law. Other states have done the same by statute.

Minnesota's not one of them—but there are some hints that the supreme court is conducting more searching review of agency action.

Recently emphasized that courts may **but are not required to** defer to an agency's interpretation of an ambiguous statute.

Recently emphasized that courts should defer to an agency's reasonable interpretation of an ambiguous rule, but "reasonableness" review has teeth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DC
AK
HI
Judicial Rejection of Deference
Legislative/Constitutional Rejection of Deference
Legislative and Judicial Rejection of Deference
Recently Rejected Chevron but Still has Auer
Skidmore Only
Some Types of Deference but not others
Growing More Skeptical
Some deference + Skeptical Voices
Inconsistent
Full Deference
Created with mapchart.net ©

Questions?

Sources

- Statutes
  - Minn. Stat. ch. 116B
  - Minn. Stat. §§ 14.44-.45
  - Minn. Stat. § 14.69
- Representative Cases
  - *West Virginia v. EPA*, 597 U.S. 697 (2022)
  - *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)
  - *In re Denial of Contested Case Hearing Requests*, 993 N.W.2d 627 (Minn. 2023)
  - *In re Reissuance of an NPDES/SDS Permit to United States Steel Corp.*, 954 N.W.2d 572 (Minn. 2021)
  - *White Bear Lake Restoration Ass'n v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373 (Minn. 2020)
- Secondary Sources
  - Minn. L. Rev. Editorial Board, *Note: The Minnesota Environmental Rights Act*, 56 Minn. L. Rev. 575 (1972)
  - Daniel M. Ortner, *The End Of Deference: the States That Have Rejected Deference*, Yale J. on Reg.: Notice & Comment (Mar. 24, 2020)
  - Daniel P. Selmi & Kenneth A. Manaster, *State Environmental Law* § 16.53 (2022)

A Look at Other States and the Future

Colin O'Donovan

Roadmap of Discussion

1. Which other states have similar environmental protection statutes.
2. Why it is worth considering other states' statutes and caselaw.
3. How have Minnesota Courts relied on other states' MERA-like statutes, or not, to inform its own precedent.
4. What do these cases suggest for future decisions.

Other States With MERA-Like Statutes

- Michigan
- Connecticut
- New Jersey
- Florida
- Indiana
- South Dakota

Be Careful

- Not all statutes are created equal and not all of the statutes have the same provisions as MERA.

- Three state environmental rights statutes, Connecticut's and South Dakota's provide no explicit cause of action for violation of governmental regulations, and Florida's provides no explicit cause of action for a general material adverse effect. *See* Conn.Gen.Stat. §§ 22a–14—22a–20 (1993); S.D.Codified Laws Ann. §§ 34A–10–1—34A–10–17 (1992); Fla.Stat.Ann. § 403.412 (1993).

- Michigan's environmental protection act, the model for MERA, provides a basis for challenging the validity of governmental pollution standards when they are "involved" in a suit for general material adverse effect, but gives the "no prudent and feasible alternative" defense to all actions brought under this statute. *See* Mich.Comp.Laws Ann. §§ 691.1202—691.1203 (West 1987).

- A side-by-side comparison sometimes is the best way to determine if a relevant provision is common among the statutes.

Why is it worth considering other states?

1. Statutory argument

2. Persuasive authority

3. Significantly increasing the body of case law to draw on for ideas and arguments

4. It can be time consuming but not incredibly difficult

Statutory Argument

PEER:

"Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them. *Hunt v. Nevada State Bank*, 285 Minn. 77, 98, 172 N.W.2d 292 (1969)."

"A statute adopted from another state is presumed to have been taken with the construction there placed upon it. *Id.*"

Wacouta:

"MERA is modeled on the Michigan Envitoneronmental Protection Act. Mich.Comp. Laws §§ 691.1202–.1207 (1990). *PEER,* 266 N.W.2d at 866–67 n. 6. As a result, we generally construe MERA in accordance with the construction placed upon the Michigan act. *Id.*

Persuasive Value

State by Kasden v. Independent School Dist. No. 97:

- Whether a 1.7 acre grove of various trees was a protectable natural resource.

- The grove consisted of Norway pine, white pine, jack pine, aspen, and a variety of other smaller hardwoods, bushes, and shrubs. A number of the Norway pines, the largest of which exceeds 60 feet in height, are over 100 years old and have a life span of 150 to 250 years.

- "In *PEER* the court refers to the Michigan statute (MEPA) after which MERA is modeled and relies on the reasoning in several Michigan opinions which interpret MEPA. *PEER,* 266 N.W.2d at 866. **The Michigan courts have consistently held that trees constitute a natural resource under MEPA. *City of Portage v. Kalamazoo County Road Commission,* 136 Mich.App. 276, 280-81, 355 N.W.2d 913, 915 (1984);** *Stevens v. Creek,* 121 Mich.App. 503, 508, 328 N.W.2d 672, 675 (1982); *Eyde v. State of Michigan,* 82 Mich.App. 531, 540, 267 N.W.2d 442, 447 (1978), *lv. den.* 403 Mich. 812 (1978)."

- City of Portage nearly on all fours and there the Michigan Court found that removing some trees did not rise to the level of impairment or destruction.

Or Not So Persuasive Value

City of Mankato v. Dickie:

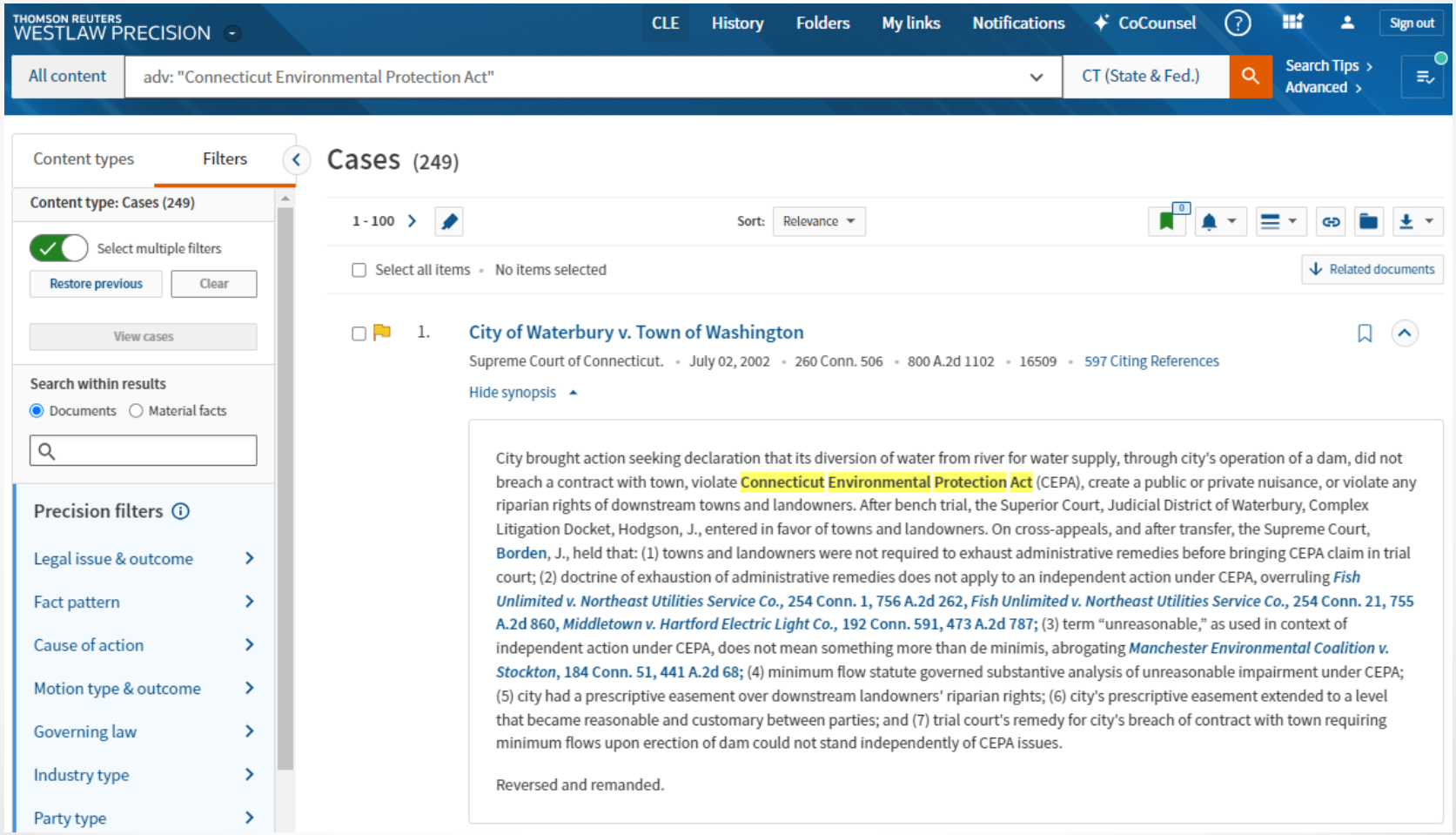
"We also observe that Dickie's reliance on *Gangemi v. Zoning Bd. of Appeals of Town of Fairfield,* 255 Conn . 143, 763 A.2d 1011 (Conn.2001), a case from a foreign jurisdiction with distinguishable facts, lacks any precedential or persuasive value here."

Increasing Body of Case Law

- There's only about 140 Minnesota MERA cases.
- Connecticut has well over 200 cases.
- Michigan has another 180 cases.
- New Jersey has about 100 cases.
- Considering other states' laws exponentially increases the likelihood of a similar fact pattern or judicial interpretation.

It's Not Difficult

- For many of the states, you can run a search by simply inserting the state's name followed by "Environmental Rights Act" or "Environmental Protection Act."



324.1701. Actions for declaratory and equitable relief; parties; standards for pollution or ...

MI ST 324.1701 • Michigan Compiled Laws Annotated • Chapter 324. Natural Resources and Environmental Protection (Approx. 2 pages)

Notes of Decisions (105)

Sort: Procedural Order

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latter county and therein made the challenged decision. Robinson v. Department of Transp. (1981) 327 N.W.2d 317, 120 Mich.App. 656. Injunction 1504

6. Exhaustion of administrative remedies

An administrative agency's decision may be challenged directly under the Michigan Environmental Protection Act (MEPA); it is unnecessary for a party to exhaust administrative remedies before seeking relief under the MEPA. Preserve The Dunes, Inc. v. Department of Environmental Quality (2002) 655 N.W.2d 263, 253 Mich.App. 263, appeal granted 661 N.W.2d 231, 468 Mich. 869, reversed 684 N.W.2d 847, 471 Mich. 508, on remand 690 N.W.2d 487, 264 Mich.App. 257. Environmental Law 665

Environmental Protection Act (EPA) did not require exhaustion of administrative remedy for judicial review of issuance of permit for landfill, allegedly in violation of EPA. Township of Holly v. Department of Natural Resources (1991) 473 N.W.2d 778, 189 Mich.App. 581, on rehearing in part 486 N.W.2d 307, 194 Mich.App. 213, vacated on other grounds 487 N.W.2d 753, 440 Mich. 891. Administrative Law And Procedure 229; Environmental Law 665

Plaintiffs alleging that drain project undertaken by defendant violated certain provisions of Environmental Protection Act of 1970, § 691.1201 et seq., were not required to exhaust remedies provided in Drain Code, § 280.1 et seq. and Soil Erosion and Sedimentation Control Act, § 282.101 et seq., before court could take jurisdiction under Environmental Protection Act. People ex rel. Atty. Gen. v. Clinton County Drain Com'r (1979) 283 N.W.2d 815, 91 Mich.App. 630. Environmental Law 665

6.2. Duties of administrative agency

Department of Environmental Quality (DEQ) was required to deny oil company's permit applications to drill exploratory wells for oil and gas in nondevelopment region of state forest even though permits concerned private land, where consent order designating certain portion of forest as a nondevelopment region, which order had been adopted by environmental regulations, stated that the nondevelopment region "will not be subject to oil and gas development," and there was no clear public policy favoring drilling. Schmude Oil, Inc. v. Department of Environmental Quality (2014) 856 N.W.2d 84, 306 Mich.App. 35. Environmental Law 44

6.5. Standing

By enacting statute permitting suit to vindicate right to clean air, water, and other natural resources, the legislature cannot compel a court to exercise the judicial power beyond constitutional standing limits any more than court can legitimately enlarge or diminish the legislature's constitutionally prescribed legislative power. Michigan Citizens for Water Conservation v. Nestle Waters North America Inc. (2007) 737 N.W.2d 447, 479 Mich. 280, rehearing denied 739 N.W.2d 332, 480 Mich. 1203. Environmental Law 651

Neither state constitutional provision establishing public interest in natural resources nor statute permitting suit to vindicate right to clean air, water, and other natural resources lightens a plaintiff's burden to satisfy traditional standing requirements in

Have Minnesota Courts Been Influenced?

- Undeniably Yes.
- More recently, Minnesota Court have not been referring to other court's decisions as often.
- Similar fact patterns can still persuade.

White Bear Rod and Gun Club

The *Michigan Supreme Court in Ray v. Mason County Drain Commissioner*, 393 Mich. 294, 224 N.W.2d 883 (1975), discussed the discretion given to the courts to determine if there has been a violation of environmental rights even in the absence of established standards or statutes. The court stated: “The Legislature in establishing environmental rights set the parameters for the standard of environmental quality but did not attempt to set forth an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution or impairment. Rather the Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality.

The act allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to take into consideration changes in technology which the Legislature at the time of the act's passage could not hope to foresee.” 393 Mich. 306, 224 N.W.2d 888. (Emphasis supplied.)

PEER v. MEQC

- Following the lead of Michigan, , *see e. g.*, *Michigan State Highway Comm. v. Vanderkloot*, 392 Mich. 159, 220 N.W.2d 416 (1974); *Ray v. Mason County Drain Commissioner*, 393 Mich. 294, 224 N.W.2d 883 (1975), this court has recognized that MERA provides not only a procedural cause of action for protection of the state's natural resources, but also delineates the substantive environmental rights, duties, and functions of those subject to the Act. *County of Freeborn v. Bryson*, 309 Minn. 178, 243 N.W.2d 316 (1976); *Corwine v. Crow Wing County*, 309 Minn. 345, 244 N.W.2d 482 (1976); *MPIRG v. White Bear Rod & Gun Club*, Minn., 257 N.W.2d 762 (1977). Although respondents would limit this substantive cause of action to those situations in which no other environmental legislation exists, their reasons for doing so are not persuasive.

- Minnesota's interpretation is also consistent with that taken by the Michigan courts. In an unreported decision in which the plaintiff challenged the Michigan Department of Natural Resources' grant of a permit for the construction of a dam under the Dam Act, which had become effective subsequent to its Environmental Protection Act, the court held that a citizen could maintain an action to ensure that regulatory agency decisions were environmentally defensible on their merits. Sax & Connor, Michigan's Environmental Protection Act of 1970: A Progress Report, 70 Mich.L.Rev. 1004, 1061.

McGuire

- The texts of several state environmental rights or protection acts passed during the same time period as MERA and also modeled after Michigan's Environmental Protection Act, support reading Minn.Stat. § 116B.04 as limiting the affirmative defense to cases brought under the second paragraph.

- New Jersey's Environmental Rights Act and Indiana's environmental suit statute provide distinct defenses for actions based on governmental standards violations versus those based on a general material adverse effect. *See* N.J.Stat.Ann. §§ 2A:35A–4—2A:35A–7 (West 1987) (prudent and feasible alternative analysis only in cases of general material adverse effect, not when governmental regulations violated); Ind.Code Ann. § 13–6–1–2 (Burns 1992) (defendant can make prima facie defense by showing compliance with appropriate rule, or when no applicable rule, by showing no feasible and prudent alternative).

Wacouta

We generally construe MERA in accordance with the construction placed upon the Michigan act. *Id.* Michigan courts consider the following factors in determining whether an action's effect on a natural resource affects or is likely to affect the environment so as to justify judicial intervention:

(1) whether the natural resource involved is rare, unique, endangered, or has historical significance, (2) whether the resource is easily replaceable, (for example, by replanting trees or restocking fish), (3) whether the proposed action will have any significant consequential effect on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed), and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number, considering the nature and location of the wildlife affected. *City of Portage v. Kalamazoo Co. Rd. Comm'n,* 136 Mich.App. 276, 355 N.W.2d 913, 916 (1984).

We adopt this test for use in determining whether the second prong of a prima facie MERA case has been established; that is, whether actual or likely pollution, impairment, or destruction of a natural resource has or is likely to have a material adverse effect on the environment.

Schaller

- The *Wacouta* court adopted the Michigan test to give effect to the statutory limitation that conduct must "materially adversely affect" the environment to be enjoined as pollution, impairment or destruction of natural resources under Minn.Stat. § 116B.02, subd. 5. *Id.*

- We believe the *Wacouta* test is both consistent with our prior caselaw and harmonious with the environmental policy objectives underlying MERA.

Matter of U of M

The MPCA's examination of the proposed permit in light of the existing site is a reasonable interpretation of the statute.

MERA is modeled after the Michigan Environmental Protection Act. We are guided generally by the construction placed on the Michigan act. *State ex rel. Wacouta Township v. Brunkow Hardwood Corp.,* 510 N.W.2d 27, 30 (Minn.App.1993).

Michigan courts have held that to determine if a prima facie showing of pollution, impairment, or destruction of a natural resource has been made the trial court should evaluate the environmental situation before the proposed action and compare it with the probable condition of the environment after. *Rush v. Sterner,* 143 Mich.App. 672, 373 N.W.2d 183, 186 (1985); *see also Kent County Rd. Comm'n v. Hunting,* 170 Mich.App. 222, 428 N.W.2d 353, 358 (1988), *review denied* (Mich. June 21, 1989).

Thus, we conclude that MPCA did not err in its projected emission evaluation by comparing the current environmental condition with the probable environmental condition as projected.

White Bear Lake

The dissent referenced a case nearly directly on point from Michigan's Supreme Court.

The court cites no state or federal court decisions that hold that an executive branch decision is conduct reached by Minn. Stat. § 116B.03, subd. 1, or equivalent statutes, and none are immediately apparent.

To the contrary, the only case law on the subject is from the Michigan Supreme Court, which held that "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends [the Michigan Environmental Protection Act]." *Pres. the Dunes, Inc. v. Dep't of Envtl. Quality*, 471 Mich. 508, 684 N.W.2d 847, 853 (2004).

We have specifically recognized that MERA is modelled after the Michigan Environmental Protection Act. State by *Schaller v. Cty. of Blue Earth*, 563 N.W.2d 260, 265 (Minn. 1997). In doing so, we also borrowed from the reasoning of Michigan's Supreme Court when interpreting the statute. *See id.* at 266. Applying the same harmonization, I would adopt the view that administrative decisions do not constitute conduct.

White Bear Lake (Cont.)

The majority opinion took a very different view of how the Minnesota Supreme Court has considered foreign case law in the past:

The dissent's invocation of a Michigan case, *Preserve the Dunes, Inc. v. Department of Environmental Quality*, 471 Mich. 508, 684 N.W.2d 847 (2004), is not persuasive.

However murky Michigan law [may be], when interpreting MERA, we have ***always*** engaged in our own analysis. *See State by Schaller v. Cty. of Blue Earth*, 563 N.W.2d 260, 265–67 (Minn. 1997) (adopting a "modified formulation" of Michigan's test based on Minnesota case law and MERA).

Brief Example

2. The only legislative indications as to how "conduct" should be interpreted do not suggest any intent to apply it more broadly than "project,"

As discussed above, there is no statutory basis to ascribe a broader definition to "conduct" governed by MERA than projects governed by MEPA. The City described the project-specific limitation in MEPA at length in its motion to dismiss memorandum and will not repeat it here. But those project-specific requirements achieve the primary directive of MEPA prohibiting "state action significantly affecting the quality of the environment." Minn. Stat. § 116D.04, subd. 6 (emphasis added). And the same section ends by mandating that [e]conomic considerations alone shall not justify such *conduct*." Minn. Stat. § 116D.04, subd. 6 (emphasis added). Therefore, the only legislative direction that can be inferred from use of the word "conduct" is that it intended no broader reach to MERA than MEPA, and certainly evinces no intent that a court should ignore MERA's causation requirement.

In addition, MERA was based on Michigan law. *PEER*, 266 N.W.2d at 866 & n.7 (following the lead of Michigan in interpreting scope of MERA's protections and noting that "Michigan was the first state to enact a statute like MERA, and Minnesota's statute is modeled after it."). That law similarly applied, and applies, to certain "conduct." *See Ray v. Mason County Drain Comm'r*, 224 N.W.2d 883, 889 (Mich. 1975) (quoting original language); Mich. Comp. Laws Ann. § 324.1703 (current language same in relevant part).

But Michigan not only rejects the broad interpretation suggested by Plaintiffs, it applies a narrower scope than even the City suggests. Regulated "conduct" under Michigan's version of MERA does not apply to government issuing permits for specific projects, but only to the action of building the project itself. *See Preserve The Dunes, Inc. v. Dep't of Envtl. Quality*, 684 N.W.2d 847, 853 (Mich. 2004) [13] ("DEQ determinations of permit eligibility... are unrelated to whether the applicant's proposed activities on the property violate MEPA [Michigan's MERA equivalent]. [¶] An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA.") (emphasis added); see also Lakeshore Group v. Michigan, No. 341310, 2018 WL 6624870, at *3 (Mich. Ct. App. Dec. 18, 2018) ("[T]he 'action' of an administrative decision does not pollute, impair, or destroy natural resources; at most, the 'action' of an administrative decision authorizes conduct that does so. Simply put, the issuance of a permit is too far removed from the environmental harm to be actionable as 'conduct' under MEPA.") (emphasis added).

Here, of course, the City does not dispute whether a permit issued for a specific contemplated project would be challengeable under MERA. But this underscores the weakness of Plaintiffs' contention that "conduct" can only be interpreted broadly. In Michigan, on which Minnesota based the law, it is in fact interpreted even more narrowly than the City proposes here.

Morgan v. Dep't of Environmental Protection (Fl.)

- Homeowner applied for a permit with the Department of Environmental Protection to use sovereign submerged lands for the construction of a dock. The Department granted the permit and homeowner began construction.

- Department learned the permit application contained false information and initiated an administrative enforcement proceeding.

- Neighbor sought to intervene in the administrative proceeding to have the dock removed.

- Court of Appeals concluded that the administrative law judge properly ruled that citizens do not have a right to intervene in agency enforcement proceedings. The Court interpreted the statute to be limited to licensing and permit proceedings.

Morgan (Cont.)

Florida Stat. 403.412

•"In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.

MERA, Minn. Stat. 116B.09

•"Except as otherwise provided in section 116B.10, in any administrative, licensing, or other similar proceeding, and in any action for judicial review thereof which is made available by law, any natural person residing within the state, the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, or any partnership, corporation, association, organization or other legal entity having shareholders, members, partners, or employees residing within the state shall be permitted to intervene as a party upon the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state

Patterson v. Vernon Tp. Council (N.J.)

- In support of its right to counsel fees for its work under the Historic Places Act, plaintiffs cite *N.J.S.A.* 2A:35A–8, the provision of the ERA that requires a court to "remit" the parties to administrative proceedings that "are required or available to determine the legality of the defendant's conduct...."

- That provision, on its face, is applicable only to a section 4a action, where the plaintiff claims a violation of existing law. Such a claim ordinarily should be determined in the first instance by the agency that is charged with enforcement of environmental laws.

- We need not address whether such a referral to the agency entitles that plaintiff, if it prevails, to counsel fees for the administrative proceedings. That is not this case.

Will Past Be Prologue?

- What to protect and how much protection to afford has been a constant in MERA and the tension will likely always remain.

- Flexible standard allows courts to address site specific issues but also makes litigation uncertain.

- You have the ability to shape the law of MERA and to be shaped by other courts' interpretation of the MERA-like laws, provided you've researched them.