

CITIZEN PARTICIPATION IN WATER QUALITY DECISIONS

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ABSTRACT

Citizen participation in water quality decision making is a crucial step towards individual empowerment in a process that may affect a community. Public involvement in agency decision making centers around three types of participation: public meetings, notice and comment rule-making, and adjudication. Citizens attempting to use these traditional participation opportunities are disadvantaged in their attempts to influence decision makers. This paper discusses various methods of citizen participation occurring in Minnesota from the Administrative Procedures Act, to the use of citizen boards and advisory committees, citizen water quality monitoring efforts, and the potential use of citizen suits.

INTRODUCTION

There are many ways that citizens can become involved with water quality decision making, and some are clearly more effective than others. When functioning at its best, public participation integrates the needs of stakeholders (parties interested in a given issue) into a decision making process. The citizen participation opportunities discussed here focus on examples from Minnesota and include notice and comment rulemaking under the Minnesota Administrative Procedure Act (MAPA);¹ participation on citizen boards and citizen advisory committees; monitoring of water quality parameters and compliance monitoring of Discharge Monitoring Reports (DMRs) and National Pollutant Discharge Elimination System (NPDES) permit requirements;² as well as citizen suit provisions of the Minnesota Environmental Rights Act (MERA).³

MINNESOTA ADMINISTRATIVE PROCEDURES ACT

Administrative procedures are like an operating manual for government agencies and provide criteria for the development of rules, orders, and the numerous functions that agencies undertake. Public involvement in government decision making generally focuses on three opportunities for participation: public meetings, notice and comment rule making, and adjudication. Citizens attempting to use MAPA participation avenues are often frustrated in their attempts to influence decisions. One reason for this is that public meetings usually occur long after permit discussions have taken place between the agency and industry. At this point the agency supports the decision because it has invested time and energy in this process. Citizen participation in this model simply occurs too late in the decision making process to influence the outcome.

Rulemaking and adjudication procedures generally involve scientific and legal issues, requiring citizens to hire scientists and lawyers to challenge agency regulations.⁴ This limits citizen involvement, but even when the resources to challenge agency decisions exist, at this point in the process courts usually defer to the agency and its expertise. The court will grant limited review to determine only whether agency action was within its authority or whether the agency acted arbitrarily or capriciously.⁵

Despite these drawbacks there are avenues open to citizen participation within MAPA procedures. Permit hearings generally involve public meetings as a vehicle for citizens to voice their opinion. Frequently this type of participation is limited in time and is presented to a panel or individual that listens to the opinion rather than engage in a dialog about the policy. It is important however, that citizens bring their concerns and knowledge to public meetings in order

to bring forth new facts and raise questions that require the agency to conduct further research related to the issue.⁶

An important reason for following these administrative steps relates to what is known as the “exhaustion doctrine” which implies that a party is not able to get a court to hear a case for an alleged or threatened injury until administrative remedies have been exhausted.⁷ Exhaustion simply requires that the plaintiff take all steps available at the agency level first when attempting to influence a decision.⁸ Agencies are experts in carrying out their statutory mandates and courts prefer that the agency attempts to remedy the situation before the case is brought to it.

Despite the limitations and frustrations of public involvement within the MAPA format, it is crucial that citizens participate at all levels open to them in order to avoid being hampered by the exhaustion doctrine⁹ and to build a record that a court can review in the advent of a subsequent citizen suit.

When citizens are frustrated in their attempts to dialog in a meaningful way with agencies they become suspicious and lose trust in the decision making process. As a result, this lack of empowerment leads to cynicism towards their ability to influence agency decisions and there is an increased use of the political and legal process to resolve conflicts.¹⁰ When the first opportunity for public involvement occurs during the last steps of a permitting process, it is easy to understand why feelings of frustration and anger are directed toward agency staff and the decision making process. Furthermore, any data presented by citizens at this point is offered too late in the process, after risk assessments and regulations have been adopted.¹¹

Citizen interaction with administrative procedures can be viewed as a necessary evil. The exhaustion doctrine requires citizens to take the necessary administrative steps, even though those steps are not especially effective in influencing agency decisions. There are more gratifying ways to involve citizens in decision making as the following examples illustrate.

MINNESOTA POLLUTION CONTROL AGENCY CITIZEN BOARD

The Minnesota Pollution Control Agency (MPCA) is the administrative agency that creates environmental rules, distributes NPDES permits, and enforces environmental regulations. A board of nine lay citizens are the decision makers for one of the most important administrative agencies in Minnesota. Board members are not required to have any experience or expertise in the functions of the MPCA.¹² The only requirement found in the statute that created the Board is that membership be "broadly representative of the skills and experience necessary to effectuate the policy" and that one member be "knowledgeable in the field of agriculture."¹³ Board members are appointed by the governor, with the senate's consent, for staggered four year terms.

Perhaps the greatest benefit of this Citizen Board is how it changes the nature of communication between parties. The use of a Citizen Board requires groups making presentations to clearly state their position using non-technical language. Likewise, citizens with little scientific background may feel more at ease presenting their concerns to fellow lay citizens. Using a Citizen Board as the agency decision making authority encourages agency staff to be more receptive to public participation and is likely to create a habit of listening respectfully to non-scientists.¹⁴

Any process which sincerely involves citizen input is likely to take longer than decisions made directly by agency staff. Additional time is required to provide board members with information and education on the technical and legal aspects of pollution control. Despite this additional time requirement the final outcome provides better decisions because it includes a broader range of opinions and information which would otherwise not have been obtained by an exclusively agency driven process.

GREAT LAKES WATER QUALITY AGREEMENT

The International Joint Commission¹⁵ (IJC) was formed by the United States and Canada in 1909 as a result of the Boundary Waters Treaty. The IJC functions as a unitary body authorized to provide neutral solutions to issues involving water bodies shared by the two countries. Under the Great Lakes Water Quality Agreement (GLWQA), the IJC is required to monitor progress of the two countries as to their implementation of the goals and objectives of the agreement. The Commission's ability to resolve or prevent conflicts relating to transboundary water resources relies on the public's perception of its credibility, and on citizen willingness to support action by the Parties to accept and implement IJC recommendations.¹⁶

The right to public participation in IJC decisions was guaranteed in 1909 under Article XII of the Treaty, which states that "all parties interested therein shall be given convenient opportunity to be heard". Public participation is an effective way to provide oversight of agency progress and accountability, as well as allowing for the integration of community values that otherwise would have been lost in a typical top down agency process. But the main objectives of public participation within the context of the GLWQA are to build consensus regarding water quality problems and solutions, and to provide the foundation for a sustained political will which is necessary to carry out implementation of cleanup activities.¹⁷

Areas of Concern, Remedial Action Plans and Citizen Advisory Committees

The goal of restoring the Great Lakes and involving citizens in that effort, was furthered by Annex II of the 1987 Protocol amending the Agreement. Annex II identified and targeted 43 pollution hot spots around the Great Lakes and named them Areas of Concern (AOC).¹⁸ Local participation is encouraged from the communities surrounding AOCs to develop and implement Remedial Action Plans (RAPs).

The purpose of a RAP is to restore impaired beneficial uses¹⁹ in each AOC. Two unique attributes of RAPs include the use of an ecosystem approach to resolving water quality problems, and includes a focus on public participation throughout the RAP process. Each U.S. AOC has a Citizen Advisory Committee (CAC), or in Canada a Public Advisory Committee (PAC), which carries out various functions. To guide this process, each RAP has three stages which it must complete. In Minnesota, the CAC to the St. Louis River RAP identified the impaired beneficial uses (contributing significantly to Stage I), developed strategies for remediation of pollution problems and to restore beneficial uses (Stage II) and is developing methods for implementation and monitoring of pollution remediation strategies (Stage III). Currently as part of Stage III efforts, CAC members are developing plans to become a nonprofit organization. The non-profit status will allow the CAC to function more independently from government agencies (budget cuts have removed staff positions) and will allow members to raise funds which can be used for clean up efforts. As an advisory committee recommendations are made to the MPCA and the Wisconsin Department of Natural Resources.²⁰

There are several positive aspects of this type of citizen involvement. There is a focus on consensus building among the various stakeholders involved in RAPs ,which until the recent introduction of alternative dispute resolution has been unprecedented in government agencies. In addition, public involvement happens prior to a decision and therefore creates an opening for influencing agency decisions. There is also opportunity to nurture commitments for project implementation from those with a stake in the decision (industry, environmental groups and citizens are at the table together). The process is also amenable to dispute resolution techniques and communication about undesirable impacts in committee meetings.²¹ There has been a high degree of citizen empowerment in the St. Louis River RAP because of active involvement in all three stages of the process.

Citizen Water Quality Monitoring

The IJC has emphasized the need for school-based education to focus on the Great Lake's value to the region's well-being, and on the role of the individual and society in assuring the health of the ecosystem.²² The Remedial Action Plan process allows for opportunities to

teach school students and the public about water quality issues by using problems found in local AOCs as a focal point for education. The St. Louis River Watch²³ was created as a component of the St. Louis River RAP in order to develop a citizen outreach, education, and water quality monitoring program for the St. Louis River Area of Concern.

Citizen water quality monitoring has become an uprising of creative activity that is adding a powerful new dimension to environmental protection.²⁴ Water quality monitoring programs encourage individuals to take personal responsibility for their local environment, and to take informed action to educate and change environmental policy within their community.

Citizen monitoring programs work with school students and citizens to teach them how to monitor and protect water quality. Most programs monitor for at least nine water chemistry parameters²⁵ and conduct a survey of the benthic macroinvertebrate community²⁶ in order to obtain information on water quality. Some programs also conduct toxicity tests²⁷ and biological surveys.²⁸

The beauty of these programs is that participants are engaged in a hands on learning experience which can transform into direct citizen participation with a pollution problem. People are actively learning about a river which flows through their community, and they monitor the health of that river over a long period of time. This level of participation begins to make a real difference when viewing the entire gamut of citizen participatory models available in water quality decision making. Through this activity, citizens are becoming ambassadors for their river. They adopt the river and monitor its health, alerting government officials, and at times the media, when they notice a change in water quality parameters. Citizens tend to participate in public meetings only when they are strongly motivated to do so²⁹ and Citizen Monitoring programs provide the education and interest needed to build a motivated public.

From Data to Action

In 1988 the first edition of the National Directory of Volunteer Environmental Monitoring Programs³⁰ listed 44 monitoring programs in 24 states. The fourth edition, published in 1994 listed 517 programs in 45 states, (nearly a six-fold increase in six years)³¹ whereas the fifth edition (1998)³² listed 772 programs in every state of the Union. The increase in the number of citizen monitoring programs affirms that school students and citizens are interested in conducting water quality monitoring programs.

The fifth edition of the Directory reported that the most common use of monitoring data (84% of programs) is education for building public awareness about natural resources and the threats they face. The next most common uses of data include establishing baseline conditions

(67%), screening for problems (61%), research (53%) and 107 programs (14%) provide data to state agencies for use in the biennial 305(b) report (the state of the state's waters) to EPA and Congress.³³ These are encouraging statistics that demonstrate government agencies' growing acceptance of the validity of data collected by citizen monitoring programs.

There are several exciting opportunities for the use of citizen data collected through these types of programs. Provided that data is collected with laboratory quality equipment and with sufficient quality control and assurance to withstand scrutiny (the challenge is to collect data that is of the same quality that industry and government collects), there are several next steps that citizens can take. Citizens need to understand their data well enough to be confident in using it to influence a city council or planning commission with the goal of affecting water or land use changes. Some programs are successfully engaged in this step.³⁴ Another step which is not frequently pursued by citizen monitoring programs, is to compare citizen data with that collected by industries as part of their NPDES permit requirements. All industries which have a permit to discharge wastewater are required to monitor their effluent and report that data to state or federal agencies in a discharge monitoring report (DMR). Data provided in DMRs is available to citizens from the agencies. Based on a survey of 531 randomly selected major dischargers in 6 states, the General Accounting Office estimated that "82% of the dischargers exceeded their NPDES permit limits at least once during an 18 month period and that 31% of the dischargers that exceeded permit limits for one or more pollutant did so by 50% or more for at least 4 consecutive months".³⁵ An untapped potential exists for citizens to use their water quality data to insist that regulatory agencies bring a permittee into compliance, or to use it in the context of potential citizen legal action. There seems to be a natural nexus between citizen interest in water quality monitoring and citizen suits.

Citizen Vs. Industry and Government Data

While the regulated community usually has access to the best and sometimes the only relevant data, the data base of citizen groups is usually inadequate. Frequently, citizens attempting to challenge this data will try to discredit industry statistics, usually without an alternative source of data. This is where the use of citizen monitoring programs can assist in data collection as well as provide the language and scientific experience that citizens need in order to communicate with agencies.

A survey conducted with MPCA staff and Minnesota residents³⁶ indicated that agency staff are skeptical about the accuracy of citizen scientific data. Staff viewed industry data as accurate despite the lack of agency monitoring to confirm that data.³⁷ Over 48% of agency staff

believed that industry estimates of health risk were reasonably accurate.³⁸ In contrast, only 3% believed the same for citizen data.³⁹ Yet, 59% of agency staff were skeptical of the ability of scientists to accurately predict the harm from most chemicals.⁴⁰

Because the agency often has limited resources to conduct routine water quality monitoring for regulatory purposes,⁴¹ industry becomes the major source of data for agency use in risk assessment, permit applications, and discharge monitoring.⁴² With the advent of citizen monitoring programs, citizens are now able to generate site specific assessment data in a format readily adaptable for use in compliance monitoring.⁴³ Citizen data has the ability to rival industry data as programs become more experienced and sophisticated.⁴⁴

The Puget Soundkeeper program is an excellent example of the potential of combining citizen monitoring with citizen legal action. Over 200 volunteers patrol the Puget Sound using kayaks, small boats, and on foot, searching for signs of unauthorized pollution.⁴⁵ Volunteers attend training sessions to study topics from biology to the Clean Water Act. One person is trained in handling hazardous substances and conducts the water quality sampling.⁴⁶ The program reviews industry NPDES records to determine a history of non-compliance, and then uses the citizen suit provision under Section 505 of the Clean Water Act to litigate for compliance.

MINNESOTA ENVIRONMENTAL RIGHTS ACT

In *Defending the Environment*,⁴⁷ Joseph Sax concluded that the power of the judiciary should be increased in environmental disputes to allow citizens, through litigation, to play a greater role in environmental protection.⁴⁸ His vision was that the judicial process allow citizens to do more than participate in a public hearing, by providing opportunities for citizens to initiate actions to protect the environment. "[T]he fact is that the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. He is perfectly capable of fighting his own battles--if only he is given the tools with which to do the job."⁴⁹ Those tools need to blend education and information about water quality along with mechanisms for citizen action such as citizen suit provisions found in state and federal statutes.

In 1969 a bill was introduced to the Minnesota Legislature⁵⁰ that was very similar to the Model Environmental Protection Act developed by Sax. The Minnesota Environmental Rights Act (MERA) extends the right to initiate actions to any person residing within the state to enforce existing environmental quality standards, enjoin conduct that "materially adversely affects or is likely to materially adversely affect the environment", intervene in or compel

judicial review of administrative proceedings concerning the environment, or challenge state environmental standards or actions.⁵¹

MERA changes the burden of proof, requiring that the plaintiff make only a prima facie case of pollution, impairment or destruction. A prima facie case is made by showing that a protectable natural resource is at issue and that the defendant's conduct results, or is likely to result, in the pollution, impairment or destruction of that resource. The burden is then on the defendant to rebut the prima facie showing.⁵²

Within the framework of Clean Water Act citizen suits (Section 505) there is a mechanism that allows penalties to be used for the mitigation of environmental damage by conducting environmentally beneficial activities. In recent years these supplemental environmental projects (SEPs) have been used by various citizen and environmental groups as an additional mechanism to be used in the settlement of citizen suits.⁵³ The use of SEPs is attractive to all parties involved. The industry is entitled to receive a tax deduction if the money is given to a non-profit organization and in many cases would rather see funds spent on a good environmental purpose rather than pay a civil penalty to the government. Money also becomes available for remediation or community education within the watershed that was affected by the pollution⁵⁴.

MERA doesn't have such a provision, however it may be worthwhile negotiating for in an out of court settlement. Funds from a settlement could be placed into an environmental trust fund for remediation and could be administered by a local unit of government. Another option is that the funds could go directly to a non-profit organization (in the Federal scheme, these penalties generally do not go to the citizen group involved in the law suit) for use within the watershed. With limited funds to support citizen monitoring programs, money from settlements could assist with the development and implementation of citizen monitoring efforts.

A Sampling of MERA Cases

Many of the cases brought under MERA have been successful, in part because defendants have a difficult time rebutting a prima facie case or to plead successfully the affirmative defense.⁵⁵ The courts in Minnesota have protected various resources from scenic vistas, to the serenity of a lake, and the historical value of abandoned row houses. Below are examples of MERA cases which have successfully protected Minnesota's natural resources and have been decided using different aspects of the MERA statute.

Protection of Aesthetic and Scenic Resources Under MERA

MERA's scenic and aesthetic provision is an important tool for the protection of Minnesota's environmental resources from external threats:⁵⁶ "[s]cenic and aesthetic resources shall ... be considered natural resources when owned by any governmental unit or agency."⁵⁷ The phrase, "when owned by any governmental unit or agency", implies that the scenic or aesthetic resource is owned by the state, or that conduct is actionable if it is likely to adversely affect a state-owned scenic or aesthetic resource.⁵⁸

In State ex rel. Drabik v. Martz,⁵⁹ Martz was enjoined under MERA from building a radio tower on land he owned near the Boundary Waters Canoe Area (BWCA) in Cook County, Minnesota. The issue was whether Martz could be enjoined from building the tower on private land if it marred the view from government-owned land.⁶⁰ Drabik argued that the visual impact of the tower on the surrounding public lands would impair the wilderness setting. Martz countered that whether or not the tower was a scenic eyesore was irrelevant since the state did not own a proprietary interest in his land.⁶¹

The appeals court held that the view in and around the BWCA is a protectable natural resource within the meaning of MERA and that construction of the radio tower would materially impact that view, diminishing the wilderness experience for visitors to the area.⁶² The significance of the courts holding is that conduct on private land may be enjoined if it adversely affects the scenic or aesthetic value of government-owned lands.⁶³

Protection of Quietude Under MERA

In Minnesota Public Interest Research Group v. White Bear Rod and Gun Club,⁶⁴ the Minnesota Public Interest Research Group (MPIRG), initiated a suit under MERA for declaratory and injunctive relief against the operation of a trap-and-skeet-shooting facility.⁶⁵ The White Bear Rod and Gun Club (Club) had applied for and received a conditional use permit for the operation of the Club.⁶⁶ The permit in part required that noise created by the Club's activities not exceed forty decibels.⁶⁷ MPIRG argued that the Club had not complied with the noise requirement and that the operation of the Club impaired the quietude of the surrounding environment.

The Club asserted its economic right, in light of the conditional use permit, to use the land in any manner which did not "substantially" affect the environment.⁶⁸ The court refused to read the word "substantial" into the statute,⁶⁹ finding that the city did not have the authority to license activity which resulted in the pollution of the environment.⁷⁰ The Minnesota supreme court concluded that, "as against the damage likely to be caused to the protectable natural resources ... [t]he benefits of the Club are temporary." The purpose of MERA is to preserve the

environment for future generations.⁷¹ Even though the defendant pleaded economic hardship if denied use of its present location, the court cited MERA as clearly stating that “economic considerations alone shall not constitute a defense hereunder.” The court’s position was that “it is a hardship which the club itself chose to risk from the beginning”.⁷²

Wetland Protection Under MERA

The case of Krmpotich v. City of Duluth⁷³ conducted a balancing test of the utility of the action against the damage to the environment. The appeals court of Minnesota heard the case which was brought by citizen groups attempting to stop a mall development in a wetland in the City of Duluth. The defendant, Watson Centers, Inc. proposed to develop a 35 acre site for a 267,000 square foot strip mall and parking lot. The proposed mall and parking lot were inconsistent with Miller Hill Corridor Management Plan and a Land Use and Transportation Plan because they did not preserve existing wetlands.⁷⁴

The appeals court reviewed the case on several points (mostly pertaining to rezoning actions by the city council), including if construction of the mall would violate MERA by materially and adversely affecting the environment. The trial court found that the mall would have no consequential effect on the natural resources which were in the vicinity of the proposed development. The appeals court responded: “we cannot accept the writing off of these wetlands and the other natural resource aspects of this site” and went on to state that “it was clearly erroneous for the court to deny the environmental value of the Watson site, particularly the wetlands.”⁷⁵ The appeals court felt that the mall would destroy an important environmental resource, and the proposed mitigation ponds designed for flood control were not adequate substitutes for the ecosystem values lost from the natural wetland. Finally, the court stated that “while the wetland may recover from its present degraded condition, it will never recover if converted to a strip mall.”⁷⁶

In the end however, the appeals court affirmed the trial court by denying relief to the Krmpotich appellants on their appeal of the city council actions granting variances, rezoning, and vacating an easement. However, the court reversed the lower court decision and held that the Watson development would violate MERA.

Wildlife Protection Under MERA

A good example of wildlife protection under MERA is that of State of Minnesota, ex. rel. Wacouta Township v. Brunkow Hardwood Corporation.⁷⁷ A logging contract (assigned to Pepin Heights) allowed for the harvest of approximately 100 trees. However, the largest bald eagle winter roost site in Minnesota had been confirmed on the property. When respondent State of Minnesota, ex rel. Wacouta Township became aware of the logging contract, it filed suit under MERA in an effort to protect the eagles and their roosts.

The trial court concluded that the bald eagles and the roosts are a protected natural resource, and permanently enjoined Pepin Heights from taking any action within 500 meters of the roosts that would destroy, disturb, or impair the bald eagles or their roosts. The appeals court reviewed the decision to determine whether the trial court had erred in enjoining Pepin Heights from destroying, disturbing, or impairing the bald eagles or their roosts.

The appeals court acknowledged that MERA is modeled on the Michigan Environmental Protection Act⁷⁸ and therefore Minnesota courts look to the Michigan Act and case law for guidance. In Michigan the 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; 3) whether the proposed action will have any significant consequential effect on other natural resources; 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.⁷⁹ This test was adopted by the Minnesota Appeals court to determine 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.

The trial court found that eagles and the roosts are a natural resource as well as rare, difficult to replace (an endangered species), interrelated (roosts are found near feeding areas), and constitute a critical number. It is clear that the affect of the enjoined activities on the eagles and the roosts was likely to have a material adverse effect on the environment. Expert testimony provided that the only adequate remedy was to prevent physical changes to the environment within 500 meters of the roost. The appeals court upheld the trial court decision.

MERA in Summary

These cases have illustrated how MERA can be used as a valuable environmental protection tool. Citizen groups may be effective in using MERA to enforce water quality violations, maintain the scenic character of rivers and lakes, protect fish spawning areas and

other wildlife habitat. There is the potential to use MERA to regulate billboards along the North Shore of Lake Superior in order to protect scenic viewsheds of the Lake. Citizen water quality data could be used in amicus briefs or to gain intervenor status to a MERA suit. The data itself could be the basis for challenging DMR reports and NPDES permit violations. The citizen suit provision of MERA is a sleeping giant and a great potential for protecting water resources.

CONCLUSION

The traditional MAPA approach to public participation has a chilling effect on citizen participation. Bringing citizen involvement into the early stages of decision making would allow for citizens to negotiate directly with agency and industry representatives, and would integrate public concerns into the process. Early citizen participation in decision making is clearly the most promising solution to the barriers found within the MAPA process.

Likewise, remediation of ecosystem impairments through RAP programs requires changes in societal values and individual behavior. Providing citizens with opportunities for direct involvement either through participating as a citizen advisory committee member or conducting water quality monitoring, provides information and experience which is necessary for developing new societal behaviors. The bottom up approach that RAPs have taken has proven to be an effective way to involve and empower citizen participants.

A survey of Minnesota residents⁸⁰ indicated a strong interest in environmental compliance issues, and a desire to assist in the enforcement of pollution control measures. Thus, direct involvement by citizens in water quality monitoring programs could expand the role of citizens in collecting data either for use by government agencies, or to provide data for citizen suits brought under MERA. Citizen monitoring programs have an exciting opportunity to use their data to insure industry compliance with their NPDES permit requirements. In addition, expanding citizen monitoring programs to include monitoring of DMRs on a regular basis would significantly augment state agency efforts. Citizen monitoring programs have the greatest potential in motivating and empowering citizens to actually help protect and improve water resources.

Justice Oliver Wendell Holmes stated that “A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it”.⁸¹ Today citizens are claiming more of that power through their involvement with water quality decision making.

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¹ Minn. Stat. ss. 14.001- 14.69.

² Section 402 Clean Water Act

³ Minn. Stat. ss. 116B.01-.13.

⁴ Ann Bray, Scientific Decision Making: A Barrier To Citizen Participation in Environmental Agency Decision Making. 17 Wm. Mitchell L. Rev. 1111 (1991)

⁵ Chevron, Inc. v. Natural Resources Defense Council 467 U.S. 837 (1984); Chemical Manufactures Assoc. v Natural Resources Defense Council, 470 U.S. 116; and Breyer and Stewart, Administrative Law and Regulatory Policy Problems, Text and Cases, Third Edition 1992 pp 276-319

⁶ Marcia Gelpe, Exhaustion of Administrative Remedies: Lessons From Environmental Cases, 53 Geo. Wash. L. Rev. 1 (1984)

⁷ Id.

⁸ Id. Gelpe illustrates this example with the following hypothetical.” Assume a company that is discharging effluents into a lake in excess of state regulatory standards is seeking an administrative variance that would allow its discharges. Variance proceedings are not yet complete. A citizens' group brings an action under MERA (see infra notes 56 and accompanying text) to enjoin the company's discharges in excess of those permitted under the regulatory standard. MERA gives any person residing within the state standing to seek an injunction against any corporation that is violating an environmental quality standard or rule. The question of whether the company is justified in exceeding the regulatory limits would be before the agency in the variance proceeding and before the court in the suit under MERA. These circumstances present the court with the issue of primary jurisdiction; it must determine whether to give the agency the first opportunity to decide the question.”

⁹ See supra note 6. In Gage v U.S. Atomic Energy Commission, 479 F.2d 1214 (D.C. Cir. 1973), the court held that exhaustion was required and that the petitioners' failure to participate in the rulemaking procedure precluded them from invoking judicial review. See also MPIRG v. Adams, 482 F. Supp. (1970) (a Minnesota case on exhaustion).

¹⁰ See supra note 4.

¹¹ Id..

¹² Minnesota Statute ss. 116.02(1)

¹³ Id.

¹⁴ Gelpe, Citizen Boards as Regulatory Agencies, 22 Urban Law 451, (1990)

¹⁵ A bi-national organization created by the 1909 Boundary Waters Treaty between the U.S. and Canada which addresses boundary water concerns between the two countries.

¹⁶ International Joint Commission, Third Biennial Report to the Governments under the Great Lakes Water Quality Agreement 49 (1983).

¹⁷ See Mimi Larson- Becker, The International Joint Commission and Public Participation: Past Experiences, Present Challenges, Future Risks. 33 Natural Res. J. 235 (1993) and also the 1972 Great Lakes Water Quality Agreement along with the 1987 Amendments which added citizen participation through the Remedial Action Planning process.

¹⁸ Actually, there are now 42 AOCs, as the Collingwood Harbor site in Canada was delisted in 1994.

¹⁹ Impaired beneficial uses include fish consumption advisories, threats to wildlife habitat, sediment contamination, failure to meet water quality criteria, etc.

²⁰ The St. Louis River borders Wisconsin and Minnesota and therefore the CAC is a bi-state effort. The CAC focuses on the river through a watershed approach and must work through the difficulties of a multi-jurisdiction resource. The MPCA is the lead agency for the St. Louis RAP.

²¹ See Mimi Larson- Becker at supra note 17.

²² The IJC has conducted Great Lakes Education Round tables in order to develop strategies and priorities for Great Lakes education.

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- ²³ I use the terms River Watch and Citizen Monitoring programs interchangeably.
- ²⁴ As an example of the potential value of citizen monitoring efforts take the fact that Minnesota contains the headwaters of three major drainage basins: Hudson Bay, North Atlantic and Gulf of Mexico and has 92,000 miles of rivers. Only 4% of these rivers are monitored by the MPCA.
- ²⁵ Phosphate, nitrates, dissolved oxygen, biological oxygen demand, temperature, pH, turbidity, solids, and fecal coliform are the common conventional parameters that many programs survey.
- ²⁶ Bottom dwelling creatures found in rivers and lakes which are visible to the eye and have no backbone, for example mayflies, crayfish and aquatic worms.
- ²⁷ The Montreal based organization Societe pour Vaince la Pollution (SVP) works to educate fishermen along the St. Lawrence River. SVP, with the fishermen's approval, will send fish caught from the St. Lawrence to a lab where it is analyzed for various toxic chemicals. The fisherman is then sent a report of what chemicals were identified in his/her fish and possible industries along the river discharging those chemicals. The fisherman is also provide with the name and address of the CEO from that industry. Personal communication with Daniel Green 9/24/95
- ²⁸ The St. Louis River Watch organized the first frog survey of the St. Louis Watershed. Long Point Bird Observatory in Ontario developed a marsh bird and frog survey in tributaries to the Great Lakes.
- ²⁹ See Judy B. Rosener, Making Bureaucracy Responsive: A Study of the Impact of Citizen Participation and Staff Recommendation on Regulatory Decision Making. 42 Pub. Admin. Rev. 339 (1982). The author conducted a survey of 1,816 permit requests for development projects that were presented to the California Coastal Commission and found that citizen participation did influence the outcome of permit decisions.
- ³⁰ National Directory of Volunteer Environmental Monitoring Programs – Fifth Edition. US EPA , 1988
- ³¹ The St. Louis River Watch program in Minnesota experienced a three-fold increase in school participation over three years, closely mirroring national trends.
- ³² US EPA, 1998
- ³³ Id.
- ³⁴ Mississippi Headwaters River Watch program in Minnesota was created through the Mississippi Headwaters Board and students have presented water quality data to the Board.
- ³⁵ US General Accounting Office, Report to the Administration, Underwater Dischargers and not Complying with EPA Pollution Control Permits, at i-iii (Dec. 2, 1983) in Houck, Oliver A., Ending the War: A Strategy To Save America's Coastal Zone, 47 Md. L. Rev. 358 (1988)
- ³⁶ See supra note 4
- ³⁷ Id. 64% of agency staff felt that division resources were inadequate to independently verify industry test results. Agency Survey, App. B, Ques. 9.
- ³⁸ Id. Ques. 12.
- ³⁹ Id. Ques. 11. Only 6% of citizens, on the other hand, felt that industry provided "reasonably accurate" health risk information. Citizen Survey, App. A, Ques. 5.
- ⁴⁰ Id. Agency Survey, App. B, Ques. 11.
- ⁴¹ Program Evaluation Division Of The Legislative Auditor, Minnesota Pollution Control Agency 49 (Jan. 1991).
- ⁴² See supra note 4
- ⁴³ Id. The majority of citizens agreed with agency staff that citizen groups would be more effective with the help of scientific experts (95%) and with legal assistance (80%) in influencing agency decisions. Citizen Survey, App. A, Ques. 8(8) and 8(3).
- ⁴⁴ Id. Currently MPCA relies on self-monitoring and reporting by permit holders which depends on the accuracy of data submitted by the permit holders. MPCA staff rarely verify the validity of these reports

⁴⁵See page 210 of the National Wildlife Federations publication *The Earth Care Annual* (1993) for a complete description of this program.

⁴⁶*Id.*

⁴⁷Joseph Sax, *Defending The Environment: A Strategy For Citizen Action* (1971) Sax authored the Model Environmental Protection Act which was adopted by the Michigan Legislature in 1969 as the Michigan Environmental Rights Act (MEPA). See MICH. COMP. LAWS ANN. ss 691.1201-.1207 (West Supp.1977). For the text of the Model Act, see the appendix to *Defending The Environment*, at 247-52.

⁴⁸*Id.* at 56

⁴⁹*Id.* at 56

⁵⁰Minn. Stat. ss. 116B 1996. The Minnesota Environmental Rights Act was signed into law by Governor Wendell Anderson on June 7, 1971.

⁵¹Minn. Stat. 116

⁵²See s. 116B.04 (Burden of Proof).

⁵³See Mark J. Zimmermann, *Working With EPA's Revised Policy On Supplemental Environmental Projects*. 11 No. 1 *Envtl. Compliance and Litig. Strategy* 1 (1995)

⁵⁴As of April, 2000 the Minnesota Pollution Control Agency in Duluth was actively persuading SEPs with several industries in Northeast Minnesota. John Thomas – Personal Communication

⁵⁵County of Freeborn by Tuveson v. Bryson 210 N.W.2d 290 (1973), rev'd 243 N.W.2d 316 (MN 1976)

⁵⁶"External threats" are activities which occur on adjacent land which have a significant impact on the "integrity" of the area.

⁵⁷MINN. STAT. s 116B (1996) (Definitions).

⁵⁸Timothy Murphy, *Environmental Law--Protection Of Scenic And Aesthetic Resources Under The Minnesota Environmental Rights Act--*[STATE EX REL. DRABIK v. MARTZ, 451 N.W. 2d 893 (MINN. CT. APP. 1990)]. 17 *Wm. Mitchell L. Rev.* 1190 (1991)

⁵⁹451 N.W.2d 893 (Minn. Ct. App. 1990), review denied, Apr. 25, 1990.

⁶⁰*Drabik*, 451 N.W.2d at 897

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.*

⁶⁴257 N.W.2d 762 (MN 1977).

⁶⁵*Id.* at 764.

⁶⁶*Id.* at 765.

⁶⁷*Id.*

⁶⁸*Id.* at 771.

⁶⁹*Id.* at 782

⁷⁰*Id.* at 783.

⁷¹*Id.* at 782; see MINN. STAT. s 116B.01 (1990) (Purpose).

⁷²*Id.* at 781

⁷³474 N.W. 2d 392 (MN 1991)

⁷⁴The Miller Hill corridor has been the focus of numerous debates over the wisdom of building malls and parking lots in the wetland areas surrounding Miller Creek. The Miller Hill Corridor Plan, adopted by the Duluth City Council in 1979 provided guidelines to limit development in order to prevent undesirable impacts to the environment. In 1994 and again in 1999 the Duluth City Council chose to ignore this management plan and allowed additional

development to occur in the watershed. The Miller Hill corridor is the location of numerous mall developments surrounding the Miller Creek, what is left of the Miller Creek wetlands, and numerous steep slopes, all of which are located in a flood hazard zone.

⁷⁵Id. at 399. The “alleged natural resources” included steep rocky cliffs, Coffee Creek, a tributary to Miller Creek and the natural wetlands on the site.

⁷⁶Id. at 399. Expert testimony noted that if given relief from the regular input of pollutants, the wetland would purge itself and recover.

⁷⁷510 N.W.2d 27 (D.Minn. 1993)

⁷⁸Mich. Comp. Laws ss 691.1202-.1207 (1990). PEER, 266 N.W.2d at 866-67 n. 6. See supra note 48 and text.

⁷⁹City of Portage v. Kalamazoo County Road Commission, 136 Mich.App. 276, 355 N.W.2d 913, 916 (MI 1984).

⁸⁰See supra note 4.

⁸¹State of New Jersey v. State of New York 283 U.S. 336 at 342.