2006

True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney's Fees into the Minnesota Environmental Rights Act

Michael Wietecki

Follow this and additional works at: http://scholarship.law.missouri.edu/jesl

Part of the Environmental Law Commons

Recommended Citation
Available at: http://scholarship.law.missouri.edu/jesl/vol14/iss1/5

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized administrator of University of Missouri School of Law Scholarship Repository.
TRUE ACCESS TO THE COURTS FOR CITIZENS WORKING TO PROTECT NATURAL RESOURCES: INCORPORATING ATTORNEY’S FEES INTO THE MINNESOTA ENVIRONMENTAL RIGHTS ACT

Michael Wietecki*

INTRODUCTION

The Minnesota Legislature, through the Minnesota Environmental Rights Act ("MERA"), sought to improve the natural environment of the state by providing an "adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment and destruction." In reading this statute, the Minnesota Supreme Court stated that preservation of natural resources is, "... superior to all other . . . concerns."1

* Michael Wietecki is a 2006 graduate of the University of St. Thomas School of Law and is a Masters of Science candidate at the University of Minnesota College of Natural Resources. The author thanks Dean Jerome Organ for his guidance, David Rosedahl for his assistance, his parents, and Jennifer Hanson for her invaluable insight and support.

1 MINN. STAT. ANN. § 116B.01 (West 2005). Purpose:
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, 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. Id. (emphasis added).

2 Krmpotich v. City of Duluth, 474 N.W.2d 392, 400 (Minn. Ct. App. 1991) (quoting Floodwood-Fine Lakes Citizens Group v. Minn. Envtl. Quality Council, 287 N.W.2d 390, 399 (Minn. 1979). The court concluded "MERA express[e]d a 'paramount' concern for the preservation of natural resources," which makes preservation of natural resources "superior to all other concerns" when balancing concerns. Id.
MERA creates a cause of action and legal remedy for any person bringing a claim for protection of Minnesota's natural resources, regardless of whether standards or regulations exist concerning the alleged violation.\(^3\) Thus, the MERA citizen suit provision could be an effective means to uphold the stated policy of Minnesota:

The legislature further declares its policy to create and maintain within this 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.\(^4\)

The broad grant of standing in section 116B.03 to citizens, coupled with the noble policy laid out in section 116B.01, give Minnesotans the tools to act as private attorney generals and defend their environment against degradation, but bringing such a claim demands considerable expenditure of time and resources. Unlike the vast majority of federal environmental citizen suits provisions, MERA does not provide for recovery of reasonable attorney fees or costs.\(^5\) Because the adversely affected party pursuing a claim under MERA bears the cost of litigation,

---

\(^3\) Minn. Stat. Ann. § 116B.03 subdiv. 1. Parties:

Any person residing within the state . . . may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction


5 Federal Citizen Suits that provide for the recovery of costs and attorney fees: Clean Water Act, § 505(d), 42 U.S.C. § 1365(d); Clean Air Act, § 304(d), 42 U.S.C § 7604(d) (costs of litigation may be awarded to " . . . any party, whenever the court determines such award is appropriate."); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (Supp. III 1985); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(f); Toxic Substances Control Act, 15 U.S.C. § 2619(c)(2); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659(f).
MINNESOTA ENVIRONMENTAL RIGHTS ACT & ATTORNEY'S FEES

MERA effectively imposes an economic burden that discourages those parties from bringing an action to protect Minnesota's natural resources.

State agencies carry the burden of protecting Minnesota's natural resources to maintain the goals the legislature espoused in section 116B.01, but those agencies will never have the funding to adequately do so. As Professor Joseph Sax envisioned, the state environmental citizen suit provision creates a statutory right for citizens to be protected from pollution and impairment or destruction of natural resources, in order to relieve some of the enforcement burden from perpetually under-funded state agencies.  

Instead of making citizen actions that may effectively advance MERA's policy prohibitively costly by failing to reimburse parties for the costs incurred, the MERA claim should be made more accessible by affording the citizen an opportunity to recover the costs and fees of a lawsuit they brought to protect a primary state interest. Because MERA does not include a provision by which affected parties can retrieve attorney's fees and costs, the statute effectively provides standing only to those with considerable financial resources, or for those who use it as a shield of last-resort.

If the legislature's stated primary interest in protecting and preserving natural resources is to be realized, and state agencies are unable to accomplish adequate protection, Minnesota's citizenry must be empowered through MERA to insure that interest. This empowerment comes through access to MERA, and MERA will only become accessible if it is amended to allow for recovery of reasonable attorney's fees and costs to citizens effectuating that interest.

---

6 See Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action (Knopf 1970). Professor Sax recognized that agencies lack the funding and the political will to adequately protect natural resources. This recognition was not necessarily a criticism of such agencies but rather an acceptance that they were not the solution to the problem of resource degradation. See generally id.

7 See County of Freeborn v. Bryson, 210 N.W.2d 290 (1973); infra Part 3. While the grant of standing under MERA is broad, that grant is only relevant when a party has enough resources or enough personal stake in the outcome of the proceeding to avail themselves of the cost.
Part I of this paper discusses the history and development of environmental citizen suits, and provides an overview of several federal and state environmental citizen suits.

Part II is an overview of fee shifting and the American Rule of fee shifting; this part also discusses how the American Rule has been expressly waived for many federal environmental citizen suits and for non-environmental Minnesota citizen suits that grant a public benefit.

Part III looks specifically at the Minnesota Environmental Rights Act (MERA), its history, effectiveness (or lack thereof), and use.

Part IV proposes model language for amending MERA and discusses how that language can be implemented to effectuate the primary interest of the state in conserving and protecting the invaluable natural resources of Minnesota.

The article fully supports, and recommends immediate enactment of MN H.F No. 4158, which will effectively amend MERA to accomplish access to the courts for Minnesota’s citizens.

I. ENVIRONMENTAL CITIZEN SUITS

A. General Citizen Suit Theory, History and Development

The roots of environmental citizen suits can be traced back to 1388 and Richard II as a way to deal with serious public health risks. The 1388 statute permitted individuals that were “grieved” by acts of pollution to bring an action for protection of the King’s commons from pollution. Earlier in the 14th century Parliament enacted a statute allocating a share of damages assessed against the transgressor to the bringer of the citizen suit.

---

8 The Statute of 12 Rich. II, ch. 13 (1388). See Barry Boyer & Errol Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under the Federal Environmental Laws, 34 Buff.L.Rev. 833, 947 (1985). The statute granted every man the ability to sue in the name of “Our Lord Our King” for specific transgressions such as dumping waste into ditches or water. Boyer describes the statute as providing for a “dual system of enforcement: either public officials or others who ‘feel themselves grieved’ or who ‘will complain’ could bring enforcement actions.” Id.

suit (an early fee-shifting provision). These statutes appear to be the historical basis by which the sovereign recognizes its inability to police environmental wrongs effectively on its own, and enlists citizens to support the sovereign by granting victims the right to sue in place of the sovereign. They also symbolize the sovereign's willingness to reward individuals that bring suits on behalf of the sovereign.

Substantively, the 1388 statute had two functions, it provided for clean up of past pollution and compelled the Chancery to act to prevent future pollution. This dual nature laid the foundation for many of today's

---

10 See Statute made at Westminster In the Fifth Year of the Reign of K. Edward the Third After the Conquest, 5 Edw. III, ch. 5 (1331). A 1331 statute, for example, allocated one-fourth of any fines imposed on stallholders selling goods after the close of a fair to “every Man that will sue for our Lord the King.” Id. See also Boyer & Meidinger supra note 8, at 947. The evolution of fee shifting will be discussed in more detail, infra Part 2.

11 See infra, Part 2 for further discussion of fee shifting.

12 The Statute of Rich. II ch. 13, reads in relevant part as follows:

For that so much Dung and Filth of the Garbage and Intrails as well as of Beasts killed, as other of Corruptions, be cast and put in Ditches, Rivers, and other Waters, . . . that the Air there is greatly corrupt to infect, and many Maladies and other intolerable Diseases do daily happen, . . . to the great Annoyance, Damage and Peril of the Inhabitants, Dwellers, Repairers, and Travelers . . . ; (2) . . . all they which cast and lay all such Annoyances . . . in . . . Waters . . . shall cause them utterly to be removed, avoided, and carried away [before the next Feast of St. Michael] . . . every one upon Pain to lose and to forfeit to our Lord the King [twenty liver] . . . ; (3) . . . the Mayors and Bailiffs . . . shall compel the same to be done upon like Pain; (4) And if any feel himself grieved, that it be not done in the Manner aforesaid, and will thereupon complain come into the Chancery, there to show why the said penalty should not be levied on him, and if he cannot excuse himself, the said penalty should be levied of him; (5) . . . none of what Condition soever he be, [shall] cause to be cast or thrown from henceforth any such Annoyance . . . into the . . . Waters; (6) and if any do, he shall be called by Writ before the Chancellor, at his Suit that will complain; and if he be found guilty, he shall be punished after the discretion of the Chancellor.

2 STAT. AT LARGE 382 (O. Rufhead ed. 1763). Boyer & Meidinger, supra note 8, at 947 n.279.
private causes of action, as agency action compelling and conducting regulation.\(^{13}\)

The idea of the private cause of action migrated to the New World and was well accepted and a well-known practice in early American courts.\(^{14}\) As a fixture in English and American jurisprudence, the private cause of action (citizen suits) has been implied in essentially every case where a statute was enacted to protect a personal interest.\(^{15}\) This implied that a private citizen has the right to employ the courts to guarantee a benefit or utilize a protection bestowed on him by statute.\(^{16}\) Through the private cause of action the individual is empowered to enforce the statute's guarantees without action by the state. Where the action by the private party can be commenced, and effectively fulfill the purpose of the statute without state action, the state conserves its scarce financial resources.

The right of private action, or citizen suit, is also frequently written into statutes to ensure its availability to citizens. Congress and state legislatures have statutorily authorized many mechanisms whereby citizens can bring a legal action to enforce various laws, including many

\(^{13}\) See generally Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 776-77 (1993) [hereinafter Sisk Primer]. Using the Clean Air Act as an example, the government made itself liable in two different capacities: first, as a regulator for failure to fulfill a statutory obligation and second, the federal government (or any person) may be challenged in its capacity as a polluter that is in violation of environmental restrictions. *Id.* at 776-78. These functions will be discussed further infra Part 2.

\(^{14}\) California v. Sierra Club, 451 U.S. 287, 299-300 (1981) (Stevens, J., concurring). Justice Stevens said, “in my view, the Members of Congress merely assumed that the federal courts would follow the ancient maxim ‘ubi jus, ibi remedium’ and imply a private right of action.” *Id.* at 300. See Tex. & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916). In Rigsby, the statute in question creates liability for injuries suffered by the plaintiff, and although there is no express language in the statute creating a private action for recovering on the injury, the right of a private action to remedy an injury has “never been doubted.” *Id.* at 39.

\(^{15}\) Sierra Club, 451 U.S. at 300 n.3. “So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.” *Id.* (quoting 1 Comyns’ Digest 433, 442 (1822)).

\(^{16}\) See *id.* at 299-300.
environmental statutes. In some instances citizens are given authority to act in place of the state attorney general if they can meet standing requirements. A broad grant of standing is the hallmark of current environmental citizen suit provisions, and is ubiquitous throughout these statutes, thereby overriding the common law nuisance standing requirement.

B. Modern Federal Environmental Citizen Suit Provisions – Codification of the Lorax’s Legal Standing

"I am the Lorax. I speak for the trees. I speak for the trees, for the trees have no tongues." 

If the Lorax, in Dr. Seuss’s story of environmental destruction, would have been able to secure jurisdictional standing in court over the fictional pollution site called The Street of the Lifted Lorax, the Once-ler may have been forced to listen to his pleas, and the Brown Bar-ba-loots,

---


18 See MINN. STAT. ANN. § 8.31 subdiv. 3a. Private remedies: In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.

Id. Subdivision 1, as referenced in Subdivision 3a, does not contain any environmental laws. This is a separate area where the legislature would be well suited to amend the statute and include relevant environmental laws. Including such laws would allow Minnesota citizens to act as private attorney generals to uphold the environmental laws of the state. This will be discussed further infra Part 4.


20 Dr. Seuss, The Lorax (Random House 1971).
Swomee-Swans and Humming-Fish may have been able to stay amongst the Truffula Trees.21 But, without a statutory grant of standing the Lorax was powerless against the destructive forces of the Once-ler’s industrial might.22

Congress, in its wisdom, invited citizens to step into the mossy brown suit of the Lorax and “speak for the trees”23 by allowing “any person” to act as a “private attorney[s] general” and “commence a civil action on his own behalf” against “any person” for the violation of an Environmental Protection Agency (EPA) prohibition or regulation, or to bring an action against the EPA for its own failure “to perform any act or duty . . . which is not discretionary.”24 This explicit decision to include the

21 See generally id.
22 Id.
23 Id.
24 See 42 U.S.C. § 7604(a) (2000); 33 U.S.C. § 1365(a). These two statutes contain slightly different language but accomplish the same grant of standing of a citizen to bring a citizen suit:

[A]ny citizen may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.


[A]ny person may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of
public in the enforcement of environmental regulations was Congress’ recognition that budgetary constraints and political forces impaired the ability of governmental agencies to enforce such laws adequately on their own.\textsuperscript{25} In a nation of limited resources and innumerable potential polluters, the government cannot police all potential violators of environmental laws.\textsuperscript{26} Because of the indisputable reality that government does not have the ability to patrol all potential polluters at all times, the public was deputized to act as private attorneys general to protect the environment.

Congress chose to deliberately increase access to courts to ensure citizens’ ability to “speak for the trees”\textsuperscript{27} and participate in the legal process by expressly discarding jurisdictional barriers such as standing.\textsuperscript{28} Congressional intent became manifest with the inclusion of a citizen suit provision in each substantive environmental statute enacted between 1970 and 1980.\textsuperscript{29} In fact, Congress perceived that citizens have such an

\begin{quote}
subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.
\end{quote}

important role in compelling the government to comply with nondiscretionary duties and enforcing permits and regulations against polluters, that the Federal Insecticide & Fungicide Rodenticide Act is the lone major environmental statute lacking a citizen suit provision. The idea that a citizen has the right to bring a suit against environmental transgressors is in no way an anomaly. It has developed over six plus centuries of Anglo-American jurisprudence, and is statutorily adopted in nearly all modern federal environmental regulations.

C. Modern State Citizen Suit Provisions

Since the early 1970's many states have enacted citizen suit mechanisms similar to those in federal environmental laws. The several states that have enacted citizen suits create standing to sue for environmental violations allowing citizens to act as private attorneys general, thereby relieving some of the regulatory burden of the state.

1. Michigan Environmental Protection Act of 1970

The first, and arguably most important, state citizen suit provision is commonly known as the "Sax Act," after its principle visionary and drafter, Professor Joseph Sax. This Act, the Michigan


See supra note 29, and see generally Part I for a discussion on the evolution of environmental citizen suits.

George et al., supra note 9. George looks at all the states and the general components of their environmental laws. In the Appendices of his article, George surveys the existence of environmental citizen suit provisions. Id.

Id. at 14.

Professor Joseph Sax is credited with promoting and being the force behind the passage of the Michigan Act. This act was the first in a line of statutes that the federal and state governments passed allowing citizens to bring legal claims without being required to show standing arising out of standard nuisance law.

George et al., supra note 9, at 15.
Environmental Protection Act of 1970 ("MEPA"),\(^{36}\) contains broad standing provisions which provide citizens the right to sue.\(^{37}\) The Michigan Environmental Protection Act allows citizens to sue to protect Michigan's natural resources whether or not a law has been broken.\(^{38}\) Professor Sax thought it essential that citizens have access to the courts before environmental harm occurs.\(^{39}\) The Michigan legislature enacted this essential piece, making the standing requirement a minimal hurdle in the MEPA.\(^{40}\) Section 324.1701(1) states:

\[
\text{The attorney general or any person may maintain an action for declaratory and equitable relief against any person for the protection of air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.}\nn\]

By allowing citizens to sue without a violation of state law, Michigan's Supreme Court found that this Act "imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities."\(^{42}\)


\(^{37}\) Id. at 324.1701(1).

The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.


\(^{39}\) See Sax, supra note 6, at Ch. 1.

\(^{40}\) George et al., supra note 9, at 15.


\(^{42}\) Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 888 (Mich. 1975). The Court develops a process to analyze claims brought under the MEPA and the first step is determining if "the plaintiff has established a P[ri]ma facie case that the defendant's conduct 'has or is likely to pollute, impair or destroy the air, water, or other natural
With the broad grant of standing under MEPA, citizens who bring a claim have an opportunity to involve the legal system before damage has been done, just as Professor Sax envisioned. Professor Sax identified the environmental lawsuit as most effectively employed as a preventive measure.\(^4\) Prior to this Michigan citizen suit provision, Sax observed that citizens were unable to access the courts to seek relief on behalf of public environmental rights.\(^4\) Sax also observed that the interests which create most of the negative environmental effects have very good access to policy makers, whereas those who oppose the negative effects of those interests have very limited access.\(^4\) It makes sense in a political climate in which enforcement actions by the government are declining, penalties are falling, and the EPA itself has expressed concerns about diminishing inspections and criminal referrals, to create the necessary access to encourage citizens to bring actions protecting environmental values.\(^4\)

2. Connecticut Environmental Protection Act of 1971

In enacting the Connecticut Environmental Protection Act of 1971\(^4\)7 (“CEPA”), Connecticut’s legislature, like Michigan’s, provided the citizens with a legal voice for the protection of the state’s natural resources.\(^4\)8 CEPA expanded “the number of potential guardians of the resources . . .’ or how he has failed to.” \(\text{Id.}\) at 889. This showing is all that is needed to put the burden on the defendant to show the opposite. \(\text{See generally George et al., supra}\) note 9, at 15-16.

\(^{43}\) SAX, \textit{supra} note 6, at 121.

\(^{44}\) \(\text{Id.}\) at 122.

\(^{45}\) \textit{See id.} at Ch 1. Sax recounts a fact scenario where the politically well connected had the resources to bide their time and be patient with their “investment” until the opposing forces exhausted their own resources. The story Professor Sax tells generates a vision of cigar-smoke-laden backroom dealings, between the politically powerful in Washington D.C.

\(^{46}\) \textit{See James R. May, Now More Than Ever: Trends in Environmental Citizen Suits At 30, 10 WIDENER L. REV. 1, 5 (2003) [hereinafter May Trends]. May includes specific percentages and trends of declining enforcement. Id.}

\(^{47}\) \textit{See CONN. GEN. STAT. §§ 22a-14 to 22a-20 (2006).}


Traditionally, citizens seeking to protect the environment were required to show specific, personal aggrievement to attain standing to bring a legal action . . . . The Connecticut Environmental Protection Act;
public interest in the environment into the millions, instead of relying exclusively on the limited resources of a particular agency.⁴⁹ This expansion "provid[ed] all persons with an adequate remedy to protect the air, water or other natural resources from unreasonable pollution, impairment or destruction."⁵⁰ The Connecticut courts have interpreted the term "natural resources" broadly.⁵¹ This broad reading of "natural resources" was in part guided by Minnesota's statutorily defined use of "natural resources."⁵² Where there is an action that could negatively affect "natural resources," Connecticut courts require that alternatives to such actions be considered.⁵³

3. Minnesota Environmental Rights Act

In 1971 Minnesota joined the growing movement seeking to increase access for citizens to sue as private attorneys general for environmental wrongs.⁵⁴ The Minnesota Environmental Rights Act

---

General Statutes § 22a-1 et seq.; however, waives the aggrievement requirement in two circumstances. First, any private party, including a municipality, without first having to establish aggrievement, may seek injunctive relief in court for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . . Second, any person or other entity, without first having to establish aggrievement, may intervene in any administrative proceeding challenging conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

---

⁵¹ Jennifer E. Sills, The Connecticut Environmental Protection Act ("CEPA"): Enabling Citizens to Speak For the Environment, 70 Conn. B.J. 353, 357-359 (1996). Sills recounts the process Connecticut followed in arriving at the conclusion that the term 'natural resources' is not limited to that which has economic value, but includes a broad range of organisms within its meaning. See Red Hill Coal., Inc. v. Town Plan & Zoning Comm'n, 563 A.2d 1339 (Conn. 1989).
⁵² Sills, supra note 51, at 358.
⁵³ Id. at 357-59.
"MERA") followed the wise observations of Professor Sax\(^55\) and statutorily guaranteed the essential role that citizens and courts play in protecting the natural environment.\(^56\)

Minnesota’s courts have interpreted the language to of MERA to allow "any person" to bring an action for the protection of "any natural resource" from "any conduct" that "has, or is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resource located within the state."\(^57\) MERA requires a balancing of ecological concerns against technological considerations, which allows the defendant in the suit to rebut a prime facie case by showing that there is "no feasible or prudent alternative or the conduct is in the best interest of the public."\(^58\)

\(^{55}\) See generally Sax, supra note 6.


Any 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 entity having shareholders, members, partners or employees residing within the state may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction; provided, however, that no action shall be allowable hereunder for acts taken by a person on land leased or owned by said person pursuant to a permit or license issued by the owner of the land to said person which do not and can not reasonably be expected to pollute, impair, or destroy any other air, water, land, or other natural resources located within the state; provided further that no action shall be allowable under this section for conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture.

\(^{57}\) County of Freeborn v. Bryson, 210 N.W.2d 290, 297 (1973).

\(^{58}\) Id. at 297-98. Evidence of alternatives that were considered, when offered as an affirmative defense, may rebut the prime facie case presented by the plaintiff. Id. at 298. The defendant may show that "there is [n]o feasible and prudent alternative and the conduct at issue is [c]onsistent with and reasonably required for the promotion of the public health, [s]afety, 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,
Prior to MERA’s enactment, Minnesotans had a difficult time getting into court to protect the state’s natural resources due to procedural and substantive barriers. Due to the need to show direct damage or injury, plaintiffs were often unable to achieve standing necessary to bring a common-law nuisance claim. The inability of the citizen plaintiff to show that the defendant/polluter’s actions has caused or would cause plaintiff direct injury or damage resulted in citizens having little or no ability to utilize the court system for benefit of the environment. The effectiveness of these common-law nuisance suits was further limited by governmental immunity statutes, and by the determination that defendants had acquired a prescriptive easement to pollute. Such barriers limited citizens’ most effective means (access to the courts) to participate directly in the resolution of environmental problems.

MERA was adopted in a time of environmental experimentation attempting solutions to remedy dangers that Rachel Carson’s *Silent Spring* predicted. It was groundbreaking in the broad grant of standing it created, but it did not provide the legislature’s intended “adequate civil remedy.” The Minnesota Supreme Court concluded that MERA

---


60 Id. at 402-403.

61 See Herman v. Larson, 7 N.W.2d 330, 333 (Minn. 1943). Bringing a common law nuisance claim requires such a showing for standing. Id.


63 See, *e.g.*, MINN. STAT. ANN. § 540.13 (West 1987).

64 See Herman, 7 N.W.2d at 333.

65 See SAX, *supra* note 6, at xii.

66 See RACHEL CARSON, *Silent Spring* (Fawcett World Library 1962). Carson cites numerous examples of ecological destruction including the effects of DDT on bird populations, toxic rivers killing off fish over vast distances, the increase in human leukemia's associated with known toxic substances, and the prediction of ecosystem collapse if these practices continue.

67 MINN. STAT. ANN. § 116B.01 (West 2005).
"expresses a paramount concern for the preservation of natural resources," which means that this concern is "superior to all other[s]."\footnote{Floodwood-Fine Lakes Citizens Group v. Minn. Envtl. Quality Council, 287 N.W.2d 390, 399 (Minn.1979).} The courts have interpreted standing broadly due to the exhaustive list of definitions contained within the statute for the term "person."\footnote{Minn. Stat. Ann. § 116B.02 subdiv. 2. Person: "Person" means any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality, any public or private corporation, any partnership, firm, association, or other organization, any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing, and any other entity, except a family farm, a family farm corporation or a bona fide farmer corporation. Id. See County of Freeborn v. Bryson, 210 N.W.2d 290, 294-95 (1973).} The legislature also wisely contained an extensive, but non-exclusive list, of natural resources that are available for protection under MERA.\footnote{Minn. Stat. Ann. § 116B.02 subdiv. 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. Id. at subdiv. 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. Id. at subdiv. 5.} Also included within the definitions section of MERA is restatement of what pollution, impairment, or destruction includes.\footnote{Id. at subdiv. 5.} This definition is essential as it grants standing for pollution that is likely to occur.\footnote{Id.} The
The term "likely" allows for a civil action before the environmental harm has occurred, thus fulfilling one of Professor Sax's prerequisites for an effective environmental citizen suit statute.\footnote{See generally SAX, supra note 6, at Ch. 1.}

The Minnesota Supreme Court interpreted MERA to allow for "any person"\footnote{Freeborn, 210 N.W.2d at 294-95.} to bring suit to protect and preserve the state's natural resources.\footnote{Minn. Pub. Interest Research Group v. White Bear Rod & Gun Club, 257 N.W.2d 762, 781 (Minn. 1977). "The Minnesota Environmental Rights Act, ... a far-reaching legislative enactment, has created, in effect, a right in each person to the preservation and protection of natural resources within the state and has provided a legal remedy for the effectuation of those rights." Id.} This is right is not taken lightly by Minnesota's highest court as they see citizen vigilance as essential for the protection of the state's environmental resources.\footnote{People for Envtl. Enlightenment & Responsibility v. Minn. Envtl. Quality Council, 266 N.W.2d 858, 866 (Minn. 1978). MERA "was seen by the legislature as an important mechanism which could be used by citizens to force an administrative agency to protect the state's natural resources." Id. at 866 n.6.}

Under MERA a successful plaintiff is entitled to declaratory relief, or temporary or permanent equitable relief.\footnote{MINN. STAT. ANN. § 116B.07 (West 2005). Relief: The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction. When the court grants temporary equitable relief, it may require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief, if permanent relief is not granted. Id.} Typically, successful plaintiffs under MERA have been granted injunctive relief.\footnote{See Piela, supra note 59, at 423. Piela lists a string of cases that ended in injunctive relief: Krmpotich v. City of Duluth, 474 N.W.2d 392, 400-01 (Minn. 1991); Minn. Pub. Interest Research Group v. White Bear Rod & Gun Club, 257 N.W.2d 762, 783 (Minn. 1977); County of Freeborn v. Bryson, 243 N.W.2d 316, 321-22 (Minn. 1976).}
II. FEE SHIFTING: ATTORNEYS' FEES PROVISIONS

What would happen if the Lorax not only had standing, but could also recover the cost he expended on protecting the Humming Fish from the glupitty-glup?

Many environmental statutes accomplish two important actions; first, as discussed above, they create standing requirements that are much more attainable than the alternative common law nuisance claim; and second, they even the playing field between interests that profit from environmental degradation and interests that seek to protect natural resources by allowing for the recovery of attorney fees and costs.

A. History of Fee Shifting

The roots of environmental citizen suits can be traced back to Richard II; his predecessor, Edward III, took the next step in advancing the power of those suits by enacting an early fee-shifting provision in 1331. This 1331 law awarded the individual bringing a citizen suit for their effort by allocating a share of the damages assessed against the transgressor to the individual bringing the suit. By the eighteenth century, England created an “informers action” whereby the “parties assisting in the apprehension and conviction of violators would share in the fines collected as a result” of the action. The bringer of the suit was also allowed to recover a share of fines imposed as a result of the citizen suit. “Informers actions” created a financial incentive for citizens to

79 See supra Part 1(A).
80 Statute made at Westminster In the Fifth Year of the Reign of K. Edward the Third After the Conquest, 5 Edw. III, ch. 5 (1331). See Boyer & Meidinger, supra note 8, at 947.
81 Id. A 1331 statute, for example, allocated one-fourth of any fines imposed on stallholders selling goods after the close of a fair to “every Man that will sue for our Lord the King.” Id.
82 George et al., supra note 9, at 10. See also Boyer & Meidinger, supra note 8, at 952. The “informers action” was created in England at the start of the industrial revolution to combat what was seen as an “epidemic of crime.” Id.
83 Boyer & Meidinger, supra note 8, at 952.
privately prosecute violations of the law on the theory that it would lesson the burden on the government as it fought the growing crime epidemic in England. These actions were eventually abolished due to the problems inherent in enforcing them.

The so-called “English Rule” of fee shifting has evolved to become a “loser pays” rule where the successful party may collect legal fees or costs from the loser. This loser pays rule is a two-way fee shifting regime where the loser, whether plaintiff or defendant, pays the winner’s attorney fees.

Another system of fee-shifting known as “one-way fee shifting,” is a method where fees are shifted only in favor of one party. Under this regime only the winning plaintiff would benefit and recover fees from the losing defendant. The one-way fee shifting system has been incorporated in some American environmental statutes to encourage plaintiffs to file claims that benefit the public.

B. The American Rule

While the American legal system inherited much of England’s jurisprudence, including citizen suit provisions, the loser pays theory did not complete the trans-Atlantic crossing. Instead, in the United States the

---

84 Id. The theory is straightforward; pay private citizens to enforce the law on their fellow citizens, because the crown does not have the resources to adequately enforce its own laws. Id.
85 Id. at 954. Informer’s actions and private enforcement became so widespread and available for such diverse regulations as the English legal system sought to increase the cost of crime by making private prosecution lucrative. There were several problems with the system including an overt class bias which encouraged the wealth class to act as regulators of the lower classes. The crimes that the upper classes enforced with vigor were largely petty offences and eventually disrespect grew for the laws and contempt grew for the enforcers. Enforcers were no longer looked on as legitimate and the system eroded. Id.
87 Id.
88 Id.
89 Id.
90 See infra Part II(C).
traditional rule on attorney’s fees is known as the “American Rule,” which holds that each party must bear its own legal expense. In the United States express statutory authorization must exist for the court to depart from the traditional rule and allow fee shifting. While the general rule in the United States is that the prevailing party is prohibited from recovering fees, there is a substantial body of statutory exceptions to the rule. The American Rule is frequently disregarded to promote public interest litigation where Congress has “opted to rely heavily on private enforcement to implement public policy.”

In the United States the default method for calculation of attorney’s fees is known as the “Lodestar Method.” The mechanics of the method are simple: “the value of the attorney’s work on a case is measured by (1) the number of hours reasonably expended on the litigation, multiplied by (2) a reasonable hourly rate.”

C. Federal Environmental Citizen Suits With Attorneys’ Fees Provisions

Not only has the federal government granted citizens standing to sue for violations of environmental statutes and waived sovereign immunity of its own liability for environmental transgressions, it has also incorporated fee shifting provisions, thus creating an incentive, or at least

---

91 Sisk Primer, supra note 13, at 738.
92 Id. at 738-39. There are limited common law exceptions to the American Rule, but because of their limited application generally, and their nonexistence in the scope of environmental citizen suit provisions they will not be discussed here.
93 John F. Vargo, The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice, 42 AM. U. L. REV. 1567, 1588 (1993). Vargo’s research found “over 200 federal statutes and almost 2000 state statutes that provide for the shifting of attorney’s fees.” Id.
94 Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 263 (1975). “It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damages awards under the antitrust laws is a prime example . . . .” Id.
96 Id. at 748.
leveling the playing field, for attorneys to take cases that are in the public interest and may not otherwise be economically feasible.\textsuperscript{97}

There is nothing unusual about the recovery of attorney’s fees in federal environmental citizen suits.\textsuperscript{98} It was well known in the 1970’s that federal enforcement mechanisms were lacking in efficacy, so Congress created the citizen suit provision to bolster enforcement.\textsuperscript{99} In recognizing citizens’ invaluable role in enforcing environmental regulations, Congress removed the financial barriers to that assistance by allowing courts to award reasonable attorney’s fees whenever “appropriate.”\textsuperscript{100} This provision for funding devices was intended to close the resource gap between industry and public interest.\textsuperscript{101} In \textit{Sierra Club v. Gorsuch},\textsuperscript{102} the D.C. Circuit stated the purpose of the attorney’s fees provision in the Clean Air Act\textsuperscript{103} is “to encourage the participation of ‘public interest’ groups in resolving complex technical questions and important and difficult questions of statutory interpretation, and in monitoring and implementing the Act.”\textsuperscript{104} The Supreme Court has found that under the Clean Air Act a party need not prevail on the “central issue,”\textsuperscript{105} but need only succeed on “any significant issue in [the] litigation which achieves some of the benefit the parties sought in bringing the suit.”\textsuperscript{106}

The Senate, in enacting section 304(d) of the Clean Air Act, stated:

\textsuperscript{97} \textsc{Gregory C. Sisk, Litigation with the Federal Government: Cases and Materials} 809-10 (Foundation Press 2000) [hereinafter \textsc{Sisk Casebook}].

\textsuperscript{98} See Sisk Primer, supra note 13, at 777-78.


\textsuperscript{100} Id. at 309.

\textsuperscript{101} Boyer & Meidinger, supra note 8, at 843-844. In the agency rulemaking process there is an imbalance between the resources industry can muster as opposed to the “other interests.” The fee shifting provisions are an attempt to mitigate this imbalance. Id.


\textsuperscript{103} 42 U.S.C. § 7607(f) states: “In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines such award is appropriate.”

\textsuperscript{104} Gorsuch, 672 F.2d at 38. See also Russell & Gregory, supra note 99, at 343.


Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions brought. The courts should recognize that in bringing legitimate actions under this section, citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions that result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such action.\(^{107}\)

Like the Clean Water Act there are about a dozen federal citizen suits that allow awards for litigation costs including reasonable attorney and expert witness fees to any party, whenever the court determines such award is appropriate.\(^{108}\) This provision has been tested and interpreted in


\(^{108}\) Clean Air Act § 304(d) states: "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." Id. There is similar language in 42 U.S.C. § 7604(d) (2000). The following environmental statutes allow attorney's fees to be granted when the court deems such an award "appropriate": Toxic Substances Control Act §§ 19(d), 20(c)(2), 15 U.S.C. §§ 2618(d), 2619(c)(2); Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4); Surface Mining Control and Reclamation Act of 1977, § 520(d), 30 U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act § 117(c), 30 U.S.C. § 1427(c); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g)(4), 33 U.S.C. §
the federal courts since the 1970's, and has acted as an incentive for the citizenry to bring environmental suits that serve the public interest.109

D. State Environmental Citizen Suits With Attorneys' Fees Provisions

When professor Sax proposed his plan to open access to the courts for citizens to sue for environmental wrongs, he was attempting to level the field between interests adverse to the conservation and protection of natural resources and interests that endeavor to protect those resources.110 In order to achieve balance Sax knew that access to the courts was not enough; he knew that it was necessary to allow for the possibility of cost recovery.111

While it is now somewhat routine for fee shifting provisions to be included in federal environmental statutes,112 relatively few states113 have fully employed their citizenry to fill in for the inadequate enforcement of environmental regulations due to budgetary constraints.114 Minnesota is one of the states that imprudently lacks provision for an award of attorney's fees and costs in environmental citizen suits.


109 See Russell & Gregory, supra note 99, at n.91. Russell found no empirical evidence that the "appropriate" standard encourages public interest groups to litigate these types of suits, but common sense suggests that potential fees recovery can serve as a powerful incentive for public interest groups with limited resources.

110 See SAX, supra note 6, at Ch. 1.

111 Id.

112 SISK CASEBOOK, supra note 97.

113 See generally George et al., supra note 9 for which states have environmental citizen suit provisions that include allowance for fee shifting and costs.

114 Lehner, supra note 25, at 4.
The possibility of cost recovery for a "prevailing or substantially prevailing party" is not so much an incentive to bring a suit as it is a risk-reducing factor in weighing whether or not to bring a suit to prevent a deleterious action.\textsuperscript{115} This concept was incorporated into MEPA\textsuperscript{116} and has been interpreted as providing for costs "if the interests of justice require."\textsuperscript{117} Where such suits are brought, it is within the court's discretion to award costs. As the presiding Judge in \textit{Model Laundries} states:

Public policy favors an award of attorney fees to the prevailing or substantially prevailing party in environmental suits brought by citizens. It was in the interest of cleaning up the environment as quickly as possible that the Legislature provided the vehicle for individuals to initiate litigation without awaiting government action. The attorney fees provision of MERA serves an important purpose. It enables individuals, otherwise without the necessary financial means, to initiate and carry to completion a complex environmental action.\textsuperscript{118}

The possibility of cost recovery for a "prevailing or substantially prevailing party" is not so much an incentive to bring a suit, as it is a risk-reducing factor in weighing whether or not to bring a suit to prevent a

\textsuperscript{115} George et al., \textit{supra} note 9, at 15.

\textsuperscript{116} See \textit{supra} Part I(C)(a) for a description of MEPA. "In issuing a final order in an action brought pursuant to this section, the court may award costs of litigation, including reasonable attorney and expert witness fees to the prevailing or substantially prevailing party if the court determines that an award is appropriate." \textsc{Mich. Comp. Laws. Ann. § 324.20135(5)} (West 2005).

\textsuperscript{117} Three Lakes Ass'n v. Kessler, 300 N.W.2d 485, 488-489 (Mich. Ct. App. 1980). "Certain portions of this action were brought under MEPA." \textit{Id.} at 488. "Section 3(3) of that act provides that costs, including attorney fees, may be awarded if the interests of justice require." \textit{Id.} at 488-89. "We agree with the argument that [the section] is a statutory exception . . . ." \textit{Id.} at 489.

deleterious action. The allowance of a citizen suit with the possibility of cost recovery levels the playing field in Michigan by allowing the concerned parties access to the courts, and in some cases making it “worth it” to go to court.

2. Connecticut

The Connecticut statute, like the Michigan statute, takes an important step beyond Minnesota’s Environmental Rights Act by adopting a provision whereby the court may grant costs and attorney fees to the party that maintains the action under CEPA. The Connecticut legislature, in adopting this explicit and general waiver of the American Rule for attorney’s fees, evinced the state’s desire to abide by Professor Sax’s goal of empowering the citizenry to be a check on the environmental well being of their state.

Connecticut courts abide by the idea that standing is expressly conferred to “any person” that brings a claim to “restrain a continuing violation of” specific environmental regulations and statutes. When an individual has standing under CEPA and the person maintaining the action under the statute obtains declaratory or equitable relief against the defendant, the court may award costs, “including reasonable costs for witnesses, and a reasonable attorney’s fee.”

---

119 George et al., supra note 9, at 15.
120 CONN. GEN. STAT. § 22a-18(e) (2006).
   The court may award any person, partnership, corporation, association, organization or other legal entity which maintains an action under section 22a-16 or intervenes as a party in an action for judicial review under section 22a-19, and obtains declaratory or equitable relief against the defendant, its costs, including reasonable costs for witnesses, and a reasonable attorney’s fee.
122 Id. See also CONN. GEN. STAT. § 22a-18(e).
3. Minnesota

Following the observations of Professor Sax regarding the essential role that both citizens and courts play in protecting the natural environment, federal and state governments around the country took on the task of creating statutes to effectuate citizen interaction. Minnesota began the process with two competing bills proposed early in 1971. These bills, S.F. 471 and S.F. 418, were early versions of what became known as the Minnesota Environmental Rights Act. They were modeled after the Michigan Environmental Protection Act and were clearly intended to involve citizens in furtherance of the goal of protecting natural resources.

In effectuating this goal, Professor Sax introduced the idea of the Citizen Suit as a preventative measure, as a way to level the playing field between interests that "benefit" from environmental degradation and the

---

123 Minn. Leg. S. Committee Record, at 6-7 (1971) (on file at Minn. Hist. Soc’y.).
124 Both bills allow for citation as the “Minnesota Environmental Rights Act.” S.F. 471 § 14 (SAM 279) and S.F. 418 (1971 Journal).
125 See supra Part I(C)(a) for a description and history of MEPA.
126 Section 1 of S.F. 471, S.F. 418 provides:

The Legislature recognizes the interdependence of all components of the natural environment and that the life support system of the earth has finite limits, and recognizes further that inherent in these principles is the right of each person to the protection, preservation and enhancement of air, water, land and other natural resources locate within the state and that each person has the responsibility to contribute to the protection, preservation and enhancement thereof. Therefore the legislature declares that its continuing policy is to create and maintain within the state those conditions under which man and nature can exist in productive harmony to insure the maximum potentiality of diversity, vitality and fertility of the air, water, land, and other natural resources with which the state has been endowed. Accordingly, it is in the public interest to provide adequate civil remedies to protect the air, water, land and other natural resources located within the state from pollution, impairment or destruction.

Id. (emphasis added). See also SAX, supra note 6, at 120-21.
127 Author’s note: Economically the benefit from environmental degradation operates only in the very short term; there is arguably no way to benefit in the long term and practice operations that destroy the environment.
While the proposed Minnesota bills slightly differed from the Michigan statute, judging from the timing of their introduction (immediately after the Michigan statute’s adoption) and their general similarity to the MEPA, the Minnesota Legislature likely intended the same effect as Professor Sax suggested. In Michigan these desired effects (expanded citizen access to the courts and a more leveled playing field) were achieved by liberalizing standing requirements beyond the common law nuisance showing, and by allowing the plaintiff to recover reasonable attorney fees and costs.

S.F. 471 included the grant of standing and attorney’s fees and costs provisions when both it and S.F. 418 were re-referred out of the Natural Resources and Environment committee to the Committee on Civil Administration, but only S.F. 418 left the Civil Administration committee. S.F. 418 did not contain the attorney’s fees portion of the formula that would result in an effective empowerment of the citizenry to address environmental degradation. While it is unclear what happened to S.F. 471 or the attorney fees provision, it is clear that between the Natural Resource and Environment Committee and the Committee on Civil Administration the Senate inserted portions of S.F. 471 into S.F. 418 without including the fees provision. Once a single bill was decided on, it enjoyed enormous support from the senate, passing unanimously out of each committee it was sent to and then it was adopted unanimously. S.F. 418 became the Minnesota Environmental Rights Act and was considered novel with respect to its broad definition of what resources

128 SAX, supra note 6, at 122.
129 The Minnesota bills have expanded standing allowances, as well as extensive definitions of what “natural resources” are. See MINN. STAT. ANN. § 116B.02 (West 2005) (definitions).
130 See SAX, supra note 6. See also supra Part 2(D)(a).
131 On May 21, 1971 S.F. 418 was unanimously passed out of the Committee on Civil Administration and referred to Conference Committee. Journal of the Senate, 1971 vol. 2.
132 Id.
133 S.F. 418 was reprinted in the Journal of the Senate vol. 2., p.2636 with provisions adapted from S.F. 471, such as the definitions of natural resources section.
134 See Journal of the Senate, pp. 2636, 3464.
135 1971 Minn. Laws c.952, s.3; S.F. No 418.
were to be included within the scope of its protection.\textsuperscript{136} Loss of the essential attorney’s fees provision however, destined it to fall short of its legislative purpose.\textsuperscript{137}

III. MERA: One Leg Short of a Balanced Stool

Federal environmental citizen suit provisions that allow for the recovery of attorney’s fees are like a stable three legged stool: the first leg is the resource to be protected, the second leg is grant of standing for a citizen to sue to protect that resource, and the third leg is access that is afforded to citizens by the opportunity to recover the costs of their efforts to protect the nation’s resources.

\textit{A. Citizen Use of MERA}

Minnesota enacted the MERA shortly after Michigan’s enactment of its groundbreaking citizen suit statute with the purpose of empowering the citizenry to protect the state’s natural resources.\textsuperscript{138} Unfortunately, the legislature enacted MERA as a two-legged stool unable to accomplish its poetically drafted purpose.\textsuperscript{139}

\textsuperscript{136} Lehner, \textit{supra} note 25, at 10.

\textsuperscript{137} MINN. STAT. ANN. § 116B.01 (West 2005) states:

\[\text{T}hree\text{e present and future generations may enjoy clean air, and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.}\]

(emphasis added).

\textsuperscript{138} See id. See also section 1 of S.F. 471 (1971) and S.F. 418 (1971).

\textsuperscript{139} Purpose:

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,
MERA has been effectively utilized as a defensive suit where there is a direct personal interest at stake.\textsuperscript{140} Not long after MERA was enacted the Bryson case set the tone for how the act would be used in the coming decades.\textsuperscript{141} The Brysons owned land that contained a natural wetland, and the county sought to condemn the wetland to build a county road.\textsuperscript{142} Because Bryson was directly affected, both financially and physically, by the state action, he found it necessary to avail himself of the courts regardless of the cost. While the Brysons were successful in protecting the natural resource on their property under MERA,\textsuperscript{143} they sued to protect property from condemnation that they had a direct financial interest in. However, use as a defensive-shield-of-last-resort was not the only way Minnesota’s legislature intended MERA to be used.\textsuperscript{144} Instead, the legislature intended that any Minnesotan use the statute where a natural resource needs protection, not just where a citizen has a financial interest in protecting such a resource.\textsuperscript{145}

With the broad grant of standing to citizens and the broad scope of included natural resources, MERA’s two legs allowed access to the courts.\textsuperscript{146} Citizens and citizen groups have been successful under MERA,\textsuperscript{147} but success has been difficult to come by considering that the Minnesota Attorney’s General Office has record of only 9 suits being brought (not necessarily successfully) under MERA since 1997.\textsuperscript{148} The

\begin{itemize}
\item and other natural resources with which this state has been endowed.
\item 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.
\end{itemize}

\footnotesize
\textsuperscript{140}County of Freeborn v. Bryson, 210 N.W.2d 290 (1973).
\textsuperscript{141}Id.
\textsuperscript{142}Id. at 293.
\textsuperscript{143}Id. at 298.
\textsuperscript{144}See MINN. STAT. ANN. § 116B.01.
\textsuperscript{145}Id.
\textsuperscript{146}See Freeborn, 210 N.W.2d 290; Krmpotich v. City of Duluth, 474 N.W.2d 392 (Minn. Ct. App. 1991).
\textsuperscript{147}See id.
\textsuperscript{148}According to Andy Tourville of the Attorney’s General Office, as of 12/07/05 there is record (by statute [MINN. STAT. ANN. § 116B.03 subdiv. 2] the initiator of the suit must notify the AG’s Office) of 9 MERA claims being initiated since 1997 and 1 currently being contemplated. Mr. Tourville thinks that this number seems low, and posited that
question becomes, with so few claims does MERA meet its stated purpose "to provide an adequate civil remedy" to protect the natural resources of the state?

There are several possibilities for the lack of MERA claims: 1) the statute does provide for "adequate civil remedies," but there is no need for claims as degradation of Minnesota's resources have all but ceased, 2) other statutes are adequately protecting Minnesota's resources, 3) citizens lack the desire to bring such suits, or 4) the MERA statute is deficient in its accessibility.

B. Minnesota's Wetland Loss as Measure of MERA Efficacy

The Minnesota Department of Natural Resources (DNR) reports that since 1995 more than 11,000 acres of wetlands have been lost with only 6,000 acres of replacement wetlands created, even though the Wetland Conservation Act ("WCA") requires that destroyed wetlands
be replaced at up to a two-to-one ratio. Both the Minnesota DNR and Pollution Control Agency have published reports that even under the WCA, wetlands are not adequately protected. These unmitigated losses of wetlands, the high percentage of impaired waters in Minnesota, and the massive increase in sprawl based development, just to name a few, illustrate the condition of resource preservation in Minnesota. It is clear that even with MERA, Minnesota’s resources are still being degraded.

There are also examples of citizen groups forgoing the legal avenue that MERA affords due to the prohibitive cost and inability to recover any of those costs or reasonable attorney’s fees. For example, the Nine Mile Creek Homeowners Association filed several petitions for

---

(3) rectifying the impact by repairing, rehabilitating, or restoring the affected wetland environment;

(4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the activity;

(5) compensating for the impact by restoring a wetland; and

(6) compensating for the impact by replacing or providing substitute wetland resources or environments.

---

(e) Except as provided in paragraph (f), for a wetland or public waters wetland located on nonagricultural land, replacement must be in the ratio of two acres of replaced wetland for each acre of drained or filled wetland.

Id. § 103G.222 subdiv. 1.


155 See id. The Minnesota Pollution Control Agency and interested stakeholders identified sprawl, and its associated issues, a high priority threat to the health of Minnesota’s environment.

156 This is a group of Hopkins, MN homeowners, led by David Rosedahl, esq. (Briggs and Morgan PA. 612-977-8560), that were concerned that a neighboring development proposal would destroy portions of a wetland, resulting in increased impairment of the Nine Mile Creek watershed and increase flooding in the area. The group had little success with the City Council or the Watershed District in attempting to place limitations
Environmental Assessment Worksheets, worked with the local watershed board, the Hopkins City Council, the Minnesota Environmental Quality Board, the Minnesota DNR, and the Minnesota Pollution Control Agency with little success.\textsuperscript{157} When MERA became its last option for protecting the wetland, the group halted their efforts as the financial cost, with no chance of recovery, was unduly prohibitive.\textsuperscript{158} If citizens are unable to access MERA due to the prohibitive cost with no chance of recovering reasonable costs and attorney's fees, then the statute is not meeting the goal as stated by the legislature, "to provide an \textit{adequate civil remedy} to protect the . . . ."\textsuperscript{159} natural resources of Minnesota.

\textbf{C. Existing Attorneys' Fees Provisions in Minnesota}

There is nothing new or novel about awarding attorney's fees for citizen suits in Minnesota. One example of opportunity for recovery is found within the Duties of the Attorney General Statute.\textsuperscript{160} Minnesota's Supreme Court found that where citizens brought claims under the private attorney general statute\textsuperscript{161} an award of attorney's

and conditions on the development proposal to safeguard against flooding and unreasonable degradation of the wetland.

\textsuperscript{157} The group did succeed in having minimal conditions placed on the wetland permit. \textit{See Hopkins City Council Resolution 2005-07 to 2005-08} for conditions imposed.

\textsuperscript{158} Conversations with David Rosedahl regarding constraints to continued action. \textit{See supra} note 156.

\textsuperscript{159} \textsc{Minn. Stat. Ann.} § 116B.01 (West 2005) (emphasis added).

\textsuperscript{160} \textsc{Minn. Stat. Ann.} § 8.31 subdiv. 3a.

In addition to the remedies otherwise provided by law, \textit{any person} injured by a violation of any of the laws referred to in subdivision 1 may bring a \textit{civil action} and recover damages, together with \textit{costs and disbursements}, \textit{including costs of investigation and reasonable attorney's fees}, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.

\textit{Id.} (emphasis added).

\textsuperscript{161} \textsc{Minn. Stat. Ann.} § 8.31, subdiv. 3a.
fees is authorized. The statute limits claims that can be brought, and the claimant must prevail on the merits of the claim or in a pretrial motion. Importantly, the claimant does not need to prevail on all the claims that are made, but must prevail on a claim that allows for an award of attorney’s fees.

The other part of Minnesota’s judicial test for the award of attorney’s fees is whether the respondents’ claims benefited the public. In determining whether or not the claim benefited the public, the relative size of the group of persons injured is less important than how the contested actions affected the general public. Where the general public could be injured by the contested actions, and the claim stopped those actions, courts will find that the claim is beneficial to the public and be willing to award attorney fees.

---

162 Collins v. Minn. School of Bus., 655 N.W.2d 320, 327 (2003). “[W]e conclude that when the statute that underlies the plaintiff’s cause of action allows attorney fees as part of costs and disbursements, . . . costs and disbursements can include attorney fees.” Id.

163 MINN. STAT. ANN. § 8.31 subdiv. 1.

The attorney general shall investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade, and specifically, but not exclusively, the nonprofit corporation act, the act against unfair discrimination and competition, the unlawful trade practices act, the antitrust act, section 325F.67 and other laws against false or fraudulent advertising, the antidiscrimination acts contained in section 325D.67, the act against monopolization of food products, the act regulating telephone advertising services, the prevention of consumer fraud act, and chapter 53A regulating currency exchanges and assist in the enforcement of those laws as in this section provided.

Id. (citations omitted).

164 Collins, 655 N.W.2d at 327-28. See also Farmer’s State Bank of Darwin v. Swisher, 631 N.W.2d 796 (Minn. 2001).

165 Collins, 655 N.W.2d at 329 (relying on Foster v. Kings Park Cent. Sch. Dist., 174 F.R.D. 19 (E.D.N.Y.1997)).

166 Id. at 329; Ly v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000).

167 Collins, 655 N.W.2d at 330. The Court found that advertising, informational presentations, sales presentations, and other contact with the public could be factored in to how the “public at large” is affected. Id.

168 Id.
The language of MERA communicates the important role that citizens play in the protection of Minnesota’s natural resources and the importance of that role can only be met if citizens are truly afforded access to the courts by allowing for recovery of their attorney's fees and costs when they act for the benefit of the public.

IV. LANGUAGE TO ALLOW FOR RECOVERY OF FEES AND COSTS UNDER MERA

Environmental citizen suits create avenues where the public can engage the legal system in oversight of governmental actions, prevent destruction of natural resources, and repair environmental damage. It is now clear that MERA is not providing the “adequate civil remedy” as intended, and it is not fulfilling the policy of maintaining conditions whereby “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.” The attorney’s fees provision is vital, as MERA is not adequately meeting its legislatively stated purpose.

There are two options that the Minnesota Legislature can employ to allow citizens to recover attorney’s fees and costs when they sue to protect Minnesota’s natural resources from “pollution, impairment, or destruction.” The first option requires amendment of the Attorney General Statute, and the second, preferred option, amends the MERA statute to reflect its counterparts in other states and the federal system which allow for recovery of fees.

These options would enhance citizens' ability to utilize MERA to effectuate its intended policy of protecting, preserving, and enhancing the state’s air, water, land and other natural resources, for the enjoyment of

169 "[I]t is in the public interest to provide an adequate civil remedy . . . ." Minn. Stat. Ann. § 116B.01.

170 Id.

171 See id. for purpose.


present and future generations. These options are tested, and have proven effective in removing the onerous financial barriers to providing an "adequate civil remedy" without resulting in an increase of abusive or harassing lawsuits. This can be accomplished with simple amendments to current Minnesota law. By not making any substantive changes in the environmental restriction, affected interests will not be overly burdened or blindsided by a dramatic shift in the law. Further, by utilizing existing, time-tested language, such as the attorney's fee provision in the Clean Air Act, or in state statutes that have been extensively litigated to determine their meaning, Minnesota courts hopefully will not have to work to determine their meaning because similar language has been litigated in other judicial systems.

The following changes will afford citizens an accessible avenue to insure that existing environmental regulations are enforced and the state policy of protecting invaluable natural resources is upheld.

A. Incorporating MERA Into Minnesota's Private Attorney General Provision

Minnesota's Private Attorney General Statute provides that any person, who is injured by violation of any of the included laws, "may

---

174 MINN. STAT. ANN. § 116B.01.
175 After an extensive survey of the relevant literature drawn together to write this paper, no evidence has surfaced that attorney's fees provisions increase the amount of abusive or harassing claims.
176 Clean Air Act 42 U.S.C. §§ 7604(d), 7607(f). "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." Id. See, Sisk Primer, supra note 13, at 776-78, n.333. For an extensive list of relevant attorney's fee provisions in federal environmental statutes. Id.
177 MINN. STAT. ANN. § 8.31 subdiv. 3a.
178 Id. The private AG provision is available for claims that are within the scope of statutes included in subdivision 1 of § 8.31. Those statutes include: violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade, and specifically, but not exclusively, the nonprofit corporation act, the act against unfair discrimination and competition, the unlawful trade practices act, the antitrust act, section 325F.67 and other laws against
bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees.”

In Collins the court found that such recovery was available only for the included statutes, and where the lawsuit benefited the public. Therefore, by adding MERA to the list of included statutes it comes within a court's discretion to award relevant costs and fees.

Amendment of the Private Attorney General Statute is something that the legislature is very capable of completing as it was amended in 2005 to include the Prevention of Fraud Act and the False Statement in Advertising Act. This 2005 amendment added laws that citizens are

false or fraudulent advertising, the antidiscrimination acts contained in section 325D.67, the act against monopolization of food products, the act regulating telephone advertising services, the prevention of consumer fraud act, and chapter 53A regulating currency exchanges and assist in the enforcement of those laws as in this section provided.

MINN. STAT. ANN. § 8.31 subdiv. 1 (citations omitted).
179 MINN. STAT. ANN. § 8.31 subdiv. 3a.
180 Collins v. Minn. School of Bus., 655 N.W.2d 320, 327, 329 (2003). The court did not allow recovery of attorney’s fees and cost for all of the claims petitioners made, but did allow for recovery for the claims that were within the scope of § 8.31. Id.
181 Id. Fee awards under the Private AG Statute are reviewed for abuse of discretion. Id.
182 See H.F. 2459, 2005 Leg., 84th Sess. (Minn. 2005), amending MINN. STAT. ANN. § 8.31 subdiv. 3(a). Civil actions pursuant to subdivision 3a for violations of the Prevention of Consumer Fraud Act (sections 325F.68 to 325F.70), or the False Statement in Advertisement Act (section 325F.67), or other laws against false or fraudulent advertising may be brought only by natural persons who purchase or lease goods, services, or real estate for personal, family, or household purposes. Each such person seeking to recover damages for violations of these sections is required to prove on an individual basis that the deceptive act or practice caused the person to enter into the transaction that resulted in the damages. No award of damages in an action covered by this subdivision may be made without proof that the person seeking damages suffered an actual out-of-pocket loss. The term ‘out-of-pocket loss’ means an amount of money equal to the difference between the amount paid by the consumer for the good or service and the actual market value of the good or service that the consumer actually received. Any party to an action for damages under this subdivision shall have the right to demand a jury trial. Id.
183 MINN. STAT. ANN. §§ 325F.68-.70 (West 2005).
184 MINN. STAT. ANN. § 325F.67.
now able to privately enforce, and recover costs and fees for their action where it serves the public’s benefit.

There are several problems with this option, the first being that MERA does not create any substantive rights as the other statutes included in section 8.31 do. Instead, it is procedural in that it creates standing for “any person” to file an action against “any person” for “any conduct” “which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit . . . or any conduct which materially adversely affects or is likely to materially adversely affect the environment.” This allows any person residing within Minnesota to maintain a MERA action to protect natural resources within the state from pollution, impairment, or destruction without needing to show an individual injury. Because MERA creates a right to bring a claim for any environmental transgression, inclusion of it in § 8.31 would place the broad scope of enforcement within the duties the Attorney General is statutorily directed to investigate.

Inclusion of MERA in § 8.31 would vastly complicate the attorney general statute as MERA is not a single substantive statute that the Attorney General or citizens can investigate and enforce. It may instead add the requirement that the Attorney General oversee the “protection, preservation, and enhancement of air, water, land, and other natural resources located within the state.” While this may be a beneficial move for Minnesota, it is complex, unclear as to the effect, and not a politically palatable proposition.

---

185 MINN. STAT. ANN. § 116B.03 subdiv. 1.
186 MINN. STAT. ANN. § 116B.02 subdiv. 5.
188 MINN. STAT. ANN. § 8.31 subdiv. 1. This section is a directive to the Attorney General defining the scope of his enforcement and prosecution powers. While it is arguable that Minnesota would benefit as a whole if the Attorney General were directed to enforce environmental violations as defined in MERA it adds an unnecessary layer of complexity to the goal of providing citizens with access to the judicial system through MERA by allowing recovery of costs and fees. Id.
189 MINN. STAT. ANN. § 116B.01.
While the attorney’s fee provision in the private attorney general statute has been tried and tested by Minnesota courts, and citizens have been successful in recovering fees for their efforts under the statute, the inclusion of MERA in § 8.31 will not efficiently accomplish MERA’s original purpose of providing an adequate civil remedy for the protection of Minnesota’s natural resources. Incorporation of MERA into § 8.31 will raise many questions regarding the duties of the Attorney General in relation to MERA, the scope of claims that citizens are able to bring under MERA for recovery in conjunction with § 8.31’s attorney’s fees provisions, and the standing that is necessary to bring a claim for the protection of the state’s resources.

B. Incorporating Federal Language Waiving the American Rule into MERA

When the Minnesota legislature was contemplating MERA in 1971 and unfortunately choose not to include the attorney’s fees provision, they made a mistake that must now be rectified if the Act is to accomplish its stated purpose. Including the fee shifting language directly in MERA was the best location then, just as it is now. The question now becomes, where in the statute should that language be, and exactly what should it say?

1. Original Proposed Language

One of the original versions of MERA included a simple provision providing for:

[Attorneys’ Fees; Costs; Damages.] Upon a finding against the defendant in any action maintained under this act, the

---

190 MN. STAT. ANN. § 8.31.
192 Minn. S. File 471 (Feb 10, 1971) (stored at Minn. Hist. Soc’y, SAM 279 roll 2).
193 Id.
court shall award the plaintiff reasonable attorney fees, costs, and damages as proved.\textsuperscript{194}

While the 1971 legislature incorrectly believed that such a provision was not necessary,\textsuperscript{195} that language is useful in determining where the current cost and fees provision will fit in the structure of the existing act. Section 7, where the provision was originally located, is generally concerned with the actions of the court once it has determined the defendant is in violation of MERA.\textsuperscript{196} In the present MERA statute, this location most closely corresponds with Minn. Stat. § 116B.07 [Relief], as this section develops the remedies available to the court once a violation has been found. While Minn. S. File 471 (1971) provides helpful insight as to where in the text of MERA the attorney's fees provision should be located, it is not necessarily a good model to incorporate into the current MERA. The provision was not adopted by the 1971 legislature and it has not been tested in the environmental context. Thus, it would be wise to adopt a provision that has seen substantial judicial interpretation and has been successfully used in environmental citizen suit litigation.

2. Federal Language

The oldest and possibly most litigated\textsuperscript{197} attorney's fees provision is found in § 304(d) of the Clean Air Act: "[t]he court in issuing any final order in any action brought pursuant to subsection (a)\textsuperscript{198} of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate."\textsuperscript{199}

\textsuperscript{194} Id. § 7(7).
\textsuperscript{195} Enactment of Minn. S. File 418 (1971) without the attorney's fee provision can be interpreted as legislative belief that allowance of fees was not necessary to fulfilling the policy as laid out in the act.
\textsuperscript{196} Minn. S. File 471 1971 at § 7.
\textsuperscript{197} See Russell & Gregory, supra note 99, at 310.
\textsuperscript{198} 42 U.S.C. § 7604(a) creates a civil action against any person (including the government) for any violation of the Clean Air Act.
\textsuperscript{199} 42 U.S.C. § 7604(d) (2000).
This provision has seen substantial litigation in interpreting the meaning of "appropriate," and in determining when a party has prevailed so as to justify the fee award. There have been numerous federal statutes that employ this same language with regard to their own citizen suit provisions. As a result, use of "appropriate," and the preceding language, would not be a radical departure from common practice and would not require extensive research or litigation to determine its judicial meaning. But, the use of "appropriate" may result in unnecessary confusion as to the plain meaning of the attorney's fee provision. Confusion is understandable as the U.S. Supreme Court has spent time determining what it means. According to Justice Rehnquist in Ruckelshaus, "whenever it determines that such an award is appropriate" requires that the party have some degree of success on the merits for an award of fees to be "appropriate" within the historical principles of fee-shifting.

While the language that is employed within the Clean Air Act and with numerous other federal environmental statutes has worked for decades, it includes unnecessarily ambiguous terms such as "appropriate." In order for MERA to create access for citizens trying to protect the State's resources it is essential that the tools allowing such access be clear and free of complexities that could result in further future litigation.

C. Proposed Language for MERA

Currently, Representative Steve Simon of the Minnesota Legislature has introduced a bill based on earlier versions of this article. Minnesota statutes 2004, section 116B.03, is amended by adding a

---

201 See Russell & Gregory, supra note 99, at 310. See also supra notes 91-109 and accompanying text.
202 See supra note 108 for a list of these statutes.
203 See Ruckelshaus, 463 U.S. 680.
204 Id. at 682-83 (emphasis omitted).
205 Minn. H.F. 4158. As introduced in the 84th Legislative Session (2005-2006), "A bill for an act relating to the environment; ... providing for the award of costs in civil actions; amending Minnesota statutes 2004, sections 116B.03, by adding a subdivision;" Id. at § 1.
subdivision to read: “subdiv. 6. Award of Costs: Upon motion of a party prevailing in an action under this section, the court may award costs, disbursements, and reasonable attorney fees and witness fees to that party.” Rep. Simon’s proposed language accomplishes access by clearly and succinctly providing a two-way waiver of the American rule. Further, this proposed provision is very similar to existing statutory language in Minnesota.

Section 1. Minnesota Statutes 2004, section 116B.03, is amended by adding a subdivision to read: **Subd. 6. Award of costs.** Upon motion of a party prevailing in an action under this section, the court may award costs, disbursements, and reasonable attorney fees and witness fees to that party.

Rep. Simon’s proposed language will add a new subdivision to section 3 of MERA that will directly incorporate the attorney’s fee provision into the section of MERA that develops the civil suit. The proposed language is also unambiguous as to its meaning, unlike some of the federal waivers of the American rule, thus hopefully eliminating inefficient litigation over the meaning of the waiver.

This language is very similar to language in other Minnesota environmental statutes, such as the Minnesota Environmental Response and Liability Act. Two-way waiver (also known as the “English Rule”) of the American Rule allows either party to petition the court for fees and costs when they are the prevailing party. See supra Part 2(A).

---

206 Id.
207 Two-way waiver (also known as the “English Rule”) of the American Rule allows either party to petition the court for fees and costs when they are the prevailing party. See supra Part 2(A).
208 Minn. H.F. 4158.
209 See MINN. STAT. ANN. § 115B.14 (West 2005) (Minnesota Environmental Response and Liability Act). “Upon motion of a party prevailing in an action under sections 115B.01 to 115B.15 the court may award costs, disbursements and reasonable attorney fees and witness fees to that party.” Id.
210 Minn. H.F. 4158.
211 MINN. STAT. ANN. § 116B.03. This section creates standing for citizens to sue under MERA.
212 See supra Part 4(B).
and Liability Act (MERAL).\textsuperscript{213} MERLA’s attorney fees provision has been litigated and a reviewing court found that the district court has discretion in awarding fees to the prevailing party. That award decision would only be disturbed if there is a clear abuse of that discretion.\textsuperscript{214} In calculating fees arising from the MERLA provision the court used the well-accepted lodestar method\textsuperscript{215} by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate.\textsuperscript{216}

Representative Simon’s language can easily be implemented, as it is uncomplicated and clear in its effect on the citizen suit provision of MERA. It will allow the prevailing party,\textsuperscript{217} either plaintiff or defendant, to recover some of the expenses associated with litigating the case. This will have effects that are beneficial to both industry and public interest groups. Suits with just enough merit to not be frivolous, but that can delay industrial actions will be discouraged because the bringer of the claim may have to bear the opposition’s cost. Citizens concerned with the health of Minnesota’s resources will benefit, as they will be able to afford to bring suits to protect those resources through recovery of the attorney’s fees and costs of the litigation.

CONCLUSION

For the last three decades MERA has failed to provide Minnesotans with an “adequate civil remedy” as the legislature promised in its poetic mission statement of the statute. The air, water, land, and other natural resources have suffered pollution, impairment, and destruction because of that failing. As a result, Minnesota’s citizens, both present and future, have suffered and will continue to suffer.

\textsuperscript{213} \textsc{Minn. Stat. Ann.} §§ 115B.01-.241. “Upon motion of a party prevailing in an action under sections 115B.01 to 115B.15 the court may award costs, disbursements and reasonable attorney fees and witness fees to that party.” \textsc{Minn. Stat. Ann.} § 115B.14.
\textsuperscript{214} Kennedy Building Assoc. v. Viacom, Inc., 375 F.3d 731, 748 (8th Cir. 2004).
\textsuperscript{215} See supra Part 2(B) for discussion of the lodestar method.
\textsuperscript{216} Kennedy Building Assoc., 375 F.3d at 748.
It is the right of each Minnesotan to protect the state’s resources by amending MERA to allow for the recovery of costs, citizens are afforded greater court access to exercise that right. MERA is a powerful statute that can contribute to the maintenance of the invaluable natural resources of Minnesota if it is amended as H.F. No. 4158 proposes.

---

218 MINN. STAT. ANN. § 116B.01 states “[E]ach person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state . . . .”