Environmental Law—Protection of Scenic and Aesthetic Resources under the Minnesota Environmental Rights Act—State ex rel. Drabik v. Martz, 451 N.W.2d 893 (Minn. 1990)

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INTRODUCTION

The objective of the Minnesota Environmental Rights Act (MERA)\(^1\) is to provide "an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction."\(^2\) The term "natural resources" includes "scenic and aesthetic resources . . . owned by any governmental unit or agency."\(^3\) Since its enactment in 1971, MERA has been used effectively to prevent the pollution, impairment, and destruction of a variety of Minnesota's natural resources.\(^4\)

1. MINN. STAT. §§ 116B.01-.13 (1990). The Minnesota Environmental Rights Act was signed into law by Governor Wendell Anderson on June 7, 1971.
2. Id. § 116B.01 (Purpose). Section 116B.01 states:
   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.
   Id.
3. Id. § 116B.02, subd. 4 (Definitions): "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 aesthetic resources shall also be considered natural resources when owned by any governmental unit or agency."
4. See, e.g., Powderly v. Erickson, 301 N.W.2d 324 (Minn. 1981) (applying MERA to prevent, for a time, the demolition of historic row houses in Red Wing); People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minnesota Envtl. Quality Council, 266 N.W.2d 858 (Minn. 1978) (applying MERA to block a segment
MERA's "scenic and aesthetic" provision is a potentially invaluable tool for the protection of Minnesota's unique environmental resources from external threats. However, few cases have been initiated under MERA asserting protection of scenic and aesthetic resources. To date, Minnesota court decisions have developed no
formal standards to determine what is protectable under MERA’s scenic and aesthetic provision.

In *State ex rel. Drabik v. Martz*, the Minnesota Court of Appeals decided that MERA precluded the construction of a radio tower on privately-owned land near the Boundary Waters Canoe Area in Northern Minnesota. In holding that the construction of the radio tower would “materially adversely affect” protected scenic and aesthetic resources, the court failed to articulate authoritative criteria for the evaluation of scenic and aesthetic resources. As the provision now stands, a private landowner cannot reasonably determine what conduct is actionable. MERA’s scenic and aesthetic provision remains open to future challenges based on unconstitutional vagueness.

This Note first discusses the history and purpose of MERA in light of the problems faced by plaintiffs in environmental actions at common law. Next, this Note explores MERA’s unique provisions and illustrates MERA’s effect on common law obstacles generally encountered in traditional natural resource litigation. Third, this Note discusses the Martz decision and identifies problems that arise from the protection of a scenic or aesthetic resource. This Note concludes by describing a method for evaluating scenic and aesthetic resource issues that should withstand attacks of unconstitutional vagueness and continue to serve the purpose of protecting Minnesota’s environmental resources.

I. HISTORY AND PURPOSE OF MERA

A. Defending the Environment: Common Law Obstacles

The area of environmental law developed in the 1960s in response
to citizen concern for the preservation of the environment. By the late 1960s, it was clear that existing administrative and common law environmental protection mechanisms were inadequate to protect the environment. Legal scholars argued that by modifying existing legal doctrines, citizens could provide an important and effective supplement to governmental action for environmental protection.

Foremost among these scholars was Professor Joseph Sax, who published Defending the Environment: A Strategy for Citizen Action in 1971. In Defending the Environment, Sax concluded that the power of the judiciary should be increased in environmental disputes to allow citizens, through litigation, to play a greater role in environmental protection.

Sax's conclusion was based on two criticisms of the then-existing environmental protection system. First, Sax stated that the then-current system for resolving environmental disputes was enmeshed in the political and practical quagmire of the bureaucratic process. The highly political nature of administrative agencies made it difficult for the bureaucrat, let alone the private citizen, to advance and resolve environmental concerns through administrative channels. Further, "red tape" involved in the administrative process could convince a concerned party that the measures necessary for success were not worth the effort.

Second, to preserve their political capital, bureaucrats and agencies often put their self-interest ahead of environmental quality. For this reason, Sax argued the then-existing practice of relying solely on administrative regulation would likely result in the "insidious, cumulative degradation of the environment." "It is much easier [for the

10. Bryden, Environmental Rights, supra note 4, at 163. Commentators theorized that if private citizens were able to litigate their environmental concerns, the courts, in conjunction with interested private citizens, could play a meaningful and useful role in shaping environmental policy. Id.
11. J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971) [hereinafter DEFENDING THE ENVIRONMENT]. Sax, at the time his book was published, was a professor of law at the University of Michigan. Sax is also the author of the Model Environmental Protection Act (Model Act) which was adopted by the Michigan Legislature in 1969 as the Michigan Environmental Rights Act (MEPA). See MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West Supp. 1977). For the text of the Model Act, see the appendix to DEFENDING THE ENVIRONMENT, supra, at 247-52.
12. DEFENDING THE ENVIRONMENT, supra note 11, at 56.
13. Id. at 108.
14. Id. at 110.
15. Bryden, Environmental Rights, supra note 4, at 170. This cumulative degradation is also known as the "nibbling phenomenon" where "large resource values are gradually eroded, case by case, as one development after another is allowed." DEFENDING THE ENVIRONMENT, supra note 11, at 55.
government bureaucrat] to tell a developer that he cannot dam up the Grand Canyon than to tell each real estate investor, one by one over time, that he cannot fill an acre or two of marshy 'waste land.'”

Sax reasoned that, with necessary modifications, the judicial process would allow private citizens to do more than merely participate in an agency hearing. Private citizens would have the opportunity to initiate actions to protect the environment. Sax's premise in *Defending the Environment* was that private citizens and special interest groups are better suited to the pursuit of “good” environmental policy through litigation than are government bureaucrats through agency administration. “[T]he fact is that the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. He is perfectly capable of fighting his own battles—if only he is given the tools with which to do the job.”

With the right tools, the citizen could bring an environmental concern to the branch of government least likely to be infected by the “disease” of politics, the courts. When compared with administrative agencies, the courts are “outsiders.” Courts are less amenable to political pressure than administrative agencies and the judicial process inherently presents less “red tape” than the bureaucratic process. Because no judge is likely to deal exclusively with environmental cases, there is far less pressure than in the bureaucratic process to strike some balance between the various parties involved in such cases. By possessing the uninhibited power to enjoin “projects that lack specific legislative authorization and that have substantial and often irreversible environmental consequences, the courts can achieve a sort of ‘legislative remand,’ . . . forcing the defendants to seek ‘some form of genuine public assent’ . . . .”

In 1969, a bill was introduced to the Minnesota Legislature that was very similar to the Model Environmental Protection Act offered by Sax in *Defending the Environment*. The version of MERA that

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17. *Id.*
18. *Id.* at 82. The selection of agency bureaucrats who deal with environmental matters is based partly on the reaction of pressure groups towards political candidates. This is generally not the case with the selection of judges. Further, judges and the courts are, by design, immune to political pressure. See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970).
21. Note, *The Minnesota Environmental Rights Act*, 56 Minn. L. Rev. 575, 577 (1972) (discussing enactment of the MERA in 1971). This environmental bill was introduced too late in the 1969 legislative session to be considered. In fact, very few
eventually became law went through more than a dozen drafts and weathered a number of major controversies.\textsuperscript{22} However, the final version of MERA embodied all of what Sax hoped to accomplish with the Model Act.

Before MERA was enacted there were few common law remedies available to private citizens fighting pollution. The common law enforced strict standing requirements for private individuals and organizations wishing to sue federal or local governments in connection with environmental damage.\textsuperscript{23} If standing was found, a court typically gave great deference to the federal and local governmental decisionmaking process. This deference was embodied in the "substantial evidence" rule which applied only a minimum rationality test to the governmental action.\textsuperscript{24}

Common law remedies were aimed primarily at protecting individual property interests.\textsuperscript{25} Nuisance law served as the most useful cause of action for landowners with environmental concerns.\textsuperscript{26} Under nuisance law, a plaintiff was required to show a specific injury,
an interference with the quiet use and enjoyment of some proprietary interest.27 However, the nuisance cause of action was problematic because, when the environmental damage affected a larger area, the plaintiff was required to show that his injury differed "'not only in degree but in kind' from the injury to other citizens."28 For this reason, a plaintiff with ideological concerns about environmental damage was rarely successful at obtaining relief.

Once in court, a plaintiff had to contend with extremely difficult burden of proof requirements. In environmental disputes, factual issues are often so complex and speculative that the party with the burden of proof cannot meet the required legal burden. Consider, for example, the difficulty of proving, by a preponderance of the evidence, that horse manure entering a tributary creek several miles upstream from a lake is the cause of severe detrimental algal growth in that lake.29 These obstacles often prevented plaintiffs and organizations from successfully challenging polluters under the common law.

B. MERA's Modification of the Common Law

The Minnesota Environmental Rights Act removes the standing and burden of proof obstacles presented by the common law. The removal of these obstacles allows private citizens effectively to confront environmental degradation. MERA extends the right to initiate actions to "'[a]ny 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 . . . .'"30 These persons or entities may enforce existing environmental quality standards,31 enjoin conduct that "maternally adversely affects or is likely to materially adversely affect the environment,"32 intervene in or compel judicial review of administrative

27. See Bryden, Environmental Rights, supra note 4, at 166; see generally RESTATEMENT (SECOND) OF TORTS § 822 (1979).
28. Bryden, Environmental Rights, supra note 4, at 166 (citations omitted); see also RESTATEMENT (SECOND) OF TORTS § 821B (1979).
30. MINN. STAT. § 116B.03, subd. 1 (1990) (Civil Actions).
31. Id. § 116B.03, subd. 1. See id. § 116B.02, subd. 5: "'Pollution, impairment or destruction' is any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof . . . ."
32. Id. § 116B.02, subd. 5. However, the mere introduction of an odor into the air does not alone constitute pollution. Id.
proceedings concerning the environment, or challenge state environmental standards or actions.

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

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33. Section 116B.09 states:

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

(2) In any such administrative, licensing, or other similar proceedings, the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources located within the state and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

(5) In any action for judicial review of any administrative, licensing, or other similar proceeding as described in subdivision 1, the court shall, in addition to any other duties imposed upon it by law, grant review of claims that the conduct caused, or is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources located within the state, and in granting such review it shall act in accordance with the provisions of sections 116B.01 to 116B.13 and the administrative procedures act.

Id. § 116B.09 (Intervention; Judicial review).

34. See id. § 116B.10 (Reviewal of State Actions).

35. See id. § 116B.04 (Burden of Proof). This section states in part:

In any action maintained under section 116B.03, . . . whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant violates or is likely to violate [an] environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit, the defendant may rebut the prima facie showing by the submission of evidence to the contrary; provided, however, that where the . . . regulations . . . of two or more of the aforementioned agencies are inconsistent, the most stringent shall control.

[Whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by
Unlike nuisance law, MERA does not require the plaintiff to show that a defendant’s conduct is unreasonable. Reasonable conduct is considered an affirmative defense under MERA. To use this defense, a defendant must show that there is no feasible and prudent alternative and that the conduct at issue is consistent with and reasonably required for “promotion of the public health, safety, and welfare in light of the state’s paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone are not sufficient.”

The first case involving MERA to reach the Minnesota Supreme Court was *County of Freeborn v. Bryson*. William and Arlene Bryson initiated this action in response to condemnation proceedings brought by Freeborn County. Land owned by the Brysons was condemned for construction of a new county highway. The Brysons asserted that the construction of the highway would destroy marshland on their property which supported a substantial wildlife population. The Brysons argued that, under MERA, even governmental condemnation of land was prohibited if the condemnation resulted in the destruction of wildlife and if the government failed to show that no feasible and prudent alternative existed. The County argued that the application of MERA was limited by the County’s power to condemn land for public use and that any alternative routes for the highway were less safe and more expensive than the proposed route. The *Bryson* court held that MERA was not limited by the County’s power of eminent domain and that affordable and safe alternatives were available to the County that would avoid impairment and destruction of the marshland.

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36. *Id.*
37. 297 Minn. 218, 210 N.W.2d 290 (1973), rev’d, 243 N.W.2d 316 (Minn. 1976).
38. *Id.* at 220, 210 N.W.2d at 293. The area consisted of approximately 7.5 acres of natural marsh with three open water ponds. The marsh contained abundant plant and animal life. The area was developed by the owners "as a wildlife habitat through fir tree plantings, excavation of the open water ponds and maintenance of a 1-acre unharvested food plot for wildlife." *Id.*
39. *Id.* at 219-20, 210 N.W.2d at 292.
40. *Id.* at 220-21, 210 N.W.2d at 293. To avoid the marshland, the County would have to put curves in the proposed highway, a maneuver which allegedly would make the highway more dangerous and more expensive to construct. *Id.*
41. *Id.* at 227, 210 N.W.2d at 296.
42. *County of Freeborn v. Bryson*, 243 N.W.2d 316, 321 (Minn. 1976).
The *Bryson* court found in MERA fundamental environmental rights which cannot be "taken" by the state or local government. Conduct that materially adversely affects protectable resources is permitted only where factors of "unusual or extraordinary significance" exist.\(^{43}\)

On its face, MERA appears to have succeeded in removing the common law obstacles to effective citizen participation in the protection of the environment. However, examination of MERA's unique provisions, in light of the cases to which it has been applied, shows there is room for improvement.

II. MERA's Unique Provisions: Selected Applications

MERA contains a number of unique provisions not contemplated in Sax's Model Act.\(^{44}\) Provisions unique to MERA include the "limitation of the hardship" doctrine, providing that "economic considerations alone" may not constitute an affirmative defense;\(^ {45}\) the preclusion of actions against a landowner for conduct on his land which is not expected to pollute, impair, or destroy air, water, land, or other natural resources located within the state;\(^ {46}\) and the classification of scenic and aesthetic resources as protectable natural resources "when owned by any governmental unit or agency."\(^ {47}\)

The inclusion of the "limitation of the economic hardship" doctrine resulted from sharp disagreement among the drafters of MERA over what should constitute a defense under MERA. Under Sax's Model Act, the defendant can justify conduct damaging to the environment by showing there is no feasible and prudent alternative to such conduct.\(^ {48}\) Some of MERA's drafters were concerned that such a provision would allow the consideration of cost as a defense. Some drafters believed economic considerations should never be a factor in a defense to a MERA action, while others believed it should always be considered.\(^ {49}\) As a compromise, the final draft of MERA included the "no feasible and prudent alternative" language and the proviso that "economic considerations alone shall not constitute a defense."\(^ {50}\)

\(^{43}\) Id.

\(^{44}\) See appendix to *Defending the Environment*, supra note 11, at 247-52 (text of Model Act).


\(^{46}\) See id. § 116B.03, subd. 1 (Civil Actions).

\(^{47}\) Id. § 116B.02, subd. 4 (Definitions).

\(^{48}\) See Mich. Comp. Laws Ann. §§ 691.1203, subd. 1, 691.1205, subd. 2 (1987); *Defending the Environment*, supra note 11, at 250.

\(^{49}\) See Note, supra note 21, at 579.

\(^{50}\) Id. The language originally agreed upon by the drafters was: "Economic considerations alone shall not justify such conduct, program or product." This was
To date, no Minnesota case initiated under MERA has focused more than incidentally on the economic hardship limitation. However, one case sheds some light on the limitations of the "economic considerations" provision. Powderly v. Erickson\textsuperscript{51} involved the MERA provision which protects buildings, structures or sites "possessing historical, archeological, or architectural value."\textsuperscript{52} In Powderly, citizens brought an action under MERA to enjoin the demolition of row houses which had been designated by the Minnesota Historical Society as "historic" resources within the meaning of MERA.\textsuperscript{53} The owner of the buildings planned to demolish them to make room for parking for an adjacent business.\textsuperscript{54} The Minnesota Supreme Court, on first hearing, determined that the owner of the row houses, by raising the affirmative defense that there was no feasible and prudent alternative to demolition, had failed to rebut plaintiffs' prima facie evidence. The court further determined that an injunction of such demolition did not constitute an unconstitutional taking because it did not deprive the owner of all effective uses of the property. Demolition of the row houses was therefore temporarily enjoined.\textsuperscript{55}

The case was remanded to the district court to determine whether the injunction should remain if the row houses were not sold or renovated or if they fell into further disrepair.\textsuperscript{56} On remand, the district court modified the injunction and determined that if the owner could demonstrate by competent evidence that a reasonable time had lapsed and that the row houses had not been sold, renovated or acquired by eminent domain, demolition would be allowed.\textsuperscript{57} On rehearing, the Minnesota Supreme Court upheld the district court's modified injunction.\textsuperscript{58} The supreme court held that it had the duty to enjoin destruction of the protected historical resources until parties interested in preserving them had a reasonable opportunity to

\textsuperscript{amended to read: "Economic considerations alone shall not justify such conduct." Id. at 579 n.26.}

\textsuperscript{51. 285 N.W.2d 84 (Minn. 1979), appeal after remand, 301 N.W.2d 324 (Minn. 1981).}

\textsuperscript{52. Id. at 88. See Minn. Stat. § 116B.02, subd. 4 (1990) (Definitions).}

\textsuperscript{53. Powderly, 285 N.W.2d at 88. Russell Fridley, Director of the Minnesota Historical Society, defined a "historical resource as a building, structure, or site possessing historical, archeological, or architectural value . . . . [A]lthough age was one factor to consider, not all old buildings were historically significant." Id. Other factors considered were: "(1) who built the structure; (2) who lived in it; (3) its location; (4) its architecture; (5) unique materials; (6) quality of workmanship; (7) the structure's association with builders or important people or events in the area; and (8) its interaction with other buildings." Id.}

\textsuperscript{54. Id. at 84.}

\textsuperscript{55. Id. at 89-90.}

\textsuperscript{56. Powderly v. Erickson, 301 N.W.2d 324 (Minn. 1981).}

\textsuperscript{57. Id. at 325.}

\textsuperscript{58. Id. at 326-27.}
protect the integrity of the resources through legislation or other equitable measures. However, in the absence of such measures, "where neither the owners nor any public body after a reasonable length of time in which to act has lapsed, elect to preserve from demolition structures which are historical resources, the owners have a constitutional right to destroy the buildings or to put the property to any other lawful use, free from the restrictions otherwise imposed by [MERA] . . . ."60

The holding in Powderly may allow economic considerations alone to be used as a defense under certain circumstances.61 However, some commentators suggest that the economic hardship limitation is ambiguous because it opens for discussion the question of when, if ever, economic considerations are truly "alone."62 "Are such issues as jobs, prices, and taxes simply 'economic' or are they partly 'social'?"63

Another unique MERA provision precludes a cause of action based on conduct taken by a person on his own land or on land leased by him, if the conduct does not and cannot "reasonably be expected to pollute, impair or destroy any other air, water, land, or other natural resources located within the state . . . ."64 This provision was added to MERA to limit the impact of the statute on privately-owned property, to help preserve a landowner's individual freedom to use her property.65 However, it is difficult to imagine

59. Id. at 324.
60. Id.
61. In Powderly, the court could not force the owner of the historic row houses or any one else to repair and maintain their integrity. For this reason, the result was actually based on economic consideration.
62. See, e.g., Bryden, Environmental Rights, supra note 4, at 175. The question is whether the intent of MERA to ignore economic considerations can be bypassed by addressing important "social" considerations, such as a person's or a community's livelihood.
63. Id. at 175 n.89. It is not difficult to identify scenarios where an activity otherwise damaging to the environment could be justified on grounds that the activity could benefit local economies. Opponents of MERA could argue that such benefits are "social" rather than "economic."
64. MINN. STAT. § 116B.03, subd. 1 (1990) (Civil Actions) states:
   [N]o 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 cannot reasonably be expected to pollute, impair, or destroy any other air, water, land, or other natural resources located within the state . . . .
Id.
65. Bryden, Environmental Rights, supra note 4, at 175-76; Note, supra note 21, at 581-82 (based in large part on conversations with the lawmakers who were instrumental in getting MERA signed into law).

Prior to 1973, the Minnesota Legislature did not make audio recordings of committee or floor discussions. Therefore, all discussion regarding the intent of the legislature in adopting MERA is based on secondary sources.
any controversial conduct on a parcel of land that would not, to some extent, affect environmental resources located beyond that parcel of land.

In *Minnesota Public Interest Research Group v. White Bear Rod and Gun Club*, the Minnesota Public Interest Research Group (MPIRG), initiated an action under MERA for declaratory and injunctive relief against operation of a trap-and-skeet-shooting facility near the city of Hugo in Washington County. The White Bear Rod and Gun Club (Club) had applied for and received a conditional use permit for the operation of the Club. The permit required, among other things, that noise created by the Club's activities not exceed forty decibels. MPIRG argued that the Club had not complied with the noise requirement and that the noise from the operation of the skeet-shoot impaired the quietude of the environment near the Club. MPIRG further argued that pollution and destruction of water and wildlife had occurred and would continue to occur as a result of heavy deposits of lead shot created by the Club's activities.

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

*White Bear Rod and Gun Club* involved a common law nuisance issue that was litigated under environmental rights legislation. It also presented a heated discussion of the standards which should be applied in such cases. The court held that the lack of clearly developed standards for impulsive sounds did not prevent the plaintiff from asserting an action under MERA for the impairment of quietude. In formulating its reasoning for this holding, the court looked to the Michigan Supreme Court's decision in *Ray v. Mason County Drain*.

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66. 257 N.W.2d 762 (Minn. 1977).
67. *Id.* at 764.
68. *Id.* at 765.
69. *Id.*
70. *Id.* at 770.
71. *Id.* at 771. MINN. STAT. § 116B.03, subd. 1 (1990) (Civil Actions) provides that "no action shall be allowable under this section for conduct taken by a person pursuant to any . . . license . . . ."
72. *White Bear Rod & Gun Club*, 257 N.W.2d at 782 n.11.
73. *Id.* at 783.
74. *Id.* at 782; see MINN. STAT. § 116B.01 (1990) (Purpose).
75. *White Bear Rod & Gun Club*, 257 N.W.2d at 782.
Commissioner. In Ray, the Michigan Supreme Court discussed the discretion given by the Michigan Legislature to the courts to determine environmental rights in the absence of established standards. The court stated:

The Legislature in establishing environmental rights set the parameters for the standard of environmental quality but did not attempt to set forth an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution or impairment. Rather the Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality. The [Michigan Environmental Protection] Act allows the courts to fashion standards in the context of actual problems as they arise in individual cases . . . .

The court in White Bear Rod and Gun Club adopted the notion that the legislature had delegated to the courts the authority to use MERA to develop "a common law of environmental quality." However, in the process of developing a "common law," the court has thus far failed to articulate adequate guidelines for evaluating similar pollution cases in the future. This inadequacy was acknowledged by Justice Todd in his dissenting opinion in White Bear Rod and Gun Club. Justice Todd wrote: "Under the majority opinion, the decision whether certain conduct amounts to noise pollution must be made by the court with reference to vagaries attendant to the words 'materially adversely affects.'" The dissent contended that, without standards more specific than those set out by the court, there is no objective criteria for evaluating noise pollution. The dissent suggested that, in future cases involving noise pollution, the plaintiff should be required to introduce evidence of a maximum, objective level of sound which is reasonable for a particular area and to show that the conduct in question exceeds the established level.

Perhaps the most unique provision in MERA is its scenic and aesthetic provision. Minnesota contains millions of acres of wilderness in its state and federal parks and forests. By providing for the protection of scenic and aesthetic resources, the drafters of MERA sought to preserve Minnesota's natural beauty. Exactly how the drafters of MERA intended this provision to be enforced is not clear. MERA states that "[s]cenic and aesthetic resources shall . . . be considered natural resources when owned by any governmental unit

76. Id. at 782 n.12; Ray v. Mason County Drain Comm., 393 Mich. 294, 224 N.W.2d 883 (1975).
77. Ray, 393 Mich. at 306, 224 N.W.2d at 888 (footnotes omitted).
78. White Bear Rod & Gun Club, 257 N.W.2d at 762 n.12 (quoting Ray, 393 Mich. at 306, 224 N.W.2d at 888).
79. Id. at 786 (Todd, J., dissenting).
80. Id.
or agency.”81 Arguably, the phrase, “when owned by any governmental unit or agency,” is ambiguous. Does it mean that the scenic or aesthetic resource must be owned by the state if it is to be protected, or that conduct is actionable only if it is likely to adversely affect a state-owned scenic or aesthetic resource?

However, the difficulty of defining objective criteria for determining what constitutes a scenic or aesthetic resource is a more serious problem.82 This provision may have been left ambiguous for fear that a more specific provision would result in less effective protection of the environment.83 A more likely explanation for the ambiguity is that the legislature intended to delegate to the courts the task of developing the law of environmental quality.84

III. THE MARTZ DECISION

In State ex rel. Drabik v. Martz,85 Martz was enjoined under MERA from building a radio tower on land he owned near the Boundary Waters Canoe Area (BWCA) in Cook County, Minnesota. Construction of the 611-foot tower was challenged by Drabik and other Cook County residents on several grounds: (1) the tower would infringe on the scenic and aesthetic beauty of the BWCA and surrounding

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81. MINN. STAT. § 116B.02, subd. 4 (1990) (Definitions).

82. See Linder, New Direction for Preservation Law: Creating an Environment Worth Experiencing, 20 ENVTL. L. 49 (1990) [hereinafter Linder, New Direction]. “The conclusion that a particular place or object is ‘beautiful’ or ‘ugly’ has little to do with the tenets of any school of aesthetic formalism. Beauty, it appears, is indeed in the eye of the beholder.” Id. at 52.

Linder further states:

Visual beauty is an inappropriate basis for preserving natural areas. Reliance on visual beauty as the basis for protection only obscures the underlying value conflict. Various natural configurations are not favored because they have qualities that could be identified by aesthetic experts. Patterns of aesthetic responses indicate that “aesthetic response is a social construct, not an ontological given.” How “beautiful” or “ugly” a place is said to be depends on how people construe the place’s message, not upon formal visual properties.

Id. at 57 (footnotes omitted).

83. See, e.g., Houston Compressed Steel Corp. v. Texas, 456 S.W.2d 768 (Tex. Civ. App. 1970). In upholding a Texas air pollution statute, the court responded to allegations that the statute’s definition of air pollution was unconstitutionally vague by stating: “The science of air pollution control is new and inexact, and these standards are difficult to devise, but if they are to be effective, they must be broad. If they are too precise they will provide easy escape for those who wish to circumvent the law.” Id. at 774.

84. See, e.g., White Bear Rod & Gun Club, 257 N.W.2d at 782 n.12 (citing Ray, 393 Mich. at 306, 224 N.W.2d at 888) (In establishing environmental rights, the legislature set the parameters for a standard of environmental quality which was to be developed in detail by the courts.).

wilderness areas,86 (2) the supporting guy wires for the tower would endanger certain protected birds,87 and (3) the diesel fuel storage tanks necessary to power the radio station and tower could leak and threaten wildlife and water quality.88 Under MERA, Drabik had to show that a protectable natural resource was at issue and that Martz’s construction and operation of the tower would likely cause pollution, impairment, or destruction of that resource.89

The crucial issue in the case was whether Martz could be enjoined from building a structure on private land if the structure marred the view from government-owned land.90 Drabik sought to protect natural resources, including the scenic view from public lands surrounding Martz’s property, and the safety of bird and plant life on and around Martz’s property. Drabik argued that, if Martz was permitted to build the tower, the visual impact of the tower on the surrounding public lands would impair the wilderness setting. Drabik further argued that there was a significant chance that birds flying through Martz’s land would be injured or killed by the tower’s guy wires and that leakage of fuel used to power the radio tower would harm plant life and water quality.91

The Minnesota Court of Appeals affirmed the trial court’s decision to enjoin Martz from constructing the tower.92 The court held that the view in and around the BWCA is a protectable natural resource

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86. Id. at 896-97. “Over 95% of Cook County land is owned by government entities and Martz’ site is virtually surrounded by the BWCA, Judge C.R. Magney State Park and other parkland areas with outdoor recreational and wilderness uses.” Id. at 895.

87. Id. at 897. Drabik argued that “bald eagles and peregrine falcons . . . can be expected to fly in the vicinity of the Proposed Tower and that the Proposed Tower would place numbers of these species at risk.” Respondent’s Brief at 22-23, State ex rel. Drabik v. Martz, 451 N.W.2d 893 (Minn. Ct. App. 1990) (C6-89-1620).

88. Drabik, 451 N.W.2d at 897. Drabik argued that “leakage from . . . fuel storage tanks during delivery, refueling and/or storage would present a fire hazard. Leaks would endanger the area’s plant and animal life and cause ground water contamination. Any leakage, contamination, or fire, moreover, would likely go unnoticed, as the tower site will not be manned.” Respondent’s Brief at 20, State ex rel. Drabik v. Martz, 451 N.W.2d 893 (Minn. Ct. App. 1990) (C6-89-1620).

89. Drabik, 451 N.W.2d at 896. See also County of Freeborn v. Bryson, 297 Minn. 218, 210 N.W.2d 290 (1973), rev’d, 243 N.W.2d 316 (Minn. 1976); Minn. Stat. § 116B.04 (1990) (Burden of Proof).

90. Drabik, 451 N.W.2d at 897.

91. Id. at 896-97.

92. The procedural history of the Martz case is relatively complex. Findings of fact were not fully made at the trial and it is arguable whether, in fact, the tower’s guy wires posed a significant risk of injury or death to birds or whether the storage of diesel fuel on the land posed a significant risk of harm to plant life and water quality. Martz submitted affidavits which suggested the tower was not located in any major avian migration route and that diesel-powered generators were common and safe to the area. Appellant’s Brief at 9-12, State ex rel. Drabik v. Martz, 451 N.W.2d 893 (Minn. Ct. App. 1990) (C6-89-1620).
within the meaning of MERA and that construction of the radio tower would materially impact that view, diminishing the wilderness experience for visitors to the area.93

The state can clearly enjoin conduct which has or is likely to have an adverse affect on traditionally protected natural resources, such as plant and animal life.94 However, in Martz, there is the additional question of how the scenic and aesthetic language of MERA should be interpreted.95

Most would agree that a view without a radio tower is more aesthetically pleasing than a view with a radio tower, particularly when the tower is located near wilderness areas such as the BWCA. But, MERA protects only scenic and aesthetic natural resources “owned by any governmental unit or agency.”96 Martz argued that his land did not come under this provision since it was not owned by the state or any of its agencies.97 Martz also pointed to section 116B.03 of the Minnesota Statutes, which disallows actions under MERA “for acts taken by a person on land leased or owned by 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.”98

Martz argued that this language prevented the state from regulating conduct on his land, so long as the conduct did not unreasonably affect other natural resources.99 He stated that the question of whether or not the tower was a scenic eyesore was irrelevant since the state did not own a proprietary interest in Martz’s land.100 Further, Amicus Cook County argued that MERA clearly distinguishes traditional natural resources from scenic and aesthetic resources because traditional resources are readily quantifiable while scenic and

93. Drabik, 451 N.W.2d at 897.
94. Id. at 896. But see Minn. Stat. § 116B.02, subd. 2 (1990) (Definitions) (exempting family farms, a family farm corporation, or bona fide farmer corporations) and Minn Stat. § 116B.02, subd. 5 (1990) (providing that “‘pollution, impairment or destruction’ shall not include conduct which violates, or is likely to violate, any... standard, limitation, rule, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air”).
95. Drabik, 451 N.W.2d at 897.
97. Drabik, 451 N.W.2d at 897.
99. Commentators suggest this provision is designed to allow land owners freedom to do as they wish with their land. See Bryden, Environmental Rights, supra note 4, at 175-76.
100. Drabik, 451 N.W.2d at 897.
aesthetic resources are not. Amicus Cook County stated: "Scientists can measure air quality, constituents in land or water, amounts of timber, and even decibels polluting quietude. Scenic [and aesthetic] resources . . . are very subjective; beauty is in the eye of the beholder."\textsuperscript{101}

Martz contended that MERA's scenic and aesthetic provision was overly subjective and that no court could reasonably interpret the provision to include the actions of private landowners on their own land. Though this argument seems logical, the court of appeals found it flawed. Drabik framed the sole issue of the case as "[w]hether MERA protects the scenic and aesthetic qualities of government-owned wilderness from visual despoliation."\textsuperscript{102} The court found that MERA protected such qualities, stating: "The question is not whether the view from government owned land onto private property is protected. The issue is whether protected scenic and aesthetic resources of the government owned land would be materially adversely affected by construction of the tower."\textsuperscript{103} The court held that conduct on private land may be enjoined if the conduct adversely affects the scenic or aesthetic value of government-owned lands.\textsuperscript{104}

The Martz holding presents potential problems for future environmental disputes where scenic and aesthetic values are at issue. Without a concrete standard for the evaluation of scenic and aesthetic resource violations, landowners and Minnesota courts will have difficulty determining what conduct constitutes a violation of this provision. Given the results in cases such as Powderly v. Erickson,\textsuperscript{105} it is not difficult to imagine a set of facts which could circumvent both the economic considerations and the scenic and aesthetic provision and allow degradation of Minnesota's environment.\textsuperscript{106} Like the court in

\textsuperscript{101} Brief for Amicus Curiae Cook County at 5, State \textit{ex rel.} Drabik v. Martz, 451 N.W.2d 893 (Minn. Ct. App. 1990) (No. C6-89-1620). Cook County provided Martz with the necessary permits for construction of the tower. It was Cook County's position that a broad interpretation of the scenic and aesthetic provision could have an overreaching impact on the County and on other parts of northern Minnesota where most of the land is owned by government entities. Cook County argued that the increased government ownership rights which would result from a broad interpretation of the scenic and aesthetic provision would have a chilling effect on the desirability of private property ownership in such areas. \textit{Id.} at 7.


\textsuperscript{103} \textit{Drabik}, 451 N.W.2d at 897.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} 285 N.W.2d 84 (Minn. 1979), \textit{appeal after remand}, 301 N.W.2d 324 (Minn. 1981).

\textsuperscript{106} For the sake of argument, consider this: A small town in Minnesota is experiencing hard times. Its core industries are no longer important to Minnesota's econ-
White Bear Rod and Gun Club,\textsuperscript{107} the\textsuperscript{108} Martz court failed to establish adequate guidelines for future evaluation of unique natural resources, such as those with scenic and aesthetic value.

IV. A Suggested Method For Evaluation

A. The Judicial Approach to Scenic and Aesthetic Disputes

Courts in some jurisdictions have refused to consider environmental disputes based solely or largely on scenic or aesthetic grounds. Generally, these courts point to the lack of objective criteria available in defining scenic and aesthetic value as the reason for avoiding such an evaluation.\textsuperscript{108} In \textit{Commonwealth v. National Gettysburg Battlefield Tower, Inc.},\textsuperscript{109} the Commonwealth of Pennsylvania sought to enjoin the defendant from constructing an observation tower near the site of the Battle of Gettysburg. The court stated:

It is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and aesthetic values of any environment. If the standard of injury to historic values is to be that expressed by the Commonwealth's witnesses as an "intrusion" or "distraction," it becomes difficult to imagine any activity in the vicinity of Gettysburg which would not unconstitutionally harm its historic values. This, of course, indicates why elements of State government other than the judiciary should . . . establish reason-

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\textsuperscript{107} 257 N.W.2d 762 (Minn. 1977).


able regulations for the preservation, conservation and maintenance of the peoples' resources.\textsuperscript{110}

Other courts, however, routinely endorse the use of the concept of visual beauty in land-use and preservation cases.\textsuperscript{111} The United States Supreme Court has held that visual beauty is a legitimate criterion for land regulation.\textsuperscript{112} Critics of this endorsement, like Martz, contend that statutes with undefined procedures for the evaluation of what is scenically or aesthetically pleasing eventually become "catch all remedies" for anyone opposing development.\textsuperscript{113} Yet, judicial definition of scenic and aesthetic standards is arguably less intrusive when natural resource preservation is at issue than when such standards are used to prevent "private development considered to be in bad taste."\textsuperscript{114}

The problem arises when a private landowner is surrounded by protectable public lands. Nearly all of Cook County is government-owned wilderness.\textsuperscript{115} Virtually anything a private landowner does in such a setting may be considered a despoliation of the environment. For this reason, it would be prudent to establish evaluation criteria that puts similarly situated landowners on notice as to what they may and may not do with their land.

The Michigan courts have developed a common law of environmental quality. Michigan courts employ a four-part test in conjunction with the Michigan Environmental Protection Act to determine whether the impact of a proposed action on the environment rises to a level that justifies judicial intervention. In \textit{City of Portage v. Kalamazoo County Road Commission},\textsuperscript{116} the Michigan Court of Appeals considered the removal of dozens of trees along a city street that was to be widened. In deciding whether to allow the removal of the trees, the court considered:

(1) whether the natural resource involved [was] rare, unique, endangered, or had historical significance, (2) whether the resource [was] easily replaceable, (for example, by replanting trees or restocking fish), (3) whether the proposed action [would] have any

\textsuperscript{110.} Id. at 249, 302 A.2d at 895.
\textsuperscript{114.} Linder, \textit{New Direction}, supra note 82, at 51.
\textsuperscript{115.} Drabik, 451 N.W.2d 893.
significant consequential effect on other natural resources (for example, whether wildlife [would] be lost if its habitat [were to be] impaired or destroyed), and (4) whether the direct or consequential impact on animals or vegetation [would] affect a critical number, considering the nature and location of the wildlife affected.\(^{117}\)

The Michigan court determined that the short-term effect of removing trees, even when considered in aesthetic terms, did not merit judicial intervention. Further, the court held that the trees were not unique, endangered or of historical significance and that there was no significant direct impact on other natural resources.\(^{118}\)

The Minnesota Court of Appeals applied the same four-part test to a case with facts similar to those of *City of Portage* one day after it decided the *Martz* case. In *Kasden v. Independent School District No. 97*,\(^{119}\) the Minnesota Court of Appeals considered the removal of trees for construction of a driveway. The plaintiff in *Kasden* argued that removal of the trees would impair the scenic and aesthetic quality of the grove in which the trees were located, and would destroy the quietude the trees provided by shielding noise from a school playground.\(^{120}\)

Applying the *City of Portage* test to *Kasden*, the court of appeals acknowledged the similarities between MERA and the Michigan Environmental Protection Act and noted that Minnesota courts have looked to Michigan law in the past to help interpret MERA.\(^{121}\) The *Kasden* court then determined that the grove in question was not "unique" in terms of aesthetic or historical significance. From a silvicultural standpoint, the number of trees to be removed was too small to be significant. Further, the removal of the trees would not have a significant impact on the aesthetic value of the remaining grove. Finally, the removal of the trees would not have a material adverse impact on the environment.\(^{122}\)

A key problem with the test used in *City of Portage* and in *Kasden* is that such a test does not provide for an evaluation of scenic or aesthetic resources as they stand alone. The test fails to articulate definitive standards for determining what is a protectable scenic or aesthetic resource.

Applying the *City of Portage* test to *Martz*, the court of appeals could

\(^{117}\) Id. at 279, 355 N.W.2d at 916.

\(^{118}\) Id.


\(^{120}\) Id. at 1.

\(^{121}\) Id. at 2. See, e.g., *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minnesota Envtl. Quality Council*, 266 N.W.2d 858, 866 (Minn. 1978).

\(^{122}\) *Kasden*, No. C7-88-1597, at 3.
have determined that the scenic and aesthetic qualities of Cook County and the BWCA are unique and of historical significance to the state of Minnesota. Arguably, such qualities are not easily replaced. The construction of the tower could affect other natural resources, such as bird, plant and other animal life. In light of the state's interests in protecting these resources, the impact of the tower on the scenic and aesthetic qualities of the area could be too great to justify construction of the tower.

Likewise, the court could have arrived at an opposite result. The court could have determined that, given the vast expanse of the BWCA and other wilderness areas surrounding Martz's property, the limited view from these areas onto the Martz property was so insignificant that it could not be classified as unique or endangered. In light of this insignificance, the resource at issue could be considered to be not in danger. The court could have concluded that construction of the radio tower would pose no significant threat to other natural resources.

B. Scenic and Aesthetic Criteria in Zoning Law

The use of zoning ordinances to preserve unique scenic and aesthetic resources has become an accepted practice. Local governments have the police power to enact zoning ordinances which protect scenic and aesthetic resources. Generally, zoning ordinances are upheld if the local government merely shows that a rational connection exists between the public welfare and the scope of the ordinance and that the ordinance does not inflict irreparable injury on an individual landowner. A variety of zoning ordinances that protect scenic and aesthetic resources have been upheld.Previously,
courts were reluctant to uphold ordinances based solely on scenic or aesthetic considerations, reasoning that such considerations alone could not be sufficient to justify the use of the police power. Therefore, local governments have used other justifications, such as traffic safety, to sustain ordinances where their true motivation was the protection of aesthetic value.\textsuperscript{126}

Today, scenic and aesthetic considerations alone justify the use of the police power.\textsuperscript{127} The rationale is that “unsightly utilization of land can have adverse affects on people or on property values that are just as real and troublesome as those created by smoke, odors or other common nuisances that lower the quality of the environment.”\textsuperscript{128} So long as the government can show that a rational connection exists between the ordinance and the public welfare and that the landowner has incurred no irreparable harm, the ordinance will be upheld.\textsuperscript{129}

C. Suggested Method for Evaluation

The first step in evaluating the protection of scenic and aesthetic resources should be the identification of what is scenically or aesthetically protectable. Arguably, objectively identifying what is “scenic” or “aesthetic” based on visual beauty is impossible because “beauty” is entirely subjective. Minnesota courts could avoid attacks on MERA’s “scenic and aesthetic” provision based on vagueness if the “visual beauty” rationale is abandoned.\textsuperscript{130} Instead, courts should determine whether the resource has sufficient community

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\item Amendment cannot stand in the way); \textit{County of Pine}, 280 N.W.2d at 627 (upholding ordinance with dominant aesthetic purpose which prevented the construction of a residence near river bank); \textit{Naegle Outdoor Advertising Co.}, 281 Minn. at 499, 162 N.W.2d at 212 (upholding ordinance based largely on aesthetic considerations which phased-out the operation of billboards within the city).
\item \textit{Metromedia}, 453 U.S. at 529 n.7. The \textit{Metromedia} case concerned a San Diego city ordinance banning the use of billboard advertisements under certain circumstances. The city in \textit{Metromedia} claimed as justification for the ordinance that excessive posting of billboards within the city limits had a detrimental impact on highway traffic safety. \textit{Id.} Damages to scenic and aesthetic resources are often alleged together with damages to tangible natural resources because of the fear that scenic and aesthetic damage alone will not be enough to justify judicial intervention.
\item \textit{See Metromedia}, 453 U.S. at 529 n.7.
\item Agins, 447 U.S. at 261.
\item There is little evidence to support the visual beauty rationale of preventing “eyesores” or “offensive visual forms” based on the physiological or sensory predisposition of human beings to experience visual qualities in a relatively uniform manner. Aesthetic response to visual form appears to be largely based on the meanings ascribed to it by the cultural contexts of our individual histories and our experiences as members of political, economic, religious, and other societal groups. Ziegler, \textit{Ohio Land Use Law}, supra note 8, at 26.
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support and appreciation to merit protection from nearby activity that is substantially and realistically\textsuperscript{131} out of harmony with the resource's visual character.

The next step in evaluating the protection of scenic and aesthetic resources should be to balance any private interests in question against the public interest in protecting the scenic or aesthetic resource. Scenic and aesthetic criteria under zoning law calls for a balancing of private and public interests. This balancing test is absent from environmental protection statutes such as MERA. Minnesota courts should borrow this balancing test from zoning law to block action on land which harms a scenic or aesthetic resource. Minnesota courts should also use a standard which looks to whether the proposed action presents a substantial and realistic threat to the scenic or aesthetic resource to be protected rather than the overbroad relationship-to-the-public-welfare standard.\textsuperscript{132} Courts could then balance the support for the resource against the harm done to any private interests in question.

In a case with facts similar to those in \textit{Martz}, this method for evaluation would first look to whether widespread appreciation and support existed in the community for protecting the area from the scenic and aesthetic impact of a 611-foot tower. Second, the test would examine whether the tower would present a substantial and realistic threat to the scenic and aesthetic views from the BWCA. Next, the test would balance this finding against the potential harm done to the private landowner if construction of the tower is prohibited. The balancing of these issues would be left to the fact finder.\textsuperscript{133}

\textsuperscript{131} The language "substantial and realistic threat" is taken from Justice Brennan's dissenting opinion in \textit{Lyng v. Northwest Indian Cemetery Protective Ass'n}, 485 U.S. 439, 474 (1988) (Brennan, J., dissenting). Justice Brennan argued for a "centrality" test instead of a "coercion" test for cases involving the constitutional issue of free exercise of religion. \textit{Id.} In \textit{Lyng}, the issue was whether the government could be enjoined from building a road through part of a national forest in Northern California which was the site of the "high country," an area which played and continues to play a critical role in the religious practices and rituals of certain Native American tribes. \textit{Id.} at 442. The Native American tribes argued that construction of the road would disrupt their ritual practices to the point of preventing them from practicing their religion. The majority held in favor of the government on the ground that the act of building the road did not "coerce" the Native American tribes to practice another religion or, in fact, prevent them from practicing their own religion. \textit{Id.} at 449. Justice Brennan argued that if the Court employed his "centrality" test, the Court must find that the site of the road so substantially and realistically threatened the practice of the Native American faith that the Court would be required to prohibit construction of the road. \textit{Id.} at 475.

\textsuperscript{132} Most would concede that protection of the environment is rationally related to the advancement of the public welfare. For this reason, it is necessary to use a standard which is customized for environmental disputes.

\textsuperscript{133} No matter what balancing test is employed, either the environment or the
CONCLUSION

Although the result of the Martz decision may not have been different with the application of a more definitive standard for the evaluation of scenic and aesthetic resources, the present decision's precedential value is questionable since it relies on the vagaries of the words "materially adversely affects." Minnesota courts should take advantage of the opportunity presented by cases like Martz to develop more definite standards for the evaluation of unique environmental issues, such as those raised by MERA's scenic and aesthetic provision.

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actor will pay some price. John McPhee describes this balancing process particularly well:

When Stanley dammed the river, and diverted it into the pipe, he took it out of its bed for a couple of hundred yards. Pools remained there, like low tide, and as they slowly drained they revealed the graylings' dorsal fins. I walked from pool to pool, trapping the fish with my hands. This pretty little stream is being disassembled in the name of gold. The result of the summer season—of moving forty thousand cubic yards of material through a box, of scraping off the tundra and stuffing it up a hill, of making a muck-and-gravel hash out of what are now streamside meadows of bluebells and lupine, daisies and Arctic forget-me-nots, yellow poppies, and saxifrage—will be a peanut-butter jar filled with flaky gold. Probably no one will actually use it. Investors will draw it into their world and lock it in an armored cellar, while up here in these untravelled mountains a machine-made moonscape will tell the tale. Am I disgusted? Manifestly not. Not from here, from now, from this perspective. I am too warmly, too subjectively caught up in what the Gelvins are doing. In the ecomilitia, bust me to private. This mine is a cork on the sea. Meanwhile (and, possibly, more seriously), the relationship between this father and son is as attractive as anything I have seen in Alaska—both of them self-reliant beyond the usual reach of the term, the characteristic formed by this country. Whatever they are doing, whether it is mining or something else, they do for themselves what no one else is here to do for them. Their kind is more endangered every year. Balance that against the nick they are making in this land. Only an easygoing extremist would preserve every bit of the country. And extremists alone would exploit it all. Everyone else has to think the matter through—choose a point of tolerance, however much the point might tend to one side. For myself, I am closer to the preserving side—that is, the side that would preserve the Gelvins. To be sure, I would preserve plenty of land as well. My own margin of tolerance would not include some faceless corporation "responsible" to a hundred thousand stockholders, making a crater you could see from the moon. Nor would it include visiting exploiters—here in the seventies, gone in the eighties—with some pipe and some skyscrapers left behind.

J. McPhee, Coming into the Country (1977), quoted in Linder, New Direction, supra note 82, at 72-73.