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Environmental Law—A Balancing Test Adopted Under MERA—MPIRG v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn. 1977)

tions. Therefore, the tradition and the capability exist for the use of name rotation.[51] But, absent stronger evidence of the impact of positional bias, such a return to name rotation is not the responsibility of the courts; it is the responsibility of the Minnesota Legislature. Surely the Legislature will recognize that voters can identify their party's candidate through party labels, regardless of the position of the candidate's name on the ballot. In an era when cynicism toward our political system is widespread and has the potential to impair severely public participation in elections, the Legislature would do well to return to procedures designed to enhance the integrity of the ballot election process.

Environmental Law—A Balancing Test Adopted Under MERA—*MPIRG v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977).

An effort by the Minnesota Legislature in 1971 to protect, conserve, and promote the best use of the state's natural resources resulted in the passage of the Minnesota Environmental Rights Act (MERA).[1] MERA

ballots without designation of party affiliation beside the candidates' names. *See* Act of Apr. 24, 1959, ch. 675, art. III, § 3(1), 1959 Minn. Laws 1133 (current version at MINN. STAT. § 203A.21(1) (1976)). First ballot position was, and continues to be, rotated in the nonpartisan general election contests. *See* Act of Apr. 24, 1959, ch. 675, art. IV, § 34(1), 1959 Minn. Laws 1158 (codified at MINN. STAT. § 203A.35(1) (1976)). In contrast to ballot positioning of candidates in nonpartisan general elections, candidates in partisan general elections were arranged in the order of number of votes polled by their party in the last general election. In first position was the party polling the largest number of votes. *See* Act of Apr. 24, 1959, ch. 675, art. IV, § 33(3) (current verson at MINN. STAT. § 203A.33(4) (1976)). In 1973, ballot placement methods for state legislative contests changed when the Legislature changed the status of elections for members of the state legislature from nonpartisan to partisan. *See* Act of Feb. 20, 1973, ch. 3, § 1, 1973 Minn. Laws 2 (codified at MINN. STAT. § 203A.21(1) (1976)).

51. Despite the expanded use of voting machines, which in some respects impairs the ability to attain perfect name rotation, the use of the machines can be adapted to effect rotation. *See* State v. Board of Comm'rs, 39 Ohio St. 2d 130, 135, 136-37 & n.4, 314 N.E.2d 172, 176-78 & n.4 (1974). For a discussion of Ohio's method of achieving ballot rotation while using voting machines, see the discussion of State v. Board of Comm'rs, *supra* note 9.

1. Act of June 7, 1971, ch. 952, 1971 Minn. Laws 2011 (codified at MINN. STAT. §§ 116B.01-.13 (1976)). For a comprehensive discussion of the origin and legislative history of the Act, see Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575 (1972). Discussion of actions brought under MERA in the first five years following its enactment may be found in Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163 (1978).

The Legislature's policy under MERA is:

> [T]o create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future genera-

entitles all citizens to the preservation of natural resources[2] by permitting any person[3] to obtain injunctive relief from the pollution, impairment, or destruction of protected resources.[4] The Act does not, however, set forth a standard for trial courts to use in determining whether harmful conduct should be enjoined.[5] The Minnesota Supreme Court in

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tions may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed.

MINN. STAT. § 116B.01 (1976). MERA's statement of policy parallels the policy embodied in the Minnesota Environmental Policy Act. *See id.* §§ 116D.01-.02. In particular, subdivision one of section 116D.02 states:

> [I]t is the continuing policy of the state government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.

Id. § 116D.02(1).

2. MINN. STAT. § 116B.01 (1976) provides: "[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 and . . . each person has the responsibility to contribute to the protection, preservation, and enhancement thereof."

3. MINN. STAT. § 116B.02(2) (1976) broadly defines "person" to include:

> [A]ny 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.

The statute exempts the owner of a family farm from suit for farming or farm-related activities. *See* County of Freeborn v. Bryson, 309 Minn. 178, 185, 243 N.W.2d 316, 320 (1976) [hereinafter cited as Bryson II]. This exemption, however, does not preclude an individual owner of a family farm from bringing a suit under the Act. *See* County of Freeborn v. Bryson, 297 Minn. 218, 224, 210 N.W.2d 290, 295 (1973) [hereinafter cited as Bryson I]. The court found it unnecessary to decide whether a family farm as an entity could bring an action. *See id.*

4. MINN. STAT. § 116B.03(1) (1976). Natural resources protected under MERA include "mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources." *Id.* § 116B.02(4). The Act also defines "pollution, impairment or destruction" as:

> [A]ny 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 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, regulation, rules, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air.

Id. § 116B.02(5).

5. *See* MPIRG v. White Bear Rod & Gun Club, 257 N.W.2d 762, 782 & n.12 (Minn. 1977) (MERA does not prescribe elaborate standards to guide trial courts).

MPIRG v. White Bear Rod & Gun Club[6] established such a standard. The standard takes the form of a balancing test by which trial courts can determine on a case-by-case basis whether an injunction should be granted when no agency standards have been promulgated to assist in the determination.[7]

The plaintiffs, the Minnesota Public Interest Research Group and a local citizens' organization,[8] alleged that noise from the White Bear Rod and Gun Club's trap-and-skeet shooting range would impair the quietude of the area,[9] and that lead shot falling onto wetlands would poison the wildlife feeding on the nearby lake.[10] Local residents and expert witnesses testified that excessive noise from the range disturbed residents and would be likely to disturb wildlife.[11] The experts also stated that lead shot, when ingested, would have a toxic effect upon waterfowl.[12]

The trial court found that the plaintiffs had established a prima facie case showing that the defendant's conduct would "materially adversely affect" protected natural resources in violation of MERA.[13] Because the

6. 257 N.W.2d 762 (Minn. 1977).

7. *Id.* at 782. This holding is not surprising in light of the court's language in *Bryson I*, "Obviously, the legislature intended that there should be a balancing of ecological against technological considerations through the Environmental Rights Act." 297 Minn. 218, 229, 210 N.W.2d 290, 297 (1973).

8. Hugo Electors Leading Progress (H.E.L.P.) was the local organization formed to preserve Rice Lake. *See* 257 N.W.2d at 766 & n.5.

9. *Id.* at 766. MERA specifically includes quietude as a protected natural resource. *See* MINN. STAT. § 116B.02(4) (1976). Additionally, the Minnesota Supreme Court has found a lake to be a protectable natural resource. *See* Corwine v. Crow Wing County, 309 Minn. 345, 361 n.3, 244 N.W.2d 482, 490 n.3 (1976).

10. 257 N.W.2d at 766-67. The White Bear Rod and Gun Club purchased 80 acres of land located about 1300 feet south of the edge of Rice Lake and approximately one and one-half miles east of the city of Hugo in Washington County. Peat marshes and brush swamp surrounding the lake provided shelter and food for migratory waterfowl and other wildlife. Land in the area was zoned farm-residential and neighboring landowners used their property for farming, hunting, recreational, and residential purposes. *See id.* at 764-65.

11. *See id.* at 770-77. The court quoted extensively from the trial record, citing testimony from both area residents and expert witnesses supporting the finding of the trial court that it would be very difficult for the club to operate without materially degrading the surrounding environment. *See id.* at 777. In its discussion of evidence supporting plaintiffs' allegations, the court cited the testimony of three expert witnesses and at least eight other witnesses. *See id.* at 770-76. The volume and weight of the plaintiffs' affirmative testimony apparently was a significant factor affecting the majority's decision.

12. *See id.* at 777-80. Expert witnesses testified concerning the impact of poisoning from lead shot falling onto wetlands near the lake and the effects of various methods that the gun club might employ to remove that shot from the wetlands. *See id.* at 779-80. Based on such testimony, the trial court found that ingestion of lead shot would affect waterfowl and other wildlife and that lead shot could not be removed without substantial destruction of the wetlands area. *Id.* at 780.

13. *See id.* at 780-81. The trial court applied the standards established by the supreme court in the case of Bryson I, 297 Minn. 218, 210 N.W.2d 290 (1973). *Compare* 257 N.W.2d

defendant failed to rebut the prima facie case[14] and further failed to raise the affirmative defense permitted under MERA,[15] the trial court permanently enjoined the defendant from operating the shooting range.[16]

A divided Minnesota Supreme Court affirmed the trial court and upheld the granting of the permanent injunction.[17] The court held that MERA specifically gives members of the public standing to bring civil actions to enjoin harmful conduct even when no applicable standards have been promulgated by the state or by any of its administrative agencies.[18] A formal balancing test, analagous to the test traditionally used by courts of equity, was adopted to be utilized by the trial courts in resolving suits for injunctive relief brought under MERA.[19] In utiliz-

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at 769 *with id.* at 780-82.

In *Bryson I* the supreme court reversed and remanded a district court decision that had denied relief to a landowner whose property was being taken by a county for highway construction purposes. The court found that the landowner had established a prima facie case under MERA by showing a protectable natural resource (a natural wildlife marsh) and that the county's action would materially adversely affect that resource. *See* 297 Minn. at 228, 210 N.W.2d at 297. On remand, the trial court refused to enjoin construction across the marsh, because the county had changed the route to cross the marsh on an adjoining farmer's land. *See* Bryson II, 309 Minn. 178, 179, 183-84, 243 N.W.2d 316, 317, 319 (1976). On appeal, the supreme court again reversed the trial court, holding that because the landowner had shown a prudent and feasible alternative to construction across the marsh, regardless of where such construction was to take place, the trial court must enjoin the environmentally destructive conduct. *See id.* at 187, 243 N.W.2d at 321.

14. *See* 257 N.W.2d at 781, 782. MINN. STAT. § 116B.04 (1976) provides that "the defendant may rebut the prima facie showing by the submission of evidence to the contrary."

15. *See* 257 N.W.2d at 782. MINN. STAT. § 116B.04 (1976) provides:

> The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

Use of the affirmative defense is limited to cases that do not involve alleged violations of regulations, rules, licenses, permits, or standards issued by the Minnesota Pollution Control Agency or the Departments of Agriculture, Health, or Natural Resources. When violation of those agencies' standards are alleged, the defendant may rebut only by contrary evidence. *See* MINN. STAT. §§ 116B.03(1), .04 (1976).

16. *See* 257 N.W.2d at 767.

17. *See id.* at 782-83.

18. *See id.* at 771 n.6.

19. *See id.* at 782. For a general discussion of equitable balancing, see W. DE FUNIAK, HANDBOOK OF MODERN EQUITY § 25 (2d ed. 1956). The doctrine of equitable balancing has been stated as follows:

> [T]he court will weigh the loss, injury, or hardship resulting to the respective parties from granting or withholding equitable relief; that if the loss resulting to the plaintiff from denying the equitable relief will be slight as compared to the loss or hardship caused to the defendant if the injunction is granted, the equitable relief will be denied.

ing the *White Bear* balancing test, a trial court must weigh the utility of the defendant's conduct against the gravity of any resulting environmental harm.[20] Therefore, according to the majority, the *White Bear* trial court acted properly when it balanced the recreational benefits of the trap-and-skeet range against its interference with protected natural resources.[21]

Three justices, dissenting from the decision, argued that the trial court should have adopted objective noise standards for the area in question before determining whether the effects of the defendant's conduct were material and adverse.[22] These standards, to be established on a case-by-case basis, would be founded upon evidence submitted by the plaintiffs, who would then be required to show that the defendant violated the adopted standards.[23] The dissenting justices also argued that granting a permanent injunction in *White Bear* was an unnecessarily harsh remedy, because the trial court could have reconciled the competing interests of the parties by allowing the shooting range to operate under noise and shot restrictions.[24]

The basis for the balancing test adopted by the court is unclear. MERA does not prescribe the use of a balancing test and such broad balancing would appear to exceed the scope of the affirmative defense.[25]

Id. at 43. When a substantial right of the plaintiff is endangered by the defendant's threatened or actual conduct, however, many courts have granted injunctions even though the hardship on the defendant exceeds the dollar value of the benefit to the plaintiff. *Id.* de Funiak also notes another qualification of the rule when an injunction would affect public convenience or rights, but does not consider the reverse possibility of an injunction to protect public interests or rights. *See id.* at 45. One must recognize that equitable balancing, arising as it did in trespass and nuisance actions, was applied frequently as a doctrine to limit the granting of injunctions in such cases. *See* McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565, 569-70 (1928).

20. *See* 257 N.W.2d at 782.

21. *See id.* at 782-83.

22. *See id.* at 785, 790. Although the Pollution Control Agency has the authority to develop impulsive noise standards, *see* MINN. STAT. § 116.07(2) (1976), standards have not yet been promulgated. *See* 257 N.W.2d at 771 & n.6, 784-85.

23. *See* 257 N.W.2d at 785.

24. *See id.* at 788, 790. In his dissent, Justice Kelly agreed with the majority's use of a balancing approach, stating that MERA should not be implemented mechanically, on the basis that the Act gives courts the discretion to balance the value of protecting our natural resources against any competing social value in the defendant's conduct. "In this respect, decisions under the act are not unlike traditional nuisance cases, but with the difference that the act instructs us as to the greater weight to be given environmental values." *Id.* at 790 (Kelly, J., dissenting).

25. *See* note 15 *supra*. It is difficult to reconcile the terms of the affirmative defense (conduct for which there is no prudent, feasible alternative and which promotes public health, welfare, and safety) with the general language used by the court in *White Bear* (utility of the defendant's conduct). *But see* Note, *supra* note 1, at 600 (If the conduct materially adversely affects the lake, "the affirmative defense is not incongruous with prior Minnesota law. In deciding whether the defense has been satisfied, as well as if there is, in fact, pollution, the courts will be balancing many of the considerations which they

The absence of "elaborate standards to guide trial courts" in MERA provided the court with a basis to infer that the Legislature intended to permit the courts to give substance to the statute.[26] As support for this position, the court cited *Ray v. Mason County Drain Commissioner*,[27] a Michigan Supreme Court decision interpreting the Michigan Environmental Protection Act.[28] That statute served as the model for environmental rights acts in Minnesota and other states.[29] In *Ray* the Michigan Supreme Court held that the Michigan Act permits the courts to develop a "common law of environmental quality" and to fashion standards on a case-by-case basis in the context of actual problems.[30] But neither *Ray* nor other Michigan cases suggest the application of a formal balancing test.[31] Nevertheless, the Minnesota court used the broad lan-

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have taken into account in the past in deciding whether a nuisance has been committed.").

26. *See* 257 N.W.2d at 782 & n.12.

27. 393 Mich. 294, 224 N.W.2d 883 (1975), *noted in* Comment, *Three Recent Cases: State Environmental Protection Acts Revisited*, 1975 DET. C.L. REV. 265, 271-80.

28. MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West Supp. 1978). The Michigan Act has been reviewed extensively. For a legislative history of its enactment, see Note, *Michigan Environmental Protection Act*, 4 U. MICH. J.L. REF. 358 (1970). Cases brought under the Act are discussed in Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J. URB. L. 589 (1976); Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974).

29. *Compare* CAL. GOV'T CODE §§ 12600-12612 (West Supp. 1978) *and* CONN. GEN. STAT. ANN. §§ 22a-14 to -20 (West 1975) *and* FLA. STAT. ANN. § 403.412 (West 1973) *and* IND. CODE ANN. §§ 13-6-1-1 to -6 (Burns 1973) *and* MASS. GEN. LAWS ANN. ch. 214, § 7A (West Supp. 1978) *and* MINN. STAT. §§ 116B.01-.13 (1976) *and* NEV. REV. STAT. §§ 41.540-.570 (1975) *and* N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West Supp. 1978) *and* S.D. CODIFIED LAWS ANN. §§ 34A-10-1 to -15 (1977) *with* MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West Supp. 1978). *See generally* DiMento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URB. L. 413 (1976) (discussing state acts); DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409 (discussing administrative effect of acts).

30. *See* 393 Mich. at 306-07, 224 N.W.2d at 888.

31. *Ray* speaks only in general terms of the role that the Michigan Environmental Protection Act gives to the courts—the development of a substantive common law of environmental quality. *See id.* In a more recent case the Michigan Court of Appeals has stated that the Michigan Act will supersede the common law of nuisance to the extent that there is any conflict between the respective bodies of law. *See* Wayne County Dep't of Health v. Olsonite Corp., 79 Mich. App. 668, 693, 263 N.W.2d 778, 791 (1977).

The Michigan courts, in any action brought under the Michigan Act, may examine the validity, applicability, and reasonableness of any pertinent standard set by any instrumentality or agency of the state or a political subdivision thereof. If the court finds the standard deficient, it is empowered to adopt its own standard to apply at the trial. *See* MICH. COMP. LAWS ANN. § 691.1202, subd. 2(2) (West Supp. 1978). In contrast, MERA provides a separate civil action to challenge agency standards or regulations, *see* MINN. STAT. § 116B.10(1) (1976), but prohibits suits against persons for acts conducted pursuant

guage from *Ray* to support its own development of a common law of environmental quality under MERA.[32] This common law now includes the use of a balancing test.[33]

The need for the balancing test is questionable because MERA already appears to provide adequate safeguards for the environment. According to a previous Minnesota decision, a prima facie case under MERA is established by showing that the defendant's conduct would pollute, impair, or destroy a protected resource.[34] Once a prima facie case is established, the burden shifts to the defendant either to rebut the plaintiff's prima facie case by using contrary evidence or to establish MERA's affirmative defense.[35] To establish the affirmative defense the defendant must show both that there is no prudent and feasible alternative to the conduct sought to be enjoined, and, additionally, that the conduct promotes the public health, safety, and welfare.[36] If a prudent

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to standards or regulations promulgated by the Minnesota Pollution Control Agency, or by the Departments of Agriculture, Health, or Natural Resources. *See id.* § 116B.03(1).

While the Minnesota law protects individuals who have acted in good faith pursuant to certain agency regulations, it does not specifically grant authority to the courts to adopt their own standards. The dissenters in *White Bear* called for the court to adopt a standard procedure for trial courts to use in actions where no state standards are applicable, similar to the standards established by the Michigan court in *Olsonite*, but the majority opinion does not recognize this problem. *See* 257 N.W.2d at 785, 790. Instead, by creation of the balancing test, the majority opinion addressed the overall function of a trial court in actions brought under MERA, not the procedures to be applied in determining whether a prima facie case has been established. *See id.* at 782.

32. *See* 257 N.W.2d at 782 & n.12. In *Ray*, landowners in a watershed district sought to enjoin the drain commissioner from continuing with a flood control project that allegedly caused "substantial forms of environmental degradation." *See* 393 Mich. at 299, 301, 224 N.W.2d at 884-85. The trial court ruled against plaintiffs' claim, which was brought under Michigan's Environmental Protection Act. *See id.* at 298, 224 N.W.2d at 884. The Michigan Supreme Court remanded the case for more complete and specific findings of fact, which the court held were required under both the Act and Michigan's rules of court. *See id.* at 303, 224 N.W.2d at 887. The court discussed what the Act requires to be included in the findings of fact: whether a prima facie case is established; whether defendant's conduct results in pollution, impairment, or destruction of natural resources; whether the case has been rebutted by contrary evidence; and whether defendant has established the affirmative defense allowed under the Act. *See id.* at 308-09, 224 N.W.2d at 889.

33. *See* 257 N.W.2d at 782 & n.12.

34. *See* Bryson I, 297 Minn. 218, 228, 210 N.W.2d 290, 297 (1973). For a discussion of the *Bryson I* decision, see note 13 *supra*.

35. Bryson I, 297 Minn. 218, 229, 210 N.W.2d 290, 297-98 (1973).

36. MINN. STAT. § 116B.04 (1976). As an affirmative defense, the defendant may show that there is no feasible and prudent alternative. If he meets this burden of proof, the defendant must demonstrate further that his conduct 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 . . . natural resources." *Id.* If the defendant's activity promotes the public welfare by providing employment, the economic impact of enjoining his conduct might be weighed against the environmental impact of permitting him to continue polluting. *See* Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 841 (Minn. 1977) ("|S|tate agencies and courts are required by statute to consider both the economic

and feasible alternative is shown to exist[37] or if the conduct does not promote the public health, safety, and welfare,[38] the environmentally destructive conduct must be enjoined. Therefore MERA would appear to adequately address the state's paramount concern for protection of the environment without the use of a formal balancing test.

The court in *White Bear* failed to specify when the balancing test is to be applied. At least four different uses for the balancing test exist. First, the trial court could balance the utility of the defendant's conduct against the potential environmental harm to determine whether the adverse effects on natural resources are material,[39] thus constituting pollution, impairment, or destruction as defined by MERA. Materiality, however, is essentially a factual determination that should not include the subjective factors of balancing.[40] Balancing at a later time, after the prima facie case has been established, seems logically more sound and still gives broad discretion to the trial court, as was apparently intended by the supreme court in *White Bear*.[41]

A second alternative would be to employ the balancing test when weighing the evidence submitted by the defendant to rebut the plaintiff's prima facie case. But determining how much weight should be given to conflicting evidence, like determining whether harmful conduct

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impact and the environmental impact . . . . It is only where the likelihood of danger to the public is remote and speculative that economic impacts which are devastating and certain may be weighed in the balance to arrive at an environmentally sound decision.").

37. *See* Bryson II, 309 Minn. 178, 187, 243 N.W.2d 316, 321 (1976).

38. *See* MINN. STAT. § 116B.04 (1976).

39. The Sierra Club, as amicus curiae, submitted a brief to the court in *White Bear* suggesting that the trial court had exercised its discretion appropriately at this point in determining whether the adverse effects were indeed material. *See* Brief of Amicus Curiae Sierra Club at 21-23, 257 N.W.2d 762 (Minn. 1977). Although the court appears to draw upon that brief in its opinion, it did not state expressly that balancing would be employed solely to determine whether the adverse effect was material and thus in violation of MERA. *Compare id. with* 257 N.W.2d at 781-82. As stated in notes 40-41 *infra* and accompanying text, balancing at this point in the trial appears to be unsound.

40. In *White Bear* the court states that the word "materially" as used in MERA carries the same effect and meaning as the word "substantially." *See* 257 N.W.2d at 782 n.11. Permitting balancing to be used to determine whether a prima facie case has been made, that is, whether the defendant's conduct substantially affects protected resources, invites what would appear to be a logically unsound result. Through balancing a court could find, in a case in which a project has great social and economic utility, that there was no materially adverse effect even though the resource may be significantly affected or destroyed.

41. *See* 257 N.W.2d at 782. The court held:

> The Minnesota Environmental Rights Act does not prescribe elaborate standards to guide trial courts, but allows a case-by-case determination by use of a balancing test, analogous to the one traditionally employed by courts of equity, where the utility of a defendant's conduct which interferes with and invades natural resources is weighed against the gravity of harm resulting from such an interference or invasion.

Id. (footnote omitted).

is material, is a factual determination. Therefore, introduction of the subjective factors of the balancing test also would be inappropriate at this point.

As a third alternative, the balancing test could be used to evaluate the affirmative defense. This approach finds little support in Minnesota law, however.[42] Minnesota decisions, both prior and subsequent to *White Bear*, have construed the statutory language "prudent and feasible alternative" in accordance with the United States Supreme Court's interpretation of similar language in a federal statute.[43] According to these decisions, the language is not intended to give the fact-finder a wide range of discretion through the use of a balancing test.[44] Furthermore MERA requires that environmentally destructive conduct be enjoined when a prudent and feasible alternative is shown to exist.[45] Therefore, although a trial court may have discretion in its consideration of what will constitute a prudent and feasible alternative, balancing the utility of a defendant's conduct against the harm would appear to exceed the scope of that determination.

Finally the court could take advantage of the balancing test adopted in *White Bear* in attempting to determine what relief should be granted.[46] This use of the balancing test seems to be the most appropri-

42. *See* Bryson II, 309 Minn. 178, 187, 243 N.W.2d 316, 321 (1976); *cf.* People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 870 (Minn. 1978) (balancing under Minnesota Power Plant Siting Act limited by MERA to consideration of noncompensable human damage). Language relating to balancing under MERA in the *Bryson I* decision is more general but does not specifically espouse a broad balancing under the Act. *See* Bryson I, 297 Minn. 218, 228, 210 N.W.2d 290, 297 (1973).

43. *Compare* PEER, Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 869-70 (Minn. 1978) *and* Bryson II, 309 Minn. 178, 186-87, 243 N.W.2d 316, 320-21 (1976) *with* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). In *Overton Park* Tennessee citizens and local conservation organizations brought an action against the Secretary of Transportation, alleging that he had violated federal statutes in approving acquisition of parkland near Memphis for highway construction. The Supreme Court held that the Secretary did not have discretion under the Department of Transportation Act of 1966, Pub. L. No. 89-670, § 4(f), 80 Stat. 931 (current version at 49 U.S.C. § 1653(f) (1970)) to perform a wide-ranging balancing of competing interests in determining whether to acquire parkland for highway construction, *see* 401 U.S. at 411, and remanded the action to the district court for review of the Secretary's decision. *See id.* at 420.

44. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411-13 (1971); PEER, Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 869-70 (Minn. 1978); Bryson II, 309 Minn. 178, 186-87, 243 N.W.2d 316, 320-21 (1976).

45. Bryson II, 309 Minn. 178, 187, 243 N.W.2d 316, 321 (1976).

46. In Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975), *modified on other grounds sub nom.* Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976), the court found that Reserve's air and water discharges endangered public health and justified preventive action. 514 F.2d at 535. However, the court adopted a balancing approach to determine what relief was appropriate: "In fashioning relief in a case such as this involving a possibility of future harm, a court should strike a proper balance between the benefits conferred and the hazards created by Reserve's facility." *Id.*

ate. MERA specifically grants discretion to the courts in determining what form the remedy will take.[47] Similarly, equitable balancing is already used by the courts in traditional nuisance and trespass cases to determine whether injunctive relief should be granted.[48] Applying the balancing test in determining what kind of relief would be appropriate under MERA, therefore, both comports with the language of MERA and parallels the application of equity's balancing test in other areas of the law.

However the issue of when to apply the balancing test is resolved, the question remains whether use of the test actually will provide additional protection to the state's natural resources. Unlike the circumscribed consideration that the trial court makes in determining the validity of the affirmative defense under MERA,[49] a broad consideration of the utility of a defendant's conduct results from the use of a balancing test. This broad consideration may give greater weight and protection to a defendant's actions than apparently was intended by MERA. A trial court could find that the value of a defendant's conduct outweighs any harm to the natural resources, even though the harm is material and adverse, and therefore refuse to enjoin the harmful conduct. One of the dissenting justices noted this fact, emphasizing that use of the balancing test in *White Bear* should have resulted in a remedy less severe than a permanent injunction, such as limited operation of the shooting range under court-established standards.[50]

The broad balancing test—weighing the utility of a defendant's conduct against any resulting environmental harm—adopted by the Minnesota Supreme Court in *White Bear* has become a part of the common law developed under MERA. In applying this balancing test and in determining whether conduct "materially adversely affects" natural resources, the trial courts are likely to play an active role in the future development of substantive environmental quality standards under MERA. Both the majority, in preparing its own standard for trial courts to apply in resolving environmental actions brought under MERA, and the dissenters, in supporting the creation of objective pollution stan-

47. MINN. STAT. § 116B.07 (1976) provides: "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." (emphasis added).

48. *See generally* Payne v. Johnson, 20 Wash. 2d 24, 145 P.2d 552 (1944) (allowing operation of an outdoor theatre under noise restrictions); Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1940); McClintock, *supra* note 19.

49. The statute emphasizes the paramount considerations to be given to protection of state natural resources and limits the use of economic considerations in the affirmative defense. Furthermore, the defendant must focus on the absence of any prudent and feasible alternative rather than stressing the benefits or utility of his actions. *See* MINN. STAT. § 116B.04 (1976).

50. *See* 257 N.W.2d at 791 (Kelly, J., dissenting).

dards for each case, have indicated a willingness to involve both levels of courts in the development of substantive environmental quality standards. In assuming an active role in the area, the supreme court would be wise to consider further development of the trial court's role in cases under MERA, particularly in resolving the issue of when the *White Bear* balancing test should be applied.

Remedies—DAMAGES FOR LOST PROFITS OF AN UNESTABLISHED BUSINESS—*Leoni v. Bemis Co.*, ___ Minn. ___, 255 N.W.2d 824 (1977).

A growing acceptance of present day business methods of predicting future profitability[1] has resulted in a substantial liberalization of the former general rule that damages could not be recovered for the lost profits of an unestablished business.[2] This denial of recovery is based on the doctrine of certainty; damages for breach of contract cannot be speculative, remote, or conjectural.[3] Originally, even the lost profits of an established business were considered inherently too uncertain to be awarded in either a tort or contract action.[4] Courts began to modify this absolute exclusion by stating that lost profits could be recovered if three prerequisites were satisfied: the loss was caused by the breach,[5]

1. *See generally* C. ALMON, AMERICAN ECONOMY TO 1975 (1966); Denning, *New Look at Business Forecasts*, 64 NATION'S BUS. 48 (1976); Wheelwright & Clarke, *Corporate forecasting: promise and reality*, 54 HARV. BUS. REV. 40 (1976).

The RESTATEMENT OF CONTRACTS § 331, Comment *b* (1932) defines profits as "the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them." *See* King Features Syndicate v. Courrier, 241 Iowa 870, 882, 43 N.W.2d 718, 726 (1950). *See also* Swaney v. Derragon, 281 Mich. 142, 143-44, 274 N.W. 741, 741 (1937).

2. Formerly, damages could not be recovered for any loss of profits, even though the business was established. W. HALE & R. COOLEY, HANDBOOK ON THE LAW OF DAMAGES § 32 (2d ed. 1912). Exceptions to the complete denial rule began to appear in the mid-nineteenth century. *See, e.g.*, Masterton v. Mayor of Brooklyn, 7 Hill 61, 72 (N.Y. Sup. Ct. 1845) (profits directly attributable to contract, but not profits from further transactions with third parties, held recoverable); *cf.* Village of Elbow Lake v. Otter Tail Power Co., 281 Minn. 43, 46, 160 N.W.2d 571, 574 (1968)(recognizing unestablished business rule). *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.3 (1973).

3. *See, e.g.*, Hornblower & Weeks-Hemphill Noyes v. Lazere, 301 Minn. 462, 467, 222 N.W.2d 799, 803 (1974); Olson v. Naymark, 177 Minn. 383, 384, 225 N.W. 275, 275 (1929); Note, *Damages—Loss of Profits Caused by Breach of Contract—Proof of Certainty*, 17 MINN. L. REV. 194 (1933).

4. *See* R. BAUER, ESSENTIALS OF THE LAW OF DAMAGES § 75, at 160 n.1 (1919). *See also* Allison v. Chandler, 11 Mich. 542, 551 (1863) (allowance of profits as damages less limited in tort action than in breach of contract action).

5. The requirement of causation is outside the scope of this comment. The Minnesota Supreme Court has recognized, however, the causation requirement. *See* Faust v. Parrott, 270 N.W.2d 117 (Minn. 1978) (in breach of noncompete clause action, plaintiff's lost profits must be caused by breach; possibility of poor management, market changes, and change of business name to be considered as possible alternative causes); Northern Petro-