MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 49 | Issue 1 Article 6

2023

# No Alternative: The Failure of the Minnesota Environmental Policy Act to Consider Project Alternatives and Proposed Remedies

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# NO ALTERNATIVE: THE FAILURE OF THE MINNESOTA ENVIRONMENTAL POLICY ACT TO CONSIDER PROJECT ALTERNATIVES AND PROPOSED REMEDIES

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## I. INTRODUCTION

The protection of Minnesota's environment is both a core value of many Minnesotans and a heavily debated topic within the state.[1] Minnesota was among the first states to pass its own Environmental Policy Act and is currently one of only sixteen states to have such a law in place.[2] The attention paid to these issues, as well as many other environmental debates, demonstrates Minnesotans' desire for involvement in a responsible environmental review process. However, certain mechanics of that review process are flawed.

When the Minnesota Environmental Policy Act (MEPA) was first passed, one purpose of the law was to force agencies to consider alternatives in determining the use of Minnesota's natural resources.[3] The statute prohibits projects with significant environmental effects from going forward

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[1] *See generally Minnesota Voters' Environmental Priorities in 2017*, MINN. ENV'T P'SHIP (2017), https://www.mepartnership.org/wp-content/uploads/2017/03/MEP-Poll-Public-Release-3.1.17.pdf [https://perma.cc/Z4UC-9EER] (finding that a majority of Minnesota voters were concerned about environmental law "rollbacks," wanted stronger environmental laws or better enforcement of environmental laws, were concerned about global warming, drinking water quality, and disappearing pollinators, supported phasing out certain pesticides, and favored the 2008 Minnesota Constitutional Amendment approving an increase in sales tax to fund clean water, land protection, wildlife habitat, arts education, and parks and trails).

[2] These states are California (CAL. PUB. RES. CODE §§ 21000–21177 (West 2019)), Connecticut (CONN. GEN. STAT. §§ 22a-1–22a-1i (1971)), Georgia (GA. CODE ANN. §§ 12-16-1–12-16-8 (2022)), Hawaii (HAW. REV. STAT. §§ 343-1–343-8 (2014)), Indiana (IND. CODE §§ 13-12-4-1–13-12-4-10 (1996)), Maryland (MD. CODE ANN., NAT. RES. §§ 1-301–1-305 (2022)), Massachusetts (MASS. GEN. LAWS ch. 30, §§ 61–62H (2022)), Minnesota (MINN. STAT. §§ 116D.01–.11 (2021)), Montana (MONT. CODE ANN. §§ 75-1-101–75-1-324 (2021)), New Jersey (N.J. Exec. Order No. 215 (Sept. 11, 1989), https://www.nj.gov/dep/pcer/docs/eo215.pdf [https://perma.cc/2X4W-MSHP], New York (N.Y. ENV'T. CONSERV. LAW §§ 8-0101–8-0117 (LexisNexis 2022)), North Carolina (N.C. GEN. STAT. §§ 113A-1–113A-13 (2022)), South Dakota (S.D. CODIFIED LAWS §§ 34A-9-1–34A-9-13 (2021)), Virginia (VA. CODE ANN. §§ 10.1-1188–10.1-1192 (2022)), Washington (WASH. REV. CODE §§ 43.21C.010–.914 (2009)), and Wisconsin (WIS. STAT. §1.11 (2021)). In addition, Guam (Guam Exec. Order No. 96-26 (Oct. 28, 1996), http://governor.guam.gov/governor-content/uploads/2017/07/E.O.-96-26-Relative-to-Creating-the-Application-Review-Comm.pdf [https://perma.cc/J533-U68S], Puerto Rico (P.R. LAWS ANN. tit. 12, §§ 1121–27 (2021)), and Washington D.C. (D.C. CODE §§ 8-109.01–.11 (2022)) have their own environmental review procedures.

[3] *See* MINN. STAT. § 116D.01 (2022). The statute lists three purposes of MEPA: to create a policy that "encourage[s] productive and enjoyable harmony between human beings and their environment," to encourage the prevention or elimination of damage to the environment and promote the health of residents of the state, and "to enrich the understanding of the ecological systems and natural resources important to the state and to the nation." *See also* Kevin Reuther, *MEPA at 36: Perspectives on Minnesota's Little NEPA*, 39 ENV'T L. REP. NEWS & ANALYSIS 10663 (2009) ("The intent of MEPA was to couple the substantive standard with the environmental impact statement (EIS) mechanism to determine and explore feasible and prudent alternatives.").

where a feasible and prudent alternative exists.[4] However, alternatives analysis has become increasingly rare.[5]

Thorough consideration of reasonable alternatives to projects in environmental review provides government agencies with stronger input into the development of proposed projects.[6] Additionally, providing project alternatives in environmental review helps inform the public of the impact of a project and the potential alternative options for projects, thereby providing the public an opportunity to contribute to the development of the project.[7] Such involvement encourages public trust and acceptance of projects and builds trust between agencies and the public.[8] The notion of a public weighing of environmental costs against economic or other benefits from a project encourages robust environmental review in as many projects as possible.[9] For these reasons, alternatives should be considered in as many projects as possible. Unfortunately, as others have observed, project proposers and Responsible Government Units (RGUs) often avoid alternatives review in Minnesota.[10]

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[4] MINN. STAT. § 116D.04, subdiv. 6 (2019) ("No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, 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] *See* discussion *infra* Section II.B. (finding that the average number of EISs completed annually by Minnesota agencies has dropped from nine to fewer than two between 1972 and 2020).

[6] Anne Steinemann, *Improving Alternatives for Environmental Impact Assessment*, 21 ENV'T IMPACT ASSESSMENT REV. 3, 9 (2001). https://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.files/fileID/12893 [https://perma.cc/6N4R-62ZZ] (noting that an EIS "centers on alternatives analysis: the identification, prediction, and evaluation of the environmental impacts of each alternative. After the analysis, the agency identifies a 'preferred alternative,' which may or may not be the 'proposed action,' and which may or may not be the 'environmentally preferable action.'").

[7] *Id.* at 18. Public involvement aids in the discovery of alternatives that agencies may not have considered, helps agencies identify plans or systems that are more popular with the public, and aids in both identifying and furthering societal goals. Public involvement in the environmental process is preferable to the "piecemeal public meetings for individual projects" approach.

[8] *Id.* at 9 (citation omitted) ("[P]ublic involvement can create a more widely accepted project, establish cooperative and trustful relationships between agencies and citizens, and improve the implementation process.").

[9] No Power Line, Inc. v. Minn. Env't Quality Council, 262 N.W.2d 312, 333 (Minn. 1977) (Yetka, J., concurring) ("The more the public generally is exposed to what is being done to our environment, the better they will be able to participate in the decision-making process of determining whether or not they wish to pay the cost—both in dollars and in destruction to the environment—involved in a project such as this.").

[10] *See* Kevin Reuther, *MEPA at 36: Perspectives on Minnesota's Little NEPA*, 39 ENV'T L. REP. NEWS & ANALYSIS 10663, 10664 (2009) ("[A]n EAW does *not* present or evaluate alternatives . . . . [F]or the great majority of projects, the 'heart of environmental review'—the alternatives analysis—is absent. It is common for project proponents to prepare lengthy

This Note argues that the Environmental Quality Board (EQB) should revise its rules to require consideration of alternatives in environmental assessment worksheets in order to better fulfill the intentions of MEPA and the Minnesota Environmental Rights Act (MERA). This Note will also briefly discuss the potential for a MERA Section 10 suit to compel such action. Under MERA Section 10, a party may challenge an agency's rules or procedures, and if the party can present a prima facie case that said rules or procedures are insufficient to protect the natural environment, a district court must require the agency to undergo a rulemaking process.[11] The agency is then required to show, by a preponderance of the evidence, that in the rulemaking process they adequately addressed the issue presented by the plaintiff.[12] Part II of this Note explains the basics of environmental review in Minnesota. Part III documents the shift in the use of Environmental Assessment Worksheets (EAWs) and Environmental Impact Statements (EISs) in Minnesota's environmental review program, and through comparison, will show that Minnesota considers alternatives at a lower rate than similar states. Part IV argues that a rule amendment is necessary to ensure adequate alternatives analyses. Ultimately, to protect our natural resources and ensure that our natural resources are used in the most responsible way, as intended by MEPA, a greater number of project proposals should consider alternatives. One way to do this is for the EQB to require alternatives in EAWs.

## II. THE ENVIRONMENTAL REVIEW PROCESS IN MINNESOTA

### *A. History of Minnesota's Environmental Review Process*

Enacted in 1970, the National Environmental Policy Act (NEPA) requires agencies to evaluate the environmental impacts of their actions.[13] At the core of this law was a new requirement for agencies to perform environmental assessments and EISs for major projects.[14] Inspired by this law, many states soon passed their own "little NEPAs," including Minnesota, which passed MEPA in 1973.[15] The core of MEPA, much like NEPA, is the EIS.[16] The purpose of the EIS is to inform decision-makers,

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EAWs, sometimes with more detail than one would find in a typical EIS, but without any alternatives analysis.").

[11] MINN. STAT. § 116B.10 subdiv. 1 (1985).

[12] *Id.* at subdiv. 3.

[13] 42 U.S.C. § 4321 secs. 2–3 (1970); s*ee also* Exec. Order No. 11514, 35 FR 4247 (1970) ("[T]he heads of Federal agencies shall [...] Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality.").

[14] *See* Exec. Order No. 11514, 35 FR 4247 (1970).

[15] Reuther, *supra* note 10, at 10663.

[16] Stacy Lynn Bettison, *The Silencing of the Minnesota Environmental Policy Act: The Minnesota Court of Appeals and the Need for Meaningful Judicial Review*, 26 WM. MITCHELL L. REV. 967, 970 (2000) ("The EIS is the heart of MEPA. The statute focuses

before approving a proposed project, of strategies to avoid or minimize negative environmental effects.[17]

Crucial to the EIS is the requirement that the Responsible Government Unit (RGU) consider alternatives to the proposed project. The Council on Environmental Quality Regulations reportedly referred to the alternatives requirement as the "heart" of the environmental impact statement.[18] In considering alternatives, an EIS must present alternate sites, technologies, and project designs that meet the underlying needs of the project and consider the alternative of no action.[19] The EIS must also provide reasons why alternatives were eliminated or not appropriate for the project.[20]

In its original form, MEPA surpassed NEPA by giving decision-making authority to a body separate from state agencies.[21] Under NEPA, the agency in charge of a particular project (also known as the RGU) determines whether an EIS is required, prepares the EIS, and makes a final determination based on the result of the EIS.[22] But originally under MEPA, the decision to complete an EIS and the final determination on the adequacy of the EIS was placed with the Environmental Quality Council (later renamed the Environmental Quality Board).[23] The EQB was made up of four governor-appointed citizen members, a representative for the governor, and the heads of the Departments of Natural Resources, Health, and Agriculture, the Pollution Control Agency, and the State Planning Agency.[24] This structure gave the executive branch some control over the board, but also allowed independent input from citizens on the board.[25] To allow greater citizen input in the environmental review process, citizens could also request an EIS by submitting a petition with at least 500 signatures.[26]

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primarily on the standards for determining when an EIS is necessary and the information to be included in an EIS. Likewise, the regulations promulgated by the Environmental Quality Board (EQB), the agency created to implement MEPA, concentrate on the EIS as the analytical tool that examines a proposed project's significant environmental impacts.").

[17] JAMES A. PAYNE & JAMES A. MENNELL, ENVIRONMENTAL IMPACT STATEMENTS, *in* 25 MINNESOTA PRACTICE: REAL ESTATE LAW § 9:5 (2021 ed.).

[18] DANIEL R. MANDELKER, ROBERT L. GLICKSMAN, ARIANNE M. AUGHEY, DONALD MCGILLIVRAY & MEINHARD DOELLE, THE ALTERNATIVES REQUIREMENT: ADEQUACY OF DISCUSSION, *in* NEPA LAW AND LITIG. § 10:29 (2021); *see also* League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1069 (9th Cir. 2012) (identifying the alternatives analysis as "the heart of the environmental impact statement," and further explaining that the alternatives analysis "present[s] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.").

[19] MINN. R. 4410.2300(G) (2009).

[20] *Id.*

[21] ROBERT M. ELEFF, UNFULFILLED PROMISE: TWENTY YEARS OF THE MINNESOTA ENVIRONMENTAL POLICY ACT: A PROGRAM FOR REFORM 28–29 (1994).

[22] *Id.* at 29.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

This structure did not last. Soon after MEPA's passage, the EQB was overwhelmed by EISs and requests for environmental review.[27] Because many board members worked in a volunteer capacity, they had little time to administer the EQB.[28] As a result, in 1975, citizen petitions were limited to projects that "concerned an action of more than local significance."[29] In 1976, the determination of whether an EIS was required, and the ultimate determination regarding the adequacy of the EIS, was reassigned to the RGU—a model closer to NEPA.[30] As part of this shift, the EQB established the EAW to aid agencies in determining the necessity of an EIS.[31] Through these and other rule changes, the EQB soon transitioned from a body overseeing environmental reviews to an agency focused on statewide environmental policy.[32] One tangible result of this transition was an immediate reduction in the number of EISs: in the first three years of the program, sixteen EISs were completed annually on average, while in the three years after this rule change, the average dropped to less than eight.[33] While it is possible such a drop was the result of fewer proposed projects or "smaller scoping" by project proposers (that is, proposing smaller projects to avoid heavy environmental review), decades of economic and population growth in Minnesota suggest this is unlikely.[34]

### *B. Minnesota's Environmental Review Process*

Minnesota's environmental review process is, at least facially, similar to federal environmental review or environmental review in other

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[27] *Id.* at 31.
[28] *Id.*
[29] MINN. STAT. § 116D.04 subdiv. 3 (1975) (repealed 1980).
[30] ELEFF, *supra* note 21, at 32.
[31] *Id.*
[32] *Id.* at 32–33 ("Yet the EQB continued to view its role as administrative appeal body as burdensome. It received 52 challenges and petitions in the three years after the amendments took effect. (EISs were ordered in four cases.) Procedures were lengthy, and the EQB felt it was 'examining issues that were clearly appeals of local land-use decisions and did not involve any environmental issues of statewide concern.' It wanted to devote more time to directing state environmental policy.").
[33] *Id.* at 33 (noting that in the first three years of its existence, the EQB ordered fifty EISs, but in the three years following the 1976 changes requiring that RGUs oversee EIS preparation, only twenty-two EISs were prepared).
[34] In 1976, Minnesota's population was approximately four million and has grown to approximately 5.6 million today. Data Commons, *Timelines: Minnesota Population*, Data Commons, https://datacommons.org/tools/timeline#&place=geoId/27&statsVar=Count_Person [https://perma.cc/F53A-ZE23]. Adjusted for inflation, Minnesota's GDP grew from $41 billion in 1978 to $374 billion in 2020. Pac. Nw. Reg'l Econ. Analysis Project, *Minnesota vs. United States Comparative Trends Analysis: Gross Domestic Product Growth and Change, 1977-2020*, U.S. Reg'l Econ. Analysis Project, https://united-states.reaproject.org/analysis/comparative-trends-analysis/gross_domestic_product/tools/270000/0/ [https://perma.cc/MN9Z-GZUU].

states.[35] It includes a two-stage process[36] in which projects first undergo a shorter review, called an EAW, which is used to make determinations about the environmental impact of a project. Based on the review of this document, an agency will determine whether the project must undergo a more detailed form of environmental review, called the EIS.[37]

In Minnesota, environmental review is initiated by an RGU once a project proposer begins the permitting process.[38] Typically, the RGU is the unit of government with the most authority over approval of the project.[39] The RGU is required to verify the accuracy of environmental documents submitted by the project proposer and ensure adherence to EQB Rules.[40]

By statute, EAWs are brief documents intended to "rapidly assess the environmental effects which may be associated with a proposed project."[41] Their purpose is to "aid in the determination of whether an EIS is needed for a proposed project" and "serve as a basis to begin the scoping process for an EIS."[42] In alignment with this intent to use EAWs to decide on a need for an EIS, Minnesota regulations do not explicitly require EAWs to include project alternatives.[43] EAWs are required whenever a project "may have the potential for significant environmental effects" or when a project falls within a "mandatory category."[44]

The content of an EAW is directly specified by the EQB, and includes basic information about the project, procedural details regarding the permitting for the project, the purpose of the project, methods of

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[35] JAMES A. PAYNE & JAMES A. MENNELL, ENVIRONMENTAL IMPACT STATEMENTS, *in* 25 MINNESOTA PRACTICE: REAL ESTATE LAW § 9:3 (2020 ed.) ("MEPA is modeled after the National Environmental Policy Act (NEPA).").

[36] *Id.* ("MEPA establishes two types of environmental review documents: the Environmental Assessment Worksheet (EAW) and the Environmental Impact Statement (EIS).").

[37] MINN. STAT. § 116D.04, subdiv. 2a (2021).

[38] PAYNE & MENNELL, *supra* note 17.

[39] MINN. R. 4410.0500 (2020). Typically, this is a state agency, a city government, or a county government.

[40] PAYNE & MENNELL, *supra* note 17.

[41] MINN. R. 4410.1000 subpart 1 (2018).

[42] *Id.*

[43] *See* MINN. R. 4410.1200 (2009) (detailing required content for an EAW). The Minnesota Court of Appeals has interpreted this statute as not requiring that project proposers ever include alternatives in EAWs. *In re* Minntac Mine Extension Project in Mountain Iron, St. Louis Cnty., No. A13-0837, 2014 WL 274077, at *4–5 (Minn. Ct. App. Jan. 27, 2014) (holding that the DNR's decision to not assess alternatives in the environmental assessment worksheet for the expansion of a mining project was legal because the statute only requires an RGU to determine whether a proposed government action will result in significant environmental effects and does not require a comparison of alternatives).

[44] MINN. R. 4410.1000 (2009). Certain projects fall into mandatory categories which require EAWs, including projects that will impact more than one acre of wetlands or protected waters or will destroy historic spaces, projects that will alter certain lengths of shoreland, projects that will convert native prairie, agricultural, or forest land, and mixed use residential commercial projects, among others. *Id.* The EQB has also promulgated certain project categories which are exempted from completing an EAW, including industrial, commercial, and institutional developments below certain square-footage thresholds, residential developments involving fewer than a threshold number of units, and certain construction projects. MINN. R. 4410.4600 (2020).

construction, a description of the project site and land, any proposed resource protection measures, and any potential environmental impacts that may require further investigation.[45] Importantly, although an RGU must prepare an EAW, the "data portions" of the EAW (the most time-intensive aspects) are completed and submitted by the project proposer.[46]

In contrast to EAWs, an EIS is a more detailed environmental review document. Decision-makers use this information to determine whether the project should be approved or denied and to aid in setting permit terms and conditions.[47] The development of an EIS begins with a "scoping stage" by the RGU—a period in which the RGU identifies the contents of the EIS and a timeline for the EIS's completion.[48] Then, the RGU prepares a draft EIS, which includes a project description, a list of all required permits, reasonable alternatives, a description of the environmental and other impacts of the proposed project and of each major alternative, and an analysis of potential mitigation measures.[49] Once completed, the draft EIS is made available for public comment.[50] A final EIS which addresses public comments is then completed.[51] As is clear from this process, the involvement and effort of the RGU is far greater in the preparation of an EIS than an EAW.

A project requires an EIS for one of two reasons. First, and most commonly, several mandatory categories require EISs.[52] Second, if the potential for significant environmental impact exists, an agency must prepare an EIS that describes the action in detail and analyzes its significant environmental impacts.[53]

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[45] MINN. R. 4410.1200 (2009).
[46] MINN. R. 4410.1400 (2018).
[47] PAYNE & MENNELL, *supra* note 17.
[48] *Id.* The scoping process includes the preparation of a "scoping" EAW that identifies the impacts and alternatives that should be addressed in the EIS, a draft scoping decision document, and the final scoping decision. The scoping decision must identify the content of the EIS, set a timeline for the EIS, describe alternatives that will be analyzed in the EIS, and identify the potential impact areas and necessary studies related to the project. *Id.*
[49] *Id.*
[50] *Id.*
[51] MINN. R. 4410.2700 (2009).
[52] *Id.* 4410.4400 (2020). Mandatory categories include larger power generation facilities, mineral mining, petroleum refineries, solid waste plants, mixed-use residential/commercial developments, and others. There are, like EAWs, also some categories that are statutorily exempt from completing EISs. These include feedlots, small electric-generating projects, highway projects, and ethanol plants, among others. *Id.* 4410.4600 (2020).
[53] MINN. STAT. § 116D.04, subdiv. 2a (2019). When a project has the "potential for significant environmental effects," a "detailed" EIS must be prepared by the RGU. MINN. STAT. § 116D.04, subdiv. 2a (2019). The EIS is called an "analytical," not "encyclopedic," document describing the project's environmental impacts, alternatives to the project and the impacts of those alternatives, and mitigation strategies to reduce environmental impacts. In addition, an EIS must consider economic and sociological effects of the project. *Id.*

It is exceedingly rare that RGUs find that a project has the potential for significant environmental effects, triggering an EIS.[54] To determine whether the "potential for significant environmental impact" threshold is met by a proposed project and, therefore, whether an EIS is necessary, the RGU must first prepare an EAW.[55] Importantly, an EAW, intended to be a brief review, does not require the evaluation of alternatives for a proposed project and is far less time-intensive for both the proposing party and the agency.[56]

Recently, the EAW—a traditionally "brief" document—is increasing in length and complexity. The purpose of greater length and complexity is, presumably, to avoid the need for an EIS. For example, a 2017 EAW for a park renovation project was more than 130 pages long.[57] Another EAW for the construction of a housing complex was 113 pages long, and a 2021 solar project's EAW was 159 pages long.[58] None of these lengths seem consistent with the characterization of an EAW as "a brief document which is designed to set out the basic facts necessary to determine whether an EIS is required for a proposed project or to initiate the scoping process for an EIS."[59]

With the ballooning length of EAWs, there is a significant reduction in the number of EISs. One review found that from 1972 to 1979 Minnesota averaged nine EISs per year.[60] Another review noted that prior to the 1976 amendments—when the authority to issue an EIS rested with the EQB—Minnesota averaged sixteen EISs per year.[61] After the 1976 amendments—when the authority to issue an EIS rested with the RGU—the

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[54] *See infra* Section II.B. (finding that between 2018 and 2020, only one EIS was ordered due to a finding of potential for significant environmental effects out of 197 EAWs completed during the same period); *see also* Kevin Reuther, *MEPA at 36: Perspectives on Minnesota's Little NEPA*, 39 ENV'T. L. REP. NEWS & ANALYSIS 10663, 10663 (2009) (finding that past records on the numbers of EISs and EAWs are inconsistent, but that in 1996, records showed 137 EAWs and 2 EISs, but a survey of 14 Staff members administrating MEPA "report that the number of EISs for most years is below 10, while the number of EAWs can reach 150.").

[55] *See infra* Section II.B. (finding that between 2018 and 2020, only one EIS was ordered due to a finding of potential for significant environmental effects out of 197 EAWs completed during the same period).

[56] *See generally* Minn. R. 4410.1200 (2009) (describing the contents of an EAW).

[57] *See Environmental Assessment Worksheet: Scherer Site and Hall's Island Reconstruction*, BARR ENGINEERING (Feb. 2017), https://www.minneapolisparks.org/_asset/mdctfv/scherer_bros_eaw.pdf [https://perma.cc/45HY-W6LB].

[58] *See Environmental Assessment Worksheet: Granite Works Redevelopment*, CITY OF DELANO (July 2020), https://www.delano.mn.us/GraniteWorksRedevelopment_EAW_For_Public_Notice_08032020.pdf [https://perma.cc/R3HW-EFPU]; *Environmental Assessment Worksheet: Hoot Lake Solar Project*, CITY OF FERGUS FALLS (Mar. 2021), https://www.otpco.com/media/3499/hoot-lake-solar-project-eaw_eis-need-decision_final_20210301.pdf [https://perma.cc/37DB-8PSZ].

[59] MINN. R. 4410.0200 (2020).

[60] John H. Herman & Charles K. Dayton, *Environmental Review: An Unfulfilled Promise*, 47 BENCH & B. MINN. 31, 33 (1990).

[61] ELEFF, s*upra* note 21, at 32 (noting that over the first three years of the program, the EQB ordered fifty EISs, but in the three years following 1976, only twenty-two EISs were ordered).

number of EISs dropped to an average of less than eight per year.[62] More recently, the EQB has published annual summaries of the environmental reviews completed.[63] As shown in the table below, between 2015 and 2020, several dozen EAWs were completed each year, but no more than two EISs were completed in any year. Further, in 2020, when two EISs were completed, both were required because the projects fell into mandatory EIS categories.[64]

| Year | EAWs Completed | EISs Completed |
|---|---|---|
| 2015 | 61 | 1 |
| 2016 | 67 | 1 |
| 2017 | 79 | 1 |
| 2018 | 86 | 2 |
| 2019 | 48 | 2 |
| 2020 | 63 | 2 |

Table 1: *Number of EAWs and EISs completed annually between 2015 and 2020.*[65]

This means that in 2020, no project out of sixty-three proposed projects was required to perform an EIS because of the potential for significant impacts. In other words, no Minnesota agency evaluating sixty-three project proposals ever found that a project had the potential for significant environmental impact—which would trigger an EIS. Similarly, in 2019, both EISs submitted were required because they fell into a mandatory category, not because the RGU found the potential for significant environmental impact.[66] In 2018, one EIS was ordered for a mandatory category, and one was discretionarily ordered.[67] It is difficult to find this information for years prior to 2018, as the EQB restructured their reporting to include this information in 2018.[68] Prior to 2018, one would need to evaluate each EIS to determine whether it fell into a mandatory category. While this information provides only a limited snapshot, it seems clear from 2018 to 2020 that RGUs are unlikely to order an EIS unless a project falls into a mandatory category.

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[62] *Id.*

[63] *See generally* MINN. ENV'T QUALITY BD., *Publications*, https://www.eqb.state.mn.us/content/all-publications [https://perma.cc/6ZQ5-RGJ3] (listing published environmental reviews).

[64] *2020 Minnesota Environmental Review Program Performance Report*, MINN. ENV'T QUALITY BD. 4–5 (Apr. 2021), https://www.eqb.state.mn.us/sites/default/files/April%202021%20Environmental%20Quality%20Board%20Packet.pdf [https://perma.cc/9547-7NYC].

[65] *Id.* at 4.

[66] *2019 Environmental Review Program Performance Report*, MINN. ENV'T QUALITY BD. 9 (July 2020), https://www.eqb.state.mn.us/sites/default/files/July%202020%20ERIS%20Packet_1.pdf [https://perma.cc/XA3N-YB3B].

[67] *2018 Environmental Review Program Performance Report*, MINN. ENV'T QUALITY BD. 3 (July 2019).

[68] Interview with Denise Wilson, Director, Env't Rev. Program, Minn. Env't Quality Bd. (July 29, 2021).

It is also clear, just by comparing the numbers from 1972 to 1979 with the numbers from 2018 to 2020, that the number of EISs ordered has dropped considerably. Between 1972 and 1979, Minnesota averaged nine EISs each year, but from 2015 to 2020, there were no more than two EISs in a given year.[69] While it is still questionable whether nine EISs reflect all the projects that have potential for significant environmental impact,[70] that this number is now less than a quarter of what it once was, after nearly five decades of increased knowledge on environmental impact, is concerning.

## III. OTHER STATES AND FEDERAL ENVIRONMENTAL REVIEWS CONSIDER ALTERNATIVES MORE FREQUENTLY THAN MINNESOTA

Despite the sharp drop in the number of EISs conducted in Minnesota, and the shifting environmental review process, many argue that Minnesota's environmental standards are still some of the strictest.[71] Minnesota is, after all, one of only sixteen states to have a state environmental policy act. However, when compared to other state environmental policy acts, Minnesota considers project alternatives at a far lower rate.

### *A. Many States with "Little NEPAs" Consider Alternatives in Environmental Review More Frequently than Minnesota*

Among the sixteen states with existing environmental policy acts, most follow a two-stage environmental review structure, where a smaller review is first conducted, followed by a more detailed review when necessary. The first review is usually referred to as an "Environmental Assessment," or, in the case of Minnesota, an EAW. Seven of these states include a review of alternatives at the lower, environmental assessment stage, these states being Hawaii, Indiana, Maryland, Massachusetts, Montana, North Carolina, and Wisconsin.[72] This demonstrates that while Minnesota

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[69] *See* Table 1 above.

[70] *See* Herman & Dayton, *supra* note 60, at 37 ("In a state of four million, it is inconceivable that there are fewer than ten projects, permits, and funding decisions warranting full scale environmental review. And the element always excluded from the EAW is consideration of alternatives."); *see also* Kevin Reuther, *MEPA at 36: Perspectives on Minnesota's Little NEPA*, 39 ENV'T L. REP. NEWS & ANALYSIS 10663 (2009) ("One might expect in the land of 10,000 lakes, where state population grew by more than one million between 1970 and 2000, large numbers of projects would have been proposed that had the 'potential for significant environmental effects' and triggered the need for an EIS. Not so.").

[71] *See Environmental Responsibility*, MINING MINNESOTA, http://www.miningminnesota.com/environmental-responsibility/ [https://perma.cc/K5WV-KM75] (arguing that Minnesota has some of the strictest environmental standards in the world).

[72] HAW. CODE R. 11-200.1-18(d)(7) (LexisNexis 2021) ("Identification and analysis of impacts and alternatives considered[.]"); 329 IND. ADMIN. CODE 5-3-2(b)(1)(B) (2021) ("An environmental assessment includes the following: Brief discussions of . . . alternatives to the

is not an outlier in not requiring a consideration of alternatives at the EAW stage, this omission is not uniform or necessary, and requiring alternatives at the lower environmental review stage allows for more projects to consider alternatives, and thereby, provides the public with greater opportunity to consider the most responsible use of their environment.

Further, there are several states where EISs are more common than they are in Minnesota. For example, Massachusetts, a state with a population approximately twenty percent greater than Minnesota's, completed an average of 25.8 EISs per year between 2015 and 2020.[73] During that same period, Minnesota's average was just 1.3 EISs per year.[74] Similarly, Hawaii, a state with just 25 percent of Minnesota's population, completed an average of 7.8 EISs.[75] Connecticut, which has approximately two-thirds the population of Minnesota,[76] completed an average of 6.6 EISs per year from 2015 to 2020.[77] Of all states, California may be the strictest about requiring EISs. California completed an average of 352 EIS

proposed action . . . ."); MD. CODE REGS. 11.01.08.08 (2021) ("6. List of alternatives considered."); 301 MASS. CODE REGS. 11.05(5)(a) (2021) ("The ENF shall include a concise but accurate description of the Project and its alternatives . . . ."); MONT. ADMIN. R. 17.4.609(3)(f) (2021) ("[A]n EA must include . . . a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented . . . ."); N.C. ADMIN. CODE 25.0502(2) (2021) ("[R]easonable alternatives to the recommended course of action . . . ."); WIS. ADMIN. CODE DNR § 301.21(2)(b)(2) (2021) ("A description of reasonable alternative actions to the proposed action, including the alternative of taking no action.").

[73] *See MEPA Environmental Monitor Archives* 2015-2020, MASS. ENV'T PROT. AGENCY, https://eeaonline.eea.state.ma.us/eea/emepa/emonitor.aspx#eirnew [https://perma.cc/WQH3-P3YC].

[74] *See supra* Section II.B. (finding that between 2015 and 2020, only nine EISs were conducted in Minnesota).

[75] *See The Environmental Notice Archives 2015-2020*, STATE OF HAWAII DEP'T OF HEALTH OFF. OF ENV'T QUALITY CONTROL, http://oeqc2.doh.hawaii.gov/_layouts/15/start.aspx#/The_Environmental_Notice/Forms/AllItems.aspx [https://perma.cc/3NQY-CDTZ].

[76] *See Connecticut*, CENSUS.GOV, https://www.census.gov/quickfacts/CT [https://perma.cc/5S6W-PN38].

[77] *See Environmental Monitor Archives*, CONN. STATE COUNCIL ON ENV'T QUALITY, https://portal.ct.gov/CEQ/Environmental-Monitor/Environmental-Monitor-Archives/Environmental-Monitor-Archives [https://perma.cc/3F73-SKU3]. This information was determined by reviewing each issue of the Environmental Monitor for the years included year and tabulating the number of EISs completed during that time period.

equivalents between 2015 and 2020.[78] These comparisons alone do not suggest that these states are "correctly" performing environmental review.[79]

Just considering the available numbers, it is clear that Minnesota has relegated the EIS to a rarely used tool in environmental review rather than as a report completed any time a project has potential for significant environmental impacts—as required by law.[80] While the focus of this Note is not strictly EISs, it is important to highlight that a lack of EISs points to a lack of consideration for project alternatives since alternatives are not considered in EAWs. Project alternatives, the "heart of the NEPA process,"[81] are a rare aspect of review in Minnesota but are considerably more common in other states that consider them in Environmental Assessments (EAs), EISs, or both.

### *B. NEPA Requires Consideration of Alternatives in Environmental Assessments, Not Just in EISs, Leading to a Greater Consideration of Alternatives*

NEPA's version of the EAW, the EA, requires an evaluation of alternatives to a proposed project.[82] This requirement to include evaluation of alternatives with both EAs and EISs at the federal level is supported by the statutory authority for these regulations, which requires that "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment"

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[78] *See Environmental Document Filings with the State Clearinghouse 1999-2020*, CAL. STATE CLEARINGHOUSE, https://opr.ca.gov/docs/20210201-1999-2020_Environmental_Document_Filings_SCH.pdf [https://perma.cc/3DYW-4N6F]. In California, an EIS is referred to as an Environmental Impact Report (EIR) but is procedurally similar to an EIS, including in that it considers alternatives. *California Environmental Quality Act (CEQA),* California State Lands Commission, https://www.slc.ca.gov/ceqa/ [https://perma.cc/N5NM-LEZU].

[79] While I was able to find annual numbers of EISs for the above-listed states, not all states centrally track their EISs, and instead, many allow individual RGUs to maintain their EISs. For these states, it would be nearly impossible to determine the annual number of EISs, since this would require reviewing the records of every state agency, city, and county in the state, limiting the extent of this survey.

[80] MINN. STAT. § 116D.04, subdiv. 2(a) (2019) ("Where there is potential for significant environmental effects resulting from any major governmental action, the action must be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. The environmental impact statement must be an analytical rather than an encyclopedic document that describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement must also analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented.").

[81] Dine Citizens Against Ruining our Env't v. Klein, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010) ("The obligation to consider alternatives to the proposed action is at the heart of the NEPA process, and is 'operative even if the agency finds no significant environmental impact.'") (quoting Greater Yellowstone Coal v. Flowers, 359 F.3d 1257, 1277 (10th Cir. 2004)).

[82] 40 C.F.R. § 1501.5(c)(2) (2020).

include an evaluation of alternatives.[83] This statute does not explicitly relegate evaluation of alternatives to EISs, but instead requires such evaluation "in every recommendation or report" that "significantly affect[s] the quality of the human environment."[84]

Minnesota's statutes include similar language, with an arguably lower bar for evaluating alternatives, stating Minnesota agencies shall "study, develop, and describe appropriate alternatives to recommended courses of action in *any proposal which involves unresolved conflicts concerning alternative uses of available resources*."[85] Despite this language, EQB regulations only require evaluation of alternatives in EISs and not EAWs.[86] This puts the content of EAWs in conflict with the statutory purpose of the Minnesota Environmental Policy Act, which is to "understand[] the impact which a proposed project will have on the environment" and "to aid in providing that understanding through the preparation and public review of environmental documents." This stated purpose suggests that EAWs themselves exist to aid in the resolution of conflicts concerning alternative uses of available resources.[87] From this, it is likely that EAWs themselves should include a consideration of alternatives to satisfy this conflict. While NEPA does not preempt MEPA, it is a helpful comparison in considering whether EQB regulations fulfill the statutes governing them. Despite the intention of the EAW as a tool for determining the need for an EIS, it appears from their increasing length and the decreasing frequency of EISs that Minnesota agencies are effectively using the EAW as a method for full environmental review of proposed projects. In doing so, they have removed the analysis of alternatives to proposed projects from the process.

Further, it is not uncommon for federal courts to find that agencies have violated NEPA when they fail to evaluate alternatives for projects with potential for significant environmental impact, even when an EIS is not completed. As mentioned previously, unlike EAWs, EAs are required to include evaluations of alternatives. For example, in *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Department of the Interior*, the court held that even though the Bureau of Reclamation was not required to prepare an EIS for the renewal of a contract for water delivery, they were still required to evaluate alternatives to the contract.[88] Ultimately, the "no action" alternative presented here did not meet the definition of a "no action" alternative, and the Bureau did not provide an explanation for their rejection of alternatives.[89]

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[83] 42 U.S.C. § 4332(C) (2010).
[84] *Id.*
[85] MINN. STAT. § 116D.03, subdiv. 2(4) (1986) (emphasis added).
[86] *See* MINN. R. 4410.2300 (2021); MINN. R. 4410.1200 (2009).
[87] MINN. R. 4410.0300, subpart 3 (2009) ("A first step in achieving a more harmonious relationship between human activity and the environment is understanding the impact which a proposed project will have on the environment. The purpose of parts 4410.0200 to 4410.6500 is to aid in providing that understanding . . . .").
[88] 655 F. App'x 595, 598–99 (9th Cir. 2016).
[89] *Id.* at 599. A "no action" alternative may be defined as no change from a current management direction or historical practice. *Id.* (citing 43 C.F.R. § 46.30).

Similarly, in *Native Fish Society v. National Marine Fisheries Services*, the National Marine Fisheries Service (NMFS) failed to consider a reasonable range of alternatives under NEPA in their approval of a fish hatchery genetic management plan.[90] NMFS and other state and federal agencies proposed the development of a genetic management plan and during the permitting process they did not complete an EIS or consider a range of alternatives.[91] Citizen groups argued that the release of fish from the hatchery into the wild would threaten endangered species in the area by reducing the genetic diversity of fish populations and damaging the ecology of river habitats.[92] The court held that NMFS violated NEPA by failing to prepare an EIS for the project and by failing to consider a reasonable range of alternatives to the proposed project.[93] Both violations were independent; even without preparing an EIS, NMFS still should have evaluated alternatives in this case.[94]

Minnesota courts have looked to interpretations of NEPA to interpret MEPA. For example, in *Iron Rangers for Responsible Ridge Action v. Iron Range Resources*, the court cited interpretations of NEPA in holding that MEPA does not require that findings of no significant impact be based on the best available scientific data.[95] Similarly, the Minnesota Supreme Court noted that consideration of federal case law on NEPA was helpful in interpreting ambiguities in MEPA because of similar procedural protections in the two laws.[96] Federal courts have similarly used NEPA in interpreting MEPA, arguing that "[p]rocedures under MEPA are in large measure similar to, and coextensive with, those under NEPA."[97] While Minnesota state courts have previously determined that EAWs do not require an evaluation of alternatives,[98] they could look to federal court findings—where a failure to consider alternatives in EAs is improper—as guidance in reconsidering this issue.

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[90] Native Fish Soc'y v. Nat'l Marine Fisheries Servs., 992 F. Supp. 2d 1095, 1096 (D. Or. 2014).
[91] *Id.* at 1105.
[92] *Id.* at 1104.
[93] *Id.* at 1110.
[94] *Id.*
[95] 531 N.W.2d 874, 881 (Minn. Ct. App. 1995).
[96] Minn. Ctr. for Env't Advoc. v. Minn. Pollution Control Agency, 644 N.W.2d 457, 468 n.10 (Minn. 2002).
[97] Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1171 (8th Cir. 1994).
[98] *See In re* Minntac Mine Extension Project in Mountain Iron, St. Louis Cnty., No. A13-0837, 2014 WL 274077, at *4–5 (Minn. Ct. App. Jan. 27, 2014) (holding that the DNR's decision to not assess alternatives in the environmental assessment worksheet for the expansion of a mining project was legal because the statute only requires an RGU to determine whether a proposed government action will result in significant environmental effects and does not require a comparison of alternatives).

## IV. THE ENVIRONMENTAL QUALITY BOARD SHOULD AMEND THE RULE REGARDING EAW CONTENT IN ORDER TO INCORPORATE ALTERNATIVES ANALYSIS

As shown in the previous sections, the current rules surrounding environmental review in Minnesota do not include consideration of alternatives in most project proposals.[99] Far fewer projects today consider alternatives than when MEPA was first passed, severely limiting the impact both the public and agencies can have in the review process.[100] Although the EQB has revised their rules periodically since the Act was first passed, they have not yet expressed any intention of revising their rules to include a consideration of alternatives either in EAWs or earlier in the review process.[101] Such a revision would better reflect the intentions behind the passing of MEPA and MERA. Further, this would bring Minnesota's environmental review policies in alignment with both NEPA and environmental review in other states.[102] This section will explain the reasons that including alternatives review in EAWs would better fulfill the intent of Minnesota's environmental review process. Then, this section will explain what such a revision would look like. Finally, this section will conclude with a brief discussion of citizen remedies to encourage this change.

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[99] *See supra* Table 1 (showing that between 2015 and 2020, Minnesota agencies completed 404 EAWs and 9 EISs).

[100] *See supra* Section II.B. (showing that the average number of EISs completed annually by Minnesota agencies dropped from nine to less than two between 1972 and 2020); *see also* Steinemann, *supra* note 6, at 9 (finding that agency involvement in alternative selection is a valuable aspect of the environmental review process and that public comment informed by project alternatives is a valuable aspect of the environmental review process, building public trust in agencies and projects).

[101] *See* Jennifer Bjorhus, *Minnesota Expands Environmental Reviews to Include Greenhouse Gas Inventories*, STAR TRIB. (Sept. 15, 2021), https://www.startribune.com/minnesota-expands-environmental-reviews-to-include-greenhouse-gas-inventories/600097564/ [https://perma.cc/E7FV-4YRC] (reporting on an expanded environmental assessment worksheet that requires developers to quantify a range of greenhouse gases from new projects (such as carbon dioxide and methane) and requires them to discuss ways of mitigating the pollution effects from climate change challenges such as flooding).

[102] HAW. CODE R. 11-200.1-18(d)(7) (LexisNexis 2021) ("Identification and analysis of impacts and alternatives considered[.]"); 329 IND. ADMIN. CODE 5-3-2(b)(1)(B) (2021) ("An environmental assessment includes the following: Brief discussions of . . . alternatives to the proposed action . . . ."); MD. CODE REGS. 11.01.08.08 (2021) ("6. List of alternatives considered."); 301 MASS. CODE REGS. 11.05(5)(a) (2021) ("The ENF shall include a concise but accurate description of the Project and its alternatives . . . ."); MONT. ADMIN. R. 17.4.609(3)(f) (2021) ("[A]n EA must include . . . a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented . . . ."); N.C. ADMIN. CODE 25.0502(2) (2021) ("[R]easonable alternatives to the recommended course of action . . . ."); WIS. ADMIN. CODE DNR § 301.21(2)(b)(2) (2021) ("A description of reasonable alternative actions to the proposed action, including the alternative of taking no action.").

### *A. An Amended EAW Rule Would Better Reflect the Spirit of MEPA & MERA*

MEPA requires that Minnesota agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[103] Originally, the EQB interpreted this much more broadly, requiring completion of EISs (and therefore, alternatives evaluation) in far more projects than today.[104] The early years of the Act and the explicit requirement that agencies evaluate alternatives in "unresolved conflicts" strongly suggest an intention to evaluate alternatives in a large portion of projects.[105] In contrast, today's environmental review process reflects a desire to avoid EISs, and therefore alternatives consideration, by preparing lengthy EAWs to justify bypassing an EIS.[106] However, including alternatives analysis in EAWs would restore the original intent of MEPA to review and pursue the least environmentally harmful route in project proposals.

Further, reviewing alternatives at the EAW stage better reflects the original structural design of MEPA. Originally, the architects of MEPA thought vesting environmental review power in a central administrative agency would encourage a more complete environmental review for statewide projects by taking decision-making power out of the hands of approval agencies who may be less interested in environmental impacts.[107] However, shifting the decision-making power to RGUs shortly after the inception of the bill, ultimately undermined the initial intent behind the creation of the EQB.[108]

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[103] MINN. STAT. § 116D.03, subdiv. 2(4) (1986).

[104] ELEFF, *supra* note 21, at 32 (noting that in the first three years of its existence, the EQB ordered fifty EISs, but in the three years following the 1976 changes requiring that RGUs oversee EIS preparation, only twenty-two EISs were prepared).

[105] Reuther, *supra* note 10, at 10663 ("The intent of MEPA was to couple the substantive standard with the environmental impact statement (EIS) mechanism to determine and explore feasible and prudent alternatives.").

[106] Reuther, *supra* note 10, at 10664 ("The failure of Minnesota's state and local agencies to require EISs significantly undermines the purpose and efficacy of MEPA. In Minnesota, an EAW does *not* present or evaluate alternatives. As a result, for the great majority of projects, the 'heart of environmental review'—the alternatives analysis—is absent. It is common for project proponents to prepare lengthy EAWs, sometimes with more detail than one would find in a typical EIS, but without any alternatives analysis. Rather than looking at alternatives that could reduce impacts, the focus, instead, becomes justification for a FONSI.").

[107] Herman & Dayton, *supra* note 60, at 32 ("With MEPA, the intent was to impose the MERA standard on major state agency decisions, and couple it with the EIS mechanism to determine and explore those feasible and prudent alternatives. When the law was first enacted, it was thought that creating a centralized Environmental Quality Board (EQB) would result in more rational implementation of the act and cure two perceived defects of the national program: excessive reliance on the courts for implementation and the lack of an agency to advocate for more complete environmental review. The EQB was to be analogous to the federal Council on Environmental Quality (CEQ) with oversight responsibility.").

[108] ELEFF, *supra* note 21, at 32.

Therefore, the consideration of alternatives, initially triggered by an agency-ordered EIS for the sole purpose of environmental review, is now the responsibility of other state agencies. In other words, the decision-making power initially intended to be vested in the EQB now lies with other agencies and governmental units. For this reason, shifting the consideration of alternatives to EAWs would better reflect MEPA's intent and better reflect the robust environmental review program that was put forward in the original structure of MEPA. By removing agencies' ability to choose whether alternatives are examined in project proposals, MEPA's original intent is furthered still.

Finally, there is some conflict between MEPA's trigger for an EIS and the EQB's trigger for an EIS. Requiring EAWs to consider alternatives would resolve this conflict. The statutory trigger for an EIS (and therefore, consideration of alternatives) is that a project presents the "potential for significant environmental effects."[109] Assessing whether a project has the potential for significant environmental effects depends on the following factors:

> A. type, extent, and *reversibility* of environmental effects;
> B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; *the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project*;
> C. *the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project*; and
> D. *the extent to which environmental effects can be anticipated and controlled* as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.[110]

Notably, items B and C explicitly require the consideration of "mitigation" methods as part of the determination of the need for an EIS, while items A and D use language such as "reversibility" and "control," further underlining that agencies should consider mitigation. This is important, because under Minnesota regulations, mitigation is defined to include alternatives:

[109] MINN. R. 4410.1700, subpart 1 (2018).
[110] *Id.* subpart 7 (emphasis added).

> A. avoiding impacts altogether by not undertaking a certain project or parts of a project;
> B. minimizing impacts by limiting the degree of magnitude of a project;
> C. rectifying impacts by repairing, rehabilitating, or restoring the affected environment;
> D. reducing or eliminating impacts over time by preservation and maintenance operations during the life of the project;
> E. compensating for impacts by replacing or providing substitute resources or environments; or
> F. reducing or avoiding impacts by implementation of pollution prevention measures.[111]

The result is a tension in the regulatory scheme. On one hand, the EIS trigger rule, when paired with the definition of "mitigation," would seem to call for alternatives analysis at the EAW stage. Yet the longstanding practice is that an EAW, which is used to evaluate a project's potential for significant environmental effect, does not explicitly require projects to consider avoiding impacts by alternatives such as not undertaking a project or parts of the project or limiting the degree of magnitude of a project to avoid impacts.[112]

The regulatory definition of alternatives that must be considered in an EIS, however, aligns with this definition of mitigation measures. In explaining what alternatives to consider, Minnesota regulations require an EIS to include at least one alternative from each of the following categories: "alternative sites, alternative technologies, modified designs or layouts, modified scale or magnitude, and alternatives incorporating reasonable mitigation measures identified through comments received during the comment periods for EIS scoping or for the draft EIS," as well as a "no action alternative," meaning an alternative where the project is not undertaken at all.[113] By considering a no action alternative, alternatives of modified scale or magnitude, alternative sites, and alternatives incorporating reasonable mitigation measures, an EAW could satisfy all the requirements under the definition of mitigation provided in section 4410.0200 subpart 51 of the Minnesota Rules. This would allow agencies to better consider a project's potential for significant environmental effects, the trigger for an EIS. In other words, the EQB's definition of potential for significant environmental effects, presented in section 4410.1700 subpart 7 of the Minnesota Rules should explicitly include project alternatives as a consideration in order to appropriately determine the need for an EIS. This

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[111] MINN. R. 4410.0200, subpart 51 (2020).
[112] *See id.* 4410.1200 (2009); *see also* MINN. ENV'T QUALITY BD., ENVIRONMENTAL ASSESSMENT WORKSHEET (2013) https://www.eqb.state.mn.us/sites/default/files/documents/Finalized%20EAW%20Form%20July2013.pdf [https://perma.cc/J6C9-LYQ6].
[113] MINN. R. 4410.2300(G) (2009).

would resolve the tension between the EQB's regulations and MEPA's requirements while allowing agencies to make decisions regarding the need for project proposers to complete an EIS.

In addition to satisfying MEPA's intent, requiring EAWs to evaluate alternatives would also place Minnesota's regulations more firmly in line with the intent behind MERA. MERA creates a civil right of action for any citizen of the state of Minnesota "to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction."[114] Under MERA, any action which causes, or is likely to cause, pollution, impairment, or destruction requires the court to prevent such conduct if a "feasible and prudent alternative" exists.[115]

Prior to MERA's passage, it was very difficult for citizens to bring suits in order to protect the environment due to the high bar presented by standing requirements. Bringing a suit required showing individual harm, usually through nuisance or trespass actions.[116] In response to this, Joseph Sax, a leading professor of environmental law, proposed a new legal right of action.[117] Arguing that most environmental problems are caused by "powerful and well-organized minorities who have managed to manipulate governmental agencies to their own ends," Sax claimed that government agencies were insufficient to make decisions regarding the most responsible use of the environment and therefore, the court's role in protecting the environment should be expanded by allowing citizens to directly bring suits regarding environmental degradation or pollution.[118] Sax laid out a model environmental rights act that would create this new cause of action, and several states began developing their own versions of Sax's model act.[119] While there are some differences between MERA and Sax's model act, the genesis of MERA and its primary components reflect Sax's original structure put forward as a judicial remedy for the failures of agencies to adequately protect the environment.[120] MERA removed the common standing requirement that a plaintiff must show an "injury in fact," which is

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[114] MINN. STAT. § 116B.01 (1986).

[115] *See id.* § 116B.04 (1985); Cnty. of Freeborn by Tuveson v. Bryson, 309 Minn. 178, 187, 243 N.W.2d 316, 321 (Minn. 1976) ("As here applied, this construction means that, in the absence of unusual or extraordinary factors, the trial court must enjoin environmentally destructive conduct if a feasible and prudent alternative is shown."). Importantly, proof of no feasible and prudent alternative is the only available affirmative defense set out in MERA, emphasizing the act's emphasis on the pursuit of the least harmful course of action in projects. MINN. STAT. § 116B.04 (1985).

[116] Editorial Board, Minn. L. Rev., *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 575 (1972).

[117] Bryden, David P., *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163, 170–71 (1978).

[118] *Id.* Sax argued that "the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. *Id.* He is perfectly capable of fighting his own battles—if only he is given the tools with which to do the job." *Id.* Sax further felt that judges, like citizens, were "political outsiders," making them appropriate figures for oversight of governmental agencies. *Id.*

[119] *Id.* at 173. Michigan was one of the first to pass such a law, and it was held up by Sax as a "model law" for other states. *Id.*

[120] *See* Editorial Board, Minn. L. Rev., *supra* note 116, at 575.

challenging to show with issues surrounding the environment. Harms to the environment are often difficult to quantify and may not be visible for years or decades.[121] Instead, under MERA, any natural person in Minnesota may challenge an action which causes, or is likely to cause, pollution, impairment, or destruction.[122]

At its core, MERA reflects a desire to place more control over environmental review into the hands of Minnesota citizens, and, to both consider and pursue available alternatives whenever possible. By placing alternatives consideration in EAWs, both goals are satisfied. As stated earlier, greater and earlier consideration of alternatives creates more robust and valuable citizen engagement in projects.[123] Further, requiring alternatives consideration in EAWs removes agencies' ability to choose when alternatives are considered through EIS determinations, instead making them mandatory in all environmental reviews. Alternatives consideration is, therefore, removed from the "manipulated" government agencies, as expressed by Joseph Sax in his reasoning for creating citizen rights of action for environmental suits.[124] More importantly, this change strengthens MERA by presenting alternatives to all proposed projects. Under MERA, reasonable alternatives are required when a project presents a likelihood of pollution, impairment, or destruction. Therefore, by requiring alternatives consideration under MERA, citizens concerned about projects could show that such alternatives exist, and thereby, could better encourage the reasoned consideration of alternatives intended by MERA.

### *B. The Proposed Amendment to EQB Regulations*

For these reasons, the EQB should modify SECTION 4410.1200 of the Minnesota Rules , the regulation detailing the required contents of EAWs,[125] to expressly include the consideration of alternatives. Language, detailing the alternatives required for EISs, like that provided in section 4410.2300(G) of the Minnesota Rules, could be incorporated into section 4410.1200 of the Minnesota Rules, satisfying the intent of MEPA and

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[121] Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992); *see also* Robin Craig, *Standing and Environmental Law: An Overview*, FL. STATE PUB. L. & LEGAL THEORY, RESEARCH PAPER SERIES, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536583# [https://perma.cc/CC9F-QXCK] ("Specifically, because environmental plaintiffs often bring public interest claims, their connections to the legal problems challenged can appear attenuated, prompting defendants to assert that the plaintiffs lack standing to bring the legal challenge.").

[122] MINN. STAT. § 116B.10 subdiv. 1 (1985).

[123] Steinemann, *supra* note 6 (finding that agencies use alternatives to choose the most prudent path forward in a particular project and that public comments on alternatives can be a valuable aspect of the environmental review process).

[124] Bryden, *supra* note 117, at 170–71.

[125] EAWs must describe the project, its purpose, its construction and features, any potential impacts to the surrounding land or environment, and any other permits or approvals required. MINN. R. 4410.1200 (2009).

MERA.[126] Such a change would require EAWs to include discussion of alternative sites, alternative technologies for pollution mitigation, and changes in the size or layout of the project to reduce pollution.[127]

The modified rule then, would add to the existing rule, section 4410.1200 of the Minnesota Rules, a ninth required section, which would state: "reasonable alternatives to the proposed project of the following types or a concise explanation of why no alternative of a particular type is included in the EAW: alternative sites, alternative technologies, modified designs or layouts, modified scale or magnitude." This would then necessitate adding a question with such language to the Environmental Assessment Worksheet Form provided by the EQB.[128]

Such modification is a straightforward change following procedures laid out in the Minnesota Administrative Procedures Act. In Minnesota, an agency may give public notice of a proposed rule change followed by a thirty-day public comment period.[129] If, during the public comment period, twenty-five or more comments request a public hearing, a hearing on the proposed rule change must be held before an Administrative Law Judge (ALJ).[130] Once through the hearing process, the rule is submitted to the ALJ for review.[131] The ALJ determines the legality of the rule, and if rejected, the agency may modify the rule.[132] If the rule is approved, it is filed by the judge and is then effective upon publication in the state register.[133] The EQB has revised their rules regularly under this process, demonstrating their willingness to address deficiencies in Minnesota's environmental review process and to improve oversight of projects. Most recently the agency amended their rules in 2021 to require that project proposers calculate the greenhouse gas emissions for projects in EAWs.[134]

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[126] *See id.* 4410.2300(G) ("Alternatives: the EIS shall compare the potentially significant impacts of the proposal with those of other reasonable alternatives to the proposed project. The EIS must address one or more alternatives of each of the following types of alternatives or provide a concise explanation of why no alternative of a particular type is included in the EIS: alternative sites, alternative technologies, modified designs or layouts, modified scale or magnitude, and alternatives incorporating reasonable mitigation measures identified through comments received during the comment periods for EIS scoping or for the draft EIS.").

[127] *Id.*

[128] *See* MINN. ENV'T QUALITY BD., ENVIRONMENTAL ASSESSMENT WORKSHEET (2013), https://www.eqb.state.mn.us/sites/default/files/documents/Finalized%20EAW%20Form%20July2013.pdf [https://perma.cc/J6C9-LYQ6]. Currently, the form has twenty questions for project proposers to complete including their identifying and contact information and information regarding the environmental impacts of the project. For a majority of Minnesota's projects, these twenty questions are the only environmental review any project goes through.

[129] MINN. STAT. § 14.22 subdiv. 1 (2009).

[130] *Id.*

[131] *Id.*

[132] *Id.* § 14.26.

[133] *Id.* § 14.27.

[134] Bjorhus, *supra* note 101 (reporting on a "revised and expanded environmental assessment worksheet that requires developers to quantify a range of greenhouse gases from new projects such as carbon dioxide and methane. It also requires them to discuss ways of mitigating the pollution and how well their project can withstand climate change challenges such as flooding.").

Alternatively, should such a modification proposal fail, citizens may also petition the EQB to adopt a rule change requiring the inclusion of alternatives analysis in EAWs.[135] Any Minnesota resident may petition the EQB for adoption of a rule change if the petition specifically states the desired action.[136] Then, the EQB must respond to the petition within sixty days by stating their intent to proceed with the rule adoption process as outlined above or their intent to deny the petition.[137] The EQB must also provide reasons for their decision to the petitioner.[138] Thus, there are two methods by which a modification to the EQB's regulations regarding EAW content could be initiated, either by the EQB themselves or through citizen petition.

### *C. MERA Provides a Civil Remedy to Compel Rule Modification*

Alternatively, there is a third way to initiate such a rule change. A Minnesota resident may bring a lawsuit under MERA to compel such a rule change if the EQB is unwilling. Under MERA Section 10, a party may bring suit in district court for relief against an agency challenging a rule promulgated by an agency.[139] In such an action, the plaintiff need only present a prima facie case proving the existence of material evidence showing the inadequacy of a rule to protect the state's resources from pollution, impairment, or destruction.[140]

A particularly powerful aspect of MERA Section 10, discussed previously as a core element of MERA, is the broad standing requirements under the statute. Any person, organization, business, agency, or any other group that resides within the state may bring a suit against an agency

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[135] MINN. STAT. § 14.09 (1995).
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* § 116B.10 subdiv. 1 (1985) ("[A]ny natural person residing within the state . . . may maintain a civil action in the district court for declaratory or equitable relief against the state or any agency or instrumentality thereof where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed.").
[140] *Id.* § 116B.10 subdiv. 2–3 (1985) ("In any action maintained under this section the plaintiff shall have the burden of proving that the environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit is inadequate to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction . . . . In any action maintained under this section the district court, upon a prima facie showing by the plaintiff of those matters specified in subdivision 2, shall remit the parties to the state agency or instrumentality that promulgated the environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit which is the subject of the action, requiring said agency or instrumentality to institute the appropriate administrative proceedings to consider and make findings and an order on those matters specified in subdivision 2.").

regarding an environmental quality standard, rule, or permit.[141] The standing requirement under MERA Section 10 is supported by Minnesota courts' interpretation of standing doctrine regarding matters of public interest in Minnesota. Standing in suits on matters of public interest is granted to anyone who shows either "(1) damages distinct from the public's injury, or (2) express statutory authority."[142] Since MERA Section 10 grants statutory authority to anyone residing within the state, this burden is met.

Another powerful part of MERA Section 10 is the statutory burden of proof in such cases. Under a MERA Section 10 suit, if a plaintiff can present a prima facie case that an agency rule is inadequate to protect against pollution, impairment, or destruction, the issue is remitted to the agency at fault to address the inadequacy.[143] To support a prima facie case, a plaintiff must demonstrate that the claim implicates a natural resource and that the defendant's conduct will lead to the pollution, impairment, or destruction of that resource.[144] If the court does remand to the agency responsible for rulemaking, the district court retains jurisdiction over the case and conducts a judicial review to determine whether the final order of the agency is supported by a preponderance of the evidence.[145]

There have been relatively few cases brought directly under MERA Section 10. However, a recent case from Northeastern Minnesotans for Wilderness (NMW) represents some success for such claims. NMW sued the Department of Natural Resources (DNR) under MERA Section 10, arguing that their mining rules are insufficient to protect the Boundary Waters.[146] Specifically, the suit alleged that chapter 6132 of the Minnesota Rules is inadequate to protect the Boundary Waters.[147] Chapter 6132 of the Minnesota Rules regulates nonferrous metallic mineral mining, in order "to control possible adverse environmental effects of nonferrous metallic mineral mining, to preserve natural resources, and to encourage planning of future land utilization, while at the same time promoting orderly

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[141] *Id.* § 116B.10 subdiv. 1 (1985) ("As hereinafter provided in this section, 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 may maintain a civil action in the district court for declaratory or equitable relief against the state or any agency or instrumentality thereof where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed.").

[142] Stansell v. City of Northfield, 618 N.W.2d 814, 818 (Minn. Ct. App. 2000).

[143] MINN. STAT. § 116B.10 subdiv. 2–3 (1985).

[144] Friends of Tower Hill Park v. Foxfire Prop., LLC, No. A19-1111, 2020 WL 994767, at *3 (Minn. Ct. App. Mar. 2, 2020).

[145] MINN. STAT. § 116B.10 subdiv. 3 (1985) (requiring that the presiding court retain jurisdiction over the controversy in order to determine whether the agency's decision on the matter is supported by a preponderance of the evidence).

[146] Complaint, Ne. Minnesotans for Wilderness v. Minn. Dep't of Nat. Res., No. 62-CV-20-3838 (Minn. Dist. Ct. June 24, 2020), [https://perma.cc/WCH4-BRF3].

[147] *Id.* at 7–8.

development of nonferrous metallic mineral mining...."[148] State rules prohibit nonferrous mining within the Boundary Waters but do not prohibit siting such mines in the headwaters of the Boundary Waters,[149] and therefore, NMW argued that the rules do not meet the goal of the legislature's policy and are not sufficient to meet the rules' purpose because they would allow nonferrous mining to occur in the source of waters that flow into the Boundary Waters.[150]

In their case, NMW presented evidence of the Twin Metals copper sulfide mines' proximity to the Boundary Waters, geological evidence of the permeability of the rock in the area, the connectivity of surface waters in the region.[151] They also detailed the legislative history of nonferrous mining laws and regulations in Minnesota, identifying practical shortcomings in these laws.[152] By presenting numerous scientific studies that demonstrated the threat of acid mine pollution in the Boundary Waters caused by the Twin Metals mine, NMW argued that the current nonferrous mining rules were insufficient to protect the Boundary Waters.[153] The DNR agreed that NMW had met the prima facie burden in this case, and the case was remanded to the DNR for rulemaking.[154] Once the rulemaking process is complete, the court will take evidence to determine whether the rule is adequate.[155] If it is not adequate, the agency will be compelled to revise; if the rule is adequate, it will become the new rule.[156]

While the NMW case points to a specific action—the proposed Twin Metals mine—and explains how the rule is insufficient to prevent pollution from this action, it is also possible to bring a MERA Section 10 case to show that a rule is inadequate to protect against pollution more generally.[157] *State of Minnesota by Smart Growth Minneapolis v. City of Minneapolis* discusses such a claim.[158] In that case, plaintiffs sued alleging that the City of Minneapolis's 2040 Comprehensive Plan (2040 Plan) would "likely materially adversely affect the environment."[159] They argued that a

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[148] MINN. R. 6132.0200 (2008).
[149] *See id.* 6132.2000, subpart 2 (2008).
[150] Complaint, Ne. Minnesotans for Wilderness v. Minn. Dep't of Nat. Res., No. 62-CV-20-3838 at *7–8 (Minn. Dist. Ct. June 24, 2020), [https://perma.cc/WCH4-BRF3].
[151] *Id.* at 10–19.
[152] *Id.* at 20–22.
[153] *Id.*
[154] *See* Order Den. Defs.' Mot. Dismiss and Allowing Stipulation at 2, Ne. Minnesotans for Wilderness v. Minn. Dep't of Nat. Res., No. 62-CV-20-3838 (Minn. Dist. Ct. May 12, 2021), https://publicaccess.courts.state.mn.us/CaseSearch [https://perma.cc/U96E-6M2W] ("On November 13, 2020, NMW and Defendants filed a stipulation (the 'Stipulation') in which NMW and Defendants agreed to skip the first step of analysis under Minn. Stat. § 116B.10 and move straight to administrative remand to the DNR for consideration of MINN. R. 6132.2000 . . . .").
[155] MINN. STAT. § 116B.10 subdiv. 3. (1985) (requiring that the presiding court retain jurisdiction over the controversy in order to determine whether the agency's decision on the matter is supported by a preponderance of the evidence).
[156] *Id.*
[157] *See* 954 N.W.2d 584 (Minn. 2021).
[158] *See id.*
[159] *Id.* at 588.

full build-out of the plan would increase storm water runoff, cause habitat loss, reduce green space, increase residents, increase traffic, and increase wastewater generation in the city.[160] Their complaint further alleged that likely results of the plan included threats to public infrastructure, air quality, and wildlife habitat.[161] As evidence for these claims, the group presented an environmental analysis of the 2040 Plan, calculating the impacts its various features.[162] The district court dismissed the case for failure to state a claim for two reasons. The court first reasoned that comprehensive plans are exempt from MEPA environmental review, so Smart Growth's claim asking that the city engage in environmental review was procedurally barred.[163] Second, the court reasoned that Smart Growth failed to make a prima facie showing under MERA because Smart Growth did not identify any specific city action that would "itself cause any pollution, impairment, or destruction of natural resources."[164] The court of appeals affirmed both holdings.[165]

However, on further appeal, the Minnesota Supreme Court disagreed with the lower courts. Citing section 116B.12 of the Minnesota Statutes, the court noted that MERA identifies its remedies "in addition to any rights now or hereinafter available."[166] The court further held that absent an explicit statement, other laws are not exempt from MERA, and therefore the comprehensive plan was not exempt from MERA.[167] The city argued that because the 2040 Plan is simply a high-level planning document, adoption of the 2040 Plan does not in and of itself cause environmental effects.[168] Based on this, the city claimed it would need to take subsequent actions to implement any part of the 2040 Plan before environmental effects might occur; the city also argued a MERA claim could only be brought when a specific, discrete project was approved.[169] But the court disagreed, stating that because the document, by law, dictated both zoning plans and future city projects, it was appropriate to bring such a claim.[170] Importantly, the

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[160] *See id.*
[161] *See id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 592.
[167] *Id.* at 593 (finding that Minneapolis had not proven that their plan was exempt from review under MERA because "MERA and MEPA can be read in harmony and their provisions can be given full force without resulting in conflict," and, based on this, holding that "the district court erred in concluding that Smart Growth's claims are barred under Minnesota law, because rule 4410.4600 does not exempt comprehensive plans from environmental review under MERA.").
[168] *Id.* at 595.
[169] *Id.*
[170] *See id.* at 596. The court found that a planning document for a city can be scrutinized as an action under MEPA because Minneapolis's laws required the city's land use to adhere to the plan, and because any zoning ordinances in conflict with the plan would be required to change to adhere to the plan. *Id.* The court found that the plaintiff's projections of environmental harm resulting from implementation of the city's planning documents were reasonable despite being based on a full build-out of the plan since such a build-out was what the plan allowed for, and therefore, the plaintiff's projections were not speculative. *Id.*

Minnesota Supreme Court did not determine whether Smart Growth had met their prima facie case; they only determined that the dismissal of Smart Growth's claim was inappropriate and remanded the case to the district court to reinstate the claim.[171] In its June 15, 2022, decision, the Hennepin County District Court enjoined the city from implementing the 2040 Plan until the city can rebut the *prima facie* showing by the Plaintiffs or until the city can modify the plan based on the evidence presented by the Plaintiffs.[172]

Based on these cases, it is possible to challenge the EQB's rules regarding EAW content in Minnesota, arguing that their rules have failed to generate the reasoned evaluation of alternatives required by MEPA and MERA. Not requiring them in section 4410.1200 of the Minnesota Rules 4410.1200 does not sufficiently meet the intentions of MEPA and MERA, and therefore, the rule is insufficient to prevent pollution, impairment, or destruction of natural resources in the state of Minnesota. *Northeastern Minnesotans for Wilderness* and *Smart Growth* present two recent examples of successful MERA Section 10 claims, suggesting that a claim against the EQB in this case could have similar success.

A successful presentation of prima facie evidence would result in the court remanding the regulations in question to the EQB, who would be required to address the deficiencies in EAWs presented by the case.[173] While the court may not directly change the rules regarding EAW content to include alternatives, the court may provide temporary injunctive relief, which could include such a temporary change to EAW content, if the plaintiff demonstrated that a temporary change presented a permanent threat to the environment while the EQB underwent its own rulemaking process.[174] The EQB would be required to undergo its own rulemaking procedures to address the prima facie case before them.[175] In *Northeastern Minnesotans for Wilderness*, the DNR (the agency that was sued) voluntarily remanded the case to themselves to undergo this process rather than wait for a court ruling on the case.[176] However, a mining company attempted to intervene to block this voluntary remand, since the mining company may potentially be affected by the pending rule changes.[177]

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[171] *See id.* at 596–97.

[172] Order at 1–2, State of Minnesota by Smart Growth Minneapolis v. City of Minneapolis, No. 27-CV-18-19587 (Minn. Dist. Ct. June 15, 2022), https://s3.documentcloud.org/documents/22061355/order_msj-smart-growth-v-minneapolis-27-cv-18-19587.pdf [https://perma.cc/CJ4Y-VMZ9].

[173] MINN. STAT. § 116B.10 subdiv. 3 (1985) (stating that a prima facie presentation of evidence by the plaintiff will result in the court remanding the issue to the state agency responsible for the rule, and the agency will then be required to "institute the appropriate administrative proceedings to consider and make findings and an order on those matters . . . .").

[174] *Id.* ("In so remitting the parties, the court may grant temporary equitable relief where appropriate to prevent irreparable injury to the air, water, land, or other natural resources located within the state.").

[175] *Id.*

[176] *See* Order Den. Defs.' Mot. Dismiss and Allowing Stipulation at 7, Ne. Minnesotans for Wilderness v. Minn. Dep't of Nat. Res., No. 62-CV-20-3838 (Minn. Dist. Ct. May 12, 2021), https://publicaccess.courts.state.mn.us/CaseSearch [https://perma.cc/U96E-6M2W].

[177] *Id.* at 2.

However, the court denied the mining company's motion, noting that the plaintiffs had met the "low bar" required under section 116B.10 of the Minnesota Statutes and therefore, remand was appropriate.[178] This demonstrates the court's ability to provide remedy to plaintiffs in such a case, as well as the agency's role in the process.

The EQB would then be required to present rule changes addressing the failure of EAWs to evaluate alternatives or findings supporting a decision not to change these rules.[179] Any decisions made by the EQB must be presented before the court and must be supported by a preponderance of the evidence.[180] While no case on record has yet gotten this far in the process, the initial presiding court retains jurisdiction over the matter and would therefore be responsible for ensuring the EQB had met this preponderance of the evidence burden.[181]

Such a suit, if successful, could result in significant changes to Minnesota's environmental review process by requiring the EQB to consider rulemaking that includes a consideration of alternatives at the EAW stage. MERA Section 10 provides unique power to the citizens of Minnesota by allowing them to challenge deficiencies in agencies' regulations by presenting a relatively "low bar" of evidence, which then compels an agency to correct such deficiencies under judicial oversight. A change requiring alternatives review in EAWs such as that which has been presented here would bring Minnesota's environmental review process in line with the review process in other states including Hawaii, Indiana, Maryland, Massachusetts, Montana, North Carolina, and Wisconsin.[182] More importantly, this would increase the careful consideration of the use of Minnesota's natural resources by requiring agencies to consider alternatives in far more projects, and could even encourage greater public involvement in Minnesota's environmental review process by equipping

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[178] *Id.* at 7.

[179] MINN. STAT. § 116B.10 subdiv. 3 (1985) (requiring that the agency "institute the appropriate administrative proceedings to consider and make findings and an order on those matters . . . .").

[180] *Id.* ("In so remitting the parties, the court shall retain jurisdiction for purposes of judicial review to determine whether the order of the agency is supported by the preponderance of the evidence.").

[181] *Id.*

[182] HAW. CODE R. 11-200.1-18(d)(7) (LexisNexis 2021) ("Identification and analysis of impacts and alternatives considered[.]"); 329 IND. ADMIN. CODE 5-3-2(b)(1)(B) (2021) ("An environmental assessment includes the following: Brief discussions of . . . alternatives to the proposed action . . . ."); MD. CODE REGS. 11.01.08.08 (2021) ("6. List of alternatives considered."); 301 MASS. CODE REGS. 11.05(5)(a) (2021) ("The ENF shall include a concise but accurate description of the Project and its alternatives . . . ."); MONT. ADMIN. R. 17.4.609(3)(f) (2021) ("[A]n EA must include . . . a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented . . . ."); N.C. ADMIN. CODE 25.0502(2) (2021) ("[R]easonable alternatives to the recommended course of action . . . ."); WIS. ADMIN. CODE DNR § 301.21(2)(b)(2) (2021) ("A description of reasonable alternative actions to the proposed action, including the alternative of taking no action.").

concerned members of the public with more information about projects and alternatives to those projects.[183]

## V. CONCLUSION

MEPA's early ambitions to ensure responsible use of Minnesota's natural resources have steadily weakened as the cornerstone of the act, the EIS, has become a rarely used tool.[184] In this process, alternatives to proposed projects, which allow both government agencies and the public to choose the most responsible path forward,[185] are now rarely considered. Requiring that EAWs include the consideration of alternatives, like other states and NEPA, would address this.[186] Such a change would align Minnesota's environmental review process with the intentions of both MEPA and MERA, which present that feasible alternatives must be pursued whenever it is likely that a project will result in pollution, impairment, or destruction.[187] Requiring alternatives in EAWs would similarly bring MEPA in alignment with the seven other states that currently require consideration of alternatives in their own EAW equivalents.[188] Because alternatives are not considered at the EAW stage, determination of the feasibility of alternatives is impossible if a project never completes an EIS, but has a likelihood for pollution, impairment, or destruction. To facilitate such a change, the EQB should modify its rules regarding EAW content to include alternatives consideration at the EAW stage. Alternatively, Minnesota citizens can bring a MERA Section 10 claim against the EQB. Such a claim has the potential to successfully compel the EQB to develop new rules requiring the consideration of alternatives in EAWs. As Minnesotans continue to grapple with our impact on the environment, it is imperative that our regulators support robust environmental review processes and greater public involvement in such processes.

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[183] Steinemann, *supra* note 6 (finding that agencies use alternatives to choose the most prudent path forward in a particular project and that public comments on alternatives can be a valuable aspect of the environmental review process).

[184] *See supra* text accompanying notes 61, 63 (finding that the average number of EISs completed annually by Minnesota agencies has dropped from nine to less than two between 1972 and 2020).

[185] Steinemann, *supra* note 6.

[186] *See supra* note 182 and accompanying text; *see also supra* note 63; *see also supra* note 64; *see also supra* note 65; *see also supra* note 66; *see also* 40 C.F.R. § 1501.5 (c)(2) (noting that NEPA requires federal projects to consider alternatives in EAs).

[187] MINN. STAT. § 116D.04 subdiv. 6 (2019).

[188] *See supra* note 186 and accompanying text.