

**Minnesota Foundational Environmental Laws
Oral History Project**

**Narrator:
Charles K. Dayton (CD)**

**Interviewer:
Stephanie Hemphill (SH)**

**Recorded:
August 23, 2016**

Stephanie Hemphill (SH): The following interview was conducted with Charles K. Dayton on behalf of the UMD [University of Minnesota Duluth] Kathryn A. Martin Library Archives for the Minnesota Foundational Environmental Laws Oral History Project. It took place on August 23, 2016, at Mr. Dayton's summer home on Jasper Lake near Ely, Minnesota. The interviewer is Stephanie Hemphill.

SH: Your name is Charles K. Dayton?

Charles Dayton (CD): That's correct.

SH: What's your middle name Charles?

CD: Kelly.

SH: How do you spell that?

CD: K-e-l-l-y.

SH: I've got your email address, so if you could give me your birth date and year.

CD: May 16, 1939.

SH: So, Chuck, would you tell me where you were born and where you grew up?

CD: I was born in northern Illinois in a small town called Belvedere, and I grew up mostly in DeKalb, Illinois, where my father was a high school teacher, coach, and athletic director.

SH: Where did you go to college and what degrees did you get?

CD: I went to Dartmouth College in Hanover, New Hampshire, and I got a degree in English literature and then I went to the University of Michigan Law School and graduated with a JD [Juris Doctor] in 1964.

SH: What was the progression of your career?

CD: My first job was with the firm that's now known as Gray Plant Mooty. It was then a firm of twenty lawyers and the name was Cant, Haverstock, Beardsley, Gray and Plant.

[Laughter]

CD: It's a wonderful firm that had been around for many years, one of the oldest firms in town. A small community of scholars, wonderful bright lawyers, and I was there for six years and I became a partner. But while I was there, I got involved in both race and poverty issues and environmental issues. And I was finding that I had three things in my life that were important: my family, my professional work, and my volunteer work. And I could do two out of the three well, but I couldn't do all three well. So, I left and I joined the Minnesota Public Interest Research Group [MPIRG], which was funded by contributions of one dollar per student per quarter from students at a number of colleges and universities around Minnesota.

SH: So you could do more of the kind of law that satisfied your social needs, your social commitments at that point?

CD: Well, I went through this period of trying to decide what I was going to do with my life and I was with a good firm and I could see my future, but it was like being on a railroad track and knowing exactly where I was going for the next fifty years. And I got involved and very excited about environmental law, and this was the time of the civil rights movement, the environmental movement—a very exciting—and the anti-war movement. So, it was a very exciting time of change and ferment and I wanted to be a part of that and so I went to work for MPIRG.

SH: Do you remember what year that was?

CD: 1971.

SH: And how did you get involved with the passage of these two laws that are the subject of this oral history [project]?

CD: Before I left the Cant, Haverstock firm I was part of a committee of lawyers with the

Hennepin County Bar Association, the Environmental Law Committee. Michigan had passed a bill called the Environmental Rights Act, which had been crafted by a law professor named Joseph Sax. Sax had written a book called, Defending the Environment: A Strategy for Citizen Action. And so that was our bible. We took that and we worked with the Michigan bill and made some amendments to it, found authors. I learned later—I don't remember knowing it at the time—but, I learned later that apparently Wendy [Wendell] Anderson, as a state senator, in the 1970 session had introduced the Michigan—had just introduced it—it probably never had a hearing. But then in the '71 session, we found authors for the bills. We had John Broeker, who was a lobbyist—a lawyer lobbyist—with my firm.

0:05:30

SH: How do you spell Broeker?

CD: B-r-o-e-k-e-r. And he was also with the Gray Plant firm, or whatever the incarnation was at that time, I think it was still Cant, Haverstock. And a lawyer named Will Hartfeldt—

SH: How do you spell that?

CD: H-a-r-t-f-e-l-d-t. And several others that I could name, Dick Flint, who was also with the Cant, Haverstock firm—

SH: And Flint is spelled?

CD: F-l-i-n-t. Grant Merritt was involved in that and John King, who was married to Governor LeVander's daughter—

SH: King is K-i-n-g?

CD: Yes. Those are the principal people I remember from the committee. Broeker was the one with the lobbying experience and knew the [Minnesota] Legislature and knew the process, knew who the authors should be. I think the Republicans were still in charge in '71 and so we had Republican authors for MERA [Minnesota Environmental Rights Act].

SH: I'm sorry, you mentioned a committee? I don't know if I caught the name of that.

CD: There was a committee of the bar association, the Hennepin County Bar Association, which was the group of young lawyers, mostly in Minneapolis, who were,

who got together and decided to propose this bill. And as I said, John Broeker was the one with the legislative experience, so he helped us get authors and strategize on the bill. I remember doing some of the drafting on the bill and reading Sax's book as a source. Sax's book made the argument that we shouldn't have to have a requirement of standing in order to bring a lawsuit to protect the environment.

SH: What's that?

CD: "Standing" means that if you are going to bring a lawsuit as a plaintiff, the subject matter has to have some direct impact on you. And so, if you were bringing a lawsuit on behalf of a park that you hadn't visited or some river that you didn't use, you couldn't get into court, because it wouldn't have an effect on you. So, and there were cases throwing people out of court on a standing issue. It was a huge problem for the Sierra Club when they brought a lawsuit to try to stop a big ski area in California and I think the case stumbled on the standing issue, because they weren't using the ski area, they were trying to protect the forest, or they weren't using the particular forest, they just wanted to protect the forest. So, the rationale of a rights act, an environmental rights act, is that individuals, citizens of a state, should be able to sue to protect natural resources of that state, without having to demonstrate some technical requirement of standing. That was the principal thrust of the bill.

0:10:05

CD: It also contains a substantive standard, and I'm not sure whether that's in the Michigan law, but there's a standard, a very strongly worded standard, that says if you have a project that's going to result in pollution, impairment or destruction of some natural resource—and all those words are defined in the bill—and there is a feasible and prudent alternative, you have to pick the feasible and prudent alternative! And that's a very strong language that came out of the Federal Highway Act originally, the feasible and prudent language. And there were some wonderful cases under that act where the highway department wanted to put a highway through a park and they ended up having to go around the park. The definition of "feasible and prudent" was very specific and very helpful. They said it doesn't just mean that it's less expensive; in order to not be feasible and prudent it has to be extraordinary circumstances. The best case in Minnesota on that is a case that I had on Blackhawk Lake. It's—what is the name of the plaintiffs?—but it's a case involving Blackhawk Lake down in, south of St. Paul and [Interstate Highway] 35E. 35W and 35E split down by Buck Hill ski area and 35E heads straight as a string towards St. Paul. But there's a place where it goes around and makes a curve around a lake. Originally, that had been planned to go straight across the lake, Blackhawk Lake, and we represented the folks on Blackhawk Lake and we argued under the [Minnesota Environmental] Rights Act, [that] there's a feasible and prudent

alternative to putting the road across the lake. And putting the road across the lake will result in destruction of scenic resources, the wonderful resource of “quietude,” which is listed as a resource in the act. So, every time I fly into Minneapolis/St. Paul airport from the East, and you go over Pilot Knob and over the river, I look out the left side of the plane and I can see that curve in the road and I can say, “Well, I did that.” So, I was very happy about that result. I had the pleasure of showing it to my grandson recently as we were flying in, and that was fun. So, we’re back to the Rights Act. So, it had both, it has the substantive standard that you can’t go forward with a project that will result in pollution or permanent destruction, where there is a feasible or prudent alternative. So, I’m not sure if I’m still on track with the question?

0:14:16

SH: Well, let’s see. We’re talking about the Rights Act now; let’s talk about MERA first, of course, passed in 1971 and you mentioned a little bit about the people who were involved in that, and you said that you modeled it on a Michigan law. And wasn’t there already a national law passed in 1969?

CD: You’re thinking of the National Environmental Policy Act [NEPA].

SH: Okay.

CD: There’s nothing on the federal level of that, that is anything like—

SH: About a rights act?

CD: Rights act, no.

SH: So, what problem did the Rights Act solve then? It sounds like this business of “standing” was the main thing?

CD: Well, “standing” is important and if you’re going to sue on behalf of the state resource, you have to give notice to the attorney general and the attorney general has the ability to intervene on behalf of the state. So, it solved the standing issue. Justice Douglas, about that same time wrote an article that was published in a law review, probably Yale, entitled, *Should Trees Have Standing?* So, that was kind of a seminal article on the same issue. The law had to develop on the federal level through case law and there was a case involving recycling material, SCRAP, S-C-R-A-P, Students Contesting Agency Regulatory Procedures [Students Contesting Regulatory Agency Procedures] v. the EPA [Environmental Protection Agency] in which the students were saying the rates

of transportation for recycled materials were too high—discriminating against recycling. And the court held that the students had standing. And so, that was kind of the high water mark for standing cases and I don't know that it's been a huge issue. If you want to bring a case, for example, you want to bring a case on the Boundary Waters Canoe Area [BWCA], you have a plaintiff who uses the Boundary Waters Canoe Area, you can find some connection, if you can find some connection to the resource, you can solve the standing question. But the substantive standard, requiring you to pick the feasible and prudent alternative, is not present in federal law and is fairly unique, I mean, I don't know how many states have a law like this, but not a lot.

SH: Hmm. Okay, and so you've mentioned this committee of the Minneapolis Bar or the Minnesota Bar?

CD: Hennepin County.

SH: Hennepin County Bar.

CD: Yes.

SH: And you mentioned that probably the sponsors were Republicans, in the [Minnesota] Legislature.

CD: Yes.

SH: Do you remember those folks?

CD: Yes.

SH: And how they were chosen, how it was decided who would bring this legislation forward.

CD: I think in the House, it was Winston Borden and in the Senate it may have originally been William McKinstry and then Robert Dunn.¹

SH: Do you know how to spell McKinstry?

CD: No.

SH: Okay. But then it moved to Robert Dunn?

CD: I believe so. This is long-term memory stuff. [Laughs]

SH: Well, I'm planning to go to the library and look and find out that stuff, too.

CD: Yes, you're going to explore. Right. Right.

SH: Did they come forward and volunteer and say, "I want to do this," or did you have to recruit them?

¹ The Legislative Reference Library shows that Dunn was in the House at the time and Borden was in the Senate. William McKinstry was a legislator in 1877.

CD: Well, you know, you have to remember the context. You couldn't pass these laws today; you couldn't even get a hearing. But this was the time when everybody wanted to be "green." It was the time of Earth Day; it was just right after Earth Day. And there was this great fervor for protecting the environment and people were finally beginning to understand what we have been doing by polluting—we had no concept of climate change at that point and greenhouse gases—but we knew that the rivers were polluted, the air was polluted, and people were using the water and air as a free dump. There was a great outpouring of support in both parties. People were picked who were either the chair of the committee or someone who was viewed as—I think Borden was viewed as a very energetic and successful legislator.

SH: Do you remember going to committee hearings?

CD: Yes.

SH: What arguments were made pro and con?

CD: I was the first witness to testify on behalf of the bill.

SH: In the House or the Senate?

0:20:00

CD: In the House. And the chair—it was the House Judiciary Committee—chaired by Fred Norton, who later became a judge, a very good lawyer, and they were very receptive.² I

made the arguments about standing and about a substantive standard. The arguments on the other side were, “well, if you...” There were a lot of arguments about the definitions of “protected natural resources.” One of them was about the definition of “scenic and aesthetic resources.” And the argument was, I recall, “Well, what if my neighbor has an old barn, and my neighbor wants to take the barn down, and I like the barn because I think it’s scenic and aesthetic. Uh, can I go to court to prevent my neighbor from taking down his barn?” So there’s a clause in the act that says nothing in the statute prevents someone from doing something on their own land, which doesn’t affect, which has no effect outside their own land. So there were several things like that where amendments were made in order to satisfy those kinds of objections. There was an objection about farmers, “What about agricultural odors? What about manure? Are they going to be able to shut down my farm because it smells bad and it’s, quote, and it affects, quote, ‘air quality’?” So farm odors were exempted from the bill [laughs] and we had to do that in order to get the bill passed.

² Fred Norton was a member of the House Judiciary Committee in 1971, but the chair was Howard Albertson. Norton may have chaired the meeting at which Dayton testified.

SH: Were there other aspects of farming that were exempted? I read somewhere that farmers, period, were exempted?

CD: It may be. You just have to read the statute. In fact, I should probably get it in front of me.

SH: Well, I have this [unfolds paper] but I don’t think this must be the whole thing because—

CD: Oh, no, no, no, no, no, no.

SH: It’s awfully short. [Laughs] There’s more to it than that?

CD: There’s a *lot* more to it. Let me—

SH: Chuck is going to go get his copy.

0:23:05

CD: There is an exemption for family farms. There is also an exception for odor. It does not limit it to farm odor; it just says that the definition “doesn’t include conduct which is the introduction of odor into the air.” The business about family farm corporations was

added later. Okay, so I was going to explain that the definition of “pollution, impairment, or destruction,” which are the terms of art that trigger the Environmental Rights Act, has two parts. The first part is “the violation of any environmental quality standard or rule, state rule.” If you violate the rule, because the industry guys argued, “If we’re in compliance with the rule, that ought to be a defense. We shouldn’t have to put up with an argument that we are having a material, you know, an effect on the environment if we’re in compliance with the rule.” So—and this is really unique—the, we said, “Okay, if you are in compliance with the rule, there’s no, you’re not subject to suit under ‘pollution, impairment or destruction’.” But we added a section—Section 10—which says we could bring an action if we want to challenge the rule. And what our burden of proof would be in such a case is that the rule is inadequate. I mean, suppose there is a rule that, well, take the wild rice rule, for example, that allows a certain level of sulfur in the water and it is, and the scientists determine that the level in the rule is too high and that level will have an impact on the wild rice. So we bring an action, and this rule has not been used in forty years, I don’t think ever, effectively. You could research that, but I just thought it was a wonderful rule. Anyway, that was the trade-off for saying that compliance with the statute is a defense.

SH: But in that case, would you bring a suit against the polluter or against the state for having an inadequate rule?

CD: Well, the action would be against the agency. It’s an action in district court for relief against the state or any agency of the state where you’re challenging the rule, because it’s the agency that puts out the rule.

SH: Hmm. Well, why do you think that has never been used?

CD: I don’t think it has been used. I’m not sure. Well, I’d like to say the agencies are doing a good job, but—

[Laughter]

CD: I’ve always wanted to see a suit under that statute, and I don’t know if MCEA [Minnesota Center for Environmental Advocacy] has ever brought one. All right, so that’s one part of the definition, is “a violation of an environmental quality rule, standard or permit”. The other half of the definition is much fuzzier. And, “pollution, impairment, or destruction” is defined as “conduct which is likely to materially adversely affect the environment.” “Materially adversely affect,” so it’s like the standard of reasonableness in many cases of tort law for example. It’s a fuzzy standard subject to judicial interpretation. And you’d have to research the case law to see how it’s come up, but it can be pretty broad. Incidentally, the family farm—I’m just noticing in the statute—

the definition of person exempts farms and farmers—period—from the Rights Act.

SH: That's a pretty big exemption.

0:29:10

CD: It's huge.

SH: But you had to, that was the trade-off you had to make in order to get it passed.

CD: I think that was added later, like in 1985. I don't think it was part of the original bill. The odor exemption was part of the original bill. I'm, you know, I'm guessing here, though.

SH: I should have done more research before we recorded, but this is interesting anyway. Do you remember other trade-offs or compromises, other arguments that opponents brought forward that you had to deal with?

CD: Well, only that it was going to cost corporations lots of money to have to deal, and the major argument was that "this opens the flood gates of litigation. We're going to have all kinds of law suits on anything under the sun." Well, it didn't happen. But the existence of organizations like the Sierra Club, with volunteer lawyers, or MPIRG with its own staff of lawyers, or Minnesota Center for Environmental Advocacy [MCEA], now, with its staff of lawyers, it can bring suits under these statutes, are one of the things that makes them effective. Without that kind of resource, of public interest advocates, it's difficult for a citizen to bring that kind of case. Because generally, the citizen is bringing a case that has no financial, that has no financial benefit to them, they're just trying to preserve the environment.

SH: Do you remember the passage of the bill in the legislature and when it was signed? Was there a big hoopla about that?

CD: I don't remember that.

SH: There must not have been a hoopla?

CD: Must not have been a big hoopla. I don't know.

SH: Okay. Well, let's talk about how MERA then, has been used. You told me that Bryson was an important case. Tell me about that case.

CD: Right, well, it was a classic case where Freeborn County wanted to build a road and they wanted to go straight across a wetland, and Bill Bryson, who was a farmer, but also an Audubon [Society] member and an environmentalist, didn't want it to go across his wetland; he liked his wetland. And so, he brought an action with volunteer counsel, I think, and you'd have to look up the name of the lawyer that brought it; he's probably still around. I can't bring it to mind. But claiming that putting the, that the wetland was a natural resource, protected under the act and that there was a feasible and prudent alternative, putting the road around the wetland. I don't know why the county resisted except perhaps that it takes land out of production and therefore out of the tax base. But anyway, the case went all the way to the Minnesota Supreme Court. And there was a wonderful opinion, written by a judge from Duluth [Lawrence Yetka], who cited Sand County Almanac. I mean, read the opinion; it's a really good opinion. And saying, "This is serious stuff and this is what the law says and we're going to rule for Bryson." So, it was a good case and a good precedent setting case; first case under the act.

0:33:50

SH: So when that happened were you aware, or were other people aware that this was an important change in what might happen in Minnesota?

CD: Well, we were certainly aware of the case and the result and we were happy with the result. In fact, I think I went to hear the argument at the Minnesota Supreme Court. What was the name of that judge? Larry?

SH: Well, we'll think of it later.

CD: Yes, but you should definitely read the opinion.

SH: The way the law works then is that that case is a precedent for future cases, right?

CD: Right. And I don't think the case, I mean, I think the case interpreted the statute correctly and didn't detract from the statutory language. And so Blackhawk Lake was another one.

SH: Did Bryson come first or Blackhawk?

CD: Bryson was first.

SH: Okay.

CD: Yes. But Blackhawk Lake was another classic case of the highway department

seeking to put a road across a lake where there was an alternative of going around the lake. And the only detriment to the highway department was that it wasn't a straight line. And they like to have things in a straight line, I guess.

[Both laugh]

SH: Well, I was going to ask, once there's a precedent then it seems like a highway department or anybody would know that they couldn't do that. But the suit has to come; they have to be challenged, right?

CD: Well, each case is unique on its facts. I don't know why they thought they could get away with it except that litigation is expensive. I mean, this required the people who lived on Blackhawk Lake to organize and raise funds. By this time I was in private practice and, you know, I was charging an hourly fee, and so they raised the money among themselves to pay my fee.

SH: And, [interruption] Hi! Okay, we're going to put this on pause for a second.

[Brief pause]

SH: Turning the tape back on. What critiques do you have about MERA at this point, after forty-five years of existence? How has it worked out?

CD: Well, I think it's very useful in significant cases as a standard of conduct. It also, of course, the standard, the substantive standard of MERA was picked up in MEPA [Minnesota Environmental Protection Act] and repeated, that's quite unique, as well. I think it is instructive to corporations and agencies when they are making a plan to realize that they'd better do it right or they might get sued, if it's going to have an adverse environmental impact and there's a feasible and prudent alternative. There's also language in that section that says economic considerations alone are not sufficient to make something unfeasible. So, and that is a unique piece of language that is not in the Michigan bill, you won't find it anywhere else, I don't think. And I think it was Grant Merritt that came up with that sentence. And, it's just amazing that we got it passed! I mean, literally, it says, "We don't care how much it costs. If it's going to screw up the environment, you've got to take the alternative!" Now getting courts to actually apply that, there's a filter. And it doesn't always come out the way you would think given the strong language of the statute. But I'm glad it's there. I think it's done some good. And I think it has this precatory effect, this advisory effect of keeping the, of making corporations and agencies think something, think harder in advance about what kind of challenge they are going to get for a project.

0:39:05

SH: Precatory? That sounds like a legal term.

CD: Well, yes it is.

SH: How do you spell it?

CD: Strike it!

[Both laugh]

CD: Just like it sounds.

SH: Okay. So, does that mean that you've been disappointed in how the courts have—?

CD: Well, when I was thirty years old, I thought by the time I was seventy-five all the problems would be solved and we'd pass these wonderful laws and everything would be taken care of. Now we've got bigger problems than we ever imagined, with climate change and mining up here. So it's not the silver bullet, but I think it's very helpful in and especially in large cases where you're going to go to court and it gives the judge a hook to make a decision on the right side.

SH: It gives a judge a thing to hang his decision on.

CD: A basis, right, right.

SH: So, I've got a question here, should it be changed, or if so, how? But I bet you're going to say, "We'd never be able to improve it in this political climate."

CD: I've always been afraid that a conservative legislature would go after it. But it seems like it's almost a sacred cow. Maybe it hasn't done that much damage to them. But there hasn't been the flood of litigation that was envisioned by the opponents of the bill when it was being debated.

SH: Okay, shall we change gears and talk about MEPA?

CD: Sure.

SH: Okay. So you mentioned that MERA was modeled on the Michigan law.

CD: Right.

SH: Was MEPA modeled on an existing law?

CD: Sure. In 1970, the first act of President Nixon was to sign the National Environmental Policy Act, NEPA. NEPA applies only to federal actions. It has to be of some action of a federal agency, the federal government; so federal highways are big ones.

SH: Corps of Engineers?

CD: Corps of Engineers, right. Bureau of Land Management [BLM], Bureau of Reclamation. And there's, NEPA has no substantive standard; it says you can do an Environmental Impact Statement [EIS]. The Environmental Impact Statement has to accurately predict what the environmental impacts will be, but if they are predicted to be horrible, there's no law that says you can't go ahead with the project! Not so in our bill—we'll come back to that. But NEPA was the model. So that was the model.

SH: Okay. Maybe you could talk a little more about "substantive standard," because I think that's also a legal term.

0:42:40

CD: Ah, "substantive standard" means that, it is a way for a court to evaluate a project that is not allowed to go forward because of its environmental effect. NEPA does not have that. MEPA does, MEPA has a standard that's modeled on MERA and modeled on the Federal-Aid Highway Act, which says if the project is going to be environmentally damaging and there's a feasible and prudent alternative, then you have to choose the feasible and prudent alternative. That's a substantive standard not present in federal law except for that Highway Act. And not present in most states. So that was a huge, I think, benefit of MEPA. I'm not sure where it came from, Stephanie, I think, I don't think I proposed it or the environmental side, I think that Peter Watson, who was the senate counsel for the Senate Agricultural and Natural Resources Committee was the guy who put that into the bill. Because one version of the bill just suddenly showed up with this substantive standard and it was just wonderful! And as I said, it was a different time. [Laughs] You know? And it wasn't particularly challenged. I don't know if it wasn't well understood, but it was like, "Wow! This is really good!" The federal bill created, the federal bill created a Council on Environmental Quality. The original state bill also had such a, it had an environmental committee that was to review Environmental Impact Statements and to review state projects. The state agency heads went crazy about that. They were all Democrats. Grant Merritt was one of them at that point; he was the head

of the Pollution Control Agency. And the Commissioner of Natural Resources was Robert Herbst. Jerry—I want to say Snyder but that’s not right—was the head of the State Planning Department. [Gerald (Jerry) Christiansen] And there was a very wise man, the head of the Transportation Department at that time. [Ray Lappegaard headed MDOT 1971-74.] But they were all saying, “We aren’t going to have somebody looking over our shoulder and challenging every decision that we have.” And so one of the big compromises in MEPA, changing it from NEPA, was to agree that the Minnesota Environmental Quality Board [EQB] would be made up of the heads of all the environmental agencies, as well as three citizen members, appointed by the governor. I actually was one of those citizen members on the first board.

[Noise interruption]

CD: Turn it off for a second?

SH: I’ll put it on pause for a second.

[Audio back on]

SH: Back on. Well, I want to take one step back and ask you, after you got MERA passed, did you know right away that something else would be needed and that was MEPA? Or did it become obvious somehow? Or how did you decide?

0:47:30

CD: There were a lot of things that happened between the 1971 and 1973 sessions. Maybe after the, I don’t know whether MEPA passed in ’71 or ’72, probably ’72.

SH: I think it was ’73. No?

CD: MEPA?

SH: Yes.

CD: Or MERA?

SH: No, MEPA.

CD: Yes, MEPA was ’73, but MERA was ’71?

SH: Yes, ’71.

CD: Yes. Well, before the session of 1973 a number of things happened. There were basically three separate review efforts looking at environmental issues and legislative solutions to environmental problems. Because the makeup of the legislature had changed and the new chairman of the natural resources committees were going to be Democrats and not Republicans, and so there was finally going to be a chance to get something passed. So as a background, as a background to lay the foundation for environmental legislation in the '73 session, the Minnesota Water Resources—I don't know if it was a board or council—and a man named William Walton, had a series of meetings of stakeholders, and at each one of these meetings, Bill Walton would bring in an expert to talk about the problem. And then the committee would meet and discuss, and then he would write a report about that session. And then there was a final, very intense session, where the final report of the committee was put together and made public. I know the governor's office was very interested in what that was going to say. And I think the governor's office relied heavily on that.

SH: And this was Wendy Anderson?

CD: Yes. And Peter Gove was his environmental assistant. I think they relied, and Ron Way was also working for, I don't know if he was with the governor's office or the PCA [Pollution Control Agency] at that time, but he was also deeply involved in it. He later became a reporter; you probably know him.

SH: Yes.

CD: And that report, I believe, became one of the bases for Wendy Anderson's environmental State of the State address. He gave several State of the Environment addresses that were directly aimed at the environment and he proposed twenty-six pieces of legislation and nineteen of them were passed. Peter has just written a piece about Wendy's environmental record.

SH: I'll have to get that.

CD: Well, he knew he was about ready to die. He wrote it, he sent it to *MinnPost*, they didn't publish it, but I have it; I'll forward it to you.

SH: Okay, good.

CD: Remind me to do that. So there was this, the Walton Water Resources Center, I think it was called, Water Resources Center report. Robert Dunn, who was probably in the '72 session, the chair of the Natural Resources Committee, held a series of interim

hearings about environmental issues and was considering some kind of an environmental review statute based on NEPA. And then there was another committee that was appointed by the governor to help him formulate his environmental program. And the chair of that was Dean Abrahamson. And I remember the committee meeting, it was a fairly large committee, it was staffed by legislative staff, and it came up with a report. So the governor proposed MEPA and the first bill was, had this environ- opponents referred to it as an "environmental czar,"—I think it was like one person who was going to be the head of it, the environment and oversight, and ultimately that did not fly. But the language was, the language of the bill, this would be very interesting, Stephanie, because the first sections of MEPA are almost poetic, talking about the importance of preserving land, water, and the environment, air. Yes. It would be interesting to see where this came from, because I don't think it's in NEPA and in Subdivision 2 [of Section 2] all of these goals of the statute, I think those are, I think those are unique. And I suspect that they came from Bill Walton. But I'm not sure. Or maybe Peter Watson would know. But it's wonderful language. I mean, you go back and say, "How did we ever get that passed?"

[Laughter]

0:54:45

SH: How did we ever get that passed, but it was a Democratic legislature.

CD: It was a Democratic legislature.

SH: Now, there's a bit of a contradiction here, Chuck, I have to say, because a few minutes ago, I mean you told me you passed MERA under a Republican regime, and then you said, "Then the Democrats took over and we knew we could get something done."

CD: More.

SH: More.

[Laughter]

CD: Yes. More done. And I'm not, I wasn't close to legislative politics at that point in my life. I later became a lobbyist, by the time MEPA came around I was a lobbyist, I was a full time lobbyist for the Sierra Club, but in the time when MERA was there I was still in private practice.

SH: Well, was it difficult?

CD: All I'm saying is we couldn't pass this; we couldn't begin to pass this now, under current conditions.

SH: Okay. Well, do you remember any of the arguments about MEPA?

CD: Sure. Well, one argument is there's a permitting process and the agencies are charged with—

SH: Well, maybe we should step back and say, "What's the most important part of MEPA?" Is it the Environmental Impact Statement? Sorry to interrupt.

CD: No, that's okay. Well, it is the environmental review *process*. As it worked out in implementation, which is a long story, we were quite disappointed, as that article that John Herman and I authored in the *Bench and Bar* magazine, the implementation was such that there weren't very many Environmental Impact Statements done that weren't otherwise required by federal law. And the agencies, one of the impacts of having the agency heads comprising the Environmental Quality Board, was that it is the EQB that sets the thresholds for Environmental Impact Statements. So this was, as we said, "the fox guarding the chicken coop." The agency itself gets to decide when it wants to do an Environmental Impact Statement, rather than having an independent agency, or the legislature, setting a threshold for that. So they've set the thresholds very high. They had the discretion to do an Environmental Impact Statement when it wasn't actually required, but they would never do that.

0:58:00

CD: So, what we found was, over the years, there were very few Environmental Impact Statements done, you know, maybe three, four a year, and there were lots of projects. What happened was that there was also an animal that was created by the regulations, called an Environmental Assessment Worksheet [EAW]. And the consulting firms, and the corporations that were proposing projects, moved to doing, the Environmental Assessment Worksheets was originally intended to be just a checklist, to help decide whether or not an Environmental Impact Statement was needed, but it turned out to be a substitute for the Environmental Impact Statements. It became the substantive environmental review. Now, the difference between an Environmental Impact Statement and an Environmental Assessment Worksheet is that the worksheet is not required to study alternatives. We've had Environmental Assessment Worksheets that have cost a million dollars! I mean, the one for Potlatch, in Cloquet, for example, was huge! Encyclopedic! But it didn't talk about the alternatives. And it's not a subtle

difference; it's a big difference. But and the agencies let them get away with it. And so that became the norm, I think, in Minnesota, was to do, instead of doing Environmental Impact Statements, they would do Environmental Assessment Worksheets. I would have preferred that, and the environmental, that they did Environmental Impact Statements, but they didn't have to write an encyclopedia and have to study every bug and bunny. They had to talk about "what is the impact on the environment and what are the alternatives?" I think the consulting firms are partly at fault here. I think they convinced their clients that you've got to really do a good job of an extensive encyclopedic review of every possible tiny impact so that you don't get challenged in court for having an inadequate Environmental Impact Statement.

SH: Why are the alternatives important to look at and is that what companies were trying to avoid by just doing EAWs?

CD: Well, I believe that. And alternatives are important because they are the heart of the environmental review process. Alternatives provide an assessment of, "how can this project be done with, how can it be done, how can the goal of the project be accomplished without having the same adverse environmental impact?" If you don't look at the alternatives, it doesn't do you much good to look at just the impact without looking at how you could change it, how you could make it better. So that's always been distressing to me that that happened.

SH: Okay. Would you want to talk a little bit about some of the important cases that were brought under MEPA that provided some precedence? You mentioned Bryson and Iron Range and PEER? [NOTE: People for Environmental Enlightenment and Responsibility, Inc. v Minnesota Environmental Quality Council]

CD: Well, PEER was—

SH: No, not Bryson.

CD: We talked about Bryson.

SH: Yes, that was MERA, sorry. Okay.

CD: Yes, and PEER, I think was also MERA, but you understand, it was the same substantive standard that if you're going to have a material adverse effect on the environment, and there's a feasible and prudent alternative, you have to pick the feasible and prudent alternative. And that's true under both MERA and MEPA. PEER was a case involving a high voltage transmission line. We got involved, our firm, our law firm, Dayton and Herman Honest Lawyers, got involved after, I think, the case had been

argued in the district court. I guess we got involved at the appellate level and I think that the case had not been properly handled and was wrongly decided. And we got the court of appeals, I think, to rule—I'd have to go back and look at the opinion—to rule that the Environmental Impact Statement was inadequate because it didn't look at alternatives, alternative routes, particularly routes that had already been the site of transmission lines. And that was the case that set a precedent about using corridors that may be helpful in the current battles over pipelines. In fact, you know, you might want to talk to Kathryn Hoffman at MCEA about how these earlier MEPA cases have an impact on pipeline routing.

1:04:40

SH: My reading of that case—now I'm remembering what I've read—was that the appellate court said that the procedures weren't followed correctly because they discussed in a hearing, a public hearing, an alternative route, but they didn't talk about it in much detail in the actual final EIS, and therefore the EIS was inadequate because they didn't include that alternative, which was actually the alternative they finally chose. So that's a procedural case and then there's the substantive cases.

CD: Right.

SH: And I think that the NEPA doesn't have the substance, so all those cases are decided on procedural grounds or do I have that wrong?

CD: Well, you mean—

SH: That the agency didn't follow the right procedures?

CD: Many cases have been brought challenging the adequacy of Environmental Impact Statements. The problem with that kind of case is that, what you get is delay. You don't get a substantive decision; you just get a better Environmental Impact Statement.

CD: So that's why the substantive standard is important.

SH: I see.

CD: For example, MCEA did not challenge the adequacy of the Environmental Impact Statement on PolyMet. Well, they've been preparing that Environmental Impact Statement for ten years. And one would think they've gotten it right by now, because the EPA [Environmental Protection Agency], I mean, there's still things wrong with it, they don't look at long-term financial issues, but the likelihood of success in the

Minnesota Court of Appeals challenging the adequacy of Environmental Impact Statement is not great; at least it has not been. So there are other ways to get at the substance of it.

SH: So does that mean that the courts give a lot of deference to agencies? Would that be a problem with MEPA at this point, or don't you see it that way?

CD: It was always a problem. Agencies know more about the substance than the courts and so, unless you can make a really strong case that the EIS is inadequate, it's a tough case to win and the courts do defer to the expertise of the agencies. And if you win, you get a Supplemental Environmental Impact Statement. Now, sometimes a delay is helpful. Prices change, situations change, financial backing changes, but that's not a good reason to bring a lawsuit, usually.

1:08:00

SH: So, you've mentioned the fact that agencies that project developers use EAW more than they should and aren't doing enough EISs and that the agencies are letting them get away with that.

CD: Well, they have for many years and it's sort of become the pattern, yes.

SH: Any other problems with MEPA that you see now? If we had a legislature that were inclined to make any changes, do you think that changes should be made?

CD: Well, it prob—you know there have been, [laughs] this is also interesting, Stephanie, there have been at least three reviews, stakeholder reviews, stakeholder committees reviewing the environmental review process. There have been some amendments over the years to MEPA, but most of them have gone nowhere. And my friend Gregg, who was the, what's his name, was the director of EQB forever.

SH: Downing?

CD: Gregg Downing. He will tell you in agonizing detail about all of the efforts to review MEPA that have basically have gone no place. There have been amendments to MEPA that weakened it.

SH: To NEPA or MEPA?

CD: MEPA.

SH: MEPA, okay.

CD: Particularly, in the agricultural industry and particularly for turkey farms and cattle farms. Their argument, well, first of all, the farmers are very powerful in the legislature and secondly, their argument is the permitting process is so onerous now, for a turkey farm or a cattle operation, that doing an Environmental Impact Statement is superfluous and so they've raised the threshold. It used to be, I've forgotten how it's measured, animal units, there's something called "animal units," which is like, ten people equal one animal, something like that. But they raised it from, like, three hundred to thirty thousand; it's a huge difference.

SH: To require an EIS?

CD: Yes. That's the main one that I'm aware of. But people who've been around the legislature more than I have, in the last ten years or so, would help you out with that.

SH: Okay. All right. Well, we've been talking for quite a while and I've gotten a lot of information from you and so, I'll ask you if there's anything specific that you wanted to touch on that we haven't touched on and then if nothing comes to mind at the moment on that, but I'll give you time to think about it, I want to ask you how you feel about your work on these issues.

CD: Oh, well, let me think about the first part of that question. You know, there are cases where I think the substantive standard failed for the wrong reasons. For example, the Reserve Mining tailings basin case, where the agency made the right decision that the tailings basin, instead of being located in Silver Bay [Minnesota], should be located further from the plant and further from the town. I believe that the Supreme Court was afraid that affirming the agency decision would put a lot of people out of work because that's what the company told them. The company actually sent them a telegram, to the Supreme Court, extra-judicial contact, the day before the case was argued before the Supreme Court, and I argued the case with Byron Starns.

1:13:10

CD: And [they] said, "We will close the plant if we lose this case." So they heard the case. By the way, the name of the judge was Larry Yetka, Y-e-t-k-a, who wrote the Bryson opinion. And this [the Reserve case] was a case that I had devoted better part of a year of my life to and there clearly was an environmental pollution, impairment, or destruction, a material adverse effect. They were going to put a tailings basin in a beautiful valley, and secondly, they've got the potential health impact of fibers—airborne—into the city that can cause mesothelioma to the residents of the city, and they

can put it way back in the woods where it won't do either of those things, and I think the decision was disingenuous. It just said, "Well, there are people that live back in the woods, too, who will be affected." And I thought, Judge Otis wrote the opinion and I always liked him, but I just feel it was a terrible decision and failed to follow the plain language of the statute! I was so depressed after that case came down I almost went to work for the federal government because I wanted to do something where I could be in a position of power rather than just being an advocate! [Laughs] I mean, really, it was just, it was a terrible moment.

SH: That was the Milepost Seven—

CD: The Milepost Seven portion of the Reserve Mining case.

SH: Now, you mentioned Larry Yetka just now, but was he the Bryson judge?

CD: He was the Bryson judge.

SH: Okay.

CD: I think he was still on the court when Reserve Mining was argued, as well.

SH: So he made a good decision in one case and not so good in the other, do you think?

CD: Yes, I don't think there were any dissents in the Reserve case.

SH: And Judge Otis is, how do you spell that?

CD: O-t-i-s.

SH: Okay.

CD: James Otis. His son is a very good friend of mine, Todd, who has been a state senator and an activist on climate issues, a good guy. Anyway, so overall, how do I feel about working on the statutes? Um, great, I mean, when I was trying to decide what to do with the rest of my life, I was hopeful that I could do something that would have an impact. And these laws, while they're not perfect, are pretty good and somewhat unique. I think there are a number of "Little NEPAs" as they're called, there's probably only about a dozen or so in the states. And I don't know, other than Michigan, Minnesota, I don't know what other states might have an Environmental Rights Act like ours. So the tools are there. MEPA has, it's also provided a focus for citizens to bring their concerns to the state agencies. There's a provision for filing a petition that forces,

pretty much forces an Environmental Impact Assessment. And that's been used by a number of citizens' groups. It's a way to do something that gets press and raises awareness about the issue. It doesn't necessarily solve the problem, but that's been used a number of times, so I think the laws are helpful. And for me, it was very satisfying to be involved in cause-oriented lawyering. That's what I wanted to do.

[Wind interference]

CD: When I left my corporate law firm and joined MPIRG and then we started our small, boutique firm to do environmental work and then gender discrimination law came along. Lawyers joined us, Kathleen Graham and Carolyn Chalmers, and so for a number of years we were a firm that did environmental and gender discrimination work. And that was fun, it was like Camelot, you know, and then we merged with a big firm and my last fifteen years were in a large corporate firm, which wasn't as much fun, but it, you know, it helped to build the retirement fund.

[Both laugh]

1:19:00

SH: And you have served on the board of MCEA, right?

CD: I have.

SH: Do you find that kind of work—?

CD: When I retired—my wife, Kathy, died when I was sixty years old and I had cut back on my work. She had a long-term, slow growing cancer and I had cut back on my work, and after she died, I had a reduced work schedule and I don't know, practice wasn't much fun anymore and so I decided I was going to go back to being a public interest lawyer as a volunteer. So I spent about five years volunteering for MCEA as a lawyer on the staff and would help advise them and I think I was much more active there than I was as a board member.

SH: Oh, I see.

CD: I was a board member for about nine years. There's a paddle over there [laughs] that has my name on it. Uh, anyway, that's the answer.

SH: Okay, great. Let me just get the spellings of the two women lawyers that did the gender discrimination.

CD: Kathleen Graham?

SH: Yes.

CD: G-r-a-h-a-m.

SH: And the Kathleen part?

CD: Kathleen?

SH: With a "K" or a "C"?

CD: "K," sorry.

SH: "K." Okay.

CD: And Carolyn, with a "C." C-a-r-o-l-y-n.

SH: Yes.

CD: Chalmers. C-h-a-l-m-e-r-s.

SH: Okay.

CD: Yes, they were people who were bringing lawsuits on behalf of class actions on behalf of women in particular companies.

SH: Well, on behalf of this wonderful Minnesota Foundational Environmental Laws Oral History project, let me thank you for your time, Chuck Dayton.

CD: You're very welcome; it was fun.

1:21:10

[End of interview]