

**Minnesota Foundational Environmental Laws
Oral History Project**

**Narrator:
John Herman (JH)**

**Interviewer:
Stephanie Hemphill (SH)**

**Recorded:
November 9, 2016**

Stephanie Hemphill (SH): The following interview was recorded with John Herman 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 November 9, 2016, at Mr. Herman's home in Scandia, Minnesota. The interviewer is Stephanie Hemphill.

SH: John, thanks so much for your time today.

John Herman (JH): Happy to do it.

SH: I know you're a busy man. Where were you born and where did you grow up?

JH: I was born in Akron, Ohio, and I spent my whole early life there.

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

JH: Then I went to Yale College and Harvard Law School. I got a BA at Yale in economics and, of course, a law degree at Harvard.

SH: What year would that have been?

JH: I graduated from law school in 1970 and from college in '67.

SH: Give me a brief outline of your career.

JH: Well, I'd never been anywhere outside of Akron, or not very many places, so after law school I applied for quite a few jobs around the world and finally got a teaching job in a small American school in Switzerland. So, I went there and taught school for a year. Of course, we were in the midst of the Vietnam War and the antiwar protests. When I came back, one of my friends from back then was working for Ralph Nader. This was before Nader ran for president and it was kind of a period of, certainly, legal activism

and social activism. And so, I came back and was looking for law jobs. [I was] thinking about maybe going out to Denver, Colorado, or someplace else in the West. And this person recommended that we interview for a couple of jobs in the public interest, one here for the Minnesota Public Interest Research Group [MPIRG] and one in Oregon for a similar group there. So, I came to Minnesota in September of 1971 and interviewed for this job at MPIRG as a lawyer. MPIRG was a much more robust organization then; it had four lawyers, and three or four scientists, and several office staff people.

SH: Just in Minneapolis?

JH: Yes. Because the one-dollar fee went a lot further in those days and we were working for much lower wages. So, then I went on to Denver and got a couple of job offers there, but I liked Minneapolis and I particularly liked Chuck Dayton, who was the legal advisor at MPIRG. And because I wasn't quite sure what I wanted to do, I turned around and came back here and took the job as a staff lawyer at MPIRG. So, I did that for two years—1971 through the end of 1973. And then, at that point, Chuck and I started a law firm, Dayton and Herman, and [I] practiced law with him from then until we merged with Leonard, Street and Deinard in 1988, and I stayed at Leonard through '99, and then I went to Faegre & Benson. So, I made the transition from a two-person law firm to the largest law firm in the state. I stayed at Faegre until I retired last year.

SH: What type of law did you practice, later then, after MPIRG?

JH: Well, because we were, kind of, the “environmental lawyers” of the state at that time, we were the ones who had worked on practically every law, and we knew the laws, we knew all the administrators. I would say that in the early period my law practice was to a major extent environmental law, but I also had done a lot of lobbying at the Capitol. In passing, we're going to talk about MEPA [Minnesota Environmental Policy Act], but passing a lot of other laws, as well. And, because of that, I was quite well known as a young Democratic lobbyist, so I actually attracted, beginning in 1974, quite a bit of commercial lobbying business.

0:05:30.8

JH: My first really big commercial client was Norwest Bank Corporation, which wanted to have branch banking. And so, I had a fairly extensive lobbying practice and also just the beginnings of a real estate practice working for developers who had environmental problems or some of the earliest non-profit development organizations that were doing, particularly, low-income housing. So, that would have been the '70s.

SH: Uh-hmm.

JH: Then, as we moved into the '80s, I started to be more of a, more often a real estate development lawyer, doing projects that involved major governmental redevelopment programs. I did a lot of work for the Riverplace project, for a project in Minneapolis called Laurel Village—it's about a thousand housing units—and many, many others.

SH: So, when you came to Minnesota in 1971, you were working for MPIRG and the MERA, the Minnesota Environmental Rights Act, had already been passed?

JH: Um-hmm.

SH: Have you got experience using it? Or have you observed how it's been used over the years?

JH: Well, it's interesting, because back at that time, of course, it was a fairly new law, and the first significant cases were happening. The Bryson case, involving the idea of a feasible and prudent alternative to route the road around a wetland area was decided—probably in '70 or '71. We at MPIRG were using MERA in cases that we were bringing, and then later in private practice, it was always a claim in the cases we were bringing under the National Environmental Policy Act [NEPA] or the Minnesota one, the Minnesota Environmental Policy Act, that we'll talk about. I would say it was in an expansive and robust time, at that point, and courts were more interested in being environmentally, ah, I was going to use the word "aggressive", environmentally interested during the cases. And the law, I would say, was having a material impact on people's thinking about exposure, if they didn't look at environmental alternatives or try to mitigate impacts. I think that it's been used much less recently; although, definitely it's a claim in many cases. For example, it was one of the claims in the recent case about the Peavey Plaza. So, I think that the law is still effective, but it's just not being used as much, and I think courts have become more willing to defer to agencies or to the governmental unit, or even the private party that's undertaking the project, in terms of whether there really are alternatives. So, it's probably a little more of a, a little less effective an instrument right now than it was then. But, I think that it turns on a more case-by-case kind of an analysis.

0:10:00.3

SH: Um-hmm. You said that it had an affect on companies or proposers of projects—that they would feel that they'd be exposed to litigation if they didn't make sure they did some mitigation.

JH: Um-hmm.

SH: Do you have any examples of that, or is that just a general impression?

JH: Well, I think that it was certainly a frequent claim in power line siting cases, in, you know, we got a really good result raising the issue, although we had some other Clean Air Act claims that were also effective in defeating a large coal terminal in St. Paul. It was a major aspect of the Reserve Mining case, in terms of looking at the alternatives for the on-land disposal site. I think that it introduced into the requirement for thinking hard about a decision with significant environmental impacts, the issue of feasible and prudent alternatives, and doing an alternative analysis. Even though it seems extraordinary in its breadth, I think it takes a lot of economic, it takes a lot of legal talent and a lot of expert testimony, assistance, to make effective use of it. So, it's an economically expensive tool if you want to mount a really good MERA claim. And so, the number of people who are fighting a project who are able to do that, is kind of self-limiting, because, you know, a lot of times people don't have that many resources, and so, it takes an unusual case for someone to bring the claim.

SH: Do they have other venues, other laws, to use instead of MERA then?

JH: Well, yes, it might be a good segue, actually, to say that the concept of MERA is then embodied in both the Environmental Policy Act, MEPA, and also in quite a few other things that have happened since then, or happened around the same time. For example, power plant siting is a kind of an alternative-driven process and that passed in that timeframe. We also have some more generalized things that went on in the '70s and early '80s, like the state doing their copper-nickel environmental review, where they were really looking at alternative issues and feasibility and so on for handling of a lot of environmentally problematic things, like solid waste or hazardous waste, the idea of looking for alternative ways to deal with it. And ultimately, for example, for solid waste, settling on, of course a lot of recycling, but more importantly for what you can't recycle, the burning and energy generation that became Minnesota's preferred approach, really kind of grew out of that idea that you should look for alternatives. And in a lot of cases of road construction or pipeline construction, it's now commonplace to actually do a multi-route analysis before you make your choices. It doesn't always mean that, maybe everyone arrives at consensus on what's the least environmentally harmful option, but at least we've embodied in everything, pretty much, that we do now, much more of an alternative analysis than previously when you would say, "We've got to get from 'A' to 'B'—what's the straightest line?"

SH: Well, that is a good segue then, to MEPA, the Minnesota Environmental Policy Act. So, how were you involved in that?

JH: So, in MEPA—I was here then—the legislature had been Republican since statehood, pretty much continuously. So, all of these environmental ideas started in the late '60s, I want to say MERA passed in '69, is that right? Or maybe—

SH: MERA was, the Rights Act was '71.

0:15:23.1

JH: Yes, so it was just before I got here; but in that '70, '71 session, the Republicans were actively considering the idea of an environmental policy act. A guy who was in the House, named Bob Dunn, from Princeton, held a whole series of hearings in the summer of '71, and had introduced the legislation in the House. So, when I arrived here in late '71, you know, we had a lot of projects at MPIRG and, of course, I didn't know a soul, but we were anticipating we'd be active in the legislative session in '73. So, the significant thing that happened in the '72 election was that both the House and the Senate in Minnesota went Democratic for the first time ever. And as a result, it was a wholly different place in which to advocate for environmental laws and all manner of other kinds of change in terms of legislation.

SH: Could I interrupt briefly?

JH: Sure.

SH: This seems a little contradictory, because you said Bob Dunn held those hearings—

JH: Right.

SH: And they passed MERA and they passed—

JH: Well, they didn't pass it; he just introduced it. It hadn't passed.

SH: But in '71, the Rights Act, they passed.

JH: Right.

SH: And that was still a Republican legislature.

JH: Yes.

SH: And they passed something else in that same legislature, I forget whether it was the Power Plant Siting Act or—

JH: No, maybe, you know, I'm not sure. I think they also considered seriously the idea of a state Wild and Scenic Rivers Program.

SH: Maybe that was it.

JH: No, definitely the Republicans in that '71 class of legislators had many people who were very environmentally oriented.

SH: Okay.

JH: So, during that period of '72, before the session, the governor convened a number of committees to study different potential environmental legislation. One of them was on the Environmental Policy Act and Chuck Dayton served on that one as an MPIRG lawyer. Another was power plant siting, because Northern States Power [NSP] wanted to do a very major new power plant and was proposing to put it on the Minnesota River south of the Twin Cities.

SH: On the Minnesota River?

JH: Yes.

SH: Not the Mississippi?

JH: No, on the Minnesota.

SH: Okay.

JH: And asked the state to convene a group to recommend alternative sites and also to develop a permanent process for siting of power plants, and I served on that committee. And then there were several others dealing with land use issues and other, I think, looking for better ways to deal with places that were experiencing rapid potential development change.

SH: I'm sorry, did you say that NSP asked for these hearings and this planning?

JH: On the power plant siting.

SH: Okay. They asked for that?

JH: Yes. They were trying to, I think everybody was trying to adapt to the idea—because NEPA [National Environmental Policy Act] had already passed at the federal level—to adapt to the idea that we should be approaching these complex environmentally, potentially harmful things by looking at the impacts, understanding better what they were in advance, and then looking at feasible alternatives, and what would make sense, and how you would mitigate the impacts. So, we had these committees that were

working, then the Democrats won control of the legislature and suddenly the whole landscape was changed. It was very interesting. Although Bob Dunn, the most active legislator on this issue moved from the House to the State Senate and so he was a Republican member of the Senate.

0:20:20.0

SH: And still pretty well involved with environmental stuff.

JH: Yes, very much so. I mean, there was a very large cadre of active Republicans on environmental issues at that time: Bob Dunn, William Kirchner from Richfield, Harmon Ogdahl from southwest Minneapolis, and quite a number in— Another one, Rolf Nelson, I think Rolf might have been one of the authors of the Rights Act in the Senate side. And on the House side, too, there were quite a few Republican House members who were very, very strong environmental advocates.

SH: Jim Ulland?

JH: Jim Ulland would be a good example of that, absolutely. Several others from up north, and also quite a few from the suburbs of Minneapolis and St. Paul.

SH: Can I get you to spell some of these names? William Kirch—?

JH: Kirchner? Yes, K-i-r-c-h-n-e-r.

SH: Harmon Ogdahl?

JH: Yes. O-g-d-a-h-l.

SH: And Rolf Nelson, is that s-o-n or s-e-n?

JH: Uh, I think it was N-e-l-s-o-n.

SH: Okay. Okay, so how were you involved?

JH: Well, Chuck had been at MPIRG before me; we had all agreed that we would—all of us who took staff jobs there—we all agreed that we would work for two years minimum. And so, at the end of 1978 [he means 1973] Chuck's two years were up and he left and took a job lobbying for the Sierra Club on environmental issues for the '73 session. My two years wasn't going to be up until the end of '73, so I ended up becoming a very regular lobbyist at the Capitol on behalf of MPIRG. So, for MPIRG's lobbying on the Environmental Policy Act, I did all of it. And so, instead of what you might have

expected, that Chuck and I would sort of split up the bills and he'd do half and I'd do half, I ended up doing all the bills for MPIRG, and he did all the bills for, together with me—we worked together a lot—he did the bills for the Sierra Club. So we were both involved in passage of almost all the bills that passed in '73.

SH: Can you remember some of the other key ones? You mentioned Power Plant Siting Act.

JH: Well, I think the other things that were particularly significant that year were critical areas, and I would have to go back and look, Stephanie, but I think Wild and Scenic Rivers [Act] actually may have not passed until '73.

SH: I think so. And the EQB [Environmental Quality Board]?

JH: Yes, well, that's part of the story of the Environmental Policy Act, how it came to be that there were two bills there, one for the environmental policy and one for the Environmental Quality Board.

SH: Yes. I want to hear about that.

JH: Yes.

SH: So, you had a lot of work to do that year.

JH: Yes, and we had consumer protection laws, too. And we also were rewriting some of the statutes in terms of areas that were already in law, but needed revision. I spent a lot of time on energy, on mine land reclamation. We passed the first very comprehensive mine land reclamation bill. We passed a bill that provided for taxation of severed mineral rights, which was very important in terms of rationalizing minerals, and of course, resulted in a lot of severed rights forfeiting to the state, which is, I think, a good thing. We had quite a few changes in, and really the first, kind of, modern approach to public waters, where we give the state authority over public waters.

SH: And wetlands?

JH: And wetlands, yes.

SH: Hmm.

0:25:05.2

JH: So, it was incredibly productive.

SH: Wow.

JH: Yes, it was a pretty heady time.

SH: Yes.

JH: And we were also looking forward to further things in the next couple of years. It wasn't during the '73 session, but right afterwards, that I was hired to lobby on the bill to create the Met [Metropolitan] Council's open space program, which we lobbied for and passed, which I lobbied for and passed in '74. And so, there were a lot of things going on.

SH: Things that have made a big difference in people's lives.

JH: Yes, positive things, mostly.

SH: All the way down to today.

JH: Yes.

SH: So, you were lobbying on MEPA. One of my questions here is what models did you use in drafting that legislation?

JH: Well, the MEPA part of the law was largely drafted based on the National Environmental Policy Act, but we, of course, we were idealistic, and we thought that people were very rational and one of the things that we did was we tried to create a system that would be more managed by the Environmental Quality Board, rather than primarily by the agencies. We kind of envisioned the Environmental Quality Board as an agency that would have a major role in shaping how the other agencies implemented the program and would adopt rules about projects big enough that they should have an EIS [Environmental Impact Statement] for sure and those where we would do something less than that, but by using kind of a fairly simple check-sheet and environmental assessment, we would decide whether or not you needed an Environmental Impact Statement, and we would scope the Impact Statement to be focused on just the important things, not a lot of time spent on issues that weren't material, and that the EQB would act as an agency that you could appeal to regularly if somebody wasn't doing it right, and so, a lot of those ideas, I think, evolved in the period of this commission and also in the early drafting of the legislation before the session and in the early part of the session. As you know, normally the chief authors of bills are from the majority party, and so, in the initial conceptualization of MEPA, the EQB part of the bill, and the MEPA, the Environmental Policy Act, were just one piece of legislation. But, when we were

talking to the Senate, in a rarely-seen-today bipartisan demonstration of the Senate, the chief author there that we were approaching was Roger Moe, who was, as I recall, a younger but up-and-coming member of the Senate side, he suggested that Bob Dunn should have the honor of carrying this, kind of, most significant environmental bill because he had done all of the work on it in the interim and as a member of the House. So, Bob became the chief author of the Environmental Policy Act part of the bill, and a very active player in the Environmental Quality Board part of the bill.

SH: Hmm. And why were those two parts divided up?

JH: To give him a chance to carry half of it.

SH: Oh, so who carried the EQB half then?

JH: Uh, you know, you're right; yes, so the EQB half, I think, was carried by Roger Moe.

SH: Oh. So they could both get a little credit. [Laughs]

JH: Exactly. It was an honorific, conferred on Bob Dunn.

SH: But, he had to work at it; I mean, any sponsor has to.

JH: Oh, absolutely. He was totally dedicated. And, I mean, the legislature, of course, was partisan, but it was more bipartisan then. And, of course, the Senate side is always a little more bipartisan anyway, because of the longer terms and definitely, I mean, he was a very, very active participant in the process. As were many of these other Republicans who had been so involved in thinking about it in the period before the '73 session.

0:30:26.5

SH: Hmm. Like Kirchner and—

JH: Well, I remember them in general, as being very involved in environmental things. You know, I'd have to go back and look at who the exact authors were; it's been so long ago.

SH: I should know that, too. I looked at the Minnesota History Center at the minutes or the meeting notes and stuff like that so I've seen the names, but I don't have them right at my fingertips. What about, just briefly, other organizations that were involved? You mentioned Chuck already, working for the Sierra Club, were there other groups that were promoting this, or fighting it, or contributing one way or another?

JH: Well, at that time, what's now the statewide Chamber of Commerce was called the Minnesota Association of Industry and Commerce, M-A-C-I; people called it MACI. And MACI was very involved in representing business. Northern States Power had full-time lobbyists at the Capitol, all the time. And they were very involved, but primarily focused on the Power Plant Siting bill, which had a very parallel kind of a process—the idea of looking at alternatives, and comparing them, and picking the least environmentally harmful alternative. There were other environmental groups, but not very many. I think the biggest one was probably MECCA [Minnesota Environmental Control Citizens Association], which was a completely citizen-oriented group, but had a presence at the Capitol. The Izaak Walton League [Ikes] was also a pretty active lobbying organization at that time. It had a couple of people from 3M who were very frequently at the Capitol, on a volunteer basis.

SH: For the Ikes?

JH: For the Ikes, yes. But the only real full-time lobbyists who were there all the time and actually getting paid to lobby, I think, were Chuck Dayton and myself.

SH: Hmm.

JH: And we wrote a lot of laws and it was a heady time, because everybody wanted to be an author of some kind of an environmental bill.

SH: So they were clamoring at your door asking to sponsor these things?

[Both laugh]

JH: They were clamoring at the door, and I was writing a lot of laws at home on my dining room table at night.

SH: So, it really felt like a special time, a turning the corner, a “doing big things” kind of time?

JH: I would say so. I mean, it was really an interesting and unique time, because environmentalism had really started in Washington, [D.C.] in the late '60s and it spread to the states irregularly, some states faster than others, in the period from the late '60s through the early and middle '70s; and Minnesota caught fire in '73 with this change in the legislature. So, there were all sorts of environmental bills and environmental hearings and a huge amount of energy for the idea that we hadn't been paying enough attention to the environment and we needed a framework under which to consider how to do that.

SH: So, from that standpoint, if everybody recognized that this was kind of a big deal, I would have thought that there would be somebody—maybe it was MACI—saying, “Wait a minute, this is going too far. We don’t want to throw the baby out with the bathwater.” Or some other arguments like that.

JH: Well, I think MACI was the primary voice for industry and for not having too much of a regulatory burden. But, of course, keep in mind that the Environmental Policy Act is primarily an obligation of the governmental agencies to study the alternatives in making a decision. And I don’t, neither as we conceptualized it, nor, I think, as the people who were lobbying against it and authoring it, none of us conceptualized this as something that was going to stop everything. We were thinking about it as a law that would be pretty effective and streamlined and would make the decisions better. Some things might not happen, but we weren’t, as it later came to be thought of, as a law where if somebody said you have to do an EIS, you were talking about three to five years or many, many hundreds of thousands of dollars. I think we were thinking that this would be the kind of effort that would happen quickly and decisions would get made and it, I think, was transmuted over time for many reasons, into a more complex process.

0:35:50.7

JH: So, Ted Shields, the guy who lobbied for MACI, was very, very involved in all of this. And many of these laws ended up being kind of compromises, where we would say to Ted, “What are your problems? What don’t you like? How could we do this differently?” And in many cases, the laws were going to pass, because everybody wanted to pass environmental laws, but did we work with him and try to come up with compromises? Absolutely. And there was a particular focus on the part of MACI on the EQB part of the bill and the membership of the EQB.

SH: Okay, let’s talk about that in a minute. Somebody told me that MACI was very interested in a sort of one-stop-shop, streamlining review.

JH: Yes, and particularly true in more recent years, there’s been a lot of talk about that.

SH: So, was that something that he—

JH: I don’t think that came up until later.

SH: Okay.

JH: That arose later in the ‘70s, or maybe even in the ‘80s, because of the feeling that there were, you know, you could have many agencies running around, nobody being the

lead agency, and frankly, the laws to provide for that haven't turned out to work very well. And we don't, I mean, if you looked at the law, you'd say there's kind of a one-stop-shop option, but it's not frequently used and when it is used, it's not really a one-stop-shop, it doesn't seem like it.

SH: And would be the EQB?

JH: No, it's in the Department of Energy and Economic Development [DEED] now, that you can go to them and ask them to do a more coordinated permit issuance for a project that has permits from multiple agencies.

SH: Oh, I hadn't heard about that.

JH: Yes.

SH: So, what, aside from working with Ted Shields from MACI, to kind of ease his concerns, what other compromises were made?

JH: Well, the other big actor in this major legislative enactment, Stephanie, would be the governor's office [Governor Wendell "Wendy" Anderson]. Because, at that time, Peter Gove was the governor's environmental aide, Wendell deservedly has had a lot of credit, particularly surrounding his recent death, for being a great environmental governor, and Wendy was very interested in seeing these laws pass and Peter was a very effective governor's office lobbyist and had a huge amount of autonomy in the regulatory area in the governor's staff. He was an omnipresent player in the passage of these laws.

SH: And how about particular industries that may have been exempted. I think I understand that the farmers, the ag [agriculture] people were exempted.

JH: Well, in MERA there are some ag exceptions for, particularly for odor and for activities on your own farm. In MEPA, I don't think there's a particular ag exception, but again there's the idea that if activities were confined to your own property, they might not give rise to, potentially, this kind of review. But remember, MEPA is procedural. But, embodied in it, in Minnesota, we do have actual substantive standards. Really, the same substantive standard as the Environmental Rights Act—that you should not do activities that are environmentally harmful if there's a feasible and prudent alternative. Economics alone are not a basis for doing environmental damage if there's a feasible option.

SH: Well, I'd like to talk about that a bit, but let's talk about the EQB aspect for a minute.

JH: Yes.

0:40:29.3

SH: You were saying that there was an idea that the EQB should manage a lot of things that happened—

JH: Yes.

SH: —with the interest of making things happen rationally and not harming the environment. And I know there was some debate about who should be on the EQB.

JH: Right.

SH: So, tell me about that.

JH: Yes, well, the original, the Environmental Quality Council, at the federal level, is three independent appointees, and they've tended to be people of extraordinary environmental credential. You know, people who are academically or legally uniquely qualified people. But, it's an advisory council to the president, and in these early periods it was very influential on how the National Environmental Policy Act would be implemented, but the implementation was left to the agencies. Our idea was, why not, I mean, A) we're a state, we're not the federal government, our agency structure was smaller, we had a very robust state planning agency at that time, and so we were thinking that we could have the EQB as the traffic cop, also be somewhat like the CEQ [Council on Environmental Quality], the national council, and be three citizens. And this really scared the agencies, and the governor didn't like the idea, and so the huge argument that ensued was, "Should the EQB be citizens or should it be state agencies?" And, of course, MACI thought it should be the agency heads. We thought that was putting the fox in charge of the chicken coop. And so, this dispute went on for weeks at the beginning of the session and I remember meeting often with Peter Gove, Jerry Christiansen, who was the head of the state planning agency, particularly those two, and Bob Dunn, and Roger Moe, to talk about this. And we kind of moved through, we held a lot of the hearings, a lot of testimony about this. And meanwhile, behind the scenes, there were all of these meetings going on, and of course, Ted Shields was in those meetings, and Chuck Dayton, and we were debating, you know, "How should we structure this?" At the very end of the day, we crafted a compromise, which like all compromises, was not perfect, in that we put on to the EQB quite a few agency heads, and if memory serves me right, in the first incarnation, three citizens. And so, it was a little bit of an unwieldy organization, and it had a structure where there was both the special interests of the agencies and not making too much work for themselves, and also citizens who weren't really getting paid enough to be as mindful as maybe would be

desirable of the whole process, because, it was one of those state jobs, fifty dollars a day, or maybe then it was thirty-five, I can't remember. So, that's how it came to be as an agency. I remember Bob Dunn saying, "It's got to have a citizen presence so that we have people there who don't have a special interest from the agency perspective." And Jerry Christiansen saying, "The agencies have to be there, they are the ones who have to do the work, they should be the ones deciding how big an imposition it should be and when cases require an EIS." And so, that's how it ended up. I want to say we had four or five agencies with the state planning director as the chair and we had three citizens. Later, it's been changed from that to a chair appointed by the governor. There is no state planning agency anymore and there've been more agencies added to it over time, particularly economic development agencies. So, now it's an even more unwieldy board, but it is still a board where you can go and talk about broader state environmental policy issues.

0:45:50.2

JH: And it was in that format— There were less changes, frankly, in the Environmental Policy Act part; that really survived pretty much intact, as I recall, and very much like what came out of the work of Bob Dunn's committee during the interim. But the EQB part—very unique structure compared to other states and the federal law, and it was the focus of a lot of compromise and discussion.

SH: And, I think a long discussion also was a, I mean, weren't you hoping at some point that the EQB would conduct the environmental reviews rather than the state agencies?

JH: You know, I don't remember. [Laughs] Maybe, but if that was the case, that certainly didn't survive very long. You know, my idea, and of course, Chuck and I had two different portfolios at this time from the environmental side. My idea was that we could do a more rational process than the federal process, which mostly ended up in the courts, to have a decision on whether an EIS was needed, and whether there'd been, quote "strict procedural compliance" by the agency. I thought we could do it with, using the EQB to monitor, regulate, tell people when they had to do it, to tell them if what they were doing was inadequate. And, I think in that regard, that part of the concept, for me, has been an unfulfilled promise, because the EQB very quickly didn't have the staff to do a good job, and very quickly the agency members decided that this was absolutely not going to be a place where you got to appeal the agency decision and have the EQB overturning a decision, or deciding that the EIS by the Department of Transportation was inadequate. So, there were many hearings held at the EQB and many arguments about, you know, "You guys are supposed to look at the adequacy." Or, "You should order an impact statement in this case because the city of Bloomington didn't do one." Or whatever, and Jerry Christiansen as the chair and other members said, "Hey, I've got a job to do and, you know, we're not going to have ten days of

hearings on this at the EQB.” So, perhaps some, on my part a little naiveté, and the EQB did do a pretty good job of putting a set of comprehensive rules together, which has survived, with limited changes, to the present. And they’ve done a good job of providing guidance on adequacy and implementation of the law, but they’re not the traffic cop that a young lawyer [laughs] imagined they were going to be in 1973. They are much more standoffish from the process.

SH: They don’t really hold agencies’ feet to the fire.

JH: Right. Now, occasionally they have done EISs themselves. For example, the one I mentioned before that, copper-nickel EIS was done by the EQB and the, recently, they were told to do an EIS on a frac sand project in southeastern Minnesota but the project hasn’t been going forward, so they haven’t really proceeded with that.

0:50:01.5

SH: And they did the Generic Environmental Impact Statement, or maybe the DNR [Department of Natural Resources] did that, on forestry, in the ‘80s?

JH: Uh, you know, I can’t remember which of the two, but that’s another good example. I mean, one of the things we wrote into the law was the idea that you could do more generalized environmental review, a generic EIS, and more broadly anticipate problems and set policies. And [it] was always my hope that we would do that on regions where there was rapid development or on some of the bigger planning processes, but we’ve used the EIS more sparingly in those cases, unless it’s ordered separately by the legislature, like it was with copper-nickel or the generic for the forestry.

SH: So, would you say that the EQB has failed—your expectations anyway—by not being fully enough staffed or supported, or is it more of a structural thing, that it just doesn’t want to cause too many waves?

JH: I think it’s both. You know, if you don’t have a very big staff, there’s limits to what you can do, and a lot of procedural things that you’re responsible for, if you’ve got to organize the meetings, have the agenda, prepare all kinds of resolutions, and the like. The staff’s never been more than a handful of people. And the structural problem is that the agencies are very, very protective of not having the EQB telling them what to do, and not requiring the agencies to do—

[Cell phone ringing]

JH: Do you want to stop for a second?

SH: Okay.

[Resumed]

SH: Well, you talked a little bit ago about the substantive standard in MEPA, which the federal law doesn't have, and I think other states maybe don't have it?

JH: Right.

SH: What does that mean?

JH: Well, the Rights Act has this substantive standard that came out of Joe Sax and his ideas that there should be a citizen's suit capability and when you did that suit you would impose on the agency decision-maker that substantive standard. Or you would have the courts be able to review a decision against that standard.

SH: Which is that you shouldn't harm the environment unless you don't have a reasonable and prudent alternative?

JH: No, if there is a feasible and prudent alternative that's less harmful to the environment you should do that, and of course, one alternative is not to do the project. What we tried to do in MEPA, was take that standard, which was triggered by either intervention or judicial review, and make it a part of the organic law of every state agency, every city, every county, all the instrumentalities of the state, in making all their decisions. And we succeeded in writing it into the law. MEPA has a standard that it's the policy of the state to consider alternatives and to consider all manner of impacts that, really, prior to the '60s and '70s, never were thought about, or often weren't thought about. And then to use this standard of consideration of feasible and prudent alternatives, particularly where you have larger scale projects that have unresolved trade-offs amongst mitigation, and impacts, and options. But I think most agencies don't think about this as one of their primary mission constraints or mission guidelines all the time—the DNR, I think, sometimes, the PCA [Pollution Control Agency], perhaps a little bit more. And those two, of course, have been the most frequent users of the EIS process, to get at those alternatives. But it definitely is a substantive standard that is unique and there are certainly a few cases where the courts have said, "Yes, you have this obligation." And certainly, in my own thinking about cases, I would always think about whether we had a MEPA as well as a MERA claim, and could make both. In the '70s, in decisions, I think judges were looking at this as kind of a seamless integration of the two standards, but there's a little bit less so of that kind of thinking in court decisions now. As I said, I think there's a little more deference and I think there's also a feeling that agencies actually are doing a lot of this and, you know, second guessing the agencies after they've done environmental review is, you should be looking at whether

they have a rational basis or a substantive basis for the decision.

0:56:05.1

SH: Hmm.

JH: Times change and it's a little harder to win these cases today, both because the projects tend to have, excuse me, tend to have mitigation and also because courts are more cautious and conservative.

SH: So, it's a combination of things.

JH: It's a—

SH: And the agencies are kind of doing their job so the courts are deferring to the agencies more, just because of cultural or attitudinal—

JH: Yes, I think so, I think, you know, there's a sense that there's too much regulation, that it's impeding progress, that we've made huge environmental progress in many respects, particularly air and water quality, in a lot of cases, and you know, the alternatives that we've adopted in land use, and land use planning, and with protection of sensitive places, particularly in Minnesota, have been pretty successful. You know, I think you see more sensitivity in development today than you did in the '50s or the '60s when you would just bulldoze huge areas, so it's been inculcated in the culture, I guess, a bit. I would still say there's an unfulfilled promise, because when you get into alternative analysis, whoever wants to do the project, whether it's the agency or a private developer, they want their alternative, and they seldom are really looking for alternatives that are much different. But it's still there and a lot of people know it's there and so they, it's been taken into consideration in the proposal a bit already.

SH: Well, I wanted to ask you about your own career in that regard, because you went from writing these laws to then working with developers who have to obey the laws, I guess.

JH: Yes.

SH: So, what's that been like?

JH: Well, for a long time Chuck and I didn't work for any party that was seeking permits and then in the late, in the mid-'70s, as I said, I started working a little bit with community development organizations and working with developers who were having some environmental issues, typically having to do with contamination, where doing the

redevelopment, building on top of a contaminated site, raised a lot of interesting questions, about liability, and should we do it, and can we do it? And then we also got some chances to work on larger scale redevelopment projects growing out of some of that earlier work and as we went from the late '70s to the early '80s I found myself personally more and more interested in that. In one of my bigger cases in my early career was the challenge to the environmental review of the New-Town-In-Town [NTIT] at Cedar-Riverside. And after I won that case I got hired by the city to represent it on Loring Park and on City Center—keep them out of trouble, help them through the process. And both of those projects evolved a lot, to have environmentally interesting responses to problems; for example, in the City Center it was moving the Forum cafeteria down the street and preserving that interior because it was a unique historical site. In Loring Park, it was doing the Loring Park Greenway, having a mix of heights of the buildings and changing the plan to do the townhouse project in the western side of the Greenway. And so, I was very involved in urban development and I found that I enjoyed that because rather than always trying to stop a project or modify it on behalf of a neighbor—often the classic “not in my backyard”—it was a chance to be in on the ground floor and propose things that were much more positive, often in terms of mixed income housing, or redevelopment, and then gradually it evolved into the new urbanism, and in my own practice, as you can see from my resume, I've done a lot of big projects [laughs].

1:01:27.9

JH: It was very enjoyable for me, later, to do many of the big cultural projects. So, I think this kind of paralleled my moving from being at the firm where we had started and where we had a very strong public interest orientation in our practice, we added a woman lawyer who did employment law, Kathleen Graham, in '74 and, but by the early '80s we were trying to be more like a regular law firm. We had employees, we had ten lawyers, then we merged with some business guys and we had thirteen, and then fifteen, and at the end we were up to almost twenty lawyers, and so, we had like, you know, thirty-five total people, a lot of employees. We were trying to be more like a regular business enterprise.

SH: And were you still calling yourselves “honest lawyers”?

[Both laugh]

JH: Well—

[Both laugh]

SH: That was cute!

JH: We were still doing a lot of public interest cases. All of us were trying to do that. And our extensive lobbying for the Sierra Club— You know, after I left MPIRG and Chuck and I started the firm, our first and largest client was the Sierra Club, and we did their lobbying from '74 until the mid-'80s. And, of course, there were dozens of additional environmental laws there, and it was during that period that Chuck did so much work on the Boundary Waters. And while he was off doing that, I was here doing laws at the state level. And we did hundreds of millions of dollars of bonding for parks, we did that metro Open Space bill, we did many, many changes in all kinds of other laws applicable to the Pollution Control Agency, or the DNR, and then we did our own hazardous waste laws in the early '80s, the environmental companion at the state level to the Superfund laws that had passed in Congress. And then we got into the mid-'80s and the Sierra Club hired staff that really took over the whole lobbying job. And, you know, it was interesting because originally, we had set up what's now the Minnesota Center for Environmental Advocacy [MCEA] to be the regulatory advocacy group that was part of the Sierra Club lobbying effort. And they, we spun them off as a separate organization during that period and they've gone on to be a pretty robust organization, with lawyers and scientists, and a pretty active research and advocacy effort generally. The Sierra Club has its own lobbyist now at the Capitol, they continued their lobbying activity, but we've got dozens of environmental groups now—too much fragmentation, probably.

1:05:13.3 [Audio buzz here]

JH: And ironically, I would say, maybe my most successful environmental law, I passed for the bankers and the redevelopment authorities in the late-'80s, the whole brownfields recycling program legislation in Minnesota is called the VIC program, Voluntary Investigation and Cleanup, which has led to remediation of several thousand contaminated sites for redevelopment. So, it was kind of like a merging of my interests in redevelopment with my idea that you could be more rational and come up with a way to make these things work better and still accomplish your goal. So yes, it's been a great journey, no question about it. And it's been amazing, because if you understand the legislature you can create things that are very, very successful longer term in terms of, for example, all these cultural projects, and a number of social service projects all come out of the idea of state bond financing of property for these organizations that in affect, ameliorate the burden of government or offer things that we want as a society. And you know, that was a big program that we did starting in like, '88, '89, with the Science Museum asking for bonding and trying to figure out how to do it and still meet the constitution. Now we've had probably, I don't know, fifty major facilities all over the state that have been done using the state bonding to help make cultural projects and some social service projects happen; pretty amazing and great for the advancement of the state overall.

SH: Well, I only have two questions to end here.

JH: Okay.

SH: And you've already, in a way, you've already answered them both, but see if you have anything else to add.

JH: Okay.

SH: The first is, what else would you want to mention that I haven't asked you about. And then the second would be, how do you feel about your work on these issues?

JH: Well, in terms of MEPA itself, you know, I think it's easy to be cynical. Chuck and I wrote an article, "The Unfulfilled Promise of MEPA", a few years back for the *Bench and Bar* law magazine. But I think that actually, it has had a pretty salutary effect in causing the agencies to actively think about the impacts and the alternatives. So, it was fundamental to making environmental considerations a part of all the decisions. And so, while I think it could have had more promise, it hasn't been totally unfulfilled. It created a whole career of environmental planning and in most of our physical activities, it's created a large number of consultants, who sometimes justify projects, but also solve problems. And so, I think it's been a pretty successful law. And people have accommodated to it enough that even some project proposers view it as a good way to move projects forward and anticipate problems and solve them before they become so controversial that they are embroiled in a long fight. So, I think that is one aspect of the law that has worked reasonably well. If you think more broadly about the environmental movement of the '70s, it changed the world. I mean, suddenly, it became a primary consideration and it happened at just the right time, because we at least have the framework now for dealing with the much more significant environmental problems we have with larger scale issues. You know, understanding everything from runoff of water and protection of larger scale water quality, even if we haven't solved all the problems, we at least know what they are and we're working on them.

1:10:25.0

JH: Air quality improvements, protection of land, and recreational protection of land in proximity to people that have happened in that period, and just the whole environmental culture that I think will ultimately help us to solve the global warming problem, so I feel pretty good about it. I mean, I'm pretty proud that I was able to be a part of it and I think Minnesota was a fertile place to do it, a responsive place, because we are a state that cares about the out-of-doors, where a lot of people recreate outside in all kinds of ways: hunting, fishing, hiking, birding, biking, you name it. I mean, we're at the forefront of a huge amount of this nationwide; and we're also a problem-solving

state. You know, another good example of that, which came out of industry and the Chamber of Commerce, was switching landfill clean-up to be no-fault. It saved hundreds of millions of dollars in transactional costs; it's been a huge success. And doing it that way was a lot better than what the other forty-nine states have done, which is a lot of litigation about it. So we have a lot, as Minnesotans, to be proud of in this area. This land-recycling thing that I mentioned has been a huge success; two-thirds of the other states copied our law. But we've been way ahead of the rest of the country in its effective implementation. And now the federal law has been modified to be very similar to ours, too, in terms of giving protection to the redeveloper.

SH: You're talking about brownfields?

JH: Brownfields, yes.

SH: Um-hmm.

JH: So, I feel pretty good about all those things. And there's always more to do. [Laughs] Global warming is totally a surprise to all of us; I don't think any of us thought it was an issue until the last decade or so. So it's amazing how, there's so many people now and so many new technologies that understanding the implications becomes a huge part of humanity's decision-making process about, "How do we accommodate all of this stuff and not cause unintended, expensive, or harmful consequences?"

SH: And are you active in working on climate change?

JH: Ah, a little bit. But, I would say I'm more active in historic preservation and open space protection, in the last decade or so. I was very involved in passing the state historic tax credit, and I've been very involved with the Trust for Public Land [TPL] and the St. Croix River Association, and some land protection efforts and both state-wide with TPL, and in the valley with the River Association.

SH: Well, John Herman, thank you so much.

JH: Thank you.

1:14:13.0

[End of interview]