

Private Practice of Public Interest Environmental Law: Leveling the Playing Field

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JUST CHANGE LAW OFFICES¹

I. INTRODUCTION TO ENVIRONMENTAL PUBLIC INTEREST LAW

Environmental public interest law today is often thought of as the work of non-profit organizations in Washington, D.C. or in progressive urban centers on the West Coast seeking to reform environmental policy, rather than represent clients. Many of us are familiar with Justice Douglas' eloquent dissent in the well-known case of *Sierra Club v. Morton*,² arguing that trees have standing. This rallying cry was adopted by the Sierra Club Legal Defense Fund, now known as EarthJustice, with its *raison d'etre*. "Because the earth needs a good lawyer."³

However, as leading commentator Professor John Bonine stated in a recent article,

Public interest environmental law in the United States did not originate because some lawyers wanted to shape policy for the whole nation, or because they had a steady job at a non-profit organization. It started with a passion to save some fish in a local river, with a yearning for the continued peace of a river valley, with a love for the springtime songs of birds. Environmental litigation also did not start in Washington, D.C. It started in a remote canyon in southern Utah, along unspoiled trails in a mountain valley in California, in neighborhoods of Memphis, in small towns of Long Island, and in villages of the Hudson River Valley. Lawsuits to save the environment did not start in national non-profit groups. They started with private lawyers who wanted to devote some of their time to causes larger than the interests of their private clients.⁴

Landmark cases in the development of public interest environmental law included a case filed in the late 1950's on Long Island, New York, where private lawyers represented residents seeking to block the spraying of DDT pesticides,⁵ and the Storm King Mountain case in the 1960's, where nearby residents sought to protect the Hudson River Valley from construction of an impoundment.⁶

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² *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972)(Douglas dissent).

³ See <http://earthjustice.org/> (last visited Mar. 20, 2012).

⁴ John E. Bonine, PRIVATE PUBLIC INTEREST ENVIRONMENTAL LAW: HISTORY, HARD WORK, AND HOPE, 26 *Pace Envtl. L. Rev.* 465, 465-466 (Summer 2009).

⁵ See *Murphy v. Benson*, 151 F. Supp. 786, 789 (E.D.N.Y. 1957); Bonine (2009), *supra*, at 469.

⁶ See *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Bonine also cites a series of 1960s suits against highway construction by a raft of local, private lawyers in Boston, Chicago, Memphis, Nashville, New Orleans, New York, San Francisco,

The first non-profit environmental organization may have been the Conservation Law Foundation of New England, which grew out of local citizen activism to protect Mount Greylock in northwest Massachusetts from a ski resort.⁷

In 1968, a group of law students met with the Ford Foundation and by 1970, with a \$400,000 grant from the Ford Foundation, the Natural Resources Defense Council was launched.⁸ Some commentators suggest that the Ford Foundation's investments in the Sierra Club Legal Defense Fund, the Natural Resources Defense Council, Citizens Communication Center, the Mexican American Legal Defense Fund, the Center for Law and Social Policy, Public Advocates, and the Center for Law in the Public Interest was an effort to relegitimize the legal system in the face of potentially revolutionary challenge.⁹ Long after the Ford Foundation's leading role has lapsed, the non-profit legal reform model of public interest law has remained a significant force.

Public interest environmental lawyers in the non-profit sector and private public interest lawyers combined are likely to represent no more than two percent of the total environmental law bar. Professor Bonine estimated the following distribution of environmental lawyers in the United States¹⁰:

Business Environmental Lawyers	20,000-30,000
Government Environmental Lawyers	2,000
Citizen's Environmental Lawyers	750
Non-profit Salaried Litigators	250
Non-profit Salaried Non-Litigators	250
Private Non-Salaried Public Interest Lawyers	250

It is widely recognized that there is minimal latitude for business environmental lawyers to take on cases for the protection of natural resources. Sometimes, the justification given is one of "loyalty" or a "positional conflict of interest." Positional conflicts involve matters that do not require disqualification under ethical rules, but are likely to offend existing or potential clients or otherwise preempt business development.¹¹ In cases involving significant projects that are likely to be controversial due to the potential for environmental harm, it is not uncommon for companies to place multiple law firms on

San Antonio, and Washington, D.C. among the origins of public interest environmental law. Bonine (2009), *supra*, at 471.

⁷ *Id.* at 469.

⁸ *Id.* at 467-468.

⁹ Eduardo R.C. Capulong, CLIENT ACTIVISM IN PROGRESSIVE LAWYERING THEORY, 16 *Clinical L. Rev.* 109, 154-155 (Fall 2009).

¹⁰ Bonine (2009), *supra*, at 474-475.

¹¹ John E. Bonine, THE DIVERGENT PATHS OF ENVIRONMENTAL LAW PRACTICE A REPLY TO PROFESSOR MANASTER, 28 *Pace Env'tl. L. Rev.* 265, 273 (Fall 2010); Scott L. Cummings & Deborah L. Rhode, MANAGING PRO BONO: DOING WELL BY DOING BETTER, 78 *Fordham L. Rev.* 2357, 2392-2393 (2010).

retainer, creating real as well as positional conflicts of interest in representing the interests of citizens or groups favoring environmental protection.¹² For business environmental lawyers, whether the client is actually adverse to a client of the firm or whether the legal position one would take on behalf of the client would conflict with a client's position, these are "real" conflicts of interest.¹³

Some commentators suggest that attorneys serving as corporate counsel may have an opportunity to advance an environmental public interest in their advice to clients, but the fiduciary obligation of corporate directors is to their shareholders. Although maintaining relationships through compliance with governmental standards, avoidance of liability in litigation, reduction of transaction costs or maintaining positive public and customer perceptions may be consistent with long-term if not short-term profitability, these corporate interests are distinct from public environmental interests. Protecting the environmental public interest is better served by appreciating the divergent interests of business environmental law, rather than naively believing that all participants are similarly motivated.

Environmental law practiced by government lawyers may result in significant regulatory or litigation work to protect natural resources. Certainly, lawyers in the federal government were early, major contributors to environmental protection. For example, *United States v. Republic Steel Corp.* and *United States v. Standard Oil Co.*, two water pollution cases brought by the Justice Department in the 1960s, led to the Supreme Court's substantial expansion of the reach of legislation to protect navigable waters.¹⁴ However, since the 1980s, there has been extensive pressure against enforcement of environmental protection regulations. Commentators have acknowledged that the regulatory approach may fail "where there is too much political weakness to reach hard legislation or too much ideological resistance to ensure implementation."¹⁵ Government environmental lawyers may be called upon to devise or justify narrow administrative interpretations of environmental protection standards¹⁶ as well as to defend and enforce environmental rules.¹⁷

¹² Atina Duffley, Gardens of Eagan farmer, wrote in her recent book, *Turn Here Sweet Corn – Organic Farming Works* (Minnesota: Univ. of Minn. Press, 2012), pp. 276-277, that she called one law firm after another seeking representation in a case where Koch Industries' Minnesota Pipe Line Company (MPL) sought to condemn an easement across her organic farm only to be told by numerous firms that they were already on retainer to MPL and had a conflict of interest.

¹³ Kenneth A. Manaster, THE MANY PATHS OF ENVIRONMENTAL PRACTICE A RESPONSE TO PROFESSOR BONINE, 28 *Pace Env'tl. L. Rev.* 238, 254 (Fall 2010).

¹⁴ *Id.*, at 242; *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Standard Oil*, 384 U.S. 224 (1966).

¹⁵ Orly Lobel, THE RENEW DEAL: THE FALL OF REGULATION AND THE RISE OF GOVERNANCE IN CONTEMPORARY LEGAL THOUGHT 89 *Minn. L. Rev.* 342, 394 (December, 2004).

¹⁶ In Minnesota, see e.g. *In re Alexandria Lake Area Sanitary Dist.*, 763 N.W.2d 303 (Minn. 2009); *Minn. Ctr. For Environmental Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427 (Minn. Ct. App. 2003).

¹⁷ In Minnesota, see e.g. *Minn. Chamber of Commerce v. Minn. Pollution Control Agency* ("MPCA"), 469 N.W. 2d 100, 107 (Minn. Ct. App. 1991), *review denied* (Minn. July 24, 1991); *In re Appeal of Rocheleau*, 686 N.W.2d 882 (Minn. Ct. App. 2004), *review denied* (Minn., Dec. 22, 2004).

In this business and political climate, the two percent of the bar who are citizens' environmental lawyers play an important role in preventing environmental harm from state or private action. In addition, given the likelihood of conflicts of interest with business environmental law firms, a dedicated *private* public interest environmental bar is needed so that clients -- individuals, small businesses and communities impacted by infrastructure or pollution, impairment or destruction of natural resources -- can have a chance to participate in regulatory processes, mitigate harms or, if all else fails, obtain redress in the courts.

Although some of my clients have been established environmental groups, such as the Sierra Club's Minnesota Chapter or the Ecology Center, I am one of the nation's few hundred private practitioners of public interest environmental law. My clients have been individual land owners, organic farms, community groups, municipalities and non-profits that sprung into being to solve specific environmental problems, often in or near their back yards.

The balance of this presentation asks what can be done to create an ecological niche where public interest environmental law can thrive. I explore the philosophy of progressive private lawyering and the role of client activism in effective practice of public interest environmental law. I then identify some of the tools and tactics that might help to level the playing field for public interest environmental law. Finally, I talk about satisfaction and opportunity in the practice of citizens' environmental law.

II. PROGRESSIVE LAWYERING AND CLIENT ACTIVISM

Legal theorists describe two trends in public interest law. "Progressive" lawyering is defined through its relationship to other activism – mass movements, mobilization, direct action, organization-building, civic participation or even just individual empowerment. Progressive lawyers believe that only organized mass action from below – not law reform - produces fundamental, lasting change. For lawyers operating within this paradigm, "the key question driving legal practice is not what will ensure legal victory, but what will motivate, support and further effective activism."¹⁸ Progressive lawyers may measure success by how practice raises political consciousness, motivates and strengthens client activity or supports effective grassroots activism generally.¹⁹

Liberal-legalist practice, on the other hand, focuses intently on legal reform, secured by expert litigators, policy analysts and lobbyists. In this type of public interest practice, "lawyers substitute their own advocacy and leadership (usually through litigation) for grassroots activist efforts."²⁰ Historically, commentators suggest that the liberal-legalist

¹⁸ Eduardo R.C. Capulong, CLIENT ACTIVISM IN PROGRESSIVE LAWYERING THEORY, 16 *Clinical L. Rev.* 109 (Fall 2009).

¹⁹ *Id.* at 118. This theoretical approach to public interest practice is also referred to as "rebellious" lawyering, as in Gerald Lopez' book Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1972).

²⁰ *Id.* at 112.

public interest law practice developed as political trends began to turn to the right and activism fragmented. Legalist public interest practices reconceptualized clients as more abstract public interests and focused on serving causes rather than individuals as their goal. It is possible that the substantial litigation victories in the 1970's further reinforced the orientation away from mass activism to public interest legal advocacy.²¹

As a private public interest environmental lawyer with a history in politics and a practice based on representing a range of clients, I would propose a third paradigm of public interest environmental law integrating both the progressive and the legalist theories of practice. This integrated paradigm is, first, based on representing clients with concrete and specific interests and demands.

Next, although the definition of “victory” may vary in scope from case to case, the goal of the practice is to change some aspect of the legal landscape, such as amending or defending rules or statutes; grants, denials, modifications or enforcement of permits; denial of certification, imposing conditions on or changing the route of proposed infrastructure; or obtaining an equitable remedy or financial recovery through administrative processes or litigation. Whether or not the request for legal assistance comes from the grassroots, this integrated paradigm questions whether representation that does no more than raise awareness serves the goal of public interest environmental law. A quixotic effort that has no positive legal or environmental outcome may dispirit and further fragment community activists, rather than invigorate or mobilize change.

Further, for pragmatic reasons related to the disparity in resources as well as any adherence to “progressive” philosophy, this integrated paradigm of public interest law is vitally dependent on client activism, public participation and client and community empowerment. A public interest environmental lawyer, in addition to conventional legal work, may need to coach, mentor and support clients to advocate on their own behalf; collaborate on outreach and media relations; and even assist clients in developing and sustaining a non-profit organization. The driving force for this client activism is not only the independent benefit of supporting civic engagement. Integrated advocacy also increases the likelihood of prevailing in the legal matter for which the client sought representation. Depending on the specific legal matter, clients may enhance fact-finding, develop expert testimony, build public support for an issue or help hold regulators more accountable to public scrutiny.

The integrated paradigm of public interest environmental practice requires rigorous analysis of various potentials for victory, engagement of clients as collaborators, and drawing together community resources as well as legal resources to increase the potential for success.

As other commentators have noted, as compared to litigation, administrative practice may be more conducive to client activism and public participation.²² The development of environmental jurisprudence over the past several decades also suggests the importance

²¹ *Id.* at 141.

²² *Id.* at 128-129.

of public interest environmental lawyering in rulemaking, regulatory, and permitting matters.

Since the 1970's, many of the significant issues in environmental protection – air quality, water quality, protection of wetlands, disposal of solid and hazardous wastes, protection of endangered species, control of public lands, selection of the type and size of needed energy facilities, location of energy infrastructure – have been extensively regulated under both federal and state law. With this regulatory scheme has come significant administrative discretion in enforcement of statutes and regulations.

In Minnesota, for many critical decisions affecting environmental protection, the factual record is established in an administrative process. The modern tendency is “to be more liberal in permitting grants of discretion to administrative officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase.”²³ The requirement for exhaustion of administrative remedies prior to seeking judicial review²⁴ also reinforces the importance of public interest environmental lawyering in the administrative process. In public interest practice, local representation throughout the regulatory process, rather than a national law firm that becomes involved at the time of litigation, may provide the best chance of success in achieving environmentally protective outcomes.

Given the additional risk that agencies may be colonized, politicized or captured by the centers of power of the regulated parties and the trend toward various “collaborative” governance practices where regulated parties help implement the rules to which they then be subject,²⁵ public interest representation early in administrative processes becomes critical. Where government relies upon agents or employees of regulated entities to help interpret or enforce applicable rules, the absence of public interest environmental participation further increases the likelihood of cooptation and “consensus” to avoid more costly or transformative environmental protection.

III. LEVELING THE PLAYING FIELD FOR PUBLIC INTEREST ENVIRONMENTAL LAW

Whether public interest environmental law is practiced by non-profit public interest groups or by private attorneys, from a legal reform perspective or with the goal of progressive social change, it is virtually certain that the practitioner will be outnumbered and outgunned. The most obvious reason is resources – the disparity in funds possessed by business opponents of regulation or enforcement will result in more lawyers, experts, public relations staff, time and often more experience on the other side of the table.

²³ *Coalition of Greater Minnesota Cities v. Minn. Pollution Control Agency*, 765 N.W. 2d 159, 165, 166-167 (Minn. Ct. App. 2009) *review denied* (Minn. Aug. 11, 2009); *State v. U.S. Steel Corp.*, 240 N. W. 2d 316, 319 (Minn. 1976).

²⁴ See e.g. *Northwest Airlines, Inc. v. Metropolitan Airports Comm'n*, 672 N.W.2d 379, 382-383, 385 (Minn. Ct. App. 2003) *review denied* (Minn. Feb. 25, 2004); *Zaluckyj v. Rice Creek Watershed Dist.*, 639 N.W.2d 70, 75,77 (Minn. Ct. App. 2002) *review denied* (Minn. Apr. 16, 2002).

²⁵ Orly, *supra*, at 363-364, 425-426.

In general, one way to reduce the impact or resource disparities in public interest litigation is “fee shifting,” particularly the form of asymmetrical fee shifting provided to a party that enforces rules or protects the public interest. Over 200 federal statutes and 2,000 state statutes provide for “fee-shifting” of one kind or another.²⁶

Although any attorney may seek sanctions where a cause of action or defense is prosecuted in bad faith²⁷ Minnesota has historically followed the American Rule that litigants must bear their own attorney’s fees absent statutory or contractual authorization.²⁸ The State adopted its first fee shifting provision in the Granger Era, to allocate fees to a railroad found liable for injuring livestock.²⁹ By the end of 2008, commentators identified 444 fee-shifting provisions in Minnesota law.³⁰

Minnesota statutes provide for asymmetrical recovery of attorneys’ fees in some situations where government attorneys enforce an environmental public interest. Where there is a release or substantial threat of release of a hazardous substance from a facility, government attorneys may recover all reasonable expenses incurred, including administrative and legal expenses as well as response costs.³¹ In an action brought under Minnesota’s environmental response and liability act pertaining to hazardous waste, if the agency prevails in litigation, “the court shall award the commissioner reasonable attorney fees and other litigation expenses incurred” to bring the action.³²

Government attorneys who prevail in securing a civil penalty, injunctive relief, or an action to compel compliance under Minnesota's Water Pollution Control Act may be awarded "litigation expenses incurred by the state" if the proven violation was willful.³³ Where a county enacts an ordinance to control delivery of mixed municipal solid wastes to a processing or disposal facility, the civil penalty for violation includes the cost of mitigating any damages caused by the violation “the attorney fees and court costs incurred by the county to enforce the ordinance.”³⁴

²⁶ Bonine (2009), *supra* at n70; John F. Vargo, THE AMERICAN RULE ON ATTORNEY FEE ALLOCATION: THE INJURED PERSON'S ACCESS TO JUSTICE, 42 *Am. U. L. Rev.* 1567, 1588 (1993).

²⁷ Minn. Stat. § 549.211 (2011).

²⁸ Early Minnesota cases adopting the American Rule include *Kelly v. Rogers*, 21 *Minn.* 146, 152-53 (1874); *Frost v. Jordan*, 37 *Minn.* 544, 547, 36 *N.W.* 713, 714 (1887). See Minn. Stat. §549.01(2011).

²⁹ See Jeff Holth, CASE NOTE: CIVIL PROCEDURE: I WIN, YOU PAY: CONSIDERATIONS OF EFFICIENCY AND FAIRNESS IN MINNESOTA APPELLATE LITIGATION OF ATTORNEY'S FEES - T.A. SCHIFSKY & SONS, INC. v. BAHR CONSTRUCTION, LLC, 37 *Wm. Mitchell L. Rev.* 267, 275 (2010).

³⁰ *Id.* at 276.

³¹ Minn. Stat. §115B.17, Subd. 1, Subd. 6 (2011) The agency’s certification of expenses serves as *prima facie* evidence that the expenses are reasonable and necessary.

³² Minn. Stat. §115B.41, Subd. 1 (2011).

³³ Minn. Stat. §115.072 (2011).

³⁴ Minn. Stat. §115A.86, Subd. 6(c)(2011).

Citizens' environmental lawyers who prevail in enforcement of environmental compliance have no similar recourse.³⁵ In the current political climate, adoption of new laws to shift litigation costs to reduce disparities between polluting industries and public interest environmental lawyers is unlikely.

As compared to litigation, administrative practice may reduce transaction costs as well as providing greater opportunities for client and community advocacy. The Minnesota Public Utilities Commission, where important decisions are made related to need, type, size, site and routing of energy facilities has adopted many practices that can help level the playing field. These factors, which are the result of custom as well as rule, include: referral disputed matters for a contested case where they can be decided based on the probative factual record;³⁶ ease of intervention and public participation;³⁷ provision of written filings for witnesses, particularly expert testimony;³⁸ a practice where information requests are customarily answered with substance and pertinent responses;³⁹ readily searchable data bases for pertinent documents;⁴⁰ and electronic filing and service.⁴¹ Although practitioners need to be vigilant to preserve transparency, these practices permit effective participation with fewer resources and allow environmental lawyers to bring additional allies and community members into the process of advocacy.

Additional practices that would place environmental public interest on a more equal footing with other interests would be to provide transcripts without charge to public parties and to provide intervenor compensation when public interest advocacy has influenced an outcome to protect environmental resources.

Current Minnesota practice provides for unsalaried court reporters who charge parties for requested transcripts in contested cases.⁴² Rules providing for intervenor compensation are restricted to the financial aspects of rate cases,⁴³ even though the primary obligations of ratepayers are established in certificate of need proceedings. In addition, requirements to demonstrate the need for compensation are so intrusive and onerous⁴⁴ that they virtually preclude access to this resource. Intervenor compensation is, thus, unavailable

³⁵ Although no such ruling has been identified for a public interest environmental case, in a civil action or contested case brought against the state the court or administrative law judge could award fees and expenses if the position of the state were not substantially justified. Minn. Stat. § 15.472 (2011).

³⁶ Willingness to refer matters for contested case disposition pursuant under the Administrative Procedures Act (APA), Minn. Stat. § 14.57 (2011) is not uniform among agencies. The Minnesota Public Utilities Commission (MPUC) rule pertaining to referral is Minn. R. §7829.1000 (2012).

³⁷ See Minn. R. §1400.6200 (2012) for APA provision; Minn. R. §7829.0800(2012) for MPUC; Minn. R. §1405.0900 and §1405.0800 (2012) for energy facility routing and siting.

³⁸ See Minn. R. §1400.5500, Subp. L (2012) discussing administrative law judge authority to permit testimony; Minn. R. §1405.1900 (2012), prefiled testimony in routing and siting procedures.

³⁹ APA discovery rules are provided in Minn. R. §1400.6700 (2012). Custom and practice may be more influential than these formal rules in supporting meaningful discovery.

⁴⁰ There is substantial variation in efficacy of access through various state agencies' electronic files.

⁴¹ See Minn. Stat. § 216.17 (2011).

⁴² Minn. Stat. § 14.58 (2011); Minn. R. 1405.1800, Subp. 4. It should be noted that transcripts can often be viewed in hard copy by members of the public at government offices or public libraries.

⁴³ Minn. Stat. § 216B.16 Subd.10 (b) (2011).

⁴⁴ Minn. Stat. § 216B.16 Subd.10(c) and (d) (2011).

for public interest environmental advocacy, whether for a less polluting form of energy or a less environmentally sensitive location.

Procedural efforts to support public interest advocacy could significantly enhance environmental outcomes at the Commission as well as at other state agencies, where public interest advocacy and contested case fact-finding are less common.

IV. CONCLUSION – PRACTICE AND OPPORTUNITY

Although both changes in resources and changes in rules could certainly provide additional support for public interest environmental law, an integrated public interest practice provides both great personal satisfaction and the opportunity to provide positive outcomes that serve clients and communities and protect environmental values.

In general, slightly more than half of lawyers are satisfied with their careers.⁴⁵ Recent surveys of young lawyers suggest, “The inability to make a contribution to social good is the aspect of practice that seems to disappoint young lawyers the most.”⁴⁶ Although not a panacea for all, the practice of public interest environmental law provides a chance to contribute to social good and an exciting intellectual challenge. As Professor Bonin suggested in his commentary

Once a lawyer has decided on public interest practice, she should consider private public interest practice, not just looking for an existing job in the non-profit sector. The public interest movement in environmental law needs far more advocates than it has. There are broad opportunities for young lawyers (and older lawyers who are dissatisfied with what they do and whom they represent and counsel) to join that movement to advance environmental protection goals.⁴⁷

Based on my experience, here are a few suggestions for a rewarding and effective practice of private public interest environmental law:

- Select clients and cases that you believe will enhance protection of the public interest in the environment as well as their private or organizational interests.
- Rigorously analyze the potential for and gradations of victory, share all analysis with the client and only take cases where you believe that some form of victory is probable.

⁴⁵ Stephanie Francis Ward, “Pulse of the Legal Profession,” ABA Journal (Oct. 1, 2007). http://www.abajournal.com/magazine/article/pulse_of_the_legal_profession (last visited Mar. 20, 2012)

⁴⁶ ABA Young Lawyers Division Survey (2000), p. 19. http://www.law.indiana.edu/people/henderson/share/satisfaction_800.pdf (last visited Mar. 20, 2012)

⁴⁷ Bonin (2010), *supra*, at 285.

- Combine a “low bono” discounted fee practice, low overhead and strategies to support client fundraising along with more traditional fee for service to support a public interest practice.
- Practice in administrative proceedings as well as litigation to facilitate client participation and reduce resource disparities as well as to develop a factual record and influence regulatory culture.
- Coach, mentor, support and encourage client activism and enhancement of client capacity to self-advocate and to facilitate success in achieving outcomes.
- Build alliances and relationships to support client objectives. As suggested in a recent article describing the case where the Gardens of Eagan organic farm was up against a Koch Industries pipeline,⁴⁸ when David is up against Goliath, David needs to make friends.

⁴⁸ Dan Heilman, “Book details farmers’ legal victory over Koch Industries,” *Minnesota Lawyer* (March 23, 2012) <http://minnlawyer.com/2012/03/23/book-details-farmers%e2%80%99-legal-victory-over-kochindustries/> (Attached as Appendix).

Appendix

*Private Practice of Public Interest Environmental Law:
Leveling the Playing Field*

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Book details farmers' legal victory over Koch Industries

By Dan Heilman

Special to Minnesota Lawyer

More and more, organic and non-traditional forms of farming are gaining attention and prominence — even the Minneapolis City Council is considering an ordinance that would allow commercial vegetable farming within the city limits, 60 years after the last working farm left town.

Some of them might not realize it, but organic farmers scored a huge legal victory six years ago that helped lead to that growth. Atina and Martin Diffley, owners of the 120-acre Gardens of Eagan organic farm in Dakota County, stared down Koch Industries, the Kansas-based multinational conglomerate that is one of the largest privately owned companies in the world.

The struggle is a centerpiece of a book written by Atina Diffley and set to be published next month by the University of Minnesota Press. “Turn Here Sweet Corn: Organic Farming Works” discusses Atina Diffley’s life and journey into the world of organic farming and goes into detail about the experience of facing a monolithic corporate interest.

Koch at the time was financing the development of the MinnCann crude oil pipeline by the Little Falls-based Minnesota Pipeline Co. (MPC). In April 2006, the Diffleys received a letter from MPC stating that it had filed a certificate of need and route permit application with the Minnesota Public Utilities



Paula Maccabee (left), an environmental justice attorney in St. Paul, with her client, Atina Diffley, co-owner of the Gardens of Eagan farm in Dakota County. Diffley’s new book, “Turn Here Sweet Corn: Organic Farming Works,” features the story of her legal battle against Kansas-based Koch Industries, which wanted to build a crude oil pipeline through the farm. (Staff photo: Bill Klotz)

Commission to install a crude oil pipeline and that all three parcels that compose Gardens of Eagan were in the route corridor.

No lawyers available

The Diffleys started out by researching Minnesota statutory law regarding

crude oil companies and eminent domain. For all the research they did, they couldn’t figure out how a company could force its way across private property for its own profit.

“We wouldn’t have continued to run Gardens of Eagan if the project had gone through,” Atina Diffley told Minnesota Lawyer recently. “We know

Diffley Organic farms were integrated ecosystems, not just places that produce food to eat

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from personal experience that once land has been affected in that way, you can't grow an organic vegetable crop on it. We didn't want to start over."

As she sorted through PUC agricultural impact mitigation documents related to the pipeline application, she started to notice how unrealistic the plans were — no soil, whether on a chemical or organic farm, can return to its previous condition after such a disruption. MPC's plan, which included the removal of up to 12 inches of topsoil, seemed especially egregious.

After conversations with MinnCan project leaders went nowhere, Diffley began hunting for an attorney. But as she called them, one after the other — environmental attorneys, lawyers specializing in public utilities — begged off. Why?

"They had all told her that they worked for the pipeline or for other energy infrastructure companies," said Paula Maccabee, the St. Paul environmental justice attorney she eventually hired. "Even if she were willing to pay, they couldn't take her case (because of conflicts of interest)."

Maccabee came to the case with experience in cases regarding transmission lines and knowing the routing law, and with an awareness of Minnesota laws having to do with the state's Environmental Rights Act.

Her initial perception was that they would approach their case as an issue of route selection and environmental protection. But the more the Diffleys talked to her about what they did, the more Maccabee began to realize that organic farms were integrated ecosystems, not just places that produce food to eat.

"I looked at it from the perspective of an environmental lawyer, as well as someone who had done work on energy infrastructure at the PUC," she said.

David. v. Goliath — David makes friends

As Maccabee and the Diffleys filed

a succession of documents with the PUC proposing to amend the pipeline route, pointing out ecological disasters that had befallen similar projects and beseeching MPC to modify its agricultural impact assessment, Atina Diffley also went to work building an army of supporters.

She provided an expert affidavit hav-

"We put together a huge amount of resources and evidence. Atina not only was a client but also a very active expert."

—Paula Maccabee, attorney

ing to do with the nature of the Gardens of Eagan farm and why it should be avoided; helped enlist two testifying experts whose opinions were filed with the PUC; persuaded Dakota County and the nearby town of Eureka to pass resolutions asking that the

pipeline avoid organic farms or else create specific mitigations for them; and got numerous co-ops, organic consumers, the Land Stewardship Project and the Organic Advisory Committee on her side. Eventually, about 4,500 public comments supporting protection of the farm poured into the PUC offices.

"It was a relatively short time between April and September, when the Koch brothers basically agreed with Atina," Maccabee said. "We put together a huge amount of resources and evidence. Atina not only was a client but also a very active expert."

MPC approached Maccabee the day there was to be a public hearing with a draft stipulation agreeing to keep the pipeline away from Gardens of Eagan and to include an organic farm appendix to the PUC Agricultural Impact Mitigation Plan. Two months later, administrative law Judge Beverly Jones Heydinger affirmed the agreement.

"What was great about the experience was that I felt Paula really had absorbed my values and beliefs," Atina Diffley said. "I felt she was acting as if she was me, not just lending her legal expertise."

The MinnCan project was completed in September 2008, but not with the cooperation of landowners who didn't want the soil on their seventh-generation farm compromised. The organic farm appendix used in the settlement is becoming a staple of similar energy infrastructure plans. For her part, Maccabee credits the Diffleys' knowledge and determination as a crucial factor in reaching the unlikely settlement described in Atina Diffley's book.

"It's a lesson for lawyers who represent parties who don't have a lot of resources," she said. "MPC settled on the eve of the hearing, and they settled because little Gardens of Eagan was no longer standing alone. When David is up against Goliath, David needs to make friends." 