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THE INDIANA ENVIRONMENTAL PROTECTION ACT: AN ENVIRONMENTALIST'S WEAPON IN NEED OF REPAIR

We celebrate the earth.

We celebrate the seas that gave birth to life . . .

We pledge ourselves to the defense of the earth,
of its airs, of its waters,
of the life that moves upon it.

We shall defend it from the assault of machinery,
from the noxious gasses, the toxic wastes,
the subtle poisons . . .
from ourselves.¹

I. INTRODUCTION

The 1960's saw a sudden explosion of concern for the environment. The struggle of the Vietnam era conservationists survives today in the voices of concerned individuals crying out for a liveable environment.² Industries pollute the atmosphere, water, and soil, while commercial development swallows up unique natural resources.³ Amid these consequences of

1. NO DEPOSIT - NO RETURN, MAN AND HIS ENVIRONMENT: A VIEW TOWARD SURVIVAL 278 (H. Johnson ed. 1970).

2. See Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

3. 115 CONG. REC. 29,066 (1969) (Statement of Sen. Jackson).

[O]ver the past decade there have been some very remarkable changes in public attitudes toward the manner in which the nation's resources are administered.

. . . These changes in public attitudes and the growing public awareness and concern over man's limited natural resource base were perhaps best articulated during the decade of the sixties by former Secretary of the Interior Stewart Udall. Secretary Udall made the inadequacy of the nation's knowledge, policies, priorities and institutions for the administration of the public's resources and man's total environment an important public issue. . . .

. . . .
We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion and conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being; the loss of open valuable spaces; inconsistent and, often, incoherent rural and urban land use policies; critical air and water pollution problems; diminishing recre-

man's rapid rise from fire to modern society is the environmentalist.⁴ Neglected by the environmental agencies designed to serve his interests,⁵ the environmentalist was left without a weapon to fight the war against pollution until Congress and several state legislatures came to his aid.⁶

In response to the powerful environmental movement, in 1969 Congress enacted the National Environmental Policy Act (NEPA).⁷ The enactment of NEPA was predicated upon the widespread belief that while the quality of the nation's environment was rapidly deteriorating, the federal agencies designed to preserve the environment were actually speeding up rather than impeding the process of decay.⁸ NEPA requires all federal agencies to consider the environmental consequences of federal activities and to provide the public with information of any adverse environmental effects from these activities.⁹

To supplement NEPA, many states, including Indiana, enacted provisions known as state environmental protection acts (SEPA's).¹⁰ These acts

ational opportunity; continuing soil erosion; the degradation of unique ecosystem; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectural design and ugliness in private and public structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; and increasingly ugly landscape cluttered with bill boards, powerlines, and junkyards; growing scarcity of essential resources; and many, many other environmental quality problems.

Id. at 29,066-67.

4. See Hatch, *Massachusetts and Michigan: Two States With An Answer*, 6 LINCOLN L. REV. 119, 126 (1971).

5. See *infra* notes 8 and 118-21 and accompanying text.

6. See *infra* notes 7-16 and accompanying text.

7. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-35, 4341-47, 4361-70 (1982 & Supp. III 1985).

8. See Note, *Standing on the Side of the Environment: A Statutory Prescription For Citizen Participation*, 1 ECOLOGY L.Q. 561, 561-67 (1971). "A primary purpose of NEPA is to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment." S. REP. NO. 296, 91st Cong., 1st Sess. 8 (1969).

9. 42 U.S.C. § 4332 (1982 & Supp. III 1985). "The public availability of impact statements, and of agency comments on them, has provided an extraordinarily effective vehicle for making nongovernmental groups and private citizens aware of government actions affecting them, and for bringing their preferences as well as their knowledge to bear upon those decisions." McGarity, *The Courts, The Agencies and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 807 n.20 (1977).

10. These state environmental protection acts are also referred to as citizen-suit standing provisions. CONN. GEN. STAT. ANN. §§ 22a-14 to -20 (West 1985); FLA. STAT. ANN. § 403.412 (West 1986); ILL. ANN. STAT. ch. 111½ §§ 1031-34 (Smith-Hurd 1977 & Supp. 1986); IND. CODE ANN. §§ 13-6-1-1 to -6 (West 1983 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 732, § 10A (West 1971); MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West 1987); MINN. STAT. ANN. §§ 116B.01-.13 (West 1987); NEV. REV. STAT. §§ 41.540-.570 (1986); N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West Supp. 1987); S.D. CODIFIED LAWS ANN. §§ 34A-

provide virtually everyone with standing to sue any alleged polluter for declaratory or injunctive relief in order to protect the state's environment.¹¹ Although these state statutes differ in detail,¹² all SEPA's share the same objectives of improving the quality of environmental decision-making and expanding the role of the private citizen in managing natural resources.¹³ The intended result of SEPA's is to avoid conventional standing limitations¹⁴ and thereby provide greater policing of actions detrimental to the environment.¹⁵ While most SEPA's grant standing to businesses, corporations, and agencies, the major focus and strength of these provisions is the ordinary citizen's right to challenge local, small-scale problems.¹⁶

Like other SEPA's, the Indiana Environmental Protection Act

10-1 to -15 (1986).

11. See DiMento, *Citizens Environmental Legislation in the States: An Overview*, 53 DET. J. OF URB. LAW 413, 418 (1976).

12. A variety of differences exist among SEPA's. For example, the Michigan SEPA allows the plaintiff direct standing before the court. In contrast, the Indiana Act requires plaintiffs to exhaust administrative remedies before they have access to the courts. See *infra* notes 67, 89-92 and 115 and accompanying text. Also, the Michigan, Connecticut and Nevada courts have de novo review power of the environmental agency rules and regulations while the Indiana courts may not examine and reject administrative standards. The Michigan courts may even promulgate new standards when they consider existing ones unreasonable. The other state courts, including Indiana, are not given such broad power under their SEPA's. See *infra* notes 125-28 and accompanying text.

Regardless of the differing procedural innovations, the potential for citizen involvement in the process of environmental control is considerable under most SEPA's and was one intended result of their development. See DiMento, *supra* note 11, at 418-19.

13. DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409, 428.

14. DiMento, *supra* note 11, at 416-18. See *infra* notes 46-47 and 52 and accompanying text.

15. DiMento, *supra* note 11, at 416-18. See *infra* notes 56-57 and 144-46 and accompanying text.

16. The most frequent use and success of SEPA's is their application to local issues. See *Anderson v. State Highway Comm'n*, No. 15609-C (Ingham County Cir. Ct., filed May 8, 1973) (Michigan's SEPA used to save a stand of shade trees), cited in DiMento, *supra* note 11, at 429 n.69; *Minn. Public Interest Research Group v. White Bear Rod and Gun Club*, 257 N.W.2d 762 (Minn. 1977) (Minnesota's SEPA enlisted to enjoin a gun club from operating near a residential area); *Crystal Lake Resort Ass'n v. Village of Beulah*, No. 807 (Benzie County Cir. Ct., filed May 8, 1973) (Michigan's SEPA used to challenge the routing plans of a highway through a small resort town), cited in DiMento, *supra* note 11, at 430 n.70. But see *Roberts v. Michigan*, No. 12428-C (Ingham County Cir. Ct., filed Oct. 23, 1970) (plaintiff invoked MEPA to sue the Highway Department and Secretary of State for failure to control automobile pollution and asked for an injunction against all drivers until more efficient standards could be developed), cited in Sax & Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004, 1083 (1972); *Marshall v. Consumers Power Co.*, No. 3-16-150 (Jackson County Cir. Ct., filed March 28, 1973) (a Michigan resident unsuccessfully tried to use MEPA to challenge the licensing of nuclear power plants in the state), cited in DiMento, *supra* note 11, at 429 n.66.

(IEPA),¹⁷ statutorily confers standing on all legal entities and individuals to sue any alleged polluter, regardless of whether the plaintiff is personally harmed by the defendant's activities.¹⁸ Despite the broad opportunities this

17. IND. CODE ANN. §§ 13-6-1-1 to -6 (West 1983 & Supp. 1987). The Indiana statute appears in the Indiana Code under a chapter entitled "Standing to Sue." Although not its official name, it will be referred to in this note as IEPA, an acronym consistent with other SEPA's.

18. IND. CODE ANN. §§ 13-6-1-1 to -6 (West 1983 & Supp. 1987) provides:

Sec. 1. (a) The attorney general of the state of Indiana, or any state, city, town, county, or local agency or officer vested with the authority to seek judicial relief, any citizen of the state of Indiana, or any corporation, partnership, or association maintaining an office in the state of Indiana may maintain an action for declaratory and equitable relief in the name of the state of Indiana against any individual, partnership, copartnership, firm, company, corporation, association, joint stock company, trust, estate, state agency, or officer, city town, county, or local governmental unit, agency or official, or any other legal entity or their legal representative, agent or assigns, for the protection of the environment of the state from significant pollution, impairment, or destruction. Any citizen, partnership, corporation, association, or public officer or agency, as a condition precedent to maintaining such action, shall give notice in writing by registered or certified mail to the department of natural resources and the department of environmental management or its successor agency in environmental affairs, and to the attorney general of the state, who shall promptly notify all state administrative agencies having jurisdiction over or control of the pollution, impairment, destruction, or protection of the environment for which relief is sought.

(b) No action shall be maintained under this chapter unless the administrative agency to whom such notice was given and having jurisdiction as set out in subsection (a) fails to investigate and conduct a hearing to determine whether or not the accused is a polluter as defined by law or rule. The complainant shall be joined as a party. If the agency fails to hold a hearing and make a final determination within one hundred eighty (180) days after receipt of notice by the attorney general as provided in subsection (a), action may be maintained and such agency need not be joined as a party defendant.

(c) If the administrative agency holds a hearing and makes a final determination within one hundred eighty (180) days, an appeal from its action may be taken in the manner prescribed by law.

(d) In any administrative, licensing, or other such proceeding, and in any action for judicial review thereof which is made available by law, the attorney general of the state of Indiana, or any state, city, town, county, or local agency or officer vested with the authority to seek judicial relief, any citizen of the state of Indiana, or any corporation, partnership, or association maintaining an office in the state of Indiana shall be permitted to intervene as a party upon the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct, programs, or products which may have the effect of significantly impairing, polluting, or destroying the environment of the state.

(e) In any such administrative, licensing, or other such procedure, the agency shall consider the alleged significant impairment, pollution, or destruction of the environment of the state, and no conduct, program or product shall be authorized, approved, or permitted to continue which does, or is reasonably likely to, have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

(f) In any action for judicial review of any proceedings as described in

statute creates for Indiana citizens to privately enforce environmental law, the provision has stirred virtually no response. Since its enactment in 1971, only three cases have reported use of IEPA, each initiated by the same plaintiff. The most recent case dates back to 1976.¹⁹ Unfortunately, these cases offer little substantive interpretation of the statute.²⁰ Although several commentators have noted that IEPA is a failure, no one has yet concluded why this statute — designed to give Indiana citizens an opportunity to pro-

subsection (c), the court shall, in addition to any other duties imposed upon it by law, grant review of claims that the conduct, program, or product under review has, or is reasonably likely to impair, significantly pollute, or destroy the environment of the state.

Sec. 2. (a) In any action maintained under section 1 of this chapter, whenever the petitioner shall have made a prima facie showing that the conduct of the respondent has, or is reasonably likely to impair, pollute, or destroy the environment of the state, the respondent shall have the burden of establishing:

(1) where there is an applicable rule adopted by an agency of the state setting standards for pollution, impairment or destruction, or for antipollution devices, compliance with such rule which shall constitute a prima facie defense to petitioner's claim; or

(2) where there is no applicable rule, that there is no feasible and prudent alternative and that the conduct, program, or product at issue is consistent with and reasonably required for the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its environment from pollution, impairment, or destruction.

(b) Upon making such proof, said respondent shall have rebutted the prima facie showing, and the petitioner shall have the burden of going forward with the evidence.

Sec. 3. Such action shall be brought in a circuit or superior court in the county in which the significant pollution, impairment or destruction is alleged to have occurred.

Sec. 4. The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a report to the court in any such action. The costs thereof may be apportioned to the parties if the interests of justice require.

Sec. 5. The court may grant temporary and permanent equitable relief, or may impose such conditions upon the respondent as are required to protect the environment of the state from pollution, impairment, and destruction.

Sec. 6. In any action where a petitioner or intervenor seeking judicial adjudication as provided by this chapter has failed to intervene in any administrative, licensing or other such proceedings, the court may remit such petitioner, or intervenor to such proceeding for amplification of the record therein, and may order the granting of intervention and the granting of review therein as provided in section 1 of this chapter:

Provided, That where intervention was available in such administrative, licensing or other such proceedings, and where the petitioner or intervenor seeking judicial adjudication hereunder willfully and inexcusably refused intervention therein, the court may dismiss the action with prejudice to the petitioner or intervenor.

19. *Sekerez v. U.S. Reduction Co.*, 168 Ind. App. 526, 344 N.E.2d 102 (1976); *Sekerez v. Youngstown Sheet and Tube Co.*, 166 Ind. App. 563, 337 N.E.2d 521 (1975); *Sekerez v. U.S. Steel Corp.*, 316 N.E.2d 413 (Ind. Ct. App. 1974).

20. *Youngstown* is the only case in which the court interprets any of IEPA's provisions. *Youngstown*, 166 Ind. App. 563, 337 N.E.2d 521. See *infra* notes 78-80 and 103 and accompanying text.

tect their environment — is an impotent weapon for fighting pollution.²¹

This note explores the ineffectiveness of IEPA in the context of other SEPA's, primarily the Michigan Environmental Protection Act (MEPA),²² the leading citizen suit statute in the country.²³ The thesis of this paper is that the procedural requirements of IEPA and the Indiana judiciary's attitude toward the Act destroy any opportunity for meaningful judicial and public involvement in protecting the state's environment. This note first examines several advantages that Indiana and other states possess by virtue of having a SEPA.²⁴ Next, how the environmental plaintiff may use the statute is explored.²⁵ The third section examines several characteristics of IEPA which, in light of other SEPA's, are impeding use of the statute.²⁶ Finally, changes are suggested which, if adopted, will transform the currently unused IEPA into an effective weapon in the arsenal for fighting

21. Two possible reasons IEPA is not working are because "significant" pollution, implying a high burden of proof, is required and also because the defendant may rebut this showing, if made, through evidence of "compliance with applicable pollution standards." Abrams, *Threshold of Harm in Environmental Litigation: The Michigan Environmental Protection Act As A Model of a Minimal Requirement*, 7 HARV. ENVTL. L. REV. 107, 125 (1983). See *infra* note 83 and accompanying text. IEPA's prerequisites of notifying various agencies and exhausting administrative remedies are distasteful to plaintiffs. Moreover, the very restrictive view of standing advanced by the court in *Youngstown* severely limits use of the provision. Shaffer, *Survey of Administrative Law*, 10 IND. L. REV. 37, 46-48 (1976). See *infra* text accompanying notes 89-103. "Indiana citizens are either unaware of this statute or, alternatively, are choosing not to use it because they find unpalatable the 180 day waiting period to maintain an action in court." Note, *Citizen Standing in Environmental Licensing Procedures*, 18 IND. L. REV. 989, 1026 n.241 (1985). See *infra* text accompanying notes 89-95. Under IEPA, environmental litigation is restricted to a limited set of circumstances — only when the citizen-litigant has exhausted all administrative remedies. DiMento, *supra* note 13, at 412.

22. MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West 1987). For complete text see *infra* note 113.

23. MEPA is a landmark piece of environmental legislation in the United States. Letter from Ralph A. MacMullen, Director, Michigan Dept. of Natural Resources, to the Editor, *State Journal*, Lansing (Jan. 18, 1972), cited in Sax & Connor, *supra* note 16, at 1004. The influence of Professor Joseph Sax, the drafter of MEPA, has been felt across the country. Many states now have enacted some version of MEPA. In addition, the federal government even considered enacting an EPA based on MEPA. S. 1104, 93d Cong., 1st Sess. (1973). See *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 224 N.W.2d 883 (1975). "Michigan's EPA was the first legislation of its kind and has attracted worldwide attention. The act has also served as a model for other states in formulating environmental legislation." *Id.* at 304-05, 224 N.W.2d at 887. The passage of the Act received worldwide press coverage. See, e.g., *Time*, August 24, 1970, at 37; *N.Y. Times*, August 3, 1970, at 36, col. 2; *Le Courier (UNESCO)*, July, 1971, at 20; *Proceedings Int'l Symposium on Environmental Disruption, Tokyo, 1970 (Asahi Evening News, Tokyo)*, cited in *Ray*, 393 Mich. at 304 n.4, 224 N.W.2d at 887 n.4.

24. See *infra* notes 28-63 and accompanying text.

25. See *infra* notes 64-85 and accompanying text.

26. See *infra* notes 89-188 and accompanying text.

environmental deterioration.²⁷

II. THE SEPA ADVANTAGE

A. *The Relative Sphere of Regulation Under NEPA, "Little NEPAs" and SEPAs*

NEPA is a major means of environmental regulation.²⁸ Nevertheless, the thresholds and the limited subject matter of NEPA highlight the differences between the goals and purposes of NEPA as compared to SEPAs.²⁹ NEPA requires federal agencies to file Environmental Impact Statements (EIS) which discuss the environmental consequences of federal actions.³⁰ Because NEPA only applies to major federal actions that significantly affect the environment, NEPA monitors a limited subject matter.³¹ Neither private behavior nor federal activities defined as having less than a significant impact on the environment qualify for NEPA protection.³²

In contrast to NEPA's concern with the environmental consequences of an unwieldy national bureaucracy, SEPAs apply to more local situations. Although perhaps not as newsworthy as suits brought under NEPA, many local issues are of substantial environmental consequence.³³ In general,

27. See *infra* notes 188-230 and accompanying text.

28. One commentator hails NEPA as an environmental bill of rights due to its broad applicability to federal actions. Coggins, *Preparing An Environmental Impact Lawsuit, Part I: Defining a Claim for Relief Under the National Environmental Policy Act of 1969*, 58 IOWA L. REV. 277, 287 (1972).

29. Abrams, *supra* note 21, at 129 n.164.

30. NEPA establishes procedures for federal agencies to follow when considering federal action. Every agency must file an Environmental Impact Statement (EIS) for "proposals for legislation and other major Federal actions significantly affecting the environment." 42 U.S.C. § 4332(c) (Law Co-op. 1982 & Supp. III 1985).

The EIS is a detailed statement including:

- (i) The environmental impact of the proposed action;
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) alternatives to the proposed action;
- (iv) the relationship between short-term use of man's environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

31. 42 U.S.C. § 4332(c) (Law Co-op. 1982 & Supp. III 1985). See Abrams, *supra* note 21, at 129.

32. See *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360 (D. Md. 1973), *aff'd*, 500 F.2d 29 (4th Cir. 1974) (NEPA could not be used to challenge highway construction since letter from federal highway administrator approving construction did not constitute major federal action under NEPA). This construction may have local environmental effects, however, which may be considered under a SEPA.

33. See *supra* note 16 and accompanying text. EPAs have preserved local water quality

SEPA's are designed to create a broad, private right of action without the limits set forth in NEPA.³⁴ The burden of proof a plaintiff must sustain to use a SEPA, although different from state to state, is substantially lower than the threshold of harm a plaintiff must prove under NEPA.³⁵ This relaxed burden of proof is consistent with the strength of SEPA's demonstrated in other states — a vitally important tool that is indispensable for improving environmental protection on a local level.³⁶

Furthermore, NEPA provides for less citizen involvement than most SEPA's. Under NEPA, citizens only tangentially enter the process of evaluating an activity's adverse effect on the environment. Although citizens may criticize the EIS³⁷ prepared by an agency, they are limited to responding to the agency's study.³⁸ In contrast, one goal of SEPA's is to provide the public with an opportunity to become directly involved in managing the state's resources.³⁹ SEPA's arm the citizen with direct power to initiate proceedings against an alleged polluter, thereby increasing the number of potential guardians of the environment.⁴⁰

Several states have enacted Environmental Policy Statutes, often called "little NEPA's," that require the filing an an EIS at the state or local

and unique natural resources. These statutes also have guided development to protect environmental qualities. DiMento, *supra* note 11, at 447. See generally Sax & Connor, *supra* note 16.

34. For explanation of these limits, see *supra* notes 29-32 and accompanying text. Although some SEPA's, including IEPA, contain modifiers such as "unreasonable," "material," or "significant" to describe the type of pollution qualifying as a violation of the act, many courts have construed these terms to preclude frivolous or petty claims. See *infra* notes 225-28 and accompanying text.

35. Abrams, *supra* note 21, at 128-29. See *infra* text accompanying notes 165-88.

36. See *supra* note 16 and accompanying text.

37. The EIS process provides the public with information regarding agency actions and their environmental consequences. When they have complaints, however, the public's only recourse is to petition agencies or Congress about the proposed action. See Abrams, *supra* note 21, at 128 n.164. See also *supra* note 30 and accompanying text.

38. Citizens may also challenge decisions not to prepare an EIS. They may not initiate the EIS process, however, and are restricted to responding to the agency sponsoring the project. These rights are governed by the Admin. Procedure Act, 5 U.S.C. §§ 551-56; 702-06 (Law Co-op. 1982 & Supp. 1985). The narrow "arbitrary and capricious" standard of review binds a federal court when reviewing agency decisions not to prepare an EIS.

Agency response to the public is typically poor, as one notewriter has observed:

As the problems of the nation and the states multiplied, the laws became more prolix and the discretion granted administrators became greater and greater. . . . Management of natural forests and national parks is left to federal agencies which in turn promulgate regulations governing the use of these properties but seldom allow a public voice to be heard against any plan of the agency.

Note, *supra* note 8, at 567 n.24. "Achieving meaningful public participation in Federal agency decisions that have an impact on the environment seems to be one of the most important challenges facing Federal agencies." McGarity, *supra* note 9, at 807 n.20.

39. DiMento, *supra* note 13, at 428 and accompanying text.

40. See *infra* notes 54-57, 144-46 and accompanying text.

level.⁴¹ In those states, including Indiana,⁴² where the policy act applies

41. CAL. PUB. RES. CODE §§ 21000-21174 (West 1986); CONN. GEN. STAT. §§ 229-1 to -1h (West 1985); HAW. REV. STAT. § 343-1 (1985); IND. CODE ANN. §§ 13-1-10-1 to -8 (West 1983 & Supp. 1987); MD. NAT. RES. CODE ANN. §§ 1-301 to -305 (1983); MASS. GEN. LAWS ANN. ch. 30, § 61, 62-62H (West 1979); MINN. STAT. ANN. §§ 116D.01 - .07 (West 1987); MONT. CODE ANN. §§ 75-1-101 to -105, § 75-1-201 (1985); NY ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984); N.C. GEN. STAT. § 113A-1 (1983); P.R. LAWS ANN. tit. 12, §§ 1121-1127; S.D. CODE ANN. §§ 34A-9-1 to -12 (Law Co-op. 1986); VA. CODE ANN. §§ 10-17.107 to .112 (1985); WASH. REV. CODE ANN. §§ 43-21C.010 - .910 (1983); WIS. STAT. ANN. § 1.11 (West 1986).

42. IND. CODE ANN. §§ 13-1-10-1 to -8 (West 1983 & Supp. 1987) provides:

Sec.1. The purposes of this chapter are: to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote effort which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state.

Sec.2.(a) The General Assembly, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Indiana, in co-operation with the federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Indiana citizens.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the State of Indiana to use all practical means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources to the end that he state may:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all citizens of Indiana safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wise sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The General Assembly recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec.3 The general assembly authorizes and directs that, to the fullest extent possible:

(1) the policies, rules, and laws of the state of Indiana shall be interpreted and administered in accordance with the policies set forth in the chapter; and

exclusively to state agencies, only those state activities with "significant"

(2) all agencies of the state shall:

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures which will insure that unquantified environmental amenities and values may be given appropriate consideration in decision-making with economic and technical considerations;

(C) include in every recommendation or report on proposal for legislation and other major state actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed actions;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitment of resources which would be involved if the proposed action should be implemented.

(Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor and to the public and shall accompany the proposal through the agency review process. The air pollution control board, water pollution control board, and solid waste management board shall by rule define which actions constitute a major state action significantly affecting the quality of the human environment.)

(D) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternatives uses of available resources;

(E) recognize the long-range character of environmental problems and, where consistent with the policy of the state, lend appropriate support to initiatives, resolution, and programs designed to maximize state cooperation in anticipating and preventing a decline in the quality of mankind's environment;

(F) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment; and

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects.

Sec.4 All agencies of the state shall review their statutory authority, administrative rules, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies which prohibit full compliance with the purposes and provisions of this chapter.

Sec.5 Nothing in section 3 and 4 of this chapter shall in any way affect the specific statutory obligations of any state agency:

(1) to comply with criteria or standards of environmental quality;

(2) to coordinate or consult with any other federal or state agency; or

(3) to act, or refrain from acting contingent upon the recommendations or certification of any other federal or state agency.

Sec.6 Nothing in this chapter shall be construed to require an environmental impact statement for the issuance of a license or permit by any agency of the state.

consequences for the environment are addressed — neither private nor less than significant state behavior is checked.⁴³ Similar to NEPA, these limited statutes cannot remedy the local environmental abuse that SEPA's are meant to address.⁴⁴

B. The Relative Sphere of Regulation Under the Common Law and SEPA's

Another distinct advantage of SEPA's stems from the inability of the common law to deal with many environmental issues.⁴⁵ Although the common law theories of trespass, private nuisance, and public nuisance are all theoretically viable means of abating pollution, these causes of action are actually of very limited usefulness because each requires the environmental plaintiff to show standing.⁴⁶ To the extent that a plaintiff must prove actual

Sec.7. Policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of State agencies.

Sec.8. Any state agency that is required by the National Environmental Policy Act (P.L. 91-190) to file a federal environmental impact statement shall not be required to file a statement with the state government as provided under sections 3 and 4 of this chapter, unless the action contemplated requires state legislation or state appropriations.

IND. CODE ANN. §§ 13-1-10-1 to -8 (West 1983 & Supp. 1987).

43. The Environmental Policy Acts in California, Hawaii, New York, and Washington apply the impact statement requirement to local governments as well as state governments. Under these statutes, impact statements must be filed on private land development, a requirement which has become very controversial in these states. This extension of the EIS to private development is in addition to the requirement that private developers meet zoning and other prerequisites in the local land use control process. Unfortunately, Indiana does not offer the additional protection of requiring local agencies to file impact statements on private activity which affects the environment. D. MANDELKER, *NEPA LAW & LITIGATION, THE NATIONAL ENVIRONMENTAL POLICY ACT* (1984).

44. See *supra* note 16 and accompanying text.

45. SEPA's create private remedies for redressing polluters without the encumbered common law theories of nuisance and trespass. See Fitzpatrick, *Private Legal Remedies To Air Pollution in Illinois*, 59 ILL. B.J. 746, 756-57 (1971).

46. *Baker v. Carr*, 369 U.S. 186 (1962) (standing requires that a plaintiff show a legally protected interest which has been violated so that he is harmed in some tangible way).

Several elements must be present before a plaintiff has standing in a common law trespass action. See *State ex rel. Green v. Gibson Circuit Court*, 246 Ind. 446, 206 N.E.2d 135 (1965) (because trespass actions are possessory in nature, the plaintiff must have a property interest and must prove that his exclusive rights to chattel or land have been violated in order to have standing). Also, the defendant's act must be an invasion of tangible matter to use the trespass theory. See *Metzger v. Penn. Ohio & Detroit Railroad Co.*, 147 Ohio St. 406, 66 N.E.2d 203 (1946) (smoke insufficient invasion for trespass because not tangible); *Amphitheatres, Inc. v. Portland Meadows*, 184 Or. 336, 198 P.2d 847 (1948) (light insufficient invasion for trespass since not tangible); *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954) (gas insufficient invasion for trespass because not tangible).

Standing is often a bar to suits brought under private nuisance. See *Sans v. Ramsey Golf & Country Club*, 20 N.J. 438, 149 A.2d 599 (1959) (the damage the plaintiff suffers must be distinct from and more severe than that which the general public suffers). Several additional

personal injury, challenging many environmentally-damaging activities is difficult.⁴⁷

Consider an individual who tries to sue under nuisance law to abate industrial pollution in his town. Because the contamination is equally harmful to everyone in the community, his case will probably be dismissed for lack of standing.⁴⁸ It is insufficient that this individual suffers the same inconvenience and harm as the general public.⁴⁹ If no identifiable party has the individual injury required to prove standing, the damage will go unabated⁵⁰ unless the Attorney General for the state or another official with

elements must be present to maintain a private nuisance action. The plaintiff must possess a property interest and must show that the defendant's conduct substantially and unreasonably interferes with the plaintiff's use of his property. The plaintiff must also prove that his damage is greater than any benefit derived from defendant's activities. *Id.* at 448-49, 149 A.2d at 605.

There are several difficulties in obtaining standing under public nuisance as well. *See* *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972). Plaintiff may bring a public nuisance action when damage to his property is shared by a significant number of others in the area. The plaintiff's case will be dismissed for lack of standing, however, if his injury is not distinct and separate from the injury to the public at large. Another disadvantage of public nuisance lies in the number of people who must be affected before an alleged nuisance is considered public. *Id.* at 184, 494 P.2d at 705-06.

47. *See* *Sierra Club v. Morton*, 405 U.S. 727 (1972). The case was dismissed because the plaintiff environmental group lacked standing. They failed to show that they used the national park allegedly being polluted; they were not personally harmed. To have standing, the injured interest may be conservational or aesthetic, as well as economic. However, the plaintiff himself must still suffer an injury. *See also* *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1972). Here an environmental group had standing to sue the ICC for increasing railroad freight rates which would lead to an increase in non-recyclable commodities resulting in the need to use more natural resources to produce such goods. The environmental group used the forests, streams, and parks which would be affected by the rate increase; therefore, they were personally affected and had standing.

48. Note, *supra* note 8, at 577. *See* *Schroder v. City of Lincoln*, 155 Neb. 599, 52 N.W.2d 808 (1952) (private individual could not maintain action for public nuisance against city for installing an automatic bank teller on sidewalk in absence of showing he sustained some special injury distinct from that suffered by the public).

49. Generally, the plaintiff's damage must differ in kind, rather than degree, from that shared by the general public. *See* *Poulos v. Dover Boiler & Plate Fabrications*, 5 N.J. 580, 76 A.2d 808 (1950) (fact that plaintiff used a navigable stream five times as often as everyone else did not give him a right of action); *Bouquet v. Hackensack Water Co.*, 90 N.J. 203, 101 A. 379 (1916) (fact that plaintiff used a highway more frequently than others did not give him a right of action). In some instances, however, a court will recognize plaintiff's standing when the nuisance is a private one as well as a public one. *See* W. PROSSER & W. KEETON, *THE LAW OF TORTS*, 648 (5th ed. 1984).

50. *See* W. PROSSER, *supra* note 49, at 646. "[T]here might be cases of environmental degradation in remote wilderness areas, where no individual may be able to establish material injury. Or there may be serious conflicts between the interests of those suffering immediate material injury and other, more remotely involved interests that should nonetheless be considered." Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1734-47 (1975). Under SEPA's, however, individuals may take the part of private Attorneys General thereby circumventing the common law standing requirements. *See* Note, *supra* note

similar authority steps in. As a consequence, under the common law theories much pollution goes unchecked and many polluters escape legal accountability.⁵¹

By statutorily granting standing to plaintiffs, regardless of whether traditional injury-in-fact exists or not, SEPA's are a more useful weapon for fighting pollution than the common law theories.⁵² These provisions allow a plaintiff to obtain relief on behalf of the public interest without proving the technical standing requirements of the common law. Therefore, SEPA's are a vital means of achieving environmental quality.⁵³

C. Policy Justifications for SEPA's

Several strong policy arguments justify the existence of a SEPA. The sheer importance of protecting the state's environment justifies the creation of a statute that will improve environmental control.⁵⁴ Preservation of natu-

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51. "[T]he legal profession must go into the courts and argue that . . . pollution must be prohibited not because it may or may not constitute a trespass, or some other common law tort, but because it violates a fundamental right, the right to life. . . ." These rights have been smothered "in the straight-jacket restrictions of nuisance, trespass. . . ." Fitzpatrick, *supra* note 45, at 758.

The recently adopted Environmental Protection Act, creates an additional private remedy . . . by granting a right to any person, whether or not injured, to file a complaint. . . ." Fitzpatrick, *supra* note 45, at 756.

[T]he common law provisions for private citizen response to environmental problems are limited by technical, legal requirements and hobbled by the complex nature of environmental problems which are not easily characterized as causing personal injury. With this conceptual inability of the common law to deal with twentieth century environmental problems, the private citizen must ordinarily look to a statutory provision of standing, and where it does not exist, he is left without a remedy.

Note, *supra* note 8, at 579.

52. See DiMento, *supra* note 13, at 412-13. "At a time when preservation of the environment is one of the most pressing issues of the day, we can ill afford to bar cases involving major public interests on narrow technical grounds." Oakes, *Environmental Litigation: Current Development and Suggestions for the Future*, 5 CONN. L. REV. 531, 536 (1973).

53. See Note, *supra* note 8, at 561.

54. For evidence of the vast wasteland developing throughout the United States warranting new measures to protect the environment, see *supra* note 3 and accompanying text. See also *McCloud v. City of Lansing*, No. 13057-C, (Ingham County Cir. Ct., Decision, May 14, 1971). The plaintiffs challenged the routing of a utility line through a public park. The court complimented the plaintiff for his environmental concern: "'The plaintiff . . . put it well with reference to the . . . public interest' " in the environment, "'an interest which is there to be protected, an interest which [the plaintiff] possesses . . . and an interest which our children born and yet to be born possess. . . . I commend [the plaintiff] for bringing this litigation' ", cited in Sax & DiMento, *Environmental Citizens Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 36 (1974).

It is a timely and important concern that courts permit interested individuals and groups to defend the environment through litigation. The Michigan and Massachusetts SEPA's are the

ral resources is the truest form of defending the nation.⁵⁵ By affording the public the opportunity to sue alleged polluters, the efforts of the environmental agencies are supplemented⁵⁶ which, in turn, increases the likelihood that maximum defense of the environment will be achieved. The greater the number of guardians with authority to vindicate the public interest in environmental protection, the greater the ability to hold polluters accountable.⁵⁷

In addition to the positive cumulative effect of allowing citizens to sue polluters, SEPA's allow the ordinary individual, who is typically unable to influence state representatives or to buy slick advertising in the media, to plead his case.⁵⁸ For example, a new highway may be the latest link in a grandiose transportation network to an administrative official, whereas it may serve as an annoying, dangerous development to the residential neighborhood that it divides.⁵⁹ A small stream or forest, which developers view as a mere hindrance to plans for a sprawling new shopping center, is often a special source of joy and beauty to nature lovers who view its destruction as substantial environmental damage.⁶⁰ Although these are simple values, they are as important to a growing segment of the American public as the growth of commercialism and industry prevalent today.⁶¹ Through SEPA's, those who hold these often overlooked values have means of redressing their

beginnings of putting words into action toward man's improvement of the environment that he has damaged and destroyed. Hatch, *supra* note 4, at 126.

55. Preservation of our homeland is not a partisan issue. It demands attention and concern from all Americans of every political persuasion. Protecting our soil, air, and water is a more valid form of national defense than most weapon systems. "If we ourselves lay waste to our country, ravaging the land that is our home, what will there be left for 'star wars' to defend?" Kean, *The Environmental Movement in 1985: Between NEPA and 2000*, 10 COLUM. J. OF ENVTL. L. 199, 200 (1985).

56. "[B]roadening standing to allow the private citizen to complement agency action is necessary because administrative bodies cannot carry the entire burden of restoring and maintaining the public domain." Note, *supra* note 8, at 576.

57. "Citizen monitoring and enforcement, with ample precedent in antitrust and securities fraud litigation, add a healthy, fresh dimension to state and local abatement efforts. Society is in no position to refuse pollution monitoring and enforcement by so widely distributed and resourceful a staff as its own citizenry." McGregor, *Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute*, 1 ENVTL. AFF. 606, 621 (1972). "When regulators either will not or cannot do the job, it is up to citizens to do it. And the best form of 'self-help' I know of is a broad 'citizens-right-to-sue' law." Kean, *supra* note 55, at 207.

58. Sax & Connor, *supra* note 16, at 1081. See Note, *supra* note 8, at 570.

59. See *Crystal Lake Resort Ass'n v. Village of Beulah*, No. 807 (Benzie County Cir. Ct., filed May 8, 1973), cited in DiMento, *supra* note 11, at 430 n.70. See also *Tri-Cities Environmental Action Council v. A. Reenders Sons, Inc.*, No. 2737 (Ottawa County Cir. Ct., filed Feb. 26, 1973) (challenge under MEPA to a highway routing plan), cited in DiMento, *supra* note 11, at 430 n.70.

60. See Sax & Connor, *supra* note 16, at 1081.

61. *Id.*

grievances which have been unnoticed or ignored.⁶² The environmentalist finally has some power to control the quality of his environment.⁶³

III. THE INDIANA ENVIRONMENTAL PROTECTION ACT

A. *The Statute Itself*

Consistent with most SEPA's, IEPA confers standing on individuals and various entities to sue any polluter in the courts of the county where the pollution occurred.⁶⁴ The courts may grant temporary and permanent equitable relief in the form of a declaratory judgment or an injunction.⁶⁵ Violations under the statute are restricted to activities that significantly pollute, impair, or destroy the state's environment, terms not defined within the Act.⁶⁶

Despite these broad standing provisions, the plaintiff must overcome several procedural obstacles before he may present his case to the judiciary.⁶⁷ As a condition precedent to bringing suit, the citizen or entity must send written notice of the intention to sue to the Department of Natural Resources, Department of Environmental Management, and the Attorney General who, in turn, must notify the appropriate state environmental agency.⁶⁸ The plaintiff must then wait six months for the agency to address the problem by holding a hearing or issuing a final order.⁶⁹ Unlike the opportunity to personally pursue the complaint in a court of law, the plaintiff is merely joined in the administrative hearing.⁷⁰ Other than on appeal from the administrative ruling,⁷¹ the plaintiff may only have standing before the judiciary if the agency fails to hold a hearing and enter a final determination in the plaintiff's case.⁷²

One of the two defenses available to a defendant under IEPA also re-

62. Note, *supra* note 8, at 564.

63. Sax & Connor, *supra* note 16, at 1080-81. See note, *supra* note 8, at 561.

64. IND. CODE ANN. §§ 13-6-1-1, 3 (West 1983 & Supp. 1987). For complete text, see *supra* note 18.

65. IND. CODE ANN. § 13-6-1-5 (West 1983 & Supp. 1987).

66. IND. CODE ANN. § 13-6-1-1(a) (West 1983 & Supp. 1987); *Sekerez v. U.S. Steel Corp.*, 316 N.E.2d 413, 414 (Ind. Ct. App. 1974) (court noted that nowhere in the statute are the terms pollution, impairment, or destruction defined).

67. IND. CODE ANN. § 13-6-1-1(a) (West 1983 & Supp. 1987). In Indiana, environmental litigation is restricted to a limited set of circumstances — potential plaintiffs are precluded from the courts unless they fully exhaust administrative remedies. *DiMento*, *supra* note 13, at 412.

68. IND. CODE ANN. § 13-6-1-1(a) (West 1983 & Supp. 1987).

69. IND. CODE ANN. § 13-6-1-1(b) (West 1983 & Supp. 1987).

70. IND. CODE ANN. § 13-6-1-1(b) (West 1983 & Supp. 1987).

71. IND. CODE ANN. § 13-6-1-1(c) (West 1983 & Supp. 1987).

72. IND. CODE ANN. § 13-6-1-1(b) (West 1983 & Supp. 1987).

lates to the government agency. Any defendant in compliance with an applicable administrative rule or standard for pollution control has a prima facie defense to the plaintiff's claim.⁷³ The defendant may also escape responsibility on the ground that, although there is no applicable rule, there is no prudent or feasible alternative to his conduct and that his conduct is consistent with the public health, safety, and welfare.⁷⁴ This defense deters any attempt to get effective judicial review of regulated activity adversely affecting the environment.

B. Application of IEPA

A hypothetical situation may help illustrate the limited usefulness of IEPA. Suppose a steel manufacturer in Gary, Indiana, is discharging chemicals into the atmosphere. Some residents of Gary and an environmental group based in Valparaiso, Indiana, wish to challenge the steel mill's conduct under IEPA.

In order to have standing to sue, the plaintiffs must fulfill all of the procedural prerequisites of the statute or risk dismissal of their case.⁷⁵ The plaintiffs must send written notice of their suit to the Department of Natural Resources, Department of Environmental Management, and to the Attorney General, who will then notify the Air Pollution Control Board having jurisdiction over the mill.⁷⁶ These prerequisites are the first step in the maze of pursuing polluters under IEPA. Furthermore, the plaintiffs must wait six months for the agency to hold a hearing or issue a final order regarding the factory's emissions.⁷⁷ Importantly, the Air Pollution Control Board must both fail to hold a hearing *and* issue a final order before the Gary residents and the environmental group have standing before the court.⁷⁸ The Indiana Court of Appeals stressed that standing should be granted only in limited circumstances.⁷⁹ Therefore, if the Air Pollution Control Board fulfills only one of these functions, the plaintiff will not have access to the court.⁸⁰

Now assume that the plaintiffs have fulfilled all of the procedural prerequisites and that the agency has failed to both hold a hearing and to issue a final order. The plaintiffs finally have standing. At this point, however, the steel manufacturer may attempt to invoke the prima facie defense of

73. IND. CODE ANN. § 13-6-1-2(a)(1) (West 1983 & Supp. 1987).

74. IND. CODE ANN. § 13-6-1-2(a)(2) (West 1983 & Supp. 1987).

75. See *supra* notes 67-72 and accompanying text.

76. See *supra* note 68 and accompanying text.

77. See *supra* note 69 and accompanying text.

78. *Sekerez v. Youngstown Sheet and Tube Co.*, 166 Ind. App. 563, 337 N.E.2d 521 (1975).

79. *Id.* at 569, 337 N.E.2d at 525. See *infra* note 103 and accompanying text.

80. *Id.*

compliance with administrative standards.⁸¹ The statute gives deference to administrative agencies and their work by providing the defendant's conduct with a presumption of validity through this defense. A finding that the steel mill's level of chemical emission is within the limits set by the Air Pollution Control Board will serve as a *prima facie* defense to the plaintiffs' claim. This defense results even if the regulatory limits allow excessive pollution.⁸²

Once the defense is established, the burden shifts back to the plaintiffs.⁸³ This shift leaves the plaintiffs in a difficult position since, under IEPA, the court does not have power to review agency regulations or consider their effectiveness in light of the facts of the case.⁸⁴ In other words, the plaintiffs cannot sustain their burden of proof where the defendant acted in accordance with agency rules, since the rules may not be rejected by the court. Whether the regulations are reasonable or unreasonable, IEPA shields from judicial scrutiny the agency standards set by the Air Pollution Control Board or any other administrative body having jurisdiction. Dismissal of their case leaves the plaintiffs with the impractical common law theories, or virtually without any means of fighting the chemicals polluting the state's atmosphere.⁸⁵

IV. PROBLEMS WITH IEPA

IEPA is not helpful for fighting pollution for several reasons. First, IEPA violates the objectives of SEPA's. Second, IEPA's procedural impediments curtail use of the Act, as is evident from an examination of several SEPA's which do not possess procedural barriers. Finally, the requirement of a high threshold of harm to sustain the burden of proof adds to the impotency of IEPA.

A. *IEPA Violates the Objectives of SEPA's*

The purposes of a SEPA are to improve the quality of the environment and increase public participation in environmental law enforcement.⁸⁶ Citizen initiative in the courtroom provides an essential supplement to the envi-

81. See *supra* note 73 and accompanying text.

82. For the inability of administrative agencies to set down objective, effective environmental controls, see *infra* notes 118-20 and accompanying text.

83. IND. CODE ANN. § 13-6-1-2(b) (West 1983 & Supp. 1987). The defendant under IEPA may rebut a showing of significant pollution, impairment, or destruction through evidence of compliance with an applicable pollution standard. Abrams, *supra* note 21, at 125.

84. Compare with MEPA under which Michigan courts have power to reject agency standards and even promulgate new ones. See *infra* notes 125-28 and accompanying text.

85. See *supra* notes 45-53 and accompanying text.

86. DiMento, *supra* note 13, at 428.

ronmental agencies' regulation and enforcement.⁸⁷ Also, removing technical standing requirements through SEPAs increases the number of potential guardians of the environment, giving rise to greater policing of polluters.⁸⁸

For several reasons, however, the Indiana statute has not served these objectives. The legislature unnecessarily restricted the statute by requiring a plaintiff to exhaust all administrative remedies before gaining access to the courts.⁸⁹ This inconvenience alone has been cited as one reason Indiana citizens do not use IEPA.⁹⁰ As previously illustrated, this procedure effectively precludes citizens from playing an active role in the environmental decision-making process.⁹¹ Instead of having his complaint heard by the judiciary, the statute requires that a plaintiff wait six months for an agency to address the issue before access to the courts is available. While an agency is considering the case, the concerned citizen is merely a passive amicus.⁹² He is denied the opportunity to initiate private litigation and fight for injunctive or declaratory relief himself. Instead, environmental agencies, isolated from citizen action and too close to those they are supposed to regulate, handle the citizen's complaint.⁹³ The agency might not even hold a hearing regarding the plaintiff's grievance but may simply issue a final order.⁹⁴ Thus, IEPA does not foster citizen input, despite the goal of SEPAs to increase public participation.⁹⁵

In addition to the burdensome administrative requirement imposed by the legislature, the judiciary's interpretation of the statute renders IEPA nearly worthless. Although no legislative history is available regarding the purpose behind the enactment of IEPA, logic insists that the legislature intended to develop a tool for citizens to use to fight pollution, despite the burdensome agency requirement.⁹⁶ The very existence of IEPA indicates

87. Sax & DiMento, *supra* note 54, at 2.

88. See *supra* notes 56-57 and accompanying text.

89. IND. CODE ANN. § 13-6-1-1(a) (West 1983 & Supp. 1987). See *supra* note 67 and accompanying text.

90. Shaffer, *supra* note 21, at 46, 48; Note, *supra* note 21, at 1026 n.241; DiMento, *supra* note 13, at 412.

91. See notes 75-80 and accompanying text. Although many states have enacted SEPAs, barriers in the form of restrictions and redtape remain. Kean, *supra* note 55, at 207.

92. IND. CODE ANN. § 13-6-1-1(b) (West 1983 & Supp. 1987).

93. See *infra* notes 118-22 and accompanying text.

94. See *supra* notes 78-80 and accompanying text.

95. See DiMento, *supra* note 13 and accompanying text.

96. See *Thompson v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972) (courts must construe NEPA so as not to frustrate congressional policy of promoting efforts to eliminate damage to the environment). See also *State v. Griffin*, 226 Ind. 279, 79 N.E. 537 (1948). The court is bound by the rule that "a statute must be reasonably and fairly interpreted so as to give it efficient operation, and to give effect . . . to the intention of the legislature. . . . It should not be wantonly narrowed, limited or emasculated and rendered ineffective, absurd or nugatory. If possible it should be allowed to perform its intended mission as shown by the existing evils to

legislative desire to provide additional means of controlling pollution.⁹⁷ To presume otherwise would render IEPA an empty gesture to the public. Also, the legislature passed IEPA only two years after NEPA⁹⁸ and at the same time that several other states enacted their SEPAs.⁹⁹ Thus, the Indiana courts should construe the statute in light of the objectives of SEPAs¹⁰⁰ without unnecessarily limiting or narrowing the statute.¹⁰¹

Nevertheless, the Indiana judiciary took a strict and overly cautious approach in the one case construing IEPA.¹⁰² In addition to the administrative prerequisites making standing difficult, the Indiana Court of Appeals erected a wall around the statute making it even less amenable to public use. The court considered the tenor of the provision as calling for a strict construction of standing and sparing use.¹⁰³ The court's comments can only

be remedied." *Id.* at 284, 79 N.E.2d at 540.

97. Similarly, MEPA's drafter indicates that MEPA was developed to increase private initiative, expand judicial involvement, and restrict agency authority, all with the intention of benefiting the environment. *See Sax & Connor, supra* note 16, at 1005.

98. NEPA was enacted in 1969; IEPA was enacted in 1971. Although individuals may not invoke NEPA themselves, the statute was developed in part to present the public with information regarding environmental consequences of agency action. *See McGarity, supra* note 9, at 807.

99. MEPA was enacted in 1970. Minnesota enacted a SEPA in 1971 and New Jersey enacted a provision in 1974. Since agencies have failed in their responsibility of protecting the public's environmental interests, MEPA was developed to allow citizens, the logically proper defenders of the environment, access to court to redress pollution. Citizens may finally participate. Butler & Cameron, Book Review, 1 *ECOLOGY L.Q.* 228 (1971) (reviewing Sax, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971)). *See Dept. of Transp. v. PSC Resources, Inc.*, 159 N.J. Super. 154, 387 A.2d 393 (1978). In this case, a property owner invoked the New Jersey SEPA to sue a corporation operating an oil reprocessing facility. The court commented that the statute was developed for those instances where the government agencies do not take necessary action; an individual may be assured a course of action under the SEPA. The broad language of the Act indicates that the provision was developed to allow individuals to supplement existing agency action. *Id.* at 163, 387 A.2d at 397.

100. DiMento, *supra* note 13, at 428 and accompanying text. *See supra* notes 87-88 and accompanying text.

101. *See supra* note 96 and accompanying text. The courts are given the important responsibility of ensuring that SEPAs are interpreted consistently with their objectives. SEPA "legislation is based on the premise that the courts will be more receptive to increased protection of natural resources than are administrative agencies set up to pursue that goal. To the extent this is an accurate evaluation, [SEPAs] will provide for increased protection of the environment." Note, Note: *The Minnesota Environmental Rights Act*, 56 *MINN. L. REV.* 575, 639 (1972).

102. *Sekerez v. Youngstown Sheet and Tube Co.*, 166 Ind. App. 563, 337 N.E.2d 521 (1975).

103. *Id.* at 569, 337 N.E.2d at 525. "Although IC 1971, 13-6-1-1(b) accords standing to bring an action, it does so under limited circumstances. The general tenor of its provisions is restrictive and an action thereunder is not permitted unless an agency fails to hold a hearing and make a final determination." The court dismissed the plaintiff's complaint since the agency had issued a final order, although no hearing was ever held. "There has been no showing in the case at bar that the agency refused to proceed. . . . [I]t must be concluded that

be interpreted as an effort to deter use of the statute, contrary to what the legislature must have intended when enacting IEPA. Consequently, the SEPA objective of improving the environment through the citizenry is violated and legislative will is frustrated.

The Indiana Supreme Court is apparently critical of citizen standing provisions generally. In response to another public lawsuit statute,¹⁰⁴ the court commented on the alleged dangers of granting standing to an individual without legal injury-in-fact. The court stressed that Machiavellians living in Utopian communities would enlist such statutes while pretending to sue on behalf of the public.¹⁰⁵ According to the court, such liberal statutes allow those with pure hearts and empty heads to bring frivolous lawsuits.¹⁰⁶ The Indiana Court of Appeals apparently shares this attitude, as it insisted that standing under IEPA is only to be granted in very limited circumstances,¹⁰⁷ in spite of legislative intent to the contrary.

The Indiana Court of Appeals' view is erroneous, however, and should be reconsidered in light of the legislature's March 6, 1971, amendment to the statute¹⁰⁸ and other state's experiences with SEPA's. Recognizing the dangers of Machiavellian or frivolous claims, the Indiana legislature protected the courts through the addition of qualifying language to the statute.¹⁰⁹ The words "significant" and "significantly" were inserted in several sentences to describe the type of pollution and kinds of activities constituting violations under the statute.¹¹⁰ Courts in other jurisdictions interpret similar language as precluding unwarranted litigation.¹¹¹ Any additional restrictions on standing out of fear of abuse of the Act are unnecessary.

Instead of fulfilling its objective of allowing more individuals a chance to police the environment, unnecessary restrictions and negative attitudes toward IEPA have destroyed any meaningful use of the Act. As evidenced by the statute's meager record,¹¹² the absence of opportunity for public and judicial involvement renders this tool intended for pollution control

appellant therefore lacked the necessary standing to bring the present action." *Id.*

104. IND. CODE ANN. § 34-4-17-1 (West 1983) (a citizens' suit statute for testing public improvements).

105. *Sekerez v. Lake Superior Ct.*, 263 Ind. 601, 603, 335 N.E.2d 199, 200 (1975).

106. *Id.*

107. *Youngstown*, 166 Ind. App. at 569, 337 N.E.2d at 525.

108. CONF. COMM. REPORT, S. No. 345, Apr. 6, 1971.

109. *Id.*

110. IND. CODE ANN. § 13-6-1-1(a) (West 1983 & Supp. 1987) (line 9: "significant"); IND. CODE ANN. § 13-6-1-1(d) (West 1983 & Supp. 1987) (line 8: "significantly"); IND. CODE ANN. § 13-6-1-1(e) (West 1983 & Supp. 1987) (line 2: "significant"); IND. CODE ANN. § 13-6-1-1(f) (West 1983 & Supp. 1987) (line 4: "significantly").

111. *See infra* notes 225-30 and accompanying text. SEPA's have not led to a flood of frivolous suits in these states.

112. *See supra* note 19.

unusable and illusory. The future of IEPA for fighting pollution is dim indeed.

B. Unnecessary Procedural Impediments in IEPA

The burdensome requirement of exhausting agency remedies and the apparent unwillingness of the judiciary to broadly interpret standing have destroyed effective use of IEPA. To test the validity of this hesitant approach toward judicial and public involvement, examination of the Michigan Environmental Protection Act (MEPA),¹¹³ the leading SEPA in the

113. MICH. COMP. LAWS ANN. §§ 691.1201-.1205 (West 1987) provides:

Sec. 1. This act, shall be known and may be cited as the "Thomas J. Anderson, Gordon Rockwell environmental protection act of 1970."

Sec. 2. (1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction.

(2) In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to [sic] deficient, direct the adoption of a standard approved and specified by the court.

Sec. 3. (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water, or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act.

(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified to take testimony and make a record and a report of his findings to the court in the action.

(3) Costs may be apportioned to the parties if the interests of justice require.

Sec. 4. (1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction.

(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings, which proceedings shall be conducted in accordance with and subject

nation,¹¹⁴ is instructive. Unlike IEPA, MEPA essentially shifts environmental decision-making power from the agencies to the courtroom, since there is no prerequisite of exhausting administrative remedies.¹¹⁵ Further, the Michigan courts have been open to suits brought under MEPA.¹¹⁶ Consequently, the judiciary and public play a leading role under MEPA and this joint involvement has had positive effects.¹¹⁷

1. Judicial Involvement

The Michigan courts' more active role has several advantages. First, standing before the judiciary without prior administrative intervention in the case avoids the politically-biased forum of the administrative agency. Environmental agencies are permeated with political pressures from busi-

to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.313 of the Compiled Laws of 1948. In so remitting the court may grant temporary equitable relief where necessary for the protection of the air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

(3). Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.

(4) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, notwithstanding the provision to the contrary of Act No. 306 of the Public Acts of 1969, pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

Sec. 5. (1) Whenever administrative, licensing or other proceedings, and judicial review thereof are available by law, the agency or the court may permit the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein.

(2) In any such administrative, licensing or other proceedings, and any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

(3) The doctrine of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

114. See *supra* note 23.

115. MICH. COMP. LAWS ANN. § 691.1202(1) (West 1987).

116. See *infra* notes 125-31 and 141-51 and accompanying text.

117. See *infra* notes 118-22 and 125-37 and accompanying text.

ness and industry, entities that they regulate.¹¹⁸ Unlike the typical environmental plaintiff who has limited resources, big business typically possesses considerable financial resources enabling it to exert pressure on the regulatory agencies to consider its interests above those of the less powerful environmentalists.¹¹⁹ Thus, the agencies frequently fail to consider the public interest.¹²⁰

Unlike the Indiana environmental plaintiff who is immediately subjected to this potential bureaucratic bias, the Michigan plaintiff may present his case to an essentially neutral tribunal, the judiciary. Compared to an agency, the court has less interaction with regulated defendants brought before it and is less subject to outside political pressures.¹²¹ Shifting envi-

118. Former Secretary of the Interior Stewart Udall summarizes forces which foul administrative machinery, and thus diminish bureaucratic efficiency, as follows:

[A] government agency . . . is an empire of many interests. As Secretary . . . I was constantly called upon to call balls and strikes between competing interests within the agency. . . . For example . . . the needs of the budget for the money from oil lease sale tugs against environmental programs, and so it goes. Every administrator will seek to compromise the competing demands within his agency. It becomes a way of life. . . . It is sometimes easier for a court to avoid compromise.

. . . [E]very agency develops a program . . . and a point of view. Blind spots also develop. The administrator may conclude that one type of pollution is the important thing and . . . leave other problems to another day. . . . In addition, the administrator often hears about problems over and over again, and he becomes jaded. A problem may be so pervasive that he does not get upset with each new example and begins to lose any sense of urgency. When an aroused citizen or conservation group goes to a judge, he will not face the bureaucrat who has heard it all before.

When an agency takes vigorous action against pollution, there is likely to be a vigorous counterattack by large economic interests. Things slow down, drag out, and, in many cases, become interminable.

. . . [A]gencies and the industries they regulate often begin to think alike and develop their own *modus vivendi*. They learn to accommodate each other. Today we need action, not accommodation.

Hearings on S. 3575 Before the Subcomm. on Energy, Natural Resources, and the Environment of the Senate Comm. on Commerce, 91st Cong., 2d Sess. 10 (1970). "Even if an agency is diligently attempting to enforce its statutory mandate, the sordid realities of bureaucratic survival in a highly political atmosphere force it to compromise environmental values to an unacceptable degree." Cramton, *Citizen Suits in the Environmental Field*, 25 *AD. L. REV.* 147, 148 (1973).

119. Plaintiffs are usually limited in their ability to finance EPA suits and almost always face defendants with greater resources. For this reason, Sax opposed procedural prerequisites to MEPA as they make litigation more expensive and deny most local groups a day in court. Sax & DiMento, *supra* note 54, at 5. See Note, *supra* note 8, at 570.

120. The spectre of pollution haunting the United States stems from obeisance paid to the sacred administrative cow. As a consequence of the power within the fossilized bureaucracies, the public voice is ignored and persons are ordinarily left without recourse. Forkosh, *Administrative Conduct in Environmental Areas - A Suggested Degree of Public Control*, 12 *S. TEX. L.J.* 1, 1-2 (1970).

121. Courts can operate with less pressure from industrial and business groups than legislators and agencies. Hatch, *supra* note 4, at 124. Unlike agencies, which are highly

ronmental controversies from the agency to the courtroom thus places the environmental plaintiff and regulated defendant on equal footing.¹²²

In the unlikely event that a plaintiff using IEPA is granted standing, he must still overcome the statutory defense of compliance with an administrative standard, a second obstacle tied to the politically-biased administrative agency.¹²³ If the defendant is indeed complying with pollution control regulations, he is presumptively not liable, regardless of the effectiveness of the standards.¹²⁴ IEPA does not give the court the power to evaluate and reject regulations, even when they are ineffective for protection of the environment. The agency standards are essentially shielded from judicial scrutiny; the court may not check the agency's power.

In contrast, the Michigan judiciary has the responsibility of assuring that the agencies make the best possible decisions regarding environmental quality. MEPA accomplishes this check on agency power by providing the courts with *de novo* review of agency regulations and findings.¹²⁵ To achieve more effective protection of the environment, the purpose of MEPA and all SEPA's, the Michigan legislature believed that agencies could not be exempt from strict judicial scrutiny.¹²⁶ The courts' power to review, reject, and reform agency regulations was thus considered necessary to assure that agencies set sufficient standards to protect the public domain.¹²⁷ Indeed MEPA goes further, since the court may even promulgate new regulations

politicized, courts are relatively apolitical. They do not interact daily with regulated defendants. DiMento, *supra* note 11, at 420.

122. "Moving adjudication of environmental controversies from the agencies to the courts is thus seen as a means of allowing the citizen to be heard by government on an equal basis with the regulated interest group." DiMento, *supra* note 11, at 420. The agencies are often unresponsive to private litigants. MEPA, however, by providing direct court access, has given the private litigant hope in solving the administrative problem that has bogged down local, state, and federal governments for a decade. Hatch, *supra* note 4, at 124-25.

123. IND. CODE ANN. § 13-6-1-2(a)(1) (West 1983 & Supp. 1987). See *supra* notes 118-20 and accompanying text.

124. See *supra* notes 83-84 and accompanying text.

125. MICH. COMP. LAWS ANN. § 691.1201(2)(a)(b) (West 1987).

126. See West Mich. Env'tl. Action Council v. Natural Resources Comm'n, 405 Mich. 741, 275 N.W.2d 538 (1979). The supreme court reversed a decision in which the trial court had deferred to the Department of Natural Resources' conclusion that no damage to a forest would take place as a result of allowing an oil company to drill in it. The court ruled that "the EPA would not accomplish its purpose if courts were to exempt administrative agencies from the strict scrutiny which effective protection of the environment demands." *Id.* at 754, 275 N.W.2d at 542.

127. Under MEPA, "courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary and capricious conduct." *Id.* This forces agencies to pursue their responsibilities effectively since they must defend themselves in court when charged with failure to protect the environment.

to replace regulations established by administrative agencies.¹²⁸

In contrast to IEPA, which restricts judicial involvement and favors administrative control, judicial input is given credit for several of the unexpected, yet very positive, developments in the Michigan environmental protection effort. The prospect of judicial scrutiny has been cited as creating an incentive for defendant polluters and administrative agencies to more diligently pursue environmental protection where less cooperation was previously exhibited.¹²⁹ Although Michigan has not experienced any major change in the pattern of commercial development, several authorities have noted that in general developers are exercising more caution in a variety of matters including sewage disposal, erosion control, and provision of access roads.¹³⁰ Also, the threat of judicial examination under MEPA spurred an increase in administrative efforts. This was the intention of MEPA's drafter who believed that for the Act to be successful, it must motivate entrepreneurs and agencies to do their jobs more conscientiously.¹³¹

128. MICH. COMP. LAWS ANN. § 681.1201(2)(b) (West 1987).

129. See *Three Lakes Ass'n v. Fisher*, No. 1142 (Antrim County Cir. Ct., Consent Judgment, Aug. 20, 1973), cited in *Sax & DiMento*, *supra* note 54, at 10 n.34. Defendant planned to develop lake front property. Plaintiffs sued under MEPA arguing that the development would result in overcrowding and pollution of the lake. Before the case went to trial, defendant conceded to drastic changes in his plans to accommodate plaintiffs. See also *Irish v. Property Dev. Group, Inc.*, No. 234-3 (Antrim County Cir. Ct., Decision, Mar. 5, 1973), cited in *Sax & DiMento*, *supra* note 54, at 10 n.38. Defendant developers agreed in course of MEPA trial to make mitigating promises that very likely would not have been made voluntarily or in the less intense atmosphere of administrative hearings. The court retained jurisdiction of development to ensure compliance with the changes. *Id.*

130. *Sax & DiMento*, *supra* note 54, at 12.

131. *Sax & Connor*, *supra* note 16, at 1050.

[W]ary of a public lawsuit, members of Livingston County's Dept. of Public Works may set up a close monitoring system on water quality at Thompson Lake. . . .

. . . DPW members have taken careful note of a recent ruling by the Livingston County Circuit Court. . . .

They are reasonably certain the Red Oaks Plant can meet most of the purity standards Judge Paul R. Mahinske imposed. . . .

If the question of pollution by the Red Oaks plant [sic] is ever raised in court . . .

DPW members want to have statistics which can point the blame at some other source. *State Journal* (Lansing), Apr. 5, 1972, at B-5, col. 5, quoted in *Sax & Connor*, *supra* note 16, at 1050 n.181. See *Muha v. Union Lakes Associates*, No. 2964 (Grand Traverse County Cir. Ct., filed Aug. 14, 1972), discussed in *Sax & DiMento*, *supra* note 54, at 12 n.45 (Defendants were constructing a shopping center and parking lot on low-lying land near a stream. Only after several citizens filed a complaint under MEPA did the DNR take initiative to force the defendant to clear pollution from his project from the creek), cited in *Sax & DiMento*, *supra* note 54, at 12 n.46. Controversial plans to build a harbor at the mouth of the Platte River also brought about a change in typical administrative behavior. The DNR supported the project and ignored the conservationists opposing it until plans were made to file suit under MEPA. According to newspaper coverage, the anticipated suit under MEPA helped persuade the DNR to reconsider and abandon its plan. *Ann Arbor News*, Feb. 27, 1972, at 35, col. 6, cited in *Sax & Connor*, *supra* note 16, at 1052 n.188.

When enacting IEPA, the Indiana legislature was apparently very sensitive to the proper respect and regard for agency expertise.¹³² Indeed, the Michigan administrative agencies themselves reacted negatively to the idea of judicial review and examination of their standards. In Michigan, defendants argued on behalf of the agencies that MEPA improperly disregards the agency role.¹³³ Nevertheless, such judicial review has resulted in a cleaner environment where agency control proved insufficient.¹³⁴

Like the Indiana statute, MEPA also provides standing for agencies to sue under the Act.¹³⁵ Unlike the Indiana experience, however, Michigan agencies are actually using the provision and contributing to a very significant aspect of the statute's success. Several agencies, after suffering through judicial scrutiny of their work, are now comfortable invoking the statute as plaintiffs to help fulfill their function of protecting the environment.¹³⁶ The agencies have forced polluters to comply with improvements in their pollution control procedures.¹³⁷

Also, responses to a questionnaire sent to several attorneys handling MEPA issues support increased administrative efforts. One plaintiff's attorney responded: "My case involved the W.R.C. [Water Resources Commission] standards and witnesses. . . . I think that this [judicial scrutiny] heightened their concern for their own standards and procedures. Having them called into question . . . seemed to sting," cited in Sax & Connor, *supra* note 16, at 1053.

One Assistant Attorney General made the following comment regarding EPA cases he had handled: "In my view, . . . pending litigation has materially affected [agency] attitudes toward environmental issues. . . . [A]gencies have tightened up their procedures for handling of contaminating wastes." *Id.*

132. This is demonstrated by the requirement that a plaintiff must first give an agency six months to resolve the issue before a court has jurisdiction over the matter. IND. CODE ANN. § 13-6-1-1(b) (West 1983 & Supp. 1987).

133. See *Kelly v. National Gypsum Co.*, No. 1918 (Alpena County Cir. Ct., Consent Judgment, Sept. 25, 1973). Defendants argued that ignoring determinations of their Air Pollution Control Commission was improper disregard of agency expertise. Nevertheless, the Attorney General, who initiated the suit on behalf of the public, argued for judicial review of standards set by the commission. "We have asked the courts to take action against a firm which, while in compliance with an order of the Air Pollution Control Commission, is still polluting the air around it. We have taken this action because we consider the Commission's order inadequate," quoted in Sax & DiMento, *supra* note 54, at 26.

134. See *supra* notes 129-31 and 133 and accompanying text.

135. MICH. COMP. LAWS ANN. § 691.1202(1) (West 1987).

136. The Air Pollution Control Division of the Wayne County Health Department, for example, incorporates the statute into daily policing activities. The Department, having jurisdiction over Detroit, has enlisted the statute in suits leading to consent orders with Chrysler, Ford, the Detroit Edison Company, and the American Cement Corporation. See *Wayne County Health Dept. (WCHD) v. Chrysler Corp.*, No. 166223 (Wayne County Cir. Ct., filed Oct. 1, 1970); *WCHD v. Ford Motor Co.*, No. 211654-R (Wayne County Cir. Ct., filed July 5, 1972); *WCHD v. Detroit Edison Co.*, No. 248582 (Wayne County Cir. Ct., filed Aug. 31, 1973); *WCHD v. American Cement Corp.*, No. 194927-R (Wayne County Cir. Ct., Dec. 29, 1971), cited in DiMento, *supra* note 11, at 432 n.8.

137. DiMento, *supra* note 11, at 445.

2. Citizen Involvement

As a result of denying the courts any significant control over environmental issues, IEPA also effectively denies public participation in the crusade against environmental degradation. When remanded to the administrative agency where the case may sit for six months, the individual is relegated to the role of powerless observer.¹³⁸ The agency cannot possibly have as vigorous an interest in fighting for the environment as the plaintiff who spends his time and money to personally initiate the litigation.¹³⁹ Forcing environmentally-concerned plaintiffs to wait for a politically-influenced agency to handle their cases is an inconvenience and a disincentive for individuals to take action to improve their environment.¹⁴⁰ By keeping the plaintiff out of the courtroom and removing the case from his control, IEPA destroys important practical and personal aspects of SEPA's. Consequently, citizens are reluctant to invoke the statute as is evident from the scarce use of IEPA.¹⁴¹ The objective of increasing citizen action in environmental law enforcement is lost. Indiana's environment is the ultimate loser.

In contrast to IEPA, MEPA as well as the Connecticut Environmental Protection Act (CEPA) grant the citizen initial standing in a court of law.¹⁴² Liberal citizen standing has benefited the Michigan and Connecticut environments in several ways. First, administrative agencies frequently lack the time, data, personnel, or money required for enforcement action. An agency might rank a matter as particularly insignificant and pursue the issue less vigorously than it should, or fail to pursue the matter at all.¹⁴³ Thus, a statute that provides citizens with authority to bring alleged polluters before the judiciary supplements the limited resources of the agencies.¹⁴⁴

138. IND. CODE ANN. § 13-6-1-1(b) (West 1983 & Supp. 1987).

139. Citizens may participate more directly in the process of protecting their interests in courts than in agency proceedings, and have greater leverage there. Issues are narrowed from the general to the specific in litigation, and positions become a matter of open record.

[F]urther, without court action and its attendant publicity, legislatures and the public may never become aware of important issues and of administrative decisions having environmental impact.

Butler & Cameron, *supra* note 99, at 229-30.

140. See *supra* note 21 and accompanying text.

141. "The citizen who today sees his Nation being ravaged also sees a labyrinth of agencies, procedures, and rules which make individual action impossible." Note, *supra* note 8, at 564 n.9.

142. MICH. COMP. LAWS ANN. § 691.1202 (West 1987); CONN. GEN. STAT. ANN. § 22a-16 (West 1985).

143. See McGregor, *supra* note 57, at 621.

144. "Society is in no position to refuse pollution monitoring and enforcement by so widely distributed and resourceful a staff as its own citizenry." *Id.*

The Supreme Court of Connecticut characterized the public right to take polluters to court as one of private Attorneys General empowered to vindicate the public interest.¹⁴⁵ Similarly, the Supreme Court of Michigan described the broad rights conferred on individuals under MEPA as an effective means of augmenting the public agencies which have not proved to be dedicated defenders of the environment.¹⁴⁶ Instead of depending on the limited resources of an agency, MEPA and CEPA provide the ordinary citizen with standing, consequently greatly increasing the policing of the environment.

Additionally, by letting administrative agencies handle citizens' complaints, IEPA removes responsibility for environmental protection from the public. Those aware of, concerned about, and affected by the environment are not entrusted with its well-being. Citizens have no incentive to bring suits under the statute because the power remains in the agencies.¹⁴⁷

MEPA, in contrast, places responsibility for the environment where it should be — with the people.¹⁴⁸ The Supreme Court of Michigan credits MEPA as providing "a sizeable share of the initiative for environmental law enforcement for that segment of society most directly affected — the public."¹⁴⁹ Environmentalists supporting MEPA argued that greater citizen participation was necessary before any environmental improvement could

145. *Town of Greenwich v. Conn. Transp. Auth.*, 166 Conn. 337, 348 A.2d 596 (1974). The court stated:

We are of the opinion, . . . that [CEPA] is an example of a legislative enactment of what has been described as the expanding doctrine of 'private attorney[s] generals', [sic] who are empowered to institute proceedings to vindicate the public interest. . . . By utilizing this procedure, the legislature expanded the number of potential guardians of the public interest in the environment into the millions, instead of relying exclusively on the limited resources of a particular agency.

Id. at 343, 348 A.2d at 599.

146. *Daniels v. Allen Indus.*, 391 Mich. 398, 216 N.W.2d 762 (1974). This was a class action suit in which plaintiffs sought discovery of pollution control studies conducted by the defendant. The court ruled for the plaintiffs, partially on grounds of the policy behind MEPA. "[T]he Legislature in enacting the Environmental Protection Act has made a realistic policy decision that the stimulus of possible litigation is now practically necessary to expedite what the ideal of *laissez-faire* has been too slow in accomplishing." *Id.* at 410-11, 216 N.W.2d at 768.

147. While governmental power expands, individual participation contracts; the individual citizen feels excluded from government. This feeling of helplessness and exclusion is an evil. Individuals and organized groups are a source of information, experience, and wisdom which the agencies are not accepting. Because the agencies are captured by particular pressures often not in the public interest, procedural devices enabling citizens to invoke judicial control are very valuable. See Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

148. *Daniels*, 391 Mich. at 411, 216 N.W.2d at 768 n.6 (court described MEPA as a significant affirmation of confidence in the citizen).

149. *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 305, 224 N.W.2d 883, 887-88 (1975).

be achieved.¹⁵⁰ This objective is being reached by permitting individuals, as well as agencies, to force polluters to bear the consequences of their conduct.¹⁵¹ In contrast to IEPA, MEPA does what it was intended to do — serve the public interest. In a Michigan case in which the Department of Natural Resources (DNR) was made a defendant, the director of the DNR stated that the suit exhibited public interest in the environment.¹⁵² He described MEPA as landmark legislation finally allowing concerned citizens to register their complaints in court. Thus even as a defendant, the DNR characterized MEPA litigation as a means of hearing and better interpreting the wishes of the public.¹⁵³

Citizen aid in enforcing the law adds a healthy, fresh dimension to state and local abatement efforts. Unfortunately, monitoring and enforcement by Indiana's most resourceful staff, its citizenry, is impossible under IEPA. Without a meaningful day in court, the public interest to be served under IEPA is lost among the labyrinth of agencies, procedures, and rules.

C. *The Burden of Proof in IEPA*

In order to use IEPA, a plaintiff must establish that a defendant's conduct is "significantly" polluting or destroying the environment.¹⁵⁴ There has been no judicial construction of these terms to indicate the threshold of harm or burden of proof a plaintiff must sustain. However, at least one commentator has noted that, consistent with the Indiana Court of Appeals' strict interpretation of the statute and the Indiana Supreme Court's sensitivity to "Machiavellian" suits, the Indiana judiciary is likely to adopt a strict interpretation of "significant," thereby forcing a plaintiff to sustain a

150. DiMento, *supra* note 11, at 418. See Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. OF PLANNERS 216 (1969). The author analyzes different degrees of participation in the environmental movement. The lowest rungs of involvement are advisory and non-participatory. The highest rung of citizen control is analogous to policymaking and the power to initiate litigation.

151. See *supra* notes 135-37 and 142-44 and accompanying text.

152. See *infra* note 153.

153. The director of the DNR commented on MEPA as follows:

It is true that the Natural Resources Commission, upon my recommendation, approved construction. . . . It is likewise true that suit has been brought under the Environmental Protection Act by persons who disagree with that decision. The Act — one of the landmark pieces of environmental legislation in the nation — was passed for precisely that reason; to allow dissenting citizens an opportunity to register their dissents in court. Even though we have been made the defendants in this suit, we welcome it as an expression of public interest in the environment, and another step toward redefining the law so that we can better interpret the wishes of the people.

Letter from Ralph A. MacMullen, Director, Michigan Department of Natural Resources, to the Editor, *State Journal* (Lansing), Jan. 28, 1972, at A-6, col. 6, *cited in* Sax & Connor, *supra* note 16, at 1004.

154. IND. CODE ANN. § 13-6-1-1(a) (West 1983 & Supp. 1987).

high threshold of harm.¹⁵⁵

Examination of the burden of proof construed under other SEPAs demonstrates the limiting effect of a high threshold of harm.¹⁵⁶ For instance, the South Dakota judiciary has interpreted the South Dakota SEPA¹⁵⁷ to impose a high threshold of harm. Not surprisingly, the statute has hardly been used and all decisions have held against plaintiffs.¹⁵⁸ The Supreme Court of South Dakota has stressed that plaintiffs must show substantial evidence of pollution. Small-scale damage is insufficient to sustain the burden of proof,¹⁵⁹ yet localized environmental damage is the intended primary focus of SEPAs.¹⁶⁰

Similarly, the New Jersey Environmental Rights Act provides relief from any "actual" pollution or impairment of the environment.¹⁶¹ An earlier version would have provided relief from activity "likely" to pollute.¹⁶² Although some relief has been granted under this Act, the New Jersey courts have given a rather restrictive meaning to the burden of proof.¹⁶³ In

155. Although there has been no judicial construction of the term "significant," *Youngstown* shows an inclination to interpret the Act restrictively. Abrams, *supra* note 21, at 125.

156. Although these cases may be read as calling for more certain proof of harm, the more convincing view is that plaintiffs must present evidence to satisfy a more difficult burden of proof. Abrams, *supra* note 21, at 124.

157. S.D. CODIFIED LAWS ANN. §§ 34A-10-1 to -15 (1986).

158. Only three cases have been reported under the South Dakota SEPA. *See In re Solid Waste Disposal Permit Application by City of Sioux Falls*, 368 N.W.2d 599 (S.D. 1978) (plaintiffs failed to sustain burden of showing that a solid waste disposal facility would be likely to pollute and that there was a prudent and feasible alternative to the facility); *In re Solid Waste Disposal Permit Application of County of Clay and City of Vermillion*, 295 N.W.2d 328 (S.D. 1980) (plaintiffs failed in their burden of showing that pollution would occur as a result of issuance of a waste disposal permit). *But see* Basis Electric Power Coop. v. Payne, 298 N.W.2d 385 (S.D. 1980) (dismissed on grounds unrelated to the burden of proof).

159. *City of Vermillion*, 295 N.W.2d at 330-32. The plaintiffs contended that the city's plans for a landfill would pollute the air, soil, and other natural resources. They argued that the landfill would disturb the tranquility of rural homes, increase traffic on roads near the dump, and severely decrease property values. These disturbances were not enough to violate the Act; the court allowed the city to proceed. *Id.*

160. *See supra* note 16 and accompanying text.

161. N.J. STAT. ANN. §§ 2A:35A-1 to -14 (Supp. 1986).

162. Abrams, *supra* note 21, at 125 n.136.

163. *See* Dept. of Transp. v. PSC Resources, Inc., 159 N.J. Super. 154, 387 A.2d 393 (1978). Broad construction was anticipated for the statute. "In those instances where government is unable or unwilling to take the necessary action, any person should be assured of an alternative course of action." (Sponsor's Statement to Assembly Bill 1245 which became the New Jersey SEPA). "The broad language of the Act . . . indicate[s] that actions by 'any person' were intended to be supplemental to actions by state agencies. . . . [T]he Environmental Rights Act broadly expands the right to enforce. . . ." *Id.* at 163, 387 A.2d at 397. Unfortunately, the statute has not been interpreted as broadly as anticipated. The courts may have been responding to the insertion of the word "actual" to describe pollution instead of an earlier version which provided relief from activity "likely" to pollute. Goldshore, *A Thumbnail Sketch of the Environmental Rights Act*, 1985 N.J. STATE B.J. 1, 18.

at least one case, the court has refused to allow environmental concerns to interfere with a public project involving widening a highway.¹⁶⁴

In contrast, MEPA and the Minnesota Environmental Rights Act (MERA)¹⁶⁵ operate with a relatively low threshold of harm.¹⁶⁶ Consistent with one purpose behind having a SEPA, MEPA and MERA serve as vehicles for addressing relatively small, local environmental issues. These issues are similar to those dismissed by the courts under the more restrictive SEPAs discussed above.¹⁶⁷ Under the high threshold of harm that the Indiana courts will predictably demand under IEPA, many of these issues also would be dismissed under the Indiana Act.

MEPA sets forth no explicit threshold of harm. Instead, the Act allows virtually anyone to sue to protect the environment from "pollution, impairment, or destruction," terms not defined within the statute.¹⁶⁸ Because of the absence of restrictive language and the judiciary's reluctance to read a threshold into the statute, MEPA provides an opportunity for the private sector to bring cases concerning local environmental impact before the judiciary.¹⁶⁹ The Michigan courts facilitate the plaintiff's efforts to establish a *prima facie* case by enforcing a low threshold of harm,¹⁷⁰ an appropriate gesture in light of the lack of other useful legal theories available to the private environmental plaintiff.¹⁷¹ Despite the Michigan Supreme Court's

164. *Borough of Kenilworth v. Dept. of Transp.* 151 N.J. Super. 322, 376 A.2d 1266 (1977). The plaintiff produced evidence to show that widening a highway, which required destroying a lot of trees, could cause an increase in noise and air pollution, and the increased flow of water would result in drainage problems. The plaintiffs also adduced evidence that the city's plan failed to include reasonable methods to control rodents and other pests, which would lead to a health hazard. The court ruled that the threat to the environment was not sufficient to warrant judicial intervention with "this important public project." Furthermore, the plans for the state highway were classified by the Federal Highway Administration as "non-major" federal action. Therefore, in addition to the citizen suit Act, NEPA did not reach the conduct. *Id.* at 326-35, 376 A.2d at 1269-73.

165. MINN. STAT. ANN. §§ 116B.01-.13 (West 1987).

166. *See infra* notes 168-82 and accompanying text.

167. *See supra* notes 158-59 and accompanying text.

168. MICH. COMP. LAWS ANN. § 691.1202 (West 1987).

169. MEPA applies to even the smallest instances of environmental harm. The statute's lack of a threshold provision enables the court to regulate a broad range of existing and potential damage. *Abrams, supra* note 21, at 108-09. This is consistent with the intended purposes of SEPAs. *See supra* note 16 and accompanying text.

170. *See Anderson v. Michigan State Highways Comm'n*, No. 15609-C (Ingham County Cir. Ct., filed May 8, 1973) (MEPA used to challenge redesign of an intersection near Michigan State University); *Wilcox v. Board of Comm'rs*, No. 7-237 (Calhoun County Cir. Ct., filed June 16, 1971) (MEPA used to enjoin proposed tree cutting along short stretch of road); *Tri-Cities Environmental Action Council v. A. Reenders and Sons, Inc.*, No. 2737 (Ottawa County Cir. Ct., filed May 6, 1974) (MEPA enlisted to challenge a highway routing plan), *discussed in DiMento, supra* note 11, at 429-30.

171. *See supra* notes 29-53 and accompanying text.

opportunities to establish a high threshold of harm, the court has followed the intended use of SEPAs and has declined to do so, thereby preserving the broad applicability and flexibility of the Act.¹⁷² The Michigan Supreme Court has considered both the destruction of a small swamp with rare ecological traits¹⁷³ and the pollution of a private individual's property from a large sewer route¹⁷⁴ as significant enough to be raised under MEPA.

MERA defines environmental damage in a manner apparently imposing a higher threshold of harm than MEPA.¹⁷⁵ In practice, however, the courts have required the plaintiffs to prove only a low threshold.¹⁷⁶ MERA requires the plaintiff to make a prima facie showing that the defendant's conduct violates or is likely to violate an existing environmental regulation or is activity that materially, adversely affects or is likely to materially, adversely affect the environment.¹⁷⁷ The burden of proof has been interpreted leniently, which is consistent with the goal of SEPAs to provide an adequate, usable, civil remedy to protect the state's natural resources.¹⁷⁸

Although the Minnesota courts have not explicitly addressed the threshold of harm issue, case law reveals that similar to MEPA, small-scale local grievances receive attention under the statute.¹⁷⁹ In one case a farmer

172. For instance, the supreme court could have defined a threshold of harm in *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 224 N.W.2d 883 (1975). Instead, the court ruled that evidence showing threats to a unique forest met the burden of proof. The court addressed MEPAs broad language and lack of an explicit threshold. "[T]he Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality." *Ray*, 393 Mich. at 306, 224 N.W.2d at 888. See *West Mich. EIntl. Action Council (WMEAC) v. Natural Resources Comm'n*, 405 Mich. 741, 275 N.W.2d 538 (1979) (evidence of potential interference with elk breeding habits, from noise, odors, and traffic on access roads due to an oil drilling project supported plaintiff's burden of proof. Again, the court offered no definitions of what constitutes pollution or impairment).

173. See *Michigan State Highway Comm'n v. Vanderkloot*, 392 Mich. 159, 220 N.W.2d 416 (1974).

174. *Eyde v. State*, 393 Mich. 453, 225 N.W.2d 1 (1975). Reversing the trial court, the court of appeals stated: "We perceive no purpose to be served by writing extensively in this case. It is patently a dilatory effort to forestall construction of a necessary sewer, delayed by litigation for over three years." The supreme court reversed the court of appeals, placing more emphasis on the importance of considering the environmental damage under MEPA: "This action raises environmental issues . . . which are of interest and concern. . . ." The court issued an injunction against the proposed construction of the sewer. *Id.* at 455, 225 N.W.2d at 2-3.

175. MERA defines pollution as only that conduct having a material, adverse effect on the environment.

176. "Plaintiffs under MERA typically have not found it difficult to make a prima facie showing of environmental damage." *Abrams*, *supra* note 21, at 122. See *infra* notes 179-82 and accompanying text.

177. MINN. STAT. ANN. § 116B.02(5) (West 1987).

178. See Note, *supra* note 8, at 598.

179. The Minnesota courts stress substance rather than thresholds in MERA and focus

brought suit under MERA alleging that the proposed condemnation of some marshland for construction of a highway would destroy the solitude of the marsh, the natural assets of the area, and kill animal life in the region.¹⁸⁰ The trial court dismissed the case for failure to sustain the burden of proof. The Minnesota Supreme Court reversed, however, and ruled that the plaintiff had met his burden. Since the marshland housed abundant plant and animal life, timber, soil, and contained quietude resources, the court ruled that constructing a highway would materially and adversely affect the natural habitat.¹⁸¹ The Minnesota courts have used a similar approach to the burden of proof in other cases.¹⁸²

The Supreme Court of Illinois settled a dispute among the state appellate courts as to the burden of proof under the Illinois Environmental Protection Act.¹⁸³ The Illinois Act contains four factors regarding the "unreasonableness" of the defendant's conduct.¹⁸⁴ Some courts had required

on paramount concern for the state's natural resources. Abrams, *supra* note 21, at 122. See State *ex rel.* Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979). Citizens sued under MERA to enjoin city and owner of historical houses from demolishing the homes. The court stated: "[P]rotection of natural resources is to be given paramount consideration, and those resources should not be polluted or destroyed unless there are truly unusual factors present in the case. . . ." *Id.* at 88.

180. County of Freeborn v. Bryson, 297 Minn. 218, 210 N.W.2d 290 (1973).

181. *Id.* at 228, 210 N.W.2d at 297; County of Freeborn *ex rel.* Tuveson v. Bryson, 309 Minn. 178, 189, 243 N.W.2d 316, 322 (1976). When the same parties challenged an alternative routing of the highway, also across the marshland, the Supreme Court of Minnesota again issued the requested injunction:

To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction for improvement. However, to an increasing number of our citizens who have become concerned enough about the vanishing wetlands to seek legislative relief, a swamp or marsh is a thing of beauty. To one who is willing to risk wet feet to walk through it, a marsh frequently contains a springy soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It is quiet and peaceful — the most ancient of cathedrals — antedating the oldest of manmade structures. . . . In short, marshes are something to protect and preserve.

Id. at 189, 243 N.W.2d at 322.

182. See Minn. Public Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762 (Minn. 1977). The plaintiffs adduced evidence that a gun shooting facility disturbed the peacefulness of the area and polluted nearby wetlands with lead shot. The court, satisfied that the plaintiffs had sustained their burden of proof, concluded:

[T]he Rice Lake wetlands area would, but for the club, otherwise be preserved permanently and for future generations. . . . It is necessary to enjoin the trap and skeet shooting at the White Bear Rod and Gun Club in order to protect, preserve and enhance for the plaintiffs and the people of Minnesota generally the air, water, land, and other natural resources within the state. The plaintiffs have no adequate remedy at law.

Id.

183. See Processing and Books, Inc. v. Pollution Control Board, 28 Ill. App. 3d 115, 328 N.E.2d 338 (1975), *rev'd* 64 Ill. 2d 68, 351 N.E.2d 865 (1976). ILL. ANN. STAT. ch. 111½, §§ 1031-34 (Smith-Hurd 1977 & Supp. 1986).

184. ILL. ANN. STAT. ch. 111½, § 1033(c) (Smith-Hurd 1977). The four factors to be

plaintiffs to present evidence on all four of these criteria to make a prima facie showing of pollution.¹⁸⁵ In response, the Illinois Supreme Court stated that to hold the plaintiff accountable on all four of these factors would force him to sustain a burden more stringent than the burden in a common law nuisance action.¹⁸⁶ This would violate the objective of developing a program whereby ordinary individuals can force polluters to bear the consequences of their conduct.¹⁸⁷ By lessening the required threshold of harm, the Illinois Supreme Court aligned the interpretation of the statute with its purpose of making it easier for individuals to seek and obtain relief for protection of the environment.¹⁸⁸

V. A PROPOSAL FOR INDIANA

This note has criticized the structure and judicial handling of IEPA. Under IEPA the public is discouraged from pursuing environmental control because of the administrative burden in the Act, while the judiciary has evidenced its dislike of granting standing to citizens. As a result, neither the judiciary nor the public plays an active role under IEPA, which directly conflicts with the intended purpose of SEPA's. Ultimately, more polluters escape accountability. To make the statute an effective tool for environmen-

use² to evaluate the defendant's activities are:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

Id.

185. See *Aurora Metal Co. v. Pollution Control Board*, 30 Ill. App. 3d 956, 333 N.E.2d 461 (1975); *Lonza, Inc. v. Illinois Pollution Control Bd.*, 21 Ill. App. 3d 468, 315 N.E.2d 652 (1974). *But see Freeman Coal Mining Corp. v. Illinois Pollution Control Bd.*, 21 Ill. App. 3d 157, 313 N.E.2d 616 (1974), and *Ford v. Environmental Protection Agency*, 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973) for cases not requiring evidence on all four factors concerning "unreasonable."

186. *Processing and Books, Inc.*, 64 Ill. 2d at 76-77, 351 N.E.2d at 869.

187. To require a plaintiff to prove all four factors would place upon the complainant a burden more stringent than he would bear in a common law nuisance action, and thus frustrate the purpose of the Act 'to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.'

Id.

188. Under *Processing and Books*, a complainant need not offer evidence on every factor in § 1033(c) of the Act to make out his burden of proof. This substantially eases the burden on the individual seeking to abate pollution and brings the Act in accord with legislative intent. Note, *The Illinois Environmental Protection Act: The Burden of Proof Becomes Clearer*, 53 CHI[-]KENT L. REV. 57, 76-77 (1976).

tal control, judicial and public participation need to increase. To achieve this, the Indiana statute should be amended and judicial interpretation of the Act should be aligned with the objectives of SEPAs.

A. Removing the Requirement of Exhausting Administrative Remedies

First, the citizen's right and desire to participate can be enhanced by removing the prerequisite of exhausting administrative remedies and providing direct access to the courts.¹⁸⁹ Environmental plaintiffs deserve a day in court. Citizen input will be encouraged under the statute if action before the bench is available.¹⁹⁰ Forcing plaintiffs to spend an unpalatable six month waiting period for an agency to take action does not encourage citizen input, as is evident in the nonuse of the current statute.¹⁹¹ Removing the requirement of exhausting agency remedies will allow environmental decision-making to take place in the courtroom, a more neutral forum compared to the politically-dependent administrative realm.¹⁹²

After a plaintiff gains direct access to the court, the court needs broader power under IEPA to resolve the dispute. In order to serve as a check on agency behavior, IEPA should be amended to expressly allow the court to consider administrative regulations asserted as defenses, in addition to all of the other evidence in the case. The court should have power to refuse to recognize the regulations as defenses when it deems them unreasonable or ineffective for controlling pollution. A case-by-case factual inquiry should be employed, whereby administrative regulations can be weighed along with other evidence and disregarded as defenses when appropriate.

Under this change in IEPA, the court would check every standard set forth as a defense. Giving the court this extended power will create an incentive for agencies to more diligently pursue their obligations.¹⁹³ The addition of judicial scrutiny will serve as a catalyst for more effective administrative behavior, and thus further the intended result of environmental litigation generally and SEPAs particularly — protection of the environment.¹⁹⁴

A defendant under IEPA may also defend on grounds that no other prudent and feasible alternative exists to replace his conduct. He must also show that his activity is necessary for promotion of the public health,

189. See *supra* notes 118-22 and accompanying text.

190. *Id.*

191. See *supra* notes 19-21 and accompanying text.

192. See *supra* notes 118-22 and accompanying text.

193. See *supra* notes 125-40 and accompanying text.

194. See *supra* notes 13-15 and 125-37 and accompanying text.

safety, and welfare.¹⁹⁵ This defense should be modified by adding that economic considerations alone do not render a particular alternative unreasonable or infeasible. This will ensure that potentially more expensive substitutes to the polluting activity, which are also more environmentally sound, are not eliminated solely because of cost.

Critics argue that allowing citizens direct access to the courts and giving the judiciary broad power to decide environmental issues, including rejecting agency rules, opens the floodgates of litigation.¹⁹⁶ They also argue that such a liberal procedure places highly technical environmental issues before a panel of generalist judges ill-suited to adjudicating complex, scientific matters.¹⁹⁷ Practical experience under MEPA, however, does not support these fears. MEPA provides the plaintiff with direct court access without exhausting procedural remedies and grants the court power to independently review agency standards as well as reject regulations when they are unreasonable for achieving protection of the environment.¹⁹⁸

First, the Michigan courts have not experienced a flood of MEPA suits.¹⁹⁹ There is no indication that plaintiffs file frivolous suits and fabricated claims under the statute. In fact, with the exception of a few test cases, there has been very little sensational use of MEPA.²⁰⁰ As stated earlier, typical MEPA litigation involves local problems: "patching a wound here, tightening a screw there."²⁰¹

Furthermore, the Michigan judiciary proved that courts can handle complex environmental issues just as they regularly deal with other complicated litigation, such as anti-trust and patent cases.²⁰² In *Irish v. Green*²⁰³

195. IND. CODE ANN. § 13-6-1-2(a)(2) (West 1983 & Supp. 1987).

196. In Michigan, frivolous suits in which neighbor sued neighbor to avenge for earlier losses in the administrative process were predicted under MEPA. Also, there was a fear that those unable to discriminate true environmental problems from standard and acceptable results of a growing economy would file MEPA suits without merit. One long range result predicted from these abuses was clogging court dockets. DiMento, *supra* note 11, at 424. See N.J. STAT. ANN. § 2A:35A-4 (West Supp. 1987) (New Jersey provision contains a clause concerning frivolous suits drafted in response to similar fears).

197. Cramton, *Citizens Suits in the Environmental Field - Peril or Promise?*, 25 AD. L. REV. 147, 151 (1973).

198. MICH. COMP. LAWS ANN. § 691.1202(2) (West 1987).

199. DiMento, *supra* note 11, at 428-29.

200. *Id.* See *supra* note 16 and accompanying text. See also Goldshore, *supra* note 163, at 18. (The fear that the New Jersey SEPA would lead to a flood of litigation is unjustified. On the contrary, there have been very few cases brought pursuant to its provisions).

201. See Sax & DiMento, *supra* note 54, at 12-13. See also DiMento, *supra* note 11, at 429.

202. See generally *Rex Chainbelt Inc. v. Borg-Warner Corp.*, 477 F.2d 481 (7th Cir. 1973) (patentee denied priority of invention where he had no conception of means to accomplish feed rate variation through voltage for a squirrel cage motor); *General Plastics Corp. v. Borkland*, 129 Ind. App. 97, 145 N.E.2d 393 (1957) (court held evidence insufficient to estab-

for example, plaintiffs challenged a housing development on an environmentally-valuable section of Little Traverse Bay. After a five day trial during which the court heard testimony from several dozen lay and expert witnesses, including a transportation planning consultant and a micro-biologist, the judge rendered an opinion representing an ingenious solution to the problem.²⁰⁴ In fact, the Supreme Court of Michigan even attached the opinion in *Irish* as an appendix to another case as an exemplary judicial response to a MEPA situation involving highly complex issues.²⁰⁵ Judges competently handle many other cases involving complicated technical environmental problems and can be expected to do so in the future.²⁰⁶

Several authorities, in arguing against the establishment of a special environmental court, focus on the excellent ability of existing federal and state courts to deal with environmental issues.²⁰⁷ First, obscure scientific issues are not usually presented in environmental cases. Common questions concern evidentiary or procedural matters.²⁰⁸ Inevitably, the court will be forced to balance the equities of the particular case as it does in deciding

lish that improvements contracted to license were new and useful improvements in plastic products and in art of manufacturing such products); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (court found sixty to sixty-four percent of defendant's market share in aluminum market did not constitute a monopoly).

203. No. 162-63 (Emmet County Cir. Ct., filed July 15, 1972), *discussed in Sax & DiMento, supra* note 54, at 10-11.

204. The judge set forth some general conditions to be considered before development could proceed. The judge required that an access road be built to ease traffic burdens and that appropriate devices be constructed to restrain the flow of surface water within the subdivision. *Id.*

205. *Ray v. Mason County Drain Comm'r*, 393 Mich. at 314, 224 N.W.2d at 892-96.

206. *See Michigan United Conservation Clubs v. Anthony*, No. 2331 (Ottawa County Cir. Ct., filed Aug. 2, 1971), *discussed in Sax & Connor, supra* note 16, at 1014. This case involved a very extensive hearing regarding a motion to enjoin the Indians from their methods of commercial fishing. The plaintiff presented a fishing expert who educated the judge about the complex effects that the Indians' fishing would have on a local basis and beyond. With the expert's help, the judge readily understood the environmental problem. *See also Lakeland Property Owners Ass'n v. Twp. of Northfield*, No. 1453 (Livingston County Cir. Ct., filed Aug. 27, 1970), *discussed in Sax & Connor, supra* note 16, at 1041. The plaintiffs challenged present operation and plans for enlargement of a local waste water treatment plant. There was extensive and detailed testimony in the case. The court ruled for the plaintiffs and even issued new, more restrictive effluent standards and other alternative locations in which the defendant could operate.

207. *See Oakes, supra* note 52. "It has been demonstrated that in most environmental cases the number of 'environmental' issues is small and can be explained adequately to the court in layman's terms. Therefore, the cry of the court's need of technical knowledge is not founded on the practical experience of the agencies involved in environmental litigation." Smith, *The Environment and the Judiciary: A Need For Co-operation or Reform?* 3 ENVTL. AFF. 627, 635 n.50.

208. A typical question might be: "What do the facts show the effect of a given factor (concentration of a given pollutant or use of a control method) to be on a given variable (human health, or the survival of a certain form of wildlife)?"

any other type of case.²⁰⁹ Therefore, allowing the Indiana courts to overstep the agency by evaluating agency rules will not present an impossible or even an unusually difficult task for the judiciary. Secondly, with the use of experts and cross-examination in the adversary system, judges can carefully consider complex, scientific issues.²¹⁰

Under the proposed reform of IEPA, the Indiana courts will be able to scrutinize agency standards whenever they are asserted as a defense. Judicial investigation alone will provide adequate incentive for agencies to diligently and effectively perform their functions.²¹¹ Administrative rules will be subject to evaluation in a court of law where they can be rejected if unreasonable. Additionally, regulated defendants relying on compliance with agency rules will be very unhappy when the court declares the rule invalid and rejects it as a defense. Instead of applying political pressure to set up lax regulations in their interests,²¹² the potential defendants in Indiana will be more concerned with viable and effective rules which will hold up in court as a defense to their activities.²¹³ The public will also place more pressure on agencies to promulgate rules to protect the environment instead of the regulated businesses.

Furthermore, removing the requirement of exhausting agency remedies from IEPA will not necessarily lead to a flood of lawsuits that the judiciary is ill-equipped to hear. Instead, the absence of this obstacle will give the environmental plaintiff a fair chance to be heard by an impartial tribunal particularly suited to weighing contradictory policies.²¹⁴ The Indiana plaintiff should be given an opportunity to prove that he can play an effective role in improving the state's environment.²¹⁵ Likewise, the judiciary should take the responsibility for hearing and resolving environmental controversies. Based on the poor record of the statute, the legislature and courts are hardly in a position to turn down suggestions that have been successful in other states.

209. Smith, *supra* note 207, at 639. See *Rose v. Chaikin*, 187 N.J. Super. 210, 453 A.2d 1378 (1982) (utility of defendant's conduct in nuisance case must be balanced against the harm to the plaintiff).

210.

[T]he current system of review by generalist judges already allows for the consideration of the best technical expertise in the various areas of environmental concern. The adversary system with introduction of expert testimony and careful cross-examination allows for pretty careful examination of the most advanced technical knowledge about the costs of a given polluting activity and the alternatives to that activity.

Oakes, *supra* note 52, at 555.

211. See *supra* notes 126-31 and accompanying text.

212. See *supra* notes 118-20 and accompanying text.

213. See *supra* notes 129-34 and accompanying text.

214. See *supra* notes 202-06 and accompanying text.

215. See *supra* notes 143-53 and accompanying text.

B. Developing a Low Threshold of Harm

Once the procedural barriers are removed from IEPA, thereby allowing the courts to hear more cases, the Indiana courts must use their power carefully to ensure that the burden of proof is not set too high. Because virtually all human activity has some sort of adverse impact on the environment, determining when certain conduct rises to the level of "significant" pollution or impairment of the environment is difficult.²¹⁶ In light of the goals of SEPAs in general, the inaccessibility of the common law, and the limited applicability of NEPA, however, the Indiana courts will preclude facilitation of environmental concerns if they insist on a high threshold of harm.²¹⁷

Under a high threshold, the relatively large environmental issues will still be covered. However, the less newsworthy, local controversies will not qualify as severe enough to be a violation of the statute, so the plaintiff will once again be placed at the mercy of the common law to protect the environment.²¹⁸ Thus, the plaintiff will be essentially without a remedy in many situations.²¹⁹ As stated earlier, SEPAs are strongest in their application to relatively small-scale, local concerns.²²⁰ If the Indiana courts insist on a high threshold of harm, these types of issues will go uncorrected, at least until they become so severe that they are beyond repair.²²¹ Experience under MEPA and MERA supports the argument that SEPAs should not be restricted by a high burden of proof.²²²

Critics suggest that the use of limiting words such as "significant" are a weakness in SEPAs because the language does more to confuse than to help courts determine when there is sufficient damage to have a cause of action.²²³ In practice, however, MERA and MEPA are interpreted to set a low threshold of harm, even though the former statute contains limiting language while the latter does not.²²⁴ Therefore, the Indiana judiciary can develop a low threshold under IEPA despite the presence of the term "significant."

Several courts have focused on how the modifying words in a SEPA

216. *West Mich. Envtl. Action Council v. Natural Resources Comm'n*, 405 Mich. 741, 760, 275 N.W.2d 538, 545 (1979) (court recognized that virtually all human activity could harm the environment in some manner).

217. *See supra* notes 154-88 and accompanying text.

218. *See supra* notes 154-64 and accompanying text.

219. *See supra* notes 45-53 and accompanying text.

220. *See supra* notes 16, 39, 160, 166, 171-82, 187 and 188 and accompanying text.

221. *See supra* notes 156-64 and accompanying text.

222. *See supra* notes 165-82 and accompanying text.

223. *Hatch, supra* note 4, at 120.

224. *See supra* notes 168-88 and accompanying text.

should be construed. Since one purpose of the Act is to provide remedies beyond the common law, the Supreme Court of Illinois ruled that the burden of proof in the Illinois Environmental Protection Act should be less stringent than the burden in a common law nuisance action.²²⁵ Therefore, the court interpreted "unreasonably" as used in the statute to preclude trifling, petty suits.²²⁶

The Supreme Court of Connecticut also addressed the interpretation of the word "unreasonable" that qualified "pollution, impairment, or destruction" in CEPA.²²⁷ Because the language of CEPA was borrowed in large part from MEPA, the addition of "unreasonably," seemed to represent a legislative effort to make CEPA less amenable to environmental plaintiffs than MEPA.²²⁸ The Connecticut Supreme Court, however, found a much narrower intent. The court interpreted "unreasonable" to eliminate harassment or spite suits.²²⁹ Once a Connecticut court determines that the plaintiff is not bringing a spite suit, the operative effect of "unreasonable" is exhausted.²³⁰

Similarly, the Indiana Courts should interpret "significant" to preclude only frivolous suits. Under such construction, citizens may invoke IEPA to challenge local abuses, the typical and most successful application of SEPA's. Securing IEPA from an unduly restrictive burden of proof is an indispensable requirement before the Act can ever be effectively used to protect the environment that it was meant to serve.

VI. CONCLUSION

The combination of burdensome procedural requirements in IEPA and the judiciary's overly cautious and reluctant approach to the statute destroys its purpose and effectiveness. Instead of encouraging citizen participation in environmental law enforcement and improvement of environmental quality as intended, the statute abandons the concerned environmentalist in the politically-biased environmental agency where citizen input and the public interest are often forgotten. Lack of judicial power to review administrative standards asserted as a defense also forces the Indiana courts to surrender to agency control. The courts will predictably further emasculate an already impotent statute by imposing a severe burden of proof under

225. *Processing and Books, Inc. v. Illinois Pollution Control Bd.*, 28 Ill. App. 3d 115, 328 N.E.2d 338 (1975), *rev'd* 64 Ill. 2d 68, 351 N.E.2d 865 (1976).

226. *Id.*

227. *Manchester Env'tl. Coalition v. Stockton*, 42 CONN. L.J. No. 45 (Sup. Ct. May 5, 1981).

228. See Molleur, *CEPA Update: Manchester Environmental Coalition v. Stockton*, 14 CONN. L. REV. 695, 708 (1982).

229. *Stockton*, 42 CONN. L.J. at 23.

230. *Id.*

IEPA which will leave many local issues unaddressed. Consequently, Indiana citizens, harmed yet remediless, helplessly watch their environment deteriorate.

With several changes, however, IEPA can take its place on the front line with other SEPAs. Removing the administrative prerequisite and giving citizens direct court access will open an avenue of citizen participation. Requiring the judiciary to check agency standards will encourage more effective administrative action. Additionally, setting a low threshold of harm will allow recourse against local, small-scale environmental abuse. These changes will vitalize IEPA, making it an effective weapon in the Indiana citizen's arsenal for fighting environmental destruction. Indiana's environment will emerge the victor.

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