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Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences

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ENVIRONMENTAL RIGHTS STATUTES IN THE UNITED STATES AND CANADA: COMPARING THE MICHIGAN AND ONTARIO EXPERIENCES

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I. INTRODUCTION

THE last three decades have witnessed the development of voluminous legislation in both the United States and Canada, which introduced environmentally protective regulatory and administrative regimes at the federal,[1] state[2] and provincial[3] levels. Notwithstanding the emergence of such sophisticated administrative regimes, certain jurisdictions have enacted legislation designed to encourage citizen access to the courts[4] and to aid the development of a common law of environmental protection.[5] Two examples include legislation that Michigan enacted in the 1970s[6] and Ontario enacted in the 1990s.[7] Citizen-oriented legislation has focused on

1. *See, e.g.*, Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (1994); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6939b (1994). At the federal level in the United States, the Environmental Protection Agency (EPA), was established in the early 1970s to administer various pieces of federal pollution control legislation. The United States has promulgated numerous and extensive rules and regulations under its pollution control laws. Other areas of federal environmental law administered by EPA include pesticides, toxic substances, solid waste disposal and related areas which have their own extensive body of rules and regulations. Besides EPA, there are federal departments and agencies specifically designed to oversee the management and protection of natural resources, endangered species, public and forest lands and wetlands. The Army Corps of Engineers and the Department of the Interior are two such departments. At the federal level in Canada, the Department of the Environment was created in the early 1970s to regulate selected aspects of the environment. *See* Canadian Environmental Protection Act, R.S.C., ch. 22 (1988) (Can.) (detailing Canadian federal environmental regulation); Fisheries Act, R.S.C., ch. F-14 (1985) (Can.).

2. *See, e.g.*, Missouri Clean Water Law, MO. ANN. STAT. § 644.136 (West 1997) (creating pollution control agency to regulate various facets of environment). Similarly, each state in the United States has created an agency to oversee environmental and pollution regulation.

3. *See, e.g.*, Ontario Water Resources Act, R.S.O., ch. O.40 (1990) (Can.) (regulating water pollution). The government in each Canadian province has established ministries of the environment and natural resources to regulate these matters.

4. *See, e.g.*, Anna Dwyer, *OEBR Improves Public Access to the Courts*, LAW TIMES (Toronto), Feb. 7-13, 1994, at 16 (discussing citizen suit legislative provision); Craig McInnes, *Environmental Rights Bill Now Law*, GLOBE AND MAIL (Toronto), Feb. 16, 1994, at A3 (noting that due to passage of Ontario Environmental Bill of Rights (OEBR) "individuals can now use Ontario courts to fight polluters").

5. *See* Rep. Thomas J. Anderson, *Michigan Passes Landmark Environmental Law*, (July 2, 1970) (press release) (stating at time of passage of Michigan Environmental Protection Act (MEPA) that statute should "permit courts to develop a common law of environmental quality, much as courts have developed a right to privacy"); *see also* Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 888 (Mich. 1975) (holding that legislature left to courts important task of "developing a common law of environmental quality [under MEPA]").

6. *See* Michigan Environmental Protection Act (MEPA), MICH. COMP. LAWS ANN. §§ 324.1701 to 324.1706 (West 1997).

7. *See* Ontario Environmental Bill of Rights (OEBR), S.O., ch. 28 (1993) (Can.).

establishing, or seeking to establish, certain "environmental rights."[8] These rights encompass the following: (1) the right to a healthy environment; (2) the right to participate in environmental decisions; (3) the right to hold governments accountable for activities detrimental to the environment; and (4) the right of public access to the courts to ensure environmental protection.[9]

Although these initiatives are hardly new, they point to fundamental and continuing dissatisfaction with the administrative and regulatory process as the exclusive source for implementing the public interest in environmentally-sound decision-making.[10] The initiatives further evince a concern with leaving all environmental management decisions to the government[11] and indicate a signifi-

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8. *See* Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93 (1990) (attempting to identify source of fundamental environmental rights and articulating their content). Professor Joseph L. Sax, chief architect of MEPA, believes there are important links between certain environmental claims of right and baseline democratic values. *See id.* According to Professor Sax, the democratic values that contribute to articulating environmental rights and responsibilities are: (1) an open process of decision-making; (2) recognition of the intrinsic value of each individual; and (3) patrimonial or governmental responsibility as a public duty. *See id.* From these values, Professor Sax derives three precepts as the source of basic environmental rights: (1) fully informed open decision-making based upon free choice; (2) protection of all at a baseline reflecting respect for every member of society; and (3) a commitment not to impoverish the earth and narrow the possibilities of the future. *See id.*

9. *See, e.g.*, OEBR, S.O., ch. 28, § 2 (1993) (Can.).

10. *See* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT at xvii (1970) (explaining need for administrative regulation of environment). Professor Sax states:

> We are a peculiar people. Though committed to the idea of democracy, as private citizens we have withdrawn from the governmental process and sent in our place a surrogate to implement the public interest. This substitute—the administrative agency—stands between the people and those whose daily business is the devouring of natural environments for private gain.

Id. Similar observations were made in Ontario during the same period. *See* J. A. Kennedy, *Foreword to the First Edition* of DAVID ESTRIN & JOHN SWAIGEN, ENVIRONMENT ON TRIAL at xvii (3d ed. 1993) (1974) (explaining need for administrative regulation of environment). Kennedy notes:

> [T]he bureaucratic agency or department—is charged with looking after that elusive, ever-changing thing called the public interest, but so often the bureaucracy seems to impede desired action . . . . The administrative agency . . . for example, the Ontario Ministry of the Environment . . . is admittedly an essential element in our society. Someone must take the initiative for planning, must set standards, supervise the granting of permits and see that regulations are enforced. Yet, all too often, the citizen has been left out of the decision-making . . . process. In many cases, the citizen is actually forbidden to take part.

Id.

11. *See* Kennedy, *supra* note 10, at xvii (discussing implications of leaving all environmental management decisions to government). Kennedy articulates that the perception in Ontario from the late 1960s onward, concerning the spotty record of government enforcement of environmental laws, eventually caused citizens

cant and continuing interest in reasserting citizen involvement in the democratic process.[12] In an era signified by government attempts to dramatically shrink the size of the public sector,[13] a partial privatizing enforcement of environmental law through citizen suits becomes all the more important as a supplement to or substitute for government action or inaction.[14] Moreover, citizen-initiated lawsuits demonstrate the judiciary's capacity to assist in the

to rely on the judicial system to protect the environment. *See id.*; *see also* SAX, *supra* note 10, at 108-24, 157 (highlighting reasons for permitting courts to develop and explore environmental rights arena). Writing in the early 1970s, Professor Sax focused on a role for the courts in environmental protection. He did so because courts were not as amenable to political pressures as agencies, could supplement the administrative process and could serve as a catalyst of the legislative process without usurping legislative functions. *But see* Jeanette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 223 (1987) (explaining that citizen suits invite judicial lawmaking and place courts in uncomfortable position of having to define content of regulatory requirements). Austin speculated that increased opportunity for judicial lawmaking will cause inconsistent enforcement, loss of administrative control over regulatory programs and the impairment of governmental ability to develop and maintain cooperative relationships with the regulated industry. *See id.*

12. *See* Joseph L. Sax, *Legal Redress of Environmental Disruption*, ARCH. F., May 1970, at 51 (noting that public has turned to courts to protect environment). Sax explained that litigation represents an attempt to bring concerned citizens into the decision-making process by opening a forum in which there is relative equality of access and in which the issues are considered on their merits. *See id.*; *see also* SAX, *supra* note 10, at 60 (characterizing enforcement of public rights as application of democratic theory to allocation of natural resources).

13. *See, e.g.*, Kathleen Cooper, *Ontario Environmental Protections Swept Away*, GREAT LAKES UNITED, Winter 1996-97, at 1, 6 (noting that 13 of Ontario's environmental laws have been weakened, dismantled or eliminated since Progressive Conservative government came to power in 1995); Jean Greig, *No Question, It's Deregulation*, ONTARIO ENVIRONMENTAL NETWORK NEWS, Dec. 1996, at 1, 3; Brian McAndrew, *Environment Rules to Be Cut by 50%*, TORONTO STAR, July 24, 1996, at A2; Brian McAndrew, *Ontario to Sink Pollution Law*, TORONTO STAR, July 26, 1996, at A5 (noting that business organizations representing dozens of Ontario's largest mining, chemical and pulp and paper "high pollution" companies, upon invitation of new Progressive Conservative government, urged dismantling of province's stringent framework of environmental laws); Brian McAndrew, *Minister on Endangered List: Brenda Elliot Sits in the Environment Minister's Chair at Queen's Park but Critics Say the Only Impression She Has Left Is on the Cushion*, TORONTO STAR, Apr. 20, 1996, at C6 (noting that $60 million-dollar cut from Ontario Ministry of Environment and Energy's 1995 $330 million-dollar budget represented reduction of 18%); Martin Mittelstaedt, *Industries Urge Ontario to Ease Pollution Laws*, GLOBE AND MAIL (Toronto), May 21, 1996, at B1; Ken Traynor, *Deregulation—A Disturbing Continental Trend*, INTERVENOR, Mar./Apr. 1996, at 2 (noting that "dramatic assault on environmental regulation now being carried out by Ontario's Progressive Conservative government since being elected in June 1995 represents a common and disturbing" North American trend); Editorial, *Polluted Public Policy*, TORONTO STAR, May 26, 1996, at E2.

14. *See* Peter H. Lerner, *The Efficiency of Citizen Suits*, 2 ALB. L. ENVTL. OUTLOOK 4 (1995) (noting that it may be appropriate to recognize that enforcement of environmental laws is too important to leave to "exclusive province" of government in light of public's growing questioning of government's ability to solve problems).

development of critical environmental policy.[15]

What is remarkable, however, is how the interest in defending the environment through an assertion of fundamental environmental rights has persevered over time. This notion, which may have reached its zenith in the United States in the 1970s with the passage of the Michigan Environmental Protection Act (MEPA),[16] found its

15. *See, e.g.*, Natural Resources Defense Council v. Train, [1976] 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,588 (D.D.C. June 9, 1976) (involving United States citizen suit which resulted in EPA's establishment of priority pollutant program under Clean Water Act); Canadian Wildlife Fed'n, Inc. v. Minister of Env't, [1989] 3 C.E.L.R. 287 (F.C.T.D.), *aff'd* [1989] 4 C.E.L.R. 1 (F.C.A.) (Can.); Friends of the Oldman River Soc'y v. Canada, [1992] 7 C.E.L.R. 1 (S.C.C.) (Can.) (affirming statutory validity and obligation of federal government to comply with its environmental assessment and review process).

16. MEPA, MICH. COMP. LAWS ANN. §§ 324.1701 to 324.1706 (West 1997). *See A New Right to Sue Polluters*, TIME, Aug. 24, 1970, at 37 (noting that MEPA puts every Michigan citizen on an equal footing with state's attorney general in environmental cases); Editorial, *Environment Goes to Court*, N.Y. TIMES, Aug. 3, 1970, at 30 (noting that MEPA pointed way toward similar initiatives at federal and state level). MEPA achieves three key reforms: (1) allows any private citizen to sue on behalf of general population for public nuisance whether or not nuisance affects that person personally; (2) does not require Michigan courts to defer to governmental decisions; and (3) shifts the burden of proof to the defendant once the plaintiff makes out a prima facie case. MEPA, MICH. COMP. LAWS ANN. §§ 324.1701 to 324.1706 (West 1997).

A number of states have adopted environmental legislation employing language similar to that found in MEPA. *See, e.g.*, Minnesota Environmental Rights Act (MERA), MINN. STAT. ANN. §§ 116B.01 to 116B.13 (West 1997); Connecticut Environmental Protection Act (CEPA), CONN. GEN. STAT. ANN. §§ 22a-14 to 22a-20 (West 1997); MASS. GEN. LAWS ANN. ch. 214, § 7A (West 1997); South Dakota Environmental Protection Act (SDEPA), S.D. CODIFIED LAWS §§ 34A-10-1 to 34A-10-15 (Michie 1997); New Jersey Environmental Rights Act (NJERA), N.J. STAT. ANN. §§ 2A:35A-1 to 2A:35A-8 (West 1997); Indiana Environmental Protection Act (IEPA), IND. CODE ANN. §§ 13-30-1 to 13-30-12 (West 1997); Florida Environmental Protection Act (FEPA), FLA. STAT. ANN. § 403.412 (West 1997). *But see* Lerner, *supra* note 14, at 10 (indicating that experience among MEPA-influenced environmental rights statutes has been mixed).

Where standing rules have been unclear, some courts have been slow to adopt the broad legislative intention of allowing anyone to sue. *See id.* (referring to state of Connecticut). Where standing rules have been clear, other states have retained other limitations, thereby preventing the statute from being used frequently. *See id.* (referring to state of Indiana which additionally requires exhaustion of all available administrative remedies). Conversely, courts interpreting environmental rights legislation containing an exhaustive list of definitions have recognized very broad standing rights. *See id.* (referring to state of Minnesota which has largely avoided disputes on this issue).

According to Lerner, states have been inconsistent in their determination of what types of polluting activities are actionable under their respective environmental rights statutes. *See id.* For example, some state statutes authorizing actions against unreasonable damage to the "public trust" in those state's resources, have been interpreted by courts to allow actions for protection of air and water but not for other resources. *See id.* (referring to state of Connecticut which has found damage to natural resources to be reasonable). On the other hand, courts have allowed citizen suits protecting a broad range of resources where the state statute

transnational expression and more modest articulation in Canada in the 1990s with the passage of laws such as Ontario's Environmental Bill of Rights (OEBR).[17] To this day, environmental rights legislation continues to be considered in the legislatures of various jurisdictions in the United States[18] and Canada.[19]

The Michigan experience has been the impetus for the development of slightly modified environmental rights legislation in several Canadian jurisdictions. In Ontario, for example, the legislature enacted OEBR, a law emulating MEPA but reflecting substantial changes. OEBR modified MEPA's substantive rights regime[20] to a predominantly administrative rights regime, by addressing such matters as notice and comment opportunities,

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provides an extensive definition of "natural resources" and does not require a finding of unreasonableness. *See id.* (referring to state of Minnesota).

Lerner further explained that some court holdings have conflicted with the broad remedial purposes of citizen suit laws. *See id.* (referring to state of Massachusetts which required that damage to natural resources be significant and arise from violation of statute). Similarly, where states have permitted citizen suits for both statutory violations and damage to the public trust, the courts have allowed citizen suits only for the former, but not the latter. *See id.* (referring to state of New Jersey).

17. OEBR, S.O., ch. 28 (1993) (Can.). *See* Paul Morden, *Environmental Bill Allows Citizens to Take Action,* SARNIA OBSERVER, Jan. 3, 1994, at 1; Lynne Olver, *Environmental Bill Called "Tool Box" for Citizens,* SAULT STAR, Feb. 19, 1994, at B4 (noting that OEBR should make it easier for citizens to take action against persons causing pollution because it allows residents to bring suit against alleged polluters suspected of breaking environmental law and damaging public resources). MEPA had the greatest impact on Ontario legislators, lawyers and the public during the 1970s and 1980s. A number of provinces and territories have adopted environmental legislation similar to MEPA and earlier versions of OEBR introduced as private members' bills during the 1980s. *See, e.g.,* Quebec Environmental Quality Act, R.S.Q., ch. Q-2 (1993) (Can.) (outlining statutory scheme similar to Environmental Bill of Rights); Northwest Territories Environmental Rights Act, S.N.W.T., ch. 38 (1990) (Can.) (same); Yukon Territories Environmental Act, S.Y.T., ch. 5 (1991) (Can.) (same).

18. *See* Lerner, *supra* note 14, at 4 (noting that New York State Assembly passed an environmental citizen suit bill in 1995 which was being considered by the New York State Senate).

19. *See* PAUL MULDOON & RICHARD LINDGREN, THE ENVIRONMENTAL BILL OF RIGHTS: A PRACTICAL GUIDE 25-26 (1995) (explaining that provinces of Saskatchewan and British Columbia introduced draft bills on environmental rights, but neither legislature has yet passed such bill).

20. *See* Michigan State Highway Comm'n v. Vanderkloot, 220 N.W.2d 416, 427-28 (Mich. 1974) (holding that MEPA provides both separate procedural route for protection of environmental quality as well as source of supplementary substantive environmental law). The Michigan Supreme Court explained that MEPA is designed to accomplish two distinct results: (1) provide a procedural cause of action for protection of Michigan's natural resources; and (2) establish substantive environmental rights and impose substantive environmental duties and functions upon those engaging in pollution, impairment or destruction of air, water or other natural resources or the public trust therein. *See id.*; *see also* Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report,* 70

administrative appeals and procedural rights.[21] Both political and economic factors contributed to these changes.[22] As they are currently structured, MEPA and OEBR represent the polar extremes of approaches or paradigms of environmental rights law. Understanding the strengths and weaknesses of each can assist not only Michigan and Ontario in any future reforms, but also other jurisdictions considering the enactment of environmental rights legislation.

This Article explores the extent to which the Ontario approach in OEBR differs from MEPA, the Michigan approach, and explains whether those differences constitute a positive or negative departure from the Michigan law. Part II reviews the origins and sources of environmental rights theory and the initiatives in Michigan and Ontario.[23] Part III discusses MEPA's key substantive provisions and surveys the case law that has interpreted the statute for over twenty-five years.[24] Part IV examines the evolution of OEBR's develop-

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MICH. L. REV. 1004, 1005, 1054-64 (1972) (noting that MEPA "recognizes and makes enforceable a new substantive right" to environmental quality).

21. OEBR, S.O., ch. 28, §§ 2(a)-(c) (1993) (Can.). OEBR has three essential purposes: (1) increase public participation in the environmental decision-making process; (2) increase government accountability; and (3) increase public access to the courts. *See id.*; *see also* MULDOON & LINDGREN, *supra* note 19, at 3, 46 (detailing three essential purposes). The components of the first purpose include: (1) notice and comment opportunities in relation to new statutes, regulations, policies and instruments (e.g., licenses, permits or approvals); (2) opportunities to request governmental review of existing statutes, regulations, policies or instruments or to request that new statutes, regulations or policies be developed where none exist; and (3) limited opportunities for appeals of instruments to an administrative tribunal and in some cases, review in the courts. *See id.* The first purpose, the public participation regime, has been called the "core" and the "heart" of OEBR, designed to reform the role of the public in the administrative process of environmental protection in the province. *See id.* The components of the second purpose include: (1) a requirement that certain ministries of the Ontario government develop statements of environmental values (e.g., an action plan); and (2) establishment of an Environmental Commissioner to oversee, monitor and report to the Ontario legislature on implementation of, and compliance with, OEBR. *See id.* The components of the third purpose include: (1) opportunities to request governmental investigation of alleged statutory, regulatory or instrumental violations; (2) establishment of a new cause of action where there has been a violation of an environmental law that has caused a significant harm to a public resource; and (3) modification of the bar to allow standing in public nuisance cases. *See id.* One commentator suggested that OEBR turned the courts into the forum of last resort. *See* Michael Cochrane, *Overview of the Environmental Bill of Rights: Address Before the Canadian Bar Association on the Subject of Environmental Bill of Rights* (June 10, 1994), *in* ENVIRONMENTAL BILL OF RIGHTS: PRACTICAL IMPLICATIONS 6 (1994) (describing OEBR as a regime with reliance on both political and judicial accountability).

22. For further discussion of the political and economic factors contributing to the new focus in OEBR, see *infra* notes 186-203 and accompanying text.

23. For a discussion of the origin of environmental rights theory, see *infra* notes 28-70 and accompanying text.

24. For explication of MEPA's substantive provisions, see *infra* notes 83-168 and accompanying text.

ment.[25] Throughout this Article, a comparative analysis of MEPA and OEBR is conducted.[26] Ultimately, Part V concludes that OEBR is largely a "rights law" in name only because its administrative and procedural rights regime is highly dependent on agency discretion.[27]

II. ORIGINS OF ENVIRONMENTAL RIGHTS INITIATIVES

The origins of environmental rights initiatives in both Michigan and Ontario reflect parallel and diverging paths. The parallels arise from a similarity in judge-made law concerning common law obstacles to sue, such as public nuisance. According to Michigan and Ontario common law, only the Attorney General may sue for public resource interferences unless there is a showing of harm different in kind from the public at large.[28] The diverging paths are a result of Canada's lag in regulatory reformation. The United States

25. For a discussion of OEBR's development, see *infra* notes 169-209 and accompanying text.

26. For a comparative analysis of MEPA and OEBR, see *infra* notes 338-39 and accompanying text.

27. In sum, the author believes that OEBR's substantive rights regime is too narrow in scope to achieve its proclaimed goals of encouraging the public's right to participate in environmental decisions, holding the government accountable and gaining access to the courts. Although OEBR is clearly a step forward, the statute represents neither the end of Ontario's search for public environmental enforcement nor the beginning of the end. It merely represents the end of the beginning.

28. *See, e.g.*, White Lake Improvement Ass'n v. City of Whitehall, 177 N.W.2d 473, 476 (Mich. Ct. App. 1970) (articulating common law standing principles). In *City of Whitehall*, a conservation association filed a motion requesting that the Michigan Court of Appeals "overrule the universally accepted doctrine that only one who suffers harm different in kind from that suffered by the public generally may maintain an action for the abatement of a public nuisance." *Id.* In rejecting the request, the Michigan Court of Appeals noted that "no case has been cited where a court has, even for a clearly publicly motivated group, made an exception to the 'different in kind' standing requirement which for so long has been a feature of the law of public nuisance." *Id. See also* Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 720-21 (Mich. 1992) (evidencing that Michigan public nuisance common law remains largely same today); Cloverleaf Car Co. v. Phillips Petroleum Co., 540 N.W.2d 297, 500 (Mich. Ct. App. 1995) (holding that private citizen may bring action in public nuisance only upon suffering harm different from that suffered by general public). Canadian common law is similar to Michigan common law. *See, e.g.*, Hickey v. Elec. Reduction Co. of Can., Ltd., [1971] 21 D.L.R.3d 368, 369 (Nfld. S.C.) (explicating limitation on citizen suit standing); Fillion v. N.B. Int'l Paper Co., [1934] 3 D.L.R. 22, 26 (N.B.C.A.) (holding that in order to succeed in public nuisance action, plaintiffs must establish that injury inflicted upon them by defendant is particular, direct and substantial, over and above injury inflicted upon public in general). The *Fillion* court emphasizes that where plaintiff's injury is common to all and is no greater than that of other members of the public, only the Attorney General may sue in public nuisance to vindicate that right. *Fillion*, 3 D.L.R. at 26.

advanced its federal and state laws in the 1970s in such areas as access to information, public participation in rule-making and requirements to conduct environmental impact studies.[29] Similar developments, however, took form much more slowly at the Canadian federal and provincial levels.[30]

A. Michigan

In the 1960s and early 1970s, a variety of factors and forces converged in Michigan and the United States, which led to the enactment of MEPA, including: (1) the increased evidence of environmental damage from industrial and technological activities;[31] (2) the inability of government to prevent such damage and actions of some agencies in initiating or perpetuating environmental

29. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (1994); Administrative Procedure Act, 5 U.S.C. § 553 (1994); National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331-4335 (1994).

30. *See, e.g.*, Access to Information Act, R.S.C., ch. A-1 (1985) (Can.) (reflecting information access legislation was not enacted at Canadian federal level until early 1980s); Freedom of Information and Protection of Privacy Act, R.S.O., ch. F.31 (1990) (Can.) (reflecting information access legislation was not enacted in Ontario until late 1980s); OEBR, S.O., ch. 28, §§ 3-48 (1993) (Can.) (reflecting legislation requiring public participation in environmental rule or rule-making process was not enacted in Ontario until 1990s); Environmental Assessment Act, R.S.O., ch. E.18 (1990) (Can.) (reflecting legislation requiring environmental impact studies was not enacted in Ontario until mid-1970s and was not fully enforceable until mid-1980s); Canadian Environmental Assessment Act, S.C., ch. 37 (1992) (Can.) (reflecting that although ad hoc procedures were applied throughout 1970s and 1980s, federal legislation requiring environmental impact studies was not in effect until 1995). *See also* JOSEPH F. CASTRILLI & MARK WINFIELD, THE ONTARIO REGULATION AND POLICY-MAKING PROCESS IN A COMPARATIVE CONTEXT: EXPLORING THE POSSIBILITIES FOR REFORM (Oct. 1996) (report prepared for the Environmental Commissioner of Ontario) (on file with author) (explaining Canada's lag in ensuring public participation in rule-making process under environmental regulatory schemes).

Unlike Michigan, Canadian environmental reform encompassed a wider notion than just a role for citizens in the courts; it extended a role to citizens in the administrative process as well. MEPA's and OEBR's different starting points contributed significantly to the different paths environmental rights eventually took in each jurisdiction. Notwithstanding their differences, the enactment and interpretation of MEPA significantly influenced the environmental rights debate in Ontario.

31. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 4 (1992) (noting that number of vivid events in 1960s highlighted growing public awareness of environmental problems). Percival lists the following events that reflected the growing public environmental awareness: (1) 1962 publication of Rachel Carson's *Silent Spring*, which exposed the bioaccumulative character of DDT; (2) 1963 federal government proposal to dam the Colorado River in order to flood part of the Grand Canyon; (3) the mid-1960s discovery of methyl mercury in swordfish; (4) studies in California linking automobile exhaust to urban smog; (5) the contribution of supersonic transport to noise pollution and ozone depletion; and (6) the 1969 oil spill off the coast of Santa Barbara, California drenching both the shoreline and seabirds with oil. *See id.*

problems;[32] and (3) the rise of local, regional and national environmental organizations responding to immediate environmental crises and seeking long-term legal and institutional solutions.[33] The immediate catalyst for the development of MEPA stemmed from a 1968 lawsuit.[34] In *Environmental Defense Fund, Inc. v. Michigan Department of Agriculture,* the plaintiff environmental organization sought to enjoin the defendant agency from spraying the pesticide dieldrin on state farm areas for the purpose of eradicating the Japanese beetle.[35] The Michigan Court of Appeals held that the agency had not exceeded its discretion and could, therefore, spray the pesticide on 4600 acres of small watersheds draining into Lake Michi-

32. *See* SAX, *supra* note 10, at 103, 240-42 (discussing events surrounding 1969 Santa Barbara oil spill). According to Professor Sax, the conduct of the Department of the Interior revealed the pressures that administrative agencies are often under in attempting to balance the competing interests of environmental protection and resource development. *See id.* The Department of Interior faced pressures from all directions. It needed to assure local government officials and citizens that an oil spill could never occur, and also to calm the fears of the oil industry which had already invested millions of exploratory dollars into the project. *See id.* Moreover, the Department faced pressure from the Budget Bureau to have a maximum leasing program to provide more money to meet the President's need to balance the national budget. *See id.*

33. *See* PERCIVAL, *supra* note 31, at 4 (noting that in 1960s and early 1970s traditional conservation and preservationist groups, such as Wilderness Society, were joined by new organizations, such as Environmental Defense Fund, which focused on problems including pesticides and toxic substances); Joseph L. Sax, *Environment in the Courtroom,* SATURDAY REVIEW, Oct. 3, 1970, at 56 (noting that small Michigan conservation organization asked author to draft model environmental law that eventually became MEPA). The United States' long-standing interest in preservation of nature articulated in the 19th century writings of various authors such as Emerson and Thoreau, and more contemporary authors, such as Leopold, further colored the environmental regulatory movement. *See, e.g.,* RALPH WALDO EMERSON, NATURE (Stephen E. Whicher ed., Riverside 1960) (1836) (reflecting literary appreciation of nature and laying foreground to environmental preservation movement); ALDO LEOPOLD, A SAND COUNTY ALMANAC (Ballantine Books 1970) (1949) (same); HENRY DAVID THOREAU, WALDEN (Signet Classic 1960) (1854) (same). In addition, there was an emerging legal interest in examining the philosophical basis for recognizing new judicially enforceable rights arising in part from popular movements of the period such as poverty and civil rights. *See, e.g.,* JOHN RAWLS, A THEORY OF JUSTICE (1971); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). *See also* SAX, *supra* note 10, at 96 (noting considerable literature in 1960s asserting that these and other areas constitute fundamental rights); Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent,* 21 STAN. L. REV. 767 (1969) (asserting indigence as basis for legal right).

34. Environmental Defense Fund, Inc. v. Michigan Department of Agriculture, 162 N.W.2d 164 (Mich. Ct. App. 1968). *See also* John A. Watts, *Michigan Environmental Protection Act,* 4 U. MICH. J.L. REFORM 358, 359 (1970) (suggesting that this 1968 suit is directly responsible for enactment of environmental citizen suit legislation); James M. Olson, *The MEPA: An Experiment That Works,* 64 MICH. B.J. 181, 185-86 (1985) (same).

35. 164 N.W.2d at 164.

gan.[36] For the plaintiffs, this decision illustrated the problem of judicial deference to the determinations of administrative agencies.[37]

Several groups involved in the dieldrin lawsuit sought the assistance of then University of Michigan Law School Professor, Joseph L. Sax, to draft legislative proposals giving citizens a better chance of succeeding in environmental legal proceedings.[38] Professor Sax drafted a bill which the Michigan legislature eventually

36. *See id.* (holding that agency's decision to use pesticides to eradicate insects and protect agricultural crops was not abuse of discretion since it was within agency's wisdom and judgement).

37. *See* Watts, *supra* note 34, at 360 (describing problem predicted to prevent legal system from fully protecting environment).

38. *See id.* (detailing history of MEPA); Olson, *supra* note 34, at 185-86 (same); Joseph F. DiMento, *Environmental Hope or Hysteria of Dilettante Earth Savers? A Return to the Debate Over MEPA*, 63 MICH. B.J. 348, 349 (1984) (explaining that Professor Sax had long been studying problem of using legal system to protect environment). In the course of his study, Professor Sax developed numerous theories as to why the legal and regulatory system was failing. According to Sax, individual citizens need to be able to sue in public nuisance for damage to public resources. *See* Sax, *supra* note 33, at 55 (noting that although harm to environment touches every member of community, no individual may sue for such widespread public nuisances as air and water pollution, dissemination of pesticides or destruction of valuable natural resources). Sax states: "For the great bulk of environmental problems there is no recognized public right to redress and even the most meritorious cases continue to founder on the rock of the sixteenth century public nuisance law." *Id.*

Sax also emphasized the undue reliance on, and judicial deference to, the discretion of administrative agencies as the central environmental decision-making institution. *See* SAX, *supra* note 10, at 53, 63, 125-26, 147-48 (noting that despite fact that administrative agencies are created to promote and protect public interest, elements that characterize administrative agencies, such as narrow technical expertise, managerial orientation, historical association with particular regulated interests and budget concerns, tend to lock agencies into insider perspective that is often at odds with interests of public in environmental protection). Sax explains that courts have been restricted by traditional notions of the limited scope of judicial review of administrative action and feel that "special deference must be paid to administrative expertise when they are in fact, usually only giving the courts' imprimatur to administrative politics." *Id.*

Sax, likewise, felt that reformers misplaced their expectations; he disagreed with the proposition that modified agency procedures would bring significant improvement in protection of the environment. *See id.* at 63-82 (explaining typical reform proposals). According to Sax, reform proposals usually consist of the following: (1) a requirement that agencies undertake more careful and elaborate studies before they approve projects; (2) enlargement of public participation, such as better notice proposals, more public hearings and greater public access to official documents and reports; and (3) agency reorganization, better coordination between agencies, or establishment of new bodies. *See id.* Sax further noted the lack of overall government accountability as trustee for the public on environmental issues. *See* Sax, *supra* note 33, at 57 (comparing old Roman public trust doctrine to contemporary concerns about environment). Finally, Sax identified as a problem the exclusion or withdrawal of citizens from the process of determining what constitutes the public interest in environmental quality. *See* SAX, *supra* note 10, at 56, 58 (noting that administrative process tends to produce elaborate structure of

adopted almost entirely from his original draft.[39] The bill's central feature was the notion that private citizens could activate the judiciary to protect natural resources and the environment. According to Professor Sax, the purposes of his bill were as follows: (1) to recognize the public right to a "decent environment" as an enforceable legal right; (2) to make this right enforceable by private citizens suing as members of the public; and (3) to set the stage for the development of a common law of environmental quality.[40]

Broad and diverse support for the bill in Michigan demonstrated widespread public dissatisfaction with the existing legal and regulatory regime.[41] This dissatisfaction centered on the view that administrative agencies, as the primary source for implementing the public interest in environmental protection, were too closely associated with the regulated interests and activities to effectively balance opposing priorities.[42] Moreover, citizens were viewed as unlikely to obtain adequate relief from the agencies or courts because the agencies viewed them as meddlesome interlopers.[43] In light of these concerns, Professor Sax's bill tapped a strong current of public support in Michigan by identifying underlying obstacles to public intervention in the process of environmental protection. At the same time, the bill proposed a solution to the problem. Perhaps more significantly, MEPA has influenced the development of similar initiatives in other states and countries, including several jurisdictions in Canada.[44]

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administrative middlemen which has dulled public's sensitivity to claim that citizens as members of public have rights).

39. *See* Watts, *supra* note 34, at 360-69 (discussing history of MEPA); DiMento, *supra* note 38, at 349 (same); Olson, *supra* note 34, at 185-86 (same).

40. *See* SAX, *supra* note 10, at 248 (articulating purposes of his reform bill).

41. *See* Watts, *supra* note 34, at 360-69 (noting that those supporting bill included variety of national, regional and local environmental conservation organizations, some state agencies, state attorneys general, and both democrats and republicans); DiMento, *supra* note 38, at 349-50 (identifying League of Women Voters, Parent-Teachers Association and United Auto Workers as MEPA supporters).

42. *See* Susan Pearce, *Michigan Environmental Protection Act of 1970,* 4 U. MICH. J.L. REFORM 121, 121-22 (1970) (discussing factors leading to enactment of MEPA).

43. *See* SAX, *supra* note 10, at 50 (noting that inability of citizens to obtain adequate relief from courts stems from judicial deference to agency determinations).

44. For a list of state statutes emulating MEPA, see *supra* note 16. *See also* GERRY M. BATES, ENVIRONMENTAL LAW IN AUSTRALIA 368 (3d ed. 1992) (noting MEPA's inspiration on legislative provisions in state of New South Wales, Australia); Kenneth M. Murchison, *Environmental Law in Australia and the United States: A Comparative Overview,* 22 B.C. ENVTL. AFF. L. REV. 503, 554 (same). The New South Wales law allows any person to enforce its environmental assessment requirements.

B. Ontario

In the late 1960s and early 1970s, Ontario faced a host of concerns including pesticides, industrial chemical contamination, indiscriminate highway development, contamination of the Great Lakes, mismanagement of public forests and park lands, destruction of wetlands and other natural areas, and air pollution.[45] Each

By eliminating standing as a barrier to obtaining judicial review, this provision permits environmental groups to act as overseers of government implementation of environmental policy. *See* Murchison, *supra*, at 554.

45. *See* CROSS-MISSION TASK FORCE, GOVERNMENT OF CANADA, SCIENTIFIC AND TECHINCAL ASPECTS OF THE ENVIRONMENTAL CONTAMINANTS PROBLEM, A9-A10 (1972) (on file with author) (acknowledging that pesticide DDT seriously affected reproduction of carnivorous birds in Canada, such as peregrine falcon); *see also* Warner TROYER, NO SAFE PLACE 13-20 (1977) (discussing industrial mercury contamination); Editorial, *Mercury Poisoning-Who Should Pay?*, TORONTO STAR, May 21, 1973, at A8 (comparing exposure of native people to methyl mercury in northwest Ontario with similar poisoning of fishermen in Minamata, Japan); *Mercury Level Unsafe, Ban Lake Erie Fishing*, GLOBE AND MAIL (Toronto), April 1, 1970, at 1 (discussing mercury contamination in Great Lakes); Farrell Crook, *More Fishing Curbs Announced Because of Mercury*, GLOBE AND MAIL (Toronto), May 2, 1970, at 3 (same); Stan Oziewicz, *Dropping of Dow Suit Defended by Minister*, GLOBE AND MAIL (Toronto), June 10, 1978, at 5 (same); *see also* C. C. Lax, *The Toronto Lead Smelter Controversy, in* ECOLOGY VERSUS POLITICS IN CANADA (William Leiss ed., 1979) (discussing lead contamination in Toronto schools beginning as early as 1965, and noting official findings of inadequate regulatory standards and enforcement, sparking decade and half- long effort to correct); Alden Baker, *Cabinet Decides to Halt Spadina*, GLOBE AND MAIL (Toronto), June 4, 1971, at 1 (discussing debate over environmental effects of proposed $140 million Toronto expressway which ended after Ontario Cabinet withdrew funding); Editorial, *People Before Things*, GLOBE AND MAIL (Toronto), June 4, 1971, at 6 (same); INTERNATIONAL JOINT COMMISSION ON POLLUTION OF LAKE ERIE, LAKE ONTARIO AND THE INTERNATIONAL SECTION OF THE ST. LAWRENCE RIVER 81-82 (1970) (on file with author) (discussing contamination of Great Lakes from phosphate detergents and urging both U.S. and Canadian governments to reduce phosphorus content of detergents and to take other actions designed to reduce phosphorous input to lakes in order to reverse eutrophication of waters); J. F. FLOWERS & F.C. ROBINSON, ONTARIO MINISTRY OF NATURAL RESOURCES, PROPOSED POLICY FOR CONTROLLING THE SIZE OF CLEARCUTS IN NORTHERN FOREST REGIONS OF ONTARIO (1976) (on file with author) (discussing mismanagement of public forests, uncontrolled clear-cutting in northern Ontario Crown forests, frequent difficulty in ensuring proper forest regeneration); *see also* Green v. Ontario, [1972] 34 D.L.R.3d 20 (Ont. H.C.) (discussing mismanagement of public lands). Despite an extensive developing system of provincial parks in Ontario, resource extraction, including mining and logging formed a part of the system. The *Green* court concluded that Ontario's provincial parks law imposes no public trust on the government to protect such lands from resource exploitation. *See id.* The ruling was made notwithstanding Ontario's 99-year lease to a cement company to extract sand from lands immediately adjacent to the provincial park. *See id.* (disregarding fact that park's origination was to prevent destruction of ecological value of park's own sand dune system). The court further held that members of the public do not have standing to sue where a park is being exploited, because standing only inures in the Ontario Attorney General for public nuisances. *See id.*

See also ELIZABETH A. SNELL, ENVIRONMENT CANADA, WORKING PAPER NO. 48, WETLAND DISTRIBUTION AND CONVERSION IN SOUTHERN ONTARIO 32-33 (1987) (on file with author) (discussing destruction of wetlands); GOV'T OF CANADA, GREEN

of these concerns and a myriad of other environmental problems generated public reliance on the government for solutions. As in the United States, Canada's federal and provincial governments responded to these concerns by establishing new institutions and investing existing institutions with new powers to protect the environment. The legislature granted broad authority to these institutions, but imposed few mandatory obligations to act.[46] The result was public dissatisfaction with both the government's and the public's limited role in the management and protection of the environment and natural resources of the province.[47]

During this period, environmental pressure groups also sought a greater say in environmental protection efforts.[48] In the early 1970s, the introduction of an environmental protection bill in the

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PLAN 79 (1991) (on file with author) (same). Before European settlement, wetlands covered over 2.4 million hectares of southern Ontario. By the 1970s and 1980s, however, only about 60% of this total remained, with agricultural drainage accounting for a majority of the province's losses. *See* SNELL, *supra.* Wetlands provide recharge areas for surface and groundwater, filter pollutants, and are a source of habitat for wildlife and waterfowl, including many rare, threatened and endangered species. *See id.* Destruction of wetland areas in southern Ontario continued to accelerate so that by the early 1990s, estimates of the remaining stock were in the 30% range. *See* GOV'T OF CANADA, *supra.*

See also Editorial, *Acid-threatened Lakes,* GLOBE AND MAIL (Toronto), July 27, 1971, at 6 (discussing air pollution from sulphur oxides); SCIENCE COUNCIL OF CANADA, REPORT NO. 16, IT IS NOT TOO LATE—YET 14 (1972) (on file with author) (same). The sulphur dioxide emitted by the International Nickel Company smelter at Sudbury, Ontario in the 1970s constituted 10% of all sulphur dioxide produced in North America. *See* SCIENCE COUNCIL OF CANADA, *supra.* The sulphur dioxide, once emitted, mixed with water vapor to form acid rain and killed lakes for 50 miles around Sudbury. *See id.*

46. *See, e.g.,* Environmental Protection Act, S.O., ch. 86 (1971) (Can.) (granting authority to new Ontario Ministry of Environment to issue various stop, control, remedial, preventive and removal orders); Re Canadian Metal Co. v. McFarlane, [1973] 1 O.R.2d 577 (Ont. H.C.) (discussing authority of Ministry of Environment). Ontario used its stop order power to immediately halt lead emissions from a battery crushing operation in Toronto. *See McFarlane,* 1 O.R.2d at 577. The order was quashed on the grounds that the ministry director had failed to act judicially and had abused discretion by not having relevant evidence that the plant constituted an "immediate danger to human health" as required by statute. *Id.*

47. *See* David Estrin, *Annual Survey of Canadian Law-Part 2: Environment,* 7 OTTAWA L. REV. 397, 405 (1975); John Swaigen, *Annual Survey of Canadian Law-Environmental Law 1975-1980,* 12 OTTAWA L. REV. 439 (1980) (noting that in early 1970s, governments began taking staff from various government agencies and integrating them into new departments or ministries of environment); Walter Pitman, *Pollution Victims Can't Enforce the Laws,* TORONTO STAR, Mar. 2, 1973, at 8 (noting that initial public assumption that pollution problems would be solved by creation of a department of environment at both federal and provincial levels turned out to be incorrect, as governments were not acting and citizens were being excluded from process).

48. *See* Estrin, *supra* note 47, at 397 (noting parallel development of environmental pressure groups in United States and Canada); Swaigen, *supra* note 47, at

Ontario legislature served as the catalyzing agent for the formation of several environmental law groups. Ontario entitled its bill the Environmental Protection Act, characterizing it as both the centerpiece of reform and an "Environmental Bill of Rights."[49] Analogizing the bill to an "Environmental Bill of Goods," the pressure groups roundly criticized the bill for failing to contain many of MEPA's elements.[50] Essentially, the groups argued that the bill gave the public no independent right of action where the government was not prepared to act. While the new regulatory regime looked powerful on paper, it proved ineffective in practice. The pressure groups were particularly concerned with the grant of administrative discretion which could have the potential effect of locking the public out of the process.[51] Notwithstanding such criticism, the provincial government managed to convince the 1971 Ontario legislature to enact the Environmental Protection Act with only minor amendments from the original draft.[52]

The passage of the Environmental Protection Act sparked a debate over environmental law reform in Ontario that was to last for over two decades. The debate ultimately ended with the passage of OEBR in 1993. Although unsuccessful in amending the Environmental Protection Act, the pressure groups proposed a number of environmental law reforms in the early 1970s. Because of the infancy of environmental legislation in the province at that time, those proposed reforms not only encompassed substantive and procedural law reform of the type found in MEPA, but also sought to remedy a host of administrative law deficiencies that excluded the public from the environmental decision-making process. Like the Ontario government, the environmental pressure groups called

446 (noting rise of Canadian Environmental Law Association and West Coast Environmental Law Association).

49. *See* CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION, CRITIQUE OF PROPOSED ENVIRONMENTAL PROTECTION ACT-BILL 94 1 (1971) (on file with author); *Broad Pollution Law Proposed,* GLOBE AND MAIL (Toronto), July 1, 1971, at 1.

50. *See* CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION, *supra* note 49, at 1-6 (noting that Ontario government's proposed bill failed to provide any new private rights of action against polluters); David Estrin, *Premier Davis Sold Us a Bill of Goods on Pollution,* TORONTO STAR, May 5, 1972, at 8 (observing that bill granted government broad authority to protect environment but imposed few duties on officials to do so).

51. *See* Estrin, *supra* note 50, at 8.

52. *See* Environmental Protection Act, S.O., ch. 86 (1971) (Can.) (reflecting original act). The Environmental Protection Act has been amended many times since 1971 but has never been changed to reflect the original criticisms aimed at it by the various environmental pressure groups concerning too much governmental discretion and too little public involvement. *See* Environmental Protection Act, R.S.O., ch. E-19 (1990) (reflecting revised act).

their package of reforms an "Environmental Bill of Rights."[53] Over

53. *See, e.g.*, DAVID ESTRIN, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, NEEDED: AN ENVIRONMENTAL BILL OF RIGHTS (1973) (discussing pressure group reform proposals); Clifford Lax, *An Environmental Bill of Rights Will Clear the Air*, TORONTO STAR, April 17, 1973, at 9 (same). In contrast to the Environmental Protection Act, the pressure groups proposals included: (1) a declaration of the public's right to a healthy and attractive environment; (2) establishment of a public trust in the environment; (3) standing before courts and administrative tribunals; (4) a requirement of environmental impact studies; (5) access to information; (6) public participation in setting environmental standards; (7) an environmental ombudsman; (8) class actions; (9) the right to defend the environment at a reasonable cost; (10) restrictions on agency discretion and a corresponding expansion of judicial review of administrative action; and (11) placing the burden of proof on a polluter to demonstrate that there is no feasible alternative to his conduct. *See* Swaigen, *supra* note 47, at 456 (detailing pressure groups proposals); ESTRIN, *supra*, at 6 (same).

The content of a right to a healthy and attractive environment appeared to vary, ranging from a civil right equal in status to that of private property, to a civil liberty equivalent to that of freedom of speech or religion. The difference between the two conceptually was that the former appeared to constitute a positive entitlement to a particular result, whereas the latter implied freedom from environmental disruption. *See id.* In practice, both notions were intended to be enforceable in the courts. *See id.*

The second proposal, lifted directly out of MEPA, called for the treatment of natural resources as being subject to a public trust whereby the government would have a duty to protect these resources on behalf of the public. *See* Swaigen, *supra* note 47, at 456. The government would not be free to authorize development or pollution of such common resources unless it could be established that the action furthered the public interest. *See id.* Traditionally, the legislature and the courts restricted the right to use courts and tribunals to those individuals with property interests at stake. The third reform proposal aimed to remove the barriers to standing in public nuisance actions as well as to implied and express statutory restrictions. *See id.* at 458-61. Swaigen noted that the fourth proposal was more of a "look before you leap" reform derived largely from American experience under NEPA. *Id.* at 450-55.

Access to both government and private sector information about environmental damage was viewed as the key to the success of many of the proposals. *See id.* at 458. The sixth reform proposal required that citizens be given the right to participate in setting standards of environmental quality, and the right to demand that such standards be reviewed periodically. *See id.* at 457-58. Whether viewed as one person or an environmental council, the focus of the seventh reform proposal was to advise on policy, demand review of environment ministry decisions, report periodically on the state of the provincial environment and act as a watchdog for environmental abuse. *See id.* at 461-63 (explaining that seventh reform proposal was viewed as part of process of making government agencies more accountable to public while maintaining legislative authority). The eighth reform proposal allowed citizens to sue on behalf of other similarly aggrieved citizens for damages resulting from environmental destruction. *See id.* at 463-64. The ninth proposal provided relief from the normal Ontario civil rule that unsuccessful litigants pay a portion of the costs to the successful litigants. The proposal also granted authority to administrative tribunals to give sufficient funds to members of the public who want to appear before them to hire legal and technical assistance to prepare cases. *See id.* at 466-68 (recognizing that it would not be effective to create rights or provide access to information and decision-makers unless public could afford to enforce such rights). Because provincial legislation contains clauses that give government agencies unfettered discretion to make major decisions based on the agencies' view of the public interest, courts are limited as to the scope of review of

time, the Ontario legislature enacted some of the pressure group's proposals, including: (1) standing before certain administrative tribunals; (2) environmental impact studies; (3) access to information; (4) class actions; and (5) funding to intervene before administrative tribunals to protect the environment.[54] The bulk of the reform proposals, however, were not considered seriously by the Ontario government until the development of OEBR by the New Democratic Party (NDP) in the 1990s.

Because of the delay in enacting an environmental rights bill for over two decades, the intensity of the debate in Ontario was, in some ways, stronger and more vigorous than in Michigan.[55] During this long gestation period, jurisdictions in Canada observed the experience of states with MEPA-type laws.[56] A rich literature developed in Canada concerning the role of the courts in environmental policy which drew on the writings of Sax, Dworkin and others.[57]

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agency action. The tenth reform proposal restricted agencies with more non-discretionary duties and authorized judicial review to ensure conformance with its guidelines. *See id.* at 461-62. Where existing or prospective industrial activity damages or may damage the environment, the view implicit in the eleventh reform proposal is that the proponent of such activity is in the better position to carry the burden of proof. This final proposal, however, placed an initial showing on the plaintiff. *See id.* (explaining that eleventh reform proposal stemmed from MEPA).

54. *See* Class Proceedings Act, S.O., ch. C.6 (1992) (Can.); Intervenor Funder Project Act, R.S.O., ch. I.13 (1990) (Can.) (authorizing three-year pilot project). The Intervenor Funding Project Act required applicants for approvals of certain types of development projects to fund their opposition who could not otherwise afford to intervene in administrative proceedings. Funding was not authorized for civil proceedings. *See* W. A. BOGART & MARCIA VALIANTE, ACCESS AND IMPACT: AN EVALUATION OF THE INTERVENOR FUNDING PROJECT ACT, ONTARIO MINISTRIES OF THE ATTORNEY GENERAL, ENERGY AND THE ENVIRONMENT 239 (1992) (on file with author) (discussing 1992 study recommending that provincial ministries maintain requirement that intervenor funding be paid for by proponents of development projects). The report resulted in the extension of the law by the NDP government to 1996. *See* Joseph F. Castrilli, *Survey Supports Intervenor Funding Law, But Future in Doubt*, ENVIRONEWS, Nov. 1995, at 12; Kathleen Griffin, *Death of Intervenor Funding Expected to Have a "Chilling Effect" on Environmental Litigation*, LAW TIMES (Toronto), June 17-23, 1996, at 13-14 (observing sunset of law in April 1996 by newly elected Progressive Conservative government as part of its deregulation program); Rick Lindgren, *Harris Government Kills Intervenor Funding Law*, INTERVENOR, Mar./Apr. 1996, at 1; *Ministry of the Attorney General, Extension of Intervenor Funding Project Act Announced* (March 25, 1992) (news release on file with author).

55. *See* Paul Muldoon, *The Fight for an Environmental Bill of Rights; Legislating Public Involvement in Environmental Decision Making*, ALTERNATIVES, Apr./May 1988, at 32.

56. *See* Orlando E. Delogu, *Citizen Suits to Protect the Environment; The U.S. Experience May Suggest a Canadian Model*, 41 U. N. B. L.J. 124, 125-30 (1992). For a list of states with MEPA-type laws, see *supra* note 16.

57. *See, e.g.*, D. Paul Emond, *Co-operation in Nature: A New Foundation for Environmental Law*, 22 OSGOODE HALL L.J. 323 (1984); P.S. Elder, *Legal Rights for Nature - The Wrong Answer to the Right(s) Question*, 22 OSGOODE HALL L.J. 285 (1984) (focusing on why there was continuing search for environmental rights, what tangible

Furthermore, as in the United States, the debate in Canada focused on whether environmental rights should be procedural rights,[58] administrative rights,[59] substantive rights,[60] constitutionally-entrenched rights,[61] group rights,[62] non-human rights,[63] or some

effects were on environment, what basis of claim of rights was, what judicially enforceable rights were intended to do, what practical effect of recognizing rights would be, whether recognition of rights would answer public concerns about environmental degradation); John Livingston, *Rightness or Rights?*, 22 OSGOODE HALL L.J. 309 (1984) (same); John Swaigen & Richard E. Woods, *A Substantive Right to Environmental Quality, in* ENVIRONMENTAL RIGHTS IN CANADA 195, 197-205 (John Swaigen ed., 1981) (noting that rights holder is not mere supplicant of state and that right must be interest recognized and protected by law, respect for which is legal duty and disregard of which is actionable wrong).

58. *See, e.g.*, Elaine L. Hughes, *Civil Rights to Environmental Quality, in* ENVIRONMENTAL LAW AND POLICY 409, 411-22 (Elaine L. Hughes et al. eds., 1993) (noting that proposals for procedural environmental rights often focused on overcoming some obstacles to environmental litigation found at common law, such as barrier to standing to sue in public nuisance).

59. *See, e.g.*, David Estrin, *Vital Reforms Needed to Save Environment*, TORONTO STAR, April 8, 1972, at 13 (arguing that citizens required minimum rights of participation in administrative forum because of dominant role legislatures assigned to administrative agencies in environmental protection efforts). Administrative rights include: notice of proposed projects, environmental impact studies, administrative hearings and public involvement in setting environmental standards. *See id.* An additional administrative right was financial assistance for those who could not otherwise afford to intervene in administrative proceedings to defend the environment. *See* Raj Anand & Ian Scott, *Financing Public Participation in Environmental Decision-Making*, 60 CAN. B. REV. 81 (1982); Joseph F. Castrilli, et al., *An Environmental Impact Assessment Statute for Ontario, in* ENVIRONMENTAL MANAGEMENT AND PUBLIC PARTICIPATION 319, 329-30, 354-55 (P. S. Elder ed., 1975); *Support for Environment Fight Urged*, TORONTO STAR, Aug. 30, 1973, at A6.

60. *See* Swaigen & Woods, *supra* note 57, at 196, 204 (viewing substantive right as one which ensures advocates of environmental quality, establishes environmental quality as value equivalent to property rights, and fetters governmental discretion to permit environmentally harmful activities). The right need not be absolute in order to be substantive, but it must have the same prima facie weight as a property right and it must be enforceable in the courts. *See id.*

61. *See, e.g.*, Dale Gibson, *Constitutional Entrenchment of Environmental Rights, in* LE DROIT A LA QUALITE DE L'ENVIRONMENT 287 (N. Duple ed. 1988) (noting that statutory bills of rights are too easily amended or repealed, and their provisions are too easily construed narrowly by courts intent on deferring to legislature or administrative agency). Some proposals called for entrenching environmental rights in the Canadian Constitution. *See id.*

62. *See, e.g.*, Michael C. Blumm, *Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits A Prendre and Habitat Servitudes*, 8 WIS. INT'L L.J. 1, 23-24 (1989) (describing group rights as emerging environmental rights in Canada). Although the group rights of aboriginal peoples, such as hunting, fishing and trapping, do not expressly include environmental rights, they may nonetheless provide for a degree of environmental protection, particularly where wilderness preservation may be necessary to secure these rights. *See id.* Group rights may themselves be raised to the level of constitutional rights in Canada to the extent that the Canadian Constitution recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada." CAN. CONST. (Constitution Act, 1982) pt. 1, § 35. *See also* Randy Kapashesit & Murray Klippenstein, *Aboriginal Group Rights and Environmental Protec-*

other combination thereof. While some of this debate generated more heat than light on the subject, it gave Canadian provinces the opportunity to learn from the experience of MEPA, and to develop more sophisticated and effective laws over time.

C. Arguments Against Enacting Rights Legislation

During the environmental debates, business and industry argued against the enactment of environmental rights legislation. Some suggested that courts were neither competent to hear technically complex environmental cases traditionally determined by specialized administrative agencies, nor politically accountable.[64] Others felt that environmental rights laws would spawn a flood of frivolous litigation and drive industry away by creating undue delay, uncertainty and increasing costs.[65] Likewise, opponents, particularly in the 1990s, urged that environmental rights laws were unnecessary as a comprehensive administrative and regulatory regime, since vigorous enforcement and public participation were already in existence.[66] As a result, supporters of environmental rights laws responded to the following issues: (1) judicial competence; (2) ju-

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tion, 36 McGILL L.J. 925, 955 (1991) (discussing group rights of aboriginal peoples).

63. *See* Elder, *supra* note 57, at 285 (explaining that granting of legal rights to environment itself has been debated in Canada as means of averting as well as extending human dominance of nature); Emond, *supra* note 57, at 332-33 (same); Livingston, *supra* note 57, at 309 (same).

64. *See* Watts, *supra* note 34, at 365 (noting arguments against enactment of environmental rights legislation); Austin, *supra* note 11, at 223 (stating "citizen suits invite judicial lawmaking"). Environmental rights legislation has not been without its detractors in Michigan and Ontario. Concerns about such a legislative approach have come not only from expected sources, such as business, industry, and government agencies, but also from the academic and environmental community. While the legislation eventually overcame opposing arguments, the debate in Ontario significantly shaped the final content of the law.

65. *See* DiMento, *supra* note 38, at 349 (referring to MEPA and noting arguments which suggest that environmental rights legislation could have a chilling effect on new investment, eventually producing economic backlash); Joseph H. Thibodeau, *Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box*, 48 J. URB. L. 579, 597 (1971) (noting "[a]t best, [MEPA] may clog the circuit courts in Michigan for some time; at worst, [MEPA] could throw them into chaotic disrepair"); Watts, *supra* note 34, at 366 (discussing concerns of Michigan Chamber of Commerce on frivolous litigation); *Bill Frowns on Businesses Activities, Businesses Can Start Locking Their Doors*, ENVIRONSCAN, Oct. 1993, at 1 (referring to OEBR).

66. *See, e.g.*, Leonard J. Griffiths, *The Environmental Bill of Rights: Address Before the Canadian Institute on the Subject of the Environmental Bill of Rights*, *in* ENVIRONMENTAL LAW AND REGULATION 12-15, 17 (1992).

dicial accountability; (3) frivolous litigation; (4) undue delay; and (5) legislative need.[67]

Certain members of the academic environmental community asserted that a statutory bill of rights would be too narrowly construed by the courts, and the purpose of the enactment would be defeated since the success of such legislation is heavily dependent on the judiciary.[68] Other academics opined that neither recognition of rights for nature, nor process improvements would achieve environmental protection goals in comparison to more cooperative approaches.[69] Neither argument recognized the fact that giving citizens an entitlement to go to court to protect the environment could prevent or abate environmental harm when agencies did not act. Furthermore, judicially enforceable environmental rights could also encourage government agencies to enforce the law more effectively, induce agencies and the regulated community to negotiate with citizens on a more equal footing and strengthen the demo-

67. *See* SAX, *supra* note 10, at 149-51, 212-30 (noting that courts are called upon frequently to decide technically complex cases in such areas as medical malpractice, product safety and industrial accidents, in which evidence of experts is crucial). Sax supplied many examples of the ability of courts to cope with the merits of environmental cases, and explained that it is not ordinarily the technical judgment of administrators that is at issue, but rather their legal or policy judgment. *See id.* (combating judicial competence criticism); *see also id.* at 115-20 (noting that courts are fully capable of controlling their own process to avoid abuse; Daniel K. Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980s*, 12 ECOLOGY L.Q. 271, 272-76 (1985) (noting that case statistics indicated that Michigan court system had not been flooded with MEPA suits as of 1982); *see also* Jeffrey K. Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J. URB. L. 589, 593 n. 13 (1976) (noting "MEPA cases constitute[d] less than .02 of 1 percent of all civil cases" initiated in Michigan circuit courts between 1970 and 1975 and further noting that investor confidence had not been shaken, nor jobs lost, plants closed or industry driven from Michigan as result of MEPA lawsuits); Joseph L. Sax, *Environmental Action: A Passing Fad?*, NAT. HIST., June-July 1976, at 10, 12, 16, 21 (noting that arguments alleging MEPA's detrimental impact on industry in order to justify amendments to statute were without merit). Despite the existence of greater environmental enforcement and public participation before administrative tribunals in the 1990s, there were still many gaps in environmental law in Ontario, such as standing to sue in public nuisance, entitlement to notice and comment and regulation-making initiatives and related concerns. *See* MULDOON & LINDGREN, *supra* note 19, at 6-7.

68. *See* Gibson, *supra* note 61, at 287 (arguing against environmental rights legislation); Daniel P. Lynch, Note, *The Michigan Environmental Protection Act (MEPA): Developing a Common Law Threshold of Harm for the Prima Facie Case*, 69 U. DET. MERCY L. REV. 55, 57 (1991) (noting that Michigan Court of Appeals uses narrow approach when prima facie case has been made under MEPA, requiring higher threshold of harm than statute, MEPA legislative history, or early decided cases would have suggested).

69. *See* Emond, *supra* note 57, at 348.

cratic character of environmental decision-making by opening up the process to greater public scrutiny and involvement.[70]

III. MICHIGAN ENVIRONMENTAL PROTECTION ACT: SUBSTANTIVE-PROCEDURAL ENVIRONMENTAL RIGHTS REFORM

MEPA was the first environmental statute in the United States to depart significantly from a regime based largely on administrative agency enforcement of environmental requirements.[71] Any member of the public may take the environmental initiative in enforcement through the courts because MEPA creates substantive rights and establishes a procedural framework for bringing an environmental lawsuit, which makes it easier for a citizen to enforce an environmental interest in court.[72] The particulars of these substantive and procedural reforms have been the subject of over twenty-five years of judicial examination during which the scope and impact of MEPA have been both expanded and contracted by the courts.

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70. *See* Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,141 (Mar. 25, 1995) (noting that "citizen legislation enhance[s] the legitimacy of administrative decision-making"). The ambivalence of various sectors about the recognition of environmental rights may explain the preference for a hybrid approach relying on both political and judicial accountability, and the courts as forum of last resort. *See* Cochrane, *supra* note 21, at 6 (discussing hybrid approach followed by Ontario).

71. *See* Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 1 (1974) (asserting that MEPA was "first statute to provide for citizen suits to protect the environment from degradation by either public or private entities and to provide a broad scope for court adjudication").

72. *See* Michigan State Highway Comm'n v. Vanderkloot, 220 N.W.2d 416, 427-28 (Mich. 1974) (drawing distinction between substantive and procedural rights created under statute). There appears to be some overlap between substantive and procedural rights. Where there is a right, in the normal course, there should be a remedy. Having a legal interest in environmental protection should translate into an entitlement to vindicate that interest in court, just as having a property or contractual right entitles the holder of that right to go to court to vindicate that interest. The division in the concepts between substantive and procedural entitlements in the environmental context appears to stem from the problems litigants historically have confronted in the area of public nuisance. The right to sue for public nuisance is more theoretical than actual due to the requirement to either demonstrate special damage or obtain consent of the Attorney General to sue. *See* SAX, *supra* note 10, at 58-59 (noting that clean air and water have been treated as free goods in large part because no one has been entitled to assert right in their maintenance). The development of a theory of public rights and its enforcement has lagged behind concepts of private rights. *See id.* MEPA reforms the law by stating that there is a right to environmental quality, and that any person may enforce that right. *See id.*

A. Purpose of MEPA

While MEPA does not contain a purpose section or a preamble setting forth its goals and objectives, the statute does implement provisions of Michigan's constitution which reflect concern for the protection of its natural resources and environment.[73] Both Professor Joseph L. Sax, chief architect of MEPA, and Representative Thomas J. Anderson, MEPA's main sponsor in the Michigan legislature, viewed MEPA as enlarging the role of the courts and permitting the judiciary to develop a "common law of environmental quality" in a manner similar to the development of the law of property or contracts.[74] To the extent that courts have considered MEPA's purpose, they have affirmed this view. For example, in *Ray v. Mason County Drain Commissioner*,[75] the Michigan Supreme Court held that the legislature had set a standard of environmental quality in MEPA. The court further explained that MEPA did not set out an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution and impairment. Instead, the legislature left to the courts "the important task of giving substance to the standard by developing a common law of environ-

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73. MICH. CONST. of 1963, art. IV, § 52. The pertinent provision states:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Id. See also SAX, *supra* note 10, at 248 (outlining chief purposes of MEPA: (1) recognizing a public right to decent environment as enforceable legal right; (2) making that right enforceable by private citizens suing as members of public; and (3) setting stage for development of common law of environmental quality). Although the first two purposes sound equivalent, the distinction is that there is a right to environmental quality and that any person may invoke that right. As to the third purpose, Professor Sax noted:

> [MEPA] purposely refrains from defining pollution, environmental quality, or the public trust. At this early stage in the development of environmental law it is important to open the way to elucidation and consideration of a wide range of problems, many of which are still uncertain, rather than to create confining definitions. Use of the courts to evolve a common law approach to environmental problems adds to the arsenal of the public interest a significant weapon: the ability to meet problems as they are identified and to formulate a solution appropriate to the occasion.

Id. Professor Sax also articulated a fourth purpose: supplementing the administrative process with judicial review when the regulatory regime is inadequate, in order to promote remedial legislative action where necessary. *See id.* (noting that problems recognized and information elicited through litigation can lead to legislative reform).

74. Anderson, *supra* note 5, at 1; Sax & Conner, *supra* note 20, at 1005.

75. 224 N.W.2d 883 (Mich. 1975).

mental quality."[76] According to the *Ray* court, the "development of a common law of environmental quality under MEPA is no different from the development of the common law in other areas, such as nuisance or torts,"[77] and the court saw "no valid reason to block the evolution of this new area of common law."[78] Many subsequent cases in Michigan and in other states with legislation similar to MEPA have followed the Michigan Supreme Court's reasoning in *Ray*.[79] Likewise, federal courts that have had the opportunity to examine MEPA have agreed that MEPA created a "state environmental common law" that is independent of decisions by state or federal agencies.[80]

Professor Sax and Representative Anderson's view of citizen suits was sharply at odds with the views of Congress in developing federal citizen suit provisions during the early 1970s. For example, in explaining the citizen suit provision of the Clean Water Act, Congress stated that it "would not substitute a common law or court-developed definition of water quality."[81] Congress did not want an alleged violation of an effluent control limitation or standard to lead to re-analysis of technological or other considerations at the enforcement stage. Instead, Congress intended to have these matters settled in the administrative process leading to the establishment of the effluent limitation or standard. As such, Congress expected citizens bringing an action to meet an objective eviden-

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76. *Id.* at 888.

77. *Id.*

78. *Id.* at 888 n.10.

79. *See, e.g.*, Westervelt v. Natural Resources Comm'n, 263 N.W.2d 564, 574-65 (Mich. 1978) (holding no unconstitutional delegation of legislative power); Whittaker Gooding Co. v. Scio Township Zoning Bd. of Appeals, 323 N.W.2d 574, 575 (Mich. Ct. App. 1982) (stating that MEPA was enacted with intention of allowing courts to develop environmental common law); Paige v. Town Plan & Zoning Comm'n of Town of Fairfield, 668 A.2d 340, 344-45 (Conn. 1995) (noting that MEPA served as model for Connecticut's statute).

80. *See* Ontario v. City of Detroit, 874 F.2d 332, 341 (6th Cir. 1989) (discussing MEPA challenge by Her Majesty, the Queen in Right of the Province of Ontario, of decision to approve municipal incinerator that would contribute to air pollution problems and holding that MEPA was not preempted by federal Clean Air Act). The court noted that MEPA creates a "state environmental common law that is unaffected by federal law, and creates an independent state action that is unaffected by anything that happens in the federal sphere of government." *Id.*

81. S. REP. NO. 92-414 (1971), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT, 1971, at 3745 (1971) [hereinafter S. REP. NO. 92-414]; Clean Water Act, 33 U.S.C. § 1365 (1994) (authorizing any person to commence civil action against any person alleged to be in violation of effluent standards, limitations or orders under Act, or against Administrator of EPA for failure to perform any non-discretionary duties under Act).

tiary standard.[82] MEPA differs from federal citizen suit laws because of its preference for judicial development of environmental standards through the common law.

B. MEPA's Key Provisions

There are several key procedural and substantive reform aspects of MEPA. In terms of procedural reform, MEPA allows "any person" to maintain an action "for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment or destruction."[83] This liberal grant of standing effectively permits anyone to sue anyone.[84] The substantive right created by MEPA entitles the plaintiff to succeed in an action upon making a prima facie showing that the defendant has caused, or is likely to cause, pollution, impairment or destruction to the environment. The plaintiff will prevail unless the defendant can rebut this showing by submitting evidence to the contrary or by way of "affirmative defense that there is no feasible and prudent alternative . . . that 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."[85] Where a defendant's challenged conduct is subject to an existing environmental standard that the courts find deficient in light of MEPA's requirements, the court can direct the agency to adopt a standard "approved and specified by the court,"[86] or remit the parties to appropriate admin-

82. *See* S. REP. No. 92-414, *supra* note 81, at 3745. Presumably Congress also did not want the citizen suit provision to be interpreted to preempt state common law. *See id.*

83. MICH. COMP. LAWS ANN. § 324.1701(1) (West 1997).

84. *See* Gary A. Trepod & John A. Yeager, *The Michigan Environmental Protection Act: Pervasive!*, 64 MICH. B.J. 187, 187 (1985) (discussing MEPA standing provision).

85. MICH. COMP. LAWS ANN. § 324.1703(1).

86. MICH. COMP. LAWS ANN. § 324.1701(2)(a)-(b) (authorizing court, where "there is a standard for pollution or for an antipollution device or procedure fixed by rule or otherwise by the state" to "[d]etermine the validity, applicability, and reasonableness of the standard" and if court "finds a standard to be deficient" to "direct the adoption of a standard approved and specified by the court"). *See* Lakeland Property Owners Ass'n v. Township of Northfield, [1972] 2 Envtl. L. Rep. (Envtl. L. Inst.) 20,331 (Mich. Cir. Ct. 1972) (requiring publicly owned sewage treatment plant to meet higher and additional waste water treatment standards, redetermined and specified by court following hearing of technical evidence, than had been imposed by Michigan Water Resources Commission); Wayne County Dep't of Health, Air Pollution Control Div. v. Olsonite Corp., 263 N.W.2d 778, 793-94 (Mich. Ct. App. 1977) (holding premature trial court's adoption of particular odor units as standards governing odor emissions from paint manufacturer). The *Olsonite* court explained that the guidelines adopted as standards "may be too lax,"

istrative or other proceeding.[87] At such a proceeding, however, an agency may not authorize conduct which does, or is likely to pollute, impair or destroy the air, water or other natural resources, or the public trust in these resources, if there is a feasible and prudent alternative consistent with reasonable requirements of the public health, safety and welfare.[88]

1. Standing to Sue

MEPA permits litigants to reach the merits of environmental controversies with a minimum of procedural obstacles. To this end, the statute authorizes "any person" to maintain an action to protect the environment. This reform of the law of public nuisance eliminated standing to sue as a major issue under the statute.

MEPA cases on standing and those decided under similarly worded statutes in other states mark a significant departure from cases decided by federal courts which have imposed pre-conditions to standing based on the "cases and controversies" language of the United States Constitution.[89] These conditions, most recently ar-

as they did not gauge the cumulative effect of multiple emission sources from a single plant, therefore, the decision on whether standards are indeed deficient required further inquiry by trial court. *Id.*

87. *See* MICH. COMP. LAWS ANN. § 324.1704(2) (West 1997).

88. *See id.* § 324.1705(2).

89. Michigan State Highway Comm'n v. Vanderkloot, 220 N.W.2d 416, 427-28 (Mich. 1974) (interpreting MEPA's standing provision broadly to allow plaintiffs to initiate actions without their having to first meet traditional tests for standing that courts normally impose on environmental litigants); *see also* Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 888 (Mich. 1975) (holding that MEPA affords individuals standing to maintain environmental actions); Eyde v. State, 225 N.W.2d 1, 2 (Mich. 1975) (holding that MEPA creates independent cause of action and grants standing to private individuals to maintain actions for declaratory and other equitable relief against anyone for protection of Michigan's environment); Trout Unlimited, Muskegon White River Chapter v. City of White Cloud, 489 N.W.2d 188 (Mich. Ct. App. 1992) (holding that plaintiffs could rely on MEPA as independent basis for their assertion of standing to maintain action challenging legality of construction of new dam); Freeborn County by Tuveson v. Bryson, 219 N.W.2d 290, 295 (Minn. 1973) (interpreting MERA as authorizing any person to maintain action for declaratory or equitable relief for protection of air, water, land or other natural resources of state); Manchester Envtl. Coalition v. Stockton, 441 A.2d 68, 73 (Conn. 1981) (interpreting Connecticut's statute as conferring standing on any person to raise environmental issues under statute). *See also* David P. Gionfriddo, Comment, *Sealing Pandora's Box: Judicial Doctrines Restricting Public Trust Citizen Environmental Suits*, 13 B.C. AFF. ENVTL. L. REV. 439, 444-47 (1986) (discussing liberal standing requirements resulting from distrust of government's ability to guard environment); Andrew J. Piela, Comment, *A Tale of Two Statutes: Twenty Year Judicial Interpretation of the Citizen Suit Provision in the Connecticut Environmental Protection Act and the Minnesota Environmental Rights Act*, 21 B.C. AFF. ENVTL. L. REV. 401, 406-10, 417-19 (1994) (noting Connecticut's grant of automatic standing regardless of actual injury in environmental cases). The United States Constitution limits the jurisdiction of the federal courts to "cases and controversies." U.S. Const. art. III, § 1.

ticulated by the Supreme Court of the United States in *Lujan v. Defenders of Wildlife*,[90] require that the plaintiff suffer an injury in fact, that there exist a causal connection between the injury and the conduct, and that the injury be redressable by a favorable decision.[91] The application of these conditions has sometimes deterred courts from granting standing to plaintiffs bringing actions to protect the environment under federal citizen suit legislation.[92] Under state statutes like MEPA, however, state courts have no such preconditions.

By permitting most plaintiffs to bring actions to resolve the merits of environmental disputes, MEPA jurisprudence appears to have largely swept aside standing as a procedural obstacle. Standing remains an issue, however, where litigants propose to use MEPA for reasons that are inconsistent with the statute's purposes, such as to protect the right to develop natural resources. In such circumstances, Michigan courts have not hesitated to deny standing to plaintiffs.[93] To the extent that OEBR permits Ontario residents to act as private attorneys general in the same way as MEPA, one may anticipate that plaintiffs in Ontario courts will likewise more readily have standing to sue.

2. *Establishing a Prima Facie Case*

In order for a plaintiff to establish a prima facie case under MEPA, the plaintiff must demonstrate that the conduct of a defend-

90. 504 U.S. 555 (1992).

91. *Id.* at 560-61. The Supreme Court explains injury in fact to encompass injuries which are invasions of concrete, particularized legal interests rather than conjectural or hypothetical. *See id.* To prove causal connection, the plaintiff must show that the injury is fairly traceable to the challenged action of the defendant and is not a result of the independent action of some third party not before the court. *See id.* Finally, it must be likely, and not merely speculative that the injury will be redressed by a favorable decision. *See id.*

92. *See id.* at 561-78 (holding that environmental group lacked standing to seek judicial review of rule promulgated by Secretary of Interior under Endangered Species Act, because of failure to show both injury in fact and redressability, notwithstanding existence of citizen suit provision which authorized any person to commence action).

93. *See, e.g.*, Whittaker Gooding Co, v. Scio Township Zoning Bd. of Appeals, 323 N.W.2d 574, 576 (Mich. Ct. App. 1982) (holding that gravel pit owner lacked standing to bring action under MEPA because statute was designed to protect natural resources, "rather than an exploiter's mining of the resources"). This approach has been followed by courts in other states with MEPA-type laws. *See, e.g.*, Water Pollution Control Auth. of Town of Stonington v. Keeney, 662 A.2d 124, 129 (Conn. 1995) (holding that sewage treatment plant operator did not have standing under Connecticut's statute, CEPA, to contest permit decision of Environmental Protection Commissioner, as CEPA standing provision was not intended for persons who seek to use natural resources or opponents of those who seek to protect environment).

ant "has . . . or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources."[94] Courts must consider three key elements in determining whether a plaintiff has established a prima facie case. First, the environmental damage need only be "likely," not actual, thus making the requirement preventive in nature.[95] Second, the court must ascertain the scope of what constitutes "pollution, impairment or destruction."[96] Third, the court must find that there is a "natural resource" entitled

94. MICH. COMP. LAWS ANN. § 324.1703(1) (West 1997).

95. *See* Slone, *supra* note 67, at 278 (concerning first factor and discussing that provision permitting prima facie case to be made by showing "likely" pollution permits plaintiffs to dispense with need to demonstrate actual harm). As a result, early court decisions interpreting MEPA suggested that a low threshold of harm sufficiently met the prima facie test. *See id.* Slone suggests that a low threshold requirement is consistent with the legislative history of MEPA, which indicates that legislators wanted to encourage public access to the courts by both limiting what citizens must prove initially, as well as by shifting burden of proof to defendants who were presumed to be in possession of superior information about the conduct and impact of their operations on the environment. *See id.*

96. Michigan United Conservation Clubs v. Anthony, 280 N.W.2d 883, 887 (Mich Ct. App. 1979) (holding that word "impair," in context of conduct which is likely to pollute, impair, or destroy air, water or other natural resources, means conduct that tends to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in injurious manner). The second element in establishing a prima facie case has been left to the courts since MEPA does not define actions constituting environmental pollution, impairment or destruction. *See id.* The key debate in this area has been whether "impairment" should be defined on the basis of a substantial harm requirement, which is a standard not dissimilar to OEBR's "significant harm" test. MEPA's legislative history supports the view that the purpose of the statute was to make it relatively easy for plaintiffs to make out a prima facie case so litigants would not be thwarted by a high threshold of harm requirement. *See* Slone, *supra* note 67, at 281-82; Lynch, *supra* note 68, at 64-65 & nn. 66-67. Early cases were consistent with this view, suggesting that a showing of mild or de minimis levels of harm was sufficient for a plaintiff to meet the prima facie case requirement. Beginning in the 1980s, however, partly due to developing judicial concern about protecting resources from trivial impacts, a second line of authority developed which suggested that plaintiffs must meet a much higher threshold of harm standard based on a statewide perspective on pollution, impairment or destruction. *See* Lynch, *supra* note 68, at 57, 71-74, 88-89 (criticizing statewide approach); Slone, *supra* note 67, at 281-82 (same). As a result of criticism, two other discernable judicial approaches have developed. These approaches include a local perspective and a general perspective on the appropriate threshold of harm. Overall, no single theory appears to dominate the developing case law on this issue. What seems apparent is that the Michigan judiciary has moved away from the extremes of either a high or de minimis threshold of harm, and moved toward seeking middle ground on this issue.

to public protection.[97] All three factors are similar to those identified by courts in jurisdictions with MEPA-type laws.[98]

a. Likelihood of Environmental Damage

Early court decisions interpreting MEPA suggested that a low threshold of harm sufficiently met the prima facie test. For example, in *Ray v. Mason County Drain Commissioner,* the Michigan Supreme Court held that to meet the prima facie case requirement "a showing is not restricted to actual environmental degradation but also encompasses probable damage to the environment as

97. *See* Stevens v. Creek, 328 N.W.2d 672, 674 (Mich. Ct. App. 1982) (holding that trial court erred in dismissing plaintiff's claim under MEPA without permitting her to introduce environmental study and expert testimony of ecologist). A plaintiff may show the third factor by establishing existing or probable future pollution, impairment or destruction of natural resources or of the public trust in those resources. *See id.*

Unlike the environmental rights laws of some other states, MEPA does not provide a definition of natural resources. *See, e.g.*, MERA, MINN. STAT. ANN. § 116B.02 (West 1997); Minnesota Public Interest Research Group v. White Bear Rod & Gun Club, 257 N.W.2d 762, 768 (holding that MERA's definition of natural resources "is presumed to be broad"). A variety of court decisions have fleshed out the scope of the definition of natural resources on a case-by-case basis. *See* People for Envtl. Enlightenment & Responsibility, Inc. v. Minnesota Envtl. Quality Council, 266 N.W.2d 858, 867 (Minn. 1978) (including trees in definition of natural resources); *Minnesota Public Interest Research Group,* 257 N.W.2d at 769-70 (including birds in definition of natural resources); County of Freeborn v. Bryson, 210 N.W.2d 290, 297 (Minn. 1973) (including marsh and wildlife supported by marsh in definition of natural resources); State *ex rel.* Wacouta Township v. Brunkow Hardwood Corp., 510 N.W.2d 27, 29 (Minn. Ct. App. 1993) (including bald eagles and trees in which bald eagles roost in definition of natural resources).

The Michigan courts have likewise identified the scope of the phrase natural resources on a case-by-case basis. Rather than develop a comprehensive definition, the courts have established categories of resources. Besides air and water, which were expressly identified in MEPA, the courts have identified trees, fish and wildlife, but have excluded the social, cultural and aesthetic environment from MEPA's ambit. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (holding that social and cultural environments are matters not encompassed within term "natural resources" and therefore, are not within MEPA's purview); West Mich. Envtl. Action Council v. Natural Resources Comm'n, 275 N.W.2d 538, 542 (Mich. 1979) (elk); Portage v. Kalamazoo County Rd. Comm'n, 355 N.W.2d 913 (Mich. Ct. App. 1984) (holding that aesthetic considerations alone are not determinative of significant environmental impact which would allow judicial intervention under MEPA); *Stevens,* 328 N.W.2d at 675 (including trees); Michigan United Conservation Clubs v. Anthony, 280 N.W.2d 883, 887 (Mich. Ct. App. 1979) (including fish); Eyde v. State, 267 N.W.2d 442, 447 (Mich. Ct. App. 1978) (including trees).

98. *See, e.g.*, State *ex rel.* Wacouta Township v. Brunkow Hardwood Corp., 510 N.W.2d 27, 29 (Minn. Ct. App. 1993) (holding that there are two prongs to prima facie case under MERA). MERA reads: "First, there must be a protectible natural resource . . . [and s]econd the defendant's conduct must cause or be likely to cause 'pollution, impairment or destruction of that resource.'" MERA, MINN. STAT. ANN. § 116B.04 (West 1997).

well."[99] The *Ray* court indicated that "the evidence necessary to constitute a prima facie showing will vary with the nature of the alleged environmental degradation involved."[100] Accordingly, the court held that MEPA provides a trial judge with guidelines for making such a determination.[101] The *Ray* court further explained that MEPA authorizes application of the generally applicable burden of proof and weight of evidence rules with an exception for MEPA affirmative defenses. Under the MEPA affirmative defense exception, once a plaintiff establishes a prima facie case, the burden shifts to the defendant to show that there is no feasible and prudent alternative to defendant's conduct.[102]

Subsequent cases decided under MEPA made it clear that the courts were prepared to require a low threshold of harm before holding that a prima facie case had been established. For example, several cases decided in the 1970s held that MEPA does not require a plaintiff to develop elaborate scientific evidence or demonstrate adverse effects with certainty in order to make a prima facie showing.[103] As a result, the low threshold test characterized the court's

99. 224 N.W.2d 883, 889 (Mich. 1975) (suggesting implicit low threshold in MEPA). The Michigan Supreme Court's finding arises from the statute's use of the phrase "has . . . or is *likely* to pollute." *Id.* (quoting MEPA, MICH. COMP. LAWS ANN. § 324.1703(1) (West 1997)) (emphasis added). A finding of probable damage that is more likely than not to occur is similar to a common law nuisance standard.

100. *Ray*, 224 N.W.2d at 889 (suggesting that demonstrating less than probable damage may be sufficient in circumstances where magnitude of environmental consequences are high).

101. *See id.*

102. *See id.* (explaining that prima facie case in Michigan is one that is sufficient to withstand directed verdict motion, or one that establishes when plaintiff's evidence is sufficiently strong so as to call defendant to answer it). According to the *Ray* court, evidence adduced at trial by the plaintiff to establish a prima facie case had not been adverted to by the trial judge. *See id.*; *see also id.* at 890 & n.11 (noting defendant's concession on appeal that prima facie case had been made out by plaintiffs); Slone, *supra* note 67, at 278 & n.47 (suggesting that examination of evidence by *Ray* court is consistent with view that less than conclusive evidence may be adequate to establish prima facie case).

103. *See, e.g.*, Wayne County Dep't of Health v. Olsonite Corp., 263 N.W.2d 778, 792-94 (Mich. Ct. App. 1977) (holding that scientific or medical evidence of health impairment unnecessary to establish prima facie case where numerous citizens complain over lengthy period that foul odors recurrently emitted from defendant's plant, penetrate their homes and cause such adverse physical reactions as nausea, burning eyes, headaches, loss of sleep and reduction of appetite); Dwyer v. City of Ann Arbor, 261 N.W.2d 231, 235-36 (Mich. Ct. App. 1977) (holding that violations by city of effluent limitations under its discharge permit established prima facie case that city's conduct violated MEPA, and that it was not necessary that evidence also established some injury or threat of injury to environment); Michigan United Conservation Clubs v. Anthony, 280 N.W.2d 883, 887-89 (Mich. Ct. App. 1979) (holding that MEPA prima facie standard was one of "probable rather than guaranteed harm").

approach until the early 1980s.

Notwithstanding the early MEPA cases, judicial decisions of the 1980s began to reverse the trend. For example, in *Kimberly Hills Neighborhood Association v. Dion*,[104] area residents sought to enjoin the development of an eighteen-acre subdivision in order to protect wildlife habitat.[105] The Michigan Court of Appeals reversed the trial court's injunction and held that a prima facie case required the following dual inquiry: (1) whether a natural resource was involved; and (2) whether the impact of the activity on the environment rose to the level of impairment justifying injunctive relief.[106] The decision turned as much on the size of the area as the uniqueness of the resource values.[107]

Subsequent cases relying on the *Kimberly Hills* two part test appear to have additionally required inquiry into whether the challenged action constituted an environmental risk.[108] To the extent that risk is a product of both probability and magnitude of consequences, this third requirement constituted a greater obligation on plaintiffs than that required by early MEPA cases or the statute itself. Arguably, *Ray* may have directed the court's holding in *Kimberly Hills* by suggesting that the evidence necessary to constitute a prima facie case varies with the nature of alleged environmental harm.[109]

Recent cases have continued to affirm the trend to a higher threshold of harm. In *Wortelboer v. Benzie County*,[110] the Michigan Court of Appeals upheld a county resolution establishing two sea-

104. 320 N.W.2d 673, 673-74 (Mich. Ct. App. 1982).

105. *Id.*

106. *See id.* This decision has been followed in several subsequent cases. *See, e.g.*, Kent County Rd. Comm'n v. Hunting, 428 N.W.2d 353, 358 (Mich. Ct. App. 1988) (following *Kimberly Hills* decision). The second inquiry appears to give a court considerable discretion, similar to a general equitable balancing approach.

107. *See Kimberly Hills*, 320 N.W.2d at 673-74.

108. *See* City of Portage v. Kalamazoo County Rd. Comm'n, 335 N.W.2d 913, 915-16 (Mich. Ct. App. 1984) (holding "a court is not empowered to enjoin any conduct which does not rise to the level of an environmental risk"); Attorney General *ex rel.* Natural Resources Comm'n v. Balkema, 477 N.W.2d 100, 102 (Mich. Ct. App. 1991) (holding that in determining whether prima facie case under MEPA has been established, court must not weigh environmental risk with good to be accomplished by action, but rather court must determine whether action rises to level of impairment or destruction of natural resource so as to constitute environmental risk).

109. *See Ray v. Mason County Drain Comm'r*, 224 N.W.2d 883, 889 (Mich. 1975); *but see* Lynch, *supra* note 68, at 64-65 & nn. 66-67 (suggesting that trend of cases raising threshold of harm for prima facie case is inconsistent with MEPA's legislative history, which emphasized removal of barriers to citizen access to courts).

110. 537 N.W.2d 603, 609 (Mich. Ct. App. 1995).

sonal lake levels for recreational and other purposes. The *Wortelboer* court held that the resolution did not constitute an environmental risk to property owners abutting a connecting stream, and it did not justify judicial intervention.[111] Since OEBR does not have a MEPA-type prima facie case requirement, it is not possible to directly compare the two statutes on this point. OEBR, however, does require a plaintiff to demonstrate significant harm to a public resource arising from violation of an environmental statute. As the Michigan judiciary raises the threshold of harm in order for a plaintiff to establish a prima facie case, both statutes may produce comparable results.

b. Pollution, Impairment or Destruction

The courts in the 1970s did not require large-scale or statewide environmental impact to satisfy MEPA's prima facie case requirement.[112] Instead, the courts interpreted MEPA's prima facie case to require only a showing of small-scale, local environmental impact. Professor Sax suggested that the courts used a de minimis standard.[113] Commentators noted that the early cases involving housing developments, road and sewer projects in environmentally-sensitive areas demonstrated the types of activities which were not necessarily significant per se, but which cumulatively caused environmental degradation.[114] Professor Sax characterized this type of

111. *See id.* (holding that in deciding "whether a plaintiff has established a prima facie claim under MEPA, the court must determine whether the challenged action by the defendant" constitutes environmental risk justifying judicial intervention, and availability of subsequent administrative proceedings before harm to natural resource could occur, also providing later opportunity to invoke MEPA).

112. *See* Eyde v. State, 225 N.W.2d 1, 2-3 (Mich. 1975) (holding that construction of sewer across plaintiff's property was sufficient to constitute pollution, impairment or destruction of downstream waters and thus trigger application of MEPA); Wayne County Dep't of Health v. Olsonite Corp., 263 N.W.2d 792, 792-93 (Mich. Ct. App. 1977) (holding that air pollution from single factory was sufficient to establish liability under MEPA); Oakwood Homeowners Assoc. v. Ford Motor Co., 258 N.W.2d 475 (Mich. Ct. App. 1977) (holding that air pollution from four corporations in eight-block neighborhood area less than square mile in size was sufficient to base action under MEPA).

113. *See, e.g.*, Lynch, *supra* note 68, at 68-69 (referring to amicus brief of Professor Sax filed in *Kent County Rd. Comm'n v. Hunting*, 428 N.W.2d 353 (Mich. Ct. App. 1988)).

114. *See* Lynch, *supra* note 68, at 69. *See also* Irish v. Green, 4 Env't Rep. Cas. (BNA) 1402 (Mich. Cir. Ct. July 15, 1972), *reprinted as appendix to* Ray v. Mason County Drain Comm'r, 224 N.W.2d 883 (Mich. 1975) (noting housing development impacts on scenic area); Michigan State Highway Comm'n v. Vanderkloot, 220 N.W.2d 416, 416 (Mich. 1974) (discussing road project effects on wetland); *Eyde v. State*, 225 N.W.2d 1,1 (describing water pollution from sewer construction).

environmental impact as exhibiting the "nibbling phenomenon."[115] By the 1980s, however, the attitude of Michigan courts on the question of the prima facie threshold began to change.

Kimberly Hills remains the leading authority in the development of a higher threshold of harm prima facie standard.[116] The Michigan Court of Appeals in *Kimberly Hills* noted the need to balance the importance of the resources against the magnitude of the likely harm, an approach derived from an earlier Michigan Supreme Court decision.[117] According to the *Kimberly Hills* court, the plaintiff's evidence of adverse environmental effects failed to meet the statutorily required impairment standard because the plaintiffs had failed to show that the development would "actually interfere with the maintenance of diversified natural areas of wildlife" under a statewide perspective.[118] The *Kimberly Hills* court noted that changes in the character of a neighborhood are inevitably on the borderline between urban and rural areas. Additionally, the court suggested that if MEPA was used to prevent such changes, its application must be on a broad enough scale "that the relief granted will have some effect."[119] Because the relief sought might be rendered useless by development of surrounding areas, the *Kimberly Hills* court concluded that the "narrow local interests represented by the plaintiffs . . . are not interests protected by [MEPA]."[120]

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115. *See* SAX, *supra* note 10, at 55 (explaining nibbling phenomenon as "the process in which large resource values are gradually eroded, case-by-case, as one development after another is allowed"). Sax further explains that this phenomenon often results in increasing judgments for parties "with a big economic stake in development and with powerful allies." *Id.*

116. Kimberly Hills Neighborhood Assoc. v. Dion, 320 N.W.2d 668, 668 (Mich. Ct. App. 1982) (reversing trial court injunction and ruling that "proper application of impairment standard as it pertains to preservation of animal and plant life does not limit conservation only to resources that are 'biologically unique' or 'endangered;' a statewide perspective is necessary"). The Michigan Court of Appeals also stated that in dealing with wildlife, "adverse impact must be evaluated, not in the context of individual animals or neighborhoods, but in the context of populations and ecological communities." *Id.*

117. *See* West Mich. Envtl. Action Council, Inc. v. Natural Resources Comm'n, 275 N.W.2d 538, 545 (Mich. 1979) (holding defendant's conduct violates environmental laws "[i]n light of the limited number of the elk, the unique nature and location of this herd, and the apparent serious and lasting . . . damage that will result").

118. *See Kimberly Hills*, 320 N.W.2d at 674.

119. *Id.*

120. *Id.* The court appeared to be concerned that MEPA litigation might fail to bring finality to development issues in a particular geographic area. The decision never explained why MEPA could not be used to address incremental and broad-scale development.

The *Kimberly Hills* conclusion that one must view impairment from a statewide perspective generated significant adverse commentary. The *Kimberly Hills* court appeared to ignore MEPA's legislative history which refused to impose an unreasonableness threshold on the level of pollution, impairment or destruction. The court also appeared to ignore the early cases which imposed little or no threshold.[121] Furthermore, the court provided no justification for seeking to protect only statewide resources.[122] Notably, only one other Michigan Court of Appeals panel followed the *Kimberly Hills* holding.[123]

Several panels of the Michigan Court of Appeals have diverged from the *Kimberly Hills* approach. These decisions have developed a number of factors to be applied which could result in local impact being sufficient to justify judicial intervention under the circumstances of a particular case. In *City of Portage v. Kalamazoo County Road Commission*,[124] the Michigan Court of Appeals had to determine whether the removal of seventy-four roadside trees constituted prima facie impairment under MEPA. The *Portage* court articulated the following four determinative factors:

> (1) whether the natural resource is rare, unique, endangered or has historical significance; (2) whether the resource is easily replaceable; (3) whether the proposed action will have any significant consequential effect on other natural resources; and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number, considering the nature and location of the wildlife or vegetation affected.[125]

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121. *See* Robert H. Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as Model of a Minimal Requirement*, 7 HARV. ENVTL. L. REV. 107, 115 (1983) (citing Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 889-89 (Mich. 1975)).

122. *See id. See also* Lynch, *supra* note 68, at 68-69 (referring to Professor Sax's brief). Professor Sax filed an amicus brief in *Kimberly Hills* in which he noted that MEPA had been created to address small cases, and neither the statute nor decided cases required a statewide perspective before courts could make a prima facie finding. *See id.*

123. *See* Thomas Township v. John Sexton Corp. of Mich., 434 N.W.2d 644, 647 (Mich. Ct. App. 1988) (holding that lower court erred in using local perspective, as opposed to statewide perspective, and draining of lake did not constitute impairment of natural resource under MEPA).

124. 355 N.W.2d 913 (Mich. Ct. App. 1984).

125. *Id.* (holding that trial court erred in determining prima facie case was established by weighing environmental risk of removing trees against good to be accomplished by their removal). The short-term effect of removing the trees did not rise to the level of impairment or destruction of natural resources within the meaning of MEPA. *See id.*

Applying these factors, the court explicitly disagreed with the *Kimberly Hills* court's interpretative statewide standard and suggested that a local perspective may be more appropriate. The *Portage* court, however, held that a prima facie case had not been made out by the plaintiff whether viewed from a statewide or local perspective.[126] The same three-judge panel that decided *Portage* reaffirmed its refusal to follow the *Kimberly Hills* statewide perspective just one year later in *Rush v. Sterner.*[127]

Several cases decided by the Michigan Court of Appeals since 1985 have applied the *Portage* four-part test in determining satisfaction of MEPA's impairment requirement. There is no indication whether the courts' holdings stemmed from a statewide or local perspective.[128] As such, the Michigan Supreme Court has yet to re-

126. *See id.* at 914 n.2 (contrasting holding of *Kimberly Hills* court which stated "[w]e do not agree that a statewide as opposed to local perspective is always necessary in such cases, . . . [and] we find that removal of the trees in this case does not have a significant environmental impact from either a statewide or local viewpoint").

127. 373 N.W.2d 183, 187 n.1 (Mich. Ct. App. 1985) (reaffirming position that "statewide" as opposed to "local" perspective unnecessary when addressing alleged impairment or destruction of animal or plant life, and that under either "statewide" or "local" perspective, level of impairment involved where downstream landowner sought to rehabilitate dam did not justify judicial intervention).

128. *See, e.g.*, Friends of Crystal River v. Kuras Properties, 554 N.W.2d 328, 334 (Mich. Ct. App. 1996) (reflecting plaintiff environmental organization failed to demonstrate impairment of natural resource from filling 3.68 acres of wetlands to construct resort golf course, as 6.63 acres of new wetlands would be created in mitigation, construction and operation of golf course would not cause damage to nearby river or neighboring wetlands, and state natural resources agency had secured resort owner's continuing adherence to environmental protection plan); Trout Unlimited, Muskegon-White River Chapter v. City of White Cloud, 532 N.W.2d 192, 194 (Mich. Ct. App. 1995) (noting plaintiff conservation group failed to establish prima facie case that dam reconstruction would impair trout habitat where trout are not rare, project would not diminish population, and no negative impacts would be caused to other natural resources); Attorney General *ex rel.* Dep't of Natural Resources v. Huron County Rd. Comm'n, 538 N.W.2d 68, 73-74 (Mich. Ct. App. 1995) (showing that plaintiff state agency failed to establish prima facie case that dredging and expanding county drain would constitute impairment of water quality, fish and wildlife, where agency did not conduct inspections and witnesses testified resources were not rare, could be replaced and would benefit from project); Dafter Sanitary Landfill v. Mich. Dep't of Natural Resources, 499 N.W.2d 383, 385 (Mich. Ct. App. 1993) (noting plaintiff failed to establish prima facie case that landfill operator's actions in constructing, operating and closing landfill violated MEPA impairment standard, where allegations of statutory violation not supported by facts); Attorney General *ex rel.* Natural Resources Comm'n v. Balkema, 477 N.W.2d 100, 102 (Mich. Ct. App. 1991) (indicating Attorney General established that draining of three lakes constituted prima facie impairment where associated marsh contained unique vegetation, attraction for waterfowl in southwest Michigan, and declining bird species reside on area); Kent County Rd. Comm'n v. Hunting, 428 N.W.2d 353, 358 (Mich. Ct. App. 1988) (reflecting plaintiff landowners failed to demonstrate that proposed removal of old trees in connection with road-widening constituted prima facie impairment because trees are not unique,

solve the uncertainty these divergent approaches have created.[129] What is clear from the current state of the law, however, is that MEPA case law has moved away from a de minimis approach to the level of impairment necessary to establish a prima facie case, and towards applying the *Portage* four-part test without regard to whether decisions are driven by statewide or local considerations.

c. Natural Resources and the Public Trust

The third factor in establishing a prima facie case is to show that the affected "natural resources" are entitled to public protection. Specifically, MEPA permits a plaintiff to succeed in establishing a prima facie case if a showing is made that the natural resources or the public trust have been, or are likely to be, impaired by defendant's conduct.[130] By incorporating the public trust doctrine into the definition of natural resources, MEPA explicitly attempts to ensure that public uses of natural resources are protected from actions of third parties. Because it does not define "natural resources," MEPA has the potential of going beyond the limited notion of public trust and applying a public trust to all the natural resources in the state. This potential is exemplified by the 1982 *Stevens v. Creek* decision, in which the Michigan Court of Appeals held the language of MEPA disjunctive.[131] The *Stevens* court noted that nothing in MEPA's language "would limit the protections . . . to natural resources affecting land in which there is a public trust or

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are easily replaceable, and their removal would not have significant consequential effect on wildlife or vegetation).

129. *See* Lynch, *supra* note 68, at 88-89 (suggesting that in order for MEPA to be used effectively, Michigan Supreme Court or state legislature should resolve conflicting approaches pursued by Michigan Court of Appeals).

130. MICH. COMP LAWS ANN. § 324.1703(1) (West 1997). The concept of a public trust is a common law development derived from Roman law which held that the sea and other waterways, as well as the land and water interface, were to be treated as the common property for all people. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 475 (1970). The public trust doctrine has been part of American law for over one hundred years. In *Illinois Central Railroad Company v. Illinois*, the Supreme Court characterized the notion of a public trust as a title held in trust for the people of a state so that they may enjoy navigation, commerce and fishing on the navigable waters free from the obstruction or interference of private parties. 146 U.S. 387 (1892). *See also* Arnold v. Mundy, 6 N.J.L. 1 (1821) (describing one of first cases recognizing existence of public trust doctrine in United States). Under the public trust doctrine, a state is a trustee of the public rights in its navigable waters and can only alienate that trust where no substantial diminishment in trust resources would occur. *See* Fred R. Jensen, *Developing the Future of Michigan Environmental Law: Expanding and Blending MEPA with the Public Trust Doctrine*, 1989 DET. C.L. REV. 65, 67-69 (1989) (noting that public rights in navigable waters include navigation, commerce and fishing).

131. 328 N.W.2d 672, 674 (Mich. Ct. App. 1982).

a right to public access."[132] As a result of the court's conclusions, it is clear that MEPA takes into account a more extensive list of resources than just the common law public trust doctrine.[133]

3. Shifting the Burden of Proof: The Rebuttal and the Affirmative Defense

Once a plaintiff has established a prima facie case, the defendant is confronted with two options. The defendant may either rebut the prima facie showing by submission of evidence to the contrary, or assert an affirmative defense.[134] An affirmative defense connotes that there is no "feasible and prudent alternative" to defendant's conduct, and that the 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."[135] This shift in the burden of proof is one of the most significant and controversial reforms in MEPA and the laws of several other states that have adopted similar provisions. Opponents of the shift point to the inconsistency with regard to usual evidentiary rules about who bears the burden of proof in a lawsuit and the hardship MEPA places on defendants.[136] Courts, however, have decided few cases addressing this issue. This is due, in part, to the correspondingly few instances in which defendants are called upon to respond since courts have raised the prima facie threshold for plaintiffs.

The leading case on the scope of defendant's rebuttal defense is *Ray v. Mason County Drain Commissioner*.[137] According to the *Ray*

132. *Id.* (examining section 2 of MEPA and finding that it provides that party may bring action for declaratory and equitable relief against other party "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction"). Under section 3 of MEPA, in order to obtain relief, the plaintiff must make a prima facie showing that the defendant's conduct "has or is likely to pollute, impair or destroy the air, water and other natural resources or the public trust therein." *Id.*

133. *See id. See also* Jensen, *supra* note 130, at 86 (considering public trust as separate item in list and not additional element of natural resources that may be protected by MEPA). Although OEBR does not incorporate the public trust doctrine into its provisions, it does, however, contain mechanisms for government accountability which may be viewed as an attempt at indirect incorporation of public trust concepts.

134. *See* MICH. COMP LAWS ANN. § 324.1703(1) (West 1997).

135. *Id.*

136. *See* Gionfriddo, *supra* note 89, at 451-53 (suggesting that MEPA burdens defendants with necessity to refute prima facie showing).

137. 224 N.W.2d 883 (Mich. 1975) (holding that action must be remanded for full and specific findings of fact where trial court failed to meet requirements for findings of fact necessary to insure that MEPA fulfilled goals for which it was enacted).

court, the burden of going forward with the evidence shifts to the defendant once the plaintiff establishes a prima facie case. If the defendant successfully rebuts the plaintiff's prima facie showing, the burden shifts and the plaintiff must then prove environmental pollution, impairment or destruction.[138] The *Ray* court indicated that the nature of the evidence necessary to rebut a prima facie showing will vary according to both the type of environmental pollution alleged as well as the nature and extent of plaintiff's evidence. For example, testimony by expert witnesses may be sufficient to rebut the plaintiff's prima facie showing in some cases. The defendant may, however, find it necessary to bring forward field studies, actual tests and analyses to establish that the environment has not or will not be damaged by its conduct. The *Ray* court acknowledged that such evidence would be necessary when the impact upon the environment resulting from defendant's actions cannot be ascertained with any degree of reasonable certainty without empirical studies or tests.[139] Thus, in the event the plaintiff makes a prima facie showing, the burden shifts to the defendant even if the environmental effects of its activities are uncertain.

The *Ray* court's burden on the defendant is a significantly higher burden than that initially placed on the plaintiff to prove a prima facie case.[140] The obligation, however, is consistent with a statute designed to place the burden on the party presumably in possession of better information about the environmental impact of its activities. The Michigan Court of Appeals endorsed this theory in *Wayne County Department of Health v. Olsonite Corp.*[141] The *Olsonite* court upheld a trial court denouncement of defendant manufacturer's odor tests conducted after institution of lawsuit, because the tests were conducted by employees untrained in odor detection.[142]

138. *See id.* at 890 (finding that standard of proof for plaintiff was preponderance of evidence). To clarify, the burden of proof never shifts, but the burden of proceeding shifts to the defendants after the plaintiff makes a prima facie case. *See id.* Thus, while the burden of proving environmental pollution or impairment remains with the plaintiff, the burden of going forward with the evidence shifts to the defendant once the plaintiff establishes a prima facie case. *See id.* If the defendant successfully rebuts, the burden of going forward with the evidence would then shift back to the plaintiff. *See id.*

139. *See id.* at 891 (noting that one of defendant's witnesses conceded that without detailed study of configurations in areas, he could not say how wetlands were dependent upon watertable and whether they were subject to drying up if watertables were lowered).

140. *See* Lynch, *supra* note 68, at 60.

141. 263 N.W.2d 778 (Mich. Ct. App. 1977) (endorsing *Ray* court's placement of burden on party presumably in possession of information about environmental impact).

142. *See id.* (holding that manufacturer's tests didn't meet empirical studies).

The court characterized such tests as self-serving and not measuring up to the empirical studies espoused by the *Ray* court.

If a defendant is unable to rebut the plaintiff's case with evidence to the contrary, MEPA permits a defendant to plead an affirmative defense. This requires a defendant to show that there is no feasible and prudent alternative to defendant's conduct and that the defendant's conduct is consistent with the promotion of the public health, safety and welfare.[143] Establishing an affirmative defense has proved difficult for defendants under MEPA and similar MEPA-type laws.[144] In *Olsonite*, the Michigan Court of Appeals held that the normally applicable rules requiring a plaintiff to carry the burden of proving its case by a preponderance of the evidence do not apply to the affirmative defense under MEPA. Instead, the defendant has the burden of proving by a preponderance of the evidence that there is no feasible and prudent alternative to its activities.[145] The court stressed the concern that if private citizens are to have a sizable share of the initiative for environmental law enforcement, the only reasonable construction of MEPA is to place the burden of proof "not on a citizenry largely unschooled in the intricacies of environmental technology, but on a defendant who has the underlying data and documentation upon which his choice of a given course of action is based."[146] The *Olsonite* decision re-

143. *See* MICH. COMP. LAWS ANN. § 324.1703(1) (West 1997) (viewing defendant's affirmative defense in light of state's paramount concern for protection of its natural resources from pollution, impairment or destruction).

144. *See, e.g.*, Haynes, *supra* note 67, at 599; Abrams, *supra* note 121, at 117; Gionfriddo, *supra* note 89, at 451. *See also* State ex rel. Wacouta Township v. Brunkow Hardwood Corp., 510 N.W.2d 27, 31 (Minn. Ct. App. 1993) (holding that under MERA, once plaintiff has established prima facie case, defendant must either rebut or affirmatively defend by demonstrating that no feasible or prudent alternative exists and that its actions will promote public health, safety or welfare, other than economically). A defendant must shoulder an extremely high burden in order to establish an affirmative defense. *See id.*

145. *See Olsonite*, 263 N.W.2d at 781-82 (leading case under MEPA on scope of defendant's obligation).

146. *Id.* (citing Joseph L. Sax, Responses to "Thoughts on H.B. 3055" 4 (March 20, 1970) (unpublished manuscript, Professor Sax, University of Michigan Law School), *quoted in* Note, *Michigan Environmental Protection Act: Political Background*, 4 U. MICH. J.L. REFORM 358, 367 n.36 (1970)). The *Olsonite* court also held that: (1) to maintain its affirmative defense, a defendant must demonstrate that it is keeping its emissions to a practical minimum; (2) an alternative may be economically feasible even if it would substantially increase production costs, burden finances and affect profit margins adversely; (3) the concept of economic feasibility does not guarantee the continued existence of individual employers if they have lagged behind the rest of the industry and, for financial reasons, are unable to comply with new standards as quickly as other employers; (4) the concept of prudent alternative does not require that there be a comprehensive balancing of competing interests; and (5) a defendant must show technical, economic infeasibility

flects the influence of several trends in federal environmental legislation and jurisprudence relating to the obligation to consider alternatives and the extent to which compliance is expected even if it may mean the demise of individual companies.[147] The strength of the affirmative defense under MEPA is tempered by the fact that if the plaintiff does not make out a prima facie case of impairment, the defendant has no obligation to take alternatives into account.[148] The overall effect of the Michigan cases on MEPA's affirmative defense provision demonstrates that, where applicable, MEPA poses a high hurdle for defendants and forces them to choose environmentally sound approaches to conducting their operations.

4. *Standards of Environmental Quality*

MEPA addresses the question of judicial deference to administrative agency action in a fundamentally different manner than United States federal law. Under federal law, the principle of deference to administrative interpretations and decisions is firmly en-

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and imprudence of alternatives to succeed. *Id.* at 703-06, 796-98. *Olsonite* was recently distinguished by the Michigan Court of Appeals in Friends of Crystal River v. Kuras Properties, 554 N.W.2d 328, 332 (Mich. Ct. App. 1996) (refusing to apply principles of *Olsonite* to wetlands statute with requirement similar to MEPA to consider "feasible and prudent alternatives," because, unlike MEPA, wetlands statute contained neither affirmative defenses nor burden shifting obligations, and because *Olsonite* had expressly rejected notion that phrase "prudent alternative" in MEPA required comprehensive balancing of competing interests while wetlands statute specifically embraced obligation to balance burdens and benefits of activity).

147. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971) (holding that phrase "prudent alternative" in several pieces of federal transportation legislation did not mandate comprehensive balancing of competing interests, and destruction of parkland was not to be approved unless alternative routes present unique problems); *Olsonite*, 263 N.W.2d at 796-97 (endorsing interpretation of "prudent" advanced in *Overton Park* decision); Environmental Protection Agency v. National Crushed Stone Ass'n, 449 U.S. 64, 79 (1980) (holding that EPA was not required to include economic ability as factor in granting variances from 1977 Best Practicable Control Technology (BPT) effluent limitations under Clean Water Act, as Congress foresaw and accepted economic hardship that effluent limitations would cause, including closing of some plants).

148. *See* Oscoda Chapter of PBB Action Comm., Inc. v. Department of Natural Resources, 268 N.W.2d 240 (Mich. 1978) (holding where alternative chosen by defendant does not violate MEPA's impairment standard, court has no authority to order defendant to choose different option); *Friends of Crystal River*, 554 N.W.2d at 334 (making plain that where plaintiff failed to make prima facie showing that proposed golf course would impair wetland area, court will not reach question of whether feasible and prudent alternatives exist to defendant's conduct). OEBR imposes no comparable requirement on defendants. As a result, in cases under OEBR, the plaintiff retains the burden of proof throughout the case as in any other civil proceeding.

trenched, based in part on notions of agency expertise.[149] The legislative sponsors of MEPA supported a different approach to judicial interpretation of environmental rights. They wanted the Michigan courts to inquire directly into the merits of environmental controversies rather than invalidate only arbitrary and capricious administrative conduct.[150]

MEPA supplements existing administrative and regulatory procedures. Specifically, it authorizes courts to determine the validity, applicability and reasonableness of any standard for pollution and to specify a new or different pollution control standard in the event an agency's standard falls short of MEPA's substantive requirements.[151] As a result, courts have consistently held that trial courts may not defer to the expertise of the agency when reviewing administrative agency action in a MEPA suit.[152] The court must exercise its independent judgment as to whether the agency activity prevents the likelihood of the pollution, impairment or destruction claimed by the plaintiff.[153] According to the Michigan Supreme Court, the statute would not accomplish its purpose if the courts were to exempt administrative agencies "from the strict scrutiny which environmental protection demands."[154] Thus, MEPA authorizes Michigan courts to enforce standards and to establish new stan-

149. *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding that EPA regulation allowing states to treat all pollution-emitting devices within same industrial grouping as though they were encased within single "bubble" was based on permissible construction of term "statutory source" in Clean Air Act amendments). The United States Supreme Court held that a court's review of an agency's construction of a statute must give effect to the unambiguously expressed intent of Congress if the intent is clear. *See id.* However, if the statute is silent or ambiguous with respect to the precise question at issue, the question for the court is whether the agency's answer is a reasonable interpretation of the statute. In the latter circumstance, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the agency. *See id.* at 842-43.

150. *See generally* West Mich. Envtl. Action Council v. Natural Resources Comm'n, 275 N.W.2d 538 (Mich. 1979); *see also* Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 895 (Mich. 1975) (holding that by establishing environmental rights in MEPA, legislature set parameters for standard of environmental quality but did not attempt to set forth elaborate definitional scheme to cover every conceivable type of environmental harm). The *Ray* court noted that MEPA left to the courts the task of giving substance to the standard by developing a common law of environmental quality. *See id.*

151. *See* MICH. COMP. LAWS ANN. § 324.1706 (West 1997); Haynes, *supra* note 67, at 602-03 (suggesting that MEPA, in effect, amends other statutes by filling gaps in existing statutory schemes).

152. *See West Mich. Envtl. Action Council*, 405 N.W.2d at 754.

153. *See id.*; Ontario v. City of Detroit, 874 F.2d 332, 341 (6th Cir. 1989).

154. *West Mich. Envtl. Action Council*, 405 N.W.2d at 754.

dards where existing ones are inadequate.[155] By making the courts responsible in the final analysis for the adequacy of environmental standards, MEPA constitutes a dramatic shift away from decision-making by administrative agencies and traditional administrative law principles.

5. Remedies

Under MEPA, courts may grant declaratory and equitable relief to a plaintiff on a temporary or a permanent basis.[156] Furthermore, a court may impose conditions on the defendant that are required to protect the air, water and other natural resources, or the public trust in these resources, from pollution, impairment or destruction.[157] Courts can examine a standard to determine if it is consistent with the statute's requirements and direct the agency to revise it if necessary. Departing from traditional administrative law principles, Michigan courts have refused to require plaintiffs to exhaust all other administrative remedies before invoking MEPA's remedy provisions.[158]

MEPA, however, does not authorize courts to award damages. Legislators excluded damages from MEPA because they sought to avoid frivolous suits and judicial gridlock. Statistics have indicated that the number of actions brought under MEPA are a small fraction of those initiated annually in the Michigan courts.[159] The ab-

155. *See Ontario*, 874 F.2d at 343. OEBR has no comparable provision granting courts the authority to second-guess the actions of administrative agencies. Like the United States, the Ontario approach deliberately withholds authority from the courts to reassess agency rules. However, the concern Ontario legislators expressed about the adequacy of administrative standards of environmental quality led to the establishment in OEBR of an elaborate administrative process of public participation in the evaluation of existing regulations and development of new environmental regulations.

156. *See* MICH. COMP. LAWS ANN. § 324.1701(1) (West 1997).

157. *See id.* § 324.1704(1).

158. *See West Mich. Envtl. Action Council*, 405 N.W.2d at 751-54. The Michigan courts have been creative in fashioning remedies to achieve MEPA's objectives. *See* Stevens v. Creek, 328 N.W.2d 672, 672 (Mich. Ct. App. 1982) (holding that where plaintiff maintained property as wildlife preserve, attempted to perpetuate it in its natural state, and sought reforestation of damaged area, restoration of natural habitat was proper remedy under MEPA). *But see* Slone, *supra* note 67, at 316 (noting that although MEPA does not authorize courts to award damages, it does expressly provide for equitable or declaratory relief).

159. *See* Haynes, *supra* note 67, at 593 n.13 (noting that MEPA cases constituted less than .02 of 1% of all civil cases initiated in Michigan circuit courts from October 1970 to July 1975). Suits joining equitable relief under MEPA and damages under nuisance occur particularly where plaintiffs have proceeded by way of a class action. *See id.* at 650 (noting that of nine air pollution class actions involving MEPA, two settled with damages awards, one was dismissed and six were pending as of March 1976).

sence of a remedy in damages, as well as the high costs of civil litigation, would appear to account for the small number of cases under MEPA.

6. Other Procedural Matters

Two additional procedural matters that are important in considering the effect of MEPA on environmental litigation are security for costs and attorney's fees. The imposition of a high security bond on plaintiffs and the refusal to award them attorney's fees can be significant deterrents to initiating citizen suits. Although judicial opinion is split on imposition of attorney's fees, MEPA explicitly addresses security bonds. Courts may order plaintiffs to post either a surety bond or cash in an amount not exceeding $500 when a court has reasonable grounds to doubt the plaintiff's solvency.[160] This MEPA provision strikes an uneasy balance between compensating defendants unfairly restrained by erroneous injunctions and not discouraging citizen suits by saddling them with prohibitive expenditures.[161] Other courts applying MEPA-type laws have also limited the security bond requirement in order to foster citizen environmental protection initiatives.[162]

With regard to attorney's fees, MEPA simply states that "[c]osts may be apportioned to the parties if the interests of justice require."[163] Until recently, Michigan Court of Appeals panels sharply divided on the question of whether the term "costs" includes attorney's fees.[164] Although the Michigan Supreme Court has yet to rule

OEBR authorizes injunctive remedies, declaratory relief and restoration orders, but like MEPA, it does not authorize damage claims. Plaintiffs may be expected to use the class proceeding provisions of other Ontario statutes in conjunction with the declaratory and equitable remedies available under OEBR and the common law cause of action in public nuisance, in order to fashion appropriate relief in a manner similar to MEPA.

160. *See* MICH. COMP. LAWS ANN. § 324.1702 (West 1997) (applying to cases in which court eventually holds that preliminary injunction was erroneously granted in action brought under MEPA).

161. *See* Sax & Connor, *supra* note 20, at 1076-77.

162. *See, e.g.*, State of Minnesota v. Martz, 451 N.W.2d 893, 897-98 (Minn. Ct. App. 1990) (holding that while MERA defines temporary injunction bond as optional, temporary injunction shall not be granted except upon giving of security in amount court deems proper for payment of costs and damages as may be incurred or suffered by party who was wrongfully enjoined). The *Martz* court held that the trial court was within its discretion in requiring only a $1,000 bond in temporarily enjoining construction of radio tower pending trial action under MERA. *See id.*

163. MICH. COMP. LAWS ANN. § 324.1703(3) (West 1997).

164. *See* Taxpayers & Citizens in the Public Interest v. Department of State Highways, 245 N.W.2d 761, 762 (Mich. Ct. App. 1976) (holding that term "costs" includes attorney's fees); Superior Public Rights, Inc. v. Department of Natural Resources, 263 N.W.2d 290, 297-98 (Mich. Ct. App. 1977) (same); Three Lakes

on this issue, recent decisions by the Michigan Court of Appeals support the view that MEPA does not allow an award of attorney's fees unless authorized by statute or court rule.[165] In *Platte Lake Improvement Ass'n v. Department of Natural Resources*,[166] the Michigan Court of Appeals held that although the *Ray* court recognized that the legislature left to the courts the important task of giving substance to the MEPA standard of environmental "pollution or impairment" by developing a common law of environmental quality, it did not authorize the courts to disregard the meaning of well-defined legal terms such as costs.[167] Accordingly, costs do not include attorney's fees under Michigan law unless provided for by legislation.[168]

IV. ONTARIO ENVIRONMENTAL BILL OF RIGHTS: ADMINISTRATIVE-PROCEDURAL-SUBSTANTIVE ENVIRONMENTAL RIGHTS REFORM

MEPA's enactment in 1970 had a profound influence on the reform of Ontario environmental law. In the early 1970s, a constituency called for what was termed an "Environmental Bill of Rights." Ontario legislators began drafting bills to meet this demand. As the government committed itself to enacting environmental rights legislation in the 1990s, political and legislative compromise brought about a rough consensus with business and industrial interests. If

Ass'n v. Kessler, 300 N.W.2d 485, 487-88 (Mich. Ct. App. 1980) (same); Dafter Township v. Reid, 354 N.W.2d 689, 691-92 (Mich. Ct. App. 1983) (same). *But see* Oscoda Chapter of PBB Action Comm. v. Department of Natural Resources, 320 N.W.2d 376 (Mich. Ct. App. 1982) (holding that term "costs" does not include attorney's fees).

165. *See* Model Laundries & Dry Cleaners v. Amoco Corp., 548 N.W.2d 242, 243 (Mich. Ct. App. 1996) (holding that attorney's fees are not covered by MEPA unless court rule or statute specifically authorizes); Buckeye Marketers, Inc. v. Finishing Services. Inc., 540 N.W.2d 757, 759 (Mich. Ct. App. 1995); Attorney General v. Pillar, 514 N.W.2d 210, 212-13 (Mich. Ct. App. 1994).

166. 554 N.W.2d 342 (Mich. Ct. App. 1996) (holding that MEPA provision authorizing apportionment of "costs," but not expressly including attorney's fees, did not authorize award of attorney's fees in MEPA actions).

167. *Id.*

168. *See id.* at 344-45 (concluding that "[w]hile the statute permits apportionment of costs, it does not purport to alter the ordinary definition of 'costs' or to allow taxation of costs for items which may not be taxed as costs in ordinary civil actions"); *Oscoda*, 320 N.W.2d at 378-79. The legislature's implicit public policy in providing a vehicle for individuals to initiate environmental litigation without waiting for government action suggests that MEPA favors an award of attorney's fees to prevailing plaintiffs. Under this interpretation, citizens are empowered to initiate and carry through to completion complex and expensive environmental litigation without the necessary financial means. *See Platte Lake*, 554 N.W.2d at 343-45 (holding that legislature should resolve attorney's fees issues as policy matter). The Michigan Court of Appeals has sent a clear message that only the Michigan Supreme Court or state legislature can reverse.

MEPA is primarily a substantive rights statute, OEBR may be described as primarily an administrative rights regime. This change in approach may profoundly impact OEBR's efficacy for ensuring environmental protection. Whether the statute can achieve its purposes of encouraging the public's right to participate in environmental decisions, holding governments environmentally accountable and allowing citizens access to the courts, remains to be seen.

A. Early Bills on Environmental Rights

The Ontario Environmental Rights Act (OERA), introduced in 1979 as a private member's bill by Stuart Smith, the leader of the Liberal Party, was the first environmental rights bill to appear in the Ontario legislature.[169] The bill contained many provisions derived from MEPA principles.[170] Because it was introduced by the leader of the official opposition, the bill received greater public scrutiny than private members' bills usually receive.[171] As a result, the 1979 bill is used in this Article as the primary means for summarizing the

169. *See An Act Respecting Environmental Rights in Ontario*, Bill 185, 31st Leg. Ont. 28 Eliz. II (1979) [hereinafter Bill 185] (Mr. Smith-first reading Nov. 20, 1979, Ont. Leg.) (introducing Ontario Environmental Rights Act (OERA)). A private member's bill is a non-governmental bill. In 1979, the governing party was the Progressive Conservatives. The official opposition was the Liberal Party. The third party in the legislature was the New Democratic Party.

170. *See An Act to Establish an Environmental Magna Carta for Ontario*, Bill 91, 31st Leg. Ont. 29 Eliz. II (1980) (Ms. Bryden-first reading June 3, 1980, Ont. Leg.) (private member's bill based largely upon Bill 185); *An Act Respecting Environmental Rights in Ontario*, Bill 134, 32d Leg. Ont. 31 Eliz. II (1981) (Mr. Smith-first reading June 29, 1981, Ont. Leg.) (same); *An Act Respecting Environmental Rights in Ontario*, Bill 96, 32d Leg. Ont. 31 Eliz. II (1982) (Mr. Elston-first reading Apr. 29, 1982, Ont. Leg.) (same); *An Act Respecting Environmental Rights in Ontario*, Bill 9, 33d Leg. Ont. 36 Eliz. II (1987) (Mrs. Grier-first reading Apr. 29, 1987, Ont. Leg.) (same); *An Act Respecting Environmental Rights in Ontario*, Bill 13, 34th Leg. Ont. 36 Eliz. II (1987) (Mrs. Grier-first reading Nov. 9, 1987, Ont. Leg.) (same); *An Act Respecting Environmental Rights in Ontario*, Bill 12, 34th Leg. Ont. 38 Eliz. II (1989) (Mrs. Grier-first reading May 15, 1989, Ont. Leg.) (same); *An Act Respecting Environmental Rights in Ontario*, Bill 23, 35th Leg. Ont. 39 Eliz. II (1990) (Mrs. Sullivan-first reading Dec. 13, 1990, Ont. Leg.) (same). For a discussion of the influence of MEPA on Bill 185, see *infra* notes 172-84 and accompanying text. Numerous other bills based on Bill 185 and MEPA-type principles were introduced during the period 1980-1990. For a discussion of the fate of some of these other bills, see *infra* note 185 and accompanying text.

171. *See Bill to Protect Nature Offered*, TORONTO STAR, Nov. 21, 1979, at A20 (noting that Ontario Liberal Leader had introduced environmental rights bill that would permit citizens to go to court to protect environment without first having to prove they have been personally damaged or injured; Hugh Winsor, *Society's Values on the Line*, GLOBE AND MAIL (Toronto), Dec. 11, 1979, at 7 (noting that "[t]he fact that a private bill of the kind that usually rears its title for an hour on Thursday afternoon and is never heard of again can have caused such a fuss is in itself evidence that we are dealing with a seminal issue").

provisions of the great bulk of the private members' bills later introduced.

The first part of OERA set forth certain key definitions as well as the bill's purpose. Three definitions were of particular interest, namely, public trust,[172] contamination,[173] and degrade.[174] Other important provisions in the first part of OERA concerned the grant of environmental rights, the trusteeship of public land and the availability of citizen remedies.[175] The concepts found in the first part of OERA were derived from MEPA, notwithstanding the fact that the latter neither defined terms nor declared rights. Like MEPA,[176] OERA would have remedied impairment or destruction

172. *See* Bill 185, *supra* note 169, § 1(g) (defining term "public trust" as "collective interest of residents of the Province of Ontario in the quality of the environment and the protection thereof and the heritage therein for future generations").

173. *See id.* § 1(b) (defining term "contamination" as impairment of "quality of the environment or the public trust therein for any use that can be made of it"). OERA provided in pertinent part:

> "[C]ontaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man which may:
>
> (i) impair the quality of the environment or the public trust therein for any use that can be made of it,
>
> (ii) cause injury or damage to property or to plant or animal life,
>
> (iii) cause harm or material discomfort to any person,
>
> (iv) adversely affect the health or impair the safety of any person, or
>
> (v) render any property or plant or animal life unfit for use by man.

Id.

174. *See id.* § 1(d) (providing that "'degradation' refers to any destruction or significant decrease in the quality of the environment or the public trust therein other than a change resulting from contamination and 'degrade' has a corresponding meaning").

175. *See id.* §§ 2(1)-(2) (providing that "[t]he people of Ontario have a right to clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment," and that "Ontario's public lands, waters, and natural resources are the common property of all the people," and imposing obligation upon Ontario Government as trustee to "conserve and maintain [natural resources] for benefit of present and future generations"). OERA further declared that "it is in the public interest to provide every person with an adequate remedy to protect and conserve the environment and the public trust therein from contamination and degradation." *Id.* § 2(3).

176. MICH. COMP. LAWS ANN. §§ 324.1701 to 324.1706 (West 1997). The second part of OERA was also modeled on MEPA. *See id.* Like MEPA, OERA allowed any person to sue without having to establish special damage. *See id.* § 324.1701(1). OERA thus proposed to reform the law of standing in relation to public nuisance in Ontario. Furthermore, OERA, like MEPA, authorized a court to establish a standard where none existed to govern a defendant's conduct. *See id.* § 324.1701(2). OERA, however, did not give Ontario courts the ability to revise an existing standard in the same way MEPA empowered the Michigan courts. MEPA shifted the burden of proof to the defendant to demonstrate there was no feasible and prudent alternative to its activity where there is no governing statute, and OERA followed suit. *See id.* § 324.1703(1). This burden shift would not have applied where there was an established standard. In contrast to MEPA, in circum-

of the environment or public trust.[177] The particular need to define "public trust" and to set out the fiduciary obligation of the government in OERA arose partly because Canadian common law narrowly defined the term and severely restricted actions against the Crown as trustee.[178]

The second part of OERA granted a right of action in the Supreme Court of Ontario against any person contaminating or degrading the environment.[179] Where the activity complained of was not governed by a legally established standard, OERA authorized the court to establish a standard with which the defendant need comply.[180] Like MEPA, the bill also shifted the burden of proof from the plaintiff to the defendant to show "no feasible and prudent alternative to the defendant's activity."[181] The bill also recog-

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stances involving an established standard, a defendant under OERA would prevail unless the plaintiff established on a balance of probabilities that the activity was causing severe environmental damage. *See id.* Although MEPA and OERA both authorized injunctions and limited security bonds to $500, OERA alone permitted actions in damages. *Id.* §§ 324.1704(1) (injunctions), 324.1702 (security bond). MEPA and OERA further differed in that OERA lacked a prima facie test requiring plaintiffs to provide a minimum evidentiary showing to shift the burden of proof to defendants.

177. MICH. COMP. LAWS ANN. § 324.1701(1) (West 1997) (authorizing any person to maintain action to protect "air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction"); *see also* Bill 185, *supra* note 169, §§ 1(b) (including impairment in statutory definition of contamination), 1(d) (including destruction in statutory definition of degradation), 2(3) (stating that it is in public interest "to provide every person with an adequate remedy to protect and conserve the environment and the public trust therein from contamination and degradation), 3(1) (granting cause of action where activity has contaminated or degraded environment or threatens to contaminate or degrade environment), 6 (setting forth remedies for protection of public trust).

178. *See* Constance D. Hunt, *The Public Trust Doctrine in Canada, in* ENVIRONMENTAL RIGHTS IN CANADA 151, 177-78 (John Swaigen ed., 1981).

179. *See* Bill 185, *supra* note 169, §§ 3(1)-(2) (establishing that one could initiate action without showing of "any greater or different right, harm or interest than that of other members of the public").

180. *See id.* § 3(3). In establishing any standard, Bill 185 required courts to take into consideration the following:

> (a) [T]he right of the people of Ontario to protection of the environment and the public trust therein against contamination or degradation;
>
> (b) the fulfillment of the widest range of beneficial uses of the environment without contamination or degradation; and
>
> (c) the achievement of a balance between population and resource use that would permit high standards of living and a wide sharing of life's amenities.

Id.

181. *See id.* §§ 5(1)-(2) (dealing with allocation of burden of proof), 7-8 (authorizing court to refer technical and scientific matters to administrative tribunal or referee for review pending final judicial determination); 4(2)-(3) (limiting obligation to post security for costs or damages to $500 where court satisfied plaintiff

nized as a defense, the defendant's compliance with a standard, and permitted the plaintiff to rebut the defendant's showing by proving that the defendant's activity caused or is likely to cause severe or irreparable contamination or degradation to the environment.

Similar in many respects to MEPA, OERA fashioned a major role for the courts in Ontario environmental matters. Accordingly, OERA generated much public debate. Some commentators argued that the bill's fatal flaw was that it placed primary responsibility for protecting the environment in judicial hands.[182] Because formulation of effective environmental policy requires a balancing of the benefits of a cleaner environment against the economic cost of reduced industrial activity and lost jobs, commentators felt that such political decisions should only be made by politicians directly accountable to the electorate for their parliamentary actions.[183] The

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had prima facie case to bring before court), 6 (setting forth injunctions, restoration orders and damages to protect environment).

The remaining parts of OERA dealt with such matters as access to information and attempts to open up both the licensing and regulation-making process to public scrutiny. *See id.* §§ 12 (regarding access to information), 10-11 (regarding licensing and regulation-making process). These latter initiatives established a notice and comment procedure in relation to new instruments and a review procedure in relation to existing instruments to be supervised by an appropriate administrative tribunal. *See id.* § 10 (defining term instrument to include "any licence, permit, approval . . . or order made under an Act listed in the Schedule" to bill "that would permit a person to contaminate or degrade the environment in contravention of such Act or the regulations"). OERA also authorized periodic reviews of all environmental regulations by an administrative tribunal in order to ensure their "adequacy to protect the environment and the public trust therein from contamination and degradation, especially in the light of technological advances that can be applied in the Province of Ontario." *Id.* § 11(1) (stating that there should be review every five years by Environmental Assessment Board). MEPA inspired these latter initiatives. Notwithstanding that OERA did not authorize judicial scrutiny of existing standards, the Act recognized a need to keep approvals and regulations current. This initiative grew into subsequent versions of private members' bills and, eventually, into OEBR itself. *See An Act Respecting Environmental Rights in Ontario,* Bill 12, 34th Leg. Ont. 38 Eliz. II §§ 14-16 (1989) (providing greater opportunity for review of both existing and new instruments and regulations by public).

182. *See* Pat Crowe, *Who Will Control Court That Acts as Government?*, TORONTO STAR, Dec. 4, 1979, at A10 (arguing that environmental review should not be in hands of judiciary); Editorial, *Smith's Idea Fatally Flawed*, TORONTO STAR, Dec. 6, 1979, at A8 (same); Editorial, *Out of Court*, GLOBE AND MAIL (Toronto), Dec. 5, 1979, at 4 (noting that Ontario's Environmental Minister, Hon. Dr. Harry Parrott of Progressive Conservative Party, disagreed philosophically with intention of bill believing that enforcement of environmental laws should be handled by elected officials, and that environmental standards were never meant to be in hands of courts).

183. *See* Crowe, *supra* note 182, at A10. In effect, Bill 185's detractors were making two separate arguments. First, they argued that the government was more representative of the people than courts and thus should be making environmen-

environmental community and the provincial bar association expressed the contrary view.[184] Specifically, they argued that the judiciary's independence could serve as an important check on the environmental decision-making of the more political branches of government. Over the next decade, opposition members introduced numerous other private members' bills on environmental

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tal decisions. Second, they argued that courts are not capable of objectively balancing environmental considerations.

184. *See* Harry Poch, *Smith Environmental Rights Bill Praised by Bar Official*, GLOBE AND MAIL (Toronto), Dec. 12, 1979, at 7 (arguing that environmental decisions should be in hands of judiciary); Joseph F. Castrilli, *Environmental Bill Called "Best News" of Decade*, TORONTO STAR, Nov. 27, 1979, at A9 (same); Joseph F. Castrilli, *Environmental Bill Supplements Law He Argues*, TORONTO STAR, Dec. 13, 1979, at A9 (same). Commentators made the following responses to opponents of OERA: (1) the bill was meant to supplement, not displace, the regulatory process, especially where there are no standards in place; (2) making environmental protection an enforceable legal right in the courts where prompted by citizens would merely place such rights on an equal footing with private property rights; (3) citizen environmental actions in other jurisdictions with laws similar to OERA did not result in dire economic consequences for industry; and (4) the often irreversible nature of environmental damage required more proactive and preventive mechanisms than that provided by an election once every four years. *See* Poch, *supra*, at 7.

OERA's legislative sponsor, Dr. Stuart Smith, noted that there was nothing new in granting courts the authority to make law as courts frequently set standards in many complex financial, technical and social areas as securities fraud, price fixing, patents and obscenity laws. *See* Ont. Leg. Debates, 31st Leg. Ont., 3d Sess., 28 Eliz. II 5482 (Dec. 13, 1979) (argument by Smith that judges be allowed to set standards in environmental law arena). Smith also noted that because environmental legislation provided the government with power but not the duty to act, Ontario had experienced many serious pollution episodes which demonstrated the need for citizen suit legislation to improve environmental conditions between elections when the government does not act. *See id.* (referring to mercury contamination in St. Clair River, sulphur dioxide emissions in Sudbury, and lead emissions from Toronto lead smelters). Smith and other legislative supporters made frequent reference to MEPA for the principles found in OERA and for refuting suggestions that such laws lead to clogging of judicial system with frivolous suits. *See id.* at 5481-83 (Smith and Bryden supporting decision-making in hands of judges).

Legislators who did not support Bill 185 argued that its inherent assumption, that judges will always take effective anti-pollution measures, was not necessarily accurate. The judiciary might instead issue rulings that would frustrate effective legal action in the future. *See id.* at 5485 (testimony of Mr. McCaffrey against passage of bill). Despite broad public support, the bill died on the Order Paper at the close of the 1979 legislative session. *See id.* at 5481; Kirk Makin, *Environmental Rights Bill Supported*, GLOBE AND MAIL (Toronto), Dec. 12, 1979, at 52 (noting support for bill from various national and provincial environmental and conservation organizations, provincial bar association, consumers' associations and church groups); Joseph F. Castrilli, *Broad Public Coalition Supports Citizens' Suit Bill, Though Measure Is Defeated in Ontario Legislature*, CAN. ENVTL. L. ASS'N NEWSL., Dec. 14, 1979, at 5 (noting that members of governing Progressive Conservative party voted to prevent bill from proceeding to committee, thus killing bill at end of legislative session).

rights, none of which became law.[185]

B. Ontario Task Force on OEBR: Search for Consensus

In the September 1990 Ontario election, environmental issues played a prominent role, and the newly elected New Democratic Party provincial government promised to introduce environmental rights legislation. The new Environmental Minister, the Honorable Ruth Grier, appointed a twenty-six person advisory committee for the purpose of reviewing and making suggestions regarding the environmental rights legislation.[186] Through its environmental rights initiative, the new government intended to provide the public with the right to a healthy environment, as well as access to the judiciary and administrative decision-making process.[187] The advisory committee engaged in wide-ranging deliberations for several months, during which time it surveyed the experiences of MEPA-type jurisdictions and hundreds of public comments.[188] Most of the public

185. *See Environmental Rights "Snowed Again" in Ontario*, CAN. ENVTL. L. ASS'N NEWSL., Dec. 1980, at 99-100 (noting defeat of second environmental rights bill introduced in 1980 by Ms. Bryden, environmental critic and member of New Democratic Party); Joseph F. Castrilli, *Control of Toxic Chemicals in Canada: An Analysis of Law and Policy*, 20 OSGOODE HALL L.J. 322, 384 & nn.329-32 (1982) (noting history of environmental rights bills to 1981); Muldoon, *supra* note 55, at 39 (noting history of environmental bills to 1987).

Several of the later Ontario environmental rights bills were introduced by a future provincial environmental minister. For further discussion, see *supra* note 170 (referring to Bills 9, 12 and 13 which were introduced by Mrs. Grier in 1987 and 1989 while she was a member of Opposition New Democratic Party).

Mrs. Grier became Ontario Environment Minister in the Fall of 1990. Next to Liberal Leader Stuart Smith's Bill 185, Mrs. Grier's Bill 12 was the most commented upon environmental rights initiative. *See* Andrew McNaught, *Citizen Participation in the Protection of the Environment: Recent Proposals for Legislative Change*, ONT. LEG. RES. SERV. 1, 11-13 (1990); Roger Cotton & Nancy Johnson, *Avenues for Citizen Participation in the Environmental Arena: Some Thoughts on the Road Ahead*, 41 U.N.B. L.J. 131, 136-53 (1992) (noting that Bill 12 would have entrenched statutory guarantee of basic environmental rights, and given citizens increased access to courts and decision-making process giving effect to environmental rights).

186. *See* Ont. Leg. Debates, 35th Ont., 1st Sess., 39 Eliz. II 2710 (Dec. 13, 1990) (statement of Hon. Ruth Grier, Ontario Minister of the Environment). Among the sectors represented on the advisory committee were the fields of labor, business, industry, environment, aboriginal, health, legal, municipal and provincial governments. *See id.*

187. *See id.* (identifying environmental rights intentions of new government). The government specifically expected the bill to address the public's right to a healthy environment, the enforcement of this right through improved access to the courts and tribunals, increased public participation in the environmental decision-making process and increased government responsibility and accountability for the environment. *See id.* (addressing also greater protection for employees blowing whistle on their polluting employers).

188. *See* ONTARIO MINISTRY OF THE ENVIRONMENT, TASK FORCE REPORT ON THE ENVIRONMENTAL BILL OF RIGHTS 1 (1992) [hereinafter TASK FORCE REPORT].

comment supported the environmental rights concept.[189]

Subsequent to the advisory committee's initiatives, Minister Grier announced the creation of a small task force of multi-stakeholders from business, industry, government and environment groups.[190] The task force was assembled to draft the environmental rights legislation. After extensive examination and consultation, the task force achieved consensus, crafted the bill's provisions and released an accompanying report in 1992. The report advocated reform for three major aspects of Ontario's environmental law, namely, public participation, government accountability and public access to the courts.[191] Specifically, the task force proposed the creation of an environmental registry to give the public notice of government proposals potentially affecting the environment.[192] The

189. *See* Dianne Saxe, *Environmental Rights Bill Will Open Pandora's Box*, FIN. POST (Toronto), Apr. 11, 1991, at 13 (noting that, in principle, environmental rights bill was desirable, but questioning whether giving unelected and unaccountable judiciary power to make fundamental decisions was good idea).

190. *See* Ont. Leg. Debates, 35th Leg. Ont., 1st Sess., 40 Eliz. II 2623 (Oct. 1, 1991) (statement of Hon. Ruth Grier, Ontario Minister of Environment). The legislation's goal was to "give the citizens of Ontario the right to act to protect the environment." *Id.* The task force was also charged with the responsibility of determining whether this goal could be achieved on a consensual basis. *See* TASK FORCE REPORT, *supra* note 188, at 1. The task force's terms of reference in drafting the bill were similar to the policy objectives and principles established for the advisory committee. *See id.* at 2. Minister Grier's terms of reference also included a list of initiatives that could be incorporated into a bill of rights. *See id.* at 3. The list of initiatives included the following: (1) a clearly articulated definition of the term "environment;" (2) creation of a duty on government to protect public resources; (3) a citizen's right to request an investigation and report which would be shared with the person who requested the investigation and the person investigated; (4) an expanded civil cause of action for environmental harm; (5) a right of standing for environmental claims; (6) a private right to compel government instruments and regulations related to the environment to be made, enforced or set aside; (7) expanded provisions for judicial review of government action; (8) a public right to participation in the issuance of instruments and the making of regulations, including the right to notice, comment and hearing; (9) improved public access to information upon which environmental decisions are based; (10) encouragement of non-litigious methods of dispute resolution, such as mediation; and (11) exemption of certain types of environmental harm from short limitation periods. *See id.*

191. *See* Ont. Leg. Debates, 35th Leg. Ont., 2d Sess., 41 Eliz. II 1905 (July 8, 1992) (statement of Hon. Ruth Grier, Ontario Minister of Environment) (noting that task force draft bill reflected consensus of business and environmental groups); *see also* TASK FORCE REPORT, *supra* note 188, at 9-14, 23.

192. *See* TASK FORCE REPORT, *supra* note 188, at 9 (noting that "public does not have a consistent clear right to participate in significant environmental decisions by government"); *id.* at 10-13 (noting that "person may stand in the Attorney General's shoes and sue for widespread public harm only where the Attorney General consents to the action, or where the person can prove . . . a loss which is different in kind or degree from that of other members of the public"); *id.* at 28 & 151-52 (noting that "environmental registry system . . . would provide a uniform, predictable and certain system for providing notice of pending significant environ-

task force also recommended that the public have the opportunity to request governmental review of existing policies.[193] Finally, the task force proposed limited opportunities for public appeal to an

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mental decisions, an opportunity to comment, notice of the decision once made and, in some cases, appeal rights").

The task force proposed a public right to apply to the Environmental Commissioner for an investigation into violations of environmental law requirements, the creation of a new cause of action for violation of an environmental law causing significant harm to a public resource and removal of impediments to members of the public suing in public nuisance. *See id.* at 70-76 (noting that under task force's proposed reform, application to Environmental Commissioner for investigation of alleged contravention by appropriate minister is prerequisite step resident must take before commencing action under bill where government has elected not to protect public resource); *id.* at 83-84 (recommending that any Ontario resident should be able to commence action where significant harm to public resource is occurring as result of non-compliance with prescribed statute, regulation or instrument; pre-condition to such action must be resident's request for investigation of alleged contravention and unreasonable or untimely response by government); *id.* at 95-98 (recommending that "no person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment should be barred from bringing an action in respect of the loss only because the person has suffered or may suffer a direct economic loss or direct personal injury of the same kind or to the same degree as other persons;" and that permission of Attorney General no longer be required before person may bring public nuisance action).

193. *See id.* at 76-83. Because the task force determined that there was a need for greater government accountability to the public, it proposed that provincial ministries prepare statements of environmental values to explain how the purposes of the proposed bill would be incorporated into the particular ministry's environmental decision-making. *See id.* at 13-15 (noting that "at present, there is no legal mechanism in place to oversee government's administration of environmental laws and to provide an independent assessment of government's success or failure in achieving the goal of a sustainable, healthful environment for Ontarians"); *id.* at 23-25 (noting that statements of environmental values would be similar to each ministry's mission statement or strategic plan, except that it would be devoted to environmental matters and would outline what purposes of bill mean to environmental decision-making within that ministry, and how bill's purposes will be integrated into that ministry's existing decision-making). While this proposal bore a resemblance to the requirement to produce an environmental assessment or impact statement for ministry activities, the task force did not refer to that process or how it would interact with environmental rights. *See id.* The task force also proposed the appointment of an Environmental Commissioner to monitor and report to the legislature regarding compliance with the bill provisions. *See id.* at 65-70 (noting that Office of Environmental Commissioner would address need for objective oversight and measurement of implementation of OEBR and use of statements of environmental values by various ministries). The task force expected that objective, non-partisan analysis would lead to the political accountability implicit in OEBR. *See id.* The task force considered and specifically rejected the concept of judicial review of the application or non-application of the statements of environmental values as being less effective than an Office of the Environmental Commissioner, because resort to courts on this issue would undermine certainty, predictability and uniformity sought by the task force for the overall OEBR process. *See id.* at 68.

administrative tribunal.[194]

To achieve consensus, the reform mechanisms departed significantly from previous private members' bills. While private members' bills of the 1970s and 1980s focused on effectuating environmental accountability through the courts, the approach of the task force was to establish environmental responsibility through the political process and the administrative process, while leaving the courts as the forum of last resort.[195] For example, the issue of the public trust doctrine illustrated the degree of departure from the approach of the earlier private members' bills. The principal means of encouraging government accountability in the private members' bills was statutory enshrinement of a public trust doctrine which would recognize a governmental fiduciary duty to protect the environment for present and future generations.[196] The public trust doctrine, however, polarized industry and environmentalists on the task force, as the former suggested that the ballot box should vindicate this concept, while the latter argued for the courts.[197] To resolve the impasse, the task force created several new institutional mechanisms to instill an environmental ethic in the government and limited access to the courts without reference to the public trust doctrine.[198] Political accountability mechanisms do

194. *See id.* at 46-48, 54-56, 63 (identifying certain classes of instruments, known as Class I and II, as having potential for significant environmental impact). Under existing law, Class I and II instruments are subject to appeal by the instrument holder or the person whose activity is the subject matter of the instrument, but not by an ordinary member of the public. *See id.* The task force proposed that these two classes of instruments be subject to leave to appeal applications by members of the public. *See id.*

195. *See id.* at 17-18. Among the reasons articulated by the task force for the sharp departure from prior court-oriented approaches to environmental rights reform was that "while public and government share responsibility for environmental protection . . . the government, by virtue of the role it plays . . . and by virtue of our democratic traditions, must have primary responsibility for protection of the environment and . . . public resources." *Id.* at ii. A second reason was that a regime that was too court-driven in controlling government conduct would create too much uncertainty for the public, business and government. *See id.* at 17. Finally, courts were not independently effective enough to protect the environment because of the expense, delay, scientific and technical complexity, risk and consequence of failure associated with litigation. *See* Cochrane, *supra* note 21, at 6. The unstated reason for the task force's departure from prior court-oriented approaches was that, without business and industrial support, the government would not have proceeded with any reform initiative. *See* TASK FORCE REPORT, *supra* note 188, at 17 (noting that task force was charged with responsibility of determining whether environmental rights legislation could be achieved on a consensual basis).

196. *See* TASK FORCE REPORT, *supra* note 188, at 17-18 (summarizing public trust provisions of Bill 12).

197. *See id.*

198. *See id.* at 84-85.

not have an analogue in MEPA or earlier Ontario private members' bills.

Following public and legislative committee hearings, the legislature passed OEBR in virtually its original form. Some of the issues the task force excluded from OEBR which had been prominent in previous bills are noteworthy and include the following: (1) court establishment of new standards controlling the conduct of a defendant where none exist;[199] (2) defendant's obligation to establish the absence of any feasible and prudent alternative to his conduct;[200] (3) a limitation on a plaintiff's obligation to post security bonds;[201] and (4) the availability of a remedy in the form of damages.[202] Without these provisions, the overall effect of the task force proposal was a significant departure from MEPA and the early MEPA-inspired private members' bills. It was clear that the task force was recommending that the province embark on a completely new framework for environmental decision-making in Ontario.[203]

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199. *See id.* at 59-60, 76-81, 168. The task force did not discuss why this private members' bill reform was excluded from its report and draft bill. What the task force did recommend was that any two Ontario residents who believe that a new policy, Act, regulation or instrument should be adopted in order to protect the environment should be able to apply to the Environmental Commissioner for a review of the need. *See id.* The task force recommended that no judicial review of this process be authorized, but did not explain why it made this recommendation.

200. *See* TASK FORCE REPORT, *supra* note 188, at 98. The task force made no reference in its report to shifting the burden of proof to a defendant at any stage of litigation involving its proposed new statutory cause of action. Instead, it recommended that the new cause of action be used in the Ontario courts "as much as possible like ordinary civil litigation." *Id.* The defenses recommended by the task force did not include any obligation on a defendant to demonstrate at any stage that there was a feasible or prudent alternative to its conduct. *See id.* at 100-01. The task force did not explain why this approach was omitted.

201. *See id.* at 105. The task force recognized that a resident who undertakes environmental litigation faces certain financial risks. However, the task force did not want to create any "special inducement to plaintiffs to commence litigation of this sort." *Id.* It articulated, however, that Ontario Rules of Civil Procedure, Rule 56 in particular, would still apply with respect to security for costs. *See id.* Rule 56 states that a court, on a motion by the defendant, may make such order for security for costs where it appears that "there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant" or "there is good reason to believe that the action or application is frivolous and vexatious." *See* ONT. R. CIV. P. 56.01(1)(d)-(e). It was this type of rule that MEPA explicitly sought to change in order to encourage environmental litigation where necessary.

202. *See* TASK FORCE REPORT, *supra* note 188, at 103. The task force was of the opinion that the focus of a judgment in cases involving the new cause of action should be on restoration rather than on calculation of damage awards. *See id.* Because no personal loss would have occurred for the plaintiff and damages could be difficult to quantify, the task force recommended that damage awards not be available as part of a court's judgment. *See id.* Damage awards were also not part of MEPA. *See id.*

203. *See* Cochrane, *supra* note 21, at 3.

C. Legislative Consideration of OEBR

After the release of the task force draft bill in 1992, an extensive period of public consultation preceded the introduction of the government OEBR in the legislature.[204] The purpose of the public consultation program was to build upon the consensus that business and environmental groups on the task force had achieved.[205] To a remarkable degree, consensus continued and received acknowledgment by the new Minister of the Environment, the Honorable Bud Wildman, when he introduced the new government bill in the Ontario legislature in May 1993.[206] The legislative standing committee held hearings on the bill at which opposing views were heard.[207] Notwithstanding widespread support for the bill's principles, business and environmental groups and opposition legislators continued to express concerns regarding certain details of OEBR.[208] Despite these concerns, most witnesses appearing before

204. *See* ONTARIO MINISTRY OF THE ENVIRONMENT, TASK FORCE REPORT ON THE ONTARIO ENVIRONMENTAL BILL OF RIGHTS: SUPPLEMENTAL RECOMMENDATIONS 1 (1992) [hereinafter SUPPLEMENTAL TASK FORCE REPORT].

205. *See id.*

206. *See* Ont. Leg. Debates, 35th Leg. Ont., 3d Sess., 42 Eliz. II 1000 (May 31, 1993) (statement of Hon. Bud Wildman) (noting that government bill continued to reflect consensus of business and environmental representatives).

207. *See* Ont. Leg. Debates, 35th Leg. Ont., 3d Sess., 42 Eliz. II 3045 (Sept. 27, 1993) (testimony of Mr. Steven Offer, Liberal environment critic, and Mr. David Tilson, Progressive Conservative environment critic) (noting support, in principle, for legislation); *see also Ontario Environmental Bill of Rights, 1993: Hearings on Bill 26 Before the Standing Committee on General Government*, 35th Leg. Ont., 3d Sess., 42 Eliz. II 505, 507 (1993) [hereinafter *Hearings*] (testimony of Mr. Frank Pazner, Vice President, Laidlaw Waste Systems, Ltd.) (noting support for principle of bill); *id.* at 553 (testimony of Ms. Marie Rauter, President, Ontario Forest Industries Association); *id.* at 515 (testimony of Ms. Rhonda Hustler, Chair, Rural Action on Garbage and the Environment); *id.* at 490-94 (testimony of Ms. Marcia Valiante, Professor, Environmental Law, University of Windsor, and Professor Paul Emond, Professor, Environmental Law, Osgoode Hall Law School, York University) (noting favor with shift from emphasis on "substantive right to a healthy environment" which characterized early versions of environmental rights proposals in Ontario based on MEPA, to OEBR's emphasis on right to participate in administrative decision-making process).

208. *See Hearings*, *supra* note 207, at 505-07 (testimony of Mr. Frank Pazner, Vice President, Laidlaw Waste Systems, Ltd.) (noting business community's concern that litigation created by new cause of action could lead to backlog of cases and increased costs of doing business); *id.* at 536-38 (testimony of Leonard J. Griffiths, Environmental Counsel, Ontario Mining Association) (same); *id.* at 545-48 (testimony of Mr. Carl Lorusso, President, Ontario Waste Management Association) (noting business community's concern that delay in approval of instruments due to opportunities for public review or appeals could lead to discouragement of investment and act as barrier to new job creation); *id.* at 53-54 (testimony of Ms. Marie Rauter, President, Ontario Forest Industries Association) (noting business community's concern that new registry system for giving notice of environmental decision-making on Acts, regulations, policies and instruments would be too costly, too slow and would encourage more bureaucracy); *id.* at 492 (testimony of Ms.

the legislative committee and most legislators commenting on the bill were prepared to work with the OEBR process. As a result, the bill received legislative approval in December 1993, and became law on February 1, 1994.[209]

D. Key Provisions of OEBR

OEBR is a complex statute that addresses environmental rights from administrative, procedural and substantive perspectives. Containing approximately twenty times as many sections as MEPA, OEBR is divided into eight main parts. Part I proclaims OEBR's purpose.[210] Part II establishes minimum levels of public participation that must be met before the Ontario government makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.[211] Part III provides for the appointment of an environmental commissioner responsible for reviewing compliance with OEBR's requirements as well as recourse to the rights provided.[212] Part IV authorizes Ontario residents' applications to the provincial government for review of

Marsha Valiante, Professor of Environmental Law, University of Windsor) (noting environmental community concern that excessive ministerial and administrative discretion all but precludes judicial review); *id.* at 500-01 (testimony of Dr. Mark Winfield, Research Director, Canadian Institute for Environmental Law and Policy, and Mr. Chris Winter, Executive Director, Conservation Council of Ontario) (noting expressed environmental community concern that vagueness and limited mandate and authority of new institutional mechanisms for ensuring government or political accountability cast doubt on effectiveness of these tools as substitutes for public trust doctrine); *id.* at 481-85 (testimony of Ms. Marcia Valiante) (noting environmental community concern that requirement in new cause of action to show both violation of law and significant harm to public resource would result in limited use of citizen suit provision); *id.* at 482 (testimony of Dr. Mark Winfield) (noting environmental community concern that leave to appeal provision in connection with government-approved instruments was too onerous and thus made it virtually impossible for citizens to achieve success on leave applications); *id.* at 492 (testimony of Ms. Marcia Valiante) (noting environmental community concern that failure to change existing court rules on costs or to provide funding mechanism for involvement in administrative process made citizens' ability to afford to bring such actions or participate extensively in administrative reform under bill unlikely, and noting concern that declaration in bill of right to healthy environment was too tentative and circumscribed to lead to effective remedies); *id.* at 573 (statement of Mr. David Tilson, Progressive Conservative environment critic) (expressing concern about OEBR duplication of public participation processes in existing environmental legislation); *id.* at 664 (statement of Mr. Steven Offer) (expressing concern about strengthening new Office of Environmental Commissioner's mandate beyond that of reporting to legislature).

209. *See* Ont. Leg. Debates, 35th Leg. Ont., 3d Sess., 42 Eliz. II 4987, 5026 (Dec. 14, 1993).

210. *See* OEBR, S.O., ch. 28, §§ 1-2 (1993) (Can.).

211. *See id.* §§ 3-48.

212. *See id.* §§ 49-60.

Ontario policies, Acts, regulations or instruments when residents believe that such review should be undertaken to protect the environment.[213] Part V provides Ontario residents' application for investigation to the provincial government when they believe that a prescribed Act, regulation or instrument has been contravened.[214] Part VI permits Ontario residents to bring an action in the courts when a person has violated, or will imminently violate, a prescribed Act, regulation or instrument and the actual, or imminent, violation has caused or will imminently cause, significant harm to a public resource of Ontario.[215] This part also removes certain barriers to bringing a court action regarding either direct economic loss or personal injury resulting from a public nuisance which has caused environmental harm to the environment.[216] Part VII provides for protection of employees who use the provisions of OEBR to protect from reprisals by employers.[217] Part VIII addresses general matters, including judicial review.[218] The first six parts of OEBR and the judicial review portions of Part VIII are most directly influenced by MEPA, even though they now depart significantly from the particulars and approach of the Michigan law.

1. Preamble and Purposes

Examination of the preamble provisions illustrates the extent to which OEBR is meant to both commit government to the goal of environmental protection and to encourage public involvement in the environmental decision-making process.[219] First, the preamble states that the people of Ontario recognize the inherent value of the natural environment. Second it proclaims that the people of

213. *See id.* §§ 61-73.

214. *See id.* §§ 74-81.

215. *See* OEBR, S.O., ch. 28, §§ 82-102.

216. *See id.* § 103.

217. *See id.* §§ 104-116.

218. *See id.* §§ 117-124.

219. *See* TASK FORCE REPORT, *supra* note 188, at 18 (explaining decision to include both preamble and purpose sections). According to the task force, the preamble's purpose is to capture OEBR's philosophical approach and explain its object. *See id.* The purpose section was included to establish goals and influence the interpretation of portions of the legislation. *See id.* One unspoken reason for including both sections may be that Ontario, unlike Michigan, does not have a written constitution that commits the province to preserving and protecting its natural resources. *Compare* MICH. CONST. art. IV, § 52 (describing conservation and development of state resources as "of paramount public concern"). The task force may have, therefore, wanted to underscore, as much as possible, Ontario's obligations to both protect the environment and encourage public involvement in the process, in order to facilitate public, administrative and judicial review of OEBR's provisions.

Ontario have a right to a healthy environment. Third, the preamble announces that the people of Ontario possess a common goal of protecting, conserving and restoring the natural environment for the benefit of present and future generations. Fourth, the preamble notes that, "[w]hile the government has the primary responsibility for achieving this goal, the people should have the means to ensure that it is achieved in an effective, timely, open, and fair manner."[220]

Three broad goals are established in the purpose section of OEBR, namely, (1) to protect, conserve, and where possible, restore the integrity of the environment; (2) to provide for the sustainability of the environment; and (3) to protect the right to a healthful environment.[221] The final part of the purpose section stipulates the following mechanisms to achieve the above purposes: (1) public participation in the environmental decision-making process; (2) increased government accountability; and (3) increased public access to the courts in respect of environmental harm.[222] These three mechanisms are the cores of OEBR. They constitute the culmination of Ontario's efforts to reform environmental law, which began as an attempt to adopt a MEPA-type law but ended with a significantly different legislative initiative.

2. *Public Participation*

OEBR's public participation regime has been described as the "heart" of the statute.[223] According to the Ontario legislature, public participation necessitates notice and comment opportunities in relation to new statutes, regulations, policies and instruments. Public participation also makes available limited opportunities for seeking leave to appeal to an administrative tribunal, the decisions of ministries to issue instruments.[224] Furthermore, public participation includes opportunities to request governmental review of ex-

220. OEBR, S.O., ch. 28, preamble.

221. *See id.* §§ 2(1)(a)-(c). These three goals are supplemented and clarified by additional purposes relating to the following: (1) protection of environment from hazardous pollutants; (2) protection of bio-diversity; and (3) conservation and wise management of ecologically sensitive systems, processes and areas. *See id.* §2(2).

222. *See id.* §§ 2(3)(a)-(c).

223. *See* MULDOON & LINDGREN, *supra* note 19, at 46 (discussing public participation in environmental decisions); *Hearings, supra* note 207, at 512 (testimony of Mr. John Jackson, Representative, Citizen Network on Waste Management) (calling public participation scheme heart of OEBR because of expectation that most members of public will invoke OEBR's simple, easy, cost-effective procedures).

224. *See* OEBR, S.O., ch. 28, §§ 15-48.

isting statutes, regulations, policies or instruments or to request development of new statutes, regulations, or policies where none exist.[225] These initiatives largely pertain to reform of the public's role in the administrative process of environmental protection. Although they were to some extent inspired by MEPA because of its environmental improvement provisions, there is no parallel MEPA provision.[226]

a. Notice and Comment

i. Threshold Determinations

A government proposal is subject to OEBR's notice and comment requirements unless the proposal lacks significant environmental effects or is exempt under the terms of OEBR.[227] Likewise, a proposal is not subject to notice and comment if an OEBR regulation does not classify it into a particular category where it is an instrument.[228] Proposals for statutes, regulations and policies of fourteen ministries, and proposals for instruments of five ministries were scheduled to become subject to OEBR notice and requirement over a period of several years.[229] Recent government decisions to further cost-cutting measures, however, have begun to remove some ministry proposals, if not whole ministries, from the duty to comply with OEBR.[230] These recent decisions have been the subject of adverse reports to the Ontario legislature by the Environmental Commissioner, which outlined the potential for severe reduction in the nature and scope of government proposals and for abuse in the exercise of government discretion in avoiding the statute's notice and comment requirement.[231]

More specifically, OEBR requires that if a minister believes that a proposal under consideration could have a significant environ-

225. *See id.* §§ 61-73.

226. *See* MICH. COMP. LAWS ANN. § 324.1701(2) (West 1997) (stating in an action under MEPA, "if there is a standard for pollution or for an antipollution device or procedure . . . the court may (a) determine the validity, applicability and reasonableness of the standard; (b) if the court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court").

227. For further discussion of significant harm and OEBR exemption, see *infra* notes 232-38 and accompanying text.

228. For a discussion of OEBR classification processes, see *infra* notes 239-42 and accompanying text.

229. O. Reg. 73/94 §§ 1-4 (Can.).

230. For a discussion of the effects of recent government decisions to further cost-cutting measures, see *infra* note 235 and accompanying text.

231. *See* EVA LIGETI, ONTARIO REGULATION 482/95 AND THE ENVIRONMENTAL BILL OF RIGHTS 3-11 (1996) (special report prepared for the Legislative Assembly of Ontario) (on file with author) [hereinafter LIGETI I].

mental effect, the minister must do everything in his or her power to give a thirty-day notice before implementation of the proposal.[232] This time frame may be extended under certain circumstances. In determining whether a proposal could have a significant effect on the environment, a minister must consider the following factors: (1) the extent and nature of the measures that might be required to mitigate against or prevent harm to the environment; (2) the geographic extent of any harm to the environment; (3) the nature of private and public interests including governmental interests involved in the decision whether or not to implement the proposal; and (4) any other matters the minister considers relevant.[233]

The Environmental Commissioner is authorized to review and report to the legislature on how this discretion is being exercised under the Act.[234] To date, provincial ministers have frequently exercised ministerial discretion contrary to the purposes of OEBR, reaching decisions that have unnecessarily curtailed the public's role in the process.[235] What has become clear is OEBR's limited recourse with respect to redressing unwarranted conduct, specifically the ineffectiveness of adverse comment by the Environmental Commissioner in a report to the legislature.[236] There is little incen-

232. *See* OEBR, S.O., ch. 28, §§ 15, 16, 22 (1993) (Can.).

233. *See id.* § 14.

234. *See id.* § 57(g).

235. *See* LIGETI I, *supra* note 231, at 3, 8-11 (noting that exemption from OEBR notice and comment provisions occurred at precise time when numerous changes were under way in province's environmental policy and regulatory framework). In January of 1996, the Environmental Commissioner issued her first special report to the Ontario legislature in which she criticized a provincial government decision to suspend for ten months OEBR public notice and comment requirements dealing with environmentally significant proposals linked to government cost-cutting initiatives. *See id.* In October 1996, the Environmental Commissioner issued a second special report to the legislature in which she again criticized certain provincial government ministries for failing to give notice to the public on environmentally significant proposals relating to changes in the management of certain natural resources and public lands, establishment of regimes for the self-regulation of petroleum industries, and the delegation of certain environmental monitoring responsibilities for underground fuel storage tanks to a private sector agent. *See* EVA LIGETI, KEEP THE DOOR TO ENVIRONMENTAL PROTECTION OPEN 3 (1996) (special report prepared for the Legislative Assembly of Ontario) (on file with author) [hereinafter LIGETI II] (noting that these and other restrictions on Ontarians' right to comment on environmentally significant proposals deprives government of valuable information and perspectives it needs to adequately protect environment).

236. *See id.* The two special reports issued by the Environmental Commissioner not only did not result in correction of the problems identified but also indicated that the abuses had increased. Neither report resulted in a reversal by the government of its decisions not to give notice in the circumstances of the cases identified by the Environmental Commissioner.

tive for the government to change its conduct or even to concede there is a problem because in a parlimentary democracy, the government is the majority party in the legislature.[237] Moreover, recent events suggest the problems may be getting worse, not better.[238]

Instruments are among the many types of proposals covered by OEBR. The OEBR process of classifying instruments by regulation is subject to notice and comment and can enormously influence the scope of OEBR's effect on environmental decision-making. Generally, OEBR classifies instruments as either environmentally insignificant or environmentally significant. OEBR classifies environmentally significant instruments into three classes. Class I instruments require minimum notice and comment. Class II instruments require enhanced notice and comment. Finally, Class III instruments require a public hearing.[239] The first classification regulation the Ontario Ministry of the Environment and Energy (MOEE) filed with the registrar of regulation classified less than ten percent of MOEE's instruments in Classes I-III. It identified the remaining instruments as environmentally insignificant.[240] Thus,

237. *See* Martin Mittelstaedt, *Tories Rebuked Over Pollution*, GLOBE AND MAIL (Toronto), Oct. 11, 1996, at A6 (noting that Ontario Minister of Environment and Energy, Hon. Norman Sterling, had trouble coming to same conclusions as Environmental Commissioner did with respect to failure to give notice).

238. *See* Martin Mittelstaedt, *Firms Get First Say on Levels of Toxics*, GLOBE AND MAIL (TORONTO), Dec. 17, 1996, at A1 (noting that dozens of major polluters in Ontario are being given a chance to review and influence new emission standards covering 19 harmful substances from their plants before proposals are issued for public comment under OEBR); Martin Mittelstaedt, *Preview of Pollution Standards Defended*, GLOBE AND MAIL (Toronto), Dec. 18, 1996, at A3 (discussing Progressive Conservative government's defense of its actions as common practice in Ontario).

239. *See* OEBR, S.O., ch. 28, §§ 19 (establishing requirement to develop classification regulation for instruments), 20 (listing steps to be taken in classifying instruments), 24 (defining enhanced notice and comment as including oral representation opportunities, public meetings, mediation and other processes to facilitate more informed public participation in decision-making).

240. *See* O. Reg. 681/94 (Can.) (dealing with classification proposals for instruments); ENVIRONMENTAL COMMISSIONER OF ONTARIO, 1994-95 ANNUAL REPORT: OPENING THE DOORS TO BETTER ENVIRONMENTAL DECISION-MAKING 60 (1996) [hereinafter EC ANNUAL REPORT I] (discussing MOEE's classification of instruments). In her first annual report, the Environmental Commissioner found that of 33,000 of MOEE's annually issued instruments approximately 2700 were classified as environmentally significant. *See id.*

In addition to minimal classification of instruments as environmentally significant, public notice and comment obligations under OEBR may be further limited by ministries refusing to classify instruments. In December 1996, an environmental group brought an application for judicial review against the Ontario Ministry of Natural Resources, alleging that the agency failed to meet its duty to promulgate a regulation classifying its instruments into different categories by the April 1996 deadline. *See* Canadian Envtl. L. Ass'n v. Chris Hodgson, No. 732-96 (Ont. Div. Ct. filed Dec. 20, 1996); *Eco-Challenge Launched*, GLOBE AND MAIL (Toronto), Dec. 21,

ninety percent of the instruments issued annually by MOEE are not subject to even minimal notice and comment procedures under OEBR. For example, subsequent OEBR classification amendment regulations issued by MOEE expanded the scope of OEBR Part II exemptions and then contracted it without providing opportunity for public notice and comment.[241] Likewise other recent government initiatives, proposing the introduction of "permit-by-rule" systems for approvals of certain environmental activities whose effects are minor, predictable and controllable by existing technology, may result in still fewer opportunities for public notice and comment on instruments.[242]

Although there is a general obligation to subject proposals to notice requirements, several exceptions exist. In particular, notice need not be given for a proposal in the following instances: (1) the proposal is predominantly financial or administrative in nature;[243] (2) delay associated with compliance with the notice and comment provisions would result in damage to human health or safety, harm or serious risk thereof to the environment, or injury or damage or

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1996, at A8. A failure to produce the classification regulation means that none of the instruments issued by the ministry under the mining, logging, public land, endangered species, fisheries or other resource statutes are subject to notice and comment. This would constitute a gaping loophole in OEBR in that it would effectively remove both the Ontario Ministry of Natural Resources and the industries that it regulates from compliance with key parts of OEBR designed to encourage public participation in the management of Ontario natural resources.

241. *See* EC ANNUAL REPORT I, *supra* note 240, at 33-34. As of November 15, 1994, the Ministry of the Environment and Energy (MOEE) had to provide public notice on the environmental registry of proposed environmentally significant instruments. *See id.* On November 18, the Ontario government issued Regulation 719/94, exempting any application for proposed instruments received by MOEE earlier than November 15, 1994 from the registry posting requirements. *See id.* This was done to reduce the number of instruments MOEE would have to post during the start-up period. *See id.* This exempted over 280 approvals applications, including permits for over 180 waste disposal sites and other environmentally significant facilities. *See id.* Notice of this exemption was not posted on the registry. *See id.* In an attempt to undo the damage, the MOEE issued Regulation 108/95, which reinstated the registry posting requirements for those proposed instruments that were previously exempted. *See id.* However, MOEE again failed to give notice of the regulation on the registry. *See id.* The Environmental Minister acknowledged that both regulations significantly affected the environment, that both should have been posted on the registry and that efforts would be made to avoid such errors in the future. *See id.*

242. *See* ONTARIO MINISTRY OF THE ENVIRONMENT AND ENERGY, RESPONSIVE ENVIRONMENTAL PROTECTION 33 (1996) (Report prepared for citizens of Ontario) (on file with author) (noting that changes resulting from approvals reform may reduce number of proposals to be placed on environmental registry); *An Act Respecting Environmental Improvement*, Bill 57, 36th Leg. Ont. 45 Eliz. II (1996) (Mrs. Elliott-first reading June 3, 1996, Ont. Leg.).

243. *See* OEBR, S.O., ch. 28, §§ 15(2) (excepting acts and policies), 16(2) (excepting regulations).

serious risk thereof to property;[244] (3) there is a public participation process with respect to the proposal that is "substantially equivalent" to that under OEBR;[245] or (4) the proposal would form part of or give effect to a budget or economic statement presented to the Ontario legislature.[246] Determining applicability of the exception is subject to the broad ministerial discretion of provincial ministers and is subject to examination and reporting to the legislature by the Environmental Commissioner.[247]

ii. Notice

Once the minister determines that a proposal is subject to Part II, the public must receive notice on the environmental registry established under OEBR.[248] Although notice on the registry constitutes the minimum level of acceptable notice under OEBR, a minister does have discretion to give notice by other methods.[249] The contents of the notice registry must include: (1) a brief description of the proposal; (2) a statement of the manner and time within which the public may participate; (3) a statement of where and when the public may review the written information about the proposal; (4) an address to which written comments and questions may be sent; and (5) other prescribed information.[250] The failure of several ministries of the Ontario government to use the environmental registry as a minimal source of notice was criticized severely by the Environmental Commissioner in both her first and second special reports to the legislature.[251]

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244. *See id.* § 29 (excepting emergencies).

245. *See id.* § 30.

246. *See id.* § 33.

247. *See* LIGETI I, *supra* note 231, at 4-7 (examining and reporting critically on exemption determinations made by ministers). In January 1996, the Environmental Commissioner, in her first special report to the Ontario legislature, was highly critical of a government regulation issued under OEBR which permanently exempted the Ministry of Finance from OEBR despite clear environmental significance of that ministry's decision-making. *See id.* (noting that principal functions of Ministry of Finance have potential to produce environmentally-significant effects).

248. *See* OEBR, S.O., ch. 28, §5 (discussing establishment of environmental registry). The registry is a government electronic database accessible to any member of the public through computer hookup.

249. *See id.* § 27(1) (discussing constraints of notice procedures). Other forms of notice accepted under a minister's discretion include news releases, news media, door to door flyers and direct mailings to individuals or groups. *See id.* § 28(1) (listing methods of notice for Class II instruments).

250. *See id.* § 27(2).

251. *See* LIGETI I, *supra* note 231, at 11-14 (noting MOEE failure to post Regulation 482/95 on environmental registry constituted non-compliance with public notice requirements of OEBR). For a discussion of the Environmental Commis-

Under OEBR, a minister must also include a regulatory impact statement (RIS) in a notice on a proposed regulation if he considers it necessary to allow for more informed public consultation.[252] The RIS must include a brief statement of the proposed regulation's objectives, a preliminary assessment of the consequences of implementing the regulation and an explanation of how the regulation's environmental objectives would be appropriately achieved.[253] Experience reveals that a RIS is rarely issued by ministries and ministries are failing to assess or report on significant environmental effects of proposed regulatory changes.[254]

iii. Comment

Every notice of a proposal must include a description of the environmental rights accompanying public participation in decision-making.[255] Although cast as "environmental rights," such public opportunities are highly dependent upon the exercise of broad ministerial discretion. The minimum public comment period for proposals under OEBR is thirty days.[256] "In order to permit in-

sioner's two special reports to the legislature, see *supra* note 235 and accompanying text.

The task force did not believe that a failure to place a notice of a policy or regulation on the environmental registry was the type of non-compliance that should be subject to judicial review. According to the task force, only a failure to place a notice of a proposed instrument on the registry should be subject to judicial review. *See* TASK FORCE REPORT, *supra* note 188, at 59-60. The task force did not give reasons for this distinction. *See id.* The distinction was incorporated into OEBR. *See* OEBR, S.O., ch. 28, § 118(1)(2) (1993) (Can.).

252. *See* OEBR, S.O., ch. 28, § 27(4) (1993) (Can.).

253. *See id.* § 27(5).

254. *See* LIGETI II, *supra* note 235, at 6-7 (noting that each of four prepared RIS's were two sentences long). The Environmental Commissioner in her second special report to the Ontario legislature noted that only four of forty-two proposals posted by MOEE as of August 1996 were accompanied by a RIS. *See id.* These four contained little meaningful information about environment, social or economic effects of the proposed regulatory changes. *See id.* (noting that MOEE did not assess effects of its cutbacks in air quality monitoring, its shut-down of drinking water laboratories and its layoffs of scientists, nor did Ontario Ministry of Natural Resources assess regulatory compliance or enforcement issues surrounding its decision to introduce self-regulation for sand, gravel and quarry industries while significantly reducing ministry staff).

255. *See* OEBR, S.O., ch. 28, § 27(3) (listing environmental rights of public participation in decision-making). Such rights include: (1) the right to submit written comments in the manner and time specified in the notice; (2) any additional rights of public participation, such as oral representations, public meetings, mediation and other processes that would facilitate more informed participation on the proposal; (3) any additional rights of public participation prescribed by regulation under OEBR; and (4) any additional rights of public participation that the minister giving the notice deems appropriate. *See id.*

256. *See id.* §§ 15 (policies and Acts), 16 (regulations), 22 (instruments).

formed public consultation" on the proposal, a minister must consider extending the comment period for more than thirty days.[257] Since the minister has discretionary ability, he must consider a variety of factors before limiting the period of public comment.[258] Such factors make it clear that the more technically complex or controversial the proposal, the more likely a longer comment period will be necessary. Experience to date has shown that ministries are failing to consider additional comment opportunities for the public.[259]

A minister who gives notice of a proposal must take every reasonable step to ensure that all comments are considered by the ministry.[260] The minister must give notice to the public as soon as reasonably possible after the proposal is implemented.[261] Further, the minister must include in the notice a brief explanation of the effect of public participation on decision-making and any other information that the minister considers appropriate.[262] The effect of public comment on the final content of government proposals has been mixed and cannot be easily generalized. The Environmental Commissioner noted in her annual report that some proposals were made as a result of election promises, and, therefore, public comment had little impact on the government's policy decision to proceed with the proposal.[263] In other cases, public consultation

257. *See id.* §§ 17(1) (policies, Acts and regulations), 23(1) (instruments).

258. *See id.* §§ 17(2), 23(2). The factors contemplated by the minister include: (1) the complexity of the matters; (2) the level of public interest; (3) the period of time the public may require to make informed comment; (4) any private or public interest in resolving the matters in a timely manner; and (5) other matters that the minister considers relevant. *See id.*

259. *See* LIGETI II, *supra* note 235, at 6 (noting that MOEE did not provide any comment forums to discuss its proposed reforms of 80 regulations under Ontario's environmental statutes, nor did MOEE provide any comment opportunity before allowing Ontario's intervenor funding law to sunset). In her second special report to the legislature, the Environmental Commissioner found that, even where the potential environmental effects of the proposal were clearly significant, comment periods either had not been provided or had been unreasonably short. *See id.* at 4-5 (noting that MOEE gave public only 38 days to comment on proposal to exempt development of pits and quarries from approval by Niagara Escarpment Commission, even though proposal had potentially significant environmental effects on United Nations designated ecological reserve, and constituted abrupt reversal of MOEE position taken only nine days before notice of proposal was given to public).

260. *See* OEBR, S.O., ch. 28, § 35(1) (1993) (Can).

261. *See id.* § 36(1).

262. *See id.* § 36(4).

263. *See* EC ANNUAL REPORT I, *supra* note 240, at 35 (discussing MOEE decisions to remove ban on establishment of new municipal waste incinerators).

on proposals appeared to result in more significant changes.[264] In more controversial proposals, however, sometimes even significant changes arising from the public comment process have been insufficient to prevent a member of the public from seeking leave to appeal the matter to an administrative appeal tribunal.[265]

b. Appeals of Instruments

Historically, under Ontario enviromental law, only the applicant for a Class I or II instrument, which respectively requires minimum or enhanced notice and comment, had a right to appeal a government refusal to issue an instrument or the imposition of terms and conditions on the instrument. A person under a government order to undertake a certain action could similarly appeal the imposition of that order or its terms and conditions.[266] Prior to OEBR's enactment, no one else could seek leave to appeal the granting by the government of an instrument, or the imposition of inadequate terms and conditions before the province's environmental appeals tribunal.[267] Members of the public were effectively locked out of the process.

OEBR changed the law regarding appeals of environmental instruments in two key respects. First, it gave any member of the public the right to seek leave to appeal in certain circumstances. Second, it established the threshold standards an applicant must meet for a tribunal to grant leave to appeal. The experience to date with these provisions has demonstrated that, while it is by no means easy for an ordinary member of the public to succeed in a leave to appeal application, it is not an insurmountable task.

264. *See id.* at 40 (noting how waste disposal site changes successfully mediated between operator and community).

265. *See id.* at 37-38 (discussing proposed changes to existing air emission and sewage works by petro-chemical plant operator located near several residential areas generating over 1000 public comments both for and against proposal and granting of approval resulting in third party leave to appeal application).

266. *See* TASK FORCE REPORT, *supra* note 188, at 54-55 (discussing policies and regulations regarding appeals). The task force recommended that the law be changed to allow a member of the public to seek leave to appeal instruments to an appeals tribunal. *See id.* at 55 (commenting "where applicants or orderees have a present right of appeal, interested or affected members of the public should have a right to seek leave to appeal"). The grounds for such leave application would be the applicant's participation in the consultation process, and the instrument's unreasonableness in light of the particular statutory requirements governing its issuance. *See id.* (discussing requirements for leave application).

267. *See* Environmental Protection Act, R.S.O., ch. E.19, §§ 139-40 (1990) (Can.) (noting applicant's right to appeal to Ontario Environmental Appeal Board (OEAB) after MOEE's refusal to issue instrument and right of appeal to OEAB by person subject of MOEE imposed order).

In order for an Ontario resident to be able to seek leave to appeal from a decision with respect to a Class I or II instrument, two conditions must be met. First, the person seeking leave to appeal must have an interest in the decision. Although OEBR does not define the term "interest," the task force argued that "standing" in this context meant that the appellate body should accept a person as having sufficient interest if the person is acting in good faith and has a "demonstrable interest" in the issuance of the instrument. Second, the applicant for the instrument or instrument-holder must have a right to appeal arising from the underlying statute.[268] This means that if the applicant or instrument-holder does not have the statutory authority to appeal, neither does any member of the public.[269] The Ontario Environmental Appeal Board's (OEAB)[270] first leave to appeal decisions have demonstrated that it is possible for individuals and groups to satisfy the standing requirements for leave to appeal.[271] OEAB, however, may apply additional tests in deciding when it will grant leave to appeal a MOEE order beyond those suggested by the task force.

The threshold test for leave to appeal to an administrative tribunal is far more difficult for members of the public to meet than the test for standing. Leave to appeal is granted only if the appellate body finds the following: (1) there is good reason to believe that no reasonable person, considering relevant law and government policies, could have made the decision, and (2) the decision for which the appeal is sought could result in significant harm to

268. *See* OEBR, S.O., ch. 28, § 38(1) (1993) (Can.).

269. *See* TASK FORCE REPORT, *supra* note 188, at 55 (outlining as requirement for standing person's good faith and reasonableness). The task force perceived the public's entitlement to standing to arise from a person's participation in the public consultation on the instrument through the environmental registry or other means. *See id.* OEBR itself states that "the fact that a person has exercised a right given by [OEBR] to comment on a proposal is evidence that the person has an interest in the decision on the proposal." *See* OEBR, S.O., ch. 28, § 38(3).

270. *See* R.S.O., ch. E.19, part XIII. OEAB is an administrative tribunal established under the Environmental Protection Act in the 1970s to hear appeals of MOEE refusals to issue instruments and the imposition of orders. Under OEBR, the body hearing leave to appeal applications by members of the public would be the OEAB.

271. *See, e.g., In re* Hunter [1995] 18 C.E.L.R. 22 (Can.) (concluding that individual met interest test where he was neighbor who might potentially suffer adverse effects from air emissions from wood product plant approved by MOEE); *In re* Barker [1996] 20 C.E.L.R. 72 (Can.) (holding that appellants had demonstrated sufficient proof of intent in matter to have standing to seek leave to appeal due to a documented record of on-going concern and involvement and their close proximity to site); *In re* Grand River Bio-Region Ass'n [1996] 19 C.E.L.R. 244 (Can.) (suggesting that where group seeks leave to appeal under OEBR, it must demonstrate that it is "person in law").

the environment.[272] The task force suggested that for a member of the public seeking leave to appeal, it will be necessary to satisfy the tribunal that the appeal has "preliminary merit."[273] Some commentators have remarked that the tests for leave as set out in OEBR are extremely strict.[274] They are clearly more stringent than the prima facie test plaintiffs must satisfy under MEPA.

Early experience with OEAB treatment of these requirements suggested that the tests for leave would frustrate the overall intent of OEBR.[275] Subsequent decisions have not adopted the approach of the early cases, but have instead enunciated a less stringent test similar to the one advocated by the task force.[276] As a whole, the

272. *See* OEBR, S.O., ch. 28, § 41 (1993) (Can.).

273. *See* TASK FORCE REPORT, *supra* note 188, at 55 (noting that preliminary merit means prima facie case that the instrument is unreasonable as issued and requires review).

274. *See* DIANNE SAXE, ONT. ENVTL. PROTECTION ACT ANN., EBR. 40-41 (suggesting that appeals by members of public are intended to be exceptional remedy for those few cases where regulators have failed to act). The OEBR unreasonableness standard is essentially the same as the "arbitrary and capricious" standard under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) (1994). Under the arbitrary and capricious standard, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (noting that court is not empowered to substitute its judgment for that of agency). The difference between the two standards is that the latter determination is made after a full briefing and consideration of the case, whereas the former occurs at a very early stage of the proceeding.

275. *See, e.g.*, *In re* Hunter [1995] 18 C.E.L.R. 22, 28 (Can.) (holding that required demonstration of unreasonableness of decision and potential of decision to cause significant environmental effects can seldom be met by general statements of concern from public, particularly in face of expert technical and scientific evidence to contrary). According to the tribunal, submission by the leave applicant of general statements about the harmful properties of chemicals to be emitted from the facility was not sufficient to show that MOEE had acted unreasonably in approving emission of those chemicals or that it had failed to properly evaluate the risks to the environment. *See id.* at 28 (holding further that standard of proof that leave applicant must meet is balance of probabilities, not lower standard of establishing prima facie case, as suggested by task force). The balance of probabilities test is comparable to the American standard of preponderance of the evidence. For a discussion of the task force's findings, see TASK FORCE REPORT, *supra* note 188, at 55.

276. *See In re* Barker [1996] 20 C.E.L.R. 72, 79-81 (Can.) (noting that leave applicants sufficiently demonstrated that MOEE decision to amend certificate to allow deposition of waste at previously closed site was unreasonable because based on uncorrected inaccurate description of site location in approval documents that could result in significant harm). The *Barker* OEAB panel refused to follow the *Hunter* balance of probabilities requirement. Instead, the panel held that a lesser standard of proof than a "likelihood of potential harm materializing" is more appropriate at the leave to appeal stage than at the hearing of the appeal itself. The panel decided that at the leave stage, the proof must only be sufficient to show that

decisions suggest that OEAB considers the leave to appeal provisions as requiring a balance between the general public's interest in greater participation in the environmental decision-making process and the instrument-holders' interests in avoiding undue delay and cost in obtaining approval of projects that may contribute to the economic well-being of the community. Moreover, while OEBR's leave to appeal standards cannot be directly compared to MEPA's prima facie case test, they are not being interpreted by OEAB to require a showing of probable harm. As such, there is at least the suggestion of a parallel approach to MEPA.

c. Reviews

Part IV of OEBR permits any two Ontario residents to request either a review of an existing policy, Act, regulation or instrument, or the development of a new policy, Act or regulation in order to protect the environment.[277] The task force's rationale behind these recommendations was that the public required a standardized procedure for bringing to the government's attention out of date, ineffectual laws and potentially harmful unregulated activities. In addition, the public had a right to a timely governmental response explaining actions taken or reasons for failing to act. The task

the "concerns have a real foundation" sufficient to give the applicants "the right to pursue them through the appeal process." *Id.* Subsequently, the same panel concluded that the *Barker* lower standard was preferable. *In re* Residents Against Co. Pollution Inc. [1996] 20 C.E.L.R. 97 (Can.) (stating that proof of actual unreasonableness or likelihood of potential harm materializing is unnecessary at leave stage). In *Residents,* the panel granted leave to appeal a MOEE air approval for sulphur dioxide emissions in connection with expansion of a petro-chemical facility. The evidence showed that MOEE's issuance of approvals for equipment, process and production rates for which no application had been made and no notice given under OEBR was unreasonable under the circumstances. The evidence also showed that the facility's compliance with Ontario's sulphur dioxide standards would be marginal under worst case scenarios, potentially posing significant harm to apartment residents near the plant. *See id.* at 126-34, 163-64.

Of 13 applications for leave to appeal heard by OEAB to the end of September 1996, two have been granted, seven rejected, three withdrawn, and one pending. *See* David McRobert, *The Nuts and Bolts of Ontario's Environmental Bill of Rights: An Update, Address Before the Canadian Institute, in* ENVIRONMENTAL LAW, REGULATION AND MANAGEMENT 29 (1996). No reported OEAB decisions since *Barker* and *Residents* have interpreted § 41 of OEBR. *See In re* APT Environment [1996] 18 C.E.L.R. 180, 186-88 (Can.) (holding that approval issued was not in relation to Class I or II instrument, and, therefore was not subject to third party appeal provisions of OEBR); Wetlands Preservation Group of Carleton v. Ontario [1996] 20 C.E.L.R. 65, 69 (Can.) (holding that water taking permit issued to control water quantity is inappropriate instrument to address third party appellant concerns about impacts of chemical runoff on water quality, and therefore, not subject to leave to appeal provisions).

277. *See* OEBR, S.O., ch. 28, §§ 61(1) (dealing with review requests), 61(2) (dealing with development of new policies, Acts or regulations).

force anticipated that, over time, the government's environmental agenda would be supplemented by the public.[278] Commentators have characterized the regime as a "gap-filler."[279] Experience to date does not suggest that the government will readily adopt the environmental agendas suggested by the public.[280] Moreover, the Environmental Commissioner's lack of authority to require or undertake review is a critical limitation in the structure of OEBR.

The principal exemption from application of Part IV is if a law or policy is less than five years old prior to the date of the review request. In such circumstances, a minister cannot determine that a review is warranted unless there is social, economic, scientific or other evidence that failure to review the law or policy could significantly harm the environment. Likewise, the minister cannot determine that review is warranted if the evidence was not taken into account upon creation of the law or policy sought to be reviewed.[281]

To employ the review procedure for an existing or proposed law or policy, at least two residents of Ontario must apply to the Environmental Commissioner.[282] Their application must provide, among other things, the following: (1) an explanation of their belief that protection of the environment requires undertaking of the review for which they applied; (2) a summary of the evidence supporting their beliefs; and (3) identification of the law or policy to be reviewed.[283] A prudent applicant should provide the Environmental Commissioner with as much information as possible in support of his request. Where a complex or highly technical proposal is contemplated, the lack of any funding to assist applicants in the preparation of their material may be a significant factor impeding the ultimate success of the review requested and Part IV itself. Moreover, the task given the Environmental Commissioner of merely passing review requests from the public on to the appropriate minister and reporting to the legislature on how the government eventually handles such requests is procedurally confusing

278. *See* TASK FORCE REPORT, *supra* note 188, at 77-81.

279. *See* MULDOON & LINDGREN, *supra* note 19, at 108. Apart from MOEE, which became subject to Part IV in early 1995, most ministries did not become subject to part IV until April 1996. *See* O. Reg 73/94 § 5 (Can.).

280. *See infra* note 285.

281. *See* OEBR, S.O., ch. 28, § 68(1)(2); *see also* MULDOON & LINDGREN, *supra* note 19, at 110.

282. *See* OEBR, S.O., ch. 28, § 61(1)(2). Residency is not otherwise defined in OEBR or the regulations.

283. *See id.* § 61(2)(4). A perfected application is sent to the relevant ministry by the Environmental Commissioner.

and highlights the weakness and limited scope of the Environmental Commissioner's responsibilities.

Once the minister receives a request under Part IV, the minister may consider a lengthy list of matters in addition to the time frame the statute imposes in determining whether the public interest warrants a review.[284] These factors illustrate the minister's broad discretion. The Environmental Commissioner's oversight is the only constraint on this exercise of his discretion.[285] The Environmental Commissioner's inability to require or undertake reviews in the absence of government action is a critical limitation in OEBR's structure.

d. Overall Impact of Public Participation Requirements: Summary

The promise of notice, comment, appeals and reviews raised public expectations concerning OEBR's contribution to increased public participation in the environmental decision-making process. Apart from some occasional successes in the leave to appeal process, however, broad ministerial discretion has greatly diminished the anticipated value of notice and comment opportunities and the public's ability to help establish Ontario's environmental agenda through requests to review laws and policies. The absence of a funding requirement permitting members of the public to become involved who could not otherwise, has compounded these concerns.[286] In its short existence, the Office of Environmental Commissioner has released several hard-hitting critiques of the

284. *See id.* § 67(2)(3).

285. *See id.* § 57(g). Section 57(g) permits the Environmental Commissioner to review the exercise of ministerial discretion. *See id.* In practice, this means that the Environmental Commissioner may report ministerial exercises of discretion to the legislature. For the period 1994-1995, the Environmental Commissioner forwarded over 300 requests for review to MOEE covering 16 different topics. Over 200 of these requests dealt with just two topics, namely, drinking water objectives for tritium and regulations relating to refillable beverage containers. These two topics were the only ones MOEE accepted for review. *See* EC ANNUAL REPORT I, *supra* note 240, at 45-47. In examining the basis for MOEE's rejection of reviews in other areas, the Environmental Commissioner concluded that rejections occurred even though many requests had merit and raised important public policy issues, including drinking water standards for other contaminants, air pollution controls, groundwater protection, landfill site management, and packaging waste. *See id.* at 47.

286. *See* Eva Ligeti, *Overview of the Environmental Bill of Rights, Address Before the Canadian Bar Association-Ontario, in* NEW RIGHTS AND REMEDIES UNDER THE ENVIRONMENTAL BILL OF RIGHTS 15-16 (Dec. 1994). The Environmental Commissioner has stated that funding of local public involvement in OEBR public participation process examining a proposal should be considered by the legislature as a way to avoid costly confrontations after a decision is made. *See id.*

government's performance in these areas, thus raising public awareness of existing problems. The limitations of a *post hoc* report as primary weapon in the arsenal of the Environmental Commissioner, however, cannot be overemphasized. In practice, few of the instances the Environmental Commissioner identified as problems have been subsequently corrected, as the government proposals were usually implemented by the time of the report to the legislature. Indeed, sometimes the conduct of concern was repeated in connection with a subsequent government initiative.[287] All of these difficulties raise larger questions about the benefits of OEBR's political accountability approach to environmental rights in comparison to MEPA.

3. Government Accountability

There are several ways in which governments can be made accountable to the public regarding management and protection of the environment. In Michigan,[288] other states,[289] and the Yukon territories,[290] government accountability has evolved through the concept of the public trust doctrine, whereby governments are held to what is effectively a fiduciary standard of conduct with respect to protecting public resources. This duty is enforceable by the judiciary, a concept which was long included in many private members' bills on environmental rights introduced in Ontario but not incor-

287. For further discussion of this issue, see *supra* note 235 and accompanying text.

288. For a discussion on MEPA's approach to government accountability, see *supra* notes 73-93, 130-33 and accompanying text.

289. In the United States, the development of public trust concepts has occurred not only as a result of judicial doctrine or statutory initiative, but also as a result of state constitutional entrenchment. *See* PA. CONST. art. I, § 27. Pennsylvania's constitution states that "[t]he people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." *Id.* This provision is identical to the public trust provision incorporated into various environmental rights bills introduced in Ontario between 1979 and 1990. The Pennsylvania constitutional provision has been read narrowly by the courts. *See, e.g.*, Payne v. Kassab, 361 A.2d 263, 273 (Pa. 1976) (holding that state transportation department may not be enjoined from widening street and taking some of river common, because state had complied with all statutory requirements and therefore had not violated its duty as trustee).

290. *See* Yukon Territories Environmental Act, S.Y.T., ch. 5, §§ 2, 38 (1991) (Can.) (defining term "public trust" as "collective interest of the people of the Yukon in the quality of the natural environment and the protection of the natural environment for the benefit of present and future generations," and declaring Yukon government to be "trustee of the public trust [and requiring it] . . . to conserve the natural environment in accordance with the public trust").

porated into OEBR.[291] Instead, OEBR primarily addressed the notion of government accountability inherent in the public trust doctrine through two political mechanisms, namely, ministry statements of environmental values and the Office of the Environmental Commissioner. Limited experience with these mechanisms suggests that they do not provide appropriate governmental accountability and cannot substitute for resort to the courts because ministry statements have been reduced to vague statements of philosophy, and the Office of the Environmental Commissioner cannot impose sanctions on recalcitrant ministries.

a. Statements of Environmental Values

Each ministry subject to OEBR must produce a statement of environmental values (SEV) that addresses how the purpose of OEBR will affect its environmental decisions and how the ministry will ensure that OEBR's purpose will be integrated with social, economic and scientific considerations. Under OEBR, each ministry's SEV must be prepared in consultation with the public, and the SEV cannot be implemented without public notice and comment. Once a SEV is implemented, OEBR requires that each minister take every reasonable step to ensure public comment is considered whenever the minister makes decisions that might significantly affect the environment.

Experience with the development and content of the SEVs for the fourteen ministries originally subject to the process has been very disappointing. The task force intended the SEV to be a statement of environmental ethic, plan, practice or mission for each ministry that would help integrate environmental considerations into the overall decision-making process for that particular ministry.[292] Although the SEV process has the potential to complement

291. *See, e.g.*, Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (holding that state under public trust doctrine has duty to eradicate present pollution and prevent future pollution in its navigable waterways, and that land owners do not have absolute and unlimited right to change essential character of their land and cause injury to others); Robert Hopperton, *The Public Trust Doctine and Environmental Justice in Great Lakes States: A Case of Unrealized Potential*, in LAKE LINKS 1, 2-3 (Legal Institute of the Great Lakes, Toledo, Ohio, ed., Fall/Winter 1996) (suggesting that potential of public trust doctrine at state level as doctrine of environmental protection has remained largely unrealized due to judicial rulings); John C. Maguire, *Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized*, 7 J. ENVTL. L. & PRAC. 1, 2 (1996) (noting that similar situation characterizes Canadian judicial development of public trust doctrine, but situation may improve as provincial legislatures seek to entrench concept in statutes).

292. *See* TASK FORCE REPORT, *supra* note 188, at 23-24.

the older environmental impact assessment process which has existed under Ontario law for over two decades, problems have plagued the SEV process from its inception.[293] The ministries have produced primarily vague statements of philosophy which lack both detail and impact on their existing programs.[294] Likewise, public

293. The province's environmental assessment law requires proponents of public and designated private-sector undertakings to prepare environmental assessments, outlining the rationale for the undertaking. The document must consider alternatives to, and methods of carrying out the undertaking, the affected environment, potential environmental effects and mitigation measures. For projects subject to the Act because they are a certain size, category, cost, or because they are controversial, approvals are preceded by quasi-judicial hearings before a provincial tribunal which adjudicates both the adequacy of the environmental assessment and whether approval to proceed with the undertaking should be granted. *See* Environmental Assessment Act (EAA), R.S.O., ch. E-18 (1990) (Can.). EAA is a prescribed statute for the purposes of OEBR. *See* O. Reg. 73/94 (Can.). As a result, MOEE must consider its SEV when it makes decisions under the environmental assessment law that are environmentally significant, and it must demonstrate that the purposes of OEBR have been integrated into the ministry's decision-making process.

To the extent that both the province's environmental assessment law and OEBR attempt to integrate environmental considerations into a ministry's decision-making process, they are similar to the intent of United States environmental laws. *See, e.g.*, National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-35 (1994). However, overall NEPA is closer to the province's environmental assessment law than to OEBR, because the former requires the production of a specific environmental impact statement or environmental assessment every time a project or undertaking is subject to the law, while OEBR requires only one SEV which the ministry must thereafter consider and apply to the entire range of ministry decision-making activities. Moreover, the sanctions for failure to comply with NEPA include judicial review. Under EAA, an undertaking subject to the Act requires a specific environmental assessment approval, may be preceded by an administrative hearing and judicial review and quasi-criminal prosecution is available for failure to conduct an environmental assessment on a project that is subject to the Act. In contrast, under OEBR, there is neither a hearing requirement nor judicial review regarding the adequacy of a ministry SEV, nor quasi-criminal sanction for failure to apply a SEV.

Perhaps the biggest blow to the development and implementation of SEVs by ministries was the sudden and permanent exemption by the Ontario cabinet of the Ministry of Finance from the requirements of OEBR in late 1995. *See* O. Reg. 482/95 §§ 1, 2 (removing finance ministry from OEBR). The Environmental Commissioner regarded the removal of the finance ministry from the requirements of OEBR, including any SEV obligations, as a blow that would weaken OEBR and "impede Ontario's progress toward a healthy, sustainable environment." LIGETI I, *supra* note 231, at 7.

294. *See* EC ANNUAL REPORT I, *supra* note 240, at 11-12 (noting that Environmental Commissioner had asked ministries for details regarding how programs might significantly affect environment, for statement of environmental values and for specific activities and goals). According to the Environmental Commissioner, the ministries did not agree with her interpretation of the function and content of the SEV. The ministries considered the SEV to be a "statement of philosophy which guides management," not a policy that itself sets goals. *Id.* Typical of the SEVs produced by the 14 ministries is the six-page SEV prepared by MOEE. MOEE's SEV states that it will apply the purposes of OEBR and certain guiding principles and integrate them with social, economic and other considerations in its

comment on the draft and final versions of the SEVs raised many common themes of concern.[295] The Environmental Commissioner herself acknowledged the shortcomings of SEVs, noting that "[o]n their own, [SEVs] will not change . . . ministries. Instead, [SEVs] must be accompanied by strong action plans, with clear purposes and goals."[296] The call for strong action plans ignores the questions of whether the legislature expected SEVs to constitute those action plans and whether the ministries simply failed to deliver on the legislative and public expectations.[297]

Overall, the SEV requirements have been an abject failure as a key element in justifying OEBR's political approach to government accountability. Absent from earlier private members' bills, the SEVs were meant to partially substitute for judicial accountability, if not the public trust doctrine. The practical application of the SEV process, however, does not support the case for political accountability as a substitute for environmental rights redressable through the courts.

b. Environmental Commissioner

The other component of government accountability OEBR created is the Office of Environmental Commissioner. The Environmental Commissioner is appointed by, reviews, monitors, and reports to the Legislative Assembly with respect to governmental

decision-making process. *See* MINISTRY OF THE ENVIRONMENT AND ENERGY, STATEMENT OF ENVIRONMENTAL VALUES 2-3 (1994) (on file with author). The Environmental Commissioner, in reviewing MOEE's SEV, found the document generally disappointing. The Environmental Commissioner found it "particularly troubling that environmentally significant programs go unmentioned." EC ANNUAL REPORT I, *supra* note 240, at 17.

295. *See* RICHARD D. LINDGREN, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, SUBMISSION TO THE ENVIRONMENTAL COMMISSIONER RE: EBR STATEMENT OF ENVIRONMENTAL VALUES 4-5 (1995) (on file with author); Letter from Richard D. Lindgren, Counsel, Canadian Environmental Law Association, to Eva Ligeti, Environmental Commissioner 4-5 (Oct. 13, 1995) (on file with author). Complaints concerning the SEVs included: (1) their failure to explain adequately how OEBR's purposes will be applied in ministry decision-making; (2) their lack of measurable benchmarks to assess progress, or lack thereof, in meeting the Act's purposes; (3) their failure to require environmental monitoring or reporting; (4) their failure to ensure meaningful public participation when environmentally significant decisions are made; and (5) their provision of insufficient information about the relationship between SEVs and other ministry policies. *See* LINDGREN, *supra.*

296. EC ANNUAL REPORT I, *supra* note 240, at 13.

297. *See id.* (analogizing strong action plans to environmental management systems). The Environmental Commissioner defined the term environmental management systems as "the part of the overall management system of an organization which sets out practices and procedures to develop and implement the environmental policies, objectives and targets of the organization." *Id.* at 72.

compliance with OEBR.[298] The Office of the Environmental Commissioner is the task force's answer to the need for objective oversight and measurement of OEBR's implementation and the use of SEVs. Because ministry compliance with SEVs is not judicially reviewable, the task force recognized the need for sufficient deterrent consequences for a ministry that ignores its SEVs. The task force, therefore, felt that periodic reports by an Environmental Commissioner, ministry-by-ministry, in an objective, non-partisan manner, would lead to the political accountability implicit in OEBR's framework.[299] In reaching this conclusion, the task force considered and specifically rejected judicial review of the application or non-application of SEVs as being less effective than creating an Environmental Commissioner's office. Judicial intervention, according to the task force, could "undermine the certainty, predictability and uniformity of the public participation system contemplated [in OEBR]."[300]

The SEV and Environmental Commissioner's initiatives were meant to substitute for the government accountability MEPA created through the public trust doctrine. Experience to date casts

298. *See* OEBR, S.O., ch. 28, § 57 (1993) (Can.). The Environmental Commissioner's particular responsibilities include: (1) reviewing OEBR's implementation and ministries' compliance with OEBR; (2) guiding any ministry that requests assistance with respect to SEV development and application; (3) providing assistance to any ministry requesting help in providing education programs about OEBR; (4) providing public educational programs about OEBR; (5) giving advice and assistance to members of the public who wish to participate in decision-making about a proposal; (6) reviewing the use of the environmental registry; (7) reviewing the exercise of ministerial discretion under OEBR; (8) reviewing recourse to the appeal rights for instruments; (9) reviewing the receipt, handling and disposition of requests for reviews under Part IV and requests for investigations under Part V; (10) reviewing ministry plans and priorities for conducting reviews under Part VI; and (11) reviewing the use of the right of action, the defenses, and reliance on the public nuisance reforms under Part VI. *See id.* The Environmental Commissioner is authorized to issue annual and special reports with respect to all of the above matters. *See id.* § 58. She may also conduct public inquiries on her own motion and compel any person to either give sworn testimony or produce any document related to the performance of the Environmental Commissioner's duties under OEBR. *See id.* § 60.

299. *See* TASK FORCE REPORT, *supra* note 188, at 65-68. The Environmental Commissioner is appointed for a five year term by the provincial cabinet on the address of the legislative assembly. The Environmental Commissioner is an officer of the legislative assembly and reports directly to the assembly, not through a minister of the Crown. *See* OEBR, S.O., ch. 28, § 49 (1993) (Can.). The first Environmental Commissioner was appointed in June 1994 following hearings by a standing committee of the legislative assembly.

300. TASK FORCE REPORT, *supra* note 188, at 68 (indicating that instead of judicial intervention to ensure government accountability, OEBR, through Environmental Commissioner, relies on "shame factor" to prompt appropriate government action); *see also Hearings*, *supra* note 207, at 491 (testimony of Ms. Marcia Valiante).

doubt on the argument that OEBR's political accountability approach produces more environmentally sound decisions than would judicial review. In effect, the current approach merely catalogues instances of governmental non-compliance for public consumption, an action which further reduces public confidence in government. It is doubtful whether a little bad publicity is a sufficient consequence for governmental inaction or misconduct. The task force might have had a much more limited goal of raising public awareness in mind for the Environmental Commissioner's office. However, adverse comments by the Environmental Commissioner in the first two years of OEBR regarding the disappointing SEV process, the frequent improper exercises of governmental discretion and inadequate public consultation on key government initiatives have not produced corrections in the identified problems. Indeed, members of the environmental community have expressed their concern that the Environmental Commissioner understated the gravity of the environmental problems and the overall conduct of the government in restricting the role of the public in the decision-making process.[301] Combined with almost complete non-use of OEBR's access to the courts reforms, serious questions must be raised about whether Ontario opted for an environmental rights regime in name only.

If Ontario retains a complex administrative structure as an integral part of its approach to environmental rights, the legislature should consider strengthening the Environmental Commissioner's role in ensuring government accountability. Currently, the Environmental Commissioner has only a limited oversight and reporting function. It might be more appropriate for the Environmental Commissioner to be a combination of auditor general, ombudsman, and public advocate. The auditor general function, which the Environmental Commissioner's activities most closely resemble now, would allow her continued reports to the legislature regarding the effectiveness of government programs in meeting environmental responsibilities under OEBR. The ombudsman function would allow the Environmental Commissioner to directly undertake investigations of environmental complaints, rather than simply report on government handling of public complaints, as is currently the case under OEBR. Finally, the public advocate role would allow the Environmental Commissioner to go to court to seek redress for environmental violations arising from investigated

301. *See* Cathy Taylor, *Environmental Commissioner's First Annual Report Released, in* ONT. ENV'T NETWORK NEWS 6 (July, 1996).

public complaints in which a particular minister refused to act on the Environmental Commissioner's findings. Although precedents for these three roles exist in Canadian law,[302] no institution combines the three roles into one officer's position. Considering the Environmental Commissioner's importance in promoting government accountability under OEBR, this modification would be effective in enhancing the Environmental Commissioner's ability to achieve the statute's objectives.

4. Investigations and Access to the Courts

The right to request a government ministry's investigation of an alleged violation of environmental law under Part V and increased access to the courts under Part VI are closely linked under OEBR. Without first seeking a minister's undertaking of an investigation, the public may be barred from invoking a new cause of action for acts violating the law and significantly harming a public resource. Two other aspects of court access under OEBR are reform of the law of standing in relation to public nuisance and limited opportunities for judicial review. Most of the experience to date, however, has related to MOEE's treatment of investigations. Even in those situations, however, the public has requested few investigations, and MOEE has granted even fewer. Reasons for the minimal use of court access reforms might include the prerequisite of requiring a request for an investigation as well as the new cause of action's stringent criteria of a violation of law and significant harm to a public resource.

302. *See, e.g.*, Auditor General Act, R.S.C., ch. A-17, § 7(2)(e) (1985) (Can.); Audit Act, R.S.O., ch. A.35, § 12(2)(f)(v) (1990) (Can.). Under Canadian federal and provincial law, an auditor general must report to Parliament or to the legislature on whether satisfactory procedures have been established and used by ministries to measure and report on the effectiveness of government programs. Recent amendments authorize the Auditor General's office to appoint a special Environmental Commissioner with the responsibility to monitor and report to Parliament on the progress of federal departments in achieving sustainable development objectives. *See* AUDITOR GENERAL ACT, Bill C-83, cl. 15.1, 21 (1995) (Can.).

Under Ontario law, the ombudsman is authorized to investigate public complaints regarding decisions, acts, or omissions by governmental authorities that adversely affect the complainant, and to report the results to the governmental authority, the Premier of Ontario, the legislature, and the complainant, where such decisions, acts or omissions are contrary to law, or are unreasonable, wrong, or based on a mistake of law or fact. *See* Ombudsman Act, R.S.O., ch. O.6, §§ (1990) (Can.). Under federal access to information law, the information commissioner of Canada, following an investigation of government refusal to disclose information requested by a member of the public, is authorized to apply to federal court for judicial review of such government refusal. *See* Access to Information Act, R.S.C., ch. A-1, § 42 (1985) (Can.).

a. Preliminaries to the New Cause of Action: Requests for Investigation

Although Ontario has always maintained an informal process of public complaints regarding alleged incidents of environmental harm, the task force argued that the public did not know whether complaints had been received, acted upon, or how they were decided.[303] Consequently, it is now possible under Part V of OEBR for any two Ontario residents who believe that a prescribed law has been violated to apply to the Environmental Commissioner for the appropriate minister's investigation of the alleged violation.[304] Similar procedural steps to those applicable to requests for reviews under Part IV apply to requests for investigations under Part V.[305] Different time frames apply to the Environmental Commissioner's forwarding of the application to the appropriate minister, the minister's consideration of the application and the minister's notification of the outcome.[306]

This principal value of Part V has proven to be the Environmental Commissioner's abilities to oversee the situation and report to the public about less than satisfactory MOEE responses. These efforts, while of limited effect in the short term, may spur future reforms. What is surprising is that, despite the high percentage of ministerial rejections of apparently meritorious requests, the application for investigation process has not caused the public to make

303. *See* TASK FORCE REPORT, *supra* note 188, at 70-71 (noting MOEE reportedly receives thousands of public complaints each year).

304. *See* OEBR, S.O., ch. 28, § 74(1) (1993) (Can.).

305. *See id.* § 74(3) (4). Applicants for investigations must also swear an affidavit attesting to the truthfulness of the facts their application alleges. *See id.*

306. *See id.* §§ 75-81. The process may be analogized to the regime that exists in the United States under the Endangered Species Act (ESA) where citizens may petition the Secretary of the Interior to list as threatened or endangered particular species of fish, wildlife or plants. *See* 16 U.S.C. § 1533(b)(3) (1994) (authorizing citizen petitions to force listing determinations and requiring Secretary to make finding as to whether petition presents substantial scientific or commercial information indicating petition action may be warranted). Key differences between the two statutes, however, are that under ESA the petition is directed to the Secretary and the decision to list or not is subject to judicial review, whereas there is no judicial review from a minister's decision under OEBR. *See id.*

A critical issue involving a request for investigation is the minister's exercise of discretion in the determination of whether to conduct an investigation. A minister is not required to conduct an investigation if he considers: (1) the application to be frivolous and vexatious; (2) the alleged violation to not be serious enough to warrant an investigation; (3) the alleged contravention to not likely harm the environment; or (4) the requested investigation to duplicate either an on-going or completed investigation. *See id.* § 77(2)(3). Because the receipt, handling and disposition of requests for investigation under Part V are subject to the Environmental Commissioner's review, monitoring and reporting to the legislature, there exists some experience of MOEE's performance regarding this issue.

many requests nor has it encouraged use of the new cause of action under Part VI. It is likely that the public is not invoking the request for investigation process because of its greater formality in comparison to the older, informal process of filing public complaints.

b. Access to the Courts

In addition to OEBR's public participation and government accountability mechanisms, the task force recognized that government accountability may be insufficient to ensure appropriate government action in certain circumstances.[307] Therefore, the task force allowed for limited access to the courts in certain situations. OEBR speaks to three areas relating to access to the courts, namely, (1) the new cause of action for violation of a law which significantly harms a public resource; (2) reform of the law of standing as it relates to public nuisance; and (3) judicial review of proposals for instruments. The first two of these areas are the closest analogue to MEPA found in OEBR. There has, however, been little experience with any of these three authorities to date.

i. New Cause of Action: Contravention of Law and Significant Harm to a Public Resource

Under Part VI of OEBR, any Ontario resident may bring an action against a person who has "contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V, and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource in Ontario."[308] However, a plaintiff cannot bring an action for actual contravention unless the minister fails to respond to plaintiff's application for an investigation within a reasonable time or the minister responds unreasonably.[309] This step may be avoided where ministerial delay would result in significant harm or serious risk of significant harm to a public resource.[310] These OEBR provisions may be compared to United States federal citizen suit legislation and judicial interpretation of constitutional requirements.[311] Comparatively, OEBR's pre-condition of requesting an

307. *See* TASK FORCE REPORT, *supra* note 188, at 83-84, 97.

308. OEBR, S.O., ch. 28, § 84(1).

309. *See id.* § 84(2).

310. *See id.* § 84(6).

311. Citizens may only sue if the following exist: (1) they have standing; (2) they give notice before they sue; (3) they allege an on-going violation; and (4) a prior governmental lawsuit does not bar them from proceeding.

investigation prior to using the new cause of action appears reasonable.

To mitigate the effects of OEBR's new cause of action, the statute provides numerous exemptions. For example, OEBR exempts from liability farm practices resulting in odor, noise or dust problems.[312] Other defenses to the new cause of action include: (1) defendant's exercise of due diligence in complying with the Act, regulation or instrument;[313] (2) the alleged contravention is in

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Under most federal citizen suit legislation, a citizen may not commence an action until 60 days after having notified EPA, the state in which the alleged violation occurs, and the alleged violator. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(A) (1994). Compliance with the sixty day notice requirement is a mandatory precondition to commencing the action, and failure to meet the requirement necessitates dismissal of the action. *See* Hallstrom v. Tillamook County, 493 U.S. 20, 25-33 (1989) (interpreting citizen suit provision notice requirement accordingly); *see also* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56-64 (1987) (holding that provision authorizing citizen suits for injunctive relief or penalties did not allow citizen suits for wholly past violations, and that jurisdiction to bring citizen suit exists only where citizen makes good faith allegation of continuing, intermittent, or on-going violation).

Federal citizen suit legislation also prevents the bringing of such actions where EPA or the state "has commenced and is diligently prosecuting a civil or criminal action in a court." *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(B). A further provision unique to the Clean Water Act precludes the bringing of citizen suits where the federal government or a state under a comparable law has commenced and is diligently prosecuting an administrative civil penalty order not subject to further review and the violator has paid the penalty. For a state law to be deemed comparable to the Clean Water Act provision, it must provide citizens with rights to notice, to be heard, to present evidence, to participate in hearings and to seek judicial review. *See id.* § 1319(g)(4)-(6). The courts have diverged on what constitutes a comparable state law capable of precluding citizen suits under the Clean Water Act. *See* North & South Rivers Watershed Ass'n v. Scituate, 949 F.2d 552, 555-58 (1st Cir. 1991) (holding that Massachusetts administrative order issued that did not include civil penalties does not alter comparability of state law's scheme to Clean Water Act; it is enough that state statutory scheme, under which state is diligently prosecuting, contains penalty assessment of provisions comparable to federal statute, that state is authorized to assess those penalties and that overall scheme of two laws is aimed at correcting same violations and thus achieving same goals); *but see* Atlantic States Legal Found. v. Universal Tool, 735 F. Supp. 1404, 1414-17 (N.D. Ind. 1990) (holding Indiana law not comparable because it does not provide for public notice and participation, penalty assessment, judicial review and other matters required by Clean Water Act).

312. *See* OEBR, S.O., ch. 28, § 84(4). Ontario law has long provided the farm community with protection for these particular nuisances. For example, since 1988, neighbors cannot sue farmers in nuisance for any odor, noise, or dust arising from normal farm practices. *See* Farm Practices Protection Act, R.S.O., ch. F-16, §§ 1-2 (1990) (Can.).

313. *See* OEBR, S.O., ch. 28, § 85(1). The defense of due diligence or reasonable care has a long history at common law and in numerous statutes, including environmental statutes in Canada. Generally, due diligence is defined as "taking all reasonable steps in the circumstances to prevent the occurrence of the prohibited conduct." *See* R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 1326 (S.C.C.). In the context of OEBR, even if a defendant caused significant harm to a public re-

fact authorized by the Act, regulation or instrument;[314] or (3) the defendant complied with an interpretation of the instrument a court considers most reasonable.[315] Remedies include injunctions, negotiation of a restoration plan, declaratory relief, or other measures.[316] Under special circumstances, a court may dispense with a plaintiff's pre-trial undertaking to pay damages.[317]

The task force designed the new cause of action to permit the public's use of the judicial system to protect a public resource in the absence of the government's attempts to do so.[318] The new cause of action contains, however, several significant limitations. First, there must be both a violation of prescribed law and significant harm to a public resource. This combination is more stringent than citizen suit requirements under environmental legislation in the United States,[319] and more stringent than those required by most nuisance laws.[320] Second, the definition of "public resource"

source, he might be able to avoid liability by satisfying a court that all due care was taken in the circumstances.

314. *See* OEBR, S.O., ch. 28, § 85(2).

315. *See id.* § 85(3). Ironically, this section may allow courts to overrule administrative permits, licenses, approvals, authorizations, directions, or orders in favor of defendants. In contrast, MEPA allows courts to second-guess administrators in favor of plaintiffs by setting new, stricter standards.

316. *See id.* § 93(1).

317. *See id.* § 92. Such circumstances include when the action is a test case or raises a novel point of law. The same special circumstances test applies to the court's exercise of discretion in considering the issue of costs at the close of proceedings. *See id.* § 100. The Environmental Commissioner maintains a reporting function with respect to the use of the new cause of action and the defenses. *See id.* § 57(k).

318. *See* TASK FORCE REPORT, *supra* note 188, at 95-96.

319. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(a)(1) (1994) (permitting commencement of citizen suit actions against any person who is alleged to be in violation of effluent standards, limitations or orders). There is no requirement under the Clean Water Act to show that there is also significant harm. *See id.* In fact, the theory behind the federal pollution control statutes was to avoid having the courts make such a determination. The purpose of the substantive standards under statutes like the Clean Water Act is to avoid having to prove environmental harm from pollution on a case-by-case basis. Where state environmental rights laws have required that citizens not be able to sue unless there is both a violation of environmental statute and resulting significant environmental damage, judicial interpretation has been restrictive of the broader remedial purposes of the legislation. *See* Lerner, *supra* note 14, at 10 (commenting on citizen suit law in Massachusetts); *see also* Diane K. Danielson, Comment, *Environmental Regulation in Michigan and Massachusetts: Two States with Two Different Solutions to the Same Problem*, 20 B.C. ENVTL. AFF. L. REV. 99, 112 (1993).

320. *See, e.g.*, Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 720 (Mich. 1992) (stating that "gist of a private nuisance is an interference with the occupation or use of land"). According to the Restatement of Torts, a private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *See* RESTATEMENT (SECOND) OF TORTS §§ 821D, 822 (1979). One is subject to liability for a private nuisance if her conduct is a legal cause of an invasion of

considerably narrows OEBR's ambit because it includes only public land.[321] Third, the plaintiff bears the burden of proving the contravention or imminent contravention on a balance of probabilities.[322] OEBR has no provision such as that found in MEPA which shifts the burden of proof to the defendant once the plaintiff has established a prima facie case. Fourth, OEBR authorizes compliance with an interpretation of an instrument the court considers reasonable.[323] This defense appears to allow for mistake of law or reasonable but erroneous interpretation of the law, even though courts have not historically accepted such a defense.[324] Fifth, damages are an excluded remedy, thus providing less incentive for the provision to be invoked by many ordinary members of the public.[325] Sixth, OEBR permits a court to dispense with a plaintiff's undertaking to pay damages to obtain an interlocutory injunction only where the court finds special circumstances, such as with test cases or novel points of law.[326] Seventh, OEBR litigation may impose high costs on plaintiffs for legal and technical expertise in attempting to demonstrate that harm to a public resource is significant. Furthermore, where plaintiffs are unsuccessful, they also face the possibility of adverse cost awards.[327] These various limitations constitute a formidable set

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another's interest in the private use and enjoyment of land and the invasion is either intentional and unreasonable or unintentional and otherwise actionable. *See id.* The essence of public nuisance is an unreasonable interference with a right common to the general public. *See id.* § 821B. Neither the definition for private or public nuisance requires showing a statutory violation.

321. *See* OEBR, S.O., ch. 28, § 82. "Public resource" is defined under OEBR as air, water, "unimproved public land, any parcel of public land that is larger than five hectares and is used for recreation, conservation, resource extraction, [or related activities], and any plant or animal life or ecological system associated with the above." *Id.* Public land is defined as "land that belongs to the Crown in right of Ontario, a municipality, or a conservation authority," but not land leased from the above three categories that is used for agricultural purposes. *Id.*

322. *See id.* § 84(8).

323. *See id.* § 85(3).

324. *See* TASK FORCE REPORT, *supra* note 188, at 100-01 (recommending defense of reasonable interpretation and arguing that, in some circumstances, instrument under which defendant operates may be technical or vague; if defendant's interpretation is reasonable and he has complied with instrument according to that interpretation, he should not be held liable for environmental harm to public resource).

325. *See* OEBR, S.O., ch. 28, § 93(2).

326. *See id.* § 92. This provision largely codifies existing law as the courts have always had this discretion. *See* Attorney General for Ontario v. Harry, [1982] 35 O.R.2d 248, 250 (Ont. H.C.) (noting that court retains discretion to refuse to enforce undertaking given upon interim injunction if special circumstances exist).

327. *See* Courts of Justice Act, R.S.O., ch. C.43, § 131 (1990) (Can.) (stating that costs are in court's discretion and, unless otherwise ordered, unsuccessful litigant pays successful litigant's costs). The discretion authorized by OEBR largely codifies existing judicial practice. *See* TASK FORCE REPORT, *supra* note 188, at 105

of impediments to its public use, and do not provide comfort to plaintiffs contemplating bringing an OEBR action. Although the task force intended that the provision be used only as a last resort, these obstacles suggest little deterrent effect on the regulated community.[328]

ii. Public Nuisance Law Reform

Public nuisance is defined as an unreasonable interference with a right common to all members of the general public. Historically, only the Attorney General was entitled to bring a public nuisance action, either on his own or through a private person to whom permission to bring the lawsuit had been granted. Private individuals wishing to sue in public nuisance were required to either obtain a particular attorney general's consent or, in the absence of such consent, demonstrate having suffered a harm both different in kind and greater than that of the rest of the public.[329] In practice, the public nuisance rule often resulted in numerous individuals within a single community suffering either inconvenience or interference through denied access to the courts.[330] The rule had been the subject of concern in Ontario before being examined by the task force.[331]

As a result of the reforms proposed by the task force, OEBR permits any person to bring an action who has suffered, or who may suffer, a direct economic loss or direct personal injury as a result of a public nuisance caused by environmental harm. OEBR permits such actions without the consent of the Attorney General and regardless of whether other persons had been similarly injured.[332] The OEBR-reformed public nuisance rule may prove to be a more frequently used provision than the new cause of action because it allows damage awards, class actions and is not contingent on prior

(noting that courts now have discretion to depart from normal costs rules where litigation raises special circumstances such as novel point of law or test cases).

328. *See* TASK FORCE REPORT, *supra* note 188, at 97. The new cause of action was not invoked during 1994 and 1995. *See* EC ANNUAL REPORT I, *supra* note 240, at 64.

329. *See, e.g.*, Hickey v. Electric Reduction Co. [1971], 21 D.L.R.3d 368, 369 (Nfld. S.C.).

330. *See* TASK FORCE REPORT, *supra* note 188, at 92.

331. *See* ONT. LAW REFORM COMMISSION, REPORT ON THE LAW OF STANDING 2 (1989) (on file with author) (concluding that public nuisance standing rule is "offensive and not compatible with our notions of who ought to have access to the judicial process in the face of widespread harm caused to all, or a significant segment, of the community").

332. *See* OEBR, S.O., ch. 28, § 103.

requests for investigation.[333] Nonetheless, the reformed public nuisance provision went unused during the 1994, 1995 and 1996 reporting periods.[334]

iii. Judicial Review

OEBR authorizes few opportunities for judicial review. Government failure to comply with Part II of OEBR regarding public participation in environmental decision-making does not affect the validity of any policy, Act, regulation or instrument.[335] Moreover, judicial review is not available for any action, decision, failure to take action or failure to make a decision by a minister or his or her delegate under OEBR.[336] Although there is limited authority for any Ontario resident to seek judicial review on the grounds that a minister or his delegate "failed in a fundamental way to comply with the requirements of Part II respecting a proposal for an instrument," OEBR provides no guidance regarding what might constitute "fundamental" non-compliance.[337]

Now that the public can also seek leave to appeal in relation to certain instruments, greater public involvement and judicial scrutiny in the development and approval of some instruments issued to the regulated community may be expected when the leave to appeal and judicial review provisions are interpreted together. This is possible for two reasons. First, judicial review may be available to compel a minister to introduce a regulation classifying instruments which should be subject to notice and comment. Second, a member of the public might later invoke the leave to appeal provisions to seek a hearing before OEAB on the appropriateness of ministry approval of those instruments that had been subject to notice and comment. Apart from authorizing greater public and judicial roles

333. *See id.* The new cause of action provision contains each of these impediments, while the public nuisance provision is silent on these matters.

334. *See* EC ANNUAL REPORT I, *supra* note 240, at 64; ENVIRONMENTAL COMMISSIONER OF ONTARIO, 1996 ANNUAL REPORT: KEEP THE DOORS OPEN TO BETTER ENVIRONMENTAL DECISION MAKING 54 (1997) [hereinafter EC ANNUAL REPORT II].

335. *See* OEBR, S.O., ch. 28, § 37.

336. *See id.* § 118(1).

337. *See id.* § 118(2). The task force, however, suggested that a minister's failure to place a notice regarding an instrument on the environmental registry or to properly exercise discretion in relation to emergency powers should result in the instrument being considered voidable by a court. *See* TASK FORCE REPORT, *supra* note 188, at 59-60. A further example of fundamental non-compliance may be a minister's failure to introduce a regulation OEBR requires which classifies the statutes it administers. Such non-compliance prevents the application of OEBR notice and comment and other requirements in relation to instruments the ministry issues.

in the development of instruments, however, OEBR judicial review provisions exclude both the public and the courts from the environmental decision-making process.

V. CONCLUSION: A FINAL COMPARATIVE ANALYSIS OF MEPA AND OEBR

The origins of environmental rights legislation in both Michigan and Ontario emerged from similar experiences, including: (1) a myriad of environmental problems that could no longer be ignored; (2) existing administrative and regulatory regimes that largely locked the public out of law enforcement; and (3) a developing citizens' movement actively seeking long-term legal and institutional solutions. The response of each jurisdiction to the question of what constitutes environmental rights, however, has been sharply divergent. In its 1970 law, MEPA, Michigan focused on the courts as the engine of reform, while Ontario concentrated OEBR, its 1993 law, on institutional changes in government, the role of public participation and limited access to the courts.

The Michigan approach to the problem focused on the courts as the more independent and appropriate forum for resolving environmental conflicts by allowing citizens to sue to vindicate broad entitlements to environmental quality. Over twenty-five years of experience with MEPA's substantive and procedural reforms have demonstrated both successes and failures with use of the courts to protect environmental values. Reforms that have opened up the courts to hearing environmental disputes brought by ordinary members of the public include: (1) standing to sue; (2) imposition of public trust obligations on government to protect the enviromnent; (3) shifting of the burden of proof to defendants to demonstrate lack of feasible and prudent alternatives to their conduct following plaintiff establishment of a prima facie case of impairment; (4) judicial ability to inquire into the adequacy of, and if necessary to change, environmental standards; and (5) minimal surety bond requirements for obtaining preliminary injunctions. The Michigan courts' gradual development of a high threshold of harm for plaintiffs' establishment of a prima facie case of environmental impairment has increasingly prevented the burden from being shifted to defendants, thus lifting the obligation to address alternatives to their conduct. Lack of judicial support for awards of attorney's fees also makes MEPA potentially less accessible to members of the public seeking environmental protection. However, the essence of MEPA remains, that is, access to the courts is both an

efficient and integral part of public participation. Experience to date has on the whole largely vindicated that perception.

The Ontario approach to the question of establishing environmental rights has had a much longer and more convoluted history. In the 1970s, groups that embraced the notion of establishing environmental rights envisioned a law similar to MEPA, and early legislative versions of such a bill adopted a MEPA-type approach to the problem. Eventually, through a wide-ranging attempt by the New Democratic Party government to achieve consensus with business, industrial, and environmental interests on the content of such a law, a quite different approach emerged as Ontario's environmental rights statute. At its core, OEBR rejects the fundamental "access to the courts" right that is the cornerstone of MEPA.

By creating rights of participation in the administrative and regulatory process of developing and approving regulations, policies and instruments, and creating new institutional mechanisms to act in an oversight capacity on government, OEBR is a statute much more fully dedicated to reforming the governmental decision-making process on environmental matters.[338] Access to the courts under OEBR, instead, is an exercise of limited last resort. The experience with OEBR is admittedly not of similar duration as MEPA. As such, it is more difficult to draw final views as to the comparative performance and effectiveness of both laws. However, based on the experience thus far under OEBR, it is fair to say that the Ontario law is largely a "rights law" in name only. This is because the administrative rights regime established under OEBR to increase opportunities for notice and comment on government or citizen-initiated reforms depends highly on the government's exercise of discretion. In practice, government discretion frequently has been exercised to limit or remove opportunities for public involvement in environmental decision-making. The lone bright spot in the administrative rights reforms, the exercise of leave to appeal by members of the public concerning instruments, has occasionally resulted in being able to examine these decisions. On the other hand, the institutional mechanisms created to monitor government compliance have mainly functioned to catalogue, not reverse, government decisions, and have essentially locked the public out of the process. At the same time, the substantive right to resort to the

338. To the extent that OEBR focuses on integrating the public and environmental considerations into the administrative decision-making process through such mechanisms as the SEV process, the law has much in common with other process statutes, such as Ontario's environmental assessment law and NEPA in the United States.

courts established by OEBR is hedged with so many limitations that it has not been invoked at all during the statute's first three years.

As more jurisdictions consider enacting environmental rights legislation, legislators will need to consider where they want to position themselves on the continuum of polar extremes reflected in the Michigan and Ontario approaches. Indeed, legislators in jurisdictions that already possess environmental rights laws, including Michigan and Ontario, may want to consider possible reform to their own laws. For example, if legislators view access to the courts as a critical element in environmental protection, they will want the legislature to provide greater guidance on the need to impose minimal prima facie case obligations on plaintiffs. By permitting plaintiffs to make this prima facie showing more easily, environmental justification will then lie with the defendant to demonstrate that no superior alternatives to its conduct are available. The failure of the Michigan legislature to address this issue could increasingly result in judicial findings that correspond to OEBR's significant harm test. Such a high threshold test is inconsistent with the legislative history surrounding the enactment of MEPA.[339] The Michigan legislature, or other jurisdictions considering enacting such legislation, will also have to grapple with making citizen suit litigation more affordable through clearer guidance on the availability of attorney's fees.

When legislators review the Ontario experience, they will likely determine that complex administrative and institutional reforms established in an environmental rights law, like OEBR, must be subject to greater judicial scrutiny and less government discretion if they are to avoid the problems catalogued in the first three years of OEBR's operation. Legislators will also need to consider whether to make a violation of a statute or significant harm to the environment, but not both, as the standard for invoking plaintiff's cause of action. Similarly, legislators will have to consider the applicability of the earlier reforms rejected by the task force and excluded from OEBR. Two key rejected reforms that should be considered include shifting the onus to a defendant to establish lack of feasible and prudent alternatives, and requiring a minimal surety bond from a plaintiff to obtain a preliminary injunction. Finally, for those jurisdictions considering establishing a more complex admin-

339. *See* Lynch, *supra* note 68, at 64-65 (noting that Michigan legislators wanted to ensure that MEPA could address small-scale, incremental, and cumulative environmental problems, which, if ignored, could gradually erode larger resource and environmental values).

istrative rights and a government accountability regime like that found in OEBR, the Office of Environmental Commissioner needs to be redeveloped. Certainly, if Ontario is itself determined to retain such a complex administrative and institutional structure as an integral approach to environmental rights, the province should strengthen the role of the office by giving the Environmental Commissioner the powers of auditor general, ombudsman and public advocate, so that oversight, reporting and redress to the courts may be undertaken directly by that office where appropriate. Whether one chooses the Michigan or Ontario environmental rights approach, enacting the above reforms would appear to be minimum conditions to strive for in the continuing search for environmentally sound decision-making.