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Michigan Environmental Protection Act of 1970

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MICHIGAN ENVIRONMENTAL PROTECTION ACT OF 1970[1]

I. INTRODUCTION

Widespread public preoccupation with environmental quality is a recent development, and one that has provided the impetus for a thorough examination of existing governmental structures in order to establish a functional system for the environment's protection and improvement. Commenting on this development, a leading environmental lawyer recently noted: "[T]he explosion of concern for the environment, at every private and governmental level, is the great political phenomenon of the last twelve months."[2] As concern has grown about the quality of the environment, so too has skepticism increased about the ability of present institutions to cope with the problem.[3] A constitutional amendment has even been suggested as a necessary prerequisite to adequate protective measures.[4]

One of the principal sources of disillusionment with the responsiveness of governmental bodies to environmental problems is the reaction of administrative agencies to the introduction of this new area of public interest as a factor in the agency decision-making process.[5] Many agencies are viewed as being too closely associated with the interests of the industries and activities that are in theory being regulated to effectively balance opposing priorities.[6]

[1] MICH. COMP. LAWS § § 691.1201-691.1207 (SUPP. 1970). This Act incorporates the provisions of a model bill drafted by Joseph L. Sax, Professor of Law, University of Michigan, for the Western Michigan Environmental Action Council.

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

[3] *See, for example*, Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666 (1970); Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 COLUM. L. REV. 652, 655 (1970).

[4] Ottinger, *supra* note 3, at 671-672.

[5] *See* Office of Communications of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994, 1003-1004 (D.C. Cir. 1966) granting standing to members of the listening public to intervene in and challenge the re-licensing of a local television station by the FCC, in vindication of the public interest.

[6] An extreme illustration of this problem is found in structure of the Interior Department, commented upon by Ottinger, *supra* note 3, at 670:

> Furthermore, the Interior Department is by design a truly schizoid agency. Despite its environmental responsibilities, however tenuous they might be, the agency is also the biggest developer and exploiter of natural resources in the United States. Among other things, it is the largest single producer of electric power, a licenser of offshore drilling, and a dam builder and developer second only, perhaps, to the Corps of Engineers. It is not surprising, therefore, that Interior's concern for environmental protection is overshadowed by its obligations to the opposition.

Commenting on this point, Professor Joseph L. Sax of the University of Michigan Law School recently stated:

> Official agencies which are created to promote and protect the public interest sometimes become too single-minded. In the past few years, a number of cases have brought home the degree to which important regulatory agencies failed to take into account all the information and all the perspectives which a proper regard for the public interest required.[7]

For this reason, many see private litigation and the active involvement of the courts in the environmental area as the only means of effecting any significant change in agency policy decisions.[8]

Obtaining a judicial determination of the issue, however, is traditionally contingent upon two factors: the standing of the plaintiff to bring the suit, and the willingness of the court to entertain the action. The doctrine of standing, although flexible[9] and "determined by the specific circumstances of individual cases,"[10] does require that a party have a "personal stake"[11] in the disposition of the case. This limitation has created problems for groups not alleging the invasion of a private right.[12]

Courts have also been hesitant to take jurisdiction of the subject matter absent a specific legislative authorization,[13] especially where the protection of the interest involved has been conferred on a public agency.[14] This note will discuss the provisions of one such legislative authorization, its basis in previous common law

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[7] Testimony of Joseph L. Sax before the Committee on Conservation and Recreation, House of Representatives of Michigan, on H.B. 3055, January 21, 1970.

[8] Sive, *supra* note 2, at 615, 650; Comment, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734, 735, 752 (1970).

[9] *See* Flast v. Cohen, 392 U.S. 83 (1968) (granting standing to a taxpayer to challenge an exercise of the congressional taxing and spending power, where it was alleged that the enactment in question exceeded specific constitutional limitations on that power).

[10] United States *ex rel.* Chapman v. Federal Power Commission, 345 U.S. 153, 156 (1953), granting standing to the Secretary of the Interior and others to institute proceedings under the Federal Power Act to set aside an order of the Federal Power Commission, at the same time finding that the license was issued in a valid exercise of authority.

[11] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), where standing was granted to petitioners, who, as data processing manufacturers, challenged a ruling by the comptroller of the currency that allowed national banks to make data processing services available to other banks and customers. Although the petitioners alleged economic damage as their personal interest, Mr. Justice Douglas, writing for the Court, states that "the interest, at times, may reflect 'aesthetic, conservational, and, recreational' as well as economic values," at 154.

[12] *See* Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254, 1275, (1970).

[13] Testimony of Joseph L. Sax before the Committee on Commerce, United States Senate Subcommittee on Energy, Environment and Natural Resources on S. 3575, Environmental Protection Act of 1970, May 13, 1970.

[14] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 498 (1970).

decisions, its qualitative differences from those decisions, and its potential functioning.

II. MAJOR PROVISIONS OF THE ACT

The Michigan Act serves two primary functions in relation to the field of environmental litigation. First, it explicitly recognizes and expands a legal interest in the protection of the environment, enforcible either by state or local governments or by private citizens. Second, it establishes a framework for the assertion of this interest within the context of judicial proceedings.

The Act specifically provides for the maintenance of a civil action in the circuit court for declaratory and equitable relief by any "legal entity,"[15] public or private, against any other legal entity for the "protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."[16] It also authorizes intervention in any administrative proceeding whose subject matter has environmental implications and judicial review of the agency decision on the filing of a pleading asserting actual or potential pollution, impairment or destruction.[17] Consequently, these two provisions, in addition to conferring jurisdiction on the courts, enable the commencement of class actions and the bringing of actions against the state.

In the first stage of litigation in a suit brought under the Act, the plaintiff must make a prima facie showing that the conduct of the defendant has violated, or is likely to violate, the interest created.[18] The defendant then has two options: (1) to rebut the plaintiff's case by the submission of evidence to the contrary; or (2) to raise the affirmative defense that there is no "feasible and prudent alternative"[19] to the conduct in question, 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."[20] In weighing the relative merits, the circuit courts apply the standard principles of burden of proof and weight of the evidence generally used in civil actions.

In entertaining an action brought under the Environmental Pro-

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[15] MICH. COMP. LAWS §691.1202 (1) provides that an action may be brought by: the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity.

[16] MICH. COMP. LAWS §691.1202 (1) (Supp. 1970).

[17] MICH. COMP. LAWS §691.1205 (1) (Supp. 1970).

[18] MICH. COMP. LAWS §691.1203 (1) (Supp. 1970).

[19] *Id.*

[20] *Id.*

tection Act, the court is authorized to choose between alternative means of arriving at a final disposition of the case. It may try the case directly, taking evidence and making an adjudication on the merits,[21] or it may appoint a technically qualified master or referee to take testimony and report his findings to the court.[22] The court also has the option of remitting the case to available administrative proceedings for a determination of the legality of the defendant's conduct, retaining jurisdiction of the action pending completion of the proceedings for the purpose of ascertaining whether adequate protection has indeed been provided.[23] In any event, where the circuit court chooses to exercise its original jurisdiction, it shall retain jurisdiction for the purposes of judicial review of all later administrative proceeding, contrary provisions of the Administrative Procedures Act of 1969[24] notwithstanding.[25]

The circuit court also has a number of options available in fashioning the type of relief which it may grant. If an agency standard is challenged, the court is authorized to evaluate its validity and applicability, determine whether a standard is deficient, and direct the adoption of a standard specified and approved by the court.[26] It has the power to grant permanent equitable relief,[27] or to grant temporary equitable relief, appropriate, for instance, when a case has been remitted to administrative proceedings.[28] Moreover, the court has the further option of imposing conditions on the defendant in order to insure adequate protection of the environment.[29] Where there has been intervention in, or judicial review of, administrative proceedings, no conduct shall be approved which is likely to have the effect of pollution, impairment or destruction of natural resources if there is a feasible and prudent alternative.[30]

On the other hand, the Act has empowered the court to take steps designed to protect defendants from spurious claims or a multiplicity of suits. Thus, the court may order the plaintiff to post a bond, not to exceed $500.00, to insure payment of any cost or judgment which might be rendered against him,[31] and, if the

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[21] *Id.*

[22] MICH. COMP. LAWS §691.1203 (2) (Supp. 1970).

[23] MICH. COMP. LAWS §691.1204 (2) (Supp. 1970).

[24] Administrative Procedures Act of 1969, MICH. COMP. LAWS §§ 24.201 to 24.313 (Supp. 1970).

[25] MICH. COMP. LAWS §691.1204 (4) (Supp. 1970).

[26] MICH. COMP. LAWS §691.1202 (2) (Supp. 1970).

[27] MICH. COMP. LAWS §691.1204 (2) (Supp. 1970).

[28] MICH. COMP. LAWS §691.1204 (1) (Supp. 1970).

[29] *Id.*

[30] MICH. COMP. LAWS §691.1205 (2) (Supp. 1970).

interests of justice require, costs may be apportioned to the parties.[32] In addition, the court's use of res judicata and collateral estoppel is sanctioned by the Act in order to prevent multiplicity of suits.[33]

Finally, to emphasize that judicial proceedings are not intended to substitute for the established agency framework, the Act specifically provides that its provisions are supplementary to existing administrative and regulatory procedures.[34]

III. EVALUATION

A. A Legal Basis of the Right in the Environment

Recognition of a new interest inevitably presents initial difficulties inhering in the constitutional "case" or "controversy" limitation on judicial power.[35] This requisite dictates that each party must assert a definable interest and have a sufficient involvement in the outcome to insure an adequate presentation of the issue in the adversary context necessary for proper judicial determination. It has been held that while a statute cannot create a "case" or "controversy," new interests or rights can be created by legislation, thereby granting standing to one who, without the legal recognition of the interest, would be barred by the lack of "case" or "controversy."[36] This analysis of the function of "interest" provides a useful framework for an examination of the basis for a man's right in a safe environment. A grant of standing independent of a definable interest must be invalid for lack of a "case" or "controversy," but if the foundation of the right can be found in the previous recognition of similar rights, then the act of the legislature can be seen as only clarifying, expanding, and

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[31] MICH. COMP. LAWS §691.1202a (Supp. 1970).

[32] MICH. COMP. LAWS §691.1203 (3) (Supp. 1970).

[33] MICH. COMP. LAWS §691.1205 (3) (Supp. 1970).

[34] MICH. COMP. LAWS § 691.1206 (Supp. 1970).

[35] U.S. CONST. art. III, §2. Although the Michigan Constitution does not incorporate the same "case" or "controversy" limitation (*see* art. VI, § 1), the federal standards have been largely followed by Michigan decisional law. *See* Hodge v. Pontiac Township Board, 363 Mich. 544, 110 N.W.2d 746 (1961), holding that courts will not take cognizance of suits instituted merely to obtain judicial opinions on points of law and where persons invoking the jurisdiction have not shown a personal grievance or an adverse affect upon their personal or property rights; Attorney General *ex rel.* McRae v. Thompson, 167 Mich. 507, 133 N.W. 532 (1911), holding that the court will not adjudicate academic questions or "what the decision would be were the controversy presented upon a given state of facts," *Id.* at 513; Horowitz v. Rott, 235 Mich. 369, 209 N.W. 131 (1926), holding that the court cannot review a satisfied judgment (a moot case), and that it is beyond the power of the legislature to confer jurisdiction to hear moot cases.

[36] Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 615 (2d Cir.), *cert. denied*, 384 U.S. 941 (1965). *See* text accompanying footnotes 52-56 *infra*.

authorizing the assertion of an existing group of interests in a broader context.

A somewhat similar right, and one from which the right to a safe environment is arguably an expansion and extension, is that to the quiet "use and enjoyment of land;"[37] interference with this right constitutes the tort of nuisance. A private nuisance action is based on property rights and may be brought by a landowner whose personal rights in his own land have been invaded by the conduct of another.[38] Implicit in the protection of this interest by the courts is the recognition that a nontrespassory invasion of an individual's rights can exist, and that some activities, even when conducted exclusively within the confines of a person's property and not illegal per se, constitute an infringement of the rights of others.

A second similar right is that of citizens in the proper administration of land by government for the public trust.[39] Frequently, the cases relying on this doctrine deal with resource management and the responsibility of government to the public interest in the utilization and disposition of publicly held land.[40] Based in part on the theory that there are traditional uses reserved to the public, it establishes a precedent for the assertion that individual citizens have an inherent interest in natural resources and the use thereof and that such an interest can be protected by judicial intervention.

An additional right, partly substantive and partly procedural, is that interest of the public in the proper functioning of governmental agencies. Formalized by the Federal Administrative Procedure Act[41] and similar state statutes,[42] private citizens have been allowed to intervene in administrative proceedings and to obtain judicial review of those processes. Although these agencies have been entrusted with the regulation of given activities and protection of the public interest therein, the ability of private citizens to make demands on these institutions establishes an implicit recognition of an obligation to be responsive to the public's view of its own interest and to be directly accountable to the public through the courts for decisions, actions and policies.

Thus, the combination of these three separate interests pro-

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[37] Prosser, *Private Action for a Public Nuisance*, 52 VA. L. REV. 997 (1966).

[38] *Id.* at 999.

[39] *See* Sax, *supra* note 14.

[40] *See* Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892), (holding a grant to the railroad of almost the entire Chicago waterfront area to be beyond the power of the Illinois Legislature, in that it was an abdication of its police power responsibility.

[41] 5 U.S.C. §701 *et seq.* (1967).

[42] *See, for example*, MICH. COMP. LAWS § § 24.201 to 24.313 (Supp. 1970).

vides a basis for the emergence of a new interest in the protection of the environment and a theoretical background for its development. Although none of the three deals with the same area or means of protection, extrapolation of the principles involved gives substance to the significance of the new interest and furnishes criteria which may prove useful for future adjudications. The importance of this is seen in the need for judicial standards by which to evaluate an interest within the context of a case. Balancing the competing interests in a case and arriving at an adjudication on the merits is dependent upon the application of "judicially discoverable and manageable standards for resolving it."[43] Given this necessity, the availability of a logical nexus with similar interests is particularly significant.

In this regard, the development of the law of privacy provides a useful analogy. By means of the formal recognition of an existing right,[44] a forum for its protection was created and courts were authorized to determine definitions and boundaries within the framework of its evolution.[45] There are fundamental differences between statutory and constitutional recognition of a right, but the analogy is valid in terms of the utilization of precedent in considering the meaning of a new right.

The Michigan Environmental Protection Act, therefore, can be seen as a progression in the development of the protection of a right, a culmination signified by a legislative codification and expansion of a recognizable group of interests. This substantive foundation of the new right continues to provide the standards and form necessary to its validity, while its assertion is made possible in a broader context.

B. Past Review of Administrative Proceedings

Of primary significance is the fact that the Act removes many limitations which previously prohibited the full enjoyment of the rights involved. For instance, even though the legislature has recently recognized the right to intervene in and obtain judicial review of administrative proceedings, this recognition has been of limited utility.

In most cases review of administrative proceedings has extend-

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[43] Baker v. Carr, 369 U.S. 186, 217 (1962).

[44] *See* Griswold v. Connecticut, 381 U.S. 479 (1965), holding unconstitutional Connecticut statutes prohibiting the use of contraceptives, as an invasion of the privacy of the marriage relationship.

[45] *See* Comment, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 464-467 (1970).

ed only to the consideration of procedural questions and an evaluation of the agency's performance in terms of its statutory function. An example of this type of limited review is found in *Citizens' Committee for the Hudson Valley v. Volpe*,[46] a case involving an attempt by a group of citizens to prevent the construction of a six-lane highway along the Hudson River. Standing in the action was based on the Administrative Procedure Act[47] and the statutory requirements, which established the necessary public interest, that consideration be given by the agency to environmental concerns.[48] The focus of the trial,[49] however, was on the issue of whether a part of the proposed expressway was a dike, the construction of which would require Congressional approval under an 1899 statute.[50] Although the court set aside the agency action as being in excess of statutory authority,[51] its holding did not go beyond insisting upon the fulfillment of procedural requirements, failing to reach the issue of environmental protection.

Scenic Hudson Preservation Conference v. Federal Power Commission,[52] which involved the licensing of an electric power plant on an unusually scenic section of the Hudson River, provides another example of judicial reticence in reviewing administrative agency decisions. Considered a landmark case because of its allowance of standing[53] and its discussion of the policy questions involved in environmental determinations, the decision was still limited to an evaluation of the agency's action within the framework of specific statutory provisions. Relying on language in the Federal Power Act,[54] the court held, that to be valid, the Federal Power Commission's action must be based on a complete

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[46] 425 F.2d 97 (2 Cir. 1970).

[47] 5 U.S.C. §702 (1967) provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

[48] Department of Transportation Act of 1966, as amended by § 18 (b) of the Act of August 23, 1968, 82 Stat. 824, 49 U.S.C. § 1653 (f) (Supp. IV); The Hudson River Basin Compact Act, P.L. 89-605, 80 Stat. 847 (1966).

[49] Citizens' Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083 (S.D. N.Y. 1969).

[50] Rivers and Harbors Act of 1899, §9, 30 Stat. 1151, 33 U.S.C. §401 (1967).

[51] Administrative Procedure Act, 5 U.S.C. § 706 (1967).

[52] 354 F.2d 608 (2d Cir. 1965).

[53] *Contra, see* Sierra Club v. Hickel, No. 24, 966 (9th Cir. Sept. 16, 1970), which denied standing to the plaintiff, stating, "The question of standing here must be decided from the facts in this action," at 12. The court held that the plaintiff had not shown a sufficiently direct interest (there was no allegation of property damage, that the organization or its members were endangered or that its status was threatened), nor the requisite connection between the official action and a legally protected interest, and that it had not sufficiently alleged that it was aggrieved within the meaning of a relevant statute. The court distinguished the Scenic Hudson case on the grounds that there was no statute in the present case giving standing to aggrieved parties.

[54] 16 U.S.C. §803 (a) (1964).

record, which includes a consideration of all "relevant factors" and "a thorough study of possible alternatives to the Storm King project."[55] The holding's significance should not be ignored, since it served at least to delay the construction of the project, but the limited utility of this approach is evidenced by the fact that a new authorization for the Storm King project has recently been issued by the Commission.[56] As a result, either renewed litigation will be necessary or the ultimate goal sought by the plaintiff—to prevent the destruction of a scenic wilderness by the building of a power plant—will be unattainable.

The limitations illustrated by these two cases are typical of the problems faced by individuals attempting to assert a right to the protection of the environment without the aid of specific legislative authorization. First, the only relief available is a remand of the proceeding to the administrative agency, which, by complying with the procedural standards set by the court, can reach the same determination as in the previous hearing. Second, the cases which have been successful have dealt almost entirely with the licensing of new projects and not with the imposition of new regulations on the conduct of existing activities. Third, cases which have allowed even this limited degree of review have been almost exclusively in the federal courts and have dealt with standards set by federal legislation. Because of the narrow field of permissible inquiry, courts have not arrived at the point of making a determination on the merits of any given controversy, but have had to rely on purely technical grounds to protect the underlying interests involved.

Consequently, one of the most significant advantages of the Act is that actions brought under it will present the environmental issues directly to the courts. Litigation will be framed in terms of the consequences of concrete examples of threats to the environment and factual evidence relating to those threats will be the basis of adjudication. A practical outgrowth of this development is the statute's requirement that the issues be presented in a clearly defined manner, drawn narrowly enough to allow the application of standards which in and of themselves are only vaguely defined.

C. Absence of Judicial Standards

The fact that the Act does not set forth standards for the courts to employ in reaching decisions should also serve to facilitate the assertion of one's right in the environment. In the absence of

[55] 354 F.2d at 612.

[56] N.Y. Times, Aug. 20, 1970, §1, at 1, col. 1.

enumerated standards, the court is allowed a certain responsiveness to the individual characteristics of each action and can make a case-by-case determination without the constraint of over-precise formulas. One of the deficiencies of narrow legislative standards in this area is that it is virtually impossible to foresee all the different types of environmental pollution that may develop with later changes in technology. In view of this, private litigation and the careful use of expert testimony[57] can best serve the function of giving definition to the general language in existing statutes and regulations.[58] If prudent and extensive use of expert testimony is made, the courts may prove to be more responsive to rapidly changing environmental technology than legislatures and administrative agencies.[59] It may thus be possible for private citizens with the aid of the courts to prevent irreparable harm in some instances, and to keep impairment of the environment within reasonable limits in others.

An important aspect of any system of regulation, whether judicially, legislatively or administratively imposed, is consistency and coordination.[60] In attempting to enforce loosely articulated interests, the Environmental Protection Act may result in a divergence in end results and an unequal imposition of conditions for compliance, and, to this extent, consistency and coordination may be sacrificed. Because of the number of different courts that will be trying cases brought under the Act, the wide variety of plaintiffs and their presentation of the issues and evidence, and the existence of like problems in different situations, very similar types of conduct could produce highly dissimilar dispositions. Moreover, since all activity with identical effects will not be challenged, the likelihood is that higher standards will be imposed only on those unfortunate enough to have been brought to court.

The primary reason for this potential discrepancy in result is the difficulty involved in the rapid development of common law standards for a previously unlitigated interest. As of October 1, 1970, the circuit courts must make determinations using criteria that as yet have not been applied directly. Although judicially created rules will develop in time, the creation of these standards will impose a heavy initial burden on the courts, and the judicial ability to handle this task may well control the efficacy of the legislation. Still, precedent from cases involving the traditional interests from which the interest in a safe environment evolve,

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[57] *See Toward a Constitutionally Protected Environment, supra* note 45, at 477.
[58] *See Equity and the Eco-System, supra* note 12, at 1260.
[59] *See Equity and the Eco-System, supra* note 12, at 1261-1262.
[60] *See* Ottinger, *supra* note 3, at 672.

and policy and regulatory provisions of other legislation could provide a basis for the emergence of a doctrinal foundation for the definition of the new interest.

D. Variety of Actions and Remedies

In addition to providing the courts with flexibility in developing enforcement standards, the Act permits a variety of actions to be brought under its provisions, ranging from a suit questioning the legality of an individual's conduct to a challenge of an industry-wide procedure or a demand for specific state action. This characteristic of the legislation constitutes an implicit recognition of the fact that protection of the environment does not consist of controlling specific activities determined to be harmful in advance, but rather of balancing competing interests in terms of their actual effect on the public welfare taken in its totality.

Legislative recognition of the demands that this diversity of claims will place on the judicial system is found in the flexibility of procedures established for adjudication. The options available to the courts, from the aspect of procedure and relief, are designed to create a realistic judicial structure which is responsive to the peculiar problems involved in this field of litigation. While the court maintains the power of ultimate determination, it may take a variety of intermediate steps depending upon the existence of administrative proceedings for the evaluation of that type of interest, the technical nature of the problem, the extent of the effects of the activity in question, or any of a number of variables which define the issues in a given case. The flexibility of relief functions analogously: conduct may be prohibited or regulated so as to make it conform to standards found acceptable by the court after it weighs the evidence presented in a true adversary context. This power of the courts to frame relief can also serve as an impetus to administrative agencies to reassess their own decisions within the context of a fuller consideration of environmental concerns. As Professor Sax has pointed out, "[p]ublic intervention may help to strengthen the resolve of an agency which is under pressure from interested parties, or it may encourage an agency to reconsider a problem it has ignored or held too long in abeyance."[61] As the development and enforcement of adequate agency standards would have a greater effect than a case-by-case granting of relief by the courts,[62] this would be a very satisfactory consequence of judicial determinations of suits in this area.

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[61] Testimony of Joseph L. Sax before the Senate Subcommittee, *supra* note 13.

[62] *See Toward a Constitutionally Protected Environment, supra* note 45, at 479.

However, the power given to the courts to judge the efficacy of state action in various contexts does create a high potential for direct conflicts between the courts on the one hand and the agencies and the legislature on the other. The state has a vested interest in some of the activities that will be challenged under the Act, and it always has the option of evading the burdens imposed on it by enacting new legislation either limiting the power of the courts or specifically authorizing the activity in question.[63] Agencies charged with enforcing standards imposed by the courts may resort to dillatory tactics or superficial compliance, leaving the basic situation unchanged. The involvement of one branch of government in the functions of another branch is a delicate operation, and the power of the courts to issue direct mandates affecting internal activities of administrative agencies may threaten the traditional separation of powers.

The flexibility inherent in the provisions of the Act may also work to the disadvantage of a plaintiff desirous of immediate judicial intervention. The availability of remand to administrative proceedings may make a court unwilling to make the initial determination, and ultimate adjudication could be delayed for a considerable period of time. An example of this is found in a recent Michigan case, *White Lake Improvement Association* v. *City of Whitehall*,[64] involving the pollution of a lake by the dumping of sewage. The Michigan Court of Appeals granted standing to the plaintiffs and asserted concurrent jurisdiction with the Water Resources Commission, but, relying on the theory of primary jurisdiction, it remanded the case to the agency, stating:

> To rule on the plaintiffs' cause of action would require a court to duplicate the efforts of the water resources commission and perhaps to contradict the agreements which, we have observed, function as orders. In order to achieve uniformity and consistency in this vital area, we think it would be wise for the courts to refrain from ruling on the merits of the association's claims at this time.[65]

Although courts are now authorized under the Act to take prima-

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[63] *See* Ottinger, *supra* note 3, at 671. *Equity and the Eco-System*, *supra* note 12, at 1268:

> Indeed, there is reason to suspect that the current wave of governmental activism against polluters may waver somewhat and that even the present inadequate level of regulation may be tempered as the conservation movement begins to interfere more significantly with American industry, for American governmental institutions are resistant to changes which encroach upon powerful vested interests.

[64] 22 Mich. App. 262 (1970).

[65] 22 Mich. App. at 281.

ry jurisdiction, the reasoning of the *Whitehall* opinion could be attractive to a court with an appropriate administrative proceeding available for remand. However, a court may now consider all relevant factors, including the need for immediate judicial action, in reaching a decision on remanding a case.

E. Protection of Indigents Under the Act

Another serious problem raised by a consideration of the potential functioning of the Act is the ability of indigents to assert the invasion of their environmental interest. Pollution of the environment has been recognized as an infringement of a right enjoyed by all the citizens, and yet its protection will be available only to those able to afford the costs of litigation.[66] Pursuit of a legal remedy is unfortunately a costly process, and, consequently, economic discrimination is an inherent characteristic of the legal system. In many types of private actions, because of the availability of legal assistance on a contingency fee basis, an indigent plaintiff has equal opportunity to assert his rights, but an action brought under the Act has no possibility of a money award, making this type of arrangement impossible. Coupled with the fact that low income neighborhoods with high population concentrations are often situated in areas of intense pollution, this aspect of the applicability of the Act's protection seems inconsistent with its underlying philosophy. The authorization of class actions may serve to mitigate this effect (as might the fact that a suit could be brought by someone living outside of the area), but the nature and extent of the organization required for such an effort would probably make it the exception rather than the rule.

IV. CONCLUSION

With the enactment of the Environmental Protection Act, Michigan has made an important and innovative advance toward the development of a comprehensive system of environmental protection. By establishing a forum for its assertion, the Act provides an alternative to reliance on legislative and administrative action for a full consideration of the public interest in natural resources.

However, due to its inherent flexibility, it is difficult to predict the practical functioning of the various provisions of the Act. This flexibility, on the one hand, has the potential for allowing a realis-

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[66] *See* Office of Communications of the United Church of Christ v. Federal Communications Commission, *supra* note 5, where one of the justifications for granting standing was that the individuals involved had demonstrated a "sufficient interest" by being "willing to shoulder the burdensome and costly procedures." 359 F.2d at 1005.

tic response to environmental issues and the development of significant standards. On the other hand, it could conceivably result in a dispersal of energy and an effective negation of any meaningful protection. For the Act to have maximum effect, it will be essential that early cases brought under it be well defined and supported by sufficient evidence to insure the orderly development of reasonable judicial standards.

—*Susan Pearce*