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Michigan Environmental Protection Act

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MICHIGAN ENVIRONMENTAL PROTECTION ACT

I. POLITICAL BACKGROUND

The Michigan Environmental Protection Act of 1970[1] was signed by the Governor on July 27, 1970, after more than a year of intensive lobbying by citizen groups and environmentalist organizations on the one hand, and by a few individual industries and the Michigan Chamber of Commerce on the other. Its primary purpose is to facilitate, through the medium of legislation, the creation of an environmental common law by the Michigan courts.

The Act permits the "attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof" as well as any "legal entity" to maintain an action in an appropriate circuit court for declaratory and equitable relief against the state, its agencies and subdivisions, or 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."[2] Once the plaintiff has made a prima facie showing that the defendant has, or is likely to pollute or otherwise damage any of the state's natural resources, the defendant may either rebut the plaintiff's evidence[3] or establish by way of an affirmative defense, that "there is no feasible and prudent alternative" to his conduct, *and* that such conduct is "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."[4]

The Act permits a circuit court to grant temporary and permanent equitable relief or to impose conditions on a defendant necessary to protect the natural resources of the state.[5] Alternatively, the circuit court may remit the parties to administrative, licensing or other proceedings or promulgate a standard of con-

[1] MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1971). This Act, in its original form, was drafted by Joseph L. Sax, Professor of Law, University of Michigan, for the West Michigan Environmental Action Council. The discussion in this grouping of notes will refer to the Act as H.B. 3055, which was the popular name ascribed to the proposal by its supporters and the press prior to passage.

[2] *Id.* § 691.1202(1).

[3] *Id.* § 691.1203(1).

[4] *Id.*

[5] *Id.* § 691.1204(1).

duct where the court, after determining the "validity, applicability and reasonableness" of an agency standard, finds it deficient.[6] If the court chooses not to immediately adjudicate an action, it is required to retain jurisdiction pending completion of the proceedings to which the action was referred for the purpose of determining whether adequate protection from pollution has been afforded.[7] In addition, the Act authorizes intervention by a "legal entity" in any administrative proceeding whose subject matter has environmental implications, and judicial review of the agency decision upon the assertion that the administrative proceeding "involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein."[8]

In order to safeguard defendants from frivolous and spurious claims, the court, if it has reasonable ground to doubt the plaintiff's solvency or his ability to pay the costs of a possible adverse judgment, may require a plaintiff to post a surety bond or cash of up to five hundred dollars.[9] Moreover, the court is empowered to apportion costs[10] and apply the doctrines of collateral estoppel and res judicata.[11]

A 1967 suit by the Environmental Defense Fund against the Michigan Agriculture Department[12] was indirectly responsible for the effort to enact a law allowing individual suits as a means of safeguarding the environment. The plaintiffs unsuccessfully sought a writ of mandamus to prevent the Agriculture Depart-

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[6] *Id.* § 691.1202(2)(a)(6).
[7] *Id.* § 691.1204(4).
[8] *Id.* § 691.1205(1).
[9] *Id.* § 691.1202a.
[10] *Id.* § 691.1203(3).
[11] *Id.* § 691.1205(3).
[12] Environmental Defense Fund, Inc. v. Director of Agriculture Dep't, 11 Mich. App. 693 (1967). The Environmental Defense Fund, Incorporated (EDF), a non-profit New York membership corporation, is an alliance of lawyers and scientists dedicated to the protection of man's environment. The EDF brought this suit in late 1967. The Michigan Court of Appeals found that the Michigan State Department of Agriculture had not exceeded its discretion and hence a temporary restraining order was dissolved and the spraying of 4600 acres of small watersheds draining into Lake Michigan was carried out as planned.

This case, however, brought to the surface the growing conflict between the Michigan Department of Agriculture and the Michigan Department of Natural Resources. The Department of Natural Resources, opposed to the use of persistent pesticides, had joined the case on the side of the plaintiffs. The agency conflict was eventually resolved by a three-man panel, appointed by the Governor, which ruled that if allowed to go untreated the Japanese beetles would eventually require even heavier chemical treatment. The subsequent crop-dusting spread two pounds per acre of dieldrin over three thousand acres, and ten pounds of chlordane per acre over another sixteen thousand acres. The original plan had called for spraying twenty-eight thousand acres. *Persistent Pesticides and Environmental Quality*, 6 COLUM. J. L. & SOC'L. PROB. 122, 124, 140 (1970). *See also* George Laycock, *The Beginning of the End for DDT*, 115 CONG. REC. 21,994-997 (1969).

ment from spraying the pesticide Dieldrin on certain farm areas to eradicate the Japanese beetle. Frustrated by what they considered to be a problem of national scope confronting environmental law—the judiciary's unwarranted confidence in the determinations of administrative regulatory agencies which too often tended to identify with the interests of those groups ostensibly being regulated—local supporters of the pesticide suit began searching for a means by which persons interested in protecting the environment could gain more adequate responses from the legal system.

In early 1969 the West Michigan Environmental Action Council (W.M.E.A.C.), whose members had participated in the 1967 case against the Agriculture Department, sent a letter to Professor Joseph L. Sax of the University of Michigan Law School requesting him to propose legislative reforms which would facilitate the bringing of actions to protect the environment. Sensitive to the apparent inability of environmentalists to obtain adequate relief from administrative agencies, and the deference with which courts have traditionally reviewed administrative determinations, Professor Sax drafted a bill which hopefully would create "a more responsive and sensitive forum in which to continue the . . . struggle for a better environment."[13] In essence, the bill would allow a citizen to bring his complaint against activities harmful to the environment directly before the courts without first seeking relief from an administrative agency.

Once drafted, the bill's supporters turned their attention to the problem of obtaining favorable legislative action. To offset the strong opposition expected from government agencies and industry, the proponents sought to mobilize public support with an extensive campaign encompassing a broad spectrum of environmental concerns. In the early stages, leadership and organization came from the membership of the W.M.E.A.C. This group was soon joined by other influential organizations such as the Mackinac (Michigan) Chapter of the Sierra Club, the Parent-Teachers Association, the League of Women Voters and the United Auto Workers.[14] Seeking to minimize duplication of effort and to pro-

[13] Letter from Joseph L. Sax to Mrs. Willard E. Wolfe, Feb. 4, 1969.

[14] The Sierra Club, a non-profit California membership corporation, was founded in 1892 and now has over eighty thousand members. The stated purpose of the Sierra Club is the preservation of scenic resources, forests, waters, wildlife and wilderness. This has been achieved largely through extensive educational programs and, more recently, by legal actions.

The West Michigan Environmental Action Council is an unincorporated association. Its membership, which consists of twenty-five civic organizations and over three hundred individuals, assists in coordinating the activities of individuals and organizations concerned with the protection and restoration of the environment.

Other organizations forming the Coalition include the Michigan United Conservation

vide organizational efficiency, these groups joined an umbrella organization known as the "Coalition to Pass H.B. 3055." The Coalition, working through constituent groups, became the bill's primary proponent.

The Democratic representative who was co-chairman of the House Conservation and Recreation Committee was asked to introduce the bill. His selection may have been crucial to the eventual passage of the law, for the Michigan House was controlled by a Democratic majority and the bill was referred to the Conservation and Recreation Committee.

Following the introduction of the bill, preparations were made for the first public hearing. Believing that the ultimate success of H.B. 3055 depended upon the amount of public support that could be generated, the proponents of the bill devoted substantial amounts of time and energy to assuring that the first and every subsequent public hearing were well attended, and that the witnesses for the bill were prepared to present well-documented testimony. Notice of each meeting was distributed by various means to the membership of all interested organizations and, judging by the number of people who attended, each hearing was considered by the proponents of H.B. 3055 to be entirely successful.[15]

Recognizing the more parochial and immediate political realities confronting passage of the bill, the proponents attempted to secure the support of both Republicans and Democrats. In this effort, the Coalition benefitted from the fact that 1970 was an election year. With an increasing public awareness of and concern for environmental issues, neither party wished to become known as an opponent of the bill. Since the Coalition had previously secured support from the Democrats in the state legislature, it focussed its efforts on the Republican Governor and his administration[16] whose endorsement would undoubtedly have been helpful in enlisting the support of Republican members of the legislature.

An initial setback to the Coalition's efforts to gain gubernatorial support took the form of an unfavorable "analysis" by the Attorney General.[17] This analysis, issued three weeks after H.B. 3055

Clubs, Trout Unlimited, the Audubon Society, The Izaak Walton League, Environmental Action for Survival (a student group at the University of Michigan) and the University of Michigan Environmental Law Society.

[15] Mrs. Willard E. Wolfe, History of House Bill 3055, (not dated) (unpublished manuscript in the files of Professor Sax, University of Michigan Law School).

[16] The Republican Governor of the State of Michigan was William G. Milliken.

[17] Attorney General Frank J. Kelley, Analysis of House Bill 3055, April 21, 1969 (unpublished analysis in the files of Professor Sax, University of Michigan Law School).

was introduced, set forth several grounds underlying the Attorney General's opposition to the bill: (1) the bill was not needed in view of present statutes which provide means for citizens to file complaints with state agencies to initiate correction of state law violators; (2) the bill could disrupt presently established and proven state agency methods and procedures; and (3) the bill might encourage the initiation of spurious suits.[18] Although most state agencies felt obligated to adopt the opinions of the Attorney General, the Department of Natural Resources, striking a more independent course, released the first of its analyses of H.B. 3055, immediately preceding the first public hearing, supporting the bill and suggesting only some "purely mechanical and minor" changes.[19] The fact that some public agencies expressed approval of the bill not only thwarted any attempt to present a united agency opposition, but also cast some doubt on the Attorney General's argument that to allow individual suits in the environmental arena would impede administrative efforts in this area.[20]

As it turned out, the Governor looked neither to the Attorney General, who was a Democrat, nor to the state agencies for guidance in formulating his position on H.B. 3055. Since the Governor was not a lawyer, he generally relied on his appointed Republican Legal Advisor[21] for "objective" legal counsel as well as for liaison activities with the legislature. This advisor was presumably the source of legal information utilized by the Governor in forming an opinion regarding the bill.

Soon after the first public hearing, the Legal Advisor submitted his analysis of H.B. 3055 to the Governor,[22] and assumed a neutral position by limiting his report to an outline of the bill's provisions commenting only on certain "weak" sections. His major concern with the bill was the absence of any "definite standards" to guide the courts in actions brought under the proposed

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[18] *Id.*

[19] Michigan Dep't of Natural Resources, Analysis of House Bill No. 3055, January 20, 1970 (unpublished analysis in the files of Professor Sax, University of Michigan Law School).

[20] The major state agency to publicly state its opposition to H.B. 3055 was the Department of Public Health, which is also responsible for air pollution control in Michigan. The first analysis by the Dep't of Pub. Health was issued on the day of the initial public hearing and expressed objections to the bill similar to those voiced by the Attorney General nearly a year before. Michigan Dep't of Public Health, Analysis of House Bill 3055, (not dated) (unpublished analysis in the files of Professor Sax, University of Michigan Law School).

[21] The Governor's legal advisor was Joseph H. Thibodeau.

[22] J. Thibodeau, Memorandum to Governor Milliken on House Bill 3055, January 26, 1970 (unpublished memorandum in the files of Professor Sax, University of Michigan Law School).

act, and the inclusion of several terms which he felt should be more specifically defined.[23]

By the time this analysis was made available to legislators and the public, interest in H.B. 3055 had grown considerably and the strength of its advocates had increased proportionally. Public hearings were being held across the state adding to the already high level of enthusiasm surrounding the bill.[24] The Governor was probably feeling pressure to take a stand on the bill, and although the proponents were not certain of the Governor's endorsement, they thought it would be extremely difficult, given the tremendous public support, for him to actively oppose it.

Approximately two months after submitting his initial analysis to the Governor, the Legal Advisor presented another expanded analysis to the House Committee on Conservation and Recreation. Although expressing the Governor's support for the *concept* underlying the bill,[25] he clearly intimated that the Governor's support was to be contingent upon certain changes in the phraseology of the bill. The Governor's major recommendations in regard to the definitional problem were: (1) insertion of the word "unreasonable" before the phrase "pollution, impairment or destruction" wherever it appeared in the bill; (2) insertion of the phrase "considering all relevant surrounding circumstances and factors" before any mention of a "feasible and prudent alternative to defendant's conduct;" and (3) deletion of the term "public trust" wherever it appeared in the bill.[26]

The proponents objected to these definitional changes asserting

[23] *Id.* at 2. These terms were "impairment, pollution or destruction of the public trust or air, water or other natural resources of the state," "reasonably likely," and "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."

[24] Several public hearings on H.B. 3055 were held during the 1970 legislative session, providing samplings of the dimension of public support. In addition, the hearings provided a forum for the discussion of proposed amendments to the bill.

[25] J. Thibodeau, *Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box*, 116 CONG. REC. S16,247 (daily ed. Sept. 22, 1970).

[26] J. Thibodeau, Analysis of House Bill 3055, at 6, March 18, 1970 (unpublished analysis in the files of Professor Sax, University of Michigan Law School). Thibodeau stated that he wanted to eliminate "public trust" for purposes of "clarification," because he saw no legal significance to the term. Some of the language, *e.g.*, "other natural resources" and "pollution, impairment or destruction," had been taken directly from art. 4, § 52 of the 1963 MICH. CONST. and, the proponents argued, to define it may give it more or less scope than intended. This same sentiment was expressed by Professor William Pierce of the University of Michigan Law School. Testimony of Professor Pierce before Michigan House of Representatives Committee on Conservation and Recreation, at 19, March 12, 1970 (unpublished testimony in the files of Professor Sax, University of Michigan Law School).

On the floor of the House, the term "public trust" was maintained in the bill and the language "consideration of surrounding circumstances" was omitted.

that an innovative act demands flexibility in its execution and that the courts should at least be allowed the freedom to adopt new and different approaches to individual protection of the environment. Nevertheless, to obtain the Governor's support, several of his suggestions were incorporated into a substitute bill which was drafted by his Legal Advisor after consulting with University of Michigan Law Professors Pierce and Sax.[27]

Although the substitute bill was reported out of the House Committee on Conservation and Recreation by a vote of twelve to one, some committee members and several of the proponents outside the legislature were still dissatisfied with the Governor's modifications. The fact that the *substitute* rather than the original bill was reported out of the committee chaired by the sponsor of H.B. 3055 was interpreted by many legislators to be indicative of the great importance attached by the proponents to the Governor's support.[28] Nevertheless, the substitute measure did not pass the House without further dispute and alteration. The conservationist groups decided to oppose on the floor the insertion, made pursuant to the Governor's recommendation, of the word "unreasonable" before the phrase "pollution, impairment or destruction" wherever it appeared in the bill for fear the word might establish a "loophole" in the bill.[29] This one word became the sole point of heated partisan disagreement. The majority of Republicans favored retention of the word on the ground that it would provide some guideline for the courts in enforcing the Act. However, the House Democrats, outnumbering the Republicans fifty-seven to fifty-three, were joined by a few Republicans and successfully voted to delete "unreasonable" from the bill.[30] Moreover, the other two amendments recommended by the Governor were also deleted from the final version of the bill.

Opposition to H.B. 3055 came from two principal sources: state manufacturers and regulatory agencies. However, because of the early widespread skepticism of the bill's chances of success, and because of the hesitancy of many manufacturers to

[27] Personal Interview with Joseph H. Thibodeau, October 9, 1970.

[28] Subsequent to the committee's adoption of the substitute bill, the Governor's office issued a press release stating that he now supported the bill "not only in concept, but in its present substituted form." Governor William G. Milliken, Press Release, Lansing, Michigan, Mar. 31, 1970 (in the files of Professor Sax, University of Michigan Law School).

[29] Thibodeau, *supra* note 25, at S16,252.

[30] The general consensus of the parties involved in the argument over "unreasonable" was that it was not a significant *legal* issue. Professor Sax stated that he would prefer the word not be included in the bill but that it was not important enough to warrant extended debate. Concern was expressed that if the word took on much significance courts might be inclined somehow to limit their interpretation of the bill's overall effect; but the argument over "unreasonable" was primarily *political*, and not *legal*.

publicly oppose an environmental protection proposal, opposition to the bill never became especially strong or vocal. Similarly, because of their concern for public opinion, individual manufacturers remained in the background and allowed the Michigan Chamber of Commerce to wage the major fight against the bill. One important consequence of this strategy was to make the outpouring of support for the bill seem all the more impressive. For example, at public hearings on H.B. 3055 only a very few of the hundreds of participants and spectators were opposed to the bill.

As public support for the measure grew, the organizations opposing the bill became more concerned with the potential impact of individual provisions rather than with the chances of the bill as a whole. Instead of broadside attacks, the opposition began to think in realistic terms of ways in which the scope of the bill could be narrowed. Thus, the battle between those for and those against was reduced to a dispute over whether the proposal would be adopted in broad terms allowing for the development of an environmental common law for Michigan, or whether the proposal would be more limited in scope.

Several amendments were offered which, in effect, would have drastically limited the scope of H.B. 3055. The first of these amendments, offered by the Water Resources Commission and supported by the Attorney General, other regulatory agencies, and the various manufacturing organizations, would have required a plaintiff bringing suit under the Act to file a petition with the court for leave to commence an action.[31] The plaintiff would have to show, in the petition, that all germane administrative procedures had been exhausted or the suit would be dismissed. In view of the fact that the amendment was introduced by the Water Resources Commission, one of the two state "watch-dog" agencies (the other being the Air Pollution Control Commission), it is not unreasonable to conclude that the motivation for the amendment was, in part, a defensive reaction on the part of these agencies to the central premise of the bill that existing environmental protection agencies were not responsive to the needs of the public. Another of the underlying bases for the amendment was the consideration often raised during legislative debates of whether the courts are competent to hear these complex questions of environmental quality which have traditionally been determined by administrative agencies. Thus, the amendment was de-

[31] Letter from Ralph W. Purdy, Executive Secretary, Michigan Water Resources Commission, to Representative Thomas Anderson, March 6, 1970.

signed to ensure that persons could not circumvent normal administrative procedures, and to make it easier for the court to dismiss the suit so that the agencies would not be constantly called upon to provide information for these suits. These agency objections to H.B. 3055 were substantially quieted, however, by the subsequent support given the bill, without the proposed change, by the Attorney General. Not only did the Attorney General's reversal of opinion place the weight of the state's legal advisor behind the bill, but because of his official position, the agencies in large part felt bound by his opinion.[32]

A second issue dealt with what the Chamber of Commerce considered to be the problem of spurious and harassment suits. The Chamber of Commerce offered a number of solutions by way of amendments, the most significant being that the Attorney General should have the power to review and "*dismiss* a complaint if *he* determines that no public interest is involved."[33] (Emphasis added). This proposal, in effect, would have given the Attorney General the power to make a final, non-appealable decision on whether a suit could be brought to trial—a determination the proponents felt would be more suitable for the judiciary. Those supporting the bill without the amendment set forth two reasons for not adopting the proposed change. First, in many cases the Attorney General would be the *defendant's* lawyer (*e.g.*, in a suit against a regulatory agency) and surely should not in that capacity have veto power over plaintiff's case. Second, it was argued that H.B. 3055 had a built-in safeguard against frivolous or spurious suits in that such claims are not only easily defeated but are generally more costly to the plaintiff than to the defendant. Although the above proposal was never voted upon by the legislature, concern over the possibility of frivolous suits did result in the adoption of an amendment allowing the court to require the plaintiff to post a bond or cash not in excess of five hundred dollars.[34]

Following passage of the substitute bill in the House,[35] the

[32] This reversal of the Attorney General's position on the bill was initially made known during the University of Michigan's, March, 1970 teach-in on the environment. Letter from Frank J. Kelley, Michigan Attorney General, to Douglas Scott, Co-chairman of ENACT, March 6, 1970.

[33] Michigan Chamber of Commerce. State Legislation Report, No. SL 2-70, at 2, Feb. 27, 1970 (unpublished report in the files of Professor Sax, University of Michigan Law School).

[34] The Michigan Manufacturers Association had lobbied for an increase to three thousand dollars. Michigan Manufacturers Association, Statement on House Bill 3055 by Mr. Dwight Vincent, May 13, 1970 (unpublished manuscript in the files of Professor Sax, University of Michigan Law School).

[35] The second substitute for H.B. 3055 was passed by the Michigan House of Represen-

Chamber of Commerce introduced an amendment in the Senate concerning the problem of burden of proof. Section three of the bill, as passed by the House, provided that when the plaintiff had established a prima facie case, the defendant could show, by way of affirmative defenses, that there is not a feasible and prudent alternative to his conduct "*and* that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."[36] (Emphasis added). Although those who were in favor of the bill as it passed the House argued that this provision merely made certain that the defendant would explain his conduct, the Chamber of Commerce considered it to be the imposition of an "almost impossible burden on any defendant."[37] They consequently proposed an amendment to change the "and" to "or" thereby giving the defendant the option of showing either that no feasible and prudent alternative to his conduct exists *or* "that such conduct is consistent with the promotion of the public health."[38] The opponents of the proposed amendment asserted that by permitting a defendant to continue conduct for which he could show there was no feasible and prudent alternative, even though inconsistent with the promotion of the public health, the efficacy of the bill would be seriously impaired; conduct damaging to the environment could continue for an indefinite period of time subject to little, if any, public restraint.[39] Although the Senate Committee on Conservation and Tourist Industry reported this amendment out with

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tatives by a ninety-eight to three vote and sent to the Republican-controlled (twenty to eighteen) Senate. MICH. H.R. JOUR., No. 57, at 1297, 75th Cong. Reg. Sess. (1970).

[36] The theory underlying this provision was that the defendant would have access to information not readily obtainable by plaintiffs, and therefor should

> have considered all reasonable alternatives and to have chosen the best of those available; to ask him to support his decision is merely to require that he reveal the process which he must already have undertaken, if he has planned rationally and with consideration for the public interest. He has the underlying data and documentation upon which his choice of a given course of action is based.

Pierce, Sax & Irwin, *Responses to "Thoughts on H.B. 3055,"* at 4, March 20, 1970 (unpublished manuscript in the files of Professor Sax, University of Michigan Law School). This section was designed to discourage "the common practice of assuming that a particular plan would go through, thereby failing to thoroughly examine the alternatives." *Id.*

[37] Michigan State Chamber of Commerce, Special Legal Subcommittee, Recommended Amendments to H.B. 3055, at 1, March 4, 1970 (unpublished report in the files of Professor Sax, University of Michigan Law School).

[38] *Id.* at 2.

[39] State Representative Thomas J. Anderson, Memorandum to Members of the Senate with reference to H.B. 3055, June 16, 1970 (unpublished memorandum in the files of Professor Sax, University of Michigan Law School).

a favorable recommendation, it was defeated on the floor of the Senate.[40]

The Chamber of Commerce also submitted an amendment which would allow as affirmative defenses, "compliance with existing standards set by rule or law," and the "state of the art defense,"[41] *i.e.*, that the technology necessary for control of this particular type of pollution had not been developed or made available. The Chamber of Commerce asserted that it would be unfair to penalize the defendant for his good faith attempt to meet existing regulations.[42] An alternative amendment submitted by proponents of the bill explicitly rejecting the Chamber's suggestion was enacted by the Senate: the courts may determine the "validity, applicability and reasonableness" of standards set by rule or law, and, if found to be deficient, "direct the adoption of a [more appropriate] standard."[43] This amendment was drafted to ensure that the court would not dismiss an action simply because the industry was complying with promulgated standards. It was successfully argued that plaintiffs should be given the opportunity to prove that the agency standards were inconsistent with the bill's legal standards of environmental protection. Thus, both the polluter and the appropriate agency could be forced to improve their attempts to alleviate damage caused the environment.

Conclusion

Several factors combined fortuitously to bring about the passage of H.B. 3055. First, relatively few organizers, aided by extensive media coverage, were able to stimulate public awareness of the environmental crisis and attract the support of thousands of citizens. Second, important political leaders reacted to the public support by aligning themselves with the bill's proponents. Third, the chairman of the committee to which the bill would be referred was chosen as the sponsor of the proposal before the legislature. Fourth, the Governor, Attorney General and most state departments eventually saw fit to add their support, further reducing the possibilities of political fragmentation of this issue. Fifth, the objections of the regulatory agencies were rather cautiously advanced in view of the formidable public support, the support of the Attorney General, and the strong backing of the bill by the Department of Natural Resources. Sixth, the

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[40] MICH. S. JOUR., No. 95, at 1628, 75th Cong. Reg. Sess. (1970).
[41] Letter from Peter W. Steketee to State Senator Basil W. Brown, May 29, 1970.
[42] *Id.*
[43] MICH. COMP. LAWS ANN. §§ 691.1202(2)(a), (b) (Supp. 1971).

major industries let the Michigan Chamber of Commerce fight the battle for them, giving the opponents but a single, though potentially powerful, voice. Finally, most of the strength of the opposition was never able to reach its potential because of a failure to accurately appraise the overwhelming public support from the outset of the campaign. As a result, the proponents of H.B. 3055 successfully opposed the attempts to limit the possible effect of the legislation, thereby achieving enactment of an instrument which should allow the development of an environmental common law.*

* This note is a revised and edited version of a study prepared by John A. Watts from material compiled by Donald Dworsky, Patrick McCauley, Michael D. McGuire and John A. Watts for a course in environmental law at the University of Michigan Law School.

II. MULTIPLICITY OF SUITS

A. Introduction

With the enactment of the Environmental Protection Act of 1970, the Michigan legislature has enabled any state citizen to institute legal action against polluters of the environment.[1] Because of the large number of possible plaintiffs—eight million Michigan citizens—a potential problem exists of excessive anti-pollution litigation and a multiplicity of suits against any single polluter's activity. The possibility of multiple suits entails complex and conflicting interests. While the general public shares an interest with potential defendants in avoiding further encumbrance of overloaded courts by repeated litigation on identical questions, the people of Michigan, particularly potential plaintiffs under the Act, also have an interest in ensuring that claims are fully and fairly litigated.

The defendants' interest can perhaps best be illustrated by a hypothetical situation in which individuals living adjacent to a factory sue the owner under the Environmental Protection Act to compel installation of anti-pollution devices. If the court rules favorably to plaintiff, other environmentalists would have no desire to relitigate the issue, but if the court rules unfavorably, parties not involved in the initial litigation may bring numerous new actions against the polluter. Such redundant litigation compels the owner to defend himself against repeated attacks based on identical claims, and may well hinder environmental reform by provoking adverse reaction from the judiciary and the general public.

The multiplicity problem, however, cannot be equitably resolved by having the initial suit against any particular act of alleged pollution preclude further litigation. Since the original plaintiff may have been poorly financed, inadequately represented, or may have sought inappropriate or inadequate relief,[2] the foreclosure of subsequent litigation would radically curtail the

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[1] MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1971). Prior to the enactment of the Environmental Protection Act of 1970, environmental contamination went unchallenged, since the right to sue polluters was limited to attorneys general and other government agencies.

[2] This problem becomes particularly complicated in view of the fact that the Environmental Protection Act gives standing not only to individual citizens, but also to the Attorney General and to other state and local government agencies (as well as to corporations, partnerships and other private legal entities). MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1971). The previously dismal record of a number of governmental

effectiveness of the new Act. The purpose of this note is to explore the extent to which multiplicity problems will actually arise, to examine whether any existing legal techniques can be applied to solve such problems, and to suggest new techniques to deal with multiplicity problems.

B. Possible Extent of the Multiplicity Problem

Relitigation of issues previously argued on the merits is unlikely for several reasons.[3] Environmentalists will realize that repeated attempts to gain injunctive relief against an alleged polluter on the basis of facts and law previously considered by a court will probably afford no positive results. Moreover, the high financial costs of bringing complicated environmental suits[4] will undoubtedly have a chilling effect on multiple litigation since environmental groups are unlikely to squander their resources relitigating hopeless causes.[5]

The court's power to consolidate will also tend to curtail multiplicity where concurrently pending actions involve a common issue of law or fact.[6] Although the Michigan court rules require

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agencies in acting on environmental matters and their apparent willingness to compromise many environmental cases suggests that it could be catastrophic if actions by government units could preclude subsequent suits by individuals.

[3] A look at the experience with multiple suits in the antitrust area can help to put the problem in perspective. Similar to the new Environmental Protection Act, the federal antitrust laws broadly open the way to repeated suits against the same defendant. In addition to the possibility of treble damage actions by potentially huge numbers of consumers or competitors, an antitrust violator may also be subject to actions by the Justice Department and/or the Federal Trade Commission. Nonetheless, the federal courts have never felt it necessary to take steps to deter multiple suits. A defendant's success in a civil suit brought by the Justice Department does not preclude a private treble damage action on the same claim. Conversely, government victory in a civil action is sure to open the way for successful private litigation based on an identical theory. Nor does one unsuccessful (or successful) private action bar subsequent private actions by anyone other than those party to the first action. Most revealingly, defendant's victory in an action brought by the government will not preclude a later government suit on the same theory on defendant's repetition of the very conduct held lawful in the prior suit. Despite this relative freedom from restriction on multiple suits, chaos has not resulted. Although there are some special factors working against the possibility of multiple suits in the antitrust area such as financial considerations, particularly related to the availability of damages and the fact that far fewer people are eager to litigate to protect the economy than the environment, the antitrust experience does suggest that the multiple suit problem is largely self-regulating. *See* P. AREEDA, ANTITRUST ANALYSIS, §§ 145-70 (1967).

[4] On the complexity of environmental cases, *see* Sive, *Securing, Examining, and Cross-Examining Expert Witnesses in Environmental Cases*, 68 MICH. L. REV. 1175 (1970).

[5] This is particularly true when one considers that most on-going environmental groups considering the possibility of relitigating a previously litigated problem would be faced with the much more reasonable alternative of committing their resources to litigation against some other environmental problem or polluter.

[6] *See* 2 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED, R. 505 (2d ed. 1963).

the common issue to be "substantial or controlling,"[7] it is clear that both the legal and factual issues in any two suits under the Environmental Protection Act will be identical regardless of the plaintiffs,[8] which means that the process of consolidation, as well as the management of consolidated suits, should be relatively easy.[9] In addition, the venue provision of the Act authorizing suits to be brought only where an alleged violation occurs will facilitate consolidation by eliminating the problem of consolidating actions pending in the different circuit courts.[10]

Other constraints will exist where the third or fourth party asserting the same environmental claim was influenced by an improper motive (*e.g.*, harassment), for the court has the power to apply the clean hands doctrine and dismiss the action.[11] Similarly, in extreme cases of multiplicity where the plaintiff has failed to join in prior suits against a particular act of pollution and is, thereby, guilty of unconscionable delay, the doctrine of laches is applicable.[12] More generally, a court, in "doing equity" between the parties to an action brought under the Environmental Protection Act, can look askance at a party who is merely relitigating a previously litigated case.[13]

Finally, the doctrine of stare decisis may dissuade some poten-

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[7] MICH. GEN. CT. R. 505.1. The federal consolidation rule, FED. R. CIV. PRO. 42, is identical to the Michigan rule, except that it omits this language.

[8] The issue of fact will always involve defendant's conduct resulting in pollution, and the issue of law will always involve the Environmental Protection Act of 1970.

[9] Relating to innovative techniques of dealing with a consolidated case, *see In re* Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953), which involved the consolidation of 273 suits brought by approximately 8,500 claimants. On the practical considerations governing consolidation, *see* Journapak Corp. v. Bair, 27 F.R.D. 509 (S.D.N.Y. 1961).

[10] MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1971).

[11] Curtin v. Benson, 222 U.S. 78 (1911).

[12] Cases on the use of laches against unconscionable delay are collected at 34 A.L.R.2d 1314 (1954).

[13] Indeed, as a practical matter, the venue provision of H.B. 3055, MICH. COMP. LAWS ANN. § 691.1202(2) (Supp. 1971), requiring suits to be brought where alleged pollution occurs, is likely to create judicial impatience with successive suits under the Act. Because of the venue provision successive suits will be tried in the same circuit court, possibly before the same judge. It is perfectly reasonable that a judge, having previously tried a suit against a given defendant, would be somewhat displeased to find himself rehearing an identical case brought by a new plaintiff. One particularly important area of judicial discretion would be in the area of temporary injunctive relief since many environmental suits turn on the plaintiff's motion for a temporary restraining order or preliminary injunction. For example, if an Environmental Protection Act suit seeks to halt the timbering of a forest area, preliminary relief until the case could be tried would be essential to the plaintiff lest his case become moot. Most courts might properly find the basis for such relief wanting if the same case had previously been carried to judgment by different plaintiffs. One of the few real incentives for multiple suits could be the prospect of interminably delaying a project by tying it up in preliminary injunctions while successive suits were litigated. Denial of such temporary relief would, of course, eliminate this prospect.

tial plaintiffs from relitigating issues previously adjudicated.[14] Since environmental cases are likely to raise more novel issues of law than the typical lawsuit, it is probable that a fair number of decisions in environmental cases will be decided on legal rather than factual grounds, particularly during the first few years when the courts are building a new common law of environmental disruption. If a first suit has turned on a legal point, potential plaintiffs will surely be reluctant to file a second identical case, since doing so would be likely to produce nothing more than summary judgment in defendant's favor.

C. Some Traditional Solutions

1. Single Forum Solution

The most direct solution to the problem of multiple suits is to bring all potential litigants into the courtroom whenever an action under the Act is commenced. In this way, a single suit would have binding effect upon all future litigants under the doctrine of res judicata.[15] This solution, however, seems utterly impractical. Leaving aside the question of whether there are any presently known devices which the courts may use to bring all potential litigants under the Environmental Protection Act into the same courtroom, it is perfectly clear that it is not practical to force eight million or so people (plus assorted government agencies and private groups) to attempt to work together in the same suit. Though no such extreme solution seems feasible, the possibilities for bringing a *substantial* number of interested parties into an initial suit under the Act are worthy of discussion.

2. Joinder

Compulsory joinder is a device traditionally used to promote judicial economy by requiring persons with similar or related interest in the subject matter of the litigation to be present before

[14] The determination of a point of law by a court will generally be followed by a court of the same or a lower rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case. Stare decisis is a matter of judicial policy and is motivated by the need to promote certainty, stability and predictability in the law. *See, e.g.*, Hertz v. Woodman, 218 U.S. 205 (1910); Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941).

[15] The doctrine of res judicata is that a final judgment rendered upon the merits by a court of competent jurisdiction is conclusive of causes of action and of facts and issues thereby litigated as to the parties and their privies, in all other actions in the same or any other court of concurrent jurisdiction. *See, e.g.*, Hoffman v. Blaski, 363 U.S. 335 (1960); United States v. International Bldg. Co., 345 U.S. 502 (1953); Commissioner v. Sunnen, 333 U.S. 591 (1948); Forsyth v. Hammond, 166 U.S. 506 (1897).

the court.[16] In addition to reducing the number of actions necessary to dispose of a claim against a particular defendant, compulsory joinder guards against one person affecting the interests of others without allowing them to participate in the disposition of the matter.[17]

To qualify for compulsory joinder, essential parties must be found who have an interest in the action or without whom complete relief cannot be granted.[18] If such parties are found but cannot be joined, the question becomes whether the action should proceed in their absence.[19] The joinder statutes provide the framework for determining who qualifies as a necessary party and whether the action should proceed without his joinder. The most

[16] For a general treatment of compulsory joinder in the State of Michigan *see* 1 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED, R. 205 (2d ed 1962). For federal procedure *see* 3A J. MOORE, FEDERAL PRACTICE ¶ 19.1 *et seq.* (2d ed. 1969); 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 511 *et seq.* (Wright ed. 1961) (see pocketpart for 1966 amendment). For a discussion of compulsory joinder in general *see* Note, *Federal Rules of Civil Procedure—Rule 19 and Indispensable Parties,* 65 MICH. L. REV. 968 (1967); Comment, *The Litigant and the Absentee in Federal Multiparty Practice,* 116 U. PA. L. REV. 531 (1968).

[17] Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964); Matthies v. Seymour Mfg. Co., 270 F.2d 365 (2d Cir. 1959), *cert. denied,* 361 U.S. 962 (1960).

[18] Many jurisdictions determine those required to be joined through categorization of parties. As first articulated by the Supreme Court in Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1854), parties were:

> 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties . . . . 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

These latter parties were called indispensable parties. However, these categories, used by the Federal Rules of Civil Procedure until 1966 when a major revision of Rule 19 was accomplished, tended to become too important, losing sight of more important considerations.

[19] The most frequent reason for non-joinder of interested parties is lack of jurisdiction. An action brought under the Environmental Protection Act of 1970 would be able to use the Michigan long arm statute which gives Michigan courts jurisdiction over persons with the necessary contacts in the state. MICH. COMP. LAWS § 600.701 (1968). *See also* 1 J. HONIGMAN & HAWKINS, *supra* note 16, R. 105.9. Any person who owns land within Michigan is also subject to limited jurisdiction of the courts. MICH. COMP. LAWS § 600.705 (1968). In addition, any land in the state is subject to a Michigan court's jurisdiction whether or not the owner is under the court's jurisdiction. MICH. COMP. LAWS § 600.751 (1968). Inasmuch as many environmental actions will involve land and the damage to that land, the Michigan courts should be able to maintain jurisdiction over the owners of the damaged property if for some reason the party did not join voluntarily. One possible plaintiff over whom the court would not be able to exercise jurisdiction without his consent is the plaintiff who lives across the border in Ohio or Indiana and wishes to sue a Michigan defendant under the Environmental Protection Act for damage to his air, water or other reasons. Nothing in the bill limits plaintiffs to Michigan residents; however, even if this plaintiff could not be brought within the jurisdiction of the court, it is unlikely that a court would find that the action could not be equitably maintained without him.

relevant considerations are: whether failure to join this person would result in a multiplicity of suits, putting an unnecessary burden on the courts and causing harassment to the defendant;[20] whether a judgment without this person would have an adverse effect upon his rights as well as the rights of those already parties;[21] whether the court would be able to render a valid judgment;[22] whether the plaintiff would be able to assert his claim elsewhere if the court dismisses the action for failure to join this person;[23] whether the court could fashion a decree in such a way as to eliminate prejudice to all persons involved.[24]

Under the Environmental Protection Act, compulsory joinder is probably inappropriate since the plaintiff does not fit within traditional concepts of an essential party. The crucial factor for joinder is the interest that the parties share which is generally thought to be an interest in the same dollars or in the same piece of property.[25] Without the necessary common interest, there is no compulsory joinder. No such specific interest would normally be present in a suit brought under the new Act. Since no damage amount is relevant, money is of no concern. Similarly, no interest exists in a particular piece of property, only an interest in attacking ways in which certain properties are used.

Compulsory joinder also seems unlikely because, under the Environmental Protection Act, the right of one plaintiff to sue is separable from another's right to sue the same defendant on the same claim.[26] One person can ask for equitable relief without affecting the rights of another to bring a similar action. This

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[20] *See* MICH. GEN. CT. R. 205.2(8); FED. R. CIV. P. 19(a)(2)(ii).

[21] *See* MICH. GEN. CT. R. 205.2(3); FED. R. CIV. P. 19(b).

[22] *See* MICH. GEN. CT. R. 205.2(1); FED. R. CIV. P. 19(b).

[23] *See* MICH. GEN. CT. R. 205.2(2); FED. R. CIV. P. 19(b).

[24] *See* MICH. GEN. CT. R. 205.2(4); FED. R. CIV. P. 19(b).

[25] *E.g.*, when an insurance company is sued by the federal government to recover the value of an insurance policy issued to a delinquent taxpayer, the insured is a required party because his money and rights in the insurance policy are being affected. Likewise, a suit for patent infringement by the owner of the patent required the joinder of the licensee where the owner had agreed to join the licensee in such suits. Each had an interest in the patent that would be materially affected by the outcome of the litigation. *See* United States v. Aetna Life Ins. Co., 46 F. Supp. 30 (D. Conn. 1942); Norvell v. McGraw-Edison Co., 270 F. Supp. 57 (E.D. Wis. 1967).

[26] The Environmental Protection Act of 1970 does not recognize any peculiar legal interests on the part of persons particularly affected by a given act of environmental disruption. Rather, and quite properly, all persons in the state stand in the same legal position with respect to any such act. MICH. COMP. LAWS § 691.1202(2)(1) (Supp. 1970) provides: "The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur . . . ."

separability of claims provided by the statute itself inhibits attempts to join all such claims. Even when the Environmental Protection Act case is compared to a tort action where defendant injures several persons at once giving rise to the same claim by each injured party, joinder would not necessarily follow, there being no requirement under traditional notions of joinder and due process that all those injured in a single incident be joined.[27] Thus it does not seem likely under the usual concept of compulsory joinder that possible plaintiffs under the Act can be required to join together in the action.[28]

Even assuming joinder could be required, in order to solve the multiplicity problem by having the greatest number of possible plaintiffs bound by the disposition of the action, it would be necessary to join everyone in the state. The costs of this endeavor would be tremendous. In the first place, all potential plaintiffs must be notified of their joinder.[29] If the cost of notification is to be borne by the plaintiff, as it most likely would be, he would undoubtedly be discouraged from continuing the suit.[30] Even if he did continue, the fact of having eight million people tied together in the same suit would be more disruptive of the judicial process, as well as more burdensome to defendants, than would be a multiplicity of suits.[31] Because this would be the only opportunity for plaintiffs to be heard, each plaintiff could be expected to exert as much energy in the joint trial as he would had he been allowed to bring a separate action. As much court time would be consumed in hearing motions and arguments,[32] and the defendant would have to answer as many interrogatories and attend as many depositions as would have been necessary in a series of suits.

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[27] In tort actions, joinder is relevant only to codefendants; joint tortfeasors may be sued severally or individually. *See, e.g.*, Tower v. Camp, 103 Conn. 41, 130 A. 86 (1925); Wrabek v. Suchomel, 145 Minn. 468, 177 N.W. 764 (1920); Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N.E. 956 (1892).

[28] The parties may choose to join together and would be entitled to do so under permissive joinder statutes, but this does not solve the problem of multiple plaintiffs who do not desire to sue together.

[29] The notice problem is analogous to that arising in class actions. *See* Northview Const. Co. v. City of St. Clair Shores, 12 Mich. App. 104, 162 N.W.2d 297 (1968); *see also* discussion of class actions in subsection *C infra*.

[30] An example of the costs which would be incurred here is found in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). In that case, the cost of providing personal notice to 3,750,000 persons was estimated at $400,000.

[31] Some indication of the procedural problems which would be posed in this situation can be seen in *In re* Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953). Management of this action, involving the consolidation of 273 suits with eighty-five thousand plaintiffs, was accomplished by using committees of plaintiffs' attorneys.

[32] Indeed, with repeated suits, the doctrine of stare decisis might eliminate some of the arguments raised in a single multiple party suit.

Furthermore, with such a large group, stipulations on anything would be impossible. Finally, a plaintiff joined in this action might be forced into a position in which it would be difficult for him to properly present his case. For example, he might be required to join at a time inconvenient to him either in terms of finances or in terms of collecting necessary information. Every time he wished to file a motion or request interrogatories there would be pressures from other plaintiffs to do so in a different fashion. The cost of notifying all the plaintiffs of actions he takes during the course of the trial would be quite high and might well discourage him from taking necessary strategic actions. Thus, the notion of requiring every person in the state to join in a single suit in order to avoid the multiplicity problem would create far more complex problems than would the multiple suits.

3. *Class Actions*[33]

The class suit has significant advantages over joinder as a device to limit litigation to a single suit binding upon all subsequent plaintiffs litigating the same claim against the same defendant. For example, the class suit permits the court to hear actions on behalf of large numbers of people without the necessity of jamming the courtrooms with litigants and their attorneys.[34] As one commentator notes, a class action "can achieve economies in the administration of the court system and in the enforcement of [the] numerous claims."[35] Also, courts have greater flexibility in administering a class action than would be possible in cases of mass joinder. Many class action rules, including the present Federal Rule 23 and Michigan Rule 208, grant the presiding judge

[33] For a general treatment of the subject of class actions, with a focus on Federal Rule 23, *see The Class Action: A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969). On Michigan Rules, *see* Meisenholder, *The New Michigan Pre-Trial Procedural Rules—Models for Other States?*, 61 MICH. L. REV. 1389 (1963). A general survey of the types of class actions available in the different states can be found in Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407 (1969). Generally, four divergent types of class actions are recognized. The oldest forms of the device are the common law class action and the 1848 Field Code class action. Although these forms have declined in importance in recent years, they are still employed in a significant minority of the states. *Id.* at 425-63. Of more recent vintage are class actions patterned on the 1938 version of Federal Rule 23. Michigan is one of the states using some variant of this form. *Id.* at 463-91. The fourth type is the revised Federal Rule 23 class action. This form was developed for use in the Federal courts in 1966 and has been adopted in a number of states. *Id.* at 491-96.

Despite the somewhat different backgrounds of the present federal rule and Michigan Rule 208, practice under both rules tends to be fairly uniform.

[34] In a class action, a few individuals may represent vast groups of people. The class in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) was thought to include about 3,750,000 purchasers of odd lot securities.

[35] Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. IND. & COM. L. REV. 515, 520 (1969).

significant authority to assure the fair and full conduct of the action.[36] In part, subdivision (d) of the Federal Rule permits broad measures to prevent undue repetition or complication in the presentation of argument and authorizes the imposition of conditions on representative parties or interveners. Such provisions are not only necessary to allow the courts to protect the interests of class members but create a flexibility in management which allows judicial control of suits involving vast numbers of plaintiffs.[37]

Despite these advantages, the class suit as a practical solution to the potential multiplicity problem of the Environmental Protection Act is in many respects little better than compulsory joinder. Even with the administrative flexibility available in class suits, it is still possible that sheer numbers might overwhelm the litigation and prevent the court from protecting the rights of individual parties or from reaching the merits of the action at all. Moreover, the courts will often require those originally bringing a class action to seek out additional named plaintiffs to represent certain interests within the state.[38] Although class actions are more efficient than joinder in dealing with tremendously large numbers of possible plaintiffs, they are nevertheless immensely complicated proceedings often resulting in substantial waste of judicial time and the litigant's resources.[39] Additional financial problems for potential plaintiffs are generated by due process requirements of notice to interested parties; if class members are to be bound by a judgment, they must receive notice of the pendency and significant developments of a class action.[40] The courts are divided on the question of who is responsible for bearing the cost of

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[36] *See* Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. IND. & COM. L. REV. 577 (1969).

[37] *Id.*

[38] *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.73 (2d ed. 1969). In addition to improving conditions relating to class definition, it is common for the courts to require the strengthening of class representation before a suit may proceed on a class basis; *see Advisory Committee on Civil Rules, Note of 1966 to Rule 23(c)(1)*, reprinted at 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01 [11] (2d ed. 1969). Such action is often required because of the constitutionally imposed condition that persons must be adequately represented by someone sharing their interests before they can be bound by a class suit; Hansberry v. Lee, 311 U.S. 32 (1940). Because of the diversity of those entitled to sue under the Environmental Protection Act (the group ranges from individuals to corporations to government agencies) strengthening of representation should often be required in suits brought under the Act.

[39] On some of the administrative problems involved in class actions, *see* Weithers, *supra* note 35, at 522-24. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962), *cert. denied*, 371 U.S. 801 (1963), an admittedly complicated case, various administrative problems required three years to resolve.

[40] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *See also* Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 559-60 (1969); Comment, *Constitutional and Statutory Requirements of Notice Under Rule 23(c)(2)*, 10 B.C. IND. & COM. L. REV. 571 (1969).

notice, but most often it has been held that the representative plaintiffs are responsible for this cost.[41] Plaintiffs, precluded from seeking damages under the Environmental Protection Act,[42] might well find the costs of initiating a class action prohibitive.[43]

Apart from these practical difficulties, there remains the problem of whether the courts may *force* plaintiffs to utilize the class device. There is little authority allowing a court to compel litigation as a class rather than as an individual. To be sure, a court could apply pressure toward this end by requiring joinder of excessively large numbers of persons; but forcing the plaintiff to choose between Scylla and Charybdis does little to alleviate the substantive problems of either joinder or class actions. Whether a court could order a plaintiff to convert an individual suit into a class suit is very doubtful. Neither Federal Rule 23 nor Michigan Rule 208 provides for compulsory class suits. Although Professor Moore argues that it is permissible for a court, at least under present Federal Rule 23, to order a suit transformed into a class action,[44] he does not cite any cases in which this power has been exercised.[45] Certainly if Professor Moore had been discussing the old version of Rule 23, his position would have been wrong, for at least two cases hold to the contrary.[46] The history and policy of the present rule suggest that its drafters had no intention of overturning these cases; during the drafting of the rule, a proposal

[41] *Compare* Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (plaintiff must pay notice) *and* Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967) (action dismissed on plaintiff's refusal to pay notice), *with* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968) (indicating that cost of notice may be assumed by court). If notice by personal service were required, though it may not be in cases under the Environmental Protection Act, the cost would be staggering and, for all practical purposes, would spell the immediate end of the litigation. Despite the cautious language on the point found in 1 J. HONIGMAN & C. HAWKINS, *supra* note 16, R. 208, the notice provision of Michigan's class action rule appears to make it a simple matter for the courts to permit notice by publication in appropriate cases. *See also* FED. R. CIV. P. 23(c)(2). Even if the notice device is publication, the costs would certainly be substantial.

MICH. COMP. LAWS ANN. §691.1203 (Supp. 1971), which provides for the apportionment of costs, might open the way to shifting the costs of notice to the defendant in cases won by the plaintiffs. This does not, however, help either plaintiffs unwilling to gamble on the possibility of reimbursement if the suit is successful (notice costs have to be expended early in the litigation), or plaintiffs who fail to prevail on the merits.

[42] The Act does not make provision for damage claims. It might be possible, however, to join an Environmental Protection Act case with a tort action seeking damage relief.

[43] In Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), the cost of providing personal notice to 3,750,000 class members was estimated at $400,000. Consider the possible costs if the class were eight million persons, or two hundred million.

[44] 3B J. MOORE, FEDERAL PRACTICE ¶ 23.02-2 n. 38 (2d ed. 1969).

[45] Professor Moore's only case, Richmond v. Irons, 121 U.S. 27 (1887), involves creditors' bills and the statement on which he seems to rely is merely dicta and only supports his position by implication.

[46] Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F.2d. 245, 251 (7th Cir. 1942); Matlaw Corp. v. War Damage Corp., 7 F.R.D. 349, *aff'd.* 164 F.2d 281 (7th Cir. 1947).

allowing a court upon its own initiative to convert an individual action into a class suit against plaintiff's wishes was dropped from the final revision.[47] The implication of this history is supported by the central policy embodied in the rule, which according to Professor Kaplan is to safeguard the interests of "the smaller guy."[48] To achieve this goal, the rule provides for collective redress of wrongs which, although involving only small claims by each individual, affect a great number of people.[49] It is difficult to infer from this purpose the authority to force compulsory class actions on small and unwilling litigants at the request of corporate defendants in order to protect such defendants from multiple suits. While there is no Michigan authority on the compulsory use of class actions, it is likely that the Michigan courts would follow the interpretation of old Federal Rule 23, on which the Michigan rule is based.

At a different level of analysis, it does seem clear that the courts can require the plaintiff, who on his own initiative seeks to litigate on a class basis, to define his class to include all potential plaintiffs under the Environmental Protection Act. Federal Rule 23(d)(3) permits the "imposition of conditions" on representative parties. Section 208.4 of the Michigan rule appears to contain analogous authority. Quite frequently, these rules have been used to require redefinition of classes as a prerequisite to continuing an action on a class basis.[50] Although such redefinition typically is designed to reduce a class to a more coherent or manageable size,[51] the power to impose conditions seems to provide an equal-

[47] Newberg, *supra* note 36, at 600.

[48] *Quoted in* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant,* 10 B.C. IND. & COM. L. REV. 501, 504. Professor Kaplan was Reporter for the Advisory Committee on Civil Rules when it drafted the 1966 revision of Rule 23. *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 375-400 (1967). Certainly the recent use of class actions justifies this sweeping view. The device has frequently been employed on behalf of welfare recipients, *e.g.,* King v. Smith, 392 U.S. 309 (1968); consumers, *see* cases cited in Starrs, *The Consumer Class Action—Part II: Considerations of Procedure,* 49 B.U.L. REV. 407 n.9; and tenants, *e.g.,* Gatreaux v. Chicago Housing Authority. 265 F. Supp. 582 (N.D. Ill. 1967). It has been widely used to challenge both racial discrimination, *e.g.,* Norwalk CORE v. Norwalk Redevelopment Agency, 42 F.R.D. 617 (D. Conn. 1967), *rev'd,* 395 F.2d 290 (2d Cir. 1968); Congress of Racial Equality v. Comm'r, Social Security Adm., 270 F. Supp. 537 (D. Md. 1967); Nesmith v. Y.M.C.A., 273 F. Supp. 502 (E.D.N.C. 1967); and malapportionment of government bodies, *e.g.,* Baker v. Carr, 369 U.S. 186 (1962). Its uses have also extended to such disparate groups as civil rights workers, *e.g.,* Chafee v. Johnson, 229 F. Supp. 445 (S.D. Miss. 1967); contract home buyers, *e.g.,* Contract Buyers League v. F. & F. Investment, 300 F. Supp. 210 (N.D. Ill. 1969); and Selective Service registrants, *e.g.,* Gregory v. Hershey, 311 F. Supp. 1 (E.D. Mich. 1969).

[49] *See* Ford, *supra* note 48, at 502.

[50] *See* note 38 *supra.*

[51] Thus in Philadelphia Electric Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968), the complainant was required to pare down a vaguely drawn class of about

ly appropriate device in which to require expansion of a proposed class. However, since the power to require class redefinition initially depends upon the plaintiff's decision to bring a class action it is doubtful whether this power will significantly curtail the multiplicity problem. Not many Environmental Protection Act plaintiffs are likely to make this decision. Because of the administrative problems which they create, class actions are generally useful in only two situations: when damages are sought and the class device can be used to aggregate a number of smaller claims which might not have been economically maintained as separate actions;[52] and when injunctive relief is needed on behalf of a group of similarly situated individuals and an injunction, if obtained by a single member of the group, will benefit only that member and not the other members of the group.[53] Actions under the Environmental Protection Act do not fall into either of these categories; damages cannot be awarded under the Act, and injunctive relief is as adequate when obtained through an individual action as through a class suit. Thus, it is difficult to see why environmental plaintiffs, particularly when faced with having to litigate for everyone in the state, would choose to bring a class action. Moreover the sanction available to enforce a condition imposed under Rule 23(d)(3)—denial of an opportunity to litigate on a class basis—is obviously not effective in a situation where the court is seeking to compel people to litigate on a class basis.[54] Finally, at least under the Federal Rule, individuals within the

eighteen thousand homebuilders to a more limited class including only those homebuilders operating within the district in which the action was filed.

[52] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (damages sought on behalf of class of securities purchasers with individual claims as small as seventy dollars).

[53] The college desegregation cases are typical of this situation. If one member of the group seeking admission sues separately on his own behalf and is successful in obtaining injunctive relief, he alone, and not other members of the group, will benefit from the injunction. But, where an injunction is obtained in a class suit on behalf of the entire group, the injunction can be used by each member of the class to obtain individual relief (*i.e.*, his or her admission to the defendant college). *See, e.g.*, Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala.), *aff'd*, 228 F.2d 619 (5th Cir.), *cert. denied*, 340 U.S. 939 (1955). *See also* Gregory v. Tarr, 311 F. Supp. 1 (E.D. Mich. 1969) (relief on behalf of a class of selective service registrants). By contrast, in the so-called "single issue" situation, adequate relief can be obtained on behalf of a group either by a class suit or by an action by one aggrieved individual alone. For example, suppose a group is seeking to halt the dumping of untreated wastes into a river. If one member of the group, suing alone, obtains injunctive relief, all members of the group will benefit by the resulting halt in the dumping of the wastes. No more effective benefits for the group can be obtained if they sue as a class. The only possible advantage of class injunctive relief here is that it provides a larger group of individuals who may subsequently enforce an injunction through contempt proceedings. *See* Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 413-15 (1969).

[54] *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.73 (2d ed. 1969).

defined class are permitted to opt out of the class if they so desire, removing themselves from the litigation entirely.[55] Thus, without a change in the underlying theory and practical administration of class action rules, the device cannot be counted on to bring all possible plaintiffs under the Environmental Protection Act into the same courtroom, and, even if it could, the problems created by using the device might well outweigh the benefits of avoiding multiple suits.

4. Collateral Estoppel

Under a theory of collateral estoppel, the decision of the first suit directed at an alleged act of environmental disruption would be binding on all possible plaintiffs under the Act without actually bringing all these persons into the first suit as parties.[56] Before collateral estoppel may be asserted, however, certain limitations on the application of the doctrine must be overcome.

One prerequisite is that the issues which are sought to be given conclusive effect must have been fully litigated.[57] The purpose of this requirement is reasonably clear. A party may not consider it worth his time and expense to raise and argue every possible issue involved in a case, and his failure to do so should not prevent him from subsequently raising that issue should it be relevant to some new cause of action.

Not only must all issues for which collateral estoppel is sought be fully litigated, but the issues must have been necessary to the outcome of the litigation.[58] Conclusive effect should only be given

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[55] *Id.* ¶ 23.55.

[56] As traditionally defined, the collateral estoppel doctrine provides that an individual or persons with whom he is in privity will be estopped from asserting a matter of fact if that matter has been previously determined against the individual or his privies in some other suit (at least so long as the matter was essential to the judgment in the former litigation). Cromwell v. County of Sac, 94 U.S. 351 (1877); *see generally Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 840–50 (1952); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); RESTATEMENT OF JUDGMENTS § 68 *et seq.* (1942). Collateral estoppel differs from res judicata in that the latter doctrine is only conclusive within the confines of a single cause of action. The purpose of both doctrines, however, is identical: litigation of an issue should come to an end once litigants have had their day in court. *See, e.g.*, Reed v. Allen, 286 U.S. 191 (1932); United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922).

[57] *E.g.*, Cromwell v. County of Sac, 94 U.S. 351 (1877); Bloch v. Mill Factors Corp., 119 F.2d 536 (2d Cir. 1941).

[58] Detroit Trust Co. v. Furbeck, 324 Mich. 401, 37 N.W.2d 151 (1949); The Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); United States Fidelity & Guaranty Co. v. McCarthy, 33 F.2d 7 (8th Cir.), *cert. denied*, 280 U.S. 590 (1929). One should also note that full litigation has also generally been interpreted to preclude collateral estoppel effect for default judgment and consent decrees. Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324 (10th Cir. 1948); Cutler v. Arlington Casket Co., 255 Mass. 52, 151 N.E. 167 (1926).

to "ultimate" facts not "mediate" or "evidentiary" facts.[59] Both the "full litigation" and "necessary to judgment" requirements increase the attractiveness of collateral estoppel as a solution to the multiplicity problem. Because they limit the binding effect of a prior judgment which is being asserted as conclusive in a later suit, they could be employed by the judiciary to assure that the use of a first Environmental Protection Act suit to collaterally estop later suits did not foreclose important environmental issues which had never actually been litigated. On the other hand, estoppel provides some assurance that defendants will not be subject to harassing litigation and that the courts will not be forced to expend time on issues previously adjudicated.

Mutuality of estoppel, where a litigant could not invoke the conclusive effect of a judgment unless he would have been bound had the judgment gone the other way, was at one time a general requirement for collateral estoppel.[60] However, a number of recent cases have discarded the mutuality requirement on the theory that where there is an identity of issues in two suits, a party against whom judgment has been rendered in one suit is consequently bound in subsequent suits regardless of the identity of his adversaries.[61] The most notable examples of the breakdown of the mutuality doctrine have been in the area of multiple party disasters, particularly airplane crashes.[62]

The use of collateral estoppel to resolve the problem of mul-

[59] This issue was raised in Judge Learned Hand's opinion in The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944). The Board of Tax Appeals had determined the defendant's basis as to certain "fully improved" lots. In a subsequent action to determine the basis for certain "partially improved" lots in the same area, the taxpayer argued that collateral estoppel required that the basis of the partially improved property must be found by subtracting from the basis of the fully improved lots the amount which the Board has found that the taxpayer spent to improve his "improved lots." The court held that in determining the value of the improved lots it was not necessary, though it may have been helpful, to determine the amount that the taxpayer spent improving the lots. The amount spent on improving the lots was thus only a mediate or evidentiary fact in the Tax Board hearing. As a mediate fact, the determination of this amount was not binding in the subsequent litigation.

[60] *See, e.g.*, Ralph Wolff & Sons v. New Zealand Ins. Co., 248 Ky. 304, 58 S.W.2d 623 (1933); First Nat'l Bank v. Barkshire Life Ins. Co., 176 Ohio St. 395, 199 N.E.2d 863 (1964).

[61] *See* Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); DePolo v. Greig, 338 Mich. 703, 62 N.W.2d 441 (1954). The accepted rule prior to *Bernhard* was that since a nonparty would not be bound by a judgment, notions of mutuality prevented the use of that judgment against a party by one not bound. Justice Traynor in *Bernhard* stated that as long as the party had the opportunity to fully litigate the issues in the first trial, there was no reason not to bind him to that determination. However, Traynor reaffirmed the view that it would be a violation of due process to bind a nonparty to a judgment. 19 Cal.2d, at 811, 112 P.2d at 894.

[62] Those courts which have abolished the mutuality requirement have applied a reasonableness standard to assertions of collateral estoppel by nonparties. Two of the airplane

tiple suits faces the more troublesome consideration of whether non-parties to an Environmental Protection Act suit are in privity or otherwise sufficiently connected to the party-plaintiffs who brought the case. If this connection between the plaintiffs is established, then collateral estoppel would apply to all decided issues. It is quite possible, however, that such a broad determination of privity would evoke significant problems of due process. Typically, collateral estoppel is used to give conclusive effect to determinations made in one suit when a *party* to that suit subsequently attempts to re-litigate these determinations in another suit. Moreover, it is generally assumed that binding non-parties to a former adjudication is a denial of due process because it deprives them of their opportunity for a day in court.[63] Although it is clear that a non-party may be bound by the outcome of an action if he is in privity with a party to the action,[64] it is exceedingly unclear whether successive plaintiffs in suits brought under the Act can be said to be in privity under traditional privity notions. Privity is generally found (1) where there is a common interest in property either through a concurrent or successive relationship in the same property,[65] and (2) where there is substantial identity between two or more persons.[66] Potential

cases serve as useful examples. In United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.* United Airlines v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. denied,* 379 U.S. 951 (1964), seven claimants brought suit in Washington and Nevada federal courts seeking to invoke a California judgment as collateral estoppel against United Airlines for damages resulting from an airplane crash. The initial action in California was brought by twenty-four plaintiffs who extensively litigated the issues over a period of fourteen weeks. The airline lost, appealed, and the judgment was affirmed. Considering these factors, plus the fact that the seven claimants did not live in California and were under no duty to intervene, the court ruled that the California judgment could be used as collateral estoppel against the airline.

A different conclusion was reached in Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d. Cir. 1965), *cert. denied,* 382 U.S. 983 (1966). A wrongful death action arose in California federal court as a result of an airplane crash which resulted in the death of all the passengers. The jury returned a verdict for the airline, but the judge granted a new trial. After the second trial, the jury returned a verdict for $35,000 in contrast to the $500,000 which was sought. BCPA did not appeal. Berner, the plaintiff in a separate but parallel action pending in federal court in New York, then asserted that the California judgment should be determinative against the airline in his case. Judge Moore, writing for a unanimous court, noted that since the first judgment had been relatively small, the airline might not have exerted the same energies in defending itself as it would in Berner's case – an inference supported by the airline's decision not to appeal. He therefore ruled that collateral estoppel should not be invoked by a plaintiff who was not a party to the first action when to do so would work substantial injustice upon the defendant. The court distinguished the United Airlines case in which the first action involved twenty-four of the thirty-one claimants and the issues were fully litigated and appealed.

[63] Hansberry v. Lee, 311 U.S. 32 (1940); Bernhard v. Bank of America, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942) (dictum).

[64] *See, e.g.,* Southern Pacific R.R. v. United States, 168 U.S. 1 (1897).

[65] RESTATEMENT OF JUDGMENTS § 83, comment *a* (1942).

[66] *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[3] (2d ed. 1965).

plaintiffs under the Environmental Protection Act do not seem to fall into either of these categories.

They do not have a traditional common interest in particular pieces of property; rather, they have an interest, recognized by statute, common to all members of the public in the natural resources of the state. Thus while there is a similarity of interest, there is not—because of the diversity of the citizenry—a common interest or a "substantial identity" in the sense of the conventional law of property. Even though there is no conventional common interest, all potential plaintiffs under the Act sue as members of the general public and not simply on their own behalf. In this sense, it might be said that any two plaintiffs under the Act represent the same interest and share "substantial identity."[67] The problem, however, is that the Environmental Protection Act does not embody the idea of a monolithic "public interest" which must necessarily be represented once and for all by a single attorney general, whether public or private. It contemplates that the public interest may incorporate a variety of interests and views that have not traditionally had their day in court; and it leaves open the opportunity for representation of a plurality of interests, different though none the less each legitimate, in litigation under the Act.

Even assuming that it would be possible to develop a new privity rule to bind environmental plaintiffs—for example, such a rule might deem plaintiffs under the Act to be in privity because of their analogous rights to sue in the public interest as private attorneys general—due process requirements might preclude such innovation. The Supreme Court in *Postal Telegraph Cable Co.* v. *Newport*[68] has suggested that due process requires privity to be narrowly construed. In that opinion, the Court stated that "[t]he

[67] The concept of "substantial identity" is illustrated by Chicago R.I. & P. Ry. v. Schendel, 270 U.S. 611 (1926). In this case, a decedent's administrator who was suing the decedent's former employer, solely on behalf of *B* (a relative of the decedent), under the Federal Employers' Liability Act, was held collaterally estopped as to an issue decided in a prior case between *B* and the employer under the Iowa Employers' Liability Act. The administrator was estopped because he was representing the same interest in the FELA suit, *B's*, which *B* himself had represented in the prior suit.

[68] 247 U.S. 464 (1918). The constitutional difficulties which arise in attempting to extend privity were illustrated in this case. The City of Newport had sold a license for the construction of telegraph poles and lines to a New York firm. The firm subsequently resold its rights to a Kentucky corporation. Neither firm paid the contract price allegedly owed the city for the license. Therefore, sometime after the first sale, Newport sued the New York firm and succeeded in obtaining a judgment. Newport subsequently attempted to recover judgment from the Kentucky corporation on the theory that the corporation was bound by res judicata by the earlier suit against the New York firm. This clearly would have been a proper assertion of right if the judgment in the suit against the New York firm had been entered before sale of its rights to the Kentucky firm. If the judgment had preceded the sale, the subsequent pruchasers, as successors to the New York firm's rights

opportunity to be heard is an essential requirement of due process of law in judicial proceedings."[69] This opportunity is denied where actual privity is lacking.

Besides the opportunity to be heard, due process requires that proper notice be given. Conceivable safeguards could be built into suits brought under the Act which would assure adequate notice, a fair opportunity to appear, and constitutionally sufficient representation which might avoid the constitutional difficulties of expanded notions of privity. The trouble with this remedy is that it gives environmental suits a quasi-class aspect with the panoply of problems (*e.g.*, high costs and complicated administration) associated with class actions.

D. Towards an "Innovative" Solution

The fundamental difficulty with attempts to solve the problem of multiple suits through the doctrines of joinder, class action and collateral estoppel is that these devices try to use the first suit directed at a particular act of alleged pollution as a vehicle to avoid multiple litigations. By trying to bring everyone together in the same courtroom, joinder and class actions (to the extent that they work at all) would probably burden environmental protection litigation with costs far out of proportion to the multiplicity problem. The safeguards necessary to avoid the constitutional

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and liabilities, would have been bound by the judgment. That is, they would have been treated as in privity with the New York firm. But because the judgment followed the sale, the Kentucky firm did not succeed to the judgment liability. It was not in privity as to the judgment. Nevertheless, the city argued, and the Kentucky courts accepted the view, that privity between the New York and Kentucky firms did exist. 160 Ky. 244, 169 S.W. 700 (1914). The U.S. Supreme Court in reversing the Kentucky decision, found that the two firms were not in privity, and stated:

> The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. The opportunity to be heard is an essential requirement of due process of law in judicial proceedings. . . . And a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, . . . so it cannot, without disregarding the requirement of due process give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein. 247 U.S. at 476.

The clear implication of this statement is that the Kentucky courts exceeded constitutional bounds in attempting to expand privity as they did. While the Supreme Court has apparently not addressed this exact same question since *Postal Telegraph*, there is no doubt that the principle for which it stands is still good law. And, indeed, this assertion can be supported by implications in a number of cases, most recently Justice Harlan's opinion in Provident Tradesmens' Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968). *See also* NLRB v. Lannom Mfg. Co., 226 F.2d 194, 199 (1955); Newberry Library v. Board of Education of Chicago, 387 Ill. 85, 55 N.E.2d 147 (1944); Hedlund v. Miner, 395 Ill. 217, 69 N.E.2d 862 (1946).

[69] 247 U.S. at 476.

difficulties of binding non-parties with collateral estoppel have much the same effect.

This suggests that perhaps the better approach to the problem of multiple suits is to deal with it when it arises, not before. Thus, litigation arising under the Environmental Protection Act need not be burdened with safeguards against future suits based on identical claims, especially when such suits are little more than a remote contingency. Instead of telling the successive claimants that their rights have been determined in a previous action, a better solution is to allow a defendant faced with yet another *identical* suit to seek de novo judicial protection against further litigation (so long, at least, as the subsequent litigation raises no new issues). Although no device in modern procedural codes is suitable for this task, it may be possible to construct a new device to deal with multiple suits out of an old and virtually forgotten equitable tool, the bill of peace.

1. Origins of Bills of Peace

Bills of peace originally evolved in the English chancery courts in the mid-17th century because of difficulties encountered in attempting to join a multitude of individuals with similar interests in a single action.[70] Bills of peace became a general means of confining litigation of multiple claims in two situations: first, where a large number of persons were suing or threatening to sue a defendant or group of defendants in a series of parallel suits involving common issues; second, where further litigation was threatened after a right had been determined in one or more previous actions.[71] In the former case, equity would order a halt

[70] Persons who were not joint obligees or jointly liable could generally not be united on one side of a case either by writ or by court action. Z. CHAFEE, CASES ON EQUITABLE REMEDIES 107 (enlarged ed. 1939). The first exception to this procedural tendency was expressed in How v. Tenants of Bromgrove, 23 Eng. Rep. 277 (Chancery 1681). The case involved a controversy between a lord and his tenants over rights of common. Taking jurisdiction in equity of a bill filed by the lord to determine his rights against the tenants collectively, Nottingham observed that the issue would normally be triable in actions at law, but that equity might hear the controversy in a single package to prevent a multiplicity of suits. The issues in the cases being legal, equity could not have heard it but for the multiplicity feature.

[71] These two categories were defined by Justice Field in Sharon v. Tucker, 144 U.S. 533, 541-42 (1891). *See also* Boston & M.R.R. v. Delaware & Hudson Co., 242 App. Div. 714, 273 N.Y.S. 670 (1934) (dissenting opinion). *See generally* Chafee, *Bills of Peace With Multiple Parties*, 45 HARV. L. REV. 1297 (1932). This article is reprinted, with additional annotation, in Z. CHAFEE, SOME PROBLEMS OF EQUITY 149-98 (1950). The flexibility, as well as the good sense, with which equity used bills of peace is illustrated by the decision in Mayor of York v. Pilkington, 1 Atk. 282 (Chancery 1737). The case arose out of a dispute between the City of York and a group of lords of manors and other land-holders over fishing rights in a section of the River Ouse. The city asserted that, by virtue of an ancient prescription, it had sole rights in the tract of river. Collectively the

to the further prosecution of separate litigation and would bring the whole controversy together in a single action to determine the respective rights and duties of the parties.[72] In the latter, equity would simply halt all further litigation of the issues previously decided.[73]

2. *Characteristics of Bills of Peace*

The question whether some variation of the bill of peace can be as effective in dealing with the multiplicity of suits under the Environmental Protection Act requires consideration of the characteristics of bills of peace[74] and possible difficulties which may arise from their use.[75] Two characteristics are couched in terms of prerequisites to the use of bills of peace: first, the multiplicity of suits against which the bill is sought must contain some common element;[76] second, the person seeking the bill must possess an existing cause of action or right of relief against future litigants.[77] As Pomeroy expresses it, a bill of peace will not issue unless the

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members of the multitude disputed whether there was indeed such a prescription. Individually each also asserted a separate and distinct right to fish based on his riparian proprietorship. In substance, then, the issues in the case broke up into, first, a common question of whether York had any right of fishery at all and, second, separate questions of whether, even if the city did have such a right, individual members of the multitude had superior rights. This was obviously a far more complex problem than that in *How v. Tenants of Bromgrove* where the issues between each member of the multitude and their lord were identical. Yet, despite the distinct claims of the various landholders, the chancellor sustained a bill of peace filed by the city. The chancellor's theory was this: only if the city won on the common question would it be necessary to hear each of the separate defenses. Permitting a bill would thus not only save repeated hearings in separate suits on the common issue, but it might also collectively determine whether there was any need to reach the defenses. This advantage, the chancellor apparently felt, was sufficient to incur the disadvantages of hearing the divergent claims of the multitude in a single proceeding should the city prevail on the common issue.

[72] H. MCCLINTOCK, PRINCIPLES OF EQUITY § 181 (2d ed. 1948). A collection of typical cases is found in Z. CHAFEE, CASES ON EQUITABLE REMEDIES 108 n.4 (enlarged ed. 1939). Sometimes the technique used to make a determination of collective rights was to try one of the multitude of suits and then to apportion relief to the other parties on the basis of the result in the test case. *See* Comment, *Procedural Devices for Simplifying Litigation Stemming from Mass Tort Cases*, 63 YALE L. J. 493, 502 n.60 (1954).

[73] 1 J. POMEROY, EQUITY JURISPRUDENCE § 247 (5th ed. 1941). *See also* Marsh v. Reed, 10 Ohio 347, 350 (1842) and the cases cited at 2 AMES, CASES IN EQUITY JURISDICTION 96 n.2 (1904). Repeated actions in ejectment were possible because of the common law rule that the judgment in one action of ejectment was not conclusive in a subsequent action even between the same parties. H. MCCLINTOCK, PRINCIPLES OF EQUITY § 192, at 520 (2d ed. 1948). Today, statutes regulating ejectment and modern actions for the recovery of real property make one successful verdict conclusive against later suits on the same claim. Z. CHAFEE, CASES ON EQUITABLE REMEDIES 205 (enlarged ed. 1939).

[74] A word of caution may be appropriate here. In attempting to define bills of peace, McClintock points out that: "The term 'bill of peace,' like all terms referring to forms of equitable relief, is descriptive, not technical, so that no precise statement of its scope is possible." PRINCIPLES OF EQUITY § 176, at 480-81 (2d ed. 1948).

[75] An extensive discussion of the traditional uses of bills of peace is at 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 243-75 (5th ed. 1941).

[76] First State Bank v. Chicago, R.I. & P.R.R., 63 F.2d 585 (8th Cir. 1933).

[77] *See* 1 J. POMEROY, *supra* note 75, at § 250, and cases cited therein.

suits at which it is directed have "*some* common relation, some common interest, or some common question."[78] Although it is clear that a complete identity of issues between the pending suits is not necessary,[79] some commonality is required. This requirement stems from the fact that the function of a bill of peace is to produce economies in the judicial system by reducing repetitive litigation.

The first prerequisite poses no problems for the use of bills of peace in environmental cases. As stressed earlier,[80] all possible plaintiffs under the Act stand in exactly the same respect to any potential defendant. Issues of the impact of defendant's conduct on the *particular* plaintiff bringing a suit will not be relevant in suits brought pursuant to the Environmental Protection Act. The only relevant issues in such actions will be the impact of the defendant's conduct on the public generally, and any two suits directed at the same defendant over the same alleged pollution will pose identical questions in all respects. Thus the only restriction imposed by the first prerequisite would be to preclude a potential defendant under the Environmental Protection Act from resorting to bills of peace until he had actually been subjected to a multiplicity of suits. The rationale for this restriction becomes quite clear when considered in the context of the Environmental Protection Act. If a defendant, immediately after litigating a single suit, could freely obtain a bill of peace to preclude the possibility of suits at some future time, however remote,[81] the underlying purposes of the Act might be easily frustrated.

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[78] *Id.* § 251.

[79] *See* discussion of Mayor of York v. Pilkington, *supra* note 71.

[80] *See* note 26 *supra*.

[81] One problem relating to the first prerequisite remains, however. It has sometimes been said in cases, *e.g.*, Tribette v. Illinois Central R.R., 70 Miss. 182, 12 So. 32 (1892), and in commentaries, *e.g.*, Comment, *Procedural Devices for Simplifying Litigation Stemming from a Mass Tort*, 63 YALE L. J. 494, 504–06 (1954), that not only must there be common issues in the multiplicity of suits against which a bill of peace is directed, at least when these suits are at law, but there must also be a "community of interest" among members of the multitude. By this, it is apparently meant that members of the multitude must share a common title or common interest in subject matter. Potential litigants under the Environmental Protection Act do not have a "community of interest," at least not a "community of interest" in this sense. Though the claims of all plaintiffs under the Act come from a common origin and have parallel issues, they cannot be said, for example, to share a common interest in a *res*. It is unlikely, however, that this problem will be a serious matter of concern in the context of the Act. For one thing, the test applied only where the multiplicity of suits being attacked were at law. Suits under the Environmental Protection Act are, of course, suits in what traditionally would have been equity. Besides, the "community of interest" test, while it may have had some popularity in the last century, was clearly not required under early cases like Mayor of York v. Pilkington, 1 Atk. 282 (Chancery 1737), and it has been rejected by more recent authority. Bailey v. Tillinghast, 99 F. 801, 807 (6th Cir. 1900). *See also* Z. CHAFEE, SOME PROBLEMS OF EQUITY 176–77 (1950).

The second prerequisite, that of an existing cause of action or right of relief in the *person seeking the bill,*[82] evolves, according to Pomeroy, from the principle that "[t]he very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of *some* form might arise."[83] A bill of peace, in other words, cannot be used to create a cause of action where none at all existed before. In typical cases, this requirement was usually satisfied because the party seeking a bill and each member of the multitude against whom the bill was sought had existing rights of action against the other. For example, in *How* v. *Tenants of Bromgrove*[84] the lord had a right of action at law against each of his tenants to restrict their rights of common and, conversely, each tenant had a right of action against the lord to enforce his rights of common. All that the lord did in obtaining a bill of peace was to consolidate his existing causes of action at law into a single suit in equity in order to avoid having to sue each of the tenants separately. It is clear, however, that the availability of the bill will not be absolutely precluded by the fact that an individual seeking a bill of peace has no existing and independent right against those to whom he seeks to have the bill applied. A defendant in several nuisance actions, for example, could not have originally sued the plaintiffs over the matter. Still, beyond question, a bill of peace will issue against the nuisance actions.[85] The reason is that the filing of the multiple suits apparently creates a new right of relief for the defendant. Or, perhaps more precisely, the filing of the suits activates the defendant's previously inchoate right to defend himself against the suits.[86] The requirement of an existing cause of action as a prerequisite to the availability of bills of peace, then, is really only a bar against the use of a bill by an individual who fears that at some future time persons against whom he has no existing causes of action may sue him.

It is just this restriction, however, which could impede the use of bills of peace against environmental suits brought under the Act. To be genuinely effective against the problem of consecutive suits over identical issues being filed against a defendant, bills of peace will have to be available against all possible plaintiffs under the Act. The process of obtaining a bill of peace will involve

[82] 1 J. POMEROY, *supra* note 75.
[83] *Id.* § 250, at 472-73.
[84] 23 Eng. Rep. 277 (Chancery 1681).
[85] *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 180-81 (1950).
[86] Storrs v. Pensacola & A.R.R., 29 Fla. 617, 11 So. 226 (1892); Turner v. City of Mobile, 135 Ala. 73, 33 So. 132 (1902).

some, perhaps substantial, relitigation of the issues raised in prior cases. Thus obtaining bills of peace against only present plaintiffs would not be markedly less expensive to a defendant than defending the suits brought by them on their merits. The use of bills of peace as a cure for the multiplicity problem will make economic sense only if they can be used to preclude more or less *all* future suits on the same claim.

Since a potential environmental defendant has no cause of action under the Act against potential plaintiffs, a bill should theoretically issue only if a new cause is created in him by a multiplicity of suits. Historically, a cause of action would arise with multiplicity; however, the focus in all prior suits where bills of peace were granted included only present parties to the dispute. Yet under the Environmental Protection Act every consecutive suit would necessarily involve a new plaintiff, and not a present party (any single plaintiff would be barred by res judicata from suing repeatedly on the same cause). The question thus becomes whether a series of consecutive suits brought by separate parties creates a cause of action in the defendant allowing him to sue for a bill of peace against all possible plaintiffs. An affirmative answer might be achieved through the kind of analysis used in the discussion of collateral estoppel to suggest that subsequent claimants would not be asserting personal rights, but instead would, in effect, be representing the public in vindicating a right held generally by the public. Since the prior suits were also brought by claimants vindicating a public right, not a personal one, maybe there does exist a multiplicity of suits between two "parties:" the public and the defendant.

Although there is value in suggesting that a cause of action does arise with environmental suits, it is probably more satisfactory to examine whether a substantial portion of the existing cause of action doctrine might be dispensed with in the situation arising under the Act. Presumably, no constitutional difficulties would be raised by easing the restriction. Clearly if a bill of peace is going to be used to preclude someone from exercising the power of suit given to him by the Environmental Protection Act, it will have to do so within the context of constitutionally mandated procedural requirements. Adequate notice has to be given and there probably has to be a fair opportunity to resist the bill.[87] Similarly, there might be some concern if the bill of peace device were being used to preclude possible plaintiffs from availing them-

[87] *See* Hansberry v. Lee, 311 U.S. 32 (1940).

selves of a jury trial.[88] The upshot is that a bill of peace may require substantial expenditures; but these concerns have nothing at all to do with whether a bill of peace ought to be available to a defendant faced with the possibility of multiple suits in the absence of an existing right of relief.

Although the matter is not particularly well articulated by Pomeroy[89] or other equity treatise writers, it would appear that nothing in the nature of bills of peace inherently requires the existing cause of action requirement. Rather it is likely that the requirement grew out of a variety of practical or public policy concerns. One of these was surely a general reluctance among judges and chancellors to multiply causes of action; the very purpose of bills of peace was to make "one lawsuit grow where two grew before."[90] It would have been exceedingly anamolous to allow use of the device created for this purpose to promote new litigation where there had been none before.

Yet the Michigan legislature in passing the Environmental Protection Act has at least intimated a very strong counter-policy for allowing a bill of peace to issue despite the complainant's lack of an existing right of relief where he previously has won suits brought against him under the Act. The purpose of the Act is to create a broad class of private attorneys general authorized to bring suit to vindicate the general public interest in a non-polluted, healthful environment. The Act does not give any individuals any special rights, but only the general right to sue on behalf of the public. Given these facts, there is no reason for everyone to have an unfettered right to sue under the Act. Once a defendant has been sued on identical claims, assuming the claims have been adequately prosecuted, the function of the Act has been fulfilled. The environmental merits of the defendant's conduct will have been examined and ruled upon. If the defendant has managed to prevail, the public's interest is not to be served by yet more attacks on exactly the same conduct. Indeed, at this point, there may be a greater public interest in avoiding court congestion resulting from repetitive litigation.

The traditional policies underlying the existing cause of action

[88] The Supreme Court in Beacon Theatres v. Westover, 359 U.S. 500 (1959), expressed just this concern: "[T]he availability of such equitable remedies as Bills of Peace, *Quia Timet* and Injunction," the court suggested, should be used sparingly when they might threaten the availability of a jury trial and particularly when the use of some other procedural device might preserve this availability. 359 U.S. at 509-10. This is not a problem in the context of the Environmental Protection Act since actions under the Act would be equitable in nature, and a jury trial would probably not be available in any actions under the Act anyway. *See* C. WRIGHT, FEDERAL COURTS 350-61 (1963).

[89] *See* notes 77-78 *supra*, and accompanying text.

[90] Z. CHAFEE, SOME PROBLEMS OF EQUITY 149 (1950).

requirement, on the other hand, lack force in the Environmental Protection Act situation. Since there is a clearly definable group of individuals eligible to sue under the Act, the practical problem of identifying against whom the bill should issue dissolves entirely. The fear that causes of action will be multiplied by allowing persons without existing rights of action to seek bills of peace against potential plaintiffs is groundless so long as availability of bills of peace is limited to defendants who have been sued at least once previously under the Act and are presently faced with a second or third suit on the same claim. Moreover, imposition of the prior suit condition on the availability of bills of peace minimizes the possibility that potential plaintiffs would be forced into court on the defendant's terms. If, for example, a defendant can only seek a bill of peace while a second, third or fourth suit is pending against him, his ability to favorably time litigation will be almost eliminated. To be sure, the availability of the bill will force potential litigants who have not yet filed an action under the Act to come into court when they might have preferred not to do so. But if the public's interest has already been represented in several prior cases on the same claim, it seems of little importance to permit these potential plaintiffs to relitigate the public's interest whenever they choose. In this context, the policies involved in the multiplicity of suits problem favor relaxing the "existing cause of action" prerequisite for bills of peace.

3. Bills of Peace Practice and Procedure

The procedural characteristics of bills of peace applicable to the multiplicity problem will depend on several factors. Since the paramount concern in issuance of a bill in an Environmental Protection Act situation will be the protection of the public interest, the traditional flexibility of chancery bills of peace should be retained to enable a bill to conform to the particular needs of the Act. However, issuance of a bill of peace against all eight million potential plaintiffs may encounter constitutional difficulties if individual rights of action were cut off without notice or hearing. Furthermore, joinder of all possible plaintiffs in opposition to a plea for a bill of peace, though theoretically possible, would be practically unworkable because of the almost incomprehensible procedural problems involved.

Since the use of the class device to sue defensive classes is well known, the use of a class action to join all potential plaintiffs as defendants does seem within the realm of possibility.[91] Although

[91] *See* FED. R. CIV. P. 23(a).

issuance of a bill of peace against a defensive class of eight million would pose some difficult administrative problems, these problems would be considerably less troublesome than those discussed above in the use of class actions as a "single action" solution to the multiplicity problem.[92] For example, an individual seeking a bill of peace would clearly have an interest in suing against a defensive class, and although notice costs and other charges would be quite high, those seeking bills of peace may be better able to pay these costs than Environmental Protection Act plaintiffs are able to pay the high cost of class actions as a "single action" solution. Furthermore, since the surcharge in the bill of peace situation is placed not on one's right to litigate against environmental disruption, but rather only on the availability of a remedy for curbing the hardship of having to defend against repeated environmental suits, the financial burden seems less objectionable. Finally, whereas suits brought as class actions entail possible problems of case management that might hinder judicial efforts to reach the merits, in the bills of peace situation the underlying environmental issues will have previously been litigated and the court will be primarily concerned with less complicated questions such as the content of previous litigation.

One possible problem of bills of peace against defensive classes is that the party seeking the bills might be tempted to sue named representatives of the class of potential plaintiffs who could not adequately defend the class' interest. The court, however, can avoid this problem simply by invoking its power to require a strengthening of class representation[93] by directing that the attorney general, other interested government agencies and private groups with a particular interest in the environmental problem at stake be named as representative defendants in a class suit seeking a bill of peace.

E. Conclusion

Because it is impossible to determine exactly how multiplicity problems under the Environmental Protection Act will develop, it is probably best that precise conditions for issuance of bills be developed on a case by case basis. However, some general specifications can nonetheless be suggested. As an initial matter, the very right to seek bill of peace relief ought to be conditioned on the happening of two events: first, the person seeking a bill of peace should have been previously sued at least once on a par-

[92] *See* notes 33-49 *supra*, and accompanying text.
[93] *See* note 38 *supra*.

ticular environmental claim under the Act; second, an identical suit should be pending at the time the bill of peace is sought. These requirements seem necessary to prevent abuses by persons seeking bills of peace for reasons other than dealing with an actual multiplicity of suits; for example, a company seeking a bill of peace to quiet suits against smoke emissions from its factory at a time when there was no real public concern over the emissions.

Furthermore, in entertaining a claim for a bill of peace, the courts should attempt to accommodate all of the conflicting interests involved in each case. They must determine whether relief from a multiplicity of suits is really required to protect the plaintiff's interests, and whether granting a bill might foreclose future litigation of important environmental points which have been inadequately or ineptly litigated in previous cases.

Traditional equity principles, such as denial of a bill's issuance to a defendant with unclean hands, or a defendant who has slept on his right to relief and to whom laches applies, are clearly appropriate in the multiplicity context.[94] Going beyond this, however, the courts should formulate some specific standards to determine whether all of the environmental issues in a claim against which a bill of peace is sought have been fully and fairly examined. Relevant factors should include whether circumstances have changed since previous litigation over the claim, whether all the issues involved in the claim were fully litigated previously, which issues were crucial to the decision in the previous litigation, who were the plaintiffs, whether these plaintiffs were in a position to adequately represent the general public interest, the type of relief sought, whether the quality of the legal representation was adequate, whether the previous cases were appealed, and to what appellate level.

Analyzing these various standards will require that the courts in bill of peace cases conduct fairly extensive trials involving not only an examination of previous cases, but also some reconsideration of issues in order to provide some basis for determining whether the previous litigation adequately covered the environmental issues involved in the claim in question. The burden of persuasion in these cases would, of course, lie on the person seeking the bill of peace.

Having applied these standards, a court which has been asked for bill of peace relief ought to issue an order accommodating the interest of the defendant to that of the public interest. If, for instance, only some of the issues involved in the claim in question

[94] *See* notes 11-13 *supra*, and accompanying text.

have been fully litigated previously, the order ought to preclude relitigation of only these issues. Similarly, if the particular concerns of some special interest group—back packers, persons living in proximity to the source of the alleged pollution, etc.—were not represented in previous litigation, the order should allow future litigation on behalf of these groups. Bill of peace relief should be denied if the first litigation was collusive, if the plaintiffs presented the case in a shockingly inadequate manner, or if the previous plaintiffs' presentation of their case had been hampered by a lack of funds. In some cases in which bill of peace relief is partially or wholly denied on one of these or other grounds, the court might still retain jurisdiction over the various parties and attempt to litigate the underlying claim fully and properly on the merits. Since the bill of peace claim will have necessarily brought all of the interested parties before the court, the court might find that the case presented the only real opportunity for complete litigation of this underlying claim; but this solution should not be used if trial at the particular time would cause any plaintiffs undue hardship. If the case were fully relitigated and Environmental Protection Act relief denied, a bill of peace could then issue. Finally, as an equitable decree, bills of peace would be modifiable after their issuance on a showing of changed circumstances.*

* This note is a revised and edited version of a study prepared by David Everson, Dawn Phillips, Phil Powers and John Trezise for a course in environmental law at the University of Michigan Law School.

III. THE CONSTITUTIONAL QUESTION: VAGUENESS AND DELEGATION OF POWERS

The Environmental Protection Act of 1970 allows private individuals to seek judicial protection of the state's substantial interest in environmental quality. To accomplish this objective, the Act establishes an obligation in both public agencies and private citizens to prevent or minimize environmental damage. To enforce that obligation, the Act also gives the courts significant authority to shape the law of Michigan on environmental protection. The purpose of this note is to consider whether the provisions of the Act placing a new burden on polluters and vesting discretion in the courts transgress constitutional prohibitions on grounds of vagueness, or as an improper delegation of authority.

A. VAGUENESS

The Act describes the obligations which it imposes in broad terms. Persons shall not pollute or otherwise destroy the environment as long as there is a "feasible and prudent alternative."[1] If there is no such alternative, the conduct may continue only if it is consistent with the "public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources."[2] The Act does not explicitly define pollution. The fact that the Act was drafted in broad, general terms raises a question of vagueness: whether the legislature is constitutionally prohibited from imposing duties couched in such expansive language on private citizens.[3]

1. A Bill in the Common-Law Mold

The sweeping language of the Act was consciously adopted by

[1] MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1971).

[2] *Id.*

[3] The most frequently cited statement of the vagueness doctrine is found in Connally v. General Constr. Co., 269 U.S. 385, 391 (1927):

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

However the test is phrased, the concern of the courts is that a person should be given fair warning of the conduct required of him before a law can be enforced against him. *Cf.* Burke v. Stephenson, 305 S.W.2d 926 (Ky. Ct. App. 1957) (statute will be declared void if it cannot be understood by persons upon whom it operates); People v. Detroit Edison Co., 16 Mich. App. 423, 168 N.W.2d 320 (1969) (due process is satisfied if defendant is fairly and reasonably informed of the obligation cast upon him).

the draftsmen.[4] The Act was written with a view towards creating a common-law right to a quality environment, a right inuring to the people as members of the public.

The common-law approach is particularly appropriate to environmental protection. Research is constantly revealing activities to be dangerous which were once thought to be harmless. The breadth of the bill assures that the courts will be open for private citizens concerned about the quality of their environment to raise such issues as evidence becomes available. Conversely, the existence of a specific definition is an invitation for the artful lawyer to argue that it excludes his client. This fear was articulated by the Texas Court of Appeals in *Houston Compressed Steel v. Texas:*

> The science of air pollution control is new and inexact, and these standards are difficult to devise, but if they are to be effective they must be broad. If they are too precise, they will provide easy escape for those who wish to circumvent the law.[5]

An expansive, flexible standard is further necessitated by the complexity of the pollution problem. Commentators have asserted that specific regulations which do not take into consideration the dynamic and changing quality of the evidence both with regard to the effects of pollution and the techniques for control are inappropriate.[6] Similar warnings against environmental measures narrowly restricted in scope were expressed during recent Con-

[4] It should be noted that the law tracks the MICH. CONST. art 4, § 52, which provides:

> The conservation and development of the natural resources of the state are hereby declared to be of *paramount public concern* in the interest of the *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.* (Emphasis added)

The relevant portion of the new Act provides:

> When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair, or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is *consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.* (Emphasis added).

MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1971).

[5] 456 S.W.2d 768 (1970). Air pollution was defined in the statute as

> the presence in the atmosphere of one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare . . . as to interfere with the normal use and enjoyment of . . . property.

[6] *See, e.g.,* Cassell, *The Health Effects of Air Pollution and their Implications for Control,* 33 LAW & CONTEMP. PROB. 197, 215 (1968).

gressional hearings on techniques to more thoroughly assess the impact of technology before its introduction into widespread use.[7] Nevertheless, to establish the propriety of the legislature's creating the framework for development of an environmental common law is not to resolve the constitutional question of vagueness resulting from the legislation's language.

2. *Trend in the Courts*

Courts have never required laws to define precisely the nature of the burden they impose. A legislature can rarely anticipate every fact situation to which a statute may be applied, nor articulate its intent in language so precise as to be incapable of different interpretations. On the other hand, there is a judicial policy, reinforced by the command of due process, to avoid the fundamental unfairness of a law so vague that one is unable to determine if his conduct is proscribed. Courts have harmonized these two policies differently according to the interests affected by the legislation. Although the basic standard remains constant, the manner in which it is interpreted and the required certainty and warning fluctuates depending on the court's construction of the statute, the nature of the subject matter restricted, and the sanction involved. Along with these factors is an overriding desire to give effect to the legislative intent whenever possible.

When a person can lose his freedom for violating a law, courts naturally examine it with a critical eye to assure that he could know his act was illegal. The Supreme Court has stated that the primary purpose of the "void for vagueness" doctrine is to prevent the injustice of enforcing an overly vague criminal law.[8] In recent years the "void for vagueness" doctrine has been used to strike down overly broad statutes which were used to restrict freedom of speech and expression.[9]

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[7] *Technology Assessment Seminar, Proceedings Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 90th Cong., 1st Sess. *passim* (1967). The witnesses "stressed the vastness and intricacy of the problems to be investigated and warned against the *dangers of . . . too narrowly focussed measures.*" (Emphasis added). Katz, *The Function of Tort Liability in Technology Assessment,* 38 U. CIN. L. REV. 587, 590–91 (1969).

[8] In Jordan v. DeGeorge, 241 U.S. 223, 230 (1951), the Court declared: "The essential purpose of the void for vagueness doctrine is to warn individuals of the criminal consequences of their conduct." State courts are in agreement that criminal statutes must be construed narrowly, and that the unfairness of an overly broad criminal statute must be avoided. *See, e.g.,* People v. Consumers Power Co., 275 Mich. 86, 265 N.W. 785 (1936); Otis v. Mattila, 281 Minn. 187, 160 N.W.2d 691 (1968); State v. Tatreau, 176 Neb. 381, 126 N.W.2d 157 (1964); Chadwick v. State, 201 Tenn. 57, 296 S.W.2d 857 (1956); Duffy v. Crown Central Petroleum Corp., 366 S.W.2d 956 (Tex. Ct. Civ. App. 1963); State *ex rel.* Ganon v. Krueger, 31 Wis.2d 609, 143 N.W.2d 437 (1966).

[9] In Winters v. New York, 333 U.S. 507 (1948), the Supreme Court reviewed the conviction of a New York law banning papers "principally made up of . . . accounts . . . or

The courts are in agreement that where criminal penalties and limitations on personal freedoms are involved, the standard of certainty is higher than when economic interests are regulated. The prevailing judicial policy is to allow legislatures when regulating economic interests to protect the public interest to proscribe conduct in very broad terms. In *Winters v. New York,*[10] the Court explained: "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." The Court stated further: "This Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression."[11] Justice Brennan, in *Smith v. California,*[12] went on to explain why specificity is required of statutes affecting such fundamental rights: "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[13]

Courts recognize that frequently statutes cannot be both specific and effective due to the nature of the activity being regulated and the dissimilar fact situations to which the law would apply. In *Boyce Motor Lines, Inc. v. United States,*[14] defendants challenged a penal regulation of the Interstate Commerce Commission which required all motor vehicles transporting explosives and other dangerous substances to avoid, as far as practicable and where feasible, driving through congested thoroughfares, tunnels, viaducts, and other places where many people were likely to be. The Court responded to the charge that the statute was unconstitutionally vague by saying:

> [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen vari-

pictures, or stories of deeds of bloodshed, lust or crime." The Court found the statute too vague because it failed to distinguish clearly enough the "line between the allowable and forbidden publications. No intent or purpose is required – no indecency or obscenity in any sense heretofore known to the law." *Id.* at 519. *See generally* Note, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

[10] 333 U.S. 507 (1948).

[11] *Id.* at 515, 517. In a similar vein, the Idaho Supreme Court, finding a statute unconstitutional which regulated the distribution of campaign literature, noted parenthetically that "although some limitation on speech is permissible, it cannot be accomplished by a somewhat vague statute even though the statute would be sufficiently definite if, for example, it restricted an economic interest." State v. Barrey, 92 Idaho 581, 583, 448 P.2d 195, 197 (1968). *See also The Void-For-Vagueness Doctrine of the Supreme Court, supra* note 9.

[12] 361 U.S. 147 (1959).

[13] *Id.* at 151.

[14] 342 U.S. 337 (1952).

> ations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently no more than a reasonable degree of certainty can be demanded.[15]

The Michigan Supreme Court followed the same approach when reviewing a statute allowing the Board of Registration to revoke the medical license of doctors who engaged in advertising of medical business in which grossly improbable statements were made. The court rejected the vagueness argument on the ground that "[i]t would be quite impossible for the legislature to enumerate all of the specific statements which might be grossly improbable."[16]

In *People v. Associated Oil Co.*,[17] the California Supreme Court reviewed a statute in many respects similar to the Michigan Environmental Protection Act: the Michigan Act proscribes "impairment of the environment" where there are "feasible and prudent alternatives"; the California provision prohibited "unreasonable waste" of natural gas, and provided for equitable relief as a remedy.[18] The court, in upholding the statute under challenge for vagueness, noted the necessity of the broad terminology: "because of the many and varying conditions peculiar to each reservoir and to each well . . . it would be *impossible* for the legislature to frame a [specific] measure . . . ."[19] (Emphasis added).

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[15] *Id.* at 340.

[16] Warnshuis v. State Bd. of Reg. in Medicine, 285 Mich. 699, 281 N.W. 410 (1938). This is part of the rationale for a large group of professional misconduct cases. *See, e.g.*, State v. Durham, 191 A.2d 646 (Del. Sup. Ct. 1963); and Morrison v. State Bd. of Education, 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969), upholding a statute allowing teachers to be removed for "moral turpitude and unprofessional conduct," and cases cited therein.

[17] 211 Cal. 93, 294 P. 717 (1930).

[18] The Oil and Gas Conservation Act, CAL. PUB. RES. CODE §§ 3300, 3312 (Deering 1954) provides

> § 3300: The unreasonable waste of natural gas by the act, omission, sufferance, or instance of the lessor . . . is opposed to the public interest and is unlawful.
>
> § 3312: Wherever it appears to the director that the owners . . . are causing or permitting an unreasonable waste of gas, he may institute [suit] . . . in the name of the people . . . to enjoin such unreasonable waste of gas . . . .

The law was a response to large releases of natural gas from oil wells which the legislature wanted to limit after the discovery that the gas was a very valuable energy source.

[19] 211 Cal. at 108, 294 P. at 724. The court stated that

> [c]itation of authority is not necessary to support the statement that the standard of reason has been applied in many cases where certainty is less capable of measurement than in the present case, for instance, in statutes prohibiting unreasonable restraints of trade, the common-law rule of a reasonable use of water by riparian owners, the rule of law regulating the duty of care, etc. *Id.*

Other courts have spelled out in similar detail the different situations to which an act

Perhaps the best known example of the judicial approval of broadly drafted legislation is the Sherman Anti-Trust Act,[20] which was passed in response to a public outcry over the monopolistic practices of the large trusts of the late 1800's. Prior to its enactment, a body of law existed which prohibited restrictive arrangements between competitors,[21] but that approach was not sufficient to protect the public interest. The legislative response was the Sherman Act which (1) restated the rights and obligations of private enterprise in the broadest terms (actions became unlawful which amounted to a "restraint of trade"); (2) provided criminal sanctions for violations; and (3) established a cause of action in private citizens for equitable relief and treble damages.[22] The Supreme Court did not find the broad language of the Act constitutionally troublesome, but rather held it an appropriate response to the problem. As Justice Hughes wrote in *Appalachian Coals, Inc. v. United States*:[23]

> As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.

Of the standard established in the law, the Court said the Act's "general phrases, interpreted to attain its fundamental objects, set

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applied and the concomitant necessity for broad language. In Illinois Steel Co v. Fuller, 216 Ind. 180, 23 N.E.2d 259 (1939), the Indiana Supreme Court reviewed provisions of the state Workmen's Compensation Act requiring that employers supply "serviceable gas masks" and "sufficient means of ventilation" in workrooms in which there were "dangerous, noxious, or deleterious gases." The court rejected the vagueness argument:

> It may be observed that in the adoption of the . . . statutes . . . the General Assembly was undertaking to impose safety measures with respect to factories, establishments, and industries of many kinds. For example, masks that would be serviceable and a means of ventilation that would be sufficient in a gaseous mine might be wholly unsuited or inadequate in a factory where poisonous chemicals or explosives were manufactured, or vice versa. It would . . . be impossible to prescribe by law definite specifications as to what particular type of gas mask or what particular means of ventilation would be serviceable and sufficient under all the varying circumstances to which the acts are applicable . . . .

216 Ind. at 185, 23 N.E.2d at 262. Substitute "feasible and prudent alternative" for "masks that would be serviceable and a means of ventilation that would be sufficient" and the argument applies directly to the Michigan Environmental Protection Act.

See also Gorin v. United States, 312 U.S. 19 (1941) (broad standards needed in relation to national defense); Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936).

[20] 15 U.S.C. §§ 1-7 (1964).

[21] The common law forbade contracts, combinations and agreements creating or tending to create a monopoly, or unreasonably suppressing or restraining trade. These laws, however, proved to be ineffective because at most the court could declare the contract void and unenforceable. A. NEALE, THE ANTI-TRUST LAWS OF THE U.S.A. (2d ed. 1970).

[22] 15 U.S.C. §§ 1-7 (1964).

[23] 288 U.S. 344, 359-60 (1933).

up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce . . . ."[24]

Justice Hughes' opinion is germane to Michigan's Environmental Protection Act of 1970 in two important respects. First, it accepts a statute which is phrased in expansive terms. Second, it recognizes that the broad language of the Sherman Act adequately describes a judicially enforceable standard. Indeed, the Environmental Protection Act goes beyond the anti-trust law's statement of the wrong, and describes the issues which are to be considered and the factors which are to be weighed in determining the propriety of the defendant's conduct. Thus, the Act asks whether there are feasible and prudent alternatives to the pollution. If not, the court must determine the public need for the defendant's conduct to decide whether it should be allowed to continue given the great weight which is to attach to the public interest in the preservation of the environment.[25] The Environmental Protection Act, like the Sherman Act, provides workable guidelines for judicial inquiry.

3. Clear Legislative Intent Required

To be sure, the application of each of the statutes previously discussed to specific fact situations could not be predicted with precision. Forthright jurists have acknowledged, none more lucidly than Justice Holmes in upholding the Sherman Act against a charge of unconstitutional vagueness, that "[t]he law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree."[26] Yet, it would be wrong to say that the courts have given cavalier treatment to the interests of defendants in knowing what the law requires of them. The courts realize that the defendant usually understands full well the intent of the regulation at issue, is well aware of the alternatives he might have chosen, and frequently comes to the court hoping to win a battle which he lost in the legislature.

This point is well illustrated by the Minnesota Supreme Court's decision in *City of St. Paul v. Haugbro*.[27] The City of St. Paul passed an ordinance prohibiting the emission of "dense smoke" from chimneys. The court answered the vagueness challenge by saying:

> [N]or will any subtle distinction be indulged as to what is

[24] *Id.* at 360.
[25] MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1971).
[26] Nash v. United States, 299 U.S. 373, 377 (1913).
[27] 93 Minn. 59, 100 N.W. 470 (1904).

> meant by 'dense smoke' as the terms are used in the ordinance. The terms used will be understood as commonly employed and this court will understand by 'dense smoke' a volume of dark, dense smoke as it comes from the smokestack or chimney . . . .[28]

The court knew that the defendants and all citizens were aware that heating with soft coal was one of the most serious causes of St. Paul's substantial winter air pollution problem. As a result, the court would not tolerate defendant's effort to postpone the implementation of the legislation until the adoption of a specific regulation for each class of polluters.

The implication of these cases on vagueness is that while a few of the terms of each act in question may admit of some ambiguity in the abstract, the court will look to the statute as a whole—and the practical context from which it emerged—in order to determine whether the law is sufficiently clear. Once the policy decision of the legislature is articulated, the court's role is to implement, not frustrate that policy. As the Indiana Supreme Court stated in *Illinois Steel Co. v. Fuller*:[29]

> When it is asserted that a statute is so indefinite . . . the court must consider the enactment *in the light of the problems with which the Legislature was undertaking to deal*. . . . [S]uch statutes are valid when they clearly designate the dangers and hazards against which the Legislature sought to provide protection and reasonably indicate the means or methods by which that is to be accomplished. (Emphasis supplied).

Courts often rely on the use of commonly used words as a factor in the determination that the policy of an act is adequately set forth so as to enable defendants to determine obligations. In *Smith v. Peterson*,[30] the California Court of Appeals dealt with statutes making it a criminal offense to operate an automobile with

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[28] *Id.* at 472.

[29] 216 Ind. 180, 185, 23 N.E.2d 259, 262 (1939). *See* note 19 *supra* for a discussion of the case. *See also* People v. Detroit Edison Co., 16 Mich. 423, 168 N.W.2d 320 (1969), where defendant power company argued that it was unable to determine if it was in violation of the statute because the definition of "smoke" in the statute was too ambiguous. The court acknowledged the ambiguity, but answered that "[t]he common council chose words and expressed intentions which are not capable of being so completely misunderstood by a company in the position of defendant which uses at least nine large smokestacks." *Id.* at 428, 168 N.W.2d at 323. The court went on to affirm that

> [i]t then may become the *duty* of the court to interpret and construe the word or terms in the statute in order to give effect to the expressed intent of the legislative body so as not to render the statute and the intent ineffective. *Id.* at 426, 168 N.W.2d at 322. (Emphasis added).

See also Geraldine v. Miller, 322 Mich. 85, 33 N.W.2d 672 (1948); Benjamin v. City of Huntington Woods, 349 Mich. 545, 84 N.W.2d 789 (1957).

[30] 131 Cal. App. 2d 241, 280 P.2d 522 (1955).

a muffler which made "excessive noise." The court concluded that the policy underlying the enactments was made clear by the use of commonly used terms: "while these are abstract words, they have, through daily use, acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[31]

Analogously, the words in the Environmental Protection Act of 1970, "feasible and prudent alternatives" to "impairment" and "destruction of the environment," have become familiar terms in the law. "Feasible and prudent alternatives" appears in numerous statutes[32] and court opinions.[33] Of course, "public health, safety, and welfare" is a familiar legal phrase that describes concisely the public interest, and "pollution, impairment, and destruction of the environment" have been the subject of public and private nuisance law for centuries.[34] No one would argue that the law of nuisance is unconstitutionally vague, even though it is manifestly clear that the doctrine proceeds from broad principles, and often individuals cannot know exactly what the outcome in a particular fact situation is going to be.[35] To say that the Michigan Environmental Protection Act is unconstitutional is to argue that the legislature cannot create a new right in the common law tradition. Courts have disposed of this question with little difficulty. In *Air*

[31] *Id.* at 247, 280 P.2d at 527. "Words of common usage" have been held to comply with constitutional requirements in a variety of settings. In Sproles v. Binford, 286 U.S. 374 (1932), the Court upheld a criminal statute requiring trucks carrying explosives to use the "shortest practicable route":

> 'Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding .... The use of common experience as a glossary is necessary to meet the practical demands of legislation.

286 U.S. at 393.

[32] *See, e.g.*, § 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (Supp. V, 1970):

> [T]he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park ... unless (1) there is no feasible and prudent alternative to the use of such land ....

In Citizens to Preserve Overton Park v. Volpe, 39 U.S.L.W. 4287, 4290 (U.S. Mar. 2, 1971), the Supreme Court called the provision a "clear and specific directive."

[33] *See, e.g.*, Attorney General *ex rel.* Township of Wyoming v. City of Grand Rapids, 175 Mich. 503, 141 N.W. 890 (1913).

[34] Air pollution was the subject of early nuisance cases. *See* James Bond's Case, Moore K.B. 238, 72 Eng. Rep. 553 (1587) (injunction issued against the continued operation of a pigeon-house), and William Aldred's Case, 9 Co. Rep. 57, 77 Eng. Rep. 816 (1610) (smoke from a lime kiln held to be a nuisance). *See also* Home Owners v. Detroit, 298 Mich. 622, 299 N.ffl. 740 (1941) (noxious gasses and odors); Renken v. Harvey Aluminum, Inc., 226 F. Supp. 169 (1963) (air pollution).

[35] The Massachusetts Supreme Court wrote, in Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914), dealing with air and noise pollution: "The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all circumstances." *Id.* at 488, 104 N.E. at 373.

Comm'n v. Coated Materials,[36] a Pennsylvania court examined a statute prohibiting pollution "which unreasonably interferes with the comfortable enjoyment of life." To the argument that the definition was unconstitutionally vague the court responded:

> [T]he present contention that the definition of 'air pollution' is uncertain . . . cannot stand. The language employed in the statute is equivalent to the definition of a nuisance which is certainly firmly established in the law.[37]

The plain fact is that courts have accepted statutes regulating economic interests in terms far less precise than the Environmental Protection Act. When complex activities require broad, inclusive regulatory statutes, courts require only that the legislature articulate a clear policy direction.[38] The court will render the legislative effort nugatory only if the statute is so conflicting, unclear or internally inconsistent that the court cannot ascertain its intent. The policy behind the Environmental Protection Act is well understood. The legislature stated concisely its desire that all persons, public and private, examine with greater care the social costs of their activities, and consider a broader range of alternatives to protect the public right to environmental quality.

The vagueness argument is especially inappropriate in the case of the Environmental Protection Act because of the context in which the bill is to operate. Potential defendants under the Act were subject to greater uncertainty about their duties not to pollute before the bill was passed. For example, a Michigan industry which is a source of both air and water pollution falls under the rules and regulations of the Michigan Air Pollution Commission, which specify that

> [n]o person shall cause or permit the emission of an air contaminant or water vapor . . . which causes or will cause detriment to the safety, health, welfare, or comfort of any person, or which causes or will cause damage to property of business.[39]

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[36] 1 ENVIRONMENT REPORTER 1444 (1970).

[37] *Id.* 1447.

[38] In Redmond & Co. v. Securities Commission, 222 Mich. 1, 192 N.W. 688 (1923), the Michigan Supreme Court upheld a license revocation for "good cause":

> Must the law map out, for the guidance of the licensee, a code of ethics and post danger signals against inhibited and dishonest practices? The plaintiff had no right to have the conduct of its business charted by specifications of forbidden practices involving revocation of the license. The general scope and expressed purpose of the law, together with open and fair dealing, entered the license and transgression thereof constituted good cause for revocation thereof.

Id. at 6, 192 N.W. at 689-90.

[39] MICH. ADMIN. CODE R. 336.46 (Supp. 1967).

The standard of care for emissions into waterways is similarly described:

> It shall be unlawful for any person directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to . . . domestic, commercial, industrial, agricultural, recreational or other uses which are being or may be made of such waters . . . .[40]

Not only are the terms in these standards undefined, but neither statute prohibits the agency from changing its interpretation of the application of these broad prohibitions to a particular company or industry. In addition, industries can be subject to suits under private nuisance doctrine by nearby businesses and homeowners and actions under public nuisance doctrine by a local prosecuting attorney or a crusading State Attorney General.[41]

The tendency of the Environmental Protection Act is not to create greater uncertainty, but rather to coalesce these various approaches into a single, unified standard for environmental guardianship over the resources of the state. The real source of uncertainty for potential defendants under the Act is not created by the lack of precise definitions or specific regulations in the statute, since that situation existed long before the Act became law. The uncertainty derives from the fact that enforcement of the law is no longer left to an understaffed administrative agency and an overworked attorney general's office; any citizen can now enter a court and insist that environmental quality be maintained. Uncertainty has increased as to the likelihood of the law being enforced, and it is not surprising that potential defendants are unhappy at the prospect. Nevertheless, the prospect of more vigorous law enforcement initiated by a variety of sources is precisely the value sought by the legislature. It is hardly the proper function of the courts to restrike that legislatively determined balance.

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[40] MICH. COMP. LAWS ANN. § 323.6(a) (1967).

[41] MacGregor, *Too Many Cooks*, Wall Street Journal, Dec. 23, 1970, at 1, describes the present situation in these terms:

> A single polluter may have to cope with two agencies each (one for air, one for water) at the city, county and state levels, plus a dozen Federal agencies. Each regulatory body has its own standards, and they often compete with each other for jurisdiction.

See also Detroit Free Press, Mar. 31, 1971, § A, at 15.

> [Major industries] have recognized . . . that standards they meet today may prove inadequate tomorrow; they worry about investing millions on anti-pollution facilities only to be told later that they'll have to spend millions more on further improvement.
>
> And federal officials . . . can offer no assurances it won't happen.

B. SEPARATION OF POWERS

While vagueness deals with the ambiguity of obligations imposed by the statute, the separation of powers or delegation question focuses on the nature of the tasks assigned to the court. Historically, the separation of powers doctrine has been used to prevent delegations of non-judicial functions to the court. In the context of the Environmental Protection Act, two separation of powers questions may arise: (1) whether the broad language of the law delegates too much of the legislature's policy-making authority to the courts, and (2) whether the Act delegates to the courts too much control over decisions made by state administrative agencies.

1. Delegation of Legislative Authority

By following a common law approach, the legislature vested significant discretion in the courts to elucidate the precise impact of the Act in particular cases. In large part the reason for this broad delegation was the fact that new evidence is constantly being discovered about the effects of current policies and technologies upon the environment. Since the legislature cannot reexamine annually every policy or regulation set down in the past, a substantial time lag has resulted between the development of scientific knowledge and changes in specific legislative programs. The common law approach, constructed upon a general policy of maintaining environmental quality, results in a decision-making process more sensitive to new evidence and discoveries.[42]

Much like the vagueness question, the improper delegation issue involves the determination of whether the bill must be more specific to avoid excessive delegation of the legislature's policy-making authority to the courts. Unfortunately, judical attempts to define the degree of power which may be delegated to

[42] *E.g.*, when broad spectrum pesticides like DDT and Dieldrin were introduced, legislation was based on the assumption that they were unmixed blessings. Throughout the 1960's, a growing number of scientists and conservationists tried unsuccessfully to persuade the departments of agriculture at the state and federal level to consider the deleterious effects of the pesticides. Even as evidence mounted, the inertia of the previous decision maintained a bias against a thorough examination – by government agencies and the agricultural industry – of alternatives such as genetic or predator control.

In 1967 the West Michigan Action Council instituted an action to prevent the Michigan Department of Agriculture from authorizing and participating in using Dieldrin. Had there been an Environmental Protection Act in 1967 perhaps the court would have decided – as the Department of Agriculture finally did – to limit the use of Dieldrin and DDT instead of summarily rejecting the case. At the very least, the evidence of the harmful effects of such pesticides and possible alternatives could have been brought into focus by a court decision. The legislature could have subsequently rejected, modified, or codified that decision in a specific statute.

the courts have done little more than restate the issue.[43] It is tempting simply to argue that the Act does not violate the separation of powers principle because it sets forth existing obligations which the courts only interpret in each particular case. Nevertheless, there is much judicial rhetoric which, taken literally, suggests that functions of one branch must not be related to the functions of another branch.[44]

The determination and implementation of legislative policy is, of course, an appropriate function for the courts. In fact, most laws require the courts to interpret and shape the legislative policy as it is applied to specific fact situations.

In each of the cases cited previously in which broad remedial statutes were upheld, the court performed a policy-shaping function.[45] In this context, the essential role of the courts is to implement, not frustrate, the legislative will. Once a policy is articulated in language which, though broad, has a meaning given by common usage and the historical context from which the legislation emerges, the courts will apply the law in individual cases.[46] In *Johnson v. Kramer Bros. Freight Lines Inc.*,[47] the Michigan Supreme Court upheld an amendment to the garnishee statute which stated: "the court may, at any time before judgment, for

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[43] *E.g.*, the Michigan Supreme Court explained the distinction between legislative and judicial powers in the following terms:

> The legislature makes the law—courts apply it. To enact laws is an exercise of legislative power; to interpret them is an exercise of judicial power. To declare what the law shall be is legislative; to declare what it is or has been is judicial. The legislative power proscribes rules of action. The judicial power determines whether, in a particular case, such rules of action have been transgressed. The legislature prescribes rules for the future. The judiciary ascertains existing rights.

In re Consolidated Freight Co., 265 Mich. 340, 343, 251 N.W. 431, 433-34 (1933).

[44] There is broad dicta regarding delegation of powers in old Michigan cases which can be misconstrued if viewed outside their historical contexts. In Civil Service Comm'n v. Auditor General, 302 Mich. 673, 5 N.W.2d 536 (1942), the Civil Service Commission claimed the right to set salaries to be paid by the auditor general without the passage of an appropriations bill; in Wood v. State Administrative Bd., 255 Mich. 220, 238 N.W. 16 (1931), the Governor asserted the power to lower items in an appropriations bill rather than vetoing the bill. It is not surprising that intrusions into the most fundamental legislative power—the power of the purse—elicited strong language from the court.

[45] *E.g.*, the Sherman Act, 15 U.S.C. §§ 1-7 (1964), was first literally interpreted to prohibit any contract which in fact restrained competition. United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). Subsequently, the Supreme Court developed a "Rule of Reason," Standard Oil Co. v. United States, 221 U.S. 1 (1911), and from this evolved a host of judicial rules on the subject. To say that the Court was not involved in policy-making would be erroneous; yet, the courts did not consider this rule a usurpation of the legislative function. The Court was giving effect to a policy which the Congress has articulated, albeit in broad terms.

[46] While the legislature cannot delegate its power to make a law, where it is difficult or impossible to lay down a definite comprehensive rule for the application of a statute, the legislature may vest authority in the courts to determine whether the law applies in a particular instance.

[47] 357 Mich. 254, 98 N.W.2d 586 (1959).

good cause shown, discontinue proceedings against the garnishee, or make any such other reasonable order as in its discretion seems advisable."[48] The court reasoned that the legislature was asking it to perform a function with which it was very familiar; "[j]udicial discretion upon good cause shown is a standard in itself sufficient to satisfy all constitutional requirements."[49]

The First Circuit Court of Appeals responded similarly in upholding the Auto Dealer's Day in Court Act.[50] The Act gives automobile dealers a cause of action against a manufacturer who fails to act in "good faith" in terminating, or failing to renew, a franchise.[51] The court concluded that the language and history of the Act made it clear that Congress intended to prohibit "unfair and inequitable" conduct. Thus, while "[i]t may be true that the statute in effect delegates some responsibility to the courts . . . this is neither unusual nor unconstitutional."[52] By this standard the Environmental Protection Act is not an unconstitutional delegation of legislative authority. Furthermore, the bill is no more a usurpation of the legislative role than is the prior common law in Michigan, since common law courts have been deciding what is "pollution" and "feasible and prudent alternatives" thereto for many years.

Consider, for example, *Attorney General ex rel. Township of Wyoming v. City of Grand Rapids*,[53] a Michigan public nuisance case. It was alleged that the City of Grand Rapids was dumping raw sewage into Grand River in such quantities that the river was becoming severely polluted. The Supreme Court first examined the evidence to see whether the pollution was sufficient to constitute a public nuisance. After hearing testimony from citizens of the affected cities, academic experts, and state public health officials, the court concluded that the polluting substances were coming from Grand Rapids sewers, and that the effects were significant enough to constitute a public nuisance. The defendant

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[48] MICH. COMP. LAWS § 628.41 (1948) (*repealed* 1963) (*now* MICH. GEN. CT. R. 738).

[49] 357 Mich. at 257, 98 N.W.2d at 588.

[50] 15 U.S.C. § 6 1221-25 (1964). Volkswagen InterAmericana S.A. v. Rohlson, 360 F.2d 437 (1st Cir. 1966).

[51] "Good faith" is defined as

> the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. 15 U.S.C. § 1221(e) (1964).

The court construed the definition to mean that "[i]t must appear that the condition was unfair or inequitable." 360 F.2d at 442.

[52] 360 F.2d at 445.

[53] 175 Mich. 503, 141 N.W. 890 (1913).

responded that the city could not practically dispose of the sewage in any other manner. Evidence was taken regarding possible alternative methods of treatment; whether they could accomplish sufficient purification of sewage so that it could be emptied into a stream without damage or creating a nuisance; and whether such facilities "for a city the size of Grand Rapids [were] feasible."[54]

After considering all of the evidence the court concluded that the public nuisance created by the city's dumping was "inflicting irreparable injury, which *it is the peculiar office of a court of equity to prevent.*"[55] (Emphasis added). It went on to hold that "the construction of a septic tank or septic tanks by the defendants within a reasonable time is *feasible and practicable* . . . ."[56] (Emphasis supplied). *Grand Rapids* is only one of many examples where courts have examined the impact of defendant's conduct, the availability of feasible and prudent alternatives, and implemented the public policy against pollution.[57] The courts have clearly not usurped the legislative function in developing the law of nuisance, despite the policy-making necessarily involved. Had the Environmental Protection Act granted standing to private citizens in actions to abate public nuisances, surely no one would have objected that an unconstitutional delegation of legislative authority was involved. Yet the bill describes in greater detail the issues to be considered and the policy to be followed in individual cases than does the concept of nuisance, the content of which is simply the principle "[u]se your own property in such a manner as not to injure that of another."[58]

Both the unquestioned role of the courts in nuisance cases and the broad statutes regularly upheld by the courts suggest that the Environmental Protection Act does not grant unconstitutional law-making powers to the courts.

In addition, the charge of improper delegation seems inappropriate considering the recent development and application of

[54] *Id.* at 517, 141 N.W. 895.

[55] *Id.* at 535, 141 N.W. 901.

[56] *Id.* at 543, 141 N.W. 904.

[57] In the widely cited case of Hurlburt v. California Portland Cement Co., 161 Cal. 238, 118 P. 928 (1911), the California Supreme Court upheld a decree limiting defendant's cement production to 88,706 barrels per year, rather than its capacity of 900,000 barrels per year, to lessen the impact on a neighboring orchard.

In Renken v. Harvey Aluminum Inc., 226 F. Supp. 169 (D. Ore. 1963), the court ordered the defendant to install hoods and electrostatic precipitators on its aluminum reduction plant in order to reduce flouride emissions which were damaging adajacent farmland. In Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914), the court balanced the interests of a quarry owner against that of local residents, but rejected plaintiff's request that it order production to halt. Instead the court ordered that defendant pursue several alternatives to reduce smoke and noise pollution.

[58] Attorney General v. Grand Rapids, 175 Mich. 503, 543, 141 N.W. 890, 904 (1913).

the concept of delegation of powers. Courts have invalidated delegations of policy-making authority to administrative agencies in part to prevent the exercise of excessive power which could be allowed by overly broad delegations.[59] The Environmental Protection Act is consistent with this approach, for its fundamental purpose is to limit the scope of agency discretion by imposing a legal standard, enforceable by the courts, in place of the extremely broad discretion the agencies previously had.

Finally, where the legislature intentionally determined that the courts should develop a common law for protection of the environment, it would be ironic to argue that the bill gives too much power to the courts. For in the same breath the defendant would be asking the same court to arrogate to itself the ultimate power of reversing the legislature's fundamental policy decision that the courts should play a larger role in environmental protection.[60] The proper response of the courts is perhaps illustrated by Justice Frankfurter's comments when construing the phrase "substantial evidence on the whole record" in the Administrative Procedure Act:

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[59] The fear of arbitrary agency action has led the Michigan Supreme Court to invalidate delegations to administrative agencies. *See, e.g.*, Osius v. City of St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25 (1956), (a delegation to a zoning board of appeals of the power to grant a variance without any standards by which a reviewing court might measure the validity of the decision); Hoyt Bros. Inc. v. City of Grand Rapids, 260 Mich. 447, 245 N.W. 509 (1932) (city ordinance allowed city manager to license charities if in his judgment "the charity is a worthy one and that the person or persons . . . are fit and responsible parties." *Id.* at 450, 245 N.W. at 510); Central Advertising Co. v. State Highway Comm'n, 12 Mich. App. 314, 162 N.W.2d 834 (1968) (highway commission not allowed to place restrictive covenants on land despite provision that it could sell land not needed, on whatever terms it may deem proper).

In recent years, the state courts have followed the lead of the federal courts in allowing delegations which seem quite broad indeed by earlier standards. 6 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 201 (1958). The Michigan Supreme Court has, in recent years, followed a less rigid approach than in the past, to allow broad delegations. *See, e.g.*, McKibbon v. Michigan Corp. & Sec. Comm'n, 369 Mich. 69, 119 N.W.2d 557 (1963) (upheld statute granting commission power to revoke licenses for "dishonest or unfair dealings"); School District v. State Bd. of Educ., 367 Mich. 591, 116 N.W.2d 866 (1962) (delegation of discretionary power to county boards of education to detach territory from one school district and attach it to another making "equitable payment" for the property taken).

[60] It is tempting to draw an analogy between the breadth of authority which can be delegated to courts and agencies. If the same limitation applied to both, the Act would not fail as a delegation of legislative authority. *See* note 59 *supra*. But the analogy is fundamentally inapt, for the courts have the responsibility to construe constitutional provisions which are broad by design, and to interpret the statutes pursuant to which agencies function. The difference between the breadth of discretion allowed to courts and agencies is rarely made explicit. In City of Saginaw v. Budd, 381 Mich. 173, 160 N.W.2d 906 (1968), the court rejected an ordinance allowing the health inspector to demolish abandoned buildings which he found "by reason of inadequate maintenance, dilapidation, obsolesence, or abandonment" to be a public nuisance. While rejecting such broad powers in a bureaucrat, the court "recognized a city's right to proceed in court to abate a nuisance, and nothing in this opinion should be interpreted to prevent plaintiff from taking further proper action against the defendants." *Id.* at 178, 160 N.W.2d at 908.

> It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the Federal Judiciary.[61]

2. Delegation of a Non-Judicial Function

The widespread use of administrative agencies is an experiment launched in full force only in this century.[62] The Environmental Protection Act of 1970 should be viewed as a part of a current movement in the law to make the administrative system a more effectual, responsive one. To that end the Act is a fundamental departure from the traditional model in which initiative rests solely with an administrative agency. The citizen no longer "comes to a regulatory agency as a supplicant, requesting that they undertake to examine and to pursue his rights."[63] Instead he comes "as a claimant [with] no insulation of administrative discretion between him and his claims."[64] Hopefully in the courts, citizens' concerns will obtain a more receptive hearing.

In order to effectuate the Act's concept of individual action and policy of environmental protection, the courts are given three powers: (1) where regulatory agencies have not acted to halt pollution, the court may issue an order upon the request of private or public plaintiffs;[65] (2) where the plaintiff demonstrates that an agency has not enforced the standard established in the Act, the court is to adjudicate defendant's conduct and determine whether the agency is allowing him to pollute despite feasible and prudent alternatives;[66] (3) where plaintiffs show that a defendant's conduct violates the Act, even though in compliance with the standard of an agency, the court is not bound by the standard, but may "direct the adoption of a standard approved and specified by the court."[67]

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[61] Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487 (1950), construing § 10 of the Administrative Procedure Act.

[62] Elihu Root, then President of the American Bar Association, addressed the A.B.A. convention only fifty years ago about the creation of a body of administrative law, as an experiment which will go forward. 41 A.B.A. REP. 355, 368-69 (1916).

[63] 117 CONG. REC. S 555 (daily ed. Jan. 29, 1971) (Remarks of Professor Joseph L. Sax).

[64] *Id.*

[65] MICH. COMP. LAWS ANN. § 691.1204(2) (Supp. 1971).

[66] *Id.* §§ 691.1204(3), 691.1205(1)-(2).

[67] *Id.* § 691.1202(2)(a)-(b).

The consideration requiring discussion is whether any of these powers conferred upon the courts is a non-judicial function.

a. Administrative Agencies Fail to Act—One difficulty faced by regulatory bodies is that they are rarely given staffs commensurate with the number and size of the problems which they must resolve. The inevitable result is that some violations are overlooked or prohibitory action is postponed. In response to this problem, the Act allows private or public attorneys general to bring a court action against an alleged polluter who has not been subject to regulatory sanction.[68]

Whether the agency or a court must decide the case in the first instance is a primary jurisdiction question. Primary jurisdiction is not a constitutional doctrine, but a judicial doctrine developed to provide orderly and efficient management of cases in which the courts and agencies have overlapping jurisdiction, and to give effect to the intent of the legislature—when expressed—that the agency should decide first.[69] The Environmental Protection Act provides that if the pleadings show a need for the agency to examine the case, the court may remand. Nevertheless, where the only value likely to be gained by a remand may be further delay, with continued unnecessary degradation of the environment, the legislature has given the courts jurisdiction to hear and decide the case. The question of whether the court should be *required* to remand is a question of policy which the legislature has resolved.

b. Review of Agency Action—The legislature was also concerned that agencies maintain a vigorous effort to prevent the further destruction of the environment. For this reason the legislators incorporated into the Act a standard for all agency action affecting the environment.[70] Moreover, the Act provides that citizens may challenge an agency action as inconsistent with the Act, and provides that on review of such agency determinations the

[68] *Id.* § 691.1204(2).

[69] *See* Sengstock, *Administrative Law*, 14 WAYNE L. REV. 59, 68 (1967). *See also* Arnold v. Ellis, 5 Mich. App. 101, 145 N.W.2d 822 (1966). The court decided a case under a riparian rights theory which could have been decided by the Department of Natural Resources under the Inland Lakes Level Act of 1961. The court argued that where jurisdictions of court and agency overlap, in the absence of clear legislative intent to confer exclusive jurisdiction on the agency, an equitable action was proper when the agency had elected not to act.

[70] MICH. COMP. LAWS ANN. § 691.1205(2) (Supp. 1971):

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

court *shall determine* whether there is or is likely to be impairment of the environment, and *shall not permit* the agency to authorize such conduct where there are feasible and prudent alternatives, consistent with the public welfare.[71]

There were two important reasons for allowing the courts to adjudicate the defendant's conduct in accord with the standards of the Act and not be bound by the rulings of the agencies. First, the present scope of review of administrative action is complicated at best, and totally confusing at worst. *Citizens to Preserve Overton Park, Inc. v. Volpe*,[72] recently decided in the United States Supreme Court, is illustrative of the problem faced by courts in attempting to review administrative determinations. The Federal Aid to Highways Act of 1968 provided that the Secretary of Transportation should not permit a highway to be built through a park unless there were "no feasible and prudent alternatives"[73] to the construction. The Court decided that the appropriate standard for review of the administrative action was whether the choice made by the Secretary was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[74]

Delineating the proper scope of judicial review under this standard, Justice Marshall noted that a court should allow a "presumption" in favor of the Secretary, but conduct "a probing review;" a court's inquiry is to be "searching," but "narrow;" a court is to invalidate any "clear error in judgment," but not "substitute its judgment for that of the agency."[75] The opinion reflects the confusion which presently pervades the law on review of administrative decisions, a confusion resulting from the limitations inherent in a test which does not allow the court to determine issues on the basis of the weight of the evidence. An additional consequence of this confusion is the unpredictable variety of outcomes when courts review administrative rulings.[76]

To avoid these shortcomings, the Michigan legislature chose to

[71] MICH. COMP. LAWS ANN. §§ 1205 (1)-(2) (Supp. 1971).

[72] 39 U.S.L.W. 4287 (U.S. Mar. 2, 1971).

[73] 49 U.S.C. § 1653(f) (Supp. V, 1970).

[74] 5 U.S.C. § 706(2)(A) (Supp. V, 1970).

[75] The opinion of the Court stated:

> Certainly, the Secretary's decision is entitled to a presumption of regularity (citations omitted). But that presumption is not to shield his actions from a thorough, probing in-depth review.
>
> To make this finding the 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 (citations omitted). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. 39 U.S.L.W. 4287, 4291-92 (U.S. Mar. 2, 1971).

[76] *See generally* J. Sax, DEFENDING THE ENVIRONMENT 125-48 (1970).

establish a legal standard, and provide for judicial determination of whether an agency action is in compliance with the policy of the legislature. The court is not asked to substitute its judgment as to the reasonableness of an administrative decision, but only to determine whether the administrative decision is consistent with a legal standard.[77]

Article 6, section 28, of the Michigan Constitution of 1963 provides the framework for judicial review of administrative decisions:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts *as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law;* and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.[78] (Emphasis supplied.)

Given the explicit command that courts, at a minimum, should examine whether agency decisions are "authorized by law," the power to decide whether an agency decision authorizes conduct in violation of the Environmental Protection Act seems well within the power given the courts. Moreover, by adding that administrative decisions "shall be subject to direct review *as provided by law,*" the constitution authorizes the legislature to detail the scope of review in subsequent legislation.[79]

In enacting the Environmental Protection Act, the legislature made full use of this constitutional authorization by allowing the courts to make a fresh determination of whether certain conduct is causing pollution, and whether there are feasible and prudent alternatives less environmentally destructive.[80]

The range of judicial review now available under Michigan law

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[77] MICH. COMP. LAWS ANN. § 1205(2) (Supp. 1971).

[78] MICH. CONST. art. 6, § 28.

[79] *See* Cooper, *Administrative Law,* 10 WAYNE L. REV. 1 (1963). *See also* Lorland Civic Ass'n v. DiMatteo, 10 Mich. App. 129, 157 N.W.2d 1 (1968). The court reviewing the grant of a variance from the zoning act, notes that MICH. CONST. art. 6, § 28 provides a minimum scope of review and that "neither the enabling act nor the ordinance state a more generous standard of review." *Id.* at 135-6, 157 N.W.2d at 4-5. The implication of the court's statement is that the act could have provided for a broader scope of review. The Administrative Procedure Act, the review provisions added to the statutes of some administrative agencies, and the Environmental Protection Act of 1970 are laws to give effect to art. 6, § 28.

[80] MICH. COMP. LAWS ANN. § 1205(2) (Supp. 1971).

is illustrated by *Fisher-New Center Co. v. Tax Comm'n.*[81] The petitioner argued that his property was substantially over-valued for state property tax purposes. At issue was whether the Tax Commission's finding of the rate of return on investment was proper. The commission argued that the determination of the figure was within its discretion, and that the court must uphold its determination in view of the fact that there was conflicting expert testimony in the record. The court held, however, that it must make an independent evaluation of whether the decision was supported by the evidence on the record. After undertaking such review, the court concluded that

> the commission findings are not supported by competent, material and substantial evidence, are unsupported by substantial evidence in view of the entire record as submitted, and are contrary to the overwhelming weight of the evidence; that this constitutes an error of law; that such error presents a question for judicial determination and, upon judicial review, the constitutional grounds and requirement for reversal, under Michigan Constitution of 1963, art 6, § 28, namely, error of law and adoption of wrong principles.[82]

The court then directed the commission to "recompute the valuation and assessment of the taxpayer's property at a capitalization rate *within the range established by the competent evidence in this record*"[83] (emphasis added), as determined by the court.

Thus, the court not only made its own determination of whether the Tax Commission's decision met legal requirements set forth in the Administrative Procedure Act, but also determined the range of alternatives the commission could choose in light of those requirements. Had the court merely reversed the decision, the agency could well have reached a new determination outside the range supported by the evidence, and still another appeal and remand would have followed. The court avoided this possibility, as does the Environmental Protection Act, by requiring the court to adjudicate the existence of pollution and whether there are feasible and prudent alternatives.

The same approach was followed in *Thomas v. Busch*[84] where the Michigan Court of Appeals reviewed the grant of a variance by a zoning review board for the construction of an insurance office building. The court refused to accept the "mere repetition"

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[81] 380 Mich. 340, 157 N.W.2d 271 (1968), *rev'd on rehearing*, 381 Mich. 713, 167 N.W.2d 263 (1969).

[82] 381 Mich. at 715, 167 N.W.2d at 264.

[83] *Id.*

[84] 7 Mich. App. 245, 151 N.W.2d 391 (1967).

of the language of the zoning ordinance, and independently determined whether the facts met the legal requirements in the ordinance for the grant of a variance. The court concluded that the conclusory and inferential findings of the board were insufficient to support the variance, and proceeded to grant a permanent injunction against construction.[85] Realizing that a remand might bring the same case again before the court with the same facts but more carefully drafted findings, the court explicitly rejected the alternative of remanding the case to the zoning appeals board:

> Such a course of action, in effect permitting the board to repair its faulty performance, does not recommend itself to us as the proper course of action . . . .[86]

These cases indicate that courts have in the past made independent evaluations of the legality of agency action. Some commentators have gone further to suggest that it is always the role of the courts to ultimately determine whether the decision of an administrative agency comports with a legal standard set down by the legislature.[87] Thus, in giving courts the authority to decide whether an agency has allowed pollution where there exist feasible and prudent alternatives, the Act cannot be said to delegate a non-judicial function.

c. Agency Standards—Section 2 of the Act describes the proper posture of the court when plaintiff alleges that "standards for pollution or for anti-pollution device or procedure" are not strict

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[85] Michigan courts have issued similar orders in several zoning variance cases. *See, e.g.*, Farah v. Sacks, 10 Mich. App. 198, 157 N.W.2d 9 (1968). Puritan-Greenfield Improvement Ass'n v. Leo, 7 Mich. App. 659, 153 N.W.2d 162 (1967); Tireman-Joy-Chicago Improvement Ass'n v. Chernick, 361 Mich. 211, 105 N.W.2d 57 (1960). In each case the court held that the necessary findings were not supported by evidence in the record, and went on to render a decision that the facts in each precluded the grant of a variance. *But see* Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 804 (1963).

[86] 7 Mich. App. 245, 256, 151 N.W.2d 391, 396 (1967). For a case where a federal court decided whether an agency decision violated a legal standard, *see* Office of Comm. of United Church of Christ v. F.C.C., 425 F.2d 543 (D.C. Cir. 1969). Commenting on the record of F.C.C. hearings which culminated in the renewal of a broadcast license to station WLBT in Jackson, Mississippi, the court stated:

> The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair. . . .
>
> For this reason the grant of a license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license.

425 F.2d at 550.

[87] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 575 (1965).

enough, given the legislative policy set down in the Act.[88] Section 2(a) provides that the compliance with an agency standard is not a complete defense, for the court may "[d]etermine the validity, applicability, and reasonableness of the standard."[89] Section 2(b) provides further that "[w]hen a court finds a standard to be deficient, [it may] direct the adoption of a standard approved and specified by the court."[90]

The legislature in enacting section 2 did not intend that the court should conduct ex parte hearings, call in experts to testify, and assume the rule-making function of the agency. The Act need not and should not be read as imposing that responsibility on the courts. Indeed the language and structure of the statute make clear that the legislature intended no such role for the courts. Section 2 begins with the phrase, "In granting relief provided by subsection one;"[91] that is, that the validity of a standard is to be determined only in the context of a particular case in which one defendant's conduct is being adjudicated. Thus, in an appropriate case the court may determine the proper remedy for the individual defendant before it, and inform the agency that the agency standard is inadequate and another must be adopted that is consistent with the legal requirements of the Act.

As a practical matter, the standards set by the courts will affect future parties not before the court in several respects. Where a court ruling in a particular case would be equally applicable in other, similar situations, it is to be expected that the public agency will go back and reconsider its rules of general application, rather than requiring the same issue to be litigated numerous times. And, of course, the decision in any given case may have a powerful precedential importance for other potential cases. These result from the conventional stare decisis effect of a particular decision, and so long as the court's judgment is issued in a particular controversy, as the decision in *that* case—which is what the Environmental Protection Act contemplates—no problem is raised of exceeding the judicial function rule that courts should decide only the cases before them.

Thus the key issue in deciding whether a power is non-judicial is whether the question facing the court arises in a traditional adversary setting. As a Michigan court explained in *Chamberlain v. Detroit Edison Co.*,[92]

[88] MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1971).
[89] *Id.* § 691.1202(a).
[90] *Id.* § 691.1202(b).
[91] *Id.* § 691.1202.
[92] 14 Mich. App. 565, 165 N.W.2d 845 (1968). The case concerned whether judges could be authorized to preside over condemnation proceedings and to determine the

> [w]hether a function is nonjudicial, for purposes of the separation of powers principle, often will depend on the manner in which it is expected to be discharged. . . .
>
> In most cases, as long as the court can function as a court in deciding the question, receiving and applying factual testimony against identifiable standards, laws and rules of law, the function conferred will not be regarded as nonjudicial.[93]

It is therefore significant that the Act contemplates that the court may direct the adoption of a different standard only in the context of a particular case. The fact that a new agency standard of general application is likely to emerge from the decision in a particular case does not change the nature of the proceeding before the court from a judicial to an administrative one.

So long as this fundamental limitation on the judicial function is not violated, the question remains one of ascertaining legislative intent. That is the true issue raised by the Act, and it is not a constitutional matter. Professor Cooper has pointed out that legislative intent—rather than constitutional considerations—has been the key factor influencing judicial willingness to thoroughly examine agency standards:

> Where the purpose of the statute is to vest broad discretionary powers in an agency . . . a broad measure of autonomy will be accorded the agency; and there will be a tendency to view its rules as in harmony with the statute and reasonable. Where, on the other hand, the statute does not disclose a purpose of any such broad grant of power to the agency . . . the courts will be more ready to discover a conflict between the statute and the rule, or to hold that the rule attempts to enlarge the statute, or is unreasonable.[94]

In the context of the Environmental Protection Act, the legislature sought to restrict the role of administrative agencies by allowing the courts to subject agency discretion, as reflected in administratively adopted rules, to a legal standard; and to do so in a way calculated to conserve private and judicial energy traditionally expended on unnecessary multiple suits or remanded actions. Clearly, in some cases, a range of policies not before the court will need to be considered prior to the adoption of a new

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question of "necessity." Petitioners argued that "necessity" was a legislative question, therefore unassignable to the courts. The court responded that while the issue was in a sense legislative, "[t]he procedure . . . follows the adversary form customary in common law courts. . . . [and] the probate court is required to function as a court in adjudicating the controverted issue of necessity." *Id.* at 576-77, 165 N.W.2d at 851.

[93] *Id.* at 576, 165 N.W.2d at 851.

[94] F. COOPER, STATE ADMINISTRATIVE LAW 263 (1965).

standard, and it would seem that the agency could best serve this role. However, to approve remand in this limited case suggests only that the court should resolve the question of whether it can properly direct the adoption of a different standard according to the facts of each case, and not that it should erect a constitutional barrier preventing it from enforcing a standard it finds legally determinative in an appropriate case.

There is no single response appropriate to all cases. The court, where necessary, should remand to the agency. Where the issue is capable of judicial resolution, and the public interest requires an expeditious resolution of the matter, the correct response is for the court to specify the proper standard.[95] A third way in which the court may implement section 2(b)[96] is to order the agency to adopt a new standard which falls within a range, any of the points of which it finds consistent with the requirements of the Environmental Protection Act. This approach has the advantage of preserving some flexibility in the agency's decision-making, while avoiding repeated judicial review and remands by indicating the range within which the agency can properly exercise its discretion.[97]

A final alternative is suggested by the decision in *In re Ten Mile Drain,*[98] which involved a review of an intra-county drainage board's decision that the state should be charged a percentage of the estimated cost of the drain's construction. The board had applied a formula which it had been using for thirty years to determine the state's proper assessment. The state, however, offered a detailed engineering study which indicated that their share should be decreased. Faced with the two alternatives, the court found the state's evidence decisive and ordered that

> the drainage board shall hold a new hearing . . . and requiring further—in the absence of new proof tending to overcome the State's present showing—that the board enter an order accepting the State's calculation of the "State highway" share.[99]

[95] Magnuson v. Kent County Canvassers, 370 Mich. 649, 122 N.W.2d 808 (1963), is an example of a court determining a legally required standard. The county board of canvassers had decided that the relevant statute permitted them to allow an annexation of a part of one city by another on the basis of (1) the vote of the area to be annexed, and (2) the combined vote of the two cities. The trial court felt bound by the agency determination, but the Michigan Supreme Court ordered that the annexation be certified only upon a positive vote by the area to be annexed and the vote of each of the two cities counted separately. The Michigan Supreme Court held that it was free to choose a rule since the statute did not determine the particular alternative to be solicited.

[96] MICH. COMP. LAWS ANN. § 691.1202(b) (Supp. 1971).

[97] This approach was taken in Fisher-New Center Co. v. Tax Comm'n, 380 Mich. 340, 157 N.W.2d 271 (1968), *rev'd on rehearing*, 381 Mich. 713, 167 N.W.2d 263 (1969).

[98] 371 Mich. 209, 123 N.W.2d 719 (1963).

[99] *Id.* at 213, 123 N.W.2d at 721.

The order in *In re Ten Mile Drain* is analogous to that which might be made under the Environmental Protection Act. The Attorney General did not challenge the standard in the abstract, but rather in the context of a particular case. In order to decide the case before it, the court had to determine the validity and reasonableness of the prior agency practice, and it specified a standard to be adopted in the absence of further relevant and conflicting evidence. Judge Friendly explained in a recent environmental case that such questions are

> entirely appropriate for judicial consideration at this time. The formulation of standards for suspension is entrusted to the Secretary in the first instance, but the court has an obligation to ensure that the administrative standards conform to the legislative purpose . . . .[100]

C. CONCLUSION

Each of the questions discussed in this note revolve around the same basic issue: the propriety of vesting broad power in the courts to prevent environmental destruction, and to develop an environmental common law. The need for the broad standard of the Act derives from the complexity of the problem. The clear authority of the courts to decide cases which have been, or should have been dealt with by an administrative agency is important both for the relationship it establishes between citizens and agencies, and to insure that the policies of the Act will be implemented. In responding to these needs the legislature appears to have violated no constitutional barrier.

Perhaps the best way to conclude this note is to call attention to one of the first cases to be filed under the new law.[101] The case involved a small local township which was piping inadequately treated sewage just upstream from the plaintiffs—a community and a property owner. Defendant planned to enlarge the capacity of the sewage system without adequately improving its waste treatment facility. The case is a model of one situation for which the Act was created. Plaintiffs are challenging in court a municipal decision which affects their daily lives, where pollution is continuing despite the existence of readily available alternatives, and where the appropriate administrative agency has not been moved to act.[102] At this stage a preliminary injunction has been granted

[100] Environmental Defense Fund v. Ruchelshaus, (D.C. Cir. No. 23,183) (decided Jan. 7, 1971).

[101] Lakeland Property Owners Ass'n v. Township of Northfield, C.A. 1453 (Cir. Ct., Livingston County, Mich., filed Sept. 24, 1970).

[102] The judge first denied defendant's motion to remand the case to the Water Resources

by the judge (1) prohibiting the proposed enlargement of the facility, and (2) prohibiting additional businesses and dwellings from tapping into the sewage system until the case is resolved.

This initial decision upholds the confidence of the legislature in the capacity of the judiciary to understand and deal with environmental problems. As expressed by Professor Joseph Sax in recent testimony before a committee of the Texas Legislature:

> It is notable that the judge recognized the fundamental purpose of the law . . . [and] felt free to enter an order responsive to the genuine problem with which he was faced; the problem of residential and industrial growth outstripping the ability of the community to provide needed public services. He saw the new law as allowing him to take steps designed to bring those two matters into phase.
>
> I say this is heartening because the judge in this case recognized—and responded—to the legislature's effort to bring back to environmental regulation the . . . approach of the common law. The problem is recognized in a straightforward manner and those who are adversely affected are authorized to bring their complaint to a court for investigation of the facts and an equitable resolution.[103]

—*Roger L. Conner**

Commission. He stated in a formal ruling that he was not required to remand where the exercise of his equitable power was necessary to prevent pollution from being increased, adding that the Commission had taken an interest in the problem only as a result of the lawsuit.

[103] *Hearings on H.B. 56 Before the Comm. on State Affairs,* House of Representatives of Texas on H.B. 56, An Environmental Protection Act, March 15, 1971. The Act is modeled after the Michigan Act.

* This note draws heavily upon research done by the following individuals for a course in environmental law at the University of Michigan Law School: Roger Connor, Robert Isaacson, Louis Joseph, Jeff Raney, John Schoonmaker, Edward Thompson, Peter Thompson and Wayne Witkowski. Roger Conner is a second year law student at Michigan Law School and is a member of the State Pollution Control Commission.