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ENVIRONMENTAL REGULATION IN MICHIGAN AND MASSACHUSETTS: TWO STATES WITH TWO DIFFERENT SOLUTIONS TO THE SAME PROBLEM

*Diane K. Danielson**

I. INTRODUCTION

Imagine returning home from work one evening only to find that the densely wooded area bordering your property has been cleared to accommodate a commercial strip mall. These woods were a natural habitat for many different species of wildlife, as well as an asset to your property. Through the thin veil of trees remaining just beyond your property line, you can see the bulldozers necessary to clear the land for future parking lots and building sites. Much of the wildlife has fled and the destruction of the woods, or at least the appearance of a large number of new residents, likely will drive out the rest. Outraged by the destruction and convinced that the project's adverse impact on natural resources is contrary to public policy and potentially in violation of state environmental law, you join with your neighbors in filing a grievance with the appropriate state agency. The agency responds with a decision not to require the commercial developer to submit a report on the environmental impact of the project. You feel that this agency decision is incorrect and possibly arbitrary, but what can you do?

If you live in Michigan, you could bring suit against the developer and perhaps force a compromise or obtain a temporary, if not a permanent, injunction. If you reside in Massachusetts, however, there are no more options beyond the final agency determination. Under Massachusetts law, if the developer follows the appropriate administrative procedures, courts will not review the impact of the impending development. Moreover, in Massachusetts, a citizen cannot challenge the administrative decision not to require a developer

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to submit an environmental impact report. In short, administrative agencies have the sole discretion to resolve many of Massachusetts' environmental conflicts.

In contrast to the Massachusetts system, Michigan's environmental policy attempts to encourage more effective environmental regulation by agencies through citizen and judicial intervention. In 1970, Michigan enacted the Michigan Environmental Protection Act (the Sax Act),¹ the first environmental policy of its kind.² The Sax Act allows citizens to bypass administrative agencies and sue directly any project proponents and developers, public or private, whose conduct significantly causes damage to natural resources.³ The act has served as the model for environmental policy acts in Connecticut,⁴ Florida,⁵ Indiana,⁶ Minnesota,⁷ New Jersey,⁸ South Dakota,⁹ and arguably Massachusetts.¹⁰ Each of these statutes contains a citizen suit provision similar to that in the Sax Act.¹¹

Massachusetts enacted its environmental citizen suit statute (CSS) in 1971.¹² This statute, like Michigan's Sax Act, grants citizens the right to sue project proponents who cause significant damage to the environment.¹³ Massachusetts' statute, however, differs from Michigan's because in order to have standing, Massachusetts plaintiffs cannot simply allege that defendants' conduct is damaging to the environment. Instead they must demonstrate that defendants' con-

¹ MICH. STAT. ANN. §§ 14.528(201)-(207) (Callaghan 1989). Because both Massachusetts and Michigan refer to their Environmental Policies as MEPA, this Comment will refer to Michigan's Environmental Protection Act as the "Sax Act", after Joseph L. Sax, the professor at the University of Michigan Law School who was responsible for drafting the original act.

² Daniel K. Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Suits into the 1980's*, 12 *ECOLOGY L.Q.* 271, 271 (1985).

³ MICH. STAT. ANN. §§ 14.528(202)(1).

⁴ CONN. GEN. STAT. ANN. §§ 22a-14 to -20 (West 1985).

⁵ FLA. STAT. ANN. § 403.412 (West 1986).

⁶ IND. CODE ANN. §§ 13-6-1-1 to -6 (Burns 1990).

⁷ MINN. STAT. ANN. §§ 116B.01 to -.13 (West 1987).

⁸ N.J. STAT. ANN. §§ 2A:35A-1 to -15 (West 1987).

⁹ S.D. CODIFIED LAWS ANN. §§ 21-10A-1 to -15 (1986).

¹⁰ MASS. GEN. LAWS ANN. ch. 214, § 7A (West 1989); see also Jeffrey K. Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 *J. OF URB. L.* 589, 591, n.7 (1976); Slone, *supra* note 2, at 272, n.7.

¹¹ See, e.g., CONN. GEN. STAT. ANN. §§ 22a-16 ("the attorney general . . . any person . . . or other legal entity may maintain an action . . . for declaratory and equitable relief against the state, . . . any person . . . or other legal entity for the protection for the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.").

¹² MASS. GEN. LAWS ANN. ch. 214, § 7A (West 1989) (amending MASS. GEN. LAWS ANN. ch. 214, § 10A (1971)).

¹³ See *infra* note 110.

duct violates one of the state's environmental laws.¹⁴ This requirement limits the applicability of the CSS because as long as developers in Massachusetts stay within the confines of established procedural and prohibitory environmental regulations, they are immunized from citizen suits.¹⁵ In Michigan, on the other hand, plaintiffs merely need to demonstrate that defendants' conduct allegedly causes, or is likely to cause, significant damage to the state's natural resources, regardless of whether or not it violates any existing environmental law.¹⁶

In 1972, Massachusetts supplemented its CSS with the Massachusetts Environmental Policy Act (MEPA).¹⁷ MEPA contains a set of procedural guidelines for administrative review of the environmental impact of proposed projects within the Commonwealth.¹⁸ It requires certain developers to submit environmental impact reports (EIRs) to the Secretary of the Executive Office of Environmental Affairs for review and approval.¹⁹ Since MEPA's enactment, the Supreme Judicial Court of Massachusetts has interpreted the act as restricting the courts' jurisdiction to review certain environmental cases and controversies brought by citizens.²⁰ Instead of supplementing existing environmental law, MEPA in effect has supplanted the citizen suit statute by creating an administrative system that emphasizes reliance on regulatory agencies.

This Comment discusses these two very different approaches to environmental regulation—Michigan's reliance on citizen and judicial intervention and Massachusetts' emphasis on administrative regulation. Section II presents an overview of Michigan's Sax Act, a statute that encourages citizen intervention in environmental controversies without imposing an abundance of procedural requirements.²¹ This section also focuses on the Michigan courts' development of standards for environmental regulation and the strict limitations they place on the applicability of the Sax Act.²² Section III of this Comment discusses Massachusetts' regulatory procedure for resolving environmental disputes: a procedure that tends to discourage citizen intervention by favoring stricter procedural and reg-

¹⁴ *Id.*

¹⁵ See MASS. GEN. LAWS ANN. ch. 214, § 7A.

¹⁶ See *infra* notes 30, 48.

¹⁷ MASS. GEN. LAWS ANN. ch. 30, §§ 61–62H (West 1988).

¹⁸ See *infra* notes 121–53 and accompanying text.

¹⁹ See MASS. GEN. LAWS ANN. ch. 30, § 62A.

²⁰ See *infra* notes 178–89 and accompanying text.

²¹ See *infra* notes 43–57 and accompanying text.

²² See *infra* notes 75–106 and accompanying text.

ulatory agency requirements.²³ In this section, the Comment specifically addresses the Massachusetts Supreme Judicial Court's 1988 decision in *Cummings v. Secretary of the Executive Office of Environmental Affairs*, which restricted the courts' power to review certain administrative determinations.²⁴ This section also discusses recent proposals for amendments to MEPA.²⁵ These proposed amendments indicate that the Massachusetts courts may have gone too far in their interpretation of MEPA by completely abdicating their duty to protect the environmental interests of the citizens of Massachusetts. Section IV of this Comment compares the directions taken by the Michigan and Massachusetts courts by analyzing the judicial restrictions that have developed to limit the applicability of the Sax Act and MEPA. Section V of this Comment concludes that an efficient and less costly environmental regulation program needs more checks and balances between the judiciary and the administrative agencies than presently exists in Michigan and Massachusetts. In Michigan, the court-established restrictions are perhaps too limited to make the Sax Act an effective tool for environmental regulation. In Massachusetts, the citizens need easier access to the courts in order to fully participate in environmental regulation. In sum, both Michigan and Massachusetts have adapted innovative and ambitious environmental legislation, but the court systems have limited their applicability. Instead of constricting the application of the Sax Act and MEPA, the courts should further expand and clearly define the natural resources that these environmental acts serve to protect.

II. MICHIGAN'S ENVIRONMENTAL PROTECTION ACT (THE SAX ACT)

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

Joseph L. Sax²⁶

²³ See *infra* notes 121–53 and accompanying text.

²⁴ *Cummings v. Secretary of the Executive Office of Env'tl. Affairs*, 524 N.E.2d 836 (Mass. 1988); see *infra* notes 178–99 and accompanying text.

²⁵ See *infra* notes 200–19 and accompanying text.

²⁶ JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION*, xvii (1971).

A. *The Constitutional Duty of the Michigan Legislature to Protect Natural Resources*

Michigan's state constitution reflects the state's history of great concern for its natural resources.²⁷ A 1963 constitutional provision places on the state legislature a duty to provide for the protection of the environment from pollution, impairment and destruction.²⁸ In 1970, Michigan responded to this environmental responsibility by enacting the Sax Act.²⁹ The Sax Act is an innovative approach to environmental regulation that rejects agency involvement and incorporates the use of citizen suits to protect Michigan's natural resources.³⁰ Under the Sax Act, any citizen of Michigan can sue any public or private project proponent for the protection of the air, water, and other natural resources.³¹ Remedies under the act, however, are limited to equitable or declaratory relief.³² The Sax Act operates through the state courts which interpret the act and give it substance, thereby fulfilling the legislature's constitutional duty to protect the state's natural resources.³³

In the 1974 case, *Michigan State Highway Commission v. Vanderkloot*, the appellants accused the legislature of not fulfilling their

²⁷ See Fred R. Jensen, *Developing the Future of Michigan Environmental Law: Expanding and Blending MEPA with the Public Trust Doctrine*, 1989 DET. C.L. REV. 65, 71 (detailing Michigan's incorporation of public trust doctrine from Northwest Territory Ordinance of 1787 into Michigan's constitution).

²⁸ MICH. CONST. of 1963 art. IV, § 52. Section 52 provides that [t]he conservation and the 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.

Id.

²⁹ MICH. STAT. ANN. §§ 14.528(201)-(207) (Callaghan 1989).

³⁰ *Id.* § 14.528(202)(1). The statute states in relevant part [t]he attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, *any person*, partnership, corporation, association, organization or other legal entity *may maintain an action* in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur *for declaratory and equitable relief against* the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, *any person*, partnership, corporation, association, organization or other legal entity *for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.*

Id. (emphasis added).

³¹ *Id.*

³² *Id.*

³³ Jensen, *supra* note 27, at 76.

environmental duty as outlined in the Michigan Constitution.³⁴ The Vanderkloots challenged the constitutionality of the statutory authority under which the Highway Commission had seized eleven acres of their land.³⁵ They argued that the Highway Commission Act did not specifically provide for the protection of the environment.³⁶ The court rejected this claim on the grounds that the legislature had adequately fulfilled its duty to provide environmental protection through its enactment of the Sax Act.³⁷ According to the court, the Michigan Constitution did not require that the legislature place an environmental protection clause in each and every statute.³⁸ Instead, the legislature intended the Sax Act to supplement all existing state laws such as the Highway Commission Act.³⁹

The *Vanderkloot* court further noted that the Sax Act provided more than a separate procedural route for the protection of the environment.⁴⁰ They interpreted the Sax Act as also providing a source of supplementary law, prescribing substantive rights, duties and functions for all persons subject to the act.⁴¹ On this basis, the court held that the Sax Act supplemented the Highway Commission Act and adequately fulfilled Michigan's constitutional duty to protect its natural resources.⁴²

B. The Sax Act: a Radical Departure from Traditional Environmental Regulation

Growing distrust of then-present administrative procedures and the inadequacies of the regulatory agencies responsible for environ-

³⁴ Michigan State Highway Comm'n v. Vanderkloot, 220 N.W.2d 416, 419 (Mich. 1974); see *supra* note 28.

³⁵ *Vanderkloot*, 220 N.W.2d at 419.

³⁶ *Id.* at 424.

³⁷ *Id.* at 425.

³⁸ *See id.*

³⁹ *Id.* at 430; see MICH. STAT. ANN. § 14.528(206) (Callaghan 1989) ("Sec. 6. This act shall be supplementary to existing administrative and regulatory procedures provided by law.").

⁴⁰ *Vanderkloot*, 220 N.W.2d at 427.

⁴¹ *Id.* at 428. The court supports its holding that the Sax Act incorporates both substantive rights and procedural causes of action through the text of the act and its official title. The long title for the Sax Act states that it is

[a]n Act to provide for actions for declaratory and equitable relief for protection of the air, water and other natural resources and the public trust therein; to prescribe the rights, duties and functions of 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; and to provide for judicial proceedings relative thereto.

Id. (quoting MICH. STAT. ANN. § 14.528(201)) (emphasis added).

⁴² *Vanderkloot*, 220 N.W.2d at 428.

mental protection motivated the adoption of the Sax Act.⁴³ In response to the disgruntled public sentiment, Michigan enacted the Sax Act deliberately devoid of elaborate administrative procedures and guidelines, assigning the task of creating environmental standards to the courts.⁴⁴ The legislature removed environmental quality control from the regulatory agencies and placed it with the citizens and the courts, hoping to curb the courts' general tendency in environmental cases to defer to agency expertise.⁴⁵ As cases and controversies arise under the Sax Act, it is the courts that determine the validity and enforceability of applicable agency standards.⁴⁶ If a court finds that an agency standard is deficient, the court can create its own appropriate standard of review.⁴⁷

Standing under the Sax Act does not depend on the existence of an environmental harm that personally affects the plaintiff.⁴⁸ Any party may have standing if it alleges that a defendant's conduct

⁴³ See David P. Gionfriddo, *Sealing Pandora's Box: Judicial Doctrines Restricting Public Trust Citizen Environmental Suits*, 13 B.C. ENVTL. AFF. L. REV. 439, 444 (1986).

⁴⁴ See John A. Watts, *Michigan's Environmental Protection Act: Political Background*, 4 U. MICH. J.L. REF. 358, 358 (1970).

⁴⁵ Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003, 1004 (1972); see also *Ray v. Mason County Drain Comm'n*, 224 N.W.2d 883, 887 (Mich. 1975). The reason for this dramatic change in environmental law enforcement is that "[n]ot every public agency proved to be diligent and dedicated defenders of the environment." *Id.*

⁴⁶ MICH. STAT. ANN. § 14.528(202)(2). This statute states in relevant part

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

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

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

Id. (emphasis added).

⁴⁷ *Id.*

⁴⁸ See *id.* § 14.528(203)(1). The statute states in relevant part

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

Id. (emphasis added).

adversely affects the state's natural resources.⁴⁹ Therefore, the burden of proof rests on plaintiffs to establish a *prima facie* case by demonstrating the occurrence or likely occurrence of an environmental harm resulting from the defendant's conduct.⁵⁰ Once a plaintiff establishes a *prima facie* case, the defendant may rebut the plaintiff's charges by submitting evidence to the contrary, or by showing that no realistic alternative exists to its proposed action and that such action will not substantially harm public health, safety, or welfare.⁵¹

Although Michigan has an administrative process for reviewing projects potentially damaging to the environment,⁵² the Sax Act allows a citizen to file a complaint against the harmful conduct of a project proponent without exhausting all administrative agency procedures.⁵³ The legislature incorporated this bypass of the state's regulatory agencies in order to push the agencies to fulfill their environmental responsibilities to the public.⁵⁴ Supporters of the Sax Act believed that the threat of court involvement would result in better compliance with, and enforcement of, environmental legislation by regulatory agencies as well as private developers.⁵⁵ In addition, the judicial forum can better accommodate those controversies that necessitate immediate attention because the act allows courts to hand down temporary injunctions prior to deciding the merits of a case.⁵⁶ Even after granting a temporary injunction, the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See* DEBORAH H. JESSUP, GUIDE TO STATE ENVIRONMENTAL PROGRAMS 293 (2d ed. 1990). The Natural Resources Commission is the administrative agency in Michigan responsible for determining long-term environmental policy objectives and hearing appeals pertaining to permit approval and denial. *Id.*

⁵³ *See* Sax & Conner, *supra* note 45, at 1019; *see also* West Michigan Env'tl. Action Council, Inc. v. Natural Resources Comm'n, 275 N.W.2d 538, 541-42 (Mich. 1979) *cert. denied*, 444 U.S. 941 (1979) (holding that Sax Act did not require plaintiffs to exhaust all administrative remedies before filing court action).

⁵⁴ *See* Sax & Conner, *supra* note 45, at 1019.

⁵⁵ *See* Joseph H. Thibodeau, *Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box*, 48 J. OF URB. LAW, 579, 597-98 (1970-71) (quoting Governor William Milliken's statement in press release, from Mar. 31, 1970: "[The Sax Act] will also, in some cases, produce quicker action from those agencies and instrumentalities of state and local governments whose responsibility it is to protect the environment, as well as from the polluters themselves.").

⁵⁶ MICH. STAT. ANN. § 14.528 (204)(1). This section states that "[t]he court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction." *Id.*

Sax Act directs courts to proceed directly and quickly to the merits of a case without wasting time on procedural issues.⁵⁷

The original proposal for the Sax Act created much controversy in Michigan.⁵⁸ State manufacturers and regulatory agencies made up most of the opposition to the Sax Act.⁵⁹ Manufacturers, however, tended to let the agencies take the offensive because they feared publicly opposing popular environmental legislation.⁶⁰ The regulatory agencies opposed to the Sax Act attempted to circumvent the statute's liberal application by proposing amendments ensuring that plaintiffs exhaust all administrative procedures before taking court action.⁶¹ The legislature never adopted the agencies' proposals and consequently enacted the Sax Act without any such limitations.⁶²

C. *The Public Trust Doctrine and the Role of the Courts*

Michigan specifically incorporates its historic public trusteeship over natural resources into the text of the Sax Act by providing citizens with standing to sue defendants "for the protection of the air, water, and other natural resources and the *public trust* therein."⁶³ The public trust doctrine derives from old common law principles that Michigan's natural resources are held in a trust for the benefit of the citizens of Michigan.⁶⁴ The entire state, therefore, has the obligation to protect the trust for the intended beneficiaries, the state's citizens.⁶⁵ Despite the explicit mention of the public trust in the Sax Act, the Michigan courts have neglected to expand and combine the public trust doctrine with the Sax Act.⁶⁶

Without specifically addressing the public trust, the Supreme Court of Michigan discussed the idea of a communal duty in its examination of the parameters of the Sax Act in *Ray v. Mason County Drain Commission*.⁶⁷ In *Ray*, landowners and interested parties in the Black Creek Watershed area in Mason County sought

⁵⁷ Sax & Conner, *supra* note 45, at 1020; *see also* Jensen, *supra* note 27, at 76-77.

⁵⁸ Watts, *supra* note 44, at 360-68.

⁵⁹ *Id.* at 364-65 (two agencies most concerned with adoption of Sax Act were Water Resources Committee and Air Pollution Control Commission).

⁶⁰ *Id.*

⁶¹ *Id.* at 365-66.

⁶² *Id.* at 366.

⁶³ MICH. STAT. ANN. § 14.528(202)(1); *see supra* note 28; Gionfriddo, *supra* note 43, at 443.

⁶⁴ Gionfriddo, *supra* note 43, at 441; *see also* Jensen, *supra* note 27, at 71.

⁶⁵ *See* Jensen, *supra* note 27, at 71.

⁶⁶ *Id.* at 73-74. Jensen argues that such a combination would beneficially expand the courts' interpretation of the parameters of the Sax Act. *Id.* at 81.

⁶⁷ *Ray v. Mason County Drain Comm'n*, 224 N.W.2d 883, 888 (Mich. 1975).

an injunction against a local flood control program's channelization of drains.⁶⁸ The plaintiffs alleged that the proposed project would disrupt the area's swamps and woodlands which served as refuge for a variety of wildlife.⁶⁹ The *Ray* court stated that in addition to providing a procedural cause of action and a substantive environmental right to citizens, as established in *Vanderkloot*,⁷⁰ the Sax Act also imposes a duty on all individuals and organizations to prevent environmental damage that could result from their activities.⁷¹ The *Ray* court, however, failed explicitly to incorporate the public trust in its opinion.⁷² Only in the 1983 case of *Stevens v. Creek*, did a court discuss the inclusion of the public trust in the Sax Act.⁷³ The discussion in *Stevens*, however, was limited to the finding that the Sax Act did not apply only to publicly-held resources.⁷⁴

D. *The Role of the Courts Under the Sax Act*

In *Ray*, the Supreme Court of Michigan also discussed the courts' responsibility under the Sax Act.⁷⁵ According to the *Ray* court, the legislature purposely did not create an elaborate set of procedures detailing every conceivable environmental impact.⁷⁶ Instead, the legislature left Michigan's environmental policy open to allow the courts to interpret the Sax Act and to create their own standards of review.⁷⁷ The legislature reasoned that these court-created standards arise out of actual controversies, and provide flexibility in the future to accommodate presently unforeseeable forms of environmental damage.⁷⁸

The *Ray* court held that the Sax Act requires that circuit judges make detailed findings of fact and law in order to fulfill their environmental responsibility.⁷⁹ The court concluded that detailed findings

⁶⁸ *Id.* at 884. The channelization plan, requested by two local farmers to protect their crops from flooding, involved widening, deepening, and straightening the present drain channels. *Id.*

⁶⁹ *Id.* at 885.

⁷⁰ See *supra* notes 38-39 and accompanying text.

⁷¹ *Ray*, 224 N.W.2d at 888.

⁷² See *id.*

⁷³ *Stevens v. Creek*, 328 N.W.2d 672, 674-75 (Mich. Ct. App. 1982).

⁷⁴ *Id.* at 674; see also Jensen, *supra* note 27, at 87.

⁷⁵ *Ray*, 224 N.W.2d at 888-89.

⁷⁶ *Id.* at 888.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 888-89. The court stated that

[t]he judicial development of a common law of environmental quality, as envisioned by the Legislature, can only take place if Circuit Court judges take care to set out with specificity the factual findings upon which they base their ultimate

of fact in the lower courts are essential to the creation of a common law of environmental quality.⁸⁰ Due to the minimal finding of facts supplied by the trial court in the *Ray* case, the Supreme Court of Michigan ultimately remanded the case back to the trial court for proper findings of fact.⁸¹

In *West Michigan Environmental Action Council v. Natural Resources Commission*, the Supreme Court of Michigan established that the Sax Act required courts not to defer to agency standards and determinations in environmental litigation.⁸² In *West Michigan*, an environmental group brought an action to restrain the state from issuing any permits to oil companies for oil or gas drilling in Pigeon River Country State Forest.⁸³ The *West Michigan* court found for the plaintiffs and held that the trial court had erred in deferring to the Department of Natural Resources's conclusion that the drilling would not cause any impairment of the environment.⁸⁴ The Supreme Court of Michigan reasoned that the trial court's deference to agency expertise violated the Sax Act, which requires independent *de novo* determinations by the courts.⁸⁵ The Sax Act does allow a court to remit parts of a case to agencies if administrative licensing or other proceedings are required or available.⁸⁶ Final determination of environmental issues, however, remains with the courts.⁸⁷ According to the *West Michigan* court, the Sax Act necessitated strict scrutiny of administrative agencies in order to accomplish its goal of efficient

conclusions. . . . In the final analysis the very efficacy of the [Sax Act] will turn on how well Circuit Court judges meet their responsibility for giving vitality and meaning to the act through detailed findings of fact.

Id.

⁸⁰ *Id.* at 889; see Haynes, *supra* note 10, at 600.

⁸¹ *Ray*, 224 N.W.2d at 892 (supreme court could not decide case on basis of three-sentence finding of facts and conclusion of law submitted by trial court).

⁸² *West Michigan Env'tl. Action Council, Inc. v. Natural Resources Comm'n*, 275 N.W.2d 538, 541 (Mich. 1979) *cert. denied*, 444 U.S. 941 (1979).

⁸³ *Id.* at 540.

⁸⁴ *Id.* at 541. The plaintiffs challenged the Natural Resources Committee because it approved the plan after the submission of an environmental report from the Department of Natural Resources. The Department of Natural Resources originally sold the land to the oil companies and subsequently developed the plan for issuance of permits. *Id.* at 540.

⁸⁵ *Id.* at 541; see MICH. STAT. ANN. § 14.528(202)(2), *supra* note 46.

⁸⁶ *West Michigan*, 275 N.W.2d at 541-42; see MICH. STAT. ANN. § 14.528(204)(2), which states in relevant part

(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings. . . . In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

Id. (emphasis added).

⁸⁷ *Id.*

environmental regulation.⁸⁸ Thus, the adoption of the Sax Act channeled environmental regulation away from the government agencies and into the Michigan court system, and the courts were now responsible for the quality of environmental standards.

*E. Common Law Development of Environmental Standards
Under the Sax Act*

After the clarification of their duties under the Sax Act, the Michigan courts began to formulate standards of review for actionable environmental damage. The *West Michigan* court began the review process by weighing the effects of the adverse impact on natural resources against the need for the conduct likely to cause the impact.⁸⁹ In *West Michigan*, the court granted a permanent injunction because the plaintiffs demonstrated that the proposed drilling for oil and gas would have a significant adverse impact on a unique natural resource.⁹⁰ The court acknowledged that all human activities can adversely impact the environment, but concluded that not all levels of impact are sufficiently significant to warrant court action.⁹¹ Because the plaintiffs in *West Michigan* demonstrated that oil or gas drilling in the area would destroy the only sizable elk herd east of the Mississippi River, the court found that the impact on the elk herd constituted impairment and destruction of a natural resource and granted a permanent injunction.⁹² This was the first indication that the courts would limit the Sax Act to the protection of unique or rare natural resources.

In the 1982 case, *Kimberly Hills Neighborhood Association v. Dion*, the plaintiffs brought a Sax Act suit against a developer who planned to construct single-family homes on land that supported various types of wildlife.⁹³ The Michigan Court of Appeals denied the injunction, reasoning that the impact of the construction did not rise to a level justifying an injunction.⁹⁴ The *Kimberly Hills* court examined the issue, first raised in *West Michigan*, of when an en-

⁸⁸ See *West Michigan*, 275 N.W.2d at 542.

⁸⁹ *Id.* at 545.

⁹⁰ *Id.*

⁹¹ *Id.* "We recognize that virtually all human activities can be found to adversely impact natural resources in some way or other. The real question before us is when does such impact rise to the level of impairment or destruction?" *Id.*

⁹² *Id.*

⁹³ *Kimberly Hills Neighborhood Ass'n v. Dion*, 320 N.W.2d 668, 669-70 (Mich. Ct. App. 1982).

⁹⁴ *Id.* at 669-70.

vironmental impact rises to the level of actionable impairment and destruction of the environment.⁹⁵ The court consequently devised a two-part test in which it must determine first whether the defendant's activity adversely impacted a natural resource and second whether the activity's adverse impact rises to a level justifying injunctive relief.⁹⁶ The court ultimately held that the *Kimberly Hills* case involved natural resources, but that the alleged impact on those resources did not warrant an injunction.⁹⁷ The court based this conclusion on the evidence provided, which did not demonstrate that any of the endangered wildlife were unique or uncommon in the area.⁹⁸

In a later case, *City of Portage v. Kalamazoo County Road Commission*, the Court of Appeals developed more specific standards for determining the level of environmental impact.⁹⁹ In *City of Portage*, the plaintiff sought to enjoin the defendant from removing certain trees along Portage Road in Portage, Michigan.¹⁰⁰ Using the two-part test it created in *Kimberly Hills*, the Court of Appeals determined that the removal of trees involved a natural resource but that this particular tree-cutting did not rise to a level of impairment and destruction justifying an injunction.¹⁰¹ The *City of Portage* court further supplemented the *Kimberly Hills* test by supplying the following list of factors for a court's consideration: whether the natural resource involved is rare, unique, or endangered, or has historical significance;¹⁰² whether the resource is easily replaceable;¹⁰³ whether the proposed action will have any significant consequential effect on other natural resources;¹⁰⁴ and whether the direct or consequential impact on animals or vegetation will affect a critical number considering the nature and location of the wildlife affected.¹⁰⁵ This list of

⁹⁵ *Id.* at 670-71.

⁹⁶ *See id.* at 671; *see also* *Stevens v. Creek*, 328 N.W.2d 672, 675 (Mich. Ct. App. 1982) (case remanded for plaintiff to submit evidence regarding second part of *Kimberly Hills* test).

⁹⁷ *See Kimberly Hills*, 320 N.W.2d at 674.

⁹⁸ *See id.*

⁹⁹ *City of Portage v. Kalamazoo County Road Comm'n*, 355 N.W.2d 913, 915-16 (Mich. Ct. App. 1984), *lv. denied*, 422 Mich. 883 (1985).

¹⁰⁰ *Id.* at 914.

¹⁰¹ *Id.* at 916.

¹⁰² *Id.*; *see West Michigan Env'tl. Action Council, Inc. v. Natural Resources Comm'n.*, 275 N.W.2d 538, 545 (Mich. 1979) *cert. denied*, 444 U.S. 941 (1979) (uniqueness of elk herd was vital factor in decision).

¹⁰³ *City of Portage*, 355 N.W.2d at 915-16.

¹⁰⁴ *Id.*; *see West Michigan*, 275 N.W.2d at 545 (oil or gas drilling would significantly affect wildlife in area).

¹⁰⁵ *City of Portage*, 355 N.W.2d at 916; *see, e.g., Kent County Road Comm'n v. Hunting*,

factors, created fifteen years after the Sax Act's adoption, constitutes the Michigan courts' attempt to qualify when the Sax Act requires their intervention in an environmental controversy. In essence, the factors serve as a balancing test in which the court must weigh the rarity of a resource against the magnitude of the environmental harm to it.¹⁰⁶

III. MASSACHUSETTS' ENVIRONMENTAL POLICY ACTS

A. *The Massachusetts Citizen Suit Statute*

In 1971, Massachusetts enacted its own citizen suit statute (CSS).¹⁰⁷ The CSS grants standing to any group of ten citizens to sue for an injunction against a defendant whose conduct is presently causing damage to the environment or likely to cause damage in the near future.¹⁰⁸ Although the CSS resembles Michigan's Sax Act in its use of citizen suits to protect the state's natural resources, the Massachusetts statute has stricter threshold requirements for plaintiffs bringing suit and more explicitly stated limitations on its applicability.¹⁰⁹ The CSS, unlike the Sax Act, requires that the alleged damage to the environment be both significant and in violation of an environmental statute, ordinance, by-law, or regulation.¹¹⁰ The CSS

428 N.W.2d 353, 358 (Mich. Ct. App. 1988) (court used factors to determine that removal of 100 year-old trees did not constitute actionable impact); *Rush v. Sterner*, 373 N.W.2d 183, 187 (Mich. Ct. App. 1985) (court used factors to determine that destruction of trout population in one river did not constitute actionable impact).

¹⁰⁶ Jensen, *supra* note 27, at 80.

¹⁰⁷ MASS. GEN. LAWS ANN. ch. 214, § 10A (amended by MASS. GEN. LAWS ANN. ch. 214, § 7A).

¹⁰⁸ MASS. GEN. LAWS ANN. ch. 214, § 7A. The CSS defines "damage to the environment" as "destruction, damage or impairment, actual or probable to any of the natural resources of the commonwealth." *Id.*

¹⁰⁹ See Gregor I. McGregor, *Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute*, 1 ENVTL. AFFAIRS 606, 608 (1971).

¹¹⁰ MASS. GEN. LAWS ANN. ch. 214, § 7A. The CSS states in relevant part
Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources. . . .

The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the Commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the Commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

Id. (emphasis added).

further requires that plaintiffs, at least twenty-one days prior to filing a complaint, give written notice to the agency responsible for enforcement of the law allegedly violated, as well as to defendants.¹¹¹ A defendant may rebut the plaintiffs' challenge by demonstrating that its conduct complies with either an approved regulatory pollution abatement schedule or that they are presently implementing a plan to alleviate the environmental damage at issue.¹¹² If the defendant demonstrates its compliance with such a schedule or plan, the plaintiffs can prevail only by proving that the defendant's conduct still endangers public health and safety.¹¹³ Under the CSS, a court may assess court costs but may not award attorneys' fees or damages.¹¹⁴

In 1974, the Supreme Judicial Court (SJC) of Massachusetts established the parameters of the CSS's applicability in *City of Boston v. Massachusetts Port Authority*.¹¹⁵ The *City of Boston* controversy arose from the construction of a new passenger terminal and parking garage at the General Edward Lawrence Logan International Airport.¹¹⁶ The plaintiffs based their standing on the allegation that the Massachusetts Port Authority had violated certain environmental procedural regulations.¹¹⁷ Because the plaintiffs did not allege a substantive violation of an environmental statute, the SJC addressed the issue of whether the CSS granted standing not only for substantive damage to the environment but also for failure to follow environmental regulatory procedures.¹¹⁸ In its majority opinion, the SJC incorporated dictum from an earlier case in which it had suggested that violations of the Hatch Act, a purely procedural statute, could grant plaintiffs standing and courts jurisdiction under the CSS.¹¹⁹

¹¹¹ *Id.*

¹¹² *Id.* The CSS states in relevant part

It shall be a defense to any action taken pursuant to this section that the defendant is subject to, and in compliance in good faith with, a judicially enforceable administrative pollution abatement schedule or implementation plan the purpose of which is alleviation of damage to the environment complained of, unless the plaintiffs demonstrate that a danger to the public health and safety justifies the court in retaining jurisdiction.

Id.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *City of Boston v. Massachusetts Port Auth.*, 308 N.E.2d 488, 493-95 (Mass. 1974).

¹¹⁶ *Id.* at 491.

¹¹⁷ *Id.* (standing under CSS requires that plaintiffs allege that defendant's conduct violates an environmental statute, ordinance, by-law, or regulation); see *supra* note 110.

¹¹⁸ *City of Boston*, 308 N.E.2d at 493-94.

¹¹⁹ *Id.* at 494-95, n.10. In *Christoffels v. Alton Properties, Inc.*, a group of ten Tewksbury

Following this line of reasoning, the *City of Boston* court held that the CSS applies to cases when a defendant either causes actual damage to the environment or fails to follow the correct environmental regulatory procedure.¹²⁰

B. The Massachusetts Environmental Policy Act (MEPA)

In 1972, one year after the adoption of the CSS, the Massachusetts legislature enacted MEPA, an act relying on administrative regulation for environmental protection.¹²¹ Massachusetts adopted MEPA to ensure that no state agency could undertake a major state project within the commonwealth without considering the potential environmental impacts and providing an opportunity for public debate on these impacts.¹²² Like the National Environmental Protection Act (NEPA),¹²³ MEPA requires public project proponents to submit environmental impact reports to an appointed agency for approval before commencing proposed projects.¹²⁴ Under the original 1972 MEPA, the state agencies administering permits for these public projects were also responsible for reviewing the related environmental report.¹²⁵ The legislature redrafted parts of MEPA in 1977 to create a more centrally administered system under the direct control of the Secretary of the Executive Office of Environmental Affairs (the Secretary).¹²⁶ Under the new MEPA, the Secretary heads up a MEPA Unit and reviews all environmental impact reports

residents sought an injunction against a developer who planned to fill Ames Pond and construct a shopping center on the site. *Christoffels v. Alton Properties, Inc.*, 285 N.E.2d 453, 453 (Mass. 1972). The plaintiffs challenged the constitutionality of the Hatch Act, an act that detailed regulations and procedures for filling ponds. *Id.*; see MASS. GEN. LAWS ANN. ch. 131, § 40. The plaintiffs challenged the constitutionality of the Hatch Act because it did not provide them with an opportunity to be heard prior to departmental approval of the developer's plan, nor did it require departmental consideration of recommendations that could be filed after a public hearing. *Christoffels*, 285 N.E.2d at 454. The *Christoffels* court rejected the plaintiffs' claim because the Hatch Act does not confer any enforceable rights on the plaintiffs. *Id.* The Court noted, however, that the Hatch Act did not preclude the plaintiffs from proceeding under the newly enacted CSS. *Id.*

¹²⁰ *City of Boston*, 308 N.E.2d at 494-95.

¹²¹ MASS. GEN. LAWS ANN. ch. 30, §§ 61-62H (West 1988).

¹²² GOVERNOR'S MESSAGE, H.R. DOC. NO. 5859 (1971).

¹²³ 42 U.S.C. §§ 4321, 4331-4335, 4341-4347.

¹²⁴ See Thomas F. Holt & Franklin G. Stearns, *A Survey of Recent Environmental Decisions in Massachusetts and the First Circuit*, 75 MASS. LAW R. 103, 110 (1990) (NEPA requires environmental impact study prior to federal actions that significantly affect environment); see also MASS. GEN. LAWS ANN. ch. 30, § 62A.

¹²⁵ See H.R. DOC. NO. 5134 (1972) (prior to 1977, project proponents submitted EIRs to separate agencies for approval).

¹²⁶ 1977 Mass. Acts 947, § 1 (Secretary will review all economic impact reports).

(EIRs), therefore separating the permitting process from the environmental review.¹²⁷ These 1977 amendments also expanded MEPA's jurisdiction beyond the regulation of public projects to incorporate parts of the private development sector.¹²⁸

MEPA now authorizes the Secretary to regulate all public and many private construction projects in Massachusetts.¹²⁹ The act establishes a series of procedural steps that a project proponent must complete before beginning construction.¹³⁰ MEPA applies to all state agencies and any private developers applying for state-issued permits or public funding.¹³¹ The Act's primary requirement is an EIR, which any public or private project proponent subject to MEPA must submit to the Secretary.¹³² An EIR informs project proponents, appropriate government agencies, and the general public about both the environmental effects of the proposed development and possible alternatives.¹³³ MEPA requires extensive EIRs for all public projects and any publicly funded private projects, but only requires limited EIRs for privately funded projects requiring state-issued permits.¹³⁴

¹²⁷ MASS. REGS. CODE tit. 301 § 11.02. A MEPA Unit is the Secretary's staff responsible for the implementation and administration of the MEPA review process. *Id.*

¹²⁸ 1977 Mass. Acts 947, § 1; see Jonathan C. Kaledin, *The Massachusetts Environmental Policy Act and Private Development Activity: Is the Law Working?* 32 BOSTON B.J., 23, 23 (1988).

¹²⁹ See Steven C. Davis, *Common Wealth*, 5 ENVTL. F., 10, 10 (1988).

¹³⁰ See MASS. GEN. LAWS ANN. ch. 30, § § 61-62H. Section 61 requires all state agencies and departments involved in projects to assess and minimize the damage to the environment. *Id.* at § 61. Section 62 defines the important terms included in MEPA. *Id.* at § 62. Section 62A sets out the timetable for initial submission and review, and describes the subject matter jurisdiction of privately funded projects. *Id.* at § 62A. Section 62B lists the required contents of an EIR. *Id.* at § 62B. Section 62C sets out the timetable for review by the Secretary and deadlines. *Id.* at § 62C. Section 62D states the deadlines for acting on permit applications. *Id.* at § 62D. Section 62E gives the Secretary the power to create categories of projects and permits not requiring EIRs. *Id.* at § 62E. Section 62F allows projects to begin before final approval, if emergency action by a person or agency is essential to avoid or eliminate a threat to public health or safety, or a threat to any natural resources. *Id.* at § 62F. Section 62G allows federal EIRs to be submitted in lieu of state reports. *Id.* at § 62G. Section 62H sets deadlines for filing a suit under MEPA. *Id.* at § 62H. See also MASS. REGS. CODE tit. 301, §§ 11.00-11.30 (1987) (MEPA regulations promulgated by Secretary).

¹³¹ See MASS. GEN. LAWS ANN. ch. 30, §§ 62A, 62B (only private developers receiving public funds or requiring state-issued permits are subject to MEPA review); MASS. REGS. CODE tit. 301, § 11.01(1).

¹³² MASS. GEN. LAWS ANN. ch. 30, § 62A; MASS. REGS. CODE tit. 301 §§ 11.02, 11.07.

¹³³ See MASS. GEN. LAWS ANN. ch. 30, § 62B; see also MASS. REGS. CODE tit. 301 § 11.07 (outline and content of EIR).

¹³⁴ See MASS. GEN. LAWS ANN. ch. 30 § 62A. An EIR is limited for privately funded projects only to those aspects of the project for which a state-issued permit is necessary. *Id.* The statute states that "[i]n the case of a permit application to an agency from a private person for a project for which financial assistance is not sought the scope of said report and

Pursuant to MEPA, the Secretary promulgates regulations which create thresholds, procedures, and timetables for a two-level review process.¹³⁵ The first level involves an Environmental Notification Form (ENF) review.¹³⁶ If a project meets certain threshold requirements regarding type and size, as detailed in the regulations, the project's developer must submit an ENF to the MEPA Unit.¹³⁷ The Secretary publishes notice of each ENF review in the *Environmental Monitor*, a state journal.¹³⁸ This publication initiates a thirty-day ENF review period at the end of which the Secretary determines whether the project requires an EIR.¹³⁹ During the review period, the Secretary accepts written comment and may hold a public consultation session to review the details of the project and discuss its possible impacts and alternative suggestions.¹⁴⁰

The second level of the MEPA review process pertains only to those projects required to produce an EIR.¹⁴¹ If the Secretary determines that an EIR is required, the Secretary must issue formal documentation of the scope of the EIR for that project.¹⁴² For privately funded projects requiring a state-issued permit, the scope of an EIR is limited to that part of the project requiring a state-issued permit.¹⁴³ In contrast, a public project requires an EIR for every aspect of the project which might feasibly affect the environment.¹⁴⁴ In either case, the project proponent must prepare a draft EIR and file it with the Secretary.¹⁴⁵ The *Environmental Monitor* then announces the availability of the draft and another thirty-day public

alternatives considered therein shall be limited to that part of the project which is within the subject matter jurisdiction of the permit." *Id.*

¹³⁵ MASS. GEN. LAWS ANN. ch. 30, § 62H; see MASS. REGS. CODE tit. 301, §§ 11.00-11.30.

¹³⁶ See MASS. REGS. CODE tit. 301, §§ 11.04-06.

¹³⁷ MASS. REGS. CODE tit. 301, § 11.25 is a list of 32 project types or sizes, all of which would require both an ENF and an EIR, provided that the project is publicly funded or is a privately funded project requiring an agency action or permit. *Id.* MASS. REGS. CODE tit. 301, § 11.26 is a list of those sorts of permits that would cause the proponent of a private project to file an ENF. *Id.* MASS. REGS. CODE tit. 301, § 11.27 is a list of the review thresholds for projects requiring agency actions and financial assistance. *Id.*

¹³⁸ MASS. REGS. CODE tit. 301, § 11.19.

¹³⁹ *Id.* at § 11.05.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at § 11.06.

¹⁴² *Id.*

¹⁴³ MASS. GEN. LAWS ANN. ch. 30, § 62A; MASS. REGS. CODE tit. 301, § 11.06(3). For example, if the project needs only a sewage permit, then the EIR is limited to a study of the environmental effects of the proposed sewage plan. *Id.*

¹⁴⁴ MASS. GEN. LAWS ANN. ch. 30, § 62A; MASS. REGS. CODE tit. 301, § 11.06(3).

¹⁴⁵ See MASS. REGS. CODE tit. 301, § 11.07 (description of the elements required in draft EIR).

comment period commences, which the Secretary's official comments follow.¹⁴⁶ The project proponent then prepares a final EIR from these comments and submits it to the Secretary, who places notice of its availability for public review in the *Environmental Monitor*.¹⁴⁷ One final thirty-day period for comments follows this notice.¹⁴⁸ No project may begin until the Secretary issues a positive decision on the final EIR, indicating that the project may commence construction.¹⁴⁹

MEPA also requires that any state agency that acts on a project requiring an EIR must submit its own finding of potential environmental impact, generally referred to as a "Section 61" finding.¹⁵⁰ An agency's Section 61 finding assures the Secretary that the proponent will take all feasible means and measures to minimize the project's potential to cause environmental damage.¹⁵¹ The Section 61 finding is limited to the scope of the EIR.¹⁵² Similarly, no Section 61 finding is required when the Secretary does not require an EIR for a project.¹⁵³

C. Judicial Review Under the CSS and MEPA

In contrast to the CSS which provides a judicial forum for citizens with environmental grievances, MEPA does not specifically provide for judicial review in all cases.¹⁵⁴ The lack of specificity has given rise to a controversy over the extent of court interference in environmental regulation in Massachusetts. In the 1974 *City of Boston* case, the SJC discussed the availability of judicial review, under the CSS and MEPA, of those agency decisions affecting the environment.¹⁵⁵ The *City of Boston* case involved the construction of a new passenger terminal and parking garage at Logan International Airport.¹⁵⁶ The plaintiffs alleged that the Massachusetts Port Authority failed to follow correct environmental regulatory procedure.¹⁵⁷ Thus, the court first had to resolve the issue of standing under the CSS

¹⁴⁶ MASS. GEN. LAWS ANN. ch. 30, § 62C; see also MASS. REGS. CODE tit. 301, § 11.08.

¹⁴⁷ MASS. GEN. LAWS ANN. ch. 30, § 62C; see also MASS. REGS. CODE tit. 301, § 11.09.

¹⁴⁸ MASS. GEN. LAWS ANN. ch. 30, § 62C; see also MASS. REGS. CODE tit. 301, § 11.09.

¹⁴⁹ MASS. GEN. LAWS ANN. ch. 30, § 62B; see also MASS. REGS. CODE tit. 301, § 11.01(2).

¹⁵⁰ MASS. GEN. LAWS ANN. ch. 30 § 61; MASS. REGS. CODE tit. 301, § 11.10.

¹⁵¹ MASS. GEN. LAWS ANN. ch. 30 § 61; MASS. REGS. CODE tit. 301, § 11.01.

¹⁵² MASS. GEN. LAWS ANN. ch. 30 § 61; MASS. REGS. CODE tit. 301, § 11.10(3).

¹⁵³ MASS. GEN. LAWS ANN. ch. 30 § 61; MASS. REGS. CODE tit. 301, § 11.01(3).

¹⁵⁴ See MASS. GEN. LAWS ANN. ch. 30 § 61-62H.

¹⁵⁵ *City of Boston v. Massachusetts Port Authority*, 308 N.E.2d 488, 503-05 (Mass. 1974).

¹⁵⁶ See *supra* notes 116-17 and accompanying text.

¹⁵⁷ *Id.*

and MEPA,¹⁵⁸ and then the availability of judicial review of regulatory decisions.¹⁵⁹ In the opinion, the *City of Boston* court relied on an earlier case, *West Broadway Task Force, Inc. v. Commissioner of the Department of Community Affairs*, involving a challenge to the Boston Housing Authority's operation of a housing project.¹⁶⁰ The *West Broadway* court held that the courts should not intervene in administrative agencies' discretionary decisions until plaintiffs had exhausted all alternative regulatory procedures.¹⁶¹ Like *City of Boston*, the *West Broadway* case did not involve any of the traditional challenges to administrative agencies, such as the constitutionality of a relevant statute or a charge of arbitrary and capricious decision making.¹⁶² Instead, the plaintiffs asked the court to substitute its own judgment for that of an administrative agency.¹⁶³ The *West Broadway* court noted its reluctance to scrutinize an agency action except in cases which involved the public's health or safety.¹⁶⁴ Despite the court's recognition that health and life were at issue in the *West Broadway* housing controversy, it held that satisfactory alternative administrative procedures were available and directed the plaintiffs to exhaust these procedures before petitioning for judicial review.¹⁶⁵ The *City of Boston* court relied on this reasoning and held that it could not intervene in the controversy because the procedures detailed in MEPA provide alternatives to judicial review which plaintiffs must exhaust before judicial intervention.¹⁶⁶

In the 1975 case, *Secretary of Environmental Affairs v. Massachusetts Port Authority*, the SJC reviewed another controversy over

¹⁵⁸ See *supra* notes 118–20 and accompanying text (plaintiffs have standing under CSS if they allege either a procedural or substantive violation of an environmental law).

¹⁵⁹ *City of Boston*, 308 N.E.2d at 503–05.

¹⁶⁰ See *id.* at 503–04 (quoting *West Broadway Task Force, Inc. v. Comm'r of the Dep't of Community Affairs*, 297 N.E.2d 505, 509–10 (Mass. 1973)).

¹⁶¹ *West Broadway*, 297 N.E.2d at 510.

¹⁶² *Id.* at 509. The plaintiffs did not challenge the constitutionality of the relevant statute, nor did they allege an offense of a specific statutory prohibition or charge the agency with arbitrary or capricious decision making or inaction. *Id.* In *West Broadway*, the SJC had to determine the appropriate time for judicial intervention in an administrative action that was neither regulatory nor adjudicatory. *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *id.* at 510.

¹⁶⁵ See *id.*

¹⁶⁶ *City of Boston v. Massachusetts Port Authority*, 308 N.E.2d 488, 504 (Mass. 1974). The *City of Boston* court acknowledged that, at the time of filing, the alternatives detailed in section 62 had yet to become effective. *Id.* Nevertheless, the court stated that it must interpret sections 61 and 62 together for them to accord with the legislature's intent. *Id.* Therefore, plaintiffs must first follow section 62 procedure before bringing a court action. *Id.*

construction at Logan International Airport.¹⁶⁷ In the *Secretary of Environmental Affairs* case, the Secretary challenged the authority's determination that it did not need to submit an EIR for review.¹⁶⁸ The SJC upheld the superior court's finding that it had jurisdiction for judicial review of an agency decision not to submit an EIR.¹⁶⁹ The *Secretary of Environmental Affairs* court distinguished the *City of Boston* holding, which did not allow judicial review, on the basis that the plaintiffs in the present case had exhausted all agency alternatives, and therefore, judicial review was appropriate.¹⁷⁰

The next important case regarding the availability of judicial review under MEPA did not occur until 1985 when the Boston Preservation Alliance challenged the Secretary's decision to limit the scope of an EIR for the International Place project in Boston's financial district.¹⁷¹ In *Boston Preservation Alliance, Inc. v. Secretary of the Executive Office of Environmental Affairs*, the plaintiffs alleged that MEPA required the Secretary to order a full-scope EIR covering all environmental impacts, including wind, shadow, visual, historical, and archaeological effects.¹⁷² Because the project involved a private developer, the Secretary ordered an EIR limited to potential sewage and traffic impacts, the two areas of the project requiring state permits.¹⁷³

The SJC rejected the plaintiffs' arguments for a full-scope EIR on the grounds that MEPA had limited subject matter jurisdiction for

¹⁶⁷ *Secretary of Environmental Affairs v. Massachusetts Port Authority*, 323 N.E.2d 329, 340 (Mass. 1973).

¹⁶⁸ *Id.* at 331.

¹⁶⁹ *Id.* at 344.

¹⁷⁰ *Id.* at 340. The *Secretary of Environmental Affairs* court also discussed the involvement of public health and safety and the appropriate court response, as referred to in *West Broadway. Id.*; *West Broadway Task Force, Inc. v. Comm'r of the Dep't of Community Affairs*, 297 N.E.2d 505, 510 (Mass. 1973); see *supra* notes 160-65 and accompanying text. The court held that public health and safety were important in the *Secretary of Environmental Affairs* case, and that because of this the courts had a responsibility to scrutinize the agency decision. *Secretary of Environmental Affairs*, 323 N.E.2d at 340. The legislature enacted MEPA because agencies, such as the authority, had not given sufficient consideration to environmental concerns. See *id.* The SJC held that "[c]onsequently, when an agency makes a decision downplaying the environmental effects of a proposed activity, the court may properly 'cock a skeptical eye' at that decision." *Id.* The court also referred to federal cases where the courts exercised their power of *de novo* review of negative agency statements. *Id.* at 341, n.6.

¹⁷¹ *Boston Preservation Alliance, Inc. v. Secretary of the Executive Office of Env'tl. Affairs*, 487 N.E.2d 197, 198 (Mass. 1986).

¹⁷² *Id.* at 199.

¹⁷³ *Id.* at 200.

EIRs involving private development.¹⁷⁴ Based on the legislature's granting to the Secretary the authority to promulgate rules and regulations for MEPA, the SJC reasoned that the legislature intended for the Secretary to have broad discretion in establishing the parameters of its authority.¹⁷⁵ Allowing the Secretary this discretionary power, however, did not mean that the courts were to abdicate their duty to review agency decisions that are allegedly arbitrary and unreasonable.¹⁷⁶ The SJC stated that despite the broad discretionary power of the Secretary, they would not hesitate to overrule the arbitrary or unreasonable agency interpretation of statutes or rules.¹⁷⁷

In 1988, the SJC distanced themselves from environmental regulation by abruptly restricting its jurisdiction to review certain administrative determinations in *Cummings v. Secretary of the Executive Office of Environmental Affairs*.¹⁷⁸ In *Cummings*, ten residents of Gloucester, Massachusetts sued the Secretary, alleging that the Secretary's decision not to require an EIR for a mixed-use commercial development in Gloucester violated MEPA.¹⁷⁹ The central issue before the SJC was whether the Massachusetts superior courts have subject matter jurisdiction over an action challenging a Secretary's decision not to require an EIR.¹⁸⁰ Despite finding jurisdiction to review the scope of an EIR in *Boston Preservation Alliance*,¹⁸¹ the *Cummings* court definitively ruled that neither MEPA nor the Secretary's regulations granted the courts jurisdiction to review the Secretary's determination not to require an EIR.¹⁸²

After denying jurisdiction to the Superior courts under MEPA, the SJC then faced the issue of whether the CSS could grant the courts jurisdiction in a challenge to the Secretary's decision not to require an EIR.¹⁸³ The CSS expressly grants jurisdiction to the superior courts whenever a group of ten citizens seek equitable or

¹⁷⁴ *Id.*; MASS. GEN. LAWS ANN. ch. 30, § 62A; see *supra* note 143 and accompanying text.

¹⁷⁵ *Boston Preservation Alliance*, 487 N.E.2d at 202.

¹⁷⁶ See *id.* The court noted that "[t]his principle . . . is 'one of deference, not abdication,' and this court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable." *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Cummings v. Secretary of the Executive Office of Env'tl. Affairs*, 524 N.E.2d 836, 840 (Mass. 1988).

¹⁷⁹ *Id.* at 836-37 (project at issue was Gloucester Landing Association shopping mall).

¹⁸⁰ *Id.* at 837.

¹⁸¹ See *Boston Preservation Alliance*, 487 N.E.2d at 201.

¹⁸² *Cummings*, 524 N.E.2d at 837.

¹⁸³ *Id.* at 838.

declaratory relief against project proponents whose conduct causes significant environmental damage which is in violation of an environmental law.¹⁸⁴ In the *City of Boston* case, the SJC held that the CSS encompasses both procedural and substantive violations of environmental legislation.¹⁸⁵ In *Cummings*, the court adhered to this ruling but denied the plaintiffs' claim against the Secretary on the basis that a decision not requiring an EIR is neither a procedural nor a substantive violation of any environmental statute, ordinance, by-law, or regulation.¹⁸⁶ According to the court, an incorrect decision by the Secretary did not constitute damage to the environment as defined by the CSS.¹⁸⁷ The SJC reasoned that the Secretary acts as a disinterested public official to whom deference by the courts constitutes sound environmental policy based on the Secretary's expertise in environmental matters.¹⁸⁸ The SJC has upheld the *Cummings* interpretation of the CSS and MEPA as recently as 1991.¹⁸⁹

In a lengthy dissent in *Cummings*, Justice Abrams interpreted MEPA to grant review of a Secretary's decision not to require an EIR.¹⁹⁰ First, Abrams noted that MEPA contains language which allows for review.¹⁹¹ Second, the SJC has previously reviewed other

¹⁸⁴ See MASS. GEN. LAWS ANN. ch. 214, § 7A, *supra* note 110.

¹⁸⁵ See *City of Boston v. Massachusetts Port Authority*, 308 N.E.2d 488, 494-95 (Mass. 1974), *supra* notes 118-20 and accompanying text.

¹⁸⁶ See *Cummings*, 524 N.E.2d at 838-39.

¹⁸⁷ See *id.* at 839. The court relied on *Warren v. Hazardous West Facility Site Safety Council*, and held that the language of the CSS suggests that "the Legislature contemplated only the agency or authority or private person proposing a project, and not the public official who administers the statutory scheme, as 'the person causing or about to cause' environmental damage." *Id.*; *Warren v. Hazardous West Facility Site Safety Council*, 466 N.E.2d 102, 110 (Mass. 1984). If the plaintiffs had challenged the project proponents for failure to comply with the procedural requirements of a relevant provision, then the superior court would have had jurisdiction under the CSS. *Cummings*, 524 N.E.2d at 838-39. The court also relied on *Aertson v. Landrieu*, a first circuit case where the court did not review the Secretary's decision not to require an EIR. *Id.*; *Aertson v. Landrieu*, 488 F. Supp. 314, 323 (D. Mass.) *aff'd on other grounds*, 637 F.2d 12 (1st Cir. 1980).

¹⁸⁸ *Cummings*, 524 N.E.2d at 839.

¹⁸⁹ See *Villages Development Co. v. Secretary of the Executive Office of Env'tl. Affairs*, 571 N.E.2d 361, 366-67 (Mass. 1991) (upholding the *Cummings* interpretation of CSS and MEPA, although specifically limiting its application to cases that challenge Secretary's determination not to require EIR for project).

¹⁹⁰ *Cummings*, 524 N.E.2d at 842.

¹⁹¹ See *id.* The majority held that the language in the second paragraph of section 62H, allowing that "[a]ny action alleging an improper determination that a project requires the preparation of an [EIR]" indicated the legislative intention to limit review to project proponents' challenges of the requirement of an EIR. *Id.* (emphasis added). Abrams found such a reading contradictory to the language of the first paragraph of section 62H, in which the legislature allows actions "whether a project requires the preparation of an [EIR]" *Id.* (emphasis added).

Secretaries' decisions, and the 1977 MEPA amendments do not reveal any legislative intent to limit review in this particular area.¹⁹² According to Justice Abrams, legislative silence on an issue is not indicative of radical departures from existing law.¹⁹³

Justice Abrams also argued that the plaintiffs fulfilled the CSS's standing requirements, thereby granting the superior court proper jurisdiction over the case.¹⁹⁴ The plaintiffs alleged that the Secretary made an incorrect decision not to require an EIR.¹⁹⁵ Under MEPA, any project that may cause damage to the environment requires an EIR.¹⁹⁶ Abrams argued that an incorrect determination by the Secretary not requiring an EIR could constitute significant damage to the environment and therefore violate MEPA.¹⁹⁷ In addition, the plaintiffs alleged that a possible abuse of discretion or an arbitrary decision by the Secretary is in itself an error of law and a violation of MEPA.¹⁹⁸ Thus, Justice Abrams concluded that because an incorrect decision by the Secretary could cause significant damage, and that an arbitrary decision violates environmental law, the plaintiffs reasonably had standing under the CSS.¹⁹⁹

In sum, the SJC's decision in *Cummings* restricts the courts' role in environmental regulation, and consequently limits the public's access to the courts. The decision also grants extensive unchecked power to the Secretary. This is not the result intended by the legislature and one which they are attempting to correct.

D. *The Legislative Response to Cummings*

In response to the *Cummings* decision, both the Massachusetts legislature and the Secretary have proposed several amendments to

Justice Abrams also argued that because section 62H allows actions to commence within the thirty days following the first issuance of a permit or grant of financial assistance, it is possible that the party bringing an action is a party challenging the Secretary's decision not to require an EIR. *Id.* The party receiving the permit would have no reason to further challenge the Secretary's determination. *Id.*

¹⁹² *Id.* at 842-43.

¹⁹³ *Id.* at 843.

¹⁹⁴ *Id.* at 844; see also MASS. GEN. LAWS ANN. ch. 214, § 7A, *supra* note 110 (only limitations on standing under the CSS are that alleged damage must be significant and in violation of an environmental law).

¹⁹⁵ *Cummings*, 524 N.E.2d at 836-837.

¹⁹⁶ See MASS. GEN. LAWS ANN. ch. 30, § 62C.

¹⁹⁷ *Cummings*, 524 N.E.2d at 844.

¹⁹⁸ *Id.*; see *Boston Preservation Alliance, Inc. v. Secretary of the Executive Office of Env'tl. Affairs*, 487 N.E.2d 197, 202 (Mass. 1986) (SJC will not hesitate to overrule arbitrary and unreasonable agency interpretations); see *supra* note 176 and accompanying text.

¹⁹⁹ *Cummings*, 524 N.E.2d at 844.

MEPA, the first of which appeared in July 1988, only one month after the *Cummings* decision.²⁰⁰ The most recent proposal is presently in third reading in the Massachusetts House of Representatives and will likely be engrossed and sent to the Massachusetts Senate in the Fall of 1992.²⁰¹ This proposal amends several basic areas of MEPA, but most notably it counteracts the SJC's ruling in *Cummings*, which limits review of the Secretary's EIR determinations.²⁰² Specifically, the amendments seek to: provide for judicial review of the Secretary's decisions not to require an EIR; give the Attorney General the authority to obtain injunctive relief and civil penalties for violations of MEPA; allow local cities and towns to request review of projects that would normally not meet MEPA's threshold requirements; and clarify the time for bringing an action before the courts.²⁰³

The proposed amendments received both positive and negative endorsements from interested parties.²⁰⁴ Regardless of the position taken, however, most submitted opinions have openly supported the provision explicitly granting citizens the right to judicial review of a Secretary's decision not to require an EIR.²⁰⁵ The provision limits the judicial review to whether the Secretary exceeded his or her statutory authority, whether the decision was arbitrary or capricious, or based upon an error of law, and whether the Secretary

²⁰⁰ H.R. Doc. No. 6131 (1988) (on file with the Joint Committee on Natural Resources and Agriculture).

²⁰¹ Conversation with Neil O'Brien, Staff Director, Joint Committee on Natural Resources and Agriculture, July 16, 1992.

²⁰² H.R. Doc. No. 4549 (1992) (on file with the Joint Committee on Natural Resources and Agriculture). The same bill has been proposed in the Senate. S. Doc. No. 915 (1992) (on file with the Joint Committee on Natural Resources and Agriculture).

²⁰³ H.R. Doc. No. 4549 (1992).

²⁰⁴ See, e.g., Judy Shope for The Environmental Lobby of Massachusetts, In Support of H6131, An Act to Improve the Massachusetts Environmental Policy Act (MEPA), Address before the Joint Committee on Natural Resources and Agriculture (Nov. 15, 1988) (transcript available at the Joint Committee on Natural Resources and Agriculture); Marsha Rockefeller, for the Massachusetts Audubon Society, In Favor of H. 6131, An act to Improve the Massachusetts Environmental Policy Act (MEPA), Address before the Joint Committee on Natural Resources and Agriculture (Nov. 15, 1988) (transcript available at the Joint Committee on Natural Resources and Agriculture); letter from James A. Alois, Jr., Assistant Secretary for Governmental Affairs for the Executive Office of Transportation and Construction, to Representative Steven Angelo, House Chair, Joint Committee on Natural Resources and Agriculture, (Nov. 14, 1988) (on file with the Joint Committee on Natural Resources and Agriculture); letter from David Begelfer, President, National Association of Industry and Office Parks (NAIOP), to Representative Steven Angelo (Nov. 15, 1988) (on file with the Joint Committee on Natural Resources and Agriculture).

²⁰⁵ See, e.g., letter from Richard A. Nylén, Jr., NAIOP, to Representative Steven Angelo (Apr. 11, 1991) (on file with the Joint Committee on Natural Resources and Agriculture) (stating that, "NAIOP is not opposed to extending standing to legally challenge the Secretary's decisions pursuant to M.G.L. ch. 62-62H.").

abused his or her discretion.²⁰⁶ In addition to explicitly providing for judicial review, this provision clarifies who may bring such actions by authorizing persons proposing the project, cities or towns, aggrieved individuals, and groups of ten or more residents to challenge the Secretary's decisions in superior court.²⁰⁷ This provision is consistent with the previously adopted CSS which allows concerned citizens to bring environmental challenges in court.²⁰⁸

Another generally uncontested MEPA amendment proposal would explicitly prohibit projects from commencing until the Secretary determines that a project does not require an EIR.²⁰⁹ Under present law, a private developer may begin construction before or during the MEPA review period on any part of a project not within MEPA's subject matter jurisdiction. Thus, construction can begin on a project and then be held up for years, or permanently, due to a subsequent EIR that reveals the possibility of severe environmental damage.²¹⁰ The proposed amendment, however, provides that the Secretary may still opt to allow commencement of a project if such commencement does not foreclose mitigation options and does not lead to the potential for significant environmental damage.²¹¹ Although there has been some opposition to the inclusion of such a "loophole" in this particular provision, this amendment is generally supported.²¹²

²⁰⁶ H.R. Doc. No. 4549 (1992).

²⁰⁷ *Id.*

²⁰⁸ See MASS. GEN. LAWS ANN. ch. 214 § 7A, *supra* note 110.

²⁰⁹ See H.R. DOC. NO. 4549, § 1 (1992), which states that

[n]o agency shall commence a project . . . or act on a permit, land transfer, or financial assistance application for any such project unless the secretary has determined that no environmental impact report is required. . . . No private person seeking a permit, land transfer, or financial assistance from an agency for a project . . . shall commence that project unless the secretary has determined that no environmental impact report is required. . . .

Id.

²¹⁰ See, e.g., Phillip J. Nexon, *The Aftermath of Christmas Tree Plaza: Could a "New" MEPA Directly Restrict Private Development?*, Mass. Continuing Legal Educ. Conference 1 (1990). For example, an inadequate EIR submittal delayed the Christmas Tree Plaza retail development project in Hyannis for almost a year. *Id.* "The project was virtually completed—and the store shelves actually stocked—before the Final Environmental Impact Report was approved and before two curb cut permits (the only required state permits) were obtained." *Id.*

²¹¹ H.R. Doc. No. 4549, § 2 (1992). The provision states that "[n]o agency shall commence a project . . . unless the secretary has made a written finding that such commencement does not foreclose mitigation options and does not lead to the potential for significant environmental damage." *Id.*

²¹² Darshan Brach & Rebecca Marks, Comments of Conservation Law Foundation on Senate Bill 915 Amending the Massachusetts Environmental Policy Act, April 16, 1992, at 6 (on file with the Joint Committee on Natural Resources and Agriculture). Brach and Marks suggest

The provision which allows the Attorney General to obtain injunctive relief reinforces the legislative need for fully informed decision making prior to commencement of building activity.²¹³ Nevertheless, the amendment only provides the Attorney General with this power and some of its supporters do not find it adequate.²¹⁴ The Conservation Law Foundation suggests an expansion of this provision allowing ten citizens or aggrieved persons to obtain injunctive relief.²¹⁵ They also suggest that the amendment provide for the recovery of attorneys' fees which would make access to the courts easier for the public.²¹⁶ The Conservation Law Foundation reasons that most citizens, as evidenced in the *Cummings* case, are less interested in seeing fines and penalties assessed, and more interested in preventing environmental damage.²¹⁷

The proposal's remaining provisions expand the categorical limitation of projects reviewed, and clarifies the time period for bringing a court action. One proposed amendment provides cities and towns with an opportunity to request a review of those projects requiring city permits, but which do not automatically trigger review under the MEPA regulations.²¹⁸ This provision would provide small towns and cities with more control over private developments in their region. The provision clarifying the time period for bringing court action is an effort to remedy procedural difficulties before a case can even reach the superior court level. This will potentially limit the

that such a loophole would be detrimental to MEPA's effectiveness and cite *Sierra Club v. Marsh*, a federal case where the court noted that "[t]he way that harm arises may well have to do with the psychology of decision makers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built. But the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation." *Id.* (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989)).

Another loophole that is not addressed by the proposed amendments allows developers to circumvent the delay of the review period through the waiver provision of the regulations. See Mass. Regs. Code tit. 301, § 11.18 (1987). The regulations give the Secretary the discretion to waive any provision or requirement if the Secretary finds that strict compliance with such provision or requirement would result in an undue hardship and would not serve to minimize or avoid damage to the environment. See *id.* This waiver, however, has ultimately become a bargaining device for both the Secretary and project proponents. See Kaledin, *supra* note 128, at 25 (stating that "a disconcerting trend has emerged: because of the subject matter jurisdiction limitation built into MEPA, in situations where the [Secretary] recognizes the need for a comprehensive EIR but cannot legally require such a study, the waiver mechanism is being used as a bargaining device.").

²¹³ H.R. Doc. No. 4549 (1992).

²¹⁴ Brach & Marks, *supra* note 212, at 5.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ H.R. Doc. No. 4549, § 5 (1992).

number of future cases and help the courts move beyond procedural issues and focus on the merits of these environmental challenges.

In short, proposals exist in the legislature which could remedy the inadequacies of MEPA.²¹⁹ The adoption of the proposed amendments would overrule *Cummings* and subsequent cases, increase the use of the CSS as an effective tool for environmental regulation, and restore the balance of power between the administration and the citizens by way of judicial review.

IV. THE DEVELOPMENT OF TWO DIFFERENT ENVIRONMENTAL POLICIES AND THE COURT-IMPOSED RESTRAINTS ON THEIR APPLICABILITY

A. *The Sax Act: An Innovative Statute, Restricted by the Michigan Courts*

Michigan's Sax Act limits agency control over environmental regulation by permitting plaintiffs to initiate court actions whether or not they have exhausted relevant administrative procedures.²²⁰ Opponents of the Sax Act feared that because of the freedom given to citizens to bring suits, the statute's enactment would flood the Michigan courts with frivolous cases.²²¹ Moreover, the Sax Act does not contain a minimum threshold of environmental impairment.²²² Theoretically, the statute allows a plaintiff to take to court any party whose conduct is causing even insignificant environmental damage.²²³ Nevertheless, frivolous citizen suits have not flooded the courts since the adoption of the Sax Act.²²⁴ Some scholars attribute the limited number of Sax Act suits to the lackluster state of the economy.²²⁵ The economic recession in the decade following the statute's enactment slowed residential construction projects, which are a main source of Sax Act litigation.²²⁶ Another impediment to plaintiffs is

²¹⁹ See *id.*; S. Doc. No. 915 (1992).

²²⁰ See *supra* note 53.

²²¹ Robert H. Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as Model of a Minimal Requirement*, 7 HARV. ENVTL. L.R. 107, 118 (1983); see also Thibodeau, *supra* note 55, at 597.

²²² Abrams, *supra* note 221, at 112.

²²³ See *id.*

²²⁴ See Sax & Conner, *supra* note 45, at 1007; see also Slone, *supra* note 2, at 272; Haynes, *supra* note 10, at 593 (in six years following enactment, only 119 cases of 600,000 filed in Michigan courts were filed under Sax Act.).

²²⁵ Haynes, *supra* note 10, at 593.

²²⁶ *Id.*

the unavailability of money damages in Sax Act suits.²²⁷ Many plaintiffs cannot afford to bring a suit unless they have a vital interest at stake.²²⁸

Sax Act opponents also feared that the environmental groups that had pushed heavily for the statute's enactment would step in and file numerous suits throughout the state.²²⁹ This fear has gone unfounded as environmental organizations have not used the Sax Act with the amount of zeal originally expected.²³⁰

In spite its lack of specific common law standards, the Sax Act has proved effective in encouraging settlements.²³¹ Because the courts have interpreted the Sax Act to require a low threshold for plaintiffs to establish a *prima facie* case of significant environmental damage, parties have opted to settle rather than incur the expense of litigation.²³²

Those groups initially opposed to the Sax Act felt that allowing courts to develop environmental standards on a case-by-case method would lead to confusion over substantive issues such as what would constitute significant damage to the environment.²³³ Until the courts specifically addressed the lack of a threshold for standing in 1985, there were no limitations for bringing a Sax Act suit during the first fifteen years of the act's existence.²³⁴ Not until the *City of Portage* case did a Michigan court delineate the factors necessary for determining whether or not a particular project's threatened impairment to the environment is actionable.²³⁵ The *City of Portage* factors were

²²⁷ See MICH. STAT. ANN. § 14.528. The title to the Sax Act states that this is "An Act to provide for actions for *declaratory and equitable relief* for protection of the air, water and other natural resources. . . ." *Id.* (emphasis added).

²²⁸ Slone, *supra* note 2, at 273-74, 315. The community focus of the Sax Act has meant that plaintiffs showing interest in suits far from home is minimal. *Id.*

²²⁹ Sax & Conner, *supra* note 45, at 1008.

²³⁰ See *id.* (despite original efforts to enact Sax Act, environmental groups have not used the statute with any frequency); see also Haynes, *supra* note 10, at 594 (environmental groups have made only modest use of statute).

²³¹ See Slone, *supra* note 2, at 291.

²³² See *id.* at 291, 300 (Sax Act also encourages mitigating alternatives); see also Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 *ECOLOGY L.Q.* 1, 51 (1974). Through studies done during the first few years following the enactment of the Sax Act, Sax and DiMento determined that if a trial ensues, a plaintiff must anticipate litigation expenses averaging around \$10,000, but if the case settles without a trial, costs averaged just under \$2,000. This data is from information collected from questionnaires sent to plaintiffs and defendants involved in Sax Act cases. *Id.*

²³³ See Thibodeau, *supra* note 55, at 597.

²³⁴ See Abrams, *supra* note 221, at 113.

²³⁵ See *City of Portage v. Kalamazoo County Road Comm'n*, 355 N.W.2d 913, 916 (Mich. App. 1984), *lv. denied*, 422 Mich. 883 (1985); see *supra* notes 99-106 and accompanying text.

an attempt to deter future Sax Act plaintiffs from bringing numerous small-scale suits.²³⁶ Similar to the Massachusetts courts' interpretation of the CSS and MEPA, the *City of Portage* court interpreted the Sax Act in a manner that restricted the original intent of the statute.²³⁷ By limiting the Sax Act to the protection of uncommon or unique natural resources, the *City of Portage* opinion limited the act's applicability and effectiveness in environmental regulation.²³⁸

In sum, the Sax Act is a broadly-drafted statute dependent upon the courts for the creation of environmental standards and guidelines.²³⁹ In fulfilling their responsibility, the courts have subsequently interpreted the Sax Act so that it only protects uncommon or unique natural resources.²⁴⁰ One scholar has suggested that the courts expand their restrictive interpretation of the Sax Act to include the common law idea of the public trust.²⁴¹ The act specifically provides for the protection of the air, water, other natural resources, or the public trust therein.²⁴² The public trust does not protect only uncommon or unique resources.²⁴³ The Sax Act's drafters included the protection of the public trust in order to make the Sax Act more comprehensive in its applicability.²⁴⁴ Thus, the Michigan courts could easily use this doctrine to expand the protection of the Sax Act to a number of natural resources.²⁴⁵ Short of overruling the *City of Portage* case, this may be a necessary step that the courts must take in order to make the Sax Act an effective system of environmental regulation in Michigan.

B. The Massachusetts Cummings Case: A Restrictive Interpretation of the CSS and MEPA

Like the Michigan courts which imposed restrictions on the applicability of the Sax Act, the Massachusetts SJC imposed its own

²³⁶ See Gionfriddo, *supra* note 43, at 468–75. Gionfriddo argues that *Kimberly Hills* is a “bad case that made bad law.” *Id.* at 468. He believes that the *Kimberly Hills* holding and the cases following, like *City of Portage*, artificially restrict the courts from extending the Sax Act to reach beyond the protection of unique natural resources. *Id.* at 469–70.

²³⁷ See Jensen, *supra* note 27, at 80.

²³⁸ *Id.*

²³⁹ See *supra* notes 44–47 and accompanying text.

²⁴⁰ See *supra* notes 99–106 and accompanying text.

²⁴¹ See Jensen, *supra* note 27, at 81–83.

²⁴² See MICH. STAT. ANN. § 14.528(202)(1), *supra* note 30.

²⁴³ See Jensen, *supra* note 27, at 71–72.

²⁴⁴ See *id.* at 85.

²⁴⁵ *Id.* at 82.

jurisdictional limitations in environmental regulation.²⁴⁶ The SJC's ruling in *Cummings* narrowed the scope of both the CSS and MEPA by giving the superior courts jurisdiction only when a project proponent—and not a public official responsible for administering environmental regulations—violates an environmental law.²⁴⁷ The *Cummings* court specifically held that the superior courts lacked jurisdiction to review a challenge of a Secretary's decision not to require an EIR.²⁴⁸ Moreover, the court stated that this rule applies even when plaintiffs allege that the Secretary made an arbitrary or capricious determination.²⁴⁹

In its denial of judicial review, the *Cummings* court misconstrued the plain language of both MEPA and the CSS.²⁵⁰ As Justice Abrams explained in her *Cummings* dissent, MEPA's language does not explicitly prevent review of the Secretary's determination not to require an EIR.²⁵¹ In addition, Justice Abrams argued that the plaintiffs had fulfilled the threshold requirement of the CSS because an improper determination by the Secretary can result in damage to the environment, and therefore the court should have found standing for the plaintiffs.²⁵²

The *Cummings* majority also improperly relied on precedence such as *Warren v. Hazardous Waste Facility Site Safety Council* for its argument that the legislature did not intend citizens to challenge the official responsible for administration of the regulatory agency.²⁵³ The *Warren* case specifically stated that the CSS did not authorize injunctive relief against an agency created to regulate the process for siting hazardous waste facilities.²⁵⁴ The *Warren* circumstances are distinguishable from those of the *Cummings* case because the plaintiffs in *Warren* challenged the feasibility determination by the siting agency, not the actual siting of the project.²⁵⁵ The feasibility determination is only a preliminary step in the siting process and

²⁴⁶ See *Cummings v. Secretary of the Executive Office of Env'tl. Affairs*, 524 N.E.2d 836, 839–40 (Mass. 1988).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See *id.* at 839.

²⁵⁰ See *id.* at 842 (J. Abrams, dissenting). The plain language of both the CSS and MEPA do not reveal any clear intent of the legislature to immunize the Secretary from review. *Id.* Nor do the 1977 amendments alter the plain language of MEPA to deny review. *Id.*

²⁵¹ See *id.*; see *supra* notes 190–99 and accompanying text.

²⁵² See *id.* at 844; see *supra* notes 194–99 and accompanying text.

²⁵³ See *id.* at 839 (quoting *Warren v. Hazardous West Facility Site Safety Council*, 466 N.E.2d 102, 110 (Mass. 1984)).

²⁵⁴ See *Warren*, 466 N.E.2d at 110.

²⁵⁵ *Id.* at 108.

the plaintiffs did not demonstrate that the feasibility of a siting determination would likely cause damage to the environment.²⁵⁶ Preliminary siting determinations in themselves do not damage the environment, nor do they indicate the likelihood of consequential environmental harm.²⁵⁷ The plaintiffs' challenge in *Warren* was initiated prematurely and therefore, cannot act as controlling precedent for the *Cummings* case.²⁵⁸

In addition, the *Warren* court stated that the CSS did not allow injunctive relief against an agency of the commonwealth.²⁵⁹ The plaintiffs in both *Cummings* and *Warren*, however, did not seek to enjoin the Secretary from continuing harmful conduct.²⁶⁰ Instead, the plaintiffs sought judicial review of agency determinations.²⁶¹ The SJC already resolved this issue in *City of Boston*, in which the court relied on its *West Broadway* opinion to hold that plaintiffs may obtain judicial review of an agency decision when they have exhausted all feasible administrative alternatives.²⁶² Thus, the *Cummings* court should not have used *Warren* to support the holding that the CSS and MEPA preclude judicial review of a Secretary's decision not to require an EIR.

The *Cummings* court could have properly relied on other cases which would have yielded a result in favor of the plaintiffs. In *City of Boston*, the SJC held that the CSS grants standing to citizens who bring suit against defendants whose conduct violates either a substantive or procedural environmental regulation.²⁶³ Justice Abrams argued that if an incorrect decision by the Secretary results

²⁵⁶ *Id.* at 110.

²⁵⁷ *Id.*

²⁵⁸ See *supra* note 187. The court's reliance on *Aertson v. Landrieu*, is also misplaced because the *Aertson* court only stated that the "[Secretary's] determination that no EIR is required is a complete answer to plaintiffs' contentions under MEPA." *Cummings*, 524 N.E.2d at 844; *Aertson v. Landrieu*, 488 F.Supp. 314, 323 (D. Mass.), *aff'd on other grounds*, 637 F.2d 12 (1st Cir. 1980). The Secretary's determination in *Aertson* refers to the project proponent's compliance with procedural requirements of MEPA, the only state law issue in the case. *Aertson*, 488 F.Supp. at 323; see *Cummings*, 524 N.E.2d at 844 (J. Abrams dissenting). Additionally, a federal court decision on this issue does not bar judicial review of a Secretary's negative determination by the superior courts. See *Cummings*, 524 N.E.2d, n.9 at 844.

²⁵⁹ See *Warren v. Hazardous West Facility Site Safety Council*, 466 N.E.2d 102, 110 (Mass. 1984).

²⁶⁰ *Id.* at 108.

²⁶¹ *Id.*; see also *Cummings*, 524 N.E.2d at 839. The *Cummings* court suggests that the provision in the CSS that the Superior Courts may "before the final determination of the action, restrain the person causing or about to cause such damage" prevents the courts from reviewing a Secretary's decision. *Id.*

²⁶² See *supra* note 166.

²⁶³ See *City of Boston v. Massachusetts Port Authority*, 308 N.E.2d 488, 494 (Mass. 1974); see *supra* notes 118-20 and accompanying text.

in environmental damage, that decision substantively violates MEPA.²⁶⁴ Therefore, a group of citizens could have standing under the CSS to challenge the Secretary's conduct.²⁶⁵ To interpret the CSS and MEPA otherwise would mean that so long as a project proponent and the Secretary correctly follow procedure, a Secretary's decision not to require an EIR would be unassailable regardless of any improper motivations or environmentally damaging results.²⁶⁶ The SJC has also previously held that both the CSS and MEPA explicitly allow for judicial review of agency decisions.²⁶⁷ The *City of Boston* court found judicial review appropriate after the plaintiff exhausts all administrative alternatives.²⁶⁸ In *Boston Preservation Alliance*, the SJC reviewed the scope of a Secretary's decision to limit the content of a required EIR.²⁶⁹ Thus, the court has authorized judicial review of administrative determinations in at least two instances in the past, and the *Cummings* ruling contradicts this precedence. First, pursuant to the *City of Boston* holding, the plaintiffs in *Cummings* exhausted their administrative alternatives before bringing a court action.²⁷⁰ Second, a proposed project is likely to cause similar environmental damage regardless of whether the Secretary incorrectly limits the scope of an EIR, as alleged in *Boston Preservation Alliance*, or decides not to require an EIR in the first place.²⁷¹ Although the SJC acknowledged the logic behind the latter argument, they refused to act on it.²⁷²

²⁶⁴ *Cummings*, 524 N.E.2d at 844 (J. Abrams, dissenting).

²⁶⁵ See MASS. GEN. LAWS ANN. ch. 214 § 7A, *supra* note 110.

²⁶⁶ See Seth D. Jaffe, *Cummings v. Executive Office of Environmental Affairs: The SJC Restricts Access to the Courts in Environmental Cases*, BOSTON B.J. May/June 1989, at 17. Jaffe notes that "unless MEPA or [the CSS] is amended, MEPA may no longer serve as a basis for legal challenges to development decisions, so long as the developer and the Secretary of EOEa comply with the procedural requirements of MEPA." *Id.* He bases his view on the SJC's statement in *Cummings* that there is no "specific provision in MEPA or in any other statute susceptible of violation by the secretary's incorrect, or even arbitrary, determination that an EIR is not required." *Id.*; *Cummings*, 524 N.E.2d at 839.

²⁶⁷ See *Secretary of Environmental Affairs v. Massachusetts Port Authority*, 323 N.E.2d 329, 340 (Mass. 1975); see also *Boston Preservation Alliance, Inc. v. Secretary of the Executive Office of Environmental Affairs*, 487 N.E.2d 197, 202 (Mass. 1986).

²⁶⁸ *City of Boston v. Massachusetts Port Authority*, 308 N.E.2d 488, 504 (Mass. 1974).

²⁶⁹ See *supra* notes 172-77 and accompanying text; see also *Cummings*, 524 N.E.2d at 840 (court dismissed issue of why it had jurisdiction in *Boston Preservation Alliance* and not in *Cummings*).

²⁷⁰ *Id.* at 844 (J. Abrams dissenting) (Secretary's decision not to require EIR is final decision subject to review); but see *Warren v. Hazardous West Facility Site Safety Council*, 466 N.E.2d 102, 110 (Mass. 1984); see *supra* notes 256-58 and accompanying text (feasibility study is not final decision and therefore not subject to review).

²⁷¹ See Jaffe, *supra* note 266, at 17.

²⁷² *Cummings v. Secretary of the Executive Office of Environmental Affairs*, 524 N.E.2d 836, 840 (Mass. 1988).

In addition to ignoring precedence, the *Cummings* court misinterpreted the legislative histories of the CSS and MEPA which do not support its argument that the legislature intended to exempt the Secretary from judicial review. At the time of the CSS's enactment, Governor Francis W. Sargent intended the CSS to include citizens in the enforcement of environmental regulation.²⁷³ Limiting citizen access to judicial review of environmental controversies, as the SJC did in *Cummings*, contradicts that original intention.²⁷⁴ In addition, Governor Sargent's original proposal for MEPA in 1971 required agencies to make well-informed decisions and held public officials accountable to the people.²⁷⁵ He repeated this intention in his endorsement of the proposed MEPA amendments in 1972.²⁷⁶ It is doubtful the legislature intended to except the Secretary from this accountability. Thus, in 1971 and 1972, when Massachusetts first enacted its environmental policy acts, neither the language nor the history of the statutes suggested any legislative intention to limit either courts' jurisdiction or involvement by citizens in environmental regulation. Moreover, the 1977 MEPA amendments do not reveal any change in these original intentions.²⁷⁷ The SJC's majority opinion in *Cummings* is inapposite to the plain language and the legislative intent of the CSS and MEPA, as well as to prior case law. Unless

²⁷³ GOVERNOR'S MESSAGE, H.R. DOC. No. 5023 (1971) (endorsing CSS permitting citizens to join in enforcement of antipollution laws).

²⁷⁴ See *Cummings*, 524 N.E.2d at 840.

²⁷⁵ GOVERNOR'S MESSAGE, H.R. DOC. No. 5859 (1971). Governor Francis W. Sargent stated that MEPA's goal is to "insure that our decisions are as well informed as they can be, and that the people have an opportunity to know, to argue, to disagree if they must, and ultimately to hold us, the public officials, accountable." *Id.* (emphasis added).

²⁷⁶ GOVERNOR'S MESSAGE, H.R. DOC. No. 5134 (1972). Governor Francis W. Sargent stated that "[MEPA] builds into our decision making process a major consideration in the development of state projects; that people will be informed of all relevant factors and that we as public servants will be held accountable for our decisions." *Id.* (emphasis added).

²⁷⁷ See *Cummings v. Secretary of the Executive Office of Environmental Affairs*, 524 N.E.2d 836, 842 (Mass. 1988) (J. Abrams dissenting). Justice Abrams argued that the legislature failed to state their intention to eliminate the courts' ability to review a Secretary's decision not to require an EIR. *Id.* The *Cummings* majority, however, reasoned that deference to the Secretary is appropriate after the 1977 MEPA amendments because of the centralization of the review process. *Id.* at 839. Prior to the amendments project proponents submitted EIRs to different agencies for approval; after 1977, the Secretary regulates the procedure and has expertise in this area. *Id.* Nevertheless, Abrams warns against allocating unchecked power to agencies based on their level of expertise because it leaves agencies with no practical limits on their discretion and pushes them toward the point of unaccountability. *Id.* at 846 (J. Abrams dissenting) (quoting *Arthurs v. Board of Registration in Medicine*, 418 N.E.2d 1236, 1244 (Mass. 1981)) (stating that abdication of judicial review on basis of agency expertise means that administrative expertise is "on its way to becoming 'a monster which rules with no practical limits on its discretion.'").

the SJC itself moves to overrule the *Cummings* case, the administrative decisions not to require EIRs will remain immune from review. In the absence of court initiative, it will be left to the legislature to take action and restore a proper balance to environmental regulation in Massachusetts.

V. CONCLUSION

Returning to the dilemma created by the construction of the commercial strip mall just beyond your property line, what alternatives actually exist for you? In Michigan, in the instance where an administrative agency fails to adequately regulate the environmental impact of a project, the Sax Act exists which grants citizens the right to bring a court action for equitable or declaratory relief. In truth, however, unless you have a rare elk herd grazing in your backyard, the Michigan courts will not grant injunctive relief. In Massachusetts, at the present time, you can be similarly estopped because of the courts' reluctance to review a Secretary's decision not to require an EIR. Thus, Michigan and Massachusetts have adopted two vastly different models for state environmental policies, yet due to subsequent court interpretations, neither provides effective assistance in many of the environmental controversies faced by the individual citizen.

Where do you go from here? In Michigan, the legislature could pass an amendment clarifying whether it intended the courts to limit the application of the Sax Act to unique and rare natural resources. Moreover, the courts themselves could overrule the Court of Appeals' *City of Portage* standards or use the public trust doctrine to expand the Act's applicability. In Massachusetts, the legislature is attempting to clarify the extent of MEPA by explicitly granting the courts jurisdiction to review a Secretary's determination not to require an EIR, as well as amending various other loopholes within the Act. Should they adopt this proposal, citizen participation in environmental regulation would likely increase, as would comprehensive, fully-informed decision making prior to the commencement of projects. Both Michigan and Massachusetts have instituted progressive environmental regulations, however, by leaving the responsibility of interpretation to the courts, the potential effectiveness of the regulations have been greatly hindered. It is time for the courts to take on their responsibility and interpret the Sax Act, CSS, and MEPA to protect against a wider spectrum of environmental damage, before too many natural resources become uncommon or unique.