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# SEALING PANDORA'S BOX: JUDICIAL DOCTRINES RESTRICTING PUBLIC TRUST CITIZEN ENVIRONMENTAL SUITS

*David P. Gionfriddo\**

## I. INTRODUCTION

The early 1970's were important years for the development of American environmental law. On the federal level, heightened concern for environmental issues led to the passage of the National Environmental Policy Act of 1969 (NEPA),<sup>1</sup> the cornerstone of our federal resource protection legislation. NEPA signalled a new national commitment to environmental protection, and a new willingness on the part of government to assume a forceful role in preserving the country's natural resource trust.<sup>2</sup> This pervasive concern was

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\* Production Editor, 1985-1986, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

<sup>1</sup> 42 U.S.C. §§ 4321-4361 (1976). For a comprehensive overview of NEPA and its evolution in the courts, see D. MANDELKER, *NEPA LAW AND LITIGATION* (1984).

<sup>2</sup> See 42 U.S.C. § 4331(b)(1) (1982). At a November, 1970 conference on environmental law, Professor Joseph Sax, author of the Michigan Environmental Protection Act's first draft, commented on the implications of NEPA:

[I]t is in conception one of the most important environmental laws on the books of the federal government, for it reflects a sense in the Congress that the time has come to stop and reflect on where the traditional production-consumption enterprise that dominated our resource policies has carried us; that it is time to open for equal consideration the cultural approach which views consumption and demand as malleable factors which should be made responsive to the carrying capacities of the natural system in which they arise . . . .

A statute which sets out a mandate to "fill the responsibilities of each generation as trustee of the environment for succeeding generations," . . . reflects, I think, a sense within the Congress that something more is required than the beautification of power sites with plantings of flowers, or painting of buildings to blend in with the surroundings.

It is a call for unconventional approaches, for reappraisal of traditional ways of operating, for taking some substantial time and energy to seek out alternatives which were not even thought relevant before . . . .

The National Environmental Policy Act reflects a yearning in the Congress for

felt at the state level as well, and a number of states passed their own environmental statutes.<sup>3</sup>

These state laws took a variety of different forms. Some statutes contained strong declarations of environmental policy, but left all enforcement authority with state agencies.<sup>4</sup> Others gave citizens standing to challenge environmentally hazardous activities indirectly by suing the state for its failure to prosecute polluters.<sup>5</sup> Citizens were empowered, under still other laws, to sue private polluters for violations of existing state laws or regulations.<sup>6</sup> The most innovative type of law, however, gave citizens a much wider grant of standing under a new cause of action modelled on the venerable common law principles of public trust.<sup>7</sup>

For example, the Michigan Environmental Protection Act of 1970 (MEPA),<sup>8</sup> the Minnesota Environmental Rights Act of 1971 (MERA),<sup>9</sup> and the Connecticut Environmental Protection Act of 1971 (CEPA),<sup>10</sup> grant to any private party the authority to sue virtually any actor, public or private, to enjoin conduct that substantially harms the state's natural resources.<sup>11</sup> No minimum number of plain-

new ideas about environmental control. It reflects, I would say, a mandate to reconsider the old idea that the existing state of the art is to be taken as a clear defense in any challenge to polluting conduct. It reflects a desire to promote innovation, to encourage, to put demands upon the enormous skills and ingenuity of industry — rather than to accept a static situation as wholly given, a position which has in itself perpetuated the lack of incentives to innovate.

Sax, *New Direction in the Law: Breaks in the Legal Logjam*, in ENVIRONMENTAL LAW 12-13 (C. Hasset ed. 1971).

<sup>3</sup> For a complete summary of state environmental protection acts and their relevant provisions, see Dimento, *Asking God to Solve Our Problems for Us: Citizen Environmental Suit Legislation in the Western States*, 2 U.C.L.A. J. ENVTL. L. & POL'Y. 169, 174-75 (1982) [hereinafter cited as Dimento, *Western States*].

<sup>4</sup> See CAL. GOV'T CODE §§ 12,600-12,612, 12,607 (West 1980).

<sup>5</sup> See Maryland Environmental Standing Act of 1978, MD. NAT. RES. CODE §§ 1-501 to 1-508, 1-503(b) (Michie 1983).

<sup>6</sup> See Florida Environmental Protection Act of 1971, FLA. STAT. ANN. § 403.412 (West 1973). For more on the variations among state environmental citizen suit laws, see Dimento, *Western States*, *supra* note 3, at notes 4-10 and accompanying text; Dimento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues, and a Direction for Future Research*, 1977 DUKE L.J. 409, 410 [hereinafter cited as Dimento, *Administrative Process*].

<sup>7</sup> A lengthy account of the common law public trust's history and development is beyond the scope of this Comment. For a comprehensive overview of the doctrine, see H. ALTHAUS, PUBLIC TRUST RIGHTS (1978).

<sup>8</sup> MICH. STAT. ANN. §§ 14.528(201)-(207) (Callaghan 1980); MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West Supp. 1984). Subsequent citations will be to Michigan Statutes Annotated only.

<sup>9</sup> MINN. STAT. ANN. §§ 116B.01-.13 (West 1977).

<sup>10</sup> CONN. GEN. STAT. ANN. §§ 22a-14 to 22a-20 (West 1985).

<sup>11</sup> MERA does not authorize suits brought against a landowner for acts taken on his own

tiffs is required to bring suit,<sup>12</sup> and no violation of any other applicable state law need be proven. Each of these laws establishes a substantive framework to determine the legality of environmentally harmful conduct. Each citizen becomes a beneficiary of the public trust inherent in the state's resource pool; the obligation of the "trustee" to protect those resources reaches beyond the state to include all private citizens.<sup>13</sup> In essence, these statutes create a

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land, or against a lessee acting pursuant to a valid permit from the landowner, when the challenged acts do not and can not reasonably be expected to impair any other MERA resources within the state. Also, any activity conducted pursuant to a valid environmental quality standard, regulation, rule, license, or similar order cannot be the subject of a citizen suit under MERA. See MINN. STAT. ANN. § 116B.03, subd. 1 (1977). Thus, MERA does not give state courts the type of administrative oversight functions envisioned by MEPA's drafters, see *infra* note 24. The Michigan legislature rejected a proposed MEPA amendment that would have exempted from MEPA suits parties acting pursuant to validly-issued state environmental permits, licenses, or agreements. Haynes, *Michigan's Environmental Protection Act in Its Sixth Year: Substantive Environmental Law From Citizen Suits*, 53 J. URB. LAW 589, 666-68 (1976).

<sup>12</sup> Compare these statutes with the environmental citizen suit provision of Massachusetts, MASS. GEN. LAWS ANN. ch. 214, § 7A (West Supp. 1986). The Massachusetts statute requires that a citizen suit be brought by "not less than ten persons domiciled within the commonwealth." *Id.*

<sup>13</sup> The concept that natural resources are a "commons" to be shared by all people has frequently appeared in scholarly writings, state constitutions, and even judicial opinions.

One state court has hinted that the common law public trust can create enforceable legal rights in the entirety of a state's natural resources. See *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. Sup. Ct. 1984).

The common ownership concept also has been discussed frequently by scholars in law, science and economics. See, e.g., Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); E. F. MURPHY, NATURE, BUREAUCRACY AND THE RULES OF PROPERTY (1977). Economists and legal commentators have used the notion of common property to buttress some interesting proposals for new environmental protection strategies. One such group of proposals, differing from MEPA's injunction-centered approach, involves the assessment of "user fees," "subsidies," or "charges" against those who deplete the commons by polluting. See, e.g., G. BJORK, LIFE, LIBERTY, AND PROPERTY 112-18 (1984); P. DOWNING, ENVIRONMENTAL ECONOMICS AND POLICY 193-94 (1984); Lahey, *Economic Charges for Environmental Protection: Ocean Dumping Fees*, 11 ECOLOGY L.Q. 305 (1984), see also Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1 (1985) (advocating system of tradable environmental permits as economic incentive to creation of pollution controls). Through such fees, the true cost to society of the consumed resources are internalized in the polluter's operation.

Generally, however, the question of citizens' property rights in common natural resources has troubled legal scholars. Professor Sax, one of the rejuvenators of the common law public trust doctrine, initially rejected the idea that it gave citizens real property rights in trust resources, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 478-83 (1970) [hereinafter cited as Sax, *Public Trust*]. He stated that the existence of such property rights would imply an "irrevocable commitment" of resources to public use, a type of commitment that rarely binds the sovereign. *Id.* at 480. Also, he noted, the public could hardly suffer a "taking" of property, in that the reciprocal benefits it received from any government act or regulation would necessarily be proportionate to its loss of common property rights, unlike the case when small classes of property owners were regulated. *Id.* at 479. Sax preferred to characterize the trust as a "name" or device for

communal duty to minimize adverse impacts to the state's ecosystems, and an equally wide-ranging power to enforce that duty.<sup>14</sup>

Perhaps predictably,<sup>15</sup> however, the type of regime envisioned at the time these statutes were enacted has not fully materialized. State judiciaries faced with unfamiliar new public rights have caused the caselaw under these statutes to develop along restricted doctrinal patterns. Ill-fitting common law concepts have been engrafted onto the statutory causes of action, statutory terms have been interpreted in ways that limit the citizen-plaintiff's enforcement power, and unresolved constitutional questions have been permitted to cloud the statutes' futures. Consequently, the effectiveness of these laws as tools of environmental protection has recently come into question, and the efficacy of citizen suits under these statutes may have to be reevaluated.

This Comment will first examine the basic elements of the public trust citizen suit statutes; next it will discuss the various approaches taken by courts to limit their potency. In conclusion, this Comment will propose that these judicial trends be abandoned, and that these

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focusing judicial scrutiny on legislative and administrative resource allocation decisions. *Id.* at 509. In later writings, however, as Professor Lazarus points out, Sax began to edge toward more property-oriented language in describing the trust, emphasizing the use of the doctrine to protect publicly held "expectations" about trust resource management which merited the same protection as "conventional private property rights." Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C.D. L. REV. 185, 188-89 (1980); see also Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 643 (1986). Other commentators are even more vehement in advancing a property law basis for the public trust doctrine, see V. YANNECONE, B. COHEN, & S. DAVISON, ENVIRONMENTAL RIGHTS & REMEDIES 14 (1972); Coquette, *Mosses From an Old Manse: Another Look at Some Historical Property Cases About the Environment*, 64 CORNELL L. REV. 761, 810-13 (1979). Professor Lazarus, however, concludes, after reviewing the American cases decided under the public trust doctrine, that the doctrine conveys no real property rights on the public, but rather serves as a "legal fiction" employed to enable courts to address the merits of environmental controversies. Lazarus, *supra*, at 656.

<sup>14</sup> See *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 306, 224 N.W.2d 883, 888 (1975) ("[M]EPA . . . imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities"). See also Dimento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URB. L. 413, 416 (1976) [hereinafter cited as Dimento, *Overview*].

<sup>15</sup> As early as 1970, Professor Sax had noted the tendency of courts faced with difficult cases to construe environmental statutes restrictively:

To some extent, special obligations toward particular resources are imposed by statutory or constitutional provisions, rather than by judicially-developed theory. The laws, however, are subject to great judicial manipulation and the case is very rare in which a court feels compelled to adopt a standard more rigorous than that which it desires to impose.

Sax, *Public Trust*, *supra* note 13, at 478 n.27.

citizen suit laws be liberally construed in order to encourage environmentally-sympathetic planning and resource development.

## II. THE ELEMENTS OF THE PUBLIC TRUST STATUTES

MEPA and its successors were drafted to embody the ancient principles of the public trust doctrine.<sup>16</sup> Professor Joseph Sax, MEPA's initial author and one of its chief architects, had by 1970 identified the public trust doctrine as the foundation of a new type of environmental law, a law which would give substance to the then-developing concepts of public resource rights, and allow for direct citizen action to defend those rights.<sup>17</sup> Although in its ancient common law form the doctrine had been used to safeguard important resource bases from harmful government resource allocation decisions,<sup>18</sup> the common law cause of action was inherently limited as a private litigation tool. The geographic reach of the doctrine traditionally had been limited to the shoreline and land beneath navigable waterways.<sup>19</sup> Even where established trust resources were the subjects of public trust suits, the substantive applications of the public trust doctrine by the courts have been inconsistent. Courts have applied different substantive standards in different types of cases. For example, the trust sometimes offered little protection, even against the state, in cases where a resource was diverted to another use beneficial to the public.<sup>20</sup> On the other hand, the common law

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<sup>16</sup> See *supra* note 7.

<sup>17</sup> See J. Sax, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 158-74 (1970); Sax, *Public Trust*, *supra* n.13 at 474 n.14.

<sup>18</sup> See, e.g., *Illinois Cent. Ry. v. Illinois*, 146 U.S. 397 (1892).

<sup>19</sup> See V. YANNECONE, B. COHEN, & S. DAVISON, *supra* note 13, at 16; W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 172 (1977). Commentators are divided over the doctrine's potential for more widespread geographic applicability. Professor Sax fears that the trust, despite brief forays inland, may stay largely confined to its traditional sphere:

My impression is that the public trust doctrine may well remain limited to the shore and its immediate environs, . . . while, at the same time the goals and basic ideas underlying the trust will continue to enlarge through the medium of enabling statutes, such as coastal zone or fragile area acts, and through the modification and expansion of cognate techniques such as re-interpretation of standard zoning authority and the permissible scope of subdivision exactions.

Sax, *The Potential for Expansion of the Public Trust Doctrine*, at 10 (1984) (unpublished manuscript). *But see* Lazarus, *supra* note 13, at 647-50 (discussion of cases expanding the geographic reach of the public trust doctrine).

<sup>20</sup> See *id.* at 651-52. Professor Lazarus isolates three categories of judicial standards employed by courts in deciding public trust cases. Under the standard which mandates the lowest level of scrutiny regarding government resource decisions, courts require only that a "public trust purpose" be satisfied by the challenged resource use. This may amount to little more than a "rational basis" type of scrutiny, *see id.* at 651. Thus, despite the public trust's frequent

public trust doctrine offered those who drafted environmental legislation some important bedrock concepts, namely, that the public shared common ownership of certain beneficial rights<sup>21</sup> to distinctly "public" resources,<sup>22</sup> and that those rights created judicially enforceable remedies.<sup>23</sup> The public trust statutes built on these fundamental concepts by clarifying the public's standing rights, expressly setting out substantive burdens of proof, and explicitly widening the catalogue of protected resources.

### A. Standing

One of the most basic motivational forces behind citizen suit statutes was a growing distrust of the administrative process, and of the state's ability to act as the sole guardian of the environment. MEPA, MERA, and CEPA were designed to facilitate public intervention in key resource decisions by forcing these decisions into the judicial forum, where they could proceed free from the delay and political pressures that too often characterized administrative proceedings.<sup>24</sup> In order to fully advance this public oversight, the laws

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utility in environmental cases, it has been burdened with significant limitations. Even within a given jurisdiction, public trust jurisprudence may not clearly define key public trust concepts, leaving commentators with more questions than answers about the doctrine's substantive components, see Olson, *The Public Trust Doctrine: Procedural and Substantive Limitations on the Governmental Re-Allocation of Natural Resources in Michigan*, 1975 DET. C.L. REV. 161, 203-09. In attempts to apply the trust to privately-owned resources, courts have sometimes been reluctant to upset private property rights in favor of public trust rights. Compare *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984); *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974).

<sup>21</sup> See W. RODGERS, *supra* note 19, at 182.

<sup>22</sup> See Sax, *Public Trust*, *supra* note 13, at 484-85. Professor Sax emphasizes that the doctrine most readily applies to natural resources whose "public" character makes them "inappropriate" objects of private ownership. *Id.* at 485.

<sup>23</sup> Public trust-based causes of action have been expressly recognized in the majority of American states. See Lazarus, *supra* note 13, at 644 n.77 for a listing by state of some of the most important recent public trust cases.

<sup>24</sup> In his book, *Defending the Environment: A Strategy for Citizen Action*, Professor Sax expressed skepticism about the ability of administrators who are constantly subjected to interest group pressure to settle environmental controversies. Citizen lawsuits, he felt, would allow plaintiffs to avoid agency inertia, and sidestep administrative decision-makers' distaste for defending their own initial decisions:

The court [hearing a citizen suit] is spared the responsibility for opening sensitive questions — indeed, in a number of environmental lawsuits, judges have made it a point to comment from the bench that they do not seek out controversies and would be just as happy to be left alone, but that if a citizen comes to them with a complaint, they have a duty to respond. Moreover, the traditional legal process is particularly responsive to this problem of citizen initiative. Not only is there no "political screening" of cases, but once a complaint is filed, the judicial process moves inexorably

conveyed standing to virtually any citizen, citizens' group, or corporation.<sup>25</sup> Litigation challenges to the standing of plaintiffs under the Acts have proven almost uniformly unsuccessful.<sup>26</sup>

Connecticut, however, has struggled with this liberal expansion of the law. In *Belford v. City of New Haven*,<sup>27</sup> a group of New Haven

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forward. Pleadings are filed, testimony taken, requests for particular relief are put forward and must be acted upon. It is not in the nature of the judicial process — as it so often is with complaints made elsewhere in the governmental system — for a matter to be shelved, put off for interminable study, or met with a form letter noting that some official is glad to hear of the matter and will certainly give it his consideration (someday, maybe).

J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 111–12 (1971). The idea of an unresponsive administrative bureaucracy, and the need for direct citizen participation has been echoed many times since. See, e.g., L. CALDWELL, L. HAYES & I. MACWHIRTER, CITIZENS AND THE ENVIRONMENT xvii–xx (1976). Even MEPA's detractors recognized, at the time of the Act's passage, that administrative deficiencies prompted its enactment, see Thibodeau, *Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box*, 48 J. URB. L. 579, 581 (1971).

In order to bring a MEPA suit, it is not required that a plaintiff exhaust his administrative remedies, see Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004, 1019 (1972); it is not a defense to show compliance with an agency standard or permit. MEPA permits courts to remand parties to agency proceedings while retaining jurisdiction over the controversy to ensure that the agency complies with MEPA's substantive mandates, MICH. STAT. ANN. § 14.528(204)(2) (1980), see also CONN. GEN. STAT. ANN. § 22a–18(b) (1985), MINN. STAT. ANN. § 116B.08, subd. 1 (1977). Courts review agency actions *de novo*. See *West Michigan Env'tl. Action Council v. Natural Resources Comm'n*, 405 Mich. 741, 275 N.W.2d 538, cert. denied 444 U.S. 941 (1979), see also CONN. GEN. STAT. ANN. § 22a–18(c) (1985). MEPA directly imposes similar environmental standards on courts and agencies; agencies are prohibited from authorizing conduct that is likely to pollute, impair or destroy natural resources if a feasible and prudent alternative is available. MICH. STAT. ANN. § 14.528(205)(2) (1980), see also CONN. GEN. STAT. ANN. § 22a–19(b) (1985); MINN. STAT. ANN. § 116B.09, subd. 2 (1977). In addition, a MEPA court may, if it finds agency standards insufficient to protect resources, rewrite those standards. MICH. STAT. ANN. § 14.528(202)(2) (1980); see also MINN. STAT. ANN. § 116B.10, subs. 1–3 (1977) (separate judicial procedure remanding deficient standard or rule for agency reconsideration); but see *infra* note 242.

Lastly, courts have recognized the importance of citizen enforcement in MEPA's scheme of environmental control. See *Ray*, 393 Mich. at 305, 224 N.W.2d at 887–88; *Daniels v. Allen Indus., Inc.*, 391 Mich. 398, 410–11, 216 N.W.2d 762, 768 (1974).

<sup>25</sup> See CONN. GEN. STAT. ANN. § 22a–16 (1985); MICH. STAT. ANN. § 14.528(202) (1980); MINN. STAT. ANN. §§ 116B.02, subd. 2, 116B.03, subd. 1 (1977).

<sup>26</sup> Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits Into the 1980's*, 12 ECOLOGY L.Q. 271, 315 (1985) (“[N]o court has ever denied standing to a plausible plaintiff, whether it be a statewide environmental organization, a neighborhood group, a public agency, or a private party”); see also *Minnesota Public Interest Research Group v. White Bear Rod And Gun Club*, 257 N.W.2d 762, 771 n.6 (Minn. 1977) (fact that state pollution control agency did not set standards for impulsive sounds did not bar plaintiffs from alleging noise pollution under MERA); *Manchester Env'tl. Coalition v. Stockton*, 184 Conn. 51, 57, 441 A.2d 68, 73–74 (1981) (CEPA standing automatically conveyed to any plaintiff).

<sup>27</sup> 170 Conn. 46, 364 A.2d 194 (1975).



residents brought a CEPA suit to challenge the construction of an olympic-style rowing course on city parkland. The state supreme court held that the citizens' group lacked standing to challenge the city's legislative act, since the decision itself did "not directly threaten the public trust in the air, water, and other natural resources" of the state.<sup>28</sup> A CEPA plaintiff, the court held, would be allowed to protect natural resources from impairment, but the litigant would not be permitted to use the statute as a means indirectly to challenge purely legislative policy choices.<sup>29</sup> In *Belford*, the court found that the plaintiffs' interests were not sufficiently concrete to accord them standing to contest the city's act.

The rationale of *Belford* seemed to be grounded in more established principles of standing, principles that CEPA expressly superseded. Clearly, CEPA was intended to apply to the actions of state and local government instrumentalities. In light of the statute's emphasis on prevention,<sup>30</sup> it is difficult to imagine that the plaintiffs' standing should not be granted until actual physical damage to the resource was imminent. Such a reading would rob the law of one of its key aspects: its ability to permit plaintiff intervention during the planning stages of environmentally-questionable projects.

The confusion engendered by *Belford* was dispelled six years later in *Manchester Environmental Coalition v. Stockton*.<sup>31</sup> In *Manchester Environmental*, the plaintiff sued to halt the development of a 393-acre industrial park. The trial court had held, consistent with *Belford*, that the plaintiff's standing depended on the Coalition's ability to make out a prima facie case under the terms of CEPA.<sup>32</sup> The state supreme court reversed, and thus reversed its own holding in *Belford*. Standing under CEPA, the court held, was "automatically granted . . . to 'any person' under the law's provisions."<sup>33</sup> The decision, by simply invoking the plain meaning of the law's terms, successfully aligned its reading of CEPA with both the Michigan and Minnesota cases interpreting citizen suit standing,<sup>34</sup> and with federal cases that separated questions of standing from the substance of claims.<sup>35</sup> *Manchester Environmental* thus affirmed the rights of

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<sup>28</sup> *Id.* at 54, 364 A.2d at 199.

<sup>29</sup> *Id.*

<sup>30</sup> See CONN. GEN. STAT. ANN. § 22a-17 (1985) (plaintiff may establish prima facie case by showing that defendant's conduct is "reasonably likely" to cause environmental damage).

<sup>31</sup> 184 Conn. 51, 441 A.2d 68 (1981).

<sup>32</sup> *Id.* at 57, 441 A.2d at 73.

<sup>33</sup> *Id.* at 57, 441 A.2d at 73-74.

<sup>34</sup> See *supra* note 26 and accompanying text.

<sup>35</sup> See, e.g., *Association of Data Processors v. Camp*, 397 U.S. 150, 153 (1969).

CEPA plaintiffs to defend the type of novel environmental interests created by the statute's provisions.

The effects of public trust citizens suit statutes, however, are limited in certain ways. These laws' extensive grants of standing may not expand the standing provisions of other state statutes, even though the environmental duties created by the public trust laws are incorporated into other laws of the state.<sup>36</sup> Thus, CEPA did not give a plaintiff standing to seek injunctive relief under environmental licensing statutes that contained more limited standing provisions.<sup>37</sup> In addition, MEPA plaintiffs seeking to intervene in an ongoing suit may lack standing, despite the public trust statutes' liberal standing policies, if a court deems intervention to be merely permissive.<sup>38</sup> Plaintiffs seeking permissive intervention may have to demonstrate that an existing plaintiff is not representing them adequately.<sup>39</sup>

### B. *The Prima Facie Case*

Plaintiffs under the public trust citizen suit statutes, in order to establish a prima facie case, must demonstrate that the defendant's conduct has caused, or is likely to cause, the pollution, impairment

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<sup>36</sup> See *Michigan Oil Co. v. Natural Resources Comm'n*, 406 Mich. 1, 33, 276 N.W.2d 141, 150 (MEPA incorporated into all state statutes governing natural resources, *cert. denied*, 444 U.S. 980 (1979)); *Michigan State Highway Comm'n v. Vanderkloot*, 392 Mich. 159, 186, 220 N.W.2d 416, 428 (1974) (MEPA duties incorporated into other state statutes; MEPA duties must be considered in administering state Highway Condemnation Act).

<sup>37</sup> *City of Middletown v. Hartford Elec. Light Co.*, 192 Conn. 591, 472 A.2d 787 (1984). See also ENVIRONMENTAL LAW SOCIETY OF THE UNIVERSITY OF MICHIGAN SCHOOL OF LAW, ENVIRONMENTAL LAW IN MICHIGAN 123 (1982) [hereinafter cited as ENVIRONMENTAL LAW IN MICHIGAN].

<sup>38</sup> *Wayne County Dep't of Health v. Chrysler Corp.*, 43 Mich. App. 235, 203 N.W.2d 912 (1972). However, other forces than simple statutory interpretation may have led to the *Chrysler* case's restrictive view of MEPA intervention. While the trial judge initially permitted a neighborhood citizens' group to intervene, in the hopes of advancing "communication and understanding and exchange" between the parties, his attitude changed dramatically when all parties but the citizens' group agreed to a proposed consent order. At that time, the judge labelled the group's intervention "permissive." The trial court's decision was later upheld on appeal. See Sax & Connor, *supra* note 24, at 1070-72.

The original version of MEPA drafted by Professor Sax gave plaintiffs the *right* to intervene in administrative or judicial proceedings. "Permissive" language was substituted, however, in a later draft. See MICH. STAT. ANN. § 14.528(205)(1) (1980), *but see* CONN. GEN. STAT. ANN. § 22a-19(a) (1985), MINN. STAT. ANN. § 116B.09, subd. 1 (1977). Interestingly, Professor Sax claimed to have no recollection of why the change was made, nor did his research uncover any legislative discussion of the permissive intervention provision prior to MEPA's passage. Sax & Connor, *supra* note 24, at 1070 n.270.

Recent developments indicate that courts may be more willing to support citizen MEPA intervention in administrative agency proceedings. See *Slone*, *supra* note 26, at 312-13.

<sup>39</sup> *Chrysler Corp.*, 43 Mich. App. at 236, 203 N.W.2d at 913.

or destruction of the air, water, land, or other natural resources of the state.<sup>40</sup> MERA contains an additional provision that permits the plaintiff to make out a prima facie case simply by proving that the defendant has violated, or is likely to violate, an existing environmental permit, license, regulation or standard.<sup>41</sup>

### 1. "Natural Resource"

The class of resources that falls within the statutory definitions of "natural resource" has, as a general rule, been liberally construed. While air and water are explicitly mentioned, the Acts have also been applied in cases involving excessive fishing,<sup>42</sup> the removal of trees,<sup>43</sup> the possible despoilation of sand dunes,<sup>44</sup> adverse impacts on elk,<sup>45</sup> and a number of other common wildlife species and unexceptional natural areas.<sup>46</sup> Although efforts have been made to persuade courts to narrow the resource definition,<sup>47</sup> few, if any, resource categories seem to lie outside the Acts' provisions. However, certain attempts to extend the coverage of public trust laws beyond their intended spheres of operation have been skeptically viewed by the courts.

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<sup>40</sup> CONN. GEN. STAT. ANN. § 22a-16 (1985); MICH. STAT. ANN. § 14.528(202) (1980); MINN. STAT. ANN. § 116B.03 (1977). CEPA includes the qualification that pollution which is the subject of a citizen suit be "unreasonable." However, this language was only intended to discourage frivolous actions, not to substantially raise the prima facie case threshold. See *Manchester Environmental*, 184 Conn. at 58 & n.10, 441 A.2d at 74 & n.10; Johnson, *The Environmental Protection Act of 1971*, 46 CONN. B.J. 422, 429-31 (1972). An effort to insert "unreasonable" impairment into the provisions of MEPA failed in the Michigan legislature. See Note, *Michigan Environmental Protection Act: Political Background*, 4 U. MICH. J.L. REF. 358, 363-68 (1970) [hereinafter cited as Note, *Political Background*].

<sup>41</sup> MINN. STAT. ANN. § 116B.03, subd. 1 (1977).

<sup>42</sup> *Michigan United Conservation Clubs v. Anthony*, 90 Mich. App. 990, 280 N.W.2d 883 (1979).

<sup>43</sup> *Eyde v. Michigan*, 82 Mich. App. 531, 267 N.W.2d 442 (1978); *Stevens v. Creek*, 121 Mich. App. 503, 328 N.W.2d 672 (1982); *Irish v. Green*, 4 Env't Rep. Cas. (BNA) 1402 (Mich. Cir. Ct. 1972).

<sup>44</sup> *Lincoln Township v. Manley Bros.*, No. 74-001113-CE (Mich. Cir. Ct. Dec. 20, 1974).

<sup>45</sup> *West Michigan Env'tl. Action Council, Inc. v. Natural Resources Comm'n*, 405 Mich. 741, 275 N.W.2d 538, cert. denied, 444 U.S. 941 (1979).

<sup>46</sup> See *Vanderkloot*, 392 Mich. at 167, 220 N.W.2d at 419 (11.04 acre swamp); *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 504-05, 320 N.W.2d 668, 672 (1982), lv. denied, 417 Mich. 1045 (1983) (four acre area including seasonal holding pond, common plant and animal species).

<sup>47</sup> In the *Kimberly Hills* case, discussed *infra* at notes 115, 140-53 and accompanying text, the appellants proposed a more restrictive resource definition for MEPA cases. The proposed definition of "natural resource" would include only those resources that were "relatively rare or in some way ecologically important." Brief for Appellants at 6, *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982).

It has been held, for example, that MEPA does not protect historical or cultural "environments." In *Poletown Neighborhood Council v. City of Detroit*,<sup>48</sup> the Michigan Supreme Court held that MEPA could not be invoked to prevent the condemnation of a large section of an ethnic neighborhood. Such non-natural environments, the court held, clearly were not contemplated by the statute's drafters as the proper subjects of MEPA lawsuits.<sup>49</sup> Careful drafting has helped to avoid this problem in Connecticut and Minnesota, however, where historical resources are explicitly included within the statutory definition of "resource."<sup>50</sup>

MERA also expressly protects "quietude."<sup>51</sup> In the absence of such an express provision, however, it remains unclear whether noise pollution harms a resource comprehended by a public trust citizen suit statute.<sup>52</sup> The application of these Acts to such inchoate resources is still a subject for scholarly speculation. A community's sense of aesthetics may also fall outside of the resource definition.<sup>53</sup> It is thus unclear whether conduct lacking readily quantifiable effects on generally accepted natural resources or species can be remedied through a citizen suit brought under the public trust statutes. Even a resource that has been held to fall under MEPA or its progeny may be unprotected in a particular case if that resource is viewed as an economic amenity, valued for its contribution to property values, rather than a natural resource valued for its ecological significance.<sup>54</sup>

The resource definition may not be used to turn citizen suit laws into developers' tools. One recent case, *Whittaker & Gooding Co. v. Scio Township Zoning Board of Appeals*,<sup>55</sup> demonstrated that the

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<sup>48</sup> 410 Mich. 616, 304 N.W.2d 455 (1981).

<sup>49</sup> *Id.* at 635, 304 N.W.2d at 460.

<sup>50</sup> CONN. GEN. STAT. ANN. § 22a-19a (1985); MINN. STAT. ANN. § 116B.02, subd. 4 (1977).

<sup>51</sup> *Id.* Excessive noise was an important issue in the Minnesota Pub. Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762 (Minn. 1977), discussed *infra* at notes 96-114 and accompanying text.

<sup>52</sup> See West Michigan Env'tl. Action Council, Inc. v. Natural Resources Comm'n, No. 76-19335-CE, (Mich. Cir. Ct. Dec. 6, 1977) at A1246 ("not clear" that noise pollution falls under MEPA). References are to an unpublished oral opinion of the trial court [hereinafter cited as *Trial Opinion*]. A transcript is available at the law offices of Vanderkloot & Haynes, Bloomfield Hills, Michigan.

<sup>53</sup> See *City of Portage v. Kalamazoo County Rd. Comm'n*, 136 Mich. App. 276, 282, 355 N.W.2d 913, 916 (1984) ("Esthetic considerations alone are not determinative of significant environmental impact"); see also Haynes, *supra* note 11, at 621 n.126, Slone, *supra* note 27, at 285 n.107. But see MINN. STAT. ANN. § 116B.02, subd. 4 (1977) (MERA covers "scenic and esthetic" resources when resources owned by government unit or agency).

<sup>54</sup> See Slone, *supra* note 26, at 285 n.107.

<sup>55</sup> 117 Mich. App. 18, 323 N.W.2d 574 (1982).

Michigan judiciary would not uphold efforts to facilitate development activities through MEPA suits.<sup>56</sup> In that case, the plaintiff, an operator of a gravel pit, claimed that the defendant Board's denial of a permit modification impaired a "natural resource" by preventing it from extracting the gravel deposits. The contention that the development of the resource constituted part of the resource itself for MEPA purposes was summarily rejected by the court of appeals.<sup>57</sup>

## 2. "Pollution, Impairment, or Destruction"

Of the three statutes herein examined, only MERA contains an attempt to define "pollution, impairment, or destruction" within its provisions;<sup>58</sup> MEPA and CEPA leave the term open to case-by-case development under the statutorily-created "common law of environmental quality."<sup>59</sup> Courts' efforts to formulate a durable standard of "impairment" have resulted, as will be discussed,<sup>60</sup> in a potentially significant diminution of MEPA's usefulness and, by implication,<sup>61</sup> the usefulness of MERA and CEPA as well. Interestingly, this development in MEPA law has occurred despite the opinions of numerous commentators that the law's *prima facie* case threshold was intended to offer plaintiffs only a minimal hurdle to clear,<sup>62</sup> and the contrary precedent established by early MEPA cases which

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<sup>56</sup> See Slone, *supra* note 26, at 285; Trepod & Yeager, *The Michigan Environmental Protection Act: Pervasive!*, 64 MICH. B.J. 187, 189 (1985).

<sup>57</sup> 117 Mich. App. at 23, 323 N.W.2d at 576.

<sup>58</sup> MINN. STAT. ANN. § 116B.02, subd. 5 (1977).

<sup>59</sup> See Ray, 393 Mich. at 306, 224 N.W.2d at 888:

[The legislature] left to courts the important task of giving substance to the [pollution, impairment or destruction] standard by developing a common law of environmental quality. The Act [MEPA] allows courts to fashion standards in the context of actual problems as they arise in individual cases and to take into consideration changes in technology which the legislature, at the time of the Act's passage, could not hope to foresee.

See also Wayne County Dep't of Health v. Olsonite Corp., 79 Mich. App. 668, 693, 263 N.W.2d 778, 791 (1977), *lv. denied*, 402 Mich. 845 (1978), Haynes, *supra* note 11, at 605.

<sup>60</sup> See *infra* notes 128-82 and accompanying text.

<sup>61</sup> MEPA provided the model for both MERA and CEPA, see Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163, 175 (1978); Johnson, *supra* note 40, at 426. Consequently, courts in Connecticut, Minnesota, and other states may look to Michigan opinions for guidance in interpreting their own environmental protection acts. See People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Env'tl. Quality Council, 266 N.W.2d 858, 866 n.9 (Minn. 1978).

<sup>62</sup> See Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as a Model of a Minimal Requirement*, 7 HARV. ENVTL. L. REV. 107, 109-11 (1983); ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 129-30.

construed the statute liberally to achieve its stated environmental goals.<sup>63</sup>

### C. *The Affirmative Defense Provisions*

The defendant in a public trust citizen suit may escape liability in two ways: she may successfully refute the plaintiff's prima facie case, or she may invoke the affirmative defense offered by the statutes.<sup>64</sup> Under the Acts, the defendant is permitted to demonstrate that there is "no feasible and prudent alternative" to the challenged conduct and<sup>65</sup> that such conduct is consistent with the promotion of the public health, safety, and welfare when considered in light of the state's "paramount concern"<sup>66</sup> for the protection of its natural resources.

These affirmative defense provisions have generally proved to be of little use to the environmental defendant.<sup>67</sup> Courts typically use established readings of the statutes' "feasible and prudent" language to create rigorous burdens of proof.<sup>68</sup> Rarely can a defendant successfully establish a statutory affirmative defense. The high cost of an environmentally-sound course of action, by itself, is clearly not enough to render it infeasible or imprudent.<sup>69</sup> Nor is the fact that large sums of money have already been invested in the challenged course of conduct.<sup>70</sup> Courts may temper their strictness when the threatened environmental impairment is minor, and when alternatives impose significant burdens on defendants or represent possible

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<sup>63</sup> See *Abrams*, *supra* note 62, at 114.

<sup>64</sup> CONN. GEN. STAT. ANN. § 22a-17(a) (1985); MICH. STAT. ANN. § 14.528(203)(1) (1980); MINN. STAT. ANN. § 116B.04 (1977). Under MERA, no affirmative defense is available when the defendant is alleged to have violated any environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit. *Id.*

<sup>65</sup> An attempt to replace "and" with "or" in the affirmative defense provision failed to pass the Michigan legislature. See Note, *Political Background*, *supra* note 40 at 363-68.

<sup>66</sup> "Paramount" has been defined to mean "superior to all others." *Floodwood-Fine Lakes Citizens' Group v. Minnesota*, 287 N.W.2d 390 (Minn. 1979).

<sup>67</sup> See *Abrams*, *supra* note 62, at 115-17, *Slone*, *supra* note 26 at 278, 288, 295.

<sup>68</sup> See *Industrial Union Dep't, AFL-CIO v. Hodgson*, 162 U.S. App. D.C. 331, 499 F.2d 467 (1974), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), *discussed in Olsonite Corp.*, 79 Mich. App. at 703-06, 263 N.W.2d at 796-97.

<sup>69</sup> See *Manchester Envtl.*, 184 Conn. at 62, 441 A.2d at 76; *Olsonite Corp.*, 79 Mich. App. at 704, 263 N.W.2d at 796 (quoting *Hodgson*, 162 U.S. App. D.C. at 341-42, 499 F.2d at 477-78); *Urban Council on Mobility v. Minnesota Dep't of Natural Resources*, 289 N.W.2d 729 (Minn. 1980); see also MINN. STAT. ANN. § 116B.04 (1977) ("Economic considerations alone shall not constitute a defense hereunder.").

<sup>70</sup> *Urban Council on Mobility*, 289 N.W.2d at 735.

public hazards.<sup>71</sup> In most cases involving more significant environmental degradation, however, only highly unusual or compelling factors have been sufficient to establish an affirmative defense. The public trust statutes were not designed merely to force actors to disclose the reasons for their conduct.<sup>72</sup> They go much further than that. The laws were written to get to the "guts" of environmental controversies,<sup>73</sup> to force defendants to weigh alternative methods for achieving their goals, and then to choose the most environmentally desirable courses of action.<sup>74</sup> By denying defendants an easy method

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<sup>71</sup> See ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 129. See also Sax & Conner, *supra* note 24, at 1037, 1066-67 (discussion of *Crandall v. Biergans*). An interesting case suggesting the possible interplay of an EPA's prima facie case and affirmative defense components is *Lake Williams Beach Ass'n v. Gilmer Bros.*, 496 A.2d 182 (Conn. 1985). In *Lake Williams*, the defendant, a plastics company, owned a 19th-century dam and the right to impound waters in a man-made lake. After a 1976 federal inspection judged the dam unsafe, the state Department of Environmental Protection asked the defendant to lower the water level in the lake pending further study of the problem. The defendant chose to lower the water level by about three feet. The lake level fluctuated considerably after the defendant's act, and at times, the lake was almost completely drained of water. This consequent reduction of the water level caused a decline in the property values of plaintiff's members and interfered with their recreational use of the lake. The suit was brought in two counts; one claim sounded in common law riparian rights, while the other alleged a CEPA violation. The Connecticut Supreme Court, summarily dismissing the feasibility of alternative forms of conduct, held that an affirmative defense under CEPA had been established. The opinion seemed to indicate, however, that the court was focused more intently on common law riparian rights doctrines than the substantive duties imposed by CEPA. Citing a series of water rights cases, the court held that the defendant had acted "reasonably" in drawing down the lake's water level. This "reasonableness" did not appear to be a reference to the CEPA "unreasonable" impairment standard, which is clearly meant only to discourage frivolous suits, see *supra* note 40. Rather, this reasonableness described the conduct of a riparian owner under the common law, and precluded other riparian owners from enjoining his actions in a common law suit. Thus, despite the interesting fact situation presented by the case, it is unclear from whence the court derived its opinion; the opinion could be an example of the tension between CEPA's prima facie case and affirmative defense provisions, or it could simply be the result of an improper mingling of standards from two discrete and separate areas of law.

<sup>72</sup> See *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966). *Gould* was a case involving the application of the prior public use doctrine to public trust property. In its opinion, the Massachusetts Supreme Judicial Court invalidated a lease and a management contract between the state and a private developer who sought to construct and operate a ski resort on the site of the state-owned Mt. Greylock State Reservation. The court held that the legislature could only convey such public lands to private developers by clearly and explicitly authorizing the new use in a separate enactment. Thus, the prior public use doctrine, like the public trust doctrine, functioned to protect public rights in property devoted to public uses by forcing adequate disclosure of resource decisions and subjecting those decisions to open political debate. See Sax, *Public Trust*, *supra* note 13, at 491-502; see also Comment, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF. L. REV. 839, 869-86 (1984).

<sup>73</sup> Olson, *The MEPA: An Experiment that Works*, 64 MICH. B.J. 181 (1985) [hereinafter cited as Olson, *Experiment*].

<sup>74</sup> Professor Sax stated in an amicus brief filed in the *Kimberly Hills* case:

of justifying proposed or current activities that harm statutorily-protected resource values, the laws force the parties to consider and implement alternative courses of conduct when the situation so requires.<sup>75</sup>

CEPA seems to offer a defendant the most flexible language around which to structure an affirmative defense. It lacks the "par-amount concern" language of MEPA and MERA, and includes the qualification that alternatives must be weighed "considering all relevant surrounding circumstances and factors."<sup>76</sup> Yet even Connecticut courts have not been overly receptive to defendants' affirmative defense claims. In *Manchester Environmental*, the plaintiffs asserted that the use of mass transit was a feasible alternative to planned highway modifications that would have significantly increased automobile traffic to the challenged industrial park. The state supreme court agreed that the mass transit alternative was both feasible and prudent, although it would have involved a major change in governmental policy for which no planning had previously been undertaken and no money had been budgeted.<sup>77</sup>

CEPA's affirmative defense has been successfully invoked, however, despite the courts' insistence on extraordinary factors, where the complained-of resource impairment seemed "reasonable" and the defendant lacked the opportunity to choose an environmentally-sensitive course of action. In *Lake Williams Beach Association v. Gilman Brothers*,<sup>78</sup> the defendant, owner of a 19th-century dam on a recreational lake, was faced with a Hobson's choice: the company could open its dam and lower the lake's water level pursuant to state and federal agency requests, thus impairing plaintiff's use of the lake for recreational purposes, or it could maintain the water level and risk dam collapse and flooding, as well as eventual administrative sanctions. In this situation, although the court found that the defendant had indeed impaired a CEPA resource, it held the defendant's conduct to be "reasonable" and consequently ruled that it had established an affirmative defense. From the court's holding, it can per-

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MEPA was enacted to encourage people to make socially responsible decisions that consider environmental values in choosing between alternative means of reaching an objective without requiring them to bear an unconstitutionally heavy burden because they consider these values.

Sax, Brief of Amicus Curiae at 17, *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982) [hereinafter cited as *Amicus Brief*].

<sup>75</sup> See *Abrams*, *supra* note 62, at 117.

<sup>76</sup> CONN. GEN. STAT. ANN. § 22a-17 (1985).

<sup>77</sup> *Manchester Envtl.*, 184 Conn. at 62, 441 A.2d at 76.

<sup>78</sup> 496 A.2d 182 (Conn. 1985). For a further discussion of the opinion, see *supra* n.71.



haps be inferred that courts may view the affirmative defense provisions less rigorously in cases where environmental damage primarily affects less-pressing recreational interests, the defendant's alternatives are limited, and the challenged conduct is designed to safeguard the public welfare.

Nevertheless, the difficulty of employing the affirmative defense has led many defendants to forego it entirely. As a result, it is usually the *prima facie* case that becomes the most important area of legal controversy in these environmental citizen actions.<sup>79</sup>

### III. JUDICIAL STRATEGIES RESTRICTING CITIZEN SUITS

MEPA and the other citizen suit statutes establish general guidelines to be used by the courts in handling litigation arising under them. A certain amount of elasticity was intentionally built into the laws' provisions; courts retained the ability to give flexible interpretations to statutory terms, and to tailor injunctive remedies to individual fact situations.<sup>80</sup> The purpose of the statutes was to establish a new common law, a far-reaching regime capable of settling the broadest possible range of resulting environmental disputes within the statutory causes of action.<sup>81</sup> The court deciding a citizen claim would be free to create new statutory approaches as new types of controversies arose. The drafters of these laws may not have anticipated that the judiciary, despite express statutory and, in some cases, constitutional language accentuating the primacy of environmental protection,<sup>82</sup> would use the Acts' built-in flexibility to weaken

<sup>79</sup> See *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982) *lv. denied*, 417 Mich. 1045 (1983); *Cook v. Grand River Power Co.*, 131 Mich. App. 821, 346 N.W.2d 881 (1984); *City of Portage v. Kalamazoo County Rd. Comm'n*, 136 Mich. App. 276, 355 N.W.2d 913 (1984); *Rush v. Sterner*, 143 Mich. App. 672, 373 N.W.2d 183 (1985).

<sup>80</sup> See CONN. GEN. STAT. ANN. § 22a-18(a) (1985); MICH. STAT. ANN. § 14.528(204)(1) (1980); MINN. STAT. ANN. § 116B.07 (1977). See also ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 138:

[MEPA's equitable relief] provision allows courts to develop innovative and imaginative solutions to environmental problems and provides fertile ground for the development of the common law of environmental quality. The authority is particularly useful in dealing with land use problems where the crux of the issue often is how to allow development to proceed in a manner consistent with the preservation of the environmental values of the trust.

For examples of Michigan courts' flexible tailoring of equitable relief, see *Irish*, 4 Env'tl. Rep. Cas. (BNA) at 1405; *Kimberly Hills*, 114 Mich. App. at 520-22, 320 N.W.2d at 679-80 (trial court order).

<sup>81</sup> ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 125; *Abrams*, *supra* note 62, at 110.

<sup>82</sup> See MICH. CONST., art. IV, § 52:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety, and

the statutory causes of action. The advent of these interpretive strategies forces us to re-examine the language and purpose of the laws, and to assess the compatibility of recent judicial decisions with long-range environmental protection goals.

### A. *The "Front-Loaded" Equity Balance*

The notion of equity balancing, as it arose in nuisance law, gave courts a method of weighing an activity's benefit to society against its adverse effects on plaintiffs. By balancing the equities, a court was able to reach a solution that yielded the most beneficial overall use of resources to society as a whole.<sup>83</sup> To illustrate, where a manufacturing business produced an essential product, was part of an essential industry,<sup>84</sup> or represented a substantial capital investment,<sup>85</sup> the nuisance complaints of neighboring landowners would not necessarily lead to injunctions, even when the existence of a nuisance was proven.<sup>86</sup> Nuisance law enabled the courts to accommodate the interests of the parties by permitting the nuisance to continue while awarding past or permanent damages to compensate injured defendants.<sup>87</sup> Clearly, the public trust laws, which address sensitive questions of resource allocation, require some mechanism that would permit a court to allow socially valuable enterprises to continue in extraordinary situations where equitable relief is not called for. However, the citizen suit statutes, unlike nuisance law, do not permit the award of damages. This mechanism, to function within the statutory scheme, would have to be consistent with the laws' environmental goals. It could not offer defendants an easy way out simply because their pollution-creating enterprises "benefit" the state's citizens.

The drafters of MEPA understood this, and considered a number of alternative methods to accomplish this goal.<sup>88</sup> The Michigan legislature finally settled on a statutory balancing test, incorporated in

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general welfare of the people. The legislature shall provide for the protection of the air, water and other resources of the state from pollution, impairment and destruction.

<sup>83</sup> See, e.g., Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980).

<sup>84</sup> See, e.g., *Heppenstall Co. v. Berkshire Chem. Co.*, 130 Conn. 485, 35 A.2d 845 (1954).

<sup>85</sup> See, e.g., *Roy v. Chevrolet Motor Car Co.*, 262 Mich. 663, 247 N.W. 774 (1933).

<sup>86</sup> See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

<sup>87</sup> See *id.*; W. PROSSER & W. P. KEETON, *THE LAW OF TORTS*, § 88A at 631-32 (5th ed. 1984).

<sup>88</sup> See Note, *Political Background*, *supra* note 40, at 363-68.

section 3(1) of MEPA.<sup>89</sup> This test permits the court to consider the non-environmental public benefits of a defendant's conduct, but only within certain clearly defined parameters established to safeguard the Act's effectiveness as a plaintiff's tool.<sup>90</sup> The same balancing test was subsequently adopted in MERA.<sup>91</sup>

Only after the plaintiff has established his *prima facie* case and the defendant has demonstrated that no feasible and prudent alternative exists to his conduct may the defendant invoke the statutory balancing test. The defendant may escape liability if he can demonstrate that his conduct is sufficiently beneficial to the public health, safety and welfare to outweigh the state's paramount concern for environmental protection.<sup>92</sup> A court strictly adhering to the terms of MEPA or MERA would thus only begin to balance the equities at the time the defendant offered his affirmative defense, if indeed one was offered at all. Such a balancing test seemingly would be tilted in the plaintiff's favor by the state's primary concern for the environment.

This approach makes sense when the public trust citizen suit laws are viewed as vehicles of compromise between socially beneficial private enterprise and the public's interest in sound environmental practice,<sup>93</sup> not as specialized, codified nuisance laws which force the court to make hard choices: either to shut down the defendant's enterprise, or to permit the continual environmental degradation to go on unabated. MEPA permits plaintiffs to sue before environmentally-threatening conduct takes its toll on natural resources. In addition, courts are given extremely wide remedial discretion in settling cases. The paradigm MEPA case involves compromise between the parties, with injunctive relief merely going as far as necessary to preserve environmental interests. The court, while not empowered to choose the best alternative for the defendant,<sup>94</sup> may remedy

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<sup>89</sup> See MICH. STAT. ANN. § 14.528(203)(1) (1980).

<sup>90</sup> See *Olsonite Corp.*, 79 Mich. App. at 703-06, 263 N.W.2d at 796-97; see also ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 134-35, 155; Amicus Brief, *supra* note 74, at 7-8.

<sup>91</sup> See *supra* note 64 and accompanying text.

<sup>92</sup> See Haynes, *supra* note 11, at 599.

<sup>93</sup> See Sax & Dimento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 9 (1974); Haynes, *supra* note 11, at 604-05; Slone, *supra* note 26, at 291 n.142, 297-98.

<sup>94</sup> See *Irish v. Green*, 4 Env't. Rep. Cas. (BNA) 1402, 1403 (Mich. Cir. Ct. 1972) (court refused to mandate cluster development); *Oscoda Chapter of PBB Action Comm., Inc. v. Dep't of Natural Resources*, 403 Mich. 215, 232, 268 N.W.2d 240, 247 (1978) (court refused to compel incineration of PBB-poisoned cattle).

defects in the planning or conduct of an activity stemming from insensitivity to resource protection goals. Since the statutory relief may be tailored to permit the defendant to carry on his activity in a manner compatible with environmental interests, there is less need for a nuisance-based equity balancing component.

This statutory scheme has not gone undisturbed, however. The language of several key opinions in Minnesota and Michigan indicate that some courts may be in the process of reformulating the statutory balancing tests in ways contrary to the original intent of the legislatures that enacted the citizen suit statutes. These opinions have pushed the equity balance forward from the affirmative defense to the prima facie case. The implications of this development are significant. The laws were written to include low prima facie case thresholds; clearly the greater burdens of environmental justification were to fall on defendants, frequently corporations or businesses with more access to data than the typical citizen plaintiff.<sup>95</sup> Also, as previously mentioned, the light prima facie case burden enabled the court to proceed directly to the question of alternatives, the real heart of any MEPA or MERA controversy. Clearly, should courts examine the social value of a defendant's conduct at the prima facie case stage, the issue of preferable alternatives would never be reached in many instances, and the chance to grant equitable relief would be more increasingly foreclosed.

### 1. The *White Bear* Case

One of the first public trust citizen suit opinions to discuss equity balancing was *Minnesota Public Interest Research Group v. White Bear Rod and Gun Club*.<sup>96</sup> The defendant, a non-profit recreational shooting club, operated a trap shooting range on land adjacent to

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<sup>95</sup> See *Olsonite Corp.*, 79 Mich. App. at 702, 263 N.W.2d at 795 (quoting Pierce, Sax & Irwin, Responses to "Thoughts on H.B. 3055", unpublished manuscript in the files of Professor Sax, University of Michigan Law School); Abrams, *supra* note 62, at 117.

<sup>96</sup> 257 N.W.2d 762 (Minn. 1977). *But see* *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977). *Reserve Mining* involved permit applications for the construction of a disposal facility for taconite tailings. The permits were denied by the state Department of Natural Resources and the state Pollution Control Agency. Affirming the trial court's decision, which overturned the agencies' permit denials, the state supreme court used language which may be interpreted as the seed of a prima facie MERA equity balance. When a challenged activity's public health effects are significantly adverse, the court stated, no consideration need be given the economic effects, such as a plant closing, of an agency decision on the surrounding area. However, where the likelihood of damage to the public is "remote and speculative," economic impacts which are "devastating and certain may be weighed in the balance to arrive at an environmentally sound decision." *Id.*

Rice Lake, an ecologically-fragile natural wetland area<sup>97</sup> within the City of Hugo. An environmental organization brought suit under MERA to enjoin the club's shooting activities. The plaintiff claimed that the operation of the range caused excessive noise pollution, disturbing local residents.<sup>98</sup> More significantly, the plaintiff claimed that the noise from the shooting disrupted the use of the lake by migratory waterfowl,<sup>99</sup> and that birds were dying from ingesting lead shot that fell into the lake.<sup>100</sup> The lead shot, the plaintiffs alleged, also posed a threat to area drinking water supplies.<sup>101</sup>

The trial court enjoined the club from operating its shooting range, relying on the testimony of the plaintiff's wildlife experts. The trial judge need only have determined that the gun club polluted, impaired or destroyed a protected natural resource; White Bear did not plead MERA's affirmative defense. The trial court's findings of fact, however, included unusual language more compatible with a nuisance cause of action:

The Court has weighed the benefits to users together with the fact of an apparently substantial investment as against the damage likely to be caused to the protectable natural resources in the wetland area. The benefits of the Club are temporary. The desire and reasonable possibility is that the Rice Lake wetlands area would, but for the Club, otherwise be preserved permanently and for future generations.<sup>102</sup>

While the result in *White Bear* was favorable to the environmental plaintiffs, the court's language raised a number of important questions regarding the role of equity balancing in the MERA scheme. It is unclear just where in the statute the court found language to support this balancing test, or what standards it employed in weigh-

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<sup>97</sup> The lake, a "natural bowl surrounded by hilly areas," was described at trial by one of the plaintiff's experts, Dr. Miron Heinselman, professor of ecology and behavioral biology at the University of Minnesota, as "an exceptionally fine example of a waterfowl lake . . . [o]ne of the finest undeveloped waterfowl lakes in the Twin Cities area." Brief for Appellees at 7, *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977). Dr. Heinselman advised that the lake be purchased by the state and preserved in its natural state. *Id.*

<sup>98</sup> Complaint at 5-6, *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, No. 44328, (Minn. Dist. Ct., April 19, 1976).

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> District Court's Findings of Fact at 12-13, *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, No. 44328, (Minn. Dist. Ct., April 19, 1976).

ing the cited factors.<sup>103</sup> While MERA contains a component weighing the activity's social utility, such balancing was designed to take place when an affirmative defense was asserted. Here, no affirmative defense was pleaded by the defendants,<sup>104</sup> and thus it is difficult to conclude that the balance struck by the court is the same balance struck by the legislature.<sup>105</sup> A reader of the *White Bear* opinion could reasonably conclude that the weighing engaged in by the trial court did not involve the statutory balance at all, but rather a more nuisance-oriented equity balance factored into the plaintiff's prima facie case.<sup>106</sup> That the court's equity balancing was drawn from common law nuisance, rather than from the statute, is supported by the fact that the court did not, aside from a single conclusory sentence, discuss alternative modes of operation, the primary component of the affirmative defense balance, and that it did, like a court deciding a nuisance case, discuss the social benefits to be derived from the club's operation.<sup>107</sup> Consequently, the import of the case is unclear. Under a "front-loaded" equity balance, the social worth of the de-

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<sup>103</sup> See Note, *A Balancing Test Adopted Under MERA — MPIRG v. White Bear Rod & Gun Club*, 5 WM. MITCHELL L.REV. 270, 274-80 (1979) (discussion of the balancing test as found in the state supreme court's affirmance) [hereinafter cited as Note, *Balancing Test*].

<sup>104</sup> *White Bear*, 257 N.W.2d at 781.

<sup>105</sup> See Note, *Balancing Test*, *supra* note 103, at 274 n.25.

<sup>106</sup> In a typical nuisance case, a court must weigh proofs offered by the plaintiff and the defendant to determine whether the defendant has acted "unreasonably." RESTATEMENT (SECOND) OF TORTS § 822(a) (1978). Conduct is unreasonable if its social utility does not outweigh the gravity of the harm caused. *Id.* § 826(a). The *White Bear* trial court used the concept of "unreasonable" pollution to assess the plaintiff's prima facie case:

The impact of noise from two gun clubs is more than it is reasonable to expect residents of the community near them to absorb. It is likely that it is impossible for the defendant club to operate without unreasonable natural acoustical degradation of the surrounding environment.

District Court's Findings of Fact at 8, *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, No. 44328 (Minn. Dist. Ct. April 19, 1976) (Anderson, J.). See *Smith v. W. Wayne County Conservation Ass'n*, 380 Mich. 526, 158 N.W.2d 463 (1968) (defendant's operation of rifle range in sparsely-populated area not a nuisance; nuisance decided by effects of noise upon "ordinary reasonable man"). See also RESTATEMENT (SECOND) OF TORTS § 826, comment c (1978) (equity balance inherent in "reasonable man" standard). It may be reasonable to say that the resemblance between the factual settings of certain statutory citizen suits and common law nuisance cases has invited trial courts to borrow reasoning from nuisance law. See *Sax & Conner*, *supra* note 24, at 1066-67 (discussion of trial court opinion in *Crandall v. Biergans*).

<sup>107</sup> See District Court's Findings of Fact at 11-13, *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, No. 44328, (Minn. Dist. Ct., April 19, 1976) (Anderson, J.). On the subject of alternative forms of conduct, the court simply notes that "[t]here are other feasible and prudent alternative places for the conduct of such shooting activities." The court goes into more detail in discussing the club's social utility. The Findings of Fact state the gun club held training programs for young shooters, and gave its adult members release from "general pressures and routines."

fendant's conduct would help determine whether he had polluted, impaired or destroyed the environment under the statute, and not simply whether his conduct outweighed the state's primary concern for resource protection.

This inference — that the *White Bear* trial court utilized nuisance law balancing as part of MERA's prima facie case — was subsequently drawn, and approved, by the Minnesota Supreme Court. In fact, the supreme court's opinion explicitly affirmed the connection between the trial court's judicially-created balance and the type of balance frequently employed in common law nuisance cases:

The Minnesota Environmental Rights Act does not prescribe elaborate standards to guide trial courts, but allows a case-by-case determination by use of a balancing test, analogous to the one traditionally employed by courts of equity, where the utility of a defendant's conduct which interferes with and invades natural resources is weighed against the gravity of harm resulting from such an interference or invasion.<sup>108</sup>

It is unclear why the *White Bear* court engrafted these traditional nuisance law concepts onto the MERA cause of action. Justice MacLaughlin, writing for the majority, gives us a clue by citing the Michigan case *Ray v. Mason County Drain Commissioner*<sup>109</sup> in support of his nuisance analogy.<sup>110</sup> The same citation was given in an amicus brief filed by the Sierra Club. That brief used nuisance law, not as a proposed framework for reviewing MERA claims, but merely to illustrate the principle that courts could integrate emerging social concerns into MERA's common law of environmental quality.<sup>111</sup> The brief did not propose that nuisance concepts be integrated into MERA; it merely suggested that a court engaged in evolving a "common law" under MERA could integrate social concerns for the environment into its decisions, just as a nuisance court could.

In the wake of *White Bear*, commentators expressed uncertainty about the role of this quasi-nuisance equity balance in the scheme of

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<sup>108</sup> *White Bear*, 257 N.W.2d at 782.

<sup>109</sup> 393 Mich. 294, 224 N.W.2d 883 (1975).

<sup>110</sup> *White Bear*, 257 N.W.2d at 782 n.12.

<sup>111</sup> Brief of Amicus Curiae at 20, *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977). The issue addressed in this section of the brief was whether courts or administrative agencies should control the outcome of environmental disputes. Amicus cited *Ray* to show that courts bring a unique "integrating" power that "circumscribed and specialized" agencies did not possess, to environmental cases. *Id.* at 16-17. Interestingly, one of the examples of judicial integration of social variables is the courts' changing approaches to environmental nuisance cases. *Id.* at 20.

MERA.<sup>112</sup> The supreme court's opinion in the case did not resolve the question of where and how to apply this new test. The balance could have been "front-loaded" to help determine whether a defendant's conduct involved "pollution, impairment or destruction" of a natural resource, or the courts could have used it at the remedial stage to determine the proper form of injunctive relief.<sup>113</sup> Neither *White Bear* opinion disclosed precisely what role the gun club's social utility did play, but the injunction finally issued was a severe one, hinting that social utility was not a factor at the remedial stage.<sup>114</sup> This unresolved question of statutory interpretation left courts free to read *White Bear* in support of their own "front-loading" doctrines. Thus, under doctrines like that implicitly adopted in *White Bear*, socially valuable activities could be accorded some form of wholly-unintended "common law" exemption from equitable relief under the public trust citizen suit statutes.

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<sup>112</sup> See Note, *Balancing Test*, *supra* note 103, at 277-79.

<sup>113</sup> *Id.* at 277-78. The author also examined two other possibilities: that the balance was used to weigh the defendant's rebuttal evidence, or that it was employed to assess the feasibility or prudence of alternatives. Both the defendant's failure to plead an affirmative defense, and the prior Minnesota caselaw condemning improper considerations of social utility in the affirmative defense, see *County of Freeborn by Tuveson v. Bryson (Bryson II)*, 309 Minn. 178, 187, 243 N.W.2d 316, 321 (1976), indicate that the club's social utility was not considered at that phase. Placing the balancing test at the rebuttal stage is not substantially different from making it an element of the plaintiff's prima facie showing, although the author disapproves of both. Note, *Balancing Test*, *supra* note 103, at 277-79. In either event, it is the extent of, not the alternatives to, pollution that is debated in the case. See *Abrams*, *supra* note 62, at 117.

<sup>114</sup> The supreme court affirmed the trial court's permanent injunction on all shooting activities. See *District Court's Conclusions of Law* at 13, *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, No. 44328, (Minn. Dist. Ct., April 19, 1976) (Anderson, J.). In 1980, the club petitioned the Washington County District Court to lift the injunction, but the request was denied. Subsequently, the club installed a sound barrier around one of its shooting sites and in November, 1984, asked the City of Hugo to raise the forty decibel limitation in its original conditional use permit. This request, too, was denied. In *White Bear Rod & Gun Club v. City of Hugo*, 377 N.W.2d 49 (Minn. App. 1985), the court of appeals held that the city's denial did not violate the club's due process rights under either the state or federal constitution because, pursuant to the original injunction, any new evidence regarding pollution, impairment or destruction of the environment was to be submitted to the trial court, not the city. Under the circumstances of the case, the city lacked jurisdiction to consider the club's application for a permit amendment. *Id.* at 2-53.

Like MEPA, MERA affords the court a great deal of flexibility in structuring its relief. Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 602 (1972). But the question remains: may the court use MERA's permissive language to balance the equities and avoid injunctive relief when a statutory violation has been proven? See *Slone*, *supra* note 26, at 316. For a discussion of the problem in the context of federal statutes, see *Plater, Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982). Professor Plater argues that once a statutory violation has been proven, equity should not permit the violation to continue unabated, and that consequently, conduct violating the statute should be enjoined.



## 2. "Front-Loading" in Michigan

Although no Michigan case has explicitly relied on *White Bear*, its presence can be found in MEPA opinions containing equity-balancing language,<sup>115</sup> as well as a recent court of appeals opinion which explicitly condemns *White Bear's* integration of social utility notions into MEPA's prima facie case.<sup>116</sup>

The trial court's opinion in *West Michigan Environmental Action Council, Inc. v. Natural Resources Commission*,<sup>117</sup> one of the most controversial MEPA lawsuits to date, offers a good example of prima facie equity balancing. The litigation involved a challenge to the decision of the Natural Resources Commission (NRC) to grant ten experimental oil drilling permits for sites within the Pigeon River County State Forest. The trial judge held that the plaintiff had not

<sup>115</sup> Traces of the equity balancing doctrine can be found, for example, in the *Kimberly Hills* case, discussed *infra* at notes 140-53 and accompanying text. The defendant's arguments to the Michigan Court of Appeals were phrased in the vocabulary of "progress" and social utility:

[T]he question is whether the impact on the mice, birds and squirrels rises to the level of impairment or destruction of a natural resource. If so, there will be no more building in the State of Michigan.

Brief for Appellants at 6, *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982).

The defendants/appellants expressly asked the court to adopt a front-loaded balancing test, citing the *White Bear* case as persuasive authority:

[A]pplication of [the *White Bear* opinion's] interpretation of the MEPA would require a finding by the trial court that defendants' proposed conduct would not be of sufficient value to offset the harm to society's natural resources . . . .

[I]t is completely consistent to interpret the statute as incorporating a balancing test within the standard required for the finding that the plaintiff has met the requirements of its prima facie showing, while prohibiting the redundant incorporation of the same test in defendants' standard for an affirmative defense.

*Id.* at 10-11.

The court of appeals declined the appellants' invitation to import the balancing test expressly into MEPA common law, but employed language that demonstrated the influence of appellants' arguments. In its modification of MEPA's prima facie case component, the "type of property involved" and the context in which that property is placed, were key elements in the *Kimberly Hills* court's decision. In its finding that the property was not suitable for preservation is the implicit corollary that it is more suitable for development. The court openly discusses the desirability of such residential construction: "[d]evelopment of the defendant's property will undoubtedly change the character of the neighborhood. *Such changes, however, are inevitable on the borderline between urban and rural areas.*" 114 Mich. App. at 509, 320 N.W.2d at 674 (emphasis added). Notions of defendant's socially useful conduct may thus betray the presence of a submerged, "front-loaded" equity balance.

<sup>116</sup> *City of Portage*, 136 Mich. App. at 282-83, 355 N.W.2d at 916. In *Olsonite Corp.*, the court of appeals held that the substantive provisions of MEPA supercede nuisance law whenever the two conflict. 79 Mich. App. at 689-94, 263 N.W.2d at 789-92. For a general survey of the differences between MEPA's provisions and those of conventional nuisance law, see ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 153-56.

<sup>117</sup> 405 Mich. 741, 275 N.W.2d 538, *cert. denied* 444 U.S. 941 (1979).

proven that the drilling's impact on the forest and its resident animal populations rose to the level of MEPA "impairment":

As I have spoken of earlier in this lawsuit, the Commission has to balance the interest of many diverse groups in its decision. The work, obviously, of the state must go on. Progress, if we want to call it that, must be allowed, and the interests of some must be balanced against the interests of others. Defendant Commission has attended to that duty, the Court believes, and the adverse impact here described by the evidence would have been greater, more acutely persuasive, had they not acted as they did.

The conduct is therefore approved and is not condemned as pollution, impairment or destruction.<sup>118</sup>

Left to their own devices, mission-oriented state agencies will frequently accord non-environmental objectives increased importance in reaching their decisions.<sup>119</sup> For that reason, MEPA enabled courts to reach their own decisions regarding the desirability of agency actions while placing primary emphasis on oft-ignored environmental values. Permitting a prima facie equity balance in MEPA cases, in many instances, would mean sanctioning a principle of deference to agency decisions that would undercut one of MEPA's basic goals — ensuring the accountability of administrative bodies for decisions harming the environment.

Echoing the court in *White Bear*, however, the *West Michigan Environmental* trial court invoked extra-statutory balancing in a case where no affirmative defense was pleaded.<sup>120</sup> Its balance of equities, and its tone of deference to agency decision-making processes,<sup>121</sup> reflect the trial court's "fundamental misconception"<sup>122</sup> of MEPA's purpose and function.

In *City of Portage v. Kalamazoo County Road Commission*,<sup>123</sup> the court of appeals expressly disapproved the front-loaded equity

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<sup>118</sup> Trial Opinion, *supra* note 52, at A1255.

<sup>119</sup> See *supra* note 24; see also Note, *Michigan Environmental Protection Act of 1970*, 4 U. MICH. J.L. REF. 121 (1970).

<sup>120</sup> 405 Mich. at 754–55, 764, 275 N.W.2d at 542, 547.

<sup>121</sup> In *West Michigan Environmental*, the state supreme court expressly disfavored the trial court's tone of deference to agency decision-making. *Id.* at 753–54, 275 N.W.2d at 542. The trial judge had compared the NRC's decision to permit hydrocarbon development with environmental "management decisions" designed to foster the proliferation of plant and animal populations. See Sax & Conner, *supra* note 24, at 1031 (discussing *Payant v. Department of Natural Resources*). The state supreme court rejected this analogy. 405 Mich. at 759–60, 275 N.W.2d at 545, but see *Kimberly Hills*, 114 Mich. App. at 507–08, 320 N.W.2d at 673 (court of appeals' citation of *Payant* in support of holding).

<sup>122</sup> 405 Mich. at 759, 275 N.W.2d at 545.

<sup>123</sup> 136 Mich. App. 276, 355 N.W.2d 913 (1984).

balance approach to MEPA. *City of Portage* involved the city's efforts to prevent the removal of approximately seventy-four trees during a road construction project. Upholding the plaintiff's MEPA claim, the trial court permanently enjoined the removal of the trees, but its rationale came under attack in the appellate opinion:

The trial court in the present case determined that a prima facie case was established by weighing the environmental risk of removing the trees against the good to be accomplished by their removal. This was error. The MEPA does not contemplate or permit a determination that a prima facie case has been made by the balancing of disadvantages against advantages of the defendant's proposed action. Rather, MEPA requires the court to first determine whether such proposed action rises to the level of an impairment or destruction of a natural resource so as to constitute an environmental risk.<sup>124</sup>

The court then proceeded to reverse the trial court's holding by stating that the removal of the trees, under the *Kimberly Hills* factors<sup>125</sup> discussed in the next section, did not constitute impairment of a MEPA resource.

The front-loaded equity balance spawned by the *White Bear* opinion, and sternly renounced in *City of Portage*, is more than a "common law" fleshing out of statutory terms; it represents a judicial rewriting of the statutory schemes enacted by the states' respective legislatures. Such judicial lawmaking, if allowed to remain vital doctrine in Michigan and Minnesota could have important negative implications for plaintiffs challenging major corporate or government polluters.<sup>126</sup> In addition to invoking the doctrine explicitly, courts in close cases may also allow equity balancing notions to influence their decision-making processes in subtle ways.<sup>127</sup> This type of submerged "front-loading" may lead to a significant erosion of plaintiffs' environmental rights, and may constitute a significant windfall for defendants seeking to avoid statutory liability.

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<sup>124</sup> 136 Mich. App. at 282-83, 355 N.W.2d at 916.

<sup>125</sup> See *infra* note at notes 132-33 and accompanying text.

<sup>126</sup> See Note, *Balancing Test*, *supra* note 103, at 277 n.40; but see Cramton, *Citizen Suits in the Environmental Field: Peril or Promise?*, 25 AD. L. REV. 147 (1973). Professor Cramton fears that courts deciding environmental citizen suits will fail to differentiate between polluters of varying levels of social importance. The balancing of environmental and non-environmental objectives, he claims, should not be left to courts to accomplish in an ad hoc fashion, but should be done by more competent and far-sighted administrative bodies.

<sup>127</sup> See *supra* note 115.

B. The "Rarity" Balance in Determinations of Pollution,  
Impairment or Destruction

Despite the liberal definitions of "pollution, impairment or destruction" found in early cases under the public trust statutes,<sup>128</sup> a recent string of Michigan opinions has substantially altered the content of these statutory terms. Beginning with *West Michigan Environmental*, a new form of balancing test, independent of the "front-loaded" equity balance, has emerged in MEPA cases. This new "rarity" balance weighs the relative scarcity of the resource sought to be protected against the magnitude of harm caused by the defendant's activities to determine whether the threshold level of impairment has been reached. This rarity balance, like the front-loaded equity balance, threatens to undermine the ability of MEPA plaintiffs to challenge a defendant's choice of alternatives on the merits. De minimus harm has never satisfied the Acts' prima facie requirements,<sup>129</sup> but the minimal impairment threshold allowed the courts to remedy actual or threatened resource degradation even in localized, low-profile controversies. Under rarity balancing, fewer MEPA claims will survive the summary judgment stage of litigation.<sup>130</sup>

The rarity balance, first enunciated in *Kimberly Hills Neighborhood Association v. Dion*,<sup>131</sup> weighs the rarity of the resource in question against the magnitude of harm to that resource threatened by the defendant's conduct. The "magnitude of harm" determination comprehends a weighing of three factors: the "nature of the defendant's actions," the "characteristics of the resources involved," and the "type of property involved."<sup>132</sup> While the precise meanings of these factors have not yet been fully explored in the caselaw,<sup>133</sup> the cases have established a general hierarchy of resources under

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<sup>128</sup> See *MUCC*, 90 Mich. App. at 105-06, 280 N.W.2d at 887.

<sup>129</sup> See *Oscoda Chapter of PBB Action Comm., Inc. v. Dep't of Natural Resources*, 403 Mich. 215, 268 N.W.2d 240 (1978); *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 237 N.W.2d 266 (1975); see also *State by Skeie v. Minnkota Power Coop., Inc.*, 281 N.W.2d 372 (Minn. 1979).

<sup>130</sup> See *Cook v. Grand River Power Co.*, 131 Mich. App. 821, 346 N.W.2d 881 (1984).

<sup>131</sup> 114 Mich. App. 495, 320 N.W.2d 668 (1982), *lv. denied*, 417 Mich. 1045 (1983).

<sup>132</sup> *Id.* at 505.

<sup>133</sup> Some elaboration is found in *City of Portage*, 136 Mich. App. at 282, 355 N.W.2d at 916. The court of appeals cites as key factors under the *Kimberly Hills* test whether the resource is rare or unique, whether the resource is "easily replaceable," whether the defendant's conduct is likely to have a significant consequential effect on other resources, and whether the direct impact on animals or plants affects a "critical number." See *infra* notes 158-60 and accompanying text.

MEPA, with those resources considered comparatively "rare" or important receiving substantially more protection under the Act than common resources or species.<sup>134</sup> Thus, Michigan courts have come to adopt what might be termed a "sliding scale" approach to resource protection.

The first suggestion of a rarity balance in MEPA caselaw appeared in the state supreme court's *West Michigan Environmental* opinion. Although the plaintiff in that case alleged adverse impacts to a wide variety of resources and species,<sup>135</sup> the court's final opinion strongly, and almost exclusively, emphasized the adverse effects on the forest's rarest residents — an endangered elk herd:

In light of the limited number of elk, the unique nature and location of this herd, and the apparently serious and lasting, though unquantifiable, damage that will result to the herd from the drilling of ten exploratory wells, we conclude that defendants' conduct constitutes an impairment or destruction of a natural resource.<sup>136</sup>

The opinion's emphasis on the elk herd made the possibility of damage to the herd seem to be the sole motivation behind the supreme court's decision. Certainly, this was the signal sent to the press<sup>137</sup> and the courts of appeals.<sup>138</sup> While the state supreme court's focus on resource rarity served the environmentalists well in *West Michigan Environmental*, it was to have negative repercussions for later MEPA plaintiffs. The *West Michigan Environmental* decision added a new element to MEPA's prima facie case. By casting MEPA as an endangered resource act, the court prepared the way for a new approach to interpreting MEPA, one which would permit "rea-

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<sup>134</sup> 114 Mich. App. at 508, 320 N.W.2d at 673. The court stated: "Since elk are extremely rare in Michigan, destruction of a relatively small number of elk will amount to an impairment. Destruction of the same number of a more common species would not necessarily amount to an impairment." *Id.*

<sup>135</sup> Among the species threatened by the proposed drilling were elk, bear, bobcat, and osprey. *West Michigan Environmental*, 405 Mich. at 755, 275 N.W.2d at 543. At trial, one of the plaintiff's wildlife experts also noted that a bald eagle had been sighted in the area of the proposed drilling. 405 Mich. at 755 n.3, 275 N.W.2d at 543 n.3.

<sup>136</sup> *Id.* at 760, 275 N.W.2d at 545.

<sup>137</sup> One Michigan newspaper, the *Detroit News*, characterized the case as one of "oil versus elk." Price, *Pigeon River Country State Forest — A Case of Oil Versus Elk*, at 5 (unpublished paper in the files of Professor Zygmunt Plater, Boston College Law School). In another editorial, the *Detroit News* lambasted the state supreme court for defending the "scraggly" forest and its "ersatz" elk herd, claiming that the herd was "phony" and advocating the reversal of the decision by the United States Supreme Court. *Pigeon River Justice*, *Detroit News*, July 6, 1979, at 6A, col. 1.

<sup>138</sup> See *Kimberly Hills*, 114 Mich. App. at 508, 320 N.W.2d at 673.

sonable" impairment despite the legislature's explicit rejection of such a qualifying term.<sup>139</sup> The reasonableness of any impairment would depend on the relative abundance or scarcity of the resource and its ability to adapt to the defendant's challenged activity.

The court of appeals crystallized the supreme court's statement into an explicit balancing test in the *Kimberly Hills* case. The resource complex at the center of the dispute was a four-acre parcel containing a seasonal holding pond, its surrounding vegetation and a host of common bird, animal and insect species. Of particular note was the presence of a pair of pheasants that used the parcel as a breeding ground.<sup>140</sup> The defendants sought to develop a series of one- and two-family residences on a nine-acre tract which included the disputed four acres that the plaintiff group sought to preserve. The city of Ann Arbor had at one time indicated an interest in purchasing the four-acre parcel for use as a public park, but no such transaction was ever consummated.<sup>141</sup>

The *Kimberly Hills* trial court decided the case in a manner consonant with earlier MEPA cases, avoiding any rarity analysis and instead drafting an order that preserved the pond and established open access lanes for wildlife migrating across the property.<sup>142</sup> Only limited development restrictions were placed on the remainder of the defendants' tract.<sup>143</sup> As had courts in earlier MEPA cases, the trial court, functioning as a mediator between environmental and commercial interests, tailored an injunctive order that permitted development to go forward while forcing key environmental concessions.<sup>144</sup>

The trial court's resolution of the *Kimberly Hills* controversy, however, was short-lived. The court of appeals struck down the trial court's order and dismissed the MEPA claim in an opinion that elaborated on *West Michigan Environmental's* rarity analysis.<sup>145</sup> The appeals court held that the plaintiffs had failed to establish their *prima facie* case; MEPA claims of pollution, impairment or destruction were to be decided in light of adverse impacts on statewide

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<sup>139</sup> See Note, *Political Background*, *supra* note 40, at 363-68.

<sup>140</sup> 114 Mich. App. at 514, 320 N.W.2d at 676 (trial court opinion).

<sup>141</sup> *Id.* at 513, 320 N.W.2d at 675-76.

<sup>142</sup> *Id.* at 520-22, 320 N.W.2d at 679-80.

<sup>143</sup> The defendants, in addition to being required to preserve the pond, a four-acre area around it, and the wildlife access lanes, were restrained from installing fences or concrete or asphalt driveways on the land. *Id.* at 521, 320 N.W.2d at 679.

<sup>144</sup> See Haynes, *supra* note 11, at 605.

<sup>145</sup> 114 Mich. App. at 508-10, 320 N.W.2d at 673-74.

"populations or ecological communities."<sup>146</sup> The Act, the court concluded, was not designed to focus on "narrow local problems."<sup>147</sup> Such a narrow focus, the opinion added, would not only be contrary to the drafters' intent, but would also be unreasonably difficult to administer in the courtroom.<sup>148</sup> Thus, in weighing the availability of MEPA injunctions, courts handling MEPA suits should address resource controversies from a statewide, and not a local, orientation.

Under this new rarity balance, the *Kimberly Hills* plaintiff association had little hope of success; none of the plant or animal species found on the parcel was in any way unique or unusual. The land's only unusual feature, the holding pond, did not affect any other adjoining watercourses or drainage systems.<sup>149</sup> Thus, development of the parcel would not cause the type of statewide environmental impact required to force judicial action. While the property was a distinctive local habitat area, that was no longer enough; where displaced wildlife was able to find alternative habitats, no judicial relief would now be forthcoming under MEPA.<sup>150</sup>

*Kimberly Hills* was a classic example of a bad case that made bad law. The relative insignificance of the resources involved made it unlikely that the court of appeals would uphold the meticulously-crafted trial court order.<sup>151</sup> Instead, the appellate court inartfully attempted to create a rule of reason to deter future MEPA plaintiffs from initiating small-scale actions.<sup>152</sup> While the case is currently an uncertain source of MEPA precedent, its effect could be disastrous if its holding were applied to more significant types of environmental

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<sup>146</sup> 114 Mich. App. at 507, 320 N.W.2d at 673.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 507 n.1, 320 N.W.2d at 673 n.1; but see *West Michigan Environmental*, 405 Mich. at 706, 275 N.W.2d at 545. The state supreme court recognized that damage to the elk herd was "serious and lasting, though unquantifiable." See also ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 129 (firm scientific evidence not required to establish prima facie case under MEPA).

Commentators have discerned a growing need for courts to intervene in situations where environmental threats are serious but merely anticipated. See Comment, *Projected Environmental Harm: Judicial Acceptance of a Concept of Uncertain Risk*, 53 J. URB. L. 497 (1976).

<sup>149</sup> 114 Mich. App. at 508-09, 320 N.W.2d at 674.

<sup>150</sup> *Id.* at 510, 320 N.W.2d at 674.

<sup>151</sup> The plaintiffs were, in fact, counselled against bringing the case for fear that it might create bad precedent. Interview with Professor Joseph Sax (Dec. 10, 1984); interview with Professor Zygmunt Plater (April 14, 1985)

<sup>152</sup> Not all observers of MEPA are convinced that the impact of *Kimberly Hills* on Michigan law is entirely negative. Professor Abrams argues that the case's holding may in fact deter potential MEPA plaintiffs from bringing suit against developers to obtain minor residential amenities. This function, he contends, is best left to local planning and zoning boards. Interview with Professor Robert Abrams, (March 21, 1985). But see Slone, *supra* note 26, at 298.

damage.<sup>153</sup> Consequently, Michigan courts will have to clarify *Kimberly Hills*' precedential effect before MEPA's future as a litigation tool can be accurately assessed.

Although the balancing test created by *Kimberly Hills* was relatively stringent, it did not represent the ultimate extension of *West Michigan Environmental's* rarity analysis. Subsequent opinions interpreting *Kimberly Hills* seemed to create even more demanding standards for MEPA impairment. In *Cook v. Grand River Power Co.*,<sup>154</sup> the court of appeals seemed to take an even tougher approach to MEPA's prima facie case. In *Cook*, the plaintiffs claimed that the renewed operation of a hydroelectric dam by the defendant would cause flooding on their properties, damaging a number of common plant and animal species.<sup>155</sup> Affirming the trial court's dismissal of the MEPA claim, the appeals court addressed the dam's impact on wildlife:

[t]he testimony presented indicated that if the dam were to operate again, certain plant life would be destroyed and certain animals displaced. There was no evidence that the plant life was unique or that the displaced animals would not have a suitable environment if the dam were operated.<sup>156</sup>

In light of the court's language in *Cook*, the plaintiff may have to make an even stronger showing than *Kimberly Hills* had indicated. While under *Kimberly Hills*, a loose balance was established weighing resource rarity against the harm caused by a defendant's conduct, *Cook* focuses, as did *West Michigan Environmental*, on the uniqueness of resources, and the ability of animal species to flee from the path of development. The language of the opinion seems to require a showing that migratory wildlife would have no alternative habitat, and that plant life was in some way unique before the plaintiff could make out his prima facie case.<sup>157</sup>

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<sup>153</sup> Professor Abrams claims that he has not observed *Kimberly Hills* to have a negative effect on air and water pollution cases, because under MEPA's terms, a "pollution" case need not involve the type of factors the *Kimberly Hills* court employed to reach a finding of "impairment." *Id.* However, *Stevens v. Creek*, 121 Mich. App. 503, 328 N.W.2d 672 (1982), seems to imply that the *Kimberly Hills* test may be applied to cases involving resource "destruction." In *Stevens*, the court of appeals remanded a case involving the destruction of trees to the trial court for application of *Kimberly Hills*' "impairment" factors.

<sup>154</sup> 131 Mich. App. 821, 346 N.W.2d 881 (1984).

<sup>155</sup> *Id.* at 824, 829, 346 N.W.2d at 883, 885.

<sup>156</sup> *Id.* at 829, 346 N.W.2d at 885.

<sup>157</sup> It is difficult to harmonize the approach taken in a case like *Cook* with the court of appeals' opinion in *Stevens v. Creek*, 121 Mich. App. 503, 328 N.W.2d 672 (1982). In that case, the court of appeals remanded a MEPA suit to the circuit court with the instruction that the



Such a brief and conclusory statement as the one found in *Cook* may not represent any deliberate effort to increase the MEPA plaintiff's burden of proof, but its restrictive reading of *Kimberly Hills* is echoed by similar language in the court of appeals' *City of Portage* opinion.<sup>158</sup> The court in *City of Portage* held that where the plaintiff did not show that the trees in question were "unique or irreplaceable" or that their removal "would have any significant consequential effect on other natural resources," the court would not enjoin their destruction.<sup>159</sup> The court also observed that the number of trees removed was "not critical" from an environmental standpoint.<sup>160</sup>

Lastly, while the court observed that any adverse effects caused by the trees' destruction should be cured by replanting, its restrictive reading of the prima facie case left it unable to order such relief. Clearly, courts following *City of Portage* could no longer use MEPA widely as an environmental planning tool, even in the types of cases which would have warranted MEPA relief just a few years earlier.<sup>161</sup> If a showing of "uniqueness," "irreplaceability," lack of alternative habitat or "critical" damage to resource populations will be required

trial court permit the plaintiff to offer expert testimony on the "pollution, impairment or destruction" resulting from the defendant's cutting and removal of a small number of trees from her property. One possible explanation is that *Stevens* merely involved the propriety of an offer of evidence, not a determination of pollution, impairment or destruction. However, the court's leniency in the context of a decidedly "local" problem has caused some confusion. See *Slone*, *supra* note 26, at 282. Another explanation is possible. *Stevens* involved a trespass, an invasion of another's property rights, while *Kimberly Hills* and *Cook* involved proposed uses of the defendant's own property rights. (The defendant in *Cook* had valid flowage easements over the properties of the plaintiffs, see 131 Mich. App. at 825-28, 346 N.W.2d at 883-84.) Thus, a new wrinkle in MEPA doctrine may be emerging, offering individuals a limited right to impair resources on their own property without the threat of MEPA sanctions. See MINN. STAT. ANN. § 116B.03, subd. 1:

[N]o action shall be allowable hereunder for acts taken by a person on land leased or owned by said person pursuant to a license issued by the owner of the land to said person which do not and can not reasonably be expected to pollute, impair or destroy any other air, water, land, or other natural resources located within the state, . . .

This development, if carried to fruition, could have negative implications for the future of the public trust statutes. Such a common law "private impairment" exemption would carry laws like MEPA closer to the "sic utere" rule embodied in traditional nuisance law. A contrary development would be mandated if the law, as it seems to have been, was intended to give the public rights to intervene as "guardians" of the resources themselves in which they hold trust interests. See *Olson*, *Experiment*, *supra* note 73, at 181; *Stone*, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 465 n.53 (1972).

<sup>158</sup> 136 Mich. App. 276, 355 N.W.2d 913 (1984).

<sup>159</sup> *Id.* at 283, 355 N.W.2d at 916.

<sup>160</sup> *Id.*

<sup>161</sup> Replanting has been a long-accepted equitable remedy under MEPA, see *Eyde v. Michigan*, 82 Mich. App. 531, 539-40, 267 N.W.2d 442, 447 (1978).

of future MEPA plaintiffs, the withdrawal of courts from even more types of resource disputes may be inevitable.

The most recent MEPA case decided by the court of appeals more clearly illustrates the threat to environmental enforcement inherent in the *Kimberly Hills* test. In *Rush v. Sterner*,<sup>162</sup> the plaintiffs, like those in *Cook*, challenged the defendants' plans to rehabilitate an unused dam in order to generate hydroelectric power. They asserted that if the dam were to be operated, it would flood their land, alter the character of a local trout stream, Prarie Creek, damage trees and vegetation, and adversely affect the local flood plain. Prarie Creek was stocked with trout by the state Department of Natural Resources, and represented one of only two such trout streams in the county.<sup>163</sup>

The court of appeals agreed that the impoundment of the stream would have a number of harmful effects, but nevertheless held that the plaintiffs had failed to make out a prima facie case of MEPA impairment. The changes in the speed, temperature, and rate of sedimentation of Prarie Creek would likely lead to the trout's demise, but the court refused to issue a MEPA injunction because, while the trout were admittedly "unique" in Ionia County, they were common in the state, existed in other streams in the general geographical area of the county, and were only able to survive in the stream because of the "stringent management efforts" of the DNR.<sup>164</sup> Without this human help, the court observed, the trout would be unable to compete with other fish species.<sup>165</sup> The court also failed to consider significant the dam's impacts on trees and vegetation, which were not unique or difficult to replace, or the area's flood plain, which the court conceded would become "more of a permanent swamp."<sup>166</sup>

Clearly, *Kimberly Hills* is growing by increments. After *Rush*, wildlife maintained by resource management programs may be accorded even less protection than those species which do not require such assistance. *Rush* also deals a significant blow to the nascent "local impact" standard<sup>167</sup> first cited in the *City of Portage* opinion, even while claiming to support it.<sup>168</sup> With each new MEPA case

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<sup>162</sup> 143 Mich. App. 672, 373 N.W.2d 183 (1985).

<sup>163</sup> *Id.* at 679-80, 373 N.W.2d at 186.

<sup>164</sup> *Id.* at 680, 373 N.W.2d at 187.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*, 373 N.W.2d at 186-87.

<sup>167</sup> See *infra* notes 180-81 and accompanying text.

<sup>168</sup> 143 Mich. App. at 680 n.1, 373 N.W.2d at 187 n.1.

decided by the court of appeals, the evolution of ever-stricter readings of *Kimberly Hills* threatens to undermine still further citizens' environmental protection powers.

The doctrinal innovations wrought by *West Michigan Environmental* and *Kimberly Hills* have engendered controversy among commentators. Some commentators have described the *Kimberly Hills* opinion as a laudable effort to balance the state's economic and environmental objectives.<sup>169</sup> Others, however, have viewed the rarity balance critically.<sup>170</sup> These critics point out that the heightened impairment standard is inconsistent with the Act's legislative history<sup>171</sup> and prior caselaw development,<sup>172</sup> and does little to guide future courts regarding the appropriateness of MEPA injunctions.<sup>173</sup>

During the debate surrounding MEPA's passage, a number of efforts to weaken the statute's language were rejected. One of these would have qualified the pollution, impairment or destruction standard by requiring that such degradation be "unreasonable."<sup>174</sup> By rejecting such a modification, the legislature clearly evidenced the intent that something less than a common law nuisance should serve to trigger the Act's provisions. MEPA is not simply designed to remedy the type of "unreasonable" intrusions on resources that the common law itself could adequately remedy. The law was meant to force behavioral changes, to create an incentive for government agencies and private enterprises to structure their conduct around conservation objectives. Developers were to be forced, Professor Sax has written, to consider alternatives to even the most common types of activities affecting environmental quality.<sup>175</sup> This goal may not be attained if MEPA is henceforth to apply only in exceptional circumstances.

MEPA is, above all, a citizen suit statute.<sup>176</sup> It is hardly surprising that citizen suits often involve distinctly local issues affecting local-

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<sup>169</sup> Favre, *Protecting a Natural Treasure: Michigan's Upper Peninsula*, 62 MICH. B.J. 304 (1983).

<sup>170</sup> See Abrams, *supra* note 62, at 132-34; Olson, *Experiment*, *supra* note 73, at 183; Pratt, *Natural Resources and Environmental Law*, 29 WAYNE L. REV. 871, 878-80 (1983); Slone, *supra* note 26, at 281-82.

<sup>171</sup> See Abrams, *supra* note 62, at 115.

<sup>172</sup> See *id.* at 114 & nn.50-54; Slone, *supra* note 26, at 281 & n.74.

<sup>173</sup> See Pratt, *supra* note 171, at 880.

<sup>174</sup> See Note, *Political Background*, *supra* note 40, at 363-68.

<sup>175</sup> See *supra* note 74. Abrams sees this focus on developmental alternatives, not controversies about the extent of environmental harm, to be the logical core of the act. See Abrams, *supra* note 62, at 117. See also Sax & Dimento, *supra* note 93, at 9.

<sup>176</sup> See, e.g., Haynes, *supra* note 11, at 1; Trumbull, *Private Environmental Legal Action*, 7 U.S.F.L. REV. 27 (1972).

ized resource bases.<sup>177</sup> If MEPA is to remain an important tool to environmental litigants, it must be able to respond to these types of situations. Not only does the *Kimberly Hills* standard threaten to force judges out of many local controversies,<sup>178</sup> the heightened prima facie case requirements may also serve to place heavier financial burdens on the underfinanced citizen plaintiffs who are able to meet the tougher rarity test.<sup>179</sup> One logical solution to the problems posed by these recent judicial developments is the abandonment of the *Kimberly Hills* standard in favor of one examining impacts on an resource's local user base.<sup>180</sup> There is already some judicial support for this locally-focused approach to MEPA impairment.<sup>181</sup>

Currently, it is unclear where courts will draw the line denoting significant state- or area-wide impairment. As a result, pollution or overdevelopment may have a "nibbling effect" on resources, unchecked by potential MEPA liability.<sup>182</sup> If plaintiffs are forced to wait for resources to be critically threatened before bringing suit, MEPA's most important aspect will be sacrificed and its behavioral incentives will disappear. MEPA may, under those conditions, simply be too little too late.

A problem similar to the "common" resource dilemma has arisen in MEPA challenges to zoning decisions. Recent caselaw seems to indicate that disputes arising at the zoning stage may not be the proper subjects of MEPA suits because the act of zoning does not

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<sup>177</sup> Commentators have noted the tendency of ad hoc citizen group plaintiffs to crystallize around decidedly local issues. See Sax and Conner, *supra* note 24, at 1008 n.21; Sax and Dimento, *supra* note 93, at 7-8; Haynes, *supra* note 11, at 595, 672; Slone, *supra* note 26, at 275. Indeed, it has been suggested that intervention by statewide environmental groups is rare because only those locally affected by resource decisions, in many cases, are sufficiently motivated to sue. *Id.* at 315.

Professor Sax has described MEPA as "a tool for education and institution-building on the local level." Sax & Dimento, *supra* note 93, at 5.

<sup>178</sup> See *supra* notes 154-68 and accompanying text.

<sup>179</sup> See Abrams, *supra* note 62, at 119; Pratt, *supra* note 171, at 880.

<sup>180</sup> See Abrams, *supra* note 62, at 133-34.

<sup>181</sup> See *City of Portage*, 136 Mich. App. at 283 n.2, 355 N.W.2d at 916 n.2 (removal of trees has insignificant environmental impact from "either a statewide or local viewpoint"). Professor Abrams points out an inconsistency between *Kimberly Hills* and other areas of standing doctrine. Traditionally, when judging the merits of a standing claim, courts have looked at the concreteness of the plaintiff's injury; mere abstract concern would not be enough to gain standing in a court of law. See *Sierra Club v. Morton*, 405 U.S. 727 (1972). The closer a plaintiff was to the harm, and the more intimately he was tied to the controversy by his use of the damaged resource, the easier it would be for him to sue. Under the *Kimberly Hills* standard, the courts would have to rule against plaintiffs who suffered direct, tangible injuries to their enjoyment of local resources, while granting equitable relief to those suing for more abstract injuries to statewide populations. See Abrams, *supra* note 62, at 133 & n.204.

<sup>182</sup> See Abrams, *supra* note 62, at 133 & n.199.

itself impair the environment. The prospective MEPA plaintiff may thus have to consider not only the rarity or regional importance of the resources he is seeking to protect, but, at least in the zoning context, the timing of his suit as well.

In *Committee for Sensible Land Use v. Garfield Township*,<sup>183</sup> the plaintiffs challenged the rezoning of a 36-acre parcel from residential to shopping center use. The parcel was to be the site of a planned commercial complex to be known as "Buffalo Mall."<sup>184</sup> While it acknowledged that the rezoning of land could "ultimately affect natural resources,"<sup>185</sup> the court of appeals affirmed the trial court's ruling that zoning alone did not impair resources within the meaning of MEPA. Resources could be adequately protected, the court added, by a MEPA suit brought at a later stage of land use regulation, such as the issuance of building permits.<sup>186</sup>

Interestingly, the court dismissed a line of Washington zoning cases cited by the plaintiffs in which zoning challenges were permitted.<sup>187</sup> This line of cases took a different approach than that ultimately adopted by the court of appeals: they permitted plaintiffs to contest rezoning when such rezoning was directed toward a specific project, but denied judicial relief when no particular project motivated the challenged zoning amendment.<sup>188</sup>

One recent article on MEPA has suggested that Michigan courts adopt this rule in MEPA cases involving zoning amendments.<sup>189</sup> The "specific project" rule would seem to be a logical outgrowth of MEPA's language and purpose. The Act does not merely encompass past conduct that has harmed the environment; it also applies to activities which are "likely to" harm resources in the future.<sup>190</sup> Prevention is a major concern of the statute. If plaintiffs must wait for damage to occur before bringing suit, they may already be faced

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<sup>183</sup> 124 Mich. App. 559, 335 N.W.2d 216 (1983).

<sup>184</sup> *Id.* at 563, 335 N.W.2d at 217.

<sup>185</sup> *Id.*, 335 N.W.2d at 218.

<sup>186</sup> *Id.* at 565, 335 N.W.2d at 218. The case's holding has been criticized, however, as inconsistent with the Michigan Supreme Court's decision in *West Michigan Environmental*. Although the court was unsure about which stage of the permit procedure was being challenged in *West Michigan Environmental*, it allowed the plaintiffs to challenge the proposed exploratory drilling. See Olson, *Experiment*, *supra* note 73, at 183.

<sup>187</sup> See *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148 (1980); *Save A Valuable Environment v. City of Bothell*, 89 Wash. 2d 862, 576 P.2d 401 (1978); *Ullock v. City of Bremerton*, 17 Wash. App. 573, 565 P.2d 1179 (1977).

<sup>188</sup> *Barrie*, 93 Wash. at 860, 613 P.2d at 1158.

<sup>189</sup> Slone, *supra* note 26, at 304.

<sup>190</sup> MICH. STAT. ANN. § 14.528(203)(1) (1980); ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 130-31.

with a disastrous *fait accompli* by the time adequate injunctive relief is forthcoming.

When a specific project is on the drawing board, little is accomplished by forcing plaintiffs to delay their suits. The uncertainty of environmental harm, and the difficulty of gauging that harm, which is so much a concern in MEPA cases,<sup>191</sup> are not nearly as troublesome when definite plans have been drawn. In such cases, courts will most likely be able to judge environmental impacts with reasonable accuracy. Additionally, deferral of MEPA suits may cause developers' costs to mount, or permit a project to gain public support and administrative momentum. If MEPA is genuinely to influence a developer's search for alternative strategies, citizens must be able to inject its sanctions into the planning process. In this way, environmental accommodations can be reached at the earliest possible time and in the most efficient possible manner.<sup>192</sup>

### C. The Taking Issue

The taking<sup>193</sup> question, one of the most puzzling in all of legal scholarship,<sup>194</sup> represents another issue which has circumscribed the effects of the public trust citizen suit statutes in the courts. The issue has been clearly presented only once, in the Minnesota case *Powderly v. Erickson*.<sup>195</sup> In *Powderly*, the Minnesota Supreme Court stated that MERA, in certain circumstances, could work a taking of

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<sup>191</sup> See *supra* note 148 and accompanying text.

<sup>192</sup> Olson, *Experiment*, *supra* note 73, at 184.

<sup>193</sup> Although, for the sake of convenience, this Comment denotes fourteenth amendment challenges as "taking" issues, it is important to note that in recent years a separate strain of legal theory has developed that espouses substantive due process as the proper theory under which to challenge the constitutional validity of state legislative enactments. See Kelso, *Substantive Due Process as a Limit on Police Power Regulatory Takings*, 20 WILLAMETTE L. REV. 1 (1984). The distinctions are that under the "takings" clause, damages are automatic, while a court finding a due process violation has discretion to award damages on other types of declaratory or injunctive relief. *Id.* at 4. Also, those commentators who favor substantive due process claim that the takings clause limits the government's power of eminent domain, and thus is not applicable where regulatory acts are challenged. *Id.* at 5. The separate theories were argued before the Supreme Court in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108 (1985), but the case was instead decided on exhaustion of remedies grounds. Despite the conceptual differences between the theories, the Court strongly suggested that their analysis of a due process claim would be substantially similar to that involved in a taking claim. *Id.* at 3122-24.

<sup>194</sup> Professor Haar has stated that defining the parameters of a regulatory "taking" was the "lawyer's equivalent of the physicist's hunt for the quark." C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1976), quoted in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 105 S. Ct. at 3124 n.17 (1985).

<sup>195</sup> 285 N.W.2d 84 (Minn. 1979), *rev'd*, 301 N.W.2d 324 (Minn. 1981).

property in violation of the fourteenth amendment.<sup>196</sup> The taking issue has also been raised, but never authoritatively decided, in Michigan.<sup>197</sup> Although courts seem reluctant to decide whether public trust injunctions work unconstitutional takings of private property, the question will continue to cast a shadow over the citizen suit laws and the plaintiffs who may seek to invoke them.

### 1. *Powderly v. Erickson*

In the first *Powderly* case (*Powderly I*), the state supreme court examined a controversy over the proposed demolition of two historic row houses in the city of Red Wing. The owners planned to use the land to expand parking facilities for a group of stores they also owned. A group of local citizens obtained a MERA injunction in the trial court that permanently enjoined the defendants from demolishing the structures. The court held that the defendants had failed to rebut the plaintiffs' showing of pollution, impairment or destruction, and, significantly, that no evidence indicated that the injunction was a taking without just compensation.<sup>198</sup>

The supreme court's *Powderly I* affirmance at first appears to support a preservationist reading of MERA. The opinion draws from such early MERA cases as *County of Freeborn by Tuveson v. Bryson*,<sup>199</sup> the principle that, once a prima facie case is made out, it is the resource that is to be given primary consideration by the court.<sup>200</sup> MERA's protections are only to be lifted in the face of truly unusual factors or community disruptions of an extraordinary magnitude.<sup>201</sup>

The *Powderly I* opinion, however, ultimately seems to say two different things. While the court discusses the taking issue at some length, citing the United States Supreme Court's pro-government holding in *Penn Central Transportation Co. v. City of New York*,<sup>202</sup> and ultimately concluding that no taking had been proven, the opinion then begins to change its tone. The court first notes that it would be far more "fair and more efficient"<sup>203</sup> for the state or city to condemn the properties, then adds that a MERA injunction could not force renovation or the indefinite preservation of the homes

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<sup>196</sup> 301 N.W.2d at 326.

<sup>197</sup> See *infra* notes 223-39 and accompanying text.

<sup>198</sup> 285 N.W.2d at 90.

<sup>199</sup> 309 Minn. 178, 243 N.W.2d 316 (1976).

<sup>200</sup> 285 N.W.2d at 88.

<sup>201</sup> *Id.*

<sup>202</sup> 438 U.S. 104 (1978).

<sup>203</sup> 285 N.W.2d at 90.

without violating the fourteenth amendment. Finally, the opinion concludes in a fashion almost diametrically opposed to the pro-MERA tone with which it began: "[w]here control or acquisition of property is for the benefit of many, it makes sense that the cost of the control or acquisition should be borne by all of the taxpayers and not the few directly affected."<sup>204</sup>

On remand, the trial court modified its permanent injunction. The new injunction could be dissolved if, within three months, the houses were not "sold, renovated, or acquired by eminent domain."<sup>205</sup> After the three month waiting period expired, the defendants moved to have the injunction lifted. The resulting litigation led back to the state supreme court and the decision in *Powderly II*.

While the supreme court upheld the injunction, it modified it to last only to the end of the legislative session.<sup>206</sup> The opinion's language strongly suggested that the application of MERA to the defendants' houses lay beyond the permissible scope of the state's police power and could render the state liable for the payment of just compensation if the MERA injunction was not ultimately dissolved.<sup>207</sup> In the future, the state or concerned citizens would possibly be forced to purchase properties they wished to conserve.

A strict reading of MERA's terms would make the case a fairly simple one. The homes were "historic" resources covered by MERA. Plaintiffs established a prima facie case of threatened destruction, and the defendants failed to rebut that case. Thus, the focus should have shifted to the environmentally-weighted balancing test present in MERA's affirmative defense provisions.<sup>208</sup> In order to prevail, the defendants would have had to show that no feasible or prudent alternative to the demolition existed, and that the value to the public welfare of increased parking was great enough to outweigh the state's concern for historical resources. Economic considerations alone would not be sufficient to establish an affirmative defense

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<sup>204</sup> *Id.* at 90-91.

<sup>205</sup> 301 N.W.2d at 325.

<sup>206</sup> *Id.* at 327. The court goes on:

In the event the legislature takes no corrective action at this session, respondents may apply to the trial court for an order dissolving the injunction, unless by that time appellants have been able to propose and implement some other remedy appropriate to the equitable jurisdiction of the court.

*Id.* The court suggests that, if government funds are not available, an appropriate unit of government could acquire the houses by eminent domain, with citizens' groups compensating the property owners. *Id.* at 327 n.3.

<sup>207</sup> *Id.* at 326.

<sup>208</sup> See *supra* note 64.



under the Act.<sup>209</sup> This reading of the statutes is logically consistent with the theory behind the citizen suit laws: when conduct threatens protected resources, it should be enjoined until less harmful compromises can be engineered. In that way, all citizens could be required to structure their activities around environmental, and in MERA's case, historical, preservation.

The *Powderly II* opinion ignored the possibility of profitable alternative uses for the properties consistent with the state's historic preservation interests. The court's earlier opinion indicated that renovation and rental could have proven successful, due to the "tight" rental market then existing in Red Wing.<sup>210</sup> Even the second *Powderly* opinion admitted that "reasonable" developers were still negotiating with the defendants for the rights to purchase and renovate the homes.<sup>211</sup>

Judicial interpretations of "feasible and prudent alternative" strongly favor resource preservation;<sup>212</sup> the possibility of renovation or sale would seem to cancel out any chance of proving the affirmative MERA defense. Established principles of taking law also counsel that the mere inability to use property as one sees fit is not a taking, provided an owner still retains an economically viable use and does not suffer too great an infringement on "reasonable investment-backed expectations."<sup>213</sup> A MERA injunction prohibiting demolition would impose no affirmative obligations on the defendants, but state historic preservation laws imposing such obligations have been held constitutional.<sup>214</sup> The taking question is frequently a close one, but the *Powderly* court's use of constitutional doctrine to break a par-

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<sup>209</sup> See *supra* note 69.

<sup>210</sup> 285 N.W.2d at 89.

<sup>211</sup> 301 N.W.2d at 326. The court expressly alludes to the developers' apparent expectations of a reasonable rate of return on the row houses. *Id.*

<sup>212</sup> See *Olsonite Corp.*, 79 Mich. App. at 703-06, 263 N.W.2d at 796-97; *PEER*, 266 N.W.2d at 868.

<sup>213</sup> See *Agins v. City of Tiburon*, 447 U.S. 255, 260-62 (1980); *Penn Central*, 438 U.S. at 136.

<sup>214</sup> See *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir.), *cert. denied*, 426 U.S. 905 (1985); Note, *Affirmative Maintenance Provisions in Historic Preservation: A Taking of Property?*, 34 S.C.L. REV. 713, 729-30 (1983) [hereinafter cited as Note, *Affirmative Maintenance*]. The author suggests that an anti-demolition or affirmative maintenance law is constitutional unless it requires "extensive repairs" to a building having "no reasonable future use." The "reasonableness of future use" inquiry would involve an examination of both rehabilitation and resale alternatives, see *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61, 66 (Mo. Ct. App. 1980). The author concludes that an historic preservation statute or ordinance with an affirmative maintenance provision should only fail a constitutional takings challenge when the regulated structure possesses "little or no potential use."

ticularly troublesome impasse<sup>215</sup> is contrary to the spirit of MERA and increasingly liberal judicial attitudes toward historic preservation.<sup>216</sup>

The historic preservation component of MERA functions in an unusual manner, which may have left it particularly vulnerable to constitutional attack. The law establishes no historic districts or regions, and creates no single governmental body charged with enumerating historic structures.<sup>217</sup> Only the piecemeal application of MERA in individual cases by private or governmental plaintiffs determines which resources are "historic" for the purposes of the Act. Laws establishing historic districts have survived constitutional challenges due to the "reciprocal benefits" they may offer regulated property owners.<sup>218</sup> The creation of the historic district often occasions a rise in property values, and this rise may offset the restrictions placed upon regulated property owners.<sup>219</sup> Here, however, it is unclear whether the two row houses were located near other historic structures. From the tone of the court's opinion, it appears that they stood in relative isolation.

On a more general level, historic resources simply may not partake of the "public" character which makes natural resources so clearly part of the public trust.<sup>220</sup> Intuitively, historic resources may not seem appropriate subjects of state trusteeship. The state's police power may not be as appropriate a regulator of historic homes as it is of streams or meadows, and courts interpreting laws like MERA may view their application to man-made structures with more skepticism.

The ultimate cost/benefit rationale of *Powderly* is troubling. The same notion, that any public "benefit" acquired at the expense of

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<sup>215</sup> In *Powderly*, the defendants staunchly refused to negotiate with potential buyers. The court, in somewhat cryptic terms, chose to uphold the Powderly's "right to refuse to negotiate" over the state's power to protect historical resources. 301 N.W.2d at 326.

<sup>216</sup> See *Penn Central*, 438 U.S. at 107-08.

<sup>217</sup> The *Penn Central* case involved just such an administrative body, see *id.* at 110.

<sup>218</sup> See *Penn Central*, 438 U.S. at 134-35; Note, *Affirmative Maintenance*, *supra* note 214, at 726. The *Penn Central* discussion of reciprocity is particularly enlightening because it involves an historic preservation law that did not create historic districts, but applied randomly to landmarks as they were designated by the statutorily-created Landmarks Commission. The Supreme Court supported the New York City Council's claim that the city's Landmarks Preservation Law, N.Y. ADMIN. CODE ch.8-A, § 205-1.0 (1976), conferred reciprocal benefits on "all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole." 438 U.S. at 134.

<sup>219</sup> See Note, *Affirmative Maintenance*, *supra* note 214, at 726; see also *Figarsky v. Historic Dist. Comm'n of Norwich*, 171 Conn. 198, 368 A.2d 163 (1976).

<sup>220</sup> See *supra* note 22.

private property owners must be paid for with public funds, lay at the heart of a number of environmental cases whose opinions questioned the state's police power over natural resources.<sup>221</sup> In other words, it is conceivable that the *Powderly* opinion may fuel the arguments of those challenging public trust citizen suit laws in environmental contexts.

## 2. *Kimberly Hills*

The taking issue was briefed, but not decided, in the *Kimberly Hills* case, and an examination of the parties' arguments sheds some light on the probable constitutionality of MEPA injunctions. The conflict presented in *Kimberly Hills* involved a fundamental dispute over the appropriate characterization of the Act. The plaintiffs argued that the trial court's injunction was not an unconstitutional taking, and relied on the state's ability to regulate land use and environmental matters under an expansive police power.<sup>222</sup> The defendants, however, sought to differentiate legitimate police power exercises from quasi-eminent domain laws that attempted to extract public benefits without compensating landowners.<sup>223</sup> This latter type of statute, they asserted, fell outside the realm of permissible police power regulation, since the laws took property for public use<sup>224</sup> without paying just compensation.

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<sup>221</sup> See, e.g., *Maine v. Johnson*, 265 A.2d 771 (Me. 1970); *Morris County Land Improvement Co. v. Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

<sup>222</sup> See Amicus Brief, *supra* note 74, at 9-14; Appellees' Citation of Additional Authority at 1-3; *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982) (discussion of the recently-decided *Agins* case).

Another argument advanced for the constitutionality of MEPA by both commentators and appellees asserted that there could be no taking of "property," since the landowner had no property right which could be taken. Property rights, for the purposes of "taking" jurisprudence, are defined by the state. Since article IV, § 52, of the state constitution mandates that the legislature protect natural resources, a duty fulfilled by the passage of MEPA, there could be no "right" to pollute which could be taken by a MEPA injunction. See ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 157; *Slone*, *supra* note 26, at 306 n.216; see also *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (no taking resulting from wetlands zoning ordinance; landowner has no right to fill wetland).

<sup>223</sup> See Brief for Appellants at 21-27, *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982).

<sup>224</sup> At the time the case was decided, Michigan had adopted the view that a "public use" required that the public have an actual right to physically use the property. See Brief for Appellants at 24, *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982) (citing *Livonia Township School Dist. v. Wilson*, 339 Mich. 454, 64 N.W.2d 563 (1954); *Lakehead Pipeline Co., Inc. v. Dehn*, 340 Mich. 25, 64 N.W.2d 903 (1954); *Board of Health of Portage v. Jacob Van Hoesen*, 87 Mich. 533, 49 N.W. 894 (1891)). The trial court's injunction gave the public no right to enter the appellant's property. See Brief For Appellants, *supra* at 24.

The defendants sought to draw an analogy between MEPA and statutes restricting development on future public parkland. In *Maryland National Capital Park and Planning Commission v. Chadwick*,<sup>225</sup> a statute permitted a city planning board to place land proposed for park acquisition in "reservation" for up to three years. No development would be permitted during that three-year period. The Maryland Supreme Court held that when a law imposed restrictions on private land "in order to create a public benefit," rather than to forestall a "public harm," the law worked a compensable taking.<sup>226</sup> This is the same type of cost/benefit theory that lay behind a number of cases invalidating wetlands regulations.<sup>227</sup>

In response to the defendants' "public benefit" arguments, the plaintiff association asserted the legitimacy of the state's police power exercise. Of central importance to the plaintiff's argument was *Agins v. City of Tiburon*,<sup>228</sup> one of the most recent of the United States Supreme Court's land use opinions. The controversy in *Agins* centered around five acres of unimproved land overlooking San Francisco Bay. Subsequent to the Agins' purchase of the land, the city adopted zoning ordinances limiting the density of future residential development on the property.<sup>229</sup> In passing on the constitu-

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<sup>225</sup> 286 Md. 1, 405 A.2d 241 (1979).

<sup>226</sup> 286 Md. at 11, 405 A.2d at 246, citing *Smoke Rise, Inc. v. Washington Sanitation Comm'n*, 400 F. Supp. 1369, 1382 (D. Md. 1975).

<sup>227</sup> See *supra* note 194. For a discussion of the "public benefit" analysis in the wetlands context, see F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 155-63 (1973). An important recurring rationale in taking cases has been that the state may not use its regulatory power to appropriate land for proprietary public uses, see Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876, 888-90 (1972). The distinction between a public benefit and a public harm has been elusive, however, particularly in environmental cases where elements of both are present, see *id.* at 890. A later rule proposed by Sax, one seemingly consistent with MEPA's notions of public environmental rights, would permit the government to regulate private land uses in cases where private ownership rights and more diffuse public rights to environmental quality come into conflict. See Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149 (1971). The costs of regulation would be imposed on private owners to create incentives for developing new technologies and alternative land use strategies. MEPA seems to fit conceptually with Sax's later conception of taking law, since the "costs" of environmental quality are intended to stimulate new approaches to environmentally harmful activity.

<sup>228</sup> 447 U.S. 255 (1980).

<sup>229</sup> The zoning amendments created an "RPD-1" zoning classification for the plaintiffs' property. This zone permitted only one-family dwellings, accessory buildings and open space. The plaintiffs would have been permitted to build between one and five single-family dwellings on the tract. *Id.* at 257.

Appellants sought to distinguish *Agins* by contending that, since MEPA was not a zoning ordinance, it was not entitled to the type of deferential treatment usually accorded zoning enactments. See Appellants' Response to Appellee's Citation of Additional Authority at 2,

tionality of the density restrictions, Justice Powell articulated a takings test strongly weighted in favor of state environmental and land use controls: "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land . . . ." <sup>230</sup>

The Court held that the zoning amendments in question advanced a legitimate police power objective, the protection of local residents from "the ill effects of urbanization."<sup>231</sup> Since the ordinances permitted limited residential development, they neither prevented "the best use of appellant's land," nor extinguished "a fundamental attribute of ownership."<sup>232</sup> In addition, since other residents were also affected by the ordinances, an unfair share of the regulatory burden did not fall on the plaintiffs; the public shared in both the benefits and the burdens flowing from the law.<sup>233</sup> The Court also added that state action in defense of "scenic beauty" and the controlled use of natural resources was constitutionally defensible when the landowner's reasonable investment expectations were preserved.

The *Kimberly Hills* defendants would clearly have been fighting an uphill battle in pursuing their taking claim. A variety of state and local land use regulations designed to advance a wide range of valid state purposes had already survived constitutional attack, despite the often harsh consequences for regulated landowners.<sup>234</sup> *Agins* offered states and municipalities powerful new support for their regulation of environmental hazards; environmental protection is now firmly established as a legitimate state interest.

MEPA is a law of general application, covering all citizens, organizations and governmental entities within the state. The Dions also clearly retained profitable use of their land, even with the *Kimberly*

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*Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982). This argument, however, is not satisfying. MEPA admittedly functions in a similar fashion to zoning ordinances in land use cases. *Slone*, *supra* note 26, at 301; *see also* Skillern, *Environmental Legislation: An Alternative to Minimum Acreage Zoning*, 6 TEX. TECH L. REV. 1 (1974). Such cases are among the most frequently brought under the act, *see* *Slone*, *supra* note 26, at 275; *Sax & Dimento*, *supra* note 93, at 8. In fact, the appellants themselves challenged the application of MEPA to their land as an unlawful amendment of the City or Village Zoning Act of 1921, *see* Brief for Appellants at 28-33, *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982).

<sup>230</sup> 447 U.S. at 260.

<sup>231</sup> *Id.* at 262.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> For a comprehensive survey of state and local land use regulation, and the current state of taking jurisprudence in the area, *see* D. MANDELKER, *LAND USE LAW* (1982).

*Hills* trial court's injunction in place.<sup>235</sup> Contrarily, the defendants' arguments seemed to offer unconvincing semantics; the characterization of resource preservation as a "public benefit" and not the prevention of a "public harm," even where land is kept in a park-like state, is a conclusion that seems to contradict a lingering strain of judicial reasoning in environmental opinions.<sup>236</sup>

Although the diminution in property value suffered by a property owner must vary from case to case, it is unlikely that MEPA would deprive him of all "economically viable use." Such an extreme deprivation would trigger the Act's affirmative defense provisions, at least in theory.<sup>237</sup> Also, the high degree of flexibility given to judges in fashioning equitable relief under MEPA would enable a court to preserve for the defendant the maximum permissible level of use. Finally, given the growing public awareness of environmental reg-

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<sup>235</sup> Appellees even hinted, in their brief to the court of appeals, that the appellants' property value may even have increased, as in the case of historic districts, due to the preservation of the natural areas. Brief for Appellees at 21, *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982). Appellees estimated that, if developed under the trial court's MEPA order, the property would have grossed around \$4.8 million. *Id.* Appellants sought to base their taking claim on the total development ban placed on the four-acre tract. Under *Penn Central*, however, it would be impermissible for the court to divide the tract for the purposes of its taking analysis. 438 U.S. at 130-31.

<sup>236</sup> See *Brecciaroli v. Commissioner of Env'tl. Protection*, 168 Conn. 349, 362 A.2d 948 (1975); *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d 287 (N.H. 1984); *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975); *Just*, 56 Wis. 2d at 17, 201 N.W.2d at 768; but see *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981) (limiting holding of *Sibson* to unique or vanishing resources such as wetlands; ordinary woodland not the proper subject of conservation zoning). For a more theoretical view of the rise of state police power, see Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983) [hereinafter cited as Sax, *Some Thoughts*]. Professor Sax suggests that society is turning away from private property as a means of advancing collective social goals, and embracing instead more publicly-oriented "nonexclusive" rights concepts. This shift, in turn, has led to more environmentally-sensitive judicial decision-making. Citizens may now, Professor Lazarus has observed, have developed "new property" expectations in today's extensive governmental resource regulation, and these expectations may be in the process of displacing some forms of traditional private property rights. See Lazarus, *supra* note 13, at 698-702.

<sup>237</sup> See ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 37, at 156; Slone, *supra* note 26, at 305-06; *Amicus Brief*, *supra* note 74, at 14-15.

Thus, MEPA courts may regulate private land use only to the point that a "reasonable use" remains. Other commentators have proposed regulatory schemes that would theoretically permit the state to constitutionally regulate land even beyond the "reasonable use" level. See Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1049-52 (1975). Professor Costonis proposes that courts judge a challenged state regulation against a spectrum of land use intensities. When the regulation restricts land use below the "Reasonable Beneficial Use" level, the government would be allowed to pay "compensation," in cash or other "marketworthy alternatives" such as transferrable development rights, for the difference between the land's value as regulated and its value with a reasonable beneficial use. *Id.* at 1052.

ulation, it may be argued that the scope of a landowner's "reasonable" development expectations may indeed be decreasing over time.<sup>238</sup> Thus, given the current trend in land use law forged by the Supreme Court, and the careful crafting of MEPA's provisions, a constitutional challenge to the statute, and those of its kind, should ultimately prove unsuccessful. Such a result would affirm the states' power to regulate environmentally-threatening conduct through the courts under the sensitive and innovative provisions of public trust-based citizen suit statutes.

#### IV. CONCLUSION

The enactment of MEPA in 1970 was a cause for great concern in the legal community. Skeptics feared the the statute would clog the courts with environmental suits, opening a "Pandora's box"<sup>239</sup> of frivolous litigation. They also feared the disruption of administrative agency functions, and the confusion which would be created in the courts by vague concepts of "public trust." Studies of MEPA, however, have shown these fears groundless; MEPA suits have comprised only a small percentage of civil actions,<sup>240</sup> and courts have generally been successful in weeding out the few frivolous suits

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<sup>238</sup> See Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 193-226 (1974); Lazarus, *supra* note 13, at 673-74; Sax, *Some Thoughts*, *supra* note 236, at 494; Comment, *Wetlands Regulation: The "Taking" Problem and Private Property Interests*, 12 URB. L. ANN. 301, 309-10 (1976); see generally Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1241-42 (1967).

<sup>239</sup> See Thibodeau, *supra* note 24, at 1.

<sup>240</sup> MEPA commentators have been fairly unanimous on this point. See A. REITZE, ENVIRONMENTAL LAW 1-54 (1972); F SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 7.10 at 272 (1981); Abrams, *supra* note 62, at 118; Dimento, *Overview*, *supra* note 14, at 423-29 (1976); Sax & Conner, *supra* note 24, at 1007; Slone, *supra* note 26, at 273-74.

Nevertheless, there have been mixed indications regarding the reaction of the industrial and development communities to MEPA. One survey has indicated that industry has suffered no major dislocations as a result of MEPA or similar statutes. See Dimento, *Overview*, *supra* note 14, at 443 & n.160; see also Haynes, *supra* note 11, at 655-57; Sax & Dimento, *supra* note 93, at 12-13. *But see* Slone, *supra* note 26, at 297 & nn.168-69.

Commentators credit a number of factors for the small number of MEPA suits brought: traditional legal cost factors, economic downturns limiting the amount of development activity, and lack of public awareness or publicity accorded to adverse MEPA opinions. See Abrams, *supra* note 62, at 119; Dimento, *Overview*, *supra* note 14, at 449-50; Haynes, *supra* note 11, at 593; Slone, *supra* note 26, at 273-74. For a discussion of factors inhibiting citizen suits under federal environmental statutes, see Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 54-74 (1985).

brought under the Act.<sup>241</sup> Furthermore, no serious effects on the administrative process have been observed.<sup>242</sup> Finally, courts do not seem to have wrestled unduly with the metaphysics of the "public trust."<sup>243</sup>

Despite the adverse judicial decisions discussed herein, commentators and practitioners in Michigan have not lost their enthusiasm for MEPA. The law still serves as a valuable tool for citizen intervention in public and private decisions affecting ecological values, and still helps concerned citizens and agencies force compromise solutions to complex environmental controversies.<sup>244</sup>

However, the approaches recently adopted in a number of cases involving MEPA and the laws modelled upon it could blunt the statutes' vitality in the years to come. MEPA, particularly, due to its status as a "harbinger of the environmental movement,"<sup>245</sup> must retain the support of the judicial branch if its novel focus on alternatives is to be followed in other states. By giving the citizen a stronger voice in the planning and development of activities affecting his environmental rights, MEPA, MERA and CEPA have yielded new solutions to constantly-escalating resource preservation contro-

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<sup>241</sup> See Sax & Connor, *supra* note 24, at 1017-19 (discussion of *Roberts v. Michigan*). *Roberts* is reprinted in A. REITZE, *supra* note 240, at 1-56. Professor Abrams credits the lack of frivolous litigation to an intuitive awareness on the part of courts and litigants regarding the "typical elements of a plausible case." Abrams, *supra* note 62, at 132.

<sup>242</sup> F. SKILLERN, *supra* note 240, § 7.10, at 272. Professor Skillern also notes, however, that Michigan courts have rarely used the power MEPA gives them to rewrite agency pollution standards. *Id.*

<sup>243</sup> *But see* *Stevens v. Creek*, 121 Mich. App. 503, 328 N.W.2d 672 (1982). In *Stevens*, the appellees contended that MEPA did not apply, because the land in question was subject to no public trust or public right of use. The court of appeals, stressing the act's disjunctive language, held that MEPA applied whenever natural resources or the public trust was threatened. In separating the two concepts, it is not clear that the court acknowledged the presence of a public trust in even privately owned resources. *Contra* CONN. GEN. STAT. ANN. § 22a-15 (1985) ("there is a public trust in the air, water, and other natural resources of the state of Connecticut . . .").

<sup>244</sup> F. SKILLERN, *supra* note 240, § 7.10 at 272; Sax & Dimento, *supra* note 93, at 9; Slone, *supra* note 26, at 297-98. See also Olson, *supra* note 73, at 185-86.

<sup>245</sup> Sax & Dimento, *supra* note 93, at 1.

However, the impetus behind environmental legislation patterned after MEPA seems to have waned considerably, causing even some of MEPA's staunchest supporters to question whether such laws are likely to be enacted in the future. See Dimento, *Western States*, *supra* note 3, at 184-86. Organized opposition to such laws, and the perceived desirability of alternative methods of environmental control may make the passage of MEPA-based statutes unlikely in the years to come. For a discussion of some of the legal arguments and institutional roadblocks currently impeding the passage of environmental citizen suit laws, see *id.* at 181-84.



versies of the modern age. If courts continue to emphasize private or public economic objectives over collective environmental goals by interpreting these statutes with heightened regard for the social utility of challenged conduct, to apply only in exceptional cases, or to work unconstitutional takings of private property, the fight for environmental quality will have lost an important legal weapon.