

1983

# Thresholds of Harm In Environmental Litigation: The Michigan Environmental Protection Act as Model of a Minimal Requirement

Robert H. Abrams

*Florida A & M University College of Law*, robert.abrams@fam.u.edu

Follow this and additional works at: <http://commons.law.famu.edu/faculty-research>



Part of the [Environmental Law Commons](#)

---

## Recommended Citation

Robert H. Abrams, Thresholds of Harm In Environmental Litigation: The Michigan Environmental Protection Act as Model of a Minimal Requirement, 7 Harv. Envtl. L. Rev. 107 (1983)

This Article is brought to you for free and open access by the Faculty Works at Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Journal Publications by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact linda.barrette@fam.u.edu.

# THRESHOLDS OF HARM IN ENVIRONMENTAL LITIGATION: THE MICHIGAN ENVIRONMENTAL PROTECTION ACT AS MODEL OF A MINIMAL REQUIREMENT

*Robert H. Abrams\**

The Michigan Environmental Protection Act of 1970 (MEPA)<sup>1</sup> creates a broad private cause of action by which citizens and other entities<sup>2</sup> can prevent environmental degradation. As with all statutes, the scope of MEPA's coverage is a critical issue in determining its effectiveness. The central argument of this article is that MEPA, in contrast to other environmental legislation, is intended to govern an extraordinarily wide variety of cases unfettered by a substantial threshold of harm requirement.

Securing MEPA and statutes like it from undue restrictions is a particularly timely concern, given the recent curtailment of other environmental remedies. In the last two terms, the United States Supreme Court has significantly narrowed the scope of federal common law protection of interstate resources<sup>3</sup> and has held that two federal statutes allow no implied private rights of action to prevent marine pollution.<sup>4</sup> These cases reaffirm the importance of state-created environmental remedies; the courts should not, without reasoned justification, restrict private causes of action established expressly to address environmental concerns by statutes such as MEPA.

Part I advances the article's central contention, that MEPA's broad scope should not be restricted by substantial threshold of harm requirements. The focus is on MEPA's unusually clear legislative history. Part II of the article shows that the courts have not found MEPA to require

---

\* Professor of Law, Wayne State University; Visiting Professor of Law, University of Michigan (Winter 1983). A.B. 1969, J.D. 1973, University of Michigan. The author wishes to thank Professor Joseph Sax of the University of Michigan Law School for the use of his files and other unpublished materials relating to cases brought under the Michigan Environmental Protection Act since its inception and, more importantly, for his incisive comments about the Act and this article. The author would also like to thank Zyg Plater and Paul Dimond for their many excellent suggestions while this Article was in progress. The research assistance of John Lawson and Bob McAllister was greatly appreciated.

1. Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1982).

2. *Id.* § 691.1202(1).

3. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*). See generally Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41 (1983).

4. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). See *infra* note 13.

a threshold, and Part III demonstrates that the statute, as administered, provides little justification for fears that MEPA will lead to unnecessary litigation over trivial resources. Part IV compares MEPA both with state legislation similar to it and with federal environmental protection statutes quite different in function and approach. Part IV also asserts that a broad private right of action serves a unique purpose and fills an important gap in the range of legislative tools furthering environmental protection. Michigan's courts should continue to respect its legislature's intentional choice of this technique. The article concludes with a brief articulation of factors apparently at play in the courts' ad hoc decisions to date, which may serve as a more certain guide to both courts and litigants in determining under what circumstances MEPA was intended to be available.

### I. AN OVERVIEW OF MEPA

MEPA authorizes any "legal entity," ranging from state agencies to corporations or individual citizens, to sue any other legal entity to obtain relief from actual or potential "pollution, impairment or destruction" of the "air, water and other natural resources and the public trust therein."<sup>5</sup> The statute does not require that the plaintiffs bringing suit have an economic interest in the outcome of the case. Once suit has been brought, courts may determine the "validity, applicability and reasonableness" of relevant state or local pollution standards,<sup>6</sup> and may mandate the promulgation of new standards.<sup>7</sup> Although damages are not available under the statute, MEPA provides both declaratory and injunctive relief for threatened or existing harm.<sup>8</sup>

MEPA defendants may, of course, introduce evidence to rebut a plaintiff's prima facie case, but the statute also provides an affirmative defense. To raise this defense the defendant must show that there is "no feasible and prudent alternative" to the conduct in question, and that this conduct is "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources."<sup>9</sup>

Finally, MEPA establishes no threshold of harm requirement. Instead, the Act defines a violation as the "impairment" of a "natural resource."<sup>10</sup> The statute leaves these terms undefined; thus, at least in theory, the courts could apply the statute to the smallest instances of environmental harm.<sup>11</sup> Even if these terms are interpreted less expan-

---

5. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1982).

6. *Id.* § 691.1202(2).

7. *Id.*

8. *Id.* § 691.1202(1).

9. *Id.* § 691.1203(1).

10. *Id.* § 691.1202(1).

11. MEPA's drafters intended the courts to articulate the statute's broad purpose. Sax, Pierce & Irwin, Thoughts on H.R. 3055. Historical Collection, *infra* note 16, Box 1 File 2.

sively, MEPA's private right of action and lack of a threshold provision allow the courts to regulate a wide range of both prospective and existing harm. MEPA has become a prominent statute. Initially, it pioneered the field of legislatively created, broad-based substantive environmental rights. Subsequently, several states have modelled legislation on MEPA.<sup>12</sup> In recent years, the importance of state statutes like MEPA has been heightened by the decline in federal legal protection of the environment, evinced both by the conservative attitude of the Supreme Court toward environmental class actions<sup>13</sup> and the reduction in funding for environmental protection programs.<sup>14</sup> State environmental protection laws like MEPA are, therefore, increasingly important.<sup>15</sup>

## II. MEPA'S LEGISLATIVE HISTORY: THE DECISION TO EXCLUDE A THRESHOLD OF HARM

MEPA's unusually clear legislative history<sup>16</sup> confirms that the Michigan legislature considered and rejected the imposition of a threshold of

12. See *infra* text accompanying note 102.

13. The Supreme Court's decision in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), is a recent example of this restrictive attitude. In an action brought by shell fishermen to enjoin public authorities from discharging pollutants into local fishing grounds, the Court ruled that "elaborate enforcement provisions," *id.* at 13, under both the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980), and the Marine Protection Research and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401-1444 (1976 & Supp. IV 1980), preempted other related forms of relief. In light of Congress's intent to "provide[] precisely the remedies it considered appropriate," 453 U.S. at 15, the Court held *inter alia* that the federal common law of nuisance was inapplicable, and that the statutes imply no private rights of action. *Id.* at 13-22. Commentary on *Sea Clammers* has suggested that "the decision seems entirely to preclude the possibility of finding an implied remedy where the statute provides some express remedy, no matter how minimal." Note, 10 *ECOLOGY L.Q.* 39, 44 (1982).

The Court cited its decision in *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981), in support of its holding that "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [Clean Water Act]." 453 U.S. at 22. The Court gave identical treatment to MPRSA. *Id.* See also *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-24 (1979) (no implied private cause of action under § 206 of the Investment Advisors Act of 1940); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-79 (1978) (no implied private cause of action under § 17(a) of the Securities Exchange Act of 1934).

14. Peterson, *Laissez-Faire Landscape*, *N.Y. Times*, Oct. 31, 1982, § 6 (Magazine), at 27, 32, col. 4.

15. In contrast to the limited view of the place of private rights of action asserted in *Sea Clammers*, MEPA was predicated on the public trust doctrine advanced by Professor Joseph Sax. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471 (1970). The basis of the doctrine is that because all natural resources are held in trust for the people by the government, any environmental degradation is actionable unless it is sanctioned by specific legislation. *Id.* Hence, MEPA establishes a new substantive right enforceable in much the same way as a property or contract right. See Sax & Connor, *Michigan Environmental Protection Act of 1970: A Progress Report*, 70 *MICH. L. REV.* 1003, 1005 (1972).

16. MEPA's legislative history has been preserved in far greater detail than that of most other Michigan enactments. The published records of the Michigan legislature are

harm requirement. Even in its formative stage, MEPA was conceived as a broadly applicable tool that was not to be restricted by a high threshold of harm requirement, a choice expressly adopted by the legislature in its subsequent deliberations.

Originally, the West Michigan Environmental Action Council (WMEAC), a citizens' organization, approached Professor Joseph Sax with the idea of drafting an environmental protection statute. Its first proposal was that a special environmental review board be established to monitor environmental decisions made within the state.<sup>17</sup> Professor Sax counselled against such an arrangement. Review boards, he argued, were too often captives of political and economic constituencies, and could not be relied upon to guard the diverse public interests involved in environmental protection. Sax suggested instead that prudent environmental decisionmaking at every level, in both the public and private sectors, could best be overseen by the judiciary with the help of citizen suits.<sup>18</sup> Such an arrangement would subject all questionable environmental decisionmaking to judicial review.

Despite the breadth of the original bill,<sup>19</sup> the legislature and other actors on several occasions paid particular attention to the question of the degree of harm a plaintiff should be compelled to show in order to advance a *prima facie* case under MEPA. Michigan Attorney General Frank Kelley, for example, initially opposed MEPA because he feared that the liberal standing provisions would combine with the lack of a threshold of harm to encourage spurious litigation.<sup>20</sup> For similar reasons, the powerful Michigan Chamber of Commerce proposed amendments that would have required a precise legislative definition of "natural resources"<sup>21</sup> and would have subjected all MEPA claims to prescreening by the Attorney General, who would then prosecute only the "substantial" cases on behalf of the plaintiffs.<sup>22</sup> These amendments never advanced beyond the committee stage.

---

only logs of votes taken and occasional reports of speeches by legislators. The records do not include reprints of committee reports. Material on MEPA is available mainly because the statute's author, Professor Joseph Sax of the University of Michigan Law School, donated his papers relating to MEPA to the Michigan Historical Collection. These papers are available to the public at the Bentley Historical Library of the University of Michigan, under the heading "Michigan Environmental Protection Act of 1970" [hereinafter cited as Historical Collection]. A law review note appearing shortly after MEPA's enactment also recounts the legislative history of the Act in considerable detail. Note, *Michigan Environmental Protection Act of 1970*, 4 MICH. J.L. REFORM 358 (1970).

17. Letter from Joan Wolfe to Joseph Sax (Jan. 28, 1969), Historical Collection, *supra* note 16, Box 1 File 2.

18. See generally J. SAX, DEFENDING THE ENVIRONMENT (1970).

19. H.B. 3055, 1969 MICH. HOUSE BILLS 2480, Historical Collection, *supra* note 16, Box 1 File 17.

20. Attorney General Frank J. Kelley, Analysis of H.B. 3055, Apr. 21, 1969, Historical Collection, *supra* note 16, Box 1 File 14.

21. Michigan State Chamber of Commerce Special Legal Subcommittee Recommended Amendments for H.B. 3055, Proposed Amendment I (Mar. 4, 1970), Historical Collection, *supra* note 16, Box 1 File 9.

22. *Id.* Proposed Amendment II.

The office of the Governor also became involved with the MEPA legislation, most significantly through a substitute bill proposed by the Governor's Legal Advisor, Joseph Thibodeau.<sup>23</sup> The substitute would have introduced the qualifier "unreasonable" to describe the level of "pollution, impairment or destruction" actionable under the statute.<sup>24</sup> The House Committee on Conservation and Recreation adopted this substitute bill and reported it out of committee.

The proposed alteration received a mixed response. Professor Sax felt that the addition of a "reasonableness" standard would not greatly alter the working of the statute, because he thought that the courts would exercise their common-law discretion to produce a threshold of harm anyway.<sup>25</sup> In contrast, several members of the MEPA coalition believed that insertion of the term "unreasonable" would make the provision unduly restrictive and highly manipulable.<sup>26</sup> Those desiring to remove the term "unreasonable" from the substitute bill understood that the debate itself would have a lasting impact. One WMEAC member later observed that if "the word [were] given significance in the history of the legislation, it would be given more significance in the courts."<sup>27</sup>

By this time public attention had focused on the bill. Extensive media coverage and large turnouts at public hearings exposed the entire legislative process to an unusual degree of public scrutiny.<sup>28</sup> The political process, including a sense of legislative accountability not always evident in state houses, was at work. Although at first the full Michigan House of Representatives included the reasonability threshold in its final bill,<sup>29</sup> it later voted by a narrow margin to delete the provision.<sup>30</sup> In its final form, MEPA easily was passed by both chambers of the Michigan legislature.

Thus, the legislature's decision to exclude an explicit threshold of harm requirement from MEPA was deliberate and well-considered. Although the legislature did not altogether preclude the common law development of a threshold, it apparently intended that no substantial threshold be imposed. This express legislative determination to delete all limitations based on degree of harm provides important information concerning the threshold issue and emphasizing MEPA's broad applicability.

---

23. Mr. Thibodeau later wrote critically of MEPA and its lack of a threshold requirement. See Thibodeau, *Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box*, 116 Cong. Rec. S16,247 (daily ed. Sept. 22, 1970), reprinted in 48 J. URB. L. 579 (1971).

24. Substitute for House Bill 3055, Historical Collection, *supra* note 16, Box 1 File 18.

25. Sax, Pierce & Irwin, *supra* note 11.

26. J. WOLFE, HISTORY OF HOUSE BILL 3055 13, (1970) Historical Collection, *supra* note 16, Box 2 File 5.

27. *Id.*

28. *Id.* at 14. See also 1970 MICH. HOUSE J. at 1294.

29. J. WOLFE, *supra* note 26, at 14; Note, *supra* note 46, at 364.

30. See Note, *supra* note 16, at 368; see also DiMento, Brief Biographical Sketch of MEPA, Bentley Historical Collection Catalog, at 28-31.

### III. EXPERIENCE UNDER MEPA

#### A. Judicial Interpretation of the Threshold of Harm

The Michigan Supreme Court affirmed the broad scope of MEPA when, in *Ray v. Mason County Drain Commissioner*,<sup>31</sup> it rejected a due process challenge to the statute based in part on vagueness: "[T]he Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality."<sup>32</sup> The opinion continued, "[w]hile the language of the statute paints the standard for environmental quality with a rather broad stroke of the brush, the language is neither illusive nor vague."<sup>33</sup>

The *Ray* Court's acceptance of MEPA's intended breadth lends credence to a low or nonexistent MEPA threshold requirement. However, the Court specifically claimed for the judiciary the role of articulating an "environmental common law," a role within which the courts have ample room to prevent MEPA's extension to trivial cases. Indeed, the courts themselves have shared this view. Despite sufficient opportunity to require that parties demonstrate a threshold level of environmental damage as a prerequisite to establishing their prima facie case, little common law on this issue has developed.<sup>34</sup> Similarly, no Michigan case has attempted a crabbed definition of the undefined statutory terms as a means of limiting the statute's reach to "big cases."<sup>35</sup>

For example, the Michigan Supreme Court could have defined MEPA's threshold of harm in *Ray*.<sup>36</sup> There, however, the Court refused to give the threshold explicit definition, and instead held that a threat to the continued existence of a "unique quaking forest"<sup>37</sup> met whatever threshold the statute imposed.<sup>38</sup> The uniqueness of the resource at stake seems to have formed the basis of the court's ruling.

The Michigan Supreme Court recently had another opportunity to establish an explicit threshold. In *West Michigan Environmental Action Council v. Natural Resources Commission (Pigeon River)*,<sup>39</sup> the defen-

31. 393 Mich. 294, 224 N.W.2d 883 (1975).

32. *Id.* at 306, 224 N.W.2d at 888.

33. *Id.* at 306 n.10, 224 N.W.2d at 888 n.10.

34. See *infra* text accompanying notes 39-63.

35. Compare *infra* text accompanying note 126 & note 131.

36. In reviewing MEPA cases on the merits, the Michigan Supreme Court ordinarily will address the threshold of harm issue only if that issue is assigned as error and the court's grant of leave to appeal includes that issue. See MICH. GEN. CT. R. 853.2(1)(a). Where the defendant argues that the plaintiff has failed to state a claim upon which relief can be granted, the court is free to say that the amount of environmental degradation involved in the case is too slight to be actionable. The court may act in this way even if the ostensible issue under review is whether a particular type of injury is actionable.

37. 393 Mich. 294, 310, 224 N.W.2d 883, 890 (1975).

38. *Id.*

39. 405 Mich. 741, 275 N.W.2d 538 (1979).

dant oil company sought a permit to drill in an environmentally sensitive area of the Pigeon River Country State Forest. Its defense to a MEPA challenge to its plan was that none of the activities involved in drilling would have sufficient impact to be characterized as "likely to pollute, impair, or destroy" natural resources.<sup>40</sup>

Although noting that "virtually all human activities can be found to adversely impact natural resources in one way or another,"<sup>41</sup> and accepting the defendant's statement of the issue as "when . . . [an] impact rise[s] to the level of impairment or destruction,"<sup>42</sup> the Court held that the plaintiff had established a prima facie case. Notably, the Court made no attempt to define the statutory terms "impair" and "destroy" and took no notice of how those terms had been defined in earlier cases. Rather, the decision rested on the importance of the resources at stake in the case: the proposed drilling might have interfered with the breeding habits of the only sizeable elk herd east of the Mississippi River, and access roads, noise, and odors would have been introduced into an unusually pristine area of Michigan's Lower Peninsula.<sup>43</sup> The *Pigeon River* case could have satisfied even the most stringent threshold of harm requirement. Thus, it cannot be viewed as a decision that will have any impact on cases involving less significant resources or environmental values.

No other Michigan Supreme Court MEPA decision directly addresses the threshold issue, but the court's rulings that MEPA issues do arise in the context of small-scale projects provide additional evidence that plaintiffs do not need to demonstrate significant harm to establish a prima facie case. In a case involving sewer routing, for example, the supreme court ruled that possible pollution stemming from the route chosen was actionable under MEPA.<sup>44</sup> Similarly, MEPA was found to extend to the injury alleged when a small segment of a proposed road-widening project crossed swampland.<sup>45</sup> A third case, *Irish v. Green*,<sup>46</sup> was not an actual supreme court decision, but the court singled out that lower court ruling as a model of the proper judicial response to fact-finding and decisionmaking under MEPA.<sup>47</sup> *Irish* involved a second home development that affected only two square miles of land.<sup>48</sup> These

---

40. *Id.* at 750, 275 N.W.2d at 542. The company eschewed the affirmative defense that no feasible and prudent alternatives to the activities were available. *Id.* at 764, 275 N.W.2d at 547 (Levin, J., dissenting).

41. *Id.* at 750, 275 N.W.2d at 542.

42. *Id.*

43. *Id.* at 755-56, 275 N.W.2d at 543-44.

44. *Eyde v. Michigan*, 393 Mich. 453, 225 N.W.2d 1 (1975).

45. *Michigan State Highway Comm'n v. Vanderkloot*, 392 Mich. 159, 220 N.W.2d 416 (1974).

46. *Irish v. Green*, 4 ENV'T REP. CAS. (BNA) 1402 (Mich. Cir. Ct. 1972), reprinted as appendix to *Ray v. Mason County Drain Comm'r*, 393 Mich. 314, 224 N.W.2d 892 (1975).

47. 393 Mich. at 313-14, 224 N.W.2d 891-92.

48. 4 ENV'T REP. CAS. (BNA) at 1402-03.



decisions, which considered allegations of localized, low-level environmental harm, strongly suggest that if the court has imposed an implicit threshold of harm, it is a very low one.

Lower court decisions have also failed to define plaintiff's prima facie case requirement. Few decisions have been widely reported. Even fewer explicitly address the threshold issue.<sup>49</sup> However, a review of the facts of reported cases indicates that most allegations of even slight environmental harm have passed the threshold. Such cases include proposed tree cutting along a short stretch of road,<sup>50</sup> redesign of an important intersection near Michigan State University,<sup>51</sup> sandmining operations on a little less than 100 acres of dune land,<sup>52</sup> residential development on various size tracts, including at least one case of under 80 acres<sup>53</sup> and many pollution cases.<sup>54</sup>

The leading case that adopts a more limited view of the threshold issue is the Michigan Court of Appeals opinion in *Kimberly Hills Neighborhood Association v. Dion*.<sup>55</sup> The case involved the residential development of an unspectacular eighteen acre tract located near the edge of Ann Arbor. In sustaining the plaintiff's claim, the trial judge held that the small pond and several old trees on the lot were natural resources protected under MEPA;<sup>56</sup> the project area also provided habitat for birds and other wildlife, all deemed to be natural resources.<sup>57</sup> The court did not require the plaintiffs to establish that the parcel was in any way unique and, indeed, found the species of wildlife and vegetation on the parcel to be common to the area.<sup>58</sup>

49. The fullest consideration given to the issue appears in the appellate decision in *Kimberly Hills Neighborhood Ass'n v. Dion*, 114 Mich. App. 495, 320 N.W.2d 668 (1982). See *infra* text accompanying notes 55-64.

50. *Wilcox v. Board of Road Comm'rs*, No. 7-237 (Calhoun County Cir. Ct. June 16, 1971).

51. *Anderson v. Michigan State Highway Comm'n*, No. 15,609-C (Mich. Cir. Ct. 1973) (discussed in Sax & DiMento, *Environmental Citizen Suits: Three Year's Experience Under the Michigan Environmental Protection Act*, 4 *ECOLOGY L.Q.* 1, 38 (1976)).

52. *Lincoln Township v. Manley Bros.*, No. 74-001,113-CE (Berrien County Cir. Ct. 1974).

53. *Environmental Action Council v. A. Reenders & Sons, Inc.*, No. 2737 (Mich. Cir. Ct. May 6, 1974) (discussed in Sax & DiMento, *supra* note 51, at 13).

54. See generally Sax & DiMento, *supra* note 51, at 8 and app. E.

55. 114 Mich. App. 495, 320 N.W.2d 668 (1982), *leave to appeal filed*, No. 69570 (Mich. June 7, 1982). See also *Gang of Lakes Envtl. Org. v. Gee*, No. 7-562 (Mich. Cir. Ct. June 22, 1975); Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizens' Suits*, 53 *J. URB. LAW* 589, 621 (1976).

56. *Kimberly Hills Neighborhood Ass'n v. Dion*, No. 79-16,452 CH, slip op. at 4 (Washtenaw County Cir. Ct. Mar. 28, 1979).

57. *Id.* at 4-5. The quantum of proof required of plaintiffs was minimal: a hawk and some pheasants had been sighted on the parcel, and expert testimony suggested that the parcel did provide a part of the habitat for those birds. Defendant admitted that site clearing work would necessarily destroy some trees and vegetation.

58. *Id.* at 4-6.

Relying on *Pigeon River*<sup>59</sup> and *Ray*,<sup>60</sup> the appellate court found that the word "impair" imposed a threshold requirement. Although correctly noting that "[p]roper application of the impairment standard as it pertains to the preservation of animal and plant life does not limit conservation only to resources that are 'biologically unique' or 'endangered,'"<sup>61</sup> the court found MEPA to have intended a "statewide perspective"<sup>62</sup> and held that allegations of adverse impacts on small numbers of animals of common species did not meet MEPA's threshold of harm.

The *Kimberly Hills* decision is flawed in several respects. First, the court failed to consider the full range of previously decided MEPA cases.<sup>63</sup> Second, the court offered no justification for looking only to statewide resource populations.<sup>64</sup> Third, the court neglected to make even a rudimentary search of MEPA's legislative history.

Overall, a review of the cases indicates that showings of very low levels of actual or potential environmental damage have generally satisfied the courts. That the cases involving small degrees of harm have not thoroughly analyzed the issue indicates that the courts have no apparent problems in administering MEPA without a threshold or under an implicit view that the threshold is minimal. Even the cases announcing a threshold requirement have done little to explicate its content and have seldom used the issue as the ground of decision.

### B. MEPA's Focus on Alternatives

After a plaintiff has established his or her prima facie MEPA case, the defendant may either rebut the plaintiff's evidence or raise the statutory affirmative defense of a lack of "feasible and prudent" alternatives to the proposed course of action.<sup>65</sup> Like rebuttal,<sup>66</sup> establishing the affirmative defense has proven difficult.

---

59. See *supra* note 39.

60. See *supra* note 31.

61. 114 Mich. App. at 507, 320 N.W.2d at 673.

62. *Id.*

63. See *Eyde v. Michigan*, 393 Mich. 453, 455-56, 225 N.W.2d 1, 3 (1975); *Michigan State Highway Comm'n v. Vanderkloot*, 392 Mich. 159, 167, 220 N.W.2d 416, 419 (1974).

64. See *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 306, 309, 224 N.W.2d 883, 888-89 (1975).

65. MICH. COMP. LAWS ANN. 691.1203(1) (Supp. 1982).

66. As the defense counsel in *Kimberly Hills* put it:

A single blade of grass is a natural resource, and when one thrusts a shovel into the ground one will necessarily destroy a blade of grass or two and thus destroy a natural resource. Clearly one cannot deny that thrusting a shovel into the ground where grass is growing will destroy some grass.

Reply Brief of Appellee at 7, *Kimberly Hills Neighborhood Ass'n v. Dion*, No. 79-16,452 CH (Washtenaw County Cir. Ct. Mar. 28, 1979). Although this obviously exaggerates the burden on defendants, it does highlight the fact that few activities can be proven to have no potential effects on the environment so long as a low threshold of harm is in use.

The main function of the affirmative defense is to ensure that the defendant has considered and can articulate valid reasons for rejecting other courses of action. An affirmative defense will be raised only if the threshold has been met. Accordingly, the success of the role of the defense as a means to mandate concern about alternatives depends on what degree of harm the threshold requires. If a low level of environmental harm satisfies the threshold, defendants will be forced to explore alternative courses of action in a greater range of cases. If the threshold is too low or nonexistent, however, fears arise that complex litigation over alternatives will ensue, whereas the original project would have involved only minimal environmental impact.

The critical language of the affirmative defense, "feasible and prudent alternative," was adopted from the federal Transportation Act.<sup>67</sup> In *Citizens to Preserve Overton Park v. Volpe*,<sup>68</sup> the United States Supreme Court interpreted that phrase to require not merely that the defendant choose the preferable alternative, but required that DOT prove that rejected alternatives affording greater parklands protection be beset with unique problems that preclude their selection. Although MEPA cases construing the affirmative defense are by no means numerous, several decisions by the Michigan Court of Appeals confirm the stringency of the requirements for establishing a successful affirmative defense.<sup>69</sup>

The Court of Appeals' decision in *Wayne County Health Department v. Olsonite Corp.*,<sup>70</sup> a case culminating a long history of repeated citizen and regulatory complaints about odors emanating from defendant's painting operations,<sup>71</sup> is particularly indicative. The health department easily made its prima facie case;<sup>72</sup> the defendant contended that it had installed a water curtain and that other alternatives were not feasible or prudent.<sup>73</sup> The court rejected the defense on the grounds that the defendant had failed to conduct site-specific studies on the effect of various odor control options, to make serious attempts to seek reductions in quoted prices for

---

67. Department of Transportation Act, § 4, 49 U.S.C. § 1653(f) (1976).

68. 401 U.S. 402 (1971). In proving that no alternative to the destruction of parkland was feasible and prudent, the Department of Transportation was not allowed to rely upon a simple comparison of options and its bald conclusion that the alternative selected was best. Instead, the Department was instructed that it must show that non-parkland options would engender "unique problems" preventing their selection. *Id.* at 416. A mere increase in expense, or the need to increase the length of the road, was held to be insufficient to carry the burden. *Id.* at 411.

69. See Haynes, *supra* note 55, at 622. See, e.g., *Oscoda Chapter of PBB Action Comm., Inc. v. Department of Natural Resources*, 403 Mich. 215, 268 N.W.2d 240 (1978); *Wayne County Dep't of Health v. Olsonite Corp.*, 79 Mich. App. 668, 263 N.W.2d 778 (1977); *Anderson v. Michigan State Highway Comm'n*, No. 15609-C (Ingham County Cir. Ct. June 27, 1973); *Crandall v. Biergans*, No. 884 (Clinton County Cir. Ct. Sept. 3, 1971).

70. 79 Mich. App. 668, 263 N.W.2d 778 (1977).

71. *Id.* at 676-77. 263 N.W.2d at 783.

72. *Id.*

73. *Id.* at 683-84. 263 N.W.2d at 786-87.

control systems, or to earmark funds for the acquisition of additional odor control equipment.<sup>74</sup>

In another case, *Crandall v. Biergans*,<sup>75</sup> a trial court also adopted a stringent approach to the affirmative defense, even though the defense was ultimately established. Relying heavily on expert testimony, the defendant demonstrated that his efforts to mitigate environmental damage from a hog raising operation had been effective and that the various alternatives suggested by the plaintiffs had been tested and found unavailing.<sup>76</sup> *Olsonite* and *Crandall* together indicate that the affirmative defense is not easily maintained. They also suggest that expert testimony and a demonstrated willingness to experiment with control or mitigation techniques are essential factors in successfully raising the affirmative defense.

The one Michigan Supreme Court case devoting extended discussion to the affirmative defense did not, in fact, result in a holding on the affirmative defense. *Oscoda Chapter of PBB Action Committee, Inc. v. Department of Natural Resources*<sup>77</sup> involved a proposal by state health officials to bury PBB contaminated cattle in a clay-lined pit. The plaintiff urged that incineration of the cattle was the preferable alternative and hence mandated by MEPA.<sup>78</sup> The Court held, however, that the defendant's proposed conduct would not result in pollution,<sup>79</sup> thus eliminating the need to debate the merits of the affirmative defense.

The decided cases demonstrate that the affirmative defense is hard to establish without the aid of expert testimony and some significant time at trial. If, as advocated, an exceedingly low threshold is employed under MEPA, litigants and courts alike will often find that the crux of litigation is the alternatives issue. In fact, this is salutary: the focus becomes how best to improve decisionmaking instead of a nit-picking debate about how much harm will ensue. The question remains whether these benefits can be obtained without undue social cost.

### C. Practical Experience under MEPA

A dozen years after its enactment, MEPA is generally regarded as a success. The statute has, consistent with its purpose and language, played a positive role in "protect[ing] . . . the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."<sup>80</sup> Before any substantial litigation had occurred under

---

74. *Id.* at 703, 263 N.W.2d at 796.

75. No. 844 (Clinton County Cir. Ct. Sept. 3, 1971).

76. *Id.*

77. 403 Mich. 215, 268 N.W.2d 240 (1978).

78. *Id.* at 229-30, 268 N.W.2d at 246.

79. *Id.* at 230, 268 N.W.2d at 246.

80. MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1982). See generally Haynes, *supra* note 55; Sax, *Developments Under the Michigan Environmental Protection Act — 1980 Update* (unpublished manuscript).

MEPA, however, some feared that plaintiffs would inundate the courts with lawsuits, many of them frivolous.

These fears have proven to be unfounded.<sup>81</sup> Only thirty-four cases were filed in the first year the statute was in force, and by the end of the third year only seventy-five.<sup>82</sup> The total count of cases filed under MEPA by January 1982 stood at 168,<sup>83</sup> reflecting a decrease over the years in the number of cases brought per year. The 119 cases filed under MEPA during its first five years accounted for less than .02% of all civil cases filed in Michigan.<sup>84</sup> Clearly, the statute has not interfered with the efficient processing of other judicial business, nor have a disproportionate amount of judicial resources been expended on MEPA cases.

Few MEPA cases have been brought vexatiously or frivolously. Only two notoriously frivolous cases arose during the first six years of the statute's operation.<sup>85</sup> Furthermore, MEPA's structure is conducive to out-of-court settlement<sup>86</sup> because defendants, faced with the possibility of court injunctions, often prefer to settle rather than to litigate. When litigated, MEPA cases have produced little or no unusual delay.<sup>87</sup>

Studies of MEPA's operation have shown that pollution cases comprise more than one-half of all MEPA litigation.<sup>88</sup> Most remaining MEPA cases are land use decisions involving either public or private land.<sup>89</sup> The use of MEPA has not been dominated by any particular type of plaintiff. State and local officials, citizens' groups, environmental organizations, and individual property owners all have availed themselves of the statute's liberal standing provisions.<sup>90</sup> Somewhat surprisingly, public agen-

81. See Berset, *Standing: A Barrier to the Achievement of Justice in Environmental Litigation* 66 (1970) (unpublished LL.M. thesis, Harvard University). Studies published at various points since MEPA's passage reveal not a glut of litigation but an even flow of cases spread throughout Michigan's trial courts. See Sax & Connor, *supra* note 15; DiMento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URB. LAW 43 (1976).

82. See Sax & DiMento, *supra* note 53.

83. This figure comes from a personal file maintained by Professor Joseph Sax of the University of Michigan Law School. The maintenance of this file is discussed in Sax & Connor, *supra* note 15, at 1006.

84. See Haynes, *supra* note 55, at 593.

85. *Roberts v. State* (Mich. Cir. Ct. 1971), 2 ENV'T REP. CAS. (BNA) 1612, *aff'd in part, rev'd in part*, 45 Mich. App. 252, 206 N.W.2d 466, 5 ENV'T REP. CAS. (BNA) 1111 (1973) (suit brought under MEPA to enjoin all grants of automobile licenses and all highway construction until automobile air pollution standards were adopted and enforced); *Marshall v. Consumers Power Co.*, No. C-16-150 (Jackson County Cir. Ct. Mar. 28, 1973):

86. See Sax & Connor, *supra* note 15, at 1010 & 1012.

87. The average length of completed cases filed under MEPA was ten months; they ranged in length from one to thirteen months. See DiMento, *supra* note 81.

88. See Sax, *supra* note 80, at 2-3. Professor Sax writes, "[b]ecause the Act speaks explicitly of protecting air and water from pollution, cases involving air and water pollution have not given rise to the threshold question . . . ." See Haynes, *supra* note 55, at 628-31 (use of MEPA in pollution cases by county prosecutors).

89. See Sax & Connor, *supra* note 15, at 1090-91; Sax & DiMento, *supra* note 51, at 61-62; Haynes, *supra* note 55, at 692-95.

90. See Haynes, *supra* note 55, at 645.

cies have invoked MEPA more often than have individuals or other private organizations.<sup>91</sup> Countersuits by MEPA defendants for malicious prosecution or damages have been rare and almost always unsuccessful.<sup>92</sup>

It is harder to ascertain whether the conduct of MEPA litigation has proven inordinately expensive. Dated and unsystematically collected estimates place the cost of MEPA litigation to plaintiffs at about \$10,000 per case.<sup>93</sup> These estimates attribute 80% of the litigation expenses to fees paid for experts and attorneys. Both are factors that are likely to increase dramatically with the length and complexity of the trial. In comparison, the same study estimates that MEPA cases resolved without trial, a result encouraged by the statute, cost plaintiffs an average of only \$2,000, with more than half of those cases costing less than \$1,000.<sup>94</sup>

These limited data indicate that MEPA cases are not inherently more difficult or expensive to litigate than are others that require some expert testimony, such as personal injury cases. Nonetheless, these costs may partly explain why so few frivolous cases have surfaced. In general, these statistics support the conclusion that MEPA has been used effectively and judiciously by many different parties, whether private, governmental, or commercial. As its drafters intended, it has served as a vehicle for citizens' action. MEPA's success in establishing a practical program of wide-ranging environmental protection strongly militates in favor of retaining only a minimal threshold of harm.

Apart from the claimed inefficiency of litigating small cases, the most compelling argument for exempting cases of small harm from MEPA is one based on fairness and efficiency. This argument emerges in the context of MEPA's operation in a land use case. Arguably, even a defendant who attempts to engage in an environmentally sound project will have difficulty in establishing the affirmative defense because the plaintiff can seek to force the defendant to demonstrate that any number of alternative mitigation measures would not be feasible or prudent. This possibility might provide a strong incentive for defendants to try to settle with plaintiffs.<sup>95</sup> However, the avoidance of litigation through a compromise that modifies plans according to a plaintiff's preferences will not necessarily benefit the public, especially because the public's interest in "responsible" development presumably has already been secured through the zoning and permit process.<sup>96</sup> Thus, the principal beneficiaries of a MEPA settlement may not be the public at large, but rather parties who are in a position to use MEPA to enhance the amenity value of their holdings by forcing defendants to modify development plans.<sup>97</sup>

---

91. See Sax & DiMento, *supra* note 51, at 59-61.

92. See Haynes, *supra* note 55, at 664.

93. See Sax & DiMento, *supra* note 53 at 51.

94. *Id.*

95. See Sax, *supra* note 80, at 21.

96. See generally T. SCHOENBAUM, ENVIRONMENTAL POLICY LAW 426-27, 436-41 (1982).

97. Of course, the outcome most beneficial to the plaintiff can also benefit the general

In cases that actually reach litigation, the sound exercise of judicial discretion and the advantages of a careful consideration of alternatives either overcome or outweigh these disadvantages. Courts, especially equity courts, have the power to refuse to enforce claims which are not advanced in good faith.<sup>98</sup> Specific examples of environmental benefits gained through the MEPA-mandated evaluation of alternatives even in small cases include the preservation of shade trees,<sup>99</sup> the elimination or minimization of siltation in local streams,<sup>100</sup> and the maintenance of small areas of wildlife habitat in the project area.<sup>101</sup> The effect of a low threshold of harm on the evaluation of alternatives, therefore, does not present a strong argument that the threshold ought to be raised.

#### IV. THE RELATIONSHIP OF MEPA TO OTHER ENVIRONMENTAL STATUTES

Until now, MEPA has been discussed in isolation. Two factors justify expanding this inquiry to encompass experiences under other environmental protection statutes. First, a study of statutes modelled on MEPA confirms the assessment that legislatively adopted low thresholds of harm are workable and can be implemented by the judiciary. The fact that some states have included higher thresholds of harm adds indirect credence to the low threshold interpretation given to MEPA. More specifically, the discussion of MEPA's sister statutes indicates that although similar language can be given several different meanings, the statutes have led to surprisingly little litigation, even in states with low thresholds.

Second, the study of selected federal environmental protection statutes reinforces the conclusion that a variety of statutory approaches can be appropriately employed to attain varied underlying environmental protection goals. This examination also suggests that low or non-existent thresholds of harm are, at times, well suited to accomplishing legislative goals.

##### A. Analogous State Statutes

Several states have enacted statutes which, like MEPA, grant citizens direct access to the judicial system for the purpose of protecting

---

public interest. *Cf. Lakeland Property Owners v. Town of Northfield*, 3 ENV'T REP. CAS. (BNA) 1893 (Mich. Cir. Ct. 1972) (plaintiffs' improvement of water treatment benefited general public in addition to improving their individual property).

98. This is often referred to as the "clean hands" doctrine. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 45-46 (1973).

99. *Wilcox v. Board of Road Comm'rs*, No. 7-237 (Calhoun County Cir. Ct. June 16, 1971).

100. *Muha v. Union Lake Assocs.*, No. 2964 (Grand Traverse County Cir. Ct. Aug. 14, 1972).

101. *Kimberly Hills Neighborhood Ass'n v. Dion*, No. 79-16,452 CH (Washtenaw County Cir. Ct. Mar. 28, 1979).

the environment and enforcing compliance with existing environmental regulations.<sup>102</sup> Reported legislative history indicates that the legislatures in some of these states used MEPA as a model.<sup>103</sup> As with MEPA, reported decisions construing these statutes are rare,<sup>104</sup> and of these cases, few have dealt with the question of damage thresholds.

### 1. *The Minnesota Environmental Rights Act*

The substantive language of the Minnesota Environmental Rights Act of 1971 (MERA)<sup>105</sup> mirrors MEPA and provides that any citizen of the state may maintain a civil action for declaratory or equitable relief "against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction . . . ."<sup>106</sup> Unlike MEPA, however, MERA's definition of environmental damage expressly contains a modest threshold of harm. MERA defines "pollution, impairment, or destruction" as conduct which "violates, or is likely to violate,"

---

102. CONN. GEN. STAT. ANN. §§ 22a-14 to -20 (West 1971); FLA. STAT. ANN. § 403.412 (West 1971); IND. CODE ANN. §§ 13-6-1-1 to -6 (Burns 1981); MINN. STAT. ANN. §§ 116B.1-.13 (West 1971); N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West 1974); S.D. CODIFIED LAWS ANN. §§ 34A-10-1 to -15 (1973).

Two states with environmental citizen suit laws worthy of note but not explored below include Massachusetts and Nevada. The Massachusetts statute, MASS. ANN. LAWS ch. 214 § 7A (Michie/Law. Coop. 1973), defines damage to the environment as "any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth . . . ." *Id.* The statute does contain a number of limitations, however, including a provision that "[d]amage to the environment shall not include any insignificant destruction, damage or impairment," *id.*, which, like New Jersey's insistence that damage not be "frivolous," N.J. STAT. ANN. § 2A:35A-4(c) (West 1974), is intended to screen out spurious suits. The Massachusetts statute further specifies as a prerequisite to the granting of relief that the proposed conduct must constitute a violation of a statute, ordinance, or regulation "the major purpose of which is to prevent or minimize damage to the environment." MASS. ANN. LAWS ch. 214 § 7A (Michie/Law. Coop. 1973). Finally, the most severe limitation is probably the requirement that at least ten domiciliaries of the state join as plaintiffs. *Id.* A single citizen may bring suit under the other environmental protection statutes that have been discussed. The Minnesota Environmental Rights Act is a typical example: "Any person residing within the state . . . may maintain a civil action in the district court for declaratory or equitable relief . . . ." MINN. STAT. ANN. § 116.03(1).

The Nevada statute is similar in purpose to the state statutes examined above but significantly different in detail. Nevada's statute, NEV. REV. STAT. §§ 41.540-.570, provides for private actions to enforce existing environmental regulations or statutes, but the action cannot proceed unless the state or a governmental enforcement agency is joined as a party. *Id.* § 41.540.

A notable California statute, CAL. GOV'T. CODE §§ 12600-12, is distinguished by the fact that relief from environmental harm may be sought only through the Attorney General; there is no provision in the statute by which citizens themselves may obtain relief.

103. See, e.g., Goldshore, *A Thumbnail Sketch of the Environmental Rights Act*, N.J. STATE B.J., Winter 1975, at 18; Johnson, *The Environmental Protection Act of 1971*, 46 CONN. B.J. 422, 426 (1972).

104. With the exception of the Minnesota statute, none of the state statutes listed in note 102, *supra*, has been cited in more than eight reported cases since enactment.

105. MINN. STAT. ANN. §§ 116B.01-.13 (West 1971).

106. *Id.* § 116B.03(1).



an environmental quality standard or regulation, or as "conduct which materially adversely affects or is likely to materially adversely affect the environment."<sup>107</sup> Somewhat surprisingly, no cases directly addressing thresholds of harm have been decided, although this provision appears to be more favorable to defendants than is MEPA.

In interpreting MERA, the Minnesota courts have stressed substance rather than thresholds and held that the state's natural resources should be given paramount consideration<sup>108</sup> within a balancing test that weighs the utility of a defendant's conduct against the gravity of the harm allegedly resulting from that conduct.<sup>109</sup> Rather than presenting a threshold that the plaintiffs must meet in order to obtain review on the merits, the existence of environmental harm is merely one factor in determining whether relief will be granted. In practice, once the courts have found that an activity is likely to impair the environment, they have tended to discount defendants' counterarguments of utility.<sup>110</sup>

Plaintiffs under MERA typically have not found it difficult to make a prima facie showing of environmental damage. In *County of Freeborn ex rel Tuveson v. Bryson*,<sup>111</sup> a farmer brought an action to enjoin the construction of a highway across a marsh. The court found that the plaintiff's evidence, that the highway would disturb the "quietness and solitude of the marsh"<sup>112</sup> and increase animal fatalities, constituted a prima facie case.<sup>113</sup> The case reappeared before the Minnesota Supreme Court when an alternative highway route was challenged by the same parties.<sup>114</sup> Here, the court again granted the requested injunction, holding that the alternative of rerouting the highway through a second farmer's land was "feasible and prudent." Although the alternative would force the shortening of the second farmer's crop rows, the court stated that this was not a "factor of unusual or extraordinary significance" relative

107. *Id.* § 116B.02(5) (emphasis added). As is provided by MEPA, the defendant may rebut the plaintiff's prima facie showing by submitting evidence to the contrary, or by way of an affirmative defense may show that there is no "feasible and prudent alternative" and that the alleged damage to the environment is "consistent with and reasonably required for the promotion of the public health, safety and welfare . . ." *Id.* § 116B.04.

108. *Id.* § 116B.04. See also *State ex rel. Powderly v. Erickson*, 285 N.W.2d 84 (1979).

109. See *SST, Inc. v. Minneapolis*, 288 N.W.2d 225 (Minn. 1979); *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977).

110. In one case that appears to be contrary, *State ex rel. Skeie v. Minnkota Power Coop., Inc.*, 281 N.W.2d 372 (Minn. 1979), the court did find against the plaintiffs, but the basis of the holding was a finding that the construction of a power line across the plaintiffs' land would not constitute pollution, impairment or destruction. The court held that the presence of the power line would make use of the land more difficult, but that it would not harm the environment. *Id.* at 374. The balancing test, which presumably would have weighed the utility of the power lines against the damage done to the landowners' interest, was not reached.

111. 297 Minn. 218, 210 N.W.2d 290 (1973).

112. *Id.* at 226, 210 N.W.2d at 297.

113. *Id.*

114. *County of Freeborn ex rel. Tuveson v. Bryson*, 309 Minn. 178, 243 N.W.2d 316 (1976).

to the environmental harm that the injunction would prevent.<sup>115</sup> In another case<sup>116</sup> the court found that, while economic as well as environmental impacts may be weighed in the balancing test, a court should only base its decision on economic factors when the environmental harm is remote and speculative and the economic impact would be certain and devastating.<sup>117</sup>

Additional examples further enforce the view that plaintiffs need satisfy only a low threshold of harm while defenses are scrutinized rigorously. One case held that a gun club's operation of a trapshooting facility would create noise pollution and pollute a nearby wetlands area with lead shot.<sup>118</sup> The club was enjoined from operating its facility when it failed to prove that there was no feasible alternative to its present location and method of operation.<sup>119</sup> In another case,<sup>120</sup> a city which owned row houses was enjoined from demolishing the houses when the plaintiff historical society made a prima facie case that the houses were "historical resources" protected by the statute.<sup>121</sup> In terms of the promotion of the public health, safety and welfare, the court held renovation to be preferable to demolition.<sup>122</sup>

Although MERA defines environmental damage in a manner that imposes a higher express threshold of harm than does MEPA, MERA specifically states that "economic considerations alone shall not constitute [an affirmative] defense."<sup>123</sup> In practice, however, MERA differs little from MEPA.

## 2. Other State Statutes

Five other states have enacted statutes that grant some right of citizen standing in environmental disputes: South Dakota, Connecticut, Florida, New Jersey, and Indiana. Of these, the South Dakota statute<sup>124</sup> is most similar to MEPA; it incorporates the exact wording of various provisions of the Michigan statute.<sup>125</sup> However, the few reported

115. *Id.* at 188, 243 N.W.2d at 321.

116. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977).

117. *Id.* at 841. Indeed, MERA specifically excludes economic considerations from the affirmative defense when the defendant has no other defenses. MINN. STAT. ANN. § 116B.04 (West 1971).

118. *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977).

119. *Id.* The plaintiff in this case relied only on two noise tests and evidence of local opinion to show that harm would result. No showing of a specified minimum level of noise pollution was required, because applicable standards had not yet been developed by the state Pollution Control Agency. *Id.* at 770-71.

120. *State ex rel. Powderly v. Erickson*, 285 N.W.2d 84 (1979).

121. *Id.* at 90.

122. *Id.* at 89.

123. MINN. STAT. ANN. § 116B.04.

124. S.D. CODIFIED LAWS ANN. §§ 34A-10-1 to -15 (1973).

125. For example, the two acts share the same general standing provision, although that in SDEPA is shorter than that in MEPA. Compare S.D. CODIFIED LAWS ANN. § 34A-

decisions under the statute have held against the plaintiffs, stressing the plaintiffs' burden of providing substantial evidence that pollution is occurring or is about to occur as a result of defendants' conduct.<sup>126</sup> Although those cases may merely call for more certain proof that harm will occur, a better view is that plaintiffs must adduce sufficient evidence to satisfy a nontrivial threshold of harm requirement.

The Connecticut Environmental Protection Act,<sup>127</sup> like MEPA, is grounded in the "public trust" doctrine,<sup>128</sup> which holds that any harm to the environment is a violation of a right held in trust by the state for its citizens.<sup>129</sup> Whereas MEPA protects the "air, water and other natural resources and the public trust therein,"<sup>130</sup> CEPA protects only the "public trust in the air, water or other natural resources."<sup>131</sup> The vagueness of these terms has enabled some courts to deny relief.<sup>132</sup>

Although relief has been granted in a number of actions<sup>133</sup> under New Jersey's Environmental Rights Act,<sup>134</sup> the statute has not generally been given the broad construction anticipated for it.<sup>135</sup> In part, the courts may have been responding to the legislative history, which shows that

10-1 with MICH. COMP. LAWS ANN. § 691.1202. In addition, the South Dakota statute reproduced MEPA's provisions on defendant's rebuttal of the prima facie case and the establishment of affirmative defenses. Compare S.D. CODIFIED LAWS ANN. §§ 34A-10-9 to -10 with MICH. COMP. LAWS ANN. § 691.1203.

126. See *In re Solid Waste Disposal Permit Application*, 295 N.W.2d 328 (S.D. 1980); *In re Solid Waste Disposal Permit Application*, 268 N.W.2d 599 (S.D. 1978).

127. CONN. GEN. STAT. ANN. §§ 22a-14 to -20 (West 1971). See generally Johnson, *The Environmental Protection Act of 1971*, 46 CONN. B.J. 422 (1972).

Under the Connecticut act, a plaintiff can make a prima facie showing of harm only by demonstrating that the defendant's conduct "has, or is reasonably likely *unreasonably* to pollute, impair or destroy the public trust in the air, water or other natural resources of the state . . ." CONN. GEN. STAT. ANN. § 22a-17 (emphasis added). The defendant may rebut by showing evidence to the contrary or may establish that no feasible and prudent alternative exists and that his or her conduct is "consistent with the reasonable requirements of the public health, safety and welfare." *Id.*

128. CONN. GEN. STAT. ANN. § 22a-15; MICH. COMP. LAWS ANN. § 691.1202(1).

129. See generally Carlson, *The Public Trust and Urban Waterfront Development in Massachusetts: What is a Public Purpose?*, 7 HARV. ENVTL. L. REV. 71 (1983).

130. MICH. COMP. LAWS ANN. § 691.1202(1).

131. CONN. GEN. STAT. ANN. § 22c-17.

132. See, e.g., *Belford v. City of New Haven*, 170 Conn. 46, 52, 364 A.2d 194, 199 (1973) (denying injunction against construction of proposed rowing course in part on the ground that the public trust was not directly threatened) (1975). *But cf.* *Brecciaroli v. Connecticut Comm'r of Env'tl. Protection*, 362 A.2d 948, 953 (Conn. 1975) (court applied a balancing test and found that the environmental harm would outweigh the utility to the landowner: because the landowner was free to modify his proposal and submit further permit applications, the denial of the landowner's application was held not to constitute an unconstitutional taking).

133. See, e.g., *Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes*, 179 N.J. Super. 409, 432 A.2d 525 (1981); *Department of Transp. v. PSC Resources, Inc.*, 159 N.J. Super. 154, 387 A.2d 393 (1978).

134. N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West 1971).

135. See *Department of Transp. v. PSC Resources, Inc.*, 159 N.J. Super. 154, 387 A.2d 393 (1978).

language designed to restrict the scope of the statute was inserted to prevent the harassment suits predicted by those opposing the bill.<sup>136</sup> Like MEPA, the New Jersey act authorizes injunctive relief when a defendant's conduct violates an environmental statute or regulation, as well as when the conduct is otherwise harmful to the environment.<sup>137</sup> An exclusionary clause, however, provides that the Act will not apply when the defendant's harmful conduct is regulated by "a more specific standard" than the ERA.<sup>138</sup> At least one court has used this exclusionary clause to deny relief.<sup>139</sup>

Indiana's statute on Special Jurisdiction and Procedure in Environmental Suits<sup>140</sup> differs from MEPA in two important respects:<sup>141</sup> by requiring a showing of "significant" pollution, impairment or destruction,<sup>142</sup> and by allowing the defendant to rebut this showing through evidence of compliance with applicable pollution standards.<sup>143</sup> Although there has been no judicial construction of the term "significant" harm, the few reported cases under the statute have shown an inclination to interpret the Act restrictively.<sup>144</sup>

Finally, The Florida Environmental Protection Act<sup>145</sup> differs substantially from MEPA in that Florida citizens may bring actions only to

136. As enacted, the statute provides relief from "any *actual* pollution, impairment, or destruction." N.J. STAT. ANN. § 2A:35A-3(b) (West 1971) (emphasis added). An earlier version would have provided for relief from conduct that was "*likely* to pollute, impair or destroy." Goldshore, *supra* note 103, at 19 (emphasis added). The Act provides specifically for the immediate dismissal of any action "which on its face appears to be patently frivolous, harassing or wholly lacking in merit". N.J. STAT. ANN. § 2A:35A-4(c).

137. N.J. STAT. ANN. § 2A:35A-4(a)-(b).

138. *Id.* § 2A:35A-4(b).

139. See *Borough of Kenilworth v. Department of Transp.*, 151 N.J. Super. 322, 376 A.2d 1266 (1977), in which a borough sought an injunction against the widening of a state highway, claiming potential air and water pollution and drainage problems. The court held that a plan approved by the Federal Highway Administration, finding that the proposed widening would have no environmentally negative impact, constituted a "more specific standard" under the clause so as to require dismissal of the action under the New Jersey statute. *Id.* at 335, 376 A.2d at 1273.

Although the court ultimately did not invoke any environmental protection statute, it nevertheless seemed to weigh the prospective harm against the usefulness of the project. In response to the borough's assertion that the widening of the highway would result in a problem of rodent infestation, the court ruled that "[t]he claimed threat to the environment is not sufficient to warrant the court interfering with the completion of this important public project." *Id.*

140. IND. CODE ANN. §§ 13-6-1-1 to -6 (Burns 1981).

141. Like MEPA, the Indiana statute provides for declaratory and equitable relief when the defendant's conduct has or is reasonably likely to harm the environment. *Id.* § 13-6-1-1(e). The defendant may raise the same affirmative defense of reasonableness and a lack of "feasible and prudent" alternatives to the proposed conduct. *Id.* § 13-6-1-2.

142. *Id.* § 13-6-1-1(a).

143. *Id.* § 13-6-1-2.

144. See, e.g., *Sekerez v. Youngstown Sheet & Tube Co.*, 337 N.E.2d 521 (Ind. 1975). The court, in denying standing to a plaintiff seeking compliance with air pollution standards, stated that "[t]he general tenor of [the Indiana statute's] provisions is restrictive . . ." *Id.* at 525.

145. FLA. STAT. ANN. § 403.412 (West 1971).

compel government authorities to enforce existing environmental laws, rules and regulations.<sup>146</sup> In effect, the Florida statute excludes cases on the basis of subject matter, rather than by employing a threshold of harm requirement.<sup>147</sup>

Thus, the experience in other states reinforces the conclusion that citizen standing provisions do not open the floodgates of litigation. The Minnesota experience supports the thesis that MEPA-like statutes work well when a low threshold is employed. The experience in other jurisdictions must be viewed more cautiously, in light of the differing legislative histories and statutory provisions there at work.

### B. Comparison with Three Federal Statutes

Statutory interpretation must of course be guided by statutory purpose. The substantiality of any threshold requirement imposed by MEPA should thus be consistent with MEPA's intent to provide an environmental remedy of broad applicability. This point is further illustrated in three major federal environmental statutes: the Endangered Species Act (ESA),<sup>148</sup> the National Environmental Policy Act (NEPA),<sup>149</sup> and the Clean Water Act.<sup>150</sup> Each statute has its own internal logic. The ESA has a narrow applicability, a narrow (though critical) purpose, and a high threshold; NEPA has a broad applicability, an institutional rather than a substantive purpose, and a medium threshold; and the Clean Water Act has a narrow subject matter of applicability, a comprehensive substantive purpose in that area, and no threshold.

#### 1. Catastrophe Avoidance: The Endangered Species Act

The Endangered Species Act is a statute of narrow scope. Its legislative history shows that Congress was explicitly concerned with the avoidance of environmental catastrophes resulting from the elimination of plant and animal species. A House of Representatives committee report issued during consideration of the Act expresses the urgency of this concern: "As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their — and

---

146. *Id.* § 403.412(2)(a)(1)-(2).

147. It should be noted, however, that the Act is only one part of a comprehensive legislative scheme; presumably almost any environmentally harmful activity would be in violation of one of the state's environmentally related statutes. See the Environmental Reorganization Act, *id.* § 403.801-817 (1975); the Florida Litter Law of 1971, *id.* § 403.413; the Electrical Power Plant Siting Act of 1973, *id.* § 403.501-517; the Safe Drinking Water Act of 1977, *id.* § 403.850-864; and a provision creating a Department of Pollution Control, *id.* § 403.045.

148. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976 & Supp. IV 1980).

149. 42 U.S.C. §§ 4321-4369 (1976 & Supp. IV 1980).

150. Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980).

our own — genetic heritage. The value of this heritage is, quite literally, incalculable."<sup>151</sup>

The Endangered Species Act need not be a statute of universal application to achieve its intended results. Although all plant and animal species potentially fall under its protection,<sup>152</sup> the occasions for its use in litigation are limited. The Act requires that the Department of Interior publish a list of endangered species and a corresponding inventory of habitat considered critical to the continued survival of listed species.<sup>153</sup> Thereafter, all federal actions adversely affecting listed species or their habitat must not "jeopardize the continued existence of such endangered species."<sup>154</sup> Although the statute contains a citizen suit provision,<sup>155</sup> that provision applies only to litigation involving listed species.<sup>156</sup> A decision not to place a species on the endangered list can be challenged only under the general provisions of the Administrative Procedure Act.<sup>157</sup> Thus, judicial intervention under the Endangered Species Act is reserved for cases involving an administratively defined threshold of importance; the judicial role is otherwise restricted to pre-existing, highly deferential modes of review of administrative activity.<sup>158</sup>

A comparison of ESA and MEPA discloses widely divergent degrees of legislative reliance on the judicial process. These differences functionally correspond to the very different motives behind the enactment of the statutes and in turn affect the scope of their applicability. ESA entrusts the Department of Interior with the crucial task of preparing a list of the most immediately threatened species and calls on sister agencies to avoid harming these species. The courts play a secondary role, stepping in when agencies fail to comply with these mandates. MEPA, on the other hand, empowers the courts to review agency performance directly and to modify agency procedures and standards found to be inadequate.<sup>159</sup> Far from limiting the judiciary's role to a preselected, urgent set of cases, MEPA's broad applicability and liberal standing provisions invite citizens to participate, by way of the judicial process, in the enforcement of environmental protection at all levels. To the extent that ESA and MEPA appear to be at opposite ends of the legislative spectrum, ESA's unusually high threshold of harm is the counterpoint to MEPA's unusually low threshold.

---

151. H.R. REP. NO. 412, 93d Cong., 1st Sess. 4 (1973).

152. 16 U.S.C. § 1531(a)(1).

153. *Id.* § 1533(c)(1).

154. *Id.* § 1536.

155. *Id.* § 1540(g).

156. *Id.* § 1540(g)(1). *See also id.* §§ 1533(d), 1538.

157. 5 U.S.C. §§ 551-559, 701-706 (1976). *See also* 16 U.S.C. § 1533(c)(2).

158. *See generally* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 195 (1979).

159. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1982).

## 2. Major Project Control: The National Environmental Policy Act

NEPA has become one of the major tools of environmental regulation.<sup>160</sup> By requiring that federal agencies prepare environmental impact statements (EISs) for "major Federal actions . . . significantly affecting the human environment,"<sup>161</sup> NEPA creates an explicit threshold of harm. Many states have adopted similar legislation.<sup>162</sup> A consideration of the impact statement requirement within NEPA's statutory structure highlights the differences between the goals and purposes of judicial review under NEPA and MEPA.

NEPA creates a means for taking into account the environmental consequences of federal activities. The statute first declares a national policy of promoting "efforts which will prevent or eliminate damage to the environment."<sup>163</sup> More specifically, NEPA's EIS requirements establish an institutional mechanism for incorporating environmental values into planning by all branches of the federal government.<sup>164</sup> NEPA sup-

---

160. 42 U.S.C. §§ 4321-4369 (1976 & Supp. IV 1980). See generally R. LIROFF, *A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH* (1976). NEPA's broad, deliberately vague language and wide application to federal actions have led one commentator to describe it as a potential "environmental bill of rights." Coggins, *Preparing an Environmental Impact Lawsuit, Part I: Defining a Claim for Relief Under the National Environmental Policy Act of 1969*, 58 IOWA L. REV. 277, 287 (1972). Suits demanding compliance with NEPA's EIS requirement have been brought by environmental groups, private plaintiffs, and state governments; plaintiffs within industry can also invoke NEPA to challenge environmentally protective federal actions. In the ten years following the Act's inception in 1970, nearly 1300 suits were brought under the Act. Liroff, *NEPA Litigation in the 1970's: A Deluge or a Dribble?*, 21 NAT. RESOURCES J. 315, 321 (1981). In 1979 only 20% of all plaintiffs under the Act were environmental groups. *Id.* at 325.

161. § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). This requirement has been a staple of environmental litigation for over a decade. See generally F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* 9-1 to 9-152.1 (1979); R. STEWART & J. KRIER, *ENVIRONMENTAL LAW AND POLICY* 733-810 (1978 & Supp. 1982).

162. See generally Pearlman, *State Environmental Policy Acts: Local Decisionmaking and Land Use Planning*, 43 J. AM. INST. PLANNERS 42 (1977).

163. 42 U.S.C. § 4321.

164. *Id.* § 4332(2)(c). This method of environmental protection has a number of important limitations. First, NEPA addresses environmental impacts only prospectively. The statute provides no relief once projects have been approved. Even a proposal entailing "adverse impacts which cannot be avoided" may be approved for implementation. *Id.* Such impacts must be detailed by the statement. Second, those people affected by the proposed project, including citizens who live in the area, enter the process only tangentially. Although individuals and interest groups may comment on draft impact statements and bring suit to challenge decisions not to prepare a statement, *id.*, they cannot initiate the process and are essentially restricted to responding to the study produced by the agency that sponsors the project. These rights are governed by the Administrative Procedure Act, 5 U.S.C. §§ 551-556, 701-706 (1976). Federal courts reviewing agency decisions not to prepare environmental impact statements are restricted to the narrow "arbitrary and capricious" standard of review. See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972). But see *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973) (appellate court ordered trial court, on remand, to apply the "reasonableness" test to decisions not to prepare an environmental impact statement).

Finally, because the requirement of an impact statement only applies to "major" "federal" actions that "significantly" affect the environment, 42 U.S.C. § 4332(2)(C), it does

plements the EIS process with a special agency created to review and appraise the government's environmental policies<sup>165</sup> and with a requirement of agency self-scrutiny.<sup>166</sup>

These three requirements were all designed to further the goal of establishing sound environmental practices for a large and unwieldy bureaucracy. Within this framework, Congress tempered the operation of the environmental impact statement process by limiting its applicability to activities meeting an explicit threshold of harm, namely that of "major" actions that have "significant" environmental effects. The reasons for this may have included the goal of lessening the overall burden on the agencies or a desire to establish two levels of projects and thereby insure comparatively more intensive environmental scrutiny of some projects. Limiting the environmental impact statement requirement, however, does not impede the operation of the other methods provided by NEPA to ensure that all federal decisions respect environmental values. NEPA focuses on the ongoing business of government, rather than on providing case-specific protection; the moderate threshold that triggers EIS preparation is thus consistent with the statute's overall design.

### 3. Universal Applicability: The Clean Water Act

Judicial enforcement of the Endangered Species Act is limited to situations involving resources that an administrative agency has determined to be critically important;<sup>167</sup> judicial enforcement of NEPA's EIS provision is restricted by a threshold of harm.<sup>168</sup> In contrast, those

---

not reach purely private behavior nor federal actions deemed to be too minor or to have too indirect an effect on the environment to necessitate the preparation of an impact statement. *See, e.g.,* Movement Against Destruction v. Volpe, 361 F. Supp. 1360 (D.C. Md. 1973), *aff'd*, 500 F.2d 29 (4th Cir. 1974) (Federal Highway Administrator's letter approving state highway project was not sufficient federal involvement to require preparation of an EIS); Bradford Township v. Illinois State Toll Highway Auth., 463 F.2d 537 (7th Cir. 1972) (no EIS was required for state toll highway when there was no allegation of federal participation in its construction or funding). Such actions may have significant local effects, however, or may in combination with existing conditions have greater effects than could be predicted through initial threshold analyses.

Such was the case in Rucker v. Willis, 358 F. Supp. 425 (E.D.N.C. 1973), *aff'd*, 484 F.2d 158 (4th Cir. 1973), where the court ruled that the Army Corps of Engineers' decision to grant a permit for the construction of a marina, parking lot, boat basin, and fishing basin without first preparing an EIS was not arbitrary and capricious. *But see* Simmons v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974) ("The setting [of the project] should not be artificially large, thus diluting the actual impact on the immediate area . . .").

One case in which the importance of cumulative impacts was recognized is Natural Resources Defense Council v. Calloway, 524 F.2d 79 (2d Cir. 1975). There, the wastes from a dredging project proposed by the Navy were to be dumped in a "containment site" where they would not disperse into Long Island Sound. The Navy's EIS was held to be arbitrary and capricious for failure to consider the cumulative impact of other pending projects, which would generate a total of two million cubic feet of waste.

165. *See generally* 42 U.S.C. §§ 4321-4347 (1976 & Supp. IV 1980).

166. *Id.* § 4333.

167. *See supra* text accompanying notes 152-58.

168. *See supra* text accompanying note 161.



provisions of the Clean Water Act<sup>169</sup> that regulate industrial discharges of water pollutants are subject to rigorous judicial enforcement.<sup>170</sup> The Clean Water Act's stated goal is the eventual elimination of all effluent discharges into the nation's water.<sup>171</sup> For polluters who claim that their effluent does not significantly affect water quality, the Act provides neither exemption nor variance.<sup>172</sup> EPA and the public<sup>173</sup> can seek judicial enforcement of effluent limitations, even when to do so greatly burdens the polluter without corresponding enhancement of water quality.<sup>174</sup> Nor does the Act require a judicial or administrative finding that a particular threshold of harm has been exceeded. All violations, no matter how slight, are actionable.

A recent challenge to this claimed stringency prompted a thorough study of the Clean Water Act's language and structure by the United States Supreme Court. In *E.I. du Pont de Nemours & Co. v. Train*,<sup>175</sup> industrial dischargers sought a judicial ruling that would force EPA to make case-by-case determinations that the pollution controls required by the Act could be justified in terms of reduced pollution. They claimed that EPA lacked authority "to issue industrywide [sic] regulations limiting discharges by existing plants,"<sup>176</sup> and asserted that EPA must allow a variance procedure in regard to new sources.<sup>177</sup>

The Supreme Court held that the legislation did not require EPA to make site-specific determinations of environmental benefits.<sup>178</sup> Although

169. 33 U.S.C. §§ 1251-1376 (1976).

170. The Clean Water Act is the most complex of the environmental statutes discussed in this article. In addition to industrial point source discharges of pollutants, the Act also deals with municipal effluents, *id.* § 1314, non-point sources, *id.* §§ 1321-1322, and reservoirs, *id.* § 1252(a), and makes extensive provision for research and study of many aspects of water pollution, *id.* §§ 1254-1255. In regulating industrial discharge, the Clean Water Act uses a permit system. *See generally id.* §§ 1341-1345. No discharge into the navigable waters of the United States is allowed without a permit. *Id.* § 1342. The Environmental Protection Agency (EPA) is the permit granting agency, unless a State promulgates a qualifying permit system of its own. *Id.* § 1342(a)-(d). The standards which the EPA must incorporate into the permits are to be established by reference to technological capabilities for pollution control, *id.* §§ 1342(a)(1), 1316.

171. *Id.* § 1311(b)-(c).

172. Variances from the long-term goal of installing the best available technology, *id.* § 1311(b)(2)(A), may be granted under the Act when the economic consequences to an individual operator would force plant closure, *id.* § 1311(c)(1). The statute provides no variance procedure relating to the short-term goal of installing the best practicable technology. *Id.* § 1311(b)(1)(A).

173. *Id.* § 1365 (citizen suit provision).

174. *See infra* text accompanying notes 178-83 .

175. 430 U.S. 112 (1977).

176. *Id.* at 115.

177. *Id.*

178.

The petitioner's view of the Act would place an impossible burden on EPA. It would require EPA to give individual consideration to the circumstances of each of the more than 42,000 dischargers who have applied for permits . . . and to issue or approve all these permits well in

the Court imposed variance procedures that tempered the universal impact of the congressionally prescribed standard, it did so in only a limited fashion.<sup>179</sup> The Court found actual effluent reduction to be unimportant and economic impact of regulations to be relevant only to the extent authorized by the specific textual language and legislative history.<sup>180</sup>

Invoking Congress's decision to enact the statute without a threshold of environmental harm, the Supreme Court also explicitly rejected judicial authority to make the statute's operation more "appropriate to the regulatory process."<sup>181</sup> The Fourth Circuit had ruled that, although the Clean Water Act did not contain any variance procedure for new sources of effluent, EPA was nevertheless obliged to create one.<sup>182</sup> The Supreme Court roundly criticized this judicial revision of the Act:

The question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations. It is clear that Congress intended these regulations to be absolute prohibitions. The use of the word "standards" implies as much, as does the description of the preferred standard as one "permitting no discharge of pollutants."<sup>183</sup>

The Clean Water Act offers two lessons for MEPA's proper interpretation. First, thresholds of harm are not an ordinary part of statutes intended to be of universal applicability within their appointed sphere of operation. Second, legislative intent is crucial in determining statutory content. Once a legislature strikes the balance between environmental benefits and social costs, either costs of control or costs of litigation, this issue is not available for judicial reconsideration.

### CONCLUSION

Actions brought under MEPA have included cases of comparatively minor environmental damage,<sup>184</sup> as the state legislature intended when it promulgated the Act.<sup>185</sup> MEPA was designed to establish an opportunity

---

advance of the 1977 deadline in order to give industry time to install the necessary pollution-control equipment. We do not believe that Congress would have failed so conspicuously to provide EPA with the authority needed to achieve these statutory goals.

*Id.* at 132-33.

179. *Id.* The Court disagreed only with the EPA's distinction between "effluent limitations for point sources" and "effluent limitations for categories and classes of point sources." *See, e.g.*, 33 U.S.C. § 1311(b)(2)(A).

180. *See* 430 U.S. at 129-30.

181. 430 U.S. at 138.

182. *E.I. du Pont de Nemours & Co. v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976) (Du Pont II).

183. 430 U.S. at 138.

184. *See supra* text accompanying note 48.

185. *See supra* text accompanying notes 16-30.

for citizens, interest groups, the private sector, and government agencies alike to redress their various grievances concerning environmental issues through the judiciary. MEPA's express private right of action thus brings a wide range of activities within the scope of the courts' duty to protect natural resources,<sup>186</sup> in contrast with statutes that apply only to a specific area of environmental protection<sup>187</sup> or that only address emergency situations.<sup>188</sup> The courts have helped to further MEPA's broad purpose by facilitating plaintiffs' efforts to establish a prima facie case<sup>189</sup> while holding defendants to a more severe standard in rebutting the plaintiffs' evidence or establishing affirmative defenses.<sup>190</sup>

The practical experience of courts, both under MEPA and in other states with similar statutes,<sup>191</sup> shows that the courts have neither been inundated by environmental lawsuits nor dismissed cases that merit a hearing. One likely explanation for the success of such broad private rights of action is that both courts and litigants are intuitively aware of the typical elements of a plausible case. If articulated explicitly, these elements establish guidelines that would help decrease the ad hoc nature of litigation under such statutes.

The first of these elements, drawn from cases brought under MEPA, is the presence of a threat to unique resources. When a defendant's activity will affect a rare quaking bog,<sup>192</sup> an elk herd,<sup>193</sup> or a similarly unique resource, the appropriateness of MEPA review is clear. A second characteristic of a number of MEPA cases is that a fairly large number of resource users would be affected by the proposed action.<sup>194</sup> Examples include the regulation of the deer herd throughout the State of Michigan<sup>195</sup> or regulation of all types of fishing in Grand Traverse Bay and adjacent parts of Lake Michigan.<sup>196</sup> The third element justifying plenary MEPA review is, of course, a finding that the severity of the threatened harm to the resource base and its users is substantial.

In contrast to applying the criteria of uniqueness or effects on a large class of resource users, assessing substantiality of impact requires subtle

---

186. By contrast, NEPA's EIS requirement, which affects only "major" actions with "significant" potential effects, is part of a broader environmental protection program. *See id.*

187. *See supra* text accompanying notes 169-83.

188. *See supra* text accompanying notes 151-59.

189. *See supra* text accompanying notes 31-54.

190. *See supra* text accompanying notes 65-79.

191. *See supra* text accompanying notes 102-47.

192. *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 224 N.W. 883 (1975).

193. *Pigeon River*, 405 Mich. 741, 275 N.W.2d 538 (1979).

194. It is noteworthy that all public trust cases satisfy this criterion of importance, thereby necessitating full judicial review under MEPA. By definition, public trust resources are held by the state for the benefit of the entire public. *See supra* note 129.

195. *Payant v. Department of Natural Resources*, No. 1100 (Dickinson County Cir. Ct. July 13, 1971).

196. *Michigan United Conservation Clubs v. Anthony*, 90 Mich. App. 99, 280 N.W.2d 883 (1979).

judicial decisionmaking. Beyond merely cataloging environmental causes and effects, calculating substantiality of harm may involve evaluating the degree of aggregate damage<sup>197</sup> that would occur if other parallel projects were undertaken. Further, the impacts should be evaluated within the particular project's local context.

The courts have traditionally been perplexed by cases in which environmental harm worthy of judicial intervention exists only as a result of aggregate consequences.<sup>198</sup> Even a low threshold of harm requirement applied to a single environmentally injurious act may leave such cases outside the reach of MEPA and frustrate its ability to regulate the "nibbling phenonema."<sup>199</sup> Aggregating effects is not new to the judiciary<sup>200</sup> and will not require that all cases be given plenary review on the ground that any type of activity could significantly affect the environment "if everyone did it." Reasoned application of an aggregation principle invites limitation by inquiry into the harm anticipated and the possibility of parallel activity by others.<sup>201</sup>

Directly assessing the substantiality of environmental harm also raises important questions of context.<sup>202</sup> As the mistaken approach of the appellate court in *Kimberly Hills* shows,<sup>203</sup> context or perspective is crucial in determining whether harm is significant or inconsequential. If MEPA is to be given full application, the local context of the project or proposal is the relevant concern. Within that context it may be helpful to judges to focus on the users of the resource base and the effects a project will have on their activities.<sup>204</sup> By identifying the impact on users, courts assure themselves that there are human values attached to abstract

197. The aggregate effect of several projects occasionally exceeds the mere sum of environmental damage done by the projects individually. Problems of synergism occur in many environmental contexts. See P. EHRLICH, A. EHRLICH & J. HOLDREN, *ECOSCIENCE: POPULATION, RESOURCES, AND ENVIRONMENT* 727-28 (1977).

198. See, e.g., *Maine v. Johnson*, 265 A.2d 711 (Me. 1970).

199. The term "nibbling phenomena" is adapted from testimony given by the Director of Michigan's Department of Natural Resources: "I can't honestly say that the loss of five or six miles of stream of this size is a manjor environmental impact. . . . It is the assemblage of these small nibbles. . . . You have to take them in broad perspective and then you begin to get the significant impact." See *Tanton v. Department of Natural Resources*, No. 90-3, slip op. at 35 (Mich. Cir. Ct. Dec. 30 1972).

200. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (aggregation of conduct by individual farmers consituting a regulable impact on interstate commerce).

201. The two lines of inquiry in aggregation cases must include a finding that in sum the environmental harm would be significant and that a chance exists that other similar actions will occur. For example in both *Maine v. Johnson*, 265 A.2d 711 (Me. 1970), and *Wickard v. Filburn*, 317 U.S. 111 (1942), the potential actors had positive economic incentive to follow the litigants' course of action.

202. Cf. *Abrams, Governmental Expansion of Recreational Water Use Opportunities*, 59 OR. L. REV. 159, 188-90 (1980) (discussing relative recreational values of water bodies as a function of suitability for use).

203. See *supra* text accompanying notes 55-64.

204. This approach is consonant with a traditional concern with standing in environmental litigation. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

ecological sensitivities, a process which lends greater objectivity to the inquiry.<sup>205</sup>

Thus, by aggregating effects and looking at local context, courts can ascertain whether individual cases of seemingly slight environmental moment are nevertheless as much within MEPA's broad reach as are cases that threaten unique resources or that affect large user populations.

The establishment of these elements as general guides through the common law development of vague statutory language helps support the view that an explicit threshold of harm need not be a prerequisite to the viable implementation of a broad private right of action. The alternative screening devices offer points of reference to the judge who feels that a case is so wholly lacking in impact that it is unworthy of any judicial consideration. When any element is present, however, MEPA appropriately is employed to improve environmental quality, consistent with the legislative purpose.

---

205. *Muha v. Union Lake Assocs.*, No. 2964 (Grand Traverse County Cir. Ct. Aug. 14, 1972), for example, involved the effect of a land development project on local streams. Following the advocated analysis, the court would be concerned with the number of sport-fishing opportunities that are threatened by siltation of a trout stream resulting from poor erosion control. The court need not decide in the abstract that a certain percentage increase in turbidity of a short stream segment either passes or fails MEPA's low threshold of harm.