The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's

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INTRODUCTION

In 1970, the Michigan legislature enacted the Michigan Environmental Protection Act (MEPA),[1] the first state statute expressly to authorize citizen-initiated environmental lawsuits[2] and thus to challenge the courts to develop a "common law of environmental quality."[3] The mixed reviews greeting the Act's passage underscored MEPA's conceptual originality.[4] No one could predict the problems that might be encountered. Would the absence of a provision for damages awards deter citizens from using the statute? Would the courts be able to handle environmental issues in a timely fashion or would they become mired in highly technical controversies and frivolous complaints? Indeed, the success or failure of MEPA was considered "an important harbinger of the

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1. Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West Supp. 1984). The full text of the Act is reprinted as Appendix A, *infra*. The legislative history of MEPA is discussed in Note, *Michigan's Environmental Protection Act: Political Background*, 4 U. MICH. J.L. REF. 358 (1970). Much of the documentation of MEPA's formulation and passage has been preserved and is available at the Bentley Historical Library of the University of Michigan. The contents of the collection have been catalogued and a summary is available as J. DiMento, Brief Biographical Sketch of MEPA, Bentley Historical Collection Catalog, University of Michigan.

2. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1984).

3. Ray v. Mason County Comm'r, 393 Mich. 294, 306, 224 N.W.2d 883, 888 (1975).

4. The legislative philosophy behind the citizen-oriented approach adopted in MEPA is described in J. SAX, DEFENDING THE ENVIRONMENT—A STRATEGY FOR CITIZEN ACTION (1971). *See* J. Sax, Developments Under the Michigan Environmental Protection Act—1980 Update 1 (1980) (unpublished manuscript on file with Professor Sax at the University of Michigan School of Law) [hereinafter cited as Sax Draft]; DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409, 413-16 (1977). *See also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

fate of the environmental movement."[5]

To assist interested parties in tracing the progress of this landmark statute, three articles published between 1970 and 1976 monitored each case then filed under MEPA.[6] The articles examined not only the number and nature of actions filed under MEPA, but also the duration, outcome, and costs of concomitant litigation, both in the courts and in administrative agencies. Through exhaustive analyses, these articles focused attention on numerous important, though frequently unpublished, cases. This information proved valuable not only to Michigan courts and practitioners, but also to the courts and practitioners of other states which have subsequently adopted similar laws.[7] Moreover, the articles provided important data for state legislatures implementing or contemplating environmental statutes.

The primary purpose of this Article is to continue the tracing and analyzing of published and unpublished cases filed under MEPA. In the process of examining the MEPA actions filed since 1976, as well as subsequent legal developments in the actions discussed in prior articles, this Article will evaluate MEPA's progress and attempt to determine the impact its critical provisions have had on recent environmental litigation in the State of Michigan. This alone may resolve many of the concerns raised about MEPA. For example, statistics indicate that frivolous neighborhood disputes have not flooded the Michigan court system. Additionally, examination of the facts and decisions of unreported cases discloses that the technical issues associated with environmental litigation have not overwhelmed the courts. This Article will further illuminate some of the surprising twists in MEPA's development and address still unresolved issues, such as the appropriate role of MEPA in zoning controversies and whether attorneys' fees can be awarded under the statute.

Section I summarizes the statistics compiled thus far, including the identity of the parties filing, intervening in, or defending each MEPA

5. Sax and DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974).

6. Sax and Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972) (The data used in this "progress report" are also discussed in E. HASKELL & U. PRICE, STATE ENVIRONMENTAL MANAGEMENT 228-42 (1973).); Sax and DiMento, *supra* note 5; Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizens' Suits*, 53 J. URB. L. 589 (1976). The methodology used in these three studies is discussed in Sax and DiMento, *supra* note 5, at 2-4. *See also* Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as a Model of a Minimal Requirement*, 7 HARV. ENVTL. L. REV. 107 (1983).

7. *See, e.g.* 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). *See also* Renz, *The Coming of Age of State Environmental Policy Acts*, 5 PUB. LAND L. REV. 31 (1984); DiMento, *Asking God to Solve Our Problems: Citizen Environmental Suit Legislation in the Western States*, 2 UCLA J. ENVTL. L. & POL'Y 169 (1982).

action, and the subject matter and venue of each case. Sections II and III set out MEPA's principal provisions, particularly the requirements for establishing a prima facie case and for raising the affirmative defense. Section IV examines MEPA's central role in encouraging parties to reach settlement agreements. Section V discusses MEPA's use in urban development disputes, while Section VI analyzes MEPA's impact on personal property rights. Section VII focuses on the role of public agencies, state and local, in MEPA litigation. Section VIII addresses critical procedural issues that might arise in MEPA litigation, such as standing, jurisdiction, awards of costs and the apportionment of attorneys' fees, and problems associated with multiple litigation. Finally, Section IX summarizes MEPA's relationship to other state environmental statutes and the common law of Michigan.

I

A LOOK AT THE STATISTICS

As of April 15, 1983, a total of 185 actions involving MEPA had been filed either with the courts or with state administrative agencies.[8] Between 1970 and 1974, the first years of the statute's operation, MEPA filings averaged approximately two suits per month,[9] reaching a maximum of three filings per month during 1973.[10] Filing frequency declined dramatically thereafter, reaching a low of only four cases filed in both 1976 and 1977.[11] A brief upswing occurred between 1978 and 1980, with an average of one filing per month, and then the number of filings declined to about one every two months through the end of 1982,[12] the last full year of this study.[13]

Though the reasons cannot be determined with certainty, a number of factors have contributed to the reduction in the number of actions brought under MEPA. First, litigation in any context is subject to institutional barriers which will be exacerbated by depressed economic conditions. A tight economy may be a particularly critical factor in deciding whether to bring a suit under MEPA, both because the Act does not provide for damages and because potential MEPA plaintiffs may perceive

8. These cases are cited in Appendix B *infra*. The Haynes article, published in 1976, established that between 1970 and 1975 the statute had been involved in 119 cases or administrative proceedings. Haynes, *supra* note 6, at 592 n.8. Six additional MEPA actions filed during the 1970-75 period were located after publication of the Haynes article: Danyo v. Great Lakes Steel Corp., Dwyer v. City of Ann Arbor, Lakeshore Residents of Walnut Lake, Inc. v. Mourray, South Macomb Disposal Auth. v. Township of Washington, and Wayne County Health Dep't v. National Steel Corp. *See* Appendix B *infra* for full citation data.

9. Haynes, *supra* note 6, at 593.

10. *See* Appendix B *infra*.

11. *Id.*

12. *Id.*

13. *See* Appendix C *infra* for a graph depicting the number of MEPA actions filed per year since the passage of the Act.

that their environmental concerns are unlikely to prevail against a defendant's proffered economic arguments.[14] Second, since 1970, Michigan statutes aimed at specific environmental problems—many of them brought to light by MEPA litigation—have proliferated.[15] These statutes have both reduced the need for environmental litigation in absolute terms and provided plaintiffs with alternative sources of substantive statutory support. Third, MEPA's usefulness for stimulating examination and resolution of environmental problems may have declined as the statute has become increasingly institutionalized in its administration. Finally, the decline in MEPA actions filed after 1976 may not in fact be as sharp as the figures indicate,[16] due, in part, to less intensive reporting of MEPA cases after that date.[17]

MEPA's state-wide impact and appeal is amply demonstrated by the fact that MEPA actions have been filed in forty-eight of Michigan's eighty-three counties, as well as in the Eastern and Western Federal District Courts of Michigan and the District Court of Minnesota.[18] Wayne, Ingham, and Washtenaw counties continue to be the most frequent venues for MEPA cases,[19] although three or more cases have been filed in each of fifteen different counties.[20] MEPA plaintiffs have also filed

14. One plaintiff's attorney believes that economic factors were the primary stimulus to a jury's verdict for the defendant in at least one recent MEPA case. Telephone interview with Peter W. Ryan, attorney for the plaintiffs in Manfredi v. Inland Steel Co., No. M81-33-CA, slip op. (W.D. Mich. July 1, 1982), (May 23, 1983).

15. *See, e.g.*, Inland Lakes and Streams Act, MICH. COMP. LAWS ANN. §§ 281.951-.965 (West 1979); Goemaere-Anderson Wetland Protection Act, MICH. COMP. LAWS ANN. §§ 281.701-.722 (West Supp. 1984); Hazardous Waste Management Act, MICH. COMP. LAWS ANN. §§ 299.501-.551 (West Supp. 1984); and Sand Dune Protection and Management Act, MICH. COMP. LAWS ANN. §§ 281.651-.664 (West 1979). This trend, however, has been uneven at best. In the Pigeon River controversy, *see infra* notes 146-54 and accompanying text, the proposed legislation would have weakened rather than strengthened environmental protection. *See also* Hand, *Natural Resources and Environmental Law*, 28 WAYNE L. REV. 1025, 1032-33 (1982). Moreover, whether Michigan's sand dunes are adequately protected from encroaching development continues to be uncertain even following the passage of the Sand Dune Protection and Management Act, MICH. COMP. LAWS ANN. §§ 281.651-664 (West 1979). *See infra* notes 348-58 and accompanying text; *see also* Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc., No. 82-28908-CE (Mich. Cir. Ct. Feb. 10, 1982) (petition for review and verified complaint); Haynes, *supra* note 6, at 605.

16. For example, the Michigan Attorney General's office reports filing a number of cases containing MEPA claims incidental to other statutory claims which were the primary focus of the suits. These cases are not reported here or in other MEPA studies.

17. The scope of the project of reporting on MEPA actions was reduced in 1976 because of financial constraints. However, the occurrence of a prolonged decline in the filing of MEPA cases while intensive reporting continued, the sharpness of the decline, and the great fluctuations in the post-1976 filing frequency suggest that factors other than research constraints contributed to the lower number of reported MEPA cases after 1976. The methodology used in conducting the project is discussed at Sax and DiMento, *supra* note 5, at 2-4.

18. *See* Appendix B *infra*.

19. Thirty-nine cases have been located in Wayne County, twenty-one in Ingham, and fourteen in Washtenaw. *See* Appendix B *infra*. *See also* Haynes, *supra* note 6, at 594.

20. These are Berrien, Calhoun, Genesee, Grand Traverse, Ingham, Jackson,

actions in the administrative tribunals of Michigan's Department of Natural Resources and Public Service Commission.[21]

MEPA continues to be invoked most often in cases involving industrial air pollution, water pollution, and residential and commercial construction.[22] Since 1976, however, litigants have relied on MEPA in several nascent problem areas, including airport expansion, destruction of private forest land, construction of shopping centers and other large projects, toxic industrial wastes, and groundwater contamination.[23]

Community and ad hoc citizens' groups constitute the vast majority of MEPA plaintiffs.[24] Public officials and entities, most frequently the State Attorney General and the Air Pollution Control Division of the Wayne County Health Department, also have filed actions alleging violations of the statute.[25] Established environmental groups seldom make use of the statute except to intervene in administrative proceedings.[26]

The statute has not been particularly useful for class actions. Since 1976, MEPA plaintiffs have brought only one class action,[27] bringing the total number of plaintiffs' class action suits under MEPA to twenty-five.[28] Class defendants have been named only twice in MEPA's history.[29]

Proceedings at the circuit court[30] level remain central to MEPA's development, though appellate decisions have been instrumental in defining key terms and procedures under the statute.[31] Twenty-nine MEPA cases have involved appellate proceedings.[32] In only three instances,

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Kalamazoo, Kent, Leelanau, Livingston, Macomb, Muskegon, Ottowa, Washtenaw, and Wayne counties. *See* Appendix B *infra*.

21. *See* Appendix B *infra*.

22. *See* Appendix E *infra* for a listing of cases filed under MEPA according to the subject matter of the controversy. *See also* Haynes, *supra* note 6, at 594.

23. *See* Appendix E *infra*.

24. *See* Appendix D *infra* for a listing of cases filed under MEPA according to the identity of the parties. *See also* Haynes, *supra* note 6, at 594-95.

25. *See* Appendix D *infra*.

26. *See* Appendix D *infra*; *see also* Haynes, *supra* note 6, at 594-95.

27. Non-Partisan Progressive Action Comm., Inc. v. Twin County Airport Comm'n, No. M80-156-CA(2), slip op. (W.D. Mich. Feb. 17, 1981).

28. *See* Haynes, *supra* note 6, at 595 n.24. Two more class actions, filed in 1973 but not reported in the Haynes article, were Danyo v. Great Lakes Steel Corp., 93 Mich. App. 91, 286 N.W.2d 50 (Ct. App. 1979) and Dwyer v. City of Ann Arbor, 402 Mich. 915 (1978).

29. Michigan United Conservation Clubs v. Anthony, 90 Mich. App. 99, 280 N.W.2d 883 (1979); Muskegon County v. Environmental Protection Org., No. C-5585, slip op. (Mich. Cir. Ct. May 18, 1971).

30. The circuit courts are the general trial courts of Michigan.

31. *See* Haynes, *supra* note 6, at 591.

32. Anderson v. Michigan State Highway Comm'n; Beaman v. Township of Summit; Concerned Citizens Comm. v. Michigan State Highway Comm'n; Danyo v. Great Lakes Steel Corp.; Dwyer v. City of Ann Arbor; Eyde v. State; Jamens v. Township of Avon; Kimberly Hills Neighborhood Ass'n v. Dion; Kissner v. Board of County Road Comm'rs; Marshall v. Consumers Power Co.; Michigan Oil Co. v. Natural Resources Comm'n; Michigan State Highway Comm'n v. Vanderkloot; Michigan United Conservation Clubs v. Anthony; Oak-

however, has an appellate court overturned a circuit court decision in favor of a plaintiff.[33] The Michigan Supreme Court has heard eight cases involving significant MEPA claims.[34]

II
THE STATUTORY PROVISIONS

MEPA is designed to minimize litigation over procedural issues and "to press the parties as rapidly as possible to the merits of the case."[35] The statute liberally confers standing to plaintiffs "to maintain an action . . . for declaratory and equitable relief . . . for the protection of the air, water and other natural resources and the public interest therein from pollution, impairment or destruction."[36] To prevail under MEPA, plaintiffs must establish a prima facie case by showing that the defendant's conduct "has, or is likely to" cause the pollution, impairment or destruction proscribed by the statute.[37] Defendants can rebut a prima facie case only by demonstrating an absence of "feasible and prudent" alternatives "consistent with the promotion of public health, safety and welfare."[38]

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wood Homeowners Ass'n v. Ford Motor Co.; Oscoda Chapter of PBB Action Comm., Inc. v. Department of Natural Resources; People *ex rel.* Attorney General v. Clinton County Drain Comm'r; Poletown Neighborhood Council v. City of Detroit; Ray v. Mason County Drain Comm'r; Roberts v. State; Robinson v. Department of Transp.; Stevens v. Creek; Superior Public Rights, Inc. v. Department of Natural Resources; Taxpayers and Citizens in the Public Interest v. Department of State Highways; Three Lakes Ass'n v. Kessler; Wayne County Health Department v. Chrysler Corp.; West Michigan Envtl. Action Council, Inc. v. Betz Foundry, Inc.; West Michigan Envtl. Action Council, Inc. v. Natural Resources Comm'n; Whittaker & Gooding Co. v. Scio Township Zoning Bd. of Appeals; Wilcox v. Board of County Road Comm'rs. *See* Appendix B *infra* for full citation data.

33. In Eyde v. State, 393 Mich. 453, 225 N.W.2d 1 (1975), the court of appeals reversed the circuit court's decision for the plaintiff, but was itself reversed by the Michigan Supreme Court. The court of appeals also reversed the decision for plaintiffs in Kimberly Hills Neighborhood Ass'n v. Dion, 114 Mich. App. 495, 320 N.W.2d 668 (Ct. App. 1982), *lv. denied*, 417 Mich. 1045 (1983). In Oscoda Chapter of PBB Action Comm., Inc. v. Department of Natural Resources, 115 Mich. App. 356, 320 N.W.2d 376 (Ct. App. 1982), the court of appeals reversed the circuit court's award of attorneys' fees to the plaintiff.

34. Dwyer v. City of Ann Arbor, 402 Mich. 915 (1978); Eyde v. State, 393 Mich. 453, 225 N.W.2d 1 (1975); Michigan Oil Co. v. Natural Resources Comm'n, 406 Mich. 1, 276 N.W.2d 141, *cert. denied*, 444 U.S. 980 (1979); Michigan State Highway Comm'n v. Vanderkloot, 392 Mich. 159, 220 N.W.2d 416 (1974); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981); Ray v. Mason County Drain Comm'r, 393 Mich. 294, 224 N.W.2d 883 (1975); Waytes v. Ford Motor Land Dev. Corp., No. 60619, slip op. (Mich. Jan. 19, 1978); West Michigan Envtl. Action Council, Inc. v. Natural Resources Comm'n, 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979). *See also* Daniels v. Allen Industries, Inc., 391 Mich. 398, 216 N.W.2d 762 (1974).

35. *See* Sax and DiMento, *supra* note 5, at 5.

36. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1984). MEPA grants standing to "[t]he attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization, or other legal entity." *Id.*

37. *Id.* at § 691.1203(1).

38. *Id.*

To implement the broad environmental mandate of the statute, the legislature implicitly left to the courts the task of developing a common law of environmental quality on a case-by-case basis.[39] Consequently, much MEPA litigation has focused on the threshold question of defining the critical terms "prima facie case," "impairment or destruction," and "natural resources."[40]

A. The Prima Facie Case

To obtain the equitable relief that is the heart of MEPA, section 3 of the statute requires the plaintiff to make a prima facie showing that the defendant's conduct "has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein . . . ."[41] The disjunctive language of section 3 indicates that a plaintiff may establish a prima facie case under MEPA by showing *either* that the defendant's conduct caused past and continuing environmental pollution, impairment, or destruction, *or* that the defendant's probable future conduct will cause such harm.[42] (Interestingly, the statute does not articulate an outside time limit for such probable future conduct.) In *Kimberly Hills Neighborhood Association v. Dion*,[43] the Michigan Court of Appeals concluded that to establish a prima facie case, a plaintiff must show both that a natural resource is involved and that the impact of the activity on the environment rises to a level of impairment sufficient to justify an injunction.[44]

The Michigan Supreme Court, in *Ray v. Mason County Drain Commissioner*,[45] addressed the threshold issue of the requirements for a prima facie case. The court held that the evidence necessary to make such a

39. *See* Ray v. Mason County Drain Comm'r, 393 Mich. 294, 306-07, 224 N.W.2d 883, 888-89 (1975).

40. *See, e.g.*, Ray v. Mason County Drain Comm'r, 393 Mich. 294, 224 N.W.2d 883 (1975); Stevens v. Creek, 121 Mich. App. 503, 328 N.W.2d 672 (Ct. App. 1982); Whittaker & Gooding Co. v. Scio Township Zoning Bd. of Appeals, 117 Mich. App. 18, 323 N.W.2d 574 (Ct. App. 1982).

41. MICH. COMP. LAWS ANN. § 691.1203(1) (West Supp. 1984).

42. *See* Stevens v. Creek, 121 Mich. App. 503, 328 N.W.2d 672 (Ct. App. 1982).

43. 114 Mich. App. 495, 320 N.W.2d 668 (Ct. App. 1982), *lv. denied*, 417 Mich. 1045 (1983).

44. *Id.* at 503, 320 N.W.2d at 671.

45. 393 Mich. 294, 224 N.W.2d 883 (1975) (controversy involving a water channelization project). The court examined the issue of the necessary showing for a prima facie case despite the defendant's concession on appeal that the plaintiff had made out a prima facie case. *See id.* at 310 n.11, 224 N.W.2d at 890 n.11. In making its examination, the court adopted the following definition of a prima facie case:

> A litigating party is said to have a *prima facie* case when the evidence in his favor is sufficiently strong for his opponent to be called upon to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side. Black's Law Dictionary (4th ed.), p. 1353.

Id. at 310, 224 N.W.2d at 890.

showing would "vary with the nature of the degradation involved,"[46] and remanded the action to the circuit court for a finding on whether the plaintiff had pleaded sufficient facts to meet his burden. The supreme court implied, however, that the plaintiff had in fact established a prima facie case, even though the evidence of environmental harm was somewhat tentative.[47] In support, the court singled out specific testimony that buttressed the plaintiff's showing and noted with approval the defendant's concession on appeal that "clearly" a "prima facie case for impairment of natural resources under section 3(1)" had been made out.[48]

The *Ray* decision indicates that MEPA plaintiffs need not develop elaborate scientific evidence or demonstrate adverse effects with certainty in order to make a prima facie showing. The decision stresses that the statute only requires evidence that a defendant's conduct is "likely" to pollute, impair or destroy.[49] Moreover, the *Ray* court's emphasis on MEPA's goal of providing citizens with real access to the statute's remedies suggests that the burden of providing expensive and detailed studies of uncertain effects should rest with the defendant as a rebuttal obligation, and not with the plaintiff as a requirement of establishing a prima facie case. MEPA's effectiveness as a grassroots citizens' environmental protection statute would be severely curtailed if plaintiffs were, at the initiation of a MEPA suit, expected to come forward with extensive and detailed scientific data describing most, if not all, conceivable environmental repercussions of the defendant's conduct.[50]

Once a plaintiff makes the necessary showing, a defendant may both rebut the prima facie case and raise the affirmative defense that a "feasible and prudent" alternative does not exist.[51] The majority of defendants in MEPA actions have elected not to raise the affirmative defense, and instead have attempted to persuade the court that the plaintiff has failed at the threshold to establish a prima facie case. In some cases, the testimony of expert witnesses is sufficient to rebut the prima facie case.[52] In

46. *Id.* at 309, 224 N.W.2d at 889.

47. The evidence in that case was far from conclusive. A hydrologist testified that the water table for land adjacent to the channel would be lowered as a result of the proposed channelization project. At the same time, though, he maintained that without proper tests it would be impossible to determine whether the surrounding wetlands would dry up if the water table was lowered. A former conservation instructor described the wetlands as including a biologically unique quaking forest that might be destroyed should the water table be lowered. The testimony also included a zoology professor's discussion of the desirability of preserving bogs and marshes in order to maintain a diversified natural area for wildlife. *Id.* at 310 n.11, 224 N.W.2d at 890 n.11.

48. *Id.* at 310, 224 N.W.2d at 890 (quoting appellee's brief at 5).

49. *Id.* at 309, 224 N.W.2d at 889.

50. *See* Sax Draft, *supra* note 4, at 8.

51. MICH. COMP. LAWS ANN. § 691.1203(1) (West Supp. 1984).

52. Ray v. Mason County Drain Comm'r, 393 Mich. 294, 312 n.12, 224 N.W.2d 883, 892 n.12 (1975). In *Ray*, the defendant offered the testimony of an agronomist who had concluded that the wetlands would not dry up. Though the court did not expressly determine whether

others, the defendant may need to present field studies, scientific tests and analyses.[53]

In *Wayne County Health Department v. Olsonite Corp.*,[54] the Michigan Court of Appeals addressed the tug-of-war over where the threshold for a MEPA violation should be set. The court upheld the circuit court's finding that the plaintiff had established a prima facie case supported by the testimony of citizens and air pollution field inspectors. The defendant argued that the testimony regarding noxious odors arising from industrial painting operations was insufficient because of the absence of scientific or medical testimony establishing the harmfulness of the odors emanating from Olsonite's plant.[55] Attempting to rebut the plaintiff's prima facie case, Olsonite introduced tests conducted by its employees. The court expressly found that the defendant had failed to rebut the prima facie case because these "self-serving tests" were not the kind of empirical studies required by *Ray* in this situation.[56] *Olsonite* thus suggests that the threshold for establishment of a prima facie case is low.[57]

The Michigan Court of Appeals also allowed a minimal prima facie showing in *Michigan United Conservation Clubs v. Anthony*.[58] In that case, the defendants argued that the potential harm caused to fish populations by unregulated Native American fishing could not be ascertained with any reasonable certainty. The court responded by finding that MEPA, as interpreted by the Michigan Supreme Court in *Ray v. Mason County Drain Commissioner*,[59] requires a plaintiff to establish a prima facie case and no more, and that this showing encompasses probable as well as actual environmental degradation.[60] The court further held that

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the agronomist's testimony was sufficient to rebut plaintiff's prima facie case, the court, in dictum, implied that it was not. *Id.*

53. *See id.* at 311-12, 224 N.W.2d at 891-92.

54. 79 Mich. App. 668, 263 N.W.2d 778 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978).

55. *Id.* at 696, 263 N.W.2d at 792.

56. *Id.* at 699, 263 N.W.2d at 794.

57. *But see* Non-Partisan Progressive Action Comm., Inc. v. Twin County Airport Comm'n, No. M80-156-CA(2), slip op. (W.D. Mich. Feb. 17, 1981), in which the plaintiffs, in their efforts to block the federally funded expansion of an airport, filed a complaint which included a MEPA count. The plaintiffs argued that the heightened noise impact caused by an increased number of take-offs and landings was an "impairment of natural resources," and they demonstrated the existence of feasible alternative sites. The plaintiffs' claim that Water Tower Park, a recreational park located near the proposed runway site, would be adversely affected by the increased noise was supported by conclusions reached by the U.S. Department of Interior. The Federal Aviation Administration advanced contrary conclusions without ever clearly explaining the discrepancy. Nonetheless, the court held that the plaintiffs had not shown that Water Tower Park would be adversely affected by construction of the new runway, and thus had failed to establish a prima facie case. *Id.* at 8.

58. 90 Mich. App. 99, 280 N.W.2d 883 (Ct. App. 1979).

59. 393 Mich. 294, 224 N.W.2d 883 (1975).

60. Michigan United Conservation Clubs v. Anthony, 90 Mich. App. 99, 105-06, 280 N.W.2d 883, 888-89 (Ct. App. 1979).

while the harm was not precisely ascertainable, evidence supported the conclusion that the defendants' actions would have an injurious impact on the fish population. Under MEPA's standard requiring a showing of probable rather than certain harm, the defendants had failed to rebut the plaintiff's prima facie case.[61]

B. Impairment or Destruction

The terms "impairment" and "destruction," drawn from, but not defined by, the environmental section of the Michigan Constitution,[62] have prompted another tug-of-war between plaintiffs and defendants, and again the plaintiffs have generally prevailed. Defendants have suggested that these terms mean some form of utter and irreparable ruination. In *Anthony*, however, the court of appeals stated that the word "impairment" connotes a much milder form of harm. The court, defining "impair" as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or *otherwise affect in an injurious manner*,"[63] held that an injunction could issue under MEPA to prevent conduct which would probably injure the fish population in the Great Lakes.

The Michigan Supreme Court addressed the same issue in *West Michigan Environmental Action Council, Inc. v. Natural Resources Commission*.[64] The Department of Natural Resources (DNR), defending its leases of large tracts of state-owned land to oil companies, took the position that no violation of MEPA occurred without a showing of permanent and irreparable damage to the state's natural resources. Conceding that oil drilling in the Pigeon River Country State Forest might have an adverse impact on local wildlife, DNR claimed that there still could be no finding of impairment or destruction because the individual species of wildlife would probably recover over time and because it was unlikely that the overall forest environment would be harmed. The supreme court acknowledged that virtually all human activities have some adverse impact on natural resources.[65] This compelled the court to address the threshold at which an adverse impact becomes impairment or destruction sufficient to violate MEPA.[66] DNR's own environmental impact study stated that the drilling would affect an elk herd unique to Michigan, that the population of the herd had declined by nearly ninety percent over the previous twenty years as a result of human encroachment on the elk habitat, and that efforts to introduce the elk elsewhere in

61. *Id.* at 108-09, 280 N.W.2d at 889.

62. MICH. CONST. art. IV, § 52.

63. Michigan United Conservation Clubs v. Anthony, 90 Mich. App. 99, 105-06, 280 N.W.2d 883, 888-89 (Ct. App. 1979) (emphasis added).

64. 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979).

65. *Id.* at 760, 275 N.W.2d at 545.

66. *Id.* at 754-59, 275 N.W.2d at 542-45.

Michigan had been unsuccessful.[67] Rejecting the defendant's position, the court found the elk herd to be unique and in danger of "apparently serious and lasting, though unquantifiable, damage" from the drilling for oil in the elk's natural habitat. The court then held that the defendant's leasing of the land to the oil companies constituted "impairment or destruction" of a natural resource under MEPA.[68]

In 1982, the court of appeals, in *Kimberly Hills Neighborhood Association v. Dion*,[69] again faced the question of the "impairment or destruction" of natural resources. Defendant Dion planned to construct ninety single family homes on an eighteen-acre wooded site. The trial judge found that, although the defendant's property apparently lacked a natural resource "peculiar" to the state and although the property possessed much the same character as the surrounding region, the wildlife, trees, and wetlands neighboring the defendant's pond constituted protected natural resources under MEPA.[70] The trial judge issued an injunctive order which set aside four acres for a nature preserve and restricted the development of an additional five acres.[71] The court of appeals reversed, holding that plaintiffs had not demonstrated "from a statewide perspective, that development will actually interfere with the maintenance of diversified natural areas for wildlife"[72] and that "the impacts shown by the plaintiffs did not amount to the requisite statutory impairment."[73]

If future decisions adopt the reasoning of *Kimberly Hills*, courts will be denying relief to injured plaintiffs merely because of their failure to establish statewide impairment. This result represents a clear departure from the long line of MEPA decisions in which plaintiffs established prima facie cases by proving localized impairment.[74] The *Kimberly Hills* decision is also inconsistent with the legislative history of MEPA which

67. *Id.* at 755 n.3, 760, 275 N.W.2d at 543 n.3, 545.

68. *Id.* at 760, 275 N.W.2d at 545.

69. 114 Mich. App. 495, 320 N.W.2d 668 (Ct. App. 1982), *lv. denied*, 417 Mich. 1045 (1983).

70. Kimberly Hills Neighborhood Ass'n v. Dion, No. 79-16452-CH, slip op. at 5-6 (Mich. Cir. Ct. Mar. 28, 1979) (also published as Appendix 2 to Kimberly Hills Neighborhood Ass'n v. Dion, 114 Mich. App. 495, 520, 320 N.W.2d 668, 677 (Ct. App. 1982)).

71. No. 79-16452-CH (Mich. Cir. Ct. Mar. 28, 1979)(order granting injunction) (also published as Appendix 1 to Kimberly Hills Neighborhood Ass'n v. Dion, 114 Mich. App. 495, 510, 320 N.W.2d 668, 674 (Ct. App. 1982)).

72. Kimberly Hills Neighborhood Ass'n v. Dion, 114 Mich. App. 495, 320 N.W.2d 668, 674 (Ct. App. 1982), *lv. denied*, 417 Mich. 1045 (1983).

73. *Id.* at 508, 320 N.W.2d at 673-74.

74. *See, e.g.*, Dwyer v. City of Ann Arbor, 79 Mich. App. 113, 261 N.W.2d 231 (Ct. App. 1977), *rev'd on other grounds*, 402 Mich. 915 (1978) (sewage discharge into Huron River); Eyde v. State, 393 Mich. 453, 225 N.W.2d 1 (1975), *on remand*, slip op. (Mich. Cir. Ct. Sept. 21, 1976), *aff'd*, 82 Mich. App. 531, 267 N.W.2d 349 (Ct. App. 1978) (construction of a sewer on a 50-foot wide easement); Oakwood Homeowners Ass'n v. Ford Motor Co., 77 Mich. App. 197, 258 N.W.2d 475 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978) (air pollution in an eight block area); Wayne County Health Dep't v. Olsonite Corp., 79 Mich. App. 668, 263 N.W.2d 778 (Ct. App. 1977) (air pollution from a single factory).

expresses a legislative intent to achieve more than simply a delay of environmental catastrophes. MEPA is designed to protect against the gradual erosion of environmental quality and is specifically structured to discourage the "nibbling" away of natural resources.[75]

In its post-*Kimberly Hills* decisions, the court of appeals appears to have returned to its former, more appropriate construction of the Act.[76] In *Stevens v. Creek*,[77] the plaintiff alleged that the defendant trespassed on her property and cut down trees in an area which she maintained in a natural state as a wildlife preserve. The circuit court, while finding for the plaintiff on the trespass claim, dismissed the MEPA count. The court of appeals reinstated the MEPA count, stating that the removal of trees constituted destruction of a natural resource under MEPA and that the circuit court should have allowed the plaintiff to prove the impact of the defendant's conduct.[78] The court reasoned that the environmental impact study and the expert testimony of an ecologist offered by the plaintiff "could possibly have established a prima facie case under the Act."[79] On remand, the circuit court held for the plaintiff on the MEPA claim and ordered the defendant to pay part of the restoration costs, as well as court costs and attorneys' fees.[80]

C. *Natural Resources*

MEPA provides for the protection of air, water and "other natural resources and the public trust therein,"[81] without attempting to define

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75. *See* Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as a Model of a Minimal Requirement*, 7 HARV. ENVTL. L. REV. 107, 109-11 (1983).

76. The decision in *Kimberly Hills*, however, may have already distorted the approach of some circuit courts. In Rush v. Sterner, No. 82-B-7902-CZ, slip op. (Mich. Cir. Ct. Apr. 27, 1983), the circuit court, citing *Kimberly Hills*, dismissed the suit after holding that the plaintiffs had failed to establish a prima facie case. *Id.* at 16. The plaintiffs had brought the suit to prevent the closing of a dam. To establish a prima facie case, the court required the plaintiffs to demonstrate the uniqueness of the threatened species or of the nature of the thing to be preserved. In presenting his decision, the trial judge reasoned:

> So, if we follow the Court of Appeals in the Kimberly Hills Association versus Dion, we cannot consider in behalf of these plaintiffs the adverse impact—we can't consider it in context of individual animals, for [sic] this case trout, or neighborhoods, but it must be in total populations and ecological communities . . . .
>
> So, therefore, the relief under [MEPA] is not appropriately granted where the property at issue is not unique in character nor is it the natural habitat for any unique or rare plants or wildlife, and the destruction of the natural habitat will not have a significant impact upon either the local or state-wide population of the wildlife affected.

Id. at 10-11.

77. 121 Mich. App. 503, 328 N.W.2d 672 (Ct. App. 1982).

78. *Id.* at 507-08, 328 N.W.2d at 675.

79. *Id.* at 508, 328 N.W.2d at 675.

80. The court of appeals had already held that "[r]estoration of the natural habitat is a proper remedy" under MEPA. *Id.* at 508, 328 N.W.2d at 675. *See also* Hillsdale Daily News, Apr. 30, 1983 at 3A, col. 1.

81. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1984).

these terms. Defendants frequently concede that even minimal air and water pollution will suffice to establish a prima facie showing of injury under MEPA.[82] The extent of the "other natural resources" protected by MEPA, and the effect of the additional protection of "the public trust therein," however, are commonly contested.

MEPA's "public trust" language, codifying a comprehensive right to resource use and enjoyment,[83] gives the statute a potentially broader application than that of simply protecting and preserving physical resources.[84] In *Stevens v. Creek*, though, the court of appeals pointed out that the public trust doctrine is not a mandatory element of all MEPA cases.[85] The circuit court had dismissed the plaintiff's MEPA count, holding that MEPA did not apply, and thus that the plaintiff had failed to state a cause of action "because there was no public trust involved in this matter."[86] The court of appeals reversed, stating: "We find nothing in the language which would limit the protections in the act to natural resources affecting land in which there is a public trust or a right to public access."[87]

When plaintiffs bringing MEPA suits have sought to invoke the public trust doctrine, the courts have responded by attempting to establish parameters for the doctrine's application. In *Taxpayers and Citizens in the Public Interest v. Department of State Highways*, for example, the controversy focused on the sale of a small tract of land, located adjacent to a state highway, to a motel developer.[88] The plaintiffs contended that, until its sale, the tract had been available for recreational uses by the general public, and that these uses had become "functionally integrated into the property."[89] The circuit court, however, held that the tract could not be considered a public trust such that the sale of the land for private development "constitutes an unreasonable impairment of the

82. *See, e.g.*, Pine Lake Property Owners Ass'n, Inc. v. County of Oakland, No. 77-155423-CE, slip op. (Mich. Cir. Ct. Jan. 1, 1978) (proposed drain would increase untreated storm water runoff). *See also* Eyde v. State, 393 Mich. 453, 225 N.W.2d 1 (1975) (proposed sewer route threatened ecological damage to a nearby creek); Sax Draft, *supra* note 4, at 2.

83. Professor Joseph L. Sax, author of MEPA's first draft, explains the public trust concept in Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

84. *See* ENVIRONMENTAL LAW SOCIETY OF THE UNIVERSITY OF MICHIGAN SCHOOL OF LAW, ENVIRONMENTAL LAW IN MICHIGAN 126 (1982) [hereinafter cited as ENVIRONMENTAL LAW IN MICHIGAN].

85. Stevens v. Creek, 121 Mich. App. 503, 507, 328 N.W.2d 672, 674 (Ct. App. 1982).

86. *Id.* at 506, 328 N.W.2d at 674.

87. *Id.* at 507, 328 N.W.2d at 674.

88. No. 3137, slip op. (Mich. Cir. Ct. Nov. 29, 1973). *See* Sax and DiMento, *supra* note 5, at 32-34.

89. From notes taken at trial, on file with Professor Joseph L. Sax at the University of Michigan School of Law. *See* Sax and DiMento, *supra* note 5, at 33. Witnesses for the plaintiffs testified that the tract was used for fishing, weed picking, bird watching, and other recreational and nature-study purposes.

public interest."[90]

The plaintiffs in *Superior Public Rights, Inc. v. Department of Natural Resources*[91] also drew upon the public trust doctrine to challenge DNR's grant of an easement permitting the development of approximately 250 acres of Lake Superior bottomland. The plaintiffs' challenge failed. The court of appeals, however, refused to uphold the circuit court's conclusion that a circuit court is required to make an independent, de novo factual determination of the propriety of granting such an easement without relying on administrative findings.[92]

More litigation has focused on determining the scope of the term "natural resources" than on interpreting the public trust doctrine. The Michigan courts have held that fish[93] and wildlife[94] are natural resources. In *Ray v. Mason County Drain Commissioner*,[95] the Michigan Supreme Court evidently assumed that the subject matter of the case, described as "a biologically unique 'quaking forest,' swamps and potholes, and scattered, wooded areas which serve as a refuge for a wide variety of wildlife,"[96] was a natural resource covered by MEPA. MEPA has also been used in the courts to protect water courses,[97] and to prevent soil erosion, impairment of scenic roads, and damage to trees.[98] The decisions in a wide range of cases involving such diverse subjects as off-road vehicle management, pipeline location, mining, harbor development, and land drainage from construction further demonstrate that the courts have given broad construction to the term "natural resources."[99]

The court of appeals has further held that natural resources need not be unique nor possess an unusual or special quality to come within MEPA's protection. In *Kimberly Hills Neighborhood Association v. Dion*,[100] the defendants argued that the land in question should not be

90. Taxpayers and Citizens in the Public Interest v. State, No. 3137, slip op. at 15 (Mich. Cir. Ct. Nov. 29, 1973).

91. 80 Mich. App. 72, 263 N.W.2d 290 (Ct. App. 1977).

92. *Id.* at 81, 263 N.W.2d at 294; *see* Haynes, *supra* note 6, at 601-02 for a discussion of the case; *see also* Sax and DiMento, *supra* note 5, at 15.

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

94. *See* West Michigan Envtl. Action Council, Inc. v. Natural Resources Comm'n, 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979).

95. 393 Mich. 294, 224 N.W.2d 883 (1975).

96. *Id.* at 299, 224 N.W.2d at 885.

97. *See* Dwyer v. City of Ann Arbor, 79 Mich. App. 113, 261 N.W.2d 231 (Ct. App. 1977), *rev'd on other grounds*, 402 Mich. 915 (1978); Eyde v. State, 393 Mich. 453, 225 N.W.2d 1 (1975).

98. *See* Irish v. Green, 2 ENVTL. L. REP. (ENVTL. L. INST.) 20,505, 4 Env't Rep. Cas. (BNA) 1402 (Mich. Cir. Ct. 1972).

99. *See* Haynes, *supra* note 6, at 693-95; *see also* Waytes v. Ford Motor Land Dev. Corp., No. 60629, slip op. (Mich. Jan. 19, 1978); Wilcox v. Board of County Road Comm'rs, No. 13835, slip op. (Mich. Ct. App. Mar. 31, 1972).

100. 114 Mich. App. 495, 320 N.W.2d 668 (Ct. App. 1982), *lv. denied*, No. 69570 (Mich. June 30, 1983).

viewed as a natural resource under MEPA because the term "natural resource," as construed under the Act, should be limited to "those resources unique or relatively rare or in some way ecologically important, upon which the defendant's conduct will have a substantial adverse affect."[101] The defendants further pointed out that the supreme court had on several occasions narrowly described the natural resources protected by MEPA as "unique."[102] The *Kimberly Hills* court found, however, that the term "natural resources" properly embraced the land at issue in the case and that there was no requirement that the resources be unique, relatively rare, or even ecologically important.[103]

This broad construction has limits, however. The Michigan Supreme Court has held that the "natural resources" protected by MEPA do not include the historical, social and cultural resources of an ethnic neighborhood. In *Poletown Neighborhood Council v. City of Detroit*,[104] the plaintiffs challenged the City of Detroit's efforts to condemn land in an ethnic community in order to construct a new automobile assembly factory. According to the court, the plain meaning of the term "natural resource" does not encompass a "social and cultural environment."[105] Similarly, the court of appeals, in *Whittaker & Gooding Co. v. Scio Township Zoning Board of Appeals*,[106] affirmed the circuit court's holding that the protections codified in MEPA do not extend to the exploration for, or development of, natural resources.[107]

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101. *Id.* at 504, 320 N.W.2d at 671.

102. *See, e.g.*, Ray v. Mason County Drain Comm'r, 393 Mich. 294, 299 n.11, 224 N.W.2d 883, 890 n.11 (1975); West Michigan Envtl. Action Council, Inc. v. Natural Resources Comm'n, 405 Mich. 741, 755, 275 N.W.2d 538, 545, *cert. denied*, 444 U.S. 941 (1979).

103. Kimberly Hills Neighborhood Ass'n v. Dion, 114 Mich. App. 495, 504, 507, 320 N.W.2d 668, 671, 673 (Ct. App. 1982), *lv. denied*, 417 Mich. 1045 (1983).

104. 410 Mich. 616, 304 N.W.2d 455 (1981).

105. *Id.* at 635, 304 N.W.2d at 460; *see also* Hand, *supra* note 15.

106. 117 Mich. App. 18, 323 N.W.2d 574 (Ct. App. 1982).

107. The plaintiff, owner of a gravel pit in Scio Township, having obtained only a conditional use permit with a five year term to mine the gravel, had filed suit to prevent the township from impeding its exploration of the natural resources. The court stated that "[a] zoning permit which prohibits a developer from mining every last bit of gravel in a pit would not seem to impair any natural resource." *Id.* at 22, 323 N.W.2d at 576.

Judicial interpretation of the scope of the term "natural resources" has generated other difficult questions, such as whether MEPA protects a purely "aesthetic" interest. In Brotz v. Detroit Edison Co., No. 2201, slip op. (Mich. Cir. Ct. Dec. 26, 1973), the court rejected the use of MEPA for this limited purpose, holding that although construction of the proposed electrical transmission towers and conductors might offend the aesthetic sensibilities of the property owners, their presence would not give rise to a MEPA violation. In Irish v. Green, 2 ENVTL. L. REP. (ENVTL. L. INST.) 20,505, 4 Env't Rep. Cas. (BNA) 1402 (Mich. Cir. Ct. 1972), on the other hand, the court allowed MEPA to be invoked to protect the quality of a scenic road. Ultimately, the use by plaintiffs and courts of the vague term "aesthetic" may confuse rather than clarify interpretation of the statutory language. Whether a forest, creek or a sand dune is characterized as a "natural resource" or merely as an "aesthetic" interest might depend upon the announced goals of the party invoking MEPA. For example, in Waytes v. Ford Motor Land Dev. Corp., No. 60619, slip op. (Mich. Jan. 19, 1978), the plaintiffs, seeking

III
THE AFFIRMATIVE DEFENSE

Once a plaintiff establishes a prima facie case under MEPA, the defendant may either (1) rebut the showing by submitting evidence to the contrary or (2) assert the affirmative defense that no feasible and prudent alternative to the defendant's conduct exists and that defendant's conduct is consistent with the promotion of public health, safety, and welfare.[108] Michigan courts have examined elements of the MEPA affirmative defense, but have yet to address the public interest aspects of the defense.[109]

A. Feasible and Prudent Alternatives

The most important decision thus far regarding the use of the affirmative defense is *Wayne County Health Department v. Olsonite Corp.*[110] In *Olsonite*, the painting process used in one of the defendant's manufacturing plants emitted offensive odors, prompting widespread neighborhood complaints. The Air Pollution Control Division of the Wayne County Health Department demanded that the problem be remedied, but the odor persisted despite attempts by the defendant at mitigation. The Health Department eventually brought suit under MEPA. Olsonite, after failing to prevent the suit,[111] asserted the affirmative defense, claiming that it had taken all feasible and prudent steps to alleviate the problem. The principal defense witness testified that Olsonite had installed a "water curtain" and had attempted to obtain other odor control systems. The witness further discussed the costs of the control systems considered by Olsonite and testified that each system had drawbacks which made its use unacceptable to the company.[112]

The circuit court rejected Olsonite's affirmative defense. The court observed that on cross-examination the defense witness had not only

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to protect a beech and maple forest, could be characterized as attempting to preserve the forest either as a natural woodland resource or, alternatively, as an aesthetic amenity for the neighborhood.

Professor Joseph L. Sax argues that MEPA was broadly intended to protect natural resources for amenity and associated economic interests, and that "there is no reason to discriminate about sand dunes—or other such objects—depending on whether people like to climb them, view them or maintain them as protective barriers against the forces of the lakes." Sax Draft, *supra* note 4, at 5.

108. MICH. COMP. LAWS ANN. § 691.1203(1) (West Supp. 1984).

109. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 134.

110. 79 Mich. App. 668, 263 N.W.2d 778 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978).

111. Olsonite argued that MEPA's substantive standards were identical to those of a common law nuisance action, and that the company had met the requirements for avoiding such a claim. The court rejected the defendant's comparison, finding that MEPA constitutes a separate substantive body of law superseding the common law of nuisance to the extent of any conflict. *Id.* at 693-94, 263 N.W.2d at 791.

112. *Id.* at 683, 263 N.W.2d at 786.

been vague about the extent of Olsonite's investigation into alternate odor control systems, but that he also had acknowledged Olsonite's failure to commission pilot tests and engineering drawings.[113] The company, further, had neither attempted to negotiate reductions in the quoted costs of pollution control devices nor to ascertain the availability of less expensive pollution abatement alternatives.[114] The trial judge characterized the tests that were conducted by Olsonite's employees as "self-serving," finding that these tests could not overcome the weight of testimony given by Health Department inspectors, neighborhood residents and the plaintiff's expert witness.[115] The court of appeals affirmed the circuit court's holding that the defendant had failed to establish that there was no feasible and prudent alternative to the continued pollution.[116]

The affirmative defense, as construed by the *Olsonite* court, permits public scrutiny of a defendant's efforts to minimize the harm caused by its conduct. A defendant no longer can claim that its prior efforts to mitigate such harm lack sufficient relevance to be subject to discovery. Rather, under MEPA the defendant must make this information available to the plaintiff and to the court. The defendant's efforts will then be subject to examination in light of other "feasible" and "prudent" alternatives offered by the plaintiff.

The *Olsonite* court focused upon practical aspects of the affirmative defense. The court's decision, however, also contained a lengthy discussion of legal aspects of the defense. The court construed the Act to prevent defendants from prevailing on the affirmative defense if they fail to implement less than ideal pollution control alternatives while waiting for an alternative "guaranteed to eliminate all citizen complaints."[117] The court found that to succeed in its affirmative defense, Olsonite must demonstrate a continuing effort to "keep its emitted fumes to a 'practical minimum.' "[118] The court adopted the position that an alternative may be economically feasible even if it would substantially increase production costs, burden finances or adversely affect profits.[119] In fact, an alternative which could put a company out of business may be feasible and consistent with the purpose of the Act. This situation might arise if a

113. *Id.* at 684, 263 N.W.2d at 787.

114. *Id.* at 684-85, 263 N.W.2d at 787.

115. The circuit court also found it significant that "not one of the company employees who conducted the tests was called to testify, subject to cross-examination." Wayne County Health Dep't v. Olsonite Corp., No. 73-252680-CE, slip op. (Mich. Cir. Ct. Dec. 15, 1976).

116. Wayne County Health Dep't v. Olsonite Corp., 79 Mich. App. 668, 688, 263 N.W.2d 778, 789 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978).

117. *Id.* at 702-03, 263 N.W.2d at 796.

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

119. *Id.* at 704, 263 N.W.2d at 796, *citing* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974).

company, by its own volition, has lagged behind industry health and safety standards and for financial reasons is unable to comply with new standards as quickly as can other companies.[120] Finally, the *Olsonite* court found that to overcome the affirmative defense, a plaintiff need not prove the availability of a system which would be certain to eliminate the harm. The plaintiff must only show the existence of an alternative which "is *likely* to work out or be put into effect successfully."[121]

In making a determination of whether an alternative is "prudent," the *Olsonite* court found a comprehensive balancing of competing interests to be inappropriate.[122] To interpret the meaning of prudent, the court looked to the United States Supreme Court's opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[123] In *Overton Park*, the Supreme Court examined nearly identical language of provisions of the Department of Transportation Act prohibiting the Secretary of Transportation from authorizing the use of federal funds to finance highway construction through public parks if "feasible and prudent alternative" routes exist.[124] The Supreme Court concluded that "public parks were not to be lost unless there were truly unusual factors" dictating that feasible alternative routes were not available.[125] The Court indicated that such a situation might arise when the "costs of community disruption resulting from alternative routes reached [an] extraordinary magnitude."[126] The Michigan Court of Appeals applied the Supreme Court's reasoning to the facts in *Olsonite* and held that the "defendant has failed to show the technical, economic infeasibility and the imprudence of alternatives to defendant's conduct."[127]

B. The Search for Alternatives

As construed by the *Olsonite* court, the requirements of the affirmative defense are stringent and, consequently, not easily satisfied. This suggests that public and private enterprises which may have had to defend themselves in suits alleging MEPA violations must explore alterna-

120. *Id.*

121. *Id.* at 702, 263 N.W.2d at 796 (emphasis added).

122. *Id.* at 704-05, 263 N.W.2d at 797.

123. 401 U.S. 402 (1971).

124. Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1982). Professor Joseph L. Sax drew upon the language of the federal statute when he wrote MEPA's initial draft. *See* Sax Draft, *supra* note 4, at 19. Similar language also appears in the Federal Highway Act of 1968, 23 U.S.C. § 138 (1982).

125. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971), *quoted in* Wayne County Health Dep't v. Olsonite Corp., 79 Mich. App. 668, 705, 263 N.W.2d 778, 797 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978).

126. 401 U.S. 402, 411 (1971), *quoted in* Wayne County Health Dep't v. Olsonite Corp., 79 Mich. App. 668, 705, 263 N.W.2d 778, 797 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978).

127. 79 Mich. App. at 705, 263 N.W.2d at 797.

tives to their present or proposed activites that are both workable and less environmentally harmful.[128] The mandatory search for such alternatives, however, need not impair the ability of either private or public enterprises to carry out their necessary functions. In *Pine Lake Property Owners Association, Inc. v. County of Oakland*,[129] the County Drain Commission asserted the affirmative defense to justify its decision to build a pipeline drain in a residential subdivision. The subdivision, built in 1952, had been served by an open grassy ditch which guided untreated storm water runoff to the Pine Lake Canal, a watercourse which filtered out most of the nutrients.[130] The effectiveness of the system declined over the years as the culverts became clogged and the ditch disappeared. The Drain Commission proposed installing a pipeline drain which would deposit untreated storm water runoff directly into the lake. The court found that the project posed "a serious threat of pollution and destruction to the natural resources,"[131] and that not only a feasible but the best alternative was to rebuild the open drain which had served the subdivision for twenty-five years.[132]

In two cases, the courts have themselves fashioned compromise alternatives. In *Irish v. Green*,[133] the court responded to claims that construction of a proposed housing project would adversely affect the environmental amenities of the area by requiring that the developer: (1) not build more than forty percent of the projected homes until a central sewer system had been constructed and put into use; (2) construct a new access road to protect an existing scenic road; and (3) implement methods that would minimize surface erosion during site clearance. In *Eyde v. State*,[134] on the other hand, the Michigan Supreme Court reinstated the circuit court's grant of an injunction against the proposed condemnation of a sewer line, but required the plaintiff-landowner to provide an alternate route across his property that would diminish the adverse impact on the environment without significantly jeopardizing the condemning authority's overall plan. Subsequently, the court of appeals affirmed

128. *See* Sax Draft, *supra* note 4, at 19. In enacting MEPA, the Michigan legislature rejected an amendment which would have inserted the phrase "considering all relevant surrounding circumstances and factors" before the "feasible and prudent" language of the affirmative defense requirements. Wayne County Health Dep't v. Olsonite Corp., 79 Mich. App. 668, 705, 263 N.W.2d 778, 797 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978).

129. No. 77-155423-CE, slip op. (Mich. Cir. Ct. Jan. 2, 1978).

130. *Id.* at 2.

131. *Id.* at 5. Increases in the level of aquatic plant nutrients, such as phosphorus, accelerate the aging process of lakes. This process, called eutrophication, is characterized by increased plant growth and the continuous buildup of sediment on the lake bottom. Ultimately, the lake will be transformed into a bog or even a meadow. *Id.* at 4.

132. *Id.* at 5.

133. 2 ENVTL. L. REP. (ENVTL. L. INST.) 20,505, 4 Env't Rep. Cas. (BNA) 1402 (Mich. Cir. Ct. 1972).

134. 393 Mich. 453, 225 N.W.2d 1 (1975).

the circuit court's order that the state reforest the area around the condemned easement.[135]

Although recurrent use of the affirmative defense by MEPA defendants encourages courts to validate imaginative alternatives, the Michigan Supreme Court has suggested that there are limits to the alternatives the courts can direct. In *Oscoda Chapter of PBB Action Committee, Inc. v. Department of Natural Resources*,[136] the only supreme court decision that comprehensively examines the affirmative defense, the court held that courts have no power under MEPA to order the *best* alternative if the alternative chosen by the defendant does not itself violate MEPA.[137] In *Oscoda*, county commissioners challenged the Department of Natural Resources' initial plan simply to bury PBB-contaminated cattle in an unlined pit. When the circuit court determined that burial in this manner would violate MEPA, the Department of Natural Resources proposed to bury the cattle in a clay-lined pit. The circuit court agreed that the alternative posed by this proposal was both feasible and prudent and met the public need for quick disposal of the cattle. The plaintiffs then claimed that incineration, though not immediately available,[138] was the best alternative. Stating that the Act "does not confer plenary power on the courts to do whatever they might think preferable in environmental cases," the supreme court held that because burial in clay-lined pits had not been found in itself to "pollute, impair or destroy," the question of the affirmative defense never arose and, therefore, the court was without authority to order another alternative even though it might find the alternative more desirable.[139]

The *Oscoda* court, however, could have avoided the question of preferred alternatives altogether. There did not presently exist a feasible and prudent alternative to clay-lined pits.[140] Burial without the clay liner would have violated MEPA simply because burial with the liner was a feasible and less polluting alternative. Although incineration might have

135. Eyde v. State, 82 Mich. App. 531, 540-41 (Ct. App. 1978).

136. 403 Mich. 215, 268 N.W.2d 240 (1978). This case, together with two other MEPA cases, Board of Comm'rs of Kalkaska County v. State, No. 21052, slip op. (Mich. Ct. App. July 25, 1974) and Kretzman v. Farm Bureau Servs., Inc., No. 74-16383-CE (Mich. Cir. Ct. filed Sept. 17, 1974), were filed after several herds of cattle were fed with feed contaminated with polybrominated biphenyl (PBB).

137. 403 Mich. at 231-33, 268 N.W.2d at 246-47.

138. The need for immediate disposal of the PBB-contaminated cattle was exacerbated by the fact that the 400 head of cattle had been placed, three to a drum, in cold storage, and the owners needed the storage space for that year's crops. *Id.* at 226-28, 268 N.W.2d at 245.

139. *Id.* at 231, 268 N.W.2d at 246.

140. The circuit court had permitted the burial of contaminated cattle in clay-lined pits to continue for six months, but enjoined any further burials after the six months had elapsed. *Id.* at 228, 268 N.W.2d at 245. The state subsequently mooted the controversy by announcing that thereafter contaminated cattle would not be incinerated, but rather would be shipped to Nevada for burial. Letter from James M. Olson, attorney for the plaintiffs, to Professor Joseph M. Sax (May 15, 1981).

been considered preferable to pits, it would not have been considered a feasible alternative because it would have required a delay of several months in the disposal of the contaminated cattle and the public interest required immediate disposal.

Even though the issue could have been avoided, the court's conclusion that courts are not empowered to decide which among several feasible alternatives the defendant should adopt was nonetheless correct. Initially, a court must decide whether or not a defendant's conduct or proposed conduct violates MEPA. If the conduct does not violate MEPA, the court need not consider alternative courses of action. If the conduct does cross the threshold and the defendant raises the affirmative defense, then the court must consider whether *any* feasible and prudent alternatives exist. If *any* qualifying alternatives are demonstrated, then the affirmative defense does not protect the defendant. If no such alternatives are demonstrated *and* the defendant's conduct is found to promote the "public health, safety and welfare,"[141] the plaintiff will lose. Should a feasible and prudent alternative be developed later, however, the defendant's polluting activity may be vulnerable to a new MEPA action against which the affirmative defense will no longer provide protection.

IV

SETTLEMENTS

Perhaps the most pervasive effect of MEPA has been to stimulate settlement of a large number of cases.[142] The Act's low threshold for establishing a prima facie case and its corresponding focus on the affirmative defense provide the principal impetus encouraging parties to settle rather than pursue the expensive vagaries of litigation.

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141. MICH. COMP. LAWS ANN. § 691.1203(1) (West Supp. 1984). No reported Michigan case has yet defined the "public health, safety and welfare" as promoted by MEPA.

142. *See, e.g.*, Bise v. Detroit Edison Co.; Black River Conservation Ass'n v. Cragg; Bobula v. Inland Steel Co.; Davis v. Department of Natural Resources; Department of Natural Resources v. Kiffer; East Michigan Envtl. Action Council v. S.B. McLaughlin Assocs., Inc.; Harrison v. Leelanau County; Kelley v. BASF Wyandotte Co.; Kelley v. Bofors Lakeway, Inc.; Kelley v. Cast Forge, Inc.; Kelley v. DACA, Inc.; Kelley v. Ford Motor Co.; Kelley v. Huron-Clinton Metropolitan Auth.; Kelley v. National Gypsum Co.; Kelley v. Peerless Plating Co.; Kissner v. Board of County Road Comm'rs; Knizewski v. Detroit Edison Co.; Lakeshore Residents of Walnut Lake, Inc. v. Mourray; Margolis v. Bourquin; People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc.; Pine Lake Property Owners Ass'n, Inc. v. Mark Homes, Inc.; Pratt v. Chrysler Corp.; St. Cyril & Methodius Church v. Chrysler Corp.; State v. Michigan Standard Alloys; State v. Zilka; Walloon Lake Ass'n v. Hildee Co.; Wayne County Health Dep't v. Board of Education; Wayne County Health Dep't v. Industrial Smelting Co.; Wayne County Health Dep't v. International Salt Co.; Wayne County Health Dep't v. Pressure Vessel Serv., Inc.; Wayne County Health Dep't v. Wayne Soap Co.; Waytes v. Ford Motor Land Dev. Corp.; West Michigan Envtl. Action Council, Inc. v. Natural Resources Comm'n. *See also* Black Pond Dev. *See* Appendix B *infra* for full citation data.

The settlement of *Walloon Lake Association v. Hildee Co.*[143] confirms that parties can reach a compromise that permits development to continue, but in a manner that is environmentally enlightened. In *Walloon Lake*, a property owners' association filed a MEPA action challenging a developer's proposed use of a 150-foot lakefront lot for access to the lake by an entire subdivision. Just prior to trial, the court entered a consent judgment that permitted the defendant to use the property for lake access, but restricted development of the property, prohibited motorboat launchings, required fill material to prevent erosion, and ordered the defendant to plant a greenbelt area. Similarly, in *Waytes v. Ford Motor Land Development Corp.*,[144] 139 acres of privately owned urban forest preserve were scheduled for conversion to a condominium development. Following appellate litigation, the parties compromised, agreeing to maintain forty-three acres of the preserve in their natural state. *Waytes* marked the first successful invocation of MEPA to significantly alter a large urban developer's plan to build on private property. However, *West Michigan Environmental Action Council, Inc. v. Natural Resources Commission* (*WMEAC v. NRC*),[145] the largest and most controversial MEPA case of the decade, provides the best vehicle for the study of a MEPA settlement.

A. Settlement of West Michigan Environmental Action Council, Inc. v. Natural Resources Commission

In 1968, the Department of Natural Resources sold oil and gas leases covering more than 500,000 acres of state-owned land to various oil companies. Drilling began shortly after oil was discovered in paying quantities. Included in the tracts leased to private oil companies were about fifty-eight acres of the Pigeon River Country State Forest, a large undeveloped area which, though not a pristine wilderness, provided both outdoor recreational facilities for the general public and a sanctuary for elk, bears, bobcats, ospreys, and bald eagles.[146] Public outcry quickly arose over the oil companies' intrusive activities, with criticism directed most immediately against the widening of roads, the use of heavy trucks, and the clearing of land. In response, the state announced a moratorium on further drilling in the state forest and refused all applications for drilling permits.

The oil companies maintained a low profile throughout the early

143. No. 79-32206-CE (Mich. Cir. Ct. May 16, 1980) (consent judgment).

144. No. 60619, slip op. (Mich. Jan. 19, 1978) (parties entered into a consent judgment on Apr. 19, 1978).

145. 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979).

146. *Id.* at 748, 755 n.3, 275 N.W.2d at 540, 543 n.3. Ford Kellum, a wildlife biologist and former Department of Natural Resources employee, testified that once drilling commences in an elk habitat, the elk leave and do not return. *Id.* at 755 n.3, 275 N.W.2d at 543 n.3.

1970's when the national focus on ecological concerns dictated steering a quiet course. The controversy reemerged in the mid-seventies, however, prompted by the nationwide oil crisis and the expiration of the oil companies' leases. In 1975, the Department of Natural Resources, still defending in court its earlier refusal to grant drilling permits, issued a new plan which allowed drilling near areas where drilling had been denied under earlier permits. A coalition of the West Michigan Environmental Action Council and the Pigeon River Country Association challenged the plan by intervening in *In re Matter of Hydrocarbon Development in the Pigeon River Country State Forest*,[147] contending that the Department's plan did not rescue the oil companies from a MEPA violation that would result from the despoliation of the state forest caused by further drilling.[148]

Not surprisingly, a party's motives for bringing or intervening in a MEPA action will ultimately dictate whether or not the suit is susceptible to settlement. In *WMEAC v. NRC*, the successor of *In re Hydrocarbon Development*, the formal record shows that the plaintiffs, a coalition of environmental and outdoor recreation organizations, were utterly opposed to all drilling in the state forest, principally out of concern for the Pigeon River elk herd. By conceding in its environmental impact statement[149] that oil development would endanger the herd, the Department ensured that the threat to the elk herd would remain a central theme of the litigation.[150] However, a majority of the plaintiffs recognized that some oil and gas development was likely and that it was impractical to hope for a permanent cessation of oil development in the state forest.

147. *See id.* at 749, 275 N.W.2d at 540.

148. *See id.*

149. Filed pursuant to Exec. Order No. 1974-4 (May 3, 1974), directing state agencies to prepare environmental impact statements for proposed "major actions" within their jurisdiction "that may have a significant impact on the environment of human life." *See* J. OLSON, MICHIGAN ENVIRONMENTAL LAW 229 (1981).

150. Whether oil development would endanger other species of wildlife or despoil the state forest's natural resources was less certain. The plaintiffs had insufficient means to provide the expert testimony necessary to demonstrate the potential danger of the oil operations. Moreover, both because of the continued use of old roads criss-crossing the Forest, and because of ongoing timber harvesting and wildlife habitat management, the Pigeon River Country State Forest lacked the pristine purity of true wilderness. The lines of controversy were therefore unclear. The plaintiffs recognized that although they could raise the MEPA issue, without powerful allies they would be unlikely to prevail upon a court to terminate the development project. The plaintiffs hoped at best to deter development in the state forest, not for the sake of delay, but with the hope that the Department might advance a priority schedule in which the most environmentally sensitive oil-bearing lands would be developed last. This would allow demand to abate as new sources of energy were developed elsewhere. Development of the Pigeon River Country State Forest might thereafter seem less profitable and hence, less attractive. As the pressure for oil and gas development intensified, however, it became clear that even this modest goal would not be achieved. *See* J. Sax, Environmental Protection Law in Michigan 5-7 (Oct. 25, 1980) (lecture at University of Michigan School of Law, Institute of Continuing Legal Education, on file with Professor Sax at the University of Michigan School of Law) [hereinafter cited as Sax Lecture]. *See also* Hand, *supra* note 15, at 1031-36.

Thus, instead of attempting to prevent the drilling altogether, they shifted their focus to mitigating the risks to the forest environment as a whole.[151]

The plaintiffs identified the mechanics of day-to-day drilling operations, rather than the absence or inadequacy of formal rules for environmental protection, as posing the greatest environmental risk. This strategy was important because administrative enforcement of environmental rules is not the proper subject of a MEPA suit.[152]

Plaintiffs in MEPA actions commonly draw attention to the traditional weaknesses of enforcement agencies, such as their chronic shortage of funds, their lack of enforcement staff and their susceptibility to political pressures. The plaintiffs in *WMEAC v. NRC,* all too aware of prior environmental damage in Michigan resulting from oil and gas activity, were no exception. The existence of rules and promises by the Department of Natural Resources to enforce those rules did not satisfy the plaintiffs that the rules would in fact be enforced, that funds for surveillance and monitoring would be available, that accidents would be dealt with promptly, or that violations would be adequately punished. The plaintiffs' paramount concern was the routine failure of accepted safeguards. Thus, their principal objective was an injunction and the consequent obtainment of a superior negotiating position from which to insist on adequate surveillance and enforcement of environmental controls.

Ultimately, the parties in *WMEAC v. NRC* negotiated a settlement plan for sequential development which provided for the limited granting of permits area by area, with each new permit conditioned upon continued compliance with environmental standards in previously developed areas.[153] As part of the settlement, protective arrangements were implemented, including stationing permanent enforcement personnel in the state forest and conducting developer-financed studies of environmental harm. These results might not have been possible had not the plaintiffs first obtained a court victory on MEPA's threshold issue, the establishment of a prima facie case.[154]

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151. Sax Lecture, *supra* note 150, at 4.

152. *Id.* at 7.

153. In Irish v. Green, 2 ENVTL. L. REP. (ENVT. L. INST.) 20,505, 4 Env't Rep. Cas. (BNA) 1402 (Mich. Cir. Ct. 1972), the court employed a similar strategy by restricting the defendant's development of residential units to 40% of the planned total until the defendant had provided central water and sewer facilities. *See also* Harrison v. Leelanau County, No. 81-1077-CE (Mich. Cir. Ct. Apr. 27, 1981) (consent order), in which a consent order was entered requiring that a representative of the plaintiffs and a representative of the defendants be kept informed of, and have the right to be present at, all site inspections by the Department of Natural Resources. These representatives were additionally given the power to challenge factual decisions made by the Department, including those pertaining to the necessity of, and the environmental impact resulting from, the dredging of the channel.

154. In retrospect, the effectiveness of this settlement may be questioned. Although the elk have done well, the drilling for oil has caused contamination to groundwater in the Pigeon

Neither the Department of Natural Resources, which is responsible for granting drilling permits, nor the oil company defendants, advanced the affirmative defense. The reason may be found in these parties' desire to retain "management prerogatives" and to avoid external scrutiny. Public agencies typically wish to implement their own perception of what constitutes good management, unimpeded by what they may view as outside political interference. Hence, they will resist the external scrutiny that advancing the affirmative defense may precipitate. Private industries, on the other hand, seek to maintain a relatively stable and predictable relationship with public regulators while minimizing the cost of operations. Private industries, therefore, will typically attempt to minimize the impact of regulatory rules by urging that enforcement of those rules be relaxed. Citizen intervention and public scrutiny interfere with this goal of maintaining a low profile. By raising the affirmative defense, a MEPA defendant will inadvertently encourage public discussion of alternatives to its conduct. Such public scrutiny intrudes on the defendant's short term interests and implicitly discourages defendants from raising the affirmative defense in the first place.

Plaintiffs commonly seek opportunities to negotiate, while defendants more often hope to avoid negotiation. Hence, MEPA defendants may also hesitate to advance the affirmative defense because they believe that to do so may open the suit to negotiation. This perception is based on the likelihood that a trial judge, when confronted with competing claims of feasible alternatives, will press the parties to settle to avoid deciding the "proper" alternative.

B. Settlements Involving Public Plaintiffs

Public plaintiffs such as county governments and state agencies have also used MEPA to stimulate settlements. The Air Pollution Control Division of the Wayne County Health Department has obtained favorable settlements in a majority[155] of the nineteen actions it has

River State Country Forest area. *See* Ann Arbor News, Jan. 19, 1984, at A11, col. 1; *Pollution Discovered in Pigeon River Forest*, Detroit Free Press, Jan. 31, 1984, at 1A, col. 1 (quoting Donald Inman, a DNR environmental enforcement chief, as saying "We're disappointed. The agreement was supposed to prevent this kind of thing."). The adverse results of the compromise were widely publicized and may well have increased the reluctance of groups to attempt similar compromises in the future. *See Pigeon Pollution Warning for Rest of North Country*, The North Woods Call, Feb. 1, 1984, at 1, col. 4; *Broken Word: Promises Seep Away for Pigeon River Forest*, Detroit Free Press, Feb. 1, 1984, at 6A, col. 1; *Tougher Measures Called for in Pigeon Pollution*, The North Woods Call, Feb. 1, 1984, at 1, col. 4; *Pigeon River: Michigan Learns the Bitter Taste of Broken Promises*, Ann Arbor News, Feb. 14, 1984, at 2, col. 1.

155. *See, e.g.*, Wayne County Health Dep't v. Allen Indus., Inc.; Wayne County Health Dep't v. Allied Chem. Corp.; Wayne County Health Dep't v. Board of Education; Wayne County Health Dep't v. Central Wayne County Sanitation Auth.; Wayne County Health Dep't v. Industrial Smelting Co.; Wayne County Health Dep't v. International Salt Co.; Wayne

brought under MEPA.[156] The State Attorney General's office also has settled many of the MEPA actions that it has filed.[157] A public party's willingness to settle, however, can backfire if the defendant is particularly recalcitrant, or if the plaintiff or the court declines to seriously prosecute violations of consent judgments. Inevitably public attention focuses on imagined flaws in the statutory provisions for failures to achieve settlements, ignoring the distressingly routine failure of public entities to enforce fully the settlements obtained under MEPA.[158]

The types of settlements obtained by public plaintiffs have varied greatly. In some cases the offending operations have simply been shut down. The Air Pollution Control Division of the Wayne County Health Department, in both *Wayne County Health Department v. Allen Industries, Inc.*[159] and *Wayne County Health Department v. Pressure Vessel Service, Inc.*,[160] claimed that the defendants' manufacturing operations emitted air contaminants such as smoke, odors, and industrial dust. Each case was dismissed when the defendants closed their manufacturing operations. In other instances, defendants have consented to restrictions on their operations, possibly to avoid harsher sanctions. For example, in *Wayne County Health Department v. International Salt Co.*,[161] the Air Pollution Control Division brought a MEPA action to reduce the dust produced by the defendant's storage and transfer of large quantities of salt. International Salt agreed to load salt from a specified direction, use anti-dust solutions, sweep and wash paved areas, cease transfers when

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County Health Dep't v. Pressure Vessel Serv., Inc.; Wayne County Health Dep't v. Wayne Soap Co. *See* Appendix B *infra* for full citation data.

156. *See* Wayne County Health Dep't v. Allen Indus., Inc.; Wayne County Health Dep't v. Allied Chem. Corp.; Wayne County Health Dep't v. American Cement Corp.; Wayne County Health Dep't v. Board of Education; Wayne County Health Dep't v. Central Wayne County Sanitation Auth.; Wayne County Health Dep't v. Chrysler Corp.; Wayne County Health Dep't v. City of Dearborn; Wayne County Health Dep't v. Detroit Edison Co.; Wayne County Health Dep't v. Edward Levy Co.; Wayne County Health Dep't v. Ford Motor Co.; Wayne County Health Dep't v. Hyde Park Prod., Inc.; Wayne County Health Dep't v. Industrial Smelting Co.; Wayne County Health Dep't v. International Salt Co.; Wayne County Health Dep't v. McLouth Steel Corp.; Wayne County Health Dep't v. Modular Metals Inc.; Wayne County Health Dep't v. National Steel Corp.; Wayne County Health Dep't v. Olsonite Corp.; Wayne County Health Dep't v. Pressure Vessel Serv., Inc.; Wayne County Health Dep't v. Wayne Soap Co. *See* Appendix B *infra* for full citation data.

157. *See, e.g.*, Kelly v. BASF Wyandotte Co.; Kelley v. Bofors Lakeway, Inc.; Kelley v. Cast Forge, Inc.; Kelley v. DACA, Inc.; Kelley v. Ford Motor Co.; Kelley v. Huron-Clinton Metropolitan Auth.; Kelley v. National Gypsum Co.; Kelley v. Peerless Plating Co.; People *ex rel.* Kelley v. J.L. Hudson Co.; People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc.; State v. Michigan Standard Alloys; State v. Zilka; Waytes v. Ford Motor Land Dev. Corp. *See* Appendix B *infra* for full citation data.

158. *See, e.g.*, People *ex rel.* Kelley v. Berlin & Farro Liquid Incineration, Inc., No. 79-51326-CE (Mich. Cir. Ct. filed Feb. 27, 1979), discussed *infra* notes 246-56 and accompanying text.

159. No. 74-005800-CE (Mich Cir. Ct. Jan. 18, 1977) (order for dismissal).

160. No. 75-057398-CE, (Mich. Cir. Ct. Mar. 20, 1979) (order for voluntary dismissal).

161. No. 73-233039-CE (Mich. Cir. Ct. May 31, 1979) (consent judgment).

the wind exceeds twelve miles per hour, and institute certain other improved loading practices.

Settlements obtained by the Attorney General usually require defendants to pay fines or damages as well as to alter their behavior. In *Kelly v. BASF Wyandotte Co.*,[162] the Attorney General alleged that the defendant had violated effluent limitations under the Federal Clean Water Act[163] and had failed to install adequate wastewater treatment facilities. The settlement required BASF to correct the conditions and pay a $150,000 fine. Similarly, in *Kelley v. Bofors Lakeway, Inc.*,[164] the Attorney General alleged that the defendant company contaminated the surrounding groundwater and a nearby creek with toxic chemicals. The state sought relief under MEPA, the Water Resources Act,[165] and the common law of public nuisance. The settlement required the company to clean up the polluted water, prevent further pollution, and pay $750,000 in damages. Finally, in the settlement of *Kelley v. Cast Forge, Inc.*,[166] a suit involving PCB discharges into ground and surface waters, the defendant paid a $500,000 cleanup bill and $750,000 in damages.[167]

V

MEPA'S USE IN URBAN DEVELOPMENT

MEPA has been a significant factor in shaping state court decisions involving urban development issues. Attorneys representing concerned homeowners have used MEPA claims as part of their arsenal for challenging unwanted development projects,[168] while developers have criticized the statute's unsettling effect.[169] Nonetheless, the pattern persists that very few development cases result in classic all-or-nothing adver-

162. No. 78-22255-CE (Mich. Cir. Ct. Oct. 29, 1980) (consent decree).

163. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982).

164. No. 78-21380-CE (Mich. Cir. Ct. Sept. 24, 1981) (consent judgment).

165. MICH. COMP. LAWS ANN. §§ 323.1-.13 (West 1975).

166. No. 77-3724-CE (Mich. Cir. Ct. June 19, 1981) (consent judgment).

167. *See also* Kelley v. DACA, Inc., No. 8-503 (Mich. Cir. Ct. 1981) (consent agreement) (company to clean up PCB contaminated water and soil); Kelley v. Ford Motor Co., No. 78-21262-CE (Mich. Cir. Ct. Apr. 2, 1980) (final consent order and judgment); Kelley v. United States, No. 79-10199 (E.D. Mich. Nov. 21, 1980) (consent decree) (United States Air Force base to cease activities contaminating groundwater and to take action to remedy existing pollution); State v. Michigan Standard Alloys, No. 79-1225-CZ-Z (Mich. Cir. Ct. May 5, 1981) (consent judgment) (company to remedy contamination, prevent future contamination, and pay $50,000 fine).

168. *See* letter from Jerold Law to Professor Joseph L. Sax (Apr. 20, 1981) ("[A] MEPA count is becoming fairly standard in any suit by parties seeking to challenge real estate development.").

169. *See* letter from Larry K. Griffis to Professor Joseph L. Sax (Nov. 5, 1980). Griffis, an attorney representing the Park LaSalle Project, discussed *infra* at notes 180-82 and accompanying text, expressed his concern that MEPA portended a "very real potential for serious harm" to future development projects. He complained that because of the delay, costs and other factors instrinsic to MEPA litigation, a contentious plaintiff, by simply filing a MEPA suit against a particular project, could effectively coerce the developer to drop the project.

sarial confrontations.[170] More commonly, "[t]he courtroom provides a setting in which promises of future good conduct by the defendant become the focal point for contemplated settlements."[171]

Urban development suits are usually brought by neighboring residents who see legal action raising environmental concerns as the last available recourse to halt a planned development for which the developer has already obtained the necessary planning clearances. Arguing that the development will harm or destroy certain natural resources in the area, these plaintiffs contend that an alternative plan can be achieved which allows the development sought by the defendant but which avoids the resource impairment inevitable under the current plan. These plaintiffs also often seek to moderate or obviate adverse effects of the development. In effect, then, such plaintiffs function as a supplemental urban planning agency.

A. The Impact of MEPA In Development Decisions

Litigants have invoked MEPA in approximately eighty-two land use cases,[172] including direct[173] and indirect[174] challenges to homesite or multiple use development projects. Because this Article does not purport to locate and evaluate each Michigan suit filed since 1970 that challenged a development project, it is unknown whether MEPA has become an integral part of such challenges. Still, plaintiffs should be on notice that MEPA is not a talisman sufficient to stop every development project. The plaintiffs in *Poletown Neighborhood Council v. City of Detroit*,[175] for example, failed to convince the court that MEPA could be invoked to protect an urban neighborhood's ethnic character.

Plaintiffs may affect development decisions even though they do not prevail on their MEPA claims. In *Banghart v. Department of Natural Resources*,[176] the plaintiffs alleged that the Department of Natural Resources granted an Inland Lakes and Streams permit which violated

170. Sax and DiMento, *supra* note 5, at 9.

171. *Id.* at 9-10.

172. *See* Appendix E *infra*.

173. *See, e.g.,* Banghart v. Forbes/Cohen Properties; Black Pond Dev.; Blunt v. Apfel; Committee for Sensible Land Use v. Garfield Township; East Michigan Envtl. Action Council v. S.B. McLaughlin Assocs., Inc.; Hoffman v. Glen Arbor Township; Irish v. Green; Irish v. Property Dev. Group, Inc.; Kimberly Hills Neighborhood Ass'n v. Dion; Little Wolf Lake Property Owners Ass'n v. Haase; Margolis v. Bourquin; Olk v. Desai; Pine Lake Property Owners Ass'n, Inc. v. Mark Homes, Inc.; Territorial Enterprises, Inc.; Three Lakes Ass'n v. Fisher; Walloon Lake Ass'n v. Hildee Co.; and Waytes v. Ford Motor Land Dev. Corp. *See* Appendix B *infra* for full citation data.

174. *See, e.g.*, Muha V. Union Lakes Assocs., No. 2964 (Mich. Cir. Ct. filed Aug. 14, 1972) (drainage from construction project); and Lakeshore Residents of Walnut Lake, Inc. v. Mourray, No. 74-116378-CE (Mich. Cir. Ct. Feb. 20, 1979) (consent judgment) (wetlands protection).

175. 410 Mich. 616, 635-36, 304 N.W.2d 455, 460 (1981).

176. No. 80-1067-CZ (Mich. Cir. Ct. filed Sept. 29, 1980).

MEPA. The permit allowed a developer to divert and impound a stream known as Brickyard Creek in order to construct a suburban shopping mall on fifty-four acres of land. Plaintiffs claimed that the project would permanently degrade the stream's water quality and disrupt the stream's trout population, in addition to dramatically increasing traffic on the already inadequate local roads. Although the court ultimately dismissed the MEPA count, the plaintiffs did manage to obtain mitigation of some of the mall's deleterious effects.[177]

As with other MEPA controversies, challenges to urban development projects often result in settlement. In *Blunt v. Apfel*,[178] the plaintiffs challenged the proposed construction of condominium units and an adjacent marina. The consent judgment issued by the court described in detail the development that would be permitted. The decree limited the uses of the marina, required the construction and maintenance of a greenbelt, and set forth the maximum number of units, the maximum average number of bedrooms per unit, and the maximum number of occupants per unit.[179].

The settlement in *East Michigan Environmental Action Council v. S.B. McLaughlin Associates, Inc.*,[180] though not as detailed as the *Blunt* consent judgment, raised the issue of res judicata problems under MEPA in addition to urban development issues. In *S.B. McLaughlin*, the plaintiffs brought a MEPA action in response to the proposed Park LaSalle Project, a fifty-acre high density, mixed use, highrise complex featuring more than 1700 apartment units, a nine-story office tower, and various commercial enterprises. The plaintiffs, citing anticipated environmental damage and the creation of traffic problems, claimed that the project would have an adverse effect on the region. In settling the suit, the defendant developers agreed both to spend up to $30,000 for the preparation of plans to alleviate traffic congestion and to compensate the principal plaintiff, the East Michigan Environmental Action Council, for $20,000 in litigation expenses. The settlement restricted both the height of the highrises and the number, area, and uses of the residential units.[181].

The settlement further included a provision that:

> All parties agree that if any lawsuit is commenced against the Project under the provisions of [MEPA] or any other State or Federal statute which purports to preserve air, water or other natural resources, by any person . . . , and provided that if such lawsuit is not dismissed within

177. The defendant agreed, among other things, to reduce the area of the mall, to limit diversion of the stream's natural flow, and to modify proposed traffic patterns.

178. No. 849 (Mich. Cir. Ct. May 4, 1978) (consent judgment).

179. *Id.* at 6.

180. No. 79-195380-CE (Mich. Cir. Ct. 1981) (settlement agreement placed on record) (revised consent agreement filed July 24, 1984).

181. *Id.* at 3-5.

> three (3) months of service of process . . . , then McLaughlin and Central . . . shall have the option for a period of one month to either continue to observe and adhere to this entire Agreement or to immediately terminate this Agreement . . . .[182]

This provision permitted the defendant to set aside the settlement should third parties file subsequent MEPA actions. In such an event, plaintiffs and defendants could return to court to resolve their dispute in light of the new litigation.

In addition to encouraging settlements, MEPA also stimulates consideration of mitigating alternatives, as the *Black Pond Development*[183] matter illustrates. The controversy involved a project to develop 238 townhouse units on thirty-six acres in Ann Arbor. Although the project complied with existing zoning and permit requirements,[184] neighboring residents were dissatisfied with the plans for the project and feared that it would threaten wildlife, a large hardwood forest on the site, a glacial pond known as Black Pond, and an adjoining park.[185] The neighbors formed a citizens group which, under section 5 of MEPA, moved to intervene in the Ann Arbor Planning Commission's review of the development. The City Attorney advised the Planning Commission not to allow the intervention, arguing that once the Commission determined that applicable published standards had been met, it would be without discretion to deny approval of a site plan.[186] The Planning Commission responded to the neighbors' action by developing an environmental assessment of the project. The neighbors' right to intervene in the city's planning process under MEPA, however, remained unresolved. After the city's planning staff met with the developer and the citizens' group, the developer presented a revised plan for the project which reduced the number of dwelling units, located all construction outside of the forest, and redesigned the townhouses into garden apartments. Although the modified plan required a zoning change, the citizens' group agreed to table its petition to intervene while the Planning Commission considered the modified plan.[187] Thus, the neighborhood petition had effectively spurred consideration in the planning process of less harmful alternatives

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182. *Id.* at 7.

183. (Mich. Cir. Ct. Nov. 11, 1980) (petition to intervene).

184. The petitioners avoided "acknowledging that said site plan [was] legally sufficient and complete." *Id.* at 2.

185. *Id.*

186. The City Attorney further asserted that:

> The petitioners assert that [MEPA] attaches to all such review processes the additional obligation of determining whether there is environmental damage regardless of whether the damage is regulated by any specific published standard. If this were the case, a building official would be obligated to deny a building permit any time the project required the removal of a mature tree.

Memorandum from Bruce Laidlaw, City Attorney, to Martin Overhiser, Black Pond Planning Director (Dec. 18, 1980).

187. *See* The Ann Arbor News, Nov. 26, 1980, at A3, col. 4.

to the proposed urban development. The petition successfully promoted the public interest when became apparent that the municipal zoning regulations had failed to satisfy community concerns. The petition further allowed the neighbors to address a development problem at the level of an actual proposal rather than in the abstract form of citywide zoning.[188]

B. *MEPA's Use in Zoning Controversies*

While MEPA can serve as a substitute for zoning in rural areas,[189] and the *Black Pond Development* matter shows that plaintiffs can effectively use MEPA to fine-tune discussions of urban development zoning,[190] direct use of the statute in zoning matters has been less than successful.[191] Two cases have examined the direct applicability of MEPA to zoning decisions. In *Hoffmann v. Glen Arbor Township*,[192] the plaintiff challenged a petition to rezone Lake Michigan shoreline property from single family residential to a classification accommodating a ninety-four unit development. Though the defendant township refused at first to rezone the township property, it later amended its zoning ordinance to allow the development. According to the plaintiffs, the township "did not at any time make determinations or findings as to the likely environmental effects or the feasible and prudent alternatives with respect to the conduct authorized by the change . . . ."[193] The circuit court rejected the MEPA claim and granted summary judgment to the defendants. The court observed that MEPA does not apply to zoning or

188. *But cf.* Sax Lecture, *supra* note 150, at 16. Professor Sax suggests that in the typical case it may be:

> . . . easier for officials to perform their job by mechanical application of 'specific published standards.' To sit down with the developers and neighbors to see whether an alternate plan that mitigates damage to local amenities, while still meeting housing needs and providing a fair profit, is more troublesome.

Principally in response to the Black Pond Development matter, the City of Ann Arbor modified its Subdivision and Land Use Control Ordinance to forbid approval of a project which would likely cause a serious and lasting degradation of the environment. The modified ordinance specifies certain information which must be submitted in the approval process. Developers must submit, among other things, a brief statement and graphic description of the "[i]mpact of the proposed development on air quality, water or other existing natural features of the site and neighboring sites." "Natural features" include archaelogical finds, endangered species habitats, hedge rows, ponds and lakes, landmark trees, wetlands, and wood lots. ANN ARBOR, LAND DEVELOPMENT REGULATIONS, §§ 1.1-1.3 (1983).

189. *See* Walloon Lake Ass'n v. Hildee Co., No. 79-32206-CE (Mich. Cir. Ct. May 16, 1980) (consent judgment).

190. *See* Black Pond Dev. (Mich. Cir. Ct. filed Nov. 11, 1980) (petition to intervene).

191. Some attempts to employ MEPA in a zoning context have been particularly unusual. In Whittaker & Gooding Co. v. Scio Township Zoning Bd. of Appeals, 117 Mich. App. 18, 323 N.W.2d 574 (Ct. App. 1982), for example, the plaintiff, owner of a gravel pit, challenged a limitation imposed by the township on the plaintiff's conditional use permit, arguing that MEPA protected the development of resources. The court rejected the challenge.

192. No. 80-956-CE, slip op. (Mich. Cir. Ct. Dec. 31, 1980).

193. No. 80-956-CE (Mich. Cir. Ct. June 17, 1980) (complaint for declaratory, temporary and permanent injunctive relief at 2).

rezoning cases because these actions do not establish a specific use of the property which affects the environment. The court characterized the MEPA claim as premature, stating that it should not be asserted "until a specific use is proposed and that use is being reviewed and examined by the various administrative and licensing bodies."[194]

The Michigan Court of Appeals affirmed a similar result reached by the circuit court in *Committee for Sensible Land Use v. Garfield Township*.[195] The case involved the rezoning of thirty-seven acres from single and multiple unit residential to commercial. The developers planned to use the property together with an adjacent parcel for the construction of a shopping mall. The circuit court ruled that MEPA did not apply to the rezoning issue and found the plaintiff's claims premature. The court of appeals noted that the township and its zoning administrator were subject to MEPA, but affirmed the circuit court's judgment, holding that "[t]he mere act of rezoning does not in and of itself sufficiently impact the environment to destroy or even impair natural resources."[196] The court of appeals further reasoned that natural resources could be adequately protected at the building permit stage through a MEPA action. The court viewed the question as one of timing rather than substantive law.

The court of appeals' decision in *Garfield Township* gives effect to the plain meaning of the language of MEPA's section 5(2) mandating that MEPA apply to "administrative, licensing or other proceedings."[197] The decision thus continues the trend of prior cases that have broadly interpreted section 5(2) to provide for prospective application.[198] The Michigan Supreme Court succintly stated this interpretation in *Michigan State Highway Commission v. Vanderkloot* when it concluded that MEPA was designed "to prescribe the substantive environmental rights, duties and functions of the subject entities."[199]

MEPA challenges in zoning matters might produce more promising results for plaintiffs if raised before the administrative agency charged with ruling on zoning amendment proposals rather than before a court. Several factors contribute to this conclusion. First, as illustrated by the *Garfield Township* case, courts typically are limited to a discussion of the specific project at issue.[200] Second, the proposal stage for zoning amendments, a stage characterized by public hearings and submissions of material information, may be the best occasion for discussing the potential

194. No. 80-956-CE, slip op. at 3 (Mich. Cir. Ct. Dec. 31, 1980).
195. 124 Mich. App. 559, 335 N.W.2d 216 (Ct. App. 1983).
196. *Id.* at 564, 335 N.W.2d at 218.
197. MICH. COMP. LAWS ANN. § 691.1205(2) (West Supp. 1984).
198. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 130.
199. Michigan State Highway Comm'n v. Vanderkloot, 392 Mich. 159, 184, 220 N.W.2d 416, 428 (1974).
200. *See, e.g.*, GARFIELD, MICH., TOWNSHIP ZONING ORDINANCE § 6.8 (Aug. 15, 1979).

adverse environmental effects resulting from the adoption of the zoning ordinance. Decisions reached at the proposal stages are more likely to reflect considerations of public interest and feasible alternatives than are decisions made by the zoning administrator in the rather ad hoc process of granting individual building permits. Third, the county or municipal zoning boards commonly have established reputations for achieving reconciliation between the competing interests of developers and community groups seeking to preserve local amenities. Thus, the likelihood of settlement may be increased by early public intervention. Fourth, zoning boards may have gained an expertise at making far-reaching land use decisions not achieved by the zoning administrator, whose authority is often restricted to mandating changes in a project's general plan or design. Finally, a large number of important preliminary policy issues may be resolved at the zoning proposal stage, even though consideration of other MEPA-related issues must be deferred until the building permit stage. Under this bifurcated approach, interested parties could reduce the cost of a MEPA challenge to development projects planned for an area covered by the zoning proposal and developrs could avoid the potentially large investment loss that would be incurred if an adverse decision on the challenge were deferred to the permit stage.

The courts of the State of Washington have also examined the relationship between environmental statutes and zoning ordinances. In *Save a Valuable Environment v. City of Bothell,*[201] the Washington Supreme Court found that the defendant city's decision to rezone land to accommodate a regional shopping center required it to prepare an environmental impact statement. The court held that the city had a duty under the Washington State Environmental Policy Act[202] to serve the welfare of the entire community when acting on rezoning applications which affected the quality of the environment.[203]

The Washington Court of Appeals, in *Ullock v. City of Bremerton,*[204] considered a suit involving a zoning action in which no specific project had been proposed. The court held that the environmental impact statement submitted by the city, though it did not include a site plan nor a discussion of alternative uses, complied with the Washington Environmental Policy Act. The court stated that "a nonproject zoning action has no immediate or measurable environmental consequences," and thus a more flexibile impact statement may meet the aims of the statute.[205]

201. 89 Wash. 2d 862, 576 P.2d 401 (1978).

202. WASH. REV. CODE ANN. §§ 43.21C.010-.910 (West 1983).

203. Save a Valuable Env't v. City of Bothell, 89 Wash. 2d 862, 872, 576 P.2d 401, 406 (1978).

204. 17 Wash. App. 573, 565 P.2d 1179 (Ct. App. 1977).

205. *Id.* at 581, 565 P.2d at 1184.

Finally, in *Barrie v. Kitsap County,*[206] the Washington Supreme Court clarified the distinction between the detrimental impacts of project and nonproject zoning actions on the environment. *Barrie* involved the rezoning of a downtown area in anticipation of the construction of a 400,000 square-foot shopping mall. The developer challenged the rezoning ordinance and contended that since prospective plaintiffs could obtain administrative and judicial review of potential adverse environmental impacts after the development plans had been finalized, there was no need to "analyze vague and speculative socio-economic impacts at the preliminary zoning stage."[207] The court rejected the developer's argument and held the city's rezoning ordinance to be valid. According to the court, the *Ullock* rationale applies only when there is no specific project planned at the time of the initial zoning so that the zoning board is unable to address the ultimate "consequences" of the development. The court held that the "consequences" of the project in *Barrie* were "anticipated—not remote and speculative," and therefore that the environmental effects and alternatives had to be assessed in the zoning process.[208]

The compromise reached by the Washington courts accommodates both legislative concerns related to general zoning and quasi-administrative concerns related to zoning for a particular project. Local governments are encouraged to zone and rezone as they find necessary, but only to the extent that no specific project has prompted the zoning change. To achieve a similar accommodation in Michigan, challenges under MEPA should be reserved for specific projects. When a specific project prompts a zoning action, there is little justification for postponing discussion of environmental consequences and feasible alternatives.

VI
MEPA'S IMPACT ON PROPERTY RIGHTS

Although parties have raised the issue in the courts on numerous occasions, surprisingly little case law has emerged to resolve the tension between MEPA claims and the constitutional prohibition of uncompensated "takings" of property rights.[209] MEPA defendants frequently raise the takings issue as a defense, not because of any peculiar trait of MEPA, but because suits challenging land regulation, in general, present a fertile context for the raising of constitutional arguments.

The issue was raised by the defendant developer in *Kimberly Hills*

206. 93 Wash. 2d 843, 613 P.2d 1148 (1980).

207. *Id.* at 860, 613 P.2d at 1158.

208. *Id.*

209. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 156.

Neighborhood Association v. Dion.[210] Recognizing that its action might be characterized as confiscatory because it prohibited the defendant from freely developing his land, the circuit court ordered the developer to preserve a pond, three wildlife corridors, and a pheasant mating area previously destined to be plowed under during construction. In the opinion accompanying the order, the court underscored the importance of the defendant's prior knowledge of MEPA before making his purchase of the land for development. The court also noted that the City of Ann Arbor was not a party to the action and, therefore, could not be compelled to compensate the plaintiffs.[211] If the city had been joined as a party, the question of adequate compensation might have become paramount. However, even if the court found a taking, MEPA expressly authorizes only equitable and declaratory relief and provides no basis for compensatory relief to private plaintiffs.[212]

To counter the takings challenge, the plaintiffs in *Kimberly Hills* relied on the United States Supreme Court's decision in *Agins v. City of Tiburon*.[213] In *Agins*, the Court held that an open space zoning ordinance, limiting the owner to a minimum of one house and a maximum of five houses per five acres, did not on its face constitute a taking of private property. The Court concluded that the enactment of zoning regulations could constitute a taking only if the regulations failed to substantially advance a legitimate state interest or if they denied the property owner all economically viable primary uses of the property. The Court ultimately upheld the ordinance as a legitimate exercise of the city's police power to protect residents from the ill effects of urbanization resulting from premature conversion of open space to urban use. Importantly, the tract of land at controversy was not the only property affected by the ordinance; the appellant would "share with other owners the benefits and burdens of the city's exercise of its police powers."[214]

The Supreme Court's directive in *Agins* undercuts efforts by developers or other plaintiffs to allege a taking in suits against public agencies deriving their authority from MEPA. Absent a finding of substantial diminution in value, a court is unlikely to find restrictions on land use to be a taking simply because they were imposed via case-by-case MEPA litigation rather than by general legislative zoning decisions.[215] If a court finds that, consistent with MEPA, a feasible and prudent alternative to

210. No. 79-16452-CH, slip op. (Mich. Cir. Ct. Mar. 28, 1979), *rev'd*, 114 Mich. App. 495, 320 N.W.2d 668 (Ct. App. 1982), *lv. denied*, 417 Mich. 1045 (1983).

211. No. 79-16452-CH, slip op. at 8 (Mich. Cir. Ct. Mar. 28, 1979).

212. The court of appeals regarded the constitutional issue presented "as worthy of serious consideration." The court, however, declined to decide the issue. 114 Mich. App. at 510, 320 N.W.2d at 674 (Ct. App. 1982).

213. 447 U.S. 255 (1980).

214. *Id.* at 262.

215. Sax Draft, *supra* note 4, at 28.

the violative land use exists, it may conclude that reasonable uses of the property remain, and that therefore no taking has occurred.[216]

Another significant property rights question that has arisen in the context of MEPA litigation is the precise identification of the property eligible for compensation following a judicial determination that there has been a taking. This question, still unsettled in the context of general property law, was raised in *Waytes v. Ford Motor Land Development Corp.*[217] In *Waytes*, the defendants argued that sixty-seven acres of the 197-acre tract at controversy contained no natural resources which MEPA could be invoked to protect. The circuit court agreed, granting summary judgment with respect to these sixty-seven acres without any findings of fact.[218] The Michigan Supreme Court, however, reversed the circuit court, remanding the case for a full evidentiary hearing and findings of fact.[219] So long as the issue before the court focused on adequate findings under MEPA rather than on the mechanics of a taking, the supreme court was apparently unwilling to separate, acre-by-acre, the property at issue. The parties settled this case and left the takings issue unresolved.[220]

In *Kimberly Hills Neighborhood Association v. Dion*,[221] the defendant might have adopted a limited focus in raising the takings issue. The *Kimberly Hills* court imposed use restrictions on a four-acre tract that did not apply to the remainder of the site targeted by the defendant for development. Had the defendant focused narrowly on the argument that they had been deprived of the entire economic value of those four acres, the court might have been unable to avoid a determination that the use restrictions, as applied to that specific tract, constituted a taking. The court, however, adopted a calculus assessing the total economic value of the site to be developed, and as a consequence never directly considered the takings issue. Contrasted against the total economic value of the site, the diminution in the value of the four acres resulting from the use restrictions represented a loss of only a small fraction of the development potential of the defendant's property.

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216. ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 156. Another argument maintains that no taking may occur under MEPA simply because no property rights are involved. "Property," for the purpose of takings discussions, is defined by the state. In Michigan, the argument continues, this definition should reflect the state constitution's mandate for the protection and conservation of Michigan's natural resources. *See* MICH. CONST. art. IV, § 52. Because MEPA fulfills this constitutional mandate, injunctions issued under the statute do not constitute takings. ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 157.

217. No. 60619, slip op. (Mich. Jan. 19, 1978).

218. No. 75-075584-CE (Mich. Cir. Ct. Apr. 4, 1977) (partial summary judgment).

219. Waytes v. Ford Motor Land Dev. Corp., No. 60619, slip op. (Mich. Jan. 19, 1978).

220. *See* Waytes v. Ford Motor Land Dev. Corp., No. 75-075584-CE (Mich. Cir. Ct. Apr. 19, 1978) (consent agreement).

221. 114 Mich. App. 495, 320 N.W.2d 668 (Ct. App. 1982), *lv. denied*, 417 Mich. 1045 (1983).

The United States Supreme Court has not ruled directly on whether property interests are divisible for the limited purpose of determining whether a public act constitutes a taking for which the property owner must be compensated; however, the Court's holding in *Penn Central Transportation Co. v. City of New York*[222] suggests that the property at controversy should be considered as a single investment rather than as separable tracts.[223] In *Penn Central*, the Court upheld restrictions imposed by the City of New York on the extent of the air rights enjoyed by the owner of the Grand Central Terminal. The Court found that, because the owner's continued use of the building at its present height enabled it to produce a sufficient economic return, the city's refusal to permit the owner to construct a multi-story office tower in the air space above Grand Central Terminal did not constitute a taking.[224] The Court implied that the owner could not assert the air rights as a separate and discrete property interest protected by the Constitution.[225]

Other MEPA actions have presented related issues for judicial consideration. In both *West Michigan Environmental Action Council, Inc. v. Natural Resources Commission*[226] and *Michigan Oil Co. v. Natural Resources Commission*,[227] for example, the Michigan Supreme Court upheld decisions by the Natural Resources Commission to deny oil companies permits to drill in specific areas of large lease tracts. In neither of these cases, though, did the court address what specific valuation of property is the proper subject of a takings question; that is, whether it is the value of the aggregate of the leases, of divisible sets of leases, or of each lease representing one tract per lease.

A second property rights issue raised in these oil lease cases is whether the denial of drilling permits to lease holders, based on the provisions set out in MEPA or in the Oil, Gas and Minerals Act,[228] constitutes a taking by rendering the leases valueless. Prior to MEPA's enactment, Michigan courts had consistently construed the Oil, Gas and Minerals Act's prohibition of waste as limiting developers to practices associated with prudent development and not as imposing significant environmentally-based restrictions.[229] But by interpreting the waste provision of the Oil, Gas and Minerals Act to include new environmental controls prohibiting drilling altogether, the supreme court in *Michigan Oil Co.* adopted the view that MEPA's environmental standards must be read into other statutes under which the state grants leases, even though

222. 438 U.S. 104 (1978).
223. *Id.* at 130-31.
224. *Id.* at 136-37.
225. *See id.* at 130.
226. 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979).
227. 406 Mich. 1, 276 N.W.2d 141, *cert. denied*, 444 U.S. 980 (1979).
228. MICH. COMP. LAWS ANN. §§ 319.1-.27 (West 1984).
229. Sax Draft, *supra* note 4, at 30.

the granting of the leases may precede MEPA's enactment.[230] Thus, the permit denials by the Natural Resources Commission did not constitute a taking even though the oil companies had previously obtained term leases for the drilling sites.

VII

MEPA'S IMPACT ON PUBLIC AGENCIES

State and local public agencies have made frequent use of MEPA's enforcement provisions. Early in MEPA's development, commentators observed that "[p]ublic agencies have been plaintiffs under the Act more often than was anticipated."[231] By 1974, this trend had "become even more pronounced," and these commentators were "persuaded that use of the law by public agencies is one of the most significant effects of a statute such as [MEPA]."[232] The frequent use of MEPA by governmental entities to sue violators suggests that, contrary to popular expectations, public officials have exhibited considerable willingness to initiate enforcement of the state's environmental laws.[233] This significant governmental involvement in the enforcement of MEPA remained high throughout the 1970's[234] and continues in the 1980's.

Public agencies have participated in suits as plaintiffs or intervenors in ninety-one, or almost one-half, of the 185 MEPA cases filed to date.[235] The State Attorney General[236] and the Wayne County Health Department[237] have made the most frequent use of MEPA as plaintiffs. The State Department of Natural Resources and the Natural Resouces Commission, on the other hand, have defended against private suits more often than has any other public agency.[238] Overall, county and local governments and agencies have been party to more MEPA actions, as plain-

230. *See* Michigan Oil Co. v. Natural Resources Comm'n, 406 Mich. 1, 33, 276 N.W.2d 141, 150, *cert. denied*, 444 U.S. 980 (1979). *See also* Michigan State Highway Comm'n v. Vanderkloot, 392 Mich. 159, 220 N.W.2d 416 (1974), in which three justices of the Michigan Supreme Court concluded that Article IV, Section 52 of the 1963 Michigan Constitution requires MEPA to be read into each Michigan statute. Of the remaining justices, three declined to decide the issue while the fourth did not participate in the decision.

231. Sax and Conner, *supra* note 6, at 1008.

232. Sax and DiMento, *supra* note 5, at 23.

233. *Id.*

234. *See* Haynes, *supra* note 6, at 595.

235. *See* Appendix D *infra* for a complete list of the cases by party.

236. The Attorney General's office has participated as a plaintiff or intervenor, or by filing an amicus curiae brief, in 25 MEPA actions. *See* Appendix D *infra* for a complete list of cases by party.

237. The Wayne County Health Department's Air Pollution Control Division has been involved in 20 MEPA actions. *See* Appendix D *infra* for a complete list of cases by party.

238. The Department of Natural Resources and the Natural Resources Commission have been defendents in 28 MEPA actions. They have been involved as defendants, plaintiffs or as intervenors in 43 MEPA actions overall. *See* Appendix D *infra* for a complete list of cases by party.

tiffs, intervenors and defendants, than has the state or its various agencies.[239]

A. The State Attorney General

The State Attorney General has invoked the enforcement provisions of MEPA in a variety of settings.[240] The Attorney General, suing on behalf of the people of the State of Michigan, has initiated twenty-one significant MEPA actions, intervened in three, and filed one amicus curiae brief.[241] The Attorney General has brought other suits raising MEPA causes of action; but these suits have focused principally on violations of other statutes, with the MEPA claim merely bolstering the state's position for obtaining a preliminary injunction.[242]

In *Kelly v. Huron-Clinton Metropolitan Authority*,[243] the Attorney General successfully invoked MEPA in an unusual setting. The Huron-Clinton Metropolitan Authority (HCMA) is responsible for managing the parks system serving several counties in Michigan. In 1975, HCMA leased approximately 102 acres adjacent to the Huron River to the Kensington Children's Farm and Village Corporation. The corporation, in 1976, regraded and filled portions of the leased parkland and then built the Living History Children's Farm, a restaurant and general store, stables, barn buildings, and parking lots. The following year, the corporation added a miniature mechanical railroad line and a children's automobile ride, began electrical swan boat rides on dredged ponds, and completed plans to construct at least ten mechanical amusement rides on the leased parklands. The lease provided that HCMA receive ten percent of the gross sales from both admissions and concessions.

The Attorney General filed suit in 1977 alleging, in part, that the HCMA lease, which conveyed public parkland to a private interest, violated the public trust doctrine embodied in MEPA. After the corporation stipulated to the termination of its lease and to the removal of mechanical rides from the site, the circuit court dismissed the case.[244]

239. State, county and local agencies, county governments, boards of commissioners, drain offices, and municipal governments have been involved in 98 separate cases. *See* Appendix D *infra* for a complete list of cases by party.

240. *See, e.g.*, Kelley v. Anderson Dev. Co., Inc. (industrial pollution); Kelley v. Balkema (wetlands protection); Kelley v. BASF Wyandotte Co. (groundwater contamination); and Kelley v. Huron-Clinton Metropolitan Auth. (park management). *See* Appendix B *infra* for complete citation data.

241. *See* Appendix D *infra* for a complete list of cases.

242. Telephone interview with Thomas Emery, former Assistant Attorney General of the State of Michigan (Mar. 19, 1983).

243. No. 78-175311-AW (Mich. Cir. Ct. Feb. 4, 1980) (order of dismissal).

244. *See* Kelley v. Huron-Clinton Metropolitan Auth., No. 78-175311-AW (Mich. Cir. Ct. Feb. 4, 1980) (stipulation of plaintiff and defendent); Kelley v. Huron-Clinton Metropolitan Auth., No. 78-175311-AW (Mich. Cir. Ct. Feb. 4, 1980) (order of dismissal). The Attorney General's suit and the accompanying public scrutiny forced HCMA to abandon the role of

Huron-Clinton Metropolitan Authority illustrates how the Attorney General has invoked MEPA to encourage other government agencies to protect and conserve the state's resources.

The Attorney General has successfully resolved a number of other cases without going to trial on the merits. In particular, settlements have frequently occurred in suits involving industrial defendants.[245] The industrial setting, however, has also provided the context for one of the most notable failures by any public agency to utilize the full potential of the statute. The state's suit against the Berlin & Farro Liquid Incineration Company (Berlin & Farro)[246] demonstrates the problems that are inherent in environmental enforcement actions but which MEPA has yet to solve.

Berlin & Farro began operation of a waste incinerator in a rural Michigan community in late 1972. The incinerator, which operated twenty-four hours a day, emitted heavy black smoke that stung the eyes and burned the throats of people living in the surrounding areas. In 1973, the Township of Gaines sued the company under the township's air pollution control ordinance. The parties settled the suit in 1974, adopting the consent agreement that had already been reached between Berlin & Farro and the Michigan Air Pollution Control Commission through separate litigation.[247] The problem continued unabated for another year, however, and in September 1975 the Department of Natural Resources, citing the danger to the public health from the toxic chemicals emitted by the incinerator and from the storage of toxic wastes at the site, issued an emergency order to cease and desist.[248] The emergency order, upon the recommendation of the State Water Resources Commission, also directed Berlin & Farro to stop hauling wastes to the company's forty-acre dump site where the company had already desposited over a million and a half gallons of liquid waste. Berlin & Farro filed an action challenging the emergency order, contending that closure of the incineration plant only remedied part of the problem; closure itself failed

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lessor of public trust lands at this location. *See* Sax and Conner, *supra* note 6, at 1026-30. The HCMA, however, has not been willing to forsake this role entirely. Huron-Clinton Metropolitan Auth. v. Kelley, No. 80-961-AZ (Mich. Cir. Ct. filed Feb. 21, 1980), is a declaratory judgment action brought by HCMA to prevent a challenge to its authority to lease land at the Metro Beach Metropark for the construction and operation of a water slide. The Attorney General has filed multiple counterclaims, including one under MEPA.

245. *See* Appendix D *infra* for list of cases; *see* Appendix B *infra* for complete citation data.

246. People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc., No. 75-37207-CE (Mich. Cir, Ct. filed Sept. 24, 1975).

247. Michigan State Air Pollution Control Comm'n Consent Order No. 06-1974, May 23, 1974, settling Township of Gaines v. Berlin & Farro Liquid Incineration, Inc., No. 29230 (Mich. Cir. Ct. filed Nov. 6, 1973).

248. *In re* Berlin & Farro Liquid Incineration, Inc., (Mich. Dep't of Natural Resources filed Sept. 16, 1975) (emergency order to cease and desist).

to dispose of the significant quantities of toxic waste that remained.[249]

In July 1978, after losing its challenges both to the revocation of its certification to haul and store liquid industrial wastes and to the order to stop operation of the incinerator,[250] Berlin & Farro entered into a new consent agreement with the Attorney General and the Department of Natural Resources.[251] In violation of the consent agreement and despite revocation of its certification, Berlin & Farro continued to accept liquid waste for storage through 1979. During this period, state officials discovered and identified hexachlorocyclopentadiene, octachorocyclopentene, and hexachlorobenzene, in addition to other toxic compounds and heavy metals, in the soil, stream sediments, and aquatic life near the Berlin & Farro site.

In February 1979, the Attorney General filed a new complaint under MEPA and other statutes seeking to enforce the consent agreement.[252] The parties again settled the suit, stipulating to a preliminary injunctive order in May 1979.[253] In April 1980, the Attorney General filed a motion for an order of contempt, forfeiture of bond and appointment of receiver, and within a few weeks the circuit court held Berlin & Farro in contempt and appointed a judicial receiver to insure that the company complied with the consent agreement.[254] In the interim, Berlin & Farro declared bankruptcy, leaving the state with responsibility for the cleanup of what had become Michigan's worst toxic waste site, and the sixteenth worst site nationwide as listed on the Environmental Protection Agency's federal "Superfund" list.[255]

Ongoing clean up at the site is projected to cost five million dollars. The state has already found it necessary to require local residents temporarily to evacuate the area surrounding the Berlin & Farro toxic waste site because of the danger posed by the presence of a large number of

249. *See* Berlin & Farro Liquid Incineration, Inc. v. Department of Natural Resources, No. 75-37187-CE (Mich. Cir. Ct. filed Sept. 26, 1975). The suit was withdrawn following the company's agreement to present the Air Pollution Control Commission with a revised plan. The company refiled its complaint after the Commission rejected the revised plan. *See* Haynes, *supra* note 6, at 629 n.163.

250. Berlin & Farro Liquid Incineration, Inc. v. Department of Natural Resources, 80 Mich. App. 490, 264 N.W.2d 37 (Ct. App. 1978), *lv. denied*, 402 Mich. 907, 315 N.W.2d 926 (1978).

251. Berlin & Farro Liquid Incineration, Inc. v. Department of Natural Resources, No. 75-37187-CE (Mich. Cir. Ct. July 31, 1978) (consent agreement).

252. People *ex rel.* Kelley v. Berlin & Farro Liquid Incineration, Inc., No. 79-51326-CE (Mich. Cir. Ct. filed Feb. 27, 1979).

253. People *ex rel.* Kelley v. Berlin & Farro Liquid Incineration, Inc., No. 79-51326-CE (Mich. Cir. Ct. June 1, 1979) (stipulation of the parties and preliminary injunctive order).

254. People *ex rel.* Kelley v. Berlin & Farro Liquid Incineration, Inc., No. 79-51326-CE, slip op. (Mich. Cir. Ct. May 15, 1980); People *ex rel.* Kelley v. Berlin & Farro Liquid Incineration, Inc., No. 79-51326-CE (Mich. Cir. Ct. Aug. 26, 1980) (order directing appointment of judicial receiver and imposing penalty for defendant Berlin & Farro's contempt).

255. *See* Detroit Free Press, May 6, 1983, at 3A, col. 4.

unknown chemicals.[256] Thus, despite persistent attempts by state and local agencies to resolve the problems of the Berlin & Farro waste site from the outset, the company had continued to dump large quantities of toxic wastes at the site through 1979. In the end, the state was burdened with the multi-million dollar bill for the clean up, and there is no estimate of the lasting threat to the health of nearby residents.

B. Administrative Agencies

MEPA permits plaintiffs to initiate court actions whether or not they have exhausted relevant administrative procedures.[257] By making available various concurrent means of legal challenge, including the threat of a court order, MEPA's drafters hoped to grant private plaintiffs the tools to prod recalcitrant regulatory agencies into more careful consideration of possible environmental problems.

MEPA also creates expanded opportunities for plaintiffs through subsection 5(1). This subsection specifies that state courts and agencies may permit any public or private entity or individual to intervene in a MEPA action as a plaintiff whenever "administrative licensing or other proceedings, and judicial review thereof are available by law."[258] This provision has the dual effect of allowing plaintiffs who could have filed original suits under MEPA to intervene in either administrative or court proceedings reviewing MEPA decisions and of consolidating the hearing of all issues arising out of a single violation.[259]

The Michigan Court of Appeals has taken an expansive view of subsection 5(1). In *West Michigan Environmental Action Council, Inc. v. Betz Foundry, Inc.*,[260] for example, the court of appeals suggested that the threat of multi-party intervention is an insufficient reason for refusing to allow an interested party to intervene in an administrative proceeding. Permissive intervention in agency proceedings promotes judicial efficiency, if only because the plaintiff may not deem it necessary to file a MEPA action should the court accept his or her motion to intervene at the administrative stage.

Despite the court of appeals' pronouncement in *Betz Foundry*,

256. *See* Detroit Free Press, Apr. 12, 1983, at 3A, col. 2; Detroit Free Press, Apr. 17, 1983, at 3A, col. 3; Detroit Free Press, Apr. 18, 1983, at 3A, col. 3; Detroit Free Press, Apr. 19, 1983, at 3A, col. 3; Detroit Free Press, Apr. 21, 1983, at 1A, col. 1; Detroit Free Press, Apr. 22, 1983, at 3A, col. 3; Detroit Free Press, Apr. 26, 1983, at 3A, col. 3; Detroit Free Press, Apr. 27, 1983, at 3A, col. 2; Detroit Free Press, Apr. 28, 1983, at 3A, col. 4; Detroit Free Press, Apr. 29, 1983, at 3A, col. 2; Detroit Free Press, May 1, 1983, at 3A, col. 2; Detroit Free Press, May 2, 1983, at 6A, col. 1; Detroit Free Press, May 6, 1983, at 3A, col. 2; Detroit Free Press, May 7, 1983, at 3A, col. 2.

257. *See* MICH. COMP. LAW ANN. § 691.1206 (West Supp. 1984).

258. *Id.* § 691.1205(1).

259. *See* Sax and Conner, *supra* note 6, at 1070.

260. No. 14355, slip op. (Mich. Ct. App. Aug. 3, 1972).

MEPA's intervention provision has been invoked only sporadically. The vague language of subsection 5(1) may explain its underuse. The procedural confusion marking the *Black Pond Development* case[261] illustrates well this statutory weakness. In that case, a citizens' group sought to intervene in the Ann Arbor Planning Commission's consideration of a proposed multi-family housing development. The circuit court's discussion of whether MEPA allowed the group to intervene, however, nearly eclipsed discussion of the merits of the case.[262]

An administrative agency reviewing activities potentially causing environmental harm must still consider feasible and prudent alternatives even if no attempts are made to intervene under MEPA. Subsection 5(2) of MEPA requires that in "administrative, licensing or other proceedings, and in any judicial review thereof," no conduct may be authorized or approved which does or is likely to pollute, impair or destroy the air, water, other natural resources, or the public trust therein "so long as there is available a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."[263]

In *Michigan State Highway Commission v. Vanderkloot*,[264] the Michigan Supreme Court held that MEPA requires the State Highway Commission to consider feasible and prudent alternatives if, in an administrative condemnation proceeding, it appears that the use that will be made of the particular property acquired by the state's exercise of its eminent domain powers involves environmental pollution, impairment or destruction.[265] According to the court, the Commission's failure to comply with these requirements might support a finding of fraud or abuse of discretion.[266]

MEPA's drafters also attempted to provide the courts with a flexible arsenal of enforcement techniques to complement the expanded enforcement role envisioned for private plaintiffs. For example, a trial judge has the option of waiting for the conclusion of administrative proceedings or of moving ahead with an independent examination of the plaintiff's complaint.[267] Thus, retention of options by the trial judge may significantly

261. Black Pond Dev. (Mich. Cir. Ct. Nov. 11, 1980) (petition to intervene).

262. *See supra* notes 183-88 and accompanying text for a complete discussion of the case.

263. MICH. COMP. LAWS ANN. § 691.1205(2) (West Supp. 1984). The courts have not yet had occasion to address the significance of the legislature's incorporation of a "reasonableness" standard into section 5(2) of MEPA, supplementing what are essentially the affirmative defense provisions of section 3(1). A commentator has written, however:

> One may question the effect of interpreting this to impose less of a duty upon administrative agencies to mitigate [the polluter's] environmentally threatening activities, given the fact that the 'stricter' standard will be applied to the same activity if it is challenged later in a direct § 2(1) suit.

ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 142-43.

264. 392 Mich. 159, 220 N.W.2d 416 (1974).

265. *Id.* at 186, 220 N.W.2d at 428.

266. *Id.* at 191, 220 N.W.2d at 431.

267. *See* Sax and Conner, *supra* note 6, at 1019-20.

benefit MEPA plaintiffs because trial courts traditionally are not constrained by the institutionalized administrative law doctrines of "primary jurisdiction" or "exhaustion of remedies."[268] Trial judges, however, also have authority under the statute to reroute plaintiffs through administrative, licensing, or other proceedings to determine the legality of a defendant's conduct. In so doing, the court may grant any interim equitable relief necessary to prevent environmental harm during the administrative proceedings. Finally, the court must also review the outcome of the administrative process in light of MEPA's substantive standards.[269]

Michigan's courts have had occasion to exercise the broad discretion allowed to them by subsection 5(2) of MEPA. For example, in *Eyde v. State*,[270] the Supreme Court of Michigan reinstated the circuit court's holding that the plaintiff could assert his rights under MEPA to prevent the construction of a sewer across his land even though he had not intervened in the ongoing condemnation action. Further, in *People ex rel. Attorney General v. Clinton County Drain Commissioner*,[271] the court of appeals held that the plaintiff could use MEPA to challenge a drain project despite the plaintiff's failure to exhaust the available administrative remedies.[272]

In summary, by using the threat of citizen suits and intervention to prod administrative agencies to undertake a more careful review of environmental problems, MEPA "expands the mandate for administrative agencies and governmental bodies to consider environmental values in their deliberations" and provides them with a defense "against those aggrieved by the denial of licenses or permits for impairing activities."[273]

VIII

PROCEDURAL ISSUES

MEPA's basic procedural elements, such as those provisions relating to standing,[274] jurisdiction,[275] venue,[276] assessment of costs,[277] and

268. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 147.

269. MICH. COMP. LAWS ANN. §§ 691.1204(2)-(4) (West Supp. 1984).

270. 393 Mich. 453, 225 N.W.2d 1 (1975).

271. 91 Mich. App. 630, 283 N.W.2d 815 (Mich. Ct. App. 1979), *lv. denied*, 408 Mich. 853 (1980).

272. *See also* Kissner v. Board of County Road Comm'rs, No. 78-2969, slip op. (Mich. Ct. App. Dec. 10, 1979) (*per curiam*) (court of appeals reinstated plaintiffs' suit for injunctive relief against condemnation proceeding after plaintiffs collaterally challenged circuit court's dismissal by raising MEPA claims despite expiration of the prescribed time for raising challenges to such proceedings).

273. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 144-45.

274. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1984).

275. *Id.* at §§ 691.1202(1), 691.1204(1), 691.1204(4).

276. *Id.* at § 691.1202(1).

277. *Id.* at § 691.1203(3).

the posting of bonds[278] have yet to be made the subject of much litigation. In some areas, the absence of procedure-based suits may best be attributed to the legislature's enactment of carefully drawn provisions. However, in other areas, such as the assessment of attorneys' fees, the legislature left the statutory language purposefully vague, giving wide berth to the courts to develop the common law. The courts have had occasion to construe the Act's most critical procedural elements. In the process, they have given definition to issues which the legislature declined to explicate.

A. Standing and Jurisdiction

In the fifteen years since MEPA's enactment, few defendants have seriously challenged the propriety of a plaintiff's standing to sue. The broad language of MEPA's standing provisions effectively dissuades such challenges.[279] Because the statute provides that "any person . . . may maintain an action,"[280] no court has ever denied standing to a plausible plaintiff, whether it be a statewide environmental organization, a neighborhood group, a public agency, or a private party.

Despite the broad standing provisions, the unavailability of money damages under the Act deters potential plaintiffs who do not have a genuine adversarial interest in bringing suit. In fact, the absence of monetary damages under MEPA remains one of the significant institutional barriers for plaintiffs and is instrumental in preventing MEPA cases from flooding the state courts.[281] During the debate over MEPA's adoption, some opponents expressed concern that the statute would create excessive interference by "crusading environmentalists" who might seek to hinder projects which did not directly affect them. Remote interference, such as by interest groups from Detroit impeding projects in the Upper Peninsula, has failed to materialize. The community focus that pervades most MEPA suits suggests that individuals are, in general, not sufficiently interested to become involved in litigation concerning controversies removed from their own neighborhoods.

One jurisdictional question prompting judicial attention is whether a MEPA suit in which a governmental agency is the defendant must be brought in the county where the alleged harm caused by the agency's action occurred, or whether it may also be brought in the county where the agency sits. The court of appeals resolved this issue in *Robinson v. Department of Transportation*,[282] holding that the plaintiff's MEPA com-

278. *Id.* at § 691.1202a.

279. *See* Sax and DiMento, *supra* note 5, at 36. *But see* Rush v. Sterner, No. 82-B-7902-CZ, slip op. (Mich. Cir. Ct. Apr. 27, 1983), discussed *supra* note 76.

280. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1984).

281. *See* Sax and Conner, *supra* note 6, at 1080; Haynes, *supra* note 6, at 593 n.12.

282. 120 Mich. App. 656, 327 N.W.2d 317 (Ct. App. 1981).

plaint, alleging that defendant Michigan Department of Transportation's proposed extension of an interstate highway posed a threat to the state's natural resources, could be filed either in the county where the harm would result or in the county where the Department of Transportation located its principal place of business.

B. Remedies

Subsection 2(1) of the Act comprises the exclusive enumeration of remedies available to plaintiffs prevailing on a MEPA cause of action. The subsection expressly provides for equitable or declaratory relief, but makes no provision for awards of actual, consequential, or punitive damages.[283] The Michigan Court of Appeals has held that even if a MEPA plaintiff prevails on the merits, judicial discretion controls the choice between equitable or declaratory relief.[284] Whether a court may refuse an injunctive remedy where such relief is required to fulfill the goals of MEPA, however, remains unclear.[285] According to subsection 4(1), the courts may tailor their award of equitable or declaratory relief to fit the specific facts of each case,[286] providing the relief granted reflects an ultimate purpose of "imposing conditions . . . that are required to protect the air, water and other natural resources . . . from pollution, impairment or destruction."[287]

C. Problems Associated with Multiple Litigation

A particularly troublesome procedural question concerns the finality of decisions under MEPA and the possibility of multiple litigation. Because MEPA cases typically are not brought as class actions,[288] the binding nature of a judicial or administrative decision on interested third parties is often unclear. It is uncertain, for example, whether a neighborhood organization would be precluded from initiating a MEPA action challenging a developer's proposed project after a second organization's independently filed challenge has already been rejected. Similarly, it is uncertain whether a third group may file yet another suit even though all prior suits have been resolved through careful settlement.[289]

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283. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1984).

284. Wayne County Health Dep't v. Olsonite Corp., 79 Mich. App 668, 707, 263 N.W.2d 778, 797 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978). *See also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193 (1978); *but see* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

285. *See* Sax Draft, *supra* note 4, at 37.

286. MEPA allows the court to grant temporary or permanent equitable relief and to impose conditions on the defendant. MICH. COMP. LAWS ANN. § 691.1204(1) (West Supp. 1984).

287. *Id.*

288. Approximately one-fifth of the MEPA actions filed have been brought as class actions. *See* Haynes, *supra* note 6, at 650. *See also* Appendix B *infra*.

289. *See supra* notes 180-82 and accompanying text for a discussion of how this particular problem was dealt with in East Michigan Envtl. Action Council v. S.B. McLaughlin Assocs.,

There are no fatal theoretical impediments to the filing of such later suits.[290] In fact, the spectre of multiple litigation may be used as an important coercive tool to insure the proper functioning of MEPA's citizen-assisted regulatory system. For example, subsequent MEPA claims may be particularly appropriate following the settlement of a prior suit in which the MEPA count was merely adjunct to an action for monetary damages and the settlement was purely financial, devoid of any promise to modify behavior or project design. These situations can be treated as though the essential MEPA claim has remained unlitigated, leaving no basis for denying a future MEPA action. Subsequent MEPA claims should also be encouraged when changed circumstances, such as new technological achievements, provide superior alternatives to a party's present attempts at pollution abatement as mandated by the settlement or holding of a previous suit. Interested third parties should be permitted to bring a new MEPA suit to require the original defendant to modify its behavior to incorporate the superior alternatives.

Although these subsequent and potentially duplicative actions are theoretically possible, as a practical matter they have not been brought. Perhaps this is because a previously unsuccessful party is unlikely to succeed in a new but related case. It has been suggested that since MEPA plaintiffs are asserting a public right to environmental quality, "a court decision that the defendant has successfully rebutted plaintiff's prima facie case or has successfully pled the affirmative defense should act to preclude further MEPA suits challenging the same activity unless the later plaintiffs can show changes in defendant's operations or technological innovations which might render defendant's operations no longer 'feasible and prudent.' "[291]

Importantly, the courts have not yet construed MEPA's provisions to prevent determined parties from initiating multiple lawsuits. In fact, it is not unknown for MEPA plaintiffs to file parallel suits over the same set of facts but on independent legal grounds.[292] The plaintiffs in *Poletown Neighborhood Council v. City of Detroit*,[293] for example, brought one action in the state court under Michigan law, including MEPA, and a separate action in federal court under the National Environmental Policy

Inc., No. 79-195380-CE, (Mich. Cir. Ct. 1981) (settlement agreement placed on record) (revised consent agreement filed July 24, 1984).

290. There is some authority for the proposition that a third party failing to seek intervention in one action will be barred from raising a collateral attack in a subsequent action based on the same facts. *See* O'Burn v. Sharp, 70 F.R.D. 549 (E.D. Pa. 1976), *aff'd*, 546 F.2d 418 (3rd Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045 (3rd Cir. 1980).

291. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 157-58.

292. *See* Sax and DiMento, *supra* note 5, at 37-39.

293. 410 Mich. 616, 304 N.W.2d 455 (1981).

Act.[294]

The most significant multiplicity problem is the inefficient case-by-case resolution of related issues that results from the narrow judicial construction given to Subsection 5(1), MEPA's intervention provision.[295] *West Michigan Environmental Action Council, Inc. v. Natural Resources Commission* (*WMEAC v. NRC*),[296] which involved the state's issuance of drilling permits to oil companies already holding land leases in the Pigeon River Country State Forest, illustrates this procedural intervention problem. The Michigan Supreme Court's decision does not clearly indicate whether the oil companies were prohibited from drilling throughout the entire Pigeon River Forest or only at ten specific sites. Shell Oil Company, joined as one of the original defendants in *WMEAC v. NRC*, sought a permit to drill on another site in the state forest. The Department of Natural Resources denied the permit on the grounds that *WMEAC v. NRC* barred all permits within the forest. Shell Oil disagreed and sued the Department for the permit.[297] The original plaintiff, West Michigan Environmental Action Council, concerned now that the meaning of *WMEAC v. NRC* was being disputed, sought to intervene in the new suit. The circuit court denied West Michigan Environmental Action Council's motion to intervene, however, holding that *WMEAC v. NRC* only enjoined drilling at the ten subject sites, leaving each of the other sites to a case-by-case review. The court further ordered that Shell Oil be granted the permit to drill.[298] West Michigan Environmental Action Council responded by filing an independent suit under MEPA to enjoin issuance of the permit.[299] Although the parties ultimately settled,[300] the second suit was clearly unnecessary in this instance and could have been avoided had West Michigan Environmental Action Council been permitted to intervene in the action brought by Shell Oil.

A more common variant of the multiplicity problem arises in condemnation cases. The owner of property condemned under the auspices of a state or local authority may assert MEPA claims should he or she

294. *See* Crosby v. Young, 512 F. Supp. 1363 (E.D. Mich. 1981); *see also* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982).

295. *See, e.g.*, Nosal v. Chrysler Corp., 43 Mich. App. 235, 203 N.W.2d 912 (Ct. App. 1972); Lincoln and Lake Townships v. Manley Bros., Nos. 74-001113-CE and 74-001114-CE, slip op. (Mich. Cir. Ct. Dec. 20 1974) (transcript of testimony given on Oct. 2, 1974 before Judge Chester J. Byrns).

296. 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979); *see supra* notes 145-54 and accompanying text.

297. Shell Oil Co. v. Tanner, No. 80-24466-AA (Mich. Cir. Ct. filed Jan. 29, 1980).

298. Shell Oil Co. v. Tanner, No. 80-24466-AA, slip op. (Mich. Cir. Ct. March 4, 1980) (summary judgment for plaintiff).

299. West Michigan Envtl. Action Council, Inc. v. Tanner, No. 64839-41, slip op. (Mich. Mar. 28, 1980). The supreme court refused to hear the case, originally filed as No. 80-24630-CE, on emergency appeal before it had been heard by the court of appeal.

300. Hand, *supra* note 15, at 1031.

challenge the condemnation in court. The courts have established, however, that the property owner need not raise the MEPA claim directly in the condemnation action, but may instead file an independent MEPA suit. In *Kissner v. Board of County Road Commissioners*,[301] the court rejected the defendant Washtenaw County Road Commissioners' contention that the respondent in a condemnation action brought under the Highway Condemnation Act could not challenge the condemnation by collateral action under MEPA after the prescribed time for an administrative challenge to the necessity of the condemnation had expired. The court pointed out that MEPA creates an independent cause of action and that the Michigan Supreme Court had expressly ruled, in *Eyde v. State*,[302] that "there is no statutory duty that requires citizens to intervene in condemnation proceedings to assert their rights under [MEPA] or be forever barred from raising them."[303]

Eyde and *Kissner* offer a sensible interpretation of MEPA's intervention provisions. As the supreme court noted in *Eyde*, a neighbor of the condemnee can bring a collateral MEPA action to challenge the effects of the condemnation. Because the condemnee should have no fewer rights than his or her neighbors, the condemnee should not be denied the right also to raise MEPA claims in a collateral action.[304] Nonetheless, the approach anticipated by these decisions could lead to unnecessary litigation. For example, probate courts, which are authorized to hear condemnation cases, may adjudicate MEPA claims if raised within a context appropriate to their jurisdiction. The condemning authority could invite the owners of condemned property to raise all potential MEPA claims in the condemnation action while the property is properly before the court. These property owners will naturally desire to avoid the expense of multiple litigation and probably will respond favorably to such an invitation. Once the issue is joined under MEPA, the case might be structured as a class action in order to avoid duplicative suits brought by neighboring property owners. This approach raises some difficult questions such as the propriety of creating an involuntary plaintiff class and therefore may not be accepted by the courts of general jurisdiction. Because the interest in efficient litigation is great, the problem posed is worth careful consideration.[305] A more efficient litigation schedule need not be avoided if the

301. No. 78-2969, slip op. (Mich. Ct. App. Dec. 10, 1979).

302. 393 Mich. 453, 225 N.W.2d 1 (1975).

303. Kissner v. Board of County Rd. Comm'rs, No. 78-2969, slip op. at 2 (Mich. Ct. App. Dec. 10, 1979), *quoting* Eyde v. State, 393 Mich. 453, 454, 225 N.W.2d 1, 2 (1975).

304. Eyde v. State, 393 Mich. 453, 455, 225 N.W.2d 1, 2 (1975); *see also* Sax Draft, *supra* note 4, at 35.

305. *Cf.* Sax and Conner, *supra* note 6, at 1035 (discussion of Muskegon County v. Environmental Protection Org., No. C-5585 (Mich. Cir. Ct. filed Mar. 15, 1971) (county suit against a local organization critical of its regional sewage treatment program, seeking declaratory judgment that the planned program was not a nuisance).

following caveats are kept in mind: (1) the option to pursue the MEPA claim should remain with the owner of the condemned property; (2) the court should facilitate intervention; and (3) third parties should be free to pursue the MEPA claims if the property owner elects not to.

D. Costs and Attorneys' Fees

Subsection 3(3) of MEPA provides merely that "costs may be apportioned to the parties as the interests of justice require."[306] In 1970, when the Michigan legislature was considering the enactment of MEPA, the well settled American rule against an award of attorneys' fees was still relatively unmarred by the carving out of judicial or statutory exceptions. MEPA proponents, as a consequence, believed it best to leave to the courts the evolution of the law governing such awards. One of the first questions that arose from this language, then, was whether "costs" might be construed to include attorneys' fees.

The Michigan Supreme Court has not yet considered the question of attorneys' fees under MEPA, but the court of appeals has examined the issue on several occasions,[307] the first arising in 1976 in *Taxpayers and Citizens in the Public Interest v. Department of State Highways*.[308] The court in that case reiterated Michigan's statutory rule for costs—"[e]xcept as otherwise provided by statute, the Supreme Court shall by rule regulate the taxation of costs"[309]—and found subsection 3(3) of MEPA to be an instance where the legislature had "otherwise provided by statute."[310] Accordingly, the court ruled, under MEPA "the award of costs and fees . . . is within the broad and unfettered discretion of the trial judge, a discretion that must, however, be recognized and exercised."[311]

Despite this broad reading of MEPA's costs provisions, the *Taxpayers and Citizens* court ultimately concluded that MEPA does not require the apportionment of attorneys' fees.[312] The court refused to set out detailed guidelines for trial judges,[313] reasoning that "the trial judge must

306. MICH. COMP. LAWS ANN. § 691.1203(3) (West Supp. 1984).

307. Joseph v. Adams; Organic Growers of Michigan v. Michigan Dep't of Agriculture; Oscoda Chapter of PBB Action Comm. v. Department of Natural Resources; Superior Public Rights, Inc. v. Department of Natural Resources; and Taxpayers and Citizens in the Public Interest v. Department of State Highways. *See* Appendix B *infra* for full citation data.

308. 70 Mich. App. 385, 245 N.W.2d 761 (Ct. App. 1976).

309. *Id.* at 387, 245 N.W.2d at 762, *quoting* MICH. COMP. LAWS ANN. § 600.2401 (West Supp. 1974).

310. 70 Mich. App. at 387, 245 N.W.2d at 762. *See also* section 48(10) of the Hazardous Waste Management Act, MICH. COMP. LAWS ANN. § 299.548(10) (West 1984), for another example of a statutory provision in which the Michigan legislature has "otherwise provided."

311. 70 Mich. App. at 387-88, 245 N.W.2d at 762.

312. *Id.* at 388, 245 N.W.2d at 762.

313. *Id.* at 388-89, 245 N.W.2d at 763.

reach the result 'that the interests of justice require.' "[314] The court further explained that since MEPA's costs provision directs trial judges to exercise broad equitable discretion, attuned to the unique facts of each individual case, the appellate role is limited to review for abuse of discretion.[315]

The following year, in *Superior Public Rights, Inc. v. Department of Natural Resources*,[316] the court of appeals, citing its decision in *Taxpayers and Citizens*, directed the circuit court, on remand, to consider awarding attorneys' fees to the party prevailing under MEPA.[317] In subsequent MEPA cases, circuit courts apparently have adopted the *Superior Public Rights* court's directive, awarding attorneys' fees as well as other costs. In *Organic Growers of Michigan v. Department of Agriculture*,[318] for example, the circuit court awarded the plaintiffs about $10,200 for costs and reasonable attorneys' fees. The plaintiffs had claimed that the administration of a gypsy moth control program was unlawful under MEPA. The court ordered a preliminary injunction. The defendants, however, voluntarily discontinued the program, and the plaintiffs' motion for summary judgment was subsequently denied. The defendants argued that the plaintiffs, having lost their case, were not entitled to attorneys' fees. The circuit court responded that MEPA does not provide a "winners" award for the prevailing party but rather "an appropriate remuneration for a plaintiff that has borne the expense of performing a 'valuable public service.' "[319]

The court of appeals in *Oscoda Chapter of PBB Action Committee v. Department of Natural Resources*,[320] tightened the reigns on the trend toward liberal awards of attorneys' fees. In that case, the circuit court awarded the plaintiffs about $20,300, representing sixty percent of their total costs including attorneys' fees.[321] The Department appealed the award and the court of appeals reversed, holding that although the decision whether to award costs under MEPA remains within the discretion of the trial judge, the judge could not apportion actual attorneys' fees as

314. *Id.* at 388, 245 N.W.2d at 762.

315. *Id.* at 388, 245 N.W.2d at 763.

316. 80 Mich. App. 72, 263 N.W.2d 290 (Ct. App. 1977).

317. *Id.* at 90, 263 N.W.2d at 298. *See also* Cady v. Dick Loehr's, Inc., 100 Mich. App. 543,548-49, 299 N.W.2d 69, 71-72 (Ct. App. 1980).

318. No. 78-21764-CE, slip op. (Mich. Cir. Ct. Jan. 23, 1980).

319. *Id.* at 2, *quoting* Taxpayers and Citizens in the Public Interest v. Department of State Highways, 70 Mich. App. 385, 388, 245 N.W.2d 761, 762 (Ct. App. 1976). *But see* Three Lakes Ass'n v. Kessler, No. 1257-CX, slip op. (Mich. Cir. Ct. June 30, 1978), *aff'd*, 101 Mich. App. 170, 300 N.W.2d. 485 (Ct. App. 1980), *lv. denied*, 411 Mich. 1056 (1981) (Circuit court, despite acknowledging that it was empowered to award attorneys' fees to the plaintiffs, expressly refused to do so.).

320. 115 Mich. App. 356, 320 N.W.2d 376 (Ct. App. 1982), *lv. granted*, 417 Mich. 905, 341 N.W.2d 776 (1983).

321. No. 78-00660-CE, slip op. (Mich. Cir. Ct. Apr. 17, 1978).

costs. The court of appeals further held that a circuit court may award in its discretion only those costs taxable under other Michigan statutes.[322] According to the *Oscoda* court, the *Superior Public Rights*[323] opinion was based upon a misunderstanding of both MEPA and *Taxpayers and Citizens*.[324] The *Oscoda* court pointed out that the issue in *Taxpayers and Citizens* was not whether section 3 of MEPA authorized an award of attorneys' fees as costs, but "whether the statute gave the trial court discretion to apportion attorney fees and expert witness fees which were taxable as costs."[325]

The court of appeals recently examined the attorneys' fee question in a different context. The issue in *Auto Owner's Insurance Co. v. Biddis*,[326] a non-MEPA case, was whether the phrase "approximate loss adjustment costs" in Michigan's no-fault automobile insurance statute authorized attorneys' fees. The court cited subsection 3(3) of MEPA as an analogous provision, noting that although it only discusses costs, subsection 3(3) implicitly grants trial judges discretion to award attorneys' fees.[327]

IX

MEPA'S RELATIONSHIP TO STATUTORY AND COMMON LAW

When enacted in 1970, MEPA filled a large void in Michigan's existing statutory scheme. Many significant and recurrent environmental problems at both the state and local level had been consistently overlooked by a legislature intent on enacting statutes with narrowly defined parameters of operation or which manifested a primary purpose other than environmental protection. MEPA's drafters presumed that regular use of this broad-based environmental protection statute would focus public attention upon a variety of pressing environmental problems, thus requiring the legislature to flesh out MEPA's skeletal structure by supplementing the Act with statutes specifically tailored to peculiar sets of

322. 115 Mich. App. 356, 363-64, 320 N.W.2d 376, 378-79 (Ct. App. 1982).

323. *See supra* note 316.

324. *See supra* note 308.

325. 115 Mich. App. at 364, 320 N.W.2d. at 379 (Ct. App. 1982). The Michigan Supreme Court has agreed to review the *Oscoda* case, *see supra* note 320, and may reduce the uncertainty, created by the various court of appeals decisions, as to the scope of trial court discretion to award attorneys' fees under MEPA.

326. 123 Mich. App. 232, 333 N.W.2d 232 (Ct. App. 1983).

327. *See id.* at 234-35, 333 N.W.2d at 233. The court cited Superior Public Rights, Inc. v. Department of Natural Resources, 80 Mich. App. 72, 263 N.W.2d 290 (Ct. App. 1977), as support for this interpretation. However, the court also noted that the *Oscoda* court had been critical of the reasoning expressed by the majority in *Superior Public Rights*. *But see* Joseph v. Adams, 467 F. Supp. 141 (E.D. Mich. 1978), in which plaintiffs challenging a proposed highway extension raised both federal and MEPA claims. The court rejected the argument that attorneys' fees should be awarded under MEPA and concluded that federal law governed the subject. The court held that the plaintiffs were entitled to costs, but not attorneys' fees.

problems requiring more individualized treatment.[328] MEPA's drafters hoped that the legislature would interpret the state constitution's broad language that "[t]he legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction"[329] and MEPA's similar language as supporting the enactment of additional environmental legislation, thereby reducing the responsibility of the courts to develop piecemeal common law standards.[330] Unfortunately, the Michigan legislature has never approached this challenge in the comprehensive and coherent manner necessary to realize the drafters' hopes. Thus, the long-range goal of integrating MEPA with other specific regulatory laws to promote a comprehensive scheme for protecting the environment has not been attained.

A. MEPA and Common Law Nuisance Claims

In the early 1970's, the extent to which MEPA preempted the common law tort of nuisance was uncertain.[331] In 1977, this question was resolved by the Michigan Court of Appeals in *Wayne County Health Department v. Olsonite Corp.*[332] In *Olsonite*, the defendant corporation challenged the circuit court's directive that steps be taken to mitigate the pollution emanating from the defendant's plant. The appellate court rejected the defendant's claim that the circuit court was required to "balance the equities" in granting an injunction under MEPA, pointing out that to uphold the defendant's theory would "eviscerate the substantive facets" of MEPA and "condemn as mere surplusage" all but the Act's procedural remedies.[333] Because of Michigan's "*paramount* concern for the protection of its natural resources from pollution, impairment or destruction," the court held that the legislature intended MEPA "to supersede the common law of nuisance to the extent these respective bodies of law conflict."[334]

MEPA differs from the common law of nuisance in several respects.[335] First, under the common law, the plaintiff must show both that the defendant's conduct is unreasonable and that it substantially interferes with the plaintiff's use and enjoyment of his or her property interests.[336] MEPA, on the other hand, protects the environmental rights

328. Sax Draft, *supra* note 4, at 38.
329. MICH. CONST. art. IV, § 52.
330. Sax Draft, *supra* note 4, at 38.
331. *See* Crandall v. Biergans, 2 ENVTL. L. REP. (ENVTL. L. INST.) 20,238, 3 Env't Rep. Cas. (BNA) 1827 (Mich. Cir. Ct. Feb. 14, 1972).
332. 79 Mich. App. 668, 263 N.W.2d 778 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978).
333. *Id.* at 693, 263 N.W.2d at 791.
334. *Id.* at 693-94, 263 N.W.2d at 791 (emphasis added).
335. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 155.
336. *See id.* at 154; W. PROSSER, LAW OF TORTS, § 89, at 593-602 (4th ed. 1971).

of all of the state's citizens *in the aggregate*, rather than merely the property rights of each individual. Second, the MEPA plaintiff need only establish the threshold likelihood of pollution or impairment, as opposed to actual physical harm or substantial interference with a property interest.[337] Thus, a plaintiff under MEPA need not show the certainty of irreparable harm that is required by the nuisance tort.[338] Finally, MEPA does not require the reasonableness inquiry and its concomitant examination of the social utility of the defendant's conduct as required under the common law to establish the plaintiff's prima facie nuisance case. Instead, MEPA shifts the burden of proof, requiring the defendant to establish the social utility of its conduct as part of its affirmative defense.

B. MEPA's Relationship to Other Statutes

The Michigan Supreme Court held, in *Michigan State Highway Commission v. Vanderkloot*,[339] that MEPA "does not . . . merely provide a separate *procedural* route for protection of environmental quality, it also is a source of supplementary *substantive* environmental law."[340] In that case the State Highway Commission sought to condemn the Vanderkloots' property in anticipation of the construction of a new highway. The Vanderkloots challenged the condemnation on constitutional grounds, claiming that Michigan's Highway Condemnation Act[341] fails to include specific provisions for environmental protection as required by Michigan's constitutional provision that "[t]he legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."[342] The court concluded that this provision of the Michigan constitution "does create a mandatory legislative duty to act to protect Michigan's natural resources."[343] The court also determined, however, that the legislature had already satisfied this duty by enacting MEPA and that it need not enact environmental provisions in every statute. According to the court, MEPA is to be read *in pari materia* with other statutes, and the Highway Commission is bound to consider the restraints of MEPA in acting under the Highway Condemnation Act.[344]

The court of appeals addressed an analogous issue in *Michigan Oil Co. v. Natural Resources Commission*.[345] The plaintiff claimed that

337. *See* ENVIRONMENTAL LAW IN MICHIGAN, *supra* note 84, at 154.
338. *Id.* at 156.
339. 392 Mich. 159, 220 N.W.2d 416 (1974).
340. *Id.* at 184, 220 N.W.2d at 427 (emphasis added). *See also* Haynes, *supra* note 6, at 602-03.
341. MICH. COMP. LAWS ANN. §§ 213.171-.199 (West 1967).
342. MICH. CONST. art. IV, § 52.
343. 392 Mich. at 178-79, 220 N.W.2d at 425.
344. *Id.* at 182-84, 220 N.W.2d at 426-27.
345. 406 Mich. 1, 276 N.W.2d 141 (1979), *cert. denied*, 444 U.S. 980 (1979).

Michigan's Oil, Gas and Minerals Act[346] was meant to promote the conservation of oil and gas only, and not of the environment in general. The court found it unnecessary to reach the question of MEPA's relationship to the Michigan Oil, Gas and Minerals Act, but stated that "if a decision on that issue were required, it is logical to conclude that [MEPA] should be read *in pari materia* with other statutes relating to natural resources because it specifically refers to 'any alleged pollution, impairment or destruction of the air, water or other natural resources.' "[347]

1. The Sand Dune Protection and Management Act

The difficulty of coordinating MEPA with the Sand Dune Protection and Management Act of 1976 (Sand Dune Act)[348] illustrates well the many obstacles that impede the successful integration of MEPA with other more specific environmental statutes. An early MEPA case, *Lincoln Township v. Manley Brothers*,[349] considered the adverse environmental impact of sand dune mining. In 1974, the trial judge and the parties formulated a detailed protective order allowing the defendant to continue its mining operations subject to narrowly drawn constraints. Implementation of the order was fraught with complications and became an incessant problem for the court. In 1976, however, the legislature passed the Sand Dune Act which turned the actual administration of dune mining over to the Department of Natural Resources. Unfortunately, because the Sand Dune Act fails to address some of the larger problems associated with sand dune mining, litigation over sand dune development persists.[350]

Although the Sand Dune Act has been read as implicitly incorporating MEPA's procedural requirements,[351] it does not track MEPA's "pol-

346. MICH. COMP. LAWS ANN. §§ 319.1-.393 (West 1984) (subsequently amended by 1984 Pub. Act 51).

347. Michigan Oil Co. v. Natural Resources Comm'n, 406 Mich. 1, 4, 276 N.W.2d 141, 150 (1979), *quoting* MICH. COMP. LAWS ANN. § 691.1205(2) (West Supp. 1984).

348. MICH. COMP. LAWS ANN. §§ 281.651-.664 (West 1979).

349. No. 74-001113-CE, slip op. (Mich. Cir. Ct. Dec. 20, 1974).

350. *See, e.g.*, Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc., No. 82-28908-CE (Mich. Cir. Ct. filed Feb. 10, 1982) (petition for review and verified complaint with request for preliminary injunction and temporary restraining order); West Michigan Environmental Action Council, 2 ACTION ISSUE 5 (Dec. 1983) ("If we have learned anything in the past seven years, it is that we cannot hope that [Pub. Act] 222 will provide genuine protection for coastal dunes."). Unimin Corp. of New Canaan, Connecticut acquired the site in controversy from Martin-Marietta Aggregates on February 29, 1984. The trial judge denied the plaintiff's motion for a permanent injunction and set trial for May 21, 1984. The Natural Resources Commission has voted to draft a new program providing added protection for the dunes. *See* Detroit Free Press, Mar. 1, 1984, at 3A, col. 5. *See also* Detroit Free Press, Feb. 5, 1984, at 2B, col. 1 (editorial calling for the Natural Resources Commission to use MEPA for guidance in reconsidering a permit previously granted under the Sand Dune Act).

351. Manley Bros. of Indiana, Inc., No. 79-1-222, slip op. (Mich. Dep't of Natural Resources May 15, 1980) (hearing examiner's denial of permit application).

lution, impairment or destruction" language. For example, section 9 of the Sand Dune Act requires that the Department of Natural Resources deny applications for mining permits should the Department determine that the proposed mining would have "an irreparable harmful effect on the environment."[352] This standard lacks specificity and thus is no more helpful in resolving discrete problems than is MEPA's own broad language. Moreover, the juxtaposition of two broad and ostensibly complementary standards makes the resolution of cases even more difficult. Hence, while the Sand Dune Act provides for the permissive denial of mining permits on a finding of irreparable harm, regardless of the economic feasibility of alternatives,[353] MEPA expressly allows the issue of prudent and feasibile alternatives to be raised as an affirmative defense.

The mining companies have argued that because sand dune mining inherently leads to the irreparable destruction of sand dunes, the statute must be limited to irreparable effects on something other than the dune environment itself.[354] This seems to misinterpret the Sand Dune Act. The Sand Dune Act requires the Department of Natural Resources to study and report on the adverse impacts that sand dune mining would have on both the aesthetic qualities of the dune region and the capability of the dunes to function as natural barriers.[355] The Department of Natural Resources has found that mining may destroy "highly unique" vegetation and substantially impair the aesthetic qualities of the dunes. The Department has also found that mining may destroy elements necessary to the formation of new barrier dunes.[356]

These efforts of the Department of Natural Resources, however, do not make up for the legislature's failure to identify the elements of the sand dune environment it intended to protect through the enactment of the Sand Dune Act. The Sand Dune Act's standards have instead raised new questions, such as whether mining that causes harm, but not irreparable harm, to the dune landscape violates MEPA but not the Sand Dune Act.[357] Secondly, while subsection 3(1) of MEPA expressly describes the

352. MICH. COMP. LAWS ANN. § 281.659 (West 1979).

353. Although § 5 of the Sand Dune Act requires information on economic impact to be included in the environmental impact statement, § 9 does not include such considerations in its permit granting provisions.

354. *See* Sax Draft, *supra* note 4, at 41.

355. MICH. COMP. LAWS ANN. § 281.653(d) (West 1979).

356. *See, e.g.*, Manley Bros. of Indiana, Inc., No. 79-1-222, slip op. (Mich. Dep't of Natural Resources May 15, 1980) (hearing examiner's denial of permit application); Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc., No. 79-2-222 (Mich. Dep't of Natural Resources Dec. 4, 1981) (order), *appealed*, No. 82-28908-CE (Mich. Cir. Ct. Feb. 10, 1982) (petition for review at 5-6, 9-10).

357. MEPA does not require irreparable harm to establish a violation of the statutory provisions. *See* Michigan United Conservation Clubs v. Anthony, 90 Mich. App. 99, 108-09, 280 N.W.2d 883, 889 (Ct. App. 1979); Ray v. Mason County Drain Comm'r, 393 Mich. 294, 309, 224 N.W.2d 883, 889 (1975). *See also* West Michigan Envtl. Action Council, Inc. v.

burdens of proof required of both the plaintiff and the defendant in suits involving MEPA claims, the Sand Dune Act does not indicate who bears the burden of proving the absence of irreparable harm. Finally, mining companies claim that section 9 of the Sand Dune Act is unconstitutionally vague. Although the courts have yet to address the constitutional challenge to the Sand Dune Act, the Michigan Supreme Court has resolved in MEPA's favor a similar challenge to the analagous language of MEPA's subsection 2(1).[358] In conclusion, then, perhaps the legislature would have been better advised to resolve the doubts that must have arisen relating to legislation protecting Michigan's sand dunes by vacating the field, leaving the common law to develop in response to a single statute—MEPA.

2. *The Goemaere-Anderson Wetland Protection Act*

In contrast to the Sand Dune Act, the provisions of the Goemaere-Anderson Wetland Protection Act (Wetland Act),[359] enacted in 1979, track much of MEPA's language, indicating the legislature's intent to make the two statutes mutually reinforcing. The Wetland Act, for example, provides that its coverage will extend to tracts of five acres or less upon a determination by the Department of Natural Resources that protection is necessary to preserve the tract from "pollution, impairment or destruction."[360]

Language similar to MEPA provisions also appears in section 9 of the Wetland Act which prohibits the Department of Natural Resources from issuing permits for activities in the state's wetland areas if it determines that the activity is not in the "public interest."[361] To assist the Department in reaching its determination of public interest, the section maps out an involved set of guidelines, including nine separate criteria and a directive that "[t]he decision shall reflect the national and state concern for the protection of natural resources from *pollution, impairment, and destruction.*"[362] One criterion requires the Department to consider the existence of "feasible and prudent alternatives" to the applicant's proposed activity.[363] Such tracking of MEPA's language facilitates the Department's decisionmaking process because it encourages those in decisionmaking capacities to tailor their conclusions to reflect the views expressed by courts interpreting MEPA's parallel provisions.

Natural Resources Comm'n, 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979).

358. *See* Ray v. Mason County Drain Comm'r, 393 Mich. 294, 224 N.W.2d 883 (1975). *See also* Haynes, *supra* note 6, at 597-98.

359. MICH. COMP. LAWS ANN. §§ 281.701-.722 (West Supp. 1984).

360. *Id.* at § 281.702(g)(iii).

361. *Id.* at § 281.709(1).

362. *Id.* at § 281.709(2) (emphasis added).

363. *Id.* at § 281.709(2)(b).

Ultimately, the Wetland Act protects Michigan's wetlands from destructive development by conditioning the issuance of permits to carry on activities in the wetlands upon the applicant's showing both that the activity is primarily dependent on location in a wetland and that no feasible and prudent alternative exists. The Wetland Act thus indicates that the Michigan legislature has not diverged from MEPA's approach that empowers the courts first to identify specific environmental problem areas and second to respond by using their equitable powers to permit intrusive activity only if feasible and prudent alternatives do not exist.[364]

CONCLUSION

MEPA's fifteen years of use by public agencies, local groups, established environmental groups, and other plaintiffs has generated an important body of an environmental common law. The first few months of MEPA's use demonstrated that "citizen participation is not an empty slogan."[365] Within four years, it became apparent both that the cost of litigating MEPA cases was dramatically greater than the cost of settling MEPA cases,[366] and that public agencies were much more willing to make substantial use of the Act than originally had been anticipated.[367] After six years, empirical studies showed that the flood of citizen suits that some had optimistically anticipated, and others had feared, never materialized.[368]

Since MEPA's inception, the courts have resolved many of the initial questions regarding the statute and have at least begun to explore most, though not all, of the statute's peculiar nuances. Notwithstanding the few significant issues yet to be resolved, and despite the occasional anomolous decision that disrupts the even development of the environmental common law, MEPA has matured gracefully. It remains an outstanding example of the potential of unfettered citizen participation in environmental regulation.

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364. Professor Joseph L. Sax, author of the original MEPA draft, has stated that he is "quite impressed by this view," first advanced by Howard Tanner, former Director of the Department of Natural Resources, and generally finds it to be "accurate and sensible." *See* Sax Draft, *supra* note 4, at 43.

365. *See* Sax and Conner, *supra* note 6, at 1080.

366. *See* Sax and DiMento, *supra* note 5, at 51.

367. *See supra* notes 231-34 and accompanying text.

368. *See* Haynes, *supra* note 6, at 593.

APPENDIX A

THOMAS J. ANDERSON, GORDON ROCKWELL ENVIRONMENTAL PROTECTION ACT OF 1970

MICH. COMP. LAWS ANN. 691.1201-.1207 (West Supp. 1984)

An Act to provide for actions for declaratory and equitable relief for protection of the air, water and other natural resources and the public trust therein; to prescribe the rights, duties and functions of the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity; and to provide for judicial proceedings relative thereto.

Sec. 1. This act, shall be known and be cited as the "Thomas J. Anderson, Gordon Rockwell environmental protection act of 1970."

Sec. 2. (1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

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

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

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

Sec. 2a. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond or cash not to exceed $500.00.

Sec. 3. (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show,

by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act.

(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his findings to the court in the action.

(3) Costs may be apportioned to the parties if the interests of justice require.

Sec. 4. (1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction.

(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings, which proceedings shall be conducted in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.313 of the Compiled Laws of 1948. In so remitting the court may grant temporary equitable relief where necessary for the protection of the air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

(3) Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.

(4) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, notwithstanding the provisions to the contrary of Act No. 306 of the Public Acts of 1969, pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

Sec. 5. (1) Whenever administrative, licensing or other proceedings, and judicial review thereof are available by law, the agency or the court may permit the attorney general, any political subdivision of the

state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein.

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

(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

Sec. 6. This act shall be supplementary to existing administrative and regulatory procedures provided by law.

Sec. 7. This act shall take effect October 1, 1970.

APPENDIX B

TITLE, DATE, AND PLACE OF CASES FILED

Case Name	File No.	Date Filed	County
1. Ada-Cascade Watch, Inc. v. Costle[1]	G-80-870-CA-1	12/8/80*	U.S.D.C., W.D. Mich.
2. Alvin E. Bertrand, Inc. v. City of Detroit	191622	10/21/71	Wayne
3. American Amusement Co. v. County of Shiawasee	5559	7/12/73	Shiawasee
4. Anderson v. Michigan State Highway Comm'n[2]	15609-C	6/27/73	Ingham
5. Avon Township v. Dep't of Natural Resources[3]	75-18177-AA	11/1/75	Oakland
6. Banghart v. Forbes/Cohen Properties[4]	79-17-361	3/1/79*	Calhoun
7. Beach v. Detroit Edison Co.[5]	5993	9/9/71	Washtenaw
8. Beaman v. Township of Summit[6]	C-11-212	9/10/71	Jackson
9. Berlin & Farro Liquid Incineration, Inc.[7]		11/6/75	Dep't of Nat. Res.
10. Bise v. Detroit Edison Co.[8]	181665-S	5/24/71	Wayne
11. Black Pond Development[9]	(petition to intervene)	11/11/80*	Washtenaw

* Case not discussed in the previous articles: Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Year's Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974); Haynes, *Michigan's Environmental Protection Act in Its Sixth Year: Substantive Environmental Law From Citizen Suits*, 53 J. URB. L. 589 (1976).

1. No. G-80-870-CA-1, slip op. (W.D. Mich. Jan. 14, 1981, Enden, J.). Finding plaintiffs had failed to state a federal claim against the State of Michigan, the court granted the state's motion to dismiss. The court subsequently dismissed the remaining defendants without reaching the MEPA issue. Slip op. (W.D. Mich. March 26, 1981).

2. No. 15609-C, slip op. (Mich. Cir. Ct. Sept. 4, 1973, Warren, J.), *motion for stay granted*, No. 18198, slip op. (Mich. Ct. App. Oct. 12, 1973, McGregor, Bronson and Garland, JJ.). In the related federal case, Public Interest Research Group of Michigan v. Brinegar, 517 F.2d 917 (6th Cir. 1975), the court upheld a finding that no federal environmental impact statement was required and that § 4(f) of the Department of Transportation Act, 23 U.S.C. § 1653(f) (1970), was not violated.

3. This case arose from the conduct involved in Jamens v. Township of Avon, case no. 49, and was dismissed upon the resolution of that case.

4. Related cases are Banghart v. Dep't of Natural Resources, No. 80-1067-CZ (Mich. Cir. Ct. 1980) (challenging issuance of permit under Inland Lakes and Streams Act, MICH. COMP. LAWS ANN. §§ 281.951-.965 (West 1979)) and Banghart v. Dep't of Natural Resources, No. 1197-CZ (Mich. Cir. Ct. filed 1980).

5. Collateral case, *In re* Detroit Edison Co., No. 58-068 (Mich. Prob. Ct., Wastenaw County filed 1971) (condemnation proceedings) was dismissed May 3, 1973.

6. Case on appeal, No. 13102, slip op. (Mich. Ct. App. July 27, 1972, Fitzgerald, Quinn and Danhof, JJ.).

7. This administrative complaint involved the same conduct as People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc., case no. 111, and Bradford v. State, case no. 16.

8. Case settled.

9. On November 11, 1980, Citizens Concerned About Black Pond Development petitioned to intervene in the Ann Arbor Planning Commission's review of a large multi-family residential project. The petition was tabled on November 25, 1980 when a new plan for the project was proposed. *See* The Ann Arbor News, Nov. 26, 1980, at A-3, col. 6.

Case Name	File No.	Date Filed	County
12. Black River Conservation Ass'n v. Cragg[10]	73-575-CZ	12/7/73	Kalkaska
13. Blunt v. Apfel[11]	849	11/19/70 (amended complaint)	Antrim
14. Board of Comm'rs of Kalkaska County v. State[12]	74-619-CE	7/4/74	Kalkaska
15. Bobula v. Inland Steel Co.[13]	74-886-CE	12/16/74	Iron
16. Bradford v. State[14]	82-68620-CE	9/1/82*	Genesee
17. Braemer v. American Cement Corp.[15]	72-217833-CE	9/19/72	Wayne
18. Braun v. Detroit Edison Co.[16]	5552	1/17/72 (amended complaint)	Washtenaw
19. Brotz v. Detroit Edison Co.[17]	2201	4/17/73	Livingston
20. Brown v. Lever Bros. Co.[18]	161228	2/15/71 (3rd amended complaint)	Wayne
21. Busard v. Muskegon Heights	5291	10/27/70	Muskegon
22. Committee for Sensible Land Use v. Garfield Township[19]	79-7741-CE	11/16/79*	Grand Traverse

10. No. 73-575-CZ, slip op. (Mich. Cir. Ct. May 20, 1975, Porter, J.). Defendant's counterclaim was dismissed in the consent judgment.

11. No. 849, slip op. (Mich. Cir. Ct. June 10, 1971, W. Brown, J.). Consolidated with Ware Real Estate Corp. v. Forest Home Township, No. 880, slip op. (Mich. Cir. Ct. June 22, 1972). Consent judgment filed May 4, 1978. *See also* Apfel v. Cook, No. 926, slip op. (Mich. Cir. Ct. June 22, 1973, W. Brown, J.) (counterclaim); Three Lakes Ass'n v. Whiting, No. 74-25272-NO, (Mich. Cir. Ct. filed Aug. 6, 1974) (abuse of process action filed by plaintiffs, venue moved to Antrim County, No. 74-1398-NO, where summary judgment was granted to environmental suit defendants on January 15, 1975 (W. Brown, J.)); and Unger v. Forest Home Township, No. 911, (Mich. Cir. Ct.). Collateral case is Three Lakes Ass'n v. Securities Bureau, No. 14832-C (Mich. Cir. Ct. filed Oct. 2, 1972) (action to prevent issuance of permit for sale of condominium units); injunction stayed, No. 15897 (Mich. Ct. App., Feb. 14, 1973). *See also* Haynes, *supra* note 6 of text, at 665.

12. No. 21052, slip op. (Mich. Ct. App. July 25, 1974, Quinn, R. Burns and T. Burns, JJ.).

13. Case settled without consent judgment.

14. Berlin & Farro Liquid Incineration, Inc., case no. 9, and People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc., case no. 111, involved the same hazardous waste dump. This suit for damages and injunctive relief was brought by neighboring residents both against the companies using the dump and against the state which ultimately took over the site.

15. This case arose from conduct involved in Wayne County Health Dep't v. American Cement Corp., case no. 158. Collateral case is McGrath v. American Cement Corp., No. 35453 (E.D. Mich.) (dismissed Nov. 29, 1973).

16. Collateral case is *In re* Detroit Edison Co., No. 57775 (Mich. Prob. Ct. filed 1973, Washtenaw County) (condemnation proceedings), *appeal filed* No. 6553 (Mich. Cir. Ct.) (dismissed following settlement, May 3, 1973).

17. No. 2201, slip op. (Mich. Cir. Ct. Dec. 26, 1973, Mahinske, J.). Collateral case is *In re* Detroit Edison Co., No. 18146, decisions of Feb. 17, 1973 and Apr. 9, 1975 (Mich. Prob. Ct., Cheever, J.) (condemnation proceedings).

18. Case subsequently dismissed.

19. 124 Mich. App. 559, 335 N.W.2d 216 (Ct. App. 1983).

Case Name	File No.	Date Filed	County
23. Concerned Citizens Comm. v. Michigan State Highway Comm'n[20]	78-21793-AZ	6/1/78*	Ingham
24. Crandall v. Biergans[21]	844	9/3/71 (amended complaint)	Clinton
25. Crystal Lake Resort Ass'n v. Village of Beulah[22]	807	5/8/73	Benzie
26. Danyo v. Great Lakes Steel Corp.[23]	73-232872-CE	3/23/73*	Wayne
27. Darwin v. Board of Zoning Appeals of the City of Ann Arbor[24]	81-20-333-CZ	2/9/81* (counter-claim)	Washtenaw
28. Davis v. Dep't of Natural Resources[25]	482	10/1/70	Otsego
29. Dep't of Natural Resources v. Kiffer[26]	73-3523-CE	9/26/73	Grand Traverse
30. Dwyer v. City of Ann Arbor[27]	73-7544-CX	3/14/73*	Washtenaw
31. East Michigan Environmental Action Council v. S.B. McLaughlin Associates, Inc.[28]	79-195380-CE	10/9/79*	Oakland
32. Elsman v. Detroit Edison Co.[29]	74-116077-CE	9/19/74	Oakland
33. Eyde v. State[30]	73-16107-CZ	2/26/74 (amended complaint)	Ingham

20. No. 79-7741-CE, slip op. (Mich. Cir. Ct. Feb. 24, 1981, W. Brown, J.).

21. 2 ENVTL. L. REP. (ENVTL. L. INST.) 20,238, 3 Env't Rep. Cas. (BNA) 1827 (Mich. Cir. Ct. Feb. 14, 1972).

22. Collateral case is Storer v. Village of Beulah, No. 817 (Mich. Cir. Ct. filed June 20, 1973). The courts granted the defendant summary judgment on res judicata grounds in both cases.

23. No. 73-232872-CE, slip op. (Mich. Cir. Ct. Sept. 20, 1977, Bohn, J.), *aff'd*, 93 Mich. App. 91, 286 N.W.2d 50 (Ct. App. 1979).

24. No. 81-20333-CZ, slip op. (Mich. Cir. Ct. July, 31, 1981, Deake, J.).

25. An early controversy involving the oil drilling at issue in Michigan Oil Co. v. National Resources Comm'n, case no. 91, this suit was dropped when the Department of Natural Resources instituted a drilling moratorium.

26. No. 73-3523-CE, (Mich. Cir. Ct. Nov. 25, 1975, Forster, J.) (consent judgment).

27. No. 7544, slip op. (Mich. Cir. Ct. Apr. 20, 1977, Fink, J.), *rev'd in part*, 79 Mich. App. 113, 261 N.W.2d 231 (Ct. App. 1977), *rev'd on other grounds*, 402 Mich. 915 (1978).

28. The parties settled this challenge to the Park LaSalle Project.

29. Brotz v. Detroit Edison Co., case no. 19, involves the same electric transmission line proposal. Collateral case is *In re* Detroit Edison Co., No. 111025 (Mich. P. Ct. filed Nov. 22, 1972) (condemnation proceedings).

30. No. 73-15107-CZ, slip op. (Mich. Cir. Ct. Sept. 21, 1976, T. Brown, J.) (court ordered reforestation), *aff'd*, 82 Mich. App. 531 (Ct. App. 1978). The prior sewer condemnation decision is Petition of Delta Township for Condemnation of Private Property, 389 Mich. 549, 208 N.W.2d 168 (1973). No. 73-16107-CZ, slip op. (Mich. Cir. Ct. Apr. 30, 1974, T. Brown, J.) (defendants enjoined from using easement and plaintiff required to furnish alternate route), *rev'd*, No. 20210, slip op. (Mich. Ct. App. July 26, 1974) (memorandum opinion), *rev'd*, 393 Mich. 453, 225 N.W.2d 1 (1975) (reinstating circuit court order).

Case Name	File No.	Date Filed	County
34. Farmer v. Construction Aggregates Corp.[31]	2533	4/20/73	Ottawa
35. Gang of Lakes Environmental Organization v. Gee[32]	7-562	1/19/72	Calhoun
36. Glencoe Hills Associates v. Washtenaw County[33]	75-9810-CZ	1/30/75 (amended complaint)	Washtenaw
37. Godfrey v. Dep't of Natural Resources	1269	7/18/73	Cheboygan
38. Guthrie v. Detroit Edison Co.[34]	73-3541-ND	8/20/73	Monroe
39. Hadley Township v. Dep't of Natural Resources	3754-B	10/14/71	Lapeer
40. Harrison v. Leelanau County[35]	81-1077-CE	4/10/81*	Leelanau
41. Hendrickson v. Wilson[36]	G-26-73-CA	1/30/73	U.S.D.C., W.D. Mich.
42. Hoffman v. Glen Arbor Township[37]	80-956-CE	6/18/80*	Leelanau
43. Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc.[38]	82-28908-CE	2/10/82*	Ingham
44. Huron-Clinton Metropolitan Authority v. Kelley[39]	80-961-AZ	2/21/80*	Macomb
45. Irish v. Green[40]	14306-C	4/12/72	Ingham
46. Irish v. Property Development Group, Inc.[41]	234-3	8/29/72	Emmet
47. Jamens v. Township of Avon[42]	72-86880-CE	3/10/75 (motion for new trial)	Oakland

31. Removed to U.S. District Court. Remanded to circuit court. No. G-119-72-CA, slip op. (W.D. Mich. Sept. 26, 1973, Engel, J.). Dismissed for lack of progress.

32. No. 7-562, slip op. (Mich. Cir. Ct. Jan. 22, 1975, Prettie, J.).

33. No. 75-9810-CZ, slip op. (Mich. Cir. Ct. Feb. 7, 1975, Conlin, J.).

34. Stipulation of Discontinuance, July 28, 1977.

35. No. 81-1077-CE, slip op. (Mich. Cir. Ct. Apr. 27, 1981, W. Brown, J.), (consent order).

36. 374 F. Supp. 865 (W.D. Mich. 1973).

37. No. 80-956-CE, slip op. (Mich. Cir. Ct. Dec. 31, 1980, Forster, J.) (summary judgment for defendant).

38. No. 79-2-222, (Mich. Dep't of Nat. Res. Dec. 4, 1981) (order issuing permit to mine sand dunes), appealed to Ingham County Circuit Court as No. 82-28908-CE. Other cases involving sand dune mining are Lincoln Township v. Manely Bros., case no. 79, and Manley Bros. of Indiana, Inc., case no. 85.

39. Action for declaratory judgment to prevent challenge to authority to lease land in Metro Beach Metropark to a private lessee for construction and operation of a water slide. The Attorney General counterclaimed with several claims, including one under MEPA. Kelley v. Huron-Clinton Metropolitan Authority, case no. 58, is a related case.

40. 2 ENVTL. L. REP. (ENVTL. L. INST.) 20,505, 4 Env't Rep. Cas. (BNA) 1402 (Mich. Cir. Ct. 1972). Change of venue to Emmet County granted. No. 162-3.

41. No. 234-3, slip op. (Mich. Cir. Ct. Mar. 5, 1973, Fenlon, J.). The counterclaim was Property Development Group, Inc. v. Irish, No. 7265 (Mich. Cir. Ct. filed Dec. 14, 1972).

42. No. 72-86880-CE, slip op. (Mich. Cir. Ct. Jan. 30, 1975, Kuhn, J.), *aff'd*, 78 Mich. App. 289, 259 N.W.2d 349 (1977).

Case Name	File No.	Date Filed	County
48. Joseph v. Adams[43]	76-40076	7/8/76*	U.S.D.C., E.D. Mich.
49. Kelley v. Anderson Development Co., Inc.	79-23320-CE	5/29/79*	Ingham
50. Kelley v. Balkema[44]	D-79100176-CE	1/24/79*	Kalamazoo
51. Kelley v. BASF Wyandotte Co.[45]	78-22255-CE	9/23/78*	Ingham
52. Kelley v. Bofors Lakeway, Inc.[46]	78-21380-CE	3/1/78*	Ingham
53. Kelley v. Cast Forge, Inc.[47]	77-3724-CE	11/8/77*	Livingston
54. Kelley v. Continental Metallurgical Products	3095	7/21/72	Monroe
55. Kelley v. DACA, Inc.[48]	8-503	12/7/77*	St. Clair
56. Kelley v. Ford Motor Co.[49]	78-21262-CE	2/1/78*	Ingham
57. Kelley v. Hooker Chemicals and Plastic Corp.[50]		9/9/77*	Montcalm
58. Kelley v. Huron-Clinton Metropolitan Authority[51]	78-175311-AW	8/3/78*	Oakland
59. Kelley v. John Biewer Co., Inc.[52]	D-80-3-00-318-CE	8/6/80*	Kalamazoo

43. 467 F. Supp. 141 (E.D. Mich. 1978).

44. In November 1980, the court dismissed the plaintiff's claims under MEPA and the Inland Lakes and Streams Act, MICH. COMP. LAWS ANN. §§ 281.951-.965 (West 1979); trial continues under the Goemaere-Anderson Wetland Protection Act, MICH. COMP. LAWS ANN. §§ 281.701-.722 (West Supp. 1983).

45. No. 78-22255-CE, slip op. (Mich. Cir. Ct. Oct. 29, 1980, Warren, J.)(consent decree).

46. No. 78-21380-CE, (Mich. Cir. Ct. Sept. 24, 1981, Warren, J.) (consent judgment).

47. No. 77-3724-CE, (Mich. Cir. Ct. June 19, 1981, Mahinske, J.) (consent judgment).

48. No. 8-503, consent agreement filed in 1981.

49. No. 78-21262-CE, (Mich. Cir. Ct. Apr. 2, 1980, Hotchkiss, J.) (final consent order and judgment).

50. Hooker contracted for the proper disposal of the C-56 wastes located in Montcalm County and then entered into a stipulation and order of dismissal with prejudice with the Attorney General. Later, Hooker was named as a co-defendant in the 1979 action People *ex rel.* Kelley v. Berlin & Farro Liquid Incineration, Inc., *see* note to case no. 111. Hooker sought a bill of peace to enjoin this subsequent suit, No. 79-S-114, (Mich. Cir. Ct. filed Apr. 6, 1979). The circuit court granted the bill of peace, but was reversed by the court of appeals. Hooker Chemicals and Plastic Corp. v. Attorney General, 100 Mich. App. 203, 298 N.W.2d 710 (1980).

51. By stipulation of all parties, this case was consolidated with Kensington Children's Farm and Village Corp. v. Township of Milford, Nos. 77-161647-AW and 78-176464-AW, in which Huron-Clinton Metropolitan Authority was the third-party defendant. The court denied the Attorney General's motion to add to the action the controversy which eventually gave rise to Huron-Clinton Metropolitan Authority v. Kelley, case no. 44. In the principal case, the Attorney General sought to block development of a privately operated amusement park at the Kensington Metro Park. The case was eventually dismissed when the Huron-Clinton Metropolitan Authority and the Kensington Children's Farm and Village Corp. agreed to terminate the lease of the park land, and the Metropolitan Authority agreed to remove and never operate mechanical rides at the site. *See* Stipulation of Plaintiff and Defendant Huron-Clinton Metropolitan Authority, No. 78-175311-AW (Mich. Cir. Ct. Feb. 4, 1980, O'Brien, J.) (order of dismissal).

52. No. D-80-3-00-318-CE, slip op. (Mich. Cir. Ct. Nov. 25, 1981, Borsos, J.).

Case Name	File No.	Date Filed	County
60. Kelley v. McGraw-Edison Co.[53]	G82-650 CA5	8/11/82*	U.S.D.C., W.D. Mich.
61. Kelley v. Michigan Standard Alloys, Inc.	D-5278-W	8/1/72	Berrien
62. Kelley v. National Gypsum Co.[54]	1918	3/9/73	Alpena
63. Kelley v. Peerless Plating Co.[55]	78-21372-CE	3/78*	Ingham
64. Kelley v. Tannehill & DeYoung, Inc.	2626	11/4/71	Grand Traverse
65. Kelley v. United States[56]	79-10199	8/29/79*	U.S.D.C., E.D. Mich.
66. Kent County Dep't of Public Works[57]		10/25/75 (intervention petition)	Dep't of Nat. Res.
67. Kimberly Hills Neighborhood Ass'n v. Dion[58]	79-16452-CH	1/22/79*	Washtenaw
68. King Arthur's Court, Inc. v. Milliken[59]	75-17579-CE	5/1/75	Ingham
69. Kissner v. Board of County Road Comm'rs of Washtenaw County[60]	78-15270-CZ	6/21/78*	Washtenaw
70. Knizewski v. Detroit Edison Co.[61]	73-255182-CE	11/8/73	Wayne
71. Koch v. Dep't of Natural Resources	460	8/17/73	Alger

53. No. G82-650-CA5, slip op. (W.D. Mich. Oct. 15, 1982, Hillman, J.) (remand to Calhoun County).

54. No. 1918, (Mich. Cir. Ct. Sept. 25, 1973, Glennie, J.) (consent judgment).

55. The Water Resources Commission entered into a stipulation with Peerless Plating on July 21, 1972. No. V-00248. Subsequently, the Commission sent a notice of noncompliance and order to comply, WRC No. NC-9-75-01-160, September 23, 1975. This was superseded by the issuance of a state permit to discharge, No. M-00240, April 8, 1976. In 1978, the Attorney General filed a complaint which resulted in a consent judgment. No. 78-21372, (Mich. Cir. Ct. May 2, 1979, Brown, J.) (consent judgment). The Attorney Genenral filed a motion for contempt, September 8, 1980, resulting in a new consent order, entered October 24, 1980. The Attorney General filed additional motions for contempt on November 23, 1980 and January 13, 1981, resulting in an order of contempt against the defendant, No. 78-21372-CE, slip op. (Mich. Cir. Ct. Jan. 21, 1981, Brown, J.). Subsequently, the Attorney General brought a new suit, Kelley v. Peerless Plating Co., No. 82-30600-CE (Mich. Cir. Ct. filed Oct. 1982, Ingham County).

56. No. 79-10199, (E.D. Mich. Nov. 21, 1980, Harvey, J.) (consent decree).

57. Final Order of April 9, 1976 (Mich. Nat. Res. Comm'n).

58. No. 79-16452-CH, slip op. (Mich. Cir. Ct. Mar. 28, 1979, Stanczyk, J.), *rev'd*, 114 Mich. App. 495, 320 N.W.2d 668 (1982), *lv. denied*, 417 Mich. 1045 (1983).

59. No. 75-17579-CE, slip op. (Mich. Cir. Ct. May 15, 1975, Kallman, J.).

60. No. 78-15270-CZ, (Mich. Cir. Ct. Aug. 17, 1981, Ager, J.) (consent judgment). On July 12, 1978, an order of possession was entered in the related eminent domain case *In re* the Petition of the Board of County Road Comm'rs of the County of Washtenaw, No. 78-15051-CC (Mich. Cir. Ct., Ager, J.). No. 78-15270-CZ, slip op. (Mich. Cir. Ct. July 20, 1978, Ager, J.) (dismissing the MEPA action), *rev'd*, No. 78-2969, slip op. (Mich. Ct. App. Dec. 10, 1979, Maher, MacKenzie and Pierce, JJ.) (also vacating the order of possession in No. 78-15051-CC).

61. This case involves the same parties and controversy as Bise v. Detroit Edison Co., case no. 10. The case settled.

Case Name	File No.	Date Filed	County
72. Kretzman v. Farm Bureau Services, Inc.[62]	74-16383-CE	9/17/74	Kent
73. Lake Doster Development Co. (Silver Creek)[63]	74-12-5	1/21/74	Dep't of Nat. Res.
74. Lakeland Property Owners Ass'n v. Township of Northfield[64]	1453	8/27/70	Livingston
75. Lakeshore Residents of Walnut Lake, Inc. v. Mourray[65]	74-116378-CE	9/25/74*	Oakland
76. Lawrence v. John J. Yerington Co.	3342	7/25/72	Cass
77. Leelanau County Board of Comm'rs v. Dep't of Natural Resources[66]	510	3/1/71	Leelanau
78. Lever v. General Motors Corp.[67]	74-40006	7/31/73	U.S.D.C., E.D. Mich.
79. Lincoln Township v. Manley Bros.[68]	74-001113-CE	8/13/74 (amended complaint)	Berrien
80. Little Wolf Lakes Property Owners Ass'n v. Haase[69]	74-000837-CE	11/27/74	Montmorency
81. McCloud v. City of Lansing	13057-C	4/23/71	Ingham
82. McDonald v. Detroit Edison Co.[70]	212922	7/21/72	Wayne
83. McPhail v. Army Corps. of Engineers[71]	205941-R	4/24/72	Wayne

62. This case arises out of the polybrominated biphenyl cattle poisoning crisis first at issue in Board of Comm'rs of Kalkaska County v. State, case no. 14, and also at issue in Oscoda Chapter of PBB Action Comm., Inc. v. Dep't of Natural Resources, case no. 104; *see also* Sprik v. Farm Bureau Services, Inc., case no. 130, and Tascoma v. Michigan Chemical Corp., No. 2933 (Mich. Cir. Ct., Waxford County, Peterson, J.).

63. No. 74-12-5, slip op. (Mich. Dep't of Nat. Res. Apr. 14, 1975) (permit application denied), *aff'd*, slip op. (Mich. Nat. Res. Comm'n Apr. 14, 1978), *rev'd*, Lake Doster Dev. Co. v. Dep't of Natural Resources, No. 78-0339-AV, slip op. (Mich. Cir. Ct. Aug. 27, 1981, Corsiglia, J.) (Michigan United Conservation Clubs was an intervening defendant-appellee).

64. 2 ENVTL. L. REP. (ENVTL. L. INST.) 20,331, 3 Env't Rep. Cas. (BNA) 1893 (Mich. Cir. Ct. 1972).

65. Defendants filed a counterclaim October 7, 1974. The case was later settled. No. 74-116378-CE, (Mich. Cir. Ct. Feb. 20, 1979, Gilbert, J.) (consent judgment).

66. Collateral case is Fisher v. Morton, No. G-302-71-CA (W.D. Mich. 1971) (plaintiff sought to enjoin the National Park Service's development of Sleeping Bear Dunes National Seashore).

67. The MEPA claim was dismissed as moot when all of the plaintiffs were relocated as part of an urban renewal program.

68. No. 74-001113-CE, slip op. (Mich. Cir. Ct. Dec. 20, 1974, Byrns, J.). This was consolidated with a parallel case, Lake Township v. Manley Bros., No. 74-001114-CE (Mich. Cir. Ct. filed Aug. 13, 1974) (amended complaint). Other cases involving sand dune mining are Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc., case no. 43, and Manley Bros. of Indiana Inc., Permit Application, case no. 85.

69. No. 74-000837-CE, slip op. (Mich. Cir. Ct. July 8, 1975, Glennie, J.).

70. This case arises out of the same conduct involved in Wayne County Health Dep't v. Edward Levy Co., case no. 164.

71. This case was removed to and decided in the U.S. District Court for the Eastern District of Michigan, No. 38203, 3 ENVTL. L. REP. (ENVTL. L. INST.) 20,237, 3 Env't Rep. Cas. (BNA) 1908 (E.D. Mich. 1972).

Case Name	File No.	Date Filed	County
84. Manfredi v. Inland Steel Co.[72]	M81-33-CA	2/8/81*	U.S.D.C., W.D. Mich.
85. Manley Bros. of Indiana, Inc. Permit Application[73]	79-1-222	10/79*	Dep't of Nat. Res.
86. Marble Chain of Lakes v. WRC (D)	12/14/70	Branch	
87. Margolis v. Bourquin[74]	74-9371-CE	9/18/74	Washtenaw
88. Marshall v. Consumers Power Co.[75]	C-16-150	3/28/73	Jackson
89. Michigan Consolidated Gas Co.[76]	U-3802	1/11/71	Public Serv. Comm'n
90. Michigan Consolidated Gas Co. and Consumers Power Co.	U-3933 U-3935	7/15/71 (Notice of Intervention)	Public Serv. Comm'n
91. Michigan Oil Co. v. Natural Resources Comm'n[77]		1/1/73	Dep't of Nat. Res.
92. Michigan State Highway Comm'n v. Vanderkloot[78]	71-75543	8/2/74	Oakland
93. Michigan United Conservation Clubs v. Anthony[79]	2331	8/2/71	Ottawa
94. Mid-Shiawasee County Concerned Citizens v. Tanner[80]	75-17424-AZ	3/6/75	Ingham
95. Muha v. Union Lakes Associates[81]	2964	8/14/72	Grand Traverse
96. Muskegon County v. Environmental Protection Organization[82]	C-5585	3/15/71	Muskegon

72. No. M81-33-CA, jury decision of no cause returned July 1, 1982.

73. No. 79-1-222, Hearing Examiner's Decision of May 15, 1980 (proposing denial of permit) (Friends of the Dunes, the Michigan Environmental Protection Foundation, and a neighboring resident intervenors). Other cases involving sand dune mining are Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc., case no. 43, and Lincoln Township v. Manley Bros., case no. 79.

74. Defendant filed a counterclaim for increased construction costs. The case was eventually settled.

75. 65 Mich. App. 237, 237 N.W.2d 266 (Ct. App. 1975).

76. 1 ENVTL. L. REP. (ENVTL. L. INST.) 36,007 (Pub. Serv. Comm'n 1971).

77. Slip op. (Mich. Nat. Res. Comm'n May 9, 1974) (permit denied), *aff'd*, No. 74-16638-AA, slip op. (Mich. Cir. Ct. June 4, 1975, T. Brown, J.), *aff'd*, Michigan Oil Co. v. Natural Resources Comm'n, 71 Mich. App. 667, 249 N.W.2d 135 (Ct. App. 1976), *aff'd*, 406 Mich. 1, 276 N.W.2d 141 (1979), *cert. denied*, 444 U.S. 980 (1979).

78. 392 Mich. 159, 220 N.W.2d 416 (1974).

79. 3 ENVTL. L. REP. (ENVTL. L. INST.) 20,195 (Mich. Cir. Ct. Nov. 10, 1972, Smith, J.), *lv. denied*, Nos. 13138 and 13139, slip op. (Mich. Ct. App. Jan 19, 1973, Quinn, Bronson and Danhof, JJ.), *aff'd in part, rev'd in part*, 90 Mich. App. 99, 280 N.W.2d 883 (Ct. App. 1979). In United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), the United States challenged the state's regulation of Native American fishing and sought the declaration of Native American fishing rights as preserved by treaty.

80. This case was removed to and decided in the U.S. District Court for the Eastern District of Michigan, Mid-Shiawasee County Concerned Citizens v. Tanner, 408 F. Supp. 650 (E.D. Mich. 1976), *aff'd*, 589 F.2d 1220 (6th Cir. 1977).

81. This case was dropped in March 1974.

82. No. C-5585, slip op. (Mich. Cir. Ct. May 18, 1971; Piercey, J.).

Case Name	File No.	Date Filed	County
97. Muskegon Save Our Shoreline, Inc. v. North Star Steel Co.[83]	G75-461-CA6	9/29/75	U.S.D.C., W.D. Mich.
98. Non-Partisan Progressive Action Comm., Inc. v. Twin County Airport Comm'n[84]	80-2797-CZ	8/12/80*	Menominee
99. Oakwood Homeowners Ass'n v. Ford Motor Co.[85]	213758-S	7/31/72	Wayne
100. Oakwood Homeowners Ass'n v. Marathon Oil Co.[86]		/80*	Wayne
101. Olk v. Desai[87]	C-16-187	4/10/73	Jackson
102. Organic Growers of Michigan v. Michigan Dep't of Agriculture[88]	78-21764-CE	5/25/78*	Ingham
103. Orr v. Traverse City State Bank	562	11/6/73 (intervention counterclaim)	Leelanau
104. Oscoda Chapter of PBB Action Comm., Inc. v. Dep't of Natural Resources[89]	78-00660-CE	4/13/78*	Oscoda
105. Owens v. Water Resources Comm'n[90]	5708	5/14/71	Washtenaw
106. Payant v. Dep't of Natural Resources[91]	1100	7/31/71	Dickinson
107. People *ex rel.* Attorney General v. Clinton County Drain Comm'r[92]	78-2265	4/3/78*	Clinton

83. The plaintiff withdrew its suit after the defendant dropped its plans to construct buildings at the site.

84. This case was removed to and decided in the U.S. District Court for the Western District of Michigan, No. M80-156-CA(2), slip op. (W.D. Mich. Feb. 17, 1981, Hillman, J.).

85. No. 213758-S, slip op. (Mich. Cir. Ct. Aug. 18, 1975, Martin, J.), *aff'd*, 77 Mich. App. 197, 258 N.W.2d 475 (Ct. App. 1977), *lv. denied*, 402 Mich. 847 (1978).

86. 104 Mich. App. 689, 305 N.W.2d 567 (Ct. App. 1980).

87. Stipulated to be heard by Judge Boyle in St. Joseph County by assignment of the Michigan Supreme Court.

88. No. 78-21764-CE, slip op. (Mich. Cir. Ct. Jan. 23, 1980, Hotchkiss, J.).

89. No. 78-00660-CE, slip op. (Mich. Cir. Ct. Apr. 17, 1978, Miller, J.) (denied temporary restraining order), *lv. denied*, No. 78-1471, slip op. (Mich. Ct. App. May 4, 1978, Danhof, Gillis and Kaufman, JJ.). The Michigan Supreme Court issued a temporary restraining order and remanded the case to the circuit court. No. 78-21764-CE, slip op. (Mich. Cir. Ct. June 21, 1978, Miller, J.) (recommending modification of temporary restraining order); 403 Mich. 215, 268 N.W.2d 240 (1978) (dissolving temporary restraining order). No. 78-21764-CE, slip op. (Mich. Cir. Ct. Jan. 23, 1980, Hotchkiss, J.) (granting plaintiff attorneys' fees), *rev'd*, 115 Mich. App. 356, 320 N.W.2d 376 (Ct. App. 1982), *lv. to appeal granted*, 417 Mich. 905, 341 N.W.2d 776 (1983).

90. Stricken for no progress.

91. No. 1100, slip op. (Mich. Cir. Ct. Oct. 7, 1971, Brown, Munro and Davidson, JJ.).

92. 91 Mich. App. 630, 283 N.W.2d 815 (Ct. App. 1979), *rev'g per curiam*, Kelley v. Hardin, No. 78-2265, slip op. (Mich. Cir. Ct. July 20, 1978, Banks, J.), *lv. denied*, 408 Mich. 853 (1980). Circuit court dismissed action to enjoin drain project on jurisdictional grounds. The court of appeals reversed, holding that it was not necessary for the plaintiffs to exhaust remedies under the Drain Code, MICH. COMP. LAWS ANN. §§ 280.1-.630 (West 1979), or the Soil Erosion and Sedimentation Control Act, MICH. COMP. LAWS. ANN. §§ 282.101-.117 (West 1979), before bringing their MEPA claim. The project was completed during appeal, and the case was dismissed on remand. Decision of June 23, 1980.

Case Name	File No.	Date Filed	County
108. People *ex rel.* Kelley v. Auto-Ion Chemical Co.[93]	B-74-100514-CE	3/12/74	Kalamazoo
109. People *ex rel.* Kelley v. Hillsdale Foundry Co.[94]	74-5511-CE	4/30/74	Hillsdale
110. People *ex rel.* Kelley v. J.L. Hudson Co.[95]	73-16110-CF	12/14/73	Ingham
111. People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc.[96]	75-37207-CE	9/24/75	Genesee
112. People *ex rel.* Leonard v. City of Fenton	74-32273-CE	7/22/74	Genesee
113. People's Lakes Action Comm. v. Commerce Township[97]	4-71826	6/6/74	U.S.D.C., E.D. Mich.
114. Pine Lake Property Owners Ass'n, Inc. v. County of Oakland[98]	77-155423-CE	1/2/78*	Oakland
115. Pine Lake Property Owners Ass'n, Inc. v. Mark Homes, Inc.[99]	75-122214-CE	2/28/75	Oakland
116. Pleasant Plains Zoning Comm'n v. Marzell	637	11/30/73	Lake
117. Poletown Neighborhood Council v. City of Detroit[100]	80-039426-CZ	11/80*	Wayne

93. No. B-74-100514-CE, slip op. (Mich. Cir. Ct. Mar. 12, 1975, McCauley, J.).

94. No. 74-5511-CE, slip op. (Mich. Cir. Ct. Aug. 1, 1974, Kelley, J.). Collateral case is *In re* Hillsdale Foundry Co., No. NK-74-1462-B9, slip op. (W.D. Mich. Bankr. Ct. Nov. 18, 1974, Nims, J.).

95. No. 73-16110-CF, (Mich. Cir. Ct. Feb. 6, 1974, Reisig, J.) (consent judgment).

96. An earlier collateral case was Township of Gaines v. Berlin & Farro Liquid Incineration, Inc., No. 29230 (Mich. Cir. Ct. filed Nov. 6, 1973) which was settled by consent judgment, Michigan State Air Pollution Control Comm'n, No. 6-1974, (May 23, 1974) (consent order). On September 16, 1975, the Department of Natural Resources (DNR) issued an emergency order to cease and desist based in part on Berlin & Farro's violation of the earlier consent judgment. The Water Resources Commission (WRC) revoked the company's certification to store liquid industrial wastes and its license to haul such wastes. The company challenged the actions of the DNR and the WRC and lost. No. 75-37187-CE (Mich. Cir. Ct. filed Sept. 26, 1975), *aff'd*, 80 Mich. App. 490, 264 N.W.2d 37 (Ct. App. 1978), *lv. denied*, 402 Mich. 907, 315 N.W.2d 926 (1978). Berlin & Farro entered into a new consent agreement with the DNR and the state on July 31, 1978. On February 27, 1979, the state filed a new complaint under MEPA and other statutes seeking to enforce the consent agreement. People *ex rel.* Kelley v. Berlin & Farro Liquid Incineration, Inc., No. 79-51326-CE (Mich. Cir. Ct. filed Feb. 27, 1979, Bivens, J.). The parties stipulated to a preliminary injunctive order on May 31, 1979. On April 17, 1980, the state filed a motion for order of contempt, forfeiture of bond and appointment of receiver. The court found the defendant in contempt. No. 79-51326-CE, slip op. (Mich. Cir. Ct. May 15, 1980, Bivens, J.). Prior to this finding, Berlin & Farro filed for bankruptcy. The court directed appointment of a judicial receiver to see that the consent agreement was carried out. No. 79-51326, slip op. (Mich. Cir. Ct. Aug. 26, 1980, Bivens, J.). The state eventually had to take over the site and begin the cleanup at its own expense.

97. No. 4-71826, (E.D. Mich. Dec. 18, 1974, DeMascio, J.) (memorandum and order).

98. No. 77-155423-CE, slip op. (Mich. Cir. Ct. Jan. 2, 1978, O'Brien, J.).

99. No. 75-122214-CE, (Mich. Cir. Ct. July 16, 1975, Roberts, J.) (consent judgment).

100. The Wayne County Circuit Court held against the plaintiffs and dismissed the complaint. Slip op. (Mich. Cir. Ct. Dec. 9, 1980, Martin, J.). On December 15, 1980, the plaintiffs applied to bypass the court of appeals. The Michigan Supreme Court approved the

Case Name	File No.	Date Filed	County
118. Portage, City of v. Kalamazoo County Road Comm'n[101]	C-822-626-CE	6/10/82	Kalamazoo
119. Pratt v. Chrysler Corp.[102]	73-239129-CE	5/31/73	Wayne
120. Ray v. Mason County Drain Comm'r[103]	2-760	11/17/71	Mason
121. Reaume v. Herrick[104]	180998-R	5/21/71	Wayne
122. Roberts v. State[105]	12428-C	10/23/70	Ingham
123. Robinson v. Dep't of Transportation[106]	80-696-AZ	8/14/80*	Eaton
124. Rush v. Sterner[107]	82-B-7902-CZ	5/24/82*	Ionia
125. Rybinski v. Olsonite Corp.[108]	81-103716-CE	1/81*	Wayne
126. St. Cyril & Methodius Church v. Chrysler Corp.[109]	73-236166-CE	5/1/73	Wayne
127. Sarabyn v. City of Dowagiac	2561	9/1/70	Cass
128. Schmidt v. Grand Traverse County Road Comm'n[110]	79-7281-CE	5/22/79*	Grand Traverse
129. South Macomb Disposal Authority v. Township of Washington	74-1496-CE	3/14/74*	Macomb
130. Sprik v. Farm Bureau Services, Inc.[111]	75-18562-NZ	9/10/75	Kent

application and in a per curiam opinion affirmed the circuit court's decision. 410 Mich. 616, 304 N.W.2d 455 (1981) (Fitzgerald and Ryan, JJ., dissenting). Several of the plaintiffs filed suit in federal court alleging that the defendant's conduct violated provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982). These plaintiffs did not prevail on the federal count. Crosby v. Young, 512 F. Supp. 1363 (E.D. Mich. 1981).

101. No. C-822-626-CE, slip op. (Mich. Cir. Ct. Dec. 13, 1982, Anderson, J.).

102. Settled without consent judgment. This case arose from the same factual situation as Wayne County Health Dep't v. Chrysler Corp., case no. 161, and St. Cyril & Methodius Church v. Chrysler Corp., case no. 126.

103. 393 Mich. 294, 224 N.W.2d 883 (1975). Originally filed as Ray v. Raynowsky.

104. A related case is Reaume v. Southgate Wyandotte Relief Drainage District Board, No. 206614-R (Mich. Cir. Ct. answer filed Feb. 6, 1973).

105. 1 ENVTL. L. REP. (ENVTL. L. INST.) 20,227, 2 Env't Rep. Cas. (BNA) 1612 (Mich. Cir. Ct. 1971), *aff'd in part, rev'd in part*, 45 Mich. App. 252, 206 N.W.2d 466 (Ct. App. 1973).

106. Several of the plaintiffs were also plaintiffs in Concerned Citizens Comm. v. Michigan State Highway Comm'n, case no. 23. That case involved the same facts as Robinson v. Dep't of Transp., but was filed in Ingham County. The circuit court granted the defendants a summary judgment which the court of appeals affirmed. Robinson v. Dep't of Transp., 120 Mich. App. 656, 327 N.W.2d 317 (Ct. App. 1981).

107. No. 82-13-7902-CZ, slip op. (Mich. Cir. Ct. Apr. 27, 1983, Simon, J.).

108. The facts of this case also gave rise to Wayne County Health Dep't v. Olsonite Corp., case no. 172.

109. Settled on September 30, 1976. This case arose from the conduct involved in Wayne County Health Dep't v. Chrysler Corp., case no. 161.

110. No. 79-7281-CE, slip op. (Mich. Cir. Ct. Oct. 24, 1980, Forster, J.) (remanding case to Department of Natural Resources for findings under the Goemaere-Anderson Wetland Protection Act, MICH. COMP. LAWS ANN. §§ 281.701-.722 (West Supp. 1983)).

111. This case arises out of the polybrominated biphenyl cattle poisoning crisis at issue in Board of Comm'rs of Kalkaska County v. State, case no. 14; Kretzman v. Farm Bureau Services, Inc., case no. 72; Oscoda Chapter of PBB Action Comm., Inc. v. Dep't of Natural Resources, case no 104; and Tacoma v. Michigan Chemical Corp., No. 2944, (Mich. Cir. Ct., Waxford County, Peterson, J.).

Case Name	File No.	Date Filed	County
131. State v. City of Allen Park[112]	79-74681	12/12/79*	U.S.D.C., E.D. Mich.
132. State v. Michigan Standard Alloys[113]	79-1225-CZ-Z	11/10/79*	Berrien
133. State v. Zilka[114]	80-017702-CE	5/14/80*	Wayne
134. Stevens v. Creek[115]	78-9-264-AO	12/5/78*	Hillsdale
135. Superior Public Rights, Inc. v. City of Marquette[116]	75-5927-CE	3/21/75	Marquette
136. Superior Public Rights, Inc. v. Dep't of Natural Resources[117]	73-15852-CE	9/21/73	Ingham
137. Surowitz v. City of Detroit	178640	4/21/71	Wayne
138. Svensson v. Whitehall Leather Co.[118]	C-7121-AV	1/26/73 (amended complaint)	Muskegon
139. Szawala v. American Cement Corp.	207043-S	5/6/72	Wayne
140. Szyskiewicz v. Swedish Crucible Steel Co.	72-218695-CE	9/29/72	Wayne
141. Tanton v. Dep't of Natural Resources[119]	13859-C	12/8/71	Ingham
142. Taxpayers and Citizens in the Public Interest v. Dep't of State Highways[120]	14994-C	11/30/72	Ingham
143. Territorial Enterprises, Inc.[121]		5/9/74 (intervention petition)	Dep't of Nat. Res.
144. Three Lakes Ass'n v. Fisher[122]	7394387	1/23/73	Oakland
145. Three Lakes Ass'n v. Kessler[123]	1257-CX	11/23/73	Antrim

112. 501 F. Supp. 1007 (E.D. Mich. 1980).

113. No. 79-1225-CZ-Z, (Mich. Cir. Ct. May 5, 1981, Burkholz, J.) (consent judgment).

114. Suit concluded when the defendants took requested action.

115. The Michigan Court of Appeals reversed the circuit court's dismissal of the plaintiff's MEPA claim. 121 Mich. App. 503, 328 N.W.2d 672 (Ct. App. 1982).

116. This case arose from the coal unloading dock controversy at issue in Superior Public Rights, Inc. v. Dep't of Natural Resources, case no. 136.

117. No. 73-15852-CE, slip op. (Mich. Cir. Ct. Mar. 2, 1976, Reisig, J.), *aff'd in part, rev'd in part*, 80 Mich. App. 72, 263 N.W.2d 290 (Ct. App. 1977).

118. No. C-7121-AV, slip op. (Mich. Cir. Ct. May 28, 1974, Schoener, J.).

119. Change of venue to Charlevoix County granted, No. 90-3, slip op. (Mich. Cir. Ct. Jan. 18, 1973, C. Brown, J.). Defendant Sheldon filed a counterclaim for damages on February 24, 1972. This counterclaim was later dismissed.

120. No. 3137, slip op. (Mich. Cir. Ct. Nov. 29, 1973, W. Brown, J.); *see also* 70 Mich. App. 385, 245 N.W.2d 761 (Ct. App. 1976) (remanding to circuit court for argument on issue of costs, including witness fees).

121. Proposal for decision (Mich. Nat. Res. Comm'n filed Jan. 8, 1976).

122. Change of venue to Antrim County granted February 23, 1973, No. 1142.

123. No. 1257-CX, slip op. (Mich. Cir. Ct. Apr. 21, 1977, W. Brown, J.), *remanded*, 91 Mich. App. 371, 285 N.W.2d 300 (Ct. App. 1979). Slip op. (Mich. Cir. Ct. June 30, 1978, W. Brown, J.) (denying plaintiff attorneys' fees), *aff'd*, 101 Mich. App. 170, 300 N.W.2d 485 (Ct. App. 1980), *lv. denied*, 411 Mich. 1056 (1981).

Case Name	File No.	Date Filed	County
146. Tri-Cities Environmental Action Council, Inc. v. A. Reenders Sons, Inc.[124]	2737	2/26/73	Ottawa
147. Trout Unlimited, Inc. v. Milliken	13243-C	6/18/71	Ingham
148. United States v. Reserve Mining Co.[125]	5-72 Civ. 19	3/10/72 (motion to intervene)	U.S.D.C., D. Minn.
149. Upper Rabbit River Ass'n v. Hooker Harvey Drain Board of Determination	83-5181-CE	4/15/83*	Allegan
150. Van Zanen v. Keydel and Huron-Clinton Metropolitan Authority[126]	X-73-6491-AA	10/30/74 (amended complaint)	Macomb
151. Walloon Lake Ass'n v. Hildee Co.[127]	79-32206-CE	8/15/79*	Charlevoix
152. Washtenaw County Health Dep't v. Barton[128]	7201	11/22/72	Washtenaw
153. Washtenaw County Health Dep't v. Hoover Ball & Bearing Co.[129]	7866	7/9/73	Washtenaw
154. Washtenaw County Road Comm'rs v. Kissner[130]	78-15051-CC	5/3/78*	Washtenaw
155. Water Resources Comm'n v. Chippewa County[131]	1255	2/10/71	Chippewa
156. Wayne County Health Dep't v. Allen Industries, Inc.[132]	74-005800-CE	2/27/74	Wayne
157. Wayne County Health Dep't v. Allied Chemical Corp.[133]	78-824311-CE	7/27/78*	Wayne
158. Wayne County Health Dep't v. American Cement Corp.[134]	194927-R	11/29/71	Wayne
159. Wayne County Health Dep't v. Board of Education for the School District of the City of Detroit[135]	82-236747-CE	10/7/82*	Wayne

124. 4 ENVTL. L. REP. (ENVTL. L. INST.) 20,553, 6 Env't Rep. Cas. (BMA) 1600 (Mich. Cir. Ct. 1974).

125. 380 F. Supp. 11 (D. Minn. 1974), *modified sub nom.*, Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).

126. No. X-73-6491-AA, slip op. (Mich. Cir. Ct. Feb. 27, 1975, Gallagher, J.).

127. Settled with consent judgment.

128. No. 7201, slip op. (Mich. Cir. Ct. Jan. 30, 1973, Campbell, J.).

129. No. 7866 (Mich. Cir. Ct. July 24, 1974, Conlin, J.) (order dismissing suit with plaintiff's consent).

130. A related case is Kissner v. Board of County Road Comm'rs of Washtenaw County, case no. 69.

131. No. 1255, slip op. (Mich. Cir. Ct. May 27, 1971, Hood, J.).

132. No. 74-005800-CE, (Mich. Cir. Ct. Jan. 18, 1977, Stacey, J.) (order of dismissal stipulating closure date of the operation in controversy).

133. Consent judgment of July 27, 1978 was modified on December 30, 1981.

134. Szawala v. American Cement Corp., case no. 139, arose from the same controversy.

135. Consent judgment of October 7, 1982.

Case Name	File No.	Date Filed	County
160. Wayne County Health Dep't v. Central Wayne County Sanitation Authority[136]	76-614023-CE	5/3/76*	Wayne
161. Wayne County Health Dep't v. Chrysler Corp.[137]	166223	10/1/70	Wayne
162. Wayne County Health Dep't v. City of Dearborn[138]	203110-R	3/12/72	Wayne
163. Wayne County Health Dep't v. Detroit Edison Co.	248582	8/31/73	Wayne
164. Wayne County Health Dep't v. Edward Levy Co.	166244	10/1/70	Wayne
165. Wayne County Health Dep't v. Ford Motor Co.	211654-R	7/5/72	Wayne
166. Wayne County Health Dep't v. Hyde Park Production, Inc.[139]	79-918584-CE	6/1/79*	Wayne
167. Wayne County Health Dep't v. Industrial Smelting Co.[140]	79-934433-CE	10/10/79*	Wayne
168. Wayne County Health Dep't v. International Salt Co.[141]	73-233039-CE	3/26/73	Wayne
169. Wayne County Health Dep't v. McLouth Steel Corp.	166222	10/1/70	Wayne
170. Wayne County Health Dep't v. Modular Metals, Inc.[142]	78-833895-CE	10/13/78*	Wayne
171. Wayne County Health Dep't v. National Steel Corp.[143]	187905-R	8/20/71	Wayne
172. Wayne County Health Dep't v. Olsonite Corp.[144]	73-252680-CE	11/11/73	Wayne
173. Wayne County Health Dep't v. Pressure Vessel Service, Inc.[145]	75-57398-CE	3/3/75	Wayne

136. Consent judgment of October 26, 1978 was modified on November 1, 1979 and on March 8, 1982.

137. 1 ENVTL. L. REP. (ENVTL. L. INST.) 20,410, 2 Env't Rep. Cas. (BNA) 1708 (Mich. Cir. Ct. June, 18, 1971) (order proposed as basis for settlement), *aff'd sub nom.*, Nosal v. Chrysler Corp., 43 Mich. App. 235, 203 N.W.2d 912 (Ct. App. 1972). A collateral nuisance case for damages is Nosal v. Chrysler Corp., No. 147150 (Mich. Cir. Ct.). In June 1972, a jury gave a verdict for the plaintiffs in the suit for damages.

138. No. 203110-R, slip op. (Mich. Cir. Ct. Mar. 18, 1972, Moynihan, J.).

139. Dismissed by stipulation on June 2, 1981.

140. Consent judgment was modified December 30, 1981.

141. No. 73-233039-CE, (Mich. Cir. Ct. May 31, 1979, Montante, J.) (consent judgment).

142. Dismissed by stipulation on September 6, 1979.

143. Removed to federal court, No. CA-37111 (E.D. Mich., Sept. 16, 1971); (E.D. Mich. Nov. 22, 1971) (order of remand).

144. The circuit court held for the plaintiffs (Mich. Cir. Ct., Gilmore, J.). The court of appeals affirmed in part; but remanded the case to the circuit court for further proceedings; 79 Mich. App. 668, 263 N.W.2d 778 (Ct. App. 1977), *lv. denied*, 402 Mich. 845 (1978). The case went to the court of appeals again, No. 47753, and on July 14, 1981 the Michigan Supreme Court denied the defendant leave to appeal, No. 65802. *See also* People v. Olsonite Corp., 80 Mich. App. 763, 265 N.W.2d 176 (1975).

145. No. 75-057398-CE, (Mich. Cir. Ct. Mar. 20, 1979, Baum, J.) (order of voluntary dismissal stipulating when defendant was to cease the process which was the subject of the complaint).

Case Name	File No.	Date Filed	County
174. Wayne County Health Dep't v. Wayne Soap Co.[146]	76-629434-CE	9/20/76*	Wayne
175. Waytes v. Ford Motor Land Development Corp.[147]	75-075584-CE	7/30/75	Wayne
176. Weil v. Chesterfield Township	77-2714-CE	4/25/77*	Macomb
177. Western Oakland County Homeowners Ass'n v. Dep't of Natural Resources	81-220377-CE	3/23/81*	Oakland
178. West Michigan Environmental Action Council, Inc. v. Betz Foundry, Inc.[148]	11409	3/12/71	Kent
179. West Michigan Environmental Action Council, Inc. v. Natural Resources Comm'n[149]	76-19335-CE	9/17/76*	Ingham
180. West Michigan Environmental Action Council, Inc. v. Tanner[150]	80-24630-CE	3/4/80*	Ingham
181. Wharf Marina v. City of Grand Haven	2366	9/24/71	Ottawa
182. Whittaker & Gooding Co. v. Scio Township Zoning Board of Appeals[151]	78-14662-CE	2/24/78*	Washtenaw
183. Wilcox v. Board of County Road Comm'rs[152]	7-237	6/16/71	Calhoun
184. Williamson v. Lenawee County Road Comm'n	2216	6/26/73	Lenawee
185. Zeits v. Lake Michigan Hardwood Co., Inc.	81-1151-NZ	12/14/82*	Leelanau

146. Interlocutory consent agreements of August 11, 1979 and July 23, 1982; final consent judgment of July 27, 1983.

147. No. 75-075584-CE, (Mich. Cir. Ct. Apr. 4, 1977, Sullivan, J.) (order granting the defendant partial summary judgment), *lv. denied*, No. 77-3645 (Mich. Ct. App. Oct. 20, 1977, Brennan, Gillis and Riley, JJ.), *rev'd*, No. 60619, slip op. (Mich. Jan. 19, 1978). The parties entered into a consent agreement on April 19, 1978.

148. No. 14355, slip op. (Mich. Ct. App. Aug. 3, 1972, T. Burns, R. Burns and Fitzgerald, JJ.).

149. 405 Mich. 741, 275 N.W.2d 538, *cert. denied*, 444 U.S. 941 (1979).

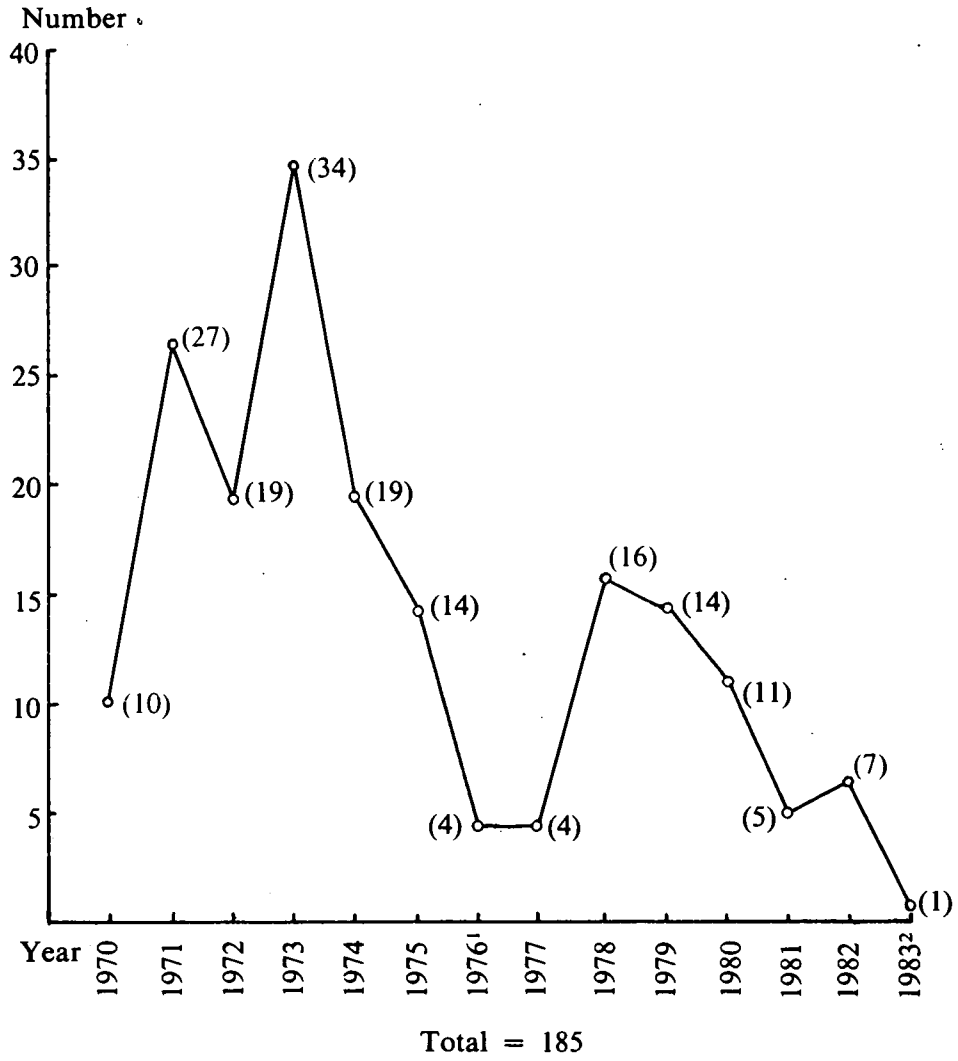
150. No. 64839-41, slip op. (Mich. Mar. 28, 1980). The Michigan Supreme Court refused to hear the case, originally filed as No. 80-24630-CE, on emergency appeal before it had been heard by the court of appeals.

151. The circuit court granted the defendant's motion for partial summary judgment and the court of appeals affirmed. 117 Mich. App. 18, 323 N.W.2d 574 (Ct. App. 1982).

152. No. 7-237, slip op. (Mich. Cir. Ct. Mar. 31, 1972, Ryan, J.), *on appeal*, No. 13835, slip op. (Mich. Ct. App. Mar. 31, 1972, Holbrook, Burns and Fitzgerald, JJ.).

APPENDIX C

NUMBER OF MEPA CASES FILED PER YEAR



Total = 185

[1] Last year of intensive study

[2] Data incomplete

APPENDIX D

IDENTITY OF PARTIES

(P=Plaintiff; D=Defendant; A=Amicus Curiae; I=Intervenor)

Party	No. of Cases	Case Name
A. PUBLIC AGENCIES		
Agriculture, Department of	4	Board of Comm'rs of Kalkaska County v. State (D) Gang of Lakes Environmental Organization v. Gee (D) Organic Growers of Michigan v. Michigan Dep't of Agriculture (D) Sprik v. Farm Bureau Services, Inc. (D)
Air Pollution Control Commission	4	Kelley v. Michigan Standard Alloys, Inc. (P) Lever v. General Motors Corp. (D) People *ex rel.* Kelley v. Hillsdale Foundry Co. (P) West Michigan Environmental Action Council, Inc. v. Betz Foundry, Inc. (D)
Attorney General	27	Huron-Clinton Metropolitan Authority v. Kelley (D) Kelley v. Anderson Development Co., Inc. (P) Kelley v. Balkema (P) Kelley v. BASF Wayandotte Co. (P) Kelley v. Bofors Lakeway, Inc. (P) Kelley v. Cast Forge, Inc. (P) Kelley v. Continental Metallurgical Products (P) Kelley v. DACA, Inc. (P) Kelley v. Ford Motor Co. (P) Kelley v. Hooker Chemicals and Plastic Corp. (P) Kelley v. Huron-Clinton Metropolitan Authority (P) Kelley v. John Biewer Co., Inc. (P) Kelley v. McGraw-Edison Co. (P) Kelley v. Michigan Standard Alloys, Inc. (P) Kelley v. National Gypsum Co. (P) Kelley v. Peerless Plating Co. (P) Kelley v. Tannehill & DeYoung, Inc. (P) Kelley v. United States (P) Michigan Consolidated Gas Co. (I) Michigan Consolidated Gas Co. and Consumers Power Co. (D) Michigan United Conservation Clubs v. Anthony (A) People *ex rel.* Attorney General v. Clinton County Drain Comm'r (P) People *ex rel.* Kelley v. Auto-Ion Chemical, Inc. (P)

Party	No. of Cases	Case Name
		People *ex rel.* Kelley v. Hillsdale Foundry Co. (P)
		People *ex rel.* Kelley v. J.L. Hudson Co. (P)
		Waytes v. Ford Motor Land Development Corp. (I)
		Wayne County Health Dep't (WCHD) v. Chrysler Corp. (I)
County Government or Boards of Commissioners	28	American Amusement Co. v. County of Shiawasee (D)
		Board of Comm'rs of Kalkaska County v. State (P)
		Gang of Lakes Environmental Organization v. Gee (D)
		Glencoe Hills Associates v. Washtenaw County (D)
		Harrison v. Leelanau County (D)
		Irish v. Green (D)
		Kelley v. Tannehill & DeYoung, Inc. (P)
		Kent County Dep't of Public Works (D)
		Kissner v. Board of County Road Comm'rs of Washtenaw County (D)
		Leelanau County Board of Comm'rs v. Dep't of Natural Resources (DNR) (P)
		Muskegon County v. Environmental Protection Organization (D)
		Non-Partisan Progressive Action Comm., Inc. v. Twin County Airport Comm'n (D)
		People *ex rel.* Attorney General v. Clinton County Drain Comm'r (D)
		People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc. (P)
		Pine Lake Property Owners Ass'n, Inc. v. County of Oakland (D)
		Portage, City of v. Kalamazoo County Road Comm'n (D)
		Ray v. Mason County Drain Comm'r (D)
		Reaume v. Herrick (D)
		Schmidt v. Grand Traverse County Road Comm'n (D)
		South Macomb Disposal Authority v. Township of Washington (P)
		Trout Unlimited, Inc. v. Milliken (P&D)
		Upper Rabbit River Ass'n v. Hooker Harvey Drain Board of Determination (D)
		WCHD v. Barton (P)
		WCHD v. Hoover Ball & Bearing Co. (P)
		WCHD v. Central Wayne County Sanitation Authority (P&D)
		Wilcox v. Board of County Road Comm'rs (D)
		Williamson v. Lenawee County Road Comm'n (D)

Party	No. of Cases	Case Name
		Water Resources Comm'n (WRC) v. Chippewa County (D)
Detroit, City of	8	Alvin E. Bertrand, Inc. v. City of Detroit (D) Danyo v. Great Lakes Steel Corp. (D) McDonald v. Detroit Edison Co. (D) Poletown Neighborhood Council v. City of Detroit (D) Reaume v. Herrick (D) Surowitz v. City of Detroit (D) WCHD v. American Cement Corp. (I&P) WCHD v. Board of Education for the School District of the City of Detroit (P&D)
Drain Office	6	American Amusement Co. v. County of Shiawasee (D) Gang of Lakes Environmental Organization v. Gee (D) Irish v. Green (D) McPhail v. Army Corps of Engineers (D) Pine Lake Property Owners Ass'n, Inc. v. Mark Homes, Inc. (D) Ray v. Mason County Drain Comm'r (D)
Governor	2	King Arthur's Court, Inc. v. Milliken (D) Trout Unlimited, Inc. v. Milliken (D)
Huron-Clinton Metropolitan Authority	3	Huron-Clinton Metropolitan Authority v. Kelley (P) Kelley v. Huron-Clinton Metropolitan Authority (D) Van Zanen v. Keydel and Huron-Clinton Metropolitan Authority (D)
Local Governments except Detroit	39	Avon Townships v. DNR (P) Beaman v. Township of Summit (D) Bise v. Detroit Edison Co. (D) Busard v. Muskegon Heights (D) Committee for Sensible Land Use v. Garfield Township (P&D) Crystal Lake Resort Ass'n v. Village of Beulah (D) Darwin v. Board of Zoning Appeals of the City of Ann Arbor (P&D) Dwyer v. City of Ann Arbor (D) Elsman v. Detroit Edison Co. (D) Eyde v. State (D) Farmer v. Construction Aggregates Corp. (D) Hadley Township v. DNR (P) Hoffman v. Glen Arbor Township (D) Irish v. Green (D) Jamens v. Township of Avon (P) Knizewski v. Detroit Edison Co. (D) Lakeland Property Owners Ass'n v. Township of Northfield (P&D)

Party	No. of Cases	Case Name
		Leelanau County Board of Comm'rs v. DNR (P)
		Lever v. General Motors Corp. (D)
		Lincoln Township v. Manley Bros. (P)
		Little Wolf Lakes Property Owners Ass'n v. Haase (D)
		McCloud v. City of Lansing (D)
		Muskegan County v. Environmental Protection Organization (D)
		Orr v. Traverse City State Bank (P&D)
		People *ex rel.* Leonard v. City of Fenton (D)
		People's Lakes Action Comm. v. Commerce Township (D)
		Pine Lake Property Owners Ass'n, Inc. v. Mark Homes, Inc. (D)
		Pleasant Plains Zoning Comm'n v. Marzell (P)
		Portage, City of v. Kalamazoo County Road Comm'n (P)
		South Macomb Disposal Authority v. Washington Township (P)
		State v. City of Allen Park (D)
		Superior Public Rights, Inc. v. City of Marquette (D)
		Taxpayers & Citizens in the Public Interest v. Dep't of State Highways (D)
		Tri-Cities Environmental Action Council, Inc. v. A. Reenders Sons, Inc. (D)
		Van Zanen v. Keydel and Huron-Clinton Metropolitan Authority (P)
		WCHD v. City of Dearborn (D)
		Weil v. Chesterfield Township (D)
		Wharf Marina v. City of Grand Haven (D)
		Whittaker & Gooding Co. v. Scio Township Zoning Board of Appeals (D)
Michigan, State of	12	Board of Comm'rs of Kalkaska County v. State (D)
		Bradford v. State (D)
		Eyde v. State (D)
		Irish v. Green (D)
		Leelanau County Board of Comm'rs v. DNR (D)
		Roberts v. State (D)
		Sprik v. Farm Bureau Services, Inc. (D)
		State v. City of Allen Park (P)
		State v. Michigan Standard Alloys (P)
		State v. Zilka (P)
		Taxpayers & Citizens in the Public Interest v. Dep't of State Highways (D)
		United States v. Reserve Mining Co. (I)
Department of Natural Resources or Natural Resources Commission	43	Ada-Cascade Watch, Inc. v. Costle (D)
		Avon Township v. DNR (D)
		Banghart v. Forbes/Cohen Properties (D)

Party	No. of Cases	Case Name
		Berlin & Farro Liquid Incineration, Inc. (P)
		Board of Comm'rs of Kalkaska County v. State (D)
		Bradford v. State (D)
		Davis v. DNR (D)
		DNR v. Kiffer (P)
		Gang of Lakes Environmental Organization v. Gee (D)
		Godfrey v. DNR (D)
		Hadley Township v. DNR (D)
		Hendrickson v. Wilson (D)
		Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc. (D)
		Kelley v. Anderson Development Co., Inc. (P)
		Kelley v. Balkema (P)
		Kelley v. BASF Wyandotte Co. (P)
		Kelley v. Bofors Lakeway, Inc. (P)
		Kelley v. Cast Forge, Inc. (P)
		Kelley v. DACA, Inc. (P)
		Kelley v. Ford Motor Co. (P)
		Kelley v. John Biewer Co., Inc. (P)
		Kelley v. McGraw-Edison Co. (P)
		Kelley v. Peerless Plating Co. (P)
		Koch v. DNR (D)
		Lakeshore Residents of Walnut Lake, Inc. v. Mourray (D)
		Leelanau County Board of Comm'rs v. DNR (D)
		Lever v. General Motors Corp. (D)
		Marble Chain of Lakes v. WRC (D)
		Michigan Consolidated Gas Co. and Consumers Power Co. (D)
		Michigan Oil Co. v. Natural Resources Comm'n (D)
		Mid-Shiawasee County Concerned Citizens v. Tanner (D)
		Oscoda Chapter of PBB Action Comm. v. DNR (D)
		Payant v. DNR (D)
		People *ex rel.* Attorney General v. Clinton County Drain Comm'r (P)
		People *ex rel.* Kelley v. Hillsdale Foundry Co. (P)
		South Macomb Disposal Authority v. Township of Washington (D)
		State v. Michigan Standard Alloys (P)
		Superior Public Rights, Inc. v. DNR (D)
		Tanton v. DNR (D)
		Taxpayers & Citizens in the Public Interest v. Dep't of State Highways (D)
		Trout Unlimited, Inc. v. Milliken (D)

Party	No. of Cases	Case Name
		West Michigan Environmental Action Council, Inc. v. Natural Resources Comm'n (D) West Michigan Environmental Action Council, Inc. v. Tanner (D)
Public Health Department	3	Irish v. Green (D) King Arthur's Court, Inc. v. Milliken (D) Lever v. General Motors Corp. (D)
Public Service Commission	1	Elsman v. Detroit Edison Co. (D)
Secretary of State	1	Roberts v. State (D)
State Highway Commission or Department of State Highways	8	Anderson v. Michigan State Highway Comm'n (D) Concerned Citizens Comm. v. Michigan State Highway Comm'n (D) Irish v. Green (D) Koch v. DNR (D) Michigan State Highway Comm'n v. Vanderkloot (D) Roberts v. State (D) Taxpayers & Citizens in the Public Interest v. Dep't of State Highways (D) WRC v. Chippewa County (P)
State Department of Transportation	1	Robinson v. Dep't of Transportation (D)
United States	4	Ada-Cascade Watch, Inc. v. Costle (D) Joseph v. Adams (D) Kelley v. United States (D) United States v. Reserve Mining Co. (P)
Water Resources Commission	6	Gang of Lakes Environmental Organization v. Gee (D) Hendrickson v. Wilson (D) Marble Chain of Lakes v. WRC (D) Owens v. WRC (D) Trout Unlimited, Inc. v. Milliken (D) WRC v. Chippewa County (P)
Wayne County Health Department (Air Pollution Control Division)	20	Michigan Consolidated Gas Co. (I) WCHD v. Allen Industries, Inc. (P) WCHD v. Allied Chemical Corp. (P) WCHD v. American Cement Corp. (P) WCHD v. Board of Education for the School District of the City of Detroit (P) WCHD v. Central Wayne County Sanitation Authority (P) WCHD v. Chrysler Corp. (P) WCHD v. City of Dearborn (P) WCHD v. Detroit Edison Co. (P) WCHD v. Edward Levy Co. (P) WCHD v. Ford Motor Co. (P) WCHD v. Hyde Park Production, Inc. (P) WCHD v. Industrial Smelting Co. (P) WCHD v. International Salt Co. (P) WCHD v. McLouth Steel Corp. (P)

Party	No. of Cases	Case Name
		WCHD v. Modular Metals, Inc. (P) WCHD v. National Steel Corp. (P) WCHD v. Olsonite Corp. (P) WCHD v. Pressure Vessel Service, Inc. (P) WCHD v. Wayne Soap Co. (P)
B. ENVIRONMENTAL ORGANIZATIONS		
East Michigan Environmental Action Council	3	East Michigan Environmental Action Council v. S.B. McLaughlin Associates, Inc. (P) Roberts v. State (A) Tanton v. DNR (P)
Environmental Law Society	1	Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc. (A)
Michigan Environmental Protection Foundation	3	Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc. (P) Irish v. Property Development Group, Inc. (P) Manley Bros. of Indiana, Inc. Permit Application (I)
Michigan Student Environmental Confederation	1	United States v. Reserve Mining Co. (P)
Michigan United Conservation Clubs	3	Michigan United Conservation Clubs v. Anthony (P) Payant v. DNR (A) Tanton v. DNR (A)
Nature Conservancy	1	Tri-Cities Environmental Action Council, Inc. v. A. Reenders Sons, Inc. (P)
Sierra Club	1	Lake Doster Development Co. (I)
Trout Unlimited, Inc.	4	Lake Doster Development Co. (I) Roberts v. State (A) Tanton v. DNR (P) Trout Unlimited, Inc. v. Milliken (P)
West Michigan Environmental Action Council, Inc. (WMEAC)	9	Kent County Dep't of Public Works (I) Michigan Oil Co. v. Natureal Resources Comm'n (A) Ray v. Mason County Drain Comm'r (A) Roberts v. State (A) Superior Public Rights, Inc. v. DNR (A) Tri-Cities Environmental Action Council, Inc. v. A. Reenders Sons, Inc. (P) WMEAC v. Betz Foundry, Inc. (P) WMEAC v. Tanner (P) WMEAC v. Natural Resources Comm'n (P)
C. LOCAL AND AD HOC GROUPS		
	41	Ada-Cascade Watch, Inc. v. Costle (P) Black Pond Development (I) Black River Conservation Ass'n v. Cragg (P) Committee for Sensible Land Use v. Garfield Township (P)

Party	No. of Cases	Case Name
		Concerned Citizens Comm. v. Michigan State Highway Comm'n (P)
		Crystal Lakes Resort Ass'n v. Village of Beulah (P)
		East Michigan Environmental Action Council v. S.B. McLaughlin Associates, Inc. (P)
		Gang of Lakes Environmental Organization v. Gee (P)
		Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc. (P)
		Irish v. Green (P)
		Kimberly Hills Neighborhood Ass'n v. Dion (P)
		Lakeland Property Owners Ass'n v. Township of Northfield (P)
		Lakeshore Residents of Walnut Lake, Inc. v. Mourray (P)
		Little Wolf Lakes Property Owners Ass'n v. Haase (P)
		Manley Bros. of Indiana, Inc. Permit Application (I)
		Marble Chain of Lakes v. WRC (P)
		Michigan Oil Co. v. Natural Resources Comm'n (I)
		Mid-Shiawasee County Concerned Citizens v. Tanner (P)
		Muskegon County v. Environmental Protection Organization (D)
		Muskegon Save Our Shoreline, Inc. v. North Star Steel Co. (P)
		Non-Partisan Progressive Action Comm. Inc. v. Twin County Airport Comm'n (P)
		Oakwood Homeowners Ass'n, Inc. v. Ford Motor Co. (P)
		Oakwood Homeowners Ass'n, Inc. v. Marathon Oil Co. (P)
		Organic Growers of Michigan v. Michigan Dep't of Agriculture (P)
		Oscoda Chapter of PBB Action Comm. v. DNR (P)
		People's Lakes Action Comm. v. Commerce Township (P)
		Pine Lake Property Owners Ass'n, Inc. v. County of Oakland (P)
		Pine Lake Property Owners Ass'n, Inc. v. Mark Homes, Inc. (P)
		Poletown Neighborhood Council v. City of Detroit (P)
		Superior Public Rights, Inc. v. City of Marquette (P)
		Superior Public Rights, Inc. v. DNR (P)
		Tanton v. DNR (P)

Party	No. of Cases	Case Name
		Taxpayers & Citizens in the Public Interest v. Dep't of State Highways (P)
		Three Lakes Ass'n v. Fisher (P)
		Three Lakes Ass'n v. Kessler (P)
		Tri-Cities Environmental Action Council, Inc. v. A. Reenders Sons, Inc. (P)
		Upper Rabbit River Ass'n v. Hooker Harvey Drain Board of Determination (P)
		Van Zanen v. Keydel and Huron-Clinton Metropolitan Authority (P)
		Walloon Lake Ass'n v. Hildee Co. (P)
		Waytes v. Ford Motor Land Development Corp. (P)
		Williamson v. Lenawee County Road Comm'n (P)

APPENDIX E

TYPES OF CASES FILED UNDER MEPA, BY SUBJECT MATTER

Type of Case	No. of Cases	Year Filed	Case Name	Class Action (P) or (D)
Air Pollution				
Automobiles	2	1974	People's Lakes Action Comm. v. Commerce Township	
		1970	Roberts v. State	(P)
Dust	3	1973	Orr v. Traverse City State Bank	
		1971	Wayne County Health Dep't (WCHD) v. American Cement Corp.	
		1971	Wharf Marina v. City of Grand Haven	
Industrial	40	1975	Berlin & Farro Liquid Incineration, Inc.	
		1971	Bise v. Detroit Edison Co.	
		1974	Bobula v. Inland Steel Co.	
		1972	Braemer v. American Cement Corp.	(P)
		1971	Crandall v. Biergans	
		1973	Danyo v. Great Lakes Steel Corp.	(P)
		1979	Kelley v. Anderson Development Co., Inc.	
		1972	Kelley v. Continental Metallurgical Products	
		1972	Kelley v. Michigan Standard Alloys, Inc.	
		1973	Kelley v. National Gypsum Co.	
		1971	Kelley v. Tannehill & DeYoung, Inc.	
		1973	Knizewski v. Detroit Edison Co.	(P)
		1973	Lever v. General Motors Corp.	(P)
		1972	McDonald v. Detroit Edison Co.	(P)
		1972	Oakwood Homeowners Ass'n v. Ford Motor Co.	(P)
		1980	Oakwood Homeowners Ass'n v. Marathon Oil Co.	(P)
		1974	People *ex rel.* Kelley v. Hillsdale Foundry Co.	
		1975	People *ex rel.* Leonard v. Berlin & Farro Liquid Incineration, Inc.	
		1973	Pratt v. Chrysler Corp.	
		1981	Rybinski v. Olsonite Corp.	
		1973	St. Cyril & Methodius Church v. Chrysler Corp.	
		1973	Svensson v. Whitehall Leather Co.	(P)
		1972	Szawala v. American Cement Corp.	(P)
		1972	Szyskiewicz v. Swedish Crucible Steel Co.	(P)
		1974	WCHD v. Allen Industries, Inc.	
		1978	WCHD v. Allied Chemical Corp.	

Type of Case	No. of Cases	Year Filed	Case Name	Class Action (P) or (D)
		1970	WCHD v. Chrysler Corp.	
		1973	WCHD v. Detroit Edison Co.	
		1970	WCHD v. Edward Levy Co.	
		1972	WCHD v. Ford Motor Co.	
		1979	WCHD v. Hyde Park Production, Inc.	
		1979	WCHD v. Industrial Smelting Co.	
		1973	WCHD v. International Salt Co.	
		1970	WCHD v. McLouth Steel Corp.	
		1978	WCHD v. Modular Metals, Inc.	
		1971	WCHD v. National Steel Corp.	
		1973	WCHD v. Olsonite Corp.	
		1975	WCHD v. Pressure Vessel Service, Inc.	
		1976	WCHD v. Wayne Soap Co.	
		1971	West Michigan Environmental Action Council, Inc. v. Betz Foundry, Inc.	
Municipal Incinerator	2	1971	Alvin E. Bertrand, Inc. v. City of Detroit	
		1972	WCHD v. City of Dearborn	
Natural Gas Allocation	1	1971	Michigan Consolidated Gas Co.	(P)
Atomic Energy				
Nuclear Plant Operation	1	1973	Marshall v. Consumers Power Co.	
Fish and Game Management				
Deer Hunting	1	1971	Payant v. Dep't of Natural Resources (DNR)	
Endangered Species	1	1973	People *ex rel.* Kelley v. J.L. Hudson Co.	
Native American Fishing Rights	1	1971	Michigan United Conservation Clubs v. Anthony	(D)
Land Use				
Airport Expansion	1	1980	Non-Partisan Progressive Action Comm., Inc. v. Twin County Airport Comm'n	
Condemnation by Public Agencies	2	1974	Eyde v. State	
		1980	Poletown Neighborhood Council v. City of Detroit	
Condemnation by Utilities	4	1971	Beach v. Detroit Edison Co.	(P)
		1972	Braun v. Detroit Edison Co.	
		1973	Brotz v. Detroit Edison Co.	(P)
		1974	Elsman v. Detroit Edison Co.	
Forest Destruction	2	1978	Stevens v. Creek	
		1982	Zeits v. Lake Michigan Hardwood Co., Inc.	
Harbor Development	1	1973	Hendrickson v. Wilson	
Homesite and Multiple Use Development	18	1979	Banghart v. Forbes/Cohen Properties	
		1980	Black Pond Development	
		1970	Blunt v. Apfel	
		1979	Committee for Sensible Land Use v. Garfield Township (zoning)	

Type of Case	No. of Cases	Year Filed	Case Name	Class Action (P) or (D)
		1979	East Michigan Environmental Action Council v. S.B. McLaughlin Associates, Inc.	
		1980	Hoffman v. Glen Arbor Township (zoning)	
		1972	Irish v. Green	
		1972	Irish v. Property Development Group, Inc.	
		1979	Kimberly Hills Neighborhood Ass'n v. Dion	
		1974	Little Wolf Lakes Property Owners Ass'n v. Haase	(P)
		1974	Margolis v. Bourquin	
		1973	Olk v. Desai	
		1975	Pine Lake Property Owners Ass'n, Inc. v. Mark Homes, Inc.	
		1983	Three Lakes Ass'n v. Fisher	
		1973	Three Lakes Ass'n v. Kessler	
		1974	Territorial Enterprises, Inc.	
		1979	Walloon Lake Ass'n v. Hildee Co.	
		1975	Waytes v. Ford Motor Land Development Corp.	
Land Drainage from Construction	3	1975	Glencoe Hills Associates v. Washtenaw County	
		1973	Koch v. DNR	
		1972	Muha v. Union Lakes Associates	
Mining Operations	6	1973	Farmer v. Construction Aggregates Corp.	
		1982	Hope for the Dunes, Inc. v. Martin-Marietta Aggregates, Inc.	
		1974	Lincoln and Lake Townships v. Manley Bros.	
		1981	Manfredi v. Inland Steel Co.	
		1979	Manley Bros. of Indiana, Inc. Permit Application	
		1978	Whittaker & Gooding Co. v. Scio Township Zoning Board (zoning)	
Off-Road Vehicle Control	1	1973	Black River Conservation Ass'n v. Cragg	
Oil and Gas Leasing	3	1970	Davis v. DNR	
		1973	Michigan Oil Co. v. Natural Resources Comm'n	
		1976	West Michigan Environmental Action Council, Inc. v. Tanner	
Park Management	5	1980	Huron-Clinton Metropolitan Authority v. Kelley	
		1978	Kelley v. Huron-Clinton Metropolitan Authority	
		1971	Leelanau County Board of Comm'rs v. DNR	
		1971	McCloud v. City of Lansing	(P)
		1974	Van Zanen v. Keydel and Huron-Clinton Metropolitan Authority	

Type of Case	No. of Cases	Year Filed	Case Name	Class Action (P) or (D)
Pipe Location	1	1971	Michigan Consolidated Gas Co. and Consumers Power Co.	(P)
Public Trust	4	1973	Godfrey v. DNR	
		1975	Superior Public Rights, Inc. v. City of Marquette	(P)
		1973	Superior Public Rights, Inc. v. DNR	(P)
		1972	Taxpayers & Citizens in the Public Interest v. Dep't of State Highways	(P)
Road Development	7	1978	Concerned Citizen Comm. v. Michigan State Highway Comm'n	
		1973	Crystal Lake Resort Ass'n v. Village of Beulah	
		1976	Joseph v. Adams	
		1971	Michigan State Highway Comm'n v. Vanderkloot	
		1980	Robinson v. Dep't of Transportation	
		1979	Schmidt v. Grand Traverse County Road Comm'n	
		1973	Tri-Cities Environmental Action Council, Inc. v. A. Reenders Sons, Inc.	
Road Widening/Tree Cutting	6	1973	Anderson v. Michigan State Highway Comm'n	
		1978	Kissner v. Board of County Road Comm'rs of Washtenaw County	
		1982	Portage, City of v. Kalamazoo County Road Comm'n	
		1978	Washtenaw County Road Comm'rs v. Kissner	
		1971	Wilcox v. Board of County Road Comm'rs	
		1973	Williamson v. Lenawee County Road Comm'n	
Shoreline Protection	2	1973	Guthrie v. Detroit Edison Co.	
		1975	Muskegon Save Our Shoreline, Inc. v. North Star Steel Co.	
Solid Waste Disposal	8	1975	Avon Township v. DNR	
		1971	Hadley Township v. DNR	
		1975	Jamens v. Township of Avon	
		1975	Kent County Dep't of Public Works	
		1974	South Macomb Disposal Authority v. Township of Washington	
		1972	Washtenaw County Health Dep't v. Barton	
		1977	Weil v. Chesterfield Township	
		1981	Western Oakland County Homeowners Ass'n v. DNR	
Stream Channelization	5	1972	Gang of Lakes Environmental Organization v. Gee	
		1972	McPhail v. Army Corps of Engineers	(P)

Type of Case	No. of Cases	Year Filed	Case Name	Class Action (P) or (D)
		1971	Ray v. Mason County Drain Comm'r	(P)
		1971	Reaume v. Herrick	
		1983	Upper Rabbit River Ass'n v. Hooker Harvey Drain Board of Determination	
Wetlands Protection	3	1981	Harrison v. Leelanau County	
		1979	Kelley v. Balkema	
		1974	Lakeshore Residents of Walnut Lake, Inc. v. Mourray	
Toxic Substances				
Lead Contamination	1	1981	Darwin v. Board of Zoning Appeals of the City of Ann Arbor	
Pesticides	2	1978	Organic Growers of Michigan v. Michigan Dep't of Agriculture	
		1971	Surowitz v. City of Detroit	(P)
Polybrominated Biphenyl Contamination	4	1974	Board of Comm'rs of Kalkaska County v. State	
		1974	Kretzman v. Farm Bureau Services, Inc.	
		1978	Oscoda Chapter of PBB Action Comm. v. DNR	
		1975	Sprik v. Farm Bureau Services, Inc.	
Industrial Wastes	5	1980	Ada-Cascade Watch, Inc. v. Costle	
		1982	Bradford v. State	
		1977	Kelley v. Cast Forge, Inc.	
		1977	Kelley v. DACA, Inc.	
		1980	State v. Zilka	
Water Management				
Dam Construction	4	1973	DNR v. Kiffer	
		1974	Lake Doster Development Co. (Silver Creek)	
		1982	Rush v. Sterner	
		1971	Tanton v. DNR	
Lake Level Maintenance	1	1971	Trout Unlimited, Inc. v. Milliken	
Stormwater Runoff	2	1978	Pine Lake Property Owners Ass'n, Inc. v. County of Oakland	
		1970	Sarabyn v. City of Dowagiac	
Water Pollution				
Groundwater Contamination	10	1973	American Amusement Co. v. County of Shiawasee	
		1978	Kelley v. BASF Wyandotte Co.	
		1978	Kelley v. Bofors Lakeway, Inc.	
		1980	Kelley v. John Biewer Co., Inc.	
		1982	Kelley v. McGraw-Edison Co.	
		1978	Kelley v. Peerless Plating Co.	
		1979	Kelley v. United States	
		1972	Lawrence v. John J. Yerington Co.	
		1979	State v. Michigan Standard Alloys	
		1971	Water Resources Comm'n v. Chippewa County	
Municipal Treatment	10	1971	Beaman v. Township of Summit	

Type of Case	No. of Cases	Year Filed	Case Name	Class Action (P) or (D)
System		1970	Busard v. Muskegon Heights	
		1973	Dwyer v. City of Ann Arbor	(P)
		1970	Lakeland Property Owners Ass'n v. Township of Northfield	
		1970	Marble Chain of Lakes v. Water Resources Comm'n	
		1975	Mid-Shiawasee County Concerned Citizens v. Tanner	
		1971	Muskegon County v. Environmental Protection Organization	(D)
		1971	Owens v. Water Resources Comm'n	
		1978	People *ex rel.* Attorney General v. Clinton County Drain Comm'n	
		1974	People *ex rel.* Leonard v. City of Fenton	
Phosphate Detergents	1	1971	Brown v. Lever Bros. Co.	(P)
Private Treatment Systems	6	1978	Kelley v. Ford Motor Co.	
		1975	King Arthur's Court, Inc. v. Milliken	
		1974	People *ex rel.* Kelley v. Auto-Ion Chemical Co.	
		1973	Pleasant Plains Zoning Comm'n v. Marzell	
		1972	United States v. Reserve Mining Co.	
		1973	Washtenaw County Health Dep't v. Hoover Ball & Bearing Co.	