Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act

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The Michigan Environmental Protection Act was the first statute to provide for citizen suits to protect the environment from degradation by either public or private entities and to provide a broad scope for court adjudication. The federal Clean Air Act and Water Pollution Control Amendments, as well as several state statutes, have followed the Michigan Act's lead. The Act's success or failure is an important harbinger of the fate of the environmental movement, because the breadth of its mandate tests the utility of the judicial process as an instrument for environmental protection. In this Article the draftsman of the Michigan Act reviews the first three years of its implementation. The authors find that the Act has received relatively little substantive interpretation, but that a considerable volume of litigation has occurred without the dire consequences which some had predicted. Encouraging developments discussed include the unexpected frequency with which public agencies have invoked the Act and the able and concerned efforts of many judges to protect the public interest in the environment.

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The authors wish to acknowledge the assistance with computer analysis provided by Louis J. DiMento, University of Michigan.
I

AN INTRODUCTORY NOTE FROM PROFESSOR SAX

Since late 1968, when I wrote the first draft of the bill which ultimately became the Michigan Environmental Protection Act, I have spent a good deal of my time urging other states and the Congress to follow Michigan's leadership by enacting laws that would broadly allow members of the public to go into court for injunctive relief against environmentally harmful activities.

My interest in having such laws enacted grew out of a conviction that citizen initiative in the courtroom was an essential supplement to regulation and enforcement by public agencies. To determine the effectiveness of procedures under the Michigan Environmental Protection Act, I began monitoring all cases initiated under the Act once it became effective on October 1, 1970. Our purposes in publishing the results of our efforts are threefold. First, lawyers in Michigan and in six other states that now have similar laws may obtain information about developments under the law, most of which do not appear in reported cases. Second, we hope our report will provide a base

3. In this undertaking, I was fortunate to have the help of two unusually competent and diligent law students, Roger L. Conner and Joseph F. DiMento. In May 1972, Conner and I published an article describing in detail the experience during the Act's first year-and-a-half. Sax & Conner, Michigan's Environmental Protection Act of 1970: A Progress Report, 70 Mich. L. Rev. 1003 (1972) [hereinafter cited as Sax & Conner]. The present article attempts to bring that report up to date for the first three years under the EPA, with data available through October 1, 1973.
5. Many of the cases under the EPA are still in progress; most of those which have been completed were resolved at the trial court level. Because of the irregular nature of most source material and the narrative perspective of this article, full citation data, including the court of decision, on unreported cases concerning the EPA is set
of information to help interested citizens assess the desirability of such legislation in the numerous states which have similar bills before their legislatures.\(^6\) Third, our efforts represent an experiment in efficacy research, a subject in which the legal literature is quite sparse.\(^7\)

Our principal sources of information were daily newspapers,\(^8\) an excellent weekly environmental newspaper published in Michigan,\(^9\) and the periodic newsletters of environmental and business groups throughout the state. In addition, a network of people throughout the state periodically wrote or called in information about new cases. Most of these persons were lawyers or plaintiffs, many seeking either advice on their own cases or information from our files on other unre-

forth in Appendix B, infra. Such data sometimes is omitted in the article itself where irrelevant to the discussion.


7. The difficulty of gathering information about suits filed under a single law in a single state has been truly astonishing. Michigan would seem to be no more backward in its legal recordkeeping than most states; yet there is no way to discover all cases filed under a given law other than to go periodically to the clerk's office in each of the state's 45 trial-level circuit courts and read through all complaints filed there. Indeed, for total coverage, one must also check the probate courts, where eminent domain cases (in which environmental defenses are sometimes asserted) arise, and the federal courts. Presumably this situation will improve under the "Case Information Control System" adopted by the Michigan Supreme Court, effective January 1, 1974, which will require attorneys to designate their complaints by case type.

8. Principally the State Journal (Lansing), the Free Press (Detroit), and the News (Ann Arbor).

ported cases. Our information sources provided sufficient duplication that we are confident we have learned of almost all EPA cases filed.

After discovering a case and opening a file, we contacted the attorneys and encouraged them to supply us with pleadings, with information about forthcoming hearings or trials, with copies of judicial orders and decisions, and with information about settlement of cases. To assure adequate case coverage, we periodically obtained copies of the docket sheets in each case from the court clerks. This turned out to be the only authoritative source we had from which to determine the status of each case. Because of financial limitations and unpredictable court schedules, we soon gave up attending hearings on routine motions, and limited ourselves to attendance at trials and a few extended hearings on requests for preliminary injunctions.

Reflection on the deeper question underlying a project such as the monitoring of EPA cases has been both stimulating and frustrating. Obviously, activity in the legal system is reflective of events in society at large. That is, a legislature willing to pass such a law is doubtless responding to a level of environmental consciousness and concern likely to be evidenced in public and private conduct even in the absence of a given statute. Thus, the fact that regulatory agencies in a number of respects have become more vigilant in environmental protection since the EPA became law does not necessarily prove that they have changed because of the EPA.

I am now convinced that the mere enactment of a law like the EPA is not itself decisive. The effect of enactment depends upon the degree of public knowledge and involvement in the legislative process and upon the stake people in the state feel they have in the law. For example, of the seven states which have enacted similar laws, it appears that only Michigan has produced more than a dozen cases.

By contrast, we have had nearly 75 cases arise in three years, widely

10. We wrote to each circuit court judge in the state asking whether any EPA cases had been filed in his or her court. Lawyers in the Attorney General's office were also quite helpful, particularly as they represent all state agencies which are either plaintiffs or defendants in EPA cases. We also maintained contact with individuals in environmental organizations and in some of the major state agencies that would be likely to become involved in EPA litigation.

11. If there is any significant gap, it probably would be in traditional air pollution nuisance cases to which an EPA count is added, but where the EPA is not the central issue.

12. Docket sheet entries in our circuit courts are frequently made by hand, are often virtually illegible, and sometimes most uninformative. Though a space is provided for that purpose, many docket sheets do not even contain the names of all lawyers in the case, or the name of a large firm may be given without indicating the individual attorney handling the case.

spread around the state and at a steady rate, indicating that many people and groups in Michigan are aware of the statute and perceive it as an available tool. Had the legislative process leading to enactment been less well known, and had citizen groups been less committed to enactment of the law, it is very doubtful that we would have seen nearly so much use of the EPA. Similarly, the Attorney General's office and the Department of Natural Resources (DNR) have had a stake in the success of the law and have provided important support during the past three years.\textsuperscript{14}

I have always viewed the EPA largely as a tool for education and institution-building on the local level. The structure of the statute itself reflects this goal, for the EPA was designed to be simple in language, to minimize the opportunity for extensive litigation over procedural issues, and to press the parties as rapidly as possible to the merits of the case. For this reason the statute seeks to eliminate litigation over issues like standing to sue,\textsuperscript{15} and does not limit the opportunity to sue to situations where the plaintiffs can first demonstrate that some administrative agency is not doing its job, as do federal citizen suit provisions.\textsuperscript{16}

Assuming that most plaintiffs would be limited in their ability to finance EPA litigation and would almost always face defendants with considerably greater resources, I was persuaded that any statute encouraging extensive procedural litigation would deny most local groups a meaningful day in court. I therefore opposed such proposed amendments as those requiring plaintiffs to obtain leave to file a complaint by making an initial showing that the suit was not frivolous and held fast in favor of a $500 maximum bond limitation upon the issuance of preliminary injunctions.\textsuperscript{17}

Nothing that has occurred under the EPA has approached the sort of big-time test litigation with which the legal literature is generally concerned. Indeed, with a few rather tentative exceptions,\textsuperscript{18} the

\textsuperscript{14} The community's stake in the law also provides protection against weakening amendments. In 1973 the introduction of a bill to weaken the EPA reawakened the network of environmental organizations that had worked for the original bill's enactment and produced a strong turnout at a wholly unpublicized legislative committee hearing on the proposed amendment. See notes 212-17 infra.

\textsuperscript{15} The EPA has been highly successful in this respect. See text accompanying notes 148-55 infra.


\textsuperscript{17} See text accompanying notes 212-17 infra; see also Sax & Conner, supra note 3, at 1076.

EPA has not been used in a major assault against the biggest actors in the state—the auto industry, agriculture, the electric generating utilities, or even the rapidly developing oil and gas or mining operations. In one respect, this is disappointing, for in theory the EPA is capable of dealing effectively with everything from the neighborhood nuisance to the most pervasive threat to the biosphere. At the same time, had the law been used more aggressively, it might well have produced only a glorious defeat for environmentalists.19

In an important respect, as suggested above, a law like the EPA is an experiment in education—the education of judges, of lawyers and of public agencies and citizens all over the state. It is a wise predicate of education that one begins with what one has, working with the material at hand. While I personally view our environmental situation as profoundly serious, and in some areas as imminently dangerous to values we all cherish, I do not yet sense any such intensity of feeling among our legislators or judges, or among many segments of the populace.

We have made some important educational achievements. A good many Michigan lawyers have begun to develop valuable expertise in environmental cases and awareness of environmental problems. Citizens who had previously been taught that one cannot successfully fight established interest groups are learning that one can fight, and win; they are learning that citizenship means participation, which may involve far more than writing letters to the editor or signing petitions. I believe it is possible to educate these essential elements of our society. The litigation process, with its detailed development of fact built upon fact, and experience upon experience, can teach us to take more effective ameliorative steps. A few years hence, after some demonstrably effective, if modest, achievements under the Act, we will be ready to move toward more ambitious use of the legal process in environmental controls.

II

STATUS OF THE CASES: A BRIEF SUMMARY

The Michigan Environmental Protection Act became effective on October 1, 1970. During the first three years since its enactment,
74 cases have been initiated in a steady pattern of about two each month. Suits have been filed in 26 of Michigan's 83 counties; only in six counties have more than two cases been filed. Nineteen EPA suits have been brought in Wayne County, the most populous and most heavily industrialized area of the state. The Wayne County Health Department (WCHD), Division of Air Pollution Control, has been the most frequent user of the Act; it has been involved in eleven suits, ten as plaintiff, and one as plaintiff-intervenor.

Sixteen cases have involved class plaintiffs, and in two cases a class defendant was named. No cases have involved both a class plaintiff and a class defendant. Despite the liberal standing provisions of the Act, established environmental organizations have not frequently used the EPA. They have instituted only a half-dozen suits; been brought and had a court imposed far-reaching and novel restrictions, Michigan agriculture might have flexed its political muscles to weaken the EPA.


Since this article was written, we have learned of the following additional cases: American Amusement Co. v. County of Shiawassee, No. 5559 (Cir. Ct., Shiawassee County, filed July 12, 1973), alleging pollution by County Drain Commission of a pond adjacent to a county drain; People ex rel. Kelley v. J.L. Hudson Co., No. 73-16110-CF (Cir. Ct., Ingham County, filed Dec. 14, 1973), charging sale of furs in violation of Michigan conservation and game laws; a consent judgment enjoining sales and advertising, and instituting employee training programs was entered on Feb. 6, 1974; People ex rel. Kelley v. Auto-Ion Chemical, Inc., No. B-74-100514-CE (Cir. Ct., Kalamazoo County, filed Mar. 12, 1974), charging violation of a Water Resources Commission order and seeking revocation of defendant's liquid industrial waste hauler's permit; Three Lakes Ass'n v. White Sands Bldg. & Dev. Corp., No. 1257 (Cir. Ct., Antrim County, filed Nov. 23, 1973), alleging that a proposed development on Torch Lake will pollute the water, in which the court has denied defendant's motion for summary judgment claiming that plaintiff did not have standing; Guthrie v. Detroit Edison Co., No. 73-3541-ND (Cir. Ct., Monroe County, filed Aug. 20, 1973), seeking to enjoin an excavation in an "environmental area" designated under the Shorelands Protection Act.

21. These are Grand Traverse, Ingham, Jackson, Ottawa, Washtenaw, and Wayne Counties.

22. See Appendix D infra.


25. See Appendix D infra.
local and ad hoc groups, on the other hand, have made greater use of the statute and as plaintiffs have accounted for a dozen more suits.26

While industrial air pollution and land development cases have been those most often litigated,27 EPA cases have involved matters ranging from pesticides to Indian fishing, and from simple efforts to save a number of roadside trees to an omnibus case designed to control pollution by the Ford Motor Company. Forty-seven cases have been completed. Twenty-six were resolved in favor of the plaintiffs, 16 in favor of the defendants, and five cases were not pursued. Thirteen have gone to trial on the merits,28 and eleven have involved appellate proceedings.29 The mean length of completed cases has been ten months, the median seven months, and the range from one to 34 months.30

III

HOW THE EPA IS UTILIZED: THE LAND-USE EXAMPLE

A. Land Development Cases in General

While detractors frequently claim that environmental litigation tends to convert an otherwise flexible planning process into a pitched battle between unyielding adversaries, experience with the EPA suggests quite a different conclusion. Cases involving land development

26. Id.
27. The former type has been most frequently brought by public agency plaintiffs, and the latter by environmental organizations. See Appendix E infra for a complete listing of cases by type. As to the types of cases brought by public agencies and individuals, see text accompanying notes 89-115 infra.
29. Anderson v. Michigan State Highway Comm'n; Beaman v. Township of Summit; Blunt v. Apfel; Braun v. Detroit Edison Co.; MUCC v. Anthony; Ray v. Raynowsky; Roberts v. State; Wayne County Health Dep't v. Chrysler Corp.; Wayne County Health Dep't v. City of Dearborn; West Mich. Environmental Action Council, Inc. v. Betz Foundry, Inc.; Wilcox v. Board of County Road Comm'rs. The Wayne County Health Department is hereinafter referred to as WCHD. See Appendix B infra for full citation data. Appellate decisions are described in connection with discussion of these cases elsewhere in this article.
30. Nine suits have been resolved in a month or less, and 21 have taken a year or more. The longest cases were Braun v. Detroit Edison Co. (23 months), Roberts v. State (25 months), Sarabyn v. City of Dowagiac (34 months), Water Resources Comm'n v. Chippewa County (18 months), WCHD v. Edward Levy Co. (24 months), WCHD v. McLouth Steel Corp. (29 months), and Wilcox v. Board of County Road Comm'rs (23 months). See Appendix B infra for full citation data. The time lapse for cases still pending appears to follow the same pattern as that for completed cases.
problems are of particular interest in this regard, both because they are numerous\textsuperscript{31} and because they generally have been contested more vigorously than other kinds of EPA cases.\textsuperscript{32}

Very few of the land development cases—even those which have gone to full trial—have resulted in all-or-nothing confrontations.\textsuperscript{33} Most often, once a challenge has been presented in court, the defendants assert that the plaintiffs' claims of threatened environmental harm are exaggerated and that a variety of protective steps will be undertaken during construction to avert any such risks. The prospect of judicial scrutiny seems to encourage defendants to make promises of mitigating steps that would not otherwise be made, either voluntarily or in the less intense atmosphere of administrative regulation. The courtroom provides a setting in which promises of future good conduct by the defendant become the focal point for contemplated settlements, transferring pressure for compromise from plaintiff to defendant.

\textsuperscript{31} The cases are grouped by subject matter in Appendix E infra. For purposes of this section, we are referring to nine cases involving residential developments, six cases dealing with tree cutting and/or road development, two public trust cases and three utility right-of-way eminent domain cases.

\textsuperscript{32} Perhaps a land developer, who may have a great deal to lose if his project is thwarted, feels more threatened by demands for environmental controls than does an ongoing manufacturing facility that is required to buy and install pollution control hardware.

\textsuperscript{33} As reported in Sax \& Conner, \textit{supra} note 3, at 1049, only one EPA land development case, \textit{Blunt v. Apfel}, No. 849, Decision of June 10, 1971 (Cir. Ct., William Brown, J.), has developed as a classic knockdown, drag-out affair. The original suit, involving a proposed condominium development on Torch Lake, was complicated by three collateral matters: (1) Opponents of the project obtained a preliminary injunction requiring the Securities Bureau to revoke the sales permit for condominium units, but enforcement of that injunction was stayed by the court of appeals and five units were sold; (2) several cases challenged the township's zoning ordinance; and (3) the developers counterclaimed for damages against the original plaintiffs in \textit{Blunt v. Apfel}. See discussion of countersuits at text accompanying notes 83-88 infra.

In 1971 the circuit court in \textit{Blunt} denied preliminary relief and dismissed some counts of the primary complaint, but retained jurisdiction. In December of that year the court of appeals denied an appeal of right to the plaintiffs, since the circuit court was retaining jurisdiction. In 1972 the circuit court judge wrote the attorneys that he estimated the trial would take a month, that the court was busy, and that the matter would be adjourned until 1973 (following his own retirement).

In December 1972 the judge did hear some motions and, though retaining jurisdiction, issued an opinion indicating that the plaintiffs had abandoned their claim. In April 1973, a new judge granted accelerated judgment for the defendants on some matters, but indicated that he thought the first court had issued a final order on the original injunction action (despite the 1971 action of the court of appeals).

In this confused situation, the developer appears to have been moving very slowly with development, though he has been under no legal constraining order. According to one of the attorneys, a proposed settlement, which would permit the developer to build a small number of units (perhaps enough to recover his investment) and yet would restrict development close to the lake, has not been consummated, even though both sides apparently agreed to it at one time. A plaintiff's motion to confirm the settlement is still pending before the court.
This setting also permits the judge to mediate rather than to determine the question of future harm. In this context the judge either presides over a formal settlement agreement or suspends the case, retaining jurisdiction to assure that informal promises are fulfilled. This pattern produces a structure of regulation in which private plaintiffs supplement the formal regulatory processes of administrative agencies.

A number of EPA land-use cases illustrate this process. In *Three Lakes Association v. Fisher* 34 for example, plaintiffs were property owners on and near Torch Lake, in Antrim County. The defendants owned a small riparian tract at the lake and a much larger adjoining back tract. Defendant planned to build houses on both tracts and, through the use of a common area on the riparian tract, to give lake access to all the owners. Plaintiffs claimed that the proposed project would result in both pollution and overcrowding of the lake. The claim questioned the extent to which riparian owners' traditional opportunities for water access could be "stretched" to include owners of back lots. 35

Before the case went to trial, a consent judgment was negotiated providing the following compromise: 36 the number of back lots was reduced so that each would be at least a half-acre in size; a private park with swimming pool, tennis courts, and picnic facilities was to be built on the access tract to reduce recreational demand on the lake; the use of fertilizers near the lake was restricted; back lot owners were prohibited from storing personal property, launching or mooring boats, operating vehicles, or building any structures on the access land; owners of back lots were permitted to use the lake only for swimming and wading; and no more than 12 people from those lots would be allowed to use the lake at any one time. 37

An order of similarly high detail was issued in *Irish v. Green*, 38 a residential development action involving a full trial. There the judge required a limitation on the number of units to be built until central water and sewer service was provided, and imposed an escrow condition to assure the availability of funds. He also required an improved access road, and set out specifications for dams, reser-

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37. Id. at 2-4.
voirs, and other devices to restrain the flow of surface water within the subdivision. The court retained jurisdiction of the matter, and counsel for the plaintiffs reports that there have been two subsequent judicial hearings pursuant to the order.\textsuperscript{46}

EPA land-use litigation reveals a strong judicial inclination to supervise such cases.\textsuperscript{40} A case initiated by a county prosecutor, \textit{Washtenaw County Health Dep't v. Barton}, sought to enjoin the dumping of fine ash at an industrial landfill site. The judge's settlement order not only specified in detail the requirements for cleaning up the dust problem but also provided:

that this Court shall retain jurisdiction over this matter, and that in the event that Defendant . . . wishes to place any refuse, garbage, rubbish or ashes . . . he shall first apply to this Court for permission to renew dumping. At that time, this Court shall decide if Defendant . . . will be required to secure a license . . . and post bond for said disposal area . . . . \textsuperscript{41}

Some cases are compromised informally,\textsuperscript{42} and even those in which defendants prevail regularly produce continuing judicial supervision to assure that defendants fulfill their promises. In \textit{Irish v. Property Development Group, Inc.}, defendant's plan to build several hundred condominium units adjacent to Little Traverse Bay was tried fully and decided in defendant's favor. The court's opinion nonetheless made the following observation and determination:

Since much of the evidence relates to plans by [Defendant], this Court will retain jurisdiction of this matter to make certain the Cedar Cove site is developed in essential accord with the testimony given at the hearing and trial on this matter.

It was indicated that the location of these twelve areas, by reason of clustering of living units, will concentrate those twelve acres in such a

\textsuperscript{39} Communication from Peter W. Steketee to the authors.

\textsuperscript{40} This is also true as to such industrial air pollution cases as WCHD v. McLoth Steel Corp., No. 166222, Consent Judgment of Mar. 27, 1973 (Cir. Ct., Brennan, J.); WCHD v. National Steel Corp., No. 187905-R, Consent Judgment of Oct. 2, 1972 (Cir. Ct., Martin, J.). \textit{See also} McCloot v. City of Lansing, No. 13057-C, Decision of May 14, 1971 (Cir. Ct., Reisig, J.), at 12, where Judge Reisig specifically retains jurisdiction "to insure the proper performance of the promises [defendants] have made here in Court."

\textsuperscript{41} \textit{Washtenaw County Health Dep't v. Barton}, No. 7201, Decision of Jan. 30, 1973 (Cir. Ct., Campbell, J.), at 2. On Aug. 2, 1973, the plaintiff filed a motion for an order to show cause for contempt, an issue still unresolved at the time of this writing.

\textsuperscript{42} \textit{E.g.,} Wilcox v. Board of County Road Comm'n, No. 7-237, Decision of Mar. 3, 1972 (Cir. Ct., Ryan, J.), discussed in Sax & Conner, \textit{supra} note 3, at 1045, was later settled by a compromise to save about half the trees threatened by the road widening. Williamson v. Lenawee County Road Comm'n, No. 2216 (Cir. Ct., filed June 26, 1973), and Anderson v. Michigan State Highway Comm'n, No. 15609-C, Decision of Sept. 4, 1973 (Cir. Ct.), are similar cases, still pending. \textit{Anderson} is discussed at text accompanying notes 163-68 \textit{infra}. 

way that the 171 acres which would remain in its natural state will be essentially undisturbed. By retaining jurisdiction of this matter, the Court expects and will insist that the development be carried out in the manner to protect the environment as represented by the Defendant at trial.48

There is some evidence that private EPA litigation also prods regulatory agencies to act in situations where they had previously evinced little interest in defendant's conduct.44 In Muha v. Union Lakes Associates, defendants were building a shopping center and parking lot on low-lying land near a stream.45 After citizen plaintiffs had filed the complaint, the Department of Natural Resources requested the Attorney General to initiate action to compel the defendant to clear the silt from the creek.46

While these examples indicate that the EPA is having an effect on land-use development problems in Michigan,47 the question remains whether the Act is having any significant impact on the larger issues of land use, or whether it is operating only as a small-scale remedial device, tightening a screw here, patching a gaping wound there. We do not observe any major change in the pattern of residential and commercial development in the vacation-land areas where


44. Following the controversial case of Tanton v. DNR, in which the Department of Natural Resources was a defendant, DNR intervened as a plaintiff in Irish v. Property Dev. Group, Inc. The DNR itself has now initiated its first case under the EPA, DNR v. Kiffer, No. 3523 (Cir. Ct., filed Sept. 26, 1973). This suit seeks to compel removal of a dam on Bancroft Creek in Grand Traverse County. The case was filed in late September 1973, and no action had been taken at the time of this writing.


46. Letter to authors from defendant's attorney, Harry T. Running, Aug. 6, 1973. A telephone conversation with plaintiff's attorneys indicates that the DNR is also ordering the defendants to cut back the parking area and increase the land area to be used for drainage.

47. A similar process has operated in other types of cases. In Sarabyn v. City of Dowagiac, No. 2561, Consent Judgment of July 3, 1973 (Cir. Ct.), a plaintiff claiming damage to his land challenged the city's handling of storm water runoff. The consent judgment required that the city construct a dam to control runoff and stop other homeowners from dumping septic tank runoff into the storm sewer. In Koch v. DNR, No. 460 (Cir. Ct., filed Aug. 17, 1973), plaintiff challenged a proposed excavation that would have created an artificial lake or enlarged an existing lake and the proposed enlargement of parking facilities by the state highway department. According to Judge Hood, "A two-day preliminary injunctive order was issued .... At the time of hearing on the motion for summary judgment and [preliminary injunction] a compromise was reached and stipulation made for entry of a consent judgment." Letter from Judge Hood to the authors, Oct. 8, 1973.
most of the EPA land-use cases have been initiated, but we do see increased developer caution in matters such as sewage disposal, erosion control, and provision of access roads. To some extent, the spirit of compromise described above, although it promotes relatively swift disposition of cases and avoids rigidity, tends also to restrain the breadth of plaintiffs' environmental ambitions. However, we may underestimate the significance of some of these cases simply because they appear rather small in scale.48

A few other EPA land-use cases may indicate increased boldness on the part of plaintiffs' attorneys; although none of these cases have yet been completed, the trend indicates some of the directions which future EPA litigation may follow. Two recently filed cases explicitly seek to develop the law of the public trust recognized in the EPA. While the Act is commonly understood to be an anti-pollution law, it also incorporates protection of the public trust, the legal doctrine that government has a responsibility to maintain and protect broad public uses of the state's natural resources.49 Taxpayers & Citizens in the

48. Tri-Cities Environmental Action Council v. A. Reenders Sons, Inc., No. 2737, Decision of May 6, 1974 (Cir. Ct., Miles, J.), a recent EPA land-use case, was perceived by the press as of very great significance. Under a recent headline reading "Canal Dispute Holds Key to Future of Michigan Rivers," the Detroit Free Press criticized a developer's plan to turn a 65-acre tract of sand dune land on the south bank of the Grand River into a luxury residential development by cutting two long canals to create waterfront for 43 homes:

Whether they are allowed to do this may determine for decades to come the scope and direction of riverfront development in Michigan and who will make use of the state's public waters. If their plan is approved . . . it could encourage dozens of other canal projects along major Michigan rivers. . . . The proposal has created deep divisions within DNR ranks . . . [One DNR official is reported to have said] "I can see no reason to deny the permit." His position has been to look at the project as an individual proposal and not in the context of its broader implications.

Detroit Free Press, Nov. 5, 1973, at 7-B, col. 1. For further discussion of the Tri-Cities decision see note 230a and accompanying text infra. A more general value of public involvement in land-use litigation is that it broadens awareness of the importance of proposed legislation such as a state land-use control bill (Mich. H.B. 5055, introduced July 12, 1973).

Public Interest v. State\textsuperscript{50} involves a most interesting application of the public trust doctrine.\textsuperscript{51} In 1947 the State Highway Department acquired for highway purposes a tract of land slightly larger than one acre in size situated between the public highway and Grand Traverse Bay. Thereafter, the land was used for purposes of public recreation, although trial testimony was in conflict as to both the quantum of public use and the tract's suitability as a recreational site. The Highway Department never formally dedicated the tract as public recreational land, but in 1958 the Department gave Traverse City permission to landscape and maintain the property as it saw fit, with an understanding that the Highway Department could use it for roadway purposes at some future time should that become necessary. In 1970, 23 years following acquisition and without resort to public proceedings or formal findings of any kind, the Highway Department declared the land "excess property" and thus available for sale. The land was initially offered for sale both to the City and to the Michigan Department of Natural Resources, but was eventually sold to the owners of an adjacent motel, who wanted it for expansion purposes. The case has been tried and ultimately resolved in favor of the defendant based largely on a factual determination that public uses of the land had been very limited; the court, however, did recognize the applicability and importance of the doctrine in Michigan law.\textsuperscript{52}

\textsuperscript{50} No. 3137, Decision of Nov. 29, 1973 (Cir. Ct., William Brown, J.). This case is discussed further at text accompanying notes 133-42 infra.


\textsuperscript{52} On November 29, 1973, Judge Brown ruled that "the plaintiff has not sustained the burden of demonstrating that the premises in dispute are impressed with a public trust of such a nature that the sale and private development constitutes an
Superior Public Rights, Inc. v. Department of Natural Resources challenges the DNR's grant of an easement allowing some 250 acres of bottomland underlying Lake Superior off Marquette, Michigan, to be used for a coal dock, for an unloading facility, and for intake and discharge pipes related to the expansion of an electric generating plant. Plaintiff claims that the DNR made no findings as to protection of the public trust and that the disposition of the bottomlands will impair protected public uses. No judicial action had been taken in the case at the time of this writing.

B. Eminent Domain Cases

A final category of vanguard cases involves challenges to land condemnation and familiar claims of disruptive effects on the landscape predicted to result from the proposed installation of new electric transmission lines. Although from a legal perspective these are rather conventional environmental cases, they are potentially quite significant, as they appear to question the scope of the "necessity" requirement of the condemnation laws where environmental damage is asserted. In this regard, they may raise a whole new set of questions about the interplay between the traditionally broad powers of private condemnation and contemporary concerns about environmental protection.

One of the larger unresolved questions of environmental law is the extent to which judicial limitation of plaintiffs to recovery of money damages—by failure to grant injunctive relief—provides an adequate remedy. A fundamental problem is that the alleged injuries to named plaintiffs in most environmental lawsuits do not themselves reflect the total social cost of asserted environmental damage. This issue lay behind much of the litigation concerning standing.

unreasonable impairment of public interest." Taxpayers & Citizens in the Public Interest v. State, No. 3137, Decision of Nov. 29, 1973 (Cir. Ct., Brown, J.), at 15. See also Taxpayers & Citizens, No. 3137, Decision of May 2, 1973 (Cir. Ct., William Brown, J.), at 4, denying defendant's motion for summary judgment. See Irish v. Green, No. 162-3, Decision of July 15, 1972 (Cir. Ct., Miller, J.), at 11-12, 4 ERC 1402, 1405, where the court found that "trees per se are natural resources... whether or not the trees are within the [public] roadway or outside of the roadway, since there is a public trust in each." See also McCloud v. City of Lansing, No. 13057-C, Decision of May 14, 1971 (Cir. Ct., Reisig, J.), at 10.

The disposition of Great Lakes bottomlands is an issue with a long history in Michigan and is generally regulated by the Great Lakes Submerged Lands Act, MICH. COMP. LAWS ANN. §§ 322.701 et seq. (1967).


problem is particularly acute in private condemnation cases, where the traditional legal remedy has been limited to money damages for the harm done—where it apparently has been assumed that the condemn-ees alone suffered cognizable harm.

Cases involving condemnation by privately owned utility companies for transmission line rights-of-way form a special category of land-use litigation.\textsuperscript{57} The first of the EPA eminent domain cases was \textit{Beach v. Detroit Edison Co.} In the course of its hearing on the question of "necessity" for condemnation,\textsuperscript{58} the circuit court proposed to issue a writ calling upon the probate court, where condemnation cases are tried in Michigan, to establish standards which would assure compliance with the EPA's requirements. The court further suggested that it would supervise the probate court to make certain that the EPA's environmental requirements were met.\textsuperscript{59}

The probate court subsequently held extensive evidentiary hearings on the environmental issues involved.\textsuperscript{60} The three commissioners, who sit as a jury in such cases, found "necessity" for the project as a whole and for the taking of 29 of the parcels of land involved, but they did not find the requisite necessity for the taking of ten other parcels, which included the land owned by plaintiff Dwight Beach, a retired four-star army general. Thereafter, the probate judge ordered the commissioners to view the ten parcels. After having done so, they determined that the taking \textit{was} necessary. The probate judge then confirmed the finding of necessity for all the parcels. At this point,

\begin{footnotesize}
\begin{itemize}
\item See Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149 (1971).
\item The condemnation statute provides: "The Court shall appoint three disinterested freeholders, as commissioners, whose duty it shall be to ascertain and determine the necessity of the proposed public use, the necessity of using such property or of acquiring an interest or easement therein for the purposes named, and the just compensation. . . ." MICH. COMP. LAWS ANN. § 486.252c (1967).
\item Beach v. Detroit Edison Co., No. 5993, Opinion of Sept. 16, 1971 (Cir. Ct., Campbell, J.). The court's suggestion is quoted in Sax & Conner, supra note 3, at 1038-39. No formal order was in fact issued.
\item The probate court case was \textit{In re} Detroit Edison Co., No. 58-068 (P. Ct., dismissed May 3, 1973).
\end{itemize}
\end{footnotesize}
General Beach surrendered. He was quoted as saying:

I went through the damage hearings. I had no one with me, and if I would have appealed the decision, it would have taken two to three years and be very expensive. My chances of winning were very slim. Besides, even if I had appealed, they could have gone ahead with their project. The settlement was fair but I don't think I won anything. If I had two or three others with me, I had a chance.62

The Beach case points out one of the special problems of eminent domain cases—the ability of the condemnor to push potentially successful objecting landowners into acquiescence by offering attractive money settlements. Unlike many environmental cases in which plaintiffs have no personal economic interest at stake, the eminent domain cases are directly translatable into dollars and cents; thus, unlike the land development cases previously considered, a compromise is likely to take the form of a cash payment, rather than a mitigation of asserted environmental damage.63 So far none of the EPA condemnation cases has involved objectors other than landowners whose parcels were condemned.

Often transmission line right-of-way cases also involve claims of what is termed aesthetic damage, a characterization which has always troubled the judiciary. The problem became explicit in the EPA case of Braun v. Detroit Edison Co., where the judge dismissed the complaint with the following observation:

At the evidentiary hearing an expert witness was produced by plaintiff who testified that the pollution involved in this case would be what the witness termed as "visual pollution."

The Court is unable to determine how an electric power line strung across a field could pollute, impair or destroy the air, water or other natural resources in any way except as an impairment of the aesthetic qualities of the environment. If the legislature intended that "visual pollution" should be included in the Environmental Protection Act of 1970, such a situation could easily have been included specifically. This was not done, and the Court does not feel that it can read such intent into the Act.65

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61. In light of the amount of the settlement, however, it was not quite unconditional. See note 63 infra.

62. Ann Arbor News, Jan. 17, 1973, at 6, col. 6. Whether Beach's chance of winning was in fact "very slim" is not at all certain. He had the opportunity of going back to a circuit court which had thus far taken a very favorable posture toward his case.

63. For example, in the Beach case, General Beach received $22,500 for the easement over his 7.5 acre parcel. Settlements for the other parcels ranged from $7,700 to $55,000.

64. See text accompanying notes 68-72 infra.

In assessing the legislative intent behind the EPA, it is worthwhile to note that the problem presented in the *Braun* case was put before the legislature as an example of the need for an EPA. In testifying on the bill that became the EPA, its author responded to an early negative report from the Attorney General's office asserting that environmental hazards were already adequately covered by existing legislation.\(^6\)

Moreover, the Attorney General has omitted completely the environmental problems created by private enterprise; to take but a single example, that of Utility Companies with their extensive right of eminent domain. \(^7\)

The notion of "aesthetic" harm seems to create a good deal more confusion than it resolves. \(^8\) Why are some cases characterized as merely aesthetic, or as involving only "visual pollution"? Is it that they do not involve imminent health or safety hazards? Cases involving intrusions on parkland are well accepted by the judiciary, \(^9\) though they involve only restrictions on enjoyment. Well-established categories of nuisance—odors and unsightliness cases, for example—affect only sensibilities. \(^10\) Moreover, the so-called aesthetics cases frequently involve demonstrable economic loss. Yet, once a court has identified a case as "aesthetic," it tends with dogged tenacity to respond to that conclusory characterization, perceiving the suit as in some way inappropriate for judicial action. \(^11\) To avoid solutions which suggest judicial implementations of individual views of tastefulness, perhaps a first practical step would be for landowners' attorneys in right-

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\(^6\) See No. 15195, Decision of Feb. 7, 1973 (Ct. App.). See also the decision of the probate court in *In re Detroit Edison Co.* No. 18146, Decision of Feb. 17, 1973 (P. Ct., Cheever, J.), at 18 et seq.

\(^7\) Shortly thereafter, the Attorney General came out in strong support of the bill.


\(^11\) See note 68 supra.

\(^1\) Even as insightful a judge as Donald Reisig of the Ingham County Circuit Court spoke in one EPA case of "making aesthetic judgments, which I seriously question any judge is capable of doing." McCloud v. City of Lansing, No. 13057-C, Decision of May 14, 1971, at 11.
of-way condemnation cases to discourage their witnesses from using terminology like "aesthetic harm" and "visual pollution," and instead to focus attention on loss of vegetative cover, erosion, economic losses, and similar issues.\(^\text{72}\)

The third and legally most interesting question raised by EPA eminent domain litigation involves allocation of institutional responsibility for applying the EPA to right-of-way cases. The Public Service Commission, the probate courts and the circuit courts each play a role in implementing the EPA in this context, and the three cases arising thus far have shown interesting and diverse uses of jurisdictional techniques.

In the **Beach** case, the landowners immediately went to the circuit court when condemnation proceedings were instituted, and obtained a proposal from the circuit judge that the probate court take evidence on environmental matters and thus build the requirements of the EPA into the determination of "necessity" under the condemnation law.\(^\text{73}\) In **Braun v. Detroit Edison Co.**, the landowners filed in circuit court alleging a threatened trespass before the condemnation petition was even filed in the probate court, and subsequently amended their circuit court complaint to assert an EPA violation. In **Brotz v. Detroit Edison Co.**, the landowners went through the entire condemnation proceeding in the probate court, and only after losing there did they invoke the EPA to petition the circuit court for an injunction against further condemnation proceedings.

The probate court in the **Brotz** case wrote an extensive opinion dealing with the jurisdictional problems created by cases of this sort, holding the probate court to be a court of limited jurisdiction not competent to implement the EPA's requirements.\(^\text{74}\) In our view, this is not an accurate interpretation of section 5 of the EPA,\(^\text{75}\) but it nonetheless suggests the desirability of landowners' following the strategy of the **Beach** case by seeking immediately from the circuit court a writ of superintending control over the probate court.

A second observation of the probate court in **Brotz** was "that the Public Service Commission has the jurisdiction and power to control

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\(^{72}\) Note, though, that in **Irish v. Green**, No. 162-3, Decision of July 15, 1972 (Cir. Ct., Miller, J.), at 11-12, the court held that it had authority to protect trees as part of the public trust under the EPA; and the compromise worked out in **Wilcox v. Board of County Road Comm'rs**, No. 7-237, Decision of Mar. 3, 1972 (Cir. Ct., Ryan, J.), saved a large number of trees from cutting in a road project challenged under the EPA. Neither of these cases seems to have been characterized as "aesthetic," and thus amenity values were readily accepted as legitimate.

\(^{73}\) See notes 58-59 and accompanying text supra.

\(^{74}\) In **re Detroit Edison Co.**, No. 18146, Decision of Feb. 17, 1973 (P. Ct., Cheever, J.).

\(^{75}\) **MICH. COMP. LAWS ANN. § 691.1205** (Supp. 1973).
public utilities in all aspects of their affairs which would include environmental matters." This interpretation, however accurate, does not suggest that a failure of the Commission to exercise such jurisdiction in any way impedes the circuit court from assuring that the requirements of the EPA are met.

Indeed, section 5 of the EPA is designed to give the circuit court ample authority to see that somewhere the requirements of the EPA are considered—in an administrative proceeding if one be available—with ultimate determination left to the circuit court. Thus, once a case like Brotz is in the circuit court, the EPA appears to allow the court to follow one of several paths. It can, in effect, remand to the Public Services Commission and/or to the probate court for the taking of evidence on environmental issues, reserving to itself a final determination on the question of compliance with the EPA; or it can take testimony itself and render an original opinion on that question.

The probate court in Brotz also found that the requirement of "necessity" under the condemnation law does not permit determination of how or where a power transmission line should be strung, but rather that the law permits a ruling only on the much more general question of whether the route is needed. Thus, it would be improper to admit evidence on the building of the line underground or evidence of alternate routes that might be environmentally more suitable. In this decision, the judge narrowly construed the meaning of the "necessity" provision in condemnation law.

The Brotz opinion is ambiguous on the central question whether and to what extent the EPA requirements are to be read into the condemnation law. The probate judge, apparently thinking he was being asked to decide that the EPA "supersedes the condemnation statutes," held that it does not, since the EPA itself says it is "supplementary" to existing legal procedures. We believe the language and intent

76. *In re* Detroit Edison Co., No. 18146, Decision of Feb. 17, 1973 (P. Ct., Cheever, J.), at 9. The PSC had issued a permit to construct the proposed transmission line, and refused to revoke it upon request by the landowners, stating that "[t]he approval of the submitted plans constitutes solely an acknowledgment by the Commission Staff that the proposed transmission line has been engineered in accordance with the applicable Commission design in safety standards and criteria." *Id.* at 6. On January 21, 1971, the PSC had asked the Attorney General for a formal opinion on whether the EPA gave it authority over the environmental effects of proposed power line routes. Sax & Connor, *supra* note 3, at 1057. At the time of this writing the opinion still had not issued.

77. See note 58 *supra*. He noted that the condemnation statute "has never been interpreted on this point by a Michigan Appellate Court. . . ." *In re* Detroit Edison Co., Decision of Feb. 17, 1973, at 7. The closest Michigan case was New Products Corp. v. Ziegler, 352 Mich. 72, 88 N.W.2d 528 (1958).

78. *In re* Detroit Edison Co., Decision of Feb. 17, 1973 (P. Ct., Cheever, J.), at 12, referring to section 6 of the EPA.
of section 5(2) support the interpretation that the EPA, in requiring the traditional scope of "necessity" hearings to be enlarged, was indeed supplementing the existing law by adding an environmental element to those proceedings and was not superseding them.

Finally, the probate court in Brotz suggested that the EPA is purely a procedural law which creates no substantive environmental rights, finding that since the Public Service Commission had issued no environmental regulations for power-line rights-of-way, there was no substantive law either for it or for a circuit court to apply. In our view, the EPA was clearly intended to be a source of substantive law. Section 2(1) of the Act specifically creates a right to relief from any conduct which can be shown to pollute, impair, or destroy the air, water, or other natural resources or the public trust therein.

On December 26, 1973, Circuit Court Judge Mahinske overruled much of the probate court's interpretation, particularly its finding that the EPA is procedural in nature and not substantive. Judge Mahinske observed that the EPA was created to limit discretionary environmental administrative standards or the lack thereof in all statutory proceedings, or administrative proceedings. [The EPA] is a statute of general application and is to be applied in all proceedings whether they be statutory or administrative where there is no overriding statute or administrative rule that sets forth an exacting or quantitated standard. It is the further opinion of this Court, by order of Superintending Control, that it may expand the proofs in the condemnation proceedings below to include questions of the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction. It is Order of this Court, by virtue of its power of Superintending Control, that an order enter permitting the property owners to submit to the Condemnation Commissioners proofs relative to power lines being constructed via the overhead "standard" as opposed to the underground "standard." After such proofs said Commissioners shall then determine whether or not one standard as opposed to the other does not violate the [EPA] . . . .

C. Counterclaims in Land-Use Cases

Before leaving the land development cases, it is important to note one related development—the adoption of a counterclaim or counter-
suit strategy by some defendant land developers. The counterclaim or countersuit, brought by the EPA-suit defendant against the EPA-suit plaintiff, usually asserts some version either of a slander claim, of malicious prosecution, or both. These countersuits, and their potential success, are of considerable import to the progress of the EPA, for it is our observation that plaintiffs in environmental cases tend to be quite fearful of the prospect of suits claiming large sums in damages against them.

Of the three countersuit cases, only one has reached the point of decision. In *Apfel v. Cook* the court granted the motion of defendant (the EPA-suit plaintiff) for summary judgment, stating that the Complaint as filed fails to state a cause of action upon which relief can be granted. There is a failure to allege facts, constituting damages suffered by Plaintiffs attributable to acts of Defendants; there is no allegation that the sole reason for Defendants’ acts was malice and the acts of Defendants as alleged appear in almost every instance to represent Constitutionally privileged activity.

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83. We are aware of three such cases. A counterclaim in Tanton v. DNR, No. 90-3, Decision of Dec. 30, 1972 (Cir. Ct., Charles Brown, J.), alleges that the EPA plaintiff had a purpose to coerce the developer and deprive him of the lawful use of his land and that allegations in the complaint were knowingly false. *Apfel v. Cook*, No. 926, Decision of June 22, 1973 (Cir. Ct., William Brown, J.), is a countersuit responding to Blunt v. *Apfel*, No. 849, Decision of June 10, 1971 (Cir. Ct., William Brown, J.), discussed at note 33 supra. The original complaint alleged that the EPA-suit plaintiffs conspired to obstruct and delay the residential project by bringing a suit alleging pollution, knowing that health department permission had been granted; had told others they did not expect to prevail, but desired to cause financial losses that would require abandonment of the project; persuaded the township to enact a restrictive zoning ordinance; told the bank financing the project that they would cease to do business with it; and made false and defamatory statements in newspaper ads and to the Securities Bureau to induce them to delay favorable action on a permit. *Property Dev. Group, Inc. v. Irish*, No. 7265 (Cir. Ct., filed Dec. 14, 1972), alleges disparaging and defamatory letters encouraging others to join the EPA suit (*Irish v. Property Dev. Group, Inc.*) and soliciting contributions therefor; false representations to the Department of Natural Resources that the project would destroy environmentally valuable wetlands; slander of title; and disparagement of property.

There appears to be a widespread apprehension among laymen about such countersuits, even though, to the best of our knowledge, no judgments against environmentalists have resulted from such suits. Of cases decided against the party bringing the counterclaim, the best known is Sierra Club v. *Butz*, 349 F. Supp. 934, 4 ERC 1673 (N.D. Cal. 1972); see also *McKeon Corp. v. Kennedy*, No. 221454, Dept 12 (Super. Ct., Sacramento County, Cal., Jan. 5, 1973). A countersuit by a land development company seeking $80,000,000 against citizens who spoke at public hearings against the project was reported in 74 *Audiubon Magazine* 110 (1972).

84. *Apfel v. Cook. Property Dev. Group, Inc. v. Irish* is awaiting judicial action, and the counterclaim in *Tanton v. DNR* appears to have been abandoned when the plaintiff decided not to appeal the adverse judgment in the main case.

85. No. 926, Decision of June 22, 1973 (Cir. Ct., William Brown, J.), Defendant’s Motion for Summary Judgment. Subsequently, plaintiffs filed an amended complaint; defendants again filed a motion for summary judgment, which was heard on September 28, 1973, and subsequently denied. That decision is now on appeal.
In this rather cryptic holding, the court appears to have followed the California federal court case of *Sierra Club v. Butz* holding that suits such as those brought under the EPA are protected by the first amendment right to petition the government for redress of grievances:

\[
\text{[L]iability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petitioning is a "sham," and the real purpose is not to obtain governmental action, but to otherwise injure the plaintiff.}
\]

It is not yet certain whether the Michigan court has adopted this strong standard, designed to give the counterclaim-defendant the "'breathing space' that the First Amendment freedoms need to survive" and the freedom from the "burden and expense of defending a lawsuit" except under the strongest allegations of "sham." However, the court's statement that a counterclaim must allege that the "sole reason" for the acts complained of was "malice" indicates that such claims will be very difficult to prove.

IV

BRINGING SUIT UNDER THE EPA: THE PUBLIC PLAINTIFF

We noted in our first report that public agencies became plaintiffs in EPA cases more frequently than had been anticipated when the law was enacted. This trend has become even more pronounced in the ensuing 18 months. We are now persuaded that use of the law by public agencies is one of the most significant effects of a statute such as the EPA. This suggests, contrary to common opinion, that there is a considerable, if often latent, willingness on the part of public officials to take the initiative in environmental law enforcement. We think the opportunity for public initiatives can be activated if there is both overt public awareness of the availability of the Act and a strong public desire that it be used. Each of these conditions has been fulfilled in Michigan.

At the time our first article was written, the Wayne County Health Department (WCHD), which has charge of air pollution regulation in the Detroit metropolitan area, had initiated six EPA cases. WCHD continues to be the most active EPA plaintiff, having brought

87. *Id.* at 939, 4 ERC at 1675.
88. *Id.* at 938, 4 ERC at 1675.
89. Sax & Conner, *supra* note 3, at 1008, 1084-89.
90. See Appendix C *infra*.
91. See text accompanying notes 1-19 *supra*.
ten cases during the Act's first three years.\textsuperscript{93} While WCHD has only limited enforcement authority under other laws,\textsuperscript{94} its successes under the EPA are notable. Six of its cases have been settled, and, insofar as we can determine by examining the pleadings and settlement orders, the WCHD is obtaining comprehensive relief,\textsuperscript{95} similar to that described in our previous discussion of \textit{WCHD v. Chrysler Corp.}.\textsuperscript{96}

None of the WCHD cases has gone to trial.\textsuperscript{97} The reasons are probably these: the agency has a very small legal staff, one not constituted for major litigation; the defendants are principally large industrial corporations economically able to deal with air pollution control problems and apparently willing to do so when enforcement pressures become strong enough; finally, because of their size and national reputation, many of the defendants are sensitive to the adverse publicity a protracted trial would entail.

\textsuperscript{93} See Appendix D \textit{infra}.

\textsuperscript{94} Sax \& Conner, \textit{supra} note 3, at 1010 n.36. Recently the Wayne County Board of Commissioners passed a resolution advocating an increase in the fine provision of its governing regulations from $100 to $10,000 per day. \textit{Detroit Free Press}, Oct. 20, 1973, at 10-D, col. 3.

\textsuperscript{95} Six cases have terminated with consent judgments: \textit{WCHD v. American Cement Corp.; WCHD v. Edward Levy Co.; WCHD v. Chrysler Corp.; WCHD v. Ford Motor Co.; WCHD v. McLouth Steel Corp.; WCHD v. National Steel Corp.} One WCHD case was an intervention before the Public Service Commission. See Appendix D \textit{infra}. Three cases are still pending as of this writing: \textit{WCHD v. Detroit Edison Co.} (six weeks); \textit{WCHD v. International Salt Co.} (six months); and \textit{WCHD v. Olsonite} (one day). In \textit{WCHD v. City of Dearborn}, a preliminary injunction was in effect for 18 months, and defendant's effort to have the injunction overturned by the court of appeals was unsuccessful. This case was settled in February 1974 after this article was completed; see note 97 \textit{infra}. See Appendix B \textit{infra} for complete citation data regarding these cases.

Two of the WCHD cases have been the subject of collateral action by private citizens. Nosal \textit{v. Chrysler Corp.}, No. 147150, Decision of June 1972 (Cir. Ct.), resulted in a jury verdict for the citizen plaintiffs on liability. Most of the individual claims have been settled, with an average award of $668. \textit{Detroit Free Press}, July 13, 1973, at 7-C, col. 3. A group of citizens sought to have the consent judgment in \textit{WCHD v. American Cement Corp.}, No. 194927-R, Consent Judgment of Dec. 8, 1971 (Cir. Ct., O'Hair, J.), set aside, but the court denied their motion on May 8, 1972. A related class action by local residents was settled by cash payments to the plaintiffs. Szawala \textit{v. American Cement Corp.}, No. 207043-S (Cir. Ct., filed May 8, 1972). The sum paid was not disclosed. \textit{Detroit Free Press}, Mar. 15, 1973, at 7-A, col. 1.

\textsuperscript{96} See Sax \& Conner, \textit{supra} note 3, at 1010. For a more recent example of a highly detailed and comprehensive consent judgment see \textit{WCHD v. Ford Motor Co.}, No. 211654-R, Consent Judgment of Aug. 1, 1973 (Cir. Ct., Stacey, J.). However, conversation with attorneys representing private clients in damage suits arising out of the same conduct as that in the WCHD cases suggests less than full satisfaction with the settlements WCHD is obtaining. This is a question which needs further research.

\textsuperscript{97} \textit{WCHD v. City of Dearborn}, No. 203110-R (Cir. Ct., filed Mar. 12, 1972), a case involving the burning of diseased elm trees, was concluded on February 11, 1974, when a permanent injunction was entered prohibiting the burning. See note 95 \textit{supra}.
As of our last report, only one case had been brought by a state regulatory agency other than WCHD, the Attorney General had brought one other action, and county prosecutors had shown little initiative in EPA cases. That situation has now changed, and we are beginning to see an appreciation by public prosecutors that the EPA is a reliable weapon in their enforcement arsenal. In Washtenaw County, for example, the prosecutor has brought and prosecuted vigorously two landfill cases. The Department of Natural Resources, a defendant in one of the early and highly publicized land-use cases, intervened in support of private citizen plaintiffs in a subsequent land development case. In the recently filed case of DNR v. Kiffer, the DNR complaint alleges that defendant built a dam on his property, interrupting the flow of a top-quality trout stream and causing serious erosion, which threatened the destruction of fish and other aquatic life. This complaint rests solely upon a claim of violation of the EPA as a substantive law and upon the Department's general authority to protect the state's natural resources, rather than upon the use of the EPA to enforce compliance with some other environmental law.

98. Water Resources Comm'n v. Chippewa County, No. 1255 (Cir. Ct., filed Feb. 10, 1971). See Sax & Conner, supra note 3, at 1020. That case was fully tried and judgment given for the defendant. It was held that the plaintiff had not proven the causative relationship between the salt contamination of ground water supplies and the salt storage practices of the defendant.


100. The county prosecutor did join with the Attorney General in Kelley v. Tannehill & DeYoung, Inc.

101. In Washtenaw County Health Dep't v. Barton, No. 7201, Decision of Jan. 30, 1973 (Cir. Ct., Campbell, J.), an injunction prevented the defendant from dumping ash on landfill he owned and required the existing area to be covered to prevent further airborne dissemination of particulate matter. The plaintiff alleged that the landfill was a public nuisance, and was unlicensed, in violation of the Garbage and Refuse Disposal Act, Mich. Comp. Laws Ann. § 325.297a (Supp. 1973). In Washtenaw County Health Dep't v. Hoover Ball & Bearing Co., No. 7866 (Cir. Ct., filed July 9, 1973), still pending decision, defendant was alleged to be overloading a septic tank field and producing on the ground a "black, odorous, foul smelling septic tank effluent." See Ann Arbor News, Oct. 29, 1973, at 32, col. 4.


104. No. 3523 (Cir. Ct., filed Sept. 26, 1973). No judicial action has yet been taken in the case. The defendant has filed an answer and interrogatories, and has noticed the taking of depositions.

A parallel development is noted in EPA suits initiated by the Attorney General.\textsuperscript{106} Having first tested the Act by intervening in administrative proceedings and in a suit initiated by the WCHD,\textsuperscript{107} the Attorney General later brought several actions under the EPA which were in essence suits to enforce existing administrative agency orders.\textsuperscript{108}

In March 1973 the Attorney General filed a suit against the National Gypsum Company which marked a significant departure from his previous cases.\textsuperscript{109} This suit revealed the impact the EPA can have on administrative and enforcement officials. It was based on the EPA and a general public nuisance claim, rather than upon the state air pollution law. Upon filing the suit the Attorney General issued a press release stating:

This is a unique and important case. It is the first time in our efforts to fight air pollution that we have asked the courts to take action against a firm which, while in partial compliance with an order of the Air Pollution Control Commission, is still polluting the air around it. \textit{We have taken this action because we consider the Commission's order inadequate.}\textsuperscript{110}

The Air Pollution Control Commission had referred the \textit{National Gypsum} case to the Attorney General because defendant had failed to comply with the Commission's emission rules. Upon examining the file, however, the Attorney General's lawyers discovered that the Commission had issued an order requiring three steps toward compliance

\begin{itemize}
  \item \textsuperscript{106} Of course, the Attorney General represents the DNR and other state agencies, and initiates their lawsuits. He also files suits in his own name for and on behalf of the people of the State of Michigan. See note 20 \textit{supra}.
  \item \textsuperscript{107} See note 99 \textit{supra}. He also sued in \textit{Kelley v. Tannehill & DeYoung}, Inc., No. 2626 (Cir. Ct., filed Nov. 4, 1971), discussed in \textit{Sax & Conner, supra} note 3, at 1027.
  \item \textsuperscript{108} \textit{Kelley v. Continental Metallurgical Products}, No. 3095 (Cir. Ct., filed July 21, 1972), and \textit{Kelley v. Michigan Standard Alloys}, Inc., No. D-5278-W (Cir. Ct., filed Aug. 1, 1972), both referred by the Air Pollution Control Commission. In the former, defendant was enjoined from operating furnaces for which permits had not been issued, and the company was closed while a permit to install air cleaning devices was pending. In the latter case, a preliminary injunction required an aluminum smelting and refining operation in Benton Harbor to modify its smelting process and to submit monthly reports to the Air Pollution Control Commission.
  \item \textsuperscript{110} \textit{Press Release, Mar. 9, 1973} (emphasis supplied).
\end{itemize}
that spanned a six-year period. The first step, involving the replacement of old and uneconomic kilns, had been taken. Subsequent steps would be very costly, however, and by early 1973 the Commission staff was convinced that the company was not going to meet its next obligation, which would not come due until July 1974.

The filing of the Attorney General's complaint, and the accompanying press release describing the Air Pollution Control Commission's order as inadequate, led to a meeting between the Commission members and the Attorney General. The Attorney General, assessing his relationship to the administrative agencies, concluded that he was not only a lawyer for the agencies, but that as Attorney General he had an independent responsibility to the people of the State, and could act independently via the EPA despite the legally disadvantageous position in which his "client" (the Commission) had left him.

From the Commission's perspective, the Attorney General's press release implied that the Commission had failed the public. Yet, while failure to draft a more tightly defined enforcement order was no doubt an oversight on the Commission's part, it led to establishing the proposition that the EPA provides a supplement to the administrative process. The meeting also gave the Commission an opportunity to express an opinion that the Attorney General had not prosecuted with sufficient vigor other matters which the Commission had referred to him. The result was a heightened bilateral awareness of the possibilities for using the EPA to apply greater pressure upon polluters to comply with air pollution control requirements.

The meeting both cleared the air and created a better working relationship between the Commission staff and the Attorney General's office. The matter in general seems to have encouraged the Attorney General to appreciate and act upon his independent legal responsibility to the people of Michigan. The EPA apparently was the catalyst for these developments.

The outcome of National Gypsum provides an encouraging

112. The company's answer to the Attorney General's lawsuit undoubtedly reinforced this concern. The answer stated in part:
At present, the Huron Cement plant in Alpena is not fully competitive due in part to certain terms in its labor contracts. National Gypsum intends to invest the necessary funds to build these facilities if agreement on labor contract terms can be reached with the unions involved which would include the elimination of non-competitive provisions in their contracts and if National Gypsum is allowed a reasonable time for construction of these facilities.
cation of what can be achieved by cooperative use of the EPA by the State's regulatory agencies and by the Attorney General. On September 25, 1973, the Attorney General and National Gypsum, with unanimous approval by the Air Pollution Control Commission, entered into a consent judgment which set a stricter timetable for compliance.\textsuperscript{114} It should be noted that here, as in the land-use cases discussed earlier, the settlement obtained represents some compromise. The Company is still given nearly two years to comply with existing regulations, and the citizens of Alpena are not out of the dust yet. However, the deadline for final compliance was moved forward significantly from the Commission's original order, and the existence of a firm court order should give strong assurance that compliance will be achieved on schedule.

Perhaps the most important feature of the National Gypsum case is that it discredits the view that any use of laws like the EPA to seek relief beyond that ordered by an administrative agency is improper and disruptive of the appropriate structure of environmental regulation. The National Gypsum Company itself propounded such an argument:

By filing this complaint, the Attorney General ignores the provisions of the Air Pollution Act and illegally, inequitably and unconscionably overrides and ignores the express findings and determinations of the Air Pollution Control Commission which has lawful jurisdiction and authority herein . . . . Such disregard for the authority of the Air Pollution Control Commission, an agency of the executive branch of State government, by the Attorney General's office, another agency of the executive branch, is improper and unlawful and should not be tolerated by a court of equity.\textsuperscript{115}

The outcome of the case should discourage use of such arguments in future litigation.

V

TRIALS ON THE MERITS

Since our first article was published, there have been trials or

\textsuperscript{114} Kelley v. National Gypsum Co., No. 1918, Consent Judgment of Sept. 25, 1973 (Cir. Ct., Glennie, J.). The judgment set the following timetable:
2. Dec. 1, 1975, application will be made to the Commission to operate the new kilns.
3. Dec. 31, 1975, particulate emission from old kilns will be reduced by one-half by shutting down half of existing kilns.
4. Dec. 31, 1976, particulate emissions from all other kilns will be reduced so as to comply with now current regulations of the Commission.
5. The Court will retain jurisdiction until the compliance schedule has been achieved.

long evidentiary hearings in six cases, of which we have monitored four.\footnote{116}

\textit{A. Irish v. Green}

\textit{Irish v. Green}\footnote{117} challenged a proposed housing development on Little Traverse Bay. There were four counts in the plaintiff's complaint: (1) that seepage from septic tanks was likely to cause pollution of both ground water and the Bay; (2) that the project likely would result in traffic congestion on a scenic access road; (3) that defendants had failed to prepare a required environmental impact statement;\footnote{118} and (4) that the development was a wasteful use of land and should be modified to allow for cluster development.

During the trial, which lasted five days, the judge paid close attention to the environmental testimony and allowed it to be fully developed. He overruled defendant's objections to evidence of the broad potential impacts of the project, and at one point referred to defendant's view of a privilege to develop property as "old fashioned."

The court had the assistance of articulate and well-prepared expert testimony, including that of an architect, a consulting hydrology engineer, a geologist, a transportation planning consultant, a professor of microbiology and a consulting civil engineer. Judge Miller asked incisive questions of these experts and subsequently issued detailed findings of fact on such diverse issues as the presence of a perched water table, the rate of groundwater seepage, the nutrients in the ground water, and the impact of anticipated traffic density on the scenic roadway.\footnote{119} During the trial, the judge also visited the site of the proposed development.

The court's twelve-page opinion found for the plaintiffs on the water-pollution and access-road issues, but dismissed their claims seeking cluster development and an environmental impact statement.\footnote{120}

\footnote{116. \textit{Anderson v. Michigan State Highway Comm'n; Gang of Lakes Environmental Org. v. Gee; Irish v. Green; Irish v. Property Dev. Group, Inc.; Ray v. Raynowsky; Taxpayers & Citizens in the Public Interest v. State.} Our failure to attend the proceedings in \textit{Irish v. Property Dev. Group, Inc.} and \textit{Anderson v. Michigan State Highway Comm'n} was the result of inadequate monitoring resources at trial time, and not of a decision that the cases were unimportant. Discussion hereafter about trial testimony is based on notes made during the proceedings. We have thus far not been able to obtain stenographic transcripts. See Appendix B \textit{infra} for full citation data regarding these cases.}

\footnote{117. No. 162-3, Decision of July 15, 1972 (Cir. Ct., Miller, J.), 4 ERC 1402.}

\footnote{118. \textit{See} Governor's Exec. Dir. No. 1971-10 (later superseded by Governor's Exec. Orders Nos. 1973-9 and 1974-4.}}

\footnote{119. \textit{Irish v. Green}, No. 162-3, Decision of July 15, 1972 (Cir. Ct., Miller, J.), 4 ERC 1402.}

\footnote{120. \textit{Id.} On the impact statement question, the court ruled that the Executive Order, \textit{supra} note 118 applied only to state action \textit{per se} and not to state agency approval}
The court ordered that construction could proceed on no more than 40 percent of the lots until central water and sewer facilities were provided, required the opening of another entrance road to lessen traffic burden on the scenic highway, and imposed restrictions to lessen the flow of surface water within the proposed subdivision.

B. Two Drain Cases: Ray v. Raynowsky and Gang of Lakes v. Gee

Ray v. Raynowsky involved a challenge to a proposed drain project in Mason County. Plaintiffs alleged violations of both the EPA and the Michigan Drain Code. They argued that changes in the water table resulting from the proposed channelization would adversely affect the cultivation of crops in the area and would destroy bogs and water holes essential as habitat for wildlife.

To make their environmental case, plaintiffs submitted depositions of three experts. The first, presented by a zoology professor, discussed the role of water in ecological systems and the desirability of maintaining some water holes and bogs for diversity in natural areas. The statement also outlined preferred techniques for watershed management and planning. The second deponent, an engineer for the Soil Conservation Service, described the steps taken in the approval and development of engineering plans for the project, establishing that no detailed studies had been made of the effects of the drain on the water table.

The third deposition, that of a certified engineering geologist who had studied the reports of the Drain Commissioner and had visited the area, concluded that the project would result in a lowering of the water table and that, because the soil configuration in the area was...

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of private action. Decision of July 15, 1972, supra, at 5, 4 ERC at 1403. Compare Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1972); Comment, Aftermammoth: Friends of Mammoth and the Amended California Environmental Quality Act, 3 ECOLOGY L.Q. 349 (1973). On the cluster development issue, the court stated: "The defendant developer's project either violates the act or it does not. Plaintiffs have no right to invade property rights to the extent of dictating alternative developments which may or may not have market appeal." Decision of July 15, 1972, supra, at 5.

121. No. 2-760, Decision of July 15, 1971 (Cir. Ct., Wickens, J.); see Sax & Conner, supra note 3, at 1045.


123. Deposition of William Cooper, Ph.D., Michigan State Univ.

124. Deposition of Loren Oshel, Conservation Engineer, State Soil Conservation Service. His deposition established that the Soil Conservation Service does not take environmental factors into account in determining the economic feasibility of a project. Said Mr. Oshel: "From the dollar and cents value . . . we have no tools to put a dollar value on environmental factors."
"highly erratic," the project's effects on bogs and swamps in the vicinity, as well as the habitat in general, could not be determined without further studies. He challenged the defendant's view that the project area was an "insignificant" part of the watershed. Finally, he suggested that new road culverts and the cleaning of existing culverts might provide an alternative remedy for spring flooding.  

The plaintiff, Edward Ray, a former conservation school instructor, used slides to indicate to the court the possible environmental effects of the drain, describing the present nature of the area and presenting a natural history of the region. At the conclusion of his testimony, he also offered an alternative to the project: utilization of the natural processes of drainage in the area to allow the underground water to recharge. He noted that the minor spring flooding, which the drain was designed to halt, benefits the ecology of the area. Other landowners called by plaintiffs claimed the proposed drain was both unnecessary and very costly.

Counsel for the defense, an experienced trial lawyer who has represented defendants in a number of EPA cases, put together testimony which presented a chronology of the project's development, detailed the topographic, drainage, and agricultural conditions of the area, and described possible environmental effects. A soil scientist first outlined the soil types found in the region and discussed the relationship between soil wetness and its potential for cultivation. A wildlife biologist described the area's wildlife and concluded that, rather than being detrimental, the project might enhance the habitat. A DNR fisheries biologist indicated that channelization might ameliorate degrading effects of the flow of Black Creek into the valuable Pere Marquette River.

Judge Wickens made no specific findings of fact, and did not explain how the evidence comported with the evidentiary requirements of section 3(1) of the Act. His brief opinion on the EPA case declared simply: "The plaintiffs do not sustain the burden of proof on this issue. In fact, the burden is carried by a great volume of evidence in favor of the defendants." In addition, the court dis-

125. Deposition of David Nixon.
126. Seventeen landowners testified, giving views on the desirability of the project and stating property assessments for the first year of the drain's existence. The former drain commissioner said he felt that the construction was a "make work project" and that flooding could best be remedied by the highway department.
127. An agriculturist from the Agricultural Extension Service and an agronomist from the Soil Conservation Service also testified for the defendants, arguing that proper drainage could increase the values of the area as an agricultural region.
missed the claims alleging that the Commission had not complied substantially with the Drain Code. Plaintiffs originally based an appeal solely on Drain Code issues, but their focus shifted to the EPA when the state supreme court unexpectedly invited the parties to brief the EPA issues. *Ray v. Raynowsky* thus may produce the first decisive legal interpretation of the EPA.  

In *Gang of Lakes Environmental Organization v. Gee*, as in the *Ray* case, inadequate inquiry into the environmental effects of a proposed drainage project was a central issue in the litigation. At trial one defendant testified he never took any steps to determine whether damage would ensue or whether the shoreline would be exposed on one or more of the chain of lakes to be affected by the drain project.  

C. Taxpayers & Citizens v. State

The most recent case we have monitored is *Taxpayers & Citizens in the Public Interest v. State*, which challenged the State Highway Department's sale of a small piece of land in Traverse City to a private owner. The lucky buyer was Northern Michigan Inns, which operates the Traverse City Holiday Inn on land contiguous to the parcel in litigation. The plaintiffs, learning of the sale after observing con-

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130. See note 220 *infra*. Plaintiffs considered the adverse judgment a terrible inequity. One has written:

Seventy-three farmers and land owners who opposed the project and joined the suit to stop the project were not considered. If there ever was a governmental boondoggle that ran a steam roller over the people, this was it. If this decision stands, then a governmental bureaucracy can even, without a hearing, take land from those who own it and do whatever they want with it. Nobody has redress before the law.”

Letter of July 15, 1972, to Zygmunt Plater from Edward M. Ray, on file with the authors.

131. No. 7-562 (Cir. Ct., filed Jan. 19, 1972). The suit involves a challenge to a proposed “cleaning out, relocating, widening and straightening” of an inter-county drain in Calhoun and Jackson Counties. Plaintiffs alleged that the cleaning out of the 55-year-old drain would result in lowering the water level of the chain of lakes to which the drain is connected, so as to cause destruction of wildlife habitat and damage to property of riparian owners. The project was challenged under the Michigan Drain Code, Mich. Comp. Laws Ann. §§ 280.1 et seq. (1967), as well as the EPA. The case was tried during the week of July 25, 1972, but no judicial decision has been announced as of this writing.

132. Notes taken at the trial indicate that at one point this defendant stated that he did not know how much the shoreline would be lowered, as he “didn’t check.” He said: “I still say it isn’t going to lower it as much as they say . . . maybe a foot, that’s all . . . that’s just my own judgment, that’s all.” He also testified that when informed by one source in state government that the lake level would be lowered 3/2 feet, he “did not believe it.”

133. No. 3137, Decision of Nov. 29, 1973 (Cir. Ct., William Brown, J.). The case is discussed at text accompanying notes 50-52 *supra*. The statute under which the land was sold is Mich. Comp. Laws Ann. § 213.194 (1967).
struction equipment in the area, obtained a temporary restraining order to prevent further construction and also sought rescission of the sale.

Judge William Brown first determined to hold an extended evidentiary hearing on the public trust question. Because of the nature of the proceedings and the complexity and novelty of the issues, the court permitted witnesses to offer their opinions on the “ultimate” questions in the case: the definition of public trust and the existence of such a trust in the property whose transfer was contested. Judge Brown himself noted that the questions were new to him. He did indicate during a recess that he considered the case very similar to the famous Illinois Central decision of the United States Supreme Court.

At the hearing plaintiffs argued that the land had been in public ownership until very recently and was available for free use by the general public, a use now “functionally integrated into the property.” Through public use, then, there had been established an implied dedication “or something in the nature of a public trust or prescriptive easement,” further confirmed by a legislative determination ranking shorelines as lands of high priority. To establish their case, plaintiffs called as witnesses a number of area residents, who described their use of the region for fishing, picking weeds, watching ducks and swans, and for other recreational and nature-study purposes.

Defendants argued that the public trust was an “intangible term,” but added that even under the traditional view of the doctrine in Michigan, the subject land was not in the public trust. The defense also sought to nullify the implied dedication argument by claiming that there was a revocable permit attached to the land. Defendants also argued that the area was polluted, and therefore somehow not fit for public dedication.

The complexity of the issues made the choice of experts a critical concern. Plaintiffs called, among others, an architect, a biologist,
a coastal-zone planner and a resource economist; the latter two presented primarily hypothetical testimony and were vigorously cross-examined by defense counsel. Witnesses for the defense included experts in planning and landscape architecture and employees of the State Highway Department and the Water Resources Commission.

This case was a venturesome step for EPA plaintiffs; the risks and the opportunities for legal development were high. The court's decision that plaintiff had not sustained its burden of proving the impression of such a public trust as should prevent sale and private development probably will be appealed, since Judge Brown himself indicated that he considered it important that such a determination be reviewed by a higher court.

D. Some General Observations

1. The Role of the Lay Witness

In each of the four cases discussed above, attorneys for both sides have called on lay witnesses to testify, often in their capacities as landowners or users of the area threatened by environmental alteration. This has produced a sense of citizen involvement and concern which may be obscured by the maps and technical reports of experts.

While it is difficult at this point to evaluate the effect these individuals have had, or will have, on the determination of the cases, a few general points can be made. First, this type of testimony is of central concern to the adjudication of many environmental issues. Particularly when environmental suits are of local interest, such as many brought under the EPA, settlement often means a balancing of changes in the character of a natural resource against other values, such as economic growth. Environmental alterations which defendants may perceive as *de minimis* may be of great significance to local residents.

An analysis of EPA cases indicates that for plaintiffs to have the greatest impact they should emphasize to the court that others in the area share their environmental concerns. Further, local citizens do have expertise. Long-time residents have been useful in pressing the

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141. Plaintiff's coastal zone planner indicated that he felt the land was in the public trust because it was unique, a shoreland, and met a number of criteria which his profession considers important in defining public trust. The resource economist did not address the issue of public trust but rather introduced an economist's conceptual framework for differentiating private from public goods. He concluded that the land is a "public good," for which the public is entitled to just compensation. This compensation, however, could not fully be realized without first putting the piece of land on the open market for sale.

point that a series of small changes can accumulate over time and significantly degrade the quality of an area.

To be sure, courts sometimes seem to discount the testimony of lay "experts." In *Ray v. Raynowsky*,\(^\text{143}\) for example, lay testimony that the drains were unnecessary to local residents, and that the area provided a habitat essential for wildlife, appears to have made no impression on the judge. Lay testimony also can backfire; skillful defense attorneys can depict such evidence as selfish or parochial. Unwary and inexperienced citizen witnesses may unwittingly trivialize their environmental claim or slip into superficiality and irrelevance. Despite these risks, we have concluded that skillful integration of expert opinion and local response is the most powerful combination for developing a successful case.

2. Timing and Handling of the Trials

Trials have been scheduled quite promptly and have rarely taken more than three to five days.\(^\text{144}\) Considering the economic constraints under which most plaintiffs operate,\(^\text{145}\) the quality of testimony has been high. Occasionally, a judge withholds decision following a trial for what seems to us a very long time, as in the *Gang of Lakes* case,\(^\text{146}\) but that is exceptional.

Although we have sometimes disagreed with their decisions, the judges in each of the four cases described above have been efficient and competent in reducing great quantities of seemingly unrelated and contradictory data to a few critical issues, which will govern the court's ultimate decision.\(^\text{147}\)

VI

PROCEDURAL ISSUES

A. Standing, Parties, Joinder and Intervention

The broad standing provision in the EPA\(^\text{148}\) has produced a very diverse set of plaintiffs: local and state agencies;\(^\text{149}\) neighboring prop-

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\(^{143}\) No. 2-760, Decision of July 15, 1972 (Cir. Ct., Wickens, J.).

\(^{144}\) The longest trial, lasting several weeks, was in *Water Resources Comm'n v. Chippewa County*, No. 1255 (Cir. Ct., filed Feb. 10, 1971), where both plaintiff and defendants were public agencies.

\(^{145}\) See the discussion at text accompanying notes 238-40 infra.

\(^{146}\) No. 7-562 (Cir. Ct., filed Jan. 19, 1972). As of October 1973, it had been 15 months since the trial.

\(^{147}\) Sax & Conner, *supra* note 3, at 1033. While there have been instances of a court missing a crucial point in the litigation of environmental issues, this has been the exception rather than the rule.

\(^{148}\) Section 2(1), MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1973).

\(^{149}\) See the cases discussed in Part IV, text accompanying notes 89-115 *supra*. 
erty owners who would have had standing under traditional riparian or nuisance law;\textsuperscript{150} taxpayer and citizen groups;\textsuperscript{151} and established environmental organizations whose interest is more in the subject matter of the suit than in any personal injury to their members.\textsuperscript{152} We are aware of no case in which the plaintiff's standing has been successfully challenged,\textsuperscript{153} nor of any situations in which the broad standing allowed by the EPA has created any practical problems for effective resolution of controversies. In \textit{McCloud v. City of Lansing},\textsuperscript{154} a citizens' class action challenging a utility line through a public park, the judge said:

The plaintiff, Mr. McCloud, put it well with reference to the public trust and the public domain and the public interest—an interest which is there to be protected, an interest which Mr. McCloud possesses . . . and an interest which our children born and yet to be born possess, in maintaining that public domain . . . . I commend Mr. McCloud for bringing this litigation. Too long have our citizens, when they have been dissatisfied with public and official conduct, merely complained to their neighbor and let it go at that. Too long have they been unwilling to take the personal risk of taking on the intrenched establishment, and spending funds, whatever it might be, necessary to have the issue fully aired.

The plaintiff, as I have already said, has an interest here to be protected, and has a cause of action.\textsuperscript{155}

To assure that all appropriate parties are brought into the case, the courts have been generous in allowing intervention and joinder. In a number of cases, interested public agencies have been permitted to join suits in which they were not named as parties;\textsuperscript{156} and a rule

\begin{itemize}
\item \textsuperscript{150} Blunt v. Apfel, No. 849, Decision of June 10, 1971 (Cir. Ct., William Brown, J.);

\end{itemize}
favoring broad intervention adopted by the Court of Appeals in *West Michigan Environmental Action Council, Inc. v. Betz Foundry, Inc.* will probably have widespread application in EPA cases.\(^{157}\)

At the same time, the courts have been rather careful to assure that plaintiffs sue the proper parties. In one case, for example, a suit brought against the Secretary of State and the Director of the State Highway Department alleging a failure to adopt rules and regulations governing motor vehicle pollution suffered a summary judgment because authority to adopt such rules was vested in the Air Pollution Control Commission, and not in either of the named defendants.\(^{158}\)

In another case, the court of appeals held that it was improper to sue a township government under the EPA to enjoin the building of sewage treatment facilities; the plaintiff had claimed that the defendant township should instead have prosecuted those who were polluting the waters.\(^{159}\)

**B. Multiple Litigation**

Multiple suits over the same environmental issue have been a routine concern whenever statutes like the EPA are proposed. Although the EPA has a specific provision designed to prevent this problem from arising,\(^{160}\) the overwhelming bulk of EPA cases are the subject of only one legal proceeding.\(^{161}\) Once the plaintiffs either win or lose,

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\(^{157}\) There the court allowed the plaintiff in the EPA suit to intervene before the Air Pollution Control Commission in the administrative proceedings regulating the EPA suit defendant. The court said: “Although we view Section 5 of the EPA as discretionary . . . the threat of multiple party intervention is an insufficient reason for refusing to allow an interested party to intervene in the administrative proceedings.” *West Michigan Environmental Action Council, Inc. v. Betz Foundry, Inc.*, No. 14355, Decision of Aug. 3, 1972 (Ct. App., T.M. Burns, R.B. Burns & Fitzgerald, JJ.). In *WCHD v. Chrysler Corp.*, noted in Sax & Conner, *supra* note 3, at 1072 n.279, the court of appeals held also that intervention was permissive, but in that case denied intervention to private parties because it had not been established that representation of their interest by existing parties was inadequate. 43 Mich. App. 235, 203 N.W.2d 912 (1972).


\(^{159}\) Beaman v. Township of Summit, No. 13102, Decision of July 27, 1972 (Ct. App., Fitzgerald, Quinn & Danhof, J.J.). The case is discussed in Sax & Conner, *supra* note 3, at 1073 n.283. The strict ruling of the case seems to be that the building of a sewage treatment plant is not a violation of the EPA. As a practical matter, it would seem best for EPA plaintiffs to sue the polluters themselves, rather than a government agency for failure to prosecute.

\(^{160}\) Section 5(3), MICH. COMP. LAWS ANN. § 691.1205(3) (Supp. 1973).

\(^{161}\) Some cases spawn other related matters, but do not involve the relitigation problem: *e.g.*, the counterclaims and countersuits, discussed at text accompanying notes 83-88 *supra*, and the suits in both probate and circuit courts arising out of eminent domain actions, discussed at text accompanying notes 57-82 *supra*. Blunt v. Apfel, No.
they accept their situation, and neither they nor others sympathetic to their claims attempt to relitigate the same issue in a different proceeding.\textsuperscript{162}

We are aware of only two cases which raise the multiplicity problem in any form. The first is Anderson v. Michigan State Highway Commission,\textsuperscript{163} in which plaintiffs first lost in the federal court, on their challenge to defendant's failure to prepare the environmental impact statement required by the National Environmental Policy Act.\textsuperscript{164} A different group then brought suit under the EPA to challenge the merits of the project.\textsuperscript{165} The circuit court dismissed,\textsuperscript{166} but the state court of appeals granted a stay pending application for leave to appeal.\textsuperscript{167} Although Anderson has developed as two independent suits, cases of this kind seem readily amenable to consolidation of federal and state issues in a single proceeding.\textsuperscript{168}

\textsuperscript{849} Decision of June 10, 1971 (Cir. Ct., William Brown, J.), discussed at note 33 supra, is perhaps the most complex case to have arisen out of the EPA. A number of collateral lawsuits grew out of the controversy over condominium development on Torch Lake, which, according to the plaintiff's attorney, have all been consolidated before one judge. WCHD's air pollution suits under EPA also have spawned some collateral damage cases by residents in the area. See footnotes to Appendix A infra.


166. No. 15609-C, Decision of Sept. 4, 1973 (Cir. Ct.).

167. Anderson v. Michigan State Highway Comm'n, No. 18198, Decision of Oct. 12, 1973 (Ct. App., McGregor, Bronson & Carland, JJ.). We have been unable thus far to obtain a transcript of the circuit court decision.

168. Hendrickson v. Wilson, No. G-26-73-CA, Decision of Aug. 30, 1973 (W.D. Mich., Engel, J.), concerned a proposed expansion of Leland Harbor, and principally involved the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (1970). The case was tried in June 1973, and decided in favor of the defendant on the federal issue. In a most interesting opinion, the judge said that while he could have taken jurisdiction of the state law claims (which included alleged EPA violations) under the doctrine of pendent jurisdiction, it would not have been appropriate to do so in this particular case:

The difficulty here lies in the requirement of [United Mine Workers v. Gibbs, 383 U.S. 715 (1966)] that "State and federal claims must derive from a common nucleus of operative fact..." Ordinarily the court would be reluctant to dismiss the pendent claim where a trial has been had upon the merits, as here. . . . [But] it was not possible for the court to determine in advance what ultimately developed to be the truth: . . . that the State claim, in fact, constituted the real body of the case to which the federal claim was, if anything, only an appendage . . . . The issues raised by plaintiffs involve vital questions of interpretation of state law . . . and they involve broad and important questions as to how the State of Michigan will act to achieve the policies inherent . . . in the State's Environmental Protection Act.
A second case involves a proposed nuclear plant in Midland, Michigan, which has been the subject of very active controversy before the AEC.\(^{169}\) A suit brought in the state court (not an EPA suit) against the Board of County Commissioners challenging expenditures of tax money to promote construction of the nuclear power plant was dismissed, and the court of appeals affirmed on the ground that the plaintiff failed to show substantial injury as a taxpayer.\(^{170}\) The same plaintiff instituted an EPA case asserting potential damage from cooling towers and radioactive emissions.\(^{171}\) No judicial action has yet been taken either on the merits of the suits or on the question of multiple litigation. One of the defendants claims that the federal government has preempted regulation of nuclear power plants.\(^{172}\)

Hendrickson v. Wilson, supra, at 17-23. The court proceeded to dismiss the state law claims without prejudice. Whether plaintiffs could be required involuntarily to append their state law claims to a federal case where "[s]tate and federal claims . . . derive from a common nucleus of operative fact" (United Mine Workers v. Gibbs, supra) is a question which has never been decided by the Supreme Court. See Belliston v. Texaco, Inc., — F.2d — (10th Cir. 1974); Ford Motor Co. v. Superior Court, 35 Cal. App. 3d 476, 110 Cal. Rptr. 59 (1973); McKay v. Fairbairn, 345 F.2d 739 (D.C. Cir. 1965); Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964); Estavez v. Nabors, 219 F.2d 321 (5th Cir. 1955); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

In addition to the pendent jurisdiction question, the parties also briefed the issue raised by EPA and the Eleventh Amendment to the Federal Constitution, arguing that the EPA constituted a general state waiver of sovereign immunity, including a waiver of immunity against suits in the federal courts. The court did not address this question.

In general, the federal courts have indicated a preference not to decide EPA cases. See Sax & Conner, supra note 3, at 1072 n.280. Farmer v. Construction Aggregates was removed from Ottawa County Circuit Court to federal court and remanded back to the circuit court by Judge Engel on the ground that there was no basis for federal jurisdiction, since state courts should have the first opportunity to interpret the EPA. Farmer v. Construction Aggregates Corp., No. G-119-72-CA, Decision of Sept. 26, 1973 (W.D. Mich., Engel, J.). See also McPhail v. Army Corps of Engineers, No. 38203 (E.D. Mich. 1973), which was filed in Wayne County Circuit Court and removed to the federal district court, where it was decided wholly on federal grounds.

169. The AEC proceeding is In re Consumers Power Co. (Midland Plant, Units I and 2), Nos. 50-329, 50-330 (AEC Atomic Safety & Licensing Bd.). Wendall Marshall was one of several plaintiffs who filed a federal suit seeking a declaratory judgment concerning the adequacy of hearings and findings by the AEC, Aeschliman v. United States, No. 3202 (E.D. Mich. 1973), which was filed in Wayne County Circuit Court and removed to the federal district court, where it was decided wholly on federal grounds.


171. Marshall v. Consumers Power Co., No. 4131 (Cir. Ct., filed Jan. 17, 1973). The suit was dismissed at plaintiff's request, upon his allegation that the judge and the plaintiff-attorney had both been participants in a controversial case before the judge ascended the bench. Then plaintiff filed essentially the same suit, Marshall v. Consumers Power Co., No. C-16-150, in the Circuit Court for Jackson County on March 28, 1973. A change of venue to Midland County was granted and Marshall is back before the same judge he had in case No. 4131. Marshall v. Consumers Power Co., No. 4485 (Cir. Ct., venue changed July 31, 1973).

172. See Defendant's Brief in Support of Motions for Accelerated Judgment, etc.
C. Jurisdiction and Venue

With the exception of the remand decisions of the federal courts in Hendrickson v. Wilson and Farmer v. Construction Aggregates, noted above,\textsuperscript{173} we have found no significant developments in this area since our earlier report was published.\textsuperscript{174} In general, the circuit courts will grant motions for changes of venue to the county where the physical effects of the challenged activity occur.\textsuperscript{175} While defendants in land-use cases seem to think a change of venue to a rural project site will be advantageous to them, results thus far do not sustain this view.\textsuperscript{176}

VII

CLASS ACTIONS AND CASES SEEKING DAMAGES

About one-fifth of all cases filed under the EPA have been denominated plaintiffs' class actions.\textsuperscript{177} In general, we are puzzled by this phenomenon, since the Act itself does not speak in terms of class actions,\textsuperscript{178} and in light of its broad standing provisions, it is not obvious what benefits accrue to a class plaintiff.\textsuperscript{179} Indeed, because special obligations are imposed upon a class representative,\textsuperscript{180} it generally


173. See note 168 supra.
174. See Sax & Conner, supra note 3, at 1072 \textit{et seq}.
175. E.g., Marshall v. Consumers Power, No. C-16-150 (Cir. Ct., filed Mar. 28, 1973; No. 4485 (Cir. Ct., venue changed July 31, 1973). Issue is discussed at some length in Defendant's Brief, supra note 172. \textit{See also} Irish v. Green, No. 162-3, Decision of July 15, 1972 (Cir. Ct., Miller, J.); Tanton v. DNR, No. 90-3, Decision of Dec. 30, 1972 (Cir. Ct., Charles Brown, J.); Taxpayers & Citizens in the Public Interest v. State, No. 3137, Decision of Nov. 29, 1973 (Cir. Ct., William Brown, J.); Three Lakes Ass'n v. Fisher, No. 1142, Consent Judgment of Aug. 20, 1973 (Cir. Ct., William Brown, J.). The only exception to this practice thus far seems to be Superior Public Rights, Inc. v. DNR, No. 15852-C (Cir. Ct., filed Sept. 21, 1973), discussed at text accompanying notes 53-54 supra, a case involving state disposition of land in Marquette, Michigan, which was filed and is being litigated in Ingham County, seat of the State Capitol. See Sax & Conner, supra note 3, at 1073-74.
176. Of the three completed cases in which venue changes were granted, two—Irish v. Green, No. 162-3, Decision of July 15, 1972 (Cir. Ct., Miller, J.) and Tanton v. DNR, No. 90-3, Decision of Dec. 30, 1972 (Cir. Ct., Charles Brown, J.)—went to trial. The plaintiff won one and the defendant the other. In Three Lakes Ass'n v. Fisher, No. 1142, Consent Judgment of Aug. 20, 1973 (Cir. Ct., William Brown, J.), plaintiff achieved a very favorable settlement.
177. \textit{See} Appendix E \textit{infra}.
178. \textit{The} original version of the EPA, H.B. 3055, introduced April 1, 1969, had stated in section 2 that an action "may [be] maintain[ed] \ldots in the name of the state against any person \ldots." This language was later omitted as being unnecessary and possibly confusing.
179. \textit{See} text following note 148 supra.
180. MICh. CT. (GEN.) R. 208.
would seem undesirable for plaintiffs to file EPA suits, where only equitable relief is sought, as class actions.\textsuperscript{181} We know of only one case in which the class action issue has been litigated: in Ray v. Raynowsky the plaintiff sought to represent a class, but the judge denied class status.\textsuperscript{182}

Class action may be advantageous in an EPA case where it is appropriate to designate a class defendant in order to assure that a judicial order, if issued, will bind all persons necessary to assure the order's effectiveness. This situation is illustrated by Michigan United Conservation Clubs (MUCC) v. Anthony, where an environmental organization sued under the EPA to have Michigan's fishing regulations applied to a large number of Indians claiming exemption under Treaty rights.\textsuperscript{183}

A class also will appear attractive to a defendant who fears the prospect of multiple litigation and wishes to ensure that a judgment in his favor will bar further action.\textsuperscript{184} As indicated above, multiple litigation has not been a significant problem under the EPA, and has arisen only once where the same plaintiff instituted several suits dealing with the same proposed project.\textsuperscript{185}

In one group of cases involving industrial air pollution in the Detroit metropolitan area, claims for equitable relief under the EPA have been joined with claims for damages.\textsuperscript{186} These suits are predictably


\textsuperscript{182} No. 2-760, Decision of July 15, 1972 (Cir. Ct., Wickens, J.), at 1: The parties plaintiff are all able to appear personally in Court and be heard. The facts do not necessarily apply the same to all the parties and there is no need for the Court to exercise its discretionary powers and make this a class action. All parties plaintiff desiring to appear and be heard have been all allowed to appear and be heard, and the entire trial took less than three days, so the request for a class action is hereby denied.

The Ray case is now before the Michigan Supreme Court. See text accompanying notes 121-30 supra.

\textsuperscript{183} The case is discussed in Sax & Conner, supra note 3, at 1048-49, 1075; it has now been fully tried and decided in favor of the plaintiffs. MUCC v. Anthony, No. 2331, Decision of Nov. 10, 1972, (Cir. Ct., Smith, J.). Subsequently the United States instituted a suit seeking a declaration that by treaty the Indians are exempt from Michigan conservation laws. United States v. Michigan, No. M26-73-CA (W.D. Mich., filed Apr. 9, 1973). No judicial action has yet been taken in that case.

\textsuperscript{184} This problem arose only once, in Muskegon County v. Environmental Protection Org., No. C-5585 (Cir. Ct., filed Mar. 15, 1971). See Sax & Conner, supra note 3, at 1035 n.124.

\textsuperscript{185} See text accompanying notes 169-72 supra. The most appropriate legal tools, if any are needed, would be the doctrines of collateral estoppel and res judicata referred to in EPA § 5(3), Mich. Comp. Laws Ann. § 691.1205(3) (Supp. 1973).

\textsuperscript{186} Bise v. Detroit Edison Co.; McDonald v. Detroit Edison Co.; Oakwood
plaintiffs' class actions brought on behalf of residents and homeowners against major industrial companies. Such suits typically join claims for equitable relief under the EPA with a damage claim under nuisance law; they routinely include a demand for jury trial. Because of the damage claim, it is understandable that the plaintiffs allege a class action. In one case brought on behalf of all residents of a metropolitan area, the court dismissed charges against most defendants, finding plaintiffs' class unmanageably large. A non-EPA nuisance suit involving the same foundry which gave rise to WCHD v. Chrysler Corp. was brought on behalf of about 500 local residents; a trial resulted in a decision for the plaintiffs, who received damages. A third case, growing out of the same controversy which produced WCHD v. American Cement Corp., was settled in favor of plaintiffs. The others are still pending, and because they involve claims for jury trials in busy Wayne County, they are not likely to be concluded soon.


187. McDonald v. Detroit Edison Co., No. 212922, Decision of Jan. 10, 1973 (Cir. Ct., Bohn, J.). The court stated:

This case illustrates a purported class action (2,670,312 people of Wayne County) represented by 82 named plaintiffs, who are residents or property owners in Wayne County . . . . The (24) corporate defendants are . . . dispersed in different geographic locations of Wayne County . . . . The Courts in Michigan acknowledge the necessity for judicial manageability of a lawsuit which presents a multitude of factual and legal issues . . . [citations omitted]. The Court . . . made special reference to the inherent problems of joint or several liability, if any, of the defendants, individual damage claims and the burden of proof relative to each, and the practical problems of trial and administration . . . the instant case would cause a similar number of managerial difficulties . . . which further hinder the claims of the plaintiff that the instant case can appropriately be pursued as a class action.

The plaintiff subsequently cited the Edward Levy Co. as a single defendant, and the case may go forward in this posture.

Plaintiff in the McDonald case sought the appointment of a master to get around the manageability problem. Section 3(2) of the EPA explicitly authorizes appointment of a master, but, according to the plaintiff's attorney, Judge Bohn refused such an appointment, saying there was no provision for it in the court rules. Mich. Comp. Laws Ann. § 691.1203(2) (Supp. 1973).

188. 43 Mich. App. 235, 203 N.W.2d 912 (1972), discussed in Sax & Conner, supra note 3, at 1010-12, 1070-72.


192. Of the cases cited in note 186 supra, Bise had been pending for 29 months, Oakwood Home Owners for 15 months and Szyszkie wicz for 13 months, as of October 1, 1973. The Bise case came to trial in January 1974. In Feb. 1974 the case was settled under a commitment letter by the defendant as "consideration for a contract."
Injunctions and Security Bonds

One important question arising under laws such as the EPA is the extent to which dissatisfied citizen groups may use the judicial process to delay important projects for long periods of time. To understand the delaying impact of pending legal proceedings, we must determine more than the total number of cases filed; we also must study those in which injunctions are sought and finally granted. Of all injunctions so issued, we must then determine the length of time between issuance of the injunction and resolution of the case. Moreover, we must examine the identity of both plaintiffs and defendants; for while zealous environmental groups are often accused of imposing excessive costs upon private businesses, a good number of EPA cases have involved public-agency plaintiffs and/or public-agency defendants rather than private plaintiffs and defendants. Finally, to determine whether preliminary injunctions in environmental cases cause unwarranted delay for projects which ought to go forward as planned, we must note which party ultimately prevails.

Before turning to EPA case statistics, we note that some delay is an inevitable concomitant of the right to have a day in court. For many years industries subject to administrative regulation have fought for, obtained, and assiduously utilized this right to challenge administrative orders issued against them and have delayed substantially the imposition of restrictions upon their activities.\(^{193}\) The costs of delay in enforcing public regulation (as in the case of air or water pollution or zoning controls) do not appear in business balance sheets, but rather are diffused over a broad sector of the public. Therefore such costs tend not to be so readily quantified as are the dollars-and-cents delays imposed upon private industry. They are nonetheless real. While the EPA does lead to some delay, with attendant costs, it is no different in this regard from many other laws which provide opportunity to delay as a byproduct of the right to judicial review. The novel effect of the EPA is to shift the economic burden of the right to a day in court onto proponents of activities potentially harmful to the environment, thus demonstrating and giving meaning to the citizen's right to be protected against destruction of his state's natural resources.

In analyzing experience with injunctive relief during the pend-
ency of EPA cases, we note that no preliminary injunctions have even been sought in many of the EPA cases. Preliminary injunctions were granted in 20 cases and were denied in five others. Of the 20 cases in which injunctions were granted, six are still pending.

Of the 14 completed cases involving injunctions, the mean time from initiation to completion was nine months; the median time was 6½ months. Nine of those 14 cases ultimately were won, in whole or in part, by the plaintiffs and of the four cases that lasted the longest in time, plaintiffs won three.

It is interesting to look specifically at those four cases for such protracted cases are of greatest concern. The longest case, *Wilcox v. Board of County Road Commissioners*, involved a claim that a proposed highway widening would unnecessarily involve the cutting

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194. In about 30 cases preliminary relief never became an issue; in another 15, the issue has not yet arisen. Our figures include only those cases in which a preliminary injunction was issued, or where a temporary restraining order was extended for a significant period so that it had the practical effect of a preliminary injunction, and do not include the temporary restraining orders which are routinely issued *ex parte* for very brief periods.

195. Preliminary injunctions were granted in *Braun v. Detroit Edison Co.; Brotz v. Detroit Edison Co.; Gang of Lakes Environmental Org. v. Gee; Irish v. Green; Irish v. Property Dev. Group, Inc.; Kelley v. Continental Metallurgical Products; Kelley v. Michigan Standard Alloys, Inc.; Kelley v. Tannehill & DeYoung, Inc.; Lakeland Property Owners Ass'n v. Township of Northfield; MUCC v. Anthony; Olk v. Desai; Ray v. Raynowsky; Tanton v. DNR; Taxpayers & Citizens in the Public Interest v. State; Three Lakes Ass'n v. Fisher; Trout Unlimited, Inc. v. Milliken; WCHD v. City of Dearborn; Williamson v. Lenawee County Road Comm'n*. In two cases injunctive relief or a stay was denied by the circuit court but allowed by the court of appeals: *Anderson v. Michigan State Highway Comm'n; Wilcox v. Board of County Road Comm'rs*. Injunctive relief was sought and denied in *Alvin E. Bertrand, Inc. v. City of Detroit; Blunt v. Apfel; Reame v. Herrick; Surowitz v. City of Detroit; and Szawala v. American Cement Corp.* See Appendix B infra for full citation data regarding these cases.

196. The cases and the months they have been in litigation are: *Anderson v. Michigan State Highway Comm'n* (three months; a collateral case begun earlier is noted at text accompanying notes 163-67 supra); *Brotz v. Detroit Edison Co.* (17 months; this condemnation case has been through the eminent domain proceeding in probate court and is now in the circuit court); *Gang of Lakes Environmental Org. v. Gee* (21 months); *Taxpayers & Citizens in the Public Interest v. State* (ten months); *WCHD v. City of Dearborn* (19 months); *Williamson v. Lenawee County Rd. Comm'n* (three months). *Ray v. Raynowsky*, which we list as completed, was on appeal on a non-EPA issue. Subsequent to the compilation of our statistical data, the Michigan Supreme Court revived the EPA issue. See Appendix B infra for full citation data.


198. No. 7-237, Decision of Mar. 3, 1972 (Cir. Ct., Ryan, J.); see notes 42 and 72 supra; see also Sax & Conner, supra note 3, at 1045.
of several hundred old trees lining the road. The denial of a preliminary injunction by the circuit court was overruled by the court of appeals nine months after the complaint was filed. At this point the parties first undertook serious negotiations, which lasted 14 months. The eventual settlement satisfied the plaintiff and saved many threatened trees.

The second of these four most protracted cases, *Lakeland Property Owners Association v. Township of Northfield*, also involved a public defendant, and again plaintiff prevailed. This case was tried fully on the merits in the ninth month after the complaint was filed, but the parties waited almost an equal time following the trial for issuance of the court's decision.

*Mic higan United Conservation Clubs v. Anthony* lasted a total of 16 months, was tried fully on the merits and also was won by the plaintiff. Interestingly, although plaintiff was an environmental organization, the case was in effect a private suit brought on behalf of the State of Michigan to enforce state conservation laws in opposition to the federal treaty claims of Indians. Although the EPA litigation is terminated, the United States has reopened the matter by filing a federal suit against the State of Michigan, claiming that the Indians are protected by treaty rights (a question which had been litigated and decided in favor of the state in the EPA case, in which the federal government did not participate).

The last of these cases, *B raun v. Detroit Edison Co.*, involved Detroit Edison's exercise of the eminent domain power for a power line right-of-way. Although we have calculated this 23-month affair as the longest injunction case, the last six months actually represent the period during which the case formally was on appeal. That appeal finally was dismissed for lack of prosecution. This is the only long-enduring case ultimately won by a defendant (Detroit Edison), and the only one involving an industrial defendant.

The preceding observations should shed some new light on the rather common view that environmental cases almost always involve injunctions, are inevitably protracted, are routinely brought by zealous citizens against industries, and are frequently frivolous. A few addi-


202. No. 5552, Decision of Aug. 24, 1972 (Cir. Ct., Conlin, J.); see note 65 and accompanying text supra.
tional statistics might bring these concerns into further perspective. Of all the cases in which injunctions were granted, nearly one-third involved public agencies as plaintiffs, rather than private citizens or groups.\textsuperscript{203} Approximately one-fourth concern public projects (such as highway widening or municipal incineration) and thus were not directed at business enterprises.\textsuperscript{204} Others involved both private and public defendants, concerning such subjects as residential developments in which the plaintiff claimed that a state agency wrongfully had granted a permit.\textsuperscript{205}

Of the completed cases in which injunctions issued, about two-thirds were ultimately won by the plaintiffs, and thus were cases in which the preliminary restraint on the defendant was formally vindicated by the outcome. Of the five cases won by defendants,\textsuperscript{206} none could, in our opinion, in any sense be termed frivolous. Of those five, \textit{Braun v. Detroit Edison Co.} already has been discussed,\textsuperscript{207} and a second\textsuperscript{208} was resolved in less than a month—hardly a matter of concern in regard to delay. The other three were all tried fully on the merits, and their seriousness is a matter of extensive record. One of these, \textit{Tanton v. DNR},\textsuperscript{209} was a case of great significance, plainly deserving a full court hearing. The second\textsuperscript{210} was a land development case rather like \textit{Tanton}, and the third\textsuperscript{211} involved a challenge to controversial land drainage and channelization practices in the state. While observers may differ in their estimate of the merits of plaintiffs’ position in each of the three cases, there is no disputing the importance

\textsuperscript{203} Kelley v. Continental Metallurgical Products; Kelley v. Michigan Standard Alloys, Inc.; Kelley v. Tannehill & DeYoung, Inc.; Lakeland Property Owners Ass’n (and the Township of Hamburg) v. Township of Northfield; MUCC (and the State of Michigan, amicus curiae supporting the plaintiff) v. Anthony; WCHD v. City of Dearborn. See Appendix B infra for full citation data regarding these cases.

\textsuperscript{204} Gang of Lakes Environmental Org. v. Gee; Lakeland Property Owners Ass’n v. Township of Northfield; Ray v. Raynowsky; WCHD v. City of Dearborn; Wilcox v. Board of County Road Comm’rs. See Appendix B infra for full citation data.

\textsuperscript{205} E.g., Tanton v. DNR, No. 90-3, Decision of Dec. 30, 1972 (Cir. Ct., Charles Brown, J.); Trout Unlimited, Inc. v. Milliken, No. 13243-C (Cir. Ct., filed June 18, 1971).


\textsuperscript{207} See text accompanying note 202 supra.

\textsuperscript{208} Olk v. Desai, No. C-16-187 (Cir. Ct., filed Apr. 10, 1973).

\textsuperscript{209} No. 90-3, Decision of Dec. 30, 1972 (Cir. Ct., Charles Brown, J.).


\textsuperscript{211} Ray v. Raynowsky, No. 2-760, Decision of July 15, 1972 (Cir. Ct., Wickens, J.); see Sax & Conner, \textit{supra} note 3, at 1045.
of the matters at issue or that those matters involve controversies of the sort the legislature anticipated when it enacted the EPA.

We note that the question of injunctions and alleged unwarranted delay of meritorious projects has given rise to the only significant effort to amend the EPA. The amendment sought to make it more difficult to obtain a preliminary injunction by making more rigorous the security requirement when an injunction is granted.\textsuperscript{212} On June 27, 1973, a bill was introduced in the Michigan State Senate proposing an addition to section 2(a) of the EPA to require posting of "a surety or cash bond approved and in an amount fixed by the Court" as a condition precedent to injunction of continued construction in any case where any required permit has been issued and "construction of a building or other structure" commenced.\textsuperscript{213} The bond would be conditioned, "in the event that as determined by the final judgement the party applying therefor was not entitled to the issuance of the injunction," upon payment of damages resulting from the increase in construction costs due to the injunction.\textsuperscript{214} This requirement that a security bond be posted upon issuance of preliminary injunctive relief would be more rigorous than either the general provision in Michigan law\textsuperscript{215} or the federal law.\textsuperscript{216}

In November 1973 the bill came before the Senate Judiciary Committee for consideration. A number of environmental groups testified in opposition to the proposed bill. The Department of Natural Resources, in its analysis of the bill, recommended against enactment, stating:\textsuperscript{217}

\begin{quote}
This amendment will virtually emasculate this most important act. It imposes a threat of what amounts to prohibitive, punitive action against a citizen plaintiff whose injunction is ultimately denied. Most citizens and citizen groups have modest financial means and would not be able to meet the cash or surety bond that could be required. This is apparently in addition to the basic $500 maximum that the present statute requires. Citizens must not be denied the
\end{quote}

\textsuperscript{212} The only judicial decision on the security provision of which we are aware is the dictum in \textit{Blunt v. Apfel}, No. 849, Decision of June 10, 1971 (Cir. Ct., William Brown, J.), discussed in Sax & Conner, \textit{supra} note 3, at 1079. Despite the explicit provision in section 2(a) of the EPA [\textsc{MicH. CoMp. LAws ANN.} § 691.1202(a) (Supp. 1973)] limiting security requirements to $500, some citizens and even some lawyers seem apprehensive that a large bond will have to be posted if they obtain an injunction.

\textsuperscript{213} \textit{Mich. S.B. 751} (1973), introduced by Senator Bouwsma.

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{See Mich. CT. (GEN.) R. 718.3.}

\textsuperscript{216} See cases cited in Sax & Conner, \textit{supra} note 3, at 1076 n.300.

\textsuperscript{217} Michigan Dep't of Natural Resources, Analysis of Senate Bill No. 751, Aug. 1, 1973.
At the present time it appears that the bill will not be reported out of committee.

IX

DEVELOPMENTS IN THE SUBSTANTIVE INTERPRETATION OF THE EPA

As we have noted at several points, the EPA has received relatively little legal interpretation during its first three years. Except for some decisions on the meaning of the Act's intervention provisions, the court of appeals generally has spoken only on the maintenance of preliminary injunctions or stays pending appeal, and the Michigan Supreme Court has yet to decide its first EPA case.

Nonetheless, a number of interesting legal questions are arising, which doubtless will receive appellate consideration in the next few years. These issues include the extent to which the Act will be viewed as creating new substantive environmental rights, particularly

218. See text accompanying notes 156-57, supra. See also the discussion of Beam v. Township of Summit, No. 13102, Decision of July 27, 1972 (Ct. App., Fitzgerald, Quinn & Danhof, JJ.), at note 159 and accompanying text supra.


220. However, on December 27, 1973, the Michigan Supreme Court granted leave to appeal in Ray v. Raynowsky, No. 2-760, Decision of July 15, 1972 (Cir. Ct., Wickers, J.), discussed at text accompanying notes 121-30 supra. The supreme court's order stated: "This Court invites the parties' detailed attention to the following legal and factual issues: Under Section 3(1) of [the EPA], has Count I of the controversy been correctly decided?" Ray v. Raynowsky, No. 55248, Decision of Dec. 27, 1973 (Sup. Ct.). The court of appeals decision, affirming the trial court on the Drain Code issues, is No. 15090, July 25, 1973 (Danhof, McGregor & Miles, JJ.). The Minnesota Environmental Rights Act, modeled after the Michigan EPA, has been the subject of an extensive decision by that state's supreme court in County of Freeborn v. Bryson, — Minn. —, 210 N.W.2d 290 (1973), a case involving landowners' objections to a proposed condemnation for highway construction.

221. Among the important unresolved questions is the extent to which the EPA creates substantive law to be applied in administrative proceedings. See EPA § 5(2); Mich. Comp. Laws Ann. § 691.1205(2) (Supp. 1973); Sax & Conner, supra note 3, at 1055. Surprisingly, this question has rarely been raised before administrative tribunals. We are informed that an EPA claim was made in a case before a Hearing Examiner for the Natural Resources Commission, but was not pursued. In re Appeal From Denial of Application by Michigan Oil Co. for Permit To Drill State-Corwith # 1-22, Hearing Officer's Decision of Oct. 11, 1973 (Mich. Natural Resources Comm'n), Pigeon River Country Ass'n, Intervenor.
larly in eminent domain cases, in which the EPA will be applied to extend the "necessity" doctrine. Other important questions to come before the courts will be whether and to what extent the EPA will be a vehicle allowing the judiciary to break loose from traditional notions concerning aesthetic regulation and the public trust doctrine.

The most important legal question, of course, is the EPA's constitutionality. The original holding of unconstitutionality in the Roberts case has been reversed on the ground that it was unnecessary to the decision in the case. In Farmer v. Construction Aggregates, an EPA case in the federal court, the judge similarly declined to decide the constitutional issue, holding that a federal court ought not be "in the position of ruling on the constitutionality of a state law which has not yet been fully interpreted by the courts of Michigan."

Three other decisions (aside from those discussed in our previous article and those which implicitly assume the constitutionality of the Act) have spoken specifically to the question. In WCHD v. City of Dearborn, the court found that no question of unconstitutional vagueness arose where the plaintiff relied upon the Health Department's detailed air pollution regulations as the basis for an EPA suit. In Irish v. Green, a land development case, the court made the following finding of constitutionality:

That the Court finds the statute is constitutional when interpreted as . . . follows:

(a) That "likely" means a reasonably proximate relationship to the public health, safety and welfare.

222. See note 58 and text accompanying notes 58-61 and 73-78 supra.
223. See notes 71-72 and text accompanying notes 64-72 supra.
224. See notes 134-42 and accompanying text supra.
225. Discussed in Sax & Conner, supra note 3, at 1064 et seq.
228. Id. at 5. See note 168 supra.
229. No. 203110, Decision of May 18, 1972 (Cir. Ct., Moynihan, J.). Judge Moynihan's opinion says nothing about how the court would respond if the plaintiff sought to use the EPA to enforce controls beyond those adopted by an administrative agency. That was precisely the situation in the Lakeland case, where the judge held the EPA constitutional. Lakeland Property Owners Ass'n v. Township of Northfield, No. 1453, Decision of Feb. 29, 1972 (Cir. Ct., Mahinske, J.), 3 ERC at 1893. See Sax & Conner, supra note 3, at 1041, 1068-69; see also Kelley v. National Gypsum Co., No. 1918, Consent Judgment of Sept. 25, 1973 (Cir. Ct., Glennie, J.), discussed at text accompanying notes 109-14 supra.
(b) That the conditions that the Court may impose must likewise bear the relationship mentioned above.\(^{230}\)

As this Article went to press the first detailed decision sustaining the constitutionality of the Act was issued in *Tri-Cities Environmental Action Council v. A. Reenders Sons, Inc.*\(^{230a}\)

*Anderson v. Michigan State Highway Commission,*\(^{231}\) now before the court of appeals, could lead to an important interpretive ruling. Plaintiff sought an injunction of a proposed alteration of an intersection at the entrance to Michigan State University. His claim was that defendants were preparing to remove "mature trees and numerous shrubs and pave over parkland and open space . . . thereby denuding the area of practically all vegetation and utterly destroying one of the most scenic areas of East Lansing."\(^{232}\) According to the plaintiff's application for leave to appeal, the circuit court judge noted that the Act does not provide for degrees of pollution, impairment or destruction and that the Act "was in need of and dictates reasonable interpretation." He stated that the legislature must have had in mind the terms "substantial and significant" in connection with the degrees of pollution, impairment or destruction and therefore he interpreted the Act as containing such terms . . . . He then determined that plaintiff had established a *prima facie* case under the Act, that implementation of the modified plan by the defendants would substantially destroy natural resources at the disputed location . . . . In speaking of the provision of the Act which permits defendants to prove as an affirmative defense that no feasible or prudent alternative exists as to the proposed plan, he characterized plaintiff's expert witness Jackman and the alternative plan he proposed as being "brilliant" but stated that "courts cannot interfere with the decisions of other departments."\(^{233}\)

The *Anderson* case may lead the way to some authoritative appellate rulings on the scope of the EPA on two important issues: the question of substantiality, significant because many EPA cases deal with local problems of only modest size,\(^{234}\) and a situation sometimes

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\(^{230a}\) *Tri-Cities Environmental Action Council v. A. Reenders Sons, Inc.*, No. 2737, Decision of May 6, 1974 (Cir. Ct., Miles, J.). This was the last opinion written by Judge Miles prior to his appointment as U.S. District Judge for the Western District of Michigan. See also note 48 *supra*.

\(^{231}\) No. 15609-C, Decision of Sept. 4, 1973 (Cir. Ct.).


\(^{234}\) *E.g.*, tree-cutting for road-widening purposes. See *Wilcox v. Board of County
called the nibbling phenomenon, whereby major environmental damage develops in small increments.\textsuperscript{235}

CONCLUSION

Just prior to publishing our first article on the EPA, we sent a questionnaire to all plaintiffs' and defendants' attorneys.\textsuperscript{236} We found the results sufficiently interesting to justify repetition of this effort. The questionnaire we sent was not designed to be the instrument of a scientific opinion survey, but rather to obtain specific information about the costs of EPA litigation and to elicit comments about judicial handling of EPA cases.\textsuperscript{237}

There were few surprises on the economic questions. As we discovered previously, cost is very positively correlated with the decision to go to trial. If a trial ensues, a plaintiff must anticipate expenses averaging around $10,000,\textsuperscript{238} but if the case can be settled without a trial, costs average just under $2,000. Notably, nearly half of the cases settled without a trial cost less than $1,000.\textsuperscript{239} Expert witnesses and consultants absorb about 30 percent of the total cost of a case being tried (about $3,000); travel, transcripts, and other out-of-pocket expenses amount to another $1,500 or $2,000 and the balance (somewhat over $5,000) must be allocated for attorneys' fees.\textsuperscript{240}

On the question of expert witnesses, not a single corporate or

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\textsuperscript{235} Sax & Conner, supra note 3, at 1045. Wilcox has now been settled, a substantial number of trees having been saved. See also Williamson v. Lenawee County Road Comm'n, No. 2216 (Cir. Ct., filed June 26, 1973). The substantiality issue also arose in Tanton v. DNR, No. 90-3, Decision of Dec. 30, 1972 (Cir. Ct., Charles Brown, J.), at 35, where the court found that plaintiff had failed to prove damage sufficient to constitute a violation of the act despite the testimony of Dr. Howard Tanner that:

\textquote{I can't honestly say that the loss of five or six miles of stream of this size is a major environmental impact... It is the assemblage of these small nibbles... You have to take them in a broad perspective and then you begin to get the significant impact.}


\textsuperscript{237} As we promised anonymity, the following information is not identified as to respondent or case.

\textsuperscript{238} Each figure presented is the mean of the range of cost indicated by the questionnaire results.

\textsuperscript{239} These include a number in which very favorable settlements were obtained for the plaintiffs.

\textsuperscript{240} Of course, there are exceptional cases. We were surprised to learn that two plaintiffs went through full trials at reported costs of less than $1,000 (both plaintiffs lost). We are told that attorneys frequently charge less than their usual fees in EPA cases. Only one case ran over $25,000 for the plaintiff. Two cases—still incomplete—have already cost between $10,000 and $25,000.
public agency defendant reported difficulty in obtaining needed experts, but more than half the plaintiffs indicated that availability was a problem. Indeed, a number of plaintiffs commented emphatically on this point, typically to the following effect: “Just try to find a respected expert willing to testify against the utility companies.”

We were very much interested in responses to the question: “Was the judge able to understand and handle the environmental, scientific or technical issues?” Plaintiffs answered “yes” by a margin of 2 to 1, and defendants astonishingly answered “yes” by a margin of 12 to 1. Only ten percent of all respondents thought judges were less able to handle environmental cases than other types of cases involving technical issues. Although we have not surveyed judicial opinion, our impression is that the judges themselves are unduly cautious about their ability to undertake new tasks and would express less confidence in their own ability to handle environmental cases than did the lawyers who practice before them.

We also found our results surprising on the question of lawyers’ views of judges’ attitudes toward the EPA. An equal number of responses from plaintiffs’ lawyers found judges either neutral or sympathetic to EPA goals, outnumbering descriptions of judges as hostile by 3 to 1. Not a single defendant’s lawyer described a judge as hostile to the goals of the EPA, but answers of “neutral” outnumbered “sympathetic” by 2 to 1. We believe that these answers tell us more about the attitudes of the lawyers than of the judges; that plaintiffs’ lawyers may have more intense personal commitments to EPA cases than do defendants’ lawyers and may tend to respond more passionately. In all but one instance, plaintiffs’ lawyers who called the judge hostile had lost their cases; no such “failure/hostility” relationship was evident in defense lawyer responses. In any event, responses from lawyers who have actually litigated EPA cases do not support the doubts about judicial competence routinely expressed by opponents of EPA-type legislation.

Having now completed two extensive articles about the functioning of the EPA, we remain fascinated by the rich research opportunities still available, which we have barely begun to explore. For example, we know little about what actually happens following the entry of a consent order; an exploration of the WCHD cases in this regard would be productive. We have not probed all the costs (other than litigation expenses) to industry arising from settlements or orders issued in EPA cases, and we have little evidence of EPA’s effects on what we previously called “politically volatile” controversies.241

241. In at least two instances, EPA has seemed to have less effect on such controversies than we earlier thought. See Sax & Conner, supra note 3, at 1014, 1031.
There also remains much useful work to be done in exploring the behavioral impact of the law on regulatory agencies. We hope this Article, and its predecessor, will help to stimulate an interest in pursuing some of these intriguing questions.

APPENDIX A

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

MICH. COMP. LAWS ANN. 691.1201-.1207 (Supp. 1973)

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may 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.
This act is ordered to take immediate effect.

APPENDIX B

TITLE, DATE, AND PLACE OF CASES FILED

<table>
<thead>
<tr>
<th>TITLE OF CASE</th>
<th>FILE NO.</th>
<th>DATE FILED</th>
<th>COUNTY</th>
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<tbody>
<tr>
<td>1. Alvin E. Bertrand, Inc. v. City of Detroit</td>
<td>191622</td>
<td>10/12/71</td>
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<tr>
<td>3. Beach v. Detroit Edison Co.</td>
<td>5993</td>
<td>9/9/71</td>
<td>Washtenaw</td>
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<tr>
<td>4. Beaman v. Township of Summit</td>
<td>C-11-212</td>
<td>9/10/71</td>
<td>Jackson</td>
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<tr>
<td>5. Bise v. Detroit Edison Co.</td>
<td>181665-S</td>
<td>5/24/71</td>
<td>Wayne</td>
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</tbody>
</table>

* Case not discussed in previous article, Sax & Conner, 70 Mich. L. Rev. 1003 (1972).
4. Consolidated with Ware Real Estate Corp. v. Forest Home Township, No. 880, Decision of June 22, 1973 (Cir. Ct., Antrim County); see also Unger v. Forest Home Township, No. 911 (Cir. Ct., Antrim County); counterclaim, Apfel v. Cook, No. 926 (Cir. Ct., Antrim County, filed Aug. 6, 1971) (suit by developers against EPA suit plaintiffs for damages). Collateral case is Three Lakes Ass'n v. Securities Bureau, No. 14832C (Cir. Ct., Ingham County, filed Oct. 2, 1972) (to prevent grant
<table>
<thead>
<tr>
<th>Title of Case</th>
<th>File No.</th>
<th>Date Filed</th>
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<tbody>
<tr>
<td>13. Davis v. Dep't of Natural Resources (DNR)</td>
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<td>Otsego</td>
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<tr>
<td>14. Dep't of Natural Resources (DNR) v. Kiffer</td>
<td>3523</td>
<td>9/26/73*</td>
<td>Grand Traverse</td>
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<td>15. Farmer v. Construction Aggregates Corp.</td>
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<tr>
<td>16. Gang of Lakes Environmental Org. v. Gee</td>
<td>7-562</td>
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<tr>
<td>17. Godfrey v. Dep't of Natural Resources (DNR)</td>
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<tr>
<td>18. Hadley Township v. Dep't of Natural Resources (DNR)</td>
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<tr>
<td>20. Irish v. Green</td>
<td>14306-C</td>
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<tr>
<td>22. Kelley v. Amoco Production Co.</td>
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<td>8/17/73*</td>
<td>Grand Traverse</td>
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<tr>
<td>27. Koch v. Dep't of Natural Resources (DNR)</td>
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<tr>
<td>28. Lakeland Property Owners Ass'n 1453 v. Township of Northfield</td>
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<td>29. Lawrence v. Yerington</td>
<td>510</td>
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<td>Leelanau</td>
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</table>


5. Collateral case is In re Detroit Edison Co., No. 57775 (P. Ct., Washtenaw County, 1973) (condemnation proceedings). The condemnation case was also directly appealed to the Circuit Court for Washtenaw County, No. 6553, and dismissed following the settlement, May 3, 1973.


7. Collateral case is Storrer v. Village of Beulah, No. 817 (Cir. Ct., Benzie, Missaukee & Wexford Counties, filed June 20, 1973). In both cases summary judgment was granted for the defendant on res judicata grounds.


9. Change of venue to Emmet County granted, No. 162-3.


<table>
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<th>Title of Case</th>
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<tr>
<td>32. McCloud v. City of Lansing</td>
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<tr>
<td>33. McDonald v. Detroit Edison Co.</td>
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<td>7/21/72*</td>
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<td>34. McPhail v. Army Corps of Engineers</td>
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<tr>
<td>35. Marble Chain of Lakes v. Water Resources Comm'n (WRC)</td>
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<tr>
<td>39. Michigan United Conservation Clubs (MUCC) v. Anthony</td>
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<tr>
<td>40. Muha v. Union Lakes Associates</td>
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<tr>
<td>41. Muskegon County v. Environmental Protection Org.</td>
<td>C-5585</td>
<td>3/15/71</td>
<td>Muskegon</td>
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<tr>
<td>42. Oakwood Home Owners Ass'n, Inc. v. Ford Motor Co.</td>
<td>213758-S</td>
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<tr>
<td>43. Olk v. Desai</td>
<td>C-16-187</td>
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<td>44. Owens v. Water Resources Comm'n (WRC)</td>
<td>5708</td>
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<tr>
<td>45. Payant v. Dep't of Natural Resources (DNR)</td>
<td>1100</td>
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<tr>
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<td>47. Reaume v. Herrick</td>
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<tr>
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<td>49. Sarabyn v. City of Dowagiac</td>
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<td>50. Superior Public Rights, Inc. v. Dept of Natural Resources (DNR)</td>
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<tr>
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<td>52. Szawala v. American Cement Corp.</td>
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<tr>
<td>53. Szyszkiewicz v. Swedish Crucible Steel Co.</td>
<td>72-218695-CE</td>
<td>9/29/72*</td>
<td>Wayne</td>
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</table>

13. This case arises out of the same conduct involved in WCHD v. Edward Levy Co., case no. 66.
15. Change of venue to Midland County granted, No. 4131 (Cir. Ct., Midland County, filed Jan. 17, 1973). An earlier suit involving the same parties, was voluntarily dismissed without prejudice (costs to defendant) on Mar. 16, 1973.
16. Leave to appeal denied, Nos. 13138, 13139. Decision of Jan. 19, 1972 (Cir. Ct., Wayne County, answer filed Feb. 6, 1973), is a related case involving the same parties, was voluntarily dismissed without prejudice (costs to defendant) on Mar. 16, 1973.
<table>
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<tr>
<th>Title of Case</th>
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<td>13859-C</td>
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<td>55. Taxpayers &amp; Citizens in the Public Interest v. State</td>
<td>14994-C</td>
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<tr>
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<tr>
<td>57. Tri-Cities Environmental Action Council v. A. Reenders Sons, Inc.</td>
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<tr>
<td>58. Trout Unlimited, Inc. v. Milliken</td>
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<tr>
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<td>60. Washtenaw County Health Dep't v. Hoover Ball &amp; Bearing Co.</td>
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<tr>
<td>61. Water Resources Comm'n (WRC) v. Chippewa County</td>
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<td>62. Wayne County Health Dep't (WCHD) v. American Cement Corp.</td>
<td>194927-R</td>
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<td>63. Wayne County Health Dep't (WCHD) v. Chrysler Corp.</td>
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<td>64. Wayne County Health Dep't (WCHD) v. City of Dearborn</td>
<td>203110-R</td>
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<td>65. Wayne County Health Dep't (WCHD) v. Detroit Edison Co.</td>
<td>248582</td>
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<td>66. Wayne County Health Dep't (WCHD) v. Edward Levy Co.</td>
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<td>67. Wayne County Health Dep't (WCHD) v. Ford Motor Co.</td>
<td>211654-R</td>
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<td>68. Wayne County Health Dep't (WCHD) v. International Salt Co.</td>
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<td>70. Wayne County Health Dep't (WCHD) v. National Steel Corp.</td>
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<td>71. Wayne County Health Dep't (WCHD) v. Olsonite</td>
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<td>72. West Michigan Environmental Action Council, Inc. (WMEAC) v. Betz Foundry, Inc.</td>
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<tr>
<td>73. Wilcox v. Board of Road Comm'mrs27</td>
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<tr>
<td>74. Williamson v. Lenawee County Road Comm'n</td>
<td>2216</td>
<td>6/26/73*</td>
<td>Lenawee</td>
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</table>

20. Change of venue to Charlevoix County granted, No. 90-3. The defendant Sheldon filed a counterclaim for damages on Feb. 24, 1972, which has since been dismissed.
21. Change of venue to Grand Traverse County granted, No. 3137. An earlier suit involving the same parties, filed in the circuit court for Grand Traverse County, was voluntarily dismissed by plaintiffs.
24. Szwalba v. American Cement Co., case no. 52, arises out of the same controversy.
APPENDIX C

PUBLIC AGENCIES AND ENVIRONMENTAL ORGANIZATIONS
INVOLVED IN CASES Filed UNDER THE EPA

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<th>AGENCY OR ORGANIZATION</th>
<th>NUMBER OF CASES</th>
<th>PLAINTIFF OR INTERVENOR</th>
<th>DEFENDANT</th>
<th>PLAINTIFF &amp; AMICUS CURIAE</th>
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* Including only permanent organizations with more than local concerns.

APPENDIX D

IDENTITY OF PARTIES

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

<table>
<thead>
<tr>
<th>PARTY</th>
<th>NAMES OF CASES</th>
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<tr>
<td><strong>A. PUBLIC AGENCIES</strong></td>
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</table>
| Air Pollution Control Comm’n | Kelly v. Michigan Standard Alloys, Inc. (P) *
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| Agriculture, Dep’t of | Gang of Lakes Environmental Org. v. Gee (D) *
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|                                | Kelley v. Continental Metallurgical Products (P) *
|                                | Kelley v. Michigan Standard Alloys, Inc. (P) *
|                                | Kelley v. National Gypsum Co. (P) *
|                                | Kelley v. Tannehill & DeYoung, Inc. (P) *
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|                                | Michigan Consol. Gas Co. & Consumers Power Co. (I) *
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|                                | Irish v. Green (D) *
|                                | Kelley v. Tannehill & DeYoung, Inc. (P) *
|                                | Leelanau County Bd. of Comm’rs v. DNR (P) *
|                                | Muskegon County v. Environmental Protection Org. (D) *
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<td>Party Names of Cases</td>
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<tr>
<td>Ray v. Raynowsky (D)</td>
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<td>Reume v. Herrick (D)</td>
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<td>Washtenaw County Health Dept v. Barton (P)</td>
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<td>WRC v. Chippewa County (D)</td>
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<td>Alvin E. Bertrand, Inc. v. City of Detroit (D)</td>
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<td>McDonald v. Detroit Edison Co. (D)</td>
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<td>Reume v. Herrick (D)</td>
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<td>Surowitz v. City of Detroit (D)</td>
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<tr>
<td>WCHD v. American Cement Corp. (I &amp; P)</td>
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<td>Drain Office</td>
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<td>Gang of Lakes Environmental Org. v. Gee (D)</td>
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<tr>
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<td>Muskegon County v. Environmental Protec. Org. (D)</td>
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<tr>
<td>Traverse City) (D)</td>
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<tr>
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<tr>
<td>Irish v. Green (D)</td>
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<td>Davis v. DNR (D)</td>
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<td>DNR v. Kiffer (P)</td>
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<td>Godfrey v. DNR (D)</td>
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<td>Hadley Township v. DNR (D)</td>
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<td>Irish v. Property Dev. Corp., Inc. (I &amp; P)</td>
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<tr>
<td>Koch v. DNR (D)</td>
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<td>Marble Chain of Lakes v. WRC (D)</td>
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<tr>
<td>Consumers Power Co. (I)</td>
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<td>Superior Public Rights, Inc. v. DNR (D)</td>
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<td>Tanton v. DNR (D)</td>
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<td>Taxpayers &amp; Citizens v. State (D)</td>
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<td>Trout Unlimited, Inc. v. Milliken (D)</td>
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<td>Highway Comm'n (D)</td>
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<td>Irish v. Green (D)</td>
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<tr>
<td>Taxpayers &amp; Citizens v. State (D)</td>
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<tr>
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**APPENDIX E**

**TYPES OF CASES FILED UNDER THE EPA, BY SUBJECT MATTER**

<table>
<thead>
<tr>
<th>TYPE OF CASE</th>
<th>NO. OF CASES</th>
<th>NAMES OF CASES*</th>
<th>CLASS ACTION (P) or (D)</th>
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<tbody>
<tr>
<td>Pesticides</td>
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<td>Municipal Spray Program</td>
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<td>Surowitz v. City of Detroit (P)</td>
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<tr>
<td>Atomic Energy</td>
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<td>Land Use</td>
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<tr>
<td>Land Drainage</td>
<td>3</td>
<td>Gang of Lakes Environmental Org. v. Gee; McPhail v. Army Corps of Engineers (P); Ray v. Raynowsky (P)</td>
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(P = Plaintiff; D = Defendant; A = Amicus Curiae; I = Intervenor)
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<th>NO. OF CASES</th>
<th>NAME OF CASES</th>
<th>CLASS ACTION (P) or (D)</th>
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<tbody>
<tr>
<td>Pipeline Location</td>
<td>1</td>
<td>Michigan Consol. Gas Co. &amp; Consumers Power Co. (P)</td>
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<tr>
<td>Public Trust</td>
<td>2</td>
<td>Superior Public Rights, Inc. v. DNR (P); Taxpayers &amp; Citizens v. State (P)</td>
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<tr>
<td>Mining Operations</td>
<td>1</td>
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<td>Road Widening-Tree Cutting</td>
<td>4</td>
<td>Anderson v. State Highway Comm'n; Godfrey v. DNR; Wilcox v. Board of County Road Comm'n; Williamson v. Lenawee County Road Comm'n</td>
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<td>Park Management</td>
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<tr>
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<tr>
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<td>Oil and Gas Leasing</td>
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<tr>
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<tr>
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<td>MUCC v. Anthony (D)</td>
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* (P) or (D) indicates plaintiff or defendant class action.