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# Asking God to Solve Our Problems: Citizen Environmental Suit Legislation in the Western States

*Joseph DiMento\**

## I.

### INTRODUCTION

Citizen environmental rights take several forms and are addressed in law in a variety of ways. Oftentimes the words "environmental rights" are no more than the flowery preamble of legislation that fundamentally affects procedural change, not the substantive rights and remedies available to the private individual in environmental and natural resource controversies.

Citizen action in the courts has a somewhat narrower focus and is provided for in law through several vehicles. State constitutions may be the source of citizen rights to judicial review of environmentally controversial actions.<sup>1</sup> The judiciary may itself open state courts to private citizen action through interpretations of *specific* environmental statutes (such as the progeny of the National Environmental Policy Act (NEPA)).<sup>2</sup> Congress may provide for citizen suits in environmental law, as under the Clean Air Act.<sup>3</sup> The state courts may develop a liberal standing doctrine (sometimes interpreting, or ignoring, state administrative procedure acts). Or state common law actions (and the codification thereof) may be the basis for citizen involvement in environmental management.

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I wish to thank Mr. Donald Patterson, third year student, University of Michigan Law School, for his assistance in research on the history of the Michigan Environmental Protection Act.

1. See Mont. Const., Art. 11, § 3; Art. IX, § 1(1) and *Symposium—The Montana Constitution: Taking New Rights Seriously*, 39 MONT. L. REV. 221 (1978).

2. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1976 & Supp. III 1979). For a summary of Western state adoption of "little NEPAs" see *infra* note 38.

3. 42 U.S.C.A. §§ 7401-7642 (1977).

As well, state legislatures may specifically provide for citizen suits in environmental and land use law. These statutes allow the private citizen a wide continuum of degree of initiative. The most generous is the statutory scheme discussed in this article, modelled after both the Model Natural Resources and Environmental Protection Act<sup>4</sup> and the Michigan Environmental Protection Act.<sup>5</sup> Closely aligned with these statutes are laws authorizing citizen-initiated litigation upon a specified act or omission by government administrators or private parties. The New Jersey zoning law is an example.<sup>6</sup> The Colorado Recreation Land Preservation Act<sup>7</sup> and the California Coastal Act<sup>8</sup> fall midway on a continuum of citizen suit autonomy. These state statutes allow litigation in specified geographical regions: hence they are sometimes referred to as "critical area legislation." Less generous are those laws that allow litigation when there is a specific act or failure to act by government in circumscribed substantive regulatory areas. An example is the Mississippi Air and Water Pollution Control Act of 1966.<sup>9</sup> Finally, some statutes, such as those found in California land planning law, allow litigation in specified regions upon an act or an omission by government administrators.<sup>10</sup>

This paper focuses on state environmental citizen suit legislation: laws that provide for citizen actions challenging a wide range of alleged violations of the environment (not specific to air or water laws or to any environmental law), wherein the plaintiff is seeking declaratory or equitable relief (not money damages),<sup>11</sup> for actions that need not impact the plaintiff directly. The analysis then does not necessarily apply to all citizen suit possibilities.

This "generic" citizen suit law received considerable attention in the late 1960's and early seventies. Yet, it was a legal innovation that was not well-received in the West. With recent changes in state-federal relations involving administration of natural re-

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4. J. SAX, DEFENDING THE ENVIRONMENT (1971).

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

6. N.J. STAT. ANN. § 40: 55 D-17, -4 (West Supp. 1982).

7. COLO. REV. STAT. § 25-13-101 to -114 (1973).

8. CAL. PUB. RES. CODE § 30801 (West Supp. 1977).

9. MISS. CODE ANN. § 49-17-1 to -43 (1972).

10. CAL. GOV'T. CODE § 65860b (West Supp. 1980). For a further discussion of this continuum see DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409 [hereinafter cited as DiMento, *Empirical Findings*].

11. Use of the citizen suit provision, however, does not preclude seeking, on other counts, damages for personal injury or injury to property. *See, e.g.*, *Birchwood Lakes Colony Club v. Medford Lakes*, 179 N.J. Super. 409, 432 A.2d 525 (1981).

sources in the western states, increased interest in exploiting the West's mineral resources to meet asserted energy needs, and some indications that federal courts will be less sympathetic to citizen environmental lawsuits,<sup>12</sup> it seems an appropriate occasion to reconsider the wisdom of passing wide-ranging state citizen suit legislation.

## II.

### A SHORT HISTORICAL EXCURSION

Thirteen years ago Professor Joseph L. Sax of the University of Michigan Law School was approached by a Michigan ad hoc environmental interest group<sup>13</sup> and asked to draft a bill that would provide greater influence for the fledgling environmental movement in that state. Sax's philosophy and theory of effective action to counter pollution differed in some ways from that of the environmental group.<sup>14</sup> While their objectives were similar, and while both were seeking ways to counter what they perceived as recent defeats for environmental interests in Michigan,<sup>15</sup> Sax wished to avoid creation of another governmental institution. In fact, the overriding principle in the popular statement of Sax's views on approaches to environmental protection, *Defending the Environment*,<sup>16</sup> and in much of Sax's thinking on environmental law and policy at the time, was that organization-based responses to environmental challenges were ineffective; they were doomed to the same failures that had created a need for legislative reform. It was for this reason that he wrote the Model Natural Resources and Environmental Protection Act (MNRA) upon which the Michigan bill was based.

Sax responded to the environmentalists' request with a draft of a short bill on citizen litigation that made its way remarkably unscathed through the Michigan legislature and became law on Oc-

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12. See *infra* text accompanying notes 67-68.

13. This group was the West Michigan Environmental Action Council.

14. The Council's position may have been influenced by knowledge of a model for environmental protection encompassed in a California bill that would create a California Environmental Study Council. Dr. Harold "Ted" Black of the Michigan Department of Natural Resources had sent Mrs. Joan Wolfe, the Council's spokesperson, a copy of the bill on January 8, 1969. See ARCHIVES OF THE MICHIGAN ENVIRONMENTAL PROTECTION ACT (Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor, Michigan) (1980) [hereinafter cited as ARCHIVES].

15. See *infra* text accompanying note 42.

16. J. SAX, *DEFENDING THE ENVIRONMENT* (1971).

tober 1, 1970.<sup>17</sup> Very briefly, the legislation changed the status of the private plaintiff in environmental matters and simultaneously that of any public or private entity. Now a citizen in Michigan could sue<sup>18</sup>—obstacles of standing, primary jurisdiction, exhaustion of administrative remedies having been removed—under a broad and very general cause of action. That law reads in part:

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 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.<sup>19</sup>

Recall that this was a period prior to the development of the National Environmental Policy Act<sup>20</sup> in the courts, prior to *Friends of Mammoth*,<sup>21</sup> prior to the time when the variety of institutional approaches for involving citizens in environmental man-

17. While the bill moved unscathed, it did not move without controversy. The history of its movement is one of the more dramatic stories in the early days of the environmental movement. Consideration of MEPA, the bill's popular name, entered the politics of the gubernatorial campaign of 1969. The Republican Governor and the Democratic Attorney General sparred over who was more solidly supportive of MEPA, and the embryonic State of Michigan environmental coalition came to face the developed industrial and commercial interests of the State. The story is found in detail in the ARCHIVES, *supra* note 14.

A non-atypical exchange in MEPA's legislative birth: Dr. Paul Herbert, a retired Michigan State University professor, testified at one hearing on the bill with a heart pill in his hand: "As I listen to you talk here I thought I was coming down with a second heart attack. I challenge you to pass the bill. If something is wrong you know industry is going to scream and you'll come back and correct it next year." Senator Harvey Lodge, a Republican, retorted by charging that Michigan's 8 million residents were responsible for pollution—a theme he repeated several times in exchanges with members of the audience.

18. Mrs. Wolfe praised the draft of MEPA in a letter of March 3, 1969; the attitude toward litigation of the Michigan environmental movement had moved from acceptance of the necessity of citizen suit authorization as a supplemental tool to enthusiasm:

"It discourages me to think that we can only be protected by having the right to sue—yet I agree that there doesn't seem to be any other way. The fact that we might have that right then becomes terribly exciting and important." ARCHIVES, *supra* note 14.

19. MICH. COMP. LAWS ANN. §§ 691.1201-.1207, § (2) (Supp. 1973).

20. 42 U.S.C. §§ 4321-4370 (1976 & Supp. III, 1979).

21. *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

agement had been fully conceptualized. The Michigan law was based on the premise that legislative reform should not lead to creation of new bureaucracies, commissions, or agencies that could bog down, according to relatively straightforward assumptions about the "laws" of the behavior of organizations.<sup>22</sup> Other premises of the legislative change were that private citizens should have a role in environmental management if they represented environmental values, that decentralized approaches to management could supplement the functions of administrative agencies, and that the model of case-by-case development of environmental law—the common law model—was appropriate in the face of the challenges facing institutions that played some role in environmental management.<sup>23</sup>

### III.

#### THE LAW'S HEYDAY

A number of states, often through the personal influence and contact of Michigan environmentalists, passed versions of the MNRA or EPA, or, as it was not-too-poetically called, the Sax Act.

These laws, as Table A reflects,<sup>24</sup> differ in minor respects. Some allow for security bonds; some require exhaustion of administrative remedies before an action can be brought; some specifically state they codify the law of public trust. Five contain a master or referee provision; several mention remittitur to administrative agencies; and, in most versions, intervention is explicitly provided for either in the discretion of the court or as a matter of right.

Interestingly, in light of subsequent development of environmental law and policy, only a few of these laws define the natural resources that are the focus of the legislation. Both the California and Minnesota laws do so. In Massachusetts the law describes environmental damage and New Jersey's offers a non-exclusive definition of pollution, impairment or destruction of the environment.<sup>25</sup>

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22. See J. SAX, DEFENDING THE ENVIRONMENT (1971) and letter, J. SAX TO J. WOLFE, Feb. 4, 1969, in ARCHIVES, *supra* note 14.

23. See ARCHIVES, *supra* note 14; Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972) [hereinafter cited as Sax & Conner].

24. Reprinted with permission of the U. DET. J. URB. L. (earlier version originally published as appendices to DiMento, *Citizen Environmental Legislation in the States: An Overview*, 53 U. DET. J. URB. L. 413 (1976)) [hereinafter cited as *Overview*].

25. For cites to these provisions, see Table A.

Table A  
A Summary of Provisions of EPA's as Legislated in Several States

State and Short Title of Act Where Used	Code Section	Standing	Liability of Administrative Remedy	Matter or Refer Provisions	Relief Available	Remittitur	Inter-Revision Provision	Security Bond	Caus	Natural Resources Definition
California Environmental Actions	Cal. Gov't Code §§ 12000-12012 (Supp. 1973)	The Attorney General may maintain an action for equitable relief in the name of the people of the State of California. Cal. Gov't Code § 12007 (Supp. 1973).	Action will be stayed if proceedings are before administrative agency § 12011	not mentioned	Temporary and permanent equitable relief § 12010	Action will be stayed if proceedings are before administrative agency § 12011	Yes (Attorney General) §§ 12008, 12012	not mentioned	not mentioned	yes § 12006
Connecticut Toxic Substances Control Act of 1971	Conn. Gen. Stat. Ann. §§ 22a-218-20 (Supp. 1973)	Benefit granted "any person, partnership, corporation, association, organization or other legal entity" - Conn. Gen. Stat. Ann. § 22a-170 (Supp. 1973).	no	yes § 22a-170(b)	Temporary equitable or injunctive relief § 22a-18(a)	Yes, at court's discretion § 22a-18(b)	Yes § 22-149	not mentioned	Caus of reference § 22a-170	no
Florida Environmental Protection Act of 1971	Fla. Stat. Ann. § 403.412 (1971)	"department of legal affairs, any political subdivision or municipality of the State, or a citizen of the State" - Fla. Stat. Ann. § 403.412(2)(a) (1971).	Complaint must first be filed with appropriate government agency § 403.412(2)(c)	no	Declaratory and injunctive relief § 403.412(1)	no	Yes § 403.412(b)	Discretionary with court - bond and sufficient surety § 403.412(2)	Presiding party entitled to costs and attorney fees. § 403.412(3)	no
Indiana Environmental Suit	Ind. Stat. Ann. §§ 13-6-1-1 to 13-6-1-6 (Burns 1971)	"Attorney General, or any state, city, town, county or local agency or office vested with the authority to seek judicial relief, any citizen of the State of Indiana, or any corporation, partnership or association maintaining an office in the State of Indiana" (Burns 1971).	Complaintant must first satisfy appropriate state and statutory criteria. § 13-6-1-1(a)	yes § 13-6-1-4 (d)	Declaratory and temporary equitable or injunctive relief of conditions of the State of Indiana § 13-6-1-3	Possible but action may be dismissed with prejudice § 13-6-1-4	Yes § 13-6-1-6(d)	not mentioned	May be appointed § 13-6-1-4	no
Massachusetts	1973 Acts, ch. 1114 § 62	County superior court may take cognizance of an action in which "not less than ten persons domiciled within the Commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the Commonwealth." - "Person" means "any individual, association, partnership, corporation, organization, trust, trust agreement, estate, partnership, firm, or any political subdivision thereof, any administrative agency, public or quasi-public corporation, or any other legal entity or its legal representatives, agency or assigns." 1973 Acts, ch. 1114, § 62.	No, but notice to responsible agency and to alleged violator required.	not mentioned	Liquable or declaratory	not mentioned	not mentioned	Discretionary with court - \$500	May be assessed but does not include attorney fees.	No, but environmental damage described.
Michigan Thacker Anderson-Goodhue Rockwell Environmental Protection Act of 1973	Mich. Code Laws, Ann. § 691.1201 (Supp. 1973)	"This attorney general, any political subdivision of the state, any municipality or agency of the state or of a local unit of government." Mich. Code Laws Ann. § 691.1201(1) (Supp. 1973).	no	yes § 691.1201(2)	Declaratory and injunctive relief § 691.1201(1)	Yes, if administrative proceedings are required or available the court may refer § 691.1201(2)	Discretionary § 691.1206(1)	Not to exceed \$500 § 691.1202(a)	May be appointed § 691.1202(3)	no





The standing provisions in these laws are generally quite liberal. Most give standing effectively to anyone; and all, except the California and Massachusetts laws, confer standing on the individual person or citizen.<sup>26</sup> Massachusetts requires that not less than ten persons domiciled within the commonwealth be joined as plaintiffs, and California grants broad standing only to the attorney general "in the name of the people of the State of California."<sup>27</sup>

## IV.

## THE MODEL LAW IN THE WEST

Impact of the citizen suit concept in the western states is indicated in part by the passage of the law itself. Note that of the thirteen states represented in this symposium only two passed *some* version of the law. In several states, bills modelled on the MNRA were introduced but did not pass (see Table B). (It is likely that other attempts were made that have escaped this author's attention.)<sup>28</sup>

Table B  
Citizen Environmental Lawsuit Legislation  
Attempts in the West

<i>Alaska:</i>	Senate Bill #550 (Offered June 19, 1971)	<i>Colorado:</i>	Lamm, Colorado Environmental Policy Act (Offered September 15, 1971)
<i>Arizona:</i>	Senate Bill, Gutierrez, et al. (Offered February 9, 1973)	<i>Montana:</i>	Veto of SB 203 [May 14, 1975]
<i>California:</i>	Z'berg AB 985 (1971) Hayes AB 1311 (1971) Moscone SB 660 (1971)	<i>New Mexico:</i>	Defeated in Senate Conservation Committee (1971)
[See also Table A]		<i>Oregon:</i>	did not pass (1971)

26. See Table A.

27. See Table A.

28. Readers are asked to supply information to the author about attempts, successful and otherwise, to pass generic citizen suit legislation in states with which they are familiar.

Significance can also be noted by the case law that developed from the acts in the western states. It was conceivable that the law could contribute nothing to jurisprudence beyond adding to existing legal theory of public nuisance.<sup>29</sup> But there are no significant reported opinions in the western states. This record contrasts sharply with the history of MNRA in nonwestern states.<sup>30</sup>

## V.

### SPECULATIONS REGARDING THE DEVELOPMENT OF THE LAW IN THE WESTERN STATES; WHY THE LIMITED INFLUENCE?

What explains the lack of interest in what was a subject for the "Today Show," *The New York Times*, *Saturday Review* and other popular media? Why was a law that was heralded as the "great leveler" in battles between the common man and the major polluters not well-received in the West?

Several reasons suggest themselves. First, the concept's perceived environmental success in some states<sup>31</sup> may have been its downfall in jurisdictions that considered it later. Organized opposition to citizen suit bills evolved in ways that may have been more effective when the bill was considered in the mid 1970's. For example, in 1969 in Michigan, opposition to the MEPA came mainly in the forms of amendments and fine-tuning,<sup>32</sup> as opposed to arguments against the concept of authorizing citizens to initiate

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29. Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163 (1976), suggests that the impact of MEPA in Michigan as described by Professor Sax and others, *infra* note 31, was exaggerated and the legal effects in Michigan and Minnesota remain relatively insignificant.

30. Bryden, *id.* Haynes, *Michigan's Environmental Protection Act in Its Sixth Year: Substantive Environmental Law from Citizen's Suits*, 53 J. URB. L. 589 (1976); *New Growth in Michigan's Environmental Protection Act: State Supreme Court Enjoins Oil Development in Wilderness*, 9 ENVTL. L. REP. (ENVTL. L. INST.) 10144 (1979) Sax & Conner, *supra* note 21; and Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974).

Recent case law in the non-Western states includes: *Wildlife Fed'n v. State Dep't of Env'tl. Regulation*, 390 So.2d 64 (Fla. 1980) (reversing lower court and holding that Florida EPA creates substantive law, a new cause of action and that private citizens in Florida may initiate suit under the statute without a showing of special injury); and *Mystic Marinelife Aquarium, Inc. v. Gill*, 175 Conn. 483, 400 A.2d 726 (1978) (affirming lower court holding that neighboring landowner had statutory standing under Connecticut EPA to appeal for limited purpose of raising environmental issues).

31. See Haynes, *supra* note 30.

32. See ARCHIVES, *supra* note 14.

judicial review. In contrast,<sup>33</sup> by the time Montana had considered SB 203, a strong coalition of interest groups fundamentally hostile to the idea of promoting citizen suits was able to form. There legislation was opposed in committee by Montana-Dakota Utilities, Burlington Northern Railroad, St. Regis Paper, Pacific Power and Light, Montana Coal Council and the Montana Chamber of Commerce.

Moreover, experience of the last two decades with environmental controversies may have swung some former advocates of the use of the citizen suit away from the reform. This group may be rethinking the position that the courts are an appropriate or sympathetic forum for consideration of subjects ranging from analysis of the health effects of environmental pollutants to the environmental impact of major energy projects.

The debate over the amount of deference to be given to governmental administrative agencies is long-standing,<sup>34</sup> and environmentalists appeared to be intent upon eroding agency authority in the early 1970's. However, they and others are approaching the choice of appropriate institutions for environmental management either with new understandings or with those pulled out of long-closed closets. Expertise lodged in administrative agencies, especially those supportive of environmental protection, is again valued. As well, environmentalists, early victors in the courts, are learning that parties with developmental interests can also make effective use of the citizen suit.<sup>35</sup> Hope in administrative action that is pro-environment may be replacing distrust of agencies previously considered to be "captured" by or subject to capture by non-environmental interests.

Another way of viewing the history of the citizen environmental lawsuit in the Western states is to see it as a policy innovation that did not fare well in competition; other approaches to environmental control were introduced to the Western legislatures during this time of considerable legislative activity aimed at environmental

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33. SB 203 (1975).

34. See DiMento, *Overview*, *supra* note 24; *Empirical Findings*, *supra* note 10; Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970); Sive, *Environmental Decisionmaking: Judicial and Political Review*, 28 CASE W. RES. L. REV. 827 (1978).

35. That an enhanced scope of judicial review could benefit those who traditionally were defendants in environmental law suits became evident to some in the mid-1970's. See Sive, *supra* note 34. A number of public interest law firms that represent developmental interests were also created at that time. Among these were the Pacific Legal Foundation and the Mountain States Defense League.

protection. Federal environmental and energy legislation came in a flurry in the early 1970's<sup>36</sup> and the progeny of the National Environmental Protection Act<sup>37</sup> populated many of the Western states. Of the states considered in this symposium eight adopted some version of the impact assessment requirement,<sup>38</sup> recognition of the costs to this approach notwithstanding.<sup>39</sup>

While some may actively oppose the citizen suit legislation in their state, others may be more indifferent than they would have been in the late 1960's or than they would be if they were subject to state administrative law in another state. Recent liberalization of the standing doctrine (admittedly there is an ebb and flow of judicial views as to who is an appropriate plaintiff in a controversy)<sup>40</sup> makes for greater opportunity for the private citizen to challenge administrative agency and other acts allegedly harmful to the environment. The situation was opposite in those mainly eastern, mid-western and southern states that earlier reformed their standing provisions by means of the MNRA. For example, a main factor in the decision of Michigan citizens to seek greater input into environmental decision making was their frustration following the decision in *White Lake Improvement Association v. Whitehall*,<sup>41</sup> wherein application of the standing and primary ju-

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36. See SELECTED ENVIRONMENTAL LAW STATUTES (West 1981).

37. See *supra* note 20.

38. See California Environmental Quality Act (1970), CAL. PUB. RES. CODE §§ 21000-21276 (Deering 1976 & Supp. 1982); Washington State Environmental Policy Act (1971), WASH. REV. CODE § 43.21C (Supp. 1982); Montana Environmental Policy Act (1971), MONT. CODE ANN. §§ 69-6501 to 69-6518 (Supp. 1977); Hawaii State Environmental Policy Act (1974), HAWAII REV. STAT. §§ 344-1 to 344-4 (1976) and Hawaii Environmental Impact Statements Act of 1974, HAWAII REV. STAT. §§ 343-1 to 343-8 (Supp. 1981); State of Utah Executive Order, August 27, 1974; Nevada Utility Environmental Protection Act, NEV. REV. STAT. §§ 704.820-900 (1973). Arizona Game and Fish Commission Policy of July 2, 1971 and ARIZ. REV. STAT. ANN. §§ 40-360 to 40-360.29 (1974 & Supp. 1980); Act of April 8, 1971, ch. 288, §§ 1-7, 1971 New Mexico Laws 1141 (repealed 1974).

39. Fairfax, *A Disaster in the Environmental Movement*, 199 SCIENCE 743 (February 17, 1978); Sax, *The Unhappy Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

40. For a bibliography of articles on standing in environmental litigation through 1976 see *Empirical Findings*, *supra* note 10, at note 10.

Bryden, *supra* note 30, concluded that the influence of the Minnesota Environmental Rights Act (MERA, see Table A) was not great and that many of the suits brought under MERA could have been brought under other causes of action. He argued as well that use of the MERA influenced the outcome of litigation in only a small number (about seven) of the cases brought at the time of his analysis.

41. 22 Mich. App. 262, 177 N.W.2d 473 (1970). A subsequent MEPA opinion specifically overruled this aspect of *Whitehall*. See *Lakeland Property Owner Ass'n v. Township of Northfield*, No. 1453, Cir. Ct., Livingston County (filed August 27, 1970).

risdiction doctrines made administrative proceedings the exclusive remedy available to private environmental complainants. Recent judicial opinion in several states, including Hawaii,<sup>42</sup> may have made the need for a legislative remedy less compelling.

Part of the failure of the West to respond to the MNRA concept may be based on a factor that is difficult to empirically describe. Understandings of the scope of commonly-held resources and of private property in the West may be important to tracking receptivity to changes in and development of land use and environmental law there. This is not the place to analyze cultural factors in the development of legal concepts, but it does seem reasonable to speculate that the immense size of the Western states, their frontier characteristics, and—at least until recent appreciation of their potential for energy development—their relatively low industrial value may have influenced the approaches to legal control of resource use that evolved. One way of testing this speculation is a systematic comparative study of the public trust doctrine in the West and in the other regions of the country.<sup>43</sup> At least in some Western jurisdictions the notions of the public trust derived from

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42. See *Life of the Land v. Land Use Commission*, — Hawaii —, 623 P.2d 431, (environmental organization, although neither owners nor adjoining owners of land in dispute, had “stake” in outcome of controversy adequate to invoke judicial intervention; “standing requirements should not be barriers to justice,” at 439 (footnote omitted)).

43. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Comment, *California Beach Access: The Mexican Law & The Public Trust*, 2 ECOLOGY L.Q. 571 (1972); Note, *California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971); Note, “Public Trust” as a Constitutional Provision in Montana, 33 MONT. L. REV. 175 (1971); Note, *Environmental Law—Expanding the Definition of Public Trust Uses*, 51 N.C.L. REV. 316 (1972); Comment, *Private Action Under the Public Trust: An Environmental Bill of Rights for California*, 2 PAC. L.J. 620 (1971); Note, *State Citizen Rights Respecting Greatwater\* Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970); Case Comments, 26 RUTGERS L. REV. 868 (1973), 26 RUTGERS L. REV. 179 (1972); Olson, *The Public Trust Doctrine: Procedural and Substantive Limitations on the Governmental Reallocation of Natural Resources in Michigan*, 1975 DET. C.L. REV. 161; Nanda & Ris, *Public Trust Doctrine: A Viable Approach to International Environmental Protection*, 5 ECOLOGY L.Q. 291 (1976); Johnson & Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 WASH. L. REV. 275 (1979); and Note, *The Public Trust Doctrine: A New Approach to Environmental Preservation*, 81 W. VA. L. REV. 455 (1979). Recently in California, see *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); *City of Los Angeles v. Venice Peninsula*, 117 Cal. App. 3d 335 172 Cal. Rptr. 619 (1981); *State of California v. Superior Court*, 11 ENVTL. L. REP. (ENVTL. L. INST.) 20476; and *California v. Superior Court*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981) (*Placer*). *Placer* extended the public trust doctrine to fresh water areas. By retaining the public trust in the shore zone the principle was

Spanish and Mexican influence, and these jurisdictions did not give as wide a definition of public areas as that given by some other states.<sup>44</sup>

## VI.

### SPECIFIC REASONS FOR OPPOSITION TO THE CITIZEN SUIT LAW ARTICULATED IN THE WESTERN STATES

In addition to the broadly articulated rationales for the dismal record of the citizen environmental legislation in the Western states, informal legislative histories in the states noted in Table B highlight other reasons why the bills have not become law.

#### A. Legal Arguments

In some legislative debates main arguments were couched in legal terms. In Alaska, for example, opponents of the bill cited problems of *res judicata* and collateral estoppel, arguing that defendants would be subject to multiple lawsuits for the same alleged violation.<sup>45</sup>

These same predictions had been made almost everywhere the Model Act was considered. Professor Sax addressed the argument in consideration of the Michigan bill<sup>46</sup> as did the Governor's legal advisor in Michigan at the time.<sup>47</sup> The issue was debated in the Michigan Senate as well.<sup>48</sup> While it was recognized that these two doctrines would have been applied by the courts without explicit language in the bill,<sup>49</sup> a provision was added to emphasize the legislature's concern about possible frivolous suits and to indicate to the courts that they should be sensitive to "harassment."<sup>50</sup>

Attention was paid to the issue of vagueness in the language of the bills introduced. Terms were said to be insufficiently precise

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made applicable to 4000 linear miles along the navigable lakes and rivers in California.

44. *But see Placer*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713.

45. Letter of P. Josephson to J.L. Sax, February 18, 1971 (on file with Professor J.L. Sax, University of Michigan Law School) (bill "encountering more stiff resistance than expected even among enlightened legislators").

46. *See* his statement of March 20, 1970, in ARCHIVES, *supra* note 14.

47. Analysis by Joseph Thibodeau of March 18, 1970 in ARCHIVES, *supra* note 14.

48. ARCHIVES, *supra* note 14.

49. Statement of Senator Brown, ARCHIVES, *supra* note 14.

50. The section added reads: "The doctrines of collateral estoppel and *res judicata* may be applied by the court to prevent multiplicity of suits." MICH. COMP. LAWS ANN. § 691.1205(3) (Supp. 1973).

to allow business, industry, and other possible defendants to know whether their actions constituted a violation of the law. Among the frequently cited words were "environment," "pollution," and "public trust." California, Massachusetts, Minnesota, and New Jersey attempted to address these problems in one form or another<sup>51</sup> by adding either exclusive or non-exhaustive definitions.<sup>52</sup> Fears have been expressed that any behavior, even behavior reflecting normal industry or business practices that is in compliance with the standards set by state and local agencies, could be considered a violation under the Model Act. These fears may have been exacerbated in more recent consideration of the Model Act as litigants have introduced into environmental law highly controversial understandings of the scope of "environment." These include the notion that "people can be pollution," or put more subtly, that socio-economic groups have characteristic lifestyles that can effect adverse environmental impacts.<sup>53</sup> Another far-reaching view would include the cultural environment within the reach of the Act.<sup>54</sup>

## B. Impact Arguments

Disruptive use of the citizen suit and its anti-industry effects are common predictions of opponents to the Act. They become of

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51. See Table A. Concern with wording was great in consideration of the Michigan Act. See the discussion of the amendment which would have added the word "unreasonable" before every use of the term pollution. ARCHIVES, *supra* note 14.

52. Interestingly, this was a question that did not arise in Michigan until after the bill became law. Interview with Joseph L. Sax (May 13, 1980).

53. See *Nucleus of Chicago Homeowners Assoc. v. Lynn*, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

54. *But see* (in non-western states) *Hoboken Environment Committee, Inc. v. German Seamen's Mission*, 161 N.J. Super. 256, 391 A.2d 577 (1978) (interpreting N.J.S.A. 2A:35A-2, 4 to not apply to historical buildings); and *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 894, 304 N.W.2d 455 (1981) (inapplicability of MEPA to inner city Detroit redevelopment project; social and cultural environment not within scope of Act).

In Minnesota, however, row houses were found to be historical resources within the meaning of the Minnesota Environmental Rights Act in *Powderly v. Erickson*, 285 N.W.2d 84 (1979). In Minnesota, see also *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225 (1979) (involving efforts to prevent demolition of the Minneapolis landmark, "Scotties on Seventh"); and *Notes, The Minnesota Supreme Court: 1979, The Minnesota Environmental Rights Act: Historical Resources*, 64 MINN. L. REV. 1215 (1980).

As well, impairment of quietude falls within those resources protected under the Minnesota Act, *Minnesota Public Interest Research Group v. White Bear Rod and Gun Club*, 257 N.W.2d 762 (1977). But presumably farming does not, *State v. Minnesota Power Coop., Inc.*, 281 N.W.2d 372 (1979).

determinative concern in states where environmentally controversial projects are in process or are being considered. Impact on the Alaska pipeline project was specifically noted in consideration of the Alaska bill.<sup>55</sup> And in Montana the fear that frivolous suits would stop major energy projects was colorfully expressed:

“. . . [E]nvironmental lawsuits could be started by hitchhikers passing through the state or national organizations with no direct stake in the environment.”<sup>56</sup>

### C. Institutional Arguments

“[I]t’s . . . a little bit like asking God to solve our problem instead of letting the people decide the kind of environment they’re willing to live with . . . . Who is going to be more responsible . . . a local official or a judge who doesn’t care?”<sup>57</sup>

That the courts are an improper forum for decision making in highly technical, scientific or complex controversies is an argument often heard in legislative chambers during consideration of citizen suit legislation.<sup>58</sup> Several versions of this position are offered. Court incompetence is inevitably raised and the superior analytical capability for multifaceted problem-solving lodged in administrative agencies is noted. Closeness of local and state administrators to the nature of environmental problems is described as a benefit, although this argument is countered with the classical notion of capture of regulatory agencies by the regulated.<sup>59</sup>

Another version of opposition to shifting environmental problems to the courts reflects the political conclusion that, if the legislature cannot formulate sufficiently precise standards to cover issues raised in environmental litigation, then the need for regulation should be very seriously questioned.<sup>60</sup>

Concern over the proper forum for setting environmental standards was addressed emotionally in the debate over the first citizen environmental suit law:

I don’t care how good an attorney you are or how many degrees you have if you can’t write those standards, then don’t pass the buck and

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55. *Anchorage Daily Times*, January 1, 1971 (on file with Professor J.L. Sax, University of Michigan Law School).

56. Summary of reasons for veto of SB 203, Montana (May 14, 1975) (on file with Professor J.L. Sax, University of Michigan Law School).

57. Alaska senator quoted in *Anchorage Daily Times*, January 23, 1971 (on file with Professor J.L. Sax, University of Michigan Law School).

58. *Overview*, *supra* note 24.

59. *Id.*

60. See T. LOWI, *THE END OF LIBERALISM* (1969).



vote on something that's emotionally acceptable and politically expedient in an election year because this is what the people want and they've been sold on this sue your neighbor bill.<sup>61</sup>

Furthermore, there was increasing interest during the later part of the 1970's in avoiding governmental involvement in the resolution of environmental problems through any of its branches. Mediation was offered as a new mechanism for controversy resolution. The court was seen as a last resort—an indication of failure to reach less costly solutions.<sup>62</sup>

## VII.

### RECONSIDERING THE WISDOM OF CITIZEN SUIT LAWS

Several reasons are offered for making a version of the MNRA a part of a legislative package for the 1980's. First, discontent and disillusionment with other forms of citizen involvement in environmental management is common—both on the sides of those who advocate more important roles for private citizens<sup>63</sup> and those who prefer minimizing the input of citizens to decision making by elected officials.<sup>64</sup> Reforms of environmental impact assessment regulations have been recently offered at the federal level,<sup>65</sup> but the contribution of the environmental impact report/environmental impact statement process to environmental and land management at both the federal and state levels remains controversial.

Second, there are some indications that the federal courts may be less sympathetic to environmentalists' positions than they were in the "environmental decade" of the 1970's. Overall, this assertion is difficult to substantiate, but recent Supreme Court decisions with regard to the scope of judicial review in environmental cases and the meaning and impact of the National Environmental Policy Act<sup>66</sup> suggest that the Court is manifesting greater deference to

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61. Comment by Senator in Senate debate on The Michigan Environmental Protection Act (June, 1970). ARCHIVES, *supra* note 14.

Another senator put the matter even more colorfully: ". . . it's like asking a carpenter to take out somebody's appendix. . . ." Senate debate on the Michigan Environmental Protection Act (June, 1970). ARCHIVES, *id.*

62. Among the centers of environmental mediation that arose in the 1970's were the Office of Environmental Mediation at the University of Washington and the New England Natural Resources Center. See 11 *Ford Foundation Letter* 1 (December 1, 1980).

63. See *supra* sources noted at note 39.

64. B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979).

65. CEQ Regulations Implementing § 102(2) of NEPA (1978) §§ 1500.1-1500.6.

66. Note 20 *supra*.

the administrative decisions of government.<sup>67</sup>

Third, aspects of present federal natural resource and public lands policy envision the West as a major site for energy development projects which, all agree, will have significant environmental impacts. Because of the magnitude of their implications for present and future Americans, these proposals may deserve widespread review in a number of fora.

Constitutional issues raised by attempted challenges, including those in state courts, to projects that are said to have national significance can be complex.<sup>68</sup> Litigation can arise in a number of contexts. Businesses may seek to develop in environmentally sensitive areas in response to their predictions of national energy needs. Federal approval of a private or quasi-public project sited in a state with a non-receptive citizenry is another scenario in which plaintiffs may come forth. Alternatively, direct federal action may be the source of considerable state consternation over environmental effects. Here sovereign immunity may be dispositive<sup>69</sup> or the issues may be triable only in federal courts. Citizen challenges may be met by arguments that the federal government has preempted the field; however, preemption in certain areas of regulation does not preclude state regulation, including subsequent to a citizen challenge, in areas in which federal law is silent. In any case, state citizen environmental statutes may allow bootstrapping of citizen plaintiffs into fora that would be closed to them otherwise, and may also generate substantive environmental law that will be applied in federal court.

Fourth, the MNRA has been tested in some states, and while there is room for disagreement,<sup>70</sup> the law seems to have made a modest contribution to informed environmental management without creating the major costs predicted by its opponents.

Fifth, with the experience gained in the environmental decade, policymakers may be able to identify classes of projects with potential adverse environmental impact that are nonetheless impor-

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67. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) and *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980). See also, Note, *The Decline of the Environmental Mandate: Strycker's Bay—A Modern West Side Story*, 41 LA. L. REV. 1354 (1981).

68. See Soper, *The Constitutional Framework of Environmental Law*, in E. DOLGIN & T. GUILBERT, *FEDERAL ENVIRONMENTAL LAW*, 1974.

69. See W. RODGERS, *ENVIRONMENTAL LAW*, § 1.8 (1977); and Coggins, *Preparing an Environmental Lawsuit, Part II: Doctrinal Barriers and Pre-Trial Preparation*, 58 IOWA L. REV. 487 (1973).

70. See articles noted *supra* at note 30.

tant to other national objectives. They can then draft versions of citizen suit laws which preclude litigation in specified situations. Sections such as the following might be amended to the Model Act:

Section X. No suit may be brought by any private citizen, partnership, corporation, association, organization or other legal entity under this provision challenging an interstate compact for the disposal of hazardous waste entered into under the *[specified provision of federal law or in other situations identified by the legislature]*.

Section Y. The Court may set a security bond higher than that specified in Section ( ) to cover the potential costs of delay to projects challenged under this statute where the defendant ultimately prevails in judicial proceedings.

Section Z. "Natural resources" and "environment" as used in this section shall not include aspects of the economic and cultural environment including, but not limited to, historic buildings, aspects of neighborhood culture, and life styles characteristic of any groups.

### VIII.

#### CONCLUSION

Citizen suit law has had more limited involvement in the affairs of the states represented in this symposium than have other reforms of the environmental decade. This potential settler from the Midwest has not been well-received by the West. Nonetheless, several traditions of the West, changes in federal environmental law, and brewing preservationist-development battles in the West suggest that the legislative innovation may yet take a foothold.