State Management of the Environment Part One: An Evaluation of the Michigan Experience

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STATE MANAGEMENT OF THE ENVIRONMENT
PART ONE: AN EVALUATION OF
THE MICHIGAN EXPERIENCE†

Geoffrey J. Lanning*

I. A PRELIMINARY OVERVIEW

Michigan's citizens, as well as its government, seem but dimly aware of the fact that Michigan—the home of America's most growth-centered industry, the automobile—lies at the very eye of the environmental storm. This article seeks to take a broad look at the shortcomings of Michigan's environmental protection in recent years. In so doing, it groups many of Michigan's recent environmental failings into broad categories which will both clarify the status of Michigan's environmental law climate and provide a basis for its reform. Parts One and Two consist of this analysis and evaluation. Part Three will examine possible solutions and offer suggestions for reform.

A basic theme underlies this factual analysis: the most meaningful explanation for Michigan's many environmental problems lies in the character of Michigan decisionmaking. Consequently, this article will discuss the degree to which Michigan decisionmaking is

† This article is a condensation by the Journal of a more extensive unpublished work by Professor Geoffrey Lanning. Professor Lanning's analysis differs from this article in the former's broader scope and more detailed discussion of the environmental decisionmaking process in Michigan. The analysis by Professor Lanning is on file with the author at Wayne State University Law School.

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This article is premised upon a survey of Michigan's environmental problems during the past several years. It includes the results of interviews and discussions with many of the participants in, or observers of, the efforts to deal with these problems. These interviews and contacts were conducted by the writer. A list of interviews is on file with the author.

Mr. Phil Bozzo and Ms. Margaret McCormick are students at Wayne State University Law School. The broad coverage attempted in the study from which this article is taken would not have been possible without the long hours of work and thoughtful analysis contributed by Ms. McCormick. Mr. Bozzo performed useful research and was helpful in many ways. Research assistance was also rendered by Diana Lemanek, Shari Danch, and David Marvin, students at Wayne State University Law School. The assistance received from all of these students is acknowledged and appreciated.
open to general public interests and to broad public goals. These
decision processes are unresponsive to the need to protect against
such modern perils as nuclear accidents or toxic substances, while
they are sensitive to the more limited interests that are focused on
productivity and growth.

This effort to survey Michigan’s environmental record over the
past several years also bears some relevance to another basic en-
vironmental controversy: the issue of how effective state govern-
ment is, and can be, in dealing with the full range of environmental
problems, from those which are purely local to those which are
national in scope.

The federal-state controversies in the environmental area offer a
clear example of the unending controversy between centralization
and decentralization. People in state government may consider
themselves closer to the people and to the local scene; they argue
that the will of distant Washington bureaucrats should not be im-
posed upon them. Many in the federal government believe that
environmental problems often transcend local boundaries and can
only be dealt with effectively on a regional or national basis.

A major factor in the growth of federal authority has been the
capacity of states to deal successfully with local pressures, con-
licts of interest, or lack of resources. All of these factors are
reflected in this analysis of Michigan’s environmental record. Land
use policy and planning is an obvious example. The resistance of
local interests has barred the adoption of the methods and perspec-
tives needed to deal with many land use problems that transcend
local boundaries. Unless local interests permit the state authorities
some range of effective action, they will be confronted with the
intrusion of federal authority. This has already come to pass in the

\[\text{1 See Part Two of this article.}\]
areas of air\(^2\) and water\(^3\) quality,\(^4\) and intervention is threatened through the federal government's granting or withholding of funds in order to influence suburban land use planning.\(^5\)

In view of the successful efforts by special interest groups in Michigan to thwart effective state-wide environmental efforts,\(^6\) the federal government has begun to insist that if there is no immediate and effective state action, federal authority will intervene.\(^7\) It will thus become more difficult for Michigan to retain its local autonomy in the face of the growing urgency of many of the state's environmental problems, responses to which are, at best, at a pre-planning stage. Federal agencies have already assumed a large voice in state programs, and the limitations of current state efforts suggest that this federal intervention may increase. An analysis of the Michigan Water Resource Commission (WRC) Act's recent

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\(^2\) The Federal Clean Air Amendments of 1970, 42 U.S.C. §§ 1857-1957(1)(1970) ("Clean Air Act"), have preliminary language describing the problem involving primary state responsibilities. 42 U.S.C. § 1857c-2. However, the statute provides that if the states do not adopt implementation plans satisfactory to the federal administrators, the federal government may develop and substitute its own plans. 42 U.S.C. § 1857c-5(c). Unlike the language in the Federal Water Pollution Control Act (FWPCA), the federal threat did not scare Michigan into enacting a significantly improved state air pollution control act, nor even into significantly improving its current enforcement. It is not clear why the same reservation of powers in the federal government that so frightened Michigan industry with respect to water quality did not have a comparable effect on Michigan's air pollution legislation. See letter from EPA Acting Regional Administrator, Region V, to Geoffrey Lanning, Dec. 26, 1972 (on file at Wayne State University Law School), which concluded that while the Michigan Air Pollution Implementation Plan met legal requirements, Michigan's laws in the area would benefit from stronger measures. However, in statements (analyzing the state implementation plan) submitted to the Michigan Air Pollution Control Commission by the author on December 13 and 17, 1971, a number of the weaknesses of existing Michigan air pollution legislation were cited. These included inadequate and uneven sanctions and penalties; the failure to eliminate undue representation of polluter interests on the Michigan Air Pollution Control Commission; the lack of any central coordinating committee; the remarkable claim that automobile air pollution is not a major problem in Michigan; and the lack of provision for any correlation between transportation and land use patterns, air polluting emissions, and public health. Such defects in the underlying law appear fundamental and make it difficult to justify the position of the federal EPA.

\(^3\) The statutory pattern of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 et seq. (Supp. 1972), might seem quite similar to that of the Michigan Air Act, but the federal confrontation has been quite different. The FWPCA has language describing water pollution control as mainly the responsibility of the states. 33 U.S.C. § 1251(b) (Supp. 1972). If the states do not enforce the FWPCA in a manner satisfactory to the federal administrators, then the federal government may take over enforcement. 33 U.S.C. § 1319 (Supp. 1972). Michigan responded by passing two laws which considerably strengthened Michigan water pollution control. Mich. Comp. Laws Ann. § 323.1 et seq. (1967, as amended, Supp. 1973).


\(^5\) See section VII in PART TWO of this article.

\(^6\) See section IV C infra.

\(^7\) See notes 2-4 supra.
amendments suggests that the prior Michigan water quality law was defective in content, sanctions, procedures, and administration, and that the recent legislation correcting some of these defects would never have been enacted except for concern that the federal government would intervene. If this analysis is accurate, then it may be of limited value to seek state solutions to environmental problems, a possibility that will be examined in Part Three of this article.

Turning, then, to Michigan's efforts to solve its environmental problems at the state and local level, we must first confront the conceptual obstacles to effective legislative and administrative action.

II. THE SCOPE AND REALITY OF MICHIGAN'S ENVIRONMENTAL PROBLEMS

A. Introduction

It is, perhaps, not surprising that there is significant debate about whether there is an environmental "problem." The many distinguished authorities who have argued that the world is in a rapidly intensifying environmental crisis have been accused of being prophets of gloom and doom, and it is argued that, like Malthus, the modern environmentalists are far too pessimistic. The author has conducted a general survey of Michigan's environmental problems, including interviews with some of Michigan's environmental experts and with others working, or knowledgeable, in the area. The results of this general inquiry do not support the suggestion of the president of the Michigan Chamber of Commerce that those who seek substantial land use controls for Michigan are merely a "calamity lobby."

There can be no question as to the importance and urgency of Michigan's environmental problems and of their relevance for all

8 WRC Note, supra note 4.
10 See notes 2-4 and accompanying text supra.
11 See B. COMMONER, THE CLOSING CIRCLE (1971); P. EHRLICH, THE POPULATION BOMB (1968). See also Allaby, Allen, Davoll, Goldsmith & Lawrence, A Blue Print for Survival, 2 ECOLOGIST 1 (1972), and note 24 infra.
14 A list of those interviewed is on file with the author.
15 Hall, supra note 12.
citizens. Only the more basic problems will be discussed in this article. The scope and complexity of even this selected list underlines the importance of the state government's assuming proper leadership.

Among the most important of our specific environmental problems are those that directly affect the public safety and health. A dramatic example of this is the large scale construction of nuclear power plants in Michigan. Both the Governor and the Public Service Commission have implicitly encouraged this extensive nuclear construction,\(^\text{16}\) and there are no signs that the state has considered or explored its possible powers to limit such construction, despite the dangers of the escape of radioactivity or of explosive accidents at the plants and in the transportation and disposal of radioactive wastes.\(^\text{17}\) These perils were dramatized by negligent construction at one plant\(^\text{18}\) and a major nuclear accident at another.\(^\text{19}\) At the

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\(^{16}\) The Governor proudly proclaimed in his environmental message of Jan. 22, 1970, to the legislature that: "Michigan, in the near future, will be generating more electric power from nuclear reactors than any other state." There is no evidence that the Governor or the Public Service Commission took action at any time to discourage nuclear construction in Michigan or to insist that the many questions being raised about the safety of nuclear reactors and the related transportation and disposal of radioactive materials be resolved before the state welcomed a high level of nuclear production. While the Governor's environmental messages of January 22, 1970, and February 4, 1971, did urge emergency controls, licensing, and on-site inspections, there was no suggestion that Michigan should limit nuclear construction.


In an unusual bureaucratic admission, James Schlesinger, then chairman of the Atomic Energy Commission, stated that the agency would shift from fighting the industry's political, social, and commercial battles to "serving the public interest." Lyons, AEC Shifts Role to Protect Public, N.Y. Times, Oct. 21, 1971, at 1, col. 6. Unfortunately, that promise never materialized. See, e.g., Book Review, 1973 Science and Public Affairs 45 (May).

See also Hearings on Environmental Effects of Energy Generation on Lake Michigan Before the Energy Subcomm. of the Senate Commerce Comm., 91st Cong., 2d Sess. (1970) (an example of early warnings that to date have done little to stem the tide of Michigan's nuclear construction, or related practices).


same time, the costs resulting from the failure of industry to master the technological problems of nuclear production have been permitted to enter the rate base and increase the consumer’s cost. For example, Detroit Edison’s customers were charged many millions of dollars to pay for the misjudgments by the company that underlay the shutdown of the Fermi nuclear plant.

Other threats to health and safety include the pollution of air and water, especially by the inadequately regulated emission of toxic or potentially dangerous substances. The gravity of such pollution problems is directly proportionate to the degree to which the decision-making process responds to these perils. In Michigan, the risk of environmental danger or damage is almost always placed on the public rather than on the producer or developer who has profited thereby. Nuclear production is a classic illustration of the pattern of Michigan environmental decisions.

Another major group of environmental problems in Michigan includes transportation, open space, and recreation, which determine the survivability of our cities. Common to many of these specific problems is the question of land use. A dramatic example of this can be found in recent statements by the Michigan Department of Agriculture that Michigan has already lost so much agricultural land to other uses that it will be unable to feed its people by the end of the century; by that time, Michigan will have only 2.5 million acres remaining of an original 6.5 million acres of agricultural land.

This summary listing reveals the serious extent of Michigan’s environmental problem and how little the state government has done toward achieving even the modest goals it set forth at the height of the environmental enthusiasm of 1969-1971. A compen-

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20 See Earth Beat (a Michigan environmental newspaper), Jan. 25, 1974, at 2; id., Feb. 8, 1974, at 2, 3. The author’s interviews with persons in the Attorney General’s office and elsewhere indicate that many millions of dollars of the excess construction costs of the Palisades nuclear plant over its estimated cost will enter the Consumers Power rate base. (Interviews on file with the author).


23 See Governor Milliken’s Special Message to the Legislature on Recreation and Environmental Quality, March 7, 1969. The message lists various recreational and environmental problems but evidences neither a coordinated approach nor a viable sense of priorities. Citizen health, economic, and social factors were placed at the bottom of the list. The Governor’s Special Message to the Legislature on the Environment, February 4, 1971, evidenced a somewhat more realistic order of priorities. Most of the problems mentioned in the two messages remain unsolved.
dium of the individual problems is misleading because it does not adequately define the limits of Michigan's environmental difficulties. Michigan's inadequate performance can be explained by interrelated factors which proceed from one of the basic weaknesses of a closed decisionmaking system: undue sensitivity to narrow economic interests and the basic distribution of power in our society.

B. Economic Growth and the Environment—
The Basic Clash of Values and Priorities

The environmental crisis proceeds from the contradictions between, on one side, growth and increasing productivity and, on the other, the preservation of natural and human environments. This contradiction is particularly important for Michigan, where the economy is centered on a single major growth industry. Now that the American frontier is closed, economic health must be found in ways that will not destroy the natural system upon which it depends. The efforts to accomplish this have not been assisted by the theories of most market economists, which assume that unceasing economic expansion is both necessary and inevitable.²⁴

Some Michigan organizations have recognized the true scope of the environmental problem and have urged population limitation and other steps to help bring a gradual adjustment to a stable economy.²⁵ Such an economy would need to be labor-intensive, providing a greater emphasis on services, culture, and the amenities of life, rather than on the rapid consumption and disposal of raw materials and capital resources. It is, however, doubtful that insights of this kind could penetrate the Michigan government's bureaucracy, which has generally rejected efforts to only partially restrict development or production even where it threatened irreparable injury. For example, the United Auto Workers' suggestion that the Tilden Dam controversy over jobs (i.e., economic growth) and the environment be resolved in favor of both by pump-

²⁴ This factor apparently explains why most economists have been less than objective about the computer-based, systems analysis of W. BHERENS III, D. MEADOWS, & J. RANDERS, THE LIMITS TO GROWTH (1972). The Limits to Growth concludes that we must either stabilize the world economy within several generations or face apocalyptic collapse of society as we have known it. At the United Nations Conference on the Environment at Stockholm in 1972, business lobbyists such as Lord Zuckerman, the science adviser to the Tory Prime Minister of England, were harsh and strident in decrying the "pessimism" of The Limits to Growth. But their criticisms and their alternative proposals contained little beyond their optimistic and boundless faith in technology's ability to solve all problems.

ing in water from Lake Superior (thus avoiding largely unnecessary construction of an environmentally injurious dam)\textsuperscript{26} was rejected by the DNR in favor of constructing the dam. The injury to one of the few remaining wetlands in the Detroit metropolitan area (by dumping polluted dredging spoil) was assured by the resolution of the \textit{Pointe Mouille} case,\textsuperscript{27} in favor of commercial traffic.

Other examples of agencies that have emphasized construction and productivity, while remaining unreceptive to more general and politically less powerful public interests, are the Drain Commissioners and the Department of Natural Resources Hydrologic Survey. The Drain Commissioners have the kind of pervasive political power on the local level which the Army Corps of Engineers has at the federal level; the power of both groups derives from the multi-million dollar, productivity-oriented construction projects which they control.\textsuperscript{28} Proposed legislation would have transferred to the Michigan Department of Natural Resources (DNR) the power of environmental review over drainage and similar projects throughout the state.\textsuperscript{29} The legislation was never passed. The Governor then attempted by Executive Order to shift review authority over drainage regulation from the Agriculture Department (dominated by farmers who favor drains for production) and the Drain Commissioners to DNR. But the Drain Commissioners forced the Governor to abandon this effort.\textsuperscript{30} Further evidence of the effect on decisionmaking of the clash between economic growth and the environment is found in the current controversy over "nondegradation" of environmental quality. To require "nondegradation" is to bar industrial expansion into or within a given geographic area. Any industrial process is likely to use air or water or both as the "free" conduit for its emissions. The DNR Hydrologic Survey deliberately deleted from a draft of the Inland Lakes and Streams Act the strong "nondegradation" (of

\textsuperscript{26} Detroit Free Press, June 2, 1972, at 12C, col. 1. The Tilden Dam and Mine project is considered in detail in notes 118-27 and accompanying text infra.

\textsuperscript{27} Statements of Findings, Alternative Disposal Site for Detroit and Rouge Rivers, Monroe County, Michigan, March 27, 1974; Final Environmental Statement: Confined Disposal Facility at Pointe Mouille for Detroit and Rouge Rivers, U.S. Army Engineer District. Public opposition to the original Corps plan ultimately resulted in its substantial modification and improvement. Detroit Free Press, June 16, 1974, at 8E, col. 1. In this case, the decision favoring growth over the preservation of the environment was made by a federal bureaucracy. But Army Corps of Engineers' decisions are reached in close harmony with local and state industrial and political interests. \textit{See} A. Maas, \textit{Muddy Waters} (1951); Douglas, \textit{The Public Be Damned}, \textit{Playboy} 143 (July, 1969); Findley, \textit{The Planning of a Corps of Engineers Reservoir Project: Law, Economics, and Politics}, 3 \textit{Ecology L. Q.} 1 (1973).

\textsuperscript{28} Detroit Free Press, Mar. 6, 1972, at 4B, col. 1.

\textsuperscript{29} Id.

\textsuperscript{30} Detroit Free Press, Mar. 8, 1973, at 13A, col. 3.
water quality) language and persuaded the legislature to substitute weak, ambiguous language ("no unlawful pollution") in the final draft. The federal Environmental Protection Agency (EPA) is, in contrast to the period of accomplishment under William Ruckleshaus, seeking to frustrate the federal court decisions which have strictly upheld the nondegradation requirements of federal air pollution law. The EPA's device for doing so is to transfer to the states the basic administration of this aspect of air quality, particularly by giving the states the severe and highly controverted burden of maintaining nondegradation. The burden is administratively and politically overwhelming for the average state administration, and both the EPA and Michigan state agencies appear to be aware of this fact. While the Michigan Attorney General joined most environmentalists in condemning the EPA actions as an "authorization for run-away pollution," the Michigan Air Pollution Control Commission (MAPCC) has called the EPA strategy "a step forward." Also, the MAPCC Air Pollution Implementation Plan (under the 1970 Air Pollution Control Act) not only failed to follow the national policy against further degradation of existing air quality, but pursued what can be termed only as a pro-degradation policy.

The operation and structure of many decisionmaking processes are receptive to production interests and less open to other public interests. These factors include legal impediments in the form of a burden of proof in favor of economic activity, narrow access to the judicial and administrative arenas, solutions with a "nuisance-internalization" focus, and government research emphasizing the most "productive" areas of inquiry. Furthermore, the mechanics of environmental decisionmaking may favor productivity interests by having decisions referred to many productivity interests within the department itself.

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33 Id.
34 The new EPA rules commented upon in notes 32-33 supra essentially charge the states with the difficult determination of "significant deterioration." See EPA Rules Would Give States Authority to Determine 'Significant Deterioration,' [1974] Environment Rep. 507-08.
36 See note 32 supra. See also section VI in PART TWO of this article.
37 See section VI in PART TWO of this article.
38 See Conclusion in PART TWO of this article.
The potential ramifications of these clashes will be examined further in Part Three of this article. For example, the distribution of resources has an even greater impact upon environmental problems as the economic frontier recedes into memory. Indeed, this is one of the many points at which the international character of the environmental crisis becomes most apparent. For example, it would be literally impossible for the 800 million Chinese to reach the level of affluence found in America. The world has neither the resources nor the ability to withstand environmental insults to permit this. Since the world's resources will not permit the underdeveloped countries to reach American standards of life, these nations may force a radical redistribution of resources. In this regard, concentration of wealth is particularly significant in Michigan, where there are few countervailing forces to the automobile industry and the rest of the industrial lobby. Intrinsic patterns of Michigan culture, education, and society may well reflect the overwhelming influence of the automobile industry and its materialistic priorities.

In a number of states, excluding Michigan, there has been some perception of what all this might mean. California, Delaware,39 and a number of other states40 have enacted limits on development or construction in environmentally fragile areas. But in Michigan a fierce resistance to any governmental encroachment upon the unrestricted property right of the individual (and as a corollary, to any regional or state encroachment on the powers of local government), underlay the rejection of all land use planning at the state level.

39 Lamm & Davison, The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives, 49 Denver L.J. 1, 28-29 (1972); CAL. PUB. RES. CODE § 6301 et seq. (West 1956, as amended, Supp. 1971). This California statute tightly regulates the development of coastal and estuarine areas in order to protect them from environmental harm. The system resembles that of several other states, where a permit is required before significant alteration of a coastal region is permitted. The permits are issued only after the negative environmental impacts are found to be negligible and where development does not otherwise contravene the public interest. Delaware has taken an even more restrictive approach to coastal development. DEL. CODE ANN. tit. 7, § 7001 et seq. (1971). Delaware does not use a permit system but bars highly polluting types of industry from both the land and sea areas of its coastline. See Note, Land-Use Management in Delaware Coastal Zone, 6 U. Mich. J.L. REFORM 251, 257-58 (1972) (a discussion of the Delaware practice and a summary of the approaches of some other states).

III. MICHIGAN'S CLOSED ENVIRONMENTAL DECISION-MAKING PROCESS: A FORMAT FOR ANALYSIS

The more important factors that explain the Michigan environmental decisionmaking system and its operation are described herein. Any isolation of individual factors is arbitrary, for the decisionmaking process is as much an integrated reflection of the entire society as the environment itself, and is equally demanding of integrated treatment.

The nature and character of Michigan's system of environmental decisionmaking is examined in terms of the structure (e.g., bureaucracy) and the internal and external factors (e.g., conflict of interest, special interest pressures, possible wrong-doing, or corruption) that shape the system.

The structure of an administrative decision system is often described as "bureaucratic" to the extent that decisions are handled by a large, formal organization. It is more useful in this article to treat "bureaucracy" as referring to the tendency of such organizations to serve some narrow set of purposes rather than the broad public goals for which they supposedly were created. Internal bureaucratic malfunctioning is enmeshed with the powerful external forces that play upon and intensify its weaknesses. These weaknesses include conflicts of interest, which are a blend of internal weaknesses and external influences. Bureaucratic dysfunction also involves special interest pressures, which, though acceptable in an open, fair lobbying system, lead into areas of possible wrong-doing or outright corruption.

A basic factor behind the power and range of special interest pressures is the relative amorality of a society focused on development, productivity, and growth. It is rare that the dubious character of many special interest pressures is even recognized, much less rejected. As a consequence, decisions are largely devoid of considerations of general public interests, public safety, conservation of resources, beauty, or equitable distribution of social values. This article seeks to document these broad propositions in terms of recent Michigan experience. The theoretical and philosophical underpinnings for these views have been dealt with elsewhere and will not be reiterated.

41 See notes 48-50 and accompanying text infra for a more detailed definition of "bureaucracy."
42 See, e.g., Lanning, Injustice and the Environment: A Moral Dilemma (publication forthcoming in a book by the International Association for Philosophy of Law and Social Philosophy).
Following a consideration of the structure of the Michigan system and the factors that determine its general form, the related operational shortcomings of Michigan environmental decision processes are considered. These shortcomings include the failure to implement environmental laws or obligations, ranging from inadequate, incompetent, or nonexistent enforcement, to the lack of adequate, consistent legislation. It extends to even more fundamental matters of inadequate perspective and inadequate planning, including the lack of an integrated approach to environmental planning and management.

There is a direct correlation between bureaucracy's rejection of imaginative ideas, and the lack of environmental planning and management. Dramatic illustrations of the ways in which the bureaucratic mind is closed to ideas that are new, different, or controversial are fairly recent statements by two of Michigan's top environmental officials. A top official of DNR's environmental protection division objected strongly to opening up department procedures to public participation, stating, "There is potential for disruptive action by those elements of the American public who espouse disorder or by agents of other powers."43 This statement was no mere aberration; though the former director of DNR dubbed the official "dumb," he gave him a full pardon on the ground that an assistant had written the statement and that the official had only signed it.44 In view of the commanding importance of the official's role in the DNR, the episode can not be brushed off as the careless release of an extreme opinion. Significantly, one newspaper report of the incident charged that this official received and has retained his high position in DNR as a result of political pressures from industrial interests45 who apparently like his point of view.

Similarly, the Chairman of the Michigan Natural Resources Commission (NRC) (who is the owner of a printing company) complained in an article for the Michigan Chamber of Commerce's publication about the "plain harassment of business" by "environmental kooks," lamenting that business is held suspect and is forced to prove its honesty.46 While this is not an unusual point of view for industry publicists, it seems somewhat strange coming from the head of Michigan's top environmental agency. It also tends to illustrate the interrelationship of such individual factors as

44 Id.
45 Id.
conflict of interest, lack of environmental understanding, failure to implement environmental laws, and the favoring of economic growth.

A factor common to much of this analysis (and which will be considered later in some detail)\(^4\) is that Michigan’s concept and administration of its environmental problems are often limited to the narrow, individualistic remedies of market economics, as embodied in the nuisance-type approaches of the common law. In brief, a major shortcoming of Michigan environmental governance is that it deals with the problem as a set of individual conflicts. As a consequence, the tools used to deal with environmental problems are often fines, tax penalties, and incentives, rather than the overall management approach that the character of environmental issues requires.

IV. The Nature and Character of the System

A group of factors, including bureaucracy, conflicts of interest, special interest pressures, and possible wrongdoing, explain why the decisionmaking process is susceptible to internal or external pressures. These factors derive from one of the basic weaknesses of a closed system — its sensitivity to narrow, special interests.

A. Bureaucracy

The term “bureaucracy” has been used primarily to describe the impact of organizational structure upon the accomplishment of its various goals. Presthus commented that most bureaucracies have large size, specialization of functions, hierarchical organization, “status anxiety,” rule by the few, successorship selection by the organization’s elite, “efficiency,” and rationality.\(^4\) Robert Michaels, in developing his “iron law of oligarchy,” suggested that labor unions could not achieve their progressive reforms without the firm organization of a hierarchical bureaucracy, but he concluded that the stronger the organization becomes, the more conservative and more focused on its internal goals it becomes.\(^4\) Administrative law attempts to prevent bureaucratic abuses by large government agencies, but it runs a perilous course between inade-

\(^4\) See section VI in Part Two of this article.
\(^4\) P. BLAU, BUREAUCRACY IN MODERN SOCIETY 93-94 (1956).
quate standards of review, such as "substantial evidence" and "rational basis," and excessive judicial interference. More likely the better approach to the problem is to tackle bureaucratic abuses at their source, rather than to refine standards of administrative review.

In considering "bureaucracy" this article is concerned more with the operations of government agencies than with the labor unions with which Michaels was concerned or the business corporations which Presthus studied. Although the enforcement of some of Michigan's environmental protection laws may pose the basic controversy between economic growth and the environment, the agency's public interest charter will ordinarily be clear and specific. Therefore, a broad and comprehensive definition of bureaucracy which encompasses many of the earlier definitions and which explains many of Michigan's environmental shortcomings is appropriate. Although a Michigan agency may have been established for a broad public purpose it often serves the interests it was supposed to regulate or emphasizes the viewpoints of the people running the agency. Bureaucracy must be understood in terms of the gap between the public mission assigned to a large organization and the private purposes it actually serves.

A good illustration of bureaucratic obstacles to environmental protection can be found in the natural gas eruptions that resulted from negligent gas well drilling in the vicinity of Williamsburg, Michigan. An oil company dug a deep gas well but failed to install a metal casing down to the bottom of the well, as prudence and good practice would seem to require. The resultant gas eruptions routed a number of families from their homes, muddied streams, and threatened humans and wildlife in the area. The oil company allegedly failed to install the shaft casing because of the extra cost involved; the DNR oil well drilling regulations did not require this precaution. DNR officials argued that such an accident would not happen again, but similar accidents had occurred at least twice in Michigan during the previous five years. Inadequate drilling regulations may have been the result of incompetence—one of the major weaknesses of bureaucracy. Only after the Williamsburg accident did DNR issue an emergency order requiring insertion of intermediate casing in all deep wells. A retired DNR expert

52 Detroit Free Press, Apr. 16, 1973, at 3A.
charged that the DNR geologists' partiality to the oil industry was responsible for the perpetuation of faulty drilling practices that saved the oil companies money but endangered the public.  

Some bureaucratic shortcomings are due to factors outside agency control. Budget and staff limitations pose obstacles to DNR's carrying out its stated public missions; promises of environmental protection mean little unless supported with the necessary money. If inadequate budgets force Michigan agencies to continue to rely on experts from the very industries which are to be regulated, then regulation is likely to remain inadequate.

The Water Resources Commission's (WRC) approval of a Dow Chemical Company plan to put dams on the Pine River is a classic example of the functioning of bureaucracy. WRC approved the plan on the grounds that it would create reservoirs that could be used for recreation and for control of the river's flow. But the Ingham County Circuit Court found that the reservoirs probably could not be used for recreation and that there was no demonstrated need for river control. In short, the court found that the river was being dammed primarily for the benefit of Dow and other private industry. The bureaucratic failure to distinguish public purposes from the private purposes served by the Dow plan led to the Pine River holding.

The Pine River holding approaches the position that agency actions with a substantially adverse environmental impact can not be upheld, irrespective of the extent to which agency procedures take account of such environmental impacts. The case appears to hold that agency action based on private advantage will not be sustained.

55 DNR continues to be short of staff and resources. It lacks funds to hire adequate expert assistance, its salary levels limit the calibre of its personnel, and it will pursue unwise policies in order to make up for lack of funds, as with its oil and gas leasing policies. Cuts in the DNR payroll may result when the Governor fails to support some of the DNR's special requests, as where the legislature refused to approve a DNR proposal to increase the fishing license fee, funds from which help support its operations. North Woods Call, July 25, 1973, at 6; id., Dec. 12, 1973, at 1. While the Michigan Executive Budget for 1974-1975 did include a significant increase for DNR, much of the difference has been consumed by inflation; only about half of the increase will go towards improved or expanded environmental or natural resource programs. North Woods Call, Aug. 7, 1974, at 3.
unless it can also be justified by significant public advantage. In other words, agency action may be overturned, not because of a procedural failure to consider environmental factors, but because the result of the action is oriented solely towards private productivity interests. Application of this public purpose doctrine—which goes even further than the "public trust" doctrine—would make it much easier to reverse bureaucratic actions, the impact of which is environmentally negative. But if this doctrine were too broadly applied, it might present some of the basic constitutional and political problems posed when the courts rely upon "substantive due process." The Pine River case probably goes about as far into the making of substantive policy as the judicial process should.59

Apparently the Pine River "substantive" approach will not be restricted to public trust situations where agency action is assailed as being almost exclusively directed toward private rather than public advantage. The Michigan Supreme Court has recently held in State Highway Comm'n v. Vanderkloot60 that the provision of the Michigan Constitution that "the legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment, and destruction,"61 is satisfied by the enactment of the Environmental Protection Act of 1970.62 The court held that the Act's provision—which forbids such pollution, impairment, or destruction unless "there is no feasible and prudent alternative" to the conduct, which conduct must be consistent with the state's public environmental protection goals63—is incorporated not only procedurally, but also substantively, into pertinent state statutes such as the Highway Condemnation Act.64 The court concluded that the Act is not simply a procedural route for protection of environmental quality but also is a source of substantive environmental law.65

Despite this language, the State Highway Comm'n opinion is not clear about the differences between procedural and substantive review of environmental decisions. Review is "substantive" if the courts overturn an agency action because they find that its decision was incorrect in environmental terms. Review is "procedural" if the agency decision is overturned because the agency failed to give formal consideration to all relevant environmental factors. Proba-
bly the supreme court meant merely to emphasize that administrative agencies must give formal consideration to the environmental factors specified in the Michigan Constitution and in the Environmental Protection Act of 1970.\textsuperscript{66} It is unlikely, despite the use of the term “substantive due process” early in the opinion,\textsuperscript{67} that the court meant that agency decisions might be reversed where the agency had procedurally considered all environmental factors and alternatives, but where the substantive balance of factors indicated that the proposed action was environmentally incorrect.\textsuperscript{68}

Briefly, and based on the lack of express wording in the Michigan Constitution to impose a requirement of “necessity” when property is taken by condemnation, the supreme court held that under the Highway Condemnation Act\textsuperscript{69} the Highway Department need not prove necessity for the overall highway project, but only for the taking of a particular piece of private property.\textsuperscript{70}

It is difficult to reconcile the broad thrust of the court’s holding that environmental protection is a matter of substantive due process with a position that denies judicial review on environmental grounds of the need for a particular transportation project, although such projects are among the most destructive of all environmental dangers. Unless State Highway Comm’n can be clarified, the limited value of litigation in providing environmental protection in Michigan will be further diminished.

The failure of the Michigan Public Service Commission (PSC) to exert any authority or review, or even to require public hearings with respect to the hundreds of miles of power lines that the power companies have built in Michigan serves as an appropriate example of how narrow bureaucratic approaches can deny the public

\textsuperscript{66} MICH. COMP. LAWS ANN. § 691.1201 et seq. (Supp. 1974-75).


\textsuperscript{68} The supreme court in State Highway Comm’n v. Vanderkloot, 392 Mich. 159, 184, 220 N.W.2d 416, 426 (1974), cites Sax and Conner, Michigan’s Environmental Protection Act of 1970: A Progress Report, 70 MICH. L. REV. 1004, 1054-64 (1972) for the proposition that the Act is a source of substantive environmental law. However, Sax and Conner make it clear that

The question of the EPA [i.e., the Act] as a source of substantive law arises whenever a defendant asserts that he has no obligation to take environmental considerations into account in the performance of the challenged activity. . . .

\textsuperscript{69} MICH. COMP. LAWS ANN. §§ 213.361-391 (1968), as amended (Supp. 1974-75).

\textsuperscript{70} State Highway Comm’n v. Vanderkloot, 392 Mich. 159, 170, 220 N.W. 2d 416, 423.

The author acknowledges the benefits of the thoughtful insights of David Marvin’s note in 21 Wayne L. Rev. (publication forthcoming).
environmental protection. On occasion the lines were inadequately tested and potentially dangerous, such as those of Detroit Edison in Washtenaw County.\textsuperscript{71} Although the PSC has argued that it has no jurisdiction over power siting in Michigan, the Attorney General has taken the opposite position.\textsuperscript{72} Even if the PSC were correct in declining such jurisdiction (which is dubious, given the general language of the applicable laws)\textsuperscript{73} it is remarkable that only now is the PSC starting to give sufficient thought to energy policy so that legislation may be introduced to provide PSC with the power necessary to enforce applicable environmental restrictions.\textsuperscript{74}

A somewhat parallel case of an agency's bureaucratic failure to give first priority to its public goals is the Michigan Air Pollution Control Commission's long history of delay and reluctance in dealing with the air pollution problem presented by the Hillsdale Foundry. Since 1968 residents have been complaining of "clouds of red dust" and other contaminants emanating from the foundry. MAPCC staff air quality specialists had checked these complaints nearly thirty times as of January, 1974, without ever requiring the company to comply with state air pollution requirements.\textsuperscript{75} Foundry officials appeared before the MAPCC a number of times to explain why no action had been taken to correct the problem, arguing that it would cost too much to install pollution control equipment at the old foundry (which provides 200 jobs), and that

\begin{itemize}
\item \textsuperscript{71} Litigation against Detroit Edison in Washtenaw County, centered on this danger, was eventually dismissed by stipulation, according to Richard Ford, a Detroit Edison attorney. The practical consequence was an increased condemnation award for the private litigants, but no enhanced protection for the public. This case would appear to have offered the Attorney General an ideal occasion to intervene or otherwise participate by using the Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. \S\S 691.1201-1207 (Supp. 1974-75). The Attorney General could thereby reinforce his parallel policy of intervening in PSC proceedings in order to require the PSC to take account of the environmental impacts of its activities. Note, \textit{The Role of the Attorney General in Consumer and Environmental Protection}, 72 MICH. L. REV. 1030, 1066-67 (1974) [hereinafter cited as Note, \textit{The Role of Attorney General}].
\item \textsuperscript{72} At one point the PSC asked the Attorney General's office for an opinion as to whether the PSC has the right to order public hearings on power line routes. The Attorney General's office has stated informally that the PSC has had this power since its inception and that the PSC has been derelict in its responsibilities. Detroit Free Press, Apr. 10, 1972, at 3A, col. 5, 8A, col. 1.
\item \textsuperscript{73} MICH. COMP. LAWS ANN. \S 460.6 (1929), as amended (Supp. 1974-75).
\item \textsuperscript{74} In a memorandum of June 6, 1974, from PSC Chairman Rosenberg to William Herttiger (the Governor's executive assistant), the PSC Chairman emphasized the need to expedite the administrative process and to provide a "one stop forum" as a major goal of Michigan power siting legislation. See also Kaufman, \textit{Power for the People}, 46, N.Y. U.L. REV. 867 (1971); \textit{Electricity and the Environment} (Association of the Bar of the City of New York 1972), which explores in detail the problems of power siting and of "one-stop" licensing.
\item \textsuperscript{75} Detroit News, Jan. 2, 1974, at 4B, col. 6; \textit{id.}, Jan. 20, 1974, at 2B, col. 1.
\end{itemize}
they needed time to relocate their plant. When, after years of con-
tinued air pollution, the MAPCC told the foundry they must halt
the pollution or suspend operations by January 1, 1974, the foundry
claimed that they needed another nine months of operation so that
they could get federal money to build the new plant. The
MAPCC finally took action, perhaps prodded by an unexpected
series of events. State Representative Smeekens, who had ap-
ppeared before the MAPCC in behalf of the Hillsdale Foundry, was
discovered to be a part owner and "president" of the foundry; the
Michigan Attorney General threatened to sue the MAPCC if it
did not issue an immediate shut-down order; and the public
interest-oriented member of the MAPCC publicly stated that the
rest of the Commission was refusing to enforce the law by not
closing the foundry.

The MAPCC, however, continued to drag its heels. When the
MAPCC finally ruled that the foundry must shut down, it failed to
make the necessary finding that the foundry was in default of the
MAPCC order to comply with the law; unfortunately, state law
allows court action in this context only when one fails to comply
with MAPCC orders. When the MAPCC finally did rule that the
Hillsdale Foundry was in default of the MAPCC order to clean up
or shut down by December, 1973, the agency still did not seek an
immediate closing of the foundry; rather, it requested that the At-
torney General seek a court order which would not close the
foundry before October 1974.

Many scientists and commentators have urged that human life
and safety as well as the environment are in the gravest of perils
from the construction and operation of nuclear power plants.

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76 Id.
77 Detroit News, July 7, 1974, at 11A, col. 1. The article strongly suggests that Smeekens' role with the company was primarily as a paid lobbyist.
78 Detroit Free Press, Apr. 19, 1974, at 3A.
79 Id.
81 Detroit Free Press, Apr. 18, 1974, at 3A, col. 3.
82 See, e.g., Novick, supra note 17; Elliott, supra note 19; N.Y. Times, Feb. 17, 1974, at 16L, col. 1; N.Y. Times, Nov. 22, 1973, at 11, col. 1; N.Y. Times, Mar. 26, 1974, at C-23, col. 1. It should also be noted that the Office of Management and Budget transferred authority to set radiation standards for individual power plants from the EPA to the AEC—that is, from a safety agency to an agency stressing development. N.Y. Times, Dec. 12, 1973, at 1, col. 2.
This peril is in good part due to the intense bureaucratic emphasis of the federal Atomic Energy Commission (AEC) upon the contribution to productivity and economic growth of a headlong rush into nuclear power construction with little concern for the safety precautions that are a major part of the AEC's charter. This danger is compounded where a state agency such as the Michigan PSC accepts a dangerous level of nuclear activity without any real effort to pursue any of the possible means whereby these dangers might be avoided.

The PSC and the State of Michigan have the duty to examine AEC claims that the "emergency core-cooling systems" (ECCS) designed to prevent catastrophic accidents in nuclear reactor plants are effective. If the PSC and the Governor are actively (or passively) accepting the claims of the AEC and of the nuclear industry, they are exposing the Michigan public to grave danger and putting production-centered special interests ahead of their public duties.

Therefore, it is important to note the casual techniques by which the Michigan bureaucracies limit public participation in their procedures. For example, DNR cited the energy crisis as an excuse to transfer almost all of its major "public" meetings from convenient localities around the state to Lansing. The result, of course, was effectively to reduce public participation and environmental protection by narrowing decisional input. The fact that this incident was neither trivial nor accidental is suggested by the DNR's recently adopted policy of denying public access to intra-agency letters or reports that might be critical of DNR.

Government bureaucracy plays a major role in environmental destruction, both directly and indirectly, through the failure to require adequate environmental protection. One currently popular technique for curbing these administrative obstacles, and one

83 The AEC was formally split up by the Federal Energy Administration Act of 1974, Pub. L. No 93-275 (1975). Research and development are placed in the Energy Research and Development Administration (ERDA) together with the major federal programs of research and development for all forms of energy. The Nuclear Regulatory Commission (federal NRC) will handle safety problems including reactor safety and the processing, handling, and transportation of all nuclear materials.
85 Detroit News, Oct. 11, 1974, at 9A, col. 1. NRC has tried to open up DNR's administrative processes by requiring DNR to present differing opinions within the agency to NRC. North Woods Call, Nov. 20, 1974, at 3.
87 See notes 70-81 and accompanying text supra.
which is in obvious reaction to the closed character of most bureaucratic decisionmaking, is to follow the lead of the federal National Environmental Policy Act (NEPA). 88 NEPA requires agencies to take formal account of the adverse environmental impacts of their proposed activities, as well as procedurally to consider all appropriate alternatives from an interdisciplinary perspective. 89 Unfortunately, while NEPA has produced a huge volume of litigation and has slowed down, and even halted, a few harmful projects, its ultimate impact has been very limited, partly because NEPA has generally been interpreted as being only a procedural and not a substantive provision. 90

When the Governor originally created the Michigan Environmental Review Board (MERB) in 1973, 91 it appeared to the environmentalists whom he appointed to MERB that Michigan had learned from the experience with the federal NEPA and had adopted an effective administrative restraint on the bureaucratic elements of its environmental decisionmaking. Prominent environmentalist members of MERB interpreted the language of MERB's executive order, "to coordinate the state environmental impact review program," 92 as meaning that MERB would have a substantive veto over environmentally harmful actions of state agencies. 93 The Governor also promised the appointees that MERB would receive a staff sufficient to make an adequate evaluation of agency environmental statements. 94

In a typical maneuver, many state agency directors objected fiercely to the claim that MERB had any review authority and argued that MERB should rely on the experts of the agency submitting a project for its review. 95 In other words, the agencies wanted to review themselves and to avoid any impartial and objec-

90 See note 58 and accompanying text supra.
91 Executive Order 1973-9 provides MERB with authority "to coordinate the state environmental impact review program" [emphasis supplied]. The Governor previously had required all agencies to file environmental impact statements with respect to all major activities within their jurisdiction (Executive Directive 1971-10, Sept. 30, 1971).
93 See North Woods Call, June 19, 1974, at 1:

It was clearly understood by environmentalists—including [Professor Joseph] Sax and others who accepted appointments to the board [MERB]—that the citizens could veto a state agency project, unless they were overruled by [Governor] Milliken.

94 North Woods Call, June 19, 1974, at 5.
95 Id. at 1, 5.
tive review from outside their agency. The Governor promptly issued an amended Executive Order\(^96\) which provided only that MERB should "assist the Governor in reviewing federal and state impact statements." The Governor argued that MERB could still be of some use since it could make recommendations to the Governor, who could then veto harmful projects.\(^97\) The plan assumed that: (a) MERB would be given the resources and staff to perform an adequate review; (b) MERB would have access to the Governor; and (c) the Governor would have the political courage and strength to override the big agencies and their industrial and political allies. None of the above appears likely.

Most of the state’s environmentalists were convinced that the public interest had once again suffered a defeat, not only because of the elimination of any formal authority in MERB to prevent harmful agency actions, but also because the Governor had not provided MERB with adequate staff and other resources. The subsequent actions make it clear that the creation of MERB was never more than a political gesture. The Governor ultimately declined to support legislation that would have restored MERB’s powers as they were originally established.\(^98\)

An impartial and substantive environmental review of agency activities may still be possible if the recent Michigan Supreme Court decision in State Highway Comm’n,\(^99\) is interpreted to allow agency actions to be overturned as "fraud or abuse of discretion" if the agency does not comply with the substantive environmental duties provided in the Michigan Constitution\(^100\) and the Michigan Environmental Protection Act of 1970.\(^101\) It will still be open to the agency to avoid reversals by sustaining the burden of proof that it had no "feasible and prudent alternative" and that the action was consistent with the state’s environmental goals.\(^102\) The agency need only claim that it has procedurally considered all of the environmental impacts and alternatives. The fact that only the indi-

\(^{96}\) Executive Order 1974-4 (May 3, 1974).

\(^{97}\) North Woods Call, July 24, 1974, at 1, 9.

\(^{98}\) H. B. 6123, 1974 Legislature. After MERB was rendered impotent, State Representatives Anderson and Goemaere introduced H.B. 6123 which would have established a State Environmental Review Board with independent agency status and an all-citizen voting membership. North Woods Call, June 19, 1974, at 1, 5. The Governor did not support this legislation.

\(^{99}\) See notes 58-70 and accompanying text supra, questioning whether State Highway Comm’n v. Vanderkloot was an environmental victory.

\(^{100}\) MICH. CONST. art. 4, § 52 (1963). See note 61 and accompanying text supra.

\(^{101}\) MICH. COMP. LAWS ANN. § 691.1201 et seq. (Supp. 1974-75).

vidual party's property—not the entire highway project—was involved renders any enhanced environmental protection from State Highway Comm'n largely illusory; the basic environmental impacts of projects will be ignored while the minor impacts on the individual pieces of property will encounter the overkill of substantive due process.

Nevertheless, if under State Highway Comm'n agencies are generally required to bear the burden of proof as to the substantive environmental consequences of their activities, a significant advance in environmental protection will be effected. The legal system has remained closed to most of the general public interests primarily because of the common law doctrine that the burden of proof rests with those who seek to restrain or limit forces that emphasize productivity and economic growth. Since it may be impossible to predict the exact consequences of many kinds of productive activity, it is apparent that the burden of proof may be too heavy for people who seek to restrain destructive forms of production and development.

This is not to suggest that the judicial environmental review potentially created by State Highway Comm'n is as satisfactory or as appropriate as an effective administrative review board like MERB. Courts can deal only with ad hoc, intermittent controversies that are brought to their attention, and are hardly in a position to take the kind of systematic approach that is essential to effective environmental management. In addition, since many decisions reflect value choices between economic growth and the conservation of the natural and human environment, the absence of political accountability of the courts further diminishes the prospects for unified regulatory efforts.

The question remains: why, given the potential of an administrative review board such as MERB, were the big agencies able to frustrate the Governor's attempt to set up a workable body? The answer lies in the relationships between the big government agencies and the industrial interests that influence the state legislature.

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104 The Michigan Supreme Court made it clear in State Highway Comm'n v. Vanderkloot that the effect of their incorporating the Environmental Protection Act of 1970 into the Highway Commission's statutory duty was to leave the Commission with the burden of proof (with respect to the "necessity" for condemning the individual piece of property). In brief, construction and development interests bear the burden of showing at least an absence of alternatives, and if the project-necessity holding is reversed, the net effect may be to subject environmentally injurious projects to a much closer scrutiny.
B. Conflicts of Interest

Conflicts of interest is the second in the set of factors that explains the Michigan decisionmaking process and how it is kept responsive to limited interests rather than to public environmental concerns. Such conflicts evidence a structural defect and imply an absence of the impartiality necessary to solve environmental problems. The conflict may be personal conflict (e.g., an individual who is appointed to a public body but who is still employed by, receives income from, or has spent much of his career with, a particular regulated industry) involving a duty to the public and loyalty to the regulated company.

A second and more subtle form of conflict of interest inheres in the organizational framework of an agency. For example, if DNR has duties to protect the environment and, simultaneously, to encourage oil and gas drilling or the construction of dams, this clash of goals poses a conflict for departmental representatives. An agency's use of experts from the industry that is being regulated reflects both of these flaws.

Both commentators and the federal EPA have noted that a major cause of the ineffectiveness of state environmental agencies...
is the presence on their governing bodies of representatives of the polluting industries (or their indirect representation in the form of interested bureaucrats). Michigan has done little to remedy this situation. The state legislature has been unwilling to increase public representation or to give public representatives a majority on state environmental agencies,¹⁰⁹ and the Governor has appointed to leadership posts a proportionally high number of polluter representatives. The lack of strong, publicly focused leadership contributes substantially to the dismal record.

Seemingly innocuous duties can also help to produce the closed decisionmaking atmosphere of the Michigan bureaucracy. For example, the Director of DNR also serves as Supervisor of Wells.¹¹⁰ The impact of such organizational conflicts of interest upon the DNR’s ability to discharge its duties to safeguard the public and the environment from the adverse consequences of oil and gas drilling is clear. The situation is further aggravated by the fact that an important segment of DNR revenues comes from the leases it grants to the oil and gas industry.¹¹¹

A final factor is that of interdepartmental conflicts. Large bureaucratic organizations often fight among themselves for prestige and position, and thereby further distract their attention from their missions. The more powerful entry under the system is usually the more closed organization, since its day-to-day focus so often concerns pressure politics.

C. Special Interest Pressures

Unlike bureaucracy and conflicts of interest, special interest pressures are found outside the formal decisionmaking process. But powerful special interest pressures do not operate in a vacuum. They often make use of what may seem to be broad public inducements such as jobs and other economic growth factors. In many cases, a view of the disproportionate amount of permanent injury to the environment in contrast to the transitory economic benefit derived from a given development project renders it difficult to believe that decisions are really made on the merits. Perhaps the preponderance of decisions in favor of development as against en-

¹⁰⁹ The Governor has only appointed one member with a strong public perspective to the MAPCC. Mich. House Concurrent Res., June 6, 1974, provides authority and resources for the Joint Committee on Conflicts of Interest. Neither this, nor S.B. 1377 and S.B. 1378 (which purported to prescribe standards of order for public officials and to increase the role of the State Board of Ethics) deal with most of the conflicts of interest presented.

¹¹⁰ Oil and Gas Regulation Laws, MICH. COMP. LAWS ANN. § 319.31 (Supp. 1974-75).

¹¹¹ See section VI in Part Two of this article.
environmental protection can be explained in terms of the self-serving tendency of the bureaucrat to favor the regulated industry. Most often, the promoter and developer have well-paid expert witnesses, high-priced counsel, effective lobbyists, and expensive presentations, while the public side of the question is often supported only by government servants on the working level whose very candor and effectiveness may have denied them the top rungs of the bureaucratic ladder.

Thus, it is a standard tactic for companies like Hillsdale Foundry, Reserve Mining, and Cleveland Cliffs Iron (CCI) to claim that they cannot afford to pay the costs of environmental protection. DNR and the other big state agencies are anxious to believe them and make little demand for proof of such claims or for a realistic appraisal of the consequences of particular projects.

CCI, a consortium including Ford Motor Company and the Inland and Republic Steel companies, may offer a good illustration of the environmental role of powerful special interest pressures. CCI, with the enthusiastic support of the DNR Hydrologic Survey, sought permission to dam the Escanaba River to provide water for its production of iron pellets in its new Tilden mine, claiming this would produce as many as 1,000 new jobs and related economic growth. There was evidence that the Tilden Mine could have been made to operate economically without the Tilden dam and its inevitable environmental injury; that is, the company admitted it would be able to acquire at least 93 percent of the water needed by recirculating water from the mine's tailing basins. Furthermore, while CCI claimed that the dam would be used to regulate the flow of the Escanaba, it admitted the contrary at a later hearing. Environmental experts disputed CCI's claims that the environment would not be disrupted. There was an adverse environmental impact statement, the preferable environmental al-

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112 See notes 75-81 and accompanying text supra; North Woods Call, June 12, 1974, at 6.
114 North Woods Call, June 12, 1974, at 6.
115 For a more detailed discussion of the tactic see section VII in Part Two of this article.
117 Id.
118 Detroit Free Press, Apr. 10, 1972, at 1A, 2A.
119 Id.
120 Mich. Dept. of Natural Resources Bull., May 3, 1972, at 1-4, summarizes DNR's "working draft" on the project's environmental impact.
ternative of bringing in water from Lake Superior was not fully explored,\textsuperscript{121} and an inadequate cost-benefit analysis was prepared.\textsuperscript{122} During construction a causeway was built without a permit.\textsuperscript{123} But CCI made glowing promises of a thousand new jobs and received the support of the Hydrologic Survey, even with respect to the causeway.\textsuperscript{124} The NRC Chairman reluctantly shifted the burden of proof to favor CCI by holding that, since CCI claimed it could not afford to build the Tilden Mine complex without the cheap water from the Tilden dam, and since DNR was "incapable" of determining if this was true, the permit should issue.\textsuperscript{125}

CCI used quite a different strategy in order to apply its special interest pressures on the shores of the Great Lakes and along such natural streams as the Two Hearted River. CCI's desire to develop its land holding for a maximum profit was thwarted by the existence of the Natural River Act of 1970\textsuperscript{126} and the Shorelands Protection and Management Act,\textsuperscript{127} two of Michigan's better environmental laws. Under this legislation the Two Hearted River, for example, would have been designated a "wilderness river" and its shores would be so zoned as to bar new construction, subdivisions, commercial developments, and dams. Somewhat similar protections would have been applied to the Great Lakes shorelands.\textsuperscript{128}

CCI's answer was simple. Using strong legislative influence, CCI sought enactment of S.B. 419, the so-called "Natural Areas Preservation \textsuperscript{[sic]} Act,"\textsuperscript{129} written by the CCI lawyers.\textsuperscript{130} Although the legislation masqueraded as an environmental bill, it would have required the state to purchase outright any land it

\textsuperscript{121} Detroit Free Press, June 2, 1972, at 12C, col. 1, reports a United Auto Workers proposal that this jobs-environment controversy may be resolved by bringing in water from Lake Superior, a suggestion that was not adopted.

\textsuperscript{122} See note 117 and accompanying text supra; note 124 and accompanying text infra; North Woods Call, June 6, 1973, at 1, 8.

\textsuperscript{123} North Woods Call, Apr. 4, 1973, at 1; \textit{id.}, Apr. 11, 1973, at 4.

\textsuperscript{124} Although construction of the causeway was inconsistent with the environmental impact statement, the Hydrologic Survey later came to the rescue by claiming that they had authorized the causeway. North Woods Call, Apr. 4, 1973, at 1.

\textsuperscript{125} North Woods Call, June 12, 1974, at 6. It is not clear why the permission sought could not have been conditioned on providing the state with appropriate facts.

\textsuperscript{126} MICH. COMP. LAWS ANN. §§ 281.761-.776 (1970).

\textsuperscript{127} MICH. COMP. LAWS ANN. §§ 281.631-.645 (1970).

\textsuperscript{128} See the Shorelands Protection and Management Act, MICH. COMP. LAWS ANN. § 281.632 (1970), which is made specifically applicable to the Great Lakes shoreline by Sections 2(f) and 2(h).


\textsuperscript{130} Detroit Free Press, Nov. 25, 1973, at 1; North Woods Call, Feb. 6, 1974, at 1.
sought to protect for natural habitats or general public use. This surrender of the state’s ordinary police powers to protect the public would have cost about $2 billion, which the legislature would never have appropriated. The Governor’s office stated that he opposed S.B. 419, but the Governor was strangely silent about the matter in public. Two environmentally sympathetic state representatives finally blocked passage of the bill. CCI’s pressure tactics still accomplished a number of its goals because DNR, apparently frightened by S.B. 419 and the related publicity campaign against the preservation of wild rivers, came up with a “compromise” zoning plan that abandoned real protection of the Two Hearted River’s banks and permitted development of lots along the river.

Another typical, and not unrelated, example of the operation of such powerful special pressures can be seen in the exemption of logging and mining interests from the coverage of the 1972 Soil Erosion and Sedimentation Act—mining and logging are major sources of the erosion that the Act sought to prevent.

Michigan’s ability to resist such powerful special pressures is significantly weakened by the lack of a priority environmental plan and by the lack of executive leadership. For example, an investigation in 1973 disclosed widespread abuses and deception of the public in connection with resort land sales. As a result, a Land Sales Act was proposed that would have required the real estate industry to inform buyers of environmental and other conditions affecting land they bought. The real estate dealers, the banks, and other components of the real estate lobby put such intense pressure on the legislature that a provision was included exempting all subdivisions of twenty-five lots or more from these disclosure requirements. For all practical purposes this amendment vi-

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132 Id.
133 North Woods Call, Feb. 6, 1974, at 1.

At CCI’s request he agreed to abandon the Wild River law set back and green belt provisions on the Two Hearted River. Instead he proposed to accept CCI’s proposal that the river’s wilderness be protected by establishing minimum lot sizes of 10 acres.

tiated the Act and permitted the real estate industry to avoid its disclosure requirements.\textsuperscript{139} Furthermore, after the Department of Licensing and Administration failed to develop the necessary rules for enforcing the act in time for its original April 1, 1973, effective date,\textsuperscript{140} the real estate coalition took advantage of this happy "coincidence" by persuading the legislature to postpone the effective date of the Land Sales Act until October 1, 1973.\textsuperscript{141} This delay had the practical effect of allowing owners of subdivisions containing twenty-five or more lots another six-month selling season without having to worry about any statutory duty of disclosure.

The heavy-handed approach of many commercial special interests is aptly demonstrated by the controversy over the Pigeon River country.\textsuperscript{142} The Pigeon River country is the last large tract of wilderness land in the Lower Peninsula of Michigan, and it is the last habitat of numerous wildlife herds. Such values—not susceptible to balance sheet determinations—are unimportant to the oil and gas interests who seek drilling rights in the Pigeon River Wilderness. The oil and gas interests are supported not only by big economic power, but also by the attitudes of local inhabitants who claim that their "private property rights" allow them to do as they wish with their "own" land.\textsuperscript{143}

Given this background, it is not surprising that a local attorney who acted as hearing officer on a request for an oil well drilling permit in the Pigeon River country granted the permit despite largely unchallenged testimony about the environmental damage that such drilling would cause.\textsuperscript{144} An Assistant Attorney General stated that such a well would be "an environmental insult" and that he was "appalled" by the hearing examiner's opinion, the implication being that the decision was so erroneous as to raise questions as to its objectivity.\textsuperscript{145} Although the NRC reversed the examiner,\textsuperscript{146} analogous questions continue to be raised about DNR's purporting to develop a management plan for the Pigeon River country while failing to allocate sufficient personnel or resources to the project.

\textsuperscript{139} North Woods Call, Jan. 16, 1974, at 3.
\textsuperscript{140} North Woods Call, Mar. 4, 1973, at 1.
\textsuperscript{141} Id.
\textsuperscript{142} Detroit Free Press, Feb. 27, 1972, at 3A, col. 1, 7A, col. 1; Ann Arbor News, Nov. 21, 1971, at 37, col. 1.
\textsuperscript{143} Id.
\textsuperscript{144} See note 145 infra.
\textsuperscript{145} North Woods Call, Jan. 16, 1974, at 1, 5.
\textsuperscript{146} North Woods Call, May 1, 1974, at 4.
Because of the high cost of litigation, the courts may not really be open to those seeking to protect the Pigeon River country if appeals ensue. At the very least, then, this example illustrates the obstacles to open decisionmaking on environmental issues. The special interest need only "win" once to be free to exploit the environment, while the environmental side must hold the line every time to avoid the irreversible effects of development.

**D. Possible Wrongdoing**

At some point agency action may cross over the line between special interest pressures, conflicts of interest, or suspiciously partisan bureaucracy, and cases of explicit wrongdoing. The distinctions may be subtle.

It is rarely necessary for productivity interests to resort to explicit corruption. Indeed, the number of situations suggesting literal wrongdoing that could be assembled for this article was quite limited. The real problem is still the corrupting influence of factors such as bureaucracy, conflict of interest, special interest pressures, and inadequate perspectives or planning. These are "corruption" in the more subtle sense that such factors are conducive to a closed decisionmaking process.

The Bear Mountain case, involving the illegal development of a resort on state land at Grayling, Michigan, and the possible misuse of more than $1 million in federal funds invested in the resort, wound up with a grand jury investigation. There are still unanswered questions about who benefited from these uses of state land and the integrity of certain state organizations involved. But, oddly enough, the entire investigation seems to have faded away.

Whenever a government agency is slow to enforce its environmental obligations or is eager to assist or defend production and development despite an apparent clash with the environment, the public is entitled to a full explanation. Though DNR fishery biologists predicted that the Consumers Power Company pumped-storage generating plant at Ludington, Michigan, would destroy many fish and that Consumers Power's dams on the Au Sable River would deteriorate river water quality, DNR mys-
seriously ordered its biologists to be silent and apologized to Consumers Power for newspaper articles containing these predictions.\textsuperscript{151}

Regardless of the classification of these shortcomings, the system as a whole stands for more than just a generic pattern of state decisionmaking. In conjunction with operational and conceptual factors examined below,\textsuperscript{152} it bears a real relationship to the loss of public confidence in the government and in the political system. Watergate, if properly understood, is not merely an exercise in criminality; it is also a demonstration of the failings of traditional institutional techniques for the distribution of decisionmaking power. These established practices appear to center on the organization and operation of a closed system of government—one which provides little access to broad public interests. When judged by such a standard, the Michigan government can not be considered free of these problems; rather, it must be viewed as a part of them. Ultimately, it is the public, whose preferences are reflected by representatives in Lansing and Washington, from whom the problems and the solutions must derive.

V. THE FAILURE TO IMPLEMENT ADEQUATE ENVIRONMENTAL LAWS AND OBLIGATIONS, AND THE EFFECT OF INADEQUATE OR CONFLICTING LAWS

The group of explanatory factors considered above\textsuperscript{153} are structural. They serve largely to describe the system and its organization. The focus of the remainder of Part One of this article is on the effects of the system, concentrating on its functional and conceptual shortcomings. Basic to the ensuing analysis is the fact that Michigan tends to follow the ad hoc approach of traditional market economics, and its accompanying common law concepts such as the nuisance doctrine.

A. The General Thrust of Michigan's Environmental Laws—The "Nuisance-Internalization" Approach

An appraisal of Michigan law as a function of Michigan's environmental decisionmaking process requires that two general questions be answered: first, from a substantive standpoint, does the pattern of Michigan laws correspond to the priority needs of

\textsuperscript{151} Id.; see also note 85 and accompanying text supra.

\textsuperscript{152} See section V infra.

\textsuperscript{153} See section IV supra.
Michigan environmental correction? This question must include a consideration of the coverage of the environmental laws as well as an inquiry into the openness of the decisionmaking process. The second question is functional: are the laws efficient and effective in achieving the substantive goals the legislature has established? The adequacy of relevant penalties and the currency of the laws play an important role in evaluating functional success.

Since the substantive adequacy of the laws has been dealt with in earlier portions of this article, this section will emphasize the functional inadequacies of Michigan’s environmental laws. Of course, it is not always possible to distinguish between substantive and functional adequacy. For example, a loophole may be deliberate or else be due to poor drafting.

Despite the general language about planning in many of the Michigan environmental protection acts, it appears clear that most of these provisions are precatory at best and cosmetic at worst. For example, despite the language directing MAPCC to adopt a "comprehensive plan," in practice the result has been far from that. Furthermore, the provisions for long range management plans under the Natural River Act of 1970 and for environmental studies under the Shorelands Protection and Management Act have encountered such barriers as the DNR’s concessions to CCI and the land use pattern of local property owners along the Two Hearted River.

It is also noteworthy that in a number of areas where planning is particularly important, the legislation is silent on the subject. This includes laws concerning the reclamation of metallic mining lands, snowmobile registration, restricted use pesticides, and oil and gas regulation.

But it is not only in the missing, inadequate, or cosmetic provisions for properly planned management that Michigan environmental legislation falls short. Most of these recent environmental laws focus only upon an individual sphere of problems. The reliance of a number of Michigan environmental statutes upon indi-

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155 MICH. COMP. LAWS ANN. § 323.1 (1967).
156 See generally sections VI and VII in PART TWO of this article.
159 See section IV C supra.
164 See, e.g., MICH. COMP. LAWS ANN. § 323.1 et seq. (1967).
vidual economic and tax sanctions\textsuperscript{165} is further evidence of the basic thrust of Michigan environmental legislation. The strategies of these laws are isolated and uncoordinated. Such statutes usually address only a single environmental problem.\textsuperscript{166}

This fractionated and unplanned approach indicates that Michigan legislation reflects a very limited grasp of the importance of an integrated strategy. The current pattern is largely modeled on the highly individualized, largely nonintegrated approach of market economics, as reflected in the common law of nuisance.\textsuperscript{167}

The nuisance economics approach has always been inadequate as a strategy for resource management, both because of the conceptual and practical limitations of nuisance law as a substitute for land use planning,\textsuperscript{168} and more basically because nuisance law embodied, but did not develop or extend, the basic problem-solving


\textsuperscript{167} See M. McDOUGAL & D. HABER, PROPERTY, WEALTH, AND LAND 439 (1948).

\textsuperscript{168} Most of the elements of common law nuisance reflect the narrow or closed treatment of general public interests that has been discussed in detail herein. The doctrine of "balancing the equities," and, to a lesser degree, the choice of damages rather than injunction, reflect a weighting of the decision process in favor of productive enterprise, judged by size and/or number of jobs involved. See Hulbert v. Portland Cement Co., 161 Cal. 239, 118 P.2d 928 (1911); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870 (1970). The doctrine of "coming to the nuisance" completely ignores the economic reality of the plaintiff who had little choice but to move into a dingy industrial district. See, e.g., Schuck, Air Pollution as a Private Nuisance, 3 NATURAL RESOURCES LAWYER 475 (1969). Furthermore, nuisance law generally is an area of conceptual confusion. Prosser, Nuisance Without Fault, 20 TEXAS L. REV. 399 (1942). The necessity of choosing between nuisance, trespass, or other concepts often reflects a continuation of the absurdities of the common law forms of action. See United States v. Causby, 328 U.S. 256 (1946); Burnham v. Beverly Airways, 311 Mass. 628, 42 N.E.2d 575 (1942); Swetland v. Curtiss Airports, 55 F.2d 201 (6th Cir. 1932); Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936), cert. den., U.S. 654 (1937), for an illustration of this confusion in one area of the law. More significantly, nuisance is another ad hoc resolution that provides little means for dealing with environmental problems in a planned manner. Typical of the inadequacies of the nuisance-internalization approach to environmental land use problems is Spur Industries v. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972). In that case, the court found neither injunction nor damages appropriate for resolving a land use conflict between the developer of a new town and an established feedlot operation. This was because the controversy had been forced into the rubric of "nuisance." The court finally granted an injunction to one side and damages to the other — a poor substitute for a more managed approach. See also Piekarski, Enjoining a Public Nuisance, 7 NATURAL RESOURCES LAWYER 157 (1974).
techniques of traditional market economics. Market economics defines pollution as an “externality;” that is, as a cost of doing business which is actually inflicted on a person external to the business. Economists argue that the remedy is to “internalize” the pollution; i.e., to shift its burden back to the polluter by charging him an amount roughly equivalent to the damage done the victim. Thus, nuisance doctrine usually requires the polluter to pay a monetary penalty to the individual victim in an amount that would compensate the victim for his damage, and thereby neatly “internalize” pollution.

Most state pollution laws have started in this same direction by providing penalties for injury-causing pollution or by offering tax and other incentives to the polluter. They thereby sought to “internalize” the external injury as between plaintiff-victim and defendant-polluter instead of focusing on the overall problem. The latter includes the question of how to take account of the public and environmental interests at stake, many of which are not well represented by individual plaintiffs. Injunctions are available only as a last resort and only on an ad hoc basis resulting from “balancing the equities.” The common law approaches were amended to include a system of permits, but the amendments continued to focus on individual plaintiff-victims and consequently did not embody any major advances in environmental management. In states such as Michigan, environmental statutes have not gone a great deal beyond the codification of public nuisance law.

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170 This approach is also present when, as in Michigan, the polluter is paid, via tax credits or otherwise, for assuming one of his own costs of doing business (pollution control).

171 The close relationship between these industry arguments and the traditional nuisance doctrine of “balancing the equities” (see note 168 supra) is apparent.

172 Given the limitations discussed in the nuisance-internalization strategy, it was to be expected that the statutory codification of nuisance approaches, whether in the relatively pristine form of a public nuisance law or in the somewhat more advanced form of a permit requirement, would still fall short of the ideal. The basic approach was still individualistic and closed. Many of the Michigan environmental laws involve requirements for permits, licenses, registration, or similar administrative procedures, but in spite of their broad planning language, they focus on isolated problems without real planning or integration.

The “effluent charge systems” urged by almost every traditional economist (and rejected by almost every environmental administrator) are but a variant of the individual permit systems embodied by many state statutes. All of these approaches share the same defect; instead of damages or injunctions, they use “effluent charges” or “1899 Permits” which have the same basic goal of “nuisance-internalization.” Thus, they, too, avoid integrated management. As the federal EPA’s approaches to environmental administration grew more sophisticated, less was heard of the 1899 Refuse Act, 33 U.S.C. §§ 407, 411,413 (1964), and its nineteenth century approaches to water management. Perhaps the ultimate in such arguments for the use of effluent charges and tax incentives is to be found in Hock, Constitu-
A common environmental problem—airport noise and the injury it does to neighboring land holders—offers a practical illustration of these general arguments. A typical legal/economic solution to this situation is for the court to label it as nuisance, trespass, or taking as between the plaintiff land holder and the defendant airport, airline, or manufacturer. But the problem of airport noise is not just an issue of how much damage defendant should pay plaintiff; the question itself is wrong. The larger issue is the relationship between commerce by air and the right of the surrounding community to reasonable use of its land. The public interests at stake have minimal access to economic and legal decisionmaking. Questions about the proper planning of transportation by air, the patterns of land use surrounding airports, and the relationship of both to economic growth remain unresolved.

The proper handling of the airport noise problem would require consideration of potential injury to the upper and lower atmosphere by airplanes, the effects of various patterns of airplane traffic, and an examination of the technology that can practically be imposed upon airplane manufacturers and airlines. The decisionmaking process must meet the difficulty of persuading governmental agencies such as the Federal Aviation Administration to grant to public interests the same elaborate consideration received by airplane manufacturers and the airlines. The special immunities of the military present further obstacles. Finally, the problems of how best to allocate the related economic burdens among manufacturer, user, and the general public, as well as among national and local units of government, must be fully explored.

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See note 168 supra for cases relating to airport noise; Berger, Nobody Loves an Airport, 43 CAL. L. REV. 631 (1970); Berger, You Know I Can't Hear You When the Planes Are Flying, 4 URBAN LAWYER 1 (1972); Huard, The Roar, the Whine, the Boom and the Law, 9 SANTA CLARA L. REV. 189, 197-204 (1969); Note, Inverse Condemnation and Nuisance, [1971] SYRACUSE L. REV. 793.
Part of the explanation for the inadequacies of the system is the psychology of market economics. Traditional economic theory assumes that a reliance on human acquisitiveness as the sole motivation for social action will either adequately explain the economy or provide leverage to deal with wants and needs of society that extend beyond individual acquisition. Individual supply and demand curves are, however, unable to deal with public interests such as education, the equitable distribution of resources, or health. Wherever a social problem is so complex, so pervasive or so much a product of disparate bargaining power as to require concerted public action, the random play of individual acquisitiveness is unlikely to solve the problem.

Michigan law and its underlying executive and legislative thinking have not progressed significantly beyond the nuisance-externalities approach to environmental problems. This is not to suggest that monetary penalties, permits, injunctions, or tax incentives and disincentives, are undesirable or that they should be abandoned. But such methods will not contribute to environmental problem-solving unless they are integrated into a broader management perspective.

B. Specific Shortcomings of Michigan's Environmental Laws

Judged by sheer weight and volume of shelf space, Michigan's environmental laws compare favorably with those of other states. Unfortunately, Michigan's laws are also largely obsolete, ambiguous, or conflicting. Michigan statutes frequently lack the effective sanctions and the efficient procedures which are essential to effective environmental administration. Few 178 question the need for recodification and clarification of Michigan's loose mass of environmental statutes. The courts have referred to such ambiguous and tortuous laws and have described one such law—the Drain Code—as being "an exceedingly complex statute, the provisions of which apparently are known by few in the profession and understood by far fewer."179 Problems of form and clarity, however, are not the most serious shortcomings of Michigan's environmental statutes. This section will attempt to list briefly some of the more significant ways in which functional or substantive statutory defects have handicapped environmental protection.

178 See generally interviews on file with author.
Some enabling statutes do not provide the full range of authority agency administrators require to meet their environmental protection goals. WRC and MAPCC lack express authority to deal with emergency air pollution or water pollution episodes\(^\text{180}\) despite the fact that the Governor has called for such authority in the past.\(^\text{181}\) Specific rules as to the posting of property against intruders, the requiring of written permission for nonowners to come upon land, and the spelling out of arrest authority under various circumstances would clarify troublesome problems.\(^\text{182}\) Although Michigan has a number of statutes forbidding trespass on another's property, these statutes do not clearly define the relationship of the recreationist, the hunter, or the snowmobiler to the landowner.\(^\text{183}\) The farmer or other landowner may thus be harassed by thoughtless interlopers who destroy property; as a result, further open space may be barred to the general public.

In some instances the omissions in a statute's coverage are relatively limited and may have been overlooked in the drafting process. But other gaps are so extensive as to suggest a deliberate policy choice by the legislature. If the public believes that the passage of environmental legislation means that the problem has been solved, special pressures have yet another opportunity to defeat public interests. For example, although disclosure of extensive fraud in connection with resort land sales led to demands for reform, the real estate lobby vitiated the effectiveness of the Land Sales Act\(^\text{184}\) by persuading the legislature to exempt subdivisions of fewer than twenty-five lots from its coverage.\(^\text{185}\) The legal defects in the Subdivision Control Act of 1967\(^\text{186}\) have had a similar frustrating effect, since the Act defines subdivision as excluding all parcels over ten acres in area.\(^\text{187}\) Legislation was recently proposed to include parcels up to forty acres each and to add a County

\(^{180}\) Roush, Statutory Water Pollution Control—the Michigan WRC Act: Observations and Suggestions, 19 WAYNE L. REV. 131, 158-59 (1972). Roush points out that when confronted with large mercury discharges by Wyandotte Chemicals in 1970, the WRC was able only to request the Attorney General to act, whereas other states have statutory authority to take action in emergencies.

\(^{181}\) There is still no emergency abatement procedure for water quality (or other areas). Roush, supra note 180, at 158. The WRC does have a small emergency fund it can use for spot clean-ups.

\(^{182}\) MICHIGAN NATURAL RESOURCES COUNCIL, THE TRESPASS QUESTION, HISTORICAL PERSPECTIVES (May 20, 1974); North Woods Call, June 12, 1974, at 4.

\(^{183}\) Id.

\(^{184}\) MICH. COMP. LAWS ANN. § 565.801 et seq. (Supp. 1974-75).

\(^{185}\) See notes 137-41 and accompanying text supra.

\(^{186}\) MICH. COMP. LAWS ANN. § 26.430 (1967).

\(^{187}\) Id.
Plat Coordinating Board to make it more difficult for developers to lobby individual county officials, but it was not passed.

There are many other examples of Michigan environmental laws where an important area of coverage or an important enforcement power has been omitted. Logging and mining interests are exempted from coverage by the Soil Erosion and Sedimentation Control Act of 1972, despite the fact that mining and logging are sources of the erosion that the Act sought to prevent. The Dam Act does not contain an explicit requirement that environmental, nonengineering factors be considered in the issuance of dam permits, although the prohibition of pollution is listed as one of its objectives. Had the language been more definite, it might have helped to open the DNR Hydrologic Survey's decisionmaking processes to factors other than productivity. Somewhat similarly, state statutes fail to require that river impoundments for lake developments be subject to state regulation where they occur on nonnavigable waters. As most private lake developments are not on "navigable" rivers, very few have been subjected to damming regulation.

Even where Michigan's laws do not literally omit important areas of environmental need, enforcement and procedural provisions may remain inadequate. One weakness of both air and water quality laws has been the cumbersome procedures and resulting enforcement delays. Another gap in enforcement provisions has been the failure to require the polluter to make a full and detailed disclosure of the nature and amounts of his emissions. Nor is there a uniform pattern to the sanctions that are provided. The "voluntary compliance" approach to industry has often meant that statutory fines were rarely invoked. Most of the penalties have

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189 Apparently, the reason for the disinterest in H.B. 5770 was that the already thin ranks of environmentalists were hopelessly split by the fact that hearings on H.B. 5770 were scheduled at the same time as the Great Lakes Shorelands Conference in Traverse City, Michigan. Id.
190 MICH. COMP. LAWS ANN. § 282.101 et seq. (Supp. 1974-75).
191 See notes 135-36 and accompanying text supra.
192 MICH. COMP. LAWS ANN. § 281.132(b) (Supp. 1974-75).
193 See M. WERNETTE, ENVIRONMENTAL THOUGHTS ON MICHIGAN'S PRIVATE RECREATIONAL LAKE DEVELOPMENTS, 6, 7, (1971) [hereinafter cited as M. WERNETTE], on file at Wayne State University Law School.
194 M. WERNETTE, supra note 193, at 5; see also Bartke, Commentary: Filling and Dredging in Michigan, 18 WAYNE L. REV. 1515 (1972); Bartke, Dredging, Filling and Flood Plain Regulation in Michigan, 17 WAYNE L. REV. 861 (1971).
195 M. WERNETTE, supra note 193, at 5.
196 See Roller, Michigan Air Pollution Control, 19 WAYNE L. REV. 89 (1972); WRC Note, supra note 4, at 445.
197 See Roller, supra note 196; Roush, supra note 180.
been random, bearing little relationship to such "nuisance-economics" goals as the amount of injury or the cost of correction. Monetary and other penalties have varied among types of pollution as well as among jurisdictions within the state. Reliance on remedies such as citizen suits can mean little against the background of such disarray. Furthermore, Michigan laws omit adequate provision for court costs and legal fees in citizen suits, and fail to provide for the critical expenses of expert testimony.

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198 See section VI in PART TWO of this article; notes 165-66 and accompanying text supra.
199 Id.
200 Id. The air and water quality laws limit air pollution surveillance fees to a range of $25 to $8,000 and water pollution surveillance fees to a range of $50 to $9,000. These amounts do not adequately reimburse the state for the cost of the related administrative functions. Roush, supra note 180, at 148-50.
201 The Environmental Protection Act of 1970, Mich. Comp. Laws Ann. § 691.1201 et seq., provides only that costs may be apportioned to the parties if justice requires and is silent as to the legal expenses. The burden which this leaves on under-financed public groups illustrates the way in which the decisionmaking system is relatively closed to the general public interest in environmental protection. The Administrative Conference of the United States, recognizing the problem of inadequate finances, has suggested pro bono representation, allowing attorney fee awards or money to meet the legal expenses of public intervenors. Note, Public Interest Right to Participate in Federal Administrative Agency Proceedings, 47 Indiana L. Rev. 682, 701 (1972). Proposals by the Ford Foundation to cut back its grants to public interest law firms have underlined the scope of the problem. Ford Foundation Considers Reduction of Grants to Public Interest Law Firms, [1973] Environment Rep. 895-96. The situation has been helped by the tendency of the courts to recognize suits by "private attorneys general," and to award attorney fees to plaintiffs. See, e.g., Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973); Section 505 FWPCA of 1972, 33 U.S.C. § 1151 et seq. (1971) (permitting any party to be awarded attorney or expert witness fees).

There is another important aspect of this problem which reflects the continuing clash between economic growth and the environment: discrimination by the Internal Revenue Service against public interest organizations in the granting of tax exemptions and the deductibility of contributions, which lie at the heart of a public interest group's ability to obtain money. Business has long been able to deduct most of its extensive lobbying costs, mostly on behalf of special interest goals, either as business deductions for legal fees and other "business" expenses, or through such provisions as the lobbying deductions permitted under § 162(e) of the Internal Revenue Code of 1954. See Cooper, The Tax Treatment of Business Grassroots Lobbying, 68 Colum. L. Rev. 801 (1968); Borod, Lobbying for the Public Interest—Federal Tax Policy and Administration, 42 N.Y.U. L. Rev. 1987 (1967). On the other hand, §§ 501(c)(3) (exemption) and 170(c)(2) (deductibility of contributions) of the Internal Revenue Code of 1954 deny such deductions if a "substantial part" of the donee's activities is "carrying on propaganda or otherwise attempting to influence legislation." It is difficult to find a rational basis on which to deny tax exemption to the League of Women Voters, a rigidly nonpartisan organization (League of Women Voters v. United States, 180 F. Supp. 379 (Cl. Ct. 1960), cert. denied, 364 U.S. 822 (1960)), while many special interests are able to take lobbying deductions. The result is a barrier to the consideration of noneconomic, public interests, such as those generally espoused by public interest law firms or organizations like the League. For a detailed analysis of some of the ways in which the federal income tax decision process is far more receptive to special interests than to public interests, see L. Lanning, Some Realities of Tax Reform, Compendium of Papers on Broadening the Tax Base 10, submitted to the House Committee on Ways and Means, 79th Cong., 1st Sess. (1959).
202 In the debate over MERB, a Governor's aide argued that MERB should emulate the state agencies in soliciting free assistance from academic experts. But the state agencies
A problem that is basic to much of the organizational and functional weakness of Michigan's environmental laws is poor draftsman ship. This is true not only of the Drain Code but of Michigan's energy, zoning, planning, and land use enabling laws as well. One such ambiguity was among the factors that led to a substantial revision of Michigan water quality laws and their penalties, which were intended to avoid federal government pre-emption. The Michigan WRC Act contained a provision imposing fines for illegal discharges into state waters. But this same section ambiguously stated:

However the person shall not be subject to the penalties of this section if the discharge of the effluent is in conformance with and obedient to a rule or order of the Commission.

The obvious weakness which this language created was among the factors that led to the amendment of the WRC Act to make it conform to federal EPA requirements. In this case, fortunately, the obvious loophole created by the language was eliminated.

A second ambiguity is a continuing source of inter-agency jurisdictional conflict. The Inland Lakes and Streams Act provides in Section 3(f) that the construction of ditches into an inland lake or stream is forbidden without a permit. But the Subdivision Control Act of 1967 in Section 194(c) permits approval of a plat within a flood plain even if the flood plain is altered, as long as the flood plain's original discharge capacity is preserved and other riparian rights are not affected. The Hydrologic Survey took advantage of this uncertainty to continue authorizing drainage projects into public waterways at its discretion, instead of complying with the permit requirement of the Inland Lakes and Streams Act. The Survey permitted a developer to construct four ditches...
into the East Branch of the Paw Paw River without the required permit, explaining that "this is one that got away."212

Despite the urgency of many of these problems, Michigan politics has tended to maintain local centers of power and to reject solutions on a state or regional level.213 The failure of recent efforts to achieve any state-wide coordination of land use planning is one good illustration,214 as is the continuing absence of any real regional authority for organizations such as the Southeast Michigan Transportation Authority (SEMTA).215 Of course, more than political parochialism is involved. The bias of some regional organizations such as SEMTA216 or the Huron-Clinton Metropolitan Authority217 in favor of suburbs and against the inner city has hardly increased their acceptability.

Michigan's environmental laws are inadequate in several basic ways. They are conflicting, weak, and inefficient; their thrust is disunified and uncoordinated. They are, in many respects, the converse of the integrated approach which Congress set forth in the federal NEPA.218

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212 Earth Beat, Apr. 19, 1974, at 2, notes the effect of this overlap in the state's laws in permitting the Hydrologic Survey the leeway that resulted in the Paw Paw River episode. The conflict between the two statutes has been partially resolved through appointment of a committee, No. 346, [1972] Mich. Pub. Acts, consisting of DNR, the State Drain Board, and the Highway Department to oversee storm drains and headwalls that are claimed to be exempt from the requirement of the Inland Lakes Act.


214 See section VII in Part Two of this article.

215 See Jackson, Planning for Environmental Improvement in Southern Michigan 42 (1971) (seminar paper on file at Wayne State University Law School), noting that SEMTA has no taxing power or other real authority.

216 SEMTA argued against even exploring any new technology for Detroit's urgently needed rapid transit system. This is an extraordinary position for such an agency to take. See Jackson, supra note 215, at 43-44.

217 Although Detroit provides the great bulk of the funds for the Huron Clinton Authority, and although the great majority of the persons affected by the Authority's activities live in Wayne County, each of the Authority's five counties has one vote. As might be expected, most Huron-Clinton projects are located outside Wayne County, and the few within Wayne County have been placed many miles from the inner city. Jackson, supra note 219, at 18, notes that SEMCOG (Southeast Michigan Council of Governments) and CHPC (Community Health Planning Council) are similarly weighted against Detroit. Unfortunately, the current U.S. Supreme Court seems unlikely to upset such violations of the one-man, one-vote principle. See Note, Salyer Land Co. v. Tulare Basin Water Storage District: Opening the Floodgates in Local, Special Government Elections, 72 Mich. L. Rev. 868 (1974).

The need for a substantive recodification of Michigan environmental law is evident, but the political obstacles are great. One major problem is the apparent failure of legislators and the public to understand the direct importance to them of many of these environmental problems and the real threat posed to their safety and their way of life. This lack of understanding, in turn, is directly connected to the lack of effective political leadership and to the failure of most of the media to adequately grasp and perceive the scope of the problem and to present it to the public.\textsuperscript{219} These are among the reasons for the dismal record of environmental legislation.

\textsuperscript{219} See section III supra.