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State Management of the Environment Part Two: A Continuing Evaluation of the Michigan Experience

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STATE MANAGEMENT OF THE ENVIRONMENT
PART TWO: A CONTINUING EVALUATION OF THE
MICHIGAN EXPERIENCE†

Geoffrey J. Lanning*

In Part One of this article,¹ the author outlined the scope and character of Michigan's environmental problems and suggested some of the factors underlying the state's weak and bureaucratic decisionmaking process. Part Two concludes the author's analysis of the fundamental obstacles to effective environmental decisionmaking in Michigan, and Part Three will contain recommendations for reform.

VI. INADEQUATE OR INEFFECTIVE ENFORCEMENT OF MICHIGAN'S ENVIRONMENTAL LAWS AND OBLIGATIONS

A failure to implement or to adequately enforce environmental laws may be due to a lack of personnel and resources. It may also be due to oversight or incompetence, or to deliberate omissions resulting from the bureaucracy's response to special interest pressures. However, the most fundamental factor is the absence of an integrated approach to environmental planning.

An illustration of the interplay of some of these characteristics is provided by the difficulties that have been encountered in implementing Michigan's Wilderness and Natural Areas Act of 1972.² By the end of 1973, none of the thirty-one areas proposed by citizens under the Act had been designated as natural areas. A good part of this delay has been due to the Department of Natural Resources' (DNR) insistence on using only two or three part-time persons from its Lansing staff to serve on the Wilderness and Natural Areas Advisory Board. Another major cause is DNR's domination by fish and game profes-

†This article is a condensation by the Journal of a more extensive unpublished work by Professor Geoffrey Lanning.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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sionals who place a low priority on wilderness concerns. Furthermore, DNR's wildlife division generally resists implementing wilderness and natural areas laws because it has not been authorized to conduct game research studies in natural geographic areas. Factors such as these combined to produce DNR's initial opposition to the Sleeping Bear Dunes National Lakeshore wilderness proposals of the United States Park Service. Ultimately, the Michigan Natural Resources Council (NRC) ordered DNR to reconsider its firm position that the area offered a fine opportunity for "wild life management." If, as in many of the situations previously discussed, the DNR staff views itself as a buffer for productivity interests, the burden of implementing the Wilderness and Natural Areas Act will continue to rest on individual citizens. Rather than requiring industry to show that economic activity will not cause undue harm, this attitude guarantees that the public will continue to shoulder the risks of environmentally detrimental activities.

The activities of the Michigan Air Pollution Control Commission (MAPCC) and of its chief field agency, the Wayne County Air Pollution Control Division (WAPCD) demonstrate the effects of pro-industry bias on the implementation of environmental laws. Several studies, including those undertaken by the University of Michigan Law School and School of Natural Resources, have found WAPCD's emphasis to be on industrial interests. The tactic of "conference, conciliation, and persuasion" employed by the agencies, ostensibly as the most effective way to deal with violations of the law, amounts to an abandonment of enforcement. The tactic favors industry, which consequently ignores environmental laws without fear of WAPCD-initiated litigation. While the voluntary-compliance approach was initially dictated by the industry-inspired language of the

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3 See interviews on file with author which support this view of the Department of Natural Resources' attitude.
6 North Woods Call, Aug. 14, 1974, at 1, 5.
7 See generally notes 118-136 and accompanying text in Part One of this article.
8 See note 161 and accompanying text in Part One of this article.
9 Roller, Michigan Air Pollution Controls: Legislative Efforts at Reform, 19 Wayne L. Rev. 89, 100-01, 123-24 (1972).
11 Environmental Quality in River Rouge 24, 28 (1972) (prepared by Dr. James Swan of the University of Michigan School of Natural Resources) [hereinafter cited as River Rouge Study].
12 Study Group Report, supra note 10, at 51-53; River Rouge Study, supra note 11, at 17.
13 See id.
1967 Michigan Air Pollution Act,\textsuperscript{14} it has persisted in the enforcement practices of the air pollution control bureaucracy.\textsuperscript{15} The previously discussed examples of the Hillsdale Foundry,\textsuperscript{16} the Northern Reduction Company,\textsuperscript{17} and Peerless Cement\textsuperscript{18} demonstrate the reluctance with which MAPCC has acted in enforcing environmental obligations. Effective implementation of environmental policy is unlikely in the face of this timorous approach to enforcement.

A further example of such shortcomings is MAPCC's air pollution implementation plan\textsuperscript{10} under the 1970 National Environmental Policy Act.\textsuperscript{20} The plan concluded that the automobile is not a primary source of air pollution in Michigan, although auto emissions are a major factor in most other industrial states.\textsuperscript{21} MAPCC claimed to offer an air pollution plan without considering transportation patterns and land use planning.

The failures of Michigan's air pollution control planning are representative of the impact of many state environmental laws which threaten major productivity interests. These results stem from the unresponsiveness of Michigan decisionmaking to environmental protection problems. Similar results may be ascribed to the activities of the Water Resources Commission (WRC). The Michigan Water Resources Commission Act,\textsuperscript{22} prior to its amendments in 1972\textsuperscript{23} and 1973,\textsuperscript{24} was a clearly inadequate law, and its administration was equally ineffective.\textsuperscript{25} The federal government coerced the reluctant Michigan legislature into adopting amendments by employing the not very subtle threat that the federal government would take over administration of water quality control under the 1972 Federal Water Control Act\textsuperscript{26} (FWPCA) unless Michigan improved its law and

\textsuperscript{14} MICH. COMP. LAWS ANN. § 336.18 (1974).
\textsuperscript{15} See note 12 supra.
\textsuperscript{16} See, e.g., Detroit Free Press, June 6, 1974, at 1A, col. 6; part III of \textsc{Part One} of this article.
\textsuperscript{17} See, e.g., Sax & Conner, \textit{Michigan's Environmental Protection Act of 1970: A Progress Report}, 70 MICH. L. REV. 1003 (1972). See part III of \textsc{Part One} of this article.
\textsuperscript{18} Detroit News, July 30, 1972, at 4B, col. 1. See part III of \textsc{Part One} of this article.
\textsuperscript{21} The Federal Environment Protection Agency supported Michigan's claim that automobile emissions are not a serious air pollution problem in Michigan. See Detroit News, Aug. 14, 1974, at 21A.
\textsuperscript{22} MICH. COMP. LAWS ANN. § 323.1 et seq. (1967).
\textsuperscript{25} See part V in \textsc{Part One} of this article.
administration. Michigan had revealed no comprehensive plan for dealing with water management but instead dealt with polluters on an ad hoc basis.\textsuperscript{27} Since water management is one area in which the importance of integrated planning is widely recognized as a necessary tool of management,\textsuperscript{28} Michigan’s failure to plan in this area can be viewed as a failure to implement the laws as well. Although the FWCPA now requires states to adopt comprehensive water management plans,\textsuperscript{29} there is no evidence that Michigan has begun planning in this area.\textsuperscript{30}

The Office of the Attorney General is one organ that is in a position to take the general overview needed for adequate environmental protection. The Attorney General has a statewide role, particularly with respect to enforcement of the legislative duty to protect the environment mandated by the Michigan Constitution of 1963.\textsuperscript{31} While the Office has an organizational independence, it has not realized its full potential in the interests of environmental protection, largely because of severe shortages of funds, staff, and other vital resources.\textsuperscript{32} Jurisdictional problems with local prosecutors and the dearth of legal counsel for particular agencies further exacerbate the problem.\textsuperscript{33} Thus, despite the differences between the Attorney General’s Office and conventional environmental agencies, the Office can function no better than the agencies.

Unfortunately, the consequences of inadequate enforcement by the Attorney General can be more harmful than poor administration by other agencies, especially in the context of a lack of executive leadership. Barring motivation from the Governor, initiative is unlikely to originate below. The mercury crisis of 1970 provides an apt illustration.

A Department of Natural Resources (DNR) official learned on February 11, 1970, of a Canadian discovery that all links in the food chain were threatened with deadly mercury poisoning due to mercury discharges into bodies of water such as Lake St. Clair.\textsuperscript{34} The official

\textsuperscript{27} See WRC Note, supra note 26, at 478.


\textsuperscript{29} See 33 U.S.C. § 1313(e) (Supp. 1972).

\textsuperscript{30} See note 27 supra.

\textsuperscript{31} MICH. CONST. art. 4, § 52.


\textsuperscript{33} Id.

\textsuperscript{34} Detroit News, Apr. 26, 1970, at 10B.
apparently made none of this public, and, as a consequence, the Michigan Department of Agriculture did not learn of this problem until March 27, 1970. Another two weeks passed without completion of vital tests to determine the safety of Michigan fish for human consumption. The head of the Michigan Department of Agriculture explained, "No one had told him to work his chemists overtime." The Governor's response was that fishing could continue, but, paradoxically, that the fish should not be eaten. The Governor also said on April 3, 1970, that the Michigan sports fishery would not be curtailed. Four days later, the Governor banned all sports and commercial fishing in Lake St. Clair, and the Canadian government followed suit.

The state's continuing failure to adopt adequate precautions with respect to the use of toxic substances and its eager promotion of nuclear construction do not generate confidence that the bureaucratic reaction to future serious accidents will be any more competent or coherent than it was when the mercury crisis arose, nor that the public interest and safety will be given adequate consideration.

Once again, Michigan's lack of executive leadership has been a significant ingredient in the inadequacies of its enforcement efforts. The Governor has frequently supported environmental measures and then backed away when special interest resistance arose in the Legislature. Land use planning, which remains in a state of confusion in Michigan, provides an excellent example. The Governor withdrew his support from an enlightened proposal that might have offered a workable land use planning program because the real estate lobby had launched a massive scare program. He later offered verbal endorsement but made no bona fide effort to use his political influence. Similarly, as discussed earlier, the Governor took a bold step forward by issuing an executive order that would have given the Michigan Environmental Review Board (MERB) a veto on environmentally

35 He seems to follow his earlier advice about the grave dangers inherent in public participation in environmental decisionmaking. See notes 44-46 and accompanying text in PART ONE of this article. The same high official denied federal EPA findings that small mercury discharges were continuing into Southeastern Michigan sewer systems. Detroit Free Press, June 5, 1970, at 3A, col. 5.
36 Detroit News, Apr. 26, 1970, at 10B.
39 As long as Michigan land owners believe that ownership carries with it the right to do as they wish with the land, rational use of Michigan's land resources remains a remote possibility. See notes 47-51 and accompanying text infra.
41 See notes 97, 100-107, and 109 and accompanying text infra.
42 See notes 93-100 and accompanying text in PART ONE of this article.
adverse activities of the big state agencies. However, when the bureaucrats who headed those agencies began to apply pressure on the Legislature, the Governor recanted.

The Governor also supported a long overdue reorganization of environmental agencies in Michigan that would have vested considerable authority in DNR. Once again, however, the Governor reconsidered when the special interests backing other agencies protested their potential loss of power and influence. After recently setting up a Task Force on Environmental Education, the Governor withdrew its necessary budgetary support. Given the attitude of the leader, it does not seem surprising that lower level officials hesitate to support public environmental objectives.

The major thrust of this article—that the overall character of Michigan's environmental decision process, including the performance of its administrative agencies, makes it inadequately responsive to Michigan's public environmental needs—remains at odds with the simplistic view taken by trial lawyers who dominated, and perhaps continue to dominate, the environmental movement. These practitioners seem to think that all one needs to do is "to sue the hell out of the bastards." This philosophy disregards the limited scope of most litigation and the inability of courts to handle an integrated problem such as the environment, save at the fringes. It also ignores the fact that courts have no real political accountability, a major objection to their making fundamental policy in a democracy. Even the occasional elections to which some judges are subject do not turn upon nor affect this lack of political accountability. Whether described as a "citizens' suit" or otherwise, litigation is still only one element of the far broader decisionmaking process.

43 See notes 94-95 and accompanying text in PART ONE of this article.
44 See notes 97-98 and accompanying text in PART ONE of this article.
47 A fairly typical argument against citizen suit legislation is that it would result in a more congested court docket. However, this has clearly not occurred in Michigan. See generally Sax & Conner, supra note 17, at 1007. There is, however, a more basic objection to excessive reliance upon citizen suits as a path to improved environmental protection: litigation is ad hoc for problems which require broad environmental management. For further commentary on the citizen suit, see, e.g., Hanks & Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969, 2 ENVIR. L. REP. 147 (1971); Hatch, Massachusetts and Michigan: Two States With an Answer, 6 LINC. L. REV. 119 (1971); Lohrman, The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution, 2 ENVIR. L. REP. 199 (1971); McGregor, Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute, 1 ENVIR. AFFAIRS 606 (1971); Sax & DiMento, Environmental Citizens Suits: Three Years' Experience Under the
Still, litigation may be useful in improving the enforcement of individual environmental obligations. An interesting recent example involves a citizens’ suit to prohibit the dumping of fill into a five-acre swamp on Walnut Lake in lower Michigan on the grounds that the swamp serves as a natural filter to maintain clean lake water. Although this development would seem to violate several state environmental laws, DNR’s Hydrologic Survey gave the swamp owners permission to fill the swamp. The Hydrologic Survey claimed that it had no jurisdiction because the area to be filled would be above the lake’s high water mark. But if the Hydrologic Survey had desired to enforce environmental protection, it could have used the Michigan Environmental Protection Act to obtain judicial action. After the court acted to protect the swamp, the Hydrologic Survey suddenly decided that its first finding had not been based upon a full survey of Walnut Lake. The Survey subsequently discovered that the fill had violated the Inland Lakes and Streams Act.

VII. INADEQUATE PLANNING AND INAPPROPRIATE PERSPECTIVES

The environmental crisis is, among other things, a product of narrowness of outlook. It signifies a failure to appreciate that everything about the human and the natural environment is closely interrelated and that man cannot continue to expand productivity without some consideration of its effects. Michigan has set out upon an unfocused environmental course, and the consequence of such haphazard pursuit
is that the average person is now threatened by extraordinary dangers that cannot be forestalled by hastily improvised measures.

One of the fundamental characteristics of this failure to visualize environmental issues in an integrated fashion is the ad hoc approach taken under the Michigan laws to the handling of most environmental difficulties.52 This approach stemmed largely from the partial one-on-one approach of market economics and traditional legal doctrine which we have called "Nuisance-Internalization." In this part, the underlying aspects of these approaches are examined.

A. The Absence of an Integrated Overview

Management of the environment demands rationality of planning and foresight, and, as the National Environmental Policy Act (NEPA)53 states, "a systematic, inter-disciplinary approach which will insure the integrated use of the natural and social sciences."

The difficulties the author encountered in drafting Michigan legislation to deal with the handling of toxic substances such as mercury provides a case in point.54 The state agencies dealing with air pollution, water pollution, and solid waste face different environmental problems separately. On the other hand, mercury can permeate all aspects of the environment. The combustion of mercury produces air pollution. Its burial pollutes the soil or degrades surface or underground waters. Since the state of Michigan lacks an integrated environmental agency, it is difficult to handle the mercury problem in a unified manner. Splitting up these problems among the agencies thus prevents effective solutions.55

The state's administration of major environmental problems such as air pollution has suffered in a comparable way from the failure of individual state agencies to adopt integrated approaches. The individualistic, productivity-oriented interests that helped to quash efforts

52 See part VI supra.
54 Jula, Environmental Aspects of Heavy Metal Toxicity, 1 ENVIR. AFFAIRS 74 (1970); Lanning, Michigan Toxic Material Legislation (Draft and Comments 1972) (on file with author at Wayne State University Law School).
55 In January, 1973, the Governor, in Executive Order 1973-2, designated DNR as the agency responsible for environmental matters. He also abolished the Interim Office on Land Use within the Governor's office and transferred it to DNR. However, the legislature was not prepared to accept all of this, particularly the shifts of the drainage function and the downgrading of MAPCC. Therefore, the Governor modified his original executive order, left the drainage functions in the Agriculture Department, and left MAPCC with a more independent status. Executive Order 1973-2a. See also testimony of the author before the House Conservation and Recreation Committee, 75th Legis., Reg. Sess. (1972), as to the form a possible environmental reorganization should take (on file with author at Wayne State University Law School).
to achieve statewide land use planning continue to support only sporadic incentive devices to stem environmental hazards.

Unfortunately, however, the narrowness of vision is not restricted to industrial or anti-environmental interests. For every environmental activist who comprehends the factors that shape the protection of Michigan's environment, there exists a person who limits his or her view of the problem to bottle caps, recycling, or to a vanishing species. While these goals are clearly desirable, it is of greater import that the resources of the environmental movement are limited and that the movement can no longer afford to dissipate its energies on any but the broader, more fundamental problems.

Nevertheless, the environmental movement has frequently concentrated its few resources and energies on relatively unimportant legislation such as the Bottle Bill, H.B. 4926, or the bill to reform MAPCC, H.B. 4260, instead of working toward a unified environmental agency, a realistic environmental review power, or comprehensive land use planning. Furthermore, the movement spent a good deal of its energy in obtaining the enactment of a citizens' suit law, the Environmental Protection Act of 1970. This law has provided some useful access to the courts, and it has made it easier for politically weak environmental and public interests to be heard. But citizen suits cannot save the environment. More basic organizational improvements are needed.

B. The Absence of Planning

The first step in establishing an adequate environmental program would appear to be the drafting of an overall plan along with a reordering of priorities. This has never been done by the Michigan government. The Governor's Council on Environmental Quality, in its 1969 Report, provided a loose listing of topics which someone may

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56 See notes 95-115 and accompanying text infra.
59 See note 55 and accompanying text supra, as to the need for a unified environmental agency; see notes 96-103 and accompanying text in PART ONE of this article, dealing with the effort to provide adequate administrative environmental review in Michigan (MERB).
61 Sax & Conner, supra note 17, at 1005.
62 GOVERNOR'S ADVISORY COUNCIL FOR ENVIRONMENTAL QUALITY IN MICHIGAN (Feb., 1970).
have thought deserved priority, but there is no evidence that these problems had been analyzed or arranged in any meaningful way.

In sharp contrast are states such as Maryland, which requires its public utility agency to prepare a ten-year plan for the handling of liquid and solid wastes for its service regions.63

Despite the imminence of Michigan's growing energy problems, the Michigan Public Service Commission (PSC) has no policy or plan. The Commission avoids planning ahead even where it clearly has jurisdiction. For example, where significant dangers would attend the ultra-high voltage lines which Detroit Edison proposed to run through Washtenaw County,64 the PSC claimed that it had no jurisdiction over power siting in Michigan, though the Attorney General disagreed.65 It is difficult to comprehend how an agency can have or implement any energy policy if it lacks control over power siting. Yet, when the PSC finally recognized the energy problem sufficiently to begin seeking legislation, it favored the "one-stop" power siting legislation that power companies desire since it is easier for them to concentrate their influence and avoid environmental restrictions where only one decision is made. With a number of decision "stops," it is easier for the environmental movement to make itself felt, and for it to delay unwise or harmful power development.

Michigan has not sought to explore whether it has any powers that might restrain the careless construction and placement of nuclear power reactors.67 Exclusive reliance on the Atomic Energy Commission for this protection is risky in view of the AEC's dismal record with respect to both safety and honesty.68 The state should at least inquire into the ability of power companies to assure public safety in their development and construction of nuclear power plants.69

One reason for the absence of planning in this area is that it has been relatively easy for the powerful combination of military, industrial, and governmental interests,70 which favor the profitable

63 Maryland has adopted a ten-year plan for dealing with long-range utility planning. Each year the Chairman of the Maryland Public Service Commission sends to the Maryland Natural Resources Secretary a ten-year forecast. The Secretary then conducts siting studies and prepares environmental impact reports. Md. Ann. Code art. 78 § 54B (Cum. Supp. 1974).

64 See note 72 and accompanying text in Part One of this article.

65 See note 73 and accompanying text in Part One of this article.

66 See note 75 and accompanying text in Part One of this article.

67 See notes 17, 19, 21 and accompanying text in Part One of this article; note 69 and accompanying text infra.

68 See notes 18, 84-86 and accompanying text in Part One of this article.


70 For example, the Department of Defense is a major political supporter of the AEC, in part because the Department of Defense's nuclear warheads are provided free of charge from the AEC's separate budget. H. Metzger, The Atomic Establishment 240 (1972). See also
fission "rapid breeder" reactors, to block adoption of an open energy research policy that would consider all alternatives. The Atomic Energy Commission during President Nixon's tenure was able to channel the great bulk of federal research funds into the development of these extremely dangerous\footnote{See Morgan, Adequacy of Present Standards of Radiation Exposure, 1 ENVIR. AFFAIRS 91 (1972); Wall Street J., Jan. 26, 1972, at 1; Rodgers, Research and Corruption, The Exxon-Nixon Axis, 218 NATION 11-16, (Jan. 5, 1974), summarizing efforts by the administration and the energy industry to suppress research in less profitable alternate sources of energy.} and unpromising breeders. Only limited funds were put toward development of the cleaner and safer fusion process, and almost no funds for solar energy and other possible power sources were provided.\footnote{For example, in 1973, President Nixon requested $182 million for fast breeder reactors, $4 million for solar energy, $39 million for fusion research, and $3 million for magnetohydrodynamics. Letter on Energy from Natural Resources Defense Council, 1973, at 6.} These latter sources are both cleaner and less wasteful than the rapid breeder.\footnote{For example, in 1973, President Nixon requested $182 million for fast breeder reactors, $4 million for solar energy, $39 million for fusion research, and $3 million for magnetohydrodynamics. Letter on Energy from Natural Resources Defense Council, 1973, at 6.}

In a similar situation, the Water Resources Commission has set out what it describes as a set of "strategies" for dealing with the water problems of the state,\footnote{Mich. DEPARTMENT OF NATURAL RESOURCES, ENVIRONMENTAL PROTECTION BRANCH, STATE PLAN FOR AIR POLLUTION CONTROL, WATER POLLUTION CONTROL, SOLID WASTE MANAGEMENT FOR FISCAL YEAR 1975 (June 1974).} in addition to a State Water Pollution Control Plan.\footnote{Mich. WATER RESOURCES COMMN, MICHIGAN STATE WATER POLLUTION CONTROL PLAN (June, 1973).} These documents purportedly cover many aspects of water management and pollution control. There is reference to broad plans and to coordinating mechanisms, as well as to many of the details of effective administration. Nevertheless, it is not clear that these documents have in fact led to integrated planning.\footnote{See WRC Note, supra note 26, at 478, noting that although the WRC has issued a Michigan State Water Pollution Control Plan (see note 75 supra), it is of questionable value. For example, the Plan gives the Rouge River a very low priority for pollution control, despite the findings of the Nader Task Force Report (D. Zwick & M. Benstock, Water Wasteland 193-94 (1971)) that the Rouge River is one of the ten most heavily polluted rivers in the United States.} Nor is it clear that the agency's work is adequately linked to the fundamental environmental problems discussed in Part One of this article. WRC's failure to plan is confirmed by the fact that Michigan was compelled to amend its water quality statutes in order to conform to the comprehensive planning requirements of the FWPCA.\footnote{33 U.S.C. § 1251 et seq. (Supp. 1972).}
inadequacies is underlined by the fact that it recommended the various 1972-1973 amendments to the legislature.\textsuperscript{78}

Unfortunately, even when the state's environment officials purport to plan, their focus appears to remain on special interests rather than on broad public goals.

For example, the previously discussed\textsuperscript{78} plan to save the Pigeon River natural and wilderness areas from the oil and gas industry and other destructive forces was totally inadequate. Despite some DNR efforts, including the appointment of a Pigeon River Advisory Council,\textsuperscript{80} the citizens' group involved in the matter [Pigeon River Country Association] demonstrated that DNR's management plan was vague and that it lacked clear provisions for protection of the area or enforcement of regulations.\textsuperscript{81} Indeed, the plan did not deal with many of the basic problems at issue, particularly guarding against the intrusion of motorized vehicles and oil drilling.\textsuperscript{82} The problem could be a conceptual inability to plan, but since these shortcomings had been brought to DNR's attention, the problem is more likely to be due to special interest pressures. DNR claimed that it was attempting to work out an agreement with the oil and gas companies. But such agreements would have permitted—not barred—drilling, and the DNR delays may have contributed to the McClure Oil Company's ability to get a permit to drill in Pigeon River country. Although the permit grant was later overturned by the National Resources Commission (NRC), McClure is now challenging that decision.\textsuperscript{83} The litigation expense may be too burdensome for the public conservationists who oppose this drilling, and McClure may well win as a result.\textsuperscript{84}

DNR's controversial proposal to build a harbor on the Platte River provides another illustration of administrative inadequacy. DNR argued that the harbor was needed because it was too dangerous for small craft to fish in the open bay. When public opposition forced abandonment of the harbor plan, DNR ironically proceeded to develop an elaborate scheme to plant more salmon in the Platte Bay. The practical effect will be to increase small-craft use of the open bay,\textsuperscript{85}

\textsuperscript{78} As a practical matter, the WRC (via DNR) not only recommended increased statutory penalties, \textit{WRC Note, supra} note 26, at 463, but recommended all the 1972-1973 amendments needed to forestall federal intervention, including statutory language authorizing "comprehensive planning."

\textsuperscript{79} See notes 145-150 and accompanying text in \textit{PART ONE} of this article.


\textsuperscript{81} North Woods Call, Oct. 24, 1973, at 1, 5.

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} Mich. Oil Co. v. Natural Resources Comm'n, Dkt. No. 74-16638 (June 11, 1974).

\textsuperscript{84} North Woods Call, Aug. 21, 1974, at 1.

\textsuperscript{85} North Woods Call, Jan. 9, 1974, at 1; \textit{Id.}, Apr. 3, 1974, at 1, 5.
but now that DNR's focus has changed, the agency has chosen to ignore the danger to small craft.

The Public Service Commission (PSC) Chairman's proposal that the federal government guarantee loans by Michigan's public utilities evidences more than ill-considered planning. The idea was very similar to the federal government's guaranty of loans for the Lockheed and the Penn Central companies and was duly criticized on similar grounds. The chief objection, however, is that such a plan is really an admission that no adequate plan existed in the first place. The solution to Penn Central's difficulties lay in the development of a sound national transportation policy. In the case of Lockheed, the guaranty served as a poor substitute for the improvement of federal management of large contracts in general. Similarly, the PSC guarantee proposal fails to recognize the need for the development of a sound energy policy for Michigan public utilities.

Michigan highway construction activity also suffers from inadequate planning. The Highway Department recently admitted that, despite various federal and state requirements, and the Department's claims to the contrary, it had not yet begun a serious inquiry into the impacts of social, economic, and environmental factors upon its transportation proposals.

There are few indications that planning has been any better at the regional or urban level than at the state level. This may be due, in part, to the Governor's support for such efforts in their initial stages followed by his failure to act when funds or resources are actually needed. For example, the Governor's office appointed a capable, high-level task force to examine some of Michigan's regional problems, but, as previously noted, when the task force suggested a number of sensible and public-oriented proposals such as the creation of a strong regional planning office, its report was quietly filed away.

Despite the weakness of regional planning organizations such as the Southeast Michigan Transportation Authority, whose limitations are suggested by the Authority's claim that it need not consider environmental issues because it is a "planning" and not a "construction" agency, the Detroit metropolitan region has received little help. In

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87 N.Y. Times, Aug. 29, 1972, at 33, col. 1.
89 See note 219 in PART ONE of this article. This task force was set up by Governor Romney, who had on occasion urged broad gauge, planned approaches to urban problems which found little acceptance in the rest of the Republican party.
90 Jackson, Planning for Environmental Improvement in Southeast Michigan 46 (seminar paper on file at Wayne State University Law School).
addition to the effects of sorely inadequate funding grants by the state, the city has had to suffer the consequences of poor environmental planning. Furthermore, while public transportation is an area where the need for planning is particularly obvious, transit thinking and planning have been "almost nonexistent."\(^{91}\)

The difficulty does not appear to be that the government of Michigan lacks planning resources. The state has access to many public-oriented plans and studies, ranging from the Ralls Energy Study\(^{92}\) to the T.O.P. Task Force study of regionalism in Michigan.\(^{93}\) The problem is how to persuade the government and the people of the importance of broad planning. Citizens certainly should not have to resort to court action to compel agency staff to think or to plan.

In areas such as land use, where the need for planned management has been particularly keen, countervailing industry forces have caused agency inaction. Chairman Phillip Mastin of the House Committee on Towns and Counties held a series of hearings on land use patterns in Michigan in 1972 and 1973.\(^{94}\) He found that developers, speculators, land owners, and local authorities exercise little restraint in the conversion of farms, scenic areas, and wildlife refuges to areas of commercial and residential development. Representative Mastin suggested that continued development of rural land into new residential communities could kill tourism and agriculture and cripple Michigan's economy by 1990 unless the trend was reversed by the implementation of an appropriate statewide land use policy.\(^{95}\)

The Governor summarized the situation in a statement to the legislature:

> We have unregulated urban and suburban spread and sprawl.
> We have regressive tax laws which force conversion of prime agricultural and forest lands to more temporarily profitable, but in the long run undesirable, intensive uses. Unwise subdivision development continues, aided by loopholes in the state's Subdivision Control Act. Our wetlands are inadequately protected and flood plains are still being utilized for improper development. As yet, we have not solved the problem of solid waste disposal sites and our state tools for enforcing appropriate solutions to the solid waste dilemma are inadequate. Finally, we are faced with a

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\(^{94}\) See note 97 infra.

\(^{95}\) Detroit News, Feb. 11, 1974, at 17A.
hodge-podge of confusing, overlapping and often conflicting planning and zoning laws applicable at different levels of government.\textsuperscript{96}

This clear need for land use planning and management led to a number of efforts to fill current voids. A Subcommittee on Land Utilization of the Governor's Advisory Council for Environmental Quality released a report in August, 1970, that recognized unplanned land use as a major problem and emphasized the need for speedy corrective action.\textsuperscript{97} The report called for the establishment of a state land use policy and a review of land assessment and taxation practices.\textsuperscript{98} The Governor then created a Special Commission on Land Use in October, 1970, whose final report recommended that the state develop and implement a comprehensive land management program.\textsuperscript{99} Included were suggestions for (a) the creation of a state land use agency to review all land use programs, (b) the requirement that all counties prepare and adopt comprehensive land use plans, (c) the strengthened enforcement of state and local laws, (d) the modification of property tax laws to emphasize actual use rather than potential development value, (e) a move away from reliance on local property taxation, (f) broadened state authority to control development, (g) an inventory of significant mineral deposits for inclusion in the state land use policy, and (h) the development of a state solid waste management and disposal plan.\textsuperscript{100}

The Special Commission on Land Use then proposed legislation and held nine public hearings. Partly as a result of the fact that the public was not well informed about these proposals, developer attitudes dominated the hearings.\textsuperscript{101} As a consequence of the real estate lobby's vocal opposition to the very notion of land use planning, the Governor temporarily shelved the proposal in a January 8, 1973, statement which continued to emphasize its importance.\textsuperscript{102}

Thereafter, the Governor, by Executive Order 1973-2,\textsuperscript{103} established an Office of Land Use in the DNR as a nucleus for the ultimate development of a state land use program.\textsuperscript{104} In the meantime, Repre-
sentative Mastin drafted and introduced legislation to provide for a state land use commission, a state land use plan, and for various elements necessary for such a program.\textsuperscript{105} This bill had several significant omissions, including the failure to come to grips with urban land use problems.\textsuperscript{106} The omissions were, in part, the result of a tactical decision.\textsuperscript{107} Unfortunately, this concession proved insufficient.

The Governor expressed his support for the bill on several occasions,\textsuperscript{108} but he made no extended effort to explain the problems involved to the public, nor to counteract the lobbying campaign of the real estate interests. Determined leadership could have helped the public to see the importance of a sensible land use policy. Unfortunately, the bill was never passed.\textsuperscript{109}

While the Land Use Commission and Representative Mastin did raise some of the basic land use planning issues previously neglected in Michigan, the results of their efforts are not encouraging. Nor is there much encouragement to be found in the contribution to integrated land management in recently enacted Michigan land use legislation. H.B. 4244\textsuperscript{110} was recently passed in order to relieve somewhat the basic land use problem of undue reliance on the regressive property tax,\textsuperscript{111} which tended to accelerate speculative development of farm and open space land.\textsuperscript{112} But H.B. 4244 is more an illustration of Michigan’s inadequate perspectives and lack of planning than a monument to integrated land reform. The law provides certain tax incentives for retaining land for agricultural or open space purposes. These incentives, however, are more likely to serve as a windfall for a limited number of land owners, and the act will thus fail to serve the goals of proper land use.\textsuperscript{113} What is necessary is a statewide plan for the management of all land, together with appropriate management powers to assure that open space and farmland are preserved. While H.B. 4244 might conceivably provide enough time for effective land use planning, the results are not encouraging.

\textsuperscript{105} See \textsc{Gunn} supra note 97; H.B. 5055 (6097), 77th Legis. (1974).

\textsuperscript{106} For detailed critiques of H.B. 5055 (6097)’s provisions at various stages of its legislative career, see \textsc{Earth Beat}, Sept. 14, 1973, at 1, 2; \textit{id.}, Dec. 7, 1973, at 2; \textit{id.}, Feb. 8, 1974, at 1, 2; \textsc{North Woods Call}, Aug. 29, 1973, at 3; \textit{id.}, Oct. 10, 1973, at 1, 5; \textit{id.}, Mar. 13, 1974, at 7.

\textsuperscript{107} The Governor’s Special Commission on Land Use largely omitted the urban environmental side of the problem from its Dec. 14, 1971, Report.

\textsuperscript{108} See \textsc{Gunn}, supra note 97.

\textsuperscript{109} H.B. 6097 (5055) was referred back to committee, and died in committee on June 20, 1974. \textsc{Earth Beat}, July 12, 1974, at 2.


\textsuperscript{111} See note 96 and accompanying text supra.


\textsuperscript{113} See Note, supra note 112.
use legislation to be enacted, the extraordinary level of profit made in speculative development renders such a possibility unlikely.\footnote{Detroit Free Press, Jan. 23, 1972, at 3A, col. 1.}

The final portion of this section concerns the effects of economic growth claims on agencies which have not developed adequate plans to implement environmental laws. These agencies are more susceptible to industry pressures because of the absence of long-range management plans.

For example, the PSC's limited evaluation of energy rates, energy research, and energy advertising policies, and the Commission's failure to examine energy alternatives, clearly point to its lack of planning. Without the protection afforded by a state energy policy, the public is unable to defend the environment against uncontested claims of economic growth. Thus, the townspeople in Midland, Michigan, strongly support a proposed Midland nuclear plant because of the ostensible job and development opportunities. This has been described as the "selling" of the Midland plant by the Atomic Energy Commission, Dow Chemical, and Consumers Power.\footnote{Richardson, The Selling of the Atom, 30 BULL. ATOMIC SCIENTISTS 28 (Oct. 1974).} Meanwhile, neither the media nor local political leaders have adequately emphasized the counterbalancing perils.

If another energy crisis occurs in the near future, it is likely that the new oil industry target will be off-shore drilling for oil and gas in the Great Lakes. Michigan will need adequate energy planning and strong political leadership to resist this. The Governor has already suggested that Great Lakes drilling might be acceptable,\footnote{Detroit Free Press, Dec. 14, 1969, at 6C, col. 1; North Woods Call, May 22, 1974, at 7.} though the policy of the Governor\footnote{The Governor's Special Message to the Michigan Legislature on the Environment, Feb. 4, 1971, at 7, states a broad policy against permitting drilling near lakes and streams.} and of the NRC\footnote{MICH. WATER RESOURCES COMM'N, WATER POLLUTION PROBLEMS AND CONTROL PROGRAMS IN MICHIGAN'S PORTION OF THE GREAT LAKES, 6 (Nov. 1971).} has been to deny leases for Great Lakes oil and gas exploration. The Governor recently reaffirmed his opposition to off-shore drilling,\footnote{Detroit News, Oct. 31, 1974, at 4B. See also Tuerkheimer, Copper Mining from Under Lake Superior: The Legal Aspects, 7 NATURAL RESOURCES LAW. 137, 149-150 (1974).} but did not really rule out offshore drilling as pressures for production mount.

A frequently forwarded—and often successful—industry argument in support of economic growth is that environmental safeguards are too expensive or that the necessary technology is not presently available.\footnote{See notes 121-132 and accompanying text infra.} The agencies often accept or even advance\footnote{See Detroit News, July 18, 1974, at 14D, col. 1; Detroit News, Dec. 1, 1974, at 8A, col. 1; note 78 and accompanying text in PART ONE of this article.} such argu-
ments as an excuse for their failure to enforce environmental laws. Once again, this presents an opportunity for special interest pressures to prevail when there is no countervailing advance planning. In the Hillsdale Foundry example,\(^\text{122}\) agency procrastination, flagrant conflicts of interest, and polluter recalcitrance contributed to the MAPCC's acceptance of Hillsdale's claim that it could not afford air pollution control devices.

The Peerless Cement\(^\text{123}\) and Reserve Mining Company\(^\text{124}\) examples present further instances of cost arguments meeting little resistance. In the latter example, the company's claims that it could not afford safeguards against the discharge of metal tailings and asbestos fibers were devoid of support in the record at trial.\(^\text{125}\) Similarly, Peerless stood by its claims of inability to protect the public through environmental safeguards. Ironically, much of the company's resources derived from tax-exempt bonds guaranteed by the City of Detroit.\(^\text{126}\)

Even where a claim of excessive cost or insufficient technology can be sustained, pollution is nevertheless considered in Michigan\(^\text{127}\) to be a cost of business (externality) that is passed on to the public, rather than to the polluting industry. It is poor planning to allow an inefficient business to survive only if the costs and burdens of its polluting activity are borne by the public or if environmental standards are not enforced.

A related tactic used by industry in evading environmental measures is to threaten localities with the loss or the withholding of jobs if expensive safeguards are not foregone. But particular developments or projects often produce many fewer jobs than their promoters claim. Peerless Cement told the Detroit City Council that its new plant would produce 300 jobs.\(^\text{128}\) In reality, those jobs existed only during construction; afterwards, the plant provided less than half as many jobs.\(^\text{129}\) Cleveland Cliffs Iron talked glowingly of the creation of as many as 1,000 new jobs as an incentive for approval of the Tilden dam project.\(^\text{130}\) Upon completion of the dam, this claim proved unduly optimistic because only about 200 permanent jobs were actually filled.\(^\text{131}\) Once again, if an agency is armed with an environmental

\(^{122}\) See notes 76-83 and accompanying text in PART ONE of this article.

\(^{123}\) See note 18 and accompanying text supra.


\(^{126}\) Detroit News, July 18, 1972, at 1B, col. 3; id., Dec. 6, 1971, at 1A, col. 1, and at 12A, col. 1.

\(^{127}\) See part VI supra.


\(^{129}\) Id.

\(^{130}\) Detroit Free Press, Apr. 10, 1972, at 2A.

\(^{131}\) See notes 126-127 and accompanying text in PART ONE of this article.
perspective and an effective plan, it need not be overwhelmed by arguments about jobs and economic growth.

The pressures imposed where state efforts to assure environmental protection are countered with arguments of prohibitive expense or technical infeasibility are intensified when an industry threatens to move to another state which has less extensive environmental safeguards. Considerations arise about the relationship between federal and state efforts to resolve environmental problems. One reason that industry and the states may favor regional or national approaches to particular environmental problems is to avoid such competitive disadvantages.

A concluding observation concerning environmental planning bears mentioning at this juncture. During the United Nations International Conference on the Environment in June, 1972, it appeared that the opposing groups could be accurately categorized as either optimists or pessimists. The latter were primarily the environmentalists and academicians, while the former seemed to include industrialists, market economists, and bureaucrats. The optimists, therefore, are the group that most heavily influences the decisionmaking system. They over-emphasize economic growth and dismiss pessimism, even at the risk of failing to acknowledge potentially productive contrary factors. The public interest is excluded if it requires any restructuring of agency priorities. Whether the result of bureaucratic anti-intellectualism or feelings of inadequacy, the consequence is myopic administration.

VIII. Closed Decisionmaking and Its Effect on Urban Areas: Michigan's Neglect of Detroit's Environmental Problems

Detroit's environmental difficulties are rarely mentioned in discussions of Michigan's environmental problems. While the urgency of the urban plight often seems to outweigh problems of the fisheries or open space, the decisionmaking process remains considerably less sensitive to Detroit's predicament. The state continues to insist that the automobile is not a significant source of air pollution in Michigan, and it continues to ignore issues of transportation routes, parking, and related land use planning. The situation is exacerbated by an inadequate air pollution strategy, which is premised upon indi-

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\textsuperscript{132} See part II in PART ONE of this article.

\textsuperscript{133} See interviews on file with author at Wayne State University Law School.

\textsuperscript{134} See notes 10-11 and 19-20 and accompanying text supra.

\textsuperscript{135} Id.
vidualized penalties and incentives without any supporting plan.\textsuperscript{136} The efficacy of this limited strategy is further undermined by the withholding of individual penalties pending “voluntary compliance.”\textsuperscript{137}

Adequate public transportation and convenient recreation facilities could be most helpful in dealing with instability and crime in the inner city. Yet, both have suffered from an absence of fair and open decisionmaking.

The regional agency which has been designated to serve Southeast Michigan (the Huron-Clinton Metropolitan Authority) gives an equal vote to each of the five participating counties,\textsuperscript{138} despite the fact that Wayne County has the largest population, provides the greatest share of the revenues, and demonstrates the most unfulfilled recreation needs. The practical result of this deliberate bypassing of a “one man-one vote” principle\textsuperscript{139} is that the Huron-Clinton Authority is essentially unresponsive to the needs of Detroit and Wayne County. The Authority has yet to develop a single park, recreation, or open space facility which is convenient to inhabitants of the inner city. The Authority has thus confined the bulk of its activities to counties that provide a smaller portion of the recreation funds.\textsuperscript{140}

Detroit’s inability to obtain public transportation is attributable to a factor in closed decisionmaking previously considered at length—\textsuperscript{141} the role of special interest pressures. The highway lobby, spearheaded by the automobile industry, has helped to advance the argument that Southeast Michigan (i.e., Detroit) might be “unduly benefited” by mass transit expenditures. Measures to improve mass transit in Detroit have been notoriously unsuccessful; many studies conclude that Detroit has the poorest public transportation system in the nation.\textsuperscript{142}

One major weakness in Michigan’s environmental management is the splitting of integrated problems among ill-coordinated agencies, combined with the use of such limited behavior modification techniques as monetary penalties and tax incentives.\textsuperscript{143} Accordingly, one

\textsuperscript{136} See part VI supra.
\textsuperscript{137} See notes 8-18 and accompanying text supra.
\textsuperscript{138} The counties are: Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne.
\textsuperscript{139} See note 221 and accompanying text in PART ONE of this article.
\textsuperscript{140} Id.
\textsuperscript{141} See part IV C in PART ONE of this article.
\textsuperscript{142} Detroit Free Press, June 27, 1972, at 6A.
\textsuperscript{143} Litigation seeking to recover a portion of the 1973 two-cent increase in gasoline tax collected from Detroit motorists on the grounds that this would be the source of 90 percent of the Southeast Michigan Transportation Authority (SEMTA) budget, and that SEMTA would not devote an appropriate portion of those receipts to Detroit’s transit needs, ultimately failed in the Michigan Supreme Court. County Road Comm’rs v. Canvassers, 391 Mich. 666, 218 N.W.2d 144 (1974). Related efforts to avoid the two-cent increase by a ballot referendum were blocked by a series of political maneuvers. See County Road Commissioners v. Canvassers, 391 Mich. 666, —N.W.2d— (1974), which held that No. 326, [1972] Mich. Pub.
would expect that regional organization would provide a promising and integrated approach to the sprawling problems of the Detroit metropolitan area. But, as noted earlier, the regional authorities in recreation (Huron-Clinton Metropolitan Authority) and in transportation (SEMTA) have been unresponsive to Detroit's needs. Local politicians fear that a regional body may not be receptive to their local promotions and developments. Consequently, cities such as Troy have refused to participate in the Southeast Michigan Council of Governments (SEMCOG). From the inner city perspective, blacks who have finally achieved political control may view regional efforts with suspicion.

The schism is further widened by the distrust that exists between environmentalists and leaders of movements designed to assist indigent and minority groups. Many such leaders feel that the environmental movement is merely a diversion from their own embattled efforts to survive and that the environment offers a slogan behind which wealthy suburbanites can exclude any development that might help the black or the poor.

But these groups share a common goal that is currently being thwarted by the obstacles to effective participation in the decision-making process. All represent nonproductivity-oriented public interests and, as such, they lack political and economic power. Thus, unless the decisionmaking process is made more accessible to them, the vital interests represented by these groups will continue to go unheeded.

IX. CONCLUSION

Parts One and Two of this analysis have sought to document in detail the relationship between closed patterns of decisionmaking and Michigan's current environmental problems. A breakdown of the factors behind the failures of state environmental management provides a convenient framework within which to examine Michigan's environmental record of the past few years. The question remains, however, as to how to explain the underlying form and flow of this environmental process.

One possible explanation is that the environmental crisis presents


145 Detroit News, June 19, 1974, at lB.

a classic choice between individual satisfaction and the goals that benefit a larger community. However, the environment may be about to force a more elemental choice upon us: economic growth or survival.

The consequences of such a potentially drastic choice may be that the American propensity for compromise will give way to the necessity for strong leadership in this area. Selection of candidates on a merit and leadership basis may obviate, for example, many of the environmental failings attributable to Michigan's lack of a strong executive. Similarly, a broader public recognition of the immediate value of retaining land resources may evoke more forceful reactions to individual environmental assaults.

The agencies and the government of the State of Michigan have tried to get by with a maximum of bold words and with a minimum of necessary action that would limit productivity and growth. The major difference between the state's neglect of the inner city and its response to environmental disaster is that, while people in Detroit continue to suffer, they still lack the leadership and political power necessary to obtain a meaningful improvement in their situation. The next environmental disaster, on the other hand, may penetrate to the suburbs and to the seats of decision. Real shortages of basic resources, energy, or drinking water will hit home. If the imminence of this situation is to be impressed upon the people, every level of government must become involved in an open and responsive process of decisionmaking. That goal may seem distant, but the stakes are not inconsiderable.