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PROTECTING THE ENVIRONMENT: CREATING A CITIZEN STANDING-TO-SUE STATUTE IN VIRGINIA

I. INTRODUCTION

Recognizing that private citizens have generally been unable to obtain judicial review of state agency decisions affecting the environment, the General Assembly of Virginia recently resolved to study whether "the citizens of the Commonwealth are provided with adequate remedies for the protection of environmental interests. . . ." Specifically, the General Assembly requested that the Institute of Environmental Negotiation at the University of Virginia form a committee to examine the problem and deliver its findings and recommendations during the Assembly's 1992 Session.²

This resolution comes more than twenty years after the Commonwealth ratified a new constitution that includes a provision mandating an active governmental commitment to conserve the environment.³ Because of restrictive judicial interpretation, this provision has proven useless to ordinary citizens attempting to preserve an increasingly fragile environment.

Federal and state legislatures must continuously find ways to protect environmental resources from damage and irreparable harm caused by industry and private citizens. One legislative response to this problem has been to grant private citizens the statutory right to bring actions against potential or actual violators of environmental statutes without having to show individualized harm. For example, in several federal statutes, Con-

1. H.J. Res. 187, Reg. Sess., 1991 Va. Acts 1851. The resolution provides in part:
RESOLVED . . . That the Institute of Environmental Negotiation at the University of Virginia establish and facilitate a committee to study the process of administrative and judicial review of environmental decisions by agencies of the Commonwealth. The Committee shall review the current . . . processes and determine whether the citizens of the Commonwealth are provided with adequate remedies for the protection of environmental interests and shall recommend any changes it deems desirable for the protection of citizens.

Id.

2. *Id.* The committee has met once a month since it was created. It has not yet produced any reports or written studies.

3. VA. CONST. art. XI, § 1. The full provision reads:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

Id.; see *infra* notes 20-33 and accompanying text for the analysis of the provision.

gress authorizes standing for private citizens to bring actions intended to protect the environment.⁴ Acknowledging this same need, several state legislatures also grant citizens the right to sue to enjoin environmentally damaging activity.

This Note will examine Virginia's legislative and case history in this area, other state legislatures' responses to the environmental standing problem, and the direction in which Virginia should proceed in light of the success and failure of these other states' actions. Specifically, part II will discuss state constitutional provisions and the self-execution question. Part III will examine the development and current status of Virginia standing law in this area. Part IV will review the various forms of citizen standing statutes enacted across the country and analyze their effectiveness. Finally, part V will provide arguments in support of implementing a citizen standing statute in Virginia and will recommend how the General Assembly of Virginia should design a specific citizen standing-to-sue provision.

II. CONSTITUTIONAL PROVISIONS AND THE SELF-EXECUTION QUESTION

Many states, including Virginia, have recognized a constitutional need to protect the environment "from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people."⁵ However, as courts have consistently demonstrated, mere recognition of the need to preserve environmental quality grants no authority to do so. Courts have found that this constitutional declaration is not self-executing and that additional legislation is necessary to provide the requisite authority.⁶

Historically, courts have characterized a constitutional provision as self-executing if it sufficiently protects the articulated right without additional legislation.⁷ The First Amendment's declaration that "Congress

4. See, e.g., 33 U.S.C. § 1365 (1988). This statute, set forth in the "Navigation and Navigable Waters" section of the Code, provides in part:

[A]ny citizen may commence a civil action on his own behalf —

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . .

Id. § 1365(a). Furthermore, an action may be commenced only after the plaintiff has given notice of the alleged violation or the appropriate administrator or state has failed to commence legal action to enforce compliance of the standard or limitation. *Id.* § 1365(b). Although federal treatment of this subject is beyond the scope of this Note, it is important to mention the federal government's willingness to allow citizen participation in environmental protection.

5. VA. CONST. art. XI, § 1; see FLA. CONST. art. II, § 7; MASS. CONST. art. XLIX; MICH. CONST. art. IV, § 52; PA. CONST. art. 1, § 27.

6. See *infra* notes 12-18 and accompanying text; see also *infra* notes 26-33 and accompanying text.

7. Thomas Cooley, often quoted by courts faced with this issue, provided a test for a self-

shall make no law . . . abridging the freedom of speech, or of the press"⁸ exemplifies a self-executing constitutional provision. Inclusion of the word "shall" clearly prohibits Congress from acting contrary to the provision's mandates. When a provision lacks such explicit language, however, courts must interpret and resolve ambiguous self-execution provisions.

In determining whether a particular constitutional provision is self-executing, courts should focus on both the provision's specific wording and the drafters' intent.⁹ Most courts, however, when reviewing environmental protection provisions, have analyzed only the provision's explicit language, without considering the drafters' intent. This emphasis on a section's language has permitted courts to define terms strictly, resulting in statutory constructions different than if the language had been considered in conjunction with the drafters' intentions. Consequently, almost all courts have found that constitutional provisions regarding environmental protection constitute "merely hortatory proclamations."¹⁰

Pennsylvania's pertinent constitutional provision, with its subsequent judicial interpretation, serves as a good example of this characterization. Article I, section 27 of the Pennsylvania Constitution provides that "[t]he people have a right to clean air, pure water, and to the preservation of the . . . values of the environment. . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."¹¹ Though this language appears to provide the state with the requisite authority to participate actively in environmental protection, the Pennsylvania Supreme Court has refused to support this construction. Instead, by restricting its interpretation of Article I, section 27 to the four corners of the text, the court has rendered the constitutional

executing provision:

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

THOMAS COOLEY, 1 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 167-68 (Walter Carrington ed., 8th ed. 1927) (footnotes omitted).

8. U.S. CONST. amend. I.

9. See Oliver A. Pollard, III, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351, 355-56 (1986).

10. *Id.* at 351.

11. PA. CONST. art. I, § 27. The full text provides:

[T]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Id.

provision useless.

The Pennsylvania Supreme Court first addressed the self-execution question in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*¹² Under the authority of Article I, section 27,¹³ the Commonwealth was seeking to enjoin construction of an observation tower near the Gettysburg Battlefield.¹⁴ The trial court found that the Commonwealth had failed to prove that the tower would irreparably harm the natural and historic values of the battlefield.¹⁵ However, in reaching this conclusion, the trial court rejected the appellees' claim that "Article I, [section] 27 of the Pennsylvania Constitution . . . was not self-executing and, therefore, legislative authority was required before the suit could be brought."¹⁶

On appeal, the supreme court affirmed the trial court's ruling but did so by accepting the appellees' contention that Article I, section 27 was not self-executing.¹⁷ In its decision, the court wrote that "before the environmental protection amendment can be made effective, supplemental legislation will be required to define the values which the amendment seeks to protect. . . ."¹⁸ Thus, under the court's interpretation of Article I, section 27, the Commonwealth had no authority to challenge the tower's construction, even if its construction would have irreparably harmed the environment.

The *Gettysburg Battlefield* decision prohibited potential plaintiffs, including the Commonwealth of Pennsylvania, from using Article I, section 27 of the Pennsylvania's Constitution as the basis for environmental litigation. By rendering this constitutional provision "merely a general reaffirmation of past law,"¹⁹ the court sent a clear message that the legislature would be responsible for giving practical effect to the provision. Pennsylvania's legislature has yet to enact an environmental protection statute in response to this challenge.

12. 311 A.2d 588 (Pa. 1973).

13. See *supra* note 11.

14. 311 A.2d at 589-90. In its opinion, the court noted that there was no applicable regulation or statute authorizing the Commonwealth's suit. Thus, the Commonwealth had to base its action on Article I, section 27. *Id.* at 590-91.

15. *Id.* at 590.

16. *Id.*

17. The court wrote:

[T]he provisions of § 27 of Article I of the Constitution merely state the general principle of law that the Commonwealth is the trustee of Pennsylvania's public natural resources with power to protect the "natural, scenic, historic, and esthetic values" of the environment. If the amendment was self-executing, action taken under it would pose serious problems of constitutionality. . . .

Id. at 594-95.

18. *Id.* at 595.

19. *Id.* at 592.

III. CURRENT VIRGINIA LAW

Like Pennsylvania and other states, Virginia has also addressed the question whether its own constitutional provision regarding environmental protection is self-executing. Consistent with the result in Pennsylvania, the Virginia judiciary has ruled that the Virginia constitution's environmental protection provision is not self-executing and is ineffective without additional legislation.

A. *The Commonwealth's Constitutional Provision*

The Constitution of Virginia, ratified in November 1970, incorporated a broad provision regarding environmental protection in Article XI, section 1.²⁰ The Commission on Constitutional Revision wrote that it had drafted this provision "in recognition of the growing awareness that among the fundamental problems which will confront the Commonwealth in coming years will be those of the environment."²¹ The Commission further declared that "[t]he proposed Conservation article . . . should operate as part of the climate of state and private initiative to deal with such increasingly important problems as air and water pollution . . . and other problems of the environment."²² By transforming their concern for environmental conservation into a constitutional provision, the drafters attempted to insulate conservation "from the vicissitudes of the legislative process."²³

Specifically, Article XI, section 1 deems it the Commonwealth's "policy" to protect the environment from damage and to preserve its natural resources and public lands.²⁴ The adoption of this section appears to foster an active state commitment to the protection of the Commonwealth's natural resources. However, the drafters failed to give the provision any practical effect by rejecting language that either would have made the provision self-executing or would have directed the General Assembly to enact additional legislation to put the provision into effect.²⁵

B. *Virginia Case Law*

The Supreme Court of Virginia explicitly addressed the Article XI, sec-

20. See *supra* note 3.

21. REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, H. DOC. NO. 1, Extra Sess., 321 (1969).

22. *Id.* at 322.

23. Pollard, *supra* note 9, at 352 (footnote omitted).

24. See *supra* note 3.

25. A.E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 207-08 (1972). The General Laws Committees of the Virginia Senate and of the House of Delegates rejected language specifically asserting that the people had a "right" to a clean environment. *Id.* at 207.

tion 1 self-execution question in *Robb v. Shockoe Slip Foundation*.²⁶ In 1966, the Commonwealth had prepared a long-range construction plan for future sites of state-owned offices in Richmond. By 1981, the Commonwealth had begun demolishing certain buildings in accordance with that plan. Shockoe Slip Foundation (the "Foundation") subsequently filed suit to block the demolition, alleging that the state had violated Article XI, section 1 of the Virginia Constitution by planning and commencing destruction of these historic buildings without sufficient agency review.²⁷ Specifically, the Foundation argued that Article XI, section 1 compelled state agencies to consider the effect of their proposed actions on the historic sites before implementing their plans.²⁸ The trial court agreed with the Foundation and enjoined the state from further demolition until the appropriate agencies complied with the requirements of Article XI.²⁹

The trial court's decision initially encouraged historic preservationists throughout the country to view state constitutions as a means of protecting areas threatened by development.³⁰ Any encouragement the decision gave to those planning Article XI-type litigation, however, was temporary. In 1985, the Supreme Court of Virginia reversed the trial court's decree.³¹ By unanimous decision, the supreme court not only rejected the Foundation's argument that Article XI, section 1 controlled the state's actions, but asserted instead that the provision "lays down no rules by means of which the principles it posits may be given the force of law."³² The court dismissed the Foundation's complaint, concluding that the provision was not self-executing.³³

26. 228 Va. 678, 324 S.E.2d 674 (1985). At the trial level, the suit was styled *Shockoe Slip Found. v. Dalton* because John Dalton was the Governor of Virginia at the time the suit was commenced. The style of the case was subsequently changed when Charles Robb became governor.

27. Brief for Appellee at 1, *Robb v. Shockoe Slip Found.*, 228 Va. 678, 324 S.E.2d 674 (1985) (No. 821539).

28. *Id.* at 5-6. The Foundation later asserted: "To the extent that this Article of the Constitution mandates that agencies of the state consider and not contravene its explicit policy it may be said to be self-executing." *Id.* at 8.

29. Final Decree, *Shockoe Slip Foundation v. Dalton*, No. G7109-2, at 3, City of Richmond Circuit Court, June 2, 1982. In his decree, Judge Marvin F. Cole did not state whether Article XI was self-executing, but he implied that it was more than advisory:

The Constitution of this state has not been complied with, and it is a responsibility of the Executive branch to carry out the mandate of the Constitution and to make whatever plans and studies are appropriate to consider the alternatives to demolition of this historic site.

Id. at 3-4.

30. Martha N. Macgill, Note, *Local Historic Preservation Measures as an Alternative to Federal Preservation Efforts*, 3 VA. J. NAT. RESOURCES L. 263, 281 (1984). At the time of the trial court's decision, nine other states and Puerto Rico had constitutional provisions which articulated general environmental protection policies. *Id.* at 282.

31. *Shockoe Slip Found v. Robb*, 228 Va. 678, 683, 324 S.E.2d 674, 677 (1985).

32. *Id.* at 682, 324 S.E.2d at 676.

33. *Id.* at 683, 324 S.E.2d at 677. In dictum, the court asserted that "[a] constitutional provision is self-executing when it expressly so declares." *Id.* at 681, 324 S.E.2d at 676.

One year after holding in *Shockoe Slip* that the state constitution's environmental protection provision did not grant standing, the supreme court examined the issue of statutory standing in *Virginia Beach Beautification Commission v. Board of Zoning Appeals*.³⁴ In *Virginia Beach Beautification*, the Beautification Commission (the "Commission") opposed a decision made by the Board of Zoning Appeals of Virginia Beach (the "Board") permitting the construction of a billboard near a highway.³⁵ The Commission sought a writ of certiorari to the court of appeals to reverse the Board's decision pursuant to section 15.1-497 of the Code of Virginia (the "Code"),³⁶ which grants standing before a court to any person "aggrieved" by a board of zoning appeals' decision.³⁷ The trial court initially granted the Commission a hearing on the matter, but subsequently ruled that the Commission lacked standing in the proceeding.³⁸

In reviewing the Commission's appeal, the supreme court focused on the meaning of "aggrieved," defining it as "a denial of some personal or property right . . . or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally."³⁹ Applying this standard to the suit, the court found that the Commission "ha[d] not . . . demonstrated a direct, immediate, pecuniary, and substantial interest in the [Board's] decision to grant the variance. . . ."⁴⁰ The supreme court thus affirmed the trial court's ruling that the Commission lacked standing.⁴¹

Within the past year, the Virginia Court of Appeals reiterated Virginia's restrictive statutory standing requirement for environmental plaintiffs. *Environmental Defense Fund v. Virginia State Water Control Board*⁴² involved the Water Control Board's ("the Board") issuance of an amended permit to a poultry and wastewater treatment plant. The amended permit had authorized the facility to increase the level of effluent⁴³ it was dumping into a waterway.⁴⁴ Prior to the issuance of the permit, the Environmental Defense Fund ("EDF") and other citizen groups had objected to the proposed permit at a public hearing. After the Board issued the permit, EDF requested a formal hearing. The Board denied

34. 231 Va. 415, 344 S.E.2d 899 (1986).

35. *Id.* at 416, 344 S.E.2d at 900.

36. VA. CODE ANN. § 15.1-497 (Michie 1989).

37. 231 Va. at 418-19, 344 S.E.2d at 902.

38. *Id.* at 416, 344 S.E.2d at 900.

39. *Id.* at 419-20, 344 S.E.2d at 903.

40. *Id.* at 420, 344 S.E.2d at 903.

41. *Id.*

42. ___ Va. App. ___, 404 S.E.2d 728 (1991).

43. The term "effluent" is defined as "[l]iquid waste which is discharged into a lake, river, etc." BLACK'S LAW DICTIONARY 515 (6th ed. 1990).

44. *Environmental Defense Fund*, ___ Va. App. at ___, 404 S.E.2d at 729.

EDF's request, contending that EDF lacked standing to challenge the Board's decision. EDF filed two appeals in the Circuit Court of the City of Richmond: one challenging the Board's decision to amend the permit, and the other challenging the Board's denial of standing to EDF.⁴⁵

The trial court sustained the Board's demurrers in both suits and stated that EDF "[did] not and [could not] have . . . the same interests as one directly affected" by the issuance of the amended permit.⁴⁶ The court held that EDF lacked standing under two applicable statutes. It rejected the contention that EDF qualified as an "owner aggrieved" by the Board's actions under section 62.1-44.29 of the Code,⁴⁷ a statute within the "Waters of the State, Port and Harbors" portion of the Code.⁴⁸ The court also refused to consider EDF as a "person affected" or "party aggrieved" under section 9-6.14:16 of the Code,⁴⁹ a statute within the "Court Review" segment of the Code.⁵⁰

In May 1991, the Court of Appeals of Virginia unanimously affirmed the trial court's decision.⁵¹ In doing so, the court rendered an even narrower opinion than that of the circuit court. It held that where a law "contains a specific standing requirement, such as that contained in Code [section] 62.1-44.29, this requirement is controlling over the standardized court review in Code [section] 9-6.14:16."⁵² Thus, the court limited its review to whether EDF was an owner aggrieved under only the stringent requirements of section 62.1-44.29 of the Code and concluded that EDF was not.⁵³

45. — Va. App. at —, 404 S.E.2d at 730.

46. *Id.* at —, 404 S.E.2d at 730. In its opinion, the court cited to *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986), to support this conclusion. See *supra* notes 34-41 and accompanying text.

47. VA. CODE ANN. § 62.1-44.29(1) (Michie 1987). This section provides in part:

Any owner aggrieved by a final decision of the Board . . . , whether such decision is affirmative or negative in form, is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act.

Id.

48. — Va. App. at —, 404 S.E.2d at 732.

49. VA. CODE ANN. § 9-6.14:16(A) (Michie 1989). This section provides in part:

Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia.

Id.

50. — Va. App. at —, 404 S.E.2d at 731-32.

51. *Id.* at —, 404 S.E.2d at 733 (1991). Ironically, the judge who wrote the court's opinion in *Environmental Defense Fund*, a decision which further discouraged environmental protection suits, rendered the trial court's opinion in *Shockoe Slip*, a decision which initially supported environmental litigation. See *supra* note 29.

52. *Id.* at —, 404 S.E.2d at 732.

53. *Id.* at —, 404 S.E.2d at 732-33.

Though the *Shockoe Slip*, *Virginia Beach Beautification*, and *Environmental Defense Fund* decisions evaluate different aspects of environmental litigation, they illustrate the Virginia courts' rejection of citizen-initiated litigation in this area. In *Shockoe Slip*, the court refused to look beyond the words of Article XI to the intent of the provision's drafters. Had the court acknowledged that the drafters intended Article XI to be more than advisory, the court's decision would have been inconsistent with the legislative history of the provision. By limiting its review to the "plain meaning" of words, the court reached a conclusion that appeared logically based on the evidence but that rendered Article XI useless in practice.

After *Shockoe Slip* forced environmental plaintiffs to look to various statutes for standing, the *Virginia Beach Beautification* and *Environmental Defense Fund* cases further discouraged this kind of litigation. Both decisions narrowly construed statutory terms and denied standing to the parties bringing suit. These narrow constructions conveniently relieved the courts from reviewing the merits of the suits and assessing the actions of government agencies that allegedly harmed the environment.

Following *Shockoe Slip*, *Virginia Beach Beautification*, and *Environmental Defense Fund*, it is clear that Virginia's courts refuse to take any affirmative role in environmental protection.⁵⁴ Should the citizens of the state hope to further the constitutional objective of preserving the Commonwealth's natural resources, they must look to the General Assembly for legal support. The General Assembly has agreed to scrutinize this problem⁵⁵ but needs to take actual affirmative steps to resolve it. For example, by examining existing standing provisions in other states, the General Assembly should discover that a citizen standing statute is essential to give practical effect to the constitutional commitment made over twenty years ago.

IV. EXISTING STATE STANDING PROVISIONS

One of the primary reasons states have enacted citizen standing-to-sue provisions is the difficulty in using common law remedies to protect the environment. Traditionally, private citizens brought legal actions against parties polluting or otherwise damaging the environment under the intentional tort theories of trespass,⁵⁶ private nuisance,⁵⁷ and public nuisance.⁵⁸

54. By contrast, note the Florida judiciary's support of citizen-initiated litigation even though the language of the state's environmental statute encourages a narrow reading. See *infra* notes 96-101 and accompanying text.

55. See *supra* notes 1-2 and accompanying text.

56. To recover for trespass, a plaintiff must show that the defendant directly caused an invasion which interfered with the plaintiff's exclusive possessory right to the land. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67 (5th ed. 1984) [hereinafter PROSSER & KEETON]; see, e.g., *Ryan v. City of Emmetsburg*, 4 N.W.2d 435 (Iowa 1942); *Davis v. Georgia-Pacific Corp.*, 445 P.2d 481 (Or. 1968).

However, bringing an action under one of these theories required the plaintiff to show "that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance."⁵⁹ Only by showing a "special injury" did a plaintiff have standing to bring such an action in civil court.⁶⁰

Judicial treatment in Virginia and many other jurisdictions indicates that standing-to-sue still requires a special injury.⁶¹ However, for a private citizen to show that damage to the environment injures him individually more so than the rest of the community proves quite difficult. For this reason, state legislatures have slowly begun to ameliorate this harsh requirement by enacting environmental protection acts that provide ordinary citizens the requisite standing-to-sue without having to prove special injury.⁶²

A. Michigan's Legacy

The Michigan Environmental Protection Act⁶³ ("MEPA") was the first state statute to grant private citizens standing-to-sue for environmental harms.⁶⁴ Enacted in 1970, the statute provides that "any person . . . may

57. A private nuisance action is similar to a trespass action in that the plaintiff must show that the defendant intentionally interfered with the use and enjoyment of the plaintiff's real property. However, unlike a trespass action, a private nuisance action is sustainable only if the interference is substantial and unreasonable. PROSSER & KEETON, *supra* note 56, at 70; *see, e.g.*, *Shields v. Wondries*, 316 P.2d 9 (Cal. Ct. App. 1957).

58. One may maintain a public nuisance action only if he shows that the invasion of a public right has in some way harmed him differently than the general public. PROSSER & KEETON, *supra* note 56, at 646-47; *see e.g.*, *Dozier v. Troy Drive-In Theatres, Inc.*, 89 So.2d 537 (Ala. 1956); *see also* Mary Jane Rhoades, Note, *The Indiana Environmental Protection Act: An Environmentalist's Weapon in Need of Repair*, 22 VAL. U. L. REV. 149 (1987).

59. *See* *Venuto v. Owens-Corning Fiberglass Corp.*, 99 Cal. Rptr. 350, 355 (Cal. Ct. App. 1971) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 89, at 608 (3d ed. 1964)).

60. *Id.*

61. *See, e.g.*, *Institoris v. City of Los Angeles*, 258 Cal. Rptr. 418 (Cal. Ct. App. 1989) (plaintiff in public nuisance action must show special injury to have standing before the court).

62. Twelve states have enacted statutes granting citizens standing to sue for potential or actual environmental harm under various circumstances. *See* CAL. GOV'T CODE §§ 12607-611, 65860 (Deering Supp. 1991); COLO. REV. STAT. § 25-13-112 (1989); CONN. GEN. STAT. ANN. §§ 22a-14 to 20 (West 1985 & Supp. 1991); FLA. STAT. ANN. § 403.412 (West 1988); IND. CODE ANN. §§ 13-6-1-1 to -6 (Burns 1990); MD. NAT. RES. CODE ANN. §§ 1-501 to -507 (1988 and Supp. 1991); MASS. ANN. LAWS ch. 214, § 7A (Law. Co-op. 1990); MICH. COMP. LAWS ANN. §§ 691.1201 - .1207 (West 1987); MINN. STAT. ANN. §§ 116B.01-13 (West 1987); NEV. REV. STAT. §§ 41.540 - .570 (1986); N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West 1987); S.D. CODIFIED LAWS ANN. §§ 34A-10-1 to -15 (1990).

63. MICH. COMP. LAWS ANN. §§ 691.1201 - .1207 (West 1987).

64. Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 1 (1974).

maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief. . . .⁶⁵ Thus, to obtain standing, a citizen does not have to show any "special injury" over and above the harm to the public at large. Because a citizen's action often involves assessing whether an alleged violator's actions conform to a standard articulated by a government agency, the statute also grants a court the authority to assess the "validity, applicability and reasonableness" of that standard and to direct its change when necessary.⁶⁶

In some of the remaining sections of the statute, Michigan's legislature: 1) empowers courts to grant equitable relief or "impose conditions on the defendant that are required to protect the air, water and other natural resources . . . ;"⁶⁷ 2) authorizes a court to remit an action to the appropriate administrative body while retaining jurisdiction over the matter so that "adequate protection" of the environment occurs;⁶⁸ and 3) prohibits the violator's conduct from continuing so long as "there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."⁶⁹ The Michigan legislature thus effectively gives a court, aided by the state's citizens in bringing suit, much power to protect the environment.⁷⁰ MEPA clearly articulates the legislature's belief that protection of the environment is at times more important than the separation and balance of governmental power.

Since the judicial interpretation of environmental protection legislation often determines its scope and effectiveness, MEPA's success or failure rests on how courts actually construe the statute. Michigan's courts have consistently recognized the legislature's objective of preserving environmental quality and the court's role in achieving this goal.⁷¹ With environmental protection in mind, the courts have viewed MEPA as giving "the private citizen a sizable share of the initiative for environmental law enforcement."⁷² Perceiving this as the primary objective has encouraged the Michigan court system to review administrative standards as required by MEPA and to revise them when necessary.⁷³ In addition, Michigan's judi-

65. *Id.* § 691.1202(1).

66. *Id.* § 691.1202(2)(a),(b).

67. *Id.* § 691.1204(1).

68. *Id.* § 691.1204(2).

69. *Id.* § 691.1205(2).

70. This authority was traditionally reserved for administrative agencies and review boards.

71. *Ray v. Mason County Drain Comm'r*, 224 N.W.2d 883, 888-89 (Mich. 1975). In this case, the Michigan Supreme Court found that "the Legislature . . . left to the courts the important task of giving substance to the standard by developing a common law of environmental quality." *Id.* at 888.

72. *Eyde v. State*, 225 N.W.2d 1, 2 (Mich. 1975).

73. In *West Michigan Environmental Action Council, Inc. v. Natural Resources Commission*, the Michigan Supreme Court held that a trial court was not required to defer to an

cial system has correctly emphasized that MEPA was designed to protect the state's natural resources, not to provide citizens easy access to the court system merely to satisfy litigious tendencies.

Citizens have utilized MEPA most often at the local level. For example, they have relied on the statute to attack proposals for highway expansion; to combat automobile pollution; and to save a cluster of trees which provided shade.⁷⁴ These challenges have bolstered the contention that giving the power of de novo review to the judicial system provides a more effective structure for protecting the state's natural resources than the earlier reliance on administrative agencies for environmental law enforcement. Granting a private citizen standing to sue under MEPA has significantly advanced the preservation of Michigan's environment.

B. *Following Michigan's Lead*

Since its enactment in 1970, other states have modeled citizen standing statutes after MEPA.⁷⁵ However, the degree to which these states have granted standing in environmental litigation, without requiring citizens to show special injury, varies greatly. For the sake of analysis, these states' legislation can be grouped into three broad categories.

1. Direct Standing Statutes

In 1971, both Minnesota and Connecticut enacted environmental protection statutes.⁷⁶ In 1974, New Jersey adopted comparable legislation.⁷⁷ Under all three statutes, private citizens possess direct standing before a court to challenge activities allegedly harmful to the environment.⁷⁸

Minnesota's statute contains a purpose clause directing that "each person has the responsibility to contribute to the protection, preservation,

agency's conclusions regarding the likelihood of impairment to natural resources. 275 N.W.2d 538, 542, *cert. denied sub nom.* Shell Oil Co. v. West Mich. Env'tl. Action Council, Inc., 444 U.S. 941 (1979). The court stated that MEPA "would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." 275 N.W.2d at 542.

74. See Rhoades, *supra* note 58, at 151 n.16.

75. Sax & DiMento, *supra* note 64, at 1.

76. See MINN. STAT. ANN. §§ 116B.01-.13 (West 1987); CONN. GEN. STAT. ANN. §§ 22a-14 to 20 (West 1985 & Supp. 1991).

77. See N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West 1987).

78. Massachusetts and South Dakota have enacted similar statutes but these will not be analyzed closely here. Massachusetts requires that not less than ten persons may maintain a civil action for damage to the environment. MASS ANN. LAWS ch. 214, § 7A (Law. Co-op. 1990). South Dakota's statute allows a citizen to bring an action as long as it does not challenge an agency's ruling, a construction which is most similar to Minnesota's statute. S.D. CODIFIED LAWS ANN. § 34A-10-a (1990).

and enhancement”⁷⁹ of the environment. Connecticut and New Jersey have comparable provisions.⁸⁰ Based on these provisions, all three states grant direct standing to citizens so that they might assume the responsibility of policing the environment. As a result, these direct standing statutes have made citizens “‘private attorney generals [sic],’ who are empowered to institute proceedings to vindicate the public interest.”⁸¹

Though these three statutes provide citizens with direct standing, differing provisions and statutory language affect how courts interpret and apply each state’s legislation. Under Connecticut’s law, an environmental plaintiff must show that the defendant’s conduct “has, or is reasonably likely unreasonably to pollute, impair or destroy” the state’s natural resources.⁸² This language affords a plaintiff standing without requiring him to prove present harm to the environment,⁸³ though the term “unreasonably” deters persons from bringing frivolous suits.⁸⁴ The statute allows a private citizen to place an environmental concern squarely before a court and explicitly authorizes the court to remedy the problem in the best interest of the environment. Much like MEPA, the Connecticut statute assigns certain powers to a court giving it much discretion in settling a suit as efficiently and effectively as possible.⁸⁵

Minnesota’s statute is similar to that of Connecticut and MEPA. The statute eliminates the requirement that a plaintiff show actual environmental harm to gain standing, by defining actionable harm to the environment as “any conduct which materially adversely affects or is likely to materially adversely affect the environment.”⁸⁶ Nevertheless, Minnesota’s legislation differs from MEPA and Connecticut’s statute in one fundamental aspect. In Minnesota, a civil action may not be maintained against a person acting in accordance with an environmental quality standard or

79. MINN. STAT. ANN. § 116B.01 (West 1987).

80. Connecticut recognizes “a public trust” in the state’s environment and that “each person is entitled to the protection, preservation and enhancement” of it. CONN. GEN. STAT. ANN. § 22a-15 (West 1985). New Jersey provides that “every person has a substantial interest in minimizing” the environment’s pollution, impairment and destruction. N.J. STAT. ANN. § 2A:35A-2 (West 1987).

81. *Town of Greenwich v. Connecticut Transp. Auth.*, 348 A.2d 596, 599 (Conn. 1974).

82. CONN. GEN. STAT. ANN. § 22a-17(a) (West 1985).

83. *Manchester Env’tl. Coalition v. Stockton*, 441 A.2d 68, 74 (Conn. 1981) (“[t]he plaintiffs need not prove any pollution, impairment or destruction of the environment in order to have standing”).

84. *Id.* Compare Connecticut’s provision with New Jersey’s legislation, which expressly authorizes a court to dismiss an action which “appears to be patently frivolous, harassing or wholly lacking merit.” See N.J. STAT. ANN. § 2A:35A-4(c) (West 1987).

85. CONN. GEN. STAT. ANN. § 22a-18 (West Supp. 1991).

86. MINN. STAT. ANN. § 116B.02(5) (West 1987); see, e.g., *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977); *County of Freeborn, By Tuveson v. Bryson*, 210 N.W.2d 290, 295 (Minn. 1973).

regulation issued by any governmental agency.⁸⁷ Though this provision appears to allow adequate supervision of the environment — either by an administrative agency or by a court — it restricts a citizen's ability to file suit by presuming the validity of an agency-issued standard.⁸⁸ This restriction reflects the Minnesota legislature's belief that an agency is the most qualified authority to review environmental issues. In many instances this view might be accurate, but such deference insulates an agency's decision from judicial review and effectively favors bureaucratic balancing of power over ensuring environmental quality.

New Jersey's law is the most restrictive of the direct standing statutes. At first glance, this statement might appear inaccurate because the New Jersey statute, unlike the Minnesota statute, has been interpreted as allowing a citizen to assert directly that the state environmental protection agency "has failed or neglected to act in the best interest of the citizenry"⁸⁹ and, thereby to request judicial review. However, unlike Connecticut⁹⁰ or Minnesota,⁹¹ New Jersey explicitly requires a plaintiff to prove actual harm to the environment. New Jersey's statute defines actionable harm to the environment as "any actual pollution, impairment or destruction to any of the natural resources."⁹²

The inclusion of the word "actual" severely limits a citizen's ability to gain standing before a court and increases the burden of proof required of a plaintiff.⁹³ Although one can argue that the word was included to prevent frivolous suits, as "unreasonably" is used in the Connecticut act, the statute has a separate provision addressing that concern.⁹⁴ By requiring actual harm for standing, the statute becomes remedial in nature; only past violations can be challenged. Arguably, this result is inconsistent

87. MINN. STAT. ANN. § 116B.03(1) (West 1987).

88. Contrast Minnesota's deference to an administrative ruling with the strict scrutiny of an agency standard that MEPA demands. See *West Michigan Env'tl. Action Council, Inc. v. Natural Resources Comm'n*, 275 N.W.2d 538, 542, cert. denied sub nom. *Shell Oil Co. v. West Michigan Env'tl. Action Council*, 444 U.S. 941 (1979).

89. *Howell v. Waste Disposal, Inc.*, 504 A.2d 19, 27 (N.J. Super. 1986). Here, the court recognized that the Department of Environmental Protection (DEP) is initially entrusted with enforcement against persons harming the environment. However, it also found that allowing persons standing to challenge or request expansion of a DEP ruling was an appropriate use of the statute.

90. See *supra* note 82 and accompanying text.

91. See *supra* note 86 and accompanying text.

92. N.J. STAT. ANN. § 2A:35A-3(b) (West 1987).

93. See *Rhoades*, *supra* note 58, at 178 n.163. In MEPA, the legislature did not define the terms "pollution, impairment or destruction," thus permitting more citizens to bring issues of local concern before the courts. *Id.* at 179; see *supra* note 74 and accompanying text. Amendments to the statute, effective July 1, 1991, did nothing to change this wording. See N.J. STAT. ANN. § 2A:35A-4 (West 1987 & Supp. 1991).

94. N.J. STAT. ANN. § 2A:35A-4(c) (West 1987); see *supra* note 84.

with the statute's objectives of protecting the state's natural resources and preventing environmental damage.

2. "Limited" Standing Statutes

A second group of states have followed Michigan's model to a certain degree by statutorily providing private citizens the limited ability to protect the environment through the court system. In Florida and Indiana, a citizen may commence a civil action to protect environmental quality only if, after filing the complaint with the appropriate administrative agencies, none of the agencies addresses the citizen's concern.⁹⁵ As will be seen, "addressing" the problem requires little more than minimal attention by the agency.

Under the Florida statute, a party must initially file a complaint with the proper state agency setting forth the facts of the allegation and "the manner in which the complaining party is affected."⁹⁶ This requirement implies a need for special injury. The same section allows the agency receiving the complaint "30 days after the receipt thereof within which to take appropriate action."⁹⁷ Only when there is a threat of "immediate and irreparable harm"⁹⁸ to the environment may these requirements be bypassed and direct judicial review be legitimately granted.

The Florida legislature imposed these requirements to limit the number of environmental actions that could reach a court. Ironically, however, Florida courts have liberally construed the statutory language to support citizen standing. In one case, the state's supreme court found that standing required only that the plaintiff show "a bona fide and direct interest in the result [of the litigation]."⁹⁹ In another instance, an appellate court

95. FLA. STAT. ANN. § 403.412 (West 1988); IND. CODE ANN. §§ 13-6-1-1 to 13-6-1-6 (Burns 1989). Though one might argue that Illinois should be included in this category, such a categorization would not be accurate. While a person in Illinois may be granted standing, the person must be "adversely affected in fact by a violation of [the] Act . . . [and] no action shall be brought . . . until 30 days after the plaintiff has been denied relief by the [Pollution Control] Board." ILL. REV. STAT. ch. 111 ½, para. 1045(b) (Smith-Hurd Cum. Supp. 1991). These requirements suggest that a person in Illinois must show special injury to be granted standing. *See id.*

96. FLA. STAT. ANN. § 403.412(2)(c) (West 1988).

97. *Id.*

98. *Id.*

99. Florida Wildlife Fed'n v. State Dep't of Env'tl. Regulation, 390 So.2d 64, 68 (Fla. 1980). The court rejected the state agency's argument that the statute required application of the traditional special injury rule:

If the legislature had meant for the special injury rule to be preserved in the area of environmental protection, it could easily have said so. . . . That the legislature chose to allow citizens to bring an action where an action already existed for those who had special injury persuades us that the legislature did not intend that the special injury rule carry over to suits brought under the EPA [Environmental Protection Act].

Id. at 67.

held that the statute allowed citizens to enjoin violations of environmental laws or abuses of authority by governmental agencies entrusted with enforcing these laws.¹⁰⁰ These decisions have offered encouragement to citizens desiring to act against actual or potential harm to the environment. Still, in both mentioned cases, the courts acknowledged that the pre-standing administrative barriers facing interested parties were ones which could not be judicially removed.¹⁰¹

The Indiana statute places comparable administrative demands on a party attempting to bring an action for alleged "significant"¹⁰² damage to the environment before standing may be granted. As in Florida, a complainant in Indiana must notify the appropriate agencies of his or her allegations as a condition precedent to maintaining the civil action.¹⁰³ Then, a citizen may maintain his case only if none of the notified agencies: 1) commences an administrative proceeding, 2) commences a civil action, or 3) merely takes steps toward initiating a criminal action within three months of receiving the complaint.¹⁰⁴ Moreover, as long as the agency which commences an action "diligently pursues"¹⁰⁵ that action, a party is statutorily denied standing.¹⁰⁶

These limitations on citizen standing have been reinforced by the narrow construction given to the statute by the Indiana judiciary.¹⁰⁷ In one case, an appellate court asserted that "the Legislature . . . intended to restrict . . . [the statute's] application to those cases in which the appropriate agency failed to take virtually any affirmative action pursuant to the complaint within the prescribed period of time."¹⁰⁸ Such a restrictive

100. *Friends of Everglades, Inc. v. Board of County Comm'r of Monroe*, 456 So.2d 904, 914 (Fla. Dist. Ct. App. 1984), *review denied sub nom.* *Upper Keys Citizens Ass'n v. Board of County Comm'rs of Monroe County*, 462 So.2d 1108 (Fla. 1985).

101. *Florida Wildlife Fed'n*, 390 So.2d at 66; *Friends of Everglades*, 456 So.2d at 913.

102. IND. CODE ANN. § 13-6-1-1(a) (Burns 1989). It has been suggested that requiring a plaintiff to show "significant" pollution makes the burden of proof great. *See Rhoades, supra* note 58, at 154 n.21. *But cf.* N.J. STAT. ANN. § 2A:35A-3(b) (West 1987) (requiring "actual" harm).

103. IND. CODE ANN. § 13-6-1-1(a) (Burns 1989).

104. *Id.* 13-6-1-1(b)(1).

105. *Id.* § 13-6-1-1(b)(2).

106. Even if a party satisfies these requirements, the burden on the plaintiff in court remains great. Under the statute, a defendant can rebut the plaintiff's prima facie case by showing its action complied with an agency standard or was done because no feasible and prudent alternative existed. IND. CODE ANN. § 13-6-1-2 (Burns 1989). *But cf.* MICH. COMP. LAWS ANN. § 691.1203(1) (West 1987) (placing more of the burden of proof on the defendant).

107. *See, e.g., Sekerez v. Youngstown Sheet & Tube Co.*, 337 N.E.2d 521 (Ind. App. 1975). By contrast, note how willing the Florida courts have been to support standing even with the restrictive language of its statute. *See supra* notes 99-101 and accompanying text.

108. *Sekerez*, 337 N.E.2d at 524. The court further stated that "[t]he general tenor of its provisions is restrictive . . ." *Id.* at 525. At the time of the decision, a complainant had to wait 180 days for an agency to act before bringing a civil action. *Id.* at 523. Now, the agency

reading of the statute burdens the party concerned about the environment by requiring her to show significant harm, as well as absolute inaction by an agency before the alleged polluter is obligated to answer allegations before a court.¹⁰⁹

Unlike the direct standing statutes discussed above, the "limited" standing statutes impair a citizen's ability to play an important role in enforcing the protection of a state's natural resources. By giving agencies exclusive power and extensive time to address allegations of environmental damage, these statutes allow bureaucrats to resolve urgent environmental matters at their convenience.¹¹⁰ Moreover, requiring a citizen to go through several administrative channels before directly participating in a court action discourages him or her from bringing a complaint at all.¹¹¹ Deterring citizen participation in environmental protection sharply contrasts with the goals of heightening public awareness and protecting a state's natural resources.

3. Standing Under Specific Circumstances

The third group of states, California, Colorado and Nevada, statutorily grant standing to citizens only under very specific circumstances.¹¹² In California, an individual may bring a civil action challenging a zoning ordinance that is allegedly inconsistent with "the general plan."¹¹³ Any other action for environmental protection must be brought on behalf of the public by the state's attorney general.¹¹⁴ Once the attorney general files a complaint, however, it is handled by an administrative agency much as it would be in a "limited" standing jurisdiction.¹¹⁵ In Colorado, a person is granted standing only if he or she actually observes a person

must act within ninety days. IND. CODE ANN. § 13-6-1-1(b)(1) (Burns 1989).

109. Since the adoption of Indiana's statute, only one decision, *Sekeze*, has interpreted any of the statute's provisions. See Rhoades, *supra* note 58, at 153 n.20.

110. Cf. William A. Butler & Roderick A. Cameron, Book Review, 1 *ECOLOGY L.Q.* 228, 228 (1971) (reviewing JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971)). Additionally, placing "environmental management" into the agency's forum subjects it to the agency's bureaucracy and routine. *Id.* Unfortunately, this often results in a deferential review of a regulated industry's actions. *Id.* at 229 n.1.

111. It would be impossible to determine how many citizens are actually deterred from bringing an action due to statutory requirements. However, the fact that there are few decisions in these states regarding this issue supports this conclusion. See Rhoades, *supra* note 58, at 166-7.

112. Maryland also permits citizen's suits for the protection of the environment only when an agency fails "to perform a nondiscretionary ministerial duty" or fails to enforce an environmental standard. MD. NAT. RES. CODE ANN. § 1-503(b) (1988 and Supp. 1991).

113. CAL. GOV'T CODE § 65860(b) (West 1980).

114. *Id.* §§ 12600-612.

115. See *id.* § 12611. This section provides that an administrative agency proceeding will stay court action unless irreparable environmental harm would result.

harming the environment.¹¹⁶ Standing is further restricted to that person who observes a violation in "recreational and mountain areas of the state."¹¹⁷ In Nevada, a resident may commence an action only "to enforce compliance with any statute, regulation or ordinance"¹¹⁸ which is designed to protect the environment.

With such limitations placed on citizen-initiated actions, it is clear that these statutes provide little, if any, encouragement to a private citizen to participate actively in preserving environmental quality. In California, a citizen's complaint necessarily becomes the attorney general's, thus ending the individual's involvement. In Colorado, unless a person actually sees harm to the environment in a specified area, he or she may not maintain an action. Though this may encourage citizens to supervise others' actions, polluters of the environment can escape liability simply by not being seen. Finally, Nevada's requirement that a resident first determine whether a party's actions violate a law severely restricts the instances in which a person can bring a potentially successful suit. In short, these statutes are too limited in application to be effective in protecting a state's environment.

B. *A Proposal for the General Assembly of Virginia*

Virginia's legislature should adopt a direct standing statute similar to Michigan's legislation. The statute should be modeled primarily after MEPA because of the ease with which a citizen can request judicial review of an environmental issue under that statute.¹¹⁹ Bringing a suit where the damage "occurred or is likely to occur,"¹²⁰ would minimize the burden of proof on the plaintiff as well as encourage preventive measures. Also, like MEPA, Virginia's statute should include a section that gives courts broad authority to resolve an environmental dispute.¹²¹ Including such a provision would provide a more comprehensive review process than that which could be achieved through existing administrative proceedings.¹²²

116. COLO. REV. STAT. § 25-13-112 (1989).

117. *Id.* § 25-13-102.

118. NEV. REV. STAT. §§ 41.540 - .570 (1986).

119. *See* MICH. COMP. LAWS ANN. § 691.1202(1) (West 1987); *see also supra* note 65 and accompanying text. As part IIB of this Note discussed, Connecticut's legislation is quite similar to MEPA; thus the proposal to adopt MEPA's language should be regarded as endorsing Connecticut's statute as well.

120. MICH. COMP. LAWS ANN. § 691.1202(1).

121. *See id.* § 691.1202(2).

122. Joseph F. DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and A Direction for Future Research*, 1977 DUKE L.J. 409, 414. This article provides a concise summary of the arguments for and against environmental citizen suit provisions.

Though the General Assembly should closely follow Michigan's model, certain provisions from other statutes can also provide guidance in drafting an effective act. For the statute's purpose clause, Virginia should borrow from Minnesota's legislature and state that it is the citizens' "responsibility" to protect and enhance the environment.¹²³ Using such forceful language would encourage participation in "environmental management"¹²⁴ and properly place the burden of protecting the state's resources on the citizens.

Virginia should also borrow two provisions from New Jersey's statute. First, in a "powers of the court" section, the General Assembly of Virginia should expressly recognize a court's discretion to dismiss a frivolous or harassing suit.¹²⁵ This would avoid the use of ambiguous terms such as "significant"¹²⁶ harm. For Virginia, the avoidance of ambiguous terms is essential in light of the narrow interpretation the courts in *Shockoe Slip*¹²⁷ and *Virginia Beach Beautification*¹²⁸ gave ambiguous statutory language. Second, Virginia should borrow from New Jersey's relief section. Besides equitable relief granted to the plaintiff, the court should be able to assess civil fines against the liable party under appropriate circumstances.¹²⁹ To discourage citizens from bringing suits for the prospect of receiving monetary damages, the fines could be placed in a public fund from which environmental maintenance costs would be distributed.

Criticism of citizen standing legislation focuses on how it encourages citizens to harass governmental bodies and to waste the limited resources of the judicial system.¹³⁰ However, there is little substantive evidence that this is true. Of all the state environmental protection acts, MEPA has received the most extensive use.¹³¹ Yet "extensive" use of the statute means only that several local matters have been addressed.¹³² Few suits have advanced beyond the circuit court level in Michigan.¹³³ In the other relevant jurisdictions, few citizen suits have been initiated at all.¹³⁴ If anything, this indicates that the standing acts have been under-utilized in pursuing environmental protection. Thus, the criticism regarding citizen standing legislation is ill-founded, and the General Assembly of Virginia should ignore it in formulating a citizen's standing statute.

123. See *supra* note 79 and accompanying text.

124. DiMento, *supra* note 122, at 414.

125. See *supra* note 84 and accompanying text.

126. See *supra* note 102 and accompanying text.

127. 228 Va. 678, 324 S.E.2d 674 (1985).

128. 231 Va. 415, 344 S.E.2d 899 (1986).

129. See N.J. STAT. ANN. § 2A:35A-4 (Supp. 1991).

130. DiMento, *supra* note 122, at 415.

131. *Id.* at 420.

132. See note 74 and accompanying text.

133. DiMento, *supra* note 122, at 420.

134. *Id.*; see, e.g., *supra* note 109 and accompanying text.

Finally, the need for a citizen standing-to-sue provision becomes of immediate concern when one considers that the Environmental Defense Fund ("EDF") has decided to close its Virginia office by December 31, 1991, due to a lack of funds.¹³⁵ This closure silences a group dedicated to challenging industrial pollution that threatens Virginia's environment.¹³⁶ Without the EDF as an advocate, the burden to protect the environment necessarily falls on the Commonwealth and its citizens. The people of Virginia cannot become effective environmental advocates without a standing-to-sue statute as a weapon.

IV. CONCLUSION

The Virginia Constitution sets forth the principle that it shall be the Commonwealth's policy to preserve its natural resources and historical properties. Unfortunately, the mere recognition of a need to protect the environment from harm and irreparable damage accomplishes little. It is time for Virginia to effectuate its long-standing policy of environmental quality. Since the courts have refused to act, it is the General Assembly's responsibility to do so.

In January 1992, the General Assembly will receive a report from a committee established solely to examine how the principles of the constitutional provision can be given practical effect. The establishment of this committee clearly indicates that current Virginia law does not adequately protect the environment. Based on the information it will receive from the committee, the General Assembly should find an immediate need for creating a citizen's standing-to-sue statute for potential and actual environmental harm.

The legislature should look to the statutory examples of Michigan and several other states and design an act in accordance with certain useful provisions in those statutes. Most importantly, Virginia should enlist the aid of its citizenry by including a direct standing provision in its statute. Through direct citizen participation, the legislature will create another essential level of protection for the environment.

W. Scott Magargee

135. Tom Campbell, *Environment Fund to Close Office*, RICH. TIMES DISPATCH, Sept. 20, 1991, at B5.

136. See *supra* notes 42-53 and accompanying text.