

January 2015

## The Tyranny of Plastics: How Society of Plastics, Inc. v. County of Suffolk Prevents New Yorkers from Protecting Their Environment and How They Could Be Liberated from Its Unreasonable Standing Requirements

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### Recommended Citation

Albert K. Butzel and Ned Thimmayya, *The Tyranny of Plastics: How Society of Plastics, Inc. v. County of Suffolk Prevents New Yorkers from Protecting Their Environment and How They Could Be Liberated from Its Unreasonable Standing Requirements*, 32 Pace Env'tl. L. Rev. 1 (2015)

DOI: <https://doi.org/10.58948/0738-6206.1756>

Available at: <https://digitalcommons.pace.edu/pelr/vol32/iss1/1>

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**PACE ENVIRONMENTAL LAW REVIEW**

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**Volume 32****Winter 2015****Number 1**

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**ARTICLE**

**The Tyranny of Plastics:  
How *Society of Plastics, Inc. v. County of  
Suffolk* Prevents New Yorkers from  
Protecting Their Environment and How They  
Could Be Liberated from Its Unreasonable  
Standing Requirements**

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**I. INTRODUCTION**

Ever since the Court of Appeals of New York issued its holding in the landmark case *Society of Plastics Industry, Inc. v. County of Suffolk*, citizen oversight of government-approved and government projects with environmental implications has suffered curtailment inconsistent with the objectives of the State

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The authors would like to thank Michael Gerrard and Michael Gruen for their comments on drafts of this article.

Environmental Quality Review Act (SEQRA). At the center of the conflict between SEQRA and citizen enforcement are the restrictive standing requirements formulated by Society of Plastics, which include the demand that a petitioner demonstrate harm distinct from injury to the general public. Not only does such a prerequisite for consideration of a case's merits ignore the interrelatedness of local environmental conditions with larger regional trends, but also insulates from judicial review widespread environmental damages that injure the public.

Beyond New York, numerous other states have developed standing doctrines that more capably match the purposes of their environmental protection acts and address the ecological complexities of environmental harms yet also prevent frivolous complaints from disrupting judicial efficiency. New York State, through the example set by other jurisdictions and through recognizing the unreasonable outcomes of post-Society of Plastics cases is well situated to reform its environmental standing doctrine through judicial action or legislation. This article will first outline the current status of citizen standing to enforce SEQRA in Part II; then III) highlight the manner in which New York's standing doctrine has diverged from SEQRA's goals; IV) examine more effective environmental standing doctrines in other states; V) suggest precedent New York courts could utilize to correct New York's defective standing requirements; and, finally, VI) offer a legislative solution to the deficiency of the standing requirements engendered by Society of Plastics.

## II. THE CURRENT STATUS OF CITIZEN STANDING IN NEW YORK STATE

SEQRA is the primary New York State law used for monitoring government-permitted and government projects that could have a substantial impact on the environment.<sup>1</sup> Article 78 of the New York State Civil Practice Law and Rules (NYCPLR)

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1. See N.Y. ENVTL. CONSERV. LAW § 8 (McKinney 2013); see generally J. Andrew Williams, *Society of Plastics Industry v. County of Suffolk: New Barriers to SEQRA Standing in New York*, 2 N.Y.U. ENVTL. L.J. 152, 154-58 (1993) (summarizing SEQRA-mandated processes, including preparation of an environmental impact statement (EIS)).

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provides a mechanism to challenge a government agency's compliance with SEQRA.<sup>2</sup> However, an individual or group qualifies to bring suit only if it has "standing": a legal interest in the subject matter of the action that is recognized by the courts.<sup>3</sup> The current standing test for petitioners initiating Article 78 proceedings to compel compliance with SEQRA was set forth in *Society of Plastics Industry, Inc. v. County of Suffolk*.<sup>4</sup> In order to establish Article 78 standing, an individual petitioner must show that he or she 1) suffers actual injury (so-called "injury-in-fact" as a result of the action he or she complains of); 2) the injury must be distinct from the impact on the public as a whole; and 3) the injury must fall within the zone of interests protected by SEQRA.<sup>5</sup> In the "area of associational or organizational standing" to challenge actions under SEQRA, *Society of Plastics* held that one or more members of the organization must have standing to sue ("standing cannot be achieved by merely multiplying the persons a group purports to represent");<sup>6</sup> the organization must show that the interests it purports to represent are "germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests;" <sup>7</sup> and finally that "neither the asserted claim nor the appropriate relief requires the participation of the individual members."<sup>8</sup>

Recently, *Save the Pine Bush, Inc. v. Common Council of Albany* altered the manner in which the above standing tests are applied to a suit, at least with respect to organizational standing. While many post-*Society of Plastics* courts suggested that injury

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2. See N.Y. C.P.L.R. Art. 78 (McKinney 2011).

3. See Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1038 (N.Y. 1991).

4. See *id.* at 1039-42. Of forty-four SEQRA cases heard by the Court of Appeals, only six have been split decisions, one of which was *Society of Plastics*. Michael B. Gerrard, *Standing Under SEQRA: 'Progeny of Society of Plastics Industry,'* N.Y. L.J., Nov. 22, 2002, at 3.

5. See Soc'y of Plastics, 573 N.E.2d at 1041.

6. *Id.* at 1042.

7. *Id.* at 1041 ("[T]he requirement that a petitioner's injury fall within the concerns the Legislature sought to advance or protect by the statute assures that groups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes.").

8. *Id.* at 1042.

distinct from the public depends on a petitioner's close proximity to a permitted project,<sup>9</sup> *Save the Pine Bush* declared that a petitioner's proximity is not essential to establish the special harm prong of the standing test, and that regular use of a resource for recreation or similar activity may be sufficient.<sup>10</sup>

### III. PROBLEMS WITH STANDING UNDER SEQRA

The purposes of SEQRA,<sup>11</sup> as stated in the statute, do not suggest or impose any limits on who should be able to challenge

9. *Gernatt Asphalt Prods. v. Town of Sardinia*, 664 N.E.2d 1226, 1238 (N.Y. 1996). *See also* *Saratoga Lake Prot. & Imp. Dist. v. Dep't of Pub. Works of Saratoga Springs*, 846 N.Y.S.2d 786, 791 (App. Div. 2007); *Comm. to Pres. Brighton Beach & Manhattan Beach, Inc. v. Planning Comm'n of N.Y.*, 695 N.Y.S.2d 7, 12 (App. Div. 1999).

10. *Save the Pine Bush, Inc. v. Common Council of Albany*, 918 N.E.2d 917, 921 (N.Y. 2009) ("However *Society of Plastics* does not hold or suggest, that residence close to a challenged project is an indispensable element of standing in every environmental case."); *see also* Mary A. Chertok & Ashley S. Miller, *Environmental Law: Developments in the Law of SEQRA, 2009*, 60 SYRACUSE L. REV. 925, 930 (2010) (explaining how *Save the Pine Bush* diverged from post-*Society of Plastics* courts' proximity emphasis). A petitioner able to show close proximity may nevertheless be able to fulfill the special harm prong without a further showing of distinct injury. *Gernatt Asphalt Prods.*, 664 N.E.2d at 1238 ("A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity." (citing *Sun-Brite Car Wash v. Bd. of Zoning & Appeals*, 508 N.E.2d 130, 131 (1987))). Where the subject of a SEQRA challenge is not a zoning change adjacent to or encompassing property belonging to the petitioner, however, close proximity may be insufficient in and of itself to establish standing. Rather proximity may only be sufficient to the extent the injury-inducing project is visible from the vantage point of the plaintiff's property. *See* Matt Dulak, *What's It To You? Citizen Challenges to Landmark Preservation Decisions and the Special Damage Requirement*, 113 COLUM. L. REV. 447 (2013) (challenging the special harm rule in the context of landmark preservation cases).

11. *See* N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 2013). The purpose of SEQRA is:

to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

*Id.* *See also* Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Requirement Under SEQRA*, 65 ALB. L. REV. 421, 457 (2001) ("SEQRA—with its broad definition of environment, low threshold for requiring

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government findings that violate the statute. In fact, the limitations are court derived. The current *Society of Plastics* test, even as refined by *Save the Pine Bush*, has led to inconsistent results for standing determinations and therefore hinders the effectiveness of SEQRA.<sup>12</sup> In fact, New York's standing test under SEQRA "has no parallel in either federal standing law or the laws of most other states, and thus makes New York one of the most restrictive jurisdictions for environmental plaintiffs."<sup>13</sup>

In contrast to the preoccupation with special harm fermented by case law,<sup>14</sup> the purposes of SEQRA are general and oriented towards public interest. The Act speaks to protecting the

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the preparation of an environmental impact statement, and its action-forcing measures—held enormous promise when it was first enacted.”).

12. See Philip Weinberg, *SEQRA: Effective Weapon – If Used as Directed*, 65 ALB. L. REV. 315 (2001).

SEQRA is, in the end, only as effective as New York's courts will allow it to be. A string of early court rulings soon after SEQRA's enactment ensured its vitality by enjoining projects and vacating permits where agencies had ignored SEQRA by failing to write EISs or to consider alternatives or mitigation measures. However, . . . [Society of Plastics] unduly limited the ability of citizens to obtain legal standing in court to question agencies' compliance with SEQRA.

*Id.* at 320. See generally Matthews, *supra* note 11, at 422-23 (comparing SEQRA with the National Environmental Policy Act (NEPA), the federal equivalent of SEQRA, positing that SEQRA's standing requirements are far more "stringent and preclusive" and describing the ensuing harm caused by these requirements).

13. Michael B. Gerrard, *Judicial Review Under SEQRA: A Statistical Study*, 65 ALB. L. REV. 365, 372 (2001). See also *id.* at 379 ("The essence of the holding of the nearly 2000 SEQRA decisions can be boiled down to one sentence: If an agency identifies the relevant areas of concern, writes them up in moderate detail, takes action consistent with the write-up, and follows the procedures reasonably closely, the agency is highly likely to eventually win any SEQRA lawsuit brought against it.").

14. Historically, the special harm requirement, or the "different-in-kind" test, is actually a distortion of the older "difference-in-degree" test whereby courts determined standing based on the *severity* of an injury rather than the more restrictive criterion demanding that a petitioner suffer a *unique* injury. See generally Denise E. Antolini, *Modernizing the Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755 (2001). The special harm requirement later emerged in England during the Industrial Revolution when Parliament sought to insulate railroad companies from duplicitous suits. These "railroad cases" were based on Parliament's acts rather than common law. See *id.* (describing the origins of the special harm rule, and how, specifically in the context of public nuisance actions, it has hindered legal actions beneficial to the public).

environment generally.<sup>15</sup> The purposes of the Act emphasize the broad public environmental concerns of the state, thus suggesting that environmental threats across the state are interrelated and that environmental well-being is a concern of the “people of the state.”<sup>16</sup> Section 8-103(2) of SEQRA more specifically reveals the incompatibility of SEQRA and a special harm requirement, declaring that “[e]very citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.”<sup>17</sup>

The special harm requirement laid down in *Society of Plastics* has clearly prevented injured plaintiffs from seeking redress under SEQRA. In *Long Island Pine Barrens Society, Inc. v. Planning Board of Town of Brookhaven*, plaintiffs sought to demonstrate that a construction project would negatively affect the ground water in an area that had been designated as a protected ground water area.<sup>18</sup> The protected ground water area consisted of the “sole source aquifer” for many Long Island residents, and yet such residents did not have standing to sue because “so many” would suffer a similar harm, and thus they were unable to allege special harm.<sup>19</sup> *Long Island Pine Barrens* demonstrates an ironic impact of the *Society of Plastics* test: projects entailing the most widespread environmental harm are often unchallengeable because there will be “too many” affected members of the public to achieve standing.<sup>20</sup>

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15. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 2013) (SEQRA’s general purpose is to “encourage . . . harmony between man and his environment,” “prevent or eliminate damage to the environment,” and “to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state”).

16. *Id.*

17. *Id.* § 8-0103(2).

18. *Long Island Pine Barrens Soc’y, Inc. v. Planning Bd. of Brookhaven*, 623 N.Y.S.2d 613 (App. Div. 1995).

19. Matthews, *supra* note 11, at 456.

20. See Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 49 (2003) (describing how dissenting judges in *Society of Plastics* warned that the majority’s holding “effectively barred challenging environmental injury suffered by all area residents, unless the plaintiff can show injury unique to itself”). The United States Supreme Court has highlighted the dangerous impact of a special harm requirement where environmental damage is concerned: “[t]o deny standing to persons who are in fact injured simply because many others are also

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The special harm requirement has prevented environmental organizations from protecting the very interests for which they were established and pursuing the missions for which they are maintained. In *Otsego 2000, Inc. v. Planning Board of Town of Oswego*, the court held a non-profit entity “organized for charitable purposes which include the preservation and promotion of the natural beauty, wholesome environment and varied economic landscape of the Otsego Lake region” did not have standing to “obtain judicial review of administrative actions.”<sup>21</sup> The court held that Otsego 2000 (the non-profit plaintiff) failed to allege injury distinct from that of the general

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injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.” *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973). Furthermore, The grievously debilitating effect of the special harm requirement was not lost upon the dissent in *Society of Plastics*:

Under the new standard, someone who alleges environmental damage from an action which applies generally to an entire area and indiscriminately affects everyone in the area is precluded from judicial review. Because such environmental damage is by its very nature undifferentiated and shared by all, the objector cannot show special damage that is different from that of the public at large. The rule, as it is employed here, can thus present a virtual impasse to judicial review.

The majority's imposition of this extra standing requirement marks a decided change in the course of the Court's carefully developed jurisprudence in interpreting and implementing SEQRA since its enactment 15 years ago. It denotes an apparent lessening in what has been recognized as this Court's “powerful commitment to the goal of SEQRA.” As I believe will be demonstrated, the majority's rationale for it does not withstand critical analysis. Moreover, because it can operate to shield cases of clearly insufficient SEQRA compliance from judicial review-as it does here-the new “special damage” rule does not serve the public interest or further the important policies embraced by the Legislature in its enactment of SEQRA.

Finally, the majority's decision to erect this additional barrier to standing is at odds with the more open-handed approach to standing assumed by New York courts in recent years and our recognition that the “fundamental tenet of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had.

*Soc’y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 573 N.E.2d 1034, 1049 (N.Y. 1991) (Hancock Jr., J., dissenting).

21. *Otsego 2000, Inc. v. Planning Bd. of Oswego*, 575 N.Y.S.2d 584, 585-87 (App. Div. 1991).



public.<sup>22</sup> Furthermore, the court discussed Otsego 2000's membership qualifications, which, the court noted, did not include a membership fee or formal application process.<sup>23</sup> Therefore, the court questioned whether the organization actually represented those individuals listed on its membership list.<sup>24</sup>

*Otsego 2000* illustrates the formidable standing barriers facing non-profit environmental organizations seeking to compel review of administrative decisions under SEQRA. The implications for indigent citizens seem particularly harsh since the court suggested that the free and simple membership enrollment process of Otsego 2000 weighed against its standing to sue. Since the court also noted none of Otsego 2000's members owned property abutting the project site,<sup>25</sup> the decision highlights the increased subordination of the public's environmental concerns beneath the individual property owner's. Environmental organizations seeking to contest environmentally destructive decisions, according to the *Otsego 2000* court, cannot contest administrative actions that are inherently damaging to the broader environment. Instead, the decision suggests that environmental harms must be attached to a petitioner's private interests through ownership of adjacent property or special harm.<sup>26</sup> As discussed above and in conflict with *Otsego 2000*'s outcome, SEQRA is intended to protect the environmental concerns of the "people of the state," not individuals experiencing harm *different* from the "people of the state."<sup>27</sup> Additionally, if environmental organizations possessing the financial resources to contest an administrative decision are prevented from doing so, there may be no financially viable plaintiff who is able to survive the standing test.<sup>28</sup> Of course such limitations are especially

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22. *Id.* at 586.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. See N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 2013).

28. See Williams, *supra* note 1, at 171 ("Another concern is the inability of a directly affected local plaintiff to gather the resources necessary to make a SEQRA challenge. While a well-financed organizational plaintiff may be shut out because of the need to show direct harm, the local plaintiff who can show direct harm may not have the financial means to engage in litigation.").

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prohibitive for poor communities seeking to maintain healthy environments in the face of government-approved development plans.<sup>29</sup>

In some cases governed by the *Society of Plastics'* standing test, even owners of property abutting impacted land or water cannot convince a court to consider the merits of their claims. In *Schulz v. Warren County Board of Supervisors*, the owners of property on Lake George challenged the Warren County Board of Supervisors' acceptance of a Final EIS regarding a sewage system proposed for a town also located on Lake George.<sup>30</sup> Rather than recognize that sewage projects undertaken by a town on the lake might impact the lake's water and therefore waterside properties beyond the town's boundaries, the court refused to examine the petitioners' allegations of "increased runoff pollution" and "degradation of the quality of the waters of Lake George, which the petitioners allegedly use for drinking, boating, fishing and swimming."<sup>31</sup> The court's reasoning rested on its determination that "the lake is a public body of water and [petitioners'] allegations are merely generalized claims of harm no different in kind or degree from the public at large."<sup>32</sup> Ownership of property on the lake seemed to carry no persuasive weight in *Schulz* despite the *Otsego 2000* court's insinuations that property ownership could tilt the balance in favor of petitioners.<sup>33</sup>

*Society of Plastics*, as clarified by *Pine Bush*, has stifled concerned citizens in cases far more recent than *Schulz*. In

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29. As an epilogue to discussion of *Otsego 2000*, the reader should note that the court did not provide the petitioner leave to amend its complaint, in contrast to the US Supreme Court's position in *Sierra Club v. Morton*. *Otsego 2000*, 575 N.Y.S.2d at 586-87; *but see* *Sierra Club v. Morton*, 405 U.S. 727 (U.S.1972). Though the opinion indicates the decision did not "insulate the government from judicial review," no judicial review of the administrative process in *Otsego 2000* has since taken place. *Otsego 2000*, 575 N.Y.S.2d at 586-87.

30. *See* *Schulz v. Warren Cnty. Bd. of Supervisors*, 614 N.Y.S.2d 809-10 (App. Div. 1994).

31. *Id.* at 811.

32. *Id.*

33. In *Bolton v. Town of Bristol Planning Board*, the court echoed *Schulz* by holding that a petitioner owning property on a lake targeted for development cannot establish special harm by virtue of owning property on the impacted lake. *Bolton v. Town of Bristol Planning Bd.*, 832 N.Y.S.2d 729, 730 (App. Div. 2007).

*Saratoga Lake Protection and Improvement District v. Department of Public Works of Saratoga Springs*, the court determined that the Town of Saratoga and the Town of Stillwater lacked standing to challenge the Department of Public Works' SEQRA findings.<sup>34</sup> Both towns alleged that "loss of opportunities for lake recreation," "continued suburbanization," and "loss of wetlands," among other injuries, would result from a development plan to draw potable water from Saratoga Lake.<sup>35</sup> The court found that the town's "generalized claims of harm have failed to identify any specific, direct environmental harm to the Towns' personal or property rights, either personally or in a representative capacity, that differs from that of the public at large," and thus failed to fulfill the *Society of Plastics* special harm prong.<sup>36</sup> The public, as represented by its municipal government, was refused justice before consideration of the merits. Harm to the Town's personal or property rights should not have been at issue considering the broad scope of SEQRA and its focus on the environmental well-being of the "people of the state."<sup>37</sup>

In *East End Property Co., LLC v. Town Board of Brookhaven*, petitioners were denied standing in what was a prototypical case of industrial ruination perpetrated upon a helpless community.<sup>38</sup> The petitioners alleged that the Town Board of Brookhaven had made an "arbitrary and capricious" decision in approving construction of a power plant (the Caithness Project) after it had previously refused such approval.<sup>39</sup> The plaintiffs alleged in their appellate brief that:

[a]s the record below conclusively established, barely weeks after rejecting SEQRA Findings necessary to approve the Special Permit and zoning variances and waivers on June 6, 2006, the Town Board members held a "re-vote" on July 25, 2006 to

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34. See *Saratoga Lake Prot. & Improvement Dist. v. Dep't of Pub. Works of Saratoga Springs*, 846 N.Y.S.2d 786, 791-92 (App. Div. 2010).

35. *Id.* at 792.

36. *Id.* (internal quotation marks omitted).

37. See N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 2013).

38. See *E. End Prop. Co. v. Town Bd. of Brookhaven*, 868 N.Y.S.2d 264 (App. Div. 2008).

39. *Id.* at 267.

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approve SEQRA certification, upon the *same* environmental record, and without *any* intervening change in the environmental character or impacts of the Caithness Plant (other than an intervening *increase* in the amount paid by the applicant and LIPA via the “Community Benefits Package”).<sup>40</sup>

Nevertheless the court determined that the petitioners, which included civic associations, the owners of a nearby housing complex, and individual residents, did not have standing to enjoin the special permit, variance, and waiver granted by the Town to facilitate the Caithness Project because the petitioners did not sufficiently allege “injury which is in some way different from that of the public at large.”<sup>41</sup> The court came to this conclusion despite the power plant’s 170 foot-high exhaust stack (“more than fifty feet” over the zoning ordinance’s permitted height), an eighty-foot high building (thirty feet above the permitted height), and the building’s “[fifteen]-acre ‘footprint.’”<sup>42</sup> The petitioners also alleged that the environmental review overseen by the Long Island Power Authority did not even include a new twenty-two mile gas pipeline that would be necessary for the operation of the power plant.<sup>43</sup> Finally, the petitioners indicated “the Project [would] have an adverse impact on land use, flora, fauna, terrestrial ecology, noise, traffic, air quality, water quality and quantity, human health, aesthetics, community and neighborhood character and property values, causing environmental and economic harm to Petitioners and the residents of Atlantic

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40. Brief for Petitioners-Plaintiffs/Respondents-Cross-Appellants at 3-4, *E. End Prop. Co.*, 868 N.Y.S.2d 264 (No. 2007-05041), 2008 WL 5599985, at \*4-5. It is worth noting that the Town Board’s reversal of its decision coincided with the power plant operator and Long Island Power Authority’s intervening donation of \$151 million dollars to the town (“The Community Benefits Package”). The petitioners claimed the Board’s approval was expressly conditioned on receipt of this donation. Such conditioning resulted in “unlawful and impermissible ‘contract zoning.’” See Combined Verified Petition and Complaint, *E. End Property Co.*, 868 N.Y.S.2d 264 (No. 2006-29696), 2006 WL 6201544.

41. *E. End Prop. Co.*, 868 N.Y.S.2d at 268 (internal quotation marks omitted)

42. See Combined Verified Petition and Complaint, *supra* note 40.

43. See *id.*

Point,”<sup>44</sup> all clearly falling under the umbrella of SEQRA protections.<sup>45</sup>

As recently as 2012, in *Matter of Finger Lakes Zero Waste Coalition, Inc. v. Martens*, the Finger Lakes Zero Waste Coalition (“the Coalition”), an organization specifically organized to reduce waste production and promote healthy air and water quality in the Finger Lakes region, filed a complaint that was dismissed because the Coalition failed to allege that one of its members suffered “direct harm, injury that is in some way different from that of the public at large.”<sup>46</sup> *Society of Plastics’* familiar mantra trumped the organization’s interests in contesting the New York State Department of Environmental Conservation’s environmental assessment of a landfill permit modification. Although one of the organization’s members lived within 4,000 feet of the landfill, alleged that she suffered increased noise and dust from operations permitted by the modification, and was part of a “property protection plan” designed to compensate property owners for depreciation of property values due to the landfill, she was still unable to establish standing because she did not “use and enjoy” the “soil borrow” from which the County was excavating the landfill sand.<sup>47</sup>

As the cases prove, the *Society of Plastics* standing test has hampered proper application of SEQRA. SEQRA seeks to protect the environment for the benefit of the general public. To impose the current harsh restrictions on plaintiffs, particularly the special harm requirement, is akin to “privatizing” the statute, the effect of which will be to allow only monied individuals, some parties within a few hundred feet of permitted projects, and

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44. *Id.*

45. See N.Y. ENVTL. CONSERV. LAW § 8-0105 (McKinney 2013) (“6. ‘Environment’ means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.”).

46. *Finger Lakes Zero Waste Coal., Inc. v. Martens*, 944 N.Y.S.2d 336, 338 (App. Div. 2012) (quoting *Soc’y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 573 N.E.2d 1034, 1041 (N.Y. 1991) (internal quotation marks omitted), *appeal denied*, 976 N.E.2d 250 (N.Y. 2012).

47. *Id.* at 338-39.

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parties alleging localized environmental threats, to be heard in court.

These adverse consequences are not mere speculation. After *Society of Plastics* in 1991, up until 2002, only 48% of SEQRA cases where standing was challenged were permitted to go forward in contrast to 68% of suits before *Society of Plastics*.<sup>48</sup> The legal recourse of community groups, environmental groups, and “neighbors of challenged projects” was particularly damaged by *Society of Plastics*.<sup>49</sup> Neighbors’ rate of prevailing in standing challenges decreased from 85% before *Society of Plastics* to 50% after it.<sup>50</sup> Community groups and environmental organizations’ success rate fell from 67% to 33%.<sup>51</sup> Business entities, on the other hand, were only marginally hindered as indicated by their comparatively modest decrease in surviving standing challenges from 50% to 45%.<sup>52</sup>

Current judicial holdings are effectively in derogation of the purposes of SEQRA, but they are not without cure. Numerous other states have addressed this defect by adopting citizen suit provisions to enforce their environmental statutes. We believe New York should follow suit.

#### IV. OTHER STATES’ SOLUTIONS

Many states offer a range of alternatives to New York’s current standing requirements. The jurisdictions discussed below all maintain standing qualifications more appropriate to the needs of enforcing their environmental statutes than New York currently provides to its citizens. The states illustrating more effective standing law may be grouped into three camps. Historically, Michigan leads the states of the most relaxed

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48. Gerrard, *supra* note 4, at 3, 5. Gerrard analyzed all cases concerning standing under SEQRA considered by the New York State Appellate Division and the Court of Appeals from 1975 (SEQRA’s enactment) to 2002, which included a total of 101 cases. *Id.* at 3.

49. *See id.* at 5.

50. *Id.*

51. *Id.*

52. *Id.* Prior to *Society of Plastics*, most dismissals for lack of standing where businesses were the petitioners are attributed to the economic nature of the petitioners’ injuries, which do not fall within the purview of SEQRA. *Id.* at 3.

persuasion, including Minnesota, Connecticut, and New Jersey. Hawai'i and Illinois are not far behind. Of the states selected for comparison, Florida and California contain the least liberal standing hurdles, but these are still less inimical to public environmental interests than New York's standing demands.

### Michigan

Michigan was the first state to pass a statutory environmental citizen suit.<sup>53</sup> An examination of the Michigan Environmental Protection Act's (MEPA's) impact demonstrates that citizen suits sharpen a legislative act's ability to protect the environment, and that courts do not become flooded by frivolous or solely economically-concerned plaintiffs as a result of relaxed standing requirements.

Within the first three years of the statute's existence—MEPA was enacted in 1970—seventy-four suits were initiated.<sup>54</sup> Unexpectedly, many of these suits were initiated by state agencies rather than private parties, suggesting that eased standing requirements do not necessarily invite a slew of self-

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53. See Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Standing Suits: Three Years Experience Under the Michigan Environmental Protection Act*, 4 *ECOLOGY L.Q.* 1, 1 (1974) ("The Michigan Environmental Protection Act was the first statute to provide for citizen suits to protect the environment from degradation by either public or private entities and to provide a broad scope for court adjudication."). The relevant portion of the Michigan statute provides that:

(1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

(2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:

(a) Determine the validity, applicability, and reasonableness of the standard.

(b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

MICH. COMP. LAWS § 324.1701 (2011).

54. Sax & DiMento, *supra* note 53, at 6-7. This figure does not include collateral cases, but does include condemnation cases. *Id.* at 7 n.20.

interested and opportunistic litigants.<sup>55</sup> The Wayne County Health Department (WCHD) was the most frequent plaintiff, and yet none of its suits went to trial.<sup>56</sup> Rather than battle in court, the defendants, “large industrial corporations economically able to deal with air pollution control problems[,] apparently willing to do so when enforcement pressures become strong enough,” and faced with adverse publicity, opted to settle.<sup>57</sup> Furthermore, during the first three years, standing was not successfully challenged in any of these suits nor did “broad standing” create “practical problems for effective resolution of controversies.”<sup>58</sup> Despite relaxed standing, redundant litigation has been avoided.<sup>59</sup>

The predicted effect of stifled business and frivolous suits appears not to have occurred. First, one-fourth of all surveyed suits leading to injunctions targeted public projects, as opposed to private business enterprises.<sup>60</sup> One-third of all cases involving injunctions were suits brought by public agencies.<sup>61</sup> Where a preliminary injunction was issued, two-thirds of the cases were won by plaintiffs, thus validating their initial claims and the ensuing injunction.<sup>62</sup>

More recently, Michigan’s citizen suit provision has been challenged, but without abiding success. In *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, the Supreme Court of Michigan rolled back lenient standing requirements and adopted federal standing requirements as set forth by the United States Supreme Court in *Lujan v. Defenders*

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55. See generally *id.* at 23.

56. *Id.* at 23-4 (“[WCHD] has charge of air pollution regulation in the Detroit metropolitan area.”).

57. *Id.* at 24.

58. *Id.* at 36.

59. *Id.* at 37-8 (“Once the plaintiffs either win or lose, they accept their situation, and neither they nor others sympathetic to their claims attempt to relitigate the same issue in a different proceeding.”). Courts have also “been rather careful to assure that plaintiffs sue the proper parties.” *Id.* at 37.

60. Sax & DiMento, *supra* note 53, at 46.

61. *Id.*

62. *Id.*



of Wildlife.<sup>63</sup> The *Michigan Citizens* court read an implied “cases and controversies” clause into the Michigan State Constitution.<sup>64</sup>

Yet just three years later, *Lansing School’s Education Association, MEA/NEA v. Lansing Board of Education* overruled *Michigan Citizens*, finding that the Michigan State Constitution had no “cases and controversies” requirement equivalent to that of the federal constitution and therefore the legislature and state courts had broader leeway than federal courts in formulating standing requirements.<sup>65</sup> The *Lansing* court discussed four criteria appropriate for evaluating whether to alter a court-created rule.<sup>66</sup> Such a test is useful when considering whether to alter the *Society of Plastics* standing requirements in New York State. It is most useful to focus on the third factor that the *Lansing* court considered: “whether upholding the rule is likely to result in serious detriment prejudicial to public interests.”<sup>67</sup> Accordingly, the *Lansing* court held that the federal requirements adopted in *Michigan Citizens* operated at “the expense of public

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63. See *Michigan Citizens for Water Conservation v. Nestle Waters N. Am. Inc.*, 737 N.W.2d 447, 455 (Mich. 2007). (“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.” (quoting *Nat’l Wildlife Fed’n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 814 (Mich. 2004)), *overruled by* *Lansing Sch. Educ. Ass’n, MEA/NEA v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 699 (Mich. 2010).

64. *Michigan Citizens*, 737 N.W.2d at 453. “The *Lee/Cleveland Cliffs* majority [upon which the *Michigan Citizens* majority relied] explained that Article III, § 1 of the federal constitution grants federal courts only the ‘judicial power’ and Article III, § 2 limits the judicial power to certain ‘Cases’ or ‘Controversies.’ Although the Michigan Constitution does not include ‘Cases’ or ‘Controversies’ requirements, the *Lee/Cleveland Cliffs* majority concluded that the Michigan Constitution is analogous to the federal constitution because it expressly requires the separation of powers and grants courts only the judicial power. The majority further determined that the cornerstone of the judicial power is the case-or-controversy requirement.” *Lansing Sch. Educ. Ass’n*, 792 N.W.2d at 692 (citations omitted).

65. *Lansing Sch. Educ. Ass’n*, 792 N.W.2d at 693–96, 699.

66. *Id.* at 697–98.

67. *Id.* at 698 (citing *Petersen v. Magna Corp.*, 773 N.W.2d 564, 574 (Mich. 2009)).

interests” because the requirements “may prevent litigants from enforcing public rights, despite the presence of adverse interests and parties, and regardless of whether the Legislature intended a private right of enforcement to be part of the statute’s enforcement scheme.”<sup>68</sup> The court commented, as many commentators had noted, that the *Lujan* standard “has the effect of encouraging courts to decide the merits of a case under the guise of merely deciding that the plaintiff lacks standing, thus using ‘standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.’”<sup>69</sup>

The temporary setback and subsequent redemption of MEPA’s citizen suit provision described above has enormous implications for environmental protections in Michigan and reveals the dangers of not maintaining lenient standing requirements in environmentally-concerned jurisdictions throughout the United States. The *Lansing* court’s view that Michigan’s Constitution does not imply a “case or controversy” requirement is both the prevalent view in Michigan and a view readily applicable to the New York State Constitution. As in Michigan, courts would have to read a “case or controversy” requirement into the New York State Constitution in order to undermine a citizen suit bill through constitutional challenge.<sup>70</sup> But, as the *Lansing* court stated, judicial striking of a citizen suit enacted by a legislature in fact represents a violation of separation of powers rather than its preservation. In instances where the legislature has voted to allow the judiciary to review

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68. *Id.* The court’s repudiation of legislative intent’s superiority over public interests is noteworthy because the *Society of Plastics* court deployed the legislature’s rejection of a citizen suit provision in SEQRA as proof that more lenient standing requirements were inappropriate. See *Soc’y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 573 N.E.2d 1034, 1054 (N.Y. 1991). Moreover, as discussed below, the *Society of Plastics* court misconstrued SEQRA’s legislative history, and the legislature in fact never did expressly reject a citizen suit provision as part of SEQRA.

69. *Lansing Sch. Educ. Ass’n*, 792 N.W.2d at 698 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 490 (1982)).

70. *Soc’y of Plastics*, 573 N.E.2d at 1040. Even the *Society of Plastics* court acknowledged that there is no “case or controversy” requirement in the New York State Constitution.

certain matters, it is simply exercising its power to make law.<sup>71</sup> Prior to *Lee v. Macomb Co. Board of Commissioners*, the case which established the precedent followed in *Michigan Citizens*, “no Michigan case had held that the issue of standing posed a constitutional issue. Nor did any case hold that Michigan’s judicial branch was subject to the same case-or-controversy limitation imposed on the federal judicial branch under article III of the United States Constitution.”<sup>72</sup> Similarly, no New York State court has contemplated that standing poses a constitutional issue.

In *Michigan Citizens*, the petitioners were a non-profit corporation “formed to protect and conserve water resources of Michigan, particularly in Mecosta County,” the site of the project in question” as well as property owners along lakes and streams in the County.<sup>73</sup> By determining that the petitioners failed to

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71. See Nat’l Wildlife Fed’n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 826-28 (Mich. 2010) (Weaver, J., concurring in result), *overruled by Lansing Sch. Educ. Ass’n*, 792 N.W.2d 686 (“While pretending to limit its ‘judicial power,’ the majority’s application of *Lee*’s judicial standing test [contravening legislative intent to provide a citizen suit] in this case actually expands the power of the judiciary at the expense of the Legislature by undermining the Legislature’s constitutional authority to enact laws . . .”). Early in his concurrence, Weaver expounded upon the dangers of judicial interference with statutory purposes:

I dissent from the majority’s analysis of “standing” and “judicial power” because this analysis utterly ignores the will of the people of Michigan expressed in art. 4, § 52 of our Constitution that

[t]he conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction . . . .

The attorney general or *any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [MICH. COMP. LAWS § 324.1701(1) (2014) (emphasis added)].

*Id.* at 826.

72. *Lansing Sch. Educ. Ass’n*, 792 N.W.2d at 703 (Weaver, J., concurring) (quoting *Michigan Citizens for Water Conservation v. Nestle Waters N. Am. Inc.*, 737 N.W.2d 447, 464 (Mich. 2007)).

73. *Michigan Citizens*, 737 N.W.2d at 450.

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prove a particularized injury as required under the adopted federal standard, the court found that the petitioners did not possess “recreational, aesthetic, or economic interest in” Osprey Lake and adjacent wetlands.<sup>74</sup> In contrast, Judge P.J. Murphy’s concurrence in the Michigan Court of Appeals held that the petitioners:

have standing because of the complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources noted above and because of the hydrologic interaction, connection, or interrelationship between these natural resources, the springs, the aquifer, and defendant Nestlé’s pumping activities, whereby impact on one particular resource caused by Nestlé’s pumping necessarily affects other resources in the surrounding area. Therefore, although there was no evidence that plaintiffs actually used or physically participated in activities on the Osprey Lake impoundment and wetlands 112, 115, and 301, environmental injuries to those natural resources play a role in any harm caused to the Dead Stream, the Dead Stream’s wetlands, and Thompson Lake, which are used by and adjacent to property owned by plaintiffs and not the subject of a standing challenge.<sup>75</sup>

Therefore the petitioners asserted, and at least part of the Michigan Court of Appeals recognized, fundamental principles of deep ecology.<sup>76</sup> Remarkably, the Supreme Court of Michigan disagreed, even commenting that “pervasive . . . environmental damage in an ecosystem” does not matter in the face of the plaintiff’s inability to assert injury-in-fact according to federal

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74. *Id.* at 463.

75. *Michigan Citizens for Water Conservation v. Nestle Waters of N. Am., Inc.*, 709 N.W.2d 174, 225 (Mich. Ct. App. 2005) (Murphy, J., concurring), *aff’d in part, rev’d in part*, 737 N.W.2d 447 (Mich. 2007), *overruled by* Lansing Sch. Educ. Ass’n MEA/NEA v. Lansing Bd. of Educ., 792 N.W.2d 686 (Mich. 2010). Judge Murphy’s outlook closely resembles the broad and complex interconnectedness of water sources contaminated by the localized construction projects at issue in *Finger Lakes* and *Long Island Pine Barrens*. See *infra* Part III.

76. See generally BILL DEVAL & GEORGE SESSIONS, *DEEP ECOLOGY* 7-8 (1985). Deep ecology is the notion that the biosphere is largely defined by its interconnectedness and one sector’s well-being is inextricably linked to others.

standards.<sup>77</sup> Although *Lansing* overruled *Michigan Citizens*, the latter case indicates the dangers of using rigid standing requirements to close the doors on environmental plaintiffs. Based on the reasoning of *Michigan Citizens*, real environmental degradation may be ignored and courts may subvert our most up-to-date understanding of the interrelatedness of ecosystems and notions of what constitutes a healthy environment.<sup>78</sup> With *Lansing*, Michigan attempted to support its environmental protection act by guaranteeing citizen oversight.<sup>79</sup>

In *Anglers of the AuSable, Inc. v. Department of Environmental Quality*, the plaintiffs attempted to prevent a power company from discharging contaminants from an environmental cleanup site into a previously unpolluted site.<sup>80</sup> The plaintiffs were seeking to “protect the AuSable River watershed.”<sup>81</sup> The court granted standing, reiterating that *Lansing* supported the premise that “statutes granting standing” should be read “as written.”<sup>82</sup> *AuSable* demonstrates Michigan’s current approach to standing and how the citizen suit provision fulfills statutory purposes. Concerned citizens were able to establish standing even if they lacked special harm.<sup>83</sup> The concurrence articulated the larger implications of MEPA’s citizen standing provision, how the provision influences MEPA, and how MEPA, in turn, has impacted environmental regulation:

Michigan’s EPA was the first legislation of its kind and has attracted worldwide attention. The act also has served as a model for other states in formulating environmental legislation. The enactment of the EPA signals a dramatic change from the practice where the important task of environmental law

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77. *Michigan Citizens*, 737 N.W.2d at 457.

78. *Id.*

79. *See Lansing Sch. Educ. Ass’n*, 792 N.W.2d 686.

80. *See Anglers of the AuSable, Inc. v. Dep’t of Env’tl. Quality*, 793 N.W.2d 596 (Mich. 2010), *vacated*, 796 N.W.2d 240 (Mich. 2011).

81. *AuSable*, 793 N.W.2d at 604.

82. *Id.* at 603 (“Accordingly, MEPA, which specifies that ‘any person may maintain an action . . . against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction,’ should be applied as it is written.” (citation omitted)).

83. *Id.* at 603-04.

enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment. The EPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public. But the EPA does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.<sup>84</sup>

Under current standing requirements in New York State, the plaintiffs in *AuSable* may have only been able to achieve standing because they owned property along the course of the Ausable River or, alternatively, because they demonstrated regular recreational use of the river and thereby were able to allege special harm.<sup>85</sup> Otherwise, if New York State's standing rules had applied to the facts in *AuSable*, then state-permitted unreasonable pollution of public resources would have been allowed to continue unabated:

Defendants have presented no authority for the proposition that the diversion of contaminated water from one source to an uncontaminated watershed should be considered reasonable. It would be incongruous to hold that it is reasonable to decontaminate water by contaminating different water. Furthermore, it would be unconscionable and destructive for this Court to determine that it is reasonable to spread dangerous contamination throughout Michigan as we have described. The necessarily resulting harm would be spread not only to immediate downstream users but, in the end, to anyone in Michigan who relies, directly or indirectly, on our state's water remaining clean.<sup>86</sup>

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84. *Id.* at 608 (quoting *Ray v. Mason Cnty. Drain Comm'r*, 224 N.W.2d 883, 887 (Mich. 1975)).

85. *See generally AuSable*, 793 N.W.2d at 603. Though plaintiffs did own property along the AuSable River and indicated they fished in its waters, the Michigan court noted that they would have had standing even if they did not possess such property nor participated in recreation on the river. *Id.*

86. *Id.* at 604-05.

In other words, the *Ausable* court would have found standing existed simply because the plaintiffs were citizens of Michigan seeking to protect the state's natural resources regardless of the plaintiffs' particular and personal relationship to the river.<sup>87</sup>

Michigan represents the broadest of the major categories of environmental standing, a group in which any person may bring suit to protect resources regardless of injury to the plaintiff, let alone special harm. South Dakota, Massachusetts, and Louisiana, all possess citizen suit provisions similar to Michigan's.<sup>88</sup>

### Minnesota

Minnesota's Environmental Rights Act (MERA) is closely modeled on Michigan's.<sup>89</sup> MERA essentially removes strict standing requirements, which were once present under Minnesota's common law.<sup>90</sup> The Act actually advances standing

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87. *Id.* at 603-04 ("[I]t is clear under MEPA 'any person' has standing to maintain an action protecting Michigan's natural resources . . . . Because plaintiffs certainly qualify under the statute's designation of 'any person,' plaintiffs would have standing regardless of the Court's decision in *Nestlé*").

88. James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RESOURCES & ENV'T, no. 4, 2004, at 53, 55, available at [http://works.bepress.com/james\\_may/28](http://works.bepress.com/james_may/28).

89. *State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 30 (Minn. Ct. App. 1993). A neighboring state's adoption of Michigan's law and policy is yet another indicator of MEPA's success in practice.

90. Timothy S. Murphy, *Environmental Law – Protection of Scenic and Aesthetic Resources under the Minnesota Environmental Rights Act – State ex rel. Drabik v. Martz*, 17 WM. MITCHELL L. REV. 1190, 1195-96 (1991) ("The removal of these obstacles allows private citizens effectively to confront environmental degradation."). MERA's citizen suit provision reads as follows:

Any person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization, or other entity having shareholders, members, partners or employees residing within the state may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction; provided, however, that no action shall be allowable hereunder for acts taken by a person on land leased or owned by said person pursuant to a permit or license issued by the owner of the land to said person which do not and cannot reasonably be expected to pollute, impair,

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beyond MEPA; MERA does not require a plaintiff to show that a defendant's conduct adversely affecting the environment was "unreasonable."<sup>91</sup> Nevertheless, Minnesota courts recognize the need for a standing filter in the context of MERA.<sup>92</sup> Accordingly, *State by Schaller v. County of Blue Earth* established requirements for a plaintiff to show a prima facie cause of action to fulfill MERA standing. At the outset, the court conceded that "almost every human activity has some kind of adverse impact on a natural resource" and concluded that it could not "construe MERA as prohibiting virtually all human enterprise."<sup>93</sup> There are two prongs that plaintiffs must fulfill as part of their prima facie case: 1) the threatened resource must be a protected resource according to MERA and 2) "conduct by the defendant must cause or be likely to cause 'pollution, impairment or destruction'" as defined in MERA.<sup>94</sup> The *Schaller* court followed

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or destroy any other air, water, land, or other natural resources located within the state; provided further that no action shall be allowable under this section for conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture.

MINN. STAT. § 116B.03 (2013). Furthermore, MERA contains an environmental right invested in the citizens of the state:

The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.

*Id.* § 116B.01.

91. Murphy, *supra* note 90, at 1198. Alternatively, "reasonable conduct" is recognized as an affirmative defense in Minnesota.

92. *State by Schaller v. Cnty. of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997).

93. *Id.* at 265 (quoting *Wacouta*, 510 N.W.2d at 30).

94. *Id.* at 264.



*State ex. rel. Wacouta Township v. Brunkow Hardwood Corp.* and required that the plaintiff fulfill Michigan's test<sup>95</sup> to determine whether conduct has or would "materially adversely affect" the environment and thereby fulfill the second prong.<sup>96</sup> Accordingly, in *Schaller*, the court distilled the second prong into the following five-part balancing test to determine whether a new two-lane highway "materially adversely affected" the environment:

- (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
- (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
- (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
- (4) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); [and]

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95. *Id.* at 265-67; *see also* People for Env'tl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Env'tl. Quality Council, 266 N.W.2d 858, 866 (Minn. 1978) (indicating that the Supreme Court of Minnesota frequently utilizes Michigan cases to analyze MERA).

96. Rather than require conduct be "unreasonably" damaging to the environment to qualify for judicial review, MERA demands that conduct "materially adversely affect" the environment, a comparatively relaxed requirement. The relevant portion of MERA reads as follows:

"Pollution, impairment or destruction" is any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred or is likely to occur or any conduct which *materially adversely affects or is likely to materially adversely affect the environment*; provided that "pollution, impairment or destruction" shall not include conduct which violates, or is likely to violate, any such standard, limitation, rules, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air.

MINN. STAT. § 116B.02(5) (2013) (emphasis added).

(5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.<sup>97</sup>

The factors are neither exclusive nor dispositive. Rather, courts weigh them depending on the type of resource threatened by a project.<sup>98</sup>

Minnesota's (and Michigan's) five-part prima facie impact test proves that the presence of a citizen suit provision does not eliminate judicial safeguards against frivolous, redundant, and inefficient litigation. In fact, the *Schaller* court held that the plaintiff challenging construction of the highway lacked standing because the noise estimates he relied upon were inaccurate, habitat destruction resulting from the highway's construction did not affect "rare, endangered, or threatened" resources or destroy irreplaceable trees, and the affected area was small compared to the area condemned for the project.<sup>99</sup> Thus, in contrast to New York's plaintiff-centric requirements, the *Schaller* court espoused a standing doctrine focused on injury to the *environment* rather than the *plaintiffs*. In doing so, Minnesota courts remain unhampered by frivolous suits.<sup>100</sup> Therefore Minnesota provides another worthy example of where a citizen suit empowers the public to protect its environment more so than New York and yet is reined in by a nuanced and balanced standing test. Again, Minnesota's lack of New York's special harm requirement enables the public to defend its public right<sup>101</sup> regardless of private stakes in the matter. Like Michigan, Minnesota falls into the most

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97. *Schaller*, 563 N.W.2d at 267.

98. *See id.*

99. *Id.* at 265.

100. *See Zander v. State*, 703 N.W.2d 845, 856 (Minn. Ct. App. 2005) (plaintiffs challenged approval of a highway expansion from two to four lanes but failed the *Schaller* test when alleging that the project would destroy "state-listed valerian plants" and destroy wetlands); *State ex rel. Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 178 (Minn. Ct. App. 2003) (finding that proposed athletic center constituted no "materially adverse effect" on a protected resource); *In re Univ. of Minn.*, 566 N.W.2d 98, 104 (Minn. Ct. App. 1997) (finding that realtors failed to fulfill the *Schaller* factors when alleging that steam plants would cause a "materially adverse effect" on a protected resource).

101. *See* MINN. STAT. § 116B.01 (2013).

generous category of environmental standing, where any person may file suit to protect the environment regardless of injury to the petitioner and, of course, regardless of special harm.<sup>102</sup>

### Connecticut

Connecticut followed Michigan's lead and passed a citizen standing statute in 1971.<sup>103</sup> Coupled with a powerful declaration of the public trust doctrine,<sup>104</sup> Connecticut possesses a formidable statutory framework for protecting public environmental interests.<sup>105</sup> *Manchester Environmental Coalition v. Edward J.*

102. May, *supra* note 88, at 53.

103. W. Scott Magargee, *Protecting the Environment: Creating a Citizen Standing-to-Sue Statute in Virginia*, 26 U. RICH. L. REV. 235, 246 (1991). The Connecticut statute reads:

The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state.

CONN. GEN. STAT. § 22a-16 (2013).

104. CONN. GEN. STAT. § 22a-15 ("It is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.").

105. Jennifer E. Sills, *Environmental Protection Act ("CEPA"): Enabling Citizens to Speak for the Environment*, 70 CONN. B. J. 353, 359-60 (1996) ("Once a plaintiff has filed a verified pleading in accordance with § 22a-19(a), intervention is a matter of right, which the court has no discretion to deny. A plaintiff need not prove any pollution, impairment, destruction of the

*Stockton*, though thirty-years old, is still cited as binding authority on the question of standing. The lenient requirements set forth by the court, since undisturbed by intervening judicial or legislative action, suggest frivolous suits as well as self-interested and solely economic interests have not sufficiently troubled Connecticut's electorate or judiciary to cause them to disturb *Manchester Environmental Coalition's* holding.

*Manchester Environmental Coalition* involved plaintiffs who challenged the construction of an industrial park which was approved without an environmental impact statement (EIS), and which the plaintiffs alleged would cause pollution of the air due to increased auto emissions generated by the park's employees.<sup>106</sup> The Supreme Court of Connecticut agreed with the trial court that the plaintiffs had standing because the Connecticut Environmental Protection Act (CEPA) "confers standing upon 'any person' to sue 'any person' for 'the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.'"<sup>107</sup> On the one hand, the court's decision expresses the emphasis of actual environmental impact when determining justiciability and, on the other hand, discusses the restraints that guarantee that relaxed standing requirements do not overburden the courts.<sup>108</sup> In contrast to New York's decisions under Article 78 proceedings, the *Manchester Environmental Coalition* court did not even discuss the identities of the plaintiffs, instead focusing on the broad wording of CEPA which granted the plaintiffs standing.<sup>109</sup> Rather than having to plead particularized harm, the plaintiffs

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environment in order to have standing, and will have standing even if the allegations prove unfounded." (citation omitted)).

106. See *Manchester Env'tl. Coal. v. Stockton*, 441 A.2d 68 (Conn. 1981), *overruled by* *City of Waterbury v. Town of Washington*, 800 A.2d 1102 (Conn. 2002).

107. *Id.* at 73.

108. See *id.* at 73-76.

109. *Id.* at 73 ("This act expands the class of plaintiffs who are empowered to institute proceedings to vindicate public interest. . . . Similar acts . . . are best known for eliminating standing barriers prevalent in traditional litigation. . . . [T]he plaintiffs have standing under s 22-16 which confers standing upon 'any person' to sue 'any person' for 'the protection of the public trust in the air, water, and other natural resources of the state from unreasonable pollution, impairment or destruction.'" (citations omitted)).

needed to show how the *defendant's* conduct “acting alone, or in combination with others, has, or reasonably likely unreasonably to pollute, impair, or destroy the public trust in air, water, or other natural resources of the state”<sup>110</sup> Nevertheless, the plaintiffs did not have unbridled access to courts. “The legislative history shows that the word ‘unreasonably’ was added [to the statute] as a means of preventing lawsuits directed solely for harassment purposes.”<sup>111</sup> Regarding the particular facts of *Manchester Environmental Coalition*, the trial court found, and the appellate court upheld, that the plaintiffs successfully alleged prima facie pollution to a resource of the state resulting from the defendant’s conduct: increased auto emissions into the state’s air due to increased traffic related to the new industrial park.<sup>112</sup> The standing requirements matched the intent of the statute: the plaintiff had to show prima facie damage to a state environmental resource.<sup>113</sup> Unlike New York, Connecticut’s standing requirements under its environmental protection act closely align with the act’s intent and thus serve to aid in

110. *Id.* at 74 (quoting CONN. GEN. STAT. § 22a-17).

111. *Id.* Attorney for the majority leadership of the state’s House of Representatives said of the “reasonableness” requirement:

‘Now in framing this legislation, it was our judgment that all of us pollute the environment to one degree or another, simply by breathing, obviously we introduce elements into the environment which are not natural. And therefore, if we are going to permit the use of the courts by citizens to bring lawsuits against those who do pollute the environment, we believe there must be a check to prevent those suits which are brought simply for harassment, and for no other purpose. Therefore, H.B. 5037, which Speaker Ratchford has introduced, permits law suits against those who unreasonably pollute the environment . . . if S.B. 400 were passed with no check, then you might wind up with spite suits between neighbors and that sort of thing over conditions that are nothing more than spite between neighbors. We feel our bill, which imposes the reasonable standard, would be such as to eliminate that possibility.’

*Manchester Env’tl. Coal. v. Stockton*, 441 A.2d 68, 74 n.10 (Conn. 1981) (citation omitted).

112. *Manchester*, 441 A.2d at 74.

113. See *City of Waterbury*, 800 A.2d at 1132-36 (refining *Manchester Environmental Coalition* by clarifying that *Manchester Environmental Coalition’s* holding did not mean that unreasonable pollution occurs merely when environmental impairment exceeds de minimis damage. Rather, reasonability should be assessed by CEPA’s statutory provisions governing the defendant’s conduct.).

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protecting natural resources. Since a plaintiff need not establish any actual harm to the environment and thus no injury-in-fact, Connecticut is situated with Michigan and Minnesota at the most liberal level of standing requirements for environmental suits.

**New Jersey**

Like Connecticut, New Jersey also possesses a citizen suit statute permitting public enforcement of state environmental laws.<sup>114</sup> Courts have read the citizen suit provision to apply broadly and literally. In *Port of Monmouth Development Corp. v. Middletown Township*, the court said of the citizen suit provision: “it is now well established that where intent is made clear in its language, courts will enforce a statute according to its terms.”<sup>115</sup> The plaintiff in *Port of Monmouth* was a successor in title to land once used as a landfill and sought to compel the former municipal operator of the landfill to comply with its closure obligations under New Jersey’s Solid Waste Management

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114. N.J. STAT. ANN. § 2a:35a-4 (2013).

a. Any person may commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment. The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance, or to assess civil penalties for the violation as provided by law. The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.

b. Except in those instances where the conduct complained of constitutes a violation of a statute, regulation or ordinance which establishes a more specific standard for the control of pollution, impairment or destruction of the environment, any person may commence a civil action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment or destruction.

c. The court may, on the motion of any party, or on its own motion, dismiss any action brought pursuant to this act which on its face appears to be patently frivolous, harassing or wholly lacking in merit.

115. *Port of Monmouth Dev. Corp. v. Middletown Twp.*, 551 A.2d 1030, 1033 (N.J. Super Ct. App. Div. 1988).

Act (SWMA).<sup>116</sup> In line with literal statutory interpretation, the court determined that “the Environmental Rights Act permits any person to seek enforcement of SWMA.”<sup>117</sup> It is worth noting that the landfill was “nonhazardous,”<sup>118</sup> and that the plaintiff’s injury was not discussed at all in that portion of the opinion addressing standing. The defendant municipality had failed to comply with SWMA because it neglected to cover the closed landfill with “a minimum of two feet of compacted cover of soil, earth or other insoluble and non-degradable material covered by the DEP [New Jersey Department of Environmental Protection].”<sup>119</sup> According to the opinion in *Howell Township v. Waste Disposal Inc.*, New Jersey’s Environmental Rights Act (ERA), which contains the citizen standing provision, “constitutes umbrella legislation in an area of great current public concern [and] was passed primarily to insure access to the courts by *all* persons interested in abating or preventing environmental damage.”<sup>120</sup>

Provision (c)<sup>121</sup> acts to curtail the kind of lawsuits that may be brought under the ERA. Though “essentially [the ERA] empowers any person to maintain an action to enforce or restrain violation of *any* statute, regulation or ordinance establishing protection against impairment or destruction of the environment,” the act also deploys res judicata and collateral estoppel to prevent multiplicity of suits.<sup>122</sup> It also grants courts a “supervisory role in dismissing ‘patently frivolous, harassing’ litigation.”<sup>123</sup> Limits on ERA standing were demonstrated in *Hoboken Environment Committee, Inc. v. German Seaman’s Mission of New York*, in which the court found a citizens group lacked standing to enjoin demolition of a historic building.<sup>124</sup>

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116. *Id.* at 1031.

117. *Id.* at 1032.

118. *Id.* at 1030.

119. *Id.* at 1032.

120. *Howell Twp. v. Waste Disposal Inc.*, 504 A.2d 19, 25 (N.J. Super. Ct. App. Div. 1986).

121. See N.J. STAT. ANN. § 2a:35a-4.

122. *Howell*, 504 A.2d at 25-26.

123. *Id.* at 26.

124. See *Hoboken Env’t Comm., Inc. v. German Seaman’s Mission of N.Y.*, 391 A.2d 577, 580 (N.J.C. 1978) (“Although this statute grants liberal standing

The citizen standing suit has not usurped agency discretion. In *In re New Jersey Pinelands Commission Resolution*, an appellate court upheld the trial court's holding that environmental organizations lacked standing to challenge a settlement agreement allowing development of land possessing endangered timber rattlesnakes.<sup>125</sup> The court found the Pinelands Commission had already "fulfilled [the] role" of prosecuting a violation of the Endangered and Nongame Species Conservation Act (ENSCA) because the Commission had made "specific provisions in the settlement agreement for immediate protection of the timber rattlesnake and its habitat in conformance with [the Pinelands Protection Act]."<sup>126</sup> Therefore the plaintiffs' role as enforcers of public resource protection had already been occupied by an administrative agency.

Furthermore, subsection (b)<sup>127</sup> of the citizen suit statute offers a further constraint on plaintiffs. In *Springfield v. Lewis*, a federal court applying New Jersey law found that the plaintiffs failed to establish standing under the ERA because there existed "a more specific standard for the control of pollution, impairment, or destruction of the environment."<sup>128</sup> Peter H. Lehner has argued that subdivision (b) of the citizen suit provision is an immensely significant check on plaintiff opportunity since, he claims, "nearly any governmental license, plan or seal of approval count[s] as a 'specific standard for control of pollution.'" <sup>129</sup> Therefore, the ERA's citizen suit provision, which Lehner says

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because "every person has a substantial interest in minimizing this condition" of polluting and impairing the environment, N.J.S.A. 2A:35A-2, it is clearly limited to destruction or harm to the natural environment as opposed to the destruction of historical buildings. Plaintiffs' reliance upon this statute is obviously misplaced.") However the plaintiffs were able to establish standing under other statutes. *Id.* at 581-83.

125. See *In re N.J. Pinelands Comm. Resolution*, 812 A.2d 1113 (N.J. Super. Ct. App. Div. 2003).

126. *Id.* at 1119.

127. See N.J. STAT. ANN. § 2a:35a-4(b).

128. See *Twp. of Springfield v. Lewis*, 702 F.2d 426, 452 (3d Cir. 1983). The "more specific standard" was set forth by an Action Plan, prepared by the Federal Highway Administration, elaborating on the procedures required to develop highway projects and the environmental effects. *Id.* at 443.

129. Peter H. Lehner, *The Efficiency of Citizen Suits*, 2 ALB. L. ENVTL. OUTLOOK 4, 11 n.71 (1995).



facially “appears to be the broadest citizen suit statute,”<sup>130</sup> possesses ample counterbalances to the broad public empowerment it entails. Yet despite the restraints, New Jersey’s citizen suit provision favorably compares to Michigan, Minnesota, and Connecticut’s in that it allows any person to file suit regardless of injury.

### Illinois

Illinois has provided its public with the capability to protect the environment by including a citizen suit provision in the state constitution. Article 11, Section 2 provides not only a right to a “healthful environment,” but also a mandate for “each person [to] enforce this right.”<sup>131</sup> Judicial opinions have differed on the meaning of “healthful environment,” and therefore the question as to whether a plaintiff’s concerns fall within the zone of interests protected by Article 11 often turns on the elasticity of the term. The Supreme Court of Illinois in *Glisson v. City of Marion* determined that “healthful environment” did not encompass protection of species listed in the Illinois Endangered Species Act; rather, “healthful environment” referred to conditions strictly favoring human health.<sup>132</sup> Nevertheless, the legislative history relied upon by the majority in *Glisson* explicitly disavowed a “special injury” requirement thus directly rejecting SEQRA’s court-constructed standing requirements.<sup>133</sup> Furthermore, Illinois courts seem to harbor a generous notion of standing as it pertains to Article 11; thus, even where environmentally-minded plaintiffs have lost in court, such losses

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130. *Id.* at 10.

131. ILL. CONST. art. XI, § 2.

132. *Glisson v. City of Marion*, 720 N.E.2d 1034, 1044-45 (Ill. 1999); *but see id.* at 1045 (Harrison, J., dissenting) (arguing that biodiversity is essential to human welfare and that the majority inappropriately relied on legislative history).

133. *Id.* at 1043 (“Because the wrong here has reached crisis proportions and because it affects individuals in so fundamental a way, the Committee is of the view that the ‘special injury’ requirement for standing is particularly inappropriate and ought to be waived. Section [2], therefore, allows the individual the opportunity to prove a violation of his right even though that violation may be a public wrong, or one common to the public generally.” (quotation omitted)).

have been based on the merits and survived standing tests.<sup>134</sup> Courts have even gone so far as to announce that the primary intention in enacting Article 11, Section 2 was to remove a “special injury” requirement from the common law requirements of environmental nuisance claims.<sup>135</sup>

As discussed in *People v. Pollution Control Board*, legislative action may modify the reach of standing under Article 11, Section 2, and Article 11 does not add “substantive causes of action” that are not present in other statutes or common law.<sup>136</sup> Therefore, though Article 11 creates “standing for [the] individual to [pursue] the public interest,” it does not provide “new substantive rights.”<sup>137</sup> When compared to Minnesota and Michigan, the Illinois version of the citizen suit thus simultaneously contracts and expands the individual’s ability to protect the public interest. While on one hand its citizen suit carries the weight of a constitutional right, the citizen suit provision of Illinois’ constitution does not appreciably expand environmental protection causes of action whereas Minnesota and Michigan’s citizen suit provisions do provide substantive causes of action. Most importantly, however, all three states share a rejection of a special harm standing requirement where plaintiffs are seeking to enforce environmental protection acts. Illinois, though seeming to require injury-in-fact unlike Michigan and Minnesota, has nevertheless explicitly rejected New York’s special harm requirement.

### Hawai‘i

Like Illinois, Hawai‘i possesses a constitutional citizen standing provision to protect an environmental right.<sup>138</sup>

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134. See *Ill. Pure Water Comm., Inc. v. Dir. of Pub. Health*, 470 N.E.2d 988, 992 (Ill. 1984).

135. See *City of Elgin v. Cnty. of Cook*, 660 N.E.2d 875, 891 (Ill. 1995); see also *People v. Pollution Control Bd.*, 473 N.E.2d 452, 456 (Ill. App. Ct. 1984).

136. *Pollution Control Bd.*, 473 N.E.2d at 456.

137. *Id.* at 455.

138. The Hawai‘i constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of

Paralleling the constitutional mandate, Hawai'i's courts have relied on the notion that public interest requires lenient standing.<sup>139</sup> Hawai'i's environmental standing doctrine is most clearly distinguishable from New York in that the plaintiff need not assert a special harm.<sup>140</sup> The state judiciary has eased standing where environmental well-being is at stake as described in *Sierra Club v. Hawai'i Tourism Authority ex. rel. Board of Directors*:

in cases involving environmental concerns and native Hawai'ian rights, this court's opinions have moved "from 'legal right' to 'injury in fact' as the . . . standard . . . for judging whether a plaintiff's stake in a dispute is sufficient to invoke judicial intervention[.]" from "economic harm . . . [to inclusion of] '[a]esthetic and environmental well-being'" as interests deserving of protection and to the recognition that "a member of the public has standing to . . . enforce the rights of the public even though his [or her] injury is not different in kind from the public's generally, if he [or she] can show that he [or she] has suffered an injury in fact[.]"<sup>141</sup>

In other words, in order to establish standing in an environmental action, a plaintiff must: 1) have "suffered an actual or threatened injury" that 2) must be "fairly traceable to the defendant's actions," and 3) "a favorable decision [would] likely provide relief for plaintiff's injury,"<sup>142</sup> but he or she need not show an injury different from that of the general public. The dissent in *Sierra Club* cited the environmental right present in Hawai'i's constitution to justify "less stringent" standing

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natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

HAW. CONST. art. XI, § 9. *See also* *Sierra Club v. Dep't of Transp.*, 167 P.3d 292, 312 (Haw. 2007).

139. *See* *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1257 (Haw. 1992) ("We hold that [the plaintiff] has standing to bring its claims in [public] courts, consistent with this court's decisions lowering standing barriers in cases of public interest.").

140. *See* *Sierra Club v. Haw. Tourism Auth. ex rel. Bd. of Dirs.*, 59 P.3d 877, 885 (Haw. 2002).

141. *Id.* at 886 (internal citations omitted).

142. *Id.*

requirements.<sup>143</sup> In addition, the dissent noted that while Hawai'i had elected to follow the general federal doctrine of separation of powers, the "cases or controversies" limitation was not essential to maintaining such separation of powers.<sup>144</sup> Michigan courts reached the exact same conclusion when contemplating whether its own separation of powers restraint implied a "cases and controversies" limitation, which would have undermined MEPA's citizen suit provision.<sup>145</sup>

Hawai'i's liberal standing requirements have not resulted in a toothless standing doctrine. For example, the plaintiffs in *Mottl v. Miyahira* attempted to link the defendant's withholding of \$6 million from the University of Hawai'i's appropriation to the degradation of the university's "work environment."<sup>146</sup> The court determined that the allegation was not "specific" enough and called for "assumptions or inferences that [were] not supported by the record or any case law that the plaintiffs cite."<sup>147</sup> Furthermore, "[t]he loss of six million dollars could have been offset by the university through a tuition increase, a reduction in student services, a freeze of administrative—as opposed to teaching—staff salaries, or other savings without any discernible effect on the faculty members."<sup>148</sup> In short, the plaintiffs "failed to assert an injury to a recognized interest" despite their numerous analogies between the reduced quality of the "work environment" at the university and cases in which standing existed where "deterioration of air quality" and "odor nuisance" prompted courts to determine that injury to "aesthetic, recreational, or conservational interests" had occurred.<sup>149</sup> Hawai'i's courts have thus been successful in barring suits, even with a constitutional environmental citizen suit provision, when environmental well-being was not a genuine issue. Hawai'i is similar to Illinois in that it has a constitutional environmental citizen suit provision, but injury-in-fact remains a hurdle that

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143. *Id.* at 911 (Moon, C.J., dissenting).

144. *See id.* at 908 n.8 (Moon, C.J., dissenting); *see also id.* at 886.

145. *See supra* pp. 14-22.

146. *Mottl v. Miyahira*, 23 P.3d 716, 729 (Haw. 2001).

147. *Id.* at 730.

148. *Id.*

149. *Id.* at 729-30.

must be overcome by petitioners. Even though not as lenient as Michigan and Minnesota, Hawai'i espouses what should now be a familiar theme to the reader: a rejection of New York's special harm requirement.<sup>150</sup>

### Florida

Florida's Environmental Protection Act of 1971 (FEPA)<sup>151</sup> provides that citizens may "maintain an action for injunctive

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150. Pennsylvania, though possessing a "self-executing," *Payne v. Kassab*, 312 A.2d 86, 97 (Pa. Commw. Ct., 1973), environmental right, has substantially narrowed that right and thus presents a less significant improvement over New York's standing requirements than Illinois and Hawai'i. PA. CONS. art I, §27 ("The 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 yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

151. FLA. STAT. § 403.412 (2014).

(1) This section shall be known and may be cited as the "Environmental Protection Act of 1971."

(2) (a) The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:

1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;

2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

(b) In any suit under paragraph (a), the Department of Legal Affairs may intervene to represent the interests of the state.

(c) As a condition precedent to the institution of an action pursuant to paragraph (a), the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations

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for the protection of the air, water, and other natural resources of the state. The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action. If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings authorized in paragraph (a). However, failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.

(d) In any action instituted pursuant to paragraph (a), the court, in the interest of justice, may add as party defendant any governmental agency or authority charged with the duty of enforcing the applicable laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.

(e) No action pursuant to this section may be maintained if the person (natural or corporate) or governmental agency or authority charged with pollution, impairment, or destruction of the air, water, or other natural resources of the state is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, issued by the appropriate governmental authorities or agencies, and is complying with the requirements of said permits or certificates.

(f) In any action instituted pursuant to this section, other than an action involving a state NPDES permit authorized under s. 403.0885, the prevailing party or parties shall be entitled to costs and attorney's fees. Any award of attorney's fees in an action involving such a state NPDES permit shall be discretionary with the court. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him or her in an action brought under this section, the court may order the plaintiff to post a good and sufficient surety bond or cash.

(3) The court may grant injunctive relief and impose conditions on the defendant which are consistent with and in accordance with law and any rules or regulations adopted by any state or local governmental agency which is charged to protect the air, water, and other natural resources of the state from pollution, impairment, or destruction.

(4) The doctrines of res judicata and collateral estoppel shall apply. The court shall make such orders as necessary to avoid multiplicity of actions.

(5) In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will

relief” against governmental entities for failing to enforce, and against nongovernmental entities for violations of, “laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.”<sup>152</sup> In an explicit rejection of New York State’s standing doctrine, *Florida Wildlife Federation v. State Department of Environmental Regulation* states:

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. We presume legislative awareness of the law of

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have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state. As used in this section and as it relates to citizens, the term “intervene” means to join an ongoing s. 120.569 or s. 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57. Nothing herein limits or prohibits a citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. 120.569 or s. 120.57. A citizen’s substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner’s use or enjoyment of air, water, or natural resources protected by this chapter.

(6) Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

(7) In a matter pertaining to a federally delegated or approved program, a citizen of the state may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution.

(8) Venue of any causes brought under this law shall lie in the county or counties wherein the cause of action is alleged to have occurred. *Id.*

152. See *id.* § 403.412 (2)(a)(1).

public nuisance with its special injury requirement. 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.

A reading of the entire EPA further bolsters this conclusion. The act limits private plaintiffs to citizens, thereby countering some of the multiple suit problems by precluding just any person from coming into this state and instituting suit. Also, numerous conditions precedent, as previously discussed, have been set out. Provision has been made to protect those operations conducted under governmental permits. In an obvious effort to limit frivolous suits, the act provides that trial courts may require plaintiffs to post bond. Finally, subsection (3) provides that the trial courts may grant injunctive relief and impose conditions consistent with law, rules, and regulations, thereby preserving the court's discretion as to whether or not the moving party has stated a case sufficient to motivate granting the requested relief.

We hold, therefore, that section 403.412 creates a new cause of action and that private citizens of Florida may institute suit under that statute without a showing of special injury. As far as what showing is necessary to state a cause of action under the EPA, we note that a mere allegation of irreparable injury not sustained by the allegation of facts will not ordinarily warrant the granting of injunctive relief.<sup>153</sup>

The court elaborated upon “conditions precedent” to filing a citizen suit:

An interested party must first file a complaint with the appropriate agency. The complaint must set out the facts upon which it is based and the manner in which the complainant is affected. Thereafter, the agency has thirty days in which to act on the complaint. Only after meeting these requirements and giving the agency the opportunity to act may a complainant file suit in a court of law.<sup>154</sup>

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153. *Fla. Wildlife Fed'n v. State Dep't of Env'tl. Regulation*, 390 So. 2d 64, 67 (Fla. 1980) (citation omitted); *see also* *Legal Env'tl. Assistance Found. v. Dep't of Env'tl. Prot.*, 702 So. 2d 1352, 1354 (Fla. Dist. Ct. App. 1997) (describing the legislature's view of environmental protection as implying “collective responsibility” yet precluding non-citizens from utilizing the citizen suit).

154. *Fla. Wildlife Fed'n*, 390 So. 2d at 66.



Yet another case, *Save Our Bay, Inc. v. Hillsborough County Pollution Control Commission*, represents an early rejection of requisite special injury to bring suit and also reinforces the “concept of liberality of pleading”:

It is exceedingly difficult for us to reasonably perceive, despite the very persuasive oral argument of counsel for appellees to the contrary, that appellant, comprising a group of lay citizens interested in protecting and upgrading the environment, would have any further knowledge of the action or nonaction of the appellees in the premises other than that alleged in its complaint. To require appellant to plead its case with more particularity and specificity would be inconsistent with the well accepted and understood concept of liberality in pleading.

On the authority of the statute and this court’s opinion in the case of *Save Sand Key, Inc. v. United States Steel Corporation*, the appellant does have Standing to sue and is not required to show special injury beyond that sustained by the general public.<sup>155</sup>

Thus, the court permitted a non-profit corporation to achieve standing based on a generalized complaint that its members had “regularly over the years” used Tampa Bay for “bathing, swimming, fishing, boating, water sports, and generally as a recreation and play area,” and the defendant utility company polluted the bay by means of releasing effluent emissions into the tributaries of the bay, which was impermissible under Florida law and regulations.<sup>156</sup> Evidently, however, injury-in-fact against the public at large is required to establish standing; *Save Our Bay* implied an injury-in-fact requirement by stating “appellant does have standing to sue and is not required to show special injury *beyond that sustained by the general public*.”<sup>157</sup> *Florida Wildlife Federation* appended its rejection of special injury with the reminder that “a mere allegation of irreparable injury not sustained by the allegation of facts will not ordinarily warrant the granting of injunctive relief.”<sup>158</sup>

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155. *Save Our Bay, Inc. v. Hillsborough Cnty. Pollution Control Comm’r*, 285 So. 2d 447, 449 (Fla. Dist. Ct. App. 1973) (citation omitted).

156. *Id.* at 448.

157. *Save Our Bay*, 285 So. 2d at 449 (emphasis added).

158. *Fla. Wildlife Fed’n*, 390 So. 2d at 67.

In addition, the citizen suit statute provides insulation for state permitting and licensing activities, and such protections were judicially recognized in *Greene v. State Department of Natural Resources*. In *Greene*, a petitioner sought injunctive relief under FEPA section 403.412 (containing the citizen suit provision) and an administrative hearing regarding State land purchases as part of Florida's Conservation and Recreation Land Committee (CARL).<sup>159</sup> The court distinguished between the citizen suit in FEPA section 403.412, requiring no "special injury" to bring an action in *circuit court*, and the petitioner's attempts to use the citizen suit as a "springboard" to initiate an administrative proceeding.<sup>160</sup>

Despite the circuit court/administrative proceeding dichotomy, the state of Florida, via its legislature, saw fit to include a citizen suit provision in its environmental protection act when FEPA was passed four decades ago and has not since perceived cause to retract this right from its citizens.<sup>161</sup> Indeed, the court in *Florida Wildlife Federation* associates the legislative purpose stated in FEPA with the specific citizen suit provision contained therein,<sup>162</sup> and other states passing legislation espousing a similar desire to protect natural resources, such as New York, would do well to recognize the interplay between legislative purpose and the citizen suit. Overall, Florida represents a level of citizen standing more generous than New York, but not as liberal as Connecticut, Minnesota, Michigan, and New Jersey. Special injury is not required, but injury-in-fact remains a hurdle that the plaintiff must clear.

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159. *Greene v. State Dep't of Nat. Res.*, 414 So. 2d 251, 252 (Fla. Dist. Ct. App. 1982).

160. *Id.* at 253–54.

161. FLA. STAT. § 403.412 (2)(a)(1) (2014).

162. *Fla. Wildlife Fed'n*, 390 So. 2d at 66. ("Over a decade ago, the electors of Florida amended the state constitution to add section 7 to article II of that document. That section states the public's intent that it 'be the policy of the state to conserve and protect its natural resources and scenic beauty.' Section 7 further provides that '(a)adequate provision shall be made by law for the abatement of air and water pollution.' To help effectuate that policy, the legislature enacted the EPA as section 403.412 in 1971.")

### California

California, though lacking an environmental citizen suit provision, possesses more lenient standing requirements than New York by virtue of an exception to its writ of mandamus standing rules. To obtain a writ of mandamus for an injunction, a party must establish a “beneficial interest” in obtaining such an injunction.<sup>163</sup> The “beneficial interest” has been defined as “‘some special interest to be served or some particular right to be reserved or protected over and above the public interest held in common with the public at large.’”<sup>164</sup> On its face, such a requirement would seem to be in line with New York’s special harm standing requirement. But there is a notable exception which enhances environmental protection in California and makes it more formidable than SEQRA’s public enforcement mechanism.

The Supreme Court of California has stated that the “effects of environmental abuse are not contained by political lines; strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved.”<sup>165</sup> If a court determines such “broad and long-term effects” to be so widespread that they infringe upon a public right, then an “exception to the beneficial interest requirement” exists.<sup>166</sup> The public right/duty falls within the California Environmental Quality Act’s (CEQA’s)<sup>167</sup> subject matter.<sup>168</sup>

163. See CAL. CIV. PROC. CODE § 1086 (West 2013).

164. Prime Healthcare Mgmt., Inc. v. Valley Health Sys. (*In re Valley Health Sys.*), 429 B.R. 692, 739 (Bankr. C.D. Cal. 2010) (quoting *Carsten v. Psychology Examining Comm.*, 614 P.2d 276, 278 (Cal. 1980)).

165. *Bozung v. Local Agency Formation Comm’n*, 529 P.2d 1017, 1023 (Cal. 1975).

166. See *In re Valley Health Sys.*, 429 B.R. at 739; *Kappadahl v. Alcan Pac. Co.*, 35 Cal. Rptr. 354, 365 (Ct. App. 1963) (“However, where the enforcement of the action is to procure enforcement of a public duty, this rule [beneficial interest requirement] has been modified to permit property owners and others to sue in mandamus since they have an interest as such in seeing that the public duties are enforced.”); *Bozung*, 529 P.2d at 1023 (“Moreover, plaintiffs have standing ‘to procure enforcement of a public duty . . . .’”).

167. Henry Michael Domzalski II, *Bozung v. LAFCO: Municipal Boundary Changes and the California Environmental Quality Act*, 6 GOLDEN GATE U.L. REV. 203, 209 (1975-1976). CEQA is California’s state equivalent of NEPA and SEQRA. Like NEPA and SEQRA, “the most conspicuous of CEQA’s mandates is

The limits of “broad and long-term” effects prove somewhat elusive. An examination of facts where the exception has been invoked by plaintiffs and upheld by the courts provides some guidance. In *Bozung v. Local Agency Formation Comm’n*, plaintiffs challenged a city’s annexation ordinance that occurred without preparation of an EIS as required by CEQA.<sup>169</sup> The court pointed out that one of the plaintiffs had standing based on his residency 1,800 feet from the affected property and such proximity was sufficient to fit within the public duty exception.<sup>170</sup> However, later in the opinion, the court remarks that all the plaintiffs had standing to achieve enforcement of a public duty.<sup>171</sup>

*Kappadahl v. Alcan Pacific Co.* shed further light on the public duty exception, holding that “where the enforcement of the action is to procure enforcement of a public duty, this rule has been modified to permit property owners and others to sue in mandamus, since they have an interest in such to see that public duties are enforced.”<sup>172</sup> The court further remarked that “where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.”<sup>173</sup>

The public duty in *Kappadahl* was the obligation of building inspectors to not issue building permits in violation of zoning ordinances. Even though the court admitted that the petitioners

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that an EIR [Environmental Impact Report] be filed by all public agencies, boards commissions, which propose to carry out or approve any project which may have a significant effect on the environment.” *Id.* .

168. Matthews, *supra* note 11, at 450; see *Citizens Ass’n for Sensible Dev. of Bishop Area v. Cnty. of Inyo*, 217 Cal. Rptr. 893, 897 (Ct. App. 1985) (“However, where a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty, the plaintiff is not required to have any legal or special interest in the result . . . . Accordingly, in a writ of mandate against a municipal entity based on alleged violations of CEQA, a property owner, taxpayer, or elector who establishes a geographical nexus with the site of the challenged project has standing.”).

169. *Bozung*, 529 P.2d at 1023.

170. *Id.*

171. *Id.*

172. *Kappadahl v. Alcan Pac. Co.*, 35 Cal. Rptr. 354, 365 (Ct. App. 1963).

173. *Id.*

had not alleged “damage to the petitioners [or] other persons similarly situated,” it inferred an expected injury owing to a devaluation of property due to increased traffic resulting from the permitted construction.<sup>174</sup> But the right does not seem limited to property owners, as “taxpayers” are also individuals positioned to invoke the public duty exception (presumably because taxpayers have a fiduciary interest in seeing to it that government agencies properly perform their functions).<sup>175</sup> In *Hollman v. Warren*, where the taxpaying petitioner alleged the governor needed to at least consider applications for notary appointments, the court applied the exception.<sup>176</sup> Therefore, unlike suits under SEQRA, California waives the special harm requirement for standing where the public interest is concerned.

At the same time, a zone of interest requirement helps to prevent frivolous and harassing suits. In *Regency Outdoor Advertising, Inc. v. City of West Hollywood*, the Court of Appeal for the Second District determined that the plaintiff, an advertising company, alleged “no environmental injury” as result of a recent amendment to a city ordinance.<sup>177</sup> The advertising company, Regency, challenged the amendment because an earlier amendment had compelled Regency to remove a tall wall sign and, in the wake of the removal, competitors had occupied the space.<sup>178</sup> In light of the new amendment essentially restoring the original standard under which Regency had legally occupied the wall space, Regency alleged the city was playing “political favorites,” resulting in the loss of three years income for the agency.<sup>179</sup> In court, Regency based its claim on the city’s failure to review the environmental impact of restoring the old standard as required by CEQA.<sup>180</sup> The Court of Appeal, however, was not persuaded that Regency had a “continuing interest or commitment to the subject matter” of CEQA even though

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174. *Id.*

175. *See id.*

176. *Hollman v. Warren*, 196 P.2d 562, 566 (Cal. 1948).

177. *Regency Outdoor Adver., Inc. v. City of W. Hollywood*, 63 Cal. Rptr. 3d 287, 291 (Ct. App. 2007).

178. *Id.* at 289.

179. *Id.*

180. *Id.* at 290.

Regency offered evidence of having initiating four prior CEQA suits.<sup>181</sup> The court characterized three of the four prior suits as actions undertaken by Regency for the purposes of advancing its “competitive and commercial interests.”<sup>182</sup> Thus Regency failed to fulfill the requirements for a corporation to achieve citizen standing.

The *Regency Outdoor Advertising* court largely relied upon *Waste Management of Alameda County, Inc. v. County of Alameda*, which set forth the limitations of standing under CEQA and differentiated between a legitimate citizen suit and a purely self-interested action.<sup>183</sup> The *Waste Management* court asserted that “CEQA is not a fair competition statutory scheme” and the plaintiffs’ “commercial and competitive interests [were] not within the zone of interests CEQA was intended to preserve or protect.”<sup>184</sup> The court then provided a lengthy distillation of the “citizen suit” exception to the “beneficial interest” standing requirements.<sup>185</sup> The opinion indicates that “citizen standing” in public right claims represents “an exception to, rather than a repudiation of, the usual requirement of beneficial interest.”<sup>186</sup> Furthermore, “[t]he policy underlying the exception may be outweighed by competing considerations of a more urgent nature.”<sup>187</sup>

California courts possess a history of such findings. The *Waste Management* court cited *McDonald v. Stockton*

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181. *Id.* at 293

182. *Id.* (three of the four suits were filed against Regency's competitors for billboard space).

183. *Waste Mgmt. of Alameda Cnty., Inc. v. Cnty. of Alameda*, 94 Cal. Rptr. 2d 740 (Ct. App. 2000).

184. *Id.* at 748-49.

Numerous findings and declarations were made by the Legislature with respect to CEQA. None of them suggest a purpose of fostering, protecting, or otherwise affecting economic competition among commercial enterprises. Thus, [the petitioner's] commercial and competitive interests are not within the zone of interests CEQA was intended to preserve or protect and cannot serve as a beneficial interest for purposes of the standing requirement.

*Id.* (citations omitted).

185. *Id.* at 749-51.

186. *Id.* at 750.

187. *Id.*

*Metropolitan Transit* as a situation where “the court rejected a citizen’s suit because the action would have intruded upon the remedial discretion of a public agency that was quite able to protect its own interests.”<sup>188</sup> The *Waste Management* court also noted that in *Carsten v. Psychology Examining Commission*, a member of an administrative board could not pursue a suit against the board because “[h]er interest in the subject matter was piqued by service on the board, not by virtue of the neutrality of citizenship.”<sup>189</sup>

As the above California cases demonstrate, though standing to file citizen suits upholding CEQA is determined by California’s common law, and although the “broad” reach of a citizen’s interest is amorphous, courts’ standing decisions emphasize a citizen’s right to enjoin the government to perform its public duty rather than rely on the plaintiff’s allegation of special harm. It is difficult to place California’s environmental standing requirements in relation to the most generous frameworks (Michigan, Minnesota, New Jersey, Connecticut), and those states which rely on injury-in-fact (Illinois, Florida, Hawai’i). Even though the “beneficial interest” standard seems to be relaxed in cases where a plaintiff invokes a public duty neglected by the government, it is unclear whether this can extend to private defendants. It is easy, however, to glean that California joins

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188. *Id.* The federal Department of Transportation (DOT) was in a contractual relationship with the local transit authority against which the DOT could seek breach of contract remedies, including specific performance (installation of bus stop shelters) or withholding of federal funds. See *McDonald v. Stockton Metro. Transit Dist.*, 111 Cal. Rptr. 637, 641-43 (Ct. App. 1973). Therefore a citizen’s suit would have infringed upon the DOT’s discretion to seek performance under the contract or withhold federal funds. See *id.* at 643. The bus stop shelters were only afforded to the *McDonald* plaintiffs by virtue of the contract between DOT and the local transit authority and “mandamus is not appropriate to enforce the contractual obligations of a public body.” *Id.* at 642.

189. *Waste Mgmt. of Alameda Cnty.*, 94 Cal. Rptr. 2d at 750 (quoting *Carsten v. Psychology Examining Comm’n*, 614 P.2d 276, 280 (Cal. 1980)). Though *Save the Plastic Bag Coal. v. City of Manhattan Beach* repudiated *Waste Management’s* distinction between corporate and individual standing requirements, it did not disturb the court’s finding that *Waste Management’s* motivations were based on business competition and the holding that such motivations were improper grounds for a plaintiff to invoke the public right exception. See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1014 n.5 (Cal. 2011).

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most other jurisdictions in rejecting New York's special harm requirement.

## V. THE OPPORTUNITY FOR JUDICIAL REFORM IN NEW YORK STATE

*Save the Pine Bush* offers hope for environmental groups seeking to protect natural resources that the groups can prove individual members regularly utilize and enjoy.<sup>190</sup> The case suggests that the Court of Appeals harbors some willingness to tinker with *Society of Plastics'* standing apparatus. It was a tentative though inadequate step towards reforming the confusion and environmental harm that *Society of Plastics* has wrought on the principles SEQRA is intended to uphold. However, recently, in *Clean Water Advocates of New York v. New York State Department of Environmental Conservation*, the *Society of Plastics* test again produced an unreasonable result and serves as a reminder that much remains to be done in the wake of *Save the Pine Bush* before New York State citizens and public interest organizations can fully benefit from SEQRA's original goals.<sup>191</sup>

*Clean Water Advocates* involved a challenge to stormwater discharge of pollutants over a wide watershed.<sup>192</sup> Though the appellate division acknowledged that the plaintiff non-profit had alleged runoff from construction of a Wal-Mart would impact members who used nearby bodies of water for recreation and potable water supply, the court nevertheless did not reach the merits of the plaintiffs' claims because the plaintiffs failed to show that they used the water sources more frequently than nonparties.<sup>193</sup> The decision implies a perverse incentive for

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190. *See supra* p. 3-4.

191. *Clean Water Advocates of N.Y. v. N.Y. State Dep't of Env'tl. Conservation*, 962 N.Y.S.2d 390 (App. Div. 2013).

192. *Id.* at 391.

193. *Id.* at 393. The court also found that the plaintiffs failed to allege that Wal-Mart's stormwater pollution prevention plan would *specifically* lead to pollution of Tonawanda Creek, the Erie Canal, Lake Ontario, and the Niagara River. *Id.* at 392. Instead the court described the plaintiff's petition as alleging that stormwater runoff from constructive activities *in general* tended to pollute the named bodies of water. *Id.* However, the court's independent finding that the plaintiffs failed to allege special harm would have barred the suit even if



environmentally mindful plaintiffs: in order to be heard in court, they may have to downplay the sweep of an environmental threat and the number of people affected in order to demonstrate that they suffer to a greater degree than the public-at-large. Such a course would not only frustrate SEQRA's purposes but also in fact hinder its application by shrouding widespread environmental degradation in carefully packaged and overly specific complaints, which do not reflect the factual breadth of environmental impacts. Thus *Society of Plastics* not only disqualifies legitimate SEQRA claims but may also distort fact-finding related to the merits of a claim.

The stormwater pollution not considered in *Clean Water Advocates*, just like the noise and dust in *Finger Lakes Coalition*, the contamination of the sole source aquifer in *Long Island Pine Barrens*, the construction of the power plant in *East End Property*, and the depletion of Saratoga Lake in *Saratoga Lake and Improvement District*, all represent palpable environmental threats which were not examined by courts simply because *Society of Plastics* standards disqualified the plaintiffs.

It is worth noting that not only is the *Society of Plastics* test contrary to the purposes and values of SEQRA, but the precedential path the court followed to reach the decision is highly suspect. *Society of Plastics* cited *Matter of Mobile Oil v. Syracuse Industrial Development Agency*, which, in turn, relied on *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*.<sup>194</sup> In *Sun-Brite*, the petitioner was a lessee of a car wash objecting to a zoning board's approval of the construction of another car wash on a neighboring property.<sup>195</sup> The board's approval involved granting a variance for a non-

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Clean Water Advocates had alleged that Wal-Mart's stormwater treatment plan in particular would result in increased pollution of waterways. *Id.* at 392-93 ("Moreover, petitioner has not shown that any injuries that its members would suffer due to the alleged impacts to the water bodies would be different from that faced by the general public. Although petitioner alleges that its members use the water bodies for recreational purposes and as their potable water source, it does not allege, much less submit evidence, that any of its members do so any more frequently than any other person with physical access to those same resources.").

194. Williams, *supra* note 1, at 173-174.

195. *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 508 N.E.2d 130, 131 (N.Y. 1987).

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conforming use.<sup>196</sup> For purposes of standing, the petitioner suggested increased competition due to the new carwash qualified it as an “aggrieved” petitioner. *Sun-Brite* was an “article 78 proceeding to annul the Board’s [of Zoning and Appeals] determination.”<sup>197</sup> The Court of Appeals in *Sun-Brite* makes no mention of SEQRA, its purposes, content, or policy. Nevertheless, in *Mobile Oil*, clearly a SEQRA case in which the petitioner challenged the EIS regarding a proposed shopping mall,<sup>198</sup> the Court of Appeals relied upon *Sun-Brite* and in doing so adopted the special harm requirement that is so undesirable in the context of SEQRA.<sup>199</sup> Thus *Mobile Oil* is where the trail leading up to *Society of Plastics* took an inappropriate turn. As Joan Leary Matthews<sup>200</sup> has pointed out:

[I]t was wrong for the New York Court of Appeals to have incorporated the zoning enforcement special harm requirement into the SEQRA context. Enjoining a zoning violation is not in the same posture as a preemptive challenge under SEQRA where a petitioner alleges that an environmental review for an impending project was inadequate. The restrictive standing requirements on the zoning/land use model are inappropriate for SEQRA claims, particularly given SEQRA’s broad mandate. The presumption should be to grant standing, not to deny it.<sup>201</sup>

Other critics of *Society of Plastics* suggest that *Har Enterprises v. Town of Brookhaven*, a SEQRA case in which a property owner appealed a town board decision to rezone property from commercial to residential use,<sup>202</sup> would, when compared to *Sun-Brite*, have been a far more appropriate case for the *Mobile*

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196. *Id.*

197. *Id.*

198. *Mobile Oil Corp. v. Syracuse Indus. Dev. Agency*, 559 N.E.2d 641, 642 (N.Y. 1990).

199. *Id.* at 643-44.

200. Joan Leary Matthews is the Director of the Clean Water Division of the United States Environmental Protection Agency, Region 2. See *Organization Chart for EPA’s Region 2 Office*, EPA, <http://www2.epa.gov/aboutepa/organization-chart-epas-region-2-office#clean> (last updated July 4, 2014).

201. Matthews, *supra* note 11, at 444.

202. *Har Enters. v. Town of Brookhaven*, 548 N.E.2d 1289, 1291 (N.Y. 1989).

*Oil* court to invoke.<sup>203</sup> In *Har*, the petitioner specifically alleged that the town board failed to comply with SEQRA by issuing an inadequate declaration that the rezoning would not result in “significant adverse environmental impact.”<sup>204</sup> The court held that “[a] showing of special damage or actual injury is not always necessary to establish a party’s standing.”<sup>205</sup> *Har* broadened standing requirements to encompass plaintiffs who have “a significant interest in having the mandates of SEQRA enforced,” and, despite the court citing the plaintiff’s ownership status over the parcels which the town board was attempting to rezone, *Har* did not “delimit the parameters of the zone of interest in SEQRA compliance or define the precise nexus with the proposed action that a party must demonstrate in order to object for failure of compliance.”<sup>206</sup> Therefore, through adopting *Mobile Oil’s* view, which incorrectly relied on *Sun-Brite* and neglected *Har*, the precedential aspect of *Society of Plastics* stands on shaky ground.<sup>207</sup>

Aside from utilizing suspect precedent, the *Society of Plastics* court misstated the legislative history of SEQRA. Critics and supporters of *Society of Plastics* have described how the *Society of Plastics* court pointed to a supposed rejection of a citizen suit provision in 1975, the year SEQRA was passed, as proof that the

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203. Williams, *supra* note 1, at 174.

204. *Har Enters.*, 548 N.E.2d at 1291.

205. *Id.* at 1292.

206. *Id.* at 1292-93. “To adopt the rule urged by respondent and deny standing—absent an allegation that the owner will suffer some adverse environmental consequence—would insulate decisions such as this from judicial review, a result clearly contrary to the public interest.” *Id.* at 1293. “In some instances, the party’s particular relationship to the subject of the action may give rise to a presumption of standing.” *Id.* at 1292. Note that the court chose the more generalized term “party” rather than a term denoting property rights (e.g. land owner).

207. Philip Weinberg also points out that the plaintiffs in *Society of Plastics* and *Mobile Oil* were “industry plaintiffs” and in *Society of Plastics* the plaintiff was actually seeking to “derail environmentally beneficial legislation.” Philip Weinberg, *Are Standing Requirements Becoming the Great Barrier Reef Against Environmental Actions?*, 7 N.Y.U. ENVTL. L.J. 1, 19-20 (1999) (“There is much irony and scant justification for the courts now using these decisions to block suits by those asserting genuine environmental concerns.”).

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legislature intended to limit citizen standing under SEQRA.<sup>208</sup> However, there was no such provision in SEQRA. There were two citizen suit bills considered by the state legislature in 1975, but these bills were independent of SEQRA and pertained to claims beyond SEQRA's zone of interests.<sup>209</sup> The *Society of Plastics* court conflated the unrelated bills with SEQRA and thus inaccurately characterized the legislative intent behind SEQRA.<sup>210</sup>

Indeed, citizen standing in non-SEQRA government compliance cases illustrate that the *Society of Plastics* test lags behind established citizen-initiated review standards of government conduct.<sup>211</sup> Courts other than the *Har* court have

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208. See Matthews, *supra* note 11, at 441-42; see also Daniel A. Coffey, *A Critique of New York's Proposed Private Environmental Law Enforcement Act*, 2 ALB. L. ENVTL. OUTLOOK 23, 26 (1995) (conflating the citizen standing bills with SEQRA partly due to the *Society of Plastics* opinion).

209. Matthews, *supra* note 11, at 441-42.

210. The *Society of Plastics* court misstated the legislative history as follows:

A "citizen suits" bill, once included in the proposed legislation, did not appear in the final version. This bill, which several times failed to gain legislative approval, would have added an article 10 to the Environmental Conservation Law granting "standing to any person . . . to institute an action for conservation and protection of the air, water and other environmental resources of the state," whether that person was aggrieved or not.

Originally providing virtually unlimited access to the courts for concerned citizens, several "safeguards" were later added to the "citizen suits" bill—including a requirement that the party bringing the action post a \$500 bond and submit an affidavit of a "technically qualified person" indicating the grounds for the suit. Those amendments were a response to concerns that the bill would open the floodgates to litigation. Sponsors of the measure attempted to portray it as one that would allow concerned citizens, with no prospect of personal financial gain, to maintain litigation benefiting all the people of the state, while the opposition characterized the bill as encouraging "use of environmental protection machinery as a delaying, obstructive tactic."

By rejecting the proposed open door policy, the Legislature made clear that some limitation on standing to challenge administrative action was appropriate.

*Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 573 N.E.2d 1034, 1039 (N.Y. 1991) (citations omitted).

211. See, e.g., *Samuelsen v. Walder*, 907 N.Y.S.2d 784, 791 (Sup. Ct. 2010), *rev'd*, 932 N.Y.S.2d 30 (App. Div. 2011) ("In the non-SEQRA context, New York courts have taken a broader view of both individual and associational standing

insinuated discomfort with the stringency of *Society of Plastics*.<sup>212</sup> New York courts have hinted and other jurisdictions have zealously proclaimed that concerned and potentially impacted citizens should be able to defend essential public natural resources such as underground aquifers. California's public interest exemption to the right of mandamus suggests one potential means by which critical public resources may be guarded in cases where "special harm" has not occurred and therefore cannot be pleaded. In light of the judiciary's awareness surrounding *Society of Plastics*' harmful grip on environmental litigation, the judiciary can certainly call upon precedent, policy, common sense, and a tragically lengthening list of unconsidered environmental destruction to overturn *Society of Plastics* and restore SEQRA's lost promise to New Yorkers' reality.

## VI. POTENTIAL LEGISLATION IN NEW YORK STATE

If New York's courts demur from toppling *Society of Plastics*' reign over SEQRA, there exist plenty of admirable models on which the New York State Legislature can base a new citizen suit

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to challenges to governmental action and inaction . . . . The argument that individual petitioners did not allege a special, individualized harm, different from that of the public at large, is misplaced.").

212. In *Application of Committee to Preserve Brighton Beach & Manhattan Beach*, the court overturned the IAS court and found that the petitioners had standing when they alleged construction of a concession stand in a park would "interfere with their use and enjoyment of the park, reduce the area of open space in the park, cause noise and traffic problems, cause contaminants to be released into the air and obstruct their views of the park from their building." *Application of Comm. to Pres. Brighton Beach & Manhattan Beach v. Planning Comm'n*, 695 N.Y.S.2d 7, 11 (App. Div. 1999). In determining that the petitioners established "close proximity" to the site of the planned concession stand, the court made no mention of *Society of Plastics*. *Id.* The court backed up its claim by repeating a telling assertion from, of all cases, *Sun-Brite*: "Standing principles, which are in the end matters of policy, should not be heavy-handed . . . it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." *Id.* at 12 (quoting *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 508 N.E.2d 130, 133 (N.Y. 1987)). Again, a New York court's understanding of policy objectives seems at odds with *Society of Plastics*, especially its special harm requirement.

provision for SEQRA.<sup>213</sup> Michigan offers the most promising example. Not only has MEPA proved to be successful in Michigan, but it has also been considered a worthy template for other states seeking to protect environmental interests through adoption of a citizen suit provision.<sup>214</sup> A citizen suit in New York should not demand citizen participation in earlier administrative procedures, but at the same time should adopt practical restrictions on lawsuits for the purpose of maintaining judicial efficiency. New York's citizen suit provision would offer judicial review through an Article 78 proceeding. The provision would explicitly set forth the citizen petitioner's right to protect the environmental resources of New York while expanding potential targets from government actors and corporations<sup>215</sup> to other private parties, thereby more fully embracing the range of environmentally-harmful actors. The potential language of such a citizen suit provision might read as follows:

- (1) Any person may maintain an action in the Supreme Court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the environment.
- (2) For purposes of this section, "environment" is defined by § 8-0105 (State Environmental Quality Review Act).<sup>216</sup>

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213. The New York State Assembly has previously expressed its discomfort with the *Society of Plastics* test through passing two bills, the Environmental Access to Justice Act and the Private Environmental Law Enforcement Act. The Environmental Access to Justice Act specifically addressed *Society of Plastics* by removing the special harm requirement. Assemb. A03423, 2009 Assemb., Reg. Sess. (N.Y. 2009). The Private Environmental Law Enforcement Act was a more expansive solution, setting forth a statutory private cause of action to contest government-approved activities harmful to the environment regardless of whether or not the challenger suffered special harm. Assemb. A04272, 2009 Assemb., Reg. Sess. (N.Y. 2009). The Senate, however, has hitherto declined to take up the Assembly bills.

214. *See supra* pp. 13-33.

215. *See* Weidenfeld v. Keppler, 82 N.Y.S. 634, 635-36 (App. Div. 1903). A corporation is currently considered a quasi-governmental body for purposes of Article 78 party status because it relies on the state for its charter. *See id.* at 635-36.

216. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 2013) ("Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or

(3) For purposes of this section, a “person” shall include any individual, partnership, corporation, association, government entity, or other legal entity whose interests fall within the stated purposes of § 8-0101 and whose stated injury harms those interests.

(4) As a condition precedent to the institution of an action pursuant to paragraph (1), the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations for the environment. The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action. If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings authorized in paragraph (1). However, failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.

(5) Paragraph (4) shall not apply if the act or conduct complained of is not subject to regulation or prohibition by a government agency or authority.

Paragraphs (1), (2), and (3) borrow MEPA’s language<sup>217</sup> while inserting the zone of interests protected by SEQRA. Paragraph (4) borrows Florida’s limitations on the citizen suit.<sup>218</sup> De minimis environmental damage will be deemed insufficient as a qualifying injury through the discretion of courts. Pennsylvania<sup>219</sup> and Minnesota<sup>220</sup> have both demonstrated that

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aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.”).

217. See MICH. COMP. LAWS § 324.1701 (2011).

218. See FLA. STAT. § 403.412 (2014).

219. In *Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower*, the Attorney General, through invoking the environmental right contained in Pennsylvania’s constitution, sought to enjoin the construction of an observation tower on Gettysburg Battlefield. *Commonwealth v. Nat’l Gettysburg*

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courts can distinguish actionable damage from de minimis damage even in a setting where standing requirements are relaxed to protect the environment. It is worth noting that under the proposed citizen suit provision environmental non-profits will have standing to bring suit under the proposed language so long as they can prove that their interests fall within that of SEQRA and they allege injury to those interests. Gone is the unreasonable necessity of proving an individual member of the organization suffers special harm.

Whether through judicial reform or legislative action, the writing is on the wall for environmental standing in New York State. Considering more effective rules in other states, insights of New York courts, and perverse holdings that contradict the purposes of SEQRA, it is plain that New York deserves more reasonable standing requirements and is perfectly capable of delivering such reform to its people.

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Battlefield Tower, 302 A.2d 886, 887 (Pa. Commw. Ct. 2002). The court cautioned that:

It is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment. If the standard of injury to historic values is to be that expressed by the Commonwealth's witnesses as an "intrusion" or "distraction," it becomes difficult to imagine any activity in the vicinity of Gettysburg which would not unconstitutionally harm its historic values. This, of course, indicates why elements of State government other than the judiciary should, as by Article I, Section 27 [the constitutional environmental right] they are empowered to do, establish reasonable regulations for the preservation, conservation and maintenance of the peoples' resources.

*Id.* at 895. Though the court found that the Attorney General had standing, the validity of administrative discretion was recognized. *Id.* at 893-94.

220. *See supra* pp. 22-25.