

# An Environmental Right for Future Generations

*Model State Constitutional Provisions  
& Model Statute*



Science and Environmental Health Network

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The International Human Rights Clinic at Harvard Law School



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The Science & Environmental Health Network (“SEHN”) engages communities and governments in the effective application of science to restore and protect public and ecosystem health. SEHN is a leading proponent of the precautionary principle as a basis for public policy. Our goal is policy reform that promotes just and sustainable communities, for this and future generations.

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## **Credits and Acknowledgements**

The International Human Rights Clinic (“the Clinic”) at Harvard Law School’s Human Rights Program prepared this document at the request of the Science and Environmental Health Network (“SEHN”). The Introduction was written by Rebecca Agule, J.D./M.P.P. 2010. The Model State Constitutional Provisions and Commentary were researched and written by Jason Steffen, J.D. 2007, a student in the Clinic. The Model Statute and Commentary were researched and written by Bart Lounsbury, J.D. 2007, a student in the Clinic. Bonnie Docherty, Lecturer on Law and Clinical Instructor at the Clinic, edited the paper and supervised the collaborative efforts that led to its creation. Carolyn Raffensperger, Executive Director of SEHN, Joe Guth, Legal Director of SEHN, and Tyler Giannini, Clinical Director of the Human Rights Program, also helped formulate the ideas in this document, providing additional suggestions and edits. James Cavallaro, Executive Director of the Human Rights Program, and Nancy Myers, SEHN Communications Director, assisted with editing.



# Table of Contents

Introduction .....	1
Model State Constitutional Provisions .....	9
Model Statute .....	15





# INTRODUCTION

In an era of climate change and species extinction, the evidence that human development causes long- as well as short-term environmental harm is overwhelming. U.S. jurisdictions, both state and federal, have adopted regulatory measures to help protect the environment and the humans inhabiting it. Such tools have fallen short, however, of providing necessary protection for future generations and their interests in a healthy environment. The Model Constitutional Provisions and Model Statute presented here use substantive and procedural innovations to address the shortcomings of the traditional regulatory approach. The models, which have expanded temporal horizons and also dealt with cumulative harms, represent a means of countering the deficiencies of the current system without replacing it. They recognize the growing concern for the welfare of future generations and adapt existing paradigms for that group's benefit by introducing rights-based language and definitions that consider the long-term state of the environment, as well as by creating an ombudsman for future generations.<sup>1</sup>

Legal documents, both international and domestic, endorse principles for protecting the needs and welfare of future generations, especially as related to the environment. They have established the foundation upon which the Model Constitution and Statute stand. In an International Court of Justice opinion, Judge Christopher Weeramantry described the respect for future generations in indigenous cultures around the world.<sup>2</sup> In recent decades, legal instruments have increasingly referenced future generations. Principle 1 of the Stockholm Declaration, adopted during the 1972 United Nations Conference on the Human Environment, states: “[Humanity] bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>3</sup> Twenty years later, the Rio Declaration reinforced this concept of owing a duty to all people, both today and in the future, saying, “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”<sup>4</sup> The 1992 UN

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<sup>1</sup> For further information on how to protect future generations, see Science and Environmental Health Network and The International Human Rights Clinic at Harvard Law School, *MODELS FOR PROTECTING THE ENVIRONMENT FOR FUTURE GENERATIONS* (Oct. 2008), available at [http://www.law.harvard.edu/programs/hrp/documents/Models\\_Future\\_Generations.pdf](http://www.law.harvard.edu/programs/hrp/documents/Models_Future_Generations.pdf).

<sup>2</sup> *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 107 (Sept. 25) (Sep. Op. Weeramantry), available at [www.icj-cij.org/docket/files/92/7383.pdf](http://www.icj-cij.org/docket/files/92/7383.pdf).

<sup>3</sup> Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment, Jun. 16, 1972, 11 I.L.M. 1416, princ. 1.

<sup>4</sup> Rio Declaration on Environment and Development, U.N. ESCOR, princ. 3, U.N. Doc. A/

Framework Convention on Climate Change articulates how states parties must work for the “benefit” of future generations: “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>5</sup> These declarations and conventions exemplify how international law has embraced the principle of protecting future generations.

Domestic law from a variety of countries also enshrines this respect for the needs of future generations. Some nations have already included protections in their constitutions.<sup>6</sup> The Norwegian Constitution states: “Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.”<sup>7</sup> Some U.S. jurisdictions also recognize the place of future generations. The Indiana State Code describes the purposes of environmental policy as “to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.”<sup>8</sup> Such pieces of domestic legislation further illustrate the legal underpinnings for protecting future generations.

From an academic perspective, Edith Brown Weiss argues that a rights-based approach provides the best way to protect future generations. Weiss’s seminal work in the area of intergenerational equity brings rights and future

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CONF.151/26 (Vol. I) (1992) [hereinafter “Rio Declaration”].

<sup>5</sup> UN Framework Convention on Climate Change art. 3(1), *opened for signature* May 9, 1992, U.N. Doc. A/AC.237/18 (Part II) (Add. 1), 31 I.L.M. 848.

<sup>6</sup> See CONST. (1967, as amended 2002), art. 7 (Bol.), *available at* <http://pdba.georgetown.edu/Constitutions/Bolivia/consboliv2005.html> (according to the text as amended by Law No. 2410 of August 8, 2002, “Every person has the following fundamental rights . . . m) to enjoy a healthy environment, ecologically balanced and adequate for his wellbeing, safeguarding the rights of future generations.” (The original text in Spanish reads, “Toda persona tiene los siguientes derechos fundamentales: . . . m) A gozar de un medio ambiente sano, ecológicamente equilibrado y adecuado para su bienestar, resguardando los derechos de las generaciones futuras.”)).

<sup>7</sup> CONST. (1814, as amended 2007), art. 110(b) (Nor.), *available at* <http://www.stortinget.no/english/constitution.html#fulltext>.

<sup>8</sup> Ind. Code tit. 13, art. 12, ch. 3(1) (2008); *see also* California Environmental Quality Act, Cal. Pub. Res. Code § 21001(e) (2006) (declaring the intent of the state to “[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations”); National Environmental Policy Act of 1969, 42 U.S.C. § 4331(a) (2006).

generations together. She draws a connection between present actions and future health and survival, warning that the rights of future peoples should not be subservient to the needs of those living today. She writes:

Future generations really do have the right to be assured that we will not pollute ground water, load lake bottoms with toxic wastes, extinguish habitats and species or change the world's climate dramatically—all long-term effects that are difficult or impossible to reverse—unless there are extremely compelling reasons to do so, reasons that go beyond mere profitability.<sup>9</sup>

Weiss also cautions against the dangers of detaching the rights of future generations from present decision-making processes: “If obligations of the present generation are not linked to rights, the present generation has a strong incentive to bias the definition of these obligations in favor of itself at the expense of future generations. Intergenerational rights have greater moral force than do obligations.”<sup>10</sup> Thus Weiss looks to intergenerational rights as a means of preserving the planet for future generations.

The current regulatory system falls short of completely protecting the interests or rights of future generations described above. Regulation advances environmental protection in many ways, such as by setting emissions standards and requiring environmental impact statements prior to development. It fails, however, adequately to take into account future generations or the long-term damage that environmental degradation can cause. For example, individual polluters may each be in compliance with regulatory standards, but collectively they may be causing harm to a population or ecosystem over the long term.<sup>11</sup> The Model Constitution and Statute help fill such gaps in the regulatory approach by operationalizing the existing concern for protecting future generations' interest in a sustainable, healthy environment. While they include a variety of innovations, this introduction will focus on three particularly new ones: a rights-based framework directed specifically at future generations, definitions that look at long-term threats to the environment, and

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<sup>9</sup> Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. at 206.

<sup>10</sup> *Id.* at 204.

<sup>11</sup> Daveed Gartenstein-Ross, An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation, 14 DUKE ENVTL. L. & POL'Y F. 185, 208 (2003).

an ombudsman for future generations.

The Model Constitution and Statute supplement existing regulations with a rights-based approach, similar to that described by Edith Brown Weiss. They create a general right to a healthy environment, rather than a system based on specific, pre-set levels of pollution. Article I of the Model Constitution establishes an inalienable right to an “ecologically healthy environment” for present and future generations, and it defines this “fundamental” and “self-executing” right as including but not limited to “the enjoyment of clean air, pure water, and scenic lands; freedom from unwarranted exposure to toxic chemicals and other contaminants; and a secure climate.”<sup>12</sup> The Model Statute also establishes a right to healthy environment in § 401.<sup>13</sup> The Model Constitution’s right is for present and future generations because it fills a gap in the law for both groups; the Model Statute’s right is only for future generations because most existing statutes are designed to protect present generations and this statute is directed at future generations.

The granting of a new right to future generations strengthens the protection of the group. The United States places heightened importance on legal principles, such as the freedoms of speech and religion, once they have been enshrined as rights. In the legal hierarchy, rights are elevated above statutes and regulations. If statutes do not sufficiently protect against pollution, both current *and* cumulative, rights can help ensure that governments find a better solution. An environmentally focused, rights-based framework obligates governments to act in a way that takes into account the needs of future as well as present generations.<sup>14</sup>

The Model Statute ensures both long- and short-term protection of the environment through the substance of its definitions. In § 301(1), the Model Statute defines “environment” as “the totality of physical substances and conditions . . . that affect the ability of all life forms to grow, survive, and reproduce.”<sup>15</sup> The Statute then sets a standard for “ecological health” that takes a long view of the environment, saying that ecological health means

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<sup>12</sup> See *infra* Model State Constitutional Provisions to Implement an Environmental Right for Present and Future Generations and Commentary, Article I: Inalienable Right, § 1(1).

<sup>13</sup> See *infra* Model Statute to Implement Environmental Protection for Future Generations and Commentary, § 401.

<sup>14</sup> Gartenstein-Ross, *supra* note 11, at 187.

<sup>15</sup> See *infra* Model Statute to Implement Environmental Protection for Future Generations and Commentary, § 301(1)(a).

“the capacity for self-renewal and self-maintenance.”<sup>16</sup> The Statute states that a “violation” means any act that causes or contributes to a degradation of ecological health; it thus encompasses acts with long-term effects on the environment, especially ones that threaten the integrity of the system.<sup>17</sup> Thus, the definitions of both “ecological health” and “violation” have temporal elements that recognize the aggregate and potentially enduring impact of pollution. As future generations have a particular concern about the long-term sustainability of a system, these definitions are specifically tailored to their interests.<sup>18</sup> The list of factors to help identify a violation includes several that specifically refer to future impacts.<sup>19</sup>

The ombudsman, a new type of position created by the Model Statute in § 501, protects the interests of future generations through procedural mechanisms.<sup>20</sup> Appointed by the Department of Environmental Protection, the ombudsman is empowered to assess the legality of acts proposed to the state’s permitting authority, conduct independent investigations, initiate adjudicative proceedings, and determine the validity of citizens’ complaints.<sup>21</sup> He or she will help implement the right and apply the definition discussed above.

While the Model Constitution and Statute establish valuable principles and mechanisms for the protection of future generations, their details can be adapted to meet the needs of various jurisdictions. Ideally a jurisdiction would adopt both, but each can also be effective alone. For example, because § 401 of the Model Statute provides for “the right to an ecologically healthy environment,” the Model Statute can stand on its own and a given jurisdiction

<sup>16</sup> See *infra* Model Statute to Implement Environmental Protection for Future Generations and Commentary, § 301(1)(b).

<sup>17</sup> See *infra* Model Statute to Implement Environmental Protection for Future Generations and Commentary, § 301(1)(g).

<sup>18</sup> Gartenstein-Ross, *supra* note 11, at 208.

<sup>19</sup> The list includes: “[t]he geographical or temporal extent of the act’s effects”; “[t]he likelihood of detrimental effects on the ecological health of the environment that may persist for several or many generations or that may not emerge for several or many generations”; and “[t]he acute depletion of natural resources, especially if such depletion constitutes an unwarranted impact on future generations or if such depletion could have been, or could be, reduced through feasible mitigation measures or through the selection of a feasible alternative to the act.” See *infra* Model Statute to Implement Environmental Protection for Future Generations and Commentary, § 301(2).

<sup>20</sup> See *infra* Model Statute to Implement Environmental Protection for Future Generations and Commentary, § 501(3).

<sup>21</sup> *Id.*

need not adopt the Constitution to establish this right. Conversely, the Model Constitution creates a framework for the protection of future generations that may be more amenable to jurisdictions unwilling or unable to implement a detailed statute. A third option is for jurisdictions to take a part of these models and either adopt it by itself or add it to another instrument; for example, the position of ombudsman for future generations could be added to an existing environmental protection statute. Indeed, many variations exist, and the models are designed to spark discussion and innovation. The models have been designed based on the structure of U.S. jurisdictions, but other legal systems could adopt them as well.

The devastation of the environment, which will be passed on to future generations, has grown increasingly dire. Such damage poses long-lasting threats that affect the health and wellbeing of future generations, and legal frameworks are needed to ensure that cumulative harms are measured and evaluated. Weiss notes that the rights of present generations have limits and cautions against overstepping them, stating, “We have a right to use and enjoy the system but no right to destroy its robustness and integrity for those who come after us.”<sup>22</sup> The time has come for present generations to act with an eye to the protection of future generations. To achieve that goal, the following Model Constitution and Statute provide a means of bolstering existing regulatory schemes with a rights-based framework, substantive principles, and procedural mechanisms.

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<sup>22</sup> Weiss, *supra* note 9, at 207.





**MODEL STATE  
CONSTITUTIONAL PROVISIONS**

# MODEL STATE CONSTITUTIONAL PROVISIONS TO IMPLEMENT AN ENVIRONMENTAL RIGHT FOR PRESENT AND FUTURE GENERATIONS AND COMMENTARY

## ARTICLE I: INALIENABLE RIGHT

### § 1: Right to an Ecologically Healthy Environment

(1) Present and future generations of citizens of the State have the right to an ecologically healthy environment. This right includes but is not limited to: the enjoyment of clean air, pure water, and scenic lands; freedom from unwanted exposure to toxic chemicals and other contaminants; and a secure climate.

(2) This right is self-executing although it shall be maintained and strengthened under the guidance of the State Legislature.

(3) Individuals and groups who believe their environmental right has been violated may seek redress in state courts against alleged violators, both public and private. The State Attorney General is also charged with the enforcement of this provision, with or without additional legislative guidance, on behalf of all citizens, including future generations.

(4) The environmental right enumerated in this section is held to be fundamental to present and future generations of citizens and shall be weighed equally with other rights found by state courts to be fundamental.

### Discussion of § 1

Article 1, Section 1(1) establishes an environmental right for present and future generations. This commentary focuses on future generations, but to protect the environment and fill a hole in existing law more completely this article encompasses present generations as well. Section 1(1) gives some examples of what specific rights fall within the more general right, but explicitly articulates that the general right is not limited to the enumerated

applications. This provision balances the need for some generality while providing specificity so as to avoid being overly vague. Courts may find a right that is too general to be overly broad and may impose limitations that undermine some of the purposes of granting the right. An overly general right might also cause courts to ignore it altogether, assuming it to be merely hortatory in scope. In contrast, a right that is too specific may signal would-be violators that courts may be unwilling or unable to enforce violations unless they fall under the clear, specific constitutional guidelines. It might also have the unintended consequence of a temporal restraint, meaning new discoveries that arise potentially involving the right might not be accounted for in a constrained list of enumerated applications of the right. Section 1(1) seeks balance: it lists examples of how the general right should apply, but clearly establishes that other applications exist.<sup>23</sup>

Section 1(2) declares the right to a healthy environment to be self-executing, so there is no ambiguity for courts surrounding this issue.<sup>24</sup> Section 1(3) creates causes of action independent of those specified by the legislature and allows individuals or groups to promote enforcement of the right. States employ a variety of methods to address such causes of action.<sup>25</sup> Section

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<sup>23</sup> Several constitutions list clean air and water as specific manifestations of the right to a clean environment. *See, e.g.*, PA. CONST. art. 1, § 27. Others add rights that implicate “scenic beauty,” FLA. CONST. art. II, § 7; freedom from “excessive noise,” *id.*; preservation of “minerals and energy sources,” HAW. CONST. art. XI, § 1. This Model Constitution enumerates air, water, and scenic lands (common choices), but also adds freedom from exposure to toxic chemicals (which is becoming an increasingly visible environmental problem), as well as a reference to climate change. Most environmental problems have interstate (and even international) effects and are still addressed on a local level.

<sup>24</sup> A self-executing constitutional provision is one that has legal force absent legislative implementation. Some state constitutions are ambiguous on this point while the following constitutions contain explicitly non-self-executing environmental provisions. *See, e.g.*, LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; N.Y. CONST. art. XIV, §§ 4-5; R.I. CONST. art. I, § 17; S.C. CONST. art. XII, § 1; VA. CONST. art. XI, §§ 1-2.

<sup>25</sup> Hawaii’s constitution states that “[a]ny person may enforce this right [i.e. to a clean and healthful environment] against any party, public or private, through appropriate legal proceedings.” HAW. CONST. art. XI, § 9. Hawaiian courts have acknowledged that this provision permits the public to use the courts to enforce laws intended to protect the environment. *Kahana Sunset Owners Ass’n v. Maui County Council*, 948 P.2d 122 (Haw. 1997); *see also Fiedler v. Clark*, 714 F.2d 77 (9th Cir. 1983).

The Illinois Constitution pronounces a non-self-executing environmental right but grants citizens the power to sue subject to reasonable legislative limitations. ILL. CONST. art. XI, §§ 1, 2. One Illinois court dealt with ambiguity by holding that the provisions did not create any causes of action but rather did away with the special injury requirement typically employed in environ-

1(3) clearly authorizes enforcement of the self-executing provision, such as through the use of citizen suits. Furthermore, it charges the attorney general with additional enforcement power. Finally, Section 1(3) holds both public and private actors liable for violations of constitutional environmental rights, preventing courts from having to consider such questions.<sup>26</sup>

Section 1(4) directly addresses the question of balancing potentially conflicting rights. It categorizes environmental rights as fundamental and establishes that other fundamental rights, which may include religion and speech, shall not supercede the environmental right of future generations. This provision follows precedent set by the Montana Constitution and its courts.<sup>27</sup>

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mental nuisance cases; thus, while a plaintiff need not allege special injury to bring an environmental claim, there must nevertheless exist a cognizable cause of action apart from the constitutional provisions at issue. *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 58 (Ill. 1995).

New York's constitution provides for citizen enforcement of environmental legislation. *See* N.Y. CONST. art. XIV, §§ 4-5. Note, however, that this citizen suit provision has been interpreted to mean that citizens may only bring suits to restrain actions violating Article XIV "if the Attorney General defaults" on his or her duty to do so. 55 N.Y. Jur Environmental Rights and Remedies § 290. Still, the citizen suit provision has been used effectively by the attorney general to bring suit on behalf of citizens. *See, e.g., People v. System Properties, Inc.*, 281 A.D. 433 (N.Y. App. Div. 1953). One New York court allowed a public-interest corporation to bring suit under this section against the state to prevent it from granting certain logging permits. *Oneida County Forest Preserve Council v. Wehle*, 309 N.Y. 152 (N.Y. 1955).

<sup>26</sup> For example, two Montana Supreme Court cases established that the environmental rights guaranteed in the Montana Constitution were enforceable against public and, later, private actors. *See Montana Environmental Information Center v. Department of Environmental Quality*, 988 P.2d 1236 (Mont. 1999); *Cape-France Enterprises v. In re Estate of Peed*, 29 P.3d 1011 (Mont. 2001). Note that §1(3) enumerates who may seek redress for violation of the stated right.

<sup>27</sup> MONT. CONST. art. II, §§ 2-6. Environmental rights in Montana appear after the right to self-government, but before the rights to non-discrimination, religion, assembly, etc. They are in the same section as rights to liberty, property, and happiness. One commentator claims that because of this placement, environmental rights have "priority" over these other rights. C. Louise Cross, *The Battle for the Environmental Provisions in Montana's 1972 Constitution*, 51 MONT. L. REV. 449 (1990). Another article observes that "while the [Montana Supreme] Court . . . [has] concluded that the environmental rights in Montana's 1972 Constitution are fundamental and that they create enforceable limits at least on legislative action, the Court has also held that these rights are subject to a balancing against other, important public values such as economic and social development. As with other fundamental rights, they are subject to infringement in appropriate circumstances." John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 MONT. L. REV. 269 (2001).

## ARTICLE II: RESPONSIBILITIES

### § 1: Environmental Responsibilities

The State holds its natural resources in trust for its people and has the duty to use its powers to conserve, protect, and improve these resources for the benefit of present and future generations. In furtherance of this duty, the State shall take a precautionary approach to the use of natural resources and the development and proliferation of new technologies.

#### Discussion of § 1

Article II, Section 1 employs a “public trust” doctrine, which is used in many state constitutions.<sup>28</sup> It gives the state responsibility for preserving the environment for future generations.<sup>29</sup> Several states, including Colorado, Hawaii, and Pennsylvania, have constitutionalized concepts of public trust.<sup>30</sup> Article I, Section 3 provides that concerned citizens can sue the state for failing to uphold its duties as trustee of the environment for present and future generations.

Article II, Section 1 also specifically upholds the precautionary principle as one method of implementing the State’s duties toward future generations.<sup>31</sup> No state has mandated this formula at the constitutional level,

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<sup>28</sup> See, e.g., ALA. CONST. art. XI, § 219.07; COLO. CONST. art. IX, § 10; HAW. CONST. art. XI, § 1; PA. CONST. art. 1, § 27. Other states have established public trusts via statute. See, e.g., MONT. CODE ANN. § 75-1-103 (2005); N.Y. CLS ECL § 1-0101 (2006); N.C. GEN. STAT. § 113A-3 (2006).

<sup>29</sup> According to this view, the environment is a “trust’ under the stewardship of the state . . . to be managed for the benefit of the public.” Cross, *supra* note 5, at 450 (citation omitted).

<sup>30</sup> See, e.g., COLO. CONST. art. IX, § 10; HAW. CONST. art. XI, § 1; PA. CONST. art. 1, § 27. Montana’s strong constitutional protections do not contain a public trust provision, despite the fact that such a proposal was on the table prior to that state’s 1972 constitutional convention. For an explanation of the politics behind the decision not to include a public trust doctrine, see Cross, *supra* note 5, at 450-55.

<sup>31</sup> See, e.g., *Wingspread Statement on the Precautionary Principle*, Wingspread Conference Center, Racine, Wis., Jan. 23-25, 1998, available at <http://www.gdrc.org/u-gov/precaution-3.html> (last visited Dec. 9, 2006) (“When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”); Rio Declaration on Environment and Development, U.N. ESCOR princ. 4, 14, U.N. Doc. A/CONF.151/26 (Vol. I) (1992), princ. 15 (“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific

although some statutes have employed it and courts have inferred it.<sup>32</sup>

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certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

<sup>32</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 25531; 410 ILL. COMP. STAT. 48/5; In re Water Use Permit Applications, 9 P.3d 409 (Haw. 2000).

# MODEL STATUTE

# MODEL STATUTE TO IMPLEMENT ENVIRONMENTAL PROTECTION FOR FUTURE GENERATIONS AND COMMENTARY

## § 101: Short Title

This statute shall be known as the “Future Generations Act of 2008.”

## § 201: Findings and Purpose

(1) The legislature finds that the ecological health of the state’s environment is of critical importance to the wellbeing of future generations, and it is necessary to create legal requirements to consider explicitly the long-term impacts of acts on future generations.

(2) The purpose of this chapter is to establish a framework for ensuring the maintenance and encouraging improvement of the ecological health of the state’s environment for future generations by establishing rights of future generations, current responsibilities toward them, causes of actions, analytical requirements, and authority for administrative and judicial implementation and enforcement of such rights and responsibilities.

## Discussion of § 201

Many federal and state environmental statutes mention “future generations” in introductory language that outlines legislative purposes, policies, and findings.<sup>33</sup> This section of the Model Statute (“the Statute”)

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<sup>33</sup> Federal statutes roughly divide into those intended to preserve aesthetic and recreational qualities and those intended to conserve natural resources and prevent environmental contamination. In the aesthetic and recreational category, see, e.g., Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 (2006) (stating the Act’s purpose is “to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values”); National Park Service Organic Act, 16 U.S.C. § 1 (2006) (creating the National Park Service, “which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations”); Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (2006) (declaring the Act’s policy is to preserve “in free-flowing condition” “for the benefit



includes provisions that reflect existing federal and state statutory language and establish a robust concept of ensuring future generations' environmental needs. The second provision, in particular, sets forth a vision of the Statute's overarching objective, which is to create a framework of environmental rights, responsibilities, and analysis for protecting the needs of future generations. The aforementioned federal and state statutes merely refer to future generations as an intended beneficiary and generally fail to accord future

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and enjoyment of present and future generations" certain rivers that "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values"); Wilderness Act of 1964, 16 U.S.C. § 1131(a) (2006) (establishing "the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness"). In the resource and contamination category, see, e.g., Clean Air Act Amendments of 1990, 42 U.S.C. § 7651 (2006) (finding that acid rain is a major concern because "current and future generations of Americans will be adversely affected by delaying measures to remedy the problem"); Endangered Species Act, 16 U.S.C. § 1531(b) (2006) (declaring purpose is to conserve threatened and endangered species and the ecosystems upon which they depend); Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1609(a) (2006) (describing the National Forest System as "a nationally significant system dedicated to the long-term benefit for present and future generations"); National Environmental Policy Act of 1969, 42 U.S.C. § 4331(a) (2006) (establishing federal policy "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans"); National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd(a)(2) (2006) (stating the mission of the National Wildlife Refuge System "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans"); Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10131(a)(7) (2006) (finding that "high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations"). For examples of state statutes, see California Environmental Quality Act, CAL. PUB. RES. CODE § 21001(e) (2006) (declaring the intent of the State to "[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations"); CONN. GEN. STAT. § 22a-1 (2006) (noting that the state's growing population and economy have placed considerable burdens on the "life-sustaining natural environment"; defining the State as "trustee of the environment for present and future generations"; and establishing a State policy to conserve, improve, and protect natural resources and the environment through pollution control and improved environmental planning and interagency/intergovernmental coordination); IND. CODE § 13-12-3-1 (adopting an environmental policy intended to protect and enhance the quality of the environment in order to ensure clean air, clean water, and ecological health for future generations); Montana Environmental Protection Act, MONT. CODE ANN. § 75-1-103(2) (2005) (declaring "the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may: (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations").

generations any type of procedural or substantive significance. The Statute fills in these gaps in existing legislation. Because existing statutes primarily benefit present generations, the Statute, unlike the Constitution, focuses only on future generations.

### **§ 301: Definitions & Standards**

(1) As used in this chapter:

- (a) The “environment” is the totality of physical substances and conditions (including all living organisms in the biotic community, air, water, land, natural resources, and climate) that affect the ability of all life forms to grow, survive, and reproduce. The “environment” includes both natural and human-created substances and conditions.
- (b) “Ecological health” of the environment is the capacity for self-renewal and self-maintenance of the soils, waters, air, people, plants, animals, and other species that collectively comprise the environment. Human health is included as one aspect of the ecological health of the environment.
- (c) “Future generations” are those human beings who descend from present generations.
- (d) “Human health” is the physical, psychological, and social wellbeing of human beings.
- (e) “Natural resources” are any substances or processes that occur naturally in the environment and have value for the public welfare.
- (f) “Present generations” are currently living human beings.
- (g) A party’s act that may cause or contribute to, or may have caused or contributed to, the degradation of the ecological health of the state’s environment shall be deemed a “violation” of this chapter unless the party demonstrates that the act is not likely to cause or contribute to, or to have caused or contributed to, degradation of the ecological health of the state’s environment for future generations.

(2) The following factors shall be specifically, but not exclusively, considered when any determination is made as to whether an act constitutes a violation of this chapter:

- (a) The geographical or temporal extent of the act’s effects;

- (b) The severity of the act's effects on the environment and on ecological integrity and stability;
- (c) The likelihood that the act will create, or has created, toxic contamination of air, water, land, or living organisms;
- (d) The possibility, even if unlikely, of detrimental effects that may result from the act;
- (e) The likelihood of detrimental effects on the ecological health of the environment that may persist for several or many generations or that may not emerge for several or many generations;
- (f) The acute depletion of natural resources, especially if such depletion constitutes an unwarranted impact on future generations or if such depletion could have been, or could be, reduced through feasible mitigation measures or through the selection of a feasible alternative to the act; and
- (g) The possibility of damage to ecosystems or to individual species such that ecological health or the health of individual species cannot be maintained.

(3) When evaluating degradation of the ecological health of the environment, a court or administrative adjudicator shall consider all elements of the environment that contribute to its ecological health including, without limitation, the following elements. Degradation of any of these elements qualifies as a degradation of the ecological health of the environment for the purposes of this chapter:

- (a) Air;
- (b) Water in its many forms and locations;
- (c) Soil;
- (d) Renewable natural resource commodities, including but not limited to crops, fisheries, timber, and wildlife;
- (e) Non-renewable natural resource commodities, including but not limited to metals, minerals, and fossil fuels;
- (f) Any living species;
- (g) Ecosystems; and
- (h) Global climate and weather patterns.

### **Discussion of § 301**

In formulating these definitions, the Statute draws from conventional sources, as well as from several existing laws and international agreements,

and seeks to adapt their definitions where appropriate to reflect modern realities and to accomplish the purposes of the Statute. The definition of “environment” contains certain elements of the definition established by the California Environmental Quality Act (“CEQA”), but CEQA’s definition differs from most because of its focus on a particular project area and its failure to link the “environment” with the Earth’s ability to sustain life.<sup>34</sup> The Statute, instead, adopts a definition that conceives the environment as a global system with the critical role of supporting life.<sup>35</sup> The Statute defines “ecological health,” a concept often mentioned in state constitutions but not often rigorously examined,<sup>36</sup> to mean that the environment retains the capacity to be self-sustaining and self-renewing; it also encompasses human health, a concept that derives from the World Health Organization’s Constitution.<sup>37</sup> No major state or federal law defines “future generations,” so the Statute establishes its own definition.

The Statute’s definition of “natural resources” is meant to be capacious and not confined to physical materials. It also combines an anthropocentric

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<sup>34</sup> CAL. CODE REGS. tit. 14, § 15360 (2006):

“Environment” means the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance. The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The “environment” includes both natural and man-made conditions.

<sup>35</sup> For a definition similar to the Statute’s, see OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining “environment” as “(a) [t]hat which environs; the objects or the region surrounding anything; (b) [t]he conditions under which any person or thing lives or is developed; the sum-total of influences which modify and determine the development of life or character”).

<sup>36</sup> See, e.g., HAW. CONST. art. XI, § 9 (creating an individual “right to a clean and healthful environment” that is enforceable by any person against any party); ILL. CONST. art. XI, § 1 (declaring it to be the public policy of the State and duty of each person to “provide and maintain a healthful environment” for present and future generations and requiring the legislature to enact laws for the implementation and enforcement of this policy); ILL. CONST. art. XI, § 2 (stating that “[e]ach person has the right to a healthful environment” that is enforceable against any party); LA. CONST. art. IX, § 1 (declaring state policy to protect, conserve, and replenish “the healthful, scenic, historic, and esthetic quality of the environment”); MONT. CONST. art. II, § 3 (establishing an “inalienable right” to a “clean and healthful environment”); MONT. CONST. art. IX, § 1 (establishing a public and private duty to “maintain and improve a clean and healthful environment in Montana for present and future generations”).

<sup>37</sup> “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Constitution of the World Health Organization, declaration of principles (Forty-Fifth Edition, Supplement, Oct. 2006).

perspective with an ecological perspective by considering the resources' utility either to humans or to the maintenance of ecological health. Humans use numerous naturally occurring processes (e.g., wind, river flow, solar energy) and materials (e.g., petroleum, water, timber) whose exploitation frequently requires governmental permits that would be covered by this chapter, and the definition ensures that the evaluation of a proposed act assesses resources of human and/or ecological significance. This definition comports with traditional definitions of "natural resources" but also explicitly includes "processes," often neglected by statutory definitions, as well as resources without economic value that are nonetheless necessary for sustaining ecological health.<sup>38</sup>

The Statute defines "present generations" to include all living human beings. In its definition of "violation," it establishes the illegality of any acts that contravene the principle of intergenerational equity.

As can be seen in the definition of a "violation," the Statute places the burden of proof not on plaintiffs or the government, but on those who cause or threaten ecological degradation. See also Sections 601(1) and 801(3). Thus, the Statute brings within its scope for scrutiny and review acts that may cause or contribute to ecological degradation, but it excludes acts that do not raise such a threat. In the administrative context of Section 601(1), agencies will have to define such acts in their implementation regulations. In the private action context of Section 801(3), plaintiffs will have to demonstrate that this threshold has been reached. However, for acts that may contribute to or cause ecological degradation, defendants and proponents of the acts must demonstrate that their acts do not violate the Statute by demonstrating that

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<sup>38</sup> See, e.g., 42 U.S.C. § 9601(16) (2007) ("The term 'natural resources' means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe."); West's MD. CODE ANN., NAT. RES. § 5-601(d) (2007) ("Natural resources' means forests, fish and game, water and waterpower, soils, minerals, and all other similar sources of wealth."); MICH. COMP. LAWS ANN. § 324.20101(k) (2007) ("Environment' or 'natural resources' means land, surface water, ground-water, subsurface strata, air, fish, wildlife, or biota within the state."); BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "natural resource" as "1. Any material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wildlife. 2. Environmental features that serve a community's well-being or recreational interests, such as parks."); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 774 (10th ed. 1995) (defining "natural resources" as "industrial materials and capacities (as mineral deposits and waterpower) supplied by nature").

they are not likely to cause or contribute to, or to have caused or contributed to, degradation of the ecological health of the state's environment for future generations.

While the standard of evidence is left open, most jurisdictions are likely to adopt the familiar preponderance of the evidence standard. This standard could be made more stringent, and therefore result in greater environmental protection, by explicit use of a more rigorous standard of evidence such as "clear and convincing evidence," "reasonable certainty," or even "beyond a reasonable doubt," depending on the legal standards prevalent in each jurisdiction.

Sections 301(2)-(3) outline several considerations that should guide courts or administrative bodies in considering whether an act violates the Statute. These considerations are not all-inclusive but serve to focus attention both on the potentially detrimental environmental effects generated by humans and on the resources affected by human activities. These considerations derive from a survey of the primary purposes of various federal and state environmental laws, which frequently address the list of concerns and resources in this section of the Statute.<sup>39</sup> The Statute's inclusion of these

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<sup>39</sup> See, e.g., CERCLA, 42 U.S.C. § 9621(b)(1) (2006) (creating requirements for executive direction of remedial actions at hazardous waste sites):

In assessing alternative remedial actions, the President shall, at a minimum, take into account:

- (A) the long-term uncertainties associated with land disposal;
- (B) the goals, objectives, and requirements of the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.];
- (C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;
- (D) short- and long-term potential for adverse health effects from human exposure;
- (E) long-term maintenance costs;
- (F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and
- (G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

See also Clean Air Act, 42 U.S.C. § 7401 (2006) (recognizing cross-boundary impacts of air pollution and declaring purpose of preventing air pollution); Clean Water Act, 33 U.S.C. § 1251(a) (2006) (establishing national policy to prohibit "discharge of toxic pollutants in toxic amounts" into the nation's waters and to plan for wastewater treatment on areawide bases); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (2006) (asserting federal regulatory

guiding factors should enable better judicial administration of the Statute.

### **§ 401: Establishment of Rights and Responsibilities**

- (1) Future generations have the right to an ecologically healthy environment.
- (2) Public and private entities have the responsibility to preserve, and where possible to restore, the ecological health of the state's environment for the benefit of future generations.

### **Discussion of § 401**

The first provision in this section reflects the language of several state constitutions that establish the right to a healthy environment and, in the case of Pennsylvania, explicitly link environmental preservation to the needs of future generations.<sup>40</sup> By establishing this right, the Statute creates

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control over pesticides to control toxic environmental and human health effects); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (2006) (setting national policy of multiple use and sustained yield for management of federal lands, which means taking account of the long-term needs of future generations for renewable and non-renewable resources); Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1601 (2006) (recognizing the “vital importance of America’s renewable resources of the forest, range, and other associated lands” and setting policy of “multiple use sustained yield management”); Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (2006) (adopting policy of managing resources in national forests so as not to impair the productivity of the land); National Environmental Policy Act, 42 U.S.C. §§ 4331-32 (2006) (setting national policy to “enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources” and to study long-term effects of and alternatives to proposed actions); Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(2)(A) (2006) (creating liability for damages to natural resources caused by oil spills); Pollution Prevention Act of 1990, 42 U.S.C. § 13101 *et seq.* (2006) (requiring EPA to coordinate reduction of government waste production and to collect data on toxic chemicals entering the waste stream); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (2006) (noting the detrimental impacts of waste disposal on air, land, and water and establishing extensive requirements for solid and hazardous waste management); Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (2006) (enabling EPA to require reporting or testing of toxic chemicals and to ban the manufacture and importation of chemicals that pose an unreasonable risk to human health and the environment).

<sup>40</sup> See PA. CONST. 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.”); see also HAW. CONST. art. XI, § 9 (creating an individual “right to a clean and health-

the grounds for private suits against public or private parties that have committed violations as defined in the Statute that might not otherwise be subject to liability. In states whose constitutions already include this right, Sections 401(1) and 401(2) might be redundant and should, at the very least, be modified to reference and mirror the relevant constitution's language.<sup>41</sup> In states without such rights in their constitutions, the Statute should have considerable legal force because it creates statutory rights, which legislatures are empowered to do,<sup>42</sup> and enumerates the requirements for causes of action to enforce those rights, as Congress and state legislatures have done in numerous situations.<sup>43</sup> As explained above, the Statute specifically grants rights to future generations but not present generations, because its focus, unlike that of the Constitution, is only that group.

The Statute provides administrative and judicial remedies for any

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ful environment" that is enforceable by any person against any party); ILL. CONST. art. XI, § 2 (stating that "[e]ach person has the right to a healthful environment" that is enforceable against any party); MASS. CONST. art. XCVII (establishing that the people have a right to a clean environment and its natural, scenic, historic, and aesthetic qualities and declaring that the protection of this right through the conservation and development of natural resources is a "public purpose"); MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment.").

<sup>41</sup> An accompanying document proposes a model state constitutional provision that would establish fundamental rights for future generations.

<sup>42</sup> See generally *City of Rancho Palos Verdes, Cal. v. Abrams*, 554 U.S. 113, 121 (2005) ("We have found § 1983 unavailable to remedy violations of federal statutory rights in two cases. . . . Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.") (citations omitted).

<sup>43</sup> See, e.g., *Individuals with Disabilities Education Act*, 20 U.S.C. §§ 1400-09 (2006) (establishing a right to "free appropriate public education" to all children with disabilities and providing for enforcement of this right against the states); 35 U.S.C. §§ 154 & 281-97 (2006) (establishing various rights of patent-holders and providing for remedies against patent infringement, including injunctions, damages, and attorney fees); 42 U.S.C. §§ 1981 & 1983 (2006) (establishing "equal rights" under the law and creating liability for infringements of these civil rights); CAL. LABOR CODE §§ 2800-10 (2006) (establishing employee rights vis-à-vis his or her employer and providing for administrative or court enforcement of rights); MASS. GEN. LAWS ch. 152, §§ 26-51 (2006) (establishing rights to compensation for job-related injuries and setting forth requirements for enforcement of these rights); N.Y. GEN. MUN. LAW § 205-e (2006) (establishing and detailing a right of action for compensation for injury to or death of police officers that occurs as a result of various failures by any person to comply with the law).



violation of its terms, regardless of whether the right to an ecologically healthy environment is considered fundamental. When another fundamental right conflicts with the provisions of the Statute, however, courts may find the Statute unenforceable or even unconstitutional. For this reason, the Statute may carry greater force in states that incorporate some form of environmental rights in their constitutions, such as in Hawaii, Illinois, Massachusetts, Montana, and Pennsylvania.<sup>44</sup> Where state court decisions have removed almost all force from such constitutional provisions,<sup>45</sup> the specificity of the Statute seeks to enable plaintiffs with clear enforcement rights.

The second provision in this section establishes a duty for public and private parties to maintain a healthy environment for future generations, a duty embodied in the Montana constitution.<sup>46</sup> The Montana Supreme Court has interpreted this duty, in tandem with the right to a healthy environment, to justify the prohibition or restriction of certain detrimental activities, such as cyanide leach mining, arsenic discharge into riparian ecosystems, and well-drilling that might contaminate groundwater.<sup>47</sup> The duty created in this

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<sup>44</sup> However, even in states that have incorporated environmental rights in their constitutions, “[s]tate courts . . . have helped ease most of the constitutional provisions into relative obscurity by holding that the provisions are not self-executing, by denying standing to private citizens and groups trying to enforce the provisions, or by establishing relatively easy standards for meeting the constitutional requirement.” Barton H. Thompson, Jr., *Constitutionalizing the Environment: the History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003). If enacted in these states, the Statute might restore the force of constitutional environmental rights by specifically addressing the issues that state courts have relied upon to render environmental rights relatively obscure and unactionable.

<sup>45</sup> See, e.g., *City of Elgin v. County of Cook*, 660 N.E.2d 875 (Ill. 1995) (holding that a constitutional provision granting private citizens a right to enforce the duty to maintain a healthy environment for future generations removes the special injury requirement for environmental nuisance cases but still requires plaintiffs to present a cognizable cause of action because the constitutional provision does not create a cause of action); *Enos v. Secretary of Environmental Affairs*, 731 N.E.2d 525 (Mass. 2000) (refusing to grant standing to plaintiffs who alleged that the certification of an environmental impact report violated their constitutional right to clean air and water). But see *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Commw. Ct. 1973) (holding that the environmental rights provision of the Pennsylvania Constitution “imposes an affirmative duty” and establishes “rights to be protected by the government”); *Montana Environmental Information Center v. Department of Environmental Quality*, 988 P.2d 1236 (Mont. 1999) (declaring the state’s constitutional right to a clean and healthy environment to be “fundamental” and according standing to plaintiffs to enforce their right).

<sup>46</sup> MONT. CONST. art. IX, § 1(1) (“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”).

<sup>47</sup> See *Seven Up Pete Venture v. State*, 114 P.3d 1009 (Mont. 2005) (upholding citizen initiative banning cyanide leach mining); *Cape-France Enterprises v. Estate of Peed*, 29 P.3d 1011 (Mont. 2001) (finding performance of contract impossible where required well-drilling might have al-

section is intended to reinforce and serve as the corollary to the right created in this section, much as the Montana constitution's provisions have done.<sup>48</sup> Some state statutes also create rights—and, in a few cases, responsibilities—similar to those in Montana's constitution, and the Statute echoes the language and thrust of these statutes.<sup>49</sup>

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lowed perchloroethylene migration into public water supply); Montana Environmental Information Center, 988 P.2d at 1249 (requiring more stringent analysis of law that would have permitted arsenic discharges and potentially contravened environmental rights guaranteed by the Montana Constitution).

<sup>48</sup> Montana's constitution has a similar structure of right and duty. Although the right and the duty are located in separate articles (II and IX, respectively), the Montana Supreme Court has treated them to some extent as a self-reinforcing unit. *Cape-France Enterprises*, 29 P.3d at 1016-17 (finding right and duty to be "interrelated" and "interdependent"). Scholars frequently advance the thesis that every right has a correlative duty and vice versa. In some cases, this may not hold true, but many laws do establish interrelated rights and duties. See generally Norman J. Finkel, *Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times*, 12 PSYCHOL. PUB. POL'Y & L. 242, 244-46 (2006) (discussing the relationship, disconnects, and distinctions between rights and duties); Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. & DEV. L.J. 67, 79-80 (2005) (examining the correlativity and treatment of rights and duties in international human rights law). In the opinion of the Statute's author, the establishment of both a right and a duty can enable more stringent environmental protection for future generations.

<sup>49</sup> See, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE § 21000 (2006) (stating that "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the environment"); Minnesota Environmental Rights Act, MINN. STAT. § 116B.01 (2006):

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.

Montana Environmental Policy Act, MONT. CODE ANN. § 75-1-103(3) (2005):

The legislature recognizes that each person is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, that each person has the right to pursue life's basic necessities, and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

## **§ 501: Administrative Implementation and Enforcement**

(1) State administrative agencies with permitting authority over environmental matters shall promulgate regulations that provide for administrative implementation and enforcement of the rights and responsibilities created in this chapter.

(2) Each administrative agency that has promulgated regulations pursuant to § 501(1) of this chapter shall establish an adjudicative body to resolve claims related to acts that come within the agency's permitting authority. The decisions of such adjudicative bodies shall be appealable to district court pursuant to § 701 and § 801.

(3) To complement agency-specific adjudicative bodies established under § 501(2) of this chapter, the Department of Environmental Protection (“the Department”) shall appoint an “ombudsman for future generations” whose duty shall be to assess independently both proposed acts within the agency's permitting authority and citizen complaints of violations relating to agency action. The ombudsman shall determine the legality of proposed acts and the merit of complaints with regard to the standards established in this chapter. The ombudsman will have independent investigative powers and may also work with the Department to initiate adjudicative proceedings against an alleged violator pursuant to § 701 of this chapter. When evaluating proposed acts, the ombudsman may suggest or require the imposition of reasonable conditions designed to promote the purposes of this chapter. A proponent of an act that requires an administrative

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The implementation of these rights requires the balancing of the competing interests associated with the rights by the legislature in order to protect the public health, safety, and welfare.

W. VA. CODE § 22-1-1(b) (2006):

It is the policy of the state of West Virginia, in cooperation with other governmental agencies, public and private organizations, and the citizens of this state, to use all practicable means and measures to prevent or eliminate harm to the environment and biosphere, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations.

permit may protest any such conditions imposed by submitting a claim to the agency's adjudicative body.

(4) The ombudsman, or alternatively the court, may additionally appoint a guardian for future generations. Charged with advocating for the best interests of future generations, this guardian represents future generations in litigation or negotiations and will, as appropriate, assist in determining the impact of a proposed action upon the environment.

### **Discussion of § 501**

Section 501(1) requires administrative agencies with permitting authority over environmental matters to promulgate regulations for the implementation and enforcement of the Statute. This delegation of authority to administrative agencies is common in both federal and state environmental statutes.<sup>50</sup> Section 501(2) permits administrative agencies to resolve statutory claims that come within the agencies' permitting authority. Federal and state statutes frequently enable agencies to establish their own review and enforcement procedures.<sup>51</sup>

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<sup>50</sup> See, e.g., Clean Water Act, 33 U.S.C. § 1319 (authorizing administrative enforcement of the Act); National Environmental Policy Act, 42 U.S.C. §§ 4342-47 (2006) (creating the Council on Environmental Quality and giving it authority to advise the president and executive agencies on the implementation of environmental policies); Pollution Prevention Act of 1990, 42 U.S.C. § 13101 *et seq.* (2006) (requiring EPA to coordinate reduction of government waste production and collect data on toxic chemicals entering the waste stream); Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (2006) (enabling EPA to require reporting or testing of toxic chemicals and to ban the manufacture and importation of chemicals that pose an unreasonable risk to human health and the environment); California Environmental Quality Act, CAL PUB RES. CODE § 21083 (2006) (delegating to the Office of Planning and Research the task of developing guidelines for the implementation of the Act by public agencies); State Environmental Policy Act, WASH. REV. CODE § 43.21C.110 (2006) (delegating to the Department of Ecology the authority to "adopt and amend . . . rules of interpretation and implementation").

<sup>51</sup> The U.S. Environmental Protection Agency, for instance, exercises authority over the enforcement (sometimes in cooperation with the U.S. Department of Justice) of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 *et seq.*; the Pollution Prevention Act, 42 U.S.C. § 13101 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 321 *et seq.* On the state level, the Washington State Department of Ecology administers statutes addressing air quality; environmental assessment; hazardous waste; spill prevention, preparedness, and response; shorelands and wetlands; solid waste; toxics cleanup and sediments; and water quality and water resources. See Washington State Department of Ecology,

Section 501(3) requires the Department of Environmental Protection to create a new category of employee that does not have an exact analog in the environmental realm in the United States.<sup>52</sup> States have, however, established ombudsmen for a variety of issues, particularly those issues that concern underrepresented or voiceless populations (categories that can include future generations). Some states have employed ombudsmen specifically for certain environmental issues. Michigan, for instance, has a “Clean Air Ombudsman” who works with small business owners and managers as a liaison for the Air Quality Division of the Michigan Department of Environmental Quality.<sup>53</sup> New York has a Small Business Environmental Ombudsman program, which provides business with free and confidential assistance to help them comply with air quality regulations.<sup>54</sup> Minnesota has a Small Business Ombudsman who reviews environmental regulations to ensure that they are fair, reasonable, and appropriate for small businesses.<sup>55</sup> Several other states have similar environmental ombudsman programs, mostly to aid and advocate for small businesses. The ombudsman for future generations established by the Statute has an oversight power to analyze proposed acts and impose conditions upon them, as well as a general power to investigate potential violations of the Statute and to act to some extent as an environmental prosecutor.

In addition, the ombudsman or court may appoint a guardian for future generations to represent the best interests of the ward in litigation or negotiations.<sup>56</sup> As described by the National Guardianship Association, a

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Current Rule-Making Activity, <http://www.ecy.wa.gov/laws-rules/currentactivity.htm> (last visited Nov. 20, 2006).

<sup>52</sup> Israel offers an analog outside of the United States. Its Future Generations Commissioner gives opinions on legislation that relates to future generations and offers recommendations to members of parliament. The commissioner also has a right to access all relevant information. The Knesset, *Commission for Future Generations* 3 (Isr.) (2004), available at [http://www.knesset.gov.il/sponsorship/future/eng/future\\_index.htm](http://www.knesset.gov.il/sponsorship/future/eng/future_index.htm) (last visited Dec. 4, 2006).

<sup>53</sup> See Michigan Department of Environmental Quality, Clean Air Ombudsman, <http://www.michigan.gov/deq/0,1607,7-135-3304-11314--,00.html> (last visited Nov. 20, 2006). For citations to various state ombudsmen statutes, see Michigan Office of Children’s Ombudsman, Ombudsman Reference List, <http://www.michigan.gov/oco/0,1607,7-133--11755--,00.html#me> (last visited Nov. 20, 2006).

<sup>54</sup> See NY Business, Small Business Compliance, [http://www.empire.state.ny.us/Productivity\\_Energy\\_and\\_Environment/Environmental\\_Assistance/sb\\_compliance.asp](http://www.empire.state.ny.us/Productivity_Energy_and_Environment/Environmental_Assistance/sb_compliance.asp) (last visited Nov. 20, 2006).

<sup>55</sup> Minnesota Pollution Control Agency, Small Business Ombudsman, [http://www.pca.state.mn.us/programs/sbomb\\_p.html](http://www.pca.state.mn.us/programs/sbomb_p.html) (last visited Nov. 20, 2006).

<sup>56</sup> Science and Environmental Health Network and The International Human Rights Clinic at Harvard Law School, MODELS FOR PROTECTING THE ENVIRONMENT FOR FUTURE GENERATIONS 19-23

guardian protects those who are unable or unavailable to care for themselves.<sup>57</sup> States may use the guardian *ad litem* as a model for creating a guardian for future generations. They may also look to the natural resource trustees established by the U.S. Superfund Amendments and Reauthorization Act of 1986.<sup>58</sup> This Act provides guidance on the function of guardians, including avoiding conflicts of interest and coordinating between guardians and other relevant actors.

### **§ 601: Analytical Requirements for Proponents of Potentially Detrimental Acts**

(1) Whenever any person or entity applies to an administrative agency for authorization to engage in any act that may contribute to degradation of the ecological health of the state's environment, that person or entity must demonstrate through environmental impact analyses that the proposed act is not likely to cause or contribute to degradation of the ecological health of the state's environment for future generations. Unless the agency finds that the person or entity has demonstrated that a proposed act is not likely to cause or contribute to degradation of the ecological health of the state's environment for future generations, the agency may not authorize the proposed act.

(a) These analyses must consider the effects of the proposed act on future generations to the full extent scientifically, technologically, and economically feasible. These analyses must also consider the effects of the proposed act in the context of, and as a potential contributor to, the current and anticipated cumulative impacts on the ecological health of the environment.

(b) These analyses must include consideration of reasonable alternatives that may cause or contribute to less degradation, less endangerment of degradation, and/or restoration of the ecological health of the environment, and the feasible alternative that best promotes the ecological health of the

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and Appendix B (Oct. 2008), available at [http://www.law.harvard.edu/programs/hrp/documents/Models\\_Future\\_Generations.pdf](http://www.law.harvard.edu/programs/hrp/documents/Models_Future_Generations.pdf).

<sup>57</sup> NAT'L GUARDIANSHIP ASSOC., A MODEL CODE OF ETHICS FOR GUARDIANS (1998), available at <http://www.guardianship.org/pdf/codeEthics.pdf>.

<sup>58</sup> Comprehensive Environmental Response, Compensation and Liabilities Act (CERCLA) 42 U.S.C. § 9607(f)(2) (2006).

environment for future generations must be selected.

(c) These analyses must include an analysis of the effects on the ecological health of the environment that the proposed act would have both during and after the preparation and undertaking of the act and, if remediation is planned, after all proposed remediation has been completed. This provision imposes a duty upon permit applicants to analyze the present and future of all aspects of the proposed act from cradle to grave.

(d) When conducting any cost-benefit analysis as part of the analyses undertaken pursuant to this section, permit applicants shall not use economic discounting to reduce the apparent severity of future effects on the ecological health of the environment. Permit applicants shall provide an analysis of the impacts of the act on the ecological health of the environment in ecological health terms (in addition to any analysis in monetized terms). Actual or potential ecological degradation may outweigh monetizable benefits and render a proposed act impermissible under this chapter.

(2) In conducting these analyses, permit applicants may use environmental impact analyses undertaken pursuant to other environmental protection laws, such as the National Environmental Policy Act and this state's Environmental Policy Act. However, such other analyses may or may not satisfy the requirements of this chapter, which may exceed the analytical requirements of other state and federal environmental protection laws.

### **Discussion of § 601**

Section 601 imposes analytical requirements on persons applying to administrative agencies for permits. While statutes requiring the study of environmental impacts are prevalent in the United States, this section inserts the Statute's concept of protecting the environment for future generations into such analyses. To some extent, this concept is implicit in a number of existing laws,<sup>59</sup> but the Statute sets forth an analytical framework that explicitly

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<sup>59</sup> See, e.g., National Environmental Policy Act, 42 U.S.C. § 4332 (2006) (requiring environmental impact studies that must include analysis of "the relationship between local short-term uses

mandates consideration of long-term impacts that might compromise ecological health and sustainability goals. The Statute includes a provision, Section 601(1)(b), that not only requires the analysis of alternatives to a proposed act, but also mandates a permit applicant to choose the most environmentally preferable feasible alternative and administrative agencies to deny permits for acts that would contravene the rights and responsibilities established by the Statute. This provision responds to criticism of statutes, such as the National Environmental Policy Act (“NEPA”), that have proven almost purely procedural and have often allowed the selection of alternatives that were not environmentally preferable.<sup>60</sup> CEQA provides a well-known example of an environmental impact analysis statute that goes beyond the procedural protections of NEPA. CEQA directs public agencies not to approve projects “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.”<sup>61</sup>

Section 601(1)(c) addresses concerns about projects that may result in

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of man’s environment and the maintenance and enhancement of long-term productivity”); California Environmental Quality Act, CAL. PUB. RES. CODE § 21100 (2006) (describing the contents of environmental impact reports, which include analysis of “irreversible” impacts and “growth-inducing” impacts, among others); Montana Environmental Policy Act, MONT. CODE ANN. § 75-1-201 (2006) (outlining the requirements for environmental impact statements, including analysis of “effects that cannot be avoided if the proposal is implemented” and analysis of “the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity”); State Environmental Policy Act, WASH. REV. CODE § 43.21C.030 (2006) (adopting NEPA’s analytical requirements).

<sup>60</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted):

The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of “action-forcing” procedures that require that agencies take a “‘hard look’ at environmental consequences,” . . . and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.

Oliver A. Houck, *Is That All?: A Review of The National Environmental Policy Act, An Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENVTL. L. & POL’Y F. 173, 173 (2000) (noting that NEPA “holds the honor of being the most successful environmental law in the world and the most disappointing” because of its lack of substantive requirements).

<sup>61</sup> CAL. PUB. RES. CODE § 21002 (2006). See also *Mountain Lion Found. v. Fish & Game Comm’n*, 16 Cal. 4th 105, 134 (Cal. 1997) (calling § 21002 “one of the substantive provisions of CEQA which the Commission is required to carry out when operating pursuant to its certified regulatory program”).



environmental harm after the projects have been completed and abandoned.<sup>62</sup> This section imposes a duty on permit applicants to conduct a “lifecycle analysis” of their proposed projects and on agencies and the ombudsman to scrutinize this analysis. Manufacturers concerned about the environmental consequences of their products have for years used lifecycle analysis to examine their products “from cradle to grave,” a concept that can usefully be transferred to the analysis of much more than merely manufactured goods.<sup>63</sup> This is a salient issue in natural resources extraction as well as other arenas, and some companies are beginning to formulate closure and remediation action plans before undertaking any activity.<sup>64</sup>

Section 601(1)(d) prevents permit applicants from using economic analysis to discount the environmental impacts of their projects. Economic discounting and the assignment of arbitrary (and generally low) values to environmental assets lead to exchanges of future environmental benefits for present-day profits, thus often discouraging the achievement of the goals of sustainability.<sup>65</sup> Although environmental statutes do not typically

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<sup>62</sup> Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, operates on the same basic principle.

<sup>63</sup> See, e.g., National Office of Pollution Prevention, Environment Canada, Ecocycle, <http://www.ec.gc.ca/ecocycle/en/whatislcm.cfm> (last visited Dec. 2, 2006) (providing information on lifecycle analysis and the cradle-to-grave approach); Product Ecology Consultants, <http://www.pre.nl/> (last visited Dec. 2, 2006) (offering lifecycle assessment software).

<sup>64</sup> See, e.g., Melanie S. Marrs, *Kentucky's Efforts to Protect Its Groundwater: Uniqueness and Uniformity Among the States*, 10 J. NAT. RESOURCES & ENVTL. L. 371, 390 (1995) (citations omitted) (discussing the consensus that regulations should emphasize pollution prevention rather than monitoring and cleanup after the fact):

The Groundwater Regulation Committee, composed of governmental agencies, including the environmental protection, agriculture and transportation agencies, along with special interest groups such as coal mining, oil and gas, environmental groups, local government and industrial representatives, are in agreement that the focus of regulation should shift from leak and spill detection and remediation for groundwater contamination from underground storage tanks and solid waste landfill programs to a policy of pollution prevention. “Pollution prevention measures include advance planning, toxic use reduction and the implementation of best management practices to prevent contamination.”

See also MWH Mining Services, [http://www.mwhglobal.com/mining\\_services.asp](http://www.mwhglobal.com/mining_services.asp) (offering mining and related industries various consulting services, including “closure planning,” “mine planning,” and “remediation planning [and] permitting”).

<sup>65</sup> See Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates*,

address discounting, several do address the issue of unquantifiable assets and specifically direct permit applicants to consider these assets in their impact evaluations.<sup>66</sup> As this Statute particularly strives to find a practical solution for incorporating the rights of future generations into environmental decision-making, explicit exclusion of discounting rates is necessary because of their potential to undermine the intent and purpose of the Statute to protect this particular group.

Section 601(2) allows permit applicants to combine their analyses conducted pursuant to the Statute with any other environmental impact

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*Later Generations and the Environment*, 46 VAND. L. REV. 267, 268 & 303 (1993) (citations omitted):

OMB's choice of discount rates has dramatic implications for regulatory policy. Its choice of discount rates has even greater impact on long-term global environmental issues such as ozone depletion and the greenhouse effect. For instance, if the greenhouse effect will cost society \$100 billion twenty years from now, OMB's current discount rate would indicate that it is not worth spending \$20 billion today to avert the harm. . . . In dealing with issues of this complexity, identifying the right answer is often difficult, but ruling out some wrong answers is easier. Unfortunately, for many years, OMB has implemented a defective policy regarding discount rates. As with the deficit, society has been saddled with policies that increase short-term consumption at the expense of long-term welfare. The consequence has been to encourage myopia by regulatory agencies. We have . . . tried to articulate a working approach to the issues for use by policymakers. Briefly, we have four recommendations:

- (1) Policymakers should discount intragenerational environmental benefits at the social discount rate (one percent or so).
- (2) They should assess opportunity costs of regulations using the "shadow price" of capital if possible.
- (3) Society's concern about future generations should focus mostly on the welfare of the next generation, although it should be careful not to expose later generations to serious deprivation (including major ecological damage).
- (4) With respect to the next generation, policymakers should use a low discount rate (probably around the social discount rate).

<sup>66</sup> See, e.g., MONT. CODE ANN. § 75-1-201 (2006) (requiring applicants to "identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations"); WASH. REV. CODE § 43.21C.020(b) (2006) (requiring applicants to "[i]dentify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations").

studies that may be required by state or federal law. Such combined analyses are common, given the plethora of regulatory requirements now imposed on projects with environmental consequences.<sup>67</sup>

### **§ 701: Authorization of Civil and Criminal Sanctions**

(1) The state's Department of Environmental Protection ("the Department") is hereby designated as the agency officially responsible for investigations of public and private acts that may constitute civil or criminal violations of this chapter and that are being considered for civil or criminal sanctions not covered by administrative actions authorized by § 501(2).

(2) The Department has the power to initiate actions, as appropriate, in district court, including appeals of decisions made by administrative adjudicative determinations pursuant to § 501(2).

(3) The Department is authorized to seek civil and criminal sanctions, as appropriate, for violations of this chapter. For civil sanctions only, the Department may use its own internal administrative procedures. Such decisions shall be appealable to district court. For both civil and criminal actions, the Department may bring a claim in court with the aid of the state attorney general.

(4) Permittees that legally obtain a permit from a state agency and abide by the terms of their permit shall not be subject to prosecution by the Department under this Statute.

(5) Private persons and public agencies and officials may report potential violations of this chapter to the Department or to the ombudsman employed pursuant to § 501(3) of this chapter. Only if the Department declines to investigate or initiate a legal action may the reporting party bring a civil action in court against the party perpetrating the violation, provided that the action is consistent with the provisions of § 801 of this chapter.

(6) When private or public plaintiffs obtain monetary judgments against parties in connection with alleged or actual violations of this

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<sup>67</sup> See, e.g., CAL. CODE REGS. tit. 14, § 15222 (2006) (allowing preparation of joint documents for NEPA and CEQA review).

chapter, any funds in excess of reasonable attorney fees and litigation costs shall be deposited in a common assets trust or in a special account dedicated to environmental remediation and improvement activities. The state treasurer shall manage the account, and the Department shall have authority to direct the disbursement of account funds. In disbursing funds, the Department shall first undertake environmental remediation and improvement activities that address the alleged or actual violations for which the funds in the account were recovered. The Department shall undertake these activities as soon as possible after monetary damages have been granted by the court and placed in the account. The Department may use any leftover funds to sponsor environmental remediation and improvement activities that would not otherwise receive sufficient funding.

### **Discussion of § 701**

Section 701 allows the responsible state agency (designated by Section 701(1)) to enforce the Statute, following the model, for instance, of EPA's enforcement of various federal statutes or the Washington State Department of Ecology's enforcement of various state statutes, as well as the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act, as delegated by Congress.<sup>68</sup> Section 701(1) assigns the Department of Environmental Protection the duty to investigate possible violations of the Statute. Section 701(2) gives the Department the power to initiate actions in court. Section 701(3) specifically authorizes the imposition of civil and criminal sanctions to promote the purposes of the Statute. Many federal and state environmental statutes establish similar liability schemes and delegate enforcement responsibility to the appropriate regulatory agency.<sup>69</sup>

Section 701(4) prevents permittees from being held liable by the state for errors attributable to administrative agencies. Without such a provision, the Statute would empower the state to prosecute permittees for the State's own mistakes or political process failures. Private parties may, however, still

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<sup>68</sup> See WASHINGTON STATE DEPARTMENT OF ECOLOGY, 2005 ENFORCEMENT REPORT, Publication Number 06-01-004 (July 2006), available at <http://www.ecy.wa.gov/pubs/0601004.pdf>.

<sup>69</sup> See *supra* notes 28 and 29. See also CERCLA, 42 U.S.C. § 9609 (2006) (creating civil penalties); Clean Water Act, 33 U.S.C. § 1319 (creating and extensively detailing civil, criminal, and administrative penalties to enforce the Act); Toxic Substances Control Act, 15 U.S.C. § 2615 (2006) (establishing civil and criminal liability for violations).

enforce the Statute against permittees, thereby reducing incentives for permit applicants to attempt to obtain permits that are favorable to their interests but do not comply with the terms of the Statute. Section 701(5) enables the responsible state agency or the ombudsman for future generations to serve as a point of contact for private persons or public agencies that have discovered and wish to report potential violations of the Statute but would prefer not to pursue judicial remedies on their own. Nonetheless, because Section 701(5) anticipates that political process failures or a lack of resources may lead the responsible state agency not to pursue a legitimate claim, this Section permits reporting parties to prosecute claims on their own when the responsible state agency declines to take action or to pursue a legitimate civil remedy. Private parties must wait until the Department and ombudsman complete their investigations before filing any claims.

Section 701(6) establishes a mechanism intended to ensure that damages awarded for alleged or actual violations of the Statute actually result in the funding of remediation and improvement activities, thus furthering the Statute's goal of environmental protection. Without this provision, the Statute might serve to deter harmful conduct, but it would not guarantee that damages would be spent on mitigating the complained-of violations—plaintiffs could simply take the money for themselves. This idea of a special account dedicated to remedying the harm that is the subject of litigation follows the general pattern of laws like the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), which enables the government and potentially responsible parties to sue other potentially responsible parties for the costs of cleaning hazardous waste sites.<sup>70</sup> When the federal government recovers cleanup costs under CERCLA, they are placed in an account known as the “Hazardous Substances Trust Fund,” which can be used by the president to fund remediation activities.<sup>71</sup> Section 701(6) of the Statute applies a similar system to recoveries by both government agencies and private parties.

### **§ 801: Establishment of Cause of Action**

(1) The rights and responsibilities in this chapter may be enforced by public or private parties against public or private parties that have engaged in, or prospectively plan to engage in, acts that may constitute

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<sup>70</sup> 42 U.S.C. § 9607 (2006).

<sup>71</sup> 42 U.S.C. §§ 9607 & 9611(a) (2006).

a violation of the rights and responsibilities herein established.

(2) Public entities, including the Department of Environmental Protection (as set forth in § 701 of this chapter) and private individuals, may enforce this chapter in the courts of this state, subject to any state constitutional limitations or requirements.

(3) When a person presents evidence that a party's act may cause or contribute to, or may have caused or contributed to, the degradation of the ecological health of the state's environment, the act shall be deemed a violation of this chapter unless the party demonstrates that the act is not likely to cause or contribute to (or is not likely to have caused or contributed to) degradation of the ecological health of the state's environment for future generations.

(4) Courts or administrative adjudicators shall have the authority to grant injunctive or monetary relief, including punitive damages when violations of this chapter are egregious. When a violation is based on a completed act, adjudicators should give preference to injunctive relief directed toward the remediation of any environmental harm that has occurred. When a violation is based on a prospective act, adjudicators should give preference to injunctive relief directed toward either (1) requiring the development and study of alternatives that will eliminate the violation or (2) requiring the agency in charge of permitting the proposed act to impose mitigating conditions that will eliminate the violation.

(5) Claims under this chapter may be brought prospectively to prevent the harm that would accrue from a proposed act. This chapter shall be applied retroactively only to violations for which no relief is available pursuant to other laws.

### **Discussion of § 801**

The intent of this section of the Statute is to provide clarity for courts by establishing administrable rules and standards that will govern lawsuits brought to defend environmental rights for future generations. When courts have addressed constitutional provisions that establish environmental rights and mention future generations, they have frequently interpreted these

provisions in a manner that drastically diminishes their force, typically by declining to grant standing to plaintiffs or to find a cause of action inherent in constitutional provisions that mention future generations.<sup>72</sup> In contrast, the Montana Supreme Court did grant standing to plaintiffs and find a cause of action in the Montana constitution.<sup>73</sup> Commentators, however, have written divided evaluations of the benefits and correctness of the court's decisions on the subject of environmental rights and future generations.<sup>74</sup> This section should clarify any ambiguities for courts about causes of action.

Section 801(1) clearly creates a cause of action in order to dispel any

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<sup>72</sup> See *City of Elgin*, 660 N.E.2d 875; *Enos*, 731 N.E.2d 525; *Snelling v. Department of Transportation*, 366 A.2d 1298 (Pa. Commw. Ct. 1976) (holding that a municipality, individuals, and other parties that sued Pennsylvania's Department of Transportation failed to state a cause of action, although they alleged that allowing a developer to widen a road and build a mall violated Pa. Const. Art. I, § 27, because the Department of Transportation did not consider the environmental impact of such construction).

<sup>73</sup> *Montana Environmental Information Center*, 988 P.2d 1236.

<sup>74</sup> See, e.g., Cameron Carter & Kyle Karinen, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RESOURCES L. REV. 97, 132 (2001):

Although abbreviated reasoning and analysis tend to undercut its precedential value, at a minimum [the Montana Environmental Information Center case] illuminates some important points. First, interest groups apparently have standing to sue. . . . Second, the rights recognized in [the state constitution] are fundamental interdependent rights to be construed consistently. Finally, the court will look to the framers' intent in future cases requiring construction of constitutional provisions. [But] the opinion is not as definitive as one might hope.

Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 185, 188 (2001) (arguing that federal courts should follow the lead of courts like the Montana Supreme Court and "recognize the right to a healthful environment using the theory of substantive due process under the Fifth and Fourteenth Amendments"); John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Protections*, 62 MONT. L. REV. 269, 270-72 (2001):

What I discovered in [reading the Montana Environmental Information Center case] shocked me. The Supreme Court in MEIC had rendered a decision of monumental significance to the citizens of this state without fulfilling what ought to be even the minimum standards of judicial decision making. . . . [The MEIC opinion] never confronts the Court's own precedents that are contrary to its decision. The decision is . . . confusing, if not self-contradictory.

question of whether the rights and responsibilities declared in the Statute are enforceable in court.<sup>75</sup> By including both public and private parties in its terms, Section 801(1) also addresses concerns that were raised in the Montana Supreme Court's decisions regarding whether the enforcement of environmental rights should extend to private parties, as well as to governmental actors.<sup>76</sup> Many environmental protection statutes allow citizen suits.<sup>77</sup>

<sup>75</sup> See *supra* notes 23 and 49, for citations to cases that restricted plaintiffs' access to court based on environmental rights claims.

<sup>76</sup> See *Cape-France Enterprises*, 29 P.3d at 1023 (Rice, J., dissenting):

[T]he majority today holds that when the anticipated performance of a private, real property contract may potentially impact the environment, the contract's purpose is unlawful, and rescission is the appropriate remedy. . . . The decision leaves important questions unanswered. . . . While future decisions of the Court may eventually resolve such questions, far too much is today left in doubt. The environmental provisions of the Constitution may very well apply in this case. . . . However, on a record which leaves the question of potential environmental damage unsettled, the applicability of the constitutional protections cannot properly be determined.

<sup>77</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7604 (2006) (allowing "any person [to] commence a civil action on his own behalf" against any person, including governments and their agencies); Clean Water Act, 33 U.S.C. § 1365 (2006) (allowing citizen suits against private parties and governments); Oil Pollution Act of 1990, 33 U.S.C. § 2702 (2006) (establishing liability to injured parties); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2006) (allowing citizen suits against private parties and governments); Toxic Substances Control Act, 15 U.S.C. § 2619 (2006) (allowing citizen suits against private parties and governments). New York remains an outlier on this issue; New York courts have interpreted the State Environmental Quality Review Act ("SEQRA") to restrict standing significantly. See Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement Under SEQRA*, 65 ALB L. REV. 421, 450-52 (2001) (citations omitted):

New York does not appear to have drawn on the experience of other states in settling on its restrictive standing requirement for challenges under SEQRA. In fact, New York appears to be alone in requiring that plaintiffs allege special harm to open the courthouse doors in these proceedings. Like New York, fifteen other states have comprehensive state environmental review statutes fashioned after NEPA. A number of these states are exceedingly liberal in their standing requirements for challenges to their state's NEPA provisions. For example, California has liberal standing rules for challenges brought under the California Environmental Quality Act (CEQA). . . . [A] "plaintiff is not required to have any legal or special interest in the result; it is sufficient that as a citizen he [or she] is interested in having the public duty enforced." CEQA challenges fall within the category to enforce a public duty. The California courts have also extended this liberal standing to citizen



Section 801(2) establishes an enforcement mechanism for public agencies and private individuals, thereby avoiding any conflict over whether the Statute is to be enforced solely by government agencies. The explicit inclusion of this provision encourages citizen suits in the public interest. Section 801(3) shifts the burden of proof to defendants when plaintiffs have stated a *prima facie* claim for relief. Some courts and existing statutes include a similar shift of the burden of proof in environmental protection contexts.<sup>78</sup> This provision adopts a precautionary stance toward acts that potentially may have caused or will cause detriments to human and ecological health. This idea has been captured in the “precautionary principle,” which has been articulated in international law and in certain domestic circumstances.<sup>79</sup>

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groups and not just to individuals. Nor does Michigan require a showing of special harm for challenges under the Michigan Environmental Policy Act (MEPA). . . . The Michigan courts have construed [MEPA’s] citizen suit provision as providing liberal standing requirements. The Michigan Supreme Court has further denied standing to parties, such as industry plaintiffs, whose interests are not to protect natural resources. A plaintiff bringing a challenge under Connecticut’s Environmental Protection Act must demonstrate that he or she is aggrieved. . . . Although at first blush this may read like New York’s special harm requirement, the Connecticut Supreme Court does not appear to apply the aggrievement requirement as strictly as the New York Court of Appeals has done for the special harm requirement in New York. A number of other jurisdictions require that a plaintiff suffer injury in fact and that the injury fall within the zone of interests of the statute. This approach, too, is more expansive than New York’s special harm standing requirement and was the test under New York law prior to the imposition of the special harm requirement by the New York Court of Appeals.

<sup>78</sup> See, e.g., *Cal. Farm Bureau Fed’n v. Cal. Wildlife Conservation Bd.*, 143 Cal.App. 4th 173, 185 (Cal. Ct. App. 2006) (citations omitted) (“Where the specific issue is whether the lead agency correctly determined a project fell within a categorical [CEQA] exemption, we must first determine . . . if substantial evidence supports the agency’s factual finding that the project fell within the exemption. . . . The lead agency has the burden to demonstrate such substantial evidence.”); Melanie E. Kleiss, *NEPA and Scientific Uncertainty: Using the Precautionary Principle to Bridge the Gap*, 87 MINN. L. REV. 1215, 1229 (2003) (“Despite the National Parks decision, the Ninth Circuit’s requirements for compliance with NEPA often reflect precautionary approaches by generally shifting the burden of proof to the agency proposing the action and placing emphasis on scientific uncertainty and reliable evidence.”). *But see, e.g., Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995) (“The party challenging the agency action . . . bears the burden of proof in these [NEPA] cases.”).

<sup>79</sup> The precautionary principle is rapidly becoming a norm of international law and has been incorporated recently into the Cartagena Protocol on Biosafety and the Stockholm Convention on Persistent Organic Pollutants. For a description of the inauguration of the precautionary principle in international law, see David Barnhizer, *Waking from Sustainability’s “Impossible Dream”*:

Section 801(4) authorizes the imposition of injunctive and monetary relief for violations of the Statute and outlines the types of relief that are preferable in various situations. Several federal and state environmental protection statutes similarly authorize specific types of relief.<sup>80</sup> Section 801(5) enables plaintiffs to sue at any time for prospective violations. It allows claims to be brought retroactively only in exceptional circumstances. Very few statutes allow retroactive imposition of liability—however, one of the prime examples of a statute that does impose such liability is CERCLA, a quintessential environmental protection statute.<sup>81</sup> While CERCLA establishes strict, retroactive, joint and several liability, the Statute limits its reach by requiring that there be no other remedy under the law before a plaintiff may pray for retroactive relief.

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*the Decisionmaking Realities of Business and Government*, 18 GEO. INT'L ENVTL. L. REV. 595, 690 (2006). Within the United States, the principle is flourishing in various governmental agencies, including most prominently the Food and Drug Administration, whose entire approach to regulation is precautionary. The precautionary principle has not fared so well in domestic courts although the Hawaii Supreme Court has explicitly approved of the use of a “precautionary approach” for natural resources decisions:

The ‘precautionary principle’ appears in diverse forms throughout the field of environmental law. . . . As with any general principle, its meaning must vary according to the situation and can only develop over time. In this case, we believe the Commission describes the principle in its quintessential form: at minimum, the absence of firm scientific proof should not tie the Commission’s hands in adopting reasonable measures designed to further the public interest.

In re Water Use Permit Applications, 9 P.3d 409, 466-67 (Haw. 2000) (citations omitted) (analyzing water conservation measures implemented by Hawaii’s Commission on Water Resource Management).

<sup>80</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7604(a) (2006) (authorizing courts to apply civil penalties, to compel agency action, and to enforce emission standards); Clean Water Act, 33 U.S.C. § 1365 (2006) (authorizing courts to apply civil penalties, to compel agency action, and to enforce effluent standards); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (2006) (granting courts the authority “to enforce the permit, standard, regulation, condition, requirement, prohibition, or order [at issue], to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . , to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty . . . , and to apply any appropriate civil penalties”).

<sup>81</sup> 42 U.S.C. § 9607 (2006) (imposing retroactive liability on any person who owned or leased land where hazardous waste was disposed and on any person who used the services of any waste disposal operator or accepted waste therefrom).

## **§ 802: Attorney Fees and Cost Recovery in Litigation**

(1) Plaintiffs that prevail in litigation shall be awarded reasonable attorney fees and other litigation costs, in addition to any monetary damages that the court may deem proper. Monetary damages exceeding the amount of reasonable attorney fees and litigation costs must be placed in the common assets trust or special account established by § 701(5) of this chapter. This provision is intended to encourage litigation on behalf of the public welfare that seeks to maintain and restore the ecological health of the environment for the future.

(2) Defendants that prevail in litigation shall be awarded reasonable attorney fees and other litigation costs only when the court finds that plaintiffs have brought a frivolous claim or a claim solely intended to harass the defending parties.

### **Discussion of § 802**

To encourage public interest litigation under the Statute, Section 802 provides for the recovery of attorney fees and other litigation costs. Numerous statutes similarly provide for cost recovery where there exists a compelling interest in private enforcement of the law.<sup>82</sup> One law with especially comparable terms is California's Public Records Act: "The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. . . . If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency."<sup>83</sup>

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<sup>82</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7604(d) (2006) (authorizing award of costs of litigation whenever the court deems it appropriate); Clean Water Act, 33 U.S.C. § 1369(b)(3) (2006) (authorizing award of costs of litigation whenever the court deems it appropriate); Toxic Substances Control Act, 15 U.S.C. § 2619(c)(2) (2006) (authorizing award of costs of litigation whenever the court deems it appropriate); Private Attorneys General Act of 2004, CAL. LABOR CODE § 2699 (2006) ("Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs.");

<sup>83</sup> CAL. GOV'T CODE § 6259(d) (2006).

### **§ 803: Judicial Administration**

- (1) When examining acts permitted by state agencies, courts should provide heightened scrutiny to acts that may do the following:
- (a) Further degrade elements of the environment that are already threatened or degraded, including, for instance, certain natural resources and fragile ecosystems;
  - (b) Present a risk of potentially catastrophic consequences if not properly undertaken; and/or
  - (c) Disproportionately benefit private parties to the detriment of the public.
- (2) In all actions brought pursuant to this chapter, courts shall ensure the matter may be quickly heard and resolved.

### **Discussion of § 803**

While applicable to all causes of actions under this chapter, Section 803(1) attempts, in particular, to limit the judicial deference given to administrative agencies in situations in which the potential impacts of an act for which a permit has been granted indicate a significant likelihood of process failure. Although courts typically establish standards for scrutinizing administrative agency decisions, jurisprudence on standards of scrutiny has proven notoriously confusing in certain circumstances.<sup>84</sup> For this reason, the

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<sup>84</sup> In the context of constitutional rights and gender, for instance, the Supreme Court's standard for scrutiny of legislative actions has left many courts and commentators somewhat baffled. See, e.g., Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 2043 n.206 (2006):

The Court's demanding interpretation of intermediate scrutiny in [the Virginia Military Institute case] left many confused regarding the meaning and proper application of the intermediate scrutiny standard. See, e.g., Cass Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 75 (1996) ("After *United States v. Virginia*, it is not simple to describe the appropriate standard of review. States must satisfy a standard somewhere between intermediate and strict scrutiny."); Jeffrey A. Barnes, *Case Note, The Supreme Court's "Exceedingly [Un]persuasive" Application of Intermediate Scrutiny in United States v. Virginia*, 31 U. RICH. L. REV. 523, 523 (1997) ("The Court's apparent heightening of the level of scrutiny applied to gender-based classifications from the previously used intermediate scrutiny to an ambiguous standard . . . equivalent to strict scrutiny, will further inhibit legislatures from classifying or treating individuals differ-

Statute seeks to guide courts in their enforcement of the Statute as it pertains to administrative agency decision-making. This is, as far as the Statute's author knows, an unprecedented statutory provision. The provision implicitly acknowledges that courts do not possess the expertise of administrative agencies but recognizes that there may be certain circumstances which require heightened judicial scrutiny in this context. Hence, Section 803(1) identifies such circumstances and requires courts not to treat agency decisions too deferentially when one (or multiple) of the outlined factors is present.

Due to the dangers to ecological health that may be posed by violations of the Statute, Section 803(2) mandates that courts hear and resolve claims under the Statute as quickly as possible and prioritize such claims for scheduling purposes. This provision parallels provisions in CEQA.<sup>85</sup>

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ently based upon their gender.”); Steven A. Delchin, *United States v. Virginia and Our Evolving “Constitution”: Playing Peek-a-boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121, 1134 (1997) (arguing that “[t]he statements, formulations, and descriptions in the VMI majority opinion may presage the Court’s final ‘evolution’ to strict scrutiny for sex-based classifications”); Pherabe Kolb, *Comment, Reaching for the Silver Lining: Constructing a Nonremedial yet “Exceedingly Persuasive” Rationale for Single-Sex Educational Programs in Public Schools*, 96 Nw. U. L. REV. 367, 375 (2001) (“Although most courts since Virginia have applied the exceedingly persuasive justification standard in much the same way as they applied intermediate scrutiny, many courts are still unclear as to whether Virginia heightened, or simply re-iterated, the standard of review for gender classifications.” (footnote omitted)).

<sup>85</sup> CAL PUB RES. CODE § 21167.1 (2006):

- (a) In all actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5 [i.e., “[a]ny action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency” § 21168], including the hearing of an action or proceeding on appeal from a decision of a lower court, all courts in which the action or proceeding is pending shall give the action or proceeding preference over all other civil actions, in the matter of setting the action or proceeding for hearing or trial, and in hearing or trying the action or proceeding, so that the action or proceeding shall be quickly heard and determined. The court shall regulate the briefing schedule so that, to the extent feasible, the court shall commence hearings on an appeal within one year of the date of the filing of the appeal.
- (b) To ensure that actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5 may be quickly heard and determined in the lower courts, the superior courts in all counties with a population of more than 200,000 shall designate one or more judges to develop expertise in this division and related land use and environmental laws, so that those judges

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will be available to hear, and quickly resolve, actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5.