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**ENVIRONMENTAL LITIGATION: AN ANALYSIS OF
BASIC STRATEGIES, PROCEDURES, SUBSTANTIVE
RIGHTS AND THEIR EFFECTS**

JOSEPH Z. FLEMING*

Environmental litigation did not have much meaning twenty years ago. Most law schools only recently initiated courses in Environmental Law. Even now, analysis of the term environmental litigation is difficult. Important social, environmental and economic values involved in litigation regarding the environment constantly change and create not only new substantive rights but new forums. Like everything else in the environment, these values will continue to change.

As in every area of the law, the need to reach final decisions in each case is an indispensable part of the environmental litigation process. For this reason, it is valuable to evaluate the strategies, procedural rules and substantive rights involved in such litigation. Whether the analysis is of assistance because it prepares the attorney for problems or shows errors which can be avoided, it is worthwhile to recognize that the attorney's analysis of the case often determines the outcome. The attorney, therefore, must interpret the client's environmental rights in terms of standing, available procedures, and selection of a forum and must present a case based upon existing information and law.

The importance of an attorney's role in interpreting a confusing environment of facts and law is best described by the story of the warrior who consulted the Oracle of Apollo at Delphi as to whether it would be safe for him to proceed to a particular war. The oracle responded:

**"THOU SHALT GO AND THOU SHALT RETURN
NEVER BY WAR SHALT THOU PERISH."**

The warrior (without consulting an attorney) decided that a comma should be placed after the word "RETURN" as follows:

**"THOU SHALT GO AND THOU SHALT RETURN,
NEVER BY WAR SHALT THOU PERISH."**

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The warrior proceeded to war, but did not return. Thus, he should have placed the comma after "NEVER." The oracle's pronouncement should have been interpreted:

"THOU SHALT GO AND THOU SHALT RETURN NEVER,
BY WAR SHALT THOU PERISH."

The foregoing shows the need for proper interpretation of pronouncements. Different results can be obtained by different interpretations of the same law and facts and environmental litigation can vary by virtue of the strategies, procedures, and substantive interpretations relied upon by the parties.

THE NATURE OF ENVIRONMENTAL LITIGATION

Although it is possible to trace litigation regarding protection of the environment back to the English common law,¹ the term "environmental litigation" generally relates to the litigation commencing in the late 1960's for the protection of the environment.² Environmental litigation was then, and today remains, part of a social movement whose goals are protection of the environment for present and future generations.³ Like other social movements—such as the trade union movement⁴ and the civil rights movement⁵—environmental protection values have been codified by legislation.⁶ H.L. Mencken said that "Americans feel that every question can be answered by passing a law; either for it, or against it."⁷ Whether or not this is a legitimate description of the legislative process, it is an accurate account of the subject known as "Environmental Law."⁸ In the late 1960's, environmental litigation involved the application of existing property law and broad consti-

1. See generally William Aldred's Case, 77 Eng. Rep. 816 (KB 1610). See also F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 51-81 (1973) (publication of the Council on Environmental Quality).

2. ENVIRONMENTAL LAW INSTITUTE, *FEDERAL ENVIRONMENTAL LAW* 1-18 (E. Dolgin & T. Guilbert eds. 1974).

3. See *LAND USE CONTROLS IN THE UNITED STATES: A HANDBOOK ON THE LEGAL RIGHTS OF CITIZENS BY THE NATURAL RESOURCES DEFENSE COUNCIL, INC.* 2-3 (Moss ed. 1977).

4. See generally *THE DEVELOPING LABOR LAW* 3-59 (C. Morris ed. 1971).

5. See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW VII-XIII* (1976).

6. See generally ENVIRONMENTAL LAW INSTITUTE, *FEDERAL ENVIRONMENTAL LAW* 1-18 (E. Dolgin & T. Guilbert eds. 1974).

7. This quote has been attributed to H.L. Mencken. See generally H. MENCKEN, *THE AMERICAN LANGUAGE* (1977).

8. See generally F. BOSSELMAN, D. FEURER & C. SIEMON, *THE PERMIT EXPLOSION* 19-20 (1976) [hereinafter cited as *THE PERMIT EXPLOSION*].

tutional doctrines by groups and individuals to challenge certain decisions adversely affecting the environment.⁹ The issue of whether there existed a constitutional right to a clean and safe environment¹⁰ was never really resolved by the courts because legislatures created a matrix of protective laws at the municipal, county, state and federal levels.¹¹

While this article deals with environmental litigation, it is incorrect to suggest that all environmental issues are resolved solely by environmental litigation before administrative or judicial tribunals. Since environmental law results from a social movement, many questions have been, and will continue to be, resolved not only by administrative agencies and the courts but by the combined legislative, economic, and political processes which form the basis for decisionmaking in a pluralistic society.¹² The effect of these varied means for solving environmental problems is the creation of a multitude of options for the attorney representing a client in an environmental matter. Before one acts, these options must be evaluated carefully to determine whether the choice of forum and the tactics used will ultimately be in the client's best interest. These considerations are of equal importance whether the client be a project's proponent or foe.

THE NATURE OF THE PARTIES AND THEIR ABILITY TO SEEK RELIEF

An attorney's initial inquiry should be an evaluation of the parties and the forum in which their rights can most effectively be litigated. It is often easy to initiate suit in the wrong forum and only later find that an alternative forum would have been more desirable.

Many project opponents have depleted their financial resources in an initial forum only to find that they are unable to continue their opposition in an alternate forum. Initial administrative decisions, which may be made after long and costly hearings, often can be appealed to a higher level and then reversed.¹³ In addition, there are

9. See *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971).

10. Cf. *Illinois v. City of Milwaukee*, 406 U.S. 91, 104-07 (1972) (application of "federal common law" to pollution of interstate waters).

11. See *THE PERMIT EXPLOSION*, *supra* note 8, at 1-4.

12. For a good example of these processes see Sitomer, *How Coastal Towns Fight Offshore Oil Probes*, *Christian Science Monitor*, Aug. 27, 1975, at 11, col. 3.

13. See generally *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971); *THE PERMIT EXPLOSION*, *supra* note 8, at 4-5 (demonstration of the problem and recommended solutions to the lack of coordination in the present system's appellate review of land use controls).

cases in which the effect of a successful decision, even if not reversed by the courts, can be eliminated by applying a new criteria to the project which was not involved in the initial decisionmaking process. For example, approval of a zoning permit, after extended and costly litigation, may still not prevent a project from being attacked as a public nuisance.¹⁴

Proponents of a project do not always have the opportunity to select the forum of their choice but must proceed through the various administrative permit procedures which regulate their project. They must initially be aware of the multiple permits required and anticipate the defenses available to each permit's approval. Obviously, this preliminary phase must include an evaluation of all applicable environmental laws in order to avoid a subsequent encounter with unanticipated proceedings, large financial burdens, and ultimately, the very ability to proceed.¹⁵ For example, a developer involved in a wetland area is charged with knowledge of the necessary federal permits in addition to those required by state and local governments. Failure to adequately analyze the required permits could result in long and costly litigation to obtain a single local zoning permit which may ultimately require commitment to a project which is prohibited by state or federal law.¹⁶ Financing costs alone make it unwise to approach any project without trying to evaluate all the conceivable permits and regulations that could be required.

To properly evaluate relevant environmental laws, it is important to determine the nature of those interested or affected by a particu-

14. See *Gardner v. Sailboat Key, Inc.*, 295 So. 2d 658, 661 (Fla. Dist. Ct. App. 1974) (court confirmed that public nuisance pursuant to state statute could exist notwithstanding compliance with local zoning codes and the issuance of zoning code permits).

15. THE PERMIT EXPLOSION, *supra* note 8, at 20.

16. A strange illustration of the uncertainty that a local or state permit will insure a federal permit is seen in the case of *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56, 57-61 (Fla. Dist. Ct. App. 1976). A developer obtained a state court order requiring issuance of a state dredge and fill permit and the state was found after granting the state permit to have improperly objected to issuance of a federal dredge and fill permit. The federal permit was denied, although the state permit had been granted. A state court was subsequently asked to find and did find that the unusual facts involving the state's actions required the state to institute condemnation proceedings as to the property which could not be utilized without the federal permit involved. *Id.* at 61.

Most environmental agencies will allow amendments to permit applications. Proposed projects may be substantially modified to overcome specific agency objections which may not eliminate all environmental concerns. Thus opponents may also prevail in litigation regarding permits and find that modifications still enable a developer to obtain permits for a similar project.

lar project. A project's proponent or developer should attempt to analyze various interests and determine who will benefit from the proposed project, who will be or may perceive that they will be adversely affected by the proposed project, and who will be motivated to support or oppose the project for economic, political, social, environmental or psychological reasons. The foregoing interests are as important to evaluate because of their impact, as are the jurisdictional interests of the local, state, and federal regulatory agencies.¹⁷

For example, The National Environmental Policy Act¹⁸ (NEPA) requires that an environmental impact statement be prepared regarding federal permits which can have a significant effect upon the human environment.¹⁹ Nevertheless, federal agencies have established standards or "thresholds" to determine whether an environmental impact statement must be prepared. The thresholds used are not always consistent and depend more upon the interest groups which are affected by the project than the agencies established to enforce the laws. A specific demonstration of this inconsistency was the decision by the United States Department of Transportation and other federal agencies that an environmental impact statement was necessary in order to issue construction permits for bridges linking an island development project to an adjacent Florida community.²⁰ The same federal agencies found that it would not be

17. Most agencies are limited by their statutory authority as to the scope of environmental protection which they may regulate. This should be evaluated by all interested parties prior to litigation in order to determine whether litigation can resolve the problems involved.

18. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975).

19. *Id.* § 4332 provides that:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

20. Department of Transportation, United States Coast Guard, Three Islands Development Hallandale and Hollywood, Florida: "Preliminary Environmental Impact Statement

necessary to prepare an environmental impact statement regarding construction of a series of new bridges composing the Florida Overseas Highway linking Key West and other Florida Keys to the mainland.²¹

Thus, an analysis of the groups affected by an environmental project and their motivations for involvement is important because it can suggest the type of permits that may be necessary and the type of proceedings which may be involved. That determination is possible because some interest groups may have the ability to litigate questions in the courts while others may be unable to do so. Inability to litigate in the courts may result in groups utilizing other methods and alternatives in their opposition to a project. The result is that an analysis of the interest groups likely to be affected by a project is an important means of evaluating the type of administrative and judicial proceedings which may be involved in obtaining approval necessary for the project.

Factors which motivate parties interested in environmental matters often relate to problems which are common or shared by other members of the public.²² The role of any adjudicatory body, be it agency or court, is that of a forum for resolving specific cases or controversies. Because courts are reluctant to resolve policy questions without a reason to do so,²³ there are adjudicatory definitions of interests of parties in terms of their right to appear before the forum and present a question.²⁴

Traditionally, a complaining party had to have some property

Pursuant to Section 102(2)(c) PL 91-190" Coastguard No. 3271/3258/3259 (undated). The Coast Guard as lead agency determined that preparation of an environmental impact statement was required.

21. The Florida Keys Overseas Highway bridges have been determined not to require an environmental impact statement in a number of Public Notices issued on a bridge-by-bridge basis. The National Environmental Policy Act requires the preparation of a "negative declaration" where an environmental assessment indicates that the project will have no significant impact on the environment. It must include an appraisal documenting the agency's reasons for concluding that no statement is required. 38 Fed. Reg. 1699 (Feb. 16, 1973) amending 40 C.F.R. §6.25(a) (1972); see *Scientists' Inst. For Public Information, Inc. v. United States Atomic Energy Comm'n*, 481 F.2d 1079, 1094-95 (D.C. Cir. 1973).

22. Cf. *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972) (requiring that the common nature of interests be recognized only where a "special interest" is alleged so as to support standing). See Jaffe, *Standing to Sue in Conservation Suits*, in *LAW AND THE ENVIRONMENT* 123, 131 (M. Baldwin & J. Page eds. 1970).

23. No less a result is required by article III of the United States Constitution. U.S. CONST. art. III, § 2; Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816, 818 (1969).

24. Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 *HARV. L. REV.* 645, 646 (1973).

interest affected by the outcome of the decisionmaking process.²⁵ Since environmental interests are usually common or shared, it is often difficult to determine the unique nature or interest of a party trying to obtain environmental protection. Environmental interests and the results of environmental litigation have been, and will continue to be, affected by legal doctrines that define the right of parties to appear before a specific forum.²⁶ Whether or not relief is available to an opponent of a project often determines which forum, administrative, judicial, or in certain cases, political, will be used.²⁷

For both sides in an environmental controversy it is important to assess environmental litigation in terms of those concepts or defenses which will be raised to bar a party from litigating. Those concepts affect the outcome of environmental litigation and play an important role in determining which forum will be used. Set forth below is an analysis of some of the more important concepts which relate to the substantive interests of the parties in environmental litigation, the timing of their actions, and strategies which can be utilized to obtain relief.

The Standing Question—The Right of Parties to Invoke Jurisdiction and Substantiate their Ability to Redress an Injury Capable of Being Proved

The question of standing is one of the most difficult issues in environmental litigation.²⁸ Although an objector's lack of standing can limit judicial remedies, it does not necessarily eliminate the objection to a project. Inability to litigate may be a two-edged sword because it forces opponents of a project to utilize other forums when they lack standing to litigate in the courts. Thus, the ability to utilize the courts may determine whether objectors will resort to the remedies available through legislation and politics or

25. For an interesting analysis of the changing nature of property interests, see Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).

26. Cf. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). In *Warth*, the Court denied standing to groups and nonresident individuals because they did not "allege specific, concrete facts demonstrating" that they were harmed and would benefit "from the court's intervention." *Id.*

27. Thus, selection of choice of a forum must include an analysis of the probability of standing. See W. RODGERS, ENVIRONMENTAL LAW 23-30 (1977).

28. See Carmichael, *Some Jurisdictional and Related Problems in Environmental Litigation*, 1 Environmental Litigation 117, 122 (July 17-22, 1977) (ALI-ABA Course of Study Materials).

to the regulatory and rulemaking functions of the agency process.²⁹

In recent years, the tendency has been to codify environmental protection rights and to recognize that such codification is meaningless without the standing to pursue the right.³⁰ Thus, many federal statutes confer standing as a means of insuring that substantive provisions will be enforced.³¹

Because such statutory rights are not always available to opponents of a project,³² judicial standing tests remain important. The most significant standing test was articulated by the United States Supreme Court in *Sierra Club v. Morton*.³³ The Sierra Club, without alleging any specific use or harm to its interests, attempted to test the concept of whether it would have standing to protect natural resources of the Mineral King Valley in the Sierra Nevada Mountains from a proposed development by Walt Disney Enterprises, Inc. The Sierra Club alleged that the project would adversely affect, if not destroy, the park's scenery, natural and historic objects and wildlife for future generations.³⁴ The Court, however, held that the Sierra Club lacked standing.³⁵ It articulated the test to establish standing by noting what had not been alleged.

The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.³⁶

The Court in *Sierra Club* also rejected the argument that natural objects should have standing,³⁷ despite the forceful dissent by Jus-

29. Thus, standing can be viewed as a determination of whether judicial relief may be available, but is not determinative of whether opponents will obtain a forum for opposition.

30. See W. RODGERS, ENVIRONMENTAL LAW 75 (1977). "In recent years, Congress has acted repeatedly to give citizens an enforcement role under the environmental laws." *Id.* at 75.

31. See, e.g., Toxic Substances Control Act § 20, 15 U.S.C.A. § 2619(a) (Supp. 1977); Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (Supp. V 1975); Clean Air Act Amendments of 1977, 42 U.S.C.A. § 7604(a)-(e) (Supp. 3 1977 & Supp. 4 1978).

32. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975) does not contain a citizen's suit provision. See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689-90 (1973).

33. 405 U.S. 727, 738-40 (1972).

34. *Id.* at 734.

35. *Id.* at 741.

36. *Id.* at 735.

37. See *id.* at 738. The Sierra Club felt that harm to natural objects such as trees, rocks, and animals should create standing regardless of injury to the plaintiff.

tices Douglas and Blackmun to the contrary.³⁸ The matter has not been seriously pursued, however, because the Supreme Court did recognize that standing was available if an "injury in fact" test was met.³⁹ The Court noted that an "injury in fact" sufficient to establish standing under section 10 of the Administrative Procedure Act could be established by pleading that changes in use would destroy the environment.⁴⁰ The Court rejected arguments that aesthetic and environmental interests could be distinguished from economic well-being, or that environmental interests shared by many were less deserving of legal protection.⁴¹ The Court however, held that meeting the "injury in fact" test requires more than an injury to a cognizable interest; the party seeking relief must be among those injured.⁴²

It is important to carefully evaluate the standing issue because it will be raised often. Although other articles in this issue cover the more recent case law developments,⁴³ the practical question which remains is how to allege and prove standing. The best procedure to obtain standing is to utilize the "injury in fact" test language in *Sierra Club*. This requires three principal allegations: first, that a proposed use will destroy the environment; second, that the objecting party uses the area of the environment involved; and third, that the proposed use, because of its environmental destruction, will prevent the objector's use and thereby cause direct and substantial injury to the objector.

Even where Congress and state legislatures have provided for statutory standing through "Citizen Suit" provisions which ensure that the citizen's right to sue is judicially recognized,⁴⁴ alleging the "injury in fact" standing requirements of *Sierra Club v. Morton* is a worthwhile precaution.⁴⁵ As a result of the tendency of advocates to raise the standing defense and to assert that the *Sierra Club v.*

38. *Id.* at 741-42 (dissenting opinion).

39. *Id.* at 734-39.

40. *Id.* at 734.

41. *Id.* at 738-39.

42. *Id.* at 734-35.

43. See Skillern, *Private Environmental Litigation: Some Problems and Pitfalls*, 9 ST. MARY'S L.J. 675, 713-29 (1978).

44. There is authority which supports the conclusion that statutory citizens suit provisions "should be read as doing away with the necessity for the normal 'injury in fact' standing allegations." W. RODGERS, *ENVIRONMENTAL LAW* 76-77 (1977).

45. In one statutory provision which confers standing, a citizen is defined as "a person or persons having an interest which is or may be adversely affected." Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(g) (Supp. V 1975). Thus, rather than argue that such a statutory provision does not require an injury in fact, it is best to allege such an injury.

Morton test applies even where statutory standing exists,⁴⁶ it is advisable to establish a substantial interest in the outcome of the case and injury in fact, even if an appropriate statutory standing provision exists.

Allegations of standing should be detailed even though many jurisdictions under the liberal rules of pleading do not require that a party allege detailed facts which will justify standing.⁴⁷ It is worthwhile to allege injury in fact and to carefully examine the facts relating to standing from the outset of an environmental case for several reasons. Primarily such allegations focus early attention on the need to obtain information relating to standing and thereby enable action to obtain additional proof of standing.⁴⁸ In addition, detailed allegations may act as a deterrent to dilatory motions; at the least, such allegations will make it difficult for a court to ignore the possibility of an appellate court reversal of any dismissal for lack of standing. In many environmental cases, detailed allegations may be verified and assist in later efforts to obtain temporary or permanent injunctive relief and in support of motions for summary judgment.⁴⁹

The problem, however, is not merely alleging standing but proving it. The Supreme Court has ruled that it will not allow ingenious pleadings to circumvent the need for establishing a case or controversy.⁵⁰ As a result, this may entail substantial delay in obtaining the proof necessary to withstand motions for summary judgment which claim that the controversy contains no genuine issue of fact. The type and duration of delay necessary to obtain environmental evidence must therefore be evaluated in terms of its costs and in terms of the doctrine of laches.

46. This is due to the natural desire of defendants to take advantage of what has been perceived as an attempt by the "Burger Court" to block liberal standing rules. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1304-05 (1976).

47. C. CLARK, *HANDBOOK ON CODE PLEADING* 225-49 (1947).

48. In *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689-90 (1973), the majority noted that summary judgment would be the appropriate method to test the truth and proofs of the plaintiff's factual standing assertions and that a motion to dismiss was not the appropriate procedure. Thus, the complaint may be supplemented, assuming a motion for summary judgment is not filed simultaneously with a motion to dismiss thereby presenting the same issue early in a case.

49. This would be a wise precaution in view of the decision in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689-90 (1973).

50. *Id.* at 688, where the Court stated: "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *Id.* at 688.

The Laches Defense—Finding the Evidence and Proceeding to Court in Time

The general rule is that the defense of laches is not favored by the courts in environmental law suits.⁵¹ Nevertheless, as with any general rule, there are exceptions.⁵²

Courts have applied laches as a defense in environmental litigation where parties were aware of an action complained of and delayed unnecessarily.⁵³ The question of awareness relates not only to the date of the action complained of, but also the relevant period of a particular plaintiff's interests in a matter. Some state courts have calculated the laches bar by using the date when it became reasonable for a plaintiff to act upon, or complain of a wrong, rather than the time when the wrong occurred.⁵⁴ The Fifth Circuit has utilized "three independent criteria" which must be met before laches can be applied: (1) a delay in asserting a right or claim; (2) the delay was not excusable; and (3) there was undue prejudice to the party against whom the claim is asserted.⁵⁵

Even where standing exists, there are often delays prior to litigation. Frequently, the public nature of environmental problems encourages opponents to delay taking effective action due to the hope or belief that general opposition will persuade proponents of a project to improve or abandon the project.⁵⁶ An alternative source of delay exists when litigation cannot be resolved until there has been extensive discovery to obtain proof of the alleged injury in fact.⁵⁷ Delay for such purposes, while necessary, may be used by a project proponent to preclude any relief through the assertion of a laches

51. See *Steubing v. Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975); cf. Note, *The Application of the Doctrine of Laches in Public Interest Litigation*, 56 B.U.L. Rev. 181, 182 (1976).

52. See *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 977 (2d Cir. 1976).

53. *Save our Wetlands, Inc. v. United States Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir.), cert. denied, 98 S.Ct. 126 (1977); see *Ecology Center v. Coleman*, 515 F.2d 860, 867 (5th Cir. 1975); *Clark v. Volpe*, 342 F.Supp. 1324 (E.D.La.), aff'd, 461 F.2d 1266 (5th Cir. 1972).

54. See *Moore v. State*, 553 P.2d 8, 15-17 (Alaska 1976) (court referred to the "two independent tests" as an excusable delay by a plaintiff and resulting undue prejudice to the defendant).

55. *Save our Wetlands, Inc. v. United States Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir.), cert. denied, 98 S. Ct. 126 (1977).

56. This is a result of the common nature of most environmental problems and the typical human response that a problem may disappear if ignored or may be resolved by someone else. *But see Moore v. State*, 553 P.2d 8, 15-17 (Alaska 1976) (where defense of laches is asserted, public interest nature of lawsuit helps balance the equities in favor of plaintiff).

57. This is especially true due to proof problems and the technological complexity of most environmental controversies. See W. RODGERS, ENVIRONMENTAL LAW 5-14 (1977).

defense. Where a project has been substantially completed, a court could translate its reluctance to act in terms of the doctrine of laches.⁵⁸

It appears that the defense of laches can be segmented, however, so as to preclude only certain relief. In the "segmentation approach" to laches, courts have analyzed the defense in terms of specific elements of a project and applied the concept of laches only to certain portions of a project.⁵⁹ Thus in one case, construction had begun on a project which had not been the subject of a proper environmental impact statement. The court found that the ability to challenge the construction was no longer possible, although it was still appropriate to determine the type of use for the facility.⁶⁰ The segmentation of a project provides one means of avoiding laches where it would otherwise be an effective defense. It suggests the need to analyze a project in stages to determine how to minimize effects at different points.

Another means of avoiding application of the doctrine of laches is to determine the administrative processes involved. Where various agency permits are required, the ability to challenge compliance through the administrative process cannot be barred by laches. Administrative agencies often view failure to obtain a permit as non-compliance and laches will not be a defense to non-compliance with a statutory requirement.⁶¹

A final means for avoiding the doctrine of laches is to petition for agency relief regarding a substantive regulatory function which relates to a project. If an agency recognizes the request for relief based upon its statutory duty, the agency may assert jurisdiction. If it declines relief, the adverse agency decision may provide a basis for challenging a project through litigation of the duty imposed by the agency regulation affecting a project.⁶²

In determining whether the defense of laches may be applicable,

58. See *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 977 (2d Cir. 1976).

59. See *id.* at 978.

60. *Id.* at 978. Plaintiffs in this case had failed to file suit until two years after notice of construction was given and at the time of appeal construction was 35% complete.

61. Even after a project has been improperly built without permits, agencies may seek restoration and not be barred by the laches defense. For illustrations of cases involving restoration after alleged unauthorized dredge and fill operations, see *United States v. Joseph G. Moretti, Inc.*, 387 F. Supp. 1404, 1407 (S.D. Fla. 1974) (partial restoration), *rev'd in part, vacated in part, remanded* 526 F.2d 1306 (5th Cir. 1976); *United States v. Joseph G. Moretti, Inc.*, 331 F. Supp. 151, 158 (S.D. Fla. 1971), *vacated in part and remanded*, 478 F.2d 418 (5th Cir. 1973).

62. *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

it becomes important for both proponents and opponents of a project to analyze alternatives for several reasons. First, the existence in environmental law of multiagency procedures often makes it appropriate to negotiate from strength rather than weakness. Instead of testing the validity of a defense of laches, it is often more practical to determine whether a matter can be settled. Second, the ability to obtain evidence may be affected by the existing time limits.

Mootness—Unless Seeking Relief Can Bar Further Action, a Project May Be Completed Pending Litigation

The nature of environmental litigation involves projects which are usually quite controversial and costly. As a result, it is unlikely that project opponents will be able to obtain temporary injunctive relief in most environmental cases.⁶³ Often during litigation a project will advance to the stage at which courts may determine that an attack on certain action may be moot.⁶⁴ This could be viewed as an alternative to the defense of laches, however, the concept of mootness does not depend upon prior knowledge of a project or undue prejudice to a party. Even if a laches defense cannot be established, there comes a time when relief is merely too late.

It is important for both proponents and opponents to analyze environmental litigation in terms of those procedures which can prevent a project from proceeding. The fact that use of one remedy may require time, but not block a project, and another remedy may require even more time and simultaneously delay a project is important since it may determine whether the opponent will be recognized and given an opportunity to negotiate regarding his objections to a project. Thus, if an environmental impact statement were required by an agency prior to the issuance of a permit, then a slow administrative process is not going to result in the mooting of an opponent's complaint. Any delay in administrative proceedings postpones the project and becomes an advantage for the party ob-

63. In fact, the federal courts have recognized that in such cases the imposition of a high bond "would have the effect of denying . . . non-profit environmental organizations . . . judicial review of defendant's actions" where relief is sought under the National Environmental Policy Act. *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 167, 168 (D.D.C. 1971), *aff'd*, 458 F.2d 827 (D.C. Cir. 1972); *cf. Powelton Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809, 840 (E.D. Pa. 1968). In *Powelton*, the court did not require any bond in a Housing Act case because it would "raise virtually insuperable financial barriers insulating the agency's decision from effective judicial scrutiny." *Id.* at 841.

64. See *Don't Tear It Down, Inc. v. General Services Administration*, 401 F. Supp. 1194, 1198-99 (D.D.C. 1975).

jecting to the project.

An example of the way in which the mootness defense affects environmental proceedings is found in the previous reference to the Florida Keys' bridges. If an environmental group were interested in challenging this federal highway project requiring numerous bridges, it could object to the individual notices of permit applications which might be sent out by the Department of Transportation.⁶⁵ These numerous bridges are neither licensed or built at the same time and therefore public notices of permit applications have been issued periodically. Those bridges which were the subject of notices to which no objections were filed were constructed without an environmental impact statement. Thus, challenging the construction of any such bridge after the fact, assuming that standing and laches defenses were not raised, would place the objecting party in a position of asking for relief which would be moot. Even if the agencies were found to have violated the law, a court would have to analyze the potential environmental damage caused by the requested relief. Any relief involving elimination of a bridge could require the very type of detrimental underwater construction activities to remove existing structures that the objecting party would have to concede it sought to prevent during the construction process.⁶⁶ In such a case the objecting party's best option would not be to sue the agencies regarding bridges already built or any prior refusal to prepare an environmental impact statement, but rather to object to future permit applications for bridges. It would be preferable to petition the federal agencies to prepare environmental impact statements as to pending bridge permits and to proceed through a slow administrative process rather than seek judicial relief based on the alleged improper construction of bridges after the fact.

65. See generally Joint Public Notice Department of Transportation; Jacksonville District, Corps of Engineers File No. 77L.0462; Seventh Coast Guard District, Coast Guard File No. 16591/3444 (May 4, 1977). The Notice relates to a section of the highway system between Missouri Key and Little Duck Key in Monroe County, Florida and in part states:

Federal Funds are involved in the bridge project, with the Federal Highway Administration acting as lead agency for the environmental document. A Negative Declaration was the environmental document prepared for the bridge project. Comments concerning the effect of the project on the environment should be addressed to the Federal Highway Administration.

66. Courts are reluctant to impose a restoration requirement without evidence that it is feasible and environmentally advisable. See *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976).

Utilization of administrative procedures would prevent issuing future permits necessary for the construction of proposed bridges and would be a more practical approach than judicial action subsequent to the issuance of permits and the bridge construction since the administrative agency's permit determination would be a condition precedent to any construction activities. Additionally, the administrative proceeding would offer a forum for establishing evidence. The strategy involved in an administrative proceeding would not require the burden of proof, the bonding requirements and the other time pressures which exist in judicial proceedings. Regardless of how slow the administrative process might be when compared to the potentially immediate relief available in the courts, the agency procedure would still be a condition precedent to the action which the plaintiff seeks to prevent. The foregoing considerations are even more important if the ability of the objecting group to proceed is affected by the financial considerations involved in obtaining evidence and funding administrative or judicial proceedings.

Economic Interests—The Effect of Funding Litigation on Representative Capacity

Even if a party can overcome the standing and the other defenses usually raised in environmental litigation, there remains the need to fund the litigation. Whether environmental litigation is being considered by a public interest group, with little or no funding, by property owners whose interests relate to major economic investments, or by governmental agencies, it is important to consider the protection of financial resources as well as environmental resources when approaching environmental litigation. In addition, it is important to assess the economic strength of the parties involved in environmental litigation to determine the strategies they may utilize in order to present their legal position.

One of the most interesting developments in environmental litigation is the reliance upon the public interest law firm. Many of the more important cases have resulted from conservation groups or public interest law firms funding litigation.⁶⁷ As mentioned pre-

67. Two of the most visible public interest firms in environmental litigation are the Environmental Defense Fund, Inc., 162 Old Town Road, East Setauket, New York 11733, and the Natural Resources Defense Council, Inc. For a complete list of citizens' groups involved in Environmental Protection activities, see NATIONAL FOUNDATION FOR ENVIRONMENTAL CONTROL, INC., DIRECTORY OF ENVIRONMENTAL INFORMATION SOURCES 65-116 (2d ed. 1972). See *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). The NRDC successfully invalidated a restrictive test of navigability used by the Corps of Engineers for its section 404 dredge and fill jurisdiction. *Id.* at 686. As a result of this suit

viously, when resources are important to the general public, it is very unusual for specific individuals to participate in litigation by opposing a specific project which threatens those resources. Apart from the risks of counterclaims⁶⁸ and the specific standing issues which may be raised, there are economic bars to such lawsuits.

The Supreme Court of the United States confirmed that under the common law rule applicable in the federal courts, protection of the environment does not justify an award of attorneys' fees to the prevailing litigant.⁶⁹ There are, however, environmental protection statutes which provide for authorization of attorneys' fees to the prevailing parties,⁷⁰ and state courts have considered establishing their own "common law rules" in order to award attorneys' fees.⁷¹ Nevertheless, these statutes and decisions do not provide the necessary economic basis for initiating an environmental lawsuit and obtaining the often costly expert witnesses.

Unlike other areas of the law, the use of a class action suit does not appear to have much significance in environmental litigation to date.⁷² Due to the need to resolve issues such as the existence of a class, the class action results in delays that may be unacceptable because of the necessity for immediate effective results.⁷³ This could be less of a problem if the nature of environmental litigation shifted from protection of the public interest in natural resources to issues involving damages to property or to individuals caused by actions

and subsequent Corps of Engineers' guidelines, the Corps "now claims jurisdiction over not only waters subject to the ebb and flow of the tide but also coastal and freshwater wetlands and swamps that are contiguous to traditional navigable waters." W. RODGERS, ENVIRONMENTAL LAW 403 (1977). See also 33 C.F.R. § 209.120(d)(1), (2) (1977).

68. See generally Note, *Counterclaim and Countersuit Harrassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106 (1975).

69. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 270-71 (1975).

70. See, e.g., The Clean Air Act, § 304(d), 42 U.S.C. § 1857h-2(d) (1970), as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 303, 91 Stat. 771 (1977) (to be codified in 42 U.S.C. § 7401). The Toxic Substances Control Act, 15 U.S.C.A. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C) (Supp. 1977); Energy Policy and Conservation Act, § 335(d), 42 U.S.C. § 6305(d) (Supp. V 1975).

71. See *Serrano v. Priest*, 569 P.2d 1303, 1312-16, 141 Cal. Rptr. 315, 324-28 (Cal. 1977) (attorneys' fees awarded under "private attorney general" theory). See generally Comment, *Federal Powers and the Eleventh Amendment: Attorneys' Fees in Private Suits Against the State*, 63 CAL. L. REV. 1167 (1975); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-70 n.44 (1975).

72. For an analysis of the types of suits which warrant a class action and the types of problems which can be raised as a result of a class action, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1321-29 (1976).

73. *Id.* at 1331-48.

affecting the environment.⁷⁴ Such a shift is not yet apparent and is not a part of what is generally known as environmental litigation.⁷⁵

Environmental litigation usually involves the need to establish harm to an environmental system.⁷⁶ Such systems are so complicated that they cannot effectively be described by the lay witness.⁷⁷ Therefore the utilization of experts and the studies which must be obtained to establish their opinion can involve prohibitive costs.⁷⁸ Thus, the economics of environmental litigation must always be evaluated in determining strategies.

In many cases the economic interests influence the selection of a forum.⁷⁹ It is far less costly to proceed before an administrative agency which has regulations providing for standing and informal procedures which do not require extensive and expensive deposi-

74. See generally *id.* at 1322 (referring to the "consumer" class suit and citing Kalven & Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) as the "classic" statement of the theory of combining numerous consumer claims).

75. The social impact of litigation filed by an individual to challenge a statutory construction can have a broad effect even though the public is not a party. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1294-96 (1976). Professor Chayes wrote: "And courts, recognizing the undeniable presence of competing interests, many of them unrepresented by the litigants, are increasingly faced with the difficult problem of shaping relief to give due weight to the concerns of the unrepresented." *Id.* at 1296. An illustration of such a broad effect is environmental litigation by a single group against a single federal agency regarding interpretation of a federal regulation which has national effects. See *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

76. However, environmental litigation has often been used to present courts with the question of whether environmental statutes should be used to evaluate decisions which involve matters other than environmental systems. See *Breckinridge v. Rumsfeld*, 537 F.2d 864, 867 (6th Cir. 1976) (concluding NEPA's reference to "human environment" did not require an environmental impact statement as to job reduction resulting from transfers of personnel from army depots). See also Note, *The Environmental Impact Statement Requirement in Agency Enforcement Adjudication*, 91 HARV. L. REV. 815, 816-17 (1978) (noting that NEPA requirements have been raised as a defense against federal agency enforcement adjudications involving FTC policies).

77. The challenge to the Reserve Mining Company's discharge of talconite and asbestos into Lake Superior required testimony from numerous expert witnesses. *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 15, 39 (D. Minn.), *stayed*, 498 F.2d 1073 (8th Cir. 1974), *modified in part sub nom.*, *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975). See generally Hyde, *Expert Evidence in Environmental Cases—The Offense and the Defense*, 2 Environmental Litigation 223, 225 (July 17-22, 1977) (ALI-ABA Course of Study Materials).

78. The expenditure of costs for obtaining environmental information can be so large as to constitute a determination of policy. Thus in *Scientists' Inst. for Public Information, Inc. v. United States Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973), the obligation to prepare an environmental impact statement for a research and development program involving the Liquid Metal Fast Breeder Reactor was found to involve allocation of today's research money [which] dictates the application of tomorrow's technology. See W. RODGERS, ENVIRONMENTAL LAW 13 (1977).

79. See generally W. RODGERS, ENVIRONMENTAL LAW 13 (1977).

tions and the time commitment otherwise required in judicial proceedings.⁸⁰ It is also possible that agencies may grant relief which then results in the agencies assuming the legal and economic burden of proceeding with a matter.

Environmental litigation is affected in several ways by the ability of parties to present evidence relating to complex environmental systems. The costs of obtaining such evidence, in terms of money spent and time wasted, have a great effect on the strategies utilized in obtaining and presenting environmental evidence.

STRATEGY INVOLVED IN OBTAINING AND PRESENTING EVIDENCE IN ENVIRONMENTAL LITIGATION

A unique feature of environmental litigation is the need to depend upon expertise. While it may be easy to identify and object to undesirable characteristics of a project, it is necessary to translate such objections into competent and substantial evidence.⁸¹ By its nature, environmental law requires the utilization of various sciences and professional data in order to determine effects. Although the discov-

80. The Public Notice, *supra* note 65 involving the Florida Keys' bridge dredge and fill permit applications confirms that costly expert opinions are not always required. The Public Notice at pages 2 and 3 invites non-technical public participation:

The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic sites, public parks, fish and wildlife, flood damage prevention, land use classification, navigation, recreation, water supply, water quality and, in general, the needs and welfare of the people. All comments received will be made part of the record and given full consideration in determining whether or not it would be in the best public interest to grant approval.

Any person who has an interest which may be adversely affected by the issuance of the permits may request a public hearing. The request must be submitted, in writing, within thirty days of the date of this notice and must clearly set forth the interest which may be adversely affected and the manner in which the interest may be adversely affected by the activity.

Interested parties are requested to express their views, in writing, concerning the proposed work giving sufficient detail to establish a clear understanding of reasons for support or opposition.

Thus, the Public Notice provides an inexpensive method of participating in a decisionmaking process as compared to the requirements of a judicial proceeding.

81. The test for evidence in such cases varies depending upon the statutes involved, but generally is referred to as "substantial competent," "substantial" or "competent" evidence. See *Farrugia v. Frederick*, 344 So. 2d 921, 923 (Fla. Dist. Ct. App. 1977) ("substantial competent evidence"); cf. *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1123 (7th Cir. 1975) (extensive, detailed testimony found insufficient).

ery and presentation of that evidence can be quite costly, competent scientific and economic evidence is needed since environmental litigation is often unsuccessful even where the adverse effects of a project are apparent.⁸²

A classic example of this occurred in *Harrison v. Indiana Auto Shredders Co.*⁸³ There, a noisy automobile shredding and recycling plant was challenged as a public nuisance. The Seventh Circuit reversed the trial court which had enjoined the operation as a public nuisance.⁸⁴ Although there were certain obvious undesirable effects from the operation, there had not been any competent evidence to demonstrate that the operation was in fact a public nuisance.⁸⁵ The case is most significant because it appears from the court opinion written by retired Associate Justice Tom Clark that if the opinions of experts had been used to evaluate the project and had confirmed the reaction of the public, the Seventh Circuit might have affirmed the trial court.⁸⁶ The opinion of Justice Clark confirms that public opinion and the obviously annoying characteristics of a project are not competent evidence to show a public nuisance.⁸⁷

Justice Clark found that the presented testimony merely supported characterization of the shredder as "troublesome and annoying."⁸⁸ Justice Clark noted that such such testimony was not "competent to prove that the shredder constituted a threat or hazard to the health and life of the community."⁸⁹ As an example of the lack of competent evidence, Justice Clark noted that Dr. Emmett Lamb, a trained surgeon specializing in industrial medicine and the medical profession's representative to the local Air Pollution Control Board, testified about his observations. Over defendant's objections, he gave his opinion that the shredder might have a deleterious effect on the surrounding neighborhood, even suggesting that the air pollution from the shredder might have carcinogenic properties. Although this testimony was credible as to the observations which Dr. Lamb was able to make, Justice Clark felt that the evidence was insufficient because:

82. *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1115-17, 1123 (7th Cir. 1975).

83. *Id.* at 1107.

84. *Id.* at 1126.

85. *Id.* at 1123.

86. *See id.* at 1122-23, 1125 (Justice Clark was sitting by designation).

87. *Id.* at 1117.

88. *Id.* at 1116.

89. *Id.* at 1116.

Dr. Lamb could give neither qualitative nor quantitative analysis of the emissions and was able to give only tentative opinions about possible health hazards caused by the shredder because he had never analyzed or measured the shredder's emissions. In fact, the claimants were unable to present any evidence of imminent health hazards caused by or attributed to the shredder.⁹⁰

Justice Clark distinguished between competent evidence and "strong proof of the displeasure and annoyance caused by the shredder's noise, vibration and air pollution."⁹¹

Prior to asserting a given legal position, it is most important to obtain competent scientific and economic evidence in support thereof, not only for the purpose of obtaining satisfactory results, but also to insure that parties are not subjected to unnecessary counterclaims. The need for concern about counterclaims is based upon the fact that the environmental regulatory system has advanced to the stage where effective use of an objection can block projects. The ability to participate in a meaningful process therefore carries with it the obligation to proceed responsibly.⁹²

Certain laws seek public input and, in such situations, the broad nature of public concern should immunize an objector even if he or she proceeds without any competent evidence as a basis for objection.⁹³ As an example, the United States Army Corps of Engineers issues Public Notices requesting the public to provide the agency with objections and information as to a broad category of possible effects from a project which the agency may be asked to permit.⁹⁴ It is the Corps of Engineers that ultimately weighs the objections received and reaches a conclusion as to whether valid grounds exist for granting or denying a permit. Nevertheless, such agency objections involve a different standard of evidence than court procedures.⁹⁵ To proceed before a court, a party is expected to present competent evidence in support of a position. Thus, a party which has not retained expert witnesses to evaluate environmental problems prior to participating in a judicial proceeding may be held to a different standard of responsibility if the objections are later found

90. *Id.* at 1116.

91. *Id.* at 1117.

92. See Note, *Counterclaims and Countersuit Harrassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106 (1975).

93. See material quoted note 80 *supra*.

94. See material quoted note 80 *supra*.

95. See material quoted note 80 *supra*.

to lack any merit and to have delayed a project. The resolution of any doubts of proper use of the administrative or judicial process should be in favor of the objecting party.⁹⁶ Otherwise the chilling effect of the threat of counterclaims will prevent the environmental laws from working effectively.⁹⁷

The emphasis on the importance of evidence as a means of proving a case and preventing counterclaims requires consideration of how such evidence is obtained. Although the sources of environmental expertise are virtually unlimited,⁹⁸ the ability to utilize the available information is restricted by a party's ability to finance the processes necessary to obtain expert opinions and the amount of time necessary for preparation of such studies.⁹⁹ Because the process of obtaining competent evidence directly affects environmental litigation, it can become that litigation's most significant feature.¹⁰⁰

Sources of Information and Evidence

Utilizing NEPA. The National Environmental Policy Act (NEPA) is one means of obtaining environmental information.¹⁰¹ When federal agencies have issued permits without complying with NEPA—which is an environmental disclosure and evaluation statute¹⁰²—the courts have not only required compliance but have enjoined use of the action which was permitted pending compliance.¹⁰³

The process of litigating to obtain information through an environmental impact statement (EIS) required under section 102(2)(C) of NEPA illustrates a rather sophisticated approach to seeking information.¹⁰⁴ If a federal agency denies the request for an EIS, expert

96. This is due to the public policy which favors the presentation of citizens suits. See *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 699-700 (D.C. Cir. 1975).

97. See Note, *Counterclaims and Countersuit Harrassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106 (1975).

98. See W. RODGERS, ENVIRONMENTAL LAW 5-10 (1977). For an excellent listing of the varied environmental information sources see NATIONAL FOUNDATION FOR ENVIRONMENTAL CONTROL, INC., DIRECTORY OF ENVIRONMENTAL INFORMATION SOURCES (2d ed. 1972).

99. W. RODGERS, ENVIRONMENTAL LAW 5-10 (1977).

100. See *Scientists' Inst. For Public Information, Inc. v. United States Atomic Energy Comm'n*, 481 F.2d 1079, 1091, 1094 (D.C. Cir. 1973) (litigation centered around the AEC's failure to prepare an extensive EIS for a research project still in the developmental stages).

101. 42 U.S.C. § 4332(c) (1970).

102. *Id.* See also F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 2, 291 (1973) (available from the Environmental Law Institute).

103. *Id.* at 239.

104. The approach is "sophisticated" in the sense that it requires assertion of statutory

testimony is often required to show that the agency action complained of was incorrect, and that it involved a major federal action which would have a significant effect upon the human environment.¹⁰⁵ This presupposes possession of information by the objecting party in order to establish that the EIS did not contain sufficient information.¹⁰⁶ Thus, there are situations where a suit to require an EIS pursuant to NEPA can be a rather expensive and impractical way of obtaining information.¹⁰⁷

In those situations where such litigation is not possible, however, NEPA can be utilized to develop agency reports.¹⁰⁸ For example, many agencies often prepare an environmental assessment as a substitute for an EIS.¹⁰⁹ An environmental assessment is used to justify an agency's conclusion that an EIS is unnecessary and may often provide the type of information which an EIS would contain.¹¹⁰ This information can often substantiate an opponent's contradictory conclusion about the EIS or the whole project.

Developing an Agency Record. One of the more traditional approaches to obtaining information is to utilize agency hearings to develop a record.¹¹¹ In many cases, scientists and leading experts who would not ordinarily make themselves available for the purposes of judicial litigation will appear and provide a written statement at a hearing.¹¹² Many agency hearings are informal, and there

rights to force an opponent to develop the information you seek. ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 238, 278 (E. Dolgin & T. Guilbert eds. 1974) (neither NEPA nor its legislative history mentions judicial review).

105. In order to determine whether an EIS should be prepared, courts use as a review test the "arbitrary and capricious" standard. See *Hanly v. Kleindienst*, 471 F.2d 823, 835 (2d Cir. 1972).

106. In order to show that the agency "clearly," "arbitrarily" or "capriciously" erred, it is necessary to present proof to refute an agency decision that an EIS was not necessary. Often an agency will document its decision not to prepare an EIS. See *First Nat'l Bank v. Richardson*, 484 F.2d 1369, 1371 (7th Cir. 1973).

107. This is due to the need to refute the presumption that the agency has not erred. See material cited note 106 *supra*.

108. In *First Nat'l Bank v. Richardson*, 484 F.2d 1369 (7th Cir. 1973), the environmental assessment prepared by an agency to justify not preparing an EIS was a comprehensive 142 page report. *Id.* at 1372.

109. See *id.* at 1372.

110. See *id.* at 1372. See material on "negative declarations" cited at note 21 *supra*.

111. See the Public Notice quoted at note 80 *supra*, which shows the procedure followed for obtaining a hearing in most cases. See also ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 238, 389-96 (E. Dolgin & T. Guilbert eds. 1974) (review of general procedure for public hearings).

112. The author has observed this in numerous administrative hearings. Experts will not only provide published papers but often consent to preparing a statement, if they feel they can avoid subpoenas, cross-examination and timely depositions which they have experienced

is often no cross-examination.¹¹³ In addition, informal agency hearings offer the opportunity to submit documentary evidence which may become a part of the agency record.¹¹⁴ Often reports can be submitted into evidence through administrative procedures, even though the more formal judicial rules of evidence would not allow them to be made part of a record if it were created during judicial proceedings.¹¹⁵

Utilizing Freedom of Information Statutes. There are situations where litigation for the purpose of obtaining information is not practical and where no time is available to develop a record through participation in administrative proceedings.¹¹⁶ In those situations there are federal¹¹⁷ and state statutes¹¹⁸ providing for access to usable information held by governmental entities.¹¹⁹ Any opportunity to obtain information which may later be the basis for filing requests for admissions to force an opponent to stipulate to scientific evidence should not be overlooked. For example, such information can be obtained from the following sources.

Requests to governmental agencies often result in access to governmental reports which can constitute the basis for litigation and may serve as "competent substantial evidence" if the author can be found or if the validity of the document can be stipulated to in discovery or pretrial proceedings.¹²⁰ Valuable information can be obtained through governmental reports, notices and mailing lists.¹²¹

in judicial proceedings.

113. This is often due to the numbers of public witnesses who appear to oppose an application, and the time restraints which result, rather than the absence of a statutory right to cross-examine witnesses.

114. See Public Notice quoted at note 80 *supra* suggesting that written comments may be accepted.

115. See Public Notice quoted at note 80 *supra*.

116. For example, in certain cases where permits have been issued without an EIS, litigation would be necessary due to the termination of the agency process.

117. See The Freedom of Information Act, 5 U.S.C. §§ 552, 552(b) (1970 & Supp. V 1975).

118. See Florida Sunshine Law, FLA. STAT. ANN. § 286.011 (West 1975); Caplin & Pitt, *Freedom of Information And Sunshine Laws*, N.Y.L.J. Seminar Publication (Law Journal Press 1977); Comment, *Pennsylvania's "Sunshine Law": Problems of Construction and Enforcement*, 124 U. PA. L. REV. 536 (1975).

119. Such information may be obtained concurrent with discovery efforts.

120. Often agencies will distribute information through public relations or information service personnel. This is a non-statutory procedure but it should be recognized that most agencies have information divisions which issue press releases. Even opposing government counsel will often assist, if requested, in obtaining agency information available for public distribution.

121. Most agencies have regular mailing lists and will send normal press releases and reports if requested.

Congressmen and public officials often can request and obtain governmental reports. In many cases it helps to have a sympathetic official request such information, but most elected officials will respond to requests for information whether sympathetic to a position or not. The various governmental and agency sources available for obtaining evidence should be carefully considered¹²² since they provide considerable financial savings in expert reports and also save substantial time which might otherwise restrict a litigant's ability to proceed.

Discovery. In addition to the above mentioned sources, the traditional use of discovery under federal and state rules of procedure¹²³ can provide access to internal agency materials and to private parties' information. To the extent that initial information may justify litigation, it is always possible that certain key issues may require additional evidentiary proof in order to proceed with the presentation of the case. One should always consider whether the other side might agree to stipulate to certain facts, and whether experts will confirm the validity of certain facts or conclusions.¹²⁴

An illustration of this occurred in the preparation of a case involving the determination of whether a drainage district could be established in the Everglades near a proposed jetport.¹²⁵ It was argued by the National Audubon Society that the establishment of the district would interrupt the natural southerly sheet-flow of water from Central Florida's Lake Okeechobee across the Everglades, and ultimately into the Gulf of Mexico.¹²⁶ Although neither the existence of the sheet-flow nor the value of the water as a part of the environmental system was ever in question, an issue of proof did exist regarding the water's flow across the land where the proposed drainage district was to be located. The opponents of the project had access to governmental charts and even space satellite photos which

122. While such information may not always be admissible as competent if offered by an agency, it may be used by an adverse party as evidence of agency admissions or agency practices or policies.

123. See generally 4 MOORE'S FEDERAL PRACTICE ¶ 26.00[1], at 26-31, ¶ 26.02[4], at 26-71 (2d ed. 1948).

124. The nature of the judicial process often precludes the courts from undertaking an independent role and investigating independently. This has in fact been recognized as an important issue. See ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 192, 193 (E. Dolgin & T. Guilbert eds. 1974).

125. *Groover v. A.B.E. Options, Inc.*, No. 2-350 (Cir. Ct. Monroe County, Fla. Dec. 17, 1970), reprinted in 2 Environmental Litigation 164-69 (July 17-22, 1977) (ALI-ABA Course of Study Materials).

126. See *id.*

showed that certain documentation could establish sheet-flow in a general direction.¹²⁷ It was still necessary, however, to prove that the sheet-flow involved in the area of the proposed drainage district was flowing from north to southeast.

After several years of oversight satellite photographs and other information, it was established that there was no question as to the sheet-flow of the water.¹²⁸ At the time of trial, however, this information did not exist and there was no time for the extensive tests required.¹²⁹ Proof of this fact would have required an expert's interpretation of photos in order to establish the exact nature of the sheet-flow over the proposed district area involved.¹³⁰ Instead, the evidence of sheet-flow direction was established by deposing witnesses of the drainage district proponents who admitted the existence of the flow and its direction during their depositions.¹³¹ This eliminated an important evidentiary problem which could have been established, but only at great cost.

In many environmental cases, both parties face problems of proof because environmental conclusions are often based upon scientific assumptions that are difficult to document. This is certainly the case when an opponent must show that there will be harm due to a project not yet completed and when a proponent must show that the project will have no adverse effect.¹³² Obviously, until a project's completion it will be necessary to base conclusions regarding its potential effects upon scientific expert opinions. The ability to justify a scientific opinion depends upon the ability to convince the court or agency that an expert has sufficient information upon which to reach a conclusion as to the potential environmental impact of a specific project.¹³³ This type of decision is not based upon a scientific determination of a result but is a result of an expert opinion based upon available information which enables the court or agency to reach a decision. The balancing factor which is em-

127. The author participated in the case as counsel for the National Audubon Society and is therefore familiar with the exhibits involved.

128. EVERGLADES JETPORT ADVISORY BOARD, THE BIG CYPRESS WATERSHED 12 (April 19, 1971) (report to the Secretary of the Interior).

129. See note 127 *supra*.

130. The necessary proof would have created additional expenses as well as the problem of refuting the other side's attacks on the value and accuracy of the evidence.

131. See note 127 *supra*.

132. See W. RODGERS, ENVIRONMENTAL LAW 10-11 (1977) (referring to the look before you leap problem and discussing the need to predict).

133. See generally ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 192-237 (E. Dolgin & T. Guilbert eds. 1974).

ployed to determine the risks of scientific evidence being correct or not depends upon the magnitude of the issues involved.¹³⁴ It should always be recognized, however, that if the parties stipulate to, or admit the existence of, certain scientific facts and conclusions, a court or agency may accept those parties' stipulations or admissions as a basis for decision.¹³⁵

Utilizing the Expert Witness

In the presentation of environmental cases, one of the most difficult determinations is the strategy for presentation of environmental evidence. Cases have been lost by the utilization of environmental experts who are not able to testify regarding a specific field which is involved.¹³⁶ Unlike the various disciplines of science which may be utilized in reaching a conclusion in a laboratory, most environmental litigation involves an overlapping disciplinary approach to problems. In a wetlands case, it may be necessary to have testimony from biologists, chemists, hydrologists and experts in various other fields in order to reach a conclusion as to a project's potential for environmental damage.¹³⁷ It is most unusual to find a single witness who can present an entire case. In many cases even the expert witnesses are not able to help the attorney in evaluating whether certain additional experts should be called in light of the available information on the project.

The first problem that must be addressed is the source for the environmental witnesses. Most large corporations and governmental agencies have their own staffs, but they do not necessarily embrace all the scientific fields which may be involved in the project. Conservation groups usually have access to academic experts and other professionals within their membership who can provide them with information as to the type of expertise they may require.¹³⁸

134. *Id.* at 192-237.

135. *Id.* at 192-237.

136. *See* *Farrugia v. Frederick*, 344 So. 2d 921, 922 (Fla. Dist. Ct. App. 1977) (suggesting that the courts can use an expert witness to support conclusions other than those for which the witness was called to testify). In the case involved, it appeared that the expert had to admit a problem of water quality would be caused by a project. The court decision indicated there were no experts called to show that the specific problem could not be avoided by engineering techniques or other scientific means.

137. It is not likely that a single expert witness will be able to show competence or expertise in more than a limited area in such a case.

138. This presupposes a group which has established credentials and a responsible role in a community.

It is always important to evaluate the available environmental expertise and meet with all experts at one time to discuss the project. This enables evaluation of the way in which the available expertise may assist in the presentation of a case. At the initial meeting of all such experts it is important to determine the following matters.

One should first determine whether the available experts are sufficiently qualified to present the necessary testimony. This will necessarily involve an assessment of their experience in a particular field, the question of whether they are regarded as impartial and the nature of their previous testimony or publications which might in any way be used to support or oppose their testimony. Second, the potential litigant should determine whether the experts agree on the effects of the project. Certain experts may conclude that a project will cause one type of damage while other experts may disagree. This often is an effective means of determining whether your experts are sufficiently prepared and whether they require the services of additional experts in order to reconcile possible differences or resolve questions they cannot.

When meeting with experts, it is always valuable to require that their explanations be translated into simple terms. Where attorneys feel they cannot admit their ignorance of the experts' terminology because of their relationships with their clients (who may also be present), they should simply stress the need for experts to communicate in simple terms in order to: (1) present a clear presentation to a tribunal which may, in an agency proceeding, be composed of experts or, in a judicial proceeding, may be a judge in a court of general jurisdiction without any previous understanding of the terms involved; and (2) insure that the record created will be clear in the event that there is a need for appellate proceedings.

Clarity and simplicity in initial meetings will not only assist in insuring that the experts can raise and answer all the problems which may exist, but will also help in determining whether they can communicate in an effective manner. The initial meetings should also give the attorney an opportunity to determine the order and the style of presentation in a case. Most scientific systems have an interrelationship and require that one establish how an environmental system functions so that the target project can be evaluated in terms of the way it will fit into the system. Whether a party is opposing or proposing a specific project, it is difficult to communicate the exact effects that a project may have on an environmental system until the system involved is thoroughly understood.

In connection with explaining an environmental system, it is often difficult to present a single witness who can describe the entire system, therefore a thorough description may require presenting the expertise of several scientific disciplines. There are three approaches which can be used in presenting expert testimony in such a situation.

Utilization of the Generalist. This involves selection of an expert with a general background, who is not only articulate but by virtue of ability and education, can explain an environmental system in general terms. In many cases when the expert is challenged, other experts present can be called to provide additional information in any area which might be the subject of question. It is possible for one expert to rely upon the work of another. If the expert whose work is relied upon is presented as a witness, then an attempt by the opposition to challenge the witness called as a generalist may help dignify the expertise of the witness whose scientific work is relied upon. The idea of the generalist is based upon the understanding that there are other witnesses present to substantiate the generalist's testimony. To the extent that there are no such other witnesses present, it is dangerous to attempt to rely upon a single witness's generalized testimony which goes beyond that person's own area of expertise.

Utilization of the Panel Approach. In many administrative hearings, an informal procedure is followed which allows for the presentation of a panel of experts. Whether the panel involves experts seated around a single table, or the presentation of one expert after another, the panel approach is very effective. The party introducing the testimony can state at the outset that a number of witnesses will be presented. This is usually effective in a public hearing where a single party wants to demonstrate its position and indicates that it will present a number of expert witnesses. In such cases, there is a tendency to allow the single presentation to proceed without interruption. Even in those situations where agencies have the right to examine, they may recognize that they have not heard the entire presentation until all the witnesses have testified and choose to delay the examination until that time. This is a very effective means of presenting a single case, not only because it may eliminate or minimize examination and cross-examination but also because it creates a record which is easy to follow. If a public hearing involves hundreds of witnesses it becomes very expensive to select relevant testimony from the record without considering other conflicting testimony. In those cases where a party presents a position and there

are others who favor the same position but who are not equally well prepared or not in entire agreement with the approach, the panel presentation also provides an additional means of effectively distinguishing where the presentation of the case begins and ends. An attorney for a party calling several experts can not only remind the tribunal of the existence of the panel presentation, but may also introduce individual experts or witnesses and then summarize at the end of their testimony.

The Report Approach. This approach involves the preparation of a report or a statement in advance. The report is then distributed to the members of an agency or the trier of fact along with the testimony of the expert. In such cases, great care should be exercised by the party presenting such a report to insure that it does not contain either statements which appear to be argumentative or generalizations which would be objected to by either the opposing party or the individuals responsible for making the ultimate decision. If reports are inordinately broad, a single question on a specific point may cast doubt on the validity of the entire report. The advantage of such a report is that it can often be introduced into evidence and thereby save a great deal of testimony. Such a report may also minimize the examination of the particular party and allow the witness to concentrate on the conclusions without becoming involved with extensive details which might reduce the effectiveness of the presentation. Reports are also of tremendous advantage in terms of their use as part of a record in appellate proceedings. If a report cannot be admitted into evidence, however, the expert should be prepared to proceed based upon those portions of the report which are allowed into evidence. If none of the report can be admitted into evidence, the expert must be prepared to utilize an alternative presentation.

These three presentation techniques are not mutually exclusive, nor are they the only means of presenting environmental testimony. There are situations, especially in judicial proceedings, where a witness will simply not be allowed to present a report. For various reasons, those situations require that the examination process involve the attorney. To the extent that environmental litigation requires such an approach, it is similar to other forms of litigation. It is worthwhile to consider some excellent texts written on the art of examination and cross-examination in order to prepare the expert

witness for such an experience.¹³⁹

One of the more interesting features of environmental litigation is the extensive use of reports and studies presented into evidence. This allows an effective opportunity to cross-examine a witness while concurrently attempting to confuse an opponent's presentation. It is often possible to object to the introduction of demonstrative evidence such as reports unless provided the opportunity to question the witness who is supposedly the author or the collaborator in the report. In many cases, by challenging the expertise of the witness and then analyzing the report carefully, it is possible to undermine the expertise of the witness prior to the presentation of either direct testimony or the report.

As has been mentioned, the very nature of the environmental forum affects the ability to examine or cross-examine witnesses. There are advantages to appearing before an informal agency proceeding and being able to submit several witnesses who are not subject to cross-examination. Nevertheless, these advantages are short-lived if opposing parties utilize the same approach and challenge statements offered by your own expert witnesses. Administrative agencies, especially at the state level, often involve personnel who may not be attorneys and who may view the process of objecting based on evidentiary rules and cross-examination as a waste of time. Although they usually will not articulate those feelings, it is important in environmental litigation to recognize that objection and cross-examination may sometimes have an adverse effect upon the adjudicatory tribunal. This becomes an important matter of strategy in evaluating the frequency and types of evidentiary objections one should assert. Applicants for permits frequently find that if they present witnesses in a complex matter and then object to opposition witnesses, the administrative agency may postpone the hearing until a time when it does not conflict with other items on a specific agenda. Thus, a party may be forced to choose between effective objections and cross-examination for the purpose of protecting an appellate record and the ability to obtain a hearing and decision on a specific date.

The most prudent course of action is to insure that the relevant judicial rules relating to admission of evidence are followed and that improperly submitted evidence is the subject of objection.¹⁴⁰ If, in

139. One useful example of this type of literature is H. BODIN, *CIVIL LITIGATION AND TRIAL TECHNIQUES* (1976) (Practicing Law Institute Publication).

140. This is done by objecting in a manner which politely but firmly establishes a record.

the interest of allowing a hearing to proceed quickly, evidence which is not only incompetent but very damaging is allowed to be introduced without objection, it is always possible that an unfavorable decision may result. In such a case the risk to obtain a quick result may create the inability to obtain a successful appellate review. Although this is a matter which depends on a case-by-case evaluation, it must be recognized that parties involved in environmental proceedings at an agency level are often required to choose between preparation of a proper record and a quick decision. Although such decisions are usually not required in judicial proceedings, even this rule has its exceptions.

CONCLUSION

It is important to understand that the attorney involved in environmental litigation makes many choices which require interpretation of strategies and options. By always analyzing the strategies available to the opposing side, it is possible to determine the most effective method to pursue. While most environmental litigation may not involve the consequences which befell the warrior who consulted the Oracle at Delphi, it remains important to carefully evaluate the strategies available in environmental litigation because they are often determinative of the result in individual cases and ultimately affect the course of development which our nation will pursue.

While general or standing objections are useful, they may not adequately cover all the legitimate grounds. Therefore an attorney must make a continuing evaluation of the need to object to protect a record; notwithstanding the displeasure which such objections may cause in forums where non-legal triers of fact are receiving the objections.