Trial Strategy and Techniques in Environmental Litigation

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INTRODUCTION

The enactment of the National Environmental Policy Act of 1969 (NEPA) began a torrent of cases in a new and virtually uncharted area of the law. The strategies and techniques employed in these suits have varied and evolved as the success and failure of various methods have been tested. Despite hundreds of decisions rendered in the few years that the Act has been in existence, the area of environmental law remains unsettled and standardized methods of attack on public projects have yet to be firmly established.

The first cases in environmental law involved compliance with NEPA. Later cases focused on the adequacy of an environmental impact statement (EIS). As decisions uncover new avenues of attack on procedures, there is a return to a challenge of the procedural process.

This paper is concerned with highway projects and is limited primarily to strategies and techniques in environmental litigation involv-
ing injunctive relief. One reason for this limitation is that the focus of environmental litigation is not limited solely to NEPA itself, but involves project compliance with NEPA in addition to compliance with federal procedures for processing a highway project.\(^5\)

Attention should be directed to State environmental acts that might be applicable to the agency involved. Such State acts offer opportunities for both the challenger and the defender. In those States that have enacted statutes, litigation often involves compliance with State statutory procedures.\(^6\) A summary of States having such requirements at the time of this writing is given in Table 1.

PRELIMINARY OBSERVATIONS

The average attorney and lay person envisage the trial phase of litigation as that particular time in the litigation when the trier of fact takes evidence and applies the law and decides the issues in contention in the case. Usually, the trial phase occurs late in the litigation process and is preceded by law and motion matters and pretrial and discovery procedures. Although such procedures are important in framing the legal issues and in marshalling the facts to be introduced as evidence at the trial, they are not really dispositive of the litigation.

The trial phase of environmental litigation is not as well-defined because of the nature of the remedy sought by the parties, which is most often equitable. Equitable remedies involve early procedures for application to the court for judicial determination of the issues on the basis of whatever law and evidence can be brought to bear at the time. The most important of these procedures is the motion for preliminary injunction, although the application for a temporary restraining order cannot be ignored. However, the court’s decision on an application for a temporary restraining order does not, or at least should not, determine the ultimate decision on an application for preliminary injunction.

Another reason for the difficulty in precisely defining the trial phase of environmental litigation, as compared with other more traditional types of litigation, lies in the nature of the subject matter. Generally, petitioners for judicial remedy are seeking to halt some proposed physical act of a governmental agency that allegedly will result in environmental harm. As a necessary prelude to such proposed agency action, there has been considerable administrative effort by the agency in formulating plans for the project. Often, environmental petitioners


\(^6\) Since the enactment of the National Environmental Policy Act, many States have adopted some form of environmental control. In most States, the controls adopted are different from NEPA.
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<thead>
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<th>STATE</th>
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<tr>
<td>Ariz.</td>
<td>Administrative requirement. (Game and Fish Commission Policy of July 2, 1971.) Fish and Game Department required to prepare EIS on proposed water-oriented development projects. Similar to NEPA but abridged.</td>
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<tr>
<td>Calif.</td>
<td>Statutory requirement. [California Environmental Quality Act of 1970, CAL. PUB. RES. CODE §§ 21000-21174 (Supp. 1972), as amended by Ch. 56, Statutes of 1974 (March 4, 1974).] First State statute following NEPA. Applies to State and local agencies and private actions requiring government approval. EIS elements similar to NEPA, but includes consideration of (1) growth inducing impact and (2) mitigation measures (later added to NEPA by regulation).</td>
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<td>Del.</td>
<td>Statutory requirement. [Delaware Coastal Zone Act, Ch. 175, Vol. 58, Laws of Delaware, adding 7 DEL. CODE ANN. § 7001 et seq. (Supp. 1973), and Delaware Wetlands Law of 1973, adding 7 DEL. CODE ANN. Ch. 66 (Supp. 1973).] Limited to coastal zone. EIS required on proposed manufacturing project.</td>
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<td>Ga.</td>
<td>No general requirement but EIS required for Georgia Tollways Authority projects. [Georgia Laws 1972-179 (March 10, 1972), GA. CODE ANN. Ch. 95A-1, § 241(e)(1) (1973).]</td>
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<td>Ind.</td>
<td>Statutory requirement. [IC 1971, 13-1-10, added by Pub. L. 98, 1972, IND. STAT. ANN. § 35-5301 et seq. (Supp. 1971).] Applies to State projects. Issuance of licenses or permits specifically excluded. EIS elements similar to NEPA.</td>
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<td>Me.</td>
<td>No general requirement but Maine Site Location of Development Act of 1970 (ME. REV. STAT. ANN., Title 38, § 481 et seq.) requires developers' permit application to contain certain data on environmental effects.</td>
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<td>Mich.</td>
<td>Executive direction requirement. (Michigan Executive Order 1973-a.) Applies to State action including issuance of permits. EIS elements similar to NEPA but include mitigation modifications. (Later added to NEPA by regulation.)</td>
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<td>Neb.</td>
<td>No general requirement but EIS prepared by Department of Roads on State funded highway projects. [Nebraska Department of Roads, Department of Roads Action Plan (1973).]</td>
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<td>N.D.</td>
<td>No general requirement but a special EIS procedure applies to certain waste-water treatment facilities.</td>
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<td>S.D.</td>
<td>Statutory requirement. [South Dakota Environmental Policy Act, Session Laws 1974, Ch. 245 (March 2, 1974), S.D. Comp. Laws 1963 Ch. 11-1A (Supp. 1974).] EIS required on projects significantly affecting the environment.</td>
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<tr>
<td>Vt.</td>
<td>No general requirement, but under Act 250 (Vt. Stat. Ann., Title 10, Ch. 151) projects involving significant impact in land use require environmental scrutiny. However, no formal written document similar to EIS is necessary.</td>
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participate in such administrative action in seeking to thwart the project or change the nature of the project to reduce its feared adverse environmental impact. It is natural in such a situation that the environmental petitioners would wait to see the result of their efforts during the planning phases of the project before resorting to litigation. Thus, resort to litigation is often undertaken shortly before actual construction of the project. This results in petitioners making applications for temporary restraining orders and preliminary injunctions to halt the agency's proposed physical activities which environmental petitioners allege will result in irreversible harm to the environment.

In theory, restraining orders and preliminary injunctions only last until the trial on the merits. Also, in theory, the trier of fact at the trial on the merits should not be particularly affected by previous decisions on preliminary motions to halt an agency's activities. In practice, however, the preliminary decisions of the trier of fact on such preliminary evidence and argument are often virtually unshakeable at what could be technically considered the "trial stage" of environmental litigation—to wit, the trial on the request for permanent injunction. Therefore, under the definition of the trial phase of litigation as the crucial time when judicial determination of the issues is actually made, these early preliminary legal skirmishes are a vital part of the trial of environmental lawsuits. As such, they must receive full consideration when discussing trial strategies and techniques involved in successfully prosecuting or defending such litigation.

A flexible approach is important in developing strategy for the trial phase of environmental litigation. Such flexibility is crucial even where the law and the facts of the case do not appreciably change between the time of application for preliminary remedies from the court of equity and the trial itself. But, because of the agency's power to continue or reactivate administrative action involving the project plans, stability of facts and law is exactly what is not observed in environmental litigation. More often than not, the losing party at the preliminary injunction stage either adapts to the court's preliminary determination, or appeals. If the losing party is the public agency, it will often determine that the delay of an appeal is more harmful to the interest it represents than adaptation to the decision of the trial court by further administrative action to cure the deficiencies found by the trial court in its preliminary determination of the case.

If environmental petitioners lose at the preliminary injunction stage, by the time they are able to present their case at trial, the project will often be in such a state of physical accomplishment that the environmental harm they are seeking to prevent will have already occurred. Thus, petitioners will often abandon the attempt to halt or modify the project by litigation. However, they may still pursue an appeal even though they are uncertain of the merits of their case. The appellate process is slow, but by using certain procedural strategies, environmental petitioners can often accomplish their goal of halting an agency project.
Recent court decisions in environmental litigation have shown a tendency toward granting injunctions or stays pending appeal more often than in the average equitable case. Many appellate courts have been sympathetic to the environmentalist's plea that environmental harm caused by physical construction of the project is irrevocable. When faced with an injunction of its project pending appeal, though it has theoretically won the preliminary skirmish at the trial court level and has a more than even chance of winning on appeal, many agencies will "cut their losses" and undertake further administrative action to cure the petitioner's environmental complaints. In any event, the agency is faced with a long appellate delay which, in itself, may be more lengthy than the delay occasioned by undertaking further administrative action. Also, because environmental law is new and evolving, the outcome on appeal is not as predictable as in more established fields of the law. Should the agency unexpectedly lose the appeal, the time of appellate delay must be added to the time it will take to administratively cure the environmental deficiency. Thus, the total time consumed may prove unacceptable to the agency.

The foregoing discussion illustrates how judicial results in the preliminary injunction stage of environmental litigation may encourage the agency to undertake further administrative action concerning its proposed project. Such additional action, in turn, changes both the facts and the applicable law from those originally involved at the time of the original petition for preliminary injunction. Thus, environmental litigation concerning an agency project may not only invoke many types of equitable procedures, the result of which may be determinative of the eventual prevailing side in the case, but such litigation may also involve a constantly changing panorama of different factual and legal subcases as the agency acts administratively to meet the constantly shifting judicial challenge. Thus, there may be many trial arenas in the litigation on a particular project. This paper must do justice to them all in discussing the strategy involved and the techniques that have been found successful in each arena.

ISSUES OFTEN JOINED WITH AND RELATED TO ENVIRONMENTAL LITIGATION

There is a tendency to consider environmental litigation solely in terms of compliance with NEPA requirements or State environmental acts patterned after NEPA. Seldom, however, is the litigation so simple. Often challenges to the proposed agency action raise not only alleged noncompliance with NEPA, but also noncompliance with other statutory and regulatory requirements relating to the project planning.
process. The most common issues are the public hearing requirements relating to the location and design of highway projects,\(^8\) the Section 4(f) requirements applicable to park or recreational land,\(^9\) and relocation assistance issues involved in the displacement of persons by public projects.\(^{10}\)

A brief discussion of these issues is necessary to adequately highlight the trial strategy opportunities presented by these statutes and to illustrate the complexity of environmental litigation.

**Federal-Aid Highway Act**

In August 1968, Congress amended the public hearing provisions in the Federal-Aid Highway Act; 23 U.S.C.A. § 128. The statute applies to federally assisted highway projects. The amendment required that the public hearing concerning highway location include not only the economic effects of such proposed projects, but also its environmental and social impact. Pursuant to this amendment, the Federal Highway Administration promulgated revised Policy and Procedure Memorandum 20-8 (PPM 20-8)\(^ {11}\) effective January 14, 1969, which required two separate, formal, federal approvals—"location" and "design"—for State highway projects involving federal funding. This PPM also required two public hearings on highway projects before such federal approval would be granted—one covering the location of a highway route (corridor public hearing) and one covering the design of a highway (design public hearing). In December 1970, § 128(a) was amended to require the State to file a report with the Secretary of the Department of Transportation indicating the consideration given to the economic, social, environmental, and other effects of a proposed federal-aid highway.\(^ {12}\) Subsequently, the Secretary adopted regulations governing corridor and design hearings.\(^ {13}\) The corridor and design approval process, together with the related hearing process, is complex. Frequently, allegations of noncompliance with Federal-Aid Highway Act, § 128(a) and its various amendments and implementing regulations are joined with NEPA causes of action.

It is excellent strategy for environmental petitioners to include these issues in their complaint. Some courts have applied the foregoing statute and regulations retroactively where they have determined that NEPA has been violated. Having decided that NEPA is applicable, such courts have held that the new hearing process provided by the


\(^10\) Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C.A. § 4601 et seq.


amendment and regulations should be implemented to assure adequate and thorough compliance with NEPA. Such a determination often poses a threat of much greater project delay than any mere judicial holding that NEPA compliance is lacking. Lengthy delays often result because the project must be "recycled" back to its early location or design approval stage.

Section 4(f) Requirements

In 1967, the so-called Section 4(f) requirements came into effect. Basically, these requirements provide that a federally assisted highway project may not be located or designed in such a way as to make use of park or other designated types of open space and recreational land unless there is no prudent or feasible alternative to such use. The terms "prudent" and "feasible" have been very strictly construed by the United States Supreme Court for the purpose of effectuating congressional intent behind the enactment of Section 4(f). Under this judicial construction, a route or design not using land protected by Section 4(f) must be adopted unless it is unfeasible (from an engineering viewpoint), or imprudent in that it involves displacement or other costs of significant magnitude. A second requirement of Section 4(f) is that even if there are no prudent or feasible alternatives the program must still include all possible planning to mitigate harm to 4(f)-protected land resulting from its use. Thus, the 4(f) requirements are more stringent, and in many cases more difficult, to meet than the more generalized provisions of NEPA. Because of their specificity and difficulty of compliance, environmentalists, as part of their case strategy, often find it advantageous to add this cause of action to their NEPA allegations.

Relocation Assistance

Effective 1971, Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act (hereinafter cited as URA). The provisions thereof are applicable to all federal and feder-
ally assisted projects involving the acquisition of real property resulting in the displacement of persons. Basically, the URA requires the displacing agency to provide displaced persons decent, safe, and sanitary replacement housing. If such housing cannot be made available from existing housing, then such replacement housing must be constructed from project funds of the displacing agency. Thus, this statute and regulations promulgated thereunder require absolute guarantees that certain conditions be met, the cost of which may destroy the economic feasibility of the proposed agency action. Again, in considering trial strategy, opponents to a proposed agency action should not overlook raising issues under the URA or similar State statutes.

**Environmental Protection Agency Regulations**

Newly proposed regulations promulgated by the Environmental Protection Agency require preconstruction review of indirect sources of air pollution. Under such proposals, all States must include provisions for reviewing, before construction, the air-quality impact of major urban roadways, parking facilities, and other traffic-generating sources. If a proposed project would interfere with the attainment or maintenance of an ambient air quality standard, design changes or modes of transit must be considered as methods for ameliorating the impact. Highways and airports also are subject to EPA-promulgated parking management regulations. These regulations would require preconstruction review of new parking facilities above a specified size in 30 major urban areas. These new regulations can provide environmentalists with an additional tool in challenging highway projects.

**Pre-Suit Preparation**

The title "pre-suit preparation" was carefully selected rather than the more conventional term "pretrial preparation," which would be more appropriate for the traditional types of litigation. As previously discussed, the trial court in environmental litigation is often called upon to make important decisions early in the litigation process, which decisions are often dispositive of the entire case. This fact has important implications both for attorneys representing the environmental interests involved and for attorneys representing agencies. The attorney representing environmental interests should be fully prepared on the law and facts pertaining to the case before filing the suit. Under most federal and local rules he may move for a preliminary injunction against any defendant within 21 days after filing and service of notice of the motion. In actions not involving injunctive relief against federal defendants, the time is 60 days, but this time can be shortened on a

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21 N.D. Cal. R. 114(b).
showing of good cause. Further, he may seek a temporary restraining order almost immediately after filing suit. Therefore, he has every advantage if he uses his pre-suit time to carefully marshalling the facts concerning the project he seeks to challenge and the law applicable thereto. His entire case can be carefully prepared and set forth for the court’s perusal as early as the temporary restraining order stage of the case. A much shorter time is left for the agency attorney after the suit is filed to prepare the agency defense.

Review of Projects

The attorney representing the agency must use all pre-suit preparation procedures available in an attempt to neutralize the built-in advantages to the environmentalists. To effectively prepare for imminent litigation, it is desirable to assemble a legal file of project facts for all projects in which right-of-way acquisition or construction activity is pending. These facts should be restricted to those pertinent to the agency’s contemplated defense against possible future litigation. If the agency is large, it is advantageous to appoint one person to gather legally pertinent information for the legal file. After assembling such information on one or two projects, under the immediate supervision of the attorney, such a person should be able to proceed independently on other projects. In a large agency, such an individual becomes invaluable in acting as an interpreter between engineers, environmental specialists, and other experts with whom the attorney must communicate to adequately prepare his defense. This relieves the attorney of the responsibility of briefing every project engineer on each project that might be the target of future litigation. After the suit is filed and during pre-suit preparation and trial, such an individual, often termed a legal coordinator, acts as an aide in developing pertinent facts. In smaller agencies, the attorney must work with the entire staff in developing the information he may need in the event of litigation.

Monitoring Projects

As part of pre-suit preparation, it is most important to develop a procedure whereby controversial projects are identified and given special attention. Such a procedure requires notice to all agency personnel that the legal coordinator or the agency’s legal department be apprised of all unusual citizen inquiries, complaints, and criticisms concerning the project. In some cases, it was not until after suit was filed that agency attorneys learned that environmental groups had laboriously scrutinized the files and memoranda of the agency offices in obvious preparation for suit. It is, of course, important that agency attorneys receive notice of such activity so that, if litigation results, environmentalists will not have an undue advantage in their pre-suit preparation.

23 N.D. Cal. R. 112.
While monitoring controversial projects, the agency attorney often comes into contact with environmentalists' counsel or other representatives of environmental interests. At such time, it is most advantageous to explore possibilities for settlement of potential litigation. Whether or not such possibility merits much attention by the agency counsel largely turns on the concerns of the environmentalists. If they are completely opposed to the project, and if the agency attorney is satisfied that the project has complied with environmental requirements, then usually nothing is gained by further exploration of settlement possibilities. Environmentalists with such aims will often engage in legal repartee with the agency counsel in an attempt to influence the agency to perform one or two additional procedural steps to satisfy their demands. This legal repartee is usually a mere subterfuge for delay which will not obviate litigation. The agency attorney should not waste the agency's time and the taxpayer's money in fruitless attempts to appease such project opponents. Sometimes, however, the environmentalists' concern is consistent with fruitful attempts to explore possibilities that may result in avoiding potential litigation. It is vital that the agency's counsel learn of such possibilities early in the pre-suit preparation phase. The earlier such settlement possibilities are explored, the more likely agency flexibility will exist to permit avoidance of potential litigation. For example, if the environmentalists are concerned about the source of borrow to provide fill for the project and this concern is explored before contracts are let and other approvals irrevocably made, it may be possible to designate borrow sites that are not as adverse to environmental interests. Indeed it is in the encouragement of creative engineering by threatened agencies where environmentalists have made their greatest contribution to the quality of public projects in America today.

Settlement of Potential Litigation

In determining whether or not to enter into accommodation with environmentalists to avoid potential litigation, the agency attorney must carefully assess and advise his client as to whether such a settlement will obviate litigation. Often it will be to the agency's advantage to consent to reasonable, though costly, project modification to avoid the indefinite delays inherent in environmental litigation. But if such accommodation will not avoid litigation by other parties, then the agency may decide to proceed with the project as originally planned.

Under the law of standing as it has been defined by the United States Supreme Court,24 most individuals and groups whose use of natural

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24 Sierra Club v. Morton, 405 U.S. 727, 31 L.Ed.2d 636, 92 S.Ct. 1361 (1972). For a discussion of the standing of private citizens, associations, or organizations to maintain actions in federal courts for injunctive relief against projects alleged to be harmful to the environment in public parks, recreation lands, or wildlife refuges, see 11 A.L.R. Fed. 556 (1972).
resources is threatened by agency action have standing to bring environmental litigation. Therefore, in most cases the agency attorney must advise his clients that settlement with one group will not necessarily preclude litigation by other environmentalists not included in the group with which the settlement and accommodation has been reached. The exception is where environmentalists have filed a class action under Federal Rule of Civil Procedure 23. In theory, the individual litigants bringing such a class action represent the entire class of persons whose environmental concerns are threatened by the proposed agency action. Therefore, settlement with them will be settlement with the entire class they represent, and, thus, a bar to future lawsuits on the same concerns and on the same grounds (res judicata). However, certain procedures should be followed to assure this result. First, of course, if litigation has not been filed it should be filed as a class action so that subsequent procedures to establish a bar to further attack may be undertaken. The proposed settlement should then be presented to the court where the litigation is filed for its approval and determination that the technical requirements for a valid class action have been met. By using this procedure, subsequent environmental litigation after settlement is greatly diminished.

Federal-State Relationship

One final aspect of pre-suit preparation that must be considered from the agency’s point of view is that different government agencies may be involved as defendants in the same litigation on the same project. These agencies have both different times within which to respond to litigation brought in federal courts and different internal methods of formulating their response to such litigation. This usually occurs in litigation involving federally assisted projects. Such projects are often planned by State agencies. It is quite common for environmentalists to join State agency defendants and Federal Government defendants in the same lawsuit. However, under Federal Rule of Civil Procedure 12(a), a State defendant must respond by answer or other pleading in a shorter time period than a Federal Government defendant.

The United States Attorney handles most courtroom litigation for federal agencies. This method of preparing the response to litigation is often more complicated and time consuming than that of the legal department of the State agency. Generally, the federal machinery involves receiving from Washington, D.C., the appropriate response to be raised by the United States Attorney in respect to the issues. To formulate this advice, agency attorneys in Washington, D.C., must consult with local agency field offices. Obviously, it is disadvantageous for State agency defendants to unilaterally crystallize their defenses to litigation without initially consulting with federal defendants. There is insufficient time to achieve such coordination after litigation is filed. Therefore, the pre-suit preparation in cases that may involve the Federal Government assumes even greater importance than litigation that may
involve only State defendants. During such pre-suit stage of litigation, it is necessary to coordinate both the factual background and the legal defenses with the Federal Government so that embarrassing inconsistencies, arising from the different time periods for response and the different methods of preparing such response, do not unnecessarily occur.

Because lawsuits concerning a breach of environmental laws may involve both Federal and State law, the environmentalist in many cases is afforded a rather unique choice of forums. He may either bring suit in State courts that have the power to apply federal law applicable to the State processing of a project or he may file in federal court where allegations involving violation of State legal requirements may be raised under the pendent jurisdiction theory.

**Pendent Jurisdiction**

A long-standing basis for the assumption by federal courts of jurisdiction over alleged violations of State law is the doctrine of pendent jurisdiction. The doctrine permits jurisdiction over nonfederal matters factually related to an asserted federal question. Basically, this doctrine provides that when a federal court has jurisdiction over a federal question, a plaintiff may join with it a separate claim under State law when both claims derive from a "common nucleus of operative facts" and plaintiff would ordinarily be expected to try them in a single proceeding. Thus, in environmental litigation a plaintiff may make use of the doctrine to join claims concerning violations of both Federal and State legal requirements.

A federal court has discretion whether or not to hear a pendent claim. The court often looks to considerations of judicial economy, convenience, and fairness to the litigants in deciding whether a pendent claim should be entertained. It may refuse the invitation to exercise pendent jurisdiction in deference to allowing important questions of the interpretation of State statutes to remain with the State courts, especially when such State issues substantially predominate.

Use of the doctrine of pendent jurisdiction as a trial strategy is helpful in persuading the federal trial judge of the over-all merits of the environmentalist's position. Thus, if an environmental litigant challenges a project and raises both Federal and State claims emanating from of pendent jurisdiction, the court did cooperate jurisdiction over alleged violations of CEQA when such claims were joined with related violations of NEPA.

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26 In Keith v. Volpe, 352 F.Supp. 1324 (C.D. Cal. 1972), a Federal District Court noted the similarity between the requirements of NEPA (a Federal statute) and CEQA (a California statute) and although not explicitly discussing the doctrine of pendent jurisdiction, the court did cooperate jurisdiction over alleged violations of CEQA when such claims were joined with related violations of NEPA.
from essentially the same facts in the case, the doctrine may provide a judge with greater confidence in granting the relief sought. If the proposed agency action is likely to be halted by a State court under State law, then the harm in subjecting the proposed action to the requested relief under federal law is not nearly as severe as would otherwise be the case. Sometimes the State law issue is actually helpful in resolving the issue as to whether there has been a violation of substantive federal law. Environmentalists have used the tactic of raising State law by pendent jurisdiction as a method of forcefully presenting the State law to the court in such cases. Thus, the doctrine of pendent jurisdiction allows a plaintiff to conveniently join similar Federal and State claims in a single action in federal courts.

An opposite tactic, which environmental plaintiffs have used with varying degrees of success, involves splitting the Federal and State claims and proceeding separately in their respective forums. In choosing a forum, a primary consideration is the body of law most significantly involved in the alleged violation by the agency. Federal courts are reluctant to exercise pendent jurisdiction in cases involving initial important determination of State law, preferring to leave such matters to State courts. On the other hand, in most cases State courts are more zealous in the enforcement of State legal requirements than they are in the enforcement of federal legal requirements.

Choice of Forum

A basic guide for the environmentalists' attorney when choosing a forum is that the farther the court is situated from the site of the alleged threatened environmental harm, the more advantageous a forum it becomes. There are, of course, glaring exceptions, such as when the community in which the environmental harm is threatened is itself agitated about the project. In such a situation the best forum would be that court most closely connected with the community concerned. However, many of the dire threats to the environment envisaged by environmental organizations appear considerably less threatening to constituents of the locality, who often have rather mundane and selfish interests in seeing the project proceed. To illustrate: in California, a "Save the Redwoods" movement might be very popular in San Francisco and in the social circles in which the federal judges sitting in San Francisco revolve; however, in Del Norte County, where the lumber industry is a valuable source of employment and supports the entire economy, the movement may be anathema. Therefore, counsel for environmentalists interested in a "Save the Redwoods" cause would be well-advised to file his suit in the United States District Court for Del Norte County.

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28 See, e.g., Friends of the Earth v. Brinegar, Civil No. 688, 512 (San Francisco Super. Ct., 1974); Friends of the Earth v. Walton,
for the Northern District of California in San Francisco, rather than in
the Superior Court of Del Norte County. The agency's counsel, on the
other hand, has little control over where the suit is filed.

Choice of Judge

The selection of the individual judge who will decide the case must be
considered; agency counsel has as much influence in such choice as peti­
tioner's counsel. A California statute allows either party a peremptory
challenge of the judge assigned.29 This is accomplished merely by filing
a simple affidavit alleging prejudice. The court does not explore the
merits of such affidavit. The invocation of this statute automatically
requires the assignment of another judge. The peremptory challenge
of trial judges is not provided in Federal District Court. A federal
judge can only be challenged for cause.30 Counsel must plead and prove
specific facts upon which the claim of prejudice or other disqualifica­
tion rests. The challenged judge is allowed, if he wishes, to make an
initial determination of the issue or appoint another judge of the same
court to make a determination of whether or not "good cause" for dis­
qualification has been shown. This is a cumbersome and embarrassing
procedure, which is seldom successful. Agency attorneys who are re­
quired to practice regularly before the particular court should think
carefully before initiating this procedure.

In the event that a related case is pending in the same district, Local
Rule 101 for the United States District Court for the Northern District
of California requires counsel to apprise the court that the case at
issue is related to another case. The presiding judge may, in his discre­
tion, assign the case at issue to another judge familiar with the issues
involved.

The initial assignment of a case that has been filed in United States
District Court for the Northern District of California is made by lot
by the clerk. Often, after discovering the results of the judicial assign­
ment, counsel, in fulfillment of his obligation under Local Rule 101, will
file an affidavit stating that the case at issue is related to another case
assigned to another judge. This rule is often employed by either counsel
to assure the assignment of a judge more favorable (in his belief) to his
position than the judge drawn by lot.

Timing of Suit

Environmental litigation usually involves an application for a tempo­
rary restraining order 31 or a motion for preliminary injunction.32 Such
application is usually filed when an agency is contemplating actual
construction of the project. The prospect of physical construction pro­

29 CAL. CODE CIV. P. § 170.6 (West 1974).
31 FED. R. CIV. P. rule 65(b), 28 U.S.C.A.
32 FED. R. CIV. P. rule 65(a), 28 U.S.C.A.
vides the most compelling appeal to the trial court for the exercise of its powers to grant preliminary relief by issuing a temporary restraining order or a preliminary injunction. When construction is contemplated, the specter of irreversible damage to the environment is raised by plaintiffs. This is a difficult argument for the agency attorney to surmount despite the fact that he may have convincing evidence that tax monies will be wasted if environmentalists ultimately fail to prevail on the merits of the litigation. The difficulty in challenging this argument is demonstrated by the alacrity which some appellate courts have shown in granting injunctions pending completion of the appellate process even in cases where the trial court, after a trial on the merits, has determined that the environmentalists’ cause is without merit.33

In environmental cases, the deference ordinarily paid by appellate courts to determinations by trial courts is greatly diminished by the argument of irrevocable harm to the environment if construction is allowed to proceed. In addition, if the project is enjoined pending appeal, this in itself influences the final result of the litigation in favor of environmentalists 34 because any injunction halting a project shortly before or during construction is bound to be costly to the agency using taxpayers’ funds. No court enjoys being accused of wasting taxpayers’ funds, but basically this is the position such a court would be in if it preliminarily enjoined construction of a project, delay of which was costly to the agency, and subsequently determined that the environmental considerations of the suit were invalid. Judges often wish to avoid such embarrassment by ensuring that their final opinions are consistent with their preliminary determinations.

The timing for filing the environmental lawsuit is a tremendously important trial tactic. The nearer to the time of physical construction of the project the suit can be filed without being barred by laches or some statutorily created limitation provisions, the more advantageous to the environmentalists opposing the project. A defense to such a tactic is the invocation of the long-standing equitable doctrine of laches or, when available, some statutory limitation on late filing of suit. However, under NEPA the federal courts have been less than sympathetic to such laches arguments.

The timing of environmental suits on highway projects has been discussed extensively by courts. The Ninth Circuit Court of Appeals in *La Raza Unida v. Volpe* 35 held that an action may be brought against

33 City of Davis v. Volpe, Civil No. 74-1942 (9th Cir. 1974). [Ninth Circuit granted injunction pending appeal after District Court had ruled that State had complied with its original order to hold a public hearing pursuant to 23 U.S.C.A. § 128(a).] See also note 7, supra.

34 See, e.g., Citizens Committee for the Hudson Valley v. Volpe, 297 F.Supp. at 806 (S.D.N.Y. 1969) in which the court discussed a requirement for the issuance of a preliminary injunction: the probability that plaintiffs will eventually succeed on the merits.

35 337 F.Supp. 221 (N.D. Cal. 1971), aff’d, 488 F.2d 598 (9th Cir. 1973), cert.
a highway project as early as its "location approval" stage. The Court found that federal location approval constituted major federal action. Two recent federal cases, Steubing v. Brinegar 36 and I-291 Why Ass'n v. Burns, 37 held that a highway project may be challenged as late as a reasonable period after federal plans, specifications, and estimates (P.S.&E.) approval has been granted pursuant to 23 U.S.C. § 106. Federal P.S.&E. approval is only sought and granted shortly before the award of the construction contract. In the two cases previously mentioned, the contractor was actually constructing the project when the suit was filed; still the federal court refused to apply the doctrine of laches.

Thus, even though under the holding of the La Raza case environmentalists could have sued on these projects at any time after federal location approval, and they may have been perfectly aware of the grounds of said suit all during the considerable period of time between federal location approval and federal P.S.&E. approval, the foregoing two District Court decisions would allow them to delay suit until the construction contracts were let and construction initiated. The period of time between federal location approval and federal P.S.&E. approval is often as long as 5 to 10 years.

The theory of the aforementioned District Court cases appears to be that plaintiffs could not know whether major federal action would be involved in the project and, therefore, whether the project would be subject to federal law until after the federal government became bound to participate financially in the project by granting P.S.&E. approval. Therefore, the courts reasoned, environmentalist challengers could delay suit until after P.S.&E. approval had been granted. Indeed one, the Steubing court, appeared to question whether a suit in federal court for violation of federal law could have even been brought before the time of federal P.S.&E. approval. 38 This is more consistent with Citizens for Balanced Environment and Transp. v. Volpe 39 on the issue of when a project becomes subject to federal law than the La Raza case which establishes such time, at least insofar as highway projects are concerned, as the time of federal location approval. The Steubing and I-291 Why Ass'n cases both originate from district courts in the Second Circuit and are consistent with the Citizens for Balanced Environment case which was also a Second Circuit case. If one accepts the view that a highway project does not become subject to federal legal requirements until federal P.S.&E. approval then there is some rationale to the idea that a litigant should not be required to file suit in federal

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38 The I-291 Why Ass'n case was decided prior to Steubing and does not contain language questioning whether federal suit could be brought prior to federal P.S.&E. approval.
court until the time of such approval. A combination of this doctrine with the La Raza case is illogical and pernicious. Although hopefully the confusion and ambiguity created by these cases may be remedied in the future, at this time it appears from examination of all the federal cases dealing with the issues of laches, that it is possible for environmentalists to safely wait until construction is almost underway before filing suit. 40

Environmentalists do not have the same opportunities to use similar tactics in actions brought in State courts under some State environmental laws. Several States have enacted environmental legislation which includes limitation provisions against the late filing of environmental suits after notice by the agency that it intends to proceed with the project after environmental study. Such provisions are contained in the California Environmental Quality Act. 41 Specific sections of the Act provide statutes of limitation on the challenge of public projects. The California Public Resources Code, §§ 21108, 21167 42 provides:

§ 21108. Whenever a state agency, board or commission approves or determines to carry out a project which is subject to the provisions of this division, it shall file notice of such approval or such determination with the Secretary of the Resources Agency. Such notice shall indicate the determination of the agency, board or commission whether the project will, or will not, have a significant effect on the environment and shall indicate whether an environmental impact report has been prepared pursuant to the provisions of this division.

§ 21167. Any action or proceeding to attack, review, set aside, void or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

(a) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project.

(b) Any action or proceeding that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 10 days after the filing of the notice required by Section 21108 or 21152.

(c) Any action or proceeding alleging that an environmental impact report does not comply with the provisions of this division shall be commenced within 30 days after the filing of the notice required by Sections 21108 or 21152.

40 The United States Supreme Court refused State defendants petition for certiorari in La Raza Unida v. Volpe before the anomaly threatened by later cases became apparent.

41 CAL. PUB. RES. CODE § 21000 et seq. (West 1974).

42 CAL. PUB. RES. CODE § 21152 and § 21167 apply the same standards to private projects subject to CEQA.
Many commentators believe that a similar type of reasonable control over judicial challenges to a project, after the agency has studied its environmental impact and made the determination to proceed with the project, is vitally needed in NEPA.\footnote{Remarks of Thomas Garlington, Chief Counsel, Washington State Department of Highways, at American Bar Association National Institute on Environmental Highway Litigation, St. Louis, Mo., November 30, 1973. (Unpubl.)}

The California approach might easily be adopted into NEPA by providing that whenever a public agency approves or determines to carry out a project which would, or might in the future, involve a major federal action under NEPA, it would file notice of such approval or determination with the administrator of the Environmental Protection Agency (EPA) and with the Council on Environmental Quality (CEQ). Such notice would be published in the Council's Section 102 Monitor. The notice would indicate the determination of the agency as to whether the project would, or would not, have a significant effect on the environment and would indicate whether an environmental impact statement had been prepared pursuant to the provisions of NEPA. The limitation on litigation provisions after such notice has been filed could then be tailored to meet the particular problems involved in administering NEPA.

In addition to initiating litigation at the construction stage, environmentalists may also advance cogent grounds for issuance of temporary restraining orders or preliminary injunctions against threatened agency action short of the physical construction stage. For example, right-of-way acquisition, especially if coupled with dislocation of residents, has been held to be agency action that appropriately calls for preliminary equitable relief.\footnote{Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971). See also Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972) in which land acquisition was enjoined on theory that acquisition during consideration of highway project would make decision to alter or abandon route increasingly undesirable.} Some courts have gone so far as to enjoin agency planning and engineering on the project on the grounds that the more work and expense undertaken by the agency on the project, the less likely the agency will consider good-faith alternatives less damaging to the environment.\footnote{Stop H-3 Ass'n v. Volpe, 349 F.Supp. 1047 (D. Hawaii 1972).}

In any event, if the plaintiffs can successfully urge a court to use its preliminary equitable powers, all the tactical advantages of early presentation of facts and law to the court are available to them. Obviously, in such a situation, it is important to serve not only the summons and complaint on the agency, but also the notices for application for preliminary relief at the same time. In the case of a temporary restraining order, such notice may be verbal. However, this relief may be obtained, under certain conditions, without notice to the agency.\footnote{FED. R. CIV. P. rule 65(b), 28 U.S.C.A.} If a preliminary
injunction is sought, notice must be given in writing to opposing counsel, together with points and authorities and supporting affidavits. If agency activity is imminent or underway, an order shortening time may be sought. In United States District Court for the Northern District of California, Local Rule 114 provides that 21 days notice of a motion for preliminary injunction be given. This time period can be shortened by the court for good cause under Local Rule 112.

In cases involving federal defendants, seeking a preliminary injunction within these time constraints greatly shortens the time available for the United States Attorney to prepare responsive pleadings. Under Federal Rule of Civil Procedure 12, federal defendants have 60 days to answer a complaint whereas other defendants have only 20 days. By seeking a preliminary injunction, environmentalists can shorten the time by at least 39 days for the first response of federal defendants. Of course, the United States Attorney may seek an order extending the time in which to respond to the motion for a preliminary injunction. But in such a motion he may not have the support of counsel for State defendants, especially in a situation where the agency action sought to be enjoined would threaten great damage to the State agency. Whether the continuance is sought by stipulation or by formal motion from the court, the most obvious condition that can be extracted for granting such an extension of time would be a voluntary cessation of all agency action concerning the project. This cessation may be unacceptable to State agency defendants whose project is in jeopardy. Without the support of State agency defendants, the implication to the trial court is that if State defendants can respond within the time provided, the Federal Government should likewise be able to do so.

Because of the cumbersoness of the federal legal establishment in rapidly responding to legal threats of which they have had no notice, the Federal Government may not be able to effectively respond to the issues in such a short time period. The result is that often State agency defendants or other local agency defendants are left to handle the litigation on their own. This is particularly true if State agency defendants, through their counsel, have not prompted the federal establishment, during pre-suit preparation, to be adequately prepared for the imminent litigation. The Federal Government method of response to litigation is inadequate to accommodate a fast response, particularly where the threatened project is a potential federal-aid project rather than one conceived of and planned by a federal agency. It may be able to respond quickly if the State agency counsel has used all available resources to activate the federal legal machinery before litigation is filed and served. Even if the federal legal establishment is somewhat neutralized by its inability to effectively respond to a motion for preliminary injunction within the limited time provided, it will generally

47 N.D. Cal. R. 111.
be ready with a carefully considered, technically honed, legal defense in the 60 days before it has to file a responsive pleading to the complaint.

It is most unwise for State defendants to assume final formal litigation positions by responsive pleading to the complaint before the results of the ponderous but exact federal legal procedure of investigating and responding to the issues are considered.

Temporary Restraining Order

Although the temporary restraining order may be issued without notice to the opposing attorney, normally some notice will be given. Even though the agency attorney has been preparing for litigation, the notice always seems to come as a surprise during a period when other duties are pressing and additional time for response would be most welcome. For his own convenience, the agency attorney would appreciate more time to respond to the issues. The opposition may agree to a stipulation providing for such time; however, such stipulation is often conditioned on voluntary agency cessation of project activities. When agency counsel appears before the trial court concerning application for a temporary restraining order, he may be assured that the court will attempt to urge the agency to voluntarily cease its activities. There are, however, some tactical disadvantages in consenting to such a cessation or, indeed, in having a temporary restraining order issued against the agency's activities. Although huge costs may eventually result, they may not be immediately apparent and may not be incurred until long after the period during which a temporary restraining order can be effective under Federal Rule of Civil Procedure 65(b). Thus, an early temporary halt of a construction contract may become the basis for a liquidated claim by the contractors several years later when the financial results of completion of the contract are known. “Critical path” type analysis may be applicable to what appears to be minor initial agency stoppages. For example, a month’s halt of a 2-year construction job may delay the project for more than a year if the project involves initial bridge work in a riverbed that must be safely accomplished during the summer dry season. A month’s delay may cause the contractor to be caught in unseasonably early rains which could delay the completion of the entire contract for more than a year. In addition, such delay could result in a costly loss of all work completed before the rain. Agency counsel can be assured that environmentalists will not voluntarily offer to cover such possible costs.

When opponents of a project intend to halt such project by any legitimate means, they are aware that temporary delays may result in possible abandonment of the project by the agency. In defending against such tactics, agency counsel should be aware of the hidden costs resulting from temporary delays so that he can apprise the trial court of such costs and the impact on the public and the agency should the court impose a temporary delay. Agency counsel, in reviewing projects subject to possible environmental litigation, should pay special atten-
tion to projects in the crucial planning periods because environmentalists may seek temporary stoppages at such periods to gain maximum anti-project impact.

Perhaps one of the most critical times is the period in which the agency must determine whether to award the contract. This period is controlled by State law insofar as State agencies are concerned. By carefully timing the filing of anti-project litigation to fall within this period, it is possible for project opponents to place the agency in the difficult position of deciding whether to award the contract or, in prudence, await the outcome of the litigation. At least one California case has held that if the agency, after prevailing at the trial on the merits, awards the construction contract during the period when the appellate process is still available, the agency is "flouting" the judicial process and any damages suffered by such acts are incurred at its own risk. This appears to be another instance in which courts of equity place environmental values on a higher pedestal than the general rule of equity which balances competing interests.

In any event, to prepare for the environmentalists' tactic of filing environmental litigation during the project's most critical period, the agency attorney should determine what work is critically important to continue and what phases of the work might be appropriately deferred by consent, even though such deferral might mean costly adjustment to the normal process of project development. Trial courts tend to appreciate good faith attempts by agencies to avoid confrontations in court. Although voluntary acceptance of temporary stoppage involves extra costs, acceptance of these costs may yield dividends in the long run. By making such accommodation, it is unnecessary for the trial court to grant injunctive relief, which decision incurs costs to the agency. Such costs must come from tax funds and if, at the hearing on the final injunction, the environmental issues are decided adversely to petitioners, the initial court decision to grant temporary relief will appear to be a judicial waste of tax monies. As previously discussed, the average court placed in such a situation will tend not to reverse its previous decision. Therefore, every effort by the agency attorney to avoid placing the court in such a poor psychological position, is well spent.

Occasionally, voluntary acceptance of a temporary restraining order

48 In California, this period extends for 60 days. State of California, Department of Transportation, STANDARD SPECIFICATIONS, § 3-1.01 (1975). Most States provide similar provisions.
50 Lathan v. Volpe, 455 F.2d at 1116 (9th Cir. 1971). (In environmental-relocation assistance cases, traditional balancing of equities is inappropriate. Courts of equity are a proper forum in which to make a declared policy of Congress effective.); Stop H-3 Ass'n v. Volpe, 353 F. Supp. at 18 (D. Hawaii 1972). (The strong public policy articulated in NEPA requires any balancing of equities to favor environmental plaintiffs.)
is a useful device for suspending further legal action until a more propitious time for the agency. In litigation as in war, the strategic selection of the time and place of battle often is determinative of victory or defeat.

Planning and processing public projects has become more complex and subject to diverse legal requirements; compliance with which is not always within agency control. Thus, critical times arise in project processing when it may not be in full compliance with all required legal clearances and therefore is vulnerable to adverse judicial decision. If by design or by chance, environmentalists launch their judicial attack at such time, voluntary consent to a temporary restraining order, which can be indefinitely extended by consent of defendants, is a good tactic to provide the necessary time to achieve full legal compliance. This strategy eliminates the necessity of overtly calling to the court's attention the merits of the challengers' noncompliance contentions. Also, a temporary restraining order involves little of the publicity that often accompanies a court decision after extended adversary proceedings. Finally, the confidence of the court in the good faith of the agency's counsel may thus be preserved. Such confidence can easily be lost if agency's counsel proceeds in a formal adversary hearing to defend a project which has obvious, albeit temporary, noncompliance defects.

In addition to stipulating to a continuing temporary restraining order, an agency can achieve the same result by the use of a "letter of understanding." Such letter is particularly useful when petitioners seek to enjoin an urban project on environmental and relocation-assistance grounds at a time when right-of-way acquisition and building improvement is in progress. In such a situation, most reasonable opponents of the project would agree that complete cessation of all such right-of-way acquisition activity would not be in the public interest. Certain owners and residents have relied on the agency's continuing right-of-way and relocation-assistance programs. To abruptly interrupt these programs would cause great hardship to them. Also, certain vacant structures should be demolished to prevent fire and other public health and safety dangers. Letters of understanding as to procedures to alleviate such personal hardship and dangers to public health and safety may be entered into between environmental interests and the agency. Generally, such letters provide that these issues be submitted to the environmental interests for their review and approval. These letters usually provide for referral to the court if the parties cannot agree on the factual or equitable merits of a particular activity. These letters of understanding always contain a clause which provides that such agreement may be cancelled on short notice by either party. The parties are then free to directly use equitable remedies afforded by litigation.

DISCOVERY

Technically, discovery is the ascertainment of facts after the filing of the lawsuit. Generally, technical discovery cannot commence until the lawsuit is filed. This general rule is based on the assumption that an adversary should have independent knowledge of the facts and law that support his case before he files suit. In other words, inspection of a prospective defendant or his files should not be engaged in for purposes of “creating” a lawsuit. Despite the merits of this assumption, it is particularly inapplicable in the field of environmental law. In many cases, environmentalists effectively engage in anti-project activities during the administrative processing of the project for the purpose of carefully nurturing and gathering facts for a prospective lawsuit in the event their administrative efforts fail. Although technical discovery procedures are not available to environmentalists in perfecting lawsuits against projects, recent statutory enactments falling under the general heading of “Freedom of Information Acts” are often available to accomplish similar goals on both State and Federal levels. When consideration is given to the tremendous tactical advantage of seeking preliminary equitable relief on the basis of a well-conceived lawsuit, it is understandable that environmentalists will use Freedom of Information Acts to ensure that their pleadings and affidavits on motions for such relief are complete.

Pre-Suit Discovery

The Freedom of Information Act (FOIA) is codified in 5 U.S.C. § 552. Basically, this statute allows citizens to inspect public records and files on matters of public concern, subject, however, to certain statutorily provided areas where such inspection is restricted. Aside from the one type of executive privilege that protects matters of national defense or foreign policy, perhaps the most important area of restriction under the Freedom of Information Act appears under subsection (b)(5) of § 552, which restricts the following category of information: “interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” This general language refers to another type executive privilege, recognized under federal discovery law, which has been phrased as follows: “The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize.” This type executive privilege is a qualified privilege because the party seeking the information pursuant to federal discovery procedures after suit is filed,

52 Braniff Airways Inc. v. Civil Aeronautics Board, 379 F.2d at 462 (D.C. Cir. 1967).
or under the Freedom of Information Act before suit is filed, can demonstrate that such communications are relevant to the issues of fact and law in the case and are not available to the parties if not discovered or made available by inspection, then the court may allow such discovery or inspection after weighing the detrimental effects of disclosure against the need for the documents shown by the parties seeking them.\(^5\)

The leading environmental case involving this exemption is *Environmental Protection Agency v. Mink*.\(^{54}\) A Congresswoman wished to inspect documents prepared for President Nixon on a proposed Alaskan nuclear test. These documents had been prepared in advance of the lawsuit and had been compiled to provide the President with all views of the proposed test.

The Court held that the purpose of exemption 5 of the Freedom of Information Act was to incorporate the generally recognized rule that confidential intra-agency advisory opinions are privileged from inspection, and, further, that the purpose of this rule was to permit open, frank discussion between subordinate and chief concerning administrative action. The Court noted that the Federal Government would be greatly hampered in legal and policy matters if its agencies were forced to "operate in a fishbowl." It did note, however, that the rule had finite limits.

Generally, factual material, as distinguished from legal and policy matters, or purely factual material contained in deliberative memoranda and severable from its context, would be available for discovery by private parties in litigation with the Federal Government. The distinction is that materials reflecting deliberative or policy-making processes are not discoverable.

A recent case, *Montrose Chemical Corp. of California v. Train*,\(^{55}\) considerably amplifies *Environmental Protection Agency v. Mink* and sets forth in detail the purpose, meaning, and limitation of exemption 5 of the Freedom of Information Act.

Factual information may be protected only if it is inextricably intertwined with policy-making processes. Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny.\(^{56}\)

Both *Environmental Protection Agency v. Mink* and *Montrose* state the rule that although factual material may be disclosed, deliberative and decision-making material is protected. This long-standing rule is called "executive privilege."

The fact that exemption 5 of the Freedom of Information Act is a

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\(^{53}\) Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. at 946-948 (Ct. Cl. 1948).

\(^{54}\) 410 U.S. 73, 35 L.Ed.2d 119, 93 S.Ct.

\(^{55}\) 491 F.2d 63 (D.C. Cir. 1974).

\(^{56}\) Id. at 67.
codification of the executive privilege principle is extremely important. Exemption 5 is a defense to disclosure only if the action is brought under the auspices of the Freedom of Information Act; however, executive privilege may be claimed in any action brought against the department seeking information falling within its ambit. Thus, the analysis of Freedom of Information Act cases may be used as authority for the proper application of executive privilege in other contexts.

Both Federal and State courts have protected against attempts to use discovery to probe into the mental processes of agency decision-makers. As to interagency and intra-agency memoranda relating to questions for ultimate determination by agency decision-makers, a Federal District Court in Pennsylvania in Environmental Defense Fund v. Brinegar had the following cogent remarks concerning attempts to show that such employees either verbally or by memorandum may have had reservations regarding the adequacy of certain environmental impact statement (EIS) treatment of projects during formulation-stage discussions between agency personnel.

There is, without question, a qualified executive privilege that obtains with respect to "intra-governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, No. 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd sub nom., V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952 (1967). Whether, in a particular case, this privilege should be overcome and disclosure required, must be decided by a weighing of the detrimental effects of disclosure against the need for the documents shown by the parties seeking discovery. Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 946-48 (Ct. Cl. 1958). Subsection (b)(5) of Section 552 of the Freedom of Information Act provides protection against attempts to delve into intra-agency and interagency communications. The qualified defense of executive privilege would apply to pre-suit informal discovery under the Act and to post-suit formal discovery under the Federal rules of discovery.

As a practical matter, however, if environmentalists can advance any reasonable argument that the agency is required under the Freedom of Information Act to disclose its files and records, the agency should do so to avoid possible charges of bureaucratic secrecy. Obviously, inspection of project files is a great aid to environmental interests "creating"
a lawsuit to halt a project. Such inspection allows them to carefully formulate their pleadings and to complete their affidavits in support of motions for preliminary relief. Such inspection attempts, however, should forewarn the agency's counsel that a serious threat of potential litigation exists so that he may effectively commence pre-suit preparation. The only direct nonlegal defense available to the agency's counsel against pre-suit inspection activities is to carefully monitor such inspection so that it does not inadvertently lead into areas of privileged information and files are not removed by the inspectors. There are further cogent reasons for such monitoring: agency counsel can obtain material of interest to the inspectors so that his files contain the same material as their files, and he can prevent cross-examination, by the inspectors, of uninformed or partially informed agency representatives during the inspection process. Such questioning often leads to responses that can be used against the agency in future legal maneuvers. A capable agency agent should be present at all times during the inspection process so that he may ensure the integrity of the files and inform agency counsel as to what portions thereof the inspectors found particularly intriguing. It is probably helpful if such agency representative is not one that would be expected to be familiar with the project. Thus, the tendency to cross-examine the agency representative on the meaning of the documents and technical requirements applicable to the project is lessened without the necessity of having the representative plead "instruction of counsel."

A useful action in controlling pre-suit inspection efforts by environmental interests is to establish a policy in the agency that once a matter is in the hands of the environmentalists' counsel, all requests for information and for inspection of documents before litigation must be made through the agency's counsel. The agency's counsel then will make the necessary arrangements for the response.

Another result of adopting the foregoing policy is that agency's counsel is in a better position to voluntarily supplement material requested to assure that opposing counsel is aware that the litigation grounds he is inspecting are weak. Thus, lawsuits that would have otherwise been filed are averted. No attorney likes to spend his time and effort on a losing case, and if in pre-suit proceedings the environmentalists' attorney can be led to appreciate the weakness of his client's litigation, he may be able to persuade his client not to sue.

**Formal Discovery**

After the suit is filed, environmentalists' counsel may take the traditional discovery steps of deposition, interrogatory, and the like, to develop additional grounds for litigation and to uncover as much favorable evidence as he can on the issues raised in the lawsuit. An important area of discovery environmentalists' counsel has been precluded from exploring in pre-suit informal discovery is direct oral questioning of agency officials by deposition.
Useful information concerning project processing by the agency which may be available by use of discovery is as varied as the many possible issues in an environmental lawsuit. Of particular importance is the treatment by agency staff and management of alternatives to the project under both the NEPA and Section 4(f) requirements. Sometimes a search of the documents or depositions of agency employees and officials will reveal other reasonable alternatives to the project that did not receive consideration in the environmental impact statement or the 4(f) statement. An example relating to highway planning would be where the project alternative was a full freeway and another reasonable alternative, such as an expressway, did not receive attention. Farwell v. Brinegar \(^{61}\) established that an alternative such as an expressway should be considered, especially if it had received considerable attention during early transportation planning activities. Also, there has been a tendency by the agency to treat alternatives by the same standards in a combined environmental impact statement/4(f) statement.\(^{62}\) Legally, however, the standards for treatment of alternatives greatly differ depending on whether they are considered in the context of an environmental impact statement or a 4(f) statement. The standard of "no prudent or feasible alternative" under Section 4(f) regarding the use of 4(f)-protected lands is much more stringent than the mere requirement of the study and consideration of alternatives required under NEPA. If the agency has used NEPA standards in weighing alternatives in a 4(f) context, the agency may have violated Section 4(f) requirements.

Although use of pre-suit informal discovery is not available to the agency, the use of formal discovery after suit is filed can serve several valuable functions in determining the agency’s strategy in the lawsuit. First, it is useful in deciding whether one or more of the various defenses commonly raised in defense of the usual environmental lawsuit will be successful in court. Ascertaining this chance of success may dictate whether the agency should attempt to cut the action short by use of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The most commonly raised defenses are: (1) procedural defects in class action suits, (2) standing to sue, and (3) laches.

The pursuit of discovery in certain cases has resulted in granting summary judgment for defendants on the grounds that the plaintiffs were not members of the class they purported to represent or, if members, did not have the resources or available legal competency to adequately represent the class. Especially where the claims raised appear somewhat frivolous, many courts are reluctant to allow ill-conceived and poorly supported class suits to proceed to trial because an adverse

\(^{61}\) 5 ERC 1839 (W.D. Wisc. 1973).
\(^{62}\) FHWA Policy and Procedure Memo-
judicial determination on the merits may later bar more meritorious class suits. Discovery can, in some cases, demonstrate that the facts underlying the glib pleading relating to standing simply do not support the allegations. The motion for summary judgment is particularly useful in piercing the pleadings and determining from admissions, affidavits, and evidence in the record whether material issues of fact actually exist. If they do not, summary judgment is appropriate.

As to the issue of laches, discovery can reveal that petitioners had pre-knowledge for a considerable period of time of the basis for a possible lawsuit. Thus, such “litigant foot dragging” before filing may justify dismissal of the suit on the basis of laches.

Discovery specifically undertaken by agency counsel for the purpose of extracting facts useful in pressing the foregoing defenses may yield other valuable information. For example, in a case handled by the authors where an agency had undertaken extensive discovery to establish laches, an interesting insight into the environmentalists’ real concern was gained. Such concern involved not the project under litigation, but a fear that the creation of that project would inevitably result in a future project, which allegedly would have had adverse environmental effects. The trial court agreed on the legitimacy of the environmental concern connected with the future project, but did not, after hearing the agency’s case, agree that the construction of the first project would make the creation of the second project inevitable. Therefore, the court refused to enjoin the first project for which it felt there was a demonstrated public need. Needless to say, pretrial knowledge of the environmentalists’ real concern in relation to the two projects, developed by depositions, played a great part in shaping the agency’s case.

A most beneficial use of discovery by agency counsel is to explore the lack of evidentiary foundation for various causes of action or classes of allegations within causes of action that will not be seriously contended by plaintiff at the time of trial. These may be “pruned away” by a motion for summary judgment under Rule 56(d) of the Federal Rules of Civil Procedure, and agency counsel can direct his preparatory resources towards the issues that will seriously be contended at the trial.

Discovery is especially useful to agency counsel in attacking conclusory or argumentative affidavits filed in support of motions for preliminary equitable relief. Agency counsel can thus determine whether there are factual bases for statements contained in such affidavits. If agency counsel determines that such affidavits are, in fact, a sham, he should make the appropriate motions to strike.

Some discussion is warranted concerning voluntary versus involuntary disclosure of information by agency counsel. Often environmentalists’ counsel will approach agency counsel with a request that he produce material voluntarily so that the environmentalists’ counsel will not be forced to go through the expense and trouble of formal discovery procedures. Such a request is always couched in terms of “we are
entitled to it anyway.” These demands have to be handled on an individual basis by agency counsel. A general rule for response is not to comply with such requests unless the opposing counsel is specific; i.e., he documents in writing exactly what he wants in his request, then agency counsel may voluntarily produce the requested document. The more common request is vague and stated in general terms. Such vague requests should be treated with polite refusal, together with advice that petitioners’ counsel correctly seek what he wants through the use of formal discovery procedures.

In the event either side oversteps propriety in its discovery procedures, federal discovery rules and most State discovery rules allow a court order protecting the aggrieved party against such misuse. Most discovery rules also allow objection to improper questions in written interrogatories, thus casting the burden on the questioner to seek court aid to obtain an answer. Textbook writers have compiled voluminous references to the technical aspects of discovery, thus, no attempt is made to detail all these matters here. Obviously, agency counsel in particular should be well-versed in the defenses to improper discovery because the use of discovery is primarily the tool of the environmentalist plaintiff. Although the “fishing expedition” defense is susceptible to various definitions, it is particularly calculated to defend against vague, over-broad, improperly specified attempts to inspect areas of agency procedure, which attempts are unlikely to produce much, if any, evidence relevant to the issues to be tried.

Attorney–Client Privilege and Work-Product Doctrine

Under the rules of discovery, an attorney’s advice is privileged. Furthermore, his work product (trial preparation effort) is conditionally protected from discovery.

The attorney–client privilege and the work-product doctrine are important defenses for both agency and environmentalists’ counsel in environmental litigation. Both sides engage in rather extensive pre-suit and pretrial preparation, either for offensive or defensive purposes. Attorneys are almost inevitably heavily involved in these efforts. The attorney–client privilege and the work-product doctrine protect much of these efforts against unwarranted intrusion and discovery by the opposition. The policy behind these privileges is to allow the client to freely reveal all the facts in the case to his attorney and to allow the attorney to fully prepare litigation without fear of discovery. The fact

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that an attorney is house counsel rather than in private practice does not defeat the attorney-client privilege.

The work-product doctrine is separate and distinct from the attorney-client privilege. The doctrine was judicially recognized by the United States Supreme Court in Hickman v. Taylor.\textsuperscript{66} The purpose of the work-product doctrine is to prevent unwarranted inquiries into the files and mental impressions of an attorney. An attorney should not be inhibited in writing down for his own purposes, his analysis, impressions, and strategy of a case.

Often counsel, during settlement negotiations with the opposing party, makes statements concerning the contents of legal and factual materials, such as reports on the issues. Later, when settlement efforts fail, the opposition seeks to discover such reports to prepare for the trial. The issue that evolves is whether the work-product privilege has been waived by this prior disclosure. One case, though conceding the question was a close one, concluded there was no waiver, citing the importance of preserving free exchange during settlement bargaining, unhindered by the fear of waiver of privilege.\textsuperscript{67} Nevertheless, counsel should be aware of the limits beyond which he should not venture in disclosing his legal and factual "hand" in settlement negotiations or else he will run the risk of having waived his work-product protection.

Whatever privilege either side seeks to invoke against discovery, one problem that arises is the manner in which an attorney convinces the court that the material sought falls within the privilege asserted. He can either present the disputed material to the court for its \textit{in camera} inspection, or he can attempt to convince the court, by use of affidavits, that such material falls within the privilege.

\textbf{In Camera Proceedings}

The attorney-client privilege, work-product doctrine, and executive privilege are often asserted to prevent disclosure of potentially prejudicial material to the trier of fact. Often such material contains frank discussions of legal exposures present in the litigation. Sometimes trial tactics or alternatives for administrative procedure, recommended by the attorney but not followed by the client, would be revealed by conversations or documents entitled to protection under one or more of these privileges. Because environmental litigation is almost always equitable, the court to which such material would be submitted \textit{in camera} for determination of the applicability of the privilege asserted would be the same court that would ultimately try the facts and law of

\textsuperscript{68} \textit{In camera} means in chambers; in private. A cause is said to be heard \textit{in camera} when a judge inspects material privately without disclosure to the opposition or jury if one is involved.
the case. It would be unrealistic to anticipate that the court, once it had been exposed to such material in camera, would be able to completely disregard it.

When faced with such a problem, the in camera method of allowing the court to inspect the material has obvious drawbacks in an equitable environmental action, however effective it may be in the context of a jury trial. Obviously, it is to the tactical advantage of the opponent to seek in camera disclosure to the court even though he fails in his attempt to have such material revealed to himself for purposes of trial preparation. Indeed, the opponent may well know or surmise through other pre-suit or pretrial preparation that such material contains damaging and prejudicial statements and his attempts to discover this material may be less motivated by a belief that he is entitled to it for trial preparation than for the purposes of seeking to embarrass his opposition and adversely affect his opponent's case.

In Environmental Protection Agency v. Mink, the Supreme Court discussed the propriety of in camera inspections:

We believe, however, that the remand now ordered by the Court of Appeals is unnecessarily rigid. The Freedom of Information Act may be invoked by any member of "the public"—without a showing of need—to compel disclosure of confidential Government documents. The unmistakable implication of the decision below is that any member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for in camera inspection—no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result. As was said in Kaiser Aluminum & Chemical Corp. [410 U.S. 93], 141 Ct. Cl., at 50, 157 F. Supp., at 947: "It seems . . . obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy, is somewhat impaired by a requirement to submit the evidence even [in camera]." Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U.S.C. § 552(a) (3) if it fails to meet its burden without in camera inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for in camera inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions con-

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stitute the barebones of protected matter. In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case. Others are available. *Cf. United States v. Reynolds*, 345 U.S. 1, 97 L.Ed. 727, 73 S.Ct. 528, 32 A.L.R.2d 382 (1953). 19

There must be a clear and convincing showing that the documents are privileged to avoid an *in camera* inspection.

*Dura Corp. v. Milwaukee Hydraulic Products Inc.* 20 involved the attorney-client privilege. The Court stated that if a proper showing of privilege has been made, it can be unwarranted prying for the court to inspect such documents *in camera*.

The *Ash Grove Cement Co. v. Federal Trade Comm'n* 21 case contains a good analysis of the requirements necessary to demonstrate by means of affidavit that a document is exempt from discovery. In *Ash Grove*, the affidavit listed each document and described in general terms its content. The descriptions were more than mere conclusions. The affidavits provided the court with sufficient information to enable it to determine which division of the agency (and frequently what individual) authorized the memo, to which division (or individual) the memo was sent, and the particular areas of policy or other matters that were discussed. The Court stated that a more detailed affidavit would be tantamount to requiring full disclosure of the substance of the documents.

**COMPLAINT**

Before initiating environmental litigation, the opponents of a project usually attempt to convince the agency to modify or halt the project until the requirements of NEPA have been satisfied. When this is unsuccessful, plaintiff is compelled to commence litigation and move for a preliminary injunction, pending a trial on the merits.

Unlike other types of litigation, the success or failure of an environmental suit is determined shortly after the complaint is filed. To take advantage of this fact, plaintiff counsel should be prepared to try the case on its merits at the time the complaint is filed. Therefore, the complaint must be drafted with great care. Counsel should pursue pre-suit discovery diligently so that he has a complete understanding of the project, its history, and its impact on the environment. Because the court is expected to rule on the preliminary injunction on the basis of the limited material contained in the complaint, the response thereto, supporting affidavits, and points and authorities, the complaint should be factual, objective, and concise. However, conciseness is not synonymous with brevity. Every credible legal theory should be included in the complaint. No useful purpose is served by emotional pleading or

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derogatory allegations. These matters are better and more forcefully presented in the affidavits relating to standing or environmental impact. To detail in the complaint the emotional charges relating to the project reduces the litigation to a personal level and obscures the legal issues involved.

The affidavits attached to the complaint should develop in detail the progression of the project, the affected parties, the environmental impact, the studies or reports undertaken, and the conclusions of experts on the matters involving expert opinion. These affidavits should be sufficiently comprehensive to effectively present the case on the merits.

**Injunctive Relief**

The memorandum of points and authorities in support of the motion for a preliminary injunction must be thorough. The court expects to be apprised of the relevant law, as well as the relevant facts. Unless the alleged violation of NEPA is clear, plaintiffs have a heavy burden of persuasion. The basic test in determining whether to grant a preliminary injunction is well established. In *Canal Authority of Florida v. Callaway,* the Court stated:

... The grant or denial of a preliminary injunction rests in the discretion of the District Court. *Johnson v. Radford,* 5 Cir. 1971, 449 F.2d 115. The District Court does not exercise unbridled discretion, however. It must exercise that discretion in light of what we have termed, "the four prerequisites for the extraordinary relief of preliminary injunction." *Allison v. Froehlke,* 5 Cir. 1972, 470 F. 2d 1123, 1126. [4 ERC 1901]. The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not deserve the public interest. *Di Giorgio v. Causey,* 5 Cir. 1973, 488 F.2d 527. *Blackshear Residents Organization v. Romney,* 5 Cir. 1973, 472 F.2d 1197.

In considering these four prerequisites, the court must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion. ...

The complaint, affidavits, and points and authorities must convincingly establish the right to injunctive relief. The Court emphasized this point by stating:

First and foremost, we reemphasize the importance of the general

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589 F.2d 567 (5th Cir. 1974), 6 ERC 589 F.2d at 572-573, 6 ERC at 1803. 1801.
requirements for a preliminary injunction. It is an extraordinary remedy, not available unless the plaintiff carries his burden of persuasion as to all of the four prerequisites. . . .

Although NEPA imposes a strict duty on all federal agencies to comply with its congressional mandate, NEPA does not modify the basic principle relating to injunctive relief. The Court stressed this point by noting:

Because of the relevance of the NEPA to suits such as this, it is important to note its impact on the preliminary injunction question. It is quite clear that the NEPA provides a new statutory basis for injunctions against proposed actions by federal agencies that will have significant effects on the human environment if no environmental impact statement has been filed. See, e.g., Sierra Club v. Volpe, N.D. Cal. 1972, 351 F.Supp. 1002 [4 ERC 1804]; Environmental Defense Fund v. Tennessee Valley Authority, 1972 339 F.Supp. 806 E.D. Tenn. aff'd 468 F.2d 1164 6th Cir. 1972 [4 ERC 1850]. However, the general requirements for a preliminary injunction, even in a suit grounded on the failure to file an impact statement, have not been altered. . . .

In light of this heavy burden plaintiffs’ points and authorities must clearly establish their right to the requested relief.

The complaint should include factual matter on all applicable theories under NEPA. The most frequent issues raised under NEPA are procedural compliance, major federal action, and adequacy of the environmental impact statement (EIS).

**Procedural Compliance**

Actions under procedural compliance have received extensive attention by the courts. The initial suits under NEPA related to projects developed before its enactment. Based on the Council on Environmental Quality Guidelines and specific agency regulations, most agencies undertook the construction of a number of these “ongoing” projects without preparing a formal EIS. After much confusion and inconsistent decisions, most courts ultimately adopted the balancing test contained in Arlington Coalition on Transp. v. Volpe. This issue, as it related to highway projects, was formally resolved in National Wildlife Federation v. Tiemann. In this action plaintiffs attempted to enjoin all federally assisted highway projects that did not have an EIS. The parties to the litigation entered into a consent judgment whereby the Federal Highway Administration agreed that the EIS requirement under NEPA would be applicable to all highway projects that did not receive federal P.S.&E. approval by January 1, 1974.

Since the consent judgment entered in *National Wildlife*, most pro-
cidental compliance suits have involved processing the project consistent with the mandates of NEPA. Counsel must analyze the various Federal and State statutes and regulations to determine if the agency has fully complied with its procedures for development of the project. If, after such an investigation, it appears that the agency has omitted, neglected, or superficially covered certain procedural steps in the development of the project, then the complaint should include a cause of action under procedural compliance.

A procedural compliance issue still unresolved relates to the designation of the proper agency to prepare the EIS on federally assisted highway projects. Presently, the State highway department initially prepares the document; such document is processed and, in consultation with the federal agency, it is independently reviewed and approved by the federal agency. Circuit Court decisions are in conflict as to whether this is an appropriate procedure. The majority of the Circuit Courts have approved such procedure, 79 however, the Second Circuit has insisted that the EIS must be prepared by the responsible federal agency. 80

Major Federal Action

In order to maintain a suit under NEPA, plaintiffs must establish that the proposed project involves "major federal action significantly affecting the quality of human environment." 81 This is particularly important on comprehensive State agency projects that involve federal assistance. On such projects, because of financial and budgetary constraints, the detailed planning and construction of the project is segmented into individual phases or units. The State agency then analyzes such individual units or segments. Through this analysis, the State agency may conclude that no federal assistance is involved on the particular segment and therefore no EIS is required. Under these circumstances, the complaint should allege that the project has been improperly segmented in violation of NEPA. A segmented project, although not itself receiving federal assistance, which has been connected with past or will be connected with a future project involving federal assistance, is subject to NEPA. By challenging a project because it is improperly segmented, some courts have held that the State agency must comply with NEPA because the comprehensive project involves major federal action. 82

If the segmented project involves federal assistance, the project is

79 Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973); Iowa Citizens for Environmental Quality Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Finish Allatoona’s Interstate Right, Inc. v. Brinegar, 484 F.2d 638 (5th Cir. 1973); Movement Against Destruction v. Volpe, 500 F.2d 29 (4th Cir. 1974).
80 Conservation Society v. Secretary, 508 F.2d 327 (2d Cir. 1974), 7 E.R.C. 1236.
subject to NEPA. Quite frequently, the sponsoring agency prepares an EIS on the segmented portion but the statement does not consider the environmental impact of the total project. Under these circumstances, the complaint should allege that the segmented project will make probable a future project not considered in the EIS.83

The length of a potential highway or the extent of a highway system, which is required to be included in one EIS, is a matter on which little uniformity of opinion can be found either in the courts or, indeed, between environmental interests and their agency counterparts. Some courts have indicated that it is appropriate for an EIS to cover an entire potential highway route extending across several State lines.84 Other courts have rejected this so-called “umbrella theory” and have held that so long as a portion of highway selected for EIS study has independent utility and is long enough to allow adequate discussion of alternatives, it will be adequate for EIS coverage.85 Without detailing here the substantive law concerning this issue, it is sufficient to note that effective trial strategy in environmental litigation requires counsel for both sides to appreciate both the opportunities and the dangers inherent in the complex and often interrelated federal action and segmentation issues.

Adequacy of Environmental Impact Statement

Some issues of substantive exposure in environmental litigation are air, noise, and water pollution; traffic safety; energy consumption; and project alternatives. These issues require a working knowledge of the agency’s policies and programs. An attorney well versed on an agency’s operation can be a formidable opponent. As is true in any public project, there are many internal “trade off”s in the processing and approval of a highway project. These trade offs are often the result of internal agency operations and cannot be justified by focusing only on the individual project at issue. Because the litigation is concerned with the project itself, and its impact, the court is unlikely to accept any trade offs resulting in greater environmental damage that are motivated by factors unrelated to the project. Under these circumstances, the agency has difficulty in justifying trade offs in the context of the specific project under litigation and its compliance with NEPA.

DEFENSIVE STRATEGY

Environmental litigation is both complex and confusing. The court and counsel for the parties seldom fully comprehend every aspect of the litigation. This must be kept in mind when the defendants contemplate

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85 Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975), 7 ERC 1778, aff’d, 508 F.2d 927 (2d Cir. 1974).
their defenses to the action. In the relatively short time between filing the complaint and the hearing on the preliminary injunction or the trial itself, the plaintiffs would prefer to concentrate on the substantive issues raised by their complaint. If agency counsel raises all available defenses, however, plaintiffs are forced to concentrate on several additional issues that take time, effort, and money.

Furthermore, in environmental litigation, most affirmative defenses must be resolved before there is a hearing on the substantive issues. The court must first be satisfied that the plaintiffs are entitled to raise, for example, the substantive issues under NEPA before it will allow evidence or arguments on the merits of the complaint. The practical advantage of this is great. Instead of plaintiffs commencing a hearing or trial on the offensive by charging that the defendants are desecrating the environment, plaintiffs will have to begin on the defensive and convince the court that they are not barred from proceeding with the environmental issues. By forcing plaintiff into this position, the defendant can temper the attack on the agency and diffuse the emotionalism that surrounds environmental litigation.

In addition, affirmative defenses are a useful tool for the court. In the event the court is disposed to rule on behalf of the defendants, it is provided with alternative bases for a favorable decision. This is sometimes referred to as a "shotgun" decision, and is extremely effective. Few plaintiffs will undertake an appeal if the decision is based on multiple grounds. The trial judge may be correct on one of the grounds even though he is in error on the others. The Appellate Court will uphold or affirm the decision if it can be supported on any ground, therefore plaintiffs are unlikely to prevail on the appeal.

Response

Once a complaint is filed against a public project, the defendants are vulnerable. Counsel for defendants have limited time in which to prepare for the hearing on the preliminary injunction. Not only must he grasp the legal issues, but also marshall the facts, prepare the witnesses, secure the affidavits, learn the history of the project, as well as its impact on the environment. This usually requires him to become an instant expert on a multitude of subjects. In addition, he must prepare his response and points and authorities to the request for a preliminary injunction.

The defendants should structure their response by separately identifying the procedural and the substantive issues raised in the complaint. Typically, there are no factual disputes involved in procedural compliance issues. Usually the dispute involves whether or not the defend-

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86 Fed. R. Civ. P. rule 6(d), 28 U.S.C.A. requires service not later than 5 days prior to the time specified for the hearing. But see N.D. Cal. R. 114 which provides for notice at least 21 days prior to hearing.
ants have complied with the law based on uncontested facts. As such, the matter becomes a question of law for the court to decide. Thus, the procedural defects can be resolved as a matter of law. On the other hand, with substantive issues, resourceful counsel for plaintiffs will always raise genuine questions of material fact concerning the project itself. These questions can only be decided after a trial on the merits.

In addition to isolating procedural and substantive issues in their response, the defendants must describe, by answer and affidavits, the processing of the project up to the time of suit. Such discussion should include the time, effort, and money that has been expended in the project to date. The court is sitting as a court of equity. It will not be concerned with minor or trivial defects in the processing of the project or its compliance with the law. The court will always find substantial compliance if it feels there is little or no merit to the complaint.\(^7\)

In environmental litigation, counsel for the defendants should not consider filing technical motions that do not go to the merits of the case or the court’s jurisdiction. Once there is opposition to a project, it is in the best interests of the agency to dispose of the litigation on the merits. The agency, by prevailing on a technical defect can, at best, only buy time. The project is still under the threat of litigation and it is unlikely that the agency can receive all the necessary approvals (both Federal and State) to proceed with the project until the litigation is settled.

However, the foregoing approach should not be considered inflexible. The exception to this approach would occur if (1) there is, in fact, no serious legal threat to the project, (2) the opposition is not truly organized, or (3) the plaintiff appears to be reluctant to spend much time, effort, and money on the litigation. Under any of these circumstances, it might be advisable to use the technical defenses. By prevailing on such defenses, the defendant has bought time, won a psychological battle with accompanying favorable publicity, and has weakened, neutralized, or discouraged further opposition to the project. Often when counsels for defendants successfully prevail on their technical motions, the plaintiffs elect to abandon the litigation.

If environmental petitioners bring their action in a federal court, a procedural matter that can be raised by defendants’ counsel is lack of federal subject matter jurisdiction. The most common basis for such jurisdiction is federal question jurisdiction contained in 28 U.S.C.A. § 1331(a). However, environmental petitioners usually succeed in bringing their action within the aforementioned statute by alleging a violation of NEPA or other federal statute.

As previously mentioned, environmental petitioners should attempt to institute the action in the judicial district most favorable to their cause. When the Federal Government is a defendant, the basic venue statute is 28 U.S.C. § 1391(e), which provides in part:

A civil action . . . may, . . . be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

In environmental litigation, plaintiff usually predicates venue on the residence of a federal defendant. Because plaintiffs usually name the head of the agency, the regional officer, and division or local officials, the suit can be initiated in a number of judicial districts. However, plaintiffs cannot name a defendant for the sole purpose of establishing venue. Some nexus between the defendant and the project at issue is required.

The defendants are entitled to transfer the action to another judicial district in which it might have been initiated if the convenience of the parties and witnesses so dictate. Usually the project site is the most convenient because of the location of the parties and witnesses.

Laches, Standing, Class Actions, and Sovereign Immunity

The more frequently raised defenses in environmental litigation are: laches, standing, procedural defects in class action suits, and sovereign immunity.

It is a well established rule in equity that if a party unreasonably delays in applying for injunctive relief, the action may be barred by the doctrine of laches. However, mere delay will not ordinarily preclude the action, unless the defendant or third parties are prejudiced by the delay. The doctrine of laches has been frequently raised in environmental litigation. In Arlington Coalition on Transp. v. Volpe, the court flatly stated, "we decline to invoke laches . . . because of the public interest status accorded ecological preservation by Congress." On the other hand, in an equally strong opinion, the court in Clark v. Volpe expressly rejected the argument that laches can never apply to a suit brought by a private citizen asserting a public right. Generally, although laches has been disfavored in environmental suits, the holding in Clark may indicate a changing attitude. In the past, the courts were reluctant to bar suit when there appeared to be total noncompliance with the strong Congressional mandate of NEPA by the agency. However, because most environmental lawsuits now involve the adequacy of the environmental impact statement rather than total noncompliance, the courts should revitalize the doctrine of laches.

In addition to barring a cause of action, the doctrine of laches can

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90 458 F.2d 1323 (4th Cir. 1972).
91 Id. at 1339.
serve another useful purpose in environmental litigation. As previously mentioned, the work, study, planning, money, and effort that has gone into the total project may not be relevant to the issues raised in the complaint. However, an element of laches involves prejudice to the parties. These matters are properly before the court by raising such a defense.  

The converse of the doctrine of laches is the defense of premature filing of the action. If the agency is in the process of preparing the environmental impact statement and so advises the court, the court is likely to dismiss the action on the grounds that it is not ripe for judicial review.  

However, if the agency is proceeding with some physical activities relating to the project, the court might enjoin the agency from continuing such activities until the environmental impact statement has been completed.

Another issue relating to the equitable doctrine of laches is the retroactive application of statutes and regulations that become effective after initial approvals on a project have been granted but before the project received construction approval. The only statement in NEPA that recognizes its effect on ongoing projects is the phrase contained in Section 102 which expresses that the act is to be applied "... to the fullest extent possible. ..."  

This language has received almost as many interpretations as there have been courts that have construed it. One of the earliest and most widely quoted interpretations is that contained in Arlington Coalition on Transp. v. Volpe, 97 in which the Court noted:

At some stage of progress, the cost of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be "possible" to change the project in accordance with Section 102. At some stage, federal action may be so "complete" that applying the Act could be considered a "retroactive" application not intended by the Congress. The congressional command that the Act be complied with "to the fullest extent possible" means, we believe, that an ongoing project was intended to be subject to Section 102 until it has reached that stage of completion, and that doubt about whether the critical stage has been reached must be resolved in favor of applicability.  

In the Arlington case, the Court established a balancing test between

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97 458 F.2d 1323 (4th Cir. 1972).
98 Id. at 1321.
the cost of altering or abandoning the project against the benefits accruing from the project. Applying this balancing test to the facts in that case, the Court concluded that it was still possible to prepare an environmental impact statement on the project.

The original guidelines promulgated by the Federal Highway Administration and approved by the Council on Environmental Quality established the date of design approval as the critical date for determining whether it was still possible for ongoing projects to comply with NEPA.99

The designation of the design approval date was based on an administrative determination that NEPA compliance was impracticable because of the advanced planning stage of the project. However, this administratively established criterion for determining when NEPA compliance was required has not received general approval by the courts. In the recent Washington case of Lathan v. Brinegar,100 the Court rejected this concept and selected the date of federal plans, specifications, and estimates (P.S.&E.) (23 U.S.C. § 106) approval as the date of the last major federal action, and thus NEPA compliance would be required by the date of such approval. The date of P.S.&E. approval has also been used in other decisions as the operative date for determining whether there has been compliance with NEPA.101

Decisions like Lathan v. Brinegar may impose an unworkable burden on those defending environmental actions brought against highway projects. If those projects are required to comply with all environmental statutes and regulations that are in effect on the date on which the highway department seeks P.S.&E. approval from the Federal Highway Administration, those statutes and regulations would, indeed, have a retroactive effect. The highway planning process is a lengthy one, covering a time span of approximately 10 years from the inception of the project to P.S.&E. approval. With the constant changes in the law, it is unlikely that a project will reach the P.S.&E. approval stage without being affected by major developments in the law during the preceding 10 years in which the project was developed. Although establishment of P.S.&E. approval as the last major federal action may appear unrealistic, it is nevertheless the date upon which the agency defense against environmental suits must be based, at least in those jurisdictions in which the courts have established this date as the operative date for NEPA compliance.

Meeting the challenge of complying with the applicable laws in effect at the time of P.S.&E. approval will present new burdens to those defending environmental suits. However, the defense of substantial

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100 506 F.2d 677 (9th Cir. 1974), 7 ERC 1048.
compliance with existing laws and regulations and the defense of laches are still available to the agency.

Another defense frequently asserted in environmental suits is plaintiff's lack of standing to sue. Standing is the judicial means to ensure that the plaintiff is a proper party to bring a particular legal action. In the landmark case of Ass'n of Data Processing Service Organizations, Inc. v. Camp, the Supreme Court established a two-pronged test for standing: Did the plaintiff suffer injury in fact? If so, are his interests arguably within the zone of interest protected by the relevant statute? With respect to the injury in fact test, the Supreme Court, in Sierra Club v. Morton, established the rule that a party seeking review must allege facts showing that he is himself adversely affected. Because the Court held that damage to aesthetic, recreational, or wilderness values can constitute such injury in fact, plaintiffs can achieve standing by alleging that the project adversely affects their environmental interests. However, plaintiffs must plead and later prove that they actually used or enjoyed the area that is being threatened by the project.

In any action involving NEPA, the second prong of the test established in Ass'n of Data Processing is generally not relevant because NEPA established a "zone of interest" that arguably affects all citizens. However, the zone of interest must still be established if plaintiff is alleging other causes of action. Therefore, the complaint and each cause of action therein must be closely scrutinized to determine if plaintiff does in fact have standing to assert each of the causes of action.

Under the present law of standing, most resourceful attorneys for plaintiffs can satisfy the requirements without much difficulty. However, counsel for defendant should not overlook this defense. As is true with most procedural defenses, if the issue is raised, plaintiffs must prove to the satisfaction of the court that they fulfill the standing requirements. Consequently, counsel for the defendant might want to shift the order of proceeding by raising this preliminary issue. A classic situation in which to raise this defense is where the plaintiffs are using NEPA as a means to accomplish ulterior aims or objectives. Although the motive of the plaintiffs in filing a lawsuit is usually not an issue, the true motive if it can be established, may influence the court in its final determination.

Frequently, environmental suits requesting injunctive relief are instituted as class actions. The defendants should be aware that there are numerous grounds on which to attack procedural defects in class suits, including the following:

action litigation. However, counsel for the defendants should analyze with great care the advisability of challenging the class. If the defendants prevail on the merits of the litigation, all members of the class are precluded from challenging the decision.\textsuperscript{105} Thus, defendants against whom a dubious nonclass action suit is brought might want to move for an order requiring that the suit be maintained as a class action and be properly certified as such. This strategy was used in \textit{Sierra Club v. Hardin},\textsuperscript{106} in which the Court ordered the plaintiff organizations to sue on behalf of all their members to avoid prejudice to the defendants.

An advantage in raising the procedural defects in a class action suit arises in the situation where defendants need additional time to prepare for the trial. If defendants’ counsel can convince the court, without subjecting the project to a preliminary injunction, that there are serious questions regarding the status of the plaintiffs as a class, this is an excellent way to gain additional time to fully prepare the case.

The doctrine of sovereign immunity; i.e., that the government cannot be sued without its consent, is occasionally raised by Federal and State agency defendants in environmental litigation. The federal doctrine is extensively discussed in \textit{Larson v. Domestic and Foreign Commerce Corp.}\textsuperscript{107} In this case, the United States Supreme Court recognized exceptions to the rule by holding that a federal official may be enjoined from pursuing a course of action when he is being sued in a purely personal capacity; i.e., when it is alleged that his actions are outside the scope of a specific statutory authority, or when the statute or order authorizing him to act in the sovereign’s name is, itself, claimed to be unconstitutional.

In order to entertain a suit against a government official, plaintiffs usually allege that such official is acting outside the scope of his authority when he fails to comply with all applicable statutes. Thus, in most situations, environmental plaintiffs can successfully overcome the sovereign immunity bar.

Occasionally, State defendants raise the sovereign immunity bar under the Eleventh Amendment when environmental petitioners seek to enjoin a State project. However, this defense has not received a favorable reception by most courts.\textsuperscript{108}

Although this defense has had limited success in barring prospective equitable relief sought in relation to environmental suits, it can be significant in defending against suits brought against State agencies for past noncompliance defects in the administration of federal programs, such as those under the URA where the remedies sought involve retro-


\textsuperscript{107} 337 U.S. 682, 93 L.Ed. 1628, 69 S.Ct. 1457 (1948).

spective relief calling for remedial expenditures from the State fisc. For instance, if a State agency has violated the URA by wrongfully displacing residents without securing for them replacement housing, a suit may be filed in federal court requesting that the displacing agency cure this past violation by replenishing the existing housing stock, i.e., constructing last resort housing pursuant to 42 U.S.C.A. § 4626.

In highway projects, typically, the State highway department must often displace some residents from the corridor of a proposed route. If the agency has wrongfully displaced such residents in violation of the URA, there is little question that a federal court has the power to enjoin the further development of the highway project until the agency complies with the statute; i.e., by constructing last resort housing. The federal judicial power to grant such prospective injunctive relief against State officials is well recognized.109

Many times, however, the financial burden of such housing construction is so onerous that the agency may decide that the entire highway project is economically unfeasible, thus it may elect to abandon such project. The issue that emerges is whether a State agency may, with impunity, withdraw from the project or whether it can be compelled by a federal court to rectify its past violations of the URA regardless of its intent to abandon the project.

If confronted with the latter situation, the displacing State agency may assert the sovereign immunity defense and argue that a federal court has no power to order a State to construct such housing. To do so, would be tantamount to extracting a monetary award from State funds. The extension of federal judicial power to suits of this nature might contravene the Eleventh Amendment to the United States Constitution. A recent Supreme Court opinion (Edelman v. Jordan)110 held that the Eleventh Amendment barred federal courts from extracting retroactive monetary awards from a State treasury. The Edelman case involved a State's failure to comply with a federally assisted welfare program. Such noncompliance had resulted in the wrongful withholding of benefits from otherwise eligible recipients. Though the court acknowledged that State officials could be enjoined by a federal court from continuing their misconduct in the administration of a federal program, it held that federal judicial power under the Eleventh Amendment did not extend to the award of retroactive payments. Thus, the Edelman doctrine may be a useful defense in suits brought against an agency for violation of a federal program. This doctrine can be significant in situations where compliance with such program would be so costly that the agency may choose to withdraw from the project. As a general rule, counsel for the defendants should raise both the Federal and State immunity defenses.

109 Ex Parte Young, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908).
Another defensive technique that can be used in environmental litigation involves the encouragement of other interested parties to intervene in the action. If such parties are reluctant, defendants should be prepared to make an appropriate motion to compel joinder. In the typical action, environmental plaintiffs bring suit against the project sponsors, usually the agency. It is extremely difficult for such agency to assert the interests of the affected community and other private parties. By participating in the suit, these parties can effectively assert their interests and damages if the project is enjoined.

Summary Judgment

A most useful tool in environmental litigation is the summary judgment procedure. Federal Rule of Civil Procedure 56 allows a party to obtain summary judgment relief by piercing the allegations in the pleadings through the introduction of affidavits showing that there are no factual issues in dispute. If no issues of fact exist, a party is entitled to such judgment as a matter of law.\textsuperscript{111} The court cannot try issues of fact under Rule 56; it can only determine whether there are issues of fact to be tried.\textsuperscript{112}

Where there are numerous causes of actions or defenses, a party can move for a partial summary judgment on selected issues. The court will then determine what genuine facts exist and what facts appear uncontroverted. For those issues in which the court finds no substantial controversy, partial summary judgment can be entered.\textsuperscript{113}

A partial summary judgment determining certain issues is generally nonappealable until after the case has been tried.\textsuperscript{114}

An appeal from a decision on a motion for summary judgment is covered by the same rules that apply to appeals regarding all civil actions. Therefore, an appeal of a decision on a Rule 56 motion is available only if the determination has the effect of completely disposing of the action. This general rule is subject to some exception.\textsuperscript{115}

One exception concerns interlocutory orders rendered as a result of summary judgment proceedings. This exception appears in 28 U.S.C.A. § 1292(a)(1), which authorizes direct appeals from orders granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions. The courts have interpreted this section narrowly and have held that a denial of a Rule 56 motion in a suit


\textsuperscript{112} Aulda v. Foster, 484 E.2d 945 (5th Cir. 1973).

\textsuperscript{113} Fed. R. Civ. P. rule 56(a) and (b), 28 U.S.C.A. allow a motion for summary judgment on all or any part of a claim.\textsuperscript{114} 10 Wright & Miller, Federal Practice, §§ 2717-2742, pp. 443-743.

\textsuperscript{115} Rule 54(b) concerning appeals from summary judgment on less than the entire action in multiparty or multiclaim litigation. 28 U.S.C.A. § 1292(a)(1) relating to appeals from interlocutory orders.
seeking an injunction is not appealable under 28 U.S.C.A. § 1292(a)(1).  

The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists. Generally, the facts asserted by the party opposing the motion, if supported by evidentiary material, are regarded as true. Under these circumstances, it is difficult to prevail on a motion for summary judgment if the non-moving party presents a minimum of evidence relating to the factual issues.

The motion is of great assistance to the parties when the facts appear to be uncontroverted and the real issue is the applicable law. In environmental litigation, causes of action based on the applicability of NEPA to the project or procedural compliance with other statutes are susceptible to summary judgment motions. These issues usually involve uncontested facts and the complaint is based on the legal effect or ramifications of these facts. To avoid needless effort on issues such as these, the parties are well advised to stipulate to the facts and file motions and cross-motions for summary judgment. This will result in an expeditious resolution of the legality of the project with a minimum of expense.

PRELIMINARY INJUNCTION
Preparation and Hearing

Before the hearing on the preliminary injunction, counsel should submit complete and thorough affidavits to the court. The affidavits filed in support of a motion for preliminary injunction must state clearly and specifically the facts supporting the litigants’ position. Preliminary injunctions frequently are denied if the affidavits do not demonstrate a clear right to relief under Federal Rule of Civil Procedure 65. If there is no factual dispute, the court will rule on the preliminary injunction as a matter of law.

Trial courts have discretion to issue an order on the written evidence alone, without a hearing, when no factual controversies exist. This discretion is based, in part, on Federal Rule of Civil Procedure 78 which provides that the court "may make provision by rule or order for the submission and determination of motions without oral hearing." Further evidence and considerations that appear to justify a preliminary injunction include the circumstances of the case, the threat to the plaintiff's rights, and the likelihood that the plaintiff will prevail on the merits of the action.


119 Bushie v. Stenocord Corp., 460 F.2d at 119 (9th Cir. 1972).


thermore, Rule 65 does not explicitly require an oral hearing on a motion for a preliminary injunction.

When the written evidence reveals a factual dispute, however, most courts rule that an evidentiary hearing must be held if any party so requests. Such a hearing provides the court and the parties an opportunity to observe the demeanor of the witnesses. In *Sims v. Greene*, 121 the Court construed Rule 65(a)(1) to require such an evidentiary hearing. It noted that:

> The allegations of the pleadings and affidavits filed in the cause are conflicting. Such conflicts must be resolved by oral testimony since only by hearing the witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations made by the respective parties. If witnesses are not heard the trial court will be left in the position of preferring one piece of paper to another. . . . 122

Furthermore, because the court must make findings of fact and conclusions of law in ruling on a motion for a preliminary injunction, the better practice is to allow oral testimony on disputed facts.

In addition to complete affidavits, counsel should be prepared to present all his evidence at the hearing itself. Depending on the nature of the case, counsel can request the court to allow evidence in the form of visual aids, exhibits, documents, and oral testimony. The presentation should clearly and concisely present the facts of the case and the issues involved. Because the court usually has little knowledge of the project, counsel must briefly describe such project, indicating its purpose as well as its environmental impact. This can best be accomplished by maps, aerial photographs, or models.

At the preliminary injunction hearing, the applicant for relief normally proceeds first, because he has the burden of establishing the necessity for such relief. Thereafter, the party opposing the motion will have an opportunity to present rebuttal testimony. By proceeding in this fashion, the plaintiff may be able to gain a favorable first impression which would be difficult to overcome. However, hearings on motions for preliminary injunctions need not always proceed in this manner. It is excellent strategy for defendants to suggest to the court that arguments on the affirmative defenses be heard first. If the defendants are allowed to proceed in this fashion, the advantage of first impression will be reversed. Plaintiffs will be forced to adopt a defensive strategy, and thus will be required to convince the court that they can properly maintain the action.

As a practical matter, if a preliminary injunction is granted, the public agency will attempt to correct the alleged defects as soon as possible. Thereafter, it will move for a trial on the merits or file a motion to vacate the preliminary injunction. However, if the court

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121 *161 F.2d 87 (3d Cir. 1947).*

122 *Id. at 88–89.*
denies the request for a preliminary injunction and the public agency continues to proceed with the project, the issues may become moot by the time of trial.

If the agency desires more time to respond to the motion for a preliminary injunction, it must either stipulate to an injunction during the continuance or petition the court for an extension of time. Almost without exception, the court will extract voluntary cessation of work by the agency on the project pending the hearing.

Consolidation

As previously mentioned, the practical effect of halting a project because of a court order or agreement is enormous. The court will be reluctant to alter or change the status quo until there has been a trial on the merits. Consequently, if a temporary restraining order (TRO) is granted by consent or order, defendants will have a difficult time prevailing at the hearing on the preliminary injunction. Under these circumstances, if the defendants are confident that they can prevail at the trial on the merits, they should move for a consolidation of the hearing on a preliminary injunction with the trial on the merits. Generally, the court will grant the motion and accelerate the trial. Depending on the workload of the court, one can reasonably expect the action to be set for trial within a month. This expeditious process occurs because courts must give preference to environmental litigation involving injunctive relief. The court is acutely aware of the millions of dollars involved in public projects as well as the consequences of any undue delay in resolving the litigation.

It may also be an advantage to plaintiffs to accelerate the trial. An early trial date will limit the time defendants have to prepare their case. Typically, the defendants are slow in marshalling the necessary facts for their defense. As previously mentioned, the Department of Justice represents federal agencies in environmental litigation. Usually its attorneys are unaware of the project until the time they are requested by the affected federal agency to defend the action. The more time they have to prepare the case, the greater likelihood that they will prevail. Financial resources are not a primary concern for agency defendants, but time is.

If the plaintiffs' action has merit, the defendants will want to avoid consolidating the hearing with a trial on the merits. This will allow time to correct the defects raised by plaintiffs in the complaint, even if it means stipulating to a preliminary injunction. By correcting the

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124 See, e.g., City of Rye, N.Y. v. Shuler, 355 F. Supp. 17 (S.D.N.Y. 1973) in which the District Court consolidated hearing on preliminary injunction with the trial on the merits in order to save the court and parties a duplicitous second trial without prejudicing the rights of anyone.
defects, they can secure the project internally and then proceed to a trial on the merits. As such, the court will look anew at the litigation and will not feel bound by any prior stipulations or rulings.

Although consolidation may call for a certain period of voluntary cessation of project activity by the agency and therefore cause certain costs to such agency, the advantages to the agency of having the trial of the action on the merits advanced and consolidated with the hearing on the application for preliminary injunction are so numerous and beneficial as to make the costs well worth it in many cases.

**TRIAL**

The trial of an environmental lawsuit is a unique experience. Unlike the typical boiler plate trial, such as personal injury or condemnation, the attorney trying an environmental lawsuit is operating in uncharted waters.

Although there are numerous decisions under NEPA, there have been relatively few actions that have involved a full-fledged trial on the merits. Most cases have been decided in law and motion proceedings. The parties either agree to an expeditious proceeding, such as summary judgment, or treat the ruling on a preliminary injunction as a final judgment.

This is because the agency is usually advertising or awarding the construction contract when the suit is filed. The cost of delaying the project at this stage and the public interest dictates a speedy resolution of the action. Under these circumstances, the court or a party will not allow the action to proceed to trial in the typical fashion.

Complaints for injunctive relief are matters for judge rather than jury determination. Therefore, because the issues of the case will be heard and decided by judges often sophisticated in the trial of complex issues, the presentation of the case likewise should be thorough, precise, and sophisticated.

Once the issues and facts are established, counsel should create a simple and uncomplicated image of his case. This can best be accomplished by using visual aids and expert witnesses.

**Visual Aids**

Visual aids are extremely important in environmental trials. More than any other type of evidence, visual aids can put the case in a proper perspective. Instead of relating the physical environment of the project by oral testimony in a subjective manner, demonstrative evidence will portray to the court, in an objective manner, the surrounding physical environment, as well as the proposed project.

If the environmental action seeks to halt work on a project under construction, it is desirable that photographs be taken of the work in progress so that the trier of fact will appreciate the consequences that will result from a work stoppage. If the work in progress involves a
project as extensive as a highway project, an aerial photograph is, at
times, the best way in which to convey the status of the work in progress.
Such photographs are also helpful in illustrating the extent of the
potential loss of money in the event of a work stoppage.

Where the environmental action involves a project on which work
has not commenced, it may be possible to make use of some of the visual
aid materials that have been prepared in its development. Often in
highway projects, artist renderings, models, or photographic retouch
studies of the proposed improvement have been made in the route loca-
tion or design phases of the project. If such visual aids have been pre-
pared they can be of great assistance in illustrating the impact of the
proposed project.

In most instances, visual aids in environmental lawsuits are used
primarily to illustrate the testimony of a witness, thus the foundation
required for such exhibit is somewhat less than would be required if
the model were to be offered into evidence independently.125 However,
care should be taken to be certain that the model, photograph, retouch,
or artist rendering presents an undistorted view of the area it purports
to represent.126 Although it is not necessary that the person who pre-
pared the visual aid testify as to its accuracy,127 the witness whose testi-
mony the visual aid will illustrate should have sufficient knowledge of
the project plans to be able to state accurately that the visual aid truly
depicts the area represented therein.

The advantage of a visual aid that illustrates the different design
concepts in a proposed project is that the trier of fact can make a visual
evaluation of the environmental impact of each concept. Figures
1 and 2 show two different methods of illustrating differing design
concepts. Both methods involve the same project. Figure 1 uses the
photo retouch technique which superimposes two different design
concepts on an aerial photograph of the area through which a proposed
highway is to be constructed; one design employs a tunnel in the con-
struction of the highway and the other uses an open-cut design concept.

The photographic retouch method of illustrating highway improve-
ments can be used to illustrate other complicated design concepts. This
process is much less expensive than construction of a model.

Figure 3 shows the use of the photographic retouch process to illus-
trate how a proposed highway project will appear when completed.

Introduction of a model of the project under litigation might en-

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125 On the admissibility of visual aids into evidence, see generally, 3 Wigmore,
Evidence § 790 (Chadbourne rev. 1970). On the use and misuse of visual aids, see
generally, Goldmer & Mrovska, Demonstrative Evidence and Audio-Visual Aids at
Trial, 8 U. FLA. L. REV. 185 (1955); Crocker, Demonstrative Evidence Tech-
niques, 5 Practical Lawyer 45 (Jan.
126 Id. See also, San Mateo County v.
Christen, 22 Cal. App. 2d 375, 71 P.2d
88 (1937).
127 3 Wigmore, Evidence § 793 (Chad-
Figure 1. Photographic retouch illustrating the tunnel design concept.
Figure 2. Model showing the tunnel design concept (upper) and the tunnel portion removed showing the cut section design concept.
Figure 3. Photographic retouch method illustrating highway improvements. This method can be used to illustrate other complicated design concepts, and is much less expensive than construction of a model.
counter strenuous objection. One method of overcoming the objection is to establish the credibility of past models on similar projects. If the public agency has available photographs of a model that has been used to illustrate how a highway or public project will appear when completed and such project has already been constructed, it is desirable to obtain photographs of the completed project to show how closely the completed project matches the model. This approach can be used to establish the validity of the use of the model of the project under litigation. Such before and after situations are shown in Figures 4 and 5. From these figures it can be seen how closely the actual construction was to the model.

However, in the final analysis, the judge will decide the case on the credibility of the witnesses. Therefore, the visual aids should be used primarily to illustrate the testimony of the witnesses.

Expert Witnesses

The trial of environmental litigation involving public projects involves a wide range of technical data on the project as well as its environmental impact. As a result, one of the most significant aspects of environmental trials is the need for and use of expert witnesses. Even though most witnesses in environmental litigation are experts, trial strategy should involve the same basic considerations in preparation as any other trial before the court. Preparation of witnesses should be thorough and complete. During preparation, counsel should develop a rapport with the witness. At the same time, areas of weakness or exposure should be developed so that the witness does not become flustered or nervous on cross-examination and lose his credibility. The witness should be instructed to answer, truthfully and simply, any question on cross-examination. He should understand that cross-examination is not a game of wits. Of utmost importance, the witness should be warned about volunteering information.

Direct examination should be as brief as possible. Counsel should develop the testimony so that the court understands the witness and follows his testimony. The rules of evidence in environmental litigation are the same as in any other litigation. Therefore, counsel first should establish the qualifications of the expert witness and the foundation on which he will be expressing opinions and then develop his conclusions.

Cross-examination of an expert witness should be directed towards his knowledge of the project, his qualifications, and the reasons on which he based his opinion. Counsel should not engage in extensive cross-examination unless he feels the witness can be discredited or impeached. Most witnesses who will be testifying will be subjectively involved for or against the project. Consequently, this is a fruitful area of cross-examination, and counsel can develop the bias or prejudice of the witness on this point. No matter how objective the witness might be on his scientific testimony, in all likelihood he has formed conclusions on the project itself.
Figure 4. Photographic model illustrating a proposed highway interchange prior to construction.

Figure 5. Highway interchange as shown in the model in Figure 4 after construction.
Initially, the plaintiff can rely on agency personnel to establish the nature, extent, and scope of the environmental analysis. Thereafter, plaintiffs must use their own experts to determine weaknesses in the investigation and study of the project's environmental impact. Plaintiffs' experts should direct their testimony to those areas in which the agency failed to consider or attach sufficient weight to relevant factors.

The defendants should initially present testimony on the planning and development of the project, as well as the scope of public involvement. Thereafter, defendants' witnesses should testify to all environmental factors and impacts considered by the agency. This will enable the court to appreciate the total scope of the project and the analysis undertaken by the agency. By understanding the entire development of the project and its impact, the court is more likely to find that adequate consideration was given to the environmental impact by the agency in the development of the project.

After the court has been apprised of all the compliance efforts of the agency, the defendants must present expert testimony on the specific issues raised by plaintiffs' evidence. This testimony will either directly contradict plaintiffs' experts, or establish that the environmental analysis was adequate.

Agency counsel must be prepared to establish at the trial the need or justification for the proposed project. Most public projects are subject to current values and legislation and, therefore, are subject to legal exposure. The need or justification for the project might be challenged by plaintiffs who will assert that the project should be down-scoped because, for example, as a result of the energy crisis there will be less vehicular traffic or use. Plaintiffs might also claim that the air, noise, or water analyses were inadequate under recently enacted minimum standards. The agency cannot ignore the fact that the original justification and analysis of the project predated these crises or standards. In order to prevail, the agency must establish that these new variables were considered and convince the court that there are reasonable grounds to support the agency's decision to proceed with the project as planned.

**SUMMARY**

In the final analysis, successful trial strategy and techniques in environmental litigation involves a constant monitoring of a proposed public project from conception to completion. Public participation in the development of the project alerts the agency to the concerns of the community and the environmentalists. By considering such concerns and incorporating reasonable modification, the agency will minimize the legal exposure to the proposed project. By participating in the planning stages of the proposed project, the environmentalists will influence development and will effectuate modification that might satisfy their concerns.
Attorneys practicing environmental law can best serve their clients by actively engaging in preventive law. During the critical time between ostensive compliance with NEPA and actual construction, the attorneys should do their utmost in resolving the differences between the parties and effectuate a solution or compromise on the disputed project. In all likelihood, this is the last opportunity for the parties to take a good hard look at project impact and resolve the matter. The agency still has flexibility in the final design of the project and should realistically analyze the concerns of the environmentalist, as well as the project's exposure to litigation.

If the matter cannot be resolved, the attitude of the parties becomes rigid, their positions polarized, and the attorneys lose effective control of their clients. When this occurs, a lawsuit is inevitable.

At this juncture, the attorneys become true advocates. They must master the legal issues in drafting or responding to the litigation. A complete understanding of the court procedure is essential. Techniques in expediting or delaying the litigation must be understood. The litigation strategy will be dictated by the needs of the client and the status of the project.

Because environmental law is a relatively new area, the trial strategy of environmental litigation is itself evolving to accommodate the rapid changes in the field. As such, there is no single, correct approach to developing effective trial strategy. To a certain extent, strategy must be determined by the facts and issues of the case, as well as the witnesses involved. Hopefully, however, this paper has presented some useful approaches to litigating environmental suits. These suggestions should provide an attorney with a basic guideline from which he can develop further techniques as each individual case may dictate.

However, the most effective approach to environmental litigation is to adopt a strategy which assures that the project is developed consistent with the mandate of NEPA. By adopting this strategy the attorney involved in environmental law can often prevail without the necessity of litigating the matter. However, in the event litigation does ensue, his chances of success are enhanced by adoption of the aforementioned strategy.