SECTION 6

LITIGATION ISSUES

Litigation against a transportation agency is an unwanted and costly process through which an opponent's concerns about a particular highway or other transportation project are raised and addressed. In addition to those suits where the goal is to stop a project altogether, litigation is often threatened or filed by interest groups in order to achieve strategic advantage or leverage to influence the specifics of project design or mitigation measures, even where the project itself is viewed by these parties as a desirable improvement. Other times an interest group may litigate against a particular transportation project in an effort to "make law" that will further the organization's policy goals. Plaintiffs in such actions may include, among others, affected abutters, local community organizations, commercial interests, municipalities, local environmental and other interest groups, and national organizations or their local chapters.

Given the wide range of environmental laws and regulations to which a highway project is subject and the subjective nature of many of the review and approval processes, there may be any number of potential avenues of attack for a motivated and creative plaintiff. If not successful in warding off or ultimately thwarting the opponent's claims, the agency may find itself facing delays, changes or, in extreme cases, cancellation of the proposed transportation improvements. In addition, litigation and even the threat of litigation will cause a transportation agency to expend substantial additional funds on further analysis of an issue, and the attorney's and expert witness fees required to defend a project from attack.

This section discusses the types of court relief available to an opponent to a transportation project and the extent of aggrievement an opponent must establish to raise his concerns in court. In addition, this section discusses trial strategy and certain techniques a transportation agency may employ to successfully defend this type of litigation. Finally, this section examines the burgeoning field of mediation as an alternative to litigation. Both the mediation process itself and mediation's relative advantages to litigation are discussed.

A. PRELIMINARY OBSERVATIONS*

Three critical issues often determine whether an opponent will prevail in a lawsuit intended to alter or terminate a particular transportation project. First, if an opponent obtains a temporary injunction to halt a project while the litigation is pending, the opponent gains substantial leverage. The opponent may force a transportation agency to agree to certain modifications of the project with the promise that the injunction will be lifted once agreement is reached concerning the modifications. Given external pressures of politics, funding availability, SIP compliance schedules, and economic development goals, transportation projects are often seen as highly time-critical, and the opportunity to forestall or curtail litigation delays can prompt significant concessions on the part of the implementing agency. Second, the standard applied by a court for review of a transportation agency decision will affect an opponent's likelihood of success. Third, the administrative record existing before the agency will generally be the factual basis for judicial review of permitting and approval decisions. Because that record is in place by the time a complaint is filed, the transportation agency's best strategic opportunity to successfully defend litigation comes during the environmental study and permitting processes themselves.

1. Preliminary Injunction

a. Standard for Issuance

In suits brought by an opponent or citizens group against a transportation agency, the remedy invariably sought is injunctive relief. Although some statutes provide for financial penalties for noncompliance, the goal of an opponent is to seek both an immediate injunction restraining the project from proceeding while the lawsuit is pending, and the ultimate threat of permanent injunction to curtail the project altogether unless and until the alleged deficiencies are addressed. The opponent may allege that the transportation agency is violating a number of federal and state statutory requirements, including but not limited to NEPA,[1] the Department of Transportation Act,[2] SAFETEA-LU,[3] the Toxic Substances Control Act,[4] CWA,[5] CAA,[6] ESA,[7] RCRA,[8] and CERCLA.[9]

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* This section updates, as appropriate, and relies in part upon information and analysis in Hugh J. Yarrington, *Environmental Litigation: Rights & Remedies*, *in* SELECTED STUDIES IN HIGHWAY LAW, ch. VII; NORVAL C. FAIRMAN & ELIAS D. BARDIS, *Trial Strategy & Techniques in Environmental Litigation*, *in* SELECTED STUDIES IN HIGHWAY LAW, ch. VII; DANIEL MANDELKER, NEPA LAW AND LITIGATION (2d ed. 1992) (with annual supplements).

[1] 42 U.S.C. § 4321 *et seq*. Pub. L. No. 91-190 (Jan. 1, 1970), 83 Stat. 852.

[2] 49 U.S.C. § 303, Pub. L. No. 89-670 (Oct. 16, 1966), 80 Stat. 934, as amended.

[3] Pub. L. No. 109-59 (Aug. 10, 2004), 119 Stat. 1144.

[4] 15 U.S.C. § 2601 *et seq*., Pub. L. No. 94-469 (Oct. 11, 1976), 90 Stat. 2003.

[5] 33 U.S.C. § 1251 *et seq.,* Pub. L. No. 95-217 (Dec. 27, 1977), as amended.

[6] 42 U.S.C. § 7401 *et seq.,* Pub. L. No. 89-272 (Oct. 20, 1965), as amended, *see* 42 U.S.C.A. 7401 Note.

[7] 7 U.S.C. § 136; 16 U.S.C. 460 *et seq*., Pub. L. No. 93-205 (Dec. 28, 1973), 87 Stat. 884, as amended.

[8] 42 U.S.C. § 6901 *et seq.,* Pub. L. No. 94-580 (Oct. 21, 1976), 90 Stat. 2795.

[9] 42 U.S.C. § 9601 *et seq.,* Pub. L. No. 96-510 (Dec. 11, 1980), 94 Stat. 2767, as amended.

Some of these statutes, such as the NEPA, do not provide for injunctive relief or any other remedies.[10] Rather, opponents of a highway project who assert that a transportation agency failed to comply with the requirements of NEPA, or other federal and state law requirements, may obtain injunctive relief based on a multifactor standard that is generally applicable to all preliminary injunctions sought in federal court.[11] The multifactor standard requires a court to consider the plaintiff's probability of success on the merits, a balancing of the harm to the plaintiff if an injunction is not granted against the harm to the defendant if an injunction is granted, and the public interest affected.[12] In applying the multifactor standard, the court has substantial discretion.[13]

b. Recent Judicial Decisions Applying the Standard for Issuance of an Injunction

It is not enough for a plaintiff to satisfy just one element of the multifactor standard; plaintiffs must satisfy all elements of the standard for an injunction to be issued. In *Provo River Coalition v. Pena*,[14] a Utah district court denied plaintiffs' request for a temporary restraining order and for a preliminary injunction.[15] The plaintiffs asserted that the proposed widening of US-189 in Provo Canyon would cause irreparable injury to the vegetation and wildlife of Provo Creek.[16] The complaint asserted violation of NEPA, the CAA, and ISTEA.[17] The court applied the multifactor standard and found that in view of the ongoing construction, plaintiffs would suffer irreparable injury prior to final resolution of the case.[18] However, the court denied the plaintiffs' motion for preliminary injunction and held that the plaintiffs had failed to meet their burden of showing a likelihood of success on the merits.[19]

However, in *Fund for Animals v. Clark*,[20] the plaintiffs were able to satisfy all elements of the multifactor standard. Plaintiffs alleged that the FWS failed to perform an environmental assessment under NEPA prior to deciding to conduct an organized hunt of a bison herd in the National Elk Refuge located in the northwestern part of Wyoming. The court held that plaintiffs would likely succeed on the merits and that the harm of hunting the bison outweighed the harm of an outbreak of brucellosis that could result from not hunting the bison.[21] The court also held that the public interest would be served by having the defendants' address the public's expressed environmental concerns, as contemplated by NEPA.[22]

Typically, opponents will not just allege violation of NEPA, but will allege that a transportation agency has violated a number of federal or state statutes. Where a highway project involves the construction of undeveloped wetlands or woodlands that contain undisturbed animal habitats, opponents may invoke the ESA. In the notorious case of *Tennessee Valley Auth. v. Hill* (*TVA*),[23] the Tennessee Valley Authority had spent $78 million constructing the Tellico Dam, which was 80 percent finished. The plaintiffs alleged that the snail darter, a species of small fish that lived in the river and had recently been placed on the Endangered Species List, would be rendered extinct by the completion of the dam. Because the Supreme Court found Congress to have valued the survival of the species as "incalculable," it upheld the injunction of the completion of the dam despite the huge economic costs and the loss of electricity and irrigation to thousands of citizens.

In *Hamilton v. City of Austin*,[24] the plaintiffs relied upon *TVA* and asserted that the Barton Springs Salamander (the Salamander) was an endangered species and was threatened by the city's cleaning of the Barton Springs Pool.[25] Plaintiffs sought a preliminary and permanent injunction to enjoin the pool cleaning and experimental activities in the Barton Springs

[10] *See* 42 U.S.C. § 4371 *et seq*. See Section 3 for a discussion of NEPA. However, violation by a transportation agency of any of the substantive or procedural requirements of the federal environmental statutes can result in injunctions barring continued construction pending compliance with the statutory requirements at issue.

[11] Rule 65 of the Federal Rules of Civil Procedure allows a court to enter preliminary injunctive relief, including restraining orders, prior to adjudication on the merits of an action.

[12] *See, e.g.,* DSC Commc'ns Corp. v. DGI Tecs., Inc., 81 F.3d 597, 600 (5th Cir. 1996); Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc., 883 F.2d 886, 888–89 (10th Cir. 1989); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980); Wash. Metro. Area Transit Comm'n v. Holiday Tours, 182 U.S. App. D.C. 220, 559 F.2d 841, 842–44 (D.C. Cir. 1977).

[13] *Id*.

[14] 925 F. Supp. 1518 (D. Utah 1996).

[15] *Id*. at 1529.

[16] *Id*. at 1524.

[17] *Id*. at 1519.

[18] *Id*. at 1525.

[19] *Id*. at 1529. Some other decisions where the trial court has refused to issue a preliminary injunction under NEPA are: Chemical Weapons Working Group v. Dep't of the Army, 963 F. Supp. 1083 (D. Utah 1997); Greater Yellowstone Coalition v. Babbit, 952 F. Supp. 1435 (D. Mont. 1996); Alan Hamilton v. City of Austin, 8 F. Supp. 2d 886 (W.D. Texas 1998); Goshen Road Envtl. Action Team v. United States, 891 F. Supp. 1126 (E.D.N.C. 1995).

[20] 27 F. Supp. 2d 8 (D.D.C. 1998).

[21] *Id*. at 14–15.

[22] *Id*. at 15.

[23] 437 U.S. 153 (1978).

[24] 8 F. Supp. 2d 886 (W.D. Tex. 1998).

[25] *Id*. at 889. The Salamander lives only in certain springs in Barton Creek. Barton Springs Pool is located in Zilker Park, the premier public park owned and operated by the City of Austin. Barton Springs Pool is not an artificially bound ordinary pool. Rather it is a natural unique swimming hole created in the late 1920s by the construction of a small dam across Barton Creek. *Id*. at 889–90.

Pool.[26] The court distinguished *TVA* because the pool cleaning would not result in either the eradication of the Salamander or the destruction of its habitat.[27] In refusing to issue an injunction the court did not find a substantial likelihood that the plaintiffs would succeed on the merits, and found no evidence of irreparable harm.[28]

c. Arguments by Transportation Agencies to Prevent Issuance of Injunctions

In addition to defending on the merits of an alleged environmental law violation, a transportation agency may fend off or reduce the scope of an injunction on the following grounds:

i. Laches and Statute of Limitations.—Laches is a legal doctrine available to transportation agencies to defend against the issuance of a preliminary injunction.[29] Laches is defined as neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done.[30] Where an opponent contests agency decisions by asserting violations of NEPA, the opponent would have had ample opportunity to comment upon the highway project during the administrative process. After the NEPA process is complete and the project has commenced, or is about to commence, a transportation agency may assert that opponents have sat on their rights so long that they have waived their right to raise NEPA issues.

One defense, similar to laches, that a transportation agency may assert in certain circumstances is statute of limitations. Certain statutes only provide a limited time period within which an action must be brought.[31] These limitation periods vary, and for each statute that opponents assert has been violated, a transportation agency should consider whether there is a limitation period and, if so, whether the limitation period has passed.

ii. Balancing the Equities.—In addition to laches, a transportation agency may assert that the costs of construction already incurred outweigh the benefits to be gained by environmental compliance.[32] Because a court must balance the equities in determining whether to issue an injunction, this type of defense may substantially influence a court. In *Environmental Law Fund, Inc. v. Volpe*, the District Court for the Northern District of California determined that the balance favored the continued construction of the highway even though a technical violation of NEPA existed.[33] The factors analyzed by the court were 1) the participation of the local community in the planning of the project, 2) the extent to which the state had already attempted to take environmental factors into account, 3) the likely harm to the environment if the project was constructed as planned, and 4) the cost to the state of halting construction while it complied with the technical NEPA violation.[34] The court denied injunctive relief because the local community had been very active in planning the project, the state had attempted to analyze all environmental factors, the possible harm to the environment was slight, and significant economic loss would result if the project were halted.[35] In support of likely economic loss, the state proved that it would lose $10.8 million in federal highway funds and would be liable to various contractors if the project were halted.[36]

On the issue of balancing the equities after construction has commenced, the district court in *Brooks v. Volpe* stated:

> Imposition of the stringent requirements of NEPA, long after a project has begun, may sometimes appear to be too harsh. Yet the statute was intended not only to serve the convenience of the public today, but to provide future generations with protection of their interests as well. If NEPA had been enacted ten years ago, Seattle would surely not now be scarred with I-5, the hideous concrete ditch which runs through the heart of the city.[37]

In light of this analysis, the court in *Brooks* decided to grant the opponent's request for an injunction despite the fact that a large amount of money had been spent on the project.[38] A transportation agency that is defending an action for preliminary injunction to halt a project that is already underway should be prepared to present the best possible evidence concerning the substantial costs that will be incurred if the injunction is granted and the project halted. Evidence concerning the public interest in safety and any environmental benefits from the project should also be advanced.[39]

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[26] *Id*.

[27] *Id*. at 896. Only a few Salamanders were left stranded in any one pool cleaning and the city employed the technique of assigning three or more individuals to monitor, search, and save stranded Salamanders. *Id*.

[28] *Id*. at 897.

[29] Hugh J. Yarrington, *Environmental Litigation: Rights & Remedies*, *in* SELECTED STUDIES IN HIGHWAY LAW ("Selected Studies"), 1702.

[30] BLACK'S LAW DICTIONARY 875 (6th ed.).

[31] *See, e.g.,* 42 U.S.C. § 9613(g)(2) (provision of CERCLA setting forth statute of limitation period of 3 years to recover response costs for a removal action and 6 years to recover response costs for a remedial action).

[32] YARRINGTON, *supra* note 29, at 1702.

[33] 340 F. Supp. 1328 (N.D. Cal. 1972).

[34] *Id*. at 1334–1335.

[35] *Id*. at 1336–1337.

[36] *Id*.

[37] 350 F. Supp. 269, 283 (W. D. Wash. 1972).

[38] *Id*.

[39] Provo River Coal. v. Pena, 925 F. Supp. 1518 (D. Utah 1996) (Motion for preliminary injunction denied, even though balance of equities slightly favors public interest in enforcing

iii. Remedy.—A transportation agency may also defend against a project opponent's petition for injunctive relief by arguing that only a portion, if any, of a highway project should be halted. A court acting in equity has considerable discretion to fashion relief and may limit an injunction to only a portion of a highway project.[40]

d. Procedures for Obtaining Injunction

To obtain a preliminary injunction, petitioner's counsel must submit a complete and thorough affidavit specifying the facts supporting the petitioner's position.[41] Preliminary injunctions are frequently denied where the affidavit does not demonstrate a clear right to the relief requested.[42] Additionally, plaintiffs must establish that the irreparable injury alleged is *likely* to occur in order to obtain preliminary relief.[43] The Supreme Court in *Winter* reasoned that "issuing a preliminary injunction only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.[44]

Trial courts have the authority to render an injunction on the written evidence alone (where there are no issues of fact), or to issue a temporary restraining order until an evidentiary hearing is held.[45] Generally, where the written evidence contains a factual dispute, most courts will hold an evidentiary hearing if either party requests one.[46] Where review is on the administrative record, as in a challenge brought under NEPA, the agency should consider filing a motion to exclude oral testimony and affidavits from consideration in determining the likelihood of success on the merits.

At the preliminary injunction hearing, the petitioner will normally proceed first because it has the burden of establishing the necessity of the relief requested. Thereafter, the transportation agency has an opportunity to present its evidence.

If a temporary restraining order is issued by the court (or is consented to by the agency) prior to the preliminary injunction hearing, a transportation agency may want to consider moving for a consolidation of the preliminary injunction hearing and the trial on the merits.[47] If the transportation agency is confident that it will prevail at a trial on the merits, moving for consolidation is a beneficial trial strategy.[48] Although consolidation may require an agency to voluntarily halt a project for a certain period of time and thereby incur certain costs, the advantage of obtaining an expedient resolution of a project opponent's claims is so beneficial that it often outweighs the costs incurred by temporarily halting a project. Generally, in furtherance of judicial economy, courts will grant motions to consolidate. Depending on the number of cases before the court, the action may be set for trial within a few months. Courts are aware of the millions of dollars involved in transportation projects and the likely financial consequences of any undue delay in resolving the litigation.

If the transportation agency does not have a strong defense and expects the plaintiff to prevail, the agency will not want to consolidate the preliminary injunction hearing and the trial on the merits. The additional time before trial can permit an agency time to correct any deficiencies in the review and approval processes raised by the plaintiff.

If the preliminary injunction is granted and in place until a full trial, the agency may attempt to correct the alleged defects as soon as possible. After the defects are corrected, the agency may move to vacate the preliminary injunction.

2. Standard of Review

The standard of review employed by courts considering whether a transportation agency complied with the necessary legal requirements is critical to the effectiveness of lawsuits by opponents. A transportation agency should analyze what standard of review is applicable to an agency decision and argue where possible that a less rigorous standard is applicable than that claimed by the opponent.

a. Standard of Review Under NEPA

NEPA does not itself state that an opponent may obtain judicial review of an agency's efforts to comply with NEPA. However, in a historic decision,[49] the D.C. Circuit emphatically asserted judicial authority to enforce NEPA:

> We conclude, then, that Section 102 of NEPA mandates a particular sort of care and informed decision-making process and creates judicially enforceable duties…[I]f the decision was reached procedurally without individual consideration and balancing of environmental factors—

NEPA over the costs already expended and the safety, efficiency, and environmental benefits of the project).

[40] *See* Cook v. Birmingham News, 618 F.2d 1149, 1152 (5th Cir. 1980); Ark. Comty. Org. for Reform Now v. Brinegar, 398 F. Supp. 685 (E. D. Ark. 1975), *aff'd*, 531 F.2d 864 (8th Cir. 1975).

[41] Norval C. Fairman & Elias D. Bardis, *Trial Strategy & Techniques in Environmental Litigation*, *in* SELECTED STUDIES IN HIGHWAY LAW 1759.

[42] *See, e.g.,* Citizens Ass'n v. Wash., 370 F. Supp. 1101 (D.D.C. 1974).

[43] Winter v. Nat'l Res. Def. Council, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249, 262 (2008).

[44] *Id.* at 129 S. Ct. 376, citing Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (per curiam).

[45] FAIRMAN & BARDIS, *supra* note 41, at 1760.

[46] *Id*.

[47] *Id*. at 1761.

[48] *Id*.

[49] Calvert Cliffs Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

> conducted fully and in good faith—it is the responsibility of the courts to reverse.[50]

Compliance with NEPA's procedural provisions is subject to judicial review.[51] The Supreme Court confirmed this procedural role in *Strycker's Bay Neighborhood Council v. Karlen*.[52] It stated that the court should not "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[53]

The two standards used most often in NEPA challenges are the highly deferential "arbitrary and capricious standard," derived from judicial review provisions of the APA,[54] and the somewhat less deferential "reasonableness standard."[55] Although there has never been a comprehensive and coherent delineation between these two standards, litigants and courts generally assert that the reasonableness standard provides for more in-depth review of agency action than the arbitrary and capricious standard.[56]

The arbitrary and capricious standard requires the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[57] In *Citizens to Preserve Overton Park v. Volpe*,[58] the U.S. Supreme Court defined this standard:

> To make this finding the court must consider whether the decision was based on a consideration of the relevant facts and whether there has been a clear error of judgment [citations omitted]. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[59]

Before applying the arbitrary and capricious standard, however, the Court instructed that the reviewing court must engage in a "substantial inquiry" that requires an initial determination of whether the agency acted within the scope of its authority and discretion, and whether the facts of the decision can reasonably be said to fall within that scope. Once the court determines that the agency acted within the scope of its statutory authority, it must then evaluate the decision or action under the arbitrary and capricious standard.[60] Although *Overton Park* involved an opponent's claim under Section 4(f) of the Department of Transportation Act and not a NEPA case, the Court's statement is guidance for application of the arbitrary and capricious review in all cases.[61]

In 1989, in *Marsh v. Oregon Natural Resources Council*,[62] the Supreme Court held that the standard of review for an agency decision not to write a supplemental impact statement is the arbitrary and capricious standard.[63] *Marsh* concerned a challenge to the U.S. Army Corps of Engineers' decision not to supplement an EIS for the Elk Creek Dam.[64] Shortly after construction of the dam commenced, the Oregon Natural Resources Council and others sought a preliminary injunction to halt construction, arguing, among other things, that the Corps violated NEPA when it failed to supplement its EIS despite newly available information concerning downstream fishing impacts and turbidity.[65] The district court concluded that the agency's decision was "reasonable."[66] The Ninth Circuit reversed and held that the agency's decision was unreasonable because the new information did warrant a supplemental EIS.[67] A unanimous Supreme Court reversed the Ninth Circuit and held that the arbitrary and capricious standard was the correct one for reviewing the agency decision.[68] In reaching this holding, the Supreme Court seemed to end any further use of the reasonableness standard, which several

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[50] *Id*. at 1115. The Supreme Court subsequently ratified, at least by implication, the availability of judicial review of NEPA compliance. *See, e.g.,* Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 319 (1975) ("NEPA does create a discrete procedural obligation…[N]otions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration…").

[51] *Id*. ("The reviewing courts probably cannot reverse a substantive decision on its merits…").

[52] 444 U.S. 223 (1980).

[53] *Id*. at 227, citing Kleppe v. Sierra Club, 427 U.S. 390.

[54] 5 U.S.C. § 706(2)(A).

[55] *See, e.g.,* South Trenton Residents Against 29 v. FHA, 176 F.3d 658, 663 (3d Cir. 1999); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); Township of Springfield v. Lewis, 702 F.2d 426 (3d Cir. 1983).

[56] *See, e.g.,* Sho-Shone-Painte Tribe v. United States, 889 F. Supp. 1297, 1304 (D. Idaho 1994) (noting a perception among litigants that the arbitrary and capricious standard is more deferential to an agency decision); Louisiana v. Lee, 758 F.2d 1081, 1084 (5th Cir. 1985) (describing reasonableness standard as "more rigorous" than the arbitrary and capricious standard).

[57] 5 U.S.C. § 706(2)(A).

[58] 401 U.S. 402, 91 S.C. 814 (1971).

[59] *Id*. at 416.

[60] *Id*.

[61] 49 U.S.C. § 303(c). *See also* Cmtys., Inc. v. Busey, 956 F.2d 619, 623 (6th Cir. 1992); Comm. to Preserve Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543, 1549 (10th Cir. 1993); Sierra Club Ill. Chapter v. United States D.O.T., 962 F. Supp. 1037, 1041 (N.D. Ill., 1997).

[62] 490 U.S. 360 (1989).

[63] *Id*. at 376.

[64] *Id*. at 364.

[65] *Id*. at 368.

[66] Or. Natural Res. Council v. Marsh, 628 F. Supp. 1557, 1568 (D. Or. 1986), *aff'd in part, rev'd in part*, 832 F.2d 1489 (9th Cir. 1987), *rev'd*, 490 U.S. 360 (1989).

[67] Or. Natural Res. Council v. Marsh, 832 F.2d 1489, 1494–96 (9th Cir. 1987), *rev'd*, 490 U.S. 360 (1989).

[68] *Marsh*, 490 U.S. at 375. The Court cited § 706(2) of the Administrative Procedure Act as the source for this standard.

circuits had employed, in review of similar agency decisions.

In circuits that were already using the arbitrary and capricious standard,[69] the *Marsh* decision had little effect. However, the circuits that had previously used the reasonableness standard to review an agency decision not to supplement or prepare an EIS have since replaced it with the arbitrary and capricious standard.[70] Although *Marsh* involved the decision to supplement, the courts generally have not maintained any distinction between the agency's decision to initially prepare, and the decision to supplement, an EIS. Failure to distinguish between these two agency decisions is not surprising, given the dicta in *Marsh* that the issues are, in essence, the same.[71]

The *Marsh* decision does not mean that the arbitrary and capricious standard is applied to all questions that arise under NEPA. At the opposite end from the arbitrary and capricious standard is the de novo standard, which courts apply to questions of law.[72] Under the de novo review standard, the court decides legal questions, although it may give considerable weight to the CEQ regulations interpreting NEPA's statutory terms.

One issue left unresolved by *Marsh* is whether the reasonableness standard or the arbitrary and capricious standard should be applied when the issue raised is "predominantly legal" and not a classical fact dispute. In *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*,[73] the Ninth Circuit revived the reasonableness standard and took advantage of dicta in *Marsh* that predominantly legal questions might warrant a different standard of review.[74] In that case, opponents sought to enjoin the Forest Service from offering contracts for certain timber sales on the Tongass National Forest.[75] At issue was whether the Forest Service's cancellation of a preexisting 50-year timber sales contract, which was a central premise of earlier EIS's, was a significant circumstance requiring a supplemental EIS.[76] The Ninth Circuit held that whether the contract cancellation was a significant circumstance requiring a supplemental EIS was predominantly legal.[77] The court then employed the reasonableness standard to find that the contract had limited the range of alternatives analyzed under prior EIS's, so its cancellation was significant, and the Forest Service was unreasonable in refusing to supplement the EIS's.[78]

In light of *Alaska Wilderness*, a transportation agency needs to consider whether the issues raised by opponents involve a classical fact dispute or a predominantly legal issue.[79] If opponents successfully frame an issue as predominantly legal, the decisions made by a transportation agency may be subject to less deference under the reasonableness standard.

3. Importance of Administrative Record

A thorough and persuasive administrative record is critical to successfully defending against challenges to a transportation project. The administrative record is critical because a reviewing court generally must limit its review to the administrative record.[80] Any agency decisions made in order to comply with NEPA or other federal and state statutes should be well documented and, where necessary, supported by expert opinions. Even before opposition arises, the agency needs to consider whether existing data and facts support its decision. If an agency is thorough in its decisionmaking, it will be very difficult for opponents to prevail. A presumption of validity attaches to agency decisions made on the record.[81]

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[69] *See, e.g.,* Hanly v. Kleindienst, 471 F.2d 823, 828–30 (2d Cir. 1972); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980); Providence Rd. Cmty. Ass'n v. EPA, 683 F.2d 80, 82 (4th Cir. 1982); Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975).

[70] *See* N. Buckhead Civic Ass'n v. Skinnon, 903 F.2d 1533 (11th Cir. 1990); Goos v. Interstate Commerce Comm'n, 911 F.2d 1283 (8th Cir. 1990); Sabine River Auth. v. United States Dep't of the Interior, 951 F.2d 669 (5th Cir. 1992); Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991); Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 971 (1992).

[71] *Marsh*, 490 U.S. at 374. The Court noted that "the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance." *Id*. at 374.

[72] First National Bank of Homestead v. Watson, 363 F. Supp. 466 (D.D.C. 1973).

[73] 67 F.3d 723 (9th Cir. 1995).

[74] *Id*. at 727.

[75] *Id*. at 726.

[76] *Id*.

[77] *Id*. at 727.

[78] *Id*. at 729–30.

[79] A useful discussion of mixed questions of law and fact in the NEPA context appears in DANIEL MANDELKER, NEPA LAW & LITIGATION 3.04[2] (2d ed. 1992) (with annual supplements).

[80] Fla. Power & Light Co. v. Lorion, 470 U.S. 729 (1985). *See also* Sierra Club v. Marsh, 976 F.2d 763, 772 (1st Cir. 1992) (Administrative record may be supplemented by affidavits, depositions, or other proof of explanatory nature, but not by new rationalizations of the agency's decision).

[81] Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976).

B. WHO MAY BRING SUIT*

Generally, opponents of a highway project must overcome the legal requirement of standing to challenge a transportation agency's decision. However, under certain federal and state statutes, opponents and interested citizens are authorized to bring actions without having to establish the traditional standing requirements. This section analyzes the traditional standing requirements as applied to opponents of an agency decision, the federal statutes that plainly authorize citizen suits, and a sampling of state statutes that authorize citizen suits.

1. Standing to Challenge Administrative Agency Actions

To challenge a transportation agency's decision under NEPA, Section 4(f) of the Department of Transportation Act, or another environmental statute, an opponent must be able to establish "standing," or an appropriate individualized interest in the outcome of the case. An analysis of standing under federal law has two components. Article III of the U.S. Constitution has been interpreted as imposing a standing requirement that goes to the federal court's jurisdiction to hear a case or controversy. Alternatively, the APA and some environmental statutes impose different standing requirements.

a. Appropriate Standard

Standing under the APA exists only when a plaintiff can satisfactorily demonstrate that (1) the agency action complained of will result in an injury in fact and (2) the injury is to an interest "arguably within the zone of interests to be protected" by the statute in question.[82]

b. What Constitutes Injury in Fact?

In *Sierra Club v. Morton*, the U.S. Supreme Court held that environmental well-being, like economic well-being, may be the basis of an injury in fact sufficient to establish standing.[83] The Court reasoned that: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[84]

The case involved a decision by the Forest Service to approve a plan by Walt Disney Enterprises to build a $35 million resort in the Mineral King Valley.[85] Even though the court established that an environmental interest supports standing, the court held that the Sierra Club failed to show how its members would personally be affected in any of their activities by the project.[86]

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I)*,[87] the U.S. Supreme Court further clarified several elements of the standing requirement.[88] In *SCRAP I*, a group of law students contested a rate increase on recycled goods proposed by the Interstate Commerce Commission.[89] The students argued that the rate increase would diminish the use of recycled goods, increase the amount of litter on a nationwide basis, and would cause an increase in the amount of litter in the forests and streams in the Washington, DC, area.[90] To establish their personal interest, the students alleged that they used the forests and streams in the Washington, DC, area for camping and hiking.[91] In granting the law students standing, the U.S. Supreme Court clarified that standing "is not to be deemed simply because many people suffer the same injury."[92] Moreover, the Court held that the test for standing is qualitative, not quantitative.[93] The magnitude of a plaintiff's injury in fact is not relevant for standing purposes, rather, it is only critical that an injury itself exists.

Subsequent to *SCRAP I*, the U.S. Supreme Court indicated that opponents must not only allege and prove individual injury in fact, but must satisfy a minimum standard of adequacy of that proof. In *Lujan v. National Wildlife Federation*,[94] the U.S. Supreme Court held that plaintiffs' assertion of standing was invalid for two reasons.[95] First, the affidavits submitted by plaintiffs attesting to their use of the affected lands were defective.[96] The affidavits only stated that plaintiffs used lands in the vicinity of the affected lands. The court required plaintiffs to actually use the affected lands themselves in order to be eligible for standing. Second, the affidavits, even if adequate, could only have been used to challenge how those particular

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* This section updates, as appropriate, and is based in part upon information and analysis in Nelson Smith & David Graham, *Environmental Justice and Underlying Societal Problems*, 27 ENVTL. L. REP. 10568 (1997); Daniel Kevin, *'Environmental Racism' and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121 (1997); Terry L. Schnell & Kathleen J. Davies, *The Increased Significance of Environmental Justice in Facility Siting, Permitting*, 29 Env't Rep. 528 (July 3, 1998), BNA; KENNETH A. MANASTER & DANIEL P. SELMI, STATE ENVIRONMENTAL LAW (2008).

[82] 5 U.S.C. § 710. *See* Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 at 153, 25 L. Ed. No. 2d 184, 90 S. Ct. 827 (1970).

[83] 405 U.S. 727 (1972).

[84] *Id*. at 734.

[85] *Id*. at 729.

[86] *Id*. at 740.

[87] 412 U.S. 669 (1973).

[88] *Id*. at 685.

[89] *Id*. at 678.

[90] *Id*.

[91] *Id*.

[92] *Id*. at 687.

[93] *Id*.

[94] 497 U.S. 871, 887–88 (1990).

[95] *Id*. at 888.

[96] *Id*.

lands were used, not the entire Bureau of Land Management Program.[97]

Prior to *Lujan*, the Supreme Court's decisions seemed to reflect an awareness that environmental opponents sought not only to redress injuries to themselves, but also to protect the public interest. *Lujan* may indicate a less sympathetic judicial view toward environmental advocates.

2. Private Right of Action Under Other Federal Statutes

Certain federal environmental statutes provide "standing" for any citizen to file a lawsuit to allege violations of the particular statute in issue. These citizen suit provisions permit an individual to act as a private attorney general to insure that there is statutory compliance. This section outlines the citizen suit provisions under the CWA[98] and the CAA.[99] In addition, this section also discusses a citizen's ability to bring environmental claims under 42 U.S.C. 1983.

a. Citizen Suits Under the CWA

Section 505 of the CWA plainly authorizes persons "having an interest which is or may be adversely affected"[100] to initiate litigation against either a discharger for violating any effluent standard or limitation under the Act, or against the EPA for failure to proceed expeditiously in enforcing the Act's provisions.[101]

Sixty days prior to initiating the litigation, a citizen is required to provide notice to the EPA of an intention to bring suit.[102] Failure to comply with this notice provision can result in dismissal of the lawsuit.[103] Because a citizen suit may not be brought for wholly past violations, the suit must allege either continuing or intermittent violations.[104] To avoid dismissal, a plaintiff needs to make a good-faith allegation of continuing or intermittent violation at the time the 60-day notice is given.[105]

Plaintiffs may seek injunctive relief and civil penalties assessed by the court and payable to the federal government.[106] In addition, plaintiffs making claims under the CWA citizens suit provisions may seek attorney's fees and witness fees.[107]

In settlements of citizen suits under the CWA, the EPA has a right to review settlement agreements and to file any objections to the agreement in court. [108] This statutory review provides the EPA with the opportunity to impose more stringent conditions than the plaintiffs had agreed to. The oversight authority of the EPA is an important factor to consider in negotiating the resolution of a CWA citizens suit and may warrant involving the agency directly in the negotiation process.

b. Citizen Suits Under the CAA

The CAA allows any person to bring enforcement action against any person who is alleged to be in violation of an "emissions standard or limitation," or an administrative order issued by the EPA.[109] In addition, a citizen may bring a suit against an EPA Administrator where he or she is alleged to have failed to perform a nondiscretionary duty under the Act.[110] The term "emissions standard or limitation" is precisely defined and refers to a number of provisions in the Act that establish standards governing state and local stationary sources of air pollution.[111] Data and reports from facility monitoring systems have been admitted as competent evidence of an ongoing violation sufficient to allow suit.[112]

Under the Act, citizens must provide notice of their intent to sue 60 days prior to initiating suit to the alleged violator, the EPA, and the state in which the alleged violation is occurring.[113] The notice provides the discharger with the opportunity to rectify the alleged violations prior to becoming a defendant in a lawsuit.[114] In addition, the notice period permits the EPA to

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[97] *Id*. at 885–95.

[98] 33 U.S.C. § 1365(a).

[99] 42 U.S.C. § 7604.

[100] 33 U.S.C. § 1365(g).

[101] 33 U.S.C. § 1365(a).

[102] 33 U.S.C. § 1365(b)(1)(A), 40 C.F.R. § 135.

[103] *See, e.g.,* Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 963 F. Supp. 395, 402 (D.N.J. 1997), *aff'd* 140 F.3d 478 (3d Cir. 1998); Canada Comm. Improvement Soc'y v. City of Mich. City, Ind., 742 F. Supp. 1025, 1029 (N.D. Ind. 1990).

[104] Gwaltney v. Chesapeake Bay Found., 484 U.S. 49 (1987).

[105] *Id*. at 59–60.

[106] 33 U.S.C. § 1365(d).

[107] 33 U.S.C. § 1365(d).

[108] 33 U.S.C. § 1365(c)(3). The EPA used this provision to object to settlements that fail to provide for the payment of civil penalties to the United States. *See, e.g.,* Friends of the Earth v. Archer Daniels Midland Co., 31 ERC 1779 (N.D.N.Y. 1990) (rejecting such challenge); Sierra Club v. Elect. Controls Design, Inc., 31 ERC 1789 (9th Cir. 1990).

[109] 42 U.S.C. § 7604(a).

[110] *Id*.

[111] These provisions include standards established in state implementation plans (SIPs) and permits, Prevention of Serious Deterioration (PDS) standards, new source performance standards, requirements regarding hazardous air pollutants, nonattainment area requirements for new sources, and standards intended to protect the stratospheric ozone layer. 42 U.S.C. § 7604(f).

[112] Sierra Club v. Pub. Serv. Co. of Colo., Inc., 894 F. Supp. 1455 (D. Colo. 1995).

[113] 42 U.S.C. § 7604(b). The notice requirement does not apply to citizen suits that allege violations of EPA administrative compliance orders or violations of standards applicable to sources of hazardous air pollutants. 42 U.S.C. § 7604(b).

[114] Hallstrom v. Tillamook County, 493 U.S. 20, 25 (1989); City of Highland Park v. Train, 519 F.2d 681, 690 (8th Cir. 1975) *cert. denied,* 424 U.S. 927 (1976).

prosecute the alleged violator by taking federal enforcement actions.[115]

Federal courts have varied in how they have interpreted this notice requirement. Some courts have held that the notice requirement is jurisdictional in nature and a suit must be dismissed where a plaintiff fails to provide notice.[116] Other courts have held that the requirement was not intended to hinder citizens suits and should be construed "flexibly and realistically."[117] A transportation agency named in a CAA citizens suit should always consider whether plaintiffs have provided the requisite notice and how the courts in its jurisdiction have interpreted the notice provision.

A copy of the complaint in a citizen suit must be served on the United States Attorney General and the EPA Administrator.[118] Proper venue for a citizen suit is the judicial district in which the allegedly violating source is located.[119] Where the citizen, plaintiff, and alleged violator enter into a consent decree to resolve the dispute, the EPA and the Justice Department are allowed to review, provide comment, and intervene (if necessary) in the action.[120]

A citizen may seek to obtain injunctive relief and civil penalties if successful in the action.[121] In awarding preliminary or temporary injunctive relief, a court may require plaintiffs to file bonds, or equivalent security.[122]

The civil penalties are paid to a special account for the EPA to use for air compliance and enforcement issues.[123] In addition, a citizen making a claim under the CAA citizens suit provisions may be awarded reasonable attorney's fees, whenever the court determines that such an award is appropriate.[124]

c. Environmental Justice Claims

"Environmental justice" generally refers to the principle that low income and minority neighborhoods should not be subject to disproportionately high or adverse environmental health affects.[125] Environmental justice suits brought to date have more typically involved the siting and permitting of polluting facilities (such as a landfill) than highway projects.[126] However, there is no doubt that a creative opponent could formulate a cognizable environmental justice claim to contest the siting of a highway project in an urban neighborhood, for example.[127]

The most common basis for an environmental justice cause of action is Title VI of the Civil Rights Act of 1964. Section 601 of the Act prohibits discrimination on the basis of race, color, or national origin under any activity or program receiving federal funding.[128] Section 602 requires federal agencies to promulgate regulations implementing the Section 601 prohibition in their programs.[129] President Clinton issued an executive order in 1994 requiring that federal agencies make achieving environmental justice part of their mission and establishing an interagency working group chaired by the EPA Administrator.[130]

A key issue in environmental justice claims is that while traditional statutory civil rights claims must allege intentional discrimination, courts have held that liability may attach for discriminatory impact, regardless of intent.[131] In *Chester Residents Concerned for Quality Life v. Seif*, [132] residents of a predominately African American community alleged that by permitting waste facilities in their community, the Pennsylvania Department of Environmental Protection (DEP) violated both Section 601 of the Civil Rights Act and the EPA regulations promulgated in accordance with Section 602.[133] The district court held that plaintiffs had only alleged a discriminatory impact, and not a discriminatory intent, and dismissed plaintiffs' claim.[134] With respect to the EPA regulations, the district court held that they did not provide a private cause of action.[135] The Third Circuit reversed this aspect of the holding and found that a private right of action is implied in the EPA regulations.[136] The U.S. Supreme Court granted the state's petition for review, but then

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[115] Friends of Earth v. Potomac Elec. Power Co., 546 F. Supp. 1357, 1361 (D.D.C. 1982).

[116] *See, e.g.,* Phila. Council of Neighborhood Orgs. v. Coleman, 437 F. Supp. 1341, 1370 (E.D. Pa. 1977); West Penn Power Co. v. Train, 620 F.2d 1040 (4th Cir. 1980).

[117] *See, e.g.,* Friends of Earth v. Carey, 535 F.2d 165, 175 (2d Cir. 1976); Natural Res. Def. Council v. Calloway, 524 F.2d 79, 84 n.4 (2d Cir. 1975).

[118] 42 U.S.C. § 7604(c)(3).

[119] 42 U.S.C. § 7604(c)(1).

[120] 42 U.S.C. § 7604(c)(3).

[121] 42 U.S.C. § 7604(a). See the detailed discussion of § 4(f) in § 2E *infra*.

[122] 42 U.S.C. § 7604(d).

[123] 42 U.S.C. § 7604(g)(l).

[124] 42 U.S.C. § 7604(d).

[125] *See* Nelson Smith & David Graham, *Environmental Justice and Underlying Societal Problems*, 27 ENVTL. L. REP. 10568 (1997); Daniel Kevin, *'Environmental Racism' and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121 (1997).

[126] *See,* i.e., Rozar v. Mullts, 85 F.3d 556 (11th Cir. 1996).

[127] *See, e.g.*, Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180 (4th Cir. 1999) (Environmental justice claims based on effects of highway construction on urban neighborhood barred on immunity and statute of limitation grounds).

[128] 42 U.S.C. § 2000d.

[129] 42 U.S.C. § 2000d-1.

[130] Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994); 3 C.F.R. 859 (1994).

[131] Terry L. Schnell & Kathleen J. Davies, *The Increased Significance of Environmental Justice in Facility Siting, Permitting*, 29 ENV'T REP. 528, 530 (July 3, 1998).

[132] 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd in part and remanded*, 132 F.3d 925 (3d Cir. 1997).

[133] *Id*. at 415.

[134] *Id*. at 417–18.

[135] *Id*.

[136] 132 F.3d 925, 937.

dismissed plaintiffs' claims as moot.[137] While the action was pending, the Pennsylvania DEP had revoked the permit for the proposed facility. More recently, in *Alexander v. Sandoval*, the U.S. Supreme Court held that there is no private right of action to enforce disparate impact regulations promulgated by USDOT under Section 602.[138] There may, however, be a right to bring an action under 42 U.S.C. § 1983 to enforce Section 602 regulations.[139]

Because environmental justice may play an increasingly prominent role in facility siting, permitting, and enforcement, transportation agencies need to evaluate and to take into account the population and community surrounding potential highway sites.

3. Right to Sue Under State Law or State Constitution

a. State Citizen Suit Statutes

In addition to federal statutes authorizing citizen suits, opponents of a highway or other transportation project may seek standing under the state statutes that authorize citizen suits. The model for these state laws is the Michigan Environmental Protection Act (MEPA), adopted in 1970.[140]

MEPA and its imitators create a broad cause of action that opponents may employ to halt or delay a highway project. Under MEPA, a wide variety of named entities, including individuals and organizations, may bring suit seeking declaratory judgment or injunctive relief against governmental agencies or private individuals "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment, or destruction."[141] The plaintiff bears the burden of making a *prima facie* showing of this pollution, impairment, or destruction.[142] After a *prima facie* case is established, the defendant may rebut the plaintiff's showing with contrary evidence.[143] The defendant may also raise the affirmative defense "that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."[144]

A number of other states have enacted legislation modeled after MEPA,[145] although some of the statutes vary slightly from MEPA. The Connecticut Environmental Protection Act, for example, allows citizens to protect natural resources from "unreasonable" pollution, impairment, or destruction, thus including a qualitative adjective not present in MEPA.[146] Under the Minnesota Environmental Rights Act, a citizen is permitted to bring an action for conduct undertaken "pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit" issued by certain listed state agencies.[147] Despite minor variations from MEPA, most of the states that have adopted MEPA-type legislation retain the general aim of MEPA that citizens be afforded the right to protect the environment.

b. Attempts to Find a Basis for Citizen Suits in State Constitutions

Some state constitutions include public trust principles and have been the basis for lawsuits by private citizens to protect the environment. The Pennsylvania constitution broadly "declares that the people have a right to clean air, pure water and preservation of environmental values and that Pennsylvania resources are the common property of all people. As trustee of these resources, 'the Commonwealth shall conserve and maintain them for the benefit of all people.'" [148] Similarly, Hawaii's constitution proclaims that public resources in the state "are held in trust by the State for the benefit of the people."[149]

However, these constitutional provisions have proved to be of little practical importance in terms of citizen suits. [150] Although the Pennsylvania provision was potentially the most far reaching, the Pennsylvania Supreme Court has held that the provision's declaration of environmental rights is not self-executing. [151] More

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[137] 524 U.S. 974 (1998).

[138] Alexander et al. v. Sandoval, 532 U.S. 275 (2001).

[139] South Camden Citizens in Action v. N.J. Dep't of Envir. Prot., C.A. No. 01-702 (May 10, 2001) (2001 U.S. Dist. LEXIS 5988), 145 F. Supp. 2d 505.

[140] *See* SELMI & MANASTER, STATE ENVIRONMENTAL LAW (2008), at § 16.08[2].

[141] MICH. STAT. ANN. § 324.1701(1).

[142] *Id*. at § 324.1703.

[143] *Id*.

[144] *Id*.

[145] CONN. GEN. STAT. ANN. § 22a-14 *et seq*., MINN. STAT. ANN. § 116B.01-.13; MASS. GEN. LAWS ANN. ch. 214, § 7A; NEV. REV. STAT. ANN. § 41.540; S.D. COMP. LAWS ANN. § 34A-10-1; and IND. ANN. STAT. § 13-6-1-1- *et seq*.

[146] CONN. GEN. STAT. § 22a-16.

[147] MINN. STAT. ANN. § 116B.03 subd. 1. The Act does not apply to every conceivable government action. *See* Holte v. State, 467 N.W.2d 346 (Minn. App. 1991).

[148] SELMI & MANASTER, *supra* note 140, at § 4.03[2][d], citing PA. CONST. ART. I, § 27.

[149] HAW. CONST. ART. XI, § 1.

[150] *See* State v. Bleck, 114 Wis. 2d 454, 338 N.W.2d 492, 497 (Wis. 1983) ("The public trust doctrine is rooted in art. IX, sec. 1 of the Wisconsin Constitution"); Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) ("A public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by…the 1921 Louisiana Constitution…[and] continued by the 1974 Louisiana Constitution").

[151] SELMI & MANASTER, *supra* note 140, at § 4.03[2][d], citing to Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973).

effective constitutional provisions for citizen groups have generally been those that prohibit the alienation of specific trust resources.[152] In *Save Our Wetlands, Inc. v. Orleans Levee Bd*.,[153] private citizens in reliance upon such a constitutional provision successfully brought suit to prevent the alienation of beds of navigable waters.[154] Finally, in some circumstances, a constitutional provision may actually limit a state's public trust rights.[155]

C. TRIAL STRATEGY AND TECHNIQUES IN ENVIRONMENTAL LITIGATION*

1. Issues Often Joined With and Related to Environmental Litigation

In asserting a challenge to a highway or other transportation project, opponents will most likely raise more than one challenge under more than one federal or state statute. These additional challenges may or may not be entirely based upon requirements of environmental statutes such as NEPA. From the opponents' position, it is worthwhile to join as many claims as the facts will arguably support, since the joinder of more claims may increase the likelihood of halting, reducing the scope, or changing the location of the transportation agency's project in a way that addresses the plaintiff's goals. This section contains a brief review of some of the common statutes other than NEPA that an opponent may rely upon in challenging a highway project.

a. Section 4(f) Requirements of the Department of Transportation

Section 4(f) of the Department of Transportation (DOT) Act prohibits the USDOT from using certain types of land, such as publicly owned parks, for the construction of highway projects, unless there is "no feasible and prudent alternative."[156] The U.S. Supreme Court has held Section 4(f) to require that a route or design not using land protected by Section 4(f) be adopted in lieu of a route that uses protected land unless it is unfeasible (from an engineering perspective) or imprudent (because it involves displacement or other costs of significant magnitude).[157]

After it is determined that there are no feasible and prudent alternatives to a route or design through Section 4(f) public park land, the USDOT must include all possible mitigation measures to limit the harm to the Section 4(f)—protected land.[158] In many cases, the Section 4(f) requirements are more stringent, and more difficult for the USDOT to satisfy, than the more generalized provisions of NEPA.[159]

b. Federal-Aid Highway Act

The Federal-Aid Highway Act requires that a public hearing concerning highway location address not only economic effects of such proposed projects, but also environmental and social impacts.[160] If a public hearing was never held or was improperly limited in its scope, opponents may successfully delay a project by causing it to be returned to the design approval stage.[161]

c. Relocation Assistance

Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, a displacing agency must provide displaced persons decent, safe, and sanitary replacement housing.[162] This Act and its implementing regulations establish that if replacement housing does not already exist, it must be constructed from project funds.[163] Because of these stringent requirements, the costs of complying with the Act and its regulations may destroy the economic feasibility of a particular transportation project. Opponents of a transportation project will often consider whether an agency has failed to comply fully with any of this Act's stringent requirements, or with similar requirements of state law.[164]

d. Federal CAA

i. Conformity.—Federal CAA requirements mandating that transportation projects conform to the SIP are commonly relied upon as a basis for litigation against highway projects. The subject of conformity is discussed in more detail in Section 1.F.3. *supra*.

ii. Indirect Source Requirements.—In the early 1970s under the CAA, the EPA began to require that state implementation plans regulate such facilities that do not emit pollutants themselves but attract polluting vehicles.[165] Examples of such facilities may include, in addition to highways, facilities such as parking lots and

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[152] SELMI & MANASTER, *supra* note 140, at § 4.03[2][d].

[153] Save Our Wetlands, Inc. v. Orleans Levee Bd., 368 So. 2d 1210 (La. Ct. App. 1979).

[154] *Id*.

[155] N.J. STAT. ANN. CONST. ART. VIII, § 4 (limiting the state's right to claim riparian rights). The provision was held constitutional in Dickinson v. Fund for Support of Free Pub. Schools, 187 N.J. Super. 320, 454 A.2d 491 (1982).

[*] This section updates, as appropriate, and relies in part upon information and analysis in RUSSELL LEIBSON & WILLIAM PENNER, LEGAL ISSUES ASSOCIATED WITH INTERMODALISM (Fed. Transit Admin., Transit Coop. Research Program, Legal Research Digest No. 5, 1996); Hugh J. Yarrington, *Environmental Litigation: Rights & Remedies*, *in* SELECTED STUDIES IN HIGHWAY LAW, ch. VIII.

[156] 49 U.S.C. § 303(c) (West 1994).

[157] Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).

[158] 49 U.S.C. § 303(c). *See* discussion in § 2B *supra*.

[159] FAIRMAN & BARDIS, *supra* note 41, at 1720.

[160] 23 U.S.C. § 128.

[161] FAIRMAN & BARDIS, *supra* note 41, at 1720.

[162] 42 U.S.C. § 4601 *et seq*.

[163] *Id*.

[164] FAIRMAN & BARDIS, *supra* note 41, at 1721.

[165] 39 Fed. Reg. 25292; 39 Fed. Reg. 30439 (1974).

parking garages and, more broadly, other major transportation generators such as a stadium or large shopping center and new roads to serve them. Congress responded in 1977 by barring the EPA from direct regulation of what were labeled "indirect sources,"[166] except where a highway or other major indirect source is federally assisted. [167] However, at the same time, Congress gave the states permission, if they so chose, to regulate such indirect sources themselves as part of their SIPs.[168]

A transportation agency must be aware of whether, and the extent to which, a particular state's implementation plan regulates indirect sources. Opponents of a transportation project constituting or relating to an indirect source may be able to state a claim, cognizable under the citizen's suit provisions of the CAA or under state law, that the implementing agency has failed to comply with applicable regulations concerning indirect sources. For example, in one case, an environmental group challenged a highway project on the grounds that ventilation stacks from a new tunnel had not been approved under applicable provisions of the state air regulations, enforceable through the SIP.[169]

e. Requirements of the ISTEA

ISTEA, which was reauthorized by TEA-21, has been cited with mixed success by plaintiffs seeking to challenge a transportation project. That legislation includes conformity requirements that work in tandem with those of the CAA.[170] Additionally, ISTEA/TEA-21 impose public review obligations, limitations on project funding, and other requirements that may create arguable grounds for citizen's suit. While some cases have addressed the merits of ISTEA claims brought by a plaintiff without addressing the jurisdictional question,[171] others have held that there is no direct right of public review under ISTEA and have refused to reach the merits.[172]

f. NHPA

NHPA[173] promotes the preservation of historic properties in the United States through two mechanisms.[174] The NHPA allows for the systematic identification of significant historic resources and establishes a comprehensive review process that requires federal agencies to consider the effects of their actions on identified historic property.[175] Resources defined as historic under the NHPA are so for Section 4(f) purposes as well.

Specifically, NHPA requires federal agencies that have jurisdiction "over a proposed Federal or federally assisted undertaking…or have authority to license any undertaking" to consider the effect of such undertaking on any historically significant structure or site listed (or eligible for listing) in the National Register prior to the approval of funding or issuance of a license.[176] The term "undertaking" has been expansively defined by the Advisory Council on Historic Preservation to include projects that are supported in whole or in part through "Federal contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance."[177]

Opponents of a transportation agency project may seek to delay or halt the project by bringing a lawsuit based upon the agencies' failure to comply with NHPA.[178] Where the project is partially or federally funded, the requirements of NHPA are applicable and must be satisfied by the agency. As with NEPA, the strategy of segmenting a project to avoid the need for review under NHPA may not survive scrutiny. In *Thompson v. Fugate*,[179] an attempt by the Secretary of Transportation to separate a federally-funded 8.3-mi segment of a highway from the remaining 21 mi of the project was unsuccessful.

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[166] 42 U.S.C. § 7410(a)(5)(B).

[167] 42 U.S.C. § 7410(a)(5)(B).

[168] 42 U.S.C. §§ 7410(a)(5)(A), (C).

[169] *See* Sierra Club v. Larson, 2 F.3d 462 (1st Cir. 1993).

[170] 23 U.S.C. § 135(f)(2)(C); *See* § 1.F.3 *supra.*

[171] Conservation Law Found. v. Fed. Highway Admin., 827 F. Supp. 871, 884 (D.R.I. 1993); Clairton Sportsmen's Club v. Penn. Turnpike Comm'n, 882 F. Supp. 455, 478 (W.D. Pa. 1995).

[172] Sierra Club v. Pena, 915 F. Supp. 1381 (N.D. Ohio 1996); Town of Secaucus v. United States Dep't of Transp. 889, F. Supp. 779, 788 (D.N.J. 1995) (indicating, however, that standing to challenge a decision under ISTEA might be founded on the Administrative Procedures Act). See discussion of TEA-21 and conformity in § 1 *supra*.

[173] 16 U.S.C. 470, *et seq.* The NHPA is discussed in § 3.E *supra*.

[174] 16 U.S.C. 470.

[175] *Id*.

[176] 16 U.S.C. § 470f.

[177] 36 C.F.R. § 800.2(c). *See* Edwards v. First Bank of Dundee, 534 F.2d 1242, 1245 (7th Cir. 1976) (holding that a project is a federally assisted undertaking if it is wholly or partially funded with federal money). *See also* Gettysburg Battlefield Preservation Ass'n v. Gettysburg College, 799 F. Supp. 1571, 1581 (M.D. Pa. 1992).

[178] Opponents will need to satisfy standing requirements to survive a motion to dismiss. However, courts have held that aesthetic injury to plaintiffs or use of the historic building in issue have been sufficient to satisfy the requirements that a person be injured in fact. *See* Save the Courthouse v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975) (aesthetic or environmental interest sufficient); Neighborhood Dev. Corp. v. Advisory Council on Historic Pres., 632 F.2d 21, 24 (6th Cir. 1980) (use of the historic building in issue is sufficient).

[179] Thompson v. Fugate, 347 F. Supp. 120, 124 (E.D. Pa. 1972).

g. Federal CWA

Federal CWA citizens' suit provisions, discussed above,[180] may create a basis for a claim against a transportation agency for illegal discharge or failure to obtain a necessary permit. Other sections of this chapter discuss applicable provisions under this Act.[181]

For any transportation project involving the crossing of a wetland or body of water, or involving any need to dredge or fill a jurisdictional wetland, the requirements of Section 404 of the CWA[182] may trigger the need for a permit from the Army Corps of Engineers and create another basis for someone to challenge the completion of the project. While the citizens' suit provisions of the Act do not expressly authorize suit against the Corps of Engineers for the issuance of a Section 404 permit, review may be had through the APA.[183]

h. Local Zoning and Land Use Regulations

Local zoning and land use regulations define the uses to which land may be put, the size and location of buildings on particular parcels, and the density to which land may be put. Opponents of a transportation project may allege that a proposed project violates local zoning and land use regulations in an attempt to delay or halt a construction project. The application of these local laws to transportation agencies will vary from one jurisdiction to another, and the route that must be followed by an agency to meet the requirements of these laws may involve administrative hearings, judicial hearings, or a quasi-legislative process.[184]

Proponents of a project may argue that it is exempt from these local ordinances or that the local ordinances are preempted by federal law. However, such arguments may not always be successful. In *City of Cleveland v. City of Brook Park*,[185] the Cleveland Hopkins International Airport (which is owned by Cleveland) sought to expand its airport into the city limits of Brook Park.[186] Because Brook Park had enacted zoning ordinances establishing procedures for obtaining a special use permit for new airport construction and noise levels for new construction, Cleveland argued that Brook Park's ordinances were preempted by federal law and in violation of the Commerce Clause and the U.S. Constitution.[187] The District Court rejected these arguments and denied Cleveland's motion for summary judgment.[188] In *Medford v. Marinucci Bros & Co.,* a contractor's use of land as a temporary site for storing equipment and stockpiling fill in connection with a state contract for highway construction was held to be immune from local zoning.[189]

Where opponents contest that local zoning or land use regulations prohibit a proposed project, transportation agencies will need to examine whether the agency is exempt by enabling legislation from local requirements, and also whether the local regulations are preempted by federal law.[190] Particularly for regional transportation agencies charged with the responsibility of developing intermodal transportation facilities, enabling legislation may exempt the regional agency from local ordinances. Moreover, as cases discussed in the next two sections illustrate, and in contrast to *City of Cleveland*, parties asserting preemption sometimes prevail.[191]

i. Federal Aviation Act.—Where a transportation agency is involved in an airport project, opponents' claims based upon failure to follow local zoning regulations or other land use ordinances may be preempted under the Federal Aviation Act. The Federal Aviation Act provides in part that the United States possesses exclusive jurisdiction over the airspace of the United States and that the FAA is charged with developing policy for the use of this airspace.[192] The Act, which authorizes the promulgation of extensive regulations governing aircraft operations, is generally considered to preempt local ordinances that purport to regulate the operation of aircraft.[193]

For example, in *United States v. City of Berkeley*,[194] a district court held that a local ordinance requiring the FAA to obtain a permit prior to constructing a radar installation was preempted by the Aviation Act.[195] The court reasoned that the Federal Aviation Act gives the FAA the power to "acquire, establish, and improve air-navigation facilities wherever necessary," and that the local permit requirement was inconsistent with this specific grant of authority.[196] However, other courts have concluded that this statute does not preempt state

[180] Section 6.B.2.a.

[181] *See* §§ 3A, 3B, and 5B.

[182] 33 U.S.C. § 1251 *et seq*.

[183] 5 U.S.C. § 701 *et seq.*; Sierra Club v. Pena, 915 F. Supp. 1381, 1391 (N.D. Ohio 1996).

[184] RUSSELL LEIBSON & WILLIAM PENNER, LEGAL ISSUES ASSOCIATED WITH INTERMODALISM 11 (Fed. Transit Admin., Transit Coop. Research Program, Legal Research Digest No. 5, 1996).

[185] City of Cleveland v. City of Brook Park, 893 F. Supp. 742 (N.D. Ohio 1995).

[186] *Id.*

[187] *Id.* at 747.

[188] *Id.* at 752.

[189] Medford v. Marinucci Bros. & Co., 344 Mass. 50 (1962).

[190] LEIBSON & PENNER, *supra* note 184, at 12.

[191] *Id.*

[192] 49 U.S.C. § 40103(a) and (b).

[193] Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F. Supp. 678, 693 (N.D.N.Y. 1989) (local ordinance concerning parachute jumping preempted because parachute jumping constitutes aircraft operation).

[194] United States v. City of Berkeley, 735 F. Supp. 937, 940 (E.D. Mo. 1990).

[195] *Id.*

[196] *Id.*

or local control of the location and environmental impact of airports.[197]

ii. Noise Control Act.—Where opponents of a highway project argue that a project violates a local or state ordinance concerning noise levels, a transportation agency may defend the action on the grounds of preemption by the Noise Control Act. The Noise Control Act of 1972[198] promoted federal research programs and public information activities and authorized the promulgation of noise or emission standards for noise sources and new products.[199] Under the Act, the administration of the EPA is charged with the responsibility of coordinating the noise control programs of all the federal agencies.[200]

However, defending such actions on the grounds of preemption may be difficult. In *New Hampshire Motor Transport v. Town of Plaistow*,[201] the defendant town had issued a cease and desist order based on a local ordinance to prohibit a trucking company from continuing its nighttime access to and from a trucking terminal.[202] The trucking company claimed that the local ordinance was preempted by the Noise Control Act, because it was imposed in part to eliminate the noise caused by the trucks.[203] The Court of Appeals for the First Circuit held that the local ordinance was not preempted, as the Noise Act was not designed to remove all state and local control over noise.[204]

2. Importance of the Complaint

Opponents of a highway project generally try to convince a transportation agency to modify or halt the project before initiating suit. Opponents may even show the transportation agency a draft version of their complaint. Frequently a transportation agency will simply ignore opponents until a lawsuit is commenced. However, depending upon the nature of the opponent's concerns, a strategic project modification by the agency that occurs prior to the plaintiff filing suit may be a good way to weaken the plaintiff's case and keep the project on schedule. In undertaking such a modification, of course, the agency should be sure to undertake any further environmental review necessary to determine that there are no significant new impacts created by the project as modified. A transportation agency should evaluate an opponent's concerns prior to litigation with an eye to strengthening the agency's position should litigation be commenced.

After opponents initiate litigation, the complaint and any supporting affidavits become critical. In environmental litigation, opponents will likely seek preliminary injunctive relief to halt the project, and the success or failure of the litigation often depends on whether a preliminary injunction is granted. Although federal complaints technically require only notice pleading, to prevail on obtaining a preliminary injunction the complaint and supporting affidavits must be carefully and thoroughly drafted to be factually precise and correct.[205] It is unlikely that a complaint and supporting affidavits that are poorly drafted will result in issuance of a preliminary injunction.

3. The Discovery Process

In litigation, each party is permitted to learn about or discover the other parties' claims and defenses. The mechanisms and techniques used by parties to achieve this knowledge is generally called the discovery process. This section first examines what discovery techniques may be used by an opponent of a transportation agency and then examines techniques the agency may itself use to learn about the opponent's claims. Finally, this section explains the process by which a party may seek court orders to either compel discovery of a particular issue or to protect privileged information. The discussion is necessarily general, as discovery rules and practices vary from jurisdiction to jurisdiction.

a. Discovery by Plaintiffs Against Transportation Agency

Technically, discovery is the ascertainment of facts after litigation has commenced. However, opponents typically begin ascertaining facts long before a complaint is served.[206] Although opponents may not use technical discovery procedures to gather facts for a prospective lawsuit before a complaint is filed, opponents may use the Freedom of Information Act (FOIA)[207] or a similar state statute.[208] Under the FOIA, a citizen may inspect public records and files on all matters of public concern, subject to certain statutory exemptions.[209] By requesting information from a transportation agency, opponents may gather the necessary facts to initiate litigation. Where judicial

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[197] Gustafson v. City of Lake Angeles, 76 F. 3d 778 (6th Cir., 1996) (ordinance regulating sea plane landings not preempted).

[198] 42 U.S.C. § 4901 *et seq*.

[199] *See* 42 U.S.C. §§ 4903, 4913 (research and public information); 42 U.S.C. §§ 4904, 4905 (major noise sources and noise emission standards).

[200] 42 U.S.C. § 4903. The Act expressly permits citizen suits and a violation of any of the noise control requirements promulgated under the Act could be alleged by opponents of a highway project. 42 U.S.C. § 4911(a). Prior to suit, 60-days notice must be provided to the Administrator of the EPA. An opponent may not bring a suit for violation of a noise control requirement if the EPA has commenced and is diligently prosecuting a suit. However, the opponent may still intervene. *Id*. at § 4911(b). A court may award costs and fees to any party whenever the court deems such award appropriate. 42 U.S.C. § 4911(d).

[201] N.H. Motor Transport v. Town of Plaistow, 67 F.3d 326 (1st Cir. 1995).

[202] *Id.* at 327.

[203] *Id.* at 332.

[204] *Id.*

[205] FAIRMAN & BARDIS, *supra* note 41, at 1745.

[206] *Id.* at 1736.

[207] 5 U.S.C. § 552.

[208] *See, e.g.,* MASS. GEN. L. ch. 30A § 11½.

[209] 5 U.S.C. § 552(a).

review is on the administrative record, a court may be receptive to an agency motion to squelch discovery of matters outside of that record.

One defense strategy available to the transportation agency is grounded in Section (b)(5) of the FOIA.[210] Section (b)(5) states that a citizen is not entitled to "inter-agency 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."[211] Essentially, subsection (b)(5) protects against attempts to delve into intra-agency and interagency communications that are privileged. If an agency could withhold the documents requested in litigation on the grounds of privilege, then the agency need not provide the documents prior to litigation.

The privilege typically asserted is the deliberative process privilege, which protects the decision-making processes of the executive branch of the government from discovery in civil actions.[212] The privilege applies to documents and discussions that are pre-decisional and deliberative in nature.[213] As with other privileges, the burden of justifying it falls upon the party seeking to invoke it.[214]

To prevent pre-suit disclosure of privileged documents, a transportation agency needs to have its counsel carefully review any documents responsive to a request to determine whether any privilege should be asserted.

After the suit is filed, opponents will use the traditional discovery mechanisms, such as depositions, production requests, interrogatories, and requests for admission.[215] In actions raising NEPA issues or the Section 4(f) requirements, opponents will be particularly interested in the agency's consideration of alternatives.[216] In responding to opponents' requests, particularly with respect to the consideration of alternatives, an agency needs to be particularly careful not to provide any privileged information.

The availability of discovery in NEPA cases will depend upon whether plaintiffs seek to supplement the administrative record with additional studies and documents, depositions by experts, and exhibits. The U.S. Supreme Court has held that the principal focus of judicial review is the administrative record. A district court may, however, take additional explanatory evidence for the agency's decision if it deems it necessary.[217] If the district court allows plaintiffs to supplement the agency's administrative record, it may allow discovery.[218]

b. Discovery by the Transportation Agency

The use of formal discovery after litigation is commenced serves valuable functions for a transportation agency.[219] First, an agency may discover whether any of its defenses are merited and warrant filing a motion for summary judgment to end the litigation prior to trial.[220] Challenges to standing and the assertion of privilege are two defenses that, if successful, can avoid the need for full development and resolution of a case's merits. Second, discovery may be used by an agency to prune away allegations or elements of plaintiffs' causes of action that lack evidentiary foundation.[221] If causes of action can be eliminated by a successful motion for summary judgment, a transportation agency can refocus trial preparation resources towards the issues that will be seriously contended at trial. Third, the discovery process may bring to the fore any imbalance in available resources between it and the plaintiffs, which may be a poorly funded interest group. An agency may, subject to the limits of law and the civil rules, seek extensive discovery from its opponents. Where opponents lack the resources needed to respond to discovery in a complete and timely way, the use of comprehensive and precise discovery may lead to the withdrawal or dismissal of the opponent's challenge or a settlement on favorable terms.

c. Ability of Either Party to Seek Court Orders to Either Compel Discovery or Protect Privileged Information

Although a party may engage in discovery of greater or lesser scope, depending on the nature of the action, it may not overstep propriety in its discovery procedures. Generally, federal and state discovery rules permit a party to object to improper interrogatories, production requests, or requests to admit that are overly broad, vague, or otherwise improper.[222]

In addition, discovery requests may seek privileged information. An attorney's advice, an attorney's work product (trial preparation effort), and an agency's deliberative and pre-decisional information and

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[210] 5 U.S.C. § 552(b)(5).

[211] *Id*.

[212] *See* Hopkins v. United States Dep't of Hous. & Urban Dev., 929 F.2d 81, 84 (2d Cir. 1991); Earnst & Mary Hayward Weir Found. v. United States, 508 F.2d 894, 895 n.2 (2d Cir. 1974); Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 125 F.R.D. 51, 53 (S.D.N.Y. 1988).

[213] *See* Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO, 845 F.2d 1177, 1180 (2d Cir. 1988) ("Local 3"). Information is "pre-decisional" if it "precedes, in temporal sequence, the decision to which it relates," Hopkins, 929 F.2d at 84, rather than a "post-decisional memoranda setting forth the reason for an agency decision already made." A. Michael's Piano v. F.T.C., 18 F.3d 138, 147 (2d Cir. 1994).

[214] *See* Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).

[215] *See* FED. R. CIV., pp. 26, 28, 30, 31, 33–36.

[216] FAIRMAN & BARDIS, *supra* note 41, at 1740.

[217] Camp v. Pitts, 411 U.S. 138 (1973); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[218] *See* Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987).

[219] FAIRMAN & BARDIS, *supra* note 41, at 1740–42.

[220] *Id*.

[221] *Id*.

[222] *See* FED. R. CIV. P. 33–36.

documents are privileged. These privileges, and any other applicable privileges, must be asserted by the party to prevent the disclosure of information.

When a privilege is asserted, the opposing party may disagree and believe that the information is being unreasonably withheld. To resolve this type of discovery dispute, the parties generally each submit briefs supporting their positions and the court may conduct an *in-camera* inspection of the withheld documents or information.[223] An *in-camera* inspection is when the court views the withheld documents or information without the parties or witnesses present and determines whether they should be disclosed.

Where a party improperly withholds documents without a reasonable basis, or where a party fails to provide discovery responses, the court has discretion to issue a variety of sanctions including assigning the costs of filing certain motions to a disobedient party, staying the proceeding until a discovery order is obeyed, or entering of a default against the disobedient party.[224]

4. Defensive Strategy and Affirmative Defenses

a. Motions That Prevail on Technical Defects

A transportation agency may be able to raise technical issues in defense of an action that do not address the merits of the case. These technical defects may involve issues such as improper service or a defective summons. Raising these issues may result in dismissal of the suit and short term success, but usually will only delay the eventual outcome of the litigation.[225] Opponents may simply cure the defect raised and the project will again be under the threat of litigation.

However, under certain circumstances the technical issues should be raised. If there is no serious substantive legal threat to the project, or the opposition is very unorganized and unlikely to persevere after an early setback, technical issues should be raised.[226] A transportation agency needs to carefully gauge the strength of its opponent before deciding whether to raise technical issues.

b. Raising Affirmative Defenses

It is generally advantageous for a transportation agency to plead as many affirmative defenses as possible. Whether a transportation agency will succeed in asserting a particular defense depends upon the facts and timing of the opponent's claim. If the transportation agency learns (through discovery) facts that support any of its special defenses, the transportation agency may move for summary judgment in an attempt to truncate the litigation prior to trial. The following sections discuss the more frequently raised special defenses but are not a comprehensive list of all special defenses that might be raised.[227]

i. Laches.—The rule in equity is well established that if a party unreasonably delays in applying for injunctive relief, the parties' action may be barred by laches. In environmental litigation, the defense of laches has been frequently raised.[228] To establish laches, a defendant must show a delay in asserting a right or claim, that the delay was not excusable, and that there was undue prejudice to the party against whom the claim is asserted.[229]

There is ample precedent for a court to hold that opponents of a project have slept on their claims and that those claims are barred by laches.[230] In *Stow v. United States*,[231] plaintiffs filed a lawsuit to stop a project to eliminate perennial flooding by construction of a dam and relocation of a state highway.[232] Plaintiffs argued that the defendants failed to follow NEPA.[233] The defendants, which included both the USDOT and the New York State Department of Transportation, argued that plaintiffs' lawsuit should be barred by laches.[234] The District Court barred plaintiffs' claims and reasoned that a significant degree of work was completed on the project at substantial costs and that the environmental changes to the area had already occurred.[235]

Although the application of laches depends on the facts of the particular case and is consigned as a matter within the sound discretion of the district court, this discretion must be exercised within limits.[236] In environmental cases it has been recognized that "laches

[223] *See* FED. R. CIV. P. 37.

[224] *Id*.

[225] FAIRMAN & BARDIS, *supra* note 41, at 1751.

[226] *Id*.

[227] See *Affirmative Defenses in Actions Challenging Omission or Adequacy of Environmental Impact Statement Under § 102(2)(c) of the National Environmental Policy Act of 1969*, 63 A.L.R. Fed. 18 (1997).

[228] FAIRMAN & BARDIS, *supra* note 41, at 1752.

[229] Jersey Heights Neighborhood Ass'n v. Glendening, 2 F. Supp. 2d 772, 780 (D. Md. 1998), *aff'd on other grounds and rev'd in part,* 174 F.3d 180 (4th Cir. 1999); Save Our Wetlands, Inc. v. United States Army Corps of Engr's, 549 F.2d 1021, 1026 (1977); Clark v. Volpe, 342 F. Supp. 1324 (E.D. La. 1972), *aff'd*, 461 F.2d 1266 (5th Cir. 1972).

[230] *See, e.g.*, Jersey Heights Neighborhood Ass'n v. Glendening, 2 F. Supp. 2d at 780 (no reasonable excuse for delay of over 8 years in filing claim), City of Rochester v. United States Postal Serv., 541 F.2d 967 (2d Cir. 1976); Sierra Club v. Alexander, 484 F. Supp. 455 (N.D.N.Y. 1980), *aff'd*, 633 F.2d 206 (2d Cir. 1980); Clark v. Volpe, 342 F. Supp. 1324 (E.D. La. 1972), *aff'd*, 461 F.2d 1266 (5th Cir. 1972); Summersgill Dardar, et al. v. LaFourche Realty Co., Inc., et al., 1988 U.S. Dist. LEXIS 5715 (E.D. La. 1988).

[231] Stow v. United States, 696 F. Supp. 857 (W.D.N.Y. 1988).

[232] *Id.* at 858.

[233] *Id.* at 859.

[234] *Id.* at 862–63.

[235] *Id.* at 863. The dam was 31 percent completed and the highway relocation work was 49 percent completed, and all the trees and brush had been removed. *Id.*

[236] *See, e.g.*, Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980).

must be invoked sparingly" in suits brought to vindicate the public interest. Two reasons are frequently given for this policy.[237] First, it is understood that "citizens have a right to assume federal officials will comply with applicable law."[238] Second, because "ordinarily the plaintiff will not be the only victim of alleged environmental damage," "[a] less grudging application of the doctrine might defeat Congress' environmental policy."[239] However, even in instances where courts have recognized the need to invoke laches sparingly, courts have still barred plaintiffs' claims on the grounds of laches.[240]

ii. Standing.—Another defense frequently raised in environmental suits is plaintiffs' lack of standing to sue.[241] Standing is a judicial determination to ensure that the plaintiff is the proper person to bring a particular lawsuit. The United States Supreme Court has established a two-pronged test for standing.[242] The first prong asks whether the plaintiffs have suffered injury in fact. The second prong asks whether the plaintiffs' interests are within the zone of interest protected by relevant statute.[243]

Under the current law of standing, most resourceful plaintiff's attorneys may allege facts sufficient to support the standing requirements.[244] However, a transportation agency should not overlook the possibility of raising this defense. Where a defendant asserts that plaintiffs lack standing to bring suit, the burden is on the plaintiffs to prove to the court that they fulfill the standing requirements.

iii. Procedural Defects in a Class Action Suit.—Plaintiffs in environmental litigation frequently initiate class action lawsuits.[245] There are numerous procedural grounds upon which a class action may be attacked by a defendant transportation agency.[246]

Raising procedural defects concerning a class action lawsuit is advantageous where a defendant needs additional time to prepare before trial.[247] Although plaintiffs may ultimately overcome the procedural defects, it will take additional time to resolve such issues. For example, in *McDowell v. Schlesinger*,[248] a district court noted that "[t]he procedural technicalities and delays that would have resulted from the preliminary determinations of the class action question would have delayed resolution of this action."[249]

One issue a transportation agency should consider is whether it is beneficial to the agency that the matter proceed as a class action.[250] If the agency were to prevail on the merits of the litigation, a class action would preclude all members of the class from newly raising the issues decided in the litigation. In *Sierra Club v. Hardin*,[251] the defendants successfully employed this strategy as the court ordered the plaintiffs' organizations to sue on behalf of all of their members to avoid prejudice to the defendants.[252]

iv. Sovereign Immunity.—Where a state transportation agency is a named defendant in environmental litigation brought in federal court, the defense of sovereign immunity may be raised. The likelihood of prevailing on the defense will depend in part upon the nature of the claims asserted by the plaintiffs. For a discussion of the defense of sovereign immunity, see Section 5.B.3.C of this chapter. If successful in claiming sovereign immunity, the state agency will be, for better or worse, relegated to a spectator role in further proceedings.

v. Statute of Limitations.—Statute of limitations is an additional defense that is frequently raised in environmental litigation. It is similar to the concept of laches in that the defendants are essentially asserting that plaintiffs have waited too long before bringing their suit. However, instead of relying upon a balancing of the equities, the defendants rely upon a statute that expressly states how long after an incident or event a plaintiff must bring a lawsuit. Because statutes of limitation vary for each statute that plaintiffs assert has been violated, a transportation agency needs to determine whether each statute raised in litigation challenging a project has a limitations period and whether the limitations period has passed. For example, the statute of limitations for actions brought under NEPA pursuant to the APA is 6 years.[253]

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[237] Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982).

[238] *Id*. at 854; City of Davis v. Coleman, 521 F.2d 661, 678 (9th Cir. 1975) ("It is up to the agency, not the public, to ensure compliance with NEPA in the first instance.").

[239] Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1241 (9th Cir. 1989).

[240] *See, e.g*., Apache Survival Coalition v. United States, 21 F.3d 895, 905–06 (9th Cir. 1993).

[241] FAIRMAN & BARDIS, *supra* note 41, at 1755.

[242] Ass'n of Data Processing Service Orgs., Inc. v. Camp., 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970).

[243] *Id.* For an additional discussion of these standing criteria, *see* § 6.B.1 *supra*.

[244] FAIRMAN & BARDIS, *supra* note 41, at 1755.

[245] *Id.*

[246] Rule 23 of the FED. R. CIV. P. governs class action, and subsections (a) and (b) of the rule set forth the prerequisites that must be satisfied to maintain a class action, and subsection (c) sets forth some of the procedural requirements such as notice that must be completed to maintain a class action.

[247] FAIRMAN & BARDIS, *supra* note 41, at 1756.

[248] McDowell v. Schlesinger, 404 F. Supp. 221 (W.D. Mo. 1975).

[249] *Id*. at 226, n.2. The plaintiffs had initially brought a class action but decided it was not necessary to proceed with a class action since if plaintiffs were successful, the relief sought would apply to the entire class the plaintiffs sought to represent. *Id.*

[250] FAIRMAN & BARDIS, *supra* note 41, at 1756.

[251] Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971).

[252] *Id.*

[253] *See* Sw. Williamson County Cmty. Ass'n, Inc. v. Slater, 173 F.3d 1033, 1036 (6th Cir. 1999) (holding that a 6-year statute of limitations for "civil actions" against the United

c. The Useful Tool of Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, a party to litigation may obtain summary judgment on all or some of the causes of action raised in the complaint by demonstrating that there are no genuine issues of fact and that the party is entitled to judgment as a matter of law.[254] A party may demonstrate that there are no genuine issues of material fact by submitting affidavits or other supportive documents.[255] A transportation agency may move for summary judgment on all the causes of action and defenses in dispute or may pick and choose those claims on which it is likely to prevail.[256]

If the agency prevails on a motion for summary judgment on all of plaintiffs' claims, the litigation is over. However, plaintiffs may appeal the decision to an appellate court. Where the agency prevails on only certain issues, opponents of the project may not appeal the court decision until after the remaining issues have been tried and a final judgment entered.[257]

D. ALTERNATIVE DISPUTE RESOLUTION OF ENVIRONMENTAL ISSUES*

Mediation is a relatively new approach to managing and resolving conflict over environmental issues. Environmental conflict arises when parties involved in a decision-making process disagree about an action that has the potential to have an impact upon the environment. When one or more of these parties is able to block the proposed action of the other parties, a stalemate occurs. Mediation offers a resolution to the stalemate without extensive delay, substantial attorney's fees, and protracted litigation.

As the practice of environmental mediation evolves, practitioners have been able to identify certain techniques that have worked best and resulted in a successful resolution. This section discusses the mediation process itself, identifies certain techniques for intractable environmental conflicts, and compares the advantages of mediation over traditional litigation.

States applies to actions under NEPA brought pursuant to the APA). The court stated, "The statute of limitations is six years from the time the claim accrues; in this case, from the time of 'final agency action' as required by the APA." *Id*. *See also* The Jersey Heights Neighborhood Ass'n et al. v. Glendening et al., 174 F.3d 180 (1999) (holding that final agency action triggers the 6-year statute of limitations for review of action and that the 6-year statute of limitations had not expired on claims that project should have had a supplemental environmental impact statement prepared under NEPA).

[254] FED. R. CIV. P. 56.

[255] *Id*.

[256] *Id*.

[257] FED. R. CIV. P. 54(b).

[*] This section updates, as appropriate, and relies in part upon information and analysis in MEDIATING ENVIRONMENTAL CONFLICTS (J. Walton Blackburn & Willa Marie Bruce eds., 1995).

1. The Mediation Process

The identification and selection of a mediator is the first critical step in the mediation process.[258] Because the mediator leads the mediation and establishes the ground rules for how mediation will occur, the selection of the mediator is very important. For any party, including a transportation agency, a mediator must be objective and not have a personal interest in the outcome of the dispute.[259] If there are facts that support that the mediator has a personal interest, the mediation process may be unsuccessful. Even if a party refrains from raising the mediator's personal interest prior to mediation, the party may still raise the issue at any time and likely derail the mediation.

A second criteria to consider in selecting a mediator is the extent of the mediator's technical expertise.[260] Frequently, environmental litigation involves substantial inquiry into specialized or sophisticated issues of engineering or the natural or social sciences, and some technical expertise is necessary to understand the parties' positions. However, too much technical expertise by a mediator may lead to an overemphasis on technical details at the expense of building the relationship between the parties that is necessary for a successful resolution through mediation.

A third consideration in selecting a mediator is his or her leadership ability. Among Alternative Dispute Resolution professionals there is substantial disagreement as to how aggressive mediators should be in leading the parties to agree on the structure of the mediation.[261] If the parties lack consensus on most issues, frequently the parties will also lack consensus as to how the mediation should proceed. A mediator with strong leadership skills may drive the parties to an agreement as to the length, scope, and content of the parties' position statements, whether opening arguments will be held, and whether witnesses will be called.

In some environmental disputes it is very difficult for the parties to identify discrete issues to mediate.[262] Uncertainty as to the environmental condition of a site and the complexity of interrelated interests and concerns may make issue identification a substantial challenge.[263] To avoid ambiguity, a transportation agency should identify the issues it wishes to mediate and seek agreement from the other parties. If mediation commences without any identification of the issues, the mediation may not reach a successful result.

After the parties have selected a mediator and identified the issues to be mediated, mediation may begin. A common tactic of mediators is to stress

[258] MEDIATING ENVIRONMENTAL CONFLICTS 270 (J. Walton Blackburn & Willa Marie Bruce eds., 1995).

[259] *Id*.

[260] *Id*.

[261] *Id*.

[262] *Id*. at 273.

[263] *Id*.

consensus building between the parties. A mediator may identify any facts or legal concept that the parties agree upon. By focusing on consensus building, the mediator sets the tone for achieving consensus with regard to the more intractable facts or legal concepts.

a. Dispute Resolution of Intractable Environmental Conflicts

A key to successful environmental mediation between parties "lies in the distinction between conflict and dispute."[264] Environmental conflicts refer to the long-term divisions between groups with different social beliefs about the relationship between humans and the environment.[265] Conflicts between these groups are played out in an endless series of incremental disputes concerning a variety of policies affecting the environment.[266] Although mediation will not resolve the underlying and ongoing intractable conflict, it may be employed to resolve each incremental dispute.[267]

In any dispute there are core and overlay components.[268] To resolve a dispute through mediation, the parties and the mediator should be aware of the concepts of core and overlay components. The *core* components are those issues that are truly in dispute. The *overlay* components are generally misunderstandings, disagreements over technical facts, escalation, questions of procedural fairness, and polarization.[269] The overlay component may become so important to the parties that the decisions that ultimately resolve the conflict may be based upon the overlay problems, not the core problems.[270]

2. Advantage and Disadvantages of Mediation as Compared to Litigation

Mediation can be a faster and less costly procedure for resolving disputes than is litigation. Adjudication by a court is focused on rights, duties, and remedies, and little attention is paid to cost.[271] In addition, the increasing number of environmental disputes adds to the burden of overcrowded federal and state court systems in which cases can languish for years prior to trial.[272]

Moreover, the adversarial nature of litigation tends to polarize litigants' positions and discourage direct and open communication, sharing of information, and joint problem solving.[273] The court process is typically a win-lose process and unsuccessful litigants are thereby encouraged to keep pursuing a case through appeals.[274]

However, mediation is not without its own drawbacks. Legitimate concerns have been raised regarding power imbalances among participants in mediation in terms of experience and skills in negotiation, as well as scientific and technical expertise.[275] In addition, critics note that the mediation process may not really deliver better public health or environmental protection outcomes.[276] Finally, there has not been any systematic study that mediation is faster or less expensive than litigation.[277] In practice, mediation frequently occurs while litigation is pending and parties may be spending time and money on maintaining two concurrent processes, rather than using mediation as the only means of achieving resolution.

[264] *Id*. at 102.
[265] *Id*.
[266] *Id*.
[267] *Id*.
[268] *Id*. at 107.
[269] *Id*.
[270] *Id*.
[271] *Id*. at 206.
[272] *Id*.
[273] *Id*.
[274] *Id*.
[275] *Id*. at 207.
[276] *Id*.
[277] *Id*.