1990

Reconsidering the Application of Laches in Environmental Litigation

William Murray Tabb
University of Oklahoma College of Law, mtabb@ou.edu

RECONSIDERING THE APPLICATION OF LACHES IN ENVIRONMENTAL LITIGATION

*William Murray Tabb**

I. INTRODUCTION

Courts have long recognized the relevance of the equitable defense of laches[1] in the context of private attorney general challenges[2] against governmental entities in environmental disputes.[3] A proper application of laches is particularly critical in environmental litigation because injunctive relief is the principal enforcement remedy sought to halt or correct perceived inadequacies in the substantive or procedural steps taken by the government. Too liberal an application of laches in private attorney general suits against government entities can endanger the environment by precluding otherwise meritorious claims without regard to broader environmental considerations.

A defendant must establish two independent criteria in order for the court to impose the laches defense against an equitable claim: first, that the claimant unreasonably delayed in asserting the right or claim, and second, that the defendant would suffer undue prejudice if the claim were not barred.[4] Laches is an affir-

* Associate Professor of Law, Baylor University. LL.M. 1987, University of Illinois; J.D. 1982, M.A. 1976, B.A. 1974, University of Arkansas.

1. Laches is defined as the neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to the adverse party, operates as an equitable bar. *E.g.*, Woodal Shores Property Owners Ass'n, Inc. v. Mathews, 37 Ill. App. 3d 334, 345 N.E.2d 186 (1976); Dixon v. Cahill, 10 Ill. App. 3d 779, 295 N.E.2d 349 (1973).

2. A private attorney general suit involves a challenge by a citizen under a legislative authorization to secure compliance with the laws. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975).

3. *See* Daingerfield Island Protective Soc'y v. Hodel, 710 F. Supp. 368, 373 (D.D.C. 1989); Stow v. United States, 696 F. Supp. 857, 862 (W.D.N.Y. 1988); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980); Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977).

4. *Daingerfield Island*, 710 F. Supp. at 373. *Cf.* Environmental Defense Fund v. Alexander, 614 F.2d 474, 478 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980) (stating a standard of delay of "not excusable" rather than unreasonable).

mative defense,[5] but, as an equitable defense, its imposition rests with the discretion of the court.[6]

Chancellors in courts of equity originally developed the laches defense to serve two interrelated functions. First, public policy considerations call for the timely settlement of controversies and the peaceable resolution of stale claims.[7] Second, an equitable time bar was necessary to prevent injustice due to the separate systems of law and equity.[8] The statute of limitations that would ordinarily provide repose to untimely legal claims would not be applicable to suits requesting equitable relief.[9]

---

5. I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 232 (D. Conn. 1974).

6. Preservation Coalition v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982). In *Gardner v. Panama R.R.*, the Court explained:

> Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.

342 U.S. 29, 30–31 (1951) (citations omitted).

7. Cornetta v. United States, 851 F.2d 1372, 1376 (Fed. Cir. 1988). In *Environmental Defense Fund v. Alexander*, the court explained the rationale underlying the doctrine of laches:

> Laches is a clement doctrine. It assures that old grievances will some day be laid to rest, that litigation will be decided on the basis of evidence that remains reasonably accessible and that those against whom claims are presented will not be unduly prejudiced by delay in asserting them. Inevitably it means that some potentially meritorious demands will not be entertained. But there is justice too in an end to conflict and in the quiet of peace.

614 F.2d at 481.

8. J. POMEROY, EQUITY JURISPRUDENCE §§ 418–419 (5th ed. 1941). The doctrine is based on the equitable maxim *vigilantibus non dormientibus aequitas subvenit*, equity aids the vigilant and not those who slumber on their rights. *Cornetta*, 851 F.2d at 1375.

9. *Alexander*, 614 F.2d at 478. The Supreme Court, in *Holmberg v. Almbrecht*, explained the distinctions between the doctrine of laches and statutes of limitation:

> Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." And so, a suit in equity may lie though a comparable cause of action at law would be barred.

327 U.S. 392, 396 (1946) (citations omitted) (quoting Galliner v. Cadwell, 145 U.S. 368, 373 (1892)). Thus, an application of the statute of limitations may depend on different criteria and policy considerations than the equitable defense of laches. *See Alexander*, 614 F.2d at 479 n.3. For example, in order to avoid an inequitable result, courts may impose laches to

Courts have recognized that the equitable preclusion device of laches should be invoked sparingly[10] to foreclose claims for equitable relief brought by private citizens asserting public rights under federal environmental statutes.[11] The rationale stated by courts for disfavoring application of laches against private citizens challenging contemplated governmental action rests on two policy grounds. First is the recognition that the plaintiff often would not be the only victim of the asserted environmental damage.[12] Second, by precluding a determination of the merits of a claim, Congress's intent to allow the liberal enforcement of environmental statutes may be undermined.[13] Despite these judicial pronouncements, however, the actual practice of courts has been to impose laches quite frequently against private attorney general claims in the environmental context.

An evaluation of the defense of laches raised by government against private challenges in environmental litigation should involve a comprehensive balancing of various competing interests. Courts should consider three main factors in deciding whether to recognize the defense of laches: (1) the resonableness of the plaintiff's delay in bringing the action; (2) prejudice caused by the delay; and (3) the public interest. Part Two of this Article discusses

---

bar a claim which was filed within the limitations period. *See* James v. Nashua School Dist., 720 F. Supp. 1053, 1061 (D.N.H. 1989). Also, some courts employ the limitations period not to bar an equitable claim directly but to serve as a rebuttable presumption of inexcusable delay and prejudice for laches purposes. *See* Gruca v. United States Steel Corp., 495 F.2d 1252, 1258–59 (3d Cir. 1974). *See generally* J. POMEROY, *supra* note 8, at § 419b. In *Alexander*, the court noted that application of the statute of limitations may depend upon when the suit was filed rather than when a claim was asserted because the claim may relate back to the original complaint. 614 F.2d at 479 n.3; *see also* FED. R. CIV. P. 15(c); Tiller v. Atlantic Coast Line R.R. Co., 323 U.S. 574, 581 (1945). Thus, when measuring the potential injury to governmental interests for purposes of equitable defenses against the private attorney general claims, the *Alexander* court referred to the time at which the plaintiffs asserted their principal objections to the government plans, instead of the time that they raised ancillary challenges to the project. *See Alexander*, 614 F.2d at 479 n.3.

10. *See* Concerned Citizens on I-190 v. Secretary of Transp., 641 F.2d 1, 7–8 (1st Cir. 1981); Daingerfield Island Protective Soc'y v. Hodel, 710 F. Supp. 368, 373 (D.D.C. 1989); Stow v. United States, 696 F. Supp. 857, 863 (W.D.N.Y. 1988).

11. *See Stow*, 696 F. Supp. at 863; Detroit Audubon Soc'y v. City of Detroit, 696 F. Supp. 249, 256 (E.D. Mich. 1988), *rev'd on other grounds*, 874 F.2d 332 (6th Cir. 1989); *Alexander*, 614 F.2d at 475, 478; Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977); City of Rochester v. United States Postal Serv., 541 F.2d 967, 976–77 (2d Cir. 1976); Peshlakai v. Duncan, 476 F. Supp. 1247, 1256 (D.D.C. 1979).

12. Preservation Coalition v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982). In fact, this implication underlies the description of such suits as private attorney general suits.

13. *City of Rochester*, 541 F.2d at 977.

the way in which courts evaluate the reasonableness of the plaintiff's delay in applying the laches defense. The Article suggests that courts apply an expanded standard of delay, one that takes into account: (1) the plaintiff's promptness in opposing agency action after discovering the facts which form the basis of the equitable claims; (2) the government's contribution to the delay; (3) the pursuit of reasonably available alternatives to litigation; and (4) the nature of the statutory rights and duties involved.

Part Three examines the issue of prejudice, that is, the degree of potential hardship to the government, third parties, and the public through changed circumstances as a consequence of the delay. The Article sets forth a more comprehensive inquiry than is currently employed, examining: (1) resources already expended; (2) irretrievable commitments made; (3) decisions affecting the environment remaining to be made; and (4) adverse effects on third parties as a result of the equitable action.

Part Four examines courts' failure to take proper account of the public interest when evaluating private enforcement actions against the government in environmental disputes. Public interest has been well established as a significant factor influencing a court's equitable discretion with respect to entitlements and to the fashioning of equitable relief. Similarly, evaluation of the public interest should take on added significance in determining whether to foreclose equitable relief in environmental litigation. The public interest is particularly relevant in environmental cases because environmental injuries may adversely affect a wide range of persons other than the private plaintiff, and because harm to natural resources is often irreversible and irremediable.[14] Moreover, while public interest concerns generally are heightened in cases involving the government as a party, such concerns are especially important in private attorney general suits, which play a significant role in checking the decisionmaking function of government entities.[15]

14. Steubing v. Brinegar, 511 F.2d 489, 495–96 (2d Cir. 1975).

15. However, the evaluation of equitable defenses implicates different considerations in circumstances where the government seeks equitable relief against private parties under environmental protection statutes. In such cases, the public interest favors government enforcement of statutory schemes that effectuate congressional policies of environmental protection and remediation. See Kelley v. Thomas Solvent Co., 714 F. Supp. 1439 (W.D. Mich. 1989); United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988); United States v. Conservation Chem. Co., 681 F. Supp. 1394 (W.D. Mo. 1988); United States v. Aceto Agricultural Chems. Corp., 699 F. Supp. 1384 (S.D. Iowa 1988); United States v. Vineland Chem. Co., 692 F. Supp. 415 (D.N.J. 1988). Also, private attorney general status does not

Indeed, the theoretical underpinning for allowing private attorney general actions is to promote society's interest in expanded enforcement of statutes that touch important social issues,[16] such as environmental protection.

II. Evaluating the Reasonableness of Delay

To assert a laches defense, the defendant must first show that the plaintiff unreasonably delayed in bringing the claim.[17] In the past, courts have had difficulty identifying the factors that should be considered in determining whether a particular delay is unreasonable. The absolute length of time which has passed since the plaintiff acquired the necessary facts and asserted the claims, although not dispositive, is relevant in effectuating the public policy favoring prompt resolution of disputes.[18] In addition to the amount of time that has elapsed, a number of courts have considered whether the plaintiff opposed the agency action prior to filing suit, the nature of the agency response, and other circumstances which would prompt investigation as to legal bases to challenge the contemplated government action.[19] While these factors are relevant in determining whether a party has been diligent in pursuing claims against the government, a more expanded inquiry would better protect the interests of the claimant, the government, and third parties. Although the prompt resolution of disputes is critical to minimizing the degree of hardship on the government's resources, there is a strong public interest in protecting the environment from deleterious, hasty, government action. When reconciling these interests in the context of the equitable defense of laches, courts should consider foremost that harm to natural resources resulting from improper government action is often irremediable.

---

carry with it the derivative sovereign immunity to equitable defenses that is accorded by some courts to governmental plaintiffs. Clark v. Volpe, 342 F. Supp. 1324, 1327 (E.D. La. 1972).

16. *See* Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968).

17. Daingerfield Island Protective Soc'y v. Hodel, 710 F. Supp. 368, 373 (D.D.C. 1989).

18. Preservation Coalition v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982).

19. *See Daingerfield Island*, 710 F. Supp. at 374; *Preservation Coalition*, 667 F.2d at 854.

A. Promptness in Opposing Agency Action

The starting point for analyzing whether a delay by a private plaintiff in challenging agency action is unreasonable is the plaintiff's promptness in asserting opposition.[20] The respective interests of the government and citizens may fairly be accomodated by requiring two independent criteria to begin the running of time for laches. The first criterion should be that the rights upon which relief is sought have come into existence,[21] and the second, that the plaintiff has had an opportunity to discover the relevant facts supporting the claims.[22]

The Ninth Circuit addressed the first criterion in *Portland Audubon Society v. Lujan*.[23] The plaintiff, an environmental organization, challenged certain long-range timber management plans by the Bureau of Land Management, alleging violations of several federal acts.[24] The court determined that laches did not bar the challenges despite a several-year delay, because only recently had another case held that citizens had the right to enforce one of the statutes through the Administrative Procedure Act.[25] Thus, the rights supporting the plaintiff's suit had only recently come into existence. The analysis articulated in *Portland Audubon Society* appropriately fits within the discretionary nature of the laches defense because a plaintiff's reliance on and enforcement of nascent rights are given reasonable consideration.

On the other hand, in *Detroit Audubon Society v. City of Detroit*,[26] the federal district court held that laches barred an environmental organization's suit to enjoin the defendants from constructing a municipal solid waste combustion facility.[27] The court

20. Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980).

21. *See* Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1329 (4th Cir. 1972).

22. Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1028 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977).

23. 884 F.2d 1233 (9th Cir. 1989).

24. *Id.* at 1236. The plaintiffs asserted that the government policy requiring the maximum timber production legally possible violated the Oregon & California Lands Act, 43 U.S.C. § 1181 (1982) and the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1784 (1982 & Supp V 1987). Also, the plaintiffs claimed that the destruction of old growth forest on government lands violated the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (1988).

25. *Portland Audubon Society*, 884 F.2d at 1241.

26. 696 F. Supp. 249 (E.D. Mich. 1988), *rev'd on other grounds*, 874 F.2d 332 (6th Cir. 1989).

27. *Id.* at 256. The court also barred the plaintiffs from suing to require the defendants to adopt a different technology for the facility. *Id.*

found that the plaintiffs delayed unreasonably in filing the suit, rejecting their claim that they had waited for an outcome in a civil action between the EPA and the defendants on the same subject matter.[28] Additionally, the court found it unpersuasive that the plaintiffs spent the six months prior to the action raising money for legal fees.[29] However, courts should evaluate equitable defenses with the recognition that private plaintiffs who seek to challenge government actions typically lack extensive financial and investigative resources.[30] While such a disability should not entirely excuse dilatory enforcement of legal rights, it should be one factor influencing the court of equity's discretion in assessing the defense of laches.

The second criteria for determining the reasonableness of the delay is that a claimant is not dilatory in asserting rights until he possesses either actual or constructive knowledge of the facts necessary to challenge the government action.[31] In this context, knowledge or "notice" of the relevant facts can be demonstrated subjectively, in regard to the information the plaintiff actually possessed, or objectively, by considering what a party in the plaintiff's position, exercising reasonable diligence, should have discovered.[32] Under either a subjective or an objective standard of knowledge, the laches evaluation should turn not on whether the private party knew or should have known that the government's conduct constituted a statutory violation, but on whether the statutory basis for the claim existed.[33] However, time should not begin to run against potential claimants when they first become

---

28. *Id.*

29. *Id.*

30. In Powell v. Zuckert, 366 F.2d 634, 638 (D.C. Cir. 1966), the court determined that a 16-month delay was insufficient to impose laches to preclude a claimant from seeking judicial review of his discharge from government service, because the plaintiff had pursued administrative recourse and lacked the financial resources to seek judicial remedies. Circuit Judge Skelly Wright aptly observed: "The poor often are ignorant of their rights, and alienated from those assigned to dole out justice . . . . If poverty creates a barrier to litigation in particular cases, a court, in applying the equitable doctrine of laches, must open its eyes to this fact." *Id.* at 637–38 (citations omitted).

31. *See* Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1027–28 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977).

32. I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 239 (D. Conn. 1974); Stow v. United States, 696 F. Supp. 857, 863 (W.D.N.Y. 1988); Environmental Defense Fund v. Alexander, 614 F.2d 474, 478 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980); Daingerfield Island Protective Soc'y v. Hodel, 710 F. Supp. 368, 374 (D.D.C. 1989).

33. *Alexander*, 614 F.2d at 479.

aware of the contemplated government action; more properly, it should be calculated from the time the plaintiffs knew or should have known of the existence of the specific facts upon which relief was sought.[34]

Subjective notice, demonstrated by actual knowledge of the facts on which to base a claim, is a straightforward standard. More difficult problems arise when applying constructive notice in environmental litigation. This requires a determination of when and to what extent a private plaintiff should be held accountable for information disseminated to the public concerning the contemplated government action. In *Daingerfield Island Protective Society v. Hodel*,[35] citizen groups instituted an action against the Department of the Interior, seeking to set aside a land exchange agreement.[36] Under the agreement, the United States government acquired title to certain wetlands in exchange for granting the former owner an easement for the construction of a traffic interchange.[37] In 1978 two of the plaintiffs sought to enjoin the Department from approving the traffic interchange design until an environmental impact statement had been prepared.[38] The plaintiffs did not challenge the validity of the land exchange agreement itself, which had been in existence for seven years. The district court dismissed this suit as premature because the National Park Service had not acted upon any proposal for the interchange design.[39] In 1981 the Park Service approved the traffic interchange design, and in 1983 it completed an environmental assessment of the project. The Park Service subsequently granted the former owner a perpetual easement across the wetlands.

The plaintiffs filed suit again in 1986, this time alleging that the government's approval of the plan violated a number of federal

34. Preservation Coalition v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982).

35. 710 F. Supp. 368 (D.D.C. 1989).

36. *Id.* at 370.

37. *Id.* In 1970, before the approval of the land exchange, the National Park Service prepared a memorandum which concluded that there would be minimal adverse environmental impact from granting access to the parkway and recognized that environmental benefits would accrue from federal ownership of the wetlands. *Id.* at 371. In 1976, the Park Service further analyzed the aesthetic and traffic considerations of various alternatives and issued a draft environmental assessment which recommended that the access rights should not be granted. *Id.* The 1976 assessment was not adopted as final, however, because the government believed that it was bound by the terms of the exchange agreement and could not refuse to convey access rights to the developer. *Id.*

38. *Id.* at 371.

39. Daingerfield Island Protective Soc'y v. Andrus, 458 F. Supp. 961, 963 (D.D.C. 1978).

statutes.[40] The court held that the claim for equitable relief was barred by laches because the complaint was filed sixteen years after the Secretary's approval of the land exchange and fifteen years after the agreement took effect.[41] The plaintiffs argued that the sixteen-year delay in asserting their challenge to the agreement should be excused because the United States did not convey an easement over the parkway until 1984 and because the Park Service for a number of years had attempted to repurchase the easement. The court rejected the plaintiffs' calculation of the time period for laches purposes, stating that the plaintiffs had been on notice of the agreement based on extensive press coverage.[42] Ironically, the court also found that the prior suit by the plaintiffs did not overcome the laches defense because that action had been dismissed as premature.

At first glance, the analysis set forth in *Daingerfield* appears compelling, and the application of an equitable bar to the plaintiffs' challenge a just result. The absolute time which elapsed from the time the plaintiffs could fairly be charged with notice of the government's plans until equitable relief was sought, could be considered an unreasonable delay in most circumstances. However, it would be dangerous for courts to seize systematically upon the earliest time government proposes a plan as the starting point for applying an objective test for "reasonable" delay. To do so would fail to take into account plaintiffs' differing access to the information necessary to determine whether an equitable suit would be available and effectual.

Although an objective test for whether a plaintiff had notice of government actions may adequately protect the public and governmental interests in most circumstances, several problems of application remain. It is troublesome to require potential plaintiffs to draw significant inferences about potential government misconduct from news reports of contemplated action on a project. Courts

40. The plaintiffs asserted that the Secretary of the Interior's approval of the 1970 land exchange agreement violated the National Environmental Policy Act, 42 U.S.C. §§ 4321–4371 (1982 & Supp. V 1987); the National Capital Planning Act, 40 U.S.C. §§ 71–223 (1982); the Capper-Cramton Act, ch. 354, 46 Stat. 482 (1930); the Mount Vernon Highway Act, 45 Stat. 721 (1928); the National Park Service Organic Act, 16 U.S.C. § 1 (1988); the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-22(b) (1988); the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (1988); and Exec. Order No. 11,988, 3 C.F.R. § 117 (1977) (pertaining to flood plain areas).

41. *Daingerfield Island*, 710 F. Supp. at 375.

42. *Id.* at 373 n.10.

have recognized that citizens are entitled to presume that public officials will act in accordance with the applicable laws.[43] Furthermore, an objective test does not do away with the necessity for courts to make judgments in dealing with differently situated groups. For example, a public interest organization with extensive investigative resources could be held to a higher degree of due diligence to ascertain information about possible government misconduct than a private citizen without such resources.[44]

In sum, an objective standard of whether a private plaintiff has pursued equitable challenges to government conduct within a reasonable period of time should function adequately in most instances. The validity of the objective approach should be tested by considering the reliability and accuracy of the information that is disseminated to the public, the plaintiff's means of obtaining and evaluating the material, the degree that the information is relevant to the specific rights upon which relief is sought, and the extent to which the plaintiff is reasonably justified in expecting additional information to clarify or modify the government plans.

B. Government Contribution to Delay

The second factor which courts should consider in imposing laches in environmental litigation is whether the government contributed to the plaintiff's delay in bringing suit. If a government agency fails to prepare an adequate environmental impact statement under the National Environmental Policy Act ("NEPA"), a private plaintiff challenging the project necessarily will encounter some delay while a complete study is prepared and presented for public comment.[45] Courts have recognized that private litigants are entitled to presume that government officials will comply with their statutory duties.[46] Accordingly, in the event that the plaintiff can

43. Environmental Defense Fund v. Alexander, 614 F.2d 474, 479 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980).

44. *See* Peshlakai v. Duncan, 476 F. Supp. 1247, 1256 (D.D.C. 1979) (court focused on the fact that the plaintiff was "an international organization with a deep and well-defined interest in environmental matters and extensive resources"); *see also* I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 239 (D. Conn. 1974) (court considered the "special status" of the plaintiff organization as one factor with respect to the reasonableness of the delay in challenging the governmental action).

45. City of Davis v. Coleman, 521 F.2d 661, 678–79 (9th Cir. 1975).

46. *Alexander*, 614 F.2d at 479; *Coalition for Canyon Preservation*, 632 F.2d at 779.

establish that the government agency contributed to the delay by concealing information, by misrepresenting facts, by failing to fulfill promises, or by violating other legal duties, the filing delay should be excused.

The inquiry concerning government contribution to delay must be distinguished, however, from circumstances where equitable estoppel is applied against the government. For example, government contribution to delay will occur when government officials' statements respecting the scope of a project are incomplete, because in such cases a private plaintiff acts reasonably to delay in pursuing litigation while further investigating the legality of the government's proposal. Equitable estoppel, in contrast, is an affirmative defense involving the opposing party's reasonable but detrimental reliance on the other party's factual misrepresentations.[47] Laches does not require the plaintiff's reliance nor the defendant's affirmative misrepresentations. Instead, courts assessing the applicability of laches should focus on whether the plaintiff acted in an expeditious manner in asserting rights based on the information reasonably available after the exercise of due diligence.

C. Pursuit of Alternatives to Litigation

The third factor that should be relevant to the reasonableness of a private plaintiff's conduct is whether the plaintiff pursued alternatives to litigation, for example, by opposing the contemplated government action through administrative proceedings. The essential element of a laches defense is inaction by the claimant in circumstances where a more timely pursuit of equitable relief is merited; the rationale is to encourage the prompt resolution of disputes and to avoid harm to the defendant as a result of the delay.[48] Consequently, where the claimant has pursued redress of grievances through an alternative to the judicial system, a court of equity should recognize this action as a demonstration of diligence. Such an approach comports with the policies underlying the doctrine of laches, because the defendant would be on notice of the plaintiff's claims and would have an opportunity to address

47. United States v. Boccanfuso, 882 F.2d 666, 670 (2d Cir. 1989).
48. Preservation Coalition v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982).

prejudice which could ensue if the challenge were ultimately successful. In addition, seeking administrative or other remedies would bring ancillary benefits by reducing strain on the court system and the public treasury. Finally, pursuit of alternatives to litigation can be consistent with the legislative policy of encouraging public participation in the decisionmaking process in environmental matters.

Courts have split over whether to attribute the delay caused by inefficiency of an administrative entity to a private plaintiff. In *Cleveland Newspaper Guild v. The Plain Dealer Publishing Co.*,[49] the Sixth Circuit found that a ten-year delay in filing a Title VII claim did not constitute an unreasonable delay because the plaintiff justifiably relied on the Equal Employment Opportunity Commission's ("EEOC") administrative process.[50] The court explained that the legislative history of Title VII favors the resolution of claims through the administrative process. Thus, it would defeat the Act's purpose "to penalize plaintiffs for relying on the EEOC's performance of its statutory duties."[51] Also, Congress knew of the potential delays in the administrative process when it stated its preference for such recourse as an alternative to litigation.[52] Similarly, in *Preservation Coalition v. Pierce*,[53] the Ninth Circuit found that the plaintiff organization had demonstrated sufficient diligence

49. 813 F.2d 101 (6th Cir. 1987).

50. *Id.* at 104. *But see* Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243, 245 (8th Cir. 1987) (a ten-year administrative delay was unreasonable and operated to bar a racial discrimination claim under Title VII); *see also* EEOC v. Liberty Loan Corp., 584 F.2d 853, 857–58 (8th Cir. 1978) (finding a four-year administrative delay unreasonable, absent any excuse other than a heavy workload for the agency). It is important to distinguish those instances in which the plaintiff fails to comply with specific statutory time requirements which are deemed mandatory conditions precedent to instituting the action. In Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989), the Supreme Court dismissed for lack of subject matter jurisdiction a citizen suit commenced pursuant to the Resource Conservation and Recovery Act of 1976 because the plaintiffs failed to comply with the 60-day notice and delay provision of the Act. Justice O'Connor, writing for the majority, rejected the petitioner's argument that the notice and delay requirement should be given a "flexible and pragmatic" construction in order to facilitate the remedial goals of the Act. *Id.* at 309. Instead, the Court found that strict compliance with the time provisions of the Act served congressional goals by allowing the responsible government agency the opportunity to enforce the Act and also would allow the alleged violator a chance to halt the offending conduct. *Id.* at 310. This situation is distinguishable, however, from those circumstances where a statute does not impose absolute time requirements, and also from those statutory frameworks which contemplate some period of public participation in the government's decisionmaking process.

51. *Cleveland Newspaper*, 813 F.2d at 104.

52. *Id.*

53. 667 F.2d 851 (9th Cir. 1982).

to overcome a laches defense because it had told the government entity of its opposition to the destruction of an historic building and had filed suit shortly after a public meeting detailing the government's proposed action.[54]

However, in *Stow v. United States*,[55] the federal district court applied laches, failing to take into account the plaintiffs' pursuit of alternatives to litigation. In *Stow*, the plaintiff homeowners challenged federal, state, and local agency actions with respect to the planning, approval, and funding of a dam construction project and highway relocation.[56] The plaintiffs claimed, among other things, that the agencies had violated certain provisions of NEPA[57] because the draft and final environmental impact statements pertaining to the project were inadequate. Although the plaintiffs had protested the completion of the project at numerous administrative levels,[58] the court held that laches barred their action for injunctive relief. The court found that the plaintiffs had delayed unreasonably because they had not initiated an action to obtain judicial review of the statements until nearly two months after construction work had begun, seven months after certain permits were issued, and almost five years after the final environmental impact statement was issued.[59] Although the actual time passed is generally an indication of whether a delay is reasonable, the time spent challenging a project at the administrative level should not be seen as a lack of diligence.

In *Environmental Defense Fund v. Alexander*,[60] the plaintiff environmental protection organization sought to halt the construction of a federally financed waterway, alleging that the width of the project exceeded the size authorized by Congress.[61] The plaintiffs had actively opposed the waterway by appearing before congressional committees and by filing suit to enjoin construction after Congress approved funding for the project.[62] The suit was

54. *Id.* at 855.
55. 696 F. Supp. 857 (W.D.N.Y. 1988).
56. *Id.* at 859.
57. 42 U.S.C. §§ 4321–4332 (1982).
58. *Stow*, 696 F. Supp. at 863.
59. *Id.*
60. 614 F.2d 474 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).
61. *Id.* at 475.
62. *Id.* at 476–77.

dismissed, however, and construction proceeded.[63] Several years later the environmentalist group again sought to enjoin the project based on alleged violations of statutory and administrative regulations.[64] The plaintiffs amended their complaint to challenge the increase in the scope of the project, but the court held that the request for injunctive relief was barred by laches.[65] The court focused on the fact that the plaintiffs were aware of the questionable nature of the proposed changes to the waterway by virtue of their prior appearances before Congress and their earlier law suit.[66] However, the plaintiffs had not challenged the government action in a timely fashion.[67] The court acknowledged the difficulty in stating that a government entity can be prejudiced by forcing it to comply with the applicable laws.[68] Nevertheless, the plaintiffs' lack of diligence in instigating litigation directed at the precise misconduct by the government precluded a decision on the merits.[69]

D. Statutory Objectives

The fourth factor which courts should consider in determining the reasonableness of a private plaintiff's delay in challenging governmental misconduct in environmental affairs should be the statutory objectives, and the nature of the government's responsibilities in effectuating statutory goals. By failing to consider this factor, the conventional treatment of laches reduces the effectiveness of private enforcement of environmental protection statutes, undermines the integrity of comprehensive statutory plans which have balanced environmental interests with other values, and derogates congressional mandates for the liberal enforcement of environmental statutes.

NEPA, for example, imposes responsibilities on all agencies of the federal government to "use all practicable means and measures" to achieve the policies and goals of the statute.[70] In that

63. *Id.* at 477.
64. *Id.*
65. *Id.* at 475–77.
66. *Id.* at 478–79.
67. *Id.* at 479.
68. *Id.* at 480.
69. *Id.*
70. 42 U.S.C. § 4331(a) (1982 & Supp. V 1987).

regard, the Act contemplates "action-forcing" steps to insure that environmental values are balanced with other values in the decisionmaking process.[71] The statutory scheme of NEPA specifically contemplates public involvement in the environmental decisionmaking process.[72] This congressional policy is undermined when courts implicitly urge disgruntled parties to seek judicial recourse rather than to pursue their challenges to proposed environmental programs through the statutory means of public hearings.[73]

Some environmental protection statutes contemplate periods of delay in the dissemination of information and in the decisionmaking process.[74] In *Coalition for Canyon Preservation v. Bowers*,[75] for example, the Ninth Circuit recognized that an increase in the costs of a highway construction project attributed to delays by the plaintiffs in filing suit did not warrant application of the laches defense because NEPA itself contemplated delays.[76] As

71. Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1857 (1989); *see also* 40 C.F.R. § 1500.1(a) (1988) ("action-forcing" measures contained in the Act "to make sure that federal agencies act according to the letter and spirit of the Act"); *id.* § 1502.1 (the principal purpose of the environmental impact statement is to force the federal government to insure that the Act's policies are "infused into the ongoing programs and actions of the Federal Government").

72. The role of NEPA as an action-forcing statute designed to protect and promote environmental values is well established. Andrus v. Sierra Club, 442 U.S. 347, 350 (1979); Kleppe v. Sierra Club, 427 U.S. 390, 409 n.18 (1976). A significant way in which environmental concerns may be articulated and incorporated into the political process is through public participation in the various stages of the environmental impact statement. In *Robertson v. Methow Valley Citizens Council*, the Supreme Court, in a unanimous opinion written by Justice Stevens, delineated the statutory emphasis as follows:

> It [NEPA] ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.
>
> Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast . . . .
>
> Publication of an EIS [environmental impact statement], both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," and, perhaps more significantly, provides a springboard for public comment.

109 S. Ct. 1835, 1845 (1989) (citations omitted).

73. For an illustration of this problem, see the discussion of *Stow v. United States*, *supra* text accompanying notes 55–59.

74. Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 780 (9th Cir. 1980).

75. *Id.*

76. *Id.*

the court noted, certain periods of delay are inherent in the process of disseminating information to the public and to agencies; such delays are necessary to effectuate the goal of incorporating environmental concerns into the decisionmaking process.[77] Accordingly, although the private plaintiff's delay in challenging the proposed construction of a highway contributed to some increase in costs, the court justifiably found that the claim for equitable relief was not precluded by laches.[78]

III. Evaluating Prejudice Resulting from Changed Circumstances

Delay in commencing an equitable challenge to government action, standing alone, is insufficient to support a laches defense.[79] A laches defense also requires a showing of prejudice to the defendant as a result of the claimant's untimely pursuit of claims.[80] When assessing prejudice a court should take into acount the degree of potential hardship to the government, third parties, and the public through changes in position during the period of delay. This inquiry traditionally has been couched in terms of whether the government alone would suffer prejudice as a result of the claimant's unreasonable delay in seeking equitable relief.[81] After briefly describing the evidentiary and economic aspects of prejudice, this Part elaborates the four elements to which a court should look in evaluating prejudice.

The concept of prejudice has a dual nature, one element evidentiary and the other economic.[82] Evidentiary prejudice arises in circumstances where, as a consequence of the delay in bringing suit, the relevant evidence has been lost or destroyed or the principal witnesses are no longer available. In such circumstances, the

77. *Id.*
78. *Id.*
79. *See* Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1028 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977).
80. *See* Environmental Defense Fund v. Alexander, 614 F.2d 474, 478 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).
81. *See* Cornetta v. United States, 851 F.2d 1372 (Fed. Cir. 1988).
82. *See id.* at 1378.

defendant would be unfairly disadvantaged in marshalling a defense to the equitable challenges.[83]

Economic prejudice, the primary concern of this Part, is the type of prejudice most frequently raised by government defendants in environmental litigation.[84] Economic prejudice should and does play a significant role in determining the efficacy of equitable defenses against private challenges to government decisions affecting the environment. However, the proper application of economic prejudice requires more than a simple cost-benefit analysis. Courts should consider any policy priorities Congress has identified in the environmental area and the implications of the government's actions for the public interest.

Many courts have taken an excessively narrow view of the factors relevant to analyzing economic prejudice. When a laches defense is raised in response to a challenge to government actions affecting the environment, courts have typically restricted their investigations to whether substantial resources have been committed and construction has commenced.[85] For instance, in *Stow v. United States*, the court determined that laches should bar the challenge by citizen groups to a government project involving the construction of a dam and relocation of a highway because the project had proceeded to an advanced stage.[86] The court noted that irreversible and significant changes to the environment had

---

83. *See, e.g., id.*; Stone v. Williams, 873 F.2d 620, 625 (2d Cir.), *cert. denied*, 110 S. Ct. 377 (1989); *Ex parte* Grubbs, 542 So. 2d 927, 930 (Ala. 1989). In the early decision *Mackall v. Casilear*, the Supreme Court explained the rationale underlying evidentiary prejudice:

> The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence.

137 U.S. 566 (1890).

84. *See, e.g.*, Daingerfield Island Protective Soc'y v. Hodel, 710 F. Supp. 368, 375 n.14 (D.D.C. 1989); Stow v. United States, 696 F. Supp. 857 (W.D.N.Y. 1988); Detroit Audubon Soc'y v. City of Detroit, 696 F. Supp. 249, 256 (E.D. Mich. 1988), *rev'd on other grounds*, 874 F.2d 332 (6th Cir. 1989); *Alexander*, 614 F.2d at 479–80; Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1028 (5th Cir.), *cert. denied*, 434 U.S. 836 (1987).

85. *See Daingerfield Island*, 710 F. Supp. at 375; *Stow*, 696 F. Supp. at 863.

86. *Stow*, 696 F. Supp. at 863. The work on the dam was 31% finished and the relocation was 49% completed at the time of the request for equitable relief. *Id.*

already taken place, thus reducing the effectiveness of the plaintiffs' request for equitable intervention.[87] Similarly, the court in *Environmental Defense Fund v. Alexander*[88] allowed a laches defense, placing significance on the fact that the government had already completed eighteen percent of the project that the plaintiffs sought to halt and had spent in excess of $265 million.[89] In addition, the court noted that a large amount of soil had been excavated, and locks and bridges had been built.[90] Again, in *Save Our Wetlands v. United States Army Corps of Engineers*,[91] the percentage of completion of the project at the time of the challenge was the key influence on the court's decision to impose the laches defense.[92] The court distinguished cases in which the expenditures were high in an absolute sense yet represented a fairly low percentage of the total expenditures anticipated.[93]

As these cases illustrate, courts have often taken the view that the expenditure incurred is of primary significance in demonstrating prejudice.[94] A better approach to prejudice maintains that increases in costs attributable to the plaintiff's delay in bringing the suit should not be sufficient to establish prejudice.[95] Prejudice should be a matter of degree influenced by a variety of elements including: (1) the extent of resources already expended; (2) the extent of irretrievable commitments made; (3) the number of decisions of environmental importance remaining to be made; and (4) the extent to which third parties would be adversely affected by the equitable action.

A. Resources Already Committed

The first element—the amount of resources already committed to the project—is the factor most commonly relied upon by courts in analyzing claims of prejudice. For instance, in *Ecology Center*

87. *Id.*
88. 614 F.2d 474 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).
89. *Id.* at 477.
90. *Id.* at 480.
91. 549 F.2d 1021 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977).
92. *Id.* at 1028.
93. *Id.*
94. *See* Peshlakai v. Duncan, 476 F. Supp. 1247, 1256 (D.D.C. 1979).
95. *See* Preservation Coalition v. Pierce, 667 F.2d 851, 855 (9th Cir. 1982).

of Louisiana v. Coleman,[96] the government had spent over $1 million acquiring rights-of-way for the construction of an interstate highway at the time the plaintiffs challenged the project.[97] The court found that the expenditures alone did not establish prejudice because the amounts spent were relatively small compared to the $667 million projected cost for the highway.[98] In *Coalition for Canyon Preservation v. Bowers*,[99] the Ninth Circuit evaluated prejudice by focusing on whether it would be difficult to alter the "basic plan" of the project.[100] The court reasoned that the amount of expenditures and even the percentage of completion of the project were not dispositive, but were relevant in light of the overall purpose of the project.[101] Thus, at a certain stage, abatement of the project would not serve the policies of the pertinent environmental statutes because significant changes to the landscape already would have occurred.[102]

However, some courts have declined to impose an equitable bar although much of the project has been completed.[103] In *Arlington Coalition on Transportation v. Volpe*,[104] the court held that laches would not bar an action by a citizens group seeking to enjoin the construction of a highway even though 75.6% of the families had been relocated and 93.9% of the dwellings; 98.5% of all businesses and 84.4% of the necessary rights-of-way had been acquired at a cost in excess of $28 million at the time of the private citizens' challenge to the project.[105] The court found that the government had not demonstrated sufficient prejudice to foreclose equitable relief because the costs of changing or abandoning the proposed route did not definitely outweigh the benefits that might result as a consequence of the injunctive relief.[106] Similarly, in *Portland Audubon Society v. Lujan*,[107] the court declined to apply

96. 515 F.2d 860 (5th Cir. 1975).
97. *Id.* at 867.
98. *Id.* at 869.
99. 632 F.2d 774 (9th Cir. 1980).
100. *Id.* at 779.
101. *Id.* at 779–80.
102. *See id.* at 780. Also see *Stow v. United States*, where the court applied laches, recognizing that because a significant amount of the construction had been completed, the asserted benefits which might have been gained through injunctive relief at an earlier stage would not be available. 696 F. Supp. 857, 863 (W.D.N.Y. 1988).
103. *See* City of Davis v. Coleman, 521 F.2d 661, 677–78 (9th Cir. 1975).
104. 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972).
105. *Id.* at 1328.
106. *Id.* at 1330.
107. 884 F.2d 1233 (9th Cir. 1989).

the laches defense against a public interest group's challenge to certain government timber management plans where the government could not show that it had been prejudiced.[108] The court stated that it was not a situation such as "where a dam or nuclear power plant has already been built, where a plaintiff has 'sandbagged' a defendant by bringing a late challenge."[109] Although no standard has emerged as the benchmark for when a project has proceeded to a stage at which it would be considered prejudicial to halt it for a review of the government action, courts should balance the costs against the nature of the potential environmental benefits which might be gained through equitable relief.

The danger in evaluating prejudice principally by a test of whether construction has commenced, or even solely by reference to the degree of completion, is two-fold. First, it effectively shields from equitable challenge government conduct undertaken in a hasty manner. The incentive to comply with legal responsibilities is removed since even improvident investments of resources will foreclose an equitable challenge. Second, a percentage of completion test fails to take into account factors such as legislative expressions of environmental concerns, the long range effects on third parties, and the extent to which the harm may be reduced if steps are taken to remedy deficiencies in the project. As *Volpe* and *Portland Audubon Society* illustrate, the extent of resources already committed should not be the only factor considered when analyzing a claim of prejudice.

B. Irretrievable Commitments

In assessing prejudice, courts should consider not only costs already incurred, but also whether the defendant has made irretrievable commitments which, if abandoned, would give rise to liability to the government. In *Detroit Audubon Society v. City of Detroit*,[110] the plaintiff environmental organizations filed suit under a state environmental protection statute seeking to enjoin the defendants from the construction of a municipal waste combustion

108. *Id.* at 1241.
109. *Id.*
110. 696 F. Supp. 249 (E.D. Mich. 1988), *rev'd on other grounds*, 874 F.2d 332 (6th Cir. 1989).

facility.[111] The court determined that the plaintiffs' claims were barred by laches, finding that the defendants had been prejudiced by issuing $438 million in municipal bonds and spending $85 million on the project.[112] The court rejected the plaintiffs' argument that the defendants should be required to bear these costs.[113]

The problem with evaluating prejudice in terms of commitments made by the government is that such bureaucratic commitments may develop their own self-effectuating momentum.[114] Some courts, in the context of whether to issue injunctive relief against government action, have recognized the potential danger of a "domino-effect," where one decision leads to and justifies the next.[115] Similarly, courts should consider the nature and degree of government commitments when evaluating a laches defense but should temper this consideration with the recognition that some programs may develop their own momentum and rationalization.

C. Significant Decisions Yet to Be Made

The evaluation of potential prejudice to the government in environmental disputes should not be limited to the commitments already made, but should include consideration of what decisions remain to be made and the extent to which environmental benefits could still accrue if the project were halted or modified.[116]

---

111. *Id.* at 251. The defendants included a municipal corporation created to construct the proposed facility, the Greater Detroit Resource Recovery Authority, a construction company, and the City of Detroit.

112. *Id.* at 256.

113. *Id.*

114. *See* Sierra Club v. Marsh, 872 F.2d 497, 503 (1st Cir. 1989); Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156–57 (9th Cir. 1988).

115. For example, in *Sierra Club v. Marsh*, the First Circuit stated that the "difficulty of stopping a bureaucratic steam roller, once started, . . . [is] a perfectly proper factor" for a court to consider in evaluating risk for a preliminary injunction. 872 F.2d at 504. In a similar vein, in *Massachusetts v. Watt*, the court observed:

> Each of these events [government decisions] represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues. Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to "redecide." It is this type of harm that plaintiffs seek to avoid, and it is the presence of this type of harm that courts have said can merit an injunction in an appropriate case.

716 F.2d 946, 952–53 (1st Cir. 1983).

116. Steubing v. Brinegar, 511 F.2d 489, 495 (2d Cir. 1975).

In *Coalition for Canyon Preservation v. Bowers*,[117] the plaintiff environmental interest organization sought declaratory and injunctive relief to halt action on a proposed highway construction project until the government complied with certain federal statutes and regulations.[118] The Ninth Circuit recognized that some portions of the plan had already been completed at the time the plaintiff's appeal was granted, including the acquisition of rights-of-way and the clearing of ninety-two acres of timber.[119] Despite these investments of resources, however, the court decided that the government had failed to establish sufficient prejudice for purposes of the laches defense.[120] The critical factor, then, is not the absolute amount of resources spent, nor that some irremediable environmental changes have taken place, but rather that future environmental harms could be avoided by forcing the government to comply with the statutory mandates.[121]

Similarly, in *Steubing v. Brinegar*, the Second Circuit rejected a laches defense, and upheld a preliminary injunction against further construction of a bridge on the grounds that the project would have significant future environmental impacts.[122] The plaintiffs in *Steubing* had sought to halt further construction of a federally financed bridge, pending the government's compliance with NEPA. Although the court of appeals recognized that certain expenditures by the government and private parties could have been avoided if the plaintiffs had acted more promptly, the court found adequate support for the injunction.[123] Implicit in the court's analysis is the recognition that an injunction may be appropriate where significant environmental values may yet be preserved.

D. Balancing the Harms

Finally, a complete prejudice analysis requires a careful balancing of the equities, taking into consideration the demonstrated

117. 632 F.2d 774 (9th Cir. 1980).
118. *Id.* at 779.
119. *Id.*
120. *Id.* at 780.
121. *Id.* at 781.
122. 511 F.2d 489, 494–97 (2d Cir. 1975).
123. *Id.* at 495–97.

and projected detriment to the government, the plaintiff, and third parties, and the environmental benefits which could result if the project were halted or modified.[124] Courts should focus particularly on the balances that Congress itself has drawn with respect to environmental concerns. This principle was recognized in an early leading case, *Ecology Center of Louisiana v. Coleman*,[125] but has been largely ignored by other courts examining the issue. In *Ecology Center*, several environmental interest groups challenged the sufficiency of the government's environmental impact statement concerning the construction of a highway.[126] The district court determined that the claims were barred by laches because the government had already spent over $1 million for the acquisition of rights-of-way for the first segment of the project and the plaintiffs had waited more than two years after the final impact statement was filed before bringing suit.[127]

The Fifth Circuit Court of Appeals reversed, finding that the government had not established sufficient prejudice to impose the equitable defense.[128] The court stated that the evaluation of prejudice involves a two step process: first the court must weigh the expenditures made by the government agencies, and second the court must examine what Congress has defined as constituting prejudice.[129] The court reasoned that the government agency defendant acts as a "proxy" for the public interest as embodied in a particular environmental protection statutory scheme.[130] Prejudice, then, should be determined according to the policy that Congress has articulated for agency implementation.[131] If Congress has not articulated a specific legislative policy, the agency would have the prerogative to identify the harms it has suffered as a result of the plaintiff's delay.[132] On the other hand, when a legislative pro-

124. *See* Environmental Defense Fund v. Alexander, 614 F.2d 474, 479 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980) (court was concerned to show respect for congressional authority); Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1028 (5th Cir.), *reh'g denied*, 553 F.2d 100 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977) (court weighed the environmental benefits of an injunction).

125. 515 F.2d 860 (5th Cir. 1975).

126. *Id.* at 863.

127. *Id.* at 867.

128. *Id.* at 867–68.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

nouncement of policies does exist, the court should make that its primary focus in assessing prejudice.[133]

Although *Ecology Center* has been widely noted by other courts that have addressed the question of equitable defenses in environmental litigation, its treatment of prejudice has generally been misperceived. Typically, the opinion has been cited for the proposition that prejudice is a matter of degree and should not turn on the absolute costs incurred by the government.[134] The more important lesson of *Ecology Center* is that prejudice must be evaluated in light of legislative policy. This lesson is particularly relevant in the context of alleged government violations of environmental laws.

Historically, the courts have taken the narrow view that prejudice primarily concerns the extent to which a defendant has already committed resources to a challenged project. As the discussion above explains, however, a more complete approach to prejudice recognizes three other factors as well: irretrievable commitments undertaken; significant decisions not yet made; and the balance of harms. Courts must adopt this more comprehensive view of prejudice to ensure that significant environmental concerns are not ignored.

IV. Reconsidering the Role of Public Interest in Equitable Defenses

The final factor in a proper laches defense analysis, one which is frequently overlooked, is the public interest. In addition to applying the concepts of delay and prejudice incorrectly in environmental litigation, courts routinely fail to consider adequately the role of public interest concerns. Public interest concerns traditionally have played a key role in affecting a court's equitable discretion regarding entitlement and fashioning of equitable re-

133. *Id.*

134. *See, e.g.*, Environmental Defense Fund v. Alexander, 614 F.2d 474, 480 (5th Cir.), *reh'g denied*, 616 F.2d 568 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

lief.[135] Similarly, courts should also evaluate public interest factors in determining whether to *foreclose* equitable relief in environmental litigation. This Part begins by discussing both the defensive and offensive aspects of public interest and closes with a discussion of the importance of considering nonpecuniary values when analyzing public interest.

A. Defensive Versus Offensive Aspects of Public Interest

Public interest in environmental matters has two aspects, one defensive and the other offensive. The government or third parties may sometimes use public interest defensively to buttress a laches defense. Thus, in instances where the public treasury would be adversely affected by halting or modifying a project at an advanced stage of construction, the court may determine that public interest militates in favor of barring equitable interference. Plaintiffs, however, may sometimes use public interest offensively to support the need for equitable intervention against governmental conduct in order to promote environmental values. Public interest might be applied offensively, then, to influence a court to decline to impose a laches defense.

Courts applying the public interest factor defensively will evaluate the degree of potential economic prejudice which the government or third parties will sustain if equitable relief is granted. For example, in *Stow v. United States*,[136] the plaintiff citizens group challenged government agency action approving the construction of a dam and the relocation of a highway on the basis that the

135. *See* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). An early expression of the role of public interest in relation to equitable relief was articulated in *Hecht Co. v. Bowles*, where the Court stated:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. 321, 329–30 (1944).

136. 696 F. Supp. 857 (W.D.N.Y. 1988).

environmental impact statement pertaining to the project did not satisfy the requirements of NEPA and the Administrative Procedure Act.[137] The court recognized a public interest in complying with the requirements of the statutes but also identified an interest in avoiding economic waste.[138] In balancing the two competing policies, the court found that laches should bar the plaintiff's request for equitable intervention because the expected losses from halting the project would have outweighed the potential environmental detriments if construction were allowed to continue.[139]

A similar analysis was used in *Daingerfield Island Protective Society v. Hodel*.[140] In that case, citizens groups challenged a land exchange agreement which provided for the acquisition of certain wetlands by the government, in exchange for granting an easement over another piece of land. Although the court accepted the government's laches defense, primarily because of its concern that the government would be prejudiced by an injunction, the court also explored public interest arguments.[141] In particular, the court noted that prejudice should take into account the fact that the public had enjoyed the use of the wetlands for almost a decade since the deal was struck.[142] The court found that the public's use of the wetlands, when combined with the additional cost factors, consituted sufficient grounds to support the laches defense and to reject the plaintiff's challenge.[143]

Public interest also may be applied offensively to counter a laches defense.[144] When a government action is challenged under an environmental statute, the principal inquiry should be whether the public interest in environmental protection would still be better served through the issuance of injunctive relief.[145] A distinguishing mark of private enforcement of environmental laws is the recognition that the plaintiff will not be the only victim of degradation

137. *Id.* at 859.
138. *Id.* at 863.
139. *Id.*
140. 710 F. Supp. 368 (D.D.C. 1989).
141. *Id.*
142. *Id.*
143. *Id.*
144. *See* Steubing v. Brinegar, 511 F.2d 489, 495 (2d Cir. 1975); *see also* Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980).
145. *See, e.g., Coalition for Canyon Preservation*, 632 F.2d at 781.

of the environment resulting from the failure of the government to comply with applicable laws.[146]

Steubing v. Brinegar offers an illustration of this analysis.[147] In that case, a citizens group sought to enjoin the constuction of a bridge, alleging, among other things, that the government had violated NEPA.[148] Despite the economic prejudice suffered by the government, the court rejected the government's claim that the suit should be barred by laches.[149] Implicit in the court's analysis was the presumption that at some stage of construction, an injunction would have been ineffective because the project already would have advanced to the point where the purported environmental harm had occurred.[150] The critical inquiry, then, was not whether some costs could have been saved through increased diligence by the plaintiffs but whether the public interest still could be served by enjoining the project.[151]

B. The Importance of Nonpecuniary Values

The public interest cannot be equated solely with pecuniary interests. Consequently, courts should not evaluate the public interest in a laches defense only by reference to economic analysis. A proper analysis of public interest requires a multi-step inquiry concerning both pecuniary and non-pecuniary values. Such an inquiry involves identification of the interests targetted for protection by the relevant laws; assessment of the significance of those interests; evaluation of the extent to which the statutory goals will be impaired or furthered by application of equitable defenses; and consideration of whether environmental values not specifically mentioned by the relevant legislation would benefit from requiring the government to act in accordance with the statutory mandates.

The costs expended and the degree of potential economic hardship to the litigants should play important roles in the application of equitable doctrines; however, they should not have a

146. City of Davis v. Coleman, 521 F.2d 661, 678 (9th Cir. 1975).
147. 511 F.2d 489 (2d Cir. 1975).
148. *Id.* at 493.
149. *Id.* at 495.
150. *Id.*; *see also Coalition for Canyon Preservation*, 632 F.2d at 779–80.
151. *Steubing*, 511 F.2d at 495.

talismanic significance that outweighs other considerations. An analysis which looks only to pecuniary values would systematically undervalue environmental interests for at least two reasons. First, due consideration must be given to the values favored by underlying legislative policies. Second, environmental values often resist precise quantification and therefore do not lend themselves to cost-benefit analyses.

1. Legislative Policies

Courts must be careful to give due consideration to the special priority legislatures sometimes give to environmental concerns.[152] For instance, in *Arlington Coalition on Transportation v. Volpe*,[153] where the plaintiff citizens group sought to halt construction of a highway, the court relied on "the public interest status accorded ecology preservation by the Congress"[154] to reject the defendant's laches defense. In light of Congress's emphasis on ecology, the court balanced the public interest in ecology against the harm to the defendant from halting the project and decided in favor of ecology: "[The highway] has not progressed to the point where the costs of altering or abandoning the proposed route would certainly outweigh the benefits that would accrue therefrom to the general public."[155] Courts that fail to recognize legislative policies when considering laches defenses improperly overrule legislative policies and risk overlooking significant public interest concerns relevant to the problems before the court.

---

152. *See* NEPA, 42 U.S.C.A. §§ 4321–4370b (West 1977 & Supp. 1990). In particular, 42 U.S.C. § 4321 (NEPA § 2) states the congressional purpose underlying the Act as follows:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Id.

153. 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972).

154. *Id.* at 1329.

155. *Id.* at 1330.

2. *Difficulties of Quantifying Environmental Values*

The second reason that courts should consider both pecuniary and nonpecuniary values is that environmental values resist precise quantification, and therefore do not lend themselves to cost analyses.[156] The quantification issue has two aspects: one involves problems in valuation, and the other involves the difficulty of procuring substitutes to replace or restore injuries to the environment.

The difficulty of placing a value on ecological injury arose in *Puerto Rico v. S.S. Zoe Colocotroni*,[157] where an oil tanker spilled its cargo off the coast of Puerto Rico, resulting in the contamination of coastal areas and a mangrove forest.[158] Pursuant to a Puerto Rico statute which authorizes awards of the "*total value* of the damages caused to the environment and/or natural resources," Puerto Rico sought to recover damages equal to the costs of restoring the property.[159] The defendants contended that the damages should be calculated instead according to the traditional measure, diminution in property value after the event causing the harm.[160] The court rejected the defendant's argument, finding that application of the diminution of value rule would deny the state the ability to be fully compensated and would undermine the legislative policy of rehabilitating damages to the environment.[161] The court stated that implicit in the statutory language was the recognition that certain ecological areas do not have commercial or market value and thus cannot be protected without government intervention.[162]

---

156. *See generally* Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. ENVTL. AFF. L. REV. 405 (1989); Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269 (1989); Breen, *CERCLA's Natural Resource Damage Provisions: What Do We Know So Far?*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,304 (1984).

157. 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

158. *Id.* at 657.

159. *Id.* at 673 (emphasis added by the court); *see also* P.R. LAWS ANN. tit. 12, § 1131(29) (1977 & Supp. 1988).

160. *S.S. Zoe Colocotroni*, 628 F.2d at 672; *see also* RESTATEMENT (SECOND) OF TORTS § 929(1)(a) (1979).

161. *S.S. Zoe Colocotroni*, 628 F.2d at 673.

162. *Id.* The court stated with respect to the state statute that:

> In enacting section 1131, Puerto Rico obviously meant to sanction the difficult, but perhaps not impossible, task of putting a price tag on resources whose value cannot always be measured by the rules of the market place. Although the diminution rule is appropriate in most contexts, and may indeed be appro-

In a similar vein, in *Ohio v. United States Department of the Interior*,[163] the plaintiffs challenged regulations promulgated by the Department of the Interior ("DOI") pertaining to the measure of damages for injuries to natural resources under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[164] CERCLA provides that parties responsible for releases of hazardous substances are liable for damages to natural resources.[165] The DOI had the responsiblity to promulgate regulations for assessing damages for despoilment of natural resources.[166] The plaintiffs challenged the equal presumptive validity given to use value and restoration costs in the DOI's regulations. The plaintiffs claimed that the statutory framework instead mandated a preference for restoration or replacement of natural resources.[167] The court struck down the regulation explaining that the text and legislative history of CERCLA and the Clean Water Act explicitly showed a congressional intent to make restoration costs the basic measure of recovery for harm to natural resources.[168] In so holding, the court recognized that Congress had written the natural resource provisions because it was dissatisfied with the traditional common law rules for measuring damages.[169] The court rejected the DOI's claim that the rule was justified because it was economically efficient.[170] The application of a pure cost-benefit analysis to the valuation of natural resources was flawed, according to the court, because it assumed that such resources were "fungible goods" and that the "value to society gen-

---

> priate in certain cases under section 1131, . . . it does not measure the loss which the statute seeks to redress in a context such as the present. No market exists in which Puerto Rico can readily replace what it has lost. The loss is not only to certain plant and animal life but, perhaps more importantly, to the capacity of the now polluted segments of the environment to regenerate and sustain such life for some time into the future.

Id. at 674.

163. 880 F.2d 432 (D.C. Cir. 1989).

164. *Id.* at 438.

165. CERCLA § 107(a)(c), 42 U.S.C. § 9607(a)(4)(C) (1982 & Supp. V 1987).

166. The regulations were to establish procedures for conducting assessments of natural resource damages resulting from the release of hazardous substances or oil for purposes of CERCLA and the Clean Water Act.

167. Ohio v. United States Dep't of Interior, 880 F.2d at 441.

168. *Id.* at 450.

169. *Id.* at 455.

170. *Id.* at 456.

erated by a particular resource can be accurately measured in every case."[171]

The second reason public interest may resist quantification is the difficulty in procuring substitutes to replace or restore environmental injuries.[172] Courts faced with balancing asserted pecuniary prejudice to governmental interests with environmental interests should recognize that environmental resources are finite[173]

---

171. *Id.*

172. Aldo Leopold, in his seminal work recognizing an environmental ethic, observed:

> An ethic, ecologically, is a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct. These are two definitions of one thing. The thing has its origin in the tendency of interdependent individuals or groups to evolve modes of co-operation. The ecologist calls these symbioses. Politics and economics are advanced symbioses in which the original free-for-all competition has been replaced, in part, by co-operative mechanisms with an ethical content.
>
> . . . .
>
> One basic weakness in a conservation system based wholly on economic motives is that most members of the land community have no economic value . . . .
>
> . . . .
>
> Lack of economic value is sometimes a character not only of species or groups, but of entire biotic communities: marshes, bogs, dunes, and "deserts" are examples. Our formula in such cases is to relegate their conservation to government as refuges, monuments, or parks. The difficulty is that these communities are usually interspersed with more valuable private lands; the government cannot possibly own or control such scattered parcels. The net effect is that we have relegated some of them to ultimate extinction over large areas . . . .
>
> . . . .
>
> To sum up: a system of conservation based solely on economic self-interest is hopelessly lopsided. It tends to ignore, and thus eventually to eliminate, many elements in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning. It assumes, falsely, I think, that the economic parts of the biotic clock will function without the uneconomic parts. It tends to relegate to government many functions eventually too large, too complex, or too widely dispersed to be performed by government.

A. LEOPOLD, A SAND COUNTY ALMANAC 238, 246, 249, 251 (1966).

173. In *Puerto Rico v. S.S. Zoe Colocotroni*, the court observed:

> In recent times, mankind has become increasingly aware that the planet's resources are finite and that portions of the land and sea which at first glance seem useless, like salt marshes, barrier reefs, and other coastal areas, often contribute in subtle but critical ways to an environment capable of supporting both human life and the other forms of life on which we all depend.

628 F.2d 652, 674 (1st Cir. 1980).

and that ecological damages are often irremediable.[174] Accordingly, courts should be reluctant to accept laches defenses in private attorney general suits seeking to enforce environmental statutes. This does not mean, however, that any irremedial changes to the environment would necessarily justify equitable relief.[175] Irreversible changes to the environment may sometimes be justified by counterbalancing benefits. The point is simply that when the environmental effects of a challenged project are irreversible, courts should be particularly careful to take into account the full environmental costs.

Requiring courts to consider both pecuniary and nonpecuniary values does not necessarily conflict with the classical economic goal of maximizing monetary wealth. Classical economic theory seeks to maximize monetary wealth through the efficient allocation of resources.[176] At first glance, nonpecuniary environmental values may appear irrelevant to the classical economic project. Further consideration reveals the error of this impression. The destruction today of difficult-to-value environmental resources may result tomorrow in expensive correctional measures. That environmental resources are difficult to value does not mean they have no relevance to wealth maximization. Therefore, in the context of private attorney general challenges to government activities affecting the environment, courts should consider the long-term detrimental effects to the environment rather than simply the short-term inconveniences or costs already incurred by the government.[177]

The public interest is an essential factor for courts to consider when deciding whether to halt government activities affecting the environment. Public interest considerations can cut both ways, sometimes favoring the government defendant and sometimes favoring the plaintiff. Courts must be careful not to undervalue the public interest in environmental matters simply because that interest is hard to quantify. Though difficult to quantify, injuries to the environment can be costly. The courts' proper task is to style equitable orders which balance both economic and environmental values and which recognize legislative policies concerning the environment.

174. *See* Wilderness Soc'y v. Tyrrel, 701 F. Supp. 1473, 1489 (E.D. Cal. 1988).

175. *See* Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989).

176. *See generally* Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981).

177. *See* Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1329 (4th Cir. 1972).

IV. Conclusion

An evaluation of the equitable defense of laches raised by the government necessarily should involve a balancing process between competing interests. The government interests principally are two-fold: the prompt resolution of disputes so that further action can be undertaken and the efficient use of public funds and resources. The private interests, on the other hand, may be characterized as protecting the environment from misguided governmental conduct. In deciding whether to apply laches, the court can reasonably balance these countervailing interests by ascertaining whether the plaintiff unreasonably delayed in asserting the rights or claims, whether the defendant or third party would sustain prejudice as a result of the delay, and what public interest considerations are involved. In evaluating the diligence of the plaintiff, courts should identify when the asserted rights came into existence and whether the claimant possessed actual or constructive knowledge of the relevant facts upon which the claims are based. The government's contribution to the delay in violation of legal duties should excuse the delay. The plaintiff's pursuit of reasonably available alternatives to litigation should be considered in the plaintiff's favor, and statutory objectives should be taken into account in evaluating the reasonableness of the plaintiff's delay.

In evaluating the degree of prejudice which the government and public would sustain if the challenged project were halted or modified, costs and resources expended and committed are certainly relevant. However, courts should also consider the extent to which modifying or halting the project could still produce environmental benefits and should attempt a careful balancing of the equities. Courts should determine what legislative pronouncements of prejudice exist, if any, and consider that the plaintiff often would not be the only victim in environmental cases.

Public interest, which must be a principal facet of the equitable defense of laches, should be evaluated from the perspectives of both the government and private citizens. Government entities may use public interest concerns defensively, militating in favor of imposing laches to prevent harm to the government or third parties. Private plaintiffs may apply public interest arguments offensively, influencing a court to decline application of laches to protect the environment.

Finally, public interest concerns should not be evaluated simply by reference to a cost-benefit analysis. Natural resource damages are difficult to measure and injuries to ecological interests may be irremediable. Moreover, even under a conventional cost-benefit approach the long-term costs to remedy environmental harms may outweigh the perceived short-term benefits. Therefore, it is essential in environmental disputes that courts expand the scope of their inquiry to include a comprehensive balancing of interests and that they consider public interest concerns before applying the equitable defense of laches.