Synthesizing Criteria and Accounting for Economic Waste in Environmental Laches

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SYNTHESIZING CRITERIA AND ACCOUNTING FOR ECONOMIC WASTE IN ENVIRONMENTAL LACHES

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INTRODUCTION

Laches is an equitable defense that “prevents [a] cour[t] from reaching the merits of a case.” As an equitable defense, laches is premised on the judicial policy that allowing plaintiffs to file a suit after an unreasonable delay is unfair to defendants.

“In a legal context, laches may be defined as the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar.” Both unreasonable delay and undue prejudice must be present for courts to apply laches, and courts closely scrutinize the extent of these two elements. Courts may be flexible with respect to the extent required for one laches element based on the comparatively strong presence of the other element.

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2 See 27A AM. JUR. 2D Equity § 141 (1996) (“Laches thus was developed to promote diligence and to prevent the enforcement of stale claims.”).
4 See Lujan, 920 F.2d at 37 (noting that laches “requires a showing of inexcusable delay and undue prejudice. Both must be shown; a finding of laches cannot rest simply on the length of delay.”) (emphasis added).
5 See Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982) (holding that “[i]f only a short period of time elapses between accrual of the claim and suit, the magnitude of prejudice required before suit would be barred is great; if the delay is lengthy, a lesser showing of prejudice is required”).
Laches scrutiny is heightened in environmental cases.⁶ "Whether [laches] bars an action in a particular case depends upon the circumstances of that case."⁷ Recognizing the public interest inherent in environmental litigation,⁸ courts view laches more skeptically than they would in other circumstances, such as a suit between two private parties to a contract. The nature of environmental litigation mandates the application of "a special laches standard."⁹

It is not surprising that courts are reluctant to apply laches in cases involving environmental protection.¹⁰ Where a suit involves the public interest, courts tend to look suspiciously at attempts to

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⁷ *Weinberger*, 694 F.2d at 843.

⁸ See Park County Res. Council v. United States Dep't of Agric., 817 F.2d 609, 618 (10th Cir. 1987) (noting that "plaintiffs essentially represent" the interests of the general public in environmental cases); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1329 (4th Cir. 1972) ("[n]evertheless, we decline to invoke laches against appellants because of the public interest status accorded ecology preservation by the Congress.") (footnote omitted); *Id.* at 1326 ("It is the declared public policy of the United States to protect and preserve the national environment 'to the fullest extent possible.'") (citing NEPA, *supra* note 6).


¹⁰ See Tabb, *supra* note 6, at 377 ("[t]oo 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.").
bar a decision on the merits.\textsuperscript{11} A court's skepticism is heightened further in suits filed against a government agency, and environmental suits often involve government defendants.\textsuperscript{12} Some courts have held that laches cannot be used as a defense against parties representing the public. For example, federal cases have held that laches may not be used as a defense to claims by private attorneys general\textsuperscript{13} seeking to assert a public right.\textsuperscript{14}

When the federal government is the plaintiff, case law supports the notion "that the defense of laches does not apply to the United States when it acts in its sovereign capacity . . . ."\textsuperscript{15} These cases, particularly those considering private attorneys general suits, are not followed widely, and courts will only apply laches to bar plaintiffs'\textsuperscript{16} claims representing the public's environmental interests under narrow circumstances.\textsuperscript{17}

Judicial skepticism may stem from this uncertainty pertaining to the applicability of laches in cases brought against the government.\textsuperscript{18} Judge Posner, writing in United States v. American

\textsuperscript{11} Daingerfield Island Protective Soc'y v. Lujan, 920 F.2d 32, 39 (D.C. Cir. 1990) (holding that because environmental litigation concerns the public interest, a balancing test is not required because laches precludes reaching a decision on the merits).

\textsuperscript{12} See, e.g., Concerned Citizens on I-190 v. Sec. of Transp., 641 F.2d 1, 7-8 (1st Cir. 1981); Save Our Wetlands, Inc. v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1026 (5th Cir. 1977); Envtl. Def. Fund v. Tenn. Valley Auth., 468 F.2d 1164, 1182-83 (6th Cir. 1972).

\textsuperscript{13} Private attorney general suits are brought by private citizens asserting protection of public rights. Tabb, supra note 6, at 377 n.2.


\textsuperscript{16} Because most environmental law cases involve multiple plaintiffs and defendants, this Note will refer to these party classifications in the plural.

\textsuperscript{17} See Tabb, supra note 6, at 377.

\textsuperscript{18} See supra notes 13-17 and accompanying text.
Enterprises, Inc., peered into this confusion.\textsuperscript{19} He noted that while "[t]here is no dearth of statements that laches cannot be used against the government," he acknowledged that "the availability of laches in at least some government suits is supported by Supreme Court decisions . . . that refuse to shut the door completely to the invocation of laches . . . in government suits."\textsuperscript{20}

The lack of uniformity in the application of laches in environmental law is typical of the application of laches in general. Laches is based in equity, and "[e]quity eschews mechanical rules; it depends on flexibility."\textsuperscript{21} As a result, environmental laches analysis may be improved not only through proposing new and stricter criteria for courts to consider, but also by insisting that courts focus on several factors reflecting the peculiarly public nature of environmental law. Though courts should continue to apply laches on a case-by-case basis,\textsuperscript{22} reforming environmental laches analysis would provide guidance to parties who may become part of an untimely lawsuit. Such reform would also create needed uniformity across the landscape of federal case law.

This Note will argue that, although environmental plaintiffs represent important public interests generally negating laches justifications, courts' treatment of laches in such cases should be reexamined. Courts should take other policy concerns into consideration. Specifically, they should account for the public's considerable economic interests that are often at stake when environmental plaintiffs delay bringing a lawsuit. Suits that are delayed for years, or even months, often disrupt projects that may benefit local economies.\textsuperscript{23} Laches is invoked only in equity. When courts overlook the economic impact of these projects, they do so in cases in which the only remedy available to plaintiffs is an

\textsuperscript{19} 46 F.3d 670.
\textsuperscript{20} Id. at 672-73 (citations omitted).
\textsuperscript{21} Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946).
\textsuperscript{22} White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990) (noting that "whether laches bars an action depends on the particular circumstances of the case").
\textsuperscript{23} See infra notes 144-45 and accompanying text.
injunction halting the project.\textsuperscript{24} Allowing plaintiffs to enjoin or delay such projects after significant work has been completed is the equivalent of sanctioning economic waste.

In \textit{City of Rochester v. United States Postal Service}, the Second Circuit noted courts' hesitance to invoke laches in environmental cases.\textsuperscript{25} The court decided to apply laches, however, citing the public's interest in avoiding economic waste.\textsuperscript{26} The Second Circuit's opinion in \textit{City of Rochester} illustrates courts' sensitivity to the public's interest in protecting the environment. Moreover, in deciding whether laches is appropriate, the court's decision promotes a more nuanced approach that allows for the consideration of other public interests, including economic interests. This Note will argue that the Second Circuit's approach more adequately protects the public's interests than a policy of generally denying laches in environmental cases.

Part I examines \textit{Daingerfield Island Protective Society v. Lujan}, a case that is representative of the prevailing approach. Part II contrasts \textit{City of Rochester} with \textit{Lujan}. Part III proposes principles that courts should apply when evaluating the reasonableness of a delay. Part IV refines the criteria used to analyze the undue prejudice prong of the laches test. Part V delineates the concept of economic waste and proposes a balancing test to measure the competing public interests of protecting the environment and preventing economic waste.

I. THE PREVAILING RULE: \textit{DAINGERFIELD ISLAND PROTECTIVE SOCIETY v. LUJAN}\textsuperscript{27}

In 1970, the National Park Service ("NPS") acquired wetlands from a developer in Northern Virginia.\textsuperscript{28} In return, NPS granted the developer an easement to construct a highway interchange to

\textsuperscript{24} See Landreth v. First Nat'l Bank of Cleburne County, 45 F.3d 267, 271 (8th Cir. 1995) ("Laches is not applicable to actions for damages, accounting, or the recovery of money or property fraudulently obtained.").

\textsuperscript{25} 541 F.2d 967, 977 (2d Cir. 1976).

\textsuperscript{26} \textit{City of Rochester}, 541 F.2d at 977.

\textsuperscript{27} 920 F.2d 32 (D.C. Cir. 1990).

\textsuperscript{28} \textit{Lujan}, 920 F.2d at 33.
connect its development with a major highway. NPS approved the developer’s design plan in 1981, and the National Capital Planning Commission (“NCPC”) gave its approval in 1983. After concluding an Environmental Assessment (“EA”), NPS gave formal approval to the design plan, “noting that because of the terms of the 1970 Exchange Agreement, the Service could not recommend a ‘no build’ alternative.”

In 1986, the plaintiffs filed suit to enjoin construction of the interchange, alleging that the 1970 agreement violated several federal environmental laws, including NEPA. “The district court denied that motion and granted defendants’ motion for summary judgment, holding that all challenges... were mooted... and that all challenges to the 1970 Exchange Agreement were barred by laches.”

The court began its consideration by stating that “laches is a disfavored defense in environmental suits.” After noting that the decision to grant laches is at the discretion of the trial court, the D.C. Circuit concluded that it would “reverse the court’s laches ruling, nevertheless, on the ground that federal appellees and [the developer] failed to demonstrate sufficient prejudice from the delay.”

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29 Id.
30 Id. Although NCPC approved the plan, the Commission initially recommended that the building permit be denied because the population in the affected region had grown dramatically, rendering the initial agreement “obsolete.” Id. at 34.
31 Id. at 35 (citation omitted).
32 In addition to NEPA, the plaintiffs alleged violation of “the Land and Water Conservation Fund Act, the Mount Vernon Highway Act, the Capper-Cramton Act, the National Park Service Organic Act, the National Capital Planning Act, the Administrative Procedure Act, the National Historic Preservation Act, Executive Order 11988, and Floodplain Management Guidelines.” Id.

The plaintiffs had never challenged the lawfulness of the 1970 agreement between NPS and the developer until this case. They had, however, previously challenged NPS’s consideration of the interchange design. See Daingerfield Island Protective Soc’y v. Andrus, 458 F. Supp. 961 (D.D.C. 1978). The suit was dismissed. Id.
33 Lujan, 920 F.2d at 36.
34 Id. at 37.
35 Id. at 38.
According to the D.C. Circuit, in examining the laches claim the District Court had focused erroneously on the developer’s monetary expenditures.\(^{36}\) The court ruled that the lower court’s analysis should not have centered on these expenditures to the exclusion of other considerations.\(^{37}\) The court instead articulated “[t]wo factors [that should] have been accorded heavier weight.”\(^ {38}\) “The first [factor was] the percentage of estimated total expenditures disbursed at the time of suit.”\(^ {39}\) Next, “courts have examined whether the relief plaintiffs seek is still practicable. This consideration—the crucial one in the prior cases—has turned on the degree to which construction is complete.”\(^ {40}\)

In examining the first factor, the court found that the developer appeared to have overestimated the disbursements it made in reliance on governmental approval.\(^ {41}\) Even so, it still amounted to just over $700,000,\(^ {42}\) thus making the reliance disbursements a paltry sum in comparison with the total estimated expenditures, which were expected to total more than $500 million.\(^ {43}\)

The defendant failed to show that granting the plaintiffs’ desired relief would be impractical. “Here, not only has construction not begun, but a construction permit has not issued and cannot issue until Congress passes, if only silently, on the [Environmental Impact Statement] that NPS is still preparing.”\(^ {44}\)

Finally, the court ruled that trial courts do not have to conduct a balancing test of the benefits and harms to the environment, and hence the public interest, in a laches case.\(^ {45}\) The Lujan court erred

\(^{36}\) *Id.*

\(^{37}\) *Id.* (“Moreover, in environmental suits, the amount of money spent in reliance has not been considered the prime factor in the prejudice inquiry.”).

\(^{38}\) *Id.*

\(^{39}\) *Lujan*, 920 F.2d at 38.

\(^{40}\) *Id.* at 39.

\(^{41}\) *Id.* at 38 n.8.

\(^{42}\) *Id.*

\(^{43}\) *Id.* at 39 (noting that “the amount disbursed so far is relatively insignificant”).

\(^{44}\) *Id.*

\(^{45}\) *Lujan*, 920 F.2d at 39. “We do not impose on the district court the task of rebalancing the environmental harms and benefits on remand. Laches is a doctrine that prevents courts from reaching the merits of a case.” *Id.* at 40.
in this regard. In utilizing the two factors discussed above, the
court properly considered the public's interest in protecting the
environment. But, in failing to conduct a balancing test weighing
the respective harms to the environment and the economy, the
court left no room for a consideration of the public's competing
interest in preventing economic waste.46

II. CITY OF ROCHESTER v. UNITED STATES POSTAL SERVICE47 AND
JUDICIAL RECOGNITION OF THE PUBLIC INTEREST IN PREVENTING
ECONOMIC WASTE

The Postal Service sought to build a larger, modern facility in
a suburb of Rochester, New York.48 The Postal Service had begun
formal plans for the facility six years before the plaintiffs filed
suit, and construction was eighteen percent complete at the time
of trial.49 At appellate argument, construction had reached thirty-
five percent completion.50

The court accepted the principle that laches is disfavored
in environmental litigation, noting at the outset of the laches
discussion that the defense "is only rarely invoked in environ-
mental cases."51 Even here, where the court found the plaintiffs'
suit sufficiently prejudicial to be barred by laches, the court
appeared adverse to its application.52

46 See discussion infra Part V.
47 541 F.2d 967 (2d Cir. 1967).
48 City of Rochester, 541 F.2d at 971.
49 Id.
50 Id. at 977.
51 Id. See also Pres. Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982)
("Laches must be invoked sparingly in environmental cases because ordinarily
the plaintiff will not be the only victim of alleged environmental damage."). Tabb
asserts that while conventional wisdom holds that laches is invoked rarely in
environmental litigation, this is not borne out in the cases. "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." Tabb, supra note 6, at 379.
52 City of Rochester, 541 F.2d at 977 (noting that the court was "reluctantly
forced" to apply laches).
The formula that the Second Circuit used to reach its decision departed from that of other circuits. Other circuits, such as the D.C. Circuit in *Lujan*, examine the public interest from only one point of view—the public's interest in protecting the environment. The Second Circuit did consider this aspect. Indeed, the court acknowledged the importance of the environmental public interest as manifested in Congressional policy. In addition to these environmental concerns, the court also considered other interests, explicitly recognizing a public interest in preventing economic waste.

[W]e are not persuaded that the further construction, in and of itself, will create such an adverse environmental impact, beyond that already incurred by partial construction, as to override the public interest in averting the economic waste—invoking penalties under or renegotiation of the construction contract—entailed from a mid-stream termination of that contract.

The public's interest in preventing economic waste is arguably higher than in preventing damage to the environment, particularly if measured by the public's priorities in polling, where it consistently ranks the economy and jobs considerably higher than environmental concerns.

Public polling, however, is not a completely accurate depiction of the public interests balanced in cases like *City of Rochester*. The public, as a whole, has an interest in the environment that

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53 See discussion supra Part I.
54 *City of Rochester*, 541 F.2d at 977 (recognizing “the strong public interest in effecting compliance with NEPA”). See also Park County Res. Council v. United States Dep't of Agric., 817 F.2d 609, 617 (10th Cir. 1987) (holding that “[a] less grudging application of the [laches] doctrine might defeat Congress’s environmental policy” (quoting Pres. Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982))).
55 *City of Rochester*, 541 F.2d at 977.
is implicated if congressional policy is violated by improper construction projects.\textsuperscript{57}

Environmental interests notwithstanding, the public’s interest in preventing economic waste is substantial, particularly in areas with high unemployment. Allowing a delayed lawsuit to enjoin further work on a construction project when substantial sums have already been expended injures such communities in two ways. First, allowing unreasonably delayed claims to proceed on the merits harms the local economy directly.\textsuperscript{58} Large construction projects create sorely needed jobs.\textsuperscript{59} The new business centers, government buildings, and manufacturing plants often at stake can potentially provide employment for many people.\textsuperscript{60} Even when the buildings are merely replacements for older facilities, organizations may bring new jobs with them to their expanded quarters. These large projects also create construction related jobs that are lost, at least temporarily, if the projects are brought to a halt by a judicial order. Second, untimely claims also harm local economies indirectly. Allowing work to be enjoined after significant sums of money have been expended in reliance on government approval may discourage companies from investing in the local economy in the future.

The Second Circuit’s balancing test in \textit{City of Rochester} is mindful of both the public’s significant environmental interests and the more nuanced reality of public interests.\textsuperscript{61} These considerations are important when considering the positive economic impact of large construction projects on economically depressed locales.

\textsuperscript{57} Tabb, \textit{supra} note 6, at 380 (noting that “harm to natural resources is often irreversible and irremediable”) (footnote omitted).

\textsuperscript{58} See, \textit{e.g.}, Crutchfield v. United States Army Corps of Eng’rs, 192 F. Supp. 2d 444 (E.D. Va. 2001).

\textsuperscript{59} For example, the post office at issue in \textit{City of Rochester} was to hold approximately 1,400 employees. 541 F.2d at 973.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.}
III. UNREASONABLE DELAY

The essence of the laches defense is that it is inequitable to cause a party to defend against a delayed claim when the circumstances giving rise to the action were knowable, or known, long before. Parties to an environmental action should be held to the same standards and provided the same protections against stale claims. At the same time, courts must be cognizant of the competing public interests in preventing damage to the environment and protecting against economic waste. The most prudent course is to establish criteria for measuring unreasonable delay that protect competing public interests in ways that are consistent with equitable treatment of defendants.

A. Policy

The most important policy argument supporting courts' reluctance to apply laches in environmental law is the need to enforce congressional environmental policy. Most environmental plaintiffs do not assert private rights, but instead seek to halt projects perceived to violate the congressional policy of protecting the environment.

The goal of increasing judicial efficiency and avoiding needless use of the courts' limited resources is recognized throughout the legal system. By not automatically penalizing well-meaning plaintiffs for delayed suits, courts hope to minimize litigation by encouraging alternative methods of supervision. Park County Resource Council v. United States Department of Agriculture

62 See supra notes 1-4 and accompanying text.
63 See Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975). Even though the plaintiffs' delay in bringing suit increased costs for everyone with a stake in the disputed project, the delay did not mandate laches "per se" because the "[p]laintiffs [were] attempting to effect compliance by public officials with duties imposed by Congress under NEPA." Id. at 495.
64 Stutson v. United States, 516 U.S. 193, 196 (1996) (noting that "judicial efficiency" is an important public interest).
65 See infra note 77 and accompanying text.
illustrates this policy at work. The plaintiffs had prepared an Environmental Impact Statement ("EIS"). Assuming that the Bureau of Land Management would deny the defendants' drill permit application, the plaintiffs evidently believed that participating in the process was more prudent and effective than immediately bringing suit to force compliance. Based on the plaintiffs' pre-litigation actions, the Tenth Circuit rejected the argument that the claim should be barred by laches, stating that "we should not chastise their efforts to selectively minimize litigation. Otherwise, we discourage such thoughtful preparation and encourage rote litigation at the time of every agency action, even though successful challenge of only one action in the series would result in obtaining the benefits sought."

**B. Initial Inquiries**

The most important safeguard for the public's interest in protecting the environment is the requirement that the delay be unreasonable. Damage to the environment often goes undetected for years before environmentalist plaintiffs become aware of any possible violations of environmental policy. Evaluating the delay in terms of unreasonableness ensures that the time it takes for environmental damage to become evident does not become a shield against those seeking to protect the public interest. The tolling for a laches claim should therefore begin when the possible violations become reasonably knowable.

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66 817 F.2d 609 (10th Cir. 1987).
67 Park County, 817 F.2d at 618.
68 Id. at 612.
69 Id. at 618.
70 Id.
71 Id. The "mere lapse of time does not amount to laches. . . . The delay must be 'unreasonable.'" Id. (citation omitted).
72 This is especially true when the plaintiff is a private citizen or citizen group lacking the means to verify the accuracy of project proposals ostensibly in compliance with applicable environmental statutes. See Jones v. Lynn, 477 F.2d 885, 892 (1st Cir. 1973) (listing the fact "that many aspects of the project which trouble [plaintiffs] environmentally have only recently been discovered as there
First, courts should examine the length of plaintiffs' delay. Laches is inapplicable to timely lawsuits, so looking at the time period between plaintiffs' subjective knowledge of possible environmental violations and the filing of the lawsuit would provide insight into plaintiffs' timeliness.\(^\text{73}\) Though this is the first factor that courts should consider, evaluating the reasonableness of a delayed environmental lawsuit should not stop there.\(^\text{74}\) Although an extremely lengthy delay may raise judicial eyebrows,\(^\text{75}\) the case-specific nature of laches analysis may result in similar lengths of delay mandating a different outcome. The doctrine of laches "is flexible; no fixed or arbitrary period of time controls its applicability."\(^\text{76}\) A full consideration of the unreasonable delay prong demands an examination of more complex factors, which are more helpful in determining whether defendants can satisfy this prong of the laches test.

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\(^{73}\) It is worth noting that measuring the length of the delay normally will be the easiest task for the trier of fact in that it requires the least evaluation of extrinsic evidence. The statute of limitations may provide guidance pertaining to the reasonableness of the delay. United States v. Olin Corp., 606 F. Supp. 1301 (N.D. Ala. 1985). The district court noted that "[o]rdinarily, the delay permitted by the statute of limitations does not constitute laches in the absence of special facts making delay culpable." \textit{Id.} at 1309 (citations omitted). The delayed lawsuit was within the applicable statute of limitations. \textit{Id.} at 1310. However, the court found that given the project's publicity and plaintiffs' counsel's presence at the time of the consent decree constituted "special facts" sufficient to allow laches to bar the claim. \textit{Id.}

\(^{74}\) "Equity has acted on the principle that 'laches is not like limitation, a mere matter of time . . . .'" Holmberg v. Armbrrecht, 327 U.S. 392, 396 (1946) (quoting Galliher v. Cadwell, 145 U.S. 368, 373 (1892)). The Supreme Court's ruling in \textit{Holmberg} dealt with a more general consideration of laches. \textit{Id.} The \textit{Holmberg} statement has been followed in the environmental context. \textit{See} United States v. Hobbs, 736 F. Supp. 1406, 1410 (E.D. Va. 1990) ("Laches . . . has as its chief concern not the issue of time but the inequity of allowing a claim to be enforced.").

\(^{75}\) \textit{See} Peshlakai v. Duncan, 476 F. Supp. 1247, 1256 (D.D.C. 1979) (finding seven years to be "unusually long").

\(^{76}\) \textit{Citizens and Landowners Against the Miles City/New Underwood Powerline v. United States Dep't of Energy, 683 F.2d 1171, 1174 (8th Cir. 1982).}
Although even the best-intentioned plaintiffs may unreasonably delay litigation, a bad faith delay always should be deemed unreasonable. Long-delayed claims seeking an injunction to halt expensive construction will always result in wasted resources when successful, but the public interest in protecting the environment may override these concerns when the defendant is found in violation of the law. Unethical motives, however, should not be countenanced. The case law indicates that bad faith delays are rare, but an initial inquiry into plaintiffs’ motives for delay, if any, will eliminate suits brought after the most unreasonable delays.

C. Plaintiffs’ Diligence

Laches rewards those who assert their claims in a timely manner. The environmental context, however, dictates that plaintiffs be permitted a greater period within which to file a claim. First, plaintiffs—particularly non-governmental parties—generally are not seeking to assert individual claims. People tend to act with greater alacrity when they have a financial stake. Second, environmental damage is often difficult to detect.

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77 See Park County Res. Council v. United States Dep’t of Agric., 817 F.2d 609, 618 (10th Cir. 1987). “We do not perceive the sinister motive or dilatory tactics apparently seen by the district court . . . . Their tactical decision to fight the [Application for Permit to Drill] rather than the lease issuance, because it appeared to be the most efficient way to press their substantive objectives, standing alone, raises no implication of bad faith.” Id.

78 Whether environmental interests do militate against applying laches in a particular case will depend on specific circumstances. Later, this Note will examine the need to balance environmental goals with competing economic interests to avoid needless economic waste. See infra Part V.

79 For example, where a party knows that environmental laws are being violated, but waits until the offending party expends time and resources before filing suit, the claim should be barred by laches. Despite the suit’s goal of enforcing environmental policy, it should still be barred because the plaintiffs could have filed suit before the unnecessary waste of resources.

80 But see Peshlakai, 476 F. Supp. at 1247.

81 See, e.g., Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973).
Mindful of these concerns, courts have examined plaintiffs' assiduousness and vigilance.\textsuperscript{2} 

Diligence does not require that litigation commence when alternative action may be taken. In Cady v. Morton,\textsuperscript{3} the Ninth Circuit held that there is no unreasonable delay when plaintiffs wait until preliminary environmental precautions are taken.\textsuperscript{4} Plaintiffs are "entitled to assume that federal agencies would comply with the requirements" of environmental policy.\textsuperscript{5} In that case, the tolling for the delay did not begin until the EIS was completed. The Ninth Circuit ruled correctly by requiring that plaintiffs be diligent while refraining from penalizing the plaintiffs for waiting until there was sufficient information to justify a lawsuit.

Preliminary work that is observable to the general public will often provide information sufficient to reasonably impel a timely claim. When there is "preparatory construction," vigilant plaintiffs will "investigate the legal basis for challenging" the project's approval.\textsuperscript{6} Though applicable to all types of private attorney general suits, plaintiffs familiar with environmental laws should be held to a higher standard than lay persons who may not know that a project approved by the government is in violation of federal environmental policy.\textsuperscript{7}

Though plaintiffs are entitled to assume public officials comply with the law when they approve a particular project,\textsuperscript{8} they cannot

\textsuperscript{2}See, e.g., Sierra Club v. U.S. Dep't of Transp., 245 F. Supp. 2d 1109, 1115 (D. Nev. 2003) (noting that "[l]aches . . . requires more than delay; it requires a lack of diligence") (citing City of Davis v. Coleman, 521 F.2d 661, 667 (9th Cir. 1975)); Park County Res. Council, 817 F.2d at 618 ("The nearly two-year delay in challenging the lease issuance in this case was not due to a lack of vigilance.").

\textsuperscript{3}527 F.2d 786 (9th Cir. 1975).

\textsuperscript{4}"We cannot say that it was a lack of diligence for appellants to refrain from commencing an action to challenge the adequacy of the EIS until they could ascertain its contents." Id. at 792.

\textsuperscript{5}Id. (citing Envtl. Def. Fund v. Tenn. Valley Auth., 468 F.2d 1164, 1182 (6th Cir. 1972)).


\textsuperscript{7}See infra notes 93-96 and accompanying text.

\textsuperscript{8}Pres. Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982).
rely blindly on public officials. Plaintiffs should display their assiduity by opening and maintaining a dialogue with those involved in the approval process. This rule is beneficial because it gives savvy environmental groups guidance in the proper way to handle the pre-litigation approval process. It should not, however, be applied to lay plaintiffs unless circumstances indicate that they were aware of the environmentally defective approval.

In addition, plaintiffs may not continue to assume that public officials are forcing defendants to comply with the law against all evidence to the contrary. It is unreasonable to continue to delay a contemplated private attorney general suit even when it is evident that the pertinent public officials are neglecting to oversee the project to ensure compliance with environmental statutes. In *Centerview/Glen Avalon Homeowners Association v. Brinegar*, the court found that the plaintiffs were not vigilant. Their reliance on local officials was “neither factually established nor legally sufficient” because there was no evidence that local officials “ever sought to enforce against [d]efendants the provisions” of the applicable environmental statutes.

At least one recent case has found that compliance with federal environmental policy overrides any concerns about plaintiffs’ vigilance. In *Fund for Animals v. Mainella*, the court found that the strong public policy favoring compliance with NEPA dictated that the plaintiffs’ action could not be barred by laches “even if [p]laintiffs were asleep at the switch. . . .” A better decision would recognize that flexibility in measuring plaintiffs’ diligence protects the public interest in environmental protection without depriving defendants of the safeguards that laches provides.

Plaintiffs’ vigilance is an important consideration and often will be the deciding factor. Vigilance will not, however, be sufficient

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89 Save Our Wetlands v. United States Army Corps of Eng’rs, 549 F.2d 1021, 1027 (5th Cir. 1977) (“The plaintiffs failed to present comments, make objections or even to ask questions concerning the permit application.”).
91 Id.
in every case. Knowledgeable plaintiffs who are aware of possible environmental violations must do more than raise vocal opposition. Such plaintiffs who delay bringing their lawsuit ought not find sympathy from the courts. Whereas some private citizens will wait until after the relevant government officials finish their review of defendants' compliance with environmental statutes, savvy plaintiffs under similar circumstance delay filing their claims unreasonably.93

In *Stow v. United States*, a federal district court allowed the defendants' laches defense.94 The court found that “[t]his is not a case where plaintiffs as laypersons were not aware of the deficiencies alleged in the draft and final environmental reports at the time they were issued, and therefore, were not motivated to oppose the projects until they had a reasonable suspicion of non-compliance.”95 The plaintiffs had voiced opposition at numerous proceedings and were aware of the general process but, nevertheless, delayed the lawsuit until five years after the permit process had begun.96

Well-financed environmental groups ought to be treated in a similar fashion. *Peshlakai v. Duncan* dealt with a seven-year delay in a lawsuit brought by private citizens and Friends of the Earth, an environmental organization.97 The court found that the lengthy delay was unreasonable even though Friends of the Earth had not been involved with the process from the outset.98 “[T]he Friends of the Earth is an international organization with a deep and well-defined interest in environmental matters and extensive resources. Such a group cannot avoid the laches problem for the plaintiffs by the simple expedient of involving itself in litigation at a late stage.”99 Laches was thus applied to all of the plaintiffs, not just Friends of the Earth.100

94 Id.
95 Id.
96 Id.
98 Id.
99 Id. at 1256.
By the same token, delayed lawsuits filed by governmental plaintiffs should almost always be found unreasonable. When the plaintiffs are the governmental entities involved in a project's approval process, courts generally should find that untimely lawsuits are *per se* unreasonable because such plaintiffs are assumed to have familiarity with relevant environmental law and have access to pertinent documentation.101

D. Defendants' Notice of Plaintiffs' Opposition

The need for plaintiffs to put defendants on notice of their opposition to a project is a corollary of the diligence requirement. *Cady v. Morton* offers a detailed example, citing the plaintiffs' notice to support the court's finding that the delay was reasonable.102 The plaintiffs put the defendants on notice in two ways: the plaintiffs' opposition at a public hearing and the plaintiffs' prior suit in the United States District Court for the District of Columbia.103

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101 See Ogunquit Vill. Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977) (holding that laches barred an environmental claim filed by the local government where defendants had furnished the local government with all formal documentation pertaining to the project for three years).

102 527 F.2d 786, 792 (9th Cir. 1975).

103 The defendants were aware of the plaintiffs' opposition prior to litigation. Appellants presented their views with respect to the inadequacy in scope and content of the draft [Environmental Impact Statement] during public hearings in November, 1973. Also several environmental groups, including Friends of the Earth, filed suit in the district court for the District of Columbia on June 13, 1973 to require the federal government to issue a comprehensive impact statement covering all aspects of coal and power development in the Northern Great Plains region, the effect of which would be to halt further mining development there pending such an analysis. Westmoreland and the Crow Tribe intervened in that litigation.

*Id.*
This reason was quite persuasive because the defendant drilling company had intervened in the prior suit.\textsuperscript{104} Filing suit in opposition to the project in another court was also a clear expression of displeasure, and the defendant's involvement in the suit erased any notice concerns.\textsuperscript{105}

Plaintiffs themselves must put defendants on notice at a public hearing.\textsuperscript{106} The fact that defendants may have heard opposition from other parties does not alert them that plaintiffs may file a lawsuit.\textsuperscript{107}

\textbf{E. Combining Notice and Diligence}

A better rule would combine the notice and vigilance requirements. The Ninth Circuit has collapsed these two factors into a single, three prong diligence test.

The factors that should be considered in determining diligence in this type of case are (1) whether the party attempted to communicate its position to the agency before filing suit, (2) the nature of the agency response, and (3) the extent of actions, such as

\textsuperscript{104} Id.
\textsuperscript{105} Though there may be an issue as to whether defendants in a current suit are put on notice via a prior suit in another court, defendants situated similarly to those in \textit{Cady} should be considered to have been put on notice because the prior suit was reasonably discoverable. \textit{See supra} note 99 and accompanying text.
\textsuperscript{106} Notice at a public hearing should be required only when plaintiffs should reasonably know about the project. See \textit{Save Our Wetlands v. United States Army Corps of Eng'rs}, 549 F.2d 1021, 1025 (5th Cir. 1977), where the plaintiffs did not complain during the one year period between a public notice that defendant developer had applied for a permit to dredge and the issuance of the permit. The public notice factor may have been increased since the project was "highly visible." \textit{Id.} at 1028. "Given the visibility and publicity of the Eden Isles development, as well as the public notice of Leisure's permit application, we conclude that the plaintiffs' delay in bringing this litigation was inexcusable." \textit{Id.}
\textsuperscript{107} The argument that opposition puts defendants on notice that a lawsuit is possible is unpersuasive. Defendants may have mollified complaining third parties through other means and relied on these remedial measures to feel comfortable continuing with the controversial aspects of the project.
preparatory construction, that tend to motivate citizens to investigate legal bases for challenging an agency action.\textsuperscript{108}

Notice and vigilance should be examined together because, combined, they affect the various policy concerns behind laches analysis. Laches protects defendants who reasonably rely on the absence of opposing litigation to continue with their projects and the heavy expenditures that fund them. When plaintiffs put defendants on notice that their project is environmentally defective, this weakens defendants’ claim of reliance. Laches also ensures that plaintiffs bring lawsuits in a timely fashion. Vigilant plaintiffs should be credited with a presumption that they filed their suit in as timely a manner as possible.

IV. UNDUE PREJUDICE

A. Analyzing the Importance of Financial Expenditures

Courts examine whether a delay is reasonable to ensure that plaintiffs bring claims in a timely manner. Laches also demands that this unreasonable delay be unfairly prejudicial to the defendants. Courts should examine the harms that defendants would suffer from the plaintiffs’ unreasonable delays, leaving concerns about more general damage to discussions concerning the public’s interest in avoiding economic waste.\textsuperscript{109}

There must, of course, be prejudice. A court must ask whether defendants relied on plaintiffs’ action or inaction. Specifically, defendants must show that plaintiffs’ delay in bringing the suit is prejudicial.\textsuperscript{110} It is insufficient to prove that defendants suffered

\textsuperscript{108} Pres. Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982) (citation omitted); see also Coalition for Canyon Pres. v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980); City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975); Sierra Club v. United States Dep’t of Transp., 245 F. Supp. 2d 1109, 1115 (D. Nev. 2003).

\textsuperscript{109} See infra Part V.

\textsuperscript{110} Undue prejudice normally measures harms suffered by defendants because of the delayed lawsuit. One case has stated that undue prejudice may be
prejudice because of the plaintiffs' suit, which happened to be delayed; any lawsuit will be prejudicial. It is the delay that permits a laches defense.\textsuperscript{111}

The undue prejudicial effect prong dictates that courts look beyond total dollar figures. Though defendants' problems associated with defending against unreasonably delayed lawsuits often will be financial, an examination that focuses solely on total expenditures is too facile in that it ignores the realities behind the sometimes huge dollar figures. In \textit{Park County Resource Council v. United States Department of Agriculture}, the district court cited one million dollars as being sufficient to satisfy the prejudice prong.\textsuperscript{112} On appeal, the Tenth Circuit rejected the district court's reasoning because the money was spent on EIS preparation, which was an expense that would have arisen regardless of the existence of litigation.\textsuperscript{113}

A better analysis would be to examine what percentage of expected costs defendants have already incurred.\textsuperscript{114} This method of analysis is based on the policy set forth in \textit{Watershed Associates Rescue v. Alexander}.\textsuperscript{115} Basing undue prejudice on the percentage of the project completed shows how difficult it would be for defendants to "alter the basic plan."\textsuperscript{116} Concentrating the analysis

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\textsuperscript{111} See \textit{Cady v. Morton}, 527 F.2d 786, 792 (9th Cir. 1975) ("[Defendant] also failed to prove that any prejudice to which it may be subjected by reason of this suit resulted from reliance on appellants' inaction.").

\textsuperscript{112} 817 F.2d 609, 618 (10th Cir. 1987).

\textsuperscript{113} \textit{Id.} at 618 ("Any increased costs from delay in drilling while an EIS is being prepared on the lease issuance is not sufficient to establish prejudice, because NEPA contemplates just such a delay.").

\textsuperscript{114} \textit{Id.} at 618 ("Rather than absolute dollars already spent, the more salient inquiry explores what percentage of total costs has already been committed."); see also \textit{Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.}, 414 F. Supp. 99, 111 (N.D. Ga. 1976) ("Although, a great amount of money, time, and effort has already been expended, when compared to the total amount to be spent on the MARTA project it represents only a small percentage.").


\textsuperscript{116} \textit{Id.}
on raw dollar figures favors defendants with large projects over those with small ones, an absurd result under a test designed to protect deserving defendants regardless of financial strength.\footnote{For example, if a jurisdiction found that one million dollars in expenditures presented a \textit{prima facie} case for undue prejudice, a company that spent this amount on a project expected to cost fifty million dollars would be able to claim laches, whereas a small developer who had spent $30,000 thus far on a $50,000 project would be forced to go through the litigation process. Of course, the large company would fare better under the public interest prong, but they would have to reach that prong first.} Furthermore, examining expenditures in percentage terms is consistent with the theory that laches should proceed on a case-by-case basis.

Other courts have looked at what percentage of total work had been completed at the time of litigation. The Fifth Circuit considered this question as part of its undue prejudice inquiry in \textit{Save Our Wetlands v. United States Army Corps of Engineers}, noting that the prejudice was sufficient to compel the application of laches because "portions of the project had been substantially completed" at the time of trial.\footnote{549 F.2d 1021, 1028 (5th Cir. 1977). \textit{But see Park County Res. Council v. United States Dep’t of Agric.}, 817 F.2d 609, 619 (10th Cir. 1987) (indicating that substantial completion may not be sufficient to allow a laches defense).} The Second Circuit in \textit{City of Rochester v. United States Postal Service} found that enough work had been done to meet the undue prejudice standards even though substantially less than half of the disputed project was completed.\footnote{541 F.2d 967, 977 (2d Cir. 1976) (noting that eighteen percent of the work had been completed at trial, and thirty-five percent of the work was completed at the time of appellate argument).} This variance in two courts allowing the laches defense stems from more than the Second Circuit's comparatively favorable view of environmental defendants. The Second Circuit allowed laches in \textit{City of Rochester} because the court found that "construction [had] proceeded to a point where it [was] impractical for economic reasons to enjoin further development . . . ."\footnote{\textit{Id.}} Conversely, just as substantially completed projects indicate an appropriate case for
laches, a finding of little actual work could be fatal to a laches defense.\textsuperscript{121}

\textbf{B. Lengthy Litigation}

Though measuring the percentage of project completion is the most important task to undertake in analyzing any undue prejudice, courts should also examine the impact that a lengthy litigation process would have on defendants even if they were successful on the merits. Undue prejudice may result when a lengthy litigation process will cause defendants to be unable to complete the project. For example, in \textit{Peshlakai v. Duncan}, the defendants' drilling leases would have expired in 1982.\textsuperscript{122} The trial court found that failing to bar the plaintiffs' claims with laches in 1979 would force the defendants to risk going ahead with a trial that would not end until after their leases had expired.\textsuperscript{123} Rather than cause the defendants to lose their business opportunity even if they won the trial on the merits, the trial court allowed laches to bar the plaintiffs' lawsuit because the unreasonable delay would cause undue prejudice.\textsuperscript{124}

\textsuperscript{123} Id.
\textsuperscript{124} Id. It is worth noting that in \textit{Peshlakai}, the court feared that the plaintiffs would be able to enrich themselves after defendants' leases had expired. If the individual plaintiffs are successful in halting the project until the expiration of the leases as a result of this litigation and the inevitably lengthy controversies surrounding the drafting of an environmental impact statement, they will be able to negotiate new leases at that time on the basis of the uranium Mobil discovered at enormous expense. Id. The court held that it would employ its equitable powers to prevent this type of "enrichment." Id.
C. Future Environmental Harms

Some courts examine the extent of environmental damage likely to occur if projects are allowed to continue in the context of undue prejudice. Often, the examination involves principles similar to those employed in measuring the amount of completed work. Although environmental damage may be evident at the time of litigation, laches decisions should concentrate more on future environmental damage. For example, the Save Our Wetlands court concluded that an additional factor leading to the application of laches, discussed in the undue prejudice portion of the opinion, was that the relief sought "would produce very little, if any, environmental benefit." Furthermore, when the project has been known about for years and when substantial work has been done, laches still may be barred when the work alleged to harm the environment has yet to be done.

Of course, when courts balance the competing public interests, the environmental damage need not be completely irreversible for the public's economic interests to be given more weight. Often, the economic costs of enjoining a particular project will be much greater than the environmental harms when future environmental harms are small and most existing environmental damage is irreversible. In addition to looking at whether environmental damage is irreversible, courts should therefore examine whether

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125 See, e.g. Park County Res. Council v. United States Dep't of Agric., 817 F.2d 609, 618 (10th Cir. 1987) (asking whether the environmental impact was irreversible in the context of undue prejudice).

126 See supra notes 114-121 and accompanying text. The percentage of work done may be measured in conjunction with the potential future environmental damage. See Inman Park, 414 F. Supp. at 111 ("Further, since no actual physical construction has commenced on the segments now under dispute, there may still be great environmental benefits to be derived from the litigation of the present actions.").

127 Save Our Wetlands, Inc. v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1029 (5th Cir. 1977).

128 Sierra Club v. United States Dept. of Transp., 245 F. Supp. 2d 1109, 1116 (D. Nev. 2003) ("[T]he harm Sierra Club seeks to prevent is allegedly related to the widening phase of the project, which has not taken place.").

129 The public's economic interests are discussed in greater detail infra Part V.
the damage "is reversible only at undue cost to the relevant project. . . ."\textsuperscript{130}

\section*{V. BALANCING THE PUBLIC'S INTERESTS}

Defendants in environmental litigation must be allowed to assert a laches defense. A court's equitable powers permit it to act in the interests of justice, and it should exercise these powers when an unreasonably delayed lawsuit will result in undue harm to a defendant. Courts have recognized, and should continue to recognize, that lawsuits seeking to enforce public policy protecting the environment mandate a flexible approach acknowledging the public's interest in the outcome. Although the courts have readily considered the public's interest in the environment, the vast majority have ignored the public interest in avoiding economic waste. Courts must balance these competing interests before deciding the fate of a laches defense.

\subsection*{A. What is Economic Waste?}

Economic waste cannot be measured precisely. It must instead be viewed as a question of degree.\textsuperscript{131}["Waste is a degree, not a magnitude."]\textsuperscript{132}\textsuperscript{132} "Waste' denotes an unfavorable comparison between an actual situation and another possible or ideal situation."\textsuperscript{132} This definition lends itself readily to the present discussion, as economic waste is better left to a case-by-case analysis rather than general principles. In balancing competing public interests, courts should evaluate potential economic waste in much the same way that they assess undue prejudice. However, an additional factor in economic waste analysis should evaluate the benefits of continuing the project and the detriments of abandoning the project in the region. Once again, this should be evaluated on a case-by-case basis, as there are no general principles capable of meeting the demands of each case. There are,

\begin{footnotesize}
\begin{enumerate}
\item Apache Survival Coalition v. United States, 21 F.3d 895, 912 (9th Cir. 1994).
\item DAVID ROCKEFELLER, UNUSED RESOURCES AND ECONOMIC WASTE 214 (1941) ("Waste is a degree, not a magnitude.").
\item Id.
\end{enumerate}
\end{footnotesize}
however, certain factors that courts should employ in their analysis, such as the number of jobs created by the project, any public funding for the project, and any future detriment to the local economy.

In addition to measuring economic waste, it is also necessary to ask: "[w]aste to whom?" Environmental harm can be measured by its damage to society in general. Economic waste directly damages a smaller interest. However, defining economic waste as comprising selfish financial interests, as compared to the public good implicated by environmental damage, is overly simplistic. In fact, Rockefeller urges that the definition of "society" be specifically tailored for use in a particular analysis, stating that "society" is a term which, though convenient, is subject to ambiguities. Does it refer to a majority of the population? If so, what constitutes a majority?

Rockefeller acknowledges the problem addressed in environmental laches: "[m]ay not the pursuit of an economic objective be injurious to values noneconomic in character?" This acknowledgment does not, however, affect the necessity of considering the public's interest in preventing economic waste. In considering the public's environmental interests as the theory behind traditional environmental laches analysis, courts would answer Rockefeller's question by balancing the competing public interests on a case-by-case basis.

It is difficult to quantify the magnitude of noneconomic waste. "Noneconomic wastes complicate the issue by introducing the problem of comparative values in a sense beyond the given individual preferences measured by purchasing power, which are considered economics. At the same time, they make waste a truer and broader target for corrective action." When formulating waste elimination policy, one must consider the costs

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133 Id.
134 Id. at 215. For the purposes of this Note, "society" is represented by a political majority. Society established its interest in preventing environmental damage when Congress passed NEPA. 42 U.S.C. § 4332.
135 ROCKEFELLER, supra note 131, at 215.
136 Id. at 216.
of the supposed improvement. Environmental quality protection is a nonquantifiable noneconomic interest. It is not possible to balance the competing public interests by saying that X has been expended but the environment will be damaged by X + 1. Courts have instead looked at what further damage the environment will incur because of continued work on a particular project. "The 'best' program for eliminating waste is the one where the advantages to be derived from eliminating an additional degree of waste are precisely offset by the costs of eliminating that additional degree." 

B. The Public's Interest in Preventing Economic Waste

Public funding of a particular project is a consideration when examining any public economic interest at stake in environmental laches. While the amount of private expenditures is rightly analyzed under the undue prejudice prong, public funding for a project naturally implicates the public's interest in avoiding waste. 

A public interest may manifest itself in economic ways other than outright funding for the project. In Stow v. United States, the plaintiffs sought to enjoin further construction on a dam project. Defendants had entered into binding contracts with the local government. The court found that laches barred the plaintiffs' claims in part because "the public interest in avoiding economic waste that would result from renegotiation or breach of the construction contracts outweighs the adverse environmental

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137 Id.  
138 See supra notes 125-30 and accompanying text.  
139 ROCKEFELLER, supra note 131, at 216.  
143 Id. at 862.
impacts, if any, that might occur if further construction is not enjoined."

Public funding is an even more compelling factor when the government itself is overseeing the project. In Sworob v. Harris, the plaintiffs sought to enjoin a project approved and funded by the United States Department of Housing and Urban Development ("HUD"). As a party to the litigation, HUD had suffered the requisite undue prejudice. The court addressed the fact that the public's economic interest was at stake, stating that "[f]urther delays will undoubtedly mean additional monetary loss to the taxpayers." When the government itself is a named defendant, courts should still proceed with the usual laches analysis for undue prejudice before balancing the competing public interests. However, given the public interest in governmental expenditures, even in its legal fees, the public's interest in avoiding economic waste will often be implicated when a governmental entity-defendant suffers undue prejudice from an unreasonably delayed lawsuit.

Societal need for a particular project is also considered in evaluating the public's economic interest. Courts may consider the need for jobs that would be fulfilled by a large scale construction project in a jobs-starved region or a more specific community need such as the wastewater treatment facility in Crutchfield.

Allowing claims to proceed on the merits can implicate the public's interest in avoiding economic waste when the project is already completed and serves a company and its large customer

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144 Id. at 883.
146 Id. ("The Government of the United States, acting through HUD, has already suffered excessive monetary losses occasioned by the previous litigation.").
147 Id.
148 Crutchfield v. United States Army Corps of Eng'rs, 192 F. Supp. 2d 444, 465 (E.D. Va. 2001) (noting the community's projected need for the wastewater treatment facility sought to be enjoined by the plaintiffs).
149 Id. The court ultimately decided, however, that the public's environmental interest overrode the public's projected need for the facility. See also Sworob, 451 F. Supp. at 102 (noting that halting the disputed project would result in "irreparable injury" to local residents who were "in desperate need of decent housing").
base. In *Citizens and Landowners Against the Miles City/New Underwood Powerline v. United States Department of Energy*, plaintiffs challenged the construction of powerlines running through South Dakota on environmental grounds. Despite the fact that the powerline was complete and already in operation, the plaintiffs wanted it “rerouted.” The court found that rerouting the powerline would have “significant effects.” General Electric, a party to the litigation, would have had to pay for the substation even though it would not be in service and “[m]ore importantly, residential and commercial electrical consumers in northwestern South Dakota would face significant power shortages.” With the community’s economic interests at stake, the Eight Circuit upheld the district court’s application of laches despite recognizing that “laches is not favored in environmental cases.”

The public’s interest in preventing economic waste will override the public’s environmental interests when enjoining work will affect third parties who have already completed their portions of a joint project. *Michigan v. City of Allen Park* dealt with a sewage system designed to improve water quality. Other communities involved in the project had already substantially finished their portions of the project when the Michigan Department of Natural Resources cited Allen Park for violations. The district court found that laches barred enjoinment. Because two other communities had completed “at least eighty percent of their portions of the . . . project,” enjoining Allen Park would have resulted in serious detriment to residents of the other communities and would have caused Allen Park’s sewage to go to an already overworked water treatment facility. Despite the state’s own

150 683 F.2d 1171 (8th Cir. 1982).
151 Id. at 1177.
152 Id.
153 Id.
154 Id. at 1175.
156 Id. at 1009.
157 Id. at 1011.
158 Id. at 1017.
159 Id.
environmental agency's assessment that Allen Park's portion of the project violated environmental law, the court found that the important economic interests at stake for third parties were sufficient to override the public's environmental interests.  

C. Additional Commentary on the Public's Environmental Interests

In the only other article discussing laches in environmental litigation, William Murray Tabb advocates a greater emphasis on the public interest in preventing environmental damage. However, he fails to recognize that current environmental laches analysis is mindful of the public interest in preventing damage to the environment. "In environmental cases, such as those brought under NEPA, ... it is recognized universally that these criteria must be applied in light of the principle that '[l]aches must be invoked sparingly' in suits brought to vindicate the public interest." Cases where application of laches would otherwise clearly be appropriate have rejected a laches defense because of courts' recognition of the public's interest in protecting the environment. Absent the public's environmental interest, a court would have no difficulty finding the present action to be barred by laches. Professor Tabb's proposed refinements appear superfluous.

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160 In addition to the third party effects, the district court also mentioned that "[t]he nature of the project ... is an important factor in weighing the respective prejudice to the parties." Id.
161 See Tabb, supra note 6.
162 Apache Survival Coalition v. United States, 21 F.3d 895, 905 (9th Cir. 1994) (quoting Pres. Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982)).
163 See Citizens Committee Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 526 (S.D. Ohio 1982); see also City of Rochester v. United States Postal Service, 541 F.2d 967, 977 (2d Cir. 1976) (noting that the court will apply laches "reluctantly").
D. Balancing the Competing Public Interests

Competing public interests have been noted and balanced in the case law.\textsuperscript{164} The Second Circuit balanced the public interests in \textit{City of Rochester v. United States Postal Service}.\textsuperscript{165} Although courts often justify laches because the damage to the environment is irrevocable at the current stage of construction, the court hinted that further construction of the postal facility would result in further damage to the environment.\textsuperscript{166} But, even though continued work would increase environmental damage, the court found that the public’s interest in avoiding economic waste outweighed its interest in protecting the environment.\textsuperscript{167}

Just as the risk of future environmental damage informs undue prejudice analysis, it is also an important consideration when balancing competing public interests.\textsuperscript{168} “In most of the cases where laches has been applied in the NEPA context, the project allegedly significantly affecting the quality of the human environment was nearly completed . . . .”\textsuperscript{169} The \textit{Park County} court expressed this idea in its undue prejudice analysis, but the statement is better suited to balancing public interests. Prejudice analysis evaluates the condition of an individual defendant. Economic waste analysis examines the effects of successful, delayed litigation on the community, locally, regionally, and

\textsuperscript{164} See, \textit{e.g.}, Crutchfield v. United States Army Corps of Eng’rs, 192 F. Supp. 2d 444, 465 (E.D. Va. 2001). Cases utilizing balancing tests to analyze the competing public interests during laches analysis contradict claims that balancing tests are unnecessary in laches because the defense prevents a case from being tried on the merits. \textit{See supra} note 11 and accompanying text.

\textsuperscript{165} 541 F.2d at 967.

\textsuperscript{166} Id. at 977.

\textsuperscript{167} Id. (“But we are not persuaded that the further construction, in and of itself, will create such an adverse environmental impact, beyond that already incurred by partial construction, as to override the public interest in averting the economic waste . . . .”).

\textsuperscript{168} Park County Res. Council v. United States Dep’t of Agric., 817 F.2d 609, 618 (10th Cir. 1987) (“Moreover, and more important, this is not a case where the project is so substantially completed that significant environmental effects are irreversible, even if an EIS would now be ordered on the lease issuance.”).

\textsuperscript{169} Id. at 618.
nationally. Irreversible environmental damage greatly increases the public’s environmental interests.

The Fifth Circuit has employed a balancing test that focuses on economic prejudice to an individual defendant that is appropriate in an undue prejudice inquiry. “In assessing the degree of prejudice to the defendants in this case, we are required to balance the equities, considering both the expenditures which have been made by the defendants and the environmental benefits which might result if the plaintiffs are allowed to proceed with this litigation.”

Balancing the competing public interests is not an exact science. Laches, as a flexible remedy, demands great attention to the facts of a particular case. Courts should focus closely on the public’s well-recognized interest in preventing environmental harms when substantial, future environmental damage is likely if laches were to bar the plaintiffs’ claims. Case law suggests that environmental interests should outweigh economic concerns in such cases. But, courts should also consider the public’s interest in preventing economic waste where the defendants are acting at the behest of public officials or are satisfying an important public need.

CONCLUSION

The federal courts have acknowledged that environmental litigation affects important public interests. Even when the facts support its application, courts are reluctant to apply laches in order to effectuate environmental policy. The result has often been a blind adherence to environmental principles at the expense of public interests.

Instead, courts should recognize the multifaceted nature of public interests and acknowledge the far reaching economic effects of allowing unreasonably delayed lawsuits to halt important projects. Courts should focus on a uniform set of criteria in evaluating environmental laches while recognizing that consideration of other public interests, such as the interest in avoiding economic waste, and upholding environmental law are not mutually exclusive.

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170 Save Our Wetlands v. United States Army Corps of Eng’rs, 549 F.2d 1021, 1028 (5th Cir. 1977).