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INJUNCTION BONDING IN ENVIRONMENTAL LITIGATION

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INTRODUCTION

The preliminary injunction1 is a popular tool for plaintiffs pressing environmental rights.2 The immediate object of such a preliminary injunction is to preserve the status quo until there is a full hearing on the merits of the case.3 Plaintiffs’ ability to be heard by the court during the early stages of environmental litigation4 is often decisive, for many environmental cases are fought “in the very shadow of the bulldozer blades.”5

1. The preliminary injunction is also referred to as a “temporary injunction,” “provisional injunction,” injunction “pendente lite,” or “interlocutory injunction.” See D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 106 (1973) [hereinafter cited as REMEDIES]; Dobbs, Should Security be Required as a Pre-Condition to Provisional Relief?, 52 N.C. L. Rev. 1091, 1091 (1974).

2. Leshy, Interlocutory Injunctive Relief in Environmental Cases: A Primer for the Practitioner, 6 Ecology L.Q. 639 (1977). Monetary damages are not an acceptable form of relief for most public interest litigants since the harm accrues to the environment and the public in general, making it inequitable and meaningless to award damages to individual plaintiffs. Id. at 644-45.

3. V. Yannacone, B. Cohen & S. Davison, ENVIRONMENTAL RIGHTS AND REMEDIES § 6:13, at 382 (1972); J. Sax, DEFENDING THE ENVIRONMENT 116 (1970); J. Brecher & M. Nestle, ENVIRONMENTAL LAW HANDBOOK 99 (1970). Brecher and Nestle state that the preliminary injunction is “vitally important” because it eliminates the defendant’s possible strategy of delay. Id.

4. For purposes of this discussion, we define “environmental litigation” as those cases brought both to enforce federal, state, and local environmental protection laws and to protect resources of the natural environment, such as land, air, water, flora and fauna. Cf. Leshy, supra note 2, at 639 n.1 (offering a similar definition).

5. Sive, Securing Expert Witnesses, 68 Mich. L. Rev. 1175, 1182 (1970). Environmental claims are often asserted “at the last minute,” although not usually by choice. Potential plaintiffs find it valuable to lobby the decision-making process to avert the deleterious effects on the environment and do not wish to alienate potential defendants by filing suit unless absolutely necessary. It is also important to avoid the ripeness doctrine by presenting a concrete “case and controversy.” Thus, environmental liti-
It is not surprising, therefore, that preliminary injunctions have been issued extensively in enforcing the National Environmental Policy Act (NEPA), various state environmental policy acts, nuisance law, the public trust doctrine, and media-specific environmental laws, which together constitute

gants must wait until there is a decision which clearly permits the objectionable project to go ahead. Once that critical decision is made, the only possible barrier between the bulldozer and environmental destruction is a court order.


8. The significance of nuisance law in environmental litigation is not to be ignored. Professor Rodgers observes:

The infinite variety of wrongs covered by this amorphous theory is well known to any student of the law. . . . There is simply no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law.


An injunction is a frequent common law remedy for nuisance. See W. Rodgers, supra note 6, at 143-54; Remedies, supra note 1, at 357, and cases collected therein. See generally Newsom, State Court Injunctions and Their Enforcement in Environmental Litigation, 9 St. Mary's L.J. 821 (1978). Where codified, nuisance law commonly provides for injunctive relief. E.g., Cal. Civ. Code §§ 3491, 3501 (West 1970).

9. See W. Rodgers, supra note 6, at 170-86, and cases collected therein.

10. E.g., Noise Control Act of 1972, § 12(a), 42 U.S.C. § 4911(a) (1976). This section, in pertinent part, reads: "The district courts . . . shall have jurisdiction, without regard to the amount in controversy, to restrain [a] person from violating [a] noise control requirement or to order [the] Administrator to perform [an] act or duty, as the case may be . . . ." Id.

The California Coastal Act also invites citizen enforcement via the preliminary injunction: "Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division. On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to restrain any further violation. . . ." Cal. Pub. Res. Code § 30803 (West 1977).

Injunctive remedies are also implied by the courts where they are not expressly provided for by statute. See generally Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963). For a discussion of implied private remedies under the Rivers and Harbors Act of 1899, see W. Rodgers, supra note 6, at 396-97.
a significant portion of the environmental lawsuits filed by private plaintiffs.\textsuperscript{11}

In most of these cases, however, the plaintiff is required to post a bond, make an undertaking, or provide other security to the court before the preliminary injunction is issued. In environmental litigation and especially in those cases where the plaintiffs are citizens or non-profit groups, this requirement frequently precludes the assertion of environmental rights and environmental protections,\textsuperscript{12} or works to penalize environmental plaintiffs in a close case. A number of courts have attempted to remedy this problem by setting low or nominal bonds for non-profit environmental organizations in NEPA litigation,\textsuperscript{13} but given the discretion that courts are granted in setting bonds, the problem of prohibitively high bonds remains fundamentally unresolved.\textsuperscript{14}

The purpose of this article is to examine the effect of bonds upon the issuance of preliminary injunctions in environmental litigation. First, the preliminary injunction standard and bonding requirement will be discussed in order to explicate the justifications for injunction bonding. The effects of injunction bonds on plaintiffs, defendants, and environmental quality will then be examined and the rationale for the bonds' elimination will be considered. Finally, legislative trends will be analyzed with a view towards establishing an equitable solution to the problem of preliminary injunction bonds in environmental litigation.

While all non-governmental plaintiffs may be inhibited by the prospect of a substantial bond, the following analysis is restricted to "public interest" environmental plaintiffs. It is these plaintiffs who most frequently have trouble meeting the bond requirement and for whom there is the least justification

\textsuperscript{11} Injunctions have also been sought to enforce the environmental protections embodied in the state constitutions. See Frye, \textit{Environmental Provisions in State Constitutions}, [1975] V ENVT'L L. REP. (ENVT'L LAW INST.) 50028, and cases cited therein.

\textsuperscript{12} Environmental damage is often irreversible. If the plaintiff is forced to forego a preliminary injunction, he may find the case moot by the time a final injunction can be heard. See Lathan v. Volpe, 455 F.2d 1111, 1117 (9th Cir. 1971); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970).

\textsuperscript{13} See Leshy, supra note 2, at 672 n.152, and cases cited therein.

\textsuperscript{14} Moreover, the California legislature has recently considered several bills that would require bonds as undertakings for plaintiffs seeking relief or judicial review in environmental actions where they are not now required. The propriety of this legislation, however, is clearly debatable. See notes 165-75 and accompanying text infra.
for its imposition. By definition, public interest environmental plaintiffs need not be of any particular number or legal status, although it is clear that they must not be acting primarily in their own economic interest. Plaintiffs may be said to be litigating in the public interest when they 1) seek to vindicate a strong public policy which will 2) benefit a substantial number of persons or 3) present important legal questions.

THE PRELIMINARY INJUNCTION AND THE BOND REQUIREMENT

In order to adequately discuss the preliminary injunction bond and its effects on environmental litigation, it is necessary to have a clear understanding of the role of bonds in non-specialized litigation. Since the bond question only comes into play after the court decides that a preliminary injunction is warranted, it is appropriate to begin with an examination of the preliminary injunction and its issuance.

The preliminary injunction is a form of provisional relief, granted as an emergency measure before a full hearing can be held, requiring a defendant to refrain from a particular act. It is issued only after the defendant is notified and has had an opportunity to defend himself in court, although once a defendant is so notified, he may have only a few days to prepare his case. The hearing is short, informal, and limited in scope. The evidence presented, however, must go beyond the unveri-
fied allegations. Although the typical form of proof is by affi-
davit,23 oral testimony is preferred by most courts.24

The attenuated nature of the preliminary injunction hear-
ing makes it subject to both judicial error and abuse by frivo-
rous litigants. Without limits on the ability of the courts to
issue preliminary injunctions, defendants would be overly vul-
nerable to these dangers.25 Accordingly, two safeguards have
been established to ensure that preliminary injunctions are not
issued erroneously and, if so, that they do not damage the
defendants wrongfully enjoined. The first restraint is the pre-
liminary injunction standard, which limits the remedy to situa-
tions of serious need. The bonding requirement comprises the
second restraint, and provides security to defendants erro-
neously enjoined.

The Standard for Preliminary Injunctions

The preliminary injunction standard has been subject to
a “dizzying diversity of formulations.”26 Nevertheless, there are
two initial requirements common to this form of equitable re-
lief. One is that preliminary relief issues to “ preserve the status
quo, or, more accurately, to preserve or create that state of
affairs in which effective relief can be awarded to either party
at the trial’s conclusion.”27 The other concept, normally ap-
plicated in equity proceedings, is that the plaintiff must lack an
effective legal remedy.28 Thus, preliminary injunctions are con-
sidered “extraordinary relief.”

The majority of courts29 and statutes30 regularly require
that the plaintiff satisfy four prerequisites to be entitled to a
preliminary injunction. These prerequisites are: 1) that the
plaintiff is likely to succeed when the case is later decided on

23. Id.
24. See, e.g., Remedies, supra note 1, at 106-07.
25. Id.; Dobbs, supra note 1, passim.
28. See Remedies, supra note 1, at 57-62; 11 C. Wright & A. Miller, supra note 20, § 2944, at 392.
the merits; 2) that the plaintiff will suffer irreparable injury to legal rights if the relief is not granted; 3) that the harm to the defendant if relief is granted does not outweigh the harm to the plaintiff should the relief not be granted; and 4) that the public interest is served by granting the relief.31

There are frequent minor variations on these prerequisites. A number of jurisdictions group the harm to the plaintiff and the defendant together and denote it “balancing of the equities” or the “balancing of convenience”;32 other jurisdictions require a “substantial harm” rather than an “irreparable injury” to one party or the other.33 Despite these variations, no difference in result has been perceived from the application of the different formulations.34

One variant, the “likelihood” of plaintiff’s victory at a full hearing on the merits, could substantially affect a court’s decision whether or not to issue a preliminary injunction.35 The federal courts have used at least fourteen formulations of this requirement,36 ranging from “reasonable certainty” to mere “possibility” with “reasonable probability of success” the most popular choice.37 Assuming a different formulation will produce a different standard, this result has an impact not only upon

31. See, e.g., 11 C. Wright & A. Miller, supra note 20, § 2948, at 430-31; Leshy, supra note 2, at 641.
32. 7 Moore’s Federal Practice ¶ 65.04(1)-.04(2), at 65.42-.47, 65.50-.55 (2d ed. 1975). For an examination of the development of this balancing concept, see Leubsdorf, supra note 26, at 533-34. See also Brenner, Nuisance Law and the Industrial Revolution, 3 J. Legal Stud. 403 (1974) (emergence of balancing test in nuisance law).
33. See Leubsdorf, supra note 26, at 526 & nn.9 & 11; Leshy, supra note 2, at 641 n.9. Note the distinction between “harm” and “injury to legal rights.” Only the latter qualifies for protection by the courts. Leubsdorf, supra note 26, at 541.
34. Leubsdorf, supra note 26, at 526; Leshy, supra note 2, at 641 n.9. However, Professor Leubsdorf suggests that his model may result in different outcomes if carefully applied. Leubsdorf, supra note 26, at 541-44.
35. See Leshy, supra note 2, at 642. Contra, 11 C. Wright & A. Miller, supra note 20, § 2948, at 451-52.
36. The formulations are listed in 11 C. Wright & A. Miller, supra note 20, § 2948, at 450 nn.54 & 55, as follows: reasonable certainty, strong probability, substantial probability, clear showing of probable success, probability, reasonable probability of success, probable cause for success, substantial likelihood, reasonable likelihood, likelihood, probable chance, reasonably good chance, reasonable possibility, and possibility.
37. Compare, for example, the ways in which the federal courts have characterized the showing made by several plaintiffs: Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971) (stronger showing as to the likelihood of success on the merits); Nolop v. Volpe, 333 F. Supp. 1364 (S.D.S.D. 1971) (probable right and probable damage); Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925 (D.D.C. 1971) (substantial showing of likelihood of noncompliance with the law).
the initial decision to issue preliminary relief in a given case but also upon the preliminary injunction standard as a source of protection for the defendants. The ultimate result will not differ, however, where the court requires the plaintiff to show, for example, a "possibility" of success on the merits, if it also requires a stronger probability that the plaintiff will be seriously injured. Courts have often approved this approach to probability of outcome and seriousness of harm.38

The touchstones of the preliminary injunction, then, are irreparable harm and a reasonable probability of success on the merits. These standards ensure that the preliminary injunction will issue only in extraordinary circumstances where the court is reasonably confident of its preliminary decision.

The Bond Requirement

Generally, bond requirements are either mandatory or within the discretion of the court. Most states have a general39 statute or judicial rule granting the trial courts authority to require bonds of plaintiffs seeking preliminary relief.40 The states requiring some form of security before a preliminary injunction is issued generally use statutes based on either the Federal Rules of Civil Procedure41 (hereinafter the Federal Rule) or the New York Code of 1848,42 although a number of states have formulated original approaches.43 A majority of state statutes, however, follow the Federal Rule section 65(c), which provides, in part, that "no restraining order or preliminary injunction will issue except upon the giving of security . . . in such sum as the court deems proper."44 It should be noted that while many of these statutes appear mandatory, some courts have been liberal in their interpretation such that, in

39. For purposes of this discussion, a "general" bonding provision is one that does not refer to the subject matter of any lawsuit.
40. See Dobbs, supra note 1, at 1096-97, 1173 app. I.
42. California, Iowa, Louisiana, Maryland, Mississippi, Missouri, Oregon, Pennsylvania, Texas, and Wisconsin.
43. Arkansas, Nebraska, Ohio, Oklahoma, Virginia, and West Virginia.
44. FED. R. CIV. P. 65(c).
practice, the exaction of a bond is clearly within the trial judge's discretion. The different circuits of the federal court of appeals, for example, have reached opposite conclusions regarding the Federal Rule. Other state courts with federally derived statutes have not interpreted the mandatory language in the bond requirement.

The California statute is derived from the New York Code and states that:

On granting an injunction, the court or judge must require . . . a written undertaking . . . , with sufficient sureties, to the effect that he will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto.

Some California courts have emphasized that the bond is absolutely mandatory for plaintiffs seeking preliminary relief. In contrast, about twelve states have statutes leaving the matter of security to the judge's discretion. In these states, plaintiffs can effectively argue that the legislature intended to give the judge maximum flexibility and the ability to require no bond in the proper situation.

In both mandatory and discretionary jurisdictions, the judge is given the power to set the bond as he "deems proper." In theory, the court is to set a bond in a sum that will adequately protect the defendant from the costs and damages caused by the issuance of a wrongful preliminary injunction.

In practice, however, the amount set is largely unrestrained by this doctrine.

45. See Dobbs, supra note 1, at 1097, 1105.
46. Id. at 1099-101.
47. Id. at 1105-06.
In addition, since the main purpose of the bond requirement is to compensate the defendant for erroneously caused damages, no bond is necessary where the defendant will sustain no harm in complying with the injunction. The court may also exercise its discretionary power in setting the amount of the bond at a level that is below the actual damage sustainable by the erroneously enjoined party in cases where the plaintiffs are impecunious and pressing an issue of public concern. Thus, a trial judge’s ability to set low or nominal bonds in both mandatory and discretionary jurisdictions often leads to forum-shopping where judicial predilections are known.

Appellate review of the bond set by the trial court is not uncommon. If the appellate court determines that the trial judge abused his discretion in setting the amount of the bond, the court can order a new bond in a specific amount or remand the case to the lower court with directions to set the bond in a proper amount. The court’s failure to require the posting of a bond has also been held to be reversible error, except where the defendant would suffer no damage by the injunction or where the plaintiff is financially unable to post a bond and seeks to further the public interest. In addition, while numerous trial courts have abused their discretion by requiring a large bond, only a small handful of courts have ever been reversed for requiring a nominal bond.

A defendant damaged by an erroneous injunction may prove such damages in court and receive indemnity up to the


59. E.g., Friends of the Earth, Inc. v. Brinegar, 516 F.2d 322 (9th Cir. 1974); Natural Resources Defense Council v. Grant, 4 E.R.C. 1659 (4th Cir. 1972); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971).

60. E.g., Austin v. Altman, 332 F.2d 273 (2d Cir. 1964).

61. Attorneys’ fees are normally included in costs and damages. For a review of
amount of the bond. Damages must be proved with the requisite degree of certainty. Nominal damages are also recoverable. The award of any damages to the defendant, however, is not automatic, and rests within the discretion of the court. There appear to be no environmental cases where a court awarded damages on the bond.

**Rationale for the Injunction Bond**

Injunction bonds serve two basic functions: 1) deterrence and 2) compensation. As a deterrent, the injunction bond discourages the plaintiff from seeking "extraordinary" relief frivolously. The justification behind this deterrence function is that it provides "a means of guaranteeing that the provisional relief is sought only by those in genuine need of such relief and reasonably confident of the outcome." Thus, the danger in allow-
ing frivolous cases to go to a preliminary hearing is that "enormous pressure" may be generated against a defendant\(^6\) and judicial time wasted. If a bond in a substantial amount is not required, the logic continues, the courts and defendants will surely be subjected to numerous frivolous actions.

The seriousness of these claims, however, is overstated as applied to the public interest plaintiff. First, while all attorneys have a duty not to file frivolous or unmeritorious cases,\(^6\) it would appear that it is ultimately a decision for the court whether relief is genuinely needed. The requirement of a bond adds nothing to the attorney's duty, except to place another procedural hurdle in the path of plaintiffs.\(^6\) Second, the complexity of environmental litigation demands a detailed knowledge of complex areas of fact and law, a commitment not normally undertaken lightly.\(^7\) Third, the enormous expense of unfounded litigation against public entities and employees, as these defendants were thought to be subject to a greater number of unmeritorious litigation than private defendants. A. Van Alstyne, Government Tort Liability 785 (1964). See discussion in Beaudreau v. Superior Court, 14 Cal. 3d 448, 463, 535 P.2d 713, 715, 121 Cal. Rptr. 585, 587 (1975). While the statute limited the amount of the bond automatically allowable to a nominal amount ($100-200), this amount could be increased upon application of the defendant for good cause shown. CAL. GOV'T CODE §§ 947, 951 (West Supp. 1979).

67. Dobbs, supra note 1, at 1094.
69. Undoubtedly, the prevailing attitude is expressed in this statement by a California environmental plaintiff's attorney: "None of us—and that includes the State Bar Committee on the Environment and the San Francisco Bar Committee on the Environment, as well as responsible groups such as the Planning and Conservation League—wants frivolous litigation around to tarnish our profession, efforts, and reputations." Letter from Antonio Rossmann, Esq., to Governor Edmond G. Brown, Jr. (August 28, 1978) (on file at Santa Clara Law Review).
70. [W]hile some environmental work—such as challenging a project which has been authorized in violation of some clear procedural requirement—may involve simple issues of fact and law, more frequently environmental defense involves issues in which arguments about complex chemical, biological, ecological, and economic matters lie at the center of the controversy. ... Trubeck, Environmental Defense, I: Introduction to Interest Group Advocacy in Complex Disputes, in PUBLIC INTEREST LAW 151, 152 (B. Weisbroad ed. 1978). Effective advocacy mandates a working knowledge of the relevant issues. In discussing a campaign against several water resources development programs, the authors noted: "The dispute over each project became a protracted battle. Even the simplest form of challenge to a project required mastery of complex technical environmental and economic data." Trubeck & Gillen, Environmental Defense, II: Examining the Limits of Interest Group Advocacy in Complex Disputes, in PUBLIC INTEREST LAW 195, 215 (B. Weisbroad ed. 1978).
time and money involved in litigation is a deterrent to frivolous suits. Finally, according to the charter of many public interest groups, litigation must be internally reviewed and approved on several levels before it is commenced.\textsuperscript{71}

The fear that defendants will be harmed by "enormous pressure" is mitigated by the defendant's confidence in his own victory where the action is without substance. Where the action is meritorious, the pressure appears justified and inevitable. Moreover, it cannot be assumed that the plaintiff who is in genuine need of relief and reasonably confident of the outcome will be able to post the required security. On the other hand, the plaintiff who is neither in great need of provisional relief nor confident of the outcome may well possess the financial resources to post a large bond. There is little, if any, relation between the ability of the plaintiff to post a bond and the need for relief or confidence in victory. In short, the bond requirement is unjustified as a tool of deterrence and presents a serious obstacle to environmental litigation.

The second major function of the bond is to provide compensation to the defendants for damage incurred by "unmeritorious" temporary restraints.\textsuperscript{72} Where provisional relief is granted but a final injunction refused, the defendant may suffer monetary damage in complying with the "unmeritorious" preliminary injunction. The justification for compensation is that, given the short time in which the defendant must assemble his arguments, provisional relief is "especially prone to error."\textsuperscript{73}

The compensation function, then, involves two concerns that must be present in sufficient degree if the bond requirement is to be justified. First, a final injunction must be refused

\textsuperscript{71} E.g., the Natural Resources Defense Council requires three separate approvals within the organization before an action is brought: that of the legal staff, the Legal Committee of the Board of Trustees, and the Executive Committee of the Board of Trustees. Adams, Responsible Militancy—The Anatomy of a Public Interest Law Firm, 29 Rec. A. B. Ctr. N. Y. 631, 635-36 (1974).


"Unmeritorious," as used here, does not mean "frivolous" or refer to actions with no legal merit. Rather, hereinafter, a preliminary injunction is unmeritorious if, after a full hearing on the merits, a permanent injunction is not issued. See Comment, Injunction Bond Amounts in Federal NEPA Litigation, 61 Iowa L. Rev. 580, 580 n.3 (1975) [hereinafter cited as Bond Amounts in NEPA Litigation].

\textsuperscript{73} Dobbs, supra note 1, at 1094. See Injunctions and the Injunction Bond, supra note 62, at 336. It should be recalled that provisional relief is often a powerful remedy. See note 2 and accompanying text supra.
with some degree of frequency after preliminary relief has been granted. That is, for it to be said that provisional relief is more prone to error, final injunctions must be refused in a significant number of cases. The second component requires a significant harm to defendants who have been subject to unmeritorious preliminary restraint. Thus, the bond is valuable as a compensatory tool only if an ascertainable economic loss is incurred by defendants who comply with preliminary injunctions that are not made final.

To justify bonding, the courts must frequently issue erroneous preliminary injunctions causing economic losses to the defendants. Few defendants, however, appear to suffer serious economic losses due to erroneous preliminary injunctions in environmental litigation, and the sizable majority of these injunctions are ultimately legitimized by the issuance of a final injunction.

THE CASE FOR ELIMINATING INJUNCTION BONDS IN ENVIRONMENTAL LITIGATION

There are three ways in which a bond may inhibit access to preliminary relief. First, the plaintiff may be deterred by the cost of the bond premium.74 Second, the plaintiff may be inhibited by the threat of personal liability on the bond.75 Third, the environmental plaintiff may not be able to obtain a bond within the time allotted: a particular problem when the plaintiff is seen as pressing an unpopular cause.76 The bond underwriter cannot and does not estimate the likelihood of plaintiff's success at a final hearing. Instead, the bondsman estimates the likelihood that the plaintiff will respond to any damages covered by the bond. One of the reasons that substantial bonds are inappropriate in environmental litigation is that certain assumptions, valid in evaluating plaintiffs in nonspecialized litigation, are not true for environmental plaintiffs acting in the public interest.

In environmental litigation, plaintiffs and defendants are not likely to be in relative economic parity. It is unreasonable

74. The cost of a premium may run from twenty to thirty dollars per year per one thousand dollars. Dobbs, supra note 1, at 1112.
75. Id. See also Dimento, Citizen Environmental Legislation in the States: An Overview, 53 J. URB. L. 413, 448-49 (1976). Security bonds may also have an inhibiting effect if associated with governmental hostility toward those who would become involved in environmental affairs. Id. at 449.
to extend the bond requirement to environmental litigation where individual citizens and nonprofit organizations routinely lack the necessary resources for posting a bond.77

A 1973 study by the Council on Environmental Quality indicated that sixty-one percent of the environmental groups surveyed relied on dues and small donations as their primary source of income. Sixty-nine per cent had annual budgets of less than $5,000, from which postage, telephone, research, duplication of materials, and travel to meetings and public hearings were paid. The study found that "[l]itigation is limited for most environmental groups unless an attorney will work for little or no fee. Often day-to-day expenses are paid out of the pockets of a group’s more active members."78

Litigation is expensive. A 1974 survey of environmental actions in Michigan under the Michigan Environmental Protection Act79 revealed that the average environmental lawsuit entails expenses of around $10,000 if trial ensues, with about half that amount spent on attorneys' fees.80 Expert witnesses and consultants absorbed about $3,000.81 If the case was settled without trial, plaintiffs incurred costs of about $2,000.82 Undoubtedly, litigation expenses have risen since 1974. Clearly, litigation is out of reach for most environmental organizations, and even where money exists for these purposes, it does not provide for more than a nominal bond.83

77. See Sax & Conner, Michigan's Environmental Protection Act of 1970: A Progress Report, 70 Mich. L. Rev. 1003, 1076 (1972). Another article notes: "In an area incapable of accurate quantification, we suspect that the predominant factor inhibiting meritorious public interest environmental litigation is the lack of money." King & Plater, supra, note 16, at 29.

78. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY, FOURTH ANNUAL REPORT 398-99, 404 n.8 (1973).

Professor Bryden of the University of Minnesota in 1978 commented about that state's paucity of citizen environmental litigation by noting: "As a rule, none of the statewide environmental organizations can afford to pay all the expenses associated with even a single lawsuit. At most, they pay out-of-pocket expenses while in varying degrees the attorneys donate their time." Bryden, Environmental Rights in Theory and Practice, 62 Minn. L. Rev. 163, 213 (1978).


81. Id.

82. Id.

83. One obvious . . . disadvantage is the inequality of means. The ad hoc citizens group or regional or national conservation organization, the typical plaintiff, has little money and no paid legal staff. Every product and service that goes into substantial litigation—lawyers, typists, photostats, expert witnesses—must generally be wholly or substantially
Some tax-exempt, non-profit environmental groups do possess modest litigation budgets. The existence of these special funds, however, should not be taken into account by the court in setting injunction bonds. This economic support goes mainly to essential salaries and is the *sine qua non* for most environmental suits; 84 little if any is left over for bond costs and nothing is wasted. One court that did consider plaintiffs' aggregate assets in setting a large bond was reversed on appeal. 85 The same governmental policies favoring non-taxation of these organizations militates in favor of low or nominal bonds. 86 Non-profit groups should not be forced to risk their assets as security to post a bond, regardless of the size of those assets.

84 See King & Plater, supra note 16, at 79.

[T]he worthwhile objectives of private environmental litigation are not likely to be met by taxable groups alone. It is necessary to have organizations capable of receiving contributions which have charitable contribution status under our tax laws if the interests of our environmental programs are to be fully represented.

... The crucial consideration [as to whether organizations receive tax exempt status] appears to be whether the benefits flowing from litigations inhere primarily and principally to the general public rather than to private interests.

Id. at 745.
In like manner, it is undesirable to require individual citizens to risk enormous liability for the sake of a lawsuit when their individual interest is but a tiny part of the larger public interest. To require an individual to risk ruinous personal liability in these circumstances is tantamount to a penalty for the assertion of a public right. This point is illustrated by *Save El Toro Association v. Days*. There, the plaintiffs, including individual citizens and an unincorporated association, were given the choice of posting a $50,000 bond or losing the preliminary injunction to which they were entitled. Rather than lose the injunction, one plaintiff abandoned his homestead and offered all his real property, stocks, and bonds as security for the injunction bond. The plaintiff clearly risked financial ruin if the preliminary injunction was not sustained. Fortunately for this plaintiff, a final injunction was granted. Yet individual plaintiffs in environmental litigation are faced with just such a choice all too often.

The threat of a large bond also has a fundamental effect on the strategy of environmental dispute resolution. Where preliminary relief is precluded, the potential litigant is forced to consider other avenues of relief both within and without the judicial system. Several of these possible strategy alternatives warrant further discussion.

If the bond problem is recognized early, environmental protection may be realized through an appeal to legislative and administrative tribunals, or to public enforcers. These alternatives, however, are usually pursued prior to litigation in any case.

Where court action is inevitable, tactics may be aimed at avoiding preliminary relief by seeking other remedies. When the facts are reasonably clear, it may be possible to file for a declaratory judgment or a permanent injunction and then immediately move for a summary judgment. However, since these actions are given no special priority, the case may not be decided before the defendant has either damaged the environment or violated the applicable law.

Where a preliminary injunction is lost for failure to post a bond, the plaintiff may be able to persuade the court to exact a promise from the defendant that he will not act until advance 87. 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977).

notice is given to the court and to the plaintiff. If speed is a necessity, however, or if the judge is not willing to require notice of the defendant, there may be no choice but to suffer the environmental damage.

In some instances, a plaintiff should try to consolidate the hearing on a preliminary injunction with the trial on the merits under Federal Rule 65(a)(2). When consolidation is permitted, a bond is not required, litigation costs are reduced, the court may grant both affirmative and negative relief, and the impact of the defendant's claims of injury may be reduced. The major disadvantage of consolidation is that both the plaintiff and defendant may lack time to prepare their cases. Courts may also be reluctant to order an expedited hearing if they feel that the defendants will not be given fair notice and an opportunity to be adequately heard.

In the final analysis, substantial injunction bonds discourage environmental litigation. Environmental plaintiffs lack the resources necessary to meet such bonds, and where resources are available either from individual citizens or through a citizens' group, it is unfair and undesirable to require private parties to risk liability for the enforcement of a public right. The

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89. *E.g.*, Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 738, 749 (E.D. Ark. 1971) (where the court required defendants to keep the court currently advised as to the status of a dam project and refused a temporary injunction; an injunction was issued after trial on the merits). See also J. Sax, supra note 3, at 116-17.

Bonds have also been required of defendants in lieu of the issuance of a preliminary injunction, apparently under the general equity power of the courts. See United States v. Dominion Oil Co., 241 F. 425 (S.D. Cal. 1917); *In re Ball's Estate*, 81 N.Y.S.2d 91 (Sup. Ct. 1948). Such a procedure is not much aid to the environmental plaintiff who usually cannot be recompensed in money for the defendant's environmental damage.


91. Leshy, supra note 2, at 667-68.

92. J. Brecher & M. Nestle, supra note 3, at 99, state:

Many conservationist attorneys report that a trial under these conditions is one of the most difficult tasks to face. Tremendous time pressure often precludes the detailed discovery program usually needed to learn about the complicated technical facts in the case. These facts are usually in the possession of the defendant. As a result the conservationist attorney must often elicit the facts from witnesses for the first time in court—a perilous course. [citations omitted].

effect of a substantial bond may well be to penalize the plain-
tiff for a good-faith attempt to vindicate the environmental
laws, or to force the plaintiff to use less effective tactics.

The Compensation Function

As previously noted, compensation for defendant's expen-
ses in complying with the preliminary injunctions is one com-
mon justification for bonds. In many cases, however, the need
for compensation is negligible and there are good reasons for
viewing the cost of complying with the court's order as merely
another cost of litigation. It is, in this light, profitable to
examine further the need for compensation and the rationales
for requiring the defendant to bear the costs of carrying out the
court's order.

The usual argument offered in support of bonding is that
if substantial bonds are not required, and the restraint is erro-
neous, public and private projects will suffer significant in-
creased costs due to inflation, lost wages for contractors and
workers, lost rental income, and temporary construction.94
Thus, at least in the case of public projects, both users and
private developers are injured. If the project is private, the
immediate loss falls almost exclusively on the private devel-
oper. It is not surprising, therefore, that the construction indus-
try has led the fight in California to pass legislation that would
require substantial bonds.95

One of the construction industry's chief arguments has
been that environmental litigation has caused loss of employ-
ment as a result of delay or abandonment of projects which
would have employed members of the industry. This argument
is not without merit, if, in fact, the pace of construction in the
economy is so slow as to prevent those restrained from obtain-
ing similar employment elsewhere. There appears little need
for a compensatory mechanism, however, if the erroneously
restrained defendants are able to secure similar temporary
employment.96

94. Some of these concerns were mentioned by the district court in Friends of
the Earth, Inc. v. Brinegar, which fixed a bond of $4.5 million for the issuance of a
preliminary injunction halting expansion of the San Francisco International Airport.
518 F.2d 322 (9th Cir. 1975). On appeal, the Ninth Circuit Court of Appeals determined
that a nominal bond of $1,000 should be imposed. Id. at 323.
95. See text accompanying notes 165-175 infra.
96. Courts have used this argument to reject the defendant's claimed economic
loss and have granted final injunctions for this reason. E.g., Minnesota PIRG v. Butz,
Public entities and developers also criticize the increase in construction costs caused by delays. These claims deserve closer scrutiny. Contracts between developers and public entities often contain provisions dealing with both work stoppages and delays and provide protection against increased costs. Where projects yield an income, inflation will usually increase expected revenues. In addition, if the preliminary injunction causes an environmental impact statement or report to be changed, project operations can be altered, minimizing environmental costs and possibly decreasing the overall costs of the project. The defendant’s costs, however, may be seen as self-imposed where, from the beginning, citizens have argued the illegality of the project and the defendant was aware of its potential liability.

More importantly, there appears to be a real lack of actual harm to defendants as a result of compliance with preliminary injunctions in environmental cases. The general absence of loss calls into question the need for compensation. Moreover, some environmental statutes have implied that delay and increased costs are costs defendants should be expected to bear. There are broader rationales that justify having the defendant bear these losses.

As a question of loss shifting, it is justifiable to require the defendant to absorb the losses incurred by an erroneous injunction. In an environmental suit, the defendant is usually in the better position to absorb a loss occasioned by compliance with an erroneous injunction than is the plaintiff. It is the defendant who embarks upon the activity in the expectation of ultimately making a profit, and the delay caused by a preliminary injunction may be seen as another cost of doing business. If these costs are ultimately passed on to buyers, they will not fall.

358 F. Supp. 586, 626 (D. Minn. 1973), aff’d, 498 F.2d 1314 (8th Cir. 1974).
97. This was an argument advanced in Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322 (9th Cir. 1975). There the defendants filed affidavits showing that construction costs were increasing at approximately 1% per month, and applied this percentage to the projected costs of the projects as currently planned, arriving at the estimated net increase in overall construction costs if the inflation rate continued. Plaintiff’s Brief of Points and Authorities Regarding Bond on Injunction Pending Appeal, at 9, id. (on file at Santa Clara Law Review).
98. 518 F.2d at 322.
100. This is the reason that efforts to impose mandatory bonds on environmental plaintiffs have failed in California and Michigan, and nominal bonds are set by statute in a number of states. See text accompanying notes 165-187 infra.
101. See text accompanying notes 124-133 infra.
heavily on any one group but will be distributed more equally. If the defendant is a public entity, the costs will be passed on to the public.\(^{102}\) Thus, the importance of the capacity to bear loss as a single factor in loss shifting should not be overlooked.\(^{103}\)

In addition, it is equitable to require the defendant to absorb his own losses. It is difficult to say that the plaintiff is at fault for an erroneously issued preliminary injunction. Once the judge agrees that a preliminary injunction should issue, he has decided that the plaintiff will enjoy a probable success on the merits, that he is threatened with a significant harm, and that plaintiff's victory will satisfy the public interest. With this stamp of judicial approval, who should justly bear the risk of loss? Given the greater ability on the part of defendants to absorb losses, it appears just to require defendants to bear the risk of loss. In accordance with this rationale, many decisions have fixed nominal bonds where a private developer has been preliminarily enjoined.\(^{104}\)

Where a governmental third party is involved in approving the developer's decision or act, the question of risk allocation is complicated, although there is still no justification for shifting the loss to the plaintiff. One writer has asserted that:

\[T\]he developer is usually aware of the government's statutory obligations and his claim for damages, if any, should more properly be asserted against the government defendants who [potentially] made the error of law, than against the innocent plaintiff by means of a high bond.\(^{105}\)

Moreover, there are several ways in which a preliminary injunction may actually work to save private and public defendants considerable sums of money. First, a preliminary injunction often serves to clarify both the plaintiff's and defendant's

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102. This rationale was recognized in Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973). Where both public entities and private parties are defendants, both considerations apply. "[I]t would be a mistake to treat a revenue loss to the government the same as pecuniary damage to a private party." Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167 (D.D.C. 1971).


104. E.g., Viavant v. Trans-Delta Oil & Gas Co., 7 E.R.C. 1423 (10th Cir. 1974); Natural Resources Defense Council v. Grant, 4 E.R.C. 1659 (4th Cir. 1972); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Burger v. County of Mendocino, 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975) (injunction bond reduced from $100,000, as set by trial court, to $500).

105. Leshy, supra note 2, at 674. Indeed, many developers may invite legal error in order to secure approval of their projects as proposed.
rights early on, and prevents the economic waste which might result from a suit brought after the defendant has committed substantial resources to the project. For example:\textsuperscript{106}

Builder plans a building on Blackacre. Neighbor believes it violates the zoning laws and will constitute a common law nuisance. If Neighbor intends a suit for injunction, early determination may save money, no matter who is legally correct or who wins. If the building is built and must later be destroyed or structurally changed to comply with zoning laws, the economic waste is obvious and could have been avoided by quick access to the courts. If the building, though in violation of zoning ordinances, is allowed to stand because of this waste factor and because early relief was not sought, the building may cause other economic loss in the form of diminished property values for neighboring property. If it is assumed that the building is proper in all respects, quick access to the courts to determine this fact will mean that the builder may proceed with construction without either delay or needless risk.\textsuperscript{107}

While there are several variables that might cause the precluded economic waste to be great or minimal,\textsuperscript{108} the point is clear; if legal action is inevitable, an early resort to the courts will be less disruptive and costly. Simply as a matter of delay, the adjudication of relief that is not provisional results in more delay between filing and decision than does extraordinary relief. Therefore, a substantial bond requirement will likely contribute to economic waste to the extent that it deters preliminary relief.

Second, the moratorium provided by a preliminary injunction buys time for the parties to reevaluate the impact of a project. Reevaluation may lead to the conclusion that the project was not originally or is no longer economically or environmentally viable, resulting in its cancellation and a savings to the public. A preliminary injunction, for example, halted work on the Cross Florida Barge Canal and ultimately resulted in President Nixon's decision to abandon the project at a savings of approximately $130 million, the cost of completion of the

\textsuperscript{106} Dobbs, supra note 1, at 1095 n.13.

\textsuperscript{107} Other examples include the construction of a plant with questionable pollution control equipment and the building of a dam on a whitewater river.

\textsuperscript{108} Two of the more important variables include the cost of modification necessary to bring the defendant into compliance with law, and the extent of damage to the plaintiffs or the environment caused by noncompliance.
Thus, the importance of this "time out" function of preliminary injunctions should not be ignored. Substantial bonds can also be counterproductive and cause more delay and economic harm than would the imposition of no bond or a nominal bond. In many cases, defendants can avoid losses by not seeking a bond in the first instance. Where the defendant requests and obtains a substantial bond from the trial court, it invites a trip to the court of appeals or supreme court to review the amount of the bond as to whether its exaction constitutes an abuse of discretion. Since the chances of having a substantial bond overturned on appeal are good, an eventual vacation results in needless expense of judicial resources, increased delay and costs to defendants, and no progress towards the termination of the litigation. Defendants, therefore, can mitigate the costs and delays by foregoing an injunction bond.

The Bond and Citizen Enforcement of Environmental Laws

Prosecution and enforcement of environmental law is no longer exclusively the business of public officials. Powerful legislation has been enacted at both federal and state levels permitting and encouraging citizen enforcement.

Citizen enforcement is significant in that it supplements the small, overworked staffs of public enforcers and is less

111. A possible alternative for recovery by the injured defendant is the filing of a counteraction against the plaintiff for malicious prosecution. These are not useful, however, because defendants are unlikely to recover substantial funds from underfunded environmental groups and because of the difficulty in proving the requisite elements of the cause of action. See generally Note, Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions, 74 Mich. L. Rev. 106 (1975).
112. See W. Rodgers, supra note 6, at 75-76. See generally J. Sax, supra note 3; Cramton & Boyer, Citizen Suits in the Environmental Field—Peril or Promise, 2 Ecology L.Q. 407 (1972); Dimento, supra note 75; Comment, Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation, 1 Ecology L.Q. 561 (1971); Comment, State Legislation to Grant Standing: Questions, Answers and Alternatives, 2 Envr'tl L. 313 (1972).
113. For a thorough review of federal environmental statutes allowing citizen suits, see W. Rodgers, supra note 6, at 75-89.
114. For a review of citizen suit provisions under state laws, see id. at 170-80, 809-22; Dimento, supra note 75.
costly. Private parties may also be in a better position to weigh the costs and benefits of a particular project, and the competition from citizens sharpens the response of institutional representatives. Where private citizens challenge the acts of governments, the need for citizen enforcement is clear. Where citizens seek legal review of administrative agency action, other factors justify the breath of fresh air that citizen enforcement brings; namely, the administrative agencies may be overly deferential to the interests they regulate, whereas courts are apolitical and practiced in the art of balancing legal and political issues. It should not be forgotten, however, that citizen litigation is not a substitute for public participation in the decision-making process, but rather a last resort to determine and enforce legal rights. The repeated provision for citizen suits in environmental legislation may be read as an endorsement of active citizen litigation.

The importance of citizen litigation is well-recognized by public officials. Regarding the National Environmental Protection Act (NEPA), Congress has declared that: “[I]t is the continuing policy of the Federal Government, in cooperation with . . . concerned public and private organizations, to use all practical means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . .” Russell Train, then Chairman of the President’s Council on Environmental Quality, stated: “Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs.”

State laws also provide for citizen participation. For example, in passing the California Environmental Quality Act, the legislature declared that: “Every citizen has a responsibility to contribute to the preservation and enhancement of the environment,” and that “the interrelationship of policies and prac-
tices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution. 122 Other environmental legislation shares these policies. 123

One would expect that a large bond would stifle the very litigation that Congress and the legislatures intended to promote. This expectation is frequently cited by the courts as a factor in their decision to require only a nominal bond of environmental plaintiffs. 124 Where NEPA suits are concerned, it is now common for courts to cite this rationale and thereby set nominal bonds. The body of such cases has been referred to as representing a “doctrine,” 125 the “NEPA litigation exception,” 126 and even a “rule.” 127

There is no reason, however, to restrict this rationale to the cases involving NEPA. Where a legislature has provided for citizen enforcement of environmental laws and elsewhere declares the importance of such suits in the statutory scheme, the courts should be slow to tamper with such policy by imposing substantial bond requirements. 128

The private attorney general concept 129 is also applicable. To the extent that private citizens are supplementing the enforcement capabilities of public enforcers, there is little justification for imposing a bond that inhibits such suits. Indeed,

122. Id. § 21000(f).
123. For an even stronger statement of the need for citizen participation under the California Coastal Act, see id. § 30000.
125. Leshy, supra note 2, at 674.
126. Bond Amounts in NEPA Litigation, supra note 72, at 583.
127. Id. at 589.
128. A reviewer of the Florida Environmental Protection Act permitting substantial bonds has stated:

The statutory section allowing the bond unfortunately could condition justice on the complaining party's solvency. Therefore, the courts should require bonds in only the most extreme cases. If a bond is required frequently, many private citizens might be deprived of the judicial hearing of grievances that [the Florida] EPA statutory standing is intended to provide.

several cases have seized upon this concept as a vehicle to require nominal bonds. Going one step further, one might ask why a citizen suing as a private attorney general is required to post a bond when the attorney general is not? Public enforcers are routinely exempted from the filing of a bond, and it seems somewhat illogical to exact a bond from the private environmental plaintiff who litigates to achieve the same goals.

The ultimate concern, however, must be that large bond requirements will reduce or preclude the benefits of environmental protection and result in greater environmental degradation. One of the most important factors that has led public agencies and private parties to comply with environmental laws has been the possibility that someone would force compliance through the courts. Without this threat, many agencies and private parties would undoubtedly embark on paths that would result in reduced public participation and a disregard of environmental laws. In states where the majority of environmental cases are brought by private citizens, such as California, substantial bonds repeatedly imposed would eliminate most enforcement of state and local environmental laws.

The Preliminary Injunction Standard as a Deterrent to Frivolous Suits

The preliminary injunction standard has several features that deter frivolous suits and ensure that unmeritorious actions do not receive preliminary relief. As set forth previously, the preliminary injunction issues only in circumstances of immediate and serious need where the plaintiff can show both an irreparable injury and a legal right that must be protected. The equities must weigh in favor of granting the plaintiff relief. The public interest must also be served by the preliminary injunction. Finally, the plaintiff must show that he has a reasonable probability of success on the merits. The preliminary injunc-

130. E.g., Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322 (9th Cir. 1975); Natural Resources Defense Council v. Grant, 4 E.R.C. 1659 (4th Cir. 1972).
133. This was also the conclusion of one analysis of a recent California bill that would have allowed courts to require large bonds of environmental plaintiffs. Friends of the Earth, Legislative Analysis for S.B. 1667, at 3 (Aug. 22, 1978) (on file at Santa Clara Law Review).
134. See notes 26-38 and accompanying text supra.
tion puts a heavy burden on the plaintiff and demands that the judge explicitly consider the possibility of the plaintiff's ultimate success.

The preliminary injunction test eliminates "strike" suits and frivolous claims. Those who fear crank suits by "environmental nuts" should be calmed by the words of Professor Sax:

In a hearing on an application for preliminary relief, the court must make an informed, though tentative, judgment both as to the significance of the interests alleged to be at stake and as to the likelihood that the plaintiffs might prevail on the merits—that is whether they have a legal claim that is not frivolous. The proceeding for preliminary relief thereby provides an expeditious screening process.

If the judge believes the lawsuit does not meet the rigorous preliminary injunction test, preliminary relief will be denied. If the plaintiff is convinced that justice has not been done, the denial may be appealed or the plaintiff may seek a full trial on the merits.

Clearly, then, no preliminary injunction ever issues merely because the plaintiff seeks one. Only a trained judge has the knowledge and authority to properly scrutinize the plaintiff's claims and legitimize them through the granting of an injunction. "Judges are most reluctant—as any sensible individual would be—to restrain important and extremely costly projects. . . . [I]f there is any one quality which predominantly characterizes the usual courtroom proceeding, it is judicial cautiousness." Attorneys for environmental plaintiffs are aware of these attitudes and are careful to screen cases thoroughly. Further, since the majority of environmental plaintiffs' attorneys work pro bono, they have little interest in wasting their


137. Id. at 118, 119.

138. A California attorney with wide experience in representing environmental groups stated: "Neither I nor any other environmental attorney I know of brings an action unless it can clearly satisfy the standard of at least some 'reasonable possibility that the plaintiff will obtain a judgment. . . ."" Letter from Antonio Rossman to Governor Edmund G. Brown, Jr. (Aug. 28, 1978) (emphasis in original) (on file at Santa Clara Law Review). See also note 71 supra.
time on losing lawsuits in return for meager or nonexistent monetary compensation.  

Many courts also rely on the preliminary injunction standard as a major justification for requiring only a nominal bond of environmental plaintiffs. The courts most often emphasize that it is the requirement of a showing of the likelihood of success that provides adequate protection for fearful defendants.

The proposition that the preliminary injunction test screens frivolous suits and protects defendants from losses caused by unmeritorious suits can be tested in those states that have enacted environmental laws requiring only nominal bonds of environmental plaintiffs. In such states, the preliminary injunction test is virtually the only protection shielding the defendants. Michigan, with its environmental protection act containing liberal standing rules and a $500 bond limit, is such a state.

A study conducted six years after the passage of the Michigan act revealed that 1) very few frivolous cases have been brought, 2) the delay caused by unmeritorious injunctions has been small, and 3) little, if any, economic damage has been

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138. The California Supreme Court noted in Woodland Hills Residents Ass'n v. City Council of Los Angeles, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979) that court awarded attorney's fees for environmental lawsuits could be granted only if such litigation was successful.


140. E.g., Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975).

141. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1978-1979) provides:

The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

142. Id. § 691.1202a provides:

If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond of cash not to exceed $500.00.
sustained by Michigan industry. The study analyzed twenty-seven cases in which preliminary relief had been granted, approximately one-third of those cases filed under the act. In sixteen of the cases, few of which involved extensive delay, the preliminary injunction was upheld. Of the eleven cases ultimately won by the defendants, all either raised important issues, were disposed of expeditiously, or caused little income loss to defendants; where preliminary injunctions were denied, such cases have neither “disrupted industrial output nor caused concern over delay.” Recent attempts to amend the Michigan act to increase the bond requirement and the sound defeat of such attempts by the legislature may be interpreted as evidence of the effectiveness of the preliminary injunction standard as a screening device and a rejection of claims that it results in significant economic harm to defendants.

While it could be argued that the Michigan experience is merely a handful of cases in one state, other states with similar statutes have experienced similar results. Data collected in a 1975 mail survey in states with strong environmental legislation like Michigan’s show no evidence of industry exodus as a result of environmental suits. The judiciary has expeditiously disposed of the few frivolous suits that have arisen, and moreover, the vast majority of preliminary injunctions in environmental actions have been sustained.

The preliminary injunction test offers appropriate protection in those states where nominal bonds are exacted from environmental plaintiffs. It appears to perform the function of deterrence and largely obviates the need for compensation. Although reliance on the preliminary injunction standards to protect defendants from unmeritorious suits may cause slightly fewer preliminary injunctions to be issued, this is not necessarily a result to be eschewed: judges should always carefully

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144. Haynes, supra note 143, at 651-58.
145. Id. at 658.
146. See id. at 668-69.
147. See Dimento, supra note 75, at 443 n.160.
148. Id. at 452; King & Plater, supra note 16, at 82. “[T]he courts appear quite capable of weeding [frivolous suits], and the burdens of litigation remain such that attorneys are reluctant to sue unless they are likely to prevail.” Id.
149. Leshy, supra note 2, at 675; J. Sax, supra note 3, at 118.
INJUNCTION BONDING

weigh the equities and the effects of the preliminary injunction upon the parties.

The Policy Decision: Security for Defendant's Prospective Harm v. Preclusion of Environmental Protection

There will be cases in which the plaintiffs should receive ecological protection and in which the defendant will face certain prospective economic injury as a result of complying with a preliminary injunction. If the environmental plaintiff lacks the resources necessary to post the bond required for issuance of a preliminary injunction, the court is faced with an unpleasant dilemma. The court may set a nominal bond, which will allow the plaintiff the relief to which he is legally entitled, although it will probably subject the defendant to some economic loss. Alternatively, the court may set a bond that will compensate the defendant for his probable economic loss but stop the lawsuit and preclude the environmental protection that plaintiff's action would have provided. In this situation, the bond requirement serves to juxtapose two conflicting "rights": the right of the plaintiff to environmental protection and the right of the defendant to security and compensation for the economic harm inflicted should the preliminary injunction not be sustained. At this stage of the proceedings, neither the judge nor the parties have the benefit of foresight and it is unknown whether a final injunction will be granted. When these "rights" are in irreconcilable conflict, a decision must be made as to which will supersede the other.

The legislatures and particularly the courts have decided that the right of the environmental plaintiff to temporary relief that furthers environmental protection is to be favored over the need of the defendant for compensation. This policy decision is significant for it recognizes the importance of preliminary relief in environmental cases.

The NEPA has been interpreted by the courts as stating that costs incurred by a defendant from delay in compliance with the Act are outweighed by the benefits of environmentally informed decision-making. Judge Skelly Wright put it suc-

150. For another explication of the conflict, see Sax & Conner, supra note 77, at 1076-77.
151. See Steubing v. Brinegar, 511 F.2d 489, 497 (2d Cir. 1975); Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975); Greene County Planning Bd. v. FPC, 455 F.2d 212 (2d Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC,
cinctly in 1971 when he observed:

Section 102 duties are not inherently flexible. They must be complied with to the fullest extent. . . . Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.102

Subsequent NEPA cases have extended this policy judgment and minimized the importance of claims of harm from private parties by requiring only nominal bonds of environmental plaintiffs.103

The same policy decision is applicable at the state level. Where state courts have indicated that their environmental policy acts are modeled on NEPA or that NEPA interpretations are persuasive,104 it is logical to adopt NEPA interpretations in making the same policy decision at the state level. Other states have enacted this policy decision by statutorily limiting the amount of the bond that a court can impose under certain environmental protection laws.105

The policy decision to favor temporary environmental preservation is further documented by those cases in which environmental plaintiffs have been allowed to post a bond that is significantly less than the amount that would adequately compensate the defendant for his prospective economic loss. California has produced a line of cases in which environmental plaintiffs were not required to post a bond, or were required to post only a nominal bond.106

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152. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972). "[A] direct result of NEPA-caused delays that Congress undoubtedly was aware of, is that jobs created by a construction project might be interrupted and that the initial employment of some persons might be postponed." Steubing v. Brinegar, 511 F.2d 489, 497 n.19 (2d Cir. 1975).

153. E.g., Viavant v. Trans-Delta Oil & Gas Co., 7 E.R.C. 1423 (10th Cir. 1974); Natural Resources Defense Council v. Grant, 4 E.R.C. 1659 (4th Cir. 1972); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 236 (4th Cir. 1971); Scenic Rivers Ass'n of Okla. v. Lynn, 382 F. Supp. 69, 76 (E.D. Okla. 1974).

154. E.g., California. See No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 80, 529 P.2d 66, 74, 118 Cal. Rptr. 34, 42 (1974); Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal. 3d 247, 260-61, 502 P.2d 1049, 1057-59, 104 Cal. Rptr. 761, 769-70 (1972).

155. See statutes cited in notes 183, 186, 187 infra.

INJUNCTION BONDING

The most recent California Supreme Court ruling vacated the decision of an appellate court requiring a citizens' group to post a $50,000 bond as a condition for the continuation of a writ of supersedeas. In *Laurel Hills Homeowners Association v. City Council of Los Angeles*, the supreme court directed the lower court to set a supersedeas bond "which shall not exceed a nominal bond." The homeowners' group argued that they were acting as private attorneys general and that the prohibitive undertaking required by the court of appeals improperly denied them the right to enforce the California Environmental Quality Act. The real party in interest, a private developer who sought to construct a subdivision near plaintiffs' property in suburban Los Angeles, claimed a loss of at least $25,000 per month as a result of the delay caused by the plaintiffs. The developer argued that the plaintiffs were not private attorneys general inasmuch as they had claimed that they would receive economic and aesthetic benefits if the subdivision was not built.
The supreme court in *Laurel Hills* rejected the contentions of the real party in interest by requiring only a nominal bond of the plaintiffs. There was no written decision in the case, although an attorney for the homeowners stated that the ruling "is a rejection of the concept that a substantial bond or prohibitive bond should be required as a condition of maintaining the status quo pending appeal in a homeowners action." The ruling, however, can be read more broadly. Since the $100 bond set by the court of appeals on remand could not compensate the real party in interest, the interest of the plaintiffs in obtaining judicial review in an environmental case was found to be paramount. And because the superior court had initially decided against the plaintiffs' claims and in favor of the City of Los Angeles after a full hearing on the merits, the ruling clearly represents a decision to weigh the need for environmental protection over defendant's economic losses caused by the delay.

This policy decision should not be viewed as absolute. Where financial resources exist and the continuance of the action will in no way be obstructed by the requirement of a bond adequate to compensate the defendant for economic losses, it may be only just to require such a bond in light of existing statutes.

Thus, the policy decision to favor at least temporary environmental protection over probable harm to defendants cuts across several dimensions. The cases cited above adhere to this policy decision regardless of whether the prospective harms are

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160. The order and its attendant facts cast serious doubt on the validity of the *Venice Canals Resident Homeowners' Ass'n v. Superior Ct.*, 72 Cal. App. 3d 675, 140 Cal. Rptr. 361 (1977), where a bond was upheld.


162. *Id.*

163. *E.g.*, California v. Tahoe Regional Planning Agency, Nos. 74-2456, 74-2924 (9th Cir. 1974) (state sought to enjoin construction by private developers; $3,500,000 bond set); Anaconda v. Ruckelshaus, 362 F. Supp. 69 (D. Colo. 1972), rev'd on other grounds, 482 F.2d 1301 (10th Cir. 1973) (multinational corporation sought to avoid application of the Clean Air Act; $30,000 bond set); National Helium Corp. v. Morton, 325 F. Supp. 151 (D. Kan.), aff'd, 455 F.2d 650 (10th Cir. 1971) (national corporation sought a temporary injunction to prevent cancelation of a contract for sale of helium to the U.S. Government; $75,000 bond set); National Helium Corp. v. Morton, 361 F. Supp. 78 (D. Kan. 1973) (after the Department of the Interior completed an environmental impact statement, the helium company amended its complaint to allege that the EIS was inadequate and sought continuation of the preliminary injunction; $2,000,000 bond set).
incurred by public or private defendants. The judgment also has been approved in the legislatures and in various federal and state courts. This policy decision merits further entrenchment in the law.

**LEGISLATIVE TRENDS**

Although every state has a general bonding statute or judicial decision that establishes the power of the courts to require a bond of the plaintiff seeking preliminary relief, some states have particular bonding statutes applicable to environmental plaintiffs. The most recent activity in California involved legislative attempts to specifically mandate substantial bonds for a defined class of environmental plaintiffs.

Bills were introduced that would allow a defendant to seek a court order requiring the plaintiff to furnish a written undertaking as security for costs, attorneys' fees, and any damages incurred by the defendant as a result of the delay in a "construction project." The undertaking could be sought "in any action brought by any plaintiff, other than the state, a county, or a municipal corporation to enjoin a construction project which has received all legally required licenses and permits." The undertaking would be required if the defendant could show 1) that the plaintiff has "no reasonable possibility of obtaining a judgment against the moving defendant" and 2) that the plaintiff will not suffer "undue economic hardship" by filing the undertaking.

These bills were supported by the construction industry to discourage frivolous lawsuits directed against construction pro-

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164. One court has indicated that the private defendant's harms may be entitled to greater protection. Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975).


166. A "construction project" as defined by the bills would include but is not restricted to "the construction, surveying, design, specifications, alteration, repair, improvement, maintenance, removal of or demolition of any building, highway, road, parking facility, bridge, railroad, airport, pier or dock, excavation or other structure, development or other improvement to real or personal property." See bills, note 165, supra.

167. Id.

168. Id.
jects. Opponents of the proposals included the Resources Agency of California, the Governor’s Office of Planning and Research, the Environmental Defense Fund, the Sierra Club, Friends of the Earth, and environmental lawyers. Three of the bills were passed by overwhelming majorities, and a fourth died on the senate floor for lack for action in the rush to pass Proposition 13 legislation. The three that passed were subsequently vetoed by Governor Brown, who saw no need for further protection for corporate defendants.

There were numerous criticisms of the bills. They not only pertained to preliminary injunctions, but also to writs of mandate. In addition, the bills applied to public agency plaintiffs, such as the California air pollution control districts and the California Coastal Commission. While the legislation would have required a court to find that the plaintiff would suffer “no undue hardship” in posting the bond, it did not require the court to consider the total for which the plaintiff might ultimately become liable. The “undue hardship” test is vague and could conceivably eliminate other factors—particularly the public interest—in deciding the amount of the bond. For-


171. Governor Brown vetoed S.B. 1819 on July 10, 1976, stating: “The additional protections which this bill would provide for certain defendants appear to be unwarranted in view of the protection afforded all defendants by existing statutes and court practice.” S.B. 571 was vetoed on September 24, 1977. The Governor vetoed S.B. 1415 on July 12, 1978, and stated: “I vetoed this bill twice before because I did not find evidence that its provisions would curtail questionable lawsuits. No additional information has been presented this year that alters my earlier conclusion.”


An amendment to S.B. 1667 changed the language “in any action” to “on granting an injunction,” rendering the bill rather harmless. Read with this change, the judge who had just granted a preliminary injunction (which involved a finding of likelihood of success on the merits) would be required to find that “there is no reasonable possibility of the plaintiff’s success on the merits” in order to trigger the bond requirement. The chances of the same judge arriving at these two contradictory conclusions about the same suit appear slim to say the least.


feiture of the bond would be mandatory regardless of the eventual reason the plaintiff lost the case, thus eliminating judicial discretion in awarding damages.\footnote{175} Finally, the existing bond statute was seen to provide adequate protection for defendants, and at any rate, the appellate courts retained the power to reduce substantial bonds for environmental plaintiffs.

This legislation is ill-conceived, contrary to the trends established by the courts, and severely detrimental to the future of effective environmental litigation. Perhaps the best reason for the failure of this legislation in California has been the repeated inability of its proponents to produce any significant evidence of economic injury caused by unmeritorious environmental litigation.

Two similar bills were defeated in Michigan in 1973\footnote{176} and 1975.\footnote{177} In 1973, a bill was introduced in the state senate to amend the Michigan Environmental Protection Act (MEPA) to require posting of “a surety or cash bond approved and in an amount fixed by the Court” as a condition precedent to injunction of continued construction where any required permit had been obtained and “construction of a building or other structure” had begun.\footnote{178} If the final injunction was not issued, the bill would have required payment of damages resulting from the increase in construction costs due to an erroneous injunction. The most frequently voiced objection was the preclusion of citizen environmental litigation. The bill died in committee.\footnote{179}

Two years later, a bill was introduced to require a bond of plaintiffs suing under MEPA in a figure not less than “the amount of damages and costs which may be assessed against” the plaintiff.\footnote{180} Proponents of the bill argued that its purpose was to increase investor confidence in Michigan industry. A house of representatives’ analysis pointed out that investors

\footnote{175. Id. As this article goes to press, another bill, similar to S.B. 1667, has been introduced in the California Legislature. See notes 165 & 172, \textit{supra}. This new bill, S.B. 698, would further limit to $500,000.00, plaintiff’s liability for the undertaking. Cal. Legis. 1978-1979 Reg. Sess., S.B. 698 (introduced by Senator Foran, March 21, 1979) (on file at Santa Clara Law Review).}
\footnote{176. Mich. Legis. S.B. 751 (1973), introduced by Senator Bouwsma, and its subsequent history are chronicled in Sax & Dimento, \textit{supra} note 80, at 47-48.}
\footnote{177. The bill, Mich. Legis. S.B. 1003 (1975), introduced by Senator Mack, and its controversy is described in Haynes, \textit{supra} note 143, at 668-72.}
\footnote{178. See note 176 \textit{supra}.}
\footnote{179. Id.}
\footnote{180. See note 177 \textit{supra}.}
had not neglected Michigan industry and there was no evi-
dence that jobs had been lost or industry migration had been
caused by MEPA lawsuits. In "a confused shouting debate,"
the house soundly defeated the bill by a vote of 68-29.

Like the California bills, the Michigan legislation would
have effectively prohibited all but the wealthiest plaintiffs
from seeking environmental protection. Fortunately, these bills
were defeated or vetoed. Thus, it appears that legislation that
would increase the amount of bonds set for environmental
plaintiffs seeking preliminary injunctions or relief has been
unsuccessful.

A better approach is to follow the lead of at least five
states and enact legislation that would set a ceiling on the
bonds required of environmental plaintiffs. These states have
attempted to reconcile the usual bond requirements, which
would effectively preclude valuable citizen litigation, with the
desire by defendants to be free of unmeritorious litigation. The
compromise legislation that has resulted empowers the court to
order the environmental plaintiff to post a bond not to exceed
$500. Many of these statutes were modeled after MEPA
which provides:

If the court has reasonable ground to doubt the sol-
vency of the plaintiff or the plaintiff's ability to pay any
cost or judgment which might be rendered against him in
an action brought under this act the court may order the
plaintiff to post a surety bond or cash not to exceed
$500.00.

States that statutorily limit bonds for environmental
plaintiffs have found them successful. They have not been
flooded with environmental litigation, have not experienced
larger numbers of frivolous suits, nor have they suffered signifi-

182. See note 177 supra. The bill was later amended in the house and the house's
changes were rejected by the senate. Apparently, the bill died in conference committee.
Ann. § 34A-10-3 (1977 rev.) One state, however, specifically allows the court to impose
a bond sufficient to indemnify the defendant when an environmental plaintiff seeks
184. Id.
cant economic setbacks. Some statutes go so far as to eliminate the bond requirement completely where private litigation acts to enforce environmental laws. Perhaps ironically, California itself forbids the exaction of a bond from any plaintiff who would seek to preliminarily enjoin projects that violate the California Coastal Act. Similarly, no bond may be required of plaintiffs who sue public entities to enforce the duties imposed by the Act.

The trend, if one can be discovered, appears to be towards nominal bond statutes for environmental plaintiffs. Prior to the 1970's, special statutes for public interest plaintiffs were non-existent. In the last decade, several states have enacted laws adopting nominal bonds. Others have rejected attempts to impose substantial bonds. This result is perhaps best explained by the perceived importance of environmental citizen suits and lack of economic harm to defendants by low bonds. As more jurisdictions confront the issue, this trend may be expected to grow.

CONCLUSION

The question of injunction bonds in environmental litigation provides a microcosmic synthesis of a wider clash between the two societal goals of environmental protection for the pub-

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 Any person may maintain an action for any violation of this division.
 On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to restrain any further violation of this division. No bond shall be required for an action under this section.

The importance of public participation in coastal management is underscored by Cal. Pub. Res. Code § 30006 (West 1977) which states:

 The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation, and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.


lic and economic protection for commercial and public defendants. Plaintiffs stress the existence of an immediate environmental injury; defendants point to the need for economic protection should an initial decision for plaintiffs be reversed. In the individual case before a court, the bonding decision must be defined by the equities of the case and the boundaries of statutory and case law.

This article has offered several rationales for the establishment of nominal bonds for public interest environmental plaintiffs. Environmental plaintiffs cannot post substantial bonds. It is undesirable to require non-profit groups or private persons to post bonds in order to enforce laws that benefit the public weal. Citizen enforcement of environmental laws is essential given the need for environmental protection and the scarce public resources allocated to enforcement.

The preliminary injunction test serves as an effective deterrent to frivolous suits. The need for the bond as a compensatory tool has been overplayed, and there are often good reasons for having defendants bear the cost of complying with the preliminary order. Finally, courts and legislators have frequently decided that, as a matter of policy, immediate environmental protection is to be favored over the prospective economic harm to defendants.

If the public interest environmental plaintiff is to be encouraged to vindicate legal rights, the hurdle of the injunction bond must be lowered. Such a change should contribute to a quality environment, a universally acknowledged goal.