Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions

The National Environmental Policy Act of 1969\(^1\) established a national goal of environmental preservation and improvement\(^2\) that Congress and the states have sought to achieve by enacting various legislation.\(^3\) While enforcement of many of the statutes has been entrusted exclusively to government agencies,\(^4\) recent years have witnessed an increasing realization that effective environmental improvement is possible only if private citizens are allowed and encouraged to participate in the enforcement process.\(^5\) The recent liberalization of standing requirements for civil suits in general\(^6\) has facilitated citizen enforcement of environmental protection laws. Moreover, many recent environmental protection acts contain specific provisions authorizing citizen enforcement through private litigation.\(^7\) Parties whose interests are threatened by environmental suits, however, have jeopardized the continued development and future effectiveness of citizen enforcement of environmental protection

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2. "The Congress . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned private and public organizations, to use all practicable means and measures . . . in a manner calculated to foster and promote general welfare, to create and maintain conditions under which man and nature can exist in productive harmony. . . ." National Environmental Policy Act of 1969, § 101(a), 42 U.S.C. § 4331(a) (1970).
laws by devising a new litigation strategy—the assertion of a multi-
million dollar counteraction (either counterclaim or countersuit)
against the environmental plaintiff. Designed both to harass plain-
tiffs into compromising or withdrawing their suits and to discourage
future suits by either the present plaintiff or other prospective plain-
tiffs, this strategy has had measurable effects.

This Note first outlines the basic characteristics of the counterac-
tion strategy and considers the implications of its future proliferation
and then analyzes proposals to eliminate or ameliorate the impact
of the strategy in terms of their effectiveness and practicability.8

I. CHARACTERISTICS OF THE COUNTERACTION STRATEGY

A counteraction may take the form of either a counterclaim or
a countersuit and may be initiated either by an original defendant
in the environmental protection suit or by a party whose interest
would be indirectly affected by the outcome of that suit. Both
forms, as employed in the environmental context, share several gen-
eral characteristics. First, counteraction liability is, with few excep-
tions, based on one or more of five common-law torts:9 defama-
tion,10 malicious prosecution,11 abuse of process,12 interference with
contractual relations, and interference with prospective advantage.13

8. The information upon which this Note is based was gathered by sending letters
inquiring about familiarity with the counteraction technique to about 150 national
and local environmental organizations known to have been involved in litigation and
to about 50 private environmental plaintiffs or plaintiffs' attorneys. About 90 per
cent of those inquiries were answered. A few responses indicated no awareness of
the tactic, many showed a general awareness of the tactic but no direct experience,
some indicated an awareness of specific instances without personal experience, and
others indicated some direct experience as objects of the tactic. Detailed discussions
followed with those environmental groups and attorneys who had had direct expe-
dience with the tactic. Over-all, these groups and attorneys were extremely willing
to provide information and displayed concern regarding the use of the tactic.

9. Other theories are also relied upon, depending upon the facts of the particular
case. For example, in Property Dev. Group v. Irish, No. 7265 (Cir. Ct. Wash­
tenaw County, Mich., filed Dec. 14, 1972), and Apfel v. Cook, No. 926 (Cir. Ct. Antrim
County, Mich., June 23, 1973), the counteractions alleged civil conspiracy among the
individuals who brought the original action. Claims for such obscure actions as "of-
ficious intermeddling" have also been asserted.

10. See, e.g., Adams v. Town of Rockland, No. 989 (Sup. Ct. Sullivan County,
N.Y., filed June 11, 1971); Property Dev. Group v. Irish, No. 7265 (Cir. Ct. Wash­
tenaw County, Mich., filed Dec. 14, 1972); Apfel v. Cook, No. 926 (Cir. Ct. Antrim

11. See, e.g., Adams v. Town of Rockland, No. 989 (Sup. Ct. Sullivan County,
N.Y., filed June 11, 1971); Tanton v. Department of Natural Resources, No. 90-3

June 29, 1973, dismissed March 25, 1975, refiled April 24, 1975) (suit in response
to petition of state agency on the validity of the issuance of a permit).

5, 1972) (suit in response to speech at public hearing).
Generally, the theory of counteraction liability is determined by the technique chosen by the environmental group to promote environmental quality. Groups that rely upon publication to create awareness of environmental dangers are likely to face a defamation counteraction; those that rely primarily on the judicial forum more often face a counteraction alleging abuse of process or malicious prosecution. Second, the counteraction invariably includes a request for damages in the prayer for relief. Typically, an astronomical sum is requested; claims often range between $40 and $80 million.

Third, the litigant asserting the counteraction is usually a private party with a pecuniary interest in the outcome of the suit: governmental units have rarely utilized the tactic. Fourth, the targets of the counteraction are almost exclusively local and ad hoc environmental groups and individuals. Originally, counteractions were also brought to harass established national environmental organizations, but the willingness of these organizations to litigate the counteractions seems to have halted the practice.

The final and perhaps most interesting characteristic of these counteractions is that they are rarely litigated. Because most are

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16. However, counteractions may be asserted in response to original suits against the government. See Adams v. Town of Rockland, No. 989 (Sup. Ct. Sullivan County, N.Y., filed June 11, 1971). There is some evidence of counteraction threats by government officials, although none of these threats has yet materialized into a counteraction. See Letter from Environmental Defense Fund, East Setauket, N.Y., Sep. 5, 1974, on file with the Michigan Law Review (hereinafter EDF Letter).

17. Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972), was one of the first (and least successful) documented attempts to use the counteraction tactic.

18. James Moorman, attorney for the Sierra Club Legal Defense Fund, stated in a telephone conversation on Nov. 31, 1974, that Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972), represented the last serious attempt to use counteraction harassment against the Sierra Club, and that counteractions are no longer a problem for that organization. The National Audubon Society has not been the object of threatened suits designed to inhibit its litigation but its local branches have faced such actions. Letter from Louis R. Proyect, attorney, Oct. 1, 1974, on file with the Michigan Law Review. The Environmental Defense Fund has received frequent threats of counteractions and countersuits but none has yet materialized. EDF Letter, supra note 16.

19. Only three litigated cases have been discovered. Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972), and McKeon Corp. v. Kennedy, No. 221454 (Super. Ct. Sacramento County, Cal., Jan. 5, 1972), were dismissed after argument on summary judgment. Apfel v. Cook, No. 926 (Cir. Ct. Antrim County, Mich., June 23, 1973), was also dismissed in summary judgment but was subsequently refiled. The overwhelming majority of counteractions never make it past the pleading stage. For example, Adams v. Town of Rockland, No. 989 (Sup. Ct. Sullivan County, N.Y., filed June 11, 1971), has remained inactive with no motion for summary judgment.
brought for harassment or bargaining purposes, they are withdrawn during the litigation of the original environmental claim or concurrently with the withdrawal or compromise of the environmental claim. In those known counteractions that have been litigated to a decision, environmental litigants have uniformly prevailed.

The counteraction strategy seeks to produce two results. The immediate objective is to cause the environmentalist to withdraw or compromise his suit. The litigant asserting the counteraction typically makes an offer to the environmental plaintiff for reciprocal dismissal of pending actions.20 While this offer is rarely accepted, the mere existence of the counteraction and the consequent threat of incurring enormous liability puts pressure upon the environmental plaintiff to settle his claim rather than litigate it.21 The second goal of counteractions is to discourage future suits.22 A multi-million dollar counteraction in one suit portends the possibility of such counteractions in future suits23 and thus may inhibit environmentalists from litigating meritorious claims.24 If the financial burden of bringing an environmental suit necessarily includes the cost of defending a counteraction, environmentalists may determine that use of the litigation technique is infeasible in most instances.

The counteraction strategy is most successful against ad hoc groups and small environmental organizations. Inexperienced in litigation25 and often formed merely to challenge a single environ-

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21. However, some attorneys whose clients have faced counteractions refuse to take them seriously. See, e.g., Letter from Joseph W. Wilcox, attorney, Oct. 25, 1974, on file with the Michigan Law Review [hereinafter Wilcox Letter]. Other attorneys have observed that a frivolous counterclaim "tends to solidify plaintiffs' resolve rather than scare them," Letter from George Snyder, attorney, Oct. 29, 1974, on file with the Michigan Law Review [hereinafter Snyder Letter], although environmentalists who hear of such counteractions by public rumor are deeply concerned. See id.

22. One possible effect of a counteraction is the depletion of the financial resources of the environmentalist against whom it is asserted, which thus prevents him from bringing future actions. See Snyder Letter, supra note 21.

23. The environmentalists seem to be as well acquainted with the existence and operation of this tactic as their attorneys. See Letter from J. Richard Aramburu, attorney, Oct. 25, 1974, on file with the Michigan Law Review.

24. See Sive Letter, supra note 19 ("The threat of countersuit is constantly with attorneys bringing such suit and the organizations they represent. Regardless of how much assurance ... attorneys can advise potential plaintiffs that counterclaims will probably be dismissed, there is a real problem"); Sax & DiMento, Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act, 4 Eco. L.Q. 1, 22 (1974).

mental danger, such groups rarely possess the resources to carry on a prolonged legal battle.\textsuperscript{26} Group members in many instances evi­
dence a great fear of incurring extensive liability in the litigation of environmental claims: They seek to ensure a healthy environment but balk at the possibility of incurring multi-million dollar liability in the process.

The widespread use and success of the counteraction tactic could have far-reaching consequences. Many state environmental protection acts grant private citizens standing to litigate\textsuperscript{27} and contain pro­
visions to minimize the cost of bringing suit under them.\textsuperscript{28} The viability of these acts depends in large measure upon citizen willingness to engage in private environmental litigation.\textsuperscript{29} Citizen suits prod administrative agencies into dealing with environmental problems\textsuperscript{30} and violators into complying with statutes.\textsuperscript{31} By discouraging citizen litigation through the threat of liability and litigation expense, the counteraction tactic undermines a principal means of enforcing state environmental protection acts.\textsuperscript{32} As a result, the enforcement of en­
vironmental regulations may be left exclusively to government agen­
cies, rendering the environment once again a ward of administrative discretion.\textsuperscript{33}

The implications of the counteraction tactic extend beyond its chilling effect upon environmental protection. Practically, the tactic

\textsuperscript{26} Not only will the environmentalist group's resources affect the initial decision to go to trial, \textit{see id.} at 51, but they will determine the over-all impact of a coun­
teraction on the group. \textit{See Wilcox Letter, supra} note 21. Those groups that depend upon ad hoc fund raising are particularly susceptible to compromise when faced with counteractions. \textit{See Letter} from Mrs. Lindsay C. Smith, Clean Water Chairman of the Alabama Conservancy, Jan. 1, 1975, on file with the \textit{Michigan Law Review}. Furthermore, the expenses incurred in defending counteractions may reduce the funds available for the groups' ongoing activities. \textit{See Three Lakes Assn. Complaint, supra} note 20, at 29-30.

\textsuperscript{27} \textit{See statutes} cited in note 7 \textit{supra}. \textit{See generally 2 ENV. L. REV.} 313 (1972).

\textsuperscript{28} For example, section 2(a) of the Michigan Environmental Protection Act, \textit{MICH. COMP. LAWS ANN.} \textsection 691.1202a (Supp. 1975), sets $500 as maximum security that a plaintiff may be required to post. It was recognized that the liberal standing provisions of the Act would be futile if another section of the Act exposed environmentalist plaintiffs to substantial costs in bringing suit. \textit{Sax & Conner, Michigan's Environmental Protection Act: A Progress Report,} 70 \textit{Mich. L. REV.} 1003, 1077 (1972).

\textsuperscript{29} \textit{See J. SAX, supra} note 5, at 113; \textit{Hadden, The Socio-Economic Aspects of Private Environmental Litigation,} 45 \textit{J. URBAN L.} 607, 612 (1972); \textit{Sax & DiMento, supra} note 24, at 2.

\textsuperscript{30} \textit{See Hadden, supra} note 29, at 612 ("Regulatory agencies are more often vic­
tims than villains, and well-placed law suits naming them as defendants can liberate them from unwarranted political pressure"); \textit{Sax & Conner, supra} note 28, at 1009. \textit{See also Sax & DiMento, supra} note 24, at 12.

\textsuperscript{31} \textit{J. SAX, supra} note 5, at 231.

\textsuperscript{32} \textit{Sax & Conner, supra} note 28, at 1004-05.

\textsuperscript{33} The breakdown in effective environmental regulation caused by administrative discretion may have prompted legislatures to provide for private enforcement. \textit{See Sax & Conner, supra} note 28, at 1005.
wastes the judicial resources necessary to supervise the filing of sham pleadings, to set up pre-trial conferences and discovery, and to conduct a formal trial. With the workload of courts increasing at almost astronomical rates, the expenditure of judicial resources for other than settling genuine disputes is especially odious. Moreover, the tactic challenges the ability of private citizens to enforce their rights in the judicial setting and thus undercuts what is perhaps the most expeditious way for an ordinary citizen to reaffirm his belief in our governmental system:

The opportunity for anyone to obtain at least a hearing and honest consideration of matters that he feels important must not be underestimated. The availability of the judicial forum means that access to government is a reality for the ordinary citizen—that he can be heard, and that, in a setting of equality, he can require bureaucrats and even the biggest industries to respond to his questions and justify themselves before a disinterested auditor...  

In the extreme, the counteraction technique threatens to destroy whatever equality exists in the judicial setting. The openness of the courts becomes a myth if an affluent party, through the assertion of a multimillion dollar counterclaim or countersuit, can effectively force an environmentalist out of court.

There is one important caveat to this extensive indictment of counterclaims and countersuits in environmental protection actions. While the motives of environmentalists might generally be laudable, there is always a possibility that they will either intentionally or unconsciously assert a frivolous environmental claim. Consequently, a counteraction may have merit. Any proposed solution to the counteraction problem must recognize and preserve the rights of those asserting meritorious counteractions.

II. COUNTERACTION THEORIES AND DEFENSES

This section describes the various counteraction theories of liability. Because few counteraction cases are litigated to a decision and because most of those decided are not reported, the factual circumstances surrounding the counteraction tactic have largely gone un-

35. J. SAX, supra note 5, at 112 (emphasis original).
36. For instance, a frivolous environmental suit may arise when a large contractor on a multimillion dollar construction project faces a stringent completion deadline that he must meet to avoid substantial monetary penalties. An environmental group, knowing of no real harm created by the project, nevertheless may bring suit to enjoin construction and thereby obtain a monetary settlement from the pressured contractor that will enrich its own treasury. In such circumstances, there is no justification for shielding the environmentalist from the normal penalties imposed for abuse of the legal system.
37. See note 19 supra.
noticed. Actual counteraction cases that illustrate the problems faced by environmental plaintiffs are therefore included to help environmentalists prepare future strategies. Consideration is also given to those defenses generally available to environmentalists. While the availability and probability of success of these defenses make a finding of liability unlikely, the significance of the defenses must be discounted. Affirmative defenses are successful only after substantial trial litigation. When asserted against poorly funded environmentalists with little litigation experience, counteractions can harass and instill a fear of liability before this stage is reached. To minimize this harassment, environmentalists need some method of dismissing counteractions in the pre-trial stages of the litigation of the environmental claim. In attempting to devise a defense that can serve this purpose, environmental plaintiffs recently have relied upon the first amendment freedom to petition the government. The legal theory that underlies this defense and its potential for success are discussed in detail.

A. Defamation

The tort of defamation is the basis for most harassing counteractions presumably because many environmentalists attempt to maximize publicity about activities allegedly damaging the environment. Significantly, even though such publicity may appreciably precede commencement of an environmental suit, it is in most instances only after the environmentalist has brought suit that a counteraction is asserted alleging that the prior publicity was defamatory. For example, in Adams v. Town of Rockland, Adams, contending that a proposed subdivision would pollute the Beaverskill River and a nearby lake, brought suit against a local zoning board and two land developers. Over one year prior to initiating the action, Adams had written a letter to the New York Times complaining that the defendant developers had misrepresented the environmental impact of the subdivision in a series of advertisements. In a letter to a local newspaper, Adams had also charged that the subdivision would pol-

38. Although the law of defamation may vary, causes of action for libel are widely recognized throughout the states. See Farmers Educ. & Cooperative Credit Union v. WDAY, 360 U.S. 525 (1959). One court has defined libel as follows: "Libel is generally understood to be that which is written or printed, and published, calculated to injure the reputation of another by bringing him into ridicule, hatred or contempt; and lessening the esteem of the victim and injuring him in his trade or business are other elements of the tort." Laurence Univ. v. State, 68 Misc. 2d 408, 413, 326 N.Y.S.2d 617, 624 (Ct. Cl. 1971), revd. on other grounds, 41 App. Div. 2d 463, 344 N.Y.S.2d 183 (1973). Damage to reputation is the essence of libel. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1970).
lute both the river and the lake.\textsuperscript{41} It was only after Adams commenced his injunction action that the developers asserted their defamation claim,\textsuperscript{42} which alleged that his letters had injured them to the extent of $1 million.\textsuperscript{43}

While many generally recognized defenses are available to an environmentalist faced with a defamation counteraction,\textsuperscript{44} truth and the privilege of fair comment on issues of public concern have been the defenses most frequently invoked.

In most jurisdictions, truth is an absolute defense to charges of libel and slander.\textsuperscript{46} In other jurisdictions, truth is a defense as long as publication is made for good motives or for justifiable ends.\textsuperscript{46} Environmentalists capable of proving the truth of their publications, therefore, have little reason to compromise their claims because of defamation counteractions. In many instances, however, it is difficult to prove the accuracy of the publicized facts.\textsuperscript{47} Where the allegedly defamatory matter primarily describes visible physical dam-

\textsuperscript{41} See Adams Answer, \textit{supra} note 40, at 5-6.

\textsuperscript{42} A claim for malicious prosecution was also included in this counterclaim. \textit{See} Adams Answer, \textit{supra} note 40, at 6.

\textsuperscript{43} Another common publicity effort by an environmental plaintiff formed the basis for the counterclaim in Property Dev. Group v. Irish, No. 7265 (Cir. Ct. Washtenaw County, Mich., filed Dec. 14, 1972). In that case, the Little Traverse Bay Group had sent newsletters to residents throughout the state that detailed the proposed development of the Traverse Bay region and the potential environmental problems, and requested contributions to aid in a legal action to halt the Cedar Cove construction project. Also included in the counterclaim was an allegation that the defendant environmentalists had falsely represented to state officials that the project would destroy certain wetlands.

\textsuperscript{44} These defenses include truth, consent, absolute privilege, qualified privilege, and fair comment or constitutionally privileged criticism. \textit{Jolley v. Valley Publishing Co.}, 63 Wash. 2d 537, 541, 338 P.2d 139, 141 (1964).

\textsuperscript{45} \textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130, 151 (1967). If, upon a lawful occasion for making a publication, an individual has published the truth and no more, then there is no sound principle that can make him liable, even if he was actuated by malice: if there is a legal right to make the publication and the matter is true, the end is justifiable. \textit{Garrison v. Louisiana}, 379 U.S. 64, 73 (1964). The raising of the defense of truth, however, may turn into a hazardous adventure if its proponent is unsuccessful. \textit{See} 56 \textit{MICH. L. REV.} 659 (1958). Some courts have held that the unsuccessful raising of the defense of truth has further published the defamatory matter to the hearing of the jury and have thus allowed the unsuccessful plea to be considered in aggravation of damages. \textit{See} Marley v. Providence Journal Co., 86 R.I. 229, 134 A.2d 180 (1957).


\textsuperscript{47} The environmentalist litigant must show that the truth is as broad as the allegedly defamatory statement. \textit{Empire Printing Co. v. Roden}, 247 F.2d 8, 15 (9th Cir. 1957). However, immaterial variances and defects in proof on minor matters will be disregarded if the substance of the matter is justified. \textit{Stoneking v. Briggs}, 254 Cal. App. 2d 563, 573, 62 Cal. Rptr. 249, 256 (1967).
When, as is often the case, the publication largely speculates about prospective harm, however, greater difficulty arises. Establishing a factual basis for the statement may require expert testimony, which may in turn require monetary resources not available to environmentalists.\textsuperscript{48} The truth justification, therefore, may be of limited utility.

The overlapping common-law and constitutional privileges of fair comment on issues of public concern, which do not require a demonstration of truth,\textsuperscript{50} will be appealing to environmentalists when the truth of the publication is difficult to prove. The common law recognizes a broad privilege for publication of comments on matters of public concern.\textsuperscript{51} The initial constitutionalization of this privilege as a civil liability defense in \textit{New York Times v. Sullivan}\textsuperscript{52} covered only comments about public officials acting in their official capacity. While the scope of this constitutional privilege was later enlarged to cover comments on general matters of public concern,\textsuperscript{53} the Supreme Court's recent decision in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{54} restricted its reach essentially to statements concerning "public officials" or "public figures."\textsuperscript{55} The constitutional privilege consequently is of little aid to the environmentalist unless the allegedly defamatory statement concerned a public official or public figure.\textsuperscript{56}


\textsuperscript{49} The problem of costs of expert witnesses has been solved in some cases by the recognition of a "lay expert," i.e., a local citizen with special knowledge of the effects of activities upon an area, based on long-time familiarity with that area. While the effectiveness of such "lay experts" is unclear, it may help an environmentalist when combined with expert testimony. Sax & DiMento, supra note 24, at 34-35.

\textsuperscript{50} Fairbanks Publishing Co. v. Francisco, 390 P.2d 784, 793 (Alas. 1964).

\textsuperscript{51} W. PROSSER, supra note 46, § 118, at 822.

\textsuperscript{52} 376 U.S. 254 (1964).

\textsuperscript{53} In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Supreme Court extended the \textit{Sullivan} rule to public figures. The plurality opinion in \textit{Rosenbloom v. Metromedia Inc.}, 403 U.S. 29 (1970), held that it is the issue discussed, rather than the individual who is allegedly defamed, that determines the availability of the privilege.

\textsuperscript{54} 418 U.S. 323 (1974).

\textsuperscript{55} The Court did conclude, however, that while states "may define for themselves the appropriate standard of liability for defamatory falsehood injurious to a private individual," they cannot impose liability without fault. 418 U.S. at 347 (footnote deleted). Moreover, the Court concluded that recovery in defamation cases must be limited to actual damages and cannot include presumed and punitive damages. 418 U.S. at 349-50.

\textsuperscript{56} A business may be a public figure under \textit{Gertz}, but the standard by which this is to be determined is unclear. See Note, \textit{Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation}, 75 COLUM. L. REV. 963, 990-91 (1975). See also Redish, \textit{The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression}, 39 GEO. WASH. L. REV. 429, 470-71 (1971). Furthermore, environmentalists whose allegedly defamatory remarks...
Whether the allegedly defamatory matter qualifies as a "fair comment" on a matter of "public concern" and is thus protected by the common-law privilege is a factual determination presumably dependent upon factors such as the social values at stake, the amount of private intrusion, and the public importance of the comment.\textsuperscript{57} Therefore, it is difficult to delineate with certainty the particularized circumstances under which environmentalists could invoke the privilege. Local zoning decisions, grants of construction permits, and environmentally harmful activities in general are probably of sufficient public concern to warrant protection by this qualified privilege.\textsuperscript{58} One significant limitation on the privilege in many jurisdictions, however, is that only expressions of "comment" or opinion and not misstatements of fact are protected.\textsuperscript{59} Although this distinction has been vigorously criticized,\textsuperscript{60} its existence counsels environmentalists to couch their public allegations in terms of opinion rather than fact.

B. \textit{Malicious Prosecution}

Environmentalists at times have been confronted with counteractions alleging malicious prosecution or, as the tort is sometimes called, wrongful civil proceedings.\textsuperscript{61} Originally a remedy for unjustifiable criminal proceedings, the malicious prosecution tort in most but not all jurisdictions has been extended to cover the wrongful initiation of civil suits.\textsuperscript{62} A counteraction based on this tort that requests millions of dollars in damages may initially scare inexperienced environmentalists. In light of the elements that must be proved in an action for malicious prosecution, however, an environmental claim brought in good faith, even though legally frivolous, should not give rise to liability.

A malicious prosecution counteraction was asserted, for example, in \textit{Property Development Group v. Irish}.\textsuperscript{63} In early 1972, Irish and three other persons formed the Little Traverse Bay Group (LTG), an organization designed to protect the natural areas of northern Michigan from damaging overdevelopment. Soon thereafter a series of confrontations occurred between LTG and the Property Develop-


\textsuperscript{58} See \textit{Charles Parker Co. v. Silver City Crystal Co.}, 142 Conn. 605, 116 A.2d 440 (1955); \textit{W. Prosser}, supra note 46, \S 118, at 822-23.

\textsuperscript{59} \textit{W. Prosser}, supra note 46, \S 118, at 819-20.


\textsuperscript{61} See \textit{W. Prosser}, supra note 46, \S 120, at 850.

\textsuperscript{62} See id. \S 120, at 851-52.

ment Group (PDG), an organization seeking to construct a large condominium project along the northern Lake Michigan shoreline. LTG devised a multi-faceted program to arrest the project and sent two newsletters to citizens of several counties explaining the possible environmental impacts of the project and inviting them to make financial contributions to the group's efforts. In addition, LTG petitioned a state regulatory agency to deny construction permits for the project and, finally, brought suit to enjoin further development of the project until several alternative plans were considered. Immediately before trial of this suit, PDG filed a countersuit against Irish for $5,750,000 in which it alleged, inter alia, malicious prosecution, defamation, and interference with prospective economic advantage.

Although the counteraction in Irish was never tried, it is extremely doubtful that the malicious prosecution allegation would have succeeded. There are three principal elements to the malicious prosecution cause of action. First, counteraction plaintiffs ordinarily must prove the termination of the environmental suit in their favor. This requirement typically makes premature both a counterclaim for malicious prosecution in the original civil action, and a countersuit, as in Irish, prior to termination of the environmental claim. Second, plaintiffs must prove that the environmental proceeding was initiated without probable cause. Environmentalists who have sought advice of counsel in bringing their action should have no difficulty disproving this element: If the counsel's advice to bring suit was based upon full disclosure of the relevant facts by the environmentalists, probable cause for the original action will exist. Moreover, it is generally agreed that termination of the original claim in favor of the defendant is no evidence that probable cause was lacking. Third, plaintiffs must prove "malice" in bring-

64. These two circulars formed the basis for the libel claim asserted in the countersuit. See Complaint at 6-12, Property Dev. Group v. Irish, No. 7265 (Cir. Ct. Washtenaw County, Mich., filed Dec. 14, 1972) [hereinafter Property Dev. Group Complaint].

65. In this case, Irish v. Property Dev. Group, No. 234-3 (Cir. Ct. Emmet County, Mich., March 5, 1973), both temporary and permanent injunctive relief was sought. The court refused to grant the permanent injunction although jurisdiction to supervise the project was retained. See Sax & DiMento, supra note 24, at 11.

66. See, e.g., LaSalle Natl. Bank v. 222 East Chestnut St. Corp., 267 F.2d 247 (7th Cir. 1959), cert. denied, 358 U.S. 827 (1959). It is a favorable not a final termination that is required; termination by compromise or settlement is not considered a favorable termination. Paskle v. Williams, 6 P.2d 505, 214 Cal. Rptr. 482 (1931).

67. W. PROSSER, supra note 46, § 120, at 853 n.32.

68. Id. at 854.

69. See Alexander v. Alexander, 229 F.2d 111 (4th Cir. 1956); W. PROSSER, supra note 46, § 121, at 854.

70. See Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932).
ing the environmental action. Loosely defined in this context, "malice" may consist of a primary motive of ill will, a lack of belief in any possible success of the action, or a purpose in bringing the suit other than the adjudication of the claim. Presumably, any environmental action brought in good faith will fail to satisfy the malice requirement.

C. Abuse of Process

The essence of the abuse of process tort is that the judicial process in an earlier action, while perhaps initiated with probable cause, was used by the former plaintiff for a collateral advantage that is not a proper goal of a judicial proceeding. Abuse of process might lie, for example, if a business brought an environmental suit with the ulterior purpose of forcing a competitor to stop doing business in a certain area or with the purpose of extorting the payment of a debt.

For purposes of counteraction harassment, abuse of process is superior to malicious prosecution since the plaintiff need show neither that the process in the environmental action was obtained without probable cause, nor that the prior action was terminated in his favor. Abuse of process counteractions, either counterclaims or countersuits, can thus be brought while the environmental suit is still pending. Yet, environmentalists should have no more to fear from abuse of process counteractions than from malicious prosecution counteractions. An action brought in good faith for the purpose of alleviating an allegedly illegal environmental hazard should not give rise to liability under either of the tort theories.

D. Economic Relations Torts

Because environmental actions frequently damage the economic expectations of both defendants and nonparties, harassing counteractions are often based on business tort theories. Environmental

71. W. PROSSER, supra note 46, § 120, at 855.
72. Id.
74. W. PROSSER, supra note 46, § 121, at 856.
75. Id.
76. Id.
78. A third party whose economic interest will be affected by a judgment against the defendant may intervene in the original suit and join in a counterclaim against the environmental plaintiff. See, e.g., Alpine Lakes Protection Soc. v. Hardin, No. 8885 (W.D. Wash., filed 1971) (mining company that would have benefited from defendant's activities intervened in suit to stop road construction brought against Forest Service), discussed in Knibb Letter, supra note 20.
suits that constrain the conduct of a business have provoked counter-
actions founded on unjustifiable interference with prospective advan-
tage;79 those that threaten to alter rights under an existing contract
have provoked charges of inducing breach of contract or, more gen-
erally, interference with contractual relations.80

In an action for interference with contractual relations, the plain-
tiff must prove that the defendant intentionally interfered with a le-
gal, enforceable contract and thereby injured the plaintiff.81 Typ-
ically, in the environmental context a complaint will allege that the
plaintiff has been prevented from performing a contract or that his
performance has been rendered more burdensome or expensive.
There is a broad privilege, however, that protects the interfering de-
fendant if his actions have a proper purpose or are prompted by an
impersonal or disinterested motive of a laudable character.82 In
particular, several decisions suggest that a privilege exists for actions
undertaken to protect the public interest.83 In light of these privi-
leges, environmentalists rarely should incur liability based on inter-
ference with contractual relations.

The closely related tort of interference with prospective advan-
tage also should not give rise to liability for actions by environmen-
talists. While a plaintiff need only prove that the defendant inten-
tionally frustrated his reasonable expectations of profit or gain,84 the
environmentalist again should escape liability by demonstrating that
his actions protect a legitimate interest.85

Similar to defamation (and perhaps at times confused with it)
are the torts of injurious falsehood and product disparagement. The
essence of these torts in the environmental context is that the de-

79. See, e.g., McKeon Corp. v. Kennedy, No. 221454 (Super. Ct. Sacramento
County, Cal., Jan. 5, 1972); Property Dev. Group v. Irish, No. 7265 (Cir. Ct. Wash-
tenaw County, Mich., filed Dec. 14, 1972); Apfel v. Cook, No. 926 (Cir. Ct. Antrim

80. At least since Lumley v. Gye, 118 Eng. 749 (Q.B. 1853), a cause of
action based on unjustifiable intentional interference with the contract of a third per-
son has been recognized. Arkansas v. Texas, 346 U.S. 368 (1953). There are four
essential elements of this cause of action: (1) defendant's knowledge of an existing
contract; (2) inducement by defendant of a third person to breach of contract; (3)
subsequent breach by the third person; and (4) damage to the plaintiff. Northern
may be allowed not only for interference with performance of an existing contract,
but also for the interference with a contract that would have been consummated but
for the wrongful interference. Zoby v. American Fidelity Co., 242 F.2d 76, 79 (4th
Cir. 1957).

81. W. PROSSER, supra note 46, § 129.

82. Id. § 129, at 943.

83. See Legris v. Marcotte, 129 Ill. App. 67 (1906); Radio Station KFH Co. v.
Musicians Assn. Local 297, 169 Kan. 596, 220 P.2d 199 (1950); Green v. Samuel-
sen, 168 Md. 421, 178 A. 109 (1935); Wholesale Laundry Bd. of Trade v. Tar-
rullo, 103 N.Y.S.2d 23 (Sup. Ct. 1951).

84. W. PROSSER, supra note 46, § 130, at 950.

85. Id. § 130, at 953 n.94.
fendant has disparaged the plaintiff's business or products and has thus caused others not to deal with the plaintiff. These torts are more difficult to prove than defamation, for, in addition to proving the statement's publication and its disparaging innuendo, the plaintiff must prove that the statement is false and that he has suffered actual damages. Moreover, the privileges available in defamation actions, in particular the privilege of fair comment on matters of public concern, are available as defenses. Perhaps as a result of these difficulties, counteractions have rarely alleged either of these torts.

E. The Defense of Freedom To Petition the Government

A counteraction that states a valid claim for relief, even though frivolous in light of available defenses, is apt to be judicially consolidated with the environmental claim and not disposed of until the environmental claim comes to trial. Because pre-trial maneuvers in the litigation of the environmental claim are time-consuming, a counteraction may, for many months, pressure environmentalists into accepting a less desirable settlement. Therefore, environmentalists need a defense to counteractions that justifies an immediate dismissal of the counteraction for failure to state a claim on which relief may be granted. Such a defense, based on the first amendment right to petition the government for redress of grievances, has recently been suggested.

Sierra Club v. Butz, one of the few counteraction cases reaching the point of decision, involved a counterclaim alleging both interference with contractual relations and interference with prospective advantage. The Sierra Club had brought suit against the Secretary of Agriculture and Humboldt Fir, Inc., a private logging company, to prevent further logging and road construction in a certain forest area until the Secretary could review a request that Congress declare the forest a wilderness area. At the time of suit, Humboldt had a contract with the Department of Agriculture for timber sales and hoped to benefit from the Forest Service's contemplated program to expand sales from the area. Humboldt responded swiftly. On the same day that the Sierra Club filed its complaint, Humboldt filed the initial pleading of its two-count counterclaim that ultimately requested nearly $20 million in damages. The Sierra Club response to this counterclaim has profoundly influenced subsequent counteraction litigation for two reasons: it was the first environmentalist at-

86. Id. § 128.
87. Id. § 128, at 919-20.
tempt to confront a harassing counteraction with serious courtroom litigation, and it suggested a constitutional framework for defending such counteractions. The court dismissed Humboldt's counterclaim for failure to state a claim for relief on the ground that the facts it alleged amounted to an exercise by the Sierra Club of its right to the petition the government.\textsuperscript{91}

Because the court's reasoning was rather facile, the arguments supporting the constitutional defense are stated here more persuasively in order to evaluate the viability of the court's conclusion. The court should have applied the constitutional defense in this case only after finding that the following four requirements were satisfied: first, that the Sierra Club's actions in organizing opposition to Humboldt, in petitioning relevant federal agencies, and in bringing suit against Humboldt for declaratory and injunctive relief amounted to petitioning the government for redress of grievances; second, that granting Humboldt damages on its tort counterclaim would constitute state action; third, that the state action, if found, would infringe the right to petition the government without adequate justification; and fourth, that the freedom to petition the government can be employed as a defense in a civil suit.

With regard to the first requirement, the \textit{Sierra Club} court presumed that the alleged injury was caused by petitioning the relevant federal agencies, notwithstanding Humboldt's allegation, recounted by the court, that its injury flowed from all of the Sierra Club's activities, including its suit for injunctive and declaratory relief. Because petitioning federal agencies is clearly within the constitutional protection, the court ignored the more difficult question whether the commencement of a civil suit constitutes petitioning the government. On this issue, the leading decision is \textit{NAACP v. Button},\textsuperscript{92} in which the Supreme Court invalidated a state's attempt to preclude the NAACP from funding group legal services. The Court concluded that the NAACP activities in organizing and sponsoring litigation constituted political association protected by the first amendment:

\textit{In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.}

\textsuperscript{91} 349 F. Supp. at 939.

\textsuperscript{92} 371 U.S. 415 (1963).
. . . For such a group, association for litigation may be the most effective form of political association.93

While the *Button* Court did not hold that litigation, when engaged in for purposes other than resolving private differences, amounts to petitioning the government for redress of grievances, its dicta clearly suggest that result. Under this analysis, it is arguable that an environmental organization is petitioning the government even if it turns only to the courts for relief rather than, as was the case in *Sierra Club*, principally to administrative agencies. However, the Court has not clarified its dicta in *Button*. Moreover, under *Button*, environmental organizations must demonstrate that their litigation is essentially political expression rather than an attempt to resolve private differences—a demonstration that may be difficult if, for example, the alleged environmental hazard affects only a small geographic area and a limited number of landowners. The determination whether litigation is a form of political expression, that is, whether plaintiffs are acting as private attorneys-general, is an issue that doubtless will be difficult for courts to resolve.

The *Sierra Club* court failed to mention the requirement of state action. It has long been recognized, however, that, notwithstanding the literal language of the first amendment, a state can violate first amendment rights without enacting statutory prohibitions or taking affirmative action.94 State acquiescence or indirect participation in private conduct designed to deny constitutional rights may effectively amount to prohibited state action: “The First Amendment would . . . be a hollow premise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly . . . .”95 That state action within the contemplation of the fourteenth amendment may exist when state courts adjudicate civil actions between private parties was made clear by the Supreme Court in *New York Times v. Sullivan*.96 There the Court, in reversing a libel judgment in favor of a public official against publisher-critics of his official conduct, found state action in a state court adjudication of a civil claim that restricted the constitutional freedoms of the defendant: “The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”97 Environmentalists can analogously argue that state action occurs when a state creates the cause of action upon which the counterac-

93. 371 U.S. at 429-31.
97. 376 U.S. at 265.
tion is based, adjudicates its merits, and ultimately awards damages and enforces the judgment.

With regard to the third requirement, the court in Sierra Club apparently assumed that no state interests could justify state action restricting a genuine exercise of the freedom to petition the government: "[L]iability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petitioning is a 'sham' and the real purpose is not to obtain governmental action, but to otherwise injure the plaintiff." This absolute view of the first amendment freedom is difficult to support and, indeed, conflicts with dicta in Button to the effect that state interests in regulating the solicitation of legal work could support a narrow statutory limitation on first amendment freedoms. Because state interests can justify infringement in some situations, courts must weigh conflicting interests and forgo an absolutist position. States have significant interests in allowing their residents to recover for injuries suffered. The extent to which these interests support restrictions on the freedom to petition, an issue that should in the future prove of considerable interest to environmentalists, was unfortunately left unclarified in Sierra Club.

The fourth requirement—that the freedom to petition the government be available as a defense to a civil action—was found satisfied by the court in Sierra Club after substantial inquiry. The starting point of the court's two-pronged analysis was the Supreme Court's recognition in New York Times v. Sullivan that the constitutional freedoms of speech and press can be employed as affirmative defenses to common-law tort actions for defamation of public officials. Upon finding that the right to petition the government is intimately connected with these first amendment freedoms, the court concluded that it also could be used as a defense. Sullivan involved a limited constitutionalization of a defense historically recognized in defamation cases at common law—the defense of fair comment on issues of public concern. Because no common-law defense existed analogous to the constitutional right to petition the government, Sullivan arguably is distinguishable. This distinction is specious, however, for if tort-action defendants were prohibited from raising their right to petition as a defense, they would effectively be prohibited from protecting that constitutional right. Thus, it seems fair to assume that where a tort suit that constitutes state action unjustifiably infringes defendants' right to petition the government, that right can be raised as a defense.

98. 349 F. Supp. at 939.
In sum, environmentalists should face two principal obstacles to employing the right to petition the government as a defense justifying dismissal of a counteraction. First, they must demonstrate that their activities are petitions to the government rather than requests to resolve private disputes, and second, they must show that state interests in compensating those tortiously injured fail to justify infringements of the right to petition the government. Environmentalists are aided by the fact that several courts have followed the lead of Sierra Club in recognizing the defense. A California superior court, in McKeon Construction Corp. v. Kennedy,102 virtually incorporated the text of the Sierra Club decision into its own opinion in dismissing an interference with prospective advantage countersuit against several individuals who had petitioned a local zoning agency to deny zoning changes requested by a land developer. Because the environmentalists in that suit actually petitioned a governmental agency rather than requested judicial relief, the first principal obstacle was overcome without difficulty. In Apfel v. Cook,103 a Michigan court dismissed a countersuit alleging that the environmentalists had, inter alia, caused damage by persuading a local township to enact restrictive zoning ordinances. The court concluded that “[t]he acts of Defendants as alleged appear in almost every instance to represent Constitutionally privileged activity.”104

The right to petition the government for redress of grievances seems destined to become increasingly important to environmentalists as a defense to civil damage actions.105 Significantly, many state constitutions recognize a right to petition the government,106 and environmentalists have pressed these provisions as a basis for recognition of a civil damages defense.107

III. Solutions

An acceptable solution to the counteraction problem must prevent the tactic from discouraging litigation, must take into account the limited resources of plaintiffs and the judiciary, and must recognize the right of defendants to assert valid claims. A basic goal of our system of justice is to accord every individual possessing a meri-

torious claim an opportunity to have it adjudicated. This goal is un­
dermined by harassing counteractions that coerce the withdrawal or compromise of legitimate environmental claims. While the rules of procedure in most jurisdictions provide for accelerated dismissal of nonmeritorious claims, 108 in the context of environmental counterac­
tions these rules insufficiently reduce harassment and unnecessary litigation expenses. Any solution must confront this problem.

A. Reply by Counteraction

The counteraction tactic is not exclusively reserved for defend­
ants. Environmental plaintiffs confronted with harassing counteractions could respond with counteractions of their own based on mal­licious prosecution or abuse of process theories and, where appropri­
ate, on alleged deprivations of state and federal constitutional rights. This tactic is of little aid, however, to poorly financed environmental­ists, inexperienced in litigation.

The limitations on the use of plaintiffs' counteractions are illus­
trated in Three Lakes Association v. Whiting. 109 In 1970, Three Lakes Association and its individual members brought suit request­
ing injunctive relief against a group of land developers who were seeking to construct a large condominium project on Torch Lake in northern Michigan. 110 Although the court refused to enjoin con­
struction, it retained jurisdiction in case of subsequent environmental problems. 111 In 1971, seeking to prevent future opposition to con­
struction, the land developers instituted a countersuit 112 against the original environmental plaintiffs that requested $2.5 million in damages and alleged, inter alia, interference with prospective economic advantage and defamation. 113 Several days before serving process on the environmentalists, the developers allegedly offered to with­
draw all of their claims if the environmentalists would agree not to oppose their plans for an apartment project. 114 The environmen­

108. See, e.g., FED. R. Civ. P. 56.
110. This underlying suit was Blunt v. Apfel, No. 849 (Cir. Ct. Antrim County, Mich., Nov. 19, 1970). Even before the filing of the environmentalist counteraction, Professor Sax had described this confrontation between the environmentalists and the developers as "a classic knockdown, drag-out affair." Sax & DiMento, supra note 24, at 9 n.33.
111. Sax & DiMento, supra note 24, at 9.
112. Apfel v. Cook, No. 926 (Cir. Ct. Antrim County, Mich., June 23, 1973), was not maintained against all of the original plaintiffs. The Complaint in Three Lakes Association alleges that one original plaintiff was not named "because of assurances [from the excluded party] that he would cease being a plaintiff in action 849 [Blunt v. Apfel] . . . and cease otherwise to express freely opposition to defendant project." Three Lakes Assn. Complaint, supra note 20, at 12.
113. Three Lakes Assn. Complaint, supra note 20, at 12; Sax & DiMento, supra note 24, at 22.
ists' refusal to assent to this proposal was followed by nearly four years of litigation, and culminated in a countersuit by the environmentalists against the developers. The environmentalists' $2.7 million damage request was based on three theories, each grounded in the developers' alleged misconduct of their countersuit litigation: abuse of process in bringing the countersuit, breach of an agreement to settle the countersuit, and violations of state and federal constitutional rights.

As evidenced by Three Lakes Association, a counteraction by environmentalist plaintiffs does not preclude the assertion of chilling counteractions by defendants and is at best only a costly confrontation device available after the environmentalist plaintiff has incurred substantial litigation expenses. Indeed, it may be financially impossible for many environmentalists to assert a counteraction, although mitigation of this expense factor is possible if environmental groups can retain lawyers on a contingent fee basis. Moreover, the prospect of prolonged litigation may be undesirable to an individual or ad hoc group whose original purpose was to remedy a single environmental danger rather than to become an entrenched spokesman for the public interest. Finally, widespread use of the "environmentalist counteraction" would ultimately result in increased court congestion. A solution that prevents the assertion of harassing counteractions in the first instance would increase judicial economy.

B. The Judgment-Proof Corporation

One means of mitigating counteraction harassment by reducing environmentalist fears is to shield environmental plaintiffs from extensive financial liability by forming judgment-proof corporations. Prior to instituting the environmental action, individuals and ad hoc groups could, with the aid of an attorney, comply with the generally expedient and inexpensive requirements for corporate formation and supply the corporation with only enough assets to cover the costs.

115. Id. at 1-30.
116. Id. at 37.
117. Pursuant to 42 U.S.C. § 1983 (1970), the complaint alleged that the developers acted under color of state law to deprive the environmentalists of rights "[u]nder the Constitution of the United States, particularly the First, Fifth and Fourteenth Amendments thereto." Three Lakes Assn. Complaint, supra note 20, at 31. A similar allegation was made regarding rights guaranteed under the Michigan constitution. Id. at 33. These claims were all rejected by the court.
118. Incorporation for the purpose of avoiding unlimited liability is recognized in most jurisdictions. The prevailing rule is that where corporate formalities are preserved, initial funding reasonably adequate, and the corporation is not formed for the purpose of evading an existing obligation, the members enjoy limited liability. H. HANN, CORPORATIONS § 146, at 250 (2d ed. 1970).
119. Primary requirements include the drafting and filing of articles of incorporation with state and local officials, publication of a notice of incorporation, and the drafting of corporate bylaws. Id. § 118, at 197.
of anticipated litigation. Because judgments rendered against the corporation would be virtually uncollectible, counteractions would be considerably less effective in creating fear of extensive liability and thus might not be asserted in the first instance. This proposal is therefore appealing in that it reduces both court time and litigation expenses of environmentalists.

Nevertheless, the judgment-proof corporation concept has several troubling aspects. First, a court might lift the corporate veil and hold individual environmentalists liable for any judgment. While the criteria courts would employ in deciding whether to disregard the corporate entity are uncertain, courts have disregarded the corporate entity in other contexts when it was used to defeat public convenience, to justify a wrong, or to insulate a fraud or crime. Arguably, forming a judgment-proof corporation for the sole purpose of litigating is a type of constructive fraud since the corporate entity is erected principally to secure the benefits of the judicial forum for certain individuals without exposing them to the corresponding responsibilities imposed by that forum. A court therefore might impose liability on the corporate shareholders. A second difficulty is that the judgment-proof corporation provides no protection against suits brought against the individual members or shareholders of the corporation. Thus, notwithstanding the existence of the corporation, a defendant could harass by asserting a countersuit against one or more of the individual members of the judgment-proof corporation.

The most significant difficulty with allowing environmentalists to use judgment-proof corporations to avoid counteraction liability is its unfairness to counteraction plaintiffs possessing meritorious claims. Judicial recognition of the corporate entity might unjustly deny compensation on a valid claim for relief and might thereby insulate wrongdoers from responsibility for their acts. While this undesirable consequence presumably would inhibit few environmentalists from attempting to utilize this tactic, it derogates from the attractiveness

120. The claims and relief available to an environmentalist group taking the corporate form may be limited. Although the standing of a corporation to assert the rights of its members in seeking injunctive relief may be available when at least some claim of damage to public lands is made, standing to seek damages based on its members' claims of injury to privately held land may not be. See Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co., 367 F. Supp. 1040, 1047 (D. Del. 1973). But see Inglewood Residents' Protective Assn. v. Los Angeles, 6 Env. Rep. Cas. 1235 (Cal. Ct. App. 1974). Since damages are not the primary objective of most environmental litigation, this limitation is not troubling. There remain, however, some instances in which the corporate plaintiff may be at a disadvantage because of the cause of action upon which it must rely. Cf. Village of Bensenville v. City of Chicago, 16 Ill. App. 3d 733, 738, 306 N.E.2d 562, 566 (1973) (federal law preemption precluded suit by municipality for injunction but not its individual citizens' suits based on theory of inverse condemnation).

121. For most purposes, the corporate entity is separate from its individual members. Flink v. Paladini, 279 U.S. 59 (1929).

of the judgment-proof corporation as an equitable solution to the counteraction problem.

C. Statutory Bonding Requirement

Adequately funded environmentalists generally can weather counteraction harassment and, as evidenced by the fact that counteractions are no longer brought against national environmental organizations,123 may often be immune from counteractions in the first instance. This characteristic of the counteraction strategy suggests that one partial solution to the problem might be to require counteraction plaintiffs to post a security bond for environmentalist litigation expenses incurred in defending the counteraction. Such a provision could resemble those that require security bonding in shareholder derivative actions.124 The amount of security could be subject to increase if the course of the litigation reveals that it is inadequate or to decrease if it proves excessive. Payment of environmentalist litigation expenses by the counteraction plaintiffs could be required upon a judicial determination that the counteraction was interposed largely for harassment purposes. Judicial economy is promoted to the extent that this proposal discourages the initial assertion of harassing counteractions. This initial discouragement, coupled with potential reimbursement of litigation expenses when asserted counteractions camouflage harassment motives, could assure environmentalists relatively open access to the judicial process. However, the constitutionality and fairness of the proposal are subject to question.

Any mandatory security requirement is subject to challenge as an unconstitutional deprivation of due process of law since its acknowledged effect is to inhibit access to the judicial process by certain litigants.125 In general, the validity of a security requirement turns upon its reasonableness in the context within which it is imposed. In Cohen v. Beneficial Industrial Loan Corp.,126 the Supreme Court upheld a New Jersey statute requiring shareholders with relatively small interests in a corporation to post reasonable security for litigation expenses prior to commencing a shareholder derivative suit: "A state may set the terms on which it will permit litigation in its courts . . . . It cannot seriously be said that a state makes such unreasonable use of its power as to violate the Constitution when it provides liability and security for payment of reasonable

123. See note 18 supra.
124. See, e.g., N.Y. Bus. Corp. Law § 627 (McKinney 1974). These statutes provide, inter alia, that shareholders possessing less than a certain percentage or dollar value of stock must post reasonable security before bringing a derivative action.
126. 337 U.S. 541 (1948).
expenses if a litigation of this character is adjudged to be unsustaina-ble.”127 While acknowledging that security requirements deter li-tigation, the Court concluded that a state could close its courts when the requirement of reasonable security was not met.

The application of the Cohen standard to security requirements for environmental counteractions raises several issues. First, it is arguable that the Cohen result applies only in the specialized context of shareholder derivative actions. The Court itself noted that a state's interest in preserving the fiduciary duties owed by shareholders to their corporation constitutes a compelling reason for regulating derivative actions.128 Second, the regulation upheld in Cohen imposed security requirements only in the limited circumstances when a shareholder held less than either 5 per cent or $50,000 worth of stock. It is thus possible that a broad security requirement covering all environmental counteractions would not be upheld.129 Finally, a court might consider it unfair to require countersuit plaintiffs to post substantial security when environmentalist plaintiffs are required to post at most a modest bond.130

D. Statutory Postponement of Counteractions

A final possible solution to the counteraction problem is to post-pone counteractions by statute until termination of the environmental claim. Such a statute would have to preserve explicitly the right to bring counteractions at that time and would have to toll the statute of limitations on the environmentalists' activities while the environmental claim is being litigated. This proposal presumably would reduce the harassment and fear of liability engendered by counteractions and reduce the incidence of frivolous counteractions.

While no existing environmental legislation contains such a limita-tion, an analogous framework exists under summary repossession statutes currently in force in many states.131 The hearing on a re-

127. 337 U.S. at 549.
128. 337 U.S. at 552.
129. Courts considering the applicability of bonding requirements have given them a rather limited reading. In refusing to make a plaintiff who had satisfied the 5 per cent or $50,000 requirement pay a defendant's litigation expenses when the defendant prevailed, the Supreme Court of Pennsylvania found that security for expense legislation “was not intended to discourage derivative actions generally . . . but only to prevent ‘abuses attending the maintenance of such actions by persons whose financial stake in the corporation is slight.’” Shapiro v. Magaziner, 418 Pa. 278, 281, 210 A.2d 890, 892 (1965).
quest for summary repossession is generally limited to determining who is entitled to the property and defendants are proscribed from introducing extraneous issues: "The defendant may under a general denial of the allegations of the complaint give in evidence any matter in defense of the action. No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise." Such statutes apply only to defendants and generally do not prohibit defendants from bringing countersuits against the plaintiffs before the plaintiffs' claims are finally adjudicated. To postpone counteractions in the environmental context, the statute would need to apply to third parties as well as to defendants and should prohibit countersuits in addition to counterclaims.

Constitutional issues are raised, however, by any provision limiting an individual's access to the judicial process. It is well settled that the due process clause prohibits a state from eliminating essential issues from the original hearing of a case. Since the proposed provision preserves a defendant's opportunity to present any valid defense, this prohibition presumably is not violated. Due process also requires, however, that issues be heard in a meaningful manner and at a meaningful time. The proposed provision as applied could at times run afoul of this constitutional mandate. While summary repossession proceedings are rapid, discovery and pre-trial procedures in environmental litigation may easily last months or even years. Effective denial of the right to be heard at a meaningful time thus might result from delaying a defendant's right to bring a countersuit against an environmentalist. Between initiation and settlement of the environmental claim, conditions could change, witnesses could disappear, and possible evidence could become stale or unavailable. Courts are not likely to uphold such legislation when its practical effect in a given situation is to foreclose a defendant's opportunity to assert his claims.

This proposal is desirable, however, in that it should decrease the incidence of frivolous counteractions and increase the percentage of environmental claims fairly settled. Necessarily, a statute requiring postponement of counteractions pending litigation of an environ-

134. The Supreme Court appears to be willing to uphold limiting statutes so long as such statutes provide for a full hearing on all claims by the litigants at a meaningful time subsequent to the original proceeding. See Lindsey v. Normet, 405 U.S. 56 (1972).
135. For those cases litigated under the Michigan Environmental Protection Act before 1974, the mean length of completed cases was ten months, the median seven months, and the range, from one to thirty-four months. Sax & DiMento, supra note 24, at 8.
mental claim forces separate treatment of issues springing from the same transaction and concerning the same parties. Judicial inefficiency, however, should not result since defendants presumably would bring counteractions only in the instances when their claims were meritorious or when they anticipated that the same environmentalists would institute claims against them in the future.

IV. CONCLUSION

As more environmentalists seek judicial aid in remedying environmental harm, use of the counteraction tactic is likely to increase. Unfortunately, there exists no easy solution to this problem. Any legislative solution, moreover, is apt to encounter significant opposition from those expecting to be defendants in, or to be affected by, environmental suits. Perhaps the most efficient solution, which is outside the realm of legislation and planning, is for the environmental plaintiffs to realize that harassing counteractions do not realistically threaten extensive financial liability. As was suggested by an attorney who has had extensive experience handling counteraction threats: "There is no real answer to the problems posed by defendants whose defense consists of threats and intimidations excepting a tough plaintiff and a tough plaintiff's attorney."