Organizational Support to Fund Environmental Litigation

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ORGANIZATIONAL SUPPORT TO FUND ENVIRONMENTAL LITIGATION

Thomas R. Post* & Ronald B. Ravikoff**

"It is by no means clear that protection and improvement of the environment is always a charitable purpose."1

I. INTRODUCTION ........................................... 458

II. STRUCTURAL CONSIDERATIONS IN THE FORMATION OF THE NEW ORGANIZATION ...................... 460
   A. Generally .............................................. 460
   B. The Non-Profit Organization ......................... 461
   C. Drafting the Articles of Incorporation ............ 464

III. TAX CONSIDERATIONS .................................... 467
   A. The Tax-Exempt Organization — § 501(c)(3) .......... 468
   B. Qualifying as a § 501(c)(3) Organization .......... 469
      1. The Organizational Test .......................... 469
      2. The Operational Test .............................. 471
   C. Qualifying for Exempt Status ....................... 473
      1. Requirements to Establish a Public Interest Law Firm 473
      2. Other Requirements ............................... 475
   D. Obtaining the Charitable Contribution — § 170 .... 476
      1. Public Support Test ................................ 476
      2. Obtaining an Advance Ruling ...................... 478
   E. Fitting "Environmental Litigation" within the Definition of "Charity" .......................... 479

IV. JURISDICTIONAL CONSIDERATIONS ...................... 486
   A. Standing ................................................ 486
   B. Constitutional Rights ................................ 488

V. CONCLUSION ............................................. 490

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I. Introduction

The recent emergence of this nation's environmental concern has been a rather dramatic awakening, and many cynics who had shrugged off the environmental movement as simply a passing fad have learned that the country will no longer condone disregard for its natural environs. Protecting the environment is now a concern of virtually every major business, every legislative body, every governmental or administrative agency, and an enormous section of the populace.

This new-found awareness represents a clear change in our basic approach to growth. The United States, and perhaps the world as a whole, can no longer ignore the environmental consequences of growth decisions. Yet, due to the enormous complexity of the problems involved, our less-than-perfect knowledge of the interrelationships between various human activities and the environment, and the numerous tradeoffs that must be made in opting for environmentally sound choices, the decision-making process has become staggeringly difficult. Undoubtedly, great consternation surrounds the questions of how and by whom these choices are to be made.

Despite recent improvements in the governmental decision-making process, such as the impact statement required by the National Environmental Policy Act of 1969 (NEPA), there still remains a large ground swell of discontent among those who are concerned with the environment. Perhaps this is the result of the naturally slow rate of change inherent in the bureaucratic process. The achievement of basic changes in environmental decision-making, whether public or private, is extremely slow and often frustrating. As a result, a number of individuals have expressed concern that environmental causes must be championed in a different method. One such method that has been found to be both expeditious and effective is the use of citizen and public interest group lawsuits directed against alleged polluters, thereby enabling the courts to examine environmental disputes on their merits.

Given environmental awareness and the publicity surrounding citizen suits, it is not unusual for the attorney to be approached by clients who seek to prevent some environmentally-damaging activity. Often these clients simply wish to protect the environment. Perhaps, as often, they seek to use the environmental banner to obtain another goal, such as a desire to impede development. What-

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ever the client's motives, he seeks counsel as to how he can best institute legal or administrative action to accomplish his goals.

Environmental suits, however, cannot be fully considered without first addressing the question of costs. In light of the nature and importance of the issues involved, substantial public input into environmental decision-making is desirable. However, if citizens are effectively to utilize the courts as vehicles for protecting the environment, then some method of financing this litigation must be considered.

If the attorney has made the initial decision that the client has a meritorious case, he must next address himself to the sources of funding for this potential litigation. In this connection, several alternatives for financing are available depending on the number of people affected by the environmental problem, the monetary resources of the client and other injured parties, and whether the potential defendant is a private citizen or a governmental authority. Ideally, of course, the client should be independently wealthy and able to fund the entire litigation process. However, the probability of having such a client is the exception rather than the rule. The lawyer is most likely to be confronted with a client that has insufficient resources.

Assuming that the attorney is approached by a client who is unable to support the costs of litigation, several courses of action are available. Counsel could direct the client to a public interest law firm. Relative to private firms, however, public-interest law firms are few in number, and in many parts of the country, there are no public interest firms at all. Even those that do exist have heavy caseloads and may not be in a position to take on the individual's particular problems. A more common choice would be for the client to obtain organizational support through which the litigation could be funded. Here, too, there is more than one option. The most expeditious route to organizational support would be to persuade an existing environmental group to champion his cause. However, most existing organizations are involved in projects to the full extent of their budgets and are very selective in taking on new cases. As an alternative, the client may wish to consider creating an environmental organization to support the litigation.

This article will examine the feasibility of this latter alternative,

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3 For a discussion of the position of the public-interest law firm vis-a-vis the tax provisions discussed later in this article, see Section III C (1), infra.
its benefits and its shortcomings. The discussion will focus on the structural, tax, and jurisdictional considerations involved in establishing an organization to fund environmental litigation.

II. STRUCTURAL CONSIDERATIONS IN THE FORMATION OF THE NEW ORGANIZATION

A. Generally

If the new organization route is chosen, the initial task of the attorney is to explore fully the nature and scope of the environmental injury. This is necessary in order to ascertain all prospective plaintiffs. The class of prospective plaintiffs may include such diverse groups as the client’s neighbors, residents across town, environmental organizations, business interests, and others. In some situations, the number of persons within the category of injured plaintiffs may be so large that it will be prudent for the attorney initially to limit the scope of the organization’s membership. The limiting factor could be based upon geography, the extent of injury, or any other logical characteristic that is presented by the facts.

An important caveat must be kept in mind, however. In order for the hypothetical organization to qualify under the tax laws for exempt status, it must serve a public rather than a private purpose.4 It is necessary for the organization to establish that it is not organized or operated for the benefit of certain designated individuals. This immediately should alert the attorney to the necessity of broadly defining the purpose of the organization, and hence the membership.5 This important limitation negates the possibility of using a tax-exempt organization to fund environmental litigation when the injury is limited to readily identifiable individuals. The tax-exempt device is also likely to be unavailable if the suit is one for damages rather than equitable relief, since the outcome of a suit for damages seldom has a direct benefit to the public at large. Thus, the attorney should consider whether the contemplated suit is one that is “publicly” oriented or one which emerges purely from private fears.

If an environmental organization is suitable and desired by the client, as counsel you must advise the aggrieved parties as to the optimal type of organizational structures available from which they can direct their activities. The organizational form should be suffi-

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4 The tax aspects of this problem are discussed fully in Section III, infra.
5 See Section II C, infra.
ciently flexible to permit inclusion of new members, receipt of donations, limited personal liability of the participants, and the most favorable tax posture for the group's financial activities.

B. The Non-Profit Organization

A major decision to be made is whether this organization is to be non-profit or not. Since our hypothetical client is a person of modest means, choice of the non-profit charitable category, regardless of the ultimately selected organizational form, would be most advantageous. Several privileges are associated with non-profit charitable status: (1) possible freedom from most of the burdens of federal income tax;6 (2) possible exemption from real property and other state taxes;7 (3) exemption from labor union collective bargaining rules in many states as well as under the National Labor Relations Act;8 (4) potential immunity from tort liability for the negligence of, or other harm caused by, the organization's agents to the extent permissible by state law;9 and (5) the privilege to solicit donations, gifts, bequests, and contributions.10 On the other hand, certain disadvantages result from the restrictions imposed by the Internal Revenue Service (IRS)11 and by state and local governments on the non-profit charitable organization's activities.

Generally, for purposes of local law, non-profit organizations must meet a motive test. All profit-making12 and investment incentives13

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6 See Section III, infra.
7 See, e.g., Sahara Grotto & Styx, Inc. v. State Bd. of Tax Comm'rs, 147 Ind. App. 471, 261 N.E.2d 873 (1970) (test for determining whether certain property is exempt from property tax is whether dominant use of such property is for purposes which are exempt); State Board of Tax Comm'rs v. Trustees of Adoniram Lodge of Perfection, 140, Ancient Accepted Scottish Rite, 145 Ind. App. 300, 250 N.E.2d 605 (1969) (fraternal organization was using its property for the dominant purpose of charity and was therefore exempt from property tax). See generally E. Fisch, D. Freed & E. Schacter, CHARITIES AND CHARITABLE FOUNDATIONS § 786 (1974).
9 See, e.g., Middlesex Concrete P & E Corp. v. Cartevet Indus. Ass'n, 37 N.J. 507, 181 A.2d 774 (1962) (trade association was privileged to interfere with the business of a third party in order to protect the interests of its members or of the public). However, it should be noted that there is a definite trend in the law to limit the immunity of charitable organizations on the theory that persons injured through the negligence of employees of a non-profit corporation should have some redress, and that insurance can relieve the organization of the fears of bankruptcy. See W. Prosser, THE LAW OF TORTS, § 133 (4th ed. 1971).
10 See generally E. Fisch, supra note 7, at § 738.
11 The restrictions imposed by the IRS are dealt with in depth in Section III B, infra.
12 In re Letts' Estate, 200 Cal. App. 2d 708, 713, 19 Cal. Rpt. 502, 505 (1962), held that a college's acceptance of donations in consideration of its issuance of annuities and life income contracts to donors did not deprive it of its status as a tax-exempt non-profit institution as long as no part of its net income inured to the benefit of any private person.
for its members must be eliminated. However, it is not necessary that profit be eliminated from all activities of an organization for it to achieve non-profit status, as long as income is employed solely to further the non-profit purpose of the enterprise.\textsuperscript{14}

The alternatives available in choosing the type of non-profit organization that best fits the client's needs are several. The common forms are: (1) an individual charitable enterprise; (2) an association; (3) a corporation; (4) a foundation; and (5) a charitable trust. In attempting to choose a form suitable for the client of meager resources, alternatives (4), the foundation, and (5), the charitable trust, may be summarily dismissed. Foundations and charitable trusts are generally formed by individuals or groups providing testamentary or inter vivos endowments from which the organization can fund its activities. Nor is alternative (1), the individual charitable enterprise, a satisfactory form for carrying out our objectives, since charitable deductions generally are allowed only to a formally organized entity such as a trust, corporation, or association. For example, contributions to an informal group aiding servicemen have been disallowed the deductional privilege.\textsuperscript{15} As our hypothetical organization will most probably be heavily dependent upon contributions, this type of organization will be too risky.

Alternative (2), the association, as an unincorporated body, can be formed by uniting two or more persons for purposes of performing certain activities. The unincorporated association, however, has many disadvantages and few advantages. The major disadvantages follow:

\begin{enumerate}
\item an association is not, under state law, a legal entity separate from the persons who control it; yet, if convenient for the IRS, it is treated as a corporation;\textsuperscript{16}
\item the laws governing such groups are generally few, vague, and inade-
\end{enumerate}

\textsuperscript{13} See Associated Hospital Serv., Inc. v. Milwaukee, 13 Wis. 2d 447, 465, 109 N.W.2d 271, 280 (1961) for the test of whether or not dividends or other pecuniary benefits are contemplated to be paid to its members.

\textsuperscript{14} Miami Retreat Fd. v. Ervin, 62 So. 2d 748 (Fla. 1952); Duncan v. Steeper, 17 Wis. 2d 226, 116 N.W.2d 154 (1962). See generally E. Fisch, supra note 7, at § 394.

\textsuperscript{15} In Carolyn Trippe, 9 T.C.M. (CCH) 622 (1950), a group providing hospitality to servicemen on furlough did not qualify as an organized charity within the meaning of the Code, even though it was a worthy and beneficient operation. See also Robert M. Hewitt, 16 T.C.M. (CCH) 468 (1957), where an unorganized mission conducted at home by a minister and his wife was held not to be a qualified donee.

\textsuperscript{16} The term "corporation" is defined in I.R.C. § 7701(a)(3) as including "associations, joint-stock companies, and insurance companies." Thus, a corporation for tax purposes is not limited to those organizations which have been categorized as such under state law.
quate to spell out a system of organization and operation; (3) there may\textsuperscript{17} or may not\textsuperscript{18} be freedom from personal liability for the acts of co-members, depending on the jurisdiction; and (4) generally an association can sue or be sued only in a representative capacity,\textsuperscript{19} unless a specific state statute permits the association to carry on litigation as an entity.\textsuperscript{20}

Of particular importance to the hypothetical environmental association is the possibility that, under the vicarious liability doctrine, negligence may be imputed from one member of the association to another.\textsuperscript{21} If liability can be imputed in tort, even for injury resulting from activities unrelated to the groups' objectives, involvement by prospective members will be discouraged. It is immaterial that the fear of personal liability might be speculative or unfounded; the result will be the same. Therefore, before the association form is chosen, counsel must look to local statutes and case law and distinguish the characteristics between corporations and associations in civil suits. If the law of the jurisdiction imputes liability from one member of an association to another, counsel should be especially careful to caution the client against utilizing this organizational method. In addition, particular attention must be given to such problem areas as \textit{res judicata}, collateral estoppel, joinder of parties, class actions, and general statutory authorization permitting an association to sue or be sued as an entity. For all of the

\textsuperscript{17} In Wilcox v. Arnold, 162 Mass. 577, 39 N.E. 414 (1895), members of a college alumni group were held jointly liable for the costs of a yearbook because they had chosen one member to publish it.

\textsuperscript{18} In Stone v. Guth, 232 Mo. App. 217, 102 S.W.2d 738 (1937), a member of a trade association was held to be not liable for the salary of the editor of the association's journal because the member was inactive.

\textsuperscript{19} Benoit v. Amalgamated Local 229 U.E.R.M.W., 188 A.2d 499 (Conn. 1963), held that a statute allowing a voluntary, unincorporated association to sue or be sued in its distinguishing name is procedural and creates no substantive right, and that resort must be had to extraneous circumstances to determine in a given case whether a right of action against the association exists on behalf of one of its members. \textit{But see} Miazga v. International Union of Operating Eng'rs, 2 Ohio App. 2d 153, 196 N.E. 2d 324 (1964) (unincorporated association held legally responsible for injuries inflicted by wrongful acts not only to the public but to its members as well).

\textsuperscript{20} See, \textit{e.g.}, N.J. STAT. ANN. 2A:64 (West) (1952); N.Y. CIV. PRAC. LAW (McKinney) § 1025 (1976); OKLA. STAT. ANN., tit. 12, § 182 (West) (1960); FLA. STAT. § 617.021(2) (1975).

\textsuperscript{21} See W. PROSSER, supra note 9, at § 72; DeVillars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950) (the joinder of persons in furtherance of a common enterprise creates a mutual relationship of agency such that the negligence of any one of the persons is imputed to each and all of them). \textit{Contra}, Montgomery Ward v. Langer, 168 F.2d 182 (8th Cir. 1948) (no action allowed against individual members on the basis of a first judgment against an association where the association's assets were insufficient to satisfy the judgment).
previously discussed reasons, it is suggested that the association route is a precarious one.

Alternative (3), the corporation, is the best and most popular group enterprise of the alternatives listed. The major advantages follow:

1. a corporation avoids the major disadvantages of the association yet maintains the major benefits (i.e., fund raising capability, favorable tax status, etc.);
2. a corporation is an artificial entity—a legal entity ordinarily consisting of a number of individuals but considered by the law as a body distinct from its component members thus giving limited liability; and
3. a corporation generally has a specific name or title and enjoys specified powers which are granted by state law.

Since the corporation is a creature of state law, counsel must refer to the statutes that will govern in the particular jurisdiction.

In general, non-profit corporations are treated in a manner exemplified by New York's Not-for-Profit Corporation Law which divides non-profit corporations into four types. In a few states there are still no specially designated provisions for non-profit corporations, and only fragments of legislation can be found. Other states such as California, Delaware, Florida, Illinois, Louisiana, and Missouri, have made some significant changes in the statutory mechanisms applicable to non-profit corporations.

C. Drafting the Articles of Incorporation

Corporation status is a grant or license providing certain privileges to perform certain activities. To perform its activities, a corpo-

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23 Id. § 201(b).
Type A—includes civic, patriotic, political, social, fraternal, athletic, agricultural, and similar corporations which are primarily for members' purposes and benefits.
Type B—includes charitable, educational, cultural, prevention of cruelty and like corporations which are primarily for non-business purposes.
Type C—for any lawful business purpose to achieve a lawful public or quasi-public objective.
Type D—where formation is authorized by any other corporate law of this state for any business or non-business, or pecuniary or non-pecuniary purpose or purposes specified by such other law.
25 DEL. CODE tit. 8, passim (1974).
26 FLA. STAT. § 617.01 et seq. (1975).
ration must pay the incorporation fees required by the state and must comply with the state’s licensing requirements. Both fee amounts and licensing requirements differ from state to state.

The crucial factor in the organization’s formation process is the attorney’s responsibility. If desired by the client, the articles of incorporation and by-laws can be drafted in such a manner that it will be difficult for the original intent or objectives of the organizers to be discarded by a future (and possibly more numerous) membership. Particular care and attention must be devoted to the drafting of the purpose clause, the provisions for excluding and expelling members, and the provisions relating to amendment of the articles and by-laws. Since the articles of incorporation or their equivalent are considered to have greater dignity than the by-laws, those activities and objectives which are deemed to be paramount to the organization’s existence should be carefully protected by their specific inclusion in the articles.

The “purpose clause” is of greatest importance. In effect, it defines both the scope of the organization’s non-profit objectives and its reasons for existence. It can be a general purpose clause, such as “To engage in charitable endeavors for the public good,” or it can be more detailed. It is to be remembered, however, that the organization must serve a public rather than a private purpose if it is to qualify under the tax laws for exempt status. Counsel, therefore, would be prudent to define broadly the purpose of the organization and membership.

Although non-profit corporations generally need no “powers clause” in their charter, it might be prudent to include an all purpose powers clause following the purpose clause. For example, “To do everything and anything reasonably and lawfully necessary, proper, suitable, or convenient for the achievement of the purpose(s) above stated, or for any of them, or for the furtherance of said purpose(s).” Inclusion of such a provision would clearly establish the power of the corporation to engage in virtually any activity...

\[\text{\footnotesize See Section III B(1), infra, for tax implications when drafting the articles of incorporation.}\]
which would further the corporate purpose.

To ensure that the corporation’s original purpose clause is not amended by a future controlling membership, a provision should be included in the articles which affords some protection to the original objectives. For example, “The Articles of Incorporation may be amended, as provided for in the By-laws, except that the ‘purpose clause’ may only be amended by a unanimous vote of the Board of Directors and a 2/3 majority of all current regular members. The corporation’s existence shall be null and void if this provision is amended or violated.”

If the organization is to pursue its purposes in an aggressive fashion, a membership that is committed to the original objectives must always be maintained. The corporation should have the ability to expel and exclude members who have contrary objectives or conflicts of interests which would impede promotion of the original objectives. Several states have statutes which govern expulsion or exclusion of members.\(^{31}\) Associational interests are established and measured largely by the charter and by-laws. One who joins an organization agrees, at least impliedly, that the charter or by-laws shall determine his rights and status in relation to the organization and his fellow members.\(^{32}\) Courts can and do review the propriety of expulsions.\(^{33}\) They will do so especially when economic interests of members are involved,\(^{34}\) or when constitutional rights of a member are affected.\(^{35}\) Expulsion of existing members is basically a civil

\(^{31}\) E.g., Ohio Rev. Code Ann. § 1702.13(c) (Baldwin) (1971).

Membership in a corporation may be terminated in the manner provided by law, the articles, or the regulations (by-laws), and upon the termination of membership for any cause, such fact and the date of termination shall be recorded in the membership book.

\(^{32}\) Gilmore v. Palmer, 109 Misc. 552, 179 N.Y.S. 1 (1919). While the constitution and by-laws of a voluntary association constitute the sole rule which governs the relations between the association and its members, and courts will not redress any action in expelling or suspending a member taken in accordance therewith, such proceedings must be conducted in good faith, upon notice to the accused, and with an opportunity to be heard; otherwise, a court of equity will reverse the action of the association and restore him to membership. Id. at 553, 179 N.Y.S. at 2.

\(^{33}\) See, e.g., Randolf v. First Baptist Church, 120 N.E.2d 485 (Ohio Common Pleas 1954) (church could not expel a member with entire disregard of its unequivocal constitutional provisions governing expulsion from membership).

\(^{34}\) When membership in an organization is an economic necessity, there is a need for truly protecting public welfare and advancing interests of justice by safeguarding the individual’s opportunity for earning a livelihood while not impairing the rights of the organization. See Falcone v. Middlesex County Medical Society, 34 N.J. 582, 170 A.2d 791 (1961).

\(^{35}\) De Mille v. American Fed. of Radio Artists, 31 Cal. 139, 187 P.2d 769, cert. denied, 333 U.S. 876 (1947) (membership in a trade union is a “property right” within the meaning of the Fifth Amendment). However, except when economic interests are involved, it has consis-
rights (constitutional) problem, and right of association has been accorded constitutional dimensions by the courts. The judicially created protections with regard to this right of association were essentially codified in the Federal Civil Rights Law of 1964.

In sum, to safeguard the corporation's interest, counsel should draft charter and by-law provisions relating to expulsion or exclusion of members very precisely. For expulsion, notice and an opportunity to be heard always must be given; otherwise, an expulsion may be ruled invalid by a court.

### III. TAX CONSIDERATIONS

Environmental litigation, unlike many other types of litigation, often poses a situation where opposing interests are enormously unequal in their economic resources. Environmentally conscious groups and individuals are often unaware of the enormous costs of protracted litigation and engage in lawsuits without sufficient funding. The obvious result of this situation is the need for an organizational structure to supply the necessary financial backing. It is the contention of this article that such structure may be available under the Internal Revenue Code (Code) in the form of the tax-exempt corporation, and that contributions to this organization may be deductible by donors on their individual tax returns.

This section of the article provides an overview of two tax provisions—sections 501(c)(3) and 170(c)(2)—which allow for such an organization. The prior makes the organization tax-exempt and the latter makes the contributions deductible.

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34 For an excellent summary of the aspects concerning expulsion of members, see Palsey, Excursion and Expulsion from Non-Profit Organizations—The Civil Rights Aspect, 14 CLEV.-MAR. L. REV. 203 (1965); Friedem, Judicial Review of Expulsion Actions in Voluntary Associations, 6 WASHBURN L.J. 160 (1966).

37 Berrien v. Pollitzer, 165 F.2d 21 (D.C. Cir. 1947), for example, held that a member's relation to the association is the true subject matter of protection by judicial interference. See also Nyman v. Dessert Club, 109 Cal. App. 2d 65, 240 P.2d 37 (1952) (preliminary injunction by lower court restraining defendant club from interfering with plaintiff member's full use and enjoyment of club facility pending determination of whether expulsion was lawful was held not to be an abuse of discretion by the trial court).


39 For example, in Briggs v. Technocracy, 85 N.Y.S.2d 735 (Sup. Ct. 1948), expulsion of member from membership corporation without prior notice, statement of charge, or opportunity to be heard was held illegal, though by-laws of corporations made no express provision for a hearing. See text at note 32, supra.
A. The Tax-Exempt Organization—§ 501(c)(3)

Section 501(c) lists those organizations deemed to fall within the tax-exempt category. Among the organizations listed are fraternal orders, credit unions without capital stock, teacher retirement plans, chambers of commerce, labor organizations, and others. However, for purposes of providing a structure from which to finance environmental litigation, the most important is § 501(c)(3) and, to a lesser degree, § 501(c)(4).

Section 501(c)(3) makes exempt:

[c]orporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation . . . and which does not participate in or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Section 501(c)(4) exempts:

[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

A distinction of major importance between the above two Code sections is that a § 501(c)(4) organization does not qualify as a § 170(c)(2) donee, while a § 501(c)(3) organization does. Also, qualifying as a § 501(c)(3) organization will not only spare the corporation the burden of paying federal income tax, but may also involve
exemption from certain federal excise and employment taxes as well as exemption from certain state and local sales, use, property, and other taxes.

B. Qualifying as a \$ 501(c)(3) Organization

As the text of \$ 501(c)(3) indicates, an organization will qualify for exempt status if the following four criteria are met: (1) no part of the organization's net earnings goes to benefit private interests; (2) the organization does not engage in certain political activities; (3) the organization is organized and operated exclusively for any one or more of the purposes listed in \$ 501(c)(3) (our hypothetical organization would have a "charitable" purpose); and (4) the organization serves a public rather than a private interest. Section 1.501(c)(3)-1(a)(1) of the Treasury Regulations provides that in order to be exempt as an organization under \$ 501(c)(3), an organization must be both organized and operated within certain guidelines established by both organizational and operational tests.

1. Organizational Test

The organizational test is met only if the articles of incorporation or their written equivalent limit the corporate purpose to one or more exempt purposes and do not expressly empower the corporation to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes. In meeting the organizational test, the organization's purpose may either be as broad as, or more specific than, the purposes cited in \$ 501(c)(3). For example, an organization which has as its purpose the furtherance of literary and scientific purposes within the meaning of \$ 501(c)(3) will, if it meets the other requirements of the organizational test, be considered to have met the test.

In no case will an organization be considered to be organized exclusively for one or more exempt purposes if, by the terms of its articles, the purposes for which such organization is created are broader than the purposes specified in \$ 501(c)(3). An organization

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1978] ENVIRONMENTAL LITIGATION 469

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1978] ENVIRONMENTAL LITIGATION 469
is not considered organized exclusively for one or more exempt purposes if its articles or the instrument by which it is created expressly empower the corporation to:

(a) devote more than an insubstantial part of its activities to attempts at influencing legislation by propaganda, or otherwise;\(^54\)
(b) directly or indirectly participate in or intervene in any political campaign on behalf of or in opposition to any candidate for public office;\(^55\) or
(c) have objectives and to engage in activities which characterize it as an “action organization.”\(^56\)

In addition, an organization is not organized for one or more exempt purposes if its assets are not dedicated to an exempt purpose. An organization’s assets will be considered dedicated to an exempt purpose if, upon dissolution, such assets would by reason of a provision in the organization’s articles or by operation of law, be distributed for one or more exempt purposes, or to the federal government, or to a state or local government for a public purpose.\(^57\) Distribution of a corporation’s assets to its members or shareholders upon dissolution by authority of its articles will not enable the corporation to meet the organizational test.

In spite of the best intentions of the corporate members to pursue their objectives in an acceptable manner, the IRS will suggest as a matter of procedure the inclusion into the articles the following provision:

> Notwithstanding any other provision of these articles, this corporation shall not carry on any other activities not permitted to be carried on by (a) a corporation exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law).\(^58\)

\(^55\) Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii)(1959). The publication or distribution of statements is considered participation or intervention in a political campaign for the purposes of § 501(c)(3). Id.
\(^56\) Treas. Reg. § 1.501(c)(3)-1(b)(3)(iii)(1959). For further discussion of an action organization, see Section III B(2), infra.
\(^58\) How to Apply for Recognition of Exemption for an Organization, I.R.S. Publication 557, § 2 at 8 (1977 ed.).
In sum, there are many barriers to exempt status, but the organizational test is one of the easiest to pass. Prudence, therefore, dictates compliance with the procedural requirements outlined above.

2. Operational Test

As indicated previously, in addition to the organizational test there is an operational test to be met. Under this requirement, all but an insubstantial part of the organization's activities must be devoted to its tax exempt purposes. Unfortunately, virtually no authoritative guidelines have been promulgated concerning the circumstances under which a proscribed activity constitutes a "substantial" part of the organization's activities. The Treasury Regulations provide no guidance, and the IRS rulings are silent. Case law does provide somewhat more insight; however, it too fails in the development of a tangible test. Rather the cases seem to espouse an intuitive determination as to whether the proscribed activities were "substantial" or "insubstantial," as found on a case-by-case basis. Some of the factors used in making this finding are receipts and expenditures incidental to the activity, the time allotted to the activity, and the significance attached to the activity by the organization itself.

With respect to the operational test, a corporation is regarded as qualifying under § 501(c)(3) if it is operated exclusively for one or more exempt purpose by virtue of its primarily engaging in activities which accomplish one or more of the exempt purposes. The following factual situations disqualify a corporation under § 501(c)(3):

(a) An organization whose net earnings inure in whole or in part to the benefit of private shareholders or individuals.
(b) An organization which, by virtue of its activities, can be classified as an action organization.

"Action" organizations are defined as those organizations which (1) attempt to influence legislation by their own contacts, (2) urge the public to contact members of a legislative body for the purpose of proposing, supporting or opposing legislation, or (3) advocate the

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adoption or rejection of legislation. In addition, an organization might be deemed an action organization if it participates in a political campaign, either directly or indirectly. Finally, an organization will fall within the ambit of the action organization definition if its main objective can only be attained or defeated by legislation, or if it campaigns for this main objective which requires legislative action.

As far as the client's general purposes are concerned, however, the corporation could strengthen its posture for meeting the § 501(c)(3) operational test by not engaging solely in litigation, unless it wishes to conduct its activities as a public interest law firm. The corporation could reasonably participate in activities which provide the public with information concerning the significance of the environmental values it seeks to protect. An organization is not precluded from qualifying under § 501(c)(3) just because in carrying out its primary purpose it advocates social or civic changes or presents opinions on controversial issues with the intention of molding public opinion or creating public sentiment, as long as it is not considered

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45 Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv)(1969). In League of Women Voters v. United States, 180 F. Supp. 379 ( Ct. Cl. 1960), cert. denied, 364 U.S. 822 (1960), the League was held not to qualify for an estate tax deduction for failure to comply with the statutory condition providing that "no substantial part of the activities . . . [of the organization shall be] carrying on propaganda or otherwise attempting to influence legislation." In effect, this holding denied the League the benefit of § 501 (c)(3) status. The court of claim's finding was based on facts which showed that the League's main purpose was to influence legislation.


46 The public interest law firm is a recent addition to the list of types of organizations considered charitable. The public interest law firm does not necessarily represent the poor segment of society such as those represented by the legal aid programs. These firms supply legal representation for key citizen interests which would otherwise go unrepresented due to their economically unfeasible nature. Environmental policy is one type of interest in which the public generally wishes to have some voice but often cannot afford the costs involved in securing legal representation to promote environmental interests. For background information, see Rev. Proc. 71-39, 1971-2 C.B. 575 (guidelines under which IRS will issue advance rules of exemption to public interest law firms); Rev. Proc. 75-13, 1975-1 C.B. 662 (procedures under which a public interest law firm may accept fees for its services). See also Rev. Rul. 75-74 (when a public interest law firm qualifies under § 501(c)(3)); Rev. Rul. 75-76 (a public interest law firm which accepts only court awarded fees can qualify under § 501(c)(3)). A full discussion of the public interest law firm can be found at Section III C(1), infra.
an action organization. By formally establishing these environmental interests, the corporation will not only improve its ability to meet the organizational test, but will also increase its capability to litigate against private or public action adversely affecting the environmental values which the corporation sought to promote through its non-litigational activities. It may, in addition, obtain added exposure and membership.

Of course, if the organization is involved in "action" activities so as to preclude its tax-exempt qualification under § 501(c)(3), it might still qualify for tax exempt status under § 501(c)(4). In this case, however, the donees' benefit of deductibility is lost. Treasury Regulation § 1.501(c)(4)-1(a) provides that an organization is eligible for § 501(c)(4) status if it is not for profit and is operated exclusively for the promotion of social welfare. The Regulations prohibit intervention in political campaigns; however, no mention is made as to influencing legislation. Thus, a civic league could be organized to advocate or oppose specific environmental legislation and still qualify as a tax exempt § 501(c)(4) organization, but individual donors would not be entitled to a charitable deduction on their individual tax returns.

C. Qualifying for Exempt Status

An organization does not become exempt merely by designating itself exempt; nor does it do so by requesting exempt status from the IRS and instantaneously getting approval. Rather, the request must be considered by the IRS. An organization which is trying to serve the public interest either solely or partially through litigation must meet the qualifications provided in the Revenue Procedures (Rev. Proc.).

1. Requirements to Establish a Public Interest Law Firm

As indicated earlier, one option is to litigate through a public interest law firm structure which will qualify as a § 501(c)(3) organization. At this point, however, one becomes lost in the IRS maze. The rulings and procedures do not provide for a definition of a

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88 Id. § 1.501(c)(4)-1(a)(2)(ii)(1959).
89 I.R.C. § 508(a).
90 For excellent references as to the necessary procedures, see B. Boettcher, Exempt Organizations—Exemption and Filing Requirements (BNA Tax Mgt. Portfolio #337, 1976); How to Apply for Recognition of Exemption for an Organization, supra note 58.
"public interest law firm," although the image is that of an association of attorneys working on public interest cases. As will be seen,\textsuperscript{71} the IRS at times seems to regard the rubric "public interest law firm" as a more encompassing term. The rulings seem to say that a corporation controlled by attorneys and doing \emph{all} types of public interest law, including environmental litigation, is qualified; a qualified environmental organization getting involved in environmental litigation will lose its exemption; and an organization formed only for environmental litigation is questionable.\textsuperscript{72} Suffice it to say that the authors are unable to determine if, and if so how, the IRS distinguishes between a public interest law firm and a charitable organization which wishes to get involved in litigation. Thus, great caution is advised and close contact with the IRS is needed. Nevertheless, if one wishes to form a public interest law firm (whatever that is), certain guidelines are provided.

Rev. Proc. 71-39\textsuperscript{73} provides guidelines under which an advance exemption letter can be issued. In order to receive this advance letter the prospective firm must establish that the litigation which it will undertake is aimed at matters of public concern and interest. The Rev. Proc. notes that such interest will not be found in private suits against a private party if the party represented can provide his own counsel.

Supplementing Rev. Proc. 71-39 is Rev. Proc. 75-13\textsuperscript{74} which establishes how the firm seeking exemption status can accept fees for its services. Basically, the organization can accept attorney's fees in a public interest case if the fees are paid by the opposing parties and awarded by the court. The organization's attorneys, however, must be paid on a salary basis.

A number of Revenue Rulings (Rev. Rul.) provide additional guidance for the envisioned § 501(c)(3) public interest law firm. Rev. Rul. 75-74\textsuperscript{75} directs firms which wish to be deemed tax-exempt under § 501(c)(3) to file an application (Form 1023) with the IRS District Director for the district in which the firm will have its principal place of business or principal offices. In addition, Rev. Rul. 75-74 states that it is essential that the litigation be a public interest case which would not be financially worthwhile to a private attorney.

\footnotesize{\textsuperscript{71} See Section III (E), \textit{infra}.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} 1971-2 C.B. 575.
\textsuperscript{74} 1975-1 C.B. 662.
\textsuperscript{75} 1975-1 C.B. 152.}
Rev. Rul. 75-7576 provides that a public interest law firm will not qualify if it accepts fees from its clients. However, this ruling is supplemented by Rev. Rul. 75-76,77 which states that awarded attorney’s fees can be accepted by the organization without jeopardizing its exempt status, provided it does not pick and choose its cases on the basis of the likelihood of receiving attorney’s fees.

2. Other Requirements

Regardless of whether the proposed organization is to be a public interest law firm or a more general environmental organization, certain other procedures must be followed. Of foremost import to the practitioner, the organization must file for exemption within 15 months of its date of organization (i.e., date of incorporation or association).78 A determination letter may be obtained prior to the date of organization, but only if the proposed operations can be described in sufficient detail.79 The organization must be able to describe fully the activities in which it expects to engage, how it plans to carry out those activities, the anticipated source of income, and its contemplated expenditures.

The exemption must be applied for on IRS Form 1023. This application will show the character of the organization, the purpose for which it is organized, its actual activities, the sources of income and receipts, the disposition of income and receipts, whether or not any of the income or receipts is credited to surplus or may inure to the benefit of any private shareholder or individual, and in general, all facts relating to operations which may affect the organization’s right to exemption. Also, the following items must be attached to the application: a copy of the articles of incorporation or a similar instrument which shows the permitted powers and activities of the organization; a copy of the by-laws; and the most recent financial statement reporting the assets, liabilities, receipts, and disbursements of the organization. Based on all this information, the IRS will determine whether or not the organization qualifies for tax-exempt status.

76 Id. at 154.
77 Id.
D. Obtaining the Charitable Contribution—§ 170

Obtaining the tax-exempt status of § 501(c) is only one-half of an environmental organization's two-pronged goal. The group should also seek approval as a charitable contribution donee under § 170.

Section 170(c)(2) provides that a contribution to a corporation, trust, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, and which does not have net earnings inuring to the benefit of any private shareholder or individual, and which does not spend a substantial part of its activity time in carrying on propaganda or otherwise attempting to influence legislation or intervene in political campaigns, will be deductible. It should be obvious to the reader that these restrictions mirror the restrictions of § 501(c)(3).

Section 170(b)(1)(A) gives the general guidelines as to what types of organizations are eligible to qualify for tax deductible contributions. The pertinent portion of that provision covers organizations fitting the following description:

An organization [which is a proper charitable organization] which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption . . .) from a governmental unit . . . or from direct or indirect contributions from the general public.80

Thus it can be seen that there are two basic requirements. First, the organization must be a properly established charitable organization as defined in § 170(c)(2). Second, it must be a publicly supported organization.

1. Public Support Test

Obviously, the next line of inquiry is to establish what is meant by a "publicly supported organization." Treasury Regulation § 1.170A-9(e)(1)(ii) offers some assistance by stating that an organization will be treated as a publicly supported organization if it meets either of two tests. One test requires that at least 33⅓ percent of the organization's total support which is normally received come from government or the general public.81 If the organization fails this

test, however, it can still be considered publicly supported if it passes a factual determination test. This test requires that at least 10 percent of the organization’s normal support come from governmental units, from contributions made directly or indirectly by the general public, or from a combination of these sources. Under this alternative test, the organization must also prove that it is organized and operated so as to attract new and additional public or governmental support on a continuous basis. This requirement will be deemed to have been met if the organization maintains a continuous and bona fide program for solicitation of funds from the general public, community, or membership group involved, or if it carries on activities designed to attract support. Besides the factual determination test, the IRS looks subjectively at other factors such as: (1) support in excess of 10 percent from the general public; support from a representative number of persons; (3) a governing body which represents the broad interests of the public; (4) continuous provision of facilities or services that directly benefit the general public; and (5) additional factors such as how dues are solicited, dues rates, and the likelihood that an organization’s activities will appeal to a broad common interest.

The Regulations state that consideration will be given to the fact that an organization may, in its early years of existence, limit the scope of its solicitation to persons deemed most likely to provide seed money in an amount sufficient to enable the organization to commence its charitable activities and expand its solicitation program.

A major difficulty which arises in meeting either the 33 1/3 percent public support test or the 10 percent public support minimum under the factual determination test is that single individual contributions may apply as “public” support only to the extent of 2 percent of the total contributions received by the organization. But

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84 Id.
the total contribution will still be used as the denominator in computing total support. For example, if a hypothetical organization receives $100,000 from a nonpublic source and $100,000 each from two individuals, its total support will be $300,000. However, only 2 percent of $300,000, or $6,000 can be counted from any one individual. Thus, in our hypothetical, the organization’s percentage of public support would be $12,000 divided by $300,000 or 4 percent. The organization would fail to qualify under either test.

The harshness of this rule is mitigated to some extent by a provision that one or more contributions which might normally fall within the 2 percent limitation may be excluded for purposes of satisfying the support test.4 Although “all pertinent facts and circumstances will be taken into consideration”5 to determine if the exclusion applies, three minimum requirements must be met to avoid the 2 percent limitation. First, the contribution must have been received from disinterested parties whose contributions were attracted by reason of the publicly supported nature of the organization.6 Second, these contributions must have been unusual or unexpected with respect to amount.7 Finally, the contributions must, by reason of their size, adversely affect the status of the organization as normally being publicly supported.8

In sum, the organizers should seek as broad a base as possible for their financial support and should key the solicitation program to the criteria just discussed.

2. Obtaining an Advance Ruling

Qualification as a §170 charitable donee requires careful preparation. The attorney should consult Treasury Regulation §1.170A-9(e)(5) for the specific requirements for obtaining an advance ruling or determination letter which will sanction the deductibility of contributions by donors to the charitable organization. This is a key item, because no matter how laudible the charitable interest of the donor, the tax deductibility of the contribution will usually be an overriding factor in the initial donation decision.

As a general rule, an organization must have had a tax year consisting of at least eight months before the IRS will issue a ruling or

A newly created organization, however, can seek to obtain an advance ruling that it will be considered a tax deductible charity for its first two taxable years. Such an advance ruling can be issued if it can be reasonably expected that the organization will pass the 33 1/3 percent public support test or the factual determination test. However, it should be noted that the issuing of this ruling is entirely discretionary with the IRS.

Once a favorable ruling has been obtained, the organization must remain vigilant in carrying out its objectives to ensure that it does not lose its charitable donee status. For example, the IRS took unprecedented action contrary to its normal procedures when it found that although the Sierra Club was named in the Cumulative List of Organizations eligible to receive deductible contributions, the IRS was no longer prepared to extend advance assurances of deductibility of contributions to the group. The IRS contended that the Sierra Club may have violated the prohibition against activities designed to influence legislation by taking out a full page advertisement in various newspapers in Washington, D.C., and New York on June 9, 1966. The newspaper advertisement urged readers to protest a bill then under consideration in the Congress relating to the damming of the Colorado River.

E. Fitting "Environmental Litigation" within the Definition of "Charity"

An underlying assumption of this article has been that an organization which is formed primarily for environmental litigation purposes will fall within the definitions of §§ 501(c)(3) and 170. Certainly this is not an impossibility since the IRS recognizes public interest litigation firms as a permissible activity.

The argument that an organization formed to fund litigation can

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103 See Rev. Proc. 64-65.
104 See Rev. Proc. 72-39, 1972-2 C.B. 818, for the procedural mechanisms by which the IRS can withdraw the advance assurance of deductibility to an organization. See also Founding Church of Scientology v. United States, 412 F.2d 1197 (Ct. Cl. 1969), cert. denied, 397 U.S. 1009 (1970).
105 See discussion Section III C(1), supra.
qualify under § 501(c)(3) can be supported by an analogous situation found in Rev. Rul. 73-285.107 In that situation a religious sect’s tenets required them not to act in a certain manner. The result was that they were in violation of state law. In addition, the tenets of the religion prohibited members from defending themselves in court. To overcome this hurdle an organization was formed, the sole activity of which was to provide funds for the defense of sect members. None of the sect members belonged to the organization. The IRS found that this organization, created solely to fund litigation costs through public donations, was exempted under § 501(c)(3).

Conceptually, the Code treats the term charitable in a broad, multifaceted manner. The concept of charitable includes: (1) relief of poverty by assisting the poor, the distressed, and the underprivileged; (2) advancement of religion; (3) advancement of education and science; (4) advancement of governmental functions and lessening the burdens of government; (5) promotion of health; and (6) promotion of social welfare for the benefit of the community.108

The problem is complicated by the fact that no clear extrajudicial definition of “charity” is available. The IRS merely says that the term is to be used in its generally accepted legal sense.109 Further, the term is not limited to the enumerated purposes or guidelines listed in the Regulations. The courts generally determine what does or does not constitute a charitable purpose without articulating explicit standards. However, a long-standing judicial precedent exists for a broad interpretation of the concept of charity. In Ould v. Washington Hospital for Foundlings,110 the Supreme Court stated that “[a] charitable use, where neither law nor public policy forbids, may be applied to most anything that tends to promote the well doing and well being of social man.”111

The environmental corporation could be characterized under several of the articulated categories. Protection of environmental and aesthetic values through litigation or other permissible means allowable to a § 501(c)(3) organization arguably lessens the government’s burden, particularly in view of federal,112 state,113 and local114

110 95 U.S. 303 (1877).
111 Id. at 311.
113 E.g., Fla. Stat. § 403 (1975).
114 E.g., Metropolitan Dade County Code, ch. 24.
legislation mandating governmental protection of the environment. Some organizations within this concept of "charitable" provide services in the context of governmental activity such as assisting in the preservation of a public lake,\textsuperscript{115} beautifying a city,\textsuperscript{116} engaging in solid waste recycling,\textsuperscript{117} community improvements,\textsuperscript{118} community land analysis,\textsuperscript{119} and provision of a public park.\textsuperscript{120}

The Regulations define a charitable entity as one which, among other things, lessens the burdens of government, promotes social welfare, defends human rights, etc.\textsuperscript{121} The fact that an organization in carrying out its primary purpose advocates changes or presents opinions on controversial issues with the intention of molding public opinion or creating public sentiment for the acceptance of its views does not preclude the organization from qualifying under § 501(c)(3). The concept of "charitable" certainly encompasses the promotion of a clean and healthful environment.

The viability of this argument is further supported by Rev. Proc. 71-39, which sets forth guidelines for public interest law firms. Specifically, a public interest law firm will qualify for a § 501(c)(3) exemption if it engages in litigation on behalf of the public at large on matters of public interest:

The representation may be either in some specific area of public concern, such as protection of the environment, or more broadly upon any subject of public interest as determined by the applicant. . . . Typical of such litigation may be class actions in the public interest, suits for injunction against action by government or private interest broadly affecting the public, similar representation before administrative boards and agencies, test suits where the private interest is small, and the like. The activity would not normally extend to direct representation of litigants in actions between private persons where their financial interests at stake would warrant representation from private legal sources. In

\begin{itemize}
  \item Rev. Rul. 70-186, 1970-1 C.B. 129.
  \item Rev. Rul. 68-14, 1968-1 C.B. 243.
  \item Rev. Rul. 71-29, 1971-1 C.B. 150.
  \item Rev. Rul. 68-15, 1968-1 C.B. 244.
  \item Rev. Rul. 66-358, 1966-2 C.B. 218. Organizations which have achieved § 501(c)(3) status and the benefits that flow therefrom are listed in IRS Publication No. 78, Cumulative List of Organizations as Described in Section 170(c) of the Internal Revenue Code of 1954. A few examples of listed organizations which have environmental or aesthetic goals as their purpose are the Sierra Club Legal Defense Fund, Inc., the Natural Resources Defense Council, Inc., the Environmental Defense Fund, Inc., the Friends of Earth Foundation, Inc., and the Historical Association of Southern Florida, Inc.
  \item Treas. Reg. §§ 1.501(c)(3)-1.501(d).
\end{itemize}
such cases, however, the organization may serve in the nature of a friend of the court.\textsuperscript{122}

Finally, if one examines Schedule F of Form 1023 (\textit{Application for Recognition of Exemption Under Section 501(c)(3)}), it refers to public interest law firms "and similar organizations."\textsuperscript{123} The first question on this Schedule is revealing by its language: "Will the organization conform to the guidelines for \textit{organizations engaged in litigation} activities . . . in Rev. Proc. 71-39 . . . ?"\textsuperscript{124} While Rev. Proc. 71-39 refers only to public interest law firms, IRS Form 1023, Schedule F suggests that other types of organizations can engage in litigation and still qualify as a § 501(c)(3) organization.

Thus, it would appear that both the Code and the Regulations provide that if one organizes an environmental group for the purpose of protecting and improving the environment through litigation and studiously avoids any attempts (within the guidelines provided) to promote or defeat any specific legislation\textsuperscript{125} there should be no problem in getting tax-exempt status. This is not, in fact, the case.

Three IRS private letter rulings make it quite clear that any organization which intends to engage in environmental litigation will have a tough road to follow. A March 8, 1976 letter\textsuperscript{126} was issued to a group "organized for the purpose of stimulating public appreciation of the values of wildlife and preserving and protecting wildlife through sanctuaries."\textsuperscript{127} The IRS concluded that the organization was not qualified for an exemption under § 501(c)(3). The disqualifying action, \textit{inter alia}, was a $700 contribution toward legal fees in a suit whose object was to require a federal highway agency to file an environmental impact statement regarding a proposed highway. It is suggested that the following logic of the IRS is contrary to the evidence as previously presented.

It is by no means clear that protection and improvement of the environment is always a charitable purpose.

\textsuperscript{122} Rev. Proc. 71-39, 1971-2 C.B. 575, at §§ 2-3 (emphasis added). In the instant situation, the engagement of the organization in litigation can reasonably be said to be in representation of a broad public interest. The litigation is designed to present a position on behalf of the public at large on matters of public interest.

\textsuperscript{123} I.R.S. Form 1023.

\textsuperscript{124} Id.

\textsuperscript{125} Efforts to influence a regulatory agency rule should be distinguished from efforts to promote or defeat legislation for the purposes of qualifying as a tax exempt organization pursuant to §§ 501(c)(3) and (4).


\textsuperscript{127} Id.
Moreover, even if we assume that protection and improvement of the environment is a charitable purpose and that your contribution of money for the legal expenses in the ... litigation was motivated by a desire to protect or improve the environment, your contribution results in no direct improvement of the environment. In this case there is an improvement in the environment only if the litigation succeeds. Furthermore, there is no immediate improvement of the environment even if the litigation succeeds, since the object of this litigation is to compel the government to file an environmental impact statement rather than to compel the government to take an action directly affecting the environment, e.g., to compel the government to reroute the highway.

Finally, even if we assume that the ... litigation will result in some improvement of the environment, it is still not clear that the overall effect of the litigation will be beneficial to the area.\textsuperscript{128}

In the second letter ruling,\textsuperscript{129} the organization was requested to supply additional information. Following are some of the questions asked by IRS:

5. Since you propose to institute litigation on your own behalf, how do you serve a charitable purpose by such representation?
6. How do you justify your argument that the protection or improvement of the environment is a charitable purpose?
7. If you institute legal action which results in obtaining an injunction or other court order prohibiting or requiring action on the part of the defendant, what will the effect of this order have on the environment?
8. If you institute legal action that is ultimately successful, and the consequences (such as lack of employment, loss of land from tax rolls, loss of water storage, etc.) are not clearly in the best interests of the community, then how is such litigation performing a charitable purpose?
9. Will you enter into negotiation with business and other leaders to resolve environmental problems prior to institution of court action?
10. If you institute legal action and you do not prevail, how will this directly benefit the environment?
11. Are the consequences of your legal activities clearly predictable and obviously beneficial to the community affected?\textsuperscript{130}

Finally, an organization was created to provide support for environmental litigation in the form of financing, research, information,
and communications. Its principal activities were the payment of attorneys' fees and expenses for environmental suits and the conduct of environmental law seminars. In the letter ruling\(^\text{131}\) the IRS decided that the organization did not qualify for exempt status because environmental litigation did not have a direct and immediate effect on the environment, was not clearly in the public interest, and would not definitely result in community benefit.

These rulings are difficult to reconcile with the apparent mandate provided by the Rev. Procs. on public interest law firms. It is the contention of the authors that these private rulings are wrong. Given the great need for environmental advocates in light of the now widely-accepted belief that protection of the environment is a public concern, the IRS should not be hindering these efforts. Ample evidence exists to indicate that society as a whole, as well as the Congress and IRS policy, all view environmental protection as coming within the ambit of § 501(c)(3). It appears, however, that the IRS takes this view only in the abstract. When actual cases have come before the agency, it has been unwilling to rule that an intention to engage in environmental litigation qualifies for tax exempt status. Obviously, there is a great need for clarification. What is the definition of a public interest law firm? Does it include a litigating organization? What about an organization which merely supports litigation through its financial resources? Why is there any question as to whether environmental protection is within the scope of § 501(c)(3)? Can an organization which is qualified as a charity under § 501(c)(3) involve itself in litigation without jeopardizing its exemption, or is litigation to be limited to public interest law firm status? Can an organization qualify as a § 501(c)(3) charity if a primary purpose of its formation is to litigate?

The list of questions is endless and the confusion unbounded. The clear import of past public rulings by the IRS is that an organization can be formed for environmental litigation and still qualify as a § 501(c)(3) charity. But the private rulings have portrayed a decidedly contrary position.

The apparent rationale behind the IRS's restrictive policy is the notion that litigation is not an inherently charitable activity, and thus an organization whose purposes are otherwise charitable may not become involved in law suits without endangering its § 501(c)(3)

status. The error in this position stems from an inability to differentiate between an exempt organization's purposes, which may be charitable, and the means by which those purposes are sought. Any means, including litigation, should be permissible if in furtherance of the charitable goals and not otherwise unlawful or in contradiction to other Code provisions.

Perhaps the best argument that can be found against the IRS's seemingly contradictory position in the private letter rulings can be found in Center on Corporate Responsibility, Inc. v. Shultz.\(^{132}\) The Center case, an offshoot of Watergate, was concerned with whether political influence from the White House affected the IRS's denial of § 501(c)(3) status to the plaintiff organization. Of particular importance is the court's discussion of whether the plaintiff's activities came within the confines of § 501(c)(3). Specifically, the plaintiff involved itself in litigation activities and helped support a sister organization in carrying on proxy contests. In finding that the plaintiff met the requirements of a public interest law firm, the court noted that the only requirement placed on the scope of litigation was that it be in some area of public concern or upon any subject of public interest as determined by the plaintiff.\(^{133}\) The IRS claimed that the plaintiff was not qualified because it had financially supported its sister organization which was a non-charitable organization engaged in proxy fights—a non-charitable activity. In striking down this argument, the court gave wide latitude to the scope of § 501(c)(3): "[A]ny contribution to the [sister organization's] activities would be in furtherance of the plaintiff's purposes as both seek the same goal—increased corporate social responsibility. . . . The means employed by the charitable organization to achieve its purposes do not make the end results uncharitable."\(^{134}\) The IRS withdrew from its appeal without making any concessions.

The Center opinion does not eliminate the confusion as to whether an organization which is formed to conduct environmental litigation may qualify under § 501(c)(3) as a charity. The district court's well-reasoned opinion indicates, however, that an organization which conducts litigation in an area of public concern or upon a subject of public interest should qualify as a charity. Although the


\(^{133}\) Id. at 876.

\(^{134}\) Id. at 877-78 (emphasis added).
opinion appears consistent with Rev. Proc. 71-39 and other public rulings by the IRS, the agency has not altered the position expressed in the private letter rulings. Thus, to obtain tax-exempt status, organizations may have to resort to the courts. The Center opinion offers the encouragement that the judiciary may strike down the unduly restrictive interpretation of § 501(c)(3) adopted by the IRS, thereby establishing that environmental litigation organizations do in fact qualify for tax-exempt status.

IV. JURISDICTIONAL CONSIDERATIONS

A. Standing

The corporation's capability to litigate will be determined by its ability to achieve standing to sue. The scope of the standing doctrine was liberalized by the Supreme Court in the early 1970's in such celebrated cases as Data Processing Service v. Camp, Sierra Club v. Morton, and United States v. SCRAP. After the above decisions were handed down, standing was not an impossible barrier in the area of environmental litigation. Standing to sue was obtainable by alleging that a personal or economic interest of the corporation or its members was injured by some private or public activity.

More recent court decisions have refined the standing requirement. In denying standing in Schlesinger v. Reservists Committee to Stop the War, and United States v. Richardson, the Supreme Court handed down a two-pronged test for standing. The first was "injury in fact, economic or otherwise," id. at 152, which the Court said is required by Article III of the federal Constitution, restricting access to the courts to "cases" and "controversies." Second, the Court said, "The question of standing . . . concerns apart from the case or controversy test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by statute or constitutional guarantee in question." Id. at 153.

Sierra Club held that where a party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing to sue depends upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context—the form historically viewed as capable of judicial resolution. The Court stated that "aesthetic and environmental well being are interests to be protected, but the person or persons seeking review must be among the injured." Id. at 734.

SCRAP, standing received its most liberal interpretation. The Court held that appellees' pleading sufficiently alleged that they were "adversely affected" or "aggrieved" within the meaning of § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1976), and thus a motion to dismiss on the ground of lack of standing to sue was properly denied. The appellees claimed that the specific and allegedly illegal action of the ICC would directly harm them in their use of the natural resources in the Washington area.

The Court held that a taxpayer challenge to the propriety of
Court stressed that the injury alleged by plaintiffs must be more than a generalized injury suffered by all taxpayers. The injury must be concrete and not speculative.\textsuperscript{140}

In \textit{Warth v. Seldin},\textsuperscript{141} a 1975 case, the Supreme Court denied standing to several groups of plaintiffs challenging an alleged exclusionary zoning ordinance in the town of Penfield, New York. The Court held that plaintiffs must specifically allege and demonstrate in the complaint that they have been injured and that judicial intervention will provide a tangible remedy for the injury.\textsuperscript{142} The Court added that when an individual or an association is asserting the legal rights of a third party, it is within the judiciary’s prudential authority to deny these plaintiffs access to the courts.\textsuperscript{143}

Several commentators have suggested that the trend of the early 1970’s towards a more expansive standing doctrine may have reversed direction.\textsuperscript{144} However, environmental organizations need not be hampered by what seems to be the Court’s more sophisticated approach to standing. There are a multitude of statutorily created interests provided by federal\textsuperscript{145} and state\textsuperscript{146} environmental statutes. The respective environmental statutes provide criteria for determining who may bring statutory causes of action. Whether an environmental corporation can meet the standing requirements depends on the express language of each respective statute and the statutory construction given to that language by the courts.

The corporation’s ability to litigate as a private attorney general is limited. Possibly under very liberal state statutes such as the Michigan Environmental Protection Act,\textsuperscript{147} or a federal statute such allowing Congressmen to hold positions in the armed forces did not meet with the standing requirements.

\textsuperscript{140} 418 U.S. 166 (1974). \textit{Richardson} involved a taxpayer challenge to the constitutionality of the Central Intelligence Agency Act for not requiring a public accounting of that agency’s expenditures. The Court held that plaintiffs did not have the requisite standing to bring the action.

\textsuperscript{141} Id. at 170.

\textsuperscript{142} 422 U.S. 490 (1975).

\textsuperscript{143} Id. at 498-9.


\textsuperscript{146} E.g., FLA. STAT. ch. 403 (1975); MICH. COMP. LAWS ANN. § 691.1207 (Supp. 1975).

\textsuperscript{147} Mich. EPA § 2(1), MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1975):

The attorney general, any political subdivision of the state, any instrumentality 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
as the Clean Air Act of 1970, the corporation may be able to defend the rights of third parties even though no concrete interest of the organization is injured.

B. Constitutional Rights

An additional factor which might increase the corporation's ability to litigate is the existence of a state constitutional right to a decent environment. Recent state cases indicate that in many states which have environmental declarations in their constitutions, environmental considerations must be taken into account before state agencies can proceed with their projects. In instances where

where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any 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.


a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

See Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975). The court held that a citizen organization had standing to bring suit without alleging an injury in fact because Congress had determined that "any person" was proper party to bring suit under 42 U.S.C. § 1857 h-2(a). However, the court further held that even though this section allows any person to file suit to enforce clean air standards, it does not dispense with the necessity that a suit otherwise satisfy traditional concepts of justiciability, which, of course, include the case or controversy requirement of Article III of the federal Constitution. See also Citizen's Ass'n of Georgetown v. Washington, 383 F. Supp. 136 (D.D.C. 1974) (standing allowed to a citizen's group).

The following states have an Environmental Bill of Rights in their constitution: Florida - Art. II, Section 7; Illinois - Art. XI; Massachusetts - Art. 97 of the Amendments; Michigan - Art. IV, Section 52; Montana - Art. XI; New Mexico - Art. XX, Section 21; New York - Art. XIV; North Carolina - Art. XIV, Section 5; Pennsylvania - Art. C, Section 27; Rhode Island - Art. I, Section 17; Virginia - Art. XI.

E.g., Commonwealth v. Fox (Pennsylvania Environmental Hearing Board Docket No. 73-078). The Department of Environmental Regulation's failure to consider the effects of the sewer's construction on erosion, transportation, land use patterns, population density, and air and water quality was held by the Board to be in violation of Pennsylvania's Constitution. The Department was ordered to take environmental considerations into account. See also Flowers v. Northampton, Bucks County Municipal Authority (Court of Common Pleas,
no environmental considerations were taken into account in agency planning, environmental groups have been successful in obtaining administrative or judicial orders compelling careful consideration of environmental factors.

However, if state agencies have taken environmental factors into account and have demonstrated a reasonable effort to reduce environmental damage, the environmental groups generally have not prevailed.

Little reliance can be placed on the federal level for a constitutional right to a clean and healthful environment. Recent court decisions have rejected claims that the 5th, 9th, and 14th Amendments to the United States Constitution include substantial environmental rights.

One court, though, has implied that there may be a sound basis for claiming that the right to a clean environment is constitutionally protected. However, that court refused to hold that such a right exists on the grounds that it is beyond the province of a district court to bestow constitutional protection to the environment. Consequently, there is currently no case authority support-

Buck Co. 1972), 2 E.L.R. 20313, where the court permitted a suit under the State's environmental amendment requiring the municipal water authority to give “full and good faith consideration” to ecological and environmental factors in site selection for wells and water tanks.

E.g., Payne v. Kassab, 11 Pa. Commw. Ct. 14, 312 A.2d 86 (1973). Since the Pennsylvania Department of Transportation indicated it would make substantial efforts to relocate historical markers, relandscape affected areas, and replace trees, the court upheld a proposed highway construction that would have infringed upon a historic park area; Ely v. Luckhard, (Law and Equity Court of the City of Richmond, Virginia, August 7, 1973). Virginia had made numerous changes in the design of a state penal facility in order to minimize any adverse environmental impact that might occur as a result of construction. The court interpreted the environmental amendment to the state constitution to require merely that the state weigh environmental considerations with other considerations prior to taking any action. Therefore, the court concluded that the constitutional provision had not been violated.

Hagedorn v. Union Carbide, 363 F. Supp. 1061 (N.D.W.Va. 1973). The court denied subject matter jurisdiction under the 5th, 9th, or 14th Amendments where plaintiff alleged that the defendant's air pollution deprived them of a constitutional right to breath clean air and live in a decent environment. In Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), the court declined to elevate the right to a decent environment to a constitutional level: “While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so.” Id. at 1139. See also Virginians For Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972); Environmental Defense Fund v. Corps. of Engineers of the United States Army, 325 F. Supp. 728 (E.D. Ark. 1971); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972).


Id. at 739. Nevertheless, the court stated: “Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing
ing the concept of a constitutionally protected environment under the federal constitution.

V. CONCLUSION

This article has concentrated on the manner in which one can establish a tax-exempt, non-profit environmental corporation under local and federal law. In addition, certain jurisdictional problems were examined.

Obviously, the desirability of utilizing the tax-exempt corporate model is to provide financing when directly injured individuals lack sufficient funds to support litigation. The attorney, however, should be aware of the potential problems surrounding creation of the new organization. First, the time required to apply for and receive the status of a charitable corporation may be substantial. Second, the myriad of restrictions placed on the organization by state non-profit corporation laws and federal tax laws will require careful planning.

Third, counsel should be aware that the IRS is apparently not looking with favor on organizations seeking to engage in environmental litigation.

The authors strenuously argue that the current position of the IRS with regard to litigation activities is illogical and inconsistent with both the statutory and case law surrounding charitable organizations. The authors believe that this position must soon be reversed.

Unquestionably, the need exists for public input into the environmental decision-making process. This need, together with the legal arguments earlier put forth, clearly gives merit to the concept of a non-profit, tax-exempt, contribution-deductible environmental corporation. Without continued use of the non-profit corporation, the environmental concern of the public will be deprived of the most realistic approach for enabling the public to participate in an all-important decision-making process.

provisions of our Constitution . . . Such claims even under our present Constitution are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition." Id. at 739. The court went on to quote a passage from Judge Learned Hand's opinion in Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809 (2d Cir. 1944): "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." Id.