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Ruckelshaus v. Sierra Club: A Misinterpretation of the Clean Air Act’s Attorneys’ Fees Provision

Amy Semmel*

INTRODUCTION

In response to unprecedented public concern with environmental protection, Congress twice amended the Clean Air Act [the Act] during the 1970's. Congress embodied in these amendments a new vision of administrative law by encouraging the public to participate in the implementation and enforcement of the Act. The New Deal model of administrative agencies as disinterested experts rationally ordering a regulatory field on behalf of the public had become suspect. Congress found that the federal and state regulatory agencies had been lax in carrying out the statutory mandate to develop and implement air quality standards. Congress responded by structuring the Clean Air Act Amendments to encourage the public to keep watch over the Environmental Protection Agency [EPA]. Section 304 of the Act permits “any person” to bring suit to ensure enforcement of EPA standards and regulations.

4. Id. at 1.
5. See S. Rep. No. 1196, 91st Cong., 2d Sess. 36 (1970). Prior to 1970, the Department of Health Education and Welfare (HEW) administered federal air quality programs. HEW was required to designate air quality regions, develop air quality criteria documents, and approve state implementation plans designed to achieve ambient air quality standards. Air quality standards were set by the states. The Act proved ineffective in achieving rapid and effective control of air quality. R. STEWART AND J. KRIER, ENVIRONMENTAL LAW AND POLICY 336 (1978). The Clean Air Act Amendments of 1970 were prompted by congressional dissatisfaction with the lack of tangible achievement in federal air pollution programs over the previous decade. Id. at 340.
6. Clean Air Act § 304, 42 U.S.C. § 7604 (1982). Section 304 states in pertinent part: 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 viola-

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307 permits citizens to challenge air quality standards promulgated by EPA.7

Congress recognized that citizens often lack the funds necessary to advance legal theories and policy perspectives which protect the environment, but which reap no monetary benefits for their proponents.8 The 1977 Clean Air Act Amendments thus specified that a court may award...
the costs of litigation to parties seeking review of agency rulemaking under section 307(f). The standard for fee awards in section 307(f) is, on its face, very liberal: In any petition for review of an EPA action, the court “may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.” The language of section 307(f) departs significantly from the language of federal attorneys’ fees statutes outside the environmental area, which typically permit fee awards only to a “prevailing” or “substan-
tially prevailing”12 party.

In Sierra Club v. Gorsuch,13 the Court of Appeals for the District of Columbia construed section 307(f) as permitting a fee award to a party who has “substantially contribute[d] to the goals of the Act,” even though that party has not ultimately prevailed on any issue.14 The Court of Appeals made clear that it intended this as a strict standard which authorizes awards to nonprevailing parties only in exceptional circumstances.

In Ruckelshaus v. Sierra Club,15 however, a divided Supreme Court16 reversed the court of appeals and held that it is never “appropriate” within the meaning of section 307(f) to award litigation costs to a party who has not to some degree prevailed on the merits.17 This Note argues that the Supreme Court’s narrow interpretation of section 307(f) runs counter to the language and legislative history of this section, and that the Court’s decision frustrates congressional intent to ensure complete and balanced airing of regulatory issues surrounding EPA rulemaking under the Clean Air Act.

I

BACKGROUND OF THE CASE

A. The American Rule for Attorneys’ Fees Awards

English courts have for centuries routinely awarded attorneys’ fees to victorious litigants.18 American courts long ago rejected the English practice in favor of the “American Rule”19 which dictates that, absent an express contractual or statutory authorization for fee shifting, each party

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14. 672 F.2d at 39 (emphasis omitted).
16. Justice Rehnquist delivered the opinion of the Court. 103 S. Ct. at 3275. Justice Stevens dissented, joined by Justices Brennan, Marshall, and Blackmun. Id. at 3281.
17. Id. at 3281.
19. Id. at 152-54.
must bear its own litigation costs.\textsuperscript{20} American courts broke from the English practice for a number of reasons;\textsuperscript{21} one especially important factor was a concern for ensuring litigants unfettered access to the courts to vindicate their legal rights.\textsuperscript{22} The American Rule reflects a judgment that the risk of having to pay an adversary's legal fees under the English Rule deters litigants from asserting their legal rights, because such a risk can outweigh the prospect of recovering one's own legal fees if victorious.\textsuperscript{23} The American Rule thus encourages litigants of modest means to use the courts to vindicate their legal rights, because they need not fear a judgment for their opponent's attorneys' fees if they lose.\textsuperscript{24}

Federal courts carved out two equitable exceptions to the American Rule in the late nineteenth century; both are viable today. The first exception is designed to penalize abusive litigation practices.\textsuperscript{25} Accordingly, courts may award attorneys' fees to a litigant whose opponent has pursued a frivolous claim or defense and has done so "in bad faith, vexatiously, wantonly or for oppressive reasons."\textsuperscript{26} The second exception allows a litigant to recover attorneys' fees from a common fund where the litigant has acted to create or protect the fund.\textsuperscript{27} The fee award prevents those who benefit from the fund from being unjustly enriched by the ef

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\textsuperscript{21} Early American anti-English sentiment and the American reverence for individualism and individual initiative to enforce the law and vindicate rights helped contribute to the break from the English Rule. See Comment, supra note 18, at 152-53. See also R. Pound, The Spirit of the Common Law 13-14 (1921).

\textsuperscript{22} Comment, supra note 18, at 153-54.

\textsuperscript{23} Id. Commentators have observed that the American Rule also operates to discourage an aggrieved individual from pursing meritorious claims when he or she lacks the financial resources to obtain counsel. See Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792, 796 (1966).

\textsuperscript{24} See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("In support of the American Rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit .... "); Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 237 (1964) (Goldberg, J., concurring stated that the American Rule represented a deliberate choice to ensure that litigants of moderate means are not denied access to the federal courts.).

\textsuperscript{25} Hall v. Cole, 412 U.S. 1, 5 (1973) (dictum that the underlying rationale of the bad faith exception is punitive).


\textsuperscript{27} The Supreme Court first enunciated the common fund doctrine in Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527 (1882). In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-97 (1970), a shareholder derivative action, the Court extended the doctrine to permit recovery of fees where the litigation conferred substantial nonpecuniary benefit upon the members of an ascertainable class. Thus, the Court approved a fee award out of corporate assets where the plaintiff had benefitted the shareholders by promoting "fair and informed corporate suffrage" through a suit to dissolve a corporate merger based on a misleading proxy statement. Id. at 396. See also Bright v. Philadelphia-Baltimore-Washington Stock Exch., 327 F. Supp. 495, 506 (E.D. Pa. 1971) (attorneys' fees awarded against defendant stock exchange because plaintiff's victory benefitted the exchange members).
forts and expenditures of an individual litigant.28

Over time, Congress recognized both the vital role private litigants play in enforcing public policy and the considerable economic barriers to the legal system faced by litigants of limited means.29 Congress thus enacted numerous fee shifting provisions designed to promote private enforcement of statutory policies by requiring losing defendants to pay the attorneys’ fees of prevailing plaintiffs. Fee shifting statutes were enacted for a variety of purposes, ranging from preventing anti-competitive practices30 to protecting the environment.31 Congressional authorization of fees awards was, however, haphazard and inconsistent.32 Federal courts filled in apparent gaps in the statutes by developing a third equitable exception to the American Rule. Under the “private attorney general” doctrine, a prevailing litigant who conferred a benefit upon the public at large by vindicating important statutory interests could recover litigation costs from the losing defendant, even where there was no statutory authorization for fee shifting.33

In Alyeska Pipeline Service Co. v. Wilderness Society,34 the Supreme Court brought lower courts’ use of the private attorney general doctrine to a halt. The Court observed that Congress had authorized awards of


31. See supra note 10.

32. See Cedar, supra note 8, at 310. The contrast between sections 304 and 307 in the Clean Air Act Amendments of 1970 is a particularly egregious example of congressional failure to achieve even a modicum of internal consistency within a particular statute in attorneys’ fees provisions. Apparently as a result of oversight, in 1970 Congress authorized awards of attorneys’ fees in citizen suits brought under section 304 in the district courts, but not those brought under section 307 in the courts of appeals. This statutory scheme seemed to defy rational explanation and gave rise to conflicting interpretations of section 307. Compare Natural Resources Defense Council v. EPA, 484 F.2d 1331, 1336 (1st Cir. 1973) (permitting a fees award on the grounds that the availability of attorneys’ fees should not depend on the forum of the suit and that the legislative history of the Clean Air Act supported such a view) with Natural Resources Defense Council v. EPA, 512 F.2d 1351, 1357-58 (D.C. Cir. 1975) (denying an award of fees on the grounds of strict statutory construction, while acknowledging the absence of a sound policy for distinguishing between sections 304 and 307). Congress corrected its earlier oversight in the 1977 Clean Air Act Amendments.


34. 421 U.S. 240 (1975).
attorneys' fees in some statutes but not in others, and concluded that Congress had "reserved for itself" the power to select those circumstances which merit fee shifting. The Alyeska Pipeline Court reaffirmed the vitality of the bad faith and common fund exceptions, but made clear that Congress must expressly authorize any other modifications of the American Rule.

B. The Underlying Litigation and the Court of Appeals Opinion

The attorneys' fees at issue in Ruckelshaus v. Sierra Club were incurred in a "uniquely important and complex" case—Sierra Club v. Costle. The case involved a challenge to EPA revised new source performance standards promulgated pursuant to the Clean Air Act Amendments of 1977. Section 111 of the amended Act requires EPA to promulgate specific percentage reductions in emissions and emissions ceilings for new sources. EPA promulgated a variable percentage reduction standard, which was controversial because it allowed sources to use less efficient pollution control technology if they burned low sulphur coal. The standard required each new coal-burning power plant to reduce sulphur dioxide emissions to a level ninety percent below the level of potentially uncontrolled emissions. However, plants using low sulphur coal could reduce emissions by as little as seventy percent as long as the resulting emissions did not exceed 0.6 pounds of sulfur dioxide per MBTU.

Both industry and environmental groups objected to the revised standard and filed petitions for review under section 307 of the Act in the

35. Id. at 260-61.
36. Id. at 269. See also The Supreme Court, 1974 Term, 89 HARV. L. REV. 47, 173, 175-77 (1975) [hereinafter cited as 1974 Term].
37. 421 U.S. at 269.
40. 42 U.S.C. § 7411(b), (d), (f) (1982).
41. 40 C.F.R. § 60.43a (1983).
42. B. ACKERMAN AND W. HASSLER, supra note 3, at 19.
43. Id. The British thermal unit (BTU) is a measure of the amount of energy released by coal when burned. Typical bituminous coal produces roughly 22 million BTU (MBTU) per ton. The amount of sulfur found in coal may be expressed either as a percentage of the total weight of the coal or as the amount of sulfur dioxide that will be released per MBTU of heat generated by the coal. Id. at 138 n.10.
District of Columbia Court of Appeals. Eighty-six utility companies and two utility industry organizations challenged the standard as too strict, contending in part that the ninety percent reduction standard was not technologically feasible. The Sierra Club and the State of California Air Resources Board challenged the standard as too lax, contending that EPA had no authority to promulgate a variable percentage standard instead of a uniform standard, and that the record did not support EPA's action. The major issues litigated—the efficacy and reliability of various sulphur dioxide control methodologies, econometric modeling of the impact of various standards on utility behavior, and the impact of alternative standards on usable coal reserves—involved a staggering degree of technical complexity.

The court of appeals rejected both the Sierra Club's and the industry's contentions, and the culmination of this immense judicial task, filling 132 pages of the Federal Reporter, was "a short conclusion: the rule is reasonable." Although the court declined to adopt the environmentalists' position, it nonetheless deemed it appropriate under section 307(f) of the Act to award the Sierra Club its litigation costs. EPA initially negotiated with the Sierra Club over the amount of attorneys' fees, but in August 1981, EPA adopted a blanket policy opposing all petitions for attorneys' fees by nonprevailing parties. This policy halted the ongoing fee negotiations and prompted the Sierra Club to bring suit for its fees.

In Sierra Club v. Gorsuch, the court of appeals awarded attorneys' fees to the Sierra Club, holding that an award of attorneys' fees to a nonprevailing party is appropriate under section 307(f) where the party requesting the award has made "substantial contributions" to the goals of the Clean Air Act. An award was justified, the court found, because the Sierra Club facilitated the prompt resolution of novel, important, and

44. 657 F.2d at 312. See also Sierra Club v. Gorsuch, 672 F.2d at 40.
45. 657 F.2d at 316-17.
46. Specifically, the Sierra Club objected to EPA's use of the variable standard to "force" technological development (i.e., dry scrubbing), maintaining that only "already existing technology could provide the basis for new source performance standards." Id. at 329. The Sierra Club also challenged the validity of the econometric model used by EPA to predict long-term national trends for alternative emissions standards. Id. at 332. In addition, the Environmental Defense Fund challenged EPA's 1.2 pound/MBTU ceiling for total sulphur dioxide emissions as procedurally defective because of ex parte contacts with coal industry advocates, an issue of first impression under the new rulemaking guidelines of the Clean Air Act Amendments of 1977, 42 U.S.C. § 7607 (1982). 657 F.2d at 384, 386-91.
49. Sierra Club v. Gorsuch, 672 F.2d at 34.
50. Id.
52. Id. at 41.
complex technical questions and issues of statutory interpretation.53

The court stressed the role played by the Sierra Club in ensuring that all points of view were adequately represented before the court. Because the issues were so complex, "[i]t was absolutely essential . . . that this court have expert and articulate spokesmen for environmental as well as industrial interests. . . . [W]ithout competent representatives of environmental interests, the process of judicial review might have been fatally skewed."54 The questions raised by the environmental groups were important, the court continued, and no other party had sufficient economic interests at stake to raise them.55 The court of appeals concluded that, under these circumstances, Congress intended nonprevailing parties to be eligible for fee awards.56

II
THE SUPREME COURT DECISION

In Ruckelshaus v. Sierra Club,7 the Supreme Court held that section 307(f), which allows the court of appeals to award litigation costs "whenever [the court] determines such award is appropriate,"58 does not overrule the traditional American Rule that claimants must prevail to some degree to be eligible for a fee award.59 The Court reasoned that if Congress had intended such a radical departure from traditional fee shifting principles, it would have used more explicit language than that in section 307(f).60

The Court began its analysis by stating that fee shifting statutes should be strictly construed. Under the American Rule, the Court noted, "even the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."59 Where Congress has altered the American Rule by authorizing fee shifting, it has almost always required some success on the merits as a predicate for a fee award.62 Accordingly, the Court stated that it would not hold that Congress intended that a party which lost its case on the merits could be eligible for fees unless there was a clear showing that this result was intended.63 The Court also noted that fee shifting statutes operate as waivers of the gov-

53. Id. at 39, 41.
54. Id. at 41.
55. Id.
56. Id.
57. 103 S. Ct. 3274 (1983), rev'g Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982).
59. 103 S. Ct. at 3281.
60. Id.
61. Id. (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975)) (emphasis added by the Court).
62. 103 S. Ct. at 3276.
63. Id. at 3277.
ernment's sovereign immunity against attorneys' fees claims. Since "[w]aivers of immunity must be 'construed strictly in favor of the sovereign,'"64 the Court concluded that "care must be taken not to 'enlarge' § 307(f)'s waiver of immunity beyond what a fair reading of the language of the section requires."65

After deciding to interpret narrowly section 307(f)'s "whenever appropriate" standard for awarding attorneys' fees, the Court turned to the legislative history of this provision. The following passage from the House Report, apparently supporting the Sierra Club's position, was quoted in the Court's opinion:

In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the courts' discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party.'66

This passage, the Court maintained, was meant to correct unduly narrow readings of the "prevailing party" standard, not to eliminate the standard altogether.67 A minority of lower courts had mistakenly denied fees to plaintiffs who lacked a formal court order granting the requested relief; still others had required not just that a party prevail, but that it substantially prevail.68 The Court concluded that by adopting the "whenever appropriate" standard, Congress meant to remove any doubt that partially prevailing parties are eligible for fee awards, thus eliminating case-by-case inquiry into whether the party achieved the requisite degree of success to justify a fee award.69

The Court also analyzed the relationship of section 307, which allows citizens to challenge air quality standards formulated by EPA,70 to section 304, which authorizes citizen suits against private parties to enforce EPA air quality standards.71 Both sections authorize attorneys' fees awards under a "whenever appropriate" standard.72 The Court expressly assumed that fee awards would be appropriate in similar circum-

64. Id. (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)).
65. Id. (quoting Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1927)).
66. 103 S. Ct. at 3278 (quoting HOUSE REPORT, supra note 9, at 337, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416) (emphasis supplied by the Court).
67. 103 S. Ct. at 3278-79.
68. Id.
69. Id. at 3279.
70. See supra note 7.
71. See supra note 6.
72. Section 304(d) of the Act authorizes a fee award "whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d) (1982). Section 307(f) of the Act authorizes the court to award fees "whenever it determines that such award is appropriate." 42 U.S.C. § 7607(f).
stances under both sections. The Court reasoned that if the
government could be compelled under section 307(f) to award attorneys'
fees to nonprevailing parties challenging agency rulemaking, then private
businesses could be compelled to pay attorneys' fees to plaintiffs who
wrongly accused them of violating the law. Such a result would conflict
with the legislative history of section 304(d), which indicates that a cen-
tral purpose of the section was to protect industry from meritless suits by
making those who bring harassing suits bear the costs of the entire litiga-
tion. As the Court noted, "[o]ne might well imagine the surprise of
legislators who voted for [section 304(d)] as an instrument for deterring
meritless suits upon learning that instead it could be employed to fund
such suits." Thus the Court's parallel construction of sections 304(d)
and 307(f) provided additional support for its conclusion that Congress
did not intend nonprevailing parties to be eligible for attorneys' fees
awards in unsuccessful challenges to EPA rulemaking.

III
DISCUSSION

A. Language and Intent of the Act

Prior to Alyeska Pipeline, Congress had never declared an intention
to prohibit nonstatutory awards of attorneys' fees by the courts. Rather, Congress' pronouncements on attorneys' fees had resulted in a
patchwork of provisions lacking a comprehensible pattern. In Alyeska Pipeline, the Supreme Court viewed this ambiguous patchwork of attor-
neys' fees provisions as evidence of a congressional predisposition for in-
dividually borne litigation costs. Congress repudiated this inference
when it amended section 307 of the Act in 1977 to clarify its intent that
courts may shift fees in challenges to EPA rulemaking. In Ruckelshaus v. Sierra Club, however, the Court again attributed to Congress a bias
against fee shifting. Ironically, the Court applied this interpretation to
a broadly drafted fee shifting provision. If one reads section 307(f) and
its legislative history with an eye toward the overall purpose of the fee
shifting provision, it becomes apparent that Congress did not intend a
plaintiff's success or failure on the merits to be dispositive of the plain-
tiff's eligibility for attorneys' fees. Under the guise of strict construction,
the Court replaced the "whenever appropriate" standard that Congress

73. 103 S. Ct. at 3280.
74. Id. at 3281 & n.13 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 38 (1970)).
75. 103 S. Ct. at 3281.
76. Id. at 3280-81.
77. 1974 Term, supra note 36, at 175-77.
78. See supra note 32 and accompanying text.
80. 103 S. Ct. at 3281.
chose for challenges to EPA rulemaking with the "prevailing party" standard that Congress has used in nonenvironmental statutes.81

The Supreme Court's construction of section 307(f) is not supported by the statutory language. Congress deliberately used language in section 307(f) that departed from the "prevailing party" standard to make clear that it intended to grant courts discretion to award attorneys' fees to a broader class of parties. In the wake of Alyeska Pipeline, Congress enacted two broad fee shifting statutes82 and amended numerous existing statutes83 to enable federal courts to shift fees in litigation under those statutes. Significantly, however, Congress used the "whenever appropriate" standard for fee shifting only in statutes concerned with environmental protection.84 In section 307(f), Congress deliberately chose not to use the "prevailing party" language, which it had used in many other fee shifting provisions; this strongly suggests that it did not intend that a party must prevail in a challenge to EPA rulemaking to be eligible for a fee award.

The legislative history of the 1977 Amendments also fails to support the Court's construction of section 307(f). The House Report quoted by the Court85 states unequivocally that the drafters did not intend an appellate court's discretion to award fees to be restricted to cases in which the party seeking fees prevailed. Furthermore, the House Committee on Interstate and Foreign Commerce had considered an amendment incorporating the prevailing party standard into section 307(f); "such an amendment was expressly rejected by the committee, largely on the grounds set forth in [Natural Resources Defense Council] v. EPA."86

At issue in Natural Resources Defense Council v. EPA87 was the environmental group's petition for attorneys' fees incurred in litigation under the Clean Air Act. In the underlying litigation, plaintiffs brought suit under section 307 to challenge the EPA's approval of state air pollu-

81. See supra notes 11-12.
84. Compare statutes cited supra note 10 with those cited supra note 11.
85. See supra text accompanying note 66.
86. HOUSE REPORT, supra note 9, at 337 (citations omitted), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416.
87. 484 F.2d 1331 (1st Cir. 1973).
tion plans. Natural Resources Defense Council prevailed on some substantive issues, but lost on others. The government argued that because some issues were decided adversely to the environmental group, a fee award would be inappropriate. The First Circuit Court of Appeals rejected the government's position and approved an award for fees in full.

Confining its attention to the facts of *Natural Resources Defense Council v. EPA*, the Supreme Court in *Ruckelshaus v. Sierra Club* inferred that the House Report cited the First Circuit case to demonstrate that *partially* prevailing, as well as fully prevailing, parties were eligible for fee awards. But, as Justice Stevens observed in his dissent, the House Committee adopted the *reasoning*, not the facts, of *Natural Resources Defense Council v. EPA*. In that case, the First Circuit Court of Appeals reasoned that the "whenever appropriate" standard suggests greater latitude even than is found in 28 U.S.C. section 2412 which authorizes awards to the "prevailing party." We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early implementation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

By approving the First Circuit's reasoning, Congress recognized that a party could further the goals of the Act merely by representing before a court an interest which might not otherwise be adequately represented, and that such a party may deserve compensation for its efforts. Congress thus intended section 307(f) to authorize fee awards to parties who conferred such a benefit on the public, whether or not those parties prevailed on the merits.

The history of the prevailing party standard militates against the Court's contention that the language of section 307(f) was meant to clarify the meaning of that standard. By 1977, a "prevailing party" was

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89. 484 F.2d at 1338. Because Congress had not yet enacted section 307(f), the court relied on section 304(d) to make a fee award. See *supra* note 32.
90. 484 F.2d at 1338-39.
91. *See supra* text accompanying notes 66-69.
93. 484 F.2d at 1338. The court of appeals also stated that even those challenges upon which the plaintiffs did not prevail "were mainly constructive and reasonable," *id.*, and that as a result of the suit, "policies of the EPA have been corrected and others, upheld, have been removed from the area of dispute . . . . [Some] of the legal principles at issue have national as well as regional import. Petitioners have thus helped to enforce, refine and clarify the law. They can be said to have assisted the EPA in achieving its statutory goals." *Id.* at 1334.
94. Justice Stevens makes this observation in his dissenting opinion. 103 S. Ct. at 3289.
understood to encompass any party whose suit served to vindicate its rights, whether by court decision, consent judgment, or the defendant's voluntary compliance after commencement of the suit. Although the Supreme Court did not rule until 1980 that a favorable judicial decree is not a prerequisite for a fee award under the "prevailing party" standard, this had long been the majority rule in the lower courts. Courts regularly awarded fees under the common fund exception to the American Rule without insisting that plaintiffs prosecute through to a final decree. With the enactment of statutory attorneys' fees provisions, the majority of federal courts applied the same rule. Moreover, lower federal courts had construed the "whenever appropriate" standard of section 304(d) of the Act as permitting fee awards to nonprevailing parties as early as 1974. The reference to Natural Resources Defense Council v. EPA in the legislative history indicates that Congress took judicial interpretation of section 304(d) into account in amending section 307. The

96. See supra notes 27-28 and accompanying text.

Even under equitable exceptions to the American Rule, courts have awarded fees to nonprevailing parties. For example, courts have found that the benefits conferred by a nonprevailing party challenging a will or trust are worthy of compensation. These courts have reasoned that, where an instrument is ambiguous, even an ultimately unsuccessful challenger can "protect" the will or trust by ensuring that the true intent of its creator is ascertained. Dawson, supra note 97, at 1629-30. An analogous argument can be made for awards to nonprevailing parties under statutes designed to protect the environment. See infra text accompanying notes 118-19 and 128.

100. See supra text accompanying note 86.
legislative history thus contradicts the Court's assertion that, by enacting section 307(f), Congress meant only to make partially prevailing parties eligible for fee awards.

Justice Rehnquist also argued for the Court that sections 307(f) and 304(d) must be similarly construed. It can never be appropriate to make a private company pay attorneys' fees to a losing plaintiff in a section 304 action, he argued, and it follows that losing plaintiffs can never receive fees in a section 307 action. The premise that the scope of the two fee provisions must be precisely congruent, however, overlooks the very different nature of judicial proceedings under the two citizen suit provisions. Section 304 invites citizens to aid in enforcing the Clean Air Act. Section 307 invites citizens to participate in the process of law-making. An examination of the administrative rulemaking process, and the role of judicial review in that process, will demonstrate that the scope of the attorneys' fees provision in section 304 need not determine the scope of the fees provision in section 307.

B. The Need for Complete and Balanced Representation of Interests in the Process of Judicial Review

The policies underlying section 307(f) support fee awards for unsuccessful litigants in certain circumstances. Judicial review of environmental policymaking imposes demands on a court that are not present in the traditional private lawsuit. The issues are often technically complex, and the outcome of the litigation will affect the interests of many people. Thus, the need for a complete and balanced airing of the environmental issues related to agency regulations justifies fee shifting from the government to nonprevailing parties.

Adjudication is traditionally understood as a mechanism for settling disputes between private parties about private rights. Critics of liberal fee shifting provisions contend that litigants who fail to change the defendant's behavior have not conferred any public benefits worthy of recompense. This argument remains forceful, however, only so long as the litigation focuses on the resolution of a private dispute and the vindication of a private claim. In the public law setting, where the lawsuit involves the application of regulatory policy as well as the resolution of conflict, the traditional "private law" model of adjudication is no longer

101. 103 S. Ct. at 3280-81.
102. Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1282 (1976). Professor Chayes identifies five defining characteristics of the "traditional" model of adjudication: 1) the lawsuit is bipolar; 2) the litigation is retrospective; 3) right and remedy are interdependent; 4) the impact of the judgment is confined to the parties; 5) the process is party-initiated and party-controlled. Id. at 1282-83.
103. See, e.g., Alabama Power Co. v. Gorsuch, 672 F.2d 1, 8 (D.C. Cir. 1982) (Wilkey, J., dissenting).
104. Chayes, supra note 102, at 1295.
Professor Chayes suggests that a “public law” model of adjudication is appropriate where litigation concerns whether or how regulatory policy should be carried out. The public law model of adjudication recognizes first and foremost that the outcome of litigation over a regulatory matter will affect the interests of many people, including numerous absentees. The widespread impact of public law litigation makes the need for adequate representation of the range of interests that will be affected by the proceedings especially pressing. This need is compounded by the problem of agency “capture.” Capture is the notion that, as a natural consequence of agency structure and function, administrative decisions tend to reflect the regulated industries’ views of the public interest.

Two factors especially contribute to the phenomenon of agency capture. First, the agency must often depend on industry for much of its information. An administrative agency must translate an often vague statutory mandate into concrete policies and rules. What the public interest requires in a given context is rarely clear. Rather, the agency must typically evaluate inconclusive technical data and weigh competing policy factors. It is not surprising that the agency tends to adopt the viewpoint of the industry it regulates when the industry provides it with much of its technical information and perhaps its most coherently presented policy recommendations. Given the agency’s limited resources, it simply cannot monitor and test proposals and applications without considerable cooperation from industry.

105. Id. at 1282.
106. Id. at 1291.
107. Jaffee, The Effective Limits of the Administrative Process: A Reevaluation, 67 HARV. L. REV. 1105, 1113 (1954). The problem of agency capture has been recognized both by the courts and by Congress. See, e.g., Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003-04 (D.C. Cir. 1966). See also remarks of Senator Muskie regarding citizen suits and attorneys’ fees provisions of the Clean Air Act: “the concept . . . is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail.” 166 CONG. REC. 33,102 (1970).
108. As a result of political expediency, Congress sometimes may be purposely ambiguous about what it means or wants an agency to do. See Wald, supra note 47, at 144. See also Jaffee, The Illusion of the Ideal Administration, 86 HARV. L. REV. 1183, 1183 (1973).
109. Section 111 of the Clean Air Act, 42 U.S.C. § 7411 (1982), at issue in the litigation underlying Ruckelshaus v. Sierra Club, is a case in point. Section 111 of the Act requires the agency to balance environmental, economic, and energy supply considerations in establishing new source emission limitations. EPA’s task was to establish a standard that “reflects the degree of emission limitation achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction . . .) the Administrator determines has been adequately demonstrated for that category of sources.” 42 U.S.C. § 7411(a)(1)(C) (1982).
111. See Jaffee, supra note 107, at 1113.
The second major contributor to agency capture derives from the greater organizational abilities of industry relative to private citizens. The environmental concerns of average citizens are scattered over a great many issues, projects and locations. Industry interests, on the other hand, are highly concentrated, well organized and well financed. An industry which possesses a significant stake in a prospective regulation will invest considerable resources to present its viewpoint persuasively and coherently.

Even where more than one viewpoint is presented to the agency, mere formal representation of divergent views may not be sufficient to overcome the symbiotic relationship between regulators and industry. In contrast, the federal judiciary is relatively independent of regulated interests. Because courts are presented with cases, in a relatively random pattern, which concern a wide range of substantive law and industry interests, the federal judiciary is better able to maintain its independence. The courts, therefore, remain an important check on agency accountability.

Still, judicial review of a regulatory decision retains much of the administrative proceeding’s character. In the traditional private lawsuit, the litigation has a retrospective orientation, and factfinding is concerned with how a condition came about. Public law forces the reviewing judge into a more active role. The court must often explore the supporting evidence and the implications of an agency choice. A meaningful evaluation of those implications requires that the court synthesize a great deal of technical information. Thus, where the lawsuit concerns a grievance about the operation of regulatory policy, the factual inquiry takes on a prospective orientation.

The highly technical nature of environmental decisionmaking demands that the reviewing judge take on the role of “fact evaluator.” To evaluate whether an agency had the proper evidence and reasons for its decision, a reviewing judge must have a fair command of the necessary technical background. To acquire this, however, the judge, un-

112. Chayes, supra note 102, at 1310.
113. Id. at 1296.
114. Of course, the reviewing court’s job is not to make de novo decisions, but only to determine whether the agency’s decision is arbitrary or capricious, or backed by substantial evidence. 5 U.S.C. § 706 (2)(A), (E) (1982).
115. Professor Chayes writes:
In public law litigation, then, factfinding is principally concerned with “legislative” rather than “adjudicative” fact. And “fact evaluation” is perhaps a more accurate term than “fact finding” . . . . [Moreover,] the extended impact of the judgment demands a more visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation, and one that explicitly recognizes the complex and continuous interplay between fact evaluation and legal consequence.
116. By the 1970’s, two doctrines of judicial review of agency rulemaking had developed in the District of Columbia Circuit. One approach, the “hard look” doctrine, permitted the court
like an agency, must rely exclusively upon parties to the litigation.\footnote{117}

Fee award provisions can improve the judicial process by fostering a balance in the representation of industrial and environmental interests. Citizen participants may alert the court to important factual information that an industrial litigant may prefer not to have discussed. Citizens may put forth a legal argument which provides the court with a different perspective on an existing issue, or causes it to examine a new issue.\footnote{118} Further, a citizen suit, though unsuccessful, may point out inadequacies in existing legislative and regulatory guidelines, and may cause Congress or

In \textit{Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council}, 435 U.S. 519 (1978), the Supreme Court ended the debate over these two doctrines by prohibiting judicial intrusion into agency procedures. What remains unclear is what the Supreme Court will now allow reviewing courts to do. Judge Wald argues that after \textit{Vermont Yankee}, the "hard look" approach remains viable and that the focus on substantive review of agency decisionmaking makes more compelling the judge's need for access to relevant information and expertise. \textit{Wald, supra} note 47, at 140-41. Others have argued, however, that the Court will in time hand down a substantive version of \textit{Vermont Yankee}. See, e.g., Verkuil, \textit{Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II}, 55 \textit{Tul. L. Rev.} 418, 418-419 (1981).

\footnote{117} Judge Wald discusses the information needs of judges engaged in agency review and proposes relaxation of constraints on judicial access to needed information and expertise. \textit{Wald, supra} note 47, at 137, 153. Judge Wald writes that:

\textit{My main goal—and frustration—as a reviewing judge is getting ahold of the quality and quantity of information I need to understand what the agency did and to determine whether the agency had the proper evidence and reasons for its decision.}

\textit{Id. at 141.} She continues:

\textit{In trying to "fill in the gaps" of a statute, judges often find it necessary to explore the implications of an agency choice to see whether it best implements the overall statutory policy. And accurate evaluation of those implications depends on information and expert predictions that may or may not appear in the record before us on review. What is in the record depends entirely upon what the agency or particular group bringing the appeal (which may be only one of many different groups affected who had input into the legislative process) chooses to tell the court.}

\textit{Id. at 145.} Judge Wald then cites \textit{Sierra Club v. Costle}, 657 F.2d 298 (D.C. Cir. 1981), as an example of a case presenting these informational problems.

\footnote{118} In justifying the fee award in \textit{Sierra Club v. Gorsuch}, the District of Columbia Court of Appeals emphasized the Sierra Club's role in providing information to the court:

Although it seems almost inconceivable that a major review of the rule could have been conducted without questioning EPA's authority and evidentiary basis for promulgating a variable percentage reduction standard, an issue that the EPA Administrator had referred to at the start of the rulemaking as the "main" issue in the proceeding, Sierra Club was the only party to raise it. The court was thus totally dependent on Sierra Club to brief and advocate the opposition to a variable standard. Without Sierra Club, an issue conceded by EPA to be critically important would not have been raised or decided during the first judicial challenge to the statutory provision. The absence of debate on the issue, moreover, could have affected the outcome of other related issues in the case, e.g., the proper level of total emissions . . . , since individual standards of section 111 operate interdependently.

\textit{672 F.2d} at 40-41.
the agency to amend its guidelines. Thus, if broad public participation is viewed as beneficial not necessarily because it results in a legal victory, but rather because it enhances agency decisionmaking, it becomes apparent that fee shifting to the government may be appropriate whether or not the other party prevails.

In light of the especially important role that environmental groups can play in judicial review of EPA rulemaking, it is clear that the scope of fee shifting under sections 304 and 307 need not be congruent. Section 304 authorizes citizen suits against any person alleged to be in violation of an emissions standard or an EPA order with respect to such a standard, any person who constructs a major emitting facility in violation of certain permit requirements, or against the EPA Administrator for an alleged failure to perform a nondiscretionary duty. Section 304 thus allows citizens to aid in enforcement of the substantive provisions of the Act, to ensure that EPA carries out its statutory duties and industry remains in compliance with standards and permits.

By contrast, section 307 authorizes citizens to petition the District of Columbia Court of Appeals for review of national standards, and courts of appeals for the appropriate circuit for review of state implementation plans and local or regional regulations. Section 307 thus encourages citizen participation in implementing the Act to ensure that EPA adheres to the purposes and goals of the Act in formulating air pollution policy.

If one acknowledges that judicial proceedings under sections 304 and 307 serve different goals, the question presented in Ruckelshaus v. Sierra Club becomes much narrower than Justice Rehnquist's analysis suggests. The question is merely whether, in a legitimate but ultimately unsuccessful challenge to agency rulemaking under section 307, the government can be required to pay the nonprevailing challenger's litigation costs. The Court gives a negative answer to this question, in part because if fee awards for nonprevailing challenges to EPA rulemaking are appropriate under section 307(f), then under section 304(d) a private business could be forced to pay the fees of a nonprevailing party who erroneously accuses the business of violating the Clean Air Act. But even if the


120. See supra note 6.


122. Id. § 7604(a)(1)(B).

123. Id. § 7604(a)(3).

124. Id. § 7604(a)(2).

125. See supra note 7.


127. 103 S. Ct. at 3280-81.
Court permitted attorneys’ fees awards to nonprevailing parties under section 307(f), it would not necessarily follow that it would be appropriate under section 304(d) for courts to force a private business to pay the fees of an opponent who unsuccessfully charged the business with violating the Act.

Citizen suits under section 307 serve to ensure that EPA regulations properly implement the goals and purposes of the Act. The inherent tendency of agencies to get “captured” by the industries they are supposed to regulate tends to result in regulations which give too much weight to the industry concerns, and not enough weight to the goals of the statute that the regulations are supposed to implement. A court reviewing EPA regulations may not be able to detect that the regulations are slanted in favor of industry interests unless an environmental group is participating in the litigation. To implement environmental policy, it is not enough for Congress to pass a statute, authorize EPA to issue regulations implementing the statute, and give the courts jurisdiction to review the regulations. To ensure that the goals of the statute are fully implemented, it is also necessary to ensure that environmentalists will be able to present their point of view to the reviewing court.

The purpose of fee awards is not to reward environmentalists for prevailing on the merits in any given action, but rather to ensure that they are present so that the reviewing court can benefit from hearing what they have to say. A section 307 lawsuit challenging EPA rulemaking should thus be viewed as a forum for resolving disputes over the implementation of clean air policy. Government fee awards to nonprevailing environmental litigants can be justified as a way of spreading the cost of educating the court and promoting balanced review of important regulatory issues. Balanced judicial review of EPA policy decisions would further the goals of the Act.¹²⁸

Unlike section 307, section 304 is not concerned with whether EPA is properly implementing the Act. Rather, section 304 is concerned with ensuring that private companies are following EPA regulations. Because section 304 is not concerned with making sure that all points of view are adequately represented when a court is determining whether a regulation is valid, the policy reasons underlying section 307 do not apply to the fee shifting provision in section 304. It follows that a broad construction of section 307, allowing fees in certain circumstances to parties who do not prevail on the merits, does not imply that section 304 must be similarly construed.

Critics of fee awards for nonprevailing parties argue that litigation costs legitimately serve to deter undesirable litigation. Fee awards to

nonprevailing parties, they argue, encourage ill-founded and unproductive litigation.129 This criticism is unjustified for several reasons. First, courts will exercise their discretion to avoid granting awards to undeserving parties.130 Indeed, the courts which construed the “whenever appropriate” standard prior to *Ruckelshaus v. Sierra Club* developed a strict standard for fee awards.131 These courts denied an award of attorneys’ fees when the nonprevailing party had not substantially furthered the substantive objective of the statute under which it brought suit.132 In addition, generally a party must participate in administrative rulemaking proceedings as a prerequisite to judicial review.133 Such participation, which is often time-consuming and expensive, is ordinarily not compensable.134 Potential litigants with doubtful claims are unlikely to chall-

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130. A discussion of the optimal test for fee awards under the “where appropriate” statutory standard is beyond the scope of this Note. Justice Stevens’ dissent in *Ruckelshaus v. Sierra Club* proposed that a court consider four factors in deciding whether to award attorneys’ fees under the “whenever appropriate” standard of section 307: (1) the degree to which the contentions raised by the party seeking fees were well-founded; (2) the “importance, novelty and complexity” of the issues raised by the party seeking fees; (3) “whether the party had an economic incentive to participate in litigation because it stood to gain substantial economic benefits;” and (4) “the degree of technical and legal assistance the party provided to the court in its evaluation of the case.” 103 S. Ct. at 3290 (Stevens, J. dissenting).

131. One test of “appropriateness” asked whether the party requesting the fee award had made a “substantial contribution” to the goals of the statute. See, e.g., Sierra Club v. Gorsuch, 672 F.2d 33, 35 n.3 (D.C. Cir. 1982), rev’d sub nom. Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983). Another test asked whether the suit, at the time of its commencement, was of the type that Congress meant to encourage when it enacted the statute. See Metropolitan Washington Coalition for Clean Air v. District of Columbia, 639 F.2d 802, 804 (D.C. Cir. 1981) (per curiam). See also Note, *Awards of Attorneys’ Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 690 (1983) (endorsing a standard under which fees would be awarded upon an evaluation of the lawsuit’s prospective desirability, a standard the author argues would provide the optimal incentive structure for encouraging desirable litigation).


Challenge major administrative action on the slim chance that they might eventually recover litigation costs for judicial review of the action if they lose at the administrative proceeding. Finally, courts can discourage unproductive litigation by summarily dismissing frivolous suits and by allowing prevailing defendants to recover costs when plaintiffs bring suits which are harassing and without merit.

Critics of fee awards to nonprevailing parties also argue that deciding which nonprevailing parties deserve compensation is outside the competence and constitutional domain of the courts. Judge Wilkey's dissent in *Alabama Power Co. v. Gorsuch* exhorted the District of Columbia Circuit Court to avoid infringing upon the legislative domain by confining fee awards under section 307(f) to prevailing parties. The "whenever appropriate" standard is vague, he argued, and forces courts to make political choices among competing views of the public interest.

While stronger legislative guidance specifying when fees should be available under section 307(f) would be desirable, the court's discretion under the "whenever appropriate" standard does not radically depart from other judicial functions. Indeed, statutes authorizing fee awards to prevailing parties vest considerable discretion in courts. Under these statutes courts must determine not only which party has prevailed, but also whether the party should be awarded costs of litigation and in what amount.

Admittedly, deciding when to award attorneys' fees does contain an element of political choice. The standards a court adopts for fee awards will turn on whether it perceives the interest of complete and balanced review of agency actions as more important than discouraging frivolous litigation. However, a court is also exercising political discretion when it limits fee awards under the "whenever appropriate" standard of sec-

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135. See *FED. R. CIV. P.* 12(b)(6), 56.
136. See *supra* text accompanying note 26. See also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17, 421 (1978) (prevailing defendants subjected to vexatious litigation may recover fee awards).
137. 672 F.2d 1, 8 (D.C. Cir. 1982) (Wilkey, J., dissenting).
138. Id. at 19.
139. In *Christiansburg Garment Co. v. EEOC*, the Court noted:

Some of these statutes make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs. But many of the statutes are more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants, and entrusting the effectuation of the statutory policy to the discretion of the district courts.

434 U.S. at 415-16 (footnotes omitted).
CONCLUSION

In *Alyeska Pipeline* the Supreme Court restricted judicial discretion to award attorneys' fees and sent Congress a resounding message that it must expressly select those circumstances which merit fee shifting.\(^{143}\) Congress directly responded to *Alyeska Pipeline* in the Clean Air Act Amendments of 1977. Congress adopted a liberal standard for fee awards in section 307(f) by omitting the "prevailing party" restriction common to statutes outside the environmental area. By adopting the "whenever appropriate" standard, Congress embraced the notion that a nonprevailing party should recover fees when it confers a public benefit in a challenge to EPA rulemaking by educating the reviewing court and making balanced judicial review possible.

In *Ruckelshaus v. Sierra Club*, however, the Supreme Court construed section 307 in a manner calculated to frustrate its overall purpose.\(^{144}\) Apparently fearing a rush to the courthouse by litigious environmentalists, the Court reflexively resorted to the American Rule. The Court ignored the strict standard for nonprevailing party fee awards developed by lower federal courts, and the fact that the enormous expense and uncertainty associated with major environmental litigation deters all but the most important and well-founded challenges to EPA rulemaking. Congress appreciates the critical role environmental groups play in ensuring that judicial review of EPA action is complete and balanced, even where the reviewing court rejects the group's specific contentions. Congress should act to overturn the Court’s ill-founded decision.

\(^{142}\) Id. at 694-95.

\(^{143}\) See supra text accompanying notes 34-37.

\(^{144}\) In *Alyeska Pipeline* the Court in effect remanded to Congress the job of authorizing fee awards. Statutory attorneys' fees provisions passed in response to *Alyeska Pipeline* are therefore entitled to an interpretation aimed at achieving congressional intent to permit fee awards. Note, supra note 131, at 694 n.97.