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Ruckleshaus v. Sierra Club: Muddying the Waters of Fee-Shifting in Federal Environmental Litigation

In numerous federal environmental statutes, Congress gave plaintiffs the right to recover attorneys' fees when the court finds them "appropriate." In Ruckleshaus v. Sierra Club, the United States Supreme Court held that it was only "appropriate" to grant attorneys' fees when the plaintiff had at least partially prevailed on the merits. The decision ignored both the important role environmental groups play in the interpretation and development of regulatory programs through litigation and the ability of the lower courts to determine when attorneys' fees were "appropriate." The Court, instead, focused on the adversarial nature of such groups and the traditional American common law notions regarding attorneys' fees awards. The effect of the decision is to hamper the efforts of environmental groups by placing economic and psychological barriers in the path of any future actions.

I. INTRODUCTION

In the past decade, suits have proliferated against federal administrative agencies by private citizens and public interest groups wishing to vindicate various rights and interests.¹ One major obstacle facing potential litigants has been the enormous cost involved in pursuing a remedy through the administrative and judicial mazes.² Several theories of attorney fee-shifting have

1. "[T]he largest category of cases coming before the United States Supreme Court [today] involves the review of administrative action, mainly reflecting the enforcement of regulatory statutes, and that this category comprises about one-third of all the cases coming before the Court." B. SCHWARTZ, ADMINISTRATIVE LAW 23 (1982).

2. In an early case brought under the Civil Rights Act of 1964, *Newman v. Pig-gie Park Enters.*, 390 U.S. 400 (1968), the Court was concerned that in spite of legislation allowing private actions to enforce compliance with the Act, "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts" if they had to routinely pay their own attorneys' fees. *Id.* at 401-02. See also the remarks of Senator Strom Thurmond in support of an attorney fee-shifting provision in the Freedom of Information Act Amendments:

We must insure that the average citizen can take advantage of the law to the same extent as the giant corporations with large legal staffs. Often the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted.

S. REP. NO. 854, 93d Cong., 2d Sess. 18 (1974).

been formulated to help alleviate this problem, and encourage citizens to seek personal justice or to act as "watch dogs" over government regulations.³ One approach utilized in the federal system has been to include in some one hundred federal statutes specific authorization awarding costs and attorneys' fees in citizens' actions which promote statutory goals.⁴ Although these statutory provisions contain different criteria to determine when awards of costs and fees should be granted,⁵ most of the major federal environmental statutes⁶ specify that attorneys' fees may be granted to any party whenever the court deems it "appropriate."⁷ The Clean Air Act contains two such provisions,⁸ the interpretation of which is the basis for the controversy in a recent United States Supreme Court case, *Ruckleshaus v. Sierra Club*.⁹

The Court held in *Ruckleshaus* that the provision in section 307(f) of the Clean Air Act, which authorizes attorneys' fees to be awarded where the court finds them "appropriate", did not authorize the granting of such fees to unsuccessful plaintiffs.¹⁰ In a decision based almost entirely on interpretation of scant and frag-

3. For a general discussion of the history and purposes of attorney fee-shifting, see Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977); Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

4. Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 680 (1983) (discussing federal statutory authorization for fee-shifting) [hereinafter cited as Note, *Unsuccessful Environmental Litigants*].

5. See E. RICHARD LARSON, *FEDERAL COURT AWARDS OF ATTORNEY'S FEES* 323-27 (1981) (listing the various types of statutory provisions) [hereinafter cited as LARSON].

6. See Toxic Substances Control Act § 19(d), 15 U.S.C. § 2618(d) (1982); Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4) (1982); Surface Mining Control and Reclamation Act of 1977, § 520(d), 30 U.S.C. § 1270(d) (Supp. IV 1980); Deep Seabed Hard Mineral Resources Act § 117(c), 30 U.S.C. § 1427(c) (Supp. IV 1980); Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (1976); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4) (1976); Deepwater Port Act of 1974, 33 U.S.C. § 1515(d) (1976); Safe Drinking Water Act § 1449(d), 42 U.S.C. § 300j-8(d) (1976); Noise Control Act of 1972, § 12d, 42 U.S.C. § 4911(d) (1976); Energy Policy and Conservation Act § 335(d), 42 U.S.C. § 6305(d) (1976); Resource Conservation and Recovery Act of 1976, § 700(e), 42 U.S.C. § 6972(e) (Supp. IV 1980); Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (Supp. IV 1980); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d) (Supp. IV 1980); Ocean Thermal Energy Conversion Act of 1980, 3114(d), 42 U.S.C. § 9124(d) (Supp. IV 1980); Outer Continental Shelf Lands Act Amendments of 1978, § 23(a)(5), 43 U.S.C. § 1349(a)(5) (Supp. IV 1980).

7. See Note, *Unsuccessful Environmental Litigants*, *supra* note 4, at 681 (use of term "appropriate" in predominately environmental legislation indicates that Congress intended something different than when it passed different types of provisions in other statutes).

8. Section 304(d), 42 U.S.C. § 7064(d) (Supp. IV 1980); § 307(f), 42 U.S.C. § 7607(f) (Supp. IV 1980).

9. 103 S. Ct. 3274 (1983).

10. *Id.* at 3281.

mented legislative history,¹¹ the Court was sharply divided in a five to four decision over the issue of what Congress intended by the word "appropriate."¹² The majority of the Court, in the absence of specific language to the contrary, refused to abandon historic fee-shifting principles in favor of what it viewed as a radical departure from traditional guidelines.¹³

II. HISTORICAL BACKGROUND

The "American Rule" regarding the recovery of legal fees has been that, absent statutory or contractual provisions, each party to a lawsuit must pay his or her own attorney's fees.¹⁴ Two exceptions to the rule have been fashioned in the federal courts pursuant to their equity powers: the common fund exception¹⁵ and the bad faith exception.¹⁶

In the early 1970's the federal courts initiated a third exception based on a "private attorney general" theory.¹⁷ The rationale was

11. See Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 331-32 (1982) (discussing lack of congressional guidance for courts in interpreting legislative intent). It is suggested that a plausible explanation for Congress' failure to provide direct guidance is the fact that most of the discretionary fee-shifting provisions were enacted prior to *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), when lower courts awarded fees under the private attorney general rationale. *Id.* at 332 n.251. If Congress had been aware of the impact of *Alyeska*, it might have been able to provide the courts with more guidance. While this may be true of many of the statutory fee-shifting provisions in other acts, it is not true of the majority of environmental statutes, which were passed after 1975. See *supra* note 6 (listing major environmental statutes containing the "appropriate" standard). A logical inference is that Congress either did not foresee the problems broad language would create, or it simply did not wish to be more explicit, thus preferring to leave interpretation to the courts.

12. The Court began its discussion with a dictionary definition of the word "appropriate," which it ultimately discarded. It concluded that such a definition has no relevant meaning when applied to the statute; rather, the word "appropriate" must be defined by reference to established statutory and judicial fee-shifting rules. 103 S. Ct. at 3276.

13. *Id.* at 3281. The majority opinion was written by Justice Rehnquist. The dissent was authored by Justice Stevens, who was joined by Justices Brennan, Marshall, and Blackmun.

14. 421 U.S. at 257. For a general discussion of the history and development of the American Rule and fee-shifting exceptions, see 421 U.S. at 247-62; see also Note, *Awards of Attorney's Fees in the Federal Courts*, *supra* note 11, at 278-86.

15. The common-fund doctrine originated in two Supreme Court decisions: *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885), and *Trustees v. Greenough*, 105 U.S. 527 (1881).

16. The bad faith exception is set forth in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974).

17. The first use of this term apparently occurred in *Newman v. Piggie Park*

that litigants who were successful in vindicating important policies which Congress considered to be of "the highest priority"¹⁸ were entitled to recover attorneys' fees. Federal courts interpreted the early decisions as granting courts authority to apply principles of equity to award fees to litigants who had advanced important public interests.¹⁹ However, the judicial expansion of the doctrine was brought to a halt by the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,²⁰ which held that the determination of public policy and the awarding of fees are matters for congressional action.²¹ Absent express statutory authorization, therefore, any judicial adoption of a private attorney general rationale "would make major inroads on a policy matter that Congress has reserved for itself."²²

After the private attorney general theory was effectively invalidated, Congress responded by promulgating various statutes expressly authorizing fee-shifting in certain circumstances.²³ The majority of these statutes authorized awards of attorneys' fees specifically to "prevailing"²⁴ or "substantially prevailing"²⁵ parties. In most cases, however, the task of determining the scope of these terms was left in the hands of the courts.²⁶

Enters., 390 U.S. 400, 402 (1968) (plaintiff who obtains an injunction under Title II of the Civil Rights Act of 1964 "does so not for himself alone but also as a 'private attorney general'").

18. *Id.*

19. The private attorney general theory was adopted by seven federal courts of appeals. See Note, *Awards of Attorney's Fees in the Federal Courts*, *supra* note 11, at 284-85 & n.25 (listing several federal cases wherein the doctrine was applied).

20. 421 U.S. 240 (1975).

21. *Id.* at 262. Although it was struck down in the federal courts, the doctrine has still found favor in some state courts. See, e.g., *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (court awarded two public interest law firms more than \$800,000 in attorneys' fees based on this theory).

22. 421 U.S. at 269.

23. Note, *Awards of Attorney's Fees in the Federal Courts*, *supra* note 11, at 286.

24. See, e.g., Civil Service Reform Act of 1978, § 205(g)(1), 5 U.S.C. § 7701(g)(1) (1982); Consumer Product Safety Commission Improvements Act of 1976, § 24, 15 U.S.C. § 2073 (1982); Patent Infringement Act, § 1, 15 U.S.C. § 285 (1976); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976).

25. See, e.g., Freedom of Information Act, § 1(b)(2)(E), 5 U.S.C. § 552(a)(4)(E) (1982); Privacy Act, § 3(g)(2)(B), 5 U.S.C. § 552a(g)(2)(B) (1982); Antitrust Improvement Act of 1976, § 302, 15 U.S.C. § 26 (1982).

26. For cases interpreting who is a "prevailing" party, see *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (parties who obtain their objectives through settlement are "prevailing"); *Smith v. University of N.C.*, 632 F.2d 316, 347 (4th Cir. 1980) ("establishment of a right or the proscription of a wrong" is the minimum requirement); *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353-54 (5th Cir. 1979) (required success on "central issue"); *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978) (plaintiffs are "prevailing" if they succeed on any significant issue in litigation which achieves some of the benefit they sought); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970) (unsuccessful plaintiff is "prevailing" if the suit is a catalyst which causes defendant to eliminate a discriminatory

In the environmental area, a significant number of statutes provide that "the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate."²⁷ Seeing this language as a delegation of broad discretionary power, some federal courts have interpreted the provision to mean that they are empowered to award attorneys' fees not only to prevailing or substantially prevailing parties, but also to *nonprevailing* parties.²⁸ *Sierra Club v. Gorsuch*²⁹ was a prime example; the circuit court's decision to award attorneys' fees to the losing plaintiff in that case formed the basis of the controversy in *Ruckleshaus v. Sierra Club*.

III. FACTUAL BACKGROUND

In 1977, Congress amended the Clean Air Act to require the Environmental Protection Agency (EPA) to establish standards for the emission of sulfur dioxide by power plants.³⁰ In 1979, the EPA responded by promulgating a controversial standard for sulfur dioxide for all new plants.³¹ A number of parties, including the Sierra Club, filed petitions for review of the EPA's action;³²

policy or procedure). A synopsis of these varying standards has been stated as follows:

[A] plaintiff can be deemed to have prevailed not only through final judgment but also through settlements and consent decrees, through voluntary compliance by defendants where the plaintiff's lawsuit can fairly be viewed as having provided the catalyst for defendants' actions, and even through post- and sometimes pre-lawsuit administrative proceedings.

LARSON, *supra* note 5, at 9-10.

For holdings on "substantially prevailing" parties, see, e.g., *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (party must have prevailed on the merits of at least some claim); *Smith v. University of North Carolina*, 632 F.2d 316, 352 (4th Cir. 1980) (party must achieve victory on merits of at least one claim).

27. See *supra* note 6 for a list of statutes containing the "appropriate" provision.

28. See, e.g., *Northern Plains Resource Council v. EPA*, 670 F.2d 847 (9th Cir. 1982); *Metropolitan Wash. Coalition for Clean Air v. District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981); *North Slope Borough v. Andrus*, 507 F. Supp. 106 (D.D.C. 1981), *rev'd sub nom. Village of Kaktovik v. Watt*, 689 F.2d 222 (D.C. Cir. 1982); *Citizens Ass'n v. Washington*, 383 F. Supp. 136 (D.D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976).

29. 672 F.2d 33 (D.C. Cir. 1982) (per curiam) and 684 F.2d 972 (D.C. Cir. 1982) (per curiam), *rev'd sub nom. Ruckleshaus v. Sierra Club*, 103 S. Ct. 3274 (1983).

30. Clean Air Act, § 109(c)(1)(c), 42 U.S.C. § 7411(a)(1)(C) (Supp. IV 1980).

31. 44 Fed. Reg. 33,580 (1979) (codified at 40 C.F.R. §§ 60.8, 60.40).

32. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

however, the court of appeal rejected the petitions.³³ The Sierra Club then sought an award of attorneys' fees incurred in the underlying case. In *Sierra Club v. Gorsuch*,³⁴ the court granted attorneys' fees to the Sierra Club, thus allowing such an award to the non-prevailing parties under section 307(f) of the Clean Air Act. While cases in which such an award would be appropriate are few, the court found that this was just such a case.³⁵ The court postponed a final award in order to allow the Sierra Club and the EPA to resume negotiations over a settlement of the fees.³⁶ When a settlement was not forthcoming after several months, the court made the final award of fees.³⁷

The EPA was then granted a writ of certiorari before the United States Supreme Court.³⁸ On July 1, 1983, the Supreme Court reversed the District of Columbia Circuit's decision, holding that "absent some degree of success on the merits by the claimants, it is not 'appropriate' for a federal court to award attorney's fees under section 307(f)."³⁹

IV. ANALYSIS

The central issue in *Ruckelshaus v. Sierra Club* was defined as "whether it is 'appropriate,' within the meaning of section 307(f) of the Clean Air Act, to award attorney's fees" to a party that failed to succeed on the merits of its claims.⁴⁰ The Court considered this issue from four different perspectives: statutory language; legislative history; comparison of section 307(f) with section 304(d); and governmental waiver of immunity theory.

A. Statutory Language

The Court stated that its first objective was to determine the meaning of "appropriate." A dictionary definition was given as "specially suitable: fit, proper,"⁴¹ but the Court declared this definition to be useless as a guide to congressional intent. In order to ascertain the appropriate legal meaning, the Court looked to other sources.⁴²

33. *Id.* at 410.

34. 672 F.2d 33, 34 (D.C. Cir. 1982), *rev'd sub nom.* *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983).

35. 672 F.2d at 39.

36. *Id.* at 42.

37. 684 F.2d 972, 973 (D.C. Cir. 1982).

38. 103 S. Ct. 254 (1982).

39. 103 S. Ct. 3274, 3281 (1983).

40. *Id.* at 3276.

41. *Id.*

42. *Id.*

The Justices initially considered the Senate Report to section 307(f), which stated: "The purpose of the amendment . . . is to carry out the intent of the committee in 1970 that a court may, *in its discretion*, award costs of litigation to a party bringing a suit under section 307"43 The Court treated this excerpt merely as an example of the lack of guidance provided by Congress, and failed to analyze it in terms of the meaning of "in its discretion," which might have provided a key to the actual congressional intent.⁴⁴ Indeed, the mention of this reference did not appear to lend authority to the Court's position; rather, as the minority asserted, it tended to support the argument that Congress intended to give the courts a broad power of discretion to decide what is "appropriate."⁴⁵

Without further discussion of the relationship between the grant of discretion and the determination of appropriateness, the Court moved on to discuss the history of fee-shifting in this country and the use of the terms "prevailing" and "substantially prevailing."⁴⁶ Justice Rehnquist noted that the common thread running through the relevant decisions was that a successful party need not pay for its unsuccessful adversary's fees,⁴⁷ a concept based on "ordinary conceptions of just returns."⁴⁸ In other words, "a party who wrongfully charges someone with violations of the law should [not] be able to force that defendant to pay the costs of the wholly unsuccessful suit against it."⁴⁹

From the choice of language used by the Court, the majority apparently viewed public interest litigants as *adversaries* of the government. The decision ignored the role envisioned by Congress—that of citizen participation in and contribution to the interpretation and development of regulatory programs as an aid to achiev-

43. *Id.* at n.2 (quoting S. REP. No. 127, 95th Cong., 1st Sess. 99, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416) (emphasis in original).

44. This is just the first instance where the Court appears to have made a prejudgment about a key piece of legislative history, mentioning it almost in passing and then moving on. See *supra* notes 64-68 and accompanying text and *infra* note 71 and accompanying text for a discussion of the Court's treatment of Natural Resource Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973).

45. 103 S. Ct. at 3286-87, n.15.

46. *Id.* at 3276-77.

47. *Id.* at 3277. The minority, however, refuted this contention, noting that the government routinely pays for unsuccessful litigants' fees in criminal cases falling under the provisions of 18 U.S.C. § 3006(A)(d) (1976). 103 S. Ct. at 3281-82.

48. 103 S. Ct. at 3277.

49. *Id.*

ing statutory goals.⁵⁰ By focusing on the adversarial rather than the beneficial aspect of public interest litigation, the Court relied on “intuitive notions of fairness”⁵¹ instead of the idea that public interest litigants have a *right* to challenge government actions—and therefore a *right* to compensation for their contribution to public policy formation.⁵²

The dissent found fault with the majority’s one-dimensional description of the role played by the Sierra Club.⁵³ The minority, noting the complexity of the underlying case and the contribution of the Sierra Club to a final decision, concluded that the organization had performed a vital public benefit both in bringing the suit and in the quality of its briefs.⁵⁴ Although it is this basic disagreement over the role of the public interest litigant which lies at the heart of the controversy, the Court never openly discussed it, perhaps fearing that to do so would leave it open to charges that this was a “political” decision.

In concluding its discussion of the meaning of “appropriate,” the Court stated that if Congress had intended a departure from traditional fee-shifting schemes, it would have used explicit language in section 307(f) to indicate such a change.⁵⁵ The Court found that the term modified, but did not completely reject, the traditional rule that a fee claimant must “prevail” before recovering attorneys’ fees.⁵⁶ In the Court’s attempt to clarify the meaning of “appropriate,” however, it failed to define the scope of the term “modify,” which may ultimately give rise to further litigation.

Additionally, the Court failed to squarely answer the points raised by the minority that Congress explicitly gave the courts the power to use their discretion in interpreting what is appropriate⁵⁷ and that Congress had the opportunity to specify the amount of success required of a party when it wrote section 307(f).⁵⁸ Con-

50. See H.R. REP. NO. 294, 95th Cong., 1st Sess. 337, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416 (§ 307(f) of the Clean Air Act was intended to encourage public litigation that would assure balanced implementation and administration of the Act).

51. 103 S. Ct. at 3277.

52. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-84 (1976).

53. 103 S. Ct. at 3282.

54. *Id.* at 3282-84.

55. *Id.* at 3277.

56. *Id.*

57. *Id.* at 3289.

58. *Id.* at 3290. The minority cited several pieces of legislative history which appear to support its contention that Congress expressly rejected statutory language which included specific criteria of “prevailing” and “substantially prevailing” parties and adopted instead the broader “appropriate” standard for § 307(f). *Id.* at 3286 n.14. The majority stated that the reason Congress failed to adopt the

gress' choice to use the "appropriate" standard may be evidence that it did not *intend* to adopt the traditional standards.⁵⁹ The Court's holding thus provides specific standards which Congress deliberately left out. Substituting its own judgment, based on traditional fee-shifting notions, the Court concluded that it is *not* appropriate to award attorneys' fees to losing parties.

B. Legislative History

The Court's consideration of the legislative history of section 307(f) began with the observation that the Sierra Club relied primarily on an excerpt from the 1977 House Report discussing the purpose of the new section.⁶⁰ Unfortunately, the Court dismissed the report rather summarily, reading it only to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties.⁶¹ This conclusion was not based on an analysis of the excerpt itself but on a review of conflicting lower court definitions of "prevailing parties"⁶² and the legislative history of section 36 of Senate Bill 252, a forerunner of section 307(f).⁶³ This

"prevailing" and "partially prevailing" standards was because the original language "required" fee awards to prevailing parties, and this was simply too radical. *Id.* at 3279 nn.7, 11. The majority's reasoning did not explain, however, why Congress did not simply change "requires" to "permits" and leave the rest of the section intact. Congress' rejection of the entire section, the adoption of a completely different standard, seems to indicate the actual congressional intent.

59. *Id.*

60. *Id.* at 3278. In pertinent part, the excerpt reads:

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 court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party."* In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC v. EPA*, 484 F.2d 1331, 1388 [sic] (1st Cir. 1973) (emphasis added by court).

H.R. REP. NO. 294, 95th Cong., 1st Sess. 337, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416.

61. 103 S. Ct. at 3279. At this point, the Court defined "partially prevailing parties" as those achieving "*some success, even if not major success.*" *Id.* (emphasis in original).

62. *Id.* at 3278-80. The Court found significant the argument that some courts have set more restrictive standards for prevailing and partially prevailing parties. The Court reasoned, therefore, that Congress wanted to promulgate a single standard — "appropriate." This term, however, meant "prevailing" or "partially prevailing." This circular logic does little to provide a reasonable explanation of congressional intent.

63. *Id.* at 3279-80. The Court noted that since the Senate bill dealt separately

discussion, however, neglects the fact that the Senate committee specifically adopted the grounds as set forth in *National Resource Defense Council, Inc. [NRDC] v. EPA [NRDC]*.⁶⁴ The Court's only mention of *NRDC* defines the standard based on the particular facts in *NRDC*. Since the petitioners in that case were partially prevailing and were granted attorneys' fees, the Court adopts these as the "grounds" referred to in the Senate committee report. Therefore, the majority used *NRDC* to support its conclusion that the excerpt did not give credence to the Sierra Club's contentions.⁶⁵

The minority argued that the committee report excerpt indicates an intent to adopt the reasoning, but not the facts, in *NRDC*.⁶⁶ Although the report stated specifically that the committee rejected a prevailing party standard "on the grounds set forth in *NRDC v. EPA*," the majority selectively referred only to the fact that the plaintiffs were partially prevailing. The Court relied on the *NRDC* court's statement that petitioners had been successful in several major respects and "should not be penalized for having advanced some points of lesser weight."⁶⁷

The committee's reliance on the case indicated that it was deserving of more attention than that allotted by the majority. The *NRDC* court had stated that the "appropriate" standard gives a court the "liberty to consider not merely 'who won' but what benefits were conferred."⁶⁸ The majority did not strengthen its position by ignoring the earlier, lengthier discussion of the court's rationale, especially since it was this holding which was adopted by the court in *Sierra Club v. Gorsuch*.⁶⁹ The Court's analysis of this excerpt demonstrated that it may have intentionally side-

with prevailing ("shall recover") and partially prevailing ("may recover") parties, Congress understood them to be distinct. By rejecting this specific language for the "appropriate" standard, the Court understood Congress to be merely expanding authorization for fees to be awarded to both prevailing and partially prevailing parties "when appropriate."

64. 484 F.2d 1331 (1st Cir. 1973).

65. 103 S. Ct. at 3280.

66. *Id.* at 3288.

67. *NRDC v. EPA*, 484 F.2d at 1338.

68. *Id.* The heart of the court's rationale is as follows:

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 uncharted 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 interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

484 F.2d at 1338.

69. 672 F.2d 33, 38 (D.C. Cir. 1982), *rev'd*, 103 S. Ct. 3274 (1983) ("It is clear . . . that whether Sierra Club . . . [is] entitled to attorneys' fees turns not on whether

stepped the issue of congressional intent as embodied in the only relevant legislative history available.⁷⁰

C. Comparison of section 307(f) with section 304(d)

Section 304(d) of the Clean Air Act contains the same provision as section 307(f); accordingly, the Court believed that the relation between the two was "instructive."⁷¹ In section 304 actions, private parties are the defendants. Therefore, if attorneys' fees are to be granted to unsuccessful plaintiffs under the "appropriate" standard, "the private defendant may well succeed in refuting each charge against it . . . [and yet] the defendant's reward could be a second lawyer's bill . . . payable to those who wrongly accused it of violating the law."⁷² This statement, however, is qualified by a note which states: "We do not mean to suggest that private parties should be treated in exactly the same manner as governmental entities. . . ."⁷³ This note serves to diminish the majority's argument and lends support to the minority's position that the two sections cannot be compared in any meaningful manner.⁷⁴

[it has] prevailed in whole or in part, but on whether [it has] served the goals of the Clean Air Act.").

70. Discussion of this crucial committee report is given just 21 lines, 103 S. Ct. at 3280, while 24 lines are given to a discussion of a staff report which the Court felt supported their position. *Id.* The Court stated that section 307(f) was meant to be narrower than its forerunner. *Id.* The committee report stated: "The conference report [for § 307(f)] contained a narrower House provision. [Congress] authorized but did not require, courts to award reasonable attorneys' fees to any party against whom EPA acted unreasonably in initiating an enforcement action." (emphasis added). STAFF OF THE SUBCOMM. ON ENVIRONMENTAL POLLUTION OF THE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 95TH CONG., 1ST SESS., SECTION-BY-SECTION ANALYSIS OF S. 252 AND S. 253, 37 (Comm. Print 1977). This reference is clearly inappropriate, since it does not pertain to the type of litigation covered by section 307(f), which are challenges of the validity of standards promulgated by the agency. Instead, the reference is to a situation where the EPA has unreasonably brought enforcement action against an innocent party. As the minority points out, 103 S. Ct. at 3287 n.16, this provision was later codified as part of section 113(b), 42 U.S.C. § 7413(b) (Supp. V 1976).

71. 103 S. Ct. at 3280.

72. *Id.* at 3280-81.

73. *Id.* at 3281 n.12.

74. *Id.* at 3289 n.24. There is an important distinction between section 304 suits, which serve the function of abatement of air pollution, and section 307 suits, which are concerned with challenges to the validity of standards promulgated by the EPA. A comparison of the two may be like comparing apples and oranges. Section 304 suits can be compared to traditional litigation between private citizens. Section 307 suits are brought by private citizens challenging the EPA's exercise of its delegated power. Should a court grant fees to a losing plaintiff in a

The Court's hypothetical concern that, apart from its holding in this case, innocent parties could be forced to pay for the attorneys' fees of their malicious persecutors is not supported by actual judicial experience.⁷⁵ Additionally, the use of this argument by the Court reveals an unsettling attitude of mistrust toward the abilities, common sense, and motives of the lower federal courts.⁷⁶

D. Waiver of Immunity

In support of the narrow reading of section 307(f), the Court cited *McMahon v. United States*⁷⁷ for the proposition that waivers of immunity must be "construed strictly in favor of the sovereign,"⁷⁸ and *Eastern Transportation Co. v. United States*⁷⁹ for the rule that such waivers must not be enlarged "beyond what the language requires."⁸⁰ The Court stated that "care must be taken not to 'enlarge' § 307(f)'s waiver of immunity beyond a fair reading of what the language of the section requires."⁸¹ The minority, however, countered with two cases in which the Court appeared to endorse careful, but non-restrictive, interpretation of statutes authorizing suits against the government.⁸² This duel of conflicting authorities did little to shed light on the issue in *Ruckleshaus v. Sierra Club*.

The Court concluded that had Congress intended such a radical

section 304 suit, the defendants would have the right of appeal to the Supreme Court, based on the instant decision, they would almost certainly prevail.

75. To date, there appear to have been no such cases. See, e.g., *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 62 F.R.D. 353, 355 (D. Del. 1974) (acknowledging the power to award such fees but exercising discretion not to make an award), *aff'd*, 510 F.2d 969 (3d Cir. 1975).

76. The Court's holding acts to limit the lower courts' use of discretion in one situation only — where losing plaintiffs apply for an award of attorneys' fees. It does not disturb their power to use discretion in awarding fees to successful *defendants* where the court finds the plaintiff's lawsuit was "frivolous, unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Nor does it affect their ability to use discretion in *denying* fees to successful plaintiffs. See, e.g., *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1044-45 (4th Cir. 1976) (although defendant insurance company operated a retirement fund in violation of Civil Rights Act, attorneys' fees were not awarded to plaintiffs because insurance company acted promptly to remedy the infraction); *Carpenter v. Andrus*, 499 F. Supp. 976, 979 (D. Del. 1980) (successful plaintiff was not awarded costs because his purpose was not to advance the statutory goals of the Endangered Species Act). The courts are still required to use their discretion in discerning whether parties are "partially prevailing" or "unsuccessful" under the Court's newly articulated standard: "achieving *some* success, even if not major success." 103 S. Ct. at 3279 (emphasis in original).

77. 342 U.S. 25 (1951).

78. *Id.* at 27.

79. 272 U.S. 675 (1927).

80. *Id.* at 686.

81. 103 S. Ct. at 3277.

82. *Id.* at 3288 n.19.

departure from established fee-shifting principles, it would have so stated in far plainer language than that employed in section 307(f).⁸³ An authorization of fees for unsuccessful parties "would require federal courts to make sensitive, difficult, and ultimately highly subjective determinations."⁸⁴ The Court's rejection of this grant of discretion, in favor of a result reached by complicated and somewhat suspect reasoning, promises to have a significant impact on the future of environmental litigation in this country.⁸⁵

V. IMPACT

The immediate impact of *Ruckleshaus v. Sierra Club* will be felt in all pending cases in which attorneys' fees have been sought under section 307(f). Attorneys' fees might have been awarded in such cases based on the holdings in *Sierra Club v. Gorsuch* and similar cases. A denial of fees at this late stage in the game will most likely have a serious adverse financial impact on those plaintiffs who entered into litigation with some assurance that an award of fees was available to them.⁸⁶

The future impact of the decision is more difficult to assess. Cases such as *Sierra Club v. Gorsuch* had given environmental groups some expectation that serious, innovative, and high-quality efforts to resolve both technical standards and matters of public policy might receive compensation, even if the case was "lost" on the merits.⁸⁷ As a result of the instant decision, however, it is unlikely that many new and complex cases will be undertaken by environmentalist groups in the future.⁸⁸ As the court in *Sierra*

83. *Id.* at 3281.

84. *Id.* But see *supra* note 76 (listing a wide range of situations requiring sensitive, difficult, and ultimately subjective determinations). If the lower courts are in the best position to exercise discretion in these cases, then they are probably also the best judges of when a losing plaintiff has contributed to a case so substantially as to be entitled to some compensation for his efforts.

85. This holding applies specifically to the environmental area, since the Court states that its interpretation of "appropriate" in section 307(f) is binding on the other statutes in which this language is used — which concern environmental litigation. See *supra* note 6 (list of affected statutes).

86. As noted in *Sierra Club v. Gorsuch*, 684 F.2d 972, 973 (D.C. Cir. 1982), a new policy of routine opposition to the grant of attorneys' fees to non-prevailing parties was "abruptly" initiated, presumably due to the change of Administration in 1981.

87. The inherent difficulties involved in winning a case against the EPA are illustrated in the standard used by the court in *Sierra Club v. Costle*: "[O]n close questions [we have] given the agency the benefit of the doubt out of deference for the terrible complexity of its job." 657 F.2d 298, 410 (D.C. Cir. 1981).

88. See Note, *Unsuccessful Environmental Litigants*, *supra* note 4, at 686 (sug-

Club v. Gorsuch stated:

The questions raised by the Sierra Club and EDF needed to be resolved; yet no other party had a sufficient economic interest at stake to represent them . . . [O]ne cannot expect that contributions as substantial as those made by Sierra Club and EDF would be made by public interest groups without some form of compensation.⁸⁹

The cases that are undertaken may be only those which appear to have a high potential for success, thus leaving difficult or uncertain issues unresolved.⁹⁰ Cases that are not iron-clad are less likely to be undertaken in the future, because it now appears that the courts are unwilling to liberally construe the term "some success."⁹¹

If the Court's holding results in a chilling effect on environmental litigation, what measures might be taken to alleviate the situation? If Congress did intend to allow attorneys' fees to be awarded to non-prevailing parties at the discretion of the court, it can still amend statutes utilizing the "appropriate" standard to clarify its intent. It should be noted, however, that Congress frequently couches statutory language in deliberately ambiguous terms, preferring that the administrative agencies and the courts take the blame for unpopular decisions.⁹² Also, Congress may be reluctant to brave the political consequences of such reform, especially since the awarding of fees to unsuccessful litigants is viewed by many as a radical departure from traditional values. The current political make-up of Congress, its desire to be perceived by the public as fiscally conservative, and almost certain vigorous opposition by the current Administration make it un-

gesting that just as *Alyeska Pipeline* noticeably discouraged public interest litigation, so too will a rule against awarding fees to unsuccessful litigants).

89. 672 F.2d 33, 41 (D.C. Cir. 1982), *rev'd sub nom.* Ruckleshaus v. Sierra Club, 103 S. Ct. 2374 (1983).

90. "The major drawback of awarded fees is the possibility that they might encourage lawyers to ignore difficult and more complex cases in favor of those where a fee could be obtained with little effort or risk." Note, *Unsuccessful Environmental Litigants*, *supra* note 4, at 687 n.58 (quoting COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* 315, 319 (1976)). If the *award* of fees might be a drawback, the possibility of no fees at all may have even more of a deterrent effect.

91. The Court's dictum that "we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees," 103 S. Ct. at 3279 n.9, only contributes more uncertainty. *But see* Hanrahan v. Hampton, 446 U.S. 754, 759 (1980) (success in procedural dispositions did not give rise to prevailing plaintiff status even if party could affect ultimate determination on the merits; actual victory on the merits of a claim is required). It is readily foreseeable that varying interpretations of the Court's criteria will result in future lawsuits; thus, the Supreme Court may soon hear a similar case seeking clarification.

92. "When Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass [a] statute with some vague language." Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 584 (1972).

likely there will be any such action in the near future.⁹³

Nevertheless, the decision does not mean that the EPA has been given carte blanche to take any action it desires, free from any opposition. Additionally, public interest in environmental issues seems to be at an all-time high. This interest may provide environmental interest groups with both the financial and psychological support needed to continue in their "watch-dog" role.

One interesting possibility for change lies in a nonjudicial settlement of environmental issues. The judicial process has become a costly, time-consuming, and often unsatisfactory method of resolving disputes over agency actions and standards because of the technical complexities and scientific requirements involved in environmental issues. As a result, courts often may not be the most appropriate places in which to decide such disputes.⁹⁴ *Ruckleshaus v. Sierra Club* may prove to be the catalyst for the establishment of a new, nonjudicial approach to settling environmental disputes using such methods as mediation, negotiation, and arbitration. Such an approach would be far less costly for all concerned than the present method of litigating these issues in court and would make the problems of fee-shifting less critical. Congressional action would be required, but it would hopefully create a new and improved method of implementing statutory goals which could be more efficient than patching up former solutions. Thus, although *Ruckleshaus v. Sierra Club* was viewed by environmental groups as a disaster, the case may usher in a new era of increased cooperation among government, industry, and environmentalists, replacing the current climate of adversarial mistrust reflected in this decision.

VI. CONCLUSION

The Supreme Court, in holding that nonprevailing parties are not entitled to an award of attorneys' fees under section 307(f) and all other statutes with the same provision, took a restrictive view of public interest litigation. It colored its approach with preconceived notions of adversarial rights while ignoring Con-

93. See Note, *Unsuccessful Environmental Litigants*, *supra* note 4, at 677 n.4 (describing pending proposals for amending more than seventy statutes to specifically restrict fee awards to substantially prevailing parties).

94. SKILLERN, ENVIRONMENTAL PROTECTION, THE LEGAL FRAMEWORK, 338-39 (1981) (proposal for nonjudicial settlement of environmental issues by government, industry, and environmentalists).

gress' stated support for litigation which provides a public benefit. Courts have the prerogative, when faced with novel situations or issues, to look to public policy as a guide in formulating decisions. In this issue, the specific statement of public policy is clearly contained in the record: "to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest."⁹⁵ The Court's holding may lead to the opposite result—a chilling effect on environmental litigation in this country. Congress had given the courts of appeals the discretion to decide what is "appropriate" in each case. The Supreme Court, however, has superimposed its own discretion on the law, thereby defeating the purposes for which the statute was promulgated.

The *Ruckleshaus* decision will almost certainly hamper the efforts of environmental groups, presenting as it does both practical and psychological barriers to future challenges. It is uncertain whether some of these barriers will be lifted by future congressional action or if, spawned by a deepening conservative climate, further restrictions will be enacted. The possibility of nonjudicial settlement of environmental disputes—with a consequent reduction in fees incurred—appears to present a viable alternative, but will require major restructuring of the present system. If this occurs, the concerns of both the majority and minority in *Ruckleshaus v. Sierra Club* will have to be considered.

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95. H.R. REP. NO. 294, 95th Cong., 1st Sess. 337, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416.