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# Attorneys' Fees in Environmental Citizen Suits and the Economically Benefited Plaintiff: When are Attorneys' Fees and Costs Appropriate?

MICHEL LEE\*

## I. INTRODUCTION

Viewed as a cornerstone of the modern environmental movement, the Clean Air Act (CAA)<sup>1</sup> embodied a new generation of environmental regulation.<sup>2</sup> Coinciding with the first Earth Day and the establishment of the Environmental Protection Agency (EPA) in 1970, the CAA along with numerous groundbreaking statutes that followed, such as the Clean Water Act (CWA),<sup>3</sup> gave the fledgling EPA unparalleled power and control.<sup>4</sup> Federal and state legislatures would later duplicate many of these innovations in a further attempt to improve environmental protection.<sup>5</sup>

One of the most innovative mechanisms of environmental legislation resided in the CAA with its novel inclusion of a citizen suit provision,

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1. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006).

2. Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 67 (1996).

3. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006).

4. EPA, THE GUARDIAN: ORIGINS OF THE EPA (EPA Historical Publication-1) (1992), <http://www.epa.gov/history/publications/print/origins.htm>.

5. Zygmunt J.B. Plater, *From The Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1002 (1994) (the early 1970s "began the parade of regulatory statutes over the next several years the like of which we probably will never see again, virtually all driven by popular political fervor – the National Environmental Policy Act of 1969, the Clean Air Amendments of 1970 (CAA), the Occupational Safety and Health Act of 1970, the Fish and Wildlife Coordination Act, the Noise Control Act of 1972, the Clean Water Act of 1977 (CWA), the Coastal Zone Management Act of 1972, and more than two dozen more."); David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories Of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 354 (1994) ("states occupy an increasingly prominent role in environmental regulation and that considerable innovation has occurred at the state and local levels").

which allowed citizens to file federal lawsuits to enforce the statute.<sup>6</sup> Almost every federal environmental statute that followed duplicated this “remarkable authority” to empower citizens.<sup>7</sup> The concept of the citizen suit proved so powerful that other nations followed suit, allowing for similar citizen involvement.<sup>8</sup> In a departure from the usual “American rule,” most of these citizen suit provisions included a section allowing for the recovery of attorneys’ fees, usually to the prevailing or substantially prevailing party.<sup>9</sup> Predictably no aspect of these sections has created as much litigation as the issue of attorneys’ fees, “particularly as public interest law firms [attempt] to collect fees from a reluctant government.”<sup>10</sup> Cases that involve economic motivations have added to the debate. Whether a party should be entitled to compensation for its fees and costs in such a case currently remains unresolved and the subject of conflicting findings by several federal circuit courts.

This comment will address the current federal circuit court split over the appropriate nature of attorneys’ fee and cost reimbursement where a plaintiff economically benefits from the outcome of a CAA lawsuit. It will suggest solutions that balance environmental protection against abuse of the court system by parties with a self-interested economic motivation. While the focus of the comment will center on fee reimbursement in CAA citizen suits, the analysis presented will demonstrate wide application beyond the CAA and the classically defined citizen suit.<sup>11</sup>

The issue springs from a series of cases involving the interpretation of the attorney fee and cost provisions, also known as fee shifting, found in sections 304(d) and 307(f) of the CAA.<sup>12</sup> These cases involve courts’ interpretations of what constitutes an “appropriate” condition for the award of litigation costs where an economic benefit accrues to the challenging party. The Courts of Appeal for the Fifth and Tenth Circuits have held in

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6. James R. May, et. al., *Environmental Citizens Suits at Thirtysomething: A Celebration and Summit*, 33 ENVTL. L. REPR. 10,721, 10,721 (2003) (“Congress intended citizen suits to fill the vast void left by inadequate enforcement by federal and state regulators, and to ensure compliance and deter illegal activity. The approach stuck.”).

7. *Id.* (“Now more than one dozen federal environmental statutes, numerous state laws, and myriad foreign laws allow for such ‘environmental citizen suits.’”).

8. *Id.*

9. See *infra* Part III.

10. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVTL. L. REP. 10,309, 10,312 (1983).

11. As will be discussed, attorney fee language is nearly ubiquitous among environmental citizen suit provisions, and exists in several other non-environmental statutes as well.

12. Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (2006).

*Florida Power & Light Co. v. Costle*<sup>13</sup> and *Pound v. Airosol Co.*,<sup>14</sup> respectively, that economic benefits borne from a CAA lawsuit do not generally have an impact on fees and costs.<sup>15</sup> However, at a minimum, the parties must meet the standards promulgated by the Supreme Court in *Ruckelshaus v. Sierra Club*,<sup>16</sup> which require substantial success on the merits and result in an outcome that contributes to the goals of the act.<sup>17</sup> However, the Ninth Circuit in *Western States Petroleum Ass'n v. EPA*<sup>18</sup> came to a different conclusion in 1996, determining that a fee and cost award was not appropriate when plaintiffs derive economic benefit from the suit.<sup>19</sup>

Section two of this comment will briefly review citizen lawsuits and similar judicial review provisions. Section three will discuss attorney fee awards, the “appropriateness” of the award, and the “reasonable” fee method by which awards are calculated. Section four will examine the history and current status of the circuit court splits. Section five will consider a series of solutions that might afford the best compromise between judicial efficiency and environmental protection. Finally, sections six and seven will provide analysis and conclusion.

## II. CITIZEN LAWSUITS

Towards the end of the 1960s, a growing public environmental awareness and an acknowledgment of a woefully inadequate environmental statutory regimen led to the 1970s’ revolution of environmental legislation, which also included the creation of citizen suits.<sup>20</sup> The CAA would be one of the earliest examples of this emerging trend in environmental

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13. Fla. Power & Light Co. v. Costle (*Florida II*), 683 F.2d 941 (5th Cir. Unit B 1982).

14. Pound v. Airosol, Co. (*Pound II*), 498 F.3d 1089 (10th Cir. 2007).

15. See *Florida II*, 683 F.2d at 943 (finding “no basis for disqualifying a party from receiving an award merely because that party . . . has a financial interest in the outcome of the litigation”); Pound v. Airosol, Co., 498 F.3d at 1103 (concluding that a party bringing a CAA claim is not “disqualified from receiving attorney fees solely because it is an economic competitor of the alleged violator”).

16. Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

17. *Id.* at 694 (“absent some degree of success on the merits by the claimant, it is not ‘appropriate’ for a federal court to award attorneys’ fees under [CAA] § 307(f)”).

18. W. States Petroleum Ass’n v. EPA, 87 F.3d 280 (9th Cir. 1996).

19. *Id.* (“Congress neither intended to subsidize all litigation under the Clean Air Act nor contemplated that § 307(f) would benefit financially able parties who, out of their own substantial economic interests, would have litigated anyway”).

20. Miller, *supra* note 10, at 10,310; Plater, *supra* note 5, at 1001 (“By the end of the 1960s, environmental consciousness had percolated sufficiently as a popular phenomenon and it flooded into the national political process . . .”).

lawmaking, which, as amended in 1970, created the first citizen suit provision.<sup>21</sup> Concerned that EPA could not effectively manage the growing number of environmental mandates, Congress, for the first time, gave citizens the power to enforce the act as “private attorneys general,”<sup>22</sup> “borrowing a bit from common-law *qui tam* without the bounty.”<sup>23</sup>

In formulating the groundbreaking statute, Congress found itself initially split on the CAA’s “unprecedented”<sup>24</sup> citizen suit provision.<sup>25</sup> The House version lacked any such proviso and the Senate version provided sweeping citizen involvement by allowing citizens to enforce the act directly.<sup>26</sup> However, with “considerable skepticism, if not despair, over the prospect of effective government enforcement,”<sup>27</sup> Congress passed both the CAA and its accompanying citizen suit provision a few months after the first Earth Day.<sup>28</sup> The final version of the citizen suit provision represented a compromise between the House and Senate authorizing “any person to commence a civil action on his own behalf . . . against any person” who violated an emission standard<sup>29</sup> or “against the Administrator where there is alleged a failure . . . to perform any [non-discretionary] act or duty . . .”<sup>30</sup>

This new practice of allowing citizens to participate in the environmental enforcement process spread to numerous federal, state, and

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21. Miller, *supra* note 10, at 10,310; Plater, *supra* note 5, at 1002.

22. See James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 WID. L. SYMP. J. 1, 1 (2003); see also Robert Meltz, *The Future of the Citizen Suit After Steel Co. and Laidlaw*, CONGRESSIONAL RESEARCH SERVICE REPORTS RS20012, 1 (1999), available at <http://www.ncseonline.org/nle/crsreports/risk/rsk-38.cfm>; Zygmunt J.B. Plater, *From The Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1006 (1994).

23. James R. May, *Now More Than Ever: Environmental Citizen Suit Trends*, 33 ENVTL. L. REP. 10,704, 10,704 (2003); BLACK’S LAW DICTIONARY (8th ed. 2004) (defining *qui tam* action as “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive”).

24. 116 CONG. REC. 32,925 (1970), reprinted in CLEAN AIR AMENDMENTS OF 1970 LEGISLATIVE HISTORY 9 at 294 (while not a hotly debated issue, citizen suits were subject to some vigorous discussion with Sen. Hruska derisively referring to the provision as “unprecedented in American history”).

25. H.R. REP. NO. 91-1783, at 55 (1974) (Conf. Rep.), as reprinted in 1970 U.S.C.C.A.N. 5374, 5388.

26. *Id.*

27. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 846 (1985).

28. *Id.* at 844.

29. Clean Air Act § 304(a)(1), 42 U.S.C. § 7604(a)(1) (2006).

30. *Id.* § 304(a)(2).

foreign environmental statutes and laws.<sup>31</sup> The similarities of these citizen suit provisions have been found by courts to be so derivative that they have tended to interpret them in the same manner, barring any obvious differences.<sup>32</sup>

Prior to 1982, most of the citizen suits were used either to compel EPA action or to augment other proceedings in order to obtain further judicial review or damages.<sup>33</sup> With the dawn of the Reagan administration in the early 1980s, the pro-environmental tide of the 1970s turned, and environmental enforcement dried to a trickle, refocusing citizen litigation from suits against the EPA to actions that directly targeted polluters.<sup>34</sup> Today, the citizen suit continues to provide a valuable service by encouraging and complementing environmental enforcement. The need for this alternate enforcement mechanism remains essential, especially given the continuing decline of government enforcement actions brought on by increased economic and political pressures faced by state and federal agencies.<sup>35</sup> The citizen suit remains one of the few tools the environmentalist has to counter the changing face of government policy.<sup>36</sup>

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31. James R. May et. al., *supra* note 6, at 10,721 (2003); *See, e.g.*, Clean Water Act § 505, 33 U.S.C. § 1365 (2006); Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (2006); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (2006); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270 (2006); Solid Waste Disposal Act § 6972, 42 U.S.C. § 6972 (2006); *see also* Richard A. Epstein, *Standing in Law & Equity Defense of Citizen and Taxpayer Suits*, 6 GREENBAG 17 (2002) (discussing an alternative view of the role and justification of citizen suits beyond environmental statutes).

32. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559 (1986) (where the court found the CAA and the Civil Rights Acts citizen suit provisions to be so similar "that they should be interpreted in a similar manner"); *U.S. Dep't. of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (finding that the CAA and RCRA citizen suit sections should be "treated together because their relevant provisions are similar"); Miller, *supra* note 10, at 10,311 ("There are perhaps no sections of the environmental statutes where precedent under one statute [relating to citizen suit sections] so clearly applies to others.").

33. Boyer, *supra* note 27, at 852.

34. Ann Powers, *Gwaltney of Smithfield Revisited*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 557, 562 (1999).

35. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by The United States, The States, and Their Citizens?*, 54 MD. L. REV. 1552, 1619 (1995); Kristi M. Smith, *Who's Suing Whom?: A Comparison Of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359, 396 n.152 (citing May, *supra* note 31, at 10,718) ("finding that in the last five years [1995-2000] EPA referrals for government civil enforcement of the CWA 'fell by a whopping 55%' while citizen notice of intent to sue rose").

36. *See* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 8 (Oxford University Press 1992) (showing declining enforcement of the CWA under the Regan administration).

As envisioned by Congress over thirty years ago, the citizen suit balances cumbersome, often industry biased government interests against the desire to protect the environment at any cost.<sup>37</sup> Congress continues to recognize the value of the provision, commenting during the 1985 amendments to the CWA, that “[c]itizen suits are a proven enforcement tool [and that] they operate as Congress intended – to both spur and supplement [ ] government enforcement actions [and] have deterred violators and achieved significant compliance gains.”<sup>38</sup> The threat of citizen intervention continues to challenge those insiders who prefer to regulate without outside interference from an increasingly interested electorate.<sup>39</sup>

Best known as the judicial review portion of the CAA, section 307<sup>40</sup> provides the framework for challenges to EPA decision making on a number of levels, including air quality standards, emission standards, and most agency determinations, regulations, controls, or prohibitions.<sup>41</sup> While the section has primarily been the mechanism for the regulated community to challenge EPA, citizens have regularly used it to contest EPA promulgated standards, effectively making it the “little brother” of section 304.<sup>42</sup> However, while all citizen suit provisions contain attorney fee language, few judicial review sections, with the exception of the CAA and

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37. Mark Seidenfeld & Janna Satz Nugent, “*The Friendship of the People: Citizen Participation in Environmental Enforcement*,” 73 GEO. WASH. L. REV. 269, 269-72 (2005); see also David M. Driesen, *The Economic Dynamics of Environmental Law: Cost-Benefit Analysis, Emissions Trading, and Priority-Setting*, 31 B.C. ENVTL. AFF. L. REV. 501, 515-16 (2004) (best describing the free-market pull towards environmentally unfriendly policies: “People who make profits from environmentally-degrading activities acquire the means to hire lawyers and lobbyists to limit government efforts to protect the environment. And all of us have an incentive to favor reduced taxation, which limits the administrative capacity of government. Over time, these efforts have a rather profound effect.”).

38. S. REP. NO. 99-50, at 28 (1985); Kerry D. Florio, Comment, *Attorneys’ Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 712-13 (2000).

39. See Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL’Y F. 363, 387 (2004) (describing the case of EPA Secretary Gale Norton’s ultimately unsuccessful attempt to restrict Endangered Species Act (ESA) citizen suits through an appropriation rider during the in the early part of the second Bush administration).

40. Clean Air Act § 307, 42 U.S.C. § 7607 (2006).

41. *Id.* § 307(b)(1), 42 U.S.C. § 7607(b)(1).

42. See Amy Semmel, *Ruckelshaus v. Sierra Club: A Misinterpretation of the Clean Air Act’s Attorneys’ Fees Provision*, 12 ECOLOGY L.Q. 399, 400 (1985); Selmi, *supra* note 2, at 73.

Toxic Substances Control Act (TSCA),<sup>43</sup> allow the recovery of attorneys' fees and costs.<sup>44</sup>

### III. ATTORNEYS' FEES

Unlike English courts, which authorized the award of counsel fees to successful litigants as early as 1278, United States courts have taken an opposite approach.<sup>45</sup> Under the so-called "American rule," each party in civil litigation has the absolute responsibility to pay its own attorneys' fees no matter the outcome of the trial.<sup>46</sup> There are several exceptions to the rule, the primary one being congressional legislation making "specific and explicit provisions for the allowance of attorneys' fees."<sup>47</sup> This exception applies to public litigants as much as private ones in that "only exceptions [to the American rule] 'specifically provided by statute' will subject the United States or its agencies to liability for attorneys' fees."<sup>48</sup> The First Circuit Court of Appeals in *NRDC, Inc. v. EPA* explained, "[w]hen private litigation vindicates a significant public policy and, at the same time, creates a widespread benefit, policy today favors awarding attorneys' fees against a party who exists to serve or represent the interests of all those benefited [sic]."<sup>49</sup> The list of statutory exceptions to the American rule is extensive and ranges from antitrust to patent laws.<sup>50</sup>

Within the CAA's section 304 citizen suit statute lies a fee shifting provision that allows "[t]he court . . . [to] award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."<sup>51</sup> This same fee

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43. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (2006); Toxic Substances Control Act § 19(d); 15 U.S.C. § 2618(d) (2006) (specific fees and costs provision in the TSCA judicial review section).

44. Jeffery G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 ENVTL. L. REP. 10,407, 10,409 (1984) ("Attorney fee awards are authorized by all of the citizen suit provisions, but under few of the judicial review provisions. As a consequence, it has not been unusual for persons challenging administrative action to attempt to recoup their attorneys fees under the citizen suit sections, [usually unsuccessfully].").

45. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 n.18 (1975).

46. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 31 DUKE L.J. 651, 651 (1982); see also Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 873-79 (1929) (coining the term "American Rule").

47. *Alyeska*, 421 U.S. at 260.

48. *Rhode Island Comm. on Energy v. Gen. Servs. Admin.*, 561 F.2d 397, 405 (1st Cir. 1977).

49. *NRDC, Inc. v. EPA*, 484 F.2d 1331, 1332 (1st Cir. 1973).

50. *Alyeska*, 421 U.S. at 260-61, 260 n.33.

51. Clean Air Act § 304(d); 42 U.S.C. § 7604(d) (2006).

shifting language, added in the act's 1977 amendment, is found in the judicial review portion of the statute at section 307, allowing a court to "award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."<sup>52</sup> This similarity of language has led courts to consider the section 304 and section 307 fee shifting provisions interchangeably, finding that "whatever general standard may apply under section 307(f), a similar standard applies under section 304(d)."<sup>53</sup> Furthermore, similar to the general treatment of cross-statute citizen suit provisions,<sup>54</sup> this kind of fee shifting language is viewed as being so similar across diverse statutes that the Court tends to treat all similar provisions as *pari passu*,<sup>55</sup> or as equals.<sup>56</sup>

Expressing a desire that fee shifting promotes citizen participation, Congress recognized that "in bringing legitimate actions . . . citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party."<sup>57</sup> In 1977, when adding the language to section 307, Congress indicated the desire to use fee shifting to "encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest."<sup>58</sup> How much of a role the attorneys' fee provision in fact plays in driving lawsuits is a matter of some debate. Attorneys have argued that these provisions are not enough to encourage people to sue, while industry, perhaps predictably, disagrees.<sup>59</sup>

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52. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305, 91 Stat. 685, 777 (1977) (codified as amended at 42 U.S.C. 7607(f)); Clean Air Act § 307(f), 42 U.S.C. § 7607(f) (2006).

53. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691 (1983); *See also Pound v. Airosol, Co. (Pound II)*, 498 F.3d 1089 (10th Cir. 2007) (case arising under § 304 of the CAA, where the court extensively refers to and relies on the legislative history and circuit court decisions involving § 307 of the CAA).

54. *See supra* note 32.

55. BLACK'S LAW DICTIONARY (8th ed. 2004) (defining *pari passu* as "[p]roportionally; at an equal pace; without preference").

56. *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) ("The similarity of [the fee-shifting] language in [the Emergency School Aid Act of 1972] § 718 and [the Civil Rights Act of 1964] § 204 (b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*").

57. S. REP. NO. 92-414 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3747.

58. H.R. REP. NO. 95-294, at 337 (Comm. Rep.) (1977) (commenting on the addition of the fee-shifting provision in § 307, 42 U.S.C. 7607(f)).

59. Bruce J. Terris, *Private Watchdogs: Internal Auditing and External Enforcement – Three Perspectives – Environmentalists' Citizen Suits*, in *THE PRIVATE ASSUMPTION OF PREVIOUSLY PUBLIC RESPONSIBILITIES: THE EXPANDING ROLE OF PRIVATE INSTITUTIONS IN PUBLIC ENVIRONMENTAL DECISIONMAKING* 16 (May 16–17, 1986).

In addition, to prevent the promotion of unnecessary “harassing suits,” the language of the provision does not differentiate between plaintiff and defendant. This allows defendants who are victims of unwarranted lawsuits the right to receive fair compensation for unwarranted actions, shifting the burden to the plaintiff.<sup>60</sup> However, this option requires a party to act egregiously as courts require a plaintiff to be acting with clearly frivolous or unjustified motivations in order to recover attorney fees.<sup>61</sup> This judicial restraint on defensive fee shifting provides a logical limit to the fee shifting provision, promoting the act as desired and furthering pro-environmental policies by diminishing the chilling effect a broad “plaintiff pays” option would have on a citizen litigant.<sup>62</sup> Without such restrictions on the attorney fee provisions environmental groups might think twice if they were to face the burden of paying attorney fees.<sup>63</sup> Much of the court’s struggle with when to apply fee shifting stems from the statute’s unclear language, which lacks a precise standard to determine when such fees are “appropriate.”<sup>64</sup>

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60. 116 CONG. REC. 32,927 (1970) (“The Senator from Nebraska raised the question of possible harassing suits by citizens. This the committee attempted to discourage by providing that the costs of litigation – including counsel fees – may be awarded by the courts to the defendants in such cases, so that the citizen who brings a harassing suit is subject not only to the loss of his own costs of litigation, but to the burden of bearing the costs of the parties against whom he has brought the suit in the first instance.”).

61. *Consol. Edison Co. of New York, Inc. v. Realty Investments Assocs.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) (noting that “Congress’s design of encouraging citizen suits would be substantially frustrated were Section 7604(d) read to permit prevailing defendants to recover attorneys’ fees with the same relative ease that successful plaintiffs enjoy . . . prevailing defendants may recover fees under Section 7604(d) only where the action may be fairly characterized as frivolous or harassing”).

62. *Friends of Earth, Inc. v. Chevron Chemical Co.*, 885 F. Supp. 934, 939 (E.D. Tex. 1995) (“To place upon these citizen plaintiffs the speculative hazard of paying a Defendant’s attorneys’ fees and costs would likely have an undesirable effect. Such a hazard would have a chilling effect upon citizens bringing enforcement action under Section 1365 [of the CWA.]”); Florio, *supra* note 38, at 733 (“In order to ensure the effectiveness of citizen suit provisions, Congress provided fee-shifting provisions in environmental legislation to encourage citizens to engage in socially beneficial litigation. Common sense suggests that increasing defendants’ ability to recover attorneys’ fees would significantly decrease the ability of citizens to bring suit.”).

63. *See* *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1093-96 (9th Cir. 1991) (the frivolous standard for denial of attorneys’ fees was not universally applied until recently, as explained in this case concerning the use of fee shifting in the Endangered Species Act – the case also illustrates the cross application of fee shifting principles among different statutes).

64. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (“it is difficult to draw any meaningful guidance from § 307(f)’s use of the word ‘appropriate’”).

### A. Appropriate Standard

The fee shifting provisions allow the award of costs and fees when “appropriate.”<sup>65</sup> Not surprisingly, the vague language of the section has been subject to much debate, leading courts and commentators to struggle with questions such as whether a party must be victorious, pro-environment, or even financially solvent. The language in sections 304(d) and 307(f) is vague on the issue of whether a plaintiff must win in order to recover costs and fees. Other statutes’ citizen suit provisions, such as those found in the CWA, are slightly more explicit on this point, allowing recovery of fees to a “prevailing or substantially prevailing party.”<sup>66</sup> The CAA leaves this issue up to the court, which must decide what is “appropriate.”<sup>67</sup>

The courts grappled with the meaning of “appropriate” and initially found in cases such as *Sierra Club v. Gorsuch*,<sup>68</sup> that whether plaintiffs were “entitled to attorneys’ fees turned not on whether they had prevailed in whole or in part, but on whether they had served the goals of the Clean Air Act.”<sup>69</sup> In fact, most federal lower courts found the “appropriate” standard to be broad enough to include unsuccessful litigants, who, at a minimum, contributed to the goals of the act.<sup>70</sup> However, in 1983, the seminal case of *Ruckelshaus v. Sierra Club*<sup>71</sup> rebuffed this broad interpretation. By relying on the statute’s legislative history as well as other similar fee shifting statutes, such as the CWA,<sup>72</sup> the Court found that fee shifting applied only where a plaintiff was at least somewhat successful on the merits *and* contributed to the goals of the act.<sup>73</sup> The Court explained that an overbroad

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65. Clean Air Act § 304(d), 42 U.S.C. § 7604(d) (2006).

66. Clean Water Act § 505, 33 U.S.C. § 1365(d) (2006).

67. Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (2006).

68. *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982).

69. *Id.* at 38.

70. *Envtl. Def. Fund, Inc. v. EPA*, 672 F.2d 42, 48 (D.C. Cir. 1982) (“In enacting a provision allowing for an award of attorneys’ fees whenever a court finds that such ‘an award is appropriate,’ it seems plain that Congress intended to give the courts greater latitude than is allowed under statutes such as FOIA (‘substantially prevailing’) and 28 U.S.C. § 2412 (‘prevailing party’).”); Walter B. Russell, III and Paul Thomas Gregory, Note, *Awards of Attorney’s Fees in Environmental Litigation: Citizen Suits and the “Appropriate” Standard*, 18 GA. L. REV. 307, 322-23 (1984).

71. *Ruckelshaus*, 463 U.S. 680.

72. Clean Air Act § 304(d), 42 U.S.C. § 7604(d) (2006).

73. *Ruckelshaus*, 463 U.S. at 682; *But cf.* *Metro. Wash. Coal. for Clean Air v. District of Columbia*, 639 F.2d 802 (D.C. Cir. 1982) (exceptional case where court allowed attorneys’ fees where citizen suit was dismissed, appears contrary to *Ruckelshaus*); For a more detailed

interpretation of the “appropriate” standard would not only contradict the legislative history<sup>74</sup> but would also be implicitly unfair to prevailing defendants by compelling them to pay a plaintiff who had erroneously accused them of violating the law.<sup>75</sup> The majority found that Congress intended only to eliminate both the restrictive readings of “prevailing party” found in other statutes and the necessity for “case-by-case scrutiny” by federal courts that had been used previously, requiring the courts to delve into whether plaintiffs prevailed “essentially” on “central issues.”<sup>76</sup> This led to the currently accepted standard of “partially prevailing parties – parties achieving some success, even if not major success.”<sup>77</sup> The degree of success may not be trivial or “purely procedural” and a court must examine each issue and determine the level of success in order to determine the appropriate award.<sup>78</sup> While the ruling appeared to restrict the cases where a party might recover fees, it did not limit the pool of litigants eligible for relief, which could include interveners<sup>79</sup> and those who demonstrated some level of success through a consent decree.<sup>80</sup> In fact, under the so-called catalyst theory, adjudication of a case is not a prerequisite to fee shifting as long as the settlement leads to “substantial relief prior to adjudication on the merits.”<sup>81</sup> The concept of recoverable fees can also extend to the cost of press conferences, lobbying, and public relations work related to the action.<sup>82</sup>

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discussion concerning *Metropolitan Washington Coalition for Clean Air* and its relationship to *Ruckelshaus* see Russell & Gregory, *supra* note 70, at 333.

74. *Ruckelshaus*, 463 U.S. at 686-92.

75. *Id.* at 692. *But see supra* notes 55–57 and accompanying text (it is unclear whether the Court was either unaware of the lower courts movement away from the strict “plaintiff pays” approach or whether they wished to make a clear statement eschewing such practices).

76. *Id.* at 688.

77. *Id.*

78. *Id.* at note.9.

79. *U.S. v. City of San Diego*, 18 F. Supp. 2d 1090, 1098 (S.D. Cal. 1998) (“The Court agrees that Sierra Club [as an intervener] is a ‘prevailing party’ because it succeeded on significant issues and achieved the primary objective of its intervention.”).

80. *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (“The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees”); Ellen P. Chapnick, *Access to the Courts*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONAL RISKS* 372 (Michael B. Gerrard ed. 1999).

81. *Sierra Club v. EPA*, 322 F.3d 718, 719 (D.C. Cir. 2003); Kelly L. Jones, Comment, *Sierra Club v. EPA: Is changing the American Rule for Attorneys’ Fees Un-American? The Debate on Congressional Fee-Shifting Statutes*, 18 J. NAT. RESOURCES & ENVTL. L. 245, 245 (2004).

82. *U.S. v. City of San Diego*, 18 F. Supp. 2d at 1099 (“[P]revailing civil rights counsel are entitled to compensation for the same tasks as a private attorney. Where the giving of press conferences and performance of other lobbying and public relations work is directly

While *Ruckelshaus* dealt specifically with section 307(f), the Court made it clear “that section 307(f) was meant to parallel section 304(d) of the Clean Air Act . . . .”<sup>83</sup> In fact, the view of “appropriate” under *Ruckelshaus* extends well beyond the CAA to at least sixteen separate federal statutes with similar language.<sup>84</sup>

In 1982, the D.C. Circuit Court addressed the issue of whether a plaintiff must take a pro-environmental position in order to qualify for attorneys’ fees, using a rationale that eerily paralleled the later trio of cases discussed in this comment.<sup>85</sup> In *Alabama Power Co. v. Gorsuch*,<sup>86</sup> the District of Columbia along with environmental groups, sued and prevailed against the EPA using the CAA citizen suit provision under section 307(f). The EPA argued that the District did not deserve attorneys’ fees because it “litigated in furtherance of its economic interests and therefore did not need the prospect of an attorneys’ fee recovery as an inducement to advocate in the public interest.”<sup>87</sup> The court soundly rejected the argument finding “[t]he suggestion that fee awards are limited to parties asserting ‘pro-environment’ claims has no support in the words of the statute or its legislative history . . . .”<sup>88</sup> The court focused on the issue of a party’s environmental motivation, rather than its economic interests and declined to rule on the narrower question, later addressed by the Fifth, Ninth, and Tenth Circuits, of whether fee awards could apply where a nongovernmental party acted only to forward its own economic self-interest, regardless of its environmental position.<sup>89</sup>

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and intimately related to the successful representation of a client, private attorneys do such work and bill their clients. Prevailing civil rights plaintiffs may do the same.” (quoting *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992)); Chapnick, *supra* note 80, at 372.

83. *Sierra Club v. Gorsuch*, 672 F.2d 33, 35 n.3 (D.C. Cir. 1982).

84. *Avoyelles Sportsmen’s League v. Marsh*, 786 F.2d 631, 634 n.6 (5th Cir. 1986) (“the term ‘appropriate’ controls the construction of the same term in § 505(d) of the Clean Water Act and in a number of other federal statutes” (citing *Ruckelshaus*, 463 U.S. at 682)).

85. *Ala. Power Co. v. Gorsuch*, 672 F.2d 1, 5 (D.C. Cir. 1982) (note that this case predates *Florida Power & Light Co. v. Costle*, the earliest of the subject cases discussed, by a mere six months and would later be cited in *W. States Petroleum Ass’n v. EPA* in 1996).

86. *Ala. Power Co. v. Gorsuch*, 672 F.2d 1.

87. *Id.* at 5.

88. *Id.*

89. *Id.* (“Without passing on the eligibility under Section 307(f) of a financially able nongovernmental party having no more than its own economic interests at heart, we perceive no reason for refusing a fee allowance here.”).

Another factor considered when looking at attorneys' fees has been plaintiff solvency.<sup>90</sup> Here the question is whether a for-profit, financially solvent corporation is eligible for reimbursement of its fees and costs. As with the pro-environmental question, this issue finds close linkage to the subject of a party's economic interest and benefit. Courts have generally ignored this issue without considering a party's interest. However, the court in *Alabama Power* did signal some sympathy for the argument that the Act was not intended to subsidize "corporations or trade associations, that could otherwise afford to participate."<sup>91</sup> This interpretation will play a greater role when evaluating the suggested solutions to the circuit split and the need to calculate economic benefit.<sup>92</sup>

### B. Calculating a Reasonable Fee

Assuming entitlement to a fee, the question arises as to what a court considers to be a "reasonable" fee.<sup>93</sup> The first attempt to develop a formula led to the creation of a complex and vague twelve-factor test originating out of the Fifth Circuit in 1974.<sup>94</sup> The Third Circuit used a simplified test that established the starting point of the "reasonable" fee "by multiplying the hourly rate for each attorney times the number of hours he worked on the case."<sup>95</sup> The court adjusted this initial "lodestar" amount based on the "riskiness" and quality of the attorney's work.<sup>96</sup> This multiplier scheme continued to create more problems than it solved and over time and several cases, the United States Supreme Court began to simplify the formula.<sup>97</sup>

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90. See *Fla. Power & Light Co. v. Costle (Florida II)*, 683 F.2d 941, 942 (5th Cir. Unit B 1982); *Ala. Power Co. v. Gorsuch*, 672 F.2d at 7.

91. *Ala. Power Co. v. Gorsuch*, 672 F.2d at 7 n.33 (quoting 112 CONG. REC. 32,855 (1976) (remarks of Senator Magnuson)).

92. See *infra* Part V.

93. Generally speaking, all components of the cost of litigation must be reasonable. See *Perreira v. Sec'y of Dep't of Health and Human Servs.*, 27 Fed. Cl. 29, 34 (1992).

94. *Johnson v. Geor. Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974) (the twelve factors being: time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and results obtained, the experience, reputation, and ability of the attorneys, the "undesirability" of the case, the nature and length of the professional relationship with the client, and awards in similar cases).

95. *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973).

96. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986).

97. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984).

By 1986, the Supreme Court devised a method that eliminated complicated multipliers and established a simple “reasonable hours times a reasonable rate” calculus which could be modified “only in certain ‘rare’ and ‘exceptional’ cases, supported by both ‘specific evidence’ on the record and detailed findings by the lower courts.”<sup>98</sup> Furthermore, where a party has only partial success, the court must weigh that success and award fees that are commensurate to the result.<sup>99</sup>

As courts have struggled with the “appropriate” element of fee shifting in the CAA, they have made decisive steps towards a unified approach to the issue of when and to whom fees might be awarded. Furthermore, they have come to basic agreement of what consists of a “reasonable” fee. However, the remaining issue of economic benefit that eluded the court in *Alabama Power Co. v. Gorsuch* has yet to reach the consensus that has graced the other components of what constitutes an “appropriate” and “reasonable” attorneys’ fee.<sup>100</sup>

#### IV. CIRCUIT CASE SPLITS

The first direct attempt to address the issue of a plaintiff’s economic benefit and the award of attorneys’ fees occurred in 1982 involving a case that followed *Alabama Power Co. v. Gorsuch* by a mere six months.<sup>101</sup> The Fifth Circuit in *Florida Power & Light v. Costle* found that a plaintiff’s economic benefit had no effect on the award of fees and costs, maintaining the status quo.<sup>102</sup> Then, in 1996, the Ninth Circuit, in *Western States Petroleum Ass’n v. EPA*, explicitly disagreed with the Fifth Circuit and suggested, for the first time, that economic benefit should factor in the “appropriateness” analysis.<sup>103</sup> With a circuit split firmly established, it would not be until 2006, that the Tenth Circuit joined the debate in *Pound v. Airosol Co.* and sided with the Fifth Circuit, finding that financial interest did not preclude the award of attorneys’ fees.<sup>104</sup> Below follows a further examination of the courts’ rationales, illuminating the source of the split and offering solutions to clarify the meaning of “appropriate” and “reasonable” in the context of an economically benefited plaintiff.

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98. *Pennsylvania*, 478 U.S. at 565.

99. *Hensley v. Eckerhart*, 461 U.S. at 424.

100. *See supra* note 89 and accompanying text.

101. *See supra* note 85.

102. *Fla. Power & Light Co. v. Costle (Florida II)*, 683 F.2d 941 (5th Cir. Unit B 1982).

103. *W. States Petroleum Ass’n v. EPA*, 87 F.3d 280 (9th Cir. 1996).

104. *Pound v. Airosol, Co. (Pound II)*, 498 F.3d 1089 (10th Cir. 2007).

### A. *Florida Power – Fifth Circuit*

In 1982, in the Fifth Circuit, Florida Power & Light Company (FP&L) moved to obtain attorneys' fees and costs after successfully challenging EPA's attempt to force Florida to incorporate its state-imposed two-year limitation on relief into a federally enforceable state implementation plan.<sup>105</sup> *Florida Power & Light v. Costle* had more to do with EPA's abuse of discretion than protection of the environment, as there was little environmental benefit from the decision.<sup>106</sup> In fact, the original ruling allowed FP&L to *increase* emissions at its power plant in response to a reduced supply of low sulfur fuel oil, without which FP&L and a number of other similarly situated power plants would have incurred enormous expense.<sup>107</sup>

In arguing against the application of fee shifting, the EPA claimed that Congress never intended an award of fees and costs to a "large, solvent corporation whose main motivation . . . is financial interest."<sup>108</sup> The agency further asserted that FP&L did not require the financial motivation of section 307(f) fee shifting to initiate such a suit and "that the result achieved by FP&L . . . conferred only a 'company-specific' benefit and that any public benefit was incidental."<sup>109</sup> However, the court, looking to legislative history, found that the fee shifting provision intended not only to protect the environment, but also to "encourage litigation which [would] assure proper implementation and administration of the act *or* otherwise serve the public interest."<sup>110</sup> Here, the court appeared to split the "appropriate" test into two possibilities by creating both an implementation and public interest prong.

While the court sympathized with EPA's argument on policy grounds, they found no evidence in either the statute or legislative history that fee shifting awards were to be based on either the solvency or economic interests of the plaintiff.<sup>111</sup> Here, they expressly found that FP&L financially benefited from a result that actually led to greater emissions and

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105. *Florida II*, 683 F.2d at 942; Fla. Power & Light Co. v. Costle (*Florida I*), 650 F.2d 579 (5th Cir. Unit B June 1981) (originating case determining that EPA had abused its discretion).

106. *Florida II*, 683 F.2d at 942-43.

107. *Florida I*, 650 F.2d at 581-82.

108. *Id.* at 942.

109. *Id.* at 943.

110. H.R. REP. NO. 95-294, at 337 (1977) (emphasis added); *see also* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

111. *Florida II*, 683 F.2d at 943.

thus increased pollution, arguably worsening the environment.<sup>112</sup> However, curbing EPA's error in judgment was of enough value in that it met the goal of "assuring 'proper implementation and administration of the Act.'"<sup>113</sup>

### B. *Western States – Ninth Circuit*

In 1996 a group of trade associations and air pollutant dischargers sued the EPA under the judicial review provision of the CAA and eventually prevailed, with the court finding that the EPA had abused its discretion by unexplainably treating the petitioners differently than similarly situated groups.<sup>114</sup> Similar to *Florida Power & Light Co.* the resulting outcome of *Western States Petroleum Ass'n v. EPA* did not improve the environment; rather, it exempted certain "insignificant emissions" from the CAA permitting scheme.<sup>115</sup> While EPA had approved such exemptions in eight other state and local programs, they disapproved of Washington State's plan, flatly denying "the obvious inconsistency between its rejection of the Washington program and its approval of other state programs."<sup>116</sup> The court found EPA had abused its discretion and ruled in favor of the plaintiffs. However, the court took a different approach in deciding upon their request for attorneys' fees.<sup>117</sup>

The court expressly "decline[d] to adopt the approach of the Fifth Circuit"<sup>118</sup> and instead turned to the District of Columbia Circuit's *Alabama Power Co. v. Gorsuch*.<sup>119</sup> There, the court looked to the "legislative history of [section] 19(d) of the Toxic Substances Control Act, 15 U.S.C. § 2618(d), which use[d] the same 'appropriate' standard as the Clean Air Act, reveal[ing] the clearest expression of congressional purpose in enacting statutes of this type."<sup>120</sup> From that prior decision, the court delved into the legislative history and discovered very specific references to an economically benefited plaintiff.

The court quoted Senator Magnuson, who during debate on the final version of section 19(d) stated, in part:

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112. *Id.*

113. *Id.*

114. *W. States Petroleum Ass'n v. EPA*, 87 F.3d 280, 282-85 (9th Cir. 1996).

115. *Id.* at 282.

116. *Id.* at 285.

117. *Id.*; Brief of Petitioner, No. 95-70034, 1995 WL 17013960, at \*23 (9th Cir. 1996).

118. *W. States Petroleum Ass'n v. EPA*, 87 F.3d at 286.

119. *Ala. Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982).

120. *W. States Petroleum Ass'n v. EPA*, 87 F.3d at 286 (quoting *Ala. Power Co.*, 672 F.2d at 7 n.33).

It is not the intention of these provisions to provide an award for an individual or a group if that individual or group *may stand to gain significant economic benefits through participation in the proceeding* . . . It is not intended that the provisions support participation of persons, including corporations or trade associations, that could otherwise afford to participate . . . Whether or not the person's resources are sufficient to enable participation would include consideration of . . . the likelihood that the person would seek to participate in the proceeding whether or not compensation was available.<sup>121</sup>

Based on these findings, the court found no indication that Congress intended the CAA fee shifting provisions to subsidize *all* litigation or benefit economically advantaged parties who would have litigated anyway.<sup>122</sup> Finding that the plaintiffs would have sued regardless of a fee award and that the narrow scope of the action, which concerned a single anomalous decision, had not “served the public interest in assisting in the interpretation and implementation of the Clean Air Act,” the court refused to award attorneys' fees.<sup>123</sup> Interestingly, the court reached this conclusion independently, without prodding from any of the parties.<sup>124</sup>

### C. *Pound* – Tenth Circuit

In 2006, under the citizen suit provision of the CAA, a company named Pro Products successfully mounted a suit against one of its competitors in the case of *Pound v. Airosol Co.*<sup>125</sup> Pro Products alleged that Airosol marketed and sold a pesticide called Black Knight for use in eliminating reptile parasites, which contained ozone depleting hydrochlorofluorocarbons (HCFCs) in violation of section 610(d)(1)(A) of the CAA.<sup>126</sup> When calculating monetary penalties for the violation, the

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121. *Id.* (quoting 112 CONG. REC. 32,855 (1976) (remarks of Senator Magnuson)) (emphasis added).

122. *Id.*

123. *Id.* (the court also notes that the petitioners had not contributed substantially to the goals of the CAA as a further reason for denying the fee award without explaining how this might be differentiated from not “serv[ing] the public interest in assisting in the interpretation and implementation of the Clean Air Act”).

124. See Brief of Petitioner, *supra* note 117 (the only reference to attorneys' fees is found on page 23 of the petitioner brief, neither the respondents nor petitioner ever mention attorneys' fees or 42 U.S.C. § 7607(f) subsequently).

125. *Pound II*, 498 F.3d 1089.

126. *Pound v. Airosol Co. (Pound I)*, 440 F. Supp. 2d 1241, 1243 (D. Kan. 2006); Clean Air Act § 610(d)(1)(A), 42 U.S.C. § 7671i(d)(1)(A) (stating that it “shall be unlawful for any

United States District Court for the District of Kansas found that Pro Products “brought the instant lawsuit for the purpose of removing one of their competitors from the market.”<sup>127</sup> They did not believe that Pro Products initiated the suit to benefit the environment; rather, they deemed the interest as primarily economic and not environmental.<sup>128</sup> Upon a request for plaintiff attorneys’ fees, the court, in a prior order, specifically discussed the Fifth and Ninth Circuit splits “regarding whether an award of attorney fees is appropriate when the prevailing party brought the suit for personal financial gain rather than to further the purpose of the Clean Air Act.”<sup>129</sup> Finding the Tenth Circuit silent on the issue, the court denied the plaintiff’s request for fees and costs.<sup>130</sup>

Pro Products appealed, challenging the lower court’s lack of monetary penalty and refusal to award attorney fees.<sup>131</sup> While concluding that the district court’s penalty analysis was erroneous, the Tenth Circuit took the opportunity to resolve the lingering question concerning fees in such economic circumstances.<sup>132</sup> Although the lower court failed to issue a penalty, the circuit court found that Airosol’s actions clearly violated the CAA, establishing that Pro Products had achieved some degree of success on the merits.<sup>133</sup> When grappling with the issue of whether the action served the public and the CAA, the court acknowledged the Ninth Circuit’s ruling in *Western States*, which suggested that “it may not be appropriate to award a party attorney fees under the CAA when that party brought suit only to serve its own economic interests.”<sup>134</sup>

However, the court found that the suit successfully minimized air pollution by promoting enforcement of section 610(d)(1)(A), thereby assisting in the implementation of the statute.<sup>135</sup> After establishing that Pro

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person to sell or distribute, or offer for sale or distribution, in interstate commerce – any aerosol product or other pressurized dispenser which contains a class II substance”); Clean Air Act § 602(b), 42 U.S.C. § 7671a(b) (listing the hydrochlorofluorocarbons that are considered class II substances).

127. *Pound I*, 440 F. Supp. 2d at 1247.

128. *Id.*

129. *Id.* (discussing a prior March 4, 2005 order denying attorney’s fees).

130. *Id.*

131. *Pound II*, 498 F.3d 1093.

132. *Id.* at 1094, 1100-03.

133. *Id.* at 1102-03.

134. *Id.* at 1102.

135. *Sierra Club v. EPA*, 769 F.2d 796, 800 (D.C. Cir. 1985) (“party must have served the public interest by assisting in the proper implementation of the statute”); *Florida II*, 683 F.2d at 942 (“encourage litigation which will assure proper implementation and administration of

Products achieved the minimum requirements for the award of fees, the court turned to the impact of economic interest. Quoting directly from the *Florida Power & Light Co.* decision, the court paralleled the Fifth Circuit, stating that there was no foundation to disqualify a party from receiving attorney fees “merely because that party is solvent and has a financial interest in the outcome of the litigation.”<sup>136</sup>

With the circuits split on the role economic benefit plays in the award of attorneys’ fees, the question turns to congressional intent and public policy. Did Congress intend to “subsidize all litigation,”<sup>137</sup> regardless of the economic benefit, or did it expect fee shifting to be an alternative for those plaintiffs who did not personally stand to gain from the outcome of a suit?<sup>138</sup> From a public policy perspective, there are serious questions as to the wisdom of ignoring economic benefit while factoring the appropriateness of a fee and cost award. Unnecessary financial incentives in the form of fee shifting are likely both inefficient and environmentally unfriendly as will be discussed below.<sup>139</sup>

## V. SOLUTIONS

The issue of financial solvency alone does not seem to be the focus of the dispute. While the “financially solvent” party might have the “deep pockets” to pay its own attorneys’ fees, the issue of economic self-interest is the most likely cause of discomfort and is inextricable from the financial solvency question.<sup>140</sup> The strong financial solvency of most large non-profit environmental organizations, who are rarely scrutinized when it comes to fee shifting, are prime examples of why solvency is not the sole issue. Some non-profits earn as much as large corporations. For example, the Sierra Club and its Foundation jointly grossed over one hundred and ten million dollars in 2006,<sup>141</sup> the National Resources Defense Council earned

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the Act or otherwise serve the public interest” (quoting H.R. REP. NO. 95-294, at 337 (1977)).

136. *Pound II*, 498 F.3d 1089, 1102 (quoting *Florida II*, 683 F.2d at 943).

137. *W. States Petroleum Ass’n v. EPA*, 87 F.3d at 286.

138. *Id.*

139. *See infra* Part V.

140. *See Florida II*, 683 F.2d 941; *Pound II*, 498 F.3d 1089; *W. States Petroleum Ass’n v. EPA*, 87 F.3d 280; *Ala. Power Co. v. Gorsuch*, 672 F.2d 1 (most cases asking the solvency question associate the inquiry to the issue of financial motivation, even when discussing a plaintiff’s environmental or financial position).

141. SIERRA CLUB, IRS FORM 990 – RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2006), <http://www.guidestar.org/FinDocuments/2006/941/153/2006-94115330703c1f3>

over seventy million dollars in 2005,<sup>142</sup> and the Defenders of Wildlife made almost thirty million dollars in 2005.<sup>143</sup> Furthermore, large organizations, who would be the most likely to be financially solvent, have been found to “no longer dominate the citizen suit arena.”<sup>144</sup>

The circuits appear split for good reasons, as courts recognize that fee shifting provisions were never designed to promote financial reward for parties who were either filing a citizen suit or challenging an EPA action for their own private interests.<sup>145</sup> With vested interests, parties would likely initiate a suit without added incentives.<sup>146</sup> By offering fee shifting to the economically advantaged, a disproportionate gain would accrue, since a party would obtain the benefit with no legal costs.<sup>147</sup> On an economic level, this double gain would arguably lead to an inefficient allocation of resources, since the economically advantaged plaintiff would be getting his benefit at another’s expense.<sup>148</sup> Even if a lack of reimbursement were a disincentive to sue, a large potential economic benefit would likely overcome such a hurdle. Parties can make the same kinds of calculations concerning potential success and economic benefit as they would in any civil suit. Even the Tenth Circuit in *Pound*, while disagreeing with the Ninth Circuit’s broad restriction of fee awards to an economically benefited

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b4-90.pdf (last visited Jan. 15, 2009); THE SIERRA CLUB FOUNDATION, IRS FORM 990 – RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2006), <http://www.guidestar.org/FinDocuments/2006/946/069/2006-946069890-03720918-9.pdf> (last visited Jan. 15, 2009).

142. NATIONAL RESOURCES DEFENSE COUNCIL, INC., IRS FORM 990 – RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2005), <http://www.guidestar.org/FinDocuments/2006/132/654/2006-132654926-03a9b0c7-9.pdf> (last visited Jan. 15, 2009).

143. DEFENDERS OF WILDLIFE, IRS FORM 990 – RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2004), <http://www.guidestar.org/FinDocuments/2006/530/183/2006530183181-03a6359c-9.pdf> (last visited Jan. 15, 2009).

144. Smith, *supra* note 35, at 362.

145. See *W. States Petroleum Ass’n*, 87 F.3d at 286.

146. Boyer & Meidinger, *supra* note 27, at 839-40 (arguing that besides attorney fees a citizen litigator’s incentives might include settling so as to obtain “an ‘environmental fund’ dedicated to particular conservation uses . . . [and] . . . bring suits for the purpose of attracting or retaining members”).

147. See *infra* note 151 (a strong argument exists that this benefit is no windfall, as courts have tended to limit fees when calculating the reasonable lodestar amount).

148. See Joseph E. Hoffer, Comment, *Qui Tam: Survival of the Action and Fate of the Proceeds Following the Death of the Relator. For the King And For Himself . . . and His Heirs*, 37 ST. MARY’S L.J. 199, 208 (2005) (arguing that failing to allow qui tam actions to continue under the False Claims Act would lead to inefficient allocation of resources); Lauren E. Willis, *Decisionmaking and The Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 815 (2006) (explaining the inefficient allocation of resources where a borrower pays more than is necessary for a home loan because of imperfect knowledge).

plaintiff, agreed with the notion that fees may not be appropriate where a party brought a suit to solely serve its own economic interests.<sup>149</sup>

However, equally convincing is the counter argument that a party is entitled to fees and costs as long as its action contributed to the goals of the act, be it the CAA or CWA.<sup>150</sup> Any additional incentives, however small,<sup>151</sup> will likely help further promote the goals of the act and has even greater importance where an environmental friendly plaintiff lacks the resources to endure a protracted battle. The possibility of recovering reasonable fees may make the difference between initiating a suit and waiting in the wings, hoping EPA will come to the rescue. Furthermore, a competitor's superior technical and competitive knowledge as well as financial motivation will more likely lead to successful actions, further enhancing enforcement of environmental regulations.<sup>152</sup> While the statutes are silent in this regard, the legislative history appears to disfavor a blank-check approach to fee shifting through its desire to "encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest."<sup>153</sup>

#### A. Developing a Solution

Acknowledging the strength of each argument, this comment suggests two possible tests that can work to reconcile both views. Overall, the test should not be convoluted and difficult to administer since courts typically rebuff complex tests, such as the original twelve-factor attorney fee test from *Johnson*.<sup>154</sup> However, where a court must confront the economic value of environmental protection complexity will inevitably exist, as exemplified in *Sierra Club v. Simkins Industries*, where the court used a multipart test to help determine the actual amount of a civil penalty in a

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149. *Pound v. Airosol Co. (Pound II)*, 498 F.3d 1089, 1102 (10th Cir. 2007).

150. *Florida II*, 683 F.2d at 943; *Pound II*, 498 F.3d at 1102.

151. Miller, *supra* note 44, at 10,423 ("But of 300 recent fee award cases analyzed by the Department of Justice, rates awarded were above \$75 an hour in only 20 percent of the cases. And in most of those cases there was a graduation in hourly rates awarded, with the highest rate seldom in excess of \$100 an hour.").

152. See *Pound II*, 498 F.3d at 1102; See also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 n. 6 (1980) (where the Court in its famous opinion on commercial speech noted that "commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity.").

153. H.R. REP. NO. 95-294, at 337 (Comm. Rep.) (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1416.

154. See *Johnson*, 488 F.2d at 717-20; see *supra* note 94 and accompanying text.

CWA enforcement action.<sup>155</sup> That analysis required a complex evaluation of the “gravity of the violation, the financial status of the defendant, the possible deterrent effect of this assessment, and the past and present actions of the defendant.”<sup>156</sup>

Before discussing solutions, one must confront the difficult task of defining economic and environmental benefit. Luckily, for over twenty years these kinds of calculations have been a mainstay of environmental policy in the form of cost-benefit analysis (CBA), with the expectation that the costs of a regulation should not exceed its benefits.<sup>157</sup> In fact, several environmental statutes, such as the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),<sup>158</sup> the Toxic Substances Control Act (TSCA),<sup>159</sup> and the Safe Drinking Water Act,<sup>160</sup> explicitly require such analysis.<sup>161</sup>

## B. Measuring Economic Benefit

Often such tests suffer from vagueness and difficulties of “producing prices for things that appear to be priceless,”<sup>162</sup> especially when trying to determine the economic value of environmental protection.<sup>163</sup> While difficult, this kind of valuation is neither impossible nor untried; in fact, much of the mechanisms already exist. The requirement to measure economic benefit can be found in section 113 of the CAA, which requires courts to measure “economic benefit of noncompliance” and the “economic impact” of CAA penalties.<sup>164</sup> Similar language exists in section 309 of the

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155. *Sierra Club v. Simkins Indus.*, 17 ENVTL. L. REP. (ELR) 20,346 (D. Md. 1986).

156. *Id.*

157. Cass R. Sunstein, *Cost-Benefit Analysis and the Environment*, 115 ETHICS 351, 351 (2005).

158. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2006).

159. Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2006).

160. Safe Drinking Water Act; 42 U.S.C. §§ 300f–300j-26 (2006).

161. *Id.*; DAVID M. DRIESEN, *THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW* 16 (MIT Press 2003).

162. Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1558 (2002).

163. The court is no stranger to valuating such quantities. See John Stapleford, *Wetlands Mitigation: Retroactive Application Of Clean Water Act Requirements To Property Destroyed By Natural Disasters*, 31 WM. & MARY ENVTL. L. POL'Y REV. 861, 863 n.16 (2007) (quoting EPA publication on valuating wetlands – “[f]or example, a value can be determined by the revenue generated from the sale of fish that depend on the wetland, by the tourist dollars associated with the wetland, or by public support for protecting fish and wildlife”).

164. Clean Air Act § 113(e)(1), 42 U.S.C. § 7413(e)(1) (2006).

CWA involving the valuation of the “economic benefits (if any) resulting from [a] violation.”<sup>165</sup>

Courts also have a great deal of experience determining economic impacts in environmental cases. In *Reserve Mining Co. v. EPA*,<sup>166</sup> the court sought to balance the costs of regulation with a firm’s economic effect on a Minnesota town by evaluating the number of employees, tax payments, effects on the local economy, and similar indicia of impact.<sup>167</sup> It would not require much imagination for a court to make similar calculations to determine the economic effects of a successful citizen challenge. Because courts are generally viewed to have broad power when determining economic benefits in environmental enforcement actions, it would be reasonable to allow the court to have similar discretion when making such a decision in the context of the environmentally benefited plaintiff.<sup>168</sup>

### C. Measuring Environmental Benefit

Measuring environmental benefit suffers the most criticism since many find “certain values are simply incommensurable with money.”<sup>169</sup> Other alternatives do exist, some of which rely on a hybrid method of combining a morally grounded goal of environmental protection with a relaxed cost-benefit approach, which views the use of economic analysis as useful but not controlling.<sup>170</sup> These methods, such as the contingent-valuation system, provide multiple ways to value environmental benefits, usually by determining the cost a consumer is willing to pay for an environmental improvement.<sup>171</sup> Problems do arise where there is no measurable

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165. Clean Water Act § 309(d), 33 U.S.C. § 1319(d) (2006).

166. *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975).

167. *Id.* at 535-36 (“As of June 30, 1970 [Reserve] had 3,367 employees. During the calendar year 1969, its total payroll was approximately \$31,700,000; and it expended the sum of \$27,400,000 for the purchase of supplies and paid state and local taxes amounting to \$4,250,000 . . . . Between four and six people are supported by each job in the mining industry, including those directly involved in the mining industry and those employed in directly and indirectly related fields.”) (quoting the state district court).

168. *Pound v. Airosol, Co. (Pound II)*, 498 F.3d 1089, 1099 (10th Cir. 2007) (“the court has discretion in deciding how to calculate the economic benefits received from the defendant due to its noncompliance with the CAA”).

169. Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1423-24 (2005).

170. *Id.* at 1434; DANIEL A. FARBER, *ECO-PRACTICISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 9 (University of Chicago Press, 1999).

171. James L. Regens, *Measuring Environmental Benefits with Contingent Valuation*, 51 PUB. ADMIN. REV. 345, 346 (1991) (describing a method to use survey techniques to

environmental impact. Most experts, however, believe that current methods accurately gauge such benefits within some order of magnitude.<sup>172</sup>

One of the best solutions has a long history within the Court's *Ruckelshaus* test, which looks at an action as whether it has "substantially contributed to the goals of the Act"<sup>173</sup> in order to determine whether attorney fees are appropriate. A court can easily use this same calculus to value environmental outcomes of citizen actions by relying on multiple indices such as estimated reduction in air pollution, effects on biological diversity, and animal populations.<sup>174</sup>

#### D. Solution I – Balancing Test

The first option is a simple balancing test that would weigh a plaintiff's substantial economic benefit against the environmental benefit of the result. If the plaintiff's economic benefit outweighed the environmental benefit, the plaintiff would not be eligible for fees and costs. To limit overuse, the test would only apply where *substantial* economic benefits existed against a measure of any level of environmental benefit. Since any group pursuing a successful civil action under either 304 or 307 will potentially get *some* economic benefit,<sup>175</sup> it would be reasonable to limit the test to cases involving substantial benefit, such as putting a competitor out of business, as described in *Pound*.<sup>176</sup> Without this limitation, every time the court reaches the conclusion that a benefit has accrued, no matter how small, it would be required to apply the test. This would be solely a

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determine public willingness to pay for environmental improvement to determine environmental value); *see also* Maureen Cropper, *Has Economic Research Answered the Needs of Environmental Policy?*, 39 J. OF ENVTL. ECON. & MGMT. 328 (2000).

172. William K. Stevens, *Economists Strive to Find Environment's Bottom Line*, N.Y. TIMES, Sept. 8, 1992, at C1; Andrew C. Revkin, *Clinton Move on Pollution Wins Praise in the Northeast*, N.Y. TIMES, June 26, 1997, at D26.

173. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 698-99 (1983).

174. Keith Keplinger, *The Economics of Total Maximum Daily Loads*, 43 NAT. RESOURCES J. 1057, 1063 (2003).

175. *See supra* text accompanying note 146; *See also* Andrew J. Currie, Comment, *The Use of Environmentally Beneficial Expenditures in Lieu of Penalties as Settlement of Citizen Lawsuits: A "Win-Win" Solution?*, 1996 DET. C.L. MICH. ST. U.L. REV. 652, 655 (1997) (describing environmentally beneficial expenditures (EBEs) used in lieu of penalty fines as "[a] payment made by a polluter in settlement of a citizen lawsuit. The payment is not made to the United States Treasury as would be the normal process for payment of a penalty fine, but rather a [payment] can be made to private organizations or to fund particular environmental projects, such as clean-ups or the creation of wetlands").

176. *Pound v. Aerosol Co. (Pound I)*, 440 F. Supp. 2d 1241, 1247 (D. Kan. 2006) (finding Pro Products' "brought the instant lawsuit for the purpose of removing one of their competitors from the market").

balancing test; once the economic benefit exceeded the environmental benefit the test would fail and no fee shifting would occur.

### E. Solution II – Lodestar Test: Economic Benefit to Fee Cost Analysis.

A second option is to use a more precise measure and compare the economic benefit<sup>177</sup> with the court's "reasonable" fee and cost computation, or the lodestar amount,<sup>178</sup> to determine the appropriate benefit to cost ratio. If the economic benefit is larger, than fee shifting does not apply; otherwise, the court would reduce the lodestar by the actual economic benefit. In this case, similar to Solution I, the threshold economic benefit must be *substantial*, which as explained above, would prevent overuse of the test in cases of borderline or negligible benefit. Supporting a lodestar adjustment scheme, the Court in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* proposed lodestar modification in certain rare and exceptional conditions.<sup>179</sup> This approach is further supported by *Hensley v. Eckerhart*, which allowed modifications to the lodestar amount, suggesting that when "the plaintiff achieved only limited success, the district court should award only that amount that is reasonable in relation to the results obtained."<sup>180</sup> The Court in *Hensley* further noted that "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole."<sup>181</sup> While the *Hensley* case focused on the "partially prevailing party" debate, the principle of awarding partial costs for partial benefit does not exclude the subject of economic benefit from consideration. Here the terms "limited success" and "limited relief" could be likened to the imbalance between economic and environmental benefit.

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177. See *supra* Part V.A (using the same method to calculate economic benefit).

178. See *supra* Part III.B (relying on the method described in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*).

179. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (while mainly discussing the upward modification of the lodestar, there are no indications that the court would not be willing to accept reduced lodestar amounts to reflect economic benefit derived from litigation, in fact the court already has the tools to do this when calculating the lodestar prior to any modification as per *Hensley* – see *supra* note 97-98 and accompanying text).

180. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) (case involving attorney fee calculations stemming from application of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 where plaintiffs were only successful on one of a number of claims and awarded fees for the entire set of claims by a lower court).

181. *Id.*

## VI. ANALYSIS

While a conflict clearly exists as to what role economic benefit plays in a citizen suit under Sections 304 and 307 of the CAA, as well as any general judicial review under Section 307, the differences are far from extreme. When the Ninth Circuit decided in *Western States* that “Congress neither intended to subsidize all litigation under the [CAA] nor contemplated that [section] 307(f) would benefit financially able parties who, out of their own substantial economic interests, would have litigated anyway,”<sup>182</sup> they effectively applied the “appropriateness” test. Finding that the petitioners failed the test, the court maintained that their litigation had not “served the public interest in assisting in the interpretation and implementation of the [CAA].”<sup>183</sup> In essence, the court used economic benefit as an adjunctive test to the standard appropriateness test. Furthermore, the Tenth Circuit in *Pound* also supported the notion that economic benefit may play a role where a plaintiff’s only motivation was economic.<sup>184</sup>

Some may argue that additional tests taking into consideration economic benefit are duplicative of the “appropriate” test already used by the court to ensure the suit “contributed to the goals of the act.”<sup>185</sup> However, as seen in *Western States*, a court’s view of promoting or furthering the act does not always lead to environmentally friendly results. Therefore, a need exists to consider economic benefit beyond the “served the goals” test.<sup>186</sup> The problem rests with the necessity for a court to have the additional tools to weigh the “appropriateness” of a suit more effectively. Relying solely on a highly subjective reading of whether the result of an action “served the goals” of the CAA is bad public policy. This policy issue comes into focus when the test of appropriateness appears to include a “proper implementation and administration” prong that might allow a court to ignore environmental policy over bureaucratic issues of efficacious implementation.<sup>187</sup> The ultimate goal of using an economic

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182. *W. States Petroleum Ass’n v. EPA*, 87 F.3d 280, 286 (9th Cir. 1996).

183. *Id.*

184. *Pound v. Airosol Co. (Pound II)*, 498 F.3d 1089, 1102 (10th Cir. 2007); *see supra* text accompanying notes 134, 149 and accompanying text.

185. *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

186. *Sierra Club v. Gorsuch*, 672 F.2d 33, 38 (D.C. Cir. 1982).

187. *See Florida II*, 683 F.2d at 942 (the court “stated their [prior] decision would help maintain ‘the balance of state and federal responsibilities that undergird the efficacy of the Clean Air Act . . .’” (quoting *Fla. Power & Light, Co. v. Costle*, 650 F.2d 579, 589 (5th Cir. Unit B June 1981))) (emphasis added); *see also Pound II*, 498 F.3d at 1101.

benefits test is to prevent abuse of the various fee shifting provisions by those parties whose sole objective centers on self-enrichment with no thought of environmental benefit.

Beyond the environmental concerns lies a simple economic truth, if a citizen faces off against either the EPA or a large corporation, he is generally at a distinct disadvantage.<sup>188</sup> The citizen or public interest firm typically has fewer financial<sup>189</sup> and personnel<sup>190</sup> resources and rarely has an economic incentive to sue.<sup>191</sup> Thus, fee shifting acts as a useful device to “level the playing field” by making up for the lesser resources of the plaintiff.<sup>192</sup> When the mechanism of fee shifting applies to parties who have an economic motivation, it disrupts the economic equilibrium, resulting in a plaintiff getting double benefit and inherently leading to an economically inefficient outcome.<sup>193</sup>

Solution II, where a court weighs a plaintiff's significant economic benefit against its lodestar, has the benefit of taking economic benefit into consideration, while avoiding the pitfalls of determining environmental benefit. This test would be the easiest to administer once a court determines the level of economic benefit. As soon as a substantial economic benefit was established, the lodestar would not be difficult to determine.<sup>194</sup> Then, by relying on simple math, the court could effectively “prorate” the lodestar based on the economic benefit, without ever having to delve into the thorny issue of valuing the environmental benefit of the action. The need to determine environmental benefit would not vanish

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188. Michael D. Axline, *The Limits of Statutory Law and the Wisdom of Common Law*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,268, 10,274 (2008) (noting the need for fee-shifting provisions because “[w]ithout them citizens simply could not afford to prosecute environmental cases”).

189. See Kimberly McKelvey, Comment, *Public Interest Lawyering in the United States and Montana: Past, Present and Future*, 67 MONT. L. REV. 337, 351 (2006) (“Many public interest law firms do not have the resources to litigate every case, and focus instead on other avenues to resolve cases.”).

190. *Id.* at 339 (“Public interest law firms . . . remain essential . . . [however only] 70% of entering law students aspire to practice public interest law upon graduation [and] only 5% actually enter the field.”).

191. See *infra* note 196 and accompanying text.

192. Chad Settle, Terrance M. Hurley & Jason F. Shogren, *Citizen Suits*, in *THE LAW AND ECONOMICS OF THE ENVIRONMENT* 230-31 (Anthony Heyes ed. 2001).

193. *Id.* at 245 (commenting that “asymmetric reimbursement rules can decrease efficiency if they induce players to fight harder than they otherwise would” – there is no doubt that by giving a plaintiff the double advantage of *both* attorneys' fees and a significant economic benefit, the plaintiff would fight harder than if they only would get one of the two benefits).

194. See *supra* Part III.B.

since the entire initial measure of appropriateness rests on whether a plaintiff had “served the goals” of the act.<sup>195</sup>

## VII. CONCLUSION

These suggested tests act to put potential challengers on notice. By forcing parties to consider the costs of litigation before acting, one can limit both the judicial inefficiency of poorly reasoned actions and reduce the likelihood of bad environmental decision-making. Furthermore, in cases in which industry challenges limitations or acts of the administrator under section 307, as they did in both *Western States* and *Florida Power & Light Co.*, the economic benefit test would constrain industry by reducing further inducement in the form of reimbursed attorneys’ fees and costs without resorting to the evaluation of financial solvency or pro-environmental predisposition. In contrast, environmental groups who might obtain a tangential economic benefit<sup>196</sup> would find protection from undue scrutiny since the test is limited to a substantial economic benefit.

Furthermore, balancing environmental impact and economic benefit is an established desire of the judicial system in environmental cases. In *Reserve Mining Co. v. EPA*, the court explicitly noted that “in fashioning relief in a case such as this involving a possibility of future harm, a court should strike a proper balance between the benefits conferred and the hazards created by [the defendant’s] facility.”<sup>197</sup> History and precedent demonstrate the court’s ability and desire to balance economic and environmental benefit in a host of situations, from regulatory to enforcement actions.<sup>198</sup> Moreover, the current circuit court split illustrates a need to develop a coherent and consistent test in the case of an economically benefited plaintiff, which would be satisfied by any of the above-suggested solutions. Failing an explicit analysis as laid out above, at a minimum, a court should consider a plaintiff’s economic benefit in determining the “appropriateness” of fees in order to mitigate both the economic inefficiency and environmental harm that a “blank check” approach would encourage.

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195. *Sierra Club v. Gorsuch*, 672 F.2d 33, 38 (D.C. Cir. 1982).

196. *Boyer & Meidinger*, *supra* note 27, at 839-40 (arguing that besides attorneys’ fees a citizen litigator’s incentives might include settling so as to obtain “an ‘environmental fund’ dedicated to particular conservation uses . . . [and] . . . bring suits for the purpose of attracting or retaining members”); *see Currie*, *supra* note 175 and accompanying text.

197. *Reserve Mining Co. v. EPA*, 514 F.2d 492, 535 (8th Cir. 1975).

198. *See supra* notes 156, 158-160, 166 and accompanying text.