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# **Litigating Against the Government for Fun and Profit?**

## **A Review of Recent Environmental Attorneys' Fee Decisions**

**DONALD W. STEVER, JR.\***

### **I. Introduction**

A number of federal environmental laws provide for the award of attorneys' fees to litigants who bring lawsuits under the statute's citizen suit or judicial review provisions.<sup>1</sup> Although some of these statutory provisions vary in language, most are similar or identical to the provision in the Clean Air Act which allows for the award of "reasonable" attorneys' fees "whenever the court determines that such an award is appropriate."<sup>2</sup> These provisions, little used in the past, have recently produced several large fee awards against the govern-

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1. Citizen suit provisions for fee awards are contained in the following statutes: Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f) (Supp. V 1981); Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 1427(c) (Supp. V 1981); Deepwater Port Act, 33 U.S.C. § 1515(d) (1976); Endangered Species Act, 16 U.S.C. § 1540(g)(4) (1976) [hereinafter ESA]; Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (1976 & Supp. V 1981); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (1976); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g)(4) (1976); Noise Control Act, 42 U.S.C. § 4911(d) (1976); Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124(d) (Supp. V 1981); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (Supp. V 1981) [hereinafter OCSLA]; Resource Conservation and Recovery Act, 43 U.S.C. § 1349(a)(5) (Supp. V 1981); Safe Drinking Water Act, 42 U.S.C. § 300(j)(8)(d) (1976); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d) (Supp. V 1981); Toxic Substances Control Act, 15 U.S.C. § 2619(c)(2). Judicial review provisions for fee awards are contained in the following statutes: Clean Air Act, 42 U.S.C. § 7607(f) (Supp. V 1981); Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1976); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (Supp. V 1981).

2. 42 U.S.C. §§ 7604(d), 7607(f) (Supp. V 1981).

ment as well as a tangle of confused court of appeals decisions. The Supreme Court will decide some of the issues that have troubled the lower courts in a case awaiting decision in the current term.<sup>3</sup>

Since attorneys' fees may not be awarded by federal courts in the absence of express statutory authorization,<sup>4</sup> the scope of fee awards under these environmental statutes must be defined by the statutes themselves. Unfortunately, Congress chose "appropriateness" as the standard. Although there is some legislative history to shed light on congressional intent,<sup>5</sup> the statutes are open to varying interpretation as to how claims should be judged under this vague standard.

Before the enactment of environmental fee award provisions, most statutorily and judicially created fee awards adopted the common law "prevailing party" standard. Only a party who prevailed on the balance of his claims was entitled to have his fee paid by the opposing party.<sup>6</sup> The fee was calculated by first determining the market value of the attorney's services (the "lodestar" fee) and then by either increasing or decreasing the amount of the fee according to the "quality of the representation" and the "contingent nature of success."<sup>7</sup>

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3. *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982) (per curiam), cert. granted, 103 S. Ct. 254 (1982). See *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (U.S. May 17, 1983) (attorney's fees awarded under the Civil Rights Attorney's Fees Awards Act of 1976 to prevailing plaintiffs only for time spent on successful claims).

4. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). But see Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 Cornell L. Rev. 1222, 1229 (1973) (equitable exceptions to the *Alyeska* rule). See generally Note, Awards of Attorney's Fees to Unsuccessful Environmental Litigants, 96 Harv. L. Rev. 677 (1983).

5. 122 Cong. Rec. 32,855 (1976); Legislative History of the Toxic Substances Control Act, Senate Comm. on Public Works and Environment, 728, 730 (1976).

6. See, e.g., *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) (civil rights statute); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1981) (civil rights) (the cases cited are opinions on the merits, not addressing attorneys' fee awards); *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (private antitrust action under Sherman Act).

7. *Lindy Bros.*, 540 F.2d 102; *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc). The lodestar fee is further refined by other factors. If the case is unsuccessful, the contingency adjustment may incorporate a delay in receipt of payment for

Congress's failure to incorporate the prevailing party standard in environmental statutes has spawned many interesting issues:

- (1) Is a losing party entitled to reimbursement of attorney's fees?
- (2) Is recovery limited to "public interest" litigants?
- (3) Can an intervenor recover attorney's fees?
- (4) Is recovery limited to parties whose motive is to "protect" the environment?

Before 1977, the appropriateness standard was found principally in citizen suit provisions. Cases involved claimants who either sought to compel recalcitrant defendants to comply with the law,<sup>8</sup> or to compel federal officials to carry out nondiscretionary duties.<sup>9</sup> Most of the early cases did not involve claims against the government, but against private party defendants. In 1976, by adding fee award provisions to the statutes governing judicial review of agency rules and orders, Congress increased the potential for large awards against the government.

The Justice Department unsuccessfully sought to influence the direction of litigation brought after the enactment of the fee provisions in pleadings opposing fee awards.<sup>10</sup> The Department argued that to earn a fee, a litigant should

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services rendered. *Copeland* at 893. The adjustment reflecting quality of representation is only used "when representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the 'lodestar'." *Id.*

8. *Citizens Ass'n of Georgetown v. Washington*, 383 F. Supp. 136 (D.D.C. 1974), rev'd, 535 F.2d 1318 (D.C. Cir. 1976); *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 62 F.R.D. 353 (D. Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975) (no fee award where plaintiff lost); *Metropolitan Wash. Coalition for Clean Air v. District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981) (per curiam) (litigation commenced prior to 1977) (fee awarded where meritorious claim mooted by government regulatory action).

9. *NRDC v. EPA*, 484 F.2d 1331 (1st Cir. 1973) (winning is not a prerequisite to a fee award since petitioners prevailed on some issues, but not on others); *Colorado Pub. Interest Research Group v. Train*, 373 F. Supp. 991 (D. Colo. 1974) (fee denied to losing party), rev'd, 507 F.2d 743 (10th Cir. 1974), rev'd 426 U.S. 1 (1976).

10. See, e.g., the Government's Response to Sierra Club's request for attorneys' fees, *Alabama Power Co. v. Costle*, 606 F.2d 1068 (D.C. Cir. 1979) (opinion on the merits).

prevail on issues which further the purposes of the statute and should be the type of litigant whose lawsuit the fee provision encourages, such as an economically disinterested party who would not be enriched if he were to prevail on the merits.<sup>11</sup>

## II. Nonprevailing Parties

### A. *Sierra Club v. Gorsuch*

In *Sierra Club v. Gorsuch*, presently awaiting decision in the Supreme Court,<sup>12</sup> the Court of Appeals for the District of Columbia Circuit awarded environmental petitioners substantial attorneys' fees despite their unsuccessful challenge of an Environmental Protection Agency (EPA) rule.<sup>13</sup> Raising both procedural and statutory issues under the Clean Air Act, the Sierra Club and other environmental groups sought review of EPA's "new source performance standards" (NSPS) for fossil-fueled electric power plants. Petitioners did not prevail on any issue. The court paid lip service to the government's argument that a fee award should be premised at least on partial success.<sup>14</sup> It held that the statutory requirement of appropriateness was satisfied if the litigant "substantially contributed" to the goals of the Act.<sup>15</sup>

The court based its award on the statute's complexity and the issues raised, as reflected by the length of the court's opinion. The court denied that its substantially contributed

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11. *Id.*

12. 672 F.2d 33.

13. *Id.* at 34.

14. *Id.* at 42 n.10.

15. *Id.* *Sierra Club* was decided on the same day as two other attorneys' fee cases, *EDF v. EPA*, 672 F.2d 42 (D.C. Cir. 1982), and *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982) (Wilkey, J. dissenting). These three cases were circulated among the judges of the D.C. Circuit. On the prevailing party issue, *Sierra Club* represents the view of a majority of the en banc court. Footnote 10 in *Sierra Club* was written in response to a dissent by Judge Wilkey in *Alabama Power*, aimed at the prevailing party issue (Judge Wilkey did not sit on the *Sierra Club* panel). *EDF* and *Alabama Power* were cases in which the claimants either substantially or partially prevailed, and are thus on a somewhat different legal footing from *Sierra Club*, in which the petitioner did not prevail.

standard would create automatic fee awards under other complex statutes by referring to an earlier decision in which fees were denied to a claimant in another Clean Air Act case, *American Petroleum Institute v. Costle (API)*.<sup>16</sup> The court stated that "the occasions upon which prevailing parties will meet such criteria may be exceptional."<sup>17</sup>

An analysis of the issues raised in *API* in light of the subsequent *Sierra Club* test yields little to justify the different treatment of the two petitioners. Each case was complex,<sup>18</sup> and although the *API* petitioners also lost, they raised issues as significant as those raised in *Sierra Club*.<sup>19</sup>

### B. *Village of Kaktovik v. Watt*

Subsequent to *Sierra Club*, the D.C. Circuit decided *Village of Kaktovik v. Watt*.<sup>20</sup> *Kaktovik* consolidated suits for injunctive relief brought by the village and environmental groups under the Outer Continental Shelf Lands Act (OCSLA) and the Endangered Species Act (ESA). Plaintiffs tried, unsuccessfully, to stop the leasing of oil exploration tracts in the Beaufort Sea, off the northeast coast of Alaska. They sought attorneys' fees under fee provisions<sup>21</sup> virtually identical to the Clean Air Act section at issue in *Sierra Club*. Like the petitioners in *Sierra Club*, the plaintiffs in *Kaktovik* had asserted proenvironmental claims.<sup>22</sup> The court denied the

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16. *Sierra Club*, 672 F.2d at 39. See *API v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981), (opinion on the merits), cert. denied, 102 S. Ct. 1737 (1982).

17. *API v. Costle*, 665 F.2d 1176.

18. In *API*, industrial and environmental groups challenged EPA's revision of the national ambient air quality standards for ozone. In *Sierra Club*, industrial and environmental groups challenged EPA's new source performance standards for coal-burning power plants. Both cases involved issues of improper political influence and disputes over the standards set. The environmental groups lost on the merits in each case, and both cases generated many opinion pages.

19. Arguably, *API* was more significant than *Sierra Club* since it involved air quality standards with a national impact rather than the new source emission standards for a single-source category at issue in *Sierra Club*.

20. 689 F.2d 222 (D.C. Cir. 1982).

21. ESA, 16 U.S.C. § 1540(g)(4); OCSLA, 43 U.S.C. § 1349(a)(5).

22. See *North Slope Borough v. Andrus*, 486 F. Supp. 326 (D.D.C. 1979), aff'd in part, and rev'd in part, 642 F.2d 589 (D.C. Cir. 1980).

plaintiffs' request for attorneys' fees and reversed the trial judge's award, which had been quoted with approval in *Sierra Club*.<sup>23</sup>

Although purporting to apply the substantially contributed test from *Sierra Club*, Judge Wilkey's majority opinion actually narrowed the test significantly. He created a fee recovery rule which requires that contribution to statutory goals and performance of the claimant's attorney be "exceptional."<sup>24</sup> Applying this rule to the *Kaktovik* litigation, he distinguished *Kaktovik* from *Sierra Club* for the following reasons:

- (a) The "goals" of the Clean Air Act are purely environmental; those of OCSLA are primarily economic. Wilkey reasoned that although the plaintiffs in *Kaktovik* served OCSLA's environmental goals, their lawsuit delayed the leasing of new offshore oil tracts, and thus did a disservice to the economic goals of the statute;<sup>25</sup>
- (b) The *Sierra Club* plaintiffs attacked a nationwide standard; the *Kaktovik* petitioners challenged a single lease sale of outer continental shelf land to an oil company, a narrower and thus less "important" issue;<sup>26</sup>
- (c) *Sierra Club* raised issues of "first impression," while those in *Kaktovik* were similar to issues raised in other lease sale cases;<sup>27</sup>
- (d) *Sierra Club* was a "more complex" case;<sup>28</sup>
- (e) The fact that the *Kaktovik* plaintiffs did not prevail, while "not dispositive," was a "fact" to be "considered" by the court.<sup>29</sup>

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23. *Sierra Club*, 672 F.2d at 37 n.7. See *North Slope Borough v. Andrus*, 507 F. Supp. 106 (D.D.C. 1981).

24. *Kaktovik*, 689 F.2d at 228.

25. *Id.* at 225.

26. *Id.* at 227.

27. *Id.*

28. *Id.*

29. *Id.* at 228.

None of these distinctions survives scrutiny. While the goals of OCSLA and the Clean Air Act differ, reliance on the accomplishment of statutory goals is not a useful measure of appropriateness in judging fee awards.

### C. *Analysis of Fee Award Criteria in the D.C. Circuit*

The *Kaktovik* opinion compares what the court calls a "marginal" threat to the bowhead whale with the "magnitude" and "critical implications" of issues raised in *Sierra Club*, and the "critically important" issues raised in *EDF v. EPA*,<sup>30</sup> another case in which the D.C. Circuit awarded fees to nonprevailing parties.<sup>31</sup> There is no compelling reason to characterize the three cases in this way. The fee claimants in *Sierra Club* raised charges of political influence unrelated to Clean Air Act goals, and were soundly rebuffed by the court. They also argued for a more stringent but only marginally significant technical standard for western power plants, a subgroup of one type of pollution source among the hundreds regulated under the Clean Air Act.<sup>32</sup> Similarly, the principal argument raised in *EDF* was simply that EPA's administrative record lacked the support necessary to establish a fifty-parts-per-million "*de minimus*" threshold to ban polychlorinated biphenyl (PCB) contaminated substances. Also lacking in the record was a basis for labeling all transformers and capacitors "totally enclosed," and consequently not requiring their removal from service.<sup>33</sup> While protection against PCB contamination is a substantial public concern, *EDF* was simply a rule-making challenge which may not have resulted in any significant change to the rule on remand.<sup>34</sup>

One can infer that the impact of offshore oil leasing on the survival of the bowhead whale posed a concern greater

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30. 636 F.2d 1267 (D.C. Cir. 1980).

31. *Kaktovik*, 689 F.2d at 226-27.

32. Coal-burning power plants are a significant source of certain pollutants. However, the adjectives used to describe *Sierra Club* are overstated.

33. *EDF*, 636 F.2d at 1270, 1279-84, 1284-86 (D.C. Cir. 1980).

34. In all events, comparison with *EDF* is somewhat unfair because the court failed to emphasize that the petitioners in *EDF* had prevailed.



than the *Kaktovik* court admitted. Labeling the threat to the whales marginal, the court concluded that proposed agency action did not jeopardize an endangered species in violation of the Act and therefore did not raise "significant" environmental issues. This characterization unfairly saddled the fee claimants with the burden of the court's view of their case on the merits. For consistency's sake, the court should have pointed out that only marginal improvement in air quality would have resulted had the *Sierra Club* petitioners prevailed, and that the significance of their case should be further discounted because they did not prevail.

Judge Wilkey also opined that *Sierra Club* involved a broader set of issues than *Kaktovik*, which was merely a challenge to a single sale of offshore oil exploration lease tracts. Although the geographic reach of the rule challenged in *Sierra Club* was broader, it seems unfair to premise fee awards on this basis because a case might well raise significant legal issues if only for a circumscribed body of law under the statute. One could, moreover, recharacterize *Sierra Club* as raising a narrow set of issues. The challenged rule was only one of dozens of rules promulgated under section 111 of the Clean Air Act.<sup>35</sup> It was not the first NSPS case to be decided. In fact, the court relied on previous NSPS cases in making its decision.<sup>36</sup>

The other distinctions proffered in the *Kaktovik* opinion are no more compelling. Although the *Sierra Club*'s factual issues were of first impression, novel questions of statutory interpretation were not raised.<sup>37</sup> *Alabama Power Company v. Costle*,<sup>38</sup> an earlier decision awarding attorneys' fees involved many difficult issues of first impression on which the fee claimants prevailed in part. Several of the issues raised in *Kaktovik* were also of first impression in the context in which

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35. 42 U.S.C. § 7411 (Supp. V 1981).

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

37. The *Sierra Club*'s argument that EPA could not treat western emitters differently from eastern emitters may have involved novel statutory issues. See 657 F.2d at 328-40.

38. 606 F.2d 1068.

they were raised. It is disingenuous for the court to conclude that these issues were not novel because they were raised in one or two prior controversies with which the plaintiffs had disagreed.<sup>39</sup> This is not to say that the novelty of the issues raised should not be an important component of an appropriateness test, but a court must avoid placing too much weight on first impression since even a frequently litigated issue can be of great importance and novel when raised in a new context.

The *Kaktovik* opinion errs most when it compares the complexities of *North Slope Borough*,<sup>40</sup> *Sierra Club*, and *Alabama Power*. It is difficult to understand why complexity should be a criterion for entitlement to a fee. Complexity is more useful in establishing fee amount once entitlement has been established. Moreover, even if the criterion were relevant to entitlement, the *Kaktovik* court's application of it is overly simplistic. Acknowledging the problems inherent in such an analysis, the court compared complexity by measuring the number of opinion pages per case.<sup>41</sup> Accordingly, *Kaktovik* is brief in comparison to the other opinions. The court failed to consider, however, that *Kaktovik* was heard on appeal from a district court judgment. The other cases involved direct petitions to the appeals court for review of agency rules. To be fair, the court should have added the pages generated by the district court to the *Kaktovik* total, and subtracted from the other case totals the number of pages generated by petitioners other than the fee claimants. The inequity of the court's page counting is highlighted by its double counting of the pages of *Alabama Power*. The court included a preliminary opinion that was later superseded by the court's final opinion and thus inflated the page total. An

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39. *Kaktovik*, 689 F.2d at 227.

40. 486 F. Supp. 326; 642 F.2d 589. *North Slope Borough* is one of the suits for injunctive relief under OCSLA and ESA consolidated, sub nom. *Kaktovik*, to determine the issue of attorneys' fees.

41. *Id.*

adjustment reflecting these factors reveals an insignificant difference in opinion lengths.<sup>42</sup>

The court further discounted the importance of *Kaktovik*, claiming that its "interpretive and implemental" (i.e., precedential) value is diminished because the plaintiff did not prevail.<sup>43</sup> Contrary to the court's apparent view, a legal decision has precedential significance whatever the result. If litigant "1" claims "X" and litigant "2" claims "not X," and the court adopts as its rule "not X," it is true that the decision is scant precedent for "X." It is, however, clear precedent for "not X."

The Supreme Court has granted the government's request to review *Sierra Club*. It will be difficult for the Court to fashion a workable rule for fee awards since Congress has provided little guidance for implementing the appropriateness standard under these statutes. Since Congress enacted such a vague standard, the Court could conclude that Congress left articulation of the standard for the courts.<sup>44</sup> The Court has several options: it could adopt a prevailing party rule; or, it could adopt a "prevailing party plus" rule, requir-

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42. One might quibble with the page totals after adjustment. Nonetheless, a minor variation in page number will not undermine the insignificant difference in opinion length and the inadequacy of Judge Wilkey's measure of complexity.

	Judge Wilkey's Totals	Totals after Adjustment
<i>Kaktovik</i> :	7	22*
<i>Alabama Power</i> :	90	23**
<i>Sierra Club</i> :	122	40***

\* This page total does not include rulings on motions which might have winnowed out issues prior to summary judgment.

\*\* This page total is derived from Judge Wilkey's dissent in *Alabama Power* in which he divided the opinion pages as to the issues raised by each party.

\*\*\* This page total does not include the court's response to arguments made by the Electric Utilities.

43. *Kaktovik*, 689 F.2d at 228.

44. I say this notwithstanding Judge Wilkey's assertion, in his *Alabama Power* dissent, that such unfettered discretion would amount to an unconstitutionally standardless delegation of power to the judiciary. See 672 F.2d at 24 (dissenting opinion). Such constitutional infirmities are more imagined than real. See *Lichter v. United States*, 334 U.S. 742, 786 (1948), and *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1970).

ing that the claimant win and that he demonstrate that his litigation contributed to the goals of the statute. Finally, the Court could pick any formulation in between, including the one chosen in *Sierra Club* or the one in *Kaktovik*.

### III. The Well-Heeled Litigant

Three courts have addressed the entitlement of economically motivated claimants to attorneys' fees. In *Alabama Power Company v. Gorsuch*,<sup>45</sup> the D.C. Circuit awarded fees to the District of Columbia. In *Western Oil and Gas Association v. EPA*,<sup>46</sup> the Ninth Circuit, without opinion, refused to award fees to a group of petroleum producers. In *Florida Power and Light Co. v. Costle*,<sup>47</sup> the Fifth Circuit awarded fees to a public utility.

Understandably, the specter of paying attorneys' fees to both prevailing and nonprevailing industrial litigants troubles the government. Industry has sued under the pollution control statutes more often than have environmental groups and it usually spends more money in litigation than public interest groups. Accordingly, awards to industrial litigants would be higher.

There is little justification for such awards. Congress intended fee provisions to encourage "watchdog" litigation that, but for the prospect of reimbursement, would not be brought.<sup>48</sup> A municipal authority may well fit within this policy.<sup>49</sup> However, it is more difficult to justify public subsidies for business litigants. Legislative history does not support such awards. On the contrary, Senators commenting on the fee provision of the Toxic Substances Control Act (TSCA) stated that the provision was not intended to provide further incentive for economically motivated litigants to challenge regulatory decisions.<sup>50</sup>

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45. 672 F.2d 1.

46. 633 F.2d 803 (9th Cir. 1980) (opinion on the merits).

47. 683 F.2d 941 (5th Cir. 1982).

48. *Alabama Power*, 672 F.2d at 3 (majority opinion). See also dissenting opinion at 12.

49. *Id.*

50. See *supra* note 5.

#### IV. The Intervenor

Environmental regulatory litigation has involved more intervening petitioners and respondents than most other administrative litigation. Multiparty cases have become common.<sup>51</sup> Typically, a group of consolidated challenges to a rule brings together both environmental and industrial petitioners taking opposite positions on the rule, with each intervening on behalf of the government with respect to the other's petition. The intervenor will then submit a "me-too" brief, either repeating the government's position or proposing additional arguments with which the government may disagree. The petitioners must respond to unique arguments raised by the intervenors, and, as has happened, each may claim a right to recover attorney's fees from the government. In *Northern Plains Resource Council v. EPA*,<sup>52</sup> the Ninth Circuit awarded the petitioner fees for arguments it advanced to counter positions taken by the Montana Power Company, an intervenor on EPA's behalf over whose arguments EPA exercised no control. As in the case of awards to industry litigants discussed previously, it is difficult to reconcile this result with the purposes of the fee statutes. Such an award does not encourage "watchdog" litigation but penalizes the government with respect to the acts of a third party.

#### V. The Nature of the Challenge

In *Alabama Power*, the government opposed a fee award to the District of Columbia in part because the District's substantive claims did not seek to enhance the quality of the air, a goal of the Clean Air Act. The District of Columbia argued for a less stringent regulation than EPA had promulgated. *Alabama Power* resolved the fee issue against the government. The court looked to the legislative history and found that Congress intended to "encourage litigation that [would] assure proper implementation and administration of

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51. See *API v. Costle*, 665 F.2d 1176; *Sierra Club v. Gorsuch*, 672 F.2d 33; *Duquesne Light Co. v. EPA*, 698 F.2d 456 (1983).

52. 670 F.2d 847 (9th Cir. 1982); see also *Sierra Club*, 672 F.2d at 46.

the act or otherwise serve the public interest.”<sup>53</sup> Such litigation, the court reasoned, may be “pro-environment” or “non-pro-environment,” and either characterization may help to realize the goals by presenting “disputed issues” for resolution.<sup>54</sup>

Judge Wilkey took the *Alabama Power* analysis one step further. In *Kaktovik*,<sup>55</sup> the court denied attorneys’ fees to pro-environment plaintiffs because they did not contribute “substantially” to the nonenvironmental goals of OCSLA.<sup>56</sup> The “basic purpose” of the statute is to “promote the swift, orderly and efficient exploitation of . . . domestic oil and gas reserves.”<sup>57</sup> *Kaktovik* did not advance these goals. In fact, the lawsuit delayed the leasing process.<sup>58</sup> The court distinguished the goals of OCSLA from those of the Clean Air Act and TSCA. This analysis, however, is suspect. Since the goals of OCSLA appear to be internally inconsistent,<sup>59</sup> no single litigant suing under OCSLA will ever promote all of the statute’s goals. This leads to the logical but absurd conclusion that no one can ever be entitled to a fee award under the statute.

Which statutory “goals” are relevant to the appropriateness standard? This question goes to the heart of the language chosen by Congress for these statutory provisions. Most statutes have many goals. Some involve ideas of social priority while others deal with administrative reform, or at least good administrative practice. If a party challenges EPA’s emission standards for diesel cars on the ground that they are “unat-

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53. *Alabama Power*, 672 F.2d at 5 n.21 (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 1077, 1416).

54. Judge Wilkey, in his dissent, concurs with the majority that an issue does not have to be proenvironment to further an act’s goals. He apparently believed that the *Sierra Club* panel did not agree with this position. See 672 F.2d at 16 (dissenting opinion). The *Sierra Club* opinion is ambiguous on the point. *Id.* at 38 n.8.

55. 689 F.2d 222.

56. *Id.* at 226.

57. *Id.* at 225 (quoting H.R. Rep. No. 95-590, p. 53 (1977)).

58. Astoundingly, the court dismissed the plaintiffs’ argument that they had achieved valuable statutory goals under ESA because the court was only in “qualified agreement” with the plaintiffs’ statutory interpretation. It was on this very issue of statutory construction that the plaintiffs had prevailed. 689 F.2d at 277 n.38.

59. See *NRDC v. Costle*, 655 F.2d 318 (D.C. Cir. 1981).

tainable," does that party seek to advance the goals of the Clean Air Act any less than a litigant who challenges emission standards on the ground that they are insufficient to protect public health? Each seeks to further a different goal of the same statute—one, technological feasibility, the other, lower pollutant emissions.<sup>60</sup> The goals compel different results. Statutory goals, therefore, are a poor measure of entitlement to attorneys' fee awards because an award may depend upon the arbitrary selection of one statutory goal.

## VI. Proposal

The tests evolving in the D.C. Circuit seem to lead down a blind alley. Neither the *Sierra Club* nor the *Kaktovik* approach provides the means to separate deserving litigants from the undeserving. A fresh analysis should begin with the assumptions implicitly recognized in both cases. By making the award, Congress (1) intended to encourage litigation that aids in effectuating the underlying goals of the statute; (2) did not intend for the public to underwrite frivolous litigation or litigation that raises interesting, but nonsubstantive issues; and (3) did not intend to reimburse litigants whose interest in the substantive outcome is motivated by their own economic interests. Application of these assumptions leads to the articulation of four standards:

- (1) A litigant must prevail on at least one substantive issue to be compensated. Compensation will be awarded solely for time spent on those substantive issues on which the litigant prevails. This will eliminate any incentive to bring complex and interesting yet meritless claims to inflate the bill. It will also avoid a determination of whether the substantive issues raised were significant enough to warrant a fee award. The attempt to resolve such an issue doomed *Sierra Club* and *Kaktovik* to the essentially useless exercise of counting pages. This will foster judicial economy by expediting determination of attorneys' fee awards;

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60. *Kaktovik*, 689 F.2d at 225-26.

- (2) A nonprevailing party may be compensated only if:
- (a) the litigation is settled prior to judgment and the government materially alters its action in response to the issues raised by the litigant;
  - (b) the government voluntarily suspends, withdraws, rescinds, or changes the challenged action in a way that moots the litigation after full briefs are filed.

(These narrow exceptions to the prevailing party rule are consistent with the reasoning of the earlier citizen suit cases, such as *NRDC v. EPA*,<sup>61</sup> and *Metropolitan Washington Coalition for Clean Air v. District of Columbia*,<sup>62</sup> and prevent the government from terminating an otherwise meritorious claim by last-minute unilateral action);

- (3) Fee awards should be made only for issues that arise out of the statute containing the attorneys' fee provision. Thus, a litigant who raises issues that arise under the Administrative Procedure Act should not be compensated even if he prevails on those issues; and
- (4) The claimant should be required to certify that the issues for which fees are sought would not, if decided in the claimant's favor, result in an economic benefit.

## VII. Conclusion

The environmental attorneys' fee provisions pose an interesting problem of statutory construction for the Supreme Court. The Court may announce a rule in *Sierra Club* which will be instructive for the resolution of future cases. Arguably, Congress left it to the courts to make awards in cases on an *ad hoc* basis, allowing for the development of a common law of attorneys' fee awards under these statutes. Indeed, a review of the extant opinions reveals a working out of rules from various fact patterns in common law fashion.

Hopefully, whatever standard the Court chooses to artic-

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61. 484 F.2d 1331.

62. 639 F.2d 802.



ulate will be easy to apply. The D.C. Circuit's recent efforts are cumbersome because an in-depth analysis of the controversy is required to determine whether an award is appropriate. Judges are already overburdened by the issues brought before them. Adding to that burden a *Sierra Club* or *Kaktovik* analysis elevates the tail end of the regulatory litigation cycle to a level it does not deserve.

### VIII. Postscript

*Since this Article went to press, the United States Supreme Court handed down its decision in *Ruckelshaus v. Sierra Club*.<sup>63</sup> The majority held that "absent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees under § 307(f)"<sup>64</sup> of the Clean Air Act. Four Justices dissented.*

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63. 51 U.S.L.W. 5132 (U.S. July 1, 1983).

64. *Id.* at 3136.