Awards of Attorneys' Fees to Nonprevailing Parties Under the Clean Air Act—Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983)

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The Clean Air Act (the Act)\(^1\) provides that in a suit for judicial review of an agency action under the Act, "the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such [an] award is appropriate."\(^2\) In *Ruckelshaus v. Sierra Club*,\(^3\) the United States Supreme Court held that this language permits an award of attorneys’ fees only to parties who prevail on the merits. In a footnote, the Court extended its holding to sixteen other statutes with identical provisions.\(^4\)

In *Sierra Club v. Costle*,\(^5\) the Sierra Club and the Environmental Defense Fund (EDF) had petitioned the Court of Appeals for the District of Columbia to review the Environmental Protection Agency’s (EPA) promulgation of standards governing the control of sulfur dioxide emissions from coal-fired powerplants.\(^6\) Although the EPA prevailed in the decision, the court awarded attorneys’ fees to the Sierra Club and the EDF under section 307(f) of the Clean Air Act Amendments of 1977,\(^7\) holding that fee awards were appropriate because the petitioners had substantially contributed to the goals of the Act.\(^8\) In a 5–4 decision, the Supreme Court

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2. Clean Air Act § 307(f), 42 U.S.C. § 7607(f) (Supp. V 1981). The Clean Air Act contains two provisions allowing litigants attorneys’ fees. Although these two subsections contain almost identical language, the provision pertaining to judicial review, § 307(f), is of primary concern in this Note. Section 307(f) applies to litigation under § 307(b), which provides for direct judicial review of agency actions in the federal circuit courts of appeals. 42 U.S.C. § 7607(b) (Supp. V 1981).
6. The Sierra Club argued that the EPA standards were invalid because the EPA had exceeded its authority in establishing the standards and because there were defects in the rulemaking procedures. *Id.* at 316–18. The EDF contended that the EPA’s decisionmaking had been prejudiced by unlawful ex parte contacts with private industry advocates. *Id.* at 386.
7. Other plaintiffs in *Costle* also petitioned the court for review of the EPA’s adoption of the standards. The California Air Resources Board asserted the same claims as the Sierra Club. *Id.* at 312. A group of electric utilities also challenged the EPA’s standards, claiming that they were too strict. *Id.*
reversed, holding that a party must obtain some success on the merits to be eligible for an award of attorneys’ fees under section 307(f).9

This Note will evaluate the soundness of the Supreme Court’s holding in Ruckelshaus. Part I describes the fee awards provisions in the Clean Air Act and identifies the basic considerations behind fee awards. Part II then reviews the Supreme Court’s analysis in Ruckelshaus v. Sierra Club of the validity of fee-shifting to nonprevailing parties. Part III presents an evaluation of the Court’s decision. It examines the Court’s use of the legislative history of the Clean Air Act, the general effectiveness of the Court’s holding, and the soundness of its extension to other statutes. In Part IVA, a more effective standard for fee awards under section 307(f) is proposed and assessed in terms of the basic fee-shifting considerations. Finally, Part IVB applies this standard to Ruckelshaus, and concludes that there was a reasonable basis for fee awards to the Sierra Club and the EDF.

I. FEE AWARDS UNDER THE CLEAN AIR ACT

Courts in the United States generally require that each litigant bear the cost of its own counsel’s fees.10 There are three general exceptions to this “American rule.” Exceptions are recognized where fee awards are authorized by contract,11 by judicially defined equitable doctrines,12 or by statute.13

Sierra Club, 103 S. Ct. 3274 (1983). In a separate case decided the same day, the District of Columbia Circuit again awarded attorneys’ fees to the Sierra Club and the EDF, although they had not prevailed. Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982). In Alabama Power, the majority relied on essentially the same standard it had established in Sierra Club v. Gorsuch.


10. The American rule against shifting fees is an unusual approach. Under the system most common in other countries, exemplified by the English rule, the loser pays the prevailing litigant’s attorneys’ fees. For a discussion of the development of the American rule and fee awards systems in other countries, see Comment, Court Awarded Attorney’s Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 639–44 (1974).


The common fund doctrine is invoked when a successful litigant creates or preserves a fund, and a definite class of persons enjoys pecuniary benefits as a result. The court awards the litigant’s attorneys’ fees from the common fund to avoid unjustly enriching participants in the fund at the expense of the litigant. E.g., Trustees v. Greenough, 105 U.S. 527 (1882). See generally Berger, supra, at 295–96 (describing evolution and application of common fund rationale).

If necessary to prevent unjust enrichment, a beneficiary of litigation may be assessed with the
Federal fee awards provisions vary widely in scope and specificity. Some statutes make fee awards mandatory, while others provide for awards in the court's discretion. Most statutes provide that fees may be awarded only to prevailing parties, or to parties who have "substantially prevailed," or to parties who are "successful." The Clean Air Act authorizes the court reviewing EPA actions to award attorneys' fees "whenever it determines that such [an] award is appropriate." This is the least specific type of language found in fee awards provisions. Since the Act's language does not include the concept of prevailing, it is uncertain whether courts may shift fees in favor of non-prevailing as well as prevailing parties, and if so, what considerations should guide the courts.

plaintiff's attorneys' fees under an outgrowth of the common fund doctrine known as the common benefit theory, even if no fund is involved. For example, the common benefit theory has been applied where shareholders brought a successful stockholder derivative suit against a corporation. The plaintiff's attorneys' fees were assessed against the corporation on the assumption that it had benefited from the action. E.g., Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). See generally Berger, supra, at 300-01 (discussing development of common benefit theory).

13. In Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-62 (1975), the Supreme Court held that federal courts were limited to the traditional equitable bases for awarding fees to the prevailing party absent express statutory authorization by Congress. The Court reasoned that because such awards require judicial evaluation of the relative importance of the policy behind a particular statute, it would ordinarily be an improper interference with Congressional authority for courts to award attorneys' fees absent statutory authorization. Id. at 269.

The Court's decision halted a trend begun in the early 1970's, in which some courts had awarded fees to prevailing plaintiffs without statutory authorization on the theory that the plaintiffs had acted as private attorneys general by bringing actions benefitting the public. E.g., La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (environmental case). This approach developed after the Court used the private attorney general theory in affirming a fee award to a prevailing plaintiff in Newman v. Piggie Park Enters., 390 U.S. 400 (1968), under a statute authorizing such awards.

14. According to the majority in Ruckelshaus v. Sierra Club, there are more than 150 federal fee-shifting provisions. 103 S. Ct. 3274, 3276 (1983).


22. The possibility of fee awards to nonprevailing parties is essentially relevant only for nonprevailing plaintiffs. There is no apparent reason for awarding fees to a nonprevailing defendant; because the plaintiff won, the suit obviously could not have been frivolous. Furthermore, because the
Judicial interpretations of the Clean Air Act's fee awards provisions have reflected one or more of three basic considerations addressed by fee-shifting systems. The first consideration is the incentive effect that the availability of fee awards may have on potential litigants. The possibility of recovering fees may encourage parties to bring actions which could lead to advances in policy. Such actions are often not economically attractive or even feasible otherwise. The second consideration in fee-shifting is that parties should be treated equitably. The final consideration, externalities, involves outside impacts of the litigation. These impacts include influences on policy, changes in judicial rules governing a particular policy under the Act, and indications of the need to enact legislation. Generally, when nonprevailing parties have been awarded fees under the Act, courts have emphasized externalities by identifying some public benefit produced by the litigation.

II. THE RUCKELSHAUS v. SIERRA CLUB DECISION

In Ruckelshaus, the Supreme Court held that a party must prevail on the merits to some extent in order to recover attorneys' fees. Writing for the majority, Justice Rehnquist began with the premise that the American rule prohibits the shifting of fees between litigants, and that most statutory departures from this rule have allowed recovery by the prevailing party only. The Court stated that it therefore would be "a radical departure from long-standing fee-shifting principles" to require a prevailing defendant to pay the losing plaintiff's fees. The Court reasoned that a rule against shifting fees to nonprevailing parties was "rooted . . . in intuitive notions of fairness," because it would be contrary to ordinary

defendant did not initiate the suit, fees should not be awarded as compensation for actively producing some other benefit. Fee awards to prevailing defendants, however, are plausible where plaintiffs have brought frivolous litigation. See infra note 53.

23. See generally Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 DUKE L.J. 651, 652 (proposing that fee-shifting systems generally are based on three major concerns—equity, litigant incentives, and external effects—and observing that a particular fee-shifting scheme may reflect one or more of these considerations).

24. See, e.g., Metropolitan Washington Coalition for Clean Air v. District of Columbia, 639 F.2d 802, 804 (D.C. Cir. 1981) (whether suit was of a type that Congress intended to encourage through the citizen-suit provision is a highly relevant concern in determining whether nonprevailing plaintiffs should be awarded attorneys' fees).

25. See infra notes 54–57 and accompanying text.

26. See infra notes 58–59 and accompanying text.


28. Id. at 3276–77.

29. Id. at 3276.
conceptions of justice to force a defendant to pay the legal fees incurred by a party who wrongly charged it with unlawful action.\textsuperscript{30}

In light of these considerations, the Court stated that fees should not be awarded to nonprevailing parties under section 307(f) of the Clean Air Act without a clear showing that Congress intended this result.\textsuperscript{31} The Court devoted the rest of its opinion to an extensive review of the legislative history of section 307(f). Concluding that the legislative history did not provide evidence of clear congressional intent to authorize fee awards to nonprevailing parties,\textsuperscript{32} the Court held that fees could only be awarded to parties who prevailed to some extent on the merits.\textsuperscript{33}

The Court considerably expanded the scope of its holding by stating in a footnote that its interpretation of the term “appropriate” in section 307(f) controls construction of identically worded fee awards provisions in sixteen other statutes and section 304(d) of the Clean Air Act.\textsuperscript{34} As a result of the Court’s interpretation of section 307(f) in \textit{Ruckelshaus}, parties litigating under those provisions also must prevail on the merits of an issue in order to recover fee awards.

In his dissenting opinion, Justice Stevens argued that the majority’s interpretation of section 307(f) was twisted by a predisposition toward the American rule.\textsuperscript{35} He contended that the language and legislative history of section 307(f) indicate that Congress intended that nonprevailing parties would be able to recover fee awards in exceptional circumstances.\textsuperscript{36} He concluded that it would be an abuse of discretion to award fees to a nonprevailing party “unless its contribution to the process of judicial review, or to the implementation of the Act by the agency, had truly been substantial and had furthered the goals of the Clean Air Act.”\textsuperscript{37}

\section*{III. AN ANALYSIS OF \textit{RUCKELSHAUS} v. \textit{SIERRA CLUB}}

The Supreme Court’s decision in \textit{Ruckelshaus} is grounded on traditional American doctrine which precludes fee awards to nonprevailing parties. The Court’s reliance on general historic fee-shifting conventions, however, is valid only if it is supported by section 307(f). The majority

\begin{itemize}
  \item \textsuperscript{30} \textit{Ruckelshaus,} \textit{103 S. Ct.} at 3281.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{See infra} notes 39–43 and accompanying text.
  \item \textsuperscript{33} \textit{Ruckelshaus,} \textit{103 S. Ct.} at 3281.
  \item \textsuperscript{34} \textit{Id.} at 3275 n.1. The Court apparently interpreted previous cases as holding that similarly worded attorneys’ fees provisions are subject to the same standards. \textit{Id.} at 3280. Justice Rehnquist observed that in prior cases the Court had used identical standards in construing the term “prevailing party” under various fee awards provisions.
  \item \textsuperscript{35} \textit{Id.} at 3282 (Stevens, J., dissenting).
  \item \textsuperscript{36} \textit{Id.} at 3290.
  \item \textsuperscript{37} \textit{Id.}
\end{itemize}
misinterpreted the legislative history of the Act to arrive at an improper construction of section 307(f). In addition, in prohibiting fee awards under the Act to all nonprevailing parties, the Court failed to effectively address fundamental considerations involved in fee-shifting schemes. Furthermore, the Court multiplied the error in its analysis of section 307(f) by extending its holding to preclude fee awards to nonprevailing parties in litigation under all identically worded provisions.

A. The Court's Misreading of Section 307(f)

The Court's conclusion that the statute provides only for fee awards to prevailing or partially prevailing parties is not substantiated by the legislative history of section 307(f). The House Report on section 307(f) states,

the committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in [Natural Resources Defense Council, Inc. v. EPA].

The Court reasoned that at the time section 307(f) was enacted, the term "prevailing party" had been narrowly interpreted. It concluded that the report simply indicated an intent to extend eligibility for fees beyond wholly prevailing parties to include partially prevailing parties as well, and thus reflected the facts in Natural Resources Defense Council, Inc. v. EPA (NRDC) where the parties who recovered fees had only partially prevailed. It therefore held that Congress meant merely to follow the result in NRDC, not to suggest that parties who lost on all issues should be awarded fees.

38. Id. at 3279.
40. Ruckelshaus, 103 S. Ct. at 3278.
41. 484 F.2d 1331, 1338 (1st Cir. 1973).
42. Ruckelshaus, 103 S. Ct. at 3279-80.
43. Id. at 3280. The majority cited language from an earlier version of § 307(f) which provided for mandatory fee awards to prevailing parties and discretionary awards to partially prevailing parties. Id. at 3279; see S. 252, 95th Cong., 1st Sess. § 36 (1977), reprinted in 3 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 [hereinafter 3 LEGISLATIVE HISTORY], at 688 (1978). The Court considered this evidence that Congress viewed prevailing parties and partially prevailing parties as falling into distinct categories. It therefore asserted that the language in the House Report stating that the court's discretion should not be restricted to prevailing parties simply reflects Con-
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However, the majority’s interpretation incorrectly concentrated on the result rather than the reasoning in NRDC. The House Report clearly states that the House committee relied “on the grounds set forth in [NRDC].” As the dissent in Ruckelshaus noted, the court in NRDC held that to decide whether fees should be awarded, the courts should consider not only who won, but the benefits produced by the litigation. The NRDC court did not suggest that fee awards should be granted solely on the basis of whether the party prevailed to some extent.

The majority in Ruckelshaus also relied on the legislative history of section 304(d), the companion provision to section 307(f), which provides for fee awards in citizen suits. The legislative history of section 304(d) is relevant in interpreting section 307(f). The Court’s analysis of section 304(d), however, is inapposite. The Court focused on the fact that a major purpose of section 304(d) was to discourage meritless litigation and suggested that fee awards to nonprevailing parties would have the opposite effect of funding frivolous suits. This argument incorrectly assumes, however, that all suits by nonprevailing parties are frivolous.

Both the Act itself and the legislative history indicate that Congress did not intend to restrict fee awards to prevailing parties under section 307(f). Congress’ use of the term “appropriate” in section 307(f), rather than the

44. See supra text accompanying note 39; see also Ruckelshaus v. Sierra Club, 103 S. Ct. at 3288 (Stevens, J., dissenting).

45. NRDC, 484 F.2d at 1338, quoted in Ruckelshaus v. Sierra Club, 103 S. Ct. at 3287 (Stevens, J., dissenting).

46. Ruckelshaus, 103 S. Ct. at 3280-81.

47. The two sections contain essentially the same language regarding fee awards. Moreover, while § 304(d) was enacted seven years before § 307(f), Congress enacted § 307(f) to eliminate an apparently inadvertent inconsistency in the explicit authorization of fee awards for citizen suits but not for judicial review actions. A Senate Report indicates that when § 304(d) was enacted, Congress had actually intended to provide for fee awards under § 307(f) as well. The report states that § 307(f) was adopted “to carry out the intent of the committee in 1970 that a court may, in its discretion, award costs of litigation to a party bringing a suit under section 307.” S. REP. No. 127, 95th Cong., 1st Sess. § 36 (1977), reprinted in 3 LEGISLATIVE HISTORY, supra note 43, at 1473.

48. Ruckelshaus, 103 S. Ct. at 3281.

49. In addition, the majority ignored the portion of § 304(d)’s legislative history stating that the court may award fees to either party without regard to the outcome of the litigation. See infra note 52 and accompanying text.
more specific language it had adopted in other fee awards provisions, 50 suggests that it intended a broader standard. 51 The legislative history of the Act as a whole shows that the Court made an unnecessarily narrow interpretation of section 307(f) when it construed it to include only parties who succeed wholly or partially on the merits. According to a Senate Report, under section 304(d), "[t]he court may award costs of litigation to either party whenever the court determines such an award is in the public interest without regard to the outcome of the litigation." 52

B. The Effectiveness of the Court's Standard for Fee Awards Under Section 307(f)

The Court's decision in Ruckelshaus prohibits awarding fees to a party unless the party prevailed on the merits of an issue. This standard, however, undermines the basic fee-shifting considerations of incentives, equity, and externalities.

The legislative history of section 307(f) indicates that fee awards were intended "to encourage litigation which will assure proper implementation and administration of the [A]ct or otherwise serve the public interest." 53 However, the Court's interpretation of section 307(f) limits its incentive effect. Poorly funded public interest groups will not bring actions unless they are confident that they will prevail on the merits. Thus, the Court's standard effectively discourages frivolous litigation, but at the cost of inhibiting some legitimate actions.

In Ruckelshaus, the Court's sense of equity in denying fee awards to nonprevailing parties 54 is largely legitimate. It is generally inequitable to assess a prevailing party for the legal fees of its opponent. However, the circumstances of a particular case may indicate that the loser should not have to pay its own costs. 55 For example, a party may bring a valid, sub-

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50. See supra notes 17–19 and accompanying text.
51. Ruckelshaus, 103 S. Ct. at 3285–86 (Stevens, J., dissenting).
53. H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 (1977), reprinted in 1977 CONG & AD NEWS, supra note 39, at 1416. Section 307(f) also was intended to function as a disincentive to frivolous actions. Id. Thus, if a plaintiff brought a frivolous suit, the defendant might recover a fee award.
54. Ruckelshaus, 103 S. Ct. at 3277; see supra note 30 and accompanying text.
55. See, e.g., Citizens Ass'n of Georgetown v. Washington, 383 F. Supp. 136, 142, 145 (D.D.C. 1974) (fees awarded to plaintiffs who did not prevail on the merits "only because of the inherent difficulties of proof," thereby benefiting public by illustrating local government inaction and burden on private parties seeking to enforce the Clean Air Act), rev'd on other grounds, 535 F.2d 1318 (D.C. Cir. 1976); Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co., 62 F.R.D. 353, 355 (D. Del. 1974) (although fee award was denied to nonprevailing party due to absence of compelling equity, a losing party could be awarded fees where "exceptional circumstances tip the balance of
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Substantial claim, and lose solely because of intervening events, such as a change in the defendant's behavior or policy concerning the challenged action. Although the plaintiff has technically lost, the legitimacy of the original claim has not diminished, and therefore a fee award to the plaintiff may still be appropriate.

Furthermore, the unfairness of assessing fees against the prevailing defendant in a section 307(f) suit may be ameliorated because the defendant will always be the EPA, a government agency. Assessing fees against a government agency that can spread the costs widely is more defensible than assessing them against a private business. While businesses can spread the costs of attorneys' fees assessments by raising prices to consumers, there is no assurance that consumers constitute the appropriate class to shoulder the entire burden. An assessment of fee awards against the government would more likely result in an even and properly targeted distribution of the costs because they would be directed ultimately to the taxpayers. Such awards are proper because taxpayers benefit from refinement of the law under the Act, and because the EPA acts on their behalf.

The external impacts of awarding fees based on the Court's standard would vary from case to case. Generally, however, this standard may fail to encourage suits that would advance the discussion of important policy issues under the Act. For example, the Sierra Club and the EDF might have not litigated if uncertain about their chances of recovering fees.

56. In Metropolitan Washington Coalition for Clean Air v. District of Columbia, 639 F.2d 802 (D.C. Cir. 1981), plaintiffs challenged the operation of an incinerator under a District of Columbia implementation plan filed with the EPA. The plan was subsequently revised, rendering their claim moot. The court of appeals reversed the district court's denial of a fee award to the plaintiffs, stating that although their claim had been dismissed, the suit was "a prudent and desirable effort to achieve an unfulfilled objective of the Act." Id. at 804.

57. In Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973), the court stated that it was fair to assess the EPA for the nonprevailing plaintiffs' attorneys' fees, for this "is to spread them ultimately among the taxpaying public, which receives the benefits of [the] litigation." Id. at 1334. The court drew an analogy between the EPA's relationship to the plaintiffs and the connection between a corporation and its plaintiff shareholders when fees are awarded the plaintiffs under the common benefit doctrine. See supra note 12. The court suggested that the EPA and the corporation are in similar positions; each is "a party who exists to serve or represent the interests of all those benefited," and thus can be assessed with attorneys' fees when the litigation creates a significant benefit. Natural Resources Defense Council, Inc. v. EPA, 484 F.2d at 1333–34. But cf. Alabama Power Co. v. Gorsuch, 672 F.2d 1, 17 (D.C. Cir. 1982) (Wilkey, J., dissenting) (contending that fees should not be assessed against government because this diverts scarce public resources).

Potential fee assessments against the government in litigation to review agency action may also exert a positive influence on the agency. The prospect of such assessments may function as an oversight mechanism, encouraging the agency to implement the Act correctly.
Without litigation, the Court would have had no opportunity to consider significant issues. Indeed, the lower court in *Ruckelshaus* highlighted the external impacts of the Sierra Club's and the EDF's litigation, stating that these parties had substantially contributed to the goals of the Act by raising major, complex questions concerning its interpretation.

By prohibiting fee awards to all nonprevailing parties, the Court has inadequately responded to fundamental considerations behind fee-shifting. First, while the Court's holding discourages frivolous litigation, it could also deter parties from bringing meritorious actions. Second, an automatic denial of a fee award to a nonprevailing party may be inequitable, depending on the circumstances of the litigation. Finally, this strict standard may impede the deliberation of significant issues concerning the Act. Because the Court's standard neglects these basic fee-shifting considerations, it is an ineffective approach to fee awards under the Act.

C. The Court's Extension of its Holding to Other Statutes

The Court's tenuous analysis of fee awards under section 307(f) reaches far beyond litigation under the Clean Air Act. It extended the holding to control the construction of all other fee awards statutes containing identical language. The broad scope of the Court's holding is unjustifiable. First, the Court's faulty interpretation of the legislative history of the Clean Air Act fails to support its conclusion regarding fee awards under section 307(f). Extending this flawed reasoning to sixteen other statutes only compounds the basic error. Moreover, the Court applied its holding to the other statutes without considering their purposes. To legitimately construe these statutes, the Court should have expanded its analysis to examine their legislative histories.

Most of the provisions affected by the Court's decision are contained in environmental and energy legislation. As a result of the Court's holding, litigation in these major areas of public interest activity may be restricted. To reverse such a trend, Congress should amend the provisions, stating in more explicit terms when fees should be awarded.

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58. See infra notes 76–77 and accompanying text.
59. Sierra Club v. Gorsuch, 672 F.2d 33, 38–39 (D.C. Cir. 1982) rev'd sub nom. *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983). Similarly, in Alabama Power v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982), the court stated that the controlling consideration was not who had prevailed, but "whether litigation by that party has served the public interest by assisting the interpretation or implementation of the Clean Air Act." Id. at 3; see also Natural Resources Defense Council, Inc. v. EPA, 484 F.2d at 1338 (court awarded fees to plaintiffs who had prevailed on some issues; "[w]e are at liberty to consider not merely 'who won' but what benefits were conferred").
60. See supra note 34 and accompanying text.
IV. IDENTIFYING AND APPLYING AN EFFECTIVE FEE-SHIFTING STANDARD

The legislative history of the Clean Air Act indicates that Congress intended section 307(f) to allow for fee awards to some parties who did not prevail on the merits. The legislative history provides little clear guidance, however, for formulating a standard for such awards. An acceptable standard should consider incentives, equity, and externalities. A proposed standard for fee awards under section 307(f) that includes a variety of factors would effectively promote these three basic fee-shifting considerations. When applied to *Ruckelshaus*, this factors standard supports the circuit court's award of fees to the Sierra Club and the EDF.

A. The Factors Standard

The factors standard generally addresses whether a party's litigation substantially contributed to the implementation of the Act. The standard identifies four factors that indicate when a plaintiff's contribution to the Act is sufficiently substantial to warrant a fee award.

62. In his dissent in *Alabama Power v. Gorsuch*, 672 F.2d 1, 17 (D.C. Cir. 1982), Judge Wilkey argued that congressional direction regarding § 307(f) is so lacking that the judiciary should abstain from establishing any new standard departing from traditional rules. He reasoned that the court cannot create a standard for fee awards under § 307(f) without making policy determinations and interfering with the legislative function, in possible violation of article III of the Constitution. *Id.* at 20. He concluded that the court must therefore apply the traditional "prevailing" standard to avoid a policymaking role. *Id.* at 32.

The weakness in Wilkey's argument lies in his assumption that by adopting the "prevailing" standard, the court would be abstaining from policymaking. Whether it adopted the "prevailing" standard or a broader one, the court would be acting in the face of an unclear congressional policy regarding § 307(f). The adoption of a "prevailing" standard is arguably more active policymaking by the court because it conflicts with the implicit congressional intent of § 307(f) that a broader standard should govern. See *Sierra Club v. Gorsuch*, 672 F.2d 33, 42 n.10 (D.C. Cir. 1982) (adopting a "prevailing" standard would be rewriting Congress' legislation), rev'd sub nom. *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983).

While it is true that specific direction to the court for applying § 307(f) is lacking, there are indications that Congress did intend a standard other than "prevailing." Courts should accept the responsibility for making a reasonable interpretation of the statute that comports with existing evidence of congressional intent.

63. The factors standard is composed of several elements, some of which have been suggested by various courts in determining whether fees should be awarded. See, e.g., *Ruckelshaus v. Sierra Club*, 103 S. Ct. at 3290 (Stevens, J., dissenting) (court should consider importance, novelty, and complexity of issues raised, and whether party seeking fee award had an economic incentive to litigate); Village of Kaktovik v. *Watt*, 689 F.2d 222, 232 (D.C. Cir. 1982) (Greene, J., concurring in part and dissenting in part) (Judge Greene considered whether party seeking fees added anything new to the law); *Sierra Club v. Gorsuch*, 672 F.2d at 39 (parties addressed issues that were important, complex and novel, and assisted substantially in resolution of issues); Northern Plains Resource Council v. *EPA*, 670 F.2d 847, 848-49 (9th Cir. 1982) (court considered party's self-interest in litigating).
The first factor concerns the petitioner's motives in litigating. A plaintiff with a sufficient economic incentive to litigate even in the absence of the fee awards provision would not recover a fee award. The motives factor does not imply that a party with an economic interest in an action is litigating in bad faith; rather, it presumes that a fee award to a party with sufficient interest in an action is gratuitous.

Prior court decisions have deemed the motives factor irrelevant because a plaintiff with economic interests in bringing an action could still contribute to the implementation of the Act by its litigation. However, assuming that a primary objective of fee awards is to encourage meritorious actions that might not otherwise be brought, there is no reason to award fees to those parties who would have litigated without the prospect of such awards. The motives factor has also been criticized because an inquiry into the plaintiff's motives is complex and speculative. However, while it may be impossible to identify all the motives involved in a party's decision to bring an action, in most cases a court can determine whether a party had economic interests in litigating.

The motives factor would best function as a threshold criterion. A party who did not meet this test would receive no further consideration for a fee award. If a party met this threshold test, the remaining three factors would then be applied to determine whether the party should be awarded fees. These factors would guide the courts in identifying substantial contributions to the implementation of the Act; it would not be necessary for a party to meet all the factors in order to recover an award. In addition,

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64. See, e.g., Northern Plains Resource Council v. EPA, 670 F.2d at 848-49 (court awarded fees to nonprevailing plaintiff, noting that its members' self-interest in litigating would have been an insufficient incentive); see also Ruckelshaus v. Sierra Club, 103 S. Ct. at 3290 (Stevens, J., dissenting) (dissent states that court should consider whether a party had an economic incentive to litigate).

65. See Florida Power & Light Co. v. Costle, 683 F.2d 941, 942-43 (5th Cir. 1982) (EPA argued that there was no need for a fee award because plaintiffs had sufficient financial motivation to litigate without potential of recovering such an award).

66. In Florida Power, the court held that a utility that had successfully challenged the EPA could recover attorneys' fees under § 307(f), regardless of its financial motivation in litigating. Id. at 943. Under the court's interpretation of § 307(f), the main concern was whether the result of the suit would aid proper implementation and administration of the Act; the fact that the party had a financial interest in the outcome was considered irrelevant. Id; see also Alabama Power v. Gorsuch, 672 F.2d 1, 27 (D.C. Cir. 1982) (Wilkey, J., dissenting). The court in Florida Power conceded that the argument against awarding fees to a party whose primary motive in litigation was economic interest might be persuasive from a policy standpoint. The court concluded, however, that it could not not prohibit fee awards to a party with an economic interest since Congress had not expressed any intent to disqualify such a party. Florida Power, 683 F.2d at 943.

67. See Alabama Power v. Gorsuch, 672 F.2d at 28 (Wilkey, J., dissenting) (cautioning against court involvement in 'complex analyses of economic actors' decisionmaking').

68. If a poorly funded public interest group undertakes highly complex litigation, this suggests that it is litigating with the hope of a fee award. The complexity of the issues raised in the litigation has been considered by some courts in deciding whether fees should be awarded. See infra note 69.
the factors would be weighed differently in each case depending on the specific fact pattern.

The second factor in the standard is whether the party prevailed on the merits. Generally, a losing party is less likely than a prevailing party to have actually contributed to the implementation of the Act. The fact that the litigant did not succeed may indicate that the agency is already implementing the Act correctly.

This factor incorporates the Court's concern in *Ruckelshaus* by recognizing that, in many cases, a nonprevailing party should not recover fees. Under the factors standard, however, prevailing on the merits becomes one of several factors to be considered, rather than an absolute requirement as held in *Ruckelshaus*. The factors standard allows for the possibility that a litigant who has lost on the merits could aid in the overall implementation process. For example, even if the particular agency action challenged in the suit was vindicated, the court's advancement or clarification of a questionable point of law may subsequently assist the agency in implementing the Act. The two remaining factors in the standard reflect this possibility.

The third factor requires a new development in the law as a result of the plaintiff's litigation. A case resulting in new rules of law to be applied

69. See Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982). In *Kaktovik*, a case in which nonprevailing plaintiffs were denied fee awards, Judge Greene emphasized that their litigation had added little new to the law. *Id.* at 232 (Greene, J., concurring in part and dissenting in part). The suit was brought under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356, 1801–1802, 1811–1847, 1861–1866 (1976 & Supp. IV 1981), and the Endangered Species Act, 16 U.S.C. §§ 1531–1542 (1982), which contain fee awards provisions similar to those in the Clean Air Act.

An additional factor mentioned by some courts as a criterion for judging whether fees should be awarded is the complexity of the issues involved. See *Ruckelshaus* v. Sierra Club, 103 S. Ct. 3274, 3290 (1983) (Stevens, J., dissenting); Sierra Club v. Gorsuch, 672 F.2d 33, 39 (D.C. Cir. 1982), rev'd sub nom. *Ruckelshaus* v. Sierra Club, 103 S. Ct. 3274 (1983). The litigation of complicated issues may increase the likelihood that the suit will produce developments in the law. However, the fact that the issues are complex should not in itself be a reason for a fee award; the important question is whether the resolution of the issues contributes to the maturation of the law under the Act.

Alternatively, complexity may be interpreted as a sign that the issue is so unusual or intricate that the court must rely heavily on the assistance of counsel because it is treading on unfamiliar ground. This interpretation is related to past suggestions that courts consider the degree of technical and legal assistance provided to the court. See, e.g., *Ruckelshaus* v. Sierra Club, 103 S. Ct. at 3290 (Stevens, J., dissenting). It is questionable, however, whether this factor should be a reason for awarding fees. All parties' counsel aid the court in its understanding of the issues; that is their role. Attorneys are expected to demonstrate competence in presenting the issues they raise. Even if counsel demonstrate exemplary skill and effort to provide needed assistance to the court, it does not follow that a substantial contribution to the implementation of the Act has been made. See *Kaktovik*, 689 F.2d at 227 (court denied attorneys' fees even though it was impressed with the counsel's competence, for "despite . . . counsel's considerable skill it was difficult for them to list any contributions of substance from their suit"). The degree of technical and legal assistance should be considered in calculating the amount of fees to be awarded, rather than in deciding the preliminary issue of whether fees should be awarded at all.
prospectively may substantially affect implementation of the Act. For example, the plaintiff’s arguments could stimulate the court to reinterpret the statute in a new light, even if this new interpretation does not result in victory for the plaintiff. Also, a case of first impression may clarify a previously unexplored or uncertain aspect of the Act, thus contributing substantially to the interpretation of the Act.\footnote{70}

The final factor considers whether the litigation indicates a need for new legislation.\footnote{71} A case may raise issues so unusual that they are unanswerable through references to the existing law. By its action, the losing plaintiff would, therefore, have contributed to the implementation of the Act by revealing inadequacies in the law.

The factors standard promotes all three of the fundamental considerations behind fee-shifting. Under this standard, a reasonable prospect of recovering fees encourages parties with legitimate claims. This was the main goal of section 307(f).\footnote{72} At the same time, the factors standard discourages frivolous claims by providing specific criteria for recovering fees.

The factors standard implicitly acknowledges that equity to the parties involves more than the outcome on the merits. The more substantially particular litigation contributes to the implementation of the Act, the more fairness may require a fee award to a nonprevailing plaintiff.

Finally, the factors standard responds to externalities by accounting for the broad impacts of litigation. Two of the factors in the standard—bringing about developments in the law, and indicating a need for new legislation—directly concern external benefits.

The factors standard effectively addresses all three fee-shifting considerations. In addition, it is sufficiently concrete to distinguish those cases in which a nonprevailing party should receive attorneys’ fees.

B. Applying the Factors Standard to the Ruckelshaus v. Sierra Club Decision

Applying the proposed factors standard to \textit{Ruckelshaus} allows for a concrete, principled analysis of whether attorneys’ fees should have been awarded.\footnote{73} As for the Sierra Club’s and the EDF’s motives in litigating, it

\footnote{70. The dissent in \textit{Ruckelshaus} briefly mentions that the novelty of the issues should be considered. 103 S. Ct. at 3290 (Stevens, J., dissenting); \textit{see also Kaktovik}, 689 F.2d at 227 (fee award denied where issues were similar or analogous to issues already adjudicated elsewhere); Sierra Club v. Gorsuch, 672 F.2d at 39 (court notes that issues addressed were novel).}

\footnote{71. W. RODGERS, \textsc{Environmental Law § 1.13} (1977).}

\footnote{72. \textit{See supra} note 53 and accompanying text.}

\footnote{73. The majority in \textit{Ruckelshaus} barely dealt with the facts involved, treating the issue of attor-
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is reasonable to assume that as public interest organizations, they were litigating for the sake of a broader cause than their own economic interests. In addition, because the issues were extraordinarily complex and technical, involving massive preparation, the plaintiffs probably would not have been sufficiently motivated to litigate in the absence of potential fee awards.

Assuming the Sierra Club and the EDF would pass the threshold motives test, the remaining factors in the standard should be considered. These plaintiffs plainly failed to meet the second factor: prevailing on the merits. Whether fees should have been awarded, therefore, depends on how they might otherwise have contributed to the implementation of the Act.

The Sierra Club’s and the EDF’s litigation satisfies the third factor in the standard, since the case produced important additions to the body of law under the Act. Although they did not prevail, both parties significantly affected judicial interpretation of the Act and future agency implementation. In addition, both parties raised novel questions. Their claims concerned EPA’s implementation of certain 1977 amendments to the Act, which had never before been examined by the courts.

Finally, the Sierra Club and the EDF did not produce any effects that would satisfy the final factor in the standard. Neither party’s litigation


75. The court did not fully discuss the plaintiffs’ particular motivations in litigating. However, it did state that no other party besides the Sierra Club and the EDF had sufficient economic interest to raise the questions they posed. Id.

76. The Sierra Club was the sole party to raise the question of the EPA’s authority and basis for adopting a variable percentage reduction standard for emissions, an issue that the EPA itself had conceded to be critically important at the beginning of rulemaking. Id. at 40-41. Had this issue not been contested, the outcome of other issues in the case could have been affected because of the interdependence of individual emissions standards under § 111 of the Act, 42 U.S.C. § 7411 (Supp. V 1981). Sierra Club v. Gorsuch, 672 F.2d at 41. The court’s decision on another issue raised by Ruckelshaus, the reliability of the econometric model used by the EPA to forecast impacts of possible standards, would influence agency procedures in other substantive areas. Id. at 40. The EDF’s ex parte contacts challenge gave the court an opportunity to clarify the operation of the new § 307(d) and to help resolve difficult questions of interpretation in future rulemaking proceedings under the Act. The court cited evidence that the EDF’s claim had stimulated discussion in the executive branch of proper limits on ex parte comments in other agency proceedings. Id. at 41.

77. Sierra Club v. Gorsuch, 672 F.2d at 40. The Sierra Club’s claims provided the first significant opportunity for judicial interpretation of amendments to § 111 of the Act, concerning the EPA’s establishment of emission standards for new pollution sources, and the relationship among several recently amended sections of the Act. Id. In addition, the EDF’s claim of procedural defects in rulemaking due to ex parte contacts led to the first comprehensive judicial interpretation of § 307(d), which contained a new set of rulemaking guidelines under the Act. Id.
indicated the need for new legislation; the court was able to decide the issues with reference to the existing Act.

In sum, under the factors standard, the strongest arguments for fee awards to the Sierra Club and the EDF are manifested in the presence of the third factor. Despite losing on the merits, both plaintiffs made substantial contributions to the interpretation and implementation of the Act. Assuming that the plaintiffs also satisfied the threshold motives test, their litigation in *Ruckelshaus* presented a sound basis for awards of attorneys’ fees.

V. CONCLUSION

The Supreme Court’s prohibition of attorneys’ fees awards to nonprevailing parties in *Ruckelshaus v. Sierra Club* was inappropriate. Denying fee awards to all nonprevailing parties is inconsistent with the congressional intent behind the Clean Air Act’s fee awards provisions. In addition, the Court’s holding inadequately addresses important considerations underlying fee awards. Moreover, the Court unjustifiably expanded its holding to preclude the award of fees to nonprevailing parties under all fee-shifting provisions identical to section 307(f). By incorporating elements reflecting the considerations of incentives, equity, and externalities, the proposed factors standard allows for a rational evaluation of petitions for fee awards. An application of the factors standard to *Ruckelshaus* demonstrates that the court of appeals’ decision to award attorneys’ fees to the Sierra Club and the EDF should have been affirmed.

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