1-1-1976

Defrosting the *Alyeska* Chill: The Future of Attorney’s Fees Awards in Environmental Litigation

Philip M. Cedar

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Environmental Law Commons

Recommended Citation
Philip M. Cedar, Defrosting the *Alyeska* Chill: The Future of Attorney’s Fees Awards in Environmental Litigation, 5 B.C. Envtl. Aff. L. Rev. 297 (1976),
http://lawdigitalcommons.bc.edu/ealr/vol5/iss2/6

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
DEFROSTING THE ALYESKA CHILL: THE FUTURE OF ATTORNEYS’ FEES AWARDS IN ENVIRONMENTAL LITIGATION

Philip M. Cedar*

In recent years the American public has become a significant force in pressing for environmental protection. Because access to Congressional and administrative policy decisions is often limited by cost to regulated commercial and industrial interests, individual citizens and public interest groups have opted for the more expeditious route of bringing law suits directly against violators of federal pollution standards and challenging administrative decisions which allegedly fail to comply with environmental protection and policy legislation.1

Despite serious economic obstacles, these citizen suits have assumed a well-recognized watchdog function. Such public interest environmental litigation has helped to fill the interstices created by inadequate enforcement resources in those agencies charged with the administration of environmental legislation. Citizen suits attempting to enforce Congressional mandates have received the approval of all branches of the federal government.2

* Staff Member, Environmenta! Affairs


2 In his August 1971, “Message to Congress,” President Nixon stated:

My confidence that our Nation will meet its environmental problems in the years ahead is based in large measure on my faith in the continued vigilance of American public opinion and in the continued vitality of citizen efforts to protect and improve the environment. The National Environmental Policy Act has given new dimension to citizen participation and citizen rights—as is evidenced by the numerous court actions through which individuals and groups have made their voices heard.

7 WEEKLY COMP. OF PRES. DOC. 1132, 1133 (1971).

The President’s executive agency, created by NEPA, 42 U.S.C. § 4342 (1970), pointed out in its Second Annual Report that citizen litigation has:
The increased incidence of such suits can be attributed, in large part, to statutorily authorized and judicially created awards of attorneys' fees to the public interest plaintiff. "Fee-shifting," as this development has been termed, has induced citizens and non-profit public interest organizations to undertake complex litigation challenging agency determinations, as well as private corporate actions which have allegedly failed to comport with environmental protection statutes. Congressional authorization of fee awards against government defendants and private defendants reflects a recognition of the inadequate financial support available to public interest plaintiffs.

The courts in the exercise of their equity powers have fashioned several exceptions to the "American Rule," which dictates that all litigants are responsible for their own attorneys' fees. The primary equitable exception, which greatly encouraged civil rights and environmental litigation, was based on the private attorney general theory. The rationale for this theory, as adopted and expanded by the lower federal courts, was that a public interest plaintiff, whose suit effectuated strong Congressional policies and benefited the public at large or broad segments of society, acted in essence as a private attorney general and was therefore entitled to collect attor-

speeded up court definition of what is required of federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation.

U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: SECOND ANNUAL REPORT 155-56 (1971). But see Cramton & Boyer, Citizen Suits in the Environmental Field: Peril or Promise? 2 ECOL. L.Q. 407, 409 (1972), which asserted that the creation of private rights to sue for environmental protection were "... neither philosophically sound nor carefully drafted," and thus gave a very guarded approval to such suits.

Legislative sanction is reflected in the various provisions authorizing such suits. E.g. Clean Air Amendments of 1970 § 304(b), 42 U.S.C. § 1857h-2(a) (1970) (authorizing citizen suits against any private or government violator); Id. § 307(b), 42 U.S.C. § 1857h-5(b) (directing petitions for review of specified actions of the Administrator to the United States Courts of Appeals).

Judicial approval is traceable to statements acknowledging the beneficial effects of such litigation. For instance, Judge Bazelon recently noted in Natural Resources Defense Council v. EPA, 512 F.2d 1351, 1358 (D.C.Cir. 1975): "These suits have opened the Administrator's actions to judicial scrutiny from a point of view widely divergent from that represented by the regulated interests, and their positions have frequently been upheld."

The statutory provisions authorizing fee awards against the government are important exceptions to the application of the sovereign immunity doctrine to the taxation of costs and fees. In the absence of specific legislation providing otherwise, 28 U.S.C. § 2412 (1970) prohibits fee awards. Awards against state defendants may be barred by the concept of sovereign immunity as embodied in the Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI. See text at notes 82-100 infra for further explication of the effect of sovereign immunity on the awards of attorneys' fees.
An award based on this theory was further recognition of the private enforcement potential of such suits and the development of an effective means of mitigating the disparity of resources between public interest plaintiffs and the typical government or corporate defendant.

Notwithstanding the broad acceptance of this exception, the possibility of subjective judicial determinations as to which Congressional or public policies were deserving of fee award incentives, and the confusion attendant upon such selections, led the Supreme Court in *Alyeska Pipeline Service Company v. Wilderness Society* to decisively foreclose fee awards based on the private attorney general rationale. The Court held that, in the absence of express statutory authorization for the granting of attorneys’ fees, federal courts may exercise their equitable powers to allow counsel fees in only a limited class of cases.

This dramatic halt in the development of court awarded attorneys’ fees has shifted the burden to Congress to select those areas of public interest litigation which merit or require the inducement of fee-shifting. Congress has in fact acknowledged the task. The process of selection, however, is replete with difficult choices as to what constitutes the “public interest” and between the strong competing interests operative in environmental controversies. Manageable standards for regulating judicial discretion must be developed to prevent subjective policy preferences from becoming the benchmarks in granting or denying attorneys’ fees. The appropriate choices must inevitably be based upon careful analysis of the operation of statutory and judicially created awards to date.

This article will focus on the development of fee-shifting in an attempt to clearly define the problems confronting Congress in its forthcoming response to *Alyeska*. A brief discussion of the economic constraints involved in environmental litigation will set the framework for the legal analysis that follows. After an historical overview of the place of fee-shifting in American jurisprudence, recent statutory and judicial treatment of this development will be examined. Finally, the reasoning of the Court in *Alyeska* will be critically ana-

---

2 421 U.S. 240 (1975) [hereinafter cited as *Alyeska*].
3 Id. at 269. The Court approved of the longstanding exceptions for a litigant’s bad faith or where a judgment results in the creation of a common fund. See text at notes 101-112 infra for a discussion of these exceptions.
lyzed. The author contends that although the Court correctly terminated the common law usage of the private attorney general rationale, legislatively created fee awards under this theory remain the most viable method of financing private enforcement suits.

I. ECONOMIC OBSTACLES TO ENVIRONMENTAL LITIGATION

Basic to an understanding of the rationale supporting fee-shifting is a sense of the economic barriers inherent in the complex process of private enforcement of environmental statutes. The successful environmental plaintiff must overcome significant obstacles. Foremost among the barriers is the inequality of means between the public interest plaintiff and the government or industrial defendant. That most environmental suits seek injunctive relief rather than monetary damages makes difficult the procurement of vigorous and competent representation for the public interest plaintiff. The typical plaintiff in these suits, an ad hoc citizens group or standing public interest organization, cannot look to an award of money damages to pay the expenses of the litigation but must rely primarily on the charity of local attorneys or limited grants from foundations to fund these court battles. The government, relative

---

* See Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 618 (1970). The imbalance of resources may be exacerbated where, in a suit against the government, a private company intervenes to protect its interest in relaxed enforcement of environmental safeguards. The *Alyeska* case, 421 U.S. 240 (1975), dramatically illustrates this problem. There, a consortium of seven major oil companies intervened to support the Secretary of the Interior's initial approval of the proposed trans-Alaskan pipeline.

* The absence of a potential contingent fee arrangement has dissuaded the private bar from becoming involved in public interest litigation. See generally, Note, *The Private Bar, the Public Interest and Tax Incentives: Monetary Motivation for Action*, 13 ARIZ. L. REV. 953 (1971).

* Among the more prominent environmental interest groups are the Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, the Appalachian Mountain Club and the Wilderness Society. Another similar source of legal resources and manpower in environmental litigation is the Center for Law and Social Policy. For a description of the Center's activities, see Halperin & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1085 (1971).

* Foundation grants cannot be viewed as a long-term, consistent source of funding. While these grants have supported public interest law firms and national organizations, the grantors have perceived the funds as "seed money." See Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675, 686-87 (1970). Even assuming a willingness to continue funding these groups, foundations, as institutional investors subject to fluctuation in stock-market conditions, may have a difficult time living up to their funding commitments. Neither can such grants be assumed to come with no strings attached. Foundations may place implicit or explicit conditions on the grantee's activities and use of such funds. Halperin & Cunningham, *supra* note 10, at 1112.
to these plaintiffs, has virtually unlimited legal resources.\textsuperscript{12} The industrial defendant or intervenor will allocate funds for legal services commensurate with the potential source of profit to be derived from relaxed environmental standards. In addition, the corporate party to the litigation will receive a tax deduction for expenses incurred for such business-related lawsuits.\textsuperscript{13}

While the lack of adequate funding is shared by public interest litigators in other areas,\textsuperscript{14} environmental lawsuits demand an additional measure of expertise in non-legal matters. Scientific data must be gathered, analyzed and presented in order to demonstrate the adverse environmental consequences of the private or agency project being challenged.\textsuperscript{15} Successful prosecution of an environmental lawsuit therefore requires either retaining experts or at least engaging in the costly process of taking extensive depositions. Typically, the litigation and appeal will extend for several years.\textsuperscript{16} Continuation of the litigation depletes the already meager resources of the plaintiff\textsuperscript{17} and precludes it from participating in other potential lawsuits.

\textsuperscript{12} Hearings on Attorneys Fees Before the Subcomm. on Representation of Citizen Interest of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. at 791 (1973) (testimony of J. Anthony Kline, Esq.) [hereinafter cited as Hearings].

\textsuperscript{13} Federal income tax law permits business corporations to deduct the cost of such litigation from taxable income. \textsc{Int. Rev. Code of 1954, § 162(a)}. \textit{Cf. Commissioner v. Tellier}, 383 U.S. 687 (1966). Since the present corporate income tax rate is approximately 48\%, in essence, the federal government is contributing almost one-half of the private defendants' legal expenses. \textsc{Int. Rev. Code of 1954, § 11}.

\textsuperscript{14} Civil rights organizations suffer from the same funding deficiency. Legal services organizations, although principally funded through direct governmental assistance, are in a similar position, particularly in areas where "test cases" are required. \textit{See generally} McLaughlin, \textit{The Recovery of Attorney's Fees: A New Method of Financing Legal Services}, 40 Ford. L. Rev. 761 (1972).

\textsuperscript{15} Hearings, supra note 12, at 837 (testimony of Dennis Flannery, Esq.).


\textsuperscript{17} Note that the public interest intervenors in Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), \textit{cert. denied}, 384 U.S. 941 (1966), a case which is recognized as one of the leading standing decisions, required a last minute gift from a reluctant foundation in order to participate in the appeal to the Second Circuit. Sive, \textit{The Functions and Features of Private Litigation in the Growth of Environmental Law, Transcript of the Speeches, National Conference on Environmental Law} 58 (November 1970). Protracted litigation is not without adverse consequences for the defendants and the public. \textit{E.g.}, \textit{N.Y. Times}, Jan. 6, 1974, sec. 1, p. 53, col. 2, cited in W. Gellhorn & C. Byse, \textit{Administrative Law} 185 n.3: Consolidated Edison officials noted that the hydroelectric project being challenged in the
II. AMERICAN REJECTION OF THE ENGLISH SYSTEM OF INDEMNITY

Fee-shifting, or "indemnity," as some have termed it, is not new to Anglo-American jurisprudence. For centuries the English have allowed counsel fees as a part of the award assessed against unsuccessful litigants. The chancellor in equity was recognized as always having the discretionary power to award fees to the prevailing party. Statutorily based awards in the law courts have been a part of the English system since 1267. For the last one hundred years, judges at law have also been invested with the power to award fees in their discretion. The English system of fee awards, however, failed to take root in America. The American system of requiring each party to finance its own legal representation is virtually unique.

Several arguments advanced in support of the American Rule warrant consideration. The Supreme Court, as an important advocate of the American system of fee awards, posited the theory that the poor might be "unjustly discouraged" from instituting actions.

Scenic Hudson case, as originally proposed, would have cost $165 million, but after the inflationary effects of the delay engendered by the court action estimates were as high as $500 million.


See generally, Goodhart, Costs, 38 Yale L.J. 849 (1929).

Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U. L. Rev. 301, 312 (1973) [hereinafter cited as Nussbaum]; Goodhart, supra note 19, at 852-54.

Statute of Marlborough, 52 Hen. 111, c. 6 (1267) (authorizing fee awards to the prevailing tenant-defendant in certain actions maliciously brought by a landlord). 2 F. Pollock & F. Maitland, History of English Law 597 n.6 (2d ed. 1909). See Nussbaum, supra note 20, at 312-13, for a concise history of statutory fee awards.

In 1875, the Rules of Court altered the established tradition of awarding fees as of right to grant such awards in the discretion of the court. Order 55 of the Rules of Court, attached as First Schedule to the Supreme Court of Judicature Act, 38 Vict., c. 77 (1875).

See generally, Report of the Committee on Comparative Procedure and Practice, Proceedings ABA International and Comparative Law Section 117-24 (1963); Report of the Committee on Comparative Jurisprudence, Proceedings ABA International and Comparative Law Section 125 (1952). Conflicting explanations for this aberration have been offered by several commentators. See, e.g., Goodhart, supra note 19, at 873 (since lawyers were held in suspicion during the early years of America's development, the courts did not want to encourage the use of attorneys by awarding fees); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792, 798-99 (1966) ("accidental statutory history"); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619, 641-42 (1931) (individualistic spirit of the frontier years demanded each party bear his own costs).

See Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (the inclusion of attorneys' fees in a damage award was reversed because "(t)he general practice of the United States is in opposition to it"). Acceptance of the American system was recently reaffirmed in Alyeska, 421 U.S. 240 (1975).
to vindicate their rights, if, in losing, they would be saddled with liability for the fees of their opponent's counsel.25 Another argument commonly advanced is that an individual with a small damage claim will be discouraged from bringing suit, if the possibility exists that defendant's attorney's fees, which might exceed the value of the claim, would be taxed against him.26 Similarly, a defendant faced with a small claim might be induced to capitulate, notwithstanding a legitimate defense, so as to avoid the additional liability for plaintiff's counsel fees.27

The Supreme Court has also noted "the expense and difficulty" inherent in litigating the amount of the fee to be awarded.28 This fear that the post-litigation determination of fees will create an undue burden on the courts is not shared uniformly. Congressional authorization of fee-shifting29 indicates at least a provisional legislative finding that this mechanism for effectuating certain articulated policies is both appropriate and manageable. Moreover, the lower federal courts, upon whom this "burden" falls, have not been reluctant to award fees.30 Whatever "difficulty" is created by grafting such hearings onto a lawsuit is attributable not to the institution of fee-shifting, but instead to the lack of workable standards for setting the award. In the absence of such standards, the disparity in per hour rate or in the size of the overall fee31 may have a significant effect on a public interest plaintiff's decision to litigate. The lack of uniformity and resultant confusion in the fee hearings does not necessarily condemn the indemnity system, but rather calls out for legislative guidance for determining the size of the fee.

Several commentators have advocated wholesale adoption of the

26 Wilderness Society v. Morton, 495 F.2d 1026, 1031 (D.C. Cir. 1974) [hereinafter cited as Wilderness Society].
27 Id. at 1032.
28 Fleischmann, 386 U.S. at 718. See also Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872): "... this grafted litigation might possibly be more animated and protracted than that in the original cause."
30 Wilderness Society, 495 F.2d at 1031 n.1. See text at notes 140-163 infra, for a discussion of the tremendous increase in fee awards in the public interest prior to Alyeska, 421 U.S. 240 (1975).
“English Rule.”32 Some contend that under the indemnity system, which “raises the stakes”33 to include additional liability for fees, litigants are encouraged to settle out of court.34 Plaintiffs are said to be less likely to bring nuisance suits, defendants less apt to interpose frivolous defenses.35 Plaintiffs who mistakenly believe their claim is meritorious will not hesitate to litigate, however, nor will defendants who assume the same. In fact, fee-shifting under the English Rule may provide a positive incentive to litigate. Thus, the same characteristics which can be argued for repudiation of the American Rule, can also be cited by opponents of a system of universal indemnity. Absent statistical evidence demonstrating the positive effects of an indemnity system on court congestion and on the goal of equalizing access to the courts, mere speculation as to behavioral changes among litigants does not provide a sufficient basis for adoption of the English Rule.36 In this context, total abandonment of the American Rule would appear to be ill-advised.

Adoption of a pure indemnity system would have dire consequences for the poor or public interest plaintiff. A disadvantaged litigant seeking to vindicate his or her rights through injunctive or declaratory relief may well be discouraged not only by the absence of a monetary award but also by the possibility of having to defray counsel fees for both parties. With the premium which the English Rule places on predictability of outcome, “test cases” in developing areas of the law or in areas where the precedents are uncertain are likely to be discouraged.37 Environmental suits would therefore decrease in view of the emergent nature of that area of the law. The

32 E.g., Ehrenzweig, supra note 23, at 793; McCormick, supra note 23, at 643; Goodhart, supra note 19, at 877. For an excellent analysis of the various arguments both for and against the adoption of the English Rule, see, Comment, Court Awarded Attorney’s Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 648-55 (1974).
33 Wilderness Society, 495 F.2d at 1032.
35 See Mause, supra note 18, at 38. Professor Mause, in his preliminary behavioral analysis of litigants under both systems, concluded that without more specific data the impact of indemnity on the incidence of litigation was impossible to determine.
37 Mause, supra note 18, at 41.
element of mutuality of indemnity which characterizes the English system is thus inappropriate where the purpose of the fee award is to encourage legitimate suits by disadvantaged persons and citizen suits as a private law enforcement mechanism.

III. STATUTORY INFLUENCES ON THE DISTRIBUTION OF ATTORNEYS' FEES

A. Statutory Exceptions to the American Rule

The initial Congressional stance with respect to awarding attorneys' fees was to permit a federal court to follow the practice of the courts of the state where it sat.38 Despite the subsequent expiration of legislative authorization to follow state rule, the practice continued until 1853 when Congress attempted to standardize the costs and fees allowable in federal litigation.39 In 1853, legislation was passed which prescribed a limited number of items to be allowed as taxable costs.40 Among the goals of the Act was the preclusion of abuses in the practice of fee-shifting which had at times led to exhorbitant awards being taxed against the losing litigant.41 In order to achieve this goal, Congress expressly defined those few instances in which counsel fees would be collectible from the losing party and provided that no other compensation was permissible.42 This statute has been carried forward by Congress and is presently embodied in sections of the Judicial Code of 1948.43 Under these sections, a court may tax as costs only attorneys' docket fees in a narrow range of cases.44 This apparent Congressional acceptance of the American Rule has been tempered by the recent enactment of statutory fee-shifting provisions which seek to encourage private enforcement of the poli-
cies articulated therein. These fee provisions are premised primarily on the recognition that economic barriers hinder the effectuation of Congressional policies through private litigation. The statutory allowances differ both in scope and form. The nature of the legislative mandate varies from allowing awards in “exceptional cases” to granting awards to any party “whenever the court determines such award is appropriate.” The provisions, however, may be broken down into those which allow awards in the discretion of the court and those which require the court to award fees to the prevailing plaintiff.

A significant proportion of the recently enacted environmental protection statutes contain fee-shifting provisions. In specifically providing for a private right of action under the statutes, Congress evidently acknowledged that private enforcement was necessary to effectuate important environmental policies. Moreover, to mitigate the deterrent to private suits under the statutes posed by the cost of legal representation, broad discretionary fee-shifting sections were adopted. The rationale supporting the provisions, as enunci-
ated by the Senate Committee Report for the Federal Water Pollution Control Act Amendments of 1972, was that citizens bringing legitimate actions under the acts would be “performing a public service and in such instances the courts should award costs of litigation to such party.”

The Committee further indicated a desire to extend permissible awards to plaintiffs in actions which cause an abatement of a violation before a verdict is issued. Thus ultimate success in a citizen’s suit was not intended to be a prerequisite to an award.

The discretion afforded the trial courts in awarding attorneys’ fees under these statutes may be utilized to discourage abuse of the citizen suit provisions. The legislative history of the Water Pollution Control Act suggests that the discretion was engendered by fears that the citizen suit provision would be used to bring “frivolous or harassing actions.” This discretionary power may also be viewed as authorizing an award in favor of the defendants where the litigation is deemed frivolous by the trial judge.

The discretionary nature of the legislative mandate, however, necessarily militates against consistency in judicial construction of fee-shifting provisions in environmental legislation. A liberal stance with respect to these provisions was illustrated by Citizens Association of Georgetown v. Washington, in which the court awarded attorneys’ fees to the public interest plaintiffs, in spite of its dismissal of the suit for failure to establish the alleged violation of emissions standards under the Clean Air Act. The court predicated the award upon what it considered the “plain meaning” of the

---

53 Id.
54 Id. Concern over the institution of harassing suits and the burden on the courts resulting from a flood of citizens suits are not commonly held by the judiciary. Cf. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C.Cir. 1966) (agency fears of inundation of their processes are rarely borne out); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 617 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) (“... the expense and vexation of legal proceedings is not lightly undertaken.”).
55 This result remains true despite the Supreme Court’s guidance offered in Piggie Park, 390 U.S. at 402, where the Court held that a fee-shifting provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970), was to be followed in successful suits under that Title “unless special circumstances would render the award unjust.” Id. at 402. The Court’s construction of the provision in Piggie Park, albeit in a civil rights context, should have defined the scope of discretion afforded trial courts in applying discretionary fee-shifting provisions contained in other statutes; however, few courts have looked to the case for guidance in exercising their discretion.
fee provision in the Act, which indicated awards could be made irrespective of the success of the plaintiff in establishing a violation under the Act.58

Similar considerations entertained by the court in Delaware Citizens for Clean Air v. Stauffer Chemical Company59 produced a conflicting result. In Stauffer Chemical, a citizens group brought suit against the corporation charging that its sulfur dioxide emissions were in violation of the Clean Air Act. The suit was dismissed on the grounds that the Administrator of the Environmental Protection Agency (EPA) was contemporaneously considering the propriety of a state-granted variance to permit Stauffer more time to construct the required emissions control facility. The court denied the requested award of attorneys' fees, noting that providing "added incentive" for the institution of citizen suits was inappropriate when the Administrator was engaged in review of a state initiated revision to its air quality control plan.60 While recognizing the positive contributions of citizen suits to the effective enforcement of emissions standards, the court was unable to find a "compelling equity" in favor of the plaintiff to support an award.61

In contrast to the reasoned approaches in these cases, the district court in Colorado Public Interest Research Group v. Train62 summarily dismissed plaintiff's motion for a fee award under the Federal Water Pollution Control Act.63 The action, which sought to compel the EPA Administrator to take supervisory control under the Act of discharges of radioactive material into navigable waters, was dismissed on the basis of federal regulations which placed the power plant in issue under the jurisdiction of the Atomic Energy Commission. The court rejected plaintiff's contention that a fee award was permitted by the Act even where the government prevailed. The district court judge noted that this contention went "somewhat against my training and experience as a lawyer pos-

58 383 F. Supp. at 144. This interpretation comports with the legislative history of the Act. The Senate Committee Report stated: "(t)he court may award costs of litigation to either party whenever the court determines such award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 1196, 91st Cong., 2d Sess. 65 (1970).
60 Id. at 357.
61 Id.
62 373 F. Supp. 991 (D. Colo.), rev'd on other grounds, 507 F.2d 743, 749 (10th Cir. 1974), cert. granted, 421 U.S. 998 (1975). The Tenth Circuit did not address itself to the attorneys' fees question and the Supreme Court is not expected to pass on this issue. See 43 U.S.L.W. 3032 (U.S. 1975) (questions presented).
sessed of much experience in losing contingent fee cases." Without reference to the wording of the statute or the legislative history, the court found it inappropriate that the suit should be "subsidized with taxpayers' money."

These cases present important questions as to the breadth of Congressional policy supporting fee awards: Should this discretionary power invested in the federal district courts be exercised whenever an important environmental issue is brought out or clarified by a public interest suit? Once plaintiff's good faith is established, should counsel fees be awarded automatically irrespective of the ultimate outcome of the suit? Does Congressional intent to accelerate enforcement of environmental legislation extend so far as awarding fees in any non-frivolous citizens suit? Unfortunately, the legislative history provides little guidance for the trial court in exercising its judgment relative to these questions.

*Stauffer Chemical* apparently stands for the proposition that the discretionary fee-shifting provisions authorize a balancing of the equities as assessed by the court. Although judicial flexibility in allowing awards may contribute to the just application of this remedy to individual cases, the latitude afforded the lower courts may produce an unhealthy disparity among the courts and may permit arbitrary denials of awards to frustrate an articulated Congressional policy. The dissimilarity in construction of the statutes destroys the predictability upon which litigants base their strategies. This factor is of particular salience where the very ability to fund the litigation is based on the potential of an award of counsel fees. Broad discretion, without statutory language to provide benchmarks for the courts, may result in the granting or denying of awards based upon the subjective policy preferences or upon the predisposition of the judge against Congressional authorization of fee-shifting, as exemplified by *Colorado PIRG*. Nevertheless, the extent to which the discretionary provisions disserve the policy behind the encouragement of citizen suits through fee-shifting is presently unclear, and requires the attention of Congress prior to the enactment of similar provisions in other environmental statutes.

Another important deficiency in the Congressional response to the

---

44 373 F. Supp. at 995.
45 Id.
46 See *Alyeska*, 421 U.S. at 266 n.39 (1975), where the Court expressly disapproved of latitude accorded judges under the private attorney general rationale and noted the possibility of selective application of substantive law priorities and preferences.
recognized need for encouraging private enforcement is the lack of consistency among the statutes addressed to environmental problems. Whether produced merely by the ad hoc nature of Congressional determinations fostered primarily by the committee system, or by a genuine failure to achieve a consensus as to the need for supplementary citizen action, citizen suit and fee-shifting provisions are noticeably absent in legislation, such as the National Environmental Policy Act (NEPA), which embodies significant environmental policy statements and mandates consideration of the ecological consequences of major projects. Additionally, certain environmental statutes lack internal consistency with respect to the award of attorneys' fees. The legislative histories of such acts provide little insight into the basis for Congressional preference. What has thus emerged is a crazy quilt of provisions which defies rational explanation.

A dramatic example of the failure to achieve a modicum of consistency within a statute is represented by the fee-shifting provisions in the Clean Air Amendments of 1970. The Act specifically permits suits under § 304 in the district courts in the form of mandamus and confers upon the courts the power to issue appropriate relief. Section 307 grants jurisdiction to the courts of appeals to review specified actions by the Environmental Protection Agency Administrator. Notwithstanding Congressional approval of citizen suits under the Act, only § 304 accords the power to award attorneys' fees. The unexplained absence of a fee-shifting arrangement in actions initiated in the courts of appeals has given rise to conflicting interpretations of these sections of the Act. In two cases, both

---


This absence of consistency also characterizes the treatment of fee awards in civil rights legislation. Compare the Reconstruction Civil Rights Acts, 42 U.S.C. § 1981 et seq. (1970) (no fee-shifting provisions) with Civil Rights Act of 1964, Title II and VII, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (discretionary authority to award fees). The failure to provide fee awards under the Reconstruction statutes may be in part explained by their enactment before Congressional recognition of the potential inducement to citizen redress in the courts which fee-shifting represents. The historical explanation is, however, inappropriate with regard to environmental legislation in that the relevant statutes are of recent vintage.


Id. § 1857h-5(b).

See text at notes 51-53, supra.

entitled *Natural Resources Defense Council v. Environmental Protection Agency,* the courts were confronted with actions brought against the EPA under § 307, by public interest plaintiffs who sought to challenge the sufficiency of state air pollution control plans approved by the Agency. The First Circuit in *NRDC I* issued an order favorable to the plaintiff; the claim in *NRDC II* was satisfied by the agency's voluntary capitulation on the merits, while the appeal was pending before the District of Columbia Circuit Court of Appeals. The successful plaintiffs in each case subsequently filed a motion for an award of attorneys' fees.

The court in *NRDC I* rejected the contention that the absence of a fee-shifting clause in § 307, coupled with express allowance for awards of fees under § 304, required an inference that Congress deliberately chose to exclude such a remedy for actions initiated in the courts of appeals. The First Circuit noted that the availability of attorneys' fees should not depend upon the forum of the suit nor should remedies in such cases be limited to the express language of the particular section. It held, based upon the approval of fee-shifting in the legislative history and the wording of § 304, that the plaintiffs were entitled to the benefits of that provision.

In contrast, the District of Columbia Circuit in *NRDC II* reluctantly declined to follow the First Circuit's interpretation. The *NRDC II* court found that the sections "contemplated distinct groups of cases" for which the remedies were not interchangeable. While emphasizing the absence of a sound policy for denying the availability of fees under § 307 and noting the temptation to follow the First Circuit, the court declined to grant counsel fees for fear that the award would "strain the limits" of its "interpretive function."

---

75 *Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973)* [hereinafter cited as *NRDC I*]. *Natural Resources Defense Council, Inc. v. EPA, 512 F.2d 1361 (D.C. Cir. 1975)* [hereinafter cited as *NRDC II*].

76 *NRDC I*, 484 F.2d at 1336 n.6.


78 *NRDC I*, 484 F.2d at 1338.

79 *NRDC II*, 512 F.2d at 1355.

80 *Id.* at 1357. *But see NRDC II, 512 F.2d at 1361* (Wright, J., dissenting) wherein the judge asserted that § 304 should be read broadly particularly in light of the impossibility of awarding fees on other theories as mandated by *Alyeska.*
The pitfalls inherent in such inconsistency in statutory mandate in addition to unenlightening legislative history dilutes the desired encouragement to private enforcement which fee-shifting provides. The court in NRDC II was not unmindful of the anomalous result engendered by the inconsistency within the Clean Air Amendments and accordingly suggested several options to Congress to rectify the problem.\(^{81}\) One obvious cure, as suggested by the District of Columbia Circuit, would be to extend the scope of § 304 to include actions brought in the courts of appeals. In treating this example of internal statutory contradiction, Congress should be aware that it indicates a failure to establish a rational scheme of fee-shifting sections in environmental statutes such that litigants and judges may have sufficient guidance.

B. A Statutory Obstacle to Environmental Litigation

The doctrine of sovereign immunity, which provides that a state may not be sued without its consent,\(^{82}\) has been extended to preclude fee awards against the federal government in the absence of express Congressional authorization. Despite mounting criticism of the reach of the doctrine,\(^{83}\) this common law rule is of such vitality with regard to attorneys’ fees that Congress deemed it appropriate to codify it in § 2412 of the Judicial Code\(^{84}\) in order to standardize its application. This total prohibition was modified in 1966 to allow a judgment of certain costs against the government.\(^{85}\) The rationale for the amendment, on the basis of the Senate Committee Report, was to correct the existing disparity of treatment between private litigants and the United States with respect to the allowance of costs.\(^{86}\)

---

81 NRDC II, 512 F.2d at 1357.
82 Hans v. Louisiana, 134 U.S. 1, 12-13 (1890); United States v. Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940).
   Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States.
The statute, however, expressly excluded the award of attorneys fees from taxable costs, notwithstanding the apparent recognition of the inequality of means between the government and its adversaries. Clarity of wording and legislative history\(^{47}\) leaves little room for the courts to perform their interpretive function to meet the equitable demands of each case. The reasons which Congress relied upon in not permitting attorneys' fees awards in the absence of an express statutory provision are unclear. Although more equitable treatment for private litigants by awarding costs against the State mitigates the governmental advantage, it continues to ignore the basic disparity in resources, particularly where the plaintiff must rely on marginal foundation support.\(^{88}\) Arguments have been advanced that the "inequity of recognizing a litigant's right to sue on the one hand, but depriving him of otherwise available financial implements with which to vindicate that right, is patent."\(^{89}\) One public interest litigator commented that § 2412 has had a "most significant chilling effect" on the development of fee-shifting as a method of inducing private enforcement.\(^{90}\)

This potent deterrent to citizen suits against the government has led to judicial attempts to circumvent the prohibition of the cost statute. Frustration expressed by some courts has resulted in acceptance of tenuous arguments in support of taxing private intervenors or defendants.\(^{91}\) The attenuated line of thought offered to justify the imposition of fees on private corporations turned primarily on the erroneous assumption that the intervenor or private defendant, admittedly having a stake in relaxed environmental standards, also shared in the responsibility for inadequately prepared Environmental Impact Statements under NEPA or for the government's failure to comply with the applicable statutes.\(^{92}\)


\(^{88}\) See text at notes 8-13, supra.

\(^{89}\) King and Plater, The Right to Counsel Fees in Public Interest Environmental Litigation, 41 Tenn. L. Rev. 27, 87 (1973).

\(^{90}\) Hearings, supra note 12, at 791 (statement of J. Anthony Kline, Esq.).


\(^{92}\) In actuality, 42 U.S.C. § 4332(2)(c) makes federal agencies primarily responsible for the preparation of Environmental Impact Statements (EIS's) which the Act requires in "major Federal actions." Cf. Committee to Stop Route 7 v. Volpe, 7 ERC 1681, 1682 (D. Conn. 1972).
Courts based these awards, in the absence of express statutory authorization which would have nullified the effect of § 2412, on the now defunct private attorney general rationale.

In cases where no private party was available upon which to impose a fee award, several courts have taxed counsel fees against the federal government after finding in other statutes a responsibility to assist in providing legal services under certain circumstances. The courts here sought to broadly construe statutes conferring upon the government the duty to represent Indian interests or to provide legal counsel in agency proceedings so as to create a federal responsibility to finance plaintiffs' actions against the challenged agency. Like the attempts to tax private intervenors to mitigate the effects of the sovereign immunity bar, the opinions in these cases had stretched the applicable statutes beyond a reasonable construction to achieve an equitable result. In view of appellate court disapproval of such attempts to circumvent § 2412, these cases may serve more importantly to underscore the impatience of the judiciary with the effects of that statute on public interest litigation.

Another method of awarding counsel fees to public interest plaintiffs, in cases in which the federal government is a party, is to tax the fees against the state defendant. Awards in such cases are not automatically granted when the plaintiff has demonstrated the requisite "vindication of a Congressional policy," which would otherwise trigger the private attorney general rationale. Environmental statutes such as NEPA, in placing the responsibility of compliance upon federal agencies, make difficult an attempt to justify the imposition of counsel fees by fixing a duty of obedience upon the state. Additionally, many courts have held that the Eleventh Amendment to the Constitution precludes fee awards against the states on a sovereign immunity theory. Since the circuits are split...
on the effect of sovereign immunity of the states on fee-shifting, this approach can only have a limited impact on the development of private enforcement, particularly in view of the demise of the private attorney general rationale.88

The cases are legion in which the courts would have awarded attorneys’ fees to public interest plaintiffs but for the sovereign immunity bar.89 Constraints imposed by § 2412 are particularly acute where the suit is brought under the provisions of NEPA, in which the federal government is invariably the defendant.90 The sovereign immunity bar, taken together with the absence of fee-shifting authorizations in major environmental statutes and judicial preclusion of awards based on the private attorney general theory, has severely limited the range in which the courts may operate to effectuate the established Congressional policy of encouraging private enforcement. Therefore Congress should evaluate and resolve the conflicting policies behind the sovereign immunity bar and citizen suit provisions in environmental legislation.

IV. JUDICIAL TREATMENT OF FEE-SHIFTING AND THE GROWTH OF THE PRIVATE ATTORNEY GENERAL RATIONALE

A. The Early Development of Fee-Shifting

Fee-shifting, in its infancy, was employed by the courts as a mechanism to spread the costs of successful suit among the plaintiff and the beneficiaries of the litigation. The early cases making


While recognizing the disparity among the lower courts on the issue, the Supreme Court, in Alyeska, 421 U.S. at 269-70 n.44 (1975) declined to address this question. Since Alyeska, the Court has elected not to hear cases which present Eleventh Amendment issues with regard to fee-shifting. See, e.g., Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), vacated and remanded for further consideration in light of Alyeska, 421 U.S. 982 (1975); Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dep’t, 496 F.2d 1017 (5th Cir. 1974), cert. denied, 420 U.S. 926 (1975).

E.g., Committee to Stop Route 7 v. Volpe, 4 ERC 1681 (D. Conn. 1972).

awards for this purpose were grounded in the original authority of the chancellor to do equity in particular cases. So reasoned the Supreme Court in the leading case, Trustees v. Greenough, in which a plaintiff who succeeded in rescuing a trust fund from a delinquent trustee was allowed an award of attorneys' fees to be drawn from the reclaimed fund. The suit, filed on behalf of other participants in the fund, created a common fund from which equity demanded a ratable contribution for legal fees incurred. The Court in Trustees found nothing in the 1853 fee bill, which had severely limited awards of counsel fees, to deprive equity courts of their "long established control" over the costs and charges of litigation involving the rights to a general or common fund.

In Sprague v. Ticonic National Bank, the Court further developed the "common fund" exception to the rule prohibiting fee-shifting. There, a successful suit against an insolvent bank, which resulted in a lien on funds earmarked for repayment of money deposited by the plaintiff, established, by collateral estoppel, the rights of fourteen other depositors who were not represented in the suit. The absence of a class action or the actual creation of a fund was held not to preclude the reimbursement of counsel fees on the theory that plaintiff's success would have a stare decisis effect entitling others similarly situated to enforce their own liens against the bank. Justice Frankfurter, speaking for the Court in Sprague, noted that the creation, in essence, of a constructive fund, was a judicial act that "hardly touch(ed)" the general equity power of the federal courts "to do justice between a party and the beneficiaries of his litigation." This broad reading of the equitable exception to the American Rule for common fund cases proved to be an important antecedent to the development of the private attorney general theory discussed below.
In contrast to the cost spreading rationale in common fund cases, the federal courts, in the exercise of their equity powers, have taxed counsel fees against parties acting in bad faith prior to or during the litigation as a punishment for such conduct. The courts have found an award of reasonable attorneys' fees appropriate where the unsuccessful litigant has engaged in vexatious, harassing, dilatory, or otherwise unreasonable conduct. For example, defendants found to have wilfully disobeyed or failed to make good faith efforts to comply with constitutional imperatives in desegregation and reapportionment cases have been taxed under the punitive rationale of the bad faith exception. Furthermore, a court may assess attorneys' fees for disobedience of a judicial order. Although the bad faith rationale has not experienced the same expansion as the other equitable exceptions the demise of the private attorney general doctrine may prompt the courts to look more carefully at the behavior of the litigants in search of a non-statutory basis for an award of counsel fees.

B. Fee-Shifting in the Public Interest: Toward a Private Attorney General Rationale

The need to encourage citizens to litigate important social issues and to vindicate personal rights has resulted in an effort by the judiciary to expand access to the courts. Predicated, in part, on the recognition of practical difficulties inherent in citizen participation in modern government and influence in bureaucratic decision-making, these judicial efforts have chipped away at the barriers which had previously relegated individual grievances to the cumbersome legislative process. The creation of private rights of action under federal statutes which were merely declarative of certain fund cases, see Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 850-81 (1975).


See, e.g., Bell v. School Bd. of Powhatan Cty., 321 F.2d 494, 500 (4th Cir. 1963); Rolfe v. County Bd. of Educ. of Lincoln Cty., 391 F.2d 77, 81 (6th Cir. 1968).


E.g., Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

See, e.g., Doe v. Poelker, 515 F.2d 541, 547 (8th Cir. 1975).

rights or provided only for government enforcement has contributed to increased access to the federal courts. In the environmental area, relaxation of standing requirements to permit challenges to agency action by public interest groups reflects judicial cognizance of the role of the courts in protecting our natural resources. Set in the context of these developments, fee-shifting in public interest litigation can be understood as a logical extension of these attempts to open the courts to legitimate citizen grievances.

While the coalescence of the growth of equity power to transfer fees and the recently expanded access to the courts provided familiar ground for the courts to base awards to public interest plaintiffs, the federal judiciary primarily looked to Congressional policy as the foundation upon which to build the private attorney general doctrine. With the appearance of early fee-shifting provisions in certain enforcement statutes, some lower federal courts were willing to extrapolate from this Congressional inclination a basis for awarding fees to private parties suing to enforce broad statutory policies, even where the relevant statute was silent on the fee award question. The Supreme Court, however, was initially reticent to go beyond the boundaries of statutory fee-shifting. In Fleischmann Distilling Corporation v. Maier Brewing Company, the Court held an award of attorneys' fees inappropriate where the applicable trademark statute "meticulously" provided the complete remedies available under the Act without authorizing the transfer of litigation costs. Basic to the holding in Fleischmann was the Court's adoption of the canon of statutory construction, expressio unius est exclusio alterius, which states, that specific mention of one remedy implies exclusion of another. This conservative approach to fee-shifting temporarily chilled the development of awards as a method of mitigating the economic deterrent to private enforcement of federal legislation.
One year later the Court had occasion to make substantial inroads into Fleischmann. The per curiam opinion in Newman v. Piggie Park Enterprises stands as the foundation and most concise statement of the now defunct private attorney general rationale. In a suit brought under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination in a restaurant chain, the court allowed the successful plaintiffs an award pursuant to the fee-shifting provision in the Act. More importantly, the Court went further in dicta by declaring that a plaintiff who obtains an injunction under the Act, "does so not for himself alone but as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."

The Court relied explicitly on the strength of the legislative history and implicitly on the heightened national demand for the eradication of racial discrimination that marked the 1960's in concluding that the Congressional policy was in fact of the "highest priority."

Despite the strong dicta in Piggie Park, the decision had to be limited to statutory fee-shifting issues. Expansion by the Court was required in order to develop the private attorney general doctrine into an equitable exception to be operative in the absence of specific statutory authorization. Such expansion came indirectly from the Court in Mills v. Electric Auto-Lite Company. The action was brought as a shareholders' derivative suit under § 14(a) of the Securities Exchange Act of 1934 to set aside a merger approved by the shareholders on the basis of a misleading proxy statement. The

123 390 U.S. 400 (1968).
125 Id. § 204(b), 42 U.S.C. § 2000a-3(b) (1970).
126 Piggie Park, 390 U.S. at 402. The private attorney general theory was first employed to expand the class of persons who had standing to challenge administrative action. Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir.), dismissed as moot, 320 U.S. 707 (1943).
128 The holding of Piggie Park was twice reaffirmed in school desegregation suits brought under the Emergency School Aid Act of 1972, 20 U.S.C. § 1601 et seq. (Supp. IV, 1974). Northcross v. Bd. of Educ., 412 U.S. 427 (1973); Bradley v. School Bd., 416 U.S. 696 (1974). Section 718 of the Act, id. § 1617, a discretionary fee-shifting provision similar to the clause construed in Piggie Park, was held in both cases to require an award of fees to the successful plaintiffs. The Court in Northcross found that the plaintiffs were "'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions." 412 U.S. at 428.
129 396 U.S. 375 (1970) [hereinafter cited as Mills].
Court held that an award of attorneys' fees was appropriate notwithstanding the absence of specific statutory authorization for fee-shifting or a common financial benefit or fund created by the suit. Confronted with similar Congressional treatment of fee awards as was presented in Fleischmann, the Court was forced to detail its attempt to distinguish that case. Provisions for fee-shifting under two other sections of the Securities Exchange Act rendered the statute susceptible to the *expressio unius* argument held applicable to the remedies available in Fleischmann. However, the Mills Court, relying in part on an analogous Second Circuit decision, held that the absence of express Congressional authorization for a fee-shifting under § 14(a) did not preclude such an award in certain cases. The Mills opinion drew an analogy from the recently acknowledged judicial power to create a private right of action under the Act to establish the ability to award counsel fees. Thus, the Court concluded that the lack of Congressional mandate for fee-shifting under the statutory section in issue did not deprive a court of the power to award counsel fees in appropriate circumstances.

To buttress this circumvention of Congressional silence, the traditional formulation of the common fund exception was expanded to encompass benefits to a corporation and its shareholders which were incapable of expression in monetary terms. This alternative holding provided the impetus for the lower courts to apply the private attorney general rationale to non-statutory fee-shifting. The Court held that where a successful suit conferred a “substantial benefit on an ascertainable class” and the “court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them,” fee-shifting is permissible.

The Court further emphasized the validity of this form of benefit in saying: “... private stockholders' actions of this sort 'involve corporate therapeutics' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy stat-

---

132 Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943). The court in Smolowe awarded attorneys' fees, in a suit by stockholders to recover short swing profits for the corporation under § 16(b) of the Securities Act of 1934, “on the theory that the corporation which had received the benefit of attorney's services should pay the reasonable value thereof.” Id. at 241.
133 Mills, 396 U.S. at 390-91.
135 Id., at 390-91.
136 Id. at 393-94.
ute." In effect, the conclusion that vindication of statutory policy was a significant benefit conferred upon the corporation by private enforcement suits engendered at least an expanded construction of equity powers under the common fund exception, if not its merger with the private attorney general theory articulated in *Piggie Park*. *Mills* was therefore read by the lower courts to provide authority in a broad range of cases for fee-shifting in the absence of express Congressional authorization.

C. Expansion of the Private Attorney General Theory in the Lower Federal Courts

The inferior federal courts were particularly receptive to the Supreme Court's apparent expansion of equity power to award fees in the absence of statutory authorization. The broad language of *Mills* and *Piggie Park* was interpreted to permit awards to plaintiffs who effectuated "important" Congressional policies by securing rights and benefits due a certain class or group. For example, the Fifth Circuit gave *Mills* a typically generous reading, noting that the decision was "better understood as resting heavily on 'overriding considerations' that private suits are necessary to effectuate congressional policy and that awards of attorneys' fees are necessary to encourage private litigants to initiate such suits."

The lower courts treated the size and relevant common interests of the class of beneficiaries more liberally than the immediately ascertainable class of shareholders in the *Mills* case. The most

---


139 The common fund exception was again given broad reach in *Hall v. Cole*, 412 U.S. 1 (1973). In that case, a former union member expelled for decrying certain union actions and policies, sued for reinstatement under § 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412 (1970). The Supreme Court affirmed the award of attorneys' fees, despite the absence of a fee-shifting provision in § 102. *Fleischmann* was distinguished by reading authorization in that section to grant "such relief . . . as may be appropriate" to include fee awards. Under the expanded common benefit doctrine developed in *Mills*, the Court held the suit, by vindicating plaintiff's right of free speech guaranteed by the Act, had rendered a substantial benefit to the union and its membership. 412 U.S. at 8. The Court concluded that an award in this case fell "squarely within the traditional equitable power of federal courts to award such fees whenever 'overriding considerations indicate the need for such a recovery.'" Id. at 9, quoting *Mills*, 396 U.S. at 391-92.

140 Lee v. Southern Home Sites Corp., 444 F.2d 143, 145 (5th Cir. 1971).

141 See, e.g., Calnetics Corp. v. Volkswagen of America, Inc., 353 F. Supp. 1219, 1225 (C.D. Cal. 1973) (fee awarded in private antitrust suit since plaintiff vindicated a compelling national economic interest which benefits inured to the "marketplace"); *Brandenburger v. Thompson*, 494 F.2d 885, 888-89 (9th Cir. 1974) (fee awarded in suit striking down a durational residency requirement for welfare recipients which benefited a "significant class" composed of "potential welfare recipients and interstate travelers").
significant development of the private attorney general doctrine came in suits vindicating federal rights and challenging racially discriminatory practices. Awards in these cases were often premised on the recognition that a “private attorney general” who advances the public interest should not be forced to bear the costs of litigation. Alternatively, the courts reasoned that the vindication of important rights ought not be made dependent upon the financial resources of the plaintiff; therefore, elimination of an impediment such as counsel fees would go far to encourage these suits. While the Supreme Court envisioned equity based awards as being discretionary, some of the lower courts held such an “award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public minded suits . . . and to carry out Congressional policy.”

Environmental plaintiffs also benefited from the private attorney general doctrine, albeit to a lesser extent than civil rights plaintiffs. As noted above, fee awards in environmental suits, particularly those brought under NEPA, were precluded by the sovereign immunity bar. Additionally, certain litigated environmental issues lacked clearly defined statutory and public policy imperatives that characterize racial discrimination and civil rights cases. The courts, lacking an unassailable public policy preference, were less willing to encourage conservationist suits through fee awards.


\[144\] See, e.g., Fowler v. Schwarzwald, 498 F.2d 143, 145 (8th Cir. 1974).


\[148\] See text at notes 99-100 supra.

Notwithstanding the sporadic incidence of fee-shifting in environmental litigation, the private attorney general doctrine provided an important impetus for litigation over ecological and conservation issues.\(^{150}\) In one of the leading cases applying the doctrine, \textit{La Raza Unida v. Volpe},\(^{151}\) the district court awarded counsel fees to a public interest organization which had obtained an injunction halting the construction of a highway through public parklands. The court articulated three requirements the satisfaction of which would qualify plaintiffs for a fee award: "1) the effectuation of strong public policies; 2) the fact that numerous people received benefits from plaintiffs' litigation success; 3) the fact that only a private party could have been expected to bring the action. . . ."\(^{152}\)

In this particular suit, both federal and state agencies were named as defendants, resulting in a private party mounting the challenge. The requisite strength of public policy was found in federal legislation designed to prevent wholesale destruction of our natural resources by highway construction\(^{153}\) and to protect the interests of persons displaced by such projects.\(^{154}\) The consideration of alternative routes to highway projects running through parklands, which the \textit{La Raza Unida} plaintiffs had gained through the judicial process, was mandated by the Department of Transportation Act.\(^{155}\) As further support for its award, the court noted that to force plaintiffs to pay their counsel fees after effectively policing those charged with implementing Congressional mandates would be "tantamount to a penalty."\(^{156}\)

In taxing fees against the state defendant,\(^{157}\) the court noted that all state residents had received the fruits of the litigation. By matching the state treasury, as the source of the fund, with the residents as beneficiaries, the court concluded that it was following the dictates of \textit{Mills}.\(^{158}\) This somewhat loose adaptation of \textit{Mills} raises an

\(^{150}\) See Witt, \textit{After Alyeska: Can the Contender Survive}, JURIS DOCTOR (October 1975), at 35.

\(^{151}\) 57 F.R.D. 94 (N.D. Cal. 1972) [hereinafter cited as \textit{La Raza Unida}].

\(^{152}\) Id. at 101.


\(^{156}\) \textit{La Raza Unida}, 57 F.R.D. at 101.

\(^{157}\) The court dismissed the Eleventh Amendment sovereign immunity argument which led other federal courts to deny an award in otherwise appropriate circumstances. \textit{See} text and notes 96-98, \textit{supra}.

\(^{158}\) \textit{La Raza Unida}, 57 F.R.D. at 101.
important question as to the application of the common benefit rationale for fee-shifting in environmental litigation. In contrast to the direct benefit of increased corporate control which inured to the stockholder beneficiaries in Mills or the actual recovery of a fund in Trustees, the actual benefits which accrue to the general public in successful environmental suits are difficult to trace with accuracy. While maintenance of clean air or clean water may fairly be viewed as a benefit uniformly accruing to all members of the public, the preservation of beautiful open spaces and parklands cannot be easily identified as such. The number of persons actually taking advantage of public parklands, although difficult to ascertain, certainly amounts to less that the entire taxpaying public. This inability to match cost with the benefits of the litigation required a strained interpretation of the common benefit line of cases to justify a fee award against the government. The La Raza Unida court and other federal courts, which found partial support in Mills for taxing fees against the government were, in reality, acting without precedential guidance from the Supreme Court.

Another potential defect in the private attorney general doctrine illustrated by La Raza Unida was the latitude accorded judges in determining which types of private enforcement litigation were sufficiently invested with the public interest or involved high priority legislation demanding inducement of fee-shifting. In La Raza Unida, the protection of parklands and assistance to persons displaced by eminent domain taking for mass transit projects, as the relevant statutory policies, were probably no stronger in the minds of the legislators than statutes aimed at product safety or the regu-

---

159 This strain on the logical application of a common benefit theory does not, however, negate its utility as a justification for taxing the government in order to spread the cost of private enforcement among its intended beneficiaries. When a private citizen or public interest group acts as an attorney general in enforcing federal legislation with which the government itself has failed to comply, they ought not bear the litigation costs of performing a function ordinarily assigned to a public official and defrayed through tax revenues. While the government may be an effective mechanism for redistributing the burden of private enforcement suits, this theory is less apposite when applied to justify taxing fees against a private violator of environmental protection statutes. Support for taxing such violators may more appropriately come from a punitive or an incentive rationale.

160 This position was taken by several commentators. Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 897 (1975); King & Plater, The Right to Counsel Fees in Public Interest Environmental Litigation, 41 Tenn. L. Rev. 27, 48 (1973); but compare Note, The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Rev. 316, 330 (1971). Consistent with these criticisms of the expansive interpretation of Mills, the Supreme Court in Alyeska noted the impropriety of placing within the common benefit framework suits which involve millions of taxpayers who allegedly receive intangible benefits, 421 U.S. at 266 n.39 (1975).
lation of securities markets. Thus it may have been possible under the doctrine to cause an award to turn automatically upon the invocation of a federal statute without additional indicia of Congressional concern.

In Piggle Park, the statutory fee-shifting case which spawned the notion of private enforcement as vindicating strong Congressional policies, the Court relied on legislative history which indicated a Congressional concern of preeminent importance. In lip service recognition of a need to find a heightened and immediate legislative interest or concern, the lower courts at times noted that a fee award was not a license to encourage enforcement of all statutes. Yet the courts, in purporting to find a strong Congressional policy, could in essence rely on a subjective judgment of public good or benefit. The judges were thus set free to exercise their discretion in determining what constituted socially desirable litigation which warranted fee awards.

Thus, prior to the Supreme Court's opinion in Alyeska, the private attorney general doctrine was poorly defined. Despite the broad language of Mills and Piggle Park, which had triggered its development, the doctrine had not been expressly approved by the Supreme Court. The Court had, on several occasions, declined to pass on the validity of the doctrine as a rationale for transferring fees in public interest litigation.

V. THE ALYESKA LITIGATION AND THE DEMISE OF THE PRIVATE ATTORNEY GENERAL DOCTRINE

The Alyeska litigation was commenced in 1970 by several environmental interest groups against the Secretary of the Interior to halt the construction of the trans-Alaskan oil pipeline. After two years of court proceedings, during which construction of the pipeline was suspended by preliminary injunction, the plain-

---

161 See text at note 127, supra.
162 La Raza Unida, 57 F.R.D. at 99; Lee v. Southern Homesites Corp., 444 F.2d 143, 145 (5th Cir. 1971).
164 Wilderness Society, Environmental Defense Fund, Inc. and Friends of the Earth.
165 The State of Alaska, to present another version of the public interest implications of the pipeline, and Alyeska Pipeline Service Company, a consortium composed of seven major oil companies, was granted leave to intervene early in the proceedings.
tiffs obtained a declaration by the District of Columbia Circuit Court of Appeals\textsuperscript{167} that the developer’s rights of way granted by the Secretary of the Interior were in violation of § 28 of the Mineral Leasing Act of 1920.\textsuperscript{168} Following their success in temporarily halting the project pending further study, the environmental groups filed a bill of costs with the Court of Appeals. They requested an award for over four thousand hours of attorney time allocated in connection with the numerous motion hearings and appeals undertaken during the course of the litigation.

Sitting en banc the District of Columbia Circuit Court of Appeals decided in favor of an award of attorneys’ fees relying entirely on the private attorney general doctrine.\textsuperscript{169} Since an award taxed against the federal government was precluded by the sovereign immunity bar, and the court determined an award against the State of Alaska, irrespective of proscription by the Eleventh Amendment, would be inappropriate where the State had intervened to present the “public interest implications” of the pipeline,\textsuperscript{170} the burden of plaintiffs’ counsel fees fell on Alyeska, the consortium of oil companies involved in the construction of the pipeline. Because Alyeska had an immense financial interest in the outcome of the suit and had been a vigorous participant at all stages of the litigation, the court found the consortium to be the real party in interest,\textsuperscript{171} and remanded to the district court with directions to tax the oil compa-


\textsuperscript{168} 30 U.S.C. § 185 (1970). Although allegations that the Department of the Interior had failed to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (1970), were fully briefed and argued, the court declined to adjudicate these issues on ripeness grounds. 479 F.2d at 890.

\textsuperscript{169} Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) [hereinafter cited as Wilderness II]. Three justices of the seven member panel vigorously dissented.

\textsuperscript{170} Id. at 1036 n.8.

\textsuperscript{171} Alyeska, being comprised of oil companies which account for approximately 20% of the national oil market and do business in 49 states, was arguably an appropriate medium for redistributing the cost to the general public. See Alyeska, 421 U.S. at 288 (Marshall, J., dissenting). The Wilderness II court dismissed this seeming infusion of the Mills common benefit rule into the private attorney general exception. 495 F.2d at 1029. However, the real party in interest justification is likewise vulnerable to challenge. As an intervenor, Alyeska was neither involuntarily brought into the litigation as a violator of the relevant statutes nor, in reality, charged by statute with compliance under NEPA or the Mineral Leasing Act; therefore, to tax attorneys’ fees merely for vigorous participation and interest in the litigation against a party so situated seems inequitable. See Sierra Club v. Lynn, 502 F.2d 43, 65-66 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975). This strained rationale for shifting fees to a private intervenor, criticized in Sierra Club, again points to the inequity created by the sovereign immunity bar.
nies one-half of what it determined to be reasonable attorneys’ fees.\(^{172}\)

The constellation of events which surrounded the litigation made tenuous the requisite ascertainment of strong Congressional public policy which would trigger the private attorney general rationale. In response to the delay in construction of the pipeline engendered by the litigation, Congress enacted legislation amending the Mineral Leasing Act to allow the granting of permits sought by the oil companies and declaring that no further statements under NEPA would be required before construction commenced.\(^{173}\) The amendments did, however, include certain provisions to insure safety and environmental protection along the pipeline route.\(^{174}\) Moreover, the Senate Committee which reported out the bill explicitly noted that the litigation-produced delay had lessened the risk of environmental damage.\(^{175}\)

In acknowledging the national commitment to protecting the natural environment, as exemplified by NEPA, the Court of Appeals noted benefits from the litigation in the form of forced reconsideration of the environmental consequences of the project\(^{176}\) and the “inclusion of strong safeguards in plans for the Alaskan line.”\(^{177}\) Instead of construing the Congressional intervention as a rejection of the environmentalists’ position, the majority read it to be a recognition of the substantial policy and technical issues which the litigation had served to focus.\(^{178}\) The accumulation of these benefits gave rise to the majority’s conclusion that plaintiffs had vindicated the statutory interests of all citizens affected by the proposed pipeline project.\(^{179}\)

In contrast to the aura of successful litigation portrayed by the majority, the disservice to the public caused by the delay in construction, concern with blocking access to much needed oil reserves and the attendant increase in cost and dependence on foreign petroleum marked the dissenting judges’ rejection of the fee award.\(^{180}\) The

---

\(^{172}\) Wilderness II, 495 F.2d at 1036.


\(^{174}\) Id. at § 204(b), 43 U.S.C. § 1653(b) (Supp. IV, 1974).


\(^{176}\) Wilderness II 495 F.2d at 1034.


\(^{178}\) Id. at 1035.

\(^{179}\) Id. at 1032.

\(^{180}\) Id. at 1041 (MacKinnon dissenting). Judge MacKinnon went so far as to boldly state:
Mineral Leasing Act amendments were viewed as the definitive statement of Congressional preference for immediate resumption and completion of the pipeline.\textsuperscript{181}

What emerges from the juxtaposition of majority and dissenting opinions is that Congressional policy on this question was at best ambiguous. The case is therefore instructive in highlighting the difficulty in adducing a strong Congressional policy, particularly in environmental lawsuits where a demand for energy resource development and interest in the preservation of the environment collide. Moreover, it indicates the inherent weakness in allowing judges, absent legislative guidance, to render subjective assessments or speculate as to those statutes which require the inducement of fee-shifting for private enforcement. The resultant differences in the perception of justice and the public interest may undermine the public confidence in a neutral judiciary.

Upon a grant of certiorari,\textsuperscript{182} the Supreme Court reversed the District of Columbia Circuit Court of Appeals in a 5-2 decision.\textsuperscript{183} The Court held that under the American Rule attorneys' fees would not be recoverable on a private attorney general theory in the absence of express statutory authorization.\textsuperscript{184} Mr. Justice White, speaking for the Court, engaged in an extensive historical analysis to document both statutory and judicial adherence to the American Rule.\textsuperscript{185} In establishing the Rule's continuing vitality, principal reliance was placed on the 1853 docketing fees statute, which undertook to limit the circumstances where fee awards were appropriate.\textsuperscript{186} The combination of the present version of that statute,\textsuperscript{187} being essentially unaltered, and the express fee-shifting authorization contained in various recently enacted statutes\textsuperscript{188} was therefore read as being indicative of Congressional hegemony over the creation of this remedy.

\begin{quote}
"When we subsidize lawyers to bring such suits against our national interest we promote our own destruction." \textit{Id.} (dissenting opinion) (emphasis in the original).
\end{quote}

\begin{quote}
\textsuperscript{181} \textit{Id.} at 1039 (MacKinnon dissenting). "Judging from Congress' most recent action, plaintiffs have been frustrating the policy Congress considers highly desirable and of the utmost urgency." \textit{Id.} at 1042 (Wilkey dissenting) (emphasis in the original).
\end{quote}

\begin{quote}
\textsuperscript{182} 419 U.S. 823 (1974).
\end{quote}

\begin{quote}
\textsuperscript{183} \textit{Alyeska}, 421 U.S. 240 (1975). Justices Powell and Douglas took no part in the consideration of the case, while Justices Brennan and Marshall dissented.
\end{quote}

\begin{quote}
\textsuperscript{184} \textit{Id.} at 269.
\end{quote}

\begin{quote}
\textsuperscript{185} \textit{Id.} at 247-62.
\end{quote}

\begin{quote}
\textsuperscript{186} \textit{Id.} at 252-56.
\end{quote}

\begin{quote}
\end{quote}

\begin{quote}
\textsuperscript{188} See notes 48-51, \textit{supra}.
\end{quote}
The Court, however, failed to convincingly treat its own precedents which establish a coordinate independent equity power to award fees under the several flexible exceptions to the American Rule. The proposition that sporadic Congressional exercise of its prerogative to annex fee-shifting provisions to certain statutes preempted the judicial creation or at least maintenance of non-statutory theories upon which to base awards ignores the well-established breadth of equitable remedies. Such an argument, as noted by the dissent, is logically inconsistent with the Court's acceptance of the previously sanctioned bad faith and common fund exceptions. Assuming that the federal judiciary has the power "to do equity" in these situations, the same power would likewise attach in cases where justice requires a fee award to ratably allocate the burden of private enforcement.

In rebuttal to the majority's broad construction of the docketing fees statute, the dissent invoked the Court's prior rejection in Trustees and Sprague of arguments that the statutes operated as a plenary restraint on the equity power to award fees. In both Sprague and Trustees, the Court had explicitly held that the statute imposed no bar to an award of fees in common fund cases, and contained nothing which could be construed to deprive equity courts of their long-established control over taxing litigation costs.

Mr. Justice Marshall's dismissal of the Court's interpretation of Congressional silence as to fee transfers was appropriately grounded in the broad language of Mills and Hall v. Cole. These recent decisions offer a clear statement of the Court's preference prior to Alyeska for interpreting Congressional silence "not as a prohibition, but as an authorization for the Court to decide the attorneys' fees issue in the exercise of its coordinate, equitable power." If the holding of Alyeska is viewed solely as evolving from

---

189 421 U.S. at 282 (Marshall, J., dissenting).
192 See 421 U.S. at 278-82 (Marshall, J., dissenting).
193 As Mr. Justice Marshall correctly states, the only explanation which preserves the internal logic of the Court's argument is that these already sanctioned exceptions were too well established to jettison. Id. at 278 (Marshall, J., dissenting).
194 Id. at 278-79 (Marshall, J., dissenting).
196 421 U.S. at 281-82 (Marshall, J., dissenting).
the judicial power argument addressed above, the lack of cogency undermines its credibility.

Nothwithstanding the apparent internal inconsistency or the Court’s failure to square its reasoning with even the most conservative reading of Mills, the Court correctly reversed the award of fees under the private attorney general rationale. Alternative support for the holding may be adduced from the inability of the judiciary to develop manageable standards to govern the use of the private attorney general rationale as an incentive for private enforcement actions. This interpretation of the majority’s reasoning is most directly responsive to the demonstrated deficiencies in the application of the doctrine, and is therefore the most persuasive ground for the decision.

Recognizing the Court’s concern with the vagaries inherent in a fee-shifting scheme dependent upon a trial judge’s subjective assessment of the importance of a public policy involved in a particular case, Mr. Justice Marshall attempted to salvage the doctrine by suggesting several criteria to aid the courts in determining the propriety of requested awards. The principal factor to be considered would be whether the “important right being protected is one actually or necessarily shared by the general public or some class thereof.” Mr. Justice Marshall’s formulation adds little to the criteria established in La Raza Unida to assist in the crucial determination of which legislative policies are actually of the highest priority. One need look no further than the Wilderness II opinion to witness the enigma involved in ascertaining the “important right” without statutory guidance. The conflicting perceptions of public policy illustrated by the 4-3 split in the lower court’s decision in Wilderness II underscored this problem.

In light of the dissent’s failure to propose viable standards for gauging a statute’s importance, the holding in Alyeska attains credibility. Nevertheless, a restrictive reading of the Court’s finding of legislative dominance over fee-shifting will unduly constrain the

199 Id. at 266 n.39.
200 See text at notes 160-63 and text following note 181, supra.
202 Id. Other factors implicated in the determination are whether “(2) . . . the plaintiff’s pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.” Id. Note that this third requirement presents the same admixture of vindication of Congressional policy drawn from Piggie Park and the common benefit rationale of the Mills case which left the lower courts without precedential foundation. See Id. at 265 n.39. See also text at notes 157-60, supra.
jurisdiction which equity courts have traditionally exercised where compelling circumstances require. The rationale of Alyeska should therefore be ascribed to the Court’s recognition of a need to impose prudential limits on the power of a federal judge to grant awards of attorneys’ fees to public interest plaintiffs in the absence of statutory authorization. The demise of the private attorney general doctrine need not be interpreted as a judgment on the merits of fee-shifting or the utility of redistributing the cost of legal services to encourage private enforcement of environmental legislation. In deciding not to embroil the federal courts in political and social policy debates, the Court merely returned to the legislature the burden of ascertaining those public policies which demand private enforcement incentive through fee-shifting.

**Conclusion**

Recent legislative authorization of citizen suits in numerous environmental protection statutes has created a vital role for the federal courts in the process of environmental decision-making. Given this consistent Congressional approval of private enforcement in the courts, the need to encourage such suits becomes clear. Citizen suit provisions contained in these statutes, however, will remain empty invitations, without an opportunity for public interest plaintiffs, lacking any direct monetary stake in the litigation, to recover the costs of vindicating statutory rights or enforcing Congressional mandates. Citizens and environmental interest groups assuming this watchdog role are in actuality “private attorneys general” performing an enforcement function ordinarily assigned to government officials who are compensated by the public treasury. If for no other reason, logic demands that a citizen suing to enforce compliance with an environmental protection statute should not be forced to bear the litigation costs incident to performing a quasi-official function.

With private foundation sources of funding for environmental plaintiffs uncertain, the need to develop a comprehensive scheme of fee awards for public interest litigants is acute. In suits against the government, an award will act to redistribute the costs to the general public, who in most instances, is the intended beneficiary. Ad-

---

ditionally, this mechanism for equalizing the resources of private, non-profit plaintiffs doing battle with government and corporate entities has not been an administrative burden on the courts, as witnessed by their willingness, prior to Alyeska, to grant fee awards with impressive regularity.204

While a comprehensive Congressional scheme which entitles a plaintiff,205 suing under any environmental protection or policy statute, to an award of attorneys' fees is the long range goal to be pursued,206 the following two proposals must receive the highest priority. The federal sovereign immunity bar embodied in § 2412 of the Judicial Code must be repealed or strictly limited in environmental protection situations. This statute stands as a deterrent to numerous legitimate suits which would name the federal government as defendant. In addition, the immediate inclusion of a fee-shifting provision under the National Environmental Policy Act is essential.207 Since only the government is charged with compliance with NEPA requirements, the statute will be enforced, if at all, through litigation commenced by individual citizens or their representative organizations. The absence of transfer provisions in other environmental legislation also deserves Congressional attention in order to develop a comprehensive program to encourage enforcement by citizen watchdogs and to supplement government efforts to achieve compliance with these statutes. Until Congress enacts such a program, the cloud created by Alyeska will continue to hang over public interest environmental litigation.

204 One commentator suggests another conclusion. Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 905 (1975). Whatever administrative difficulties are encountered in post litigation fee hearings stem in large part from a lack of standards to guide judges in computing the size of the award. This problem might be remedied by the establishment of guidelines similar to those established by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d) (1970), or by promulgation of local court rules. Caveat: in designing the schedules, fees ought to be of sufficient size to attract skilled advocates who are capable of presenting the complex and delicate issues that attend environmental disputes.

205 As established under the fee-shifting provisions in the clean air and water pollution legislation, ultimate success in the lawsuit need not be made a prerequisite to an award.

206 An omnibus provision permitting fee awards in suits brought under any environmental protection or policy statute would be preferable. However, divisions of jurisdiction among the various Congressional committees might preclude such a solution.

207 One such bill has already been introduced and is pending in the House Committee on Merchant Marine and Fisheries. H.R. 7829, 94th Cong., 1st Sess. (1975).