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**THE CLEAN AIR ACT: CITIZEN SUITS, ATTORNEYS’ FEES, AND THE SEPARATE PUBLIC INTEREST REQUIREMENT**

Matthew Burrows*

**Abstract:** The Clean Air Act (CAA) authorizes citizen suits and empowers courts reviewing these suits to award attorneys’ fees whenever appropriate. For some courts, awarding attorneys’ fees to a CAA citizen plaintiff is appropriate whenever a plaintiff achieves some success on the merits. Other courts hold that such awards are appropriate only when the citizen plaintiff has served the public interest by bringing suit. This note argues that a CAA citizen plaintiff seeking attorneys’ fees should not be required to demonstrate that the suit served the public interest. Instead, courts should award attorneys’ fees whenever a plaintiff partially or wholly prevails on the merits of a CAA citizen suit.

**INTRODUCTION**

The Clean Air Act (CAA)\(^1\)—the federal air pollution regulation statute—contains two sections that authorize citizen participation in CAA enforcement and implementation.\(^2\) Section 304 permits citizen suits against CAA violators.\(^3\) Section 307 allows citizen suits challenging Environmental Protection Agency (EPA) actions made pursuant to the CAA.\(^4\) Both sections vest discretion in the reviewing court to award attorneys’ fees to a citizen litigant whenever it determines that such award is “appropriate.”\(^5\) While the scope of the court’s fee-shifting discretion is broad, the Supreme Court has ruled that it is not “appropriate” to award attorneys’ fees to a citizen plaintiff absent some degree of success on the merits.\(^6\) In addition, most courts hold that it is “appropriate” to award attorneys’ fees to a partially or wholly prevailing citizen

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4. *Id.* § 7607(d).
5. *Id.* §§ 7404(d), 7607(f).
plaintiff only where that plaintiff demonstrates to the satisfaction of the reviewing court that the citizen suit served the public interest.\footnote{See, e.g., Pound v. Airosol Co., 498 F.3d 1089, 1102 (10th Cir. 2007) \textit{[Pound II]}; W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996).}

This Note discusses the propriety of the separate public interest requirement for citizen plaintiffs who partially or wholly prevail on the merits of a CAA citizen suit. Part I provides an overview of environmental citizen suit statutes and the CAA and examines in detail the distinct features and objectives of the CAA’s citizen-suit provisions. Part II addresses the judicial practice of fee-shifting and explores the reasons that underlie Congress’s decision to authorize awards of attorneys’ fees in CAA citizen suits. Part III summarizes and scrutinizes the judge-made rule that a successful citizen plaintiff is not entitled to attorneys’ fees absent a separate showing that the public interest has been served. Finally, Part IV proposes that the separate public interest requirement be abolished in favor of awarding attorneys’ fees whenever a citizen plaintiff achieves some degree of success on the merits of a CAA citizen suit.

I. Citizen Suits and the Clean Air Act

A. Environmental Citizen Suits

In the 1960s, citizens began seeking legal procedures to give them a role in environmental regulation.\footnote{See \textit{Daniel Riesel, Environmental Enforcement: Civil and Criminal} § 15.02[1] (2007).} Specifically, citizens called for the statutory expansion of standing in environmental lawsuits.\footnote{Id.} As a result of this movement, several states enacted citizen-suit statutes.\footnote{Id.} These state statutes provided a model on which other citizen-suit statutes would be based.\footnote{Id.}

parties. Typically, citizen-suit provisions confer broad authority to “any person” to bring suit on his own behalf against a private or government entity alleged to have violated the substantive provisions of the underlying statute, and may also authorize suits against a government agency charged with the implementation of the statute. Citizen-suit provisions also authorize the reviewing court to award attorneys’ fees to citizen plaintiffs, in some cases where they prevail or substantially prevail, and in other cases whenever the court deems it appropriate.

B. The Clean Air Act

Congress’s first attempt at addressing air pollution was a measured one: it sought to encourage and assist state and local governments in combating the problem while still adhering to the notion that the prevention and control of air pollution at its source was not the primary responsibility of the federal government. Accordingly, in 1963, Congress passed the CAA. The Act required the Department of Health, Education, and Welfare (HEW) to provide scientific information to the states on the effects of various air pollutants, but did not require states to implement abatement programs based on these data. The 1963 Act also empowered the Secretary of the HEW to investigate interstate pollution sources, but only state and local governments could undertake any recommended abatement measures. Finally, the 1963 Act vested in the Secretary of the HEW the power to take direct legal action to abate air pollution in instances where pollution endangered

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13 Riesel, supra note 8, § 15.02[2].
14 Id.
15 See, e.g., 42 U.S.C. § 7607.
16 See, e.g., Clean Water Act § 1365(d). The Clean Water Act authorizes the reviewing court to award attorneys’ fees in a citizen suit to “any prevailing or substantially prevailing party.” Id.
17 Riesel, supra note 8, § 15.02[2]; see, e.g., 42 U.S.C. §§ 7604(d), 7607(f). The CAA authorizes the reviewing court to award attorneys’ fees whenever it “determines that such award is appropriate.” 42 U.S.C. §§ 7604(d), 7607(f).
20 The HEW is now called the Department of Health and Human Services.
22 Id.
the public health or welfare. These powers so diffused responsibility that no effective enforcement efforts were ever brought.

Thus the 1963 CAA yielded little progress, largely because it relied almost exclusively on voluntary state efforts to control air pollution. Subsequent acts and amendments to the CAA enlarged the federal government’s role in combating air pollution. But these legislative efforts also proved ineffective. Part of their failure was attributable to the difficult scientific and institutional problems that federal and state agencies faced; preparing implementation plans and enforcing air pollution standards were enormous tasks.

In response, Congress drastically overhauled the CAA through the enactment of the CAA Amendments of 1970. These Amendments essentially federalized the field of air pollution prevention. The avowed purpose of the Amendments was to “speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.” The CAA charged the EPA with effectuating this broad legislative mandate, tasking it with the issuance and enforcement of concrete rules and regulations to combat air pollution.

Congress amended the CAA in 1977 and again in 1990. As it now stands, the CAA provides the basic framework for regulation of air pollution in the United States. The Act uses four basic techniques to achieve this end: it creates the broad, basic regulatory system for control of the most commonly-produced and significant air pollutants by stationary (as opposed to mobile) sources; it sets specific, strict congressional standards for across-the-board rollbacks of automobile and

23 Id.
24 Id.
27 Plater et al., supra note 25, at 442.
28 Anderson, Mandelker & Tarlock, supra note 21, at 159.
30 Anderson, Mandelker & Tarlock, supra note 21, at 159.
32 See Semmel, supra note 2, at 418.
34 Anderson, Mandelker & Tarlock, supra note 21, at 162.
truck tailpipe emissions; it establishes a system of “best-technology” emissions requirements; and it implements a technology-based strategy for regulating hazardous air pollutants.\(^{35}\)

C. Citizen Suits and the CAA

The CAA represents a vision of administrative law that encourages citizen participation in the enforcement and implementation of public policy.\(^{36}\) Congress enacted the CAA Amendments of 1970 in part because it had lost faith in the ability of government to enforce and comply with the substantive provisions of the CAA.\(^{37}\) Furthermore, Congress had lost confidence in the EPA’s ability to implement air pollution policy on behalf of the public.\(^{38}\) Accordingly, the CAA Amendments of 1970 included two provisions that authorize public involvement in CAA enforcement and implementation.\(^{39}\)

Section 304 permits “any person” to “commence a civil action on his own behalf.”\(^{40}\) Specifically, a citizen plaintiff can initiate an ac-

\(^{35}\) Plater et al., \textit{supra} note 25, at 442.
\(^{36}\) Semmel, \textit{supra} note 2, at 399.
\(^{38}\) Semmel, \textit{supra} note 2, at 399.
\(^{39}\) \textit{Id.} at 399–400.
\(^{40}\) 42 U.S.C. § 7604(a) (2000). Section 304 states in pertinent part:

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf — (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter (or (B) an order issued by the Administrator or a State with respect to such a standard or limitation), (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2)
tion against any person alleged to be in violation of an emissions standard or limitation, or challenge an order issued by the EPA Administrator or a state with respect to such a standard or limitation. A suit can also be filed against the EPA Administrator for failure to perform a nondiscretionary act. Finally, a suit can be brought against a person who builds or purposes to build a “new or modified major emitting facility” without a permit or in violation of the conditions of a permit.

Section 307 authorizes private citizens to initiate review of certain EPA actions under specifically enumerated provisions of the CAA.

of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

Id.

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title, (B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title, (C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title, (D) the promulgation or revision of any requirement for solid waste combustion under section 7429 of this title, (E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title, (F) the promulgation or revision of any aircraft emission standard under section 7571 of this title, (G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition), (H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order), (I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection), (J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility), (K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title, (L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title, (M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warran-
Additionally, section 307 permits citizen suits challenging “any other nationally applicable regulations promulgated, or final action” taken by the EPA under the CAA.\textsuperscript{45} Finally, citizens can initiate judicial review of certain EPA actions under other specifically enumerated provisions of the Act and of “any other final action . . . which is locally or regionally applicable.”\textsuperscript{46}

D. Authorization of CAA Citizen Suits: Legislative Intent

1. Section 304

Congress authorized section 304 suits to bolster CAA enforcement.\textsuperscript{47} Congress recognized that government necessarily lacks the manpower, techniques, and awareness to combat air pollution on its own in an efficient, effective manner.\textsuperscript{48} Indeed, governmental agencies may fail to act or themselves might be polluters.\textsuperscript{49} Congress viewed citizens as useful instruments in identifying CAA violations and in bringing

\textsuperscript{45} 42 U.S.C. § 7607(b)(1).

\textsuperscript{46} Id.


them to the attention of the courts and enforcement agencies. Accordingly, citizen suits would motivate governmental agencies to act on their nondiscretionary duties to bring enforcement and abatement proceedings.

There was, however, significant disagreement in Congress over the degree to which section 304 should broaden standing. Some advocated a provision that conferred virtually unlimited standing to ensure that private citizens could make meaningful contributions to the enforcement and implementation of air pollution policy. Congress intended that citizens not be “treated as nuisances or troublemakers but rather as welcome participants in the vindication of the environmental interests,” and thus broad standing was needed to effectuate this goal. Others argued for strict limitations to standing in order to prevent a “multiplicity” of frivolous, harassing lawsuits that would frustrate enforcement and implementation of the Act and overburden the courts. Many in Congress feared that private citizens would challenge virtually every agency decision in executing the numerous complex duties and responsibilities imposed by the CAA.

In the end, the final version of section 304 effected a compromise between the two sides. The provision broadens standing by permitting “any person” to bring a citizen suit and by expressly removing jurisdictional barriers to citizens’ suits, such as amount in controversy and diversity of citizenship. Section 304 circumscribes standing by limiting citizen suits to instances where the government or an alleged polluter has failed or refused to comply with the CAA’s substantive provisions. Thus, section 304 suits can be brought only for viola-

52 Id., as reprinted in Train, 510 F.2d app. B at 727; Riesel, supra note 8, § 15.02[1].
53 Riesel, supra note 8, § 15.02[1].
55 See id.
57 Id. at 726–27.
58 Riesel, supra note 8, § 15.02[1].
60 42 U.S.C. § 7604(b); Carey, 535 F.2d at 173. Absent an environmental emergency, a citizen must provide sixty days’ notice to the Administrator, to the state in which the violation occurs, and to the alleged violator before initiating a suit. 42 U.S.C. § 7604(b). This notice period gives the administrative enforcement office an opportunity to act on the alleged violation. S. Rep. No. 91-1196, at 436–39 (1970), as reprinted in Train, 510 F.2d app. B at 724. Moreover, if the Administrator or state has “commenced and is diligently prose-
tions of specific provisions of the Act or of specific provisions of the
applicable implementation plan.\textsuperscript{61}

Congress believed that CAA enforcement was not a technical matter beyond the competence of the courts.\textsuperscript{62} Section 304 vested in the courts jurisdiction to enforce emission standards, limitations, or orders; to apply appropriate civil penalties; and to compel the EPA Administrator to perform nondiscretionary duties.\textsuperscript{63} In a section 304 suit, then, the court would not be asked to substitute its own definitions and standards for those of the EPA.\textsuperscript{64} Instead, the standards would be the same whether enforcement were sought through administrative or citizen enforcement.\textsuperscript{65} Thus, citizens who bring actions under section 304 must meet established, objective evidentiary standards, thereby eliminating the need for the court to reanalyze technological or other considerations at the enforcement stage.\textsuperscript{66} Furthermore, Congress's view was that CAA rules and regulations contained sufficiently clear and specific guidelines to enable federal judges to direct compliance, especially since they could obtain necessary expert advice and assistance to help guide them.\textsuperscript{67}

2. Section 307

Congress authorized section 307 suits to aid in CAA implementation.\textsuperscript{68} The CAA tasked the EPA with issuing rules and regulations to effectuate the broad policy goals of the Act.\textsuperscript{69} Congress recognized the
cutting a civil action in a court of the United States or a State to require compliance,” the citizen suit cannot be heard. 42 U.S.C. § 7604(b)(1)(B). That said, any person may intervene in such a civil action being prosecuted by the government as a matter of right. 42 U.S.C. § 7604(b)(1)(B).

\textsuperscript{61} Wilder v. Thomas, 854 F.2d 605, 613 (2nd Cir. 1988).


\textsuperscript{63} 42 U.S.C. § 7604(a).


\textsuperscript{65} Id. at 724.

\textsuperscript{66} Id. at 723.

\textsuperscript{67} Id. at 724.

\textsuperscript{68} Id. at 723.

\textsuperscript{69} See Semmel, supra note 2, at 418. For instance, the EPA is required to publish a list of specific air pollutants which, in the Administrator’s judgment, contribute to air pollution and endanger the public health or welfare. 42 U.S.C. § 7408(a)(1)(A) (2000). Addition-
unprecedented scale and complexity of the CAA, but also desired its speedy implementation and administration.\textsuperscript{70} By authorizing suits challenging EPA decisionmaking, Congress sought to enlist citizen participation in the development of identifiable standards of air quality and in the formulation of control measures to implement such standards.\textsuperscript{71} Congress saw citizens as useful mechanisms for educating the court about complex regulatory issues.\textsuperscript{72} Indeed, citizens can bring to light certain factual information that other litigants might be unwilling or unable to raise.\textsuperscript{73} Citizens may also raise arguments that cause the court to examine or reexamine a legal issue.\textsuperscript{74} Finally, citizen suits may reveal inadequacies in existing air pollution policy.\textsuperscript{75}

Like section 304, section 307 embodies a compromise: it confers broad standing while also circumscribing it to prevent undue interference with government action. Section 307 guarantees broad rights of participation at all stages of the regulatory process to virtually any person.\textsuperscript{76} Moreover, through section 307, participants are assured access to a regulatory docket of relevant studies, comments, and agency memoranda that may affect EPA decisionmaking.\textsuperscript{77}

To limit standing, only final EPA actions are ripe for judicial review.\textsuperscript{78} In so doing, Congress sought to limit section 307 judicial review to situations where the EPA’s deliberative process has been sufficiently final to demand compliance with its announced position.\textsuperscript{79} To intervene where the Agency’s deliberative process is merely tentative may deny the EPA an opportunity to correct its own mistakes or to apply its

\begin{footnotes}
\item[	extsuperscript{70}] Natural Res. Def. Council, Inc. v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973).
\item[	extsuperscript{72}] See Semmel, supra note 2, at 418.
\item[	extsuperscript{73}] Natural Res. Def. Council, Inc. v. EPA, 512 F.2d at 1358 (noting that, by permitting public interest groups as well as businesses to challenge EPA actions, section 307 opens “the Administrator’s actions to judicial scrutiny from a point of view widely divergent from that represented by the regulated interests”); Semmel, supra note 2, at 416.
\item[	extsuperscript{74}] Semmel, supra note 2, at 416.
\item[	extsuperscript{75}] Id. at 416–17.
\item[	extsuperscript{76}] Anderson, Mandelker & Tarlock, supra note 21, at 171.
\item[	extsuperscript{77}] Id.
\item[	extsuperscript{78}] See Natural Res. Def. Council, Inc. v. EPA, 512 F.2d at 1356.
\item[	extsuperscript{79}] See Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (quoting Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986)).
\end{footnotes}
expertise. Moreover, such intervention leads to piecemeal review that is inefficient and may prove unnecessary upon completion of the administrative process.

Adjudication of a section 307 suit imposes unique burdens on the reviewing court. In a section 304 suit, the court’s role is limited to determining whether a governmental entity or private party has violated the substantive provisions of the CAA. In a section 307 suit, however, the court must determine whether the EPA had the proper evidence and reasons for reaching a particular policy decision. Thus, the court must evaluate the highly technical background information of the case and, in reaching its decision, weigh competing policy factors and conflicting public interests.

II. Attorneys’ Fees

A. The “American Rule”

Under the traditional “American Rule,” a prevailing litigant ordinarily is not entitled to collect attorneys’ fees from the losing party. The underlying justification for the “American Rule” is that because the outcome of litigation is uncertain, one should not be penalized merely for defending or prosecuting a lawsuit, and that many might be unjustly discouraged from initiating legitimate lawsuits if the penalty for losing included the fees of their opponents’ counsel. Moreover, the time, expense, and difficulties of proof that arise in litigating the reasonableness of attorneys’ fees are too burdensome for judicial administration.

There are two common law exceptions to the “American Rule.” One is where the court awards attorneys’ fees to a prevailing party as a punitive measure upon finding that the losing party acted in bad

80 See id. (quoting Fed. Trade Comm’n v. Standard Oil Co. of Cal., 449 U.S. 232, 242 (1990)).
81 See id.
82 See Semmel, supra note 2, at 415.
84 Semmel, supra note 2, at 415.
85 See id. at 415, 418.
88 Id.
89 Id.
90 Semmel, supra note 2, at 403.
faith.\textsuperscript{91} The other is the “common benefit” exception, where the court may spread the cost of litigation to those persons benefiting from it.\textsuperscript{92}

More often, however, exceptions to the “American Rule” are found in fee-shifting provisions of federal statutes.\textsuperscript{93} These provisions provide express authority for courts to require a party to pay the attorneys’ fees of another party.\textsuperscript{94} For most fee-shifting statutes, Congress relies heavily on private efforts to aid in the enforcement and implementation of public policy.\textsuperscript{95} Congress thus allows awards of attorneys’ fees to encourage citizen participation in the supervision and regulation of these public-policy areas.\textsuperscript{96}

B. Awards of Attorneys’ Fees Under the CAA: Legislative Intent

Although neither section 304 nor section 307 authorizes the court to award damages to citizen plaintiffs,\textsuperscript{97} both sections contain provisions that authorize the court to award attorneys’ fees “whenever . . . appropriate.”\textsuperscript{98} The CAA Amendments of 1970 address attorneys’ fees in Section 304(d).\textsuperscript{99} Section 307(f)—added to the Act as part of the CAA Amendments of 1977—is section 307’s fee-shifting provision.\textsuperscript{100}

Congress did not authorize awards of attorneys’ fees to reward plaintiffs for prevailing on the merits of a citizen suit.\textsuperscript{101} Rather, Congress included the attorneys’ fees provisions to achieve two important

\begin{itemize}
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Riesel, supra note 8, § 15.01.
  \item \textsuperscript{95} See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 263 (1975).
  \item \textsuperscript{96} See id.
  \item \textsuperscript{97} See 42 U.S.C. §§ 7604(d), 7607(f). In a section 304 suit the reviewing court may levy civil fines. But any penalties are generally put into a special fund to finance air compliance and enforcement activities. Id. § 7604(g). The CAA also gives the courts limited discretion to direct up to $100,000 in penalties arising from a citizen suit to be spent on beneficial mitigation projects after obtaining the view of the Administrator. Id.
  \item \textsuperscript{98} Id. §§ 7604(d), 7607(f). Apparently as a result of congressional oversight, the 1970 CAA Amendments authorized awards of attorneys’ fees under section 304 but not under section 307. Semmel, supra note 2, at 404 n.32. The 1977 CAA Amendments corrected this mistake by including section 307(f), which authorizes awards of attorneys’ fees for section 307 citizen suits. 42 U.S.C. § 7607(f).
  \item \textsuperscript{99} See 42 U.S.C. § 7604(d).
  \item \textsuperscript{100} See id. § 7607(f).
  \item \textsuperscript{101} Semmel, supra note 2, at 418.
\end{itemize}
goals. First, Congress sought to encourage citizens to bring meritorious suits; second, Congress determined the risk that the court would order a citizen plaintiff to bear a defendant’s costs would discourage the filing of frivolous or harassing suits.

Congress viewed the authorization of attorneys’ fees as critical to ensuring robust citizen participation in CAA enforcement and implementation. Absent the possibility of attorneys’ fees, many legitimate section 304 enforcement suits would not be brought because, for many plaintiffs, the certainty of paying attorneys’ fees would outweigh the gain those plaintiffs would reap if they prevailed. Moreover, many litigants cannot be expected to participate in section 307 suits without the prospect of attorneys’ fees. Such fees offer the promise of mitigating the high costs of suits involving complex statutory questions.

In the 1970 Senate Report, Congress made clear its intent that attorneys’ fees be awarded under section 304 in a manner that both encouraged meritorious enforcement suits and discouraged frivolous ones. The Report states that, because citizens could not be awarded damages, “only in the case where there is a crying need for action will action in fact be likely. In such cases . . . that action must be in the public interest.” The Report further states that citizens who brought “legitimate actions” would be “performing a public service and in such instances courts should award costs of litigation.” At the same time, Congress made clear that the court could award attorneys’ fees to defendants whenever it “determines that such action is in the public interest.” Thus, the court could force a citizen plaintiff to bear the defendant’s attorneys' fees where “litigation was obviously frivolous or harassing.” Congress’s belief was that awarding fees in

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103 Id. at 1337–38; H.R. Rep. No. 95–294 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1416 (“[T]he purposes of the authority to award fees are . . . not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act . . . .”); see Metro. Wash. Coal. for Clean Air v. Dist. of Columbia, 639 F.2d 802, 804 (D.C. Cir. 1981) (“The attorneys’ fee feature was offered as an inducement to citizen-suits, which Congress deemed necessary . . . .”).
104 See Metro. Wash. Coal. for Clean Air, 639 F.2d at 804.
105 See Natural Res. Def. Council, Inc., 484 F.2d at 1337.
107 See id.
109 Id. at 729.
110 Id. 725.
111 Id.
112 Id.
this manner would have the effect of “discouraging abuse of [section 304], while at the same time encouraging the quality of the actions that will be brought.”\textsuperscript{113}

Congress likely intended courts to award fees under section 307(f) in the same manner.\textsuperscript{114} When Congress amended section 307 in 1977 to authorize awards of attorneys’ fees, it adopted the same fee-shifting language as section 304.\textsuperscript{115} Furthermore, the 1977 Senate Report observed that “[t]he purpose of the amendment to section 307 is to carry out the intent of the committee in 1970 that a court may, in its discretion, award costs of litigation to a party bringing a suit under section 307 of the Clean Air Act.”\textsuperscript{116} The 1977 House Report also notes:

In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court’s discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the “prevailing party.”\textsuperscript{117}

That section 304(d) and section 307(f) should be given the same effect is intuitive, because Congress’s goal of combating air pollution is no less frustrated by improper implementation of the CAA than it is by lax enforcement.\textsuperscript{118}

III. Judicial Interpretation of the CAA’s Attorneys’ Fees Provisions

A. A Plain Language Reading of “Appropriate”

Both section 304(d) and section 307(f) give the court discretion to award attorneys’ fees “whenever . . . appropriate.”\textsuperscript{119} Courts have had difficulty, however, in drawing any guidance from these sections’ use of

\textsuperscript{113} Id.
\textsuperscript{114} Ala. Power Co. v. Gorsuch, 672 F.2d 1, 14 (D.C. Cir. 1982) (Wilkey, J., dissenting).
\textsuperscript{118} Natural Res. Def. Council, Inc. v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973).
\textsuperscript{119} 42 U.S.C. §§ 7604(d), 7607(f).
the word “appropriate.” The word “appropriate” is necessarily ambiguous, for its meaning is vague and subjective. As such, the scope of a reviewing court’s fee-shifting discretion is not self-evident by reference to the statutory text of the attorneys’ fees provisions. Consequently, a variety of interpretations have emerged from case law regarding when it is and is not appropriate to award attorneys’ fees.

B. Some Success on the Merits

Soon after the enactment of the CAA Amendments of 1970, several courts adjudicating CAA citizen suits implied that prevailing on the merits was a sufficient condition for an award of attorneys’ fees to be “appropriate.” Some courts went further, however, holding that whether a citizen plaintiff achieved some success on the merits of a citizen suit was not a necessary condition for such an award. In Metropolitan Washington Coalition for Clean Air v. District of Columbia, for example, the Court of Appeals for the District of Columbia interpreted section 304(d) as authorizing awards of attorneys’ fees to a citizen plaintiff where the underlying suit was “of the type that Congress intended to encourage when it enacted the citizen-suit provision.” Similarly, in Sierra Club v. Gorsuch, the Court of Appeals for the District of Columbia interpreted section 307(f) as authorizing awards of att-

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120 See Ruckelshaus, 463 U.S. at 683.
123 Id. at 14; see Natural Res. Def. Council, Inc., 484 F.2d at 1338 (holding that an award of attorneys’ fees was appropriate largely because plaintiffs were successful on the merits in several respects); Del. Citizens for Clean Air, Inc. v. Dist. of Columbia, 62 F.R.D. 353, 355 (D. Del. 1974), aff’d, 510 F.2d 969 (3rd Cir. 1974) (noting that, in determining whether to award attorneys’ fees, “success or failure must be given substantial weight”).
125 639 F.2d 802, 804 (D.C. Cir. 1981). In this case, a citizen suit was brought to enjoin the continued operation of a large solid waste incinerator that was operating in violation of an EPA approved implementation plan. Id. at 803. While the suit was being litigated, the EPA revised its implementation plan so as to permit the continued operation of the incinerator. Id. The case was subsequently dismissed as moot, and the court denied plaintiff’s request for attorneys’ fees because plaintiff had not achieved any success on the merits. Id. On appeal, the D.C. Circuit examined the legislative history of section 304 and found that Congress had authorized section 304 suits to enable citizen participation in CAA enforcement. Id. at 804. The court thus reasoned that an award of attorneys’ fees is appropriate where the underlying suit was “a desirable effort to achieve an unfulfilled objective of the Act.” Id.
torneys’ fees to a citizen plaintiff who, by bringing suit, has contributed substantially to the goals of the CAA.126

In Ruckelshaus v. Sierra Club, however, the Supreme Court reversed Gorsuch, and held that, absent some degree of success on the merits, it is never “appropriate” to award attorneys’ fees to a CAA citizen plaintiff under either section 304 or section 307.127 The Court reasoned that the “American Rule” largely prohibits awarding attorneys’ fees to a party, and thus only a clear showing that Congress intended a departure from the “American Rule” would justify awarding attorneys’ fees to wholly unsuccessful plaintiffs.128 The Court found that Congress’s decision to reject the “prevailing party” standard in favor of the broader “whenever . . . appropriate” standard showed clear intent to broaden the class of parties eligible for fee awards from prevailing parties to partially prevailing parties.129 That said, the Court found no evidence that Congress intended the class of parties eligible for such awards to be so broad as to include parties who achieved no success whatsoever.130 While the Court’s holding applied to section 307(f) of the CAA, the Court noted that “the interpretation of ‘appropriate’ in section 307(f) controls construction of the term” in section 304(d) as well as in all other statutes that contain the “whenever . . . appropriate” standard.131

126 672 F.2d 33, 41 (D.C. Cir. 1982), cert. granted, 459 U.S. 942 (1982), rev’d, Ruckelshaus, 463 U.S. 680 (1983), remanded to 716 F.2d 915 (D.C. Cir. 1983). In this case, the Sierra Club and the Environmental Defense Fund unsuccessfully challenged EPA regulations promulgated pursuant to the CAA. Id. at 34. Nevertheless, plaintiffs moved for an award of attorneys’ fees. Id. The D.C. Circuit made clear that whether an award of attorneys’ fees was “appropriate” turned heavily on whether the citizen plaintiff had achieved some success on the merits. See id. at 35. But of equal concern was whether the citizen suit contributed to the goals of the CAA. Id. at 38. The court found it appropriate to award fees to the citizen plaintiffs because they had contributed to the goals of the CAA by addressing important, complex, and novel issues of statutory interpretation; by substantially assisting in the resolution of the issues in a way that was not duplicative of the efforts of other parties; and by putting forth written and oral presentations of exceptional caliber. Id. at 39.
128 Id. at 685.
129 Id. at 689–90.
130 See id. at 690.
131 Id. at 681 n.1.
C. The Separate Public Interest Requirement

1. In General

A majority of courts hold that, in addition to achieving some success on the merits, a citizen plaintiff must also make a separate showing of serving the public interest before an award of attorneys’ fees is “appropriate.” To be sure, the original version of section 304(d) actually authorized the reviewing court to award attorneys’ fees whenever it determined that such award was “in the public interest.” In fact, it was this version of section 304—and not the final version—that was reported on in the 1970 Senate Report. However, the “public interest” language was expressly struck from section 304(d) in 1970 in favor of the “whenever . . . appropriate” language. The 1977 House Report also mentions the public interest factor. Still, nowhere in the statutory text or legislative history of the CAA is the term “public interest” defined.

2. Judicial Interpretation and Application of the Separate Public Interest Requirement

While the separate public interest requirement has little basis in the statutory text or legislative history of the CAA, courts routinely employ it to determine whether it is “appropriate” to award attorneys’ fees to a partially or wholly successful citizen plaintiff. Not surprisingly, several amorphous standards and methods have emerged from case law for determining whether a partially or wholly successful citizen plaintiff has served the public interest. One such standard focuses on the outcome of the litigation, awarding attorneys’ fees where the citizen suit

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132 See, e.g., *Pound II*, 498 F.3d 1089, 1102 (10th Cir. 2007); W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996); Sierra Club v. EPA, 769 F.2d 796, 799–800 (D.C. Cir. 1985).
133 *Id.* at 12 n.25.
134 *Id.* at 18.
135 *Id.* at 18.
136 See *H. R. Rep. No. 95-294*, at 337 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1416 (“[T]he purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest.” (emphasis added)).
137 *Ala. Power Co.*, 672 F.2d at 18 (Wilkey, J., dissenting).
138 See, e.g., *Pound II*, 498 F.3d 1089, 1102 (10th Cir. 2007); W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996); Sierra Club v. EPA, 769 F.2d 796, 799–800 (D.C. Cir. 1985).
assisted in the enforcement or implementation of the CAA. This standard generally prohibits awarding attorneys’ fees where the benefits conferred in the litigation were limited to the citizen plaintiff in the underlying suit.

For example, under section 304, litigation compelling a government agency to exercise its nondiscretionary duties and successfully enforcing a provision of the CAA in a way that minimizes the amount of pollution in the atmosphere has been held to meet this standard. Under section 307, litigation that aided in interpreting important, complex, or novel issues related to the CAA has been held to have served the public interest.

Another standard for determining whether a partially or wholly successful citizen plaintiff has served the public interest focuses more on whether the citizen suit was the type of suit that Congress sought to encourage by authorizing awards of attorneys’ fees. This standard focuses less on the effect of the litigation and more on the nature of the suit itself, the type of litigant filing suit, and the ostensible motives for doing so.

For instance, some courts have held that it is not appropriate to award attorneys’ fees to successful citizen plaintiffs that are not pro-environment, that is, industry, trade association, or corporate citizen plaintiffs. Neither section 304 nor section 307 explicitly denies awards of attorneys’ fees to such groups. But courts that limit awards of attorneys’ fees to pro-environment citizen plaintiffs have stated or implied that Congress authorized awards of attorneys’ fees to encourage litigation by “watchdog” or public-interest groups whose involve-

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139 See, e.g., Ala. Power Co., 672 F.2d at 3 (noting that, in determining whether to award attorneys’ fees, the “dominant consideration” is not whether the party has prevailed but rather whether the litigation “has served the public interest by assisting the interpretation or implementation of the Clean Air Act”).

140 See id.

141 See Pound II, 498 F.3d 1089, 1102.

142 See generally Envtl. Def. Fund, Inc. v. EPA, 672 F.2d 42 (D.C. Cir. 1982) (concerning the citizen suit provision of TSCA, whose fee-shifting language is nearly identical to that of the CAA). The court found that an award of attorneys’ fees was appropriate because the citizen plaintiff, by filing suit, had brought to bear “critically important and difficult issues of first impression, and that the outcome of the litigation greatly served the public interest . . . .” Id. at 55.

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

144 See id.


ment in such litigation was motivated by altruism and public spirit.147 Awarding attorneys’ fees to pro-environment citizen plaintiffs is needed because, absent the prospect of an award of attorneys’ fees, these plaintiffs may not have sufficient financial resources to file suit.148

A circuit split exists regarding whether it is appropriate to award attorneys’ fees where a citizen plaintiff has brought suit for financial gain rather than to further the goals of the CAA.149 In Western States Petroleum Ass’n v. EPA, for instance, the Ninth Circuit declined to award attorneys’ fees to a citizen plaintiff who prevailed on the merits of a section 307 suit because plaintiff was a financially able, nongovernmental body who filed suit to advance its own economic interests.150 In that case, the court cited the legislative history of the Toxic Substances Control Act (TSCA)151—whose citizen-suit provision uses the same fee-shifting language as the CAA152—as the clearest expression of Congress’s intent in authorizing attorneys’ fees in environmental citizen-suit statutes.153 During the debate on TSCA’s fee-shifting provision, Senator Magnuson stated:

It is not the intention of these provisions to provide an award for an individual or group if that individual or a group may stand to gain significant economic benefits through participation in the proceeding . . . . It is not intended that the provisions support participation of persons, including corporations or trade associations, that could otherwise afford to participate . . . . Whether or not the person’s resources are sufficient to enable participation would include consideration of . . .

147 See Fla. Power & Light Co. v. Costle, 683 F.2d 941, 942 (5th Cir. 1982).
148 See id. at 942–43.
149 Compare W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996), and Ala. Power Co. v. Gorsuch, 672 F.2d 1, 4 (D.C. Cir. 1982), with Pound II, 498 F.3d at 1102 (10th Cir. 2007), and Fla. Power & Light Co., 683 F.2d at 942.
150 87 F.3d at 286.
152 Compare id. § 2618(d) (“The decision of the court in an action commenced under subsection (a) of this section . . . . may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.”), with 42 U.S.C. § 7607(f) (“In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.”).
153 W. States Petroleum Ass’n, 87 F.3d at 286.
likelihood that the person would seek to participate in the proceedings whether or not compensation was available.\footnote{112 Cong. Rec. 32,855 (1976) (statement of Sen. Magnuson), quoted in W. States Petroleum Ass’n, 87 F.3d at 286.}

Based on these remarks, the court concluded that Congress neither intended to subsidize all CAA litigation nor contemplated that costs and fees would be awarded to large, solvent corporations or trade associations that, out of their own substantial economic interests, would have litigated anyway.\footnote{W. States Petroleum Ass’n, 87 F.3d at 286.}

Other courts have rejected the notion that financial solvency and economic interest are bases for declining attorneys’ fees to citizen plaintiffs who partially or wholly prevail.\footnote{See, e.g., Fla. Light & Power Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982).} In \textit{Florida Power & Light Co. v. Costle}, for example, the Fifth Circuit reasoned that the statutory text and legislative history of the CAA do not support the notion that financial solvency and economic interest should disqualify a citizen plaintiff from an award of attorneys’ fees.\footnote{Id.} In that case, a financially solvent corporation filed a section 307 suit challenging an EPA action that required Florida to incorporate a state-imposed two-year limitation on relief into a state implementation plan.\footnote{Id.} The court ruled in favor of the citizen plaintiff, holding that the EPA action constituted an abuse of discretion, and plaintiff moved for an award of attorneys’ fees.\footnote{Id. at 942.} The court found that the citizen plaintiff had served the public interest by helping to maintain “the balance of state and federal responsibilities that undergird the efficacy of the Clean Air Act.”\footnote{Id. (quoting Fla. Power & Light v. Costle, 650 F.2d 579, 589 (5th Cir. 1981)).} The EPA, however, argued that Congress did not intend to award attorneys’ fees to financially solvent citizen plaintiffs who file suit out of an underlying economic motivation.\footnote{Id.} The court, noting that the EPA’s argument was persuasive as a matter of public policy, nonetheless rejected it on grounds that it was not supported by the CAA’s statutory language or legislative history.\footnote{Fla. Light & Power Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982).}

Furthermore, in \textit{Pound v. Airosol Co. (Pound II)}, the Tenth Circuit rejected using financial solvency and economic motive as bases for declining to award attorneys’ fees—reasoning that doing so would consti-
tute bad public policy. In that case, a financially solvent company prevailed on the merits of a section 304 citizen suit against a business competitor that was violating the CAA’s ban on certain aerosols. The lower court, applying the public interest requirement, held that the citizen plaintiff was not entitled to attorneys’ fees because plaintiff had brought suit out of a desire to remove a business competitor from the market and not out of concern for the environment. The Tenth Circuit reversed, reasoning that the citizen plaintiff had served the public interest by minimizing the amount of pollution in the atmosphere and argued that the lower court’s interpretation of section 304(d) would weaken CAA enforcement. The court noted that “competitors are most likely to have a substantial financial interest in ensuring that their peers are CAA compliant, and they are the most informed regarding products offered and sold by their peers.” Implicit in the court’s reasoning is the notion that without the prospect of an award of attorneys’ fees, many legitimate citizen suits against ongoing polluters would not be brought.

3. Judicial Resistance to the Separate Public Interest Requirement

Some judges have sought to abandon the separate public interest requirement entirely. In Pound, Judge Hartz, writing in concurrence, argued that the separate public interest requirement was a superfluity that ought to be discarded. Judge Hartz advocated following the rule set out by the Supreme Court in Hensley v. Eckerhart, which is that a prevailing party should ordinarily recover attorneys’ fees unless the citizen suit was vexatious, frivolous, or brought to harass or embarrass the defendant. Hensley involved the Civil Rights Attorney’s Fees Awards Act of 1976, whose citizen-suit fee-shifting language is nearly identical to that of the CAA. Judge Hartz argued that the at-
attorneys’ fees provisions of the CAA and the Civil Rights Attorney’s Fees Awards Act should be interpreted in a similar manner because Congress enacted them for the same reason: to promote citizen enforcement of important federal policies.173

Similarly, in Alabama Power Co. v. Gorsuch, Judge Wilkey—in a dissenting opinion—argued that the legislative history of the CAA requires that a prevailing citizen litigant be awarded attorneys’ fees.174 Citing the 1970 Senate Report, which urged judges to award fees for those who bring “legitimate actions,” Judge Wilkey argued that a party who prevails on the merits of a non-frivolous citizen suit has necessarily brought a legitimate action and thus is entitled to attorneys’ fees.175 Moreover, Congress’s decision to adopt section 304(d)’s language for section 307(f) evidenced its intent to award attorneys’ fees to prevailing plaintiffs.176 Furthermore, the 1977 House Report makes clear that the “committee did not intend that the court’s discretion to award fees . . . should be restricted to cases in which the party seeking fees was the ‘prevailing party.’”177 He argued that while it is unclear whether wholly non-prevailing citizen plaintiffs can recover attorneys’ fees, it is clear from this language that Congress intended to award attorneys’ fees to partially or wholly successful citizen plaintiffs.178

IV. Analysis

No separate public interest showing should be required of a plaintiff who seeks an award of attorneys’ fees after partially or wholly prevailing on the merits of a CAA citizen suit.179 Such a requirement is unrelated to the statute’s text or to its legislative history.180 Moreover, there is no judicially cognizable standard for determining whether an underlying citizen suit served the public interest, causing

173 *Pound II*, 498 F.3d at 1103 (Hartz, J., concurring).
179 *See Pound II*, 498 F.3d 1089, 1103 (10th Cir. 2007) (Hartz, J., concurring).
180 Fla. Power & Light Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982).
courts to create their own standards out of thin air. Additionally, the separate public interest requirement should be rejected because it has a chilling effect on citizen participation in CAA enforcement and implementation. In lieu of the separate public interest requirement, courts should simply award attorneys’ fees whenever a citizen plaintiff achieves some degree of success on the merits of a CAA citizen suit.

A. The Statutory Text and Legislative History of the CAA Do Not Support the Separate Public Interest Requirement

The requirement that a partially or wholly successful citizen plaintiff make a separate public interest showing before an award of attorneys’ fees is “appropriate” has no basis in the statutory text or legislative history of the CAA. While the original version of section 304(d) did embody the public interest factor, Congress expressly struck this phrase from the final version in favor of the “appropriate” language. Section 307(f) adopted identical language. This, of course, does not conclusively evidence that Congress did not intend for a separate public interest requirement, but it certainly does not evidence that it did. And while the 1970 Senate Report and 1977 House Report do mention serving the “public interest” on a handful of occasions, they do so primarily to highlight the fact that attorneys’ fees can be awarded both to citizen plaintiffs and to citizen defendants.

Still, Congress’s decision to authorize awards of attorneys’ fees “whenever . . . appropriate” arguably evidences a Congressional endorsement of the separate public interest requirement. After all, this language is unlike the fee-shifting language of other environmental statutes, which authorize the court to award attorneys’ fees to parties who “prevail” or “substantially prevail.” Had Congress intended prevailing on the merits to be a sufficient condition for an award of attorneys’ fees it plainly would have said so in the statute.

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181 Ala. Power Co. v. Gorsuch, 672 F.2d 1, 24 (D.C. Cir. 1982).
182 See Pound II, 498 F.3d at 1102-03; Riesel, supra note 8, § 15.01.
183 See Pound II, 498 F.3d at 1103 (Hartz, J., concurring).
184 See Fla. Power & Light Co., 683 F.2d at 943.
185 Ala. Power Co., 672 F.2d at 12 n.25, 18 n.54 (Wilkey, J., dissenting).
187 See Ala. Power Co., 672 F.2d at 12 n.25 (Wilkey, J., dissenting).
188 See id. at 18.
But the CAA’s unique fee-shifting language reflects Congress’s intent to expand—not limit—the class of parties eligible for attorneys’ fees. As the 1970 Senate Report notes, the CAA’s broad fee-shifting language was intended to give the court discretion to award attorneys’ fees not only to plaintiffs, but also to defendants against whom a citizen suit was brought for frivolous or harassing reasons. Furthermore, the 1977 House Report 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.” At a minimum, then, Congress intended that the class of parties entitled to attorneys’ fees be broad enough to include prevailing or partially prevailing parties.

There is some persuasive evidence indicating that Congress intended for a separate public interest requirement. As the Ninth Circuit noted in *Western States Petroleum Ass’n v. EPA*, the legislative history of TSCA suggests that, in general, Congress did not intend to award fees to plaintiffs in environmental citizen suits who filed suit only out of their own self-interest. Senator Magnuson remarked that Congress did not intend to subsidize citizen suits commenced by solvent parties who, due to their own substantial economic interest in the underlying suit, would have litigated anyway. He argued that, in determining whether to award attorneys’ fees, the court should look to the “likelihood that the [plaintiff] would seek to participate in the proceeding whether or not compensation was available.”

But TSCA and CAA are different statutes, and what is appropriate under one statute is not necessarily appropriate under another. Indeed, Senator Magnuson was not involved with the enactment of e-

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193 Ala. Power Co. v. Gorsuch, 672 F.2d 1, 14 (D.C. Cir. 1982) (Wilkey, J., dissenting). According to Judge Wilkey, “The uncertain part of the statute was to be in addition to ‘prevailing,’ so Congress has given us at least half a loaf.” *Id.* at 24 (emphasis added).
196 *W. States Petroleum Ass’n*, 87 F.3d at 286.
198 *Id.*
ther section 304(d) or section 307(f), and thus his comments have little bearing on the proper interpretation of these provisions.\textsuperscript{200}

Moreover, there is no need to reference TSCA or its legislative history because the legislative history of the CAA makes clear that Congress viewed prevailing on the merits of a citizen suit and serving the public interest as one and the same.\textsuperscript{201} In the 1970 Senate Report, Congress noted that, because the CAA does not authorize awards of damages to successful citizen plaintiffs, only where there is a “crying need for action will action in fact be likely.”\textsuperscript{202} In such instances that action “must be in the public interest.”\textsuperscript{203} The Report also stated that a citizen plaintiff who brings a legitimate action necessarily has performed “a public service and in such instances the courts should award costs of litigation.”\textsuperscript{204} Although what constitutes a legitimate action is unclear, it seems logical that a citizen plaintiff who prevails on the merits has brought a suit that is both legitimate and non-frivolous.\textsuperscript{205}

In addition, Congress’s decision to adopt section 304(d)’s fee-shifting language for section 307(f) further evidences that Congress did not intend for a separate public interest showing.\textsuperscript{206} In the years following the CAA Amendments of 1970, several courts deciding cases under section 304 implied that prevailing on the merits was sufficient for an award of attorneys’ fees to be “appropriate.”\textsuperscript{207} When Congress enacted section 307(f) in 1977, it presumably was aware of these cases.\textsuperscript{208} In choosing to adopt section 304(d)’s language for section 307(f), Con-

\begin{itemize}
\item \textsuperscript{200} Id. at 28.
\item \textsuperscript{201} Id. at 13–14. Judge Wilkey notes, “A review of the relevant statutes and legislative history, however, makes clear that . . . prevailing is not a necessary condition for the award of attorneys’ fees and costs, though it is sufficient. Congress, that is, generally intended that an award be made when a petitioner prevailed . . . .” Id. at 13. He further states, “[I]f the idea is to encourage ‘legitimate actions,’ ‘proper implementation,’ or suits in the ‘public interest,’ an award to parties who prevail would seem to be required by the legislative history.” Id. at 14.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id., as reprinted in Train, 510 F.2d app. B at 725.
\item \textsuperscript{205} Ala. Power Co. v. Gorsuch, 672 F.2d 1, 14 (D.C. Cir. 1982) (Wilkey, J., dissenting).
\item \textsuperscript{206} Id.
\item \textsuperscript{207} See Natural Res. Def. Council, Inc. v. EPA. 484 F.2d 1331 (1st Cir. 1975); Del. Citizens for Clean Air, Inc. v. Dist. of Columbia, 62 F.R.D. 353, (D. Del. 1974), aff’d, 510 F.2d 969 (3rd Cir. 1974).
\item \textsuperscript{208} Ala. Power Co., 672 F.2d at 14 (Wilkey, J., dissenting).
\end{itemize}
gress likely approved of that statutory interpretation. Moreover, it probably intended that section 307(f) be given the same effect.

B. The Separate Public Interest Requirement Lacks a Judicially Cognizable Standard

Even if Congress intended for—or at least would not have objected to—a separate public interest requirement, the requirement should still be abandoned because there is no judicially cognizable standard for determining whether a citizen plaintiff has served the public interest. Typically, courts can look to statutory text, legislative history, or some other source to glean a judicially cognizable standard. But traditional gloss does not make clear what standard—if any—should control. In determining whether a successful citizen plaintiff has served the public interest, then, courts must define the types of litigants, suits, and motives that are worthy of attorneys’ fees. This process has yielded a number of amorphous case-law standards as well as a circuit split. It remains unclear which of these standards should apply, how they should be applied, and the extent to which they relate to one another.

Additionally, courts contravene the principle of separation of powers by creating their own public interest standards. Where the separate public interest requirement is imposed, prevailing on the merits of a CAA citizen suit does not necessarily equate to aiding in the enforcement or implementation of public policy. Thus, in order to determine whether a prevailing citizen plaintiff has served the public interest, a court must craft an independent definition of what consti-

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209 Id.
210 Id. Indeed, the 1977 Senate Report to section 307 observed, “[t]he purpose of the amendment to section 307 is to carry out the intent of the committee in 1970 that a court may, in its discretion, award costs of litigation to a party bringing a suit under section 307 of the Clean Air Act.” S. Rep. No. 95-127, at 99 (1977), quoted in Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 n.2 (1983).
212 Id.
214 Ala. Power Co., 672 F.2d at 27 (Wilkey, J., dissenting).
215 Compare W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996), and Ala. Power Co. v. Gorsuch, 672 F.2d 1, 4 (D.C. Cir. 1982), with Pound II, 498 F.3d at 1102 (10th Cir. 2007), and Fla. Power & Light Co., 683 F.2d at 942.
216 Ala. Power Co., 672 F.2d at 16 (Wilkey, J., dissenting).
218 Id. at 20.
tutes good public policy. It must then create a standard for determining whether the underlying suit was consistent with its definition. But defining good public policy is the role of Congress, not the courts. By creating their own public interest standards, courts unduly encroach on legislative ground.

In practice, the separate public interest requirement leads to inconsistent judicial rulings. Application of any particular public interest standard requires the court to look beyond the suit itself “into the heart of the petitioner,” in deciding whether the petitioner is worthy of an award. Consequently, the scope of the court’s fee-shifting discretion has no clear contours, enabling the court to award or not award attorneys’ fees to successful citizen plaintiffs on myriad bases or on no basis whatsoever.

The circuit split regarding whether it is “appropriate” to award attorneys’ fees to a citizen plaintiff whose decision to litigate a section 304 suit was motivated by a substantial economic interest provides a useful illustration. Where courts use economic motive as the public interest standard, an award of attorneys’ fees is prohibited for “a tenant farmer who seeks to stop a nearby factory from polluting his water supply,” but not for “his amateur fisherman brother-in-law who visits him on weekends.” This standard—like all independent public interest standards—is incoherent, because the citizen plaintiff must have enough interest in the litigation to establish standing but not so much that he becomes ineligible for attorneys’ fees.

It could be that the public interest is served where the underlying citizen suit is consistent with public law. But if this standard controls, it seems that the public interest standard is the same as the prevail/not prevail standard—for, as a matter of valid public law, a non-prevailing party has lost and a prevailing party has won. Furthermore, Congress’s avowed purpose for authorizing citizen suits was to

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219 Id.
220 Id. at 19–20.
221 Id. at 20.
222 Id.
223 Compare W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996), and Ala. Power Co., 672 F.2d at 4, with Pound II, 498 F.3d 1089, 1102 (10th Cir. 2007), and Fla. Power & Light Co. v. Costle, 683 F.2d 941, 942 (5th Cir. 1982).
224 Ala. Power Co. v. Gorsuch, 672 F.2d 1, 27 (D.C. Cir. 1982).
225 Id. at 28.
226 Id.
227 Id. at 18.
228 Id.
spur government enforcement and to aid in CAA implementation.\textsuperscript{229} Thus, a completely unsuccessful citizen suit has not advanced these goals, while a partially or wholly successful plaintiff has.\textsuperscript{230}

Another possibility is that the public interest is served where the underlying suit is consistent with valid public policy.\textsuperscript{231} But this standard, too, is tantamount to the prevail/not prevail standard.\textsuperscript{232} In authorizing CAA citizen suits, Congress opted to rely heavily on private participation in the enforcement and implementation of federal air pollution policy.\textsuperscript{233} Congress has given courts jurisdiction to adjudicate citizen suits and has directed them to award attorneys’ fees in a manner that advances the CAA’s goals and purposes.\textsuperscript{234} Where a citizen plaintiff achieves some success on the merits, he has prevailed on public policy determinations that Congress has authorized the courts to make.\textsuperscript{235} The plaintiff, therefore, has aided in the proper enforcement or implementation of public policy as enumerated by Congress by bringing a suit consistent with Congress’s definition of what good public policy is.\textsuperscript{236}

\textbf{C. The Separate Public Interest Requirement Is Superfluous}

The separate public interest requirement is wholly superfluous because a citizen plaintiff necessarily serves the public interest by partially or wholly prevailing on the merits of a CAA citizen suit.\textsuperscript{237} Section 304’s limitations to standing, for instance, ensure that a successful citizen plaintiff has served the public interest by aiding in CAA enforcement.\textsuperscript{238} Congress authorized section 304 suits to bolster CAA enforcement, but concerns abounded that authorizing such suits would cause a spate of citizen litigation that would interfere with governmental enforcement of the Act.\textsuperscript{239} Accordingly, section 304 limits standing largely to specific instances where the government has failed or declined to enforce or

\textsuperscript{229} See id.
\textsuperscript{230} Ala. Power Co. v. Gorsuch, 672 F.2d 1, 18 (D.C. Cir. 1982) (Wilkey, J., dissenting).
\textsuperscript{231} Id. at 19.
\textsuperscript{232} Id.
\textsuperscript{234} See id.
\textsuperscript{235} Id.
\textsuperscript{236} See Pound II, 498 F.3d 1089, 1103 (10th Cir. 2007) (Hartz, J., concurring).
\textsuperscript{237} See 42 U.S.C. § 7604(b) (2000).
comply with the CAA.240 Thus, a citizen plaintiff establishes standing only by identifying and bringing to the reviewing court’s attention an unaddressed or uncorrected CAA violation.241 Where that plaintiff achieves at least some success on the merits, he or she necessarily serves the public interest by remedying an unfulfilled objective of the Act.242

Similarly, a separate public interest requirement is unnecessary under section 307 because that section’s limitations on standing guarantee that a citizen plaintiff who achieves some success on the merits has served the public interest by assisting in CAA implementation. Under section 307, citizens may only challenge EPA actions that constitute final actions, for example, actions that represent the EPA’s definitive position on an area of air pollution policy.243 Where a citizen plaintiff prevails on the merits of a section 307 suit, he has demonstrated to the satisfaction of the reviewing court that a particular EPA action did not comport with the purposes and goals of the CAA.244 The plaintiff has thus aided in correcting an EPA action that did not properly implement Congress’s legislative mandate.245 And because the reviewing court’s decision implicates public law and public policy, the beneficiaries of this correction include the public as well as the citizen plaintiff.246

D. The Separate Public Interest Requirement Constitutes Bad Public Policy

There are valid public policy arguments in favor of requiring a separate public interest showing. Principally, the separate public interest requirement gives the court latitude to limit an award of attorneys’ fees to citizen plaintiffs whose decision to litigate was motivated by public spirit.247 These plaintiffs are more likely to need the financial incentive of fee awards in order to pursue litigation.248 No additional encouragement is needed, however, for citizen plaintiffs whose decision to litigate was motivated by pure self-interest.249 The separate public inter-

242 See Metro. Wash. Coal. for Clean Air, 639 F.2d at 804.
244 See Semmel, supra note 2, at 418.
245 See id.
246 See id. at 414.
247 See Fla. Power & Light Co. v. Costle, 683 F.2d 941, 942 (5th Cir. 1982).
248 See id.
249 See id. at 942–43.
est requirement thus enables the court to avoid gratuitous awards of attorneys’ fees.\textsuperscript{250}

But an award of attorneys’ fees to a plaintiff who achieves some success on the merits of a CAA citizen suit is hardly gratuitous. Where the defendant is a private polluter, for instance, an award of attorneys’ fees rightly forces the defendant to internalize a portion of the societal costs caused by the pollution.\textsuperscript{251} Where the defendant is a governmental entity, for example the EPA, an award of attorneys’ fees is also justified. By enacting the CAA, Congress tasked the EPA with implementing and supervising air pollution control.\textsuperscript{252} The EPA—as well as other governmental entities bound by EPA rules and regulations promulgated pursuant to the CAA—handles public funds appropriated for that purpose.\textsuperscript{253} Awarding attorneys’ fees to a successful citizen plaintiff where the defendant is the EPA or some other government body is to spread those costs among the taxpaying public—which receives the benefits of the litigation.\textsuperscript{254}

In addition, a separate public interest requirement constitutes bad public policy because it has a chilling effect on CAA citizen participation.\textsuperscript{255} Admittedly, many citizen plaintiffs who file suit out of pure self-interest would have done so absent the prospect of attorneys’ fees. But this will not always be the case.\textsuperscript{256} If the petitioner already has an incentive to sue, the promise of an award of fees will offer an additional incentive and will “alter the decisionmaker’s calculus of whether to sue or not.”\textsuperscript{257} Indeed, just because some incentive to litigate exists does not mean that enough exists without attorneys’ fees for the suit to be brought.\textsuperscript{258}

A reduction in citizen participation weakens CAA enforcement.\textsuperscript{259} Citizens are often in the best position to identify CAA violations and to

\textsuperscript{250} See id. at 943.
\textsuperscript{251} See Pound II, 498 F.3d 1089, 1102 (10th Cir. 2007).
\textsuperscript{252} See Semmel, supra note 2, at 418.
\textsuperscript{253} See Natural Res. Def. Council, Inc. v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973).
\textsuperscript{254} Id.
\textsuperscript{255} See Pound II, 498 F.3d at 1102; Natural Res. Def. Council, Inc. v. EPA, 512 F.2d 1351, 1358 (D.C. Cir. 1975) (noting that the prospect of attorneys’ fees under section 307 could have a “strong impact on [citizens’] willingness and ability to pursue section 307 actions”); Riesel, supra note 8, § 15.01.
\textsuperscript{256} See Ala. Power Co. v. Gorsuch, 672 F.2d 1, 28 (D.C. Cir. 1982) (Wilkey, J., dissenting)
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{259} See Pound II, 498 F.3d 1089, 1102.
bring them to the attention of courts and enforcement agencies.\textsuperscript{260} A private polluter, however, likely has a financial incentive to continue polluting and to defend against a citizen suit.\textsuperscript{261} Similarly, a governmental entity that fails to bring nondiscretionary enforcement actions likely has an incentive to remain inactive. Absent robust citizen participation, CAA violators who might otherwise be ordered to comply with the CAA will continue polluting, and government entities that might otherwise be found in dereliction of duty and compelled to act will remain inert. By weakening CAA enforcement, the separate public interest requirement undermines the central public policy rationale for authorizing section 304 suits—to persuade regulated parties not to pollute and to motivate government action.\textsuperscript{262}

Diminished citizen participation also weakens CAA implementation.\textsuperscript{263} Under the CAA, the EPA is required to issue rules and regulations in a manner that effectuates the broad policy goals of the Act.\textsuperscript{264} But the development of identifiable standards of air quality and the formulation of control measures to implement such standards are onerous tasks.\textsuperscript{265} Citizen participation in section 307 suits is therefore critical to proper implementation of the CAA.\textsuperscript{266} Without vigorous citizen participation, important suits, factual information, and legal arguments will not be brought to the attention of the courts.\textsuperscript{267} Moreover, section 307 suits implicate public law, and thus the outcome of a section 307 suit affects absentee interests as well as those of the citizen plaintiff.\textsuperscript{268} Therefore, when a section 307 suit is brought, diminished citizen participation impairs the reviewing court’s ability to make a balanced, fully-informed ruling.\textsuperscript{269}

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\item\textsuperscript{261} See Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 69 (3rd Cir. 1990).
\item\textsuperscript{262} S. Rep. No. 91-1196, at 436–39, \textit{as reprinted in} Train, 510 F.2d app. B at 723–24; \textit{see} Riesel, \textit{supra} note 8, § 15.02[2].
\item\textsuperscript{263} See Semmel, \textit{supra} note 2, at 418.
\item\textsuperscript{264} \textit{See} id.
\item\textsuperscript{265} Anderson, Mandelker & Tarlock, \textit{supra} note 21, at 159.
\item\textsuperscript{266} Semmel, \textit{supra} note 2, at 415–17.
\item\textsuperscript{267} \textit{Id}.
\item\textsuperscript{268} \textit{See} id. at 414.
\item\textsuperscript{269} \textit{Id} at 418.
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CONCLUSION

The requirement that a successful citizen plaintiff make a separate public interest showing before being awarded attorneys’ fees is erroneous. It is inconsistent with Congress’s intent that citizens who bring meritorious actions be awarded attorneys’ fees. It is also decidedly unnecessary, because a citizen plaintiff who partially or wholly prevails on the merits of a CAA citizen suit necessarily has served the public interest. Moreover, the public policy benefits of the separate public interest requirement do not justify the chilling effect it has on citizen participation in CAA enforcement and implementation.