Paying for Defense of a Consent Decree: Intervenors, Attorneys' Fees, and Natural Resources Defense Council v. Thomas

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Paying For Defense Of A Consent Decree: Intervenors, Attorneys’ Fees, and Natural Resources Defense Council v. Thomas

Parties seeking to shift litigation costs to their opponents face significant obstacles, most notably the so-called American Rule. The Rule requires each litigant to pay its own attorneys’ fees unless there is express statutory authorization to the contrary. In 1975, the United States Supreme Court placed its imprimatur on the Rule,¹ and today, at least partially as a response, more than 150 federal fee-shifting statutes are in effect.²

The fee-shifting question usually arises in situations where there are just the two original sets of litigants. In many instances, however, courts face the more difficult task of apportioning the fee burden among the original parties and any intervenors. The court must decide who among them is deserving of a fee award and who should have to pay it. The presence of consent decrees or settlements poses an even more difficult question: what role should the fact that the original litigants have resolved their dispute play in the fee eligibility determination?

This comment examines the propriety of assessing attorneys’ fees against intervenors who unsuccessfully attack a consent decree. Courts often penalize intervenors who fail in their attempts to overturn or modify settlement by requiring them to pay attorneys’ fees, or by denying their requests for fees.³ The District of

¹ Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). In Alyeska Pipeline, environmentalists sought attorneys’ fees for their successful opposition to a pipeline permit. Subsequent congressional action allowing such permits to be issued mooted the underlying controversy. Despite the absence of a statute authorizing fees, the court of appeals awarded fees to the environmentalists on the ground that as the prevailing parties, they had acted as private attorneys general, vindicating important public rights. The Supreme Court reversed, holding that the exception to the American Rule against fee-shifting created by the appellate court was too far-reaching. The Court found that it was the duty of the legislature, not the judiciary, to shift the costs of litigation.


Columbia Circuit, until recently, has followed this approach, both in and out of the settlement context. The Circuit's recent decision in *Natural Resources Defense Council, Inc. v. Thomas* ("NRDC") however, represents a significant departure; both the court of appeals and the district court denied the settlement defenders' request for fees under the fee-shifting provision of the Clean Water Act against intervenors wholly unsuccessful in their attempts to impart substantive changes in the decree or to overturn it altogether.

*NRDC* is a paradigm case for assessing fees against intervenors. The litigation began in 1973 when several environmental groups filed the first of four related suits against the Environmental Protection Agency ("EPA"). The environmentalists challenged the government's regulation of toxic discharges under Section 307(a) of the Clean Water Act, which was added by the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972, and brought suit pursuant to the citizen suit provision of those amendments.

Soon afterward, the parties began settlement negotiations. In early 1976, the parties settled and the district court entered a consent decree covering all four suits. The decree "proved to be of great significance in the administration of FWPCA." Because they wanted to help oversee implementation of the decree, several rubber and chemical companies moved to intervene. The district court denied their motion but the court of appeals reversed and allowed the corporations to intervene pursuant to Rule 24(a) of the

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5 801 F.2d 457 (D.C. Cir. 1986).

6 See text at notes 99-116.

7 Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d) (1982). The section provides that the court, "in issuing any final order in any action brought pursuant to the section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."


Federal Rules of Civil Procedure.\textsuperscript{12}

In 1978, the original parties—the environmentalists and the EPA—agreed to extend some of the deadlines contained in the settlement. The industry intervenors simultaneously moved to vacate the decree. They claimed that the 1977 amendments to the Clean Water Act rendered the decree moot, and that the proposed modification dispensed with public notice and comment procedures and therefore violated their due process rights. The district court granted the parties’ joint motion to modify and denied the intervenors’ motion to vacate.\textsuperscript{13} The intervenors failed in their appeal on the mootness and due process issues, but the court of appeals \textit{sua sponte} raised the question of whether the settlement impermissibly infringed on the discretion of the EPA administrator.\textsuperscript{14} On remand, the intervenors sought to vacate the decree based on the discretion issue raised by the appellate court.\textsuperscript{15} Again, the intervenors failed in their efforts at both the district and appellate court levels.\textsuperscript{16}

Based on these unsuccessful post-settlement efforts, in 1982 the environmentalists moved for attorneys’ fees against the intervenors under Section 505(d) of the Clean Water Act.\textsuperscript{17} The district court emphasized that

\textit{[i]t would be an anomalous result to find that NRDC could not be compensated for its efforts to ensure that this agreement was enforced. This court will not subscribe to such a result . . . The more difficult question is whether attorneys’ fees should be awarded against intervenors for NRDC’s efforts to resist intervenors’ motions to modify and vacate the settlement agreement.}\textsuperscript{18}

In fact, both the district court and the court of appeals resolved this “difficult question” quite easily. The lower court re-

\textsuperscript{12} Natural Resources Defense Council (NRDC) v. Costle, 561 F.2d 904 (D.C. Cir. 1977) (granting intervention as of right). Four other industry groups that had intervened in one of the suits joined in the settlement. See NRDC, 801 F.2d at 459.

\textsuperscript{13} Natural Resources Defense Council (NRDC) v. Costle, 12 Env’t Rep. Cas. (BNA) 1833 (D.D.C. 1979).

\textsuperscript{14} Environmental Defense Fund v. Costle, 636 F.2d 1229, 1258 (D.C. Cir. 1980).


\textsuperscript{17} NRDC v. EPA, 595 F. Supp. 65. The environmentalists’ request that the EPA pay their fees for work done in opposition to the agency is not at issue here. Id. at 69.

\textsuperscript{18} Id. (emphasis added).
fused to assess fees against the intervenors\textsuperscript{19} and the court of appeals, in an opinion by Judge (now Justice) Scalia, affirmed.\textsuperscript{20} Both courts concluded that the intervenors' activity in the unsuccessful eight-year battle constituted a reasonable attempt to further the goals of the Clean Water Act. In addition, both courts found that the EPA, which joined the environmentalists in defending the settlement, should not be liable for the costs incurred by the intervenors' efforts. The court of appeals characterized the question before it as whether the Act permits fee awards against intervenors who are private rather than public entities.\textsuperscript{21} The opinion suggests that the intervenors' status as private parties persuaded the court that such awards are not "appropriate," for such parties deserve "special care"\textsuperscript{22} in the fee award determination.

By refusing to hold the intervenors liable, the court of appeals in fact created the "anomalous result" the lower court hoped to prevent: the NRDC, which both courts acknowledged deserved compensation for successfully defending the decree,\textsuperscript{23} could not recover fees from any other litigant. Such a result is inconsistent with the policies underlying the Clean Water Act in particular and statutorily created fee shifting in general.

This comment argues (1) that \textit{NRDC} was wrongly decided, and (2) that it is always "appropriate" within the meaning of Section 505(d) of the Clean Water Act and other fee-shifting provisions using that language to award fees to settlement defenders who repel completely unsuccessful attacks by post-settlement intervenors, regardless of the latter's status as private or public parties.

Part I of the comment examines the courts' general approach to fee shifting under the Clean Water Act and analogous statutes, and discusses the treatment of intervenors under these provisions. Part II evaluates the \textit{NRDC} decision against this backdrop, and proposes a bright-line rule for handling the problem of post-decree intervention and attorneys' fees that, contrary to \textit{NRDC}'s approach, is both responsive to the legal system's desire for settlement and consonant with existing law.

\textsuperscript{19} Id. at 70.
\textsuperscript{20} \textit{NRDC}, 801 F.2d at 462.
\textsuperscript{21} Id. at 461.
\textsuperscript{22} Id. at 462, quoting Ruckelshaus, 463 U.S. at 692 n.12.
\textsuperscript{23} \textit{NRDC}, 801 F.2d at 460-461. See also \textit{NRDC} v. EPA, 595 F. Supp. at 69.
I. Fee-Shifting Standards

A. The General Rule

Fee-shifting provisions fall into one of two general categories: the statutes provide either that courts award fees to the "prevailing party," or to any party when the court determines that it is "appropriate" to do so. The fee-shifting provision at issue in NRDC falls into the latter category, and is found in Section 505, the citizen suit section of the Clean Water Act which Congress added through the Federal Water Pollution Control Act Amendments of 1972 as part of a national campaign to clean up the nation's water supply. The provision, modeled after Section 304 of the Clean Air Act, provides that the court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Congress sought to provide potential litigants with an economic incentive: "courts should award costs of litigation" to citizens "per-
forming a public service” by bringing suit. However, fearing possible abuse of the fee award mechanism, Congress also sought to discourage frivolous or harassing actions.

Section 505(d) proved to be uncontroversial and passed with ease, but the section has troubled both courts and commentators because of what they see as an inherent vagueness and ambiguity in the chosen standard. Nowhere is the word “appropriate” defined in the statute. Also, neither the section nor its legislative history makes reference to intervenors. Most importantly, the statute fails to describe specifically who should receive fees and who should pay them. The Senate committee report provides some guidance, however, by distinguishing between winning and losing plaintiffs: a winning plaintiff may recover fees from its opponent while a losing plaintiff is liable for fees to its opponent if the suit was “frivolous or harassing.”

Few courts to date have attempted a careful analysis of Section 505(d)’s “appropriate” language. Much of the judicial discus-

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31 Sen. Rep. No. 92-414, 1972 U.S. Code Cong. & Admin. News at 3747 (cited in note 27). See also the statement of Senator Cooper in Senate debate on S. 2770, 1972 Legislative History at 1306 (cited in note 28) (“the regulation of environmental quality is of fundamental concern to the public” and “[i]t is appropriate, therefore, that an opportunity be provided for citizen involvement”).


33 See, for example, Bruce Fein, Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-“Subsidized” Litigation, 47 Law & Contemp. Probs. 211, 228-29 (Winter 1984) (lack of articulated standard forces courts into legislative role).

34 The reports for Section 505(d)’s companion provisions under the Clean Air Act do not make reference to intervenors either. However, the legislative history for the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, notes that while “[i]n the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff intervenors . . . [,] the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors.” Sen. Rep. 94-1011, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5912. See generally 1972 Legislative History (cited in note 28).

35 Such an omission in the statute is a critical but common flaw not confined to legislative actions. Both in and out of the environmental context courts also often fail to provide explicit directions on remand as to which party or parties should bear the fee burden. See, for example, Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979) (under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, the appellate court remanded to the district court for determination of the amount of the fee award but failed to state against whom it should be assessed; language of decision, however, indicates strong disapproval of intervenors’ anti-settlement efforts, suggesting intervenors should bear fee burden).


37 One court indirectly suggested that “appropriate” means whatever is “fair.” Roosevelt Campobello Intern. Park v. EPA, 711 F.2d 431, 434 (1st Cir. 1983). Another found that an award is “appropriate” to the extent it covers costs incurred in furthering the Section 505 claim. Citizens Coordinating Committee v. WMATA, 765 F.2d 1169, 1174 (D.C. Cir. 1985).
sion, however, centers on the virtually identical fee-shifting provisions in the Clean Air Act and on the civil rights fee shifting statutes. Accordingly, analogy to these statutes is helpful.\textsuperscript{38} The Clean Air Act provides for fee shifting in two contexts: in citizen suits under Section 304(d) and in judicial review proceedings under Section 307(f).\textsuperscript{39} As with Section 505 of the Clean Water Act, Congress failed to define in the Clean Air Act what it meant by “appropriate.” The absence of any precise legislative definition has proved troubling to some judges,\textsuperscript{40} but in general courts readily have assumed the task of fashioning a definition.

The leading case attempting to define the standard is \textit{Ruckelshaus v. Sierra Club},\textsuperscript{41} and it has become the centerpiece of what has in practice, at least in the environmental and civil rights contexts, become a merger of the “appropriate” and “prevailing party” standards into a single, two-pronged test. To recover fees under the “appropriate” standard, (1) a party must have achieved some success on the merits, and (2) its actions must have contributed to statutory goals.\textsuperscript{42} \textit{Ruckelshaus} gave birth to the first prong, while its dissent and another Clean Air Act case, \textit{Metropolitan Washington Coalition for Clean Air v. District of Columbia},\textsuperscript{43} gave birth to the second.

\begin{footnotesize}
\begin{itemize}
\item \footnote{\textsuperscript{38} Analogy to these provisions may even be required. The Supreme Court has held that its interpretation of the “appropriate” language in Section 307(f) of the Clean Air Act (requiring some success on the merits) controls interpretation of other identical provisions, including Section 505(d). \textit{Ruckelshaus}, 463 U.S. at 682 n.1.}
\item \footnote{\textsuperscript{39} Section 304(d) provides that “[t]he court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, wherever the court determines such an award is appropriate.” 42 U.S.C. § 7604(d) (1982) (emphasis added). Section 307(f) provides that “[i]n 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.” 42 U.S.C. § 7607(f) (1982) (emphasis added). Congress added Section 304 in the Clean Air Act Amendments of 1970. H.R. Rep. No. 91-1146, 1970 U.S. Code Cong. & Admin. News at 5388 (cited in note 28). It added Section 307(f) in the 1977 amendments. H.R. Rep. No. 95-294, 1977 U.S. Code Cong. & Admin. News at 1106 (cited in note 28).}
\item \footnote{\textsuperscript{40} See, for example, \textit{Alabama Power v. Gorsuch}, 672 F.2d 1, 32 (D.C. Cir. 1982) (dissent of Wilkey, J.) (it is “inconsistent with the judicial role” to accept “Congress’ implicit invitation to supply” a definition of “appropriate”). See also \textit{Fein}, 47 Law and Contemp. Probs. at 224 (cited in note 33) (lack of articulated legislative standards transfers policy making from Congress to courts). Of course, there is the alternative view that such a judicial practice is not truly “legislative” but rather reflects the proper function of a court in statutory interpretation.}
\item \footnote{\textsuperscript{41} 463 U.S. 680, 682 (1983) (“appropriate” means the would-be fee recipient must have achieved some substantive success on the merits). See text at notes 57-64.}
\item \footnote{\textsuperscript{42} \textit{Sierra Club v. EPA}, 769 F.2d 796 (1985).}
\item \footnote{\textsuperscript{43} 639 F.2d 802 (D.C. Cir. 1981).
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In *Ruckelshaus*, the Supreme Court essentially equated “appropriate” with “prevailing party” by holding that both standards require minimum levels of success on the merits for a litigant to recover fees. Likewise, other judicial discussions have used the terms interchangeably or in such a manner as to suggest also that, as a practical matter, there is no cognizable difference between the two. In some Section 1988 fee award eligibility determinations, for example, courts using the “prevailing party” standard have questioned whether fee awards against parties under Section 1988 are “appropriate,” or whether “appropriate special circumstances” exist that would support denial of an award of attorneys’ fees. And, in an action under the Voting Rights Act fee-shifting provision, also using the “prevailing party” standard, a court of appeals remanded the case to the district court with the instruction that the lower court “resolve this controversy and determine if fees are appropriate.”

Despite this treatment, the NRDC court summarily dismissed any analogy to Section 1988 and the “prevailing party” standard because of a mere textual difference. However, the court ignored the history that the “appropriate” and “prevailing party” standards share.

Section 505 of the Clean Water Act, which uses the “appropriate” standard, and the Civil Rights Attorneys Fees Awards Act of 1976 (Section 1988), which uses the “prevailing party” standard, provide the most striking example of the standards’ shared background. Section 1988 is the legislative response to the Supreme Court’s mandate in *Alyeska Pipeline*; the section’s purpose was to “remedy [the] anomalous gaps in our civil rights laws” created by that decision. The section is an “essential remedy if private citi-

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44 Ruckelshaus, 463 U.S. at 686.
45 See, for example, Decker v. United States Dept. of Labor, 564 F. Supp. 1273, 1280 (E.D. Wis. 1983). The Decker court speaks in such terms at three points during the course of the opinion. See also Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1273 n.5 (N.D. Ohio 1984) (rejecting case law offered by intervenors in support of their position against fee assessment, finding that none of the cases “suggest[s] that an award of attorneys’ fees against intervenor-defendants would never be appropriate”) (emphasis added).
46 Akron Center for Reproductive Health, 604 F. Supp. at 1273.
48 Donnell, 682 F.2d at 249 (emphasis added).
49 NRDC, 801 F.2d at 461 n.3.
zens are to have a meaningful opportunity to vindicate... important Congressional policies... Just four years earlier Congress had expressed the same sentiments with regard to Section 505: "public participation... is essential to the accomplishment of the objectives we seek...."

Not only do both provisions thus serve to promote private enforcement of statutory goals, but their approaches for evaluating fee award claims are the same as well. The language in the Section 505(d) Senate committee report foreshadows the dual standard courts would later incorporate into the Section 1988 jurisprudence: under Section 505(d) a court "should award" fees to a plaintiff bringing a legitimate suit while a defendant may recover fees only when a plaintiff's suit is "frivolous or harassing." Moreover, the Senate committee report on Section 1988, in explaining the rationale behind the dual standard, finds that other statutes providing for attorneys' fees have followed "similar standards," and expressly lists the Clean Water and Clean Air acts.

Thus, the "appropriate" standard, as courts have applied it, has two components: the would-be fee recipient must (1) have achieved some success on the merits, and (2) have acted in a manner that furthers statutory goals. The former found approval in

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Alyeska Pipeline, 421 U.S. at 269.


{54} Id. at 3747. Compare Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam) (in civil rights fee-shifting context, a court should "ordinarily" award fees "unless special circumstances would render such an award unjust"). In practice, under § 1988 courts have rejected most, if not all, claims of "special circumstances" that would preclude an award of attorneys' fees to a prevailing party. See generally E. Richard Larson, Federal Court Awards of Attorney's Fees 44-51 (1981).

{55} Sen. Rep. No. 92-414, 1972 U.S. Code Cong. & Admin. News at 3747 (cited in note 27). Compare Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (in civil rights fee-shifting context, a prevailing defendant may recover fees if suit was "frivolous, unreasonable, or... the plaintiff continued to litigate after it clearly became so").

{56} Sen. Rep. No. 94-1011, 1976 U.S. Code Cong. & Admin. News at 5912 (cited in note 34). The committee wrote that the "bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith'.... Similar standards have been followed... in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act... and the Clean Air Act." Id.

{57} See, for example, Hooker Chemicals, 592 F. Supp. at 70; and Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1209 (4th Cir. 1986), combining the constructions of Section 307(f) of the Clean Air Act in Ruckelshaus, 463 U.S. 680 (some success on the merits) and Metropolitan Washington, 699 F.2d 802 (action of a type Congress meant to encourage). The District of Columbia Circuit combined the two standards in Sierra Club, 769 F.2d 796. The development of this standard is examined in detail in the text at notes 41-70.
the Supreme Court's decision in *Ruckelshaus.* Ruckelshaus marks the last time the Supreme Court interpreted the "appropriate" standard, yet the case remains far from the final word on the subject.

In *Ruckelshaus,* a divided Supreme Court held that the "appropriate" language requires that the would-be fee recipient achieve "some degree of [substantive] success on the merits" before a court may authorize an award. The case involved a request for attorneys' fees by environmentalists who unsuccessfully contended that EPA emission standards violated the Clean Air Act. Although the Court of Appeals for the District of Columbia Circuit rejected the environmentalists' claims, it nevertheless granted their request for fees under Section 307(f) for their "contributions to the goals of the Clean Air Act." The Supreme Court reversed in a strongly worded 5-4 decision, holding that the principles historically underlying fee shifting require that a party prevail to some degree before it may receive fees. The majority relied on "intuitive notions of fairness" embodied in the American Rule against fee shifting, and the supposed costliness of what it deemed an otherwise inherently difficult determination.

A vigorous dissent, however, emphasized that Congress's intentional choice of the "appropriate" language instead of the "prevailing party" language of other fee-shifting statutes was meant to give the courts "authority to award fees and costs to a broader category of parties." According to the dissent, the purpose of an

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58 463 U.S. 680.
9 The sharply divided opinion has generated some equally vehement commentary. See, for example, Amy Semmel, *Ruckelshaus v. Sierra Club: A Misinterpretation of the Clean Air Act's Attorneys' Fees Provision,* 12 Ecology L.Q. 399 (1985) (criticizing Court for erroneously attributing to Congress a bias against fee shifting and arguing that such statutes are entitled to an interpretation designed to further legislative intent to permit fee awards); Comment, *Ruckelshaus v. Sierra Club: Attorneys' Fees Awards to Nonprevailing Litigants are not "Appropriate" under the Clean Air Act,* 9 J. Corp. L. 965 (1984) (arguing that Court was correct and that ambiguity of "appropriate" standard precludes its consistent application).
60 Ruckelshaus, 463 U.S. at 694.
62 Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982).
63 Ruckelshaus, 463 U.S. at 686.
64 Id. at 694 The majority feared that courts generally would be unable to fill in the blanks provided by an allegedly ambiguous standard, hinting strongly that the "appropriate" standard is really no standard at all.
65 See, for example, the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (court "may allow the prevailing party . . . a reasonable attorney's fee").
66 Ruckelshaus, 463 U.S. at 694 (dissent of Stevens, J.).
award of costs and fees is “to allocate the costs of litigation-equitably, to encourage the achievement of statutory goals.”

The Ruckleshaus dissent’s conception of the purpose of fee-shifting first found judicial sanction two years earlier in the District of Columbia Circuit’s decision in Metropolitan Washington Coalition for Clean Air v. District of Columbia. It has since become the second prong of the two-pronged test. In Metropolitan Washington, a case which also involved Section 307(f) of the Clean Air Act, the court of appeals held that whether fees were “appropriate” did not hinge on a suit’s outcome but rather on whether the suit at its initiation was “of the type that Congress intended to encourage” when it enacted the provision. Post-Ruckelshaus decisions combine the Metropolitan Washington and Ruckelshaus constructions into a dual-faceted test: to recover fees under the “appropriate” standard the party must have achieved some success on the merits and its actions must have contributed to statutory goals.

B. Fee Awards and Intervenors

The entry of additional parties into a lawsuit by intervention does not alter the two-pronged test to determine which party

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67 Id. at 706 (dissent of Stevens, J.) (emphasis added), quoting Natural Resources Defense Council v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973).
69 Id. at 804.
70 Sierra Club, 769 F.2d at 799-800; Stoddard, 784 F.2d at 1209. See also Northern Plains Resource Council v. EPA, 734 F.2d 408, 408-09 (9th Cir. 1984) (“NPRC”). In NPRC, on remand from the Supreme Court, the court of appeals denied plaintiff’s request for fees, but reemphasized the reasoning of Metropolitan Washington that it earlier had found so persuasive: “Congress seemed inclined to facilitate challenges of EPA decisions to insure that the EPA fulfilled its designated function of preserving air quality.” (emphasis added). The appellate court was reluctant to deny fees, noting that “NPRC brought this suit to promote the quality of air resources” and that the “suit presented issues important to the construction of the Clean Air Act.” Id. at 409 (emphasis added).
71 See Fed. Rule Civil Proc. 24. See generally 3B Moore’s Federal Practice §24 (1985) (“Moore”); Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7C Federal Practice & Procedure (1986) (“Wright”). Rule 24(a) provides in relevant part that anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties. Rule 24(b) provides in relevant part that anyone may be permitted to intervene in an action . . . when an applicant’s claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
should recover attorneys' fees. This is consistent with the historically subordinate status of intervenors. An intervenor is entitled to receive fees under the "appropriate" standard, if, like any other litigant, it enjoys some success on the merits of its claims while furthering statutory goals.

At least in the environmental and civil rights contexts, courts have used the same two-pronged test to determine the fee liability of intervenors as well. In Sierra Club v. EPA, the District of Columbia Circuit stated expressly what had been implicit in previous fee award decisions: to escape fee liability an intervenor must enjoy some substantive success on the merits of its claims while acting in a manner that furthers statutory goals.

In Sierra Club, environmentalists successfully challenged various EPA regulations implementing the 1977 Clean Air Act amendments. They also successfully opposed the attempts of industry intervenors both to modify the court of appeals' order and to persuade the Supreme Court to hear the case. The environmentalists then sought fees for their efforts, but the Court of Appeals for the District of Columbia Circuit refused, finding that the industry intervenors had "reasonably" attempted to advance statutory goals. More importantly, however, the court twice expressly refused to hold that intervenors should always be insulated from fee liability.

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72 See text at notes 81-84.
73 Many courts have denied intervenors' requests for fees under both the Clean Air Act and the civil rights fee-shifting provisions. The underlying rationale typically suggests that the intervenors' participation was frivolous or obstructionist. Sometimes an even lower threshold is sufficient. For example, in Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982), a Clean Air Act case, intervenor environmentalists sought attorneys' fees under Section 307(f) for, inter alia, work done in concert with the EPA regarding the agency's air quality regulations. The Court of Appeals for the District of Columbia Circuit denied their request because the intervenors' participation did not add "in any essential way" to the issues involved. Id. at 4.
In those few instances in which intervenors have recovered fees, their participation has proved helpful on substantive issues. See, for example, Baker v. City of Detroit, 504 F. Supp. 841 (E.D. Mich. 1980), vacated and remanded on other grounds as Bratton v. City of Detroit, 712 F.2d 222 (6th Cir. 1983) (in civil rights suit involving fee request under Section 1988, intervenors' actions contributed to result by demonstrating existence of past discrimination and subsequent need for affirmative action plan).
74 769 F.2d 796 (1985).
75 Id. at 810.
76 Id. at 799, 810.
77 Id. at 811.
78 Id. at 810-11. Compare Akron Center for Reproductive Health, 604 F. Supp. 1268. There, shortly after plaintiff abortion clinics filed their complaint challenging the validity of a city abortion ordinance, two individuals petitioned the court to intervene as representatives of a class of parents whose children might be affected by such an ordinance. The court
In the other principal case in which intervenors have escaped fee liability, the court also applied the two-pronged interpretation of the “appropriate” standard to determine whether the intervenors should have borne the fee burden. In *Delaware Valley Citizens’ Council v. Commonwealth of Pennsylvania*,\(^7\) the Third Circuit declined to assess fees against the intervenors. Faced with the unique situation in which the defendant, the Commonwealth of Pennsylvania, and the intervenors, several Pennsylvania legislators, were, as a practical matter, inseparable branches of state government, the court affirmed an award of fees to environmentalists who had successfully defended a 1978 consent decree. The court found, however, that the defendant Commonwealth, and not the intervenors, should pay the environmentalists’ attorneys’ fees. While alluding to the two-pronged test, the court nevertheless refused to “parse out the roles and responsibilities of various branches of the state government.”\(^8\)

The courts’ treatment of intervenors in the fee-shifting context as discussed above has deep historical roots. Traditionally, the intervenor lived a judicial life subordinate to that of the original litigants under old Equity Rule 37.\(^8\) The subordination doctrine officially fell from grace with the advent of the Federal Rules of Civil Procedure, and today an intervenor theoretically is treated as if he were an original party.\(^8\) However, the intervention device does not confer upon the newcomer unrestricted control over the existing litigation. An intervenor cannot, for example, change the issues framed by the original parties.\(^8\) Also, courts can control the participation of an intervenor by imposing conditions upon intervention. Such conditions more often attach to permissive intervention than to intervention as of right, although they sometimes attach to the latter as well.\(^8\)

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\(^7\) 762 F.2d 272 (3d Cir. 1985), aff’d in relevant part, 106 S. Ct. 3088 (1986).

\(^8\) Id. at 277.

\(^9\) See Wright, § 1920 at 487 (cited in note 71).

\(^10\) Id. at 488.

\(^11\) Id. at 489.

\(^12\) Id. at 503. Courts can limit the participation of an intervenor as of right to overseeing implementation of a consent decree, as in *NRDC v. Costle*, 561 F.2d at 911 n.36 (granting post-settlement intervention as of right to rubber and chemical companies in litigation that led to the attorneys’ fee dispute at issue in *NRDC*). At least one treatise praises the
It is in the fee-shifting context where this de facto subordination becomes most evident. Courts often reject an intervenor’s claims that its status as an intervenor is a “special circumstance” insulating it from fee liability.\textsuperscript{65} Also, if an intervenor’s participation contributes little or nothing substantive to the development of the issues, courts often willingly assess fees against the intervenor.\textsuperscript{66} As the District of Columbia Circuit has noted, Congress did not intend to make a fee award “as nearly automatic” for intervenors as for other litigants,\textsuperscript{67} and also did not intend for intervenors to escape fee liability in all circumstances.\textsuperscript{68}

C. Fee Awards, Intervenors and Settlement

As the preceding discussion demonstrates, courts hold intervenors to the same two-pronged standard as the original litigants in determining when fee awards are “appropriate.” The presence of settlement or a consent decree, however, should and in fact does tip the balance against the intervenors, particularly when the question is whether the court should assess fees against them.

Courts justify this treatment by recognizing the need to preserve the integrity of compromise in the face of intervenor attack.\textsuperscript{89} The law strongly favors settlement, particularly in light of the need to allocate “scarce federal judicial resources.”\textsuperscript{90} As in many other

\textsuperscript{65} The view is most dominant in the civil rights context. See, for example, Akron Center for Reproductive Health, 604 F. Supp. 1268; Decker, 564 F. Supp. 1273.

\textsuperscript{66} See, for example, May v. Cooperman, 578 F. Supp. 1308, 1317 (D.N.J. 1984) (under Section 1988, fees assessed against intervenors; section contemplates assessment without regard to type of contribution) (dictum); Akron Center for Reproductive Health, 604 F. Supp. at 1274 (fees assessed against intervenors; intervenors’ contribution to issues held not a “special circumstance” under Section 1988).

\textsuperscript{67} Donnell, 682 F.2d at 246.

\textsuperscript{68} Sierra Club, 769 F.2d at 810-11.

\textsuperscript{69} See, for example, Kirkland v. N. Y. State Dept’ of Correctional Services, 711 F.2d 1117 (2d Cir. 1983) (in Title VII class action by correction officers, court limited the right of nonminority intervenors to challenge reasonableness or validity of settlement). Consider also the view that intervention for the purpose of “impeaching a decree already made” is prohibited. 3B Moore at 24-179 (cited in note 71), quoting U.S. v. California Canneries, 279 U.S. 553, 556 (1929) (opinion of Brandeis, J.).

\textsuperscript{70} Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 n.10 (7th Cir. 1980), citing Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977). The Metropolitan Housing court found the public policy favoring settlement to be important in areas where voluntary compliance by parties over time will contribute significantly toward ultimate achievement of statutory goals. For a critique of settlement as a favored means of dispute resolution, see generally Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073 (1984). In this regard see also Harry T. Edwards, Alternative Dispute Resolution: Pan-
areas of the law, most environmental litigation ends in settlement. Courts accord great deference to settlement upon review, and, in the fee-shifting context, dispute resolution by settlement is sufficient to confer upon a fee seeker “prevailing party” status, a key element enabling the party to recover fees. In the face of attack by intervenors, both courts and commentators recognize an even greater need for deference. Accordingly, when the original litigants have settled, courts readily charge intervenors with fees.

Most of the cases involve fee shifting under the civil rights statutes. In fact, the only case other than NRDC to address the intervenor-settlement fee problem under Section 505(d) of the Clean Water Act involved the question of intervenor fee entitlement rather than intervenor fee liability. In United States v. Hooker Chemicals & Plastics Corp., the district court refused to grant fees to citizens groups who had intervened after settlement because it found that the settlement reflected no contribution by acea or Anathema? 99 Harv. L. Rev. 668, 676-82 (1986) (arguing that public law disputes such as those involving environmental issues should be resolved by adjudication rather than private settlement so as to prevent incursion of private values into public law domain).


See, for example, Airline Stewards, Etc. v. American Airlines, 573 F.2d 960 (7th Cir. 1978).

Maher v. Gagne, 448 U.S. 122, 129-30 (1980) (litigant challenging denial of federal aid in civil rights action considered to have “prevailed” for purposes of award of attorneys’ fees despite fact that she settled her claim).

See 3B Moore at 24-180 (cited in note 71) (pre-intervention decree should be set aside only if it clearly would deprive intervenor of substantial rights). See also Dawson v. Pastrick, 600 F.2d 70, 76 (7th Cir. 1979) (warning that allowing post-settlement changes to upset the decree would encourage settling litigants to back out of the agreement; “in the absence of unusual hardship to the objecting party, we decline to permit subsequent events to defeat otherwise reasonable settlements”).

See, for example, Reeves v. Harrell, 791 F.2d 1481, 1485 (11th Cir. 1986) (in Section 1988 action, untimely intervention held frivolous); Vulcan Soc. of Westchester Cty., 533 F. Supp. at 1062 (in Section 1988 action, intervenors “persistent activity inflicted” expenses). But see Kirkland v. N. Y. State Dep’t of Correctional Services, 524 F. Supp. 1214 (S.D.N.Y. 1981) (no fees assessed against intervenors because of their good faith efforts to assert their own rights). Kirkland appears to be in the minority, although it was expressly followed in Paradise v. Prescott, 626 F. Supp. 117, 118 (M.D. Ala. 1985) (intervenors were “functionally plaintiffs” and therefore should not have been liable for fees unless their claims were “without foundation,” which they were not). Compare Comment, Protecting Defendant-Intervenors from Attorneys’ Fee Liability in Civil Rights Cases, 23 Harv. J. on Legis. 579 (1986) (urging limited attorneys’ fee liability for private defendant-intervenors in civil rights litigation); and Brian Zenkichi Tamanaha, The Cost of Preserving Rights: Attorneys’ Fee Awards and Intervenors in Civil Rights Litigation, 19 Harv. C.R.-C.L. Rev. 109 (1984) (urging same treatment in fee eligibility determinations for both pro-plaintiff and pro-defendant intervenors).


the intervenors and that an award of fees under Section 505 would be “entirely inappropriate.” Implicit in the court’s reasoning was the intervenors’ lack of success in changing the terms of the settlement and their failure to act in a manner that furthered statutory goals.

II. POST-DECREE INTERVENTION: THE NEED FOR A BRIGHT-LINE RULE

A. The Problematic Rule of NRDC v. Thomas

In NRDC, the critical question facing the court was whether the intervenors should be liable for fees to the environmentalists. The statutory scheme, providing for fees against losing plaintiffs whose actions are “frivolous or harassing,” envisions an affirmative answer. In NRDC, the industries intervened as parties-defendant. However, as a practical matter, their interests initially were aligned more closely with those of the environmentalists, the plaintiffs in the underlying litigation: their goal was to ensure that the EPA complied with the Clean Water Act. With regard to the decree, the intervenors brought with them a realignment of the parties; the environmentalists—the original plaintiffs—joined the EPA—the original defendant—in defending the decree against intervenor attack.

The NRDC court found that the intervenors’ efforts were reasonable. However, it accepted without question the proposition that the intervenors’ claims had continuing vitality, despite the reality that the intervenors repeatedly lost on every point. Even if the court were correct that the intervenors’ claims remained reasonable throughout the eight-year battle over the decree, the intervenors’ activity was nevertheless harassing. Accordingly, they should have been liable for fees under the statute as losing plaintiffs.

The dispositive factor in NRDC should have been the intervenors’ absolute failure to make substantive contributions to the

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88 Id. at 971. The court rejected the intervenors’ claims that they had been responsible for “de facto modifications” of the agreement when any modifications that existed had been made by the principal litigants or did not exist at all.
89 See NRDC v. EPA, 595 F. Supp. at 69.
91 NRDC v. Costle, 561 F.2d at 907.
92 NRDC v. EPA, 595 F. Supp. at 70.
93 NRDC, 801 F.2d at 462.
94 See text at notes 10-16.
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decree. Both the district court and the court of appeals documented with striking particularity the intervenors’ persistent yet unsuccessful eight-year battle to vacate or modify the agreement.\textsuperscript{105} Moreover, their choice to enter the litigation after the original parties settled was apparently a strategic attempt to interpose delay, rather than to offer considered suggestions. The intervenors’ late entry should not have worked a hardship—the denial of fees—on the settling litigants.

There is, however, the view that in a less tangible sense the intervenors made a contribution and thus their efforts were not so clearly harassing. One might posit that their activity exhausted significant challenges to the decree, thereby insulating it from future attack by someone else. However, such a view discounts the fact that this would not necessarily preclude a future potential challenger from at minimum trying to attack the decree, thus triggering actions in defense, regardless of whether estoppel would eventually bar the effort.

The precedent facing the \textit{NRDC} court also required that the court have assessed fees against the intervenors. The same factors that determine when fees should be awarded to a party also apply in deciding against whom such awards should be made.\textsuperscript{106} Thus, a party who achieves no substantive success and fails to act in a manner furthering statutory goals pays fees to the party that does.\textsuperscript{107} The intervenors in \textit{NRDC} neither succeeded on the merits nor furthered statutory goals. At the outset, the intervenors’ professed reason for entering the litigation—to help oversee implementation of the decree\textsuperscript{108}—advanced the purposes underlying the Clean Water Act. Clearly, preservation of a joint EPA-environmentalist agreement is a type of enforcement envisioned by the legislature. But the picture that subsequently evolved was quite different: the intervenors’ activity resulted in nothing more than an eight-year delay in implementing a decree that was acknowledged as being valuable.\textsuperscript{109}

The \textit{NRDC} court’s decision to insulate the intervenors from fee liability is thus out of step with congressional intent and with the predominant judicial construction of the “appropriate” standard for awarding fees. The effect of the court’s holding is to sug-

\textsuperscript{105} Id.
\textsuperscript{106} Sierra Club, 769 F.2d at 810. See text at notes 74-80.
\textsuperscript{107} Id.
\textsuperscript{108} NRDC v. Costle, 561 F.2d at 907.
\textsuperscript{109} NRDC v. EPA, 595 F. Supp. at 69.
gest the following rule: a party may recover attorneys’ fees under the “appropriate” standard if it satisfies the two-pronged test of (1) prevailing to some degree on the merits while (2) advancing statutory goals, unless the party against whom the fees are sought is a private intervenor. The NRDC court began its analysis correctly, but added a troubling element: disallowing fee awards against private intervenors.

This “private intervenor” limitation is problematic for several reasons. First, it creates a troublesome asymmetry: a party who wins is entitled to fees while the party who loses escapes fee liability if it is a private entity. Second, the genesis of this limitation is the questionable distinction between public and private litigants the Supreme Court drew in Ruckelshaus v. Sierra Club. The Court’s rationale for differential treatment was two-fold: (1) a private litigant’s ability to bear a fee burden may be less than that of a governmental or other public entity; and (2) private and public parties have differing responsibilities for fulfilling statutory purposes. On this basis, the NRDC court found that as private litigants, the intervening corporations deserved “special care” in determining whether to assess fees. This distinction, implicitly requiring deferential treatment toward private litigants, is not a justifiable one to make, particularly in the NRDC context.

The first prong of the “special care” rationale ignores the fact that a public entity is not necessarily better-equipped than a private concern to pay fees, for the former shoulders enormous public responsibilities and often works within tight fiscal constraints. A fee award assessed against a public agency, while benefitting the individual fee recipient, may actually work to the disadvantage of a broader class of persons than the agency paying the fee. By reducing the agency’s monetary resources, the award reduces the amount of money available for use in the agency’s public programs. On the other hand, a private entity’s resources in many instances may be far more substantial. In NRDC, in particular, the intervenors were multibillion-dollar corporations, including, among others, Dow Chemical Company, E.I. duPont de Nemours, and Firestone Tire and Rubber.

The second prong is similarly flawed. Many enforcement statutes, the citizen suit provision of the Clean Water Act among

110 463 U.S. at 692 n.12.
111 Id.
112 NRDC, 801 F.2d at 461-62; see also note 22.
113 NRDC v. Costle, 561 F.2d at 907 n.10 and n.11.
them, expressly provide for suits against both governmental bodies and private industry.\footnote{114} Both types of entities, regardless of their character, must adhere to the legislative mandate. Finally, the NRDC court's rule is also troublesome in that it downplays the importance both of settlement as a favored means of dispute resolution\footnote{116} and of deference to settlement in the face of intervenor attack.

B. An Alternative Solution

A better rule for fee determinations in the intervenor-settlement context, and one more in line with the spirit of the "appropriate" standard and the purposes underlying statutorily-created fee shifting, is the following: it is always "appropriate" under provisions using such language to award fees to successful settlement defenders and against wholly unsuccessful post-settlement intervenors. Stated another way, it is always "appropriate" to assess fees against post-settlement intervenors, whether private or public, who completely fail in challenging a consent decree.

This proposed rule for awarding attorneys' fees is consonant with the approach developed by courts for making such determinations under the "appropriate" standard. Only those post-settlement intervenors who fail to achieve any substantive success by contributing to the development of the decree, and who, by definition, have done nothing to further statutory goals, will be liable for fees. There will, of course, be intermediate cases. The NRDC experience itself suggests that in such situations a court could consider such factors as the number and importance of substantive changes to the decree; the length of time the intervenor's post-settlement activity added to the litigation; and the degree and reasonableness of any variance between the initial reason for intervention and the resultant reason for settlement attack.\footnote{118}

\footnote{114} See Section 505 of the Clean Water Act, 33 U.S.C. § 1365(a)(1) and (2): "any citizen 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 . . . ) who is alleged to be in violation of . . . an effluent standard . . . or (2) against the Administrator [of the EPA for] alleged failure . . . to perform any [nondiscretionary act or duty]."


\footnote{118} At least one commentator, suggesting that better legislative drafting is the answer, has proposed a model statute incorporating some of these factors. Under his proposal, a
The suggested rule is appealing in several other respects. First, it creates important positive incentives which the NRDC rule does not. It encourages prospective litigants to give more thought to the timing of their intervention, which in turn ultimately affects the representative quality of the decree. Because the original parties have not yet cemented their agreement, and, as a consequence, may be less resistant to suggestions for change, a pre-settlement intervenor is more likely to help mold the settlement terms. A decree thus developed is more reflective of a wider range of interests, and is thereby likely to be even more in tune with the spirit of the underlying substantive law.

In addition, even if prospective intervenors forego an earlier entry into the litigation, the proposed solution encourages them to undertake an even more careful preparation and argument of their contentions to insure against total failure and its attendant fee liability. Such heightened effort is likely to increase their chances of success—an acceptance by the original litigants and the court of some modifications to the decree—again rendering the agreement representative of a broader range of interests.\[119\]

Finally, the proposed solution enables future litigants to predict when any fee award would be “appropriate;” successful decree defenders will always receive fees from intervenors wholly unsuccessful in attacking the agreement.

The proposed solution, however, concededly carries with it the specter of some negative, yet not insurmountable, incentive effects. Most importantly, such a rule might discourage intervention. As a practical matter, intervention is of little use if the intervenor cannot act to protect its interests once it gains entry into the litigation. However, the rule affects only those who choose to enter late in the game and who completely fail to effect substantive modifications or to overturn a decree. In such situations, this disincentive might actually benefit the judicial system as a whole, since only those parties who are in a position to add substantively to a pre-existing agreement will now chance post-settlement intervention.

court “may award” fees to any party when it finds that the following circumstances are present: the party has “substantially prevailed,” and the party “has sought to effectuate the purposes” of the statute by, inter alia, supplying new and important information, or by raising a significant interest not otherwise considered. Fein, 47 Law & Contemp. Probs. at 230-31 (emphasis in original) (cited in note 33).

\[119\] In NRDC, four of the eight industry groups involved in the connected suits did participate in the decree negotiations. NRDC, 801 F.2d at 459. See note 12. The opinions are silent as to why some intervenors participated in settlement negotiations and the others, the ones seeking to escape fee liability, did not.
Furthermore, although the rule may snare well-intentioned but unsuccessful settlement-attacking intervenors, it nevertheless serves several broader purposes in doing so. First, recognizing the inherent tension in such fee award situations between the rights of the original parties and those of subsequent intervenors, the rule tips the balance to favor the settlement defenders. This accords with accepted doctrine favoring settlement.\textsuperscript{120} Second, and more importantly, the rule is consistent with the purpose underlying fee shifting—to encourage private enforcement of legislative goals—by making it more attractive to a potential plaintiff to bring an enforcement suit in the first instance knowing that it will receive attorneys’ fees if faced with unsuccessful intervenor attack.

In addition, the proposed formulation shores up the important weaknesses of the \textit{NRDC} rule: it eliminates the troublesome asymmetry by rewarding a successful party with fees and requiring an unsuccessful party to pay them; it deemphasizes the problematic public entity-private entity distinction; and it comports with settled notions of deferential treatment of settlement and the de facto subordinate status of intervenors.

This alternative method of considering the intervenor-settlement fee problem, if applied to the \textit{NRDC} situation, would yield the opposite result from that reached by the \textit{NRDC} court. The environmentalists completely prevailed in their defense of the consent decree and furthered statutory goals in doing so. Conversely, the intervenors completely failed to modify or to convince the court to vacate the decree, and the degree of their contribution to statutory goals was virtually nonexistent. The fact that NRDC ultimately gained implementation of the decree would have made an award of fees to it “appropriate.”

\textbf{Conclusion}

This comment’s solution to the post-settlement intervenor fee award question is not meant to suggest that intervenors will always be liable for fees. The rule allows intervenors who are even partially successful to escape fee liability. If the settlement attackers in \textit{NRDC}, for example, had succeeded in overturning the decree altogether, an award of fees against them would not have been “appropriate,” but it might have been against the unsuccessful settlement defenders. If the intervenors had succeeded only in modifying the decree, then an award of fees to anyone may not have

\footnotesize\textsuperscript{120} See notes 115 and 116.
been "appropriate," for it can be said of such a situation that both sides prevailed to some extent yet it would not be clear which side acted in a manner more directly serving the public interest. Such situations inevitably require balancing and case-by-case determination.

The difficulty in a fee award determination lies in reconciling the rights of the original litigants with the right of intervenors to protect their interests. Under this comment's solution, only those intervenors who fail completely will bear the fee burden. Such a view, to borrow the words of Justice Stevens,\textsuperscript{121} best fulfills the purpose of a fee award by ensuring that the costs of litigation are allocated equitably.

Karen Williams Kammer

\textsuperscript{121} Ruckelshaus, 463 U.S. at 706 (purpose of fee award is equitable allocation of litigation costs while encouraging achievement of statutory goals) (dissent of Stevens, J.), quoting Natural Resources Defense Council v. EPA, 494 F.2d 1331, 1338 (1st Cir. 1973).