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FEE-SHIFTING PROVISIONS AND THE CLEAN AIR ACT: SHOULD FINANCIALLY-MOTIVATED PLAINTIFFS BE BARRED FROM RECOVERING FEES?

Mark Tannahill*

I. INTRODUCTION

When Congress set out to clean up the environment in the 1970s, it included “citizen suit” provisions in most major environmental legislation,1 including the Clean Air Act (the “CAA” or the “Act”).2 In passing the CAA, Congress aimed “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”3 Congress gave the Environmental Protection Agency (“EPA”) the power to enforce the CAA,4 but also included provisions empowering private citizens to bring lawsuits to enforce compliance with the Act.5 Congress also made it easier for private citizens to obtain judicial review of EPA decisions regarding the CAA.6

Along with citizen suits, Congress included fee-shifting provisions in its environmental legislation.7 Because of the

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6. See id.
inherent complexity and expense of environmental litigation, citizen suit provisions provide a means for private plaintiffs to enforce environmental laws and ensure proper administration without facing the burden of attorneys’ fees.\textsuperscript{8} Of all of Congress’s fee shifting provisions, Congress used the broadest language in the CAA, which authorizes fees to be assessed “whenever ‘appropriate.’”\textsuperscript{9} Courts of Appeals disagree whether plaintiffs with financial interests in litigating a CAA citizen suit should be barred from recovering attorneys’ fees.\textsuperscript{10} A plaintiff’s financial interests in bringing a CAA citizen suit are most evident: (1) when a plaintiff brings suit against a business competitor and alleges a CAA violation,\textsuperscript{11} and (2) when a plaintiff seeks to overturn an EPA decision that adversely affects his or her business.\textsuperscript{12} Some circuit courts have held that Congress never intended the CAA’s citizen suit provisions to benefit financially-interested parties that would arguably litigate without the prospect of recovering attorneys’ fees.\textsuperscript{13} Others conclude that Congress never intended such a limitation.\textsuperscript{14}

Part II of this comment begins with a brief discussion of fee-shifting statutes and their history, followed by a discussion of the CAA’s fee-shifting provisions.\textsuperscript{15} Part II then describes the general approach the United States Supreme Court and lower courts have employed when determining whether to award attorneys’ fees to a prevailing plaintiff or defendant in CAA litigation.\textsuperscript{16} Part II concludes with a description of appellate cases that have addressed the issue of whether financially-interested plaintiffs are permitted to recover attorneys’ fees under the CAA.\textsuperscript{17}

Part III of this comment explains how the current circuit split results in uncertainty that can impact a plaintiff’s

\textsuperscript{8} Russell & Gregory, \textit{supra} note 1, at 326–27.
\textsuperscript{9} Id. at 309.
\textsuperscript{10} See, e.g., W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996); Fla. Power & Light Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982).
\textsuperscript{11} See \textit{Fla. Power & Light Co.}, 683 F.2d at 942–43.
\textsuperscript{12} See \textit{W. States Petroleum Ass’n}, 87 F.3d at 286.
\textsuperscript{13} Id.
\textsuperscript{14} \textit{Fla. Power & Light Co.}, 683 F.2d at 943.
\textsuperscript{15} See discussion \textit{infra} Part II.A–C.
\textsuperscript{16} See discussion \textit{infra} Part II.D–F.
\textsuperscript{17} See discussion \textit{infra} Part II.G.
decision of whether and where to file a CAA citizen suit. Part IV analyzes the use of legislative history and additional factors for determining if attorneys' fees should be granted to a prevailing plaintiff. Lastly, Part V proposes that a plaintiff's financial interests should not factor into whether the plaintiff recovers fees. Instead, the United States Supreme Court should adopt different standards dependent on the type of citizen suit brought and should use caution when assessing fees against a private party.

II. BACKGROUND

A. The American Rule

United States courts have long adhered to the "American rule" when determining whether to award attorneys' fees to a prevailing party. Under the American rule, even "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Although "English courts have awarded counsel fees to successful litigants for over 750 years," an inherent American notion of fairness requires each litigant to pay his or her own legal fees.

As will be further discussed in Part IV, scholars have proffered several different rationales in support of the American rule. First, because "litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit..." Second, courts fear that if they routinely award fees to successful parties, "the poor might be unjustly discouraged from instituting actions to vindicate

18. See discussion infra Part III.
19. See discussion infra Part IV.
20. See discussion infra Part V.
21. See discussion infra Part V.
23. The "American rule" is "the general policy that all litigants, even the prevailing one, must bear their own attorney's fees." BLACK'S LAW DICTIONARY 92 (8th ed. 2004).
26. Id. at 685.
27. See discussion infra Part IV.
28. See Russell & Gregory, supra note 1, at 312.
their rights . . . ."30 Lastly, courts believe that "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration."31

Like many areas of law, exceptions to the rigidity of the American rule have evolved.32 Courts recognize general exceptions to the American rule when fee awards are authorized by contract, defined equitable doctrines, or statute.33

B. Fee-Shifting Provisions

1. Statutory Fee-Shifting Provisions

The CAA includes statutory exceptions to the American rule.34 These fee-shifting provisions provide a discretionary mechanism which permits courts to award fees to prevailing parties.35 Statutory fee-shifting systems address three basic considerations: the incentive effect the availability of fee awards may have on potential litigants, the belief that parties should be treated equitably, and the concept of externalities36 and the public benefit produced by the litigation.37

The numerous federal fee-shifting statutes vary in their requirements and specificity.38 Some statutes make fee awards mandatory, while others leave fee awards to the court's discretion.39 Most statutes provide that fees may be awarded only to "prevailing parties," to parties who have

30. Id.
31. Id.
33. Id.
34. See Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (2006).
35. See, e.g., Holmlund, supra note 32, at 588.
37. Kochan, supra note 36.
"substantially prevailed," or to parties who are "successful."  

2. The CAA's Fee-Shifting Provisions

The fee-award provision language in the CAA is the least-specific language used in any of the federal fee-award provisions.\textsuperscript{41} The CAA provides a discretionary mechanism for courts to award fees, including reasonable attorney and expert witness fees, "whenever it determines that such an award is appropriate."\textsuperscript{42} The CAA provision was the first of its kind and served as a model for at least twelve other environmental fee-shifting statutes allowing courts to grant attorneys' fees "whenever . . . appropriate."\textsuperscript{43}

C. CAA Citizen Suits

Two basic types of citizen suits exist under the CAA: (1) private enforcement actions against private parties or the United States government, and (2) actions seeking judicial review of EPA decisions.\textsuperscript{44}

1. Private Enforcement Actions

Section 304(a)(1) of the CAA allows for private enforcement actions and provides that "any person" may commence a civil action against "any person" violating air quality regulations.\textsuperscript{45} Private enforcement actions may also be brought against the government "where there is alleged a failure of the Administrator to perform any act or duty under this Act that is not discretionary with the Administrator."\textsuperscript{46}

This provision allows private citizens to directly enforce

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (2006).
\textsuperscript{44} Russell & Gregory, \textit{supra} note 1, at 324.
\textsuperscript{45} 42 U.S.C. § 7604(a)(1).
\textsuperscript{46} Id. § 7604(a)(2).
environmental legislation, an area traditionally reserved for regulatory agencies. The CAA states that a court “may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.”

2. Judicial Review of EPA Decisions

Section 307(f) of the CAA provides for an action seeking judicial review of EPA regulations. This provision of the statute acts as a direct check on the EPA and provides a higher degree of scrutiny than the EPA's own internal review. Similarly, this provision of the CAA states that a court “may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.”

Private enforcement actions and the ability to seek judicial review of EPA decisions empower private citizens to enforce compliance with the CAA.

D. The United States Supreme Court's Ruling on CAA Fee-Shifting Provisions

The United States Supreme Court has provided some guidance on how to interpret the CAA's fee-shifting provisions. Since the CAA's language for recovery of fees in citizen suits does not expressly require a party to prevail, it was originally uncertain whether courts could shift fees in

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47. Russell & Gregory, supra note 1, at 324. For an example of a private enforcement action, see discussion infra Part II.G.2.b.
49. Id. § 7607.
50. Russell & Gregory, supra note 1, at 326. See William F. Pedersen, Jr., Formal Records and Informal Rulemaking, 85 YALE L.J. 38, 59-60 (1975). Pedersen contends that a court's factual review of EPA regulations is "several times more detailed than the regulations at issue had received since they were first written." Id at 59. Pedersen argues that a detailed factual review by the courts is beneficial:

- It is a great tonic to a program to discover that even if a regulation can be slipped or wrestled through various layers of internal or external review without significant change, the final and most prestigious reviewing forum of all—a circuit court of appeals—will inquire into the minute details of methodology, data sufficiency and test procedure and will send the regulations back if these are lacking.

Id. at 60.
52. See Russell & Gregory, supra note 1, at 324.
favor of non-prevailing parties.\textsuperscript{53} In \textit{Ruckelshaus v. Sierra Club},\textsuperscript{54} the Supreme Court addressed the issue of whether it is appropriate to award attorneys' fees to a party that achieved no success on the merits of its claims under the CAA.\textsuperscript{55} The case involved a section 307 petition for review of an EPA action that limited emission of sulfur dioxide by coal-burning power plants.\textsuperscript{56} The plaintiffs did not prevail on the merits of their claim, but maintained they were still entitled to attorneys' fees.\textsuperscript{57}

Although the case dealt specifically with a section 307 suit, the Court noted the close relationship between judicial review and private enforcement actions.\textsuperscript{58} Since both provide that a court may award fees when "appropriate,"\textsuperscript{59} the Court explained that "whatever general standard may apply under [section] 307(f), a similar standard applies under [section] 304(d)."\textsuperscript{60} But the Court also noted that section 304 actions are different because they may be brought "against private parties."\textsuperscript{61} The Court elaborated on the distinction:

We do not mean to suggest that private parties should be treated in exactly the same manner as governmental entities. Differing abilities to bear the cost of legal fees and differing notions of responsibility for fulfilling the goals of the Clean Air Act likely would justify exercising special care regarding the award of fees against private parties.\textsuperscript{62}

In its analysis of the issue, the Court noted that when Congress chooses to depart from the American rule by

\textsuperscript{53} Holmlund, supra note 32, at 587.
\textsuperscript{55} Id. at 682. Notwithstanding their lack of success on the merits, the plaintiffs urged it was still "appropriate" to award attorneys' fees because they maintained they had contributed to the goals of the CAA. Id. at 682–83. The plaintiffs had challenged EPA standards that limited the emission of sulfur dioxide by coal-burning power plants. Id. at 681. The plaintiffs argued that the EPA's contacts with private industry tainted the standards it promulgated and that the EPA lacked authority under the CAA to issue the standards. Id. The Court of Appeals agreed and awarded the plaintiffs with $91,000 in attorneys' fees. Id. at 682.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} See supra Parts II.C.1–2.
\textsuperscript{59} Ruckelshaus, 463 U.S. at 691.
\textsuperscript{60} Id. For a discussion of section 304(d) and 307(f), see supra Part II.C.
\textsuperscript{61} Ruckelshaus, 463 U.S. at 691.
\textsuperscript{62} Id. at 692 n.12.
statute, virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on some success by the claimant (using phrases like "prevailing party," "substantially prevailing party," or "successful"). The Court also explained that although English courts have awarded counsel fees to successful litigants for over 750 years, they have never gone so far as to force a vindicated defendant to pay the plaintiff's legal expenses.

The decision in *Ruckelshaus* mandated that, "absent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees under § 307(f)." Complete success on every issue is not required; "some degree of success" is sufficient. The Court extended its holding to sixteen other statutes with identical provisions that allow fees to be awarded when "appropriate."

### E. A Two-Part Rule Emerges

Resulting from the *Ruckelshaus* decision and its progeny, a two-part rule for awarding fees to prevailing plaintiffs under the "when appropriate" standard of the CAA has evolved. *Ruckelshaus* created the first part of the rule, requiring a prevailing plaintiff to demonstrate "some success on the merits." In *Ruckelshaus*, the Supreme Court offered no clear guidance as to how to determine if awarding fees is appropriate after some success on the merits has been reached and, instead, left the issue to lower courts.

In answering this question, one common articulation of the second prong of the rule requires a prevailing plaintiff to have "contributed substantially to the goals of the Clean Air Act . . . ." Other courts label it as a public interest component and require the plaintiff "to serve the public

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63. *Id.* at 684–85.
64. *Id.* (citing Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975)).
65. *Id.* at 694.
66. *Id.*
68. *E.g.*, Pound v. Airosol Co., 498 F.3d 1089, 1100–03 (10th Cir. 2007) (applying the two-part test to determine if attorneys' fees should be granted to a prevailing plaintiff).
70. *See id.*
71. W. States Petroleum Ass'n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996) (citing Abramowitz v. EPA, 832 F.2d 1071, 1079 (9th Cir. 1987)).
interest by assisting in the proper interpretation, or implementation of the statute." 72

F. A Note on Prevailing Defendants and Fee-Shifting Provisions

A dual standard exists for the purpose of awarding attorneys' fees under environmental fee-shifting statutes, dependent upon whether the prevailing party is a plaintiff73 or a defendant.74 "This dual standard generally holds prevailing defendants to a stricter standard when determining whether an award is 'appropriate.' "75 When determining whether a prevailing defendant should recover fees, courts typically follow the standard set by the Supreme Court in Christiansburg Garment Co. v. EEOC.76

Courts follow Christiansburg as precedent for environmental cases because of the similarities between both the fee-shifting provisions and the legislative intent of environmental and civil rights legislation.77 The Christiansburg standard states that a prevailing defendant may recover fees only if they are able to demonstrate that a "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."78 Additionally, plaintiffs whose lawyers violate Rule 11 of the Federal Rules of Civil Procedure79 or 28 U.S.C. § 1927,80 which prohibit frivolous claims and excessive costs, are subject to liability for attorneys' fees.81

72. Pound, 498 F.3d at 1102.
73. See supra Part II.E.
75. Id.
77. Florio, supra note 74, at 726. Both forms of legislation share a common goal in protecting public interests. Id. Although the United States Supreme Court has yet to apply the Christiansburg standard outside the context of civil rights litigation, based on the similarity between the public interests protected by civil rights and environmental legislation, the Court would likely affirm lower courts and apply the standard to environmental fee-shifting provisions. Id. at 726.
78. Christiansburg Garment Co., 434 U.S. at 421.
79. FED. R. CIV. P. 11.
The rationale for denying a prevailing defendant attorneys’ fees derives from the burden that the award would place on plaintiffs. The risk of incurring this burden would severely undercut Congress’s efforts to promote citizen enforcement of federal legislation.

G. Discussion of Relevant Circuit Case Law

In order for prevailing plaintiffs to recover attorneys’ fees from the opposition, the second prong of the rule requires that a plaintiff’s lawsuit contribute to the general goals and public purpose of the CAA. Before reaching this inquiry, however, some courts have ruled that prevailing plaintiffs are ineligible for fee awards under the CAA if the plaintiff has a personal financial interest in bringing the lawsuit. This section discusses cases that have addressed the issue of whether financially-interested plaintiffs should be barred from recovering fees after successful CAA citizen suits.

1. Circuit Courts Disentitling Attorneys’ Fees to Plaintiffs with Financial Interests

a. D.C. Circuit

The D.C. Circuit was the first to consider the issue in Alabama Power Co. v. Gorsuch. The plaintiffs had successfully challenged EPA regulations that prevented significant deterioration of air quality in the nation’s “clean air areas.” After prevailing, the plaintiffs moved for an order compelling the defendant to pay all legal fees.

The EPA argued that although the plaintiffs had prevailed on the issues raised, they did not qualify for

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82. See Christiansburg Garment Co., 434 U.S. at 422.
83. Id.
84. See supra Part II.E.
85. See W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996); Pound v. Airosol Co., 498 F.3d 1089, 1100–03 (10th Cir. 2007).
86. See W. States Petroleum, 87 F.3d at 286.
87. See discussion infra Part II.G.
89. Id. at 3. The Court of Appeals had earlier held that some of the EPA’s regulations regarding the air quality of the nation’s “clean air areas” contradicted the CAA’s discernible legislative intent. Ala. Power Co. v. Costle, 606 F.2d 1068, 1074–75 (D.C. Cir. 1979).
90. Gorsuch, 672 F.2d at 3.
attorneys' fees under the CAA because their position was not "pro-environment," and because they litigated in furtherance of their own economic interests and did not need the possibility of attorneys' fees as an incentive to advocate in the public interest.  

The court rejected the EPA's first contention, explaining, "[T]he suggestion that fee awards are limited to parties asserting 'pro-environment' claims has no support in the words of the statute or its legislative history." The court did not directly address the EPA's second contention that a financially-interested plaintiff should not be permitted to recover attorneys' fees because the plaintiffs also sought fees under provisions other than the CAA. Nonetheless, in a footnote, the court discussed the EPA's contention and suggested that the legislative history of the Toxic Substances Control Act, which uses the same "whenever appropriate" language for the granting of attorneys' fees, should be used for guidance. The legislative history of the Toxic Substances Control Act states "it is not intended that the provisions support participation of persons, including corporations . . . that could otherwise afford to participate." Additionally, "[w]hether or not the person's resources are sufficient to enable participation would include consideration of . . . the likelihood that the person would seek to participate in the proceeding whether or not compensation was available.

The dissent argued that a plaintiff's motive for bringing suit should not be considered because of the complexity and speculation it entails. The dissent noted that a standard that included motive as a factor "would prohibit an award to a tenant farmer who seeks to stop a nearby factory from polluting his water supply, but would allow an award to his amateur fisherman brother-in-law who visits him on
weekends.”

b. Ninth Circuit

In *Western State Petroleum Ass'n v. EPA*, the Ninth Circuit was next to address the issue of whether a plaintiff with personal financial interests in bringing suit should be permitted to recover fees after a successful CAA judicial review action. In this case, the EPA had granted interim approval of a plan submitted by the State of Washington that would exempt “insignificant emissions units” from permit application, monitoring, reporting, and record-keeping requirements. The petitioners, five air-pollutant emitters and two trade associations of pollutant emitters, brought suit and successfully challenged the EPA's decision.

In addressing the issue, the court agreed with *Gorsuch* and reasoned that the legislative history of the Toxic Substances Control Act gives “the clearest expression of congressional purpose in enacting statutes of this type.” Using this approach, the court held that a plaintiff with personal financial motivation cannot recover attorneys’ fees in a judicial review action under the CAA.

Additionally, the court explained that the “petitioners do not assert, nor do we find, that their litigation of this case has served the public interest in assisting in the interpretation and implementation of the Clean Air Act.” The court found

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99. Id.
100. *W. States Petroleum Ass'n v. EPA*, 87 F.3d 280 (9th Cir. 1996).
101. *Id.* at 282. “The EPA has allowed states to exempt insignificant activities and emissions levels from certain requirements in order to reduce the regulatory burdens on emitters. Subject to EPA approval, each state determines what activities and emissions levels qualify as insignificant.” *Id.*
102. *Id.* The Northwest Pulp & Paper Association, the Aluminum Company of America, the Columbia Aluminum Corporation, Intalco Aluminum Corporation, Kaiser Aluminum & Chemical Corporation, and Vanalco, Inc. joined Western States Petroleum Association as petitioners. *Id.* at 280.
104. Toxic Substances Control Act § 19(d), 15 U.S.C. § 2618(d) (2006). This fee-shifting provision uses the same “whenever appropriate” standard for the granting of attorneys' fees as the CAA. *Id.*
105. *W. States Petroleum Ass'n*, 87 F.3d at 286 (citing *Gorsuch*, 672 F.2d at 7 n.33).
106. *Id.*
107. *Id.* All parties and the court acknowledged that this litigation was limited to the EPA's Washington decision and would not affect other CAA litigation. *Id.*
that "the issue under the Act has been relatively narrow and concerns only the anomalousness of the EPA's Washington decision." Further, they held that the petitioners' status as prevailing parties, standing alone, did not automatically establish that they had assisted in the proper implementation of the Act.

2. Circuit Courts Entitling Attorneys' Fees to Plaintiffs with Financial Interests

a. Fifth Circuit

In *Florida Power & Light Co. v. Costle*, the Fifth Circuit was the first to specifically rule on the issue of whether a financially-interested plaintiff should be permitted to recover fees after prevailing in a CAA judicial review action. The plaintiff, an electric utility company, had prevailed on a claim that the EPA had abused its discretion in requiring Florida to incorporate a "two-year limitation on relief into a state implementation plan" under the CAA. After its successful CAA judicial review action, the plaintiff moved for fees.

The EPA contended "that Congress never intended that costs and fees be awarded to a large, solvent corporation whose main motivation in pursuing section 307 litigation is financial interest; instead, Congress meant only to reward so-called 'watchdog' or public interest groups whose involvement in such suits is motivated by public spirit." In rejecting the EPA's contention, the court held: "There is no indication that Congress meant to limit section 307(f) awards to public interest groups, nor is there any basis for disqualifying a party from receiving an award merely because that party is

108. Id.
109. Id.
111. *Id.* at 942. "To comply with Florida's EPA-approved state implementation plan under the CAA, petitioner burned low sulfur fuel oil at its oil-fired generating plants." *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981). Early in 1979, Exxon Company, U.S.A., petitioner's source of oil, informed the petitioner "of a significant decrease in the availability of low sulfur fuel." *Id.* Petitioner "could not burn available higher sulfur fuel without exceeding the pollution limits imposed by Florida's" state implementation plan, so Petitioner filed this lawsuit to seek judicial review of the EPA's regulation. *Id.* at 581–82.
113. *Id.*
solvent and has a financial interest in the outcome of the litigation.”

In support of its conclusion, the court quoted legislative history from section 307(f) of the CAA: “‘[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.’” The court reasoned that “the result of this suit will aid in assuring ‘proper implementation and administration of the Act,’ [and] that it will also specifically benefit [the plaintiff] is of no moment.”

b. Tenth Circuit

Most recently, the Tenth Circuit considered the issue in Pound v. Airosol Co., and it was the first to address it with regards to a CAA private enforcement action. In Pound, a private plaintiff brought suit against a competitor in the reptile ectoparasites industry, alleging a violation of the CAA. The district court partially granted the plaintiff’s motion for summary judgment, finding that the defendants violated the Act.

After prevailing in its private enforcement action, the plaintiff moved for fees and argued that by successfully litigating the citizen suit, an important public service had been performed and costs should be awarded. In response,
the defendant argued that the citizen suit was not brought to further the objectives of the CAA, but rather to protect the plaintiff's personal economic interest in eliminating a competitor from the market. The district court noted that the award of fees is clearly discretionary under the CAA and elected against awarding fees.

On appeal, the Tenth Circuit reversed and ordered the defendant to pay attorneys' fees. In its analysis of the issue, the court acknowledged that the language of section 304(d) and section 307(f) of the CAA are identical, and therefore it is appropriate to treat them similarly. Drawing on cases that had addressed the issue under section 307(f) of the CAA, the Tenth Circuit concluded that the public interest element of the CAA had been satisfied, regardless of the plaintiff's financial motivation for bringing the lawsuit.

By bringing this partially successful action, the court concluded that the plaintiff had "promoted the enforcement of the Act and assisted the EPA in achieving the Act's statutory goals." The court held that there was "no basis for disqualifying a party from receiving an award of fees 'merely because that party is solvent and has a financial interest in the outcome of the litigation,' " and if the court denied fees to plaintiffs with a financial interest, it would weaken enforcement of the Act. Denying fees to a financially interested plaintiff would leave them less inclined to bring CAA citizen suits, weakening enforcement of the Act. In further support, the court reasoned that "competitors are most likely to have a substantial financial interest in ensuring that their peers are CAA compliant, and they are

122. Id. at 1164–65.
123. Id. at 1166.
124. Pound v. Airosol Co., 498 F.3d 1089, 1101–02 (10th Cir. 2007).
126. 42 U.S.C. § 7607(f). This provision of the statute addresses judicial review actions. See id.
128. Id. at 1102.
129. Id.
130. Id. (quoting Fla. Power & Light Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982)).
131. Id.
132. See id.
also the most informed regarding the products offered . . . by their peers.” The court also acknowledged that “no ‘special circumstances’ [had] been identified which would cause an award of attorney fees to be unjust.”

III. IDENTIFICATION OF THE PROBLEM

The circuit courts disagree as to whether an award of attorneys’ fees is appropriate in a CAA citizen suit when the prevailing plaintiff had personal financial interests for bringing suit. In the context of judicial review actions, financial interests for bringing suit typically involve the plaintiff’s desire to challenge and overturn EPA decisions that have an adverse effect on its business. With private enforcement actions, financial interests typically stem from a plaintiff’s desire to bring harmful litigation against a competitor.

Only three circuits have directly addressed the issue. The Fifth and Tenth Circuits hold that plaintiffs with a financial interest in bringing a CAA citizen suit are still eligible for an award of fees. In contrast, the D.C. Circuit suggests, and the Ninth Circuit holds, that a plaintiff with a financial interest in litigation is ineligible for an award of fees after a successful CAA citizen suit. The other circuits have yet to address the issue.

A potential Supreme Court ruling on this issue could have far-reaching effects because at least twelve other environmental fee-shifting statutes allow courts to grant attorneys’ fees whenever “appropriate.” At the very least, a uniform approach would eliminate uncertainty and give prospective plaintiffs a clear indication of whether they

133. Pound v. Airosol Co., 498 F.3d 1089, 1102 (10th Cir. 2007).
134. Id. at 1103.
135. See supra Part II.G.
136. See, e.g., W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 282–83 (9th Cir. 1996).
137. See Pound, 498 F.3d at 1093–94.
138. See supra Part II.G.
139. Although the D.C. Circuit did not directly rule on the issue, its dicta is of practical importance because the D.C. Circuit is traditionally the most active venue in environmental litigation. See Adrienne Smith, Standing and the National Environmental Policy Act: Where Substance, Procedure, and Information Collide, 85 B.U. L. REV. 633, 638 (2005).
140. See supra Part II.G.
141. See statutes cited supra note 43.
should have concerns about their eligibility for CAA fee-shifting provisions. As it stands, plaintiffs are encouraged to make all efforts to file CAA citizen suits in the Fifth and Tenth Circuits since a plaintiff's financial interest in bringing the lawsuit will not make it ineligible for recovering fees. The remainder of this comment will discuss and analyze whether a financially-interested plaintiff should be eligible for the CAA's fee-shifting provisions, and will then propose an approach the Supreme Court should adopt when presented with this question in the future.

IV. ANALYSIS

A. Speculating about Legislative Intent

A difference in opinion regarding the legislative intent of the CAA serves as the principal reason for the circuit split. In Western States Petroleum, the court turned to the legislative history of the Toxic Substances Control Act, which uses the same "whenever appropriate" standard as the CAA, for guidance. There, the legislative history made clear that the fee-shifting provisions of the Toxic Substances Control Act were not intended to benefit plaintiffs that otherwise would have brought suit.

In Florida Power, the Fifth Circuit declined to draw analogies to other statutes and instead focused on the legislative history of section 307(f) of the CAA: "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." Noting that this history was silent as to financial interest, and finding that a solvent party with a financial interest in litigation could still assist in the proper implementation and administration of the CAA, the court concluded there was no indication that

142. See discussion infra Part IV.
143. See discussion infra Part V.
145. W. States Petroleum Ass'n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996) (citing Ala. Power Co. v. Gorsuch, 672 F.2d 1, 7 n.33 (D.C. Cir. 1982)).
146. Id. (citing Gorsuch, 672 F.2d at 7 n.33).
Congress intended to limit section 307(f) of the CAA to public interest groups.\textsuperscript{148}

Although legislative intent can be helpful in statutory interpretation, one common criticism is that it is often difficult to discern.\textsuperscript{149} When the intent in question must emanate from a large group of persons, especially a group with as varied an array of aspirations, agendas, and motivations as Congress, there is great room for doubt about the ability to perceive intent.\textsuperscript{150} Even if Congress clearly expressed its legislative intent, it often only includes statements from a minority of Congress; therefore, no clear indication exists as to the intent's pervasiveness.\textsuperscript{151} The uncertainty is even more pronounced when courts turn to the legislative intent of other statutes in order to guide statutory interpretation. Unless Congress has expressed a desire to do so, courts run the risk of attributing an inaccurate intent to Congress.

B. Additional Considerations Regarding Fee-Shifting Provisions

Although the relevant case law does not delve deeply into the issue,\textsuperscript{152} multiple considerations come into play when considering statutory fee-shifting provisions.\textsuperscript{153} One such consideration is the incentive effect that the availability of fee awards may have on potential litigants.\textsuperscript{154} A second consideration is the concept that parties should be treated equitably.\textsuperscript{155} Lastly, a third consideration involves the public benefit produced by the litigation.\textsuperscript{156}

1. Incentive Effect

Common sense dictates that the prospect of recovering

\textsuperscript{148} Id.
\textsuperscript{150} Id. at 989.
\textsuperscript{151} See id. at 1009–11.
\textsuperscript{152} See supra Part II.G.
\textsuperscript{153} See Holmlund, supra note 32, at 588.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
fees provides an incentive to bring a lawsuit. With regard to environmental litigation, statutory fee-shifting systems acknowledge that "[t]he complex and technical nature of environmental litigation makes it expensive to prosecute."\textsuperscript{157} Furthermore, plaintiffs in environmental litigation typically "must face groups with vast financial resources, such as the government and private industry."\textsuperscript{158} Since the typical remedy in a CAA citizen suit is an injunction to stop the violation as opposed to monetary damages,\textsuperscript{159} an award of attorneys' fees to prevailing plaintiffs provides them with a direct means to fund the litigation that otherwise would not exist.

The CAA's fee-shifting provisions provide another incentive—an incentive to abide by the Act.\textsuperscript{160} In support of supplementing civil penalties with fee awards, the Act's potential for fee awards promotes deterrence from violating the Act.\textsuperscript{161} In the context of CAA citizen suits, there is a justification for using fees as a deterrent against violating the Act. Even though private plaintiffs technically bring CAA citizen suits, they involve claims that are fundamentally public in nature.\textsuperscript{162} Successful lawsuits serve the public interest in maintaining the environment and assuring proper implementation and administration of the CAA. This can be said to justify the use of attorneys' fees as a deterrent against violating the Act.\textsuperscript{163}

Although there is concern that the incentive created by providing fees to financially-interested plaintiffs will lead to an increase in meritless litigation,\textsuperscript{164} there are provisions in place that protect defendants against frivolous CAA

\begin{flushleft}
158. \textit{Id.} at 327.
161. \textit{Id.}
164. \textit{See, e.g.}, W. States Petroleum Ass’n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996).
\end{flushleft}
A prevailing defendant may recover fees if it can show that a "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Placing the burden too readily on an unsuccessful plaintiff to pay the prevailing defendant's fees, however, would substantially undercut the efforts of Congress to promote the citizen enforcement of federal legislation. Therefore, this more-protective standard is necessary.

Defendants have maintained that plaintiffs with a financial motive for bringing a private enforcement or judicial review action under the CAA do not need a fee-shifting system as an additional incentive. They argue that because of their own interests in the litigation, plaintiffs in this situation would bring the lawsuit even without the prospect of recovering fees. Yet, the shortcoming of arguing that a plaintiff's financial motive for bringing a CAA citizen suit lies in the difficulty in determining a plaintiff's motive for bringing a lawsuit, and whether that motive is significant enough to induce a plaintiff to bring suit even without the prospect of recovering fees.

Courts have criticized inquiring into motive because of its complexity and speculative nature. As previously mentioned, the dissenting opinion in Gorsuch noted that considering motive as a factor for determining if fees should be recoverable "would prohibit an award to a tenant farmer who seeks to stop a nearby factory from polluting his water supply, but would allow an award to his amateur fisherman brother-in-law who visits him on weekends."

165. See supra Part II.F.
167. See id. at 422.
168. See Florio, supra note 74, at 707.
169. See, e.g., W. States Petroleum Ass'n, 87 F.3d at 286.
170. See, e.g., id.
172. See id.
173. Id.
Although this may be an unlikely example, it highlights the shortcomings of considering motive for bringing suit. The farmer would have a clear financial interest in maintaining his livelihood and bringing a CAA citizen suit to keep his farm’s water supply clean. The next inquiry would be whether the farmer’s financial interest would have led him to file the lawsuit even if he had no possibility of recovering attorneys’ fees. This would presumably entail a difficult and open-ended analysis of the farmer’s financial status and whether his own financial incentive in bringing the suit outweighed the large costs involved in environmental litigation. With so much at stake financially, a court could easily find that the farmer would have brought the suit without the prospect of recovering fees.

This example also highlights the inefficiencies of including motive as a factor in the analysis of whether a prevailing plaintiff should recover fees. If personal financial motive for bringing suit is a factor, a plaintiff in the farmer’s position would be encouraged to shop around for a “disinterested” plaintiff to bring the lawsuit, such as the “amateur fisherman brother-in-law.” This would undermine the core reason for permitting citizen suits, which is to allow private citizens to directly enforce provisions of environmental legislation, an area traditionally reserved to regulatory agencies.

Citizen suits are designed to allow enforcement where environmental legislation is not being properly administered. Regardless of whether the “interested” farmer or the “disinterested” brother-in-law brings suit, a successful CAA citizen suit serves the same public benefit of abating pollution.

2. Treating Parties Equitably

The notion that parties should be treated equitably represents a second consideration said to be addressed by statutory fee-shifting systems. Of principal concern is whether it is fair to break away from the traditional
American rule and order a defendant to pay a prevailing plaintiff's fees. The unique characteristics of judicial review and private enforcement actions require different analyses in order to determine what is equitable.

a. Equitableness in Judicial Review Actions

After a successful judicial review action of an EPA decision under the CAA, a prevailing plaintiff may move for fees pursuant to section 307(f) of the CAA. If the EPA is ordered to pay fees, the government is able to spread the cost throughout the tax base. Since the public benefits by the proper implementation and interpretation of the CAA, ordering the government to pay attorneys’ fees is defensible on the grounds that the taxpayers ultimately pay for the benefit they receive.

b. Equitableness in Private Enforcement Actions

Assessing fees under section 304(d) of the CAA against private businesses is arguably less defensible. Although businesses can typically spread the cost of attorneys’ fees to the public by raising prices, this method does not uniformly spread costs in the same manner as taxing the public. Here, there is no assurance that consumers represent the appropriate class to shoulder the entire burden.

3. Public Benefit Served by Successful CAA Litigation

Lastly, fee-shifting provisions provide public benefits that result from successful litigation. Whether “the movant . . . serve[d] the public interest by assisting in the proper interpretation, or implementation of the [Clean Air Act]” has long been part of the inquiry into whether attorneys’ fees should be assessed in favor of a prevailing plaintiff in CAA

179. See id.
180. See id. at 593.
182. Holmlund, supra note 32, at 593.
183. id.
185. See Holmlund, supra note 32, at 593.
186. See id.
187. Id.
188. Id. at 588.
In examining the public benefit of successful litigation under the CAA, it is important to note the distinction between private enforcement actions and judicial review actions, as will be discussed below. Provisions providing for fees in an enforcement action are meant to encourage abatement of pollution, whereas provisions providing for fees in judicial review proceedings are meant to encourage proper implementation and administration of the statute. Different public benefits flow from successful private enforcement actions and successful judicial review actions. Depending on the circumstances, these public benefits may help counterbalance the time, difficulty, and costs involved in determining reasonable attorneys’ fees.

a. Public Benefits of Private Enforcement Actions

Private enforcement actions are designed to encourage abatement of pollution. Consequently, successful actions of this type provide the public benefit of enforcing the CAA and eliminating pollution. Although the magnitude of these benefits vary, every successful private enforcement action serves the public interest in maintaining air quality.

Additional public benefits emanate from successful private enforcement actions under the CAA. First, public officials and agencies may not be able to adequately police the environment (due to problems such as insufficient funds, inadequate staff, or lack of expertise), and absent a private enforcement action, violations would go unpunished. Second, an enforcement agency, such as the EPA, may be lenient in prosecuting violators “because of political pressure, alignment with the special interests it was intended to regulate, or because the agency itself is promoting the activity that threatens the environment,” and a private enforcement action is necessary in order to properly enforce the CAA.

189. Pound v. Airosol Co., 498 F.3d 1089, 1102 (10th Cir. 2007).
190. Russell & Gregory, supra note 1, at 324.
191. Id. at 324–25.
192. See id. at 323.
193. See id. at 324–25.
194. See id.
195. See id.
196. Russell & Gregory, supra note 1, at 325.
197. Id. at 324–25.
Lastly, citizen suits reduce the government's enforcement burden and save the government money.198

b. Public Benefits of Judicial Review Actions

The public benefit of judicial review actions is not as readily apparent because these actions do not always result in a direct abatement of pollution.199 Understanding the benefit of judicial review actions starts with a recognition that although these lawsuits are technically brought on behalf of a private plaintiff, they involve claims that are fundamentally public in nature.200 Similar to legislative changes, which are capable of providing profound public benefits,201 judicial review of EPA actions can have vast impacts on public health, the environment, and the economy. If a court overrules an EPA decision as an improper administration of the CAA, that single action may impact public health and the environment on a national level.

In addition, judicial review serves as a direct check on the EPA and provides a higher degree of scrutiny than it would be subject to under only the EPA's internal review.202 Judicial review acts to protect the public from improper EPA action and provides an extra level of review to ensure the proper application and administration of the CAA.203 This is of special importance because "[w]hen cases involve allegations of administrative lawlessness . . . society has a keen interest in ensuring that all legitimate points of view are represented so that courts make fully informed decisions."204

C. The "Watchdog" Rationale

In Pound, the Fifth Circuit proffered an additional rationale to justify an award of fees in favor of a prevailing plaintiff.205 The court asserted that "competitors are most likely to have a substantial financial interest in ensuring that

198. Id. at 325.
199. Id. at 325–26.
200. Babich, supra note 162, at 223.
201. Id.
202. Russell & Gregory, supra note 1, at 326.
203. See id.
204. Babich, supra note 162, at 223.
205. See Pound v. Airosol Co., 498 F.3d 1089, 1102 (10th Cir. 2007).
their peers are CAA compliant, and they are also the most informed regarding the products offered ... by their peers.”

The court interpreted a competitors' financial interest as a positive—it gives it an interest in acting as a “watchdog” to ensure that its competitors are CAA compliant. Further, competitors are informed about the products offered by their counterparts, and have an understanding of how the CAA applies to their industry. Under this approach, where a plaintiff’s financial interest in CAA litigation does not bar recovery of fees, the court focuses its attention more on the defendant’s status as a violator of the CAA and whether an award of fees is justified.

V. PROPOSAL

After some success on the merits, courts should not consider a plaintiff's financial interests for bringing a CAA citizen suit when determining if it is “appropriate” to award them attorneys’ fees. Environmental legislation includes citizen suit provisions to ensure and protect the public interest in maintaining the environment. Although parties with financial interests may have ulterior motivations for bringing CAA litigation, such motives do not eliminate the public benefits that flow from the abatement of pollution and the proper implementation and interpretation of the Act. An automatic denial of a fee award to a party with a financial interest in litigation shifts the focus away from the defendant's status as a violator of the law and ignores the public benefit served. Considering a plaintiff's financial interest begins a complex and speculative journey, first requiring a determination of the plaintiff's motive for bringing suit, and then requiring a determination of whether that motive would have led the plaintiff to bring suit without the prospect of recovering fees.

Although courts have attempted to decipher how legislators intended this issue to be resolved, this has proved inconclusive since the legislative history of the CAA does not

206. Id.
207. See id.
208. See id.
209. See Russell & Gregory, supra note 1, at 308–09.
210. See Pound, 498 F.3d at 1102.
211. See supra Part IV.B.1.
specifically address the issue.\textsuperscript{212} Until the legislature specifically addresses the issue, courts should limit their analysis to the confines of the CAA and not speculate as to legislative intent. Limiting the analysis to the CAA and its legislative history, there is no clear indication that Congress intended to bar financially-motivated plaintiffs from recovering fees.\textsuperscript{213} Further, eliminating the inquiry into financial motive eliminates any incentive for financially-interested parties to seek "disinterested" parties to bring suit.\textsuperscript{214} This allows for a more direct enforcement of the CAA and promotes efficiency.\textsuperscript{215}

Additionally, having a financial interest in litigation can help a plaintiff fulfill standing requirements in order to bring a CAA citizen suit. As the Supreme Court notes, "a concrete and particularized, actual or imminent invasion of a legally protected interest" is required in order to establish standing, even in the case of environmental citizen suits.\textsuperscript{216} Plaintiffs with a financial incentive to bring CAA litigation are arguably in a better position to fulfill this requirement than financially-neutral third parties.

In deciding whether a private plaintiff should recover fees after successful CAA litigation, as discussed in further detail below, courts should apply different tests depending upon whether the lawsuit involves a private enforcement action or a judicial review action.

A. Test for Private Enforcement Actions

Given the Supreme Court's advice in \textit{Ruckelshaus} and the unique characteristics of private enforcement actions, courts would be wise to use caution when assessing fees against a private party. Equitableness serves as the primary concern with assessing fees against a private party; although the entire public benefits from an abatement of pollution, only the defendant's customers feel the burden of paying for the

\textsuperscript{212} See Pound, 498 F.3d at 1102; Fla. Power & Light Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982).
\textsuperscript{213} Pound, 498 F.3d at 1102; Fla. Power & Light Co., 683 F.2d at 943.
\textsuperscript{214} See supra Part IV.B.1.
\textsuperscript{215} See supra Part IV.B.1.
\textsuperscript{216} Lujan v. Defenders of Wildlife, 504 U.S. 555, 555 (1992) (holding that the plaintiffs did not sufficiently assert imminent injury to have standing and that plaintiffs' alleged injury was not redressable).
benefit. If the defendant cannot pass the burden to the public through its customers, the defendant faces the entire burden on its own.

However, an inability to pass the financial burden onto the public does not make it inappropriate to assess fees against private parties. Assessing fees against a private party acts as a deterrent against violating the CAA, penalizes those that violate the law, and creates an incentive for private parties to bring suit for improper enforcement or administration of the CAA. Additionally, permitting financially-interested plaintiffs to recover fees embraces the fact that competitors are in a perfect position to act as a "watchdog." Competitors have an incentive to ensure that their peers comply with the CAA, and they have a unique understanding of how the CAA applies to their industry.

With private enforcement actions, courts should first consider whether the prevailing plaintiff's lawsuit serves the public interest in the proper implementation and interpretation of the CAA. In making this determination, courts should look to the significance of the lawsuit. Especially in the context of citizen suits against the government for failure to act, seemingly minor enforcement actions may take on large-scale significance by establishing important precedent. When determining whether granting fees is appropriate, courts should consider the potential importance of the precedent set by the prevailing plaintiff. In cases where the public benefit is trivial, courts would be justified in not awarding fees. This formulation eliminates any additional incentive for private parties to bring minor litigation against their competitors just for the sake of creating a burden and damaging reputation; although a successful lawsuit hurts its competitors, a prevailing plaintiff may still have to pay its own fees.

217. Holmlund, supra note 32, at 593.
218. See id.
219. See supra Part II.B.
220. See Pound v. Airosol Co., 498 F.3d 1089, 1102–03 (10th Cir. 2007).
221. See id.
222. See, e.g., id. Courts already take a similar approach as part of the two-part inquiry to determine if a plaintiff prevailing in a CAA citizen suit should recover fees. See, e.g., id. at 1101–02. The two-part test typically asks (1) if there has been some success on the merits, and (2) if the public interest in the proper implementation and interpretation of the CAA has been served. Id.
If the public interest has been served, courts should then ask whether it is fair to assess fees in favor of the prevailing plaintiff. Considerations here should include the extent of the defendant's culpability for the violation, the defendant's ability to pay fees, and any other special circumstances that would justify not assessing fees. This inquiry would give the court added discretion in determining whether it is "appropriate" to stray from the American rule and assess fees against a private party.

B. Test for Judicial Review Actions

Assessing fees against the government should not entail as many considerations and safeguards as assessing fees against a private party. If a plaintiff prevails in a judicial review action and the court orders the government to pay fees, the government can pass that cost on to taxpayers. Therefore, by levying fees against the government, the public ultimately pays for the benefit it receives. Since the burden of paying for the public benefit is more evenly distributed amongst taxpayers, courts do not need to consider fairness when assessing fees against the government.

With judicial review actions, courts should only consider whether the prevailing plaintiff's lawsuit serves the public interest in the proper interpretation and implementation of the CAA. In addressing the issue, courts should focus on the significance of the lawsuit and its impact on public health and the environment. The fact that the plaintiff had a financial motivation for challenging an EPA decision is inconsequential; as long as the public benefits in a meaningful way by the lawsuit, courts are justified in assessing fees against the government.

Had Western States Petroleum used this test, it still would have reached the same result, and fees would not have been awarded to the plaintiff. Although the plaintiff

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224. Holmlund, supra note 32, at 593.
225. Id.
226. See supra Part II.B.
227. See Babich, supra note 162, at 223.
228. See W. States Petroleum Ass'n v. EPA, 87 F.3d 280, 286 (9th Cir. 1996). Although the court eventually addressed whether the litigation had served the public's interests, the court had already held the plaintiff ineligible for a CAA fee award because he had a financial interest for bringing suit. Id.
prevailed on all issues raised, there were no arguments to support the notion that the public interest in the proper implementation and interpretation of the CAA had been served by the litigation.\textsuperscript{229} As a result, even without considering financial interests, the plaintiff still would not have been entitled to an award of fees under the CAA.

VI. CONCLUSION

The American rule of parties paying their own fees has a long tradition in the United States judicial system and is not discarded lightly.\textsuperscript{230} Nonetheless, drafters of the CAA felt it necessary to include fee-shifting provisions that would enable prevailing parties to recover fees.\textsuperscript{231} Because of the inherent complexity and expense of environmental litigation, citizen suit provisions provide a means for private plaintiffs to enforce environmental laws and ensure proper administration without facing the burden of attorneys' fees.\textsuperscript{232}

When determining the appropriateness of awarding fees, some courts have considered whether the plaintiff had personal financial interests for bringing suit.\textsuperscript{233} This inquiry into a plaintiff's personal financial interest is not supported by the CAA or its legislative history, and speculating about congressional intent on this issue has clear shortcomings.\textsuperscript{234} Successful citizen suits still provide public benefit, regardless of the plaintiff's reason for initiating litigation.\textsuperscript{235}

In the future, when determining whether awarding fees to a prevailing plaintiff is appropriate under the CAA, courts should follow the Supreme Court's advice\textsuperscript{236} and use different approaches dependent upon whether the defendant is a private party or the government.\textsuperscript{237} With both private enforcement and judicial review actions, courts should continue to look to whether the public purpose in the proper implementation and interpretation of the CAA has been

\begin{itemize}
\item \textsuperscript{229} Id.
\item \textsuperscript{230} See supra Part II.A.
\item \textsuperscript{231} See Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (2006).
\item \textsuperscript{232} Russell & Gregory, supra note 1, at 326–27.
\item \textsuperscript{233} See supra Part III.
\item \textsuperscript{234} See supra Part IV.A.
\item \textsuperscript{235} See supra Part IV.B.3.
\item \textsuperscript{236} See Ruckelshaus v. Sierra Club, 463 U.S. 680, 692 n.12 (1983).
\item \textsuperscript{237} See supra Part V.
\end{itemize}
served.\textsuperscript{238} In the case of private enforcement actions, however, courts should augment this with a determination of the fairness in assessing fees against a private party.\textsuperscript{239} Until the Supreme Court or Congress specifically addresses the issue, the uncertainty and difference of opinion will persist.

\begin{flushleft}
\textsuperscript{238} See supra Part V.
\textsuperscript{239} See supra Part V.A.
\end{flushleft}