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THE AWARDING OF ATTORNEYS' FEES IN ENVIRONMENTAL LITIGATION

One of the most crucial problems which face groups seeking to enforce environmental laws is in the financing of the necessary litigation. Environmental litigation tends to be complex and protracted, and therefore expensive. Because the successful conclusion of such litigation often results in injunctive rather than monetary relief, the use of a percentage fee is often unavailable to finance the attorney's work. Until the recent decision in Alyeska Pipeline Service Co. v. The Wilderness Society, ___ U.S. __, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975), it had been fairly common for federal courts to award attorneys' fees to successful plaintiffs in environmental actions under a theory that the public benefited from these "private attorneys general." This theory had developed as an exception to the general "American rule" that each party bear the burden of its own attorneys' fees. However, in Alyeska, the Supreme Court held that, absent specific statutory authority, the federal courts were without power to award attorneys fees to "public attorneys general."

Thus, except where authorized by Congress, environmental and other public interest groups can no longer rely on the federal courts to award attorneys' fees, even when the litigation results in the successful enforcement of existing law. There are currently several federal statutes which permit the awarding of attorneys' fees in environmental litigation. They include:

(1) The Federal Water Pollution Control Act, 33 U.S.C. §1151 et. seq., §1365(d).
(2) The Clean Air Amendments of 1970, 42 U.S.C. §1857 et. seq., §1857h-2(d).
(3) The Noise Control Act of 1972, 42 U.S.C. §4901 et. seq., §4911(d).
(4) The Marine Protection, Research, and Sanctuaries Act of 1972, [Ocean Dumping Act], 33 U.S.C. §1401 et. seq., §1415(g)(4).

All four of these statutes authorize recovery of attorney fees in almost identical circumstances. They apply to suits (1) against any person (including the federal government), who is in violation of any effluent limit, criteria, regulation, order, etc., or order of a state, or appropriate federal agency; and to suits (2) against the appropriate federal administrator for failure to comply with a non-discretionary duty. In all these statutes, the awarding of costs is discretionary with the court, to be exercised where appropriate All the statutes require that appropriate administrations be given 60 days to correct the alleged violation before suit may be initiated.

Despite the wide application of the above statutes, many areas of potential litigation are left uncovered, including natural resource issues involving agencies such as the National Forest Service and the Department of the Interior. Legislation was introduced in the 94th Congress to expand the scope of permissible attorneys' fees awards. Among these were H.R. 7826, which would have allowed attorney fees to be assessed against the federal government in all civil cases; H.R. 7829, which would have amended the National Environmental Protection Act to allow fees in any case brought under that Act; and H.R. 7825, which would have permitted the award of attorneys' fees under the Mineral Leasing Act of 1920. Similar legislation was passed under the Civil Rights Attorney Fees Act of 1976, P.L. 94-559, 90 Stat. 2641, 42 U.S.C. §1988, which permits the recovery of attorneys' fees under the various civil rights provisions of 42 U.S.C. §1977-81, or Title VI of the Civil Rights Act. This statute was passed specifically in response to Alyeska. Undoubtedly, attempts will continue to be made in future sessions of Congress to enact similar legislation in the environmental field.