The Violator-Pays Rule

Should attorney-fee awards in environmental citizen suits follow the pay-your-own-way, “American” rule? The loser-pays, “English” rule? Or did Congress choose a third alternative — what might be called a “violator-pays” rule to fully compensate litigants who smoke out those who break federal laws? The violator-pays rule discourages frivolous lawsuits but bolsters the regulatory system’s credibility by making it practical for a broad range of citizen enforcers to inform the judges we depend on to keep EPA decisions tethered to the rule of law.

ADAM BABICH

In environmental citizen-suit provisions, Congress created private rights of action for citizens to prod EPA to carry out statutory duties, challenge bureaucratic overreaching, and fill enforcement gaps. To encourage citizen enforcement, and make litigation practical for those who cannot reasonably afford to pay lawyers, Congress authorized courts to award attorney fees in appropriate circumstances. But what circumstances make those awards appropriate?

Our answer should reflect the three primary goals stressed in the Supreme Court’s fee-shifting precedents: implementing Congress’s goal of encouraging legitimate citizen enforcement; respecting ordinary conceptions of just returns; and creating rules that are reasonably easy for courts to administer. To best advance these goals, the key question in awarding fees should not be the extent of the prevailing party’s victory, but whether the lawsuit exposes a violation of federal law. If so, the violator should pay all of the prevailing party’s reasonable fees. If a lawsuit does not expose a violator, ordinary conceptions of just returns demand a return to the default, “American” rule, under which all parties bear their own fees.

Congress’s goal in authorizing courts to shift fees was to encourage legitimate citizen suits by treating citizen enforcers as, in the words of the D.C. Circuit, “welcomed participants in the vindication of environmental interests.” Why encourage such litigation? The short answer is Congress knew that EPA — like any bureaucracy — could not be trusted to hew to legislative instructions or to consistently enforce the law.

An essential element of our constitutional system is the division of authority between the executive and legislative branches of government. The legislative branch is supposed to make the law and the executive to faithfully implement and enforce it. The Supreme Court explained in Whitman v. American Trucking Associations, a 2001 Clean Air Act opinion, that in theory the Constitution “permits no delegation of [legislative] powers.” But as the Court acknowledged in 1989, in “our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.” In Whitman, the Court reiterated that environmental laws may provide for administrative decisionmaking so long as they lay down “intelligible principle[s]” for EPA to follow.

But what if EPA ignores those intelligible principles? One need look no further than human nature for reasons to distrust federal bureaucracies. Like all of us who sometimes act as if our personal goals transcend our obligation to comply with, say, traffic laws, federal regulators need policing. People being people, they sometimes put their own priorities above the law. In general, EPA’s departures from the strict letter of the law can be explained by one or more of the following six factors:

Hubris — as experts in environmental policy, EPA regulators sometimes think they can better serve the public by implementing their own policies rather than the laws Congress wrote;

Ambition — at least occasionally, regulators believe that they or EPA will gain in political position or influence by advancing policies that, although in political favor, are inconsistent with statutory commands;

Cowardice — at times regulators fear that they cannot carry out the law as enacted without unacceptable political repercussions;
Capture — sometimes regulators identify with the interests of the industries they are charged with regulating or with advocacy groups, including organizations the regulators worked for or represented in the past or which they hope to work for or represent in the future;

Inertia — layers of bureaucratic review, within EPA as well as in the Office of Management and Budget, can bring initiatives to a virtual halt even without a formal decision to stop implementation; and finally

Wisdom — sometimes EPA’s appropriate exercise of administrative discretion can avoid the effects of poor legislative draftsmanship and turn what could have been a disastrous law into an effective regulatory program that advances congressional goals.

Other excuses for agency recalcitrance usually can be restated in terms of one or more of these six factors. Commentators have argued, for example, that Congress tends to provide EPA with less funding than it needs to meet statutory mandates. But because EPA continues to spend money on entirely discretionary activities, such as experimental regulatory reinvention exercises, lack of resources is a poor excuse for failing to discharge legal duties, like issuing timely standards for hazardous air pollutants. EPA may need additional resources, but the agency also needs oversight to provide a check on its tendency (often rooted in hubris but, perhaps, occasionally in wisdom) to divert resources from legislative goals to programs selected by unelected bureaucrats.

Commentators have also asserted that some environmental laws make unrealistic demands on EPA, the regulated community, and — ultimately — the economy. But these arguments may be recast in terms of either cowardice (the agency fears the political consequences of taking the drastic steps necessary to comply) or wisdom (the agency’s practical compromises implement what is, in essence, aspirational legislative language). Also, some observers have noted EPA’s tendency to ignore congressional intent behind enactment of statutory language in favor of current executive branch policies or pressure from congressional committees. This tendency is explainable by hubris, ambition, or cowardice, depending on whether EPA departs from the rule of law based on a belief that current political trends are superior to the policy set forth in law, or because falling into line with those trends is good politics.

Is it mere EPA bashing to suggest that agency decisions sometimes cross the line between legitimate discretion and lawlessness? Court rulings suggest otherwise. For example, the D.C., Eleventh, Seventh, and Fifth circuits all recently reviewed an EPA assertion of authority to extend congressional deadlines for attaining the health protection standard for ozone air pollution whenever an undefined “significant” amount of ozone comes from upwind sources. Those courts ruled, respectively, that EPA’s policy would “subvert the purposes of the act,” was “unauthorized agency action contrary to the [act’s] express language,” showed “disregard [for] statutory limitations on . . . discretion,” and violated the “plain terms of the CAA.” (These, like all quotations in this essay, omit citations and internal quotation marks.)

Examples of EPA lawlessness are not limited to administrations staffed by one political party or the other, and cannot be counted on to consistently favor industry over environmentalists or vice versa. Courts have admonished EPA for watering down statutory mandates, as in the D.C. Circuit’s 1998 opinion in American Lung Association v. EPA, remanding a nonsensical EPA finding that “substantial physical effects experienced by some asthmatics” due to “short-term, high-level SO2 bursts” do “not amount to a public health problem.” But they have also pulled EPA back from regulating past the limits of statutory authority, for example when the D.C. Circuit overturned the agency’s refusal to register the fuel additive “MMT” in 1995. But no matter how nonpartisan and understandable human tendencies toward hubris, ambition, cowardice, capture, and inertia may be, the federal executive is duty bound, under Article II, Section 3, of the Constitution,
to “take care that the laws be faithfully executed.”

Occasionally, however, EPA departures from literal statutory language may serve legislative intent better than would blind obedience. One example is in the agency’s National Contingency Plan, the regulations that govern cleanups of hazardous substances under the Superfund law. In a show of getting tough on polluters after the public relations disaster of Anne Gorsuch’s tenure as EPA administrator, Congress amended Superfund in 1986 to require that hazardous-substance cleanups “utilize[] permanent solutions . . . to the maximum extent practicable.” Of course, any member of Congress with a dictionary should have known that “practicable” means “possible” or “capable of being put into practice,” rather than practical or convenient. Thus, read literally, this provision would have required EPA to demand that every remedial design be as permanent as possible.

Faced with enormous potential costs, EPA diluted the plain language of Congress’s instructions by treating the mandate for permanence as one factor to be balanced against others, including cost, “implementability,” a preference for treatment, and protection against short-term impacts, e.g., on worker safety. In a challenge to this scheme, several states tried to force EPA to strictly follow Congress’s impractical language. But in its 1993 decision in \textit{Ohio v. EPA}, the D.C. Circuit backed the agency, adopting the fiction that “if EPA were to require the selection of permanent remedies whenever possible, it would be ignoring the statutory mandate to select cost-effective remedies.”

Although reaching the only practical result, the court ignored legislative history which says that “cost-effective” means only that decisionmakers should “first determine[]” the cleanup goal, “and then select[] a cost-efficient means of achieving that goal.” Nonetheless, with as little violence to statutory language as practicable, EPA managed to inject common sense into a congressional mandate that, if read literally, would have been unworkable.

So wise exercise of administrative discretion is sometimes necessary to turn politically attractive but poorly drafted mandates into programs that work in the real world. One might argue, of course, that EPA has no business softening unrealistic legislative language but should always implement the law as written and let the political chips fall where they may. After all, if a democratically elected Congress — itself born of revolution — decides to take radical action, who is EPA to argue? Bureaucratic dilution of congressional commands is not one of the checks and balances the framers wrote into the Constitution. In fact, a consistently literal approach to interpreting statutes might convince Congress to enact better, more realistic laws that impose drastic solutions only when Congress is serious about shaking things up.

EPA’s job, however, is not to improve legislative draftsmanship but to implement the law. Mindlessly literal agency interpretations of statutes could easily produce results contrary to congressional goals — similar to labor slowdowns in which workers frustrate their employers’ objectives by performing each of their tasks painstakingly by the book, without regard to the common-sense compromises that can be necessary to get things done.

Because Congress presumably would not enact an environmental law without a pressing public need, EPA should not lightly sacrifice their employers’ objectives by performing each of their tasks painstakingly by the book, without regard to the common-sense compromises that can be necessary to get things done. Because Congress presumably would not enact an environmental law without a pressing public need, EPA should not lightly sacrifice the effectiveness of such a law for the sake of offering Congress a lesson in drafting.

Nonetheless, the spectacle of unelected bureaucrats making decisions that trump the plain language of the law remains disturbing. Once we concede that EPA may sometimes disregard the letter of the law to follow its spirit, however, we throw the executive’s Article II, Section 3, duty into a gray area. There is no bright-line standard to separate benign, common-sense fixes from malignant attempts to hijack a statutory framework to advance an administrator’s ends rather than those of Congress. So how do we distinguish a wise administrative emphasis of legislative purpose over literal language from bureaucratic contempt for the rule of law? This is not a problem! Our legal system answers this type of question all the time.

We simply defer to decisionmakers who do not need bright-line standards. We put the question to people who are comfortable righting a wrong because — to borrow from Justice Stewart’s famous invocation of common sense in \textit{Jacobellis v. Ohio} — they “know it when [they] see it.” We let the courts decide.

Can we really count on the judiciary to preserve the rule of law and constitutional separa-
To conform the loser-pays system with Congress’s intent to encourage citizen litigation, the courts excuse losing plaintiffs from fees unless the suit was frivolous.

Over the last 30 years, citizen litigation has played a key role in environmental law’s development. For example, the court in a Sierra Club lawsuit ordered EPA to implement Congress’s goal “to protect and enhance” air quality. In response, EPA created the Prevention of Significant Deterioration program in 1974. Congress liked the program so much, it became part of the 1977 Clean Air Act amendments. Similarly, EPA’s implementation of the Clean Water Act’s priority pollutant program was prompted by a citizen suit. Also under the Clean Water Act, the significance of discharge monitoring reports as enforcement tools was first fleshed out in citizen litigation. To reduce risks from hazardous waste, citizen enforcers forced EPA to issue regulations to implement the Resource Conservation and Recovery Act’s “cradle to grave” regulatory program after years of delay. And, in general, private attorneys general, including private citizens, have taken the lead in moving polluting federal agencies toward compliance with federal environmental laws. Moreover, for some laws, citizen suits are the only available enforcement mechanism—for example it is unrealistic to expect the Department of Justice to sue its sister federal agencies over executive-branch violations of the National Environmental Policy Act or the Federal Land Planning and Management Act.

For the environmental citizen-suit mechanism to effectively and evenhandedly promote the rule of law, it must be available to stakeholders who can inform courts about the full range of legitimate points of view about the public laws at issue. But with occasional...
exceptions, access to justice in the United States is limited to those with a realistic way of paying for lawyers. As a practical matter, unless Congress made some arrangement for compensation of citizen enforcers’ attorneys, the courts would only hear about EPA lawlessness that was detrimental to moneyed interests. Beginning, therefore, with the first modern federal antipollution statute — the Clean Air Act Amendments of 1970 — Congress sought to make citizen enforcement practical for a broad range of enforcers by allowing citizens to recover reasonable litigation costs, including attorney fees “whenever . . . appropriate” to (sometimes, depending on the particular statute) the “prevailing or substantially prevailing party.”

All of this brings us back to our question: When is it “appropriate” in an environmental citizen suit to require one party to a lawsuit to pay the other’s attorney fees? Absent contrary legislative instruction, the Supreme Court has selected the “American” rule, under which each party to a lawsuit pays for his or her own lawyer, as the default principle. But because Congress departed so clearly from the American rule in environmental citizen suits, courts sometimes analyze citizen-suit provisions as if they established the loser-pays, or “English” rule, which is the American rule’s best known alternative. A loser-pays analysis only works, however, when the citizen-suit plaintiff is also the lawsuit’s winner. If, as is inevitable, citizen-suit plaintiffs sometimes fail to prove their cases against alleged polluters, a true loser-pays system would require the citizen enforcer to pay the defendant’s attorney fees. Such a system would discourage citizen enforcers from accepting Congress’s invitation to prod EPA to carry out statutory duties, challenge bureaucratic overreach, and fill gaps in enforcement.

To conform the loser-pays system with Congress’s intent to encourage — rather than chill — public-law litigation, the courts excuse losing plaintiffs from paying their opponents’ lawyers unless a plaintiff’s suit was “frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so.” The quoted language is from the Supreme Court’s 1978 decision in Christiansburg Garment Co. v. EEOC, a civil rights case in which the Court recognized that “assessing attorney[] fees against plaintiffs simply because they do not finally prevail would . . . undercut the efforts of Congress to promote . . . vigorous enforcement . . . .” The key distinction recognized by the Christiansburg Court is that when a fee is awarded to a winning public-law plaintiff, the award issues “against a violator of federal law.”

Similarly, in a 1989 civil rights case, Independent Federation of Flight Attendants v. Zipes, the Court held that losing intervenors who try in good faith to inform the Court about legitimate viewpoints need not pay for plaintiffs’ lawyers. The “central purpose” of public-law fee-shifting “to make the wrongdoers pay at law” is not advanced by assessing fees against “blameless intervenors” whose arguments are not “frivolous, unreasonable, or without foundation.” In contrast, plaintiffs or intervenors who make frivolous, unreasonable, or groundless claims engage in unlawful conduct under Federal Rule of Civil Procedure 11 and 28 U.S. Code Section 227. Thus, they are violators who may be fairly held liable for their opponents’ attorney fees. The differing standards the Court has approved for awarding attorney fees against defendants, plaintiffs, and intervenors illustrate that it is not the loser-pays principle that drives fee-shifting jurisprudence in public-law litigation. Instead, the attorney fees provisions of civil rights and environmental citizen-suit provisions are best understood as establishing a violator-pays rule.

In keeping with the “generous formulation” for determining when a party is eligible to recover fees that the Court set out in its 1983 civil-rights opinion, Hensley v. Eckerhart, some focus on identifying the winner is necessary to determine whether a party has crossed “the statutory threshold” for receiving an award. But past the point of denying fees to litigants who fail to succeed on “any significant issue,” emphasizing the extent of victory only muddies the fee-shifting analysis. Admittedly, the Hensley Court called for a “fully compensatory fee” when the plaintiff has obtained “excellent results.” But a blind equation of “excellent results” with favorable rulings — rather than exposure of violations and vindication of the rule of law — invites a confused analysis.

Courts that measure excellence by focusing on the extent of a litigant’s victory have an unfortunate tendency to weigh the results obtained against the specific relief the litigant prayed for in its complaint or motion papers. But to accurately measure the extent of a party’s litigation success, one would have to weigh re-
results against original goals or expectations which, if documented at all, are likely to appear only in privileged attorney-client communications or work product.

A prayer for relief is a poor proxy for clients’ goals. Instead, adopting a litigation position in a complaint or a motion is analogous to making an opening offer in a settlement discussion—if you start at your bottom line, there will be no room to move. Many courts tend to split the baby, awarding plaintiffs less than the most extreme relief demanded in their complaints and deciding procedural and discovery motions so that each side wins a fair share. Further, because most cases are settled rather than tried to judgment, lawyers tend to draft pleadings with an eye to the opening position they will adopt in settlement negotiations. Plaintiffs in such negotiations lose credibility if their opening demands are for greater relief than prayed for in their complaints. Thus, for example, a competent lawyer may elect to draft a citizen-suit complaint that demands immediate closure of a polluting facility, even if the plaintiff would be happy with a tight compliance schedule. Only the plaintiff and its attorney may be in a position to know whether the plaintiff is disappointed or elated with the relief eventually obtained by judgment or settlement. Reducing awards based on degree of success, therefore, risks either under-compensating plaintiffs or encouraging their lawyers to provide less than optimally aggressive representation.

A violator-pays analysis avoids these distortions. If the defendant is a violator, then the plaintiff who exposes the violation should be a particularly “welcomed participant[] in the vindication of environmental interests.” The violator should pay the enforcer all reasonable litigation costs incurred in vindicating the rule of law. In determining what litigation costs are reasonable, courts should bear in mind that few litigants win every motion. And if the fees and costs incurred by the non-violator are, first, reasonably and honestly documented and, second, in the same ballpark as the violator’s fees, the policy of creating easily administrable rules should cause courts to presume the fees are reasonable. Where practical, therefore, courts should avoid second-guessing staffing and litigation decisions, especially when the petitioner’s fees are commensurate with those of the petitioner’s opponent, who has been exposed as a violator of federal law.

But is a violator-pays approach to public-law litigation fair? Is it right to deny compensation to plaintiffs who, although losing their cases, incur attorney fees responding to Congress’s invitation to help vindicate policies “of the highest priority?” And should an innocent defendant or its insurer be forced to absorb defense costs just because a plaintiff’s claims have a good faith basis in law and fact? Under the default American rule, these are the breaks. And “ordinary conceptions of just returns” (to borrow language from the Court’s 1983 opinion in Ruckelshaus v. Sierra Club) demand a return to the default rule unless a fee award can be made “against a violator of federal law” to make the “wrongdoers pay at law . . .” (to use the Court’s Christiansburg and Zipes language). And while, in theory, it might be fair for litigants who lost on the merits to recover fees if they can prove their opponents were violators at the fee petition stage, to allow the attorney-fee dispute to “result in a second major litigation” would violate the Hensley Court’s policy of ready administrability. No rule can deliver perfect fairness in every situation, but the violator-pays rule provides courts with an easily administrable way to compensate citizens who wield public-law claims to vindicate congressional policy, consistent with ordinary conceptions of just returns.

So to sum up: Modern environmental laws rely on citizen-enforcers and the courts to keep regulatory programs in line with legislative mandates. Because environmental citizen suits have broad impacts on public health and welfare, society has a keen interest in ensuring that judges make fully informed decisions in these public-law cases. Limiting access to the courts to litigants who can afford lawyers would skew the information available to judges and therefore undercut the regulatory system’s credibility. To implement Congress’s goal of enhancing the rule of law, and encourage participation by a wide range of stakeholders, courts should read Hensley’s “excellent results” standard in light of the Christiansburg and Zipes insight that the equitable high ground lies in awarding attorney fees to litigants who smoke out “violator[s] of federal law” or “wrongdoers.” •