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Calling Sierra Club for Help: Attorney Fees under the Equal Access to Justice Act and Its Effects on Litigation involving Large Environmental Groups

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I. Introduction.

Congress passed the Equal Access to Justice Act (EAJA) as an exception to the "American rule"[1] that attorney fees and costs generally are not recoverable. The EAJA permits recovery in litigation against the federal government, as long as no statute expressly prohibits recovery. To recover, the party must be both eligible and prevail in litigation. Awarding attorney fees under the EAJA is mandatory unless the government's position is "substantially justified." Eligible individual parties may not have a net worth exceeding two million dollars, and a business may not exceed seven million dollars in net worth.

The Equal Access to Justice Act was passed to help citizens lodge complaints against the government, and EAJA is perfectly suited for environmental litigation. Often small groups of citizens or individuals seek the assistance of the large environmental groups, such as Greenpeace, the National Environmental Defense Fund, and Sierra Club to litigate their environmental claims against the federal government. These large environmental groups usually are not eligible parties because they exceed the seven-million-dollar net eligibility limitation set forth in the statute. Recently, certain courts have questioned the eligibility of all plaintiffs when the leading plaintiff's net worth exceeds seven million dollars. The result, if this trend continues, will be to hinder future environmental litigation that is much too costly and technical for individual plaintiffs. In the future, the courts may rely heavily on the "substantial justification" section of the statute to limit EAJA payouts by the government to individuals and small businesses.

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1. *See infra* notes 2-12 and accompanying text. Traditionally, the United States' courts would deny attorney fees and costs to the prevailing party.

A. Legislative History.

United States Courts traditionally deny attorney fees and costs to the prevailing party, which is commonly referred to as the "American rule." The Equal Access to Justice Act[2] creates an exception to this rule when the United States is a party. The EAJA originally was enacted for a temporary three-year period in 1980 but was enacted permanently in 1985.[3] EAJA was designed to allow prevailing parties to recover fees and costs[4] if the government's position was not "substantially justified."[5] EAJA sought to address two major problems of litigation: EAJA would help to pay the expense that deters many potential plaintiffs from judicial action, and EAJA would help fight unreasonable governmental action.[6]

The legislative history elucidates that originally EAJA was passed to help small businesses pursue their disputes with the federal government.[7] Members of Congress, during the floor debate considering this legislation, spoke to the importance of the EAJA to small businesses facing capricious and oppressive governmental conduct.[8] Congress believed that fee-shifting legislation, like the EAJA, would deter the federal government and its agencies from excessive regulation that would put them at risk for EAJA liability.[9] Congress also believed that administrative

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2. *See* 28 U.S.C. § 2412 (amended 1985).

3. *See id.*

4. *See* 28 U.S.C. § 2412(b). The Act states, "unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded . . . to the prevailing party in any civil action brought by or against the United States. . . ." *Id.*

5. *See* 28 U.S.C.A. § 2412(d)(1)(B). "The party shall also allege that the United States was not substantially justified." *Id.*

6. *See Award of Attorney's Fees Against the Federal Government: Hearings on 265 Before the Subcom. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary,* 96th Cong. 56 (1980) (addressing oppression of "the small business owner"); *see also* H.R. REP. NO. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4953, 4988. Congress believed federal agencies targeted small businesses disproportionately because they lacked the financial ability to fight the agency policies and lawsuits. *See* H.R. REP. NO. 96-1418, at 10.

7. *See id.*

8. *See generally* 131 CONG. REC. S9991-98 (daily ed. July 24, 1985); 131 CONG. REC. H4760-64 (daily ed. June 14, 1985).

9. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct* (Part One), 55 LA. L. REV. 217, 225 (1994). Congress believed that the EAJA fees would be a strong deterrent for agencies to act in a reasonable manner toward small businesses and individuals because of their responsibility to pay the EAJA awards for the actions of their agency. *Id.* The agencies would fear exceeding

agencies should "have to pay for their over[-r]egulatory mistakes themselves . . . and with this in mind perhaps the agencies [would] make fewer such mistakes."[10] President Reagan stated approvingly that "this important program helps small businesses . . . fight faulty government actions . . . ."[11] As these statements demonstrate, the government believed that fee shifting would help deter federal agencies from making costly mistakes that otherwise could not be challenged by small businesses and other individuals because of the enormous expense.

Of particular importance are the statements by Senator Pete V. Domenici, (R-NM), who sponsored the Equal Access to Justice bill, that individuals were also a concern to Congress:

> Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process. The purpose of the bill is to redress the balance between the government acting in its discretionary capacity and the individual.[12]

As these comments of Senator Domenici suggest, it is apparent that a secondary goal of the EAJA was to help ensure that this legislation would be beneficial to the individual. Senator Domenici believed the bill would help both individuals and small businesses to adequately challenge burdensome regulations passed by the government.

B. Government Action Preventing Attorney Fees.

In order to receive attorney fees and costs in a civil action against the United States, the government's position[13] must not be "substantially justified."[14] To be substantially justified, the

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their annual operating budgets with high EAJA attorney fee awards. *Id.*

10. *See* 126 CONG. REC. H28653 (daily ed. Oct. 1, 1980) (statement of Sen. Heckler).

11. *See* 21 966-67 (August 5, 1985) WEEKLY COMP. OF PRES. DOC.

12. *See* Award of Attorneys' Fees Against the Federal Government: Hearings on 265 before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong. 16 (1980).

13. *See* 28 U.S.C. § 2412 (d)(2)(D). The "position" of the United States includes both the litigation position and the action taken by the agency for which the original action was brought. *See id.* Before the EAJA amendments in 1984, some courts had held that "position" only pertained to the government's position in litigation. *See* Boudin v. Thomas, 732 F.2d 1107, 1115 (2d Cir. 1984); Environmental Defense Fund, Inc. v. Envtl. Protection Agency, 716 F.2d 915, 920 (D.C. Cir. 1983).

14. *See* 28 U.S.C. § 2412(d)(1)(A). Because the EAJA lacks a formal

government's position must rest upon a reasonable basis.[15] The Supreme Court has supported the understanding that the government's position was to be singular,[16] meaning that the Court will not take into account the fact that the federal government often involves pre-litigation conduct by both an administrative agency and the Department of Justice's litigation wing.[17] These both are to be treated as the same position.[18] Though the government's position must be substantially justified, it does not mean that every argument made by the government must be substantially justified.[19] For example, in *Roanoke River Basin Association (II),* the Fourth Circuit noted that the court must look beyond one issue and consider the substantial justification of the government's position regarding "the totality of the circumstances" surrounding the claim.[20]

An exception deals with administrative agencies that make determinations based on a judicial or quasi-judicial adjudication.[21] The process of the adjudication must be adversarial, in which the government takes a stance separate from that of the decision-

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definition of the phrase, courts have struggled to interpret the phrase through either legislative history or statutory construction. *See generally* Gregory C. Sick, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct* (Part Two), 56 LA. L. REV. 1, 18-24 (1995). *See* Pierce v. Underwood, 487 U.S. 552, 565 (1988) (stating that the government's position is substantially justified if it possess a "reasonable basis both in law and fact."). *See id.*

15. *See* Commissioner v. Jean, 496 U.S. 154 (1990).

16. *See id.*

17. *See id.*

18. *See id.* at 158-60.

19. *See* Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 131 (3d Cir. 1993) (stating the court must "evaluate every significant argument made by the government" to determine if that argument is substantially justified and then to conclude whether "as a whole, the Government's position was substantially justified.") *Id.* at 131. *See also* Roanoke River Basin Ass'n v. Hudson (II) where the plaintiff insisted that it was entitled to EAJA awards because it prevailed upon one issue, regardless that the district court found the government's overall position was substantially unjustified. *See* Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 135 (4th Cir. 1993).

20. *See Roanoke River Basin Ass'n*, 991 F.2d at 136-39. The district court refused to narrow its focus to the question of whether the government's position regarding "specific, isolated issues that were substantially justified," instead of evaluating the entire proceeding. *Id.* The court concluded that because of the magnitude of the Army Corps' project and their careful analysis, the failure of the government to consider the relevant information on one issue should not lead the plaintiff or the court to consider the government's position, as a whole, to lack substantial justification. *Id.See also* Aguilar-Ayala v. Ruiz, 973 F.2d 411, 421 (5th Cir. 1992). The court had "serious doubts" about the government's arguments, but it decided the government's position was reasonable. *See id.*

21. *See* 5 U.S.C. § 504 (1988).

maker.[22] Practically speaking, there usually is no distinction between the government's position in a dispute and a judgment for the government. Few situations exist, such as a decision reached on different grounds than the government's position or harassment of the litigator, in which the court will need to look closely at the characterization of the adjudicatory decision.[23] The common sense approach indicates that if an independent adjudicator accepted the government's position, it must have been reasonable.

C. *Focus of This Comment.*

This Comment will analyze the manner in which recent court decisions have discussed the problem of mixed eligibility problems for EAJA awards.[24] Specifically, some plaintiffs have monetary limitations preventing them from collecting EAJA awards because of their net worth. This Comment will focus on the applicability of the EAJA to environmental litigation. Environmental litigation is very costly and, more often than not, individuals or small businesses do not have the resources to fight the government regarding environmental problems, regulations and bills. As discussed above, these individuals and small businesses are the exact type of potential litigants that Congress sought to help by passing the EAJA.[25]

A growing concern of modern courts, often addressed in dicta, is that of eligible plaintiffs who seek help or allow a non-eligible party to do the significant amount of work for the litigation.[26] Many courts have concluded that they should not receive EAJA fees.[27] The courts have reasoned in reliance on the congressional intent behind the passage of EAJA.[28] The courts point out that the goal is to help individuals and small businesses fight governmental injustice, not to help the well-to-do environmental groups.[29] If this

22. *See id.*

23. Hypothetically, one example would be if the adjudicator entered a decision in favor of the government on different grounds from that of the government's position. If the government's position was substantially justified, the government should not be accountable for a legal ruling contrary to its theory of the case and therefore, should not have to pay fees. The adjudicator may engage in misconduct, such as harassment of the litigating party against the government, and as such, the government would only be liable if it perpetuates the adjudicator's misconduct.

24. *See infra* notes 93-100 and accompanying text.

25. *See supra* notes 2-12 and accompanying text.

26. *See infra* notes 93-100 and accompanying text.

27. *See id.*

28. *See supra* notes 2-12, *infra* notes 93-100 and accompanying text.

29. *See id.*

analysis became binding precedent rather than mere dicta, it would seriously curtail legitimate and necessary environmental litigation against the government. The result could further future unchecked abuses by federal agencies because of the high litigation costs associated with challenging such agency behavior.

II. Attorney Fees: Exceptions to the American Rule.

The Supreme Court in *Arcambel v. Wiseman* noted that attorney fees generally are unrecoverable unless specifically allowed by statute.[30] Since that decision, three exceptions to the "American rule" have been created. The first exception rests on the idea that a penalty or fine should be assessed against a party[31] who acts in bad faith[32] or willfully disobeys a court order.[33] Congress even codified this exception, in part, in the Federal Rules of Civil Procedure.[34]

The second exception awards attorney fees to the prevailing party if the party had created a common fund for the benefit of others.[35] This exception was later expanded so that if there was a creation of a common fund to benefit a specific class,[36] the party creating that benefit would be entitled to attorney fees. The impetus behind this exception was to create an incentive for parties to raise class issues and to prevent unjust enrichment for those who did not take part in the litigation.[37]

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30. *See* Arcambel v. Wiseman, 3 U.S. 306, 306 (1796).

31. *See* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 427 (1923). *See also* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

32. *See id.*

33. *See* Hall v. Cole, 412 U.S. 1 (1973). *See also* Vaughn v. Atkinson, 369 U.S. 527, 531 (1962).

34. *See* FED. R. CIV. P. 37(a)(4)(A).

> If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

See id.

35. *See* Trustees v. Greenough, 105 U.S. 527, 532-533 (1881).

36. *See, e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1973).

37. *See generally* D. Dawson, Lawyer and Involuntary Clients: Attorney Fees

The third and most pertinent exception grants attorney fees to the prevailing party who acted akin to a private attorney general for the public interest.[38] This exception was first created by the Supreme Court in the 1968 decision *Newman v. Piggie Park Enter.* In *Newman*, a statute allowed fee shifting for the attorney fees,[39] and this same principle was extended to other cases that did not involve a fee shifting statute.[40]

A. Early Case Law and Legislation in Support of Fee Shifting.

Even before the first passage of the Equal Access to Justice Act in 1980, the Circuit Court of Appeals for the District of Columbia decided a case that extended the third exception to allow environmental groups attorney fees.[41] In *Wilderness Society v. Morton*, environmental groups who sought to challenge the federal government regarding construction of the Alaska Pipeline were permitted to recover their attorney fees.[42] The most interesting aspect of this case was that the environmental groups were not the prevailing parties because Congress passed a statute granting the very permits that were the impetus for the litigation.[43] The Court stated that the litigation was important for all citizens[44] and that fee shifting was necessary because of the high cost of litigation.[45] The Court further stated that if it had not granted the fees, future litigants would be discouraged from attempting to litigate environmental issues.[46]

As important as *Wilderness Society v. Morton* was for environmental litigation and attorney fees, the Supreme Court overturned that decision in *Aleyeska Pipeline Service Co. v. Wilderness Society* the following year.[47] The Court specifically stated that fee shifting was appropriate when a statute existed permitting it, but that the fee shifting statute was not to be used for

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From Funds, 87 HARV. L. REV. 1597 (1974).

38. *See* Newman v. Piggie Park Enter., 390 U.S. 400 (1968).

39. *See id.*

40. *See* La Raza Unida v. Volpe, 488 F.2d 559 (9th Cir. 1973).

41. *See* Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).

42. *See id.*

43. *See generally* 30 U.S.C. § 185, 43 U.S.C. § 1651 (1982). The time of the case's decision EAJA was not codified. *See also* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, tit. II, 87 Stat. 576 (1973).

44. *See Morton*, 495 F.2d at 1032.

45. *See id.*

46. *See id.*

47. *See* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

pure public policy.[48] The result of this case was to limit the private attorney exception to the American rule. This case also may well have increased legislative activity over fee shifting.

As a result, in the early 1970s, Congress started adding fee shifting provisions in certain statutes, though Congress did not permit recovery against the government. Some commonly known statutes with fee shifting provisions are the Federal Water Pollution Control Act Amendments of 1972[49] and the Clean Air Act of 1970.[50] Through the mid-1970s, only three statutes allowed recovery against the government: the Freedom of Information Act,[51] the Civil Rights Act[52] and the Privacy Act.[53] In 1973, Congress conducted hearings designed to create legislation subjecting the federal government to the American rule exceptions and the subsequent attorney fees provisions.[54] These hearings lead to the passage of the Equal Access to Justice Act.

B. Fee Shifting Under the EAJA.

If the government subjects parties to unreasonable or unjustified governmental conduct,[55] the EAJA allows the parties to recover reasonable attorney fees against the government.[56] The party also may receive more than the attorney fees alone if the party indeed prevails.[57] The Supreme Court has held that all of the

48. *See id.* at 263.
49. *See* 33 U.S.C. § 1365(d).
50. *See* 42 U.S.C. §§ 7413(b), 7604(d), 7606(f).
51. *See* 5 U.S.C. § 552(a)(4)(E).
52. *See* 42 U.S.C. §§ 2000a-3(b), 2000b-1.
53. *See* 5 U.S.C. § 552(a)(g)(2)(B), (3)(B), (4).
54. *See generally The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. (1973); *Awarding of Attorney Fees, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975).
55. *See* 28 U.S.C. § 2412(d)(1)(A). The Court must find that government's conduct was not substantially justified. *See id.*
56. *See* 28 U.S.C. § 2412(b)(3).
57. *See* 28 U.S.C. § 2412(d)(2)(A).

> For the purposes of this subsection—"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an

EAJA's provisions must be construed in the government's favor.[58] The EAJA allows for three types of fee shifting.[59] The first makes the federal government subject to any fee shifting available at common law that is available against any other party.[60] The second type of fee shifting allows fee shifting that was previously unavailable at common law.[61] Under this section, attorney fees are granted to the prevailing party in a civil action against the government, as long as the government's position lacked substantial justification.[62] The EAJA's third fee shifting provision allows a party to recover legal expenses and attorney fees in any administrative agency adjudication.[63]

To be awarded by EAJA fee shifting, one must satisfy the eligibility standards. Under the EAJA, a party must meet four criteria to qualify as an eligible party. First, the party must have legal expenses.[64] Second, the party must have prevailed on the issue or issues underlying the party's request for fees.[65] Third, the party also must allege that the government's position in the underlying litigation was not substantially justified.[66] Finally, if the party is a business,[67] it must not possess a net worth[68] exceeding seven million

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increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

See id.

58. *See* Perales v. Casillas, 950 F.2d 1066 (5th Cir. 1992); *See also* Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129 (1991).

59. *See* 28 U.S.C. § 2412.

60. *See* 28 U.S.C. § 2412(b) which states: "The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." *See id.*

61. *See* 28 U.S.C. § 2412(d).

62. *See id.*

63. *See* 5 U.S.C. § 504. This section of the EAJA only applies to administrative agencies and their adjudication proceedings. *Id.* This statute is similar to 28 U.S.C. § 2412 because the government agencies will be required to pay attorney fees unless the agency's position lacked substantial justification. *Id.*

64. *See* 28 U.S.C. § 2412(d)(1)(A). For a more comprehensive study of this requirement, *see* Sisk, *supra* note 14, at 341- 360.

65. *See id.* at § 2412(d)(1)(B).

66. *See id.*

67. *See id.* "The EAJA does not use the word business to describe a party whose net worth may not exceed $ 7 million. The section refers to an individual or "any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization." *Id.*

68. *See generally* Sisk, *supra* note 14. In order to establish net worth for an individual or business, most courts look to an informal balance sheet the party has prepared. *See id.* Some commentators have explained that a more informal net worth assessment is appropriate for individuals, given that only a few individuals

dollars. If the party is an individual, his or her net worth may not exceed two million dollars.[69] In addition to the substantive criteria listed above, a party must submit to the court within thirty days of final judgment of the underlying litigation an application for a fee award demonstrating the party's EAJA eligibility.[70]

C. *The Specifics of Substantial Justification.*

The focus of most litigation under the EAJA rests with the provision granting attorney fees unless the "position of the United States was substantially justified."[71] Under EAJA, a party is entitled to fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[72] The government has the burden of proof to establish that its position was substantially justified. If the government proves substantial justification, the prevailing party cannot recover attorney fees.[73]

The burden of proof that the government must meet suggests that substantial justification is an affirmative defense for the government. The legislators' reasoning in requiring the government to have the burden of proof is based on the general idea that the burden should rest upon the party with better access and knowledge to the facts in question.[74]

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possess a $2 million net worth. *See id.* If, however, the court may have any doubts, it may require the party to file additional information to make a more informed determination. *See id.*

69. *See* 28 U.S.C. § 2412(d)(2)(B) which states the party's eligibility according to net worth.

70. *See id.* at § 2412(d)(1)(B). "A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . ." *See id.*

71. *See* 28 U.S.C. § 2412(d)(1)(A). Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. *See id.*

72. *See id.*

73. *See id.*

74. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4997 (states that the legislation "adopted the language in Rule

In the EAJA situation, clearly the government is in a better position to show that its actions were reasonable as opposed to the prevailing party's burden to demonstrate that the government's action was unreasonable.[75] The legislative history[76] refers to the government's burden, and all the federal appellate courts have agreed that the government bears the burden of proof to show substantial justification.[77]

The statutory provisions of the EAJA do not explicitly define "substantial justification." When one statute utilizes similar language as another, the same interpretation or construction should be used for both.[78] Legislative history indicates the standard was chosen from the federal civil litigation discovery standards.[79] Federal Rules of Civil Procedure 37(a)(4) and (b)(2) state if a party fails to respond to a discovery motion or its order "without substantial justification," the party may be sanctioned.[80] The Advisory Committee that drafted this discovery rule stated that a party would be substantially justified if "the dispute over discovery between the parties is genuine, though ultimately resolved one way

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3711 for the standard"); *see also* S. Rep. No. 253, 96th Cong., 1st Sess. 20-21 (1979). The EAJA standard that the government's position "was substantially justified or that special circumstances make an award unjust," parallels Rule 37 on almost a word-for-word basis. *Id.Compare* 28 U.S.C. § 2412(d)(1)(A)(1988) *with* Fed. R. Civ. P. 37(a)(4) and (b)(2), which allows award of expenses unless the party's action regarding discovery "was substantially justified or that other circumstances make an award of expenses unjust." *See id.*

75. *See id.*

76. *See id.*

77. *See, e.g.,* Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993); Lundin v. Mecham, 980 F.2d 1450, 1459 (D.C. Cir. 1992); De Allende v. Baker, 891 F.2d 7, 12 (1st Cir. 1989); Federal Election Comm'n v. Political Contributions Data, Inc., 995 F.2d 383, 386 (2d Cir. 1993); Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 128 (3d Cir. 1993); Thompson v. Sullivan, 980 F.2d 280, 281 (4th Cir. 1992); Baker v. Bowen, 839 F.2d 1075, 1080 (5th Cir. 1988); Jankovich v. Bowen, 868 F.2d 867, 869 (6th Cir. 1989); Cummings v. Sullivan, 950 F.2d 492, 495 (7th Cir. 1991); Moseanko v. Yeutter, 944 F.2d 418, 427 (8th Cir. 1991); Oregon Natural Resources Council v. Madigan, 980 F.2d 1330, 1331 (9th Cir. 1992); Gutierrez v. Sullivan, 953 F.2d 579, 584 (10th Cir. 1992); City of Brunswick v. U.S., 849 F.2d 501, 504 (11th Cir. 1988).

78. *See* Fed. R. Civ. P. 37(a)(4), (b)(2).

79. *See* Shannon v. U.S., 114 S. Ct. 2419, 2426 (1994). When courts are interpreting statutory language used in another statute, the court should apply the same construction to the language as other courts interpreting the language used from the other statute. *Id. See also* Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 284-285 (1987) (Court needs to interpret statute based on previous interpretation of the same language in another statute).

80. *See* Advisory Committee of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules Civil Procedure Relating to Discovery, 48 F.R.D. 487, 540 (1970).

or the other by the court."[81] The legislative history at the time of the original enactment of the EAJA confirms that the substantial justification standard is really one of reasonableness; "[w]here the government can show that its case had a reasonable basis both in law and fact, no award will be made."[82] Between the initial enactment of the EAJA in 1980 to its re-enactment in 1985, "the almost uniform appellate interpretation" (twelve out of thirteen Circuit courts) endorsed this reasonableness standard.[83]

Under the 1985 amendments to the EAJA, the determination of whether the government was "substantially justified" is based on both the government's action that preceded the litigation and the actions taken by the government during the litigation.[84] This follows the reasoning and underlying purpose of the EAJA legislation that ensures that the government shall form a legitimate legal position and that it is reasonable in future policy making.[85] The government should be held responsible for attorney fees when it is at fault, regardless of whether the fault occurred as the primary conduct or occurred during the litigation.[86] It is important to note that in most circumstances, the major focus regarding the "substantial justification" requirement will be upon the pre-litigation position of the government[87] because a reasonable

81. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4989; *see also S.* Rep. No. 253, 96th Cong., 1st Sess. 6 (1979).

82. *See Pierce* 487 U.S. at 567.

83. *See generally* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11-12 (1980), reprinted in 1980 U.S.C.C.A.N. 4984.

84. *See also* 5 U.S.C. § 504. Administrative agencies that utilize judicial or quasi-judicial adjudication that are adversarial should be viewed separately. *Id.*

85. *See* H.R. Rep. No. 120, 99th Cong., 1st Sess. 12 (1985), reprinted in 1985 U.S.C.C.A.N. 132.

86. *See id. See generally* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview,* 1982 DUKE L.J. 651. Both unreasonable postures in court and unreasonable decisions or actions by the government leading to litigation unjustifiably impose a huge legal expense upon the party challenging that particular governmental position. *See also* Rowe's discussion of the "make-whole rationale" behind fee shifting as a general theory. This theory can easily be applied to environmental action taken by individuals or small businessmen who wish to be "made-whole" both by the governmental action and the legal expense incurred to correct that governmental action. *See id.*

87. *See* Marcus v. Shalala, 17 F.3d 1033, 1036 (7th Cir. 1994) ("[T]he fact that the government's litigating position was substantially justified does not necessarily offset pre-litigation conduct that was without a reasonable basis."); *see also* Wilderness Soc'y v. Babbitt, 5 F.3d 383, 388 (9th Cir. 1993) (stating that the government's "procedural litigation defense" may have been substantially justified is not sufficient because the underlying government action must also be considered.) *See also* H.R. Rep. No. 120, 99th Cong., 1st Sess. 11 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 140. A House Report attached to the 1985 re-enactment legislation states, the definition of the "position of the United States" "is not

litigation position in court will not save the government from liability under EAJA if the pre-litigation or underlying conduct was unjustified.[88] Both pre-litigation and litigation positions cost the prevailing party attorney fees and legal expenses, which ultimately need to be paid, however.[89]

Courts often will refuse to label a governmental position reasonable if other justices voted against that very position. Courts have disagreed on whether the government's position is not substantially justified simply because it prevailed in district court.[90] A court would be unreasonable in finding the government's position to be substantially unjustified if the subject of litigation had caused a division among the Supreme Court justices.[91] The standard most often relied upon is whether reasonable minds could differ, thus demonstrating the government's requirement to act reasonably.[92]

III. The Mixed Eligibility Problem.

The EAJA was passed for the specific purpose of guaranteeing that parties would not be prevented from contesting government action merely because they could not afford to litigate.[93] Courts have continually been challenged by several parties joining together

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meant to preclude government attorneys from asserting jurisdictional or technical defenses (e.g., statute of limitations or mootness)." *See id.* If this defense is successful, then the action will be dismissed because the litigating party will have failed to meet the "prevailing party" requirement. *Id.* If the defense fails, the reasonableness of that defense will not prevent an EAJA award if the pre-litigation conduct was not substantially justified. *Id.*

88. *See* cases cited *supra* note 87.

89. *See generally* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview,* 1982 DUKE L. J. 651.

90. *Compare* Pate v. U.S., 982 F.2d 457, 459 (10th Cir. 1993) The Tenth Circuit ruled that the government's win at the district court level did not establish that the government's position was justified. *Id.* This was because the district court did not consider nor hear the controlling law. *Id. with* Porter v. Heckler, 780 F.2d 920, 922 (11th Cir. 1986) (District court victory may be evidence that the government's position was justified."), *and* Wyandotte Sav. Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982) (stating that based on the fact that two justices had supported the government's position, there clearly was a reasonable basis for its position).

91. *See* De Allende v. Baker, 891 F.2d 7, 13 (1st Cir. 1989). Court reversed the district court's finding that the government lacked substantial justification when the Supreme Court had divided evenly in a similar case raising the same issue. *Id.*

92. *See* League of Women Voters v. Federal Communications Comm'n, 798 F.2d 1255, 1260 (9th Cir. 1986). The government's position that a statute was constitutional was justified because of a five-four split in the Supreme Court deciding this issue. *Id.*

93. *See* Boudin v. Thomas, 732 F.2d 1107, 1112-1113 (2d Cir. 1984); *see also* Citizens Council of Delaware County v. Brinegar, 741 F.2d 584 (3d Cir. 1984).

to litigate the same issue against the federal government. The problem is whether parties are eligible for EAJA fees if some of their members are EAJA-eligible and others are not eligible. Also, the issue of how the court ultimately should decide if fees are available to any member of the party. This scenario is particularly apt for small businesses or small groups of citizens who seek the assistance of a large environmental group, which inevitably will be an EAJA-ineligible party.

A petition for fees by a party suggests that a party incurred litigation expenses.[94] Notwithstanding this suggestion, courts have questioned whether an EAJA-eligible petitioner has incurred any of the litigation costs when they work with an EAJA-ineligible party.[95] This approach is referred to as "the real party in interest" doctrine dealing with mixed eligibility problems.[96] The courts also have questioned whether the petitioner who actually did incur legal expenses should be allowed to petition for fees because the EAJA-ineligible party may have a duty to absorb those costs.[97] This is the "special circumstances" approach to the mixed eligibility problem.[98] This approach is to prevent a party from taking a "free ride through the judicial process" at the government's expense.[99] This approach also prevents unjust awards.[100] This issue is particularly highlighted with environmental litigation involving large environmental groups. For example, if Sierra Club joins Friends of the Red River, a small citizen group organized to protect a local river, in an action against

94. A party's petition for fees implies it funded a part of the litigation expenses because the EAJA requires that the party incur legal costs. *See* 28 U.S.C. § 2412.

95. *See, e.g.,* Unification Church v. Immigration & Naturalization Serv., 762 F.2d 1077 (D.C. Cir. 1985). Commentators and courts have termed this type of eligibility inquiry as "the real party in interest" approach when dealing with mixed eligibility. *Id.*

96. This doctrine has a history starting at common law where a suit could be brought only in the name of the person with the right of action. Congress revised common law with the passage of Fed. R. Civ. P. 17(a). Rule 17(a) states "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought . . . ." *See id. See generally* Charles Alan Wright, FEDERAL COURTS 490 (5th ed. 1994).

97. *See e.g.,* Louisiana ex rel. Guste v. Lee, 853 F.2d 1219 (5th Cir. 1988).

98. *See id.*

99. *See id.* at 1225.

100. *See* 28 U.S.C. § 2412(d)(1)(A) ("Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.").

the federal government, and the litigation is successful, the question thus remains who, if anyone, should receive EAJA fees. This type of scenario is evident in many environmental lawsuits against the government.

IV. Pertinent Case Law Involving Large Environmental Groups.

In *Sierra Club v. United States Army Corps of Engineers*, the district court had to decide about the fee application after it concluded that the government's position was unjustified.[101] In *Sierra Club (III)*, the court rejected the EAJA fee claim, holding that if one plaintiff is ineligible for fees, then all other plaintiffs are barred under the EAJA.[102] The court eventually allowed some fees as a result of the Corps and state's bad faith during litigation.[103] The Circuit court reversed, however, and sought a middle ground approach where each plaintiff could be deemed separate and fees could be awarded based upon individual net worth.[104] Under this approach, a court thus must consider the ratio of eligible plaintiffs to total plaintiffs.[105] Judge Meskill, in dissent, believed the majority had enlarged the reading of the statute, however.[106]

The state of Louisiana and five small environmental groups[107] sued the Army Corps of Engineers, challenging the renewal of shell dredging permits along the Louisiana Gulf Coast.[108] Their argument was that the Corps violated the National Environmental Policy Act (NEPA) when it failed to fill out an Environmental Impact Statement (EIS) before the permit renewal.[109] The court held that the government's position was not substantially justified,[110]

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101. *See* Sierra Club v. U.S. Army Corps of Eng'rs, 776 F.2d 383, 393 (2d Cir. 1985).

102. *See* Sierra Club v. U.S. Army Corps of Eng'rs, 590 F. Supp. 1509, 1526 (S.D.N.Y. 1984) (Sierra Club III).

103. *See id.* at 1522-1525.

104. *See Sierra Club* 776 F.2d at 393-394.

105. *See id.*

106. *See id.* at 394 (Meskill, J., dissenting). "When a group of twelve plaintiffs, one of whom has a net worth over $1 million, [Author notes the limit has been increased to two million dollars since the 1985 re-enactment], join together, congressional concern about access to the courts is not implicated. Indeed, it seems incongruous to hold that if the ineligible plaintiff alone challenged Westway, fees could not be awarded under the EAJA, but because the ineligible plaintiff was joined by less wealthy friends, fees may be awarded." *Id.*

107. Save Our Coasts, Inc., The Orleans Audubon Society, Sierra Club, Manchac Fisherman's Assoc., and the Envtl. Defense Fund.

108. *See Louisiana ex rel. Guste*, 853 F.2d at 1220.

109. *See id.* at 1221.

110. *See id.* at 1223.

so the focal issue became the assessment of Louisiana's role in the case.[111]

Louisiana is an EAJA-ineligible party and the environmental groups sought attorney fees under the EAJA.[112] The district court stated "special circumstances" existed making the award unjust because of Louisiana's involvement, despite the group's assurances that Louisiana's involvement was subtracted from their fee petition.[113] Ultimately, this case will go back to the district court for reconsideration, but the court must determine what portion of the case or what amount of resources Louisiana added to this lawsuit.[114] This then will allow the court to properly assess the amount of attorney fees entitled to the environmental groups.[115] The district court then has broad discretion to follow its formula for determination.[116]

In *United States v. 27.09 Acres of Land*, Purchase Environmental Protective Association, Inc. appealed the district court's denial of its attorney fees petition.[117] There essentially were two phases of the litigation.[118] In the first phase, the Association hired a law firm to obtain a preliminary injunction against the Postal Service to prevent the building of a new post office without complying with NEPA.[119] When the Association ran out of funds, its president stepped in as its attorney and was not very active in phase two of the litigation.[120] The Postal Service ended up turning the property over to the county as a settlement.[121]

The appellate court's review of the attorney fees issue was limited to whether the district court "abused its discretion in refusing to award fees."[122] The appellate court concluded that the district court did not abuse its discretion because of the unique situation of two phases and the failure of first phase being

111. *See id.*
112. *See id.* at 1224.
113. *See Guste*, 853 F.2d at 1224-5.
114. *See id.* at 1225.
115. *See id.*
116. *See id.*
117. *See* U.S. v. 27.09 Acres of Land, 43 F.3d 769, 770 (2nd Cir. 1994). *See also* U.S. v. 27.09 Acres of Land, 737 F. Supp. 277 (S.D.N.Y. 1990) (27.09 Acres I); U.S. v. 27.09 Acres of Land, 760 F. Supp. 345 (S.D.N.Y. 1991) (27.09 Acres II); U.S. v. 27.09 Acres of Land, 808 F. Supp. 1030 (S.D.N.Y. 1992) (27.09 Acres III).
118. *See* 43 F.3d at 771.
119. *See id.*
120. *See id.*
121. *See id.* at 772.
122. *See* 43 F.3d at 772.

unsuccessful.[123] The Association's work through the entire litigation, and specifically the second phase, did not substantially contribute to the successful result sought by the Association.[124] Also, the Association was the only party opposing the postal service building who was EAJA-eligible.[125] The factors made an award of attorney fees unjust under the EAJA.[126] This rationale was based on both *Sierra Club v. Army Corps of Engineers* and *Louisiana ex rel. Guste v. Lee*.[127]

The mixed eligibility problem continues to concern courts as to exactly how they should consider each of the parties. The courts that are hesitant to issue binding decisions concerning party eligibility under the EAJA often believe it is easier to decide these cases based mainly on the substantial justification[128] argument. The substantial justification standard is not burdensome and is often defined as "justified to a degree that could satisfy a reasonable person."[129]

A modern example of this problem is *Sierra Club, Illinois Chapter v. Brown* decided in July 1999.[130] Several not-for-profit corporations[131] and the Sierra Club sued the state of Illinois and federal transportation agencies and officers[132] because they failed to comply with NEPA.[133] The defendants did not adequately assess the future use of the toll road and their EIS was insufficient because of its obvious avoidance of quantifying the effects of ozone production.[134] As a result, the court declared the project invalid.[135] The court granted summary judgment in favor of the plaintiffs.[136]

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123. *See id.* at 772-773.
124. *See id.* at 773.
125. *See id.* at 774.
126. *See id.*
127. *See generally Sierra Club*, 776 F.2d 383; *Louisiana ex rel. Guste*, 853 F.2d 1219.
128. *See supra* notes 55-70 and accompanying text.
129. *See Pierce*, 487 U.S. at 565.
130. *See* Sierra Club, Illinois Chapter v. Brown, No. 96-C4768, 1999 U.S. Dist. LEXIS 11194, at *1 (N.D. Ill. July 9, 1999).
131. South Corridor Against the Tollway Inc. and Environmental Law and Policy Center of the Midwest.
132. Kirk Brown, Secretary, Illinois DOT, Julian D'Esposito, Chairman Illinois State Toll Highway Authority, U.S. DOT and Rosalind A. Knapp, Secretary, Federal Highway Administration and Ronald Marshall, Illinois Division Administrator.
133. *See Sierra Club, Illinois Chapter*, 1999 U.S. Dist. LEXIS 11194, at *1.
134. *See id.* at *2 .
135. *See id.*
136. *See id.* at *2.

All of the plaintiffs except Sierra Club petitioned for fees under the EAJA.[137] The party seeking the fees bears the burden of proving that it is eligible for compensation under the EAJA.[138] If a party fails to qualify as an EAJA eligible party, the court will not consider the fee question further.[139] In *Brown*, the plaintiffs did not establish eligibility as EAJA parties because their motions were inadequate.[140] The court also raised a question relating to mixed eligibility because Sierra Club, an EAJA-ineligible party, also was the lead plaintiff.[141] The court believed that none of the parties involved should be entitled to EAJA fees because of Sierra Club's substantial involvement in the case. Even though the discussion was mere dicta, the case demonstrates that courts still are struggling with the multiple party issue. Ultimately, the court decided that the government's position was substantially justified,[142] thus ending the EAJA eligibility discussion.

V. Critique of Modern Case Law Approach.

Modern case law has established precedent[143] making it difficult for parties to acquire EAJA fees. The EAJA was passed specifically to aid small businesses and individuals in their challenges against unreasonable actions by the federal government.[144] When these same plaintiffs are denied EAJA fees simply because they seek the assistance of a large environmental group with a considerable net worth such as Sierra Club or the World Wildlife Fund, the policy behind the EAJA erodes.[145] Courts have had problems deciding how to treat each of the parties when a lead party member is an EAJA-ineligible party. Cases have not always been consistent[146] on how to handle such a situation. Some courts have held that if an EAJA-ineligible party were a joint plaintiff with an EAJA-eligible party, then awarding the EAJA-eligible party would be unjust.[147] Other courts are concerned with the "free-rider" problem specifically: "[i]f the party ineligible for

137. *See id.*
138. *See, e.g.,* Estate of Woll v. U.S., 44 F.3d 464, 470 (7th Cir. 1994).
139. *See*, e.g., Comm'rs of Highways of Towns of Annawan v. U.S., 684 F.2d 443, 445 (7th Cir. 1982).
140. *See Sierra Club, Illinois Chapter*, 1999 U.S. Dist. LEXIS 11194, at *2.
141. *See id.* at *5.
142. *See id.* at *3.
143. *See supra* notes 101-142 and accompanying text.
144. *See supra* notes 2-12 and accompanying text.
145. *See* 28 U.S.C § 2412(d)(1)(B). *See also* discussion *supra* Part II. B.
146. *See supra* notes 143-150 and accompanying text.
147. *See Louisiana ex rel. Guste*, 853 F.2d at 1225.

fees is fully willing and able to prosecute the action against the United States, the parties eligible for EAJA fees should not be able to take a free ride through the judicial process at the government's expense."[148] Still others seek to reduce the EAJA-eligible party's fee based upon the proportion of the number of eligible plaintiffs and upon the amount of work that each plaintiff performed during specific stages in the litigation process.[149] None of these court "solutions" solve the real problem of trying to help the average citizen challenge the government and/or its actions, however.

Courts also have turned to the substantial justification requirement[150] as a way to limit or to prevent plaintiffs from receiving EAJA fees. This standard is a low threshold for the government to overcome, thus making it easy for courts to find that the government was substantially justified. The government's burden under this standard merely is to "satisfy a reasonable person." Some courts have held that if one justice dissents, the government's position must be reasonable. This low threshold becomes a deterrent for citizens, who already may be wary of not receiving EAJA fees because of the presence of their EAJA-ineligible co-plaintiff, from spending any expense to challenge the government.

VI. Conclusion.

The government makes decisions everyday affecting the environment, such as the construction of highways and federal buildings, the location of dumps and nuclear facilities, health testing, and maintaining an endangered species list. Each of these decisions has an effect on small businesses or individuals, and if these decisions have a negative consequence for the environment, the public at large has a vested interest in challenging and litigating them.

To maintain and to preserve a safe and healthy environment, environmental litigation should be welcomed. If the "bad actor" is the federal government, private individuals should be allowed to challenge the government without concern for the high costs of litigation. Substantial justification standards must be raised so that the government cannot evade payment of attorney fees and expenses simply because its argument bears a mere hint of rationality. The EAJA should be revised to allow small, private,

148. *See 27.09 Acres of Land*, 43 F.3d at 774.
149. *See id.* at 774. *See also Sierra Club*, 776 F.2d at 393.
150. *See supra* notes 55-70 and accompanying text.

EAJA-eligible parties to receive EAJA fees regardless of the assistance of large environmental groups in complex environmental litigation.

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