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## DECREASING INCENTIVES TO ENFORCE ENVIRONMENTAL LAWS: *CITY OF BURLINGTON V. DAGUE*

*MICHAEL D. AXLINE\**

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“Ultimately, enforcement of the law is what really counts.”<sup>1</sup>

For the past decade, the Supreme Court has been limiting citizen efforts to enforce environmental laws — despite strong and continued congressional support for citizen enforcement.<sup>2</sup> The Court has limited citizen enforcement efforts by narrowly interpreting statutes that authorize citizen enforcement<sup>3</sup> and by broadly applying defenses to citizen enforcement.<sup>4</sup> In *City of Burlington v. Dague*,<sup>5</sup> the Court

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\* Associate Professor of Law, University of Oregon. B.A., Idaho State University, 1977; J.D., University of Oregon, 1980. My thanks to second year law students Hillary Wray and Matt McKeown for their assistance with the research on this article, and to Paul Slovic for his insights on the decisionmaking process.

1. *Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) (Brennan, J., dissenting).

2. See Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint In The Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 421 (1989) (concluding that the Court's decisions have been both “activist” and “pro-development”).

3. See, e.g., *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987) (holding that a complaint must allege that defendant is “in violation” of the Clean Water Act at the time the complaint is filed, rather than that the defendant “has violated” the Act); *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (finding that prior notice of intent to file a citizen suit is a prerequisite to such suits, even if the defendant has actual notice through service of complaint).

4. See, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2139-40 (1992) (finding that plaintiff's allegations of standing were insufficient to show “direct” injury from government action); *Department of Energy v. Ohio*, 112 S. Ct. 1627, 1634-35 (1992) (finding that Congress was not sufficiently clear in its waiver of sovereign immunity to subject federal agencies to civil penalties); *Lujan v. National Wildlife Fed'n*, 497 U.S.

continued to impede citizen enforcement efforts by reducing the financial incentives for attorneys to represent citizens in environmental citizen suits.<sup>6</sup> In *Dague*, the Court prohibited lower courts from using a "contingency factor" to enhance statutorily authorized fee awards to prevailing plaintiffs in environmental citizen suits.<sup>7</sup>

The stakes in this determination are high. Because nonprofit organizations and poor or middle income individuals cannot afford to pay attorney fees in environmental citizen suits, court ordered fee awards provide the only quantifiable incentive for attorneys to represent citizens in enforcement actions.<sup>8</sup> Congress has unequivocally indicated its support for private enforcement of environmental laws by including citizen enforcement provisions, including provisions for awards of attorney fees, in nearly every major piece of environmental legislation adopted since 1971.<sup>9</sup>

The larger a potential fee award, the greater the incentive for an

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871 (1990) (holding that plaintiffs must allege use of precise area affected by government land policies in order to establish standing); *Chevron USA v. National Resources Defense Counsel*, 467 U.S. 837, 844 (1984) (stating that courts should defer to agency interpretation of statutes unless Congress has clearly addressed the precise question at issue).

5. 112 S. Ct. 2638 (1992).

6. The term "citizen suit" refers to a statutorily authorized lawsuit, prosecuted by private citizens, to enforce a public right created by the statute authorizing the lawsuit. Such lawsuits can involve either private or public defendants or both. *See generally* MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (Butterworth's 1991) (outlining the citizen suit process).

7. *City of Burlington v. Dague*, 112 S. Ct. at 2643-44.

8. Of course, attorneys may decide to represent citizens for non-monetary reasons. However, Congress correctly concluded that a private enforcement system cannot be based on the assumption that attorneys will be willing to donate hundreds of thousands of dollars worth of their time on a regular basis. *See, e.g., The Effect of Legal Fees on the Adequacy of Representation: Hearing Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. for the Judiciary*, 93d Cong., 1st Sess. 788 (1974) (statement of Sen. John V. Tunney, Chairman of Subcommittee) ("[I]t may well be that 'fee shifting' affords the best means of ensuring that rights provided by the Constitution and the Congress are not taken away by the high costs of litigation.").

9. *See generally* AXLINE, *supra* note 6, Appendix A (listing federal laws containing citizen suit provisions); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 844-51 (1985) (discussing common provisions in citizen suit statutes). The Marine Mammal Protection Act, 7 U.S.C. §§ 1361-1407 (1988) and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988) do not include citizen enforcement provisions. *See generally* John E. Bonine, *The New Private Public Interest Bar*, 1 J. ENVTL. L. & LITIG. xi (1986) (discussing private enforcement).

attorney to accept a citizen enforcement action.<sup>10</sup> As Justice Blackmun stated in dissent in *Dague*, by denying courts the discretion to enhance statutory fee awards to reflect the contingent nature of the recovery in citizen enforcement actions, the Court impairs the effectiveness of the environmental and civil rights statutes that rely on fee awards to attract private enforcement counsel.<sup>11</sup> The Court's opinion in *Dague* therefore means that the legislative goals articulated in the Clean Water Act,<sup>12</sup> the Resource Conservation and Recovery Act,<sup>13</sup> and other environmental legislation are less likely to be realized.

Although that outcome is consistent with the anti-regulatory preferences of a majority of the Court, it is counter-democratic because it replaces the policy choices of an elected legislature with the policy preferences of an appointed judiciary.<sup>14</sup> To prevent *Dague* from decreasing citizen enforcement, Congress must now enact legislation expressly authorizing contingency enhancements for fee awards to prevailing plaintiffs. This article suggests that a standard enhancement for all contingency cases would achieve the congressional goal of attracting competent counsel for citizen suits, without imposing unreasonable burdens on the judiciary.

### I. COMPENSATING PUBLIC INTEREST ATTORNEYS UNDER FEE-SHIFTING STATUTES

Even the most altruistic private sector attorney cannot afford to prosecute lengthy and expensive environmental cases without some hope of meaningful compensation. The costs incurred in litigating *Alyeska Pipeline Service Co. v. Wilderness Society*<sup>15</sup> illustrate why significant incentives are necessary to induce attorneys to accept such cases. In *Alyeska*, citizen plaintiffs spent five years prosecuting a case under the Mineral Leasing Act of 1920 and the National Environmental Policy Act.<sup>16</sup> Plaintiffs' attorneys devoted over 4,000 hours and more

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10. This is particularly true in the relatively inelastic setting where attorney fees are the *only* quantifiable incentive to bring such suits.

11. *City of Burlington v. Dague*, 112 S. Ct. at 2644 (Blackmun, J. dissenting).

12. 33 U.S.C. §§ 1251-1387 (1988).

13. 42 U.S.C. §§ 6901-92 (1988).

14. Reducing incentives to file citizen enforcement suits will also have the institutional effect of reducing the workload of the federal courts, a consideration that would appeal to the court.

15. 421 U.S. 240 (1975).

16. *Id.* at 242-43.

than one-half a million dollars (assuming a rate of \$125 per hour) to the case, and ultimately prevailed by demonstrating a violation of the Mineral Leasing Act.<sup>17</sup> The plaintiffs, however, were forced to bear the cost of the litigation, because the Court refused to order the losing defendant, who had precipitated the case by violating the law, to pay the plaintiffs' fees and costs.<sup>18</sup> Instead, the Court held that, under the "American rule," the losing party has no obligation to pay the costs or attorney fees of a prevailing party, absent a statutory fee shifting provision.<sup>19</sup>

Citizen plaintiffs usually are either modest-income individuals or nonprofit organizations who lack the resources necessary to compensate attorneys for work on complex citizen suits. Even if private citizens could afford the legal fees in such cases however, it would be fundamentally unfair to make them do so. The general public, and not individuals, reap the primary benefits of this type of litigation.<sup>20</sup> Both of these factors were behind Congress' decision to authorize fee-shifting awards to prevailing plaintiffs. Absent direct federal funding for private enforcement of environmental laws, meaningful private enforcement will occur only if the financial incentives provided by these fee-shifting provisions are sufficient to persuade private sector attorneys to forego paying cases in order to prosecute contingency suits.

Although every citizen suit statute contains a fee-shifting provision,<sup>21</sup> these provisions do not specify a rate of compensation. Rather, they typically provide that awards shall be "reasonable."<sup>22</sup> Courts, therefore, determine what constitutes a "reasonable" hourly rate to award successful plaintiffs in particular cases, and in so doing, exercise significant control over the incentives for private attorneys to litigate

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17. *Id.* at 245 n.13.

18. *Id.* at 269.

19. *Id.* at 247.

20. Fee shifting provisions serve both equity and policy goals. They bring a measure of equity to citizen enforcement proceedings by sparing the costs of litigation associated with a case that primarily benefits the public. The fee shifting provisions also further Congress' policy objectives by providing financial incentives for private sector attorneys to enforce the substantive programs adopted by Congress.

21. See generally *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (stating that Congress included fee shifting provisions in over 150 federal statutes).

22. See, e.g., *The Clean Water Act*, 33 U.S.C. § 1365(d) (1988) (court "may award costs of litigation [including reasonable attorney and expert witness fees]").

such suits.<sup>23</sup>

Prior to *Dague*, the Supreme Court had recognized that there is a relationship between fee award amounts and the willingness of attorneys to accept contingency cases. In *Blum v. Stenson*,<sup>24</sup> the Court found that Congress had intended the use of "market rate" awards for prevailing plaintiffs under the Civil Rights Attorney's Fees Awards Act of 1976.<sup>25</sup> The Court rejected the "actual cost" award approach because Congress was "legislating in light of experience" when it adopted the 1976 Act, and specifically referred to prior cases using a market based approach.<sup>26</sup> Under the market rate approach, attorneys who prosecute citizen suits receive compensation comparable to the amounts received by attorneys with similar qualifications who are employed by clients with sufficient resources to pay for services. The market rate applies even though the attorneys may be institutionally employed at a lower rate.

The market rate approach provides some inducement for attorneys to provide representation in citizen enforcement actions, but the market rate approach only mirrors the rates paid in hourly fee cases — it does not reflect the contingent nature of payment in citizen enforcement actions. An unmodified market rate approach therefore requires attorneys to choose between traditional cases that are certain to pay a given hourly rate and citizen suit cases that offer only a possibility of receiving the same hourly rate.

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23. The exception is the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1988) ("EAJA"), which provides:

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 . . . attorney fees shall not be awarded in excess of \$75 per hour unless the court determines that an 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.

*Id.*

While EAJA provides a starting point in calculating fees, it does not establish a fixed rate and does not specifically address contingency factors. EAJA is only invoked in suits that do not involve specific citizen suit provisions, such as those brought under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-70 (1988), where citizen review of agency conduct is sought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702, 706 (1988).

24. 465 U.S. 886 (1984).

25. 42 U.S.C. § 1988 (1988). The Court has explicitly approved the practice of analogizing to fee awards under the Civil Rights Act when determining the appropriateness of an hourly rate in a citizen's suit. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (*Delaware I*).

26. *Blum v. Stenson*, 465 U.S. at 894-97.

For nearly a decade prior to *Dague*, the Court struggled with various methods of reflecting the contingent nature of fee recoveries in determining the fees awarded to successful plaintiffs in citizen suits. The Court's ultimate rejection in *Dague* of all contingency enhancements will significantly decrease the number of attorneys willing to prosecute citizen suits. Unless Congress acts to establish a uniform contingency enhancement as suggested below, *Dague* will have delivered a serious blow to Congress' efforts to strengthen private enforcement of environmental laws.

## II. BLOCKING LEGISLATIVE POLICY WITH JUDICIAL DISINCENTIVES

When the Supreme Court reverses a prior decision, it reveals that its decisions reflect the policy preferences of the Court, rather than some neutral, objectively verifiable, legal truth. To reach the result it wanted in *Dague*, the Court had to reverse *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*. In *Delaware Valley II*,<sup>27</sup> a plurality concluded that although fee enhancements may be appropriate in certain cases, the lower court<sup>28</sup> erred in granting an enhanced award under the facts of that particular case.<sup>29</sup> Justice O'Connor, concurring in the judgement, concluded that a fee enhancement based on the contingency of payment is appropriate only when the plaintiff will be unable to obtain representation in the absence of such an enhancement.<sup>30</sup> The dissent concluded that Congress intended

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27. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*). The Delaware Valley Citizens' Council for Clean Air and the United States (respondents) sued Pennsylvania seeking to compel the State's compliance with the Clean Air Act. See *Delaware I*, 478 U.S. at 546. A consent decree obligated Pennsylvania to establish a vehicle emissions program. The state failed to comply, but the respondents agreed to an extension of the compliance deadline. Subsequent to that agreement, the respondents sued to recover their attorney's fees and costs. The Third Circuit upheld an enhanced fee award. 762 F.2d 272 (3rd. Cir. 1985) The Supreme Court reversed. 483 U.S. 711 (1987).

28. *Delaware Valley II*, 762 F.2d 272 (3d Cir. 1985).

29. *Delaware II*, 483 U.S. at 728. Justice White, joined by Chief Justice Rhenquist, and Justices Powell, and Scalia, wrote for the Court. They determined that courts could never allow a contingency enhancement, except in "exceptional" cases. *Id.*

30. *Delaware Valley II*, 483 U.S. at 733. Justice O'Connor noted the absence of a congressional prohibition on fee enhancements. According to O'Connor, contingency enhancement is appropriate if an applicant establishes that "without an adjustment for risk, the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.*

that courts increase fee awards to account for contingent payment in all appropriate cases, and that such enhancement was necessary to insure a "reasonable fee" for prevailing plaintiffs in citizen suits.<sup>31</sup> Although there was no majority opinion in *Delaware Valley II* establishing the circumstances under which contingency enhancements would be allowed, there were clearly five votes for the proposition that contingency enhancements were appropriate, at least in *some* circumstances, under fee-shifting procedures.

After *Delaware Valley II*, attorneys frequently argued for fee-enhancements by attempting to satisfy the criteria established in Justice O'Connor's concurrence.<sup>32</sup> In *Dague*, the plaintiffs convinced the district court that they were entitled to contingency enhancements,<sup>33</sup> but on appeal, the Second Circuit expressly refused to apply the O'Connor standard. The Second Circuit found instead that the division among the Justices in *Delaware Valley II* left the question of what constituted adequate grounds for a contingency enhancement unanswered.<sup>34</sup> The Second Circuit therefore applied its own rule.<sup>35</sup> Under its criteria, the Second Circuit noted that the plaintiffs confronted substantial obstacles in attempting to obtain counsel, and these obstacles justified a twenty-five percent enhancement.<sup>36</sup> The Court granted certiorari in *Dague* to reconsider fee enhancements in citizens environmental suits. The current composition of the Court differs from the Court that decided *Delaware Valley II*, and the new mix of justices concluded that, contrary to the votes of five justices in *Delaware Valley II*, contingency enhancements are *never* appropriate under fee-shifting statutes.<sup>37</sup>

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31. *Id.* at 754-55 (Blackmun, J. dissenting). Justices Brennan, Marshall, and Stevens joined Justice Blackmun in dissent.

32. *See, e.g.,* Alberti v. Klevenhagen, 903 F.2d 352, 352 (5th Cir. 1990) (applying the O'Connor standard); McKenzie v. Kennickell, 875 F.2d 330, 334 (D.C. Cir. 1989) (same); Lattimore v. Oman Constr., 868 F.2d 437, 439 (11th Cir. 1989) (same); Rode v. Dellarciprete, 892 F.2d 1177 (3d Cir. 1988) (same); Student Pub. Interest Research Group v. AT & T Bell Lab., 842 F.2d 1436, 1451 (3d Cir. 1988) (same); Spell v. McDaniel, 824 F.2d 1380, 1404 (4th Cir. 1987) (same).

33. *See Dague v. City of Burlington*, 935 F.2d at 1347.

34. *Id.* at 1360.

35. *See Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987) *citing* Lewis v. Coughlin, 801 F.2d 570, 576 (2d Cir. 1986) (finding that the proper inquiry was "whether [w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the courts").

36. *Dague v. City of Burlington*, 935 F.2d at 1360.

37. *City of Burlington v. Dague*, 112 S. Ct. at 2643-44. As Justice Blackmun points

Justice Scalia's opinion for the majority in *Dague* focuses on the policy implications of contingency enhancements and affords only minimal consideration to the legislative intent behind citizen suit fee-shifting provisions.<sup>38</sup> The analysis is incorrect in several respects and result driven in all respects.

#### A. *Confusing the Merits of a Case With the Risk of Loss*

Justice Scalia's first concern with contingency enhancements is that such enhancements would encourage nonmeritorious claims. He reaches this conclusion by asserting that the risk of loss in any particular case is a product of two factors: (1) the merits of the claim, and (2) the difficulty of establishing those merits. According to Justice Scalia, if courts enhance fees in low-merit cases to compensate for the high risk of loss in such cases, then the lower the merits of a case, the higher the incentives to take the case should be.<sup>39</sup>

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out in his dissent in *Dague*, the contingency award was a minor issue in the lower courts and in the petition for certiorari. *Id.* at 2647 n.5.

38. See *infra* notes 39-54 and accompanying text for a discussion on Scalia's opinion.

39. Justice Scalia begins his analysis of contingency enhancements with the assertion that:

The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor . . . is ordinarily reflected in the lodestar — either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. . . .

The first factor (relative merits of the claim) is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award. It is of course, a factor that *always* exists (no claim has a 100% chance of success) so the computation of the lodestar would never end the court's inquiry in contingent-fee cases. . . . Moreover, the consequence of awarding contingency enhancement to take account of this "merits" factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 20% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the "reasonable fees" provision.

*Id.* at 2641-42.



This analysis is flawed for several reasons. First, there is no particular reason that a contingency enhancement would have to track the risk of loss. Rather, as discussed below, it need only offer the possibility of recovering something more than the attorney's usual hourly rate. If the contingency enhancement is the same for all cases, the merits become the determining variable, and attorneys will tend to bring cases that have more, rather than less, merit.

Second, Justice Scalia's reasoning fails to account for the fact that only successful plaintiffs receive fee awards. A plaintiff in an environmental citizen suit will ultimately prevail only if her case has 100% merit. Regardless of whether a case may have been evaluated as having a 20% chance of success on the "merits" before it was filed, the case becomes "100% meritorious" once it is won. *Any* case in which citizen plaintiffs prevail will provide the "social benefits" of greater compliance with environmental laws. At that point, counsel should be entitled to an enhancement *at least* equal to that provided to the attorney trying a case with "80% merits."<sup>40</sup> Absent such compensation, counsel lacks any incentive to take the difficult cases at the cost of foregoing paying cases, despite the fact that such cases may actually involve a violation of environmental laws.<sup>41</sup>

Third, despite the fact that Justice Scalia distinguishes between the "merits" of a case and the "risk of loss" in a case, he uses the two interchangeably to support his argument. This sleight of hand allows Scalia to argue that "high risk" cases are not to be encouraged, because they have no "merit." But that proposition is not necessarily, or even commonly, true.

An attorney may believe that a case has 100% "merit" because there is a clear violation of an environmental law. The same attorney, however, might also conclude that the "risk of loss" is high, and the

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40. The converse is that a case with "merits" of 80% might be lost. In that event, the case in fact did not have merit and counsel will not be compensated. Justice Scalia's hypothetical assumes that this 80% case, even though ultimately shown to be without merit, is preferable to the 20% case that is ultimately shown to be meritorious. Arguably, the contingency enhancement awarded to the attorney who successfully prosecuted the 20% case should provide a total award greater than that given to the attorney who successfully prosecutes an 80% case and receives a contingency enhancement, because the risk of loss is greater in the 20% case, even though both are in the end equally meritorious.

41. In fact, under Justice Scalia's reasoning in *Dague*, counsel only will bring contingent cases approaching a 100% chance of success merit, because only those cases potentially provide the financial incentives presented by cases in which the client pays on an hourly rate as services are provided.

chances of *winning* the case are only 20%. For example, given recent Supreme Court opinions which narrowly interpret statutory citizen suit provisions, broadly apply procedural defenses, and indicate a general hostility towards citizen enforcement actions,<sup>42</sup> counsel might conclude that success is unlikely, despite a clear violation of the law. By using the word “merit” as if it is equivalent to “risk of loss,” Justice Scalia implies that all losing cases lack “merit” — an erroneous inference.<sup>43</sup>

Scalia correctly states that there are “social costs” associated with encouraging the prosecution of “nonmeritorious,” claims. Although he does not elaborate on what he means by “social costs,” the most obvious cost is the expenditure of judicial resources in reviewing and dismissing meritless cases. Increasing the potential recovery in high risk cases can certainly be expected to increase the number of meritless cases, particularly if the amount of recovery is tied to the degree of risk.<sup>44</sup> Increasing the potential recovery, however, also encourages meritorious claims that otherwise would *not* be prosecuted, thereby insuring greater compliance with environmental laws. Scalia’s “social cost” emphasizes the conservation of judicial resources but at the expense of enforcing environmental legislation. This preference contradicts *Congress’* express preference for greater citizen enforcement of the nation’s environmental laws.

### B. *Risk Spreading and Contingency Enhancements*

Justice Scalia’s second major concern is that contingency enhancements in effect allow an attorney to receive some compensation for losing cases. Scalia asserts that an attorney will apply the enhanced fee awards in winning cases to offset her costs in unsuccessfully litigating prior cases.<sup>45</sup> Having made this assertion, Scalia then reasons that re-

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42. See *supra* notes 2-9 and accompanying text for a discussion on the Supreme Court’s hostility toward citizen enforcement actions.

43. On the other hand, courts are unlikely to rule for plaintiffs in a non-meritorious case, because that entails finding a violation of an environmental law when in fact none existed.

44. This possibility is tempered by the fact that environmental cases are expensive and time consuming. Thus, even with a contingency enhancement, attorneys would not view such cases as a guaranteed “money-maker.” Rather these cases are investments with variable outcomes, ranging from a complete loss of the investment to complete compensation.

45. 112 S. Ct. at 2643. Justice Scalia stated that:

An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting stat-

imbursing an attorney for expenses incurred in a losing case is contrary to congressional purposes, because Congress authorized fee awards only for prevailing parties.<sup>46</sup>

Scalia's conclusion follows, however, only if he is correct in stating that the effect of a contingency enhancement is to compensate an attorney for costs incurred in prior losing cases. That premise is incorrect in the context of fee-shifting statutes. Contingency enhancements do not compensate counsel for cases previously lost. Rather, contingency enhancements provide incentives for attorneys to forego paying clients and accept contingency cases.

If contingency fee enhancements were awarded by courts to compensate counsel for prior losing cases, then presumably less skilled counsel, who lose more cases, would receive higher awards than skilled counsel, who win more cases. But since no court has enhanced a fee award expressly to compensate for past lost cases, there are no guideposts for determining how a court would go about accounting for prior losses. Scalia's argument is constructed from whole cloth.

The statutory language of fee-shifting provisions implies nothing about compensating or not compensating counsel for losing cases when authorizing payment of "reasonable" fees. Rather, the statutory language and its legislative history demonstrate Congress' attempt to develop a scheme with sufficient incentives to induce attorneys to accept contingency cases and, at least occasionally, forego paying clients to do so. Without the ability to compensate for the contingent nature of payment in citizen suits, fee awards are unlikely to provide those incentives.

### C. *The Efficiency Factor*

Justice Scalia raises two efficiency arguments in support of his conclusion. First, he argues that awarding a contingency enhancement in one case will necessarily require it in all fee-shifting cases, because payment in these cases is always contingent on winning.<sup>47</sup> It is not clear, however, why this would be inefficient, wrong as a policy matter, or

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ute would in effect pay for the attorney's time (or anticipated time) in cases where his client did *not* prevail.

*Id.*

46. *Id.* Scalia reasoned that if the statutory language that limits fee awards to prevailing parties bars a plaintiff from recovering costs of lost cases, then the language should also bar a prevailing plaintiff from recovering for the risk of loss. *Id.*

47. *Id.* at 2642-43.

contrary to congressional intent. The award of enhancements in all cases does not, by itself, impose any additional burden on the courts. It is only Scalia's assumption that the amount of enhancement should vary with the risk of loss that would make such enhancements inefficient. A standard enhancement for all contingency cases would be both efficient and consistent with congressional intent. In fact, if the purpose of fee-shifting statutes is to provide an incentive for counsel to forego paying clients in favor of contingency cases, then insuring a higher payment in all winning cases is the only realistic way to achieve that goal.

Scalia's second efficiency concern is that contingency enhancements would spawn "burdensome satellite litigation."<sup>48</sup> Again, however, the amount of litigation over fee enhancements will depend on the courts' formula for determining fee enhancements. The variable formula suggested by Scalia might cause significant litigation. However, a standard enhancement of ten or fifteen percent, applied in all cases, would be easy to administer and provide consistency in fee awards.<sup>49</sup> There are so many variables impacting the risk of loss that it is impossible to correlate the contingency factor with the risk of loss in a case in any event. The legislative intent behind citizen suit provisions suggests that only reasonable incentives for such enforcement are required, and a standard enhancement would provide such incentives.

In *Delaware Valley II*, Justice O'Connor suggested that enhanced fee awards are appropriate only where the applicant can prove that, absent an adjustment for risk, the prevailing party would have incurred "substantial difficulties" in obtaining counsel.<sup>50</sup> Justice O'Connor also would require that contingency compensation be determined by the market, rather than by the nature of the risks involved in a particular case.<sup>51</sup>

This comes close to suggesting a standardized contingency enhance-

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48. *Id.* at 2643.

49. Other commentators have suggested similar approaches. See, e.g., Don Corson, Note, *Attorney Fees And The Contingency Factor Under 42 U.S.C. § 1988*: Blum v. Stenson, 465 U.S. 886 (1984), 64 OR. L. REV. 571, 590 (1986) (suggesting an initial set rate modified based upon data considering whether it attracted counsel to a sufficient number of cases).

50. *Delaware Valley II*, 483 U.S. at 733. In making this suggestion, O'Connor relied on the language of the plurality, which required a showing "that without risk enhancement, plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Id.* at 733 (footnote omitted).

51. *Id.*

ment. But in *Dague*, Justice Scalia rejects Justice O'Connor's approach because it requires a showing that the enhancement was necessary to attract counsel to such a risky case, while prohibiting the enhancement from being based on the risks of the particular case.<sup>52</sup> This is inconsistent, Scalia argues, because the only way to attract competent counsel is to offer a contingency sufficient to counter the riskiness of the particular case — a point he later ignores by prohibiting all contingency enhancements.<sup>53</sup> But the inconsistency in O'Connor's position does not suggest that all contingency enhancements should be eliminated. Scalia's premise — that the size of the contingency enhancement must "match" the risk of loss in order to attract competent counsel — is not intuitively obvious. It is more accurate to say that the size of the enhancement must be sufficient to persuade attorneys to forego cases that pay on an hourly basis.

### III. *DAGUE'S* LIKELY IMPACT ON CITIZEN ENFORCEMENT OF ENVIRONMENTAL LAW

Private enforcement of environmental laws is an increasingly important supplement to the enforcement efforts of administrative agencies. The inherent tension between Congress' legislative agenda and the executive branch's administrative agenda impedes aggressive agency enforcement of some laws. When the two branches are controlled by separate parties with different agendas, the tension is at its greatest. Even when the same party controls both branches, however, administrative agencies will have agendas distinct from Congress'. Agencies have limited resources for enforcement, and may assign different priorities for those resources than the priorities intended by Congress.<sup>54</sup>

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52. *City of Burlington v. Dague*, 112 S. Ct. at 2642.

53. *Id.* Scalia also argues that examining the private sector market to determine a "reasonable" award in fee-shifting cases is circular. The contingency enhancements of hourly rates (as opposed to contingency amounts based on a percentage of the ultimate award) exist only in fee-shifting cases. *Id.* On this point, Scalia is correct. However, as Justice Blackmun notes, that problem also exists with market rate awards, which Scalia accepts. *Id.* at 2647.

54. See, e.g., Dianne Dumanoski & Michael Kranish, *President Loosens Stance on Wetlands*, BOSTON GLOBE, Aug. 10, 1991 (regarding President Bush's removal of wild-life-rich wetlands from protection and opening them to development); Statement of Senator John Dingell, Chair, Subcommittee on Oversight and Investigations, Thursday, September 10, 1992, at 2 ("upper management at the Justice Department [has] halt[ed] environmental prosecutions that the Environmental Protection Agency, local U.S. Attorney's offices, and even the line attorneys in the Environmental Crimes Section itself think should go forward").

Private enforcement provides citizens, who are the intended beneficiaries of Congress' environmental programs, a meaningful role in implementing those programs. And private enforcement provides the *only* means of enforcing environmental laws against federal agencies, who are among the worst violators of those laws.<sup>55</sup>

Although Justice Scalia's analysis in *Dague* raises several potential problems with contingency enhancements, he fails to address whether Congress' goal of inducing private sector attorneys to accept citizen enforcement cases can be met in the absence of such enhancements. Without adequate financial incentives, it is unlikely that legislation authorizing citizen enforcement will be implemented in the manner envisioned by Congress. Absent some form of contingency enhancement, private attorneys have no financial incentives to accept such cases rather than cases in which they are certain to be paid. Justice Blackmun correctly notes in his dissent that the reduced compensation awarded in citizen environmental suits will induce only the less competent, underemployed attorneys to accept these cases.<sup>56</sup> Because citizen enforcement actions are expensive, time consuming, and frequently controversial, even underemployed lawyers are likely to avoid such enforcement actions, at least in the absence of a potential fee award sufficient to overcome the risk involved in taking the case. The decision in *Dague* to prohibit all contingency enhancements means that if Congress wants meaningful private enforcement of environmental and civil rights laws, it will have to adopt legislation authorizing contingency enhancements.

Numerous public interest attorneys filed amicus briefs in *Dague*. These briefs documented the economic reality that attorneys will de-

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55. See generally Michael D. Axline et al., *Stones For David's Sling: Civil Penalties In Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1, 4-7 (1987) (noting the "enormous problem" caused by pollution from federal facilities); Nancy E. Milsten, Note, *How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government?*, 18 RUTGERS L.J. 123 (1986) (analyzing the problem of hazardous waste released by federal facilities).

56. *City of Burlington v. Dague*, 112 S. Ct. at 2644-45 (Blackmun, J., dissenting). Justice Blackmun points out:

If federal fee-bearing litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers — who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation — and public interest lawyers who, by any measure, are insufficiently numerous to handle all cases for which other competent attorneys cannot be found.

*Id.*

cline meritorious contingency cases in favor of hourly-fee paying clients, because even public interest attorneys need to pay their bills.<sup>57</sup> This reality is self-evident, well documented, uncontradicted, and directly relevant to the impact of *Dague* on Congress' efforts to enlist citizens in environmental law enforcement. It is also ignored in Scalia's opinion.

Scalia acknowledges that attorneys consider the "risk of loss" when deciding whether to accept a case.<sup>58</sup> But he does not acknowledge that the *amount* of the award is at least as important in the decision making process as the fact that *some* award is likely.<sup>59</sup> He expresses a concern that an enhanced fee award provides an incentive for attorneys to litigate non-meritorious cases,<sup>60</sup> but ignores the fact that increased payoffs are necessary to encourage attorneys to accept cases *with* merit.<sup>61</sup> He

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57. Brief Amicus Curiae of Alabama Employment Lawyers Association; American Civil Liberties Union Foundation; Joaquin G. Avila; Cooper, Mitch, Crawford, Kuykendall & Whatley; Disability Rights Education and Defense Fund, Inc.; Jay-Allen Eisen Law Corp.; Erickson, Beasley, Hewitt & Wilson; Law Office of Alan B. Exelrod; Law Offices of Richard B. Fields; Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A.; Julian, Olson & Lasker, S.C.; Legal Services For Prisoners With Children; Legal Services of Northern California; Mexican American Legal Defense and Educational Fund; NAACP Legal Defense and Educational Fund, Inc.; National Employment Lawyers Association; Patterson, Harkavy, Lawrence, Van Noppen & Okun; Richard M. Pearl; Prison Law Office; Planned Parenthood Affiliates of California; Puerto Rican Legal Defense and Education Fund, Inc.; Public Advocates, Inc.; and Rosen, Bien, & Asaro at 1, *City of Burlington v. Dague*, 112 S. Ct. 2638 (No. 91-810).

These attorneys explained that "[i]f contingent risk enhancers were not available to compensate these private attorneys when they prevail, economic necessity would force many of them to turn down meritorious cases in favor of hourly-fee paying clients." *Id.*

58. *City of Burlington v. Dague*, 112 S. Ct. at 2640. Specifically, Scalia recognized that "the attorney bears a contingent risk of nonpayment that is the inverse of the case's prospects of success: if his client has an 80% chance of winning, the attorney's contingent risk is 20%." *Id.*

59. It is a fundamental precept of decision theory that a person considering whether to undertake an action will consider both the probability of success and the potential payoff while making her decision. Telephone interview with Paul Slovic, Director, Decision Research (September 1992). In fact, Scalia recognizes that the size of the potential payoff is important, when he argues that the size of the contingency enhancement would have to "match" the risk of loss in order to attract competent counsel. *City of Burlington v. Dague*, 112 S. Ct. at 2642.

60. The significant disincentives to accepting citizen enforcement actions, including the expense, time, and potential community disapproval, discount this possibility. See *supra* notes 15-19 and accompanying text.

61. An attorney deciding whether to accept a case that has "some" or even a "good" chance of success, is more likely to accept the case if the potential recovery is \$100,000 than if the potential recovery is \$10,000.

also fails to acknowledge that in the absence of any offsetting factors, attorneys are unlikely to trade a guaranteed hourly rate for even an eighty percent chance of getting the same rate.<sup>62</sup>

Plaintiffs in *Dague* argued that the private legal market is the best determinant of what constitutes "reasonable" fees in contingency cases. In the private sector, attorneys who accept contingency cases generally receive some premium over their ordinary rates.<sup>63</sup>

Justice Scalia fails to respond directly to this empirical evidence of the need for contingency enhancements to provide financial incentives. Rather, Scalia argues enhancements merely duplicate factors incorporated into the lodestar. According to Scalia, difficulty of establishing the merits of a case is reflected in the lodestar by either a higher number of hours expended on the case, or in the higher hourly rate charged by an attorney capable of overcoming the difficulties in less time.<sup>64</sup> The problem with this reasoning is that even if lodestar amounts in contingency citizen suits reflect the greater number of

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62. Decision theorists have documented the existence of a "certainty effect," which is a "tendency to overweight outcomes that are considered certain, relative to outcomes that are merely probable." SLOVIC ET AL. *DECISION MAKING* (Wiley 1988). Scalia fails to account for the intuitively obvious fact that attorneys will prefer certain payment over a probability of payment, unless the probable payoff is significantly higher than certain payoff. Both Justice Blackmun and Justice O'Connor note this omission in their dissents. Justice Blackmun stated that, "the Court's argument is mistaken so far as it assumes the only relevant incentive to which attorneys respond is the risk of losing particular cases." *City of Burlington v. Dague*, 112 S. Ct. at 2647 (Blackmun, J., dissenting). Justice O'Connor stated:

[W]hen an attorney must choose between two cases — one with a client who will pay the attorney's fees win or lose and the other who can only promise the statutory compensation if the case is successful — the attorney will choose the fee-paying client, unless the contingency-client can promise an enhancement of sufficient magnitude to justify the extra risk of nonpayment.

*Id.* at 2648 (O'Connor, J., dissenting).

63. *City of Burlington v. Dague*, 112 S. Ct. at 2641. Plaintiffs in *Dague* argued that: "Fee-shifting statutes should be construed . . . to replicate the economic incentives that operate in the private legal market, where attorneys working on a contingency-fee basis can be expected to charge some premium over their ordinary hourly rates." *Id.*

64. 112 S. Ct. at 2641. Scalia argues that an enhancement is unnecessary because: [A]n enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar — either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so.

*Id.*



hours or the higher hourly rates charged for difficult cases, the same will be true for hourly rates in difficult cases involving paying clients. Therefore, those factors are not a basis for distinguishing contingency cases from paying cases, nor do they provide incentives for attorneys to forego paying cases for cases in which the attorney may receive nothing.<sup>65</sup>

Enhancing an "hourly basis" award to account for the contingency nature of citizen suits, as Justice Scalia points out, creates a "hybrid" model that draws both from contingency tort cases and from standard hourly rate cases, and the "hybrid" model lacks a precise analog in the private sector.

The "reasonableness" of a fee system for citizen enforcement actions, however, whether that system is a "hybrid" or a more traditional system, should be measured by whether the system accomplishes the purposes for which Congress authorized fee-shifting. Does the scheme stimulate private enforcement of environmental laws? Under this test, the unmodified straight-hourly-rate lodestar system adopted in *Dague* fails miserably.

Legislation authorizing a standard contingency enhancement in fee-shifting cases is now necessary to replace the incentive system undermined by *Dague*. A ten or fifteen percent enhancement over market rates would be a modest method of insuring that attorneys who gave up paying cases to take on citizen suits have the prospect of *some* additional compensation for accepting the risk, getting *no* compensation.

#### IV. CONCLUSION

The decision to accept any case will depend upon a variety of factors. There is little doubt, however, that the attorney's potential payoff is a major consideration. By decreasing the potential payoff, the Supreme Court's decision in *Dague* decreases the incentives for attorneys to represent citizen groups in statutorily authorized enforcement actions. An attorney who is personally committed to the issues involved in a case may assume the risk of nonpayment for altruistic reasons. However, by authorizing attorney fee awards in citizen suits, Congress recognized that reliance on such altruism could not form the

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65. Traditional contingency arrangements recognize that the decision to accept a case will involve consideration of the potential payoff, as well as the likelihood of success. Therefore, the contingency payoff is typically a percentage of the total amount recovered, and it provides an incentive for attorneys to represent impecunious plaintiffs, even when the chances of success are low, so long as the potential payoff is high.

basis for a realistic private enforcement program.<sup>66</sup> The *Dague* decision significantly narrows the incentive system established by Congress for encouraging citizen enforcement of environmental laws. Given the current composition of the Supreme Court, Congress can expect additional roadblocks on the path to greater citizen involvement in the enforcement of our country's environmental laws. The only meaningful response to such roadblocks is to remove them with legislation.

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66. See, e.g., S. REP. NO. 1011, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S.C.A.N. 5908, 5910:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.  
*Id.*