INTERVENOR FUNDING AS THE KEY TO EFFECTIVE CITIZEN PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING:
PUTTING THE PEOPLE BACK INTO THE PICTURE

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I. INTRODUCTION

Much has been written in recent years about the need to enhance the citizens' ability to participate effectively in the environmental decision-making process. Legislative reform and enlightened court decisions have, for the most part, overcome major impediments such as *locus standi*, and some jurisdictions have accorded the environmental intervenor the unfettered right to party status. Does this in itself lead to effective participation? The answer, in this writer's opinion, is an unqualified no.

The purpose of this paper will be to discuss the nature of an environmental dispute or proceeding, which by its very definition contains at its core the essential elements of what is commonly referred to as the public interest, and to illustrate why the traditional application of the power to award costs by courts in the civil context is inappropriate when applied to intervenors seeking to put forward their interest in the matters being adjudicated.

This paper will address the fundamental issues surrounding the funding/cost debate, which underscores the *quality* of citizen participation in the context of environmental decision-making, and it will draw the reader's attention to the merits of various ways of meeting the public's expectations in this regard. The discussion will also give considerable attention to the difficulty of curtailing opportunities for abuse, while at the same time maintaining a high degree of efficiency when applied to an environmental regulatory regime.

Though controversial, the concept of a proponent funding *its own opposition* will be fully explored utilizing examples from other jurisdictions, such as that embodied in Ontario, Canada's innovative experiment a decade ago under the *Intervenor Funding Project Act, 1988*.[1] Where possible, the discussion will

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1. R.S.O. 1990 c. I.13, § 16 (repealed 1996).

consider how the experiences derived from other jurisdictions might be applicable in the Unites States' constitutional and regulatory framework.

A. The Nature and Definition of Underlying Concepts

Prior to entering into a detailed discussion of the funding/cost debate, it is necessary to briefly set out some of the issues concerning the nature and definition of the "*public interest"* and the role of *citizen participation*, for the development of these two fundamental concepts in the context of environmental law has, in large part, provided the framework circumscribing this debate.

1. The Public Interest

The term "public interest" is one that defies precise definition. It is a broad concept that encompasses a wide array of considerations.[2] One way to think of it is as an interest "shared by citizens generally in the affairs of local, state or national government."[3] The public interest is an issue in which the public or community at large has "some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question."[4] For example, in *Rose v. Chaikin*,[5] the court recognized the need to take into account the public's interest, on a *national* scale, in cleaner and renewable energy when considering whether to issue an injunction against operation of a local windmill. In other words, in a case dealing mostly with a claim for local, private nuisance, the interests of the nation as a whole were included for consideration.[6] Public interest law, then, centers on the need to protect and preserve the legal interests of the general public.[7]

The common law roots of the public interest reflect a deep and abiding

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2. *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 768-71 (2d ed. 1993).

3. Russell v. Wheeler, 439 P.2d 43, 46 (Colo. 1968).

4. BLACK'S LAW DICTIONARY 43 (5th ed. 1983); *see also* Raj Anand & Ian G. Scott, *Financing Public Participation in Environmental Decision-making*, 60 CAN. BAR REV. 81 (1982).

5. *See* Rose v. Chaikin, 453 A.2d 1378 (N.J. Ch. 1982) (granting an injunction to cease operation of windmill which exceeded maximum sound levels established by local ordinance and whose contributions to the national public interest did not outweigh the detriment to the local community and adjacent homeowners).

6. *See Rose*, 453 A.2d at 1382.

7. *See* R. Quicho, *Watching the Trees Grow; New Perspectives on Standing to Sue, in* CAPACITY BUILDING FOR ENVIRONMENTAL LAW IN THE ASIAN AND PACIFIC REGION 679 (Donna Craig, et al. eds., 2002).

respect for the considerations imbued within the doctrine. An early decision of the Supreme Court of the United States recognized that courts will often go to greater lengths to consider, and potentially further, the public interest than they will private interests.[8] Lending credence to the notion that the public interest is a force of great significance and importance, United States Supreme Court Justice Thurgood Marshall said:

> *Public interest law seeks to fill some of the gaps in our legal system. Today's public interest lawyers have built upon the earlier successes of civil rights, civil liberties, and legal aid lawyers, but have moved into new areas. Before courts, administrative agencies and legislatures, they provide representation for a broad range of relatively powerless minorities for example, to the mentally ill, to children, to the poor of all races. They also represent neglected interests that are widely shared by most of us as consumers, as workers, as individuals in need of privacy and a healthy environment. These lawyers have . . . made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decision-makers. They have made it possible for administrators, legislators and judges to assess the impact of their decisions in terms of all affected interests. And, by helping to open the doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.*[9]

The area of environmental protection is one such relatively "new area" to which Justice Marshall referred. In an environmental context, a court, tribunal or other environmental decision-maker, in rendering decisions pursuant to environmental legislation, is inevitably responsible for specifically taking into account the public interest. Under the framework of an environmental regulatory/approval process, this compels the decision-maker to look beyond the interests of the party seeking approval or redress to consider how a decision might affect the public at large or the particular aspect of the environment the statute or regulation seeks to protect. Many environmental statutes give the term "environment" its broadest meaning and may be deem it to include not only the

8. *See* Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937) (finding that courts of equity may, and frequently do, go much farther both to give and withhold relief in the furtherance of the public interest than they are accustomed to go when only private interests are involved).

9. Quicho, *supra* note 7, at 680.

natural environment and impacts to air, land and water, but also the social, cultural, and economic environment.[10] Similarly, the intervenor in an environmental case often seeks to protect not only her personal interests, but also those of future generations. She would not be able, in some cases, to meet the criteria established for attaining party status in the absence of legislative reform of the law of standing recognizing the importance and utility of public interest litigation as a necessary safeguard to unmitigated environmental harm and expression of public concern.

Governmental and political recognition and acceptance of the citizens' desire to play a more meaningful role in environmental decision-making over the last twenty years has spearheaded the movement to enhance the citizens' ability to both challenge development proposals and to provide more of a balance in the factual data upon which the decision-maker must rely, thus leading *in theory* to more informed environmental decisions. Thus, some jurisdictions have developed the role of the public interest advocate to the point where they recognize the right of party status and have modified the ordinary application of the law of costs in civil proceedings to encourage participation. A dissent by Justice Douglas in *Sierra Club v. Morton*[11] signaled his desire to see the standing requirement broadened for environmental litigants. Douglas maintained that the public's interest in protecting the natural world should be sufficient, in and of itself, to confer standing in environmental litigation. He remarked:

> Inanimate objects are sometimes parties in litigation.

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10. Ontario, Canada's Environmental Assessment Act of 1975 defines "environment" as:

> (a) air, land or water,
> (b) plant and animal life, including human life,
> (c) the social, economic and cultural conditions that influence the life of humans or a community,
> (d) any building, structure, machine or other device or thing made by humans,
> (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
> (f) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario.

By way of contrast, the New South Wales Environmental Planning and Assessment Act, 1979, § 4 defined the term environment as including "all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings." "Environmental planning instrument" means a State environmental planning policy, a regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by this Act, includes a deemed environmental planning instrument.

11. Sierra Club v. Morton, 405 U.S. 727, 741 (1972).

> A ship has a legal personality, a fiction found useful for maritime purposes. The corporation . . . is a 'person' for purposes of the adjudicatory processes. . . . So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, proves of trees, swampland, or even air that feels the destructive pressures of modern technology or modern life.[12]

He then continues:

> The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals including man, who are dependent on it for its sight, its sound or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction . . . . Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.[13]

Other commentators also argue for reform in order to facilitate public interest in environmental decision-making on the grounds that it justifies alteration of the normal distribution of litigation costs in order to sustain public representation.[14] The common law Province of Ontario recognizes the rights of successful parties to recover at least partial indemnity from their opponents, [15] as do many other jurisdictions. To a private citizen or public interest intervenor, the financial liability for an unsuccessful claim may constitute a significant deterrent. Legal scholars Raj Anand and Ian Scott propose modification of this financial disincentive by introducing concepts like tax deduction, cost immunity and public funding as methods by which the cost impediments may be removed.[16]

Australia has gone even further to demonstrate its commitment to the role of the public interest, legislating reforms in both standing requirements and costs

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12. *Id.* at 742-43.
13. *Id.* at 744-45.
14. *See* Anand, *supra* note 4, at 81.
15. *See* Field v. Richard, [1913] 24 O.W.R. 606, 607; *see also* Ritter v. Godfrey, [1920] 2 K.B. 47, 60.
16. *See* Anand, *supra* note 4, at 114-19.

powers. In 1979, New South Wales established the Land and Environment Court (LEC), dedicated solely to the purpose of adjudicating matters of environmental and planning law. The Legislature viewed the public interest as so vital a component in this process that it saw fit to remove barriers to standing to allow the public to represent their own interests in the LEC.[17] Justice Paul Stein (formerly) of the LEC was of the view that "public participation in environmental decision-making was an ethic to be encouraged . . . ."[18] In recognition of the important role of citizen participation, courts in several jurisdictions in the United States, Canada, and Australia in recent years have moved towards *not* assessing costs against unsuccessful public interest litigants because of the "chilling effect" that awarding costs against them might have on public interest representation.

2. Citizen Participation

Citizen participation is a "process by which interested and affected individuals, organizations, and government entities are consulted and included in the decision-making process,"[19] and from the days of the Founders to the present, the American political process has recognized citizen participation as a fundamental tenet.[20] Meaningfully implemented, citizen participation encourages government accountability, ensures continuation of a participatory democracy and can even, in an environmental context, stimulate inventive and socially acceptable answers to environmental problems.[21]

A vast body of legal doctrine in the United States supports these preceding principles. The 1960s, in particular, marked a significant period for the exercise and expansion of citizen participation in the United States.[22] The environmental movement, though not new, received renewed impetus after publication of both Rachel Carson's SILENT SPRING and newspaper headlines that outlined various environmental disasters. These highlighted the dire environmental and human health consequences of rapid industrial development and emphasized the need to adopt a better way of doing things.

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17. *See* Justice Paul Stein, *The Case for a Specialist Environmental Court, Remarks at the Annual Public Interest Environmental Law Conference* (March 2001) (transcript available at http://www.pielc.uoregon.edu/Records/justice_stein_01-keynote.htm) (last visited Feb. 19, 2002); *see also* the New South Wales (NSW) Environmental Planning and Assessment Act, 1979, § 123.

18. Stein, *supra* note 17, at 2.

19. Adam N. Bram, *Public Participation Provisions Need Not Contribute to Environmental Injustice*, 5 TEMP. POL. & CIV. RTS. L. REV. 145, 150-51 (1996).

20. *See id*.

21. *See* Anand, *supra* note 4, at 91; *see also* Bram, *supra* note 19, at 151-52.

22. *See* Steven D. Shermer, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461 (1999); *see also* Bram, *supra* note 19, at 150-51.

The United States Congress responded to growing environmental concerns by enacting certain legislation empowering "the people" to participate in environmental protection through both administrative and adjudicative proceedings.

a. Administrative Proceedings

The Administrative Procedures Act (APA) and the National Environmental Policy Act (NEPA) constitute two of the main sources for expanding public participation in national environmental administrative decision-making.[23] For example, the APA mandates public access to information regarding an agency's organizational structure and to the process by which parties may obtain documents, access to agency policies, manuals, decisions, and other records for public inspection; it also provides instructions for facilitating dissemination of the documents to "any person" making the request.[24] The Act further dictates that the public be given notice and opportunity to comment in situations involving informal rulemaking; for formal rulemaking, the public must be afforded the opportunity to participate in a public hearing.[25]

Citizens may have the opportunity to participate in two types of environmental administrative proceedings: rulemaking and adjudication. Rulemaking is an agency action that creates a regulation intended to implement, interpret, and prescribe a statute or policy. In other words, rulemaking is the process of making rules that apply prospectively to relevant parties. Adjudication is the process of resolving disputes between an agency and a particular party. Adjudications result in orders that resolve the matter in dispute.

i. Rulemaking Proceedings

There are two types of administrative rulemaking procedures—formal and informal. Section 553 of the APA governs informal rulemaking and allows authorized agencies to issue substantive rules without first providing a hearing on a record, so long as the agencies follow three basic steps. First, the agency must notify potentially interested parties that it is contemplating the adoption of some proposed rule and provide the text of the rule or a summary of its substance.[26] Second, the agency must allow those parties an opportunity to comment on the

23. *See* Bram, *supra* note 19, at 151; *see also* Administrative Procedures Act 5 U.S.C. §§ 551-59, 561-69, 571-83, 701-06, 1305, 3105, 3344, 5372, 7521 (1946); National Environmental Policy Act 42 U.S.C. §§ 4321-4370d (1969).

24. Administrative Procedures Act § 552 (a) (1946).

25. *Id*. §§ 553, 556, 557.

26. *See id*. § 553(b).

agency's proposed rule.[27] Third, the agency must issue, before the rule is to take effect, the final version of the rule and a statement explaining why, in light of the comments and its own information, the rule took the form that it did take.[28] Formal rulemaking requires that an agency conduct a hearing on record, during which parties provide testimony, present evidence, and cross-examine witnesses. Although the agency can conduct formal rulemaking in some circumstances through the mail, it is required to record the evidence that parties submit and to comply with the other requirements of formal rulemaking.[29]

Any party may participate in the informal rulemaking procedure at the comment level by responding to a notice. There are no requirements as to the form of the comment and no limitations as to who may respond.[30] The level of influence a party may have, then, might be a reflection of the party's quality of arguments and information. Ignoring arguments or information bearing on the agency's final rule can be detrimental to the rule when subjected to judicial review.[31] Because a party's quality of argument and information may largely be a reflection of its resources, parties with better access to funds will be able to bring more persuasive and informed arguments to the table.

The formal rulemaking procedure is also open to any party. However, the formal rulemaking process requires more of a party participant in that the opposing party can scrutinize and challenge their evidence through argument and cross-examination. Parties who participate in the formal rulemaking process are also entitled to a response from the agency, included in the record of the rulemaking procedure, to any findings, conclusions, and exceptions they submitted.[32] The more detailed procedures of the formal rulemaking procedure, then, generally require a greater investment of resources and time. Again, the party with the more persuasive and developed argument is likely to better inform the agency's findings or conclusions.

ii. Administrative Adjudication

Administrative adjudications are more similar to court proceedings than rulemaking procedures in that, at the conclusion of an administrative adjudication, the agency renders an official order that declares specific rights and responsibilities according to the circumstances in dispute.[33] Similar to

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27. *See id.* § 553(c).
28. *See id.*
29. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 109 (1998).
30. *See id.*
31. *See id.*
32. Administrative Procedures Act § 553; *see also* Croley, *supra* note 29, at 109.
33. Administrative Procedures Act § 551(6)-(7) (stating that adjudication is an

rulemaking, adjudications can be both formal and informal. The APA requires formal adjudication when the statute at issue requires an agency decision be determined on record.[34] In contrast to the wider public participation in rulemaking procedures, adjudications generally only address the concerns and voices of the two disputing parties. As a result, the decisions and policies that result from adjudications have a narrower application than those of rulemaking.

In addition to administrative proceedings, the opportunity for citizen challenges of environmental decisions extends into the realm of adjudication, which in the context of the United States more often takes the form of instituting a court action seeking an injunction or damages for failure by proponents to meet regulatory requirements set out in environmental legislation.

b. Court Proceedings

There are three general types of actions that a citizen may be able to pursue in federal court in an attempt to secure particular environmental outcomes: 1) a private right of action to enforce federal environmental law against violators; 2) an action to compel federal agency action to implement federal environmental law; and 3) an action to secure judicial review of federal agency action.[35] Of the three, an action to compel a federal agency action usually requires the smallest amount of time and resources since it involves limited introduction of evidence and a focus on a clear application of the relevant statute.[36] Actions seeking judicial review or enforcement against violators, however, usually demand more time and resources because they involve more complicated factual and procedural issues.

Citizens or organizations can lodge a private right of action not only against private entities that are in violation of environmental standards and regulations, but also against local, state, and federal government entities that fail to perform their duties as provided for in specific environmental laws. A court would independently assess the alleged failure to perform a duty or to comply with standards and regulations under the environmental law at issue. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Resource Conservation and Recovery Act (RCRA), Clean Water Act (CWA), Clean Air Act (CAA), and Endangered Species Act (ESA) all have citizen suit provisions that allow any person to commence a civil suit on his or her own behalf under the respective act for certain violations of its provisions

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"agency process for the formulation of an order" that is a "final disposition . . . of an agency in a matter other than rulemaking").

34. *Id*. § 554(a).

35. *See* Charles C. Caldart et al., *Public Interest Environmental Litigation,* ENVI MA-CLE 4-i: 5 (1999).

36. *See id.*

or regulations.[37] Although NEPA does not expressly allow for judicial review, courts have held that judicial review of agency compliance with NEPA is permissible under the APA.[38]

In addition, a citizen may have standing to sue in court under the APA to redress environmental violations under statutes that do not include citizen suit provisions, so long as the agency action directly and adversely affects that citizen.[39] In *Bennett v. Spear,*[40] the Court addressed the instances in which the APA may provide additional judicial review. The Court noted that although some claims may not qualify under the judicial review provision of the environmental statute at issue,[41] a claim may still be judicially reviewable under the APA, provided that the claim is a "final agency action for which there is no other adequate remedy in a court."[42] The Court in *Bennett* found that the claim not covered by the ESA's citizen suit provision was reviewable under the APA.

Under the citizen suit provisions of environmental statutes, many challenges in court address the adequacy or absence of an Environmental Impact Statement (EIS).[43] In an EIS challenge, there are five main grounds to challenge: 1) failure to adequately analyze the environmental effects of a project; 2) failure to adequately develop and disclose potential alternatives; 3) failure to adequately disclose unresolved issues; 4) failure to address possible mitigation of adverse environmental effects; and 5) failure to clearly write the EIS in a manner necessary to convey the information to interested parties and agency decision-makers.[44] When courts address EIS challenges, they first determine whether the

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37. Endangered Species Act 16 U.S.C.A. § 1540(g) (2002); *see also* Clean Water Act 33 U.S.C.A. § 1365 (2002); Resource Conservation and Recovery Act 42 U.S.C.A § 6972 (2002); Clean Air Act 42 U.S.C.A. § 7604 (2002); Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C.A. § 9659 (2002).

38. *See* Calvert Cliffs's Coordinating Comm., Inc. v. Atomic Energy Comm'n., 449 F.2d 1109 (D.C. Cir. 1971) (holding that courts have power to require agencies to comply with procedural directions of NEPA).

39. *See id* .at 1115 (finding that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof).

40. Bennett v. Spear, 520 U.S. 154 (1997).

41. *Id.* at 171-74. (The Court in *Sierra Club* concluded that the ESA did not authorize review of petitioners' § 1533 claim.)

42. *Id.* (citing 5 U.S.C. § 704).

43. Environmental Impact Statements are intended to insure that the policies and goals defined in NEPA are connected to the programs and actions of the federal government. They must include "full and fair discussion" of significant environmental impacts and inform the decision-makers and the public of any reasonable alternatives that would avoid or minimize negative impacts. An EIS should be succinct and supported with evidence that the agency has conducted the proper analyses. Courts require an EIS when a major federal action significantly affects the quality of the human environment. *See* 40 C.F.R. § 1502.1 (2002).

44. Peter S. Knapman, Comment, *A Suggested Framework for Judicial Review of*

EIS fails to meet statutory requirements, and then they decide whether to rule that the EIS is inadequate or order that the requesting party or entity complete the process. If the project is underway before the court resolves the challenge, courts are unlikely to require a new EIS. In general, federal courts have been reluctant to invalidate EISs for "technical deficiencies."[45]

That most environmental laws have citizen suit provisions does not guarantee that citizens will be successful in lodging a lawsuit against a private or public entity that is in violation of a particular environmental law. Citizens challenging environmental laws in court must first pass the barrier of both the constitutional and prudential limitations of standing.

c. The Issue of Standing

The seminal United States Supreme Court case addressing standing under Article III, the Constitution's "case or controversy" requirement, is *Lujan v. Defenders of Wildlife.*[46] In *Lujan*, the Court denied standing in a case that addressed statutory requirements of the ESA and defined a minimum constitutional threshold for standing under Article III. The constitutional minimum includes the presence of: 1) an injury in fact – concrete and particularized, actual or imminent; 2) a "fairly traceable" causal connection between the injury and the conduct complained of; and 3) a likelihood that the injury will be redressed by a favorable decision.[47] Citizens bringing suit over environmental laws in federal court must demonstrate each of these factors to survive a standing challenge. Through various decisions, the courts have defined each of the three prongs. For example, in *Sierra Club v. Morton,*[48] the Supreme Court examined Article III's "injury in fact" and "redress" prongs. The Court held that the injury in fact test for standing to sue requires that parties seeking

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Challenges to the Adequacy of an Environmental Impact Statement Prepared Under the Hawaii Environmental Policy Act, 18 U. HAW. L. REV. 719, 721 (1996).

45. *See, e.g.,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

46. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). *Lujan* addressed a statute requiring the Secretary of the Interior to use certain guidelines to list species that are either endangered or threatened, and their critical habitats. *Id*. at 558. Originally, the statute included actions taken in foreign nations, but was revised to include only actions in the United States or on the high seas. *Id*. Defenders of Wildlife sued the Secretary of the Interior, seeking a declaratory judgment regarding the error in the regulation and an injunction to restore the original version of the statute. *Id*. at 559.

47. *Lujan*, 504 U.S. at 560-61.

48. *Sierra Club*, 405 U.S. at 727. In *Sierra Club*, the Sierra Club brought an action for declaratory judgment that construction of a ski and recreation resort in a national forest would violate federal laws, and for preliminary and permanent injunctions to stop federal officials from approving and issuing permits for the project. *Id*. at 730.

review be themselves among the injured. In addition, the Court noted that "injuries" were not limited to economic or physical damage, but encompassed aesthetic, recreational and other non-traditionally protected interests. As for "redress," the Court determined that organizations can initiate litigation on behalf of the individuals they represent. Thus, the Court defined the scope and extent of the first of three-prongs under constitutional standing requirements.

However, considerations of standing do not end with an Article III three-prong analysis. Rather, citizens must also overcome the federal judiciary's prudential limitations on standing. Prudential limitations on standing include proof that: 1) the injury is not a common grievance shared by all or a large class of citizens;[49] 2) the legal rights and interests are the plaintiff's own and not a third party's;[50] and 3) the complaint lies within the zone of interests protected by the relevant statute or constitutional provision.[51]

This prudential analysis, then, examines standing in the context of the specific environmental law at issue. While most environmental laws include broad statutes granting jurisdictional standing to sue within their citizen suit provisions,[52] because some lawsuits involve significant amounts of time and money, many defending corporations or agencies seek to halt litigation by challenging standing issues. Thus, courts have taken an active role in defining the parameters of the prudential limitations of standing.

The Supreme Court addressed the "zone of interest" prong of prudential standing requirements in *Bennett v. Spear,*[53] when it examined whether a citizen grievance regarding "recreational, aesthetic and commercial"[54] interests in reservoir water fell within the "zone of interest" of the ESA. In examining the citizen suit provision of the ESA, the Court noted that the statute broadly and expressly permitted "any person [to] commence a civil suit."[55] In addition to the broad citizen suit provision language, the Court noted that the overall subject matter of the case (the environment) and the obvious purpose of the provision (to encourage enforcement of the particular provision in question) signaled that

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49. Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)).

50. *Id.* at 751.

51. *Id.* (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982)).

52. For the most part, the standing provisions of environmental laws are similarly drafted. The Clean Air Act's standing provision, for example, reads that the act provides "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to § 70.7(h) of this part, and any other person who could obtain judicial review of such actions under State laws." Protection of Environment, 40 C.F.R. 70.4(b)(3)(x) (2002).

53. Bennett v. Spear, 520 U.S. 154 (1997).

54. *Id.* at 160 .

55. *Id.* at 164.

Congress intended to provide a broad grant of standing to sue under the ESA.[56] The Court concluded that the plaintiffs met the zone of interest test under the broad standing provision of ESA.

The Supreme Court has also addressed the issue of standing in *Gwaltney of Smithfield v. Chesapeake Bay Foundation,*[57] a citizen suit involving the enforcement of the CWA. In *Gwaltney*, the Court addressed whether the citizen suit statute provision of the CWA permitted citizen suits for past violations. The Court determined that the CWA does permit citizen suits for past violations if the violations continue in the present or are likely to re-occur in the future. In sum, federal prudential standing requirements do not appear difficult to overcome, and most courts will interpret the facts so as to encourage citizen participation.

In addition to federal standing requirements, states often impose their own standing requirements on challenges brought within state courts. However, states are constitutionally limited in how restrictive their standing requirements can be. States must, at a minimum, extend judicial review rights to participants in the state public comment process who satisfy the standards for Article III standing.[58] In general, then, with well-pled general allegations of harm, tailored to fit the particularities of the environmental issue at hand, proof of standing in federal or state courts should not be any more difficult than a diligent lawyer would expect it to be.

In the Australian state of New South Wales (NSW), the government has virtually eliminated impediments to "open" standing in the environmental law area, allowing anyone to bring an action against any public or private party to restrain a breach of an environmental statute. The best known provision is section 123 of the New South Wales (NSW) *Environmental Planning and Assessment Act, 1979*, which allows any person to bring an action to restrain a breach of the Act. Notably, these standing provisions often do not extend to granting open standing to challenge the merits of many decisions, although fairly broad standing is granted to "objectors" to designated development applications under part four of the NSW *Environmental Planning and Assessment Act, 1979.*

The notion and significance of citizen participation is not unique to American idealism only, but rather it extends to the international arena as well.[59] Raj Anand and Ian Scott discuss the concept of "agency capture" whereby regulated industries have predominant influence over government agencies and

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56. *Id*. at 165.

57. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., et al., 484 U.S. 49 (1987). In *Gwaltney*, citizens brought suit against a permit holder under the national pollution discharge elimination system, arguing that they had violated and continued to violate conditions on the permit by exceeding limitations on certain pollutants. *Id*. at 54.

58. Clean Air Act, 61 Fed. Reg. 34733, 34734 (July 3, 1996) (to be codified at 40 C.F.R. § 70).

59. *See* Casey Lefkowitz S., *A Comparative Look at the Role of Citizens in Environmental Enforcement,* 1997 NAT'L ENVTL. ENFORCEMENT J. 29.

decision-makers by way of their working relationship.[60] Public participation is necessary to counterbalance the weight of information the industry provides to the government agencies to ensure that the agency accounts for the needs and interest of the general public.[61]

B. Financial Resources – The Heart of the Funding/Cost Debate

All too often the "enforcers" or "intervenors" in environmental adjudicative or administrative processes are private citizens or non-profit, non-governmental organizations (NGOs). While attaining party status may gain citizens access to the courtroom, this small and necessary triumph does not ensure availability of the financial resources necessary to adequately and meaningfully fight the war in court. While federal environmental laws may provide for subsequent reimbursement of attorney, expert witness, and other fees of prosecuting an administrative or adjudicative claim, the financial assistance comes too late to effectively promote citizen participation in environmental enforcement.

1. Funding Intervention in Administrative Proceedings

As might be imagined, the cost of actually participating in an administrative procedure, including fees for multiple document copies and transcripts, obtaining information to support substantive arguments, and hiring relevant experts or consultants, can be substantial. As a result, public interest groups, concerned citizens, and other outsider groups often may not be able to afford to participate in administrative procedures.[62] During the mid-1970s through the early 1980s, several agencies implemented "public intervenor programs" intended to encourage participation by groups for whom the costs would otherwise be prohibitive.[63] However, support for public interest intervenor funding fell by the wayside by the mid-1980s and the agencies eliminated the public funding.[64] Until the Equal Access to Justice Act (EAJA) in 1980, participation in administrative adjudication required potential intervenors to cover

60. *See* Anand , *supra* note 4, at 91.

61. *See id.* at 91-92.

62. *See* Earnest Gellhorn, *Public Participation in Administrative Proceedings,* 81 YALE L.J. 359, 393 (1972); *see also* Peter H. Schuck, *Public Interest Groups and the Policy Processs,* 37 PUB. ADMIN. REV. 132, 137 (1977).

63. *See* Susan B. Flohr, Note, *Funding Public Participation in Agency Proceedings*, 27 AM. U. L. REV. 981 (1978).

64. *See* Croley, *supra* note 29, at 124, nn.371-72; *see also* Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience,* 70 GEO. L.J. 51, 52 (1981).

the costs themselves.[65]

Under an adjudication recovery, the EAJA expense award is not limited to proceedings brought against the United States. Expenses may include attorney or agent fees, expert witness fees, and the cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party so long as the matter was necessary for preparation of the applicant's case and to the extent that the charge for the service was reasonable.[66] An award of fees is limited to expenses and fees incurred after initiation of the adversary adjudication, unless considering excessive demand fee expenses.[67] The EAJA gives the award of fees to the prevailing party—other than the United States—to cover the expenses incurred in connection to the proceeding.[68] The award of fees is not applicable where the Commission's position in the proceeding was "substantially justified or special circumstances make an award unjust."[69]

To be eligible for fee awards under the EAJA, the applicant must be a party to the adjudicative proceeding and show that it meets certain conditions of eligibility.[70] Parties seeking an award of fees under the EAJA should file an application along with an itemized statement listing the actual time expended by any attorney, agent, or expert witness representing or appearing on behalf of the party.[71] The burden of proof as to what are reasonable fees is on the party seeking the award.[72] A court cannot make a decision on an application for fees and other expenses under this section until the appeals court renders a final and unreviewable decision.[73] One should note that, because the EAJA provides administrative funding for only adjudicative and not rulemaking procedures, it inefficiently, and perhaps unwittingly, enhances the administrative forum so that it is less likely to promote greater citizen participation and corresponding public benefit.

2. Funding Intervention in Adjudicative Proceedings

The EAJA also awards reasonable attorney expenses and fees to the prevailing party in an action brought by or against the United States, any agency,

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65. *See* Boyer, *supra* note 64, at 52.
66. 16 C.F.R. § 3.81(f) (2002).
67. *Id*. § 3.81(f)(5).
68. 5 U.S.C. § 504 (2002).
69. 16 C.F.R. § 3.81 (a)(1)(i) (2002).
70. *Id*. § 3.81(d).
71. 5 U.S.C. § 504(a)(2) (2002).
72. *See* Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (finding that counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary).
73. 16 C.F.R. § 3.81(d) (2002).

or any official of the United States in a civil court proceeding.[74] The EAJA allows courts to award fees and other expenses, such as expert witness fees, the reasonable cost of any study, analysis, engineering report, test, or project necessary for the preparation for the party's case, to a prevailing party other than the United States in a claim brought by or against the United States.

Unfortunately, a litigant may not recover an EAJA award of costs or fees before the adjudicative or civil proceedings are complete and the court makes a final decision. As cost recovery is limited to those successful in the proceedings and only to final decisions, the fact that intervenors cannot guarantee fee awards as payment for services in advance of the conclusion of the proceedings may inhibit meaningful citizen participation.

In contrast to fee awards under the EAJA, Congress provides for attorney fee provisions within specific environmental statutes as an incentive to encourage public interest and other lawyers to litigate citizen enforcement actions.[75] Fee provisions under the CWA, CAA, CERCLA, RCRA, and the ESA are broad, providing that the court "may award costs of litigation . . . whenever the court determines such an award is appropriate."[76] Each of the costs provisions set out in environmental statutes normally includes both attorney and expert witness fees. Depending on the specific statute and court interpretations, fees and awards also may include the reasonable cost of any study, analysis, engineering report, test, or project found to be necessary for the preparation of the party's case.[77]

Federal courts have further defined who can claim costs and what costs they may claim. While for the most part courts have given wide deference in awarding fees, courts occasionally limit fee amounts, or the awards themselves. In *Ruckelshaus v. Sierra Club,*[78] the Supreme Court ruled that absent some degree of success on the merits, the court could not award claimant attorney's fees in a challenge under the CAA. A party requesting a fee award, therefore, must be the prevailing or substantially prevailing party.[79] When parties do qualify to receive a fee award, they may not be able to collect compensation for past clean-up costs,[80]

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74. 28 U.S.C.A. §§ 2412(a)(1), (b) (2002).

75. *See* Steven M. Dunne, *Attorney's Fees for Citizen Enforcement of Environmental Statutes; The Obstacles for Public Interest Law Firms,* 9 STAN. ENVTL. L.J. 1, 1-2 (1990).

76. Endangered Species Act 16 U.S.C.A. § 1540(g)(4) (2002); *see also* Clean Water Act 33 U.S.C. § 1365(d) (2002); Resource Conservation and Recovery Act 42 U.S.C.A. § 6972(e) (2002); Clean Air Act 42 U.S.C. § 7607(f) (2002); Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. § 9659(f) (2002).

77. These costs are specifically included in RCRA's costs provision statute, under 28 U.S.C.A. § 2412(d)(2)(A).

78. Ruckelshaus v. Sierra Club, 463 U.S. 680, 693-94 (1983).

79. The CWA, CAA, CERCLA, and RCRA cost provision statutes all include a parenthetical that reads "(including reasonable attorney and expert witness fees)."

80. *See* Meghrig v. KFC Western, Inc., 516 U.S. 479, 484 (1996). In *Meghrig*, KFC brought suit under the RCRA, claiming restitution for clean up costs of the oil pollutant contamination the previous owner caused on the property. The Supreme Court held that

or courts may limit the attorney's fees awarded according to what the court considers reasonable.[81] In limiting fee awards, courts then require citizens who wish to enforce environmental laws to find lawyers who will work for less than full market compensation, thereby often diluting the effectiveness of the representation.

Even without the danger of limited fee awards, non-profit public interest law firms face the threat of losing their status as charities if the possibility of winning a fee award is a substantial motivating factor in their decision to pursue a case. Tax-exempt status as charities under section 501(c)(3) of the Internal Revenue Code is vital to many environmental public interest law firms because contributions to a 501(c)(3) charity are tax-deductible. Foundation grants and private contributions constitute a financial staple for many national environmental public interest law firms, and many benefactors donate largely because of the organization's 501(c)(3) charity status.[82] Due to IRS procedural requirements, charitable public interest law firms may not seek or accept attorney's fees from clients in return for the provision of legal services. While the public interest law firm may accept and use an award of attorney's fees from an opposing party, a charitable public interest law firm may not use "the likelihood or probability of a fee" award as a consideration in its selection of cases.[83] Not only does this prohibition fail to take into account the need for public interest law firms to consider their financial position before taking cases, but it also opposes congressional efforts to foster public interest environmental litigation.[84]

Thus, in certain circumstances the fee provisions Congress has enacted may not provide adequate funding or may, in fact, undermine the very public interest they intended to promote. Most notably, because funding through costs provisions is awarded upon conclusion of court proceedings, the funding may be counterproductive in that citizen or public interest intervenors may have difficulty retaining experts or lawyers without a guarantee of recovery up front.

3. Other Sources of Funding and Citizen Representation

RCRA does not provide compensation for past clean up costs. *Id*. at 482.

81. In *American Petroleum Institute v. U.S. E.P.A.*, 72 F.3d 907 (D.C. Cir. 1996), the District of Columbia Court of Appeals examined the attorney hours and expenses claimed by the petitioner in a Clean Air Act claim, finding some attorney hours reasonable and others excessive. In instances where the court found the hours claimed excessive, the court cut back the attorney's fees awarded by the amount the court felt was appropriate. *Id*.

82. *See* Dunne, *supra* note 75, at 24-26.

83. *See* Rev. Proc. 92-59 § 4.04 ("The likelihood or probability of a fee, whether court awarded or client-paid, may not be a consideration in the organization's selection of cases."); *see also* Dunne, *supra* note 75, at 25.

84. *See* Dunne, *supra* note 75, at 31.

Citizen participation in the context of environmental proceedings has evolved in most jurisdictions with a focus on how to ensure the citizens' right to participate as a party, regardless of the citizens' financial ability to do so in an effective manner. In some respects, the public and certain judiciaries have almost entirely overlooked the dynamics of the environmental litigation process. Without adequate resources to properly prepare a case for hearing, to retain experienced counsel and expert witnesses, and to participate fully throughout the entire proceeding, standing translates into little more than *participatory tokenism.* In recognition of the difficulties facing intervenors who are unable to access sufficient funds to effectively participate, some jurisdictions have explored a number of alternatives designed primarily to safeguard the public interest. These alternatives include the establishment of public defenders—for example, the Environmental Defenders Office established in New South Wales—and the extension of state-based legal aid schemes to cover the costs of environmental litigation.

While the provision of legal aid may be possible in some jurisdictions, by and large, it is unavailable as a source of funding for environmental litigation. Where it is available, legal aid suffers from the same disadvantages of costs awarded after the fact. In addition, fees and disbursements covered under most legal aid schemes are at rates that are rarely attractive to experienced counsel. Consequently, the attorneys in most cases ultimately fund the costs of litigation themselves in advance, albeit with a higher expectation of recovery than would be the case under a discretionary costs award. Once again, the provision of legal aid does not provide the funding necessary at the point in time when litigation most requires it, namely for the preparatory stage. Moreover, almost all legal aid schemes have some form of means test and are not accessible by significant segments of the public at large. The major impediment to the use of legal aid as a source of funding environmental litigation is the fact that most jurisdictions have simply excluded this type of proceeding from state-based schemes on the grounds that there is not enough legal aid funding available to adequately cover criminal, matrimonial, and other classes of litigation requiring legal resources.

Likewise, jurisdictions that have adopted the public defender model, although purporting to represent the public interest, do not substantially enhance the citizens' ability to participate directly in environmental decision-making. The Wisconsin Legislature created a Public Intervenor Office in 1967 to serve as a sort of public environmental defender. The Office protected the "public right" in matters of pollution control and granted state permits for various developmental projects.[85] The Intervenor Office gave ordinary citizens a place to call for technical and legal advice, lobbied government agencies directly to ensure public rights were addressed, and counteracted the lobbying efforts of special interest

85. *See Facts About the Changes to the Public Intervenor's Office & DNR, at* http://www.wsn.org/piofactsheet.html (last visited Feb. 4, 2002) (quoting THOMAS HUFFMAN, PROTECTORS OF THE LAND AND WATER (1994)).

groups who could harm public rights.[86] The Office also advised legislators, testified at hearings, wrote detailed technical and legal comments to agencies, served on numerous agency advisory committees, and successfully pushed for environmental protection legislation.[87] On occasion, the Intervenor Office joined or initiated lawsuits on precedent-setting cases to uphold public rights—for example, to stop pollution or protect drinking water sources.[88] In 1995, the Wisconsin State budget process abolished the Intervenor Office. Public interest groups recently introduced a bill reestablishing the Public Intervenor Office to the Wisconsin Legislature; however, the Assembly removed it from the Budget Bill.[89]

In addition, some private public interest organizations, such as the Environmental Defense Fund [EDF], the Center for Public Interest Law [CPIL], the Environmental Law Foundation [ELF], and the Sierra Club, may provide legal expertise or representation in limited circumstances. These organizations, however, are themselves seriously under-funded and thus, able to render assistance in only a few selective cases.

Policy makers in the United States have not widely discussed or embraced the alternative of using an intervenor funding model that provides the necessary financial resources *in advance of a hearing*. Such a model may be more likely to facilitate effective public participation and inevitably lead to better environmental decision-making. The following example from the Province of Ontario, Canada, illustrates how states can address the funding dilemma in this fashion.

C. The Ontario Model

In the late 1980s, the Ontario government embarked upon a somewhat novel initiative, at least in the context of the development of public interest litigation and citizen participation in Canada.

In order for the reader to fully appreciate how and why the government of the day enacted legislation that placed the burden of funding intervenors upon proponents in certain designated situations involving public hearings, one must have an appreciation of the events leading to this course of action.

The direct origins of Ontario's *Intervenor Funding Project Act, 1989* can be traced in large part to an interlocutory decision made by the Joint Board, chaired by this writer and constituted under the provisions of the *Consolidated Hearings Act, 1981,*[90] in an application by the Regional Municipality of Hamilton-

86. *See id.*
87. *See id.*
88. *See What Was the Public Intervenor Office, at* http://www.wsn.org/issues/WhatwasPIO.html (last visited Feb. 4, 2002).
89. *See id.*
90. S.O. [1981] c.19.

Wentworth for the approval to construct an eleven-kilometer roadway connecting two provincial highways in the city of Hamilton, Ontario. Before gaining the permit to construct the proposed roadway, the Province required the proponent to obtain a number of specific environmental and planning approvals.[91]

By virtue of the proponent electing to proceed pursuant to the *Consolidated Hearings Act*, *1981* (CHA), the legislation gave the Joint Board the power to render a comprehensive decision on the entire undertaking at one hearing, thus assuming the jurisdiction of all other tribunals to issue the necessary approvals to enable the undertaking to proceed.

In that proceeding, after entertaining a motion for financial assistance brought by two separate groups of citizens who were known as the *Lime Ridge Property Owners* and the *Save the Valley Group* to enable both groups to participate effectively in opposition to the proponent's undertaking, the Joint Board awarded the two groups of intervenors a total of $75,000 as "costs in advance" to be paid immediately by the proponent under a stringent set of requirements mandated by the Joint Board in its Order. The significant factors surrounding the Joint Board's Order, which represented a startling departure from what had occurred to that point in time in the Province and indeed throughout Canada, can be delineated as follows:

i) The Joint Board made this Order pursuant to its costs power set out in section 7 of the *Consolidated Hearings Act* (CHA). It should be noted that this section did not specifically set out at which point in time an award of costs could be made, nor did the CHA specifically provide for the *funding* of intervenors.

ii) The Joint Board's Order placed the cost burden squarely on the proponent and to be provided at the outset of the hearing, thus in effect requiring the proponent to fund *its own opposition*.

iii) The Joint Board's award of costs-in-advance in favor of these intervenors was made irrespective of the intervenors' success in the proceeding before the Joint Board.

iv) The Order made by the Board did not derogate from

91. For example, an undertaking of this type required, *inter alia*, approvals, licenses, or permits under Ontario's Environment Assessment Act, Environment Protection Act, Niagara Escarpment Development Act, and Planning Act, several of which would have required separate hearings before different tribunals having jurisdiction to render such approvals, licenses, or permits under the requisite statutes.

> the power of the Board to make a further award of costs at any time during and up to the end of the hearing.

This action, taken after extensive argument by counsel for all parties to the proceeding, was the result of a perceived inequity with respect to the relative positions of the parties and their ability to provide the Joint Board with the type and quality of evidence that would enable the Board to arrive at an informed decision in the public interest. It also bore the mark of the frustration of the Joint Board, and this writer in particular, of being placed in the uncomfortable position of having to adjudicate complex applications for approval, often involving evidence of a highly technical nature, in the absence of having that evidence adduced by expert witnesses called on behalf of a party other than the proponent. In essence, the inability of intervenors to secure an appropriate level of funding was, to some extent, undermining the very nature of the hearing itself, *i.e.*, providing an open forum within which citizens could effectively participate in the decision-making process, and impairing the ability of the Joint Board to render a decision based on evidence not only from the perspective of the proponent but also from the perspective of those in opposition.

As might be expected, the Joint Board's action triggered an immediate and spirited protest from counsel for the proponent and brought the funding issue to the immediate attention of the media, the government, the corporate community and a broad spectrum of NGOs. Not surprisingly, the proponent filed for a judicial review of the Joint Board's Order, arguing vociferously that the Joint Board had exceeded its jurisdiction in providing what essentially was *intervenor funding under the guise of exercising its statutory power to award costs*.

It should be pointed out that the Joint Board, in making this award of costs-in-advance, did so after carefully considering its statutory powers to award costs in the light of the particular nature of the proceeding before it. In reaching its decision to provide the intervenors with the basic financial resources to mount an effective opposition to the proponent's proposed undertaking, the Joint Board considered why, in such circumstances as were presented by this case, the costs power should not necessarily be exercised in the same manner as has been traditionally exercised by a court of law in the context of a civil case.

Although an application for approval in an undertaking such as a proposed highway involves a wide range of environmental and planning considerations, it is the environmental ones, particularly under environmental impact assessment legislation, such as the Ontario *Environmental Assessment Act*, which involve issues concerning significant and serious impacts to the natural environment; that is, impacts to air, land and water as well as significant impacts to the economic, social and cultural environment. The Joint Boards have long recognized that such impacts may involve long-term environmental degradation

and, consequently, are matters that might properly be included within the concept of the "public interest."

This public interest component differentiates this type of case from the more traditional civil case arising out of a *lis* between the parties to the proceedings. In the latter case, the plaintiff brings suit against a defendant—a breach of contract action, for example—and if successful, normally recovers costs from the unsuccessful party under what is frequently referred to as the *damages* theory of costs.[92] That is, the costs follow the event and the successful party is reimbursed for his/her costs in successfully upholding his/her rights or, if a successful defendant, for being unnecessarily dragged into court to defend the plaintiff's action. In the normal civil lawsuit, it is in the plaintiff's discretion as to whether or not the suit will be commenced, and in the event that the plaintiff fails to prove the essential elements of the action, the court will have little difficulty in simply dismissing the plaintiff's action by reason that the court is not concerned about the wider public interest. Moreover, the defendant has little choice but to defend the action at the suit of the plaintiff by reason that failure to do so will render the defendant liable to judgment and costs.

On the other hand, a regulatory proceeding such as the one before this Joint Board is of a different nature altogether. Here, the proponent has no choice as to whether or not to bring its application for approval to proceed with the undertaking, as that obligation is a statutory one imposed by the environmental/planning regulatory legislation, which is in place as part of the state's efforts to protect the environment in its broadest sense.

A three-judge panel of the Ontario Divisional Court initially heard the application for judicial review of the Joint Board's *Costs in Advance* Order. The Ontario Division Court at that time was a Division of the Ontario Supreme Court, now known as the Superior Court of Justice, empowered to hear judicial review applications.

Due to the public interest the Joint Board generated by its somewhat novel interpretation of its costs power set out in section 7 of the CHA, four other interested groups sought standing in the judicial review proceedings on the basis that the Divisional Court's disposition of this application would have profound implications in future proceedings involving other quasi-judicial administrative tribunals constituted under a plethora of environmental and planning statutes. [93]

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92. Where costs are awarded following the event, they are normally awarded on a party and party basis which affords reimbursement at a lower amount than normal attorney/client costs between an attorney and his or her own client. Indemnity costs, *i.e.*, reimbursement of the full amount of attorney/client costs, may be appropriate in some circumstances such as when the plaintiff brings a frivolous action or a party is found to have acted in bad faith.

93. Of the interest groups seeking party status to these proceedings, several represented government agencies, public utilities, associations of municipalities, and other potential private and public sector proponents who might, if the Joint Board's Order was

After considering issues related to standing, the Divisional Court granted leave to the four interested groups seeking party status in this proceeding to appear as friends of the court.[94] The issue before the Court was whether or not the Joint Board had exceeded its jurisdiction under the costs power set out in section 7 of the CHA by making an award of costs in advance against the applicant [the Regional Municipality of Hamilton-Wentworth], a decision that opponents of the award maintained amounted to intervenor funding.

Section 7 of the CHA, 1981 provides, *inter alia*:

> (3) Subject to this Act and the regulations, a joint board may determine its own practice and procedure.
>
> (4) A joint board may award the costs of a proceeding before the joint board.
>
> (5) A joint board that awards costs may order by whom and to whom the costs are to be paid.
>
> (6) A joint board that awards costs may fix the amount of the costs or direct that amount be taxed, the scale according to which they are to be taxed and by whom they are to be assessed.[95]

The Joint Board, after hearing extensive argument, concluded that it had such jurisdiction, and in written reasons justified its action in part on the basis that:

> Notwithstanding the ambiguity of the sections in the Act dealing with costs, this Board has concluded that it does have the jurisdiction to make an award of costs in advance of a hearing in

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upheld, be required to fund intervention in the future. The remainder of the groups seeking party status were public interest groups and NGOs who might, in the future, be the recipient of intervenor funding. *See* Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc., et al., indexed as: Re Hamilton-Wentworth Save the Valley Committee [High Court of Justice (Divisional Court)], [1985] 51 O.R. (2d) 23, for the full text of the Divisional Court's decision.

94. Before this matter came before the Divisional Court, the Ontario Energy Board stated a case to the Court for the purpose of ascertaining whether the Ontario Energy Board Act R.S.O. 1980, chapter 332, permitted the making of a regulation by the Lieutenant Governor in Council which would allow the Board to provide intervenor funding for interested parties in applications before it. As there were obvious advantages in having this matter and the Hamilton-Wentworth judicial review application heard by the same panel of the court, they were listed successively and were heard by the same panel.

95. Consolidated Hearings Act, R.S.O., ch. C.29, §7 (1990) (Ont.)

> circumstances where not to do so would effectively frustrate the hearing process itself.

In reaching this conclusion, the Joint Board sought to insure that the recipient intervenors would not abuse any such awards of intervenor funding that the proponent would pay.[96] Accordingly, in its Order dated 16 October 1984, the Joint Board ordered that:

> (d) [T]he Board is prepared to make an award of costs in favour of Save the Valley Committee Inc. and the Limeridge Property Owners Interest Group Inc., subject to the following specific conditions:
>
> Counsel for the aforementioned groups shall submit for the Board's consideration a fully detailed budget to include the total projected expenditures with supporting documentation for both witnesses and counsel, also including projected scheduling of the timing of payments.
>
> In addition, this detailed budget shall include a statement setting out the manner in which any expert or other witness shall be employed or sued in the course of the hearing.
>
> After reviewing the documentation referred to herein, the Board shall fix the amount of the costs and determine a schedule of payments.
>
> In considering both the amount and scheduling of payments, the Board will have regard to the performance of counsel and witnesses.
>
> With respect to any award of costs in advance, the Board is not prepared to make any such award to:
>
> --Any persons or organizations supporting the proponent's position,
> --Any political parties or affilifiates of political parties,
> --Any individual objectors whose interest, in the

96. After the Joint Board issued an initial Order confirming its conclusion that it had the jurisdiction to order the proponent to pay costs in advance, counsel for the Hamilton and District New Democratic Party Area Council brought a further application for an award of costs in advance. This subsequent application was dealt with in the Order issued by the Board dated October 16, 1984.

> Board's opinion, be the same or similar as those groups represented by Mr. Turkstra, for the Board is not prepared to have the efforts of both experienced counsel and consultants duplicated at the expense of the proponent.[97]

After the submission of a detailed budget to the Joint Board by counsel for Save the Valley Committee, Inc. and the Limeridge Road Property Owners Interest Group, Inc. (Intervenors), and upon consideration of an application by counsel for the Regional Municipality of Hamilton-Wentworth (Proponent) to review the quantum of costs awarded by the Board under its Order dated October 16, 1984, the Joint Board issued a further Order, dated November 5, 1984, in the following terms:

> 1. The Regional Municipality of Hamilton-Wentworth shall pay Counsel representing Save the Valley Committee, Inc. and the Limeridge Road Property Owners Interest Group Inc., the following amounts:
>
> (a) The sum of $22,712.50 forthwith upon receipt of detailed Statements of Account, being the amount considered by the Board as the proper costs and disbursements for the period up to and including November 1st, 1984;
> (b) Up to a maximum amount of $22,500.00 for consultants to be retained by counsel for the Save the Valley Committee, Inc. and the Limeridge Road Property Owners interest Group, Inc., to be paid forthwith after their respective accounts have first been submitted to and approved by the Board;
> (c) Further costs in advance of the conclusion of this hearing up to a maximum of $30,000.00 to be payable by the Regional Municipality of Hamilton-Wentworth, in installments, the amount of which shall be set out in detailed Statements of Account for legal fees and disbursements for the two-week period preceding the delivery of each account.
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> 2. Copies of all accounts tendered to the Regional Municipality of Hamilton-Wentworth, pursuant to this order,

97. Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc., [1985] 51 O.R. (2d) 23, 26.

> shall also be filed with the Board prior to payment of same by the Region.[98]

It should be noted here that prior to the Joint Board issuing its Order dated November 5, 1984, counsel for the proponent brought to the Board's attention a recently discovered case decided by the Manitoba Court of Queen's Bench,[99] wherein the Court appeared to hold, *inter alia*, that the Manitoba Public Utilities Board, in refusing to exercise a similar costs power for the purpose of enabling a party to retain experts to assist its case, lacked jurisdiction even if it had been prepared to do so.

In the course of his decision, Mr. Justice Huband offered the opinion that, in his view, the Manitoba Board's power to award costs (powers that were similar in wording to the Joint Board's power under section 7 of the CHA) did not permit an award to be made for the purpose of funding, *except at the conclusion of a hearing* (emphasis added).[100] After considering submissions on the Manitoba case, the Joint Board concluded that it was not bound by the Manitoba decision and, in the absence of a decision on-point by a superior court of the Province of Ontario or by the Supreme Court of Canada, the Board was at liberty, if it so chose, to confirm its earlier ruling. The Joint Board restated its position in the following terms:

> This board remains steadfastly committed to a fundamental principle underlying the hearing process; that principle, simply stated, is to '*ensure that parties to this hearing may participate and be heard in a fair, effective and meaningful fashion*.'[101]

The Divisional Court, in disposing of the judicial review application before it, arrived at the following conclusions:

- This [Joint] Board, being a creature of statute, can only exercise the powers conferred upon it by its enabling legislation.
- [T]he language employed by the Legislature is clear and unambiguous. It is of significance that the words there used to authorize the Board to award costs are remarkably similar to those in section 141[1] of the Courts of Justice

98. *Re Regional Municipality of Hamilton-Wentworth*, 51 O.R. (2d) at 27.

99. *See* Manitoba Society of Seniors, Inc. v. Greater Winnipeg Gas Co. [1982] 18 Man R.2d. 440.

100. *See Re Regional Municipality of Hamilton-Wentworth*, 51 O.R. (2d) at 28 (emphasis added).

101. *Id.* at 29.

> Act, 1984 [Ont.], c. 11, from which courts derive their "costs" jurisdiction.[102]

In section 7 of the Consolidated Hearings Act, 1981, no words appeared to lend credence to the suggestion that the Legislature intended to grant to the Board any special powers beyond what those courts had traditionally exercised, and it would require very clear and cogent language, embodied in the legislation, to do so. Under this Act, the tribunal's power over costs cannot exceed that of the Supreme Court of Ontario. The legislature may, of course, grant such powers to a tribunal, but it has not done so in the Consolidated Hearings Act, 1981, section 7.

> - No doubt the nature of the proceedings before the Board differs in certain respects from that before a court, but each has its adversarial aspect, and in a real sense, it may be seen that there are winners and losers. Public hearings, such as are here involved, generally have proponents and opponents. It is not surprising that in the present case there are two groups – those that may here or in the future be called upon to finance persons or groups that may wish to appear at a hearing, and those that might be likely to receive such benefits.[103]

After reviewing the relevant case law concerning "costs," the Court concluded that the characteristics of costs, developed over many years are:

1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

4) They are not payable for the purpose of assuring

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102. *Id*. at 30.
103. *Id*. at 30-31.

participation in the proceedings.[104]

The Court went on to say that there were, however, special cases that lacked one or more of these characteristics but where the Court still permitted the award of costs. Historically, the Court had confined these exceptions, by and large, to matrimonial causes, trustee cases, and appeals in *forma pauperis* or by special leave and security for costs.

The Court concluded that the Consolidated Hearings Act, under which the Joint Board derived its costs power, did not grant the Board power to award intervenor funding, no matter how desirable it might be that the Board have such power for the purpose of assuring effective opposition. Whether the award is a lawful exercise of the Board's jurisdiction to give costs cannot rest, in any way, upon the designation given to it by the Board. The award must have the well-established characteristics of "costs" in order to be within the Board's jurisdiction.[105]

While to many black letter lawyers the Divisional Court's disposition of the legal issues under review was not unexpected, it was nevertheless, to some, including this writer, disappointing in several key respects.

The Joint Board's ill-fated endeavor to bring a degree of realism and rationality into a hearing process involving citizen participation that was both ineffective and demoralizing to both intervenors, and indeed the decision-makers who were compelled to render far-reaching decisions based for the most part only on evidence adduced by the proponent, once again fell victim to the judiciary's inability to view environmental litigation differently from other forms of civil litigation.

The Court's refusal to regard proceedings before an environmental tribunal such as the Joint Board as anything other than producing a "winner" and "loser" misses the mark entirely, as the primary purpose of an environmental approval process is *to protect the environment*. Although the matter reaches the tribunal or court charged with issuing or refusing to issue a permit or approval in a forum involving parties in opposition and in support of the particular undertaking, the environmental decision-maker's duty to safeguard the *environment*, and by extension, the public interest, is paramount to that of the individual parties before it. Many jurisdictions have, at least in recent years, recognized this fundamental difference and have modified the application of their costs powers to provide that costs will not normally be awarded against a public interest litigant even if the decision goes against that litigant's position, except in exceptional circumstances.[106]

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104. *Id*. at 32.

105. The Ontario Court of Appeal refused Respondent's application for leave to appeal the Divisional Court's decision.

106. The practice of not awarding costs against unsuccessful intervenors in Ontario

Although the Orders made by the Joint Board in the Hamilton-Wentworth case provided the Court with an opportunity to redefine the law of costs as it pertained to environmental litigation, the Court decided that the reform agenda embraced by the Joint Board should properly be within the purview of the Legislature and not the judiciary.

Fate, however, can sometimes be a wily mistress. The following year saw the first change of government in Ontario in more than four decades.[107] The individual who became Attorney General of Ontario, the Honorable Ian Scott, Q.C., who had been counsel representing an intervenor in the Hamilton-Wentworth judicial review action a year earlier (and who had argued vociferously in favor of the Joint Board's Order to provide intervenor funding), decided to take up the legislative challenge to enact intervenor funding legislation and to provide a statutory right to funding for hearings before the Ontario Environmental Assessment Board, the Ontario Energy Board and the joint boards established under the Consolidated Hearings Act.

1. The Intervenor Funding Project Act, 1988[108] (IFPA)

This Legislature finally enacted this innovative legislation, entitled *The Intervenor Funding Project Act,* in 1988, which for a period of time made a significant contribution in the area of citizen participation as well as the quality of environmental decision-making.

As with any funding legislation, courts and policymakers must take care to prevent abuse. With this in mind, and in recognition of the fact that the scheme was to be *proponent-funded*, the Legislature gave considerable attention when drafting the legislation to building in appropriate eligibility criteria and accountability provisions.[109] What this legislation did was provide intervenors

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before the Environmental Assessment Board or Joint Boards convened under the Consolidated Hearings Act, 1981 was well-entrenched from the inception of these tribunals.

In Australia, the New South Wales Land and Environment Court (LEC) has also, in recent years, adopted the practice of not awarding costs against unsuccessful intervenors for fear of discouraging public participation.

107. The Ontario Progressive Conservative Party had held power continuously in Ontario since before the second World War and was replaced in 1985 by the Ontario Liberal Party.

108. R.S.O. 1990 c. I.13, § 16 (repealed 1996). One should note that a government formed by a political party other than the one responsible for its enactment in 1988 subsequently repealed this legislation.

109. This writer, in his capacity as Chair of the Ontario Environmental Assessment Board at the time, played an active role, at the request of the Attorney General, in the discussions leading up to the drafting of the legislation and the implementation of the intervenor funding scheme it encompassed.

with a "right" to funding awarded to the intervenor in advance of a hearing before one of the named tribunals, with the funding provided by a proponent who has been named by a funding panel as a funding proponent. The essential elements of the funding scheme follow.

Upon receipt of an application for approval requiring a public hearing to be held before one of the three tribunals designated under the IFPA, the tribunal issues a Notice of Hearing containing, *inter alia*, a statement that an intervenor may apply to the Board for intervenor funding and advising potential intervenors of where and when they can submit applications for status as an intervenor.[110] When the Board receives applications for intervenor funding, the Board shall appoint an intervenor-funding panel for a hearing before that Board.[111] The members of the funding panel shall not be members of the panel hearing the merits of the application before it.[112] The "funding panel shall determine, with respect to the hearing for which the Board has appointed it, all issues related to the determination of who are the proponents, funding proponents and [their] eligibility for intervenor funding and the amount of the funding."[113] The legislation specifically provided that the hearing panel could not commence with the hearing itself until the last date for applying for intervenor funding had passed and no applications were received, or until the funding panel for the hearing had advised the Board that all applications for intervenor funding had been decided, if any applications had been received.[114]

The proponent whom the funding panel intended to name as a funding proponent had the right to file an objection, and in such case, the legislation obliged the funding panel to hold a hearing to determine whether it would name the proponent as a funding proponent. A funding proponent was entitled to be a party to hearings before the funding panel and with respect to applications for supplementary funding.[115]

The eligibility criteria for intervenor funding were set out in section 7, which read as follows:

> (1) Intervenor funding may be awarded only in relation to issues,
>
> (a) which, in the opinion of the funding panel, affect a significant segment of the public; and
>
> (b) which, in the opinion of the funding panel, affect the public interest and not just private interest.
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> (2) In deciding whether to award intervenor funding to an

110. *See* Intervenor Funding Project Act, S.O., c.71, § 3 (1988) (Ont.).
111. *See id.* § 4(1).
112. *See id.* § 4(3).
113. *Id*. § 4(2).
114. *See id*. § 3(4).
115. *See id*. § 6.

intervenor, the funding panel shall consider whether,

(a) the intervenor represents a clearly ascertainable interest that should be represented at the hearing;
(b) separate and adequate representation of the interest would assist the board and contribute substantially to the hearing;
(c) the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;
(d) the intervenor has made reasonable efforts to raise funding from other sources;
(e) the intervenor has an established record of concern for and commitment to the interest;
(f) the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the interests at the hearing;
(g) the intervenor has a clear proposal for its use of any funds which might be awarded; and
(h) the intervenor has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award.

(3) In determining the amount of an award of intervenor funding, the funding panel shall,

(a) if the proposal includes the use of lawyers in private practice, assess legal fees at the legal aid rate under the legal aid plan in effect on the day of the award for work necessarily and reasonably performed;
(b) set a ceiling in respect of disbursements that may be paid as part of the award and such disbursements shall be restricted to eligible disbursements;
(c) deduct from the award funds that are reasonably available to the applicant from other sources.

(4) A funding panel may award intervenor funding subject to such conditions as it sets out in its order.

(5) In clause (3)(b), "eligible disbursements" means disbursements for consultants, expert witnesses, typing, printing, copying and transcripts necessary for the representation of the interest and such other expenditures as may be named in the regulations made under this Part as eligible

disbursements.[116]

The Ontario IFPA included a provision for an intervenor to apply for supplementary funding during the course of a hearing, thus assuring continued participation throughout if the Board was satisfied that the intervenor's contribution was meritorious.[117] The Board was to deduct any amount of funding the intervenor received under the IFPA from any costs the court awarded to the intervenor at the conclusion of the proceedings.[118]

It should be noted that the Board retains its power to award costs, and, theoretically, the Board could exercise its discretion in making an award of costs *against* a funded intervenor in favor of a proponent thus, in effect, clawing back funds inappropriately received or utilized by the intervenor. Such costs power, as in most litigious proceedings, also serves as a "control mechanism" and is used by courts and tribunals to curtail abuse of process where indicated.

Recalling the decision of the Divisional Court in the Hamilton-Wentworth judicial review where the Court held that "the tribunal's power over costs cannot exceed that of the Supreme Court of Ontario"[119] and therefore, by implication, should be exercised in the same manner as the courts, the Ontario government responsible for enacting the IFPA decided once and for all to end the controversy surrounding the somewhat restrictive interpretation of this power when exercised by environmental courts and/or tribunals. Part II of the IFPA amended the statutory costs powers of the Joint Board and the Environmental Assessment Board of Ontario by providing that the Board[s], "in awarding costs, *are not limited to considerations that govern awards of costs in any court*," thus freeing them from the constraints placed upon them by this decision.[120] Therefore, the Legislature made clear its intention that the joint boards under the CHA, the Environmental Assessment Board and the Energy Board could, if they so wished, award costs to intervenors regardless of whether they upheld their positions taken at the hearing. The Legislature thus put the concept of *winners* and *losers*, at least in the context of environmental decision-making, to rest.

Although no jurisdiction in the United States, to this writer's knowledge, has yet adopted an intervenor-funding program wherein the funding is proponent-based, the concept of providing intervenor funding to facilitate effective citizen participation is by no means without precedent. In New York, Article X of the Public Service Law stipulates that the New York Power Authority provide intervenor funds to defray the cost of expert witnesses and consultants on issues concerning proposed power plants.[121] Municipalities, non-profit groups, and

116. Intervenor Funding Project Act, ch. 71, § 7.
117. *See id.* § 12 (1).
118. *See id*. § 12 (3).
119. *Re Regional Municipality of Hamilton-Wentworth*, 51 O.R. (2d) at 30.
120. Intervenor Funding Project Act, ch. 71, § 17 (7) (emphasis added).
121. 16 N.Y.C.R.R. § 1000.9.

individuals who qualify may use the funds.[122] Under New York's intervenor funding statute, parties may request intervenor funding for experts and consultants no later than fifteen days after notice of the initial pre-hearing conference is made public.[123] Therefore, parties may have access to the funds in advance of the hearings. Requests for funding must include various details, including the number of persons and goals the party represents, a statement of available funds and efforts made to obtain funds, the name, qualifications, and services of experts to be employed and an explanation as to how the experts' services will contribute to the development of an adequate record, as well as other information.[124] Within fifteen days after the close of the initial pre-hearing conference, the presiding examiner must deposit the initial award in an intervenor account, and may make additional fund awards in the interest of further developing an adequate record.[125] The Power Authority is to award funds with the intention of facilitating broad and fair public participation in the proceedings.[126] On a quarterly basis, the funded intervenor must provide an accounting of the monies that have been spent and submit a report showing that the purpose of the funds awarded has been achieved and demonstrating the results of studies conducted using the funds, as well as why further expenditures are warranted.[127]

2. Other Intervenor Funding Programs

Other intervenor funding programs, such as the one established by the Public Utilities Commission in Maine for proceedings under the United States Public Utilities Regulatory Policies Act of 1978 and under Ohio's Low-Level Radioactive Waste Facility Development Authority, provide compensation for attorney's fees, expert witness fees, and other litigation expenses incurred in adjudicatory proceedings to intervenors who meet eligibility standards and demonstrate need.

These latter programs, however, appear to fall short of the advantages of the Ontario model in that they appear compensatory in nature and do not address the up-front funding requirements necessary to ensure effective and constructive participation. Likewise, these schemes are not proponent-based and accordingly compete for increasingly limited state funds.

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122. *See id.*; *see also Intervenor Funds Available for Specific Uses,* COMMUNITY CONNECTION, NEW YORK POWER AUTHORITY (Spring 2001).

123. 16 N.Y.C.R.R. § 1000.9(a).

124. *See id.* § 1000.9(c).

125. *See id.* § 1000.9(e).

126. *See id.*

127. *See id.* § 1000.9(g).

II. CONCLUDING COMMENTS

Given the prominence of environmental issues such as global warming, air and water pollution, and disposal of hazardous wastes in the public psyche in the latter part of the twentieth century, it is beyond serious debate that legislatures, courts, and administrative agencies must improve the quality of environmental decision-making dramatically if sustainable development objectives are to be realized. It is also increasingly evident that the general public remains mistrustful and skeptical of government's ability to adequately and apolitically represent the public interest.

The public's discontent over the last quarter-century has manifested itself in the demand for *direct* citizen involvement in the environmental decision-making process, which the state has met in part by affording its citizens a greater participatory role. Thus, we have seen a gradual removal of standing impediments and more opportunities for public comment and/or challenge of environmental decisions.

What the states have not, however, adequately addressed is the continued imbalance and inequality between well-funded proponents (both in the private and public sectors) and the ordinary citizen. Where financial assistance is forthcoming through an award of costs, it is too late in the process to enable the citizen intervenor to properly prepare for environmental litigation and, for the most part, renders the participation ineffective and often meaningless. The real loss to the citizenry at large, however, is the generally poor quality of the environmental decisions that result when the decision-maker is deprived of evidence obtained from parties other than the proponent.

The inability of parties in opposition to effectively present their case seriously undermines the concept of public participation as well as the integrity of the entire decision-making process. There is little doubt in this writer's mind that the quality of environmental decision-making is greatly enhanced where all of the relevant evidence is canvassed at a hearing, not just that adduced by the proponent, for the very nature of an adversarial proceeding guarantees that a party seeking approval will inevitably attempt to present the evidence in the most favorable light.

Legislatures design provisions of intervenor funding to provide the funded intervenor with the requisite resources to prepare for the hearing and present his or her case in an effective and cost efficient manner. Unlike an award of costs in the conventional sense, intervenor funding is designed not as a reimbursement for expenses incurred during the course of the proceeding, but more importantly as a means of enabling the intervenor to retain counsel and expert witnesses in order to provide the decision-maker with the type and quality of evidence that is needed to support an informed decision.

Although virtually all jurisdictions have environmental protection or similar agencies specifically charged with the responsibility of regulating and

managing environmental resources, all such agencies suffer from a lack of financial resources and experienced personnel to properly carry out their legislative mandate. The participation of the private citizen, therefore, is an essential component in ensuring compliance with environmental regulations and in promoting sustainable development, and the citizens' ability to play a meaningful role in the struggle to successfully curtail ongoing degradation of environmental resources cannot be over-emphasized.

When one weighs the benefits to society and the environment of better informed decision-making against the expenses associated with environmental clean-up occasioned by the approval of an inappropriate undertaking, the cost of providing adequate funding for public interest intervention pales in comparison. In turn, there is little doubt that the provision of intervenor funding is *the key* to effective citizen participation.