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**Who's Footing the Bill for the Attorneys' Fees?:
An Examination of the Policy Underlying the Clean Water Act's
Citizen Suit Provision**

*Saint John's Organic Farm v. Gem County Mosquito Abatement District*¹

I. INTRODUCTION

Congress has recognized that effective enforcement of environmental protection laws calls for citizen participation to enhance governmental efforts.² Accordingly, several federal statutes permit citizens to bring lawsuits to enforce these laws.³ However, litigation costs may deter individual citizens or small businesses from bringing such an

¹ 574 F.3d 1054 (9th Cir. 2009).

² James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER LAW REVIEW 1, 3-4 (2003). "Citizen resources are an important adjunct to governmental action to assure that these laws are adequately enforced. In a time of limited government resources, enforcement through court action prompted by citizen suits is a valuable dimension of environmental law." *Id.* at 5-6 (quoting 136 CONG. REC. S3,103 (daily ed. Mar. 26, 1990) (remarks of Sen. David Durenberger)); "The [citizen suit] provision is directed at providing citizen enforcement when administrative bureaucracies fail to act." *Id.* at 6 (quoting 116 CONG. REC. 33, 103 (1970) (remarks of Sen. Muskie)); "Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings." *Id.* (quoting S. REP. NO. 91-1196, at 36-37 (1970)).

³ *Id.* at 2 (stating, "Environmental laws that allow citizen suits are, in more or less temporal order: Clean Air Act (CAA), 42 U.S.C. § 7604 (2006); Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1270(a) (2006); Clean Water Act (CWA), 33 U.S.C. § 1365(a) (2006); Endangered Species Act (ESA), 16 U.S.C. § 1540(g) (2006); Deep Seabed Hard Mineral Resources Act (DSHMRA), 30 U.S.C. § 1427(a) (2006); Marine Protection Research and Sanctuaries Act (MPRSA), 33 U.S.C. § 1415(g)(1) (2006); Deepwater Port Act (DPA), 33 U.S.C. § 1515(a) (2006); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a) (2006); Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6305(a) (2006); Powerplant and Industrial Fuel Use Act (PIFUA), 42 U.S.C. § 8435(a) (2006); Ocean Thermal Conservation Act, 42 U.S.C. § 9124(a) (2006); Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1349(a)(1) (2006); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659(a) (2006); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2619(a) (2006); Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-8(a) (2006); Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. § 11046(a) (2006).").

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action. In recognition of this hardship, many environmental statutes' citizen suit provisions expressly allow the court to award attorneys' fees to the prevailing party in the litigation.⁴ Most fee-shifting provisions contain similar statutory language, requiring that attorneys' fees be awarded to "prevailing or substantially prevailing parties" and only if such an award is "appropriate."⁵ While the fee-shifting provisions in citizen suit statutes often contain identical language and have been interpreted similarly, federal courts have grappled with determining exactly who qualifies as a prevailing party and when awarding attorneys' fees is appropriate. Unsurprisingly, the federal circuit courts are split in announcing a standard for awarding attorneys' fees. While some interpretations give district courts wide discretion in determining whether attorneys' fees will be awarded, *Saint John's Organic Farm v. Gem County Mosquito Abatement District's* interpretation of the Clean Water Act's citizen suit provision gives trial courts limited discretion in disallowing an award of attorneys' fees, thereby awarding attorneys' fees liberally.⁶ The *Saint John's* ruling provides private litigants with the necessary assurance to proceed with litigation in order to enforce compliance with environmental laws. Given the circuit split and the recent interpretation of the Clean Water Act's citizen suit provision in the *Saint John's* case, a review of the policy rationale underlying the citizen enforcement scheme is necessary to understand the importance of awarding attorneys' fees to prevailing parties in environmental litigation.

II. FACTS AND HOLDING

The plaintiffs, Saint John's Organic Farm and Peter Dill (collectively, "Dill"), brought a lawsuit against the Gem County Mosquito Abatement District and Gem County (collectively, "Gem") under the

⁴ May, *supra* note 2, at 11.

⁵ Clean Water Act, 33 U.S.C. § 1365(d) (2006).

⁶ Compare *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 283 (1st Cir. 2000) (stating that courts have "wide discretion" when considering the appropriateness of any award of fees), with *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1063 (9th Cir. 2009) (limiting the discretion given district courts to deny attorneys' fees to the prevailing party).

citizen suit provision of the Clean Water Act ("CWA").⁷ Gem's measures for controlling mosquitoes in the county involved the longstanding use of pesticides, whereupon the pesticides were sprayed from airplanes and fog trucks.⁸ Pursuant to the provisions in the CWA,⁹ Dill sent Gem a notice of intent to sue after Gem failed to obtain the required permit from Environmental Protection Agency ("EPA") for its discharge of pesticides into the waters of the United States.¹⁰ After the notice of intent to sue, Gem applied to EPA for the required permit to discharge the pesticides; however, EPA responded that a permit was unnecessary pursuant to its' interpretive guidance of the CWA.¹¹ After EPA declined to issue the requested permit, the parties participated in settlement discussions.¹²

Before the parties reached a settlement, Gem filed suit in the United States District Court for the District of Columbia against Dill and EPA. Gem sought a declaratory judgment that it was either not required to have a permit or that EPA was required to issue a permit.¹³ During this time, Dill also filed suit in the United States District Court for the District of Idaho alleging that Gem was violating the CWA by discharging pesticides into waters of the United States without a permit.¹⁴ The federal district court in Idaho stayed the proceedings until the D.C. district court reached a resolution.¹⁵ The D.C. district court dismissed the suit on two grounds. First, the court held that there was no case or controversy between Gem and EPA since they both agreed a permit was not required. The court further held that venue was improper as to Gem and Dill.¹⁶ After the D.C. district court dismissal, the Idaho district court lifted its stay and the parties eventually filed a settlement agreement.¹⁷

⁷ *Saint John's*, 574 F.3d at 1057; see also 33 U.S.C. § 1365.

⁸ *Saint John's*, 574 F.3d at 1057.

⁹ 33 U.S.C. § 1365(b).

¹⁰ *Saint John's*, 574 F.3d at 1057.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

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The settlement agreement required Gem to make efforts to reduce its use of adulticides,¹⁸ to refrain from aerial spraying of pesticides except in health emergencies, and to discontinue fogging pesticides from trucks within certain footages of the Payette River and surrounding areas.¹⁹ The agreement required that Dill engage in various methods of mosquito control. Furthermore, the settlement agreement required Dill to release all claims against Gem under the CWA, dismiss the suit with prejudice, and refrain from suing Gem under the CWA so long as Gem complied with the settlement agreement.²⁰

The Idaho district court retained jurisdiction over the settlement agreement to enforce its terms, specifically retaining jurisdiction to decide the applications for attorneys' fees and costs under the CWA.²¹ Dill applied to the Idaho district court for payment of its attorneys' fees and expenses for both the Idaho case and the D.C. case, for a total sum requesting over \$149,000.²² The district court rejected Dill's application for attorneys' fees because Dill was not a "prevailing or substantially prevailing party," so an award was not "appropriate."²³ The court examined Dill's alternative argument that Dill should recover fees under the catalyst theory and held that the catalyst theory was inapplicable in the context of the CWA.²⁴ Dill appealed the district court's denial of

¹⁸ Adulticides are pesticides used to kill adult mosquitoes. *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 1058.

²¹ *Id.*; see also 33 U.S.C. § 1365(d) (2006).

²² *Saint John's*, 574 F.3d at 1058; *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, No. CV-04-87-S-BLW, 2007 WL 2461990, at *1 (D. Idaho Aug. 27, 2007) (stating "Dill seeks \$116,041.03 in attorney[s'] fees and \$5,371.15 in expenses in connection with the Idaho case and \$27,549.05 in attorney[s'] fees and \$89.16 in expenses in connection with the D.C. case for a total sum of \$149,050.39.").

²³ *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, No. CV-04-87-S-BLW, 2007 WL 2461990, at *8 (D. Idaho Aug. 27, 2007)).

²⁴ *Id.* at *4. The alternative argument in *Saint John's* was premised under the catalyst theory, which is where the plaintiff is deemed prevailing when the lawsuit was a catalyst to a change in behavior underlying the lawsuit. *Id.* at *3 n.4 (citing *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598, 601 (2001)). This alternative argument, in effect, would have provided another interpretation for the "prevailing party" status under the Clean Water Act's citizen suit provision. A prior Supreme Court decision has rejected the catalyst theory in qualifying a litigant as a prevailing party. *Buckhannon Bd. and Care Home, Inc.*, 532 U.S. at 605. The Supreme

attorneys' fees to the United States Court of Appeals for the Ninth Circuit.²⁵

The Ninth Circuit adopted a different test than the district court for determining whether an applicant is a "prevailing or substantially prevailing party,"²⁶ and consequently held that Dill was in fact a prevailing party under the CWA. The Ninth Circuit also articulated the standard for determining whether an award is appropriate, as appropriateness is a prerequisite to awarding fees under the CWA and the court had not previously articulated a standard for lower courts to apply.²⁷ Given the Ninth Circuit's newly articulated appropriateness standard, the matter was thus remanded to the district court in order to determine whether an award to Dill was appropriate.²⁸

III. LEGAL BACKGROUND

Section 505 of the CWA provides that in any final order in a citizen suit a district court can award costs of litigation, including reasonable attorneys' and expert witness fees, to any party if the court determines that such an award is appropriate.²⁹ However, to obtain reimbursement of litigation costs, the party seeking such an award must be a "prevailing or substantially prevailing party."³⁰ The authority to award litigation costs rests solely with the district court, and the responsibility cannot be shifted to the jury.³¹ Where a settlement is reached between the parties, determining who prevailed or substantially prevailed can be

Court's standard for determining whether a litigant is a prevailing party ultimately depends on whether there has been a "material alteration of the legal relationship [between] the parties." *Id.* at 604.

²⁵ *Saint John's*, 574 F.3d at 1058.

²⁶ The new application by the court for "prevailing party status" includes a three-part test. *Id.* at 1059. This includes: (1) whether the terms of the settlement agreement are judicially enforceable; (2) whether there was a material alteration in the legal relationship between the parties; and (3) whether the party received actual relief on the merits of the claim. *Id.*

²⁷ *Id.* at 1061.

²⁸ *Id.* at 1063-64.

²⁹ 33 U.S.C. § 1365(d) (2006).

³⁰ *Id.*

³¹ *Jones v. City of St. Clair*, 804 F.2d 478, 481-82 (8th Cir. 1986).

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difficult.³² Furthermore, there is a circuit split for determining the appropriateness of awarding attorneys' fees to the prevailing party under the CWA.³³

A. *Prevailing Party Status*

Under statutory provisions authorizing attorneys' fees, the moving parties must demonstrate that they prevailed in some measure.³⁴ Whether the moving party is a prevailing or substantially prevailing party depends on the circumstances involved. These issues have generated much litigation and a number of Supreme Court opinions.

The line between naming a litigant a prevailing party or a losing party has proven to be somewhat murky. Various decisions recognize this ambiguity; however, the courts have not adequately clarified the status for courts to apply. The Supreme Court's decision in *Ruckelshaus v. Sierra Club*³⁵ interpreted the Clean Air Act's citizen suit provision, which states that a "court may award costs of litigation whenever it determines that such an award is appropriate."³⁶ Despite the absence of "prevailing party" language in the Clean Air Act, the decision in *Ruckelshaus* read into the statute the "prevailing party" standard. The issue before the Supreme Court in *Ruckelshaus* was determining whether it was appropriate to award attorneys' fees to a party that achieved no success on the merits of its claims.³⁷ The Court noted that there is at least one consistent rule in the

³² See generally *Saint John's*, 574 F.3d 1054.

³³ *Id.* at 1061. Compare *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 283 (1st Cir. 2000) (giving district courts "wide discretion" in determining appropriateness), and *Chem. Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1229 (5th Cir. 1989) (requiring award when party has advanced the goals of the statute invoked in the litigation), and *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1209 (4th Cir. 1986) (awarding fees when plaintiffs have "served the public interest"), with *Penn. Envtl. Def. Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228, 231 (3d Cir. 1998) (placing "no restriction on the award other than that the party entitled to the award be prevailing or substantially prevailing"), and *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1143 (11th Cir. 1990) (holding that "good cause" is needed for the court to deny an award of fees to a prevailing party).

³⁴ *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 690-91 (1983).

³⁵ 463 U.S. 680.

³⁶ 42 U.S.C. § 7607(f) (2006).

³⁷ *Ruckelshaus*, 463 U.S. at 682.

fee-shifting provisions: complete failure on the merits will not justify shifting fees from the losing party to the winning party.³⁸ The Supreme Court held that some success on the merits is required before a party becomes eligible for a fee award under the Clean Air Act citizen suit provision; however, the Court failed to pronounce exactly what denotes “some success on the merits.”³⁹

In clarifying the “prevailing party” standard, the Supreme Court case of *Farrar v. Hobby*⁴⁰ made clear how little relief is actually necessary for a citizen to be deemed eligible for an award of attorneys’ fees as a prevailing party.⁴¹ In *Farrar*, the Court held that when a plaintiff wins nominal damages, the plaintiff is deemed to be a prevailing party even though the plaintiff sought substantial actual damages in their complaint.⁴² Thus, while the nature and quality of relief may have some bearing on the amount of fees awarded, an extremely small amount of relief is sufficient to confer prevailing party status.⁴³ The Court further held that in order to recover attorneys’ fees as a prevailing party, the prevailing party must obtain an enforceable judgment or comparable relief through a consent decree or settlement against the other party.⁴⁴ The *Farrar* decision set forth the following standard for prevailing party status: “a plaintiff prevails when actual relief on the merits of her or his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”⁴⁵

The *Buckhannon Board Care Home v. West Virginia Department of Health and Human Services*⁴⁶ decision further articulated prevailing party status in the context of the Fair Housing Act⁴⁷ and the Americans

³⁸ *Id.* at 684.

³⁹ *Id.* at 682.

⁴⁰ 506 U.S. 103 (1992).

⁴¹ *Id.* at 111-12.

⁴² *Id.* at 112.

⁴³ *Saint John’s Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1059-60; see also *Farrar*, 506 U.S. at 114.

⁴⁴ *Saint John’s*, 574 F.3d at 1059.

⁴⁵ *Farrar*, 506 U.S. at 111-12.

⁴⁶ 532 U.S. 598 (2001).

⁴⁷ 42 U.S.C. § 3616(c)(2) (2006).

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with Disabilities Act.⁴⁸ The issue before the Supreme Court was whether a party is “prevailing” if they achieve the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct and the result was not through a court rendered judgment or court-ordered consent decree.⁴⁹ This is known as the “catalyst theory” of recovery, where the plaintiff is deemed prevailing when the lawsuit was a catalyst to a change in behavior underlying the lawsuit. Many of the circuits recognized the catalyst theory as a means of recovery under the citizen suit provisions, but the circuits were split.⁵⁰ Therefore, the Supreme Court granted certiorari in the *Buckhannon* case to resolve the disagreement among the circuits regarding whether the catalyst theory was a permissible basis for awarding fees.⁵¹ The Court held that the catalyst theory was inapplicable in a prevailing party determination.⁵² This decision somewhat narrowed the potential avenues for awarding attorneys’ fees. Rejecting the catalyst theory, the *Buckhannon* standard for a litigant to qualify as a prevailing party is if [the prevailing party] has obtained “a court-ordered change in the legal relationship between the plaintiff and the defendant.”⁵³

The Eighth Circuit actually used the catalyst theory in decisions prior to *Buckhannon*,⁵⁴ but it began applying the *Buckhannon* decision to the CWA citizen suit provision⁵⁵ in *Sierra Club v. City of Little Rock*.⁵⁶ In *Sierra Club*, the Eighth Circuit noted “the Supreme Court has made clear that a plaintiff must receive at least some relief on the merits of his claim before he can be said to prevail.”⁵⁷ The Eight Circuit then rejected the catalyst theory, adding that the parties’ voluntary change in their

⁴⁸ 42 U.S.C. § 12205 (2006).

⁴⁹ *Buckhannon*, 532 U.S. at 600.

⁵⁰ *Id.* at 601-02.

⁵¹ *Id.* at 602.

⁵² *Id.*

⁵³ *Id.* at 604 (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

⁵⁴ See *Armstrong v. Asarco*, 138 F.3d 382 (8th Cir. 1999).

⁵⁵ 33 U.S.C. § 1365 (2006).

⁵⁶ 351 F.3d 840 (8th Cir. 2003).

⁵⁷ *Id.* at 845 (quoting *Buckhannon*, 532 U.S. at 603).

relationship as a result of the lawsuit was insufficient to trigger a shift in the general rule that parties pay their own fees.⁵⁸

B. *Appropriateness Standard*

Many of the environmental acts use the appropriateness standard for awarding fees, including the Clean Air Act,⁵⁹ the Endangered Species Act,⁶⁰ and the CWA.⁶¹ For example, the statutory language contained in the CWA states, “[t]he court . . . may award costs of litigation . . . to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.”⁶² While the CWA mandates that the fee award to the prevailing party must be appropriate, courts do not apply a uniform standard of application in making this determination.⁶³ Some courts stringently apply the “appropriateness” standard, using it as a safety harbor provision that grants wide discretion to courts in discouraging liberal fee awards. On the other hand, some courts use this standard as a low threshold requirement before awarding fees.

The environmental acts containing a citizen suit provision have been analogized to various civil rights statutes, and the standards for applying fees have been modeled after the civil rights statutes.⁶⁴ However, even with models for application of the citizen suit provision, the “appropriateness” language used in the CWA citizen suit provision has not been the subject of fluid application.⁶⁵

Citizen suit provisions awarding attorneys’ fees is not a new phenomena; the Civil Rights Act of 1964 allowed prevailing parties that brought actions under the citizen suit provision of the Civil Rights Act to be awarded attorneys’ fees.⁶⁶ The Supreme Court decision in *Newman v.*

⁵⁸ *Id.*

⁵⁹ 42 U.S.C. § 7604(d) (2006).

⁶⁰ 42 U.S.C. § 1540(g)(4) (2006).

⁶¹ 33 U.S.C. § 1365(d)(2006).

⁶² *Id.*

⁶³ *Saint John’s Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1061 (9th Cir. 2009).

⁶⁴ *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 182 F.3d 1091 (9th Cir. 1999); *Marbled Murrelet v. Babbitt*, 478 U.S. 546 (1986).

⁶⁵ *See St. John’s*, 574 F.3d at 1061-64.

⁶⁶ 42 U.S.C. § 2000a-3(b) (2006).

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Piggie Park Enterprises, Inc.,⁶⁷ a Civil Rights Act of 1964 case, announced the standard for determining when such fees should be awarded and the underlying policy for awarding such fees.⁶⁸

The Supreme Court noted that a person bringing an action under the citizen suit provision of the Civil Rights Act cannot recover damages, but can only obtain an injunction to vindicate the policy that individuals injured by racial discrimination seek judicial relief to secure compliance with the law.⁶⁹ The Court reiterated the policy behind Congress enacting the provision for awarding attorneys' fees, stating that "[if] successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."⁷⁰ The *Piggie Park* case held that an individual who succeeds in obtaining an injunction under the Civil Rights Act should ordinarily recover attorneys' fees unless "special circumstances" would render such an award unjust.⁷¹ This decision garnered widespread impact, with various decisions applying the "special circumstances" standard in interpreting the "appropriateness" language contained in a variety of statutes.⁷²

Given *Piggie Park's* liberal standard for awarding attorneys' fees, and the rise of citizens using fee-shifting provisions in environmental litigation, it became necessary to analogize the interpretation of civil rights statutes and environmental statutes. The Supreme Court accomplished this in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*.⁷³ In *Delaware Valley*, the Court interpreted section 304(d) of the Clean Air Act, which authorizes an award of attorneys' fees to a successful party. The Court stated that the Clean Air Act and the Civil Rights Act have the common goal of promoting citizen enforcement of important federal

⁶⁷ 390 U.S. 400 (1968).

⁶⁸ *Id.* at 402-03.

⁶⁹ *Id.* at 402.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978) (regarding Title VII); *Northcross v. Bd. Of Educ.*, 412 U.S. 427, 428 (1973) (regarding Emergency School Aid Act).

⁷³ 478 U.S. 546 (1986).

policies, and thus should be interpreted in the same manner.⁷⁴ Similarly, the Endangered Species Act⁷⁵ was given the same interpretation as the Civil Rights Act attorneys' fee provision in the Ninth Circuit case of *Marbled Murrelet v. Babbitt*.⁷⁶

Although the Endangered Species Act and the Clean Air Act have been analogized with the Civil Rights Act's standard for appropriateness, the circuits are split on applying the appropriateness standard for a prevailing plaintiff under the Clean Water Act.⁷⁷ As the Supreme Court decision of *Ruckelshaus v. Sierra Club* highlighted, there is difficulty in announcing a standard for appropriateness.⁷⁸ The *Ruckelshaus* decision stated, "[it] is difficult to draw any meaningful guidance from [an attorneys' fees provision's] use of the word 'appropriate.'"⁷⁹

The First Circuit advises that district courts maintain wide discretion in determining the appropriateness of fees under the citizen suit provision of the CWA. However, the First Circuit has not announced an applicable standard for exercising such discretion.⁸⁰ In granting this discretion in the courts, the First Circuit referenced the *Ruckelshaus* decision, which pointed out a Senate Report recognizing the court's discretion in awarding costs.⁸¹

Conversely, the Eleventh Circuit rejects giving wide discretion to district courts in determining the appropriateness of awarding attorneys' fees.⁸² Limiting the district courts' discretion, a denial of fees and cost under the CWA citizen suit provision must be shown with good cause in the Eleventh Circuit.⁸³

⁷⁴ *Id.* at 560.

⁷⁵ 16 U.S.C. § 1540(g)(4) (2006).

⁷⁶ 182 F.3d 1091, 1095 (9th Cir. 1999).

⁷⁷ *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1061, 1063 (9th Cir. 2009).

⁷⁸ *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983).

⁷⁹ *Id.*

⁸⁰ *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 283 (1st Cir. 2000).

⁸¹ *Comunidades*, 204 F.3d at 283; *Ruckelshaus*, 463 U.S. at 683.

⁸² *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1143 (11th Cir. 1990).

⁸³ *Id.*

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As for the Third Circuit, the court in *Pennsylvania Environmental Defense Foundation v. Canon-McMillan School District* simply noted that the only consideration in determining the appropriateness of an award of attorneys' fees was considering whether the party is "prevailing or substantially prevailing."⁸⁴ Here, the court virtually read the appropriateness standard out of the CWA statute.

Other circuits, including the Fourth and Fifth Circuits, rely almost solely on whether the prevailing party's lawsuit promotes the CWA's goals. The courts examine whether the prevailing party's action ensures compliance with the CWA as a matter of public interest, which serves as the basis for determining the appropriateness of the award of attorneys' fees.⁸⁵

The implications of the different approaches used in the circuits will lead to some circuits liberally awarding fees and some circuits being conservative in their awarding of fees. By examining the various circuits' application of the CWA citizen suit provision, one can see the turmoil underlying a private citizen's decision to bring a citizen suit in securing compliance with the environmental laws and the importance of establishing a cohesive standard for courts to apply. Given the background of various environmental acts and the application of the citizen suit provisions in these analogous contexts, establishing a cohesive standard for courts to apply in CWA cases is a manageable task.

IV. INSTANT DECISION

Since the Idaho district court declined to award Dill attorneys' fees, an appeal was taken to the Ninth Circuit. Consequently, the Ninth Circuit had to interpret the language of the CWA in making its decision whether Dill was to be awarded attorneys' fees.

⁸⁴ Penn. Envtl. Def. Found. v. Canon-McMillan Sch. Dist., 152 F.3d 228, 231 (3d Cir. 1998).

⁸⁵ Chem. Mfrs. Ass'n v. EPA, 885 F.2d 1276, 1279 (5th Cir. 1989); Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1209 (4th Cir. 1986).

In deciding whether Dill was to receive attorneys' fees, the Ninth Circuit divided the language of the CWA into a hybrid two-part test.⁸⁶ First, the court investigated whether the attorneys' fees applicant, Dill, was a "prevailing or substantially prevailing party."⁸⁷ Second, the court examined whether an award of attorneys' fees was "appropriate."⁸⁸

In order to determine Dill's prevailing party status, the court applied the standard set forth in one of its' prior decisions.⁸⁹ Using this established precedent, the court examined the parties' settlement agreement and applied a three-part test for determining whether Dill was a prevailing party.⁹⁰ The Ninth Circuit first looked to see if the terms of the settlement agreement were judicially enforceable; second, whether the settlement agreement brought about a material alteration in the legal relationship between the parties; and finally, whether Dill received actual relief on the merits of his claim.⁹¹ The first two elements of the prevailing party status were easily satisfied. The Ninth Circuit concluded that the agreement was judicially enforceable because the Idaho district court retained jurisdiction to enforce the settlement agreement and to decide applications for attorneys' fees and costs.⁹² The court further determined that Dill and Gem's legal relationship was materially altered because Gem was legally required under the settlement agreement to behave in a certain manner with respect to applying aduicticides.⁹³

With respect to the third requirement for prevailing party status, that the plaintiff must achieve actual relief on the merits of his claim, the court determined that only a low threshold is necessary to constitute actual relief.⁹⁴ Although Dill did not receive the exact relief requested, the court decided that Dill effectively achieved relief through the settlement agreement's terms by mandating Gem to engage in certain acts and refrain

⁸⁶ *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1058 (9th Cir. 2009).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Richard S. v. Dep't of Dev. Servs. of Cal.*, 317 F.3d 1080, 1087 (9th Cir. 2003).

⁹⁰ *Saint John's*, 574 F.3d at 1059.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

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from other acts.⁹⁵ Because Dill was required to minimize aduicide pollution under the settlement agreement, the court further concluded that Dill achieved the CWA's goals.⁹⁶ All requirements being met, Dill was termed a prevailing party by the court, as required by section 1365(d) of the CWA.⁹⁷

As required by the citizen suit provision of the CWA, the court next considered whether the award of attorneys' fee was appropriate.⁹⁸ Since the court had not previously applied the appropriateness standard for awarding fees, the court took the opportunity to articulate the standard for district courts to apply in these circumstances.⁹⁹ Because there was no uniform standard for determining appropriateness, the Ninth Circuit looked at the various standards established by other circuits.¹⁰⁰

The Ninth Circuit ultimately looked to a prior United States Supreme Court decision in *Newman v. Piggie Park Enterprises, Inc.*, which interpreted the civil rights citizen suit provision in order to determine the appropriateness of fees.¹⁰¹ The policy rationale argument for awarding attorneys' fees in *Piggie Park* proved equally persuasive for the Ninth Circuit in the CWA decision,¹⁰² as the court found that promoting citizen suits to enforce federal policies generally serves the public interest.¹⁰³ The Ninth Circuit also justified their interpretation of the CWA citizen suit provision on the basis of other environmental act

⁹⁵ *Id.* at 1060.

⁹⁶ *Id.* at 1061.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1061-62.

¹⁰¹ *Id.* at 1062. The Ninth Circuit looked at the First, Third, Fourth, Fifth, and Eleventh Circuit's varying standards for awarding attorneys' fees. *Id.* at 1061-62. The Ninth Circuit ultimately decided to follow the Supreme Court's decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Id.* at 1062.

¹⁰² *Saint John's*, 574 F.3d at 1062. The *Piggie Park* Court stated, "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees...to encourage individuals injured... to seek judicial relief." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

¹⁰³ *Saint John's*, 574 F.3d at 1062.

decisions, such as the Clean Air Act and the Endangered Species Act, analogizing the citizen suit provisions with the Civil Rights Act's citizen suit provision.¹⁰⁴

The Ninth Circuit adopted the Supreme Court's "special circumstances" standard in interpreting the "appropriateness" language contained within the CWA's citizen suit provision. Announcing the newly adopted civil rights standard, the court held that the district court may deny attorneys' fees to a prevailing plaintiff under section 1365(d) of the CWA only where there are "special circumstances."¹⁰⁵ Under the "special circumstances" standard for determining the appropriateness of an attorneys' fee award, the prevailing plaintiff should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust.¹⁰⁶ The Ninth Circuit explained that the standard set forth provides an extremely narrow means of denying attorneys' fees.¹⁰⁷ With these limitations expressed, the court remanded the case to the district court and ordered it to decide whether the attorneys' fee award was appropriate.¹⁰⁸

V. COMMENT

Many fee-shifting provisions in citizen suit statutes contain identical language and have been interpreted using similar standards to that in the instant case.¹⁰⁹ These provisions allow attorneys' fees to be granted to any party on a final order whenever appropriate.¹¹⁰ Federal courts have grappled with determining exactly who qualifies as a prevailing party and whether awarding attorneys' fees is appropriate.¹¹¹ Unsurprisingly, this lack of a precise standard for awarding attorneys' fees

¹⁰⁴ *Id.* at 1063 (discussing both *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) (a Clean Air Act case) and *Marbled Murrelet v. Babbitt*, 182 F.3d 1091 (9th Cir. 1999) (an Endangered Species Act case)).

¹⁰⁵ *Id.*

¹⁰⁶ *Piggie Park*, 390 U.S. at 403.

¹⁰⁷ *Saint John's*, 574 F.3d at 1063-64.

¹⁰⁸ *Id.* at 1064.

¹⁰⁹ *See* Clean Water Act, 33 U.S.C. § 1365(d) (2006); Clean Air Act, 42 USC § 7604(d)(2006); Endangered Species Act, 42 USC § 1540(g)(4)(2006).

¹¹⁰ *See* Clean Water Act, 33 U.S.C. § 1365(d); Clean Air Act, 42 USC § 7604(d); Endangered Species Act, 42 USC § 1540(g)(4).

¹¹¹ *Saint John's*, 574 F.3d at 1061.

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has led to a split among the federal circuit courts.¹¹² An examination of the role of statutorily sanctioned citizen suits in society and further illumination of the policy underlying the significance of such suits may lead to a clearer understanding of why the *Saint John's* interpretation of the CWA citizen suit provision gave the court narrow discretion in denying a fee award to a prevailing party.

Two countervailing views arise from the implications of the *Saint John's* holding. *Saint John's* holding that attorneys' fees will be awarded to a prevailing plaintiff in CWA citizen suits, absent special circumstances,¹¹³ leaves some individuals with discomfort and some with optimism. One view is that if successful plaintiffs are required to carry the burden of paying for their attorneys' fees, few aggrieved parties would be in a position to advance the public interest and goals of environmental statutes by bringing a lawsuit.¹¹⁴ However, the opposing view posits that defendants may be willing to "roll the dice" by going to trial on the chance of success at avoiding the payment of an attorneys' fee award to the prevailing party. This potential for risk-taking thereby discourages settlement between the parties and further clogs the courts' limited resources.¹¹⁵ In the pursuit of maintaining a safe and healthy environment, environmental litigation is necessary. On the other hand, encouraging settlements between parties helps to avoid the cost and uncertainty that trials produce. Given the current difficult economy, parties especially need to focus on negotiating a settlement to avoid litigation costs.¹¹⁶ With the split among the federal circuits for interpreting the citizen suit provision of the CWA, the examination of the underlying policy rationale of the environmental statutes is necessary.

The citizen suit mechanism in environmental statutes is of paramount importance. Given the citizen suit's role in environmental litigation, attorneys' fees awarded to the prevailing plaintiff in these litigations merit discussion. The rate of environmental citizen suit activity

¹¹² See *supra* note 33 and accompanying text.

¹¹³ *Saint John's*, 574 F.3d at 1062.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1064-65 (Tallman, J., concurring).

¹¹⁶ Ruth D. Raisfeld, *Negotiating Skills: Now More Important Than Ever*, 32 THE NAT'L L. JOURNAL 11 (Nov. 16, 2009).

has accelerated markedly in the last quarter-century.¹¹⁷ Citizen suits promote economic and environmental interests, secure compliance by countless agencies and polluting facilities, diminish pollution, and protect hundreds of rare species and thousands of acres of ecologically important land.¹¹⁸ With the decline of government enforcement actions,¹¹⁹ citizen suits provide assurance that environmental laws are being adequately enforced.¹²⁰ Litigation costs may have a chilling effect on actions brought by individual citizens or small businesses, particularly when a litigant's personal stake is relatively small. The Eighth Circuit's decision in *United States v. Dico, Inc.* highlights the large amount of attorneys' fees that accrue in environmental litigation.¹²¹ There, the court awarded \$370,454 to the prevailing party.¹²² If the plaintiffs do not have the ability to recover attorneys' fees, it will hinder future environmental litigation that is much too costly and technical for individual plaintiffs.

When the Civil Rights Act of 1964 was passed, it was evident that private litigants were going to be a necessary and primary source for securing broad compliance with the law.¹²³ Congress enacted the Civil Rights Act's citizen suit provision,¹²⁴ which allows the recovery of attorneys' fees, to encourage individuals injured by racial discrimination to seek judicial relief.¹²⁵ Given the prior interpretations of the citizen suit provision in Civil Rights Act cases¹²⁶ and the liberal "special circumstances" standard adopted in awarding attorneys' fees, the *Saint John's* ruling is on target in adopting this standard for use in CWA cases. With the decline of governmental enforcement actions and the importance

¹¹⁷ May, *supra* note 2, at 1.

¹¹⁸ *Id.* at 3-4 (citing Adam Babich, *Citizens Suits: The Teeth in Public Participation*, 25 ENVTL. L. REP. 10, 141 (1995)).

¹¹⁹ Michel Lee, *Attorneys' Fees in Environmental Citizen Suits and the Economically benefitted Plaintiff: When are Attorneys' Fees and Costs Appropriate?*, 26 PACE ENVTL. L. REV. 495, 499 (2009).

¹²⁰ May, *supra* note 2, at 5.

¹²¹ 266 F.3d 864 (8th Cir. 2001).

¹²² *Id.* at 876.

¹²³ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968).

¹²⁴ 42 U.S.C. § 2000a-3(b) (2006).

¹²⁵ *Piggie Park*, 390 U.S. at 402.

¹²⁶ *See id.*; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978) (discussing Title VII).

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of environmental litigation under the CWA, private individuals should be encouraged to bring suits to enforce environmental laws. We must rely upon private litigants as a means of securing broad compliance with environmental laws just as much as we relied upon private litigants to rid the country of racial discrimination. Awarding attorneys' fees to private litigants invoking the public interest is extremely important in both the civil rights context and in the environmental context. Therefore, the statutes should be interpreted consistently.

The Supreme Court's recent decision in *Hardt v. Reliance Standard Life Insurance Co.*¹²⁷ addressed the issue of whether prevailing party status is necessary for an award of attorneys' fees under the Employee Retirement Income Security Act (ERISA) § 502(g).¹²⁸ Since the text of ERISA did not include the express "prevailing party" language, the Court concluded that the attorneys' fee claimant need not be a "prevailing party" to be eligible for an award of attorneys' fees.¹²⁹ The Court held that under ERISA's general fee-shifting statute, district courts have discretion to award attorneys' fees to either party, as long as the fees claimant shows "some degree of success of the merits."¹³⁰ *Hardt* evinces that valuable judicial resources are being depleted in an effort to clarify standards for the various fee-shifting statutes. As the concurring opinion in *Saint John's* noted, "Congress is, of course, always free to clarify when attorneys' fees may appropriately be assessed in these types of cases."¹³¹

The potential of recovering attorneys' fees may make the difference between initiating a citizen suit and simply standing by and waiting for EPA enforcement.¹³² The *Saint John's* ruling may result in future courts relying heavily on the "special circumstances" language,¹³³ thereby increasing payouts to individual plaintiffs and encouraging citizen suits to enforce environmental statutes. Balancing the countervailing

¹²⁷ *Hardt v. Reliance Standard Life Ins. Co.*, 336 F. App'x 332 (4th Cir. 2009), *rev'd*, 130 S. Ct. 2149 (2010).

¹²⁸ *Hardt*, 130 S. Ct. at 2156; 29 U.S.C. § 1132(g)(1) (2006).

¹²⁹ *Hardt*, 130 S. Ct. at 2156.

¹³⁰ *Id.* at 2158.

¹³¹ *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1065 (9th Cir. 2009) (Tallman, J., concurring).

¹³² *Lee, supra* note 119, at 515.

¹³³ *Saint John's*, 574 F.3d at 1062 (majority opinion).

effects of the *Saint John's* holding, one thing is clear: private individuals are encouraged to use the citizen suit provisions of environmental acts when they are given the assurance that their high litigation costs are likely to be reimbursed by the other side.

VI. CONCLUSION

The *Saint John's* ruling provides substantial leverage to citizens in enforcing environmental statutes. The uncertainty from a circuit split regarding application of the CWA citizen suit provision for awarding attorneys' fees necessitates an examination of the underlying policy of the statute. In this instance, environmental statutes such as the CWA generally encourage citizen enforcement of the statutes to serve the public's interest. The "special circumstances" standard adopted by the *Saint John's* ruling provides limited trial court discretion in disallowing an award of attorneys' fees to the prevailing party. Given the public interest in maintaining a healthy environment and ensuring compliance with federal statutes, liberally awarding attorneys' fees to prevailing parties incentivizes citizen suits and environmental litigation. In the future, there may be heavy reliance on the *Saint John's* decision as a measure for assuring that the prevailing party will not have to "foot the bill" for attorneys' fees.

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