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Congress Should Act to Define "Prevailing Party" to Ensure Citizen Suits Remain Effective in Environmental Regulation. *Sierra Club v. City of Little Rock*

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CASENOTE

CONGRESS SHOULD ACT TO DEFINE "PREVAILING PARTY" TO ENSURE
CITIZEN SUITS REMAIN EFFECTIVE IN ENVIRONMENTAL REGULATION*Sierra Club v. City of Little Rock*¹

I. INTRODUCTION

Citizen suits may be brought by aggrieved citizens under various federal environmental laws. Parties may bring suit when adversely affected by a violation of federal law or the Environmental Protection Agency's failure to act.² The goal is to protect the environment by forcing liable parties to comply with environmental legislation such as the Clean Water Act.³ Such suits are made possible largely due to provisions in environmental statutes awarding attorney's fees to "prevailing" or "substantially prevailing" parties.⁴

Before a recent Supreme Court's decision, a plaintiff could receive attorney's fees as long as the plaintiff's actions were the catalyst, or cause of the change in the defendant's conduct.⁵ However, the Supreme Court, in its 2001 decision, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, held that a "material alteration of the legal relationship of the parties" is required before an award of attorney's fees is proper.⁶ The Eighth Circuit has now sought to apply the Supreme Court's *Buckhannon* reasoning in *Sierra Club v. City of Little Rock*. While clearly applying the *Buckhannon* precedent correctly, the decision also revealed some of the problems created by the present system, particularly the danger of the "material alteration" requirement to the effectiveness of citizen suits.

II. FACTS AND HOLDING

Appellant, City of Little Rock ("the City"), appealed the district's court award of attorney's fees to appellee, Sierra Club.⁷ The award of attorney's fees was granted under the Clean Water Act as a result of an action Sierra Club had instituted against the City.⁸ Also, the City appealed the district court's refusal to award expert fees as requested in the case.⁹

The City oversees the operation of a Municipal Separate Storm Sewer System in Little Rock, Arkansas, and is responsible to ensure that the city complies with a National Pollutant Discharge Elimination System (NPDES) permit under which it operates.¹⁰ The City delegated operation of the Little Rock Sanitary Sewer

¹ 351 F.3d 840 (8th Cir. 2003) [hereinafter *Sierra Club*].

² See *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

³ 33 U.S.C. § 1365(a) (2000).

⁴ See e.g. *id.*

⁵ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598, 602 (2001) [hereinafter *Buckhannon*]. Only the 4th Circuit previously did not follow the catalyst theory. *Id.*

⁶ *Id.* at 604.

⁷ *Sierra Club*, 351 F.3d at 842.

⁸ *Id.* See 33 U.S.C. §§ 1251-1387. The district court ordered the City and the Sewer Committee to pay attorney's fees to Sierra Club, however only the City appealed the ruling. *Sierra Club*, 351 F.3d at 842, n. 1.

⁹ *Id.* at 842.

¹⁰ *Id.* The permit was issued by the Arkansas Department of Environmental Quality (ADEQ) and basically required four things. *Id.* First, it allows the City to discharge storm water runoff into the Arkansas River. Second, the City must prohibit sewage discharges into the Storm Sewer System. Third, the City must operate a Storm Water Quality Management Program (including controls aimed at reducing the discharge of pollutants as much as possible). Fourth, the

Collection System to the Little Rock Sanitary Sewer Committee (“Sewer Committee”) under state law.¹¹ The Sewer Committee, which also operates under a NPDES permit, supervises the operation and maintenance of the Sanitary Sewer Collection system, as well as controlling revenues collected from the system’s operation.¹²

The Sierra Club, a national non-profit public interest organization,¹³ brought a citizen suit against both the City and the Sewer Committee alleging three causes of action.¹⁴ First, it alleged that the defendants had violated the Clean Water Act and their NPDES permits by repeatedly allowing untreated sewage from the Sanitary Sewer Collection System to overflow and pollute Arkansas waterways.¹⁵ Second, Sierra Club alleged that the City did not adhere to the comprehensive master planning process mandated in the City’s NPDES permit.¹⁶ Lastly, Sierra Club contended that the sanitary sewer overflows violated the Resource Conservation and Recovery Act (“RCRA”) by creating “imminent and substantial endangerment to the environment.”¹⁷

The district court awarded a partial summary judgment in favor of the Sierra Club and against the Sewer Committee, holding that the Sewer Committee had violated the Clean Water Act by allowing the sanitary sewer overflows.¹⁸ The Sewer Committee and Sierra Club reached a Settlement Agreement to correct the sanitary sewer overflow issues, and pursuant to this agreement, Sierra Club dismissed the other counts against the Sewer Committee.¹⁹

Sierra Club continued to pursue its other claim against the City after the Settlement Agreement had been reached with the Sewer Committee.²⁰ Cross-motions for summary judgment led the district court to holding that “the City [was] in violation of the portion of its permit which relates to sanitary sewer overflows into the municipal storm sewer system.”²¹ However, the court stopped short of instituting an injunction or ordering a remedy against the city for its violation.²² Additionally, the court kept jurisdiction “to resolve any issues which may develop regarding remedies for permit violation.”²³ At the following bench trial, the district court found in favor of the City on Sierra Club’s other claims, ordering the case closed.²⁴

city is required to use “a comprehensive master planning process” seeking to reduce pollutant discharge from areas of new development. *Id.* at 842-43.

¹¹ *Id.* “The construction, acquisition, improvement, equipment, custody, operation, and maintenance of any works for the collection, treatment, or disposal of sewage and the collection of revenue from it for the service rendered by it, shall be effected and supervised by a committee to be designated for that purpose by the municipal council.” Ark. Code Ann. § 14-235-206(a)(1)(A) (2003).

¹² *Sierra Club*, 351 F.3d at 843. The City does retain power to issue bonds or authorize rate increases in the event that funds are needed to operate in excess of those generated from use of the system. *Id.*

¹³ *Id.* The Sierra Club is an organization of 700,000 members which works to protect communities and the planet. “The Club is America’s oldest, largest and most influential grassroots environmental organization.” Sierra Club <<http://www.sierraclub.org/>> (accessed April 18, 2004).

¹⁴ *Sierra Club*, 351 F.3d at 843. The suit was brought in the U.S. District Court for the Eastern District of Arkansas. *Id.*

¹⁵ *Id.*

¹⁶ *Id.* See *supra* n. 10.

¹⁷ *Sierra Club*, 351 F.3d at 843. See 42 U.S.C. § 6901 et seq.

¹⁸ *Sierra Club*, 351 F.3d at 843. The district court reached this conclusion because the Clean Water Act is a strict liability statute. See 33 U.S.C. § 1311(a).

¹⁹ *Sierra Club*, 351 F.3d at 843.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

After the case had been disposed of, Sierra Club sought an award of attorney's fees against both the Sewer Committee and the City.²⁵ On the other side, the City wanted an award of expert witness fees against Sierra Club, a request denied by the district court, because "as a prevailing defendant, the City had failed to establish that Sierra Club's action was frivolous, unreasonable, or without foundation."²⁶ In contrast, the court awarded Sierra Club the full amount of attorney's fees sought against the Sewer Committee, and 50 percent of the fees sought against the City in recognition of its partially prevailing position.²⁷ The City appealed, first arguing that the district court erred by denying its motion for expert witness fees, and it also appealed the order for the City to pay \$50,308 in attorney's fees to Sierra Club, arguing that the group was not a substantially prevailing party in this case.²⁸

III. LEGAL BACKGROUND

A. *The Clean Water Act*

The United States regulates the discharge of wastewater into U.S. waters through the Clean Water Act.²⁹ Enacted in 1972 as a response to a growing concern over national water quality, this legislation was first known as the Federal Water Pollution Control Act.³⁰ It later came to be commonly referred to as the Clean Water Act.³¹ The Clean Water Act regulates various activities, including "the issuance of permits, compliance with water quality and technology-based standards, the development of compliance plans, periodic monitoring and reporting, and the mitigation of adverse development-related impacts."³² The Clean Water Act requires facilities which discharge harmful pollutants to have a National Pollutant Discharge Elimination System (NPDES).³³ These permits require compliance with technology-based effluent limitations as well as relevant state water quality standards.³⁴ States have the option to apply to manage their own clean water programs in place of the federal programs, although Congress has generally given this administrative duty to the Environmental Protection Agency.³⁵

²⁵ *Id.* at 844.

²⁶ *Id.* The City sought compensation for the expert witness fees in relation "to its successful defense of the comprehensive master planning process portion of the case." *Id.*

²⁷ *Id.* This court gave Sierra Club \$92,635 in attorney's fees against the Sewer Committee and this ruling was not appealed and is not at issue in the case. *Id.*

²⁸ *Id.*

²⁹ 33 U.S.C. § 1251 et seq.

³⁰ Pub. L. No. 95-217, 91 Stat. 1566 (1977). See *Mo. Soybean Assn. v. The Mo. Clean Water Commn.*, 102 S.W.3d 10, 14, at n. 3 (Mo. 2003).

³¹ See *id.*

³² 1 *Mo. Prac.*, Methods of Practice Transaction Guide § 14.7 (4th ed.).

³³ 33 U.S.C. §§ 1311, 1342. "The NPDES permitting system is aimed only at controlling pollution coming from a point source." *Mo. Soybean Assn.*, 102 S.W.3d at 15.

³⁴ 33 U.S.C. § 1311; see also 33 U.S.C. §§ 1342, 1362(11); *Intl. Paper v. Ouellette*, 479 U.S. 481, 489 (1987); *Envtl. Protection Agency v. Cal. ex Rel. St. Water Resource Control Bd.*, 426 U.S. 200, 205 (1976).

³⁵ 33 U.S.C. § 1342(b)-(c). In order for the state to be allowed to manage its own program, its plan must be at least as strict as the federal program, and it must have enough legal authority to monitor and ensure compliance through methods such as civil and criminal penalties. *Id.*

B. Citizen Suit

Almost every major federal environmental act permits aggrieved citizens to bring enforcement suits.³⁶ For instance, a citizen suit may be brought to force liable parties into compliance under the Clean Water Act.³⁷ In recognition of limited governmental resources, Congress enacted these citizen suit provisions to encourage citizens to enforce environmental laws.³⁸ Federal statutes allow persons to bring suits when they are adversely affected by a violation or the EPA's failure to act.³⁹ While encouraging citizen participation in enforcement, the citizen suit does not create a private cause of action for damages.⁴⁰

There are various reasons why citizen suits are beneficial and even necessary as a primary means of environmental legislations enforcement.⁴¹ One reason is the fear that without citizen participation, much of the legislation would go unenforced.⁴² This is because public officials and agencies such as the EPA are prevented from closely policing the environmental regulation system due to inadequate funding, staff, or expertise.⁴³ Also, the agencies may be under political pressure which prevents it from aggressively regulating those agencies it oversees, and the violator may be the government itself.⁴⁴ Third, citizen suits lower the burden of environmental regulation enforcement by using private resources, thus leading to a greater level of enforcement.⁴⁵ Citizens may not benefit financially from bringing a suit, because relief generally is in the form of an injunction. This is to ensure that citizens have altruistic, rather than economic, motivations and are bringing the action as a kind of public service.⁴⁶

Three standing requirements for a citizen suit have been recognized.⁴⁷ First, an "injury in fact," or the invasion of some legally protected interest, must have been suffered by the plaintiff.⁴⁸ This interest must be concrete and particularized, as well as actual or imminent.⁴⁹ Second, there must be a causal connection between the injury to the plaintiff and the conduct of the defendant.⁵⁰ Third, it must be likely that the injury will be corrected by the court's favorable decision.⁵¹ "This triad of injury in fact, causation, and redressability

³⁶ See Clean Water Act, 33 U.S.C. § 1365; Clean Air Act, 42 U.S.C. § 7604; Resource Conservation and Recovery Act, 42 U.S.C. § 6972; Toxic Substances Control Act, 15 U.S.C. § 2619; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 300j-8; and Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act) 33 U.S.C. § 1415(g). The only major environmental act without such a provision is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. All of these provisions are based on Section 304 of the Clean Air Act, which was the original environmental act with a citizen suit provision, since the Act served as a model for subsequent environmental legislation. See Clean Air Act, 42 U.S.C. § 7604(d); Theodore L. Garrett & Sonya D. Winner, *A Clean Air Act Primer: Part I*, 22 E.L.R. 10159 (March 1992).

³⁷ 33 U.S.C. 1365(a). Citizen suits may also be brought under the Safe Drinking Water Act. 42 U.S.C. § 300j-8.

³⁸ See generally Sen. Rpt. 92-414 (1972) (reprinted in 1972 U.S.C.C.A.N. 3668).

³⁹ See *Morton*, 405 U.S. at 732.

⁴⁰ See *Middlesex County Sewerage Auth. v. Natl. Sea Clammers Assn.*, 453 U.S. 1, 18 (1981).

⁴¹ Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. Env'tl. Aff. L. Rev. 707, 709 (2000).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 710.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1981).

⁴⁸ *Id.* at 560 (citing *Morton*, 405 U.S. at 740-41, n. 16).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 561. It must be "likely" as opposed to "speculative" that a favorable decision will give redress. *Id.*

constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence."⁵²

Before bringing a citizen suit under the Clean Water Act, a person must give 60 days notice to the EPA, the state, and the alleged violator.⁵³ Additionally, the Clean Water Act does not allow a citizen suit if the EPA or a state has already begun a civil or criminal action.⁵⁴ Generally, a citizen suit may not be brought for non-recurring violations committed completely in the past, although such suits have been held proper when the plaintiff has made a good faith allegation of continuous or intermittent violations.⁵⁵

When a violation occurs causing damage to the environment, both injunctive relief and damage awards may be granted, as well as civil penalties.⁵⁶ Generally, some success on the merits is required for an award of fees and costs.⁵⁷ However, parties are not required to obtain a final judgment in their favor to be considered prevailing parties, so long as some objective of their suit was achieved.⁵⁸

C. Attorney's Fees

Citizen suits are made possible largely due to attorney's fees provisions in environmental statutes.⁵⁹ These provisions give lawyers the ability to represent citizens knowing that defendants will pay their fees if the plaintiff prevails.⁶⁰ Without such provisions, it would be impossible for citizens to enforce environmental legislation because of the prohibitive cost of such complex litigation.⁶¹ Although enacted to encourage plaintiff citizens to enforce environmental legislation, defendants may also seek attorney's fees from citizen plaintiffs when they prevail.⁶² This is possible because statutory language generally provides for attorney's fees to be granted to "any party" when "appropriate."⁶³ For example, the Clean Water Act states that "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."⁶⁴ Although any party may recover their fees, despite arguments to the contrary, defendants have traditionally had a more difficult time and have recovered only when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."⁶⁵

⁵² *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 103 (1998).

⁵³ 33 U.S.C. § 1365(b)(1)(A).

⁵⁴ 33 U.S.C. § 1365(b)(1)(B).

⁵⁵ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987).

⁵⁶ 33 U.S.C. § 1365(a).

⁵⁷ See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 (1983).

⁵⁸ See *Env'tl. Defense Fund, Inc. v. Watt*, 554 F. Supp. 36, 39 (E.D.N.Y. 1982). In an Eighth Circuit case, a prevailing private party seeking compensation for clean-up costs under CERCLA from a responsible party was also allowed to collect attorney's fees and expenses. *General Elec. Co. v. Litton Indus. Automation Sys., Inc.* 920 F.2d 1415, 1422 (8th Cir. 1990). However, this rule is now in question in light of *Buckhannon*. See *infra* at part V for further discussion.

⁵⁹ Florio, *supra* n. 41, at 707.

⁶⁰ *Id.* at 708.

⁶¹ *Id.* at 707-08.

⁶² *Id.* at 708.

⁶³ *Id.*

⁶⁴ 33 U.S.C. § 1365(d). Also, "[t]he court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure." *Id.*

⁶⁵ Florio, *supra* n. 41, at 708 (quoting *Christiansburg Garment Co. v. Equal Employment Opportunity Commn.*, 434 U.S. 412, 421 (1978)).

There are two general schools of thought regarding who bears the cost of litigation. Under the English rule, the prevailing side in an action recovers its reasonable litigation expenses, including court costs, legal fees, and expert witness fees.⁶⁶ In England, the loser funds the winner not only in lawsuits, but in settlements, regardless of whether a formal action has been filed.⁶⁷ Generally, the English system is thought to discourage private parties from bringing claims, even when such claims have merit.⁶⁸

In contrast, under the American Rule, each party to the litigation is required to cover its own legal fees and costs.⁶⁹ This practice has been criticized, but has been upheld by the Supreme Court for several reasons.⁷⁰ First, a party should not be penalized only for defending or prosecuting a lawsuit in light of the uncertainty involved.⁷¹ Second, if successful litigants were always awarded fees, the poor may be reluctant to bring action when their rights were infringed.⁷² Lastly, determining reasonable attorney's fees is a task too difficult for the courts to undertake.⁷³

There are common law exceptions to the American Rule, such as the bad faith exception.⁷⁴ Under this exception, courts have punished litigants who have acted in bad faith, vexatiously, wantonly, for oppressive reasons, without just cause (whether maliciously or frivolously), unreasonably delaying or disrupting litigation, or willfully violating a court order.⁷⁵ Courts have also allowed an exception for a common fund or common benefit doctrine, which is based on the premise that it is unjust to force a litigant who obtains a benefit for a group to bear the costs alone.⁷⁶ A third exception to the American Rule is the private attorneys general exception, created to encourage private enforcement of legislation.⁷⁷ However, this exception has been rejected by the Supreme Court.⁷⁸

Of particular importance in the environmental regulatory context are statutory provisions authorizing courts to grant attorney's fees, a Congressionally created exception to the American rule.⁷⁹ Environmental statutes allow fee shifting of attorney's fees under the "appropriate" standard.⁸⁰ The appropriate standard gives the court discretion in awarding attorney's fees.⁸¹ However, attorney's fees are almost always granted, because to do otherwise would defeat the legislative intent of encouraging such suits to improve enforcement of

⁶⁶ See Herbert M. Kritzer, *The English Rule*, 78-Nov. A.B.A.J. 54, 55 (Nov. 1992). The English rule is also known as cost shifting, or fee shifting, or indemnity for costs. *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* The risk to plaintiffs in England is reduced because most actions costs are paid by legal aid, trade unions, or legal expense insurance. *Id.* at 55-56.

⁶⁹ See Kritzer, *supra* n. 66, at 55.

⁷⁰ Walter B. Russell, III & Paul Thomas Gregory, Student Authors, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 Ga. L. Rev. 307, 312 (1984).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 313.

⁷⁵ *Id.*

⁷⁶ *Id.* at 314-15.

⁷⁷ Florio, *supra* n. 41, at 715. (citing *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975)).

⁷⁸ *Id.*

⁷⁹ Marisa L. Ugalde, *The Future of Environmental Citizen suits after Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 8 Env'tl. Law 589, 589 (2002).

⁸⁰ Florio, *supra* n. 41, at 716. See 33 U.S.C. § 1365(d) ("The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is *appropriate*."). (emphasis added).

⁸¹ Florio, *supra* n. 41, at 716.

environmental legislation.⁸² Generally, the provisions call for fees to be awarded to “prevailing” or “substantially prevailing” parties.⁸³ It has been held that a party must succeed in obtaining “some degree of success on the merits” before federal courts may award attorney’s fees.⁸⁴ Thus, the Supreme Court has limited this discretion to a degree.

Moreover, this same result occurred when the environmental statute contains language that a party be prevailing or substantially prevailing in order to be eligible to obtain attorney’s fees.⁸⁵ Prior to the recent Supreme Court decision in *Buckhannon*, a plaintiff could be eligible to receive fees as long as the suit was the catalyst for the change in the defendant’s wrongful conduct.⁸⁶ Before *Buckhannon*, this “catalyst theory” had been applied by most courts of appeal and had only been rejected by the 4th Circuit.⁸⁷ However, in *Buckhannon*, the Supreme Court took the position that the “view that a ‘prevailing party’ is one who has been awarded some relief by the court can be distilled from our prior cases,” although noting that it had never specifically addressed the “catalyst theory.”⁸⁸ The Supreme Court held that the “catalyst theory” is not a permissible basis for awarding attorney’s fees,⁸⁹ and that a “material alteration of the legal relationship of the parties” is required before attorney’s fees may be awarded.⁹⁰

The Supreme Court said that for a group to be “prevailing” in order to justify rewarding attorney’s fees, either an enforceable judgment on the merits or a settlement agreement enforceable through a court-ordered consent decree must have been obtained.⁹¹ The first requirement justifies the plaintiff’s status as a prevailing party, because the plaintiff has received at least some relief based upon the merits of the claim.⁹² The second requirement is justified, even without an admission of liability, because it is a “court-ordered change in the legal relationship” between the two parties.⁹³ Thus, the Court noted, “[a] defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change.”⁹⁴

⁸² *Id.*

⁸³ Russell, *supra* n. 70, at 318. See e.g. 33 U.S.C. § 1365(d).

⁸⁴ *Ruckelshaus*, 463 U.S. at 694. The Court held that Section 307(f) did not authorize an award of attorney’s fees to two environmental protection groups which were unsuccessful in litigation challenging standards set out by the EPA. *Id.* Also, the courts do not require that success be had on every claim sought, rather that some of the benefit sought is achieved on any significant issue in the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

⁸⁵ Ugalde, *supra* n. 79, at 598.

⁸⁶ *Id.* at 598-99 (citing *Buckhannon*, 532 U.S. at 601).

⁸⁷ *Buckhannon*, 532 U.S. at 602. See *S-1 and S-2 v. St. Bd. of Ed. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994). For a survey of the other Circuits, see, e.g., *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, 577, n. 2 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Payne v. Bd. of Ed.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock School Dist. v. Pulaski County School Dist.*, # 1, 17 F.3d 260, 263, n. 2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).

⁸⁸ *Buckhannon*, 532 U.S. at 602-03.

⁸⁹ *Id.* at 610.

⁹⁰ *Id.* at 604.

⁹¹ *Id.* at 605. In defining “prevailing party” the court relied heavily on the definition found in Black’s Law Dictionary’s definition of prevailing party as “a party in whose favor a judgment is rendered, regardless of the amount of damage awarded in certain cases, the court will award attorney’s fees to the prevailing party—Also termed *successful party*.” *Id.* at 603 (internal punctuation omitted).

⁹² *Id.* at 603.

⁹³ *Id.* at 604 (citing *Tex. St. Teachers Assn. v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989)) (internal punctuation omitted).

⁹⁴ *Id.* at 605.

D. Citizen Group Standing

A three-prong test has been created which must be met in order for a citizen group to bring suit under Section 505 of the Clean Water Act.⁹⁵ First, an individual member of the group must have standing to sue in his or her own right.⁹⁶ Second, the interests to be protected must be germane to the group's purpose.⁹⁷ Third, neither the claim nor the requested relief requires individual participants.⁹⁸ Even when the defendant has subsequently come into compliance with state authorities, the U.S. Supreme Court has recognized a broad basis for citizen standing and ability to bring suit.⁹⁹ For instance, the fact that the Sierra Club, a citizen group, meets standing requirement has been recognized in the context of the Clean Water Act.¹⁰⁰

IV. INSTANT DECISION

The Eighth Circuit recognized the vested ability of "any citizen to commence a civil action on his own behalf" against any government entity which is alleged to have violated the Clean Water Act.¹⁰¹ It reviewed the district court's award of costs and fees under the Clean Water Act merely for an abuse of discretion, while it reviewed the issue of whether a party is a prevailing party *de novo* as an issue of law.¹⁰²

A. Sierra Club's Motion for Attorney's fees

The Eighth Circuit first reviewed the City's appeal of the district court's award of attorney's fees to Sierra Club, which totaled \$50,308.09, by arguing that the group was not a substantially prevailing party.¹⁰³ The district court had found that the city was in technical violation of its NPDES permit, because it allowed sanitary sewer overflows to occur unabated.¹⁰⁴ Since the City, as operator of a storm sewer system, had neither completely eliminated non-storm water discharges into storm sewers, nor obtained permits allowing a certain number of such discharges, the district court awarded Sierra Club partial summary judgment on that issue.¹⁰⁵

⁹⁵ See *Natl. Fedn. of the Blind of Mo. v. Cross*, 184 F.3d 973, 981 (8th Cir.1999) (citing *Hunt v. Wash. Apple Advertising Commn.*, 432 U.S. 333, 343 (1977)). See also *Save Our Community v. EPA*, 971 F.2d 1155 (5th Cir. 1992); *Natural Resources Defense Council, Inc. v. Texaco Refining & Mktg., Inc.*, 800 F. Supp. 1 (D. Del. 1992); *Ark. Wildlife Fedn. v. Beakert Corp.*, 791 F. Supp. 769 (W.D. Ark. 1992). These cases show the citizen group requirement in the context of clean water.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

¹⁰⁰ See, e.g., *Middlesex County Sewerage Auth.*, 453 U.S. at 16.

¹⁰¹ *Sierra Club*, 351 F.3d at 844 (quoting 33 U.S.C. § 1365(a)). The district court may enforce the standard and enforce through civil penalties. *Id.* Also, on a final order under the Clean Water Act, the district court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." *Id.* (quoting 33 U.S.C. § 1365(d)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The issue was "whether the City violated its permit in allowing the sanitary sewer overflows to occur unabated[.]" *Id.*

However, the district court did not award any relief sought by Sierra Club.¹⁰⁶ The district court even refused an injunction, since, in light of the City's past compliance with reasonable requests, there was no reason to believe that the City would not work with the Sewer Committee to carry out the Sewer Committee's obligations arising from the Settlement Agreement.¹⁰⁷

The Eighth Circuit next noted that the statutory language of Clean Water Act explicitly allowed for attorney's fees to be awarded to "a prevailing or substantially prevailing party" despite the traditional American Rule which requires parties to pay their own attorney's fees.¹⁰⁸ The Supreme Court stated "'that a plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail[.]'"¹⁰⁹ This relief must materially change the legal relationship between the parties so that the defendant's behavior changes in a way which benefits the plaintiff.¹¹⁰ However, the court stated that the change must be in response to a judicial sanction, not as a voluntary change in the relationship between the parties.¹¹¹

Here, Sierra Club had no meritorious relief against the City.¹¹² Although Sierra Club obtained a summary judgment in its favor, it was only a declaration that the City had violated its NPDES permit, and no requested relief was granted by the district court.¹¹³ The Eighth Circuit explained that a declaratory judgment constitutes relief only when the behavior of the defendant toward the plaintiff is affected.¹¹⁴ Since Sierra Club had no "enforceable judgment" against the City and could find no effect the judicial declaration had on the City toward Sierra Club, it was not a prevailing party.¹¹⁵

The Eighth Circuit also said that the Sewer Committee's request for a sewer rate increase led to the 42 percent increase being granted by the City, rather than the district court's declaratory finding that the City had violated its permit.¹¹⁶ The Eighth Circuit also said the district court's retention of jurisdiction over permit violation remedies did not create judicial sanction or "imprimatur," since the retained jurisdiction did not have contempt power.¹¹⁷ Again, the judgment of the district court gave Sierra Club no relief, and the district court erred by ordering the City to pay attorney's fees to the group.¹¹⁸ Thus, the Eighth Circuit reversed the district's court holding on the issue ordering the City to pay attorney's fees to Sierra Club.¹¹⁹

¹⁰⁶ *Id.* The relief sought by Sierra Club included "a declaration that the City was in violation of the Clean Water Act; an injunction ordering the City to comply with its permit, to cease all unlawful discharges, and to clean up prior unlawful discharges; and civil penalties up to \$25,000 per day." *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 844-45.

¹⁰⁹ *Id.* at 845 (quoting *Buckhammon*, 532 U.S. at 602).

¹¹⁰ *Id.* Here the City would have to change its behavior in such a way as to benefit Sierra Club. *Id.*

¹¹¹ *Id.* A mere voluntary change would not trigger a shift from the traditional American Rule to the statutory requirement found in the Clean Water Act for payment to the prevailing party. *Id.*

¹¹² *Id.* Although Sewer Committee entered a Settlement Agreement agreeing to correct the sanitary sewer overflow problems, the City did not participate in this agreement. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 845-46. The court did not feel that "but for" the declaratory judgment the City would not have granted the sewer rate increase, so the City's subsequent conduct was not judicially sanctioned. *Id.* at 846.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 847.

B. The City's Motion for Expert Witness Fees

The Eighth Circuit next examined the City's motion to receive expert witness fees in connection with the lawsuit.¹²⁰ If approved by statute, the district court may award litigation fees to a prevailing party "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."¹²¹ The district court denied the claim for expert fees even though the City was the prevailing party on the master planning process issue, because Sierra Club's claims were "not frivolous, unreasonable or without foundation."¹²²

Sierra Club argued that the City had violated its permit in not implementing "a comprehensive master planning process to develop, implement, and enforce controls to reduce, to the [maximum extent practicable], the discharge of pollutants from areas of new development and significant redevelopment after construction is completed."¹²³ Sierra Club felt that the policies and ordinances of the City did not directly affect water issues and were insufficient to comply with the permit.¹²⁴ As the district court noted, there was conflicting expert testimony on this subject, and while it finally determined that the City had complied with its storm water application and storm water permits, the Sierra Club's action was not frivolous, unreasonable, or without foundation.¹²⁵

The City did not, nor was it required to, put all of its comprehensive master planning process ordinances and policies into a single document.¹²⁶ Unfortunately, the City's lack of across-the-board organization made it difficult for Sierra Club to be sure that the City was in compliance with its permit.¹²⁷ As a result, Sierra Club's lawsuit seeking to ensure that the permit was followed was not frivolous, and the district court did not abuse its discretion by denying the City's motion to receive litigation costs as a prevailing defendant.¹²⁸ The Eighth Circuit affirmed the district court's ruling on its denial of litigation costs to the City.¹²⁹

V. COMMENT

In *Sierra Club v. City of Little Rock*, the Eighth Circuit strictly applied the Supreme Court's rule of *Buckhannon* by finding that some "judicially sanctioned" change in relationship between the parties must occur in order to create the judicial *imprimatur* required to trigger the fee shifting provision of the Clean Water Act.¹³⁰ This ruling clearly indicates that the Eighth Circuit is following the instructions of the Supreme Court in *Buckhannon* in abandoning the catalyst theory.

Some have expressed the concern that *Buckhannon* could potentially reduce the role of citizen suits, and *Sierra Club* seems to demonstrate this possibility.¹³¹ Similarly, without the catalyst theory, defendants will be able to make an action moot before a judgment in order to avoid an award of attorney's fees and to prevent

¹²⁰ *Id.* at 846-47.

¹²¹ *Id.* (quoting *Christiansburg Garment Co.*, 434 U.S. at 421).

¹²² *Id.* at 847. The Eighth Circuit only reviewed for an abuse of discretion, because the district court used the proper standard of review. *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* The district court noted that the EPA has not clearly defined what makes up a comprehensive master planning process and allows significant flexibility. *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 845.

¹³¹ Ugalde, *supra* n. 79, at 609.

those with expensive, albeit meritorious, cases from bringing suit.¹³² As Justice Ginsburg's dissent in *Buckhannon* notes, Congress wanted to "encourage private enforcement" through the inclusion of fee-shifting statutes and that "[f]idelity to that purpose calls for court-awarded fees when a private party's lawsuit, whether or not its settlement is registered in court, vindicates rights Congress sought to secure."¹³³

Under a premise such as the catalyst theory, plaintiffs were able to obtain attorney's fees, as prevailing or substantially prevailing parties authorized by statute, in situations where the lawsuit led to a change in wrongful behavior. This result was allowed even in the absence of final judicial ruling against the defendant. Now under the *Buckhannon* and *Sierra Club* line of reasoning, in order for a party to obtain attorney's fees under the Clean Water Act (or any other fee shifting statute), the party must obtain some judicially sanctioned relief—not merely be the cause or catalyst of the change. The Eighth Circuit is recognizing the narrow definition of the term "prevailing party," by including only parties that have obtained either a judgment on the merits or a court-ordered consent decree.¹³⁴ There is a potential danger, in the wake of *Buckhannon*, that underfunded public interest groups will not be able to continue their beneficial enforcement efforts, facilitated by citizen suits, if they will not be compensated for success by an award of attorney's fees.¹³⁵ This fear seems to be becoming a reality in *Sierra Club*, where attorney's fees were denied.

Although attorney's fees were denied, the denial in *Sierra Club* can be justified on another ground. When the district court denied Sierra Club's request for an injunction, it did so because there was no evidence that the City would not cooperate with the Sewer Committee to carry out the Sewer Committee's obligations stemming from the Settlement Agreement.¹³⁶ If the City was willing to cooperate and try to resolve problems to come into compliance, then a lawsuit was not necessary to compel its compliance. Despite all the good environmental groups, their only recourse should not be a citizen suit. If anything, it should probably be the last. First, an effort should be made to see if compliance can be obtained amicably, which may have been possible here. In *Sierra Club*, both sides seemed to have acted in good faith, the City in complying with Sewer Committee Requests and Sierra Club in feeling that the City had violated its permit.¹³⁷ It would seem that in such good faith situations, the parties would be better off seeking compromise rather than commencing expensive litigation—regardless of who is ultimately responsible for attorney's fees. Only where there is evidence of bad faith or delay that results in more environmental harm, should attorney's fees automatically be awarded.

The Eighth Circuit's ruling in *Sierra Club* demonstrates one of the benefits of the rejection of the catalyst theory—ease of application. A court need only look for a judgment on the merits of a court-ordered consent decree granting judicial *imprimatur* to the prevailing party, when deciding whether or not to shift fees to the defendant. Because neither of these were present in *Sierra Club*, the court did not award the plaintiff attorney's fees.

The main problem with the *Sierra Club*'s application of *Buckhannon* is that there seems to be little incentive for the parties to enter private settlement agreement, thereby prolonging litigation and reducing any deterrence of defendant's unlawful conduct.¹³⁸ Environmental litigation is costly, and environmental public interest groups seldom have resources to bring such actions.¹³⁹ If such groups can bring suit only in cases where success is probable and judicially sanctioned relief is likely, the benefits of citizen suits, such as publicity

¹³² See *id.* at 605. This view was expressed by the petitioners in *Buckhannon*. *Id.*

¹³³ *Buckhannon*, 532 U.S. at 644.

¹³⁴ See *id.* at 602.

¹³⁵ See Ugalde, *supra* n. 79, at 590.

¹³⁶ *Sierra Club*, 351 F.3d at 844.

¹³⁷ *Id.* at 847.

¹³⁸ See Ugalde, *supra* n. 79, at 608.

¹³⁹ *Id.* at 609-10.

and deterrence, are lost and Congress' goal of private enforcement is not accomplished.¹⁴⁰ The citizen suit is designed to cause the defendant to terminate some wrongful conduct, however, if the courts do not award attorney's fees to a narrowly construed prevailing party, then public interest groups will not be able to act as private attorneys general.¹⁴¹

In the absence of Congressional action to redefine "prevailing party" to include those whose suits lead to a change in the wrongdoer's behavior, the decision of the Supreme Court in *Buckhannon* was correctly applied by the Eighth Circuit in *Sierra Club*. Congress needs to revisit the issue of fee shifting provisions in environmental statutes to more clearly define under what circumstances fees will be awarded to petitioners. Attorney's fees should not be awarded in situations where compliance was attempted by the defendant in good faith. In such situations, the danger to the environment is already being addressed and hopefully solved. When suit is brought despite such efforts, mainly to ensure an award of attorney's fees, then such an award is not justified.

Until such time as Congress re-examines the issues, the result in *Sierra Club* will be repeated, and fees will only be awarded to parties who prevail on the merits and obtain judicially sanctioned relief. Such a result is dictated by the decision in *Buckhannon* to not allow fee shifting merely because a suit acted as the catalyst in changing a party's behavior.¹⁴²

VI. CONCLUSION

Citizen suits serve an important purpose by helping to enforce environmental legislation that otherwise might be under-enforced due to limited governmental resources and competing political pressures. By limiting prevailing party to those receiving an "enforceable judgment," many potential citizen-plaintiffs will not be able to bring suits due to the prohibitive costs involved. If fee shifting provisions present in environmental legislation are circumvented by a narrow definition of "prevailing party," then the benefits of citizens and citizen groups acting as watchdogs for the environment will be lost, and legislation will go unenforced at great cost to the environment. Congress should seek to ensure that the legislative intent to improve enforcement of environmental legislation by encouraging private citizen suits under fee shifting provisions does not vanish, and these groups can continue to function as private attorney generals funded by such provisions altering the traditional American Rule. Congress should seek to clearly define "prevailing party" with a return to some form of the catalyst theory, so that a party which effects a change may be compensated for its altruistic effort through an award of attorney's fees.

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¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 610-11. Congress wanted the fee shifting provision because the agencies which enforce environmental laws operate with limited resources and under political pressures which the citizen suit is designed to side step. *Id.*

¹⁴² *Buckhannon*, 532 U.S. at 610. The catalyst theory was held to no longer be "a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205." *Id.*