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PRIVATE ATTORNEY GENERALS NEED ATTORNEYS' FEES TO PROTECT OUR ENVIRONMENT

*Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co.*¹

I. INTRODUCTION

Recognizing that everyone has an interest in a clean and healthful environment, the Michigan Environmental Protection Act first included citizen suits provisions to authorize private enforcement of environmental laws in 1970.² The concept of citizen suits was soon adopted by federal environmental statutes.³ This new concept, however, is broader than the traditional notion of citizen suits in two critical aspects.⁴ First, to bring a citizen suit under environmental statutes a plaintiff is no longer required to suffer economic injury.⁵ Second, under the new notion of citizen suits, individual citizens and public interest groups can sue not only to vindicate plaintiff's injury, but also to enforce environmental rights.⁶ Had it not been for the citizen suits, the American environmental law would not have been enforced as it has been in the past three decades, and our environment and natural resources would have been totally different from what it is today.⁷

In order to encourage citizen suits, Congress altered the American Rule and included fee-shifting provisions in most environmental statutes allowing the courts to grant attorneys' fees to private citizens who brought lawsuits to further the goals of environmental statutes.⁸ To determine

¹ 511 F.3d 407 (4th Cir. 2007).

² Barton Thompson Jr., *Promoting the Public's Interest*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 22 (2008)

³ *See Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Kelly L. Jones, Comment, *Sierra Club v. EPA: Is Changing the American Rule for Attorneys' Fees Unamerican? The Debate on Congressional fee-Shifting Statutes*, 18 J. NAT. RESOURCES & ENVTL. L. 245, 254 (2004).

whether a plaintiff is entitled to attorney's fees, Congress set two different standards by utilizing two different languages, namely, "prevailing or substantial prevailing party," and "whenever appropriate."⁹ Moreover, whether a plaintiff is entitled to attorney's fees is further determined by the "catalyst theory," which was developed by case law.¹⁰ Under the catalyst theory, a plaintiff is entitled to an award of attorney's fees as long as the plaintiff obtains his desired result as a product of the lawsuit.¹¹ In other words, a judicial decision or court remedy in favor of the plaintiff is not required.¹² Except for the Fourth Circuit, the catalyst theory was well accepted by almost all federal courts for both the prevailing party standard and the whenever appropriate standard. However, things changed in 2001 when the Supreme Court handed down its decision on *Buckhannon Bd. and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, a fourth circuit case, holding that the catalyst theory was not permissible under the prevailing party standard.¹³

Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co. is also a Fourth Circuit case seeking for an award of attorney's fees under the "whenever appropriate" standard. In *Ohio River*, the Fourth Circuit held that the catalyst theory was permissible under the whenever appropriate standard. This note will study the development of the catalyst theory before and after *Ohio River*, and will explore possible solutions to deal with the important issues of environmental protection left by *Buckhannon*.

II. FACTS & HOLDING

⁹ Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 11 (2004).

¹⁰ *Parham v. Sw Bell Tel. Co.*, 433 F. 2d 421, 423 (8th Cir. 1970).

¹¹ E. Carter Chandler, *Loggerhead Turtle v. County Council: The future of Fee Shifting in Environmental Litigation*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 477, 484 (2004), see also *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 601-02 (2001) ("Petitioners argued that they were entitled to attorney's fees under the 'catalyst theory,' which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.").

¹² *Id.*

¹³ *Id.*

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Green Valley Coal Company (“Green Valley”), a surface coal mining company in West Virginia, appealed an award of attorney’s fees in a citizen suit brought by three environmental organizations, Ohio River Valley Environmental Coalition, Inc., Hominy Creek Preservation Association, Inc., and Citizen Coal Council (collectively, “OVEC”) under the Surface Mining Control and Reclamation Act (“SMCRA”).¹⁴ In January 2000, OVEC brought this action against the Director of the West Virginia Division of Environmental Protection (“state agency”) alleging that the state agency had been consistently approving permit applications without adequate cumulative hydrologic impact assessments (“CHIA”) required by the SMCRA.¹⁵ Green Valley intervened to defend the validity of its two permit applications known as incidental boundary revisions 6 and 7 (“IBR 6” and “IBR 7”).¹⁷

After a four-day hearing in mid-June, the district court denied relief to IBR 7, but issued a preliminary injunction enjoining the state agency from approving IBR 6 for inadequate CHIA.¹⁸ On April 11, 2001, the district court dissolved the preliminary injunction after Green Valley withdrew IBR 6 and replaced it with IBR 9, which concluded phase one of the litigation.¹⁹ In October 2001, OVEC filed an administrative complaint, a citizen complaint, with the office of the federal Office of Surface Mining (“OSM”) in West Virginia alleging that Green Valley Hominy Creek operations violated SMCRA.²⁰ In October 2002, phase two of the litigation commenced when OVEC successfully filed supplemental claims against Green Valley in the district court.²¹ OVEC dismissed its supplemental claims without prejudice on May 3, 2004 after Green Valley took remedial measures prompted by OSM’s notice of violation.²²

¹⁴ Ohio River Valley Evntl. Coal Inc. v. Green Valley Coal Co., 511 F.3d, at 410 (4th Cir. 2007).

¹⁵ 30 U.S.C. § 1201 *et seq.* (2000).

¹⁶ Ohio River Valley Evntl. Coal Inc., 511 F. 3d at 411.

¹⁷ *Id.* at 412.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 412-13.

²² *Id.* at 413.

The district court awarded OVEC costs of litigation, including fees for attorneys and expert witnesses, plus prejudgment interest pursuant to SMCRA's fee shifting provision, 30 U.S.C. § 1270(d),²³ based on the degree of success OVEC achieved in both phases of the litigation.²⁴ Green Valley appealed and OVEC argued alternatively that the fee award for phase one of the litigation was justified either by the preliminary injunction itself because of sufficient success on the merits, or by the catalyst theory because of Green Valley's withdrawal of IBR 6.²⁵ With respect to the fee award for phase two of the litigation, OVEC argued that it should be upheld under the catalyst theory for its dual track filings of an administrative complaint and supplemental claims.²⁶ The United States Court of Appeals, Fourth Circuit affirmed the fee award with respect to phase one of the litigation and prejudgment interest on the ground of catalyst theory.²⁷ Noting that costs arising out of pursuing administrative remedies could only be awarded under 30 U.S.C. § 1275(e), the court remanded fee award with respect to phase two of the litigation for reconsidering whether OVEC's achievement in phase two supported a catalyst theory fee award.²⁸

III. LEGAL BACKGROUND

A. Citizen Suits and Fee-shifting Provisions

As early as 1796, the Supreme Court of the United States had already set the American Rule that in the absence of statutory modification, a prevailing party is not entitled to collect attorney's fees

²³ "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The 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." 30 U.S.C. § 1207(d) (2004).

²⁴ Ohio River Valley Evtl. Coal Inc., 511 F.3d at 413

²⁵ *Id.* at 413-14.

²⁶ *Id.* at 418-19.

²⁷ *Id.* at 420.

²⁸ *Id.* at 418-19.

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from a losing party.²⁹ This rule was reaffirmed in 1975 by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.³⁰ In *Alyeska*, the Court emphasized that it was within the province of the legislative branch to relocate the burden of litigation.³¹ Exercising its legislative power, Congress has created statutory exceptions to the American Rule by including fee-shifting provisions in approximately 150 federal statutes to encourage citizen suits.³² The notion of “citizen suits” evolved from the common law “private attorney general doctrine” allowing courts to “award attorneys’ fees to plaintiffs who not only vindicated their own rights, but also benefited all similarly situated plaintiffs.”³³

Since Congress passed the Clean Air Act (“CAA”) in 1970, citizen suit provisions and fee-shifting provisions started appearing in most environmental statutes.³⁴ These provisions allow citizens, usually private environmental groups, to act as “private attorney generals” to enforce environmental statutes against both private parties and the government for malfeasance, nonfeasance or both.³⁵ Citizen suits play an important role in environmental protection because the governmental agencies are subject to political pressure, lack effective enforcement capabilities, and sometimes an agency itself may be in violation of a regulation.³⁶ Fee-shifting provisions are of particular importance in environmental litigations because these litigations are costly, and the under-funded private environmental groups usually litigate against government agencies and private industries with substantial resources at their disposal.³⁷

Depending on the language used in environmental fee-shifting statutes, there are two different standards to determine whether plaintiffs

²⁹ *Arcambel v. Wiseman*, 3 U.S. 306 (1796).

³⁰ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975).

³¹ *Id.* (“[I]t would be inappropriate for the judiciary, without legislative guidance, to reallocate the burden of litigation in the manner and to the extent...”).

³² Marisa L. Ugalde, *The Future of Environmental Citizen Suits After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 8 ENVTL. LAW 589, 596 (2002).

³³ Chandler, *supra* note 11, at 481-82.

³⁴ Silecchia, *supra* note 9, at 11.

³⁵ *Id.* at 1.

³⁶ Ugalde, *supra* note 32, at 594.

³⁷ *Id.*

are entitled to attorneys' fees.³⁸ The first standard is the "prevailing or substantial prevailing party fee-shifting statutes," such as the Clean Water Act and the Solid Waste Disposal Act.³⁹ The other is the "whenever appropriate fee-shifting statutes," such as the Clean Air Act and the SMCRA.⁴⁰ Although plaintiffs have to meet different requirements to win attorneys' fees under two different standards, the "catalyst theory" was used as the basis for attorneys' fees awarded under both standards before 2001.⁴¹

B. Catalyst Theory

Catalyst theory, a method of determining whether attorneys' fees should be shifted from plaintiffs to the defendants was first articulated in 1970 in *Parham v. Southwestern Bell Telephone Co.*⁴² *Parham* was a racially discriminatory employment case brought under Title VII of the Civil Rights Act of 1964.⁴³ Its holding, like holdings of many other civil rights cases, paved the way in which the catalyst theory has been applied to environmental cases.⁴⁴

Arthur Ray Parham, an eighteen-year-old black man, applied for a job at Southwestern Bell and his application was rejected.⁴⁵ Parham filed a complaint in federal district court pursuant to the Civil Rights Act of 1964.⁴⁶ At trial, evidence showed that Southwestern had a history of hiring more whites than blacks, the blacks constituted less than two percent of their work force and the majority of black employees worked as janitors or laborers.⁴⁷ However, evidence presented by Southwestern showed that it had adopted an affirmative action program and had hired

³⁸ Silecchia, *supra* note 9, at 11.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 13.

⁴² See *Parham v. Sw. Bell. Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), *see also* Chandler, *supra* note 11.

⁴³ See *Parham*, 433 F.2d at 422.

⁴⁴ Silecchia, *supra* note 9, at 14.

⁴⁵ *Parham*, 433 F. 2d at 423.

⁴⁶ *Id.* at 424.

⁴⁷ *Id.*

black employees, including skilled employees such as telephone operators, clerks and craftsmen, at a much higher rate.⁴⁸ The trial court found no evidence of employment discrimination against blacks either as a class or Parham as an individual.⁴⁹ On appeal, the Court of Appeals for the Eighth Circuit awarded the plaintiff attorney's fees even though it refused to issue the injunction relief requested by the plaintiff because the employer had already ceased the discriminatory conduct.⁵⁰ The court found that the lawsuit brought by the plaintiff functioned as a "catalyst" to prompt the employer to implement fair employment policies, and to voluntarily comply with the requirements for equal employment opportunities.⁵¹

Under the catalyst theory illustrated by *Parham*, whether the attorney's fees should be shifted from a plaintiff to a defendant is determined by the outcome of the interaction between the plaintiff and the defendant as a whole.⁵² As long as the plaintiff obtains his desired result as a product of the lawsuit, a judicial decision or court remedy in favor of the plaintiff is not required.⁵³

C. Demise of the Catalyst Theory under the Prevailing Party Standard

Except the Fourth Circuit, the catalyst theory had been utilized by all federal courts in determining whether attorneys' fees were awarded in the context of the "prevailing party standard" until the Supreme Court handed down its decision on *Buckhannon Bd. and Care Home, Inc. v. West Virginia Department of Health and Human Resources* in 2001.⁵⁴ *Buckhannon* was a decision based on the Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA") containing prevailing party fee-shifting provisions.⁵⁵ Although it was not an

⁴⁸ *Id.* at 424-425.

⁴⁹ *Id.* at 425.

⁵⁰ *Pharm*, 433 F.2d at 429-30.

⁵¹ *Id.*

⁵² Chandler, *supra* note 11, at 484.

⁵³ *Id.*; see also *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep.t. of Health & Human Res.*, 532 U.S. 598, 601-02 (2001).

⁵⁴ *Id.*

⁵⁵ *Id.* at 600-01.

environmental case, it has strong impact on future environmental citizen suits.

In *Buckhannon*, plaintiffs challenged that a state statute violated the FHAA and the ADA after the State issued cease and desist orders requiring the closure of plaintiffs' residential care facilities for failure to meet the self-preservation rule defined under the state statute.⁵⁶ Plaintiffs brought a lawsuit seeking declaratory and injunctive relief.⁵⁷ The following year, after the state legislature enacted two bills eliminating the self-preservation rule, plaintiffs moved to dismiss the case as moot and requested attorney's fees as the prevailing party under the FHAA and the ADA.⁵⁸

In its opinion, the Supreme Court asserted that whether the catalyst theory was allowed under the prevailing party standard was an open question because the Court never had an occasion to decide on this issue.⁵⁹ In reliance on the Black Law Dictionary, the Court defined a "prevailing party" to be "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.⁶⁰ Based on precedent cases, the Supreme Court attempted to establish a "bright line" rule that only enforceable judgments on the merits or settlements enforced through consent decrees may create "material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."⁶¹

⁵⁶ *Id.* at 600.

⁵⁷ *Id.* at 600-01.

⁵⁸ *Id.* at 601.

⁵⁹ *Id.* at 603 fn. 5 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("we expressly reserved the question"); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) ("Farrar 'involved no catalytic effect'");

⁶⁰ *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603.

⁶¹ *Id.* at 604; *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (stating that Congress intended to permit the "interim award of counsel fees when a party has prevailed on the merits of at least some of his claims."); *Farrar v. Hobby*, 506 U.S. 103 (1992) (holding that an award of nominal damages enforceable through judgments or consent decrees was sufficient to be a base to award attorney's fees); *Maher v. Gagne*, 448 U.S. 122 (1980) (holding that settlement agreements enforced through a consent decree was a basis to award attorney fees); *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989) (stating that in order to win attorney's fees the legal relationship between the plaintiff and the defendant must be changed through a court order).

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On the contrary, the catalyst theory allowed an award of an attorney's fee without judicially sanctioned change in the legal relationship between the plaintiff and the defendant.⁶² Even under a limited form of the catalyst theory, a plaintiff could recover attorney's fees on purely procedural basis, such as lack of jurisdiction or failure to state a claim.⁶³ Because the catalyst theory conflicted with the Court's view, in a 5-4 decision the Supreme Court affirmed the ruling of the Fourth Circuit holding that the catalyst theory was impermissible under the prevailing party standard in *Buckhannon*.⁶⁴

To support its decision, the majority advanced three policy justifications. First, the legislative history of the meaning of "prevailing party" was ambiguous and should be construed narrowly.⁶⁵ An award of attorneys' fees should be allowed only when legislative intent was unambiguous and explicit because fee-shifting provisions departed from the American Rule.⁶⁶ Second, the majority disagreed that the catalyst theory was necessary "to prevent defendants from unilaterally mooting an action before judgment in order to avoid an award of attorney's fees."⁶⁷ It was also skeptical about the assertion that the catalyst theory could avoid deterring plaintiffs from bringing meritorious but expensive cases.⁶⁸

Finally, the Court expressed its concern on judicial efficiency warning that claims for catalyst relief would be "administratively difficult, fact-specific, and time-consuming."⁶⁹ There was no precise rule for district courts to follow in determining the awarded fees.⁷⁰ It was particularly difficult to determine the awarded fees when plaintiffs did not succeed on every claim.⁷¹ In addition, an award of attorney's fees should not be the reason for a second major litigation.⁷²

⁶² *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 605.

⁶³ *Id.*

⁶⁴ *Id.* at 599-600.

⁶⁵ *Id.* at 607-608.

⁶⁶ *Id.* at 608.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 609.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 629-636 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

Justice Scalia concurred with the majority's opinion in a stronger term.⁷³ He warned that with the catalyst theory, plaintiffs could extort attorneys' fees from victimized defendants for meritless claims.⁷⁴ Although Justice Scalia was strongly against the catalyst theory, he conceded that it is Congress who has the final say on the issue.⁷⁵

D. Catalyst Theory and the Whenever Appropriate Standard

Immediately after *Buckhannon*, lower courts interpreted the Court's ruling on *Buckhannon* in different ways.⁷⁶ Some lower courts have interpreted the catalyst theory to be prohibited under any federal citizen suit statute, while others believed that the theory was still permissible under the whenever appropriate standard.⁷⁷

There are sixteen federal environmental statutes utilizing the whenever appropriate standard to award attorney's fees.⁷⁸ The controlling case for the whenever appropriate standard is *Ruckelshaus*⁷⁹ which recognizes the catalyst theory.⁸⁰ In *Ruckelshaus*, environmental groups brought a lawsuit against the Environmental Protection Agency ("EPA") challenging its promulgation of sulfur dioxide emission standards for coal-burning power plants.⁸¹ The DC circuit rejected all the claims, nonetheless, it found that it was appropriate to award attorneys' fees to environmental groups because of their "contributions to the goals of the Clean Air Act."⁸²

The Supreme Court disagreed.⁸³ It conceded that replacing the term "prevailing party" with "whenever appropriate" in the fee-shifting provision, Congress intended to award attorneys' fees to parties who only

⁷³ *Id.* at 615.

⁷⁴ *Id.* at 618

⁷⁵ *Id.* at 622.

⁷⁶ Chandler, *supra* note 11, at 478.

⁷⁷ See *id.* 478-479.

⁷⁸ Ugalde, *supra* note 32, at 600.

⁷⁹ *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

⁸⁰ *Silecchia, supra* note 9, at 24.

⁸¹ *Ruckelshaus*, 463 U.S. at 681.

⁸² *Id.* at 682.

⁸³ *Id.* at 684-686.

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partially prevail by achieving some success but not major success.⁸⁴ However, because the Court believed that the term “appropriate” did not suggest a complete rejection of the traditional rule, it concluded that “some success on the merits must be obtained before a party becomes eligible for a fee award under a whenever appropriate standard.”⁸⁵

Ruckelshaus, however, does not authorize automatic award of attorneys’ fees to prevailing or partially prevailing plaintiffs.⁸⁶ To award attorneys’ fees under the catalyst theory, courts must engage a two-prong test.⁸⁷ The first prong is a factual inquiry determining whether a lawsuit was a “catalyst” that prompted the defendant to take actions.⁸⁸ The court must find a causal relationship between the lawsuit and the action.⁸⁹ The second prong is a legal inquiry determining whether the desired result was required by law and was not a gratuitous act of the defendant.⁹⁰ According to the test, whether the litigation results in a judicial decision or judicially enforceable court remedy in favor of the plaintiff is irrelevant.⁹¹

In addition to the test, lower federal courts rationalize their award of attorneys’ fees on a broader scheme. In *Metropolitan Washington coalition for clean Air v. District of Columbia*⁹², the D.C. Circuit Court adopted the “prudent effort standard” to award attorney’s fees when the court found that the lawsuit brought by the plaintiff was the type of action Congress sought to encourage.⁹³ In *Stoddard v. West Carolina Regional Sewerage Authority*⁹⁴, the Fourth Circuit reasoned that the award of attorneys’ fees was because plaintiffs attempted to ensure compliance with the statute exactly the way Congress contemplated and plaintiffs had

⁸⁴ *Ruckelshaus*, 463 U.S. at 688, 704 (citing 42 U.S.C. § 7607(f) (2008)).

⁸⁵ *Id.* at 682, 684, 686 (“[T]he consistent rule is that complete failure will not justify shifting fees from the losing party to the winning party...English courts have awarded counsel fees to successful litigants for 750 years...”).

⁸⁶ Chandler, *supra* note 11, at 492.

⁸⁷ *Ctr. for Biological Diversity v. Scarlett*, 452 F.Supp.2d. 966, 970 (N.D. Cal 2006).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Chandler, *supra* note 11, at 484.

⁹² *Metro. Wash. Coal. for Clean Air v. D.C.*, 639 F.2d 802 (D.C. Cir. 1981).

⁹³ *Id.* at 804.

⁹⁴ *Stoddard v. W. Carolina Reg'l Sewerage Auth.*, 784 F.2d 1200 (4th Cir. 1986).

served the public interest.⁹⁵ Other courts held that an award of attorneys' fees was appropriate if the statute's goals had been substantially contributed by the plaintiff's litigation or the public interest had been furthered because the plaintiff's litigation aided in the interpretation or implementation of the underlying statutes.⁹⁶

E. Catalyst Theory after Buckhannon

After *Buckhannon*, the catalyst theory is generally survived in most Court of Appeals in the context of the whenever appropriate fee-shifting statutes.⁹⁷ In 2007, even the Fourth Circuit held, in *Ohio River*, that *Ruckelshaus* was the controlling law under the whenever appropriate fee-shifting provisions and the catalyst theory still existed. With regard to the prevailing party standard, nearly all courts held that the catalyst theory was no longer the basis for an award of attorneys' fees under prevailing party standards.⁹⁸

However, there have been exceptions. In *Barrios v. California Interscholastic Federation*, the Ninth Circuit read *Buckhannon* expansively and held that a settlement agreement could be the basis to award attorney's fees under the prevailing party standard.⁹⁹ The District Court of the District of Columbia reached similar decision in *Johnson v. District of Columbia*.¹⁰⁰ The court declined to extend *Buckhannon's* holding because it believed that *Buckhannon* only "arguably expressed

⁹⁵ *Id.* at 1209.

⁹⁶ Chandler, *supra* note 11, at 493 (citing Carson-Truckee Water Dist. v. Sec'y of the Interior, 748 F. 2d 523, 525-26 (9th cir. 1984); Ala. Power Co. v. Gorsuch, 672 F.2d 1, 3 (D.C. Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d 33, 42 n.10 (D.C. Cir. 1982); Fla. Key Deer v. Monroe County, 772 F. Supp. 601, 602-03 (S.D. Fla. 1991)).

⁹⁷ Loggerhead Turtle v. County Council, 307 F.3d 1318 (holding that *Buckhannon* is inapplicable to the Endangered Species Act ("ESA")); Sierra Club v. EPA, 322 F.3d 718 (D.C. Cir. 2003) (holding that attorney's fees could still be awarded under the CAA's whenever appropriate fee-shifting provisions); Idaho Watersheds Project v. Jones, 253 Fed.Appx. 684 (9th Cir. 2007) (holding that attorney's fees could be awarded under the catalyst theory).

⁹⁸ Silecchia, *supra* note 9, at 42.

⁹⁹ Barrios v. Cal. interscholastic Fed'n, 277 F.3d 1128 (9th Cir. 2002).

¹⁰⁰ Johnson v. D.C., 190 F. Supp. 2d 34 (D.D.C. 2002).

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skepticism that such a private settlement could alter the legal relationship between the parties.”¹⁰¹ Moreover, federal circuit courts and district courts have allowed attorneys’ fees under prevailing party statutes by broadly construing *Buckhannon*’s bright line rule to find a legal relationship change in a fairly wide range of factual circumstances.¹⁰²

Although some courts are attempting to resist *Buckhannon* through broad construction of its ruling, it is safe to assume that after *Buckhannon* the catalyst theory is permissible under the whenever appropriate statutes, but not permissible under the prevailing party statutes.¹⁰³ It is true that basic principles of statutory construction indicate that Congress intended different outcome by choosing different language in environmental statutes, but no guidance was given in the language to show whether “catalyst theory” could be used as the basis for attorneys’ fees awarded.¹⁰⁴ The big gap created by *Buckhannon* is probably not what Congress intended or anticipated when it chose the language in environmental statutes.¹⁰⁵

IV. INSTANT DECISION

In *Green Valley*, the Fourth Circuit held that SMCRA’s fee shifting provision supported a catalyst theory fee award.¹⁰⁶ The Court did not take up the question of whether a preliminary injunction by itself was sufficient to support a fee award under a “whenever appropriate” provision.¹⁰⁷ *Green Valley* challenged the validity of catalyst theory adopted by the Fourth Circuit by citing *Buckhannon Board & Care Home v. West Virginia Dept. of Health & Human Resources*.¹⁰⁸ The Court refuted *Green Valley*’s challenge for wrong interpretation of the

¹⁰¹ *Id.* at 44.

¹⁰² Silecchia, *supra* note 9, at 48-50.

¹⁰³ *Id.* at 87.

¹⁰⁴ *Id.* at 13.

¹⁰⁵ *Id.* at 61.

¹⁰⁶ *Ohio River Valley Env'tl. Coal., Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 417 (4th Cir. 2007).

¹⁰⁷ *Id.* at 414.

¹⁰⁸ *Ohio River Valley Env'tl. Coal., Inc.*, 511 F.3d at 414.

“prevailing party” provision under the controlling law, *Ruckelshaus v. Sierra Club*.¹⁰⁹

The Court found that the district court’s findings fulfilled all three requirements of the catalyst theory despite the fact that the district court’s fee award was not based on that theory. To meet the requirements, the Court found that the district court’s findings proved that OVEC’s claims were not frivolous and the lawsuit was a substantial or significant cause of Green Valley’s remedial efforts.¹¹⁰ In addition, Green Valley’s withdrawal of IBR 6 achieved one of OVEC’s purposes that required the state agency to reconsider the allegedly inadequate CHIA.¹¹¹

Citing *Independent Federation of flight Attendants v. Zipes*,¹¹² Green Valley argued that the fee award was inappropriate because Green Valley was an intervenor and its participation in the litigation was not frivolous, unreasonable, or without foundation.¹¹³ The Court found that although *Zipes* was not applicable because it did not construe the “whenever appropriate” standard under SMCRA, *Zipes*’ rationale supported the fee award in *Green Valley* for at least two reasons. First, Green Valley was not blameless.¹¹⁴ Second, SMCRA’s large objectives did not justify using *Zipes* as a protection against liability when Green Valley intervened to defend allegedly illegal mining permits and practices.¹¹⁵

The Court held that, under *Hensley v. Eckerhart*,¹¹⁶ OVEC could not recover litigation costs arising out of phase two based on the success achieved in phase one. A plaintiff was entitled to litigation costs only with respect to any phase that was successful when a lawsuit involved had distinct phases. Noting that OVEC could have recovered costs for

¹⁰⁹ *Id.* at 414; see generally *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

¹¹⁰ *Ohio River Valley Envtl. Coal., Inc.*, 511 F.3d at 415.

¹¹¹ *Id.*

¹¹² *Indep. Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

¹¹³ *Ohio River Valley Envtl. Coal., Inc.*, 511 F.3d at 416.

¹¹⁴ *Zipes*, 491 U.S. at 762 (“[T]he union intervenor was blameless because there was no allegation that it had violated Title VII”).

¹¹⁵ *Id.* at 759 (“discretion to award fees is guided by the ‘large objectives’ of the underlying substantive provisions in a statute”).

¹¹⁶ *Hensley v. Eckerhart*, 461 U.S. 424 (1983)

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pursuing administrative remedies under 30 U.S.C. § 1275(e),¹¹⁷ the Court remanded the case for reconsidering whether OVEC's achievement in phase two supported a catalyst theory fee award.¹¹⁸

V. COMMENT

Since Congress first provided citizen suit provisions in the CAA in 1970, citizen suits, coupled with the judge-made catalyst theory, have substantially advanced American environmental law over the past thirty years.¹¹⁹ Citizen suits and the catalyst theory play such an important role in the protection of the nation's environment and natural resources for two reasons.¹²⁰ First, damages caused by violations of environmental laws often are first noticed by an everyday citizen, and second, the environmental violations caused by the modernization of the industrial economy have exceeded government's police power.¹²¹ *Buckhannon* is described by commentators as "the most significant attorney's fees decision of the generation" because, if the catalyst theory is eliminated from environmental statutes, the health and welfare of all citizens are endangered.¹²²

After *Ohio River*, a case decided by the only circuit court that is not friendly to the catalyst theory, it can be safely assumed that the viability of the catalyst theory under the whenever appropriate fee-shifting standard is unlikely to be challenged.¹²³ The survival of the catalyst theory under the whenever appropriate standard lightens the negative impact on

¹¹⁷ *Ohio River Valley Env'tl. Coal., Inc.*, 511 F.3d at 417. "Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper." 30 U.S.C. § 1275(e) (2000).

¹¹⁸ *Ohio River Valley Env'tl. Coal., Inc.*, 511 F.3d at 418-419.

¹¹⁹ See Ugalde, *supra* note 32, at 593-94.

¹²⁰ See Jones, *supra* note 8, at 254.

¹²¹ See *id.*

¹²² See *id.*; Silecchia, *supra* note 9, at 40.

¹²³ See Ugalde, *supra* note 32, at 589.

the nation's environment and natural resources because most environmental statutes are whenever appropriate statutes.¹²⁴ However, it is still problematic and troubling when the catalyst theory is permissible under one set of environmental statutes and not permissible under the other set, which will lead to different levels of enforcement of various statutes.¹²⁵ Moreover, although the effort demonstrated by lower federal courts in resisting *Buckhannon's* ruling is encouraging, the uncertain and unpredictable outcomes discourage private citizens or environmental groups to come forward as enforcers to litigate costly environmental violations at the risk of huge financial burden.¹²⁶

In order to maintain the accomplishments achieved by citizen suits and the catalyst theory in the past three decades, there are many reasons for Congress to address the issue created by *Buckhannon* as early as possible. First, Congress has the responsibility to provide clear guidance for courts to follow. In 1975, when the Supreme Court reaffirmed the American Rule in *Alyeska*, it clearly indicated that only the legislative branch has the power to reallocate the burden of litigation and Congress never had the opportunity to decide the applicability of the judge-made catalyst theory under fee-shifting standards.¹²⁷ Congress needs to provide clear guidelines for the judiciary branch to follow because, in *Buckhannon*, the Supreme Court was unable to ascertain the legislative intent and construed the statute narrowly resulting in such a disparity in interpretation of fee-shifting standards.¹²⁸ Moreover, even Justice Scalia, who was strongly against the catalyst theory and raised the extortionist theory, pointed out that it is Congress who has the final say on the permissibility of the catalyst theory.¹²⁹

¹²⁴ *Id.* at 597.

¹²⁵ Silecchia, *supra* note 9, at 61-63.

¹²⁶ Jones, *supra* note 8, at 254.

¹²⁷ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *see also* Silecchia, *supra* note 9, at 62.

¹²⁸ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 607-09 (2001).

¹²⁹ *Id.* at 622 (Scalia, J., concurring).

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Second, Congress, not the Court, has the responsibility and resources to formulate public policy on great issues.¹³⁰ In *Buckhannon*, the Court advanced policy justifications to bolster its ruling without any evidentiary basis because courts are not well-equipped or well-suited to do so.¹³¹ The catalyst theory was held impermissible simply because the Court disagreed with the plaintiffs' assertion that without the catalyst theory, defendants would moot the action to avoid an award of attorney's fees.¹³² Similarly, the Court did not provide any evidentiary findings to support the refutation that the catalyst theory could avoid deterring plaintiffs from bringing meritorious but expensive cases.¹³³

Thirdly, it is Congress's responsibility to provide a bright line rule to protect judicial efficiency, especially when the development after *Buckhannon* proved that lower courts can still circumvent *Buckhannon* by broadly construing the established bright line rule.¹³⁴ In addition, the wide gap and outcome unpredictability created by *Buckhannon* between prevailing party statutes and whenever appropriate statutes can easily cause inefficient and wasteful increases in attorney fee litigation.¹³⁵ Finally, only Congress is well-equipped and well-suited to formulate a sound and feasible policy to protect the health and welfare of all citizens because many issues must be delved into deeply.¹³⁶

VI. CONCLUSION

The recent decision of the Fourth Circuit in *Ohio River* confirmed that the catalyst theory is permissible under the "whenever appropriate standard" but not permissible under the "prevailing party standard." This disparity between the two sets of environmental statutes created by

¹³⁰ Local 1330, *United Steel Workers of America v. U.S. Steel Corp.*, 631 F.2d 1264, 1282 (6th Cir. 1980) (citing *Nebbia v. N.Y.*, 291 U.S. 502 (1934)).

¹³¹ *Buckhannon Bd. & Care Home, Inc.* at 608.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Silecchia, *supra* note 9, at 39.

¹³⁵ Silecchia, *supra* note 9, at 63.

¹³⁶ *Id.* at 64-72. (Listing eleven issues needing to be studied, for example how to define "success," catalyst theory and rate in mootness litigation, catalyst theory and settlement rate).

Buckhannon will lead to different levels of enforcement of various environmental statutes. To maintain the accomplishments in environmental protection achieved by citizen suits and the catalyst theory in the past thirty years, Congress has the responsibility to address this issue as early as possible. It is Congress' responsibility as they have the power to reallocate the burden of litigation. Moreover, only Congress is well-equipped and well-suited to formulate a public policy with respect to fee-shifting principles to encourage private general attorneys to enforce environmental laws. Finally, it is Congress' responsibility to provide clear guidance for the federal courts to follow. Hopefully, the health and welfare of all citizens will be benefited by the citizen suits encouraged by Congress' guidance.

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