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THE WATER IS ON FIRE: CURRENT CIRCUIT APPROACHES TO FEE-SHIFTING IN CITIZEN-SUITS UNDER THE CLEAN WATER ACT AND THE NEED FOR CLEARER AND MORE UNIFORM STANDARDS

CHARLES KINLEY*

INTRODUCTION

By the 1970s, water quality in the United States had reached a breaking point.[1] As citizens in Missouri drank water from a muddy river, others in Ohio watched a river burst into flames.[2] At the same time, wetlands were disappearing at an alarming rate, and fish were dying from pollution by the millions.[3] Clearly, something needed to be done.[4] In response to problems such as these, Congress enacted the Clean Water Act ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] However, while water quality in the United States has improved in the decades since the CWA was enacted, the fight is far from over.[6]

Unfortunately, federal and state agencies tasked with enforcing environmental regulations sometimes lack the funding to enforce the law, fail to spot violations, or simply ignore certain polluters altogether.[7] Thus,

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[1] *Forty Years of the Clean Water Act Mean Much Better Water*, MINN. POLLUTION CONTROL AGENCY [hereinafter MINN. POLLUTION CONTROL AGENCY], https://web.archive.org/web/20201112024637/https://www.pca.state.mn.us/about-mpca/forty-years-clean-water-act-mean-much-better-water [https://perma.cc/UB65-APQF] (last visited Jan. 12, 2022).

[2] *Id.*

[3] John Devine, *Clean Water Act at 45: Despite Success, It's Under Attack*, NRDC (Oct. 18, 2017), https://www.nrdc.org/experts/jon-devine/clean-water-act-45-despite-success-its-under-attack#:~:text=Industry%2Dspecific%20discharge%20standards%20now,pre%2DClean%20Water%20Act%20era [https://perma.cc/2Z47-KC9B].

[4] *See id.*

[5] *See* 33 U.S.C. § 1251(a) (2018).

[6] *See* MINN. POLLUTION CONTROL AGENCY, *supra* note 1; Devine, *supra* note 3.

[7] ENV'T L. INST., A CITIZEN'S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE 33–35 (2002), https://www.epa.gov/sites/production/files/2015-04/documents/citizen-guide-ej.pdf [https://perma.cc/5YKT-WNEM].

in spite of the clear goals of the CWA, private companies and individuals may still get away with pollution.[8] As examples of wide-scale drinking water contamination in New York, Michigan, Ohio, and North Carolina show, failure to prevent water pollution may have serious consequences for U.S. citizens.[9] It is no wonder that nationwide concern over polluted drinking water continues to grow.[10] Confronted with these environmental and health threats, average citizens may feel helpless, unable to do anything to protect their communities from disaster.

Fortunately, U.S. citizens may sue any person or government entity to enforce the requirements of the CWA.[11] However, few citizens have the expertise and resources needed to litigate environmental issues, and these lawsuits often involve pricey expert witnesses, high discovery costs, and other necessary expenses associated with litigation.[12] Consequently, regardless of how great a citizen's concern is for the environment, the idea of an average citizen suing to enforce the CWA out of her own pocket is likely impractical.[13]

To help lessen this financial burden, Congress has given courts the discretion to award litigation costs and attorney fees in CWA citizen-suits "to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."[14] This fee-shifting provision allows private citizens to hire qualified attorneys to enforce environmental regulations without having to pay the price for helping to enact positive

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[8] For example, regional water boards in California are unable to pursue every CWA violation because of limited resources. *See* Reed Sato, *Citizen Suit Enforcement Under the Federal Clean Water Act: A Snapshot of the California Experience Based on Notices of Intent to Sue*, CAL. STATE WATER BD. OFF. OF ENF'T 7 (2011), https://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/citizen_suits/citizen_suit_report_may2011.pdf [https://perma.cc/G4UB-G5AE].

[9] *See* Nicole Greenfield, *Getting the Lead Out of Yonkers Schools*, NRDC (Apr. 2, 2020); Susan Cosier, *Flint's Lead Crisis*, NRDC (Apr. 2, 2020); Jodi Helmer, *Wilmington's Battle With GenX, a Dangerous Teflon Chemical*, NRDC (Apr. 2, 2020); Jodi Helmer, *Toledo's Blooming Algae Crisis*, NRDC (Apr. 2, 2020) (all four articles *available at* https://www.turningonthetap.org/#/introduction(summary:1//toledo:1//wilmington:1//flint:1//yonkers:1 [https://perma.cc/DP5R-STZX]).

[10] *See* Justin McCarthy, *In U.S., Water Pollution Worries Highest Since 2001*, GALLUP (Mar. 31, 2017), https://news.gallup.com/poll/207536/water-pollution-worries-highest-2001.aspx [https://perma.cc/JZ4G-CNMM].

[11] *See* 33 U.S.C. § 1365(a) (2018).

[12] *See* ENV'T L. INST., *supra* note 7, at 33–34; Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L. Q. 1, 79 (1995).

[13] *See* Gauna, *supra* note 12, at 79.

[14] *See* 33 U.S.C. § 1365(d).

change.[15] It also means that Non-Governmental Organizations ("NGOs"), such as the National Resources Defense Counsel and Sierra Club, may serve as environmental enforcers on a national scale without losing hundreds of thousands of dollars on every case.[16] With the help of this financial safety net, the CWA citizen-suit has been an effective tool in encouraging compliance with environmental regulations.[17]

However, despite both Congress and public policy favoring CWA citizen-suits, ambiguous Supreme Court guidance has allowed a decades-long rift between federal circuits to emerge regarding both how district courts should exercise their discretion under the fee-shifting provision and which factors warrant an award.[18] While some circuits grant district courts broad latitude to determine when to award costs and fees, others only allow courts to grant or deny awards in certain instances.[19] Additionally, while some circuits focus solely on whether a party seeking fees has prevailed, others look to see whether that party has advanced the goals of the CWA.[20] Furthermore, while certain circuits have provided somewhat clear guidance to their lower courts, other appellate courts have remained silent.[21] This silence has led to disunity within individual circuits, as their district courts may be free to adopt differing standards, decline to follow their own precedent, or fail to explain their reasoning altogether.[22]

This lack of uniformity both among and within circuits may potentially lead to murky, unpredictable outcomes, impose greater litigation risks, create uncertainty for both plaintiff and defendant, and possibly undermine the ability of citizens and NGOs to enforce environmental regulations.[23] Thus, until the Supreme Court provides clarification and a clearer standard for courts to follow, federal circuit courts need to step

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[15] *See* ENV'T L. INST., *supra* note 7, at 34; Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RES. ENERGY & ENV'T. L. REV. 61, 72 (2011) ("[T]he relative ease of proof of the CWA case and the availability of attorney's fees to prevailing plaintiffs . . . create[s] an effective, self-funded citizen enforcement mechanism.").

[16] *See* James T. Lang, *Citizens' Environmental Lawsuits*, 47 TEX. ENV'T L.J. 17, 22 (2017).

[17] *See* Robins Kundis Craig, *Constitutional Environmental Law, or, the Constitutional Consequences of Insisting that the Environment Is Everybody's Business*, 49 ENV'T L. 703, 724 (2019).

[18] *See infra* Part III.

[19] *See infra* Part III.

[20] *See infra* Part III.

[21] *See infra* Part III.

[22] *See infra* Part III.

[23] *See infra* Sections IV.A–B.

in and give their lower courts more tangible guidance, rather than letting discretion run wild.

This Note will start by providing a short explanation of the origins of and congressional goals for the fee-shifting provision in the CWA.[24] It will then offer a brief summary of how Supreme Court precedent has both clarified and confused this issue.[25] Then, it will dive into an examination of how the different circuits and their district courts have interpreted the CWA's fee-shifting provision and how these interpretations have struggled with past Supreme Court decisions.[26] Finally, this Note will explore the costs and benefits associated with these fee-shifting standards and offer a potential solution to this problem.[27] Ultimately, this Note will argue that, in the absence of Supreme Court guidance, the circuits must adopt clearer, more uniform standards in order to fulfill congressional objectives, bolster the viability of CWA citizen-suits, and ensure that citizens do not pay the price for their public service.[28]

I. PRIVATE ENFORCEMENT AND FEE-SHIFTING UNDER THE CWA CITIZEN-SUIT: ORIGIN, GOALS, AND PRECEDENT

Considering the environmental crises Congress faced in the early 1970s, its initial goal that "the discharge of pollutants into the navigable waters be eliminated by 1985" may have been a bit impractical.[29] Thus, it makes sense why Congress would amend the CWA in 1972 to include a citizen-suit provision that "provide[d] citizen participation in the enforcement of control requirements and regulations," as it had done with the Clean Air Act Amendments of 1970.[30] This provision would allow a citizen to sue any individual or government agency for violating the CWA and bring actions against the Environmental Protection Agency ("EPA") Administrator for failing to perform required duties.[31]

Private enforcement regimes, such as the CWA's citizen-suit provision, can benefit society by expanding government resources, shifting the

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[24] *See infra* Part I.
[25] *See infra* Parts I–II.
[26] *See infra* Part III.
[27] *See infra* Part IV.
[28] *See infra* Part IV.
[29] *See* MINN. POLLUTION CONTROL AGENCY, *supra* note 1; Devine, *supra* note 3; 33 U.S.C. § 1251(a)(1) (2018).
[30] *See* S. REP. No. 92-414, at 79 (1971).
[31] *Id.* at 80–81.

costs of regulation, encouraging judicial innovation, and providing more eyes on the ground to detect violations.[32] However, allowing private enforcement may also lead to an excess of judicial policymaking, create inconsistency and disunity among courts, and discourage cooperation and voluntary compliance with regulators.[33] Additionally, it may open the door for self-serving plaintiffs and their lawyers to take advantage of their enforcement power for their own gain.[34]

Furthermore, for a private enforcement regime to thrive, citizens need an economic incentive.[35] Fee shifting provides such an incentive by allowing successful litigants to recover litigation costs and attorney fees.[36] In the context of environmental regulation, which is often costly, complicated, and time-consuming, this incentive is crucial to private enforcement.[37]

Congress recognized both the potential for abuse and the need for financial incentive, and so it proposed a fee-shifting provision to accompany citizen-suits.[38] To prevent frivolous or harassing lawsuits, Congress would give courts the discretion to award attorney's fees and costs of litigation "whenever the court determines that such action is in the public interest."[39] This would permit a court to "award costs of litigation to defendants where the litigation was obviously frivolous or harassing."[40] At the same time, Congress recognized that "in bringing legitimate actions under this section citizens would be performing a public service."[41] Thus, this provision would also allow a court to "award costs of litigation to such party."[42]

To further encourage public service, Congress intended that these awards would "extend to plaintiffs in actions which result in successful abatement but do not reach a verdict."[43] For example, if a citizen-suit prompted a defendant to stop violating the CWA before a verdict was

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[32] *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662 (2013).
[33] *Id.* at 667–69.
[34] *Id.* at 670.
[35] *Id.* at 675.
[36] *Id.* at 675–76.
[37] *See* Lang, *supra* note 16, at 22.
[38] S. REP. No. 92-414, at 81 (1971).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *See id.*

issued, the court could still award costs and fees to that plaintiff.[44] Thus, as enacted in 1972, Section 505(d) of the CWA gave courts the discretion to "award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."[45]

Unfortunately, by using the word "appropriate," Congress may have been too vague. The Supreme Court recognized this lack of clarity in *Ruckelshaus v. Sierra Club*, where it noted the difficulty in "draw[ing] any meaningful guidance from [a statute's] use of the word 'appropriate,' which means only 'specially suitable: fit, proper.'"[46] In that case, the Court analyzed Section 307(f) of the Clean Air Act and concluded that "appropriate" "modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees."[47] The Court explained that the purpose of the "when appropriate" standard was to "permit awards of fees to all partially prevailing parties."[48] However, "absent some degree of success on the merits by the claimant, it is not 'appropriate'" to award fees.[49] Furthermore, the Court stated that its interpretation of "appropriate" in that case controlled the construction of the term in other statutes using identical language, including Section 505(d) of the CWA.[50]

After *Ruckelshaus*, Congress amended Section 505(d) to clarify when courts may award costs and fees.[51] Based on the premise that it is unreasonable and inappropriate "to compel either the government or a private party to pay the costs of an opposing party to a lawsuit when the opposing party has not prevailed on the issues," Congress decided to limit awards to only "prevailing or substantially prevailing parties."[52] However, the amendment was "not intended to preclude the awarding of costs to a partially prevailing party with respect to the issues on which that party has prevailed, if such an award is deemed appropriate by the court," nor was it intended to preclude a party that has achieved a successful settlement from obtaining a fee award.[53] Rather, the purpose of adding

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[44] S. REP. No. 92-414, at 81 (1971).
[45] Pub. L. No. 92-500, tit. V, § 505(d), 86 Stat. 889 (1972).
[46] *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 (1983).
[47] *Id.* at 686.
[48] *Id.* at 691.
[49] *Id.* at 694.
[50] *Id.* at 682–83 n.1.
[51] *See* S. REP. No. 99-50, at 33 (1985).
[52] *Id.*
[53] *Id.*

the new language was to exclude superfluous parties, such as "a party who intervenes in a case and, although technically on the prevailing side, fails to make a substantial contribution to the successful outcome of the case."[54] Consequently, as amended in 1987, Section 505(d) provides that, in its final order, a 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."[55]

II. CURRENT STANDARDS FOR PREVAILING OR SUBSTANTIALLY PREVAILING PARTY STATUS

For prevailing defendants, a court deciding whether to award costs and fees under the CWA typically applies the Supreme Court's *Christiansburg Garment* standard.[56] Under this standard, a court may only award costs and fees to a prevailing defendant if the defendant shows that the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[57] For a defendant seeking an award under this standard, the burden may be quite high.[58]

For plaintiffs, however, the standard is less strict because "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority,'" and an award to a prevailing plaintiff is "against a violator of federal law."[59] Courts have generally recognized prevailing party status when a party has: (1) obtained "a

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[54] *Id.*
[55] 33 U.S.C. § 1365(d) (2018).
[56] *See* Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n, 434 U.S. 412, 422 (1978).
[57] *See, e.g.*, Sierra Club v. City of Little Rock, 351 F.3d 840, 847 (8th Cir. 2003) (holding district court's denial of fees to defendants proper when plaintiff's claims not "frivolous, unreasonable, or without foundation"); Razore v. Tulalip Tribes, 66 F.3d 236, 240 (9th Cir. 1995) (holding *Christiansburg Garment* standard applies to CWA fee awards and denying award to defendant because plaintiffs' arguments were not "not frivolous or unreasonable"); City of Highland Park v. EPA, No. 2:16-cv-13840, 2020 U.S. Dist. LEXIS 141030, at *9 (E.D. Mich. Aug. 6, 2020) (awarding defendants fees when plaintiff's claims were "completely groundless and frivolous").
[58] *See, e.g.*, Del. Riverkeeper Network v. Sunoco Pipeline L.P., No. 18-2447, 2020 U.S. Dist. LEXIS 174494, at *13–15 (E.D. Pa. Sept. 23, 2020) (denying defendant's request for an award despite the plaintiffs "litigat[ing] in a questionable manner").
[59] *Christiansburg Garment Co.*, 434 U.S. at 418 (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

favorable final judicial order on the merits"; (2) secured a consent decree; or (3) reached a private settlement.[60] In some instances, a party may qualify as "prevailing" under the "catalyst theory," which essentially requires plaintiffs to show that "(1) the lawsuit stated a genuine claim, (2) the lawsuit was a 'substantial' or 'significant' cause in the defendant's decision to voluntarily change its conduct, and (3) defendant provided some of the benefit sought by the lawsuit."[61] However, based on unclear Supreme Court precedent, circuit courts, and sometimes even their own district courts, disagree as to whether the catalyst theory still applies to CWA awards.[62]

The Supreme Court has interpreted "prevailing party" to mean "one who has been awarded some relief by the court."[63] In *Buckhannon*, the Court decided a case involving attorney fees under the Fair Housing Amendments Act of 1988 ("FHAA") and the Americans with Disabilities Act of 1990 ("ADA").[64] The Court rejected the catalyst theory.[65] Rather, the Court held that "prevailing party" does not include a party "that has failed to secure a judgment on the merits or a court-ordered consent decree," despite "achiev[ing] the desired result" and bringing about "a voluntary change in the defendant's conduct."[66] The Court held that to prevail, a party must "receive at least some relief on the merits of his claim."[67] There must be a judicially sanctioned (*judicial imprimatur*) "'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees," such as by an enforceable judgment on the merits or court-ordered consent decree.[68]

There are numerous problems that could result from the inapplicability of the catalyst theory to environmental citizen-suits, including: (1) permitting agencies and corporations to avoid consequences for violating the law by merely complying once the violation is discovered (thus

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[60] Jason Douglass Klein, *Attorney's Fees and the Clean Water Act after* Buckhannon, 9 HASTINGS W.-NW J. ENV'T L. & POL'Y 109, 109–10 (2003).
[61] *Id.* at 109.
[62] *See infra* Part III.
[63] Buckhannon Bd. & Care Home v. W.Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001).
[64] *Id.* at 600–01.
[65] *See id.* at 601.
[66] *Id.* at 600.
[67] *Id.* at 603 (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1987)).
[68] *Id.* at 604–05 (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989)).

making the case moot); (2) allowing violators to voluntarily comply once a lawsuit looks unfavorable; (3) placing undue risk on those seeking to enforce environmental laws; and (4) potentially discouraging settlements (if rejection of the theory is taken too far).[69] Some, looking to congressional intent and the actual language of the statute, have concluded that *Buckhannon* may not apply to the CWA.[70] Others, including some courts, are unsure.[71] Still others, notably the Fourth Circuit, have shied away from deciding this issue.[72]

A potential clarification came in *Hardt v. Reliance Standard Life Insurance Co.*, where the Supreme Court made a distinction between statutes that permit a court to award fees only to a "prevailing party" and statutes that authorize courts to grant fee awards to "substantially prevailing" parties.[73] The Court held that its "prevailing party" precedents "do not govern the availability of fees awards under [a provision that] does not limit the availability of attorney's fees to the 'prevailing party.'"[74] Although this suggests that *Buckhannon* may not apply to the CWA, many courts still refuse to apply the catalyst theory based on the holding in *Buckhannon*.[75]

In light of congressional intent, inclusion of "whenever . . . appropriate" terminology, *Buckhannon*'s debatable prohibition on applying the catalyst standard, and *Hardt*'s distinction between "prevailing" and "substantially prevailing" statutes, circuits have differed in the standards they use to determine whether to award costs and fees in citizen-suits brought under the CWA.[76] These differing standards have led to a circuit split (and sometimes even splits within circuits) that may threaten to undermine Congress's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[77]

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[69] Klein, *supra* note 60, at 109–10.
[70] *Id.* at 116.
[71] *See, e.g.*, Ailor v. City of Maynardville, 368 F.3d 587, 601 n.6 (6th Cir. 2004) ("It is an open question whether the catalyst theory remains viable in the context of environmental statutes like the CWA").
[72] *See, e.g.*, Sanitary Bd. of Charleston v. Wheeler, No. 18-2385, 2020 U.S. App. LEXIS 112, at *7–8, *10 (4th Cir. Apr. 9, 2020) (declining to decide whether catalyst theory still applies to CWA).
[73] Hardt v. Reliance Standard Life Insurance Co., 560 U.S. 242, 253 (2010).
[74] *Id.* (citations omitted).
[75] *See, e.g.*, Sierra Club v. City of Little Rock, 351 F.3d 840, 845–47 (8th Cir. 2003) (holding that, under *Buckhannon*, "the change in the relationship must be 'judicially sanctioned.'").
[76] *See infra* Part III.
[77] 33 U.S.C. § 1251(a) (2018); *see infra* Part III.

III. DIFFERENT APPROACHES TO THE CWA FEE-SHIFTING PROVISION

When considering whether to award costs and fees to a plaintiff in a CWA citizen-suit, a district court must decide two things: (1) whether the party seeking an award is a "prevailing or substantially prevailing party"; and (2) whether an award is "appropriate."[78] However, the circuits differ in which of these two determinations they focus on and may apply different standards to determine both "prevailing or substantially prevailing party" status and appropriateness.[79] These different standards often turn on the amount of district court discretion allowed within the particular circuit.[80]

Generally, there are three main approaches circuits take regarding a district court's discretion to award costs and fees to a prevailing party.[81] Some circuits provide little guidance to their lower courts and instead give them broad latitude in determining awards.[82] For example, the First Circuit gives district courts "wide discretion" to consider a variety of factors in determining whether to grant or deny an award.[83] Similarly, the Third Circuit places no restrictions on a district court's discretion as long as the party seeking the award is "prevailing or substantially prevailing."[84] The Eighth Circuit takes a similar approach by focusing on whether the party is truly "prevailing or substantially prevailing."[85] The Second Circuit takes this approach as well.[86]

Other circuits provide more guidance and only allow their lower courts to exercise narrow discretion.[87] One example is the Fourth Circuit, which directs courts within its jurisdiction to limit their focus to determining whether the party seeking an award has advanced the goals of the

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[78] St. John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist., 574 F.3d 1054, 1058 (9th Cir. 2009).
[79] *See infra* Sections III.A–C.
[80] *See infra* Sections III.A–C.
[81] *See infra* Sections III.A–C.
[82] *See infra* Section III.A.
[83] *See* United States v. Comunidades Unidas Contra la Contaminacion, 204 F.3d 275, 283 (1st Cir. 2000).
[84] *See* Penn. Env't Def. Found. v. Canon-McMillan Sch. Dist., 152 F.3d 228, 231 (3d Cir. 1998).
[85] *See* Sierra Club v. City of Little Rock, 351 F.3d 840, 844 (8th Cir. 2003) (citing Armstrong v. ASARCO, Inc., 138 F.3d 382, 388 (8th Cir. 1998)).
[86] *See* Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295, 297 (2d Cir. 1987); Student Pub. Int. Rsch. Grp., Inc. v. Anchor Thread Co., No. 84-320(GEB), 1988 U.S. Dist. LEXIS 4348, at *4–5 (D.N.J. May 12, 1988); Penn. Env't Def. Found. v. Packaging Corp. of America, No. 87-4739, 1989 U.S. Dist. LEXIS 380, at *6–7 (E.D. Pa. Jan. 18, 1989).
[87] *See infra* Section III.B.

CWA.[88] However, despite this goal-oriented approach, in practice, courts in this jurisdiction sometimes focus purely on party status instead.[89]

Finally, some circuits provide greater guidance and greatly limit their district courts' discretion.[90] For example, the Eleventh Circuit only permits district courts to deny costs and fees upon showing of "good cause."[91] Similarly, the Ninth Circuit requires "special circumstances" to deny these awards.[92]

Within each of these general categories, the approaches vary by circuit.[93] Indeed, even within a particular circuit, district courts may differ in their analyses.[94] While each approach may have its benefits, this lack of uniformity among and within circuits has the potential to undermine the CWA citizen-suit by adding confusion, unpredictability, and risk, all of which may deter plaintiffs from suing under the CWA. In the absence of a clear standard from the Supreme Court, a clearer, more uniform approach among the circuits would benefit both those who bring citizen-suits and the district courts tasked with making fee-award determinations.

A. Approach One: Broad Latitude

1. Wide Discretion in the First Circuit

The First Circuit, relying on *Ruckelshaus*, has held that the term "appropriate" grants district courts "wide discretion . . . to weigh against

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[88] *See* Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 315, 317 (4th Cir. 1988); Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1209 (4th Cir. 1986). The Federal Circuit also focuses on the CWA's goals in determining the appropriateness of cost and fee awards. *See* Sierra Club v. EPA, 769 F.2d 796, 800 (D.C. Cir. 1985) (holding "the party must have served the public interest by assisting in the proper implementation of the statute"); Nat'l Res. Def. Council v. Adm'r, EPA, 595 F. Supp. 65, 70 (D.D.C. 1984) (denying fees award to plaintiffs fees against private, defendant intervenors because intervenors "helped further the goals of the [Clean Water] Act" and intervenors should not be "punish[ed] . . . for attempting to enforce their, non-frivolous view of the Act.").

[89] *See* Sanitary Bd. of Charleston v. Pruitt, 336 F. Supp. 3d 615, 619 (S.D.W. Va. 2018), *aff'd sub nom*. Sanitary Bd. of Charleston v. Wheeler, No. 18-2385, 2020 U.S. App. LEXIS 112, at *1 (4th Cir. Apr. 9, 2020); Ohio Valley Env't Coal., Inc. v. Wheeler, 387 F. Supp. 3d 654, 658 n.3 (S.D.W. Va. 2019).

[90] *See infra* Section III.C.

[91] *See* Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1143 (11th Cir. 1990) (citing Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1209 (4th Cir. 1986)).

[92] *See* St. John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist., 574 F.3d 1054, 1062 (9th Cir. 2009) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

[93] *See infra* Sections III.A–C.

[94] *See infra* Section III.B.1.

the total background the significance of any contributions and the appropriateness of any award of fees and costs."[95] Due to this wide discretion, a district court may choose which factors it deems relevant in determining whether to grant an award, and sometimes these factors are clearly in line with the goals of the CWA citizen-suit provision.[96] However, some courts fail to articulate which factors they find persuasive,[97] which may leave potential citizen-plaintiffs with a sense of uncertainty and a feeling of helplessness in the face of a particular district court's whims.

On appeal, the First Circuit provides little guidance, as exemplified in *Paolino v. JF Realty, LLC*, where that court affirmed a district court's fee award to a prevailing defendant based merely on the district court's "carefully detailed . . . analysis and the underlying factual basis for its conclusion," rather than on a particular standard.[98] In that case, the citizen-plaintiffs sued the defendants for discharging contaminated water without a state permit, even though they were aware that the defendants had already installed a comprehensive stormwater management system to remedy the problem.[99] The district court justified the award by explaining that the plaintiffs' claim, while initially valid, was, by that point, unreasonable, groundless, and "wholly inconsistent with a citizen plaintiff who legitimately seeks to prosecute violations of the CWA for the public good."[100]

That case shows that a district court with wide discretion may base its decision on CWA goals. However, by declining to endorse any specific factor warranting a fee award, the First Circuit may leave future citizen-plaintiffs and their defendants without substantive guidance on which to rely. With such wide discretion, potential plaintiffs are seemingly left at the mercy of the particular district judge deciding the case.

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[95] *See* United States v. Comunidades Unidas Contra la Contaminacion, 204 F.3d 275, 283 (1st Cir. 2000) (relying on the Court's definition of "appropriate" in Ruckelshaus v. Sierra Club, 463 U.S. 680, 682–83 (1983)).

[96] *See, e.g.*, U.S. Pub. Int. Rsch. Grp. v. Stolt Sea Farming, Inc., 301 F. Supp. 2d 46, 48, 50–51 (D. Me. 2004) (holding award of costs and attorney fees appropriate when plaintiffs "achieved a high measure of success," "vindicated an important societal interest in protecting . . . a key purpose of the Clean Water Act," and "established a legal precedent that can be expected to have a powerful deterrent effect").

[97] *See, e.g.*, Conservation L. Found., Inc. v. Roland Teiner Co., 832 F. Supp. 2d 102, 104 (D. Mass. 2011) (granting motion for attorneys' fees after default judgment because plaintiff "prevailed on its claims.").

[98] Paolino v. JF Realty, LLC, 830 F.3d 8, 17–18 (1st Cir. 2016).

[99] *Id.* at 10–13, 17.

[100] *Id.* at 17–18.

2. "No Restriction" in the Third Circuit

The Third Circuit has held that the CWA's citizen-suit provision "places no restriction on the award other than that the party entitled to the award be 'prevailing or substantially prevailing.'"[101] This circuit seemingly ignores an "appropriateness" analysis altogether and merely asks whether the party is prevailing and focuses on whether the lower court "employs correct standards and procedures and makes findings of fact not clearly erroneous" when it calculates the award.[102] Like the First Circuit, the Third Circuit fails to provide clear guidance to its lower courts, and this could potentially leave parties to citizen-suits guessing as to whether they will pay the price for their own public service.

3. "Broad" Discretion in the Eighth Circuit

In the Eighth Circuit, an award is "not automatic but rather is subject to the district court's discretion."[103] If a district court properly considers a prevailing party's motion, then it alone has the "broad discretion" to determine whether to award or deny fees and costs.[104] However, the catalyst theory does not apply in this circuit, and a district court's discretion may only be exercised after first applying a strict "prevailing or substantially prevailing party" analysis.[105]

For example, in *Sierra Club v. City of Little Rock*, the Eighth Circuit adopted *Buckhannon*'s prohibition on using the catalyst theory to determine prevailing party status and reversed a plaintiff's fee award.[106] In that case, the Sierra Club sued Little Rock and its Sanitary Sewer Committee for allowing untreated sewage to overflow into rivers and streams.[107]

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[101] *See* Pa. Env't Def. Found. v. Canon-McMillan Sch. Dist., 152 F.3d 228, 231 (3d Cir. 1998).
[102] *See id.* at 232 (citing Pub. Int. Rsch. Grp. v. Windall, 51 F.3d 1179, 1184 (3d Cir. 1995)) (citation omitted).
[103] *See* Citizens Legal Env't Action Network, Inc. v. Premium Std. Farms, Inc., 397 F.3d 592, 594 (8th Cir. 2005).
[104] *See* Jones v. St. Clair, 804 F.2d 478, 481–82 (8th Cir. 1986) (explaining "we express no view as to whether the court should award costs and fees. We merely direct the court to exercise its discretion").
[105] *See, e.g.*, River Ravine Rescue, Inc. v. City of S. St. Paul, No. 03-880 (JNE/JGL), 2004 U.S. Dist. LEXIS 12988, at *10 (D. Minn. July 9, 2004) (denying attorney fees because plaintiff was not prevailing party when defendant obtained permit after plaintiff sued).
[106] *See* Sierra Club v. City of Little Rock, 351 F.3d 840, 845–47 (8th Cir. 2003) (citing Buckhannon Bd. & Care Home v. W.Va. Dep't of Health & Human Res., 532 U.S. 598, 604–06 (2001)).
[107] *Id.* at 843.

After the Committee settled, the Sierra Club sought a declaration that Little Rock was violating the CWA and asked for an injunction requiring the city to comply with its National Pollutant Discharge Elimination System ("NPDES") permit.[108] The district court granted the declaratory judgment but denied the injunction, reasoning that Little Rock would likely cooperate with the Sewer Committee under the settlement agreement, which it did.[109] However, the court still awarded the Sierra Club a percentage of its fees.[110]

The Eighth Circuit reversed this award because the declaratory judgment did not "materially alter[] the legal relationship between the parties by modifying [Little Rock's] behavior in a way that directly benefit[ed] [the Sierra Club]."[111] Furthermore, because Little Rock was not a party to the settlement, its behavior was voluntary rather than "judicially sanctioned."[112] Thus, the Sierra Club was not a prevailing party, and it was therefore improper for the district court to award fees.[113]

As that case illustrates, a higher bar for "prevailing or substantially prevailing party" status (via rejection of the catalyst theory) may make citizen-suits riskier, as a defendant's voluntary compliance during litigation could leave the citizen-plaintiff picking up the tab for their public service. While a court may potentially use this higher bar to deny awards to undeserving plaintiffs with moot or frivolous claims, this strict standard may also undermine Congress's goal to reward plaintiffs for causing defendants to cease violating the CWA, even if no verdict is reached.[114]

Once a party has passed this "prevailing or substantially prevailing" hurdle, however, a court in the Eight Circuit may then exercise its discretion to determine whether the award is "appropriate."[115] In making this determination, a lower court may consider whether the party seeking the award has furthered the goals of the CWA.[116] However, due to the lack of clear guidance from above, district courts are given the freedom

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[108] *Id.*
[109] *Id.* at 844, 846.
[110] *Id.* at 844.
[111] *Id.* at 847 (quoting Farrar v. Hobby, 506 U.S. 103, 106, 111–12 (1992)).
[112] *Sierra Club*, 351 F.3d at 845 (citing Buckhannon Bd. & Care Home v. W.Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001)).
[113] *Id.* at 844–46.
[114] *See* S. REP. No. 92-414, at 81 (1971).
[115] *See* NICCW v. AgriProcessors, Inc., No. 04-CV-1037-LRR, 2007 U.S. Dist. LEXIS 41353, at *26–30 (N.D. Iowa June 6, 2007).
[116] *See, e.g.*, Iowa League of Cities v. EPA, 711 F.3d 844, 878 n.20 (8th Cir. 2013) (declining to award fees despite plaintiff technically being a prevailing party because plaintiff "was largely vindicating its own rights, rather than the purposes of the CWA.").

to formulate their own standards. For example, one district court decided that the catalyst theory, while no longer applicable to determining party status, may still be used to determine whether an award is "appropriate."[117] Like the First and Third Circuits, district courts in the Eighth Circuit are largely left to fend for themselves, and citizens bringing claims in this circuit may face a sea of uncertainty regarding whether they or their adversary will pay for the litigation once the dust has cleared.

4. Analysis of Approach One

In each of the above circuits, appellate courts give their district courts a great deal of discretion to determine which factors to consider when granting or denying awards.[118] While this freedom may allow district courts to make fact- and party-specific determinations, which may be beneficial in certain instances, it may also contribute to a disunified and unpredictable body of law both between and within the circuits. Ultimately, potential parties to citizen-suits are likely left with little certainty as to who will pick up the tab. This has potential to discourage citizen-suit litigation and, in turn, may allow for unchecked violations of the CWA.

Besides this uncertainty, courts that place too much emphasis on party status may unfairly deny awards to deserving plaintiffs. Congress's goal in imposing the "prevailing or substantially prevailing" party limitation was to prevent an intervening party that, "although technically on the prevailing side, fails to make a substantial contribution to the successful outcome of the case."[119] Focusing too heavily on party status and declining to apply the catalyst theory may undermine the overall purpose of the fee-shifting provision to encourage citizens to "perform[] a public service" by "bringing legitimate actions."[120]

B. Approach Two: Narrow Discretion

1. The Fourth Circuit's Goal-Oriented Approach

In determining whether it is appropriate to award costs and attorney fees to a prevailing party, the Fourth Circuit and its district courts

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[117] *See* NICCW v. AgriProcessors, Inc., 2007 U.S. Dist. LEXIS 41353 at *27–30 (recognizing that "there is little explicit judicial exposition of the standards that the court must apply in exercising [fee-award] discretion" but determining that the Eighth Circuit "apparently" applies the catalyst theory to the "whenever . . . appropriate" clause.).
[118] *See supra* Sections III.A.1–3.
[119] S. REP. No. 99-50, at 33 (1985).
[120] S. REP. No. 92-414, at 81 (1971).

have primarily focused on whether the party has furthered the goals of the CWA.[121] This focus on CWA goals may also influence a district court's determination of prevailing party status.[122] However, district courts in this circuit may focus too heavily on prevailing party status and award or deny fees without explaining why an award is or is not appropriate.[123] Additionally, post-*Buckhannon*, the Fourth Circuit may apply a heightened standard for prevailing party status.[124]

For example, in *Sanitary Board of Charleston v. Pruitt*, the district court explicitly held that, in light of *Buckhannon*, the catalyst theory does not apply to the CWA, and it therefore denied the plaintiff's fee award.[125] However, rather than affirm or refute this reasoning, the Fourth Circuit instead declined to decide whether the catalyst theory still applied.[126] Rather, it merely affirmed on the basis that, even if the catalyst theory did apply, attorney's fees would still be inappropriate.[127]

By failing to decide whether the catalyst theory remains applicable, the Fourth Circuit opened the door for unpredictability, as exemplified when the same district court later refused to follow its previous decision

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[121] *See* Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 315, 317 (4th Cir. 1988) (holding attorney fee award appropriate when plaintiff "served a key purpose of the citizen-suit provision . . . [by] ensur[ing] that the agencies fulfill their duties under the CWA responsibly"). *See also* Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1209 (4th Cir. 1986) (holding awarding fees appropriate when plaintiffs "actions will tend to ensure compliance with the Act . . . [and] have served the public interest by insisting that the Clean Water Act be adequately enforced") (citations omitted). The Fifth Circuit has taken a similar approach. *See* Chemical Mfr. Ass'n v. EPA, 885 F.2d 1276, 1279 (5th Cir. 1989) (holding that "an award is usually 'appropriate' when a party has advanced the goals of the statute invoked in the litigation"); Kleinman v. City of Austin, No. 1:15-CV-497-RP, 2018 U.S. Dist. LEXIS 106346, at *3 (W.D. Tex. June 26, 2018) (finding award appropriate when plaintiff "secured a civil penalty that may deter future [sand and rock] discharges).

[122] *See, e.g.*, S. Appalachian Mt. Stewards v. A & G Coal Corp., No. 2:12CV00009, 2014 U.S. Dist. LEXIS 140207, at *4 (W.D. Va. Oct. 2, 2014) (explaining that "[t]he key factor [in determining prevailing party status] is whether the plaintiffs 'advanced the goals of the [CWA]'") (citation omitted).

[123] *See, e.g.*, Sierra Club v. Va. Elec. & Power Co., No. 2:15-cv-112-JAG, 2017 U.S. Dist. LEXIS 220178, at *3–4 (E.D. Va. Dec. 12, 2017) (explaining that a court only "considers two factors: first, whether the party seeking fees is the prevailing party, and second, whether the fees requested are reasonable") (citation omitted).

[124] *See* Sanitary Bd. of Charleston v. Pruitt, 336 F. Supp. 3d 615, 618–19 (S.D.W. Va. 2018), *aff'd sub nom*. Sanitary Bd. of Charleston v. Wheeler, No. 18-2385, 2020 U.S. App. LEXIS 11235, at *1 (4th Cir. Apr. 9, 2020).

[125] *See id.*

[126] *See* Sanitary Bd. of Charleston v. Wheeler, No. 18-2385, 2020 U.S. App. LEXIS 11235, at *7–8, *10 (4th Cir. Apr. 9, 2020).

[127] *See id.*

and instead applied the catalyst theory, citing the distinction between "prevailing party" and "substantially prevailing party" statutes identified in *Hardt*.[128] "[R]egardless of the ultimate disposition of the case," that court explained, in the Fourth Circuit, "a party sufficiently prevails under the CWA when its suit causes an agency to perform a required function and advances the goals of the CWA."[129] It emphasized the Fourth Circuit's overall focus on advancing the CWA's goals as justification for its holding.[130]

2. The Second Circuit's Success-Oriented Approach

The Second Circuit has held that "a favorable settlement is sufficient by itself to support an award of attorney's fees without any adjudication or admission of liability."[131] However, post-*Buckhannon*, district courts in this circuit no longer apply the catalyst theory.[132] But, rather than apply a clear standard, these courts focus purely on the success of the plaintiff seeking the award.[133] This narrow focus on success seems to shift the focus away from rewarding public service. When combined with a rejection of the catalyst theory, this approach likely discourages citizens from suing, as a plaintiff runs the risk that her defendant may escape paying litigation costs by voluntarily complying before a settlement or verdict is reached.

3. Analysis of Approach Two

The Fourth Circuit's narrow-discretion approach illustrates that merely articulating a goal-oriented approach without providing a specific

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[128] *See* Ohio Valley Env't Coal., Inc. v. Wheeler, 387 F. Supp. 3d 654, 658 n.3 (S.D.W. Va. 2019) (citing Hardt v. Reliance Standard Life Insurance Co., 560 U.S. 242, 253 (2010)).
[129] *Id.* at 659–60.
[130] *See id.* at 660–61 (citing S. All. for Clean Energy v. Duke Energy Carolinas, LLC, 650 F.3d 401, 406–07 (4th Cir. 2011)) (citations omitted).
[131] Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295, 297 (2d Cir. 1987) (citing McCann v. Coughlin, 698 F.2d 112, 128 (2d Cir. 1983)).
[132] *See, e.g.*, Humane Soc'y of the U.S. v. HVFG, LLC, No. 06 CV 6829 (HB), 2010 U.S. Dist. LEXIS 85422, at *10 (S.D.N.Y. Aug. 19, 2010) (requiring "judicially sanctioned" change between parties before awarding costs and fees).
[133] *See, e.g.*, Student Pub. Int. Rsch. Grp., Inc. v. Anchor Thread Co., No. 84-320(GEB), 1988 U.S. Dist. LEXIS 4348, at *5 (D.N.J. May 12, 1988) (holding "'some success' [by plaintiffs] sufficient to entitle them to an award of attorneys' fees") (citing Friends of the Earth v. Eastman Kodak Co., 834 F.2d at 297); Penn. Env't Def. Found. v. Packaging Corp. of Am., No. 87-4739, 1989 U.S. Dist. LEXIS 380, at *6–7 (E.D. Pa. Jan. 18, 1989) (holding award of attorneys' fees "appropriate" because plaintiff obtained "some of the benefit sought and . . . the relief obtained was causally related to the prosecution of the complaint").

standard for determining "prevailing or substantially prevailing" party status may leave little for district courts to work with. Furthermore, because this appellate court has declined to decide whether the catalyst theory applies, district courts in this circuit are left basing award determinations on their own judgment and may be free to reach seemingly contradictory conclusions.[134] This may deter future public servants from bringing their claims by leaving them with little indication as to who will end up paying for environmental enforcement. Similarly, the Second Circuit's even narrower approach of requiring plaintiffs to achieve elevated, post-*Buckhannon* success may also discourage public service by heightening the risk of suing powerful defendants.

C. Approach Three: Limited Discretion

1. The Eleventh Circuit's "Good Cause" Standard

Similar to the Fourth Circuit, the Eleventh Circuit has held that "an award of attorneys' fees in a Clean Water Act suit is appropriate when the moving party has advanced the goals of the Act."[135] However, this circuit has explicitly stated that its lower courts may grant awards "to plaintiffs who do not obtain court-ordered relief but whose suit has a positive catalytic effect."[136] The requirement of a "positive" catalytic effect means that the change prompted by the plaintiff's suit must be tied to a successful outcome for that plaintiff.[137]

Although that circuit acknowledges that awarding costs and fees is not mandatory, it has held that "the sound exercise of [a district court's] discretion will not allow the court to deny fees and costs absent good cause."[138] Examples of "good cause" denial of prevailing parties' awards

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[134] *See* Ohio Valley Env't Coal., Inc. v. Wheeler, 387 F. Supp. 3d 654, 658 n.3 (S.D.W. Va. 2019); Sanitary Bd. of Charleston v. Pruitt, 336 F. Supp. 3d 615, 618–19 (S.D.W. Va. 2018).
[135] Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 678 F.3d 1199, 1202 (11th Cir. 2012) (citing Chemical Mfr. Ass'n v. EPA, 885 F.2d 1276, 1279 (5th Cir. 1989)).
[136] *Id.* (citing Loggerhead Turtle v. City Counsel, 307 F.3d 1318, 1326 (11th Cir. 2002)) (citation omitted). *See also* Black Warrior Riverkeeper, Inc. v. Metro Recycling Inc., No. 14-14800, 2015 U.S. App. LEXIS 9233, at *1, *3 (11th Cir. June 3, 2015) (holding "prevailing or substantially prevailing" party is one who "advanced the goals of the [Clean Water] Act" and reaffirming viability of catalyst theory in CWA cases) (citations omitted).
[137] *See Friends of the Everglades*, 678 F.3d at 1202 (holding that plaintiff causing EPA to promulgate new rules adverse to the plaintiff's position was not "what was intended by the idea that a law suit has a positive catalytic effect").
[138] Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1143 (11th Cir. 1990) (citing Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1209 (4th Cir. 1986)) (ordering district court to award fees when plaintiff was prevailing party because

often concern the connection between the party's actions in the litigation and the goals of the CWA.[139]

As cases in this circuit illustrate, by explicitly resolving the catalyst-theory question (though modifying it to a certain extent) and articulating a workable standard, district courts in the Eleventh Circuit may be better equipped to make more uniform, predictable decisions regarding fee awards. In turn, potential parties to citizen-suits will likely have a better idea as to whether they will receive or pay attorney's fees and costs.

2. The Ninth Circuit's "Special Circumstances" Standard

In *St. John's Organic Farm v. Gem County Mosquito Abatement District*, the Ninth Circuit held that a district court may not deny attorney fees to the prevailing party in a CWA case unless there are "special circumstances" that would make granting an award unjust.[140] Although this "special circumstances" standard was originally only applied in suits brought under the Civil Rights Act, the court explained that the Ninth Circuit has applied that standard to a variety of federal statutes where the "plaintiff has served the public interest."[141] For example, in a prior decision, it held that "provisions in environmental statutes with similar language and purpose as the attorney's fees provision in the Civil Rights Act should be interpreted the same way."[142]

In this case, the court concluded that "appropriate" in the CWA should therefore be interpreted in the same way as in the attorney fees provision of the Civil Rights Act.[143] Thus, a district court has limited

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plaintiff "was able to show that [defendant] was liable for civil penalties [since] . . . [c]ivil penalties are an integral part of the enforcement scheme of [the CWA]").

[139] *See, e.g.*, Friends of Warm Mineral Springs v. McCarthy, No. 8:13-cv-3236-T-23TGW, 2015 U.S. Dist. LEXIS 98381, at *1–6 (M.D. Fla. July 28, 2015) (holding although defendant was prevailing party, there was good cause to deny defendant's motion for attorney fees when "plaintiff's argument, although ultimately unsuccessful, was neither unreasonable nor groundless"); Fla. Wildlife Fed'n, Inc. v. McCarthy, No. 4:08cv324-RH/CAS, 2014 U.S. Dist. LEXIS 190998, at *9–10 (N.D. Fla. Sept. 18, 2014) (finding good cause to deny plaintiffs' fee award when plaintiffs' unrelated lawsuit was consolidated with CWA suit, plaintiffs only made marginal contributions to success of suit, and there was no evidence that the plaintiffs' "participation in [the] litigation had anything to do with inducing the [defendant] to act").

[140] St. John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist., 574 F.3d 1054, 1062 (9th Cir. 2009) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

[141] *Id.* (citations omitted).

[142] *Id.* at 1063 (quoting Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1095 (9th Cir. 1999)).

[143] *Id.*

discretion and may only deny attorney's fees to a prevailing plaintiff under the CWA if there are "special circumstances."[144]

Since *St. John's Organic Farm*, district courts within the Ninth Circuit have frequently applied this "special circumstances" standard.[145] Under this standard, a district court may deny fees to a plaintiff who: "fail[s] to adequately brief the issues," accepts a nuisance settlement, tailors a fee request to over-represent the success of the suit, or forces the court "to engage in independent research."[146] However, "special circumstances" do not include a party's financial interest in the outcome of a case, the fact that the defendant did not anticipate having to pay fees, or that a party "would be the primary beneficiary of its success in the litigation.[147]

Additionally, district courts in the Ninth Circuit may apply a lower threshold for "prevailing or substantially prevailing party" status than other circuits.[148] For example, in *Resurrection Bay Conservation Alliance*, the Ninth Circuit reversed the district court's denial of a fee award to the plaintiff in large part because, although the plaintiff only received a one-dollar nominal fee, the plaintiff nevertheless caused the defendant to obtain a permit.[149] Other district courts in this circuit have similarly granted fees despite limited success.[150] However, district courts within this circuit may still require "judicial enforceability" to determine that a party is prevailing.[151]

3. Analysis of Approach Three

The Eleventh Circuit seems to have solved the Fourth Circuit's dilemma by focusing on the goals of the CWA and explicitly embracing

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[144] *Id.* at 1003–04.

[145] *See, e.g.*, Idaho Conservation League & N.W. Env't Def. Ctr. v. Atlanta Gold Corp., No.: 1:11-cv-161-REB, 2020 U.S. Dist. LEXIS 182778, at *12 (D. Idaho Sept. 30, 2020) (awarding fees to plaintiff appropriate because "no special circumstances . . . would render an award of litigation expenses unjust").

[146] *See* Resurrection Bay Conservation All. v. City of Seward, 640 F.3d 1087, 1092–93 (9th Cir. 2011) (citations omitted).

[147] *See id.* at 1092 (citation omitted).

[148] *See id.* at 1091, 1093–94.

[149] *Id.*

[150] *See, e.g.*, San Francisco Baykeeper v. W. Bay Sanitary Dist., No. C-09-5676 EMC, 2011 U.S. Dist. LEXIS 138093, at *17–19 (N.D. Ca. Dec. 1, 2011) (holding limited success not relevant to special circumstances determination); Puget Soundkeeper All. v. Rainier Petroleum Corp., No. C14-0829JLR, 2017 U.S. Dist. LEXIS 208663, at *37 (W.D. Wash. Dec. 19, 2017) (awarding fees despite plaintiff only achieving limited success).

[151] *See* Idaho Power Co. v. EPA, No. 1:18-cv-00255-BLW, 2020 U.S. Dist. LEXIS 206787, at *5 (D. Idaho Nov. 3, 2020).

a modified version of the catalyst theory.[152] Although only allowing a district court to deny costs and fees upon a showing of "good cause" has the potential to allow for superfluous parties, in practice, district courts have applied this standard with the goals of the CWA in mind.[153] By encouraging plaintiffs to orient their claims around the goals of the CWA and to seek relief based on furthering those goals, this standard also has the potential to curb abusive litigation.[154]

The Ninth Circuit, however, by tying CWA litigation to the Civil Rights Act and allowing district courts to only deny costs and fees in "special circumstances," seems to have gone further than other circuits in encouraging citizen participation.[155] However, though this approach may allow citizens to file suit with more confidence because they have a greater chance of winning cost and fee awards, unlike the "good cause" standard, this approach does not explicitly tie a plaintiff's success to advancing the goals of the CWA.[156] Thus, it may be less adept at weeding out superfluous or abusive parties.[157]

IV. THE NEED FOR A MORE UNIFORM APPROACH

A. Policy Considerations Regarding Costs/Fees

On one hand, greater restrictions on the availability of CWA fee awards makes citizen lawsuits more risky, and this may seriously threaten Congress's goal of promoting public service.[158] First, more restrictions create fewer incentives for a law firm to take a citizen's case and place a higher burden on non-profit law firms, which may have limited resources.[159] Second, greater restrictions amplify the inequalities between impoverished

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[152] *See generally* City of Mt. Park, Ga. v. Lakeside at Ansley, LLC, No. 1:05-CV-2775-CAP, 2011 U.S. Dist. LEXIS 162205, at *13–14 (N.D. Ga. July 21, 2011).
[153] *See, e.g.*, *id.* (finding good cause to deny prevailing plaintiff's attorney fees when plaintiff's actions "actually thwarted the underlying goals of the CWA" and "plaintiff's goal in th[e] lawsuit was in great part for monetary profit rather than the advancement of the goals of the CWA").
[154] *See generally id.*
[155] *See* Mary Cile Glover-Rogers, Note, *Who's Footing the Bill for the Attorneys' Fees?: An Examination of the Policy Underlying the Clean Water Act's Citizen Suit Provision*, 18 MO. ENV'T L. POL'Y REV., 64, 81–82 (2010).
[156] *See generally id.*; *Lakeside*, 2011 U.S. Dist. LEXIS 162205, at *13–14.
[157] *See generally* Glover-Rogers, *supra* note 155, at 81–82.
[158] Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENV'T L. 229, 319 (2001).
[159] *Id.*

communities, already facing a disproportionate amount of pollution with little to no resources to protect themselves, and privileged communities that can afford to run the risk of bringing suit.[160] Ultimately, this may lead to a higher burden on government enforcement agencies, and, because those agencies may not have the resources to haul every polluter into court, this creates a greater chance that polluters will go unpunished.[161]

On the other hand, current trends in CWA citizen-suit litigation may warrant certain restrictions.[162] In 2017, then–EPA Administrator Scott Pruitt issued a directive to end the EPA's practice of "sue and settle," whereby the EPA would settle citizens' claims against it behind closed doors, which allowed citizens to change EPA policies without state or community participation.[163] As part of this new directive, the Administrator expressly excluded fee and cost awards in EPA settlements.[164] One result of this directive is an increase in citizen-suits against private companies, as it is now more difficult and risky for citizens to attempt to enact environmental change through suing the EPA directly.[165] This increase in citizen-suits against private companies creates a greater concern that some citizens will attempt to abuse the citizen-suit provision by bullying companies into reaching settlements.[166] If courts are too lenient with their fee and cost awards, then a company may just give in to these bullies rather than risk having to pay costs and fees were it to lose in court.[167] In this way, freehanded awards may undermine Congress's goal of preventing frivolous litigation.[168]

B. Benefits and Detriments of Three Categories of Approaches

Without specific data regarding the number of successful citizen-suits within each circuit, it may be difficult to determine which of the

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[160] *Id.*
[161] *See generally id.* at 301, 318–19.
[162] *See generally* Marc Robinson, *Environmental Ambulance Chasing: DOJ Urges Court to Scrutinize Clean Water Citizen-Suit Settlements*, FORBES (June 26, 2018, 11:26 AM), https://www.forbes.com/sites/wlf/2018/06/26/environmental-ambulance-chasing-doj-urges-court-to-scrutinize-clean-water-citizen-suit-settlements/?sh=1b6a1dae30c9 [https://perma.cc/Q2ZR-YCP4].
[163] *Administrator Pruitt Issues Directive to End EPA "Sue & Settle*," ENV'T PROT. AGENCY (Oct. 16, 2017), https://archive.epa.gov/epa/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle.html [https://perma.cc/DF2A-K2MT].
[164] *Id.*
[165] Robinson, *supra* note 162.
[166] *See id.*
[167] *See id.*
[168] *See* S. REP. No. 92-414, at 81 (1971).

three categories of approaches has been most favorable for citizen plaintiffs or most successful at discouraging frivolous litigation.[169] However, one may nevertheless determine how well these approaches line up with Congress's original objectives regarding the CWA citizen-suit.[170]

As stated at the beginning of this Note, the primary goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[171] The inclusion of a citizen-suit provision was meant to further this goal by allowing citizens to participate in ensuring that the EPA's regulations are enforced.[172] By bringing legitimate claims, citizens may help make their individual communities, and the Nation as a whole, a safer, healthier place in which to live. An attractive fee-shifting provision is necessary to encourage such claims because many of the biggest polluters are also some the most powerful companies in the United States.[173] Additionally, because private citizens are likely unfamiliar with the complex nature of environmental suits, they must rely on skilled lawyers and NGOs to fight their battles, which requires a lot of money.[174]

Congress initially gave courts expansive discretion in awarding fees so that courts could exclude frivolous or harassing plaintiffs from winning fees, vindicate claims that were in the public interest, and grant awards to plaintiffs whose "actions . . . result[ed] in successful abatement but do not reach a verdict."[175] However, after *Ruckelshaus*, Congress limited the fee award to "prevailing or substantially prevailing parties" in order to avoid unfair results, such as a superfluous party who intervened but "fail[ed] to make a substantial contribution to the successful outcome of the case."[176]

The First and Third Circuits' emphasis on allowing their lower courts to freely exercise discretion may leave room for district courts to make fact- and party-specific determinations.[177] While these courts may base their decisions on whether the plaintiff has demonstrated public service by bringing suit, they are not required to do so.[178] This may leave

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[169] *See generally supra* Sections III.A–C.
[170] *See generally supra* Sections III.A–C.
[171] 33 U.S.C. § 1251(a) (2018).
[172] S. REP. No. 92-414, at 79.
[173] *See Toxic 100 Water Polluters Index (2020 Report, Based on 2018 Data)*, POL. ECON. RSCH. INST., https://www.peri.umass.edu/toxic-100-water-polluters-index-current [https://perma.cc/Q486-CQJ9] (last visited Jan. 12, 2022).
[174] *See* Lang, *supra* note 16, at 22.
[175] S. REP. No. 92-414, at 81.
[176] *Id.*
[177] *See supra* Sections III.A.1–2.
[178] *See supra* Sections III.A.1–2.

room for a good-faith plaintiff to get stuck paying the tab for attempting to enforce the CWA.[179] Additionally, it allows variation between district courts, which may make the prospect of bringing a citizen-suit seem like a gamble.[180] Thus, this lack of uniformity may stifle public service under the CWA.

The Eight Circuit's broad discretion approach creates a similar risk for plaintiffs.[181] Furthermore, its explicit rejection of the catalyst theory adds an even higher level of uncertainty, as a plaintiff may have to pay his own way despite prompting positive environmental change.[182]

The Fourth Circuit's goal-oriented approach may be on the right track.[183] Requiring plaintiffs to structure their claims around the goals of the CWA likely encourages good faith claimants, rewards deserving plaintiffs, and helps prevent citizens from misusing the citizen-suit provision. However, by failing to resolve whether the catalyst theory applies, that circuit has allowed for division amongst its lower courts.[184] Although this may provide district courts with greater flexibility, it may also lead to contradictory holdings.[185] Indeed, the idea that one's fee award depends on which particular judge decides the case makes the prospect of bringing a citizen-suit look more like a night at the casino than an act of public service. Although the Second Circuit's focus on success allows for more uniformity, it also creates unpredictability for a potential deserving plaintiff, who may be robbed of her award by a defendant's sudden voluntary compliance.[186]

The final category of approaches limiting lower court discretion may be better suited to fulfill Congress's objective of promoting public service.[187] Limiting the instances in which a court may deny fees likely makes CWA litigation more reliable and encourages plaintiffs to bring good faith claims.[188] However, this may also open the door to a greater number of superfluous claimants.

The Eleventh Circuit's explicit focus on the goals of the CWA and tying the plaintiff's success to those goals may help to solve this problem

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[179] *See supra* Sections III.A.1–2.
[180] *See supra* Sections III.A.1–2.
[181] *See supra* Section III.A.3.
[182] *See supra* Section III.A.3.
[183] *See supra* Section III.B.1.
[184] *See supra* Section III.B.1.
[185] *See supra* Section III.B.1.
[186] *See supra* Section III.B.2.
[187] *See supra* Sections III.C.1–2.
[188] *See supra* Sections III.C.1–2.

by discouraging weak or nefarious claimants from abusing the citizen-suit provision.[189] Rather than playing the odds, plaintiffs who bring suits in the Eleventh Circuit can tailor their claims to the purposes of the CWA and, if they win, be fairly confident that they will not have to pay for their own public service.[190] The Ninth Circuit's "special circumstances" standard is even more plaintiff-friendly, but, without tying the plaintiff's success to the goals of the CWA, this approach has the potential to fail to fulfill Congress's second objective of excluding harassing or frivolous claims.[191]

C. Proposal for a More Uniform Standard

Our rivers continue to burn, and public service by private individuals and NGOs may be the only way to truly put out the flames. The CWA citizen-suit is a powerful tool that can give government agencies much-needed resources, promote positive policy changes, increase environmental vigilance, and force wrongdoers to pay the price for damaging the environment.[192] However, this tool cannot be effective unless citizens and NGOs have a financial incentive.[193] Thus, a workable fee-shifting provision may be crucial to "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[194]

District courts are likely best suited to decide when awarding or denying fees and costs is appropriate, and, as such, they should have room to exercise their discretion. However, it is crucial that they have clear standards by which to exercise that discretion. Considering that the purpose of the citizen-suit provision is to enforce the CWA, circuit courts should develop standards that ensure that their lower courts' discretion is centered around the goals of the CWA.

Additionally, in light of Congress's ultimate goal of encouraging public service and the need for financial incentives to do this, these standards must not be too restrictive for plaintiffs bringing good faith claims. Despite adding the "prevailing or substantially prevailing" language to exclude free riders from benefitting from the citizen-suit, Congress did not intend to discourage citizens from public service.[195] Given

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[189] *See supra* Section III.C.1.
[190] *See supra* Section III.C.1.
[191] *See supra* Section III.C.2.
[192] *See* Burbank et al., *supra* note 32.
[193] *See id.* at 675–76.
[194] *See* 33 U.S.C. § 1251(a) (2018).
[195] *See* S. REP NO. 99-50, at 33 (1985).

the environmental threats facing nearly every aspect of our Nation's waters, this public service is greatly needed.[196] Thus, because the Supreme Court has not explicitly ruled that the catalyst theory does not apply to the CWA, courts should be allowed to apply it when necessary, so that deserving plaintiffs are not punished for prompting positive environmental change.

However, district courts must still have the tools to exclude abusive litigants from cost and fee awards.[197] Again, a standard oriented around the goals of the CWA and the plaintiff's public service may be a viable safeguard against frivolous or harassing plaintiffs.

The Eleventh Circuit may be a good example for other circuits to follow.[198] Other circuits should adopt clearer standards that allow for greater uniformity among their lower courts. Like the Eleventh Circuit's approach, these standards should consider both whether the plaintiff, by bringing her claim, was pursuing the goals of the CWA and whether the plaintiff's action furthered those goals, regardless of whether the positive change resulted from judicial enforcement or voluntary compliance. At the very least, circuits like the Fourth should make a definitive decision regarding the catalyst theory so that plaintiffs at least know what to expect prior to bringing suit.[199]

CONCLUSION

Considering the environmental crises we continue to face today[200] and the often limited resources available to government agencies,[201] more citizens need to participate in enforcing the CWA. However, greater participation requires a predictable, inclusive, and incentivizing fee-shifting provision. Unfortunately, the Supreme Court has passed down vague guidance, and many circuit courts have done the same.[202] This needs to change. While some circuits are on the right track, their lack of

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[196] *See* ENV'T PROT. AGENCY, EPA 841-R-16-011, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS 2 (2017) (finding that forty-six percent of the Nation's rivers and streams were in "poor biological condition," twenty-one percent of its lakes were hypereutrophic, fourteen percent of its coastal and Great Lakes had "poor" water quality, and thirty-two percent of its wetland areas were in "poor biological condition").
[197] *See* Burbank et al., *supra* note 32, at 670.
[198] *See supra* Section III.C.1.
[199] *See supra* Section III.B.1.
[200] *See* Greenfield et al., *supra* note 9; ENV'T PROT. AGENCY, *supra* note 196.
[201] *See* Sato, *supra* note 8.
[202] *See supra* Parts II–III.

consistency breeds risk and uncertainty, which may ultimately undermine Congress's purpose regarding the CWA citizen-suit.[203] Until the Supreme Court clarifies this issue, it is up to circuit courts to take action, speak clearly, and ensure their lower courts have sufficient standards to guide their discretion. Perhaps an approach like the Eleventh Circuit has taken may be a viable example for other circuits to follow.[204] Although the Supreme Court may have muddied the waters, now is as good a time as any for circuits to clean things up.

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[203] *See supra* Part III.
[204] *See supra* Section IV.C.