Loggerhead Turtle v. County Council: The Future of Fee Shifting in Environmental Litigation?

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LOGGERHEAD TURTLE v. COUNTY COUNCIL: THE FUTURE OF FEE SHIFTING IN ENVIRONMENTAL LITIGATION?

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I. INTRODUCTION

Congress and the Supreme Court have clearly stated that they hold the preservation of endangered species to be of paramount importance, attempting under the Endangered Species Act ("ESA") to "halt and reverse the trend toward species extinction, whatever the cost."1 For the past several decades, citizen suits under ESA have played a central role in the realization of this goal. Congress has viewed the filing of legitimate citizen suits as a public service and has attempted to encourage citizens to perform this service through passing statutes that allow fee shifting for successful plaintiffs.2 In the 2001 case, Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, the Supreme Court limited fee shifting in citizen suits by holding that, at least under the Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA"), the catalyst theory3 cannot be used for attorneys' fees recovery and that courts can only grant attorneys' fees to plaintiffs who prevail on the substantive merits of their cases and have been awarded some relief by a court.4 Since the

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3 The Supreme Court, in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 67 n.6 (1987), defined the catalyst test by stating "if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions," (quoting S. REP. NO. 92-414, at 81 (1971); see also Wanda A. Dotson, Mootness and Attorney's Fees Under the Clean Water Act in the Old Timer, Inc. v. Blackhawk-Central City Sanitation District, 15 J. NAT. RESOURCES & ENVTL. L. 327, 325 (2000-2001).
Buckhannon decision, the lower courts have interpreted this limitation in various ways. Some lower courts have interpreted Buckhannon as prohibiting the use of the catalyst theory to award attorneys' fees under any federal citizen suit statute, while other courts have held that Buckhannon does not prohibit use of the catalyst theory to award attorneys' fees under federal statutes where there is clear congressional intent to permit use of the catalyst theory.

A recent decision in the Eleventh Circuit interpreted Buckhannon as inapplicable to citizen suits brought under the ESA, and held that attorneys' fees can be awarded in an ESA citizen suit under the catalyst theory. There are sound policy reasons for allowing the continued use of the catalyst theory in citizen suits brought under federal environmental statutes, but some may consider the Eleventh Circuit's decision to be contrary to the thrust of the Supreme Court's decisions in this area. The debate is far from settled.

This Note examines the continuing evolution of the rules on fee shifting in environmental citizen suits, centering on the Eleventh Circuit's 2002 decision in Loggerhead Turtle v. County Council. To this end, it first examines the history and policy behind statutory allowances for fee shifting and the impact that citizen suits have on environmental law and the protection of the environment. Second, it analyzes key Supreme Court cases, particularly Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources and Ruckelshaus v. Sierra Club, as well as lower court decisions which have interpreted those cases, including Southwest Center for Biological Diversity, California Native Plant Society v. (2001).


6 Southwest Ctr. for Biological Diversity v. Norton, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001); Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 738, 745 (2001); Southwest Ctr. for Biological Diversity v. Carroll, 182 F. Supp. 2d 944, 947 (C.D. Cal. 2001); Loggerhead Turtle v. County Council, 307 F.3d 1318 (11th Cir. 2002) [hereinafter Loggerhead Turtle III].

7 Loggerhead Turtle III, 307 F.3d at 1318.

8 Id.


"Carroll" and Center for Biological Diversity v. Norton. This Note also considers reasons for conflict and uncertainty in this area of the law and concludes that while the Supreme Court’s opinion in Buckhannon forbids use of the “catalyst theory” in connection with citizen suit provisions that authorize federal courts to award attorneys’ fees to “prevailing parties,” it does not prohibit use of the catalyst test in citizen suits brought under statutory provisions stating that courts may award attorneys’ fees “whenever . . . appropriate.”

II. BACKGROUND

A. The Catalyst Theory Defined

The first judicial articulation of the catalyst theory, or catalyst test, came from the United States Court of Appeals for the Eighth Circuit in Parham v. Southwestern Bell Telephone Co. Parham is an equal opportunity case, but the fee shifting method used in the case applies to environmental litigation. An examination of Parham will illustrate the nature of the catalyst theory.

Arthur Ray Parham was an eighteen-year-old black man who applied for a job as stockman at Southwestern Bell (“the Company”) and was rejected for employment. The Company said that it decided not to hire him because its background check showed that Parham had been fired from a previous job for frequent unexplained absences from work and for being “insubordinate [and] neglectful of duty,” and because he had graduated from high school in the bottom fifth of his class. Parham filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) in April 1967, accusing the Company of racial discrimination. The Company later offered him a job as a lineman, but Parham declined. Instead, Parham filed a complaint against the Company pursuant to the Civil Rights Act of 1964 in federal

12 262 F.3d 1077 (2001).
13 433 F.2d 421 (8th Cir. 1970), noted in Loring, supra note 5, at 978.
15 Id.
16 Id.
17 Id.
district court in April 1968.\textsuperscript{19} Evidence at trial showed that the Company had a history of employing many more whites than blacks, with less than two percent of their work force being black, and that almost all of their black employees worked in "house service," as janitors or laborers.\textsuperscript{20} The Company offered rebuttal evidence showing that it had adopted an affirmative action program in late 1968 and since then, it had hired black employees at more than twice the previous rate, and that it had increased its number of black employees in skilled employee categories, such as telephone operators, clerks and skilled craftsmen.\textsuperscript{21}

The trial court denied Parham relief, finding that the Company discriminated in their hiring practices prior to 1968, but that implementation of the affirmative action program had ameliorated the situation.\textsuperscript{22} The court found that there was no evidence of employment discrimination against blacks as a class or Parham as an individual at the time of the suit.\textsuperscript{23}

Parham appealed the decision and the appellate court found that the evidence clearly showed employment discrimination at the time of the appellant's rejection for employment and his complaint to EEOC. The court held that while subsequent employment practices are relevant in determining an appropriate remedy, the employment practices at the time complained of, not those at the time of trial, should be considered for determination of whether the employer engaged in employment discrimination.\textsuperscript{24} The appellate court ruled that while there was evidence of employment discrimination against blacks as a class at the time of Parham's rejection for employment and his complaint to EEOC, there was no conclusive evidence that the Company denied Parham employment based on racial considerations.\textsuperscript{25} Therefore, the appellate court denied his claim for an injunction and damages.\textsuperscript{26}

The court noted, however, that the Company implemented its affirmative action program and that the resulting increase in the hiring of black employees occurred subsequent to Parham's complaint to EEOC and the ini-

\textsuperscript{19} Parham, 433 F.2d at 423.
\textsuperscript{20} Id. at 424.
\textsuperscript{21} Id. at 424-25.
\textsuperscript{22} Id. at 425.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 425-26.
\textsuperscript{25} Parham, 433 F.2d at 428.
\textsuperscript{26} Id.
tiation of his lawsuit. Based on these facts, the court found that "Parham's lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII." They noted further that

[i]n this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination against blacks generally prior to February, 1967, Parham is entitled to reasonable attorney's fees, including services for this appeal, to be allowed by the district court as authorized by 42 U.S.C.A. § 2000e-5(k).

B. Looking Backward: A History of Fee Shifting in the United States

Early in this nation's judicial history, the "American rule" against attorneys' fee shifting emerged. The Supreme Court first articulated the rule in 1796 in Arcambel v. Wiseman, when it overturned the inclusion of attorneys' fees as damages, stating "[t]he general practice of the United States is in opposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." The Supreme Court adhered closely to this rule over the course of American history and reaffirmed it in 1975 in Alyeska Pipeline Service Co. v. Wilderness Society. While there may be some statutory exceptions to the rule, those exceptions must be explicitly stated to overcome the American rule. Citizen suits became such an exception.

In classic American tradition, Congress established citizen suits in an effort to afford citizens a check on their government. This practice evolved

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27 Id. at 429.
28 Id. at 429-30 (emphasis added).
29 Id. at 430. The Civil Rights Act of 1964 states that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee . . . ." 42 U.S.C. § 2000e-5(k) (2000).
30 3 U.S. 306 (3 Cranch 1796).
33 Id.; see Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994).
from the common law private attorney general doctrine, by which courts awarded attorneys' fees to plaintiffs who not only vindicated their own interests, but also benefitted all similarly situated plaintiffs. Congress did not trust administrative agencies to enforce environmental laws consistently and therefore wanted to encourage legitimate citizen suits to act as both a check on agency power and as a deterrent to keep agencies from shirking their duties to uphold protection of environmental interests.

Citizen involvement is imperative both in making sure that appropriate laws exist for environmental protection and in implementing those laws to help protect the environment. Many environmental problems manifest themselves in specific localities, and the people who live in the affected areas have a greater interest in protecting those areas than anyone else. Giving them the power to help protect their environment through citizen suits is the most efficient way to ensure protection of the environment. Judicial decisions seeking environmental protection are also much easier to implement with the cooperation of people living in the affected community. In Sierra Club v. Costle, the D.C. Circuit ruled that "[u]nder our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public . . . ." Public participation ensures both that the agencies charged with environ-

35 Loring, supra note 5, at 975.
36 Babich, supra note 34, at 10,141-42.
37 It is interesting to note the likely difference in popularity between environmental statutes that protect the beauty and cleanliness of the environment enjoyed by community residents (such as the Clean Air Act) and those that protect endangered species living in the area (such as the Endangered Species Act). In cases such as Loggerhead Turtle v. County Council, 148 F.3d 1231 (1998) (discussed infra), where citizens may see environmental protection as a hindrance to their enjoyment of property, environmental protection legislation is likely to find opposition in the affected community. In Loggerhead Turtle, environmentalists requested an injunction to keep community residents and others from driving on the beaches and using artificial light sources to illuminate the beaches during sea turtle nesting season. Id. at 1231. Residents in the community were likely to see this as having a negative impact on their enjoyment of property—the average citizen may value the ability to engage in the activities that the suit sought to ban more than he does the presence of sea turtles in the area.
38 Babich, supra note 34, at 10,142-43.
39 Id.
40 657 F.2d 298, 400 (D.C. Cir. 1981) (citation omitted), cited in Babich, supra note 34, at 10,142.
mental protection will seek to fulfill their duty and that they will be successful.

In Alyeska Pipeline Service Co., the Supreme Court rejected the private attorney general doctrine, ruling that the courts were authorized to engage in fee shifting only in response to explicit legislation. Congress responded the next year by passing the Fees Act of 1976, codifying the private attorney general doctrine for prevailing plaintiffs in civil rights litigation. In doing so, Congress explicitly stated their intention to allow fee shifting for prevailing plaintiffs in civil rights cases brought pursuant to statutes lacking fee shifting provisions.

III. KEY CASES

A. Buckhannon: Death of the Catalyst Theory?

Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources arose under the Fair Housing Amendments Act and the Americans with Disabilities Act, which provide that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee. . . ." The controversy began as a result of a West Virginia "self-preservation" statute which prohibited residential care homes and nursing homes from housing individuals who were unable to independently exit the building in the event of a fire. The plaintiffs in the case were nursing facility residents of who were unable to reach a fire exit without

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41 Loring, supra note 5, at 976.
42 Id. at 977.
43 Id. The House report stated that "after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed." H.R. REP. NO. 94-1558, at 7 (1976), quoted in Loring, supra note 5, at 979. The Senate report stated that "parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief." S. REP. NO. 94-1011, at 4 (1976), quoted in Loring, supra note 5, at 979.
47 42 U.S.C. § 3613(c)(2). The ADA uses almost identical language: "In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . ." 42 U.S.C. § 12205 (2000).
48 Buckhannon, 532 U.S. at 623. As of 1998, the statute is no longer in effect.
assistance, led by 102 year old Dorsey Pierce, the Buckhannon home, and an organization of residential homes. They when the state learned of the plaintiffs' limitations, it ordered that the facility close its doors and relocate its population within thirty days.

The plaintiffs commenced litigation to overturn both the cease-and-desist order imposed on the facility and the self preservation statute on which it was based. They alleged that the statute discriminated against persons with disabilities, violating FHAA and ADA. They requested an immediate order stopping defendants from closing the facility, an injunction barring enforcement of the self-preservation statute, damages, and attorney's fees. The plaintiffs stipulated to dismissal of their demands for damages, in response to the state's sovereign immunity pleas. Less than a month after the District Court ruled that the plaintiffs were entitled to a trial, the state legislature repealed the self-preservation rule and moved to dismiss the case as moot. The plaintiffs sought attorneys' fees, claiming to be "prevailing parties" under both FHAA and ADA.

The Supreme Court ruled that the plaintiffs were not entitled to an award of attorneys' fees although they achieved the result that they sought, holding that an award of attorneys' fees pursuant to the catalyst theory was not permitted under FHAA and ADA.

As illustrated by Parham, the catalyst theory is a method of determining whether fees should be shifted from the plaintiff to the defendant based upon the outcome of their interaction as a whole. It does not necessarily require a judicial decision and court remedy in favor of the plaintiff, but that the plaintiff obtain his desired result as a product of the litigation. In cases for injunctive relief, defendants sometimes accede voluntarily to a plaintiff's demands before the court makes its ultimate decision in order to avoid having

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49 Id.
50 Id.
51 Id.
52 Id. at 623-24.
53 Id. at 624.
54 Buckhannon, 532 U.S. at 624.
55 Id.
56 Id.
57 Id. at 600.
58 Definition of "catalyst theory" can be found in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 67 n.6 (1987), cited in Dotson, supra note 3, at 335. See also the application of the catalyst theory in Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 429-30 (8th Cir. 1970).
to pay the defendant’s legal fees as well as being held subject to an injunction. When this happens, the litigation serves as the catalyst for the defendant’s change in conduct, but not the direct cause of that changed conduct, thus the title catalyst theory.

The Supreme Court held in *Buckhannon* that only a party who obtains a judgment on the merits may be considered a “prevailing party” for purposes of an attorneys’ fee award, explaining that a prevailing party must secure either a judgment on the merits or a court-ordered consent decree in order to qualify for an attorneys’ fees award. The Court explained that the problem with the catalyst theory is that it “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” This choice of language indicates that the Court requires a court-ordered change in the legal relationship between the parties in order to find that one has prevailed over the other. The formality involved in the legal question is the vital distinction for purposes of fee shifting—the court must provide the necessary judicial imprimatur to justify an award of attorneys’ fees. The Court’s decision in *Buckhannon* intended to put an end to courts ordering fee awards for plaintiffs who accomplish their goals through voluntary changes in the defendant’s conduct brought about by the lawsuit.

The Court in *Buckhannon*, however, appeared to leave the door open for partially prevailing parties to recover fees. In the opinion, Justice Rehnquist quoted the Court’s decision in *Hanrahan v. Hampton*, stating that “Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims.” He also referenced the Court’s opinion in *Hewitt v. Helms*, saying that according to a literal reading of ordinary language, “a plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail.” Justice Rehnquist added that the Court has held that both awards for nominal

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59 Dotson, supra note 3, at 335.
60 Id.
61 *Buckhannon*, 532 U.S. at 598.
62 Id. at 605.
63 Id. at 598-99.
64 446 U.S. 754 (1980).
65 Id. at 758, quoted in *Buckhannon*, 532 U.S. at 603 (emphasis added).
67 Id. at 760, quoted in *Buckhannon*, 532 U.S. at 603 (emphasis added).
damages\textsuperscript{68} and settlement agreements that are enforced by consent decree\textsuperscript{69} are sufficient to warrant an award of fees. The key distinction is not that one party is held liable; the distinction is that the court has ordered a change in the legal relationship between the parties.\textsuperscript{70} The Buckhannon Court held that the catalyst theory ventures a step beyond what is allowed by allowing awards “where there is no judicially sanctioned change in the legal relationship of the parties.”\textsuperscript{71}

The Court was not swayed by appeals to public policy, calling “speculative” petitioner’s assertion that without the catalyst theory defendants will moot cases prior to judgment to avoid paying fees.\textsuperscript{72} The Court pointed out that the petitioner offered no empirical evidence to support the statement\textsuperscript{73} and countered the assertion by stating that a defendant’s cessation of a challenged practice does not necessarily moot a case because the court still has the power to award damages for past illegal conduct.\textsuperscript{74} Because of this possibility, the Court suggests that defendants have a strong incentive to reach a settlement agreement in which they would have the ability to negotiate attorneys’ fees and costs.\textsuperscript{75} The Court added an additional concern that “[a] request for attorney’s fees should not result in a second major litigation.”\textsuperscript{76}

The first part of the Court’s argument does not apply to claims brought under the ESA’s citizen suit provision because, unlike FHAA and ADA, ESA does not provide for awards of damages.\textsuperscript{77} The second part of the argument, that the courts will take some additional time to decide the issue of fee shifting, may be true. The catalyst theory requires that a “three thresholds” test be satisfied: the plaintiff’s claims must have been colorable, the lawsuit

\begin{itemize}
\item \textsuperscript{68} Farrar v. Hobby, 506 U.S. 103 (1992), noted in Buckhannon, 532 U.S. at 604.
\item \textsuperscript{69} Maher v. Gagne, 448 U.S. 122 (1980), noted in Buckhannon, 532 U.S. at 604.
\item \textsuperscript{70} Tex. Teachers Ass’n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93 (1989), noted in Buckhannon, 532 U.S. at 605.
\item \textsuperscript{71} Buckhannon, 532 U.S. at 605. These references to the legal relationships among parties and the possibility of partially prevailing parties receiving attorneys’ fees awards may be interpreted as prohibiting use of the catalyst test to determine whether a party was partially prevailing when applying statutes allowing for awards of attorneys’ fees to partially prevailing plaintiffs.
\item \textsuperscript{72} Id. at 608.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id. at 609.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), quoted in Buckhannon, 532 U.S. at 609.
\item \textsuperscript{77} 16 U.S.C. § 1540 (1994).
\end{itemize}
must have been a "substantial" cause for the defendant's change in conduct, and the defendant's change in conduct must have been motivated by the plaintiff's threat of victory, rather than expense. Evaluation of these factors will almost certainly involve a review of the facts of the case, often significantly adding to the time that the courts must spend in order to completely dispose of the case. The amount of time, however, will vary from case to case, depending on the facts. While some cases may require long deliberation and a lengthy review of the facts in the case, others may be comparatively straightforward and require a very short period of time to determine the issue of fees. More importantly, Congress has taken great steps to ensure the success of environmental citizen suits and the courts have recognized and supported the legislative intent behind statutes passed with environmental protection in mind. Given this history of support, it is clear that the ability and motivation for concerned citizens to initiate suits for environmental protection should not be impeded by a concern for judicial economy. It is unthinkable that the pursuit of justice should be encumbered by mere speculation that a particular proceeding will lengthen the time a case is before the court.

The Court's opinions in both Buckhannon and its earlier decision in Ruckelshaus v. Sierra Club articulated a policy of following a consistent interpretation of similarly worded fee shifting provisions in different statutes. It is clear that in its Buckhannon opinion, the Court establishes that all fee shifting statutes providing for attorneys' fees awards to "prevailing parties" should be construed in the same manner as were the civil rights statutes at issue in that case, and that the catalyst test is prohibited as a means of determining whether a party prevailed. The opinion also may be interpreted as indicating that the catalyst test may not be used in the implementation of statutes, such as the Endangered Species Act, which provide that a court may award attorneys' fees to a party "whenever . . . appropriate." The exact parameters of the Court's holding are difficult to determine. It is inter-

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78 Buckhannon, 532 U.S. at 610.
79 See supra text accompanying notes 34-40.
80 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978); see also supra text accompanying note 40.
82 See Buckhannon, 532 U.S. at 603 n.4; Ruckelshaus, 463 U.S. at 682 n.1.
testing to note that the Court’s majority opinion in *Buckhannon* neither cites nor references its earlier decision in *Ruckelshaus*. In *Ruckelshaus*, discussed *infra*, the Court held that parties obtaining “some success” on the merits of their cases may be awarded attorneys’ fees. 84

B. *Ruckelshaus v. Sierra Club: A Predecessor to Buckhannon and Possible Redemption for the Catalyst Test in Environmental Citizen Suits*

*Ruckelshaus* was brought under the citizen suit provision of the Clean Air Act (“CAA”), 85 which provides that a court may award reasonable attorneys’ fees “whenever it determines that such an award is appropriate.” 86 The “whenever . . . appropriate” language in the CAA provision 87 is identical to the wording in the Endangered Species Act provision 88 pursuant to which *Loggerhead Turtle* was based. The Court in *Ruckelshaus* noted sixteen other statutes that contained provisions for the award of attorneys’ fees identical or nearly identical to the provision at issue in that case, and indicated that their interpretation of “whenever . . . appropriate” should be applied to each of those statutes. 89 ESA, at issue in *Loggerhead Turtle*, was among the statutes cited. 90

In *Ruckelshaus*, the Supreme Court held that attorneys’ fees cannot be awarded under the CAA citizen suit provision to a plaintiff who has not prevailed on any of the substantive claims involved in the litigation. 91 The Court held that attorneys’ fees can be awarded only to a plaintiff who has prevailed, *at least partially*, on the substantive merits of the litigation. 92 The *Ruckelshaus* opinion does not explicitly discuss whether the catalyst theory may be used to find that a party was a prevailing or partially prevailing party under a statute using the “whenever . . . appropriate” language. The Court, however, does note that the Senate Report pertaining to the CAA citizen suit provision states that filing legitimate actions under CAA is a public service,

84 *Ruckelshaus*, 463 U.S. at 682.
86 *Id.* at § 7607(f).
87 *Id.*
89 *Ruckelshaus*, 463 U.S. at 682 n.1.
90 *Id.*
91 *Id.* at 682.
92 *Id.* at 688-89.
and that courts should award costs to plaintiffs in recognition of this service, even in cases “which result in successful abatement [of the defendant’s behavior complained of] but do not reach a verdict.” The Senate Report seems to describe what is now commonly known as the catalyst test.

Ruckelshaus is arguably more applicable to Loggerhead Turtle than is Buckhannon because of the wording of the statute’s citizen suit provision. Both the CAA and ESA citizen suit provisions allow for awards of attorneys’ fees “whenever . . . appropriate,” while the FHAA and ADA provisions use the more restrictive “prevailing party” language. The language used in the CAA and ESA seems to indicate a call for judicial discretion rather than blind application of a rule of law. Because of FHAA and ADA’s more specific “prevailing party” language, some plaintiffs have argued that the Buckhannon opinion is not applicable to environmental litigation brought under citizen suit statutes using the “whenever . . . appropriate” language.

The controversy in Ruckelshaus centered on Environmental Protection Agency (“EPA”) standards for coal-burning power plants. The Environmental Defense Fund (“EDF”) and the Sierra Club filed petitions for review of EPA’s guidelines in the United States District Court of Appeals for the District of Columbia. EDF argued that EPA’s standards had been written based on the agency’s relationship with representatives of private industry. The Sierra Club claimed that EPA did not have the authority that it needed under CAA to issue the type of standards that it did. The Court of Appeals rejected all of the arguments put forth by both EDF and the Sierra Club.

Despite their failure to win on the merits of their case, the plaintiffs filed a request for attorneys’ fees incurred in the Sierra Club matter, relying on the

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95 See infra text accompanying notes 177-205.
97 Ruckelshaus, 463 U.S. at 681.
98 Id.
99 Id.
100 Id.
101 Id.
citizen suit provision\textsuperscript{102} of CAA.\textsuperscript{103} The language of the provision states that a judge may award attorneys' fees "whenever [the court] determines that such award is appropriate.\textsuperscript{104} The Court of Appeals decided that although the plaintiffs did not win on the merits, it was "appropriate" to award fees to them because of their effort to further the goals of CAA.\textsuperscript{105} The Supreme Court reversed the opinion, stating that "some success on the merits [must] be obtained before a party becomes eligible for a fee award . . . \textsuperscript{106}

The opinion indicates a desire to adhere to the established "American rule," stating that "requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiff's legal fees would be a radical departure from long-standing fee-shifting principles adhered to in a wide range of contexts."\textsuperscript{107} The decision relies heavily on congressional intent, stating that "virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on some success by the claimant," though they contain varying standards.\textsuperscript{108} The Court found that by drafting the CAA provision for fee-shifting the way that it did, Congress intended the "term 'appropriate' [to] modify[y] but . . . not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees."\textsuperscript{109} The Court looked to the 1977 House Report on Section 307(f) to determine the precise meaning of the wording of the statute. The report states that:

\begin{quote}
[T]he purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party."
\end{quote}

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\textsuperscript{102} 42 U.S.C. § 7607(f).
\textsuperscript{103} Ruckelshaus, 463 U.S. at 681.
\textsuperscript{104} 42 U.S.C. § 7607(f), quoted in Ruckelshaus, 463 U.S. at 681-82. This is identical language to the citizen suit provision of the Endangered Species Act ("ESA"), on which the request for fees in Loggerhead Turtle is based.
\textsuperscript{105} Ruckelshaus, 463 U.S. at 681-82.
\textsuperscript{106} Id. at 682.
\textsuperscript{107} Id. at 683.
\textsuperscript{108} Id. at 684.
\textsuperscript{109} Id. at 686.
\end{flushleft}
fact, such an amendment was expressly rejected by the committee . . . \(^{110}\)

The Court next considered what Congress meant by the term "prevailing party" at the time that Section 307(f) was enacted. Generally speaking, the term was construed quite narrowly.\(^{111}\) There were (and still are) many possible definitions of the term. For example, some courts defined "prevailing party" as a party "who prevails as to the substantial part of the litigation . . . ."\(^{112}\) A minority of courts denied fees to plaintiffs who lacked a formal court order granting relief.\(^{113}\) Other courts required that the party seeking the fee award experience "substantial" success, as opposed to some success.\(^{114}\) At the time that Ruckelshaus was decided, courts defined "prevailing party" as a party who prevails on the "central issue."\(^{115}\) Based on these standards, the Court decided that "[s]ection 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties . . . [those] achieving some success, even if not major success."\(^{116}\)

This conclusion is supported by the language of section 36 of S. 252, a forerunner of section 307: "In any case in which such party prevails in part, the court shall have discretion to award . . . reasonable costs."\(^{117}\) Given the legislative and judicial history cited, the Court concluded that completely unsuccessful plaintiffs may not receive fees.\(^{118}\) This decision is in agreement with the later Buckhannon decision on the issue.\(^{119}\) Additionally, as explained

\(^{111}\) Ruckelshaus, 463 U.S. at 687.
\(^{113}\) Ruckelshaus, 463 U.S. at 688.
\(^{114}\) Id.
\(^{116}\) Ruckelshaus, 463 U.S. at 688.
\(^{117}\) S. 252, 95th Cong. § 36 (1976) (emphasis added), quoted in Ruckelshaus, 463 U.S. at 688-89.
\(^{118}\) Ruckelshaus, 463 U.S. at 689.
supra, the Court in Buckhannon seems to be in agreement with the decision in Ruckelshaus that a party may receive a fee award if he partially prevails. The reasoning for Congress' choice of language is undoubtedly a reflection of congressional intent to encourage reasonable citizen suits, but to discourage frivolous suits. Success, even in some small measure, on the merits of a case indicates that the claims were valid and well planned. The legislature was interested in fostering citizens' desires to resolve and prevent problems, not simply to foster litigation. The partially prevailing party standard that the Court articulated in Ruckelshaus acts as a check on frivolous litigation, while not requiring sincere citizen plaintiffs to take a chance on losing more than their claims. It also fulfills the requirement that the court convey judicial imprimatur on the party that receives the fee award, lending more credence to the party's claims through the wisdom of the courts.

C. Interpretation of "Whenever ... Appropriate" Language in Lower Courts

The lower federal courts have not interpreted Ruckelshaus as mandating an automatic award of attorneys' fees to prevailing or partially prevailing parties, but have read the opinion as giving discretion to the courts to determine whether an award is warranted. Some courts have interpreted citizen suit provisions using "whenever . . . appropriate" language to mean that in evaluating whether a prevailing or partially prevailing plaintiff is eligible for an award of attorneys' fees, courts should concentrate on whether the suit furthered the purpose of the statute being litigated or benefited the public interest. In Metropolitan Washington Coalition for Clean Air v. District of Columbia, the D.C. Circuit Court articulated what has been called the "'prudent effort' standard." The court stated that it was "appropriate" for courts to award attorneys' fees to a plaintiff when "in light of what was known . . . when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorneys' fees." In Stoddard v. West Carolina Regional Sewerage Authority, the Fourth Circuit cited its reasoning for awarding attorneys' fees to the plaintiffs by

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120 Babich, supra note 34, at 10,141-43.
121 Plaintiffs-Appellees' Brief at 23, Loggerhead Turtle III (No. 95-00587-CV-ORL-22).
saying that the plaintiffs’ actions “will tend to ensure compliance with the [Clean Water] Act in the very manner contemplated by Congress . . .” and that the plaintiffs “have served the public interest by insisting that the . . . Act be adequately enforced.” The lower courts therefore seem to say that a prevailing or partially prevailing plaintiff is not automatically entitled to collect attorneys’ fees from the defendant; the plaintiffs’ eligibility for a fee award depends on whether the suit sought to further the purpose of the statute being litigated or the public interest and whether it was successful.

The D.C. Circuit Court in Metropolitan Washington Coalition stated that a court may award attorneys’ fees “whenever such an award [is] deemed to be ‘in the public interest,’” reasoning that an award of attorneys’ fees to a citizen plaintiff is “considered . . . consonant with the public interest whenever the underlying suit was a prudent and desirable effort.” This reasoning emphasizes the importance of the plaintiff’s intent as a factor in the balance of whether the plaintiff is entitled to collect attorneys’ fees from the defendant. This position is protective of citizen plaintiffs, urging courts to see their suits from the plaintiff’s point of view. The D.C. Circuit further explained its reasoning by saying, “[t]he attorneys’ fees feature was offered as an inducement to citizen-suits, which Congress deemed necessary; and if the hope Congress had for such suits is to become a reality, decisions on fee-allowance cannot make wholesale substitutions of hindsight for the legitimate expectations of citizen plaintiffs.” Other courts have held that an award of attorneys’ fees is “appropriate” when the plaintiff’s litigation has furthered the public interest by aiding in the interpretation or implementation of the underlying statute as well as by substantially contributing to the statute’s goals. This approach, which focuses on statutory goals, has been called the “‘substantial contribution’ test.”

127 Id.
The approaches taken by the lower courts emphasize the results of the litigation, paying little attention to judicial imprimatur. They seem inclined to consider the big picture in deciding whether to award attorneys’ fees to plaintiffs in citizen suits, attempting to further the congressional intent underlying the statutes, and recognizing the discretionary nature of their option under “whenever . . . appropriate” statutes.

IV. Loggerhead Turtle v. County Council

_L_LOGGERHEAD TURTLE_ is among the latest Circuit Court decisions to hold that _Buckhannon_ does not apply to environmental litigation brought pursuant to citizen suit statutes in which the “wherever . . . appropriate” language is used for determination of attorneys’ fees awards. The decision went well beyond the usual interpretation of the Supreme Court’s position that the standards for statutes using the “whenever . . . appropriate” language are looser than those using the “partially prevailing” language. In _Loggerhead Turtle_, the Eleventh Circuit held that the catalyst test which the Supreme Court rejected in _Buckhannon_ may be used to determine whether fees should be awarded in cases brought under the citizen suit provision of the Endangered Species Act.

A. Procedural History and Arguments of Plaintiffs-Appellees

_Loggerhead Turtle_ was brought in the Eleventh Circuit Court of Appeals under the citizen suit provision of the Endangered Species Act. The plaintiffs sought declarative and injunctive relief, claiming that the county’s refusal to ban driving on the beach and the use of artificial light sources on

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130 The United States Court of Appeals for the District of Columbia recently announced a similar decision, holding that “the Clean Air Act, unlike statutes that authorize fee awards only to ‘prevailing part[ies],’ permits awards to so-called catalysts—parties who obtain, through settlement or otherwise, substantial relief prior to adjudication on the merits.” _Sierra Club v. Envtl. Prot. Agency_, 322 F.3d 718, 719 (2003).


132 _Loggerhead Turtle II_, 307 F.3d at 1319.

133 _Id._ at 1318.

the beach during sea turtle nesting season violated the ESA “take” prohibition. At the district court level, the court awarded the plaintiffs a preliminary injunction. Soon thereafter, the county obtained an incidental take permit from the United States Fish and Wildlife Service, and the court granted its motion for dissolution of the injunction and dismissal of the case. The court of appeals held that the incidental take permit did not allow the county to “take protected sea turtles through purely mitigatory measures associated with artificial beachfront lighting” and reversed and remanded the case. After the case returned to the district court, the county voluntarily amended its lighting ordinance and the court of appeals found the lighting issue to be moot.

The plaintiffs-appellees based their request for fees on the theory that they had partially prevailed in the case on two points: the Eleventh Circuit Court of Appeals’ 1998 decision, and the District Court’s issuance of a preliminary injunction in 1995. In addition, plaintiffs-appellees argued that the District Court did not commit legal error in using the catalyst theory to determine that the award of fees was “appropriate” under the citizen suit provision of the ESA. The court awarded attorneys’ fees to the plaintiffs-appellees in the case primarily on the basis of the catalyst theory, and the defendant’s appeal of the decision was denied.

The Eleventh Circuit went beyond the plaintiff-appellees' arguments in deciding that their suit merited a fee award. In a departure from (or blatant disregard of) the Supreme Court’s denouncement of the catalyst test in Buckhannon, the court held that the “whenever... appropriate” language in CAA and the Clean Water Act (“CWA”) was meant to “allow fee awards to plaintiffs who do not obtain court-ordered relief but whose suit has a positive catalytic effect.”

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135 Loggerhead Turtle III, 307 F.3d at 1319-20.
136 Id. at 1320.
137 Id.
138 Loggerhead Turtle v. County Council, 148 F.3d 1231, 1258 (11th Cir. 1998) [hereinafter Loggerhead Turtle II].
139 Volusia County Ordinance 99-12 (1999).
140 Loggerhead Turtle III, 307 F.3d at 1320-21.
141 Loggerhead Turtle II, 148 F.3d at 1231.
144 Loggerhead Turtle III, 307 F.3d at 1327.
145 Id. at 1326.
B. *Reasoning of the Court in Loggerhead Turtle*

In *Loggerhead Turtle*, the Eleventh Circuit decided that "*Buckhannon* does not invalidate use of the catalyst test as a basis for awarding attorney's fees under the ESA." The court cited three reasons for their decision. The first, and most important, centered on congressional intent. The court decided that "there is clear evidence that Congress intended that a plaintiff whose suit furthers the goals of a 'whenever . . . appropriate' statute be entitled to recover attorney's fees." The court found that Congress intended courts to use the catalyst test to decide motions for fee awards. The opinion quotes from the 1970 Senate Report for CAA, which used language identical to the ESA’s “whenever . . . appropriate” language in its fee shifting provision, saying:

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions that result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

The court’s interpretation based on this language is that cases which are mooted when a party changes its behavior or policy as a result of litigation but prior to a decision by the court are victories which warrant fee shifting, although they lack the judicial imprimatur that was so important in the *Buckhannon* decision.

The second reason that the court gave in support of their holding was that the Supreme Court in *Buckhannon* did not mention the *Ruckelshaus* decision or the class of fee shifting statutes that use the “whenever . . .

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146 Id. at 1325.
147 Id.
148 Id.
149 Id.
151 Id., quoted in Loggerhead Turtle III at 1325 (emphasis added).
152 See supra discussion of judicial imprimatur in text accompanying notes 61-63.
appropriate" language in their opinion. The Court considered only the meaning of "prevailing party," which they called a "legal term of art . . . ." Because the ESA citizen suit provision does not use the "prevailing party" language, the meaning that the Court in Buckhannon attributed to that term as well as its implications for fee shifting are irrelevant in a case brought under the ESA citizen suit provision.

The court's third reason for its holding was a public policy concern. As previously stated, the Court in Buckhannon discounted the petitioner's argument that defendants could avoid liability for fees by voluntarily altering their conduct because "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." The Eleventh Circuit in Loggerhead Turtle disagreed with this assertion. Their opinion points out that under the citizen suit provision of ESA, plaintiffs "may only seek equitable relief; damages are not available." ADA and the FHAA both allow for damages to be assessed against an offending party. This availability of damages issue is another fundamental difference between the statutory provisions underlying the Buckhannon and Loggerhead Turtle cases in addition to the wording in their fee shifting provisions. Because of this difference, the Court's statement in Buckhannon regarding damages has the opposite effect when applied to fee shifting provisions, such as ESA, authorizing only injunctive relief. In fact, there is a greater incentive for defendants to accede to plaintiffs' demands, mooting valid, strong and important ESA cases than they are in weak or close cases, because the defendant will see that the plaintiff has a good chance of prevailing on the merits and obtaining a fee award. A policy of not allowing the use of the catalyst theory for fee shifting will render the citizen suit provision of the ESA ineffective by making it impractical and too costly to bring citizen suits.

153 Loggerhead Turtle III, 307 F.3d at 1326.
154 Id. (citations omitted).
155 Id. (quoting Buckhannon, 532 U.S. at 608-09).
156 Id.
157 Id.
160 Loggerhead Turtle III, 307 F.3d at 1326.
The Eleventh Circuit’s policy concern is illustrated by facts of the Loggerhead Turtle case. “[T]he County amended its lighting ordinance only after more than four years of litigation, closely on the heels of the [appellate court’s] decision favorable to [the plaintiffs]” on the lighting issue.\(^{162}\) This is a clear example of a defendant mooting the plaintiff’s claim in hopes of avoiding an award of attorneys’ fees. Allowing this sort of manipulation virtually ensures that the plaintiff will lose on costs every time. A simple economic calculation leads the defendant to change its conduct to avoid paying the plaintiff’s costs. The court’s tolerance for this sort of behavior transforms this from being the devious choice for the defendant to being the logical one.

C. Ruckelshaus Versus Loggerhead Turtle: A Distinction of Facts

A cursory examination of the facts of the Ruckelshaus and Loggerhead Turtle cases indicates that there is a much stronger case for a fee award to the plaintiffs in Loggerhead Turtle. The factual differences between the two cases may lead some to wonder whether the Court’s decision on fee shifting in Ruckelshaus would have differed if the facts of that case had more closely resembled those in Loggerhead Turtle.

The Court in Ruckelshaus refused to award fees to the plaintiffs because they achieved no success on the merits of their case.\(^{163}\) The Ruckelshaus plaintiffs based their claim for fees on their efforts in support of the goals of CAA.\(^{164}\) The plaintiffs in Loggerhead Turtle, however, did enjoy some success on the merits, which arguably led to the defendant’s change in conduct.\(^{165}\)

The Court in Ruckelshaus stated that the citizen suit provision of CAA is “meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties—parties achieving some success, even if not major success.”\(^{166}\) The facts in Loggerhead Turtle seem to fulfill these requirements. Volusia County changed its lighting ordinance in June of 1999, four years after the plaintiffs filed their complaint. During those four years, the district court granted the plaintiff’s request for a prelim-

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\(^{162}\) *Loggerhead Turtle III*, 307 F.3d at 1327.
\(^{164}\) *Ruckelshaus*, 463 U.S. at 682.
\(^{165}\) See infra text accompanying notes 168-69.
\(^{166}\) *Ruckelshaus*, 463 U.S. at 688.
inary injunction and just prior to the county's decision to change its ordinance, the Court of Appeals ruled that the county's incidental take permit did not authorize them to "take" sea turtles by using artificial light sources.

Through the injunction issued by the district court and the appellate court's decision on the incidental take permit, the plaintiffs clearly achieved some success on the merits of their case before the county mooted the case by acceding to their demands. Just the preliminary injunction would have been enough to classify the plaintiffs-appellees as "partially prevailing." In *Ketterle v. B.P. Oil, Inc.*, the Eleventh Circuit held that a plaintiff who obtains a preliminary injunction that temporarily grants the plaintiff the ultimate relief sought in the litigation is a "prevailing party" who is eligible for an award of attorneys' fees, even if the case is later dismissed as moot.

In *Ruckelshaus*, if the plaintiffs had prevailed on even one point, based on the Court's announced policy, it should have allowed a fee award for the plaintiffs. This would have been a much stronger and clearer precedent.

*Loggerhead Turtle* is also a much stronger case than *Ruckelshaus* from a policy standpoint. As stated earlier, it is a classic case of a defendant intentionally mooting a case in order to avoid payment of the plaintiff's legal fees. There was no change in policy or regulations by the defendant in *Ruckelshaus*. Therefore, the facts of the case gave no incentive for the Supreme Court to make the leap that the Eleventh Circuit did in *Loggerhead Turtle*, in deciding that the catalyst test still applies to statutes using the "whenever . . . appropriate" language. The lack of a policy or regulatory change in *Ruckelshaus* left no opportunity or incentive in that case for the Court to distinguish between citizen suit statutes using the "prevailing party" language versus the "whenever . . . appropriate" language. With regard to the issues that arose in *Loggerhead Turtle*, this is the important question for the Supreme Court to address. It will have to wait, however, until the Court

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167 *Loggerhead Turtle II*, 148 F.3d at 1235.
168 *Id.* at 1246.
169 909 F.2d 425 (11th Cir. 1991).
171 *Ruckelshaus*, 463 U.S. at 688 (saying that the Act was meant to allow a partially prevailing party to receive a fee award if they achieve "'some success,' even if not major success" (emphasis omitted)).
172 *Loggerhead Turtle III*, 307 F.3d at 1327 (stating that the defendant changed its ordinances immediately after the court's decision on the lighting issue).
173 *Ruckelshaus*, 463 U.S. at 681.
grants certiorari in a case where the facts include a defendant changing its conduct as a result of an impending verdict.

1. "Pure" Catalyst Theory Versus Prevailing Party Theory

The plaintiffs in *Loggerhead Turtle* grounded their claim for a fee award in the idea that they were a partially prevailing party. They did not claim that they should have been able to collect attorneys' fees solely on the basis that the county changed its behavior as a result of the pending litigation. Their argument was that the catalyst test should be recognized as an alternative test that may be used to determine whether it is appropriate to award attorneys' fees to a prevailing or partially prevailing plaintiff, in addition to the public purpose tests that were in use in the lower courts. The plaintiffs crossed the threshold to become partially prevailing plaintiffs when the district court granted their preliminary injunction in 1995 and when the court of appeals decided that the county was not authorized to "take" sea turtles through artificial lighting, despite their incidental take permit. Therefore, they satisfied the requirement set by the Supreme Court in *Ruckelshaus* that in order to receive an award of attorneys' fees, a party must obtain "some success on the merits" of its case. The plaintiffs maintained that *Buckhannon* did not control their case because, in that decision, the Supreme Court only addressed the issue of whether the catalyst theory may be used to decide that a party who had achieved no success on the substantive merits of their case was a prevailing party, and because the Court did not modify or mention the *Ruckelshaus* decision in their *Buckhannon* opinion.

The plaintiffs-appellees next argued that the district court did not commit error by using the catalyst theory to determine that it was "appropriate" to award attorneys' fees to them as a partially prevailing party. The Supreme Court's opinion in *Buckhannon* prohibits use of the catalyst test to determine whether a party prevailed in litigation. It does not prohibit the

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175 Id.
176 Id. at 23-26. For a discussion of the public purpose tests used by lower federal courts, see text accompanying notes 111-19.
177 Id. at 19.
178 *Ruckelshaus*, 463 U.S. at 682.
180 Id. at 22.
181 *See Buckhannon*, 532 U.S. at 600.
courts from using the catalyst test to determine whether it is appropriate to award attorneys' fees to a party who has prevailed or partially prevailed on the substantive merits of their case. The plaintiffs-appellees pass the catalyst test and the public purpose test used by the lower federal courts because the county changed its lighting ordinance voluntarily in the manner sought by the plaintiffs-appellees after four years of litigation; that change provided better protection to sea turtles, substantially contributing to the goals of ESA. Therefore, the plaintiffs-appellees' argument adhered to the Supreme Court's opinion in *Ruckelshaus* and also appealed to public policy.

The Eleventh Circuit seemingly took the plaintiffs-appellees claims a step beyond their arguments, saying that it was not necessary for the court to issue a judgment and remedy in the plaintiffs' favor in order for them to collect fees. While the prevailing party theory put forth by the plaintiffs-appellees is arguably in accordance with the Supreme Court's opinions on fee shifting as articulated in *Ruckelshaus* and *Buckhannon*, the Eleventh Circuit's decision that the catalyst test which the Court forbade in *Buckhannon* may still be used under "as appropriate" statutes may seem to disregard the Court's *Buckhannon* opinion. The *Buckhannon* decision makes it clear that the requisite element for a fee award is favorable action by the court. If this is the Court's requirement, the use of the catalyst theory in *Loggerhead Turtle* is indefensible. The Eleventh Circuit defends its decision by drawing distinctions between the statutes involved in *Loggerhead Turtle* and those involved in *Buckhannon*, and between the facts and policy implications of the two cases.

2. Linguistic Distinctions and Policy Implications

There are clear and inherent differences in the wording of the fee shifting provisions of FHAA and ADA involved in *Buckhannon* and those of

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182 Id. at 603 n.5; Plaintiffs-Appellees' Brief at 22, *Loggerhead Turtle III* (No. 95-00587-CV-ORL-22).
183 Plaintiffs-Appellees' Brief at 22-27.
184 *Loggerhead Turtle III*, 307 F.3d at 1325 (saying that a plaintiff may collect an award of fees if a defendant abandons the behavior complained of as a result of the litigation but prior to the verdict).
185 *Buckhannon*, 532 U.S. at 603 (defining "prevailing party" as a party who has been awarded some relief by the court).
186 Id. at 605 (stating that the problem with the catalyst theory is that it does not require any "judicially sanctioned change").
187 See *Ruckelshaus*, 463 U.S. at 681.
ESA involved in *Loggerhead Turtle*. The FHAA and ADA provisions are almost identical and state that the court, “in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee . . .”[^188] The ESA provision states that a court may “award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.”[^189] The “whenever . . . appropriate” model allows for much more discretion by the court. It is possible to read this provision as allowing for use of the catalyst theory as defined in *Loggerhead Turtle*.

The distinction between the two provision models is clear—one says that a “prevailing party” may collect fees, while the other says that “any party” may collect fees at the discretion of the court. It is also important to remember, however, that both types of provisions were enacted for the same purpose: to act as a statutory exception to the American rule of fee shifting for the purpose of encouraging citizens to initiate a socially useful type of litigation. The more compelling distinctions among cases arise when one considers the implications of using either of the two models of fee shifting in the context of the statute in which it lies.

The catalyst test protects citizen plaintiffs from manipulation by defendants who wish to deny liability for their actions and at the same time retain the ability to change them voluntarily if it appears that the plaintiff will prevail. In this way, the “whenever . . . appropriate” model could act as a safety valve for defendants in environmental suits.

The word manipulation sounds harsh, but a defendant’s decision to moot a risky or losing case is based solely on logic. When operating under a prevailing-plaintiff model provision, it simply would be wise for the defendant to change its behavior when faced with the possibility of paying the costs of the plaintiff’s suit. Zealous representation would require the defendant’s counsel to suggest that course of action. The courts are effectively laying the ground rules that will determine the course of environmental litigation, and frequently, the winners and losers.

As the Eleventh Circuit pointed out, the plaintiff’s situation is far more serious in cases initiated under the ESA’s “whenever . . . appropriate” statute than under the FHAA and ADA’s prevailing-plaintiff statutes because of the inability of plaintiffs to collect damages under the ESA’s citizen suit provision. In cases like *Buckhannon*, brought under statutes such as FHAA

or ADA, "so long as the plaintiff has a cause of action for damages, a
defendant's change in conduct will not moot the case," but this safeguard
is not applicable to cases initiated under statutes such as ESA or CWA,
which do not allow for awards of damages. Suits brought under statutes that
do not allow for damages are much more easily mooted, and the Court's
justification in Buckhannon is not applicable to such statutes. When viewed
in this light, the Buckhannon decision does not apply to Loggerhead Turtle.
Given the Court's justification cited above, it is not logical for the same rule
to apply to citizen suit statutes that do not allow for monetary damages.

The Supreme Court, in Buckhannon and other cases, made it clear that
the American rule of fee shifting is to be followed unless there is a clearly
worded, explicitly stated, exception to the rule. It would be harmful in and
of itself to jeopardize judicial certainty by allowing exceptions to such long
standing and deeply rooted rules without good reason. This allegiance to
history and tradition is part of what is at the root of the Court's decision in
Buckhannon. While the "whenever . . . appropriate" model provision
clearly affords the court more discretion than the prevailing party provision,
it is arguably not a clear exception to the American rule. The provision
comes reasonably close to creating an exception by saying that the court may
award fees to any party. This language seems to imply that a party who
loses on the merits of the case may nonetheless benefit from a fee award
from the court. This is simply one possible implication, however.

Whether "whenever . . . appropriate" statutory provisions are an except-
tion to the established rule depends on the meaning of the word "appropriate," but the statutory provisions provide no definition. The judiciary is
clearly in need of a resolution to this issue. It has been suggested that
Congress amend its fee shifting statutes to include the catalyst theory. Until Congress provides specificity, the courts will continue to struggle to
define "appropriate." In Ruckelshaus, the Supreme Court found that any
party who achieves "some success" on the merits of its case is eligible for a
fee award. The lower federal courts have concentrated on public policy in

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190 Buckhannon, 532 U.S. at 608-09.
191 E.g., Arcambel v. Wiseman, 3 U.S. 306 (1796); see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); see also supra text accompanying notes 29-33.
192 Id.
193 Buckhannon, 532 U.S. at 606.
195 Loring, supra note 5, at 1005.
196 Ruckelshaus, 463 U.S. at 682.
deciding when it is appropriate to award attorneys’ fees, often considering the reasons why the plaintiff sought judicial relief and Congress’ intent that plaintiffs initiate citizen suits to further the goals of the underlying legislation.197

In **Loggerhead Turtle**, the Eleventh Circuit noted that, curiously, the Court did not mention its *Ruckelshaus* opinion in its *Buckhannon* opinion.198 The Court must have been aware of its earlier opinion in *Ruckelshaus* but chose not to discuss it. The Court seems to have consciously forgone an excellent opportunity to reconcile the two cases and to finally put to rest the issue of the differences in the language. The Court’s decision not to use *Ruckelshaus* as a precedent or even a reference point in the *Buckhannon* opinion may be perceived as a sign from the Court that the language of the two different statutes carry different meanings. This omission is certainly further indication that the issue as to the use of the catalyst theory to award fees under “whenever . . . appropriate” statutes remains unresolved.

By choosing not to adhere to the standards set forth in *Ruckelshaus* in deciding **Loggerhead Turtle**, the Eleventh Circuit seems to deliberately defy the Supreme Court’s decision in *Buckhannon*, which renounced the use of the catalyst test. It would have been possible for the Eleventh Circuit to decide *Loggerhead Turtle* with the same outcome without taking an additional step beyond the limits set forth by the Court in *Ruckelshaus* because the plaintiffs did prevail on some points during the case on the merits.199 The court could easily have classified the plaintiffs as “partially prevailing parties” and complied fully with the standards set forth in *Ruckelshaus*. Instead, the Eleventh Circuit seems to have taken this opportunity to make a point about fee shifting in environmental citizen suits. The **Loggerhead Turtle** decision serves as an invitation for the Supreme Court to resolve the issue of fee shifting in citizen suits, and the invitation will be strengthened if subsequent cases persist in the use of the catalyst theory in litigation involving statutory provisions using the “whenever . . . appropriate” language.

In choosing to push the case beyond the bounds of *Ruckelshaus*, the Eleventh Circuit attempts to make a point. It appears that the court resents the way that the Supreme Court’s standards for fee shifting tie the court’s

197 For further discussion of the lower federal courts’ interpretation of the “whenever . . . appropriate” standard, see *supra* text accompanying notes 111-19.
198 **Loggerhead Turtle III**, 307 F.3d at 1326.
199 *See supra* text accompanying notes 168-69.
hands, as well as those of plaintiffs. In doing this, the court is taking on a very modern and non-traditional role for a court.\footnote{See Kenneth L. Rosenbaum, The Supreme Court Limits Fee Awards in Unsuccessful Environmental Suits, [1983] 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,244, 10,247-48 (Aug. 1983).}

Courts normally stay within the realm of pure dispute resolution, leaving policymaking to the political process.\footnote{See id.} Dispute resolution is the traditional role of the Supreme Court, and one that the courts have generally accepted throughout American history.\footnote{See Harold Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran—Contra Affair, 97 YALE L.J. 1255, 1305-18 (1988).} It has sometimes been said that the courts are motivated by the fear of reaching too far and being ignored by the other two governmental branches.\footnote{See id. at 1315-16. The judiciary is sometimes viewed as the weakest of the three branches of American government because it lacks the power to compel compliance with its decisions, while the legislature has the “power of the purse” and the power to make laws, and the executive has the power of the military and executive agencies. Id.} This deference to the legislature is evident in the Court’s original announcement of the American rule in Arcambel v. Wiseman, when the Court said “even if [the American rule of fee shifting was] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.”\footnote{Arcambel v. Wiseman, 3 U.S. 306, 306 (1796), quoted in Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 249-50 (1975).} The Court’s words indicate the careful, conservative manner in which they approach their rapport with Congress.

While the courts have the exclusive power to say what the law is,\footnote{Marbury v. Madison, 5 U.S. 137, 177 (1 Cranch 1803).} when they choose to limit their opinions to the case at bar without expanding their reasoning to other issues, the evolution of the meaning of the law tends to move slowly. Modern law introduces the courts more often to the business of policymaking.\footnote{Rosenbaum, supra note 201, at 10,247. Rosenbaum mentions the areas of modern constitutional law and administrative environmental law as being especially progressive areas. Id.} In this capacity, courts are looking to the future and considering not only the facts at issue in the particular case, but also what may happen in subsequent cases.\footnote{Id. at 10,247-48.} This is the role that the Eleventh Circuit boldly assumes in its opinion on Loggerhead Turtle. The opinion is rife with
policy concerns, looking not only backward to determine legislative intent but also forward to ensure effective application of that intent.208

V. SUPPORT FROM OTHER CIRCUITS

The Eleventh Circuit is not the first lower court to interpret the Supreme Court’s decision in Buckhannon as inapplicable to the ESA’s citizen suit provisions and other similarly worded provisions. In August of 2001, the Tenth Circuit announced a similar opinion in Center for Biological Diversity v. Norton209 and the District Court for the Central District of California came to a similar decision in Southwest Center for Biological Diversity v. Carroll.210

A. Center for Biological Diversity v. Norton

The controversy in Center for Biological Diversity arose over the inclusion of the Arkansas River shiner211 on an endangered species list. On August 3, 1994, the Secretary of the Department of the Interior published a proposed regulation to list the Arkansas River Basin population of the shiner as an endangered species.212 This publication triggered a one year period during which the Secretary would have to do one of three things: publish a final ruling listing the shiner as an endangered or threatened species, publish a notice that the one year period would be extended, or publish a notice that the proposed regulation had been withdrawn.213 In the proposed regulation, the Secretary made a finding that the critical habitat for the shiner was not determinable, triggering a two year period during which the habitat had to be designated.214 On April 10, 1995, Congress imposed a one year moratorium prohibiting the Secretary from determining that any additional species were threatened or endangered.215 When the moratorium lifted on April 26, 1997,
the Secretary faced with a backlog of over two hundred and forty proposed listings awaiting final determination, as well as a reduction in funding. In response, the Secretary created a system of priorities to rank the importance of listing activities. When the Secretary had not taken final action on listing the shiner by May 13, 1997, the Center for Biological Diversity submitted a sixty day notice to the Secretary of its intent to sue under section 1540 (g)(2)(C), and filed suit ten months later after receiving no response. The Center filed a Motion for Summary Judgment on May 6, 1998, which was not granted. On November 23, 1998, the Secretary issued a final ruling listing the shiner as a threatened species, mooting the case. The parties entered into a Joint Stipulation of Dismissal on December 7, 1998, and the Center filed a motion for litigation costs the following March.

The Tenth Circuit Court of Appeals decided that, based on the language in the citizen suit provision of the ESA, a court is free to award attorneys’ fees “whenever . . . appropriate.” Although they recognized the Court’s admonition in Ruckelshaus against awarding fees for parties who have not achieved “some degree of success on the merits,” the Tenth Circuit decided that it could use the catalyst test, forbidden just a few months before the Center for Biological Diversity decision was rendered, because there was never any adjudication on the merits. The court, however, refused to award costs because the Secretary entered evidence that the plaintiffs’ lawsuit was not causally linked to the decision to list the shiner as a threatened species.

Although the plaintiffs did not receive the fees that they requested, the Tenth Circuit’s decision articulates an opinion that courts are free to use the catalyst test in cases that arise from the citizen suit provision of ESA, and from other statutes that use the same language. The court discussed the recent Buckhannon opinion in footnote two of its opinion. In that discussion, the

216 Id.
217 Ctr. for Biological Diversity, 262 F.3d at 1079.
218 Id.
219 Id.
220 Id. at 1080.
221 Id.
222 Id.
224 Ctr. for Biological Diversity, 262 F.3d at 1080.
225 Id. at 1081 (noting that the Secretary entered paperwork showing work on the shiner began months before the plaintiffs filed their suit).
226 Id., at 1080 n.2.
court pointed to the variations in language between the citizen suit provisions in FHAA and ADA versus that in ESA provision and stated that the difference was striking enough that *Buckhannon* is inapplicable to suits brought under statutes using the "whenever . . . appropriate" language.\(^{227}\)

**B. Southwest Center for Biological Diversity v. Carroll**

*Southwest Center for Biological Diversity*\(^{228}\) involved the effect of building a dam on plants and animals in the surrounding area. In the 1980s, the Army Corps of Engineers ("the Corps") proposed construction of the Seven Oaks Dam as part of a project to provide flood control along portions of the Santa Ana River.\(^{229}\) Pursuant to ESA, the Corps consulted with the United States Fish and Wildlife Service ("FWS") before beginning the project.\(^{230}\) FWS conducted a study which concluded that the project would not jeopardize the existence of the Santa Ana River woolly star,\(^{231}\) but it did not address the effect that the project would have on either the slenderhomed spineflower,\(^{232}\) the San Bernardino kangaroo rat,\(^{233}\) or their habitat.\(^{234}\) Plaintiffs filed an action for declaratory judgment and injunctive relief against the Corps in March of 1999.\(^{235}\) In June, the court granted Western Municipal Water District of Riverside and San Bernardino Valley Municipal Water District’s Motion to Intervene and in November of 2000, the court entered

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\(^{227}\) *Id.*

The statute at issue in this case . . . contains no express requirement that the party seeking attorney’s fees be the “prevailing party” but, instead provides, “The court, in issuing any final order in any suit . . . may award costs . . . to any party, whenever the court determines such award is appropriate.” Thus, the basis of the Court’s conclusion in *Buckhannon* is not applicable in this case.

*Id.* (citations omitted).

\(^{228}\) 182 F. Supp. 2d 944 (C.D. Cal. 2001).

\(^{229}\) *Id.* at 945.

\(^{230}\) *Id.*

\(^{231}\) The Santa Ana River wooly star is an endangered plant species.

\(^{232}\) The slenderhomed spineflower is also an endangered plant species.

\(^{233}\) The San Bernardino kangaroo rat is an animal that was not listed as endangered with ESA at the time of the Seven Oaks dam proposal.

\(^{234}\) *Southwest Ctr. for Biological Diversity*, 182 F. Supp. 2d at 945-46.

\(^{235}\) *Id.* at 946.
the parties' stipulation to a voluntary dismissal.\textsuperscript{236} Plaintiffs and the intervening districts moved for an award of attorneys' fees.\textsuperscript{237}

The Supreme Court rendered its opinion in \textit{Buckhannon} while the Central District of California was deciding this case and the court took the decision under careful consideration.\textsuperscript{238} The court came to the decision that, because of the variations in the language of the statutory provisions relied upon in the two cases, the \textit{Buckhannon} decision was not applicable to the case and awarded attorneys' fees to the plaintiffs pursuant to the catalyst theory.\textsuperscript{239} The court decided that in coming to the conclusion that the catalyst theory should not apply in the context of FHAA and ADA, "the Supreme Court [had] expressly relied on the plain meaning of the language in [the] statutes . . . ."\textsuperscript{240} The court found that the ""whenever . . . appropriate" language of the ESA is distinguishable on its face" from the FHAA and ADA "prevailing party" language, and therefore, decided that the Supreme Court had not considered applicability of the catalyst test to fee provisions of ESA.\textsuperscript{241} The court considered congressional intent and decided that, based on the legislative history of CAA quoted in \textit{Ruckelshaus},\textsuperscript{242} Congress wanted to encourage citizen suits and, to that end, wanted to allow for fee awards to plaintiffs even in cases that were mooted by desirable action on the part of the defendant.\textsuperscript{243}

\section*{VI. Current Status of the Law and Conclusion}

Based on analyses of the \textit{Buckhannon} and \textit{Ruckelshaus} opinions and the three lower court decisions which interpreted those opinions, it seems that the Supreme Court did not effectively ban use of the catalyst theory for citizen suit provisions that use ""whenever . . . appropriate" language. The courts are clearly still using the catalyst theory to award attorneys' fees in citizen suits filed under ESA and other similarly worded statutes.\textsuperscript{244} Congress chose to

\begin{thebibliography}{999}
\bibitem{236} \textit{Id.}
\bibitem{237} \textit{Id.}
\bibitem{238} \textit{Id.}
\bibitem{239} \textit{Id.} \textsuperscript{946-48.}
\bibitem{240} \textit{Southwest Ctr. for Biological Diversity}, 182 F. Supp. 2d at 947 (stating that "prevailing party" is the language relied upon).
\bibitem{241} \textit{Id.} at 947.
\bibitem{242} \textit{Id.}
\bibitem{243} \textit{Id.}
\bibitem{244} \textit{See Loggerhead Turtle III}, 307 F.3d at 1318; \textit{Southwest Ctr. for Biological Diversity}, 182
\end{thebibliography}
articulate the provisions for fee shifting differently in different statutes, and has explicitly stated a desire to encourage legitimate environmental litigation through fee shifting.\textsuperscript{245} Until the Supreme Court decides the controversy over statutory fee shifting in citizen suits, explicitly reconciling the apparent differences among the various statutes, or until Congress clarifies its intentions through more specific legislation,\textsuperscript{246} the lower courts will struggle with this issue. Hopefully, they will continue the apparent trend toward allowing use of the catalyst theory in cases brought under ESA and similarly worded "whenever . . . appropriate" statutes, allowing the fruitful continuation of environmental litigation in defense of our world and all of its inhabitants.

F. Supp. 2d at 944; Ctr. for Biological Diversity v. Norton, 262 F.3d 1077 (10th Cir. 2001).
\textsuperscript{245} See supra text accompanying notes 110, 151, 189-90.
\textsuperscript{246} Loring, supra note 5, at 973.