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I. INTRODUCTION

Environmental plaintiffs now have fewer opportunities to receive attorney fees in the wake of the United States Court of Appeals for the Eleventh Circuit's decision in *Friends of the Everglades v. South Florida Water Management District* (Friends of the Everglades II). In this case the court further narrowed what plaintiffs' civil suits must accomplish to have a “positive catalytic effect.” While many circuits, including the Eleventh Circuit, have focused on what it means for a party to be a “prevailing party” under various statutory schemes, and thus receive attorney fees, this case marks the first time the Eleventh Circuit has defined what is sufficient to constitute a change for purposes of the positive catalyst theory when reading the Clean Water Act's “whenever ... appropriate” language in conjunction with this theory. In this case the court held that when a plaintiff’s lawsuit spurs an agency to

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1. 678 F.3d 1199 (11th Cir. 2012).
2. Id. at 1202.
3. The language in environmental statutes provides for two different standards to determine when fee-shifting occurs: the “prevailing or substantially prevailing party” standard and the “whenever ... appropriate” standard. Lucia A. Silechis, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 11-12 (2004). The “appropriate” standard is more common in environmental statutes, but the positive catalyst theory plays a role in both standards. Id. at 12-13. While this Note will address the positive catalyst theory in the “whenever ... appropriate” standard's context, the theory's history with regards to the “prevailing party” standard is also important.
5. *Friends of the Everglades II*, 678 F.3d at 1201-02; see also 33 U.S.C. § 1365(d).
make new rules that are adverse to the plaintiff's position, the lawsuit will not be considered to have a positive catalytic effect and, thus, attorney fees are not "appropriate."  

II. FACTUAL BACKGROUND

In 2002, various environmental groups brought a suit to stop the South Florida Water Management District from pumping polluted canal water into a local lake. The plaintiffs wanted to force the Water District to obtain a National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act, which requires all "point sources" to apply for a permit when they "discharge[, or add,] any pollutant" into "navigable waters." Point source, discharge, pollutant, and navigable waters are all specifically defined under the Clean Water Act, and the controversy centered on whether transferring contaminated water from one navigable water—the canal—to another navigable water—the lake—constituted an "addition of [a] pollutant to navigable waters . . . ."

The district court ruled in favor of the environmental groups, finding that pumping polluted water from one navigable water to another was a "discharge" under the Clean Water Act. Accordingly, the district court issued an injunction to stop the Water District from transferring the polluted water. The Water District appealed, but before the case was resolved, the Environmental Protection Agency (EPA) promulgated a new rule that specifically excluded water transfers from the requirement to obtain NPDES permits. Ultimately, the Eleventh Circuit

6. Friends of the Everglades II, 678 F.3d at 1202.
11. Friends of the Everglades I, 570 F.3d at 1215.
gave *Chevron*13 deference to EPA's new rule and reversed the district
court's injunction.14

That reversal influenced the court's decision in *Friends of the
Everglades II*. After the Eleventh Circuit overturned the injunctive
relief to the environmental groups, the district court denied the
plaintiffs' request for attorney fees, concluding the environmental groups
were not a "prevailing party" on appeal.15 The environmental groups
then appealed that subsequent denial of attorney fees.16 The Eleventh
Circuit affirmed, holding that attorney fees were not appropriate because
the environmental groups' suit had no positive catalytic effect on the
EPA's actions.17

III. LEGAL BACKGROUND

A. The Catalyst Theory Under the "Prevailing Party" Standard

In 1970, the United States Court of Appeals for the Eighth Circuit was
the first to articulate the catalyst theory in *Parham v. Southwestern Bell
Telephone Co.*,18 although the case did not involve an environmental
statute. In that case the plaintiff claimed his employer had violated
Title VII of the Civil Rights Act of 196419 by engaging in racially

decision in *Chevron* set out a two-part test for whether courts will defer to an agency's
interpretation of its rules and regulations promulgated under the statute that the agency
is tasked with administering. *Id.* at 842-43. The first question is whether the statute is
ambiguous; if not, then the court makes no further inquiry and defers to Congress's clear
intent. *Id.* On the other hand, if the court determines the statute is ambiguous or silent
on the issue at hand, then the court continues to the second part of the test—whether the
agency's interpretation is reasonable. *Id.* In *Friends of the Everglades I*, the court of
appeals reached the second part of the *Chevron* test and held that EPA's interpretation
regarding water transfers was reasonable. 570 F.3d at 1227-28.

14. *Friends of the Everglades I*, 570 F.3d at 1227-28; see *Friends of the Everglades II*,
678 F.3d at 1201.

section provides attorney fees “to any prevailing or substantially prevailing party,
whenever the court determines such award is appropriate.” 33 U.S.C. § 1365(d).


17. *Id.* at 1202.

18. 433 F.2d 421 (8th Cir. 1970); see Marisa L. Ugalde, *The Future of Environmental
Citizen Suits After Buckhannon Board & Care Home, Inc. v. West Virginia Department of
Health & Human Resources, 8 ENVT. L. 589, 599 (2002) (“The first judicial articulation of
the catalyst theory of fee shifting occurred in *Parham v. Southwestern Bell Telephone Co.*”);
VA. L. REV. 1429, 1434 (1994) (identifying *Parham* as “the first judicial articulation of
catalyst theory”).

discriminatory employment practices. Before the district court rendered its judgment, the company stopped its discriminatory conduct. Accordingly, the court of appeals declined to issue an injunction but awarded attorney fees for two reasons. First, "[the plaintiff's] lawsuit acted as a catalyst which prompted the [defendant] to take action . . . ." Second, the plaintiff "performed a valuable public service in bringing [his] action." Thus, the original catalyst theory applied only to the fee-shifting provision in Title VII and required a plaintiff's suit to cause the defendant to positively and voluntarily alter his or her conduct towards the plaintiff.

Four years later, in 1974, the United States Court of Appeals for the District of Columbia Circuit extended the catalyst theory to environmental litigation in Wilderness Society v. Morton. The plaintiff in Wilderness Society successfully sued to halt construction of the trans-Alaska pipeline. As a result of that litigation, Congress amended the Mineral Leasing Act of 1920 to specifically permit construction of the pipeline. While the main issue and holding concerned the private attorney general theory, which is no longer a viable method under which plaintiffs may receive attorney fees, the court of appeals relied on Parham to adopt the catalyst theory. Notably, the court took a different viewpoint than the Eighth Circuit regarding what constitutes a positive change. Whereas the Eighth Circuit defined positive change from the plaintiff's perspective—that the defendant's voluntary actions must align with what the plaintiff originally sought in the lawsuit—the District of Columbia Circuit defined positive change from society's viewpoint. The court reasoned that the plaintiff's lawsuit had a positive catalytic effect because it had indirectly caused Congress

22. Id.
23. Id.
24. Id. at 430.
25. Id. at 429-30.
26. 495 F.2d 1026, 1034 (D.C. Cir. 1974).
27. Id. at 1028.
29. Id.; see also Wilderness Society, 495 F.2d at 1033.
30. Wilderness Society, 495 F.2d at 1034 ("Where litigation serves as a catalyst to effect change and thereby achieves a valuable public service, an award of fees may be appropriate even though the suit never proceeds to a successful conclusion on the merits.").
31. Id. at 1034-35.
32. Parham, 433 F.2d at 429-30.
33. Wilderness Society, 495 F.2d at 1034-35.
to take action: "[forcing [the defendant] to go to Congress to amend the 1920 Act certainly was not a sterile exercise in legal technicalities devoid of public significance." Overall, the District of Columbia Circuit's 1974 decision both extended the catalyst theory to environmental lawsuits and expanded the theory's positive-change aspect to include the value to society.

Shortly after these two circuits adopted this method for awarding attorney fees, the United States Supreme Court indirectly halted the spread of the common law catalyst theory in its *Alyeska Pipeline Service Co. v. Wilderness Society* decision. Although the Court did not consider the catalyst theory in that case, Justice White's majority opinion held that only the legislature, not the judiciary, may award attorney fees to prevailing litigants through statutory authorization. The Court reasoned that the only exceptions to the American rule—which states that generally each party to a lawsuit pays for its own litigation costs, including attorney fees—had previously been mandated by Congress through legislation. Therefore, federal courts "[were] not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation . . . depending upon the courts' assessment of the importance of the public policies involved in particular cases."

Congress responded swiftly. In 1976, federal legislators passed the Civil Rights Attorney's Fees Award Act in response to the Supreme Court's *Alyeska Pipeline Service Co.* decision. Although the relevant statutory language did not mention the catalyst theory by name, this legislation created a broad authorization for attorney fee awards in a variety of civil rights cases. Importantly, Congress implicitly recognized the catalyst theory by citing *Parham* with approval in Senate Report No. 94-1011. The report also mentioned a number of environ-
mental statutes with "[s]imilar standards [as the Civil Rights Attorney's Fees Award Act] ... providing for attorneys' fees," suggesting that Congress also contemplated the catalyst theory for environmental litigation, not solely civil rights litigation.46

After such congressional authorization, all the circuit courts of appeal adopted the catalyst theory, albeit in civil rights litigation. For example, the United States Courts of Appeal for the First and Seventh Circuits soon recognized the catalyst theory for awarding attorney fees in civil rights litigation under various sections of Title 42,47 consistent with the Civil Rights Attorney's Fees Award Act.48 Additionally, the United States Court of Appeals for the Ninth Circuit placed great weight on the Act's legislative history by stating that "the Senate Report directs that [plaintiffs] be awarded fees" when their "lawsuit 'acted as a catalyst which prompted the [defendant] to take action.'"49 By the end of 1990, the remaining federal courts of appeal followed suit and joined the First, Seventh, Eighth, Ninth, and District of Columbia Circuits in applying the catalyst theory.50

Even the Supreme Court implicitly adopted the catalyst test after Congress passed the Civil Rights Attorney's Fees Awards Act, but not in the context of environmental litigation.51 In its Hanrahan v. Hamp-
The Court interpreted the term "prevailing party" in the Act's attorney fee provision for civil rights litigation. The Court cited the legislative history of the Act, specifically Senate Report No. 94-1011, implying the catalyst test was an acceptable method of recovering attorney fees.

However, the Supreme Court seemed to indirectly rattle the foundation of the catalyst theory—despite unanimity among the circuit courts, many of which had cited Hanrahan, that attorney fees are available under the catalyst theory—when Justice Thomas wrote the majority opinion in Farrar v. Hobby. Although the Court did not directly address the catalyst theory or consider "prevailing party" status in the context of environmental litigation in Farrar, the majority held that nominal damages—which "modify[ed] the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay"—are no grounds for awarding attorney fees. Moreover, the precedents relied upon by the majority were the same cases that supported the development of the catalyst theory, thus calling the catalyst theory's basis into question.

The plaintiff in Farrar sued state government officials for closing the troubled youth school he operated and depriving him of procedural due process. Although the jury found the defendant government official had deprived Farrar of a civil right, it also found the deprivation was not a proximate cause of Farrar's injury, thus rendering the plaintiff unsuccessful at trial. The United States Court of Appeals for the Fifth Circuit remanded to the district court for entry of judgment of nominal damages, based on the jury's finding of a civil rights deprivation. Farrar then sued for attorney fees since he technically was awarded nominal relief. The Supreme Court ultimately denied attorney fees to Farrar, holding that the "plaintiff prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. The Court defined "relief" as "an enforceable judgment against the defendant from whom fees are sought, or comparable relief.

52. 446 U.S. 754 (1980).
53. Id. at 756-58.
56. Id. at 113.
57. Id. at 115.
58. See id. at 109-12.
59. Id. at 105-07.
60. Id. at 111-12.
through a consent decree or settlement.61 However, the Court noted that its prior precedent required a "generous formulation" of the term "prevailing party."62

This decision created a split among the federal circuit courts in 1994. The United States Court of Appeals for the Fourth Circuit, in light of Farrar, overruled its prior holding in Bonnes v. Long,63 the case in which that circuit had adopted the catalyst theory. In S-1 & S-2 v. State Board of Education of North Carolina,64 the court of appeals expressly overruled its prior decision in Bonnes by citing Farrar, holding that "[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. 'Catalyst theory,' allowing that result, is no longer available for that purpose . . . "65 Additionally, the Court of Appeals for the Seventh Circuit, while originally holding that the catalyst test survived Farrar,66 later wavered on that holding in its Board of Education of Downers Grove Grade School District No. 58 v. Steven L.67 decision and implicitly questioned whether the catalyst theory is still available.68 Although the Seventh Circuit's language in Downers Grove "at least questions the viability of the catalyst test,"69 the court did not cite or overrule its prior holding that applied the catalyst theory.70

The remaining circuit courts also questioned the continued viability of the catalyst test to prevailing parties after Farrar, but no others rejected the catalyst theory. The Eleventh Circuit, for example, declined to extend Farrar to eliminate the catalyst test when it decided Morris v. City of West Palm Beach,71 noting that it joined the majority of the

61. Id. at 111 (internal citations omitted).
62. Id. at 109.
63. 599 F.2d 1316 (4th Cir. 1979).
64. 21 F.3d 49 (4th Cir. 1994).
65. Id. at 51.
66. See Zinn v. Shalala, 35 F.3d 273, 276 (7th Cir. 1994) ("We agree that Farrar does not preclude the award of fees when plaintiffs attain the relief they seek through defendants' voluntary action. We simply find it implausible that the Supreme Court meant to abolish a rule employed by nearly every circuit and previously recognized by the Court itself as 'settled law,' without expressly indicating that it was doing so.").
67. 89 F.3d 464 (7th Cir. 1996).
68. See id. at 469 ("The outcome of this suit resulted in no enforceable obligations for the school district. Any relief that Andrew and his parents received was not in the form of a judgment or settlement. Thus, . . . Andrew and his parents cannot be considered to have substantially prevailed, and no attorneys fees or costs will be awarded to them under the applicable federal statute.").
69. Morris v. City of W. Palm Beach, 194 F.3d 1203, 1206 n.5 (11th Cir. 1999).
70. See Downers Grove, 89 F.3d at 468-69.
71. 194 F.3d 1203 (11th Cir. 1999).
other circuits that had already addressed the issue. The court reasoned, along with the other circuits, that Farrar did not mention the catalyst test and concerned an issue regarding the degree of relief, not the form of relief. The court also pointed out that the Farrar majority's "broad language . . . [did] not indicate how it would rule on the question of whether a showing that a plaintiff's lawsuit caused the defendant to act . . . can justify a fee award." Because of the catalyst test's "long history and the important policies undergirding [it]," the Eleventh Circuit did not abolish the catalyst theory.

The most recent blow to the catalyst theory's application came in 2001 when the Supreme Court decided Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources. Before that case, the catalyst theory gave plaintiffs greater opportunity to receive attorney fees because it did not require a "judicially sanctioned change in the parties' legal relationship." In that case, the Supreme Court directly addressed the catalyst test under the "prevailing party" standard in civil rights statutes, holding that plaintiffs may not receive an award of attorney fees using the catalyst test. The Court reasoned that a plaintiff only prevails when he "has been awarded some relief by the court," including a judgment, consent decree, or settlement. Thus, civil rights plaintiffs could no longer recover simply because their litigation brought about a voluntary change in the defendant's conduct, since such change, "although perhaps accomplishing

72. Id. at 1206 n.5 ("The First, Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have all found, explicitly or, in the case of the First Circuit, implicitly, that the catalyst test survived Farrar.") (citing Payne v. Bd. of Educ., Cleveland City Sch., 88 F.3d 392, 397 n.2 (6th Cir. 1996); Sivers v. Pierce, 71 F.3d 732, 751-52, 753 n.10 (9th Cir. 1995); Marbly v. Bane, 57 F.3d 224, 234 (2d Cir. 1995); Beard v. Teska, 31 F.3d 942, 951 (10th Cir. 1994); Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 548-50 (3d Cir. 1994); Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., 17 F.3d 260, 263 n.2 (8th Cir. 1994); Craig v. Greg County, Texas, 988 F.2d 18, 20-21 (5th Cir. 1993); Paris v. U.S. Dep't of Hous. & Urban Dev., 988 F.2d 236, 238 (1st Cir. 1993)).
73. Morris, 194 F.3d at 1206-07.
74. Id. at 1207.
75. Id.
77. James D. Brusslan, High Court Rejects "Catalyst" Theory: Momentum Shifts to Citizen Suit Defendants, 32 ENV'T REP. (BNA) 1349 (July 6, 2001).
79. Buckhannon, 532 U.S. at 602.
80. Id. at 603.
what the plaintiff sought to achieve by the lawsuit, lack[ed] the necessary judicial *imprimatur* . . . \(^{81}\)

B. The Catalyst Theory Under the “Whenever . . . Appropriate” Standard

While the *Buckhannon* decision marked the end of the catalyst theory under statutes that use the “prevailing party” standard in both civil rights and other types of litigation,\(^{82}\) a few circuit courts of appeal and at least one district court continued to apply the catalyst test to environmental statutes whose fee-shifting provisions use the “whenever . . . appropriate” standard.\(^{83}\) Notably, the Eleventh Circuit is among them. The Eleventh Circuit held in *Loggerhead Turtle v. County Council of Volusia County*\(^{84}\) that “the Supreme Court’s decision in *Buckhannon* does not prohibit use of the catalyst test as a basis for awarding attorney’s fees and costs under the . . . Endangered Species Act.”\(^{85}\) The Eleventh Circuit, like the other courts who have similarly restricted *Buckhannon*’s application, reasoned that the “whenever . . . appropriate” language in certain environmental statutes differed from the “prevailing party” standard at issue in *Buckhannon*.\(^{86}\)

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81. *Id.* at 605.

82. *Silecchia*, supra note 3, at 42-44, 47-48 (citing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Federal, and District of Columbia Circuits that applied *Buckhannon*’s bar on the catalyst test to statutes besides the ones at issue in *Buckhannon*).


84. 307 F.3d 1318 (2002).

85. *Id.* at 1327. The Endangered Species Act, 16 U.S.C. § 1540(g)(3)(B)(4) (2006), states: “The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.”

As the legal history of the catalyst theory shows, courts have predominantly applied this test under the "prevailing party" standard in non-environmental litigation. In the midst of the catalyst theory's development in civil rights litigation, however, the Supreme Court's *Ruckelshaus v. Sierra Club* decision in 1983 marked an important step in the test's development. That case specifically addressed the "whenever . . . appropriate" standard in environmental litigation and how to apply it, but the Court did not consider the catalyst theory.\(^8\)

In *Ruckelshaus*, the plaintiffs challenged certain air pollution regulations promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act.\(^9\) Although the Court of Appeals for the District of Columbia Circuit ultimately held the regulations were reasonable—hence not making the plaintiffs "prevailing parties," either "in whole or in part"—it nevertheless awarded attorney fees to the plaintiffs because they "substantially contribute[d] to the goals of the [Clean Air] Act."\(^10\) The court of appeals also noted that Sierra Club's participation in the case significantly contributed to the "court's education on each part of the [challenged] rule [and] informed its decision on other parts."\(^11\)

Despite this reasoning the Supreme Court reversed the award of attorney fees, concluding "the term 'appropriate' modifie[d] but [did] not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees."\(^12\) The Court examined the history of the "prevailing party" standard and determined that the Clean Air Act's attorney fee provision,\(^13\) which used the "whenever . . . appropriate" standard, awarded attorney fees to "partially prevailing parties—parties achieving some success, even if not major success."\(^14\) Thus, the Court implicitly rejected the argument that advancing the

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\(^{88}\) Id. at 682; *see also* Silecchia, *supra* note 3, at 23.
\(^{90}\) Sierra Club v. Gorsuch, 672 F.2d 33, 38-39 (D.C. Cir. 1982).
\(^{91}\) Id. at 41.
\(^{92}\) *Ruckelshaus*, 463 U.S. at 686.
\(^{93}\) 42 U.S.C. § 7607(f) (2006) ("In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.").
\(^{94}\) *Ruckelshaus*, 463 U.S. at 687-88.
relevant statute's goals constitutes success under the "whenever . . . appropriate" standard, but did not consider the catalyst theory.  

IV. COURT'S RATIONALE

In Friends of the Everglades II, the Eleventh Circuit gave only limited review to the district court's decision to deny attorney fees to the environmental plaintiffs. The court decided the case under the abuse of discretion standard. In the absence of clear error, application of an incorrect legal standard, or adherence to improper procedures, the court held the positive catalytic effect is an available means of awarding attorney fees "to plaintiffs who do not obtain court-ordered relief." However, the court redefined what constitutes a positive effect. In doing so, the court drew on the principles outlined above, but also set a new direction in some respects for this circuit.

The court of appeals began by reiterating the traditional American rule for attorney fees as set forth in Alyeska Pipeline Service Co.—that absent congressional authorization for shifting fees, each party is responsible for its own costs. Because the Clean Water Act's fee-shifting provision, which was at issue in the case, includes both the "prevailing party" and the "whenever . . . appropriate" language, the court addressed the interplay between these two standards by citing to its own Loggerhead Turtle decision and the Supreme Court's Ruckelshaus precedent. The Clean Water Act's fee-shifting provision states, in relevant part: "The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such award is appropriate." Comparably, the Endangered Species Act's fee-shifting provision, which contains a purely "whenever . . . appropriate" standard and was at issue in Loggerhead Turtle, states: "The court . . . may award costs of litigation (including reasonable

95. See id.
96. 678 F.3d at 1201.
97. Id.
98. Id.
99. Id. at 1202-03.
100. Id.
101. Id. at 1201.
103. Friends of the Everglades II, 678 F.3d at 1202 ("As the Supreme Court has explained, the term 'appropriate' modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees.").
104. 33 U.S.C. § 1365(d).
attorney and expert witness fees) to any party, whenever the court
determines such award is appropriate.\textsuperscript{105}

Before analyzing the Clean Water Act's standard, the court of appeals
defined "prevailing party" using both the Supreme Court's meaning and
Eleventh Circuit precedent, as "one who prevails on 'any significant
issue' and thereby achieves some of the benefits sought by bringing
suit"\textsuperscript{106} and "who prevail[s] in what the lawsuit originally sought to
accomplish."\textsuperscript{107}

The court also outlined two situations in \textit{Friends of the Everglades II}
in which attorney fees would be appropriate: "when the moving party
has advanced the goals of the Act\textsuperscript{108} and when the plaintiff's suit has
a positive catalytic effect.\textsuperscript{109} Read together, these two situations seem
to suggest that advancing the goals of the Clean Water Act, or any other
environmental statute for that matter, constitutes a positive change.
Furthermore, the original policy reason\textsuperscript{110} used by at least two circuits
to support the catalyst theory in environmental litigation—that
indirectly causing \textit{any} kind of legislative action on an environmental
statute results in a positive change for society—seems to support finding
a positive catalytic effect when legislation is changed due to a law-
suit.\textsuperscript{111} This policy still supports such a finding here, despite the fact

\textsuperscript{105} 16 U.S.C. \textsection 1540(g)(4).
\textsuperscript{106} \textit{Friends of the Everglades II}, 678 F.3d at 1201 (quoting Tex. State Teachers Ass'n
\textsuperscript{107} \textit{Id.} (quoting Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1532 (11th Cir. 1996)).
\textsuperscript{108} \textit{Id.} at 1202 (citing Chemical Mfrs. Ass'n v. U.S. Envtl. Prot. Agency, 885 F.2d
1276, 1279 (5th Cir. 1989)). Significantly, this formulation of what constitutes "appropriate"
in fee-shifting provisions differs from the Supreme Court's implied rejection of such a
definition in \textit{Ruckelshaus}, where the plaintiff had contributed to the goals of the Clean Air
Act but nevertheless was denied attorney fees. \textit{See} 463 U.S. at 687-88.
\textsuperscript{109} \textit{Friends of the Everglades II}, 678 F.3d at 1202.
\textsuperscript{110} \textit{See}, e.g., \textit{Gorsuch}, 672 F.2d at 36; Village of Kaktovik v. Watt, 689 F.2d 222, 224
(D.C. Cir. 1982); Ala. Power Co. v. Gorsuch, 672 F.2d 1, 3 (D.C. Cir. 1982) (per curiam)
("[T]he dominant consideration is whether litigation by that party has served the public
interest . . . ."); Env'tl. Def. Fund, Inc. v. EPA, 672 F.2d 42, 49 (D.C. Cir. 1982) ("[I]t is
'appropriate' to make awards . . . where such award is in the public interest without regard
to the outcome of the litigation."); Metro. Wash. Coal. for Clean Air v. District of Columbia,
639 F.2d 802, 804 (D.C. Cir. 1982) (per curiam) (same); Natural Res. Def. Council, Inc. v.
EPA, 484 F.2d 1331, 1338 (1st Cir. 1973) ("We are at liberty to consider not merely 'who
won' but what benefits were conferred."); \textit{see also} Walter B. Russell, III & Paul Thomas
Gregory, \textit{Note, Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and
interest" policy reason for awarding attorney fees to environmental plaintiffs under the
"whenever . . . appropriate" standard).
\textsuperscript{111} \textit{See} \textit{Wilderness Society}, 495 F.2d at 1033-35.
that regulations, not legislation, were changed in this case.\textsuperscript{112} Indeed, environmental statutes' citizen suit provisions allow citizens to sue the EPA Administrator when there is a failure to promulgate regulations, which suggests that one of the goals of such statutes is to ensure that new rules are made, regardless of which party they benefit.\textsuperscript{113}

However, the court of appeals did not discuss general policy reasons in its opinion.\textsuperscript{114} Rather, the court relied heavily on the precedential definitions of "prevailing party" and "whenever . . . appropriate." The court simply stated that "[a]ll that can be said of the [plaintiff's] action is that it led the EPA to promulgate rules contrary to the [plaintiff's] position. We do not think this renders the [plaintiff] a 'substantially prevailing' party; nor is this what was intended by the idea that a law suit has a positive catalytic effect."\textsuperscript{115} The court further reasoned that, while "Congress intended to permit courts to award fees 'to plaintiffs . . . whose suit has a positive catalytic effect,' it did not intend for this provision to extend to unsuccessful parties."\textsuperscript{116} The practical result is a shift in what constitutes a positive change for purposes of the catalyst theory. New regulations promulgated as a result of a plaintiff's lawsuit but adverse to that plaintiff's position in the litigation are not a sufficient change to receive attorney fees under the catalyst test in the Eleventh Circuit.\textsuperscript{117}

\section*{V. IMPLICATIONS}

The Eleventh Circuit's holding in \textit{Friends of the Everglades II} narrowed the circumstances under which environmental plaintiffs may receive attorney fees.\textsuperscript{118} Commentators agree that limiting the availability of attorney fees significantly impacts plaintiffs' lawsuits, although much of this discussion arose in the early 2000s after \textit{Buckhannon} was
decided.\textsuperscript{119} However, \textit{Buckhannon}'s implications are similar to those of \textit{Friends of the Everglades II} because both holdings restricted the circumstances in which plaintiffs may receive attorney fees.\textsuperscript{120}

Perhaps the most significant implication of the Eleventh Circuit's holding is that environmental plaintiffs will reconsider bringing suit because the financial risks of doing so are greater.\textsuperscript{121} This is especially true if a plaintiff is "motivated by factors other than simply claiming victory . . . . The initiation of a lawsuit may be a strategic decision intended to garner publicity and to prompt political or agency action . . . ."\textsuperscript{122} For instance, a plaintiff who would have brought suit to achieve a clearer definition of a particular rule or regulation\textsuperscript{123} may be more reluctant to do so for fear of incurring significant legal fees.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{119} See Silecchia, \textit{supra} note 3, at 5; Ugalde, \textit{supra} note 18, at 608-14; William Funk, \textit{Court Rejects "Catalyst Theory" for Qualifying for Attorneys Fees}, \textit{ADMIN. \& REG. L. NEWS}, Summer 2001, at 12 (stating that the practical effects of limiting the availability of attorney fees may be significant in that a defendant may drag out the litigation as long as possible); Brusslan, \textit{supra} note 77, at 1349.
\item \textsuperscript{120} See \textit{Buckhannon}, 532 U.S. at 610 (holding that "the 'catalyst theory' is not a permissible basis for the award of attorney's fees under" the prevailing party standard); \textit{Friends of the Everglades II}, 678 F.3d at 1202 (holding that while "Congress intended to permit courts to award fees to plaintiffs . . . whose suit has a positive catalytic effect," it did not intend for this provision to extend to unsuccessful parties).
\item \textsuperscript{121} Ugalde, \textit{supra} note 18, at 609 (stating that restricting the catalyst theory "will result in an inevitable reluctance of environmental public interest groups to bring suit because the risk involved in such litigation is now exacerbated"); Hope M. Babcock, \textit{How Judicial Hostility Toward Environmental Claims and Intimidation Tactics By Lawyers Have Formed the Perfect Storm Against Environmental Clinics: What's the Big Deal About Students and Chickens Anyway?}, 25 J. ENVTL. L. \& LITIG. 249, 285-86 (2010) ("While recovery of attorneys' fees is important to public interest environmental plaintiffs, an attorney fee award is crucial for an environmental clinic dependent on outside funds for its continued existence. Since plaintiffs cannot recover money damages when they win an environmental case, often the only way that environmental attorneys can be reimbursed for their time and expenses is through court-awarded attorneys' fees and costs."); see also Brusslan, \textit{supra} note 77, at 1349 ("Environmental citizen groups often rely on the award of attorneys' fees as a major incentive in filing their actions."); Jeanne Marie Zokovich Paben, \textit{Approaches to Environmental Justice: A Case Study of One Community's Victory}, 20 S. CAL. REV. L. \& SOC. JUSTICE 235, 244 (2011) ("A prevailing party's ability to recoup costs in environmental cases has been a driving force in allowing many environmental justice cases to be brought.").
\item \textsuperscript{122} Ugalde, \textit{supra} note 18, at 609.
\item \textsuperscript{123} See Keith N. Hylton, \textit{Fee Shifting and Incentives to Comply With the Law}, 46 VAND. L. REV. 1069, 1084 (1993) (stating that strategic behavior is the reason litigation occurs, and "[o]ne form of strategic behavior is a defendant's desire to litigate in order to . . . change the legal rule in a desired direction").
\item \textsuperscript{124} Russell & Gregory, \textit{supra} note 110, at 326-27 (describing why environmental litigation fees are so expensive); Ugalde, \textit{supra} note 17, at 610 ("Environmental litigation is extremely costly and requires substantial resources rarely at the disposal of environmen-
A defendant may avoid paying attorney fees by successfully lobbying an agency to adopt new rules favorable to its position in a lawsuit but adverse to that of the plaintiff. A plaintiff, then, still must pay its own attorney fees, despite having prompted the agency to change its applicable regulations. Fewer opportunities for recovering fees also means that attorneys may be less willing to represent environmental groups because such representation is often handled on a contingency fee basis. Even in particularly strong cases with a high probability of success on the merits, plaintiffs who would otherwise be encouraged to bring such suits may be wary to do so with a diminished probability of recovery under the catalyst theory. Therefore, environmental groups and their lawyers will likely reconsider bringing suit when faced with the possibility of a costly expenditure combined with less opportunity for recouping those expenses.

This likely decrease in the number of environmental citizen suits leads to the second important implication: reduced enforcement of, and compliance with, environmental laws. One purpose of citizen suits and their accompanying fee-shifting provisions is to aid agencies, which have limited resources, by enforcing environmental laws.


127. Ugalde, *supra* note 18, at 610; see Brusslan, *supra* note 77, at 1349 (stating that “diminishing the prospect of [attorneys’ fees] ... has a chilling effect on the filing of citizen suits”); see also Buente, Gerard & Visser, *supra* note 126, at 329 (discussing how the prospect of an attorney fees award “may play a significant role in the frequency with which [environmental] claims are brought”).


129. See Ugalde, *supra* note 18, at 610-12; Mark Seidenfeld, *An Apology for Administrative Law in the Contracting State*, 28 Fla. St. U. L. Rev. 215, 236 (2000) (noting that “citizen suits have been used to provide meaningful enforcement without the agency having to spend its resources”); Beverly McQueary Smith, *The Viability of Citizens’ Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 40 Case W. Res. L. Rev. 1, 56 (1990) (“Since no regulatory agency at the federal or state level can or will have adequate resources to ensure comprehensive enforcement of [environmental] statutes, citizen suits are a mechanism to turn over a portion of the burden of law enforcement to members of the private sector.”); Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Envtl. L. & Pol’y F. 39, 43 (2001) (noting that “agencies are constrained by scarce resources, limited information, and political pressures[,] ... [so] Congress enacted environmental citizen-suit provisions to help address these concerns by enabling local citizens and environmental groups to supplement governmental enforcement efforts.”).
private entities willing to bring suit thus results in less enforcement of environmental statutes. Because citizen suits fill a "necessary void" in the enforcement of environmental regulations, "allowing compensation to citizen groups through the award of fees furthers [the] goals [of citizen suits] by providing an incentive to continue to augment agency enforcement." Furthermore, willing violators of these laws are more likely to continue their illegal behavior once they know that potential plaintiffs are less likely to file suit. Therefore, limiting plaintiffs' chances of recovering attorney fees under the catalyst theory will likely result in both decreased environmental enforcement and increased violations.

Indeed, the Eleventh Circuit noted in response to Buckhannon, well before Friends of the Everglades II was decided, that eliminating the catalyst rule "would cripple the citizen suit provision" of environmental statutes. While the catalyst test is still a viable means of recovery in the Eleventh Circuit, Friends of the Everglades II curtailed the theory's application. Narrowing the catalyst rule may not completely cripple the test but will likely leave it to limp along instead.

The "whenever . . . appropriate" standard and fee-shifting provisions generally not only give defendants an incentive to follow the law, but also provide an impetus to settle. Specifically, "[t]he catalyst theory enhance[s] these incentives by giving substance to the fee-shifting provisions." For example, prior to Friends of the Everglades II, a defendant had an incentive to settle a lawsuit if an agency began to consider changing the regulations at issue in the case. Such rulemaking, undertaken as a result of the lawsuit, would have entitled the plaintiff to attorney fees, thus imposing a cost on the defendant regardless of whether the defendant won the suit. After this case, the defendant will likely have a greater incentive to lobby the agency to promulgate rules in the defendant's favor—rather than to settle the suit—because new regulations adverse to the plaintiff provide the defendant an escape hatch under the catalyst theory. Thus, narrowing the availability of the catalyst theory will likely create a disincentive to settle.

130. Ugalde, supra note 18, at 612.
131. See id. at 611 ("Defendants may find it more advantageous economically to continue violating the law because of the reduced risk of a fees award.").
132. See id. at 610-12; Brusslan, supra note 77, at 1349.
133. Loggerhead Turtle, 307 F.3d at 1327.
134. 678 F.3d at 1202-03.
135. Ugalde, supra note 18, at 612; Hylton, supra note 123, at 1121.
136. Ugalde, supra note 18, at 612 (citing McCrory, supra note 125, at 130-31).
137. See Loggerhead Turtle, 307 F.3d at 1325.
138. See Ugalde, supra note 18, at 612.
Although courts have generally allowed recovery under the catalyst theory for statutes employing the "whenever . . . appropriate" standard, few decisions have given clear contours to the test's limits. At this time the Eleventh Circuit is the only circuit that has directly addressed what constitutes a positive change for purposes of the catalyst theory. The general lack of federal appellate court action may not prompt the Supreme Court to address the issue of the catalyst rule's viability under the "whenever . . . appropriate" standard, especially given the fact that the Supreme Court has already denied at least one petition for certiorari to address the catalyst theory under the "whenever . . . appropriate" standard.

Congressional leadership, on the other hand, may be more appropriate than judicial intervention for addressing the specifics of the catalyst theory. A legislative lead, rather than a judicial lead, is likely the better avenue for ensuring that environmental plaintiffs receive attorney fees because a narrow approach for awarding fees—such as the one taken by the Eleventh Circuit in Friends of the Everglades II—"prevents courts from straying from the 'American Rule' without a clear congressional mandate." Legislative action is important for areas like environmental law in which plaintiffs often sue the government "because courts must respect sovereign immunity by declining to expand Congressional waivers of it too broadly."

Furthermore, clear legislative action gives plaintiffs the benefit of a bright-line rule's predictability regarding attorney fee awards under the catalyst theory. In turn, a clear delineation as to when attorney fees are available removes the ambiguity about whether the catalyst test applies and thus decreases litigation. Arguably, the Eleventh Circuit's holding may appear to draw such a bright-line rule. However, the fact that no other circuit has addressed what constitutes a positive effect under the catalyst test begs the question, and thus could actually create litigation. Therefore, a clear Congressional statement

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139. See Silecchia, supra note 3, at 58.
141. Silecchia, supra note 3, at 59.
142. See id.
143. Id. (quoting Michael W. Kelly, Weakening Title III of the Americans With Disabilities Act: The Buckhannon Decision and Other Developments Limiting Private Enforcement, 10 ELDER L.J. 361, 371 (2002) (internal quotation marks omitted)).
144. Silecchia, supra note 3, at 59 (citing Adam Babich, Fee Shifting After Buckhannon, 32 ENVTL. L. REP. 10, 137 (2002)).
145. See id. at 60.
146. See id.
147. See generally id. at 59-60.
regarding a sufficient positive effect under the catalyst theory will likely give predictability for attorney fees and stem possible litigation in the future, both of which are benefits for environmental plaintiffs.

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