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Liability for Cost of Litigation that Accrue after Litigation Is Complete: Costs Associated with Monitoring Compliance with Established Consent Decrees are Part of Litigation Costs. Sierra Club v. Hankinson

C. Travis Hargrove

CASE NOTE

LIABILITY FOR COST OF LITIGATION THAT ACCRUE AFTER LITIGATION IS COMPLETE: COSTS ASSOCIATED WITH MONITORING COMPLIANCE WITH ESTABLISHED CONSENT DECREE'S ARE PART OF LITIGATION COSTS

Sierra Club v. Hankinson[1]

I. INTRODUCTION

The Clean Water Act[2] ("CWA") was designed by congress and is interpreted by the courts, in ways most favorable to ensuring the tranquility of America's waterways. In the instant case, *Sierra Club v. Hankinson*, the Eleventh Circuit reviewed a district court decision assigning litigation cost liability to the losing party. The district court considered part of prevailing party's litigation costs to be the cost of the plaintiff monitoring the bodies of water *after* the consent decree was put into effect. These costs, which are not technically part of the litigation. arose after litigation in the instant case occurred. Therefore, the defendant claimed that he was not liable for such post monitoring costs since litigation was completed when the consent decree was effectuated.

II. FACTS AND HOLDING

In *Hankinson*. "Georgia ignored its obligation to produce a [Water Quality Limited Segment ("WQLS")] list for thirteen years after the 1979 statutory deadline for submission."[3] The state finally produced a partial list of WQLS in 1992. but two years later, it still had not adequately complied with the requirements of the CWA.[4] As a result. the Sierra Club and other environmental organizations filed suit under 33 U.S.C. § 1365(a) in an attempt to force the EPA to update the WQLS list and issue Total Maximum Daily Loads ("TMDLs") because of Georgia's non-compliance with the Act.[5] The district court granted summary judgment for the plaintiffs;[6] and the court "ordered the EPA to issue complete TMDLs on a relatively strict five-year schedule."[7] The EPA appealed the summary judgment. and while the appeal was pending, it entered into a consent decree with the Sierra Club "requiring that the EPA review and update Georgia's WQLS list."[8] During the next year, the same parties signed another consent decree. this time in regard to a timetable for the EPA to establish TMDLs for each body of water on Georgia's WQLS list.[9] This list was to be updated biannually by the EPA beginning on October 16. 1997.[10]

The EPA's first list of TMDLs for 124 WQLSs was submitted at the same time as the second consent decree.[11] However. two years later Georgia still had not incorporated this list into its water management plan,

[1] 351 F.3d 1358 (11th Cir. 2003).
[2] 33 U.S.C. § 1251 (2000).
[3] *Sierra Club* 351 F.3d 1358 at 1360.
[4] *Id.*
[5] *Id.* (citing Sierra Club v. Hankinson. 939 F. Supp. 872. 873 (N.D. Ga. 1996)).
[6] *Id.* (cjting *Hankinson.* 939 F. Supp. at 873).
[7] *Id.* (citing *Hankinson.* 939 F. Supp. at 873).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

"and neither . . . [Georgia] nor the EPA had moved to implement them in other ways."[12] The Sierra Club then filed a motion requesting the district court reopen the second consent decree in order to compel cooperation.[13] The state of Georgia promised the Sierra Club that it would "develop implementation plans within nine months."[14] Georgia did produce these plans within a satisfactory amount of time, and at that time the EPA requested the district court dismiss the Sierra Club's motion as moot.[15] The district court denied the motion and ruled that the "implementation plans formed part of the consent decree, and that the EPA therefore had an obligation to assure that the plans were adequate."[16] Previously, in *Sierra Club v. Meiburg*,[17] the United States Court of Appeals for the Eleventh Circuit rejected the district court's interpretation holding that the plan "did not fall within the terms of the [second] consent decree."[18]

The Sierra Club then requested the court of appeals award it litigation costs and "attorneys' fees under 33 U.S.C. § 1365(d) for its work in monitoring EPA compliance with the consent decree."[19] The district court denied the requests for all fees relating to TMDL implementation, time spent on redundant work, general background research, unsuccessful motions, and certain litigation issues:[20] then it awarded $139,963.57 to the plaintiffs, which included the $30,425.61 fee of non-testifying expert witness Barry Sulkin.[21] The EPA then appealed from this decision to the Court of Appeals for the Eleventh Circuit.[22]

On appeal, the EPA first argued that the fees awarded were for work that was beyond the scope reasonably necessary to monitor compliance with the consent decree.[23] The EPA claimed that *Meiburg* only required the Agency to establish TMDLs in some form.[24] The EPA argued that the plaintiffs could "recover the costs necessary to determine *whether* the agency promulgated standards," but there was no requirement to inspect the standards in any detail.[25] The Eleventh Circuit disagreed, pointing out that its holding in *Meiburg* "simply noted that implementation plans were not mentioned within the definition of TMDL . . . EPA obligations, or anywhere within the consent decree."[26] The consent decree in the instant case required that "each stage of TMDL proposals by the EPA relate[] to a new WQLS list promulgated by the state of Georgia, making review of the underlying WQLS lists essential to monitoring the TMDLs themselves."[27] The Eleventh Circuit agreed with the district court's decision that the "examination of the content of the TMDLs, WQLS lists and PPAs 'was necessary to meaningful enforcement of the Consent Decree.'"[28] Additionally, the court of appeals used the relevancy standard set in *Brooks v. Georgia State Board of Elections*,[29] to hold that the

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] 296 F.3d 1021 (11th Cir. 2002)
[18] *Sierra Club*, 351 F.3d at 1360
[19] *Id.*
[20] *Id.* at 1360-61.
[21] *Id.* at 1361.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* "In fact, the decree explicitly states the EPA 'does not obligate itself to perform, or ensure the performance of' the incorporation of TMDLs into future Georgia EPA Performance Partnership Agreements." *Id.*
[27] *Id.* at 1362.
[28] *Id.* (citing Order at 7).
[29] 997 F.2d 857, 864 (11th Cir. 1993). Following *Brooks*, the court held that post judgment monitoring of a consent decree must be "'relevant to the rights' established by the decree and 'related to the terms of the judgment.'" *Sierra Club*, 351 F.3d at 1362 (citing *Brooks*, 997 F.2d at 864).

information in the consent decree appeared "relevant to those rights established by the decree and related to terms of the judgment."[30]

The EPA's second argument focused on the plaintiffs' right to challenge TMDLs in the future under the consent decree.[31] The EPA reasoned that this right implied that the consent decree only covered the existence of TMDLs, not the TMDLs compliance with applicable laws.[32] It argued that challenges to TMDLs in the future would require distinct issues and "new administrative records" in that any such claims would be separate from the rights granted in the consent decree.[33] The Eleventh Circuit reasoned that if the plaintiffs had discovered inadequate standards, they could have returned to the district court on motion for enforcement of the consent decree standards.[34] This was allowable because the consent decree gave the court jurisdiction to issue orders "necessary or appropriate to construe, implement, modify, or enforce" the consent decree.[35]

Finally, the EPA argued the fee-shifting provision of the consent decree did not cover the cost of a non-testifying expert witness.[36] The district court awarded such fees payable by the EPA to the non-testifying expert witness Barry Sulkin because the litigation "had been especially complex and that he had 'helped plaintiffs prevail.'"[37] The EPA claimed Sulkin could not have helped plaintiffs "prevail" since he only helped monitor the established consent decree.[38] The Eleventh Circuit rejected this argument based on policy announced in *Pennsylvania v. Delaware Valley Citizens' Council*,[39] where the Supreme Court held that "Congress enacted the fee-shifting provision in order to 'encourage citizen participation in the enforcement of standards and regulations established under [the Clean Air] Act.'"[40] The Eleventh Circuit previously recognized that *Delaware Valley* "employed a pragmatic test over a technical one in construing the attorney's fees statute."[41] In that case, the Supreme Court was more concerned with the measures to secure the rights delineated in the consent decree than the "technical definition of 'litigation costs.'"[42] Based on this reasoning, the Eleventh Circuit affirmed the district court's award of fees for the non-testifying expert witness used after litigation had been completed.[43]

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[30] *Sierra Club*, 351 F.3d at 1362.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] 478 U.S. 546 (1986).
[40] *See Sierra Club*, 351 F.3d at 1363 (quoting S. REP. NO. 91-1196 (1970)).
[41] *Id.* at 1364 (citing Brooks v. Ga. State Bd. of Elections, 997 F.2d 857, 863 (11th Cir. 1993)).
[42] *Id.*
[43] *Id.*

III. LEGAL BACKGROUND

A. The Clean Water Act[44]

The development of the Clean Water Act began in 1890 and was named the Rivers and Harbors Act of 1890.[45] The original Act only affected New York Harbor, and only applied to waste that would interfere with navigability.[46] The Act was amended in 1899 to grant power to the Secretary of the Army to issue permits for discharging waste into navigable waters, regardless of whether the waste would impede navigability.[47]

In 1912, concern over pollution in lakes and streams began to arise, and the Public Health Service was given the power to investigate possible health effects of such pollution.[48] However, the Public Health Service was not given any power to alleviate pollution.[49] Despite Congress's realization of the dangers of water pollution, and attempts to pass bills geared toward national regulations of water pollution it was unable to accomplish anything in the 1930's. In 1948 Congress enacted the Federal Water Pollution Control Act (also known as the Clean Water Act).[50] One of the purposes of the Act was to "bolster local pollution control programs with technical services and money."[51]

In 1965, the Act was amended to give the federal government more power by permitting it to regulate water quality standards for interstate waters.[52] This version of the Act was still considered ineffective due to "its limited scope and difficulties with determining violations the standards adopted" to control interstate waters.[53]

The Clean Water Act as we know it today was enacted in 1972.[54] This 1972 revision of the old Federal Water Pollution Control Act was designed to provide incentives to encourage individuals and industry to reduce and control the amount of water pollution they produced.[55] Through the CWA's statutory regulation, the government seeks to return the Nation's waters to their "chemical, physical, and biological integrity" and maintain this level of purity.[56] The 1965 version of the Act was significantly revised because of the adoption of the National Pollutant Discharge Elimination System ("NPDES"), which replaced the River and Harbors Act permit system.[57]

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[44] 33 U.S.C. §§ 1251-1376 (2000).

[45] Jason R. Jones, *The Clean Water Act: Groundwater Regulation and the National Pollutant Discharge Elimination System*, 8 Dick. J. Envtl. L. & Pol'y 93, 96 (1999). *See also* N. William Hines, Nor Any Drop to Drink: Public Regulation of Water Quality, 52 Iowa L. Rev. 799, 803 (1967).

[46] Jones, *supra* note 45, at 96.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 96-97.

[53] *Id.* at 97. *See also generally* 33 U.S.C § 1251 (2000).

[54] Walter G. Wright, Jr. & Albert J. Thomas, III, *The Federal/Arkansas Water Pollution Control Programs: Past, Present, and Future*, 23 U. Ark. Little Rock L. Rev. 541, 588 (2001). *See also* Bridget B. Romero, Note, *Is There a Need to Regulate Mussel Harvesting? The Ninth Circuit Declares No Pollution, No Problem!*, 10 MO. ENVTL. L. & POL'Y REV. 158, 160 (2003).

[55] Wright & Thomas, *supra* note 54, at 590.

[56] 33 U.S.C. § 1251(a)(2000). *See also* Romero, Note, *supra* note 54, at 160.

[57] Jones, *supra* note 45, at 97.

B. NPDES Permits and WQLS Lists

The primary regulatory mechanism of the CWA is the NPDES.[58] This system requires permits be issued in order to legally discharge any pollutants.[59] The agency primarily responsible for the implementation and enforcement of NPDES programs is the EPA;[60] however, the EPA is permitted to relinquish this authority to the state itself.[61] Under the CWA, every state must designate and categorize all "bodies of water"[62] in its territories and set appropriate water quality standards based upon their designated uses.[63] Additionally, if a party discharges a pollutant from a discrete "point source,"[64] that party must obtain a NPDES permit from the EPA (or another approved state agency) specifying the precise amount of discharge allowed.[65] If a discharge occurs in violation of a NPDES permit, it is deemed unlawful.[66] This is significant since the EPA can "delegate the NPDES program" to individual states.[67] In effect, this causes the amount of pollution required to violate a NPDES permit to vary from state to state.[68] The issue arises in that all the government need show to prove a CWA violation is that a permit holder violated the terms of the NPDES permit.[69] So an individual state could set its standards below what the EPA would have, and a CWA violation can still occur. In turn, this means that if a party is complying with its NPDES permit, it is not violating the CWA.[70]

If the pollution is originating from a "diffuse, 'non-point' source,"[71] it renders the water quality standards unattainable by use of the NPDES permits alone.[72] These bodies of water are referred to as WQLS,

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[58] *See* 33 U.S.C. § 1342.

[59] *Id.* at § 1342(a)(1).

[60] *Id.*

[61] *Id.* at § 1342(b).

[62] The EPA defines "waters of the United States" as follows:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (b) All interstate waters, including interstate "wetlands;"
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
> (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
> (2) From which fish or shellfish are or could be taken and sold in interstate commerce; or
> (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
> (f) The territorial sea; and
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. 122.2 (2004).

[63] Sierra Club v. Hankinson, 351 F.3d 1358, 1359-60 (11th Cir. 2003). *See also* 33 U.S.C. § 1313(a)-(c).

[64] "Point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). *See also* 40 C.F.R. § 122.2. "The definition of a point source is to be broadly interpreted, and an entire facility may be a point source." Jones, *supra* note 45, at n.28 (quoting *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319 (S.D. Iowa 1997)).

[65] *Sierra Club*, 351 F.3d at 1360. *See also* 33 U.S.C. § 1342.

[66] 33 U. S.C. § 1311(a).

[67] Romero, Note, *supra* note 54, at 162.

[68] *Id.*

[69] 33 U.S.C. §1319(b), (d).

[70] Romero, Note, *supra* note 54, at 162.

[71] A "non-point source" has been defined as "one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit." S. REP. NO. 414, at 98-99 (1971).

and for each of these the state must establish a TMDL.[73] The TMDL "specifies the highest level of each pollutant that may pass" into the body of water each day.[74] Each state is expected to establish TMDLs by using "appropriately stringent point source permits" and various other measures to control non-point sources.[75] The EPA has the responsibility of making sure that each state develops WQLS lists and TMDLs, as well as, approving each state's WQLS list and TMDLs.[76] Furthermore, if a state fails to fulfill these duties as required under the CWA, the EPA becomes the responsible party for the initial creation and enforcement of the WQLS list and TMDLs.[77]

C. Fee-shifting Provisions

The fee-shifting provision of the CWA states that a court may award costs of litigation "to any prevailing or substantially prevailing party whenever the court determines that such an award is appropriate."[78] There are essentially two elements that the court must find present in order to award the costs of litigation.[79]

First, the court must determine whether an award for litigation costs to the substantially prevailing party is "appropriate."[80] The Supreme Court has defined "appropriate" as "specially suitable, fit, or proper" by using the definition from Webster's dictionary.[81] The Supreme Court has stated that such an award is only appropriate "when a party has prevailed, substantially prevailed, or been successful."[82] The First Circuit has found that the language "whenever appropriate" gives the court "great judicial latitude in awarding fees . . . ."[83] That court reasoned that "the purpose of an award of costs and fees . . . is to allocate the costs and litigation equitably, to encourage the achievement of statutory goals."[84] The "appropriate" element is not much of a barrier to an award of litigation costs since most courts generally award such fees as long as a party has substantially prevailed.[85]

The second element states that a party must be the prevailing party or substantially prevailing party.[86] The Supreme Court has dealt with the issue of who is a prevailing party in a lawsuit many times.[87] In 1980, the Supreme Court held that a party need not go to trial to receive a favorable judgment,[88] and has noted that a

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[73] Sierra Club v. Hankinson, 351 F.3d 1358, 1360 (11th Cir. 2003).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id. See also* Sierra Club v. Meiburg, 296 F.3d 1021, 1024-27 (11th Cir. 2002).
[79] 33 U.S.C. § 1365(d) (2000).
[80] Jason Douglas Klein, *Attorney's Fees and the Clean Water Act after* Buckhannon, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 109, 111-12 (2003).
[81] *Id.* at 116.
[82] Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 (1983) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 106 (1976)).
[83] Klein, *supra* note 79, at 116. (quoting *Ruckelshaus*, 463 U.S. at 683).
[84] *Id.* (citing Natural Res. Def. Council, Inc., v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973)).
[85] *Id.* (quoting *Natural Res. Def.* 484 F.2d at 1338).
[86] *See id.* at 115.
[87] *See* Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation*, at 7-12 (1994), *available at* http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index (discussing generally the cases decided through 1994, by the Supreme Court relating to attorney fees and the issue of who is the prevailing party).
[88] Maher v. Gagne, 448 U.S 122, 129 (1980). In *Maher*, the respondent filed a complaint "alleging that Connecticut's Aid to Families with Dependent Children regulations denied her credit for substantial portions of her actual work-related expenses." *Id.* at 125. The court held that despite the fact that the plaintiff prevailed by settlement rather than through litigation did not "weaken her claim to fees." *Id.* at 129. The court stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Id.* (citing S. REP. NO. 94-1011, at 5 (1976)).

consent decree or settlement was enough to fulfill the "prevailing" requirement.[89] In the 1987 Supreme Court case of *Hewitt v. Helms*,[90] the Court held that a prevailing party is one that wins judgment on at least some of its claims.[91]

In 1988, the Fourth Circuit stated in *National Wildlife Federation v. Hanson*[92] that it should interpret the term "'prevailing' in light of the goals of the Clean Water Act" in environmental litigation.[93] It reasoned that to do otherwise would be to frustrate the legislative intent of awarding fees.[94] The court noted that the legislative history of the fee shifting provisions "indicates that they were enacted to encourage litigation and ensure proper administrative implementation of environmental statutes."[95] Furthermore, the court stated that in environmental suits the plaintiffs obtain no financial benefit or vindication of personal rights as one in a civil suit would.[96]

Then, in 1992, the *Farrar v. Hobby*[97] Court held that the award of nominal damages was enough to consider a party prevailing.[98] However, that Court also stated that the amount of nominal damages could have a direct bearing on the amount of attorneys' fees awarded under the fee shifting provision.[99]

Before 1994, there was another theory upon which a party could be determined to be prevailing: the "catalyst theory."[100] Under this theory, a party could prevail "even if it did not obtain judgment on the merits," if the suit acted as the "catalyst" for a change in defendant's behavior.[101] With the "catalyst theory," a mere change in a defendant's behavior stemming from a plaintiff's suit was enough to consider plaintiff a prevailing party.

Then, in 2001, under *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[102] the Supreme Court gave clear meaning to the term "prevailing party."[103] The Court stated

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See also Robin Stanley, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party goes the Spoils . . .and the Attorney's Fees!*, 36 AKRON L. REV. 363, 372 (2003).

[89] *Maher*, 448 U.S. at 129.

[90] 482 U.S. 755 (1987).

[91] *Id.* at 760-61 (citing Hanrahan v. Hampton, 446 U.S. 754, 757 (1980)).

[92] 859 F.2d 313 (4th Cir. 1988).

[93] *Id.* at 316 (applying *Hanrahan*, 446 U.S. 754). *See* Conservation Law Found. v. Sec'y of the Interior, 790 F.2d 965, 967-68 (1st Cir. 1986).

[94] *Hanson*, 859 F.2d at 316.

[95] *Id.* at 316-17.

[96] *Id.* at 317.

[97] 506 U.S. 103 (1992). In this case, the plaintiff sued for monetary and injunctive relief under 42 U.S.C. 1983 and 1985. *Id.* at 106. The court found that Hobby had committed an act or acts under color of state law that deprived plaintiff of a civil right, and yet, Hobby's conduct was not a proximate cause of any damages suffered by the plaintiff and that each party bear their own costs. *Id.* at 106-07. Since Hobby had deprived Farrar of a civil right, Farrar was entitled to nominal damages. *Id.* at 107. Farrar then sought attorneys' fees under 42 U.S.C. 1988. *Id.* The Supreme Court held that to qualify as a prevailing party, the plaintiff in a civil case must obtain at least some relief on the merits against the defendant as well as an enforceable judgment (or consent decree) against that defendant. *Id.* at 111. "In civil rights litigation, only those circumstances that materially affect the legal relationship of the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff, can transform the plaintiff into a prevailing party." Stanley, *supra* note 88, at note 55 (citing *Farrar*, 506 U.S. at 111-12 (internal quotations omitted)).

[98] *Id.* at 114.

[99] *Id.*

[100] Stanley, *supra* note 88 at 375-76.

[101] *Id.* at 376. To be considered a "catalyst" there were three conditions that must be satisfied if there was not a final judgment or consent decree: (1) plaintiff had to show that defendant supplied some of the relief for which plaintiff sought in bringing the suit; (2) plaintiff must demonstrate that the claim was not "frivolous, unreasonable, or groundless;" and (3) plaintiff must establish that its suit was a "substantial cause" or a "significant catalyst" in the defendants providing relief. *Id.* at n.10 (quoting Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128, 131 (3d Cir. 1991) ("some of the benefit sought"), Grano v. Barry, 783 F.2d 1104, 1110 (D.C. Cir. 1986) ("frivolous, unreasonable or groundless"), and Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982) ("substantial, significant catalyst")).

[102] 532 U.S. 598 (2001).

[103] *Id.* at 610. *See also* Stanley, *supra* note 88, at 389.

that a prevailing party is a party that has received at least some relief on the merits of his claims by a settlement forced through a consent decree or a judgment on the merits.[104] In that case, the Justices adhered to the current trend of the court to interpret terms using legal dictionaries.[105] This new bright line rule has quashed much of the ability of the district courts to use discretion in awarding litigation costs.[106]

IV. INSTANT DECISION

The United States Court of Appeals for the Eleventh Circuit reviewed the district court's award of fees to plaintiffs for non-testifying expert witnesses.[107] The expert's fees amassed after litigation had technically come to end, in that the expert was to monitor the already established consent decree to assure compliance by the EPA.[108] The Eleventh Circuit evaluated three issues on appeal that were brought into question by the EPA.

The EPA first argued that the district court's award of fees was for work done by the expert was beyond "reasonably necessary to monitor compliance with the consent decree" under *Sierra Club v. Meiburg*.[109] According to the EPA, the *Meiburg* case only required them to establish TMDLs in some form.[110] The EPA claimed that the plaintiffs should be allowed to recover costs associated with determining "*whether* the . . . [EPA] promulgated standards," but not to monitor the standards in any detail.[111] In essence, the EPA claimed that the plaintiffs only needed to establish the content of the TMDLs and assess their validity to assure that the EPA has fulfilled its obligations.[112]

The Eleventh Circuit disagreed, and stated that its holding in *Meiburg* "simply noted that implementation plans were not mentioned within the definition of TMDL. . . . EPA obligations, or anywhere within the consent decree."[113] The consent decree in the instant case requires that "each stage of TMDL proposals by the EPA relate[] to a new WQLS list promulgated by the state of Georgia, making review of the underlying WQLS lists essential to monitoring the TMDLs themselves."[114] The court agreed with the district court's decision that the "examination of the content of the TMDLs, WQLS lists and [Performance Partnership Agreements ("PPAs")] was 'necessary to meaningful enforcement of the Consent Decree.'"[115] Additionally, using the standard set in *Brooks v. Georgia State Board of Elections*,[116] the court of appeals held that the information in the consent decree appeared "'relevant to those rights' established by the decree and 'related to terms of the judgment.'"[117]

Second, the EPA's contended that since the consent decree reserved plaintiffs the right to contest TMDLs in the future, it implied that the consent decree covered only the "existence of the standards rather than

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[104] *Id.* The court noted that "[i]n addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees." *Id.* at 604.

[105] Stanley, *supra* note 88 at 389-90 (citing *Buckhannon*, 532 U.S. at 603). The dictionaries are used for words that are "tailored for judicial settings." *Buckhannon*, 532 U.S. at 616.

[106] Stanley, *supra* note 88 at, 390-91.

[107] Sierra Club v. Hankinson, 351 F.3d 1358, 1359 (11th Cir. 2003).

[108] *Id.*

[109] 296 F.3d 1021, 1030 (11th Cir. 2001).

[110] *Sierra Club*, 351 F.3d at 1361.

[111] *Id.*

[112] *Id.* (citing *Meiburg*, 296 F.3d at 1030).

[113] *Id.* "In fact, the decree explicitly states the EPA 'does not obligate itself to perform, or ensure the performance of' the incorporation of TMDLs into future Georgia/EPA Performance Partnership Agreements." *Id.*

[114] *Id.* at 1362.

[115] *Id.*

[116] 997 F.2d 857, 864 (11th Cir. 1993). The court held that post judgment monitoring of a consent decree must be "relevant to the rights established by the decree and related to the terms of the judgment." *Id.*

[117] *Sierra Club*, 351 F.3d at 1362 (quoting *Brooks*, 997 F.2d at 864).

their compliance with applicable laws."[118] It further claimed that all future challenges to TMDLs would then require separate issues and new administrative records since such challenges would be to TMDLs other than the TMDLs referred to in the consent decree.[119]

The Eleventh Circuit disagreed. holding that the mere possibility of future, separate TMDL challenges would not necessarily imply that all the issues relating to such TMDLs would have to be litigated separately.[120] The court reasoned that if the plaintiffs had

> discovered that certain TMDL standards were so patently inadequate that they did not meaningfully implement the consent decree, the plaintiffs could have returned to the district court and requested enforcement.[121] Given that the consent decree granted the court jurisdiction to issue orders necessary or appropriate to construe, implement, modify, or enforce the decree, and given that the court found review of TMDL content necessary to meaningful enforcement, the district court might have considered such an action to be within the terms of the decree.[122]

The final issue raised by the EPA was that the relevant provision regarding the attorneys' fees does not cover fees of non-testifying expert witnesses.[123] The EPA reasoned that under the language of the CWA, "a court 'may award costs of *litigation* (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.'"[124] Since the district court had awarded expert witness fees to the plaintiffs because the "litigation had been especially complex and that [the expert] had helped plaintiffs prevail." the EPA argued that the expert did not help the plaintiffs prevail. In fact. the expert only monitored the established consent decree, which was *after* litigation was complete and the plaintiffs had won.[125]

The Eleventh Circuit disagreed with the EPA's argument by saying that "[w]hile the word [prevail] may not have been entirely accurate, the plaintiffs are still prevailing or substantially prevailing within the context of monitoring an environmental consent decree."[126] Quoting the Fourth Circuit in *National Wildlife Federation v. Hanson*[127] the court explained.

> if we do not interpret "prevailing" in light of the goals of [CWA], the legislative purpose in awarding fees will be frustrated. The legislative history of the fee shifting provisions indicates that they were enacted to encourage litigation to ensure proper administrative implementation of the environmental statutes. Both the Clean Air Act and [] [CWA] authorize a court to award fees whenever it determines that such award is appropriate . . . Unlike the plaintiffs in traditional civil actions. plaintiffs in environmental suits do not seek to vindicate personal rights and they obtain no financial benefit if they win.[128]

The court then went on to mention that none of the cases cited by the EPA in support of its position involved the "monitoring of a post-judgment consent decree."[129] The court then noted that the *Sierra Club v. EPA* case

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* (internal quotations omitted).
[123] *Id.*
[124] *Id.* (emphasis added). *See also* 33 U.S.C. § 1365(d) (2000).
[125] *Id.* (internal quotations omitted).
[126] *Id.* (internal quotations omitted).
[127] 859 F.2d 313 (4th Cir. 1988).
[128] *Sierra Club*. 351 F.3d at 1362-63 (quoting *Hanson*, 859 F.2d at 316-17).
[129] *Id.* at 1363. The court only mentioned one of these cases in its opinion, *Sierra Club v. EPA*, 769 F.2d 796, 812 (D.C. Cir. 1985). In that case, the D.C. Circuit denied expert witness fees for a "technical consultant who had assisted the attorneys in preparing a general challenge to Clean Air Act regulations." *Sierra Club*, 351 F.3d at 1363 (internal quotations omitted).

predated *Delaware Valley*, which is the "key Supreme Court case establishing the intimate connection between initial litigation and the post-judgment monitoring of a consent decree."[130] In that case, the plaintiffs had to modify a consent decree several times, and the court found the defendant in violation twice.[131] "The . . . plaintiffs sought attorneys' fees under the fee-shifting provisions of the Clean Air Act."[132] The defendant objected to costs for time spent monitoring the consent decree.[133] The Supreme Court rejected this argument and noted that "Congress enacted the fee-shifting provision in order to 'encourage citizen participation in the enforcement of standards and regulations established under this Act.'"[134]

The Eleventh Circuit noted the similarities between the *Delaware Valley* case and the instant case such as the "detailed instructions as to how the program was to be developed and the specific dates . . . [the] tasks were to be accomplished."[135] The court also noted that *Delaware Valley* "required significant post-judgment monitoring in order to protect the relief afforded plaintiffs through the consent decree."[136] The court recognized the *Delaware Valley* court's observation that "measures necessary to enforce the remedy ordered by the district court cannot be divorced from the matters upon which [the plaintiffs] prevailed in securing the consent decree."[137] Just as the Supreme Court in *Delaware Valley*, the Eleventh Circuit used a pragmatic test instead of a technical test in construing the attorneys' fees statute by placing more emphasis on the "nature of the rights secured by the consent decree and the measures necessary to secure those rights than on the technical definition of litigation costs."[138]

Since the instant case required a highly technical post-judgment monitoring of the TMDLs take place, because there was no evidentiary hearing in which the expert could have testified, the Eleventh Circuit concluded there was no abuse of discretion on the part of the district court in awarding the non-testifying expert witness's fees.[139] As such, the Eleventh Circuit affirmed the district court's award of post-judgment monitoring fees.[140]

V. COMMENT

The Eleventh Circuit's holding in the instant case, while one of first impression, is consistent with other decisions involving awards of attorneys' fees and litigation costs resulting from CWA litigation. All of these decisions point toward a policy of removing the disincentives from environmental suits in an effort to encourage citizens to report and litigate environmental harms. To do this, courts seem willing to award any reasonable fees or costs logically related to the cause of action, or enforcement resulting from that cause of action.

In the instant case, the Eleventh Circuit found that the plaintiffs were the substantially prevailing party in the litigation.[141] The court then set out to determine if a non-testifying expert witness who only participates in the post-judgment monitoring of the consent decree could be considered as helping a party prevail.[142] The

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[130] *Sierra Club*, 351 F.3d at 1363.
[131] *Id.* (citing Pa. v. Del. Valley Citizens' Council, 478 U.S. 546, 549-53 (1986)).
[132] *Id.* *See also* 42 U.S.C. § 7604(d) (2000).
[133] *Id.*
[134] *Sierra Club*, 351 F.3d at 1363 (quoting *Del. Valley*, 478 U.S. at 560).
[135] *Id.*
[136] *Id.* at 1364.
[137] *Id.* (quoting *Del. Valley*, 478 U.S. at 559).
[138] *Id.* (quoting *Del. Valley*, 478 U.S. at 559) (internal quotations omitted). *See also* Brooks v. Ga. State Bd. of Elections, 997 F.2d 857, 863 (11th Cir. 1993).
[139] *Sierra Club*, 351 F.3d at 1364.
[140] *Id.*
[141] *Id.* at 1362-63.
[142] *Id.* at 1363.

Eleventh Circuit agreed with the Supreme Court in *Delaware Valley* that "measures necessary to enforce the remedy ordered . . . cannot be divorced from the matters upon which [plaintiffs] prevailed in securing the consent decree."[143] The Eleventh Circuit upheld the award of the expert witness fees to the plaintiffs because "protection of the rights enshrined in the consent decree depend[] upon highly technical, post-judgment monitoring and evaluation . . . ."[144] This was consistent with the *Delaware Valley* case, which dealt with attorneys' fees resulting from administrative proceedings, not literal judicial actions.[145] That court reasoned that the work performed by counsel in the non-judicial phases was "necessary to the attainment of adequate relief . . . ."[146] "Protection of the full scope of relief afforded by the consent decree . . . [is] crucial to safeguard the [plaintiff's] interests . . . ."[147] In such a case, the plaintiff must continue to monitor the defendant in order to assure that the defendant is complying with the consent decree. This is especially important in cases where a consent decree calls for continuing decreases in the level of pollution. Put simply, the monitoring of a consent decree is necessary to enforce its effect. If a plaintiff cannot monitor a defendant's compliance with a decree due to an inability to pay for such monitoring, then the basic purpose of consent decree would be severely undermined.

In *Earth Island Institute, Inc., v. Southern California Edison, Co.*,[148] the court noted the minute amount of case law regarding attorneys' fees under the CWA.[149] As such, the *Delaware Valley* court adopted standards used in civil rights cases in order to decide whether or not to award attorneys' fees and costs.[150] Fees awarded for the post-judgment monitoring of a consent decree are considered a compensable activity under the context of the Civil Rights Act of 1976.[151] While the Clean Air Act authorizes an award of fees in any "action," the Civil Rights Act allows them in any "action or proceeding."[152] The *Delaware Valley* court held that that distinction was not a "sufficient indication that Congress intended . . . [the Clean Air Act] to apply only to judicial, and not administrative, proceedings."[153] The legislative history of the Civil Rights Act is very similar in purpose as to that of the Clean Water Act. The enforcement of the Civil Rights Act is largely dependent upon the efforts of private citizens.[154] "[U]nless reasonable attorney's fees could be awarded for bringing . . . [civil rights] actions, Congress found that many legitimate claims would not be redressed."[155] This is essentially the same reasoning used in the fee shifting provision of the CWA, where, the legislative history dictates that the statute was designed to "encourage litigation to ensure the proper administrative implementation of the environmental statutes."[156] This is also the reasoning behind the Clean Air Act statute in *Delaware Valley*: "Congress enacted § 304 [of the Clean Air Act] specifically to encourage citizen participation in the enforcement of standards and regulations established under this Act."[157] That Senate Report, which was also cited in *Delaware Valley*, urged courts to "recognize that in bringing legitimate actions . . . citizens would be performing a public service and in such instances the courts should award costs of litigation to such

[143] *Id.* at 1364 (quoting Pa. v. Del. Valley Citizens' Council, 478 U.S. 546, 559 (1986)).
[144] *Id.*
[145] *Del. Valley*, 478 U.S. at 558.
[146] *Id.*
[147] *Id.*
[148] 838 F. Supp. 458 (S.D. Cal. 1993).
[149] *Id.* at 465, n.6.
[150] *Del. Valley*, 478 U.S. at 559.
[151] *Id. See also* 42 U.S.C. § 1988 (2000).
[152] *Id.*
[153] *Id.*
[154] *Id.* at 560. *See also* S. REP. NO. 94-1011, at 2 (1976). H.R. REP. NO. 94-1558, at 1 (1976).
[155] *Del. Valley*, 478 U.S. at 560 (citing H.R. REP. NO. 94-1558, at 1).
[156] Sierra Club v. Hankinson, 351 F.3d 1358, 1362-63 (11th Cir. 2003).
[157] *Del. Valley*, 478 U.S. at 560 (citing S. REP. NO. 91-1196, at 36 (1970)) (internal quotations omitted).

party."[158] By analogizing to civil rights and environmental statutes, "the Court suggested that the purposes of each w[ere] sufficiently similar 'to interpret both provisions governing attorney's fees in the same manner.'"[159] The *Delaware Valley* Court reasoned that the analysis of the legislative histories of each supplied backing for such an interpretation.[160]

With this legislative history and reasoning in mind, the court's decision in the instant case seems extremely logical. There is generally no financial award for a plaintiff in an environmental case, and as such, there is a need for the financial burdens of pursuing such a case to be reduced. As in the *Delaware Valley* case, the post-judgment monitoring in the instant case was "'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation."[161] In 2000, in another *Earth Island v. Southern California Edison Co.* case, the court allowed the plaintiffs to collect attorneys' fees for post judgment monitoring of a consent decree that accrued for eight years after the decree was put into action.[162] The court in that case found that the plaintiffs' continued monitoring of the area at issue was "necessary to the resolution of th[e] litigation and [was] closely linked to the Plaintiffs' litigation interests."[163]

It seems that *who* it is doing the post-judgment monitoring for the prevailing party is not of great concern to the courts as long as *what* that person is doing is not illogical and the cost is not unreasonable. In the instant case, it was a non-testifying expert witness, rather than of a member of the party, who filed the suit or was privy to the consent decree.[164] The court interpreted the language of the statute very broadly and liberally in an effort to obtain a result in accordance with the congressional intent. It clearly stated that, regarding attorneys' fees, the term "prevailing" does not limit the award to merely those who helped the plaintiff obtain a judgment or a consent decree, but allows an award for the cost of those who also help enforce the judgment or consent decree.[165] The Eleventh Circuit was concerned with the protection of the rights that the consent decree gave the plaintiffs.[166] It stated that due to the "highly technical" nature of the post-judgment monitoring of the plaintiffs consent decree, and because there was no evidentiary hearing that afforded the expert witness to testify as to his importance of his involvement in enforcement of the consent decree, that it could not say the district abused its discretion in awarding these expert witness fees.[167] The court's goal is to make citizen enforcers feel "welcome[] as participants in the enforcement process to the extent that fee awards compensate them for all of their time and expenses spent on the types of activities that are ordinarily necessary to secure the final result obtained from the litigation."[168] "This includes not only attorneys' fees incurred in actual litigation.

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[158] *Id.* (quoting S. REP. NO. 91-1196, at 38).

[159] J. Douglas Klein, Note, *Does Buckhannon Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond*, 13 DUKE ENVTL. L & POL'Y F. 99, 130 (2002) (quoting *Del. Valley*, 478 U.S. at 560).

[160] *Del. Valley*, 478 U.S. at 559 (explaining that the purposes behind both legislative histories are "nearly identical," which provides support for the idea that they should be interpreted similarly).

[161] *Del. Valley*, 478 U.S. at 561 (quoting Webb v. Bd. of Educ., 471 U.S. 234, 243 (1985)).

[162] Earth Island Inst., Inc., v. S. Cal. Edison Co., 92 F. Supp. 2d 1060 (S.D. Cal. 2000). In this Federal Water Pollution Control Act case, plaintiffs filed for an application for an award of supplemental attorney fees and costs for post-judgment monitoring work under 33 U.S.C. 1365(d). *Id.* at 1062. The court found that the continuous monitoring was done to ensure compliance with the consent decree. *Id.* at 1064. As such, the court awarded the Plaintiff's motion and the award of attorney's fees and costs were granted. *Id.* at 1066.

[163] *Id.* at 1064.

[164] Sierra Club v. Hankinson, 351 F.3d 1358, 1359 (11th Cir. 2003).

[165] *Id.* at 1362-63 (citing Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 316-17 (4th Cir. 1988)).

[166] *Sierra Club*, 351 F.3d at 1364.

[167] *Id.*

[168] Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. SYMP. J. 219, 254 (2003) (internal quotations omitted).

but fees for paralegals or law students,[169] research and preparation,[170] travel,[171] consultation with clients, experts and other attorneys,[172] and working – as appropriate to pursue the client's goals – with the media."[173] Awards of fees and costs have also been awarded for "long-distance phone calls, photocopying service and express mail charges,[174] computer assisted research,"[175] and most importantly for this comment, expert consultants.[176] This,

[169] *See* Missouri v. Jenkins, 491 U.S. 274, 285 (1989) (considering the term "reasonable attorney's fee" to mean the work of "others whose labor contributes to the work product for which an attorney bills her client . . . including "work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client") and Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co., 798 F. Supp. 522, 527 (N.D. Ind. 1992) (allowing award for a third-year law student to be billed at $75.00 per hour). (Adapted from Babich, *supra* note 168 at 255-58).

[170] *See* Planned Parenthood of Cent. N.J. v. Att'y Gen., 297 F.3d 253, 269 (3d Cir. 2002) (awarding fees in conjunction with "121 hours for preparation for the oral argument for the merits appeal, [i]nclud[ing] . . . 25.5 hours of moot court time and 4.5 hours of observing oral argument") and James v. Norton, 176 F. Supp. 2d 385, 397 (E.D. Pa. 2001) (awarding fees for plaintiffs counsel for time spent researching and drafting a response to defendants motion in limine even though said response was never filed). (Adapted from Babich, *supra* note 168 at 255-58).

[171] *See Planned Parenthood*, 297 F.3d at 267 (allowing attorney fees associated with travel time when it is customary in the local community to bill clients for such charges); Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983), *rev'd on other grounds* (disallowing fees for travel expenses between the local area and the outside counsel's area when there is no need to retain such counsel); and *Atl. States*, 798 F. Supp. at 529 (holding that defendant need not pay the extra cost of travel of an attorney from New York that plaintiff chose to represent it in Indiana). (Adapted from Babich, *supra* note 168 at 255-58).

[172] *Compare* Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 860 (1st Cir. 1998) (holding that "time spent by two attorneys on the same general task is not . . . per se duplicative . . . [because] careful preparation often requires collaboration and rehearsal"), Delph v. Dr. Pepper Bottling Co., 130 F.3d 349, 358-59 (8th Cir. 1997) (The court was uncomfortable with the fact that plaintiff had three counsel, one local and two trial. The court focused on the fact that the second trial counsel billed out only 62 hours versus lead trial counsel's 325 hours, that he actively participated in the trial, and that none of the work seemed duplicative of lead counsel, in holding that the fee was proper.) *and Atl. States*, 798 F. Supp. at 528 ("[J]ustifiable instances of having two attorneys present . . . are not considered duplicative by the court. It is not uncommon, especially in complex litigation, to have more than one attorney present in the courtroom.") (internal quotations omitted) *with* Pub. Int. Research Group of N.J., Inc. v. Widnall, 42 Env't. Rep. Cas. (BNA) 1117, 1121 (D.N.J. 1995), *available at* 1995 WL 836144 (holding "that the extraordinary of time expended on [internal] consultation was unnecessary and unproductive"). (Adapted from Babich, *supra* note 168, at 255-58).

[173] *Compare Davis v. San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992) (allowing an award of attorney fees for giving press conferences, lobbying, and other public relations work where such work is "directly and intimately related to the successful representation of a client" reasoning that private attorneys who do such work bill their clients, so prevailing civil rights parties may do the same), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993) *with* Halderman v. Pennhurst St. Sch. & Hosp., 49 F.3d 939, 941-42 (3d Cir. 1995) (disallowing fee award for "time spent on public relations efforts" reasoning that simply because "private lawyers may perform tasks other than legal services for their clients, with their consent and approval, does not justify foisting off such expenses on an adversary under the guise of reimbursable legal fees"). (Adapted from Babich, *supra* note 168 at 255-58).

[174] *See* Martin v. City of Indianapolis, 28 F. Supp. 2d 1098, 1107 (S.D. Ind. 1998) (stating that "some of the costs listed by [plaintiff's] counsel, including travel expenses, long-distance telephone calls, photocopying services and express mail charges, are more properly labeled 'litigation expenses,' which generally are compensable as part of a reasonable attorney's fee, rather than costs") and Kersch v. Bd. of County Comm'r., 851 F. Supp. 1541, 1545 (D. Wyo. 1994) (allowing an award of costs for "deposition transcripts, travel expenses in connection with depositions and the contempt hearing, postage, and long distance telephone charges"). (Adapted from Babich, *supra* note 168 at 255-58).

[175] *See* In re Media Vision Tech. Sec. Litig., 913 F. Supp. 1362, 1371 (N.D. Cal. 1996) (granting attorney's request for expenses associated with computerized legal research). *But see* Standley v. Chilhowee R-IV Sch. Dist., 5 F.3d 319, 325 (8th Cir. 1993) (holding that "computer-based legal research must be factored into the attorneys' hourly rate, hence the cost of the computer time may not be added to the fee award"). (Adapted from Babich, *supra* note 168 at 255-58).

[176] *See* Hitchcock v. G & W Elec. Co., No. 85-C0067, 1989 U.S. Dist. LEXIS 195, at *4 (N.D. Ill. Jan. 5, 1989) (awarding costs for an expert consultant who was retained to "to assist in evaluating settlement proposals, analyze the cost of replacement health insurance for class members, and assist in analyzing the class members' documents to determine their recovery in . . . [a] relatively complicated benefits litigation"); Atl. States Leg. Found., Inc. v. Whiting Roll-Up Door Mfg. Corp., 38 Env't. Rep. Cas. (BNA) 1426, 1429, *available at*, 1994 U.S. Dist. LEXIS 6071 (W.D.N.Y. 1994) (awarding fees for "services of plaintiff's expert . . . [where] affidavits adequately show that the services . . . were provided in . . . expert-witness capacity" and the case settled before trial on the merits hence it was unlikely that expert testified); and Proffitt v. Mun. Auth. of the Borough of Morrisville, 716 F. Supp. 845, 859 (E.D. Pa. 1989) (allowing an award of costs for experts who did not testify and whose proposed "testimony was ultimately not necessary given

coupled with the fact that awards have been made for costs and fees incurred in administrative hearings,[177] and post-judgment monitoring and enforcement.[178] leads to the sensible conclusion that resulted in the instant case: a court will allow an expert witness's fees incurred in the post-judgment monitoring of a consent decree, to be awarded to the prevailing party since the post-judgment monitoring is an intricate part of a suit.

It seems very fair and reasonable for the courts to allow so many diverse fees and costs in light of the fact that the plaintiffs in environmental suits can very rarely obtain any financial benefit. Lawyers are less likely to help citizens in such cases due to the risk of loss on a contingency fee. Additionally, most people and organizations are unable to afford the hourly costs of such litigation.[179] The breadth of the holdings in the aforementioned cases allow citizens to bring meritorious claims, and for attorneys to help them litigate these claims, to ensure the preservation of our limited environment by slowing its destruction.

VI. CONCLUSION

The Eleventh Circuit's holding in *Sierra Club v. Hankinson* clearly furthers the government's desire for average everyday citizens to assist in the policing and enforcement of our environmental laws. The government is continually disposing of disincentives standing in the way of citizens attempting to enforce these laws. In this instance, the court furthered this goal by once again broadening the law regarding what circumstances a prevailing party may be awarded cost and fees resulting from litigation. Here, the court extended this right to a party whose only involvement in the suit occurred after the consent decree was established. In doing this, the court is sending a strong message that any reasonable and logical costs and fees related to the prevailing party's litigation and enforcement procedures will be recoverable as litigation costs, so that ordinary citizens can help preserve our precious environment.

C. TRAVIS HARGROVE

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the settlement of the case," because "their testimony would have been indispensable to the case had it gone to trial"), *aff'd*, 897 F.2d 523 (3d Cir. 1990). *But see* Sierra Club v. EPA, 769 F.2d 796, 812 (D.C. Cir. 1985) (denying an award of costs for a "technical consultant" who helped in preparing petitioners case stating that it did not consider the consultant an expert because "review of the regulations w[ere] undertaken . . . on the administrative record without any new hearings before this or any other court" and expert consulting services "do not fall under the traditional concept of costs"). (Adapted from Babich, *supra* note 168 at 255-58).

[177] *Compare* Sullivan v. Hudson, 490 U.S. 877, 888 (1989) (holding that "where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.") *and* Pa. v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986) (awarding costs incurred in administrative proceedings by holding that participation in administrative proceedings that were "crucial to the vindication of Delaware Valley's rights under the consent decree and . . . compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the [d]istrict [c]ourt") ***with*** Mich. v. EPA, 254 F.3d 1087, 1091 (D.C. Cir. 2001) (holding that the language of the Clean Air Act § 307(f) "requires awards only for 'costs of litigation,'" so "fees incurred in the preparation of an administrative petition . . . [would be] excluded). (Adapted from Babich, *supra* note 168 at 255-58).

[178] *See, e.g., Del. Valley*, 478 U.S. at 559 (stating that "[s]everal courts have held that . . . post-judgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee") and Duran v. Carruthers, 885 F.2d 1492 (10th Cir. 1989) (awarding plaintiff the fees incurred from a "special master" who monitored the consent decree to assure defendant's compliance). (Adapted from Babich, *supra* note 168 at 255-58).

[179] Babich, *supra* note 168, at 259.