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Statutory Attorney's Fees for an Environmental Practice in Florida

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STATUTORY ATTORNEY'S FEES FOR AN ENVIRONMENTAL PRACTICE IN FLORIDA

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I. INTRODUCTION

Practicing environmental law in Florida can involve challenging, high profile, and often precedent-setting litigation which will win friends and polarize enemies. Representing a local community group or a small business client, an attorney is like David pitted against Goliath, especially when the defendant federal agency or giant developer files its motion to dismiss supported by a 100-page legal memorandum submitted by a team of attorneys several times the size of the plaintiff's firm.

For many smaller law firms, an environmental dispute may further overwhelm because environmental litigation often involves multiple parties and stretches into years of complex discovery and negotiation.[1] For those attorneys, however, who do clamp onto a substantive case interpreting an environmental regulation or an agency ruling on a planned use of property, there are provisions in the laws which, in the long run, can guarantee financial compensation for the long hours invested.[2]

Congress and the Florida Legislature have included fee-shifting provisions in virtually all environmental legislation churned out during the past two decades.[3] The different policies behind the

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1. Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), a pivotal decision in the law of attorney's fees, involved environmental, governmental, and 17 oil industry parties. The plaintiffs' attorneys, from a nonprofit public interest law firm, spent several hundred thousand dollars in what the court called "exceptional" representation for the Wilderness Society. The litigation forced the federal government and the oil industry to implement a series of studies and remedial plans to minimize the environmental impact of the controversial Alaskan Oil Pipeline. *Alyeska*'s years of proceedings and litigation encompassed the era of the Arab Oil Embargo and the "energy crisis." In a split decision, the United States Supreme Court refused to shift the liability for plaintiffs' attorney's fees to the defendants, in deference to the common law "American rule" which generally prohibits fee-shifting, with limited exceptions. *Id.* at 269.

2. Fees are generally awarded at market rates, based on the total number of hours reasonably expended. In addition to the trial court litigation, fees are often recoverable for hours involved at the appellate level and even for time spent preparing a petition for a fee award itself. Costs may include travel, expert fees, law clerks, and other documented expenses, depending upon the case and the statute involved in the litigation. In most cases interest accrues from the date of judgment, and in an exceptional case, a "multiplier" may double or triple the award for certain efforts. *See* J. BENNETT, WINNING ATTORNEY FEES FROM THE UNITED STATES GOVERNMENT § 7.04 at 7-15 (1986). Consequently, in complex protracted litigation awards may total hundreds of thousands of dollars.

3. No complete or clear-cut categorization of fee-shifting provisions exists, since the law

federal and Florida statutory schemes, however, have resulted in some important differences, especially in enlisting citizens as active participants in the enforcement of environmental laws.[4]

Section II of this paper reviews the attorney's fee[5] provisions and case law at the federal level, including an analysis of recent United States Supreme Court decisions. The interpretation of the statutory tests and requirements applies generally throughout the federal system[6] and serves as a basis for the development of state law on attorney's fees when state fee-shifting provisions closely parallel the federal statutes.

Section III describes the patchwork fee-shifting scheme of more than thirty Florida statutes.[7] While the legislature has explicitly included awards of attorney's fees for prevailing parties, many of the environmental laws are used infrequently because citizens who attempt to enforce the laws against polluters may, if they lose, be required to pay the attorney's fees for the agency, the suspected polluter, or both.[8]

Section IV analyzes the prospects for recovering fees and expenses at the administrative level, where virtually all environmental and land use disputes arise.[9] The variations are many and envi-

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has accumulated over many years. Appendix I lists statutory attorney's fees in federal environmental law. Appendices V and VI list those Florida provisions which relate directly or indirectly to environmental law practice.

4. Most environmental laws recognize the importance of citizen participation in supplementing and monitoring governmental regulatory agencies. Congress clearly provided in the federal statutes for attorney's fees designed to enable citizen enforcement actions, carefully noting that legal costs can have a "chilling effect" on would-be plaintiffs. H. NEWBERG, ATTORNEY FEE AWARDS 359-60 (1986). The Florida legislature, however, has failed to remove that "chilling effect" from state environmental attorney's fee provisions. *See* Appendix IV for a general comparison of Florida and federal fee provisions.

5. Various statutes and judicial opinions apply the terms "attorney fees," "attorney's fees," "attorneys' fee," and "attorneys' fees" interchangeably. Here, "attorney's fees" and "attorney's fee" will be used to include all designations with the exception of direct quotations.

6. Miller, *Private Enforcement of Federal Pollution Control Laws*, 14 E.L.R. 10407, 10408 (1984).

7. *See* Appendices V and VI, which include 34 state provisions enacted prior to the 1987 legislative session.

8. *See, e.g.*, FLA. STAT. § 403.412 (1985).

9. Most fee statutes allow awards to include certain administrative work. *See* 7 E.L.R. 10210 (1977) (summary of fee provisions for public intervenors at administrative levels). Other statutes, such as the Freedom of Information Act, 5 U.S.C. § 552 (1982), specifically preclude administrative work. The Supreme Court has recognized that the branches of government are not wholly independent in the context of complex environmental litigation and therefore it has allowed fees for work outside the traditional processes of the judiciary. *See, e.g.*, Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088 (1986), *on rehearing*, 107 S. Ct. 3078 (1987) (the Court did not reconsider the issue of attorney's fees for adminis-

ronmental litigation often bounces back and forth among several levels of proceedings;[10] the resolution of many cases involves ongoing monitoring by a court, an agency, or a successful citizen-plaintiff.[11] Other disputes may involve public hearings, a citizens' initiative, extensive press relations, or a campaign culminating in a vote by the electorate.[12] It is important to know which of these activities are compensable under the fee provisions and in what circumstances they will be compensated.

The law of attorney's fees is dynamic, and a fee applicant must keep abreast of this complicated and evolving area to be successful.[13] From the inception of any case, an attorney practicing environmental law should meticulously maintain the required records[14] and prepare to file a petition for fees[15] upon winning a favorable decision or settlement for a client.

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trative work).

10. In *Delaware Valley*, 106 S. Ct. at 3090-94, the parties opposed each other in state agency proceedings, state courts, federal agency proceedings, and at all three levels of federal courts, including two trips to the United States Supreme Court.

11. Save our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987) (fees awarded for first phase of ongoing monitoring of the inspection, enforcement and assessment of civil penalties by the federal Office of Surface Mining); *Delaware Valley*, 106 S. Ct. 3088, (plaintiffs won fees for monitoring a consent order to implement a state air pollution control program); Adams v. Mathis, 752 F.2d 553 (11th Cir. 1985) (when court appointed attorney to monitor compliance, fees were held compensable as long as they are "reasonably expended," since all monitoring was based on the original success in obtaining the compliance order).

12. *See* Miami Beach v. Manilow, 253 So. 2d 910, 911 (Fla. 3d DCA 1971) (fees awarded for opposing bond elections); *but see* United Nuclear Corp. v. Cannon, 564 F. Supp. 581 (D.R.I. 1983) (lobbying time denied in fee award). In one exceptional case, even time spent briefing reporters was compensable because the nature of the case required substantial press relations. Dick v. Watonwan County, 562 F. Supp. 1083, 1109 (D. Minn. 1983), *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984).

13. In 1986 alone, the Florida Legislature amended or added 10 of the 34 state fee provisions surveyed here.

14. "Nothing is more important" than accurately and contemporaneously documenting in detail each task performed, the time involved, and the date. Derfner, *Amounts of Attorneys' Fee Awards in Public Interest Cases*, in 2 COURT AWARDED FEES IN "PUBLIC INTEREST" LITIGATION 995, 995 (H. Newberg ed. 1978).

15. The easiest method of fee-shifting is by stipulation of the parties. Prevailing parties compile affidavits which summarize the fees requested and attach copies of time records. If a party cannot settle on an appropriate amount, it may use formal discovery or special hearings before the trial judge. Outside attorneys usually must testify concerning the value of the services performed, considering the rates prevalent in the community. Trial courts are assumed to be expert in fee-shifting and exercise wide discretion, although appellate courts are reviewing an increasing number of fee awards, including the amount in dispute. The complexity, specificity, and frequent unpredictability of determining fee awards has prompted one writer to dub the process as "something of a religious ceremony." Derfner, *supra* note 14, at 1009.

Fee-shifting and technical knowledge of fee recovery will enable a broader contingent of the private bar to become involved in environmental and other public interest litigation,[16] as the need increases for more competent representation of the public's interest in environmental protection.[17] Moreover, fee-shifting at both the federal and state levels can help subsidize litigation costs for private industry and local and state governments that sue federal agencies.[18]

II. FEDERAL ENVIRONMENTAL LAW AND ATTORNEY'S FEES

Modern American environmental policy is often forged in a high stakes drama involving at least three discrete parties: the regulated industries, the governmental agencies, and the citizens' organizations whose purpose is to advocate the public interest.[19] Both Congress and the courts have consistently recognized the need for the participation of citizens' groups at virtually every level of policy implementation.[20] Most federal environmental laws provide for at-

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16. "Public interest litigation" remains controversial, primarily because of its threat to the economic and other interests of defendants in such suits. Over the last two decades the terms "public interest," "private attorney general," "public actions," "class actions" and "citizens' enforcement" have been used interchangeably. Newberg, *Public Interest Law on a Fee Award Basis: Opportunities for Private Practitioners*, in 1 COURT AWARDED FEES IN "PUBLIC INTEREST" LITIGATION 13 (H. Newberg, ed. 1978). As former president of the American Bar Association Chesterfield Smith explained:

> The public's true interest from the lawyer's standpoint is in an adversary system whose decisions are based on the full exposition of all relevant positions, and not just those positions of individuals and organizations who have enough interest and resources to engage in litigation. This is the true public interest which we who live by the law—that is, the lawyers—must all promote.

Id. at 13-14.

17. *Id.* at 43.

18. At least two federal circuits have ruled that the citizens' enforcement policy of federal environmental law does not preclude private industry or local or state governments from recovering fees from a federal agency. *See* H. NEWBERG, ATTORNEY FEE AWARDS 370 (1986) (citing Florida Power & Light Co. v. Costle, 683 F.2d 941 (5th Cir. 1982) and Alabama Power & Light Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982)).

19. "[C]itizens for whose benefit all these laws were enacted have accepted Congress' invitation to play a more active role in protecting their own environmental interests." Roisman, *The Role of the Citizen in Enforcing Environmental Laws*, 16 E.L.R. 10163, 10163-64 (1986).

20. Every major environmental statute enacted since 1970, except the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1982), has included a "citizen's suit" provision, allowing citizens a formal role in environmental enforcement. These 11 provisions are identical and are patterned after the "citizen's suit" provision in the Clean Air Act, 42 U.S.C. §§ 7401 - 7642 (1982). Miller, *Private Enforcement of Federal Pollution Control Laws*, 14 E.L.R. 10407, 10409 (1984). In each, Congress provided for attorney's fee awards for successful plaintiffs according to one of several formulas. *See* Appendix III.

torney's fees and expenses in cases in which the citizen watchdogs have in fact contributed to the outcome of the adjudication.[21] Federal environmental lawmakers adopted the citizen enforcement theme of recent civil rights legislation,[22] including the fee-shifting provisions which were designed to assure private citizens access to the legal resources necessary to help enforce the laws.

While some statutes involve only fee-shifting from the government to the citizens,[23] other statutes allow awards to government or private industry litigants.[24] Most of the cases resulting in attorney's fee awards involve multiple parties, complex settlements, and technical and scientific data. Over a period of years the parties in a typical case expend hundreds of hours and thousands of dollars at several levels of administrative and court review.

These attorney's fee provisions have in effect established a separate cause of action, because fee awards require a separate post-judgment petition and ruling.[25] Most federal provisions allow fee awards at the trial judge's discretion.[26] The amount of the fee may dwarf the amount adjudicated on the merits[27] and thus raise volatile questions concerning legal economics and ethics.[28]

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21. *E.g.*, 16 U.S.C. § 825q-1(b)(2) (1987) ("any person whose intervention or participation substantially contributed . . .").

22. Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1987); 42 U.S.C. §§ 1981-1983, 1985, 1986, 2000d (1987); Dunlap, *Obstacles to Fee Awards Against Government Defendants*, in 2 COURT AWARDED FEES IN "PUBLIC INTEREST" LITIGATION 989 (H. Newberg, ed. 1978).

23. *E.g.*, 5 U.S.C. § 552(a)(4)(E) (1982).

24. Some statutes authorize judges to require the government to pay fees to certain private parties in the regulated or affected industry. *See, e.g.*, 42 U.S.C. § 1845 (1987) (commercial fishermen). Under many statutes, judges can order regulated parties to pay the fees of successful citizens. *E.g.*, 16 U.S.C. § 2632(a) (1987). The reverse is seldom possible, except in an occasional remedy aimed at avoiding frivolous or bad faith litigation. *E.g.*, 30 U.S.C. § 1275(e) (1987). Government agencies can sometimes collect from polluters. *E.g.*, 42 U.S.C. § 1818 (1987).

25. *E.g.*, two fee award cases decided in 1986 spanned years just for the attorney's fee part of the cases. *See infra* City of Riverside v. Rivera, 106 S. Ct. 2686 (1986), and Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088 (1986), *on rehearing*, 107 S. Ct. 3078 (1987).

26. H. NEWBERG, ATTORNEY FEE AWARDS 207 (1986).

27. *See, e.g., Rivera*, where eight Chicano citizens received damages of $33,350 from the city and police defendants who used tear gas, arrests, and other unnecessary force to disrupt a party. Their attorneys received seven times that amount—$245,456.25—for representation over the 11-year history of the litigation. 106 S. Ct. 2686.

28. *See* LaFrance, *Public Interest Litigation, Attorneys' Fees, and Attorneys' Ethics*, 16 ENVTL. L. 334 (1986) (defendant's proposal to settle claim for costs in exchange for plaintiff's withdrawal of claim for attorney's fees created conflict between plaintiffs and their attorneys). Other sensitive areas include ex parte communications, solicitation of clients, and other conflicts of interest between attorneys and their clients, and among sub-groups of

Policy battles have intensified in recent years between federal agencies and the citizens who play the role of regulating the regulators. Often, as Congress intended, attorney's fee awards have enabled citizens "in the public interest"[29] to block illegal administrative "reforms"[30] and, in other cases, to expose even specific malfeasance by agency officials.[31]

A. *Court Limits Awards to "Prevailing Parties"*

A basic and controversial issue which arose in the courts in the early 1980s concerns entitlement of parties, primarily citizen-plaintiffs,[32] to compensation for attorney's fees. Most federal environmental statutes allow discretionary awards under the vague standard of "whenever appropriate."[33] This standard was clarified in

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clients. *Id.* Sen. Orrin Hatch (R-Utah) pointed to a single fee award of $2,204,534.99 to explain the purpose of the Reagan administration's proposed Legal Fees Equity Act, which attempted to standardize fee awards. He introduced the bill in 1984 to halt "lucrative" awards and a "veritable landslide of litigation." Hatch, *The Abuses Must Stop*, 70 A.B.A. J., Oct. 1984, at 16, 20-21. The bill would have capped all awards at $75 per hour, eliminated any multipliers and bonuses, raised the standard for determining whether a party is "prevailing," and denied fees for hours expended after a settlement offer which ultimately exceeds the final judgment. *Id.* Opponents argued successfully that Hatch's proposal would make pubic interest litigation more risky and unappealing to the private bar. Aron, *It's a Plan to Undermine Civil Rights*, 70 A.B.A. J., Oct. 1984, at 16, 21. Hatch promised to resurrect the legislation in the 100th Congress. Hatch, *The Legal Fees Equity Act: Relief to the Attorneys' Fees Quagmire*, 2 BENCHMARK 261, 268 (1986).

29. "Public interest" law developed out of the Civil Rights movement of the 1960s; the phrase generally denotes efforts to provide legal representation to previously unrepresented persons. The growth of consumerism and the environmental movement broadened the context in which the legislative and judicial branches, at both the federal and state levels, have recognized that the traditional legal system is not readily accessible to the poor or to certain other interests of the public. *See* Sive, *Successful Conduct of a Public Interest Environmental Law Practice*, in PUBLIC INTEREST PRACTICE & FEE AWARDS 418 (H. Newberg ed. 1980).

30. *E.g.*, Evans v. Jeff D., 475 U.S. 717 (1986) (ensuring services for emotionally troubled and mentally handicapped children), Sierra Club v. E.P.A., 769 F.2d 796 (D.C. Cir. 1985) (controlling air pollution from smoke stacks).

31. Natural Resources Defense Council v. E.P.A., No. 83-1509 (D.D.C. Oct. 9, 1984) (order approving settlement).

32. Usually fees go only to plaintiffs because of the dual purpose standard recognized by the Supreme Court: first, awarding fees to plaintiffs encourages citizen lawsuits as a part of federal policy enforcement; second, awarding fees to prevailing defendants discourages frivolous suits. "[A]warding fees to defendants in the ordinary case might have a chilling effect on the institution of [legitimate] suits." H. Cohen, *Awards of Attorney's Fees in Federal Courts and by Federal Agencies* (Cong. Res. Serv., Libr. of Cong.), in 2 COURT AWARDED FEES IN "PUBLIC INTEREST" LITIGATION 426 (H. Newberg ed. 1978).

33. *See* Appendix II, which lists statutes with identical "appropriateness" language. In other statutes, the language may specify how successful a party must be to qualify for an award. *E.g.*, the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2605, 2619-22 (1987).

Ruckelshaus v. Sierra Club.[34] Plaintiffs there, although unsuccessful on the merits of their suit, filed for an award of attorney's fees under the Clean Air Act.[35] The Act gives the court discretion to award attorney's fees "when such an award is appropriate."[36] In a a five-to-four decision, the Court held that only prevailing parties are entitled to fee awards under the "appropriateness" language of the Clean Air Act.[37] Saying it was inappropriate to award such fees to a party who "achieved no success on the merits of its claims," the Court held that a party must prevail at least partially to be entitled to attorney's fees from the successful defendant.[38] Justice Rehnquist reasoned for the majority that Congress would have used more specific language if it had intended to superimpose a new liability, for plaintiffs' attorney's fees, on a prevailing defendant.[39]

Justice Stevens argued in dissent that the imposition of fees on successful defendants, especially public entities, is not without precedent in American law.[40] The dissent agreed with the lower courts that the legislative history and statutory language require a policy which compensates parties who "substantially contributed to the goals of the Act."[41]

The *Ruckelshaus* decision can be questioned further in light of Congress' recent reaffirmation of the broad entitlement provision in the Equal Access to Justice Act (EAJA).[42] The stated policy reasons for awarding attorney's fees under EAJA and the Clean Air Act are similar: to lessen the likelihood that challenges to bureaucratic action would be deterred by the high cost of litigating against the government, and to encourage meritorious claims in

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34. 463 U.S. 680 (1983).

35. *Id.* at 681.

36. 42 U.S.C. § 7607(f) (1987).

37. *Ruckleshaus*, 463 U.S. at 682.

38. *Id.*

39. *Id.* at 693-94.

40. *Id.* at 701 n.11 (Stevens, J., dissenting) (compensation mandated for attorneys of indigent defendants in criminal cases is but one example of fee-shifting to successful party).

41. *Id.* at 698-99. Congress chose that specific wording for 16 other statutes. *See* Appendix III. As pointed out by the *per curiam* opinion in the lower court, Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982), *rev'd sub nom.* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983), Congress rejected other wording for section 307(f) as proposed in S.B. 252 (1977). By rejecting that language, Congress enacted a far broader policy of reimbursing parties who contribute substantially to the interpretation and development of the statutes. *Id.*

42. H.R. REP. No. 2378, 99th Cong., 1st Sess. 19, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 147. EAJA expired in 1984 and its extension was vetoed by President Reagan. Congress reinstated the Act over the veto to ensure a catch-all scheme for federal attorney fees. 28 U.S.C. § 2412 (Supp. 1986), 5 U.S.C. § 504(b)(1)(A) (Supp. 1986).

furtherance of the chapter.[43] Since these are nearly identical, *Ruckelshaus* may have wrongly second-guessed Congress as intending to limit the incentives to the plaintiff, the party it considered so important to the overall regulatory scheme. At best, the Court was extending the same strict standard for statutory clarity which it had used in *Alyeska Pipeline Co. v. Wilderness Society.*[44] In *Ruckleshaus* and *Alyeska*, the Court sustained the so-called "American Rule," which prohibits fee-shifting unless authorized by a specific legislative enactment.[45] Thus, for nearly all federal environmental litigation, an award of attorney's fees will only be "appropriate" if the plaintiff has won, at least partially, on the merits of the case.[46]

B. Full Compensation for Work Which is Necessary to Client's Success

Two Supreme Court decisions in 1986 settled key issues in fee controversies. In *Rivera v. City of Riverside*,[47] the Court considered whether attorney's fees could be awarded in a case in which plaintiffs were successful against only a few of a group of many defendants. In *Pennsylvania v. Delaware Valley Citizen's Council*,[48] the Court considered whether attorney's fees could be awarded for non-judicial proceedings.

In *Rivera* the Court revisited *Hensley v. Eckerhart*,[49] a landmark attorney's fees case under the Civil Rights Act of 1964.[50] In *Hensley*, the Court had held that time expended on unsuccess-

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43. 42 U.S.C. §§ 7401 - 7642.

44. 421 U.S. 240 (1975). The Supreme Court invalidated the private attorney general exception to the "American Rule," which generally prohibits fee-shifting, except where Congress or state legislatures have specifically granted fee-shifting arrangements in certain areas of law. After prevailing on various issues under environmental laws, including the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1987), the plaintiffs, as informal "private attorneys general," ultimately lost any claim for compensation since no statute directly applied to shift plaintiffs' attorney's fees to the defendants. *Id.* at 269.

45. Besides an express statutory provision, the only exceptions to the American rule are: (1) a "bad faith" award to the victim-party, and (2) the "common fund" exception in class actions or other suits which establish a fund from which fees can be paid. *See* Commonwealth of Puerto Rico v. Heckler, 745 F.2d 709 (D.C. Cir. 1984).

46. A handful of federal environmental statutes have language different from the "appropriateness" standard. *See* H. NEWBERG, ATTORNEY FEE AWARDS 362 n.6 (1986).

47. 106 S. Ct. 2686 (1986).

48. 106 S. Ct. 3088 (1986), *on rehearing*, 107 S. Ct. 3078 (1987) (rehearing was on the grounds of applying a multiplier, not on the award of fees for administrative level work).

49. 461 U.S. 424 (1983).

50. 42 U.S.C. § 1988 (1982).

ful claims cannot be included in the calculation of a fee award.[51] The five-to-four majority in *Rivera* limited *Hensley* by sustaining an award for time expended in successful prosecution of a police brutality case, even though only four of the original thirty-one officers were ultimately found liable for discrimination against the plaintiffs.[52] The Court cited language from *Hensley*[53] to support its ruling that a fee award need not be proportional to the degree of success on the merits, because other factors may require full compensation in certain circumstances.[54]

In *Delaware Valley*,[55] a unanimous Court held that fees and expenses could be granted under the Clean Air Act for certain administrative proceedings even though the statutory language authorizes fees only in "litigation."[56] The Court did not apply the strict *Alyeska-Ruckelshaus* standard to the statutory language.[57]

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51. 461 U.S. 424 (1983).

52. *Rivera*, 106 S. Ct. 2686 (1986).

53. *Id.* at 2691-95.

> In [some] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. . . . Such a lawsuit cannot be viewed as a series of discrete claims. . . . Where a plaintiff has obtained excellent results . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Id. at 2691-92. The majority analyzed the factual background of the case and determined that the commencement of actions against the 31 officers was reasonable since the plaintiffs could not at that early point in the case identify which of the officers were liable. *Id.*

54. The factors prescribed by *Hensley* derived from the widely accepted test in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974).

55. 106 S. Ct. 3088 (1986).

56. Section 304(d) of the Clean Air Act expressly describes the fees and costs to be compensated as "costs of litigation." 42 U.S.C. § 7604(d) (1982).

57. Congress' omission of any reference to "administrative proceedings" in the fee award provision in the Clean Air Act could have proven costly to the plaintiffs in *Delaware Valley*, since their attorneys expended major efforts at the administrative level monitoring a consent decree. 106 S. Ct. at 3096. The Court held that the administrative activities in the various phases of the protracted enforcement effort were central to the plaintiff's ability to win in court again later. *Id.* These activities included responding to Pennsylvania's proposed state regulations. *Id.* at 3095. The multilevel case included not only administrative and federal court activities but also a state court strategy, as well as a political struggle between the legislature, the governor, two federal agencies, and the citizens' organization, headed by one of its own attorneys. The Citizens' Council and the EPA initiated the legal action in 1977 to force the state to establish an automobile emissions control program, typically known throughout the country as an "inspection and maintenance" (I/M) program. The citizens' organization persisted in monitoring a compromise consent decree between EPA and the state and succeeded in nudging the state toward compliance. In spite of this success, the district court reduced the petition request for a number of factors, including excessive time spent on certain tasks, time spent preparing for hearings at the administrative level and other activities not central to the rights of the group under the consent decree. In all, the court excluded one-third of the hours submitted for compensation. *Id.* at 3092 n.2.

Instead, it fashioned its decision on the finding that the citizens' "participation in administrative proceedings was as crucial to the vindication of [their] rights"[58] and was as necessary to their client's success as was the more judicial proceeding.[59]

In summary, Congress' intention of citizen participation in the implementation of its policies has been legitimized, if revised, by the federal judiciary. Consequently, attorney's fees in federal environmental cases still offer significant incentives for attorneys representing individuals and communities against polluters or the regulatory agencies themselves. Fees are less available to the regulated businesses and government agencies absent some misconduct by plaintiffs.

III. FLORIDA'S LIMITED ACCESS TO JUSTICE

The Florida Legislature has specifically allowed fee-shifting in eighteen environmental statutes.[60] At least sixteen additional fee provisions sometimes interact in environmental controversies.[61] Florida's environmental attorney's fee provisions generally parallel the federal statutory scheme, but significant departures from the federal language severely limit the actual fees available.[62] Florida's omission of the citizen enforcement tool so central to the federal statutes demonstrates the different policies of the state and federal statutory schemes.[63]

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58. *Id.* at 3094. The Supreme Court applied a standard of deference, and stated that "compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the District Court" in determining what work was compensable. *Id.* at 3096.

59. *Id.*

60. Of the 18 environmental statutes charted, all but four require fee-shifting. *See* Appendix VI.

61. The more general statutes award fees for such diverse legal activity as access to the courts, abuse of justice, appellate review, administrative procedure, discrimination, open meetings, access to information, shareholders' derivative actions and tort reform. *See* Appendix V.

62. More than 30 provisions in the Florida Statutes as amended by the 1986 legislature affect the practice of environmental law in Florida. Florida has more than 100 fee-shifting provisions, roughly the same number as Illinois, Saltzman, *A Practical Guide to the Recovery of Attorney's Fees*, 74 ILL. B.J. 124, 124 (1985), and significantly fewer than California and Oregon, Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 336 (1984).

63. For a discussion of the federal "citizen's suit" provisions, see *supra* note 20. Whether Florida should expand its use of such citizen enforcement to help address its environmental crisis is a lengthy discussion only surfacing briefly in this discussion of fee-shifting. If Florida seriously undertakes to recruit the public in its enforcement of long-overdue environmental measures, adequate attorney's fees must be an important element of the scheme, along with the more basic element of standing, not addressed in this paper. *See* Hopping, Melson, Emerich, Rhodes & Durst, *Threshold Considerations*, 1 FLA. ENVTL. & LAND USE L.

A. Weaknesses in Florida's Fee-Shifting Scheme

Compared to the federal scheme for environmental protection, the assortment of fee provisions in Florida reflects several weaknesses. Essentially, the state legislature has failed to enlist private citizens to help enforce Florida's environmental laws. For example, some fee-shifting statutes do not provide for fees and expenses to nongovernmental parties,[64] even though private citizens may expend considerable money and effort in initiating and aiding regulatory efforts against violators of environmental laws.[65]

1. Florida's Equal Access to Justice Act

In Florida's most blatant departure from the federal statutes, Florida's Equal Access to Justice Act apparently excludes private citizens from the fee-shifting provision, even though they are included in the comparable federal law. The federal provision is one of the most frequently used federal fee-shifting provisions, the Equal Access to Justice Act (EAJA).[66] In the Florida Equal Access to Justice Act of 1984 (FEAJA),[67] the legislature limited fee awards to "prevailing small business parties."[68] The Florida Act further limits awards to agency-initiated proceedings, although most federal fees also extend to citizen plaintiffs.[69] The statute limits its scope by providing fee shifting to a prevailing private business

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2-24 (1986).

64. Of more than 30 provisions surveyed here, 19 provide attorney's fees to the state and other public entities. For nongovernmental parties, 17 allow awards to prevailing businesses, and 16 to citizens, including individual property owners. *See* Appendices V and VI. Several of the provisions are purely punitive, enacted to deter undesirable litigation which may be found frivolous, in bad faith, or as unreasonable government action.

65. In Florida, only the Environmental Protection Act of 1971, FLA. STAT. § 403.412(f) (1985), and the Administrative Procedure Act, FLA. STAT. § 120.69(7) (1985), expressly award fees for citizen enforcement.

66. 5 U.S.C. § 504 (Supp. 1986); 28 U.S.C. § 2412 (Supp. 1986).

67. FLA. STAT. § 57.111 (1985). At least a dozen other states have passed EAJA-type statutes, including Arizona, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Oklahoma, Oregon, Pennsylvania, Utah and Virginia. Stewart, *Beat Big Government and Recover Your Legal Fees*, 69 A.B.A. J. 912, 914 (1983). These statutes apply to "small private parties and state governments." *Id.*

68. FLA. STAT. § 57.111(4)(a) (1985). "Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding . . . unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust." *Id.*

69. Stewart, *supra* note 67, at 913. FEAJA, like the federal statute, specifically qualifies business parties according to their number of employees and net worth. Only businesses with no more than 25 employees and a net worth of no more than two million dollars qualify. FLA. STAT. § 57.111(3)(d) (1985).

party in a suit against the government and implicitly not providing fees to the government if the government prevails.[70] The rationale is that since the state has "greater resources," the standard for awarding fees and costs against the state should be lower than the standard for an award against a private litigant.[71] The purpose of the "greater resources" language is to diminish the deterrent effect on seeking review of a state action. This rationale in FEAJA benefits small regulated businesses, but such a flexible standard for fee provisions in other statutes would likely cause the legislature to amend other statutes to decrease private litigants' fee-shifting liability to government entities.[72] In the patchwork of thirty statutory provisions written and enacted over the years, more fee awards were specified for government coffers than were authorized to benefit either private citizens or regulated industries.[73]

As another limit on recovery, FEAJA arbitrarily caps the total fee award at $15,000.[74] This is potentially only a small percentage of the actual amount of legal expenses incurred by a party in an environmental case.

2. *Florida's Nuisance Statute*

The state's nuisance remedy[75] illustrates an early fee provision which is patently inconsistent with the 1984 legislative recognition of the necessity of different standards for awarding attorney's fees due to the "greater resources of the state."[76] When provisions for attorney's fees were originally incorporated into the statute for certain prevailing defendants, fees were not provided for private citizens who initiated injunction actions themselves.[77] Applying the "greater resources" rationale of FEAJA, it follows that the state should reimburse citizens who expend resources on the state's be-

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70. FLA. STAT. § 57.111(2) (1985).

71. *Id.*

72. *See supra* note 64. Nineteen of the federal provisions in Appendices V and VI allow fees to government agencies. Twelve could be in conflict with the flexible "greater resources of the state" standard.

73. Seventeen of the Florida provisions shift fees for businesses, and 16 for private citizens. *Id.*

74. FLA. STAT. § 57.111(4)(d)(2) (1985).

75. FLA. STAT. § 60.05 (1985).

76. *Id.* Florida allows citizens to initiate injunction actions in the name of the state against public nuisances as defined in section 823.05, Florida Statutes (1985). *Cf.* United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974)(plaintiffs must show "special injury" to qualify for fee-shifting).

77. FLA. STAT. § 60.05(5) (1985). The statute was last amended in 1977.

half to gain a legitimate injunction against a public nuisance.

3. *Whistle-blower's Act of 1986*

The Whistle-blowers Act of 1986 excludes from fee awards citizens who report certain suspected polluters.[78] The statute creates a cause of action and various remedies, including attorney's fees, for a citizen against whom a government agency retaliates in response to the citizen's formal complaint about the agency. The Act protects reporters of government waste and other abuses of power. It protects employees who report violations which threaten the public's health, safety, or welfare—whether they work for public employers or private government contractors.[79] However, citizens who report suspected pollution or other safety violations by nongovernment facilities are not protected and cannot claim attorney's fees under the Act.

4. *SUPER Act*

The State Underground Petroleum Environmental Response Act of 1986 (SUPER Act)[80] entitles citizens to attorney's fees when bringing a suit for damages due to leaking storage tanks.[81] Departing from other Florida fee provisions, such as the Whistle-blower's Act,[82] the Act does not require a party to prevail to qualify for attorney's fees, but gives judges discretion to award fees whenever an award is in the public interest.[83] Whether this "public interest" language will be construed to require a party to prevail will depend on judicial interpretation of the legislative intent.

Legislative history is virtually nonexistent at the state level compared to the reports, hearing transcripts and floor debates at the federal level. Does "in the public interest" mean that the judge should weigh the comparative wealth of the parties? Or does it

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78. FLA. STAT. § 112.3187 (Supp. 1986). Ch. 86-233, 1986 Fla. Laws 1776.

79. FLA. STAT. § 112.3187(2) (Supp. 1986). Another flaw in the Whistle-blower's Act is the entitlement (to attorney's fees) of the prevailing plaintiff or defendant. This discourages suits by plaintiffs with weak or mediocre cases. *See infra* note 103. The effect is ameliorated only minimally by the fact that under the Whistle-blower's Act fee-shifting is discretionary, not mandatory.

80. Ch. 86-159, 1986 Fla. Laws 655. The legislation passed with virtually no opposition.

81. *Id.* at 688. This statute is one of three environmental laws which create a new cause of action, establish certain conditions for strict liability, and authorize attorney's fee awards. *See also* FLA. STAT. §§ 376.205 (1985), 376.313(3) (Supp. 1986). The other tort actions are for injuries due to water pollution from oil spills or other illegal discharges. *Id.*

82. FLA. STAT. § 112.3187 (Supp. 1986).

83. Ch. 86-159, 1986 Fla. Laws at 688.

mean that an oil industry heavily laden with liability for leaking storage tanks might be able to avoid paying attorney's fees, even if liability is minimal for some claims by individual families? Defendants will rely upon the analogous "whenever appropriate" language[84] that the United States Supreme Court interpreted to entitle only prevailing parties to attorney's fees.[85] Plaintiffs can argue that "in the public interest" implies purposes other than rewarding the victor, especially since in this type of case a prevailing plaintiff receives monetary damages. Arguably, the purpose behind such fee provisions is to encourage participation by citizens to help the courts to make necessary decisions and interpretations in an increasingly complex field of law. If the provision were applied to other environmental statutes, another benefit would be the effect, in the form of policy changes, on the defendant agencies themselves. Citizen plaintiffs have influenced policies and regulations even when they have lost the net legal questions on the merits. In such a case, there is a policy argument for granting attorney's fees because the plaintiff contributed substantially.

5. *Florida's Administrative Procedure Act*

The Florida Administrative Procedure Act (APA)[86] includes a fee provision which often applies in environmental cases.[87] In fact, its language follows the comparable federal statutes more closely than Florida's environmental laws, since the APA borrows the "whenever appropriate"[88] language directly from federal law. Thus, even parties who contribute substantially to the outcome of an environmental controversy are precluded from fees unless they win the litigation itself.[89]

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84. *See supra* note 33.

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

86. FLA. STAT. §§ 120.50-.73 (1985 & Supp. 1986).

87. FLA. STAT. § 120.69(7) (1985). Attorneys can serve their clients well and receive adequate fees from recalcitrant agencies by proper use of several of the fee provisions. Nonbusiness citizens have available a handful of procedural awards for fees, primarily in the area of "good government" litigation, such as the Freedom of Information Act, section 119.12, Florida Statutes, and the open meetings provisions in section 286.011, Florida Statutes (1985). Successful judicial review against agency permitting decisions, including permits for development, water resources, dredging, land and water management, facility siting, storage or transportation of hazardous materials and sewage and waste treatment, also shifts fees to private sector attorneys. FLA. STAT. §§ 403.90, 380.085, 373.617, 161.212, 253.763 (1985)(these sections also provide fees and costs to a prevailing agency).

88. "[T]he court may award . . . whenever the court determines that such an award is appropriate." FLA. STAT. § 120.69(7) (1985).

89. Like the Whistle-blower's Act, the FAPA is a general law not limited to environmen-

6. *Fee Arrangement Provisions*

Other provisions, notably the intensely lobbied Tort Reform and Insurance Act of 1986,[90] limit and protect elements of fee arrangements between attorneys and their clients. For instance, the tort reform legislation exempts environmental tort lawsuits from a controversial provision which partially nullifies the doctrine of joint and several liability by requiring that comparative fault be used in assessing certain damages against multiple defendants.[91] This preserves the rights of some plaintiffs by preventing a reduction of attorney's fees available in environmental tort lawsuits.

7. *Florida Administrative Code*

In addition to statutory weaknesses in Florida's fee-shifting measures, the Florida Administrative Code offers very little if any help in interpreting fee provisions. Most state agency rules and regulations are either silent concerning fee awards or merely repeat the statutory language.[92]

B. *Florida Condemnation Law Recognizes Equitable Fee Liabilities*

In contrast to these inconsistent, if not self-defeating, fee provisions, Florida's eminent domain laws are a positive example of provisions which create a structure for equitably shifting fees. Here the legislature considered the disparate wealth of the parties in as central a role as in FEAJA, since the resources of the state were factored into the statutory fee provision.[93]

The legislature provided that in a condemnation proceeding mandatory attorney's fees are awarded to either a business or individual landowner whose property is the subject of the "taking."[94] If

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tal matters, yet both emphasize a special regulatory remedy for substantial threats to the public health, safety or welfare. The FAPA follows the federal administrative pattern of requiring emergency measures to be sought only by the agencies. FLA. STAT. § 120.69(6) (1985). Thus it precludes expenses for any nongovernment person who legitimately submits evidence of an "imminent and substantial threat," *id.*, since the FAPA specifically limits fees to only prevailing parties. FLA. STAT. § 120.69(7) (1985). Citizen plaintiffs who do prevail in nonemergency actions may be granted a partial or full fee award, at the discretion of the court. The FAPA and the leaking underground storage statutes also provide for expert witness fees, otherwise absent in Florida's fee provisions. FLA. STAT. § 376.313(5)(Supp.1986).

90. Ch. 86-160, 1986 Fla. Laws 695.

91. *Id.* at 756.

92. *E.g.*, FLA. ADMIN. CODE ANN. § 40C-4 (1986).

93. FLA. STAT. § 73.092(6)(a) (1985).

94. FLA. STAT. §§ 73.091-.092 (1985).

the condemnation proceeding is appealed the fees are only shifted to the losing government entity.[95] In other words, aside from the initial eminent domain proceeding, the landowner collects his fees from the government only if he wins the appeal; unlike most fee-shifting provisions in Florida, even if the government wins on appeal, the government's costs and attorney's fees are not shifted to the losing citizen or business landowner. The statute also expresses the legislature's intention to prevent windfalls to attorneys by precluding attorney's fee awards which are a percentage of the amount recovered for the plaintiff.[96]

Florida courts have extended the attorney's fee provision in the eminent domain statute to include cases of inverse condemnation.[97] In such cases, landowners assert that actions of a governmental unit or a public utility have resulted in a de facto "taking," even though the state initiated no formal eminent domain proceedings. In one complex inverse condemnation case attorneys recovered expenses and fees for seven different courts, both state and federal.[98]

C. *Environmental Protection Act Epitomizes Florida's Conflicting Policies*

Also on the positive side, the Florida Environmental Protection Act of 1971[99] provides a catch-all provision for awarding fees to private plaintiffs who win injunctions to enforce environmental laws.[100] Although it fills many gaps in three decades' accumulation of laws,[101] two obstacles block this promising measure from becom-

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95. FLA. STAT. § 73.131 (1985).

96. FLA. STAT. § 73.092 (1985); *Cf.* Division of Admin. v. Denmark, 356 So. 2d 15 (Fla. 4th DCA 1978)($565 per hour, totalling $175,000 held excessive); State v. Gables-by-the-Sea, Inc., 374 So. 2d 582 (Fla. 3d DCA 1979), *cert. denied* 383 So. 2d 1203 (Fla. 1980), ($850,000 attorney's fees awarded by trial court reduced to $800,000, the value placed on the services by the attorney who performed them).

97. State Road Dep't v. Lewis, 190 So. 2d 598 (Fla. 1st DCA 1966), *cert. dismissed* 192 So. 2d 499 (Fla. 1966); City of Jacksonville v. Schumann, 223 So. 2d 749 (Fla. 1st DCA 1969); County of Volusia v. Pickens, 435 So. 2d 247 (Fla. 5th DCA 1983), *petition for rev. denied* 443 So. 2d 980 (Fla. 1983).

98. *Gables-by-the-Sea*, 374 So. 2d at 584. The complex litigation stretched over a five-year period.

99. FLA. STAT. § 403.412 (1985).

100. The provision mandates fees to a prevailing plaintiff who enjoins the violation of "any laws, rules and regulations for the protection of the air, water and other natural resources of the state." FLA. STAT. § 403.412(2)(a)2., (f) (1985). *See* FLA. STAT. § 403.412(2)(c)(notice requirement).

101. The precursors of Florida's environmental regulatory program were the Bulkhead Act of 1957 and the Air Pollution Control Act of 1957. Cloud & Sellers, *Federal, State and*

ing an effective enforcement tool: (1) the conflicting policies behind fee-shifting and citizen enforcement, and (2) the mandatory nature of the catch-all provision.

First, the policies behind the fee-shifting and citizen enforcement provisions are in serious conflict. The policy of the former, evidenced by the seeming even-handedness of fee awards to all prevailing parties,[102] simply works to return a prevailing party to its financial position before the action. This creates a financial risk to potentially losing plaintiffs, which undermines the policy of the latter: encouraging the public to help "regulate the regulators."[103]

In *Dowdell v. City of Apopka,* the Eleventh Circuit Court of Appeals, reflecting the federal fee scheme in the context of civil rights law, listed the policies behind fee-shifting as: (1) encouraging litigation which would help to enforce legislative or congressional policies, (2) serving a primary value in situations where plaintiffs are seeking nonmonetary remedies, and (3) limiting the growth of bureaucracy and state budgetary concerns by allowing more of the enforcement to be litigated by private parties.[104] Many of Florida's fee-shifting provisions in environmental statutes do not reflect the three policies listed in *Dowdell.*[105] Two 1986 statutes, however, the Whistle-blower's Act[106] and the SUPER Act,[107] include express language concerning the public interest and providing for citizen enforcement. These recent statutes, therefore, expressly embody the same policy as does the Florida Environmental Protection Act (FEPA).[108] Like FEPA, these statutes may suffer frustration of purpose and underuse because of the intimidating effect of fee-shifting.

Local Environmental Control Agencies, 1 FLA. ENVTL. & LAND USE L. 1-15 (1986).

102. FLA. STAT. § 403.412(f) (1985).

103. A recent document has charged that the legislative goal of recruiting citizens to help enforce Florida's environmental protection laws has been frustrated by this fee-shifting provision. The Environmental Land Management Study Committee, a statewide, high-level policy committee, recommended in 1984 that Florida's Environmental Protection Act be amended to remove the "threat" of posting bond and being subject to liability for opponents' attorney's fees because the "prevailing party" language "inhibits responsible parties from relying on the Act." Environmental Land Management Study Committee, *Final Report* 31 (1984) (ELMS II). The report recommended that fees should be awarded against unsuccessful plaintiffs only for frivolous, harassing or bad faith actions. *Id.*

104. Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1189 n.12 and accompanying text (11th Cir. 1983).

105. *See infra* notes 139, 159.

106. FLA. STAT. § 112.3187 (Supp. 1986).

107. Ch. 86-159, 1986 Fla. Laws 655. The other Florida statute expressly recruiting citizen enforcement is the Florida Environmental Protection Act. FLA. STAT. § 403.412 (1985).

108. FLA. STAT. § 403.412 (1985).

The closely related second obstacle[109] to the catch-all provision is the mandatory nature of the award.[110] Fees are authorized for all prevailing parties, and a losing plaintiff must pay even if its action was not frivolous and it substantially prevailed.[111] This result deters legitimate efforts by plaintiffs who cannot afford to gamble their personal assets.

In summary, fee-shifting in Florida environmental laws reflects a patchwork history of conflicting policies and inconsistent language.[112] The Florida Legislature has resisted the federal policy of encouraging citizen enforcement,[113] to the detriment of the state's overall enforcement effort. Further, some statutes are still devoid of any fee provisions. Even recently enacted laws fail to provide adequate legal representation for individuals and citizens' organizations that lack the funds required to litigate complex controver-

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109. A third problem with the catch-all provision is that it no longer encompasses the entire field and is ripe for updating to expressly include such new areas of law as growth management. The ELMS II report recommended that the word "land" be added to the list of protected natural resources to clarify that growth management is within the scope of section 403.412. *ELMS II, supra* note 103, at 32. In the growth management amendments enacted in 1986, Ch. 86-191, 1986 Fla. Laws 1404, "affected person" includes "persons owning property, residing or owning or operating a business within the boundaries of" local governments. *Id.* at 1419-20. Policies behind other fee provisions suggest that these persons should also qualify for fee-shifting, especially in actions against state management. Some nonpoint sources of water pollution, such as fertilizer, are highly regulated and the regulatory statutes include fee provisions for the enforcement of marketing violations, but not for environmental protection violations. *See e.g.* FLA. STAT. § 576.061 3(e) (1985).

110. Thirteen of the state environmental statutes set mandatory fee awards for the prevailing party, while five are discretionary. *See* Appendices V and VI.

111. Florida's pattern of mandatory awards for "prevailing parties" is not only a departure from the federal scheme, but from some other states as well. The majority of fee-shifting statutes in Illinois, for example, are for prevailing plaintiffs only; they are not for all prevailing parties. Saltzman, *A Practical Guide to the Recovery of Attorney's Fees*, 74 ILL. B.J. 124, 125 n.21 (1985).

112. Other Florida statutes provide for legal resources other than fee-shifting, such as outside counsel, section 370.021(6), Florida Statutes (1985), and financial bonuses for state attorneys who win injunctions against defendant mining operations. FLA. STAT. § 533.05 (1985). Enforcement in future years may use similar creativity to provide adequate legal resources.

113. The continuing reluctance of the legislature to broadly embrace attorney's fees for increasing public participation may in part be a reaction to the increase in civil rights litigation following the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1985). In 1976-82, civil rights litigation increased 89 percent in Florida, Georgia and Alabama, while total civil litigation increased only 41 percent. Hymer, *The Eleventh Circuit's Application of the Civil Rights Attorney's Fees Awards Act of 1976*, 36 ALA. L. REV. 103, 141 & n.2762 (source of statistical analysis) (1984). Fee awards against Florida, in civil rights cases alone, totaled $2.6 million in 1983. *Id.* at 142. Civil rights and environmental litigation are both complex and time-consuming, but what critics fail to recognize is the resulting incentive for defendants to settle more quickly because of the risk of losing on the merits and losing again on a larger attorney's fee award because of their own delays. *Id.*

sies. Careful amendment can correct these flaws.[114] When the state effectively welcomes public participation in the implementation of environmental laws, equal access to Florida courts will become more than a limited promise.

IV. FEE-SHIFTING IN NONTRADITIONAL & ADMINISTRATIVE PROCEDURES

Attorney's fee awards in Florida environmental law reflect the policies behind both federal and state laws. Since many of Florida's statutory fee provisions were prompted by similar federal statutes,[115] federal case law interpreting the language of federal provisions serves to guide Florida courts in awarding fees in state cases.[116] In particular, federal case law influences Florida law in two critical areas concerning attorney's fees: (1) determining the reasonableness of an award, and (2) compensating administrative work.

A. Federal Courts Refine "Reasonable" Fee Formula

The Fifth Circuit Court of Appeals compiled a twelve-factor test to guide courts in determining how much to award prevailing plaintiffs in civil rights cases.[117] This test, known as the *Johnson*

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114. For example, Florida's fee-shifting provisions in eminent domain proceedings reflect legislators' careful weighing of the policies. *See* FLA. STAT. §§ 73.091-.092, 73.131 (1985). During the 1987 legislative session, Senate Bill 109 addressed several additional provisions for an even more careful and equitable statutory scheme for fees in eminent domain proceedings. Fla. SB 109 (1987)(proposed amendment to section 73.092). Foremost among the equitable changes was a provision which disallows attorney's fees to be based solely on a percentage of the award. Additionally Senate Bill 109 provided for a limitation on the amount of fees recoverable when the condemnee rejects an offer of settlement and the ultimate amount of the award does not exceed the settlement offer. In such a case, the condemnee's attorney cannot claim the hours expended after the date of the rejection or the expiration of the offer. The bill also provided that the Department of Transportation must pay all reasonable costs incurred by the condemnee in a prelitigation settlement. The amendment also prescribed that any fee dispute must be settled according to the Florida Administrative Procedures Act. 14 FLA. B. NEWS 4 (Mar. 15, 1987).

115. *Compare* Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f) *with* FLA. STAT. § 376.313(5) (Supp. 1986); *compare* Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 28 U.S.C. § 2412 *with* Fla. Stat. § 57.111 (1985); *compare* Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E) *with* FLA. STAT. §§ 119.07, 119.12 (1985).

116. *See* Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)(Court adopted the federal lodestar formula for computing reasonable attorney's fees).

117. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The first part of an attorney's fee case is a determination of whether a party is entitled to a fee under a statutory provision. The court then has wide discretion in calculating a proper amount, though that calculation must consider 12 factors and must be carefully documented in the decision. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The 12 factors from *Johnson* are

test, was subsequently adopted throughout the federal system,[118] and by Florida courts,[119] for shifting fees in such areas as environmental, contract and administrative law.[120]

These factors, in practice, proved to be too subjective and offered little guidance to the trial courts, which resulted in too much discretion and inconsistent results.[121] To update the *Johnson* test, the courts developed a formula called the "lodestar,"[122] which incorporated several factors from *Johnson* in determining a reasonable fee. The first part of a proper fee award under the lodestar formula is the product of the number of hours expended on the case multiplied by an appropriate hourly fee.[123] The remaining

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(1) the time and labor required,
(2) the novelty and difficulty of the questions,
(3) the skill requisite to perform the legal service properly,
(4) the preclusion of other employment by the attorney due to acceptance of the case,
(5) the customary fee,
(6) whether the fee is fixed or contingent,
(7) time limitations imposed by the client or the circumstances,
(8) the amount involved and the results obtained,
(9) the experience, reputation, and ability of the attorneys,
(10) the "undesirability" of the case,
(11) the nature and length of the professional relationship with the client, and
(12) awards in similar cases.

488 F.2d at 717-19.

118. *Hensley*, 461 U.S. at 430 n.3 ("These factors derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106 1980"). For example, the Eleventh Circuit requires the consideration of the *Johnson* factors. Jonas v. Stack, 758 F.2d 567, 568 n.2 (11th Cir. 1985). *See also* Dowdell v. City of Apopka, 698 F.2d 1181, 1187 (11th Cir. 1983).

119. *Rowe*, 472 So. 2d 1145, 1150 n.5 (Fla. 1985); *see also Florida Bar Association Code of Professional Responsibility*, DR 2-106(B) (1985).

120. Other areas of law include civil rights, *Johnson*, 488 F.2d at 715-19; medical malpractice, *Rowe*, 472 So. 2d at 1150 n.5; privacy, Fitzpatrick v. IRS, 665 F.2d 327, 332 (11th Cir. 1982); truth in lending, McGowan v. King, Inc., 661 F.2d 48, 51 (11th Cir. 1981); eminent domain, *Oolite*, 348 So. 2d at 904; age discrimination, du Fresne, *Is There Compensation for Litigation of Age Discrimination? Yes!*, 55 FLA. B.J. 200, 202 (1981).

121. *See* Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088, 3097 (1986), *on rehearing*, 107 S. Ct. 3078 (1987).

122. The roots of the "lodestar" formula actually predate *Johnson* and developed from antitrust litigation before they gained wide acceptance in other areas of attorney's fee law. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167-68 (3d Cir. 1973). "This [lodestar] calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. . . . There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 433-34.

123. *Id.* at 433. In Save Our Cumberland Mountains v. Hodel, 826 F.2d 43 (D.C. Cir. 1987) (*reh'g en banc granted*, 830 F.2d 1182 (1987)), the D.C. Circuit is currently rehearing en banc an appeal in which attorneys for three citizens' organizations were awarded fees at a market rate, which was higher than the discounted rate they charged to certain public inter-

steps in calculating the award allow the court to consider the factors from the *Johnson* test.[124]

In a California civil rights case, *City of Riverside v. Rivera*,[125] the plaintiffs prevailed at trial against only four of the original thirty-one defendant police officers accused of misconduct based on racial discrimination. The trial court applied the *Johnson* factors according to different priorities than in previous fee cases.[126] After concluding that the charges against the defendants were based on a "common core of facts" [127] and on the "same general legal theory," [128] the court of appeals awarded the entire fee the plaintiffs requested.[129] The United States Supreme Court upheld that award.[130] The Court updated the *Johnson* test by narrowing the trial court's discretion in applying the twelve factors to calculate the reasonable fee. This refined lodestar formula emphasizes the importance of the result and de-emphasizes the amount of plaintiffs' financial recovery.[131] Lastly, *Rivera* elevated a new factor—the extent to which the case serves "in the public interest"—where the stated purpose of the statute is to deter future violations.[132]

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est clients who were less able to pay. The Circuit panel reduced the market rate to be equal to the discounted rate, and thus limited the *Hensley* principle of awarding fees at market rate. *Id.*

124. *Id.* at 434 n. 9. Two questions determine the next steps: Did the plaintiff lose on one or more unrelated claims? What was the degree of success? In *Hensley*, the Court applied the lodestar formula to a civil rights case, stressing that "[t]he most critical factor is the degree of success obtained." *Id.* at 435-36. The Court concluded: "[W]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Id.* at 440.

125. 106 S. Ct. 2686 (1986).

126. The Court reviewed the lower court record to affirm that the trial court had carefully considered whether the plaintiffs' unsuccessful claims were related to the successful ones, and whether the level of success would justify an award including hours reasonably expended on unsuccessful claims. *Id.* at 2691. Especially important were the complex and interrelated issues of fact and of law, which the court applied from *Hensley* to determine that the time could not be reasonably separated between the successful and unsuccessful charges. *Id.* at 2692-93.

127. *Id.* at 2692.

128. *Id.* at 2693.

129. *Id.*

130. *Id.*

131. The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded. . . . It is, however, only one of many factors that a court should consider. . . . We reject the proposition that fee awards under Section 1988 should necessarily be proportionate to the amount of damages.

Id. at 2694.

132. The new factor, that "a fee award in this civil rights action will . . . advance the

B. *Florida Courts Follow Federal Formula*

Florida courts have combined the *Johnson* test and the "lodestar" as a means to calculate reasonable attorney's fees.[133] In the future, *Rivera*'s narrower use of the *Johnson* factors may be similarly adopted from federal law. In *Florida Patient's Compensation Fund v. Rowe*,[134] the Florida Supreme Court ruled on the constitutionality of a state statute which provided for mandatory fee-shifting in a medical malpractice action involving a contingency fee. The court held that the lodestar amount may be increased in tort cases because of the "contingency risk" factor,[135] and it may be decreased when the "results obtained" factor reveals that the party was unsuccessful on one or more unrelated claims.[136] More importantly, perhaps, the Court affirmed the order of the trial court finding section 768.56, Florida Statutes, to be constitutional, and allowing mandatory fee-shifting to any prevailing party.[137]

Rowe did not discuss the purposes of other Florida statutes which, like most federal statutes, award fees only to prevailing plaintiffs.[138] When such a case arises, the courts will have to decide whether the purposes of Florida's provisions are so different from the purposes of federal awards[139] that Florida should not apply the public interest factor from *Rivera*.

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public interest," *id.* at 2693, derives from the legislative history and the purpose of the statute. "Fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *Id.* at 2696. The Court said "[t]his case illustrates why the enforcement of civil rights laws cannot be entrusted to private-sector fee arrangements." *Id. See* Justice Powell's concurring opinion, in which he lists the eight findings of fact from the court below relevant to the fee award. *Id.* at 2699.

133. *See e.g.* Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

134. *Id.*

135. *Id.* at 1151.

136. *Id.*

137. The court in *Rowe* upheld the constitutionality of section 768.56, Florida Statutes (1985).

138. *E.g.*, FLA. STAT. §§ 57.111, 119.12, 373.129(6), 533.05 (1985).

139. *See supra* notes 102-04 and accompanying text. Unsuccessful defendants in environmental suits in Florida may argue that the public interest factor is not applicable because the purpose of Florida's fee awards is less concerned with citizens' enforcement than the federal statutes. Ironically, however, history suggests that Florida law helped incubate the very policy purposes which resulted in the attorney fee provisions in federal legislation, particularly in the civil rights field. Kuenzel, *Attorneys' Fees in a Responsible Society*, 14 STETSON L. REV. 283, 285 (1985).

C. *Supreme Court Interprets Legal "Action" to Include Certain Nonjudicial Administrative Proceedings*

In analyzing the applicability of a "different purposes" distinction, two other recent Supreme Court cases are instructive. In late 1986, the Court set a limit on attorney's fees awards for administrative-level work, in *North Carolina Department of Transportation v. Crest Street Community Council.*[140] The Court held that, unless a statute expressly provides otherwise, a prevailing party cannot be compensated for time expended in administrative proceedings unless the administrative-level work is useful and necessary to a pending, related legal action.[141] In a six-to-three decision, the Court narrowly interpreted the Civil Rights Attorney Fees Awards Act as excluding separate administrative hearings from the fee provision.[142] This would preclude an independent court action filed only for attorney's fees.[143]

The Court, however, did not disturb the principles which, in an earlier decision, had allowed an award for administrative work integrally related to a legal action. In *Pennsylvania v. Delaware Valley Citizens' Council,*[144] the United States Supreme Court upheld a fee award for several phases of a complex case which included both litigation and administrative expenses.[145] After the Citizens' Council won a consent order[146] directing the Pennsylvania Depart-

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140. 107 S. Ct. 336 (1986).

141. *Id.* at 342.

142. *Id.* at 343, (Brennan, J. dissenting). As a result of the majority's decision, "[p]laintiffs who fail to file a lawsuit and who prevail before an administrative agency are therefore prohibited from bringing an independent action for fees." *Id.* Brennan said further that nothing in 42 U.S.C. § 1988 compels this outcome. *Id.*

143. "The legislative history clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit." *Id.* at 341. The dissent pointed out that *Crest Street* demonstrates that "important civil rights are often vindicated in administrative hearings." *Id.* at 343 (Brennan, J., dissenting). The dissent predicted that as a direct result of *Crest Street*, attorneys will always file actions in the courts concurrent with administrative proceedings, even when the more informal efforts promise a favorable, if not more efficient, settlement than formal litigation. *Id.* at 346 n.5.

144. 106 S. Ct. 3088 (1986).

145. *See supra* note 57.

146. Both federal and Florida courts recognize such fee awards when parties win without court decisions on the merits, as occurs in settlements and certain injunctive remedies, such as consent orders. 51 Island Way Condo Ass'n, Inc. v. Williams, 458 So. 2d 364 (Fla. 2d DCA 1984); Maher v. Gagne, 448 U.S. 122, 129 (1980); McDaniel v. Berhalter, 405 So. 2d 1027, 1030 (Fla. 4th DCA 1981)(attorney's fees not awarded in arbitration; court awarded fees for enforcement of arbitration award); *but see* Cuevas v. Potamkin Dodge, 455 So. 2d 398 (Fla. 3d DCA 1984)(court denied application for attorney's fees because success was achieved through arbitration).

ment of Transportation to implement a vehicle emissions control program, it was awarded fees for time spent monitoring the state's compliance with the order and responding to proposed regulations.[147]

The Court in *Delaware Valley* faced the question of whether nonadjudicative, administrative-level work could be compensated under the Clean Air Act (CAA),[148] which allows fee awards for legal "actions."[149] In contrast, other statutes, especially the Civil Rights Attorney's Fees Awards Act,[150] allow fees for "actions and proceedings," expressly including administrative-level work.[151] The Court inferred from statutory analysis that Congress intended the CAA's "actions" to include administrative "proceedings," since the two statutes share a common purpose.[152] This "same purpose" test

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147. *Delaware Valley*, 106 S. Ct. at 3090-92. In Phase Nine of the litigation, the Citizens' Council was a prevailing third party to proceedings before the federal Environmental Protection Agency (EPA), during which the state unsuccessfully sought EPA's approval of a program covering a smaller geographical area for the emissions control program. The Council also prevailed as third party in related state court litigation, where state courts challenged the validity of the consent decree. The Third Circuit affirmed the trial court's fee award for these activities and explained:

> Because this case involved a head on collision between two court systems, plaintiff was treading through a minefield. Nevertheless, plaintiff's counsel performed exceptional services in vindicating the dignity of the federal court system, walking the tight, and sometimes imperceptible, line that divides . . . two governmental sovereignties, insuring full compliance with federal legislation designed for the safety and protection of the citizens, and vigorously battling a state governmental system that sought to defy a lawful order of this court system by resorting to discredited concepts of nullification, first by its legislature and next by its supreme court. . . . [T]hese circumstances . . . satisfy the enhancement of the lodestar.

Delaware Valley Citizens' Council v. Pennsylvania, 762 F.2d 272, 281 (3d Cir. 1985), *aff'd in part, rev'd in part*, 106 S. Ct. 3088 (1986), *on rehearing*, 107 S.Ct. 3078 (1987).

148. Clean Air Act, 42 U.S.C. § 7401 (1982).

149. 42 U.S.C. § 7604(d) (1982). "The court, in issuing any final order *in any action* . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, wherever the court determines such award is appropriate." *Id.* (emphasis added).

150. 42 U.S.C. § 1988 (1982); the 1976 fee provision was passed in direct response to Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). The language provides, "*[i]n any action or proceeding* to enforce a provision of . . . the Civil Rights Act . . . , the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982)(emphasis added).

151. *Id.*

152. The Court stated that "[g]iven the common purpose of both section 304 and section 1988 *to promote citizen enforcement of important federal policies*, we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Delaware Valley*, 106 S. Ct. at 3096 (emphasis added). The Court cited Webb v. Board of Educ., 471 U.S. 234 (1985), which held that work in optional administrative proceedings is compensable when it is "ordinarily necessary" to the conclusion of the case. *Id.* at 254 (Brennan, J., *concurring in part and dissenting in part*). In *Webb*, the plaintiff did not prove that the administrative

ensures effective enforcement of the rights and standards established in the respective statutes. As a result of this "same purpose" test, the Court awarded the fees for "non-adjudicative" functions, because such proceedings were necessary to the relief won through the litigation.[153]

D. "Same Purpose" Test May Compensate Administrative Work in Florida

The "same purpose" test for statutory construction raises questions for Florida's Environmental Protection Act (FEPA),[154] which broadly provides a remedy for parties seeking to enjoin any violation of the state's environmental laws. Like the Clean Air Act in *Delaware Valley*, FEPA includes attorney's fees in "any action."[155] However, the statute is unclear about fees for administrative proceedings, although it is arguable that a fee award should include work related to the formal notice required by the statute.[156]

As in *Delaware Valley*, the "same purpose" test for statutory analysis would compare the policies behind FEPA and other Florida fee provisions to determine whether the expressed intention of other statutes should control the interpretation of FEPA.[157] For example, the purposes of the "Whistle-blower's Act of 1986"[158] are to deter retaliatory actions by agencies and certain employers against individual parties who report violations of the law, and to protect such parties against discrimination. Similarly, FEPA seeks to deter pollution and to enable parties to seek enforcement of environmental laws.[159] These purposes are "nearly identical," satisfy-

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work was useful and necessary to advance the case to the point at which the case settled. *Id.*

153. The Court explained, "the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." *Delaware Valley*, 106 S. Ct. at 3094. The Court agreed with the district court that "participation in these administrative proceedings was crucial to the vindication of Delaware Valley's rights under the consent decree." *Id.* at 3096.

154. FLA. STAT. § 403.412 (1985).

155. "In any action instituted pursuant to this section, the prevailing party or parties shall be entitled to costs and attorney fees." FLA. STAT. § 403.412(2)(f) (1985).

156. FEPA also authorizes courts to grant injunctive relief similar to the kind won by the Citizens' Council in *Delaware Valley*; courts also can impose certain conditions on the defendants. Such court-ordered conditions often require ongoing monitoring and enforcement against recurring noncompliance. FLA. STAT. § 403.412(3) (1985). The Florida statute also recognizes "administrative, licensing or other proceedings" as part of the enforcement scheme. FLA. STAT. § 403.412(5) (1985).

157. *See generally* 106 S. Ct. at 3094-96.

158. FLA. STAT. § 112.3187 (Supp. 1986).

159. *See* FLA. STAT. § 403.021 (1985)(legislative declaration of public policy for Florida's

ing the standard used in *Delaware Valley*.[160] Thus, since the Whistle-blower's Act includes administrative-level remedies,[161] by analogy the "any action" provision in FEPA should also be construed to provide fees for certain administrative-level "proceedings."[162]

Florida courts have already applied a limited "same purpose" test (without identifying it by name) to fee controversies arising from complex condemnation cases.[163] In one opinion,[164] a circuit court in Pinellas County awarded fees to attorneys for condemnee-property owners for several related, yet diverse, proceedings, including: a direct inverse condemnation challenge;[165] representation at administrative hearings concerning dredge-and-fill permits;[166] extensive discovery concerning the government's failure to prove a lack of a "feasible or prudent alternative"[167] to the use of parklands; extensive discovery concerning the government's failure to prove that the condemnation will not result in irreparable harm to natural resources;[168] a civil suit in state court to defend against what the court found to be an illegal sale and a conspiracy to violate the city charter;[169] a civil suit in federal district court to obtain injunctive and declaratory relief;[170] and negotiations of a stipulated settlement of the condemnation case.[171] The stipulated settlement and the judicial opinion recognized that the various proceedings were interrelated and that the attorneys were entitled to compen-

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Pollution Control laws, Part One of Chapter 403, Environmental Control). FEPA's purpose is more public interest oriented than the policy for Florida's fee-shifting statutes, which is to simply return prevailing parties to their pre-enforcement financial positions.

160. *Delaware Valley*, 106 S. Ct. at 3095.

161. The Whistle-blower's Act requires the exhaustion of "all available contractual or administrative remedies" before a civil action can be filed. FLA. STAT. § 112.3187(8) (Supp. 1986). This required administrative level work is not unlike the required proceedings in *Delaware Valley*. The Whistle-blower's Act also provides defenses to "any action brought under this [Act]," FLA. STAT. § 112.3187(10) (Supp. 1986). The fee provision itself uses the same "any action" language, FLA. STAT. § 112.3187(9) (Supp. 1986). Thus, by parallel construction within the same statute, the attorney's fee provision includes administrative proceedings.

162. *See generally supra* note 161.

163. *See supra* notes 93-98 and accompanying text.

164. Department of Admin. v. City of St. Petersburg, 12 Fla. Supp. 2d 112 (Fla. 6th Cir. Ct. 1985).

165. *Id.* at 113.

166. *Id.* at 117.

167. *Id.* at 115, 118.

168. *Id.* at 118.

169. *Id.*

170. *Id.*

171. *Id.* at 120.

sation for all the work, since it was performed "after condemnation was imminent."[172]

Other Florida courts have granted fee awards for legal work which was "related" to the immediate case of "taking." In one housing controversy the court allowed counsel to claim hours expended in an ancillary circuit court proceeding.[173] In another successful defense in a condemnation case the court awarded fees for time spent opposing two bond elections which would have financed the proposed condemnation.[174] Other complex land use and environmental controversies involve equally diverse permit challenges, formal and informal hearings, and creative settlements, which may well provide for a broader recovery of fees and expenses for attorneys practicing in the field.

In summary, recent Supreme Court cases continue to influence fee awards in Florida. If the courts apply *Delaware Valley*'s "same purposes" test of statutory analysis to Florida's Environmental Protection Act, the state's most important environmental attorney fee provision, fee-shifting awards may compensate attorneys for a wider variety of legal work including, in some cases, administrative proceedings and post-adjudicative monitoring of compliance orders. Similar flexibility has already been applied in attorney's fee cases involving condemnation proceedings in Florida. Such a result under the state's environmental laws would enable more citizens to help enforce the state's policy of environmental protection, as intended by the Florida Legislature.

V. CONCLUSION

An attorney practicing environmental law in Florida may become embroiled in controversies involving any of eighty or more statutes, both federal and state. Nearly all of these laws provide for fee-shifting, generally in favor of prevailing parties. While winning attorney's fee awards may often require considerable time in record-keeping, filing petitions, renewed negotiations, special hearings, and sometimes lengthy appeals, the amount of compensation is usually worth the effort. Conversely, for a losing party, the prospect of incurring additional liability for attorney's fees may encourage prompt settlement of a fee controversy.

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172. *Id.* at 121. Attorneys were compensated a total of $90,000 for what the court held to be a "masterly defense" in an "exceedingly complex case." *Id.* at 123.

173. State v. Shaw, 303 So. 2d 75, 77 (Fla. 1st DCA 1974).

174. Miami Beach v. Manilow, 253 So. 2d 910, 911 (Fla. 3d DCA 1971).

The United States Supreme Court has resolved several questions concerning fee awards in civil rights cases, and many of the interpretations and formulas for calculating fees apply to cases arising under environmental statutes as well. While state laws sometimes closely follow the statutory langauge of federal fee provisions, Florida has accumulated a patchwork of fee-shifting provisions in environmental statutes which depart from the federal emphasis on citizen enforcement.

A general "catch-all" statute, such as the federal Equal Access to Justice Act or the Florida Environmental Protection Act, may apply when a particular statute does not provide for fees. Some statutes provide for mandatory fee awards, though many allow fee-shifting at the discretion of the trial judge.

Generally, attorney's fees are limited to actual litigation in the courts, including legal work at the appellate level. Various fee provisions may also allow compensation for time spent on administrative-level proceedings or other activities outside of the courtroom, especially when the efforts contributed toward the party's eventual success on the merits of the litigation.

In the years ahead, judges will continue to define what kinds of fact situations merit such fee awards, and Congress and the state legislature will continue to refine the statutory rules for shifting fee liability. The successful environmental attorney will keep abreast of these developments and advocate clarifications of judicial tests as the attorney's fee law evolves to implement the policy of our state and federal environmental laws.

APPENDIX I

Provisions for Attorney's Fees in Federal Environmental Statutes

1. Archaeological Resources Protection	16 U.S.C. §470w-4
2. Fed. Reg. & Dev. of Power (Ch. 12)	16 U.S.C. §825q-1
3. Publ. Util. Reg. Policies (Ch. 46)	16 U.S.C. §2632
4. Alaska Nat. Int. Lands Conservation	16 U.S.C. §3117
5. Flood Control (Nav. Waters)	33 U.S.C. §701c-1
6. Water Pollution Prev. & Control (Whistle-blowers)	33 U.S.C. §1367
7. Prev. of Pollution From Ships	33 U.S.C. §1910
8. Dev. & Control of Atomic Energy	42 U.S.C. §2184
9. Solid Waste Disposal	42 U.S.C. §6971
10. Air Pollution	42 U.S.C. §7607(f)
11. Toxic Clean-up (Whistle-blowers)	42 U.S.C. §9610
12. Toxic Clean-up	42 U.S.C. §9612
13. Toxics Substances Control	15 U.S.C. §2605
14. Toxics Substances Control	15 U.S.C. §2619(c)(2)
15. Toxics Substances Control	15 U.S.C. §2620
16. Toxics Substances Control (Whistle-blowers)	15 U.S.C. §2622
17. Air Pollution	42 U.S.C. §7604(d)
18. Solid Waste	42 U.S.C. §6972
19. Surface Mining (Coal) (Def.'s vs. gov't)	30 U.S.C. §1275
20. Surface Mining (Coal) (Whistle-blowers)	30 U.S.C. §1293
21. Offshore Oil Spill	43 U.S.C. §1818
22. Outer Continental Shelf	43 U.S.C. §1845
23. Ocean Dumping	33 U.S.C. §1415(g)
24. Surface Mining (Coal)	30 U.S.C. §1276
25. Air Pollution (Def.'s vs. gov't)	42 U.S.C. §7413(b)
26. Surface Mining	30 U.S.C. §1270
27. Water Pollution	33 U.S.C. §1365
28. Endangered Species	16 U.S.C. §1540
29. Safe Drinking Water	42 U.S.C. §300j-8
30. Outer Continental Shelf	43 U.S.C. §1349(a)
31. Toxics	15 U.S.C. §2618(d)

Other Related Statutory Fee Provisions
(Plus Six Related Provisions Listed in Appendix II)

1. Equal Access to Justice	5 U.S.C. §504(b)
2. Equal Access to Justice	28 U.S.C. §2412
3. Freedom of Information	5 U.S.C. §552(a)
4. Civil Rights	42 U.S.C. §2000(e)
5. Civil Rights Attorney's Fees Awards	42 U.S.C. §1988
6. Administrative Procedure Act	5 U.S.C. §551
7. Eminent Domain	42 U.S.C. §4654(a)

APPENDIX II

Federal Statutes Specifying the "Appropriateness" Standard for Attorney's Fees

1. Clear Air Act, 42 U.S.C. §§ 7604(d), 7607(f).
2. Toxic Substances Control Act, 15 U.S.C. § 2618(d).
3. Endangered Species Act, 16 U.S.C. § 1540(g)(4).
4. Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d).
5.* Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c).
6. Clean Water Act, 33 U.S.C. § 1365(d).
7. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4).
8.* Deepwater Port Act, 33 U.S.C. § 1515(d).
9. Safe Drinking Water Act, 42 U.S.C. § 300j-8(d).
10.*Noise Control Act, 42 U.S.C. § 4911(d).
11.*Energy Policy and Conservation Act, 42 U.S.C. § 6305(d).
12.*Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d).
13.*Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(d).
14. Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5).

Adapted from *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983).

* Statutes not listed in Appendix I, but indirectly related to Environmental Law

APPENDIX III

Comparison of Sample Attorney's Fee Provisions Affecting Federal Environmental Law

Statute	Who Can Claim?	Entitlement Requirements? (And Degree of Success Required.)	Any Total Exclusions or Unusual Reductions?	What Formula or Maximum? (Besides "Market Value"*)	What Types of Expenses (Besides Fees)?	Any Possibility for Increasing the Award?	Any Unique Features or Major Cases
EAJA	Non-U.S. party in suit by or against U.S.	"Prevailing" party must be qualified: tax exempt organizations or an entity with fewer than 500 employees & $7,000,000 net worth (also see Regs.)	Yes. Unless govt's position "substantially justified" or "special circumstances" would render award unjust; Govt's discretion if prevailing party unduly protracted the case	$75/hr max; reasonable rates & hours; Lodestar formula	"Costs & expenses" expert witnesses, necessary studies & test, paralegals & law clerks; (also see Regs.) travel & Xerox; (*not* postage, phone, messengers)	"Cost of living" or other "special factor" justifying a higher fee excellent result interest if the gov't appealed	EAJA doesn't apply when other statutes do; *test* for separating claims: 1. common core of facts 2. "on related legal theories" 3. or not truly fractionable
FOIA	Plaintiffs (non-U.S. party must be *Qualified & Entitled*)	Party who "substantially prevailed"	—	Lodestar, reasonable rates reasonably expended	"Costs & expenses" (travel, postage, Xerox, messenger service, phone, etc.); paralegals, law clerks	Multiplier is possible	
Clean Air Act (Clean Water & others)	1. "Citizens/Persons" (broad interpretation) 2. Gov't only for "bad faith" by citizen; 3. Gov't or corporate defendants in gov't enforcement action; also in administrative proceedings	*"When appropriate" prevailing & partially prevailing parties	—	Reasonable fees	Expert witnesses; "costs of litigation" (Xerox, postage, telephone)	*Multipliers only when proven (superior quality of work is insufficient) (Civil Rights cases apply)	*Ruckelshaus** *Delaware Valley**

SMCRA (strip mining)	1. "Any citizen" plaintiffs; 2. Gov't only for bad faith by citizen; 3. Gov't or Defendants in gov't enforcement action; 4. Also whistleblowers (employees); Administrative proceedings	"When appropriate" (same as CAA)	—	Same	"All costs and expenses reasonably incurred" including evidentiary	Same	Broadest citizen's rights; and strong enforcement provisions; most mandatory duties
TSCA (toxics)	"Any person" (same as *CAA*) *Rulemaking*: who 1. substantially contributes; and 2. has small financial interest or has inadequate resources to participate; also whistle-blowers (employees)	Prevailing, partially prevailing and non-prevailing parties "if appropriate"	—	Reasonable fees	Expert witnesses; "costs of suit"	Same	Strong policy considerations

* Supreme Court has ruled

." generally indicates statutory language or major interpretive language from the Supreme Court

APPENDIX IV

General Comparison of Florida and Federal Environmental Statutory Provisions for Attorney's Fees

Category	Florida	Federal
Consistency of language?	Inconsistent; different each legislature gen'ly	All statutes are nearly identical
Consistency of purpose?	More punitive; limited standing for citizens	Broad enforcement scheme consistent in citizens' suits in all but 1 major statute
Which parties are entitled?	Gov't, business & citizens; generally Ps and Ds	Generally citizens; gov't rarely; business Ds vs. gov't enforcement
To what extent successful to be entitled?	"Prevailing party" in all but one statute (underground storage)	"When appropriate"/ prevail. party only (except TSCA: non-prevailing if approp., and FOIA: substantially prevailing party)
Any limitation?	EAJA: $15,000 maximum fee	EAJA: $75/hour cap
Court's role?	Two-thirds of provisions are mandatory; only discretion re: amount reasonable	Generally at discretion of trial court
Administrative level?	Not until judicial review level in the courts (in several statutes); EAJA, APA incl. admin. proceedings	Yes, specifically in some statutes; some provide fees at judicial review level; Supreme Court to decide re: admin. level not related to court proceeding
Major catch-all statutes?	Environmental Prot. Act EAJA (small business only) (Ds vs. gov't only)	EAJA (broad, Ps & Ds) Civil Rights Att'y Fee Awards Act of 1976

APPENDIX V

Florida Statutory Provisions for Attorney's Fees in General Laws Pertinent to Environmental Law

Fla. Stat. §	Mandatory/ Discretionary	Fees Awarded To Whom?	Apparent Policy?
57.105 no justiciable issue	M "shall"	any prev. party B, C, G	*discourage frivolous suits
57.111 FEAJA	M	prev. small bus. vs. gov't action	*return small bus. to pos. pre-gov't action. *"diminish deterrent" *enable small bus. to def. selves
59.46 appeals	M	any prev. party on appeal B, C, G	*clarify that fee-shifting is for appeals level, too
111.07 actions vs. officials	a. M b. D	a. publ. officials who prevail b. gov't entity if off. outside scope	*a. provide def. costs in civil rights lit. *b. indemnify gov't for certain acts of employees after they lose in trial
112.317 mal. intent vs. officials	M	prev. publ. officials (defs.) G	*penalize frivolous, malicious suits
112.3187(9) whistle-blowers	D "may include"	prev. party: B, C, G cit. vs. gov't only employee vs. employer	*"prevent agencies or indep. contractors from retaliating vs. employee" for reporting dangerous viols; protect reporters of gov't abuse.
119.07, 119.12 FOIA	M	prev. pltf. seeking access B, C	*"all gov't records shall be open."
120.57(1)(b) FAPA (1986)	D	opposing party in bad faith ct. docts B, C, G	*make all litigation more responsible. *make attys more careful, honest *discourage frivolous suits
120.69(7) FAPA	D "when approp."	prev. party in agency enf. action B, C, G "Subst int."	*return party to position pre-case; *discourage weak claims, appeals by private parties
286.011 open meetings	a. M b. D	a. any person seeking access B, C b. G for friv. suit	*Sunshine in gov't; *punish closed mtgs in viol. *discourage frivolous suits
607.147 shareholders derivative	D	a. prev. pltf. SH B, C b. corp. if unreas. suit B	*return SHs to position pre-suit; *discourage frivolous suits
768.28 Tort Claims Act	n.a.	prev. pltf. B, C	*prevent windfall: no fee more than 25% of judgment; settlement
768.73 punitives	M	limits fees to prev. pltf.	*prevent windfall: only 40% of pun' can be calculated by atty
768.76 insurer	M	ded. for def. vs. insurer	*allow adequate fees for claimant
768.78(6) lump sum		requires lump sum for pltf. atty from def.	*help atty/clients finish business with finality, certainty
768.79 settlement	M D	losing def. if good no award if bad faith	*encourage offers *not reqard bad faith offers by Ds

APPENDIX VI

Florida Statutory Provisions for Attorney's Fees in Environmental Law

Fla. Stat. §	Mandatory/ Discretionary	Fees Awarded To Whom?	Apparent Policy?
60.05 nuisance	M "shall"	only prev. def B; fees from G	*vs. unreasonable gov't act; *let cits. donate costs
73.091-92.131 eminent dom.	M	condemnee in all proceedings; B or C; from G; on appeal, only if prevails prev. party: agency or subst. int. (prop.	*repay actual efforts; *no windfall to att'y (no percent fees)
161.212 beach pres. (judicial rev.)	M	owner) B, C, G	*return party to position pre-rev.; *remedy vs. taking
163.3184 growth mgt. (frivolous)	D "may"	any opposing party to frivolous B, C, G	*discourage frivolous litigation
190.036 com. dev. dist. (collect)	D	only c.d.c.'s to collect delinq. rents, fees, etc. G	*deterrence, punish vs. delinquent payments
253.763 publ. lands (jud. rev.)	M	prev. party: agency or prop. owner B, C, G	*return party to position pre-review; *remedy vs. taking
373.129(6) WM Dist. actions		only the agency G (C is referred to 403.412)	*to deter violators
373.436 dams. repairs	M	gov. bd. or DER G	*to encourage prompt abatement, repairs
373.617 WM Dist. (jud. rev.)	M	prev. party: agency or prop. owner B, C, G	*return party to position pre-rev.; *remedy vs. taking
376.205 oil spills	M	prev. pltf injured by spill B, C, G	*new cause of action with strict liab.; *part of damages in tort action
376.313 water poll.	"is entitled" M	prev. pltf injured by disch. B, C, G	*new cause of action with strict liab.; *part of damages in tort action
376.313(4),(5) LUST (1986)	D	any party B, C, (gov't entities have other remedy) prev. party: agency or subst. aff.	*new cause of action with s.l.; *part of damages in tort action; *ct. can avoid burden or windfall to party
380.085 envl mgt. (jud. rev.)	M	person (owner) B, C, G	*return party to position pre-review; *remedy vs. taking
403.0862(2) cleanup torts	M	injured plaint. who prev. vs. state cleanup tort; only G (local)	*fee shift b/c tort by state; *only limited liab, tho, for local faclty
403.412(2)(f) Envtl. Prot. Act (catch-all)	M	prev. party, pltf or def B, C, G	*return party to fin. position pre-inj. attempt
403.90 publ water (jud. rev.)	M	prev. party: agency or subst. aff. party (owner) B, C, G	*return party to position pre-review; *remedy vs. taking
533.05 mine wastes	M	to gov't if prev., then $ is bonus to pros. att'y G	*encourage and reward successful pros.
582.23 soil & water (erosion)	D	only to prev. conserv. district G	*deterrence, punish; *return the state to posit. pre-viol.

KEY: G- Government entity
C- Citizens
B- Business