In the spring of 2008, the 4th and 5th Circuits each ruled on cases concerning citizen suits brought pursuant to the Clean Water Act (“CWA”). These two cases, decided only a month apart, dealt with CWA citizen suits that were barred due to enforcement of various governmental agencies. In both cases, the plaintiffs could have intervened in the agency’s enforcement, but instead the plaintiffs chose to take a more difficult route in an attempt to achieve a more severe judgment against the alleged CWA violators. In short, the plaintiffs swung for the fences and struck out, when they could have pursued their interests more effectively by hitting a sacrifice fly and opting for intervention. About one year prior to these decisions, the Sierra Club intervened in a CWA action, dramatically altering the outcome of the litigation, and received attorneys’ fees for their efforts.

These three cases, when compared with each other, demonstrate the importance of intervention in CWA litigation. First, in Piney Run Preservation Ass’n v. County Commissioners of Carroll County, Maryland (“PRPA” and “County” respectively) the plaintiffs challenged the Maryland Department of the Environment’s (“MDE”) enforcement as falling short of the diligent prosecution standard.1 Although PRPA did not have their suit against the County barred by MDE’s prosecution, they were heavily involved in the ongoing activities involving the Piney Run stream and had a right to intervene in the County’s actions pursuant to the CWA.2

Second, in Environmental Conservation Organization v. City of Dallas3 (Respectively “ECO” and “City”) ECO filed a citizens’ suit against the City for alleged violations of the CWA. After the requisite statutory waiting period, and while the suit was pending, the Environmental Protection Agency (“EPA”) and the State of Texas, filed an action against the City for the same violations that ECO had alleged.4 Consequently, ECO’s case was barred, but it still had the option of intervening. ECO failed to intervene and then attempted to maintain their own suit, arguing that the suit was not barred because it was asking for different relief than that sought by the agencies.5

1 523 F.3d 453, 458-59 (4th Cir. 2008).
3 529 F.3d 519 (5th Cir. 2008).
4 Id. at 523.
5 Id. at 526.
Third, in Sierra Club v. Hamilton City. Bd. of County Comm’rs, the Sierra Club litigated a separate CWA citizen suit that was decided approximately a year ago. Their result was drastically different than the results in Piney Run and City of Dallas. The Sierra Club chose to utilize the CWA’s provision allowing for citizen intervention, and not only significantly altered the final result of the dispute, but also received attorneys’ fees for their efforts. The former groups were swinging for the fences in an attempt to hit a home run, when their alleged grievances could have been more effectively dealt with through a compromise position and intervention. In both of those citizen suits, the groups were faced with the negative consequences of independently pursuing their interests; they were barred from pursuing their grievances. The Sierra Club intervened and dramatically altered the litigation, achieving positive results for its cause. The above cases demonstrate that plaintiffs bringing citizen suits under the CWA will often better serve the environment and will obtain more favorable results (from their perspective) through intervention, as opposed to challenging the efficacy of agency enforcement. This Note will (1) explore the relevant elements of the CWA, (2) argue that citizen plaintiffs will most often better serve their interests through intervention by analyzing Piney Run, City of Dallas, and Sierra Club, and (3) discuss the implications of increased intervention and the unsettled areas of law that may hinder future intervention efforts.

I. BACKGROUND ON THE CLEAN WATER ACT

A. In General

The CWA traces its origins back to the Federal Water Pollution Control Act of 1948. As the general public became increasingly aware of the importance of maintaining clean waterways and rehabilitating contaminated ones, Congress enacted major amendments in 1972 and 1977, the product of which is the CWA. Douglas M. Costle, Administrator of the EPA in 1977, stated in reference to the CWA’s amendments, “The changes reaffirm our commitment to the protection of the health of all Americans. The priority attention given to the control of toxic pollutant discharges is significant. The day is past when our rivers and streams are the dumping place of unwanted chemicals.” The CWA reinforces this sentiment by attempting “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” One important provision of the CWA created a “National Pollution Discharge Elimination System,” (‘‘NPDES’’) designed to improve the quality of the nation’s waterways. The NPDES forces potential

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6 504 F.3d 634 (6th Cir. 2007).
pollutant dischargers to obtain permits and also imposes limits on the types and amounts of pollutants that can be discharged. Additionally, the CWA imposes fines and other penalties to those who discharge pollutants without the proper NPDES permits or those who exceed their permit limitations.

B. Citizen Suits

The EPA has primary responsibility for enforcing the CWA, but the CWA provides for an alternate avenue of enforcement. Private citizens are authorized to bring suit against alleged CWA or NPDES violators when the EPA does not. This provision provides a check to ensure that the relevant administrative authorities are diligently prosecuting CWA violations. When a citizen brings a CWA action, the federal courts are authorized to provide injunctive relief and to levy monetary penalties which are paid to the United States Treasury. The CWA does not allow private citizens to receive personal payments for damages. While the citizen suit provision is “critical” in the scheme of enforcing the CWA, it is only intended to “supplement rather than supplant governmental action.” Consequently, citizen’s suits are barred if the EPA, or the relevant state agency, has filed suit and is diligently prosecuting, or already has diligently prosecuted the violators.

Whether a prosecution is diligent or not, appears to be a perpetual point of litigation; however a basic framework exists to help determine the diligence of government actions. A government prosecution does not have to entail the same reach as that of private citizens’ and is generally “considered diligent if the judicial action is capable of requiring compliance with the Act and is in good faith calculated to do so.” Further, government prosecution does not have to rise to the same level as what a citizen might think is proper. In practice, when the EPA’s action bars a citizen suit and a consent decree results, the original citizen plaintiff might not be satisfied with the EPA’s level of enforcement. In this case, the citizen will either have to challenge the diligence of the prosecution or attempt to bring an action for different relief, such as an injunction or for additional violations not dealt with in the previous prosecution.

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12 *Id. See also* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004).
15 Sierra Club v. Hamilton County Bd. of County Comm’rs, 504 F.3d 634, 637 (6th Cir. 2007).
19 See, e.g., Piney Run Pres. Ass’n v. County Comm’rs, 523 F.3d 453, 459 (4th Cir. 2008).
20 *Id.* (quoting Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewage Dist., 382. F.3d 743, 760 (7th Cir. 2004)).
21 *Id.*
C. Filing and Intervening

Before a citizen suit can properly commence, the citizen must notify the proper authorities of the alleged violation, including the specific standards, limitations, or orders allegedly being violated, as well as the identity of the alleged violator, including the location and dates. Additionally, the citizen must wait sixty days so as to allow the relevant agency to investigate and initiate their own action. The sixty day window also provides the alleged violator with time to comply with the CWA. The EPA has discretion in choosing whether or not to prosecute the alleged violators, but if they do not prosecute, for whatever reason, the citizen is allowed to file and pursue injunctive relief and fines payable to the treasury. Even when a citizen suit is properly commenced and pending before the court, the EPA can still file suit against the alleged violator or enter into negotiations leading to a consent decree. The EPA enforcement bars the citizen suit from proceeding, but the two actions may be consolidated or the citizen may intervene as a matter right.

EPA enforcement often takes the form of a consent decree, which is analogous to a plea bargain in criminal law. The alleged violator will admit to wrong doing and the EPA and the violator will agree to dates in which the violator must comply with the act and fines which must be paid for past and future violations. Intervening gives the citizen plaintiff the opportunity to negotiate with the government agency and the defendant, possibly leading to a consent decree more palatable to the citizen and to the award of fees for the intervenor’s efforts. While many factors certainly influence a citizen’s decision of whether to intervene or pursue their own action despite EPA enforcement, the more prudent choice that generally brings stricter enforcement appears to be intervention.

D. Fee Shifting

Under the CWA, “[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation…to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” Litigation cost recovery can be based on the catalyst theory, or simply on the basis of being a prevailing or substantially prevailing party. Under the catalyst theory, a party that “has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result

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22 40 C.F.R. § 135.3(a) (2008).
25 Id.
26 ECO v. City of Dallas, 529 F.3d 519, 523 (5th Cir. 2008).
28 See generally Sierra Club, 504 F.3d 634.
30 Sierra Club, 504 F.3d at 641.
because the lawsuit brought about a voluntary change in the defendant’s conduct” may be awarded attorneys’ fees. The Supreme Court addressed the catalyst theory in Buckhannon, and while the case arguably did not refer directly to the CWA, it certainly called into question, the continued viability of this basis for recovery. In Sierra Club v. Hamilton County, the district court alternatively based its award of litigation costs on the catalyst theory despite Buckhannon, but on appeal, the award was upheld solely on the basis of the citizen being a prevailing or substantially prevailing party. The court thus evaded the question of whether the catalyst theory is still legitimate.

II. SETTLING FOR A SACRIFICE FLY INSTEAD OF SWINGING FOR THE FENCES

When a citizen suit is filed, the plaintiff knows that the suit can be barred by the diligent prosecution of the EPA, and consequently undertakes the litigation knowing that the citizen may lose control over the litigation. If the EPA steps in and bars the citizen suit, the citizen must decide whether to intervene or allow the EPA to prosecute the alleged violator on its own. In both Piney Run and City of Dallas, the citizen plaintiffs could have intervened, but they chose not to. Instead, both groups attempted to pursue independent suits despite the EPA’s prior prosecution. The Piney Run citizen group challenged the EPA’s enforcement as not qualifying as a diligent prosecution and lost on appeal. The citizens group bringing the action against the City of Dallas met a similar fate when their suit was dismissed by the trial court on res judicata grounds. On appeal, the case was dismissed for lack of standing due to mootness. The following section argues that the citizens groups should have accepted the CWA’s invitation to intervene rather than pursuing their suits on their own merits. Potential CWA plaintiffs might not achieve all of their goals through intervention, but intervention allows the citizen group to achieve more change than attempting to bring the suits independently in the face of prior agency enforcement.

The PRPA and ECO both had their citizen suits barred by the EPA’s prosecution. In both cases the citizen group did not intervene when the EPA took action against the alleged violators, choosing instead to continue on with their own suits asking for more severe consequences to be placed on the alleged violators. In both instances, the citizens groups attempted to hit a home run by continuing on

33 Sierra Club, 504 F.3d at 643.
34 523 F.3d 453 (4th Cir. 2008).
35 529 F.3d 453 (5th Cir. 2008).
36 Piney Run, 523 F.3d at 455.
37 City of Dallas, 529 F.3d at 522.
38 Id. at 531.
39 Piney Run, 523 F.3d at 460; City of Dallas, 529 F.3d at 531.
40 See Piney Run, 523 F.3d 453; City of Dallas, 529 F.3d at 519.
with their own suits, asking that more be done to remedy the violations, but instead the groups struck out. Both of these groups should have forgone their individual suits and intervened. If they had intervened, they likely would not have achieved everything they wanted, but they would have been able to exert their influence on the subsequent settlements, achieving more than what the governmental agency alone achieved. The following will discuss a) the Piney Run decision, b) the City of Dallas decision, c) how the Sierra Club achieved better results through intervention, and d) The underlying lesson that can be learned by examining these recent decisions in relation to one another.

A. The Specifics of Piney Run

1. The PRPA’s Previous Involvement with the County

The PRPA and the County have been involved in litigation dating back to the late 1990s. The PRPA pursued a citizen enforcement action against the County for violating their National Pollutant Discharge Elimination System (“NPDES”) permits that had been granted by the Maryland Department of the Environment (“MDE”). The NPDES permits provide “express limitations on the amount of certain pollutants that the Plant can discharge.” The PRPA lost on appeal and then petitioned for Certiorari, but the petition was denied. During this litigation, MDE was involved in administrative litigation with the County as well. The administrative action resulted in a modified NPDES that now contained, among other modifications, a limitation on the temperature of discharged effluent water.

The County disapproved of the modifications and wanted a review of the determinations. Consequently, the court stayed the implementation of the modifications until the outcome of the review. The stay of new limitations was in place until November 20, 2005, when the modifications became effective, and soon the final decision “modifying the permit was judicially affirmed.” Several months later, the County and MDE entered into a consent agreement “as to appropriate long-term and interim measures to insure compliance with the permit.” The consent decree had the same effect as a final judgment and specifically required that the County comply with the new thermal effluent

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42 Piney Run Pres. Ass’n, 523 F.3d at 456.
43 Id.
44 Piney Run Pres. Ass’n v. County Comm’rs of Carroll County, MD, 268 F.3d 255 (4th Cir 2001).
46 Piney Run Pres. Ass’n, 523 F.3d at 457.
47 Id.
48 Id.
49 Id.
50 Id. at 458.
limitations from the modified permit and pay a $500 penalty for each day that there was a violation between the dates of November 20, 2005, and July 25, 2006.\textsuperscript{51} MDE and the County also stipulated to prospective penalties of $500 a day for further non-compliance.\textsuperscript{52} The penalties would be triggered when the County failed to “(1) comply with the thermal limitation of the modified permit; (2) meet any requirement or complete any required work, plan, or report; or (3) adhere to any required milestone date or schedule.”\textsuperscript{53} The County also appealed for an alternate effluent limitation (AEL), but no final determination had been reached.\textsuperscript{54} If the AEL was denied, the County would be forced to install expensive mechanical chillers which would cool the effluent to an acceptable temperature before it was discharged into Piney Run.\textsuperscript{55} Finally, the County agreed to take further steps to “mitigate any water temperature increases caused by the storm water runoff or modifications to stream buffers in the Piney Run watershed.” MDE hoped that this would create “environmental benefits to the Piney Run watershed.”\textsuperscript{56}

2. Striking Out

The PRPA was not satisfied with the requirements and penalties of the consent decree and notified the County and MDE that they were initiating a citizen suit because they felt that MDE’s enforcement of the County’s violations fell below the diligent prosecution standard.\textsuperscript{57} The District Court dismissed the suit on the motion of the County under Rule 12(b)(1) because the PRPA was barred from maintaining a citizen suit due to the MDE’s prosecution.\textsuperscript{58} The PRPA appealed the suit but the 4th Circuit affirmed the district court’s holding.\textsuperscript{59} The PRPA then petitioned for certiorari but cert was denied on October 6, 2008.\textsuperscript{60}

PRPA claimed MDE’s prosecution was not diligent because it fell below the standard established by \textit{City of Cambridge}.\textsuperscript{61} Specifically, the PRPA argued that nearly fifteen years of lax enforcement established that MDE historically had done little to impede the County’s CWA violations, and that MDE’s prosecution of the County did not prevent the County “from accepting new sources of sewage for treatment at the plant, and that the consent decree did not specifically require that the County comply by a certain date before the penalties would begin to accrue.”\textsuperscript{62}

\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Piney Run Pres. Ass’n, 523 F.3d at 458.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at n.5.
\textsuperscript{56} Id. at 458.
\textsuperscript{57} Id. at 458-59.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 461.
\textsuperscript{60} Piney Run Pres. Ass’n, 523 F.3d 453, cert. denied, 535 U.S. 1077 (2002).
\textsuperscript{62} Brief of Petitioner-Appellant at 24.
PRPA concluded that MDE not only failed to diligently prosecute the County, but it had actually enabled the County by “indefinitely” delaying compliance. 63

As mentioned, when a citizen challenges the prosecution of an administrative agency under a CWA action, the citizen faces a tremendous burden. The administrative agency need not be as zealous as the citizen would have them be. 64 Moreover, diligence by the governmental agency is presumed and the PRPA could not “overcome the presumption of diligence merely by showing that the agency’s prosecution strategy [was] less aggressive” than they desired or “that it did not produce a completely satisfactory result.” 65 By demonstrating that MDE was enabling further CWA violations as opposed to punishing non-compliance and forcing compliance, the PRPA thought that it had the ideal argument for challenging the merits of MDE’s enforcement. 66 Yet the PRPA’s argument failed at the District Court, and the Court of Appeals.

The eponymous Piney Run Preservation Association describes its mission—to preserve the Piney Run waterway. Considering how involved the PRPA has been in relation to the County’s actions over the past decade, it appears almost certain that the PRPA was closely following the negotiations between MDE and the County, and likely anticipated the possibility of a consent decree. Further, it is very likely that PRPA was unhappy with the adequacy of the new NPDES requirements, the compliance timeline, or the fines to be levied upon further violation. Still, PRPA did not intervene, despite the ongoing negotiations between MDE and the County, as well as the almost insurmountable burden a challenger faces when contesting a prosecution as non-diligent. Instead, PRPA challenged the diligence of the administrative prosecution and lost. While intervening might not have achieved all the desired results of the PRPA, it would have given the PRPA an opportunity to challenge the efforts of the MDE at each stage of the negotiation process which almost certainly would have yielded a more severe consent decree. Failing to intervene gave MDE unfettered discretion in handling the County’s case and ultimately prohibited the PRPA from fulfilling its mission of preserving the Piney Run watershed. The PRPA should have taken a more pragmatic approach and intervened.

B. The Specifics of ECO v. City of Dallas

ECO v. City of Dallas presents an even more compelling case for intervention because ECO had actually filed suit against the City and while the suit was pending, the EPA barred the case by prosecuting the City on its own. 67

63 Id. at 26-27.
64 Piney Run Pres. Ass’n, 523 F.3d at 459.
65 Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007).
66 Telephone Interview with G. Macy Nelson, Attorney for the Piney Run Pres. Ass’n (Sep. 17, 2008).
67 ECO v. City of Dallas, 529 F.3d 519, 523 (5th Cir. 2008).
storm water, then directed the water through its sewer system and released it into the Trinity River. 68 This system was supposed to comply with a permitting program that imposed “planning and monitoring requirements to ensure that non-storm water and other pollutants [were] not discharged through the separate storm sewer system.” 69 ECO is a Dallas based non-profit environmental group that instigated the legal action after its members noticed the polluted condition of several bodies of water in the Dallas area. 70

1. The EPA’s Actions Barring ECO’s Suit

ECO complied with the provisions of the CWA requiring them to give notice of the intent to file suit to the proper agency as well as the alleged violator. 71 ECO then waited the requisite amount of time before initiating a citizen suit against the City for violations of the CWA. Despite complying with CWA’s procedural requirements, the EPA took the case away from ECO nearly four months after ECO first notified them and nearly two months after ECO had filed its suit against the City. 72 The EPA gave the City notice of the alleged violations through an administrative compliance order that required the City to remedy the violations or to “arrange a show cause meeting with the EPA” where the City could make its case as to why the EPA should not take action. 73 The City agreed to meet with the EPA to undertake negotiations regarding their violations and the EPA in turn encouraged ECO to participate in these negotiations. 74 ECO refused, and several months later the EPA and the State of Texas filed a CWA suit against the City, barring ECO’s citizen suit. The EPA subsequently filed a consent decree that stated the enforcement action to be taken against the City. 75 The consent decree imposed a timetable that required that the City pay nearly $800,000 in penalties, begin additional environmental projects that would cost nearly $1.2 million dollars, submit continuing compliance reports, and increase staffing in several departments to properly monitor the sewage system. 76

2. Striking Out

Similar to PRPA, ECO was not thrilled with the provisions of the settlement agreement and subsequently attempted to impose more rigorous penalties and standards through their own lawsuit. After the consent decree was entered into, the District Court ordered the City to file for summary judgment in order to dismiss ECO’s pending lawsuit. The City complied with the request and the District Court

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68 Id. at 522.
70 City of Dallas, 529 F.3d at 522.
71 Id.
72 Id. at 523.
73 Id.
74 Id.
75 Id.
76 Id.
dismissed the case on res judicata grounds. ECO appealed the ruling and the 5th Circuit vacated the district court’s order and remanded the case, directing the district court to dismiss for mootness. The 5th Circuit stated that “as a general rule, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot.”

Perhaps the most important objective that ECO wanted to achieve, which they felt was not adequately addressed in the consent decree, was injunctive relief. ECO argued that their case was not moot because the consent decree did not order injunctive relief; rather it imposed a timetable which required the City to gradually comply. The Court found this argument to be unpersuasive because the district court had “broad discretion to balance the interests of the parties and was not obligated to order injunctive relief even if the district court found the City to be in violation of the CWA.” Additionally, ECO argued that generally, the consent decree was not capable of preventing further violations. However, the only evidence they put forward to support this assertion was an affidavit from their expert which did not even mention the consent decree. The Court disagreed with ECO’s contention and determined that the consent decree addressed “every MS4 Permit and CWA violation alleged in ECO’s citizen suit.”

Despite following the proper procedure and initiating a citizen’s suit against the City for CWA violations, ECO could not pursue actions against the City due to the EPA’s actions. ECO futilely argued for nearly five years in an attempt to achieve more restrictions upon the City and ended up striking out. Not only did ECO fail to use its right of intervention made available through the CWA, but they turned down a specific offer from the EPA to participate in negotiations with the City that could have led to greater civil penalties, a more restrictive compliance timetable, and stricter levels of ongoing monitoring. Consequently, while the provisions of the consent decree appear to be able to bring the City into compliance with their permits and the CWA, the degree of the EPA’s enforcement was not satisfactory to the ECO and the ECO cannot effectuate the change they fought for. Further, there is no evidence that if ECO chose accept the EPA’s offer to participate in negotiations would have precluded ECO from subsequently continuing with their own suit if the negotiations turned out to be futile. Finally, ECO’s decision to continue on with their own suit despite the provisions of the consent decree can be seen as a desperate attempt to remedy an unwise decision; refusing to intervene and refusing to negotiate. ECO should have recognized how difficult it would be to overcome the consent decree and obtain alternative remedies. The mootness issue established by the courts was the proper result which

The City alternatively argued that ECO’s case was moot. City of Dallas, 529 F.3d at 524.

Id. at 531.

Id. at 527.

Id. at 530.

Id.

Id.

Id. at 529.

Id.
led to the demise of ECO’s efforts to strictly protect the bodies of water in the Dallas area.

C. An Intervention Success Story

*Sierra Club v. Hamilton County Board of County Commissioners* provides an example of why citizens involved in, or considering a suit against a CWA violator should strongly consider intervention. Not only did the Sierra Club drastically alter the proposed consent decree between state and federal agencies prosecuting Hamilton County, but the Sierra Club was also awarded attorney’s fees for their efforts. Consequently, citizens should strongly consider the precedent established by the Sierra Club, and sparingly attempt to pursue independent citizen suits in the face of agency enforcement.

1. Setting the Stage for Intervention

Over 100 years before the CWA was enacted in its current form, the city of Cincinnati constructed a combined sewer system that eventually led to the mixture of contaminated waste and storm water run-off. To combat this problem, Cincinnati, starting in the 1930s, began to modify the system. These modifications were far from helpful and eventually led to an “overtaxed sewer system and frequent basement flooding.” In a further attempt to fix the problem, Hamilton County (“Hamilton”) constructed sanitary sewer overflows (SSOs) which were effectively “escape points” where sewage water could escape when the system was “beyond capacity.” The escape points were located along rivers and waterways, and consequently, sanitary waste polluted the ordinary storm drainage and entered the waterways.

The Sierra Club determined that a citizen enforcement action was needed when the unacceptable conditions persisted after the CWA was effectuated. In 1992, the Ohio Environmental Protection Agency (“OEPA”) issued an order that required the County to replace their SSO system with one that complied with the CWA. Despite this order and a $174 million investment over nearly ten years, Hamilton continued to operate many SSOs in violation of both the CWA and OEPA’s order. Consequently, the Sierra Club notified the relevant parties of their intent to initiate a CWA citizen suit. Three days prior to satisfying the sixty-day waiting period, the United States, the State of Ohio, the City of Cincinnati and the Board of County Commissioners of Hamilton County, “jointly filed [a] proposed

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85 Sierra Club v. Hamilton County Board of County Commr’s, 504 F.3d 634, 636 (6th Cir. 2007).
86 Id.
87 Id. at 636-37.
88 Id. at 637.
89 Id.
90 Id. at 638.
91 Id.
92 Id.
consent decree with the court." Additionally, the United States and the State of Ohio filed suit against Hamilton and Cincinnati. The Sierra Club knew of the consent decree but insisted on filing a citizens’ suit against Hamilton, Cincinnati, and the Metropolitan Sewer District of Greater Cincinnati. Soon, all the cases were consolidated and on “May 24, 2002, the Sierra Club filed a complaint-intervention seeking to intervene in the state and federal segments of the litigation.”

2. Intervention

In the successful intervening complaint, the Sierra Club specifically alleged that the consent decree had several inadequacies including the provision that merely called for the elimination of 16 SSOs instead of all remaining SSOs. A few months later, the EPA moved to enter the consent decree, but the Sierra Club successfully opposed the motion because there was not an adequate period allowed for public comment and there was significant evidence that the motive behind the hurried attempt to effectuate the consent decree was to bar the Sierra Club’s suit. Subsequently, the government withdrew the proposed consent decree and the Sierra Club began its participation in the new round of negotiations.

The Intervention allowed the Sierra Club to act as a watchdog in the proceedings by “providing its views in writings and in meetings with the parties.” The Sierra Club continued in this role, and at the district court’s request, the Sierra Club reviewed and commented on the consent decree before a revised consent decree was finally submitted. Even after submission, the district court allowed the Sierra Club to comment at the decree hearing, where the Sierra Club complained that the decree was too lenient because it would allow the defendants to escape enforcement by claiming that compliance dates were not practicable. The Court responded by pressing the parties “to confirm on the record that any potential for the extension of the dates would not be used inappropriately and that the consent decree would be read to ensure that the County would comply with the deadlines” and additionally appointing an ombudsman to be “an advocate who can ensure that the [water in basement] program is working, investigate complaints, and keep the Court informed of the status of such program.”

93 Id. at 639.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
99 Id. at 639-40.
100 Id. at 640.
101 Id.
102 Id.
103 Id.
104 Id. at 640-641 (internal quotation marks omitted).
Clearly, the Sierra Club exerted a significant and effective influence over the negotiations and ensuing enforcement of the consent decree. They provided greater protection for the waterways in the Cincinnati area, for the residents who used those waterways, and for the residents whose basements were occasionally inundated with waste water. If the Sierra Club had simply filed their citizens’ suit against Hamilton and attempted to pursue that action in spite of the governmental prosecution, their suit likely would have been barred in the same manner as the Piney Run and City of Dallas citizen suits were barred. Instead, the Sierra Club achieved dramatic results through effective intervention as evidenced by the district court’s statement that it “appreciate[d] the involvement of Sierra Club as intervenor.”\(^{105}\)

3. Suit for Attorneys’ Fees

Beyond the Sierra Club’s significant influence on the consent decree and the following improvement in conditions along the waterways of Ohio, the district court awarded the Sierra Club attorneys’ fees because the Sierra Club was determined to be a “prevailing or substantially prevailing party.”\(^{106}\) Hamilton appealed this judgment and was faced with the burden of overcoming the “abuse of discretion” standard of review.\(^{107}\) The Appellate Court affirmed the district court’s determination that as an intervenor, the Sierra Club was a party able to litigate “fully on the merits,” and “[t]he Court’s jurisdiction is not barred as Sierra Club has a right to intervene pursuant to the applicable statute, it did intervene, and this Court granted that intervention.”\(^{108}\) The 6th Circuit then determined that the Sierra Club’s intense and continuing participation in the process allowed the district court to correctly conclude that the Sierra Club was a prevailing or substantially prevailing party entitled to their award.\(^{109}\) In conclusion, the 6th Circuit stated, “The record before us fully supports the district court’s conclusion that, without the Sierra Club’s efforts, the more comprehensive consent decree would not have come to fruition.”\(^{110}\) The case was then remanded for a proper determination of fees.\(^{111}\)

D. The Takeaway

Each case turns on its specific facts and each plaintiff in a CWA citizens’ suit might hope to accomplish something different from the next. One group might be litigating for a moral victory and another for more public recognition. One group might try to establish new precedent to ease the path for future CWA citizen suit

\(^{105}\) Id. at 641.


\(^{107}\) Sierra Club, 504 F.3d at 642.

\(^{108}\) Id. at 643.

\(^{109}\) Id. at 645.

\(^{110}\) Id.

\(^{111}\) Id. As of January 20, 2009, there was no final determination on the amount of the award.
actions and another might take action because the agencies charged with the responsibility of enforcement are not enforcing. It is difficult to determine the motivations driving the litigation in the above cases, but a reasonable assumption is that most citizen suits are brought by public interest groups and these public interest groups have the public interest in mind.

Hindsight clearly shows that the Sierra Club was the most effective advocate for the environment and the individuals who were negatively affected by the pollution in our nation’s waterways. *Sierra Club* was decided on October 18, 2007, well after litigation was underway in the *Piney Run* and *City of Dallas* cases, so the example established by the former could not have impacted the litigation strategies of the latter. However, future groups bringing CWA citizen suits would be wise to strongly consider intervention when governmental agencies are providing a less than stellar prosecution or when agency action bars a citizen suit already underway. Overcoming the presumption of a diligent prosecution in an attempt to achieve more demanding remedial measures against the violators, is a difficult task that should only be used in a situation where the enforcement is egregiously lenient. Otherwise, as *Sierra Club* demonstrates, intervention can be a more effective strategy for achieving greater environmental protection. Additionally, as the Sierra Club found out, an intervenor can still be considered a prevailing or substantially prevailing party and thus receive attorneys’ fees. Ultimately, the Sierra Club demonstrated that public interests groups considering a CWA suit should seriously consider intervention in the face of agency action.

III. THE IMPLICATIONS OF INCREASED INTERVENTION

Intervention does not appear to be a common litigation strategy, but the success of the Sierra Club should provide motivation for other parties to consider this strategy. If intervention increases, then increased litigation regarding the nuances of intervention, especially the award of fees to the intervenor, will need to be addressed in greater detail, perhaps requiring further legislative direction. Additionally, with the successful intervention of the Sierra Club, ethical issues will become more evident in regards to the tactical decisions of attorneys who represent potential intervenors. These issues have not been adequately addressed and will certainly provide for spirited litigation in an attempt to refine this area.

A. Increased Litigation Over the Fee Shifting Provision

The dissenting opinion in *Sierra Club* demonstrates that several issues regarding attorneys’ fees and the CWA’s citizen suit provision must still be
addressed. This section discusses (i) the current state of fees, including discussion of the “catalyst theory” and the clash of FRCP Rule 68 and the CWA’s fee shifting provision, (ii) relevant factors concerning the determination of “prevailing party” status, and (iii) the fate of intervention.

1. The Current State of Fees

Under the American System, parties to litigation generally pay their own fees, and “the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.” This general rule has many exceptions, including the statutory provision in the CWA, that award fees to the prevailing party. The CWA and other statutes such as the Clean Air Act contain fee shifting provisions to provide an incentive for citizens, or public interest groups to supplement agency enforcement by providing a path to obtain legal fees. Again, any action for monetary damages against an alleged CWA violator will result in fines payable to the treasury, and not to the plaintiffs. CWA citizen plaintiff litigation is often brought by public interest groups who may need an incentive to litigate citizen enforcement actions. During the Reagan administration, and in response to relaxed enforcement by the EPA, several public interest groups began filing citizen suits in dramatically increased numbers. With the increase in citizen suits, came an increase in litigation surrounding the fee shifting provision; however, these decisions did not fully clarify this murky area of law.

(a) The Catalyst Theory

Statutes with fee shifting provisions generally award fees to a plaintiff only if the plaintiff is a “prevailing party.” A prevailing party is a term of art that refers to “one who has been awarded some relief by a court.” A plaintiff can achieve “prevailing” status through a judgment on the merits” or through a “court-ordered consent decree,” but what if the lawsuit merely induces the defendant to change their conduct? In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources* The Supreme Court of the United States addressed this question, which is referred to as the catalyst theory of recovery.

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117 Id.
119 Id.
120 Id.
121 Id.
Buckhannon specifically addressed the fee shifting provisions of the Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA), which contain fee shifting provisions similar to the provision in the CWA.122 The court addressed this question to resolve a circuit split over whether the term “prevailing party” includes “a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.”123 The Court held that “the catalyst theory is not a permissible basis for the award of attorney’s fees under the FHA and ADA.”124

Buckhannon was discussed heavily in Sierra Club because the district court in Sierra Club held that the plaintiff was entitled to attorneys’ fees as the prevailing party, or alternatively, under the catalyst theory.125 While the 6th Circuit affirmed the award, they chose not to address the catalyst theory, perpetuating the theory’s ambiguous status in environmental litigation.126 Other courts refused to extend the Buckhannon decision to suits brought under environmental statutes.127 Specifically, in Sierra Club v. E.P.A., the court distinguished environmental cases from the Buckhannon decision and based the continuing viability of the catalyst theory on Ruckelshaus v. Sierra Club.128 In Ruckelshaus the Supreme Court relied on the statutory history of the Clean Air Act to determine that fee shifting was appropriate in “suits that forced defendants to abandon illegal conduct, although without a formal court order.”129 The Sierra Club v. E.P.A court concluded by stating, “Here the case that directly controls is Ruckelhaus. Whether Ruckelshaus ‘rest[s] on reasons rejected’ by Buckhannon is a matter for the Supreme Court, not us.”130

Thus, determining whether the catalyst theory is a viable form of fee recovery in environmental statute decisions is an open question. Sierra Club v. E.P.A provides evidence that environmental statutes should be treated differently, however, considering Buckhannon, citizen plaintiffs should be wary of trying to obtain attorneys’ fees under the catalyst theory. Consequently, the issue of when an intervening party will be considered the prevailing or substantially prevailing party, as opposed to merely a catalyst, becomes more important.

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123 Buckhannon, 532 U.S. at 598.
124 Id. at 610.
125 Sierra Club, 504 F.3d at 643.
126 Id.
(b) The Clash of FRCP 68 and the CWA Fee Provision

Under the Federal Rules of Civil Procedure, Rule 68, a defendant can prevent a successful plaintiff from recovering attorneys’ fees. The rule provides that if a defendant offers to settle and the plaintiff refuses, the plaintiff is precluded from an award of fees if the verdict, although favorable to the plaintiff, is not as favorable as the previously proposed settlement or else the plaintiff must pay for the defendants’ litigation costs. This issue presents another area of unsettled law that will surely lead to further litigation.

In *Marek v. Chesny* the Supreme Court of the United States held that Rule 68 effectively denies victorious plaintiffs any award for attorneys’ fees for the work done after the settlement is rejected. Although the *Marek* holding dealt with the Civil Rights Attorney’s Fees Awards Act, it is reasonable to assume that the holding applies to the CWA because both statutes “define the word ‘costs’ to include attorneys’ fees.” However, in *North Carolina Shellfish Growers Ass’n v. Holly Ridge Associates*, a district court refused to apply *Marek*’s implications and held that Rule 68 did not apply to citizens’ suits under the CWA. Similar to *Sierra Club v. E.P.A.* discussed above, the court in *Holly Ridge* chose to distinguish environmental statutory fee shifting provisions from other statutes to arrive at a favorable decision for the citizen plaintiffs. The court in *Holly Ridge* found that applying the reasoning from *Marek* would create a severe disincentive to potential citizen plaintiffs because CWA plaintiffs cannot receive compensatory damages, as any award beyond attorneys’ fees is paid directly to the U.S. Treasury. The *Holly Ridge* court relied on another federal district court decision to support this rationale, so the holding is on a somewhat shaky foundation. Consequently, plaintiffs filing citizen suits under the CWA should be wary of the trappings of FRCP 68.

2. Relevant Factors to a “Prevailing Party” Determination

Several factors are relevant to the court’s decision in *Sierra Club v. Hamilton County*, classifying the plaintiff as a prevailing party. First, was the Sierra Club’s influence on the final consent decree including the appointment of an “ombudsman, to whom the citizens of Hamilton County [could] carry their

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133 Id.
135 Burgoyne, supra note 132, at 654.
137 *N.C. Shellfish Growers Ass’n*, 278 F.Supp. 2d at 667.
complaints in the future.” Many of the Sierra Club’s contributions to the final consent decree were discussed above, and the court was adequately convinced that without the Sierra Club’s intervention, the consent decree would have been far more lenient than the actual decree. The Court ruled that although the Sierra Club was not a signatory, it was “abundantly clear on the record that without the Sierra Club’s active intervention in the litigation” the agencies and Hamilton would have submitted a “less-than-adequate interim consent decree.”

Second, the Court’s holding allows an intervening party to recover fees even though that party was not a signatory to the final decree. The County’s argument that the Sierra Club could not be considered a prevailing party because they were not officially a party to the final decree was quickly rejected by the court which stated that the County’s argument “borders on the absurd.” The Court’s justification was that as just mentioned, the Sierra Club’s substantial influence trumped the fact that they were not a signatory to the final decree.

Third, the Sierra Club’s citizen suit was filed under the corresponding provision of the CWA. This nuance could prove dispositive in future suits under the CWA and the subsequent determination of an award of fees. Hamilton attempted to persuade the court to withhold fees by citing to a case brought under the Clean Air Act’s citizen suit provision. There, the intervening party had not previously brought a citizen suit, and had only intervened. While the court in Sierra Club did not decide whether an intervening party who had not brought a separate suit prior to intervention would be automatically precluded from obtaining attorneys’ fees, they distinguished Hamilton’s argument on the basis of Sierra Club’s previously filed citizen suit. Additionally the court determined that the consolidation of the Sierra Club’s action with the agency’s action was significant. While the court ultimately affirmed the award of fees, they did not explicitly base their decision on Sierra Club being an intervening party or on the fact that the Sierra Club initially filed a citizen suit that was consolidated with agency action.

The dissent in Sierra Club refused to view the Sierra Club as a prevailing or substantially prevailing party despite their filing of a citizen suit prior to agency enforcement and their subsequent influence on the final consent decree. The dissent points out a significant omission in the majority’s opinion, which was the majority’s failure to distinguish the award of fees on the basis of Sierra Club being a substantially prevailing party through intervention or through their initial citizen

139 Sierra Club v. Hamilton County Bd. Of County Comm’rs, 504 F.3d 634, 644 (6th Cir. 2007).
140 Id.
141 Id. at 643.
142 Id. at 644.
144 Sierra Club, 504 F.3d at 642.
146 Sierra Club, 504 F.3d at 642.
147 Id.
148 Id. at 645.
suit that was consolidated. The Sierra Club abandoned their consolidated action and only pursued intervention, and the dissent argues that the CWA awards costs to a prevailing or substantially prevailing party, refusing to classify an intervenor as a party.

3. The Fate of Intervention

It is difficult, if not impossible, to presently determine whether an intervening party must have previously filed a citizen suit in order to recover attorney’s fees or whether an intervening party can rightfully be considered a prevailing or substantially prevailing party. As stated above, it appears that the majority in Sierra Club held that an intervening party can be considered a prevailing party, but as evidenced by the dissent, that may be another issue in flux. Assuming that an intervening party can properly be considered a prevailing party, there are other factors that appear relevant to an award of fees. The most significant factor mentioned above, although likely not dispositive, is whether a separate citizen suit is a prerequisite to obtaining attorneys’ fees for subsequent efforts in intervention. If that is the holding, then the PRPA clearly made the correct decision by not intervening. However, the ECO’s citizen suit was pending before the District Court when it was barred by agency action. Consequently, if ECO would have intervened, their potential award of fees appears to turn on their influence on the final consent decree.

If a plaintiff merely intervenes without previously filing an independent suit, the award of attorneys’ fees should not be automatically precluded. Instead, the court should consider the plaintiff’s overall efficacy in achieving more desirable results from the intervenor’s perspective. Thus if the Sierra Club had not previously filed a citizen suit against Hamilton and merely intervened, they still should have been awarded attorney’s fees. Courts should follow this latter method because intervention through the CWA is a matter of right and the award of attorneys’ fees is an award for citizens to be enfranchised in the process of protecting their waterways. The CWA does not state as a prerequisite that a citizen suit be filed in order to intervene, and consequently, the fee shifting provision in the same statute should not be contingent on whether or not the intervenor had previously filed a citizens’ suit that was then barred by agency action. Nor does the CWA explicitly bar an intervenor from receiving costs including attorney’s fees. If Courts were to award fees using the rationale of the Sierra Club majority, regardless of whether the citizen had previously filed suit, the Courts could still accommodate the rule that statutes awarding fees to the prevailing party should be narrowly construed by requiring a certain degree of influence on the outcome. If the award of fees is contingent on whether a prior

149 Id. at 649.
150 Id.
citizen suit had been filed or whether the party was an intervenor, citizens will be unnecessarily deterred from bringing suits against CWA violators and an important aspect of the CWA will be frustrated.

Piney Run provides an interesting example of how the determination should be made. Although the PRPA was heavily involved in the preservation of Piney Run Creek, they did not intervene in the proceedings between the County and MDE that led to the consent decree. Dissatisfied with the provisions, the PRPA then challenged the diligence of MDE’s prosecution and lost. Arguably, the consent decree was inadequate and certainly the prosecution could have been more aggressive. If courts follow a rule where a previously filed citizen suit is a prerequisite to winning attorneys’ fees, the PRPA would have a disincentive to intervene because they would be categorically precluded from winning attorneys’ fees. However, if the court held open the possibility of an award of attorneys’ fees despite merely intervening in a governmental enforcement action and then predicated the award on the intervening party’s subsequent influence on the consent decree or judgment, the PRPA would have an incentive to intervene and the vision of the CWA could be more fully realized. Similarly, if the Sierra Club had not previously filed a citizen suit against Hamilton and then chose to intervene, an award of attorneys’ fees is still justified because the Sierra Club’s influence, and their continuing involvement with enforcement.

An award of attorneys’ fees to citizen plaintiffs in CWA actions is necessary for the continued involvement of non-profit groups and citizens supplementing agency enforcement. Consequently, courts should not foreclose the award of attorneys’ fees to parties that intervene without previously filing a citizen suit under the CWA, but should insist that the intervening party exert a significant influence on the final judgment. The CWA does not explicitly address the issue, but allowing citizen plaintiffs to recover fees, who intervene without previously filing a citizen suit is in accordance with the CWA’s vision to have citizen enforcement supplement governmental enforcement.

B. Ethical Issues for Attorneys Representing Citizen Groups

A final issue to consider is the potential ethical dilemma faced by attorneys whose clients’ interests might be best served through intervention. As evidenced by the cases analyzed in this note, citizen suits under the CWA are often brought by public interest groups of varying sizes. While the Sierra Club has a nationwide presence with staff attorneys on salary,153 the Piney Run Preservation Association is a local unit represented by independent counsel.154 As previously mentioned, the CWA contains a fee shifting provision that awards reasonable attorneys’ fees to a successful citizen plaintiff, largely because the victorious plaintiff cannot collect damages personally. Consequently, attorneys representing smaller clients may take

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154 G. Macy Nelson and Paul N. DeSantis represented the PRPA. Brief of Petitioner-Appellant, supra note 62.
the case on a pseudo-contingency fee basis, collecting their fees through winning on the merits rather than basing their income on an hourly rate. Attorneys who represent smaller public interest groups and take the cases on a contingency fee basis will most surely be presented with this predicament.

_Piney Run_ presents a model of how CWA litigation will likely play out if the attorneys’ fees are withheld from successful, but intervening parties. Mr. Macy Nelson represented the PRPA in their challenge of MDE’s prosecution, and he stated that although he was aware of the ongoing negotiations between MDE and the County, he did not consider intervening.\(^{155}\) He felt that the facts of the case presented a great opportunity to clarify the standard of what a diligent prosecution consists of, but the courts felt differently. Mr. Nelson declined to comment on his fee structure, but due to the size of the PRPA, it appears likely that Mr. Macy either took the case relying on the fee shifting provision or on a pro bono basis. Intervention almost certainly would have led to more palatable results for the PRPA, and if intervening parties are categorically denied the potential award of fees, attorneys representing these groups will be faced with the decision of whether to intervene and not receive fees or to pursue a course unlikely to help the client, but with the potential of an award of fees.

IV. CONCLUSION

The CWA provides for citizens to play a vital role in keeping our nation’s waters clean and usable. While citizens do not have primary enforcement responsibility, they offer an important supplement to agency enforcement because they operate on a local level and have a greater interest in preserving their local bodies of water. Although citizens can be barred from pursuing their own actions when the relevant agency has prosecuted or is diligently prosecuting a case, citizens still have the statutory right to intervene. Considering the nearly insurmountable task of rebutting the presumption of an agency’s diligent prosecution, citizens’ groups should utilize intervention much more than they currently do. In _Piney Run_ the plaintiffs did not intervene in the negotiations leading to a consent decree, choosing to challenge the diligence of MDE’s enforcement. The PRPA struck out and is now left with what is from their perspective, a severely deficient enforcement action against a CWA violator. In _City of Dallas_ the plaintiffs not only had the right to intervene, but were actually invited to participate in the negotiations leading to a consent decree. The plaintiffs chose not to participate and instead continued with their own action which was subsequently barred due to mootness considerations. In contrast to those two cases, the Sierra Club chose to intervene and while they may not have achieved all that they would have if they were able to pursue their own action, their intervention undoubtedly achieved more stringent requirements on the CWA violators.

\(^{155}\) Telephone Interview with G. Macy Nelson, Attorney for the Piney Run Pres. Ass’n (Sep. 17, 2008).
Additionally, the Sierra Club was awarded fees for their efforts because they considered a prevailing or substantially prevailing party.

The above cases demonstrate that intervention should be seriously considered by citizen plaintiffs bringing CWA suits whenever agency action threatens to bar the citizens’ suit. If citizens start to utilize their right to intervention in increased numbers, there will certainly be an increase in litigation regarding the award of fees. The *Sierra Club* decision established that an intervening party has the capacity to be considered a prevailing or substantially prevailing party, and courts should continue to follow this. Allowing intervening parties to receive fees will perpetuate the goals of the CWA and solidify the role of citizens in the process. If courts choose to preclude intervening parties from potentially receiving an award of fees, intervention will likely cease and in many cases citizens will not be able to influence agency enforcement unless it is blatantly deficient.