The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action

Lucia A. Silecchia
The Catholic University of America, Columbus School of Law

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The Catalyst Calamity: Post-\textit{Buckhannon} Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action

Lucia A. Silecchia*

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I. INTRODUCTION

Citizen suits have long played an important, indeed integral, role in environmental enforcement.\footnote{Indeed, one commentator has called such fees "the fuel that drives the private attorney general engine." Pamela S. Karlan, David C. Baum Memorial Lecture: Disarming the Private Attorney General, 2003 U. ILL. L. REV. 183, 205 (2003). A full discussion of citizen suits is beyond the scope of this paper. However, for background on citizen suits and the myriad legal issues they raise, see generally \textsc{Jeffrey G. Miller}, \textsc{Citizen Suits: Private Enforcement of Federal Pollution Control Laws} (1987), \textsc{Michael D. Axline}, \textsc{Environmental Citizen Suits} (1992), and Barry Boyer & Errol Meidinger, \textit{Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Law}, 34 \textsc{BUFF. L. REV.} 833 (1985).} Most environmental statutes include citizen suit provisions that allow citizens to enforce those statutes against both private parties and the government when environmental statutes and regulations are allegedly violated through malfeasance, nonfeasance or...
both. Acknowledging the importance of citizen suits in giving teeth to environmental laws, and recognizing the often prohibitive costs of such litigation, Congress also included fee-shifting provisions in most environmental citizen suit statutes. These fee-shifting provisions change the so-called "American rule" for attorney fees by allowing victorious citizen plaintiffs to recover their attorney fees from the losing party.

It is well established that those plaintiffs who win a judicial ruling in their favor qualify for the benefits of fee-shifting. What is less clear, however, is whether those parties whose successes come outside the courtroom—as they often do in the environmental context—can also recover fees. In the past, the so-called “catalyst theory” answered this question affirmatively. Parties were entitled to fees by demonstrating that their litigation was the catalyst for obtaining the relief sought, albeit in another venue such as through the defendant’s voluntary change in conduct or via a private, non-judicial settlement agreement.

However, in 2001, the “catalyst theory” was dealt a fatal—or nearly fatal—blow in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources. In Buckhannon, the Supreme Court defined the meaning of “prevailing party” in the context of the fee-shifting provision of the Fair Housing Amendments Act and the Americans with Disabilities Act. The Buckhannon majority adopted a narrow view of the term “prevailing party,” ruling that, for these two statutes at least, “the ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees.” The Court required some “judicially sanctioned” victory as a prerequisite to a fee award.

This ruling garnered instant attention as scholars and advocates contemplated its significance for litigation generally as well as in a wide

2. See discussion accompanying notes 41–50, infra.


4. The complex and controversial issues pertaining to the question of whether victorious defendants may also recover fees against losing plaintiffs is explored more fully in the text accompanying notes 410–12, infra, although a full discussion of this issue is beyond the purview of this article.


6. Id. at 610.

7. Id.

8. See, e.g., Kyle A. Loring, Note, The Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation, 43 B.C. L. REV. 973 (2002); Aimee McFerren, Note, Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: The Supreme Court’s Latest Assault on Prevailing Plaintiffs Eliminates the Catalyst Theory of Fee-Shifting, 41 BRANDEIS L.J. 155 (2002); Supreme Court Update, 48 JUL FED. LAW. 4245 (July 2001);
variety of substantive contexts.\textsuperscript{9} Because environmental law relies heavily on citizen suits,\textsuperscript{10} those in the environmental arena speculated on


what the Court’s interpretation of “prevailing party” in *Buckhannon* might mean in that context. Although many environmental statutes may be distinguishable from the statutes at issue in *Buckhannon*, it is undeniable that *Buckhannon* ushered in an era of uncertainty for environmental fee-shifting. This is problematic from both a practical and a policy perspective. Fortunately, however, *Buckhannon* can itself serve as a useful catalyst for complete legislative and judicial reexamination of the wisdom of the catalyst theory for fee-shifting in environmental citizen suits.

This Article will examine the future of the catalyst theory in environmental citizen suits. First, it will explore the provisions in environmental law that provide the statutory basis for fee-shifting. Next, it will briefly survey the leading decisions up to and including *Buckhannon* that interpret the catalyst theory, with particular attention to those cases that arose in the environmental context.

The Article will then examine *Buckhannon*’s progeny as lower courts have tried to clarify the contours and extent of *Buckhannon*’s reach. More specifically, several appeals courts have ruled that *Buckhannon* should not apply in certain environmental contexts. Most notably, in *Sierra Club v. Environmental Protection Agency* and *Loggerhead Turtle v. County Council of Volusia County* respectively, the District of Columbia Circuit ruled that the Clean Air Act “authorizes awards of attorney’s fees to catalyst parties,” and the Eleventh Circuit held that “the Supreme Court’s decision in *Buckhannon* does not prohibit use of the catalyst test as a basis for awarding attorney’s fees and costs under

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10. See discussion in and accompanying notes 38–50, infra.


12. Although this Article focuses primarily on catalyst suits in the environmental context, it is hoped that the issues discussed and the proposals made may prove to be useful in other contexts as well. However, as the Article discusses, there are features of environmental law that distinguish it from other areas of law.


15. *Sierra Club*, 322 F.3d at 728.
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16. Loggerhead Turtle, 307 F.3d at 1327.

17. See discussion in and accompanying notes 346–71, infra.

18. As explained in the discussion in and accompanying note 358, infra, the court has also removed statutes in other fields from the structures of Buckhannon if the statutory language did not hinge on the “prevailing party” standard.

19. See Section V, infra.

20. Sierra Club v. EPA, 322 F.3d 718 (D.C. Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3269 (Oct. 3, 2003) (No. 03-509). Although the Supreme Court decided not to grant certiorari in this case, the policy questions raised by catalyst recovery will not be resolved, and Congressional intervention will still be needed.

21. Indeed, Buckhannon has already triggered several unenacted Congressional initiatives to overrule its holding through legislation adopting a more expansive definition of “prevailing party” for purposes of fee-shifting statutes. See discussion in and accompanying notes 429–35, infra.
and offers a new proposal to resolve the angst about catalytic recoveries and to establish a clear and legally binding statement as to how broadly "prevailing party" should be defined in the environmental context.

II. STATUTORY BACKGROUND TO ENVIRONMENTAL FEE-SHIFTING

American courts generally follow the "American Rule" for payment of court costs and attorney fees. First articulated by the Supreme Court in *Arcambel v. Wiseman* and now "fairly entrenched," the American


As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. . . . It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings. In order to determine the appropriateness and the size of an award of counsel fees. . . . Although some American commentators have urged adoption of the English practice in this country, our courts have generally resisted any movement in that direction. The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.

For a thoughtful analysis of the economic impact of the American Rule *vis a vis* other attorney fee models, see Thomas D. Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS 139 (1984).

Rule requires that all litigants—whether victor or vanquished—pay their own attorney fees. Although this rule is often sharply criticized, its initial rationale was to ensure that would-be litigants are not deterred from bringing suits for fear that a loss would require them to pay the litigation costs for both sides. The American Rule was thought to benefit impoverished litigants by reducing such risks. Implicit in the general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.

Subsequent Supreme Court decisions upheld this rule. See, e.g., Hall v. Cole, 412 U.S. 1 (1973); F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116 (1974); Hauenstein v. Lynham, 100 U.S. 483 (1879); Stewart v. Sonneborn, 98 U.S. 187 (1879); Flanders v. Tweed, 15 Wall. 211 (1872); Oelrichs v. Spain, 15 Wall. 211 (1872); Day v. Woodworth, 13 How. 363 (1852) (cited in Fleischmann Distilling, 386 U.S. at 718.)


25. For a stinging critique of the American Rule, see Albert A. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CAL. L. REV. 792 (1966). Professor Ehrenzweig denounced the American Rule as “a festering cancer in the body of our law without whose excision our society will not be great.” Id. at 794. For more moderate critiques of the American Rule that highlight its weaknesses, see Vargo, supra note 22, at 1590-93 (suggesting that American Rule has negative consequences for judicial efficiency, compensation of victorious parties, and incentives to litigate small claims), Charles W. Wolfram, The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline, 47 LAW & CONTEMP. PROBS. 293 (1984) (“The 'American Rule,' . . . has never been able to boast avid support. The rule insists that a possessor of legal rights should swallow most of the great expense necessary to vindicate them. It strikes many lay and professional observers as unjust.”), and John Leubsdorf, Recovering Attorney Fees as Damages, 38 RUTGERS L. REV. 439, 442 (1986) (arguing that American rule is defective because “[i]f damages are meant to put the plaintiff where he would have been but for the defendant’s unlawful acts, that goal cannot be reached if one third or more of the sum needed to reach it does not go to the plaintiff but to his lawyer”).


Perhaps the strongest historical justification for the American Rule is centered in the American faith in liberal access to the courts for righting wrongs. If a wronged party is deterred from filing and prosecuting a suit by the risk that he will have to pay the opposing party's attorneys' fees if the suit is unsuccessful, there is concern that many wrongs could go unremedied. . . .

27. See, e.g., Fleischmann Distilling, 386 U.S. at 718 (“[T]he poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.”); Jeffrey S. Brand, The Second Front in the Fight for Civil Rights: The Supreme Court, Congress and Statutory Fees, 69 TEX. L. REV 291, 297 (1990) (observing that the American Rule "grew out of the notion that requiring each party to pay its own fees would increase access to the courts because impecunious plaintiffs could bring meritorious lawsuits without fear that they would be responsible for paying opposing counsel's fees if unsuccessful"); Martin Patrick Averill, Comment, “Specters” and “Litigious Fog”?: The Fourth Circuit Abandons Catalyst Theory in S-1 & S-2 by and through P-1 & P-2 v. State Board of Education of North Carolina, 73 N.C. L. REV. 2245, 2252 (1995) (noting that the American Rule “was originally viewed as a progressive change in the law because it made litigation available to plaintiffs who otherwise would be deterred by the prospect of paying attorney's fees to victorious defendants”). However, not all commentators view this effect of the American Rule in a positive light. See, e.g., Kuenzel, supra note 22, at 80 (“If
American Rule is also the understanding that the legal merits of a claim are often difficult to predict prior to adjudication. Hence, the American Rule makes the financial repercussions of being on the losing side of a novel or intricate legal argument far less draconian. The rule has also been justified on the basis that it is judicially efficient because it does not require a separate proceeding to determine fees after the substantive litigation is concluded. Thus, unlike the majority of other legal systems, American courts have rejected the "loser pays all" regime in favor of the rule that all litigants generally foot the bill for their own attorney fees.

However, courts have crafted exceptions to the American Rule when "overriding considerations of justice seemed to compel such a result." The most basic exception is that a losing litigant may be forced to pay all a party abusing the system is made to pay the actual expense of the injury caused, it is to his financial advantage not to abuse the system. The possibility of having to pay a lawyer's fee for both sides of the litigation would make a plaintiff think twice before he files a petition; id. at 83 (arguing that the fee system should encourage settlement and not litigation because "[i]litigation is an expensive and wasteful process").

28. See, e.g., Fleischmann Distilling, 386 U.S. at 718 ("[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit."). But see Kuenzel, supra note 22, at 84 (arguing that the American Rule also imposes a financial burden, since "[t]he fact that even if successful the litigant is presently charged for these expenses also tends to restrict [the] openness requirement").

29. Fleischmann Distilling, 386 U.S. at 718 (warning that "[t]he time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration").

30. Indeed, in the view of one commentator, it was an overly simplistic and optimistic view of judicial efficiency that also contributed to the early appeal of the American Rule. See Kuenzel, supra note 22, at 81:

[A]t the time our judicial system was established, there was a wish to maintain a system of laws and procedures in which every man would be able to represent himself adequately before the courts. The idea that the successful litigant would be reimbursed for the expense of his attorney would appear improper as the litigant himself should have been able to succeed without this unnecessary assistance.

31. See e.g., T. Rowe, supra note 22, at 140-41 (describing the range of attorney fee models available, including "the American rule of no fee shifting, the English idea of 'two-way' shifting, and 'one-way' approaches providing for fee awards to prevailing plaintiffs or defendants only. Each of these basic approaches can be modified by other key types of attributes. . . ."). For a broader analysis of the positive and negative impacts of various rules on attorney fee-shifting, see JOHN E. SHAPARD, THE INFLUENCE OF RULES RESPECTING RECOVERY OF ATTORNEYS' FEES ON SETTLEMENT OF CIVIL CASES (Fed. Jud. Ctr. 1984) (providing economic analysis of the impact of various fee-shifting rules on litigants' behavior).

32. See Berger, supra note 24, at 281 ("In an increasing number of litigation contexts, the critical arena for determining who will ultimately bear the burden for the attorney's services shifts from the lawyer's office to the courtroom.").

33. Fleischmann Distilling, 386 U.S. at 718.
costs and fees if the litigation is frivolous or abusive.  This obviously serves a punitive function and helps to police the courtroom against abuse. Other exceptions have allowed fee-shifting in a variety of equitable circumstances such as the common fund doctrine, the common benefit doctrine, and, for a short time, the “private attorney general” doctrine.

There is another set of exceptions to the American Rule that is more important in environmental law—explicit statutory fee-shifting rules, through which “Congress has created statutory exceptions to the American Rule that allow recovery of attorney’s fees under certain

34. See Alyeska Pipeline Serv. Co. v. Wilderness Society et al., 421 U.S. 240, 258 (1975) (discussing the court’s authority to assess attorney’s fees against bad faith litigants); see also Russell & Gregory, supra note 22, at 313 (noting that “[u]nder the bad faith exception, courts awarded fees to punish litigants who abuse the judicial process. . . . The courts have thus awarded fees for filing suit without just cause whether maliciously or frivolously, unreasonably delaying or disrupting litigation, or willfully violating a court order.”); Archie T. Wright, III, note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 CORNELL L. REV. 1222, 1230–33 (1972–73) (discussing development of bad faith doctrine in the context of fee awards); Joseph H. King, Jr. & Zigmont J.B. Plater, The Right to Counsel Fees in Public Interest Environmental Litigation, 41 TENN. L. REV. 27 (1973) (tracing development of bad faith doctrine and its punitive function); Vargo, supra note 22, at 1583–87 (discussing fee-shifting in cases involving bad actors or bad faith); Dan B. Dobbs, Awarding Attorney Fees Against Adversaries, 1986 DUKE L. J. 435, 441–45 (1986) (discussing role of fee-shifting in cases of litigation misconduct).

35. See, e.g., Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Internal Improvement Fund Trs. v. Greenough, 105 U.S. 527 (1881) (both applying the common fund doctrine); Alyeska, 421 U.S. at 257–58 (discussing history of and support for common fund doctrine); see also Berger, supra note 24, at 295–98 (discussing origins of common fund doctrine); Pacold, supra note 22, at 1014–15 (exploring policy rationale for common fund doctrine); John P. Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 HARV. L. REV. 1597 (1974) (discussing implications of the common fund doctrine); McCormick, supra note 22, at 622–24 (discussing development of and implications of common fund doctrine.); Wright, supra note 34, at 1233–37 (discussing development of common fund doctrine and its application); Berger, supra note 24, 298–302 (discussing development of common fund doctrine); Dobbs, supra note 34, at 440–41 (evaluating common fund doctrine); King & Plater, supra note 34 (detailing historical development of common fund doctrine); Vargo, supra note 22, at 1579–81 (discussing cases in which the common fund doctrine was developed).

36. See generally Russell & Gregory, supra note 22, at 313–18 (discussing origins of common benefit doctrine as a means for “the award of fees to a litigant who successfully sued to protect a fund in which he and others had a common monetary interest”); Vargo, supra note 22, at 1581–83 (describing application of common, substantial benefit doctrine).

37. See generally Russell & Gregory, supra note 22, at 317–19 (discussing the brief life of the private attorney general doctrine); Carl Cheng, Comment, Important Rights and the Private Attorney General Doctrine, 73 CAL. L. REV. 1929 (1985) (discussing merits of private attorney general doctrine); Wright, supra note 34, at 1237–46 (discussing private attorney general doctrine with special attention to its applicability in the environmental context); King & Plater, supra note 34 (discussing origins of and legal uncertainty inherent in private attorney general doctrine); Dobbs, supra note 34, at 439–40 (discussing short lived private attorney general theory). The private attorney general doctrine was abolished by the Supreme Court in Alyeska, 421 U.S. at 240.
circumstances.” Indeed, these exceptions occur quite often as “Congress has authorized more than 150 fee-shifting statutes that allow plaintiffs to recover costs for attorney’s fees.” This development reflects changes in the nature of modern litigation. It is particularly prevalent in environmental law, a field in which citizen suit and fee-shifting provisions are found in all major statutes except for the National

38. Miller, supra note 9, at 1349. As noted by commentators, “[t]he main justification for statutory fee shifting is to provide an incentive for citizens to enforce certain laws as private attorneys general.” Pacold, supra note 22, at 1011.

39. Ugalde, supra note 11, at 591. See also Klein, supra note 8, at 105 (“There are currently over 150 statutes containing fee-shifting provisions available to litigants in the United States.”). Depending on the commentator, however, estimates of the exact number of fee-shifting statutes varies. Indeed, as one observer has noted, “Congress has included attorney fee provisions in so many statutes creating private rights of action that its failure to include one might well be considered significant.” Leubsdorf, supra note 25, at 472. Perhaps the most expansive of such fee-shifting provisions can be found in the Equal Access to Justice Act, 5 U.S.C. §504 (1981) (“EAJA”), which makes attorney fees available to prevailing parties in a wide range of actions against the federal government. For an interesting overview of the attorney fee provisions of the EAJA—which is, by analogy, helpful in analyzing the environmental fee-shifting provisions—see Gregory C. Sisk, The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct (Part One), 55 LA. L. REV. 217 (1994).

40. For an interesting discussion of how the modern litigation model differs from the traditional view, see Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV L. REV. 1281, 1284 (1976), observing that in much modern public litigation:

The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.

In many ways, this is also an extremely accurate description of modern environmental litigation. See also id. at 1302 (describing public law litigation and its characteristics).

41. See, e.g., Dunn, supra note 11, at 199 (“Each of the major environmental laws applicable to natural resource operations contains a fee shifting provision.”); Ugalde, supra note 11, at 589 (“Citizen suit and fee-shifting provisions have been invaluable litigation tools for the enforcement of environmental law.”); Kerry D. Florio, Comment, Attorneys Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?, 27 B.C. ENVTL. AFF. L. REV. 707 (2000) (“[A]ttorney’s fee provisions are now included in virtually all environmental legislation. Without provisions for the award of attorney’s fees, legislation allowing for private citizen enforcement would be practically meaningless.”); id. at 712 (“Citizen suits are fundamental to the effective enforcement of environmental legislation”). For a helpful overview of the attorney fee provisions in federal environmental statutes, see Gregory C. Sisk, A Primer on Awards of Attorneys Fees Against the Federal Government, 25 ARIZ. ST. L.J. 733, 776–83 (1993). For one of the earliest commentaries on the question, see King & Plater, supra note 34. For an excellent, recent analysis of the role of citizen suits in environmental enforcement, see Matthew D. Zinn, Policing Environmental Regulatory Enforcement: Cooperation, Capture & Citizen Suits, 21 STAN. ENVTL. L.J. 81 (2002).
Environmental Policy Act ("NEPA"),\textsuperscript{42} the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"),\textsuperscript{43} the Coastal Zone Management Act ("CZMA"),\textsuperscript{44} the Oil Pollution Act of 1990 ("OPA"),\textsuperscript{45} and the Pollution Prevention Act of 1990 ("PPA").\textsuperscript{46}

In environmental law, the Clean Air Act led the way. Passed in 1970, at the dawn of the early modern environmental era, the Clean Air Act was the first environmental statute to include a citizen suit provision,\textsuperscript{47} and it has "served as a prototype for almost all other citizen suit provisions in major environmental statutes."\textsuperscript{48} The citizen suit provision in the Clean Air Act—like the analogous provisions in the statutes that would follow it—did not merely give citizens the power to enforce environmental statutes. It also provided that attorney fees could be recovered by the victorious plaintiff.\textsuperscript{49}

Moreover, as a cursory review of the fee-shifting provisions in various environmental statutes reveals, where fee-shifting statutes differ from each other is in the language they use to define who is entitled to recover attorney fees.\textsuperscript{50} In general, there are two types of attorney fee provisions common in the environmental arena: the "appropriate" standard and the "prevailing or substantially prevailing party" standard.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{42} National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1969).
\item \textsuperscript{44} Costal Zone Management Act, 16 U.S.C. §§ 1451-1465 (1972).
\item \textsuperscript{45} Oil Pollution Act, 33 U.S.C. §§ 2701-2720 (1990).
\item \textsuperscript{46} Pollution Prevention Act, 42 U.S.C. §§13101-13109 (1990).
\item \textsuperscript{47} For discussion of the Congressional debate leading up to the passage of the CAA’s citizen suit provisions, see Florio, supra note 41, at 710–12, Miller, supra note 9, at 4–5, and Boyer & Meidinger, supra note 1, at 844–48.
\item \textsuperscript{48} Ugalde, supra note 11, at 593. For a fuller, early discussion of the attorney fee provisions under the Clean Air Act, see Comment, Citizens Association of Georgetown v. Washington: Awarding Attorneys’ Fees in Citizen Suits to Enforce the Clean Air Act, 125 U. PA. L. REV. 1402 (1977).
\item \textsuperscript{49} Clean Air Act, 42 U.S.C. §7604(d) ("The court . . . may award costs of litigation . . . to any party, whenever the court determines such award is appropriate.").
\item \textsuperscript{50} See Dunn, supra note 11, at 199 ("The statutes differ in their standards."); Klein, supra note 8, at 105–09 (discussing, and providing examples of, various standards for fee-shifting, including the "prevailing party" standard at issue in \textit{Buckhannon}, as well as the "substantially prevailed" standard, the "finally prevailed" standard, and the "appropriate" standard); Ugalde, supra note 11, at 596 ("The standard for an award of costs in fee-shifting statutes falls primarily into two categories: those that allow the court to award fees when appropriate and those that limit fees to a prevailing or substantially prevailing party. A large number of environmental . . . statutes apply the appropriate standard . . however, the majority of statutes use the prevailing party language."); Nicyper, supra note 22, at 788–92 (discussing the variety of fee-shifting statutes that include "mandatory fee awards made regardless of the outcome of trial; fee awards to prevailing parties; fee awards to substantially prevailing parties; fee awards to successful parties; and fee awards made whenever the court determines that an award is appropriate").
\end{enumerate}
\end{footnotesize}
A. The "Appropriate" Standard

The more common standard for the award of attorney fees in environmental statutes is the standard that allows such awards "whenever... appropriate." This is the more discretionary of the standards since none of the statutes that employ this language gives the court any concrete guidance as to how to determine "appropriateness." A version of the "whenever... appropriate" standard can be found in the Toxic Substances Control Act ("TSCA"), the Endangered Species Act ("ESA"), the Surface Mining Control and Reclamation Act ("SMCRA"), the Marine Protection, Research, and Sanctuaries Act ("MPRSA"), the Public Health Service Act (Title XIV) ("PHSA"), the Noise Control Act ("NCA"), and the Clean Air Act ("CAA").

In none of these statutes is there language that clearly narrows or limits the range of discretion to be employed by the court in making fee determinations. Instead, much deference is paid to the judgment of the trial courts as to the circumstances that justify fee-shifting.

51. For general commentary on the use of and interpretation of the "appropriate" standard in environmental statutes, see Ugalde, supra note 11, at 600–01, 613–15. See also Nicyper, supra note 22, at 791 (noting that the dual purposes of the "appropriate" standard are "to effectuate both the encouragement and discouragement functions of fee awards").

52. This terminology is "[i]n contrast with other fee-shifting statutes, which generally provide for awards in favor of prevailing parties." Sisk, supra note 41, at 778.

53. See Florio, supra note 41, at 716 ("The 'appropriate' standard differs from other fee-shifting provisions because it gives the courts more discretion in fee awards."); Note, Awards of Attorneys Fees to Unsuccessful Environmental Litigants, 96 HARV. L. REV. 677, 680–81 (1983) [hereinafter Unsuccessful Environmental Litigants] ("Most of the major federal environmental statutes, however, specify that, in private actions for enforcement or judicial review, attorneys' fees may be granted to any party whenever... [t]he statutory language and legislative history of the environmental fee shifting provisions provide little direct guidance to judges deciding whether to award attorneys' fees. The decision is explicitly delegated to the courts."); and Id. at 695 ("[C]ourts cannot avoid the broad discretion conferred by the environmental fee-shifting provisions").

54. Toxic Substances Control Act, 15 U.S.C. §2619 (c) (2) (2000). The language found in TSCA is typical of the "appropriate" statutes:

The court... may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.


B. The “Prevailing or Substantially Prevailing Party” Standard\textsuperscript{61}

The second fee-shifting standard employed by environmental statutes is the “prevailing or substantially prevailing party” standard. By explicitly requiring some degree of success prior to a fee award, this standard is less discretionary than the “whenever . . . appropriate” standard.\textsuperscript{62} This standard is used in the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”),\textsuperscript{63} as well as in the Solid Waste Disposal Act (“SWDA”),\textsuperscript{64} the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),\textsuperscript{65} and the Emergency Planning and Community Right to Know Act (“EPCRTKA”).\textsuperscript{66}

These statutes do not describe what is required in order to “prevail” or “substantially prevail.” More importantly, the statutes do not indicate whether it is only winning in court that will constitute “prevailing” or whether other forms of success are relevant.\textsuperscript{67}

There is very little legislative history to shed light on the reasons why environmental statutes have employed two different standards. In addition, while basic principles of statutory construction suggest that Congress intends different outcomes when it uses different language, nothing in the language of the statutes themselves provides guidance on the degree to which Congress might have intended different outcomes. Most importantly, the statutes themselves do not explicitly or implicitly address whether the catalyst theory may be the basis for a fee award.

\textsuperscript{61} For commentary on the use of and interpretation of the “prevailing party” or “substantially prevailing party” standard, see Ugalde, supra note 11, at 601–02, 615–17.

\textsuperscript{62} Despite the fact that the “prevailing party” standard is less discretionary than the “whenever . . . appropriate” standard, it has been aptly observed that “[t]he definition of ‘prevailing party’ is unclear and has been the subject of significant litigation.” Pacold, supra note 22, at 1012.


\textsuperscript{67} In addition, there is little guidance as to whether there was intended to be a substantive difference between those statutes that require a party to be “prevailing” and those that require a party to be “substantially prevailing.” The plain language of the statute would seem to suggest that these terms have different meanings, but the precise difference in meaning is unclear.
III. PRELUDE TO BUCKHANNON

In a series of pre-Buckhannon cases, the Supreme Court and influential lower courts developed guidelines for the use of the catalyst theory. While many of these cases arose in contexts other than environmental law, their holdings framed the way in which the catalyst theory has been applied in the environmental context. While Buckhannon's lineage has already been explored by others, a brief exploration of it is critical for understanding the legal landscape in which Buckhannon arose.68

Prior to Buckhannon, the relevant case law in all circuits except the Fourth69 was hospitable to the catalyst theory, even absent specific Congressional authorization.

The catalyst theory could be said to have originated in the Eighth Circuit's 1970 ruling in Parham v. Southwestern Bell Telephone Co.,70 called by one commentator "the first judicial articulation of the catalyst theory."71 In Parham, the plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that the defendant's 1967 decision not to employ him constituted actionable racial discrimination.72 After the EEOC's intervention73 the defendant eventually offered the plaintiff employment. The plaintiff declined the offer, a decision that the defendant maintained made the plaintiff's complaint moot and discharged it of any further obligation to conciliate.74

However, the plaintiff brought suit arguing that the defendant's policies discriminated against him in particular and against black job applicants generally. The district court rejected plaintiff's arguments. The defendant prevailed at trial largely because it was able to introduce

68. The Supreme Court has been frequently called upon to rule on a range of issues pertaining to attorney fees. An exhaustive examination of this pre-Buckhannon jurisprudence is beyond the scope of this Article which seeks only to highlight those Supreme Court decisions with direct relevance to Buckhannon's rejection of the catalyst theory. For a more comprehensive survey of the Supreme Court's earlier jurisprudence on fee-shifting questions, see Brand, supra note 27, at 316–69.

69. See infra notes 205–25 and accompanying text.


71. Trotter, supra note 70, at 1434.

72. Id. The action was brought pursuant to 42 U.S.C. § 2000e-5(a).

73. Specifically, "the EEOC found reasonable cause to believe that the Company had been guilty of a discriminatory employment practice. The EEOC then attempted to resolve the dispute through conciliation . . . and requested the [defendant] to sign a conciliation agreement." Parham, 433 F.2d at 423.

74. Id.
rebuttal evidence showing that it had adopted an affirmative action program in late 1968, which resulted in increased hiring of blacks." Thus, because the trial court found that the defendant was not currently discriminating, and had not previously discriminated against the plaintiff individually, the plaintiff was not awarded relief.

On appeal, the Eighth Circuit agreed with the trial court that the plaintiff had failed to prove that he personally suffered discrimination. However, it also ruled that this failure of the individual claim did not bar consideration of the class claim. The Eighth Circuit determined that although there had been past discrimination, the defendant had voluntarily changed its policies and practices after 1968 in a way that was "impressive and salutory." The question became whether the plaintiff should be awarded attorney fees where there was no finding that he personally had been the victim of discrimination and a finding that the defendant had voluntarily undertaken policies and practices that would remedy the past discrimination against others.

The Eighth Circuit answered this question in the affirmative. Finding that because "this progress followed, not preceded, Parham’s complaint to the EEOC," the court ruled that Parham was entitled to fees as a "catalyst" because his litigation spurred the defendant to revise its policies:

[W]e believe Parham’s lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination against blacks generally . . . Parham is entitled to reasonable attorney’s fees.

Following Parham, this rationale was followed by all circuits that confronted this issue with the exception of the Fourth Circuit from which Buckhannon emerged.

75. Id. at 424.
76. Id. at 425.
77. Id. at 428.
78. Id. ("Parham’s failure to establish his claim for individual damages will not bar relief for the class he represents.").
79. Id. at 429 (noting and describing defendant’s “good faith efforts, beginning in the middle of 1967 and continuing thereafter, to recruit black employees”).
80. Id.
81. Id. at 429–30.
82. See, e.g., Morris v. City of West Palm Beach, 194 F.3d 1203, 1206–07 (11th Cir. 1999); Payne v. Bd. of Educ., Cleveland City Sch., 88 F.3d 392, 397 (6th Cir. 1996); Kilgour v. City of Pasadena, 53 F.3d 1007, 1010 (9th Cir. 1995); Marbrey v. Bane, 57 F.3d 224, 234–35 (2nd Cir. 1995); Beard v. Teska, 31 F.3d 942, 951 (10th Cir. 1994); Baumgartner v. Harrisburg Hous. Auth., 2004

Meanwhile, as the circuit courts were generally following the Parham approach, the Supreme Court was developing its own fee-shifting doctrines.

_Alyeska Pipeline Service Co. v. Wilderness Society_ was one of the most significant early cases involving the interplay between environmental statutes and attorney fees. Although the case did not directly implicate the catalyst theory, it set important groundwork for fee-shifting jurisprudence. The Supreme Court was called upon to review a decision granting attorney fees to respondents who had brought suit to prevent the federal government from issuing permits to build the trans-Alaska oil pipeline. Plaintiffs alleged that issuing these permits would violate the Mineral Leasing Act of 1920 and the National Environmental Policy Act. The litigation was resolved legislatively when Congress "enacted legislation which amended the Mineral Leasing Act to allow the granting of the permits sought by Alyeska and declared that no further action under the NEPA was necessary before construction of the pipeline could proceed."

The two statutes at issue in _Alyeska_ did not contain fee-shifting provisions. However, the respondents' fee request was based on the common law "private attorney general" rationale. This would have allowed a fee award absent statutory authorization if the litigant seeking fees proved that it "had ensured that the governmental system functioned to ensure compliance with the relevant statutes."
properly; and [was] entitled to attorneys' fees lest the great cost of litigation of this kind . . . deter private parties desiring to see the laws protecting the environment properly enforced.90

The Alyeska Court declined to allow fee-shifting, ruling that absent a few narrow common law exceptions,91 any departure from the American Rule must come from specific Congressional authorization. The Court reasoned that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged. . . ."92 The Court viewed its role narrowly, deferring to Congress's authority to determine "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards. . . ."93

Thus, the Court refused to allow fee awards absent specific Congressional authorization even if an award of fees might be desirable in a particular case.94 Although Alyeska did not directly involve a catalyst claim, it is relevant to the debate about catalyst theory. First, it illustrates a presumption against expanding the scope of fee awards unless clearly authorized by Congress. It also champions the preeminent role of Congress in making critical decisions in this regard. Indeed, in direct response to Alyeska, Congress passed the Civil Rights Attorney's Fee Awards Act of 1976 ("Fees Act")95 providing specific legislative authorization for attorney fees in a broad range of civil rights cases.

In 1980, the Supreme Court decided Hanrahan v. Hampton,96 in which it was asked to construe the meaning of the Fees Act provision awarding attorney fees to "prevailing parties." This was not an environmental statute, but Hanrahan was nevertheless significant because it interpreted

90. Id. at 245–46.
91. See supra text accompanying notes 20–48.
92. Alyeska, 421 U.S. at 247.
93. Id. at 262.
94. As the court reasoned:
We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized . . . and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs.
Id. at 270–71.
the term “prevailing party” and said in dicta that the legislative history of the “prevailing party” test suggested that the catalyst theory was permissible.\(^{97}\)

The question before the Court was whether a party who succeeded in reversing a directed verdict and winning several discovery motions could be a “prevailing party.”\(^{98}\) The Court found that this was insufficient to justify an award as a “prevailing party”\(^{99}\) because in a situation such as this “respondents have of course not prevailed on the merits of any of their claims . . . . The jury may or may not decide some or all of the issues in favor of the respondents.”\(^{100}\)

In reaching this conclusion, however, the Court cited with approval certain aspects of the legislative history of fee-shifting that endorse the catalyst theory. As the Court noted:

The legislative history of the Civil Rights Attorney’s Fees Awards Act of 1976 indicates that a person may in some circumstances be a “prevailing party” without having obtained a “favorable final judgment following a full trial on the merits.” . . . Thus, for example, “parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.”\(^{101}\)

By citing this legislative history with approval, Hanrahan suggests that statutes using “prevailing party” language may authorize recovery of attorney fees by catalysts. This suggests that it was not the catalyst theory itself that the Hanrahan Court rejected. Instead, the Court merely took issue with the claim that the plaintiffs had “prevailed” on any substantive matters.

Following Hanrahan, the Supreme Court’s decision in Maher v. Gagne \(^{102}\) made it clear that a settlement could be a sufficient basis for fee-shifting under the “prevailing party” provisions of the Fees Act.\(^{103}\)

\(^{97}\) Hanrahan, 446 U.S. at 756–58.

\(^{98}\) Id. at 756. More specifically, the respondents had obtained:

(1) the reversal of the District Court’s judgment directing verdicts against them, save with respect to certain of the defendants; (2) the reversal of the District Court’s denial of their motion to discover the identity of an informant; and (3) the direction to the District Court on remand to consider allowing further discovery, and to conduct a hearing on the respondent’s contention that the conduct of some of the petitioners in response to the trial court’s discovery orders warranted the imposition of sanctions. . . .

\(^{99}\) Id. at 756.

\(^{100}\) Id. at 758–59.


\(^{102}\) 448 U.S. 122 (1980). For further discussion of Maher, see Gibson, supra note 9, at 216–17, and McFerren, supra note 8, at 160.

\(^{103}\) 42 U.S.C. § 1988. The complaint in Maher was based on allegations that Connecticut’s Aid
The Court strongly endorsed the principle that litigants could recover fees even absent a judicial ruling in their favor.\textsuperscript{104} Although the Court never used the term "catalyst," its ruling would lend support to an argument in favor of the catalyst theory. In \textit{Maher}, the dispute was resolved when the state amended its controversial regulations, the parties negotiated a settlement, and the district court "entered a consent decree."\textsuperscript{105} Attorney fees were awarded, and the petitioner objected based on the argument that "the respondent prevailed through a settlement rather than through litigation."\textsuperscript{106}

The Supreme Court, however, found "no merit"\textsuperscript{107} in this limited view. Instead, the Court ruled that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees"\textsuperscript{108} and that nothing in the "prevailing party" provisions requires that a fee award be preceded by "full litigation of the issues or a judicial determination that the plaintiff's rights have been violated."\textsuperscript{109} Here, the settlement agreement at issue was not an entirely out-of-court private arrangement because it received the judicial \textit{imprimatur} of a consent decree. Thus, it did not squarely address the \textit{Buckhannon} problem. However, it did reject an overly-broad reading of the "prevailing party" language and is, in that way, instructive.\textsuperscript{110}

The next time that the Supreme Court had the opportunity to address fee-shifting issues in a way relevant to \textit{Buckhannon} was in \textit{Hensley v.}}

to Families with Dependent Children regulations violated the Social Security Act and the Equal Protection and Due Process clauses of the Fourteenth Amendment. \textit{Maher}, 448 U.S. at 125. Before addressing the catalyst question, the Court first considered several constitutional and statutory claims not relevant to the issue of catalyst recovery. \textit{Id.} Specifically, the Court considered the argument that "Congress did not intend to authorize the award of attorney's fees in every type of § 1983 action, but rather limited the court's authority to award fees to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil rights or equal rights." \textit{Id.} at 128. The Court rejected this argument, finding that there was no basis for drawing this distinction. \textit{Id.} The Court was also asked to consider whether a "federal court is barred by the Eleventh Amendment from awarding fees against a State in a case involving a purely statutory, non-civil rights claim." \textit{Id.} at 130. The Court found that it did not need to reach this argument because "respondent did allege violations of her Fourteenth Amendment due process and equal protection rights." \textit{Id.} at 130–31.

\textsuperscript{104} \textit{Id.} at 126–27.
\textsuperscript{105} \textit{Id.} at 126.
\textsuperscript{106} \textit{Id.} at 129. The lower court's decision to award fees can be found at Gagne v. Maher 455 F.Supp. 1344 (D.Conn. 1978).
\textsuperscript{107} \textit{Maher}, 448 U.S. at 129.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.} The Court also cited, with approval, S. Rep. No. 94-1011 at 5 (1976), the same source noted by the Court in \textit{Hanrahan}.
\textsuperscript{110} This litigation, obviously, did not involve an environmental statute. However, there is nothing in it to indicate that the term would be interpreted differently in any other statute.
In Hensley, a complaint was filed on behalf of involuntarily confined patients at the Forensic Unit of the Fulton State Hospital against officials of the Forensic Unit and the Missouri Mental Health Commission. In the complaint, "Count I challenged the constitutionality of treatment and conditions at the Forensic Unit. Count II challenged the placement of patients in the [maximum security mental health facility] without procedural due process. Count III sought compensation for patients who performed institution-maintaining labor."

Prior to a judicial ruling on the litigation's merits, a consent decree resolved Count II. Furthermore, the start of compensation for patients mooted Count III. Thus, the initial complaint was voluntarily dismissed. However, a new two-count complaint was filed in its stead. The new Count I was substantially the same as Count I in the original action while the new Count II sought damages for the past labor performed by the patients. Count II was then voluntarily dismissed.

At a trial on the merits, the district court ruled for the patients on the constitutional claim. Following these proceedings, the respondents filed a request for fees under 42 U.S.C. § 1988 which authorizes the payment of attorney fees to


112. Hensley, 461 U.S. at 426.

113. Id.

114. Id.

115. Id. at 426-27.

116. Id. at 427.

117. Id. In addition, following this, an additional "amended one-count complaint [was filed] specifying the conditions that allegedly violated [patients'] constitutional right to treatment"). Id.

118. Id.

119. The lower court's opinion may be found at Eckerhart v. Hensley, 475 F. Supp. 908 (W.D. Mo. 1979). As described by the Supreme Court, the district court "found constitutional violations in five of six general areas: physical environment; individual treatment plans; least restrictive environment; visitation, telephone, and mail privileges; and seclusion and restraint. With respect to staffing, the sixth general area, the District Court found that the Forensic Unit's staffing levels . . . were minimally adequate." Hensley, 461 U.S. at 427-28.

120. Respondents' request was for $195,000 to $225,000 in attorney fees. In calculating this amount, it was asserted that respondents' "four attorneys claimed 2,985 hours worked and sought payment at rates varying from $40 to $65 per hour. This amounted to approximately $150,000. Respondents also requested that the fee be enhanced by thirty to fifty percent, for a total award of somewhere between $195,000 and $225,000." Hensley, 461 U.S. at 428.
The district court ruled that the respondents were "prevailing parties" for purposes of §1988, "even though they had not succeeded on every claim."\(^{122}\) Although the district court awarded less in attorney fees than the amount requested,\(^{123}\) fees were awarded.\(^{124}\) The Eighth Circuit affirmed,\(^{125}\) but the Supreme Court vacated and remanded.\(^{126}\)

The Court spent much time analyzing how to calculate a reasonable fee,\(^{127}\) acknowledging that "[t]here is no precise rule or formula for making these determinations."\(^{128}\) *Buckhannon*, of course, did not concern itself with the mathematical calculation of fees. However, several aspects of the Supreme Court's decision to vacate are relevant to the catalyst controversy. First, the Court warns that "[a] request for attorney's fees should not result in a second major litigation."\(^{129}\) This concern with judicial efficiency continually resurfaces in discussions about the catalyst theory.\(^{130}\) In addition, the Court asserts the primacy of the district court in making fee determinations.\(^{131}\) This confidence in the lower court's ability has spurred significant debate in catalyst cases.\(^{132}\)

More importantly, the Court established that while a plaintiff need not prevail on all claims, the degree of success is a "crucial factor"\(^{133}\) in

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122. *Hensley*, 461 U.S. at 428.
123. In total, the fee award was set at $133,332.25. More specifically, the district court "reduced the number of hours claimed by one attorney by thirty percent to account for his inexperience and failure to keep contemporaneous records. Second, the court declined to adopt an enhancement factor to increase the award." *Id.* at 428–29.
124. *Id.* at 428.
127. *Id.* at 433–37 (discussing financial complexities in determining appropriate attorney fee award).
128. *Id.* at 436.
129. *Id.* at 437. A similar sentiment was echoed in Justice Brennan's dissenting opinion in which he called appeals from attorney fee decisions "one of the least socially productive types of litigation imaginable." *Id.* at 442 (Brennan, J. dissenting).
130. *See infra* notes 384–87 and accompanying text.
131. As the court explained:
We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award.
*Hensley*, 461 U.S. at 437.
132. *See infra* notes 262–80 and accompanying text.
133. *Hensley*, 461 U.S. at 440. The court goes on to explain that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the
determining the amount of attorney fees to be awarded. This places great weight on substantive success as a factor in determining fees. Alas, *Hensley* did not address the question of *where* that success must occur to be relevant in the fee award calculation. Hence, while this case provided important guidance by establishing that success is relevant in defining "prevailing," its silence on the question of non-judicial success kept the catalyst theory alive and well.134

The Supreme Court then considered the fee-shifting provisions of the Clean Air Act and its "whenever . . . appropriate" standard for fee-shifting. The 1983 case *Ruckelshaus v. Sierra Club*135 began when the respondent environmental groups challenged the E.P.A.'s promulgation of sulfur dioxide emission standards.136 The Court of Appeals for the District of Columbia ruled against the groups, rejecting all their substantive claims.137

In spite of this, the Court of Appeals awarded fees to the losing parties138 under the "whenever . . . appropriate" language of the Clean Air Act's fee-shifting provision.139 In granting this award, the Court of Appeals accepted the argument that the broad discretionary language of "whenever appropriate" authorizes respondents' awards because "despite their failure to obtain any of the relief they requested, it was 'appropriate' for them to receive fees for their contributions to the goals of the Clean Air Act."140

unsuccesful claim should be excluded in considering the amount of a reasonable fee... [W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.*

134. This case, like the prior one, did not involve an environmental statute. However, it still provides some guidance as to the interpretation of "prevailing party" by establishing that success is crucial in defining "prevailing." Thus, this case is relevant, at a minimum, in interpreting the environmental statutes that use "prevailing party" language.


136. More specifically, one environmental group asserted that "the standards promulgated by the EPA were tainted by the agency's *ex parte* contacts with representatives of private industry" while the other group claimed that "EPA lacked authority under the Clean Air Act to issue the type of standards that it did." *Ruckelshaus*, 463 U.S. at 681.


138. *See Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982); Ala. Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982). The Sierra Club was awarded $45,000 and the Environmental Defense Fund was awarded $46,000. *Id.* at 3–5.

139. 42 U.S.C. § 7607 (f).

140. *Ruckelshaus*, 463 U.S. at 682. In a Note written shortly before *Ruckelshaus* was decided, an author commented on the merits of this argument and the benefits that could be derived from authorizing fee awards to non-prevailing parties. *See Unsuccessful Environmental Litigants, supra* note 51, at 682–96 (arguing that fee awards to unsuccessful environmental plaintiffs may be
The Supreme Court rejected this reasoning and reversed, ruling that the fee-shifting provision "requires the conclusion that some success on the merits be obtained before a party becomes eligible for a fee award." Failure to require at least some success would, in the view of the Court, mark a "radical departure" from prevailing principles. This case did not concern a catalytic recovery and so does not address the precise issue raised by Buckhannon. However, the Court's reasoning in Ruckelshaus is important because it provides guidance for applying the "whenever ... appropriate" standard.

First, the Court laments the fact that the statute is written in a way that makes it "difficult to draw any meaningful guidance" from the text itself. This uncertainty also impairs efforts to determine Congressional intent with regard to the catalyst theory.

In addition, because of sovereign immunity concerns, the Court asserts that fee-shifting statutes, as they apply to the government, should be interpreted narrowly. This notion is significant because the catalyst theory is often invoked against the government.

More importantly, however, Ruckelshaus addressed the distinction between the "whenever ... appropriate" standard and the "prevailing party" standard. The Court noted that when adopting the "whenever ... appropriate" standard, Congress was explicitly rejecting the "prevailing party" standard. At the time that the statute was written, the "prevailing party" standard was interpreted narrowly. Thus, the Ruckelshaus Court reasoned that by consciously selecting the "whenever ... appropriate" standard, Congress meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties. Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some cases and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central issues."

appropriate and beneficial).

141. Ruckelshaus, 463 U.S. at 682.
142. Id. at 683. The Court goes on to note that:
[O]rdinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it. Before we will conclude Congress abandoned this established principle ...—rooted as it is in intuitive notions of fairness and widely manifested in numerous different contexts—a clear showing that this result was intended is required.

Id.
143. Id. at 685.
144. Id. at 685–86 (warning that "care must be taken not to 'enlarge' § 307(f)'s waiver of immunity beyond what a fair reading of the language of the section requires").
145. Id. at 687.
146. Id. at 688.
This did not address catalytic recovery. However, the Court did not rule out this possibility and instead made a strong case for trial court discretion. Because *Buckhannon* did not address a statute employing the "whenever . . . appropriate" standard, *Ruckelshaus* remains critically important for such cases.

The following year, the Supreme Court decided *Marek v. Chesny*, a case involving the complex interrelationship between the term "costs" as mentioned in Rule 68 of the Federal Rules of Civil Procedure and as mentioned in §1988 of the Fees Act. The Court held that "[t]he plain language of Rule 68 and §1988 subjects such fees to the cost-shifting provisions of Rule 68." With the exception of very general discussions of the goals of fee-shifting, none of the legal issues involved in the catalyst theory were addressed in the opinion. However, the future significance of *Marek* lay in the Appendix to Justice Brennan's dissent. In that Appendix, Justice Brennan compiled a comprehensive list of federal statutes that contained fee-shifting provisions of various types. This listing was referenced by the majority opinion in *Buckhannon* in the context of noting that fee-shifting provisions were included in "numerous statutes" and observing that "[w]e have interpreted these fee-shifting provisions consistently." This has led to speculation as to whether the *Buckhannon* majority intended to incorporate all the statutes in the *Marek* Appendix by reference. If this is

147. Justice Stevens, in his *Ruckelshaus* dissent, elaborates more fully on the degree to which he believes the deference to the trial court should be expanded. He asserts that "Congress . . . carefully explained in the legislative history that it intended to give the court of appeals discretionary authority to award fees and costs to a broader category of parties." *Id.* at 694 (Stevens, J., dissenting).

148. See *Florio*, supra note 41, at 718–19 ("Although *Ruckelshaus* specifically applied to the CAA, that reasoning has been applied to all statutes that use the 'appropriate' standard.").

149. 473 U.S. 1 (1985). For further discussion of *Marek*, see generally Sherman, supra note 26, at 1877–79.

150. 42 U.S.C. § 1988

151. *Marek*, 473 U.S. at 11. More specifically, Rule 68 does not allow a litigant to recover costs incurred after rejecting a settlement offer when the ultimate disposition of the case results in a less beneficial outcome than the settlement offer would have provided. *Id.* at 10–13. However, §1988 however, authorizes the awarding of attorney fees to prevailing parties. *Id.* at 10.

152. See, e.g., *id.* at 10 (noting that "[t]here is no evidence . . . that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims. . . . Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for . . . settling their cases out of court."); *id.* at 11 ("Section 1988 encourages plaintiffs to bring meritorious civil rights suits.").

153. *Id.* at 43–51 (Brennan, J., dissenting) (Appendix).


155. *Id.* at 602.

156. *Id.* at 603 n.4.
true, then the scope of *Buckhannon* would extend far beyond its initial boundaries.

Several years later, the Court confronted the catalyst question more directly in *Hewitt v. Helms*. In *Hewitt*, a former inmate claimed his treatment in prison violated the Due Process Clause and sought attorney fees under the "prevailing party" language of §1988 of the Fees Act. Before the suit was resolved, the inmate was released on parole. He brought an action for fees based on several grounds, including the catalyst theory. He argued that while his case was pending, the Pennsylvania Bureau of Corrections changed its policies in a way that would remedy some of the problems about which he complained. He claimed that his suit "was a 'catalyst'" for the prison reforms, entitling him to "prevailing party" status.

The Court held that it "need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award under §1988, because even if [the former inmate] can demonstrate a clear causal link between his lawsuit and the State's amendment of its regulations," he had been released prior to the amendments. Hence, no redress was his. However, in dicta the Court appeared to be favorably disposed to the catalyst theory. Specifically, Justice Scalia wrote:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under §1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed even despite the absence of a formal judgment in his favor.


158. Specifically, the former inmate complained that he "was placed in administrative segregation . . . pending an investigation into his possible involvement in [a] disturbance. . . . [H]e alleg[ed] that the lack of a prompt hearing on his misconduct charges and his conviction for misconduct on the basis of uncorroborated hearsay testimony violated his rights to due process." *Hewitt*, 482 U.S. at 757.

159. *Id.*

160. *Id.* at 759.

161. *Id.*

162. *Id.* at 763.

163. *Id.*

164. *Id.* at 760–61. The Court goes on to explain, "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has 'prevailed' in his suit because he has obtained the substance of what he sought." *Id.* at 761.
This was mere dicta since resolution of the catalyst question was not essential to resolving Hewitt. However, Hewitt provides a strong pro-catalyst perspective from the Justice who wrote the strongly anti-catalyst concurrence in Buckhannon.

Following on the heels of Hewitt, the Supreme Court was required to apply the Hewitt standards in Rhodes v. Stewart. In Rhodes, two prisoners filed suit “alleging violations of their First and Fourteenth Amendment rights by officials who refused them permission to subscribe to a magazine.” They won a judgment in their favor. However, by the time they succeeded in their litigation, the case had been mooted by the death of one of the petitioners and the release of the other. Nevertheless, the district court awarded fees pursuant to 42 U.S.C. § 1988, and the Sixth Circuit affirmed.

However, the Supreme Court reversed. While acknowledging that the petitioners had won a declaratory judgment that resulted in “modification of prison policies on magazine subscriptions,” it held that this did not justify a fee award because “[i]n the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail.” This was not directly focused on a catalyst claim because a judicial verdict had been reached. However, the Court reaffirmed its reluctance to award fees in cases that had become moot. Because a defendant’s decision to grant the relief sought or the parties’ decision to settle renders a case moot after Rhodes, the catalyst theory was the only possible way to recover fees after relief had been obtained.

In the 1989 Texas State Teachers Association v. Garland Independent School District decision, the Court had to define “prevailing party” for purposes of §1988 of the Fees Act. The petitioners in the litigation asserted that the First and Fourteenth Amendment rights of teachers were violated by the school district whose regulation “prohibits employee organizations access to school facilities during school hours and

166. Id. at 2.
167. Id.
168. Id.
169. Id. at 4.
170. Id.
171. Id.
172. Texas State Teachers Ass’n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989). See generally Averill, supra note 27, at 2263–68; Gibson, supra note 9, at 220–21; Loring, supra note 8, at 982; Lowery, supra note 9, at 1452–53; McFerren, supra note 8, at 163–64; Sternlight, supra note 111, at 579–81; Trotter, supra note 70, at 1438–39.
proscribes the use of school mail and internal communications systems by employee organizations.”

The district court rejected all of the petitioner’s claims except the claim that the regulation requiring a principal’s approval of teacher meetings with union representatives was unconstitutionally vague. The Fifth Circuit affirmed the district court’s finding that the prohibition on giving “union representatives access to school facilities during school hours” was constitutionally permissible. However, unlike the district court, the Fifth Circuit found constitutional objections to prohibiting teachers from discussing union organization among themselves during the school day, limiting teachers’ speech about union activities during the school day, and banning teachers’ use of “internal mail and billboard facilities” to communicate about union activities. The Supreme Court affirmed the decision of the Fifth Circuit on the constitutional merits of the case.

The question that returned to the Supreme Court was whether the petitioners were entitled to attorney fees for their success on some aspects of their claim even though they failed on others. Both the district court and the Fifth Circuit denied fees, reasoning that while the petitioners were victorious on some issues, they were not “prevailing parties” on the question of whether union representatives could communicate with them during school hours. Because the courts believed that this was the central issue in the litigation, they denied a fee award.

However, the Supreme Court reversed and rejected the “central issue” test as the benchmark for measuring a litigant’s status as a “prevailing party.” Instead, it ruled that:

The touchstone of the prevailing party inquiry must be the alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree

173. Texas State Teachers Ass’n, 489 U.S. at 785.
174. Id. at 786. Specifically, the regulation provided no parameters to restrict the principal’s exercise of discretion.
176. Id. at 1054–55.
177. The Supreme Court’s opinion on the constitutional merits of the case may be found at Garland Indep. Sch. Dist. v. Texas State Teachers Ass’n, 479 U.S. 801 (1986).
179. Id. at 790.
of the plaintiff's overall success goes to the reasonableness of the award... not to the availability of a fee award vel non.\textsuperscript{180}

This still did not address catalytic recovery. Nevertheless, \textit{Texas State Teachers Ass 'n} contributes to the \textit{Buckhannon} lineage by its holding and dicta lending both indirect support and indirect opposition to the catalyst theory. On the one hand, the Court's ruling advocates a broad view of "prevailing party" by suggesting that the Court should be guided by the objective of awarding fees to successful petitioners who "have... served the 'private attorney general' role which Congress intended to promote in enacting §1988."\textsuperscript{181} This suggests that catalytic recovery would be favored in that it too advances litigants' ability to serve as private attorneys general.

In contrast, the Court's ruling used the phrase "alteration of the legal relationship" without describing what it meant and what would qualify as a change in legal relationship sufficient to confer "prevailing party" status. The opinion also used language such as "[p]etitioners obtained a judgment,"\textsuperscript{182} "[t]hey prevailed on a significant issue in the litigation,"\textsuperscript{183} and "[a] prevailing party must be one who has succeeded on any significant claim... either pendente lite or at the conclusion of the litigation."\textsuperscript{184} This emphasis on litigation does not bode well for the catalyst theory. In addition, the opinion raised concern about having "unstable threshold[s] to fee eligibility"\textsuperscript{185} on the grounds that this would "ensur[e] that the fee application will spawn a second litigation of significant dimension."\textsuperscript{186} If catalytic recovery moves away from a bright line rule, it might be condemned under this same rationale. However, because \textit{Texas State Teachers' Ass 'n} did not have to confront that question, it provides conflicting guidance.

In 1992, the Court moved closer to the catalyst question when it decided \textit{Farrar v. Hobby}.\textsuperscript{187} \textit{Farrar} caught the attention of many commentators,\textsuperscript{188} one of whom noted that \textit{Farrar} "redefined the

\textsuperscript{180} \textit{Id.} at 792–93.
\textsuperscript{181} \textit{Id.} at 793.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.} at 791.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{188} See generally, Lowery, supra note 9 passim; Laura E. Flenniken, Comment, \textit{No More Plain Meaning: Farrar v. Hobby}, 71 DENV. U.L. REV. 477 (1994); Gibson, supra note 9, at 221–23; Trotter, supra note 70; Amnino, supra note 9, at 11–12; Szczepanski, supra note 85; McFerren, supra note 8, at 164–66; Ugalde, supra note 11, at 602–03; Loring, supra note 8, at 983–85; Shub, supra
prevailing party inquiry and altered the landscape of civil rights fee-shifting.” The petitioners in Farrar operated Artesia Hall, a home for troubled youth. Respondents were government officials who attempted to close Artesia Hall after alleged difficulties at the facility, including the death of a student. Petitioner brought an action alleging “deprivation of liberty and property without due process by means of conspiracy and malicious prosecution aimed at closing Artesia Hall.”

The Fifth Circuit found that while the petitioners had not proven an “actual deprivation of a constitutional right,” they were entitled to a nominal award of one dollar because of the jury’s verdict that they had been deprived of a civil right. The district court then granted the fee request under §1988 of the Fees Act. However, the Fifth Circuit reversed, reasoning that because the nominal award was so dramatically disproportionate to the $17 million in damages that was initially sought, the petitioner was not a “prevailing party” in any real sense.

The Supreme Court held that a party who obtains only nominal relief is still a “prevailing party” because such a judgment, although small, “modifies the defendant’s behavior for the plaintiff’s benefit by forcing the defendant to pay an amount of money he otherwise would not pay.” Yet, at the same time that the Court held that mere nominal damages should not preclude “prevailing party” status, it also held that because the damages were so small in this particular case, the “reasonable” attorney fee payable to the prevailing party was no fee at all. Thus, the Court’s view was that while a nominal award is not per se inconsistent with being a “prevailing party,” it would not be reasonable to order fees for an insignificant award.

189. Trotter, supra note 70, at 1430. Indeed, in a context directly relevant to Buckhannon, one commentator feared that the Farrar ruling “cast a shadow” over catalyst jurisprudence. Lowery, supra note 9, at 1468.
190. Farrar, 506 U.S. at 105-06.
191. Id. at 106.
192. Id. at 107.
193. Id. The lower court’s opinion on the civil and constitutional merits of the case may be found at Farrar v. Cain, 756 F.2d 1148 (5th Cir. 1985).
194. The Fifth Circuit’s opinion denying fees may be found at Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991).
196. Id. at 115.
Farrar thus illustrates the Court's continuing ambivalence toward the recovery of attorney fees when the nature of the victory does not fall squarely within the bounds of a clear and substantial judicial victory.

Particularly relevant for the catalyst debate is dicta in Farrar that in order to be a prevailing party for purposes of §1988, a "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought... or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." This phrase was not explained, though it identifies the very issue at the heart of catalyst litigation. The Court lists three actions that may be the basis for "prevailing party" status: an enforceable judgment, a consent decree, and a settlement. However, it does not clearly define these terms or articulate whether its list is illustrative or exhaustive.

The Supreme Court's final significant fee-shifting case prior to Buckhannon was an environmental case and thus, it is particularly instructive for understanding the climate in which Buckhannon was decided. In Friends of the Earth v. Laidlaw Environmental Services, decided in 2000, the Supreme Court considered a claim for

197. Id. at 111 (emphasis added) (citations omitted).
198. Id.
199. It did, however, generate speculation as to the future of catalyst theory. See, e.g., Averill, supra note 27, at 2274 ("The fact that the issue of catalyst theory's viability was not before the Farrar Court provides strong support for the conclusion that the Court had no intention of eliminating it.").
200. In 1994, the Supreme Court decided Key Tronic Corp. v. United States, 511 U.S. 809 (1994), an action for attorneys' fees brought pursuant to CERCLA. Specifically, petitioners sought to recover attorney fees for three legal activities: "(1) the identification of other potentially responsible parties... including the Air Force, that were liable for the cleanup; (2) preparation and negotiation of its agreement with the EPA; and (3) the prosecution of [the attorney fee] litigation." Id. at 812. Petitioners argued that these were legitimate response costs under CERCLA §§ 107 and 113. The Court declined to award the fees. However, this case is not relevant to the fee-shifting debate because the basis for the Court's holding in Key Tronic is its view that "neither §107 nor §113 expressly calls for the recovery of attorneys fees by the prevailing party." Id. at 817. Because this case involved determining the permissible scope of response costs rather than interpreting "prevailing party," it is not particularly pertinent to Buckhannon's lineage.
fees brought pursuant to the Clean Water Act which authorizes fee-shifting for a "prevailing party."\textsuperscript{202}

In this litigation, Friends of the Earth ("FOE") sued defendant for alleged violations of its National Pollution Discharge Elimination System ("NPDES") permit. After the litigation commenced, the defendant achieved "substantial compliance with the terms of its discharge permit."\textsuperscript{203} Nevertheless, the district court fined the defendant $405,800 in civil penalties.\textsuperscript{204} However, because Laidlaw had come into compliance with the permit terms, the district court gave FOE no injunctive relief. On appeal the Fourth Circuit vacated the order of civil penalties and ruled that FOE was not entitled to attorney fees because defendant’s compliance with the terms of the permit rendered the litigation moot.\textsuperscript{205}

The Supreme Court reversed. After a lengthy discussion of standing issues,\textsuperscript{206} the Court turned to the question of mootness. While acknowledging that "citizen plaintiffs lack standing to seek civil penalties for wholly past violations,\textsuperscript{207}" the Supreme Court also acknowledged that before the case would be moot, it must be "absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur."\textsuperscript{208} Because that issue had not been addressed, the Supreme Court remanded.\textsuperscript{209}

At the end of its opinion, the Court came tantalizingly close to addressing the catalyst question. FOE had argued that it was entitled to attorney fees as a "catalyst" if its litigation brought about the desired result—in this case, the defendant's voluntary compliance with its NPDES permit. The Supreme Court acknowledged that its earlier decision in \textit{Farrar} had created confusion in the circuits as to the status of the catalyst rule.\textsuperscript{210} In addition, it acknowledged that \textit{Farrar} "involved
no catalytic effect" and left the catalyst question open. In spite of this, the Court determined that because the lower court still had to grapple with questions of mootness and substance, "it would be premature . . . for us to address the continuing validity of the catalyst theory." Thus, the Supreme Court saved the catalyst question for another day. That "other day" would come the following year when it faced Buckhannon.

Before turning to Buckhannon itself, the Fourth Circuit's decision in S-1 & S-2 by and through P-1 & P-2 v. State Board of Education bears brief discussion because it was the only significant pre-Buckhannon opinion that squarely rejected the catalyst theory. By doing so and creating a circuit split, S-1 & S-2 set the stage for Buckhannon. The S-1 & S-2 plaintiffs were parents who brought a §1983 action against school officials alleging that officials had violated the Education of the Handicapped Act ("EHA") "by refusing to authorize hearing officers to decide tuition reimbursement claims and to order reimbursement in appropriate cases." The parents sought tuition reimbursement as well as "injunctive and declaratory relief."

The district court granted summary judgment in favor of the plaintiffs with respect to their requests for declaratory and injunctive relief. While the defendants were appealing this ruling, the plaintiffs and one of the defendants, the Asheboro City Board of Education, reached a settlement agreement with respect to the tuition reimbursement. Specifically, they agreed that "the City Board would pay the parents' tuition expenses for their children and also pay plaintiffs' attorneys' fees." Although the plaintiffs did not dismiss their claims against the two defendants who were not a party to this settlement, a panel of the Fourth Circuit held that further litigation was mooted because the

211. Id. at 194.
212. Id. at 195.
214. Specifically, the named defendants were the Asheboro City Board of Education, the State Board of Education of North Carolina, and C.D. Spangler, Jr., the Chairman of the State Board. S-1 & S-2, 21 F.3d at 50.
216. S-1 & S-2, 21 F.3d at 50.
217. Id.
218. This district court opinion may be found at S-1 & S-2 by & through P-1 & P-2 v. Spangler, 650 F.Supp. 1427 (M.D.N.C. 1986).
219. S-1 & S-2, 21 F.3d at 50.
settlement agreement provided the tuition reimbursement that the plaintiffs were seeking.\textsuperscript{220}

Several years later, North Carolina "enact[ed] legislation giving administrative law judges the authority to make binding decisions, subject to appeal, regarding a child's special education needs."\textsuperscript{221} This was a legislative resolution to the issue that had ignited the litigation. Plaintiffs thus sought recovery of fees from the state defendants. The trial court granted, and a panel of the Fourth Circuit upheld, the award of fees against the two state defendants.\textsuperscript{222} However, the Fourth Circuit \textit{en banc} reversed. Overruling its earlier precedent in \textit{Bonnes v. Long},\textsuperscript{223} the Fourth Circuit rejected the catalyst theory. It held that for purposes of 42 U.S.C. §1988, a litigant:

may not be a "prevailing party" . . . except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought. . . . The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct can't suffice to establish plaintiff as a prevailing party."\textsuperscript{224}

When the Fourth Circuit put itself at odds with its sister circuits in \textit{S-1} \& \textit{S-2}, it laid the groundwork for \textit{Buckhannon} which would compel the Supreme Court to address the catalyst question head-on.\textsuperscript{225}

IV. \textit{BUCKHANNON} ANALYSIS

Although the relatively straightforward \textit{Buckhannon} case "began as a claim for reasonable accommodation, [it] ended as a debate over the

\textsuperscript{220} See \textit{S-1} v. Spangler, 832 F.2d 294 (4th Cir. 1987).
\textsuperscript{222} See \textit{S-1} \& \textit{S-2} v. State Board of Educ., 6 F.3d 160 (4th Cir. 1993).
\textsuperscript{223} Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979). Interestingly, the Fourth Circuit's \textit{Bonnes} decision was, until \textit{S-1} \& \textit{S-2}, a clear unambiguous statement in favor of the rationale behind the catalyst theory: That civil rights litigation ends in a consent judgement does not preclude an attorney's fee award under §1988. . . . [T]he legislative history indicates that Congress intended that a plaintiff who obtained its objective through a consent judgment could be a "prevailing party" within the meaning of the statute. . . . Any other construction would frustrate the basic rationale of §1988: that enforcement of civil rights legislation can best be achieved by encouraging the public to act as private attorneys general.
\textit{Id.} at 1318 (emphasis added).
\textsuperscript{224} \textit{S-1} \& \textit{S-2}, 21 F.3d at 51.
\textsuperscript{225} The \textit{Buckhannon} Court pointed out that, technically, this was a case of first impression for the Supreme Court, noting: "We have never had occasion to decide whether the term 'prevailing party' allows an award of fees under the 'catalyst theory.' . . . [T]here is language in our cases supporting both petitioners and respondents, and last Term we observed that it was an open question here." \textit{Buckhannon}, 532 U.S. at 603 n5.
meaning of prevailing party." The substantive background to the Buckhannon dispute is simple. West Virginia's code required that assisted living facilities house only residents who were capable of "self-preservation." The state defined capacity for self-preservation as the ability to escape "from situations involving imminent danger, such as fire." The petitioner, Buckhannon Board and Care Home, operated an assisted living facility. However, because several residents of the home were not able to meet the self-preservation requirement, Buckhannon received "cease and desist orders requiring the closure of its residential care facilities within 30 days."

In response, Buckhannon filed suit against West Virginia, arguing that the self-preservation rule violated the Fair Housing Act Amendments of 1988 ("FHAA") as well as the Americans with Disabilities Act of 1990 ("ADA"). Petitioner sought declaratory and injunctive relief, as well as monetary damages, a claim that was quickly relinquished.

While the case was pending, but while the parties were still doing pre-trial discovery, West Virginia enacted legislation to end the "self-preservation" rule. This legislation effectively granted the petitioner the relief requested. The statute had "eliminated the allegedly offensive provisions and... there was no indication that the West Virginia Legislature would repeal the amendments." Thus, the District Court for Northern District of West Virginia granted the respondents' motion to dismiss the suit as moot.

The petitioners then requested attorney fees under the provisions of the FHAA and the ADA that authorize recovery of such fees by "prevailing parties." Although it was the legislature and not the court that had

226. Gibson, supra note 9, at 212.
229. Buckhannon, 532 U.S. at 600.
230. Id.
231. This suit was brought on behalf of Buckhannon and "other similarly situated homes" as well as on behalf of the affected residents. Id.
234. Buckhannon, 532 U.S. at 601; see also id. at n.1 (indicating that the complaint for monetary damages was abandoned on January 2, 1998, less than three months after the suit was commenced).
236. Buckhannon, 532 U.S. at 601.
237. See 42 U.S.C. § 3613(c)(2) (providing that under the FHAA "the court, in its discretion may allow the prevailing party... a reasonable attorney's fees and costs"); 42 U.S.C. §12205 (providing
handed the petitioners their victory, the petitioners "argued that they were entitled to attorney’s fees under the ‘catalyst theory’ which posits that a plaintiff is a ‘prevailing party’ if it achieved the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct."\(^{238}\)

Unfortunately for the petitioners, they were located in the Fourth Circuit, the only Circuit that had rejected the catalyst theory. Thus, the district court\(^{239}\) denied their fee request and the Court of Appeals affirmed.\(^{240}\) The Supreme Court granted \textit{certiorari} to clarify the precise role, if any, that the catalyst theory should continue to play to compensate plaintiffs who achieve their objectives by means other than a court victory.

In a majority opinion by Chief Justice Rehnquist, the Court acknowledged the tradition of the “American Rule” as well as Congress’ decision to create statutory exceptions to the American Rule by “authoriz[ing] the award of attorney’s fees to the ‘prevailing party’ in numerous statutes.”\(^{241}\) However, when it came to the question of fee-shifting for “catalysts,” the Court declined to expand the meaning of “prevailing party.” It ruled that "the ‘catalyst theory’ is not a permissible basis for the award of attorneys fees under the FHAA . . . and ADA."\(^{242}\)

This conclusion changed the status quo everywhere except in the Fourth Circuit.\(^{243}\) The majority relied on several lines of reasoning. The

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\(^{238}\) \textit{Buckhannon}, 532 U.S. at 601.


\(^{242}\) \textit{Buckhannon}, 532 U.S. at 610.

\(^{243}\) The fairly widespread popularity of the catalyst theory was noted by many observers who correctly saw in \textit{Buckhannon} a significant departure from prior practice. See, e.g., Miller, \textit{supra} note 9, at 1347 (noting that “[u]ntil recently, courts had interpreted prevailing party to include those who brought about a voluntary change in the defendant’s conduct even though they did not obtain judicially sanctioned relief”); \textit{id.} at 1352 (noting that before \textit{Buckhannon}, “[a]lthough the Supreme Court never had specifically ruled on whether the catalysts qualified as prevailing parties, an overwhelming majority of the federal courts of appeals recognized the theory’s viability”); Gibson, \textit{supra} note 9, at 221 (“Although the Supreme Court never directly confronted the catalyst theory
Court began by attempting to define “prevailing party.” Declaring “prevailing party” to be “a legal term of art,”244 the Court relied on BLACK’S LAW DICTIONARY, which defined a “prevailing party” as “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.”245 The Court noted approvingly “that a ‘prevailing party’ is one who has been awarded some relief by the court.”246

The Court acknowledged that the simple case in which a plaintiff is “awarded some relief by the courts” could be an adequate basis for being considered a prevailing party.247 In addition to these “enforceable judgments on the merits,”248 the majority was also content to authorize attorney fees in situations involving a “settlement agreement enforced through a consent decree.”249 In these circumstances, even though “a consent decree does not always include an admission of liability by the defendant,” both involve a “court-ordered ‘chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’”250

By restricting the definition of “prevail” to only these two clear cases, the Court focused on whether the relief attained by the allegedly prevailing plaintiff was relief that changed the formal legal relationship

squarely until Buckhannon, the Court had refined and tacitly accepted its three basic tenets.”); Klein, supra note 8, at 140 (calling Buckhannon “a major deviation from established circuit court precedent”); Loring, supra note 8, at 974 (observing that Buckhannon “was . . . surprising because it overruled several decades of established attorney fee theory and contradicted congressional intent”); John W. Perry, Supreme Court Rules in Martin, Penny, and Buckhannon Cases, 25 MENTAL & PHYSICAL DISABILITY L. REP. 517, 518 (July-August 2001) (describing Buckhannon as having “struck down the rationale used in a long line of cases”); Deborah M. Weissman, Law as Largess: Shifting Paradigms of Law for the Poor, 44 WM. & MARY L. REV. 737, 781–82 (2002) (criticizing Buckhannon decision, alleging that it “rebutted the holdings of all other circuit courts that had considered the issue and discarded previous statutory interpretations that had recognized the ‘catalyst theory’ as consistent with legislative meaning and purpose”); Coyle, supra note 8, at A1 (“The catalyst theory has been recognized by federal courts for at least 30 years. Until [Buckhannon] among the nine federal circuits to have considered the question, the 4th Circuit stood alone in its rejection of the theory.”); Hanson, supra note 9, at 539 (observing that “[u]ntil Buckhannon . . . the Fourth Circuit was alone in interpreting Farrar as rejecting the catalyst theory”).

244. Buckhannon, 532 U.S. at 603.


246. Buckhannon, 532 U.S. at 603.

247. Id.

248. Id. at 604.

249. Id.

250. Id. (quoting Texas State Teachers Ass’n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989)).
between plaintiff and defendant. Indeed, "the bright line the Buckhannon Court draws is between judicial relief and any other type of relief."\textsuperscript{251} Once this bright line was drawn, the catalyst theory could not survive. In catalyst cases, while the plaintiff does "win" some or all of what was sought, this success does not involve any "alteration in the legal relationship of the parties."\textsuperscript{252} Hence in the majority's view, such a successful petitioner could not be considered "prevailing."

The majority analogized the petitioner's claim to three other circumstances in which attorney fees should not be awarded: (1) cases in which "the plaintiff has secured the reversal of a directed verdict;"\textsuperscript{253} (2) cases in which the plaintiff has "acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by 'judicial relief;'"\textsuperscript{254} and (3) cases in which there was a "nonjudicial 'alteration of actual circumstances.'"\textsuperscript{255} By choosing to analogize catalyst victories to these three situations rather than to judicial decisions on the merits, the Court eliminated any legal basis for awarding fees in catalyst cases.

In reaching its conclusion, the majority advanced three policy justifications for its restrictive approach. First, the Court reasoned that the arguments based on the legislative history of the meaning of "prevailing party" were "at best ambiguous as to the availability of the 'catalyst theory' for awarding attorney's fees."\textsuperscript{256} Given that the awarding of attorney fees represents a departure from the American Rule, the Court believed that this should be construed narrowly and allowed only when the legislative intent to do so was unambiguous and explicit.\textsuperscript{257}

Second, the Court dismissed as "speculative"\textsuperscript{258} and "unsupported by any empirical evidence"\textsuperscript{259} arguments that the catalyst theory would be necessary "to prevent defendants from unilaterally mooting an action before judgment in order to avoid an award of attorney's fees"\textsuperscript{260} or to avoid "deter[ring] plaintiffs with meritorious but expensive cases from

\textsuperscript{251} Babich, supra note 11, at 10,137.
\textsuperscript{252} Buckhannon, 532 U.S. at 605.
\textsuperscript{253} Id. at 605–06.
\textsuperscript{254} Id. at 606 (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1987)) (emphasis added).
\textsuperscript{255} Buckhannon, 532 U.S. at 606 (citation omitted).
\textsuperscript{256} Buckhannon, 532 U.S. at 607–08.
\textsuperscript{257} Id.
\textsuperscript{258} Id. at 608.
\textsuperscript{259} Id. The Court suggested that useful empirical data would include evidence as to "whether the number of suits brought in the Fourth Circuit has declined, in relation to other Circuits, since the decision in S-1 & S-2." Id.
\textsuperscript{260} Id.
The Court did not claim that rejecting the catalyst theory would never affect litigation behavior in either of these ways. However, it did not base its judgment on these predicted outcomes.

Finally, the Court was deeply concerned about the impact that the catalyst theory might have on judicial efficiency. The Court expressed confidence that the district courts were capable of analyzing claims for catalyst relief. At the same time, it warned that this would be administratively difficult, fact-specific, and time-consuming.

Ultimately, the majority did not take a position on these concerns. Although this litigation was aptly described as “brimming with considerable, and . . . conflicting policy concerns,” the Court did not base its opinion on them. It ruled more narrowly that “[g]iven the clear meaning of ‘prevailing party’ in the fee-shifting statutes, we need not determine which way these various policy arguments cut.”

Perhaps more importantly, the majority gave no indication that these policy arguments would cast any persuasive light on the intent of Congress with regard to how “prevailing party” should be interpreted.

A concurrence by Justice Scalia affirmed in stronger terms than the majority opinion that “prevailing party” is a legal term of art. In addition, Justice Scalia addressed a number of the policy concerns more forcefully than the majority. In response to the claim that catalysts should be awarded fees because extra-judicial resolution of the case is evidence that the case had merit, Justice Scalia warned:

[A]n award of attorney’s fees when the merits of the plaintiff’s case remain unresolved—when, for all one knows, the defendant only ‘abandon[ed] the fray’ because the cost of litigation—either financial or in terms of public relations—would be too great. . . . I doubt it was greater strength in financial resources, or superiority in media manipulation, rather than superiority in legal merit, that Congress intended to reward.

In addition, Justice Scalia’s concurrence minimized the risk of defendants intentionally mooting cases by “slink[ing] away on the eve of judgment.” While acknowledging this possibility, he drew a

261. Id.
262. Id. at 609.
263. Hunter, supra note 8, at 186.
264. Buckhannon, 532 U.S. at 610.
265. For further discussion of Justice Scalia’s concurrence, see generally Hunter, supra note 8, at 209–10.
266. Buckhannon, 532 U.S. at 615 (Scalia, J., concurring) (“Words that have acquired a specialized meaning in the legal context must be accorded their legal meaning.”).
267. Id. at 617.
268. Id. at 618.
The Catalyst Calamity

The distinction between the unfairness that would result from requiring the plaintiff in this situation from having to follow the default rule on fee-recovery (i.e., the American Rule) and the result in a situation where the exception to the default rule was unjustly imposed on a defendant. He concluded that the latter was the less desirable of two imperfect alternatives. 269

Justice Scalia restated the desirability of erring on the side of a narrow reading. While acknowledging that such a narrow reading may result in some unfairness, he reasoned that some bright lines must be drawn. He argued that absent clear Congressional justification for drawing the line elsewhere, it should be drawn to eliminate the catalyst theory. 270

However, a dissenting opinion by Justice Ginsburg 271 raised concerns about the negative impact of abolishing the catalyst theory. Justice Ginsburg warned that to do so “allows a defendant to escape a statutory obligation to pay a plaintiff’s counsel fees, even though the suit’s merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint.” 272

In addition, the dissent painted a gloomy picture of the impact Buckhannon would have on citizen litigation generally. The dissent warned that by rejecting the catalyst theory, the majority would “impede access to court for the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.” 273

After identifying the impact on individuals and on the litigation process, Justice Ginsberg’s dissent proposed that the desirable rule would be that a party prevails “when she achieves, by instituting litigation, the practical relief sought in her complaint,” 274 regardless of whether litigation was the means for achieving that result. 275 In adopting this

269. Id. (“There is all the difference in the world between a rule that denies the extraordinary boon of attorney’s fees to some plaintiffs who are no less ‘deserving’ of them than others who receive them, and a rule that causes the law to be the very instrument of wrong—exact[ing] the payment of attorney’s fees to the extortionist.”).

270. Id. at 620 (“There must be a cutoff of seemingly equivalent entitlements to fees—either the failure to file suit in time or the failure to obtain a judgment in time. The term ‘prevailing party’ suggests the latter rather than the former. One does not prevail in a suit that is never determined.”).

271. For further discussion of Justice Ginsberg’s dissent, see generally Hunter, supra note 8, at 210–13.

272. Buckhannon, 532 U.S. at 622 (Ginsberg, J., dissenting).

273. Id. at 623.

274. Id. at 634.

275. In further discussion, the dissent argued that “where the ultimate goal is not an arbiter’s
rule, the dissent rejected several of the policy concerns raised by the majority. The dissent argued that the "catalyst rule may lead defendants promptly to comply with the law's requirements [since] one who knows noncompliance will be expensive might be encouraged to conform his conduct to the legal requirements before litigation is threatened." 276

The dissent was also less concerned with the impact that the catalyst rule would have on judicial efficiency. It reasoned that not only were the lower courts capable of applying the catalyst rule efficiently, but their work, in fact, already involved making similar judgments. 277 The dissent was confident that the lower courts were capable of screening out the potential nuisance suits that the majority believed could be encouraged by the catalyst theory. 278

In addition to these concerns, the dissent disagreed with the majority's belief that the plain meaning of the term "prevailing party" ruled out the use of the catalyst theory. Instead of looking to the dictionary definition of "prevailing party," the dissent argued that the majority should have looked to the meaning given to the term by the vast majority of circuit courts. 279 In the dissent's reasoning, the fact that so many circuits had allowed the catalyst theory meant, at the very least, that the meaning was not as clear as the majority believed. 280

V. THE AFTERMATH OF BUCKHANNON AND ENVIRONMENTAL BACKLASH

Buckhannon was described as a case that "will probably become known as the most significant attorney's fees decision of the generation." 281 Although Buckhannon did not involve the construction of

approval, but a favorable alteration of actual circumstances, a formal declaration is not essential." Id. at 633.

276. Id. at 639.

277. Id. ("As to the burden on the court, is it not the norm for the judge to whom the case has been assigned to resolve fee disputes . . . thereby clearing the case from the calendar?").

278. Id. at 640 ("Congress assigned responsibility for awarding fees not to automatons unable to recognize extortionists, but to judges expected and instructed to exercise "discretion" . . . . So viewed, the catalyst rule provided no berth for nuisance suits.").

279. Id. at 643:

The Court states that the term "prevailing party" in fee-shifting statutes has an "accepted meaning." If that is so, the "accepted meaning" is not the one the Court today announces. It is, instead, the meaning accepted by every Court of Appeals to address the catalyst issue before our 1987 decision in Hewitt . . . and disavowed since then only by the Fourth Circuit. . . .

280. Id.

281. Klein, supra note 8, at 100. For an excellent review of judicial responses to Buckhannon and the case's progeny to date, see Klein, supra note 8, passim. See also Stanley, supra note 8, at
an environmental statute, its ruling is "clearly relevant to environmental litigators." 282 Predictably it sparked the attention of practitioners in the field. 283 Although an expansive reading of *Buckhannon* is not necessarily mandated, 284 commentators have warned that *Buckhannon* will be read broadly and have a significant impact on environmental litigation. 285

The first post-*Buckhannon* issue circuit courts have had to confront is whether the holding—which applied only to the "prevailing party" provisions of the FHAA and the ADA—should apply to other fee-shifting statutes that use that same language. In the two years since *Buckhannon*, this question has been resoundingly answered in the affirmative as "nearly every court that has required a prevailing party as

408 (predicting that *Buckhannon* "will have far reaching effects on litigants as they prepare to battle over violations under fee-shifting statutes"); Coyle, *supra* note 8, at A1 (quoting Professor John Eccheverria who warned that *Buckhannon* will have a "profound adverse effect on the economics of public interest litigation . . . . It will increase the risk that thousands of hours of legal time invested in a case will never be reimbursed even if the litigation in fact is successful and accomplished its objective."); *Supreme Court Rejects "Catalyst Theory" as Basis For Attorney's Fees*, 23 No. 12 ASBESTOS LITIG. REP. 10, June 12, 2001 (predicting that *Buckhannon* "could affect attorneys practicing in many fields"); Barbara K. Bucholtz, *Gestalt Flips by An Acrobatic Supreme Court and the Business-Related Cases on its 2000-2001 Docket*, 37 TULSA L. REV. 305, 326 (2001) (calling *Buckhannon* "one of the most important cases" of the Supreme Court's 2000-2001 term and noting that "[i]ts undoubtedly far-reaching consequences have yet to be assessed").

282. Babich, *supra* note 11, at 10,137. See also McFerren, *supra* note 8, at 176 ("The ability to recover attorney’s fees is critical to environmental litigation because such suits require abundant resources. The litigation is often complex and involves considerable research and qualified experts."); Ugalde, *supra* note 11, at 592 (predicting that *Buckhannon* "has far reaching implications in the area of environmental litigation, where public interest groups bring the majority of lawsuits under citizen suit provisions"); *Id.* at 608 (warning that *Buckhannon* "has the potential to curtail significantly environmental citizen suits"); Loring, *supra* note 8, at 974 ("A permanent rejection of the catalyst theory would dramatically chill potential vindication of civil and environmental rights."); Brusslan, *supra* note 8, at 1349 (predicting that *Buckhannon* "will have a chilling effect on the filing of citizen suits and will likely reduce both corporate and government compliance with environmental laws").

283. See discussion in note 282, *supra*.

284. See, e.g., Miller, *supra* note 9, at 1362 (noting that *Buckhannon* "does not mandate its application to all fee-shifting statutes that authorize an award to prevailing parties"); Klein, *supra* note 8, *passim* (discussing differences in statutory language among fee-shifting statutes that may justify different interpretations).

285. See, e.g., Miller, *supra* note 9, at 1347 ("The narrower definition of prevailing party embraced by the *Buckhannon* Court has serious implications, particularly concerning civil rights and the possibility of its extension to other federal statutes."); Margaret Graham Tebo, *Fee-Shifting Fallout*, 89 A.B.A. JOURNAL 54, 54 (July 2003) (quoting comment of plaintiff's lawyer William Franz who fears that *Buckhannon* "effectively guts the [Americans With Disabilities Act] and other civil rights statutes, while technically not overturning them. Without the fee provisions, the statutes will continue to exist, but they'll have no teeth."); *Id.* at 56 (noting that some observers fear that *Buckhannon*’s impact "has effectively been to declaw a number of civil rights and similar statutes that use the prevailing party language").
a prerequisite to fee recovery has applied Buckhannon's judicial *imprimatur* test to reject catalyst claims." 286

To date, courts have consistently rejected the catalyst theory as the basis for fee awards under myriad federal statutes that employ "prevailing party" language. In representative decisions from the First Circuit, 287 the Second Circuit, 288 the Third Circuit, 289 the Fourth

286. Loring, *supra* note 8, at 993. *See also id.* at 993–94 ("Although Buckhannon explicitly rejected the catalyst theory only in the FHAA and ADA contexts, courts have extrapolated its holding to nearly every other fee-shifting statute that refers to a prevailing party"); Lerner, *supra* note 9, at 394 (observing that "the Circuit Courts of Appeals have applied the Buckhannon definition of 'prevailing party' to a wide array of statutes.").

287. *See, e.g.*, Richardson v. Miller, 279 F.3d 1, 4 (1st Cir. 2002) (rejecting use of the catalyst theory to recover attorney's fees under the "prevailing party" language of the Fees Act because "[a]lthough we approved the catalyst theory in the past... we are constrained to follow the [Buckhannon] Court's broad directive and join several of our sister circuits in concluding that the catalyst theory may no longer be used to award attorney's fees"); New England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 30 (1st Cir. 2002) (rejecting use of the catalyst theory in attorney's fee action brought pursuant to the Fees Act because *Buckhannon* "consigned the catalyst theory to the scrap heap" and the voluntary decision of Massport to revise its objectionable policies did not constitute a "judicially sanctioned challenged change in the legal relationship of the parties" (quoting *Buckhannon*) as required by *Buckhannon*). For further discussion of these cases, see generally Tebo, *supra* note 285, at 59 (discussing Richardson).

288. *See, e.g.*, Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. United States INS, 336 F.3d 200, 207 (2nd Cir. 2003) (rejecting use of catalyst theory to award attorney fees for actions brought pursuant to the Freedom of Information Act, finding that while the plaintiff "may have accomplished the objective it sought to achieve by initiating this FOIA action, its failure to secure either a judgment on the merits or a court-ordered consent decree renders it ineligible for an award of attorney's fees under *Buckhannon*"); J.C. v. Reg'l Sch. Dist. 10, Bd. of Educ., 278 F.3d 119 (2nd Cir. 2002) (denying catalyst theory as a basis for recovery under the prevailing party provisions of the Individuals with Disabilities in Education Act and the Rehabilitation Act because these provisions are governed by *Buckhannon*'s reasoning); New York State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm., 272 F.3d 154, 158–59 (2nd Cir. 2001) (rejecting use of catalyst theory as a basis for fee awards under § 1988, finding that "[d]espite the fact that the holding in *Buckhannon* applied to the FHAA and ADA, it is clear that the Supreme Court intends the reasoning of the case to apply to § 1988 as well... Because the Federation's lawsuit did not result in a judicially sanctioned change in the legal relationship of the parties, the Federation is not a prevailing party...""). For further discussion of these cases, see generally *Attorney's Fees*, 26 MENTAL & PHYSICAL L. REP. 194 (2002) (discussing J.C.), *Court Ordered Relief is Prerequisite to Award of Attorneys' Fees Under FOIA*, U.S. LAW WEEK, August 5, 2003, at 1054 (analyzing *Union of Needletrades*), Lerner, *supra* note 9, at 394–397, and Hanson, *supra* note 9, at 521–23 (discussing J.C.).

289. *See, e.g.*, John T. v. Delaware County Intermediate Unit, 318 F.3d 545, 556 (3rd Cir. 2003) (reasoning that *Buckhannon* "applies to attorney's fee claims brought under the [Individuals with Disabilities Education Act]" and, thus, plaintiff's preliminary injunction, the contempt order assessed against the defendant, and the out of court negotiation of an individual assessment plan do not make plaintiff a "prevailing party" within the strictures of *Buckhannon*); A.P. Boyd, Inc. v. Newark Pub. Sch., 44 Fed Appx. 569, 573 (3rd Cir. 2002) (rejecting plaintiff's claims for attorney fees under § 1988 on the grounds that the case was moot, and "[a]ppellants' application for
Circuit, the Fifth Circuit, the Sixth Circuit, the Seventh Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, the attorneys' fees... rests entirely on the catalyst theory... We reject the... argument that the catalyst theory is alive and well in this judicial circuit. Indeed, it is moribund."

290. See, e.g., Smyth v. Rivero, 282 F.3d 268, 285 (4th Cir. 2002) (rejecting use of catalyst theory as a basis for attorney fee recovery brought under § 1988, and concluding that "the judicial approval and oversight identified by the Supreme Court as involved in consent decrees are lacking where, as here, a settlement agreement... is neither incorporated explicitly in the terms of the district court's dismissal order nor the subject of a provision retaining jurisdiction"). See generally Klein, supra note 8, at 135-37 (discussing Smyth); Attorney's Fees, Prevailing Party, Settlement Agreement, 17 No. 4 Fed. Litigator 100 (April 2002) (discussing Smyth and its limited view of settlement agreements as the basis for fee awards).


292. See, e.g., Chambers v. Ohio Dep't. of Human Servs., 273 F.3d 690 (6th Cir. 2001) (ruling that Buckhannon prevents the use of the catalyst theory to recover fee awards under the Civil Rights Attorney's Fees Awards Act of 1976); Ken-N.K., Inc. v. Vernon Township, 18 Fed. Appx. 319, 328 (6th Cir. 2001) (ruling that where township repealed ordinance shortly after conclusion of legal proceedings, plaintiff's Constitutional challenge to the ordinance was moot and Buckhannon would bar plaintiff's recovery of attorney's fees under § 1988 because "Buckhannon held that only an enforceable judgment on the merits or a court-ordered consent decrees can serve as the basis for prevailing party status"). See generally Attorneys Fees, supra note 288, at 194-95.

293. See, e.g., Federation of Advertising Industry Representatives, Inc. v. Chicago, 326 F.3d 924, 932 (7th Cir. 2003) (denying attorney fees claimed pursuant to the "prevailing party" provisions of § 1988, noting that the Buckhannon court "rejected as a basis for awarding attorney's fees the 'catalyst theory'... [and] held that the term 'prevailing party,' as used in various federal statutes, includes only those parties who have obtained a 'judicially sanctioned change' in the legal relationship of the parties"); Johnson v. ITT Aerospace/Communications Div. of ITT Indus., Inc., 272 F.3d 498 (7th Cir. 2001) (relying on Buckhannon to reject an employee's claim for attorney fees under Title VII of the Civil Rights Act, based on the theory that his suit was the catalyst for an employer's change in policy). See also Crabill v. Trans Union, L.L.C., 259 F.3d 662, 667 (7th Cir. 2001) (denying attorney's fees claimed pursuant to the Fair Credit Reporting Act, and ruling that although the facts involved did not give rise to a catalyst case, "[t]he significance of the Buckhannon decision for our case lies... in its insistence that a plaintiff must obtain formal judicial relief, and not merely 'success,' in order to be deemed a prevailing or successful party under any attorneys' fee provision comparable to the civil rights attorneys' fee statute").

294. See, e.g., Christina A. v. Bloomberg, 315 F.3d 990, 993 (8th Cir. 2003) (finding that in an action for fees under § 1988, a private settlement agreement would not be enough to satisfy the Buckhannon requirements because Buckhannon "makes it clear that a party prevails only if it receives either an enforceable judgment on the merits or a consent decree... . A private settlement agreement is not enough... . [C]onsent decrees are distinguishable from private settlements by the means of enforcement.").

295. See, e.g., Perez-Arellano v. Smith, 279 F.3d 791, 794 (9th Cir. 2002) (rejecting use of the catalyst theory to award fees under the Equal Access to Justice Act and reasoning that "the Supreme Court's express rule of decision sweeps more broadly and its reasoning is persuasively applicable to an award of attorney's fees under the [Equal Access to Justice Act]"); Bennett v. Yoshina, 259 F.3d 1097, 1100 (9th Cir. 2001) (rejecting the use of the catalyst theory to award fees under the Civil Rights Attorney's Fees Award Act of 1976, and declaring that "[t]here can be no doubt that the Court's analysis in Buckhannon applies to statutes other than the two at issue in that case"); Oro Vaca, Inc. v. Norton, 55 Fed. Appx. 433, 436 (9th Cir. 2003) (ruling that Buckhannon applies to fee
Federal Circuit,\(^{297}\) and the District of Columbia Circuit,\(^{298}\) the circuits have felt constrained to follow the strictures of *Buckhannon* in many statutory contexts other than the FHAA and the ADA. Likewise, numerous district courts facing this question have reached similar conclusions.\(^{299}\) requests under the Equal Access to Justice Act, and because a temporary restraining order was the only legal relief won by plaintiffs, this “did not alter the legal relationship between the parties” and, thus, plaintiff was not a “prevailing party”). For further discussion of these cases, see generally Wenkart, *supra* note 9, at 441–42, (discussing *Perez-Arellano*) and *Buckhannon Applies to EAJA*, 17 No. 4 FED. LITIGATOR 101 (April 2002) (discussing *Perez-Arellano*).

296. *See*, e.g., *Griffin v. Steelteck, Inc.*, 261 F.3d 1026, 1029 (10th Cir. 2001) (affirming lower court’s denial of attorney fees to plaintiff in Americans with Disabilities Act litigation because *Buckhannon* held “that a plaintiff who has failed to secure a judgment on the merits or by court-ordered consent decree in an ADA suit is not entitled to attorney’s fees even if the pursuit of litigation has caused a desired and voluntary change in the defendant’s conduct”).

297. *Maddalino v. Principi*, 37 Fed. Appx. 512, (Fed. Cir. 2002) (ruling that *Buckhannon* prevents the use of the catalyst theory to recover fee awards under the “prevailing party” provisions of the Equal Access to Justice Act); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1379 (Fed. Cir. 2002) cert. denied 537 U.S. 1106 (2003) (reversing lower court opinion allowing use of the catalyst theory for claims made pursuant to the Equal Access to Justice Act and finding that, despite difference between the language and legislative history in the EAJA as contrasted to the statutes at issue in *Buckhannon*, “we reject the [lower court’s] analysis that the text or the legislative history of the EAJA compels a reading or construction of the term ‘prevailing party’ different from other federal fee-shifting statutes and thus conclude that [*Buckhannon*’s] construction of that term . . . applies with equal force and effect to the EAJA”); *Sacco v. DOJ*, 317 F.3d 1384, 1386 (Fed. Cir. 2003) (finding that a preliminary decision by an administrative law judge that causes a federal agency to take action that moots plaintiff’s claim does not make plaintiff a “prevailing party” under 5 U.S.C. § 7701(g)(1) because *Buckhannon* applies to this fee-shifting provision and “preliminary conclusions . . . neither establish judicial imprimatur nor constitute a court-ordered change in the legal relationship of the parties to permit an award”); *Vaughn v. Principi*, 336 F.3d 1351; 1357 (Fed. Cir. 2003) (rejecting use of catalyst theory as a basis for recovery under the Equal Access to Justice Act where there were no “judgments on the merits or consent decrees or similar results that qualify as prevailing.”). For further discussion of the *Brickwood Contractors* decision, see generally *Miller*, *supra* note 9, at 1359–60, *Klein, supra* note 8, at 112–14, *Loring, supra* note 8, at 996–98, 1004–05, *Cases and Recent Developments*, 12 FED. CIRCUIT B.J. 135, 142–44 (2002), *Mary D. Fan, Note, Textual Imagination, 111 YALE L. J. 1251 (2002); EAJA “Prevailing Party” Requires Judgement or Consent Decree, Mere Corrective Action Not Enough, Federal Circuit Says, 19 GOV’T. CONTRACTOR 191 (May 15, 2002), and *High Court Denies Review of “Catalyst Theory” Case*, 16 No. 24 ANDREWS GOV’T. CONT. LITIG. REP.6 (March 28, 2003).


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2003) (finding that *Buckhannon* barred recovery as a catalyst under the “prevailing party” language of the Individuals with Disabilities Education Act); Doe v. Boston Pub. Sch., 264 F.Supp. 2d 65, 72 (D. Mass. 2003) (finding that *Buckhannon* barred recovery as a catalyst under the “prevailing party” language of the Individuals with Disabilities Education Act because it “interprets *Buckhannon* to mean that, unless Congress specifically and clearly indicates its approval of the catalyst theory in a given context, the catalyst theory should not be used to justify a fee recovery in statutes that generally provide fees to ‘prevailing parties’”); Edwards v. Barnhart, 238 F. Supp. 2d 645 (S.D.N.Y. 2003) (noting that *Buckhannon*’s holding rejects catalyst theory as a basis for recovering attorney fees under “prevailing party” language of the Equal Access to Justice Act even though this was not the statute in question in *Buckhannon*); Laprade v. Blackrock Fin. Mgmt., Inc., 2002 U.S. Dist. LEXIS 24418, *8 (S.D.N.Y. 2002) (rejecting the shareholder’s use of catalyst theory to obtain fees because, although plaintiff claimed that “her class action precipitated the defendants’ decision to abandon the proposed mergers,” the *Buckhannon* decision “rejected the catalyst theory as a basis for awarding fees”); Abiodun v. McElroy, 2002 U.S. Dist LEXIS 3519 *2 (S.D.N.Y. 2002) (rejecting use of the catalyst theory to obtain attorney fees pursuant to the Equal Access to Justice Act since, although *Buckhannon* technically applied to different federal statutes, “the opinion leaves no doubt at all that it governs the interpretation of the broad array of similarly worded federal statutes”); P.O. v. Greenwich Bd. of Educ., 210 F. Supp. 2d 76, 84–85 (D. Conn. 2002) (rejecting plaintiff’s efforts to use the catalyst theory to prevail on fee claim under “prevailing party” language of the Individuals with Disabilities Education Act and finding that “in rejecting the catalyst theory, the *Buckhannon* court held that, to be a prevailing party, one must either secure a judgment on the merits or be a party to a settlement agreement that is expressly enforced by the court through a consent decree. . . . [T]he record indicates that the parties reached an interim agreement outside of the due process hearing . . .”); Roberson v. Giuliani, 2002 U.S. Dist. LEXIS 2750, *8 (S.D.N.Y. 2002) (using the *Buckhannon* holding to deny use of the catalyst theory to award fees under § 1988 because *Buckhannon* required an alteration in the parties’ legal relationship in order to be a “prevailing party” and “there is neither an enforceable judgment on the merits nor a court-ordered consent decree. There is, instead, a private agreement . . .”); J.S. & M.S. v. Ramapo Cent. Sch. Dist., 165 F. Supp. 2d 570, 577 (S.D.N.Y. 2001) (rejecting catalyst theory as a basis for recovering fees as a “prevailing party” under the Individuals with Disabilities Education Act because “this Court must apply *Buckhannon* to the case at bar”); Alcocer v. INS, 2001 U.S. LEXIS 20543, *8 (N.D. Tex. 2001) (ruling that *Buckhannon* bars plaintiffs’ request for fees under the catalyst theory because “[t]he [District] Court did not grant any relief in the lawsuit that changed the legal relationship between the parties. Plaintiffs did not obtain an enforceable judgment on the merits or a settlement agreement enforceable through a court-ordered consent decree. The INS adjusted Mr. Alcocer’s status, but . . . plaintiffs did not prevail in the lawsuit in any plausible sense.”); Dorfsman v. Law Sch. Admissions Council, Inc., 2001 U.S. Dist. LEXIS 24044, *15 (E.D. Pa. 2001) (denying settling plaintiff’s claim for attorney fees because “[u]nder *Buckhannon*, private settlement agreements do not confer prevailing party status”); Adams v. District of Columbia, 231 F. Supp. 2d 52, 55 (D.D.C. 2002) (denying plaintiff’s request for attorney fees under “prevailing party” language of IDEA because “a settlement agreement . . . prior to a due process hearing, does not have the necessary ‘judicial impumatur’ required by *Buckhannon*”); Akinseye v. District of Columbia, 193 F. Supp. 2d 134, 140 (D.D.C. 2002) (reluctantly denying plaintiff’s fee claim because “*Buckhannon* seems to leave no room to side-step the Court’s conclusion that for a settlement agreement to elevate a plaintiff to the status of a prevailing party, it must bring about the ‘material alteration of the legal relationship of the parties’”) (quoting *Buckhannon*); Landers v. Dept. of the Air Force, 257 F. Supp. 2d 1011, 1012 (S.D. Ohio 2003) (holding that in fee claim made pursuant to FOIA, while “[i]t could not be questioned that this lawsuit was the catalyst which led to the disclosure of the documents, the production of which the Plaintiff had requested,” *Buckhannon* required the holding that “the Plaintiff is not entitled to recover his attorney’s fees, since he obtained no relief from this Court”); Jose Luis R. v. Joliet Township High Sch. Dist. 204, 2002 U.S. Dist. LEXIS 20916, *7–*9 (N.D. Ill. 2002)
Occasionally, there have been exceptions such as *Barrios v. California Interscholastic Federation*, a ruling described as one that “appears to be out of step with *Buckhannon* and . . . other circuits.” In *Barrios*, the court acknowledged that *Buckhannon* invalidated the catalyst theory as a basis for claiming attorney’s fees under the Americans with Disabilities Act. Nevertheless, it found that a settlement agreement could be the basis for classification as a “prevailing party.” In arriving at this

(denying plaintiffs’ request for attorney fees under IDEA because, although their mediation agreement was “read into the record before the hearing officer,” this was inadequate under *Buckhannon* because “[w]ithout court approval or sanction, the agreement was simply a private settlement agreement” and “[p]rivate settlement agreements do not confer prevailing party status”); Kossov v. Perryman, 2002 U.S. Dist. LEXIS 7944, *7–*8 (N.D. Ill. 2002) (holding that in requests for fees made pursuant to EAJA, plaintiff could not be a prevailing party even if his litigation was the catalyst for INS action because, in *Buckhannon*, “[t]he Supreme Court has held that the catalyst theory alone is not enough for a plaintiff to be a prevailing party’’); Gomes v. Trs. & President of the Univ. of Me., 2003 U.S. Dist. LEXIS 14668, *14–*15 (D. Me. 2003) (citing *Buckhannon* for the proposition that to be a “prevailing party” one must have “secured a court-ordered, material alteration of the parties’ legal relationship”); Doe v. Boston Pub. Sch., 264 F. Supp. 2d 65, 72 (D. Mass. 2003) (denying fees to plaintiff who successfully settled a case brought under IDEA, explaining “this Court interprets *Buckhannon* to mean that, unless Congress specifically and clearly indicates its approval of the catalyst theory in a given context, the catalyst theory should not be used to justify a fee recovery in statutes that generally provide fees to ‘prevailing parties’’); Chambers v. Time Warner, Inc., 2003 U.S. Dist. LEXIS 15444, *8–*10 (S.D.N.Y. 2003) (rejecting claim for fees brought under the fee-shifting provisions of the Copyright Act, 17 U.S.C. §505 when there was a voluntary withdrawal of claims because “this was a voluntary act [that] did not involve any judicial determination” and “the Supreme Court in *Buckhannon* expressly rejected the ‘catalyst theory’’’); Sonii v. Gen. Elec., 2003 U.S. Dist. LEXIS 9701, *20–*21 (N.D. Ill. 2003) (ruling that where parties entered into a private settlement agreement, fees could not be awarded because “[t]his court cannot conclude that a private settlement agreement, without more, sufficiently alters the parties’ legal relationship to satisfy *Buckhannon* . . . . [T]here must be more to constitute a court-ordered change in the parties’ legal relationship”).

In addition, in Bublitz v. E.I. DuPont de Nemours, & Co. 224 F. Supp. 2d. 1234 (S.D. Iowa 2002), the district court expanded the scope of *Buckhannon* to bar fee-shifting in common fund cases. The court reasoned that:

One would be hard pressed . . . to be able to say that there is any public policy reason to allow the catalyst theory to apply to the common fund doctrine. . . . The Court, therefore, sees no way around the conclusion that *Buckhannon* foreclosed the use of the catalyst theory in the common fund doctrine.

*Id.* at 1242.

This set of cases is by no means exhaustive but is, instead, representative of the trends emerging in post-*Buckhannon* litigation. See generally Miller, supra note 9, at 1356–56 (discussing Sileikis); *id.* at 1357–58 (discussing *Alcocer*); Hanson, supra note 9, at 541–43 (discussing *J.S.*).


301. Wenkart, supra note 9, at 445.

302. *Barrios*, 277 F.3d at 1134 n.5.

303. *Id.*
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conclusion, the Ninth Circuit took a critical view of reading Buckhannon expansively:

While dictum in Buckhannon suggests that a plaintiff "prevails" only when he or she receives a favorable judgment on the merits or enters into a court-supervised consent decrees, we are not bound by that dictum. . . . Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorney fees, thus providing sufficient judicial oversight to justify an award of attorney's fees and costs. 304

The Ninth Circuit relied heavily on Barrios in deciding Richard S. v. Department of Developmental Services. 305 on similarly broad grounds.

Similarly, on the district court level, the 2002 Johnson v. District of Columbia 306 decision resisted strict application of Buckhannon. In Johnson, plaintiff parents sought attorney fees after they had resolved their IDEA claim by settlement. 307 The court opined that:

[Buckhannon] did not . . . resolve the issue of whether a plaintiff who enters a private settlement agreement could be considered a prevailing party, but did arguably express skepticism that such a private settlement could alter the legal relationship between the parties . . . [S]ome courts have extracted from this skepticism a directive to bar attorney’s fees under any statute including the “prevailing party” language absent a judgment or court-ordered consent decree . . . [T]his court declines to extend the holding in Buckhannon so far. 308

The D.C. Circuit’s reasoning was based primarily on its view that “a private settlement does alter the legal relationship of the parties in a real and substantial manner” 309 because a settlement is enforceable by a court. In addition, the D.C. Circuit cited Barrios with approval 310 and reasoned that this broad reading of Buckhannon was necessary to achieve IDEA policy. 311

In spite of these anomalies, most circuit courts are consistent in applying Buckhannon to a wide range of statutes that use the “prevailing party” standard for fee-shifting. Thus, it seems likely that catalyst

304. Id.
305. Richard S. v. Dep’t of Developmental Serv. of Cal., 317 F.3d 1080 (9th Cir. 2003) (involving claims for attorney’ fees under the Civil Rights Attorney Fees Act and the Americans with Disabilities Act).
308. Id. at 44-45.
309. Id. at 45.
310. Id.
311. Id. at 45–46.
recovery is no longer available as the justification for attorney's fees for environmental statutes employing the "prevailing" or "substantially prevailing" language.\textsuperscript{312} In \textit{Kasza v. Whitman},\textsuperscript{313} for example, the Ninth Circuit—in spite of its willingness in \textit{Barrios} to depart further from \textit{Buckhannon} than other circuits—recently held that, in the RCRA context, \textit{Buckhannon}'s strictures bar recovery of fees in an action "predicated" upon the catalyst theory.\textsuperscript{314} The \textit{Kasza} court reasoned that because RCRA is a "prevailing party" statute like those at issue in \textit{Buckhannon}, a similar outcome was required.\textsuperscript{315}

However, there are two areas in which the applicability of \textit{Buckhannon} is not entirely clear, and judicial uncertainty in these two areas clouds the "bright line" rule that \textit{Buckhannon} attempted to, and initially appeared to establish. First, there are a number of cases in which the circuit courts\textsuperscript{316}

\begin{itemize}
\item \textsuperscript{312} See supra notes 285–99.
\item \textsuperscript{313} Kasza v. Whitman, 325 F.3d 1178 (9th Cir. 2003).
\item \textsuperscript{314} Id. at 1180. The court noted that the plaintiff "is not a 'prevailing party' (and thus cannot be a 'substantially 'prevailing party') because she did not gain by judgment or consent decree a material alteration of the legal relationship of the parties." \textit{Id.} (emphasis in original). Indeed, this impact of \textit{Buckhannon} has been a source of particular concern for environmental litigants. See, \textit{e.g.}, Coyle, \textit{supra} note 8, at A1 (quoting Jim Hecher, environmental enforcement director at Trial Lawyers for Public Justice, who warns "there is a lot of litigation under RCRA so \textit{[Buckhannon]} is a blow"); Southwest Center for Biological Diversity v. McGee, 31 Fed. Appx. 362 (9th Cir. 2002).
\item \textsuperscript{315} Solid Waste Disposal Act, 42 U.S.C. § 6972(e).
\item \textsuperscript{316} See, \textit{e.g.}, Former Employees of Motorola Ceramic Prods. v. United States, 336 F.3d 1360, 1366 (Fed. Cir. 2003) (holding that, in the context of a remand to an administrative agency, a plaintiff may be a "prevailing party" under \textit{Buckhannon} "where the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency . . . (1) without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court, or (2) when successful in the remand proceedings where there has been a retention of jurisdiction."); Walker v. City of Mesquite, 313 F.3d 246, 250 (5th Cir. 2002) (citing \textit{Buckhannon} with approval and allowing fee award under the "prevailing party" language of § 1988 only after ruling that a "district court's ultimate vacation of the offending provisions of the order is the functional equivalent of an enforceable judgment . . ." and thus meets the requirement that the parties' legal relationship was changed); Util. Automation 2000, Inc. v. Choctawhatchee Elec. Cooper., 298 F.3d 1238, 1248 (11th Cir. 2002)" (finding that under \textit{Buckhannon}, a Rule 68 offer of judgment may entitle a litigant to prevailing party status because while "[a]dmittedly, an offer of judgment falls somewhere between a consent decree and the minimalist 'catalyst theory' the court rejected in \textit{Buckhannon}," in this instance "an accepted offer has the 'necessary judicial imprimatur' of the court . . . in the crucial sense that it is an enforceable judgment against the defendant."); Am. Disability Ass'n v. Chmielarz, 289 F.3d 1315, 1320 (11th Cir. 2002) (acknowledging that \textit{Buckhannon} "invalidated the 'catalyst theory'" but allowing plaintiffs to be deemed "prevailing parties" for purposes of the Americans with Disabilities Act because "if the district court either incorporates the terms of . . . the settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement," thus establishing the "change in the legal relationship of the parties" mandated by \textit{Buckhannon}); Labotest, Inc. v. Bonta, 297 F.3d 892, 895 (9th Cir. 2002) (holding that while \textit{Buckhannon} applies to fee actions brought under §1988, and while \textit{Buckhannon} held "a plaintiff could no longer recover
and the district courts have allowed an award of attorney fees pursuant to “prevailing party” statutes by construing *Buckhannon*'s mandated fees merely because the lawsuit may have played a role in bringing about the desired result;” plaintiff in this case was a “prevailing party” because “[t]he court’s incorporation of the first stipulation into its final order, and its order approving the settlement agreement are the necessary judicial imprimatur”); Walker v. City of Mesquite, 313 F.3d 246 (5th Cir. 2002) (acknowledging that *Buckhannon* bars the use of catalyst theory for attorney fee recovery, but allowing recovery where plaintiff “not only secured the reversal of the declaratory judgment but also achieved a partial vacation of the remedial order and the ultimate revision of that order in the district court.”); Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 165 (3d Cir. 2002) (acknowledging that *Buckhannon* invalidated the catalyst theory, but held that plaintiff was a “prevailing party” for purposes of §1988 because plaintiff had achieved a memorandum and order that “(1) contains mandatory language . . ., (2) is entitled ‘Order,’ and (3) bears the signature of the District Court judge, not the parties’ counsel.”). For further discussion of these cases, see generally Tebo, supra note 285, at 59 (discussing various ways in which circuit courts have narrowed *Buckhannon*’s scope), and Hanson, supra note 9, at 549–554 (discussing attempts of courts to restrict *Buckhannon*’s reach in the IDEA context).

317. See, e.g., Vanke v. Block, 2002 WL 1836305, at *5 (C.D. Cal. 2002) (citing *Buckhannon* with approval and allowing fee award under the “prevailing party” language of §1988 because a preliminary injunction that causes the defendants to provide the relief sought meets the *Buckhannon* requirement that there be a change in legal relationship because “the judicial imprimatur was stamped on an injunction that led to an alteration of actual circumstances.”); Ayres v. Space Guard Prods., 201 F.R.D. 445, 450–51 (S.D. Ind. 2001) (citing *Buckhannon* with approval, and allowing the award of fees under the “prevailing party” language of the Americans With Disabilities Act only after a finding that an offer of judgement “caused a material alteration of the legal relationship of the parties” as required by *Buckhannon*); Lynom v. Widnall, 222 F. Supp. 2d 1 (D.D.C. 2002) (citing *Buckhannon* with approval and allowing the award of fees under the “prevailing party” language of the Equal Access to Justice Act because the Court’s remand of plaintiff’s APA claim was judicial relief sufficient to give rise to a change in the parties’ legal relationship); Lazarus v. County of Sullivan, 269 F. Supp. 2d 419, 422–23 (S.D.N.Y. 2003) (citing *Buckhannon*, but allowing recovery of fees under the Americans With Disabilities Act, based on a finding that “obtaining a consent decree implicitly ‘creates’ the material alteration necessary for finding [plaintiff] the prevailing party”); Yassky v. Kings County Democratic County Comm., 259 F. Supp. 2d 210, 214–15 (E.D.N.Y. 2003) (noting that while *Buckhannon* is applicable to §1988 actions, plaintiffs were prevailing parties because the lawsuit was not mooted by defendant’s voluntary repeal of an objectionable rule); M.S. v. New York City Bd. of Educ., 2002 U.S. Dist. LEXIS 22220, at *10 (S.D.N.Y. 2002) (allowing plaintiffs to recover fees under the Individuals With Disabilities Education Act’s “prevailing party” provisions because the parties “agreement was read into the record in front of the hearing officer. The hearing officer was asked to, and did, affirm a settlement.” This was found to “alter the legal relationship between the parties” as required by *Buckhannon*); L.C. v. Waterbury Bd. of Educ., 2002 U.S.Dist. LEXIS 6079, at *9–17 (D. Conn. 2002) (finding that, post-*Buckhannon*, a party may recover fees under the “prevailing party” language of the Individuals With Disabilities Education Act if a party prevailed at a due process or administrative hearing that could change the legal relationship between the parties); Thompson v. United States Dep’t of Hous. And Urban Dev., 2002 U.S. Dist. LEXIS 23875, *12 n.9 (D. Md. 2002) (allowing plaintiff to recover attorney fees because “[a]s explained in *Buckhannon* . . . a consent decree, although not always including a defendant’s admission of liability, satisfies the prevailing party test”); Nat’l Coalition for Students with Disabilities v. Bush, 173 F. Supp. 2d 1272, 1279 (N.D. Fla. 2001) (finding plaintiff could be a “prevailing party” pursuant to *Buckhannon* because the federal court retained jurisdiction to enforce the parties’ settlement agreement. Thus, “[I]n substance, if not in name, the order and judgment entered in the case at bar constitute a consent
"change in the parties' legal relationship" in a broad way that finds such
c change in a fairly wide range of factual circumstances. The typical
pattern for these cases is to begin by citing Buckhannon with respect for
its interpretation of "prevailing party" to exclude catalytic recovery. The
courts then deny that they would rely on the catalyst theory to allow a fee
award. Instead, these opinions search the facts of the individual cases
diligently, looking for something that could be construed as a judicial
imprimatur. In doing so, these courts have been successful in
circumventing Buckhannon by avoiding the catalyst theory because a
judicial remedy of some sort existed. The courts then base their fee
awards on their finding of such a judicial remedy rather than on the
discredited catalyst theory itself.

The implication of these cases in the environmental context is that this
reasoning has the potential to offer a measure of relief by suggesting
scenarios in which the requisite judicial intervention may be found in
circumstances other than the paradigmatic judicial victory on the
merits. In theory, a successful litigant may be able to strategically
sidestep Buckhannon's strictures by doing such things as winning a
preliminary injunction on a significant issue, securing a remand to an
administrative agency, involving a hearing officer in formalizing a
settlement agreement, or getting a private settlement agreement
formalized in a court order.

318. This strategy is discussed more fully in Attorneys' Fees - Freedom of Information Act-
"Substantially Prevailed," 17 No. 7 FED. LITIGATOR 180, 181 (July 2002):
Post - Buckhannon, there is little question that eligibility for attorneys' fees under statutes
authorizing fee recovery by prevailing parties is dependent on obtaining judicially sanctioned
relief. What is less clear is whether relief must take the form of a final judgment on the merits
or a court-ordered consent decree. Buckhannon says that these result in a "material alteration of
the legal relationship of the parties" necessary for a fee award. What it doesn't say, explicitly
anyway, is that they are the only two forms of relief that can result in eligibility for a fee
award... An argument can... be made that other forms of relief qualify—and it may succeed.
320. See, e.g., Former Employees of Motorola Ceramic Prods. v. United States, 336 F.3d 1360
(Fed. Cir. 2003).
322. See, e.g., American Disability Ass'n, 289 F.3d at 1320.
For example, in *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*,\(^{323}\) the Northern District of California found that resort to the catalyst theory was not necessary in this Endangered Species Act case because there was a "court-ordered TRO and ... preliminary injunction"\(^{324}\) that stopped the defendant’s logging activities. These were deemed sufficient to constitute "a court-ordered change in the relationship between the parties,"\(^{325}\) as mandated by *Buckhannon*.

However, such mechanisms may not always be easy to achieve because the defendant may not be cooperative, or the facts of a particular case may not lend themselves to these techniques.

In addition, relying on the hope that a particular court may fashion such a detour around *Buckhannon* is very risky. While courts have been surprisingly uniform in finding that *Buckhannon* invalidates the catalyst theory in "prevailing party" statutes, they have been far less unanimous in defining these very fact-specific cases that circumvent *Buckhannon*. Unfortunately, the wide variety of judicial actions involved in these cases suggests that a second generation of post-*Buckhannon* litigation may be arising to ascertain the precise types of judicial action needed to constitute a true change in legal relationship as required by *Buckhannon*. This uncertainty is clearly illustrated in a recent decision by the Seventh Circuit, in *T.D. v. La Grange School District No. 102*.\(^{326}\) There, the Seventh Circuit held that *Buckhannon* applies to claims made under the "prevailing party" fee-shifting provisions of the Individuals With Disabilities Education Act ("IDEA").\(^{327}\) Once this determination was made, the court decided that a settlement agreement was insufficient to make the plaintiffs a "prevailing party."\(^{328}\)

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324. *Id.* at 1004.
325. *Id.* As discussed below in notes 329–61, *infra*, the court also reasoned that *Buckhannon* did not even apply to the Endangered Species Act because the Endangered Species Act employs the "whenever . . . appropriate" standard as its test for fee awards rather than "prevailing party." *Id.* at 1003–05.
328. *See T.D.*, 349 F.3d at 479, reasoning that: The settlement agreement in this case does not bear any of the marks of a consent decree. It is not embodied in a court order or judgment, it does not bear the district court judge’s signature, and the district court has no continuing jurisdiction to enforce the agreement. Rather, it was merely a private settlement agreement between the parties. T.D. argues that because the district court was actively involved in the settlement negotiations, having conducted a settlement conference in his chambers and made certain settlement suggestions, that we should find that
lower court’s contrary decision, but it also seemed to conflict with the later part of the T.D. opinion that did confer “prevailing party” status for the plaintiff’s success in a proceeding in which a hearing officer partially granted T.D. requests for reimbursement. This ambivalence as to the types of non-judicial remedies that may confer “prevailing party” status illustrates the risks inherent in relying on this theory for a fee award. Indeed, the district court for the northern district of Georgia has observed that there is already “a circuit split whether Buckhannon limits prevailing party status to outcomes embodied in consent decrees or judgments.” Hence, while this approach may offer some hope to environmental litigants, its widespread availability is unclear and the likelihood of success is uncertain.

However, there is a second set of post-Buckhannon cases that may be more important in assessing Buckhannon’s impact on environmental litigation. These cases address whether Buckhannon’s strictures apply to those statutes that use the “whenever... appropriate” standard instead of “prevailing party” language. The “whenever... appropriate” standard was not used in the statutes at issue in Buckhannon. However, its prevalence in environmental statutes makes it critical to assess the impact Buckhannon has had on fee recovery pursuant to these statutes.

This inquiry has been the focus of most post-Buckhannon commentary. Thus far, the results of litigation under statutes using the

there was sufficient ‘judicial imprimitur’ on the settlement to confer ‘prevailing party’ status. Mere involvement in the settlement, however, is not enough. There must be some official judicial approval of the settlement and some level of continuing judicial oversight. Therefore, we find that the settlement agreement in this case did not confer ‘prevailing party’ status upon T.D.

329. The lower court’s opinion may be found at T.D. v. La Grange School Dist. No. 102, 222 F. Supp. 2d 1062, 1065 (N.D. Ill. 2002) (allowing award of attorney fees in IDEA settlement case because “there exist critical distinctions in the text and structure of the IDEA... that persuade me that the Court’s ruling in Buckhannon was not meant to extend to the IDEA”).

330. T.D.; 349 F. 3d at 479. A full analysis of the applicability of Buckhannon to the IDEA, written prior to the Circuit Court’s ruling in T.D., may be found in Lerner, supra note 9.


332. For an excellent discussion of a number of these difficulties, see generally Bart Forsyth, Preliminary Impirmaturas: Prevailing Party Status Based on Preliminary Injunctions, 60 WASH. & LEE L. REV. 927 (2003). In his article, Mr. Forsyth discusses the difficulties inherent in determining whether there is a sufficient “judicial imprimateur” in various procedural scenarios to justify conferring “prevailing party” status on fee-seeking litigants. Although the discussion focuses primarily on the problems particular to preliminary injunctions, the concerns he raises have more widespread implications.

333. See, e.g., Ugalde, supra note 11, at 608 (“The impact of the rejection of the catalyst theory depends on whether the lower courts interpret the Buckhannon holding as limited to fee-shifting statutes that employ the prevailing party language, or whether it applies to fee-shifting provisions that incorporate the appropriate standard as well.”).
“whenever . . . appropriate” standard are different from the results obtained by litigation brought under “prevailing party” statutes. Post-
Buckhannon litigation—particularly environmental litigation—
interpreting this standard has allowed the continued use of the catalyst theory. This is because, “[i]n contrast to the statutes construed in
Buckhannon, numerous federal environmental statutes authorize federal
district courts to award costs and attorney’s fees ‘whenever the court
determines such award is appropriate.’ These words are not equivalent
to ‘prevailing.’”334 In light of this distinction, it has been argued that it is
Ruckelshaus v. Sierra Club335—and not Buckhannon—that should
govern cases involving environmental statutes that use this formulation.336

Several recent cases illustrate the way in which Buckhannon’s
influence has been held at bay for significant environmental statutes.
The Tenth Circuit reached this conclusion in dicta when it decided
Center for Biological Diversity v. Norton.337 In this case, the plaintiffs
filed suit to require the Secretary of the Interior to take final action listing
the Arkansas River shiner as an endangered or threatened species under
the ESA.338 After long delays,339 the Secretary took the action requested

334. Jim Hecker & Ruth Ann Weidel, ‘Catalyst Theory’ for Fee Awards in Environmental Suits Survives ‘Buckhannon,’ 32 ENV’T. RPRTR. 1797 (Sept. 14, 2001) (‘[T]he fee standard in environmental citizen suit provisions differs significantly from that in the Buckhannon case. Since all environmental statutes allow awards to be made ‘whenever . . . appropriate,’ all such citizen suit fee provisions contain a broader fee entitlement standard than that enunciated in Buckhannon.’). See also Zinn, supra note 41, at 166 (predicting that “the Court’s heavy reliance on the prevailing party’ formulation in § 1988 means that, under the broader terms of the environmental statutes, Buckhannon need not bar fee awards for less than complete success or even where the plaintiff only precipitates non-judicially-sanctioned action”).

335. For a discussion of Ruckelshaus, see supra notes 134–46 and accompanying text.
336. Id.; see also Conservation Law Found., Inc. v. Evans, 2003 WL 1559940 at *1, n.1 (D. Mass. 2003) (“In the wake of Buckhannon, the Courts of Appeal have chosen to view statutory fee shifting schemes, like those of the Endangered Species Act, which contain the ‘whenever appropriate’ language as governed by the Ruckelshaus standard.”); Coyle, supra note 8, at A1 (predicting that “[e]nvironmental litigators will continue to pursue awards based on the catalyst theory under fee provisions in 17 statutes that don’t use the ‘prevailing party’ standard but allow awards if ‘appropriate’”).
337. Center for Biological Diversity v. Norton, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001). For further discussion of Center for Biological Diversity, see generally Ugalde supra note 11, at 614–15, and Loring, supra note 8, at 996.
338. Center for Biological Diversity, 262 F.3d at 1078.
339. These delays were, to a large extent, beyond the control of the Secretary. On April 10, 1995—almost 4 months before the Secretary’s final designation was due—Congress imposed a moratorium that “prohibited the Secretary from making final determinations that a species was threatened or endangered.” Id. at 1079 (citing Emergency Supplemental Appropriations & Recessions for the Dept. of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub.
by the plaintiffs, thus mooting the lawsuit. However, the plaintiffs sought attorney fees, claiming that their litigation was the catalyst for the Secretary’s action.

The court did not have to reach the issue of whether Buckhannon would apply to the ESA because it found that the plaintiff’s actions were not catalytic. However, the court distinguished Buckhannon in a footnote, indicating that Buckhannon would be inapplicable to the ESA because the ESA employs the “whenever... appropriate” standard. Center for Biological Diversity never actually addressed the question head-on because “the basis of the Court’s conclusion in Buckhannon is not applicable in this case. Because neither party raises the issue, we decline to address the continued applicability of the catalyst test to fee requests brought pursuant to statutes that do not contain a ‘prevailing party’ requirement.” Hence, although the holding in Center for Biological Diversity never had to address the catalyst question directly, its dicta indicates a willingness to distinguish Buckhannon from environmental statutes that employ the less restrictive “whenever... appropriate” standard.

More importantly, in Loggerhead Turtle v. The County Council of Volusia County, the Eleventh Circuit held that Buckhannon “does not

L. No. 104-6, 109 Stat. 73, 86). This moratorium was lifted on April 26, 1997, but by that time the backlog of proposed listings prevented the secretary from acting quickly on the shiner proposal. Id.

340. The shiner, ultimately, was listed as a threatened species on November 23, 1998. Id. at 1080.

341. Id. As a result, “on December 7, 1998, the parties entered into a Joint Stipulation of Dismissal.” Id.

342. Id. at 1081–82.

343. Id. at 1083 (“[T]he district court did not abuse its discretion when it concluded that the Center’s lawsuit was not a catalyst for final agency action on the shiner.”).

344. Id. at 1080 n.2.

345. In another Tenth Circuit opinion, the court also came close to ruling on, but did not need to decide the question of whether Buckhannon’s abandonment of the catalyst theory applied to the “whenever... appropriate” language of the Clean Water Act’s fee-shifting provisions. In Amigos Bravos v. EPA, 324 F.3d 1166 (10th Cir. 2003), the Tenth Circuit did not have to decide the question of whether the catalyst theory would apply to a Clean Water Act fee-recovery action because it held that the plaintiff did not meet the requirements for a catalytic recovery even if it were to be allowed. Id. at 1175. See also 10th Circuit Foils Green Groups’ Bid for Attorney Fees, 23 No. 18 ANDREWS HAZARDOUS WASTE LITIG. REP. 7 (April 25, 2003) (analyzing outcome in Amigos Bravos).

prohibit use of the catalyst test as a basis for awarding attorney’s fees and costs under the whenever appropriate fee-shifting provision of the Endangered Species Act." In *Loggerhead Turtle*, the plaintiffs sued the county, claiming that county actions constituted a “taking” of endangered turtles in direct violation of the Endangered Species Act ("ESA"). While the suit was pending, the defendant voluntarily adopted protective ordinances to address some of the alleged harm to the turtles. The plaintiffs then moved for attorney fees based on their beliefs that “their suit was the catalyst for improved protection of sea turtles.” The district court awarded the fees requested, based on the catalyst theory.

The defendants objected. First, they argued that, as a factual matter, “the Turtles failed to achieve their goal of a declaratory judgment, that enactment of [the ordinances] was not motivated by the Turtle’s suit, that ... the claim ... was not colorable, and that the Turtle’s suit had failed to contribute to the goals of the ESA.”

More importantly for this discussion, the defendants also argued that the Supreme Court’s decision in *Buckhannon* precluded the award of attorney fees to the plaintiffs since, even if all the factual arguments were resolved in favor of the plaintiffs, *Buckhannon* disallowed the catalyst theory for recovery. This was an important test of the post-*Buckhannon* viability of the catalyst theory. In deciding that the plaintiffs should receive fees, the Eleventh Circuit outlined the analysis that would be echoed by other courts addressing *Buckhannon*’s applicability to environmental statutes.


347. *Loggerhead Turtle*, 307 F.3d. at 1327.
348. More specifically, the plaintiffs alleged that: during sea turtle nesting season, (1) the County permitted limited vehicular access to its beaches, and (2) the County’s ordinance restricting artificial beachfront lighting was ineffective in preventing takes, because it both failed to prevent disorientation and mis-orientation of sea turtle hatchlings, and exempted certain municipalities within the County altogether.

*Id.* at 1320.
349. These ordinances provided for “more stringent beachfront lighting regulations.” *Id.*
350. *Id.* at 1321.
351. In its decision, the district court found: that the Turtles’ ‘goal in bringing suit was to afford greater protection to endangered sea turtles nesting on the County’s beaches, and that the County’s adoption of more stringent lighting ordinances afforded such protection and materially altered the parties’ legal relationship. The court further found that the Turtles’ suit was the primary impetus for the adoption of the new ordinances, and that the Turtles’ claims were objectively reasonable.

*Id.* at 1321-22.
352. *Id.* at 1321.
First, the Eleventh Circuit ruled that because *Buckhannon* dealt with catalyst awards where statutes authorized fees to be paid to "prevailing parties," it was not applicable in the ESA context because the ESA allowed the awarding of fees "whenever the court determines such award is appropriate."\(^{353}\) By drawing this distinction, the Eleventh Circuit argued for a narrow reading of *Buckhannon*. This interpretation was bolstered by the Eleventh Circuit's three-part reasoning that (i) "there is clear evidence that Congress intended that a plaintiff whose suit furthers the goals of a 'whenever... appropriate' statute be entitled to recover attorney fees;"\(^{354}\) (ii) that the *Buckhannon* opinion "expressly addressed only the meaning of 'prevailing party'"\(^{355}\) and never mentioned *Ruckelshaus*, the landmark "whenever... appropriate" case;\(^{356}\) and, finally, (iii) that the ESA provides for equitable relief only. Therefore, the court concluded that failing to allow for the catalyst rule would "cripple the citizen suit provision of the Endangered Species Act."\(^{357}\)

*Loggerhead Turtle* illustrates that it is possible to distinguish *Buckhannon*’s narrow interpretation of the catalyst theory and find it inapplicable to many environmental statutes.\(^{358}\) This development

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353. *Id.* at 1322–23 (quoting 16 U.S.C. § 1540(g)).

354. *Loggerhead Turtle*, 307 F.3d at 1325. The court conceded that there was nothing in the legislative history of the ESA to “elucidate Congress’s choice of the ‘whenever... appropriate’ standard,” *Id.* However, the court drew an analogy to the legislative history found for the identical provision in the Clean Air Act. In the Senate Report for that Act, it was written:

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


355. *Loggerhead Turtle*, 307 F.3d at 1326.

356. *Id.* The *Loggerhead Turtle* opinion also mentions that it was Justice Rehnquist who wrote both the *Ruckelshaus* and *Buckhannon* opinions. *Id.* at n.12. This would seem to suggest that the *Ruckelshaus* decision was not implicated by the *Buckhannon* ruling.

357. *Id.* at 1327.

358. Indeed, the arguments made in the brief of the plaintiff/appellees in *Loggerhead Turtle* is typical of those arguments that favor taking "wherever... appropriate" cases out of the ambit of *Buckhannon*. They argued:

[T]he catalyst theory should be held as a matter of law to be an appropriate standard that can be used by a trial court in determining whether to award attorneys’ fees to a plaintiff who partially prevailed in a citizen suit under the ESA, because under the catalyst theory attorneys’ fees only are awarded to a plaintiff who significantly contributes to the public interest by causing the dependent to change his or her conduct to conform to the purposes and goals of the Act.

The Catalyst Calamity

captured the attention of commentators and raised the hopes of litigators.\(^{359}\)

Following on the heels of *Loggerhead Turtle* was *Sierra Club v. Environmental Protection Agency*,\(^ {360}\) in which the District of Columbia Circuit ruled that *Buckhannon* would not bar fee awards for catalysts under the “wherever . . . appropriate” language of the Clean Air Act. The plaintiffs in *Sierra Club* brought action against the EPA challenging the EPA rulings that granted extensions of interim approvals for state and local permit programs.\(^ {361}\) After the action was filed, the parties reached a settlement whereby the EPA agreed to “grant no further interim approval extensions.”\(^ {362}\) The parties also agreed that they would seek a joint settlement if the EPA had met its obligations under the agreement.\(^ {363}\) The EPA did so, and the case was dismissed at the request of both parties.

After the case was dismissed, the plaintiffs sought attorney fees under the “whenever . . . appropriate” language of the Clean Air Act.\(^ {364}\) Plaintiffs argued that “their role as a catalyst in halting the EPA’s practice of serially extending interim approvals makes a fee award ‘appropriate.’”\(^ {365}\) While acknowledging that neither *Ruckelshaus* nor *Buckhannon* was directly applicable, the D.C. Circuit nevertheless decided that the *Ruckelshaus* approach was the correct one to follow—particularly in light of the fact that *Buckhannon* never mentioned or overruled *Ruckelshaus*. Although *Ruckelshaus* did not involve a catalyst, in its interpretation of the legislative history it reasoned that “Congress did in fact authorize fee awards under section 307(f) for [catalyst

\(^{359}\) For further discussion of *Loggerhead Turtle*, see generally Klein, *supra* note 8, at 126–27. See also Tebo, *supra* note 285, at 56 (noting more generally that “[s]ome circuit courts . . . have read *Buckhannon* narrowly, allowing fees in envirnmental and other cases”); *Buckhannon Did Not Eliminate Catalyst Theory in Environmental Cases*, U.S. LAW WEEK, October 8, 2002 at 1207 (reporting that, after *Loggerhead Turtle* “[t]he catalyst theory remains a viable basis for awarding attorneys’ fees to plaintiffs in citizen suits under the Endangered Species Act and similarly worded environmental statutes”); Mayfield, *supra* note 346, at 1485 (noting that the ESA “has a broader standard for fee-shifting” than the statute at issue in *Buckhannon* and, thus, the eleventh circuit correctly employed the catalyst theory “[l]argely on the basis of this statutory difference”).


\(^{361}\) *Sierra Club*, 322 F.3d at 718–20.

\(^{362}\) *Id.* at 720.

\(^{363}\) *Id.*

\(^{364}\) *Id.*

\(^{365}\) *Id.* at 721.
suits."] The Sierra Club court adopted this view. It also rejected the EPA’s policy arguments that such an approach would lead to inconsistency among statutes and generate additional judicial labor. Once the court found that the catalyst theory was still available to litigants under those statutes using the “whenever . . . appropriate” standard, it found that the Sierra Club plaintiffs met the requirements for being catalysts. Thus, it upheld the fee award.

The E.P.A. recently, but unsuccessfully, petitioned the Supreme Court to grant certiorari in Sierra Club to consider the question as to whether the catalyst theory should continue to be permitted in those cases involving the awarding of fees under the “whenever . . . appropriate” standard. In its petition for certiorari, the E.P.A. correctly identified the current urgency for “crucial and needed guidance respecting the prerequisites for obtaining attorney’s fee awards under numerous federal statutes. The petitioners sought to have the Supreme Court declare, definitively, how Buckhannon and Ruckleshaus are to be reconciled and to treat “whenever . . . appropriate” cases under the same standard. This dilemma illustrates the current difficulty confronting the circuit courts that adjudicate this issue.

Similarly, among the district courts that have addressed this question, the catalyst theory retains its viability for environmental statutes that employ the “whenever . . . appropriate” standard as opposed to the “prevailing party” test.

366. Id. at 723.

367. Id. at 726 (acknowledging that although this would create a “patchwork” among statutes, “[i]t was Congress that created the ‘patchwork’

368. Id. (reasoning that Congress was well within its authority to delegate decisions about fee awards to the courts).


370. Petition for a Writ of Certiorari at 11, Sierra Club v. EPA, 322 F.3d 718 (D.C. Cir. 2003) (No. 03-509). Petitioners also urged the Court to consider the administrative difficulties that would arise if the catalyst theory continued to be used in “whenever . . . appropriate” cases. They warned that this, “would spawn the same administrative difficulties that the court envisioned in Buckhannon . . . this case illustrates the debatable questions of relief and causation that the catalyst test would pose in the case of out-of-control settlements.” Id. at 18–19. In addition, petitioners feared that “the court of appeals’ decision is likely to generate wasteful litigation, not only in the District of Columbia Circuit, but also in each of the other circuits where the issue of catalyst-based fees against the government under “when appropriate” fee-shifting provisions remains an open question. Id. at 21.

371. Id.

372. See, e.g., Southwest Ctr. for Biological Diversity v. Carroll, 182 F. Supp 2d 944 (C.D. Cal. 2001) (holding that Buckhannon does not apply to “whenever . . . appropriate” statutes and, thus, does not preclude award of fees using the catalyst theory for fee claims brought pursuant to the
Thus, in the two years since Buckhannon, there have been judicial attempts to clarify its precise contours, and litigants' attempts to define those contours narrowly or broadly as suits their interests. This is particularly significant in the environmental context.

Although the Supreme Court chose not to re-enter the fray in Sierra Club, it is likely that similar requests for such review will recur. However, continued Supreme Court and judicial intervention in this area is not likely to be as productive as Congressional leadership in this area of conflict.

VI. TOWARD A LEGISLATIVE SOLUTION TO THE CATALYST PROBLEM

On its face, the Buckhannon decision is a fair and logical reading of the statutory provisions. Fee-shifting provisions mark a departure from the long-standing American Rule and, thus, Buckhannon's conservative approach "prevents courts from straying from the 'American Rule' without a clear congressional mandate." This is particularly important for areas in which suits against the government are prevalent because courts must respect sovereign immunity by declining to expand Congressional waivers of it too broadly.

ESA). The court reasoned that "because the 'whenever ... appropriate' language of the ESA is distinguishable on its face from the 'prevailing party' language of the [statutes at issue in Buckhannon], this court is reluctant to extend the Buckhannon holding to the fee provisions of the ESA." Id. at 947. The court elaborated: [Although the Buckhannon Court extended its holding to attorney fee provisions in other civil rights statutes, it did not address the interpretation of the 'whenever ... appropriate' language of the ESA or other environmental statutes.... Given the Court's increased reliance on the plain meaning of the specific language used by Congress in its statutes, and the lack of any mention of the ESA or other environmental statutes in Buckhannon, we are disinclined to extend the Court's interpretation to language that is dissimilar on its face.

Id. at 948. See also Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co., 229 F. Supp. 993, 1003 (N. D. Cal. 2002) (declining to find that the Endangered Species Act was affected by Buckhannon because "[w]hile Buckhannon's application is broad, it is not universal. Both the EAJA and the civil rights statutes identified in Buckhannon provide for attorneys' fees to prevailing parties," and "[i]n contrast, the ESA does not limit fees to prevailing parties, but gives courts broad discretion to award attorneys' fees 'whenever the court determines such award is appropriate,'" and "[t]his is a 'less stringent standard'") (citations omitted); Conservation Law Found. v. Evans, 2003 U.S. Dist. LEXIS 5566, 3n.1 (D. Mass 2003) (noting that "[i]n the wake of Buckhannon, the Courts of Appeal have chosen to view statutory fee shifting schemes, like that of the Endangered Species Act, which contain 'whenever appropriate' language as governed by the Ruckelshaus standard").

373. Kelly, supra note 9, at 371 (also noting that the Buckhannon Court "preferred ... to avoid staying from the 'American Rule' for attorney fees without explicit instructions from Congress").

374. See, e.g., Babich, supra note 11, at 10,137 (noting the Supreme Court's "ongoing affection for the common-law doctrine of sovereign immunity," an affection that causes it to "read[] provisions for federal liability narrowly").
In addition, all litigants can benefit from the predictability of a bright-line rule in fee matters. Arguably, *Buckhannon* attempted to move courts towards a bright-line rule by removing any ambiguity as to the availability of the catalyst rule for “prevailing parties.” Unfortunately, as the prior section explored, *Buckhannon* has not resulted in an end to all catalyst litigation. Instead, it has generated a new generation of litigation to test the limits of its holding. Nevertheless, it is likely that there would have been far more litigation had *Buckhannon* been decided in favor of broad catalytic recovery. There is a value in greater clarity that goes a long distance in recommending a more draconian judicial approach over one that creates nuanced ambiguity.

Furthermore, the legislative histories of the “prevailing party” phrases are notoriously sparse. Thus, the interpretation of the *Buckhannon* court—which at odds with the vast majority of circuit court precedents—is a logical one. The Court’s reliance on dictionary definitions is not unreasonable if there is legitimate debate as to what a statutory term meant. Congress could have given “prevailing” a particular definition, but since it did not do so with precision, the Court’s approach to solving the problem is well within a range of legitimate choices.

However, as the cases discussed above illustrate, in the post-*Buckhannon* world of fee-shifting litigation, three trends seem to be emerging in the environmental context as well as in analogous areas of law. First, it is clear that, with very isolated exceptions, any environmental statute that employs the “prevailing party” standard will be subject to the holding of *Buckhannon* even though the opinion itself involved only the FHAA and the ADA. Second, if an environmental litigant is able to secure some tangential form of judicial intervention in the resolution of the dispute, a court may deem this intervention sufficient to circumvent the catalyst theory entirely. Thus, if the resolution of the case can be tailored in such a way that it arguably involves some judicial imprimatur, a court could be persuaded to grant attorney fees without invoking the catalyst theory. Third, and most importantly, if the environmental statute uses “whenever . . . appropriate” language, it is safe to assume that *Buckhannon* will not apply and, if the

375. See, e.g., Tebo, supra note 285, at 56 (noting that some observers believe that “Buckhannon has accomplished what the Court set out to do: Provide greater predictability for defendants as they weigh whether to offer a settlement,” and “knowing whether they will have to pay the plaintiff’s attorney fees allows defendants to predict and limit costs, thereby encouraging settlements that give the plaintiff what it seeks at a cost acceptable to the defendant”).

376. See supra Section V.
requirements for recovery as a catalyst are otherwise met, fees will be awarded under the catalyst theory.

This is a deeply problematic regime for environmental litigation. Regardless of whether one favors or opposes the catalyst theory, this complex web of litigation is troubling.

The most disturbing aspect of the post-\textit{Buckhannon} landscape is that it has given rise to two vastly different standards for allocating fees.\footnote{See Petition for a Writ of Certiorari, \textit{supra} note, at 20 (arguing that “the single most important attorney’s fee issue that has arisen in \textit{Buckhannon’s} wake” is the question as to “whether the catalyst theory remains available under the ‘when appropriate’ statutes”).}

While Congress’s use of different language indicates that it likely intended different treatment of “prevailing party” cases and “whenever . . . appropriate” cases, the gulf between these two standards is growing. As environmental advocates have succeeded in convincing courts to apply \textit{Buckhannon} narrowly in cases such as \textit{Sierra Club} and \textit{Loggerhead Turtle}, the availability of the catalyst theory is now automatically barred in one set of environmental statutes and yet still viable in another.

It is true that “Congress . . . created [a] ‘patchwork’\footnote{Sierra Club, 322 F.3d 718, 726 (D.C. Cir. 2003).} of fee-shifting standards with differing meanings. However, results may be growing more divergent than Congress intended.\footnote{As one commentator has noted, “the \textit{Buckhannon} decision inevitably results in an illogical and unjustifiable inconsistency in the enforcement of federal environmental laws.” Ugalde, \textit{supra} note 11, at 608–09. \textit{See also} Hecker & Weidel, \textit{supra} note 334, at 1797 (describing the impacts of \textit{Buckhannon} on differently worded statutes, claiming “\textit{Buckhannon} did not signal the death knell of the ‘catalyst’ test under all federal statutes,” and “[t]hat test still survives under the citizen suit provisions of federal environmental statutes”).} If, at the time Congress chose to use different language in its varied fee-shifting statutes, the catalyst theory was allowed under both types of statutes, it is logical to conclude that this was not one of the disparities that Congress intended to create. Congress might have chosen greater uniformity in its statutory language had it known that the terms it chose would have such vastly different impacts for catalytic recovery. However, since such a disparity in interpretation did not exist at the time Congress created divergent fee-recovery standards, Congress never had the opportunity to decide whether the catalyst theory should be permissibly applied to fee claims under both statutory standards, under only one, or under neither. Because it has not already done so, Congress— and not the Court— should affirmatively decide whether the wide divergence in treatment of the statutes that has followed \textit{Buckhannon} is truly what it intended.
Congressional guidance regarding citizen suit provisions in environmental statutes was vague before *Buckhannon* and continues to be so. When interpreting “prevailing parties,” courts have had “[t]heir path lighted only by sparse congressional guidance.” This is particularly problematic in the environmental context. While there are significant benefits to fee-shifting rules that allow some deference to the judgment of the district courts, it should not be unfettered. Without clear guidance from Congress, the potential for unfair inconsistencies is exacerbated and widely divergent results may be invited.

The availability vel non of the catalyst theory is not the only ambiguity that exists in the fee-shifting statutes. As the discussion in Section III illustrates, Congress has left many voids in its fee-shifting legislation to be filled by the courts. This is not the best way of ensuring that Congress’ true goals and intentions are achieved with any consistency between various statutes and among different courts. Vastly different

380. *Leading Cases*, supra note 8, at 457; see also Russell & Gregory, supra note 22, at 310 (“Although the appropriate standard by its terminology differs significantly from other fee-shifting provisions, many of which explicitly authorize awards only to ‘prevailing’ litigants, Congress provided little guidance for federal courts to use in deciding the appropriateness of an award of fees.”); Trotter, supra note 70, at 1436 (observing that “[t]he specific standards of catalytic recovery were never fixed”); Flenniken, supra note 188, at 488 (lamenting that “[t]he lack of specificity in most fee-shifting statutes creates additional problems”); Wright, supra note 34, at 1228 (observing that fee-shifting statutes “provide no guidelines to aid a court in reaching its discretionary decision to award fees”); Zinn, supra note 41, at 164 (describing environmental fee-shifting statutes as “typically expansive” provisions that “give courts broad latitude to mold litigants’ incentives”); Boyer & Meidinger, supra note 1, at 851 (lamenting that the citizen suit provisions in environmental statutes “provide little guidance . . . for determining what fee levels are ‘reasonable’ and when it is ‘appropriate’ to award them”).

381. See, e.g., Gibson, supra note 9, at 223 (contrasting the pre-*Buckhannon* era in which “prior holdings allowed the lower courts a great deal of latitude in their discretion to award fees where appropriate” to the post-*Buckhannon* era that “altered the ability of courts to exercise such discretion”); id. (criticizing the way in which *Buckhannon* “removed equitable remedies from the hands of highly qualified judges”); McFerren, supra note 8, at 171 (observing that the *Buckhannon* ruling “replaces district court discretion in determining awards with a rigid per se rule”); Loring, supra note 8, at 992 (arguing that by abandoning the catalyst theory on the basis that fees may be inappropriately awarded by the lower courts, “the [Buckhannon] majority’s opinion impugned their abilities accurately to screen out meritless claims filed for nuisance value”); *Leading Cases*, supra note 8, at 457 (criticizing *Buckhannon* for “transform[ing] an equitable device most effective when applied on a case-by-case basis into a rigid formality open to abuse”); id. at 462 (“*Buckhannon*’s contribution to prevailing party jurisprudence stems from its wholesale rejection of lower court discretion in favor of a procedural, bright-line rule.”); id. at 466 (“[D]istrict court discretion in awarding and setting fees is likely to be a superior approach. Not only can a careful judicial eye squelch defendant gaming, but with the particulars of cases at their disposal, district court judges are simply better equipped to advance congressional goals when determining whether a party has prevailed.”); Brand, supra note 27, at 315–16 (arguing that “Congress clearly intended that the determination of entitlement to and the amount of a statutory fee be left to the sound discretion of the district court”).
outcomes on fee awards can easily lead to different levels of enforcement of various statutes. A lack of clear guidance can only lead to an inefficient and wasteful increase in attorney fee litigation.\textsuperscript{382} It is Congress’ responsibility to provide clear guidance to the courts to avoid these ills.

Perhaps after careful consideration and analysis, Congress may intend to retain the post-\textit{Buckhannon} regime that has emerged and to endorse a system in which catalytic recoveries are no longer permitted pursuant to the “prevailing party” statutes but are explicitly endorsed in those statutes that use the “whenever \ldots appropriate” language. There seems to be no sound rationale for Congress to do so. However, this judgment is one Congress should make after careful consideration of all the policy implications of such a plan and with a full understanding of the ways in which these two tests are now interpreted.

Perhaps most importantly, the Supreme Court’s ruling in \textit{Buckhannon} did not include a full and fact-based analysis of all the policy implications of allowing or disallowing the catalyst theory. Indeed, the majority opinion identified a number of policy concerns but refused to delve into them or base its decision on them.\textsuperscript{383} The Court’s primary tasks were to resolve the dispute between the parties before it and to interpret the relevant statute as part of that dispute resolution. While it is beneficial for a court to be guided by the policy considerations that underlie the statutes it interprets, the judicial branch is not as well-equipped or well-suited as the legislature to incorporate policy concerns into its deliberations.

The debate over the desirability of the catalyst theory in fee-shifting has launched speculation and concerns about a variety of policy issues that require the consideration of a legislative decision-maker. Most notably, courts and commentators have asked or should now be asking:

\textsuperscript{382} Indeed, one commentator has determined that there are “more reported decisions on attorneys fees than on any other aspect of the citizen suit sections.” MILLER, supra note 1, at 97. Mr. Miller goes on to theorize that:

The excessive amount of litigation under the more recent fee shifting statutes is undoubtedly another factor in the somewhat negative judicial attitude toward fee petitions. ... The excessive litigation has been caused, to some degree, by the abandonment of the more traditional “prevailing party” criteria for fee awards in favor of the novel “when appropriate” standard. This is augmented by Congressional failure, under both standards, to establish clear criteria for determining the amount of attorney fees.

\textit{Id.}

\textsuperscript{383} See supra notes 263–70 and accompanying text.
1. If the catalyst theory is allowed, what is the best way to define “success” in the catalyst context?

It is clearly more difficult to define success in the catalyst context than it is the judicial context, and consistency in defining its meaning is critically important to ensuring that there is fair predictability in fee awards. Yet, when there is a non-judicial solution to a problem, it becomes difficult for courts to determine if the litigation was, indeed, the “catalyst” for a successful outcome. Any legislative solution to the catalyst problem must consider this and define success in a way that will ensure an optimal level of predictability. Moreover, the legislation must clarify who bears the burden of proof on this question.

2. What effect will the rule on catalyst recovery have on the willingness of parties to settle their cases?

Commentators are divided on the question of whether abandoning Buckhannon reviving the catalyst theory will provide parties with positive or negative incentives to settle. The legislation must assess

384. For a thoughtful analysis highlighting the difficulties in defining success, see Klein, supra note 8, at 131, positing that:
   As can be inferred from Buckhannon, there are four broad categories of successful plaintiff outcomes. In order of the strength of the plaintiff’s legal victory, they are as follows:
   (1) A favorable judicial order on the merits
   (2) The procuring of a consent decree
   (3) Contracting for a private settlement
   (4) A defendant’s voluntary cessation of the offensive action without a legal obligation to do so.

385. See supra note 27; see also Ugalde, supra note 11, at 614 (warning that the Buckhannon approach “results in a decrease of private settlements, which consequently means an increase in prolonged litigation and overcrowded court dockets”); Shults, supra note 201, at 1042 (warning that “to reduce docket congestion parties should be encouraged to reach settlement agreements without fear of losing an award for attorney’s fees”); Hanson, supra note 9, at 521 (arguing that “Buckhannon... discourages the early resolution of disputes,” and “[s]ince Buckhannon requires a court-ordered judgment or consent decree for prevailing party status, plaintiffs are less likely to seek settlement, instead choosing to persevere to judgment to obtain reimbursement of their attorneys’ fees”); Loring, supra note 8, at 1003 (theorizing that if the catalyst theory were upheld, “defendants faced with the possibility of exorbitant trial fees would surely rather expose themselves to the possibility of a much smaller catalyst theory liability by altering their behavior during the case,” and “[t]hus, defendants who weighed the alternatives would discover that they would suffer less liability if they altered their behavior toward the plaintiff as early as possible”); Babich, supra note 11, at 10,137 (arguing that Buckhannon’s rejection of the catalyst theory “will... reduce settlement options and therefore increase costs for both plaintiffs and defendants of litigating and settling citizen enforcement and judicial review actions under statutes that provide for payment of attorney fees under the ‘prevailing party’ standard”); Miller, supra note 9, at 1354 (noting that the Buckhannon court was “troubled by the potential disincentive that the catalyst theory might create for a defendant to change its conduct voluntarily”); Richard Talbot Seymour, Recent Decisions on Monetary Relief, SG016 ALI-ABA 1081, 1140 (2001) (“If a case is not found to be moot, and the
which impact is more likely—and which is more desirable as a matter of policy.

3. What impact, if any, will eliminating the catalyst rule have on the substance of settlement agreements and the provisions for which plaintiffs and defendants will negotiate most aggressively?

One commentator has expressed concern that, without the catalyst theory "plaintiffs will likely refuse to agree to settlements that do not result in the judicial imprimatur or the needed attorney fees. The main impact will be to develop complex settlement agreements and to impose extra litigation fees that do not benefit either the plaintiff or the defendant." It is undeniable that changing the catalyst theory will change the contours of private agreements. Potentially, it can also have an impact on the role(s) played by judges in the settlement process. The legislature must carefully consider whether this is good or bad.

4. Are there particular considerations in circumstances where the litigation is not solely brought for or settled for monetary damages but only declaratory or injunctive relief?

Many environmental cases seek injunctive relief, particularly when they are suits brought against the government and the remedy sought plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs.

386. See, e.g., Tebo, supra note 285, at 57 (suggesting that some pre-Buckhannon defendants might have been less likely to settle because settling would provide no advantage in attorney's fee litigation).

387. Stanley, supra note 8, at 398.

388. An interesting discussion of judges' roles in mediating settlements may be found in Marc Galanter, The Emergence of the Judge as a Mediator in Civil Cases, JUDICATURE, Feb.-Mar. 1986 at 257–62. Professor Galanter observes that greater participation in settlements is becoming a more important part of a judge's function. Professor Galanter also discussed this issue, in more detail, in Marc Galanter, "... A Settlement Judge, not a Trial Judge": Judicial Mediation in the United States, 12 J. LAW. & SOC. 1 (1985). Here, he notes that most disputes that come to the courts are resolved without a decision imposed by the court. Id. It is interesting to speculate as to whether the judicial imprimatur required by Buckhannon will lead to an increase in judges' role in this mediation and settlement negotiation process. More recently, Professor Galanter and Mia Cahill elaborated on this question in Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994). In this piece, Galanter and Cahill explore the role of the judiciary in settlements and evaluate the merits of settlement as a method of dispute resolution. They also challenge readers to avoid the oversimplistic view that settlement is always to be preferred over litigation.
cannot include monetary damages. These are much more easily mooted than other types of cases, and thus raise particular fears.\textsuperscript{389}

5. What effect will eliminating the catalyst rule have on the incentives of defendants to moot cases deliberately on the eve of judgment to avoid paying fees?

Many observers fear that this practice will increase.\textsuperscript{390} As explained by one, “[p]laintiffs attorneys say that [barring catalytic recovery] gives

\textsuperscript{389} See Hodges & Scherer, \textit{supra} note 9, at 439 (predicting that, in the analogous ADA scenario, the demise of the catalyst theory will have a lesser impact on those cases brought for monetary damages rather than injunctive relief because when an action “seek[s] money damages . . . a pre-trial settlement normally will provide funds for “attorney’s” fees, either as part of the settlement agreement or through the retainer agreement between the attorney and client.”); McFerren, \textit{supra} note 8, at 174 (“While . . . a change in conduct will not moot a claim for compensatory relief, many civil rights, and particularly environmental claims, do not seek compensatory relief. Equitable relief is often the only remedy sought because damages are either not available under the given statute, or the plaintiff is simply more interested in stopping the defendant’s wrongful conduct than in receiving monetary compensation.”); Stanley, \textit{supra} note 8, at 396–97 (“Those particularly harmed are plaintiffs enforcing several environmental fee-shifting statutes where damages are not recoverable and only injunctive relief is available.”). Indeed, one commentator notes that “attorneys that \textit{Buckhannon} affects trial strategies by creating an incentive for plaintiffs to seek damages in addition to injunctive relief so that a defendant cannot unilaterally moot an action.” Forsyth, \textit{supra} note, at 938.

\textsuperscript{390} See, e.g., Klein, \textit{supra} note 8, at 120 (“[T]he \textit{Buckhannon} court cast aside concerns that mischievous defendants would be encouraged to unilaterally moot an action on the steps of the courthouse. Without statistical proof that \textit{Buckhannon} has indeed led to such action, the Court is sure to remain steadfast in this argument.”); Erwin Chemerinsky, \textit{Closing the Courthouse Doors to Civil Rights Litigants}, 5 U. PA. J. CONST. L. 537, 547 (2003) (warning that a result of \textit{Buckhannon} will be “that a defendant can preclude a deserving plaintiff from recovering attorney fees simply by changing policies before a verdict”); Miller, \textit{supra} note 9, at 1370 (discussing the “incentive that defendants have to moot a case unilaterally at the last minute in order to avoid attorney’s fees”); Tebo, \textit{supra} note 285, at 57 (warning that after \textit{Buckhannon}, “defendants can effectively wait until it’s clear that they might lose the case and then make an eleventh hour settlement offer”); Gibson, \textit{supra} note 9, at 229–30 (criticizing \textit{Buckhannon} and warning that its “formalistic requirement of a ‘judicial imprimatur’ completely hinders pragmatic, reasonable analyses of the behavior of the parties in mooted cases”); McFerren, \textit{supra} note 8, at 173 (expressing fear that “elimination of catalytic recovery gives defendants a significant advantage because voluntary action by the defendant will often render a case moot” and observing, more cynically, that “[a] defendant now has incentive to strategically prolong litigation, depleting the plaintiff’s resources. If the defendant complies before a decision on the merits is rendered, he can avoid paying attorney’s fees.”); Ugalde, \textit{supra} note 11, at 609 (“A defendant . . . may prolong litigation for years and then comply at its convenience. The defendant will avoid an award of attorney fees as long as the compliance occurred prior to resolution by the courts. If a citizen group brings an action with a high likelihood of success it ironically will result in prompting the defendant to cease its behavior, thereby negating any chance of a fee award.”); \textit{Say Goodbye,} \textit{supra} note 8, at 184 (predicting that the “[d]emise of the catalyst theory will have the most pronounced effect in civil rights and environmental actions for equitable or declaratory relief, since a voluntary change of conduct by the defendant is likely to moot the case”); Belfer, \textit{supra} note 8, at 278 (warning that \textit{Buckhannon} “will probably encourage defendants to
defendants an incentive to drive litigation along, requiring plaintiff's counsel to expend significant resources and then, at the eleventh hour when plaintiffs appear likely to prevail, unilaterally change their policies to moot the litigation and award a fee award.\textsuperscript{391} Others argue that this is, practically speaking, unlikely to happen because "[d]efense attorneys contend that . . . no defendant would want to expend the money or time to drop the case just before trial in order to be relieved of the possible obligation to pay the plaintiff's attorney fees."\textsuperscript{392} Thus far, there has voluntarily change their conduct to satisfy plaintiffs before trial\textsuperscript{391}); Stanley, \textit{supra} note 8, at 395 ("[D]efendants who are violating a civil rights law have an incentive to string out the litigation, and when a plaintiff appears likely to prevail just before trial, the defendant can unilaterally change their policies and moot the lawsuit to avoid a fee award."); Gibson, \textit{supra} note 9, at 226 (claiming that the "\textit{Buckhannon} majority dismissed without much consideration the concerns that defendants would moot cases"); Funk, \textit{supra} note 8, at 12 ("A defendant may now drag out the litigation as long as possible and then comply before a decision on the merits and avoid attorney's fees."); David Luban, \textit{Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers}, 91 CAL. L. REV. 209, 243 (2003) (fearing that in a post-\textit{Buckhannon} climate, "a vindictive defendant can throw in the towel on the eve of judgment to stop the onset of fee shifting, after the plaintiff and plaintiff's counsel have accrued years of expenses" and "\textit{Buckhannon} thus creates another silencing doctrine by discouraging plaintiff's lawyers from litigating expensive suits that previously held the allure of recouping costs through fee shifting"); Mahusky et al., \textit{supra} note 9, at 41 ("At any point in litigation, even at the time of trial, defendants arguably now have the ability to moot plaintiffs' claims by simply volunteering to provide the relief requested. In so doing, they can escape responsibility for an award of fees and costs."). For an analysis of the impact of mootness on fee awards written nearly two decades prior to \textit{Buckhannon}, see Slater, \textit{supra} note 96.  


392. Stanley, \textit{supra} note 8, at 395; see also Weber, \textit{supra} note 9, at 278 (noting that the \textit{Buckhannon} court "discounted predictions by the plaintiffs that defendants would intentionally moot cases to avoid fees and hence diminish the incentives for civil rights litigation, noting that no empirical evidence had emerged from the Fourth Circuit to support those results"); Kelly, \textit{supra} note 9, at 373 ("Most likely, the fear of a defendant running up excessive fees is improbable."); Miller, \textit{supra} note 9, at 1354 (noting that the \textit{Buckhannon} court "dismissed the idea that the catalyst theory was necessary to prevent defendants from unilaterally mooting an action before judgment in order to avoid paying attorney fees"); \textit{Supreme Court Update, supra} note 8, at 45 (noting that the \textit{Buckhannon} Court found "[t]he argument that the catalyst theory is necessary to prevent defendants from unilaterally mooting an action before judgment in order to avoid paying attorney's fees is speculative and unsupported by evidence"); Coyle, \textit{supra} note 8, at A1 (describing the view of Maryland's Solicitor General that it is "highly unlikely" that the \textit{Buckhannon} rule will lead to deliberate mooting or manipulation by the defense); Barnett & Terrell, \textit{supra} note 201, at 14: 

[V]iolators incur heavy legal costs for continuing their defense. ‘Holding out’ is costly, and the defendant will settle when the marginal reduction in the settlement value from continuing to defend is equal to the marginal cost of continuing litigation. Second, environmental advocacy groups, unlike violators, receive positive returns from continuing litigation. . . . [E]nvironmental advocacy groups enjoy a legal advantage over defendants that gives them greater bargaining power in settlement negotiations. Violators do not tend to be ‘repeat players’ to the extent of continually litigating environmental advocacy groups, and face much higher legal expenses since they do not have the benefit of low-cost public-interest attorney.
been little empirical data to prove the validity of either of these theories. This could be extremely valuable information for Congress to compile before enshrining either view in statute.

6. Will the demise of the catalyst theory spawn a feared “increase in mootness litigation”?\(^{393}\)

Plaintiffs who cannot recover under the catalyst theory may attempt to keep their cases “alive” by proving that objectionable conduct may recur.\(^{394}\) This may make a fee award possible. Before crafting a rule, it is critical to determine how likely this is to happen, and whether there are safeguards that could be implemented to prevent this from occurring in inappropriate circumstances.

7. What impact will the rules on catalytic recovery have on the willingness of would-be litigants to seek non-judicial remedies prior to bringing litigation?

If it is true that “[t]he purpose of attorney fees pursuant to fee-shifting statutes was not to privilege judicial determinations,”\(^{395}\) then it is important to consider whether the catalyst theory unduly affords this privilege to litigation since it is not available when a suit has not been filed, but the remedy sought is, nevertheless, achieved.

8. What is the true impact of the catalyst theory—or its absence—on judicial efficiency?

Environmental litigation is extraordinarily expensive and complex, largely due to “the technological problems involved and the need for expert witnesses, extensive discovery proceedings, and lengthy trials.”\(^{396}\) Thus, it is important to consider whether allowing catalyst recoveries will generate additional judicial burdens because of the difficulties

\(^{393}\) Ashton, supra note 8, at 968; see also id. at 975 (“Plaintiffs seeking to recover attorney’s fees will turn to exceptions to mootness doctrine to avoid the negative effects of the catalyst theory’s rejection.”).

\(^{394}\) Id. at 981–96 (discussing mootness issues with regard to voluntary cessation); Trotter, supra note 70, at 1450–53 (exploring scope of and limitations on mootness doctrine in voluntary cessation cases).

\(^{395}\) Weissman, supra note 243, at 782; see also Suits, supra note 201, at 1042 (“[T]he catalyst theory recognizes the true meaning of ‘prevailing party’ because parties do not file lawsuits just to win in court, rather they file suits to change a defendant’s behavior or to receive compensation.”).

\(^{396}\) Skillern, supra note 85, at 739; see also Zinn, supra note 41, at 139 (“Environmental litigation is notoriously complex, requiring extensive and detailed discovery and heavy reliance on expert witnesses, and is therefore expensive.”).
inherent in proving a causal connection between plaintiff's litigation and the desired achievement.

9. Will the catalyst theory encourage additional litigation or will it advance judicial efficiency by giving litigants encouragement to settle?

Allowing the catalyst theory will undeniably require judicial fee determinations in a number of cases that previously did not need to be considered. However, if the availability of the catalyst theory encourages settlement, then there might be a "decrease in litigation that results from allowing the catalyst theory," which will offset any additional judicial proceedings required to determine whether a given lawsuit truly was the catalyst for a change in the defendant's conduct.

397. See, e.g., Arkush, supra note 9, at 148 (discussing Buckhannon Court's fear that "uncertainty over causation could lead to increased litigation over fees"); Babich, supra note 11, at 10,137 (discussing the desire for "easily administrable rules that minimize the risk of burdensome satellite litigation about fees and costs"); Gibson, supra note 9, at 226 (discussing fear of the Buckhannon majority that having district courts review catalyst cases would be "too burdensome and not readily administered"); Trotter, supra note 70, at 1440 (warning that "catalyst theory probably generates more superfluous litigation than it avoids, considering the vast amounts of secondary litigation that have resulted from the inherently vague standards of catalytic recovery"); Florio, supra note 41, at 719 ("One of the major drawbacks to the attorneys' fees provisions is the resulting time spent litigating over attorney' fees for cases already decided on the merits. Courts generally dislike the amount of time spent litigating over attorney's fees for cases that have already been decided on the merits.'"); id. at 712 (arguing, generally, that generous fee-shifting can lead to efficient allocation of judicial resources because "[e]ligible citizen suits have been encouraged by the attorney's fees provision included in the statute, while at the same time frivolous suits have been discouraged by the fear of fees being awarded to prevailing defendants..."). Indeed, long before Buckhannon discredited the catalyst theory, one commentator described attorney fee litigation as "a virtually interminable morass." Sternlight, supra note 111, at 588.

398. Miller, supra note 9, at 1371.

399. See, e.g., id. at 1370 (arguing that failure to allow the catalyst theory "would discourage informal settlement and increase litigation, which is inefficient," and "[i]nstead of settling a case out of court with its opponent, a party may be compelled to continue with litigation—consuming judicial resources and increasing costs—in order to recover attorney's fees"); id. at 1370-71 ("While courts undoubtedly will have to decide whether a party qualifies as a catalyst if it is to recover... the catalyst determination is no different than the numerous other determinations that a court makes on a regular basis."); McFerren, supra note 8, at 174 ("[W]here the defendant is unwilling to include attorney's fees in the settlement agreement, or where the settlement agreement requires relinquishment of all monetary claims, the plaintiff will be forced to push on—rather than settle—in an effort to secure fees."); Dunn, supra note 11, at 200 (predicting that Buckhannon "will diminish the use of out-of-court settlements and greatly increase the use of consent decrees, which will add costs and impose burdens for the parties and the judiciary"); Stanley, supra note 8, at 396 (predicting that after Buckhannon, "[r]esources will be spent on additional hearings over settlements, consent decrees, dismissals, and other collateral issues involving attorney fees and, therefore, eliminate anything saved by the rejection of the catalyst theory and its hearings"); Figalde, supra note 11, at 608 (warning that Buckhannon "has stripped litigants of the incentive to enter into private settlement
10. What will be the true impact of the catalyst theory’s demise—or revival—on the ability of interested attorneys to remain in the field of environmental citizen suit litigation?

One of the key rationales for fee-shifting generally is to compensate attorneys who do public interest work, often for clients unable to pay their fees. If the loss of the catalyst theory reduces the opportunity for attorneys to recover fees, it is important to consider whether this will so affect the financial position of environmental litigators that many will be unable to continue to work in the field.

agreements, which will likely result in prolonged litigation and a reduction in the deterrence of defendants’ wrongful conduct”.

Indeed, more broadly, commentators have questioned whether environmental citizen suit provisions are written in such a way as to achieve the optimal level of litigation. See. e.g., Zinn, supra note 41, at 137 (“The very reasons that citizen suits can be helpful can make them harmful. The citizen suit provisions create incentives to litigate fiercely, but none to encourage citizen plaintiffs to pick their battles to achieve socially optimal enforcement.”). For a discussion of the impact of various fee-shifting regimes on litigants’ incentives to settle, see generally T.Rowe, supra note 22, at 154–70.

400. See Brand, supra note 27, at 296 (“Fee-shifting statutes that allow prevailing plaintiffs to recover fees from the defendant provide the primary inducement for attorneys to take civil rights cases.”); Miller, supra note 9, at 1370 (“Fee shifting has been used to encourage and allow attorneys to undertake complex civil rights and environmental cases when plaintiffs otherwise would be unable to afford to pay them.”); Forsyth, supra note, at 938 (“Civil rights litigants fear that Buckhannon’s narrow definition of a prevailing party and elimination of the catalyst theory eviscerates the ‘private attorney general’ model and threatens the ability of public interest groups to bring suits that are complex and expensive.”); Tebo, supra note 285, at 57 (fearing that “attorneys cannot afford to gamble on whether they will get paid); King & Plater, supra note 34 (reviewing economic aspects of environmental litigation).

401. See Annino, supra note 9, at 11 (fearing that, in the analogous civil rights area, “because of the [post-Buckhannon] risk of not being awarded attorney’s fees, many private attorneys, small law firms, and nonprofit advocacy groups may choose not to represent plaintiffs making claims under these civil rights laws,” and “[t]his is likely to result in the denial of access to justice to the neediest members of our society”); Gibson, supra note 9, at 207 (noting that in the analogous context of civil rights litigation, the Buckhannon court’s “rigid definition of ‘prevailing party’ and its firm denial of the catalyst theory . . . sharply restrict the ability of plaintiff’s attorney to bring future civil rights enforcement actions”); id. at 235 (claiming that Buckhannon “makes it far more difficult for future plaintiffs and their attorneys to enforce individual freedoms under federal civil rights legislation”); McFerren, supra note 8, at 175 (“In the absence of the catalyst rule . . . attorneys are now less inclined to take a strong case because a defendant, faced with the likelihood of losing, is liable to change her conduct and leave the attorney without fees. Attorneys will now be less likely to take a case in which fee-shifting is the primary source of compensation.”); Ugalde, supra note 11, at 592 (“Public interest groups are historically underfunded and may be unable to continue vigorous private enforcement efforts as a result of the Supreme Court’s decision.”); id. at 610 (“Environmental litigation is extremely costly . . . . It is inevitable, therefore, that environmental groups will exhibit reluctance to bring suit when faced with the prospect of expending hundreds or thousands of hours and dollars for litigation with little chance of financial return.”); Funk, supra note 8, at 12 (“Cash-poor plaintiffs attorneys are likely to be disinclined to bring litigation in which a defendant may force them to incur significant litigation expenses that may not be reimbursed if the defendant
11. Will the absence of the catalyst theory mean that only the strongest cases will be filed?

It is claimed that:

Citizen groups are often motivated by factors other than simply claiming victory, such as the political, media-related, and symbolic ramifications of litigation. The initiation of a lawsuit may be a strategic decision intended to garner publicity and to prompt political or agency action in a situation where the adjudication process would be unsuccessful. Thus, discouraging citizen groups from initiating all but the surest of victorious lawsuits will thwart these equally important purposes of citizen group litigation. Legislative decision-makers must determine whether this is an accurate assessment, determine the positive and negative impact of the catalyst theory on these activities, and decide whether these are desirable reasons to use the litigation process that should be rewarded or encouraged. All of these policy questions demand a vigorous, dispassionate, factual inquiry that has, thus far, not been done. The courts are not well

complies before judgement."; Weissman, supra note 243, at 783 ("Buckhannon reflects a deepening hostility toward poor people who rely on fee-shifting statutes and the lawyers who represent them."); Tebo, supra note 285, at 57 (arguing that attorneys have a conflict of interest in advising clients on settlement offers if settlement offer makes it less likely that attorneys will obtain fees); Shults, supra note 201, at 1042 (warning that "without a catalyst theory, attorneys will be reluctant to bring environmental cases"). See also Sternlight, supra note 111, at 592–98 (describing ways for attorneys who rely on fee awards to protect their financial interest).

402. Ugalde, supra note 11, at 609–10. See also Karlan, supra note 1, at 206 (warning that "the absence of statutory fees might skew attorneys' selecting of cases: they might concentrate on cases involving the possibility of large damages awards and the attendant contingent fee, and forego cases which involve only equitable relief or where the right, while important, is not easily translated into a large damages award for the named plaintiff").

403. See Hunter, supra note 8, at 205–06 (criticizing Buckhannon on the grounds that "[m]any of the policy arguments articulated by both the majority and the dissent are somewhat overstated and deserve criticism"); Flenniken, supra note 188, at 489 ("Unfortunately, little hard data exists upon which to base sound conclusions about the efficacy of existing fee-shifting statutes. The lack of information creates an impenetrable barrier to intelligent discussion."); Greve, supra note 3, at 376 ("[W]e lack solid empirical data concerning the effects of citizen enforcement."); Vargo, supra note 22, at 1619 (lamenting that "[m]ost analyses of competing fee-shifting systems have been based on theory and supposition"); Sherman, supra note 26, at 1869 ("The incentives created by fee shifting have been the subject of considerable analysis but limited empirical research."); Keith N. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 VAND. L. REV. 1069, 1071 (1993) ("Not a shred of empirical evidence on the compliance effects of alternative fee shifting rules exists, however, and it is unlikely that it ever will, given the cost of the required experiments."). For an excellent discussion of the practical question raised by attorney fee provisions in the civil rights context, see generally Julie Davies, Federal Civil Rights Practice in the 1990's: The Dichotomy
equipped to do so, and further Supreme Court clarifications, if any will not and cannot resolve all of the ambiguities. Each of these questions can get mired in political posturing. Facts may quickly be tainted with partisan "spin" as the supporters and opponents of the catalyst theory assert their conflicting positions. However, full and fair inquiry into these logistical questions is an appropriate role for Congress and one that it should undertake as part of a careful, considered response to *Buckhannon* and its progeny.

Additionally, the *Buckhannon* controversy can be a catalyst for Congress to consider the broader implications of fee-shifting and citizen suits in the environmental context. Presently, many of the environmental citizen suit fee-shifting provisions are approaching middle age. By most accounts, the original policy behind fee-shifting statutes was to encourage private parties to enforce public laws and to provide an incentive for them to do so. While the use of citizen suits generally,
and the fee-shifting provisions more specifically, are not viewed by all in an entirely favorable light,\textsuperscript{407} it is difficult to deny that "[o]ver the last thirty years, citizen litigation has played a key role in the development of environmental law,"\textsuperscript{408} and it is unlikely that this will change.\textsuperscript{409}

acting to further the public interest."); \textit{Leading Cases, supra} note 8, at 457 (noting that fee-shifting statutes were "designed to augment plaintiffs' incentives to litigate"); Russell & Gregory, \textit{supra} note 22, at 326–27 (noting that "[t]he complex and technical nature of environmental litigation makes it expensive to prosecute, and citizen plaintiffs must face groups with vast financial resources"); Berger, \textit{supra} note 24, at 306 ("Although for many of the statutory attorney's fee provisions little legislative history exists, it is clear from the legislative history available that the fundamental purpose of these provisions is to encourage full enforcement of the substantive rights to which they are attached"); Nicyper, \textit{supra} note 22, at 783 (claiming that the purpose of the citizen suit provisions was "[t]o encourage socially beneficial litigation"); Florio, \textit{supra} note 41, at 720–21 ("Citizens who bring suit to enforce environmental statutes normally do so on behalf of the community and not typically for personal gain. Because of this, there are few incentives for citizens to bring suit, and many disincentives."). For an interesting, but counterintuitive, perspective on this question, see Theodore Eisenberg & Stewart Schwab, \textit{The Reality of Constitutional Tort Litigation}, 72 CORNELL L. REV. 641, 689 (1987) (citing empirical evidence that "challenges the notion that fee awards drive constitutional tort litigation. One would expect that a system under which only prevailing plaintiffs recover fees would lead to more cases and more awards. Contrary to this expectation, the Fees Award Statute has not generated a burst of civil rights litigation.")

\textsuperscript{407} \textit{See, e.g.,} Barnett & Terrell, \textit{supra} note 201, at 9 ("[E]nvironmental law is written in such a way that a cartel of environmental advocacy groups is formed and maintained through citizen suits."); \textit{id.} at 10 ("[P]rivate enforcers of environmental law are unresponsive to political pressures, and have no reason to avoid exceeding the optimal level of enforcement. Because private enforcers may go after every type of offense...they may over-enforce the law, diverting too many resources from other uses. While politicians or state bureaucrats who implement or enforce laws detrimental to the community would suffer loss of position or funding, private interest groups may lobby...or file citizen suits without paying the same price."); \textit{id.} at 18 ("Whether or not it was the intent of Congress, it seems clear that citizen suits do create financial incentives for extensive litigation and for cooperation and collusion among environmental advocacy groups."); Adler, \textit{supra} note 201, at 58 ("Environmental citizen suits facilitate and encourage litigation over paperwork violations and permit exceedences, which may or may not impact environmental quality" and "the priorities of environmental litigation outfits and individual citizen-suit plaintiffs will not always align with the public's interest in greater environmental protection."); Greve, \textit{supra} note 3, \textit{passim} (providing critical perspectives on citizen enforcement); Zinn, \textit{supra} note 41, at 143–44 ("Critics have branded citizen suits as legal extortion, in which citizen plaintiffs angle to collect attorney's fees or SEP funds for marginal or baseless claims.").

\textsuperscript{408} Babich, \textit{supra} note 11, at 10,137; \textit{see also} Russell & Gregory, \textit{supra} note 22, at 323 (arguing that citizen suit provisions "reflect a congressional finding that the proper and effective implementation of national environmental policy requires citizen participation"); Florio, \textit{supra} note 41, at 709 ("[C]itizen enforcement is one of the primary means of enforcing environmental legislation.").

\textsuperscript{409} \textit{See, e.g.,} Pamela H. Bucy, \textit{Private Justice}, 76 S. CAL. L. REV. 1, 33 (2002) ("Private resources and vigilance may well be needed to protect the environment. Virtually every expert who has examined the issue of environmental enforcement has concluded that public resources will never be adequate to do so.").
However, this may be a good point in time for Congress to reflect on the role played by citizen suits, to consider the ways in which fee-shifting and the catalyst theory advance or detract from that goal, and to see whether there are any broader changes that should be made to the fee-shifting regime as a whole. The consideration of the catalyst question is an excellent starting point for such an inquiry, and one that should invite greater Congressional contemplation on the broader accomplishments of the citizen suit regime.

Two particular policies seem worthy of Congressional reconsideration. First:

[despite the fact that all of the fee-shifting provisions of the major environmental statutes are written in neutral terms, making no distinction between prevailing plaintiffs and successful defendants, courts almost always award fees to successful plaintiffs and almost never to prevailing defendants. This decidedly uneven result derives from policy reasons and is supported by the legislative history...]

However, this is worth further examination as some critics see a benefit in allowing two-way fee-shifting. This has never been the approach taken by the courts or the legislature, but Congress may find

410. Indeed, as has been observed, "[t]he debate over catalyst theory and fee awards in the civil rights context is but one small part of a more general dialogue concerning fee awards that has taken place over two centuries of American jurisprudence." Averill, supra note 27, at 2251. As long as thirty years ago, in fact, some commentators were calling for such a holistic review. See King & Plater, supra note 34 ("The American no-fee rule is today justly coming under fire for its policy and technical peculiarities. A general change or revision of the rule, however, would require a careful, comprehensive reevaluation of the whole question of litigation costs.").

411. Dunn, supra note 11, at 199; see also AXLINE, supra note 1, at 8-33 ("In considering cost awards sought by prevailing parties against non-prevailing citizens in citizen suits, courts usually exercise their discretion to deny such costs, in light of the citizen’s role as private attorneys general in such suits."); Leubsdorf, supra note 22, at 30 ("Fee statutes have almost invariably been one-sided, holding out the prospect of fees to one class of litigants... while denying it to the other."). This general disparity that limits the circumstances in which prevailing defendants may recover fees is articulated, in the civil rights context, in Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978). This case and its impact is explored more fully in Richard M. Stephens, The Fees Stop Here: Statutory Purposes Limit Awards to Defendants, 36 DePaul L. Rev. 489, 494-514 (1987), Dias, supra note 63, passim; and Florio, supra note 41, at 722-32. See also Dunn, supra note 11, at 199 ("The courts have thrown prevailing defendants a bone by giving them the ability to recoup fees if they can establish the plaintiff’s suit was frivolous or brought solely to harass. The bone has no meat.").

In the analysis of at least one commentator, this one-sided approach “gives added emphasis to the ‘access to the courts’ rationale for the rule.” Sherman, supra note 26, at 1865; see also id. at 1866 (noting that in the context of fee-shifting provision in statutes, “the ‘access to the courts’ concern underlies the departure from the American Rule in most attorney’s fee-shifting statutes, serving as an exception that actually reinforces the pro-plaintiff rationale of the American Rule”).

412. See generally Florio, supra note 41, passim (arguing that principles of equity should govern any fee awards made to defendants).
some benefit in examining the presumptions that underlie the one-sided regime of fee-shifting. The connections to the catalyst debate are clear. A change in the fee-shifting structure that would allow either party to make a claim for attorney fees would change the incentives of both parties to litigate and to terminate litigation. While departure from the plaintiffs-only regime seems unlikely at this time, it would be wise for Congress to consider the impact that the entrenched one-sided rule has on the desirability of reviving or expanding the catalyst theory.

Second, the environmental fee-shifting statutes and case law make no significant distinctions between applying the catalyst theory to a private party defendant versus a government agency or actor. A typical environmental fee-shifting statute allows the commencement of a citizen suit "against any person (including (A) the United States, and (B) any other governmental instrumentality or agency) . . . ." Environmental citizen suits are often brought against the government. Yet, the policy considerations underlying and the remedies sought in a suit against a governmental defendant may differ from those involved when the defendant is a private party. Indeed, as one commentator has observed:

[T]he United States has made itself amenable to suit in the environmental context in two separate capacities. First, citizens may challenge the government in its capacity as a regulator. . . . Second, citizens may challenge the government in its capacity as a polluter or an actor whose conduct threatens the environment.

This reality may mandate different policy considerations such as the impact of the available resources of the government, the possible

414. See MILLER, supra note 1, at 10 (observing that although "the citizen suit was conceived and designed to allow private enforcement of the law against polluting violators, until recently its most celebrated uses were against EPA for its failures to implement the environmental statutes in a timely and complete manner").
415. See, e.g., Bucy, supra note 409, at 36:
In the suits against regulatory officials, plaintiffs generally seek injunctions requiring the officials to take certain action, such as like [sic] declaring specific acts to be violations of environmental statutes, holding hearings, adopting alternative methods for computing permissible water discharges, revising national ambient air quality standards, or promulgating water quality standards.
417. This point has also been raised by commentators addressing the wisdom of allowing the catalyst theory under other non-environmental statutes that establish causes of action that often involved the federal government as a defendant. See, e.g., Miller, supra note 9, at 1365 (discussing how, under the Equal Access to Justice Act, "the government is necessarily the party against whom a citizen is litigating . . . . [Thus] a broader definition of prevailing party than Buckhannon's is justified. . . . [B]ecause of the government's role, the implications of the Buckhannon rule are more
implications of the sovereign immunity doctrine, the fact that it is often injunctive relief sought, the reality that when correction is sought mootness may be easier, the hope that compensation is beneficial to public policy, and the observation that in suits against the government "catalytic fee claims frequently arose in the context of systematic reform litigation, often originating as challenges to statutes or administrative policies." Together, these may suggest that rather than a "one-size-fits-

severe than when a private party is involved."; Arkush, supra note 9, at 149-50 (discussing how, in the FOIA context, "[b]ecause FOIA applies exclusively to federal agencies, it carries a greater need for private enforcement"); Loring, supra note 8, at 1002 (criticizing Buckhannon because it "failed to distinguish between public and private defendants and underestimated the ability of public catalyst theory defendants to meet the strict mootness standard"); Russell & Gregory, supra note 22, at 358 (noting that the distinction between private and public defendants in fee-shifting litigation "is pivotal to a determination of the fairness of shifting fees").

418. See, e.g., Miller, supra note 9, at 1365 ("There is a greater disincentive to litigate against the government than a private party, so more encouragement of citizen suits is needed. A disparity exists because of government's greater resources and expertise."); and Florio, supra note 41, at 721 ("Citizen plaintiffs often face defendants, such as the government and private industry, with vast resources to defend their cases.").

419. For further discussion of the sovereign immunity implications of fee-shifting regimes, see generally Wright, supra note 34, at 1246-53. See also King & Plater, supra note 34, at 85-92 ("Even though in most cases the doctrine of sovereign immunity has long been circumvented as a ban to environmental litigation, it may continue to pose obstacles to fee recoveries."); id. (describing use of sovereign immunity doctrine to avoid assessment of fees against government defendants).

420. See, e.g., Hecker & Weidel, supra note 334, at 1797 ("Environmental citizen suits are different from civil rights litigation because citizen suit plaintiffs cannot be awarded damages."); Florio, supra note 41, at 713 ("Citizens do not benefit financially from bringing suit. Instead, relief is usually limited to obtaining an injunction . . . .").

421. See, e.g., Miller, supra note 9, at 1366 ("[T]he government could moot cases by voluntarily changing its behavior. The government may be in a better position to change its harmful behavior if it chooses to do so."); Ugalde, supra note 11, at 611 ("Under the Buckhannon standard, if the agency chooses to take an action prior to a judicial order, thereby rendering the action moot, the plaintiff loses eligibility for a fees award. Environmental citizen plaintiffs are thus less likely to risk bringing these actions. . . ."); Brusslan, supra note 8, at 1349 ("EPA can seek to avoid paying attorney's fees by taking the legally required action before a final judgment, which may render the case moot. With a significantly lower prospect of recovering these fees, the number of environmental suits against the government is bound to decrease.").

422. See, e.g., Babich, supra note 11, at 10,137 (noting "Congress' policy of treating citizen enforcers as public servants"); Miller, supra note 9, at 1366 ("The impact of unreasonable government action is profound. . . . Improper behavior by the government must be deterred, and citizen suits are invaluable in this respect. . . . In a suit with the government, a citizen not only protects his own interest but refines public policy."); id. at 1367 (arguing in favor of "[c]ompensation for citizens who promote the public welfare" due to the "unfairness of expecting a citizen to bear this cost when he is serving a public purpose"); id. at 1371 ("Allowing catalysts to recover also may create an incentive for the government ex ante to ensure that its behavior is beyond reproach. . . .").

423. Trotter, supra note 70, at 1435.
all” catalyst rule, Congress should consider a separate rule for
government defendants and private defendants.

Thus, Congress should review catalyst doctrine not merely in a
vacuum but as part and parcel of a much-needed and long-overdue look
at environmental fee-shifting statutes generally.424

Fans and foes of the Buckhannon ruling have called on Congress to
take action in this regard. Critics of Buckhannon argue that the “mistaken
decision begs a congressional response,”425 and they call Buckhannon
“an implied call to arms to Congress to codify a critical aspect of current
common law, the catalyst theory.”426 Indeed, even pre-Buckhannon
commentators in other contexts urged Congress to respond to perceived
judicial misadventure in narrowly interpreting fee provisions of federal
statutes.427

Justice Scalia’s concurrence in Buckhannon also acknowledged a
potential response from Congress. Although he clearly favored an end to

424. But see MILLER, supra note 1, at 130 (suggesting that it is the narrow interpretation of, and
not the statutes themselves that is problematic and arguing that “[t]here is little evidence that the
attorney fee award provisions of the environmental citizen suit sections are in need of major
adjustment.”).
425. Loring, supra note 8, at 975.
426. Id. at 1005; see also id. at 1005–06 (arguing that Congress should respond to Buckhannon
by “inserting a definition of prevailing party that includes the catalyst theory within each fee-shifting
statute. The plain meaning of the prevailing party definition would then compel courts to apply
the catalyst theory to appropriate plaintiffs for attorney fee recovery.”); Brusslan, supra note 8, at 1349
(“Congress may easily restore the catalyst theory by amending environmental citizen suit
provisions.”); Luban, supra note 390, at 246 (urging public interest advocates to “work to enact
legislation to reverse Buckhannon”); Mahusky, et al., supra note 9, at 42 (“Historical precedent
indicates that the most likely source of redress from the constrictive view of the Rehnquist Court
with respect to such fee-shifting statutes lies in Congressional action.”); Coyle, supra note 8, at A1
(“Congress will be asked to overturn Buckhannon by amending fee shifting statutes expressly to
permit the catalyst theory.”); Chemerinsky, supra note 390, at 555 (“Congress could revise the
attorney’s fees laws to nullify Buckhannon and specify that plaintiffs who are the catalyst for action
are the prevailing party.”).
427. One of the most extensive such commentaries may be found at Sternlight, supra note 111,
at 599–607. In discussing the Supreme Court’s fee shifting jurisprudence in the civil rights context,
Ms. Sternlight argued:
[T]he Supreme Court’s seven-year attack on the civil rights fee-shifting legislation has
effectively acted as a repeal of that legislation . . . . It is clear that unless Congress steps in to
restore the legislation to what its drafters originally envisioned, many victims of discrimination
will be deprived of competent representation to fight for their rights . . . . Congress does not face an easy task. Whereas the legislation it originally passed was extremely
simple, the Court has developed a highly complex body of laws governing fee litigation.
Congress must address the Supreme Court’s fee decisions by passing new statutory
clarifications or amendments.
Id. at 599; see also Brand, supra note 27, at 306–09 (advocating broader role for Congress in
attorney fee controversies).
the catalyst theory, he observed that there is a critical role for the legislature to play in this context and opined:

Congress is free, of course, to revise these provisions—but it is my guess that if it does so it will not create the sort of inequity that the catalyst theory invites, but will require the court to determine that there was at least a substantial likelihood that the party requesting fees would have prevailed.428

Since Buckhannon, several observers have made proposals to address the catalyst question legislatively.429 Indeed, Congress is currently considering S.1117, a bill introduced May 22, 2003, by Senators Feingold, Kennedy, and Jeffords.430 The bill, titled the “Settlement Encouragement and Fairness Act,” provides in substance that:

428. Buckhannon, 532 U.S. at 622 (Scalia, J., concurring).
429. See, e.g., Loring, supra note 8, at 1006:
Congress could import aspects of prior case law to require that a catalyst plaintiff meet Justice Ginsburg’s three-part threshold test: (1) that the plaintiff present a genuine, colorable claim, rather than a nuisance suit; (2) that the defendant provide some of the benefit sought by the plaintiff; and (3) that the plaintiff’s suit be a substantial or significant cause of the defendant’s change in behavior. The requirement of a genuine claim would allay concerns that the plaintiff filed a non-meritorious claim for its nuisance value. The fact that the plaintiff benefited from the change in behavior would prove that the plaintiff achieved some degree of success on the claim, and so could be said to have prevailed. Finally, a plaintiff would be forced to prove that the claim caused the defendant’s action, so that the plaintiff would not be compensated for filing a claim after the defendant had decided to act. See also Brusslan, supra note 8, at 1349:
Congress can define “prevailing party” to include a plaintiff who sues and achieves all or some of the relief sought in the complaint, whether by judicial order, consent decree, voluntary change in the defendant’s conduct or otherwise. The plaintiff would have to show some nexus between its lawsuit and defendant’s changed conduct. This amended definition would likely withstand constitutional scrutiny and place citizen plaintiffs in the position they were in before Buckhannon.

In addition, “at its September 2001 annual meeting, the Vermont Bar Association adopted a resolution recommending that the State’s Congressional delegation endorse legislation to overturn the Buckhannon decision.” Mahusky, et.al., supra note 9, at 42. The resolution provides:
[T]he assembled membership of the Vermont Bar Association formally recommends that the Vermont Congressional delegation take all steps necessary to introduce, support, and enact federal legislation that would overturn the Buckhannon decision and authorize awards of attorney fees to those plaintiffs whose lawsuits achieve the relief they seek even in the absence of a judicially-approved settlement or judgment on the merits.

Id. at 43 n.30.

In a more narrow context, see Hanson, supra note 9, at 554–59 (urging Congress to take action to overrule Buckhannon in the context of IDEA litigation).

430. S. 1117, 108th Cong., 1st Sess. (2003). This is the successor to a similar bill, S. 3161, 107th Cong., 2nd Sess. (2002) that was also introduced by Senators Feingold, Kennedy, and Jeffords, and was referred to the Committee on the Judiciary. No action was taken on S. 3161 prior to the end of the 107th Congress. See Tebo, supra note 285, at 56 (noting that Senator Feingold’s proposal to the 107th Congress “was put on the back burner.”). Bill S. 3161 is discussed more fully in Bill Introduced to Reinstate “Catalyst Theory” as Basis for Attorneys’ Fees, 44 Gov’t Contractor
In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, or of any judicial or administrative rule, which provides for the recovery of attorney’s fees, the term “prevailing party” shall include, in addition to a party who substantially prevails through a judicial or administrative judgment or order, or an enforceable written agreement, a party whose pursuit of a non-frivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.\(^4\)\(^3\)\(^1\)

Congress has not yet acted on this bill.\(^4\)\(^3\)\(^2\) In the view of one commentator, this reflects the nature of political decision-making:

[T]here is [a] . . . subtle explanation for the Congressional inactivity. . . . It is much more difficult to interest the public, and therefore Congress, in laws about aspects of jurisdiction and court procedure. *Buckhannon* may be vitally important to civil rights litigants, but it is not a ruling that will get headlines.\(^4\)\(^3\)\(^3\)

As proposed, the bill provides a small degree of clarity to the currently ambiguous situation. By adopting the title “Settlement Encouragement Act,” the proposal clarifies Congress’ intent that encouraging settlements

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473 (Nov. 27, 2002) and Marcia Coyle, *Some in Congress Seek to Restore Federal “Catalyst” Fees*, BROWARD DAILY BUS. REV. A10 (Sept. 20, 2002).

431. S.1117 § 8(a). The bill goes on to provide:

(b)(1) If an Act, ruling, regulation, interpretation, or rule described in subsection (a) requires a defendant but not a plaintiff, to satisfy certain different or additional criteria to qualify for the recovery of attorney’s fees, subsection (a) shall not affect the requirement that such defendant satisfy such criteria,

*Id.* at § 8 (b)(1), and

(b)(2) If an Act, ruling, regulation, interpretation, or rule described in subsection (a) requires a party to satisfy certain criteria, unrelated to whether or not such party has prevailed, to qualify for the recovery of attorney’s fees, subsection (a) shall not affect the requirement that such party satisfy such criteria.

*Id.* at § 8 (b)(2).

432. In addition to S. 1117, there are two more narrow bills pending in the House of Representatives that also concern the definition of “prevailing party.” These are more narrow than S. 1117, however, because they purport only to redefine “prevailing party” for purposes of the Equal Access to Justice Act (“EAJA”) and do not intend that their amended definitions has general applicability. The more recent of these two bills is H.R. 2282, 108\(^th\) Cong., 1\(^st\) Sess (2003). Called the Equal Access to Justice Reform Act of 2003, this bill was introduced by Representatives Manzullo and Blumenauer on June 2, 2003. It provides, in relevant part, that

“Prevailing party” includes, in addition to a party who prevails through a judicial or administrative judgement or order, a party whose nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.


is a primary goal in formulating fee recovery rules. Indeed, in his statement accompanying the introduction of S. 1117, its sponsor, Sen. Feingold, spoke forcefully in favor of S. 1117’s potential to advance this goal:

Ironically, the failure to correct the Buckhannon decision could lead to plaintiff’s attorneys dragging out law suits beyond a point in time where the parties could reach a fair settlement, in order to insure that they meet the Buckhannon definition of “prevailing party.” This will increase the costs of litigation and discourage settlement.

The proposal also includes some limitations to the unfettered discretion of the courts in making fee awards. For example, the bill mandates that the plaintiff’s claim be non-frivolous and requires that the action taken in response to the suit provide “a significant part of the relief” that the fee-seeker sought. These requirements would avoid having catalyst claims asserted too easily or quickly.

Unfortunately, however, this proposal is a very narrowly tailored piece of legislation. It is a direct response to the decision in Buckhannon and has the narrow aim of overruling that case. Thus, it does not address the broader issues outlined above and does not seem to be based on any post-Buckhannon fact-finding as encouraged above. Without careful study, the effect of this statute will be the mere restoration of the pre-Buckhannon status quo, although there is no empirical evidence that the pre-Buckhannon rule correctly achieved Congress’s goals.

More problematically, the proposed legislation does not address the relationship between statutes that use “prevailing party” language and those using the “whenever . . . appropriate” standard. As a result, if this bill is passed, the catalyst theory will be revived via statute for “prevailing party” situations. However, it will only be preserved by the more tenuous circuit court rulings in “whenever . . . appropriate” situations. Ironically, there would then be no statute that explicitly allows the catalyst theory under the more liberal “whenever appropriate” standard, but there would be such a statute allowing the catalyst theory to be used for claims made pursuant to the facially more restrictive “prevailing party” statutes. This anomalous result should not be fee-shifting policy.

Finally, the proposed bill does not take into account the special attributes of environmental litigation that may warrant a different

435. See Statement of Senator Feingold, CONGRESSIONAL RECORD, May 22, 2003 (saying of S. 1117, “[t]he bill I introduce today restores the catalyst theory that the vast majority of courts had approved prior to the Buckhannon decision as a basis for seeking attorney’s fees”).
approach. The proposed statute is a broad one whose goal is to create a generally applicable solution to a definitional problem that arises in a vast array of statutes. However, the unique features of environmental litigation warrant at least some consideration as to whether there should be different statutory language in the environmental context.

Rather than adopt this proposal, Congress should take four steps to address the issue of fee-shifting. First, Congress must engage in the broad-based factual and policy inquiries outlined above, with particular attention to the ways in which the fee rules encourage settlement. While the temptation to address the issue narrowly is strong, indeed, mere reaction against *Buckhannon* is not sufficient. Instead, any response should involve careful consideration of the wisdom of allowing catalytic recovery and an evaluation of the best ways in which to tailor a bill to achieve the goals of citizen suit statutes.

Second, after Congress has conducted a full study of catalyst recovery, it should adopt a uniform "prevailing party" standard for all environmental statutes. The wisdom of having two different standards for the recovery of fees is not apparent. There seems to be no clear distinction between environmental statutes employing the two different standards. For example, the CAA and the CWA use different standards, although there is no compelling reason to do so. Moreover, having two standards can create confusion. Absent a true difference in the citizen enforcement regimes of the statutes that employ these standards, there seems to be no reason to continue to have two different standards.

Instead, all environmental statutes that allow fee-shifting should be amended to award attorney’s fees only to “prevailing parties.” This standard is preferable to the “whenever appropriate” test because it is less open-ended and limits trial court discretion. This will encourage greater uniformity, making it less likely that similar litigation will result in widely divergent results. In addition, the “prevailing party” standard will ensure that some success is required before an award of fees. The “whenever appropriate” standard is not as clear in that important regard. Finally, having one standard will protect the law from developing along two “tracks,” one for the “prevailing party” statutes and one for the “whenever appropriate” statutes.

436. *See supra* notes 429–35 and accompany text.
Third, Congress must remedy problems with legislative ambiguity. The law in this area has often been plagued by vague statutory language that is unaccompanied by a clear statement as to the intended meaning. Thus, any new legislation that Congress proposes must provide detailed definitions of all terms included in the statute so that courts are not left to combing uncertain legislative histories for clues as to Congressional intent.

Once Congress takes these three preliminary steps, it can turn to its fourth task: the substantive drafting of a fee-shifting statute that responds to *Buckhannon*. Such a statute should continue to authorize the award of attorney fees to the paradigmatic "prevailing parties" who achieve their success in a traditional judicial proceeding. However, the statute should also authorize the award of catalyst fees in a very narrow, well-defined set of circumstances. Such fee awards should be allowed where the plaintiff achieves a desired result through a non-judicial arena and can satisfy the following requirements:

1. To be eligible to receive attorney fees under the catalyst theory, the relief sought must have been obtained more than thirty days after the filing of the complaint.

   Requiring that a plaintiff may achieve an award for a catalytic recovery only after thirty days have elapsed since the filing of a complaint is a key feature of the proposed statute. It establishes that if a plaintiff achieves relief through extrajudicial means within thirty days after the litigation is formally commenced, no attorney fees will be awarded under the catalyst theory regardless of how successful the plaintiff might have been.

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439. As was noted above, however, Congress should precede the drafting of the fee-shifting statute with a thorough examination of the broader issues linked to the fee-shifting statutes themselves. If this empirical study results in the conclusion that termination of attorney fees generally, or the extension of attorney fees to both prevailing plaintiffs and defendants is desirable, then obviously a different conclusion from this one will follow. However, that discussion is beyond the scope of this Article. While it is desirable for Congress to undergo such an inquiry, because a radical reworking of the general fee-shifting structure seems unlikely at this time, this Article will take a pragmatic approach and focus on developing a sound catalyst proposal that will fit into the current fee-shifting structure.

440. This would include, but not be limited to, such things as private settlement agreements and unilateral actions taken by the defendant.

441. However, a plaintiff who achieves a result through the traditional judicial process within thirty days will not be barred from a fee recovery. This thirty day period applies only to those plaintiffs asserting the catalyst theory.
This may result in disappointed plaintiffs who achieve desirable substantive goals that quickly moot their cases and yet are not compensated for their fees. However, this provision gives defendants a powerful incentive to settle early in the litigation. By having a "safe harbor" of thirty days, defendants who may be tempted to delay or engage in protracted litigation may decide to grant the relief sought early on, and thus enjoy a guarantee that no attorney fees will be assessed against them. Those most likely to settle are those defendants whose cases are weakest or those who make the prudential judgment that the costs of continued litigation outweigh the costs of early compliance. These cases should be disposed of quickly.

Furthermore, the extremely short timeframe of thirty days helps ensure that the uncompensated plaintiff has not invested years of time and expense in the litigation. Naturally, in circumstances where there are significant pre-litigation expenses such as research, investigation, and expert consultation, a plaintiff may have sunk considerable costs into the litigation even prior to the filing of the complaint. Such plaintiffs, concededly, will suffer as a result of this provision. However, the advantages of this element for encouraging quick resolution of citizen suits outweigh this cost.

In addition, thirty days is not an unfairly short timeframe for a defendant who truly wishes to take advantage of this safe harbor. Most citizen suits cannot be filed until after notice to the potential parties and the government, and the passage of a statutory period of time for the government to opt to handle enforcement. Thus, defendants will have had notice of the proposed claim long before the thirty-day period has even begun running. Naturally, in a case where granting relief is complex and time consuming, a defendant will not be able to comply

442. See, e.g., C.A.A. 42 U.S.C. § 304(b)(1)(A) (prohibiting the bringing of a citizen suit "prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order); C.W.A. 33 U.S.C. § 1365(b)(1)(A) (employing identical notice requirements in the Clean Water Act context); E.S.A., 16 U.S.C. §1540(g) (2)(B)(i) (prohibiting the bringing of a citizen suit "prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species"); SMCRA, 30 U.S.C. § 1270(b)(a)(A) (prohibiting the bringing of a citizen suit "prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator"); SWDA, 42 U.S.C. § 6972(b)(2)(A) (prohibiting the bringing of an action "prior to ninety days after the plaintiff has given notice of the endangerment to—(i) the Administrator; (ii) the State in which the alleged endangerment may occur; (iii) any person alleged to have contributed to or be contributing to [the violation]").
with this brief period to enjoy the benefits of the safe harbor. However, this provision will help weed out those cases that can be easily resolved.

2. If the relief sought is obtained more than thirty days after the filing of the complaint, a plaintiff can employ the catalyst theory to recover attorney fees for relief obtained outside the judicial process if, and only if, the plaintiff has achieved a substantial part of the relief that was sought in the complaint.

This part of the test requires that the plaintiff did “prevail” in a substantial way. This requirement should be interpreted in precisely the same way as courts weigh whether someone is a “prevailing party” in a traditional judicial proceeding. Thus, if someone who wins merely nominal damages in a judicial decision is denied fees as a prevailing party, so too should a party who achieves such damages in an out-of-court arena. Conversely, if a party who wins only 30% of the relief sought is granted fees if this recovery was a judicial one, so too should a party who achieved such a result extra-judicially be granted fees.

It is important that these two standards be the same so that judicial remedies are not treated with any priority. If an important goal is to provide incentives for efficient, out-of-court settlements, Congress should not adopt a rule that would favor a judicial remedy. On the other hand, because the judicial process may be the only option available to a plaintiff facing an obstinate defendant, the judicial process should not be unduly disadvantaged either. Thus, a consistent rule will focus not on procedure but rather on the substance of the recovery achieved. In addition, having the same rule apply in both instances will ensure that the jurisprudence in this area can be developed more consistently as precedents from both types of cases will be applicable to the other. Developing an extensive set of precedents early should generate consistency quickly and provide more developed guidance to the courts.

3. If the relief sought is obtained more than thirty days after the filing of the complaint, and the plaintiff has achieved a substantial part of the relief that was sought in the complaint, a plaintiff can employ the catalyst theory to recover attorney fees for relief obtained outside the judicial process if, and only if, the underlying legal claim was meritorious.

This legal inquiry should probe the likely merits of the plaintiff’s claims (i.e., evaluate whether the claim is “non-frivolous” as required by the proposed S. 1117). A non-meritorious claim could not be the catalyst
for the fee award since such litigation should not be encouraged and because it is unlikely in those circumstances that the defendants settled because of the merits but because they believe the litigation to be a nuisance. Catalyst recovery should not be available to plaintiffs who merely harass a defendant into settling a claim. Rather, it should only be reserved for those who prevail because their claim has substantive merit.

4. If the relief sought is obtained more than thirty days after the filing of the complaint, and the plaintiff has achieved a substantial part of the relief that was sought in the complaint, and the underlying claim was meritorious, a plaintiff can employ the catalyst theory to recover attorney fees for relief obtained outside the judicial process if, and only if, there is a causal connection between the relief obtained and the filing of the suit.

Determining causal connection requires a diligent factual inquiry into the circumstances of the relief sought and obtained. Evidence that the outcome achieved was in the defendant’s plans prior to the litigation can help establish that the litigation was not the catalyst for the defendant’s actions, as can evidence that the defendant may have been pressured into providing the relief sought by parties other than the plaintiff. Evidence such as this would destroy the causal connection between the relief obtained and the suit brought.

At this stage of the test Congress must recognize that there are significant differences between an environmental suit against the government as opposed to against a private party, and it should create a different burden of proof for these two circumstances.

A. Government Defendants:

Suits brought against the government often seek injunctive relief in the form of broad reform of programs, processes, and regulations. These outcomes may often be more difficult to trace to a particular citizen’s litigation than an action against a private party. Moreover, an agency or a legislature is more subject to political pressures, lobbying efforts, and appropriation constraints than a private party, and these factors may make it more difficult to trace the cause of the reform to a citizen’s litigation. This issue is particularly problematic when the defendant is the government and the requested action is a change in legislation, regulation, or policy rather than a request for enforcement or a suit.

443. See supra notes 413–423 and accompanying text.
against the government in its capacity as polluter. As noted by one commentator:

Because these [agency] decisions are generally influenced by political forces, follow a lengthy internal deliberative process, and reflect a response to a multitude of concerned interests within and outside the government, the likelihood that a change in general governmental policy is attributable to the filing of a particular lawsuit is greatly diminished. . . . It is likely to be the unusual case in which the pendency of a lawsuit can be said to have served as the catalyst for a change in general government policy, even when the lawsuit sought a similar policy outcome.\(^{444}\)

In addition, in a suit against the government, the basis for fee awards should be more strictly construed because of sovereign immunity concerns and because the ultimate cost of the fee awards is borne by the taxpayers. They should not be asked to fund litigation against the government unless it can be shown that the litigation achieved a public goal that would not otherwise have been achieved.

Thus, the citizen plaintiff seeking fee recovery under the catalyst theory should bear the burden of proving causation when it is seeking catalyst fees against a government defendant. The plaintiffs must successfully argue that there is a factual connection between the initiation of their litigation and the award of the relief. If they are unable to meet this burden, fees should not be awarded. Conversely, if they do meet the burden of proof, the government defendant should then have the opportunity to refute the claim and the evidence supporting it.

B. Private Party Defendants:

In contrast, a private party defendant is not as subject to outward influences as the government. While it is true that there may be multiple factors that lead to a private defendant’s voluntary action, that action is less likely to be the result of a confusing blend of internal and external political factors. In addition, when a plaintiff recovers against a private party, the costs are not directly borne by the taxpayers but by a defendant who was in violation of a law or regulation. These circumstances warrant the presumption that if part (2) and part (3) of the test above are met (i.e., the plaintiff’s claim resulted in “substantial” relief and the plaintiff’s claim was “meritorious”), then the plaintiff’s litigation was the catalyst for the relief. Thus, in suits against private defendants, it should be the defendant’s burden of proving that the litigation was not the catalyst. The defendant will have ready access to its business records

\(^{444}\) Sisk, supra note 41, at 284.
which can indicate whether the relief sought was being pursued independently of the plaintiff’s claims. As always, the plaintiff has the opportunity to refute the defendant’s argument. However, the plaintiff should not have to prove the existence of the causal connection. Instead, establishing the absence of a causal connection should be the obligation of the private defendant.

VII. CONCLUSION

The Supreme Court’s decision in Buckhannon has had, and will continue to have, a significant impact on environmental litigation. Unfortunately, it has ushered in an era in which fee-shifting is an unsettled area of law and in which widely divergent results may be found. While circuit courts are bound by the Buckhannon decision, there has been a great deal of variation in the way in which courts have interpreted the scope of the decision. This should be of particular concern to environmental lawyers. Citizen suits are an integral part of environmental enforcement, and the availability of fee-shifting is an important aspect of citizen suits. The current state of case law applies Buckhannon’s structures to cases arising under “prevailing party” statutes but not under “whenever . . . appropriate” statutes. This distinction is problematic for many reasons.

Despite the issues and the complications it has raised, Buckhannon may also serve as a timely invitation for Congress to reconsider attorney fee-shifting more broadly. In doing so, it must assess the policy implications served by fee-shifting generally and by the inclusion, vel non of fee awards for catalysts as part of that regime. This Article proposes one way in which Congress may respond to Buckhannon and help resolve the catalyst fee-shifting debate with greater clarity and precision than currently exists. It attempts to balance the interests at stake in this debate and to mediate between the extreme positions in this controversy. If Buckhannon can serve as a catalyst for such a development, it will have made a substantial contribution to environmental law.

445. Naturally, this may raise the possibility of fraud as a defendant may be tempted to misrepresent its past plans to create the impression that the relief sought was in the works prior to the litigation. However, this possibility of fraud seems to be no greater in this context than in many others.