

1-1-2003

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### Recommended Citation

Jason Douglas Klein, *Attorney's Fees and the Clean Water Act after Buckhannon*, 9 *Hastings West Northwest J. of Env'tl. L. & Pol'y* 109 (2003)

Available at: [https://repository.uchastings.edu/hastings\\_environmental\\_law\\_journal/vol9/iss2/1](https://repository.uchastings.edu/hastings_environmental_law_journal/vol9/iss2/1)

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**Attorney's Fees and  
the Clean Water Act  
after *Buckhannon***

By Jason Douglas Klein \*

## I. Introduction

In May of 2001, the United States Supreme Court issued *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources* (*Buckhannon*).<sup>1</sup> The Court held that the “catalyst theory” is no longer a viable method for a plaintiff to claim “prevailing party” status for purposes of an award of attorney’s fees under the two civil rights statutes at issue. Briefly, the “catalyst theory” is one of four main methods used by environmental and other public interest practitioners (“public interest lawyers”) to seek attorney fees upon the termination of a successful lawsuit. While jurisdictions may differ in the test applied to determine whether a plaintiff qualifies as a “prevailing party” via the “catalyst theory,” generally a plaintiff must demonstrate that (1) the lawsuit stated a genuine claim, (2) the lawsuit was a ‘substantial’ or ‘significant’ cause in the defendant’s decision to voluntarily change its conduct, and (3) defendant provided some of the benefit sought by the lawsuit.<sup>2</sup> The other three methods sanctioned by courts which allow a litigant to obtain fees include (1) a favorable final

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1. 532 U.S. 598 (2001).

2. Compare *Stewart v Hannon*, 675 F.2d 846, 851 (7th Cir. 1981) (identifying a two factor test: (1)

judicial order on the merits, (2) the procuring of a consent decree, and (3) contracting for a private settlement.

In its decision, the Court went beyond merely disapproving the basis for awarding fees via the “catalyst theory.” Addressing an issue outside the scope of the case, the Court strongly hinted that it was invalidating the rule - previously approved in *every* circuit - that a plaintiff can “prevail” and collect attorney’s fees by obtaining a favorable and enforceable *settlement*.<sup>3</sup> Concern among public interest lawyers could not be greater. If extended to other fee-shifting statutes employing similar language, the decision is expected to have several effects that will undermine the policies endorsed by Congress and the courts alike of encouraging citizen enforcement of federal laws to protect the environment and civil rights. Among these effects are:

1. Allowing agencies and corporations to elude compliance with the law until caught, and then simply comply once the violation is detected to moot the case and avoid all consequences of its noncompliance;
2. Permitting violators to test judicial resolve to enforce the law and, once it looks unfavorable, opt for “volun-

whether the litigation benefited the plaintiff and members of the class, and (2) whether the lawsuit acted as a catalyst, or was a material factor in the defendant’s decision to change the disputed practices and therefore provide, in substantial part, the relief sought.), and *Southwest Ctr. for Biological Diversity v. Carroll*, 182 F. Supp. 2d 944 (9th Cir. 2001) (also identifying a two-part test: (1) whether the lawsuit was causally linked - i.e., the lawsuit was a catalytic factor - to securing the benefit obtained, and (2) the benefit obtained was

tary compliance,” avoiding full consequences of its noncompliance.

3. Tilting the balance of litigation risk in some cases sharply against those who enforce the law in favor of those who violate it.
4. Depending on how it’s interpreted, *Buckhannon* may actually discourage settlements.

At issue in this article is whether the Supreme Court’s ruling in *Buckhannon* extends to the Clean Water Act.<sup>4</sup> It is important to note at the outset that applying the *Buckhannon* test is a two-part procedure. First, a court must decide whether *Buckhannon* applies to the statute at issue. If *Buckhannon* applies, the court must then consider the facts of the case in front of it and decide whether the resolution contains the necessary *judicial imprimatur* required by the Court. This article focuses only on the former aspect, because one needs the facts of a case to determine the latter aspect.

## II. The Clean Water Act’s Fee’s Provision

The fee-shifting provision of the Clean Water Act (CWA) states that a court may award costs of litigation “to any *prevailing or substantially prevailing party* whenever the court determines that such an

required by law as opposed to a gratuitous act by the defendant), with *Grano v. Barry*, 783 F.2d 1104, 1111 (D.C. Cir 1986) (requiring “some basis in law for the benefits ultimately received by [a successful] litigant”). *See also* *Buckhannon*, 532 U.S. at 627-28 (Ginsburg, J., dissenting)

3. *Buckhannon*, 532 U.S. at 604-606.

4. The Federal Water Pollution Control Act (hereinafter cited as the Clean Water Act) § 505, 33 U.S.C. §1365 (2001).

award is appropriate.”<sup>5</sup> There are two elements at work here. First, a court must determine whether a party qualifies as a “prevailing or substantially prevailing party.” Once determined in the affirmative, the statute appears to give the court complete discretion to award fees “whenever . . . appropriate.”<sup>6</sup> Each element is addressed below.

### A. “Prevailing or Substantially Prevailing Party”—The Arguments For and Against *Buckhannon*'s Extension

As mentioned, the Court's decision in *Buckhannon* involved only “prevailing party” language, a term the Court deemed “a term of art.”<sup>7</sup> Because the CWA's fees provision employs modifying language, the issue becomes whether *Buckhannon* extends to “substantially prevailing” parties.

*Buckhannon*'s ambiguity regarding its limitations left much room to argue either for or against extension. The following arguments are expected from plaintiffs and defendants on this issue.

#### 1. The Citation to *Marek v. Chesney* Argument

The Supreme Court recognized that congressional use of the term “prevailing party” was not unique to the statutes at issue in *Buckhannon* and provided examples of other statutes that employ the term.<sup>8</sup> However, when citing these exam-

ples, Justice Rehnquist, writing for the majority, inexplicably cited to the entire appendix of Justice Brennan's dissenting opinion in *Marek v. Chesney*,<sup>9</sup> and concluded by stating: “[w]e have interpreted these fee-shifting provisions consistently.” The *Marek* appendix catalogued over one hundred fee-shifting statutes containing virtually every variation of fee-shifting language, including the CWA.<sup>10</sup> Thus, champions for *Buckhannon*'s extension will conclude that the CWA falls within the ruling's reach.<sup>11</sup>

However, a strong argument can be made that the Court was simply citing to *Marek* to provide a comprehensive list of statutes containing “prevailing party” statutes. This explanation is consistent with *Buckhannon*'s failure to specifically cite non-“prevailing party” statutes and the Court's endorsement for extending its ruling to the Civil Rights Act of 1984, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney's Fees Award Act of 1976 and *Hensley*, all of which exclusively employ or discuss “prevailing party” language.

The argument that the Court's citation to the *Marek* appendix extends *Buckhannon* to the CWA should fail for several reasons. First, it places too much emphasis on a citation that is inconsistent with the listed examples. In addition, the Court's conclusion that it has interpreted “these” fee-shifting provisions

5. Clean Water Act §505(d).

6. This grant of discretion has become known as the “wherever appropriate” standard.

7. *Buckhannon*, 532 U.S. at 603.

8. *Id.* at 602-03 (citing The Civil Rights Act of 1964, 42 U.S.C. § 2002e-5(k); The Voting Rights Act Amendments of 1975, 42 U.S.C. § 19731(e); The Civil Rights Attorney's Fees Awards Act of 1976, 42

U.S.C. § 1988; and generally, *Marek v. Chesney*, 473 U.S. 1, 43-51 (1985)).

9. *Id.*

10. *Marek*, 473 U.S. at 33.

11. See *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265,274 (S.D.N.Y. 2002).

“consistently” lacks clarity. Does the term “these” refer to every statute listed in *Marek*? Or just to “prevailing party” statutes? Does the word “consistently” mean “exactly the same?” Certainly Justice Scalia would refute such a conclusion. In his concurrence, Scalia states that inconsistent interpretations “have been nurtured and preserved by our own misleading dicta (to which I, unfortunately contributed).”<sup>12</sup> Thus, a conclusion that *Buckhannon* extends to all the fee-shifting provisions listed in *Marek* rests on shaky ground.

## 2. The Argument that “Prevail” is the Operative Word

A second issue regarding *Buckhannon*’s extension is that “prevail” is the operative word “from which the term of art . . . derives its definition.”<sup>13</sup> Under this theory, the term “prevail” “serves as the predicate for the corresponding statutory interpretation the Court enunciated.”<sup>14</sup> Thus, attaching a definition and legal consequences to the root “prevail” means other fee-shifting provisions employing the same word must bear the same consequences. Using this argument, litigants trying to avoid paying attorney’s fees may extend *Buckhannon* to any statute utilizing the root word “pre-

vail,” including the CWA.

While *Buckhannon* does not indicate whether it adheres to this theory, the main issue in that case was whether a litigant attained a procedural achievement that met the legal definition of “prevail.” Thus, there seems to be some merit to the argument that “prevail” is the term a court should focus on. However, Black’s Law Dictionary, which the court seems to have affinity for,<sup>15</sup> defines “prevail” much more broadly than “prevailing party,” needing only “success”<sup>16</sup> instead of a judgment rendered by a court. If “prevail” meant simply “success” in every statute it was used, the *Buckhannon* interpretation and analysis is surely incorrect. Thus, this argument should fail for the simple fact that, if the root “prevail” is the word one relies on, the *Buckhannon* decision is completely without merit.

## 3. The Plain Language Argument

The CWA allows fee awards to two types of successful litigants: prevailing parties and substantially prevailing parties.<sup>17</sup> An argument could easily be made here that since the CWA includes “prevailing parties,” *Buckhannon* must apply. Appellate courts have unanimously extended *Buckhannon* to all statutes

12. *Buckhannon*, 532 U.S. at 621 (Scalia, J. concurring).

13. *Needlestrades*, 202 F. Supp 2d at 280-81.

14. *Id.* at 280.

15. In *Buckhannon*, 532 U.S. at 603, the Court principally relies on Black’s Law Dictionary for its definition of “prevailing party,” deeming it a “term of art.” In dissent, Justice Ginsburg criticizes the majority for relying too heavily on Black’s, stating that a contextual interpretation is best suited for the case at hand. *Id.* at 628. As one commentator

has recognized, “[i]f courts resolved controversial legal issues by the mechanical process of opening up *Black’s Law Dictionary*, our nation would not need judges interpreting the law.” Paolo Annino, *The Buckhannon Decision: The End of the Catalyst Theory and a Setback to Civil Rights*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 11, 12 (Jan-Feb. 2002).

16. BLACK’S LAW DICTIONARY 1188 (6th ed. 1991) (defining “prevail” as “[t]o be or become effective”; “to obtain”; and “[t]o succeed”).

17. Clean Water Act § 505(d).

employing such language.<sup>18</sup> It would be difficult to argue, in light of the Court's sanctioning of "prevailing party" as a legal term of art (and seemingly every court's adherence to the rule), that the term would not also extend to the CWA. Thus, those parties achieving *Buckhannon's* definition of prevailing party status should have little problem securing an award of fees by the courts.<sup>19</sup>

In addition, under the CWA, parties who achieve "substantially prevailing party" status are also entitled to an award of fees. Compared to the term "prevailing party," the question becomes whether "substantial" prevalence requires more success, the same level of success, or less success. Since it is impossible to achieve greater procedural success than a judicial order on the merits, any argument that a litigant must achieve success greater than "prevailing party" status must fail. There is ample room to argue the other two possible options.

*Black's Law Dictionary* fails to define "substantially prevailing party." It does, however, define the term "substantially" as "[e]ssentially; without material qualification; in the main; in substance. . . in a substantial manner."<sup>20</sup> No quantifiable modifiers such as "nearly," "almost," or

"approximately" are used - the definition is limited to substantive success. In contrast, the Supreme Court has recognized that a "substantially prevailing party" involves a certain "degree of success."<sup>21</sup> But to determine how much success is needed, we must turn to other sources.

In at least one instance, Congress has indicated that it treats the terms identically. The Internal Revenue Code (IRC) states, "[i]n general, the term 'prevailing party' means any party . . . which: (I) has *substantially prevailed* with respect to the amount in controversy, or (II) has *substantially prevailed* with respect to the most significant issue or set of issues presented."<sup>22</sup> Combined with the fact that *Black's* give no guidance on the issue, one could conclude that the two terms are synonymous.

However, one canon of construction instructs that statutory use of different terms evinces congressional intent to express different meanings.<sup>23</sup> There is a "basic assumption that Congress does not use different language in different provisions to accomplish the same result,"<sup>24</sup> unless Congress specifies otherwise, as exemplified by the IRC definition above. In the case of the CWA, Congress seems to scream this conclusion. Otherwise, why else would it include *both* terms in the fee-

18. *Richardson v. Miller*, 279 F.3d 1 (1st Cir. 2002); *J.C. v. Reg'l Sch. Dist.* 10, 278 F.3d 119, 123 (2d Cir. 2002); *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002); *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2002); *Booth v. Barton Co.*, 157 F.Supp. 2d 1178 (10th Cir. 2001). *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Co., Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002). *Brinckwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002).

19. See *Buckhannon*, 532 U.S. at 600.

20. BLACK'S LAW DICTIONARY, 1428 (6th ed. 1991).

21. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

22. 26 I.R.C. § 7430(c)(4)(A) (2002) (emphasis added).

23. See *Legacy Emanuel Hosp. & Health Ctr. V. Shalala*, 97 F.3d 1261, 1265 (9th Cir. 1996) ("The use of different language by Congress creates a presumption that it intended the terms to have different meanings.") (citing *Washington Hosp. Ctr. V. Bowen*, 795 F.2d 139, 146 (D.C. Cir. 1986)).

24. *U.S. v. Fiorillo*, 186 F.3d 1136, 1148 (9th Cir. 1999).

shifting language? Further, another canon of construction instructs that, when given two possible choices of statutory interpretation, the choice making the language ineffectual should be rejected.

So, although the “plain language” argument fails to decisively resolve the issue, one gets a sense that achieving the badge of “substantially prevailing party” requires something less than a “prevailing party” according to the CWA. An inquiry into the legislative history of the term in the CWA confirms that this is indeed what Congress intended.

#### 4. The “Explicit Statutory Authority” Argument; Legislative History

In *Buckhannon*, the Supreme Court provided litigants, who might otherwise fail to receive fees under the *Buckhannon* rationale, with a narrow window of escape: if the successful party can demonstrate that Congress provided “explicit statutory authority” for allowing fees, regardless of the plain language of the statute, a court may follow Congress’ alternate definition.<sup>25</sup> In *Buckhannon*, the Court found the legislative history of the two anti-discrimination statutes at issue were “at best ambiguous” with regards to supporting an award of fees under the “catalyst theory.”<sup>26</sup> The Court had previously noted that, with respect to the CWA, “[t]he legislative history . . . states explicitly

that the award of costs ‘should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict.’”<sup>27</sup> Such “explicit” language clearly shows a Congressional intent to expand an award of fees beyond *Buckhannon*’s definition of “prevailing party.” But if this proof is still not enough to persuade a court that the CWA’s fee-shifting provision provides a court authority to award fees for achieving less than “prevailing party” status, an in-depth look at the legislative history should suffice.

The original language of section 505(d) of the CWA mirrored that of section 307(f) of the Clean Air Act. The fee-shifting provisions of each statute stated that a “court may award costs of litigation whenever it determines that such award is appropriate.”<sup>28</sup> In *Ruckelshaus v. Sierra Club*, a case argued under the Clean Air Act (CAA), the claimants argued that “it was ‘appropriate’ for them to receive fees for their contributions to the goals of the Clean Air Act,” even though the court rejected all of their claims and their requested relief.<sup>29</sup> Chief Justice Rehnquist, again writing for the majority, rejected this argument, holding that “some degree of success” is required before it is “appropriate” to award fees.<sup>30</sup> According to the Court’s reading of the CAA’s legislative history, “some degree of success” can be achieved if the party’s suit “forced defendants to abandon illegal

25. *Buckhannon*, 532 U.S. at 602. For application of this principle, see *Oil, Chem. And Atomic Workers Int’l Union, AFL-CIO v. Dep’t of Energy*, 288 F.3d 452, 456-57 (D.C. Cir. 2002)(finding legislative history was inconclusive to merit a deviation from the *Buckhannon* position); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002).

26. *Id.* at 607, 608.

27. *Gwaltney*, 484 U.S. at 67 n.6 (quoting S. Rep. No. 92-414, p.81 (1971), 2 Leg. Hist. 1499).

28. Clean Water Act § 505(d); Clean Air Act § 307(b), 42 U.S.C. § 7607(f)(1970).

29. 463 U.S. 680, 681 (1983).

30. *Id.* at 680.

conduct, although without a formal court order.”<sup>31</sup> Further, the Court itself characterized the legislative history as a “rejection” of the “prevailing party” standard, and stated its belief that the provision “was meant to expand the class of parties eligible for fee awards from prevailing parties to. . . parties achieving *some success*, even if not major success.”<sup>32</sup>

In 1987, four years after *Ruckelshaus*, Congress voiced its support for the Court’s rationale, and clarified its intention by amending both statutes to include the phrase “prevailing or substantially prevailing party.”<sup>33</sup> The Senate Report describes the purpose of the amendment as follows:

“The purpose of. . . the amendment to section 505(d) is to clarify the circumstances under which costs of litigation may be awarded. In . . . *Ruckelshaus*. . . [the lower court held that] it was “appropriate” to award attorney’s fees. . . [to a party] even though the government prevailed on all issues. The Committee does not believe that it is reasonable or appropriate . . . [for a] party to pay the costs of an opposing party to a lawsuit when the opposing party has not prevailed on the issues. Accordingly, these amendments would limit the awarding of costs under the Clean Water Act

31. *Id.* at 686 n.8.

32. *Id.* at 687-88. The Court went on to state that “Congress intended to eliminate both the restrictive readings of “prevailing party” adopted in some . . . cases.”

33. *See* Clean Water Act 505(d).

to prevailing or substantially prevailing parties.<sup>34</sup>

Congress went on to clarify its intended range of parties who are eligible for fees under the “substantially prevailing” standard:

[The standard] is not intended to preclude the awarding of costs to a *partially* prevailing party with respect to the issues on which the party has prevailed, if such an award is deemed appropriate by the court.<sup>35</sup>

Thus the standard is the same now as it always was - it is appropriate for a court to award costs when a party obtains either (1) a court order, (2) a consent decree, (3) a private settlement, or (4) defendant’s abatement of a CWA violation before a verdict is reached (the “catalyst theory”).<sup>36</sup> Congress, spurred on by the *Ruckelshaus* decision, simply clarified the provision by including *partially* prevailing parties.

In summary, Congress consciously amended the CWA and *explicitly* intended the new language to provide fee awards to those parties achieving less than “prevailing party” status. By including the more flexible “substantially prevailing” language in section 505(d), Congress recognized the need to compensate parties for legitimate lawsuits which force compliance with the CWA.

34. S.Rep. No. 50, 99th Cong., 1st Sess. 33 (1985).

35. *Id.* (emphasis added).

36. *See* Gwaltney, 484 U.S. at 67 n. 6 (“[I]f as a result of a citizen proceeding and before a verdict is issued, a defendant abates a violation, the court

## B. “Whenever Appropriate”

After a court determines whether or not the petitioning party has “prevailed” or “substantially prevailed,” it then has discretion to award fees “whenever . . . appropriate.”<sup>37</sup> Because the *Buckhannon* decision does not affect how a court interprets this Congressional grant of discretion, only brief discussion follows. Several courts have addressed the issue, although the Supreme Court previously stated that “it is difficult to draw any meaningful guidance from [CCA’s] use of the word ‘appropriate.’”<sup>38</sup>

The Supreme Court interpreted the word “appropriate” as “specially suitable,” “fit,” or “proper,” taking the definition from Webster’s Dictionary.<sup>39</sup> The Court has made it clear that it is only “appropriate” to award fees when a party has “prevailed,” “substantially prevailed,” or been “successful.”<sup>40</sup> Additionally, the First Circuit has concluded that the “whenever appropriate” standard suggests great judicial latitude in awarding fees, stating: “[t]he purpose of an award of costs and fees . . . is to allocate the costs and litigation equitably, to encourage the achievement of statutory goals.”<sup>41</sup> Thus,

may award litigation expenses borne by the plaintiffs.”). This is the Court’s declaration that the “catalyst theory” is alive under the CWA.

37. 33 U.S.C. 1365(d) (2001). This standard has become known as the “whenever appropriate” standard.

38. Ruckelshaus, 463 U.S. at 683.

39. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 106 (1976)).

40. *Id.* at 683.

41. *Natural Res. Def. Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973) (emphasis added).

most courts tend to interpret this grant of discretion broadly, mechanically granting fees if the petitioning party achieves the required status.<sup>42</sup>

## III. Conclusion

The *Buckhannon* decision should not affect how courts award fees under the Clean Water Act (CWA). Any indication within the decision itself that tends to favor expansion is strictly dicta. Nor is it persuasive that in this context the word “prevail” should be the operative term. Simply, the plain language of the statute, combined with explicit language in the legislative history and prior Supreme Court interpretation, provide a convincing conclusion that the *Buckhannon* rationale is not applicable to the CWA. Thus, it is appropriate for a court to award attorney’s fees to any party achieving “prevailing” or “substantially prevailing” status under the CWA.

42. *Sierra Club v. EPA*, 322 F.3d 718, 726 (D.C. Cir. 2003) (it is appropriate to award fees under the CAA when plaintiff meets all prongs of the ‘catalyst theory’ test); *Southwest Center for Biological Diversity v. Carroll*, 182 F.Supp. 2d 944 (C.D. Cal. 2001) (it is appropriate to award fees under the ESA when plaintiff meets all prongs of the ‘catalyst theory’ test); *Loggerhead Turtle v. Volusia County*, 307 F.3d 1318 (11th Cir. 2002) (same theory as *Southwest Center for Biological Diversity*).

**C.W.A. Citizen Suit Resource Guide**

1. J. Douglas Klein, Does *Buckhannon* Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond, 13 Duke Envtl. L. & Pol'y F. 99 (2002).  
<http://www.law.duke.edu/journals/delpf/articles/delpf13p99.htm>.  
Discusses the applicability of the decision to fee-shifting provision in statutes such as the Equal Access to Justice Act and the Freedom of Information Act, and analyzes lower court decisions with respect to the particular level of success a litigant must achieve before an award may be given.
2. Jennifer T. Buckman & Jeffrey S. Ballinger, Court Tightens Standards for Recovering Attorneys Fees, Best, Best & Krieger LLP Environmental Law Update (2001).  
<http://bbklaw.com/CM/Environmental%20Law%20Update/newsletters44.asp#8>  
Discusses two cases, including *Buckhannon* that have made it more difficult to recover attorneys fees in environmental cases.
3. Marisa L. Ugalde, The Future of Environmental Citizen Suits After *Buckhannon* Board & Care Home, Inc. v. West Virginia Board of Health and Human Resources, 8 Envtl. Law. 589 (2002).  
Discusses the purpose and importance of citizen-suit and fee-shifting provisions in environmental statutes, and the development of the catalyst theory of attorneys fees which the Court overturned. The author concludes by examining the repercussions of the decision on future environmental litigation by citizen plaintiffs.
4. Kyle F. Loring, Note, The Catalyst Theory Meets the Supreme Court - Common Sense Takes a Vacation, 43 B.C. L. Rev. 973 (2002).  
Examines the impact of the decisions and recommends that Congress should enact legislation preserving the catalyst theory and that, in the meantime, courts should distinguish the fee-shifting provisions at issue in *Buckhannon* and preserve the catalyst theory in other statutory contexts.
5. *Kasza v. Whitman*, 325 F.3d 1178  
Plaintiff not entitled to attorney's under RCRA after *Buckhannon*.

