

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 3
Issue 2 1995

Article 2

1995

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Recommended Citation

Eugene P. Schmittgens Jr. and Douglas E. Nelson, *Lessons from Kindergarten: Recovering Remediation Costs under the Citizens' Suit Provision of the Resource Conservation and Recovery Act*, 3 Mo. Envtl. L. & Pol'y Rev. 63 (1995)

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Lessons From Kindergarten: Recovering Remediation Costs Under the Citizens' Suit Provision of the Resource Conservation and Recovery Act

by Eugene P. Schmittgens, Jr. and Douglas E. Nelson¹

"Put things back where you found them.
Clean up your own mess."

ROBERT FUIGHUM,
ALL I REALLY NEED TO KNOW I LEARNED IN
KINDERGARTEN

I. INTRODUCTION

On March 1, 1995, in *KFC Western, Inc. v. Meghrig*,² the Ninth Circuit Court of Appeals ruled that citizens could recover abatement costs under the citizens' suit provision of the Resource Conservation and Recovery Act (RCRA)³. The court in *KFC* extended the Eighth Circuit's holdings in *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*,⁴ and *United States v. Aceto Agricultural Chemicals Corp.*,⁵ which held the Administrator could recover her clean up costs under the equitable theory of restitution.

This paper will examine the rationale for extending the right of citizens' to recover abatement costs prosecuted under RCRA. The authors will also respond to common arguments made by parties opposing such actions.

In the final analysis, allowing citizens to recover their costs provides for a more efficient application of the statute by encouraging remediation of contaminated sites. Such encouragement will not only reduce the risk to the public by expediting cleanups, but will also prevent those culpable from escaping liability.

II. RCRA IS AN EQUITABLE STATUTE AND AN AWARD OF RESTITUTION IS WITHIN THE EQUITABLE JURISDICTION OF THE COURTS.

A. Analysis of RCRA's Citizens' Suit Provision.

In 1984, Congress amended RCRA by enacting the Hazardous and Solid Waste Amendments of 1984. Among the changes made was an "expansion of the citizens' suit provision" of RCRA.⁶

Prior to the amendments, RCRA's citizens' suit provision gave the district court jurisdiction to "enforce" any order or regulation "or to order the Administrator to perform such act or duty as the case may be."⁷ The 1984 Amendments expanded the Court's jurisdiction regarding orders it could issue. The expansion was designed to "complement, rather than conflict with, the Administrator's efforts to eliminate threats to public health and the environment, particularly where the Government is unable to take action because of inadequate resources."⁸ Congress explicitly recognized that a citizen can sue under the section "pursuant to the standards of liability established under Section 7003."⁹ Courts which fail to recognize the right to restitution fail to enforce the Congressional intent behind RCRA and to follow the precedent of a number of federal courts.

The "citizens' suit" provision of RCRA, set out at 42 U.S.C. § 6972(a), now defines the jurisdiction of a court in a citizen suit action thusly:

The district court shall have jurisdiction, without regard to amount and controversy or the citizenship of the parties, ... to restrain any person who has contributed or is contributing to the past or present handling,

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The authors gratefully acknowledge the assistance of Professor Douglas Williams of St. Louis University School of Law for his insights in the drafting of this article.

² 49 F.3d 518 (9th Cir. 1995). Immediately prior to this volume of the *Missouri Environmental Law & Policy Review* going to print, the Supreme Court of the United States decided *Meghrig v. KFC Western, Inc.* It was, therefore, impossible to incorporate the Supreme Court's decision into this article. For those with interest, the Supreme Court's decision can be found at No. 95-83, 1996 WL 117012 (U.S. Mar. 19, 1996).

³ 42 U.S.C. § 6901.

⁴ 810 F.2d 726 (8th Cir. 1986).

⁵ 872 F.2d 1372 (8th Cir. 1989).

⁶ H.R. REP. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5612.

⁷ *Walls v. Waste Resource Corp.*, 761 F.2d 311, 315 (6th Cir. 1985).

⁸ H.R. REP. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), reprinted in U.S.C.C.A.N. 5576, 5612.

⁹ *Id.*

storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2)...¹⁰

While § 6972(a) allows any person to commence a civil action on his own behalf, § 6973 addresses the right of action given to the United States. Section 6973 provides:

The Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

Pursuant to § 6973, the Administrator may seek an order to "restrain such person from such handling, storage, treatment, transportation or disposal."¹¹ The Administrator may also invoke other kinds of equitable relief, such as asking the court "to order such person to take such other action as may be necessary, or both."¹²

The language of RCRA's citizens suit provision is nearly identical to that of the "imminent hazard" provision of § 6973. Given this nearly identical language, courts have concluded that the "regulatory language referring to § 7003 must also apply to § 7002(a)(1)(B) because the two provisions are nearly identical."¹³ Accordingly, the remedies available to private parties pursuant to § 7002(a)(1)(B) closely track those that are available to EPA under § 7003.

In fact, as the court in *Middlesex County Board of Chosen Freeholders v. New Jersey*¹⁴ noted, the 1984 amendment to § 7002 "is designed to provide a private means of obtaining the same relief that the EPA Administrator has previously been authorized to seek under RCRA by § 7003."¹⁵ Thus, cases which hold that § 7003 provides for the equitable remedy of restitution are relevant to actions brought pursuant to § 7002(a)(1)(B). Unfortunately for the citizen, however, many courts have failed to afford them the equitable remedy of restitution.

B. Cases Interpreting RCRA's Remedies.

Pursuant to § 7003, courts have ruled that restitution will lie to reimburse the government for costs expended in remediating a site and to ensure that justice is done. In *United States v. Northeastern Pharmaceutical & Chemical Co.*,¹⁶ the Eighth Circuit found that restitution for costs expended in remediating contamination is appropriate relief under RCRA § 7003. There it stated that

"[w]hen the government seeks to recover its response costs under CERCLA or its abatement costs under RCRA it is in effect seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances."¹⁷

Some discussion of the facts in *NEPACCO* is appropriate. *NEPACCO* disposed of wastes on a farm south of Verona, Missouri.¹⁸ Thereafter, the United States received an anonymous tip that wastes had been disposed of at the farm and that the geology of the farm was not suitable for such disposal.¹⁹ The government undertook remediation of the property. Suit was later filed against a number of parties including the owner of the plant, *NEPACCO*, the generator of the wastes, the corporate officers who arranged for the disposal of the wastes, and the transporter of the waste. The United States sought reimbursement of response costs under RCRA § 7003. The district court held that recovery of response costs was comparable to restitution and thus an equitable remedy.²⁰

The RCRA count was an alternative theory of recovery for the government.²¹ Although the Court remanded the case to consider whether response costs under CERCLA were available to the United States, the Court stated that "because the government also sought to recover the response costs it incurred before the enactment of CERCLA in the form of equitable relief as abatement costs under RCRA, on remand the district court could grant the government such

¹⁰ 42 U.S.C. § 6972(a).

¹¹ 42 U.S.C. § 6973(a).

¹² *Id.*

¹³ *Connecticut Coastal Fishermen v. Remington Arms*, 989 F.2d 1305, 1315 (2nd Cir. 1993) (citing *Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Authority*, 888 F.2d 180, 187 (1st Cir. 1989)), *cert. denied*, 494 U.S. 1029 (1990).

¹⁴ 645 F. Supp. 715 (D.N.J. 1986).

¹⁵ 645 F. Supp. at 721.

¹⁶ *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986).

¹⁷ 810 F.2d at 749 (emphasis added).

¹⁸ *Id.* at 729-30.

¹⁹ *Id.* at 730.

²⁰ *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823 (Mo. Cl. App. 1984).

²¹ *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 737-38 (8th Cir. 1986).

costs as a matter of equitable discretion."²² Thus, the recovery of abatement costs under the identical language of § 7003 is clearly established.

Restitution as a viable remedy under RCRA is supported by other precedent. In *United States v. Price*,²³ the federal government sought injunctive relief to remedy contamination caused by the past disposal of hazardous substances at a landfill. The government also sought to have the landfill fund studies regarding threats to the public water supply and to provide for alternative water supplies to those whose wells have been contaminated.²⁴ A preliminary injunction was denied.²⁵

On appeal, while affirming the denial of the injunction, the Third Circuit ruled that the trial court had "expressed an unduly restrictive view of its remedial powers under traditional equitable doctrines as well as under the endangerment provisions of RCRA."²⁶ As such, the decision examined at length the power of a court to "fashion any remedy deemed necessary and appropriate to do justice in the particular case."²⁷

Although the court found that the district court had authority under § 7003 to order defendants to fund the study, it sustained the denial of the preliminary injunction as within the district court's

discretion.²⁸ It held that a more practical solution was to have EPA undertake the study since "[r]eimbursement could thereafter be directed against those parties ultimately found to be liable."²⁹

In *U.S. v. Conservation Chemical Co.*,³⁰ the court interpreted § 6973 to give "[t]he court ... broad authority under § 7003 [§ 6973] to grant the equitable relief necessary to eliminate the endangerment."³¹ The court went on to discuss that RCRA imposed joint and several liability and gave the court broad power to order whatever relief was necessary to abate the applicable hazard.³² Further, the United States argued the costs were recoverable in an action pursuant to § 6973 because that section authorized prohibitory injunctions and "such other action as may be necessary."³³ The court found this language granted the United States "the full equity powers of the federal courts in the effort to protect the public health, environment, and public water supplies from the pernicious effects of toxic wastes."³⁴ The court concluded that the government, in seeking relief in the form of recovery of its costs, sought the equitable remedy of restitution. It concluded this was appropriate relief in an action under § 6973.³⁵ The court expressed the view that "unlike response costs under § 107

of CERCLA (42 U.S.C. § 9607), such cost recovery devolves purely from the court's exercise of equitable discretion and must necessarily await a full and detailed analysis of the equities of the case."³⁶

The decision in *Conservation Chemical* is consistent not only with a correct reading of *NEPACCO*, but also with the Eighth Circuit's holding in *U.S. v. Aceto Agricultural and Chemicals Corp.*³⁷ The court in *Aceto* held that the express language of § 6973 permits suit as soon as the United States receives information indicating a potential endangerment.³⁸ The court stated that the purpose of the statute is to "give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and environment."³⁹ The court went on to emphasize that RCRA, much like CERCLA, is a remedial statute which should be liberally construed.⁴⁰ Making restitution available is a natural result of that conclusion. In fact, in *Aceto*, the court stated "that RCRA's imminent and substantial endangerment language does not require the EPA to file and prosecute its RCRA action while the endangerment exists. In a context of a reimbursement action, this would be an 'absurd and unnecessary' requirement."⁴¹ Any holding which does not

²² 810 F.2d at 750.

²³ 688 F.2d 204 (3d Cir. 1982).

²⁴ 688 F.2d at 207-8.

²⁵ *Id.* at 208.

²⁶ *Id.* at 211.

²⁷ *Id.*

²⁸ 688 F.2d 204.

²⁹ *Id.* at 214. Moreover, the *Price* decision was coined by Congress. The Senate Report on the 1984 Amendments to RCRA quoted with approval the statement found in *Price* (688 F.2d at 213-214) that § 7003 is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." S. REP. NO. 284, 98th Cong., 1st Sess. 59 (1984).

³⁰ 619 F. Supp. 162, 199 (W.D. Mo. 1985).

³¹ 619 F. Supp. at 199, citing S. REP. NO. 284, 98th Cong., 1st Sess. 59 (1984) [stating § 6973 "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes"].

³² *Id.*

³³ *Id.* at 201.

³⁴ *Id.* (emphasis added).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 872 F.2d 1373 (8th Cir. 1989).

³⁸ *Id.*

³⁹ 872 F.2d at 1383.

⁴⁰ *Id.*

⁴¹ *Id.*

allow restitution discourages private persons from themselves bringing suit based on an "imminent and substantial" danger from hazardous materials.

C. Application of Equitable Principles to RCRA's Citizens' Suit Provision.

The decisions in *Price*, *Conservation Chemical*, *Aceto*, and *NEPACCO* did not blaze new ground. Rather, the courts adopted a long line of holdings beginning with the Supreme Court's decision in *Porter v. Warner Holding Co.*⁴² There, the court reversed an appellate court decision which held there was no right to restitution under a statute which granted the authority to sue "for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."⁴³ The Supreme Court held:

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. ... Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mold each decree to the necessities of the particular case." ... It may act so as to adjust and

reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. ...

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and *inescapable* inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the [applicable law] may properly be entered by a District Court once its equity jurisdiction has been invoked ...⁴⁴ Similarly, in *Wyandotte*

Transportation Co. v. United States,⁴⁵ restitution was granted to the United States for the costs of removing, from a waterway, a sunken vessel containing chlorine gas. Suit was filed pursuant to the Rivers and Harbors Act⁴⁶ seeking to recover sums it expended in removing a barge from the Mississippi.⁴⁷ Although § 15 of the Act gave the United States the authority to remove the vessel and further provided for penalties or injunctive relief, there was no express right to recover the costs expended in removing the vessel.⁴⁸

Summary judgment was entered against the United States. The Supreme Court reversed, holding:

Having properly chosen to remove such vessel, the United States should not lose the right to place responsibility for removal upon those who negligently sank the vessel. ... *Wyandotte* was unwilling to effectuate removal itself. It would be surprising if Congress intended that, in such a situation, the Government's commendable performance of *Wyandotte's* duty must be at the Government's expense.⁴⁹

Finally, in *Reserve Mining Co. v. Lord*,⁵⁰ the court held that reimbursement for expenditures by the United States in removing pollutants discharged into Lake Superior in violation of the Federal Water Pollution Control Act was within the jurisdiction of the district court. The district court, on remand, found the polluter liable for interim filtration expenses incurred by the United States, relying in part upon *Wyandotte*.⁵¹

It is extraordinarily clear that a court

⁴² 328 U.S. 395 (1946).

⁴³ 328 U.S. at 397.

⁴⁴ *Id.* at 398 (emphasis added).

⁴⁵ 389 U.S. 191 (1967).

⁴⁶ 33 U.S.C. § 409.

⁴⁷ 389 U.S. 191.

⁴⁸ 33 U.S.C. § 409.

⁴⁹ 389 U.S. at 204-5.

⁵⁰ 529 F.2d 181, 184 (8th Cir. 1976) (en banc).

⁵¹ See *United States v. Reserve Mining Co.*, 408 F. Supp. 1212, 1214-16 (D. Minn. 1976).

has jurisdiction to award abatement or remediation costs in an action brought under RCRA's § 7003. Since both Congress has stated that a citizen may sue "pursuant to the standards of liability established under Section 7003"⁵² and the courts have long ruled that § 7003 will allow for the recovery of money expended to remediate a condition, it necessarily and logically follows that a cause of action for restitution of costs under § 7002(a)(1)(B) must lie.

Further, "when the same word or phrase is used in different parts of a statute, [a] court presumes that word or phrase has the same meaning throughout."⁵³ Courts should apply this rule to proceedings brought under § 7002. To do so would materially advance the purpose of § 7002(a)(1)(B) to aid in the remediation of contaminated sites.

Both §§ 7003 and 7002(a)(1)(B) gives the courts authority to issue prohibitory injunctions and to order "such other action as may be necessary."⁵⁴ Section 7002, therefore, like § 7003 necessarily invokes "the full equity powers of the federal courts in the effort to protect public health, the environment, and public water supplies from the pernicious effects of toxic wastes."⁵⁵

A court's decision refusing to award restitution penalizes innocent landowners for performing another's duty. As such, citizen plaintiffs, like the government in *Wyandotte*, perform the duties of defendants. Surely, Congress did not intend an innocent purchaser to bear the expense of performing another's duty.

Courts which have examined available equitable remedies, have universally held the right to restitution exists. In

United States v. Valentine,⁵⁶ the United States reached a settlement agreement with a number of defendants in a § 7003 action. Thereafter, the settling defendants sought to file cross-claims and third-party complaints against a number of other defendants and other third parties found by the district court to be liable for fifty to ninety percent of the problem. The theory of the cross-claims and third-party complaints were premised upon theories of contribution and indemnification. The non-settling defendants and others opposed the motion asserting RCRA did not allow such actions.

The district court succinctly summarized the matter by saying:

In the context of this litigation, if Settling Defendants' motion for leave is granted, the Settling Defendants will recover only that appropriate share of cleanup costs attributable to responsible Non-settling Defendants and third parties. Conversely, if the Settling Defendants' motion for leave is denied, Settling Defendants assume the entire cleanup costs, but will have no recourse to recover any portion of those costs attributable to Non-settling Defendants or third parties who contributed to contamination of the Site, and who otherwise are liable to the government for remediation of the Site. In other words, denial of the motion will effectively immunize the Non-Settling Defendants and other responsible parties (who may have generated from fifty to

ninety percent of the materials to be processed from any liability for cleanup costs.⁵⁷

The court found that a right to contribution or indemnity existed.⁵⁸ Rejecting the non-settling parties' premise that there is no right to contribution since the statute does not expressly grant it, the court concluded that

defendants have a right to contribution in actions brought under Section 7003. That statute grants the Court broad authority to *fashion whatever equitable remedies are necessary to ensure the protection of the public health and environment*. While sparse, the statute's legislative history confirms this broad grant of authority. Moreover, recognizing a right to contribution would comport with the purpose of the statute and serve the unique federal interest in the expeditious settlement of RCRA actions. Therefore, a right to contribution is both implicit in Section 7003 and must be recognized as a matter of federal law.⁵⁹

Examining the jurisdictional authority of § 7003 to "order such person to take such other action as may be necessary," the court followed the logic of *Price*, and its progeny, to grant settling defendants the relief sought, concluding:

It is plain, therefore, that Section 7003 empowers the Court to grant the full range of equitable remedies and also all remedies traditionally provided under the common law of nuisance, at

⁵² H.R. REP. NO. 198, 98TH CONG., 1ST SESS. 1983, reprinted in 1984 U.S.C.C.A.N. 5576.

⁵³ *S&M Investment Co. v. Tahoe Regional Planning Agency*, 911 F.2d 324, 328 (9th Cir. 1990).

⁵⁴ 42 U.S.C. § 6972.

⁵⁵ *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982).

⁵⁶ 856 F. Supp. 627 (D. Wyo. 1994).

⁵⁷ 856 F. Supp. at 630.

⁵⁸ The court, in footnote 3 of its opinion, addressed whether contribution or indemnity was appropriate. The Settling Defendants' proposed pleadings request both contribution and indemnity from the cross-claim and third-party defendants. For the same reasons the Court holds that a right to contribution exists under RCRA, the Court also recognizes a right to indemnity, but acknowledges that they are mutually exclusive remedies. See RESTATEMENT (SECOND) OF TORTS § 886A cmt. a (1965); *Schneider National Inc. v. Holland Hitch Co.*, 843 P.2d 561 (Wyo. 1992). The Court expressed no opinion as to the precise term either contribution or indemnity may take in this case. *United States v. Valentine*, 856 F. Supp. 627, n.3 (D. Wyo. 1994).

⁵⁹ 856 F. Supp. at 632 (emphasis added).

least so long as such relief serves to protect the public health and environment. ... Accordingly, courts have awarded the equitable remedy of restitution in cases brought under Section 7003. ... Like restitution, contribution is an equitable remedy designed to prevent unjust enrichment and there is no legitimate reason for courts to grant the former remedy, and yet deny the latter.⁶⁰

The court concluded that allowing the third-party plaintiffs' requested relief would advance the purpose of RCRA by ensuring prompt cleanups. On that issue the court held:

Further, granting a right to contribution will serve the purposes underlying Section 7003. ... Contribution will encourage early settlements between defendants and the government by granting defendants an opportunity to litigate the liability of other parties and possibly recoup their settlement payments at a later date. ... Without contribution, defendants either will be forced to bear the full cost of cleanup despite the existence of other responsible parties or will be deterred from settling until after the share of every potentially responsible party has been litigated.⁶¹

The position of the citizen seeking restitution often is parallel to the settling

defendants in *Valentine*. Plaintiffs usually are directed by some public agency to remediate the property, although often, they never contributed to the problem. Denying restitution effectively immunizes defendants from any liability. By undertaking the remediation of the site, without first litigating the liability of other parties, the risk of harm to the public or the environment is reduced and efficiently leaves the issue of reimbursement from other parties to a later date. Therefore, under the reasoning above, it is obvious that citizens must be allowed to sue to recover their abatement costs.

Recently, the 9th Circuit in *KFC Western, Inc. v. Meghriq*,⁶² while relying on the 8th Circuit decision in *NAPACCO and Aceto*, ruled that a private party can sue for restitution of clean up costs under RCRA to recover environmental clean-up costs from prior owners of the contaminated property.

In this case, KFC purchased a piece of property in 1975.⁶³ While constructing a restaurant, contamination was discovered in 1988.⁶⁴ At that time KFC was ordered by the City of Los Angeles to clean up the property at a cost of approximately two hundred eleven thousand dollars (\$211,000.00). KFC brought an action under RCRA §7002(a)(1)(B).⁶⁵ The defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) relying on two issues: 1) There is no "imminent and substantial endangerment" because KFC has completed the clean-up three years before filing the action; and 2)

RCRA authorizes suits for injunctive relief only, not for damages. The district court granted the motion.⁶⁶

KFC then filed an amended complaint which alleged that the contaminated soil, at the time of the clean-up, presented a "imminent and substantial endangerment" to public health and the environment by threatening surrounding groundwater and potentially risking the health of the people expected to use the property.⁶⁷ The district court again granted the defendant's motion to dismiss and KFC appealed.⁶⁸

The 9th Circuit agreed with KFC that RCRA authorized citizen suits with respect to contamination that in the past posed imminent and substantial danger.⁶⁹ The 9th Circuit, in taking its position, relied on the 8th Circuit's interpretation of § 7003. The court relied on *Aceto*, particularly the language suggesting that the section "does not require the EPA to file and prosecute its RCRA action while the endangerment exists."⁷⁰

Clearly, the 9th Circuit not only considered the language in *Aceto*, but also the broad authority of courts to grant all relief necessary to insure the protection of the public health and environment. The court, however, felt that an action for injunctive relief would defeat that purpose.⁷¹

The court went on to hold that KFC was authorized under RCRA to obtain restitution relying on the "such other actions as may be necessary" language of 42 U.S.C. § 6972(a).⁷² In reaching

⁶⁰ *Id.* at 633.

⁶¹ *Id.* at 634. *Cf. Polger v. Republic National Bank*, 709 F. Supp. 204, 209 [D. Colo. 1989] ("If . . . owners believe that they will not be allowed to recover from others who actually generated or deposited the waste, they may decide to ignore a hazardous waste site in the hope that federal or state authorities will either not discover the waste, or will be unsuccessful in pinning liability, on them.").

⁶² 49 F.3d 518 [9th Cir. 1995].

⁶³ 49 F.3d at 519.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 519-20.

⁶⁹ 49 F.3d at 521.

⁷⁰ *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1383 [8th Cir. 1989].

⁷¹ *KFC Western, Inc. v. Meghriq*, 49 F.3d 518, 521 [9th Cir. 1995].

⁷² 49 F.3d at 527.

that conclusion, the court considered the intent of the citizen suit provision, and held that it should be governed by the same standard of reliability as governmental actions.⁷³

Because the 8th Circuit has recognized the administrative rights to sue under § 6973 for restitution of costs incurred it necessarily follows that the identical language of the citizens' suit provision should have the same result.⁷⁴

The court rejected arguments of the defendant as to the material differences existing between the citizen suit provision set out in §§ 6972(a)(1)(B) and 6973, including: a) different notice requirements for filing actions; b) lack of limitation period for RCRA citizen suits is evidence of the unavailability of reimbursement actions under RCRA; and c) case law interpreting §6972 have denied the right to recover abatement costs.

With respect to the case law, the court disregarded *Walls v. Waste Resources Corp.*⁷⁵ and *Environmental Defense Fund, Inc. v. Lamphier*,⁷⁶ as inappropriate because they were brought under the predecessor section to § 6972(a)(1)(b).⁷⁷ The court went on to hold that it disapproved of the other district court's decision holding against restitution instead of relying on the interpretation of the 8th Circuit's decision regarding § 6973.⁷⁸

This decision allowed an "innocent" party who was a "responsible" party under the applicable state or local law,

the ability to bring an action under RCRA. The majority in *KFC* noted the importance stating that "the government often orders innocent parties, so-called 'responsible parties' under the statute, to remedy discovered contamination on their property even though they did not cause the contamination or have any ties to the property when the contamination occurred."⁷⁹ For this reason alone, equity demands that restitution be sanctioned by the courts.

Other courts, while examining their equitable authority, have specifically held that § 7002 allows for restitution. For example, in both *Lincoln Properties v. Higgens*⁸⁰ and *Bayless Investment and Trading Company v. Chevron U.S.A., Inc.*,⁸¹ the courts held that § 7002 provides for the recovery of remediation costs expended under the equitable remedy of restitution. Both cases provide a well reasoned analysis of the purposes of the section, as well as the authority granted district courts to decide cases brought pursuant to the section. For example, in *Lincoln Properties*, the plaintiff filed a complaint which contained a "RCRA claim for injunctive relief and restitution of abatement costs."⁸² The court granted the plaintiff's motion for summary judgement on the RCRA claim.⁸³ Nowhere in the decision was the claim for restitution dismissed or severed from the court's order on the motion. In fact, the court specifically held that the injunction could require "the same sort of financial contribution as the court could

award under CERCLA" and, citing, *Price*, that defendants "may be required to expend money", in order to comply with the terms of an injunction.⁸⁴ Thus, the plaintiffs claim for reimbursement was allowed by the court's order.

The decision in *Bayless* is even clearer. There the court ruled that

[w]ith regard to *Bayless*' prayer for reimbursement costs, the court feels that this remedy is also actionable pursuant to RCRA [§] 7002. ... As noted above, the citizen-suit provision of RCRA, that Congress added in 1984, was designed to "invigorate citizen litigation," and "provide a private means of obtaining the same relief that the EPA Administrator had been previously been authorized to seek under RCRA. ... The statutory enablers for private individual's suit and the government's suit are virtually identical. ... and as such, no compelling reason exists to treat a "private attorney general" any differently from a "public attorney general" when they seek to promote the "prompt, private party clean up" of environmental contamination.⁸⁵

Attempts to mischaracterize the plain language of the decisions in both *Lincoln Properties* and *Bayless Investment* should be rejected.

Other cases also offer guidance. In

⁷³ *Id.* at 527-28.

⁷⁴ See *KFC Western, Inc. v. Meghriq*, 49 F.3d 518, 521 (9th Cir. 1995). See also *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (administrator may collect reimbursement after government cleaned up contaminated property); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986) (administrator may collect an equitable award of abatement costs for persons who non-negligently contributed to endangerment).

⁷⁵ 761 F.2d 311 (6th Cir. 1985).

⁷⁶ 714 F.2d 331 (4th Cir. 1983).

⁷⁷ *KFC Western, Inc. v. Meghriq*, 49 F.3d 518, 523 (9th Cir. 1995).

⁷⁸ 49 F.3d at 523.

⁷⁹ *Id.*

⁸⁰ No. CIV.5-91-760DFL/GGH, 1993 WL 217429 [E.D. Cal. Jan. 21, 1993].

⁸¹ No. CIV.93-0704 PHX/PGR, 1994 U.S. Dist. LEXIS 12190 [D. Ariz. May 24, 1994].

⁸² 1993 WL 217429, *8.

⁸³ *Id.* at *26.

⁸⁴ *Id.* at *16.

⁸⁵ No. CIV.93-0704 PHX/PGR, 1994 U.S. Dist. LEXIS 12190, *12 [D. Ariz. May 24, 1994] (emphasis added).

Zands v. Nelson,⁸⁶ the court ruled that a citizens suit, filed to recover costs of remediation of petroleum contaminated soil, may be maintained under § 7002 as between successive landowners of the property. In an extensive analysis of the issue, the court determined that the language of the section and its relationship to the other provisions of RCRA, in light of the legislative history and congressional intent, is such that an action may be maintained. The court held that a cause of action between successive landowners advances RCRA's purpose to protect the environment, to prevent the dangers associated with solid waste, and to provide appropriate incentives for prompt cleanup when waste presents an imminent and substantial endangerment.⁸⁷

In *The Pantry v. Stop-N-Go Foods, Inc.*,⁸⁸ the court determined, in dicta, that RCRA allows for the recovery of remediation costs against any person who has contributed or is contributing to the past or present disposal of any solid or hazardous waste. While the case was resolved under a Kentucky state statute, the court examined relevant RCRA provisions to determine the defendant's

liability under the Kentucky statute since no court had ever ruled on the provision.⁸⁹

Clearly, not all courts have rejected § 7002 citizens suit claims to recover abatement costs.⁹⁰ There is no good reason to reject citizen's claims for restitution in the present case since the identical language of § 7003 has been found to provide the remedy.

Although review of the specific language of § 6973(a) reveals that equitable restitution is not specifically set forth as a remedy, courts have liberally construed this section to allow restitution. However, courts often construe the language of § 6972(a)(1)(B) narrowly, rejecting equitable restitution because it is not specifically set forth as a remedy. That interpretation is misplaced because courts applying substantive equity and courts applying the law of unjust enrichment are both applying a law of "good conscience."⁹¹

D. Cases Holding the Right to Restitution Does Not Exist.

While restitution has consistently been held to be an equitable remedy available under § 6973, the same was

not true for private plaintiffs prior to the adoption of the current version of § 6972(a)(1)(B). The line of cases which interpret § 6972(a)(1)(B) as not including a right to restitution originated out of two cases, *Environmental Defense Fund, Inc. v. Lamphier*⁹² and *Walls v. Waste Resource Corp.*⁹³ Neither case addresses the current language of § 6972(a)(1)(B).⁹⁴ Prior to 1984, the only jurisdictional powers a court had under the provision was to "enforce such regulation or order or to order the Administrator to perform such act or duty as the case may be."⁹⁵ The powers of the district courts were very limited in scope. Clearly, as the jurisdictional powers of the courts were expanded after the amendments, there is little in the case which may be of guidance here.

A few district courts have addressed this issue, but also in a manner that fails to deal with current law. For example, in *Commerce Holding Co., Inc. v. Buckstone*,⁹⁶ the court rejected the argument that the statute provided a private action for damages. But the court in *Commerce* relies in part on § 6972(a)(1)(B) as interpreted prior to the 1984 amendments. Neither *Commerce* nor any of

⁸⁶ 797 F. Supp. 805 [S.D. Cal. 1992] [*Zands II*].

⁸⁷ 797 F. Supp. at 816. See also *Zands v. Nelson*, 779 F. Supp. 1254 [S.D. Cal. 1991] [*Zands I*].

⁸⁸ 796 F. Supp. 1171 [S.D. Ind. 1992].

⁸⁹ 796 F. Supp. at 1178.

⁹⁰ See also *Pine v. Shell Oil Co.*, CIV.A. No. 92-0346B, 1993 WL 389396 [D.R.I. Aug. 23, 1993].

⁹¹ D. DOBBS, LAW OF REMEDIES 370 [2d. ed. 1993].

⁹² 714 F.2d 331 [4th Cir. 1983].

⁹³ 761 F.2d 311 [6th Cir. 1985]. The *KFC* decision rejected *Walls* and *Lamphier* holding that "they do not address. . . actions brought under § [7002](a)(1)(B). Rather, they concern actions brought under the predecessor to § [7002](a)(1)(A), formerly 42 U.S.C. § 6972(a). . ." 49 F.3d 518, 523 [9th Cir. 1995].

⁹⁴ Most defendants argue blind reliance on the holding of *Walls*. *Walls* interpreted the long since amended language of RCRA. A number of courts have interpreted the current section, citing a number of cases which purportedly stand for the premise that § 7002 does not allow a court to award restitution for abatement costs expended in remediating the contamination. 761 F.2d 311 [6th Cir. 1985]. Some comment on the common cases cited will further illustrate the reasons the authority should be rejected.

For example, citations to *Mulcahey v. Columbia Organic Chemical Co.*, 29 F.3d 148 [4th Cir. 1994], *Polcha v. AT&T Nassau Metals Corp.*, 837 F. Supp. 94 [M.D. Pa. 1993], and *Chartrand v. Chrysler Corp.*, 785 F. Supp. 666 [E.D. Mich. 1992], are misplaced. *Mulcahey's* supposed holding was a statement by the court that plaintiffs agreed, in their challenge to defendant's removal petition, that they could not assert tort claims in the environmental statutes.

Similarly, the *Polcha* case was initially filed in the state court to recover for personal injury suffered as a result of exposure to hazardous materials. The court ruled that personal injury damages cannot be recovered under RCRA.

The *Chartrand* decision is premised upon § 7002 (a)(1)(B). Restitution claims are filed pursuant to § 7002(a)(1)(A). Thus, the decision provides no guidance.

The same can be said of the *Acme Printing Inc. v. Monard, Inc.*, 870 F. Supp. 1465 [E.D. Wis. 1994] and *Milbut v. Hi-Score Plant Food Co.*, Civ. A. No. 91-2008, 1992 WL 396774 [E.D. Pa. Nov. 4, 1992]. The holding in *Acme* was premised on § 7002(a)(1)(A). In *Milbut* the court erroneously holds that it can order "prospectiverelief" presumably pursuant to § 7002(a)(1)(A). 1992 WL 396774, *4. This misconstrues the section and is an unduly restrictive reading of the Act.

In *Triffler v. Hopf*, No. 92 C 7193, 1994 WL 643237 [N.D. Ill. Dec. 24, 1994], the court was convinced by the authority citing *Walls v. Waste Resource Corp.*, 761 F.2d 311 [6th Cir. 1985]. As was discussed previously, *Walls* interpreted the prior language of § 7002.

⁹⁵ 42 U.S.C. § 6972 (1978), amended by 42 U.S.C. § 6972 (1984).

⁹⁶ 749 F. Supp. 441, 445 [E.D.N.Y. 1990].

the other decisions directly considered the application of the cases interpreting § 6973.⁹⁷

The court in *Kaufman and Broad-South Bay v. Unisys Corp.*⁹⁸ followed that erroneous approach, dismissing the action of the plaintiff in seeking damages or restitution because it would imply a private remedy to 6972(a)(1)(B). By referencing language from the pre-amendment decision in *Lamphier*, the court implied that it was considering § 6972(a)(1)(B) prior to the 1984 amendments. The plaintiff in *Kaufman* argued that the court should follow the cases interpreting § 6973 which have held that restitution is recoverable. However, the court, with no analysis of the § 6973 cases, or the rationale articulated in *Conservation Chemical* and *Aceto*, elected not to consider this argument.⁹⁹

The final case which relied on *Walls* is *Portsmouth Redevelopment & Housing Authority v. BMI Apartments Associates*.¹⁰⁰ The court, while acknowledging the amendment to § 7002, still relied upon *Walls*, *Kaufman* and *Commerce Holding*.

Unless a Court addresses the obvious, significant differences between the former § 7002 and the amendment, the weight of authority to be given the cases cited is marginal. Merely characterizing an award in restitution as something other than equitable relief ignores the voluminous authority, including Supreme Court precedent, to the contrary.¹⁰¹

III. POLICY CONSIDERATIONS ALSO REQUIRE THAT CITIZENS BE ALLOWED TO RECOVER THEIR REMEDIATION COSTS UNDER THE CITIZENS' SUIT PROVISION OF RCRA.

The broad statutory purpose of RCRA is clear. Congress has established a national goal of protecting the public from the ills associated with improper handling of hazardous wastes:

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Wastes that are nevertheless generated should be treated, stored or disposed of so as to minimize the present and future threat to human health and the environment.¹⁰²

This policy has been recognized by courts interpreting § 6973.¹⁰³ Allowing restitution for costs expended by the citizen in remediating the property is entirely consistent with that purpose.

Citizens prosecuting actions under § 7002 seek to have the ability to perform a cleanup first, and then recover the costs expended. This approach is recognized under the interpretation of § 6973. It allows for prompt cleanup, cheaper cleanup, and faster protection to the public and environment.

Numerous policy arguments further the broad reading of § 6972(a)(1)(B) to allow for restitution claims upon cleanup. For example, in many states, there are hundreds, if not thousands, of contaminated sites from leaking underground storage tanks. Some are known and some are not. Such tanks are a small percentage of all sites which contain RCRA regulated wastes. Governmental regulators will never know the exact number, location, or severity of all contaminated sites. Congress has recognized this by creating statutes and amendments

which apply rules of strict liability, joint and several liability, and retrospectivity regarding environmental law and contamination.

Limited governmental resources restrict the ability of states and municipalities from inspecting and cleaning all the contaminated sites in its jurisdiction. It is therefore, important for courts to recognize that those parties who elect to clean up a site first, and pursue cost recovery against the actual polluters later, must have the right to do so. Allowing the cleanup to be pursued in the first instance by a private party is beneficial and serves the purposes of RCRA. The longer a site remains contaminated, the more expensive and involved the cleanup. The citizen suit provision, if read to allow individuals to recover remediation costs through restitution, permits individuals to proceed quickly while enforcing the purposes of RCRA.

Numerous courts have held that § 6972(a)(1)(B) allows private parties to bring suit "if generally acting as private attorneys general rather than pursuing a private remedy."¹⁰⁴ RCRA has been analyzed to allow the governmental regulator to either pursue the injunction or obtain restitution after it performs the cleanup. Allowing a private party to proceed with the cleanup protects both the environment and public health. For that party not to receive restitution under 6972(a)(1)(B), is fundamentally unfair and inconsistent with the clear aim of Congress.

Any interpretation of § 6972(a)(1)(B) which does not allow a cause of action in restitution severely limits the value of this provision. The recognition of a private right of action will enure to the benefit of the citizens of the United

⁹⁷ See *Commerce*, 749 F. Supp. at 445; *Gache v. Town of Harrison*, N.Y., 813 F. Supp. 1037 [S.D.N.Y. 1993].

⁹⁸ 822 F. Supp. 1468, 1477 [N.D. Cal. 1993].

⁹⁹ In light of the *KFC* decision, the case has no precedential value since its holding has been reversed by the Ninth Circuit.

¹⁰⁰ 847 F. Supp. 380 [E.D. Va. 1994].

¹⁰¹ A number of cases have specifically held that the recovery of remediation costs is equitable in nature. See *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 [8th Cir. 1988].

¹⁰² 42 U.S.C. § 6902(b).

¹⁰³ See *NEPACCO*, 810 F.2d at 739-42; *Aceto*, 872 F.2d at 1383; *Conservation Chemical*, 619 F. Supp. at 199-201.

¹⁰⁴ *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337 [4th Cir. 1983].

States and the environment as a whole.

A citizen's claim for reimbursement is actionable under RCRA. Congress intended that §§ 7002 and 7003 be read to provide the same remedies that are available to the government under § 7003. As such, it is obvious that decisions which have uniformly ruled § 7003 provides for restitution are controlling when considering claims brought under § 7002. All circuits agree that § 6973 allows governmental entities to pursue equitable restitution actions. No court that has carefully considered the issue has been able to articulate an acceptable rationale for denying that right to private parties.

IV. COMMON ARGUMENTS FOR THE DENIAL OF RESTITUTION.

A. A *Cort v. Ash* Analysis Demonstrates that Congress Did Not Intend to Afford the Remedy of Restitution.

Recently, defendants have begun to argue that to grant restitution, a court must perform a *Cort v. Ash*¹⁰⁵ analysis to determine whether the right is available to a citizen under § 7002. The Eighth Circuit recently, in *Furrer v. Brown*,¹⁰⁶ accepted this argument in finding that the right to restitution does not exist. While an analysis of the *Furrer* decision is outside the scope of this article, some comment on the propriety of a *Cort* analysis is appropriate.

The majority in *Furrer* asserted that "[w]hen considering the possibility that it was Congress's intent to authorize a monetary remedy for private citizens

when it [amended § 6972] we are guided by the teachings of the Supreme Court. The 'familiar test' of *Cort v. Ash* . . . sets out four factors relevant to the search for an implied cause of action."¹⁰⁷ The analysis adopted appears in direct conflict with a prior Eighth Circuit decision rejecting a *Cort* analysis when determining whether a remedy is available. It also appears to differ with United States Supreme Court authority that holds the "question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place."¹⁰⁸

It is clear that RCRA provides a private right of action. Section 7002 of RCRA, 42 U.S.C. § 6972, provides that "[e]xcept as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf."¹⁰⁹ Therefore, pursuant to *Franklin*, the Eighth Circuit was in error applying a *Cort* analysis because the question was not whether a remedy was available, but whether the statute provided for a right to sue.

A seminal case on whether *Cort v. Ash* is to be used to determine the availability of remedies under a given statute is *Davis v. Passman*.¹¹⁰ The plaintiff sought damages resulting from an alleged violation of the Fifth Amendment rights. The district court ruled there was no private right of action. The court of appeals, using a *Cort v. Ash* analysis affirmed. On appeal, the Supreme

Court reversed specifically holding the appeals court erred in applying the *Cort* analysis because the "question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution."¹¹¹ Although the court noted the difference between statutory and constitutional rights, the Court stated the criteria set out in *Cort* was "for ascertaining whether a private cause of action may be implied from 'a statute not expressly providing one.'"¹¹²

Justice Brennan, in the opinion, examined the origins of the term "cause of action" noting the distinction between the ability to "invoke the power of the courts" and the availability of relief.¹¹³ Therefore, the "concept of a 'cause of action' is employed specifically to determine who may judicially enforce the statutory rights or obligations."¹¹⁴ Thus, the question of whether a cause of action is available is different than whether a particular remedy is available.

By using the *Cort* analysis, *Furrer* also runs afoul of Eighth Circuit authority. In *Miener v. State of Missouri*,¹¹⁵ the court held that the determination of whether there is a cause of action for a particular remedy, is a "two step analysis. We ask first whether a private cause of action may be asserted pursuant to the statutes named in [the] complaint. As a separate question, we examine the propriety of [the] relief."¹¹⁶

In a citizens' suit action, the answer to the first question is clear. RCRA provides that "any" person¹¹⁷ may file suit.

¹⁰⁵ 422 U.S. 66 (1975).

¹⁰⁶ 62 F.3d 1092 (8th Cir. 1995).

¹⁰⁷ *Id.* at 1094.

¹⁰⁸ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). *Accord* *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981).

¹⁰⁹ 42 U.S.C. § 6972. [emphasis added].

¹¹⁰ 442 U.S. 226 (1979).

¹¹¹ 442 U.S. at 241.

¹¹² 442 U.S. at 240-01.

¹¹³ *Id.* at 239. Footnote 18 of the decision is particularly illustrative. There, the court notes that "cause of action is a question whether a particular plaintiff is a member of a class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available." *Id.* at n.18.

¹¹⁴ *Id.*

¹¹⁵ 673 F.2d 969 (8th Cir. 1982).

¹¹⁶ 673 F.2d at 973.

¹¹⁷ The *Furrer* decision intimates that the appellants do not fall within the class of persons that the statute empowers to file suit. This intimation has no basis under the

Therefore, the first question is answered in the affirmative. The court then is obligated to conduct the second step of the analysis.

Of particular significance is *Miener's* rejection of a *Cort* analysis in determining whether a particular form of relief is available under a statute. The Court acknowledged that "[a]lthough some courts have assessed the availability of damages under a *Cort v. Ash* analysis . . . we eschew this approach in favor to the narrower focus adopted in *Anderson v. Thompson*."¹¹⁸

In *Miener*, plaintiff brought an action to secure rights due her as a handicapped person under a number of statutes and constitutional provisions. The district court properly used a *Cort* analysis to determine that a private cause of action existed pursuant to § 504 of the Rehabilitation Act.¹¹⁹ There was no dispute that a second statute at issue, the Education Act,¹²⁰ provided for a private cause of action in the federal courts.

Having determined that the cause of action existed under both statutes, the court turned its attention to the issue of

available relief. In rejecting a *Cort* analysis when examining the availability of remedies under the Education Act the court said, "Congress has expressly created a cause of action in Section 615 of the Act and has empowered the district court to grant 'such relief as the court determines is appropriate.'¹²¹ Accordingly, the question is simply whether damages are within the relief foreseen by Congress."¹²²

The principle, that *Cort v. Ash* is inapplicable when the only question to be addressed is the availability of a particular remedy, has been addressed by the Seventh Circuit as well. In a case similar to *Miener*, that circuit also rejected a *Cort* analysis. In *Anderson v. Thompson*,¹²³ the court held that the "availability of a damage remedy . . . is a matter of statutory interpretation. What must ultimately be determined is whether Congress intended to create the remedy asserted by the plaintiffs."¹²⁴

The court distinguished *Cort* by noting the "analysis is not appropriate because the issue is not whether there is an implied private right of action . . .

Here Congress has expressly created a cause of action and empowered the district court to grant 'such relief as the court determines appropriate'. . . The question is whether damages are 'appropriate relief.'¹²⁵

The flaw in the *Cort* argument is readily apparent. The case has no application because there was no express statutory cause of action available to the plaintiff who sought relief. In *Cort*, a stockholder brought an action for injunctive relief and a derivative claim for damages, alleging violation of a statute which prohibited corporate expenditures in federal election campaigns. The court held that the plaintiff had no right to the relief requested under the section.¹²⁶

Congress, in the statute at issue in *Cort*, unlike § 7002 of RCRA, provided no private right of action to a citizen. Such a right is, however, explicit in RCRA § 7002. Thus, the argument that a *Cort* analysis is appropriate fails, because the court need not decide if the citizen has the Congressional authority to enforce RCRA.¹²⁷ Rather, the court need only determine if restitution is within

Act because the definition of "person" found at 42 U.S.C. 6903 (15) in no way excludes an "owner" from coverage under the Act.

Further, as the Supreme Court noted in *Franklin*, it is not relevant to the *Cort* factor analysis whether the plaintiff is one of the class of people for whom the special benefit of the statute was enacted because the statute provides an expressed right of action. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

¹¹⁸ *Miener v. State of Missouri*, 673 F.2d 969, 979 (8th Cir. 1982). See *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981).

¹¹⁹ 29 U.S.C. § 794.

¹²⁰ 20 U.S.C. § 1415 (e)(2).

¹²¹ *Id.*

¹²² *Miener*, 673 F.2d at 979.

¹²³ 658 F.2d 1205 (7th Cir. 1981)

¹²⁴ 658 F.2d at 1210.

¹²⁵ *Id.* at n.7.

¹²⁶ § 610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years or both. . .

Title 18 U.S.C. § 610 (1970 ed. and Supp. III).

¹²⁷ The Supreme Court, in *Cort*, ruled that to determine if a private remedy is implicit in a statute not specifically providing one, the relevant factors are: 1) is plaintiff one of the class for whose especial benefit the statute was enacted? 2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy, or deny one? 3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for plaintiff? and 4) is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law? *Cort v. Ash*, 422 U.S. 66, 78 (1975).

Even under this analysis, appellants must be awarded restitution. First, RCRA § 7002 clearly grants the appellants, as citizens, the right to bring the action below. Thus, Congress has indicated that civil enforcement is available. *Turner v. Saffley*, 482 U.S. 78, 79-80 (1987). Factor 1 is satisfied.

the equitable authority expressly conferred upon the district court under § 7002. Settled rules of statutory construction strongly indicate that restitution is within that authority.

B. The Fact That the Statute Does Not Specifically Mention the Right to Restitution Does Not Exclude it.

Defendants, in various forms, urge the courts to adopt the view that because the language of § 7002 does not specifically state the courts shall have the power to order restitution, the power does not exist. Such a position is without any support in the law, particularly when the plain language of the legislative history is considered.

It is undeniable that the powers conferred upon the district courts by § 7002 of the Resource Conservation and Recovery Act (RCRA), are equitable in nature, thus empowering those courts with authority to fashion appropriate relief. In *United States v. Price*,¹²⁸ the court found that RCRA was "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes."¹²⁹

This authority has been widely interpreted to confer upon the courts the authority, under § 7002, to award citizens "equitable-type relief." *Dominick's Finer Foods, Inc. v. Amoco Oil Co.*¹³⁰ Since the statute bears Congress' intention to entrust the courts with wide equitable powers, the courts should

exercise that authority in a manner that promotes the underlying purpose of equitable relief; fairness as between plaintiffs and defendants. In most instances, that remedy is restitution of the abatement costs expended by the citizen.

If a court were to rule that the former owners of the contaminated property have no liability under RCRA to contribute to the remediation of the contamination resulting from their use of the property, it would pose a patently unjust result. The full burden of remediation would fall upon the backs of the citizen, whose only basis of liability for the contamination at the property is that they owned it at the time the problem was discovered. This result, besides being fundamentally unfair, would directly contradict the intent of our nation's environmental statutes which is to have responsible parties pay to remediate.¹³¹

C. The Enactment of Subtitle I of RCRA Does Not Limit the Right to File a Citizens' Suit Under § 7002

A number a defendants have raised the novel issue that petroleum leaks from underground storage tank are not governed by the citizens' suit provision of RCRA citing *Winston v. Shell*.¹³²

Defendants argue that because petroleum contaminated soil is classified as a "regulated substance" under Subtitle I of RCRA and not regulated under Subtitle C, that only USEPA or the states can sue to abate the conditions. This position is erroneous.

First, the cases have consistently held, both prior and subsequent to *Winston*, that petroleum wastes are subject to suit under § 7002 because the wastes are considered solid wastes subject to suit. In, *Zands v. Nelson*¹³³ and *Dominick's Finer Foods, Inc. v. Amoco Oil Co.*,¹³⁴ the defendants were sued pursuant to § 7002 of RCRA for injury resulting from contamination from underground, petroleum storage tanks. In both cases, the defendants raise Subtitle I as a bar to the relief claimed by the plaintiffs. In both cases, the courts rejected the defendant's claims.

In *Zands*, the court analyzed the purposes of the two sections and concluded that "setting up a special system for underground storage tanks in § 6991 does not necessarily indicate that gasoline leaks could not be included within the rest of RCRA. An equally plausible alternative is that § 6991 simply provides an additional means for dealing with this specific type of problem, and the Court is of the opinion this is the case here."¹³⁵

In *Dominick's*, the Court opined that while Subtitle I provides specific regulation of underground storage tanks, it does not state it is the "exclusive remedy for petroleum leaks from underground tanks."¹³⁶ The Court further noted that § 7002 "expressly sets forth . . . exceptions to a private citizens right to bring suit . . ."¹³⁷ Clearly, *Winston* runs afoul of the better reasoned opinions of earlier decisions.¹³⁸

Second, there is explicit legislative intent to create a right of restitution. The legislative history clearly states the section is to be read the same as § 7003 where the right to restitution is undeniably granted. *Id.* Factor 2 is satisfied.

Third, granting restitution is consistent with the underlying legislative scheme to clean the hazards associated with the improper disposal of waste. Allowing a citizen to remediate first is the most efficient way to remediate. To affirm the decision below will only serve to slow further the time necessary to begin remediation. *Id.* Factor 3 is satisfied.

Fourth, the cause of action is premised on violations of the federal Resource Conservation and Recovery Act. Consistency requires the development of federal law to ensure consistent application of site remediation. *Id.* Factor 4 is satisfied.

Thus, even under the *Cort* analysis, appellants should be awarded their abatement costs under RCRA.

¹²⁸ 688 F.2d 204 [3d Cir. 1982].

¹²⁹ *Id.* at 214 [emphasis added]. See also *Dague v. City of Burlington*, 935 F.2d 1343 [2d Cir. 1991].

¹³⁰ No. 93 C 4210, 1993 WL 524808, n.5 (N.D. Ill. Dec. 15, 1993).

¹³¹ See *KFC Western, Inc. v. Meghriq*, 49 F.3d 518, 523 (9th Cir. 1995).

¹³² 861 F. Supp. 713 [C.D. Ill. 1994].

¹³³ 779 F. Supp. 1254 [S.D. Cal. 1991].

¹³⁴ 1993 WL 524808.

¹³⁵ 779 F. Supp. at 1263.

¹³⁶ 1993 WL 524808, *3.

Similarly, in *Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*,¹³⁹ the court rejected the holding of the *Winston* court that Subtitle IX (RCRA's Subtitle I) was the "exclusive, means for addressing problems with underground storage tanks."¹⁴⁰ The court concluded that "the regulation of petroleum leakage from underground storage tanks under Subchapter IX [does not] prohibit civil enforcement suits under Subchapter VII."¹⁴¹ The court rendered its decision after thoroughly examining the decision in *Edison Electric Institute v. E.P.A.*,¹⁴² also cited by many defendants, holding that the "Edison's court reasoning does not require this Court to conclude that Subchapter IX of the RCRA precludes private civil enforcement suits."¹⁴³

The court expressed its agreement with the court in *Zands v. Nelson*,¹⁴⁴ which found that the exclusion of petroleum from CERCLA's definition of "hazardous substance" does not mean it is excluded from the RCRA definition of "hazardous" or "solid waste." In other words, the court rejected Shell's contention that petroleum "is not meant to be regulated as a hazardous or solid substance."¹⁴⁵

Returning to *Edison*, the court went on to hold that "even given Edison's direction" that petroleum should be regulated under Subtitle I, "no section of Subchapter IX prohibits civil enforcement suits."¹⁴⁶ Allowing a suit to address petroleum contamination is not inconsistent

with the specific delegations given to the Administrator and the States. Furthermore, it is not inconsistent with the limitation of the right of a citizen to bring a suit if an action is being prosecuted by the government. Thus, the Court concluded that "[c]ivil enforcement suits brought pursuant to Subchapter VII § 6972(a) would merely supplement the federal enforcement provisions of Subchapter IX."¹⁴⁷ As has been noted elsewhere, the legislative history of the citizens' suit provision states it is designed to supplement government enforcement of RCRA.¹⁴⁸

In another recent decision, *Craig Lyle Limited Partnership v. Land O'Lakes, Inc.*,¹⁴⁹ the court rejected the defendant's motion for summary judgment which alleged that "gasoline and petroleum . . . are useful energy sources."¹⁵⁰

The Court ruled that there "is, no provision prohibiting citizen suits based on UST petroleum leaks or spills."¹⁵¹

Defendants assert that the EPA's decision not to regulate media containing petroleum as the result of a UST release as a hazardous waste likewise removed such media from Subtitle D regulation (42 U.S.C. §§ 6941 - 6949a) as a solid waste. This position ignores the regulatory definitions of solid and hazardous wastes.

The Code of Regulations at 40 C.F.R. § 261.1 (b) provides:

(1) The definition of solid waste contained in this part

applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA.

* * *

(2) This part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a solid waste and a hazardous waste for purposes of these sections if:

* * *

(ii) In the case of section 7003, the statutory elements are established. *Emphasis added.*

The fact that petroleum may not be defined as a hazardous waste under 40 C.F.R. § 261.1, does not mean it is not a solid waste for citizens' suit enforcement purposes. Following this logic, the court in *Craig Lyle* found petroleum a solid waste subject to citizens suit enforcement.¹⁵²

Defendants rely too, on the decision in *Edison Electric Institute v. E.P.A.*,¹⁵³ for the proposition that petroleum not be subject to citizen suit enforcement. A careful reading of *Edison* discloses no support for this position.

First, nothing in the case indicates the court held that Subtitle I is the sole

¹³⁷ *Id.*

¹³⁸ See also *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 675 (N.D. Ga. 1993) (which found that petroleum which has leaked from an underground storage tank is a solid waste subject to citizens' suits).

¹³⁹ No. 94 C 2854, 1995 U.S. Dist. LEXIS 1871 (N.D. Ill Feb. 14, 1995).

¹⁴⁰ *Id.* at *12.

¹⁴¹ *Id.* at *16.

¹⁴² 2 F.3d 438 (D.C. Cir. 1993).

¹⁴³ 1995 U.S. Dist. LEXIS 1871, *16-17.

¹⁴⁴ 797 F. Supp. 805 (S.D. Cal. 1992).

¹⁴⁵ No. 94 C 2854, 1995 U.S. Dist. LEXIS 1871, *17 (N.D. Ill Feb. 14, 1995).

¹⁴⁶ 1995 U.S. Dist. LEXIS 1871, *19*20.

¹⁴⁷ *Id.* at *21.

¹⁴⁸ See *supra* text accompanying notes 6-15.

¹⁴⁹ 877 F. Supp. 476 (D.Minn. 1995).

¹⁵⁰ *Id.* at 481.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 2 F.3d 438 (D.C. Cir. 1993).

enforcement scheme for UST petroleum contamination. Rather, the court merely held that EPA's deferral is permissible under the statute.¹⁵⁴

Second, the issue of the application of the citizens' suit provision is nowhere addressed. In fact, as noted above, finding such suits are available to citizens furthers the legislative purpose that citizen action will supplement government enforcement. Congress intended that § 7002 be used to enforce Subtitle I. In the Joint Explanatory Statements of the Committee of Conference regarding the 1984 amendments, the report stated:

[t]he Conference substitute provides that the applicable provisions of the Solid Waste Disposal Act, including Sections 7002 and 7003 [42 U.S.C. §§ 6972, 6973] may be used to enforce Title I [U.S.C. §§ 6991 *et seq.*] and specifically excludes application of Section 3008 [42 U.S.C. § 6928] to Subtitle I.¹⁵⁵

Finally, the USEPA reports that over "300,000 petroleum releases would be subject discovered and subjected to Subtitle I's corrective action requirements," it follows that they should be subject to citizens' suits because, "the right to bring citizens' suits is deliberately redundant of other statutory protections: Congress believed that by giving citizens themselves the power to enforce these provisions by suing violators directly, they could speed compliance with environmental laws, as well as put pressure upon a government that was unable or unwilling to enforce such laws itself."¹⁵⁶

Allowing citizens to sue and recover

abatement costs would aid the government in discovering and remediating these 300,000 sites. Clearly the problem is acute and the purposes of the citizens' suit provision will be served by rejecting arguments on this issue.

D. Since RCRA is Equitable, a Citizen Need Not Prove an Existing Imminent and Substantial Endangerment

Defendants argue that citizens cannot prove an imminent and substantial endangerment. The effect of this position is likely lessened with the decisions in *KFC* and *Bayless* where these arguments were specifically rejected. The reasoning of those decisions together with the cases interpreting the language of § 7003, are instructive.

In *Conservation Chemical Company*, the court specifically held that "the recovery of costs incurred by the [U.S.] pursuant to its activities under RCRA may be an appropriate form of relief in an action brought pursuant to RCRA Section 7003."¹⁵⁷ The language which affords the courts jurisdiction to hear RCRA cases is identical in §§ 7002 and 7003, so it is clear that § 7002 affords a citizen the opportunity to recover their remediation costs under the equitable remedy of restitution. Since *Conservation* was a cost recovery case, it follows that a current imminent and substantial endangerment need not exist.

In *Aceto*, the United States alleged the defendants were "liable for response costs incurred at the . . . site pursuant to section 7003 of [RCRA]."¹⁵⁸ The defendants argued that because "EPA cleaned up . . . before it brought suit, there was (and is) no 'imminent and substantial endangerment' as is required

under the Act."¹⁵⁹ The Court rejected that position. It would appear that the defendants challenged the EPA's claim to reimbursement under RCRA because the defendants raised the issue that there could be no right to restitution if there was no pending "imminent and substantial endangerment."

The cases interpreting § 7003 have uniformly held that the government need not wait until the court issues an injunction to take action at the site.¹⁶⁰ Such a procedural requirement frustrates, rather than advances, the purpose of RCRA. Citizens should not be punished for either following the edicts of agencies requiring remedial action or for voluntarily remediating hazardous conditions.

V. THE PLAIN LANGUAGE OF § 7002 DOES NOT LIMIT THE RIGHT TO RELIEF AWARDED TO EQUITABLE RELIEF¹⁶¹

It is conceded that the cases interpreting the language of RCRA have uniformly held that the statute is equitable in nature. However, there is nothing in the language of the citizens' suit provision which limits the relief to equitable relief.

A primary tenet of statutory construction is that the English rules of grammar are presumed to have been known by the legislature.¹⁶² That being so, it is clear that the plain language of the provision in question is not limited to equitable relief.

Examining the language of § 7002(a)(1)(B), if the inconsequential elements of the provision are eliminated, the section provides the court with jurisdiction to enforce the provisions of RCRA, restrain those participating in the handling of waste, order those persons to take such other action, or, award

¹⁵⁴ *Id.*

¹⁵⁵ H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 127 (1984), reprinted in 1984 U.S.C.C.A.N. 5649, 5698.

¹⁵⁶ *Greenpeace, Inc. v. Waste Technologies Industries*, 9 F. Supp. 1174, n.2 (6th Cir. 1993).

¹⁵⁷ *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 201 (W.D. Mo. 1985) [emphasis added].

¹⁵⁸ *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1376 (8th Cir. 1989).

¹⁵⁹ *Id.* at 1383 [emphasis in the original].

¹⁶⁰ See also *United States v. Price*, 688 F.2d 204 (3d Cir. 1982); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986).

¹⁶¹ The authors appreciate the comments of Dr. Dale Haskell, Assistant Professor of English, Southeast Missouri State University, on the grammatical construction of the statutory language.

¹⁶² *United States v. Goldberg*, N.Y., 168 U.S. 95 (1897).

penalties as appropriate. The grammatical construction of the statute employed by Congress in its predicate are a series of coordinate infinitive verb phrases in parallel structure. In other words, the section spells out four options available to the court; each one independent. Because “[a] comma is the mark ordinarily used to separate coordinate words, phrases, or clauses in a list or series”¹⁶³ under § 7002 a court may do a number of things, only one of which is injunctive in nature.

It is significant that there is no adjective preceding the term “such other order” which would limit the type of order to injunctive relief. Rather the term speaks of generic orders to “take such other action as may be necessary.” Presumably, an award of damages would fall within the broad category of “other action.”

This proposition is buttressed by the phrase “or both” which immediately follows the phrases “to restrain” and “to order.” The phrase, “or both” supposes that the two preceding phrases are independent. Thus, a court has broader powers rather than limited authority as many courts have stated.

Finally, “words must be accorded their normal meanings. . .and it is appropriate to assume that ordinary meaning of those words accurately express legislative purpose.”¹⁶⁴ If Congress had intended to limit the court’s jurisdiction to equitable orders, it could have added an adjective which limits the broad language of the provision.

A number of other factors support the contention that the statute must be read

to include legal damages for remediation. First, the pre-1984 language of § 7002 provided jurisdiction only to “enforce” regulations or orders, or, to “order the Administrator to perform” acts or duties. These particular powers did not require a court to award damages since injunctions were all that was necessary to accomplish the courts’ mission under the Act prior to the 1984 amendments.

Second, there is a presumption against a construction of a statute which renders the statute ineffective or inefficient.¹⁶⁵ Any decision denying remediation costs renders the citizens suit provision of RCRA ineffective and inefficient. There is no reason for private citizens to remedy hazardous sites, either with or without the prodding of the government, if there is no potential for the citizen to recover costs from liable parties. In the event a citizen would choose to ignore an administrative order to clean a site, litigation would surely follow. The overall result would be delays in undertaking cleanups and a drain on the revenues and resources of the government to track down missing responsible parties and to litigate the liabilities. .

A citizen, when confronted with the discovery of contamination, has two choices; either cleanup the site or sue under § 7002 seeking an order directing other parties to remediate. Clearly, even by the terms of the decisions denying restitution, citizens could opt for the former and avoid the financial loss. Since prompt cleanup is one of the Act’s primary purposes, the plaintiffs should not be penalized for acting in a

responsible manner, e.g., remediate now, determine liability later.

The more efficient method of advancing the purpose of RCRA¹⁶⁶ at a site is to remediate first and allocate the liabilities later. Contrary decisions serve, particularly with respect to petroleum contaminated sites, to bring site cleanups to a standstill.

It is clear that under principles of statutory construction, and the rules of English grammar, the jurisdiction of the federal courts is not limited to injunctive relief under RCRA’s citizens’ suit provision. The courts are given the authority to “order such person to take such other actions as may be necessary.” The phrase does not limit the court’s ability to award money damages for costs incurred in remediation.

V. CONCLUSION

Early in our lives we are taught to clean up our rooms and put our toys away. Unfortunately, these simple lessons are overlooked by adults because the stakes are exceptionally high in terms of costs and strategic planning.

However, there is nothing in RCRA which forgives the recalcitrant party for ignoring their obligations to leave the property they use in the same condition as they found it. Clearly, the language of this environmental statute promotes the concept that the polluter pays. There is significant law, policy, and equities which would require the polluter to revisit the lessons from kindergarten, and clean up after themselves.

¹⁶³ J.B. W. CODER & JOHN J. RUSZKIEWICZ, HANDBOOK OF CURRENT ENGLISH 218 (Scott Foresman, 8th ed. 1989).

¹⁶⁴ *United States v. Jones*, 811 F.2d 444, 447 (8th Cir. 1987).

¹⁶⁵ *Sutton v. United States*, 819 F. 2d 1289, 1295 (5th Cir. 1987).

¹⁶⁶ *Greenpeace v. Waste Technologies Industries*, 9 F.3d 1174 (6th Cir. 1993) (the court notes that the right to bring citizens suits is deliberately redundant of other statutory protections: Congress believed that by giving citizens themselves the power to enforce these provisions by suing violators directly, they could speed compliance with environmental laws, as well as put pressure upon a government that was unable or unwilling to enforce such laws itself).