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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 your found them. Clean up your own mess."

ROBERT FUGHUM, 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 citizens⁶ 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.⁷

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.”⁸ 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.”⁹ Congress explicitly recognized that a citizen can sue under the section “pursuant to the standards of liability established under Section 7003.”¹⁰ 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,
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)."... 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." 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.11

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 Jersey14 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 held 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

12 Id.
15 643 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.
21 United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 737-38 [8th Cir. 1986].
costs as a matter of equitable discretion.” 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, 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. A preliminary injunction was denied.

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.” 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.”

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. 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.”

In U.S. v. Conservation Chemical Co., the court interpreted § 6973 to give “[t]he court ... broad authority under § 7003 [§ 6973] to grant the equitable relief necessary to eliminate the endangerment.” 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. 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.”

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.” 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. 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.”

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. 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. The court stated that the purpose of the statute is “give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and environment.”

The court went on to emphasize that RCRA, much like CERCLA, is a remedial statute which should be liberally construed. 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.” Any holding which does not
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 Citizen's 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. 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." 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. Similarly, in Wyandotte Transportation Co. v. United States, 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 Act seeking to recover sums it expended in removing a barge from the Mississippi. 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.

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.

Finally, in Reserve Mining Co. v. Lord, 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. It is extraordinarily clear that a court...
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" 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 pended to remediate will allow for the recovery of money ex-
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out."
gives
remediation of contaminated sites.
do so would materially advance the pur-
proceedings brought under
§ 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." 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."

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, 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. The court found that a right to contribution or indemnity existed. 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.

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

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53 SSM Investment Co. v. Tahoe Regional Planning Agency, 911 F.2d 324, 328 (9th Cir. 1990).  
55 United States v. Price, 688 F.2d 204, 214 (9th Cir. 1982).  
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 crossclaim 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. Meghrig,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) “[i]f ... 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 51920.
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. Meghrig, 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 government-
mental actions.\textsuperscript{73}

Because the 8th Circuit has recog-
nized the administrative* rights to sue
under § 6973 for restitution of costs in-
curred it necessarily follows that the iden-
tical language of the citizens’ suit
 provision should have the same result.\textsuperscript{74}

The court rejected arguments of the
defendant as to the material differences
existing between the citizen suit pro-
vision set out in §§ 6972(a)(1)(B) and
6973, including: a) different notice re-
quirements for filing actions; b) lack of
limitation period for RCRA citizen suites
is evidence of the unavailability of reim-
bursement 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 Re-
sources Corp.\textsuperscript{75} and Environmental De-
defense Fund, Inc. v. Lamphier,\textsuperscript{76} as
inappropriate because they were brought under the predecessor section to § 6972(a)(1)(b).\textsuperscript{77} The court went on to
hold that it disapproved of the other dis-

court’s decision holding against res-

Other courts, while examining their
equitable authority, have specifically
held that § 7002 allows for restitution.
For example, in both Lincoln Properties v.
Higgins\textsuperscript{80} and Bayless Investment and
Trading Company v. Chevron U.S.A.,
Inc.,\textsuperscript{81} the courts held that § 7002 pro-
vides for the recovery of remediation
costs expended under the equitable rem-
edy 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 ex-

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

Other cases also offer guidance. In

\textsuperscript{73} Id at 527-28.
\textsuperscript{74} See KFC Western, Inc. v. Meghrig, 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

\textsuperscript{75} 761 F.2d 311 (6th Cir. 1985).
\textsuperscript{76} 714 F.2d 331 (4th Cir. 1983).
\textsuperscript{77} KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995).
\textsuperscript{78} 49 F.3d at 523.
\textsuperscript{79} Id.
\textsuperscript{80} No. CIV.591760DFL/GGH, 1993 WL 217429 [E.D. Cal Jan 21, 1993].
\textsuperscript{81} No. CIV.930704 PHX/PGR, 1994 U.S. Dist. LEXIS 12190 [D. Ariz. May 24, 1994].
\textsuperscript{82} 1993 WL 217429, *8.
\textsuperscript{83} Id. at *26.
\textsuperscript{84} Id. at *16.
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. Lampiher92 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

89 796 F. Supp. at 1178.
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 lampiher holding that “they do not address...actions brought under § 7002(a)(1)(B).” Rather, they consider 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.
95 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 Charrand 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.
96 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.
97 The Charrand decision is premised upon § 7002 (a)(1)(A). Restitution claims are filed pursuant to § 7002(a)(1)(B). Thus, the decision provides no guidance.
99 In Triller v. Hopl, 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.
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 Lampheir, 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 rational articulated in Conservation Chemical and Acelo, 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 ill 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 retroactivity 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 pursing 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 ensure to the benefit of the citizens of the United

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99 In light of the KFC decision, the case has no precedential value since its holding has been reversed by the Ninth Circuit.
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 NENAPCO, 810 F.2d at 739-42; Acelo, 872 F.2d at 1383; Conservation Chemical, 619 F. Supp. at 199-201.
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 § 7002 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 rational 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 analysis to determine whether the right is available to a citizen under § 7002. The Eighth Circuit recently, in Furrer v. Brown, 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.”

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.”

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.” Therefore, pursuant to Franklin v. University of Chicago, 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. 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.”

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.’”

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. Therefore, the “concept of a ‘cause of action’ is employed specifically to determine who may judicially enforce the statutory rights or obligations.” 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 Mienier v. State of Missouri, 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.”

In a citizens’ suit action, the answer to the first question is clear. RCRA provides that “any” person may file suit.
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 Mienier'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 of the narrower focus adopted in Anderson v. Thompson.*

In Mienier, 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.** There was no dispute that a second statute at issue, the Education Act,** 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 503 of the Act and has empowered the district court to grant such relief as the court determines appropriate."** Accordingly, the question is simply whether damages are within the relief foreseen by Congress.***

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 Mienier, that circuit also rejected a Cort analysis. In Anderson v. Thompson,** 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."****

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.'"*****

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.******

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.****** Rather, the court need only determine if restitution is within

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* Act because the definition of "person" found at 42 U.S.C. 6003 (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. Grinnell County Public Schools, 503 U.S. 60 (1992).


**** Id. at 979.

***** Id. at 980-982.

****** Id. at n.7.

******* § 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 is, 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 $5,000 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.


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. Salley, 482 U.S. 78, 79-80 (1987). Factor 1 is satisfied.
the equitable authority expressly con-
fered upon the district court under §
7002. Settled rules of statutory construc-
tion 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 be-
cause 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 with-
out any support in the law, particularly 
when the plain language of the legisla-
tive history is considered.

It is undeniable that the powers con-
ferred upon the district courts by § 7002 
of the Resource Conservation and Recov-
ery Act (RCRA), are equitable in nature, 
thus empowering those courts with author-
ity 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 affirma-
tive equitable relief to the extent neces-
sary to eliminate any risk posed by toxic 
substances.” 129

This authority has been widely inter-
preted to confer upon the courts the 
authority, under § 7002, to award citi-
zens “equitable-type relief.” *Domnick’s 
Finer Foods, Inc. v. Amoco Oil Co.* 130 
Since the statute bears Congress’ inten-
tion to entrust the courts with wide 
equitable powers, the courts should 
exercise that authority in a manner that 
promotes the underlying purpose of equi-
table 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 con-
tribute to the remediation of the contamina-
tion 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 con-
tamination at the property is that they 
owned it at the time the problem was 
discovered. This result, besides being 
fundamentally unfair, would directly con-
trast the intent of our nation’s environ-
mental 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 of defendants have raised 
the novel issue that petroleum leaks from 
underground storage tank are not gov-
erned by the citizens’ suit provision of 
RCRA citing *Winston v. Shell.* 132

Defendants argue that because petro-
leum 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* and *Dominick’s 
Finer Foods, Inc. v. Amoco Oil Co.,* the 
defendants were sued pursuant to § 
7002 of RCRA for injury resulting from 
contamination from underground, petro-
leum 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 defen-
dant’s claims.

In *Zands,* the court analyzed the pur-
poses of the two sections and concluded 
that “setting up a special system for un-
derground storage tanks in § 6991 
does not necessarily indicate that gaso-
line leaks could not be included within 
the rest of RCRA. An equally plausible 
alternative is that § 6991 simply pro-
vides 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 regula-
tion 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 . . . excep-
tions to a private citizens right to bring 
suit . . .” 137 Clearly, *Winston* runs afoul 
of the better reasoned opinions of earlier 
decisions. 138
Similarly, in Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co., 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.” 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.” The court rendered its decision enforcement suits under Subchapter IX of the RCRA precludes private civil enforcement suits.

The court expressed its agreement with the court in Zands v. Nelson, 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.”

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.” 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. 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,” as has been noted elsewhere, the legislative history of the citizens’ suit provision states it is designed to supplement government enforcement of RCRA.

In another recent decision, Craig Lyle Limited Partnership v. Land O’lakes, Inc., the court rejected the defendant’s motion for summary judgment which alleged that “gasoline and petroleum . . . are useful energy sources.” The Court ruled that there is no provision prohibiting citizen suits based on UST petroleum leaks or spills. 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 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.

Defendants rely too, on the decision in Edison Electric Institute v. E.P.A., 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...
enforcement scheme for UST petroleum contamination. Rather, the court merely held that EPA’s deferral is permissible under the statute.\textsuperscript{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:

"[The 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.]"

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.”\textsuperscript{155}

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.”\textsuperscript{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].”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 Relief\textsuperscript{161}

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.\textsuperscript{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)(11)(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


\textsuperscript{155} Id.


\textsuperscript{157} United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1376 (8th Cir. 1989).

\textsuperscript{158} Id. at 1383 (emphasis in the original).

\textsuperscript{159} 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).

\textsuperscript{160} 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.

\textsuperscript{161} United States v. Goldberg, N.Y., 168 U.S. 95 (1897).
Lessons From Kindergarten

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,” 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 adjectival preceding the term “such other order” which would limit the type of order to injunctive relief. Rather the term speaks of generic orders to “takesuch 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.” 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. Any decision denying remediation costs renders the citizens suit provision of RCRA ineffective and inefficient. There is no reason for private citizens to medly 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 RCRA 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 equity which would require the polluter to revisit the lessons from kindergarten, and clean up after themselves.