

1984

## Hazardous Waste Cleanup in Wyoming: Legal Tools Available to the Private Citizen

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### Recommended Citation

Bidinger, Jeri L. (1984) "Hazardous Waste Cleanup in Wyoming: Legal Tools Available to the Private Citizen," *Land & Water Law Review*: Vol. 19 : Iss. 2 , pp. 395 - 417.

Available at: [https://scholarship.law.uwyo.edu/land\\_water/vol19/iss2/2](https://scholarship.law.uwyo.edu/land_water/vol19/iss2/2)

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## COMMENTS

### HAZARDOUS WASTE CLEANUP IN WYOMING: LEGAL TOOLS AVAILABLE TO THE PRIVATE CITIZEN

For fundamental and deeply rooted psychological reasons, as well as more mundane utilitarian considerations, it is characteristic of man to bury that which he fears and wishes to rid himself of. In the past, this engrained pattern of behavior has generally proven harmless and, indeed, has often led man to restore to the earth the substances he had removed from it. In today's industrialized society, however, the routine practice of burying highly toxic chemical wastes has resulted in serious threats to the environment and to public health.<sup>1</sup>

Americans have been burying hazardous wastes<sup>2</sup> in landfills or depositing them in sludge ponds for a long time,<sup>3</sup> but we have only recently recognized the inherent dangers of the practice and the scope of the potential problem. In 1980, more than 400,000 generators<sup>4</sup> produced 57 million tons of hazardous waste.<sup>5</sup> According to the Environmental Protection Agency (EPA), 32,000 disposal sites in the United States contain potentially dangerous amounts of hazardous waste, and 1,200 to 2,000 of these sites may pose significant and imminent health hazards.<sup>6</sup> EPA estimates 500 to 800 of these facilities are abandoned.<sup>7</sup>

Wyoming suffers less acutely from the results of inadequate hazardous waste disposal practices than do more populous and industrialized states. When compared to the other forty-nine states and the District of Columbia, Wyoming was ranked fifty-first (last) in volume of hazardous waste generation.<sup>8</sup> EPA's listing of potentially dangerous hazardous waste disposal sites issued in 1981 included 20 Wyoming locations.<sup>9</sup> EPA's list of 418 high

1. *United States v. Price*, 523 F. Supp. 1055, 1057 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).
2. The term "hazardous waste" is defined in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976) (RCRA) as:  
a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—  
(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible, illness; or  
(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.  
42 U.S.C. § 6903(5). Though the term refers to discarded materials of little economic value, these substances often could be recycled and reused. See EPSTEIN, BROWN & POPE, HAZARDOUS WASTE IN AMERICA, note at 257 (1982).
3. About eighty percent of all hazardous waste disposal is accomplished through one of these disposal methods. Meyer, *Compensating Hazardous Waste Victims*, 11 ENVTL. L. 689, 691 (1981) (citing [1978] 9 ENVTL. REP. (BNA) 1301-02).
4. *Id.* at 690.
5. *Id.* at 690 (citing U.S. ENVIRONMENTAL PROTECTION AGENCY, HAZARDOUS WASTE INFORMATION SW-737 (1981)).
6. *Id.* (citing COUNCIL ON ENVIRONMENTAL QUALITY, THE TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 181 and n.11).
7. *Id.* at 174.
8. EPSTEIN, BROWN & POPE, *supra* note 2, at 413 (citing National Wildlife Foundation, *The Toxic Substance Dilemma*, EPA grant # T900905-01. Washington, D.C., 1980).
9. *Id.* at 544-45.

priority sites eligible for remedial action under Superfund includes the J. H. Baxter tie treatment plant outside of Laramie, Wyoming.<sup>10</sup> The state is currently pursuing clean-up of that site,<sup>11</sup> which has polluted Laramie area groundwater and the Laramie River,<sup>12</sup> sources of the city's water supply.<sup>13</sup>

Clearly, the hazardous waste disposal problem does exist in Wyoming. In this arid land we cannot afford to pollute our rivers and groundwater supplies. The problem is real, but it is not yet of the magnitude faced by much of our nation. The people of Wyoming thus have a unique opportunity to take advantage of national awareness of the potential dangers of hazardous waste disposal and implement remedial measures before the problem becomes a crisis.

The purpose of this comment is to explore the various remedies to the hazardous waste problem in Wyoming which might be available to private citizens or interest groups. The discussion is limited to possible causes of action to obtain cleanup of hazardous waste disposal sites,<sup>14</sup> with some limited tangential consideration of available causes of action to obtain damages for injury to private property.<sup>15</sup> Specifically excluded from consideration here is the complex area of victim compensation for personal injuries resulting from exposure to hazardous waste.<sup>16</sup>

The focus of this comment is, of course, legal remedies available to a private citizen who is concerned about pollution resulting from hazardous waste disposal. But such are not the only, nor perhaps even the most effective, tools to be considered. Media campaigns, complaints to state and federal agencies, negotiations with the polluter, and communication with the legislature are simpler, and certainly less expensive, alternatives.<sup>17</sup>

10. The Laramie Daily Boomerang, Jan. 19, 1984, at 1, col. 1.

11. *People v. Union Pacific Railroad Co.*, No. 96-159 (1st J.D. Wyo., filed October \_\_\_\_, 1981).

12. The Branding Iron, Jan. 20, 1984, at 1, col. 1.

13. EXISTING CONDITIONS AND BACKGROUND REPORT FOR THE CITY OF LARAMIE, WYOMING 35-36 (Fall 1982).

14. Toxic substances have historically been disposed of by a variety of methods including incineration, ocean dumping, and deep-well injection. Most such wastes are disposed of in land fills or waste water impoundments (lagoons or sludge ponds). Meyer, *supra* note 3, at 691.

15. As a practical matter the damage remedy is inseparable from the goal of cleanup since the purpose of money damages is to restore the injured party to a position roughly equivalent to his position before the damage occurred. Sometimes physical restoration is impossible, and the next most effective remedy is to replace the damaged property with wholesome property (i.e., a polluted water supply must be replaced with an alternative source of water).

16. For an introduction to the issues and policy questions of this difficult area, as well as to possible causes of action and problems of proof, see S. REP. NO. 12, 97th Cong., 2d Sess. (report to Congress by Committee established pursuant to § 301(e) (42 U.S.C. § 9651(e)) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9657 (Supp. V 1981) to study and make recommendations to Congress regarding compensation of victims of exposure to hazardous wastes); Garrett, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Federal Legislation*, 13 ENVTL. L. REP. 10172 (1983); Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133 (1980); Large & Michie, *Proving that the Strength of the British Navy Depends on the Number of Old Maids in England: A Comparison of Scientific Proof with Legal Proof*, 11 ENVTL. L. 555 (1981); Sobel, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act*, 14 HARV. J. ON LEGIS. 683 (1977); Meyer, *supra* note 3.

17. For a brief but helpful summary of how one might orchestrate a non-judicial effort to clean up a disposal site, see EPSTEIN, BROWN & POPE, *supra* note 2, at 288-92.

Private party resort to the courts is costly, time-consuming, and filled with risk, as will be seen in the discussion below. It is warranted only in the event the various non-judicial approaches have proven ineffective, and then only where the individual or interest group understands the magnitude of the project and is committed to seeing it through.

If all else has failed and private legal action seems warranted, there is an amazing panoply of alternatives available to the Wyoming practitioner. Possible federal causes of action include statutory causes of action under the Resource Conservation and Recovery Act of 1976 (RCRA),<sup>18</sup> claims against Superfund<sup>19</sup> under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>20</sup> causes of action against responsible parties under CERCLA section 107<sup>21</sup> and section 106,<sup>22</sup> and causes of action against polluters under various related federal environmental statutes. State causes of action include potential statutory causes under the Wyoming Environmental Quality Act<sup>23</sup> and various Wyoming nuisance statutes,<sup>24</sup> and the traditional common law causes of action of nuisance, trespass, negligence and strict liability for ultrahazardous activities.

The above summary lists *possible* causes of action a private party or interest group might bring to obtain cleanup of a hazardous waste disposal site in Wyoming. As will be seen, case law in the area remains unsettled if it exists at all. Almost without exception these are theoretical causes of action which, if they are well-presented and argued, stand some chance of succeeding in a court of law. As will also be seen, the claims most likely to succeed at the federal level are also the most expensive. The claims one might bring in Wyoming would all be cases of first impression; they, too, are risky and expensive.

### I. LAYING THE GROUNDWORK

Whatever means one chooses to pursue, the problems of proof in hazardous waste actions are tremendous. Proof that damage has occurred or is going to occur if something is not done to prevent it, and that it was caused by improper disposal of hazardous wastes, requires complex technological data gathered by a variety of experts including toxicologists, engineers, hydrologists and biochemists.<sup>25</sup> The exposed environment and the routes of exposure must be identified and proved, as must the hazardous substance involved.<sup>26</sup>

18. 42 U.S.C. §§ 6901-6987 (1976).

19. "Superfund" refers to the Hazardous Substance Response Trust Fund created under CERCLA for the purpose of cleaning up releases of hazardous substances into the environment. See 42 U.S.C. §§ 9631, 9611, and 9604 (Supp. V 1981).

20. 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

21. 42 U.S.C. § 9607 (Supp. V 1981).

22. 42 U.S.C. § 9606(a) (Supp. V 1981).

23. WYO. STAT. §§ 35-11-101 to -1104 (1977 & Supp. 1983).

24. WYO. STAT. § 35-10-101 (1977); WYO. STAT. § 401(a) (Supp. 1983); and WYO. STAT. § 6-6-202 (1977 & Supp. 1983).

25. EPSTEIN, BROWN & POPE, *supra* note 2, at 281. In the case of Reserve Mining Co. v. EPA, 514 F.2d 492, 502 (8th Cir. 1975), the court described the trial as covering 139 days over a nine month period of time. One hundred witnesses testified and 1,600 exhibits were introduced.

26. EPSTEIN, BROWN & POPE, *supra* note 2, at 282-88.

Scientific and legal standards of proof differ radically. Proof for a scientist is a demonstration of her hypothesis sufficient to convince her of its truth.<sup>27</sup> In contrast, legal proof is measured by degrees; proximate cause must be proved even though scientific data fails to distinguish among multiple possible causes and statistical evidence is not well received because it fails to demonstrate causation in a specific instance.<sup>28</sup>

Given these hurdles, it is imperative that fact gathering be done thoroughly before any cause of action is instituted, and probably even before any non-legal resolution is pursued.<sup>29</sup> Sources of relevant factual data include: 1) maps and census data, veterinary and humane society records, and medical records to determine the affected environment and its physical and demographic characteristics; 2) records of the suspect polluter, government records of permits granted or refused, and environmental enforcement agency records to determine the substances and disposal practices involved; and 3) soil analyses, hydrologic studies, climatic studies, analysis of the specific disposal site and methods of disposal employed to evaluate possible routes of exposure.<sup>30</sup> In addition to these sources of specific information, a variety of organizations may provide helpful background information. These include national environmental organizations, industry trade groups, labor unions, EPA, and the Wyoming Department of Environmental Quality (DEQ).<sup>31</sup>

It is obvious from the above discussion why environmental actions are so expensive to pursue. In some cases, however, much of the site-specific technological data may be on file with EPA. RCRA, CERCLA and the Clean Water Act (FWPCA)<sup>32</sup> contain provisions requiring persons who deal with hazardous substances to maintain records and to make them available to EPA.<sup>33</sup> Local public health authorities will often conduct tests of the public water supply if contamination is suspected.<sup>34</sup> Complaints to EPA and state agencies often spur additional agency inspections and fact-gathering. Thus, much of the data a plaintiff needs to prevail at trial may be available in existing reports.

27. Large & Michie, *supra* note 16, at 563.

28. *Id.* Unfortunately, statistical proof is often the *only* proof available in environmental cases. The trial judge in Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) found after an extensive and complex trial that EPA had proved imminent and substantial endangerment to the public health (*see supra* note 25). The Eighth Circuit reversed the trial court's decision, holding the evidence insufficient to support a finding of substantial endangerment. *Id.* at 507. The court observed:

[T]hat the medical and scientific conclusions here in dispute clearly lie "on the frontiers of scientific knowledge." [Cite omitted]. The trial court, not having any proof of actual harm, was faced with a consideration of 1) the probabilities of any health harm and 2) the consequences, if any, should the harm actually occur.

*Id.* at 519.

29. EPSTEIN, BROWN & POPE, *supra* note 2, at 280.

30. *Id.* at 282-86.

31. *Id.* at 286. For addresses of a number of such organizations, see *id.*, Appendix XI, at 546.

32. 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

33. *See* RCRA § 3007, 42 U.S.C. § 6927 (1976); RCRA § 3013, 42 U.S.C. § 6934 (1976); CERCLA § 102, 42 U.S.C. § 9602 (Supp. V 1981); FWPCA § 308, 33 U.S.C. § 1318 (1976 & Supp. V 1981); and FWPCA § 311(b)(5), 33 U.S.C. § 1321 (b)(5) (1976 & Supp. V 1981).

34. EPSTEIN, BROWN & POPE, *supra* note 2, at 284.

## II. FEDERAL CAUSES OF ACTION

A. *Statutory*

A number of federal statutes pertaining to environmental protection have been enacted in recent years including the Resource Conservation and Recovery Act of 1976 (RCRA)<sup>35</sup> and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>36</sup> These particular statutes are specifically designed to deal with the problems of ongoing hazardous waste disposal and cleanup of hazardous waste sites where improper disposal methods were utilized in the past. Both provide potential causes of action for the private citizen.

1. *RCRA*

The Resource Conservation and Recovery Act of 1976 provides a comprehensive federal program for the regulation of solid waste disposal, with emphasis on proper hazardous waste disposal.<sup>37</sup> RCRA's coverage, however, is limited to regulation of presently operating disposal sites and persons who are currently active in the generation or hauling of hazardous waste materials.<sup>38</sup> The statute requires anyone who treats, stores or disposes of hazardous wastes to obtain a permit.<sup>39</sup> In order to procure a permit, one must demonstrate compliance with standards established by EPA for hazardous waste management.<sup>40</sup> If any person subject to the Act's coverage operates without a permit or operates in violation of a material provision of a permit, he is subject to civil penalties of up to \$25,000 for each day of continued non-compliance,<sup>41</sup> and may also be subject to criminal prosecution.<sup>42</sup>

As does nearly every federal environmental statute,<sup>43</sup> RCRA contains a provision authorizing private citizens to bring civil actions in federal district court for violations of "any permit, standard, regulation, condition, requirement or order" issued under the statute.<sup>44</sup> The purpose of these provisions is to provide additional enforcement mechanisms for regulatory statutes too comprehensive to be enforced by a single government agency of limited resources and manpower.<sup>45</sup>

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35. 42 U.S.C. §§ 6901-6987 (1976).

36. 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

37. For the RCRA definition of "hazardous waste," see *supra* note 2.

38. See 42 U.S.C. § 6902(3), (4) and (5) (1976).

39. 42 U.S.C. § 6925(a) (1976).

40. 42 U.S.C. § 6925(a) and § 6924 (1976).

41. 42 U.S.C. § 6928(a) (1976).

42. 42 U.S.C. § 6928(d) (1976).

43. See, e.g., FWPCA § 505, 33 U.S.C. § 1365 (1976); Clean Air Act § 304, 42 U.S.C. § 7604 (1976); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1982); and Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1982).

44. RCRA § 7002(a), 42 U.S.C. § 6972(a) (1976). This section also authorizes suits against the Administrator of EPA for failure to perform non-discretionary duties under the Act.

45. See comments by Senator Muskie from Sept. 21, 1970, Legislative History at 280-81, set out in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975). At least that is one view of the purpose of allowing citizen suits to enforce environmental legislation. A contrasting motivation was stated in Senate Committee Report No. 91-1196, set out at 510 F.2d at 723 as follows:

Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.

The citizen suit provisions in the various environmental statutes<sup>46</sup> differ only slightly, and the reasons for enacting each were identical to the reasons for enacting the original citizen suit provision of the Clean Air Act.<sup>47</sup> Therefore, precedent construing the provision of one such statute should be given equal weight in construing others.<sup>48</sup> The issue of standing to sue is arguably an exception to this general rule, but as will be seen, the exception, if it exists, is practically immaterial.

Standing to bring an action under RCRA is given to "any person."<sup>49</sup> This is also the case under the Clean Air Act,<sup>50</sup> but the Clean Water Act creates a cause of action for "any citizen"<sup>51</sup> and defines "citizen" as "a person or persons having an interest which is or may be adversely affected."<sup>52</sup> This definition is a direct adoption of the standing requirements enunciated in *Sierra Club v. Morton*,<sup>53</sup> as was recognized and confirmed by the Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.<sup>54</sup> Standing under the *Sierra Club* standard is available even though the alleged injury to the individual is aesthetic in nature and is no greater than the generalized injury to many other people.<sup>55</sup> As a practical matter, it can probably be obtained by anyone who may be in any way adversely affected by an alleged environmental harm if the pleadings are carefully enough drawn. It is not available, however, to an environmental organization which brings suit "merely" in the public interest.<sup>56</sup> Here lies the difference between the *Sierra Club* standing requirement and the apparent standing criteria under RCRA or the Clean Air Act in which Congress expressly conferred enforcement powers on "any person."<sup>57</sup> Arguably, Congress has created the case in controversy by giving any member of the public, including environmental organizations, the power to bring enforcement actions and thus no specific injury beyond injury to the public interest need be alleged.<sup>58</sup>

The issue is thus whether in the area of standing the citizen suit provisions of the various acts should all be construed as enshrining the *Sierra Club* standard, or whether Congress intended by the different language used to create different standing requirements. Even if Congress did

46. See *supra* note 43.

47. *North Slope Borough v. Andrus*, 515 F. Supp. 961 (D.D.C. 1981), *rev'd on other grounds*, 689 F.2d 222 (D.C. Cir. 1982).

48. *Id.* See also *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136 (D.R.I. 1977). Thus, in discussing the use of this vital provision, cases concerning questions arising under the various federal governmental statutes will be cited without distinguishing them from RCRA cases.

49. 42 U.S.C. § 6972(a) (1976). Under § 1004, 42 U.S.C. § 6903(15) (1976), "person" is defined broadly to include "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body."

50. See 42 U.S.C. § 7604(a) (1976).

51. § 505(a), 33 U.S.C. § 1365(a) (1976).

52. § 505(g), 33 U.S.C. § 1365(g) (1976).

53. 405 U.S. 727 (1972).

54. 453 U.S. 1 (1981).

55. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

56. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

57. See *supra* note 49.

58. *Miller, Private Enforcement of Federal Pollution Control Laws, Part I*, 13 ENVTL. L. REP. 10309 (1983).

*intend* to create a lower standing requirement it is doubtful it has power to do so.<sup>59</sup> The Supreme Court in *Sierra Club* and cases cited therein, seemed to say that injury in fact is a constitutional requirement.<sup>60</sup> If so, Congress is without power to waive it.

The question is important because, as a practical matter, it would be much easier and therefore desirable to allege standing in an environmental group based on vindication of the public interest. The lines between constitutional and jurisprudential standing requirements are not clear, so an environmental plaintiff might make a case for general standing under citizen suit provisions. But while this would be appropriate as a test case, most plaintiffs will be well-advised to plead in conformity with the *Sierra Club* standard rather than risk the expense of a dismissal for lack of standing.

Under the citizen suit provision of RCRA, a private individual is empowered to bring an action to enforce the Act. The provision requires an individual who desires to bring an action to give EPA notice of the violation at least sixty days prior to filing the complaint.<sup>61</sup> In addition, no citizen suit may be brought at all "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order."<sup>62</sup> These requirements exist to allow the agency to do its job; they give the agency time to act on alleged violations itself.<sup>63</sup>

For purposes of the notice provision, administrative enforcement proceedings before an agency are equivalent to civil actions before a court only if the agency is "empowered to grant relief which will provide meaningful and effective enforcement of an implementation plan."<sup>64</sup> If Congress provided in the statute for both penalties and injunctive relief, the administrative tribunal must have the power to grant both. Otherwise, it is not a "court" for purposes of preventing a citizen suit, and the prosecution of an enforcement proceeding at the agency level will not foreclose filing of a civil action in a court of law.<sup>65</sup>

RCRA was designed as a regulatory statute to manage ongoing hazardous waste disposal. Clearly, a private individual is empowered to bring suit to enforce permit terms and to prevent disposal without a permit so long as she complies with the procedural requirements of the statute.

59. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the *Sierra Club* sought standing to vindicate the general public interest. The Supreme Court refused to grant standing without an allegation of specific harm to its individual members.

60. 405 U.S. at 733.

61. RCRA § 7002(b) (1), 42 U.S.C. § 6972(b) (1) (1976).

62. RCRA § 7002(b) (2), 42 U.S.C. § 6972(b) (2) (1976).

63. See S. REP. NO. 91-1196 at 36-39, set out in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 723 (D.C. Cir. 1975).

64. *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 218 (3d Cir. 1979).

65. *Id.*



RCRA was not designed, however, to remedy the larger and immediate problem of closed and abandoned hazardous waste disposal sites<sup>66</sup>—those sites which are presently leaking toxic chemicals into the nation's rivers and aquifers.<sup>67</sup> But when it was enacted in 1976 there was no federal statute in existence which purported to regulate closed or abandoned waste dumps. As a result, section 7003<sup>68</sup> of RCRA, the statute's imminent hazard provision, was pressed into service by the federal government in attempts to avert public health disasters threatened by leakage from abandoned waste sites into municipal water supplies.<sup>69</sup> For the most part, courts held that section 7003 could be used to attempt to remedy these severe problems caused by abandoned or closed sites.<sup>70</sup> Some refused to extend RCRA to cover what was obviously beyond its purpose even in the face of the threatened danger.<sup>71</sup>

Even if a court is willing to extend section 7003 to cover abandoned sites, the provision is probably not available to a private individual. By its own terms, it empowers only the Administrator of EPA to bring suit.<sup>72</sup> Furthermore, the legislative history is clear that Congress authorized citizen suits only for the purpose of enforcing specific standards established by statute or by EPA.<sup>73</sup> RCRA contains no express provisions governing abandoned or closed (as of 1976 when RCRA was enacted) waste sites, nor does it authorize EPA to promulgate regulations governing them.<sup>74</sup> The issues which would have to be determined by a court in such a suit are just exactly the sort of complex, technical issues that Congress expressly wanted to avoid in a citizen suit litigation.<sup>75</sup>

RCRA, therefore, provides a viable cause of action to the individual who seeks to remedy a problem created by an operating facility if the facility is in violation of its RCRA permit, or if it has failed to procure a permit. It probably does not provide a remedy for the problems caused by a closed or abandoned site.

66. *United States v. Waste Industries*, 556 F. Supp. 1301, 1307 (E.D.N.C. 1982); *United States v. Wade (Wade I)*, 546 F. Supp. 785 (E.D. Pa. 1982).

67. *Superfund at Square One: Promising Statutory Framework Requires Forceful EPA Implementation*, ENVTL. L. REP. 10101, 10102 (1981).

68. 42 U.S.C. § 6973 (1976).

69. For example, in *United States v. Price (Price I)*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982), EPA sought to remedy the pollution of the water supply of Atlantic City, New Jersey.

70. *See, e.g., United States v. Price (Price I)*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982); *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

71. *See, e.g., United States v. Waste Industries*, 556 F. Supp. 1301 (E.D.N.C. 1982); *United States v. Wade (Wade I)*, 546 F. Supp. 785 (E.D. Pa. 1982).

72. "Notwithstanding any other provision of this chapter, . . . the Administrator may bring suit on behalf of the United States. . . ." 42 U.S.C. § 6973(a) (1976).

73. The provision . . . is carefully restricted to actions where violations of standards and regulations . . . are alleged.

[The citizen suit provision] would not substitute a "common law" or court-developed [standard] . . . [and] would not require reanalysis of technological or other considerations at the enforcement stage. . . . [A]n objective evidentiary standard would have to be met by the citizen who brings an action under this section.

S. REP. No. 91-1196 at 36-39 (cited in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 723 (D.C. Cir. 1975)).

74. *United States v. Waste Industries*, 556 F. Supp. 1301, 1307 n.11 (E.D.N.C. 1982).

75. *See supra* note 73 for the relevant legislative history.

## 2. CERCLA

The Comprehensive Environmental Response, Compensation and Liability Act<sup>76</sup> was enacted in 1980 to provide for prompt cleanup of hazardous waste disposal sites.<sup>77</sup> The Act establishes the Superfund.<sup>78</sup> It also gives private parties the right to recover costs of cleanup from responsible third parties.<sup>79</sup>

The Superfund is a 1.6 billion dollar trust fund funded by taxes on industry and contributions from the federal government.<sup>80</sup> Any person who has incurred response costs in cleaning up a hazardous waste dumpsite may be eligible to recover against the Fund, provided the costs have been approved under the national contingency plan and have been certified by the responsible federal officer.<sup>81</sup> In order to proceed against the Fund, the party must 1) incur the response costs,<sup>82</sup> 2) make a claim for the costs to the responsible party,<sup>83</sup> and then, if the claim is not satisfied within sixty days, present it to the Fund.<sup>84</sup>

Claims against the fund are made to an administrative board.<sup>85</sup> CERCLA provides no standards directing the agency's discretion in awarding claims.<sup>86</sup> If the claim is denied, it is submitted to a Board of Arbitrators for review.<sup>87</sup> Decisions of the Board may be appealed to the federal district court.<sup>88</sup> If the claim is paid, the rights of the claimant against any third party for recovery of his response costs are subrogated to the United States.<sup>89</sup>

As an alternative to a claim against Superfund, CERCLA provides a cause of action against the responsible party to private individuals who incur response costs.<sup>90</sup> There are three categories of responsible persons: 1) present and former site owners, 2) transporters of hazardous wastes, and 3) those who arrange for transport and disposal (generators).<sup>91</sup> Under CERCLA section 107(j),<sup>92</sup> compliance with a permit under other federal environmental legislation precludes recovery pursuant to CERCLA.

76. 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981).

77. *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

78. *See supra* note 19.

79. CERCLA § 107(a), 42 U.S.C. § 9606(a) (Supp. V 1981). *See also Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982).

80. *Superfund at Square One*, *supra* note 67, at 10102.

81. CERCLA § 111(a), 42 U.S.C. § 9611(a) (Supp. V 1981).

82. *Id.*

83. CERCLA § 112(a), 42 U.S.C. § 9612(a) (Supp. V 1981).

84. *Id.*

85. CERCLA § 112(b), 42 U.S.C. § 9612(b) (Supp. V 1981).

86. *Id.*

87. CERCLA § 112(b) (3) and (b) (4), 42 U.S.C. § 9612(b) (3) and (b) (4) (Supp. V 1981).

88. CERCLA § 112(b) (4) (G), 42 U.S.C. § 9612(b) (4) (G) (Supp. V 1981).

89. CERCLA § 112(c) (1), 42 U.S.C. § 9612(c) (1) (Supp. V 1981).

90. In any case where the claim has not been satisfied within sixty days of presentation . . . the claimant may elect to commence an action in court against [the responsible party] or to present the claim to the Fund for payment.

CERCLA § 112(a), 42 U.S.C. § 9612(a) (Supp. V 1981).

91. *Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982); CERCLA § 107(a), 42 U.S.C. § 9607(a) (Supp. V 1981).

92. 42 U.S.C. § 9607(j) (Supp. V 1981).

Just as with claims against Superfund, the individual must first incur the response costs before she can assert a claim against the responsible party.<sup>93</sup> This requirement has been construed broadly to include costs incurred up to the date of the damages hearing, and costs for services which have been contracted but have not yet been actually paid.<sup>94</sup>

Liability under CERCLA is strict in the sense that negligence or intent need not be proved to render a party responsible for costs of cleanup.<sup>95</sup> However, section 107(b)<sup>96</sup> provides three affirmative defenses which, if proved, are complete defenses against all liability.<sup>97</sup>

As discussed above, proof of causation is one of the most difficult burdens an environmental plaintiff must bear.<sup>98</sup> The only court which has thus far considered what is required to prove causation under CERCLA has lessened this burden considerably—the court in *United States v. Wade (Wade II)*<sup>99</sup> construed the language of section 107(a)<sup>100</sup> to require only a showing that waste generated by the person sought to be charged was disposed of at the site in question, and that wastes of that type continue to be present at the site.<sup>101</sup> Most significantly, the environmental plaintiff is *not* required to prove that the cleanup measures relate to a release of the same type of waste that the defendant caused to be placed at the site.<sup>102</sup> Any release which necessitates a cleanup creates a cause of action against any person who has ever disposed of hazardous wastes at the particular site if such wastes were of a variety currently found at the site.<sup>103</sup>

While recovery under Superfund is strictly limited to response costs which have been approved and certified in accordance with the national contingency plan,<sup>104</sup> recovery against responsible parties may be had of all costs which are merely *consistent* with the plan.<sup>105</sup> The “consistency” determination is made by the court and is not limited to just those costs which would be payable, under section 111,<sup>106</sup> out of the Superfund.<sup>107</sup>

A private party may be able to recover response costs from a third party under section 107 even if *she herself* might be liable to another for costs

93. CERCLA § 107(a) (4) (B), 42 U.S.C. § 9607(a) (4) (B) (Supp. V 1981); *United States v. Price* (Price III), 13 ENVTL. L. REP. 20843 (D.N.J. 1983); *United States v. Wade (Wade I)*, 546 F. Supp. 785 (E.D. Pa. 1982).

94. *United States v. Wade (Wade II)*, No. 79-1426, memo. op. of Dec. 20, 1983 (E.D. Pa. 1983).

95. *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). See also *United States v. Price* (Price III), 13 ENVTL. L. REP. 20843 (D.N.J. 1983); and *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

96. 42 U.S.C. § 9607(b) (Supp. V 1981).

97. *Id.* Section 107(b) defenses include acts of God, acts of war and acts of third parties which are the *sole* cause of the release and damage.

98. See *supra* text accompanying notes 25-28.

99. No. 79-1426, memo. op. of Dec. 20, 1983 (E.D. Pa. 1983).

100. 42 U.S.C. § 9607(a) (Supp. V 1981).

101. No. 79-1426, memo. op. of Dec. 20, 1983 at 9 (E.D. Pa. 1983).

102. *Id.*

103. *Id.*

104. See *supra* text accompanying note 81.

105. CERCLA § 107(a) (4) (B), 42 U.S.C. § 9607(a) (4) (B) (Supp. V 1981).

106. 42 U.S.C. § 9611 (Supp. V 1981).

107. *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1117-18 (D. Minn. 1982).

of cleanup.<sup>108</sup> A private party cannot recover for damages to natural resources caused by the release.<sup>109</sup>

All CERCLA claims are subject to a three year statute of limitations.<sup>110</sup> The statute runs from the date of discovery of the loss.<sup>111</sup>

CERCLA is a statute tailor-made to enable cleanup of closed or abandoned hazardous waste disposal sites. It provides a cause of action against a broad range of responsible parties<sup>112</sup> or a claim against a government trust fund.<sup>113</sup> Liability is strict, proof of causation has been rendered simple, and a broad spectrum of costs are recoverable at the discretion of the court.<sup>114</sup> But CERCLA has one very large drawback: the statutory language is clear that cleanup costs must *first* be incurred before they can be recovered.<sup>115</sup> It is a rare environmental plaintiff who has the resources to cleanup first and recover later.

As a result, EPA has attempted to use the imminent hazard provision of CERCLA<sup>116</sup> in much the same way it has employed section 7003 of RCRA<sup>117</sup> to obtain injunctions mandating cleanup of abandoned hazardous waste sites.<sup>118</sup> The few courts which have considered the question have split in whether to allow the action.<sup>119</sup> It seems clear Congress did not intend for section 106(a)<sup>120</sup> to be employed to directly circumvent the restrictions on the cause of action it expressly granted in section 107;<sup>121</sup> yet, as a matter of policy, if closed waste sites are to be cleaned up at all there must be some way to make those responsible for their existence clean them up themselves.<sup>122</sup> For this reason some courts have been willing to allow the cause of action to stand, with liability determined on the same basis as under section 107<sup>123</sup> or under general principles of the common law of nuisance.<sup>124</sup>

A private environmental plaintiff faces an additional hurdle in pursuing an action under section 106(a):<sup>125</sup> CERCLA, unlike nearly every other piece

108. See *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1141 (E.D. Pa. 1982), where the court held the municipal owner of the landfill could recover against generators of hazardous wastes illegally disposed of at the site even though it might be held liable under CERCLA for response costs incurred by another.

109. CERCLA § 107(f), 42 U.S.C. § 9607(f) (Supp. V 1981).

110. CERCLA § 113(d), 42 U.S.C. § 9613(d) (Supp. V 1981).

111. *Id.*

112. See *supra* text accompanying notes 90-92.

113. See *supra* text accompanying notes 81-89.

114. See *supra* text accompanying notes 95-97.

115. See CERCLA § 107(a) (4) (B), 42 U.S.C. § 9607(a) (4) (B) (Supp. V 1981); and CERCLA § 111(a) (2), 42 U.S.C. § 9611(a) (2) (Supp. V 1981).

116. CERCLA § 106(a), 42 U.S.C. § 9606(a) (Supp. V 1981).

117. 42 U.S.C. § 6973 (1976).

118. See *United States v. Price* (Price III), 13 ENVTL. L. REP. 20843 (D.N.J. 1983); *United States v. Wade* (Wade I), 546 F. Supp. 785 (E.D. Pa. 1982); and *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

119. *Id.* In *Price III* and *Reilly Tar*, the court upheld a cause of action based on CERCLA § 106(a); but in *Wade I*, the court refused to use § 106(a) to overcome the obvious restriction imposed on plaintiffs by § 107.

120. 42 U.S.C. § 9606(a) (Supp. V 1981).

121. 42 U.S.C. § 9607(a) (4) (B) (Supp. V 1981).

122. *United States v. Price* (Price III), 13 ENVTL. L. REP. 20843, 20846 (D.N.J. 1983).

123. *Id.* at 20847.

124. *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1113 (D. Minn. 1982).

125. 42 U.S.C. § 9606(a) (Supp. V 1981).

of federal environmental legislation, contains no citizen suit provision.<sup>126</sup> Further, the language of section 106(a) gives a cause of action only to the federal government. Whether a private plaintiff can maintain a cause of action under section 1331<sup>127</sup> general federal question jurisdiction is a question yet to be litigated.

### 3. Other federal environmental statutes

In addition to RCRA and CERCLA, which deal specifically with hazardous wastes, a number of other federal environmental statutes may be of use in a specific case.<sup>128</sup> Of these, the Clean Water Act<sup>129</sup> is most frequently employed. It should be noted that its coverage is limited to "navigable waters,"<sup>130</sup> which does not include most groundwater.<sup>131</sup> The Clean Water Act does not regulate water pollution caused by percolation, but instead leaves regulation of "non-point source" pollution to the individual states.<sup>132</sup>

These statutes are available to private individuals for enforcement actions under their respective citizen suit provisions.<sup>133</sup>

### 4. Recovery of costs and attorney fees under federal environmental legislation

The citizen suit provisions contained in the various environmental statutes<sup>134</sup> provide for recovery of costs and attorney fees "whenever the court determines such an award is appropriate."<sup>135</sup> The plain language of these statutes suggests the award of costs and fees is in the discretion of the court, and might be determined by the value to the general public of having a close question of law litigated irregardless of whether the environmental plaintiff prevails on the merits.<sup>136</sup> But in a recent five to four decision the Supreme Court held that *no* costs or fees can be awarded an environmental plaintiff who does not prevail at least to some extent on the merits.<sup>137</sup>

126. See *supra* text accompanying note 43.

127. 28 U.S.C. § 1331 (Supp. V 1981).

128. Other federal statutes governing toxic wastes include the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982); the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981); the Safe Drinking Water Act, 42 U.S.C. § 300(f) (1976); the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136Y (1982); and the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901-7942 (Supp. V 1981).

129. 33 U.S.C. §§ 1251-1376 (1977 & Supp. V 1981).

130. See FWPCA § 301(a), 33 U.S.C. § 1311(a) (1977) (discharge of pollutant unlawful); and § 502-12, 33 U.S.C. § 1362(12) (1977) ("discharge of a pollutant" means addition of a pollutant to "navigable waters").

131. See, e.g., *Exxon v. Train*, 554 F.2d 1310 (5th Cir. 1977).

132. See *Natural Resources Defense Council, Inc. v. Costle*, 546 F.2d 573 (D.C. Cir. 1977).

133. The uses and limitations of citizen suit provisions in general are described *supra*, in text accompanying notes 43-65, and *infra*, in text accompanying notes 134-37.

134. See *supra* note 43.

135. RCRA § 7002(e), 42 U.S.C. § 6972(e) (1976). See as another example FWPCA § 505(d), 33 U.S.C. § 1365(d) (1976).

136. See the dissenting opinion in *Ruckelshaus v. Sierra Club*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3274, 3285-86 (1983). Legislative history supports this construction. A Senate Committee Report on the citizen suit provision of the Clean Water Act stated:

The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the court should award costs of litigation to such party.

S. REP. NO. 91-1196 at 36-39 (quoted in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 723 (D.C. Cir. 1975)).

137. *Id.* *Ruckelshaus v. Sierra Club* construed the citizen suit provision of the Clean Air Act.

5. *Section 1331 federal question jurisdiction over claims based on environmental statutes*

On occasion, environmental plaintiffs have brought actions based on asserted violations of environmental statutes, but have failed to comply with the sixty day notice requirement of the various citizen suit provisions.<sup>138</sup> The Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,<sup>139</sup> implied that no general federal question jurisdiction exists to allow claims based on violations of the Clean Water Act and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA),<sup>140</sup> absent compliance with the sixty day notice provisions required by the Acts.<sup>141</sup>

Of course, this problem is avoided simply by giving the requisite notice in compliance with statutory requirements.

B. *Implied Causes of Action Based on Environmental Legislation*

Closely related to the federal question jurisdiction issue is the question whether the various federal environmental statutes create implied causes of action for damages. The citizen suit provisions contain savings clauses preserving "any right which any person . . . may have under any statute or common law to seek enforcement of any standard or requirement . . . or to seek any other relief. . . ."<sup>142</sup> Environmental plaintiffs have attempted to use these clauses, as well as the statutes themselves, to imply private causes of action for damages to property, livelihood and person.<sup>143</sup> The Supreme Court, in *Sea Clammers*, refused to recognize an implied right of action based on the Clean Water Act and MPRSA.<sup>144</sup> It stated that the key inquiry is whether Congress intended to create private rights to damages in individuals when it enacted the statute, and that the comprehensive nature of these statutes, as well as the inclusion of a citizen suit provision, was evidence Congress did *not* intend to provide a damage remedy.<sup>145</sup> The court refused to construe the savings clause to *create* a cause of action for damages based on the very statute it was a part of.<sup>146</sup>

138. See, e.g., *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975). See *supra* text accompanying notes 59-65, for a discussion of the 60-day notice requirement.

139. 453 U.S. 1 (1981).

140. 33 U.S.C. §§ 1401-1444 (1977 & Supp. V 1981).

141. Though the issue was not raised on appeal and therefore was not expressly considered in the Court's opinion, such a holding would be consistent with the Court's refusal to recognize implied causes of action arising out of the Acts in question. See *infra* text accompanying notes 142-148. Further, the Court was reversing the Third Circuit's express holding that a cause of action could be maintained despite failure to give the required sixty days notice to defendant. See 453 U.S. at 8-11.

142. RCRA § 7002(f), 42 U.S.C. § 6972(f) (1977); see also, e.g., FWPCA § 606(e), 33 U.S.C. § 1365(e) (1977).

143. *Sea Clammers* was an action to recover damages for harm to the fishing and shellfish industry caused by pollution of the ocean.

144. 453 U.S. at 14.

145. *Id.* at 13-15.

146. *Id.* at 15-16.

Because of the similarity of the various environmental statutes and their citizen suit provisions,<sup>147</sup> the *Sea Clammers* holding will no doubt extend throughout the field of environmental law.<sup>148</sup>

### C. Federal Common Law

The savings clauses of the various environmental citizen suit provisions expressly preserve common law remedies in addition to the remedies granted by statute.<sup>149</sup> For purposes of construing these clauses, the courts have distinguished between federal common law and state common law.<sup>150</sup>

Federal courts lack any general power to develop common law.<sup>151</sup> They do possess limited authority to develop common law if Congress hasn't legislated in an area, and if federal policy interests preclude the use of state common law (as when the dispute involves two states).<sup>152</sup> Federal common law is always subject to the paramount authority of Congress.<sup>153</sup> Enactment of legislation which comprehends an area previously governed by federal common law causes the law to "disappear."<sup>154</sup>

The Supreme Court, in *Illinois v. Milwaukee (Milwaukee I)*,<sup>155</sup> recognized the existence of a general federal common law of nuisance to resolve interstate water pollution problems. When the same case again reached the Supreme Court nearly ten years later,<sup>156</sup> the Clean Water Act legislation was in place, and the Court found Congress had "occupied the field [of water pollution control] through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,"<sup>157</sup> and thus there was "no room for courts to attempt to improve on that program with federal common law."<sup>158</sup> *Milwaukee II* denied a common law claim for *injunctive* relief based on statutory pre-emption.<sup>159</sup> The *Sea Clammers*<sup>160</sup> decision issued later that same year went even further in holding the federal common law was *completely* pre-empted in the water pollution area by federal environmental legislation.<sup>161</sup> Thus, no federal common law action for *damages* remains either.<sup>162</sup>

As is only logical, these decisions have been extended to the field of hazardous waste regulation. Thus, RCRA and CERCLA have been found to pre-empt federal common law in the area of toxic waste disposal.<sup>163</sup>

147. See *supra* text accompanying notes 46-48.

148. In general, the current Supreme Court views implied rights of action with disfavor, and has limited them whenever possible. See, e.g., *California v. Sierra Club*, 451 U.S. 287 (1981); *Cort v. Ash*, 422 U.S. 66 (1975).

149. See *supra* text accompanying note 142.

150. See, e.g., *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), where the court disallowed the federal common law claim, but held causes of action could be maintained under state common law theories.

151. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

152. *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 313 (1981).

153. *Id.* at 314.

154. *Id.*

155. 406 U.S. 91 (1972).

156. *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981).

157. *Id.* at 317.

158. *Id.* at 319.

159. *Id.*

160. 453 U.S. 1 (1981).

161. *Id.*

162. *Id.*

163. *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1147-48 (E.D. Pa. 1982); *United States v. Price (Price I)*, 523 F. Supp. 1055, 1069 (D.N.J. 1981).

### III. STATE CAUSES OF ACTION

Up to this point discussion has centered on federal causes of action which must be brought in federal court.<sup>164</sup> In contrast, claims based on state law may be brought in state court, or they may be heard in federal court in conjunction with federal claims under pendent jurisdiction.<sup>165</sup> The State of Wyoming has almost no environmental case law,<sup>166</sup> but the two cases which have reached the Wyoming Supreme Court have been decided in favor of environmental plaintiffs.<sup>167</sup> While two cases can hardly be deemed conclusive indicia of how the court will rule on other environmental cases in the future, they do stand as encouragement to plaintiffs to develop Wyoming case law in the environmental field.

#### A. Statutory Causes of Action in Wyoming

##### 1. The Wyoming Environmental Quality Act<sup>168</sup>

The Wyoming Environmental Quality Act (WEQA),<sup>169</sup> a comprehensive environmental statute governing air, land and water quality, includes a citizen suit provision which is worded much the same as its counterparts in federal statutes.<sup>170</sup> Like its federal counterparts, WEQA provides to the private citizen a cause of action to enjoin alleged violations of the act;<sup>171</sup> it requires a plaintiff to give the alleged violator sixty days notice of the claim;<sup>172</sup> it forecloses the bringing of an action if the Department of Environmental Quality (DEQ) has already commenced a civil action to enjoin the same violation;<sup>173</sup> it provides for recovery of costs of litigation on the same terms as do the federal statutes;<sup>174</sup> and it contains a savings clause which preserves existing civil and criminal remedies.<sup>175</sup>

Because it is so similar to federal citizen suit provisions, the citizen suit provision of WEQA would appear to extend the same sort of enforcement authority as is extended to private persons under federal environmental legislation. Its coverage, however, is extremely unclear.

Section 35-11-902 of the Wyoming Statutes<sup>176</sup> was passed by the Wyoming Legislature in 1980 as part of an act which extensively amended the original WEQA.<sup>177</sup> The purpose and focus of the amendment was to

164. See, e.g., RCRA § 7002(a), 42 U.S.C. § 6972(a) (1976), which provides that "any action [against a violator] shall be brought in the district court for the district in which the alleged violation occurred." (emphasis added).

165. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

166. The only two environmental cases decided thus far by the Wyoming Supreme Court are Belle Fourche Pipeline Co. v. Elmore Livestock Co., 669 P.2d 505 (Wyo. 1983); and People v. Platte Pipe Line Co., 649 P.2d 208 (Wyo. 1982). Both construe provisions of the Wyoming Environmental Quality Act, WYO. STAT. §§ 35-11-101 to -1104 (1977 & Supp. 1983).

167. *Id.*

168. WYO. STAT. §§ 35-11-101 to -1104 (1977 & Supp. 1983).

169. *Id.*

170. WYO. STAT. § 35-11-902 (Supp. 1983).

171. WYO. STAT. § 35-11-902(a) (i) (Supp. 1983).

172. WYO. STAT. § 35-11-902(c) (i) (Supp. 1983).

173. WYO. STAT. § 35-11-902(c) (ii) (Supp. 1983).

174. WYO. STAT. § 35-11-902(e) (Supp. 1983).

175. WYO. STAT. § 35-11-902(g) (Supp. 1983).

176. WYO. STAT. § 35-11-902 (Supp. 1983).

177. See 1980 WYO. SESS. LAWS Ch. 64.



obtain regulatory authority under the Surface Mining Control and Reclamation Act of 1977 (SMRCA).<sup>178</sup> The citizen suit provision of WEQA references the SMRCA citizen suit provision,<sup>179</sup> and is certainly susceptible to a literal construction that it applies only to violations of the surface mining provisions. When viewed in light of the fact that section 902 was part of a much more extensive act amending the WEQA,<sup>180</sup> the reference of subsection (a)<sup>181</sup> to "this act" may be understood as limited to the amending act and its provisions only, rather than to the entire Wyoming Environmental Quality Act.

Based on the foregoing, it is certainly arguable that the Wyoming Legislature intended the citizen suit provision to relate only to the surface mining provisions of the WEQA. But in *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, a decision which did not discuss the section's history, the Wyoming Supreme Court held it is available for use by a private citizen to remedy a *groundwater pollution* problem.<sup>182</sup> It would therefore appear the citizen suit vehicle is available to enforce any provision of, or regulation under, the Wyoming Environmental Quality Act.

Such a construction is supported by public policy. Citizen suit provisions were originally included in federal legislation to provide an additional means by which our environment can be preserved and improved.<sup>183</sup> The legislative history of the federal Clean Water Act indicates that Congress contemplated states would be required to include citizen enforcement authority in their legislation in order to get permitting and enforcement authority under the Act,<sup>184</sup> and one court has overturned EPA approval of a state program for failure to include a citizen suit provision.<sup>185</sup> EPA regulations which *require* inclusion of such provisions in state legislation have been upheld under SMRCA.<sup>186</sup>

The primary cause of action a private person might bring in a state court in the area of hazardous waste disposal would be an action based on state RCRA enforcement authority. As of this writing, Wyoming has not obtained this authority.<sup>187</sup> The WEQA provisions covering hazardous waste disposal are extremely limited, but may provide an action in particular circumstances.<sup>188</sup>

178. 30 U.S.C. §§ 1301-1328 (Supp. V 1981).

179. See WYO. STAT. § 35-11-902(a) (Supp. 1983), which refers to 30 U.S.C. § 1270 (Supp. V 1981).

180. 1980 WYO. SESS. LAWS Ch. 64.

181. WYO. STAT. § 35-11-902(a) (Supp. 1983).

182. 669 P.2d 505 (Wyo. 1983).

183. See *supra* text accompanying note 45.

184. I sincerely hope that the Administrator understands that this applies across the board, including the establishment of the permit program under section 402 of the bill.

Remarks of Representative Dingell (quoted in *Citizens for a Better Environment v. EPA*, 596 F.2d 720, 724, *reh'g denied*, (7th Cir. 1979).

185. 596 F.2d at 724.

186. In re Permanent Surface Mining Regulation Litigation, 10 ENVTL. L. REP. 20208 (D.D.C. 1980), *aff'd en banc*, 653 F.2d 514 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 822 (1981).

187. Cf. WYO. STAT. §§ 35-11-501 to -503 (1977). See also BELFIGLIO, LIPPE & FRANKLIN, HAZARDOUS WASTE DISPOSAL SITES, 69-70 (1981).

188. See WYO. STAT. §§ 35-11-501 to -503 (1977). management under present Wyoming law relates only to newly constructed sites, therefore, only sites opened since the law's enactment in 1973 are required to obtain permits.

Wyoming does have permitting authority under the Clean Water Act.<sup>189</sup> Coverage encompasses "waters of the State," including groundwater.<sup>190</sup> "Discharge" is *any* addition of pollution to waters of the State.<sup>191</sup> Unlike the federal Clean Air Act, the WEQA does not limit its permit requirements to "point sources" of pollutants.<sup>192</sup> Thus, the water quality provisions of WEQA are an excellent vehicle to remedy hazardous waste disposal problems where one can show water is being contaminated.

Civil liability under WEQA is strict, and there are no defenses.<sup>193</sup> The Act provides for assessment of damages and civil penalties, and for injunctions against continued violations.<sup>194</sup> It does not provide specifically for cleanup costs, but such costs could arguably be assessed as damages.<sup>195</sup>

Like its federal counterparts, the Wyoming Environmental Quality Act forbids citizen suits if DEQ "has commenced a civil action to require compliance."<sup>196</sup> The meaning of "civil action" for purposes of the WEQA has not yet been determined by the Wyoming Supreme Court. Of some relevance to this issue is the court's decision in *People v. Fremont Energy Corporation*.<sup>197</sup> In construing the powers of DEQ to enforce the WEQA, the court held the agency was not required to first exhaust its potential administrative remedies before it could commence a court action seeking civil penalties.<sup>198</sup> Since this is the case, it cannot be argued that failure of DEQ to commence a judicial action after receipt of notice under 901(c) (i)<sup>199</sup> is excusable because it is first *required* to proceed administratively against the alleged violator. Because DEQ *can* proceed directly to court if it so chooses, "civil action" in 901(c) (ii)<sup>200</sup> should be construed as a judicial proceeding in a court of law.

This construction is in accord with federal construction of citizen suit provisions.<sup>201</sup> The Environmental Quality Council does not possess the remedial powers of a court in that it cannot collect civil penalties except through a civil action,<sup>202</sup> nor can it assess damages.<sup>203</sup> Since it is not the functional equivalent of a court, it should not be treated as one for purposes of barring citizen suits under the WEQA.

189. See WYO. STAT. §§ 35-11-301 to -303 (1977 & Supp. 1983).

190. WYO. STAT. § 35-11-103(c) (i), (vi) and (vii) (1977).

191. WYO. STAT. § 35-11-103(c) (vii) (1977).

192. WYO. STAT. § 35-11-301 (1977 & Supp. 1983)

193. *People v. Platte Pipe Line Co.*, 649 P.2d 208, 213 (Wyo. 1982). "*If a person alters the waters' quality without a permit, he then has violated the statute, regardless of fault.*" *Id.* at 213. (Emphasis in original).

194. WYO. STAT. § 35-11-901 (Supp. 1983). See also *People v. Platte Pipe Line Co.*, 649 P.2d 208, 214 (Wyo. 1982).

195. In *Belle Fourche*, the trial court had awarded damages based on costs of cleaning up the contaminated ground water. The Wyoming Supreme Court reversed the award because the plaintiff had failed to comply with the sixty day notice requirement of the WEQA citizen suit provision, but did not comment on whether the measure of damages applied by the trial court was appropriate. 669 P.2d at 511.

196. WYO. STAT. § 35-11-902(c) (ii) (Supp. 1983).

197. 651 P.2d 802 (Wyo. 1982).

198. *Id.* at 811.

199. WYO. STAT. § 35-11-902(c) (i) (Supp. 1983).

200. WYO. STAT. § 35-11-902(c) (ii) (Supp. 1983).

201. See *supra* text accompanying notes 63-65.

202. WYO. STAT. § 35-11-901(a) (Supp. 1983).

203. WYO. STAT. § 35-11-901(b) (Supp. 1983).

The language employed in stating criteria for awarding litigation costs under the WEQA is the same as the language used in its federal counterparts.<sup>204</sup> "The court . . . may award costs of litigation, (including attorney and expert witness fees), to any party whenever [it] determines such an award is appropriate."<sup>205</sup> There is no case law in Wyoming construing this provision. As noted above, the federal provisions have been construed to require that a party must prevail on at least some part of the merits to receive an award of costs.<sup>206</sup> The Wyoming provision providing for cost awards in general civil actions<sup>207</sup> also employs broad language which arguable could be construed to allow an award of costs even to a party who loses on the merits,<sup>208</sup> but it has never been so interpreted.<sup>209</sup>

An environmental plaintiff who does not prevail would certainly want to argue that the public interest was served just by having the particular issue litigated, and that an award of costs is therefore warranted under the broad terms of section 35-11-902(e).<sup>210</sup> Federal precedent and Wyoming case law construing the state's general costs provision indicate these arguments may be unsuccessful.

## 2. Wyoming nuisance statutes

There are several nuisance statutes relating to littering and water pollution in the Wyoming statutes,<sup>211</sup> but they provide little help in the area of hazardous waste cleanup.

In general, Wyoming nuisance statutes provide for abatement and minor penalties.<sup>212</sup> Enforcement is vested in public officials.<sup>213</sup> As a matter of policy, such statutes might not apply if the nuisance is governed by WEQA.<sup>214</sup>

These statutes may have a limited usefulness on the right facts. If abatement is the *only* remedy sought, and if the WEQA does not seem applicable,<sup>215</sup> the environmental plaintiff might be able to maintain a cause of action to enforce these provisions. The Wyoming statutes covering nuisances such as gambling and prostitution allow private citizens to sue for enforcement.<sup>216</sup> As a matter of public policy, there is no justification for

204. Compare WYO. STAT. § 35-11-902(e) (Supp. 1983) and RCRA § 7002(e), 42 U.S.C. § 6972(e) (1976).

205. WYO. STAT. § 35-11-902(e) (Supp. 1983).

206. See *supra* text accompanying notes 134-137.

207. WYO. STAT. § 1-14-126 (1977).

208. "[T]he court may award . . . costs . . . as it deems right and equitable." *Id.*

209. The court awarded costs to the prevailing party in an action for rescission of contract where no money damages were awarded in *Eldridge v. Rogers*, 40 Wyo. 89, 275 P. 101 (1929). This is as far as the Wyoming court has gone.

210. WYO. STAT. § 35-11-902(e) (Supp. 1983).

211. WYO. STAT. §§ 6-3-204, 35-10-101 and 35-11-401 (1977).

212. *Id.*; WYO. STAT. § 35-11-102 (1977).

213. *Id.*

214. The littering statute (WYO. STAT. § 6-3-204(b) (1977)) states that it doesn't apply in this situation.

215. Such a situation might arise, for instance, where the pollutor is exempt from operation of federal or state environmental quality controls by virtue of the nature or the size of the operation. As an example, RCRA permit requirements reach only those generators who produce more than 1,000 kilograms per month of hazardous waste. 40 C.F.R. § 261.5 (1983).

216. WYO. STAT. § 6-6-202 (1977).

allowing citizen enforcement of one type of nuisance statute, while denying it for another, particularly in light of the express allowance of citizen suits against violators of WEQA.

### B. State Common Law Causes of Action in Wyoming

The Supreme Court ruling in *Sea Clammers*<sup>217</sup> makes it clear federal common law has been entirely pre-empted by federal environmental legislation.<sup>218</sup> Pre-emption of state common law, however, presents an entirely different question. While federal courts are authorized to develop federal common law only in very limited circumstances,<sup>219</sup> state common law is a primary source of law in the structure of our nation. Much of what is now statutory law is in substance just a codification of the common law.

The Supreme Court has not yet directly addressed the question, but the *Sea Clammers* opinion seems to assume the savings clause of the Clean Water Act preserves state common law claims.<sup>220</sup> Other courts have so held.<sup>221</sup> The legislative history of the citizen suit clauses supports preservation of such claims.<sup>222</sup> If these saving clauses are to be construed to mean anything at all, such a conclusion is unavoidable.

The Wyoming Supreme Court has reached the same conclusion regarding the savings clause of WEQA.<sup>223</sup> In *Belle Fourche*, the court stated:

Although recovery for damages resulting from pollution of the groundwater in violation of the Wyoming Environmental Quality Act could be had under existing remedies such as trespass or nuisance actions, § 35-11-902(g), *supra*, those damages must be proven.<sup>224</sup>

Clearly, state common law actions are preserved in Wyoming.

A central issue in any action based on the common law is whether compliance with the statutory requirements of environmental legislation (i.e. permits and the conditions imposed by them) is a defense in a common law action. The Wyoming Supreme Court has not yet addressed the question.<sup>225</sup> The overwhelming majority of courts which have been con-

217. 453 U.S. 1 (1981).

218. See *supra* text accompanying notes 149-163.

219. *Id.*

220. 33 U.S.C. § 1365(e) (1977). See 453 U.S. at 20, n.31, where the Court acknowledges Congress' clear legislative intent to preserve state common law.

221. See, e.g., *Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982); and *Village of Wilsonville v. SCA Services, Inc.*, 77 Ill. App. 3d 618, 396 N.E. 2d 552, *reh'g denied* (1979); *aff'd and remanded*, 86 Ill. 2d 1, 426 N.E.2d 824, *reh'g denied* (1981).

222. [T]he [savings clause] would specifically preserve any rights or remedies under any other law. Thus if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. REP. NO. 414, 92d Cong., 1st Sess. 81 (quoted in *BATTLE, ENVIRONMENTAL LAW, PART IV, THE CLEAN WATER ACT* at 193 (1982)).

223. WYO. STAT. § 35-11-902(g) (Supp. 1983).

224. 669 P.2d at 511.

225. In *Belle Fourche*, the court held a violation of WEQA was also actionable under common law theories. In that case, there was no question WEQA had not been complied with; therefore the court did not address the question whether *absent* a WEQA violation a common law action could be maintained.

fronted with a defense of statutory compliance have held compliance *does not* bar the common law claim.<sup>226</sup> The policy justifications offered by those courts which have barred state common law claims are founded in deference to the technological expertise of permitting agencies and a desire to avoid embroiling courts in the complex factual questions inherent in determining reasonable pollution levels.<sup>227</sup>

The legislative history of the savings clauses in federal environmental legislation is clear that no such defense was intended. "Compliance with requirements under this Act would not be a defense to a common law action for pollution damages."<sup>228</sup> Traditional tort principles also suggest that although compliance is quite relevant to findings of nuisance or negligence, it is not a complete defense.<sup>229</sup>

The common law offers a variety of potential causes of action which might be employed in Wyoming. This article provides only a brief overview of each without attempting to discuss finer points of procedure and proof.

### 1. Nuisance

A common law nuisance action is available in Wyoming as a remedy for pollution damage.<sup>230</sup>

There are two categories of nuisance: public and private. "A public nuisance is an unreasonable interference with a right common to the general public."<sup>231</sup> A private individual can recover for a public nuisance if 1) he can demonstrate harm of a kind different from that suffered by the general public, or 2) he can obtain standing to represent the general public, perhaps through a class action.<sup>232</sup> "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."<sup>233</sup> It can be remedied only by those who possess property rights in the land affected.<sup>234</sup>

Private nuisance was the cause of action most frequently employed to remedy pollution of groundwater through percolation before enactment of RCRA and CERCLA.<sup>235</sup> Courts which have denied relief based on strict

226. See, e.g., *Village of Wilsonville v. SCA Services, Inc.*, 77 Ill. App. 3d 618, 396 N.E. 2d 552, *reh'g denied* (1979); *aff'd and remanded*, 86 Ill. 2d 1, 426 N.E.2d 824, *reh'g denied* (1981) (operation of landfill in compliance with state permit is not a defense to a common law nuisance action). For a catalog of similar cases, see Trauberman, *Common Law Nuisance in Hazardous Waste Litigation: Has It Survived Milwaukee II?*, 13 ENV'T L. REP. 10043, 10044 (1983). *But see* New England Legal Foundation v. Costle, 666 F.2d 30 (2nd Cir. 1981) (common law nuisance action barred because EPA had approved emission); and *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So.2d 1127 (La. 1979) (RCRA regulates the entire field of solid waste disposal).

227. See New England Legal Foundation v. Costle, 666 F.2d 30 (2nd Cir. 1981).

228. S. REP. NO. 414, *supra* note 222.

229. Trauberman, *supra* note 226, at 10043.

230. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 511 (Wyo. 1983). Wyoming case law does not define the common law action of nuisance, therefore the discussion here is confined to a survey of general common law principles.

231. RESTATEMENT (SECOND) OF TORTS, § 821B (1) (1977).

232. RESTATEMENT (SECOND) OF TORTS, § 821C (1977).

233. RESTATEMENT (SECOND) OF TORTS, § 821D (1977).

234. RESTATEMENT (SECOND) OF TORTS, § 821E (1977).

235. Davis, *Groundwater Pollution: Case Law Theories For Relief*, 39 MISSOURI L. REV. 117, 120 (1974). RCRA was enacted in 1976; CERCLA in 1980.

liability often have imposed a strict liability standard under the name of nuisance,<sup>236</sup> since it, like strict liability, addresses the reasonableness of the impact rather than the reasonableness of the activity.<sup>237</sup> Nuisance allows for liability without proving culpability.<sup>238</sup>

## 2. Trespass

Like nuisance, trespass is clearly an available remedy in Wyoming for pollution damage.<sup>239</sup>

To maintain a cause of action in trespass, it is necessary to prove a physical invasion of an interest in real property. Underground ditch seepage has been held to be a physical invasion constituting a trespass in Wyoming;<sup>240</sup> therefore, seepage from a hazardous waste dumpsite onto or under the property of another which causes harm would be actionable.

## 3. Strict liability for abnormally dangerous activities

One who carries on an abnormally dangerous activity is liable for harm to another which results from the activity without regard to the negligence or careflessness of the actor.<sup>241</sup> Whether an activity is abnormally dangerous is a fact question which is resolved by balancing the risk and magnitude of the harm against the ability to eliminate the risk, the unusual nature of the activity, the propriety of the location of the activity, and the benefit to the community of the activity.<sup>242</sup> Of particular relevance to old hazardous waste sites, the fact that disposal was accomplished in accordance with the best available technology at the time is not a defense.<sup>243</sup> Neither is disposal in compliance with industry custom.<sup>244</sup>

Few courts have been willing to extend strict liability to pollution problems.<sup>245</sup>

## 4. Negligence

Historically, groundwater pollution has often been attacked through negligence actions.<sup>246</sup> Under negligence theory, a polluter "will be liable for his pollution if he knew or should have known that his activity would be likely to cause the injury which occurred."<sup>247</sup> Negligence addresses the reasonableness of the *activity*, whereas nuisance and strict liability address the reasonableness of the *impact*.<sup>248</sup>

236. Baurer, *supra* note 16, at 141.

237. Davis, *supra* note 235, at 126.

238. *Id.* at 124.

239. See *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 511 (Wyo. 1983).

240. *Taylor Ditch Co. v. Carey*, 520 P.2d 218 (Wyo. 1974).

241. RESTATEMENT (SECOND) OF TORTS, § 519 (1976).

242. RESTATEMENT (SECOND) OF TORTS, § 520 (1976).

243. RESTATEMENT (SECOND) OF TORTS, § 520, comment b (1976).

244. *The T. J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

245. Davis, *supra* note 235, at 120. The minority which has imposed strict liability has done so in cases involving the oil and gas, mining and manufactured gas industries. *Id.* at 136-37. But see *Cities Service Co. v. Florida*, 312 So. 2d 799 (Fla. 1975).

246. Davis, *supra* note 235, at 120.

247. *Id.* at 125.

248. *Id.* at 126.

The problems of proof in a negligence action are even more difficult than those of other common law actions. In addition to proving causation, plaintiff must also prove the injury and damage were foreseeable.<sup>249</sup> This is indeed a high hurdle since it may be a very long time between disposal and damage, and damage may only become apparent after years of exposure.<sup>250</sup> The polluter can argue, and can often prove, that the risks weren't even known to exist at the time of disposal.

This variety of available common law actions is helpful only if they can be maintained against financially responsible parties. Obviously the owner of a landfill or the person who brings the waste to the site and dumps it can be held responsible for ensuing damage.<sup>251</sup> But often these are small business people and truckers who have no resources with which to repair the harm to the environment. It is the manufacturer of the waste who is most likely to be able to clean it up.<sup>252</sup>

If it can be shown the generator knew or had reason to know its hazardous waste was likely to cause harm when he hired an independent contractor to haul it away, the generator can be held liable for the harm which results.<sup>253</sup> Of course, proving that hazardous wastes of a particular generator ended up at a particular disposal site can be an almost insurmountable burden.<sup>254</sup>

A key impediment to common law actions seeking remedies for improper hazardous waste disposal is the statute of limitations. Wyoming imposes a four year limitation on such actions.<sup>255</sup> It has, however, adopted the "rule of discovery" to determine when an action accrues: that is, "the period of limitations begins to run when the plaintiff knows or has reason to know the existence of a cause of action."<sup>256</sup> If an act is done which is not itself unlawful, and damage resulting from the act occurs later, a cause of action accrues when the damage is sustained.<sup>257</sup>

Costs are recoverable in the discretion of the court.<sup>258</sup> The Wyoming courts have allowed costs to the prevailing party in cases where only equitable relief (no money damages) was granted.<sup>259</sup>

249. Meyer, *supra* note 3, at 713.

250. *Id.*

251. United States v. Price (Price I), 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

252. *Cf.* United States v. Price (Price III), 13 ENVTL. L. REP. 20843 (D.N.J. 1983).

253. City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1153 (E.D. Pa. 1982) (citing RESTATEMENT (SECOND) OF TORTS, § 448 (1965)).

254. This burden is much less heavy since enactment of RCRA, which requires detailed record keeping showing where and how each generator's wastes are disposed of. *See* 42 U.S.C. §§ 6922-6925 (1976).

255. WYO. STAT. § 1-3-105(a) (iv) (A) and (C) (1977).

256. Duke v. Housen, 589 P.2d 334, 346 n.8 (Wyo. 1979).

257. Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970).

258. WYO. STAT. § 1-14-126 (1977), quoted *supra* note 208. Note, however, that in nuisance actions no costs may be awarded absent assessment of at least five dollars in damages. WYO. STAT. § 1-14-125 (1977).

259. Eldridge v. Rogers, 40 Wyo. 89, 275 P. 101 (1929).

IV. CONCLUSION

The private individual who wants cleanup of a hazardous waste dump in Wyoming has myriad remedial tools available to her. They can be employed singly or in tandem; they encompass a variety of potential fact situations. The whole field of hazardous waste cleanup is new and the remedies described herein are largely untried. The Wyoming Supreme Court has ruled on only two environmental cases so far, so it is impossible to predict its hospitality to this sort of litigation. Both decisions favored environmental interests, but each must be limited to its particular facts.

Unquestionably, hazardous waste litigation is risky and extremely costly. But the potential damage to our environment from improper toxic waste disposal is sobering. These remedies should be tried.

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