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Still No Remedy After All These Years: Plugging the Hole in the Law of Leaking Underground Storage Tanks

JASON M. BASILE*

INTRODUCTION

Below the ground in the United States, there lie approximately two million underground storage tanks ("USTs"),¹ most of which contain petroleum.² Over eighty percent of these USTs are made of bare, unprotected steel.³ Rust and corrosion inevitably deteriorate aging tanks creating "a prescription for leaks."⁴ Indeed, in 1986, the Environmental Protection Agency ("EPA") estimated that eighteen to thirty-five percent of the then 1.6 million tanks were leaking. As tanks that were buried (and often abandoned) in the 1950s, 1960s, and 1970s continue to age, the problem will only become worse.

What makes leaking USTs a "problem of national significance"⁵ is the fact that the leak of one gallon of gasoline can contaminate the entire groundwater supply of a town of 50,000 people.⁶ And over half of the United States's drinking water comes from groundwater.⁷ Petroleum's chemical constituents are listed in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")⁸ as hazardous substances,⁹ and exposure or ingestion of petroleum-contaminated water could lead to a variety of ailments including cancer and even death.¹⁰ For these reasons, the problem of leaking USTs has

* J.D. Candidate, 1998, Indiana University School of Law-Bloomington. I thank my wonderful family for patiently enduring the one holiday season when I talked of little other than underground storage tanks. I also thank Thomas A. Barnard and Melina M. Kennedy for their helpful suggestions. Finally, I would like to thank the entire staff of the *Indiana Law Journal* for their hard work.

1. See HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984, H.R. CONF. REP. NO. 98-1133, at 128, reprinted in 1984 U.S.C.C.A.N. 5649, 5699 (reporting the EPA's estimate).

2. See Underground Storage Tanks; Technical Requirements, 52 Fed. Reg. 12,662, 12,664 (1987).

3. See Don Ritter, *Foreword* to MICHAEL L. ITALIANO ET AL., LIABILITY FOR STORAGE TANKS at xxiii, xxiii (2d ed. 1992).

4. *Id.* at xxiv.

5. *Id.* at xxiii.

6. See ITALIANO ET AL., *supra* note 3, at 3-4.

7. See Ritter, *supra* note 3, at xxiv.

8. 42 U.S.C. §§ 9601-9675 (1994).

9. See *id.* § 9601(14).

10. See John A. Chanin, Comment, *LUST on Your Corner: Strict Liability, Victim Compensation, and Leaking Underground Storage Tanks*, 62 U. COLO. L. REV. 365, 371-72 (1991) (citing NEW JERSEY DEP'T OF HEALTH, HAZARDOUS SUBSTANCE FACT SHEET FOR GASOLINE (1985)).

been called a "national . . . epidemic that presents an imminent hazard to the health of millions of American[s]."¹¹

What remedies are available to people injured by this "epidemic"? The short answer is that there often are no real remedies available, due to some "gaping loopholes" in the regulatory scheme.¹² For example, CERCLA provides a "citizen suit" mechanism in which private citizens can sue polluters to recover for some of the harms they have suffered.¹³ While victims of nearly all hazardous-waste contamination may be remedied by this citizen suit, those who have been victims of petroleum contamination are barred from suing under CERCLA because of the exclusion of petroleum in CERCLA's definition of a hazardous waste.¹⁴

The primary federal statute that regulates USTs is Subtitle I of the Resources Conservation and Recovery Act of 1976 ("RCRA").¹⁵ Yet while victims of a leaking UST might be able to bring a citizen suit against prior owners or operators of the UST under RCRA, they are likely to be disappointed. The main available relief is enforcement of RCRA's regulations, and the only provisions in RCRA allowing for monetary fines are civil penalties that can only be paid to the government.¹⁶ In 1996, the Supreme Court further limited the ability of UST-leak victims to recover expended RCRA costs routinely recovered by victims of other hazardous substances.¹⁷

In the absence of a federal statute that allows leaking-UST victims to seek compensation, victims have looked to state UST statutes and common-law causes of action. Unfortunately, state UST statutes generally mirror their federal RCRA counterpart. And common-law suits are marked by interminable litigation and often insurmountable issues of causation and fault. Even Congress has stated that in these type of common-law actions, "the victim . . . is fighting against the odds."¹⁸

The laws relating to USTs are remarkably complex, yet shockingly ineffective. In fact, UST regulations form a microcosm of what many observers consider environmental law's "two vital defects: incomprehensibility and ineffectiveness."¹⁹ This Note proposes changes that not only make UST laws more effective, but also make their remedies more complete and the regulatory scheme less complex. In terms of complexity, environmental law already can be

11. *Superfund: Hearings on Leaking Underground Gasoline Storage Tanks Before the Subcomm. on Commerce, Transp., and Tourism of the House Comm. on Energy and Commerce*, 99th Cong. 1007 (1985) (statement of Rep. Thomas J. Downey).

12. *Industry Opposes Tightening RCRA Rules*, OIL & GAS J., Sept. 16, 1991, at 41, 41.

13. See 42 U.S.C. § 9613(f)-(g).

14. See *id.* § 9601(14).

15. *Id.* §§ 6901-6992k.

16. See *id.* § 6928(a), (g); see also Kevin R. Duncan & B. Todd Bailey, *Innocence Amid "LUST": The Innocent Buyer and Leaking Underground Storage Tanks Containing Petroleum*, 7 BYU J. PUB. L. 245, 260 (1993) (noting that the available remedies do not provide damages to an innocent purchaser).

17. See *Meghrig v. KFC W. Inc.*, 116 S. Ct. 1251 (1996).

18. STAFF OF HOUSE COMM. ON PUB. WORKS AND TRANSP., 96TH CONG., COMPENSATION FOR VICTIMS OF WATER POLLUTION 12 (Comm. Print 1979).

19. Bradley C. Bobertz, *Legitimizing Pollution Through Pollution Control Laws: Reflections on Scapegoating Theory*, 73 TEX. L. REV. 711, 712 (1995).

grouped with tax law.²⁰ Part of the blame for this complexity should be Congress's penchant for responding to perceived inadequacies in one complex law by overlaying it with a separate, equally complex law.²¹ The proposals in this Note attempt to fix inadequacies without proposing an entirely new regulatory scheme. And just as a searching analysis of UST laws reveals modifications and simplifications that would greatly enhance their effectiveness, so would a close study of other areas of environmental law likely reveal similar improvements.

This Note first examines the problem of leaking USTs and the harm they cause. It then surveys the statutory and common-law remedies available to victims of leaking USTs and highlights the inequitable gap in the regulatory scheme. Part II then sets forth five proposals, each designed to fill that gap.

I. THE CURRENT LAW OF USTs

A. *The Damage Caused by Leaking USTs*

Leaking USTs cause a variety of forms of damage. The most serious damage caused by leaking USTs is contamination of groundwater. One-half of the United States' population relies upon groundwater for its drinking water and three-fourths of American cities rely at least in part on groundwater for their drinking water.²² And because of the nation's declining supply of surface water, these percentages have been increasing and are likely to continue increasing.²³

Once a tank leaks, the liquid moves quickly through aerated soil and into an unsaturated zone.²⁴ Usually this process of liquid percolation from the surface, or near the surface, down into an unsaturated zone is one of the reasons groundwater is an attractive source of drinking water. That is because as a liquid moves downward, the rocks act as filters, effectively breaking down organic pollutants. Unfortunately, this process does not remove inorganic pollutants, which are found in gasoline. And when chemical contaminants move through the filtering rocks, that area is itself contaminated. Then, any water that subsequently moves through the filter zone will also be contaminated. When gasoline leaks into the ground, therefore, the filtering rocks as well as the adjacent underground water supply are contaminated, and they remain contaminated until they are artificially removed.²⁵

Because of the extensive contamination that generally occurs when a UST leaks, corrective action for a single site can require months or even years to complete, and can range in cost from \$20,000 to \$1 million.²⁶ Due to this cost and because most federal and state statutes impose strict liability for clean-up costs on the landowner—even if she is an innocent purchaser without knowledge

20. See *id.* at 713 n.9.

21. See *infra* Part I.

22. See Chanin, *supra* note 10, at 369.

23. See Ritter, *supra* note 3, at xxiv.

24. See Chanin, *supra* note 10, at 370.

25. See *id.*

26. See Duncan & Bailey, *supra* note 16, at 247.

of the presence of the UST—USTs have been called the “scourge of the nation’s commercial real estate business.”²⁷

As serious as the financial burdens of leaking USTs are, they pale in comparison to the health risks presented by groundwater contaminated by leaking USTs. Gasoline’s chemical constituents include benzene, xylene, ethylbenzene, and toluene—all listed as hazardous substances in CERCLA.²⁸ Benzene is a known carcinogen, and the exposure to each of these substances has been proven to cause a variety of maladies in humans.²⁹

Victims of leaking USTs can suffer a wide range of damages. These include death, cancer, lung damage, birth defects, unconsciousness, fear of cancer, depression, medical monitoring, loss of property value, and lost wages.³⁰ The direct and indirect damages due to leaking USTs at a single location have been claimed to be as high as \$100 million.³¹

Those in Congress have known about the damages caused by toxic substances which “may impose sudden, massive costs on innocent parties . . . [and] victims of pollution often find they must bear the costs of the disaster.”³² Despite all the damage caused by leaking USTs, and Congress’s knowledge of the damage, leaking-UST victims have found themselves excluded from an adequate remedy.

B. CERCLA: The Petroleum Exclusion

CERCLA was the final major new law of the environmental-law movement that first began in the 1960s with the passage of the Clean Air Act.³³ The Clean Water Act³⁴ and then RCRA followed. The early environmental movement underestimated the problems that arise from dumping toxins into the land, due to scientists’ overestimation of the power of the soil to clean itself.³⁵ But after the highly publicized discovery of forgotten toxic waste seeping into people’s homes in Niagara Falls, New York (the “Love Canal” incident), the issue of hidden toxic wastes moved to the forefront of the environmental-law movement.³⁶

Congress passed CERCLA in December, 1980, after the November, 1980 elections had rendered President Carter and many Democrats in Congress lame

27. *Id.* at 248.

28. *See* *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 803 (9th Cir. 1989).

29. *See* *Chanin*, *supra* note 10, at 371-72.

30. *See id.* at 374-78.

31. *See id.* at 376.

32. STAFF OF HOUSE COMM. ON PUB. WORKS AND TRANSP., 96TH CONG., COMPENSATION FOR VICTIMS OF WATER POLLUTION 25-27 (Comm. Print 1979).

33. 42 U.S.C. §§ 7401-7671q (1994) (originally enacted as Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963)).

34. 33 U.S.C. §§ 1251-1387 (1994) (originally enacted as Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972)).

35. *See* BRADFORD F. WHITMAN, *SUPERFUND LAW AND PRACTICE* 4 (1991); Roger Armstrong, Comment, *CERCLA’s Petroleum Exclusion: Bad Policy in a Problematic Statute*, 27 *LOY. L.A. L. REV.* 1157, 1159-60 (1994).

36. *See* Armstrong, *supra* note 35, at 1160.

ducks.³⁷ CERCLA became a rushed eleventh-hour compromise of competing House and Senate bills. The feeling was that something needed to be pushed through because the incoming administration would largely ignore the issue of toxic waste.³⁸ The bill that eventually became CERCLA began in the House as the "Hazardous Waste Containment Act."³⁹ That bill regulated the clean-up and monitoring of inactive hazardous-waste sites that were on land.⁴⁰ It specifically excluded petroleum due to the concurrent consideration of the "Oil Pollution Liability and Compensation Act,"⁴¹ which dealt exclusively with the clean-up of oil spills.⁴² Both H.R. 7020 and H.R. 85 passed in the House and were sent to the Senate. The Senate then passed a modified version of H.R. 7020, but rejected H.R. 85.⁴³

This dropping of the oil-pollution bill (H.R. 85) seemed acceptable to many senators because the feeling was that the domestic oil industry could not handle the added liability: it was troubled financially and was already paying a heavy tax to fund a portion of the new Superfund.⁴⁴ Indeed, at a time when gas prices were high and lines were long at gas stations, there was fear that further increasing gas prices would send America's "troubled economy into a deeper recession."⁴⁵ Also, in 1980, there was a lack of recognition of the magnitude of the potential problem that leaking USTs posed.⁴⁶ Given the eleventh-hour mentality of Congress, the legislators "must have been aware that the oil industry would not have acceded to such a measure without a fight Thus, in a compromise effort to get the bill passed, Congress may have simply developed the petroleum exclusion to avoid pressure from the oil industry's strong lobby."⁴⁷

Congress included the petroleum exclusion in CERCLA, and subsequent attempts to repeal it have all failed.⁴⁸ After a "hastily conceived and rushed" history,⁴⁹ CERCLA provides a broad range of remedies for private parties to enforce the provisions of the Act and recover for some of the harms they have suffered.⁵⁰ Unfortunately for the victims of leaking USTs, however, CERCLA's petroleum exclusion denies them the remedies available to victims of other spilled and abandoned toxic substances.

CERCLA offers two different causes of action through which private parties can recover clean-up costs: private cost-recovery actions and contribution

37. *See id.* at 1164-65.

38. *See id.* at 1165.

39. H.R. 7020, 96th Cong. (1980).

40. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 4 (1982).

41. H.R. 85, 96th Cong. (1979).

42. *See* Grad, *supra* note 40, at 3.

43. *See id.* at 4.

44. *See* Armstrong, *supra* note 35, at 1171.

45. *Id.* at 1173.

46. *See id.* at 1172.

47. *Id.*

48. *See infra* Part II.A.

49. Armstrong, *supra* note 35, at 1166.

50. *See* 42 U.S.C. § 9613(f)-(g) (1994); *see also* Duncan & Bailey, *supra* note 16, at 261.

actions.⁵¹ In a private cost-recovery action, parties may recover all or part of their clean-up costs, even without government involvement in the site.⁵² A contribution action occurs when a party is ordered by the government to clean up a site and the party seeks other responsible parties to share the cost of clean-up.⁵³

Yet neither cause of action may proceed unless there is a substance at the site that a court determines to be a "hazardous substance."⁵⁴ CERCLA specifically excludes petroleum from its "hazardous substance" definition: "The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof . . ."⁵⁵ Subsequent judicial interpretation of this definition has clarified the scope of the exclusion.⁵⁶ These cases have held that despite the fact that some of petroleum's indigenous components and additives are specifically designated as hazardous substances under CERCLA, the exclusion removes refined and unrefined petroleum from the reach of CERCLA.⁵⁷

So the threshold issue for a CERCLA cause of action is whether the injured party was harmed by a hazardous substance other than petroleum and its indigenous components and common additives. Since the vast majority of USTs contain petroleum,⁵⁸ usually CERCLA will not aid the victim of a leaking UST.

C. RCRA and State UST Programs: An Incomplete Remedy

Enacted in 1984, federal regulation of USTs is based on Subtitle I of RCRA.⁵⁹ RCRA generally governs the storage, treatment, and disposal of solid and hazardous wastes. The regulations include provisions requiring, among other things, notification of tank existence,⁶⁰ leak detection,⁶¹ release reporting,⁶² and corrective action.⁶³ Subtitle I initially calls for the EPA to enforce the UST regulations, but it allows states to assume responsibility for enforcement.⁶⁴ Thus far, ten states have received EPA approval for their UST programs,⁶⁵ and while

51. See 42 U.S.C. § 9607(a)(4)(B); *id.* § 9613(f).

52. See *id.* § 9607(a)(4)(B).

53. See *id.* § 9613(f)(1).

54. See *Duncan & Bailey*, *supra* note 16, at 261.

55. 42 U.S.C. § 9601(14).

56. See *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989) (interpreting the scope of the petroleum exclusion); see also *Cose v. Getty Oil Co.*, 4 F.3d 700 (9th Cir. 1993) (noting that crude-oil-tank bottoms are not petroleum within the meaning of CERCLA's petroleum exclusion).

57. See *Wilshire*, 881 F.2d at 810.

58. See *Underground Storage Tanks; Technical Requirements*, 52 Fed. Reg. 12,662, 12,664 (1987).

59. See 42 U.S.C. §§ 6991-6991i.

60. See *id.* § 6991a(a).

61. See *id.* § 6991b(c)(1).

62. See *id.* § 6991b(c)(3).

63. See *id.* § 6991b(c)(4).

64. See *id.* § 6991c(a).

65. See *Duncan & Bailey*, *supra* note 16, at 250 (reporting that ten states have approval and two have tentative approval).

the state programs supplant RCRA, most of the state programs mirror RCRA's provisions.⁶⁶

RCRA provides for citizen suits to enforce the regulations of the Act.⁶⁷ Under the citizen-suit provision, a private party is allowed to maintain an injunctive action compelling another person to comply with the requirements of RCRA.⁶⁸ The statute requires the party to give ninety days written notice to the EPA, the state, and the alleged violator prior to filing suit.⁶⁹ The citizen suit may be used against any generator, transporter, owner, or operator who contributes or contributed to the past or present handling, storage, treatment, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.⁷⁰ The basic RCRA program, passed in 1976, regulates present and future hazardous substances from the "cradle-to-grave."⁷¹

The key problem for victims of leaking USTs is that Congress passed CERCLA after RCRA in order to work as a complement to RCRA. CERCLA covers areas not addressed by RCRA,⁷² namely the means to address abandoned waste sites and to more fully collect past clean-up expenses from other responsible parties.⁷³ So together, RCRA and CERCLA provide a comprehensive scheme for regulating hazardous waste, except in the area of petroleum. Because Subtitle I did not attempt to mimic all the provisions of CERCLA, this gap still exists with leaking USTs.⁷⁴ In fact, tanks abandoned prior to 1974, or prior to 1986 if the owners stopped participating in the petroleum-marketing industry by 1986, cannot be regulated in any way by RCRA.⁷⁵ This large group is not bound by RCRA's regulations or even its minimal cost-recovery provisions.

Further, none of the listed remedies in RCRA's citizen-suit provisions allows a party to collect damages. And indeed, no court has awarded damages under RCRA's citizen-suit provisions to a victim of a leaking UST.⁷⁶ Recently, however, some resourceful attorneys have attempted to find a way to imply a cause of action in Subtitle I of RCRA.

66. *See id.*; *see also infra* Part II.D (discussing Indiana statute that expands leaking-UST liability beyond RCRA).

67. *See* 42 U.S.C. § 6972(a).

68. *See id.*

69. *See id.* § 6972(b).

70. *See id.* § 6972(a)(1)(B).

71. David R. Case, *Resource Conservation and Recovery Act (RCRA)*, in ENVIRONMENTAL LAW HANDBOOK 406, 406 (J. Gordon Arbuckle et al. eds., 11th ed. 1991).

72. *See* Richard G. Stoll, *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)*, in ENVIRONMENTAL LAW HANDBOOK, *supra* note 71, at 75, 75.

73. *See id.* at 93.

74. *See* Armstrong, *supra* note 35, at 1190-91.

75. *See id.* at 1191; *see also* MARY DEVINE WOROBEC & CHERYL HOGUE, TOXIC SUBSTANCES CONTROLS GUIDE 195 (1992).

76. *See* Walls v. Waste Resource Corp., 761 F.2d 311, 316 (6th Cir. 1985); Duncan & Bailey, *supra* note 16, at 260.

*D. RCRA and Meghrig: Hope Given and Hope Taken
Away*

The UST victims in *Meghrig v. KFC Western, Inc.*⁷⁷ were not seeking damages under RCRA, but only recovery of UST-remediation costs from a prior property owner, costs that are regularly recoverable under CERCLA. RCRA expressly provides that if a governmental body remedies, it may recover remediation costs.⁷⁸ The landowners in *Meghrig* remedied and then argued that an implied cause of action existed under RCRA for them to recover those costs from prior owners. The Ninth Circuit allowed the implied cause of action,⁷⁹ holding that it would be inequitable and poor policy to allow RCRA to bar restitution actions:

By doing so, we would make the citizen suit remedy meaningless in most cases for the very citizens who most deserve the remedy, namely innocent citizens, like [plaintiffs], who have a financial stake in the contaminated property as well as potential and actual clean-up liability. . . . [T]he government often orders innocent parties . . . to remedy discovered contamination on their property even though they did not cause the contamination or have any ties to the property when the contamination occurred. When the government orders clean-up, the innocent citizen must respond expeditiously to the order. There is no time to sue for "other equitable relief" in the form of a mandatory clean-up injunction against past polluters

CERCLA and state law do not provide an adequate substitute source of relief for these innocent citizens. . . .

In fact, it is even more important for private citizens, as compared to the EPA Administrator, to have a restitutionary remedy under RCRA.⁸⁰

The Supreme Court reversed the Ninth Circuit, holding that while remedying plaintiffs may seek an injunction, they may not recover past costs from former owners.⁸¹ The Court compared RCRA's citizen suit with CERCLA's and noted that since CERCLA included provisions allowing recovery of past remediation costs, RCRA's failure to provide for recovery indicates congressional intent not to allow recovery of remediation costs under RCRA.⁸²

So while the Ninth Circuit decision seemed to indicate that at least some courts would be receptive to an argument implying a cause of action under RCRA for UST victims similar to the express provisions of CERCLA for other toxic-waste victims, the Supreme Court extinguished that flicker of hope.⁸³ Once again,

77. 116 S. Ct. 1251, 1253 (1996).

78. See 42 U.S.C. § 6978 (1994).

79. See *KFC W., Inc. v. Meghrig*, 49 F.3d 518, 521 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251.

80. *Id.* at 523-24 (footnotes omitted).

81. See *Meghrig*, 116 S. Ct. at 1256.

82. See *id.* at 1254-56.

83. *Meghrig* only dealt with the recovery of past remediation costs by a present landowner. It did not address the issue of an injured party implying a cause of action under RCRA to recover damages for physical injuries and damage to property values due to a leaking UST. However, this would be more tenuous than implying the right to recover past remediation costs (which the government can do under RCRA), so it probably can be safely assumed the Court would reject any attempts to further imply RCRA rights. Indeed, trial courts have now begun

victims of UST leaks are left without an adequate remedy for the damages they suffer, and they are forced to look elsewhere for more complete compensation.

E. Common-Law Actions: Too Many Obstacles

Before the extensive federal regulatory scheme existed, individuals injured by leaking USTs found their only recourse in the common law.⁸⁴ Regardless of how effective these common-law actions had been in the past, with the advent of federal and state UST regulations, courts have become more hostile to common-law, leaking-UST causes of action. Consequently, most UST litigation now concentrates on who has to pay what percentage of the state- or federal-ordered remediation.⁸⁵ However, victims of leaking USTs, largely excluded by the regulatory scheme, have usually found themselves forced to pursue a common-law cause of action in order to have any hope of recovering the damages caused by leaking USTs.

The first obstacle a victim of a leaking UST must avoid to maintain a common-law action against a polluter is the issue of whether the federal and/or state UST statutes preempt common-law actions. Because RCRA specifically allows delegation of UST regulation to the state by way of state UST statutes, it is clear that RCRA does not preempt state UST statutes.⁸⁶ However, state UST statutes, or federal ones where no approved state plan exists, often are interpreted to preempt common-law actions.⁸⁷ Thus, this first obstacle is often fatal to the common-law suit.

Assuming the court allows the plaintiff to bring a common-law cause of action, the most powerful common-law cause of action for recovering the damage caused by leaking USTs is strict liability. A person may be strictly liable for damages when the damages arise from an activity that is abnormally dangerous.⁸⁸ In order to win, the plaintiff must show that storing gasoline in a UST is an abnormally dangerous activity. While early leaking-UST cases held defendants strictly liable for leaks,⁸⁹ the negligence rule has largely supplanted the strict-liability rule in UST litigation.⁹⁰ Many courts have used the *Restatement's* criteria for

reacting to *Meghrig* by further constricting leaking-UST victims' available remedies under RCRA. See Michelle Kok Moritz, Note, *Cleaning Up: Equitable Considerations in the RCRA Citizen Suit Provision Controversy*, 72 IND. L.J. 869 (1997); *Hazardous Waste: RCRA Does Not Allow Past Cost Recovery Even Where Danger Is Ongoing, Court Says*, 27 Env't Rep. (BNA) 1316 (Oct. 11, 1996).

84. See Allison Rittenhouse Hayward, *Common Law Remedies and the UST Regulations*, 21 B.C. ENVTL. AFF. L. REV. 619, 619 (1994).

85. See *id.* at 659.

86. See *United States v. Colorado*, 990 F.2d 1565, 1575-76 (10th Cir. 1993) (dicta) (actually interpreting CERCLA, although noting analysis would be the same under RCRA).

87. See Hayward, *supra* note 84, at 662-63.

88. See *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 868-69 (Mo. Ct. App. 1985); RESTATEMENT (SECOND) OF TORTS § 519 (1965).

89. See Hayward, *supra* note 84, at 659.

90. See *id.*; see also *Malone v. Ware Oil Co.*, 534 N.E.2d 1003, 1006-07 (Ill. App. Ct. 1989) (requiring the plaintiff to prove that the defendant acted negligently or intentionally to maintain action).

abnormally dangerous activities⁹¹ to deny strict liability, noting that USTs are very common, are valuable in comparison to the danger they pose, or are not sufficiently dangerous if the owner exercises due care.⁹² Thus, while strict liability can be a powerful weapon, courts have effectively removed it from most UST-victims' hands.

Beyond strict liability, a plaintiff injured by a leaking UST sometimes may pursue a variety of other common-law actions, including negligence,⁹³ nuisance,⁹⁴ trespass,⁹⁵ and contract⁹⁶ actions. As the Ninth Circuit noted in *Meghrig*, for UST victims, "state law do[es] not provide an adequate substitute source of relief."⁹⁷ This is because traditional doctrines such as the duty of care,⁹⁸ the requirement of intent to harm,⁹⁹ and caveat emptor¹⁰⁰ act as further barriers to victims of leaking USTs. In addition, applying traditional common-law doctrines such as negligence has proven to be extremely time consuming and expensive.¹⁰¹ Moreover, when these victims find themselves excluded from a common-law remedy, that usually is their final opportunity to receive some compensation for the harms caused by leaking USTs.

II. PROPOSALS: PLUGGING THE HOLE IN THE LAW OF LEAKING USTs

Part I of this Note outlined the layers of environmental laws that could potentially apply to leaking USTs. Unfortunately, despite their complexity, the laws have left leaking-UST victims largely without an adequate remedy for the harms they suffer. Those harms include the obligation to help pay for remediation costs, medical care, lost wages, lower property values, pain, suffering, and increased health risks.¹⁰² The remainder of this Note sets forth five proposals, each of which would greatly alleviate this unfair gap in the regulatory scheme of environmental law.

A. End CERCLA's Petroleum Exclusion

Before addressing the benefits of this specific proposal, there is one major objection that could be levied against this (as well as the other proposals) that should be addressed immediately—the effect on the petroleum industry of giving

91. See RESTATEMENT (SECOND) OF TORTS § 520.

92. See Hayward, *supra* note 84, at 659 n.258.

93. See ITALIANO ET AL., *supra* note 3, at 118.

94. See *id.* at 146-56.

95. See *id.* at 157-61.

96. See *id.* at 128-38.

97. *KFC W., Inc. v. Meghrig*, 49 F.3d 518, 524 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

98. See Duncan & Bailey, *supra* note 16, at 271-72.

99. See Hayward, *supra* note 84, at 665.

100. See Duncan & Bailey, *supra* note 16, at 266-68.

101. See Chanin, *supra* note 10, at 368.

102. See *id.*

victims of leaking USTs a remedy. Periodically, certain members of Congress have attempted to overturn the petroleum exclusion, and each time, the petroleum industry has cried out that subjecting the industry to further liability (beyond the RCRA regulations and liability as well as liability for oil spills on navigable waters under the Clean Water Act) would cripple domestic producers.¹⁰³ Indeed, probably the main reason Congress adopted the petroleum exclusion in CERCLA was because any regulation of the petroleum industry was seen as a threat to the existence of domestic producers, at a time when America already seemed far too dependent on foreign oil.¹⁰⁴

But now, in light of the reduction of the threat of foreign oil, the industry's arguments are not as persuasive as they were in 1980. The oil-industry crisis of the 1970s no longer exists, and prices have stabilized.¹⁰⁵ In fact, despite the dire predictions in 1980 of the devastating effect Superfund taxes would have on oil reserves and domestic exploration,¹⁰⁶ oil prices have been among the lowest in history and the nation currently has huge reserves of crude oil.¹⁰⁷ While the oil industry is still troubled financially,¹⁰⁸ it can no longer convincingly make the dire predictions it made in the late 1970s.

Moreover, when the petroleum exclusion was contemplated and finally adopted in 1980, Congress vastly underestimated the magnitude of the threat from USTs. CERCLA was prompted by highly publicized visions of abandoned toxic-waste dumps, such as Love Canal.¹⁰⁹ At the time, the only highly visible and well-publicized threat that existed from the petroleum industry was that of oil tanker spills on navigable waters: "Those spills constituted a clear and present danger, and the perception was that there was already statutory protection in place to combat that danger."¹¹⁰ As hundreds of thousands of aging tanks made of unprotected steel have begun to announce their presence in people's drinking water and real estate, that perception has begun to change.¹¹¹ At the very least, because the petroleum industry is now more financially secure than in 1980, and because the threat from leaking USTs is now more apparent than in 1980, Congress should reevaluate the wisdom of favoring the petroleum industry at the expense of innocent victims of leaking USTs.

The domestic petroleum industry now concentrates its arguments for prolonging the petroleum exclusion on the idea that the industry is already paying

103. See *Industry Opposes Tightening RCRA Rules*, *supra* note 12, at 41.

104. See Michael M. Gibson & David P. Young, *Oil and Gas Exemptions Under RCRA and CERCLA: Are They Still "Safe Harbors" Eleven Years Later?*, 32 S. TEX. L. REV. 361, 364-65 (1991); *Carter Signs \$227-Billion Excise Tax Measure*, OIL & GAS J., Apr. 7, 1980, at 49, 49 ("It is beyond rational comprehension that Congress could approve and the President sign a massive tax on the U.S. oil industry at a time when our domestic and foreign policies are held hostage to our dependence on foreign oil.") (quoting the president of the Independent Petroleum Association of America).

105. See Michael Parrish, *The Oil Crisis: 20 Years Later*, L.A. TIMES, Nov. 14, 1993, at D1.

106. See *Carter Signs \$227-Billion Excise Tax Measure*, *supra* note 104, at 49.

107. See Parrish, *supra* note 105, at D1.

108. See *id.*

109. See Armstrong, *supra* note 35, at 1175.

110. *Id.*

111. See Ritter, *supra* note 3, at xxiii.

more than its fair share by being taxed to help finance the Superfund.¹¹² Yet this argument lacks persuasiveness since the chemical industry could say the same thing, and yet it is not at all exempt from CERCLA's reach. Indeed, if a chemical company buried a tank of pure benzene that was later discovered to be leaking onto someone's property, that person could recover all remediation costs under CERCLA.¹¹³ But if a company buried a tank of gasoline (which contains benzene) that was later discovered to be leaking onto someone's property, that person would be exempted from recovering under CERCLA, and would have to settle for the less protective measures of Subtitle I of RCRA.¹¹⁴

The argument that the petroleum industry is worthier of protection because of Americans' reliance on automobiles is likewise not persuasive. For example, the Clean Air Act has repeatedly required automakers to meet stringent and expensive new requirements.¹¹⁵ Also, if gasoline prices are raised slightly because of the ending of the petroleum exclusion, then perhaps Americans would have an extra incentive to ease their environmentally irresponsible overuse of automobiles.

Finally, if the petroleum exclusion were eliminated, the domestic petroleum industry might complain that such a measure would cripple domestic producers.¹¹⁶ Such a complaint would have validity if it addressed the RCRA oil-field-wastes exemption,¹¹⁷ which excludes oil-field and mining wastes from regulation. This exemption is designed to allow domestic oil companies to perform domestic oil exploration, while staying competitive with foreign oil companies who do not have to deal with such extensive regulations when exploring outside the United States.¹¹⁸ The petroleum industry has produced statistics indicating that if the oil-field-waste exemption were removed, eighty percent of the oil wells in the United States would be forced to close.¹¹⁹ Furthermore, since oil fields are rarely located near unsuspecting populations, and rarely pose a health risk,¹²⁰ the costs to society of the oil-field-waste exemption do not seem to rival the benefits of maintaining the exemption.

The same cannot be said for CERCLA's petroleum exclusion. Both domestic and foreign oil companies would be equally subject to citizen suits for the harm they cause with their USTs. Thus, the benefits of the petroleum exclusion are not nearly as great as the benefits of the oil-field-waste exemption. In addition, the ubiquity and hidden nature of USTs in most populated residential areas, as well as the severity of the harm typically caused by UST leaks mean that the costs of

112. See Armstrong, *supra* note 35, at 1188.

113. Benzene is listed as a hazardous substance under CERCLA. See 42 U.S.C. § 9601(14)(A)-(F) (1994).

114. See *supra* Part I.C-D.

115. Most recently, Congress added new limits on emissions of nonmethane hydrocarbons as well as other pollutants, which were to be completely phased in by 1996. See 42 U.S.C. § 7521(g).

116. See *Industry Opposes Tightening RCRA Rules*, *supra* note 12, at 41.

117. See 42 U.S.C. § 6921(b)(2)(A).

118. See *Industry Opposes Tightening RCRA Rules*, *supra* note 12, at 41.

119. See *id.*

120. See *id.*

the current petroleum exclusion are much greater than the costs of the oil-field-waste exemption. Unlike with the oil-field-waste exemption, the petroleum industry cannot persuasively argue that they should be treated differently from other industries.

Beyond leaving victims of leaking USTs without an adequate remedy for cost recovery and contribution, CERCLA's petroleum exclusion has had another harmful cost: litigation.¹²¹ The fact that CERCLA rather mysteriously excludes petroleum from its definition of a "hazardous substance" while defining such petroleum constituents as benzene and toluene as hazardous substances has led to a great deal of litigation. The easiest way to end the river of litigation over the petroleum exclusion's proper scope would be to eliminate the exclusion.

Finally, ending the petroleum exclusion would not only provide a needed remedy for victims of leaking USTs and reduce CERCLA litigation, but it would also make CERCLA simpler. CERCLA desperately needs simplification,¹²² and eliminating the petroleum exclusion is an easy and fair way to begin accomplishing that aim. It would also simultaneously close a loophole in the RCRA-CERCLA regulatory scheme that has allowed too many innocent victims to fall through without a remedy.¹²³

B. Expand Subtitle I of RCRA to Mimic the Cost-Recovery Provisions of CERCLA

This proposal is just another way to accomplish the goal advocated by the first proposal: allow victims of leaking USTs a similar remedy as is available to victims of other toxic-chemical leaks or dumps. As more and more tanks decayed to a state of leaking, Subtitle I of RCRA was passed to address the "new" problem of leaking USTs.¹²⁴ Unfortunately, Congress reduced the private cost-recovery remedies available to the innocent landowner who discovers a leaking UST, and virtually ignored the plight of the person harmed by groundwater contamination resulting from a nearby UST leak.¹²⁵ In so doing, Congress not only foreclosed remedies for victims of leaking USTs, but as with CERCLA, made the mistake of underestimating the power of granting a private cause of action.

121. See Peter Hong & Michele Galen, *The Toxic Mess Called Superfund*, BUS. WK., May 11, 1992, at 32, 32-33.

122. See Norman W. Bernstein, *Superfund Reform Needs Drastic Simplification*, 25 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,008 (Jan. 1995).

123. Victims are continuing to fall through every day. See, e.g., *Illinois Court Dismisses CERCLA, RCRA Suit for Failure to State Claim*, MEALEY'S LITIG. REP.: SUPERFUND, Sept. 23, 1996, at 10 (reporting the dismissal of CERCLA, RCRA, and state-law UST claims); *No Recovery for Cost of Past Cleanup Under RCRA, Illinois Judge Rules*, MEALEY'S LITIG. REP.: SUPERFUND, Sept. 23, 1996, at 9 (reporting the dismissal of RCRA and state-law UST claims).

124. See Mary Elizabeth Bosco & Russell V. Randle, *Underground Storage Tanks (UST)*, in ENVIRONMENTAL LAW HANDBOOK, *supra* note 71, at 607, 607.

125. See *supra* Part I.C-D.

Originally, the heart of CERCLA was the government clean-up trust fund, or "Superfund."¹²⁶ However, the private cost-recovery mechanisms that were added nearly as an afterthought have become the center of CERCLA activity and litigation.¹²⁷ A possible explanation for the diminution of private causes of action under Subtitle I could be that even after CERCLA had been in place for four years, Congress still had not yet realized its misjudgment.¹²⁸

Handled properly, a statutory private right of action can be a very powerful and efficient tool.¹²⁹ For instance, when a UST victim has the capability of suing to enforce the provisions of an environmental statute, it lessens the burden on (and cost to) the government. The government can act as a referee, rather than the driving force, throughout the litigation.

Likewise, as Subtitle I currently stands, if an oil company ceased using the tank before 1974, it cannot be held liable at all for any leaks.¹³⁰ But if victims of leaking USTs are permitted to more effectively and completely hold companies liable for their past abandonment of USTs, it would provide strong motivation for those companies to then scour their records and locate and contain any additional abandoned USTs. Containing a UST before it leaks is obviously much less expensive than remedying it after it leaks. Oil companies would be encouraged to contain old USTs before any leaks become apparent or cause harm, thereby saving themselves money while also preventing many other future environmental disasters. Thus, allowing victims of leaking USTs an effective cause of action for past harm can serve the policy goal of pollution prevention.

C. Allow for Full Victim Compensation

The harms caused by leaking USTs extend far beyond clean-up costs,¹³¹ yet the federal statutory scheme does not address any of those additional harms.' The only avenue to full recovery for victims of leaking USTs has been common-law actions, which usually are riddled with obstacles.¹³² A federal scheme should be enacted making it easier for victims of leaking USTs (and victims of other toxic pollution) to sue and collect for such items as medical costs, property damages, and loss of wages. Such a measure would serve two beneficial purposes. First, it would have the obvious benefit of compensating innocent victims of leaking USTs, who were harmed through drinking-water contamination and/or property damage. Second, these damages would serve a preventive function, providing further incentive for oil companies to seek out their aging, abandoned USTs and contain them before they began to leak.

126. See Stoll, *supra* note 72, at 77.

127. See *id.*

128. CERCLA was enacted in 1980, and Subtitle I was enacted in 1984.

129. The following argument applies equally to the previous section, Part II.A.

130. See WOROBEK & HOGUE, *supra* note 75, at 188.

131. See *supra* Part I.A.

132. See *supra* Part I.E.

In 1984, a federal victim-compensation scheme was proposed by the Environmental Law Institute ("ELI"),¹³³ and while the political climate was not receptive to it at the time, perhaps now it could gain wider acceptance.¹³⁴ The scheme took the form of a model statute. It established a strict-liability cause of action for victims of toxic substances, with compensation available for personal and property damages. ELI proposed the strict-liability scheme as well as the relaxing of the rules of evidence to prevent difficult issues of causation from killing most causes of action.¹³⁵ Instead, a series of rebuttable presumptions would be established. The scheme was to be funded by a "hazard fee" on hazardous-substance producers and users.¹³⁶ Later that year, a similar federal statutory-compensation scheme was recommended by a congressionally appointed study group.¹³⁷ Congress has also briefly considered a scheme that has been in place in Japan since the early 1970s.¹³⁸ Japan's scheme also relies upon a polluter tax to support a national fund, compensating pollution victims for their injuries. The claim procedure is administrative and functions similarly to workers' compensation statutes in the United States.¹³⁹

A simpler proposal would be to define the storage of gasoline in USTs in populated areas or near underground drinking-water supplies as an "abnormally dangerous activity." Such a statutory definition, calling for strict liability to be applied in common-law suits, would aid victims of leaking USTs immeasurably.¹⁴⁰

Any one of these compensation proposals would aid the victims of leaking USTs. At the very least, their possible present-day application should be carefully studied and evaluated.

133. See J. William Futrell, *The Environmental Law Institute Study: Statutory Reform of Toxic Torts*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,108 (Mar. 1984).

134. For instance, now the wide-ranging dangers of leaking USTs are better known, and oil companies are also better able to pay their fair share of the damage they cause. See *supra* Part II.A.

135. Causation issues are perhaps the largest obstacle for common-law UST plaintiffs. See *supra* Part I.E.

136. See JEFFREY TRAUBERMAN, *STATUTORY REFORM OF TOXIC TORTS* 119 (Environmental Law Inst. ed., 1983); Futrell, *supra* note 133, at 10,109.

137. See Frank P. Grad, *Remedies for Injuries Caused by Hazardous Waste: The Report and Recommendations of the Superfund 301(e) Study Group*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,105, 10,107 (Mar. 1984).

138. See STAFF OF HOUSE COMM. ON PUB. WORKS AND TRANSP., 96TH CONG., *COMPENSATION FOR VICTIMS OF WATER POLLUTION* 299-306 (Comm. Print 1979).

139. See *id.*

140. See Chanin, *supra* note 10, at 403-04.

[Strict liability] removes difficult barriers to recovery that exist under negligence and nuisance theories relating to issues of fault and reasonableness. It ensures that a LUST [leaking underground storage tank] victim will be compensated for his personal and property injuries on a simple showing that his damages were caused by an actor's leaking tanks. The victim will, of course, still have to prove his damages

D. Fill the Void with State Law

Any of the above proposals¹⁴¹ could be implemented on a state, rather than national, level. Indeed, RCRA specifically allows for state UST programs that are more stringent or allow for more recovery than the federal regulations.¹⁴² For example, Indiana's UST statute mimics the language of RCRA in most respects, but the private contribution-action language mimics CERCLA.¹⁴³ The first court to interpret the contribution section held that the Indiana legislature intended for the more broad contribution provisions of CERCLA to apply.¹⁴⁴

E. Expressly Allow for Common-Law Suits

At a minimum, Congress should include a provision in Subtitle I stating that nothing in RCRA is intended to foreclose any potential common-law causes of action. As unfair as it seems, there have been courts that have held that all common-law causes of action against responsible parties are foreclosed if the victim of a leaking UST receives any clean-up compensation under Subtitle I.¹⁴⁵ As difficult and unsatisfactory as common-law actions are for victims of leaking USTs, they are currently the only available method for recovering health and property damages, and to deny that opportunity to pursue those damages would be grossly unfair.

CONCLUSION

The threat to the environment and human health from leaking USTs is immense. Most of the nearly two million USTs in the United States do not contain corrosion protection, making leakage inevitable over time.¹⁴⁶ UST leakage creates property damage and often contaminates groundwater, rendering it poisonous until expensive and time-consuming remediation is performed.

Professor Joseph Sax polled the nation's environmental-law professors and found despair with the subject, "a sense of being drawn into a system in which enormous energy must be expended on something that is ultimately vacuous."¹⁴⁷ A major reason for this is that environmental law, "once uncovered after painstaking study and acronym translation, often turns out to be nothing more than incantations of impossible promises . . . [and] loopholes for favored industries."¹⁴⁸ The law of leaking USTs is a prime example of this. It is a

141. See *supra* Part II.A-C.

142. See 42 U.S.C. § 6929 (1994).

143. See IND. CODE § 13-23-13-8(b) (1996). Title 13 of the Indiana Code was recodified by the Indiana legislature in 1996. Section 13-23-13-8(b) is the revised citation.

144. See *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713, 720 (S.D. Ind. 1991).

145. See Hayward, *supra* note 84, at 662-63.

146. See Ritter, *supra* note 3, at xxiii.

147. Joseph L. Sax, *Environmental Law in the Law Schools: What We Teach and How We Feel About It*, 19 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,251, 10,251 (June 1989).

148. Bobertz, *supra* note 19, at 712-13 (citations omitted).

complicated system of laws that in the end offers shockingly little protection to the victim of a leaking UST and a shockingly large loophole for the petroleum industry to escape liability that similarly situated chemical companies must face.

This Note has endeavored to illuminate the gap in the regulation of leaking USTs, and more importantly, it has attempted to offer some proposals for improving the efficacy and fairness of UST law. Environmental law does not have to invoke a sense of despair. Just as the law of contracts did not develop overnight, so we should not expect environmental law to be fully developed after only a short history. Our task simply should be to continually improve environmental law by seeking out and correcting its flaws. Plugging the hole in the law of leaking USTs would be one such improvement.

