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One Person's Waste is Another Person's Liability: Closing the Liability Loophole in RCRA's Citizen Enforcement Action

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One Person's Waste is Another Person's Liability: Closing the Liability Loophole in RCRA's Citizen Enforcement Action

Michael F. Hearn*

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I. INTRODUCTION

The United States Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976 to govern the generation, transportation, treatment, storage, and disposal of solid hazardous and non-hazardous waste.¹

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Similar to many other federal environmental regulations, RCRA contains a citizen-suit provision, which allows private legal action to supplement governmental enforcement of the Act's requirements.² Recent federal district court decisions reveal a split regarding the application of one of RCRA's citizen-suit provisions—the citizen enforcement action—that allows private suits based on alleged violations of the Act.³ Specifically, there is disagreement as to whether citizen enforcement actions may be brought against *former* owners and operators for actions that continue polluting the environment.⁴

How courts interpret the applicability of RCRA's citizen enforcement action provision has a significant impact on RCRA enforcement.⁵ Because citizen-suits play a critical role in the enforcement of RCRA and other federal environmental regulations, limitations on its applicability to violators will restrict RCRA's ability to attain its goal of minimizing "the present and future threat to human health and the environment."⁶ In particular, by restricting the citizen enforcement action provision to only *current* owners and operators, as have some courts, violators are able to escape liability by selling the source of pollution prior to the

inspiration for all of my academic pursuits.

1. See RCRA Enforcement, EPA.GOV, <http://www.epa.gov/oecaerth/civil/rcra/index.html> [hereinafter RCRA Enforcement] (last visited Mar. 22, 2010) (on file with the *McGeorge Law Review*) (summarizing the RCRA's intent, history, and content); 42 U.S.C. § 6902(b) (2003) ("The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.").

2. 42 U.S.C. § 6972 (2003). Citizen-suits are allowed for enforcement of a variety of environmental acts. See, e.g., 33 U.S.C. § 1365 (2001) (Clean Water Act); 42 U.S.C. § 7604(a) (2003) (Clean Air Act); 42 U.S.C. § 9659(a)(1) (2005) (Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); 16 U.S.C. § 1540(g) (2000) (Endangered Species Act).

3. Compare *Bd. of County Comm'rs v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1201 (D. Colo. 2009) (holding that former owners and operators cannot be held liable for ongoing violations under RCRA's citizen enforcement action provision), with *Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, LLC*, No. 1:05-CV-0145-CC, 2009 WL 3151089, at *11-12 (N.D. Ga. 2009) (agreeing with several other federal courts that former owners and operators can be held liable for ongoing violations under the RCRA citizen enforcement action provision). See *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 279 (D.P.R. 2009) (recognizing that citizen suits under 42 U.S.C. § 6972(a)(1)(A) are also known as "citizen's enforcement actions").

4. Compare *Brown Group Retail*, 598 F. Supp. 2d at 1201, with *Scarlett*, 2009 WL 3151089, at *11-12.

5. See *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633 n.22 (D.R.I. 1990) (acknowledging the negative impact of a similar ruling limiting the applicability of the Clean Water Act citizen enforcement action to current owners and operators).

6. See *id.* (commenting that rulings limiting the applicability of the provision to only current owners and operators may create incentives for polluters to sell property to avoid liability, thereby creating an obstacle to compliance and enforcement); 42 U.S.C. § 6902(b) (stating the policy goals of the RCRA); see also James May, *Now More than Ever: Environmental Citizen Suit Trends*, 33 ENVTL. L. REP. 10704, 10704-05 (2003) (noting the proliferation of the citizen suit since its inception in 1970 and the increasingly important role it plays as an enforcement mechanism).

filing of suit.⁷ In addition, the interpretation ultimately chosen by the courts will resonate throughout future decisions via the doctrine of *stare decisis*.⁸

The developing rift between federal district courts is likely have a significant impact on federal and state solid waste policy. This Comment joins the debate by examining the reasoning used by courts to support their different interpretations of RCRA's citizen enforcement action, and offers guidance for future decisions. Ultimately, this Comment argues that the broader interpretation of RCRA's citizen enforcement action statute should prevail and allow citizen enforcement actions to apply to former owners and operators, where their actions continue polluting the environment. In addition to finding support in statute and case law, this interpretation is best situated to achieve RCRA's policy objectives.

II. A CONCISE HISTORY OF RCRA AND THE CITIZEN-SUIT

A. *Solid Waste Regulation and RCRA*

Waste disposal in the United States has transformed dramatically over the past two centuries, prompting new laws and technologies aimed at its control and management.⁹ The volume of waste produced in the United States increased exponentially following the Industrial Revolution and continued to accelerate during the industrial boom accompanying World War II.¹⁰ According to the EPA, in 1995, the United States generated 208 million metric tons of municipal solid waste and 279 million metric tons of hazardous waste, "more than a 500-fold increase" from levels fifty years prior.¹¹ Before increased protections were implemented, much of this waste was discarded into the environment, where it posed an increasing threat to public health.¹²

7. *Friends of the Sakonnet*, 738 F. Supp. at 633 n.22 ("[D]efendants are able to avoid responsibility for their violations of the law because they sold their property, not because they stopped violating the law.").

8. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

Id.

9. See RCRA Statute, Regulations & Enforcement, EPA.GOV, <http://www.epa.gov/oecaerth/civil/rcra/rcraenfstatreq.html> [hereinafter RCRA Statute] (last visited Mar. 22, 2010) (on file with the *McGeorge Law Review*) (summarizing the history of solid waste in the United States and RCRA's goals and provisions).

10. *Id.*

11. Franklin Assoc., Ltd., *Characterization of Municipal Solid Waste in the United States, 1996 Update*, prepared for EPA, Report No. EPA530-R-97-015 5-6 (June 1997), available at <http://www.epa.gov/waste/nonhaz/municipal/pubs/msw96rpt.pdf> (reporting municipal solid waste data for 1995) (on file with the *McGeorge Law Review*); RCRA Statute, *supra* note 9 (reporting that after World War II, the United States was producing nearly 500,000 metric tons of hazardous waste annually).

12. RCRA Statute, *supra* note 9.

The nation's waste problem prompted the creation of federal and state environmental regulations and rules to govern their compliance and enforcement. One such effort was the federal Solid Waste Disposal Act of 1965 (SWDA).¹³ However, SWDA was largely ineffective at addressing the nation's waste management problems.¹⁴

In the mid-1970s, amidst a national trend toward protecting the environment,¹⁵ Congress overhauled SWDA with the passage of RCRA.¹⁶ RCRA substantially expanded SWDA, setting comprehensive national goals for: protecting health and the environment from the hazards of waste disposal; conserving energy and natural resources; reducing the amount of waste generated; and ensuring waste is managed in an environmentally sound manner.¹⁷ These changes made RCRA "one of the most far-reaching systems of business regulation ever enacted by Congress."¹⁸

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as "Superfund," to complement RCRA.¹⁹ Unlike RCRA, which primarily focuses on controlling the generation and management of solid waste, CERCLA specifically applies to the remediation of abandoned hazardous waste sites.²⁰

In 1984, Congress passed the Hazardous and Solid Waste Amendments (HWSA) in response to public concerns over the unsafe disposal of hazardous waste.²¹ Among HWSA's changes were the expansion of RCRA's scope and the strengthened provisions concerning underground storage tanks.²² HWSA also reiterated RCRA's citizen-suit provisions and altered the language of 42 U.S.C. section 6972(a)(1)(B) to explicitly apply to both current and past contributors to

13. See *id.*; 42 U.S.C. § 6901 et seq. (2003) (SWDA).

14. RCRA Statute, *supra* note 9.

15. This period also saw the creation of other major statutes imposing environmental regulation. See, e.g., 33 U.S.C. § 1251 et seq. (2003) (Clean Water Act of 1973); 42 U.S.C. § 7401 et seq. (2003) (Clean Air Act of 1970).

16. RCRA Statute, *supra* note 9; see also RCRA PRACTICE MANUAL 1 (Theodore L. Garrett ed., 2d ed. 2004) ("RCRA was originally enacted in 1976 as amendments to the [SWDA].").

17. 42 U.S.C. § 6902(a) (listing the objectives of the RCRA).

18. DAVID B. KOPEL ET AL., RCRA DEMYSTIFIED: THE PROFESSIONAL'S GUIDE TO HAZARDOUS WASTE LAW 3 (1996).

19. See 42 U.S.C. § 9601 et seq. (2005) (establishing CERCLA); see also *Sealy Conn. v. Litton Indus., Inc.*, 989 F. Supp. 120, 124 (D. Conn. 1997) (commenting that the CERCLA was designed to correct the remaining deficiencies of the RCRA).

20. RCRA Enforcement, *supra* note 1; CERCLA Overview, EPA.GOV <http://epa.gov/superfund/policy/cercla.htm> [hereinafter CERCLA Overview] (last visited on Mar. 11, 2010) (on file with the *McGeorge Law Review*) (summarizing the CERCLA's history and content). Although CERCLA is wholly separate from RCRA, both concern the management of solid hazardous waste and "all sites subject to corrective action under RCRA could be subject alternatively to response action under CERCLA." RCRA PRACTICE MANUAL, *supra* note 16, at 16.

21. RCRA Statute, *supra* note 9. Additional amendments made to RCRA, such as the Federal Facilities Compliance Act of 1992 and the Land Disposal Flexibility Act of 1996, have been omitted from this discussion because they lack relevance to the subject matter of this comment. *Id.*

22. *Id.*

pollution that present an “imminent and substantial endangerment to health or the environment.”²³

Following the HWSA of 1984, Congress provided “each State shall adopt and implement a permit program or other system [that ensures compliance with the federal criteria.]”²⁴ Since then, “[v]irtually all states . . . administer their own EPA-authorized RCRA programs, in whole or in part, in lieu of the federal program.”²⁵

B. RCRA’s Citizen-Suit Provisions

RCRA’s citizen-suit provisions permit individuals to commence an action in federal district court to enforce waste disposal regulations promulgated under the Act.²⁶ Though citizen suits were intended to supplement government enforcement, observers note case law regarding RCRA is “overwhelmingly weighted toward citizen suits.”²⁷ As a result, citizen suits play a critical role in both the enforcement of RCRA and the resolution of its ambiguities.²⁸

RCRA provides for three types of citizen suits.²⁹ The first type of citizen suit may be brought against any person (including businesses and government) for the violation of any permit, standard, or regulation applicable under RCRA.³⁰ This type of citizen suit, also known as a citizen enforcement action, requires that plaintiffs allege a violation of RCRA against the defendant.³¹ The citizen enforcement action is the subject of this Comment.

A second type of RCRA citizen suit may be brought “against any person . . . who has contributed or who is contributing to the past or present handling,

23. 42 U.S.C. § 6972(a)(1)(B) (2003).

24. *Id.* § 6945(c)(1)(B) (2003).

25. RCRA PRACTICE MANUAL, *supra* note 16, at 422.

26. 42 U.S.C. § 6972(a)(1)(A)-(B). “Congress believed that by giving citizens themselves the power to enforce [RCRA] provisions by suing violators directly, they could speed compliance with environmental laws, as well as put pressure upon a government that was unable or unwilling to enforce such laws itself.” *Greenpeace, Inc. v. Waste Techs. Indus.*, 9 F.3d 1174, 1179 n.2 (6th Cir. 1993) (citing generally H.R. REP. NO. 198, at 53 (1984)).

27. JAMES T. O’REILLY & CAROLINE BROUN, RCRA AND SUPERFUND: A PRACTICE GUIDE 1-2 RCRAFPGF § 5:30 (3d ed. 2009), available at RCRAFPGF § 5:30 (Westlaw) (on file with the *McGeorge Law Review*) (describing the role of the RCRA citizen suit).

28. *Id.* at 1 (noting that citizen suits are one of the major ways of enforcing RCRA actions).

29. 42 U.S.C. § 6972(a).

30. 42 U.S.C. § 6972(a)(1)(A) (promulgating the citizen enforcement action).

[A]ny person may commence a civil action on his own behalf against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.

Id.

31. *Id.*; see also *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 279 (noting the standing requirements for a citizen enforcement action).

storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”³² This type of action is distinguishable from the citizen enforcement action because it does not require the plaintiff to allege a violation of RCRA; rather the plaintiff need only show the presence of “an imminent and substantial endangerment to health or the environment.”³³

Lastly, a RCRA citizen suit may be brought against the EPA for failure to perform a non-discretionary act or duty under RCRA.³⁴

C. Applying RCRA's Citizen Enforcement Action

RCRA sets forth a number of provisions that limit the application of citizen enforcement actions. One such limitation is that plaintiffs claiming a RCRA violation are required to provide sixty days notice of the suit to the EPA, the state, and the alleged violator.³⁵ According to the Supreme Court, the purpose of the notice provision is two-fold: (1) it allows the EPA the opportunity to enforce RCRA, and (2) it provides alleged violators the opportunity to come into compliance and avoid suit.³⁶ A second limitation to a RCRA citizen enforcement action is that a citizen-plaintiff cannot proceed where there is diligent action by the EPA or state to prosecute the violation.³⁷

At the same time, RCRA's citizen enforcement provision enjoys several advantages. For example, standing under RCRA's citizen enforcement action is available to “any person,” making it significantly broader than most other environmental and non-environmental statutes.³⁸ Another benefit of RCRA's citizen enforcement action is that it is not subject to a statute of limitations because the suit must be filed during an alleged violation.³⁹ Further, the finding of

32. 42 U.S.C. § 6972(a)(1)(B).

33. *Id.*; see also O'REILLY & BROUN, *supra* note 27, at 1-3 (describing the requirements of a citizen endangerment action).

34. 42 U.S.C. § 6972(a)(2).

35. *Id.* § 6972(b); see also *Hallstrom v. Tillamook County*, 493 U.S. 20, 33 (1989) (“[W]here a party suing under the citizen suit provisions of RCRA fails to meet the notice and 60-day delay requirement of § 6972(b), the district court must dismiss the action as barred by the terms of the statute.”).

36. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59-60 (1987); *Hallstrom*, 493 U.S. at 29.

37. 42 U.S.C. § 6972(b)(1)(B) (providing that no action may be commenced by a private litigant “if the Administrator [of the EPA] 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 . . .”).

38. Compare 42 U.S.C. § 6972(a) (RCRA) (“[A]ny person may commence a civil action on his own behalf . . .”), with 33 U.S.C. § 1365(g) (Clean Water Act) (“[Any person] having an interest which is or may be adversely affected”), 15 U.S.C. § 797(b)(5) (Energy Supply and Environmental Coordination Act) (“Any person suffering legal wrong”), 7 U.S.C. § 2305(c) (Unfair Trade Practices Affecting Producers of Agricultural Products) (“Any person injured in his business or property”).

Bennett v. Spear, 520 U.S. 154, 165 (1997).

39. See *Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, LLC*, No. 1:05-CV-0145-CC, 2009 WL 3151089, at *10 (N.D. Ga. 2009) (“If the [RCRA] violation continues within the limitations period . . . the

a RCRA violation invokes strict liability against the alleged violator, thereby relieving a plaintiff from having to prove intent or negligence.⁴⁰ In addition, states cannot claim immunity from federal citizen-suit actions for violations of RCRA, even if the state is authorized by the EPA to have their own system of rules governing solid waste compliance and enforcement.⁴¹ Lastly, RCRA allows courts to award successful plaintiffs the costs of litigation, including reasonable attorney and expert witness fees in addition to injunctions and civil penalties.⁴²

III. DEFINING THE SCOPE OF RCRA'S CITIZEN ENFORCEMENT ACTION

Two recent decisions reflect the divide between federal district courts on whether a RCRA citizen enforcement action applies to *former* owners and operators whose past actions continue to pollute at the time of filing. In *Board of County Commissioners of the County of La Plata v. Brown Group Retail, Inc.*, the District Court of Colorado ruled that a RCRA citizen enforcement action could not hold former owners and operators liable for ongoing violations.⁴³ In contrast, in *Scarlett & Associates, Inc. v. Briarcliff Center Partners, L.L.C.*, the Northern District of Georgia, citing a number of similarly held federal court decisions, ruled that former operators and owners could be held liable for continuing and intermittent RCRA violations.⁴⁴ Although the courts' opinions are in direct conflict, both claim to be grounded in same case—*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*

statute of limitations is tolled for a claim that otherwise would be time-barred.”).

40. *Gilroy Canning Co. v. Cal. Cannery & Growers*, 15 F. Supp. 2d 943, 946 (N.D. Cal. 1998) (applying strict liability to RCRA violations); *see also* THELENREID.COM., *U.S. Supreme Court To Decide Whether Federal RCRA Statute Permits a Purchaser of Property Contaminated by Petroleum Products to Sue Prior Owners for Clean Up Costs*, (Jan. 12, 1996), <http://www.thelenreid.com/index.cfm?section=articles&function=ViewArticle&articleID=1122&filter> (on file with the *McGeorge Law Review*) (citing strict liability, lack of statute of limitations, and the ability to collect attorney costs as benefits for plaintiffs suing under RCRA).

41. *See Ashoff v. City of Ukiah*, 130 F.3d 409, 412 (9th Cir. 1997) (“In contrast, RCRA does not authorize suits based on state standards that are more stringent than the federal criteria because they do not become effective pursuant to RCRA. When a state elects to create more stringent standards, nothing in RCRA gives them legal effect. Their legal effect flows from state law.”).

42. *See* 42 U.S.C. § 6928(a), (e), (g) (2003) (noting that available remedies include injunctions and civil penalties).

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in [42 U.S.C. § 6972 (1)(A)], . . . to order such person to take such other action as may be necessary, . . . or to order the Administrator to perform the act or duty referred to in [42 U.S.C. § 6972 (a) (2)], as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

Id. § 6972(a)(2); § 6972(e) (“The court. . . may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party. . .”).

43. 598 F. Supp. 2d 1185, 1201 (D. Colo. 2009).

44. 2009 WL 3151089, at *12.

A. *Gwaltney: Setting the Stage for Conflict*

Although the language of RCRA's citizen enforcement action provision has gone unchanged since its enactment in 1976, judicial interpretation has shaped its meaning.⁴⁵ A review of the seminal Supreme Court case interpreting the application of citizen enforcement provisions sheds light on the cause of the current debate.

In *Gwaltney*, the Supreme Court defined the limits of the environmental citizen enforcement action.⁴⁶ The Court held that citizen suits could not be maintained under the Clean Water Act (CWA) for alleged "wholly past violations."⁴⁷ In interpreting the citizen enforcement action statute, the Court concluded:

The most natural reading of "to be in violation" is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future. Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option.⁴⁸

The Court supported its interpretation of CWA's citizen enforcement action statute on three grounds. First, the Court likened the "to be in violation" language of the CWA provision to similar language in the citizen-suit provisions of several other federal environmental statutes that authorize only prospective relief.⁴⁹ Second, the Court cited the pervasive use of the present tense throughout CWA's citizen-suit provision, indicating its prospective orientation.⁵⁰ Here, the Court concluded that "[a]ny other conclusion would render incomprehensible [the Act's] notice provision . . . [,]" because past violators would not have the opportunity to avoid suit by coming into compliance.⁵¹ Lastly, the Court referred to the legislative history of CWA, which indicated citizen suits were intended to

45. See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) (holding that citizen suits cannot be brought under the Clean Water Act for wholly past violations); *Brown Group Retail*, 598 F. Supp. 2d 1185 (holding that the former owners and operators could not be held liable under the citizen enforcement provision of RCRA); *Scarlett*, 2009 WL 3151089 (holding that a former operator could be held liable under the citizen enforcement provision of RCRA for an ongoing violation).

46. *Gwaltney*, 484 U.S. at 52.

47. *Id.* at 64.

48. *Id.* at 57.

49. *Id.* ("Congress has demonstrated in other statutory provisions [Clean Air Act, RCRA, Toxic Substances Control Act] that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations.").

50. *Id.* at 58-59.

51. *Id.* at 59.

abate pollution and to enjoin *continuous or intermittent* violations, not to remedy *wholly past violations*.⁵²

Although *Gwaltney* dealt with CWA's citizen-suit provision, it affected other environmental regulations that contained similar statutes, including RCRA. In fact, *Gwaltney* specifically mentioned RCRA as an example of an environmental statute that authorizes only prospective relief.⁵³ Consequently, courts have since applied *Gwaltney*'s continuous or intermittent violation requirement to RCRA citizen enforcement actions.⁵⁴ Courts have justified this adoption on the similarity of the "to be in violation" language used in both RCRA and CWA.⁵⁵ Courts also cite the lack of legislative history or other evidence showing that Congress did not wish to limit the reach of RCRA's citizen enforcement action to continuous or intermittent violations.⁵⁶

B. Disagreement in the Federal Courts: Can Former Owners and Operators be Liable for RCRA Violations?

Although courts accept that RCRA citizen enforcement actions do not apply to wholly past actions, "the *Gwaltney* decision . . . did not clarify the line between 'wholly past' violations and those that are 'continuous or intermittent.'"⁵⁷ As a result, federal district courts have applied the statute differently to past violations that have continuing remediable effects.⁵⁸ The

52. *Id.* at 61-63.

53. *See id.* at 57 n.2.

For example, the [SWDA] was amended in 1984 [by RCRA] to authorize citizen suits against any "past or present" generator, transporter, owner, or operator of a treatment, storage, or disposal facility "who has contributed or who is contributing" to the "past or present" handling, storage, treatment, transportation, or disposal of certain hazardous wastes. 42 U.S.C. § 6972(a)(1)(B). Prior to 1984, the [RCRA] contained language identical to that of § 505(a) of the Clean Water Act, authorizing citizen suits against any person "alleged to be in violation" of waste disposal permits or standards [what is now 42 U.S.C. § 6972(a)(1)(A)].

Id.

54. *Marrero Hernandez v. Esso Oil Co.*, 597 F. Supp. 2d 272, 283 (D.P.R.); *see also Coburn v. Sun Chem. Corp.*, No. CIV. A88-0120, 1988 WL 120739, at *7-9 (E.D. Pa. Nov. 9, 1988) (barring RCRA citizen enforcement actions based on wholly past violations); *Harris Bank Hinsdale v. Suburban Lawn, Inc.*, No. 92 C 6814, 1992 WL 396295, at *2-3 (N.D. Ill. Dec. 22, 1992) (applying *Gwaltney* to RCRA); *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found.*, 81 F. Supp. 2d 359, 363 (D.R.I. 2000) (requiring an alleged current violation to bring suit under RCRA's citizen enforcement action provision); *College Park Holdings, L.L.C. v. Racetrac Petroleum, Inc.*, 239 F. Supp. 2d 1334, 1346 (N.D. Ga. 2002) (requiring alleged RCRA violations not be wholly in the past).

55. *Compare* 42 U.S.C. § 6972 (a)(1)(A) (2003) (RCRA), *with* 33 U.S.C. § 1365(a)(1)(A) (2001) (Clean Water Act). *See Marrero*, 597 F. Supp. 2d at 283 (noting the similarities between CWA and RCRA statutory language).

56. *See, e.g., Marrero*, 597 F. Supp. 2d at 283 (citing the lack of legislative history stating otherwise as a reason to adopt the continuous and intermittent violation standard for RCRA).

57. *Bd. of County Comm'rs v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1198 (D. Colo. 2009).

58. *Compare id.* at 1201 (holding that former owners and operators cannot be in violation), *and Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1011 n.20 (11th Cir. 2004) ("[Defendant] no longer exists and cannot, therefore, be in violation of the RCRA."), *with Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, No.*

following two cases—*Brown Group Retail* and *Scarlett*—are recent examples of this split, representing differing views on precedent and statutory interpretation that stand to have far reaching implications.

I. Brown Group Retail: Former Owners and Operators are not Liable

In *Brown Group Retail*, the District Court of Colorado ruled that citizen suits under section 6972 (a)(1)(A) are limited to ongoing violations of *current* owners and operators.⁵⁹ The County of La Plata brought an action against a manufacturer, Brown Group Retail, Inc., alleging violations of both CERCLA and RCRA for hazardous waste contamination.⁶⁰ In 1983, the County purchased a parcel of land previously owned and operated by the Brown Group as a munitions manufacturing facility.⁶¹ During the time of the Brown Group's ownership, toxic solvents used in the manufacturing process spilled and leaked into the surrounding soil and ground water, in violation of RCRA.⁶² After the Brown Group sold the property to the County, the contamination continued to migrate into the nearby river and its fumes pervaded the County's detention center, which was built on the parcel.⁶³

Among the County's claims against the Brown Group was that the continuing effects of the pollution caused by the Brown Group, nearly fifteen years prior, constituted an ongoing violation of RCRA under 42 U.S.C. section 6972 (a)(1)(A)—RCRA's citizen enforcement action provision.⁶⁴ The question facing the court was whether a former owner or operator could be in violation of RCRA.⁶⁵ To determine whether the former owner and operator of the parcel

1:05-CV-0145-CC, 2009 WL 3151089, at *10 (N.D. Ga. Sept. 30, 2009) (holding that a former operator may be held liable for pollution that remains ongoing), and *Marrero*, 597 F. Supp. 2d at 283 (holding that unremediated contamination is not a wholly past violation), and *Cameron v. Peach County*, No. 5:02-CV-41-1 (CAR), 2004 WL 5520003, at *26-27 (M.D. Ga. June 28, 2004) (holding that continued presence of unremediated contamination is a continuing violation despite that the acts occurred in the past), and *Cal. v. M & P Investments*, 308 F. Supp. 2d 1137, 1146-47 (E.D. Cal. 2003) (holding that unremediated contamination is a continuing violation), and *Aurora Nat'l Bank v. Tri Star Mktg., Inc.*, 990 F. Supp. 1020, 1024-25 (N.D. Ill. 1998) ("Although subsection (a)(1)(A) does not permit a citizen suit for wholly past violations of the statute, . . . the continued presence of illegally dumped materials generally constitutes a 'continuing violation' of the RCRA, which is cognizable under § 6972 (a)(1)(A)."), and *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 655-56 (N.D. Ohio 1993) ("So long as waste remains in the landfill threatening to leach into the surrounding soil and water, a continuing violation surely may exist."), and *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1512 (E.D. Wis. 1992) ("While this Court finds that the reach of § 6972(a)(1)(A) is confined to allegations of continuous intermittent violations, this Court also finds that Acme alleges 'a state of either continuous or intermittent violation[s]—that is, a reasonable likelihood that past polluter[s] will continue to pollute in the future.'").

59. *Brown Group Retail*, 598 F. Supp. 2d at 1201.

60. *Id.* at 1190-91.

61. *Id.* at 1190.

62. *Id.*

63. *Id.*

64. *Id.* at 1198.

65. *Id.*

could be held liable, the court referred to *Gwaltney's* requirement that the violation be "continuous or intermittent."⁶⁶ The court acknowledged that the issue has been "met with mixed results in the federal courts[.]" and ultimately found more merit in the argument against liability.⁶⁷ In doing so, *Brown Group Retail* explicitly disagreed with the ruling of *City of Toledo v. Beazer Materials & Services, Inc.*, in which another federal district court supported a civil suit against former property owners and operators.⁶⁸ *Brown Group Retail* found the *Beazer* holding erroneous because it relied on cases concerning ongoing violations of *current* owners and operators to extend liability for violations to *former* owners and operators.⁶⁹

Instead, the reasoning of *Friends of the Sakonnet v. Dutra*, a case not cited by either party, persuaded the *Brown Group Retail* court.⁷⁰ In *Friends of the Sakonnet*, the District Court of Rhode Island ruled the citizen enforcement provision of CWA did not apply to former owners and operators, even if their past actions resulted in violations that continued at the time of suit.⁷¹ *Friends of the Sakonnet* reasoned that to allow for former owners and operators to be subject to suit would render CWA's notice requirements gratuitous because the defendants, as former owners and operators, would have "no control over the pollution source" and no ability "to bring itself into complete compliance."⁷²

Citing *Friends of the Sakonnet* and a number of similarly decided non-RCRA cases, *Brown Group Retail* concluded that "a cause of action under 42 U.S.C. section 6972 (a)(1)(A) [RCRA's citizen enforcement action] can only be brought against an owner or operator of a polluting property who is 'alleged to be in violation' of [] RCRA at the time the suit is brought."⁷³ The court reasoned that because the Brown Group no longer owned or operated the facility, it could not be "in violation" for the purposes of a RCRA citizen enforcement action.⁷⁴ Consequently, the County's RCRA claim against the Brown Group was "dismissed for failure to state a claim upon which relief [could] be granted."⁷⁵

66. *Id.*

67. *Id.* at 1199.

68. *Id.*; *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 656 (N.D. Ohio 1993).

69. *Brown Group Retail*, 598 F. Supp. 2d at 1200 ("While Plaintiff's summary of *Beazer Materials* is accurate, I do not find the reasoning persuasive.").

70. *Id.* at 1200; *see also Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 632-33 (D.R.I. 1990).

71. *Friends of the Sakonnet*, 738 F. Supp. at 632-35.

72. *Id.* at 633.

73. *Brown Group Retail*, 598 F. Supp. 2d at 1201; *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1011 n.20 (noting that if there is no defendant, there is no violation); *Sealy Conn v. Litton Indus., Inc.*, 989 F. Supp. 120, 123 (D. Conn 1997) ("[R]efusal of defendant to remediate [is] not a 'continuing violation.'").

74. *Brown Group Retail*, 598 F. Supp. 2d at 1202.

75. *Id.*

2. Scarlett: Former Owners and Operators are Liable

In *Scarlett*, the Northern District of Georgia ruled that a RCRA citizen enforcement action could apply to a former operator for an ongoing violation, particularly when the pollution continues to migrate.⁷⁶ *Scarlett & Associates, Inc.*, the current owners of a shopping mall that included a dry cleaning business, brought a citizen enforcement action to recover contamination clean up costs from *Faison & Associates, L.L.C. (Faison)*, the former property manager from 1995 to 1997.⁷⁷

In the mid 1990s, site investigations revealed the leak of tetrachloroethene (PCE) from the shopping mall's dry cleaning business, which had operated under several different owners from 1986 until closing in 2007.⁷⁸ Although uncertainty remained as to when the chemical leaks began, scientific studies supported their existence both during and after *Faison's* tenure as property manager of the site.⁷⁹ Furthermore, evidence showed that the PCE contamination from the period *Faison* was property manager continued to migrate into the ground beneath and surrounding the facility.⁸⁰ This contamination remained unremediated and migrated through 2005, when the citizen suit was filed.⁸¹

One of the issues facing the court was whether *Scarlett's* RCRA citizen enforcement action could be used to hold *Faison*, a former operator, liable for an ongoing violation of RCRA.⁸² The court acknowledged that the Eleventh Circuit had not yet addressed the issue, and ultimately dismissed *Scarlett's* motion for summary judgment because of questions regarding *Faison's* role as operator.⁸³ Nevertheless, the court stated it agreed with the other "federal district courts [that] have held that the continued presence of illegally dumped hazardous wastes may constitute a 'current violation' of a RCRA regulation or standard, despite the fact that the operator's conduct occurred in the past."⁸⁴

While ruling otherwise, the court did acknowledge that several other courts had limited RCRA citizen enforcement actions to current owners and operators.⁸⁵

76. *Scarlett*, 2009 WL 3151089, at *12. The several other defendants and claims in this case have been omitted because they are not relevant to the subject of this Comment.

77. *Id.* at *1-2.

78. *Id.* There were multiple owners and operators of the dry cleaning business during this period, including *Faison*. *Id.*

79. *Id.* at *11.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at *10-12.

84. *Id.* at *10; *see also supra* note 58 (identifying the different approaches taken in different judicial districts).

85. *See, e.g., Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2d Cir. 1993) (holding that leftover debris that was decomposing and contaminating wildlife did not constitute a continuing violation); *Coburn v. Sun Chem. Corp.*, No. Civ. 88-0120, 1988 WL 120739, at *9 (E.D. Pa. Nov. 9, 1988) (holding that a past operator's lack of permits was not a continuing violation).

The court specifically referenced *Brown Group Retail*, noting that it “[held] that a polluter who no longer owns or operates a pollution site is not subject to suit under [section] 6972 (a)(1)(A).”⁸⁶ However, *Scarlett* did not attack the reasoning employed in *Brown Group Retail*; rather, it simply stated that it sided with the analysis of the courts allowing citizen suits.⁸⁷

Like *Brown Group Retail*, *Scarlett* and the cases it relied upon as precedent claim to operate within the framework of *Gwaltney*. That is, both sides of the argument agree that any violations alleged in support of a RCRA claim ‘must not be wholly in the past;’ rather, alleged violations must ‘be ongoing at the commencement of the lawsuit.’”⁸⁸ However, unlike *Brown Group Retail*, *Scarlett* and its predecessors focus on the status of the contamination rather than the status of the violator when determining what constitutes an ongoing violation.⁸⁹ As a result, under *Scarlett*, past actions may result in continuing violations that meet the *Gwaltney* test for a continuing violation and therefore fall within the scope of RCRA’s citizen enforcement action.⁹⁰

IV. ANALYSIS OF THE COMPETING VIEWS

The divergent opinions on the scope of RCRA’s citizen enforcement action reflect different possible interpretations of *Gwaltney*’s “wholly past” and “continuing and ongoing” violation standards.⁹¹ Courts like *Brown Group Retail*, which do not find former owners and operators liable, focus on the physical act of the violation.⁹² Here, “[i]t is only a *violator*, not the *violation*, that can be said to be in the past.”⁹³ Under this interpretation, former owners or operators cannot be in violation because they cannot currently commit the act of violation.⁹⁴

In contrast, courts like *Scarlett*, which do find former owners and operators liable, focus on the status of the pollution when determining the presence of a violation.⁹⁵ Here, “it is not the physical act of discharging . . . wastes itself that leads to the injury . . . but the *consequences* of the discharge in terms of lasting

86. *Scarlett*, 2009 WL 3151089 at *10.

87. *Id.*

88. *See, e.g.*, Cameron v. Peach County, No. 5:02-CV-41-1 (CAR), 2004 WL 5520003, at *14 (M.D. Ga. June 28, 2004) (describing the basic facets of a RCRA citizen enforcement claim).

89. *See Scarlett*, 2009 WL 3151089, at * 12; *see also* City of Toledo v. Beazer Materials & Servs., Inc., 833 F. Supp. 646, 656 (N.D. Ohio 1993) (“Congress intended to allow citizen suits . . . for past violations where the effects of the violation remain remediable.”).

90. *Scarlett*, 2009 WL 3151089, at *10.

91. *Compare* Friends of the Sakonnet v. Dutra, 738 F. Supp. 623, 633 (arguing that *Gwaltney* supports the limiting of liability to only current owners and operators) *with Beazer*, 833 F. Supp. at 656 (arguing that *Gwaltney* supports the finding liability for former owners and operators if the pollution has not be remediated).

92. *Friends of the Sakonnet*, 738 F. Supp. at 632.

93. *Id.*

94. *Id.* at 632-33.

95. N.C. Wildlife Fed’n v. Woodbury, No. 87-584-CIV-5, 1989 WL 106517, at *2 (E.D.N.C. Apr. 25, 1989).

environmental degradation.”⁹⁶ Because pollution may continue to exist after being discarded, the violation may also continue to exist, regardless of changes in property ownership.⁹⁷

A. *The Creation of a Liability Loophole*

The impact of *Brown Group Retail*'s narrow interpretation of what it means to be “in violation” is most pronounced when a past act of pollution continues to have impacts in the future. Under this circumstance, a current owner or operator can be found liable for a past act, while a former owner or operator cannot.⁹⁸ By restricting liability to current owners and operators, *Brown Group Retail* and the decisions it is based upon effectively allow a party to escape liability for past pollution by selling the source of pollution.⁹⁹ This creates a system in which liability for pollution that would otherwise constitute a violation is either passed on to the new owners and operators (if the act of polluting continues) or becomes immune to RCRA's citizen enforcement actions (if the act of polluting ceases).¹⁰⁰

Interestingly, *Friends of the Sakonnet*, which was relied upon in *Brown Group Retail*, expressly acknowledged the shortcomings of its narrow interpretation. The court determined, however, that it was the legislature's responsibility to change the language of the statute if the court misinterpreted its intent.¹⁰¹ In contrast, this Comment argues that the statute and reasoning employed in *Gwaltney* already support the broader interpretation of RCRA's citizen enforcement action, thus allowing suit against former owners and operators and closing the liability loophole.

B. *The Insufficiency of Alternative Legal Claims*

To understand the practical implications of a narrow reading of RCRA's citizen enforcement action, it is important to identify the other legal claims that continue to apply to former owners and operators.¹⁰² Fortunately, many acts of pollution that constitute violations of RCRA are subject to other areas of the law, including other RCRA provisions, other environmental regulations, and state

96. *Id.*

97. *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 656 (N.D. Ohio 1993). (“Because improperly disposed of hazardous waste remains a remediable threat to the environment . . . Congress intended to allow citizen suits . . . for past violations where the effects of the violation remain remediable.”).

98. *Friends of the Sakonnet*, 738 F. Supp. at 633.

99. *Id.* at 633 n.22 (“[D]efendants are able to avoid responsibility for their violations of the law because they sold their property, not because they stopped violating the law.”).

100. *Id.*

101. *Id.*

102. See 42 U.S.C. §6972(f) (2003) (“Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief.”).

common law.¹⁰³ For example, a RCRA violation by a former owner or operator may be subject to RCRA's citizen endangerment action provision or EPA enforcement.¹⁰⁴ A RCRA violation that either migrates into surrounding navigable waters and ambient air or is abandoned may also trigger violations of other environmental regulations, such as CWA, the Clean Air Act, or CERCLA.¹⁰⁵ Lastly, if the violation causes an injury to another's property, it may be subject to state common law claims such as trespass, nuisance, negligence, breach of contract, indirect condemnation, and/or stigmatization damages.¹⁰⁶

While this web of statutes and legal theory may serve to prevent former owners and operators from escaping all responsibility for their actions, it does not guarantee the same level of protection as RCRA's citizen enforcement action, and does not reflect Congress' intent when it enacted RCRA.¹⁰⁷ As a result, the narrow interpretation of the citizen enforcement action provision hinders a significant and unique mechanism for ensuring compliance with RCRA and furthering RCRA's goal of protecting health and the environment.

First, the other RCRA citizen-suit provisions are not an adequate substitute for the citizen enforcement action. This is evident from the fact that Congress included the provisions separately, and rules of statutory interpretation disfavor a reading of a statute that results in a redundant or moot term or provision.¹⁰⁸ The

103. See, e.g., *Bd. of County Comm'rs v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1202-03 (D. Colo. 2009) (denying citizen enforcement action, but allowing citizen suit under section 6972(a)(1)(B)); *United States v. Power Eng'g Co.*, 10 F. Supp. 2d 1145, 1148 (D. Colo. 1998) (citing 42 U.S.C. §§ 6928(a)(1), 6934(a)(1), and 6973 as evidence of the EPA's ability to proceed against former polluters and past violators, including wholly past violations); *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 275 (evaluating claims under RCRA, Clean Water Act, and CERCLA, for the same act of pollution); *Friends of the Sakonnet*, 738 F. Supp. at 635, 638 (denying citizen enforcement action claim, but allowing a nuisance claim against former owners for same acts of pollution); *Scarlett Assocs., Inc. v. Briarcliff Ctr. Partners*, No. 1:05-CV-0145-CC, 2009 WL 3151089, at *12-16 (analyzing claims against a former owner under the citizen enforcement statute and state law claims of trespass, breach of contract, nuisance, negligence, and negligence per se); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 973 (D. Wyo. 1998) (evaluating claim of an ongoing Clean Water Act violation, along with state common law claims of trespass, nuisance, negligence, indirect condemnation, and stigmatization damages).

104. KOPEL ET AL., *supra* note 18, at 5 (“[A]lmost every RCRA malfeasance violates several regulatory provisions at once.”); 42 U.S.C. § 6972(a)(1)(B) (RCRA citizen endangerment suit); *Power Engineering*, 10 F. Supp. 2d at 1148 (citing 42 U.S.C. §§ 6928(a)(1), 6934(a)(1), and 6973 as evidence of the EPA's ability to proceed against former polluters and past violators, including wholly past violations, under the RCRA).

105. See *Marrero*, 597 F. Supp. 2d at 275 (evaluating claims under RCRA, Clean Water Act, and CERCLA, for the same act of pollution); see also *Brown Group Retail*, 598 F. Supp. 2d at 1190-91 (evaluating claims under RCRA and CERCLA for same act of pollution).

106. See, e.g., *Friends of the Sakonnet*, 738 F. Supp. at 633-38 (denying citizen enforcement action claim, but allowing a nuisance claim against former owners for same acts of pollution); *Scarlett*, 2009 WL 3151089, at *12-16 (analyzing claims against a former owner under the citizen enforcement statute and state law claims of trespass, breach of contract, nuisance, negligence, and negligence per se); *Wilson*, 33 F. Supp. 2d at 973 (evaluating claims of an ongoing Clean Water Act violation, along with state common law claims of trespass, nuisance, negligence, indirect condemnation, and stigmatization damages).

107. See *infra* Part IV.B.

108. 42 U.S.C. § 6972(a)(1)(A)-(B); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (“[The courts should] give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”).

substantive differences in the citizen-suit provisions are also evident from their text.¹⁰⁹ Because section 6792(a)(1)(B) is limited to past and present contributors to pollution that “may present an imminent and substantial endangerment to [human] health or the environment,” it does not apply to all violations.¹¹⁰ As a result, under *Brown Group Retail’s* narrow view of the citizen enforcement action provision, RCRA citizen suits would not apply to former owners and operators if: (1) they acted passively (not contributed); or (2) they contributed to pollution that does not pose an imminent and substantial endangerment to health or the environment.¹¹¹ By relying on section 6792(a)(1)(B) as a substitute for holding former violators liable, certain violations would escape liability based on the role of the owner or operator as well as the impact of the pollution.¹¹² This is a significantly lower standard than strict liability and would allow pollution to linger unremedied as long as it does not meet section 6792(a)(1)(B)’s specific requirements.¹¹³

Second, while there is uncertainty regarding citizen enforcement of violations by former owners and operators, it is clear that the EPA does have this power.¹¹⁴ In fact, *Gwaltney* referred to similar provisions in CWA as examples where the EPA had power over wholly past violations, although private citizen suits did not.¹¹⁵ Although the EPA has this power, it does not compensate for the citizen enforcement action because it is wielded at the EPA’s own discretion, and citizens cannot force the EPA to take discretionary enforcement action.¹¹⁶

Relying on the EPA for enforcement is an inadequate substitute for the citizen enforcement action. According to a review of RCRA lawsuits, the EPA

109. Compare *Id.* § 6922(a)(1)(A) (requiring an alleged violation), with *id.* § 6972(a)(1)(B) (requiring an imminent and substantial harm).

110. *Scarlett*, 2009 WL 3151089, at *12 (finding that the citizen enforcement action applied to a former operator, but that the citizen suit under section 6972(a)(1)(B) did not because the former operator did not affirmatively handle or store materials).

111. *Id.*

112. *Id.* at *12-13.

113. See generally *Scotchtown Holdings, L.L.C. v. Town of Goshen*, No. 08-CV-4720, 2009 WL 27445 (S.D.N.Y. Jan. 5, 2009) (dismissing plaintiff’s claim under section 6972(a)(1)(B) because no imminent and substantial endangerment exists “if the risk of harm is remote in time, completely speculative in nature, or de minimis in degree.”).

114. See *Bd. of County Comm’rs v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1199 (D. Colo. 2009).

[U]nder Section 6928(a)(1), the EPA may proceed against a polluter whenever it determines “that any person *has violated* or is in violation of any requirement of this subchapter”. . . . Similarly, Section 6934 allows the EPA to issue compliance orders whenever it determines “hazardous waste is, *or has been*, stored, treated, or disposed of” . . . and Section 6973 allows the EPA to proceed “upon receipt of evidence that the *past or present* handling, storage, treatment, transportation or disposal of any solid waste may present an imminent and substantial endangerment to health or environment.”

Id.

115. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 58-59 (1987).

116. *Thompson v. Thomas*, 680 F. Supp. 1, 2 (D.D.C. 1987).

seldom prosecutes violators, regardless of whether they are current or former.¹¹⁷ In addition, “evidence seems very clear that public enforcement of violations by public polluters has been quite ineffective and the problem is not the inadequate availability of remedies, but rather a reluctance to use the available remedies.”¹¹⁸ As a result, reliance on the EPA to fulfill this role is inadequate to meet the goals of RCRA.¹¹⁹ In fact, Congress created the citizen enforcement action precisely because it was skeptical of the EPA’s ability to enforce environmental regulations without supplementation.¹²⁰

Third, the state common law claims that may apply to the pollution of former owners and operators are insufficient substitutes for the citizen enforcement action because they are limited in their availability, consistency, and by their difficulty to prove.¹²¹ For example, common law claims seldom invoke strict liability for a violation, as does RCRA’s citizen enforcement action.¹²² Instead, common law claims such as trespass, nuisance, and negligence focus on the intent of the defendant and the effect of the violation—the harm or threat of harm to the plaintiff.¹²³ Further, on a practical level, it is often more difficult to prove claims for injury caused by past acts of pollution given the evidentiary demands of proving the elements of the claims, such as causation.¹²⁴ Unlike the citizen enforcement action, state common law claims are subject to statutes of limitations, which often limit the time of suit to within four-to-six years of

117. See May, *supra* note 6, at 10704 (noting that the EPA seldom relies on litigation to enforce compliance).

118. Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28, 42 (1992).

119. *Id.*

120. *Id.* at 30-31 (“A pervasive recognition that the government had neither the time nor the resources to provide sufficient enforcement led the Congress to authorize citizen suits.”).

121. Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 569 n.140 (2007).

122. *Compare* Gilroy Canning Co. v. Cal. Cannery & Growers, 15 F. Supp. 2d 943, 946 (N.D. Cal. 1998) (applying strict liability to RCRA violations), with Charles E. Cantu, *Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled*, 33 U. MEM. L. REV. 823, 827-828 (“Strict liability in tort law is very limited. Our judiciary has been extremely jealous in confining this idea to seven distinct scenarios. These scenarios include animals that are trespassing, are domesticated but vicious, or are wild by nature, or fact situations involving ultra-hazardous activities, nuisance, misrepresentation, vicarious liability, defamation, or a workman’s compensation statute.”).

123. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (“[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.”); see also Elizabeth J. Wilson et al., *Assessing a Liability Regime for Carbon Capture and Storage*, 1 ENERGY PROCEDIA 4575, 4578 tbl. 1 (2009) (providing descriptions, elements, tests, and examples of common law theories often available to environmental litigants, including trespass, negligence, negligence per se, private and public nuisance, and strict liability).

124. See KFC W., Inc. v. Meghriq, 49 F.3d 518, 523 n.6 (9th Cir. 1995) (“Even though causes of action for nuisance, trespass, and potential negligence are available to plaintiffs . . . tort remedies are generally inadequate because of the difficulties of proof and attendant court delays.”); see also Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1, 71-79 (2006) (discussing the shortcomings of state common law claims as a substitute for CERCLA, even though it shares many similarities to RCRA).

knowledge of the violation, regardless of whether the pollution continues after the statute of limitations period has passed.¹²⁵ In contrast, RCRA's citizen enforcement action is not subject to a statute of limitations because the violation must be occurring when the suit is filed.¹²⁶ Also, the common law varies from state to state, lacking the uniformity in applicability and protection offered by a standard national policy.¹²⁷ In fact, Congress explicitly acknowledged the advantage of the RCRA over its common law counterpart:

[RCRA] is essentially a codification of common law public nuisance remedies [And], therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance (including [the theories of] intentional tort, negligence, and strict liability) and to determine appropriate remedies However, Some terms and concepts . . . are meant to be more liberal than their common law counterparts.¹²⁸

Lastly, even if other environmental regulations apply to former owners and operators for their acts of pollution, they often do not share all of the benefits of RCRA citizen suits and fail to meet its policy objective to "minimize the present and future threat [of solid waste] to human health and the environment."¹²⁹ Many provisions of federal environmental regulations overlap, and RCRA specifically requires integration with these provisions, where practicable, to avoid duplication in administration and enforcement.¹³⁰ However, Congress also recognized that integration is only appropriate when "done in a manner consistent with the goals and policies expressed in [RCRA] and in other acts"¹³¹ Because RCRA's

125. *Compare* *Scarlett Assocs., Inc. v. Briarcliff Ctr. Partners*, No. 1:05-CV-0145-CC, 2009 WL 3151089, at *10 ("If the [RCRA] violation continues within the limitations period . . . the statute of limitations is tolled for a claim that otherwise would be time-barred."), *with id.* at *14-19 (finding state law claims of breach of contract, negligence, and negligence per se to be barred by statute of limitations, which started running upon Scarlett's recognition of the pollution in 1994), and *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633-634 (D.R.I. 1990) (allowing nuisance claim as long as defendants were in control of the instrumentality causing the nuisance and the suit is within the statute of limitations).

126. *See Scarlett*, 2009 WL 3151089, at *10 (noting that a RCRA citizen enforcement action can be brought at any time during an ongoing violation); *THELENREID.COM*, *supra* note 40 (stating that there is no statute of limitations under RCRA, but that the equitable doctrine of laches still applies).

127. *Aronovsky*, *supra* note 124, at 79 ("The current patchwork quilt of state law statutory and common law theories standing alone is too unpredictable and inequitable to serve . . . national policy goals."); *Klass*, *supra* note 124, at 566-569 (citing several cases showing judicial preference toward federal statutory regulation for environmental protection).

128. S. REP. NO. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023.

129. 42 U.S.C. § 6902(b) (2003).

130. *Id.* § 6905(b)(1) ("The Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the [Clean Air Act, Clean Water Act, Federal Insecticide, Fungicide, and Rodenticide Act, and Marine Protection, Research, and Sanctuaries Act]"); *see also Chem. Waste Mgmt., Inc. v. EPA*, 976 F.2d 2, 23 (D.C. Cir. 1992) (identifying an instance where RCRA accommodates the Clean Water Act).

131. 42 U.S.C. § 6905(b)(1); *see also Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997)

citizen enforcement action specifically applies to violations regarding both hazardous and non-hazardous solid waste management, other environmental regulations, with fundamentally different purposes, are inadequate substitutes that cannot compensate for the liability loophole created by *Brown Group Retail*.¹³²

C. *Seeking Guidance from Gwaltney and its Descendants*

Both *Brown Group Retail* and *Scarlett* look to *Gwaltney*'s reasoning for guidance when interpreting RCRA's citizen enforcement action provision.¹³³ Courts that do not find liability rely on the majority's finding that the citizen-suit provision focuses on "current and future violations, not those in the past," and the need for the provision to align with other sections of the Act, namely the notice requirement.¹³⁴ In contrast, courts that do find liability cite language in the concurring opinion stating that a defendant remains in violation so long as it has not taken remedial measures.¹³⁵ However, as is argued below, these statements need not produce contradictory results. A review of *Gwaltney*'s reasoning suggests that ongoing and continuing pollution due to a former owner or operator should be within the scope of RCRA's citizen enforcement suits.

When interpreting the citizen-suit provisions of RCRA and CWA, courts frequently rely on cases interpreting the citizen-suit provisions of other

(reasoning based on analogy failed because the nature of the matter was explicitly differently in RCRA than in the Clean Air Act or Clean Water Act).

132. RCRA Enforcement, *supra* note 1. Even CERCLA, the environmental regulation most closely related to RCRA, does not provide coverage for all RCRA violations because it only applies to hazardous waste. CERCLA Overview, *supra* note 20.

133. *Compare* Bd. Of County Comm'rs v. Brown Group Retail, 598 F. Supp. 2d 1185, 1198-1203 (referring to *Gwaltney* when determining what constitutes a "wholly past violation" of RCRA), *with* Scarlett Assocs., Inc. v. Briarcliff Ctr. Partners, No. 1:05-CV-0145-CC, 2009 WL 3151089, at *11 (citing Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1011 n.20 (11th Cir. 2004) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. at 57-58)).

134. *Brown Group Retail*, 598 F. Supp. 2d at 1201.

[T]he express provision of notice to allow a polluter to bring itself into compliance indicates Congress intended "[t]he phrase 'any person . . . who is alleged to be in violation' [to be] clearly directed to a present violation by the person against whom the citizen suit is brought". . . . To bring a suit against a former owner or operator that has no ability to control or come into compliance would render the notice provision of the act gratuitous.

Id.

135. *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 286 (D.P.R.).

[The language] "to be in violation" . . . suggests "a state rather than an act—the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains . . . "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.

Id. (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 69 (Scalia, J., concurring)).

environmental regulatory acts.¹³⁶ The appropriate use of analogous reasoning provides for consistency among the courts in the interpretation and application of environmental regulations. This is particularly helpful when more than one environmental regulation is violated by a single act of pollution.¹³⁷ This cross-reliance reduces the number of redundant suits focused on interpreting provisions with identical or near-identical language.¹³⁸ At the same time, courts appreciate the limits of relying on other statutes for guidance where the language is materially different or the purposes of the statutes diverge.¹³⁹ With both the benefits and limitations of this approach in mind, the following analysis of the phrase “continuing and ongoing violation” pulls from both RCRA and CWA case law.

1. Preserving the Notice Requirement

One of the main arguments against holding former owners and operators liable for ongoing pollution is that it would undermine RCRA's notice requirement.¹⁴⁰ This argument follows Justice Marshall's majority opinion in *Gwaltney*, where CWA's citizen enforcement action provision was found not to apply to wholly past violations in part because it would run counter to CWA's provision requiring notice to alleged violators.¹⁴¹

According to *Gwaltney*, one of the purposes of the notice provision is to allow violators to come into compliance to avoid a suit.¹⁴² Because a wholly past violation cannot be made to comply, the citizen-suit provision cannot be interpreted to apply to them.¹⁴³ However, continuing and ongoing violations can be brought into compliance and are subject to the citizen enforcement action

136. See, e.g., *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (“[W]e examine first the [RCRA and Clean Water Act] citizen-suit sections, which can be treated together because their relevant provisions are similar.”); *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (referring to a Clean Air Act decision in a RCRA case); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 986-87 (E.D. Wash. 1994) (discussing RCRA rulings in a Clean Water Act case).

137. *Hecla*, 870 F. Supp. at 986-87.

138. See *Brown Group Retail*, 598 F. Supp. 2d at 1201. (acknowledging Congress' use of identical language in developing the RCRA and Clean Water Act citizen enforcement action provisions).

139. See, e.g., *Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997) (finding that reasoning based on analogy failed in one instance because the nature of the matter was explicitly different in RCRA than in the Clean Air Act or the Clean Water Act).

140. 42 U.S.C. § 6972(b)(1) (requiring that plaintiffs notify the alleged violator, the State, and the Environmental Protection Agency (EPA) of their intent to sue at least 60 days prior to commencement); *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I.) (arguing that bringing a suit against a former owner or operator that has no ability to control or come into compliance would render the notice provision of the act gratuitous).

141. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59-60 (1987).

142. *Id.* at 60 (“[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit.”).

143. *Id.*

provision.¹⁴⁴ In short, a citizen enforcement action may be permitted when it can promote compliance.

Friends of the Sakonnet referenced *Gwaltney*'s rationale when determining that the Clean Water Act citizen-suit provision did not apply to former owners and operators whose past actions continued to pollute.¹⁴⁵ Echoing *Gwaltney*'s notice provision argument, the court concluded the citizen-suit provision did not apply to former owners or operators because they no longer had the ability to control the pollution or come into compliance as a result of notice.¹⁴⁶ The court equated the lack of property ownership with the inability to contribute to compliance—regardless of whether the pollution remained unremediated.¹⁴⁷

Despite the reasoning in *Friends of the Sakonnet*, there is a compelling argument that *Scarlett*'s broader reading of RCRA's citizen enforcement action provision does not render the notice provision gratuitous, and may even help preserve it. While notice of wholly past violations is gratuitous because the violator is already in compliance, notice to former owners and operators for ongoing violations continues to serve an important purpose.¹⁴⁸ Arguably, by allowing former owners and operators to escape liability through sale of the polluting source, *Brown Group Retail*'s narrow reading itself may render the notice provision gratuitous.¹⁴⁹ Even if *Scarlett*'s broad interpretation of the statute conflicts with the notice provision's ability to prompt self-compliance, the notice provision still remains meaningful as a trigger for government action.¹⁵⁰ Lastly, if the narrow interpretation is based on the need to preserve the notice requirement, it would not restrict citizen enforcement actions against former owners and operators who violated RCRA provisions that are exempt from the notice requirement.¹⁵¹ The following section evaluates each of these arguments in more detail.

First, the notice provision may promote compliance if applied to former owners or operators whose actions contribute to an ongoing violation. For example, in response to receiving notice, a former owner or operator may take steps to avoid suit or commence settlement negotiations that will spare the parties

144. *Id.*

145. *Friends of the Sakonnet*, 738 F. Supp. at 633.

146. *Id.*

147. *Id.* at 633 n.22.

148. See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 485-486 (2000) (recognizing that continuing pollution caused by prior owners and operators remains remediable).

149. *Friends of the Sakonnet*, 738 F. Supp. at 633 n.24.

150. Miller, *supra* note 148, at 485 ("The legislative history amply demonstrates that the purpose of the prior notice provision is to aloe the government an opportunity to exercise its enforcement authority, not allow the violator to avoid suit by quick compliance.").

151. See 42 U.S.C. § 6972(c) (2003) (exempting from the notice period any RCRA enforcement against hazardous waste violations).

and courts from prolonged litigation.¹⁵² The likelihood of future compliance may increase by expanding the number of defendants potentially liable for an ongoing violation. By including former owners and operators, the financial resources available for compliance and mitigation measures are likely to increase.¹⁵³ This also provides protection to current owners, who are unable to recover prior costs of cleaning up pollution that does not pose a danger to health or environment at the time of suit.¹⁵⁴ At the same time, once subject to liability, owners and operators will take additional steps to avoid violations for fear of future penalties and litigation.¹⁵⁵ If violators can simply avoid liability by selling the source of pollution prior to suit, no such incentive exists.¹⁵⁶

Second, *Brown Group Retail's* narrow interpretation does not necessarily promote compliance by alleged violators. As recognized by *Friends of the Sakonnet*, "the notice requirement serves little purpose if an owner or operator can simply transfer control of the pollution source before the filing of a citizen's suit and avoid liability."¹⁵⁷ Given the liability loophole it creates, the *Brown Group Retail* interpretation may actually hinder, rather than further, the goal of the notice provision. Ironically, by restricting the citizen enforcement action to current owners and operators, the narrow interpretation may have the effect of rendering the RCRA notice provision gratuitous.¹⁵⁸ In contrast, the broad interpretation of the citizen enforcement suit is likely to result in increased compliance due to increased litigation.¹⁵⁹

152. Miller, *supra* note 148, at 485.

153. This assistance would be welcome as an increasing number of liable parties under RCRA and CERCLA are unable to meet their financial obligations, forcing the costs of compliance and clean up or environmental consequences of the pollution on to the public. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-658, ENVIRONMENTAL LIABILITIES: EPA SHOULD DO MORE TO ENSURE THAT LIABLE PARTIES MEET THEIR CLEANUP OBLIGATIONS 12 (2005) [hereinafter GAO], available at <http://www.gao.gov/new.items/d05658.pdf> (on file with the *McGeorge Law Review*). "In seeking to hold bankrupt and other financially distressed businesses responsible for their environmental cleanup obligations, EPA faces significant challenges that often stem from the differing goals of environmental laws that hold polluting businesses liable for cleanup costs and other laws that, in some cases, allow businesses to limit or avoid responsibility for those liabilities." *Id.* at 4.

154. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 488 (1996) (prohibiting current owner from recovering the costs of a past cleanup effort through a private citizen suit against a former owner). This limitation of RCRA may incentivize current owners and operators to avoid remediating existing pollution, thereby allowing it to continue. John H. Phillips, *An Update to "A Good Side of RCRA,"* PHILLIPS LAW FIRM BLOG (Aug. 28, 2007, 9:15 AM), <http://www.phillipslawfirm.com/blog/AnUpdateToQuotAGoodSideOfRCRAquot.aspx> (on file with the *McGeorge Law Review*) ("My advice to [current owners] is not to perform the clean up if a RCRA citizen suit is being contemplated.").

155. See Naysnerski & Tietenberg, *supra* note 118, at 41 ("Any firms not in compliance with the standards under public enforcement would be expected to take higher levels of precaution when confronted with citizen suits. Firms in compliance would not change their behavior in response to private enforcement because their expected penalty would be zero both before and after the onset of citizen suits.").

156. *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I. 1990).

157. *Id.* at n.24.

158. *Id.*

159. Naysnerski & Tietenberg, *supra* note 118, at 41.

The third justification for the notice requirement is not harmed by allowing citizen enforcement actions to apply to former owners and operators. In *Gwaltney*, the Supreme Court recognized a second purpose for the notice requirement—to give the government an opportunity to enforce the statute.¹⁶⁰ This is relevant to the citizen enforcement action because diligent government action to prosecute the alleged violator preempts a citizen suit.¹⁶¹ Because the government retains the power to preempt a citizen suit, the government-enforcement justification for the notice requirement remains important, despite allowing citizen enforcement actions to apply to former owners and operators.¹⁶² As a result, the broader interpretation of the citizen enforcement action does not render the notice requirement gratuitous, as suggested in *Brown Group Retail and Friends of the Sakonnet*.¹⁶³

Lastly, the *Brown Group Retail* argument, based on the notice requirement, does not account for instances in which RCRA does not require a notice period. If the narrow interpretation is based on the need to preserve the notice provision, it follows that it would not prohibit citizen enforcement actions against former owners and operators for violations exempt from the notice requirement. This exception is significant because RCRA allows citizen suits to “be brought immediately after such notification in the case of an action . . . respecting a violation of [the treatment, storage and disposal of hazardous waste].”¹⁶⁴ In such an instance, the public interest in stopping the violation outweighs the incentive for self-compliance under the notice provision.¹⁶⁵ Because the notice requirement argument does not apply here, it cannot be used to bar citizen enforcement actions against former owners and operators violating RCRA’s hazardous waste laws.

2. *Dismissing the Present Tense Argument*

When determining CWA’s citizen enforcement action was restricted to current and ongoing violations, the *Gwaltney* court cited the present tense

160. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59-60 (1987); see also *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (“[N]otice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits.”).

161. See 42 U.S.C. § 6972(b)(1)(B) (2003) (providing that no action may be commenced by a private litigant “[i]f the Administrator [of the EPA] 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 . . .”).

162. See *id.* (recognizing the independently important purpose of notice to alert the government to take action and preempt any citizen enforcement action against former owners and operators).

163. *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I. 1990); *Bd. of Comm’rs v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1201 (D. Colo. 2009).

164. 42 U.S.C. § 6972(c); see also Naysnerski & Tietenberg, *supra* note 118, at 31 (“The only exception [to the sixty day notice requirement] involves hazardous waste violations . . .”).

165. See Naysnerski & Tietenberg, *supra* note 118, at 31 (noting that citizens can take immediate action when “a violation involves hazardous substances which represent an imminent hazard . . .”).

language of the statute as evidence of congressional intent.¹⁶⁶ Although the present tense argument supports disallowing private suits for wholly past violations that are certain not to continue, it is not a compelling argument for precluding RCRA citizen enforcement suits alleging current or ongoing violations by former owners and operators.¹⁶⁷

As previously noted, the recent division among federal district courts does not concern whether or not the violation must be present—both sides agree the alleged violation must be continuing or intermittent for a RCRA citizen enforcement action.¹⁶⁸ The issue is whether the continuing presence or migration of the waste disposed of by former owners and operators constitutes a current or ongoing violation.¹⁶⁹ *Gwaltney* does not address this issue because the defendant had permanently ceased all violations prior to suit.¹⁷⁰ As a result, the Court's discussion of the present tense language in the statute does not inform future interpretation of whether pollution that had occurred under a former owner or operator constitutes a continuing violation for the purposes of a RCRA citizen enforcement action.

However, even if the present tense argument was applicable, RCRA should be interpreted more broadly than CWA was in *Gwaltney*. The language of the RCRA citizen enforcement action is subtly different from that of CWA—but it is precisely this language that the *Gwaltney* court relied on when making its present tense argument.¹⁷¹

“The most telling use of the present tense [in the Clean Water Act] is in the definition of ‘citizen’ as ‘a person . . . *having an interest which is or may be adversely affected*’ by the defendant’s violations of the Act.”¹⁷² This definition makes plain what the undeviating use of the present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not the past.¹⁷³

In contrast, RCRA’s citizen enforcement action may be brought by “any person”—a much broader group of plaintiffs than CWA’s “citizens.”¹⁷⁴

166. See *Gwaltney*, 484 U.S. at 57-59 (finding the use of present tense language, such as “to be in violation” and “having an interest that is or may be adversely affected,” as evidence that the statute is meant to apply prospectively).

167. See *infra* Part IV.C.2.

168. See *supra* notes 52-54 and accompanying text.

169. *Id.*

170. *Gwaltney*, 484 U.S. at 53-54.

171. Compare 42 U.S.C. § 6972(a) (2003) (“[A]ny person may commence a civil action on his own behalf [.]”), with 33 U.S.C. § 1365(a) (2001) (“[A]ny citizen may commence a civil action on his own behalf [.]”); see also *Gwaltney*, 484 U.S. at 59.

172. *Gwaltney*, 484 U.S. at 59 (emphasis added).

173. *Id.*

174. See 42 U.S.C. § 6972(a) (“[A]ny person may commence a civil action on his own behalf [.]”); 42 U.S.C. § 6903(15) (2003) (under RCRA, “[t]he term ‘person’ means 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 and shall include each department, agency,

The lack of a present or prospective harm requirement for standing in the language of RCRA's citizen enforcement action lends support to its broader interpretation. It suggests Congress did not want to limit the standing of parties seeking to file a citizen suit against alleged RCRA violators.¹⁷⁵ This interpretation supports the argument that RCRA citizen enforcement actions should apply to former owners and operators.¹⁷⁶ At the very least, it supports a broader interpretation of RCRA than that afforded to CWA in *Gwaltney* and *Friends of the Sakonnet*. To decide otherwise would effectively add restrictions to RCRA's citizen enforcement action that are not in the statute.

3. *Deterrence as Justification to Penalize Past Polluters*

Since *Gwaltney*, there have been a number of cases in which courts have allowed a citizen enforcement action to continue despite the cessation of the alleged violation.¹⁷⁷ Although the cases cited below involve the Clean Water Act and were filed during the alleged violation, they provide examples of courts finding standing for a citizen suit based on a past violation because of the importance of deterring future violations.¹⁷⁸ This line of cases begs the question: why would a court allow jurisdiction in these instances, where pollution has ceased, but not when pollution by a former owner or operator continues unremediated?

In *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, the Supreme Court ruled that a citizen enforcement action was not rendered moot by the defendant's cessation of pollution after the suit was filed.¹⁷⁹ Friends of the Earth, an environmental group, brought a citizen suit against Laidlaw for allegedly violating the mercury discharge limits set by their CWA permit.¹⁸⁰ In response, Laidlaw destroyed the violating plant and filed a motion to dismiss the case for lack of standing.¹⁸¹ The Supreme Court rejected Laidlaw's motion, ruling that despite the destruction of the plant, Laidlaw had not met its burden of proving there was no possibility of a future violation.¹⁸² "To the extent that [civil

and instrumentality of the United States."); *see also supra* note 36 and accompanying text.

175. *See supra* note 39 and accompanying text.

176. By expanding the scope of the citizen enforcement suit, courts will remove a barrier to standing, which is in line with Congress' intentional use of the easily achievable "any person" requirement. 42 U.S.C. § 6972(a).

177. *See, e.g.,* *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167 (2000) (allowing suit to continue despite violator permanently ceasing violation after suit filed); *S.F. Baykeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002) (allowing suit to continue despite violator selling property in violation to another party after suit filed).

178. *See infra* Part IV.C.3.

179. *Laidlaw*, 528 U.S. 167, 174.

180. *Id.* at 176-77.

181. *Id.* at 179.

182. *See id.* at 193 ("The effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter.").

penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.”¹⁸³

The Ninth Circuit took the *Laidlaw* ruling a step further in *San Francisco Baykeeper v Tosco Corp.*, ruling that a citizen suit was not moot because the alleged violator sold the source of pollution to another party.¹⁸⁴ The defendant, Tosco, sold its petroleum coke facility to another company after a citizen suit had been filed against it for violation of CWA.¹⁸⁵ Like the defendant in *Laidlaw*, Tosco then filed a motion to dismiss, claiming that Baykeeper no longer had standing.¹⁸⁶ The Ninth Circuit denied the motion, ruling that Baykeeper's claim for civil penalties was valid despite Tosco's inability to remedy the pollution.¹⁸⁷

Baykeeper held that, even though an injunction was no longer an available remedy, civil penalties still served an important purpose in deterring future violations by Tosco, as well as the new property owners.¹⁸⁸ The court argued that to rule otherwise would undermine enforcement of CWA by allowing violators to escape liability by selling their property.¹⁸⁹ This concern is identical to the liability loophole created by *Brown Group Retail* by limiting RCRA citizen enforcement actions to current owners and operators.¹⁹⁰ As a result, *Baykeeper* found a continued interest in holding a former owner liable for a past violation, regardless of its ability to comply or conduct a future violation.¹⁹¹ In doing so, the court acknowledged the importance of deterrence and the need to prevent violators from escaping liability.¹⁹²

Baykeeper's use of civil penalties as a deterrent is no different from that used by courts under RCRA. “[T]he major purpose of a [RCRA] civil penalty is deterrence . . . and that even if an individual defendant is likely to repeat its violation, a substantial penalty is warranted to deter others.”¹⁹³ By employing the

183. *Id.* at 186.

184. 309 F.3d 1153, 1160 (9th Cir. 2002).

185. *Id.* at 1156.

186. *Id.* at 1157.

187. *Id.* at 1160.

188. *Id.* (“That a new owner has taken over the facility does not make ‘the deterrent effect of civil penalties any less potent,’ . . . because an imposition of civil penalties against Tosco for its pollution at the facility will demonstrate to Ultramar and any future owner that violations at this same facility will be costly.”) (quoting *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000)).

189. *Id.* (“Liability for civil penalties attaches at the time of the violation. Allowing polluters to escape liability for civil penalties for their past violations by selling their polluting assets would undermine the enforcement mechanisms established by the Clean Water Act.”).

190. *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I. 1990). Seemingly, the only distinction between *Friends of the Sakonnet* and *Laidlaw* is that the sale of the property occurred before not after the citizen-enforcement action was filed.

191. *S.F. Baykeeper*, 309 F.3d at 1160.

192. *Id.*

193. *United States v. Bethlehem Steel Corp.*, 829 F. Supp. 1047, 1057 (N.D. Ind. 1993) (discussing the purpose of civil penalties for a RCRA violation).

reasoning *Baykeeper*, future courts may find deterrence a legitimate justification for extending the scope of the RCRA citizen enforcement action to cover former owners and operators whose actions continue polluting the environment, regardless of the availability of an injunction.

D. Measuring the Impact of Closing the Liability Loophole

1. Identifying the Benefits of Expanding Liability

By allowing liability to attach to former owners and operators for RCRA violations, the courts will have a significant positive effect on those protected by and subject to RCRA. First, by closing the liability loophole created by *Brown Group Retail*'s narrow reading of the statute, the broader interpretation will better reflect the basic legal principle of equity—assigning liability to the responsible party.¹⁹⁴ In the cases described above, the parties responsible for the pollution include former owners and operators.¹⁹⁵

Second, the public and the environment will benefit from increased private enforcement, because it will not only identify and penalize violators, but also spur increased self-compliance and public enforcement.¹⁹⁶ Expanding the pool of defendants will increase the amount of financial resources available to pay penalties, incur the costs of compliance, and remediate violations.¹⁹⁷ This will decrease the burdens placed on the public, in the form of environmental degradation and cleanup costs, resulting from violators unable to afford remediating the pollution they generate.¹⁹⁸

Third, the current owners and operators of polluted properties will benefit by potentially avoiding liability for pollution that predates ownership. This seems particularly fair in those instances in which the current owner is unaware of the continuing pollution left behind by the former owner or operator.¹⁹⁹ In addition,

194. BLACK'S LAW DICTIONARY 619 (9th ed. 2009) ("The body of principles constituting what is fair and right").

195. See e.g. *Brown Group Retail*, 598 F. Supp. 2d at 1201-1202 (defendant a former owner or operator of a polluting property); *Scarlett*, 2009 WL 3151089, at *1-3 (defendant a former operator of a polluting property).

196. Naysnerski & Tietenberg, *supra* note 118, at 41.

197. Assaf Jacob, Response, *Dilution of Liability and Multiple Tortfeasors in the Context of Liability for Unrequested Precautions*, 108 MICH. L. REV. First Impressions 12, 12-13 (2009), available at <http://www.michiganlawreview.org/assets/fi/108/jacob.pdf> (on file with the *McGeorge Law Review*) ("Adding tortfeasors improves the plaintiff's position by providing him with more defendants to sue and increases his chances of receiving full compensation, thus shifting the risk of limited resources to the tortfeasors.").

198. See GAO, *supra* note 153, at 12 ("[F]inancial assurances can help ensure that resources are available to fulfill the businesses' cleanup obligations as they arise.").

199. See, e.g., *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 481 (finding plaintiff responsible for costs of compliance despite the fact that it did not know of the pollution that was on the property when it was purchased). The Ninth Circuit, whose decision was reversed by *Meghrig*, acknowledged the inherent unfairness of this result. See *KFC W., Inc. v. Meghrig*, 49 F. 3d 518, 523 (9th Cir. 1995) ("When the government orders clean-up, the innocent citizen must respond expeditiously to the order.").

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because current owners will no longer be able to avoid liability by selling the source of pollution, there will be an increased incentive for them to comply with RCRA.²⁰⁰

Finally, public enforcement agencies will benefit from increased private enforcement and the resulting civil penalties paid to the government.²⁰¹ The very existence of the private enforcement alternative allows more flexibility to the public sector in targeting its resources, a flexibility which offers the opportunity to use those resources more efficiently.²⁰² Increased private enforcement may also accelerate the process of identifying violators, resulting in fewer violations where costs exceed statutory recovery limits or the ability of the violator to pay.²⁰³ In these instances, the extra costs of remediating the violation are passed onto the government and taxpayer.²⁰⁴

2. *Mitigating the Burdens on Liable Parties*

The most obvious burden created by *Scarlett's* broad interpretation of the scope of the citizen enforcement action falls on former owners and operators who will be held liable for their role in ongoing pollution. This burden is intentional and legitimate insofar as it reflects Congress' intent for the RCRA to regulate a business' management of solid waste.²⁰⁵ However, the extent to which former owners and operators will actually be burdened by the broader interpretation may be limited in several ways.

The most obvious factor mitigating the impact of the broader interpretation on former owners and operators will be increased compliance with RCRA.²⁰⁶ Because owners and operators will no longer be able to avoid liability by selling polluted property, there will be an increased incentive to comply with RCRA.²⁰⁷ This should result in fewer suits against former owners and operators in the future.

Another factor limiting private actions against former owners and operators is the need for plaintiffs to prove a link between the pollution and the defendant. Although a citizen enforcement action has standing based on an *alleged* violation, a plaintiff must still prove that the violation occurred during a specific

200. See Naysnerski & Tietenberg, *supra* note 118, at 41-42 (arguing that increased private enforcement will create an incentive for violators to come into compliance).

201. *Id.*; see also, e.g., *Friends of the Earth v. Laidlaw Env't'l Servs., Inc.*, 528 U.S. 167, 169-70 (2000) (recognizing that penalties under Clean Water Act are payable to the U.S. Treasury).

202. Naysnerski & Tietenberg, *supra* note 118, at 42.

203. 42 U.S.C. § 6928(a)-(g) (2003) (establishing daily violation penalties).

204. See *id.* § 6928(a)(3) (limiting daily civil penalties for a RCRA violation to \$25,000).

205. See RCRA Enforcement, *supra* note 1 (summarizing the purpose of the RCRA).

206. A citizen enforcement suit lacks standing if the violator comes into compliance during the notice period. E.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* 484 U.S. 49, 60 (1987).

207. Naysnerski & Tietenberg, *supra* note 118, at 41.

period in order to impose liability on a former owner or operator.²⁰⁸ Establishing causation for many former owners and operators, if even possible, is likely to be complicated and expensive, thus reducing the number of successful claims against them.²⁰⁹

The use of contractual clauses that shift liability to new owners may also play a significant role in limiting the liability of former owners and operators.²¹⁰ While the use of such a contractual mechanism may effectively result in shifting all liability for RCRA violations back to current owners and operators, it is fundamentally different from the liability loophole created by *Brown Group Retail*.²¹¹ Under this scenario, to transfer liability for a violation, a seller would need to provide the buyer with notice of the violation and the buyer could voluntarily choose to assume liability. This will also incentivize former and current owners and operators to maintain better records, improve monitoring, and fully inspect properties that may contain sources of pollution.²¹²

A second potential burden created by the broader interpretation of RCRA's citizen enforcement action provision falls on the courts in the form of increased litigation. As with the notice requirement discussed above, Congress' goal was to "strike a balance between encouraging citizen suits and avoiding burdening the federal courts with excessive numbers of citizen suits."²¹³ Although it is likely that the broader interpretation of the statute may lead to more litigation, the extent of the increase is unlikely to affect this balance. First, many federal district courts will not be affected because they have already adopted this interpretation.²¹⁴ Second, the mitigating effects of increased private enforcement described above—increased self-enforcement, increased public enforcement, the use of contracts to shift liability, and the expenses and burdens of proof of litigation—are likely to limit the number of new lawsuits created. In many instances, instead of creating new suits, the broader interpretation is more likely

208. See *Gwaltney*, 484 U.S. at 65-66 (distinguishing the standing requirement of an alleged violation from the requirement to prove the violation); see also *Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, No. 1:05-CV-0145-CC*, 2009 WL 3151089, at *2, 11 (finding proof that the pollution in question was occurring during the tenure of the former operator).

209. Naysnerski & Tietenberg, *supra* note 118, at 39 (explaining that the burden of proof of a violation under RCRA is often more expensive and complicated than under the Clean Water Act, reducing the suits' relative attractiveness to private litigants).

210. See Dennis B. Danella, Note, *Avondale Federal Savings Bank v. Amoco Oil Co.: No Equity in Sight for RCRA Victims*, 48 U. KAN. L. REV. 663, 685-86 (2000) (discussing the use of contracts as a means of controlling liability for RCRA violations between parties).

211. See discussion *supra* Part III.B.1 (discussing the liability loophole created by *Brown Group Retail*).

212. Danella, *supra* note 210, at 686 ("[To protect against potential liability,] a party seeking to purchase land should consider implementing environmental planning techniques. A form of environmental planning might include performing environmental audits or site assessments that would inform a potential landowner of any potential environmental liabilities. If such assessments discover potential environmental liabilities, a buyer could choose not to purchase the land or have the seller clean up the land prior to the sale.").

213. *Hallstrom v. Tillamook*, 493 U.S. 20, 21 (1989).

214. See *supra* note 59 and accompanying text.

to result in additional defendants to suits that have already been, or will be, filed against current owners and operators.

In addition, the resulting increase in the number of citizen enforcement actions should closely reflect the number of actual ongoing violations, meaning the number of successful citizen suits filed under RCRA should be similar to that under a system of complete public enforcement.²¹⁵ “Citizen suits would not develop if government enforcement were complete because no marginal net benefit would be derived from taking private enforcement action.”²¹⁶ Furthermore, there are statutory safeguards in place to protect courts and defendants from frivolous lawsuits.²¹⁷ As a result, the only way to protect courts from increased litigation would be to require that some RCRA violations go unenforced. The language of RCRA clearly does not support such an exception.

V. CONCLUSION

The recent split among the federal district courts' application of RCRA's citizen enforcement action provision is rooted in competing interpretations of the Supreme Court's decision in *Gwaltney*.²¹⁸ The resulting distinction stands to have a significant impact on the breadth of the citizen-suit provision, and therefore, the ability of RCRA to meet its desired objectives.²¹⁹ By restricting the citizen enforcement action to only current owners and operators, the court will create a liability loophole through which violators can escape liability by selling the source of pollution.²²⁰ An evaluation of *Gwaltney*'s analysis of the notice provision and present tense language of the citizen enforcement action reveals weaknesses in the view requiring violators to be current owners or operators when their past acts continue to pollute.²²¹ At the same time, it finds support for a broader interpretation of RCRA's citizen enforcement action provision.²²² As a result, courts reviewing the scope of the citizen enforcement action provision in the future should focus on the perpetrator and the availability of a remedy, not

215. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987) (“[C]itizen suits are proper only if Federal, State, and local agencies fail to exercise their enforcement responsibility.”) (internal quotes omitted); see also Naysnerski & Tietenberg, *supra* note 121, at 34-35 (analyzing the impact of citizen suits via an economic model).

216. Naysnerski & Tietenberg, *supra* note 118, at 34.

217. See, e.g., FED. R. CIV. P. RULE 11 (2010) (authorizing sanctions for frivolous lawsuits).

218. Compare *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I. 1990) (arguing that *Gwaltney* supports the limiting of liability to only current owners and operators), with *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 656 (arguing that *Gwaltney* supports the finding of liability for former owners and operators if the pollution has not been remediated).

219. See *Friends of the Sakonnet*, 738 F. Supp. at 633 n.22 (acknowledging the negative impact of a similar ruling limiting the applicability of the Clean Water Act citizen enforcement action provision).

220. *Id.* (“[D]efendants are able to avoid responsibility for their violations of the law because they sold their property, not because they stopped violating the law.”).

221. See *supra* Part IV.C.1-2.

222. *Id.*

only the status of the violator's property interest. The broader interpretation not only finds justification under *Gwaltney*, but also properly holds liable those responsible for the violation and promotes compliance by deterring current and future violators. In doing so, this interpretation will help RCRA achieve its goal of improving health and the environment.

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