than mere claims of privilege. This, of course, may require a significant financial expenditure by the company involved.

If a company does not want to ignore environmental issues but cannot afford to sign a "blank check" to show the government that it is a "good actor," the assertion of a privilege can provide valuable protection to a company while it decides how best to respond to the results of its environmental auditing activities.

Private Cost-Recovery Action under RCRA § 7003

In a decision that could dramatically enhance the ability of private parties to recover their cleanup costs, a federal district court recently ruled in *United States v. Valentine*, 1994 WL 288465 (D. Wyo. June 2, 1994), that section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, contained an implied private right of contribution.

If adopted by other jurisdictions, *Valentine* will give parties who remediate contaminated sites under consent decrees or administrative orders a powerful new weapon for use against recalcitrant parties who may have defenses under other environmental laws. The case also represents another step in the trend toward the private use of RCRA.

During the past few years, an increasing number of private RCRA actions have been filed under the citizen suit provision of RCRA, which is found in section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). These cases have held that section 7002 allows plaintiffs to obtain injunctive relief but does not permit a private right of action for damages. *See, e.g., Portsmouth Redev. & Housing Auth. v. BMI Apts.*, 847 F. Supp. 380 (E.D. Va. 1994); *Kaufman and Borad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468 (N.D. Cal. 1993); *Commerce Holding Co., Inc. v. Buckstone*, 749 F. Supp. 441 (E.D.N.Y. 1990). Moreover, some courts have held that section 7002 is unavailable to plaintiffs performing a cleanup pursuant to an administrative order or a consent decree. *See, e.g., City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971 (E.D. Ohio 1993). *Valentine* is the first decision allowing private parties to recover cleanup costs under RCRA.

Private plaintiffs have been drawn to RCRA because the statute lacks several of the barriers to private cost-recovery or contribution actions found under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* For example, "response costs" recoverable under CERCLA must be associated with releases of hazardous substances. However, CERCLA's definition of hazardous substances excludes crude oil or any of its refined fractions. 42 U.S.C. § 9601(14). The petroleum exclusion precludes recovery of costs incurred to remediate the thousands of properties contaminated by spills of petroleum fuels such as gasoline or diesel from underground storage tanks. *Wilshire Westwood Assocs. v. Atlantic Richfield Co.*, 881 F.2d 801 (9th Cir. 1989).

In contrast, because RCRA regulates "solid wastes" as well as hazardous wastes, RCRA covers petroleum products and a wider range of substances than CERCLA. The term "solid waste" encompasses hazardous wastes and RCRA defines solid waste as any "garbage, refuse . . . and other discarded material, including solid, semi-solid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities. . . ." 42 U.S.C. § 6903(27). Courts have held that petroleum fuel leaking from an underground storage tank is a discarded material resulting form commercial activity and, therefore, qualifies as solid waste. *See, e.g., Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1171 (S.D. Ill. 1992); *Zands v. Nelson*, 779 F. Supp. 1254 (S.D. Cal. 1991).

In addition, CERCLA plaintiffs must demonstrate that their response costs were "necessary" and were incurred consistent with the National Contingency Plan (NCP), which requires plaintiffs to perform remedial investigations and feasibility studies and to provide the public with an opportunity to participate in the remedy selection process. RCRA does not contain NCP consistency requirements and the section 7002 cases do not mention this requirement. Thus, costs potentially excludable under CERCLA might be recoverable under RCRA.

Finally, because section 7002(e) of RCRA allows recovery of attorneys fees when citizen plaintiffs are acting to halt pollution, section 7003 plaintiffs could argue that the same principle should apply in section 7003 contribution actions and that the courts should use their equitable power to award attorney fees. If this were done, section 7003 suits would be particularly attractive in view of the fact that the United States Supreme Court recently ruled that attorneys fees are not recoverable under CERCLA.

Section 7003(a) was enacted in 1976 to provide a tool for abating hazards created by improper management of hazardous wastes. Initially, EPA adopted the position that section 7003 only applied to ongoing facilities and could not be used to abate hazards at inactive disposal facilities. 43 Fed. Reg. 58,984 (Dec. 18, 1978). Indeed, this restrictive interpretation of the scope of section 7003 was a partial impetus for the enactment of CERCLA in 1980. In addition, the federal judiciary split on whether the section imposed strict liability on generators or transporters or if a finding of negligence or fault was required. *Compare United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982) with *United States v. Price*, 688 F.2d 204 (3d Cir. 1982). In 1984, Congress amended section 7003 to clearly indicate that the section was intended to impose strict liability and to abate conditions resulting from past activities. H.R. Rep. No. 198 (Part I), 98th Cong., 2d Sess., at 47-49 (1983). Section 7003 now provides as follows:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present han-

dling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the administrator may bring suit on behalf of the United States in the appropriate district court against the person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary or both.

Prior to the *Valentine* decision, only one case *directly* considered whether a private right of action existed in section 7003. In *United States v. Westinghouse*, 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. June 29, 1983), the United States brought suit against Westinghouse seeking to compel the company to perform a cleanup at two landfills where equipment containing PCBs had been discarded. Westinghouse then filed a contribution/indemnity action against Monsanto as the manufacturer of the PCB equipment under section 106 of CERCLA, 42 U.S.C. § 9606, and under RCRA § 7003. Westinghouse argued that the two statutory provisions granted federal courts broad equitable power and that the court should use this power to equitably allocate liability between Westinghouse and Monsanto. However, the district court found neither the statutory language nor the legislative history of these sections suggested that such a right existed and no such right should be inferred.

This issue was indirectly addressed in *McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401 (N.D. Ohio 1987), where private citizens unsuccessfully tried to invoke section 7003 to compel a cleanup but did not seek recovery of cleanup costs. The court found that section 7003 authorized only the EPA Administrator to file suit and that a private action should not be implied since Congress had provided for private citizen enforcement in section 7002.

As a result of *Westinghouse* and *McGregor*, section 7003(a) has been used exclusively by the federal government to compel cleanups and to seek restitution of response costs incurred to eliminate risks posed by hazardous wastes. *See, e.g., Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (6th Cir. 1986); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 201 (D.C. Mo. 1985).

In *Valentine*, the United States filed a section 7003 action against the owners/operators of the Powder River Crude Processors facility in Glenrock, Wyoming, as well as a number of generators and transporters who had sent or transported oil to the facility for processing. The complaint sought an injunction requiring the defendants to investigate and remediate contamination at the facility and civil penalties for failing to comply with administrative orders.

Five of the generator-defendants (the settlors) entered into a consent decree requiring the settlors to conduct a cleanup estimated to cost between $4.4 million and $8.9 million and to pay a $300,000 civil penalty. The settlors requested leave to file a section 7003 cross-claim seeking contribution and indemnity from the nonsettling defendants.

The court began its analysis by acknowledging that section 7003 did not expressly provide for a private right to contribution. However, the court said that this omission was not dispositive because the right to contribution could arise by implication or could be granted through the court's exercise of its equity power. In addition, because RCRA was a remedial statute, the court said that section 7003 had to be liberally construed.

The court concluded that a right to contribution could be implied in section 7003. The court noted that the doctrine of contribution was deeply rooted in the principles of equity, fair play and justice, and that contribution was an integral component of joint and several liability. Since RCRA imposed joint and several liability, the court concluded that Congress must have intended that a right to contribution be available under section 7003. Moreover, the court noted that section 7003 was essentially a codification of the law of nuisance and that contribution was a part of the common law of nuisance.

Even if a right to contribution was not clearly implicated by the legislative history, the court determined that contribution was permissible because Congress gave the courts broad authority under RCRA to fashion all equitable relief that was necessary to protect human health and the environment. The court reasoned that because courts had awarded restitution under section 7003 in government cost-recovery actions, there is no legitimate reason why contribution should not be granted; after all, like restitution, contribution is an equitable remedy designed to prevent unjust enrichment.

Moreover, the court ruled that granting a right to contribution would advance the legislative purposes of RCRA. Without such a right, defendants would be forced to bear the entire burden of the cleanup or may decline to enter into settlements hoping that the government authorities may not bring an enforcement action against them. If potentially liable parties knew that they could face a contribution action, early settlements and expeditious cleanups would be more likely as there would be no incentive to avoid participating in the cleanup.

The court further concluded that its holding would advance the interests of justice. Had a settlement not been reached, the court could have ordered all parties to perform a cleanup and the apportionment of cleanup costs. If the right to contribution were not recognized, the nonsettlors would be rewarded for refusing to contribute to the cleanup.

Finally, the court noted that, even if RCRA did not contain an implied right to contribution, the right existed as a matter of federal common law.

In finding that an implied right to contribution existed under section 7003 and federal common law, the *Valentine* court essentially rested on its grant of equitable power and bypassed the plain language of the statute that only authorizes EPA to bring a section 7003 action. Furthermore, nothing in the legislative history suggests that Congress contemplated that such private relief was available under section 7003. Indeed, the de-

cision also contradicts earlier decisions that held that the existence of the similarly worded citizen-suit provision in section 7002 precludes the possibility that Congress envisioned that section 7003 could be used by private parties.

If other jurisdictions adopt the *Valentine* reasoning, section 7003 could become the preferred vehicle for pursuing cost recovery on contribution. Because the *Valentine* plaintiffs had been subject to a RCRA administrative order, at first glance *Valentine* may appear to be limited to situations where a cleanup is being performed pursuant to a RCRA enforcement action. However, because the court's ruling was based on joint liability and federal common law, parties that are performing a cleanup under CERCLA might also use section 7003 to recover their response costs associated with the remediation of solid or hazardous wastes. *Valentine* did not discuss what elements a private plaintiff must establish to prevail on a section 7003 contribution action. Without such guidance, counsel for plaintiffs seeking to use section 7003 may have to look to the cases decided under the citizen-suit provision of section 7002(a)(1)(B), which contains language identical to section 7003. To successfully plead a section 7003 contribution action under this approach, plaintiffs must establish that the defendants were (1) contributing or have contributed to the handling, storage, treatment, transportation or disposal of (2) solid or hazardous wastes which (3) may present an imminent and substantial endangerment to health or the environment.

Contributing or Have Contributed. Regarding the first element, courts have broadly construed the term "contributed," which is not defined in RCRA: If the defendants engaged in the handling or disposal of solid or hazardous wastes that caused the pollution problem, they will have to share responsibility for the abatement of the problem. The key question for plaintiffs is what kind of nexus must be shown between the defendants and the solid waste to establish that the defendant contributed to the site conditions.

Specifically, owners or operators of facilities need not have control over waste disposal. They merely must have the authority to control the waste disposal that has led to the imminent and substantial endangerment. *See, e.g., Acme Printing Ink Co. v. Menard*, 812 F. Supp. 1498 (E.D. Wis. 1992). Indeed, in *Zands v. Nelson*, 797 F. Supp. 805 (S.D. Cal. 1992), the court held that if plaintiff establishes that the contamination occurred prior to its ownership or occupancy and if all prior owners/operators/defendants were joined in the action, then the burden shifts to those defendants to prove that they did not contribute to the pollution.

Transporters and generators likely face liability as broad as CERCLA in that they will be viewed as having contributed to the imminent and substantial endangerment if they arranged for the disposal of the wastes causing the present conditions. Their liability could be even broader if courts continue to hold that the kind of involvement required to meet the contributed requirement is less than the "to arrange" requirement of CERCLA. *See, e.g., United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989).

Solid or Hazardous Wastes. To establish the second element, the plaintiff must show that the conditions arose from the handling or disposal of solid or hazardous wastes. As noted above, the inclusion of solid waste in section 7003 means that the range of substances covered is greater than under CERCLA. The RCRA definition of "solid waste" includes virtually any discarded or abandoned material. For example, any products that are spilled into soils and groundwater are likely to be viewed as discarded materials thereby qualifying as "solid waste." *See, e.g., Zands v. Nelson*, 779 F. Supp. 1254 (S.D. Cal. 1991).

Imminent and Substantial Endangerment. Like section 106 of CERCLA, section 7003 authorizes relief when the solid or hazardous waste may present an imminent and substantial endangerment. Case law suggests that the term "imminent" does not require that actual harm will occur immediately. Instead, there must be a risk of threatened harm. *See, e.g., Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991). Thus, merely showing that an underground storage tank is leaking gasoline may be sufficient to establish and imminent hazard.

Similarly, to establish "substantial endangerment," a plaintiff does not have to present proof of actual harm (or present risk assessments that quantify the risk). Rather, the plaintiff need only show a threatened or potential harm. *See, e.g., Lincoln Properties Ltd. v. Higgins*, 36 Env't Rep. Cas. (BNA) 1228 (E.D. Cal. 1993). It is sufficient to show that there is reasonable cause for concern that humans or biota may be exposed to a risk of harm by the waste if an abatement action is not taken. *See, e.g., United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 193-94 (D.C. Mo. 1985). Moreover, a plaintiff is not required to prove that there is an emergency situation. *See, e.g., United States v. Waste Industries*, 734 F.2d 159 (4th Cir. 1984). Thus, proof that past or present handling or disposal of solid wastes may create an imminent and substantial endangerment is sufficient.

Larry Schnapf
Schulte, Roth & Zabel
New York, New York

Bioremediation under the Resource Conservation and Recovery Act

The costs of remediation continue to escalate as remediation goals become more stringent and the costs of technologies necessary to meet those goals increase. In response, industry and the regulatory agencies search for more cost-effective and safe solutions. One emerging solution is bioremediation. Variously referred to by a number of names, the concept generally includes the destruction of contaminants through the use of a natural biological process.

Bioremediation can occur either "in situ" or "ex situ." In situ means that the contaminants are not removed from the area of contamination. Through in-situ