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The Next Step in Revitalizing RCRA: *Maine People's Alliance* and the Importance of Citizen Intervention in EPA Actions

Jonathan York[*]

The citizen suit provision is a key component of the 1976 amendments to the Solid Waste Disposal Act, known as the Resource Conservation and Recovery Act (RCRA), since it provides individuals with the means to initiate proceedings to protect themselves even when the Environmental Protection Agency (EPA) fails to do so. Maine People's Alliance v. Mallinckrodt, Inc. *involved a citizen suit against an industrial facility that dumped mercury-laden waste into the Penobscot River over a fifteen-year period. The First Circuit held in favor of Plaintiffs, despite the limited evidence of an "imminent and substantial endangerment." This is an important decision because it continued the trend set by four previous circuits of broadly interpreting RCRA's citizen suit provision. Under the existing regulatory framework for hazardous pollutants, there are two scenarios in which a citizen may wish to sue a polluter. The first is where the EPA has not initiated a lawsuit, as in* Maine People's Alliance, *and the second is where the EPA has initiated a lawsuit, but is inadequately protecting the interests of citizens. This Note focuses on the latter scenario and proposes that courts should further strengthen RCRA by embracing the logic of* Maine People's Alliance *and apply only a minimal burden test when assessing citizens' rights to intervene in an EPA-initiated RCRA enforcement action. This would only require a limited showing that the EPA inadequately represents the citizens' interests. Just as it is important for citizens to be able to bring suit where environmental harm is not being addressed, it should also be easy to intervene in ongoing RCRA suits.*

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INTRODUCTION

The Resource Conservation and Recovery Act (RCRA) is important legislation that enables citizen groups to pursue relief from the impacts of hazardous waste contamination in circumstances where they would otherwise have no redress. The citizen suit provision is a key component of RCRA, since it provides individuals with the means to initiate proceedings to protect themselves even when the Environmental Protection Agency (EPA) fails to do so. *Maine People's Alliance v. Mallinckrodt, Inc.* involved a citizen suit against an industrial facility that dumped mercury-laden waste into the Penobscot River over a fifteen-year period.[1] Although Maine People's Alliance and the Natural Resources Defense Council could only provide limited evidence of an "imminent and substantial endangerment," the First Circuit held that (1) they had standing to sue, (2) plaintiffs sufficiently showed that defendants "may" have caused an imminent and substantial endangerment, and (3) the district court did not abuse its discretion by ordering defendants to conduct ecological studies of the impacts of mercury on Penobscot River.[2] *Maine People's Alliance* is an important decision because it continued the trend set by four previous circuits of broadly interpreting RCRA's citizen suit provision.

Under the existing regulatory framework for hazardous pollutants, there are two scenarios in which a citizen may wish to sue a polluter. The first is where the EPA has not initiated a lawsuit, as in *Maine People's Alliance*, and the second is where the EPA *has* initiated a lawsuit, but is inadequately protecting the interests of citizens. This Note focuses on the latter scenario and

1. Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 280 (1st Cir. 2006), *cert denied*, 28 S. Ct. 93 (2007).

2. *Id.* at 286, 296, 298.

proposes that courts should further strengthen RCRA by embracing the logic of *Maine People's Alliance* and apply only a minimal burden test when assessing citizens' rights to intervene in an EPA-initiated RCRA enforcement action. Based on this case and the important role of RCRA in protecting communities from environmental harm, this Note argues that future courts should continue to bolster the usefulness of RCRA by further broadening citizen opportunities to enforce violations.

I. THE VITAL ROLE OF CITIZEN SUIT ENFORCEMENT OF RCRA

RCRA and the Comprehensive Resource Conservation and Recovery Act (CERCLA) provide the primary statutory tools to address past and future handling, storage, treatment, disposal, and cleanup of hazardous waste. RCRA generally focuses on preventing future contamination, while CERCLA is mostly used as a tool to address past contamination. While there is significant overlap between the two statutes, harms suffered by the general public, including past contamination, are often addressed via RCRA claims. In some instances, RCRA is the only statute that applies,[3] while in others it is preferred because it allows recovery of attorney's fees while CERCLA does not.[4]

The two avenues for enforcing RCRA are enforcement actions brought by the EPA and citizen suits.[5] The EPA may pursue enforcement either by initiating administrative orders or by litigation in the judicial system. When the agency fails to take any action, or to adequately pursue a remedy, citizen suits provide the final safeguard to enforce RCRA and achieve its purpose of protecting the public and the environment.[6] Citizen suits are an important component of RCRA because it is imperative that enforcement is undertaken with a thorough understanding and concern for the interests of those impacted by the harm, and citizen suits allow those who are harmed to speak for themselves.

While EPA actions are important means of enforcing RCRA, they alone are not sufficient to address all cleanup actions covered by the statute.[7] EPA enforcement of RCRA may be inadequate for a variety of reasons, including:

3. For example, petroleum-related contamination, past and present, is only covered by RCRA due to a "petroleum exclusion" in CERCLA. The petroleum exemption is particularly threatening since courts have liberally construed it to exempt contaminants that are normally covered by CERCLA whenever they are mixed with petroleum products. For example, benzene is covered by CERCLA, but benzene present in gasoline is not. *See* Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989); 42 U.S.C. § 9601(14) (2006).

4. *See* Resource Conservation and Recovery Act of 1976 § 7002(e), 42 U.S.C. § 6972(e) (2006); Inside the EPA, Awaiting Superfund Fix, Plaintiffs Eye RCRA to Recoup Cleanup Costs, 2007 WLNR 3915338 (March 7, 2007).

5. 42 U.S.C. § 6972(a)(1)(B).

6. *See* Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) (noting the important but supplemental role of citizen suits in RCRA enforcement).

7. For basic information on RCRA and its operation, *see* U.S. Environmental Protection Agency, Hazardous Waste—Corrective Action, http://www.epa.gov/correctiveaction/backgnd.htm (last visited Sept. 14, 2008).

the lack of political will; limited funding or resources; discouragement by presidential signing statements[8]; or conflict between the needs of diverse communities and the desire to protect natural resources. Regardless of the cause of the EPA's shortcomings, it is essential that individuals remain able to represent themselves and force compliance with RCRA obligations. Without citizen suits in these instances, needed injunctions will not be granted, and responsible parties may continue to contaminate the environment or neglect to remediate past harm.

The citizen suit provision in RCRA is expansive, and is drafted to provide standing in a way that resembles common law nuisance claims.[9] When it was initially passed, RCRA allowed the EPA administrator to bring suit on behalf of the United States where solid or hazardous waste presented an "imminent and substantial endangerment to health or the environment,"[10] while citizens could only sue for specific violations of a "permit, standard, regulation, condition, requirement, or order which has become effective pursuant to" RCRA.[11] However, Congress expanded the citizen suit provision in a 1984 Amendment. This Amendment specifically incorporated the broad "may present an imminent and substantial endangerment" language into the citizen suit provision in order to increase citizens' right to sue.[12] There is strong legislative history supporting this intentional effort to lower the bar for citizens to bring suit under RCRA, and supporting the First Circuit's reading of the statute in *Maine People's Alliance*.[13]

Arguments to limit citizen enforcement rights often emphasize a concern for interference with the EPA's prosecutorial discretion to determine when to bring suit, and the appropriate resolution.[14] Although the EPA does have a unique and critical responsibility to protect the public and should have discretion to pursue an enforcement strategy, its approach may compromise environmental enforcement in ways that directly impact specific communities.

8. *See* John W. Dean, *The Problem with Presidential Signing Statements: Their Use and Misuse by the Bush Administration*, FindLaw Legal News (Jan. 13, 2006), http://writ.news.findlaw.com/dean/20060113.html (last visited Sept. 14, 2008) (discussing the use of signing statements to influence implementation and enforcement of statutes).

9. James B. Brown & Glen C. Hansen, *Nuisance Law and Petroleum Underground Storage Tank Contamination: Plugging the Hole in the Statutes*, 21 ECOLOGY L.Q. 643, 654 (1994).

10. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 7003, 90 Stat. 2795 (1976).

11. *Id.* § 7002.

12. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401, 98 Stat. 3221, (1984) (codified at 42 U.S.C. § 6972(a)(1)(B) (2006)).

13. Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 287–91 (1st Cir. 2006), *cert denied* , 28 S. Ct. 93 (2007).

14. *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 483–84 (1996) ("[The] [c]hief responsibility for the implementation and enforcement of RCRA rests with the Administrator of the Environmental Protection Agency."); Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) (prioritizing government enforcement to obviate the need for a citizen suit); Karr v. Hefner, 475 F.3d 1192, 1197–1198 (10th Cir. 2007) (discussing this rationale in the context of 'diligent prosecution' by the EPA under the Clean Water Act).

For example, a person who relies on a private well for drinking water, and lives adjacent to a contaminated site, may be particularly concerned about their water quality, while the EPA may negotiate a settlement that overlooks their specific concern and prioritizes broader scale impacts. In those instances, the barrier to citizens' access to the courts in order to protect personal interests should be minimal. This is not to say that citizen intervenors should be able to *displace* the EPA in ongoing litigation, but that barriers to their involvement as intervenors should be minimal where they have suffered actual harm and can show that the EPA is inadequately representing their interests.[15]

Although the role citizen suits play in enforcing RCRA inevitably fluctuates as EPA enforcement varies, it is important to maintain effective avenues for citizen involvement even when the agency's enforcement activities are receiving strong political and financial support. This is important because citizen suits continue to play an important role beyond EPA activity both by providing an opportunity for local involvement and by serving as a threat of enforcement if the EPA becomes complacent. It is imperative that barriers to citizen suits be minimal so that they remain effective enforcement mechanisms when the EPA fails to act. Given the massive scope of the EPA's responsibilities and its limited resources, bolstering citizens' ability to sue can provide relief to the EPA regardless of whether the agency is aggressively pursuing its objectives. Citizen suits may simply be more valuable environmental enforcement tools during less environmentally protective presidential administrations.

In addition to supplementing EPA enforcement by encouraging citizen enforcement, broad citizen involvement in RCRA also encourages democratic participation in the legislative process and the protection of their local environment. Citizens are involved in electing representatives and commenting on and establishing regulations. It is therefore appropriate that citizens have an opportunity to influence the way regulations are enforced. Giving individuals this power also encourages future involvement in policy development, and engenders a sense of ownership in the regulatory product. Individuals are the best judges of when their interests are being represented, and the ability to bring citizen suits is an essential means for taking meaningful control over the regulations they helped create. Private parties, particularly those impacted by environmental degradation, should have freedom to disagree with the way the EPA is or is not enforcing laws. Citizen suits therefore provide a vital, direct mechanism that supports democratic involvement in environmental regulation and enforcement. *Maine People's Alliance* is a positive step towards minimizing the barriers to bringing a RCRA citizen suit and its reasoning should be similarly applied in assessing a citizen's right to intervene in RCRA suits.

15. *See infra* Part III.A.

II. CASE SUMMARY

In *Maine People's Alliance*, a citizen group brought suit against a polluter, Mallinckrodt Incorporated. From 1967 to 1982, Mallinckrodt owned and operated a chlor-alkali plant on the banks of the Penobscot River in Orrington, Maine.[16] The plant continued to operate until 2000 under the ownership of Hanlin Group, Inc. and HoltraChem manufacturing Co.[17] Throughout its operation, the Plant dumped "tons of mercury-laden waste into the Penobscot River."[18] In 1986, the EPA filed an administrative action against Hanlin in an effort to abate the continuous release of mercury. This led to a lawsuit and settlement between Hanlin and Mallinckrodt in which Mallinckrodt agreed to pay a certain portion of the compliance costs.[19] A subsequent EPA enforcement action resulted in a consent decree with Hanlin in 1993, and Mallinckrodt paid its share of the compliance costs and participated in negotiations, consistent with the previous settlement.[20] This consent decree addressed a tripartite process of site investigation, evaluation of possible corrective measures, and remediation.[21] Mallinckrodt subsequently submitted a site investigation report, but in 1997 the EPA and Maine's Department of Environmental Protection (MDEP) issued a notice of disapproval.[22] Mallinckrodt submitted a revised plan, but the EPA and MDEP again rejected it in 2000. The EPA instructed Mallinckrodt to commission a study of mercury contamination downriver from the plant; however, the district court found Mallinckrodt deliberately avoided sufficient efforts.[23]

During this controversy, the Maine People's Alliance and the National Resources Defense Council brought a citizen suit under RCRA section 7002(a)(1)(B), seeking a court order to force Mallinckrodt to fund an independent, comprehensive scientific study to define the nature and extent of the threat caused by the mercury.[24] This citizen suit was independent from and did not conflict with EPA enforcement due to the agency's "apparent lack of interest in the lower Penobscot [River]."[25] The district court opinion focused on the evidence of harm to Penobscot River, the ecological threats of methylmercury, and whether there was a sufficient showing of potential harm

16. Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 280 (1st Cir. 2006), *cert denied*, 28 S. Ct. 93 (2007).

17. *Id.*

18. *Id.* at 280; *see* Me. People's Alliance v. Holtrachem Mfg. Co., 211 F. Supp. 2d 237, 242 (D. Me. 2002) (daily mercury production losses were estimated to be 107 pounds per day in 1970, and occurred via air emissions, groundwater, and direct dumping of contaminated sludge through the facility's water outfall).

19. *Mallinckrodt*, 471 F.3d at 280–81.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 281.

24. *Id.*

25. *Id.* at 281, 292.

to find an "endangerment" within the meaning of RCRA.[26] The district court placed very little emphasis on statutory interpretation.[27] By contrast, on appeal the First Circuit focused on statutory interpretation of RCRA section 7002(a)(1)(B), which allows citizens to sue persons or firms whose handling of solid or hazardous waste "*may* present an *imminent and substantial endangerment* to health or the environment."[28]

In a decision that has critical implications for the future interpretation of RCRA's citizen suit provision, the First Circuit affirmed the district court's conclusion that the citizen suit provision of RCRA should be broadly interpreted. Despite two decades of precedent from four circuits, the defendant, Mallinckrodt, presented an array of novel arguments supporting a narrow reading of RCRA's citizen suit provision, primarily supported by statutory interpretation.[29] However, in the First Circuit opinion, Judge Selya rejected each argument. As a matter of first impression in the First Circuit, the court affirmed the district court ruling and agreed with four other circuits in holding that a reasonable prospect of future harm is adequate to invoke the citizen suit provision.[30] The citizen suit in *Maine People's Alliance* was filed independently from EPA enforcement, as opposed to where citizens seek to intervene in an ongoing EPA suit.[31]

A. District Court Holdings

The district court conducted a thorough examination of the ecological threats posed by mercury contamination. In particular, the court noted the chemical and biological effects that result from mercury contamination in aquatic ecosystems and the harmful effects that result in human populations.[32] Mercury contamination may damage the nervous system, kidneys, immune system, and reproductive system, and is especially harmful to developing fetuses.[33] Based on the evidence and expert witness testimony at trial, the

26. *See* Me. People's Alliance v. Holtrachem Mfg. Co., 211 F. Supp. 2d 237, 246–52 (D. Me. 2002).

27. *See id.* at 246 (relying on precedent interpretations of the test for "endangerment" rather than referring to legislative history or discussing statutory interpretation).

28. Resource Conservation and Recovery Act of 1976 § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2006) (emphasis added); *see Mallinckrodt*, 471 F.3d at 286–96.

29. 42 U.S.C. § 6972(a)(1)(B).

30. *Mallinckrodt*, 471 F.3d at 295–96.

31. *See id.* at 281.

32. Inorganic mercury released into the air, soil, and water ultimately accumulates in sediments in aquatic environments. Once deposited, inorganic mercury is ingested by microorganisms, which results in the addition of a carbon atom to form methylmercury—mercury's most toxic form. Methylmercury binds to proteins in aquatic organisms and rapidly concentrates as it moves up the food chain, ultimately resulting in significant health problems in both humans and animals. *Holtrachem*, 211 F. Supp. 2d at 244–45.

33. *Id.* at 245.

district court concluded that mercury levels in the lower Penobscot may present threats to human health and the downstream environment.[34]

Significantly, the district court broadly interpreted the citizen suit provision in RCRA, and emphasized that RCRA allows a suit when the putative polluter "*may* have caused an imminent and substantial endangerment."[35] Therefore, the court held that RCRA's "imminent and substantial endangerment" standard would be satisfied by a reasonable medical concern for public health and a reasonable scientific concern for the environment.[36] Because Mallinckrodt's contamination of the Penobscot may have caused an imminent and substantial danger, plaintiffs had carried their burden of proof of liability.[37] The court directed the parties to make a good-faith effort to agree on a plan for an independent study to determine (1) the extent of the harm caused to the Penobscot River and Bay, (2) whether a remediation plan is needed, and if so, (3) to define the elements and schedule for completing the remediation plan.[38]

B. Appellate Court Decision

Mallinckrodt appealed the district court's ruling, asserting that (1) the plaintiffs lacked standing to sue, (2) the court set too low a standard for bringing a citizen suit under RCRA, and (3) the court abused its discretion in fashioning relief.[39] The dispute at the appellate court focused on statutory interpretation of RCRA's citizen suit provision, which allows citizens to sue persons or firms whose handling of solid or hazardous waste "*may* present an *imminent and substantial endangerment* to health or the environment."[40] Mallinckrodt disputed the district court's broad interpretation of the statute, and the First Circuit gave de novo review to the question of statutory construction.[41] The First Circuit upheld the district court's ruling based primarily on an affirmative reading of similar holdings in other circuits combined with the legislative history underpinning the statutory language of RCRA's citizen suit provision.[42]

The First Circuit affirmed the district court's reading of the statute based largely on its legislative history. Legislative history showed an intentional broadening of RCRA section 7002(a)(1)(B) through various revisions.[43] The

34. *Id.* at 251–52.
35. *Id.* at 246–47.
36. *Id.* at 252.
37. *Id.* at 251–52.
38. *Id.* at 256.
39. Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 282 (1st Cir. 2006), *cert. denied* , 28 S. Ct. 93 (2007).
40. Resource Conservation and Recovery Act of 1976 § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2006) (emphasis added).
41. *Mallinckrodt*, 471 F.3d at 286.
42. *See id.* at 287–88.
43. *See id.* at 287.

court focused its analysis particularly on the implications of the choice of words "may" and "substantial." The court rejected Mallinckrodt's argument that citizen suits under RCRA usurp administrative policy-making authority, and violate the separation of power between the executive branch and the judiciary.[44] Mallinckrodt also argued that the judiciary lacked competence to function under the traditional interpretation of RCRA section 7002(a)(1)(B) due to the complex scientific, technical, and medical data involved in ecological risks.[45] The First Circuit dispatched with this argument as well, stating that this "sells the federal judiciary short."[46]

Significant precedent supported the First Circuit's broad reading of RCRA's text—four other circuits have construed the provision expansively.[47] The citizen suit provision language, "may present an imminent and substantial endangerment to health or the environment," is identical to language in section 7003(a), which provides a cause of action for the Administrator.[48] Section 7003(a) was broadly construed in *United States v. Price*[49] two years before its language was incorporated into the citizen suit provision.[50] Courts have consistently used *Price* as a guide when interpreting the expansiveness of section 7002(a)(1)(B). Accordingly, Mallinckrodt's argument that the long line of cases following *Price* has consistently misread the "imminent and substantial" danger standard was not persuasive to the court.[51]

Mallinckrodt contended that the district court committed an abuse of discretion in ordering it to fund a study of the lower Penobscot. This argument was based on the court's obligation, rooted in precedent, to balance the relevant harms before granting injunctive relief.[52] Mallinckrodt suggested that the court apply a common four-part framework for determining whether injunctive relief is appropriate.[53] This test requires the injunction-seeker to demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the [parties],

44. *See id.* at 291–93.

45. *Id.* at 293.

46. *Id.*

47. *See id.* at 287; Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 258–59 (3d Cir. 2005); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004); Cox v. City of Dallas, 256 F.3d 281, 299 (5th Cir. 2001); Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992).

48. Resource Conservation and Recovery Act of 1976 §§ 7002(a)(1)(B), 7003(a), 42 U.S.C. §§ 6972(a)(1)(B), 6973(a) (2006).

49. 688 F.2d 204 (3d Cir. 1982).

50. *See* Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401, 98 Stat. 3221, (1984) (codified at 42 U.S.C. § 6972(a)(1)(B) (2006).

51. *Price*, 688 F.2d 204.

52. Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 296 (1st Cir. 2006), *cert denied*, 28 S. Ct. 93 (2007).

53. *Id.*

> a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[54]

The First Circuit agreed that the district court should balance relevant harms before granting injunctive relief, even though the statute authorizes such relief.[55] However, the court held that the four-part test was "colored by the nature of the case," and the district court had applied it appropriately, despite Mallinckrodt's argument that the third element was mishandled (given the expense of the study, and the limited benefits it may lead to).[56] The court stated that the argument that hardship must always be outweighed by deliverable benefits "offends the logic of *Price*," which emphasized the broad and flexible equitable discretion given to federal courts where hazardous wastes threaten human health.[57] The court went on to clarify that it was unwilling to say that the district court abused its discretion in making the environmental hazard its primary concern, or by the absence of a showing that the remedy's benefits exceeded its costs.[58] This decision was influenced by the strong language of *Price*, and by its having been embraced by the Senate Report, which placed a "congressional thumb on the scale in favor of remediation."[59]

III. THE IMPORTANCE OF *MAINE PEOPLE'S ALLIANCE*

Maine People's Alliance is an important decision because it affirms and reinforces a broad reading of the RCRA citizen suit provision. It concurred with the holdings of four other circuits, but addressed new statutory interpretation arguments and was the first time this pro-plaintiff reading of the statute was adopted by the First Circuit. The holding was further strengthened by the Supreme Court's denial of certiorari in November of 2007.[60] Also, the Tenth Circuit reinforced the First Circuit's holding in September of 2007 by adopting a similarly broad interpretation of RCRA's citizen suit provision in *Burlington Northern and Santa Fe Railway Company v. Grant*—making it the sixth circuit to do so.[61] These holdings reaffirm that *Maine People's Alliance* was correctly decided, and are a major gain for plaintiffs' right to sue under RCRA, given the extensive mining and energy drilling operations that take place in the states within its jurisdiction.[62]

Although citizen rights to intervene in EPA suits are less clearly defined than citizen rights to initiate a suit, the rationale supporting *Maine People's*

54. *Id.* (quoting eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006)).
55. *Id.*
56. *Id.* at 296–97.
57. *Id.* at 297.
58. *Id.*
59. *Id.*
60. *Id.* at 277.
61. Burlington N. & Santa Fe Ry. v. Grant, 505 F.3d 1013 (10th Cir. 2007).
62. *Key Appellate Circuit Backs Low Threshold for RCRA Citizen Suits*, INSIDE EPA, Vol. 28, No. 41, Oct. 12, 2007. The Tenth Circuit includes Oklahoma, Wyoming, Kansas, Colorado, Utah and New Mexico. *Id.*

Alliance and the decisions of the five concurring circuits strongly indicates that it is vitally important to minimize barriers to citizen intervention in RCRA enforcement actions. *Maine People's Alliance* should be viewed in the context of the broad need for citizen participation in protecting their health and the environment, since the EPA often fails to do so. One such opportunity is to minimize the burdens placed on private parties who seek to intervene in EPA-initiated suits. Those who opposed the 1984 expansion of the citizen suit provision also fought to limit citizen opportunities to intervene in EPA-initiated RCRA suits.[63] Courts have latitude in determining whether or not to allow citizen intervention, and should read the resounding support circuit courts have given citizen involvement in RCRA as also supporting minimal barriers to intervention whenever it is within judicial discretion.

IV. WHERE SHOULD COURTS GO FROM HERE?

Including *Maine People's Alliance*, six circuits have agreed that the "may present an imminent and substantial endangerment" language in the RCRA's citizen suit provision in section 7002(a)(1)(B) sets a standard that is relatively easy to meet.[64] The primary bar to filing a citizen suit under the RCRA provision applies when the EPA Administrator or the state is diligently prosecuting a civil or criminal action or is engaging in a removal action or Remedial Investigation and Feasibility Study.[65] Whether or not an action is being "diligently" prosecuted may turn on judicial interpretation of the statutory language. If a suit has already been initiated, either by another citizen or by the EPA, but an individual believes her interests are inadequately represented, she may seek to intervene in the ongoing litigation. While *Maine People's Alliance* affirmed the importance of a citizen's right to initiate a RCRA suit, it leaves a citizen's ability to intervene unclear.[66] Just as it is

63. Doug MacMillan & Jeffrey G. Miller, *'Citizen Suits' Would Complicate Waste Cleanups*, LEGAL TIMES Vol. 6, No. 34. (Jan. 30, 1984).

64. Resource Conservation and Recovery Act of 1976 § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2006); *see Burlington N. & Santa Fe Ry.*, 505 F.3d 1013; *Mallinckrodt*, 471 F.3d 277; Interfaith Cmty. Org. v. Honeywell Int'l., Inc., 399 F.3d 248, 258–59 (3d Cir. 2005); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004); Cox v. City of Dallas, 256 F.3d 281, 299 (5th Cir. 2001); Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir.1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992).

65. 42 U.S.C. § 6972(b)(2)(B)–(C). The issuance of an administrative compliance order does not preclude a citizen suit if the citizen claim is beyond the scope and duration of the order, and a RCRA citizen suit under section 6972(a)(1)(A) may be brought prior to the completion of a CERCLA response action. *See id.* §§ 6972(b)(2)(B), 6972(b)(2)(C) (regarding actions brought by EPA and state, respectively).

66. *See* United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987) (suggesting a statutory right to intervene pursuant to Federal Rule of Civil Procedure 24(a)(1) may exist, and granting a right to intervene pursuant to Rule 24(a)(2)); United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968 (2d Cir. 1984) (denying a statutory right to intervene pursuant to Federal Rule of Civil Procedure 24(a)(1), as well as a right to intervene pursuant to Rule 24(a)(2)); United States v. Solvents Recovery Serv. of New England, No. H 79–704, 1980 U.S. Dist.

important for citizens to be able to bring suit where environmental harm is not being addressed, it should also be easy to intervene in ongoing suits where the EPA is not adequately representing their interests, especially where individuals are threatened with immediate harm.

Citizens who seek to intervene in an EPA lawsuit must file a motion to do so according to Rule 24 of the Federal Rules of Civil Procedure.[67] Under Rule 24, intervention can either be sought "as of right,"[68] or as "permissive" [69] intervention at the discretion of the court. Intervention as of right may be based on a statutory guarantee,[70] or may be supported by showing that, in addition to filing the motion to intervene in a timely manner,[71] (1) the intervenor has an interest in the property or transaction that is subject to the ongoing suit; (2) the disposition of the EPA-initiated action, as a practical matter, may impair or impede the intervenor's ability to protect that interest; and (3) these interests are not adequately represented by the existing parties in the suit.[72]

RCRA's citizen suit provision, section 6972(b)(2)(E), provides a statutory guarantee for intervention as of right to citizens who seek to intervene in an existing citizen suit that was brought under section 6972(a)(1)(B), as long as certain conditions are met.[73] These conditions are minimal barriers to citizens who seek to intervene in lawsuits that are brought by other citizens. However, there is no statutory guarantee for intervention as of right to citizens who seek to intervene in an ongoing federal enforcement action. The statutory provision that allows the federal government to bring an enforcement action against defendants who "may present an imminent and substantial endangerment" is in section 6973(a), which does *not* provide citizens with a statutory right to intervene.[74] Therefore, citizens are given a statutory right to intervene in any action brought under the RCRA citizen suit provision, but not in an action brought by the government under section 6973(a).

LEXIS 17360 (D. Conn. Aug. 21, 1980) (granting a right to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2)).

67. *See* FED. R. CIV. P. 24.

68. FED. R. CIV. P. 24(a).

69. FED. R. CIV. P. 24(b).

70. FED. R. CIV. P. 24(a)(1).

71. "Timeliness" is not defined in the Federal Rules of Civil Procedure, and thus is largely at the discretion of the district court, and has been evaluated according to the following factors: (1) the length of time the applicants knew, or reasonably should have known, of their interest before a petition to intervene; (2) the prejudice to existing parties due to the applicant's failure to petition for intervention properly; (3) the prejudice that the applicant would suffer if it were not allowed to intervene; and (4) unusual circumstances militating for or against intervention. *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1023 (D. Mass. 1989).

72. FED. R. CIV. P. 24(a)(2); *see* United States v. Stringfellow, 783 F.2d 821, 825–29 (9th Cir. 1986), *vacated on other grounds by* 480 U.S. 370 (1987) (granting a right to intervene); United States v. Solvents Recovery Serv. of New England, No. H 79–704, 1980 U.S. Dist. LEXIS 17360, *2–*9 (D. Conn. Aug. 21, 1980).

73. Resource Conservation and Recovery Act of 1976 § 7002(b)(2)(E), 42 U.S.C. § 6972(b)(2)(E) (2006).

74. *See id.* § 6973.

Although at least one court has suggested that a right to intervene should be recognized for section 6973(a) "imminent and substantial endangerment" claims brought by the EPA, others have held that only permissive intervention is appropriate. In *United States v. Hooker Chemicals & Plastics Corporation*, the Western District of New York confirmed the limited scope of citizens' statutory right to intervene in RCRA suits.[75] The EPA presented claims under the "imminent and substantial endangerment" provision of section 6973, but made no claims under section 6972, the section containing RCRA's citizen suit provision.[76] The court held that the citizens lacked a right to intervene under RCRA because the EPA's complaint did not "state a cause of action . . . within section 6972(b)."[77] However, in *United States v. Stringfellow*, which granted citizens the right to intervene under Federal Rule of Civil Procedure 24(a)(2), the Ninth Circuit acknowledged "considerable merit" to the position that a statutory right to intervene in an existing section 6973 government action may exist under Rule 24(a)(1).[78] In that case, intervenors argued that Congress intended to clarify citizens' rights to intervene in government-initiated imminent hazard actions in the 1984 amendments to RCRA; however, an explicit provision for this intervention that was included in the Senate version of the amendments was inadvertently omitted when the Conference Committee restructured section 6972.[79] Intervenors unsuccessfully urged the court to interpret section 6972 according to congressional intent, rather than its literal terms.[80]

Lacking a statutory right to intervene, citizens who wish to participate in a federal enforcement action must either argue (1) that intervention as of right should still be allowed (by timely filing and satisfying the three criteria mentioned above), or (2) permissive intervention should be granted. Although the standards to establish permissive intervention are less clearly defined than for intervention as of right, the trial court has significant discretion[81] and typically applies the same three factors that are required to establish intervention as of right.[82] Therefore, the argument promoting a minimal burden test when reviewing a motion to intervene applies with equal force to judicial assessment of either a motion to intervene as of right or for permissive intervention.

While the same factors influence a permissive motion to intervene, recognizing a *right* to do so lessens the discretion of the court and increases the

75. *See* United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067 (W.D.N.Y. 1982).
76. *Id.* at 1081 n.7.
77. *Id.* (limiting intervenor's causes of action to claims under the Clean Water Act).
78. 783 F.2d 821, 829 n.7 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987).
79. *Id.*
80. *Id.*
81. FED. R. CIV. P. 24(b).
82. *See* FED. R. CIV. P. 24(a)(2); Bustop v. Superior Court, 137 Cal. Rptr. 793, 795-796 (Ct. of App. 1977) (applying intervention as of right requirements in a permissive intervention analysis); *supra* note 71.

predictability of the outcome for plaintiffs seeking to intervene. Recognizing this right also improves judicial efficiency by applying a clearer standard. Therefore, recognizing a citizen's right to intervene under section 6973 in EPA actions would simplify and improve avenues for private involvement in environmental protection. A right to intervene could be derived either by statute, or by weighing the three factors outlined above.

Whether a right to intervene is guaranteed by the text of RCRA section 7003 turns on questions of statutory interpretation that are not the focus of this discussion. Instead, I argue that even without a statutory right to intervene, courts should apply only a minimal burden test both when assessing the three requirements of Rule 24(a) (intervenor interest, potential impairment, and lack of adequate representation),[83] and when ruling on a motion for permissive intervention in RCRA suits.[84] The standard applied in different courts has ranged from a "minimal" to a "strong" showing that the citizen's interests are inadequately represented.[85] Requiring that a citizen only needs to satisfy a minimal burden test will ensure that a citizen group can intervene and will reinforce *Maine People's Alliance* and other circuit opinions' general support for citizen involvement in RCRA suits.

A. Courts Have Placed Inconsistent Burdens on the Intervenor

In deciding whether to allow intervention, courts sometimes explicitly applied a minimal burden test, while others placed a heavy burden on the citizen intervenor. The way courts weigh these factors is inconsistent and is not always transparent. I will discuss each of these three factors, summarizing how they have been applied, and the benefits that would accrue if courts consistently applied a minimal burden test.

1. First Factor: Interest in the Property or Transaction

The intervenor must establish that she has an interest in the property or transaction that is subject to the ongoing suit. A typical way in which a citizen could satisfy a minimal burden test on this factor is by establishing that the RCRA defendant is harming her personal property, and this impacts her in

83. FED. R. CIV. P. 24(a).

84. FED. R. CIV. P. 24(b). As indicated at *supra* note 82 and accompanying text, the factors set out for assessing intervention as of right under Rule 24(a) are in practice also applied when assessing permissive intervention under Rule 24(b). Therefore, the argument promoting a minimal burden test applies with equal force to judicial assessment of either a motion for intervention as of right or a motion for permissive intervention.

85. The court in *Hooker Chemicals* applied a "strong showing" standard, placing a heavy burden on intervenors to show inadequate representation, whereas the court in *Stringellow* applied a minimal showing, giving a variety of reasons that would suffice to support intervention. United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 985–90 (2d Cir. 1984), 607 F. Supp. 1052 (W.D.N.Y. 1985) (proceeding on other grounds) , 776 F.2d 410 (2d Cir. 1985) (affirming on other grounds); United States v. Stringfellow, 783 F.2d 821, 827–28 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987).

some way. For example, contamination from property that is subject to a RCRA suit may be carried by groundwater onto a neighboring property where the property owner uses a well. The well owner has a strong interest in ensuring that she is not drinking contaminated water, and therefore has an interest in the EPA-initiated RCRA suit. However, some cases may have less obvious impacts to neighboring property owners, such as where there is no direct contamination, but the property owners are concerned with the resale value of their properties after nearby environmental degradation. Any court is likely to recognize a legitimate property interest in the drinking-well example, whereas a court that is opposed to citizen intervention may require the owner concerned with property value to present further evidence and may ultimately refuse to recognize a legitimate interest in the EPA suit.

A court applying a heavy burden test to an intervenor may look at whether she is sufficiently invested in her property to suggest that she is truly impacted by the environmental degradation and has a sincere and direct interest in the litigation outcome. Evidence of this may be a showing of historic changes in property value, evidence of RCRA violations on neighboring property, or simply incurring the cost of acquiring an attorney to represent the interest.[86] One motivation for placing a greater burden on the intervenor is to strictly limit intervention to those who are immediately impacted, while barring parties with a removed or purely legal interest. Alternatively, a court may justify applying a heavy burden by adopting the view that intervenors in RCRA suits impair the efficiency of, and fail to add substantial value to, the existing EPA representation.

There is a strong public interest in applying a minimal burden test on this factor since virtually any intervernor who incurs the time, effort, and resource investment will have a legitimate interest and deserves to have a voice in the suit. Using financial investment as a measuring stick of interest, as courts have done, may have a discriminatory impact on insolvent intervenors who are represented by public interest attorneys (or are not represented at all). More disturbing are the environmental justice concerns raised by using investment as a deciding factor because low income communities are likely to be disparately impacted by industrial activity, while simultaneously have limited resources to fund a lawsuit. In addition, requiring a property or transaction interest as a means to prevent more removed parties from intervening is ineffective, since a truly interested but distant party (such as an environmental non-profit) can simply bring suit on behalf of a more immediately impacted individual.

86. *See* United States v. Solvents Recovery Serv. of New England, No. H 79–704, 1980 U.S. Dist. LEXIS 17360, at *4 (D. Conn. Aug. 21, 1980) (reasoning that "the strength of [intervenor's] interest is indicated by the many hours of work performed . . . in support of their complaint to the [EPA] . . . ." plus a distinct interest from EPA, a responsibility for the wells at issue, and an obligation to provide drinking water).

2. Second Factor: The Intervenor's Interest May Be Impaired

An intervenor can satisfy the second factor by showing that the disposition of the EPA-initiated action, as a practical matter, may impair or impede her ability to protect the interest shown under the first factor.[87] This factor goes hand in hand with the first, since the particular interest established under the first factor may influence the court's conclusion of the extent to which the interest may be impaired by the outcome of the existing EPA suit. Therefore, if an individual shows a compelling interest for the first factor, there is a greater possibility that any impairment of that interest will also be significant, and therefore satisfy the second factor.[88]

The primary justification for denying a citizen's intervention in a lawsuit is that citizens cannot be bound by the outcome of a suit in which they are not parties.[89] Their individual claims are not being litigated, and can conceivably be brought in a separate suit following resolution of the EPA suit, if the issues are not already resolved. However, even if a subsequent suit can be brought, the individual will likely need to raise identical issues of law and fact as were resolved in the earlier EPA action. A court will be influenced, if not compelled, to consider the outcome of the EPA suit, which will result in a practical disadvantage to the private plaintiff. The inability of citizens to argue facts and issues that are central to their case may be so severe that this may justify intervention as of right.[90] Although courts have not universally recognized the argument that the binding nature of the first suit on subsequent suits is sufficient to allow intervention, there is a strong argument to consider it where the future claim will relate to the same property as the initial suit.[91]

3. Third Factor: The Intervenor Is Not Adequately Represented by the EPA

The greatest variation is observed in courts' assessment of the third criterion of Rule 24, whether citizens are adequately represented by the EPA in the existing action. Based on existing case-law, citizen groups are likely to face the greatest difficulty satisfying this factor.

Some courts have allowed intervention based predominantly on the fact that citizen intervenors have more focused interests than the EPA and are likely to pursue their remedies more fervently than the EPA.[92] This may be accepted

87. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1908 at 515 (1972).

88. *See Solvents Recovery Serv.*, 1980 U.S. Dist. LEXIS 17360, at *4.

89. *See* Atlantis Dev. Corp. v. United States, 379 F.2d 818, 826 (5th Cir. 1967).

90. *See id.* at 828–29; *Stringfellow*, 783 F.2d at 828.

91. *Atlantis Dev. Corp.*, 379 F.2d at 829.

92. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972) ("[T]he requirement of Rule 24(a) is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal"); Natural Res. Def. Council v. Costle, 561 F.2d 904, 912–13 (D.C. Cir. 1977); *Solvents Recovery Serv.*, 1980 U.S. Dist. LEXIS 17360, at *9;

as evidence that the EPA will not "adequately" represent the citizen's interest, since those interests are not identical.[93] Other courts, however, have been reluctant to recognize inadequate representation simply due to differences in interest between the citizen and the EPA.[94] Other considerations may also influence this analysis, such as whether the citizen is making claims against both the defendant and the EPA, suggesting a difference in interest between the parties, and thus lower likelihood that the intervenors' interests are actually represented. More subtle differences of interest may also suggest that either the intervenor is not represented, or that remedies that they seek may be negotiated away in settlement due to differing EPA priorities.

Other factors may also compromise the EPA's representation of the intervenors' interest, but are given varying weight by the court depending on whether it places a high or low burden on the intervening party. Differing priorities between the EPA and specific individuals may compromise the EPA's pursuit of the goals that are most important to citizen intervenors. As an administrative agency with limited resources, the EPA may also be forced to prioritize efficiency and consistency interests. By contrast, impacted individuals are directly affected by any litigation shortcomings and are likely to pursue more aggressively a remedy that prioritizes environmental and human health, not economic and administrative efficiency. The plaintiff intervenors have a much more personal and permanent relationship with the polluted environment. A burdened administrative agency is not likely to pursue litigation as diligently as a farmer who irrigates his land from a contaminated river, eats fish caught in it, and has children who swim from its banks.

These shortcomings in EPA representation will occur even in ideal circumstances where the EPA is well funded, has sufficient staff to take on each case, and litigates those cases with full force. But in reality, the EPA often lacks the personnel or resources to address each case in an exhaustive manner.[95] A lack of political will often further compromises whether and to what extent the EPA will pursue remediation of a specific harm, or enforcement of a controversial statute.[96] While EPA shortcomings may result from a variety of causes, the limitation may result from a direct intention not to enforce a given statutory requirement. For example, environmental legislation

N.Y. Pub. Interest Research Group v. Regents of the Univ. of N.Y., 516 F.2d 350, 352 (2d Cir. 1975) (per curiam).

93. *See* United States v. Reserve Mining Co., 56 F.R.D. 408, 418 (D. Minn. 1972) ("While there may be a similarity of interests asserted between the environmental groups [applying to intervene] and the United States, the similarity does not necessarily mean that there will be adequate representation of those interests by the United States").

94. United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 985 (2d Cir. 1984), 607 F. Supp. 1052 (W.D.N.Y. 1985) (proceeding on other grounds), 776 F.2d 410 (2d Cir. 1985) (affirming on other grounds).

95. *See* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARVARD ENVTL L. REV. 297, 301–02 (1999).

96. *See id.* at 301–11.

that has been passed after great effort by public interest groups and legislative representatives can be undermined by statements by the president, such as in signing statements that direct the EPA not to enforce legislation.[97]

There is a vital need for citizens to have opportunities to be involved in protecting their local environment, even where the EPA is addressing the issue on some level. Under the Rule 24 standards for intervention, intervention as of right affords greater certainty and predictability that an individual will be allowed to intervene into an existing suit. The historic shortcomings of EPA enforcement overall,[98] and the likelihood that EPA priorities in individual cases may not align with those of private parties, support the conclusion that courts should recognize a citizen's right to intervene in EPA-initiated RCRA suits. Even if this right is not recognized, however, courts should apply the minimal burdens test in assessing the three factors discussed above, and grant motions to intervene in most instances.

4. Policy Interests Are an Additional Factor in Deciding Motions to Intervene

Although Rule 24 does not require consideration of public policy interests, courts traditionally include an analysis of public policy and treat it as a non-explicit additional factor.[99] There are wide ranging policy motivations that reinforce the importance of allowing intervention in RCRA suits, and highlight the importance of supporting citizen involvement in environmental enforcement in general.

The EPA is subject to the changing tides of presidential administrations. This impacts personnel, resources, and priorities, resulting in inconsistent handling of environmental problems. These transitions have real world impacts on those who suffer the effects of environmental contamination. Maintaining minimal bars to citizen intervention enables involvement that not only fills gaps in EPA enforcement, but promotes accountability and a level of individual influence that reflects the ideals of a democratic government. Closing the doors to citizen intervention, by contrast, reduces public accountability and deprives individuals from directly influencing decisions that will affect them. If the EPA effectively enforces RCRA violations, intervention will not be necessary, but when it fails to do so, citizens should be free to represent their own interests. Denying this right can only be justified on the false assumption that where the EPA chooses to litigate, it is doing a good enough job for everyone.

97. *See* Dean, *supra* note 8 (discussing the use of signing statements to influence implementation and enforcement of statutes).

98. *See* Farber, *supra* note 95, 301–11, and sources cited therein (providing numerous examples of EPA shortcomings, and how they may reinforce state and regulated party noncompliance).

99. *See* Atlantis Dev. Corp. v. United States, 379 F.2d 818, 824 (5th Cir. 1967) (acknowledging a public interest in efficiently resolving as much of the controversy to as many parties as possible in a single trial).

Although individuals who are denied the right to intervene cannot be barred from bringing a subsequent suit if their harm is not remedied, there is an efficiency interest in resolving all claims at once.[100] RCRA litigation may require an extended period of time to reach a conclusion. Individuals should not be required to endure the harms of contamination while they independently litigate issues that could have been resolved in the initial suit. Although a countervailing policy interest in giving individual plaintiffs control over their lawsuit may weigh against intervention in a private suit, this is less persuasive when the original plaintiff is a government agency.

A public policy argument that often opposes intervention seeks to characterize intervenors as attempting to remedy a public harm, rather than a private one.[101] This is based on the principle that the government's role is to represent the public good, and the appropriate role of citizens is in voting for representatives, not directly controlling their actions. A judge's stance on this issue may shape their application of the first factor above, where the harm to the individual is assessed. If a judge favors agency control over litigation, she may characterize the environmental harm as public in nature and conclude that private harm is minor, and that intervention should be denied. Alternatively, a judge who recognizes that individuals have very little control over EPA personnel and decisions, yet may be directly harmed when it fails to act, may be more likely to allow intervention despite the existence of a responsible agency.

Another defense for deferring to EPA enforcement and limiting citizen intervention is that environmental harms are often public in nature, and people who are removed from them should not interfere with efficient EPA enforcement. Although this policy seeks to ensure that individuals with the most at stake are the only ones able to intervene, it does not follow that the EPA does its job better, or even at all, without intervention. The history of inadequate government enforcement of environmental laws indicates that intervention by private parties is not the root cause of poor enforcement.[102] This rationale for limiting intervention holds very little water. First, public harms do actually harm individuals, and it is reasonable for a court to acknowledge a private harm where there is also a public harm in assessing the first factor. This is illustrated in the acknowledgement of standing in *Massachusetts v. EPA* where private harm associated with a global warming sufficed to establish standing where the issue of climate change impacted the public in the broadest sense possible.[103] Second, as long as the intervenor can

100. *See id.*

101. *See* Bustop v. Superior Court, 137 Cal. Rptr. 793, 795 (Ct. of App. 1977) (losing arguments presented by the defendant school district).

102. *See* Farber, *supra* note 95, 301–11.

103. Massachusetts v. EPA, 127 S. Ct. 1438 (2007); *see also* Christie Henke, Note, *Giving States More to Stand On: Why Special Solicitude Should Not Be Necessary*, 35 ECOLOGY L.Q. 385, 414 (2008).

establish grounds for individual harm, the EPA's track record of under-enforcement of environmental laws should warrant hearing intervenors' arguments on public harms *as well as* with private claims.

CONCLUSION

Maine People's Alliance added momentum to the growing consensus among circuit courts that the RCRA citizen suit provision should be broadly construed, allowing suits to be brought without significant barriers. For the same policy reasons that led to the statutory broadening of the citizen suit provision, courts should continue to enhance citizens' opportunity to represent their interest in RCRA suits. This should specifically include applying only minimal burdens to private parties who seek to intervene in RCRA suits. Ideally, courts should acknowledge a right to intervene, thus promoting judicial efficiency and predictability. Even if a motion is reviewed as a permissive intervention, judges have significant discretion and apply a similar analysis to that for intervention as of right, and the minimal burden test should be imposed. Facilitating private intervention will further revitalize the effectiveness of RCRA to protect the public interest from environmental contamination. The policy interests in favor of allowing citizens to represent themselves as parties in litigation significantly outweigh the EPA's interest in avoiding the potential inconvenience of working with additional parties.

Arguing for minimal barriers to private involvement in environmental enforcement is in part an acknowledgement that the EPA has failed to fully carry out its responsibilities in enforcing RCRA. The general public is entitled to having its interests represented, even if it means that citizens must directly intervene in ongoing enforcement actions. The natural environment is a global resource which all individuals have an interest in protecting. Government enforcement is an appropriate mechanism for stewardship and protection, since agencies are, at least theoretically, independent bodies that prioritize the public good. However, historic lack of adequate enforcement of environmental laws shows that government efforts are insufficient.[104] Relying on private enforcement to address public problems may not be the ideal solution; however, when the EPA falls short, this may be the only option.[105] The arguments endorsed by the First Circuit in *Maine People's Alliance* highlight the value of citizen involvement in RCRA enforcement. This reasoning and the protective purposes of RCRA should be embraced and extended by future courts when assessing a citizen's motion to intervene in an EPA action

104. *See* Farber, *supra* note 95, 301–11; *see generally* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971).

105. This is comparable to the role of class-action lawsuits overall. Class actions are often brought to remedy solutions where the government should arguably have already addressed the issue being litigated. The second best option is often better than none at all.

addressing an "imminent and substantial endangerment to health or the environment."[106]

106. Resource Conservation and Recovery Act of 1976 § 7003(a), 42 U.S.C. § 6973(a) (2006).

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