RCRA IN THE WORKPLACE: USING ENVIRONMENTAL LAW TO COMBAT DANGEROUS CONDITIONS IN SWEATSHOPS

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In this Note, Ariela Migdal considers the role of environmental law in the workplace. She argues that the protections environmental law provides against unsafe environmental conditions extend to unsafe conditions on the job. In particular, the Resource Conservation and Recovery Act (RCRA) affords citizens broad protection against endangerment caused by solid waste. Migdal considers whether RCRA's citizen suit provision could be used to combat dangerous conditions in American garment sweatshops. She examines the factors that have prevented traditional labor laws from addressing these dangerous conditions, applies RCRA's provision to the case of the garment industry, and concludes that the language and case law of RCRA accommodate its application to some of the dangers present in the sweatshop environment.

INTRODUCTION

Five years after Maria Alvarez[1] arrived in New York from Mexico, she began working in the T-shirt factory where she would work alongside other Latina and Polish immigrants for the next ten years. Maria worked on large machines used for painting T-shirts. She developed a number of health problems that she attributes to the working conditions in the factory. The hot paints and glues she handled every day emitted strong fumes that she and the other workers suspected as the cause of their chronic headaches, dizziness, skin rashes, eye irritations, and respiratory problems. Among the worst offenders, the glue gave off a chemical odor and never failed to coat Maria's hair, skin, eyelashes, eyes, nostrils, and throat by the end of each long day.[2]

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1 Names of interviewees and translators have been changed to protect their identities.

2 Interview with Maria Alvarez, injured worker, in Brooklyn, N.Y. (author and interviewee's bilingual daughter, trans., Apr. 5, 2000) [hereinafter Alvarez interview].

Edward Chung works as a presser in a Brooklyn garment shop. He suffers from asthma and a constant cough, which he attributes to the chemicals he inhales as he steams chemically treated fabrics. He also complains of itchy and irritated skin and eyes. Doctors have told him that his problems are caused by the chemically treated lint, dust, and steam he encounters during his long days at the factory. An immigrant who does not speak English, he does not complain to his boss for fear of being fired.[3]

May Wu is a seamstress in a garment factory in Brooklyn. She wears a surgical mask over her mouth while she works to limit the amount of chemically-treated fabric dust she inhales. She reports that some fabrics seem to cause more skin, eye, and breathing problems than others; shiny fabric, for instance, is worse than untreated cotton, even though cotton generates more lint. Summer is the worst time in the factory, which is neither air-conditioned nor well ventilated. Her sister-in-law used to work alongside her but was forced to quit when her skin allergies to the fabric and her asthma became intolerable.[4]

Ms. Alvarez, Mr. Chung, and Ms. Wu are all victims of New York City's garment sweatshop economy, in which long hours, low wages, and unhealthy working conditions are the norm.[5] Weaknesses in labor laws,[6] regulatory failures,[7] and the structure of the sweatshop system[8] prevent workers like these from addressing dangerous conditions through traditional labor laws. As a result, workers and their advocates have had to search for creative approaches to the sweatshop problem.[9]

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[3] Interview with Edward Chung, garment presser, in Brooklyn, N.Y. (Jimmy Lau, bilingual former garment worker, trans., Apr. 6, 2000) [hereinafter Chung interview].

[4] Interview with May Wu, seamstress, in Brooklyn, N.Y. (conducted partly in English with interviewee, partly through Jimmy Lau, bilingual former garment worker, trans., Apr. 6, 2000) [hereinafter Wu interview].

[5] See infra Part I.A.

[6] See infra Part I.B.2.

[7] See id.

[8] See infra Part I.B.1.

[9] See, e.g., Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 Harv. C.R.-C.L. L. Rev. 407, 428-30 (1995) (describing rise of workers' centers, which are community-based organizations that organize workers at grassroots levels across trades and industries in order to fight widespread labor exploitation); Bellevue/NYU Occupational & Envtl. Med. Clinic (BNOEMC), Draft Summary of Occupational Health Day Results (on file with the *New York University Law Review*) (screening workers in New York City on October 6, 1996) (describing efforts of grassroots labor organization dedicated to organizing Chinese immigrant workers, including through "Occupational Health Day," which was organized to raise awareness of occupational health issues among Chinese immigrant workers in New York's garment factories, restaurants, and other small factories).

This Note considers whether employees could bring a successful action under the "imminent and substantial endangerment" citizen suit provision of the Resource Conservation and Recovery Act (RCRA),[10] a federal environmental statute, in order to compel garment sweatshop operators and/or manufacturers to remedy the dangerous conditions in sweatshops. A primary goal of environmental law is to protect people from dangers to human health posed by substances in the surrounding air, water, and environment.[11] Workers in American garment shops experience health problems that may be caused by dust, fumes from fabrics, and dyes.[12] Since traditional labor law has failed to address these hazards, this Note explores whether environmental law would be a viable alternative.

Of all the environmental statutes, RCRA is the most tailored to the goal of protecting human health.[13] RCRA's citizen suit provision authorizes courts to grant equitable relief in situations in which health is endangered.[14] While using this provision to alleviate sweatshop hazards would be an innovative application of RCRA, such an application is entirely appropriate and plausible. Moreover, extending RCRA to the sweatshop context is normatively justified when the dangers are viewed as part of a larger problem of environmental injustice and inequitable endangerment.[15]

This Note argues that it is possible to apply RCRA to the chronic underenforcement of health and safety standards in the garment industry.[16] Part I describes the environmental hazards encountered by

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10 42 U.S.C. § 6972(a)(1)(B) (1994).

11 See id. § 6902 (stating that goal of Resource Conservation and Recovery Act (RCRA) is "to promote the protection of health and the environment" and to ensure that hazardous waste management practices are conducted in manner that protects human health and environment); Clean Air Act, id. § 7401 (citing congressional findings that increased air pollution has endangered "the public health and welfare" and declaring promotion of "the public health and welfare" to be purpose behind protecting air quality). Some environmental statutes are also targeted at the preservation of the "green" or natural environment, which includes land, rivers, and animal species. See, e.g., Endangered Species Act, 16 U.S.C. § 1531(b) (1994) (stating purpose as being to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved"). This Note focuses on the former set of statutes, the goals of which are to protect human health and the environment from the effects of pollution and waste.

12 See Alvarez, Chung, and Wu interviews, supra notes 2-4 (describing health problems experienced by garment workers).

13 See infra Part II.A.

14 See infra Part II.B.

15 See infra Part I.C.

16 See U.S. Gen. Accounting Office (GAO), "Sweatshops" in the U.S.: Opinions on Their Extent and Possible Enforcement Options 20 (1988) [hereinafter Sweatshops in the U.S.] (describing apparel industry as having "serious" and "widespread" problems with multiple violations of labor, health, and safety laws). As explained below, RCRA's imminent hazard provision could be used to address workplace threats caused by hazardous

sweatshop workers and explains how safety problems in the apparel industry go unaddressed by the Occupational Safety and Health Administration (OSHA), unions, and traditional labor laws. It then presents strategic, substantive, and normative arguments for supplementing these institutions with environmental law. Part II argues that the scope and purpose of RCRA's citizen suit provision encompass protecting workers from environmental hazard and that RCRA therefore applies to the problem set forth in Part I. Part III considers the limitations of this approach and suggests strategies for overcoming them.

I
GAPS AND WEAKNESSES IN THE PROTECTION OF SWEATSHOP WORKERS FROM ENVIRONMENTAL AND OTHER INDUSTRIAL HAZARDS

A. Garment Sweatshops as Unsafe Workplaces

Sweatshops are defined as businesses that regularly violate multiple labor laws, including, often, health and safety standards.[17] America's garment sweatshops[18] are known for their "deplorable working conditions,"[19] and are rife with physical dangers to workers.[20]

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materials in other industries. See infra Part III.C. This Note uses the example of the garment industry to illustrate the problem, as well as the proposed solution.

17 See U.S. Gen. Accounting Office, Prevalence of Sweatshops 1 n.1 (1994) [hereinafter Prevalence of Sweatshops] (defining sweatshop as place where "employer . . . violates more than one federal or state labor law governing minimum wage and overtime, child labor, industrial homework, occupational safety and health, workers' compensation, or industry registration"); U.S. Gen. Accounting Office, "Sweatshops" in New York City: A Local Example of a Nationwide Problem 1 (1989) [hereinafter Sweatshops in New York City] (giving same U.S. General Accounting Office definition of sweatshops); Sweatshops in the U.S., supra note 16, at 16 (same). While sweatshops can be found in the garment, restaurant, meat packing, and other industries, this Note will use the term to refer specifically to garment industry sweatshops.

18 This Note considers only American sweatshops and U.S. law. It draws on original research into New York's garment sweatshops conducted in New York City between September 1999 and April 2000. This research includes interviews with garment workers in New York, family members of garment workers, local advocates for garment workers, union staff members, and health professionals in New York City who have worked with garment workers. The author also has visited a number of garment shops in New York City.

19 Prevalence of Sweatshops, supra note 17, at 5.

20 See George Friedman-Jimenez, Achieving Environmental Justice: The Role of Occupational Health, 21 Fordham Urb. L.J. 605, 613 (1994) (listing complaints of sweatshop workers as including "back, neck, and shoulder injuries and cumulative trauma disorders such as carpal tunnel syndrome, contact dermatitis, neurotoxicity from solvents, and respiratory problems").

One account describes the physical conditions under which garment workers labor as follows:

Garment sweatshops are often poorly ventilated,[21] and workers report respiratory problems that likely are due to a combination of dust, dyes, and fumes.[22] Workers may suffer from occupational asthma,

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> The typical garment sweatshop environment is damp and hot, cramped with piles of highly flammable materials, poorly lit, with blocked exits, battered doors, and grime-coated windows; it is generally unsafe and unsanitary. Inside, one can find each seamstress sitting in a crowded space, wearing a surgical mask if lucky, otherwise improvising with pieces of cloth over her face to prevent excessive inhalation of lint and dust . . . .

Leo L. Lam, Comment, Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops, 141 U. Pa. L. Rev. 623, 633-34 (1992) (footnotes omitted) (citing Steven A. Chin, Sweatshops: Bay's Ugly Secret, S.F. Examiner, Feb. 13, 1989, at A1; Michael Freitag, New York Is Fighting Spread of Sweatshops, N.Y. Times, Nov. 16, 1987, at A1; William Serrin, After Years of Decline, Sweatshops Are Back, N.Y. Times, Oct. 12, 1983, at A1); see also Alvarez, Chung, and Wu interviews, supra text accompanying notes 2-4 (describing factories that are overheated, poorly ventilated, and cluttered, in which workers routinely handle chemically-treated fabric, dust, hot paints and glues, and chemicals without being given protective clothing or masks).

21 See Prevalence of Sweatshops, supra note 17, at 7 (reporting experts' and officials' descriptions of working conditions in typical garment shop); Chung and Wu interviews, supra text accompanying notes 3-4 (describing garment shops that are windowless, poorly ventilated, and lacking exhaust fans); see also Interview with Hai Lee, injured garment worker in Brooklyn, N.Y. (Jimmy Lau, bilingual former garment worker, trans., Apr. 6, 2000) [hereinafter Lee interview] (recounting Lee's experience hanging clothes in overheated, overcrowded garment shop, during which time she experienced allergies and breathing problems and ultimately became injured after passing out on shop floor after working several days of long hours to meet deadline).

22 Even workers in unionized garment shops report such problems. This author spoke with several garment workers in a unionized shop in Manhattan's garment district. Several workers wore masks over their mouths and noses to protect themselves from dust. One worker reported that the dust from darker fabrics causes more respiratory irritation than the dust from other fabrics, and that one of the fabrics that causes the most irritation is a chemically-treated dark cloth used to line jackets. See also BNOEMC, supra note 9 (reporting that among group of workers of whom 78% were garment workers, 33% complained of respiratory symptoms including cough, wheezing, shortness of breath, chest tightness, and coughing up of phlegm almost every day for more than three months per year); Richard Keenlyside et al., U.S. Dep't of Health & Human Servs., Health Hazard Evaluation Report: New Carolina Industries, Weldon, North Carolina 4-5 (HETA 81-056-854, 1981) (examining occupational health hazards to garment workers); Chantal Brisson et al., Disability Among Female Garment Workers, 15 Scandinavian J. Work, Env't & Health 323, 326 (1989) (finding elevated prevalence of cardiovascular disorders among female garment workers as compared with women employed in other occupations); R. Herbert et al., The Union Health Center: A Working Model of Clinical Care Linked to Preventive Occupational Health Services, 31 Am. J. Indus. Med. 263, 266 (1997) (finding that garment workers in New York study suffered from eye, nose, and throat irritation, asthma, and skin irritation); Wayne Barrett & Tracie McMillan, Geraldine Ferraro: Sweatshop Landlord, Village Voice (N.Y.), Mar. 10, 1998, at 41 (describing conditions in one alleged New York sweatshop where "[t]he ventilation is so bad, and the odors and steam so overpowering, that many workers cover their noses and mouths with cloth all day"); Interview with Shelly Zhang, industrial hygienist and Assistant Director, BNOEMC, in N.Y., N.Y. (Feb. 1, 2000) (suggesting that workers' respiratory symptoms resulted from working with materials treated with formaldehyde and other chemicals).

which occurs when they are exposed to substances such as dusts, vapors, gases, or fumes that trigger an asthma attack.[23] Some workers also report eye and skin irritation, which they attribute to the fumes from some of the materials that they encounter at work.[24]

Published studies in the field of occupational health do little more than point to the hazards of inhaling dust, fibers, and fumes in poorly ventilated garment shops. One study found that garment workers had high odds of developing occupational asthma relative to workers in other industries.[25] Another study found elevated instances of certain types of cancer among garment workers exposed to formaldehyde at work.[26] Occupational health experts agree that work-related asthma is underdiagnosed, and that the risks in specific industries frequently go unrecognized.[27] Further empirical research is needed to document

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[23] See Rafael E. de la Hoz et al., Exposure to Potential Occupational Asthmogens, 31 Am. J. Indus. Med. 195, 199 (1997) (noting that workers in "Apparel and Other Finished Products" sector were potentially exposed to "relatively high number of asthmogens"); Chung and Wu interviews, supra notes 3-4 (reporting that asthma among garment workers was anecdotally attributed to dust and chemicals encountered at work).

[24] See, e.g., Herbert et al., supra note 22, at 269-70. In one case, reactive airway disease and conjunctival irritation in a garment worker led to environmental monitoring of formaldehyde in the workplace. When formaldehyde levels in excess of the Occupational Safety and Health Administration (OSHA) standard were found, the Union of Needletrades, Industrial and Textile Employees was able to persuade the employer to install a new ventilation system that apparently reduced formaldehyde levels. See id.; see also Alvarez, Chung, and Wu interviews, supra notes 2-4 (listing health problems experienced by garment workers).

[25] The odds for garment workers, however, are not as high as for textile workers. See Tze Pin Ng et al., Risks of Asthma Associated with Occupations in a Community-Based Case-Control Study, 25 Am. J. Indus. Med. 709, 714 (1994) (showing garment workers as having adjusted "odds ratio" of asthma of 1.61, compared to 0.62 for professional/technical and administrative/managerial workers, and 5.83 for textile workers); see also Brisson et al., supra note 22, at 326 (finding elevated prevalence of cardiovascular disorders among female garment workers as compared with women employed in other occupations); de la Hoz et al., supra note 23, at 198 (noting that in "Apparel and Other Finished Products" sector, both number of potentially exposed workers and potential exposures per worker to asthmogens are high).

[26] See Leslie Stayner et al., Proportionate Mortality Study of Workers in the Garment Industry Exposed to Formaldehyde, 7 Am. J. Indus. Med. 229, 234 (1985) (finding statistically significant excesses for cancers of buccal cavity and other lymphatic and hematopoietic sites).

[27] See de la Hoz et al., supra note 23, at 195 ("Although occupational asthma is a well-recognized clinical entity, it is difficult to diagnose and is probably grossly underreported."); Ng et al., supra note 25, at 710 (stating that underdiagnosis of work-related asthma is "widely recognized"); see also Alvarez interview, supra note 2 (reporting that Alvarez had trouble communicating with American doctors and did not feel she received accurate diagnosis of her symptoms); Wu interview, supra note 4 (reporting similar experience for Wu's sister-in-law).

how conditions in sweatshops may present a serious danger to human health.[28]

B. *Widespread Underenforcement of Health and Safety Standards in the Garment Industry*

In part because of the lack of empirical research on the dangers of working in garment sweatshops,[29] it is not known whether levels of dust and fumes in garment shops violate OSHA guidelines for workplace safety.[30] What has been documented is OSHA's failure to monitor conditions in sweatshops effectively. This failure is, in part, the result of the unique structure of the sweatshop system. The problem exists within a larger failure of regulatory agencies and other institutions to enforce labor standards within this system.[31]

1. *Structural Reasons for Underenforcement of Labor Standards*

Several features of the garment industry contribute to widespread underenforcement of labor laws.[32] One is the industry's multitiered structure. The apparel industry is one of the nation's largest manufac-

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[28] The difficulty is that sweatshops are, by nature, underground operations. See infra Part I.B.1. It is extremely difficult for researchers to gain access to garment sweatshops in order to catalog their conditions in a scientific fashion because owners have not let them in. See Telephone Interview with Shelly Zhang, industrial hygienist and Assistant Director, BNOEMC (Jan. 31, 2000). In 1996, the BNOEMC conducted a screening of garment workers and other sweatshop workers in New York City. See BNOEMC, supra note 9. Thirty-three percent of the workers (78% of whom were garment workers) complained of respiratory problems related to work. See id. Respiratory problems were the second most common complaint after repetitive strain injury. See id.

[29] See supra note 28.

[30] In response to the severe problems of "brown lung" disease, OSHA issued guidelines on acceptable levels of cotton dust. See 29 C.F.R. § 1910.1043 (2000). To bring a successful RCRA imminent hazard suit, however, workers would not have to show that dust levels in sweatshops rose to the levels addressed by OSHA's guidelines, which do not apply to garment manufacturing. See id. § 1910.1043(a)(2) (exempting handling and processing of woven or knitted materials from regulations of cotton dust levels). Instead, they would have to show that the combination of dust, fumes, fibers, and other wastes in sweatshops endanger workers' health. See infra Part II.B.2 (analyzing "imminent and substantial endangerment" requirements of RCRA). OSHA's attention to cotton dust's hazardous effects, however, offers some indication of the seriousness of the dangers it can pose.

It is possible that other features of garment shops violate other OSHA regulations. See, e.g., Herbert et al., supra note 22, at 269 (discussing case in which reactive airway disease and conjuctival irritation in garment worker led to environmental monitoring of formaldehyde in workplace that revealed formaldehyde levels in excess of OSHA standard).

[31] See Sweatshops in the U.S., supra note 16, at 32 (reporting factors believed to be responsible for sweatshops, including weak labor laws, understaffed agencies, and features of apparel industry).

[32] See id. (citing factors including labor intensiveness, large immigrant work force, and low profit margins); id. at 35 (describing subcontracting system).

turing industries.[33] It is structured as a pyramid, with a small number of retailers at the top, fewer than 1000 manufacturers below them,[34] and approximately 20,000 contractors and subcontractors below them.[35]

Most often, "manufacturers" actually do not produce clothing; they contract out production work to subcontractors in order to increase profits.[36] The function of manufacturers is to design apparel, provide fabric, and give instructions about how garments should be produced.[37] Contractors operate and own the garment shops, employing cutters, seamstresses, trimmers, and pressers.[38]

Since workers are actually employed by the contractors, manufacturers generally have avoided direct liability to workers for either wages or working conditions.[39] Meanwhile, the workers' direct employers, the contractors, have evaded responsibility simply by closing up shop and reopening elsewhere when workers have demanded their rights.[40] While the situation may be changing with respect to liability for wages,[41] the multitiered structure has allowed manufacturers to hide behind a corporate shield, while contractors play a "shell game,"

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[33] See Prevalence of Sweatshops, supra note 17, at 3; see also Lora Jo Foo, The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation, 103 Yale L.J. 2179, 2185 (1994) (noting that "thirty-eight-billion-dollar-a-year apparel industry relies heavily on sweatshop labor").

[34] Manufacturers often carry well-known brand names, including Liz Claiborne®, Jessica McClintock®, Guess®, and Esprit®. See Foo, supra note 33, at 2185.

[35] See Prevalence of Sweatshops, supra note 17, at 3-4.

[36] See id.; Foo, supra note 33, at 2185.

[37] See Lam, supra note 20, at 629-31 (describing structure and roles within garment industry).

[38] See id. at 629.

[39] See id.; see also Bruce Goldstein et al., Enforcing Fair Labor Standards in the Modern American Sweatshop, 46 UCLA L. Rev. 983, 995-1002 (1999) (describing structure of garment industry and implications for manufacturer liability).

[40] See Foo, supra note 33, at 2209 (citing Susan Headden, Made in the U.S.A., U.S. News & World Rep., Nov. 22, 1993, at 48, 54) (estimating that average garment sweatshop remains in operation for 13 months).

[41] See Lopez v. Silverman, 14 F. Supp. 2d 405, 423 (S.D.N.Y. 1998) (holding manufacturer liable for back wages unpaid by subcontractor); see also N.Y. Lab. Law § 345-a (McKinney 2000) (holding apparel manufacturers and contractors who contract out apparel work liable for wage violations of subcontractors if they knew or should have known that subcontractors failed to comply with labor laws). In another joint employer case in the New York garment industry, garment workers who had worked 137-hour weeks pursued wage claims against the subcontractor, the manufacturer, and retailers. See Chinese Staff & Workers' Ass'n: Garment Workers' Commission (visited Sept. 20, 2000) <http://www.cswa.org/garment.htm>. Ultimately, the manufacturer sportswear company, not the subcontractor, paid the $285,000 settlement. See id.; Melanie Kletter, Bklyn. Sweatshop Workers to Share $285,000 Deal, Womenswear Daily, June 22, 1999, available in 1999 WL 11974319.

closing and reopening too quickly to be held liable for labor law violations.[42]

A second factor promoting widespread underenforcement of labor standards is the garment industry's systematic use of undocumented immigrant workers.[43] Such workers, who often lack fluency in English and knowledge of the legal system, are vulnerable to threats of deportation if they complain about substandard conditions.[44] "Legal" immigrants (those with documentation authorizing them to work in this country) suffer under the same system; if they report violations of labor laws, they may be fired and replaced with willing undocumented workers.[45]

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[42] See Foo, supra note 33, at 2189. This feature of the industry would also make a suit against contractors under RCRA difficult. On the other hand, certain features unique to RCRA might make it possible to hold *manufacturers* liable for hazardous conditions, thus obviating the need to pin down particular subcontractors. See infra Part II.B.3.

[43] Undocumented workers are "particularly vulnerable to exploitation by employers because of their illegal status." Sweatshops in the U.S., supra note 16, at 13. Hispanics and Asians are thought to be represented most heavily in sweatshops. See id. at 20.

[44] See Foo, supra note 33, at 2182 (describing vulnerability of undocumented workers). Evidence suggests that the passage of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.), only made matters worse. The statute imposes penalties on employers for the employment of undocumented workers. See Immigration and Naturalization Act § 274A, 8 U.S.C. § 1324a (1994).

An unintended result of the law has been that undocumented workers are afraid to assert their rights under labor law, since the Department of Labor shares information about employees' work authorization with the immigration authorities. See Elizabeth Ruddick, Silencing Undocumented Workers, in Immigr. Newsl., June 1996, at 1, 5 (detailing undocumented workers' reluctance to report violations to Department of Labor for fear of being deported). The risk of deportation to workers who stand up for their labor rights is very real. See, e.g., Montero v. INS, 124 F.3d 381, 384-85 (2d Cir. 1997) (holding that worker arrested by INS on employer tip in retaliation for labor organizing was subject to deportation); Contreras v. Corinthian Vigor Ins. Brokerage, 103 F. Supp. 2d 1180, 1182 (N.D. Cal. 2000) (describing case in which employer caused worker to be reported to immigration authorities in retaliation for worker filing unpaid wages claim).

[45] Documented workers face pressures to accept low wages "in the face of . . . employer[s'] claim[s] that [they] can immediately hire undocumented workers who will work for even less." Ruddick, supra note 44, at 4; see also Gordon, supra note 9, at 408 (describing experience of worker who watched boss fire documented workers only to replace them with undocumented workers and who, after receiving work authorization, was told by boss: "There's the door, if you don't like [working off the books]. I know a lot of people who would be interested in your job."). "Legal" immigrants may also lack fluency in English and the legal system. See Alvarez interview, supra note 2. One garment worker reported that when she finally took her injuries to the Workers' Compensation Board, her boss responded by claiming that she was lying about the work-related injuries. The worker, who does not speak English and must bring a translator to each hearing, is still awaiting a resolution of her workers' compensation case. See id.

2. *Regulatory and Legal Reasons for Underenforcement of Labor Standards*

Ineffective regulatory agencies contribute to endemic underenforcement of labor laws. OSHA is underfunded and faces many administrative constraints.[46] Other regulatory agencies also have extremely limited resources.[47] In 1994, the New York State Apparel Industry Task Force reportedly had only five inspectors charged with monitoring 2000 garment shops, with the result that it was unable to deter "chronic violators."[48]

Regulatory agencies and other institutions that might have combated sweatshop conditions do not utilize their resources in ways that enable them to address the sweatshop phenomenon.[49] One advocate reports that procedures at an office of the New York State Department of Labor, for instance, appear "designed to discourage immigrants from filing claims for nonpayment of wages," in part because of the lack of interviewers who speak Spanish.[50] Unions also have failed to eliminate sweatshop conditions in the garment industry. Many garment shops are not unionized, and unions are sometimes unresponsive to the complaints of undocumented immigrants working in sweatshops.[51]

Finally, chronic labor violations stem from weaknesses in the laws themselves. Courts traditionally have interpreted labor laws to hold

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[46] The GAO notes that "insufficient staff resources" are a factor limiting enforcement efforts. Sweatshops in the U.S., supra note 16, at 36.

[47] For example, in 1994, the Department of Labor's Wage and Hour Division reported that since 1989, it had fewer enforcement resources for all of its tasks and more employers to cover. Meanwhile, its investigative force had been cut by 17%, leaving the Division with one investigator for every 8000 or so employers. See Prevalence of Sweatshops, supra note 17, at 9.

[48] Foo, supra note 33, at 2204.

[49] For example, many sweatshops are exempt from OSHA inspection because of their small size. See Sweatshops in the U.S., supra note 16, at 44 (reporting OSHA policy of exempting from targeted inspection establishments employing 10 or fewer employees).

A variation on this problem concerns legal institutions that attempt to address the problem of workplace safety but fail to address adequately the problem of occupational disease. For example, the workers' compensation system has not been effective at addressing problems of occupational disease. See, e.g., William J. Maakestad & Charles Helm, Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives That Influence Employer Decisions to Control Occupational Hazards, 17 N. Ky. L. Rev. 9, 26 (1989) (noting that workers' compensation is more effective in fairly distributing losses in "blood trail" injuries than occupational diseases, where etiology is causally more complex).

[50] Gordon, supra note 9, at 420-21.

[51] See id. at 423-27 (giving examples of unions failing to respond to needs of immigrant workers on Long Island). One garment worker reported that conditions in unionized factories that he had worked in were no better than conditions in nonunionized factories. See Chung interview, supra note 3.

only direct employers accountable, allowing companies further up the chain of production to escape legal responsibility for the working conditions of those at the bottom.[52] The Occupational Safety and Health Act's standards can only be enforced by OSHA, as there is no private right of action under the statute.[53] As a result, private citizens are unable to supplement the limited enforcement that OSHA and other agencies can provide.[54]

In sum, both the structure of the garment industry and the weaknesses of agencies, institutions, and laws contribute to widespread underenforcement of labor standards in garment sweatshops. The contracting system allows manufacturers to evade responsibility for the conditions under which clothing is produced. The abundance of willing immigrant workers helps contractors exploit workers as they compete to provide sewing and pressing at low prices. Regulatory agencies have proven unequipped or unwilling to address the problem. Finally, the structure of protective labor laws requires action by these agencies, rather than by individual workers, in order to deter violations. Any proposed solutions to the sweatshop problem must address at least some of these factors.

C. Legal, Substantive, and Normative Reasons to Turn to Environmental Law to Supplement the "Broken" Regulatory Regime

In attempting to supplement the ineffective regulatory regime, activists have sought to identify mechanisms through which citizens can act as "private attorneys general" so as to bring about increased compliance with health and safety standards.[55] The United States' comprehensive statutory regime of environmental protection is a natural place to look for such a mechanism, for several reasons.

First, environmental protection is an area of law in which citizen-plaintiffs' role in supplementing government agencies is already established. Unlike labor laws, most environmental statutes contain citizen suit provisions that allow private citizens to bring actions to enforce

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[52] See generally Goldstein et al., supra note 39 (describing traditional common law limitations of liability beyond direct employer and effects on manufacturing and agriculture).

[53] See Mark A. Rothstein, Occupational Safety & Health Law § 502 (4th ed. 1998) (citing cases).

[54] See Foo, supra note 33, at 2180-81 (arguing that private plaintiffs should have greater role in enforcing stricter labor laws and that without assistance of private plaintiffs, unions and governments will lose battle against underground economy).

[55] See, e.g., id. at 2205 (suggesting expansion of private attorney general theory in wage and hour enforcement to allow private plaintiffs to bring qui tam actions).

environmental standards.[56] Government agencies, citizen-plaintiffs, and nonprofit watchdog groups complement one another's efforts to ensure that environmental laws are enforced. This framework, which allows groups other than government agencies to enforce the law, is one that could help alleviate government failure to address unhealthy conditions in sweatshops.

Second, workers' rights and environmental protection overlap substantively in the area of occupational health. Workers' health is adversely affected by dangerous substances and conditions in the work environment.[57] Environmental hazards such as dust or fumes that cause respiratory, skin, or other health problems do not cease to be "environmental" simply because they are encountered or inhaled at work rather than at home or outdoors.

Third, a small number of scholars have argued that legal environmental protections—with their rhetoric and moral force—*should* be applied in the workplace context. This normative argument is rooted in the concept of "environmental justice."[58] Environmental justice addresses inequities in environmental protection and in distribution of environmental harms among social and racial groups. The environmental justice movement's central claim is that "low-income and mi-

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[56] See Clean Water Act, 33 U.S.C. § 1365 (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); Clean Air Act, id. § 7604; Comprehensive Environmental Response, Compensation, and Liability Act, id. § 9659. These provisions have proven powerful tools in winning environmental victories. See, e.g., Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 338 (4th Cir. 1983) (granting private plaintiffs injunctive relief under RCRA against operator of industrial waste disposal business); Friends of the Sakonnet v. Dutra, 738 F. Supp. 623, 638 (D.R.I. 1990) (granting relief in action by citizens under Clean Water Act against owners of private septic system); Deborah F. Buckman, Annotation, Requirement That There Be Continuing Violation to Maintain Citizen Suit Under Federal Environmental Protection Statutes—Post-*Gwaltney* Cases, 158 A.L.R. Fed. 519 § 2(a) (1999) ("Citizen suits are an intricate part of the [Clean Air] Act's enforcement scheme, because, as one court put it, neither the federal nor state governments have the resources to ensure that generators of air pollutants are consistently in compliance with the Act." (citing Sierra Club v. Public Serv. Co., 894 F. Supp. 1455, 1459 (D. Colo. 1995))). One obstacle, however, has been the question of which plaintiffs have standing to enforce environmental laws. See infra Part III.A.

[57] For a discussion of the overlap between occupational safety laws and environmental laws, see Lynn K. Rhinehart, Would Workers Be Better Protected If They Were Declared an Endangered Species? A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws, 31 Am. Crim. L. Rev. 351, 353-54 (1994) (noting that Occupational Safety and Health Act and environmental laws were enacted in same era, share common purpose of protecting human health and holding accountable companies that place workers or public at risk, and regulate many of same substances and processes).

[58] See generally Robert W. Collin, Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice, 9 J. Envtl. L. & Litig. 121 (1994) (discussing debate and historical development surrounding name "environmental justice").

nority communities bear the brunt of the industrial world's environmental contamination."[59]

The inequitable distribution of hazards is a central problem in occupational health.[60] Environmental injustice and the sweatshop system affect many of the same populations, including immigrants, who bear the brunt of unhealthy workplace environments.[61] Low-wage and immigrant workers may be at higher risk for occupational disease because they are disproportionately employed in dangerous jobs.[62] Several factors contribute to the increased exposure of such workers

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[59] Lincoln L. Davies, Note, Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities, 18 Stan. Envtl. L.J. 285, 288 (1999).

[60] The bulk of environmental justice literature does not address the disproportionate effects of environmental hazards in the workplace. Instead, debate centers on three issues. Some scholars focus on the fact that dangerous land uses are disproportionately situated in low-income and minority communities. See Collin, supra note 58, at 126 & n.13 (citing Michael Greenberg, Proving Environmental Inequity in Siting Locally Unwanted Land Uses, 4 Risk 235 (1993)); see also id. at 128 n.19 (citing Vicki Been, What's Fairness Got to Do with It? Environmental Equity and the Siting of Locally Undesirable Land Uses, 78 Cornell L. Rev. 1001 (1993)). This branch of the field is concerned with challenging the assumption that "environmental law is about allocational efficiency only." Richard Lazarus, Environmental Justice and the Teaching of Environmental Law, 96 W. Va. L. Rev. 1025, 1026 (1994).

Others have investigated the disproportionate effects of governmental decisions on low-income communities. See, e.g., Marianne Lavelle & Marcia Coyle, Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation, Nat'l L.J., Sept. 21, 1992, at S2 (finding that penalties against polluters in minority areas are lower than in white areas, that government takes longer to address hazards in minority communities, and that government accepts less stringent solutions in minority communities).

Still others have been concerned with similar problems on a global scale, noting the disproportionate effects of pollution on indigenous peoples and developing countries. See Bunyan Bryant, Issues and Potential Policies and Solutions for Environmental Justice: An Overview, in Environmental Justice: Issues, Policies, and Solutions 8, 31 (Bunyan Bryant ed., 1995) [hereinafter Environmental Justice]; Tom B.K. Goldtooth, Indigenous Nations: Summary of Sovereignty and Its Implications for Environmental Protection, in Environmental Justice, supra, at 138, 143.

[61] See, e.g., Sweatshops in New York City, supra note 17, at 12 (stating that immigrants, including recently arrived Hispanics and Asians, constitute large segment of workforce in two industries investigated for prevalence of sweatshops in New York); George Friedman-Jimenez & Jesse S. Ortiz, Occupational Health, in Latino Health in the U.S.: A Growing Challenge 341, 350 (Carlos W. Molina & Marilyn Aguirre-Molina eds., 1994) (explaining Latinos' overrepresentation in hazardous jobs by social and economic factors including discrimination, deficiencies in education, undocumented status, language barriers, and lack of specific knowledge about hazardous workplace conditions).

[62] See Morris E. Davis & Andrew S. Rowland, Problems Faced by Minority Workers, in Occupational Health: Recognizing and Preventing Work-Related Disease 417-30 (Barry S. Levy & David H. Wegman eds., 1983) ("It is striking that among the 30 industries in the United States with the highest percentages of nonwhite workers the nonwhites are concentrated primarily in manufacturing and service industries . . . two sectors of the economy with high rates of occupational disease."); Friedman-Jimenez, supra note 20, at 610-11 & 610 nn.23-24.

to health hazards. These include lack of health and safety training, lack of fluency in English, and vulnerability to being fired or deported.[63] Research on sweatshops has found that immigrants often are subject to hazardous conditions because of their fears of being deported.[64] Many workplace hazards are environmental in nature, including those affecting the quality of air and water and those involving worker contact with harmful materials.[65] Workplace hazards therefore can be seen as a subset of environmental hazards to human health.[66]

The inequitable distribution of harms in the environmental arena and at work calls for solutions that acknowledge this intersection. As a significant portion of environmental injustice occurs in the workplace, activists should draw on environmental theory and law to address environmental injustice on the job. While it would be ideal if labor law addressed the inequitable distribution of occupational envi-

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[63] See Friedman-Jimenez, supra note 20, at 613-14; supra notes 43-45 and accompanying text (describing vulnerability of immigrant workers to being fired and/or deported).

[64] See, e.g., Foo, supra note 33, at 2182 (reporting that employers in garment industry prefer immigrant workers, whose vulnerability to threats of being reported to INS keeps them silent about sweatshop abuses); Ruddick, supra note 44, at 1 (citing results of study finding that convergence of labor and immigration law deterred immigrant workers from asserting rights to safe working conditions).

[65] For a discussion of the disparate treatment of "environmental" hazards and workplace hazards in the criminal arena, see Rhinehart, supra note 57, at 354 ("[I]mproper handling of toxic substances is far more likely to result in criminal prosecution when it threatens the environment—meaning natural resources or the general public—than when it threatens workers.").

A Memorandum of Understanding between OSHA and the Environmental Protection Agency (EPA) recognizes the overlap between "environmental" and occupational danger: "EPA and OSHA have the statutory responsibility to ensure the safety and health of the public and America's workforce." Memorandum of Understanding Between the Occupational Safety and Health Administration and the Environmental Protection Agency on Minimizing Workplace and Environmental Hazards, Nov. 23, 1990, at 17 (Bureau of Nat'l Affairs, Inc. 1990) [hereinafter Memorandum of Understanding]. This substantive intersection helps explain why the EPA has the authority to address problems that are also within OSHA's domain. See infra Part II.B.1.

[66] Most scholarship on environmental justice makes only passing reference to the link between environmental harms to low-income communities and occupational health problems faced by workers in those communities. The environmental hazards visited upon low-income workers are often mentioned in the literature when authors list the various realms that "environmental justice" has come to encompass. See, e.g., Lazarus, supra note 60, at 1033-34 & 1034 n.26 (listing "belated prosecution for unsafe sweatshop working conditions" as example of environmental issues lying "at or just below the surface of many of the nonstatutory areas that figure in modern environmental law"). At least one commentator, however, has described occupational health as a "Primary Environmental Justice Issue." Friedman-Jimenez, supra note 20, at 607-18. Friedman-Jimenez argues that occupational hazards constitute a large part of the problem of environmental inequity. See id.

ronmental hazards,[67] labor law has proven ineffective in protecting sweatshop workers from environmental dangers.[68] A measure of protection against environmental injustice in the workplace already may be available, however, under an existing federal environmental statute.[69]

II

THE RESOURCE CONSERVATION AND RECOVERY ACT IN THE LABOR CONTEXT

RCRA, the statute governing the handling and disposal of solid waste, is the environmental statute that most appropriately could be applied to alleviate environmental hazards in the labor context.[70] RCRA is amenable to this application, not only because of its express concern for industrial health,[71] but also because of the unique nature of its citizen suit provision. Most environmental statutes have citizen suit provisions that allow citizens to sue polluters who violate technical aspects of the statute's regulatory regime, such as permit requirements or emissions standards.[72] RCRA's citizen suit provision goes even further. It allows citizens to sue for the abatement of imminent hazards to health or the environment, regardless of whether defendants have violated any of RCRA's requirements.[73] It is unique in

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67 See Foo, supra note 33, at 2180-81 (arguing that states should strengthen labor laws and stiffen penalties to eliminate profitability of violating labor laws and that private plaintiffs should have greater role in enforcing stricter labor laws). Another solution would be to change the occupational health and safety regime to include widespread private enforcement. See id. at 2204-06 (describing dwindling governmental inspection of workplaces and enforcement of labor laws and arguing for expansion of "private attorney general" theory in labor context); Friedman-Jimenez, supra note 20, at 623 (advocating OSHA reform to improve effectiveness of regulatory process); see also supra Part I.B.2 (describing gap in enforcement of OSHA standards).

68 See supra Part I.B.2.

69 For the view that the environmental statutes' citizen suit provisions fail to assist low-income communities, see Eileen Guana, Federal Environmental Citizen Provisions, 22 Ecology L.Q. 1, 43-44 (1995) (arguing that "limitations on private enforcement, when considered from the perspective of low income communities and communities of color, inhibit private enforcement action that might otherwise lessen distributional inequities in environmental protection").

70 For a more detailed overview of RCRA, see infra Part II.B.

71 See infra Part II.A.

72 See supra note 56 (listing other environmental statutes' citizen suit provisions).

73 Thus, even if a defendant has not violated a permit requirement or violated RCRA in some other way, citizen plaintiffs may bring suit under the provision whenever a defendant is contributing to an imminent hazard, so long as the provision's elements are fulfilled. See infra Part II.B (discussing RCRA's "imminent hazard" provision, 42 U.S.C. § 6972(a)(1)(B) (1994)).

providing a remedy for the dangers themselves, rather than only for violations of regulatory requirements.[74]

This section first demonstrates that RCRA's scope and purpose include concern for industrial health. RCRA's provisions and history suggest that, while employing the statute in a labor context would be innovative, it also would be consistent with Congress's intent in enacting the statute. Second, this section considers whether a suit to abate sweatshop hazards could satisfy the elements of RCRA's citizen suit provision. Based on the provision's language and judicial interpretation, the section concludes that the provision "fits" the sweatshop scenario.

A. RCRA's Concern with Industrial Health

RCRA is a comprehensive statute governing the treatment, handling, and disposal of solid and hazardous waste.[75] It takes a "cradle-to-grave" approach, regulating waste from its generation through its disposal.[76] The statute provides for the promulgation of guidelines for solid waste collection, transport, and disposal,[77] and it emphasizes the recycling of manufacturing wastes when possible.[78] It takes a broad view of what constitutes "solid waste"[79] and attempts to fill in gaps left by other environmental statutes.[80]

Given the statute's preoccupation with landfills and solid waste disposal systems,[81] an obvious question is whether RCRA applies to

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[74] In other words, to bring a successful citizen suit under one of the other statutes' citizen suit provisions, plaintiffs must show that defendants actually have violated those statutes or the attendant regulations, rather than that defendants have contributed to a substantial endangerment. See, e.g., Clean Water Act, 33 U.S.C. § 1365 (1994) (citizen suit provision).

[75] See Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996) (citing Chicago v. Environmental Defense Fund, 511 U.S. 328, 331-32 (1994)) (describing function and purpose of RCRA).

[76] Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1313 (2d Cir. 1993) (describing function and structure of RCRA).

[77] See Resource Conservation and Recovery Act, 42 U.S.C. § 6902(a)(8) (1994) (listing provision for promulgation of such guidelines among RCRA's objectives).

[78] See id. § 6902(a)(6) (stating RCRA objective of encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment).

[79] See infra Part II.B.2.

[80] See *Remington Arms*, 989 F.2d at 1314 (noting "that RCRA was designed to 'eliminate [the] last remaining loophole in environmental law' by regulating disposal of discarded materials and hazardous wastes" (quoting H.R. Rep. No. 94-1491, pt. 1, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6241)).

[81] See, e.g., 42 U.S.C. § 6902(a)(2) (stating objective of providing training grants for design of solid waste disposal systems); id. § 6902(a)(3) (stating objective of prohibiting future open dumping on land and requiring conversion of open dumps to facilities that do not pose danger to environment or health); id. § 6902(a)(9) (promoting national research and development program for improved solid waste management techniques); id.

industrial health at all. Even if the statute's language seems applicable, a suit would fail if no connection were established between sweatshops and the concerns underlying RCRA. It is therefore important to consider whether the statute as a whole is concerned with human health and whether this concern can be read to encompass a concern with industrial health as well.

1. Statutory Indications and Legislative History

RCRA indicates a concern for industrial health in both its purpose and its "Employee Protection" provision. The statute's stated purpose is to protect the environment and human health.[82] The statute does not protect human health only from "outdoor" environmental harms or protect only the "green" environment.[83] Instead, it promotes health by addressing the generation, handling, and disposal of solid waste wherever it may be found.[84] The "Employee Protection" section of RCRA has an explicit goal of protecting workers, both from the dangers of working with waste and from retaliation for instituting RCRA proceedings at their jobs.[85] A subsection entitled "Occupational Safety and Health" acknowledges the connection between solid waste and occupational dangers.[86] It directs the Environmental Protection Agency (EPA) to provide information about wastes and hazards to workers "[i]n order to assist the Secretary of Labor and the Director of the National Institute for Occupational Safety and Health in carrying out their duties" under the Occupational Safety and Health Act.[87]

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§ 6902(a)(10) (promoting construction and application of solid waste management systems that preserve quality of air, water, and land resources).

[82] See id. § 6902(a).

[83] RCRA does not define "environment." See id. § 6903. In common usage, the "environment" is defined as "[t]he circumstances or conditions that surround one," "[t]he totality of circumstances surrounding an organism or a group of organisms, especially . . . the combination of external physical conditions that affect and influence the growth, development, and survival of organisms." The American Heritage Dictionary of the English Language 616 (3d ed. 1992). Environmental impacts on human health therefore may come from the air humans breathe, whether indoors or outdoors, the substances they touch, and the water they drink, among other factors.

[84] See 42 U.S.C. § 6902 (stating objective of "promot[ing] the protection of health and the environment"); id. § 6972(a)(1)(B) (authorizing citizen suits against persons whose handling, storage, treatment, transportation, or disposal of solid waste presents "imminent and substantial endangerment" to health or environment).

[85] See id. § 6971 (prohibiting, in section entitled "Employee Protection," discrimination or retaliation against any employee who has "filed . . . or caused to be filed" proceedings under RCRA, and providing for remedies in event of unlawful discrimination).

[86] Id. § 6971(f) (added by Pub. L. No. 96-482, 94 Stat. 2347 (1980)).

[87] Id.

RCRA's legislative history indicates that applying the statute in an industrial context would be consistent with Congress's intent. Congress's aim was to eliminate loopholes in the environmental statutory regime[88] by addressing the dangerous effects of manufacturing and disposal processes.[89] The House Report highlighted a wide range of industrial practices[90] and indicated an intent to include occupational injuries from hazardous substances within its scope.[91] One example in the House Report describes an incident in which treatment of organic lead waste resulted in alkyl lead intoxication and caused plant employees to be exposed to vapor hazards.[92] The House Report also states that the term "discarded materials" will refer to "industrial, municipal, or post-consumer waste; refuse, trash, garbage and sludge."[93] In short, Congress did not preclude the courts from interpreting RCRA's reach to include environmental hazards in the workplace.

2. *Judicial Interpretations*[94]

Courts consistently have recognized Congress's expansive objectives in enacting RCRA,[95] and at least two federal courts of appeal have taken judicial notice of RCRA's concern for workers in particu-

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88 See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1313, 1314 (2d Cir. 1993) (citing H.R. Rep. No. 94-1491, pt. 1, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6241 (specifying that RCRA was designed to eliminate last remaining loophole in environmental law—solid wastes that did not fall under other environmental statutes dealing with air and water)).

89 See H.R. Rep. No. 94-1491, pt. 1, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240. "Even more threatening [than dumps and landfills] are the present disposal practices for hazardous waste." Id. at 11, reprinted in 1976 U.S.C.C.A.N. at 6249.

90 In its report, Congress included sections on such diverse problems as mining waste, sludge, and discarded car tires. See id. at 54-55, reprinted in 1976 U.S.C.C.A.N. at 6293.

91 For example, the House Report's illustrative list of "actual instances of damage" caused by waste disposal cites such diverse settings as a former plant site used for mercury, a factory complex with arsenic, and a sewer line. See id. at 17-18, reprinted in 1976 U.S.C.C.A.N. at 6254-56. The examples do not specify whether the damage was inside or outside the buildings.

92 See id. at 20-21, reprinted in 1976 U.S.C.C.A.N. at 6258. Another example cites a bulldozer operator who was killed in an industrial explosion. See id. at 19, reprinted in 1976 U.S.C.C.A.N. at 6256.

93 Id. at 2, reprinted in 1976 U.S.C.C.A.N. at 6240. When discussing the kinds of resources to be recovered, the House Report mentions such diverse materials as steam, fuel, ammonia, scrap iron, and paper. See id. pt. 2, at 91, reprinted in 1976 U.S.C.C.A.N. at 6327.

94 This section benefits from research and interpretation completed by Nancy Marks, Senior Attorney, Natural Resources Defense Council.

95 For example, the D.C. Circuit discussed Congress's purpose of protecting health in American Mining Congress v. EPA, 824 F.2d 1177, 1179 (D.C. Cir. 1987); see also Zands v. Nelson, 779 F. Supp. 1254, 1261 (S.D. Cal. 1991) (noting Congressional finding that "'disposal of solid waste . . . without careful planning and management can present a danger to human health and the environment'" (quoting 42 U.S.C. § 6901(b)(2) (1988))).

lar. The First Circuit, in dicta in *United States v. Borowski*, noted that RCRA, unlike the Clean Water Act, "exhibits explicit concern for industrial health."[96] In *Borowski*, employees sued under the Clean Water Act, claiming that their employer had violated standards for discharges and knowingly had put employees in "imminent danger of death or serious injury" in violation of the statute.[97] The court held that, although the employer knowingly had violated the Clean Water Act[98] and had exposed employees to hazardous chemicals with "grossly inadequate" protection, the Clean Water Act was not intended to protect employees, so there was no violation of its "imminent danger" provision.[99]

The *Borowski* court cited RCRA in support of its conclusion that the Clean Water Act is not concerned with employees' safety. The court emphasized that RCRA governs the "general handling, treatment and storage of hazardous substances," whereas the Clean Water Act "is not directed at the *handling* of pollutants."[100] RCRA, in contrast to the Clean Water Act, contains provisions referring to occupational health and OSHA.[101] The court concluded on this basis that RCRA "exhibits explicit concern for industrial health."[102] The court implied that RCRA would protect employees and that the term "handling" refers to workers' contact with substances that endanger their health.[103]

In *United States v. Protex Industries, Inc.*,[104] the Tenth Circuit affirmed the criminal conviction under RCRA's "knowing endangerment" provision[105] of a defendant corporation that knowingly placed its employees in imminent danger of death or serious bodily injury as a result of "woefully inadequate" safety provisions for protecting employees against the dangers of toxic chemicals in a drum recycling fa-

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96 977 F.2d 27, 31 (1st Cir. 1992).

97 The Clean Water Act, 33 U.S.C. § 1319(c)(3) (1994), provides criminal penalties for any person who knowingly violates various provisions of the Act and who knowingly "places another person in imminent danger of death or serious bodily injury."

98 Id. § 1317.

99 See *Borowski*, 977 F.2d at 31-32.

100 Id. at 31.

101 See supra notes 85-87 and accompanying text (discussing 42 U.S.C. § 6971 (1994)).

102 *Borowski*, 977 F.2d at 31.

103 See id.; see also Vermont v. Staco, Inc., 684 F. Supp. 822, 836 (D. Vt. 1988) (holding that defendants' use of mercury in manufacturing process in "plant environment that subjected workers to exposure to volatilized mercury," coupled with inadequate protective procedures to prevent employees from becoming carriers of mercury, constituted handling within RCRA), vacated in part on other grounds, No. Civ. 86-190, 1989 WL 225428, at *8 (D. Vt. Apr. 20, 1989) (vacating RCRA claim because of defective notice); infra Part II.B.3 (providing statutory analysis of "handling").

104 874 F.2d 740 (10th Cir. 1989).

105 42 U.S.C. § 6928(e).

cility.[106] Government experts testified that without proper safety precautions, the employees were at an increased risk of suffering solvent poisoning, which may cause psychoorganic syndrome, and an increased risk of contracting cancer as a result of their extended exposure to the toxic chemicals.[107]

RCRA's emphasis on protecting human health and its concern with employees suggest that applying the statute to occupational environmental hazards would be reasonable. This conclusion is bolstered both by the *Borowski* and *Protex* courts' findings that RCRA is concerned with industrial health.

B. The Citizen Suit Provision Applied to Sweatshops

This section outlines the elements of an "imminent hazard" action under RCRA, as applied to the sweatshop context. The citizen suit provision authorizes any person[108] to commence a civil action against any person who has contributed to the handling or disposal of any solid waste that may present an imminent and substantial endangerment to human health.[109] Two features of the law should be noted.

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106 *Protex*, 874 F.2d at 742.

107 See id. RCRA's "knowing endangerment" provision states that any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under RCRA in violation of RCRA's criminal provisions, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall be guilty of an offense against the United States. See 42 U.S.C. § 6928(e), cited in *Protex*, 874 F.2d at 743.

For further discussion of the use of environmental statutes' criminal provisions to enforce workplace safety standards, see Rhinehart, supra note 57, at 363-67 (discussing mixed record in cases using RCRA and other environmental statutes' criminal "knowing endangerment" provisions in workplace contexts). See generally John Gibson, The Crime of "Knowing Endangerment" Under the Clean Air Act Amendments of 1990: Is It More "Bark than Bite" as a Watchdog to Help Safeguard a Workplace Free from Life-Threatening Hazardous Air Pollutant Releases?, 6 Fordham Envtl. L.J. 197 (1995) (describing criminal enforcement of environmental law); Maakestad & Helm, supra note 49, at 16 (citing criminal prosecution as one of three most important incentives for employers to run safer workplaces); Robert G. Schwartz, Jr., Comment, Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions, 14 Harv. Envtl. L. Rev. 487 (1990) (describing criminal enforcement of environmental law in workplace context).

108 Although the provision is associated with "citizen suits," its language does not require that the plaintiff ("any person") actually be a citizen (or a documented immigrant). For a discussion of which plaintiffs have standing to bring such a case, see infra Part III.A.

109 A fuller text of the provision provides that any person may commence a civil action

> against any 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 the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B).

First, it targets ongoing, as opposed to past, hazards.[110] Sweatshop conditions are well-suited to a provision that focuses on imminent danger, because they continue to injure workers on a daily basis.[111] Second, RCRA provides injunctive relief rather than damages for past clean-ups. It authorizes courts to "restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . to order such person to take such other action as may be necessary, or both."[112] Thus, a court could both prohibit behavior on the part of sweatshop operators and command them to take steps to alleviate dangers.[113] Such flexible injunctive power would prove an effective tool for enforcing safety standards, as it allows judges to give specific directives when necessary.[114]

Applying RCRA's citizen suit provision to sweatshops raises at least three questions. First, does the provision's scope extend to the workplace? Second, are the substances at issue in sweatshops solid waste that presents a danger to people working in the shops? Third, can contractors and manufacturers be held responsible for eliminating the dangerous conditions caused by those substances? This section will address each of these questions and conclude that the RCRA citizen suit provision can be a useful and appropriate tool for alleviating the problems inherent in sweatshops.

1. Authority to Bring Citizen Suits

RCRA's citizen suit provision allows plaintiffs to bring suit in the same instances in which the EPA is authorized to bring suit.[115] This begs the question why, if RCRA can be used in a labor context, the

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110 See Meghrig v. KFC W., Inc., 516 U.S. 479, 483-84 (1996) (holding that RCRA's citizen suit provision is designed to minimize present and future threats to human health and environment, not to provide compensation for past cleanup efforts).

111 See, e.g., Keenlyside et al., supra note 22, at 4 (reporting that workers exposed to formaldehyde, other finishing chemicals, and dust at garment shop complained of eye irritation, headaches, coughing, sneezing, and skin irritation suggestive of formaldehyde sensitivity).

Unhealthy conditions in sweatshops are cumulative in their effects, which is why the worst effects are suffered by those who, because of poverty and lack of other marketable skills, must work extremely long hours for many years. See Lee interview, supra note 21 (reporting that she knew her job at garment factory was making her sick, but felt she could not quit because she had come from China with no money, no job skills, and no knowledge of English and, therefore, could not get another job); Wu interview, supra note 4 (reporting that because piecework wages have gone down in recent years, many seamstresses have increased their workload to about 13 hours per day).

112 42 U.S.C. § 6972(a).

113 See *Meghrig*, 516 U.S. at 484.

114 See infra Part III.B for a discussion of possible remedies in the sweatshop context.

115 Section 6973, 42 U.S.C. § 6973(a), authorizes the EPA administrator to bring a suit

EPA has not taken action to abate workplace hazards under its authority. The fact that the EPA has not acted on this authority does not signify that it is unable to act. Rather, the EPA has declined to act on its authority when the hazards involve "[o]ccupational exposures," due to an agreement with OSHA.[116] Since both agencies agreed, presumably as a matter of resource allocation, that OSHA has the lead role among federal executive agencies in providing for the safety and health of workers,[117] the EPA has left administrative enforcement of workplace safety to OSHA,[118] despite the EPA's authority to address occupational exposures. The EPA's deference to OSHA in the workplace context, however, is a matter of agency policy, and is not binding on citizen plaintiffs under the citizen suit provision. Since the EPA has the authority to bring imminent hazard cases in the workplace context, citizens have coextensive authority under RCRA's citizen suit provision.

> on behalf of the United States in the appropriate district court against any 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 [upon receipt of evidence that] the past or present handling, 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 two provisions are to be read as parallel. See Toledo v. Beazer Materials & Servs., Inc., No. 90-CV-7344, 1995 WL 770396, at *9 (N.D. Ohio June 14, 1995) ("RCRA['s citizen suit provision] was intended by Congress to provide a private means of obtaining the same relief authorized to the USEPA by [§ 6973(a)] and should be evaluated pursuant to the standard of liability established under [§ 6973(a)]."); H.R. Rep. No. 98-198(I), at 53, reprinted in 1984 U.S.C.C.A.N. 5576, 5612 (noting parallel between § 6973(a) and § 6972(a) of 42 U.S.C. (1994)); see also infra notes 122-24 and accompanying text (regarding *Remington Arms* court's analogy between these two imminent hazard provisions).

116 Proposed Rules, Environmental Protection Agency, 55 Fed. Reg. 30,798, 30,831 (1990) (proposed July 27, 1990).

In 1990, the EPA and OSHA concluded a memorandum of understanding delineating areas of responsibility for each agency for facilities that are under the jurisdiction of both agencies, and providing guidelines for interface activities between the two agencies. See Memorandum of Understanding, supra note 65. While the memorandum does not state specifically that the EPA will defer to OSHA in matters that concern the employer-employee relationship, the EPA stated this policy in its comments to proposed rule 40 C.F.R. § 264.525. Proposed Rules, Environmental Protection Agency, supra (citing OSHA Instruction CPL 2-2.37A of Jan. 29, 1986).

117 See Memorandum of Understanding, supra note 65.

118 See id.

2. *Solid Waste That May Present an Imminent and Substantial Endangerment to Human Health*

RCRA deals primarily with solid waste.[119] Therefore, a crucial question is whether the hazard in question is attributable to solid waste. RCRA defines solid waste[120] as

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.[121]

This statutory definition is more capacious than the regulatory definition of solid waste.[122] Courts have held that the inclusive statutory definition applies to the citizen suit imminent hazard provision.[123]

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119 See Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996) ("RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste."). RCRA's official name is the Solid Waste Disposal Act, and the Act is codified in the United States Code chapter entitled "Solid Waste Disposal." 42 U.S.C. (1994).

120 Hazardous waste is a subset of solid waste under RCRA. See 42 U.S.C. § 6903(5) (defining hazardous waste as solid waste which, "because of its quantity, concentration, or physical, chemical, or infectious characteristics may" either cause increase in mortality or serious irreversible or incapacitating illness, or pose substantial hazard to human health or environment when improperly handled). Due to a number of technical requirements, plaintiffs suing a sweatshop under RCRA would be unable to assert that the dust and fumes they encounter are "hazardous waste." See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir. 1993) (explaining relationship between hazardous and solid waste under regulations); 40 C.F.R. § 261.30 (2000) (presenting EPA regulations on hazardous waste); id. §§ 261.20-24 (listing criteria for hazardous waste). Therefore, plaintiffs could sue only under the more inclusive "solid waste" provision. See 42 U.S.C. § 6903(27) (defining solid waste broadly to include "any garbage, refuse . . . and other discarded material"). In an imminent hazard suit, the broad statutory definition of solid waste, rather than the more narrow and technical regulatory definition of solid waste, is used. See infra notes 122-24 and accompanying text.

121 42 U.S.C. § 6903(27).

122 The regulatory definition of solid waste requires that the waste be "abandoned" or "disposed of." 40 C.F.R. § 261.2(a)(2), (b)(1) (2000). The EPA argued, for example, as amicus in *Remington Arms*, that lead shot and clay targets were not included in the narrow regulatory definition. See *Remington Arms*, 989 F.2d at 1315.

123 RCRA regulations specify that the broad statutory definition applies to imminent hazard suits brought by the United States government under 42 U.S.C. § 6973, a provision analogous to § 6972(a)(1)(B). See *Remington Arms*, 989 F.2d at 1314 (citing 40 C.F.R. § 261.1(b)(2)(ii) (1988)). The court in *Remington Arms* reasoned that since the citizen suit provision is "nearly identical" to the government imminent hazard provision, the regulatory language of 40 C.F.R. § 261.1(b)(2)(ii) (and, therefore, the broad statutory definition of solid waste) also must apply to citizen imminent hazard suits. *Remington Arms*, 989 F.2d at 1314; see also L.E.A.D. v. Exide Corp., No. CIV. 96-3030, 1999 WL 124473, at *6 (E.D. Pa. Feb. 19, 1999) ("Courts have expansively interpreted 'solid waste' in § 7002 of the RCRA [42 U.S.C. § 6972] to be broader than the EPA's regulatory definition of solid waste . . . .") (citing Owen Elec. Steel Co. v. Browner, 37 F.3d 146, 148 n.3 (4th Cir. 1994) (applying broad statutory definition of solid waste rather than narrower regulatory defini-

Within this definition, sweatshop wastes fall under the catch-all phrase "discarded material." Discarded material is a generic term identifying collectively "those substances often referred to as industrial, municipal, or post-consumer waste; refuse, trash, garbage, and sludge."[124] The dust, fibers, lint, and fumes generated in sweatshops are included in this definition, since they are waste by-products of the apparel manufacturing process.[125]

Courts have held that the important question when determining whether material is "discarded" is whether it will be reused later in the manufacturing process. They further have noted that material is not "discarded" if it is in-process secondary material destined for immediate reuse.[126] Under this test, sweatshop waste is "discarded" since it is not reused.[127] Plaintiffs would be most successful if they emphasized the fact that once cotton dust and fumes are emitted, they are not used again in the garment manufacturing process.

Moreover, *American Mining Congress v. EPA*[128] and *Zands v. Nelson*[129] both emphasized that waste is often "discarded" within the meaning of the statute, even when the defendants had not intended to

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tion); Comite pro Rescate de la Salud v. Puerto Rico Aqueduct & Sewer Auth., 888 F.2d 180, 184-87 (1st Cir. 1989) (accepting EPA's narrow reading of exception to solid waste definition in citizen suit context)).

[124] *Remington Arms,* 989 F.2d at 1314 (citing H.R. Rep. No. 94-1491 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240); see also *L.E.A.D.*, 1999 WL 124473, at *6 (noting that key term to interpret is "discarded material," since citizen suit provision, unlike regulatory definition, does not contain terms "abandoned" or "disposed of," and stating that "discarded material" simply means that material is discarded because it has been left to accumulate after serving its intended purpose) (citing Catellus Dev. Corp. v. United States, 34 F.3d 748, 752 (9th Cir. 1994); United States v. ILCO, Inc., 996 F.2d 1126, 1131 (11th Cir. 1993); *Remington Arms,* 989 F.2d at 1316; Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991)).

[125] One question that could arise regarding the term "discarded" is how long waste must be abandoned before it can be considered discarded. In *Remington Arms*, the EPA argued that lead shot and clay debris from a skeet shooting club were "discarded" by virtue of their being "left to accumulate long after" their intended purpose. *Remington Arms*, 989 F.2d at 1316. The court held that the materials were discarded, but declined to decide how long is long enough. See id. A sweatshop operator or manufacturer might respond to an argument along these lines by claiming that sweatshop waste is not "discarded" because it only sits on the shop floor for a few days before being swept up.

[126] See *Remington Arms*, 989 F.2d at 1316 (citing American Mining Congress v. EPA, 824 F.2d 1177, 1186 (D.C. Cir. 1987)); see also *Owen Elec. Steel Co.*, 37 F.3d at 150 (holding that fundamental inquiry in determining whether byproduct has been "discarded" is whether byproduct is recycled immediately for use in same industry; if not, then byproduct is part of waste disposal problem and therefore "solid waste" within RCRA).

[127] The *Remington Arms* court also cited American Petroleum Inst. v. EPA, 906 F.2d 729, 741 (D.C. Cir. 1990), for the proposition that once a product is discarded, it is part of the "waste disposal problem" and can be regulated under RCRA. *Remington Arms*, 989 F.2d at 1316 (internal quotation marks omitted).

[128] 824 F.2d 1177 (D.C. Cir. 1987).

[129] 779 F. Supp. 1254 (S.D. Cal. 1991).

discard the waste. In *Zands*, the defendants had no intention of allowing the gasoline in question to leak, but the leaking still qualified as disposal, albeit inadvertent.[130] Similarly, the *American Mining Congress* court, in looking at the definition of discarded waste, assumed an ordinary meaning of the word that includes "thrown away" and "abandoned."[131] The court emphasized the congressional purpose of protecting health and the environment. A court that keeps this purpose in mind in analyzing sweatshop waste should conclude that it is "discarded."

Even if sweatshop waste products were deemed "solid waste," plaintiffs still would have to show that these substances may present an imminent and substantial endangerment to human health. According to the statute, plaintiffs only need show that endangerment *may* exist.[132] They must show "endangerment or a threat" and need not demonstrate actual harm.[133] One court defined the requirement as a need for "reasonable cause for concern that someone or something may be exposed to a risk of harm if remedial action is not taken."[134]

In the sweatshop context, plaintiffs would not need to demonstrate conclusively that dust caused their respiratory problems, nor that it certainly would cause such problems in the future. They would not need to show that their health problems were due *only* to dust. Instead they could show, for example, that sweatshop workers have reported respiratory problems at high rates and that fibers and fumes may be causing those problems.

A similarly flexible standard exists with respect to imminence. The harm need not constitute an immediately urgent situation.[135] On

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130 See id. at 1262.

131 824 F.2d at 1183-84.

132 See Wilson v. Amoco Corp., 989 F. Supp. 1159, 1172 (D. Wyo. 1998) ("[I]t is not necessary that Plaintiffs show the contamination is damaging, or will damage, health or the environment. It is enough to show that such an endangerment 'may' exist .... Plaintiffs need not show actual harm to health or the environment, only threatened harm." (citing Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 557 (1992); United States v. Price, 688 F.2d 204, 211 (3d Cir. 1982))).

133 See Price v. United States Navy, 39 F.3d 1011, 1019 (9th Cir. 1994) ("A finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present ....").

134 Foster v. United States, 922 F. Supp. 642, 661 (D.D.C. 1996) (citing United States v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985) (defining imminence and substantiality requirements)).

135 See *Wilson*, 989 F. Supp. at 1174 (stating that while imminence encompasses emergencies, imminent and substantial endangerment also may exist when dangerous conditions are present, even if actual harm is uncertain or far in future); see also Raytheon Co. v. McGraw-Edison Co., 979 F. Supp. 858, 862 (E.D. Wis. 1997) (holding that finding of imminence does not require showing that actual harm will occur immediately so long as risk of threatened harm is present (citing *Price*, 39 F.3d at 1019)).

the other hand, it must be serious. As one court put it, "there must be some necessity for the action."[136] Federal or state safety and health regulations can serve as indications of what may constitute substantial endangerment, but they are not conclusive.[137]

In the case of sweatshops, if the levels of dust, fumes, or formaldehyde were shown to be above levels set by OSHA's guidelines, or if workers were shown to be exposed to chemicals that OSHA considers potentially dangerous, that would constitute evidence that a substantial endangerment exists. In the past, courts have analyzed the requirements of imminence and substantiality in terms of cumulative health risks of the kinds garment workers suffer.[138] Other evidence, such as a report by the National Institute for Occupational Safety and Health finding that garment workers exposed to formaldehyde developed eye and upper respiratory irritation, also could support a finding of substantial endangerment.[139] Even testimony from a large number of garment workers describing similar health problems could demonstrate that the "potential for harm is great."[140]

3. *Manufacturer Contribution*

Once plaintiffs showed that conditions in sweatshops presented a substantial health risk attributable to by-products of the manufacturing process, they would have to demonstrate that the defendants were responsible for abating the hazard. Unlike traditional labor law cases, an inquiry in a RCRA case would not focus on determining whether a

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136 *Price*, 39 F.3d at 1019.

137 In Rose v. Union Oil Co., No. C 97-3808 FMS, 1999 WL 51819, at *2-*3 (N.D. Cal. Feb. 1, 1999), the defendant's ability to show that the concentration of contaminant in the water in question was within state guidelines for drinking water, inter alia, defeated plaintiffs' RCRA claim. In making "imminence" determinations, courts also have looked at such factors as experts' assessments of the risks, see *Foster*, 922 F. Supp. at 661-62, witnesses' testimony that they saw construction debris coming out of the landfill and going into the site, see Prisco v. New York, 902 F. Supp. 374, 394 (S.D.N.Y. 1995), and expert testimony as to whether the substances in issue were contained effectively, see Price v. United States Navy, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992), aff'd, 39 F.3d 1011 (9th Cir. 1994).

138 See, e.g., Toledo v. Baezer Materials & Servs., Inc., No. 90-CV-7344, 1995 WL 770396, at *9 (N.D. Ohio June 14, 1995) (applying "cumulative carcinogenic site risk" analysis to determine whether imminent and substantial endangerment risk existed under RCRA).

139 See Keenlyside et al., supra note 22, at 5.

140 Foster v. United States, 922 F. Supp. 661, 661 (D.D.C. 1996) (quoting United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989)). Since plaintiffs would not be seeking damages, they would not have to show that the waste—as opposed to smoking or diesel exhaust—proximately caused their injuries. They only would need to demonstrate that the waste may pose an imminent and substantial health risk.

defendant is the direct employer of the plaintiffs.[141] Rather, RCRA, like most environmental statutes, focuses on determining who has contributed to the harm. This feature makes RCRA a useful vehicle for holding manufacturers, as opposed to only contractors, responsible for abating dangerous conditions.[142]

The appropriate target of a citizen suit is "any 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."[143] Generators, transporters, owners, and operators illustrate, but do not exhaust, the types of "person" against whom a plaintiff could bring suit.[144] Of all the options on the list, sweatshop operators and garment manufacturers most likely would be considered "generators" of hazardous waste.[145] RCRA defines "hazardous waste generation" as the process of producing hazardous waste.[146] It does not define "generator" or "solid waste generation."[147] To establish that contractors or manufacturers generate waste, plaintiffs would have the relatively easy task of showing that the manufacturing process produces dust and fumes.[148]

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141 See generally Goldstein et al., supra note 39 (describing labor law's traditional focus on identifying employer).

142 See supra Part I.B.1 for a discussion of the importance of "getting the manufacturer" in order to solve safety and wage abuses in garment sweatshops.

143 42 U.S.C. § 6972(a)(1)(B) (1994).

144 Regarding the analogous § 7003 (EPA's imminent hazard authority), the House Report says that the section covers persons who "include, but are not limited to, past and present generators." H.R. Rep. No. 98-198, pt. 1, at 48 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5607.

145 There is no evidence that anyone in the garment manufacturing process "transports" anything. It also would be difficult to show that sweatshop operators are "owners or operators of a treatment, storage, or disposal facility." 42 U.S.C. § 6972(a)(1)(B). While the statute does not specifically define a treatment facility, storage facility, or disposal facility, its definition of "solid waste management facility" indicates that such a facility is designed specifically for that purpose. See id. § 6903(29). A sweatshop is obviously not a system or program designed specifically for the treatment or disposal of solid waste.

146 Id. § 6903(6).

147 At least one court extended the definition of hazardous waste generation to those responsible for solid waste. See Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) (establishing that leaking gas was solid waste for purposes of imminent hazard provision). The *Zands* court emphasized that the term "generators" indicates that "RCRA applies to individuals who do no more than create solid waste." Id. at 1264. The court added: "[T]he mere creation of solid waste, and the subsequent abandonment of it . . . will support a cause of action under section 6972(a)(1)(B)." Id.

148 To make such a showing, garment workers could demonstrate, for example, the dust-generating parts of the production process, such as "marrowing." Marrowing is a process for finishing seams and fraying the ends of the fabric. It generates a fair amount of dust, and workers report that it sometimes causes respiratory problems. See, e.g., Wu interview, supra note 4. To demonstrate that the garment manufacturing process generates chemical fumes, plaintiffs would need to rely on studies like the one completed by the National Institute of Occupational Safety and Health, which showed that garment workers experi-

Even an inability to demonstrate that sweatshop operators are "generators" of solid waste, however, would not be fatal to a RCRA lawsuit. The word "including" means that potential defendants include, but are not limited to, generators, transporters, or owners or operators of the specified facilities. At least one court has held, relying on legislative history,[149] that "[l]iability is not limited to generators and transporters but includes *any person* who contributed to improper disposal."[150] As long as plaintiffs could show that a defendant contributed to the handling or disposal of solid waste, a court could conclude that an industrial facility was the right kind of "person."

RCRA makes liable any person "who has contributed or who is contributing" to the disposal of solid waste.[151] In the context of the garment industry, this term could be critical to holding manufacturers, as opposed to only contractors, responsible. To be effective, any remedy in the sweatshop context would have to include manufacturer liability. Contractors are often elusive, fly-by-night operations that close and reopen in what one author has termed a shell game.[152] Manufacturers, by contrast, are more stable.[153]

Under labor statutes, manufacturers have been shielded from liability because courts generally have interpreted the term "employer" narrowly to include only contractors.[154] Under RCRA, however, liability is not dependent on the employer-employee relationship; rather, it attaches to any party that contributes to the generation of the waste. Manufacturers, by overseeing and directing sweatshop operations,

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ence increased respiratory and eye irritation when exposed to formaldehyde and other "finishing chemicals" in cloth. See Keenlyside et al., supra note 22, at 5.

149 See supra note 144 and accompanying text.

150 United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987) (emphasis added) (citing United States v. Price, 523 F. Supp 1055, 1070 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982)); see also H.R. Rep. 98-1133 (1984), reprinted in 1984 U.S.C.C.A.N. 5649; S. Rep. No. 96-172 (1980), reprinted in 1980 U.S.C.C.A.N. 5019, 5023.

151 42 U.S.C. § 6972(a)(1)(B).

152 See Foo, supra note 33, at 2189; see also Wu interview, supra note 4 (recounting that when her boss learned that fire department was planning to inspect his factory, he simply closed it down). See generally supra Part I.B.1 (describing structure of garment industry and emphasizing importance of holding manufacturers responsible for unsafe conditions in garment sweatshops).

153 See supra Part I.B.1 for a more detailed explanation of the structure of the garment industry (explaining that manufacturers do not produce clothing, but rather design clothing and contract out production).

154 See Goldstein et al., supra note 39, at 983. This recently has begun to change, however, in the wage arena. See Lopez v. Silverman, 14 F. Supp. 2d 405, 406-07, 424 (S.D.N.Y. 1998) (holding garment manufacturer liable for unpaid wages owed by subcontractor); see also N.Y. Lab. Law § 345-a (McKinney 2000) (holding apparel manufacturers and contractors who contract out apparel work liable for wage violations of subcontractors if they knew or should have known that subcontractors failed to comply with labor laws).

"contribute" to the disposal of waste generated by the process.[155] Thus, workers in a RCRA suit could conceivably institute an action against every party in the manufacturing chain that has contributed to the hazard.

Courts have interpreted "contribute" broadly in the environmental context. For example, in *Zands v. Nelson*,[156] a district court, noting that RCRA does not define "contributor," used the dictionary definition: "'to be an important factor in; help to cause.'"[157] Using this definition, the court determined that in assessing responsibility for leaking gas, neither the landowners, the gas pump operators, nor the gas pump installers were beyond the reach of the term "contributors."[158] Similarly, in *Vermont v. Staco, Inc.*,[159] the district court held that the managing stockholders of a parent corporation that owned a mercury thermometer manufacturing company were liable for the release of mercury.[160] The court also held liable the parent corporation itself, the manufacturing company, and a sister subsidiary corporation that owned realty on which the plant was located.[161]

Plaintiffs in a sweatshop suit could argue by analogy that garment manufacturers are at least as involved in handling dangerous waste as were the landowners and pump installers in *Zands*, or the stockholders and parent corporation in *Staco*. Manufacturers give instructions that directly result in waste generation. Waste is generated as part of an industrial chain that is overseen and undertaken for the economic benefit of manufacturers.[162] For these reasons, a court could consider

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155 Plaintiffs might argue that the court should look at factors, such as those employed by the District Court in *Lopez v. Silverman*, to determine the extent to which manufacturers "contributed to" and "generated" the solid waste. See *Lopez*, 14 F. Supp. 2d at 419-20 (applying several factors to determine whether manufacturer was plaintiffs' employer under Fair Labor Standards Act, including extent to which workers performed discrete "line-job" forming integral part of manufacturer's integrated process of production, whether manufacturer's premises and equipment were used for work, extent of employees' work for manufacturer, duration of working relationship, and degree of control exercised by manufacturer over workers and others).

156 779 F. Supp. 1254 (S.D. Cal. 1991).

157 Id. at 1264 (quoting The Random House Dictionary of the English Language (2d ed. 1987)).

158 Id.

159 684 F. Supp. 822 (D. Vt. 1988), vacated in part on other grounds, No. Civ. 86-190, 1989 WL 225428 (D. Vt. Apr. 20, 1989).

160 See id. at 831-32.

161 See id.

162 See, e.g., Lopez v. Silverman, 14 F. Supp. 2d 405, 420 (S.D.N.Y. 1998) ("[P]ractically speaking, the [subcontractors] functioned for certain periods essentially as [the manufacturer's] own sewing and pressing unit, merely located a few blocks away from the main plant."). A further question is whether retailers also "contribute" to the waste's creation and disposal.

manufacturers to be contributing to the creation and disposal of the waste.

In order to bring a successful RCRA suit, plaintiffs also would have to show that defendants contributed to the "handling, storage, treatment, transportation, or disposal" of solid waste.[163] They would do best to allege that manufacturers "handle" solid waste. Handling is the broadest of all the options the statute offers. One court noted that while "handling" is not defined in RCRA, in ordinary usage, to "handle" something is "to deal with or have responsibility" for it.[164]

Additionally, the First Circuit read the term "handle" to indicate that RCRA is specifically concerned with hazards to workers who deal with waste on the job.[165] The court contrasted RCRA with the Clean Water Act, noting that the latter "is not directed at the *handling* of pollutants."[166] Another court has interpreted "handling" to refer to workers' exposure to dangerous materials.[167] These interpretations of the term "handling" are critical in countering the potential argument that a citizen suit must fail if the sweatshop wastes are *ultimately* disposed of safely. These judicial interpretations of "handling" indicate that even if waste is disposed of properly (for example, if dust is swept daily), a citizen suit still may succeed if the waste injures workers while they are *handling* it (i.e., during the manufacturing process, prior to its ultimate disposal).

Plaintiffs alternatively could allege that manufacturers "dispose" of solid waste. RCRA defines disposal as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water so that such solid waste . . . may enter the environment or be emitted into the air."[168] Disposal need not be pur-

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163 42 U.S.C. § 6972(a)(1)(B) (1994).

164 Lincoln Properties v. Higgins, 36 Env't Rep. Cas. (BNA) 1228, 1242 (E.D. Cal. 1993) (citing American Heritage Dictionary 592 (2d College ed. 1985)). Another court has summarized the citizen suit provision as available against anyone who has contributed to solid waste *handling* practices that may present an imminent and substantial endangerment to health or the environment. See Kara Holding Corp. v. Getty Petroleum Mktg., Inc., 67 F. Supp. 2d 302, 310 (S.D.N.Y. 1999); see also L.E.A.D. v. Exide Corp., No. CIV. 96-3030, 1999 WL 124473, at *7 (E.D. Pa. Feb. 19, 1999) (emphasizing "broad scope of 'handling' solid wastes").

165 United States v. Borowski, 977 F.2d 27, 31 (1st Cir. 1992).

166 Id. See supra Part II.A.2 for a more detailed discussion of the *Borowski* court's reading of RCRA as a statute concerned with industrial health.

167 See Vermont v. Staco, Inc., 684 F. Supp. 822, 836 (D. Vt. 1988) ("While the statute leaves ['handling'] undefined, the defendants' use of mercury in the manufacturing process conducted at the Staco plant site, coupled with the inadequate protective procedures to prevent the employees from becoming carriers of mercury, constitutes handling within the Act."), vacated in part on other grounds, No. Civ. 86-190, 1989 WL 225428 (D. Vt. Apr. 20, 1989) (vacating RCRA claim based on notice deficiency).

168 42 U.S.C. § 6903(3).

poseful or systematic; one court confirmed that accidental leaking is included in the statutory definition of disposal.[169] Under this reasoning, haphazard abandonment of waste would constitute disposal whether or not sweatshops had a formal system of disposal in place. Indeed, RCRA is aimed precisely at those industrial processes that generate waste without implementing well-designed disposal procedures.

In conclusion, both statutory definitions and case law indicate that RCRA's citizen suit provision is applicable in the sweatshop context. This is due to the broad definition of such key terms as "solid waste" and to the many options built into the provision. The forward-looking nature of the provision allows plaintiffs to bring actions to abate imminent hazards without proving causation of past injuries.

III
STRATEGIES FOR BRINGING RCRA ACTIONS AGAINST SWEATSHOPS

A. Finding a Plaintiff

Workers and advocates who attempt to bring an action under RCRA's citizen suit provision probably will encounter several obstacles. One is the potential reluctance of garment workers to bring RCRA suits, given the constraints they face.[170] Since RCRA allows courts to hold accountable any party that contributed to the handling of the dangerous wastes,[171] however, a suit under RCRA could reach manufacturers as well as contractors. Workers may prove more willing to take the risk of bringing suit if they feel that there is a chance of reaching the manufacturers responsible for driving down conditions among contractors.[172] In the past, it was possible to find plaintiffs willing to sue operators and manufacturers when it seemed possible to achieve a result other than the closing and reopening of a shop by the contractor.[173]

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169 See Acme Printing Ink Co. v. Menard, 812 F. Supp. 1498, 1512 (E.D. Wis. 1992) (citing definition in 42 U.S.C. § 6903(3) and holding that leaking of hazardous substances may constitute violation of RCRA).

170 See supra Part I.B.

171 See supra Part II.B.3.

172 Additionally, RCRA contains an antiretaliation provision that protects workers from being fired or discriminated against for instituting RCRA proceedings. See 42 U.S.C. § 6971. But see Gauna, supra note 69, at 43-44 (arguing that environmental citizen suit provisions do not make it easy for low-income communities to enforce environmental standards).

173 See, for example, Lopez v. Silverman, 14 F. Supp. 2d 405 (S.D.N.Y. 1998), in which three garment pressers sued garment manufacturer and subcontractor to recover unpaid overtime compensation. It also could be difficult to find attorneys willing to bring RCRA

The reluctance of some potential plaintiffs to bring suit may not lessen RCRA's effectiveness because a RCRA suit brought by a single plaintiff could clean up an entire shop. It is unnecessary for each worker to be willing to bring a suit. Even if no workers were willing to bring RCRA suits against their employers, it is possible that unions or community organizations could initiate action. This possibility, however, raises a second potential problem. As in all environmental citizen suits, plaintiffs in a RCRA imminent hazard action would have to meet the requirement of standing.

The doctrine of standing requires a plaintiff to have suffered an invasion of a legally protected interest that is concrete and particularized, actual or imminent, causally connected to the defendant, and likely to be redressed by a favorable decision.[174] One might assume that a RCRA suit would encounter standing problems unless the plaintiffs were workers who stood to be injured by hazardous conditions.[175]

Courts, however, have interpreted RCRA's citizen suit provision broadly with regard to standing's "zone of interest" requirement. One court focused on the provision's specification that "any person" is authorized by Congress to commence a suit.[176] Similarly, another court

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suits in the workplace context, since labor lawyers are unfamiliar with RCRA and environmental lawyers may be used to thinking of RCRA only in terms of landfills. In this connection, it is worth mentioning that RCRA provides for the possibility of winning attorneys' fees. See 42 U.S.C. § 6972(e) (1994) (providing that court may award costs of litigation, including reasonable attorney and expert witness fees, to prevailing or substantially prevailing party).

174 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted) (setting forth requirements for standing); see also Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. Rev. 1741, 1742 (1999) (noting that standing requires defendant to have caused plaintiff's legally cognizable, judicially redressable injury and requires plaintiff to assert interest within "zone of interest" protected by statute that plaintiff is invoking) (citing 3 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise §§ 16.1-.16 (3d ed. 1994)).

175 The potential objection is that only workers, not worker advocacy organizations, are likely to be found to be within the "zone of interest," a requirement formulated in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). Since imminent hazard suits only address ongoing dangers, it also might not be enough for plaintiffs to have worked at a hazardous site in the past. Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 120 S. Ct. 693, 700-01 (2000) (noting that citizens lack standing under Clean Water Act to sue for violation that has ceased or to sue where EPA or state already has brought enforcement action) (citing 33 U.S.C. § 1365(b)(1)(B) (1994); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56-63 (1987)).

Lopez is illustrative of the problems in finding (and keeping) plaintiffs for sweatshop suits. There, one of the plaintiffs had returned to his country of origin by the time the suit was decided. See *Lopez*, 14 F. Supp. 2d at 407.

176 See Citizens for Better Env't v. Caterpillar, 30 F. Supp. 2d 1053, 1072 n.5 (C.D. Ill. 1998) (noting that plaintiffs fall within broad category of "any person" and thus have standing).

noted that Congress may abrogate the judicially imposed "zone of interest" limits by legislatively extending standing under a particular statute and held that RCRA extends standing to the limits of the Constitution.[177] That court went so far as to hold that the plaintiffs had satisfied constitutional standing requirements simply by alleging violations of RCRA by the defendant.[178] If a court followed this reasoning, it would find that workers' groups, and not only current workers, had standing to bring imminent hazard suits.[179]

B. Requesting an Appropriate Remedy

Another challenge is devising a remedy that effectively will prevent sweatshop operators from engaging in the same shell game that is currently played.[180] If a court ordered a contractor and manufacturer to abate hazardous conditions, the manufacturer simply might direct the contractor to close and reopen across the street. One limitation of RCRA is that a decision would affect only the site named in the suit. Because RCRA's remedies are equitable, however, courts would have

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177 See Long Island Soundkeeper Fund v. New York Athletic Club, 42 Env't Rep. Cas. (BNA) 1421, 1426 (S.D.N.Y. 1996) (citing "any person" language of RCRA's citizen suit provision, 42 U.S.C. § 6972(a)).

178 See *Long Island Soundkeeper Fund*, 42 Env't Rep. Cas. (BNA) at 1427. Plaintiffs in *Long Island Soundkeeper Fund* alleged actual violations of RCRA, relying on the citizen suit's violation provision, 42 U.S.C. § 6972(a)(1)(A), rather than the imminent hazard provision at issue in this Note, id. § 6972(a)(1)(B). See *Long Island Soundkeeper Fund*, 42 Env't Rep. Cas. (BNA) at 1427. The authorization of "any person" to bring a suit includes both citizen suit provisions, however, so the court's reasoning also should apply to imminent hazard citizen suits. See 42 U.S.C. § 6972(a).

179 The Supreme Court's forays into standing in the environmental arena do not make clear how a court should treat a RCRA case brought by a workers' organization. On one hand, the Court has held that plaintiffs could not survive summary judgment merely by showing that one of the organization's members used unspecified portions of an immense tract of land on which mining activity occurred. See *Friends of the Earth*, 120 S. Ct. at 705 (citing Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990)). On the other hand, the Court has held that if several members of an environmental organization demonstrated that they were affected by a defendant's polluting discharges, they could bring a lawsuit. See id. at 704-05. This suggests that a workers' organization would have to show that several of its members were affected directly by the defendant's behavior. The Court also has held that an association has standing to sue on behalf of its members when its members would otherwise have standing in their own right, the interests at stake are germane to the organization's purpose, and neither the claim nor the relief requested requires the participation of individual members in the lawsuit. See id. at 704 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977)). Depending on the nature of the workers' organization or union, it is likely that it could satisfy this requirement.

180 The easier question is what remedies actually would abate the hazards. Remedies could include installing new ventilation systems, see Herbert et al., supra note 22, at 269-70 (describing how one employer reduced formaldehyde levels with new ventilation system); installing more exhaust fans, see Chung and Wu interviews, supra notes 3-4 (reporting that Brooklyn sweatshops where Chung and Wu work lack adequate exhaust fans); or monitoring the levels of formaldehyde on material.

flexibility in designing remedies to ensure that manufacturers abated hazards in all sweatshops from which they ordered goods.[181]

In the past, some courts were willing to apply environmental statutes to advance environmental justice.[182] Even if plaintiffs could convince a court that RCRA applied to workplace hazards, they would still have to convince the court to design an effective, enforceable remedy.

C. *Testing RCRA in Other Labor Contexts*

Sweatshops are only one context in which workers could utilize RCRA's protections. Activists also have considered bringing RCRA suits in other industries.[183] There may be strategic reasons for labor activists to establish RCRA's viability in the labor context by targeting an industry with larger, more stable workplaces. The very features of sweatshops that create the need to supplement labor law also would make the prosecution of a RCRA suit against sweatshop operators difficult. Sweatshops are small, with unstable workforces. They close and open quickly.[184] These features could make it difficult to pin down a sweatshop long enough to hold the contractor or the manufacturer liable.

Other industries may not experience the same problems. Activists and union leaders have considered bringing suits in stable, heavily unionized industries.[185] The advantages of such a strategy include the fact that workers are already organized, factory locations are less likely to change, it is generally clear who the employers are, and employers are less likely to be judgment-proof. On the other hand, such industries may not need RCRA as much as sweatshops do, since their workers do not face the same fears of deportation or replacement with undocumented workers. Workers in organized industries also can rely on traditional avenues for addressing hazards, such as union activity

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181 See Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983) (holding that RCRA's citizen suit provision authorizes courts to utilize full legal and equitable powers and that nothing in RCRA bars injunctive relief).

182 See, e.g., El Pueblo para el Aire y Agua Limpio v. County of Kings, 22 Envtl. L. Rep. 20,357 (Cal. Super. Ct. 1991) (finding inadequate environmental impact report and invalidating permit for construction of hazardous waste incinerator in predominantly Latino community).

183 See Interview with Nancy Marks, Senior Attorney, Natural Resources Defense Council, in N.Y., N.Y. (Dec. 8, 1999) (discussing possible extensions of RCRA to labor contexts).

184 See supra Part I.B.1.

185 See Interview with Nancy Marks, supra note 183 (discussing advantages and disadvantages of bringing RCRA suits in various industries).

and, in some cases, OSHA enforcement of health and safety standards.[186]

Despite these advantages, workers in organized, stable industries still may benefit from RCRA. RCRA's primary advantage is that it allows workers themselves to sue for abatement of hazards, instead of having to petition OSHA and then wait for it to decide whether it can institute a proceeding.

CONCLUSION

RCRA affords broad protections against environmental dangers to human health. The "imminent hazard" provision protects people against environmental dangers in a wide range of contexts. There is no reason to suppose that the concerns that motivated Congress to enact this provision lose their force when dangers are found in the workplace. On the contrary, the imminent hazard provision is designed to give enforcers the flexibility to abate hazards wherever and however they arise.

RCRA may play a particularly important role in addressing environmental dangers in sweatshops, where labor laws and the sweatshop system make it difficult to enforce health standards.[187] Because RCRA's citizen suit provision addresses some of the dangers in garment shops,[188] workers should use its protective power. RCRA's history shows that it may be used to protect human health from environmental hazards in a broad range of contexts, including the labor context.

Sweatshops comprise an entire industrial sector the workforce of which is not protected adequately by traditional labor laws and institutions. The large supply of undocumented workers, the structure of the apparel industry, and institutional factors such as OSHA's insufficient resources make sweatshops the site of chronic labor law violations. RCRA's citizen suit provision is an appropriate, if innovative, tool for abating dangers resulting from the handling of wastes such as fibers, dust, and fumes. RCRA will not solve the problem of sweat-

186 Since OSHA does not inspect shops with fewer than 10 employees, many sweatshops virtually never will undergo inspection. Larger, more stable factories, on the other hand, may be inspected by OSHA. See Sweatshops in the U.S., supra note 16, at 44 (noting that OSHA inspections are targeted to construction and "high hazard" manufacturing industries and that OSHA exempts from targeted inspections establishments with 10 or fewer employees).

187 See Ruddick, supra note 44, at 1, 4.

188 See supra Part II.B.

shops, nor can it compensate for a weak and ineffective apparatus of worker protection. It may prove, however, a powerful and effective supplement to labor law in the arena of health and safety in the workplace.