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THE WTI INCINERATOR: THE RCRA CITIZEN SUIT AND THE EMERGENCE OF ENVIRONMENTAL HUMAN RIGHTS

HALLIE L. SHIPLEY[†]

ABSTRACT

The WTI Incinerator currently operates in East Liverpool, Ohio, burning toxic waste despite a district court ruling that held it posed an imminent and substantial risk to both human health and the environment. Unfortunately for the Ohio plaintiffs, the Circuit Court of Appeals in this case misinterpreted the RCRA Citizen suit provision, barring any remedy for the Ohio citizens who brought the suit. This flawed interpretation has been adopted nationwide by other Appellate Circuit Courts.

This article compares the remedies available to U.S. citizens for environmental harms with those remedies available to the citizens under the European Union Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights, using the WTI Incinerator as a case study. This article argues that Congress needs to rewrite the RCRA citizen suit provision to allow for the remedies it originally intended to allow U.S. citizens the same redresses against environmental harms enjoyed by those citizens in other international jurisdictions.

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I. INTRODUCTION

On June 9, 2009, residents of East Liverpool, Ohio, looked out their windows to see a pink plume on the horizon.¹ The plume was the result of iodine released from the stacks of the Waste Technologies Industries (WTI) hazardous waste incinerator.² A power outage at the plant caused suppression sprayers, which normally alter the chemical to remove the pink color, to fail.³ While the Ohio and United States Environmental Protection Agencies held a meeting to assure the public that they were not in any danger, citizens were not convinced.⁴ Perhaps their skepticism stemmed from the numerous safety and legal issues that have plagued WTI since it began operations in 1993.⁵

WTI sits 320 feet from the nearest residence and 1,100 feet from an elementary school.⁶ The school is at the same elevation as the top of the emissions stack.⁷ The

¹ Jo Ann Bobby-Gilbert, *Pink Plume Was Iodine, Nothing Hazardous*, THE REVIEW (East Liverpool), (Nov. 20, 2009), <http://www.reviewonline.com/page/content.detail/id/521231.html?nav=5008>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See *Enforcement and Compliance History Online Detail Facility Report for WTI*, EPA-ECHO.GOV (Sept. 1, 2010), <http://www.epa-echo.gov/cgi-bin/get1cReport.cgi?tool=echo&IDNumber=110027242320>; Michael D. McElwain, *Ohio EPA: Heritage-WTI in Violation of Permit*, THE REVIEW (East Liverpool) (June 26, 2010), <http://www.reviewonline.com/page/content.detail/id/528255.html?nav=5008>.

⁶ Ashley Schannauer, *Issues in Environmental Law: The WTI Risks Assessments: The Need for Effective Public Participation*, 24 VT. L. REV. 31, 34 (1999) [hereinafter Schannauer, *WTI Risk Assessments*].

⁷ *Id.* at 34.

facility burns approximately 60,000 pounds of hazardous waste a year.⁸ The school has an emergency response plan in the event of an accident at the WTI facility; it involves duct tape.⁹ WTI is located on the bank of the Ohio River at the point where Ohio, West Virginia, and Pennsylvania meet¹⁰ and has been the target of both health and environmental groups attempting to stop the facility from operating.¹¹ These groups have used a variety of methods in their fight to get WTI shut down, including social protests and seeking legal injunctions.¹²

In the United States (U.S.), the Resource Conservation and Recovery Act (RCRA) controls the regulation of hazardous waste.¹³ RCRA includes a provision which allows citizens to bring suit against a facility that poses an imminent and substantial endangerment to human health or the environment.¹⁴ However, as this article will discuss, because of the way courts have interpreted the RCRA citizen suit provision, citizens are often unsuccessful in these suits when challenging a facility that has been granted a RCRA permit to operate by the United States Environmental Protection Agency (USEPA). Courts often interpret challenges as collateral attacks of a final agency decision, namely the final decision of the USEPA to grant a facility a permit.¹⁵ This interpretation fails to consider that USEPA permit decisions do not address a facility's possible impact on human health or the environment, which is the main focus of a RCRA citizen suit.¹⁶ Additionally, courts fail to consider that

⁸ THOMAS SHEVORY, *TOXIC BURN: THE GRASSROOTS STRUGGLE AGAINST THE WTI INCINERATOR* viii (2007).

⁹ The East End Elementary School's emergency response plan involves collecting all 400 students in the cafeteria, sealing the windows and doors with duct tape and turning off the ventilation system so outside air will not enter the building. This plan seems to assume that moving the children and sealing the room can be done quickly enough to prevent hazardous gases from entering the room, and that an explosion at WTI will not break any of the windows. L.J. Davis, *Where are you At?: Our "Earth in the Balance" Vice President is Unable—or Unwilling—to Stop Even as Dangerous a Project as the Ohio Incinerator*, MOTHER JONES (Nov./Dec. 1993), http://www.ohiocitizen.org/campaigns/wti/mother_jones.html. See also Ashley Schannauer, *RCRA Endangerment Actions: Is a Permit a Defense?*, 21 COLUM. J. ENVTL. L. 287, 360 n.3 (1996) [hereinafter Schannauer, *Permit a Defense?*].

¹⁰ The WTI facility is located at 1250 Saint George Street, East Liverpool, Ohio 43920. A satellite map of the location is available through Google Maps. GOOGLE MAPS, <http://www.google.com/maps> (enter "1250 Saint George Street, East Liverpool, Ohio 43920" into query field and follow "Search Maps" hyperlink).

¹¹ These groups include Ohio Citizen Action, Save Our County, and Greenpeace, among others. See generally SHEVORY, *supra* note 8.

¹² See generally BENJAMIN DAVY, *ESSENTIAL INJUSTICE: WHEN LEGAL INSTITUTIONS CANNOT RESOLVE ENVIRONMENTAL AND LAND USE DISPUTES* 89-124 (1997).

¹³ 42 U.S.C. § 6901 *et seq.* (1976).

¹⁴ 42 U.S.C. § 6972(a) (1978).

¹⁵ See *Greenpeace v. Waste Tech. Indus.*, 9 F.3d 1174 (6th Cir. 1993). See also *Palumbo v. Waste Tech. Indus.*, 989 F.2d 156 (4th Cir. 1993).

¹⁶ Schannauer, *Permit a Defense?*, *supra* note 9, at 339.

Congress intended endangerment suits to be under the USEPA's authority.¹⁷ By interpreting this clause so narrowly, courts have limited the use of the RCRA endangerment action as a remedy and failed to keep up with Europe in providing citizens with environmental legal protections.

The European Union has taken a broader approach by allowing citizen suits for potential health dangers stemming from hazardous wastes and other environmental harms. The European Court of Justice has ruled that the European Union Charter grants rights not only to Member States but also to the individual citizens of the Member States.¹⁸ These interpretations provide the European citizens remedies when they face a threat to their health and the environment from a hazardous waste facility. The European system is more protective than the U.S. model, and is more concerned with preventing harm to the environment or human health.¹⁹ Under European law, a substance is presumed hazardous until it is proven to be safe.²⁰ This is in direct contrast to the U.S., where a substance is assumed to be safe until it is proven hazardous.

This article will use the WTI case to compare the U.S. and European environmental legal systems by analyzing what would have happened in the WTI case if European law had been applied. Part II will give a brief background on the U.S. and European legal models as they apply to environmental law suits. Part III will look at how U.S. law was applied to the WTI case. Part IV will analyze the outcome of the WTI case had European law been applied. Part V will provide a conclusion and give recommendations on how the laws of the U.S. could be amended to keep pace with changes in global environmental standards.

II. BACKGROUND

This section will discuss the background information necessary to compare the U.S. and European laws relevant to environmental lawsuits. This includes a brief history of the RCRA citizen suit legislation, a WTI facility, and an overview of EU environmental regulations. The section will end with a discussion how the Council of Europe and the European Court of Human Rights play a role in protecting European citizens from environmental harms.

A. History of the RCRA and the Citizen Suit Provision

RCRA is a complicated act. Agency regulations created to interpret and "clarify" it consume over a thousand pages in the Code of Federal Regulations, not including the numerous guidance documents printed by both the USEPA and the state agencies charged with enforcing the statute.²¹ RCRA also controls the permits issued to hazardous waste facilities. Although Congress passed RCRA in 1976,²² it was not

¹⁷ *Id.* at 308.

¹⁸ *Id.*

¹⁹ See generally Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL. L. 221 (1997).

²⁰ *Id.*

²¹ JOHN W. TEETS, ET AL., RCRA RESOURCE CONSERVATION AND RECOVERY ACT 1 (2003).

²² *Id.* at 4.

implemented until 1980, the year Ronald Reagan took office.²³ Reagan appointed Anne Gorsuch to the position of USEPA director.²⁴ She was largely considered to be an unqualified candidate.²⁵ Under her leadership, USEPA enforcement actions dropped 75%.²⁶ By the time Gorsuch resigned in 1983 over public scandals relating to the agency, any confidence Congress or the general public had in the USEPA had largely deteriorated.²⁷ Reagan appointed new leadership in an attempt to convince Congress that his administration was serious about environmental enforcement, but the damage to the USEPA's reputation had been done.²⁸

Congress, in response to public distrust of the USEPA's ability to enforce environmental regulations, passed the Hazardous and Solid Waste Amendments in 1984.²⁹ The Amendments contained an expanded citizen suit provision³⁰ that allows individuals to bring suits to protect themselves from dangers to their health or the environment even when the USEPA failed to do so.³¹ The RCRA citizen suit provision allows for cases to be brought by individuals as follows:

(1) (A) against any person . . . alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act . . . ; or

(B) 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*.³²

Although the statute also provides for suits against the USEPA Administrator for failing to perform a non-discretionary duty,³³ this article will limit discussion to the

²³ SHEVORY, *supra* note 8, at 47.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 47-48.

²⁸ TEETS, *supra* note 21, at 5.

²⁹ *Id.* at 6.

³⁰ Schannauer, *Permit a Defense?*, *supra* note 9, at 308. The Hazardous and Solid Waste Amendments of 1984 expanded the citizen suit provision to include subsection (1)(B) included above, which allowed citizens to bring suit against facilities which posed an imminent and substantial threat to human health and the environment. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3269. Prior to these amendments, citizen suits were limited to actions against facilities in violation of a permit and suits against the USEPA Administrator for failing to perform a non-discretionary duty. *Id.*

³¹ Jonathan York, *The Next Step in Revitalizing RCRA: Maine People's Alliance and the Importance of Citizen Intervention in EPA Actions*, 35 *ECOLOGY L.Q.* 405, 406 (2008).

³² 42 U.S.C. § 6972(a)(1) (emphasis added).

³³ 42 U.S.C. § 6972(a)(2).

two types of suits listed above as the portions of the statute pertinent to the WTI facility citizen suits. First, the “permit suits,” brought under 42 U.S.C. § 6972(a)(1)(A) which allow for cases to be brought against individuals that are in violation of either RCRA itself, or a permit issued by the USEPA. Second, the “endangerment suits,” brought under 42 U.S.C. § 6972(a)(1)(B) which allow for cases to be brought against facilities that pose an imminent and substantial endangerment to health or the environment. Courts’ interpretations of the endangerment suit provision have been so narrow as to bar most actions, as discussed in more detail below.

Since RCRA was passed in 1976, the United States has fallen behind Europe in its efforts to protect the environment.³⁴ The U.S. currently has no federal regulations targeting climate change or greenhouse gas emissions, unlike the EU which adopted the Kyoto Protocol in March 2002 and has worked collectively to limit carbon emissions.³⁵ U.S. states have attempted to regulate their own environments through more stringent state standards,³⁶ to differing degrees of success.³⁷ But when states attempted to control waste within their borders by restricting garbage “imports,” federal courts found the restrictions violated the Commerce Clause and were unconstitutional.³⁸ States have also passed a number of measures to reduce greenhouse gas emissions.³⁹ Despite these state measures,⁴⁰ the U.S. government has not passed any federal climate change legislation, and climate change cannot be adequately addressed at the state level.⁴¹

The legislative intent behind passing the RCRA citizen suit provision was to allow citizen enforcement to parallel the USEPA’s enforcement authority.⁴² Allowing citizens to bring suits directly against a facility that poses an imminent and substantial harm to their health or the environment, rather than merely reporting the risk to the USEPA, reflects Congress’ fear that USEPA enforcement actions might be inadequate.⁴³ With multiple state and federal agencies asserting control over

³⁴ Erin Walter, *The Supreme Court Goes Dormant When Desperate Times Call for Desperate Measures: Looking to the European Union for a Lesson in Environmental Protection*, 65 FORDHAM L. REV. 1161, 1161 (1996).

³⁵ David Vogel, Michael Toffel, Diahanna Post & Nazli Z. Uludere Aragon, *Environmental Federalism in the European Union and the United States* 13-16 (Harvard Bus. Sch. Working Paper, Paper No. 10-085, 2010), available at <http://www.hbs.edu/research/pdf/10-085.pdf>.

³⁶ Walter, *supra* note 34, at 1163.

³⁷ California now has the most stringent automobile emissions standards compared to the rest of the nation and has become a leader in encouraging the development of zero-emission vehicles. Vogel, *supra* note 35, at 4.

³⁸ *Id.*

³⁹ As of 2003, there were approximately 700 state policies aimed at reducing greenhouse gas emissions. *Id.* at 23.

⁴⁰ *Id.*

⁴¹ *Id.* at 13-15.

⁴² Schannauer, *Permit a Defense?*, *supra* note 9, at 308.

⁴³ *Id.*

hazardous waste facility permits and regulations, it is possible for gaps in regulations to occur or for problems with a facility to get overlooked. WTI provides an example of how these gaps can occur.

B. RCRA and the WTI Facility

Permit proceedings for WTI began in 1982 and were conducted by the Ohio Hazardous Waste Facility Approval Board, the Ohio Environmental Protection Agency (OEPA) and the USEPA.⁴⁴ The 1,000 citizens that participated in the first hearing were permitted five minutes each to voice their objections to the siting⁴⁵ of the facility and the possible health risks it would pose.⁴⁶ Despite numerous objections from these citizens, the USEPA issued WTI a RCRA permit in 1983.⁴⁷ After the USEPA issued the RCRA permit to WTI, the Ohio Hazardous Waste Facility Board received objections from both state and county officials, as well as from 19,000 county residents in the form of a petition.⁴⁸ In spite of these objections, the State of Ohio issued WTI the various state permits needed to operate in 1983 and 1984.⁴⁹

While WTI met all of the relevant USEPA standards for a RCRA permit, USEPA standards for hazardous waste incinerators are largely based on their technological capabilities, rather than the potential health risks.⁵⁰ The USEPA acknowledges that its standards may not protect human health or the environment because agency standards are based on a limited knowledge of the possible health effects of the chemicals emitted and limited technical capabilities to actually monitor the emissions.⁵¹ Not all of the compounds released by hazardous waste incinerators have been identified, and some released compounds, such as dioxins⁵² and furans, are more hazardous than the waste in its original state before incineration.⁵³ Although the Clean Air Act does provide an additional set of regulations by controlling air emissions, the regulations are inadequate because the Act is only concerned with a very limited number of pollutants.⁵⁴ Some experts believe that environmental harms go unregulated because Congress tends to over-rely on

⁴⁴ DAVY, *supra* note 12, at 93.

⁴⁵ “Site” is defined as a prospective location for something, particularly a public building or industrial plant. BALLENTINE’S’S LAW DICTIONARY (3rd ed. 2010) (LEXIS).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Schannauer, *WTI Risk Assessments*, *supra* note 6, at n. 47.

⁵⁰ Schannauer, *Permit a Defense?*, *supra* note 9, at 329.

⁵¹ *Id.* at 332.

⁵² The type of dioxin released by WTI is considered the most potent carcinogen and the most potent reproductive toxin ever evaluated by the USEPA. *Greenpeace v. Waste Tech. Industries*, No. 4:93CV083, 1993 U.S. Dist. LEXIS 5001, at *47-49 (N.D. Ohio Mar. 5, 1993).

⁵³ Schannauer, *Permit a Defense?*, *supra* note 9, at 332-33.

⁵⁴ *Id.* at 338.

scientific evidence when forming environmental legislation.⁵⁵ Congressional overreliance on scientific evidence is especially problematic because scientific data is not always available to address all the issues that may be relevant to a specific piece of legislation.⁵⁶ Because RCRA performance standards do not regulate the emission of dangerous substances like dioxin or mercury, there is no relevant part of the USEPA permit process that addresses the impact of the substances on human health or the environment.⁵⁷ The permit process is inadequate to address citizen's concerns about possible health risks from a hazardous waste facility.

One of the primary objections opponents have to WTI is that it is located too close to schools and homes. Unfortunately, not one of the many state or federal agencies involved in issuing permits to WTI conducted a comprehensive examination of whether the site was suitable for a hazardous waste incinerator.⁵⁸ Siting of a hazardous waste facility is controlled by local governments through zoning ordinances.⁵⁹ In 1967, local authorities zoned the land where WTI would later be sited for general industrial activities.⁶⁰ The land was originally intended to be a port for the city of East Liverpool.⁶¹ But there is a big difference between the environmental impact of a port and the environmental impact of a hazardous waste incinerator.

Under federal law, the only relevant siting criteria to the USEPA are the facility's proximity to flood plains, salt domes, underground mines, or seismically hazardous locations.⁶² There is nothing in the USEPA regulations that forbids a hazardous waste incinerator from being located in a residential area.⁶³ However, a report by the federal General Accounting Office found problems with the federal floodplain regulations and the WTI site on the Ohio River, even within the limited scope of the USEPA's siting criteria.⁶⁴ Perhaps as a response to some of these siting problems, soon after Ohio issued WTI a permit to operate, the state amended its permit standards to exclude hazardous waste facilities from locations near homes or schools.⁶⁵

While the state and federal permits were issued in 1983 and 1984, due to changes in WTI's ownership, construction did not begin until 1990 and was completed in

⁵⁵ See generally Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181 (1999).

⁵⁶ *Id.* at 181-83.

⁵⁷ Schannauer, *Permit a Defense?*, *supra* note 9, at 340.

⁵⁸ DAVY, *supra* note 12, at 125.

⁵⁹ See generally State Law and Programs under RCRA, 4-25B Zoning and Land Use Controls § 25B.17 (MB) (2011).

⁶⁰ DAVY, *supra* note 12, at 124.

⁶¹ *Id.*

⁶² Schannauer, *Permit a Defense?*, *supra* note 9, at 337.

⁶³ *Id.*

⁶⁴ DAVY, *supra* note 12, at 125-26.

⁶⁵ *Id.* at 95.

1992.⁶⁶ In November 1992, shakedown⁶⁷ operations began.⁶⁸ In March of 1993, the eight-day trial burn occurred in which the USEPA tested the facility's ability to meet emission regulations.⁶⁹ WTI did not meet emission regulations.⁷⁰ Despite this failure, the USEPA allowed WTI to continue with the post-trial burn, a period that follows the test burn and lasts until final operating conditions for the facility are established by the USEPA, typically lasting one to two years.⁷¹ The USEPA then decided not to establish final operating conditions until the results of the risk assessment were available.⁷² Because of this decision, the WTI post trial burn period lasted until January 25, 1995, when WTI's initial RCRA permit expired without final operating conditions ever being established.⁷³ When the risk assessment was finally released on May 8, 1997, approximately fourteen years after the initial RCRA permit was issued, it found that cancer risks were within acceptable limits and that non-cancer health effects were not expected.⁷⁴ The positive risk assessment allowed WTI operations to continue uninterrupted.⁷⁵

C. History of EU Environmental Regulations

The European Union (EU), with its multiple levels of government, functions under a similar form of federalism as the United States.⁷⁶ The European Parliament (Parliament) functions as Congress would in the United States.⁷⁷ Its members are elected by the citizens of the Member States of the European Union and it is responsible for drafting legislation.⁷⁸ In much the same way the Senate and the House of Representatives share legislative duties in the U.S., the Parliament shares its legislative duties with the Council of Ministers (Ministers).⁷⁹ The Ministers can use different instruments to enact laws, the most important being directives and

⁶⁶ Schannauer, *WTI Risk Assessments*, *supra* note 6, at 44.

⁶⁷ "Shakedown" is the term used to describe initial pretest burning. SHEVORY, *supra* note 8, at 128.

⁶⁸ Schannauer, *WTI Risk Assessments*, *supra* note 6, at 44.

⁶⁹ *Id.* at 44-45.

⁷⁰ *Id.* at 45.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Schannauer, *Permit a Defense?*, *supra* note 9, at 341.

⁷⁴ Schannauer, *WTI Risk Assessments*, *supra* note 6, at 35.

⁷⁵ *Id.* The conditions of an expired EPA permit continue in force until the effective date of the new permit. 40 C.F.R. § 270.51(a) (2005).

⁷⁶ Walter, *supra* note 34, at 1173.

⁷⁷ *Id.*

⁷⁸ *Welcome to the European Parliament*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?jsessionid=9DFDE58167A8C14A5AA87896AF7DDD17.node2?id=146&language=en> (last visited Mar. 8, 2011).

⁷⁹ See JANET R. HUNTER & ZACHARY A. SMITH, *PROTECTING OUR ENVIRONMENT: LESSONS FROM THE EUROPEAN UNION* 37-39 (2005).

regulations, to be discussed in more detail below.⁸⁰ The civil service of the EU is the European Commission, which is charged with implementing policies, enforcing laws, and allocating funds.⁸¹ It also holds some legislative functions in the form of drafting proposals for new laws, although it does not have the power to pass the legislation.⁸² Citizens may lodge a complaint with the Court if the European Parliament, Ministers, or Commission fails to make a decision required by any EU Treaty.⁸³ Citizens may also petition Parliament on any matter that affects citizens directly and falls within the purview of the EU.⁸⁴ A committee within Parliament reviews the petitions, considers any evidence, holds hearings, and then submits a report to the rest of Parliament with the outcomes.⁸⁵ This provides citizens one avenue to get their cause before the EU outside of the courts.

The European Court of Justice (ECJ) acts as the judicial branch of the EU.⁸⁶ It is assisted in its duties by the Court of First Instance (CFI), created in 1988 to be responsible for giving rulings on cases brought by individuals, companies, and those relating to competition law.⁸⁷ The CFI was created to ease the case load of the ECJ to allow EU citizens greater access to legal protection.⁸⁸ The ECJ itself has jurisdiction over cases against Member States for failing to fulfill their obligations under EU law, which may be brought by either the European Commission (Commission) or, less frequently, by one Member State against another.⁸⁹ Citizens can bring an action for damages before the ECJ if they have suffered as a result of the action or inaction of the EU.⁹⁰ However, a citizen cannot bring an action before the ECJ against a Member State for a failure to fulfill an obligation that the state has under EU law, which is left to the discretion of the Commission.⁹¹

The EU did not begin enacting environmental legislation until after the U.S., primarily because the Treaty of Rome, which created the EU,⁹² did not initially contain a provision for environmental regulation.⁹³ But once the Single European

⁸⁰ *Id.* at 37-38.

⁸¹ *Id.* at 33.

⁸² *Id.*

⁸³ *The Court of Justice of the European Union*, EUROPA, http://europa.eu/institutions/inst/justice/index_en.htm (last visited Nov. 7, 2011) [hereinafter *Court of Justice*].

⁸⁴ Hunter, *supra* note 79, at 39.

⁸⁵ *Id.* at 39-40.

⁸⁶ *Court of Justice*, *supra* note 83.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Curia Court of Justice Presentation*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7024/ (last visited Nov. 7, 2011).

⁹⁰ *Court of Justice*, *supra* note 86.

⁹¹ *Id.*

⁹² *Celebrating Europe! 50th Anniversary of the Treaty of Rome*, EUROPA, http://europa.eu/50/index_en.htm (last visited Nov. 7, 2011).

⁹³ Vogel, *supra* note 35, at 2.

Act⁹⁴ was passed in 1987, environmental regulation increased because there was a clear legal basis for environmental legislation.⁹⁵ The Act added a new title to the Treaty, headed “Environment,” which set Community objectives on the environment.⁹⁶ Since this Act, the EU has implemented several policies to mitigate climate change.⁹⁷ In 2002, the EU obliged each member state to adopt the Kyoto Protocol, which was signed by the U.S. but was never sent to the Senate for ratification.⁹⁸ The treaty requires that emissions be reduced to 8% below 1990 levels by 2012.⁹⁹ Although Member States still have the power to issue permits to industries that create emissions, the EU asks that the number of permits issued complies with the Kyoto Protocol.¹⁰⁰ Additionally, Community Directives require that Member States only grant licenses to industrial plants which apply the best available technology.¹⁰¹ Because the EU’s constitutional authority is only about two decades old, it is sensitive to the impact different state standards will have on the market and seems less willing to accept divergent environmental standards than the U.S.¹⁰²

The European Parliament passed Directive 76/2000 on December 4, 2000, which regulates the incineration of waste.¹⁰³ This Directive is the most recent update by the legislature to the EU laws regulating the incineration of waste dating back to 1989.¹⁰⁴ Much like RCRA, the Directive requires facilities to apply for and obtain permits.¹⁰⁵ While the Directive does not contain a specific provision that allows for suits to be brought against the operators of facilities for posing a danger to health or

⁹⁴ Single European Act, 1987 O.J. (L 169) 1, http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleeuropeanact.pdf (last visited Jan. 23, 2012).

⁹⁵ Vogel, *supra* note 35, at 2.

⁹⁶ Francis Jacobs, *The Role of the European Court of Justice in the Protection of the Environment*, 18 J. ENVTL. L. 185, 186 (2006).

⁹⁷ Vogel, *supra* note 35, at 15.

⁹⁸ *Id.* at 22, 30.

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 15-16.

¹⁰¹ McIntyre, *supra* note 19, at 231; Council Directive 2006/118/EC, 2006 O.J. (L 372) 19.

¹⁰² Vogel, *supra* note 35, at 35.

¹⁰³ Council Directive 2000/76/EC, 2000 O.J. (L 332) 91 [hereinafter Incineration Directive].

¹⁰⁴ *Waste Incineration Summary of Legislation*, EUROPA, http://europa.eu/legislation_summaries/environment/waste_management/128072_en.htm (last visited Nov. 7, 2011).

¹⁰⁵ See Incineration Directive, *supra* note 102. The European Union requires facilities to, as much as possible, capture the heat generated during the incineration process to be used to create electricity. Although WTI was first advertised as a heat-to-energy plant, WTI has generated no electricity as of 2008. SHEVORY, *supra* note 9, at 76. See also Jason Bourne, *WTI, A Toxic Incinerator 1,100 Feet From an Ohio Elementary School*, Hillary and Bill, PROGRESSOHIO COMMUNITY BLOG, <http://www.progressohio.org/blog/2008/02/C3Z4.html> (last visited Nov. 7, 2011). There is no information about any heat-to-energy recovery on the WTI company website. HERITAGE-WTI, www.heritage-wti.com (last visited Nov. 7, 2011).

the environment,¹⁰⁶ suits can be brought against these facilities using other means, to be discussed in detail below.

Perhaps one reason the EU has been able to make such strides in environmental regulation is its adoption of the “precautionary principal.”¹⁰⁷ The precautionary principal is based on the idea that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹⁰⁸ It is a rejection of the traditional “assimilative capacity approach” which is based on the assumption that science could determine the environment’s capacity and could sufficiently mitigate threats to capacity before there is irreparable environmental damage.¹⁰⁹ The problem with the assimilative capacity approach is that sometimes scientific certainty comes too late, which is why international law has recently seen a shift towards the better-safe-than-sorry precautionary approach.¹¹⁰ In the 1992 amendments to the Treaty of Rome, the requirement was included that all environmental policy in the EU shall be based on the precautionary principle.¹¹¹ Because of this amendment, environmental citizen suits brought in the EU face a lower burden of proof than plaintiffs in the U.S., who must prove the specific cause for the environmental harm complained of.

D. The Council of Europe and Human Rights

The Treaty of London established the Council of Europe in 1949.¹¹² In contrast to the European Union, whose goal was to unify Europe through purely economic means, the Council of Europe (Council) aimed to unify the continent through broader social, political, and cultural means.¹¹³ To help fulfill these goals, the Council formed the European Convention on Human Rights (Convention) in 1950, which entered into force in 1953.¹¹⁴ The Convention can be amended through protocols, which add rights to the Convention and allow it to evolve.¹¹⁵ The Convention created the European Court of Human Rights (ECHR) in 1959, which consists of one judge per member state.¹¹⁶

¹⁰⁶ See generally Incineration Directive, *supra* note 102.

¹⁰⁷ McIntyre, *supra* note 19, at 230.

¹⁰⁸ *Id.* at 229.

¹⁰⁹ *Id.* at 221-22.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 230.

¹¹² HOWARD DAVIS, HUMAN RIGHTS LAW DIRECTIONS 16 (1st ed. 2007).

¹¹³ *Id.*

¹¹⁴ *Id.* at 17; *The European Court of Human Rights in 50 Questions*, THE EUROPEAN COURT OF HUMAN RIGHTS, http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf (last visited Nov. 7, 2011) [hereinafter *ECHR in 50*].

¹¹⁵ *ECHR in 50*, *supra* note 113, at 5. Protocols bind only the states that ratify them individually. *Id.*

¹¹⁶ HOWARD DAVIS, *supra* note 111, at 17; *ECHR in 50*, *supra* note 113, at 6. Originally, a European Commission of Human Rights was created which decided the cases the ECHR

Cases are brought before the ECHR when one state brings a case against another state for human rights violations or, more commonly, when an individual brings suit against their own state.¹¹⁷ A case before the ECHR proceeds through two stages.¹¹⁸ In the first stage, a single judge will determine whether the case can proceed, considering whether the application meets certain admissibility requirements.¹¹⁹ These requirements include the exhaustion of domestic remedies, that the complaint falls under the Convention, and that all procedural requirements have been met.¹²⁰ If all requirements are met, the case will proceed to the second stage where the ECHR will make a determination on the merits.¹²¹ The case will be heard by a panel of seven judges which must include the judge representing the state against which the case has been lodged.¹²² The rulings are enforced by the Ministers of the Council of Europe who work with the state to decide how to execute the judgment and prevent further violations.¹²³

III. ANALYSIS

This section will begin by discussing the ways citizens may get an environmental suit heard in the U.S., the EU, and before the ECHR. It will analyze the way the RCRA statute was applied in the two citizen suits brought against the WTI facility, and then proceed with a discussion on how the WTI suits may have turned out if European law had been applied. Next, the Inter-American Court of Human Rights and how its provisions may apply to the United States will be discussed.

A. The RCRA Endangerment Suit Provision

The RCRA endangerment suit provision, which allows citizens to bring suits against facilities that pose an imminent and substantial threat to human health and the environment, may seem generous to plaintiffs, but it bars citizen suits in two important areas.¹²⁴ First, it does not allow challenges to the siting of a treatment, storage, or disposal facility.¹²⁵ This leaves citizens with only the comment period provided by the USEPA during the permit process to challenge the proposed site of a facility. While parties may appeal the decision of the USEPA if it does issue a permit, this remedy is not equivalent to a RCRA citizen suit. An appeal of an

would hear, but it was abolished in 1998 and the Court now decides for itself which cases will be heard. HOWARD DAVIS, *supra* note 111, at 19.

¹¹⁷ Only states that have ratified the Convention can have cases brought against them before the ECHR. *ECHR in 50*, *supra* note 113, at 7-8.

¹¹⁸ *Id.* at 8.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 9.

¹²¹ *Id.* at 8-9.

¹²² *Id.* at 7-8.

¹²³ *Id.* at 11.

¹²⁴ William H. Rodgers, Jr., *Occasions for Judicial Review—District Courts—Citizen Suits*, 4 ENVTL. L. § 7.6 (2010).

¹²⁵ *Id.*

agency decision, such as the decision to issue a permit,¹²⁶ is controlled by the Administrative Procedure Act (APA) and the appeal will go to the appropriate Circuit Court, rather than the District Court where a RCRA suit would be brought.¹²⁷ At the Circuit Court level, the APA requires deference be given to agency expertise.¹²⁸ In contrast, no deference is given to an agency decision in a RCRA citizen suit.¹²⁹ Without the deference to an agency's expertise, a suit brought under RCRA has a lower burden of proof for plaintiffs than a suit brought under the APA.

Second, the permit process focuses on a facility's ability to comply with technical performance standards, while endangerment actions focus on a facility's impact on human health or the environment.¹³⁰ It is possible for a facility to comply with all technical standards and still pose a threat to human health.¹³¹ Because endangerment suits raise issues that are not directly addressed in permit proceedings, they should not be barred as a collateral attack of an agency decision.¹³²

One possible reason the USEPA is given preference when a citizen appeals a permit decision under the Administrative Procedure Act is because of the many steps and requirements a facility must meet in order to obtain a valid RCRA permit. Any facility involved in the treatment, storage or disposal of hazardous waste must maintain a valid RCRA permit to legally operate.¹³³ The process a facility must undergo to obtain a permit includes an informal meeting with the public, and preparing and submitting an application to the USEPA.¹³⁴ The USEPA will review the applications and prepare a draft permit, which will be submitted to the public for public comment.¹³⁵ After the close of the public comment period, a final permit is issued that incorporates all the terms imposed on a facility for it to comply with relevant RCRA conditions.¹³⁶ RCRA permits are valid for a period of ten years, although the USEPA has wide discretion to modify the terms of the permit whenever necessary to protect human health and the environment.¹³⁷

¹²⁶ 42 U.S.C. § 6976.

¹²⁷ Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1993).

¹²⁸ Schannauer, *Permit a Defense?*, *supra* note 9, at 345.

¹²⁹ 42 U.S.C. § 6976.

¹³⁰ Schannauer, *Permit a Defense?*, *supra* note 9, at 323.

¹³¹ *See generally* Schannauer, *Permit a Defense*, *supra* note 9.

¹³² *Id.* An additional limit imposed on citizen suits is that the recovery allowed is a civil penalty, rather than a monetary reward. Although the goal of most citizen suits is injunctive relief, the inability to receive monetary compensation may deter some plaintiffs from bringing suits or attorneys from accepting suits, even though RCRA allows courts to award attorney fees to the prevailing party. *See* Rodgers, *supra* note 123, at 2. *See also* 42 U.S.C. § 6972(e).

¹³³ *See generally* Treatment Storage and Disposal (TSD) Facilities for Hazardous Waste, 4-25B Zoning and Land Use Controls § 25B.04 (MB) (2011).

¹³⁴ *Id.* at 2.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 2-3.

1. The Burford Abstention Doctrine

The *Burford* abstention doctrine is sometimes applied to environmental suits.¹³⁸ The doctrine mandates the dismissal of a case by federal court if a complex state regulatory scheme is central to the lawsuit.¹³⁹ When determining whether to abstain under *Burford*, federal courts should consider: (1) whether the suit is based on a cause of action which is exclusively federal; (2) whether difficult or unusual state laws are at issue; (3) whether there is a need for coherent state doctrine in the area; and, (4) whether state procedures indicate a desire to create a special state forum for adjudication.¹⁴⁰ The types of complex regulatory schemes where *Burford* is usually applied are cases where the state scheme requires unified state administration, and there is specialized state court review available.¹⁴¹ A central factor for courts granting abstention is how important the state law is to the state and whether the issue transcends the case at bar.¹⁴² Abstention is unwarranted when the case can be fully resolved applying federal law.¹⁴³

B. The European Court of Justice

The European Court of Justice (ECJ) is based in Luxembourg and made up of one judge from each Member State.¹⁴⁴ It settles disputes between Member States, EU institutions, and individuals, and makes sure that EU legislations is interpreted and applied consistently throughout the EU.¹⁴⁵ Although the Single European Act gave the ECJ the jurisdiction to hear environmental cases, the court was ruling on cases affecting the environment in the name of regulating trade and the free movement of goods before that Act was passed.¹⁴⁶ In a 1985 case, two years before the Single European Act, the ECJ ruled that although maintaining the free movement of goods was vital, it was not absolute.¹⁴⁷ Instead, it determined that certain limits on trade could be justified if they were in the interest of pursuing community

¹³⁸ Like many jurisdictional doctrines, this doctrine is named after the case in which it first appeared. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

¹³⁹ James L. Buchwalter, *Propriety of Federal Court's Abstention, Under Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943) *as to Claim that State or Local Statute or Regulation, or Application Thereof, Violates Federal Constitution or Conflicts with Federal Statute or Regulation—Issues Other than Land Use, Zoning, Social Welfare, or Family Law*, 25 A.L.R. FED. 2D 207 (2010).

¹⁴⁰ *White & Brewer Trucking v. Donley*, 952 F. Supp. 1306, 1311 (1997).

¹⁴¹ James L. Buchwalter, *Propriety of Federal Court's Abstention, Under Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), *as to Claim that State of Local Statute or Regulation, or Application Thereof, Violates Federal Constitution or Conflicts with Federal Statute or Regulation—Land Use and Zoning Issues*, 30 A.L.R. FED. 2D 285 (2010).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Court of Justice*, *supra* note 83.

¹⁴⁵ *Id.*

¹⁴⁶ *Jacobs*, *supra* note 95, at 187.

¹⁴⁷ *Id.*

objectives, such as the protection of the environment.¹⁴⁸ This was the first time that the protection of the environment was stated as an objective of the EU, and was a departure from the court's earlier approach which stressed economic integration above all else.¹⁴⁹ The ECJ issued this ruling in favor of environmental protection before there was an explicit legal basis for them to do so.¹⁵⁰

When determining whether a measure that restricts free trade in the name of environmental protection is reasonable, the ECJ and the courts of the Member States evaluate environmental protection measures using a two-tier approach.¹⁵¹ First, the court asks whether the environmental objective is acceptable.¹⁵² If it is acceptable, the court looks to see whether the measure achieves the environmental objective while minimizing restrictions on free trade and competition.¹⁵³ The EU expressly prohibits restrictions on the movement of goods between Member States, unlike the U.S. Constitution which does not.¹⁵⁴ However, the U.S. Supreme Court has interpreted the Commerce Clause to prohibit state restrictions on interstate commerce.¹⁵⁵

Unfortunately, because most environmental legislation is laid out in the form of directives, the role of citizen suits is limited.¹⁵⁶ The ECJ does not allow private parties to use legislation set out in directives against another private party.¹⁵⁷ Directives impose minimum requirements on Member States, but give them discretion as to the way the directive is carried out.¹⁵⁸ As long as the desired result of the directive is achieved, the Member States have fulfilled their obligations.¹⁵⁹ A regulation, in contrast, sets out both the result to be achieved as well as the method for achieving that result.¹⁶⁰ Because directives leave much more discretion up to Member States, they are often adopted more frequently than other forms of legislation because they allow states with different views to reach a consensus more easily.¹⁶¹ Citizens can still bring cases against the EU for their action or inaction, but

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 195.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Walter, *supra* note 34, at 1182. However, the Supreme Court has interpreted the Commerce Clause to prohibit state restrictions on interstate commerce. *Id.* at 1174.

¹⁵⁵ *Id.* at 1174.

¹⁵⁶ Josephine A.W. Van Zeben, *The Untapped Potential of Horizontal Private Enforcement Within European Environmental Law*, 22 *Geo. Int'l Envtl. L. Rev.* 241, 242 (2010).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 242-43.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 243.

the use of directives severely limits horizontal private enforcement relating to environmental laws.¹⁶²

1. Citizen Standing Before the ECJ

Effective citizen enforcement of EU environmental law depends on whether a citizen can invoke EU law when bringing a case within a Member State. There are three doctrines which allow a citizen to invoke EU law within a Member State: direct effect, consistent enforcement, and state liability.¹⁶³ The direct effect doctrine is the most pertinent to environmental enforcement and applies to those aspects of EU law that are enforceable within Member States even if that Member State does not have a specific national law speaking to the provision.¹⁶⁴ The direct effect doctrine is a doctrine that allows a citizen to invoke EU law within the courts of a Member State.¹⁶⁵ Under the doctrine of direct effect, the ECJ has ruled that the EU intends to confer certain rights to individuals that can be enforced in national courts if the provisions of EU law are both unconditional and sufficiently precise.¹⁶⁶ But because most environmental legislation is set out in directives, and directives are intentionally imprecise because they leave implementation up to the Member States, the direct effect doctrine is of limited use for private citizens bringing environmental citizen suits.¹⁶⁷ Horizontal direct effect actions, those brought by one group or citizen against another group or citizen, are very limited because they are seen as too great an interference in the Member States' systems.¹⁶⁸ But the ECJ has allowed for "horizontal side effects" when citizens bring vertical direct effect cases, which occur when a private group or citizen brings a case against a government entity.¹⁶⁹ This would allow a citizen to challenge the decision of a regulatory agency such as a decision to issue a permit, a vertical direct effect action with the horizontal side effect that the facility's permit could be revoked.¹⁷⁰ This is in direct contrast to the U.S. law under RCRA, which allows a citizen to challenge the facility horizontally if it poses an imminent threat to human health and the environment but gives deference to agency decisions under the APA.¹⁷¹

Another way individual citizens can get their case before the ECJ is by lodging complaints with the Commission.¹⁷² The Commission brought action against Ireland

¹⁶² *Court of Justice, supra* note 83; Van Zeben, *supra* note 155, at 242.

¹⁶³ Van Zeben, *supra* note 155, at 250.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 251.

¹⁶⁸ *Id.* at 252-53.

¹⁶⁹ *Id.* at 253.

¹⁷⁰ *Id.*

¹⁷¹ *See generally* Schannauer, *Permit a Defense?*, *supra* note 9.

¹⁷² *See* Case C-494/01, *Comm'n v. Ireland*, 2005 E.C.R. I-03331, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=58802&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=495549>.

for a failure to fulfill their obligations under a directive on waste because of a series of complaints received by Irish citizens between 1997 and 2000.¹⁷³ The purpose of the waste directive was to ensure that waste is disposed of without endangering human health or the environment.¹⁷⁴ A total of twelve complaints were received, all concerning the unauthorized dumping of waste.¹⁷⁵ Ireland failed to respond to the Commission's formal notices regarding the complaints.¹⁷⁶ The ECJ found that Ireland's failure to comply with the waste directive was persistent and widespread, and that it had failed to establish a national network of waste disposal that did not endanger human health or the environment.¹⁷⁷

2. Greenpeace v. Commission

Greenpeace, a private entity, brought suit against the Commission as a vertical direct effect suit with potential horizontal direct effect consequences.¹⁷⁸ In March 1991, the Commission agreed to provide financial assistance to Spain for the construction of two power plants which were to be located on the Canary Islands.¹⁷⁹ Financial assistance would be provided in the amount of approximately ECU 108,000,000 with payments to be spread over four years.¹⁸⁰ Part of the agreement provided that payments would be suspended or reduced if irregularities in construction were found or if there were any changes in the plans which were not approved by the Commission in advance.¹⁸¹ In December 1991, two individual citizens sent a letter to the Commission saying that no environmental impact assessment study had been performed as required under EU law.¹⁸² Two environmental impact statements were later issued in December 1992 by the Canary Islands Commission for Planning and the Environment.¹⁸³ Based on the impact statements, Greenpeace challenged the EU's decision to continue funding the project.¹⁸⁴ The EU Commission's Director General upheld the decision to provide funds by saying that its decisions were made after full consultation with those concerned.¹⁸⁵ Greenpeace appealed to the CFI, which upheld the Commission's decision to continue funding.¹⁸⁶ In its order the CFI found Greenpeace and

¹⁷³ *Id.*

¹⁷⁴ *Id.* ¶ 5.

¹⁷⁵ *Id.* ¶ 8.

¹⁷⁶ *Id.* ¶ 10.

¹⁷⁷ *Id.* ¶ 123.

¹⁷⁸ Case C-321/95 P., *Greenpeace v. Comm'n*, 1998 E.C.R. I-1651.

¹⁷⁹ *Id.* ¶ 3.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* ¶ 4.

¹⁸³ *Id.* ¶ 5.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* ¶ 6.

¹⁸⁶ *Id.* ¶ 7.

associated individual citizens did not have standing to bring the action, and distinguished between individuals and environmental associations.¹⁸⁷

Greenpeace appealed the CFI's decision to the ECJ,¹⁸⁸ which proceeded with an in-depth analysis on the issue of standing in EU law.¹⁸⁹ EU case law had limited standing for individuals to issues that affect them "by reason of certain attributes that are peculiar to them," distinguishing them from the general population as the person to whom the legislation is addressed.¹⁹⁰ In this case, the applicants would be affected by any court decision in this case in the same way that all other residents of the Canary Islands would be.¹⁹¹ However, the CFI had failed to consider the effect of the recently revised Article 173 of the EU Treaty, which provided that any legal person may institute proceedings if they hold a legal interest affected by the contested act or decision.¹⁹² Greenpeace argued that this rewritten Article 173 confers rights on people who may be concerned with EU projects, such as the Canary Islands project, that significantly affect the environment.¹⁹³

The ECJ upheld the decision of the CFI.¹⁹⁴ Standing, in an environmental suit, is based on whether the individual's quality of life will be affected by the decision, and in this case it was not clear how the individual's quality of life would each be affected.¹⁹⁵ It expressed concern that if it were to allow standing for environmental groups generally, then individuals who did not have standing would get around this by creating an environmental group.¹⁹⁶ Moreover, if environmental groups were able to challenge every law that had an impact on the environment there would be an endless amount of litigation.¹⁹⁷ If the ECJ had found that Greenpeace and the individual appellants had standing, it would have significantly liberalized the standing requirements for environmental plaintiffs.¹⁹⁸

C. European Court of Human Rights

The European Convention on Human Rights (Convention), signed in 1950, contains no provision that expressly provides for the protection of the

¹⁸⁷ *Id.* ¶ 9.

¹⁸⁸ *Id.* ¶ 8.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶ 10.

¹⁹¹ *Id.* ¶ 11-12.

¹⁹² *Id.* ¶ 18, 49; EC Treaty art. 173 (as in effect 1992) (now Consolidated Version of the Treaty on the Functioning of the European Union art. 263, Sep. 5, 2008, 2008 O.J. (C 115) 162).

¹⁹³ *Greenpeace*, 1998 E.C.R. I-1651, ¶ 21.

¹⁹⁴ *Id.* ¶ 119.

¹⁹⁵ *Id.* ¶ 109-110.

¹⁹⁶ *Id.* ¶ 117.

¹⁹⁷ *Id.* ¶ 117.

¹⁹⁸ See Ann Lininger, *Liberalizing Standing for Environmental Plaintiffs in the European Union*, 4 N.Y.U. ENVTL. L.J. 90, 107 (1995).

environment.¹⁹⁹ But in 1990, the Council of Europe went on to adopt the Dublin Declaration on “The Environmental Imperative” stating that Community action “must be to guarantee citizens the right to a clean and healthy environment.”²⁰⁰ And by 1993, the ECHR was willing to allow for creative arguments to be made that environmental protection fell under one of the existing Articles.²⁰¹ The court hears environmental cases primarily under Article 8, the right to respect for home and private life, but has considered cases argued under Article 1, the right to peaceful enjoyment of possessions; Article 2, the right to life; and Article 10, the right to freedom of expression.²⁰² Bringing a case before the ECHR does require the exhaustion of domestic remedies much like the other courts discussed.²⁰³ Environmental human rights under the Convention differs from other human rights concerns because environmental protection is often pursued as being in the best interest of all, as opposed to other human rights that focus on the interest of the individual.²⁰⁴ This can be a limitation for plaintiffs because the human rights system is designed to protect individuals, rather than society generally.²⁰⁵

1. State as Environmental Protector

Individuals also bring suit before the ECHR when a State, in attempting to protect the environment, acts to violate an individual’s property interest.²⁰⁶ A primary example is when permits, such as fishing or building permits, are denied or revoked in the interest of environmental protection, such as preserving fish stocks or green space.²⁰⁷ These suits are often brought under Article 1, the right to property.²⁰⁸ But, if the permit applicant felt they were denied a fair hearing before their permit was revoked or denied, they may bring the case under Article 6, the right to a fair trial.²⁰⁹ The right to a fair trial is a procedural rather than a substantive right, but procedural rights can be just as effective as substantive rights in determining the outcome of a case.

In deciding cases where an individual brings suit against a State for a human rights violation in the name of environmental protection, the ECHR must weigh the

¹⁹⁹ Justine Thornton & Stephen Tromans, *Human Rights and Environmental Wrongs: Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law*, 11 J. ENVTL. L. 35, 35-36 (1999).

²⁰⁰ Regional Treaties and Legal Provisions, RIGHT TO ENVIRONMENT, <http://www.righttoenvironment.org/default.asp?pid=82> (last visited Mar. 9, 2011).

²⁰¹ Thornton, *supra* note 198, at 35.

²⁰² *Id.* at 38-44; Nukhet Yilmaz Turgut, *The European Court of Human Rights and the Right to the Environment*, 4 ANKARA L. REV. 1, 4 (2007).

²⁰³ Thornton, *supra* note 198, at 38.

²⁰⁴ Turgut, *supra* note 201, at 4.

²⁰⁵ *See* Thornton, *supra* note 198, at 56-57.

²⁰⁶ Turgut, *supra* note 201, at 6.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Thornton, *supra* note 198, at 44.

competing interests between the duties of the State to protect the environment for all and the rights of the individual.²¹⁰ First, the ECHR determines whether the State acted lawfully based on its own internal law.²¹¹ Second, the ECHR determines whether the State acted with a legitimate purpose.²¹² A legitimate purpose is widely defined as anything in the public interest, and the ECHR has given States a great deal of discretion.²¹³ The ECHR, by accepting the protection of the environment as a legitimate government purpose, has expanded and legitimized the States' role in environmental protection.²¹⁴ Finally, the ECHR attempts to balance the competing interests of the State and the individual, specifically looking to whether the individual has to bear a disproportionate and excessive burden.²¹⁵

2. State Fails to Provide Environmental Protection

Another type of environmental suit brought before the ECHR is when an individual brings suit against a State for failing to take the necessary steps to protect individuals from environmental harms.²¹⁶ In these cases, the ECHR does not grant the States a great deal of discretion.²¹⁷ Rather, it takes a strict approach to State actions and looks at whether they were strictly necessary to achieve the government purpose.²¹⁸ The State's justification for their actions is generally economic, and economic justifications are not seen as sufficient by the ECHR.²¹⁹ The ECHR will consider whether there were any alternatives the State could have implemented that would have prevented the environmental harm.²²⁰ If an alternative exists, then the State's actions would not have been strictly necessary and a human rights violation would have occurred.²²¹

One ECHR case involving the protection of the environment is *Giacomelli v. Italy*.²²² Giacomelli, an individual citizen of Italy, brought complaint against the Italian Republic in 1998 for failing to protect her right to respect for her home and private life under Article 8.²²³ Giacomelli lived about 100 feet away from the

²¹⁰ Turgut, *supra* note 201, at 7.

²¹¹ *Id.*

²¹² *Id.* at 8.

²¹³ *Id.*

²¹⁴ *Id.* at 10.

²¹⁵ *Id.* at 8.

²¹⁶ *Id.* at 11.

²¹⁷ *Id.* at 13.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *See id.*

²²² *Giacomelli v. Italy*, 2006 Eur. Ct. H.R. 59909/00, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=giacomelli%20%7C%20italy&sessionId=67765845&skin=hudoc-en>.

²²³ *Id.* ¶ 3

Ecoservizi plant, which specialized in the treatment and storage of hazardous and non-hazardous waste.²²⁴ Ecoservizi began operating in 1982, and its license expanded in 1989 to include the detoxification of waste, which involved treating the hazardous waste with other chemicals.²²⁵ Between 1991 and 1999, Ecoservizi's license was further expanded to allow for an increase in the quantity of waste it processed and its license was also renewed a number of times, which Giacomelli continuously challenged in Italian courts.²²⁶ Plaintiff claimed an environmental impact assessment, very similar to the USEPA risk assessment, should have been completed prior to a license being issued but was not completed until 1996, seven years after Ecoservizi began operations.²²⁷ The Italian Regional EPA also found high levels of ammonia in the atmosphere indicating a failure in the plant's detoxification process.²²⁸ The Italian authorities argued that it had not been proven that the facility was dangerous.²²⁹ The ECHR ruled that authorities cannot wait until comprehensive data is available for each and every aspect of the matter to act, and found in favor of Giacomelli in the amount of approximately \$15,000 plus attorney fees.²³⁰

3. Limitations of the ECHR

Although the ECHR can be a powerful tool for a plaintiff faced with an environmental danger, it is not without its limitations. Only about five to fifteen percent of cases filed actually get heard by the Court each year.²³¹ In those cases where plaintiffs have been successful, the facts have been extreme,²³² and human rights apply solely to individual humans, so any case which relates to the protection of the environment generally, or to the protection of animal or plant species, is outside the scope of the ECHR.²³³ Moreover, a case brought before the ECHR can take several years to come to fruition.²³⁴ Under the precautionary principle, the law should strive to prevent environmental harm before it occurs, and if a plaintiff must wait 13 years for a remedy, as Giacomelli did, a substantial harm will likely have already occurred. Therefore, the ECHR should be viewed as a last resort for a plaintiff trying to remedy an environmental harm; indeed, the ECHR requires all

²²⁴ *Id.* ¶ 11

²²⁵ *Id.* ¶ 11-12

²²⁶ *Id.* ¶ 13-25

²²⁷ *See id.* ¶ 27-40

²²⁸ *Id.* ¶ 59

²²⁹ *Id.* ¶ 73.

²³⁰ *Id.* ¶ 82-109; *XE: The World's Favorite Currency Site*, XE.COM, www.xe.com (last visited Mar. 9, 2011) (to determine amount of award in 2006 USD).

²³¹ Thornton, *supra* note 198, at 38.

²³² *Id.* at 45.

²³³ Turgut, *supra* note 201, at 16-17.

²³⁴ In the *Giacomelli* case, the plaintiff began proceedings in 1993 but a judgment was not issued until 13 years later in 2006. *See generally Giacomelli*, 2006 Eur. Ct. H.R. 59909/00.

domestic remedies be exhausted before it hears a case.²³⁵ It may serve as a safety net for plaintiffs who have no other legal options, but because so few cases are heard by the Court, and because those cases that were successful were so egregious in their facts, the ECHR should not be relied upon by citizens to resolve their environmental disputes.

D. How RCRA Was Applied to the WTI Facility

This section will discuss how the District and Circuit Courts applied, and misapplied, the RCRA statute to the two citizen endangerment suits brought against the WTI facility.

1. Palumbo v. West Technologies Industries

Michael Palumbo, the Attorney General of the State of West Virginia, brought *Palumbo v. Waste Tech. Industries* on behalf of the citizens of the State of West Virginia, joined by City of Chester, West Virginia.²³⁶ The City of Chester is located directly across the Ohio River from WTI.²³⁷ The case came before the District Court in the Northern District of West Virginia.²³⁸ Plaintiffs alleged, among other things, that the facility was not built in accordance with flood plain standards, and that the levels of lead and sulfur dioxide emissions allowed under the RCRA permit, combined with the unregulated emissions of phosgene gas, would endanger human health and the environment.²³⁹ WTI responded with a motion to dismiss, claiming the district court lacked subject matter jurisdiction.²⁴⁰ The district court denied the motion, reading the citizen suit provision as providing the district court's jurisdiction where there are allegations, acts or omissions may present an imminent and substantial endangerment to health or the environment.²⁴¹ The district court certified the jurisdictional question for interlocutory appeal, and proceeded to hear the plaintiffs' case while the appeal was pending.²⁴²

During the case on the merits, plaintiffs presented experts on public health who criticized the facility's location near residences and an elementary school.²⁴³ WTI, the USEPA, and the OEPA argued that compliance with the terms of the permits would adequately protect human health.²⁴⁴ The district court ruled in favor of WTI and denied the plaintiffs' request for a preliminary injunction to halt operations at

²³⁵ Thornton, *supra* note 198, at 38.

²³⁶ Palumbo v. Waste Tech. Indus., 989 F.2d 156 (4th Cir. 1993).

²³⁷ A satellite image is available through Google Maps. GOOGLE MAPS, <http://www.google.com/maps> (enter "Chester, WV" into query field and follow "Search Maps" hyperlink).

²³⁸ Palumbo, 989 F.2d 156.

²³⁹ *Id.* See also Schannauer, *Permit a Defense?*, *supra* note 9, at 293.

²⁴⁰ Palumbo, 989 F.2d at 158.

²⁴¹ *Id.*

²⁴² *Id.* at 158-59.

²⁴³ Schannauer, *Permit a Defense?*, *supra* note 9, at 294.

²⁴⁴ *Id.*

the facility.²⁴⁵ Plaintiffs appealed the decision to the Fourth Circuit Court of Appeals.²⁴⁶ Before the appeal could proceed, the Circuit Court ruled on the jurisdictional question that had been the basis of the defendants' interlocutory appeal.²⁴⁷

a. The Fourth Circuit Misapplied the Administrative Procedure Act

The Fourth Circuit determined that the RCRA endangerment suit was not appropriate and that plaintiffs' case was nothing more than a collateral attack on the USEPA's decision to issue WTI a permit.²⁴⁸ The court emphasized that Congress provided circuit courts exclusive jurisdiction over appeals from agency decisions, leaving the district court without jurisdiction in this case.²⁴⁹ Under the Administrative Procedure Act, an appeal of a final agency decision is brought before the circuit courts with a standard of review deferential to agency expertise.²⁵⁰ The court reasoned that plaintiffs who brought suits in district court as RCRA endangerment suits would be able to avoid the deferential standard circuit courts apply in an agency appeal.²⁵¹

The Fourth Circuit's reasoning in this case is contrary to the clear language of the statute. The statute states that "any action . . . shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur."²⁵² The Fourth Circuit erroneously treated an appeal of a USEPA permitting decision as analogous to a RCRA citizen suit action. The doctrine of *res judicata* applies when a case is substantially identical to a cause of action that has already been decided,²⁵³ but because different aspects of the facility were being challenged during the endangerment suit than during the permit process, this doctrine should not have applied. A RCRA citizen suit raises issues that are not addressed during the USEPA permitting process because the permit process does not always address concerns about human health.²⁵⁴

Additionally, the Administrative Procedure Act that the Fourth Circuit refers to was passed in 1946²⁵⁵ while the RCRA citizen suit provision was passed as part of the Hazardous and Solid Waste Amendments Act in 1984.²⁵⁶ Being aware of its

²⁴⁵ *Id.* at 295.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Palumbo*, 989 F.2d at 159.

²⁴⁹ *Id.* at 160-61; 5 U.S.C. § 706.

²⁵⁰ *Palumbo*, 989 F.2d at 161; 5 U.S.C. § 706.

²⁵¹ *Palumbo*, 989 F.2d at 161.

²⁵² 42 U.S.C. § 6972(a)(2).

²⁵³ Schannauer, *Permit a Defense?*, *supra* note 9, at 328.

²⁵⁴ *Id.* at 323.

²⁵⁵ 5 U.S.C. §§ 701 *et seq.*

²⁵⁶ Schannauer, *Permit a Defense?*, *supra* note 9, at 308. *See also* TEETS, *supra* note 21, at 5-6.

prior legislation, Congress chose to provide citizens with the endangerment suit as an additional remedy from environmental harms than that provided by the Administrative Procedures Act. “Congress’ consistent provision for citizen suits in environmental legislations ‘evinces a legislative intent that ‘citizen[s] are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests.’”²⁵⁷ While the court may not see any evidence that Congress intended to eviscerate the permitting process it established,²⁵⁸ RCRA itself seems to provide adequate evidence that it did. Congress passed the endangerment suit provision providing exclusive jurisdiction to the district courts²⁵⁹ and offered a distinct and separate cause of action than that provided under the Administrative Procedures Act. Congress’ clear intent was that district courts should have jurisdiction over endangerment claims brought under RCRA.

b. The Fourth Circuit Misapplied the Burford Doctrine

The court went on to dismiss all counts where the plaintiffs challenged the decisions of the OEPA by inappropriately applying the *Burford* abstention doctrine.²⁶⁰ In 1983, the Sixth Circuit, ruling on another RCRA case, explained that *Burford* is not appropriate merely because resolving the question at hand may overturn state policy.²⁶¹ The state must have an overriding interest in the case and federal review would disrupt the state’s efforts in establishing a coherent policy.²⁶²

Federal courts should not abstain from hearing cases merely because the law is difficult to determine.²⁶³ In RCRA suits, the federal and state agencies share jurisdiction with federal law dictating the environmental standards and state regulations supplementing enforcement. In fact, RCRA contemplates a federal-state partnership for enforcement where a state hazardous waste program becomes authorized by the USEPA.²⁶⁴ Additionally, the objective of the RCRA statute is to “promote the protection of health and the environment” through “a cooperative effort among the Federal State and local governments.”²⁶⁵ This cooperation places

²⁵⁷ *Greenpeace*, 1993 U.S. Dist. LEXIS 5001, at *12 (quoting *Proffitt v. Comm’rs of Bristol*, 754 F.2d 504, 506 (3d. Cir. 1985) (quoting *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976)).

²⁵⁸ *Palumbo*, 989 F.2d at 162.

²⁵⁹ 42 U.S.C. § 6972(a)(2).

²⁶⁰ James L. Buchwalter, *Propriety of Federal Court’s Abstention, Under Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), *as to Claim that State of Local Statute or Regulation, or Application Thereof, Violates Federal Constitution or Conflicts with Federal Statute or Regulation—Land Use and Zoning Issues*, 30 A.L.R. FED. 2D 285, § 5 (2010).

²⁶¹ *Ada-Cascade Watch Co. v. Cascade Res. Recovery, Inc.* 720 F.2d. 897, 903 (6th Cir. 1983).

²⁶² *Id.*

²⁶³ *Ibarra v. Bexar Cnty. Hosp. Dist.*, 86 F.R.D. 346, 349 (W.D. Tex. 1979)

²⁶⁴ *Families Concerned About Nerve Gas Incineration v. U.S. Dep’t of the Army*, 380 F. Supp. 2d 1233, 1237 (N.D. Ala. 2005).

²⁶⁵ 42 U.S.C. § 6902.

concerns raised under RCRA within the jurisdiction of federal courts. Applying the *Burford* abstention doctrine in cases such as this would provide defendants an “end run around RCRA” by opposing cases as being barred by this doctrine.²⁶⁶

2. Greenpeace v. Waste Technologies Industries

On January 12, 1993, Greenpeace and eight local Ohio citizens brought this case²⁶⁷ before federal District Judge Ann Aldrich in the Northern District of Ohio, just 48 hours before WTI was scheduled to begin the trial burn period.²⁶⁸ Under normal circumstances, after a test burn is completed, a facility would then enter a post-test burn period where it is permitted to burn hazardous waste pending the outcome of the test burn results.²⁶⁹ This period may last as long as one to two years.²⁷⁰ Specifically, plaintiffs argued that the facility would pose an endangerment to human health and the environment because of indirect exposure to dioxin emissions through the food chain.²⁷¹ Because plaintiffs brought this case under the citizen suit provision of RCRA, the district court’s inquiry was limited to whether the incinerator posed “an imminent and substantial endangerment to health or the environment.”²⁷² The plaintiffs were unable to introduce direct evidence as regarding the siting of WTI.²⁷³

After considering testimony from USEPA officials, scientists, and others, Judge Aldrich ruled in favor of the plaintiffs, finding that the facility did pose an imminent and substantial endangerment to the health and the environment.²⁷⁴ The court found that releases from the facility would likely cause an additional 4 cancer deaths per 100,000 residents per year, stating:

This risk for *one year* of emissions is four times higher than any analogous acceptable risk for *lifetime* emissions. When this is considered along with the non-cancer effects, this Court finds it clear that the operation of the WTI facility during the post trial burn period clearly may cause imminent and substantial endangerment to health and the environment. It is patently unsafe to subject the population exposed to the facility’s emissions to the risks involved in incineration while the USEPA determines what the risk is and what risk is acceptable.²⁷⁵

In its ruling dated March 5, 1993, the court held that WTI would be permitted to operate during the eight-day test burn period because the risk from such a short burn

²⁶⁶ *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 310, 619 (7th Cir. 1998).

²⁶⁷ *Greenpeace*, 1993 U.S. Dist. LEXIS 5001, at *2.

²⁶⁸ *Greenpeace*, 9 F.3d. at 1177.

²⁶⁹ *DAVY*, *supra* note 12, at 108.

²⁷⁰ *Id.*

²⁷¹ *Greenpeace*, 9 F.3d. at 1177.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Greenpeace*, 1993 U.S. Dist. LEXIS 5001, at *60.

²⁷⁵ *Id.* at *60-61 (emphasis original).

period would not be as great.²⁷⁶ But the district court did order an injunction barring the facility from operating during the post-test burn period.²⁷⁷ Opponents of this facility viewed the ruling as a major victory,²⁷⁸ but their celebration was short lived.

Judge Aldrich's ruling was appealed by WTI to the Sixth Circuit Court of Appeals on March 8, 1993. WTI requested an emergency stay of the district court's order. On March 16, 1993, just 11 days after the lower court's ruling, the Sixth Circuit granted WTI's request.²⁷⁹ In April 1993, WTI began burning hazardous waste after the OEPA authorized limited operations.²⁸⁰

The Sixth Circuit entered its ruling in favor of WTI on November 19, 1993.²⁸¹ The Sixth Circuit found that the district court lacked subject matter jurisdiction to hear the case.²⁸² In its opinion, the Sixth Circuit focused on the timing of the suit and noted that there was nothing to indicate that the dioxin risk was something that could not have been raised at any of the numerous prior proceedings.²⁸³ Instead, the Sixth Circuit suspected that the plaintiffs had waited to bring the case before the district court, rather than take advantage of other administrative options, in order to bring the case before what they believed would be a more favorable forum.²⁸⁴ The court also followed the reasoning of the Fourth Circuit in *Palumbo*, which ruled the RCRA citizen suit was nothing more than a collateral attack on the USEPA decision to issue WTI a permit.²⁸⁵

The Sixth Circuit failed to take into account that dioxin emissions are not directly regulated under RCRA.²⁸⁶ Because dioxin emissions were not considered by the USEPA when issuing RCRA permits, an attack on dioxin emissions cannot be a collateral attack and *res judicata* does not apply. The Sixth Circuit erroneously determined that the plain language of the statute made it clear that the RCRA citizen suit was not to be used to challenge a permitted facility.²⁸⁷ But the Sixth Circuit's interpretation of the statute is circular.

If no cause of action can be brought against a permitted facility, then there would be no need for Congress to expressly provide for suits against facilities that pose an "imminent and substantial endangerment to health or the environment."²⁸⁸ The Sixth Circuit incorrectly combined permit suits and endangerment suits into one single

²⁷⁶ *Id.* at *59-61.

²⁷⁷ *Id.* at *61.

²⁷⁸ DAVY, *supra* note 12, at 108.

²⁷⁹ *Greenpeace, Inc. v. Waste Tech. Indus.*, 9 F.3d. 1174 (6th Cir. 1993).

²⁸⁰ DAVY, *supra* note 12, at 112.

²⁸¹ *Greenpeace*, 9 F.3d. at 1174.

²⁸² *Id.* at 1178

²⁸³ *Id.* at 1175.

²⁸⁴ *Id.* at 1182.

²⁸⁵ *Id.* at 1178.

²⁸⁶ Schannauer, *Permit a Defense?*, *supra* note 9, at 297.

²⁸⁷ *Greenpeace*, 9 F.3d. at 1179.

²⁸⁸ 42 U.S.C. 6972(a)(1)(B).

cause of action. A suit against a non-permitted facility is already provided for under the first cause of action. Because Congress expressly provided for permit suits as a separate cause of action under 42 U.S.C. § 6972(a)(1)(A), this should lead courts to the interpretation that actions against permitted facilities are permitted under 42 U.S.C. § 6972(a)(1)(B) as a separate and distinct cause of action. Therefore, the Sixth Circuit's interpretation that endangerment suits cannot be brought against a permitted facility is against the clear intent of Congress.

E. How Europe Would Have Handled the WTI Case

If WTI had been located within the EU, the outcome of the citizen suits would probably have been different. The EU's adoption of the precautionary principle would have the effect of shifting the burden of proof to the facility, requiring the facility to prove that it is safe rather than citizens being required to prove that the facility is unsafe.²⁸⁹

Moreover, the EU has the ECJ in place to oversee legal battles that occur between states. In the U.S., West Virginia was left to sue on behalf of its citizens in the Ohio Supreme Court.²⁹⁰ In its suit before the Ohio Supreme Court, West Virginia was challenging the site of the facility which was controlled by zoning. As discussed above, zoning is under the purview of the state so zoning decisions must be challenged in state court. It is far more likely that West Virginia would have received an unbiased judicial opinion if it had been able to bring its case before a completely impartial court of the sort embodied by the ECJ.²⁹¹ It seems to be asking a great deal of the judges of any state to oversee impartially a dispute between their own state and another.²⁹² And, as a practical matter, the state judges overseeing these disputes must second-guess the decisions of state, county, or local officials, some of whom may have helped get them elected. Impartiality, and perhaps as importantly, the appearance of impartiality, gives the EU an advantage over the U.S. in settling disputes between states that cannot be removed to U.S. federal courts.

But it is the ECHR that has been willing to use the power of judicial interpretation to protect the environment. In the RCRA statutes, the U.S. has on its face an extremely environmentally friendly set of laws.²⁹³ It is the interpretation of RCRA by the U.S. Courts that have denied citizens the right to a safe and healthy environment. Although the EU is arguably much more progressive in its protection of the environment than the U.S., it continues to limit itself through the use of directives rather than regulations to legislate environmental concerns. The ECHR, in contrast, has put the right to a safe and healthy environment among the other human rights the citizens of all Member States are entitled to.

Had the WTI plaintiffs been able to bring their case before the ECHR, there is a real possibility they would have been successful. The WTI plaintiffs could have brought the suit claiming the facility violated Article 8, the right to respect for home

²⁸⁹ See McIntyre, *supra* note 19, at 234.

²⁹⁰ See Palumbo v. Waste Tech. Indus., 989 F.2d 156, 158 (4th Cir. 1993).

²⁹¹ *Court of Justice*, *supra* note 83.

²⁹² See generally *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (overruling several state court decisions in favor of facility).

²⁹³ See generally 42 U.S.C. §§ 6971-74.

and private life,²⁹⁴ because of the how close the facility sat to nearby residences.²⁹⁵ The suit may also have been brought under Article 2, the right to life, because of the health dangers WTI's releases of dioxin posed.²⁹⁶ In the Giacomelli case discussed above, the Italian authorities argued that it had not been proven that the facility was dangerous.²⁹⁷ In much the same way, WTI argued that the USEPA had not proven that their facility was dangerous.²⁹⁸ Again in Giacomelli, the ECHR ruled that authorities must not wait for comprehensive data for each and every aspect of the matter to act and found in favor of Giacomelli.²⁹⁹ The ECHR generally rules for plaintiffs in environmental suits only in cases that contain extreme facts,³⁰⁰ but the WTI case is extreme in its facts. Certainly the District Court for the Northern District of Ohio found it was when Judge Alrich ruled the WTI facility posed an imminent and substantial endangerment to the human health of the citizens of East Liverpool.³⁰¹ Therefore, if the WTI facility had been built in Europe, citizens faced with a threat to their health and their environment would have had greater legal remedies than citizens of the U.S. because of the presence of the ECHR.

F. *The Inter-American Court of Human Rights*

Although it may not be as established or as well-known as its European counterpart, the Inter-American Court of Human Rights (IACHR) rules on human rights cases in the Americas. The IACHR is part of the Organization of American States (OAS), which also includes an Inter-American Commission on Human Rights.³⁰² The United States was one of the 21 original members to ratify the Charter of the OAS in 1948.³⁰³ The OAS now includes all the states of North America, Central America, South America, and the Caribbean.³⁰⁴ The Inter-American Commission on Human Rights (IA Commission) is an autonomous organ of the OAS and is based in Washington, D.C.³⁰⁵ Composed of seven independent human rights experts, the IA

²⁹⁴ Thornton, *supra* note 198, at 38-42.

²⁹⁵ Schannauer, *WTI Risk Assessments*, *supra* note 6, at 34.

²⁹⁶ Thornton, *supra* note 198, at 42.

²⁹⁷ *Giacomelli*, 2006 Eur. Ct. H.R. 59909/00, ¶ 73.

²⁹⁸ *See Palumbo*, 989 F.2d 156; *Greenpeace*, 9 F.3d 1174.

²⁹⁹ *Id.* ¶ 82-109; *XE: The World's Favorite Currency Site*, XE.COM, www.xe.com (last visited Mar. 9, 2011) (to determine amount of award in 2006 USD).

³⁰⁰ Thornton, *supra* note 198, at 45.

³⁰¹ *Greenpeace v. Waste Tech. Ind.*, 1993 U.S. Dist. LEXIS 5001, at *60.

³⁰² *The Inter-American Human Rights System*, HUMAN RIGHTS EDUCATION ASSOCIATION, http://www.hrea.org/index.php?doc_id=413 (last visited Mar. 9, 2011) [hereinafter IAHR System].

³⁰³ *Id.*

³⁰⁴ Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUMAN RIGHTS L. REV. 19, 29 (2008).

³⁰⁵ *Id.* at 36. *See also* Press Release, Columbia Law School, U.S. and the Inter-American Human Rights System Symposium (Apr. 2008), available at http://www.law.columbia.edu/media_inquiries/news_events/2008/april2008/Interamerican.

Commission has strived to promote the observance of human rights since 1959.³⁰⁶ The IA Commission does not have any enforcement authority but rather it holds hearings on petitions and then submits cases to the IACHR for enforcement.³⁰⁷ Like the ECHR, the IA Commission requires the exhaustion of domestic remedies before it will hear a case.³⁰⁸

Citizens may bring a case before the IACHR by submitting a petition against a state to the IA Commission, either a general petition or a collective petition.³⁰⁹ A general petition allows for citizens to bring cases where human rights violations are widespread and not limited to one incident or one individual, while a collective petition can be filed where there are numerous victims of a specific incidence or specific practice.³¹⁰ These petitions may be brought by either an individual victim or by a third party, either with or without the victim's knowledge.³¹¹ The IA Commission will hear the case in two phases.³¹² During the first phase, the IA Commission determines whether the petition meets all procedural requirements and whether jurisdiction is appropriate.³¹³ If all requirements of the first phase are met, the case moves on to the second phase where the case will be considered on the merits.³¹⁴ The IA Commission will consider evidence, hold hearings, and ultimately determine state culpability.³¹⁵ At this point the IA Commission may turn the case over to the IACHR for enforcement, but only if the state involved is a party to the American Convention on Human Rights and has submitted to the jurisdiction of the IACHR.³¹⁶

The Inter-American Court on Human Rights does not expressly recognize the right to a healthy environment but, much like the ECHR, the IACHR has expressed a willingness to expand other rights to cover environmental harms.³¹⁷ The *Case of the Saramaka Community v. Suriname* was brought in 2007 alleging a human rights violation caused by the environmental effects of a mining operation.³¹⁸ The plaintiff lost on procedural grounds, and while the IACHR did not take the opportunity to

³⁰⁶ Bettinger-Lopez, *supra* note 302, at 29.

³⁰⁷ Press Release, Columbia Law School, *supra* note 303.

³⁰⁸ Bettinger-Lopez, *supra* note 302, at 32.

³⁰⁹ IAHR System, *supra* note 300.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Bettinger-Lopez, *supra* note 302.

³¹³ *Id.* at 32.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 32-33.

³¹⁷ Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR J. INT'L L. 585, 586-87 (2010).

³¹⁸ The original text of this case is only available in Spanish, a language in which the author is not fluent. For an English analysis of the case see Lixinski, *supra* note 318, at 596.

address the issue of environmental human rights, it also did not deny the right to a safe environment.³¹⁹ Environmental issues have been raised in other factual settings, such as when an environmental activist was murdered because of her activities, but there has yet to be case on point deciding whether an environmental danger on its own violates human rights.³²⁰

There is one U.S. case currently pending before the Commission concerning environmental rights. The City of Mossville, Louisiana is a community founded in the 1800's and consists almost entirely of African-American residents.³²¹ The community is "now surrounded by at least 14 industrial facilities, nine of which that have admitted to polluting the environment."³²² The town's residents have three times as much dioxin in their bodies as the general population.³²³ At one point the town had to be evacuated when there was an underground leak of a toxic chemical from one of the plants.³²⁴ The plaintiffs in the case allege they are the victims of environmental racism.³²⁵ To get their case before the IA Commission, the plaintiffs had to argue that there was no U.S. law that could provide them with an adequate remedy to satisfy the requirement that all domestic remedies be exhausted.³²⁶ The Commission has decided that it will hear the case, marking this as the first U.S. environmental rights case the IA Commission has considered.³²⁷ To date there has been no ruling on the merits.³²⁸

Unfortunately for the Mossville plaintiffs, any decision made by the IA Commission against the U.S. would not be enforceable.³²⁹ Because the U.S. is a

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ David S. Martin, *Toxic Town's Advocate Sees Victory Ahead*, CNN HEALTH (June 2, 2010), http://articles.cnn.com/2010-06-02/health/mossville.results.toxic.america_1_epa-contractor-superfund-designation-environmental-protection-agency/2?_s=PM:HEALTH; Press Release, Columbia Law School, *supra* note 303.

³²² Press Release, Columbia Law School, *supra* note 303.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Mossville Petition, Mossville Env'tl. Action Now v. United States, Petition No. P-242-05, Inter-Am. Comm'n H.R., *available at* http://www.ehumanrights.org/docs/Mossville_Amended_Petition_and_Observations_on_US_20_08.pdf [hereinafter Mossville Petition].

³²⁷ Press Release, Advocates for Environmental Human Rights, International Human Rights Commission Takes Jurisdiction Over Louisiana Environmental Racism Case: Residents of Mossville, LA Celebrate Landmark Decision (Mar. 30, 2010), *available at* http://www.ehumanrights.org/news_release_mar30-10.html; Ike Sriskandarah, *Living on Earth: Human Rights in "Cancer Alley,"* PUBLIC RADIO INT'L (Apr. 26, 2010, 7:15 AM), <http://www.pri.org/science/environment/human-rights-in-cancer-alley1965.html> (this publication was adapted from a broadcast segment of the show "Living on Earth." The entire transcript of this adaptation can be found at <http://www.loe.org/shows/segments.html?programID=10-P13-00017&segmentID=5>).

³²⁸ Press Release, Advocates for Environmental Human Rights, *supra* note 325.

³²⁹ Bettinger-Lopez, *supra* note 302, at 33.

member of OAS, human rights cases can be brought before the IA Commission.³³⁰ For the IACHR to enforce a ruling, the state must have acceded jurisdiction by ratifying the American Convention on Human Rights.³³¹ The U.S. has not ratified any Inter-American human rights treaty.³³² For U.S. plaintiffs, this means that the IA Commission is the farthest their case can progress and the IACHR will not be able to hear it.³³³ But because there has never been a case against the U.S. before, it is not clear as a practical matter whether or not the U.S. would comply with a ruling against it by the IA Commission. If nothing else, bringing a case before the IACHR or the Commission can have a significant media impact and possibly bring national attention to the plaintiffs' cause.³³⁴ If there is an increased public awareness of the IA Commission and the IACHR within the U.S., the Inter-American Human Rights system may become a powerful tool in influencing public policy.

G. *WTI Before the Inter-American Court of Human Rights*

The residents of East Liverpool should consider bringing their case to the attention of the Inter-American Human Rights System. East Liverpool and Mossville share factual similarities which make it likely that the IA Commission would accept the WTI case. The residents of East Liverpool are exposed to dioxin released through incineration which then ends up in the bloodstreams of individuals, while Mossville residents have blood dioxin levels three times higher than the rest of the population.³³⁵ Both locations are rural areas inhabited primarily by poor, black residents.³³⁶ And in both locations industrial facilities releasing dangerous pollutants are located adjacent to residences.³³⁷ The East Liverpool residents could argue,

³³⁰ *Id.* at 29.

³³¹ *Id.* at 33.

³³² *Id.* at 30.

³³³ *Id.* at 33.

³³⁴ In 2007, the IA Commission created some media buzz within the legal community when it agreed to hear the case of Jessica Lenahan (formerly Gonzalez), whose three daughters were kidnapped and killed by her estranged husband. She alleged, on behalf of herself and her daughters, that the U.S. violated her right to life, non-discrimination, family life/unity, due process, and to petition the government when the U.S. and the State of Colorado failed to enforce a restraining order against her estranged husband. The IA Commission agreed to hear the case after the U.S. Supreme Court ruled that she was not entitled to police enforcement of her restraining order as a Constitutional right in 2005. The IA Commission has not yet ruled on the merits. See Press Release, American Civil Liberties Union, Inter-American Commission on Human Rights Holds U.S. Responsible for Protecting Domestic Violence Victims (Oct. 9, 2007), available at <http://www.aclu.org/womens-rights/inter-american-commission-human-rights-holds-us-responsible-protecting-domestic-violen>. See also *Jessica Gonzales v. U.S.*, COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS (last visited Apr. 27, 2011).

³³⁵ See discussion *infra* Section D; Press Release, Columbia Law School, *supra* note 303.

³³⁶ SHEVORY, *supra* note 8, at 6; Sriskandarah, *supra* note 325.

³³⁷ Schannauer, *WTI Risk Assessment*, *supra* note 6, at 34; Mossville Petition, *supra* note 324, at 39.

much like their counterparts in Mossville, that the domestic remedies available to them in the U.S. were inadequate to protect their rights and could point to the flaws in their previous RCRA endangerment suits discussed above to support this argument. Additionally, WTI is located near the East End of East Liverpool, a neighborhood made up almost exclusively of black residents.³³⁸ With a properly filed petition, East Liverpool citizens could bring a case against WTI for environmental racism before the IA Commission for a ruling on the merits.

The IA Commission and the IACHR have been more and more willing to consider cases involving human rights violations stemming from environmental harms. In 2009, the IA Commission agreed to consider a case alleging an environmental human rights violation stemming from Brazil's construction of numerous dams.³³⁹ The construction of the large dams by the Brazilian government harmed the environment and the indigenous people of the area who depended on the water to sustain their way of life.³⁴⁰ The IACHR has expanded the interpretations of the American Convention on Human Rights to include environmental wrongs in much the same way as the ECHR.³⁴¹ Cases on environmental human rights are heard by the IACHR under the right to life, property, equal protection, the inviolability of the home, property, and due process.³⁴² Additionally, the IACHR is very concerned with protecting the rights of individuals who rely on the land to provide food and a livelihood.³⁴³ East Liverpool is located in the generally fertile area in eastern Ohio and many of the people surrounding the city are farmers.³⁴⁴ Pollution from dioxins, such as those released by WTI, become concentrated as they move up the food chain, making food grown in the surrounding areas potentially dangerous.³⁴⁵ East Liverpool is located in Columbiana County where nearly 40% of the land is agricultural.³⁴⁶ Because the IA Commission is sensitive to the needs of those that rely on the land, such as indigenous peoples,³⁴⁷ and because WTI poses a

³³⁸ Schannauer, *WTI Risk Assessment*, *supra* note 6, at 34.

³³⁹ Press Release, International Rivers, Inter-American Commission on Human Rights Examines Impacts of Large Dams in Latin America (Oct. 29, 2009) *available at*, <http://www.internationalrivers.org/node/4793>.

³⁴⁰ *Id.*

³⁴¹ *See generally* Lixinski, *supra* note 315, at 596; Turgut, *supra* note 201.

³⁴² *See* Organization of American States, American Convention on Human Rights art. 62, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S.123; Lixinski, *supra* note 315, at 596.

³⁴³ *See generally* Press Release, Inter-American Commission on Human Rights, IACHR Publishes Report on Indigenous Peoples' Rights Over Their Ancestral Lands (Feb. 17, 2011), *available at* <http://www.cidh.oas.org/Comunicados/English/2011/13-11eng.htm>

³⁴⁴ SHEVORY, *supra* note 8, at 93-100.

³⁴⁵ *Id.*

³⁴⁶ Ohio County Profiles, Columbiana County, OHIO DEPT. OF DEV., <http://www.development.ohio.gov/research/files/s0/Columbiana.pdf> (last visited Jan. 24, 2012).

³⁴⁷ *See generally* Alex Meyers, *Clearing the Path for Land Rights, One Road Block at a Time: How Peru's Indigenous Population Can Assert Their Land Rights Against Peru's Government*, 1 GLOBAL BUS. L.R. 229. *See also* Press Release, Inter-American Commission on Human Rights, *supra* note 344.

potential threat to an agricultural way of life by polluting the land, the IA Commission may consider this in ruling in favor of the citizens of East Liverpool.

East Liverpool residents would have greater legal protections if the U.S. ratified the American Declaration of Human Rights (Declaration). By ratifying the Declaration, the U.S. would submit to the jurisdiction of the IACHR.³⁴⁸ Currently, U.S. cases cannot be brought before the IACHR and must stop at the IA Commission.³⁴⁹ Decisions made by the IA Commission are not binding. If the IACHR had jurisdiction within the U.S. its citizens could have human rights violations legally enforced by an international body. Oversight by an international body would provide U.S. citizens another level of legal protection that is not currently available to them. With the Declaration as binding law within the U.S., U.S. citizens would have the same legal protections their European counterparts have enjoyed under the jurisdiction of the ECHR.

IV. CONCLUSION

Endangerment suits provide an “‘important set of checks and balances in the enforcement process[,]’ . . . ‘giv[ing] the outcome additional credibility, which is particularly needed’” given that government dishonesty can and sometimes does occur.³⁵⁰ In the U.S., the legal remedies Congress intended to provide for individuals faced with imminent and substantial endangerment to human health and the environment under the RCRA statutes were denied to the plaintiffs in the WTI cases. Additionally, the U.S. has fallen behind Europe and other international bodies of law in the area of environmental protection and U.S. citizens do not have the same legal remedies against environmental harms as EU citizens.³⁵¹ The right to a clean and healthy environment is also being incorporated into the fundamental human rights embodied under both the ECHR and the IACHR.³⁵² The Fourth and Sixth Circuits misinterpreted the RCRA statutes by failing to allow endangerment suits against a permitted facility. A step in the right direction would be for Congress to amend or replace this statute with a regulation that places higher restrictions on activities, such as the incineration of hazardous waste, that pose a threat to human health or the environment. In amending or replacing the RCRA citizen suit provision, the focus should be on regulating the dangerous activity regardless of whether a facility happens to hold a USEPA permit.

One way for the U.S. to place higher restrictions on dangerous activities and align itself with the environmental norms of Europe and other international bodies would be to adopt the precautionary approach to environmental regulation.³⁵³ This

³⁴⁸ See Bettinger-Lopez, *supra* note 302, at 33.

³⁴⁹ *Id.*

³⁵⁰ Greenpeace, 1993 U.S. Dist. LEXIS 5001, at *16 (citing 130 CONG. REC. S9152 [daily ed. July 25, 1984] [statement of Sen. Mitchell]). See Bob Downing, *State EPA Missing Two Years of Pollution Data: Former Staff Member Failed to Collect Samples*, THE BEACON JOURNAL (Akron), (June 23, 1991), available at http://www.ohiocitizen.org/campaigns/wti/missing_two.htm. See generally SHEVORY, *supra* note 8.

³⁵¹ See Walter, *supra* note 34, at 1161.

³⁵² See generally Turgut, *supra* note 201. See also Lixinski, *supra* note 315.

³⁵³ McIntyre, *supra* note 19, at 229-30.

principle would shift the burden to hazardous waste facilities to show that they do not pose a threat to human health, as opposed to the current regime which places the burden on plaintiffs to prove a facility poses a threat.³⁵⁴ Because there is always a degree of scientific uncertainty about the precise cause of any environmental or health effect, the evidentiary and financial burden placed on plaintiffs bringing environmental citizen suits to prove a facility is dangerous is often prohibitively high. Another way for the U.S. to provide greater protection for its citizens from environmental harm would be to ratify the American Declaration of Human Rights. This would allow U.S. citizens to bring their case before the IACHR whose holdings would then be enforceable within the U.S.³⁵⁵ These actions would provide U.S. citizens with greater legal remedies against environmental harms which are currently limited by courts' narrow interpretations of the RCRA endangerment action. By adopting the precautionary principle and the ratifying the IACHR, the citizens of the U.S. would be afforded the same environmental protections as the citizens of the EU.

³⁵⁴ *Id.* at 221-22.

³⁵⁵ Bettinger-Lopez, *supra* note 302, at 30-33.