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Expanding the Scope of RCRA Section 6972(a)(1)(B)—A Citizen Suit Provision

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EXPANDING THE SCOPE OF RCRA SECTION 6972(a)(1)(B)—A CITIZEN SUIT PROVISION

I. INTRODUCTION

On May 29, 1992,[1] an innocent purchaser of contaminated property, Kentucky Fried Chicken Western, Inc. (KFC), filed suit seeking equitable restitution[2] under the Resource Conservation and Recovery Act[3] (RCRA) section 6972(a)(1)(B)[4] from the Meghrigs, the prior owners of the property, for the several hundred thousand dollars that KFC spent remediating the property.[5] The property was contaminated with refined petroleum waste products, lead and

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1. The facts which follow are taken from *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). They are illustrative of the facts which typically give rise to a plaintiff's use of 42 U.S.C. § 6972(a)(1)(B), the citizen suit provision of the Resource Conservation and Recovery Act.

2. Restitution is a form of equitable relief. *See* DOUGLAS LAYCOCK, AMERICAN LEGAL REMEDIES: CASES AND MATERIALS 3 (2d ed. 1994). The basic purpose of restitution is to disgorge the defendant of unjust enrichment enjoyed at the plaintiff's expense. *Id.* at 646. By contrast, compensatory damages are a remedy at law and are intended to compensate plaintiffs for injury or harm they have suffered. *See id.* at 3, 7.

Even though restitution is traditionally treated as an equitable remedy, the "law/equity distinction is especially murky" with regard to restitution. *Id.* at 7. Furthermore, Professor Laycock states that restitution is available at both law and in equity. *Id.* Classification of the monetary relief sought by citizen plaintiffs under RCRA § 6972(a)(1)(B) is difficult to achieve. *See* Furrer v. Brown, 62 F.3d 1092, 1096 (8th Cir. 1995) (stating that while the court assumes that the plaintiffs seek relief in the form of equitable restitution, the relief sought "looks to us suspiciously like money damages"). *See also* Richard L. Bradford, *The Personal Injury Endorsement: An Unwarranted Straining to Obtain Insurance Coverage for Environmental Damage*, 11 J. LAND USE & ENVTL. L. 111, 114 (1995) (commenting that under RCRA § 6972(a)(1)(B), a plaintiff may recover "restitution," but then labeling such restitution as "money damages"). Because a classification of the remedies typically sought by plaintiffs under RCRA's citizen suit provision is beyond the scope of this note, the term "restitution" will be used to refer to the type of monetary relief sought by plaintiffs under the statute. However, the term "damages" will be used in reference to case law that has classified the relief as such.

3. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, *as amended by* The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6981 (1988)) [hereinafter RCRA].

4. 42 U.S.C. § 6972(a)(1)(B) (1988). Because 42 U.S.C. § 6972(a)(1)(B) has been compiled in WEST, SELECTED ENVIRONMENTAL LAW STATUTES 683 (1996-97 educational ed. 1996), this note refers to RCRA's citizen suit imminent hazard provision as either 42 U.S.C. § 6972(a)(1)(B) or as RCRA § 7002(a)(1)(B). *See* Envtl. L. Rep. (Envtl. L. Inst.) RCRA § 7002(a)(1)(B). Similarly, this note refers to the EPA Administrator's companion imminent hazard provision as either 42 U.S.C. § 6973 or RCRA § 7003. *See* Envtl. L. Rep. (Envtl. L. Inst.) RCRA § 7003.

5. *KFC Western*, 49 F.3d at 519.

benzene.[6] Prior to selling the property to KFC, the Meghrigs operated a gasoline station on it.[7] The Meghrigs' alleged negligent operation of this filling station resulted in a leakage of petroleum from underground storage tanks on the property, causing the contamination.[8]

KFC purchased the property, which is located in Los Angeles, California, from the Meghrigs in 1975.[9] Since that time KFC has owned and operated a restaurant on the property.[10] The Meghrigs never disclosed the contamination to KFC.[11] KFC discovered the contamination in October, 1988, in the course of making property improvements.[12] The contamination appeared to have been caused by miscellaneous petroleum spills, as well as leakage from underground storage tanks located on the property prior to the time that KFC acquired the property.[13]

Upon discovering the presence of hazardous waste on the property, the City of Los Angeles Department of Building and Safety issued an order forbidding KFC from proceeding with any further construction on the property pending a clearance order issued from the Los Angeles County Department of Health Services (DHS).[14] Subsequently, KFC spent over $211,000 to remediate the property.[15] KFC completed its cleanup of the property in March of 1989, but

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6. Respondent's Brief at *2, 1995 WL 728551, KFC Western, Inc. v. Meghrig, 116 S. Ct. 1251 (1996) (No. 95-83). *See also KFC Western*, 49 F.3d at 519 (noting that the soil at the property contained elevated levels of these refined petroleum products).

7. KFC Western v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

8. *Id.*

9. *Id.*

10. Respondent's Brief at *2, *KFC Western* (No. 95-83). *See also KFC Western*, 49 F.3d at 519 (explaining that KFC continues to own and operate a Kentucky Fried Chicken franchise on the property at issue).

11. *KFC Western*, 49 F.3d at 519.

12. *Id. See also* Respondent's Brief at *2, 1995 WL 728551, KFC Western, Inc. v. Meghrig, 116 S. Ct. 1251 (1996) (No. 95-83).

13. Respondent's Brief at *2, *KFC Western* (No. 95-83).

14. KFC Western v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). "Although KFC *neither caused the contamination nor owned the property when the contamination occurred*, the DHS ordered KFC to clean up the property." *Id.* (emphasis added).

15. *Id. See also* Respondent's Brief *at* *2, *KFC Western* (No. 95-83). The remediation costs in *KFC Western* were relatively minimal. Remediation of contaminated property can run into the billions of dollars. *See, e.g., United States Seeks $1.9 Billion from Shell in Rocky Mountain Arsenal Contamination Suit*, 14 Env't Rep. (BNA) 1436 (Dec. 16. 1983) (anticipating $1.9 billion for cleanup costs); *Petro Processors Settlement Reached Including $50 Million Cleanup of Two Sites*, 14 Env't Rep. (BNA) 1461 (Dec. 23, 1983) (forecasting a $50 million cleanup). *See also* Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1151 (9th Cir. 1989) (estimating that the cost of cleaning up a particular parcel of contaminated property would cost between $251,780,580 and $260,075,100); William D. Evans, Jr., *Judicial Relief From Superfund Claims: Some Good News, Possibly Fleeting, for Bankers*, 111 BANKING L.J. 4, 6 (1994) (noting that cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) can run in

DHS did not issue a formal clearance order until May of 1989.[16] In June of 1990, KFC asked the Meghrigs for reimbursement of costs expended in cleaning up the contamination, but the Meghrigs refused.[17] KFC commenced its action against the Meghrigs in federal district court on May 29, 1992, seeking restitution from the Meghrigs under RCRA section 6972(a)(1)(B).[18] Initially, KFC was permitted to recover restitution from the Meghrigs;[19] however, the United States Supreme Court reversed in a unanimous decision.[20] The Court's decision limits private citizen[21] causes of action under RCRA, creating a setback for environmental protection.[22]

The need for citizen participation in the preservation and restoration of the environment is critical because current environmental protection is deficient, and Congressional action threatens to impose measures which will further limit environmental preservation.[23] One vehicle for private environmental action is the citizen suit provision found in RCRA section 6972(a)(1)(B).[24] RCRA is a federal statute designed to regulate hazardous waste.[25] It is administered by the

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excess of $20 million).

Although in *KFC Western*, a local environmental agency issued the cleanup order to KFC, it is worth noting that often it is the EPA that issues cleanup orders to defendants. *See, e.g.*, United States Envtl. Protection Agency v. Environmental Waste Control, Inc., 917 F.2d 327 (7th Cir. 1990); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984). If a defendant fails to promptly comply with an administrative cleanup order issued by the EPA under RCRA, the resulting penalties can be severe. *See infra* notes 59-63 and accompanying text.

16. Respondent's Brief at *2, *KFC Western* (No. 95-83).

17. *KFC Western*, 49 F.3d at 519.

18. *Id.* *See also* Respondent's Brief at *2-3, 1995 WL 728551, KFC Western, Inc. v. Meghrig, 116 S. Ct. 1251 (1996) (No. 95-83).

19. *KFC Western*, 49 F.3d at 521.

20. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254, 1256 (1996).

21. Section 6972 governs "citizen" suits; however, any "person" may bring suit under this section. *See* 42 U.S.C. § 6972(a)(1)(B) (1988). The statute defines the term "person" as: "[A]n individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a state . . . ." 42 U.S.C. § 6903(15) (1994).

22. *See infra* section III.E.

23. *See infra* notes 125-36 and accompanying text.

24. 42 U.S.C. § 6972(a)(1)(B) (1994). *See* Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, C127 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 997, 1002 (1995) (noting that RCRA is potentially one of the most effective legal tools available to not only citizen environmental activists, but also to private parties who seek injunctive relief and restitution). For an examination of the amendments to RCRA § 6972(a)(1)(B) proposed in this note, see *infra* section V.

25. The term "hazardous waste" is defined as:

> [A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-
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> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

Environmental Protection Agency (EPA).[26] Amended significantly in 1984 by the Hazardous and Solid Waste Amendments (HSWA),[27] section 6972(a)(1)(B) is the current version of RCRA's citizen suit provision.[28] While the Comprehensive Environmental Response, Compensation, and Liability Act[29] (CERCLA), as well as common law remedies, produce inequities for

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(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1994).

26. Created in 1970 and considered part of the executive branch, the EPA is a federal agency which is authorized by Congress to administer various environmental statutes designed to preserve the environment. Cynthia Anne Oppliger, Note, *Putting Recovery Back into RCRA: An Effective Addition to the Resource Conservation and Recovery Act*, 25 VAL. U. L. REV. 59, 65 n.30 (1990). In addition to RCRA, other environmental statutes that are administered by the EPA include the following: The National Environmental Policies Act of 1969, 42 U.S.C. §§ 4321-4370d (1994), which declares the nation's environmental policy of promoting the general welfare, as well as creating and maintaining conditions under which humans and nature can exist in productive harmony; the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994), which regulates the emission of harmful pollutants into the air so as to protect and enhance the quality of the nation's air resources; the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994), which regulates the discharge of harmful pollutants into the nation's surface waters so as to promote the restoration and maintenance of the chemical, physical and biological integrity of the nation's waters; the Public Health Service Act, 42 U.S.C. § 300f-300j-26 (1994), which regulates contaminant levels of pollution in drinking water; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994), which regulates the production, use, and disposal of chemical substances and mixtures, while also promoting the collection and development of adequate data for chemical substances and mixtures; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994), which provides for the cleanup of abandoned, inactive hazardous waste sites; and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136-136y (1994). Congress empowers the EPA to create regulations and to employ statutory enforcement mechanisms as the means of administering the federal environmental statutes. In order to clarify EPA regulations, the EPA often publishes guidance documents that explain the EPA Administrator's policy directives associated with the implementation of the environmental regulations. Oppliger, *supra*, at 65 n.30.

27. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) [Hereinafter HSWA]. *See also* Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10122 (1994) (noting the 1984 amendments to RCRA).

28. The HSWA expanded the powers afforded citizens in the role of environmental cleanup. Melinda H. Van der Reis, Comment, *An Amendment for the Environment: Alternative Liability and the Resource Conservation and Recovery Act*, 34 SANTA CLARA L. REV. 1269, 1283-84 (1994). For a discussion of the increase in citizen authority vested in § 6972(a)(1)(B) after the HSWA, see *infra* notes 107-16 and accompanying text. *See also* John E. Sullivan, *Implied Private Causes of Action and the Recoverability of Damages Under the RCRA Citizen Suit Provision*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10408, 10408 (1995) ("In 1984, Congress expanded the role of citizen enforcers under § 7002 as part of the Hazardous and Solid Waste Amendments (HSWA) to RCRA.").

29. 42 U.S.C. §§ 9601-9675 (1994).

plaintiffs,[30] RCRA section 6972(a)(1)(B) can potentially resolve these injustices.[31] However, before section 6972(a)(1)(B) can effectively address the obstacles citizen plaintiffs face under CERCLA and the common law, it must be modified yet again.[32] Currently, the statute's ambiguous drafting contains timing problems, offers only limited remedies, and poses a number of procedural difficulties for private plaintiffs. Revisions to RCRA's citizen suit provision will create a legal scheme which will give the federal courts the jurisdiction needed to grant a full range of equitable relief to private plaintiffs.[33]

Typically, property owners respond to hazardous and solid waste contamination on their properties by first cleaning up the contamination and then seeking recovery of their cleanup costs from the parties responsible for contaminating the property.[34] Recently, property owners have turned to RCRA section 6972(a)(1)(B) in an attempt to recover response costs[35] from responsible parties.[36] However, most courts do not interpret section 6972(a)(1)(B) to allow

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30. For example, under CERCLA, relief is not available to plaintiffs whose property is contaminated with petroleum. *See* 42 U.S.C. § 9601(14) (1994). Relief is also denied for solid waste contamination under CERCLA. J. Martin Robertson, *Restitution under RCRA § 7002(a)(1)(B): The Courts Finally Grant What Congress Authorized*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10491, 10495 (1995). *See also infra* section IV.A. Similarly, the common law presents a number of bars to private party remedies, such as difficult proof problems, short state limitations periods, and costliness. *See infra* section IV.B.

31. For an examination of the amendments to RCRA § 6972(a)(1)(B) proposed in this note, see *infra* section V.

32. *See infra* section V.

33. *See infra* section V.

34. *See supra* notes 15-18 and accompanying text. The typical suit is between the current property owner and the prior owner of the property. However, situations may arise in which the entity responsible for contaminating the property is not the prior owner of property in question, but the current or prior owner of neighboring property. Still another permutation of the parties to a RCRA citizen suit can involve the current property owner and an entity which is neither a prior owner nor a neighbor to the contaminated property. *See* Agricultural Excess and Surplus Ins. Co. v. A.B.D. Tank & Pump Co., No. 95C3681, 1996 WL 11122, *3 (N.D. Ill. Jan. 8, 1996) (considering whether the manufacturer and designer of underground storage tanks that subsequently leaked hazardous waste was liable as a contributor under § 6972(a)(1)(B)).

35. The term "response costs" is used to refer to the costs a party incurs remediating contaminated property. CERCLA uses this term. *See* 42 U.S.C. §§ 9607(a)(4)(A), 9611(a) (1988). Numerous cases have also used this term. *See, e.g.*, Key Tronic, Corp. v. United States, 114 S. Ct. 1960, 1963 (1994); Exxon Corp. v. Hunt, 475 U.S. 355, 569 (1986); CMC Heartland Partners v. Union Pac. R.R., 78 F.3d 285, 286-87 (7th Cir. 1996); Virginia Properties, Inc. v. Home Ins. Co., 74 F.3d 1131, 1134 (11th Cir. 1996).

36. *See generally* Furrer v. Brown, 62 F.3d 1092, 1101 (8th Cir. 1995) (denying a private party's request for restitution under RCRA § 6972(a)(1)(B)); KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995) (permitting a private party's recovery of cleanup costs under RCRA 6972(a)(1)(B)), *rev'd*, 116 S. Ct. 1251 (1996); Kaufman & Broad—South Bay, Inc. v. Unisys Corp., 822 F. Supp. 1468, 1477 (N.D. Cal. 1993) (denying a private party's request for restitution under

such recovery.[37] Indeed, the ambiguous language in RCRA's citizen suit provision presents several problems for private[38] litigants.[39]

The over-arching problem with RCRA section 6972(a)(1)(B) concerns the available remedies for private party plaintiffs.[40] Because Congress does not expressly authorize private parties to seek restitution for cleanup costs under section 6972(a)(1)(B), the courts must imply a private cause of action in order to allow plaintiffs restitution.[41] Prior to the Supreme Court's *Meghrig v. KFC Western*[42] decision, a split had developed between the federal circuits regarding whether restitution should be implied as an available remedy under the citizen

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RCRA § 6972(a)(1)(B)); Gache v. Town of Harrison, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993) (denying a private party's request for injunctive relief under RCRA § 6972(a)(1)(B)); Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990) (denying a private party's request for restitution under RCRA § 6972(a)(1)(B)). *See also* Miller, *supra* note 24, at 1002 (noting the increasing number of suits being brought under RCRA's citizen suit provision).

37. *See infra* note 168 and accompanying text. *See also infra* text accompanying note 169.

38. The designations "private plaintiffs," "private party litigants," and "private parties" will be used interchangeably throughout this note to refer to citizen plaintiffs who seek relief for contamination on their own properties, rather than plaintiffs who sue to remedy general environmental wrongs on government property or property owned by others. The Ninth Circuit used the term "private plaintiff" in its *KFC Western* opinion. *KFC Western*, 49 F.3d at 520. *See also* Jean Buo-lin Chen Fung, KFC Western, Inc. v. Meghrig: *The Merits and Implications of Awarding Restitution to Citizen Plaintiffs Under RCRA § 6972(a)(1)(B)*, 22 ECOLOGY L.Q. 785, 786 (1995) (using the term "private plaintiffs"). At least one commentator has used the term "private parties." Robertson, *supra* note 30, at 10491.

39. In fact, in its *KFC Western* decision, the U.S. Court of Appeals for the Ninth Circuit became the first federal circuit court to allow private plaintiffs the remedy of equitable restitution under § 6972(a)(1)(B). *See* Fung, *supra* note 38, at 841. The U.S. Courts of Appeals for the Sixth and Eighth Circuits refused to do so, as did numerous federal district courts. *See infra* notes 168, 267-68 and accompanying text. Similarly, in *Environmental Defense Fund v. Lamphier*, the U.S. Court of Appeals for the Fourth Circuit suggested in dicta that allowing private plaintiffs such a remedy would be inappropriate. Environmental Defense Fund v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983).

40. *See* Sullivan, *supra* note 28, at 10408 (discussing Congress' failure to provide private party plaintiffs an express cause of action for damage recovery under RCRA § 6972(a)(1)(B)).

41. *Id. But see* Robertson, *supra* note 30, at 10491 (arguing that Congress authorized a broad grant of equitable jurisdiction in RCRA § 6972(a)(1)(B)). For a discussion of the courts which have considered whether a private restitution cause of action exists under RCRA § 6972(a)(1)(B), see *supra* note 36 and accompanying text.

42. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996). For purposes of clarification for the reader, the Ninth Circuit's disposition of the case at issue will be referred to as *KFC Western* in this note, while the United States Supreme Court's disposition of the same case, unanimously reversing the Ninth Circuit, will be referred to as *Meghrig*.

suit provision.[43] In *Furrer v. Brown*,[44] the Eighth Circuit Court of Appeals refused to imply a private cause of action for restitution under RCRA's citizen suit provision.[45] Instead, the court held that RCRA section 6972(a)(1)(B) supports neither an express nor implied cause of action for restitution by owners who incur costs remediating contaminated property.[46] The Eighth Circuit also held that only injunctive relief is available to plaintiffs under RCRA's citizen suit provision.[47] However, in *KFC Western, Inc. v. Meghrig*,[48] the Court of Appeals for the Ninth Circuit implied a private cause of action for restitution.[49] After granting certiorari to address the split in the circuits, the United States Supreme Court unanimously reversed the Ninth Circuit's holding.[50]

The analysis employed to determine whether a private cause of action for restitution exists under the statute generally involves two critical and overlapping questions. First, section 6972(a)(1)(B) presents a question concerning timing, requiring courts to determine whether "an imminent and substantial endangerment"[51] must exist at the time the plaintiff files suit.[52] In *Meghrig*, the Supreme Court held that such a danger must exist at the time suit is brought.[53] A plaintiff, therefore, may not bring suit after the contamination is removed from the property because the waste no longer poses an imminent and substantial endangerment.[54] However, the requirement of bringing suit during

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43. The United States Supreme Court granted certiorari to one of the circuit court cases, *KFC Western, Inc. v. Meghrig*, in order to resolve the split between the United States Courts of Appeals for the Eighth and the Ninth Circuits. Official Transcript at 24, KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). The Court identified this split as being based on what relief is recoverable under the statute. *Id.* at 24-25.

44. 62 F.3d 1092 (8th Cir. 1995).

45. *Id.* at 1100.

46. *Id.*

47. *Id.*

48. 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

49. *Id.* at 521.

50. Meghrig v. KFC Western, 116 S. Ct. 1251, 1254, 1256 (1996).

51. For an examination of this statutory language and the context in which it is used, see 42 U.S.C. § 6972(a)(1)(B) (1988). *See also infra* notes 109-16 and accompanying text.

52. The Court of Appeals for the Eighth Circuit did not decide the timing question presented by § 6972(a)(1)(B) because the plaintiffs in that case did not allege that the property presented an imminent and substantial endangerment, as it was remediated prior to the filing of the suit. Furrer v. Brown, 62 F.3d 1092, 1095 n.6 (8th Cir. 1995). However, it is worth noting that the *Furrer* court stated that an "imminent and substantial endangerment to health or the environment" is required by § 6972(a)(1)(B). *Id.* In comparison, the *KFC Western* majority decided both questions raised by the statute. *KFC Western*, 49 F.3d at 520-21.

53. *Meghrig*, 116 S. Ct. at 1254.

54. *Id.* at 1255.

an imminent and substantial endangerment period can be remarkably problematic for plaintiffs.[55]

Property owners subjected to a government cleanup order[56] may be forced to remove the waste before bringing suit against the responsible parties.[57] As a result, the imminent and substantial endangerment is eliminated prior to the time that the property owner sues the responsible party.[58] If a property owner cannot or will not comply promptly with a government cleanup order,[59] courts may levy civil penalties of up to $25,000 per day against the owner[60] or may mandate that the owner conduct extensive site investigations.[61] Worse yet, failure to comply by an owner can result in criminal sanctions.[62] Criminal sanctions can be comprised of imprisonment or fines of up to $50,000 per day, or both.[63] Therefore, delaying compliance with the government order with the intention of suing the responsible party for injunctive relief while the endangerment continues to exist is not a viable option for property owners.[64] Another reason why private plaintiffs may find it difficult to delay compliance is that Congress prohibits private enforcement actions where the government is

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55. However, the Ninth Circuit Court of Appeals stated that to require a plaintiff to sue during the period in which the site presents an imminent and substantial endangerment "would be an 'absurd and unnecessary' requirement." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521 (9th Cir. 1995) (quoting United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989)), *rev'd*, 116 S. Ct. 1251 (1996). *See id.* at 524 (noting the difficulties raised by requiring a plaintiff to sue for relief prior to the time that the property ceases to present an imminent and substantial endangerment).

56. The issuance of a government cleanup order is not the only thing that a property owner may suffer. For example, the private owner may be denied permits to operate a business or make improvements to the property. *Id.* at 519.

57. The *KFC Western* court held that because private citizens are subject to government cleanup orders as a result of owning contaminated property, and because these property owners cannot control the timing of the imposition of a government order, it is more important that citizen plaintiffs be permitted restitution than government plaintiffs. *Id.* at 524.

58. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254 (1996). *See also KFC Western*, 49 F.3d at 524.

59. Cleanup orders may be levied by state or local agencies under state statutes or local ordinances substantially similar to RCRA. *See* 42 U.S.C. § 6902(a)(7) (1988).

60. *Id.* § 6928(c). Such penalties can easily exceed several million dollars. *See* United States Envtl. Protection Agency v. Environmental Waste Control, Inc., 917 F.2d 327, 331 (7th Cir. 1990) (assessing civil penalties of $2,800,000).

61. JACKSON B. BATTLE & MAXINE I. LIPELES, ENVIRONMENTAL LAW: HAZARDOUS WASTE 149 (2d ed. 1993)

62. 42 U.S.C. § 6928(d)(1)-(7) (1988).

63. *Id.*

64. *See* KFC Western, Inc., v. Meghrig, 49 F.3d 518, 524 (9th Cir. 1995) (alluding to the timing problem property owners face when subjected to a government cleanup order, and stating that "public policy concerns might favor allowing a plaintiff to clean contaminated property first and seek reimbursement later"), *rev'd*, 116 S. Ct. 1251 (1996).

already prosecuting an action to remedy the property.[65] If a property owner receives a government cleanup order, the government is technically prosecuting an action, and the property owner is barred from recovery from the responsible party.[66]

In addition to the problems raised by RCRA section 6972(a)(1)(B)'s timing issue, the statute raises another troublesome issue for plaintiffs. The second question presented by section 6972(a)(1)(B) concerns what kind of relief is available to a private party.[67] RCRA's citizen suit provision compels courts to determine whether a private plaintiff has a cause of action for both equitable restitution and injunctive relief, or injunctive relief only.[68] In *Meghrig*, the Supreme Court construed the statute as permitting only an injunctive remedy, rather than an award of restitution for past cleanup costs.[69] According to the Court, injunctive relief under the statute encompasses prohibitory injunctions,

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65. Adam Babich & Kent E. Hanson, *Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen Organizations*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10165, 10171 (1988). *See also* 42 U.S.C. § 6972(b)(2)(B) (1988).

66. *See* Babich & Hanson, *supra* note 65, at 10171 (arguing that there is no similar limit on recovery under CERCLA).

67. The statute appears to permit two forms of injunctive relief. *See* 42 U.S.C. § 6972(a)(1) (1988). First, it allows the district court jurisdiction "to restrain" anyone who has contributed or is contributing to an imminent and substantial endangerment. *Id.* This type of injunction is prohibitory in nature. *See* LACOCK, *supra* note 2, at 3. It is a court order requiring a defendant to refrain from doing some specific action. *Id.* A prohibitory injunction is intended to prevent a future harmful act, such as requiring a defendant to stop contaminating a plaintiff's property. *See* Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1073 (1979).

Second, the statute permits the district court jurisdiction to order the defendant "to take . . . other action as may be necessary." 42 U.S.C. § 6972(a)(1). This type of injunctive relief is referred to as a mandatory injunction. *See* Brief for Petitioner at *14, 1995 WL 668003, KFC Western Inc. v. Meghrig, 116 S. Ct. 1251 (1996) (No. 95-83). It requires a defendant to take affirmative action, such as to clean up the contamination on the plaintiff's property. *See* LACOCK, *supra* note 2, at 3. The statute does not expressly permit the award of response costs, either in the form of compensatory damages or in the form of equitable restitution. *See* 42 U.S.C. § 6972(a)(1)(B).

68. Prior to the *KFC Western* decision, only one district court construed the scope of relief available to plaintiffs under RCRA § 6972(a)(1)(B) as permitting restitution to private parties. *See* Bayless Inv. & Trading Co. v. Chevron U.S.A., Inc., 39 Env't Rep. Cas. (BNA) 1428 (D. Ariz. May 26, 1994). Numerous other courts have denied such relief. *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311, 315-16 (6th Cir. 1985) (declining to allow a plaintiff to recover reimbursement of past response costs in an action under RCRA § 6972(a)(1)(B)); Gache v. Town of Harrison, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993) (refusing to permit a plaintiff to recover past remediation costs under RCRA § 6972(a)(1)(B)). The *Furrer* court, which denied restitution to private plaintiffs under the statute, did not address the statute's timing issue in its holding, but premised its decision solely on the question of what kind of relief a plaintiff is entitled to under RCRA's citizen suit provision. Furrer v. Brown, 62 F.3d 1092, 1095 n.6 (8th Cir. 1995).

69. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254-55 (1996). The Court left open the question of whether a private party can obtain future costs under the statute. *See id.* at 1256. *See also infra* notes 347-54 and accompanying text.

allowing the plaintiff to preclude the responsible party from further disposing of the waste, and mandatory injunctions, permitting the plaintiff to compel the responsible party to attend to the cleanup and removal of the waste.[70] However, plaintiffs may be forced to wait a long period of time for the responsible party to remove the waste.[71] This is counter-intuitive to RCRA's purpose of promoting prompt cleanup of wastes.[72] It would be consistent with the statute's objectives to allow the owner to quickly remediate the property and sue later for restitution.[73] Nevertheless, the statute's current remedial scheme does not permit such a course of action.[74] Consequently, a plaintiff cannot recover costs from the responsible party for funds it expended to clean up the property.[75] Denying restitution to private plaintiffs who incur costs by cleaning up contaminated property that they did not pollute is an unfair outcome.[76] This outcome does not promote individual responsibility for waste disposal, inhibits RCRA's goal of prompt waste cleanup, and detracts from the power of the citizen suit provision as a waste cleanup tool.[77]

Nevertheless, several factors support the Court's holding in *Meghrig*. First, the legislative history on the availability of a private cause of action for restitution under RCRA section 6972(a)(1)(B) is nebulous at best.[78] Second, current United States Supreme Court doctrine restricts implied statutory causes of action, especially where the legislative history fails to clearly delineate a

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70. *Meghrig*, 116 S. Ct. at 1254. *See also supra* note 67 and accompanying text.

71. For example, the responsible party may not have the financial means to remediate the property.

72. 42 U.S.C. § 6902(b) (1988). "The Congress hereby declares it to be the national policy of the United States that . . . the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible." *Id.*

73. *See* United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982) ("Prompt . . . action [is] the most important consideration [under RCRA]."). The *Price* court indicated that a proper course of action may be for the plaintiff to remediate property first and seek reimbursement later. *Id.*

74. *Meghrig*, 116 S. Ct. at 1254-55.

75. Private plaintiffs were denied restitution in *Furrer v. Brown*, 62 F.3d 1092, 1101 (8th Cir. 1995). The *Furrer* court stated: "Our holding leaves the Furrers without a remedy under § 6972 for the recovery of the costs they have incurred in cleaning up their property. We are not unsympathetic to the Furrers' case but we cannot justify inferring a remedy under § 6972." *Id.*

76. *See* KFC Western, Inc. v. Meghrig, 49 F.3d 518, 524 (9th Cir. 1995) (stressing the unfairness and poor public policy of refusing to allow plaintiffs restitution under RCRA's citizen suit provision), *rev'd*, 116 S. Ct. 1251 (1996).

77. See *infra* section II.B. for a discussion of the importance of citizen suits.

78. *See, e.g.*, SENATE COMMITTEE ON PUBLIC WORKS, SOLID WASTE UTILIZATION ACT OF 1976; S. REP. NO. 94-988, at 17-18 (1976); H.R. REP. NO. 94-1491, pt. 1, at 68 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6245, 6307; H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

congressional intent to create a cause of action.[79] Finally, the conspicuous absence of an express private cause of action for restitution under RCRA section 6972(a)(1)(B) strongly suggests that Congress did not intend to create a private cause of action.[80] In light of these points, the Supreme Court's reversal of the Ninth Circuit's holding in *KFC Western*,[81] leaving the private plaintiff without a means of reimbursement for waste removal response costs, is not surprising.

Thus, this Note contends that the timing problem and the lack of adequate available remedies and statutory ambiguities faced by private party plaintiffs attempting to make use of RCRA section 6972(a)(1)(B) cannot be adequately resolved by any court, including the United States Supreme Court.[82] This Note proposes a congressional revision of RCRA's citizen suit provision that will expressly allow a private cause of action for restitution.[83] Such a grant would not only facilitate the cleanup and rehabilitation of hazardous properties in keeping with RCRA's purpose, but would also serve to compensate innocent parties who incur costs by cleaning up property which they did not contaminate.[84]

Section II of this Note will examine RCRA section 6972(a)(1)(B)[85] and discuss the importance of citizen suit provisions in the environmental law framework.[86] In Section III, this Note will evaluate the current judicial treatment of the problems presented by RCRA section 6972(a)(1)(B) by examining *KFC Western, Inc. v. Meghrig*,[87] *Furrer v. Brown*,[88] *Meghrig v. KFC Western, Inc.*[89] and by analyzing the inadequacy of this treatment.[90] Section IV will discuss the viability of legislative action amending RCRA's

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79. For a general overview of Supreme Court doctrine in this area, see *infra* notes 205-13 and accompanying text. *See also* Heintz v. Jenkins, 115 S. Ct. 1489 (1995); Hallstrom v. Tillamook County, 493 U.S. 20 (1989); United States v. Ron Pair Enter., 489 U.S. 235 (1989); Cannon v. University of Chicago, 441 U.S. 677 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cort v. Ash, 422 U.S. 66 (1975); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 356-64 (Richard A. Epstein et al., eds., 2d ed. 1994). For a discussion of how the Court's statutory construction doctrine has applied to interpreting a federal environmental statute, see *infra* notes 214-27 and accompanying text.

80. *See* 42 U.S.C. § 6972(a)(1)(B) (1988). *See also infra* notes 264-97 and accompanying text; Sullivan, *supra* note 28, at 10419.

81. 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

82. For a discussion of the failure of a judicial resolution of § 6972(a)(1(B)'s problems, see *infra* parts III.B., III.D., III.E.

83. *See infra* section V.B.

84. *See infra* section V.

85. *See infra* notes 94-124 and accompanying text.

86. *See infra* notes 125-53 and accompanying text.

87. 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). *See also infra* part III.A.

88. 62 F.3d 1092 (8th Cir. 1995). *See also infra* part III.C.

89. 116 S. Ct. 1251 (1996). *See also infra* part III.E.

90. *See infra* parts III.B., III.D., III.F.

citizen suit provision to include a private restitution remedy.[91] In particular, Section IV will compare the remedies for hazardous waste contamination provided by RCRA's citizen suit provision with the remedial powers citizens have under CERCLA, as well as identify the problems private parties have obtaining common law tort remedies against parties responsible for contamination.[92] Section V of this Note will propose an amendment to RCRA's existing citizen suit provision that resolves the timing issue, allows for restitution, provides a limitations period, supplies cost recovery guidelines, eliminates the prohibition on private actions if the government is prosecuting an action, and shortens the notice provision in the statute.[93] Revisions to RCRA's citizen suit provision are critical. The only effective changes will be born from congressional, rather than judicial, action.

II. AN EXAMINATION OF THE ORIGINS OF RCRA SECTION 6972(A)(1)(B) AND THE IMPORTANCE OF CITIZEN SUITS

Generally, RCRA, as well as the other federal environmental statutes, is intended to "protect human health and the environment."[94] In particular, Congress enacted RCRA[95] to provide regulation of the continuous management, transport, disposal, and general handling of hazardous and solid wastes.[96] Additionally, RCRA's enactment was intended to facilitate the prompt and effective cleanup of environmental contamination in the form of solid and hazardous wastes.[97]

In relevant part, section 6972(a)(1)(B), RCRA's citizen suit provision, enables any citizen plaintiff to initiate a civil action against any operator of a

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91. *See infra* section IV.

92. *See infra* part IV.A.

93. *See infra* section V.

94. Van der Reis, *supra* note 28, at 1269. *See also* H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5612.

95. *See* 42 U.S.C. §§ 6903-6972 (1988).

96. *See generally* 42 U.S.C. § 6902(a)-(b) (1988); H.R. REP. NO. 94-1491, pt. 1, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6241. *See also* Jeffrey G. Miller, *Private Enforcement of Hazardous Waste Laws and Its Effect on Tort Law and Practice*, C427 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 929, 932 (1989) ("RCRA establishes a comprehensive regulatory scheme to manage hazardous waste from its point of generation to its ultimate disposal."). RCRA's regulatory scheme has three primary features:

> (1) a permit system for hazardous waste treatment, storage and disposal facilities implementing a complex body of intrusive and exacting standards; (2) a set of slightly less stringent interim regulations governing the facilities until they are permitted; and (3) a manifest system tracing hazardous wastes shipped from their point of origin to their point of ultimate disposal.

Id.

97. *See* 42 U.S.C. §§ 6972-6973 (1988).

facility[98] who is responsible for contributing, either in the past or currently, to any hazardous or solid waste disposal that may give rise to "an imminent and substantial endangerment" to human health, the environment, or both.[99] Once a plaintiff brings suit in the appropriate district court, the court has jurisdiction to restrain any person who has contributed or who is contributing to the past or present disposal of any solid or hazardous waste from further disposal and to order such other action as may be necessary to remedy the problems, or both.[100]

A. History of RCRA Section 6972(a)(1)(B)

Congress enacted RCRA in 1976, amending the Solid Waste Disposal Act (SWDA).[101] Included in that early enactment was section 6972, the harbinger

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98. The term "facility" has a broad statutory explanation, as a result of not only its specific definition, but also the way in which it combines with the term "disposal." *See* 42 U.S.C. § 6903(3), (29)(A)-(C) (1988). One of the statutory definitions of facility is: "[A]ny facility for the . . . *disposal* of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise." § 6903(29)(C) (emphasis added). *See also* Melissa Thorme, *Local to Global: Citizen's Legal Rights and Remedies Relating to Toxic Waste Dumps*, 5 TUL. ENVTL. L.J. 101, 117 (1991) (noting the broad interpretation accorded the term "facility" by courts). The statute also provides a liberal definition of the term "disposal":

> '[D]isposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid . . . or hazardous waste . . . may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3) (1988). *See also* Rita H. McMillen, *Liability for "Passive" Disposal of Hazardous Substances Under CERCLA*, 42 DRAKE L. REV. 255, 260-61 (1993) (providing an overview of the broad interpretation applied to the term "disposal"). In essence, practically any site at which solid or hazardous wastes are present may be construed as a RCRA facility under the statute's combination of the terms "facility" and "disposal."

99. The statute permits any person to: commence a civil action on his own behalf -

> (1)(B) against any person, including the United States and any other governmental instrumentality or agency . . . and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

42 U.S.C. § 6972(a)(1)(B) (1988).

100. § 6972(a)(2). Specifically, the statute provides:

> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . to order such person to take such other action as may be necessary, or both . . . .

Id.

101. Sullivan, *supra* note 28, at 10408. *See also* ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 494 (3d ed. 1991).

to RCRA's current citizen suit provision.[102] Congress modeled section 6972 after the Clean Air Act (CAA) of 1970 and the 1972 amendments to the Federal Water Pollution Control Act (FWPCA).[103] RCRA was to be used to allow citizens to actively participate in environmental enforcement.[104] Specifically, Congress intended section 6972 to provide citizens with a way to ensure the enforcement of RCRA requirements and regulations.[105]

However, the legislative history of section 6972's early enactment reveals its limited scope.[106] Not until 1984 was RCRA's citizen suit provision amended and given a more expansive role in environmental citizen enforcement.[107] In 1984, Congress amended section 6972 with the Hazardous

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102. *See* Robertson, *supra* note 30, at 10491. RCRA's original citizen suit provision provided:

> (a) In General-Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf-
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> (1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this Act; or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
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> . . . .
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> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, 2825 (1976) (codified as amended at 42 U.S.C. § 6972 (1988)).

103. S. REP. NO. 94-988, at 17-18 (1976). The House Report on RCRA is not as informative. It merely outlines RCRA's citizen suit provision. *See* H.R. REP. NO. 94-1491, pt. 1, at 69 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6245, 6307. For a Supreme Court discussion of the affinity between the citizen suit provisions of the CAA and the FWPCA, see *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987).

104. Robertson, *supra* note 30, at 10491.

105. *See* S. REP. NO. 94-988, at 18.

106. The Senate Report reflects these limitations by stating that § 6972 was "carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to perform mandated actions is alleged." *Id.* An additional restriction on the use of § 6972 was posed by the statute's notice provision. *Id.* This provision required the citizen plaintiff to supply the state environmental agency and the EPA with notice of the intent to sue, so as to allow the government an opportunity to take corrective action on the alleged violation prior to the bringing of the citizen suit. *Id.*

107. *See* Sullivan, *supra* note 28, at 10412. Although § 6972(a)(1)(B) allows citizens a larger role in compelling compliance with RCRA standards, its application, like that of its predecessor, is somewhat restricted by the notice requirement that is found in § 6972(b)(2)(A). *Id.* at 10413. *See also* Miller, *supra* note 96, at 940; *infra* notes 315-21 and accompanying text.

"Section 7002(b) imposes restrictions on the filing of citizen suits. These include a requirement that citizens notify EPA, the state in which the violation occurred, and the alleged

and Solid Waste Amendments (HSWA).[108]

HSWA permits citizens to take action to correct "imminent and substantial endangerments" created by hazardous or solid waste contamination by seeking relief against the responsible parties who produced the contamination.[109] Courts have traditionally given the "imminent and substantial endangerment" language a broad interpretation.[110] In *Lincoln Properties, Ltd. v. Higgins*,[111] a federal district court defined "endangerment" as a "threatened or potential harm" that "does not require proof of actual harm."[112] The court stated that finding "imminence" does not require proof that actual harm will occur immediately, but rather that the risk of threatened harm is present, even if the harm is not realized for years.[113] Lastly, the court indicated that the word

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violator of the claims and wait a specified period of time before filing suit." Sullivan, *supra* note 28, at 10413. Under § 6972(b)(2)(A), citizen plaintiffs must wait 90 days after giving notice before bringing suit under § 6972(a)(1)(B) to abate an imminent and substantial endangerment. Miller, *supra* note 96, at 940. The three month delay was instituted by Congress during HSWA's enactment in 1984 as a means of appeasing a minority of legislators who opposed enlarging § 6972's scope to include the authorization of citizen suits to abate endangerment. *Id.* at 940-41. From the notice requirements included in the statute, it is apparent that the right of citizens to sue under § 6972(a)(1)(B) may only be exercised if the EPA fails to bring an action after receiving notice of the alleged violation. Sullivan, *supra* note 28, at 10412.

108. BATTLE & LIPELES, *supra* note 61, at 4.

109. *See* Sullivan, *supra* note 28, at 10412. *See also* 42 U.S.C. § 6972(a) (1988).

110. Paul A. Dominick & Leon C. Harmon, *Lender Limbo: The Perils of Environmental Lender Liability*, 41 S.C. L. REV. 855, 867 (1990).

111. [1993] 23 Envtl. L. Rep. (Envtl. L. Inst.) 20665 (E.D. Cal. Jan. 18, 1993).

112. *Id.* at 20671. The court stated, "When one is endangered, harm is *threatened*; no actual injury need ever occur." *Id.*

113. *Id.* The United States Court of Appeals for the Third Circuit asserted that "imminence" refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982). Perhaps more significantly, comments in the legislative history of RCRA § 6972(a)(1)(B) state that "[i]mminence in this section applies to the nature of the threat . . . . The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment." STAFF OF HOUSE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 96th Cong., 1st Sess., Hazardous Waste Disposal 32 (1979).

However, the United States Supreme Court's most recent declaration of the definition of imminence is rather different. *See* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1255 (1996). "An endangerment can only be 'imminent' if it 'threatens to occur immediately. . . .'" *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 1245 (2d ed. 1934)). The Court's adoption of this definition of "imminence" as applied to RCRA section 6972(a)(1)(B) will likely narrow the way the term is defined in other environmental statutes. *See* John P. Zaimes, Meghrig v. KFC Western, Inc.: *The Supreme Court Sends Some Clear Signals in a Succinct Opinion*, MEALEY'S LITIG. REP.: SUPERFUND 16, Apr. 1996, at 1. *See also infra* notes 337-40 and accompanying text.

"substantial" does not require the measuring of risk.[114] Similarly, in *Dague v. City of Burlington*,[115] the Court of Appeals for the Second Circuit explained that RCRA section 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes."[116]

One commentator argues that the authority citizens have been granted under amended section 6972 is intended to be commensurate with the standards of liability in RCRA section 6973.[117] Section 6973 permits the EPA Administrator to bring suit against alleged violators for past and present endangerments.[118] When Congress amended section 6972 in 1984, it modeled the amendments after the imminent and substantial endangerment precepts and standards in RCRA section 6973.[119] Consequently, the language governing the scope of relief available to the government under section 6973 is very similar to the language governing the scope of relief available to private party plaintiffs under section 6972(a)(1)(B).[120] Section 6973's legislative history is often used to interpret and illuminate section 6972(a)(1)(B).[121] Indeed, citizen plaintiffs' powers under section 6972(a)(1)(B) had not been authoritatively defined until the Supreme Court rendered its *Meghrig* decision,[122] and even *Meghrig* fails to

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114. *Lincoln Properties*, [1993] 23 Envtl. L. Rep. (Envtl. L. Inst.) at 20671. The court noted, however, that "injunctive relief should not be granted 'where the risk of harm is remote in time, completely speculative in nature, or *de minimis* in degree.'" *Id.* (citations omitted). *See also* Gache v. Town of Harrison, 813 F. Supp. 1037, 1044 (S.D.N.Y. 1993) ("A violation of RCRA does not mean that a permanent injunction necessarily follows." The plaintiff must still offer evidence of an irreparable harm before an injunction will be issued.).

115. 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992).

116. *Id.* at 1355 (emphasis added) (quoting United States v. Price, 688 F.2d 204, 213-14 (3d Cir. 1982)).

117. *See* Sullivan, *supra* note 28, at 10412.

118. 42 U.S.C. § 6973 (1988). In relevant part, § 6973 provides:

> [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the [EPA] Administrator may bring suit on behalf of the United States in the appropriate district court against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

§ 6973.

119. H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 5612.

120. Robertson, *supra* note 30, at 10492.

121. Sullivan, *supra* note 28, at 10413. The striking similarity between the two provisions led the Ninth Circuit to hold in *KFC Western* that the relief afforded citizens under section 6972(a)(1)(B) is similar to the relief provided to the EPA under section 6973.

122. *See* Zaimes, *supra* note 113, at 1 (noting that in its unanimous *Meghrig* decision, the United States Supreme Court resolved at least two significant issues involving the scope of RCRA's citizen suit provision).

fully define the statute's scope.[123] This lack of definition is problematic for the increasing number of private plaintiffs who bring suit under this provision.[124] However, the Court's narrow construction of RCRA section 6972(a)(1)(B) seriously limits this citizen suit provision's effectiveness as a much needed hazardous waste cleanup device.

B. The Importance of Citizen Suit Provisions in the Environmental Law Framework

Identifying the scope of relief afforded citizen plaintiffs under RCRA section 6972(a)(1)(B) is important because Congress has recently enacted measures which limit the power of agency environmental protection.[125] Congress is implementing what has been dubbed an "anti-environmental" agenda[126] by attempting to work the goals of this agenda into the federal budget, appropriating less money to environmental preservation.[127] The congressional approach to environmental protection poses a significant reduction in federal and state agency enforcement of environmental cleanup.[128] Not only

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123. *See infra* notes 347-63 and accompanying text.

124. *See* Miller, *supra* note 24, at 1002.

125. John H. Cushman, *EPA Forced to Curtail Pollution Inspections: Cost-conscious Congress Eyes Deeper Funding Cuts*, COURIER J., Nov. 25, 1995, at 1A. According to one commentator, Americans are faced with the most anti-environmental Congress in recent memory [and a] "Democratic president who has . . . turned his back on nature." Tad Friend, *We Few, We Happy Few, We Band of Fledgling Monkeywrenchers Learning to Speak in Sound Bites*, OUTSIDE, Oct. 1996, at 48.

126. *Environment on Line Today as U.S. House Casts Vote On Saving Wetlands and Clean Water Says Environmental Information Center*, U.S. Newswire, Nov. 29, 1995, at 1 [hereinafter *Environment on Line*] (labeling Congress' approach to the environment as an "anti-environmental" agenda). *See also* Joseph Dlhopolsky, *Our Own Waterworld*, NEWSDAY, Aug. 15, 1995, at A29 (calling congressional initiatives "anti-environment" measures).

127. *Environment on Line*, *supra* note 126, at 1.

128. Cushman, *supra* note 125, at A1 (discussing the consequences the EPA will suffer as a result of funding cuts). For a discussion of how funding cuts to the EPA will hurt individual states, see Mark Van Putten, *EPA Funding Cuts Hurt Michigan*, DET. NEWS, Nov. 3, 1995, at A12. One commentator stated:

> Cutting off federal funding . . . would hurt Michigan. It would block EPA's partnership with the states to provide maximum flexibility in how the rules are implemented and EPA's role in coordinating inter-state consistency. It would prohibit EPA from giving technical assistance in the development of the required state standards, help that the states are crying for.

Id. *See also* Bill Dawson, *EPA Chief Browner Says Cuts in Funding Hit Texas Hard*, HOUS. CHRON., Oct. 5, 1995, at 25 ("Texas would sustain a considerable impact from the EPA budget cuts approved by Congress, including the loss of at least $59.6 million in funding that goes to state agencies for projects including sewage treatment improvements and assistance in assuring the safety of drinking water.").

does Congress intend to cut funding to agency cleanup programs[129] such as those that exist under RCRA and CERCLA,[130] but it has also proposed legislative initiatives that mark an era of less stringent regulations,[131] causing Americans and various environmental organizations to fear a variety of uncontrolled environmental hazards.[132] Funding cuts have already forced the

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129. *Environment on Line, supra* note 126, at 2. Proposed environmental amendments contain a 25% cut in the EPA's enforcement budget. *Id.* Even when environmental budgets for federal programs are increased, the increases are not always sufficient to enable the agency to accomplish the programs' objectives. This is because increases in program costs exceed increases in monies. For example, existing national parks and visitor's centers around the country are facing enormous budgetary problems despite numerous funding increases since the mid-1980s. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-95-238) NATIONAL PARKS: DIFFICULT CHOICES NEED TO BE MADE ABOUT THE FUTURE OF THE PARKS 38 (Aug. 1995). These problems may result in the closure of certain national parks which are currently part of the national park program. *Id.*

130. The Superfund, which is administered by the EPA, is one of the nation's most important remediation programs because it targets the nation's most hazardous toxic waste sites. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-95-259) SUPERFUND: OPERATIONS AND MAINTENANCE ACTIVITIES WILL REQUIRE BILLIONS OF DOLLARS 7 (Sept. 1995) [hereinafter OPERATIONS AND MAINTENANCE]. The Superfund was established under the auspices of CERCLA in 1980 and is composed of an 8.5 billion dollar fund that is used primarily for cleaning up abandoned hazardous waste sites. Superfund is financed by three sources: 73% is generated by taxes levied on chemical and petroleum affiliated businesses; 11% comes from the United States Treasury's general fund; and the remaining 16% relies on revenue from assessed penalties, recoveries, and interest earned on the remainder of the Superfund. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-85-2) ILLEGAL DISPOSAL OF HAZARDOUS WASTE: DIFFICULT TO DETECT OR DETER 12 (Feb. 1985) [hereinafter ILLEGAL DISPOSAL].

131. *Environment on Line, supra* note 126, at 2 (explaining that a recent congressional bill calls for weakened protection of wetlands, less funding for sewage treatment, less funding for drinking water treatment, the continued existence of unregulated hazards in America's drinking water, a halt to the EPA's survey of how America utilizes toxic chemicals, and a halt to cleanup of existing Superfund sites, as well as a halt to listing additional Superfund sites). *See also* Glen Martin, *Environmentalists Fear Movement's Time Passing*, HOUS. CHRON., June 4, 1995, at 22 ("In its first 100 days, the House enacted rules that would make it more difficult for the government to enforce environmental regulations or restrict ecologically unsound activities on private property."). In May of 1995, the House of Representatives approved modifications to the Clean Water Act that would "strip protection for wetlands, make it easier for industries to pollute and require the government to compensate landowners for financial losses if their properties receive wetland designation. And legislation is advancing to sell off federal lands to help balance the budget." *Id.*

132. Bob Adler of the Natural Resources Defense Council voiced concern about several proposed congressional revisions to portions of the Clean Water Act (CWA), "particularly [those provisions] regarding efforts to protect citizens in urban areas, the likely sites of the greatest pollution. 'They're often places where there are communities of color, who can't afford to go fish in pristine trout streams in the mountains, but fish off the pier.'" *Senate Subcommittee Completes Work on Clean Water Bill*, ENV'T WK., Feb. 3, 1994, at 1 [hereinafter *Senate Subcommittee*]. A national survey conducted by the EPA reports that an estimated 264 million metric tons of hazardous waste are generated every year. Oppliger, *supra* note 26, at 65 n.29. Roughly 80% of such waste is land disposed—that is, it is disposed of in surface impoundments, landfills, waste piles, lagoons, and underground injection wells. *Id.* As a result of leaking pipelines, underground storage tanks, areas of frequent spills, and treatment and holding ponds, disposal of hazardous waste often occurs in places that are not designated as hazardous waste sites or licensed as RCRA facilities. *See* Angelo

EPA to cancel hundreds of pending enforcement actions,[133] which presents a serious concern for the future of environmental protection.[134] Furthermore, congressional funding allotments to the EPA have remained almost constant since 1980,[135] while the costs of agency protection of the environment have grown.[136]

Berguson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. GUIDE 101, 103 (1985).

According to the EPA, 73 million people live within four miles of at least one EPA designated Superfund site, the most dangerous type of toxic waste site in the country. U.S. GOVERNMENT ACCOUNTING OFFICE (GAO/RCED-95-205) SUPERFUND: INFORMATION ON CURRENT HEALTH RISKS 10 (July 1995) [hereinafter CURRENT HEALTH RISKS]. Currently, there is a great deal of concern centered on the extent to which these sites pose risks of cancer and other conditions, including nerve and liver damage and birth defects. *Id.* at 11. Although the sites are designated for cleanup by the government, the EPA is unable to clean them rapidly. *See infra* note 136 (discussing the enormous costs of remediating these sites and the span of years required to effectively monitor and control them). The Congressional Budget Office estimates that the number of Superfund sites will grow from 1100 to 4500 in the near future, and costs will soar commissurally. *See* CURRENT HEALTH RISKS, *supra*, at 10.

133. *Senate Subcommittee, supra* note 132, at 1.

134. Babich & Hanson, *supra* note 65, at 10165.

135. *See* U.S. DEPARTMENT OF COMMERCE ET AL., STATISTICAL ABSTRACT OF THE UNITED STATES 337 (115th ed. 1995). Federal outlays in the millions of dollars to the EPA for fiscal years 1980, 1990, 1991, 1992, 1993, and 1994 are, respectively, as follows: 5603, 5108, 5769, 5950, 5930, and 5855. *Id.* An estimated $6274 million was apportioned to the EPA for the 1995 fiscal year. *Id.*

136. U.S. GENERAL ACCOUNTING OFFICE (GAO/HR-95-12) HIGH RISK SERIES - SUPERFUND PROGRAM MANAGEMENT 3 (Feb. 1995) (noting the "escalating costs of hazardous waste cleanups and growing constraints on federal resources"). *See also* U.S. GENERAL ACCOUNTING OFFICE (GAO/HR-95-1) HIGH RISK SERIES - AN OVERVIEW 80 (Feb. 1995) ("Recent estimates indicate that cleaning up the thousands of hazardous waste sites—many of which are owned by the federal government—could result in over $300 billion in federal costs and many billions more in private expenditures."). CERCLA's current Superfund cleanup docket alone has increased in cost by billions of dollars. CURRENT HEALTH RISKS, *supra* note 132, at 10 ("Superfund cost estimates are soaring. Although the Superfund program was authorized through 1994 at $15 billion covering more than 1,100 nonfederal sites, these figures could rise to $75 billion and 4,500 nonfederal sites, according to the Congressional Budget Office."). Another GAO report states that the EPA has developed remedies to clean up 275 of the 1300 most hazardous waste sites in America. OPERATIONS AND MAINTENANCE, *supra* note 130, at 7. Although construction has been completed at these sites, "additional activities, known as operations and maintenance, may be necessary" to ensure that the remedy continues to function effectively and that the cleanup "protect[s] human health and the environment." *Id.* The federal government, states, and responsible parties must perform long-term operations and maintenance at nearly two-thirds of the 275 sites the GAO reviewed. *Id.*

> These activities . . . will continue for decades and, in some cases, indefinitely. For cleanup remedies that EPA or the responsible parties have already undertaken or will undertake from now to fiscal year 2005, [the GAO] estimates that about $32 billion will be needed for operations and maintenance costs nationwide through fiscal year 2040.

Id.

It is important to emphasize that the 32 billion dollar expenditure applies to the remediation and continued monitoring of only 275 of the 1300 sites reviewed by the EPA. If this 32 billion dollar price tag is reflective of prices in general for these types of environmental procedures, then

Congress' anti-environmental legislative measures exist despite the fact that the global population,[137] and Americans in particular,[138] have demonstrated a new awareness during the last three decades concerning the need to protect the environment.[139] This new awareness sparked a desire in Americans to protect the environment and to ameliorate past deterioration.[140] A 1995 news poll revealed that eighty-eight percent of Americans consider the issue of environmental protection to be either "very important" or "one of the most important problems" facing the nation.[141] Therefore, it is not surprising that in lieu of the aforementioned "anti-environmental" legislative measures, the private sector has an increasingly larger role to play in the facilitation of environmental cleanup and preservation of the country.[142] One way

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the remaining 1025 sites will cost many additional billions of dollars to clean up and maintain.

137. One international political coalition, the Association of Southeast Asian Nations (ASEAN), recently decided to "pool resources and improve cooperation to abate pollution, remediate existing contamination and conserve natural resources." *ASEAN Growing Concern for Environment Prompts Regional Cooperation*, WORLD ENV'T REP., Oct. 26, 1994, at 1. The countries that comprise ASEAN include Singapore, Brunei, Malaysia, the Philippines, Thailand and Indonesia. *Id.* Due to increased concern for environmental protection throughout Asia, the governments of ASEAN, some of which are separated by wilderness and large expanses of water, are resolved that transboundary pollution cleanup efforts will require regional cooperation. *Id.*

138. Dlhopolsky, *supra* note 126, at A29.

139. Van der Reis, *supra* note 28, at 1269. Humans are facing the reality that the environment is fragile and potentially perishable. *Id. See also* Glen Martin & Marc Sandalow, *Environmental Movement in Despair*, S.F. CHRON., June 2, 1995, at A1 ("[D]espite impressive past successes and enduring citizen concern for the ecosphere . . . the new Republican-dominated Congress has taken giant strides toward rolling back 25 years of bipartisan pro-environment legislation.").

140. Van der Reis, *supra* note 28, at 1269.

141. Martin & Sandalow, *supra* note 139, at A1 (quoting the Time/CNN poll that conducted the survey). "Donations to environmental and wildlife-preservation organizations rose by 12.5% [in current dollars], to 4 billion dollars. Such groups also saw a big jump in donations—11%—in 1994." John Murawski, *A Banner Year for Giving: Donations Surge for Advocacy and Environmental Organizations; Overseas-Aid Groups Take a Beating*, CHRON. OF PHILANTHROPY, May 30, 1996, at 1.

142. Budget statistics reveal the need for an integrated effort between the private and public sectors to control pollution. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-101) ENVIRONMENTAL PROTECTION AGENCY: PROTECTING HUMAN HEALTH AND THE ENVIRONMENT THROUGH IMPROVED MANAGEMENT 36-37 (Aug. 1988). According to a GAO report, the EPA's operating budget (in real terms) declined 15% from 1978 to 1987. *Id.* In that same period of time, the federal budget increased by 248%. *Id.* As a result of a lack of resources and funds, the EPA cannot address, let alone correct, all of the environmental contamination that currently exists. *Id.*

In one realm of environmental preservation, public participation in government efforts is already underway:

> South Florida—including the Everglades and Florida Bay . . . is showing signs of ecological distress . . . . Federal agencies began an effort in 1993 to coordinate environmental restoration in South Florida . . . . In addition, the administration has identified South Florida as an appropriate site for testing a new approach to ensuring a healthy environment and managing the nation's lands and natural resources . . . . Central to this administration's new approach is the need for federal and nonfederal stakeholders to collaborate and build consensus on solutions to problems or issues of

individuals can compel environmental cleanup is through actions brought under the various citizen suit provisions.[143]

The Clean Air Act provided the first citizen suit provision in 1970.[144] Similar provisions are now found in all of the statutes which the EPA administers.[145] During the 1970s, national environmental organizations[146] used citizen suit provisions to sue the government to compel it to perform its required obligations under the various environmental statutes.[147] In the 1980s, plaintiffs who utilized the various citizen suit provisions still consisted almost exclusively of national environmental groups; however, the groups' tactics changed, and private industry was targeted for suit instead of the government.[148]

Today, citizen suits are brought in a variety of contexts by a diverse body of plaintiffs,[149] including private individuals.[150] Furthermore, the EPA and the Department of Justice (DOJ) have demonstrated consistent and powerful support for the use of citizen suits as a means of supplemental enforcement to

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mutual concern.

U.S. GOVERNMENT GENERAL ACCOUNTING OFFICE (GAO/HEHS/PEMD-95-202) RESTORING THE EVERGLADES: PUBLIC PARTICIPATION IN FEDERAL EFFORTS 20-21 (Oct. 1995). The simple fact is that supplemental citizen enforcement is critical to environmental protection and the abatement of hazardous wastes. *See* U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-140), HAZARDOUS WASTE: MANY ENFORCEMENT ACTIONS DO NOT MEET EPA STANDARDS 2 (June 1988) [hereinafter EPA STANDARDS].

143. The utilization of citizen suit provisions for increased environmental protection is preferable to the formation of groups such as Earth First!, an environmental organization that earned the federal government's disfavor by using illegal means to prevent environmental destruction. *See* Friend, *supra* note 125, at 53.

144. Miller, *supra* note 24, at 1001. Environmental statutes are not the only legislation in which Congress enacted citizen suit provisions. *Id.* Citizen suit provisions are commonly found in the social welfare statutes created in the 1970's. *Id.*

145. *Id.*

146. The environmental organizations that use citizen suit provisions as vehicles for litigation include the National Wildlife Federation, the Environmental Defense Fund, and Sierra Club. *See, e.g.*, National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988); Environmental Defense Fund v. Lamphier, 714 F.2d 331 (4th Cir. 1983); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); Natural Resources Defense Council, Inc. v. Costle, 564 F.2d 573 (D.C. Cir. 1977); Environmental Defense Fund, Inc. v. E.P.A., 465 F.2d 528 (D.C. Cir. 1972).

147. Miller, *supra* note 24, at 1002.

148. *Id.*

149. The standards governing a plaintiff's standing to sue under the environmental statutes' citizen suit provisions were enunciated in *Sierra Club v. Morton*, 405 U.S. 707 (1972) (holding that plaintiffs who sue under a citizen suit provision must allege direct injury, and that it is not enough that the plaintiff is a member of an organization which has public interest group status). *See* Miller, *supra* note 24, at 1005 (noting that *Sierra Club's* tenets on citizen plaintiff's standing are still controlling).

150. Miller, *supra* note 24, at 1005.

government actions.[151] Due to the public availability of RCRA compliance reports, and the fact that RCRA's authorization of citizen suits to abate imminent and substantial endangerments has traditionally been a liberal standard,[152] citizen suits under section 6972(a)(1)(B) have increased.[153]

RCRA's citizen suit provision is potentially a very powerful enforcement tool for citizens. However, the problems with utilizing the provision limit its effectiveness and render its use by private parties difficult. An exploration of two circuit courts' interpretations of RCRA section 6972(a)(1)(B), as well as an analysis of a United States Supreme Court decision concerning RCRA section 6972(a)(1)(B), will demonstrate the judiciary's inability to adequately resolve the statute's dilemmas.

III. CURRENT JUDICIAL RESOLUTION REGARDING SECTION 6972(A)(1)(B): WHY IT IS DEFICIENT

Despite judicial attempts at interpretive resolutions of RCRA section 6972(a)(1)(B), problems with the statute's vague language will remain.[154] Because Congress did not expressly provide a private restitution cause of action in RCRA, the statute lacks clear procedural and substantive guidelines.[155] Judicial rulings which allow private litigants monetary relief will be limited to particular circumstances, failing to create a uniform body of law.[156] As a result, many unanswered questions will remain.[157] On the other hand, judicial

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151. *Id.* at 1002.

152. *See supra* notes 109-16 and accompanying text.

153. *See* Miller, *supra* note 24, at 1002. *See also* Babich, *supra* note 27, at 10123 n.16 (noting the recent evolution of case law under § 6972(a)(1)(B)).

154. *See infra* parts III.B, III.D, III.F.

155. *See infra* part III.B.2.

156. Specifically, judicial opinions will not address all of the possible factual permutations that may arise. *See generally infra* parts III.B.2. and III.F. Therefore, judicial resolution of the problems engendered by the current legal scheme of RCRA § 6972(a)(1)(B) will be piecemeal and possibly inconsistent, depending on jurisdiction. *See infra* notes 252-63, 347-67, and accompanying text. Although the Supreme Court's *Meghrig* decision denies restitution as a remedy because the plaintiff's suit was improperly commenced, the Court's opinion does not address whether a private party may recover restitution under RCRA's citizen suit provision if suit has been properly brought. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1256 (1996) (stating that the Court's decision does not determine that restitution is never an appropriate remedy under RCRA § 6972(a)(1)(B)).

157. *See infra* notes 252-63, 347-67 and accompanying text. For a discussion of the problems that will exist for plaintiffs and defendants in the wake of the Supreme Court's *Meghrig* decision, see *infra* parts III.B, III.D, III.F. If the Supreme Court's *Meghrig* opinion had affirmed the Ninth Circuit's *KFC Western* decision, plaintiffs and defendants would still have faced numerous problems. *See infra* part III.B.2. Furthermore, because *Meghrig* does not preclude restitution as an appropriate remedy in every situation, litigants may still face the problems discussed in part III.B.2 of this note.

opinions which deny restitution[158] will preclude a remedy for private plaintiffs who have incurred costs by cleaning up contaminated property which they did not pollute.[159]

To deny restitution to private plaintiffs after the property contamination ceases to present an imminent and substantial endangerment is unfair and evidences poor public policy.[160] However, to allow plaintiffs a remedy under the current statute is contrary to statutory construction doctrine.[161] Consequently, the problems existing in RCRA's citizen suit provisions cannot be judicially resolved.[162] This is why courts which have ruled on section 6972(a)(1)(B) cases have not been able to satisfactorily settle the dilemmas presented by the statute.[163] An analysis of the decisions handed down by the United States Courts of Appeals for the Ninth and Eighth Circuits concerning the scope of RCRA's citizen suit provision will provide an informative backdrop for the United States Supreme Court's evaluation of RCRA section 6972(a)(1)(B) in its *Meghrig* decision.

A. The Ninth Circuit Court of Appeals: KFC Western, Inc. v. Meghrig

Understanding the inadequacy of judicial resolution of the problems raised by section 6972(a)(1)(B) requires an examination of the Ninth Circuit's *KFC Western* decision. Although subsequently overruled,[164] the Ninth Circuit's holding evidences the policy and equity basis supporting an expansive interpretation of RCRA's citizen suit provision.[165] Current statutory construction doctrine, however, requires that Congress amend RCRA's citizen suit provision before a broad scope of judicial relief is afforded to private plaintiffs by the statute.[166]

In *KFC Western*, the United States Court of Appeals for the Ninth Circuit became the first federal circuit to allow a private plaintiff to use RCRA section

158. Where plaintiffs seek reimbursement for past cleanup costs, courts must deny such relief in light of *Meghrig*. For a discussion of *Meghrig*, see *infra* parts III.E-F.

159. *See infra* notes 292-93, 300-14 and accompanying text.

160. *See infra* notes 198-200 and accompanying text.

161. *See generally infra* part III.B.1.

162. *See infra* parts III.B, D, F.

163. *See infra* parts III.B, D, F.

164. *See* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1256 (1996).

165. *See infra* notes 198-200 and accompanying text.

166. For a discussion of *Meghrig*, the Supreme Court's most recent decision concerning the scope of § 6972(a)(1)(B), see *infra* parts III.E-F.

6972(a)(1)(B) for restitution of environmental response costs.[167] Several other federal courts have addressed the scope of RCRA's citizen suit provision.[168] However, most of these courts have held that RCRA's citizen suit provision is not an appropriate vehicle for a private restitution cause of action.[169] In reversing the Ninth Circuit Court of Appeals' *KFC Western* holding, the Supreme Court determined that restitution was an unsuitable remedy under the facts of the case at issue, but refrained from holding that restitution may never be awarded under the statute.[170]

The Ninth Circuit's *KFC Western* decision addressed several areas of conflict presented by section 6972(a)(1)(B). First, the court concluded that an "imminent and substantial endangerment" need not exist at the time that an

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167. Fung, *supra* note 38, at 786. Before the *KFC Western* decision, many practitioners believed that only injunctive relief was available to private plaintiffs under RCRA § 6972(a)(1)(B). Robertson, *supra* note 30, at 10491.

168. The U.S. Court of Appeals for the Sixth Circuit was the first federal circuit court to specifically consider whether a private damages cause of action may be implied under RCRA § 6972(a)(1)(B). Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985). The *Walls* court held that no such remedy exists, either expressly or implicitly. *Id.* at 316. Similarly, the U.S. Court of Appeals for the Fourth Circuit suggested in dicta that permitting plaintiffs a private cause of action for damages is inappropriate. Environmental Defense Fund v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983).

A host of federal district courts have also entertained the problem of defining the scope of RCRA's citizen suit provision. Most have denied restitution to private plaintiffs. *See generally* Agricultural Excess and Surplus Ins. Co. v. A.B.D. Tank & Pump Co., No. 95-C3681, 1996 WL 11122, at *3 (N.D. Ill. Jan. 8, 1996) (considering the issue of who qualifies as a "contributor" under § 6972(a)(1)(B)); Mavigliano v. McDowell, No. 93-C7216, 1995 WL 704391, at *5-6 (N.D. Ill. Nov. 28, 1995) (holding that because the contaminated site had not been cleaned at the time suit was brought and because plaintiff only sought injunctive relief, the court had subject matter jurisdiction to hear the case); Portsmouth Redevelopment & Hous. Auth. v. BMI Apartments Assocs., 847 F. Supp. 380, 385 (E.D. Va. 1994) (finding that RCRA's citizen suit provision does not authorize an award of money damages for remedial costs, response costs, or the costs of investigation); Kaufman & Broad—South Bay, Inc. v. Unisys Corp., 822 F. Supp. 1468, 1477 (N.D. Cal. 1993) (denying a private party's request for restitution under RCRA § 6972(a)(1)(B)); Gache v. Town of Harrison, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993) ("RCRA does not authorize a plaintiff in a citizen suit to recover remediation costs."); Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990) (permitting injunctive relief under the statute, but denying a private action for damages); Werlein v. United States, 746 F. Supp. 887, 895 (D. Minn. 1990) (refusing to award money damages to private plaintiffs for medical monitoring costs under § 6972(a)(1)(B)). An Arizona district court decision, which was handed down prior to the *KFC Western* opinion, permits private plaintiffs to pursue a cause of action for restitution. Bayless Inv. & Trading Co. v. Chevron U.S.A., Inc., 39 Env't Rep. Cas. (BNA) 1428, 1431 (D. Ariz. May 26, 1994).

169. *See supra* note 168. Of course, the Supreme Court's reversal of the Ninth Circuit's *KFC Western* decision has definitively limited the scope of RCRA § 6972(a)(1)(B). *See infra* part III.E.

170. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1256 (1996). *See also infra* notes 347-54 and accompanying text.

action is filed.[171] Second, the court held that section 6972(a)(1)(B) authorizes a private plaintiff restitution of cleanup costs, rather than solely injunctive relief.[172] The court stated that the primary issue was whether section 6972(a)(1)(B) empowers a private plaintiff to collect restitution for the cost of remediating contaminated property.[173]

1. Section 6972(a)(1)(B)'s Imminent Hazard Authority—The Timing of the Action

To determine available relief, the Ninth Circuit Court of Appeals first examined the timing question presented by RCRA's citizen suit provision:[174] whether an "imminent and substantial endangerment" must exist either at the time that a private plaintiff files a complaint or at the time of the cleanup of the property.[175] The court examined the language of *United States v. Aceto Agriculture Chemical Corp.*,[176] which addressed the scope of relief under section 6973.[177] The court found that the United States Court of Appeals for the Eighth Circuit awarded relief to the EPA pursuant to section 6973 when the Administrator's suit was filed after the imminent and substantial endangerment existed.[178] The *KFC Western* court stated that to mandate that the EPA file and prosecute its section 6973 action while the endangerment continues to exist would be an "absurd and unnecessary" requirement.[179] The court concluded that Congress intended that imminent hazard authority of both the government and citizens be ruled by the same standards.[180] According to the court, requiring citizens to file and prosecute restitution actions during the existence of the imminent and substantial endangerment would defeat the purpose of the statute, since a party only seeks restitution after remediating the property and

171. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 520-21 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

172. *Id.* at 524.

173. *Id.* at 520.

174. *Id.*

175. *Id.* at 520-21.

176. 872 F.2d 1373 (8th Cir. 1989).

177. For a discussion of § 6973, the government's imminent hazard provision, see *supra* notes 118-21. *See also* 42 U.S.C. § 6973 (1988).

178. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521-22 (9th Cir. 1995) *rev'd*, 116 S. Ct. 1251 (1996). *See also* Brief for Respondent at *5, 1996 WL 728551, Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996) (No. 95-83). *But see* Furrer v. Brown, 62 F.3d 1092, 1101 (8th Cir. 1995) (stressing that in *Aceto* and *NEPACCO*, the issue of whether § 7003 authorizes courts to award restitution to the government was not raised sua sponte or by the parties. Instead, the *Aceto* and *NEPACCO* courts assumed "subject matter jurisdiction sub silentio" and dealt with the merits of the EPA's claims for relief).

179. *KFC Western*, 49 F.3d at 521 (quoting United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989)).

180. *Id.*

eliminating the endangerment.[181]

2. The Relief Afforded Plaintiffs under RCRA Section 6972(a)(1)(B)

After resolving the timing issue, the *KFC Western* court addressed the relief afforded by RCRA section 6972(a)(1)(B).[182] The court looked to analogous section 6973 decisions in *United States v. Aceto Agriculture Chemical Corp.*,[183] *United States v. Northeastern Pharmacy and Chemical Co. (NEPACCO)*,[184] and *United States v. Price*.[185] The *KFC Western* court ascertained that in these decisions restitution was awarded to the EPA pursuant to section 6973.[186]

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181. *Id.*

182. *Id.*

183. 872 F.2d 1373 (8th Cir. 1989). In *Aceto*, the court permitted the EPA Administrator to recover restitution pursuant to § 6973. *Id.* at 1383. However, a later panel of the Eighth Circuit Court of Appeals asserted that because the *Aceto* court assumed, without actually determining, that the court had jurisdiction to award the EPA restitution under RCRA § 6973, *Aceto* is not stare decisis on the issue. Furrer v. Brown, 62 F.3d 1092, 1101 (8th Cir. 1995). *See also KFC Western*, 49 F.3d at 524 n.1, 525. (Brunetti, J., dissenting) ("[B]ecause Aceto does not address the issue of reimbursement, I do not believe that the majority should rely on it to include actions for restitution within the scope of § 6972(a)(1)(B).").

184. 810 F.2d 726 (8th Cir. 1986) (allowing the lower court to grant an equitable award of cleanup costs from the responsible parties, although the government had remediated the property prior to bringing suit). *But see Furrer*, 62 F.3d at 1101 (claiming that *NEPACCO* is not stare decisis on the scope of relief afforded under § 6973, since the panel deciding the case simply assumed, without deciding, that the federal courts have jurisdiction under RCRA § 6973 to provide the EPA restitution for cleanup costs expended remediating contaminated property).

185. 688 F.2d 204, 214 (3d Cir. 1982) (noting that the EPA could recover a money award from liable parties as restitution for the costs of funding a diagnostic study of contaminated property).

186. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 522 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). It can be argued, however, that the court misplaced its reliance on the decisions of other federal circuit courts. For a discussion of the shortcomings associated with the *KFC Western* court's reliance on the two Eighth Circuit Courts of Appeals' decisions, see *supra* notes 183-84. *See also Furrer*, 62 F.3d at 1100 (stressing that careful analysis of the case law relied upon by the Ninth Circuit Court of Appeals fails to support the court's decision).

The *KFC Western* court's failure in relying on the Third Circuit Court of Appeals' § 6973 decision in *United States v. Price* is threefold. First, in the *Price* opinion, the circuit court noted that at the time of the district court's hearing the contaminated property threatened imminent danger. *Price*, 688 F.2d at 214. Second, the *Price* court affirmed the district court's holding, which denied the plaintiff's request for a preliminary injunction requiring the defendant to fund a diagnostic study of the contaminated property. *Id.* In dicta, the circuit court noted that the district court *could* have ordered an immediate injunction or *could* have allowed the EPA to fund a study and later recover reimbursement for this activity, but it did not mandate or fully explore either course of action. *Id.* Finally, the *KFC Western* court's "smorgasbord-style use of the *Price* decision—picking and choosing the portions of *Price* that supported its holding while leaving behind the contradictory parts—seriously undermines its credibility." Sullivan, *supra* note 28, at 10419. *See also infra* note 193 and accompanying text.

The majority noted that the language of section 6972(a)(1)(B) is substantially similar to the language of section 6973.[187] Persuaded by the analogous decisions of its sister circuits and by the virtually identical language of section 6972(a)(1) and section 6973, the majority chose to interpret the provisions as providing similar relief.[188] According to the *KFC Western* court, RCRA's goal is to "give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment."[189]

In addition to finding that restitution is available to citizen plaintiffs by analogy to section 6973, the *KFC Western* court also found a statutory basis for relief.[190] Examining the broad language of section 6972(a)(1)(B),[191] the court stated that restitution falls within RCRA's statutory allowance of relief.[192] Specifically, the majority focused on the language of section 6972(a)(1) which permits district courts to order defendants to take "such other action as may be necessary."[193] The court flatly rejected the argument that RCRA's citizen suit provision permits only injunctive relief or other non-monetary equitable relief.[194]

After finding that RCRA's citizen suit provision allows restitution, the *KFC Western* court declined to hold that differences in the notice provisions of sections 6972 and 6973 indicate that restitution should only be awarded to the EPA Administrator.[195] Despite the court's acknowledgement that Congress

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187. *KFC Western*, 49 F.3d at 521. *See also* Brief for Respondent at *4, 1996 WL 728551, Meghrig v. KFC Western Inc., 116 S. Ct. 1251 (1996) (No. 95-83).

188. *KFC Western*, 49 F.3d at 522.

189. *Id.* at 521 (quoting United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989)).

190. *Id.*

191. To peruse the relevant statutory language of the citizen suit provision in § 6972(a)(1)(B), see *supra* notes 99-100 and accompanying text.

192. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

193. *Id.* (citing 42 U.S.C. § 6972(a)). The court indicated that this language furnished a statutory basis for granting restitution. *Id.* However, the court failed to cite any legislative history in support of its conclusion. *Id.* The court relied on the Third Circuit Court of Appeals' *Price* decision as support for its conclusion. *See supra* notes 183-85 and accompanying text. Yet, the *Price* court "quoted legislative history that specifically contradicted the [*KFC Western*] majority's interpretation of this phrase." Sullivan, *supra* note 28, at 10419. The legislative history noted by the *Price* court indicates that the phrase "was intended to authorize both short- and long-term *injunctive* relief." *Id.*

194. *KFC Western*, 49 F.3d at 521.

195. *Id.* at 522. The court also distinguished the Supreme Court's holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.* *Id.* at 522 n.5. In *Gwaltney*, the Supreme Court rejected a statutory interpretation that would render a statutory notice provision gratuitous. Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found. 484 U.S. 49 (1987). A basic purpose of the notice

specified a limitations period in CERCLA,[196] the court rejected the defendants' contention that the lack of a limitations period suggests that Congress did not intend that section 6972(a)(1)(B) be used to obtain restitution.[197]

The *KFC Western* court's holding largely rests on policy justifications.[198] The court found that CERCLA and state law remedies fail to provide an adequate substitute source of relief for "innocent" plaintiffs like KFC.[199] In addition, the court stated that it is even more important that section 6972(a)(1)(B) provide private plaintiffs, rather than the government, restitution, since private citizens cannot control the timing of government cleanup orders and often fall victim to such orders before being able to file and prosecute an action against the parties actually responsible for contaminating the property.[200]

The *KFC Western* decision stresses that private plaintiffs should not be required to bring suit during the existence of an imminent and substantial endangerment under section 6972(a)(1)(B). The *KFC Western* decision also emphasizes the logic and equity of permitting restitution awards to private plaintiffs under the statute. However, the *KFC Western* decision's attempt to resolve the problems in RCRA's citizen suit provision is inadequate.

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requirements in the environmental statutes is to provide an alleged violator of a statute the chance to modify his or her behavior so as to comply with the applicable statutory requirements. *Id.* at 60. Such compliance obviates the need for the bringing of a citizen suit. *Id.* For a detailed discussion of the *Gwaltney* case, see Jeffrey G. Miller, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.: *Invitation to the Dance of Litigation*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10098 (1988). The *KFC Western* court stated that *Gwaltney's* analysis was not determinative because *Gwaltney* dealt with a different statute's citizen suit provision, one which pertains only to persons alleged to be in current violation of federal requirements. *KFC Western*, 49 F.3d at 522 n.5.

196. 42 U.S.C. § 9612(d)(1) (1988).

197. *KFC Western*, 49 F.3d at 522. The defendants focused their argument on the notion that the lack of a limitations period in the statute engenders problems because it leaves citizens free to file suits for monetary recovery many years after the imminent endangerment is eliminated through remediation. *Id.* The court responded to this argument by claiming that an equitable doctrine such as the common law theory of laches would suffice to alleviate any unfairness created by the lack of a limitations period. *Id.*

198. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). The court claimed:

> It would be unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions. By doing so, we would make the citizen suit remedy meaningless in most cases for the very citizens who most deserve the remedy, namely innocent citizens . . . who have a financial stake in the contaminated property as well as potential and actual clean-up liability.

Id.

199. *Id.*

200. *Id.* at 524.

B. *Deficiencies of the* KFC Western *Holding*

Some legal analysts received the *KFC Western* decision with enthusiasm.[201] However, other members of the legal community are doubtful that Congress ever intended private parties to use RCRA section 6972(a)(1)(B) to obtain post-cleanup restitution.[202] As evidenced by its reversal of the Ninth Circuit Court of Appeals' *KFC Western* holding, the United States Supreme Court is one such skeptic.[203] Although the *KFC Western* decision produces a seemingly equitable result, it raises several irreconcilable issues.[204]

1. The *KFC Western* Court's Failure to Follow Firmly Established Supreme Court Doctrine

One irreconcilable issue is that the *KFC Western* court failed to apply well-defined United States Supreme Court statutory construction doctrine[205] in its analysis of whether RCRA section 6972(a)(1)(B) permits restitution.[206] The

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201. *See* Robertson, *supra* note 30, at 10492 ("The [*KFC Western*] decision confirmed that § 7002(a)(1)(B) can be a powerful and remarkably effective remedy for private parties to use in shifting the burden of response to parties responsible for contaminating property."). Another commentator concluded:

> The *KFC Western* decision to provide restitution under RCRA § 6972(a)(1)(B) strengthens the ability of citizens to supplement government enforcement of the solid and hazardous waste enforcement schemes of RCRA and CERCLA, addresses several unsatisfactory aspects of the previously existing state of RCRA-CERCLA law, and produces a fair and equitable result.

Fung, *supra* note 38, at 841.

202. *See* Sullivan, *supra* note 28, at 10413 ("Congress did not intend to authorize a private cause of action for damages under RCRA . . . good environmental litigation planning can keep a property owner out of the difficult position of seeking cost recovery under a statute that does not provide such relief."). *See also* Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995) (holding that RCRA's citizen suit provision precludes an award of restitution to a private plaintiff).

203. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996). The Supreme Court did not hold that restitution is never afforded under the statute. *Id.* at 1256. *See also infra* notes 347-67 and accompanying text.

204. *See* Sullivan, *supra* note 28, at 10418 (specifying various problems with the U.S. Court of Appeals for the Ninth Circuit's decision in *KFC Western*).

205. The Supreme Court's statutory construction doctrine has evolved steadily over the last several decades. However, a detailed analysis of this evolution falls outside of the scope of this note, as does an in-depth examination of current Supreme Court doctrine. For a closer look at Supreme Court case law on the issue of statutory construction and the treatment of implied causes of action, see Heintz v. Jenkins, 115 S. Ct. 1489 (1995); Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994); Hallstrom v. Tillamook County, 493 U.S. 20 (1989); United States v. Ron Pair Enter., Inc., 489 U.S. 235 (1989); Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO, 451 U.S. 77 (1981); Cannon v. University of Chicago, 441 U.S. 677 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cort v. Ash, 422 U.S. 66 (1975). *See also* CHEMERINSKY, *supra* note 79, at 356-64.

206. *See* Sullivan, *supra* note 28, at 10418.

statute clearly allows a private cause of action for injunctive relief; however, the narrower question is whether it allows private restitution when suit is brought in the absence of an imminent and substantial endangerment. In *Meghrig*, the Supreme Court denied restitution under such circumstances.[207] The Court's reading of RCRA's citizen suit provision in *Meghrig* is hardly surprising in lieu of its long-standing doctrine. The Court has stated that the question of whether a private cause of action exists is essentially one of statutory construction.[208] The Court is extremely reluctant to find that Congress implied a private cause of action.[209] The Supreme Court requires an affirmative indication of Congress' intent to provide a private cause of action.[210] In the absence of plain language expressing a private cause of action, courts diligently search for evidence of congressional intent to imply a private cause of action by examining the statute's legislative history.[211] Courts may compare related statutes with the statute in question to detect congressional intent.[212] Finally, if a court is

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207. *Meghrig*, 116 S. Ct. at 1256.

208. *See, e.g., Cannon*, 441 U.S. at 688; *Touche Ross & Co.*, 442 U.S. at 568; *Northwest Airlines*, 451 U.S. at 91.

209. In *Cannon*, Justice Rehnquist essentially put Congress on notice that the Supreme Court is disinclined to imply private causes of action where Congress' intent is unclear on the face of the statute. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) (expressing that the Supreme Court was "appris[ing] the lawmaking branch . . . that the ball, so to speak, may well now be in its court" and that "this Court in the future should be extremely reluctant to imply a cause of action absent . . . specificity on (the part of the Legislative Branch")).

210. CHEMERINSKY, *supra* note 79, at 361. *See Northwest Airlines*, 451 U.S. at 91 ("The ultimate question . . . is whether Congress intended to create the private remedy . . . that the plaintiff seeks to invoke."). *See Cannon*, 441 U.S. at 717. The Court stated that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." *Id.* Only when "all of the circumstances that the Court has previously identified as supportive of an implied remedy are present" will the Court imply a private cause of action. *Id.* According to the Court, the appearance of all of these required circumstances is rare; indeed, it is the "atypical situation." *Id.* The majority warned that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *See also Touche Ross & Co.*, 442 U.S. at 571. For an argument that the Court's intent analysis is myopic because intent can be difficult to discern, see generally Joyce Yeager, Note, *No Remedy for Lust: An Implied Cause of Action and RCRA*, 64 UMKC L. REV. 637, 648 (1996).

211. *See* Cort v. Ash, 422 U.S. 66, 82-83 (1975) (requiring an examination of the statute's legislative history to determine whether Congress intended to vest in a plaintiff a federal right to damages); Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (stating that the federal courts "must surely look to . . . [federal] laws to determine whether there was an intent to create a private right of action under them"). The Eighth Circuit Court of Appeals noted: "'Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent.'" Furrer v. Brown, 62 F.3d 1092, 1097 (8th Cir. 1995) (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979)).

212. For example, to determine whether to infer an implied cause of action in a statute, the Supreme Court examined express causes of action in related statutes. *See* Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1448 (1994) (noting that if Congress had enacted a private cause of action in § 10(b) of the Securities Exchange Act, "it likely would have designed it in a manner

unable to find support for implying a private cause of action, it may not amend federal schemes "by adding to them another private remedy not authorized by Congress."[213]

The Court's reluctance to imply private causes of action applies in the realm of federal environmental law. In *California v. Sierra Club*,[214] as well as in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[215] the Court refused to imply private rights of action[216] under the Rivers and Harbors Appropriation Act of 1899[217] (Rivers and Harbors Act) and the Federal Water Pollution Control Act (FWPCA).[218] In *Sierra Club*, the Ninth Circuit Court of Appeals held that private plaintiffs who suffer injuries from unauthorized activities that interfere with the navigability of the country's waterways may sue not only to enforce the Rivers and Harbors Act's permit requirements, but may sue for damages as well.[219] The circuit court permitted this relief despite acknowledging that neither the language of the Act nor its legislative history clearly indicated that Congress intended to provide damages.[220] The court reasoned that allowing a private cause of action for damages would facilitate supplementary enforcement of the Act and was consonant with the Act's goals.[221]

On appeal, the Supreme Court reversed the decision of the Ninth Circuit Court of Appeals, refusing to imply a private cause of action for damages under the statute.[222] Significantly, the Court reproached the circuit court for failing to consider both the language and legislative history of the Rivers and Harbors Act.[223] The Court specified that the most important issue in deciding whether

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similar to the other private rights of action in the securities Acts"); Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 294 (1993) (stating that the purpose of examining express causes of action in related statutes is "to attempt to infer how . . . Congress would have addressed the issue" if it had intended to create an express cause of action). *See also* Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 93-94 (1981) ("The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies.").

213. *Northwest Airlines*, 451 U.S. at 94.

214. 451 U.S. 287 (1981).

215. 453 U.S. 1 (1981).

216. Georgene M. Vairo, *Selected Problems in Federal Jurisdiction: Standing, Implied Rights of Action, Pendent Jurisdiction, and Abstention*, C607 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 363, 375 (1991).

217. 33 U.S.C. § 402 (1899).

218. 33 U.S.C. § 1365 (1972). *See also supra* notes 103-04 and accompanying text.

219. Sierra Club v. Andrus, 610 F.2d 581, 592 (9th Cir. 1979), *rev'd sub. nom.* California v. Sierra Club, 451 U.S. 287 (1981).

220. *Id.* at 587.

221. *Id.*

222. California v. Sierra Club, 451 U.S. 287, 293 (1981).

223. *Id.* at 294.

a private cause of action shall be implied is Congress' intent to create or deny such a right.[224] Using the test in *Cort v. Ash*[225] to discern congressional intent,[226] the Court held that the language of the Act and its legislative history failed to support a judicial finding of an implied private cause of action.[227]

Apparently, the Court of Appeals for the Ninth Circuit did not learn a lesson from the Court's decision in *Sierra Club*.[228] The *KFC Western* court's failure to follow well-established Supreme Court guidelines is evidenced by the fact that, in analyzing RCRA section 6972(a)(1)(B), the court neither employed

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224. *Id.*

225. 422 U.S. 66 (1975). The *Cort* test in relevant part provides:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted). Professor Chemerinsky, an expert on issues of federal jurisdiction, notes that although *Cort* has not been expressly discarded, the Supreme Court has departed from the *Cort* methodology, replacing it with an even stricter formulation. CHEMERINSKY, *supra* note 79, at 361. Justices Scalia and O'Connor stated that they believe that the *Cort* analysis has been "effectively overruled." Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring).

The most current "test" regarding implied private causes of action is found in *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994). This new approach has been branded a "strict textualism" analysis. Melvin A. Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 14 (1995). Essentially, the majority in *Central Bank*—Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist—held that a determination of whether private plaintiffs have an implied cause of action is to be resolved by a literal reading of the statute. *Id.* at 20 (citing *Central Bank*, 114 S. Ct. at 1446-48). The *Central Bank* Court stated that "the text of the statute controls our decision." *Central Bank*, 114 S. Ct. at 1446. *But see* Eisenberg, *supra*, at 14 (arguing that strict textualism is "intellectually incoherent" and "institutionally impermissible, because judges have an obligation to be faithful servants of the legislature, and the use of strict textualism violates this obligation"). Under an approach of strict textualism, the Court only considers the language of the statute in its literal sense, refusing to consider legislative history or the underlying purpose of the legislative scheme. *Id.* at 13 (explaining that under a strict textualist test, "all elements outside the relevant canonical text—for example, the historical condition, that gave rise to the statute, and propositions of policy, morality, and experience that provide the social context of the statute or otherwise bear on its subject matter—are inadmissible").

226. *Sierra Club*, 451 U.S. at 293. Specifically, the Court examined only the first and second *Cort* factors to make its determination. *Id.* at 297. The Court explained that the third and fourth *Cort* factors are only applied if the first two factors produce evidence of congressional intent, which was not the case here. *Id.*

227. *Id.*

228. *See* Sullivan, *supra* note 28, at 10418.

formal statutory construction tests, nor cited to Supreme Court precedent.[229] Instead, the court quoted some of RCRA section 6972(a)(1)(B)'s language and considered portions of its legislative history,[230] conceding that the legislative history actually supported the defendants' arguments and undermined the court's holding.[231] Because the court failed to find the requisite congressional intent to create a private damages cause of action in either the language or legislative history of RCRA's citizen suit provision, it should have ceased its inquiry and affirmed the district court's holding.[232]

However, in clear contravention of Supreme Court precedent, the *KFC Western* court continued its analysis of RCRA section 6972(a)(1)(B).[233] Specifically, the court examined other circuit court cases on section 6973,[234] as well as the public policy implications of allowing restitution under RCRA's citizen suit provision.[235] Based on these considerations, the court ruled that RCRA's citizen suit provision permits an award of private restitution when suit is brought in the absence of an imminent and substantial endangerment.[236] In reversing the Ninth Circuit Court of Appeals in *Sierra Club*, the Supreme Court stressed that if a finding of congressional intent to create a private cause of action is absent in the statute's language and legislative history, other issues and considerations are irrelevant.[237] Therefore, the underpinnings of the *KFC*

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229. *See* KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). *See also* Sullivan, *supra* note 28, at 10419 ("The majority's analysis of § 7002 consisted of little more than quoting of some of § 7002 and italicizing some of the key phrases in the dispute.").

230. *KFC Western*, 49 F.3d at 520-21 n.3. While the *KFC Western* court's examination of statutory language and legislative history would seem consistent with statutory construction doctrine, the court did not follow established case methodology or inquiries in its examination. *See* Sullivan, *supra* note 28, at 10419.

231. *KFC Western*, 49 F.3d at 522 n.3 ("The House Committee . . . explained in its report that citizens have [merely] a limited right to sue . . . . [T]he legislative history cuts both ways because . . . [some of the] language supports the Meghrigs' contention that Congress intended to allow citizens to sue only for injunctions when it added the endangerment provision."). Earlier in the text of the opinion, the *KFC Western* majority made similar concessions: "The result urged by the Meghrigs is supported by certain comments in the legislative history that explain the meaning of the term 'imminence.'" *Id.* at 520.

232. *See* Sullivan, *supra* note 28, at 10419.

233. *Id.*

234. From examining these cases, the *KFC Western* court drew an analogy between RCRA §§ 6972(a)(1)(B) and 6973 for its holding. For a discussion of the analogy between § 6972(a)(1)(B) and § 6973 used by the *KFC Western* court, see *supra* notes 174-89 and accompanying text. *See also* Fung, *supra* note 38, at 801-02.

235. For a discussion of the *KFC Western* majority's reliance on public policy as a basis for allowing a private cost recovery claim under RCRA § 6972(a)(1)(B), see *supra* notes 198-200 and accompanying text.

236. *See* KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

237. *See* California v. Sierra Club, 451 U.S. 287, 294 (1981).

Western decision are faulty. If the *KFC Western* court had followed the Supreme Court's teachings in *Sierra Club*, it would have held that Congress did not intend private restitution to be awarded under RCRA 6972(a)(1)(B).[238]

2. Lack of Resolution of Statutory Ambiguities and Deficiencies

Thus, even though the *KFC Western* court's decision provides plaintiffs restitution, it is contrary to Supreme Court doctrine regarding statutory interpretation, which is why the decision was unable to survive the Court's scrutiny.[239] Further, even if the Court had affirmed the *KFC Western* decision, the decision fails to adequately address ambiguities in the statute which pose problems for both plaintiffs and defendants.[240] Although the Supreme Court's decision in *Meghrig* does not permit post-cleanup restitution, it does not recognize a wholesale preclusion of the award of restitution under the statute.[241] Consequently, in cases where restitution is considered an appropriate remedy, the last two problem areas identified in this section will remain troublesome for litigants.[242]

One glaring deficiency in implying a private cause of action for restitution under section 6972(a)(1)(B) is the lack of a statute of limitations period.[243] This deficiency would allow private parties to sue long after the discovery and cleanup of contamination.[244] Furthermore, the lack of a limitations period, while clearly unfair to defendants who could be dragged into court unexpectedly, is a boon to every citizen plaintiff that has been barred from the federal courts by CERCLA's petroleum exemption[245] or who is estopped from suing under common law remedies because of expired state limitations periods.[246]

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238. *See* Sullivan, *supra* note 28, at 10419.

239. *See* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254, 1256 (1996). *See also* Brief for the Petitioners at *23-25, 1995 WL 668003, KFC Western, Inc. v. Meghrig, 116 S. Ct. 1251, (1996) (No. 95-83) (discussing generally the provisions of § 6972(a)(1)(B) which are incompatible with a Supreme Court affirmation of the existence of an implied private cause of action for restitution).

240. *See* Petitioner's Brief at *23-25, *KFC Western* (No. 95-83).

241. *Meghrig*, 116 S. Ct. at 1256.

242. Specifically, the lack of a statutory burden of proof scheme for the validity of response costs, as well as the lack of guidance for the appropriateness of response costs sought to be recovered, will remain problematic for litigants. *See infra* notes 359-60, 364-65 and accompanying text.

243. *See* 42 U.S.C. § 6972(a)(1)(B) (1988). *See also* Petitioner's Brief at *23-24, *KFC Western* (No. 95-83).

244. Petitioner's Brief at *24, *KFC Western* (No. 95-83).

245. For a discussion of CERCLA's petroleum exemption, see *infra* notes 386-87 and accompanying text.

246. *See* Brief for Petitioner at *24, 1995 WL 668003, KFC Western, Inc. v. Meghrig, 116 S. Ct. 1251 (1996) (No. 95-83).

Virtually all of these types of plaintiffs will proceed to federal court to litigate their claims under RCRA's citizen suit provision.[247]

The Ninth Circuit Court of Appeals recognized these potential problems in its *KFC Western* decision, but did not adequately address them.[248] The court's solution was to apply the equitable doctrine of laches to eviscerate any unfairness that the lack of a limitations period might create.[249] However, the doctrine of laches is indefinite and cannot serve as a suitable substitute for a definitive limitations period in the statute.[250] Therefore, if RCRA section 6972(a)(1)(B) is interpreted to allow awards of private restitution, the statute must be revised to include a limitations period.[251]

Another problem posed by the existing statute that would become monumental if citizen plaintiffs were entitled to use RCRA section 6972(a)(1)(B) to recover restitution is the lack of a statutory standard to determine the appropriateness of costs.[252] Under CERCLA, the response costs incurred by plaintiffs must be "necessary and consistent" with the National Contingency Plan[253] (NCP) to be recoverable.[254] Nowhere in RCRA does the statute provide guidance similar to that in CERCLA for plaintiffs or defendants.[255] This is a significant obstacle for RCRA section 6972(a)(1)(B) litigants.[256] One

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247. *Id.*

248. *See* KFC Western, Inc. v. Meghrig, 49 F.3d 518, 522 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

249. *Id.*

250. *See* Petitioner's Brief at *24, *KFC Western* (No. 95-83). If laches were to have applied anywhere, it would have applied in *KFC Western*, since the last waste disposal occurred in the early 1960's, roughly 35 years prior to the decision. *See id.* at *4. The court merely paid lip service to laches. However, even if laches were applied, it could produce inconsistent decisions by the courts. A great deal of time and judicial energy would be spent before a consistent application of the doctrine of laches was produced.

251. *See infra* part V.

252. *See* 42 U.S.C. § 6972(a)(1)(B) (1988). *See also* Petitioner's Brief, at *24-25, *KFC Western* (No. 95-83).

253. The NCP is comprised of a 29 page breakdown of regulations on "hazardous substance response" in the Code of Federal Regulations. 40 C.F.R. §§ 300.400-300.440(1988). Parties who incur response costs remediating contaminated property may receive guidance from the NCP as to which costs will be recoverable from responsible parties in a subsequent CERCLA suit. *See id.*

254. 42 U.S.C. §9607(a)(4)(B) (1988).

255. *See generally id.* §§ 6901-6981.

256. Plaintiffs will enter the suit "blind" so to speak, uncertain as to which of their response costs will be recoverable. Similarly, defendants will be equally uncertain as to which of the plaintiff's response costs they will have to pay. Additionally, the litigants will be subject to the determinations of the court in which the suit is being litigated. Thus, the federal courts will be compelled to engage in "extensive interstitial lawmaking to define which costs are recoverable in this highly technical area." Brief for Petitioner at *25 n.11, 1995 WL 668003, KFC Western, Inc. v. Meghrig, 116 S. Ct. 1251 (1996) (No. 95-83). *See also* BATTLE & LIPELES, *supra* note 61, at 7 (noting the complexities of the RCRA scheme and how difficult they are to master). Simply

commentator argues that RCRA's citizen suit provision permits recovery of any response costs which are "reasonable."[257] However, a requirement that costs be "reasonable" provides little comfort for litigants, since federal judges may struggle to formulate what "reasonable" is in RCRA's quagmire of highly technical determinations and reach conflicting results.[258] Therefore, the current statutory framework engenders the possibility that a plaintiff will expend more money than is necessary to remediate a site and that the defendant will have to pay for the excess unless she or he can show that the plaintiff's costs are unreasonable.[259]

Another issue raised by the *KFC Western* decision concerns which party will carry the burden of proof for the validity of response costs. Under CERCLA's statutory scheme, but not under RCRA's, a clear statement regarding the burdens of proof for the appropriateness of response costs is provided.[260] In essence, CERCLA's provisions provide that when the government is seeking recovery of response costs, the burden of proof is on the defendant to show that such costs are inconsistent with the NCP.[261] In contrast, when a private party plaintiff seeks reimbursement for response costs, the burden of proof is on the plaintiff to show that his expenses are consistent with the NCP.[262] Although courts can determine distribution of proof burdens without great difficulty, a statutory scheme would simplify the process and produce consistent judicial outcomes.[263]

The lack of a statutory burden of proof scheme for the validity of response costs, as well as the lack of a guide for the appropriateness of response costs sought to be recovered, indicate the need for a statutory amendment to section 6972(a)(1)(B). They also reflect the lack of resolution provided by either the *Meghrig* or *KFC Western* courts to the problems raised by RCRA's citizen suit provision. Similarly, the lack of a limitations period in section 6972(a)(1)(B) merely serves to emphasize the inadequacy of the *KFC Western* decision.

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defining what qualifies as RCRA hazardous waste, let alone measuring the appropriateness of remediation costs for that waste, is extremely difficult. *See id.*

257. Robertson, *supra* note 30, at 10495.

258. *See* Petitioner's Brief at *25 n.11, *KFC Western* (No. 95-83). *See also* Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10254 (May 1991) (describing RCRA's perplexing complexities).

259. Yet, a determination of reasonableness may be faulty at best in the exceedingly complex game of response cost valuation. *See* Petitioner's Brief at *25 n.11, *KFC Western* (No. 95-83).

260. 42 U.S.C. § 9607(a)(4)(A)-(B) (1988). *See also generally id.* §§ 6901-6981.

261. § 9607(a)(4)(A).

262. § 9607(a)(4)(B).

263. § 9607(a)(4)(A)-(B).

C. *The Eighth Circuit Court of Appeals:* Furrer v. Brown

The *KFC Western* opinion may seem to present sound public policy arguments for allowing a private cause of action for restitution under RCRA's citizen suit provisions.[264] Yet, some legal experts have noted the substantively erroneous legal foundations of the decision.[265] In addition to at least one commentator, a consensus of courts have stated that RCRA section 6972(a)(1)(B) does not support a private remedy for post-cleanup restitution.[266] In *Furrer v. Brown*,[267] the Eighth Circuit Court of Appeals joined the majority of federal courts in denying restitution for cleanup costs to private plaintiffs under RCRA's citizen suit provision.[268] Although consonant with statutory construction doctrine, the *Furrer* decision is inadequate because of the unfairness that results from it.[269]

In *Furrer*, owners of land contaminated by petroleum discovered the contamination when they were ordered to remediate the property by a state environmental agency.[270] After responding to the state cleanup order, the Furrers sought to recover their remediation costs by suing the prior owners of the land[271] under RCRA section 6972(a)(1)(B).[272] The district court held that it lacked subject matter jurisdiction over the Furrer's suit and granted the prior owners' motion to dismiss the case.[273]

Applying Supreme Court statutory construction doctrine, the Court of Appeals for the Eighth Circuit affirmed the holding of the lower court.[274] The Eighth Circuit stated that under RCRA section 6972(a)(1)(B), the federal courts are given subject matter jurisdiction to hear citizen suits where plaintiffs seek

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264. *See supra* notes 198-200 and accompanying text.

265. *See* Sullivan, *supra* note 28, at 10418-20. *See also* Furrer v. Brown, 62 F.3d 1092, 1100 (8th Cir. 1995) ("We think . . . that the court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the *KFC Western* decision.").

266. *See supra* note 168. *See also* Sullivan, *supra* note 28, at 10408.

267. 62 F.3d 1092 (8th Cir. 1995).

268. *Id.* at 1101-02.

269. *See infra* part III.D.

270. *Furrer*, 62 F.3d at 1093. Leaking underground gasoline storage tanks contaminated the land. *See id.* at 1095.

271. The Browns and the Fagases were the prior owners of the property. *Furrer*, 62 F.3d at 1093. The Furrers also sued Shell Oil Company, which at one time had leased the property and operated a service station on it. *Id.*

272. *Id.* The Furrers also brought suit under three state common law claims. *Id.* The Furrers were precluded from suing under CERCLA because of CERCLA's explicit exemption for petroleum. *See infra* notes 386-87 and accompanying text.

273. Furrer v. Brown, 62 F.3d 1092, 1093 (8th Cir. 1995).

274. *Id.*

specific equitable remedies.[275] The *Furrer* court ruled that RCRA's citizen suit provision does not provide an express private cause of action for money judgments.[276] Ultimately, the *Furrer* court held that RCRA section 6972(a)(1)(B) simply does not support an implied private cause of action for restitution[277] and concluded that only injunctive relief is available.[278]

The *Furrer* court used the four factors set forth in *Cort v. Ash*[279] to determine whether Congress intended to provide a monetary remedy under RCRA's citizen suit provision.[280] After examining the plain language of the statute, the court concluded that under the first *Cort* factor, the Furrers did not qualify as members of the class for whose benefit the statute was created.[281]

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275. *Id.* at 1094 (explaining that "prohibitory or mandatory injunctive relief 'to enforce,' 'to restrain,' and 'to order . . . other action . . . necessary'" are the type of equitable remedies available under the statute) (quoting 42 U.S.C. § 6972(a)(1)(B)(1988)).

276. *Furrer*, 62 F.3d at 1094. Interestingly, the *Furrer* court did not address the narrower issue of whether restitution may be awarded under RCRA § 6972(a)(1)(B) in the absence of an "imminent and substantial endangerment." *Id.* at 1095 n.6. Instead, the court simply held that restitution is an inappropriate remedy under the statute in all circumstances. *Id.* at 1095. *But see* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 65-66 (1992) (stating that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place. Thus . . . we presume the availability of *all* appropriate remedies unless Congress has expressly indicated otherwise.") (emphasis added); United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982) ("Congress, in the endangerment provisions of RCRA . . . sought to invoke nothing less than the full equity powers of the federal courts in the effort to protect public health [and] the environment."). RCRA § 6972(a)(1)(B) provides that "the district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing . . ., to order such person to *take such other action as may be necessary*, or both . . . ." 42 U.S.C. § 6972 (1988) (emphasis added). Arguably, RCRA's grant of equitable jurisdiction for citizen suits is sufficiently broad to encompass an award of restitution. *See* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1256 (1996) (implying that in some instances restitution may be properly awarded under RCRA's citizen suit provision).

277. *Furrer*, 62 F.3d at 1101-02 ("[W]e cannot justify inferring a remedy under § 6972 for the recovery of cleanup costs when we are unable to find any indication that Congress intended to create such a remedy.").

278. *Id.* at 1096 ("We do not think that 'such other action as may be necessary' contemplates the payment of money to a party who already has cleaned up a contaminated site. Similarly, jurisdiction 'to enforce' or 'to restrain' does not encompass the authority to award monetary relief.").

279. 422 U.S. 66 (1975). For a listing of the *Cort* factors, see *supra* note 225.

280. Furrer v. Brown, 62 F.3d 1092, 1094-95 (8th Cir. 1995). One commentator argues that the Eighth Circuit's use of a *Cort* analysis in the *Furrer* decision allowed the court to "circumvent the history of equity as applied by the Supreme Court and the Eighth Circuit themselves . . . drastically curtail[ing] the historical power of the district courts." David A. Vandyke, Note, *RCRA Citizen Suits and Restitution: The Eighth Circuit's Full Cort Press Strangles Equity's Traditional Remedial Play*, 61 MO. L. REV. 489, 505 (1996).

281. *Furrer*, 62 F.3d at 1095. The court specified:

> Neither RCRA generally nor § 6972 specifically was enacted for the 'special benefit' of those owners of property who pay to remediate soil contamination that has resulted

In making this determination, the court compared RCRA's citizen suit provision to another RCRA provision[282] and to relevant sections of CERCLA.[283] In simple terms, the Eighth Circuit stated that Congress knows how to include a cause of action for monetary awards in a statute if it so chooses.[284] Yet, Congress specifically declined to include such a right in RCRA section 6972(a)(1)(B).[285] According to the *Furrer* court, the language of RCRA's citizen suit section explicitly defines the relief available to citizen plaintiffs under the statute, and monetary restitution is conspicuously absent.[286]

Under the second *Cort* factor, the Eighth Circuit determined that RCRA section 6972(a)(1)(B)'s legislative history does not support an implied cause of action for restitution.[287] Next, the court noted that pursuant to the holding in *Sierra Club*,[288] it had no duty to consider the last two *Cort* factors, since examination of the first two yielded no evidence of Congress' intent to create a private cause of action for restitution.[289] Nevertheless, the Court of Appeals for the Eighth Circuit, "out of an abundance of caution," examined the third and fourth *Cort* factors[290] and still failed to find any proof of congressional intent

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> from leaking underground gasoline storage tanks and for which they claim no responsibility. In fact, a persuasive argument can be made that the Furrers are in a class of persons that RCRA and § 6972 are directed against—the owners of a storage facility where hazardous waste has presented an imminent and substantial endangerment.

Id. (emphasis omitted).

282. The provision examined by the court allows the EPA and the various states to recover from "the owner or operator of an underground storage tank the costs incurred 'for undertaking corrective action or enforcement action with respect to the release of petroleum from' such a tank." *Id.* at 1096 (quoting 42 U.S.C. § 6991b(h)(6)(A) (1988)).

283. *Id.* (discussing 42 U.S.C. § 9613(f)(1)(1988)).

284. *Id.* at 1096-97.

285. *Id.* at 1097.

286. Furrer v. Brown, 62 F.3d 1092, 1096 (8th Cir. 1995) (adding that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it") (citations omitted).

287. *Id.* at 1097. The court noted:

> While there is no indication in the legislative history that Congress intended to deny the recovery of cleanup costs under § 6972, by the same token there is no evidence that Congress intended to create such a remedy, and "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best."

Id. (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979)).

288. California v. Sierra Club, 451 U.S. 287, 298 (1981). For a discussion of *Sierra Club*, see *supra* notes 214-27 and accompanying text.

289. *Furrer*, 62 F.3d at 1097.

290. *Id.* at 1097-1100. Under the third factor, the *Furrer* court commented that the overriding purpose of RCRA is to "prevent the creation of hazardous waste sites, rather than to promote the cleanup of existing sites." *Id.* at 1098. Furthermore, the court noted that several requirements in the statute were designed to limit the use of citizen suits. *Id.* In particular, the notice provision of RCRA § 6972(b)(1)(A), along with § 6972(b)(1)(B)'s constraint on the commencement of citizen suits if the EPA administrator is already "diligently prosecuting" the suit, is intended to limit the

to create a private cause of action for restitution.[291]

After explicitly declining to follow the reasoning and analysis of the *KFC Western* court,[292] the *Furrer* court noted that its holding left the plaintiffs without a remedy.[293] The court stated that it was not unsympathetic to the plaintiffs' case, but that due to its inability to discern evidence of supporting congressional intent,[294] it could not justify implying a cause of action for restitution under RCRA's citizen suit provision.[295] The dissent argued that the majority's holding was both unfair and poor public policy.[296] However, as the concurrence stated, under America's tripartite system of government, public policy is not for the courts to determine, but for Congress to legislate.[297]

D. Deficiencies of the Furrer *Holding*

Like the *KFC Western* decision, the *Furrer* decision raises several problematic issues which apply with equal force to the Supreme Court's recent *Meghrig* decision. It discourages one of RCRA's basic tenets—prompt, efficient cleanup of hazardous wastes.[298] Furthermore, as noted by the *Furrer* dissent, the decision gives rise to unfairness and poor policy results, leaving private

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use of citizen suits. *Id.* Indeed, the court stated that the "obvious goal" of these statutory provisions is to "forestall citizen suits so that they become available only as a last resort." *Id. See also* H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5612. ("[HSWA] confers on citizens a LIMITED right under § 7002 to sue to *abate* an imminent and substantial endangerment . . . .") (emphasis added).

291. *Furrer*, 62 F.3d at 1100 ("In none of the *[Cort]* factors do we find a basis for imputing to Congress the intent to create in § 6972 an implied private cause of action for the recovery of cleanup costs.").

292. Furrer v. Brown, 62 F.3d 1092, 1101 (8th Cir. 1995). In declining to follow *KFC Western*, the *Furrer* court distinguished the two prior Eighth Circuit opinions relied on by the *KFC Western* court. *Id.* For a discussion of the cases relied upon by the Ninth Circuit in *KFC Western*, see *supra* notes 176-86 and accompanying text. The *Furrer* court claimed that neither *Aceto* nor *NEPACCO* addressed whether the recovery of the EPA's response costs was authorized by RCRA § 6973. *Furrer*, 62 F.3d at 1101. *But see* United States v. Northeastern Pharm. & Chem. Co. 810 F.2d 726, 750 (8th Cir. 1986) ("[B]ecause the government . . . sought to recover the response costs it incurred . . . in the form of equitable relief as abatement costs under RCRA, on remand the district court could grant the government recovery of such costs as a matter of equitable discretion.").

293. *Furrer*, 62 F.3d at 1101.

294. According to the court, the "ultimate question is one of Congressional intent, not of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 1102 (8th Cir. 1995) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

295. *Id.* at 1101-02.

296. *Id.* at 1102 (Fagg, J., dissenting).

297. *Id.* (Bennett, J., concurring) (citations omitted).

298. *See* 42 U.S.C. § 6902(b) (1988).

plaintiffs without a means of recovery.[299]

Although consonant with Supreme Court statutory construction doctrine, the *Furrer* majority's holding denies a RCRA remedy to innocent, injured land owners.[300] In addition, because the plaintiff is not always able to pursue alternate legal remedies,[301] denying a RCRA remedy might result in the denial of all relief. For example, depending on the substances causing the contamination, the plaintiff may not be able to seek a remedy under CERCLA due to CERCLA's petroleum exemption or because CERCLA covers a more narrow scope of wastes than RCRA.[302] Moreover, a suit under state tort theory poses difficult legal hurdles which the plaintiff may be unable to clear.[303]

One commentator argues that careful environmental litigation planning can prevent a land owner from being in the difficult legal position of seeking response cost recovery under RCRA.[304] This argument erroneously assumes that an average land owner knows enough about environmental law to recognize which legal options are most effective in a given situation.[305] Unfortunately, property owners cannot "plan" for something that they do not know exists.[306]

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299. Furrer v. Brown, 62 F.3d 1092, 1102 (8th Cir. 1995) (Fagg, J., dissenting).

300. *See supra* notes 292-95 and accompanying text.

301. For a discussion of remedies alternative to RCRA, see *infra* part IV.

302. For a comparison between the scope of substances covered by CERCLA and the scope of wastes covered by RCRA, see *infra* part IV.A.

303. For a discussion of state common law tort theories, see *infra* part IV.B.

304. Sullivan, *supra* note 28, at 10408.

305. Babich & Hanson, *supra* note 65, at 10165 ("Environmental statutes and regulations are complex and many enforcement and cost recovery opportunities may be lost simply because the legal remedies are not familiar to those who might use them."). The fact that plaintiffs are unaware of the law is evidenced by the number of unsuccessful suits in which land owners have sought monetary relief under RCRA. *See, e.g.*, Furrer v. Brown, 62 F.3d 1092, 1101 (8th Cir. 1995) (denying restitution of response costs to citizen plaintiffs); Portsmouth Redev. & Hous. Auth. v. BMI Apartments Assocs., 847 F. Supp. 380, 385 (E.D. Va. 1994) (finding that RCRA's citizen suit provision does not authorize an award of money damages for remedial costs, response costs, or the costs of investigation); Kaufman & Broad—S. Bay v. Unisys Corp., 822 F. Supp. 1468, 1477 (N.D. Cal. 1993) (denying a private party's request for restitution under RCRA § 6972(a)(1)(B)); Gache v. Town of Harrison, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993) ("RCRA does not authorize a plaintiff in a citizen suit to recover remediation costs."); Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990) (permitting injunctive relief under the statute, but denying a private action for damages); Werlein v. United States, 746 F. Supp. 887, 895 (D. Minn. 1990) (refusing to award money damages to private plaintiffs for medical monitoring costs under § 6972(a)(1)(B)).

306. Evidence that plaintiffs do not effectively "plan" solutions for environmental contamination is shown by the fact that suits are typically brought under RCRA's citizen suit once a plaintiff is in a position of liability or loss, but not before. *See, e.g., Furrer*, 62 F.3d at 1093 (explaining that the Furrers brought suit to recover reimbursement of response costs); KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995) (commenting that KFC brought suit under RCRA §

Some property owners, like the Furrers, are unaware of the contaminated condition that the property is in when they purchase it.[307] Many years can elapse between the time that an innocent party purchases a contaminated parcel of property and the time that the purchaser becomes aware of the contamination.[308] In fact, the land owner may not realize that the site is contaminated until a local, state, or federal agency requires that the property be remediated.[309]

However, once a cleanup order is levied on the land owner by an environmental agency, it is typically too late for the owner to use RCRA's citizen suit provision as it was arguably intended to be used: to obtain an injunctive order against the responsible party.[310] This is a result of the fact that compliance deadlines accompany government ordered cleanups.[311] By the time a land owner is able to litigate a claim against the responsible party and ensure the responsible party's remediation of the property, the government-imposed deadline for cleanup has expired.[312] Additionally, a land owner cannot risk noncompliance by suing the responsible party first and remediating the property later because penalties for a property owner's failure to observe a cleanup deadline are severe.[313] Therefore, property owners are left between the proverbial rock and a hard place: they must expend money to remediate property which they did not contaminate, and they have no legal method whereby they can receive compensation from the responsible parties.[314]

6972(a)(1)(B) to recover cleanup costs), *rev'd*, 116 S. Ct. 1251 (1996).

307. As a result, common law remedies may be precluded since the state statutes of limitations may expire before the land owner realizes that there is problem with the property. *See infra* note 431 and accompanying text.

308. *See KFC Western*, 49 F.3d at 519 (explaining that 13 years had elapsed from the time that KFC purchased the property from the Meghrigs to the time that KFC discovered that the property was contaminated).

309. *See Furrer*, 62 F.3d at 1093 (observing that the Furrers were not aware of the contaminated state of their property until they were ordered to remediate the property by a state environmental agency).

310. A mandatory injunction requiring the responsible party to remediate the property is the only type of injunction that would give the land owner any measure of relief in this situation. A preventative injunction that prohibits a defendant from creating a future endangerment would not be helpful here because it would not force the defendant to act to alleviate the existing contamination. For a discussion of the differences between mandatory and prohibitory injunctions, see *supra* note 67.

311. *See* 42 U.S.C. § 6928(c) (1988).

312. *See* KFC Western, Inc. v. Meghrig, 49 F.3d 518, 524 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

313. For a discussion of the penalties that the EPA has the power to impose for non-compliance with a RCRA cleanup order, see *supra* notes 59-63 and accompanying text.

314. *See* Sarah L. Inderbitzin, *Taking the Burden off the Buyer: A Survey of Hazardous Waste Disclosure Statutes*, 1 ENVTL. L. 513, 558 (1995) (suggesting that if the transferor of contaminated property fails to disclose the contamination to the transferee or the state, or submits false

The statute's notice requirement confronts the property owner with an additional time constraint and procedural dilemma.[315] The statute prohibits commencement of an action by a private plaintiff until ninety days after he or she has given notice of the endangerment to the EPA Administrator, the State, and to any alleged contributor to the endangerment.[316] The notice provision is intended to serve a twofold purpose.[317] First, it allows the responsible party to voluntarily remediate the condition of the property.[318] Second, it permits the government to take action to enforce RCRA's regulations, while abrogating the need for a land owner to do so.[319] However, the notice provision delays expeditious cleanup of hazardous waste sites,[320] contrary to RCRA's purpose.[321]

E. The United States Supreme Court: Meghrig v. KFC Western, Inc.

In its unanimous reversal of the Ninth Circuit Court of Appeals' *KFC Western* decision, the United States Supreme Court sounded a death knell for the possibility of RCRA section 6972(a)(1)(B) being afforded a broad jurisdictional base and scope of remedies.[322] The Court's decision in *Meghrig* sharply circumscribes the forms of available relief under the statute,[323] limits the jurisdiction of district courts,[324] and produces inequitable results and poor

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information, "the buyer should have the option of voiding the transfer . . . [which] should release the transferee from any liability under CERCLA or RCRA, unless the transferee caused the pollution").

315. *See* 42 U.S.C. § 6972(b)(2)(A) (1988).

316. *Id.*

317. *See* Furrer v. Brown, 62 F.3d 1092, 1098 (8th Cir. 1995).

318. *Id.* (explaining that one purpose of the notice requirement is "to give the reputed violator the opportunity to correct his behavior so that it conforms with RCRA").

319. *Id.* (stating that the statute's notice provision "allow[s] Government agencies to take responsibility for enforcing environmental regulations, [and] thus obviat[es] the need for citizen suits") (quoting Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989)).

320. This delay is especially problematic for a property owner who is faced with contamination of a dire or "emergency" nature. If the property owner cleans the contamination during the 90 day period, eliminating the emergency, restitution from the responsible party is barred. On the other hand, if the property owner waits until after the 90 day period has expired, the contamination may cause irreparable injury.

321. *See, e.g.*, 42 U.S.C. § 6902(b) (1988) ("The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible."). *But see* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254 (1996) ("RCRA is not principally designed to effectuate the cleanup of toxic waste sites.").

322. *See generally Meghrig*, 116 S. Ct. at 1256.

323. *See* Zaimes, *supra* note 113, at 1. *See also infra* notes 332-34.

324. *See infra* notes 337-40 and accompanying text.

public policy.[325] However, in light of long-standing statutory construction doctrine,[326] the Court had but little choice to interpret RCRA's citizen suit provision as it did.[327] In order for the statute to serve a broader base of environmental plaintiffs and purposes, it must be reformed by Congress.

The Supreme Court granted certiorari to the Ninth Circuit's *KFC Western* case to address the conflict between the Eighth and Ninth Circuits and to assess the correctness of the Ninth Circuit's interpretation of RCRA's citizen suit provision.[328] It began its analysis of the case by examining RCRA's purpose and comparing it to CERCLA's purpose.[329] It concluded that CERCLA is designed to encourage the expeditious cleanup of toxic waste sites and to compensate innocent parties who have remediated such sites.[330] The Court continued by stating that RCRA is not designed to achieve the same results as CERCLA, but rather, is designed to reduce the generation of hazardous waste and to secure the appropriate disposal, treatment, and storage of such waste.[331]

Next, the Court concluded that a RCRA citizen suit may not be brought to recover past cleanup costs.[332] The Court stated that under a plain reading of section 6972(a)(1)(B), the statute allows citizen plaintiffs to seek a mandatory

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325. For a discussion of the inequities and poor public policy engendered by *Meghrig*, see *supra* part III.D. While part III.D. identifies deficiencies in the Eighth Circuit's decision in *Furrer*, these same problems apply to *Meghrig*.

326. For a brief summary of the Court's statutory construction doctrine, see *supra* notes 205-13 and accompanying text. For examples of how the Court's doctrine has applied to environmental law, see *supra* notes 214-27 and accompanying text.

327. *But see* Vandyke, *supra* note 280, at 505 (suggesting that the Court's decision in *Meghrig* was inconsistent with prior doctrine, which grants broad equitable powers to district courts to fashion equitable remedies). As one commentator noted:

> By only implicitly limiting the [district] courts' equitable jurisdiction, the Supreme Court now has two avenues available for answering any equitable jurisdiction issue. Under the guise of limiting its equitable powers, the Court has created an easy escape from tough equitable issues while retaining its previous, unlimited equitable powers. The next time the Court is faced with a private plaintiff who is seeking a remedy under a federal statue, the Court may invoke Porter v. Warner and find full equitable powers or it may invoke Meghrig v. KFC Western, Inc. and proclaim the absence of authority to grant relief.

Id. at 506. In *Porter*, the Supreme Court held, "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of . . . jurisdiction." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). See *supra* note 276 for a brief discussion of the Court's 1992 revival of *Porter* in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

328. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254 (1996).

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

or prohibitory injunction.[333] According to the Court, however, neither remedy is susceptible to being interpreted as permitting the award of past remediation costs.[334] In reaching this conclusion, the Court again compared CERCLA to RCRA, specifically examining the statutes' remedial schemes.[335] The Court noted that CERCLA expressly permits private parties to recover the costs of past remediation, while RCRA does not.[336]

As additional support for its conclusion that RCRA section 6972(a)(1)(B) does not support an implied cause of action for the recovery of past cleanup costs, the Court noted that the harm RCRA is intended to remedy is limited to that which "*may present* an *imminent* and substantial endangerment to health or the environment."[337] According to the Court, the words "may present" and "imminent" plainly indicate that for harm to be covered by the statute, it must threaten to occur immediately.[338] Waste which no longer presents such a danger is excluded from the statute's scope.[339] This clearly imposes a timing restriction on when a suit may be brought, limiting the district court's jurisdiction to addressing only "imminent" harm.[340]

Finally, the Court raised three striking differences between CERCLA and RCRA in support of its conclusion. First, unlike CERCLA, RCRA has no statute of limitations period during which suit must be brought.[341] Second, CERCLA requires evidence that response costs sought to be recovered are

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333. *Id.* For an explanation of the differences between mandatory and prohibitory injunctive relief, see *supra* note 67.

334. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254 (1996).

335. *Id.* at 1254-55.

336. *Id.* at 1255 ("Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy.").

337. *Id.* (emphasis added) (quoting 42 U.S.C. § 6972(a)(1)(B) (1988)).

338. *Id.* (citing the plain meaning of "imminent" in WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 1245 (2d ed. 1934)). According to one commentator, "The Supreme Court's very clear articulation of what the term 'imminent' means should also have a bearing on other environmental statutes which contain the term 'imminent,' including CERCLA. Those statutes must also now be read to mean 'threatens to occur immediately'." Zaimes, *supra* note 113, at 2. Thus, the *Meghrig* decision may limit future environmental litigation through a narrow reading of the jurisdictional timing requirement attached to the term 'imminent'. *See id.*

339. *Meghrig*, 116 S. Ct. at 1255 (noting that the language of the statute "'implies that there must be a threat which is present now, although the impact of the threat may not be felt until later.'" (quoting Price v. United States Navy, 39 F.3d 1011, 1019 (1994)).

340. *See* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1255 (1996).

341. *Id.* For a discussion of this omission in RCRA, see *supra* notes 243-47 and accompanying text.

reasonable, while RCRA has no similar provision.[342] Third, a citizen plaintiff may not commence suit under RCRA's citizen suit provision without giving ninety days notice to the EPA Administrator, the state in which the alleged violation may occur, and potential defendants.[343] Moreover, a citizen suit may not be brought if either the state or EPA is prosecuting an enforcement action against the alleged violator.[344] CERCLA has no similar requirements.[345] In light of these differences, the Court found that to permit RCRA to be used as a vehicle for the recovery of past remediation costs would be irrational and that the evidence clearly indicated a lack of congressional intent that the statute be used as such.[346]

F. Deficiencies of the Meghrig *Holding*

Despite the fact that *Meghrig* is consonant with Supreme Court precedent, it does not adequately resolve the problems posed by RCRA's citizen suit provision. First, it fosters new uncertainties concerning the statute. Second, it is subject to many of the same deficiencies raised by the *KFC Western* decision.

Although *Meghrig* defined section 6972(a)(1)(B)'s timing requirement, as well as the scope of relief afforded for the recovery of past cleanup expenses,[347] it did not determine whether RCRA's citizen suit provision

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342. *Meghrig*, 116 S. Ct. at 1255. According to the Court, "If Congress had intended § 6972(a) to function as a cost-recovery mechanism, the absence of . . . [a limitations period and a reasonableness standard for costs] would be striking." *Id.* See *supra* notes 252-59 and accompanying text for additional discussion regarding RCRA's failure to compel plaintiffs to show the reasonableness of response costs sought to be recouped. *See also infra* notes 395-99 and accompanying text.

343. *Meghrig*, 116 S. Ct. at 1255. This notice provision, as far as the Court is concerned, demonstrates that RCRA was not intended to allow the restitution of past cleanup costs: "Those parties with insubstantial problems, problems that neither the State nor the Federal Government feel compelled to address, could recover their response costs, whereas those parties whose waste problems were sufficiently severe as to attract the attention of Government officials would be left without a recovery." *Id.* For further examination of RCRA's notice provision, see *supra* notes 315-21 and accompanying text. *See also* 42 U.S.C. § 6972(b)(2)(A)(i)-(iii) (1988).

344. *Meghrig*, 116 S. Ct. at 1255. *See also, e.g.*, 42 U.S.C. § 6972(b)(2)(B)-(C) (1988); *supra* notes 65-66 and accompanying text.

345. *Meghrig*, 116 S.Ct. at 1255. *See generally* 42 U.S.C. § 9607(a)(4)(A)-(B) (1988).

346. *See* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1255 (1996). In determining that Congress did not intend to imply a private cause of action for the recovery of past cleanup costs under RCRA, the Court did not consider RCRA's legislative history. Yeager, *supra* note 210, at 668 n.33. In fact, although the *Meghrig* case provided the Court an opportunity to clarify its statutory construction jurisprudence on implied private causes of action, the Court did not do so. *See id.* at 639. Consequently, the analysis used by lower courts to determine congressional intent to imply a private cause of action in federal statutes remains inconsistent. *Id.*

347. *See* Yeager, *supra* note 210, at 639.

permits a cause of action for recovery of future costs.[348] To illustrate this situation, the following hypothetical may be helpful.[349] First, suppose a citizen plaintiff brings a RCRA action seeking injunctive relief in the form of an order requiring the defendant to remediate the property during the existence of an imminent and substantial endangerment.[350] Second, the district court issues the cleanup order.[351] Third, the defendant refuses to obey the court's order, and the plaintiff, after providing timely notice of intent, undertakes to remediate the property to stop the waste.[352] The issue this hypothetical raises is whether the district court, pursuant to jurisdiction which is properly invoked at the commencement of the suit, has the authority to permit the plaintiff to remediate the site and then award restitution to the plaintiff.[353]

The Court never answered the question posed by this hypothetical.[354] One commentator argues that as a practical matter the issue of the statute's scope in this situation is unlikely to arise as a consequence of the district court's contempt powers.[355] Specifically, the district court will never have to flex the viability of the statute's muscle to fashion a remedy in the face of a "contumacious defendant."[356] Instead, the district court will afford the plaintiff a remedy via its contempt powers.[357] However, even the respondent's counsel in *Meghrig* conceded that RCRA's citizen suit provision could conceivably be used to gain restitution for future damages from an uncooperative defendant.[358]

Leaving the statute's scope undefined in this manner may promote conflicting judicial responses and may raise questions for litigants who are in this situation. If, as *Meghrig* suggests, restitution may be properly awarded in some scenarios, the Court failed to resolve the problems posed by the statute's

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348. Zaimes, *supra* note 113, at 2.

349. *Id.* This hypothetical, posed by Justice Kennedy during oral argument, was further developed by Justices Breyer and Souter. Official Transcript at 13-22, KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

350. Zaimes, *supra* note 113, at 2.

351. *Id.*

352. Official Transcript at 16, KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

353. *Id.* at 19.

354. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1256 (1996) ("Without considering whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced, . . . we [decide] that a private party cannot recover the cost of a *past* cleanup effort under RCRA . . . .") (emphasis added).

355. Zaimes, *supra* note 113, at 2.

356. *Id.* at 2-3.

357. *Id.*

358. Official Transcript at 19-20, KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996).

lack of a burden of proof scheme for the validity of response costs and lack of guidance for the appropriateness of response costs sought to be recovered.[359] This will likely create uncertainties for litigants.[360] On the other hand, since under *Meghrig* restitution may not be granted for *past* cleanup costs, the Court's decision accents the difficulties associated with the statute's notice requirement.[361] It also results in unfairness to the class of property owners who remediate their property first and seek reimbursement of cleanup costs later.[362] This evidences poor public policy.[363]

Judicial attempts to address section 6972(a)(1)(B)'s dilemmas are inadequate, as evidenced by the lack of resolution for private litigants after the *KFC Western* and *Furrer* decisions, as well as the Supreme Court's decision in *Meghrig*. The *KFC Western* decision provides a remedy for private plaintiffs that is contrary to statutory construction doctrine and raises a number of procedural ambiguities, such as the lack of a limitations period.[364] Because the Court intimated that in some cases restitution may be awarded to plaintiffs, many of these ambiguities will apply in the wake of the *Meghrig* decision as well.[365] Furthermore, the *Furrer* and *Meghrig* decisions deny restitution of past cleanup costs to private plaintiffs and emphasize the problems posed by the statute's notice requirement.[366] These numerous problems suggest that Congress did not desire injured landowners to use RCRA section 6972(a)(1)(B) to obtain restitution.[367] However, the problems also indicate that Congress did not anticipate the unfairness resulting from the limited scope of section 6972(a)(1)(B). Therefore, one viable solution which would be both fair and consistent with RCRA's purpose is legislative action expanding the scope of RCRA's citizen suit provision.

IV. A LEGISLATIVE APPEAL: THE NEED FOR AN EXPANSIVE AMENDMENT TO RCRA'S CITIZEN SUIT PROVISION

Although RCRA purportedly exists to regulate and enforce a cradle-to-grave management scheme for hazardous waste,[368] it has failed to achieve its

359. *See supra* notes 252-63 and accompanying text.
360. *See supra* note 256.
361. *See supra* part III.D.
362. *See supra* notes 300-14 and accompanying text.
363. *See supra* notes 198-200 and accompanying text.
364. *See supra* part III.B.
365. *See supra* part III.B.
366. *See supra* part III.D.
367. *See* Brief for Petitioner at *24-25, 1995 WL 668003, KFC Western, Inc. v. Meghrig, 116 S. Ct. 1251 (1996) (No. 95-83).
368. *See generally* 42 U.S.C. §§ 6901-6981 (1988).

goals.[369] RCRA's poor track record is partially attributable to the structure of the statute itself.[370] It is a statute plagued with ambiguous legislation and unclear liability apportionment.[371] However, another reason for RCRA's inadequacy is that when hazardous waste cleanup fails because of a lack of financial solvency among responsible parties, the costs of a RCRA cleanup are absorbed by the EPA.[372] Expanding the scope of RCRA's citizen suit provision would alleviate the EPA's burden and encourage the expeditious abatement of hazardous waste contamination.[373]

Only two of the federal environmental statutes are designed to respond to hazardous waste and substance contamination: RCRA and CERCLA.[374] CERCLA, however, does not always provide adequate remedies for private plaintiffs who incur costs remediating contaminated property.[375] As a result,

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369. A 1988 report by the GAO evidences that of 836 RCRA cases reviewed by the GAO, EPA and state enforcement responses were only timely and suitable in 37% of the cases. EPA STANDARDS, *supra* note 142, at 2. An earlier report asserts, "Federal agency performance in implementing RCRA has not been exemplary." U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-86-76), HAZARDOUS WASTE: FEDERAL CIVIL AGENCIES SLOW TO COMPLY WITH REGULATORY REQUIREMENTS 3 (May 1986). The report also indicates that over 70% of the known handlers of hazardous waste operators functioning under RCRA that were reviewed by the GAO had not been inspected by government environmental agencies. *Id.* Worse yet, almost half of the remaining 30% that had been inspected had violations. *Id.* A 1985 GAO report reflects a consensus among EPA and state officials in New Jersey, Illinois, California, and Massachusetts that illegal disposal of waste is a continuing problem and that government measures designed to thwart such disposal have not been adequate. ILLEGAL DISPOSAL, *supra* note 130, at 13.

370. ROBERT V. ZENER, GUIDE TO FEDERAL ENVIRONMENTAL LAW 196 (1981) ("Because RCRA does not provide either funds or a management framework for the cleanup of environmentally contaminated sites, the EPA is required to proceed against private parties.").

371. Van der Reis, *supra* note 28, at 1287.

372. Where responsible parties have failed to remediate a contaminated RCRA site due to financial insolvency, the EPA must clean the site and may only rarely and under certain conditions shift its response costs to the Superfund. ILLEGAL DISPOSAL, *supra* note 130, at 12. The following situations are considered in determining when the EPA may transfer the costs of a RCRA cleanup to the Superfund: (1) the hazardous waste facility is no longer authorized to operate under RCRA (usually due to prior compliance failures); or (2) the parties responsible for the contamination are deemed unwilling, on a case by case basis, to clean up the facility under RCRA; or (3) the owner or operator of the facility is bankrupt. *See* U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-48), HAZARDOUS WASTE: CORRECTIVE ACTION CLEANUPS WILL TAKE YEARS TO COMPLETE 4 (Dec. 1987).

373. *See* EPA STANDARDS, *supra* note 142, at 2. The simple fact is that without the private sector's financial assistance—in the form of legal initiatives brought under the citizen suit provisions of the federal environmental statutes—environmental contamination remains largely unabated. *Id.*

374. BATTLE & LIPELES, *supra* note 61, at 179.

375. Robertson, *supra* note 30, at 10494. *See also* R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up*, 10 HARV. ENVTL. L. REV. 99, 106-08 (1986) (discussing limitations to private cost recovery actions under CERCLA). Recently, circuit court rulings have made response cost recovery under CERCLA more difficult to obtain. "The U.S. Courts of Appeals for the First, Seventh, and Tenth Circuits have ruled that only

private plaintiffs have turned to RCRA as a means of obtaining restitution.[376] For a better understanding of CERCLA's shortfalls, a comparison of the two statutes may be useful.

A. A Comparison of CERCLA and RCRA: Why RCRA Section 6972(a)(1)(B) is Preferred Over CERCLA as a Vehicle for Suit

CERCLA provides the EPA with the authority to remedy inactive, abandoned hazardous waste disposal sites which pose a threat to human health or the environment.[377] Typically, CERCLA applies where the responsible parties are absent, insolvent, or recalcitrant.[378] RCRA, on the other hand, provides the EPA with a comprehensive hazardous waste management program which governs the daily generation and handling of hazardous waste at sites that are in current operation.[379] There are several differences between the statutes that are relevant to their functions as means of recovery for private plaintiffs.[380]

Initially, the statutes apply to different contaminants. RCRA contamination includes both "hazardous wastes" and "solid wastes,"[381] while CERCLA's

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private parties who are 'innocent'— that is, who are not liable under CERCLA—may bring cost recovery action under CERCLA." Robertson, *supra* note 30, at 10494 (citing United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96 (1st Cir. 1994); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994); United States v. Colorado & E. R.R., 50 F.3d 1530 (10th Cir. 1995)).

376. *See* Fung, *supra* note 38, at 787.

377. James B. Brown & Glen C. Hansen, *Nuisance Law and Petroleum Underground Storage Tank Contamination: Plugging a Hole in the Statutes*, 21 ECOLOGY L.Q. 643, 648 (1994). *See also* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1241 (6th Cir. 1991).

378. BATTLE & LIPELES, *supra* note 61, at 180. CERCLA was essentially enacted in response to the Love Canal disaster of the late 1970s. *Id.* In the Love Canal case, roughly 21,800 tons of industrial wastes were dumped between 1942 and 1953 on to land that eventually was sold to the Niagara Falls Board of Education. Homes and schools were built on the land. *Id.* In 1978, chemicals began leaking into residential basements, causing the New York Commissioner of Health to declare a health emergency in the area of the site. *Id.* Prior to CERCLA's enactment, none of the existing laws permitted the EPA to "respond to and clean up such environmental contamination." *Id. See generally* 42 U.S.C. §§ 9601-9675 (1988).

379. *See* BATTLE & LIPELES, *supra* note 61, at 1, 2. RCRA provides "cradle to grave" regulation of hazardous and solid waste, managing the waste throughout its lifecycle. United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1376-77 (8th Cir. 1989) (quoting H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120). *See generally* PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW & POLICY 560-70 (1994) (providing an overview of RCRA's regulatory system).

380. *See generally* Miller, *supra* note 96, at 929 (comparing CERCLA's and RCRA's citizen suit provisions, as well as providing a general overview of each statute's purpose); Fung, *supra* note 38 (contrasting RCRA and CERCLA as vehicles for private party recovery); BATTLE & LIPELES, *supra* note 61 (providing a comprehensive explanation of each statute).

381. *See* 42 U.S.C. § 6903(5), (27) (1988).

scope of coverage is limited to "hazardous substances."[382] Therefore, RCRA applies to a wider range of contamination.[383] Because it applies to more contaminants, RCRA facilitates greater environmental cleanup and creates a broader cause of action for citizen plaintiffs than CERCLA.[384]

Perhaps the most significant contaminant accorded different treatment under RCRA and CERCLA is petroleum.[385] CERCLA expressly excludes petroleum from its definition of a "hazardous substance."[386] As a result, plaintiffs who own property contaminated with petroleum waste have no remedy under CERCLA.[387] By contrast, RCRA does not exclude petroleum from its definitions of "hazardous waste" or "solid waste."[388] Therefore, a large part of RCRA's appeal to private plaintiffs flows from the fact that a remedy for petroleum contamination may be obtained under RCRA.[389]

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382. *Id.* § 9601(14). CERCLA's definition of "hazardous substances" incorporates anything designated as "hazardous waste" under RCRA, but it does not include materials labeled as "solid waste" under RCRA. *Id.*

383. Robertson, *supra* note 30, at 10495. Interestingly, a hazardous waste site which is regulated by RCRA must comply with the other federal environmental statutes which apply to the site that are administered by the EPA. Oppliger, *supra* note 26, at 65 n.30. To illustrate, a hazardous waste facility that is regulated by RCRA must satisfy the directives of the Clean Water Act if it discharges wastes into navigable waters. Similarly, if it emits harmful pollutants into the air, it must abide by the performance standards specified in the Clean Air Act. If a RCRA facility handles hazardous wastes that contain more than 50 parts per million of PCB's, it is subject to regulation by the Toxic Substances Control Act. RCRA ORIENTATION MANUAL III 128-29 (1986). For a sampling of other federal environmental statutes that are enforced by the EPA, see *supra* note 26.

384. *See* Robertson, *supra* note 30, at 10495. *See also Citizens Can Recover Pollution Cleanup Costs*, NAT'L L.J., Mar. 13, 1995, at B2.

385. Fung, *supra* note 38, at 821.

386. 42 U.S.C. § 9601(14) (1988). Section 101(14) in relevant part provides: "The term 'hazardous substance' . . . does not include petroleum, including crude oil . . . natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)." *Id.* To date, congressional efforts to expand CERCLA's definition of hazardous substances to include petroleum have failed. *See* Yeager, *supra* note 210, at 649.

387. Fung, *supra* note 38, at 787. The contaminants at issue in *KFC Western* were petroleum waste products. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1251 (1996). Similarly, petroleum contamination gave rise to the litigation in *Furrer*. Furrer v. Brown, 62 F.3d 1092, 1093 (8th Cir. 1995). The plaintiffs in these cases, unable to obtain a remedy under CERCLA, turned to RCRA for relief.

388. *See* 42 U.S.C. §§ 6901-6979 (1988).

389. *See* Fung, *supra* note 38, at 787 (noting that RCRA provides relief for an entire class of plaintiffs that have been left "stranded" by CERCLA's petroleum exclusion).

In addition, under CERCLA, costs are recoverable by private plaintiffs only after their response actions are completed.[390] By comparison, RCRA permits private plaintiffs to seek mandatory injunctions, compelling defendants to remedy contamination.[391] Thus, RCRA allows private plaintiffs to obtain relief when they are insolvent or otherwise incapable of conducting a cleanup first and seeking restitution later.

Furthermore, under RCRA section 6972(e), courts are expressly authorized to award litigation costs to prevailing parties.[392] The term "litigation costs" includes expert witness fees, reasonable attorneys' fees, and other expenses associated with litigation under section 6972(a)(1)(B).[393] In comparison, CERCLA does not specifically permit the recovery of attorneys' fees.[394]

Under CERCLA, costs sought to be recovered by a private plaintiff from a private defendant[395] must be consistent with the NCP.[396] Currently, RCRA's recovery scheme has no such requirement.[397] RCRA's lack of guidance for the appropriateness of response costs poses difficulties for litigants,[398] but can be addressed in an amendment to RCRA's current scheme.[399]

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390. Redland Soccer Club v. Department of the Army, 801 F. Supp. 1432, 1435 (M.D. Pa. 1992). Courts may grant declaratory relief for future costs under CERCLA. Fallowfield Dev. Corp. v. Strunk, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, *10 (E.D. Pa. May 11, 1993) (citing 42 U.S.C. § 9613(g)).

391. Babich, *supra* note 27, at 10123. *See generally* 42 U.S.C. § 6972(a)(1)(B) (1988); *supra* note 67.

392. *See* 42 U.S.C. § 6972(e) (1988). *See also* Robertson, *supra* note 30, at 10495.

393. *See* 42 U.S.C. § 6972(e) (1988).

394. Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994). According to the Supreme Court, attorneys' fees are not a recoverable litigation expense unless courts can discern an explicit authorization by Congress to award such fees. *Id.* at 1965. To examine case law that provides a general statement of the Supreme Court's doctrine on the award of attorneys' fees, see *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

395. The CERCLA scheme permits private plaintiffs to recover restitution from private defendants and the government's Superfund. Baker & Markoff, *supra* note 375, at 106. *See also* Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985) (upholding private causes of action under CERCLA). Because RCRA has no counterpart to the Superfund, this note is concerned exclusively with restitution recovery between private litigants under CERCLA and RCRA and will not delve into private recovery from the Superfund.

396. *See supra* text accompanying note 254. *See also* 42 U.S.C. § 9607(a)(4)(A)-(B) (1988).

397. Robertson, *supra* note 30, at 10945.

398. *See supra* notes 252-59 and accompanying text.

399. *See infra* part V.B.

Finally, RCRA authorizes courts to impose severe penalties[400] on defendants who fail to comply with cleanup orders.[401] Because CERCLA suits between private litigants exist only as cost recovery actions,[402] they do not include severe penalties for non-compliance with cleanup orders.[403] Arguably, RCRA's scheme of penalties, coupled with the potential recovery of litigation costs, is a more threatening scheme to defendants than CERCLA.[404]

Despite the noted differences in the statutes, RCRA and CERCLA share some similarities.[405] For example, each statute has been interpreted as imposing joint and several liability on parties responsible for contamination. In *New York v. Shore Realty Corp.*,[406] the Second Circuit Court of Appeals held that the imposition of joint and several liability on responsible parties for restitution[407] of a plaintiff's response costs was appropriate under CERCLA if the harm was indivisible.[408] Similarly, RCRA is interpreted as imposing joint and several liability on responsible parties for restitution of all response costs.[409]

Another similarity between CERCLA and RCRA concerns defendants' rights of contribution.[410] CERCLA expressly permits private plaintiffs to

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400. *See supra* notes 59-63 and accompanying text.

401. 42 U.S.C. § 6928(a)(3) (1988).

402. *See supra* note 390 and accompanying text.

403. *See* 42 U.S.C. §§ 9607(a), 9613(f)(1) (1988).

404. Fung, *supra* note 38, at 821.

405. *See id.* at 805 (explaining that the "interlocking provisions of RCRA and CERCLA form a comprehensive residuals regulation and enforcement scheme").

406. 759 F.2d 1032 (2d Cir. 1985).

407. "Courts have characterized CERCLA cost recovery claims as equitable claims for restitution, rather than claims for damages in tort." Robertson, *supra* note 30, at 10494 n.49 (citing United States. v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982)); United States v. Wade, 653 F. Supp. 11, 13 (E.D. Pa. 1984).

408. *Shore Realty*, 759 F.2d at 1037. Other courts, using the Restatement (Second) of Torts § 433A, have determined that joint and several liability may be assessed under CERCLA if the harm is indivisible. *Accord* United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). *But see* United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (holding that "a rigid application of the Restatement approach to joint and several liability is inappropriate" due to the unfairness such extensive liability might impose on a defendant who contributed only a small amount to the contamination at a site).

409. Robertson, *supra* note 30, at 10495 (citing Lincoln Properties, Ltd. v. Higgins, 23 Env't Rep. Cas. (BNA) 20665, 20672 (E.D. Cal. 1993)).

410. "Contribution" under CERCLA § 9613(f)(1) allows a defendant who is held jointly and severally liable for contamination to seek partial reimbursement from other responsible parties. United States v. R.W. Meyer, Inc., 932 F.2d 568, 572 (6th Cir. 1991). *See also* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1251 (6th Cir. 1991) (recognizing a defendant's right of contribution under CERCLA); Thomas C. Russo, *Contribution under CERCLA*, 14 COLO. J. ENVTL. L. 267 (1989) (providing a general overview of contribution under CERCLA). Under RCRA, the

recover contribution from responsible parties.[411] In *United States v. Valentine*,[412] a district court implied a right of contribution under RCRA section 6973.[413] This led one commentator to believe that, in time, courts would recognize a right of contribution under section 6972(a)(1)(B).[414]

In fact, allowing both restitution and contribution under RCRA section 6972(a)(1)(B) would not contravene CERCLA.[415] Instead, it would address unsatisfactory aspects of the current RCRA-CERCLA scheme.[416] The legislative development of the statutes are interwoven,[417] as are the enforcement provisions.[418] Allowing litigants who sue under RCRA's citizen suit provision to obtain the same remedies that CERCLA provides would complement the statutes' existing schemes of permitting private parties to undertake environmental cleanups for the public benefit.

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term "contribution" is defined the same way as it is under CERCLA. *See* United States v. Valentine, 856 F. Supp. 627, 632 (D. Wyo. 1994) (allowing defendants a right of contribution under RCRA § 6973).

411. 42 U.S.C. § 9613(f)(1) (1988). In relevant part, this section provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action . . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Id.

412. 856 F. Supp. at 627.

413. *Id.* (stating that RCRA § 6973 "gives broad authority [to courts] to grant all relief necessary to ensure complete protection of the public health and environment." (quoting United States v. Conservation Chem. Co., 619 F. Supp. 162, 199 (W.D. Mo. 1985))).

414. Robertson, *supra* note 30, at 10495. While the right of contribution is not express in RCRA § 6972(a)(1)(B), a statutory amendment permitting such a right of action would be consistent with CERCLA and would promote greater environmental cleanup. *See infra* section V.B.

415. *See* Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1574 (5th Cir. 1988) (holding that because relevant statutory definitions in RCRA are the same as the definitions in CERCLA, the same remedies should be available under RCRA and CERCLA causes of action).

416. Fung, *supra* note 38, at 841.

417. *Id.* at 820. As one commentator explains:

> Congress enacted RCRA in 1976 . . . . In 1980, Congress enacted CERCLA upon realizing that RCRA was "clearly inadequate" to deal with the problem of inactive hazardous waste sites. Four years later, Congress found that its hazardous waste program was not progressing; there was increasing public concern about hazardous waste and conflicts regarding CERCLA. To address these concerns, Congress enacted the 1984 RCRA Amendments.

Id. at 805-06.

418. *Id.* at 820.

B. *The Deficiencies of Common Law Tort Theories of Recovery*

Just as CERCLA suits lack satisfactory compensation methods for private plaintiffs who seek restitution of response costs, common law tort bases of litigation are inadequate compensation mechanisms. There are several causes of action that can be raised by private plaintiffs under the common law of tort for the transfer of contaminated property.[419] Examination of one potential tort action—abnormally dangerous activity—will identify some of the inadequacies of common law actions. The same or similar deficiencies are evident in other tort actions,[420] such as misrepresentation,[421] negligence,[422] vendor liability[423] and nuisance.[424]

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419. Baker & Markoff, *supra* note 375, at 108.

420. *Id.* at 110.

421. Historically, the traditional rule of caveat emptor ("let the buyer beware") governed misrepresentation actions. *See* Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808, 809 (Mass. 1942). This rule prohibited buyers from recovering from sellers who intentionally failed to disclose known defects, such as property contamination. *See* Henshaw v. Cabeceiras, 437 N.E.2d 1072, 1074 (Mass. App. Ct. 1982) (reaffirming *Swinton*, while ruling that a seller is not liable to a buyer for nondisclosure of a known defect when the seller is under no duty to disclose). The current rule is found under § 551 of the Restatement of Torts. It imposes liability on a seller who intentionally fails to disclose a defect which, if known, would cause the buyer to refrain from buying. RESTATEMENT (SECOND) OF TORTS § 551 (1976).

422. In successful negligence suits, plaintiffs were traditionally required to show actual causation: (1) duty of care, (2) breach of the duty, (3) causation, and (4) damages. *See* CLARENCE MORRIS ET AL., MORRIS ON TORTS § 1, at 44 (2d ed. 1980). As a result, cases frequently failed because "actual causation was impossible to demonstrate due to circumstances beyond the plaintiff's control." Van der Reis, *supra* note 28, at 1272. For example, the defendant may have harmed the plaintiff in a way that made it infeasible for the plaintiff to prove the identity of the responsible defendant. *Id.* at n.27.

After time, the courts created an alternative liability theory for nuisance actions. *See* Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948). This new approach was codified in the Restatement (Second) of Torts. RESTATEMENT (SECOND) OF TORTS § 433(B) (1977). However, a plaintiff still "faces 'the difficulty and expense of proving legal causation between a[n] . . . act or omission and the harmful consequence alleged.'" Van der Reis, *supra* note 28, at 1292 (quoting Joseph K. Brenner, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1059 (1981)).

423. To establish a cause of action for the land seller's liability, the buyer must show four things: that the seller knew or had reason to know of the contamination; that the seller realized or should have realized the risk; that the seller had reason to believe that the buyer would not detect the contamination or realize the risk; and that the buyer did not know or have reason to know of the contamination or risk. *See* RESTATEMENT (SECOND) OF TORTS §353(1) (1964). A property owner's recovery under a vendor liability cause of action can be frustrated in several ways. First, the buyer is limited to recovery for injury incurred prior to the discovery of the contamination. ABC Builders, Inc. v. Phillips, 632 P.2d 925, 930-33 (Wyo. 1981). Second, before recovery can be obtained, a court must first decide that the contamination poses an unreasonable risk to human health. *See* Century Display Mfg. Corp. v. D.R. Wager Constr. Co., 376 N.E.2d 993, 997 (Ill. 1978) (holding that the mere presence of flammable liquids in sealed pipes and tanks did not create an unreasonable risk). Finally, since the theory of recovery is tort-based, courts may deny compensation for purely economic losses. Redarowicz v. Ohlendorf, 441 N.E.2d 324, 326 (Ill. 1982) (holding that solely

One theory of liability under the common law is the "abnormally dangerous activity" cause of action.[425] A party who contaminates property by conducting an abnormally dangerous activity on it is liable to the property owner for cleanup costs.[426] Hazardous waste disposal constitutes an abnormally dangerous activity, and defendants are strictly liable for such activity to government plaintiffs.[427] Therefore, private plaintiffs should be able to recover from responsible parties using this strict liability rule.[428] However, strict liability in tort fails to provide current owners with an adequate remedy.[429]

One practical bar to recovery is that plaintiffs may not know who to sue in cases where the disposal occurred years prior.[430] Furthermore, state statutes of limitations prohibit recovery for tortious acts that are remote in time.[431] An additional problem is that tortious acts are typically remedied through compensatory damage awards; however, the measure of damages is the owner's diminution in value of the estate, rather than the cost of cleanup.[432]

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economic losses cannot be recovered in tort).

424. The general rule for nuisance actions is that a seller who did not generate the nuisance remains liable for the buyer's cleanup costs, but only until the buyer detects the nuisance and has a reasonable opportunity to abate it. RESTATEMENT (SECOND) OF TORTS § 840A(2) (1977).

425. *See* State v. Ventron Corp., 468 A.2d 150 (N.J. 1983).

426. *See* RESTATEMENT (SECOND) OF TORTS § 520 (1977). Under the *Restatement* analysis, determination of an abnormally dangerous activity is reached by considering the following factors:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id.

427. *See* State v. Ventron Corp., 468 A.2d 150, 160 (N.J. 1983).

428. Baker & Markoff, *supra* note 375, at 110.

429. *Id.*

430. *Id. See also* Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10141, 10144 (1995) ("In general, the common-law system is geared to providing relief to plaintiffs who can prove that a specific defendant is responsible for a specific injury. Such proof is often difficult in disputes about environmental pollution, however."). Contaminants may have many potential sources, and selecting the appropriate defendant can pose proof problems. *Id.* at 10144-45.

431. *See* IDAHO CODE § 5-219 (1979) (requiring recovery actions for property injury to be brought within two years of the time that the plaintiff discovered or should have reasonably discovered the contamination). The environmental law statutes typically allow more lenient limitations periods. For example, CERCLA § 9612(d) permits plaintiffs to bring suit to recover response costs for up to six years after the completion of any response activities. 42 U.S.C. § 9612(d) (1988).

432. Baker & Markoff, *supra* note 375, at 75.

Consequently, a common law remedy could compensate the owner for the tortious acts, but may not ensure the property's remediation if the cleanup costs exceed the loss in value.[433]

A final problem with common law tort actions is their costliness.[434] Attorneys charge the same fees whether their clients win or lose, and even simple tort cases typically cost tens of thousands of dollars to pursue.[435] Furthermore, although a monetary damage award may compensate a private party for property contamination, it may fail to cover the costs of litigation.[436]

RCRA section 6972(a)(1)(B) provides more complete relief for property owners than the common law or CERCLA. However, RCRA's existing citizen suit provision is too limited in scope to award private plaintiffs the best potential remedies under the statute. Therefore, an efficient, expansive, and effective amendment to RCRA's citizen suit provision is necessary.

V. PROPOSED AMENDMENT TO RCRA'S CITIZEN SUIT PROVISION

This Note proposes that Congress amend RCRA's citizen suit provision[437] to expressly provide courts jurisdiction to award restitution to a private plaintiff regardless of the timing of the plaintiff's suit.[438] This proposal addresses the problems of vagueness in the statute that cannot be adequately resolved by the judiciary.[439] First, it articulates when a plaintiff must sue to recover relief and specifically permits a suit to be brought in the absence of an imminent and substantial endangerment, provided that the contamination previously posed an imminent and substantial endangerment. Second, the proposal specifies what types of relief the statute affords private parties: injunctive relief, restitution and contribution. Third, it sets out limitations periods for restitution and contribution actions to ensure that defendants are insulated against suits that are brought many years after the last waste disposal occurred.[440] Fourth, this proposal provides guidelines for the appropriateness of costs sought to be

433. *Id.* The federal environmental law statutes typically allow plaintiffs to recover all cleanup costs and any other necessary response costs. *See, e.g.*, 42 U.S.C. § 9607(a)(4)(B) (1988).

434. *See* Babich, *supra* note 430, at 10145 ("[A] citizen must either be relatively wealthy or gravely injured to vindicate his or her rights in the common-law tort system.").

435. *Id.*

436. *Id.* RCRA, unlike the common law, empowers the courts to award litigation expenses to prevailing parties. 42 U.S.C. § 6972(e) (1988).

437. *See supra* notes 99-100. *See also* 42 U.S.C. § 6972(a)(1)(B) (1988).

438. The revision will allow plaintiffs to sue after the imminent and substantial endangerment posed by the contaminated property ceases to exist.

439. *See supra* parts III.B, D, F.

440. See *supra* notes 243-51 and accompanying text for a discussion concerning the absence of a limitations period in the statute.

recovered to safeguard defendants against exorbitant cost recoveries and requires plaintiffs to prove the appropriateness of such costs.[441] Fifth, it reduces the current ninety day notice requirement in the statue to thirty days to encourage the availability of injunctive relief in RCRA § 6972(a)(1)(B) and to expedite cleanup.[442]

A. Purpose and Need

Allowing an express cause of action for restitution effectuates RCRA's purpose of expedient cleanup[443] and creates a more just outcome for landowners who remediate property that they did not contaminate.[444] It also facilitates needed private cleanup of the environment in a period when government action is financially constrained.[445] Furthermore, suits brought under RCRA section 6972(a)(1)(B) provide private plaintiffs with several distinct advantages over CERCLA suits[446] and common law actions in tort.[447]

B. Section-by-Section Analysis

TITLE I: PROPOSED AMENDMENT TO THE RESOURCE CONSERVATION AND RECOVERY ACT'S CITIZEN SUIT PROVISION.

Section 1— Definitions.[448]

(1) Administrator: The term "Administrator" means the Administrator of the Environmental Protection Agency.[449]

(2) Disposal: The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water.[450]

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441. *See supra* notes 252-59 and accompanying text.
442. *See supra* notes 315-21 and accompanying text.
443. *See supra* notes 72-73 and accompanying text.
444. For a discussion of the injustice that is created by denying restitution, see *supra* part III.D.
445. *See supra* part II.B.
446. *See supra* notes 377-418 and accompanying text.
447. *See supra* section IV.B.
448. These definitions are the same as provided in 42 U.S.C. § 6903 (1988). They are reproduced here to help the reader understand the proposed amendment. They appear out of order as compared to their original form.
449. 42 U.S.C. § 6903(1) (1988).
450. § 6903(3).

(3) Hazardous Waste: The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.[451]

(4) Hazardous Waste Generation: The term "hazardous waste generation" means the act or process of producing hazardous waste.[452]

(5) Hazardous Waste Management: The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.[453]

(6) Person: The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association . . . .[454]

(7) Solid Waste: The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . .[455]

(8) Solid Waste Management: The term "solid waste management" means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.[456]

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451. § 6903(5)(A)-(B).
452. § 6903(6).
453. § 6903(7).
454. 42 U.S.C. § 6903(15) (1988).
455. § 6903(27).
456. § 6903(28).

(9) Solid Waste Management Facility: The term "solid waste management facility" includes-

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, *including hazardous wastes*, whether such facility is associated with facilities generating such wastes or otherwise.[457]

(10) State: The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.[458]

(11) Storage: The term "storage," when used in connection with hazardous waste, means the containment of a period of years, in such a manner as not to constitute disposal of such hazardous waste.[459]

(12) Treatment: The term "treatment," when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport . . . amendable for storage, or reduced in volume. Such term includes activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.[460]

Commentary to Section 1: The terms and definitions included in Section 1 are used by RCRA and RCRA's citizen suit provision as amended in 1984. The definitions are reproduced here in altered order to provide a better understanding of RCRA as it currently exists. The same terms and definitions will be used by the proposed amendment.

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457. § 6903(29)(C).
458. § 6903(31).
459. 42 U.S.C. § 6903(33) (1988).
460. § 6903(34).

Section 2— Guidelines for Establishing Powers of and Remedies for Private Plaintiffs.

Section 2 amends § 6972(a)(1)(B) of RCRA to read:[461]

> *In general . . . any person may commence a civil action on his own behalf-*
>
> (A) *against any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and 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* either presents, or at a prior time presented, an *imminent and substantial endangerment to health or the environment . . .*
>
> Commentary to Section 2(A): Part (A) of Section 2 sets forth changes to the timing limitations of RCRA's current citizen suit provision. As amended, the citizen suit provision allows a plaintiff to bring an action against the responsible party as long as the contamination currently presents, or at one time presented, an imminent and substantial endangerment to human health or the environment.

Section 2 amends RCRA § 6972(a)(2) to read:

> (B) . . . *Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary . . .* or to order equitable restitution of the response costs plaintiffs incur remediating the property.
>
> Commentary to Section 2(B): Part (B) of Section 2 amends the scope of relief provided under RCRA's citizen suit provision. It specifically authorizes courts to grant restitution to private plaintiffs who respond

461. The italic typeface denotes the original statutory language of RCRA § 6972 throughout this amendment.

to contamination. By expressly allowing restitution under the statute, plaintiffs will be permitted to clean up dangerous contaminants present on their property and seek reimbursement later from the responsible parties. The allowance of restitution as a remedy will engender property owners' increased willingness to eliminate endangerments on their property and will serve RCRA's basic purpose of expeditious cleanup. Private restitution suits should not be barred by government action.[462]

Section 2:

(C) Contribution[463]

Any person may seek contribution from any other person who is liable or potentially liable under section 6972(a)(1)(B) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Commentary to Section 2(C): Part (C) of Section 2 permits responsible parties to seek contribution from other responsible parties. Its inclusion will alleviate hardships on defendants who are only partially responsible for contamination of a site. Permitting contribution actions will produce a more equitable result than a scheme in which a defendant is wholly liable for contamination produced partially by others. Private contribution suits should not be barred by government action.[464]

Section 3— Statute of Limitations.[465]

Section 3:

(A) Claims for recovery of costs:

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462. *See supra* notes 65-66 and accompanying text. *See also* 42 U.S.C. § 6972(b)(2)(B) (1988).

463. This section is borrowed in part from CERCLA § 9612(f)(1). *See* 42 U.S.C. § 9612(f)(1) (1988).

464. *See supra* notes 65-66 and accompanying text. *See also* 42 U.S.C. § 6972(b)(2)(B) (1988).

465. This section is modeled after CERCLA's limitations periods for private recovery actions and contribution actions. *See* 42 U.S.C. §§ 9612(d), 9613(g)(3) (1988).

No claim may be presented under this section for restitution of the costs referred to in section 6972(a)(1)(B) of this title more than six years after the time of completion of all response action.

Commentary to Section 3(A): Part (A) of Section 3 provides a limitations period in order to restrict plaintiffs' restitution suits. The limitations period is a necessary addition to the statute to protect defendants who are sued for waste disposal that occurred many years earlier. Essentially, it provides a framework from which parties to potential RCRA cost recovery actions can obtain guidance.

Section 3:

(B) Claims for contribution:

No action for contribution for response costs or other losses may be commenced more than three years after the date of completion of any response action under this title.

Commentary to Section 3(B): Part (B) of Section 3 provides a limitations period in order to restrict defendants' contribution suits. The limitations period is a necessary addition to the statute to protect other potentially liable parties who are sued for disposal acts that occurred many years prior. Part (B) contributes a framework from which parties to potential RCRA contribution actions can obtain guidance.

Section 4— Guidance for the Appropriateness of Costs Sought to be Recovered.[466]

Section 4:

(A) The President[467] shall publish a national contingency scheme (NCS) for the removal of hazardous waste and solid waste. Such a scheme shall include a section which establishes procedures and standards for responding to releases of hazardous wastes and solid wastes, which shall include at a minimum:

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466. This section is borrowed largely from CERCLA §§ 9605, 9607(a)(4)(B). *See* 42 U.S.C. §§ 9605, 9607(a)(4)(B) (1988).

467. The EPA is directly accountable to the executive branch of the United States' tripartite system of government. Therefore, responsibilities assigned to the President under this amendment are assumed to be transferred to the EPA.

(1) methods for discovering and investigating facilities at which hazardous or solid wastes have been disposed of or otherwise come to be located;

(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this chapter;

(4) means of assuring that remedial action measures are cost-effective.

Commentary to Section 4(A): Part (A) of Section 4 directs the President via the EPA to create a national scheme by which RCRA wastes are catalogued. It also directs the President to establish government guidance on the appropriateness of private parties' response costs. By providing this type of scheme within RCRA, courts will have a ready reference for determining whether the costs plaintiffs' seek to recover through restitution actions are appropriate.

Section 4:

(B) Any costs of response incurred by any person bringing an action for restitution under section 6972(a)(2) of this title must be consistent with the national contingency scheme.

Commentary to Section 4(B): This section provides guidance for potential RCRA litigants, requiring that plaintiffs prove their response costs are consistent with the NCS proposed in Section 4(A). This requirement ensures that costs sought to be recovered in restitution actions are appropriate. It relieves courts from having to make determinations regarding which response costs are recoverable and which litigant should bear the burden of proving the appropriateness of the costs sought to be recovered.

Section 5— Notice Provisions.

Section 5 amends § 6972(b)(2)(A) to read:

Actions prohibited

No action may be commenced under subsection (a)(1)(B) of this section prior to thirty *days after the plaintiff has given notice of the endangerment to—*

(i) *the Administrator;*

(ii) *the State in which the alleged endangerment may occur;*

(iii) *any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section*

. . . .

Commentary to Section 5: Section 5 amends the current notice provision in RCRA's citizen suit provision. The notice provision, as amended, will facilitate private plaintiffs' injunctive remedies under the statute by allowing them to bring a cause of action sooner.[468] It will also provide for faster alleviation of endangerments, thus achieving one of RCRA's primary goals.[469]

The proposed amendment is intended to avoid previous problems associated with a private plaintiff's inability to obtain restitution for past cleanup costs and limited ability to procure injunctive relief under RCRA section 6972(a)(1)(B). The proposed amendment attempts to produce a comprehensive scheme by which restitution may be awarded to a private plaintiff under RCRA's citizen suit provision even if the action for relief is brought after the contamination ceases to present an imminent and substantial endangerment. First, it expressly delineates what relief a plaintiff may obtain, specifying injunctive relief and restitution. Next, it addresses when an action for such relief may be brought. Third, it permits defendants to seek contribution from other responsible parties. Fourth, it provides a limitations period by which restitution and contribution actions can be governed. Fifth, it creates a national contingency scheme, which requires the EPA to catalogue RCRA wastes and determine which costs are appropriate for private party remediation of such wastes, and it compels plaintiffs' response costs to be consistent with the national contingency scheme. Finally, it shortens existing notice provisions to expand plaintiffs' injunctive remedies.

These changes will result in more equitable outcomes for private parties than RCRA's current citizen suit provision. Furthermore, they encourage the private sector to participate in environmental enforcement actions. Finally, they produce a statutory scheme which is consistent with RCRA's goal of requiring both prompt waste cleanup and equitable apportionment of liability for waste contamination.

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468. *See supra* part III.D.

469. *See supra* notes 72-73 and accompanying text.

VI. CONCLUSION

Although RCRA was intended to provide expeditious cleanup of hazardous and solid waste sites, it has failed to achieve its purpose. The EPA, as a result of budget constraints, has been unable to realize the effective enforcement of RCRA regulations. The private sector's financial assistance, in the form of legal initiatives brought under RCRA's citizen suit provision, would help alleviate the EPA's burden by providing supplementary enforcement actions. However, the inadequacies of RCRA's citizen suit provision have created a vague and complicated statutory scheme which has produced unfair results in the private sector for plaintiffs and defendants. It not only denies private recovery of restitution for past costs, but it denies contribution and imposes burdensome time constraints on plaintiffs. Because of these inadequacies, the existing provision fails to effectuate RCRA's purpose.

Judicial action cannot adequately resolve the various problems posed by RCRA's citizen suit provision. Judicial response to RCRA section 6972(a)(1)(B)'s deficiencies has produced a split between two federal circuits and a United States Supreme Court opinion that, while resolving the split in the circuits, does not adequately address the statute's problems. No circuit opinion has rendered solutions to the problems created by the current provision. Similarly, the United States Supreme Court has been unable to procure adequate resolution of the problems posed by section 6972(a)(1)(B). However, Congress has the power to protect the environment and the rights of private parties by amending RCRA's citizen suit provision to allow equitable restitution of response costs in situations when the contaminated property ceases to present an imminent and substantial endangerment.

Viki Panos