

Cleaning Up: Equitable Considerations in the RCRA Citizen Suit Provision Controversy

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INTRODUCTION

The Resource Conservation and Recovery Act of 1976 ("RCRA") governs the generation, treatment, disposal, storage, and transport of solid and hazardous waste.¹ Congress designed RCRA to be a prospective act used to "prevent improper disposal of hazardous wastes in the future."² Prior to enacting RCRA, Congress had devised legislation to regulate both air³ and water.⁴ Without a provision regulating the disposal of waste on land, however, these programs carried additional burdens. As a House Commerce Committee Report observed, "[t]he existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality."⁵ Conversely, the Clean Water Act⁶ and the Clean Air Act⁷ exacerbated the hazardous waste problems on land because much of the hazardous material removed from smoke stacks and navigable waters was distributed to public landfills and disposal sites.⁸ By adopting RCRA, Congress recognized the need for regulating the disposal of hazardous waste on land.

As originally enacted, RCRA contained two types of citizen suit provisions. First, citizens could bring suit against an EPA Administrator who failed to perform any duties made mandatory by the Act.⁹ Second, citizens could bring actions against persons in violation of any RCRA requirement.¹⁰ In 1984, Congress amended the RCRA citizen suit section, and furnished an additional

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1. 42 U.S.C. §§ 6901-6992 (1994).

2. STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., REPORT ON HAZARDOUS WASTE DISPOSAL 31 (Comm. Print 1979) [hereinafter REPORT].

3. Clean Air Act of 1955, 42 U.S.C. §§ 7401-7671 (1994).

4. Federal Water Pollution Control Act of 1948, 33 U.S.C. §§ 1251-1376 (1994). After undergoing significant amendment in 1977, the Federal Water Pollution Control Act became what is now the Clean Water Act. *Id.*

5. H.R. REP. NO. 94-1491, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6242.

6. 33 U.S.C. §§ 1251-1376.

7. 42 U.S.C. §§ 7401-7671.

8. *Id.*

9. 42 U.S.C. § 6972(a)(2) ("[A]ny person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.").

10. *Id.* § 6972(a)(1)(A) ("[A]ny person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . .").

provision which allows any person to commence a civil action against another person or the government for RCRA violations. Specifically, § 6972(a)(1)(B) establishes that persons may bring suit against any past or present generator, operator, or owner “who has contributed or is contributing to the . . . 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”¹¹ The section goes on to grant the district courts jurisdiction to enforce RCRA regulations, restrain individual violators, and to order such persons to take “such other action as may be necessary”¹²

In the wake of RCRA, local health agencies ordered many private parties to clean up various forms of contamination on their property. Often, these parties were not responsible for the contamination, but nonetheless complied with the government’s instructions before trying to obtain reimbursement from the responsible parties. Responsible parties, however, commonly refused to pay for the contamination. In response, these landowners filed suit under § 6972(a)(1)(B), claiming that the phrase “to take such other action as may be necessary” authorized the district courts to grant restitution of expended cleanup costs.¹³

Many courts refused to recognize that RCRA provides a private cause of action for money damages and denied these plaintiffs recovery.¹⁴ More recently, however, the Ninth Circuit held in *KFC Western, Inc. v. Meghriq*¹⁵ that the RCRA citizen suit provision does authorize the recovery of such cleanup costs.¹⁶ The Eighth Circuit responded in *Furrer v. Brown*,¹⁷ reaffirming previous interpretations and criticizing the Ninth Circuit’s analysis. This split in authority made Supreme Court adjudication of the issue necessary. On March 19, 1996, the Supreme Court held that the RCRA citizen suit provision does not permit private citizens to recover past cleanup costs when no threat to health or the environment exists at the time of suit.¹⁸

The Supreme Court may have interpreted correctly the existing statutory language of RCRA when concluding that the RCRA citizen suit provision does not provide a private right to reimbursement. In reaching a different conclusion, however, the Ninth Circuit correctly responded to what is intuitively a disturbing result. Denying landowners any right to recover expended environmental cleanup costs obstructs RCRA’s purposes, punishes innocent and compliant landowners,

11. *Id.* § 6972(a)(1)(B).

12. *Id.* § 6972(a)(2).

13. *See* Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990). In *Commerce*, plaintiffs used the “take such other action as may be necessary” clause to argue that the equitable relief (in the form of reimbursement for costs) that they sought was necessary to remedy the result of defendants’ illegal conduct, and therefore recoverable. *Id.*; *see also* Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468 (N.D. Cal. 1993) (Plaintiffs were arguing that “such other action” included restitution of costs.).

14. *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985); Portsmouth Redevel. & Hous. Auth. v. BMI Apartment Assocs., 847 F. Supp. 380 (E.D. Va. 1994).

15. 49 F.3d 518 (9th Cir. 1995).

16. *Id.* at 521.

17. 62 F.3d 1092 (8th Cir. 1995).

18. *Meghriq v. KFC Western, Inc.*, 116 S. Ct. 1251, 1253 (1996).

hinders cooperation between government agencies and citizens, wastes judicial resources, improperly shifts responsibility from federal to state courts, and unfairly distinguishes between government and private actors in like circumstances. Due to these important equitable considerations, the Supreme Court's "strict statutory construction" resolution cannot be the end of the RCRA debate; RCRA reform is necessary. Part I of this Note describes the Eighth and Ninth Circuits' treatment of the RCRA citizen suit controversy. Part II explains the Supreme Court resolution. Part III explores the equitable concerns which stem from the Supreme Court's treatment of the issue. Finally, Part IV discusses the need for future legislative action and calls for RCRA reform.

I. THE EIGHTH AND NINTH CIRCUIT SPLIT

The factual situations of *KFC Western* and *Furrer* are quite similar. However, each court's analysis and conclusion on the RCRA citizen suit provision controversy differ.

A. *The Eighth Circuit Decision: Furrer v. Brown*

In *Furrer v. Brown*, the Eighth Circuit denied the plaintiff-landowners monetary relief under § 6972(a)(1)(B), finding that the section provided no such remedy.¹⁹ In *Furrer*, the Browns and Fagases owned property which Shell Oil Company once leased. The Browns subsequently sold that property to the Furrers. In 1991, the Furrers became aware that their property was contaminated by petroleum, and the Missouri Department of Natural Resources ordered the Furrers to remediate the contamination.²⁰ Upon completing the cleanup, the Furrers sought to recover their costs from the Browns and Shell Oil under § 6972(a)(1)(B).

In denying plaintiffs relief, the Eighth Circuit first determined that § 6972(a)(1)(B) does not expressly grant courts the authority to award money judgments for past cleanup costs.²¹ However, the Eighth Circuit acknowledged that the Supreme Court "has long recognized that private rights of action do not require express statutory authorization."²² Rather, courts may imply a cause of action in federal statutes despite congressional failure to expressly provide for one.²³ The Eighth Circuit thus concluded that in order for the Furrers to recover, the court must find that Congress implicitly created in RCRA a monetary remedy

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

20. *Id.* at 1092.

21. *Id.* at 1094.

22. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 26 (1979) (White, J., dissenting) (citations omitted).

23. *See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

for past cleanup costs.²⁴ To reach its conclusion, the Eighth Circuit applied the four-pronged test established in *Cort v. Ash*.²⁵

In *Cort*, the Supreme Court developed a four-pronged analysis designed to determine whether to imply a private right of action in a federal statute.²⁶ The analysis considers whether the plaintiff is a member of a class for whose benefit the statute was enacted, whether there is evidence of legislative intent to create or deny such a remedy, whether the overall purpose of the legislation comports with granting the remedy, and whether the cause of action is one typically left to the states.²⁷ However, the Court has emphasized that all *Cort* factors are not of equal importance.²⁸ Legislative intent (prong two) has become the crux of the query: "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."²⁹ After applying the *Cort* test, the Eighth Circuit concluded that Congress did not intend to make a monetary remedy available under § 6972, and refused to imply a private right of action for recovery of cleanup costs.³⁰ The court found that RCRA § 6972 was not enacted for the special benefit of the Furrers, that neither § 6972 nor its legislative history indicates congressional intent to create the monetary remedy, and that granting the monetary remedy fails to comport with RCRA's overall purpose.³¹ Consequently, the court denied the Furrers' claim.

B. The Ninth Circuit Decision: KFC Western, Inc. v. Meghrig

The Ninth Circuit, however, allowed private landowners to recover past remediation costs. In *KFC Western, Inc. v. Meghrig*, Alan and Margaret Meghrig sold real property to KFC for the operation of a fried chicken franchise.³² Due to the Meghrig's negligent operation of a gasoline station on the premises, the property's soil was contaminated with the refined petroleum products lead and benzene.³³ At the time of sale, KFC was not aware of the contamination, but later discovered pollutants while improving the property in 1988.³⁴ The County of Los Angeles Department of Health Services ordered KFC to abort all construction on the property pending further soil analysis. Upon discovering elevated contaminant levels in the soil, the Department ordered KFC to clean up the

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

25. 422 U.S. 66 (1975).

26. *Id.* at 78-79.

27. *Id.*

28. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23 (1979); *Touche Ross*, 442 U.S. at 575.

29. *Touche Ross*, 442 U.S. at 575.

30. *Furrer v. Brown*, 62 F.3d 1092, 1100 (8th Cir. 1995).

31. The Eighth Circuit decided that the fourth *Cort* factor—whether the cause of action is one typically left to the states—was "at best a neutral factor and does nothing to advance the case for finding an implied federal cause of action for the recovery of cleanup costs." *Id.*

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

33. *Id.*

34. *Id.*

property to the tune of over \$200,000.³⁵ KFC asked the Meghriks for reimbursement for its expended costs, but the Meghriks refused. Three years after completing the cleanup, KFC brought suit against the Meghriks under § 6972(a)(1)(B) to recover its costs.³⁶

The district court granted the Meghriks' motion to dismiss on the grounds that the site no longer presented an imminent danger, and that the RCRA citizen suit provision did not authorize the recovery of past environmental cleanup costs. The court emphasized that § 6972(a)(1)(B) permits "only injunctive or other equitable relief and only in cases involving an existing, imminent danger to public health or the environment."³⁷ KFC appealed.

The Ninth Circuit reversed, allowing KFC to recover its expended cleanup costs. In reaching that result, the court addressed two issues. First, the court considered whether an "imminent and substantial endangerment" must exist at the time of cleanup or at the point of filing. Following the Eighth Circuit's reasoning in *United States v. Aceto Agricultural Chemicals Corp.*,³⁸ the Ninth Circuit concluded that to sustain a lawsuit, the contamination at issue need only pose an imminent and substantial danger at the time of cleanup.³⁹ In *Aceto*, the Eighth Circuit addressed the "imminent endangerment" requirement in RCRA § 6973, a provision which authorizes the EPA Administrator to bring suit for expended costs.⁴⁰ The Eighth Circuit stated that the requirement did not limit the time for filing an action. Thus, the Administrator could recover for expended costs after any imminent danger had subsided.⁴¹ Finding that the wording of § 6972 mirrored § 6973, the Ninth Circuit adopted the *Aceto* conclusion.⁴²

Second, the court considered what remedies § 6972 (a)(1)(B) provided, and determined that RCRA authorized a restitutionary remedy for plaintiffs like KFC. In allowing KFC to recover, the Ninth Circuit concluded that RCRA's "take other action as may be necessary" phrase granted the district courts jurisdiction to award compensatory money damages.⁴³ The court again relied on the almost identical language of §§ 6972 and 6973, and stated that Congress intended citizen suits to be "governed by the same standards of liability as governmental actions . . ."⁴⁴ The Court argued that it would be "unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions."⁴⁵

This disagreement between the *Furrer* and *KFC Western* courts gave rise to Supreme Court adjudication of the § 6972 citizen suit controversy.

35. *Id.*

36. *Id.*

37. *Id.* at 520.

38. 872 F.2d 1373 (8th Cir. 1989).

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

40. *Aceto*, 872 F.2d at 1383.

41. *Id.*

42. *KFC Western*, 49 F.2d at 521.

43. *Id.*

44. *Id.*

45. *Id.* at 523.

II. THE SUPREME COURT RESOLUTION: *MEGHRIG V. KFC WESTERN, INC.*

In a unanimous decision authored by Justice O'Connor, the Court reversed the Ninth Circuit and held that RCRA § 6972(a)(1)(B) does not permit "a private cause of action to recover the prior cost of cleaning up toxic waste that does not, at the time of suit, continue to pose an endangerment to health or the environment."⁴⁶

The Court stated that KFC's claim must fail on two fronts.⁴⁷ First, the Court determined that § 6972(a)(1)(B) permits a citizen to bring suit only when the toxic waste presents an "imminent and substantial endangerment to health or the environment" at the time the suit is filed.⁴⁸ The Court stated: "The meaning of this timing restriction is plain: An endangerment can only be 'imminent' if it 'threaten[s] to occur immediately,' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger."⁴⁹ Because KFC's land no longer posed any danger to the environment (KFC cleaned up the land three years earlier), the Court rejected KFC's claim.

Because KFC's claim failed on this first issue, the Court need not have addressed the further issue of whether § 6972 ever provides a reimbursement remedy for past cleanup costs. However, the Court decided to reach this issue, and concluded that § 6972 never provides such a remedy.⁵⁰ The Court outlined the two specific remedies found in § 6972: mandatory injunctions and prohibitory injunctions.⁵¹ The Court concluded with little discussion that "neither [remedy] contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'"⁵²

Further, the Court compares § 6972 to analogous provisions in a similar environmental statute, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").⁵³ CERCLA, passed several years

46. *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1253 (1996).

47. *Id.* at 1254.

48. *Id.* (emphasis in original).

49. *Id.* at 1255 (citation omitted).

50. *Id.*

51. A mandatory injunction "orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste." *Id.* at 1254. A prohibitory injunction "'restrains' a responsible party from further violating RCRA." *Id.*

52. *Id.* at 1254.

53. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994). CERCLA, which was amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986, permits the EPA to clean up hazardous waste sites and creates a "Superfund" to support the EPA's activities. See 26 U.S.C. § 9507 (1994); 42 U.S.C. §§ 9604-05. The Superfund is financed through industry taxes, appropriations, and legal judgments recovered from those responsible for the contamination. See 26 U.S.C. § 9507(b). CERCLA places ultimate responsibility for hazardous site clean up on "those responsible for problems caused by the disposal of chemical poisons." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

after RCRA, addresses environmental concerns similar to those in RCRA, and contains a "citizen suit" provision which mirrors § 6972.⁵⁴ However, CERCLA also explicitly permits citizens to recover remediation costs: "[a]ny person may seek contribution from any other person who is liable or potentially liable" for cleanup costs.⁵⁵ The Court then stated that Congress knows how to provide for a monetary remedy when it intends to create one, and determined that Congress did not intend for RCRA to provide such a remedy.⁵⁶ Therefore, notwithstanding the timing issue, the Court found KFC's claim for restitution of past cleanup costs to be without merit.⁵⁷ In addition, the Court discussed other aspects of RCRA's enforcement scheme which indicate that "Congress did not intend for a private citizen to be able to undertake a clean up and then proceed to recover its costs under RCRA."⁵⁸ The Court noted that RCRA contains no statute of limitations, nor a requirement for showing that alleged cleanup costs are reasonable. Further, RCRA dictates that citizens give ninety days notice to the EPA Administrator before filing an enforcement action, and refuses to allow a citizen suit once the EPA or the State commences an enforcement action.⁵⁹ The Court concluded that if Congress designed RCRA to "compensate private parties for their past cleanup efforts, it would be a wholly irrational mechanism for doing so."⁶⁰

KFC and the Furrers argued that courts should recognize an implied right of action in RCRA for recovery of past remediation costs. The Supreme Court refused to imply that right. The Court's reluctance to imply a private right of action in RCRA reflects a concern grounded in the separation of powers: Congress, not the courts, should control the availability of remedies under the statutes.⁶¹ The multiple factors cited by the Court suggest that Congress did not intend to provide a remedy for money damages in § 6972, particularly when no endangerment to health or the environment exists at the time of suit. Established Supreme Court doctrine dictates that absent a strong indicia of congressional intent to create a certain remedy in a statute, that remedy should not be implied.⁶² Therefore, the Supreme Court clearly reached the "correct" result in *Meghrig* in terms of traditional principles of statutory interpretation.

However, the Supreme Court decision gives rise to inequities which legislators and citizens cannot ignore. While traditional methods of statutory interpretation and the separation of powers doctrine ended the Supreme Court's inquiry, the debate is far from over.

54. 42 U.S.C. § 9659(c).

55. 42 U.S.C. § 9613(f)(1).

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

57. *Id.* at 1255.

58. *Id.* at 1256.

59. *Id.* at 1255.

60. *Id.*

61. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990).

62. *See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981).

III. EQUITABLE CONSIDERATIONS: UNRESOLVED
PROBLEMS IN *MEGHRIG V. KFC WESTERN, INC.*

By denying a private right of recovery to landowners like KFC and the Furrers, *Meghrig* obstructs RCRA's purposes, punishes innocent and compliant landowners, hinders cooperation between government agencies and citizens, wastes judicial resources, improperly shifts responsibility from federal to state courts, and unfairly distinguishes between government and private actors in like circumstances. Therefore, the Supreme Court's adjudication of the citizen suit issue simply cannot be the final word; RCRA reform is necessary.

A. Obstruction of RCRA

The Supreme Court's resolution of the issue frustrates RCRA's primary objective of preventing future environmental harms through the expedient remediation of contaminated land. By refusing to permit private recovery of past cleanup costs under § 6972, the Court promotes noncompliance with RCRA orders, thereby thwarting the fundamental purposes of RCRA.

According to Congress, the purpose of RCRA is to prevent future environmental harms.⁶³ Congress enacted RCRA to ensure the expeditious disposal and cleanup of existing hazardous waste so as to minimize the present and future threat to human health and the environment.⁶⁴ However, by closing off future monetary remedies, the Court guarantees future environmental harms through noncompliance and delay. The Court emphasizes that toxic waste must pose an "imminent and substantial endangerment to health or environment" at the time a suit is filed.⁶⁵ Obviously, landowners faced with an order from their local department of health services soon will learn that it is more beneficial to delay cleanup proceedings and instigate a lawsuit, rather than to speedily and willingly comply with the environmental order.⁶⁶ Every day these landowners spend arguing for injunctions and negotiating arrangements for costs is another day when no action is taken on the land, seriously compromising RCRA's intent to prevent future harms. By encouraging lawsuits, rather than action, the Court increases the potential for future environmental harms as toxic wastes spread underground and leach toward water supplies.⁶⁷ The purposes of RCRA would be better served by encouraging landowners—through the promise of future reimbursement—to quickly comply with environmental cleanup orders.

63. REPORT, *supra* note 2, at 31.

64. 42 U.S.C. § 6902(b) (1994).

65. See *supra* text accompanying notes 48-49.

66. One environmental lawyer has suggested that citizens should first determine whether cleanup costs can be recovered before cleaning up that contamination. He adds that citizens should file suit against responsible parties before incurring significant cleanup costs. 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.) 10,408, 104,20 (1995).

67. Joseph E. Lees, *An Alternative for Private Cost Recovery?*, 12 ENVTL. COMPLIANCE & LITIG. STRATEGY NO. 1, June 1996, at 4.

Preventing future harm is RCRA's primary goal; giving landowners incentives to delay cleanup action undermines this goal. Although the Court states that RCRA "was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms,"⁶⁸ the Court's holding impedes this end.⁶⁹

B. Impeding RCRA Enforcement

Meghrig impedes RCRA enforcement by hindering cooperation between environmental administrators and landowners. The Court's decision pits the EPA Administrator charged with accomplishing the goals of RCRA against the innocent landowner trying to mitigate costs. However, these parties should be on the "same side"—both presumably have the same interest in the proper cleanup of the contaminated property. Unfortunately, the Court's resolution makes these parties into adversaries. Administrators issue an environmental cleanup order expecting prompt action. Conversely, innocent landowners expect not to pay for contamination caused by third parties. These landowners are left with the choice of complying with the order and getting "stuck" with the costs, or delaying any action and violating the law.⁷⁰ Since the parties' goals are incompatible, this arrangement fosters hostility between the two groups.

Further, by creating this gulf between the two entities, the Court slows the entire remediation process. No landowner will quickly comply with an EPA order knowing that his or her remediation costs cannot be recovered without first going to court. Devising a system where innocent landowners and RCRA administrators could work together in finding responsible parties and cleaning up contamination would better serve the objectives of RCRA. However, *Meghrig* makes this cooperation impossible.

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

69. Ironically, the Eighth Circuit previously has stated that requiring parties to file and prosecute a RCRA action while endangerment exists would be an "absurd and unnecessary" requirement." *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989). In *Aceto*, the EPA and the State of Iowa spent ten million dollars to clean up a highly contaminated pesticide formulation facility. The EPA then attempted to recover its costs under RCRA and CERCLA. The Eighth Circuit remanded the case for further review, but indicated that the EPA could claim its remediation costs in the district court.

70. A property owner faced with an EPA remediation order must comply within a certain time frame or risk monetary penalties. *See* 42 U.S.C. § 6928(a)(1), (3) (1994) ("[T]he Administrator may issue an order assessing a civil penalty for any past or current violation [of RCRA], requiring compliance immediately or within a specified time period . . . Any penalty assessed in the order shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of this subtitle . . ."); 42 U.S.C. § 6928(c) (1994) ("If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than \$25,000 for each day of continued noncompliance with the order . . .").

C. Fairness to the Individual Landowner

Meghrig raises serious questions of equity and fairness. The Court's decision punishes innocent landowners who, in a timely way, willingly comply with the government's orders to remediate contamination on their land. Such landowners often first obey environmental orders, only later to investigate the possibilities for cost recovery. In addition to the negative effects on RCRA's goals and enforcement, denying a reimbursement remedy cannot be justified in terms of fairness to the individual landowners.

Landowners like the Furrers and KFC are victims. They own land contaminated by hazardous waste, but neither knew of, nor contributed, to that contamination. After *Meghrig*, these landowners have only two choices when faced with an EPA remediation order: clean up the property out of their own pocket or face fines and jail time for the contamination caused by others. This result is unjust and intolerable.

Further exacerbating this inequity, the Supreme Court unfairly targets only one particular subset of unfortunate landowners—those persons who own *petroleum* contaminated property. After RCRA's enactment, Congress created CERCLA, another environmental statute which addresses concerns similar to those in RCRA.⁷¹ Unlike RCRA, CERCLA explicitly provides that citizens may recover past cleanup costs: “[a]ny person may seek contribution from any other person who is liable or potentially liable” for cleanup costs.⁷² However, this CERCLA provision applies only to the cleanup of “hazardous substances,” and CERCLA specifically excludes petroleum from that definition.⁷³ Therefore, landowners like KFC and the Furrers have no recovery rights under CERCLA. Had the contamination been almost any other hazardous substance, these landowners could bring suit under 42 U.S.C. § 9613(f). However, landowners like KFC are denied monetary recovery simply because a third party deposited one substance, rather than another, on their property.

If landowners like KFC and the Furrers have no avenue of recovery under RCRA or CERCLA, their only recovery option is in state court under common law theories of nuisance or trespass. Since recovering on these theories may be difficult due to proof problems and differing state standards,⁷⁴ landowners like

71. See *supra* notes 53-54 and accompanying text.

72. 42 U.S.C. § 9613(f)(1) (1994). In addition to this cost recovery provision, CERCLA provides a citizen suit provision which mirrors that in § 6972. 42 U.S.C. § 9659(c) (1994).

73. 42 U.S.C. § 9601(14) (1994) (“The term [hazardous substance] does not include petroleum . . .”).

74. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 84 (5th ed. 1984). Also, both the majority and dissent in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), mention the difficulties in recovering under state law claims. The majority states, “tort remedies are generally inadequate because of the difficulties in proof and attendant court delays.” *Id.* at 513 n.6. In his dissent, Judge Brunetti agrees that restitution actions may be necessary due to the landowner's inability to recover under CERCLA or state schemes. However, Brunetti is unwilling to advance this position when the legislature has not decreed it. *Id.* at 528 (Brunetti, J., dissenting).

the Furrers and KFC may never recover expended costs. Thus, these landowners may be left without any remedy merely due to the nature of the contaminant on their land. Allowing owners of land contaminated by various hazardous substances to recover remediation costs while forcing owners of petroleum contaminated land to bear their costs is illogical and unfair.

Citizen suit provisions, by nature, should protect the innocent. When landowners like KFC and the Furrers are denied recovery under federal law, and fail to sustain a cause of action under state law, the result is that the innocent pay while the guilty get a "free ride." Statutes like RCRA and CERCLA should operate to prevent future and remedy past environmental harms, not to punish individual landowners. However, *Meghrig* effectively penalizes these innocent and compliant landowners.

D. Judicial Inefficiency and Shifted Responsibility

Meghrig also wastes valuable judicial resources by forcing owners of petroleum contaminated land to resort to state court remedies. These owners often must first go to federal court for an injunction against the party contaminating their land. However, if the responsible parties are not readily ascertainable, or are not ordered to remediate the contamination, innocent landowners who wish to timely comply with the government's order must clean up the land themselves. After complying with the federal RCRA order, the landowners must bring suit in state court to recover costs. This process results in judicial inefficiency; plaintiffs end up in two different courts for one environmental problem.

In addition, when innocent landowners are subjected to the costs of complying with a federal statute without a chance for federal remedy, the federal government improperly shifts responsibility to the state courts. As originally enacted, RCRA granted the authority merely to enforce a RCRA regulation or environmental order. In 1984, Congress amended the RCRA citizen suit provision, and broadened the available remedies by allowing the courts to "take such other action as may be necessary." Although Congress failed explicitly to provide a federal right to monetary recovery in the 1984 amendment, *Meghrig* closes off any possibility for a federal right, and forces landowners like KFC and the Furrers into the state courts to recover expended costs.⁷⁵ However, Congress acts irresponsibly by enforcing a federal statute which often may result in a state court remedy. State courts must then take on the inevitably difficult task of interpreting and applying federal law. Given the already burdensome caseload in state courts, this result is undesirable; our judicial system simply does not

75. Ironically, RCRA's legislative history indicates that Congress intended RCRA to "incorporate[] the legal theories used for centuries to assess liability for creating a public nuisance . . . [and to] determine[] appropriate remedies." REPORT, *supra* note 2, at 31. If RCRA is such an interpretation, landowners should not have to pursue a state nuisance claim to recover cleanup costs; this cause of action should be part of the federal scheme. Although the legislative history appears contradictory, innocent landowners should not bear the burden of this confusion. Federal causes of action must come equipped with complete and fair federal remedies.

contemplate hampering state courts with this responsibility. Thus, if Congress creates a federal statute, federal courts should have jurisdiction over the cause of action *and* all resulting remedies. However, *Meghrig* precludes this result, and improperly shifts responsibility for awarding environmental cleanup costs from federal to state courts.

E. Citizen Suits Versus Government Suits

The same standards of liability should govern both RCRA citizen suits and government actions due to their substantially similar wording. In RCRA, Congress created two suit provisions with almost parallel wording—one for citizens and one for EPA Administrators acting on behalf of the United States government.⁷⁶ The legislative history of RCRA suggests that Congress intended to provide the same standards of liability for the two provisions. When commenting on the RCRA citizen suit amendment, the Senate Committee on Environment and Public Works stated: “[t]hese amendments are intended to allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United States under section [6973].”⁷⁷ Although some courts have indicated that the EPA may recover its prior cleanup expenditures, *Meghrig* makes similar treatment for private citizens impossible.

A few courts have suggested that an EPA Administrator or governmental entity may recover past cleanup costs under § 6973. In *United States v. Price*,⁷⁸ the Third Circuit indicated that awarding response costs was appropriate in some circumstances. In *Price*, the Prices owned a landfill for nineteen years. Although the Prices’ license to operate the landfill specifically prohibited the disposal of soluble or liquid industrial wastes at the site, the Prices accepted hazardous waste for disposal at the site. The Prices later sold the land to AGA Partnership, which was unaware of the contamination.⁷⁹ AGA subsequently discovered on their property contaminants in quantities “likely to create grave hazards to human health.”⁸⁰ The United States, on behalf of the EPA, applied for a preliminary injunction to require defendants to fund a study of the land and to provide an alternate water supply for nearby landowners.⁸¹ The Third Circuit affirmed the district court’s denial of an injunction stating, “it may well be that the public interest counseled against the grant of the requested preliminary relief. . . . [T]he

76. 42 U.S.C. § 6973(a) provides in part:

[T]he 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 . . . *to order such person to take such other action as may be necessary, or both.*

42 U.S.C. § 6973(a) (1994) (emphasis added).

77. S. REP. NO. 98-284, at 56 (1983); *see also* H.R. REP. NO. 98-198, at 53 (1983) (stating that RCRA confers on citizens a right under § 6972 to sue pursuant to the standards of liability established under § 6973).

78. 688 F.2d 204 (3rd Cir. 1982).

79. *Id.* at 208-09.

80. *Id.* at 209.

81. *Id.* at 207-08.

most practical and effective solution may well have been to refuse the government's request for a preliminary injunction thereby necessitating the study be undertaken by EPA without delay."⁸² However, the court went on to explain: "*Prompt preventive action was the most important consideration. Reimbursement could thereafter be directed against those parties ultimately found to be liable.*"⁸³

Although the *Price* court qualified its holding by restricting the award of money payments to situations where the payments are needed to abate a present hazard,⁸⁴ subsequent decisions indicate that courts may grant past response costs to governmental entities as well. For example, in *United States v. Northeastern Pharmaceutical and Chemical Co.*,⁸⁵ the Eighth Circuit seemed to authorize the award of past cleanup costs to governmental entities. The court determined that on remand, "the district court could grant the government recovery of [past response] costs as a matter of equitable discretion."⁸⁶

These lower court decisions imply that governmental entities like the EPA may recover past remediation costs under § 6973. However, *Meghrig* eliminates that restitutionary remedy for citizens. Closing off a restitutionary recovery for private citizens, but leaving that option open to government entities in a substantially similar provision, is unreasonable. The wording of the two provisions—one for private citizens and one for government entities—parallel; consequently, so should the standards for liability. The Third Circuit's words, "[p]rompt preventative action was the most important consideration"⁸⁷ apply to *all* parties affected by RCRA regulations. Whether potential plaintiffs are private citizens or administrative bodies, RCRA's primary goal should be the expeditious remediation of contaminated land. However, the Supreme Court's decision thwarts that goal.

Some may argue that *Meghrig* implicitly overrules *Price* and *Northeastern Pharmaceuticals*. However, the Court failed to address government entities, and presumably leaves these precedents in place. Therefore, until the Court faces this issue, *Meghrig* creates an inequitable gap between treatment of citizens and administrators under substantially the same statutory provisions.

Although the Supreme Court determined that no private right to restitution of past cleanup costs exists under § 6972, policy and fairness considerations remain. Consequently, *Meghrig* cannot be the last word on the RCRA citizen suit provision controversy.

82. *Id.* at 214.

83. *Id.* at 214 (emphasis added).

84. *Id.*

85. 810 F.2d 726 (8th Cir. 1985).

86. *Id.* at 750 (8th Cir. 1985); *see also* *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1988) (remanding the case to district court, thereby allowing the EPA to seek recovery of their remediation costs).

87. *Price*, 688 F.2d at 214.

F. Some Suggested Options for Landowners

Some commentators note that there is light at the end of the tunnel for individual land purchasers. First, future buyers can engage in environmental planning techniques to avoid liability problems. Today, most buyers perform environmental audits, or site assessments, on land prior to purchase to better inform themselves of potential liabilities. The EPA defines an environmental audit as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."⁸⁸ In layman's terms, an audit is a voluntary self-evaluation conducted for the purpose of determining a property's compliance with the environmental laws.⁸⁹ Audits provide a buyer—and often a financial lender—information for evaluating whether to complete a real estate transaction.⁹⁰ If environmental contamination surfaces, the buyer may require the existing owner to clean up before sale.⁹¹

Although future buyers may avoid KFC's plight by engaging in these pre-transaction assessments, this "solution" does not apply to the problem at hand. Landowners like KFC and the Furrers *already* possess contaminated land; often, these landowners purchased their land prior to the 1970s when environmental planning techniques became popular. Further, many non-corporate buyers—the "mom and pop" enterprise—simply will not engage in these costly and technical pre-transaction measures. Therefore, environmental audits cannot solve KFC's and the Furrers' problems. Other options for these landowners are necessary.

Second, *Meghrig* itself may leave an exception for some landowners to recover costs under § 6972. In *Meghrig*, the Supreme Court explicitly refused to decide the issue "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."⁹² By intentionally leaving this issue open, the Court indicates that if contamination is present when a suit is filed, and the landowner begins cleanup only after the suit is filed, the owner may recover those remediation costs. However, the Court's failure to address this issue in *Meghrig* does not mean that it will not preclude this type of recovery in the future. Given the Court's strong assertion that § 6972 fails to provide any private right to monetary damages, this recovery avenue likely has limited availability. Again, this type of preventative measure can no longer help KFC and the Furrers, landowners who already have complied with the environmental cleanup orders. These parties already failed to bring suit before complying with their environmental cleanup order. Ultimately, neither proposed "solution" adequately

88. Incentives for Self Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710 (1995).

89. Robert W. Parnacott, *Compliance Through Cooperation*, 65 J. KAN. B. ASS'N, June-July 1996, at 22, 23.

90. John M. Scagnelli, *Environmental Issues and Liability Considerations* 607, 617 (PLI Corp. Law & Practice Course Handbook Series No. 946, 1990).

91. *Id.*

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

addresses KFC's and the Furrers' situation. Landowners who already possess contaminated land, and have complied with an environmental cleanup order, still need relief. Site assessments, environmental audits, and pre-cleanup lawsuits cannot be the answer for these landowners.

IV. THE FUTURE: A NEW LOOK AT RCRA

Landowners like KFC and the Furrers can only be saved by reform of the existing RCRA legislation. Although *Meghrig* ignores overriding equitable concerns and adopts a strict statutory approach to § 6972, the fact remains that RCRA—in its present form—has overstayed its welcome. Therefore, present landowners and citizens must challenge the existing legislation and call for RCRA reform.

In the last thirty years, public awareness of and indignation about environmental problems has increased dramatically. In response, legislators often quickly drafted and hurriedly passed environmental legislation in order to quell the public uproar.⁹³ However, legislators, administrators, and citizens now realize inherent difficulties in many of these furiously drafted environmental schemes.⁹⁴ Similarly, the executive branch has recognized the need for change in the existing environmental laws. Kathleen McGinty, head of the White House Council on Environmental Quality, has noted that the legislative reform of Superfund and RCRA is necessary to ensure the effectiveness of the programs.⁹⁵

Existing environmental laws, particularly the RCRA citizen suit provision, must change. However, Congress has yet to take any action towards reforming § 6972. Although the Supreme Court failed to address the equitable problems raised by the *Meghrig* dispute, Congress need not make the same mistake. To avoid overriding inequities in the existing RCRA citizen suit provision, Congress

93. One example of Congress hurriedly passing legislation is the quick drafting of CERCLA in December of 1980 after the "Love Canal" investigation. A hazardous waste site was discovered in the Love Canal neighborhood of Niagara Falls, New York. In the ensuing months, health officials discovered numerous other hazardous waste sites around the country. It quickly became apparent that local governments did not have the capability to respond to problems created by unsafe hazardous waste disposal, and that existing federal environmental laws were unsatisfactory. In response, Congress quickly drafted CERCLA. See Albert Bates Jr. & Timothy C. Wolfson, *An Overview of the Integration of RCRA's Imminent Hazard Citizen Suit Provision with CERCLA's Cost Recovery Provisions After KFC Western v. Meghrig*, 25 Env't Rep. (BNA) No. 51, at 2550 (Apr. 28, 1995); Gerald B. Silverman, *Love Canal: A Retrospective*, 20 Env't Rep. (BNA) No. 20, at 835 (Sept. 15, 1989).

94. For example, Superfund reform recently has been a topic of hot debate. In the years since Superfund's enactment, dissatisfaction with the statute has grown. For discussion of the Superfund reform debate, see generally *Superfund: Senate Reform Bill Could Lower Barriers to Brownfields Redevelopment*, GAO Says, 27 Env't Rep. (BNA) No. 10, at 542 (July 5, 1996); *Superfund: Bills Would Give States Brownfield Cleanup Grants, Reinstate Expired Federal Superfund Tax Until 2001*, 27 Env't Rep. (BNA) No. 15, at 837 (Aug. 9, 1996); *Superfund: Oxley Reform Bill Does Not Go Far Enough for Small Businesses*, House Committee Told, 26 Env't Rep. (BNA) No. 25, at 1131-35 (Oct. 27, 1995) [hereinafter *Oxley Reform Bill*].

95. *Federal Facilities: Superfund, RCRA Reforms in Congress Called Key Factor in Meeting Cleanup Goals*, 26 Env't Rep. (BNA) No. 24, at 1085-86 (Oct. 20, 1995).

must revise RCRA to allow landowners like KFC and the Furrers to recover environmental remediation costs from responsible parties. This "new" RCRA should include a provision, similar to that in CERCLA, which allows for restitution of past environmental cleanup costs. Alternatively, Congress should dispel the petroleum exemption from CERCLA. Further, RCRA should contain an "imminent" danger provision which refers to the time of *cleanup*, not the time of filing. Only by taking these steps can Congress eliminate the equitable problems left unresolved by *Meghrig*.

Congress enacted RCRA to advance the expeditious disposal of existing hazardous waste in order to minimize present and future threats to human health and the environment. Although cleaning up environmental contamination certainly is an important objective, this goal cannot be carried out at any cost. Congress must now consider the equitable implications of *Meghrig*, and fashion its environmental legislation accordingly. Innocent citizens simply cannot become the environmental scapegoats of legislative policy.

CONCLUSION

By denying a private right of recovery for expended environmental costs under RCRA § 6972, *Meghrig* obstructs RCRA's purposes, punishes innocent and compliant landowners, hinders cooperation between government agencies and citizens, wastes judicial resources, improperly shifts responsibility from federal to state courts, and unfairly distinguishes between government and private actors in like circumstances. In light of these overriding equitable considerations, RCRA reform is necessary.

Environmental policy must embrace the fundamental concepts of responsibility and accountability; responsible parties must pay for their own environmental mistakes and cannot be allowed to slip through the cracks of § 6972. As stated by Lois Shiffer, assistant attorney general for the Environmental and Natural Resources Division of the Justice Department, it is "very American to have polluters pay for [their own] cleanups."⁹⁶ Therefore, RCRA should continue to advance the prompt remediation of contaminated property. However, it no longer may serve that purpose at the expense of innocent landowners. The *Meghrigs* must pay up.

96. *Oxley Reform Bill*, *supra* note 94, at 1132.