RCRA and the Recovery of Past Clean-up Costs: Meghrig v. KFC Western, Inc.

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RCRA AND THE RECOVERY OF PAST CLEAN-UP COSTS:  
MEGHRIG v. KFC WESTERN, INC.

I. Introduction

The United States Government has enacted over forty environmental laws during the past century in an attempt to control the ever increasing pollution of the environment.¹ Beginning in the 1960s, as the number of federal environmental regulations was rapidly increasing, general dissatisfaction over the effectiveness of such regulations grew.² This dissatisfaction led to the passage of regulations which permitted “citizen suits.”³


2. See Jeffrey G. Miller, Environmental Law Institute, Citizen Suits: Private Enforcement of Federal Pollution Control Laws 3 (1987) (stating “[t]he enforcement mechanisms of federal environmental statutes in the 1960s were both cumbersome and ineffective”). Miller writes that as “interest in environmental protection grew, awareness of the lack of credible enforcement mechanisms and credible state and federal enforcement programs . . . led directly to the significant enhancement of federal enforcement tools in the environmental legislation of the 1970s and to the creation of citizen suits.” Id. at 3-4 (citations omitted). For a general discussion of the dissatisfaction with governmental agencies’ efforts to enforce environmental statutes, see Fredrick Anderson et al., Environmental Protection: Law and Policy 111 (2d ed. 1990).

3. For a general discussion of citizen suits in environmental acts, see Adeeb Fadil, Citizen Suits Against Polluters: Picking up the Pace, 9 Harv. Envtl. L. Rev. 23 (1985). Fadil discusses the rationale behind citizen suits, giving four reasons to have such provisions in environmental statutes:

First, private citizens immediately affected by pollution may be in a better position than public authorities to assess the costs and benefits of enforcement actions. Second, citizen suits may be less expensive than comparable government actions. Third, citizen suits expand the scope of enforcement without burdening the public treasury. Finally, such suits—actual or threatened—may serve to prod public authorities into enforcing environmental laws with increased zeal.

The passage of the 1970 Amendments to the Clean Air Act (CAA) sparked the proliferation of citizen suit provisions in federal environmental statutes. In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) as a qualified prohibition on the open dumping of solid or hazardous waste. In 1984, Congress amended RCRA's citizen suit provision to allow individuals to bring suit for endangerments to health or the environment. Meghrig v. KFC, Western, Inc. (KFC) illustrates a recent conflict over the remedies available under RCRA's citizen suit provision.


RCRA's original citizen suit provision contained two types of suits available to individuals, namely, actions against the Administrator of the Environmental Protection Agency and against those in violation of RCRA's statutory provision. See RCRA §§ 7002 (a)(2), (a)(2)(A), 42 U.S.C. §§ 6972 (a)(2), (a)(1) (1994).


8. For further discussion of the conflict over the remedies of RCRA's citizen suit provision, see infra notes 44-66 and accompanying text.
citizen suit provision provides a right to recover the costs of a past clean-up of hazardous waste that did not present an imminent danger to health or the environment at the time of suit.9

This Note addresses the issues resolved by the Court in KFC. Part II begins with a discussion of RCRA's legislative history.10 Part II then addresses how courts have interpreted RCRA, focusing on whether the citizen suit provision of RCRA authorizes monetary awards for the recovery of clean-up costs.11 Next, Part III discusses the facts of KFC.12 Parts IV analyzes the Court's interpretation of the citizen suit provision of RCRA.13 Part V critiques the Court's determination that RCRA does not authorize monetary awards for clean-up costs at a site that does not endanger health or the environment at the time of suit.14 Finally, Part VI considers the implications and effects of the Court's decision in KFC.15

II. BACKGROUND

The Supreme Court has described RCRA as a "comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave."16 The purpose of RCRA is to "assist the cities, counties and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous waste disposal."17 To this end,

10. For a discussion of the legislative history of RCRA, see infra notes 16-26 and accompanying text.
11. For a discussion of how federal courts have interpreted RCRA, see infra notes 44-66 and accompanying text.
12. For a discussion of the facts of KFC, see infra notes 67-76 and accompanying text.
13. For a discussion of the Court's interpretation of KFC, see infra notes 76-104 and accompanying text.
14. For a critique of the Court's decision in KFC, see infra notes 106-45 and accompanying text.
15. For a discussion of the implications and effects of the Court's decision in KFC, see infra notes 146-51 and accompanying text.
16. City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 331 (1994) (holding that ash from incineration of household waste and nonhazardous industrial waste used to create energy subject to regulatory scheme set forth in RCRA). The Court further described RCRA as having the two goals of "encouraging resource recovery and protecting against contamination." Id. at 339. RCRA was also described as the instrument that "delegated to the [EPA] vast regulatory authority over the mountains of garbage that our society generates." Id. at 340 (Stevens, J., dissenting). For an overview of RCRA, including its policy goals and objectives, see David R. Case, Resource Conservation and Recovery Act, in ENVIRONMENTAL LAW HANDBOOK 44, 44-47 (Thomas F. P. Sullivan ed., 15th ed. 1995) (providing graphic of "RCRA 'Cradle to Grave' System").
RCRA contains a broad definition of hazardous waste, including "solid waste" that "pose[s] a hazard to human health or the environment."18

A. Enforcement of RCRA

RCRA grants the Environmental Protection Agency (EPA) the authority to enforce federal hazardous waste regulations by way of compliance orders, criminal penalties and civil penalties.19 Similar to other environmental statutes,20 RCRA includes a citizen suit provision which allows private individuals to bring suit for violations of:

[p]rovide[ ] the groundwork for solving the discarded materials disposal problem and for minimizing the dangers of hazardous waste disposal. At the same time [RCRA] proposes a way to lessen the drain on our domestic resources and to decrease our dependence on foreign sources of raw materials and energy, both of which can be reclaimed from waste. Most important, [RCRA] is a needed step toward protecting the purity of the land itself, and health of our people and the vitality of our environment. Id. While the United States' dependence on foreign raw materials and energy was a reason behind the passage of RCRA, the House Committee also stated that "(h)azardous wastes typically have little, if any, economic value." Id. at 4. Instead, the Committee's "overriding concern" was the effect that "harmful, toxic or lethal" discarded hazardous wastes have on the "population and the environment." Id. at 3.

18. RCRA § 1004(5), 42 U.S.C. § 6903(5). RCRA's definition of hazardous waste is:

[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.

Id. RCRA broadly defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . ." Id. § 1004(27), 42 U.S.C. § 6903(27).

19. See id. § 3008(a), 42 U.S.C. § 6928(a). Section 6928, provides in relevant part: "[W]henever . . . the Administrator determines that any person has violated or is in violation of any requirement . . . the Administrator may issue an order assessing a civil penalty for any past or current violation . . . or the Administrator may commence a civil action in the United States district court . . . ." Id. § 3008(a)(1), 42 U.S.C. § 6928 (a)(1). Section 6973 provides in relevant part:

(a) upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court

. . . .

Id. § 3008(a), 42 U.S.C. § 6973(a).

20. For a list of environmental statutes similar to RCRA, see supra note 4.
RCRA's provisions. The general purpose of the citizen suit provision is to allow citizen plaintiffs to act as "private attorneys general." Private citizens may bring suit against either individuals who have allegedly violated RCRA or against EPA for failure to perform its duties under RCRA. Additionally, RCRA's citizen suit provision also protects the right to bring suit under other statutes and at common law.

In 1984, Congress amended the citizen suit provision in RCRA, granting a private citizen the power to bring a cause of action on his own behalf against any person who, in the past or present, has generated, transported, handled, stored, treated or disposed of hazardous waste which causes an imminent and substantial danger to the environment. Congress also expanded the remedies that dis-

21. See RCRA § 7002, 42 U.S.C. § 6972. For the language of the citizen suit provision, see infra note 25 and accompanying text.
23. See RCRA § 7002(a) (2), 42 U.S.C. § 6972 (a) (2). RCRA, like the CAA, has a provision for citizens to bring suit "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator." Id. This language appears to be taken directly from the CAA's citizen suit provision. See CAA § 504(a)(2), 42 U.S.C. § 7604(a)(2) (describing ability to bring suit against Administrator of CAA: "Any person may commence a civil action on his own behalf . . . (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator").
24. See RCRA § 7002(f), 42 U.S.C. § 6972(f) (stating "[n]othing in [this section of RCRA] shall restrict any right which any person (or class of persons) may have under any statute or common law"). See Joyce Yeager, Note, No Remedy for Lust: An Implied Cause of Action and RCRA, 64 UMKC L. Rev. 637, 659-62 (1996) (providing possible alternatives to RCRA citizen suits, including claims under state law).
25. See RCRA § 7002(a), 42 U.S.C. § 6972(a). The statute provides in relevant part:

any person may commence a civil action on his own behalf—

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

trict courts could grant to claimants under RCRA, giving the courts the power to order a party to “take any such action as may be necessary” to grant relief to the plaintiff in a civil suit. 26

B. Timing Requirements

RCRA imposes timing restrictions on the public’s ability to bring a citizen suit. 27 For example, a private citizen may only bring suit against an individual involved with the hazardous waste if the waste “present[s] an imminent and substantial endangerment to health or the environment.” 28 In doing so, a potential plaintiff must give the EPA Administrator and potential defendants ninety-

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26. RCRA § 7002(a), 42 U.S.C. § 6972(a). The district court has jurisdiction “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. For a discussion of injunctive relief, see 1 LAW OF ENVIRONMENTAL PROTECTION § 8.01[8][b][iii] (Sheldon M. Novick et al. eds., 1996) [hereinafter ENVIRONMENTAL PROTECTION].

27. See RCRA §§ 7002(b)(2)(A),(B),(C), 42 U.S.C. §§ 6972(b)(2)(A),(B),(C). The Court has described RCRA’s use of the terms “to restrain” and “to order” as the timing requirements for a citizen suit. See Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254 (1996).

28. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added). The Ninth Circuit found that RCRA’s use of the timing requirement as “imminent” implied “that there must be a threat which is present now, although the impact of the threat may not be felt until later.” Price v. United States Navy, 99 F.3d 1011, 1019 (9th Cir. 1994).

This “imminent and substantial” requirement is very broad in some respects, because it gives individuals the ability to seek abatement of hazardous solid wastes, even if no other violation of the statute has occurred. See 1 LAW OF ENVIRONMENTAL PROTECTION, supra note 26, at § 8.01[8][b][i] (“[T] should be noted that [RCRA’s citizen suit] also authorizes a citizen to seek abatement of imminent and substantial endangerments caused by solid waste, whether or not the endangerment results from a violation of the statute . . . . No statute other than RCRA contains such authority for citizens.”).
days advance notice before filing suit. Further, RCRA prohibits a citizen suit if EPA or a state government has brought an action against the alleged offenders.

C. Comprehensive Environmental Response, Comprehensive and Liability Act of 1980

The Court has defined RCRA's terms by making a series of comparisons to the Comprehensive Environmental Response, Comprehensive and Liability Act of 1980 (CERCLA). Congress passed CERCLA in order to guarantee the "prompt clean-up of hazardous waste sites and [to] impos[e] . . . clean-up costs on the responsible party." However, CERCLA, unlike RCRA, does not include petroleum contaminated substances in its definition of hazardous...

29. See RCRA § 7002 (b) (2) (A), 42 U.S.C. § 6972(b)(2)(A). Ninety days notice must be given to "(i) the Administrator; (ii) the State in which the alleged endangerment may occur; (iii) any person alleged to have [violated RCRA]" before an action under the citizen suit provision may be brought. Id. An exception to the notice requirement was allowed in one case when there was a danger that hazardous waste would be discharged if no action was taken. See Hallstrom v. Tillamook County, 493 U.S. 20, 26-27 (1989) (noting abrogation of notice requirement when there is danger that hazardous waste will be discharged).

30. See RCRA §§ 7002 (b) (2) (B), (C), 42 U.S.C. §§ 6972(b)(2)(B), (C). Pursuant to section 6972 (b) (2) (B), no action may be commenced under the citizen suit provision of RCRA if the Administrator (i) has commenced an action under CERCLA; (ii) has begun a removal action under CERCLA; (iii) has begun a Remedial Investigation and Feasibility Study under CERCLA; (iv) has obtained a court order under CERCLA. See id. § 7002(b)(2)(B), 42 U.S.C. § 6972(b)(2)(B). Section C is similar to section B, but section C refers to the "State" in the place of the "Administrator" named in section B. See id. at § 7002(b)(2)(C), § 6972(b)(2)(C) (stating that individual's citizen suit is barred if State has brought suit itself).

31. See KFC, 116 S. Ct. at 1254. The Court stated that "[u]nlike [CERCLA], RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." Id. at 1254 (citing General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990)). For a comparison of RCRA with CERCLA, see Robert G. Stoll, The New RCRA Cleanup Regime: Comparisons and Contrasts with CERCLA, 44 Sw. L.J. 1299 (1991).

32. General Electric, 920 F.2d at 1422 (holding that private parties were entitled to recover attorney fees and expenses). For a portion of the legislative history of CERCLA, see S. Rep. No. 96-848, at 2 (1980); H.R. Rep. No. 96-1016(I), at 2 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120. For the legislative purpose of CERCLA, see H.R. Rep. No. 99-253, at 5 (1986). In describing the purposes for passing CERCLA, the House stated that "CERCLA has two goals: (1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these cleanups." Id. Congress enacted CERCLA in order to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive waste disposal sites." H.R. Rep. No. 96-1016(I), at 22, reprinted in 1980 U.S.C.C.A.N. at 6125. The overriding purpose of CERCLA is "to protect the lives, the health, and the safety and the well-being of the American public from . . . nauseating toxic wastes that litter our coun-
waste.  

CERCLA’s citizen suit provision is similar to RCRA’s citizen suit provision, yet there are important differences. While CERCLA expressly allows the government and private citizens to recover response costs, RCRA contains no such provision. Additionally,


For a thorough discussion of the legislative history of CERCLA, see Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980, 8 COLUM. J. ENVTL. L. 1 (1982). Grad describes the passage of CERCLA as having “virtually no legislative history at all,” because CERCLA “was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts).” Id. at 1. Grad further notes that CERCLA was considered and passed “after very limited debate, under a suspension of the rules.” Id.; see also SAM COOK, THE LAW OF HAZARDOUS WASTE § 12.03(1) (1995) (discussing circumstances under which Congress passed CERCLA).

33. See CERCLA § 101(14), 42 U.S.C. § 9601(14). CERCLA defines “hazardous substances” in part by citing to the Solid Waste Disposal Act (42 U.S.C. § 6921), to which RCRA is an amendment. See id. § 101(14), 42 U.S.C. § 9601(14). CERCLA, however, states that hazardous waste “does not include petroleum,” which is included in RCRA’s definition of solid waste. See id. For a discussion of the use of RCRA’s citizen suit provision to recover petroleum-contaminated soil, including a situation in which RCRA was used to force the clean-up of a petroleum-contaminated site when CERCLA was not applicable, see MICHAEL M. GIBSON, ENVIRONMENTAL REGULATION OF PETROLEUM SPILLS AND WASTES, § 6.3 (1993 & Supp. 1995).

34. Compare CERCLA § 310, 42 U.S.C. § 9659 with RCRA § 7002(a), 42 U.S.C. § 6972. The CERCLA citizen suit provision provides that “any person may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to [CERCLA].” CERCLA § 310, 42 U.S.C. § 6972. CERCLA has been described as providing:

an effective mechanism for cleaning up such dangers as quickly as possible, with as little expense as feasible, and with as much of that expense as possible borne by the responsible parties, rather than by the taxpayers. Accordingly, CERCLA included provisions for establishing liability for the costs of cleaning up hazardous waste sites.


35. See CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). Violators of CERCLA shall be liable for “(A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .” Id. CERCLA also provides for contribution from others that are liable or potentially liable for violations of CERCLA. See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (stating [a]ny person may seek contribution from any other person who is liable or potentially liable" for response costs (emphasis added)) see also Kim Kocher, Note, Recovery of Response Costs Under CERCLA: A Question of Causation under Dedham Water Co. v. Cumberland Farms Dairy, Inc., 3 VILL. ENVTL. L.J. 225, 228-34 (1992) (giving history of CERCLA and discussing its citizen suits).
CERCLA includes a statute of limitations for citizen suits while RCRA contains no such limitation. Finally, CERCLA requires the response costs to be consistent with a "national plan," whereas RCRA contains no such provision.

D. The Concept of Equitable Restitution

Federal courts have long held that "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." The courts relinquish this traditional jurisdiction only if congressional language explicitly requires it to do so. Fur-

36. See CERCLA §§ 113(g)(2)(A), (B), 42 U.S.C. §§ 9613(g)(2)(A), (B). An initial action for the costs of liability under CERCLA must be brought within three years after a removal action, or within six years after the initiation of an on-site remedial action. See id. Unlike CERCLA, RCRA has no such statute of limitations for its citizen suit. See RCRA § 7002, 42 U.S.C. § 6972.

37. See CERCLA §§ 107(a)(4)(A), (B), 42 U.S.C. §§ 9607(a)(4)(A), (B). CERCLA mandates that actions under its citizen suit provisions must be consistent with the "national contingency plan," as described in section 105. See id. RCRA does not have a similar provision. See RCRA § 7002, 42 U.S.C. § 6972.

38. Porter v. Warner Co., 328 U.S. 395, 398 (1946). In Porter, the Court stated that "[u]nless a statute is in so many words, or by no necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Id. Porter is the leading case stating the assumption that federal courts retain all equitable jurisdiction unless Congress specifically limits such power in a statute. See id.

In Porter, the Court held that the provision granting "a permanent or temporary injunction, restraining order, or other order" gave the district court the ability to award restitution through its equitable jurisdiction. Id. at 399. The Court reached this conclusion because restitution, "which lies within . . . equitable jurisdiction," does not mean an "award of statutory damages," but instead restores "the status quo" and "the return of which rightly belongs to the wronged party." Id. at 402. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Id. at 398 (quoting Brown v. Swann, 35 U.S. 497, 503 (1836)); see also Hecht Co. v. Bowles, 321 U.S. 321 (1944) (holding in favor of courts' exercise of equitable jurisdiction when interpreting statutes). The Hecht Court stated that equity was the "instrument for nice adjustment and reconciliation between . . . competing private claims. We do not believe that such a major departure from that long tradition . . . should be lightly implied." Id. at 329-30; see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 315 (1982) (holding "Congress may intervene and guide or control the exercise of the court's discretion, but we do not lightly assume that Congress has intended to depart from the established principles").

Courts have looked to RCRA's language in order to determine congressional intent on this matter. See generally Hallstrom v. Tillamook County, 493 U.S. 20, 25 (1989) (interpreting RCRA by looking to language of statute itself); see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

39. See TVA v. Hill, 437 U.S. 153, 173 (1978) (holding that usual equitable remedies were eradicated by language used in statute). Likewise, the Court in Weinberger stated that Congress, in the Endangered Species Act of 1973 (ESA),
ther, the United States Supreme Court has held that when Congress creates a private right of action, courts still maintain a "traditional presumption in favor of all appropriate relief."\textsuperscript{40} "Appropriate relief" means equitable relief, which may include restitution, but may not include compensatory damages.\textsuperscript{41} Although the difference between restitution and compensatory damages appears blurred at times, courts have drawn a distinction.\textsuperscript{42} Therefore, a

"foreclosed the exercise of the usual discretion possessed by a court of equity." Weinberger, 456 U.S. at 313. In TVA, the Court determined that Congress intended to limit the court’s equitable power. See TVA, 437 U.S. at 173. Under ESA, the federal agencies should "insure that [their] actions . . . do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species.'" Id. (quoting 16 U.S.C. § 1536 (1976)). This language was explicit enough to pass the Porter standard that a "statute in so many words . . . restricts the court's jurisdiction in equity." Porter, 328 U.S. at 398. The TVA Court found that Congress limited the courts’ equitable powers through an environmental statute. See TVA, 437 U.S. at 153.

40. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 61 (1992) (tracing history of courts' abilities to allow implied rights of action and fashion equitable remedies). The Court noted that "from the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court." Id. at 66.

The breadth of equitable restitution is, however, not without some limitations. See Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981) (holding federal district courts have limited powers and cannot be courts of general distinction). The Court further stated that "federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

41. See Mertens v. Hewitt Assoc., 508 U.S. 248, 256 (1993). The Mertens Court stated that "'equitable relief' can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Id. In Mertens, the Court held that the plaintiffs, who asked for equitable relief, were really seeking "nothing other than compensatory damages — monetary relief . . . . Money Damages are, of course, the classic form of legal relief." Id. at 255 (emphasis added).

42. See Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (stating that "[t]he fact that a judicial remedy may require one party to pay money to another is not sufficient reason to characterize the relief as 'money damages'"). In Bowen, the Court held:

[O]ur cases have long recognized the distinction between an action at law for damages — which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation — and an equitable action for specific relief — which may include an order providing for . . . "the recovery of specific property or monies . . . ."

Id. (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949)).

Restitution may be an appropriate remedy for the proformance of another's duty without it being considered monetary damages. See Restatement of Restitution, §§ 76, 115 (1937). Section 76 states that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other." Id. at 76. Section 115 deals with the performance of another duty to the public, stating that "[a] person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or con-
district court may have the ability to award monetary relief as an equitable remedy as long as Congress has not explicitly removed a court's ability to grant restitution.\textsuperscript{43}

E. Development of Case Law

Courts first interpreted RCRA's imminent hazard citizen suit provision soon after the enactment of section 6972(a)(1)(B).\textsuperscript{44} The first case to address the issue of whether a private citizen may receive restitution for clean-up costs from a liable party was \textit{Commerce Holding Co. v. Buckstone}.\textsuperscript{45} In \textit{Buckstone}, the United States District Court for the Eastern District of New York focused on the phrase "such other action" as contained in RCRA's citizen suit provision, concluding that "the statute does not provide a private action for damages."\textsuperscript{46} \textit{Buckstone} sparked a series of decisions which held that RCRA's citizen suit provision does not allow monetary reimbursement for clean-up costs of hazardous waste sites, even when the plaintiff seeks restitution.\textsuperscript{47}

In \textit{Gache v. Town of Harrison, N.Y.},\textsuperscript{48} the District Court for the Southern District of New York addressed an issue similar to the one decided in \textit{Buckstone}. \textit{In Gache}, the plaintiff alleged that the Town sent, is entitled to restitution from the other if... (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health or safety." \textit{Id.} at § 115.

\textsuperscript{43} \textit{See} Weinberger, 456 U.S. at 313. The Supreme Court has held that there is a presumption that Congress is aware of the courts' right to award equitable remedies, and that Congress intends for these remedies, such as restitution, to be allowed absent any statutory language to the contrary. \textit{See id.} at 313 (citing Hecht Co. v. Bowles, 321 U.S. at 329; Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

\textsuperscript{44} \textit{See} Coburn v. Sun Chem. Corp., No. CIV.A. 88-0120, 1988 WL 120739, at *1 (E.D. Pa. Nov. 9, 1988). \textit{In Coburn}, a class brought suit against Sun Chemical for alleged violations of CERCLA and RCRA that caused the contamination of well water. \textit{See id.} at *1. The court concluded that the plaintiffs were seeking relief under 42 U.S.C. § 6972 (a)(1)(A) in their RCRA claim. \textit{See id.} at *8. The court stated that section 6972 (a)(1)(B) provides "essentially for injunctive relief and not remedies for alleged violations of RCRA." \textit{Id.} (emphasis added).

\textsuperscript{45} \textit{See} Commerce Holding Co. v. Buckstone, 749 F. Supp. 441 (E.D.N.Y. 1990) (holding that restitutionary damages could not be granted under RCRA).

\textsuperscript{46} \textit{Id.} at 445. The plaintiff in \textit{Buckstone} was a landowner who brought suit against his tenants for costs incurred during the clean-up of the property, resulting from contamination caused by the hazardous activities of the tenant. \textit{See id.} at 442-43. The court stated that although RCRA allowed injunctive relief, it did not grant the court the power to award monetary damages. \textit{See id.} at 445.


\textsuperscript{48} \textit{Gache}, 813 F. Supp. at 1045 (holding "RCRA does not authorize a plaintiff in a citizen suit to recover remediation costs").
of Harrison violated RCRA when the town’s landfill spread onto the plaintiff’s property.\textsuperscript{49} In holding that clean-up costs could not be recovered under RCRA section 6972, the \textit{Cache} court stated that RCRA was not intended to permit parties to pursue private remedies.\textsuperscript{50}

Soon after the \textit{Cache} decision, the District Court for the Northern Division of California followed the \textit{Cache} court’s lead in \textit{Kaufman and Broad-South Bay v. Unisys Corp.}\textsuperscript{51} The plaintiff in \textit{Kaufman} brought an action for recovery of clean-up costs under RCRA against vendors who allegedly generated and buried toxic waste on the property that the plaintiff had purchased.\textsuperscript{52} The \textit{Kaufman} court applied the \textit{Buckstone} court’s reasoning and held that RCRA does not permit parties to pursue private remedies.\textsuperscript{53} Consequently, the court found that there was no right to restitution under RCRA’s citizen suit provision.\textsuperscript{54}

Similarly, in \textit{Portsmouth Redevelopment & Housing Authority v. BMI Apartments}, the District Court for the Eastern District of Virginia determined whether RCRA’s citizen suit provision allowed for the recovery of money damages for remediation costs.\textsuperscript{55} In \textit{Ports-

\textsuperscript{49} See id. at 1040. The town never sought permission to use plaintiff’s land in such a way. See id. at 1089.

\textsuperscript{50} See id. at 1045. The defendant requested summary judgment against the plaintiff’s remediation claim under RCRA. See id. The court granted the defendant’s motion, stating that RCRA did not allow reimbursement of cleanup costs. See id. at 1045 (“To hold otherwise would allow parties to pursue private remedies rather than acting as private attorney generals. Such was not the intention of RCRA.”).


\textsuperscript{52} See id. at 1470. The defendants maintained that RCRA section 6972 offered no cause of action for recovery of prior clean-up costs, and therefore moved for dismissal. See id. at 1476.

\textsuperscript{53} See id. at 1477. To reach this conclusion, the \textit{Kaufman} court also looked to the holding in \textit{Walls v. Waste Resource Corp.} See id. (citing \textit{Walls}, 761 F.2d 311 (6th Cir. 1985) (holding that there is no private action for damages under RCRA)). In \textit{Walls}, the Sixth Circuit found that both RCRA and the Federal Water Pollution Control Act (FWPCA) do not permit the recovery of economic damages as part of their citizen suit remedies. See \textit{Walls}, 761 F.2d at 315-16 (holding that “neither of these provisions [RCRA and FWPCA] expressly permits a private action for damages”). The \textit{Kaufman} court also used the \textit{Walls} holding to support its conclusion that section 6972 did not allow a cause of action for restitution. See \textit{Kaufman}, 882 F. Supp. at 1476-77. Finally, the \textit{Kaufman} court concluded that the \textit{Walls} and \textit{Buckstone} decisions, although not binding, “persuasively argue against implying a private remedy for damages or restitution.” \textit{Id.} at 1476.

\textsuperscript{54} See \textit{Kaufman}, 882 F. Supp. at 1477.

mouth, the defendant incurred costs for cleaning up a hazardous waste site. The plaintiff then filed a declaratory judgment action in order to prevent the defendant from seeking indemnification for the clean-up costs. The court held that RCRA does not grant the court the power to award such indemnification, because RCRA's citizen suit provision does not allow a plaintiff to be the direct beneficiary of the relief.

In Furrer v. Brown, the United States Court of Appeals for the Eight Circuit faced a controversy similar to the one decided by the Portsmouth court. In Furrer, the plaintiff owned contaminated property previously owned and occupied by a Shell Oil service station. After the Missouri Department of Natural Resources ordered the plaintiffs to remediate the contamination, the plaintiffs brought suit in federal court under RCRA section 6872 to recover remediation costs from the defendants.

On appeal, the Eighth Circuit decided whether it could award monetary damages for the costs of cleaning up a site contaminated with petroleum under RCRA's citizen suit provision. In Furrer, the

56. See id. at 382-83.
57. See id. at 383. The defendants asserted counterclaims against the plaintiffs under RCRA's citizen suit provision. See id. BMI asserted that section 6972 allowed for an order of restitution for "the money [BMI] has expended and will expend in the future...for all actions necessary to investigate, assess, or abate" the violation of RCRA. Id. 58. See id. at 385. The court looked to the language of section 6972(a)(1)(B) to decide if RCRA mandates an award for past and present monetary damages. See id. For a discussion of the language of § 6972(a)(1)(B), see supra note 25 and accompanying text. The court found that section 6972 does not allow for such a remedy. See Portsmouth, 847 F. Supp. at 385. "In asking to award money damages for 'remedial and response costs'...BMI is asking for relief that is beyond the powers of the district court to grant under the citizens-suit provision of RCRA, which only allows claims by parties 'acting as private attorneys-general rather than [those] pursuing a private remedy....'" Id. (citing Environmental Defense Fund, Inc., v. Lampthier, 714 F.2d 331 (4th Cir. 1983)).
60. See Furrer, 62 F.3d at 1093. The defendants previously owned the property and had leased it to Shell Oil Company to operate a service station. See Id.
62. See id. The district court had held that it did not have subject matter jurisdiction over a federal claim and refused to exercise supplemental jurisdiction over other state law claims that had been made by the plaintiffs. See id. Because the
plaintiffs argued that section 6972 permitted the court to award money damages as a form of equitable restitution. Rejecting this argument, the Eighth Circuit affirmed the district court's decision, holding that Congress had not implicitly created a monetary remedy and that such an award had not become part of federal common law. This holding was consistent with other lower courts' dismissal was granted without reference to anything outside the pleadings, the Eight Circuit heard the appeal as a question of law de novo. See id. The Eighth Circuit looked to the language of section 6972, stating that the section gave subject matter jurisdiction to citizen suits when the equitable remedies sought were the following:

prohibitory or mandatory injunctive relief "to enforce," "to restrain," and "to order . . . other . . . action . . . necessary." The statute does not give the district court the express authority in citizen suits to award money judgments for costs incurred in cleaning up contaminated sites. Thus, if such a remedy is to be available, we must find that Congress . . . implicitly created such a remedy, or that the "cause of action . . . may become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct."

Id. at 1094 (citation omitted) (emphasis added).

63. See id. at 1095. The Furrers argued that the language "to order . . . such other action as may be necessary" was a clear example of Congress's intent to leave to the courts their traditional ability to use equitable remedies. Id.

64. See id. The Eighth Circuit examined Congress's intent when passing RCRA to decide if the citizen suit provision contained a cause of action for monetary reimbursement for the cleanup of hazardous sites. See id. at 1094-95. Using the test set forth in Cort v. Ash, 422 U.S. 66 (1975), to determine if Congress intended to create this remedy, the court used four factors to determine whether RCRA authorized an implied cause of action:

1. Is the plaintiff in the class for whose benefit the statute was enacted?
2. Does the legislative history explicitly or implicitly show an intent to create or deny the cause of action?
3. Is the proposed remedy within the context and purpose of the statutory scheme?
4. Is the matter traditionally a matter of state law, making an inferred federal remedy inappropriate?

Furrer, 62 F.3d at 1094-95 (citing Cort, 422 U.S. at 95).

The Furrer court held that the Furrers were members of the intended class. See id. at 1095. However, the court found that the Furrers were not entitled to any "special benefit" under RCRA because they were the owners of property that was contaminated through no fault of their own. See id. The court stated that it could be argued that the Furrers were "in a class of persons that RCRA and § 6972 were] directed against—the owners of a storage facility where hazardous waste has presented an imminent and substantial endangerment." Id. The court contrasted RCRA's citizen suit provision, which does not provide for contribution, from other liable sources with CERCLA's citizen suit provision, which does provide for contribution from any other liable parties. See id. at 1096 (citing 42 U.S.C. § 9613(f)(1) (1994)). Looking to the legislative history of RCRA and its amendments, the Eight Circuit found that there was "no evidence that Congress intended to create such a remedy." Id. As to the third part of the Cort test, the court decided that "RCRA's goal is to prevent the creation of hazardous waste sites, rather than to promote the cleanup of existing sites," and the purposes of RCRA would not be served by providing for a monetary remedy under section 6972. Id. at 1098. Looking at the fourth and final part of the Cort test, the Eighth Circuit concluded that this factor provided no basis for recovery of clean-up costs. See id. at 1099.

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interpretation of the citizen suit provision of RCRA. Nonetheless, one week prior to the *Furrer* court’s decision, the Ninth Circuit in *KFC* contradicted these decisions by allowing a recovery for clean-up costs.

III. FACTS

In 1975, KFC purchased real property in Los Angeles from Alan and Margaret Meghrig, and thereafter opened and operated a KFC restaurant on the site. In 1988, during construction on the property, KFC discovered that soil under and around the restaurant was contaminated with petroleum. The soil became contaminated as a result of the presence of leaking underground storage tanks. The Los Angeles County Department of Health Services ordered KFC to clean up the site.

To remedy the situation, KFC spent $211,000 to remove and dispose of the hazardous soil. In 1992, KFC brought suit under RCRA’s citizen suit provision, seeking to recover clean-up costs from the Meghrigs. The district court held that section 6972(a) does not permit recovery of prior clean-up costs, and also that sec-

65. For a discussion of other courts’ interpretations of section 6972, see supra notes 44-58 and accompanying text.

66. For a discussion of the Ninth Circuit’s holding in *KFC*, see infra note 74 and accompanying text.


69. Respondent’s Brief at *2, Meghrig v. KFC Western, Inc., 1995 WL 728551 (1996) (No. 95-83). The Meghrigs owned the property for 12 years before selling it to KFC in 1975. See id. at *4. Prior owners and/or their lessees operated a gas station on the property for 45 years. See id. The presence of petroleum also caused lead and benzene to accumulate in the soil. See id. at *2.

70. See *KFC*, 116 S. Ct. at 1253. The Los Angeles Department of Building and Safety issued a stop order on all construction on the property until a clearance was issued by the Los Angeles Department of Health Services. See Respondent’s Brief at *2, Meghrig (No. 95-83).

71. See *KFC*, 116 S. Ct. at 1253. In an effort to obtain clearance from the Department of Health Services, KFC began soil remediation work, which was completed in March, 1989. See Respondent’s Brief at *2, Meghrig (No. 95-83). Upon clean-up, the Department of Health Services issued a formal clearance. See id. The Meghrigs were unaware of the clean-up until well after the clean-up was completed. See Petitioner’s Brief at *5, Meghrig (No. 95-83).

72. See *KFC*, 116 S. Ct. at 1253. For a discussion of the language used in RCRA’s citizen suit provision, see supra notes 25-26 and accompanying text. KFC claimed that the suit fell under RCRA because the contaminated soil was “solid waste” as described in RCRA; that the soil posed an “imminent and substantial endangerment to health or environment”; and that the Meghrigs contributed to the soil’s “past or present handling, storage, treatment, transportation, or disposal.” *KFC*, 116 S. Ct. at 1253.
tion 6972(a)(1)(B) does not grant the district court the power to award remediation for toxic waste that does not pose an "imminent and substantial endangerment to health or the environment" at the time the suit is filed. On appeal, the Ninth Circuit reversed the district court's decision, holding that RCRA entitled KFC to recover restitution for clean-up costs.

The Supreme Court granted certiorari to address the Ninth Circuit's interpretation of RCRA, as well as the split between the Eighth and Ninth Circuits over the interpretation of RCRA's citizen suit provision. The Court reversed the Ninth Circuit's decision, holding that section 6972 does not authorize a private cause of action to recover the prior costs of cleaning up toxic waste that is not an endangerment to health or the environment.

IV. NARRATIVE ANALYSIS

In KFC, the Court addressed the issue of whether RCRA's citizen suit provision authorizes a private action to recover the prior cost of cleaning up toxic waste that does not, at the time of suit, pose an endangerment to health or the environment. In denying the right to a private action for prior clean-up costs, the Court focused on the following factors: (1) the differences between the purposes of RCRA and CERCLA; (2) the requirements of RCRA's citizen suit provision—timing and remedies; (3) RCRA's enforce-

73. Id. The Meghrigs moved to dismiss KFC's complaint for failure to state a claim, stating that KFC failed to allege that an "imminent and substantial endangerment" existed at the time of the complaint, and that a request for monetary relief was beyond the remedies provided by in RCRA's citizen suit provision. See Respondent's Brief at *4, Meghrig (No. 95-83). The district court held that both grounds for dismissal were valid and dismissed KFC's complaint. See KFC, 116 S. Ct. at 1253.

74. See KFC Western, Inc. v. Meghrig, 49 F.3d 518 (1995). The Ninth Circuit found that the district court did have authority under section 6972(a) to award restitution damages for clean-up costs. See id. at 521-23. The Ninth Circuit also held that a private party can proceed with a suit under section 6972(a)(1)(B) because the waste "presented an imminent and substantial endangerment at the time it was cleaned up[.]" KFC, 116 S. Ct. at 1253 (emphasis added).

75. See KFC at 1251. For a discussion of the Eighth Circuit's interpretation of RCRA's citizen suit in Furrer, see supra notes 59-64 and accompanying text.

76. See KFC, 116 S. Ct. at 1254-56.

77. See id. The Ninth Circuit held that RCRA's citizen suit provision authorized an award of restitution of past clean-up costs, and that a party can proceed with a cause of action under section 6972(a)(1)(B) when the waste removed presented an "imminent and substantial endangerment" at the time of clean-up. KFC Western, 49 F.3d at 520-21. On appeal, the Supreme Court addressed whether this was the proper interpretation of RCRA. See KFC, 116 S. Ct. at 1253.
mendment scheme; and (4) the availability of equitable remedies under RCRA.  

A. Differences Between Purposes of RCRA and CERCLA

The Court began its analysis of RCRA's citizen suit provision by comparing the purpose of RCRA with the purpose of CERCLA. The Court noted that RCRA does not compensate for the clean-up of hazardous wastes, as is the case with CERCLA, because RCRA's purpose is to prevent the disposal of hazardous wastes, while CERCLA's purpose is to facilitate the prompt clean-up of existing hazardous waste sites. Accordingly, the Court determined that RCRA is not intended to force the clean-up of hazardous waste or to compensate those who have participated in the clean-up of hazardous waste.

78. See id. at 1254-56. For a discussion of the Court's interpretation of the differences between the purposes of RCRA and CERCLA, see infra notes 79-81 and accompanying text. For a discussion of the Court's interpretation of RCRA's and CERCLA's timing and remedies, see infra notes 82-92 and accompanying text. For a discussion of the Court's interpretation of RCRA's enforcement scheme, see infra notes 93-100 and accompanying text. For a discussion of the Court's analysis of the availability of equitable remedies under RCRA, see infra notes 101-05 and accompanying text.

79. See KFC, 116 S. Ct. at 1254. The Court stated that RCRA's primary purpose is to reduce "the generation of hazardous waste," and that hazardous waste that is generated should be treated, stored, or disposed of so as "to minimize the present and future threat to human health and the environment." Id. (citing 42 U.S.C. § 6902(b) (1994)). Conversely, CERCLA's dual purposes are "'prompt clean-up of hazardous waste sites and imposition of all clean-up costs on the responsible party.'" Id. (quoting General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990)).

80. See id. The Court characterized RCRA as being "[u]nlke CERCLA," and further stated that RCRA could not be interpreted as similar to CERCLA. See id.

81. See id. at 1256. When it discussed RCRA's citizen suit provision, the Court pointed out that the EPA Administrator has primary responsibility for RCRA's enforcement. See id. at 1254 ("Chief responsibility for the implementation and enforcement of RCRA rests with the Administrator.") (citing 42 U.S.C. §§ 6928, 6973).

During the oral argument of this case, the United States, as amicus curiae, argued that Congress intended that RCRA would "encourage the responsible party to clean up the site and eliminate the need for a suit." Oral Argument at *30, Meghrig v. KFC Western, Inc., 1996 WL 14515 (1996) (No. 95-83). "Congress does not simply [wish] to see that the sites [are] cleaned up. They're also interested in seeing that the responsible parties would bear those expenses." Id. The Court dismissed the government's characterization of RCRA, answering "[n]ot in this statute." Id.
B. Requirements of RCRA’s Citizen Suit Provision—Timing and Remedies

In determining whether to allow KFC to recover restitution damages the Court looked to the sections of RCRA’s citizen suit provision which provide the requirements for the timing of the citizen suit and available remedies. Based on the statute’s plain language, the Court noted that RCRA’s timing provision allows private actions only if the hazardous waste in question presents an “imminent” danger to health or the environment. The Court construed the plain meaning of the term “imminent” to mean “threatening to occur immediately.” The Court also decided that the term “imminent” is controlling, and therefore, RCRA’s citizen suit provision does not allow a remedy for the cost of prior clean-ups of hazardous waste. Thus, the Court concluded that RCRA’s citizen suit provision does not cover reparation for past clean-up costs.

82. See RCRA §§ 3008, 7003, 42 U.S.C. §§ 6928, 6973 (stating “the first [requirement] concerns the necessary timing of the citizen suit brought under § 6979(a)(1)(B)”). For further discussion of RCRA’s citizen suit provision’s timing requirements, see supra notes 27-30 and accompanying text.

83. See KFC, 116 S. Ct. at 1254 (providing that “[t]he second [requirement] defines the remedies a district court can award in a suit brought under § 6972(a)(1)(B)”). For a discussion of the remedies provided by RCRA’s citizen suit provision, see supra note 26 and accompanying text.

84. See KFC, 116 S. Ct. at 1255. The Court emphasized that “imminent” was the controlling term in the citizen suit provision. See id. The Court wrote that the citizen suit provision “permits a private party to bring suit against certain responsible persons [for their dealings with] any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” Id.

85. See id. The Court applied the Webster’s Dictionary definition of the term imminent. Id. (“The meaning of this timing restriction is plain: [a]n endangerment can only be ‘imminent’ if it ‘threaten[s] to occur immediately . . . .’”) (citing Webster’s International Dictionary of English Language 1245 (2d ed. 1934)). The Court then stated that RCRA’s use of the term “may present” further precludes any action for past clean-ups. See id. (stating “may present” imminent harm clearly excludes waste that no longer presents a danger). The Court looked to the Ninth Circuit which noted that “may present . . . ‘implies that there must be a threat which is present now, although the impact of the threat may not be felt until later.’” Id. (emphasis added). The Court, however, also criticized the Ninth Circuit’s interpretation of the phrase “imminent endangerment,” stating that such an interpretation “represents a novel application of federal statutory law.” Id. at 1255.

86. See KFC, 116 S. Ct. at 1255. The fact that “RCRA’s citizen suit provision was not intended to provide a remedy for past clean-up costs is . . . apparent from the harm at which it is directed.” Id.

87. See id. The Court concluded that RCRA’s citizen suit provision “was designed to provide a remedy that ameliorates present or obviates the risk of future ‘imminent’ harms, not a remedy that compensates for past clean-up efforts.” Id. (citing 42 U.S.C. § 6902(b)).
Next, the Court looked to the remedies available under RCRA's citizen suit provision in order to determine whether an individual could bring an action for compensation of past clean-up costs.\(^\text{88}\) The Court noted that the statute's remedial scheme does not allow awards for compensation of past clean-ups,\(^\text{89}\) because RCRA's remedial scheme only allows for remedies such as mandatory or prohibitory injunctions.\(^\text{90}\) The Court further noted that if Congress intended RCRA's citizen suit provision to allow additional remedies, it would have used language similar to that used in CERCLA's citizen suit provision.\(^\text{91}\) Finally, the Court concluded that because Congress did not provide the same remedies in both RCRA's and CERCLA's citizen suit provisions, RCRA does not permit the court to award prior clean-up costs.\(^\text{92}\)

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88. See id. at 1254. The Court stressed that RCRA's citizen suit provision provided two remedies: "to restrain any person who [is or has dealt with] any solid or hazardous waste . . ., to order such a person to take such other action as may be necessary, or both." Id.

89. See id. "It is apparent from the two remedies described [the court's ability to restrain and to order] that RCRA's citizen suit provision is not directed at providing compensation for past clean-up efforts." Id.

90. See id. Specifically, the Court noted that RCRA provides: "[a] private citizen . . . could seek a mandatory injunction [that makes the responsible party take action] . . . or a prohibitory injunction, i.e., one that 'restrains' a responsible party from further violating RCRA." Id. For a discussion of traditional injunctive remedies, see ENVIRONMENTAL PROTECTION, supra note 26, at §§ 8 [8][b][iii], [iv]; see also MILLER, supra note 2, at § 8.1 (giving common law background, defining prohibatory, mandatory and statutory injunctions, and discussing injunctive forms of relief).

91. See KFC, 116 S. Ct. at 1254. The Court found the comparison between RCRA and CERCLA's citizen suit remedies "telling." Id. The Court stated that CERCLA addresses many of the same problems that RCRA addresses, and because the two statutes are similar, Congress intended the differences between the statutes to be truly different. See id. at 1254-55. The Court pointed out that while CERCLA's citizen suit provision is similar to RCRA's citizen suit provision, CERCLA's different remedies demonstrate that RCRA cannot be interpreted in the same manner. See id. at 1255. CERCLA "expressly permits the recovery of any 'necessary costs of response incurred by any . . . person consistent with the national contingency plan.'" Id. (citing CERCLA § 107(a)(4)(B)), 42 U.S.C. § 9607(a)(4)(B)). For a discussion of section 9607(a)(4)(B), see supra note 37 and accompanying text.

Further, CERCLA "also provides that '[a]ny person may seek contribution from any other person who is liable or potentially liable' for those response costs." KFC, 116 S. Ct. at 1255 (citing CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1)). For a discussion of section 9613(f)(1), see supra note 35 and accompanying text.

92. See KFC, 116 S. Ct. at 1255. "Congress has thus demonstrated in CERCLA that it knew how to provide for the recovery of clean-up costs, and that the language used to define the remedies under RCRA does not provide that remedy." Id.
C. RCRA’s Enforcement Scheme

The Court also examined the enforcement scheme of RCRA’s citizen suit provision to determine if it permits compensation for the prior clean-up of hazardous waste.98 The Court looked to RCRA’s lack of a statute of limitations, comparing it to CERCLA’s enforcement scheme which does contain a statute of limitations.94 Additionally, the Court noted that RCRA does not require that the relief sought be reasonable, while CERCLA’s citizen suit provision does require that the recovery sought be reasonable.95 Moreover, the Court found that the absence of these features in RCRA, but present in CERCLA, would be illogical if Congress had intended to allow actions for recovery of clean-up costs under RCRA’s citizen suit provision.96

The Court continued its analysis by focusing on the requirements an individual must meet to bring an action against another person under RCRA’s citizen suit provision.97 The Court found that the ninety-day advance notice requirement is evidence that RCRA’s citizen suit provision does not allow for the recovery of past clean-up costs.98 Also, the Court noted that RCRA’s provision barring a suit by an individual if an action has been brought by the EPA Administrator or a state provides further support for its deci-

93. See id.
95. See KFC, 116 S. Ct. at 1255 (stating RCRA’s citizen suit provision “does not require a showing that the response costs being sought are reasonable,” and noting that costs recovered through CERCLA’s citizen suit provision must be reasonable by being consistent “with the national contingency plan” described in 42 U.S.C. § 9605).
96. See id. at 1255. “If Congress had intended [RCRA’s citizen suit] to function as a cost-recovery mechanism, the absence of these provisions would be striking.” Id.
97. See id.
98. See RCRA § 7002 (b)(2), 42 U.S.C. § 6972(b)(2). The Court described the provision as stating that “a private party may not bring suit . . . without first giving 90 days’ notice to the Administrator of the EPA, to the State in which the alleged endangerment may occur,” and to the potential defendants.” KFC, 116 S. Ct. at 1255 (citing RCRA §§ 7002(b)(2)(A)(i-iii), 42 U.S.C. §§ 6972(b)(2)(A)(i-iii)). For a discussion of 42 U.S.C. § 6972(b)(2)(A), see supra note 29 and accompanying text. The Court also pointed out the single exception to the notice requirement for the citizen suit, but stressed that it was a “limited exception.” KFC, 116 S. Ct. at 1255 (citing Hallstrom v. Tillamook County, 493 U.S. 20, 26-27 (1989) (stating that notice requirement is waived “when there is a danger that hazardous waste will be discharged”).
sion.\textsuperscript{99} The Court concluded that these provisions show that prior clean-up costs cannot be awarded under RCRA’s citizen suit provision.\textsuperscript{100}

D. Equitable Remedies

Finally, the Court considered the issue of whether Congress intended that district courts be able to award clean-up costs under the principle of equitable remedy.\textsuperscript{101} The Court stated that Congress did not intend “for a private citizen to be able to undertake a clean up and then recover its costs under RCRA.”\textsuperscript{102} Further, the Court held that because Congress provided remedies in RCRA, the Court could not read other “equitable” remedies into RCRA.\textsuperscript{108} Concluding its analysis, the Court stated that an “‘elemental cannon of stat-

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\textsuperscript{99} See RCRA §§ 7002 (b)(2)(B),(C), 42 U.S.C. §§ 6972(b)(2)(B),(C). “[N]o citizen suit may proceed if either the EPA or the State has commenced, or is diligently prosecuting, a separate enforcement action.” \textit{KFC}, 116 S. Ct. at 1255 (citing RCRA §§ 7002(b)(2)(B),(C), 42 U.S.C. §§ 6972(b)(2)(B),(C)). For a discussion of §§ 6972(b)(2)(B),(C), see \textit{supra} note 30 and accompanying text.

\textsuperscript{100} See \textit{KFC}, 116 S. Ct. at 1255. The Court concluded: [i]f RCRA were designed to compensate private parties for their past clean-up efforts, it would be a wholly irrational mechanism for doing so. 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.

\textit{Id.}

\textsuperscript{101} See \textit{id.} at 1255-56. In an \textit{amicus} brief, the Government argued in support of KFC’s claim that the Court could grant equitable remedies under RCRA’s citizen suit provision. \textit{See id.} “Echoing a similar argument made by KFC . . . the Government does not rely on the remedies expressly provided for in § 6972(a), but rather cites a line of cases holding that district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them by Congress.” \textit{Id.} (citing Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Porter v. Warner Holding Co., 328 U.S. 395 (1946); Hecht Co. v. Bowles, 321 U.S. 921 (1944)). For a discussion of the concept of equitable remedy or restitution, see \textit{supra} notes 38-43 and accompanying text.

\textsuperscript{102} \textit{KFC}, 116 S. Ct. at 1256. The Court stated that “the limited remedies described in § 6972(a), along with the stark differences between the language of that section and the cost recovery provisions of CERCLA, amply” show that there was no intent to provide for recovery of clean-up costs. \textit{Id.} The Court pointed out that RCRA protects an individual’s right to bring suit for recovery of hazardous waste clean-up costs “under other federal or state laws.” \textit{Id.} (citing RCRA § 7002(f), 42 U.S.C. § 6972(f)). For a discussion of § 6972(f), see \textit{supra} note 24 and accompanying text.

\textsuperscript{103} \textit{Id.} “[W]here Congress has provided ‘elaborate enforcement provisions’ for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, ‘it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under’ the statute.” \textit{Id.} (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1, 14 (1981)).
utory construction [is] that where a statute expressly provides a particular remedy or remedies, a court must be wary of reading others into it." 104

In KFC, the Supreme Court concluded that RCRA’s citizen suit provision does not authorize a private cause of action to recover the prior cost of cleaning up toxic waste that is not an endangerment to health or the environment at the time of the suit. 105 Further discussion of the differences between the purposes and language of RCRA and CERCLA, RCRA’s remedies requirements, RCRA’s enforcement scheme, and the availability of equitable remedies under RCRA is necessary to determine if the United States Supreme Court has reached the proper conclusion.

V. CRITICAL ANALYSIS

In KFC, the Court determined whether RCRA’s citizen suit provision allows claimants to bring suits for the cost of a prior clean-up of hazardous waste that did not present an endangerment to human health or the environment at the time the suit was brought. 106 Ultimately, the Court held that RCRA’s citizen suit provision does not provide a remedy for the cost of a prior clean-up of hazardous waste. 107 By analyzing the Court’s opinion in conjunction with RCRA, CERCLA, and the concept of equitable restitution, it is clear that the Court’s holding was correct, although the Court’s reasoning was somewhat imprecise.

104. Id. at 1256 (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)).

105. The Court concluded:

[s]ection 6972(a) does not contemplate the award of past clean-up cost, and § 6972(a)(1)(B) permits a private party to bring suit only upon an allegation that the contaminated site presently poses an ‘imminent and substantial endangerment to health or the environment,’ and not upon the allegation that it posed such an endangerment at some time in the past.

Id. The Court was careful to note that it had not decided “whether a private party could seek to obtain an injunction requiring another party to pay clean-up costs which arise after a RCRA citizen suit has been properly commenced, or otherwise recover clean-up costs paid out after the invocation of RCRA’s statutory process.”

Id. (citation omitted).

106. See KFC, 116 S. Ct. at 1254-56.

107. See id.
A. Differences Between Purposes of RCRA and CERCLA

The Court began its inquiry into the meaning of RCRA’s citizen suit by comparing RCRA’s purpose with CERCLA’s purpose. The Court defined the purpose of RCRA, by first differentiating the purposes of RCRA and CERCLA, and only then looking to the definition of RCRA provided by the statute itself. By defining RCRA’s purpose in this manner, the Court strayed from the canon of statutory construction that courts must first look to the plain language of the statute to find a statute’s meaning. By referring to CERCLA at the outset, the Court’s analysis implies that RCRA is not clear on the issue of recovery of past clean-up costs through equitable restitution.

By comparing the two acts, the Court highlighted that Congress intended to use RCRA as a tool for the prevention of hazard-
ous waste and the clean-up of hazardous waste that exists, rather than the imposition of clean-up costs on responsible parties. In doing so, the Court missed the opportunity to determine the purpose of RCRA by looking to the plain language of RCRA's citizen suit provision. Because the language of RCRA's citizen suit provision supports the argument that this provision does not allow for the imposition of past clean-up costs on responsible parties, it would have been more appropriate for the Court to base its primary argument on the statutory language of RCRA's citizen suit provision.

113. For a discussion of the purposes of RCRA, see supra notes 16-18 and accompanying text. The Court did not look to any legislative history as it defined the purposes of RCRA, because RCRA's legislative history is silent on the recovery of monetary damages for past clean-ups of hazardous waste. See H.R. Rep. No. 98-198, at 53 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5612 (noting that RCRA "confers on citizens a limited right . . . to sue to abate an imminent and substantial endangerment"). The use of the word "abate" is not compelling enough to determine congressional intent. See City of Chicago, 511 U.S. at 337 (quoting Court of Appeals, which asked "[w]hy should we . . . rely on a single word in a committee report that did not result in legislation? Simply put, we shouldn't."). The KFC Court disregarded the committee report, noting "it is the statute, and not the Committee Report, which is the authoritative expression of the law. . . ." Id. at 1593. For a discussion of the legislative history behind RCRA's citizen suit provision, see supra note 25 and accompanying text.

114. See KFC, 116 S. Ct. at 1254 (noting that RCRA authorizes courts "to restrain" or "to order," but not to impose clean-up costs on responsible parties). For further discussion of RCRA's "restrain" and "order" provisions, see supra note 26 and accompanying text.

115. Although the Court was able to show RCRA's purpose by examining CERCLA, it could have proven this point by using the statutory language of RCRA's citizen suit provision, which is not consistent with the principle of equitable restitution. This would have prevented the Court from highlighting the differences between RCRA and CERCLA as its primary argument. For a further discussion of why the language of RCRA is inconsistent with the principles of equitable restitution, see supra notes 101-04 and accompanying text.

116. A better analysis would have been for the Court to begin its opinion by showing that the language of the citizen suit provision states that the "district court shall have jurisdiction . . . to restrain any person . . . to order such person to take such other action as may be necessary, or both." RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (1994). This language clearly defeats KFC's contention that the citizen suit provision allows for equitable restitution. SeeRespondent's Brief at *11, Meghrig v. KFC Western, Inc., 1995 WL 728551 (1996) (No. 95-83) (presenting KFC's erroneous argument that RCRA's citizen suit provision authorizes equitable restitution). This argument would have enabled the Court to reject the respondents' claim while adhering to the canon of statutory construction which requires courts to look to the language of the statute to derive its meaning. See Hallstrom v. Tillamook County, 493 U.S. 20, 25 (1989) (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). The Court, however, chose to postpone this part of its analysis until after it discussed CERCLA. For a discussion of the KFC Court's analysis, see supra notes 101-04 and accompanying text.
B. Requirements of RCRA’s Citizen Suit Provision – Timing and Remedies

The Court then examined the language of RCRA’s citizen suit provision to determine whether KFC’s claim for equitable restitution was allowed under RCRA.117 Unfortunately, the Court did not take the opportunity at that stage to fully clarify the legal issues under RCRA. Rather, in its analysis, the Court combined the separate issues of timing and remedies available under RCRA, whereas either issue alone would have defeated KFC’s claim for compensation.118

The Court briefly mentioned the timing requirement and then examined the availability of compensation as a remedy under RCRA’s citizen suit provision.119 While finding that RCRA does not allow for recovery of past clean-up costs, the Court blurred the dis-

117. See KFC, 116 S. Ct. at 1254. The Court stated that the “[t]wo requirements of § 6972(a) defeat KFC’s suit against the Meghrigs.” Id. These two requirements are “timing” and “remedies available.” Id. For a discussion of the timing requirement under RCRA’s citizen suit provision, see supra notes 27-50 and accompanying text. For a discussion of the remedies available under RCRA’s citizen suit provision, see supra notes 25-26 and accompanying text. The Court should have determined RCRA’s purpose by examining RCRA’s statutory language rather than by looking to CERCLA to do so.

118. The Court stated that the “necessary timing” requirement defeats KFC’s claim. See KFC, 116 S. Ct. at 1254. Next, the Court held that the remedies available under RCRA’s citizen suit provision defeated KFC’s claim. Id. The Court then returned to the timing requirement of RCRA and stated that the plain meaning of the requirement barred any past clean-up costs. See id. at 1255.

KFC’s claim for equitable restitution failed both the timing and remedies requirements separately. The Court should have made it clear that future claims will also fail if they do not meet both requirements, independent of each other. By combining the two requirements together and dealing with them interchangeably, the Court has de-emphasized the need for claims to meet both the requirement that the suit be timely and the requirement that the plaintiff’s claim seeks a remedy available under RCRA’s citizen suit provision. See id. at 1254-55.

119. See KFC, 116 S. Ct. at 1254. The Court used “a plain reading of the remedial scheme” of the statute to conclude that RCRA has only two remedies available under RCRA’s citizen suit provision: mandatory injunctions and prohibitory injunctions. See id. at 1254. For a discussion of the Court’s interpretation of the remedies available under RCRA’s citizen suit provision, see supra notes 88-92 and accompanying text.

This conclusion is properly based on the canon of statutory construction that a court must look to the plain meaning of the statute’s language. See KFC, 116 S. Ct. at 1256. If the Court had followed KFC’s line of reasoning that the language, “take such other action as may be necessary,” permitted the court to provide equitable restitution, it would have violated this canon, because this remedy does not fall under the remedial scheme provided in the language of RCRA’s citizen suit provision. See Respondent’s Brief at *19, Meghrig v. KFC Western, Inc., 1995 WL 728551 (1996) (No. 95-83) (stating that phrase “such other action as may be necessary . . . embraces an order for restitutionary relief”).
tinction between damages and equitable restitution. This distinction, however, is unimportant because the Court made it clear that neither damages nor equitable restitution are allowed under RCRA's citizen suit provision. Moreover, while examining the availability of a remedy, the Court again used CERCLA to define RCRA, rather than solely relying on the language of RCRA to defeat KFC's claim. Using this telling comparison, the Court was able to clearly show that Congress did not intend for RCRA to provide for the recovery of clean-up costs. However, the Court could have made a stronger argument by concluding that even though the 1984 amendments to RCRA's citizen suit provision came after CERCLA's citizen suit provision, Congress chose not to implement the already existing language of CERCLA.

120. See KFC, 116 S. Ct. at 1254. The Court chose to ignore the distinctions that KFC had made between its request for equitable restitution and a request for damages, stating that the citizen suit provision's remedies do not "contemplate the award of past clean-up costs, whether these are denominated 'damages' or 'equitable restitution.'" Id. This refusal to separate the two remedies derailed KFC's argument that the Court could use its equitable jurisdiction to award equitable relief. For a discussion of KFC's argument that equitable restitution is not damages, see supra note 101 and accompanying text. It is doubtful, however, that the Court would have agreed with KFC's distinction between equitable restitution and money damages because KFC's original complaint sought money damages, and only after amending its claim did KFC characterize the relief it sought as "equitable restitution." See Respondent's Brief at *3-*4, Meghrig (No. 95-83); Petitioner's Brief at *6, Meghrig v. KFC Western, 1995 WL 668003 (1996) (No. 95-83) (1995). For a discussion of the proceedings in the district court, see supra note 73 and accompanying text.

121. As the Court stated, only mandatory injunctions or prohibitory injunctions are allowed by RCRA's citizen suit provision. See KFC, 116 S. Ct. at 1254. For a discussion of the Court's holding on the remedies available under RCRA's citizen suit provision, see supra notes 88-92 and accompanying text.

122. See KFC, 116 S. Ct. at 1254-55. The Court clearly stated that the language of the citizen suit provision does not allow for monetary compensation, but used a comparison with CERCLA as the foundation for this finding. See id. For a discussion of the differences between the citizen suit provisions in RCRA and CERCLA, see supra notes 79-81 and accompanying text.

123. See KFC, 116 S. Ct. at 1254-55 (stating that CERCLA demonstrated that "Congress ... knew how to provide for the recovery of clean-up costs, and that the language used to define remedies under RCRA does not provide that remedy"). For a discussion of the Court's use of CERCLA to show that RCRA does not provide for the recovery of clean-up costs, see supra notes 91-92 and accompanying text.

124. The Court noted that "CERCLA was passed several years after RCRA went into effect." KFC, 116 S. Ct. at 1254. The Court used this time frame to show that Congress knew of RCRA's citizen suit provision, but decided that different language was needed to allow the remedy for recovery of clean-up costs in CERCLA. See id. For a discussion of the Court's argument, see supra note 96 and accompanying text. Although this argument is persuasive, the fact that Congress amended RCRA's citizen suit provision after it was passed is more compelling. For a discussion of the 1984 amendments to RCRA, see supra notes 25-26 and accompanying text. More clearly, the fact that Congress included a very comprehensive
The Court then returned to RCRA's timing requirement. The Court properly focused on the need for the hazardous waste to pose an "immediate endangerment" in order to meet RCRA's citizen suit timing provision. The Court's use of a plain meaning definition of the term "imminent," in conjunction with the Ninth Circuit's own previous definition of "imminent," clearly refuted KFC's contention that RCRA's citizen suit provision does not require that there be the threat of endangerment at the time of the suit for RCRA to apply.

C. RCRA's Enforcement Scheme

The Court next focused on RCRA's enforcement scheme to support its holding that RCRA's citizen suit provision does not allow for the recovery of past clean-up costs. The lack of a statute


125. See KFC, 116 S. Ct. at 1255. For a discussion of the Court's interpretation of RCRA's timing requirement, see supra notes 82-87 and accompanying text. See also Randall James Butterfield, Note, Recovering Environmental clean-up Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem, 49 VAND. L. REV. 689, 720 (1996) (providing excellent explanation of "the continuing endangerment requirement" under RCRA's citizen suit provision).

126. See KFC, 116 S. Ct. at 1255 (stating RCRA allows suit "only upon a showing that the solid or hazardous waste at issue 'may present an imminent and substantial endangerment to health or the environment'" (quoting RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (1994))).

127. Id. The Court first looked to Webster's Dictionary to define "imminent." For a discussion of the Court's analysis of the plain meaning of "imminent," see supra notes 84-86. The Court then reprimanded the Ninth Circuit for interpreting "imminent" by quoting a Ninth Circuit decision that was in direct conflict with the Ninth Circuit's holding in KFC. See id. at 1255 (quoting Price v. United States, 39 F.3d 1011, 1019 (1994)). For a further discussion of the Ninth Circuit's definition of imminent, see supra note 85 and accompanying text.

It was likely that the Court was dubious of KFC's claim that the hazardous waste was an "imminent" danger, because KFC had to amend this section of its complaint in district court. See Respondent's Brief at *4, Meghrig v. KFC Western, Inc., 1995 WL 728551 (1996) (No. 95-83). KFC's first complaint did not allege that the hazardous waste presented an imminent endangerment at the time of suit. See Petitioner's Brief at *6, Meghrig v. KFC Western, Inc., 1995 WL 668003 (1996) (No. 95-83) (noting that KFC amended its complaint to allege that contamination "may have presented" at some time in the past) an imminent and substantial endangerment"). The phrase "may have presented" clearly is not an imminent endangerment under a reading of RCRA's citizen suit provision. See KFC, 116 S. Ct. at 1255.

128. See id. For a discussion of the Court's interpretation of other aspects of the enforcement mechanisms contained in RCRA, see supra notes 93-100 and accompanying text.
of limitations in RCRA\textsuperscript{129} and its citizen suit provision's ninety-day notice requirement both show strong support for the Court's finding that RCRA does not allow recovery of past clean-up costs.\textsuperscript{130} However, the Court made a tenuous comparison to CERCLA by noting that costs under CERCLA's citizen suit provision must be "reasonable."\textsuperscript{131} The $211,000 which KFC spent on the clean-up of the property can be seen as reasonable without reference to a national contingency plan.\textsuperscript{132}

D. Equitable Remedies

The Court completed its analysis by addressing KFC's argument that RCRA's citizen suit provision allows for equitable restitution.\textsuperscript{133} The Court stated that courts cannot award clean-up costs under RCRA's citizen suit provision if Congress has provided "elaborate enforcement provisions."\textsuperscript{134} Further, the Court held that the

\textsuperscript{129} While not as pertinent as the discussion of the timing and remedies requirements, the Court wisely looked to CERCLA to point out that statutes with a retroactive citizen suit provision must also have a statute of limitations. See id. It is unreasonable to assume Congress would have allowed individuals to bring suit for past costs indefinitely. Such a result would be contrary to the remainder of the citizen suit provision, which allows alleged violators to have the opportunity to remedy their violations before a suit can be brought against them. See RCRA § 7002(b)(2)(B), 42 U.S.C. § 6972(b)(2)(B). For a discussion of the argument that RCRA gives alleged offenders an opportunity to remedy their violations, see supra note 29.

\textsuperscript{130} The purpose of the ninety-day requirement is to give the person who is allegedly violating RCRA an opportunity to remedy the situation before a suit is brought against them. See RCRA § 7002 (b)(2)(A), 42 U.S.C. § 6972 (b)(2)(A). For a further discussion of the purpose of the ninety-day requirement, see supra note 29 and accompanying text. If the RCRA violation had already been remedied, as it was in KFC, then the ninety-day notice requirement would serve no purpose. Therefore, the Court was correct to use this provision as evidence to support its holding. See KFC, 116 S. Ct. at 1255.

\textsuperscript{131} See KFC, 116 S. Ct. at 1255.

\textsuperscript{132} See id. The Court's determination that all costs recovered under CERCLA's citizen suit provision be reasonable does not follow from CERCLA's requirement that costs be in accordance with a "national contingency plan." See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). For a discussion of the relevant provision of CERCLA, see supra note 37 and accompanying text. It is not necessary to have a "national contingency plan" to ensure that courts will award reasonable costs. For example, the $211,000 of "equitable restitution" sought by KFC was a "reasonable" amount, because it included only the cost to remove and dispose of the oil tainted soil. See KFC, 116 S. Ct. at 1253.

\textsuperscript{133} See KFC, 116 S. Ct. at 1253. For a discussion of the concepts of equitable jurisdiction and equitable restitution, see supra notes 38-43 and accompanying text.

\textsuperscript{134} See KFC, 116 S. Ct. at 1253 (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 (1981)). The Court discussed the availability of equitable restitution under RCRA's citizen suit, although it never explicitly named equitable restitution as such during its discussion. See id. For a
limited remedies available in RCRA's citizen suit provision, along with the stark differences between it and CERCLA's citizen suit provision, prevent awards of past clean-up costs. Unfortunately, however, the Court never directly stated that RCRA's citizen suit provision foreclosed the courts' ability to grant equitable restitution, which would have foreclosed any further debate on this issue.

E. Case Law

Prior judicial decisions also played an important role in the Court's reasoning and consequent holding. The Court correctly ignored the Cort v. Ash test that the Furrer court had used as a way to determine whether RCRA supplies an implied remedy of restitution. However, the Supreme Court mistakenly applied precedent from Middlesex County Sewerage Authority v. National Sea Clammers Ass'n to determine whether Congress had revoked the courts' ability to grant equitable restitution.

It is significant that the Court ignored the Eighth Circuit's reasoning in Furrer v. Brown. The Court properly passed over the Eighth Circuit's reasoning in Furrer, even though the end result of both cases was the same. By ignoring the reasoning put forth in Furrer, the Court implicitly rejected the Eighth Circuit's use of the

discussion of the premise that a court retains equitable jurisdiction unless Congress has clearly intended otherwise, see supra notes 39-40 and accompanying text.

135. See id. at 1256.

136. See id. The Court stated that RCRA's citizen suit provision does not prevent a private party from recovering its clean-up costs "under other federal or state laws." Id. (citing 42 U.S.C. § 6972(f) (1988)). While preserving other causes of actions, this section of RCRA's citizen suit does not address the concept of equitable restitution. See RCRA § 7002(f), 42 U.S.C. § 6972(f). By citing this section, the Court failed to explicitly deny a claim for equitable restitution under RCRA's citizen suit, leaving the issue undecided for future claimants. For a further discussion of RCRA § 7002(f), 42 U.S.C. § 6972(f), see supra note 24 and accompanying text.

137. For a discussion of the reasons why the Supreme Court was correct not to use the Cort test, see infra notes 141-42. For a discussion of the test set forth in Cort, see supra note 64 and accompanying text.

138. For a discussion of Furrer, see supra notes 59-64 and accompanying text.

139. The holdings in KFC and Furrer were very similar. Compare KFC, 116 S. Ct. at 1253 ("We consider whether [RCRA's citizen suit provision] authorizes a private cause of action to recover the prior costs of cleaning up toxic waste . . . . We conclude that it does not.") with Furrer, 62 F.3d 1092, 1100 (1995) ("In sum, none of the four Cort factors tips the scales in favor of implying in [RCRA's citizen suit provision] a cause of action to recover clean-up costs."). The fact that the Supreme Court did not employ the Cort analysis implies that the Court disapproved of the Eighth Circuit's use of the Cort test.
**Cort test**\(^{140}\) as a method of determining whether KFC could recover damages under RCRA's citizen suit provision.\(^{141}\) Indeed, the Court correctly ignored the reasoning in *Furrer*, because the *Cort* test is used to determine whether a statute provides for an implicit cause of action, rather than whether a statute provides for a monetary remedy.\(^{142}\) Therefore, although the end results were the same, the Supreme Court was correct to refuse to recognize the *Cort* analysis.

Although it utilized the *Middlesex* test in its analysis, the Court misapplied this test. Because the *Middlesex* test provides a method of interpreting a statute by considering other sections of the same statute, the Court misused the *Middlesex* test by using CERCLA to interpret RCRA.\(^{143}\) While the misapplication of *Middlesex* is problematic, the Court's holding that no equitable restitution was available can still be supported by the remainder of the opinion.

When the Court stated that RCRA's citizen suit provision only provides for mandatory injunctions and prohibitory injunctions,\(^{144}\)

\(^{140}\) For a discussion of the Eighth Circuit's application of the test set forth in *Cort*, see *supra* note 63 and accompanying text.

\(^{141}\) The Court could have simply followed the reasoning set forth in *Furrer*, or at least could have used the *Furrer* opinion as evidence of the proper interpretation of RCRA. The Court did not apply *Furrer*, thereby casting doubt as to the validity of the Eighth Circuit's reasoning in that case. Rather, the Court only mentioned the Eighth Circuit's reasoning to say that the "Ninth Circuit's conclusion regarding the remedies available under RCRA conflicts with the decision of the Court of Appeals for the Eighth Circuit in *Furrer v. Brown.*" *KFC*, 116 S. Ct. at 1253-54.

\(^{142}\) See *Cort*, 422 U.S. 66, 79 (1975). In *Cort*, the Supreme Court devised a test to determine if an implied cause of action existed under a criminal statute prohibiting corporations from making election contributions. See *id.* at 80. In *Furrer*, the Eighth Circuit decided whether "it was Congress' intent to authorize a monetary remedy for private citizens when it enacted § 6972, or more precisely, when it amended the statute in 1984." *Furrer*, 62 F.3d at 1904 (emphasis added). The Eighth Circuit incorrectly applied a test for an implied cause of action to a claim for implied remedies. Thus, the Supreme Court in *KFC* appropriately ignored the Eighth Circuit's reasoning in *Cort*.

\(^{143}\) See *KFC*, 116 S. Ct. at 1256. The Court stated that RCRA's limited remedies along with CERCLA show that Congress has limited the courts' ability to award equitable restitution. See *id.* The case that the Court cites, however, deals with the provisions within the statute in question, rather than a combination of different acts. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981).

The Court dismissed the Eighth Circuit's use of the *Cort* test for a similar argument based on misuse of precedence. For a discussion of the Court's implicit dismissal of the Eighth Circuit's use of the *Cort* test, see *supra* note 137 and accompanying text. The Court fell prey to the same misapplication of past precedence by applying *Middlesex* to RCRA's citizen suits' remedies along with CERCLA's citizen suits' remedies.

\(^{144}\) "Under a plain reading of RCRA's remedial scheme ... a private citizen could seek a mandatory injunction ... or a prohibitory injunction." *KFC*, 116 S. Ct. at 1254. For a discussion of the Court's holding on injunctive remedies as well
it eliminated the possibility that equitable restitution was available under RCRA's citizen suit provision. However, the Court's misapplication of Middlesex may lead to confusion the next time a controversy arises over equitable restitution in other environmental contexts. Future litigants trying to determine whether the courts are going to exercise equitable jurisdiction will not know if they should look solely to the statute under which they are filing suit, or if they should couple different environmental acts in order to determine Congressional intent. Finally, the Court left open the possibility of recovery of clean-up costs if the costs are incurred after a RCRA suit has been properly commenced.

VI. Impact

The Court has left open the possibility for recovery of clean-up costs incurred after a RCRA citizen suit has been filed, but before any court order has been announced. It seems that such a situa-

as mandatory and prohibitory injunctions, see supra note 90 and accompanying text.

145. See KFC, 116 S. Ct. at 1254. While the statute does not seem to meet the Porter test which requires that a statute must "in so many words, or by a necessary and inescapable inference, restrict[] the court's jurisdiction in equity," the Court did not address this issue. Id.; see also Porter v. Warner Co., 328 U.S. 395, 398 (1946).

146. See KFC, 116 S. Ct. at 1256. The possibility of recovery of clean-up costs incurred after a RCRA suit has been properly commenced was posed to the Department of Justice during oral argument:

Question: Suppose the plaintiff had immediately given notice to the defendant [in October], but during the 90-day period itself under pressure, say, from town authorities, plaintiff starts cleaning up and then has to wait those 90 days to bring the suit. . . . From October to February. The plaintiff has already incurred a substantial sum. Then from the time the suit begins in February until March the clean-up is done, plaintiff incurs further expenses.

Is it your position that all of the expenses during the 90-day period plus after suit commences are reimbursable[,] or only after the suit commences?

Oral Argument at *29, Meghrig v. KFC, Western Inc., 1996 WL 14515 (1996) (No. 95-83)). A similar question was posed to the Meghrgs:

Question: But suppose that the court ordered the previous owner to clean-up under this statute [RCRA] with proper notice and the owner is contumacious. He does not obey the court's order. And the plaintiff then, giving due notice again of his intent, undertakes to clean up the – and stop the waste himself.

As an ordinary measure of contempt of court sanctions, is not the plaintiff entitled to recover the cost that he expended to avoid the harm that the defendant, in contempt of the Court's order, refused to undertake on his own?

, at *16.

147. See KFC, 116 S. Ct. at 1256.
tion would meet the timing requirement set forth in KFC.\textsuperscript{148} The vital component to such a claim would be the filing of a RCRA claim before attempting a clean-up of hazardous waste.\textsuperscript{149}

The Court refused to recognize any cause of action under RCRA when the clean-up of hazardous waste has already occurred.\textsuperscript{150} Parties who find themselves in a situation where they have already abated the endangerment of hazardous waste, however, do have the options of bringing an action under other federal

\textsuperscript{148} The KFC Court stressed that there were two main requirements to bring suit under RCRA's citizen suit provision: a timing requirement and an appropriate remedy requirement. See id. at 1255. For a discussion of the timing and remedy requirements under RCRA's citizen suit, see supra notes 82-92 and accompanying text. Using the Court's hypothetical situations in note 146, when a potential plaintiff under RCRA gives a potential defendant notice of the plaintiff's intent to clean up the contaminated area, the need to meet the timing and remedy requirements seem to be met. This scenario would seem to meet these two requirements for the following reasons.

First, as for the “timing” requirement, there are three steps needed to meet the “imminent” requirement: first, that the plaintiff filed suit previous to their clean-up measures. This would allow the court to exercise its jurisdiction over the matter. Second, the alleged defendant has to be notified of the suit, and has made no action to remedy the situation. This could be a refusal to follow a court order, as in the Court's second hypothetical in note 146. Third, the plaintiff has to meet the factual issue of whether the waste was an “imminent and substantial endangerment.” However, as long as the plaintiff can prove that the waste was threatening to cause harm immediately, the plaintiff would meet the “imminent” standard. See KFC, 116 S. Ct. at 1255 (defining “imminent”). Therefore, a plaintiff who files suit against an alleged violator, and begins to clean up the site because of the threat posed by hazardous waste, would seem to have fulfilled the timing requirement. Cf. Hallstrom v. Tillamook County, 493 U.S. 20, 26-27 (1989) (allowing exception to notice requirement). For a discussion of Hallstrom, see supra note 38 and accompanying text.

Second, in order to meet the “remedy” requirement set forth in KFC, the plaintiff would have to request an injunction requiring the other party to repay the plaintiff for his clean-up costs. See KFC, 116 S. Ct at 1256. This injunction would be seen as a “mandatory injunction” as described by the Court in KFC. See id. at 1254 (allowing injunction that “orders a responsible party to 'take action' by attending to the clean-up and proper disposal of toxic waste”). This injunction would fulfill the KFC requirement that the injunction requires the defendant “to take action and attend to the clean-up.” Id. Therefore, both the “imminent endangerment” and the “remedy requirement” would be met, and the suit would be allowed to proceed. See id.

\textsuperscript{149} For a discussion of why the recovery of clean-up costs incurred after a RCRA citizen suit was filed, but before the court had taken action, see supra note 148 and accompanying text. During oral arguments, KFC presented a variation on the hypotheticals given by the Court to the Meghrigs and the Justice Department. See Oral Argument at *33-34, Meghrig v. KFC Western, Inc., 1996 WL 14515 (1996) (No. 95-83). KFC stated that this hypothetical was a very small progression from the typically successful RCRA citizen suit, to which the Supreme Court answered: “Yes, after the case is pending. . . . [T]he court could order that.” Oral Argument at *34, Meghrig (No. 95-83) (emphasis added). For a discussion of hypotheticals that the Court presented to the parties during oral argument, see supra note 146 and accompanying text.

\textsuperscript{150} See KFC, 116 S. Ct. at 1256.
statutes, state statutes or the common law.\textsuperscript{151} Unfortunately, those who have eliminated the danger of petroleum waste, like KFC, will be unable to use CERCLA's citizen suit provision.\textsuperscript{152} For these parties, it is clear that they may not employ RCRA to recover their expenses. While this may not be the most "equitable" solution, it is clear that any change in remedies available under RCRA's citizen suit must come from Congress, for it will not come from the courts.

\textit{Timothy J. Sullivan}

\textsuperscript{151} See supra note 24 and accompanying text. RCRA states that "[n]othing in [RCRA's citizen suit] shall restrict any right which any other persons . . . may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief." RCRA § 7002(f), 42 U.S.C. § 6972(f) (1994) (emphasis added).

\textsuperscript{152} See CERCLA § 101(14), 42 U.S.C. § 9601(14) (1994). CERCLA does not cover any petroleum products. For a discussion of the relevant provision of CERCLA, see supra note 33 and accompanying text.