Journal of Natural Resources & Environmental Law

Volume 11
Issue 1 *Journal of Natural Resources & Environmental Law, Volume 11, Issue 1*

Article 7

January 1995

The RCRA Citizen Suit Provision and the Private Remedy of Restitution After *KFC Western, Inc. v. Meghrig* and *Furrer v. Brown*: Reasonable Minds May Differ

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The RCRA Citizen Suit Provision and the Private Remedy of Restitution After *KFC Western, Inc. v. Meghrig* and *Furrer v. Brown*: Reasonable Minds May Differ*

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According to a congressional House Report, the citizen suit provision of the Resource Conservation and Recovery Act[1] "confers on citizens a limited right under section 7002 to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under section 7003."[2] Exactly what limited "right" this provision "confers," however, remains subject to interpretation as disagreement in the courts concerning the available statutory remedies persists.[3] The courts are divided[4] over whether a plaintiff suing under the citizen suit provision may seek only declaratory or injunctive relief, or whether under certain circumstances a plaintiff may bring suit to recover damages.[5]

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* The United States Supreme Court recently settled the issue addressed in this Comment in *Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. 4135 (Mar. 19, 1996) (To be reported at 116 S.Ct. 1251). The Court rendered this opinion a short time before this Comment was scheduled to go to print. The addendum to this Comment contains an analysis of the Court's opinion.

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[1] Solid Waste Disposal Act, as amended, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992K (1984) [hereinafter RCRA].

[2] H.R. REP. NO. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. Section 7003 is the provision conferring enforcement authority on the EPA Administrator.

[3] For a summary of cases involving disputes over standing, the meaning of "citizen," etc., see William B. Johnson, Annotation, Right to Maintain Citizen Suit under § 7002 of Resource Conservation and Recovery Act, 91 A.L.R. Fed. 436 (1994).

[4] KFC Western v. Meghrig, 49 F.3d 518 (9th Cir. 1995) (allowing restitution as a remedy); Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995) (disallowing an action for restitution).

[5] For purposes of this Comment, the terms restitution and damages will be used

The citizen suit provision does not expressly provide for a damages remedy.[6] Thus, in light of congressional silence, the courts have turned to an analysis of legislative history, statutory purpose, and other factors in an attempt to extrapolate congressional intent.[7]

Under the RCRA citizen suit provision, section 6972(a)(1)(B), a plaintiff may bring an action against anyone:

> 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 an substantial endangerment to health or the environment.[8]

This language, concerned with contributors to a situation that poses an "imminent and substantial endangerment," appears to focus on rectifying a currently dangerous situation. This interpretation seems to be corroborated by the statute's remedial language vesting in the federal courts the power to "restrain" any such contributors. Yet litigants and some courts have posed a question of interpretation that may be summarized as follows: should a plaintiff be permitted to bring a citizen suit only when a *current* "imminent and substantial endangerment" exists; or, should a plaintiff be permitted to bring a contribution action after remediating a *past* "imminent and substantial endangerment?"

Many court opinions, either directly or indirectly, refer to this statutory directive to abate an "imminent and substantial endangerment" to support the notion that the sole statutory purpose is to allow private citizens to act as "private attorneys general,"[9] and not

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interchangeably to indicate a payment of money as a remedy. This is distinguished from injunctions and enjoinment actions that focus more on prohibiting dangerous conduct.

[6] *Furrer*, 62 F.3d at 1094 (stating that "The statute does not give the district courts express authority in citizen suits to award money judgments for costs incurred in cleaning up contaminated sites.").

[7] The *Furrer* court employed the analysis proffered by the United States Supreme Court in Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975). The four-part analysis includes: 1) determining if the plaintiff is in the class of persons to be protected; 2) interpreting the legislative history to determine legislative intent; 3) determining if the statutory purpose would be furthered by allowing such a remedy; and, 4) deciding whether the issue would be better dealt with by the state courts. The *Furrer* court, after determining that the plaintiff had failed the first three factors, virtually dismissed the fourth factor as moot. *Id. See infra*, text accompanying notes 71 - 88.

[8] RCRA, 42 U.S.C. § 6972(a)(1)(b) (1984).

[9] Portsmouth Redevelopment and Housing Authority v. BMI Apartments Associ-

to provide an avenue for compensation.[10] At least one circuit, however, recently held otherwise and allowed a RCRA citizen suit for damages.[11]

Most of the cases in this area involve contribution actions with a similar fact pattern.[12] Purchaser acquires a parcel of land from a seller. Prior to this transaction, either a previous owner, a previous lessee, or the seller operated a gasoline filling station on the premises.[13] After the property ceased to be used as a filling station, the underground storage tanks, with some contents still inside, were not removed. The tanks deteriorated and began to leak petroleum. Purchaser, unaware and uninformed by seller, becomes the owner of a contaminated site which must be either cleaned up voluntarily or at the behest of a state or federal environmental agency. After incurring several thousand dollars[14] in cleanup costs, Purchaser sues the alleged responsible party for contribution using the RCRA citizen suit provision.[15]

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ates, 847 F. Supp. 380 (E.D. Va 1994).

[10] Milbut v. Hi Score Plant Food Co., 1992 WL 396774 (E.D. Pa. 1992); Agric. Excess and Surplus Ins. Co. v. A.B.D. Tank & Pump Co., 878 F. Supp. 669 (N.D. Ill. 1995); 325-343 E. 56th Street Corp. v. Mobil Oil Corp., 906 F. Supp. 669 (D.D.C. 1995); Triffler v. Hopf, 1994 WL 643237 (N.D. Ill. 1994); Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co., Inc., 989 F.2d 1305 (2d Cir. 1993); City of Toledo v. Beazer Materials and Services, Inc., 833 F. Supp. 646 (N.D. Ohio 1993); Murray v. Bath Iron Works, 867 F. Supp. 33 (D. Me. 1994); Commerce Holding Co. Inc. v. Buckstone, 749 F. Supp. 441 (E.D.N.Y. 1990).

[11] KFC Western v. Meghrig, 49 F.3d 518 (9th Cir. 1995).

[12] *See, e.g.*, Zands v. Nelson, 779 F. Supp. 1254 (S.D. Cal. 1991); Circuit City Stores, Inc. v. Citgo Petroleum Corp., 1994 WL 483463 (E.D. Pa. 1994); Triffler v. Hopf, 1994 WL 643237 (N.D. Ill. 1994); Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc., 877 F. Supp. 476 (D. Minn. 1995); Painewebber Income Properties Three Ltd. Partnership v. Mobil Oil Corp., 902 F. Supp. 1514 (M.D. Fla. 1995); E. 56th Street Corp. v. Mobil Oil Corp., 906 F. Supp. 669 (D.C. 1995); *KFC Western*, 49 F.3d 518; Furrer v. Brown, 69 F.3d 1092 (8th Cir. 1995).

[13] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 9601 does not include petroleum products. Thus, the plaintiffs must resort to RCRA or state law for a remedy. 42 U.S.C. § 9601 (1988).

[14] In *KFC Western*, 49 F.3d 518, the costs exceeded $200,000.

[15] In *Craig Lyle Ltd. Partnership*, 877 F. Supp. 476 (D. Minn. 1995), the court dealt with the question of whether leaked petroleum constituted a "hazardous" or "solid waste" as defined by RCRA. The court began by referring to RCRA § 6903(27) which defines "solid waste" as "any garbage, refuse . . . discarded material, including solid, liquid . . . material resulting from industrial, commercial . . . and community activities" *Id.* at 480. The court then noted that RCRA regulations define solid waste as "any discarded material," and discarded material is material that is "abandoned." 40 C.F.R. § 261.2(a) (1995). Abandoned materials are those that have been "disposed of." 40 C.F.R. § 261.2(b) (1995). The court further noted that § 261.1(b)(1) states that its definition of solid waste only applies to wastes that are also hazardous for purposes of subtitle C of RCRA. The court then simply concluded that other courts "interpreting this provision

In *KFC Western, Inc. v. Meghrig*, the Ninth Circuit, largely relying on Eighth Circuit precedent, held that the RCRA citizen suit provision affords the remedy of restitution.[16] Subsequently, in *Furrer v. Brown*, the Eighth Circuit held that the citizen suit provision of RCRA does not confer upon citizens the right to sue individuals for restitution of cleanup costs.[17] Though employing an analysis similar to that of the Ninth Circuit's in *KFC Western*, the *Furrer* court came to a contrary conclusion,[18] despite the fact that the 1984 Amendment to RCRA was intended to "clarify the breadth of section 703 as to the persons, conditions and acts it covers."[19]

The purpose of this Comment is to provide an analysis of the *KFC Western* and *Furrer* decisions. Part I of this comment analyzes RCRA section 6972, focusing on judicial interpretation of the "imminent and substantial endangerment" requirement of section 6972(a)(1)(B) and the statute's broad grant of remedial powers. Part II analyzes *KFC Western v. Meghrig*, the Ninth Circuit case preceding the Eighth Circuit's decision in *Furrer*. Here the paper will analyze both Eighth Circuit precedent relied on by the *KFC Western* court as well as the *KFC Western* decision itself. A treatment of the *Furrer* decision comprises Part III, where the Comment contrasts the *Furrer* court's strict, no nonsense statutory construction with that Circuit's own interpretively liberal precedent. Finally, an addendum analyzes the Supreme Court's recent decision in *Meghrig v. KFC Western, Inc.*

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have concluded that it applies to citizen suits brought under section 6972(a)(1)(B)." *Id.* at 481. Nonetheless, the court clarified by citing Congress' intent to include within the definition of discarded material those products that no longer were wanted or served their intended purpose. *Id.* at 481 (citing Connecticut Coastal Fisherman's Ass'n v. Remington Arms, 989 F.2d 1305, 1314 (2d. Cir. 1993) (quoting H.R. REP. NO. 1491, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 USCCAN 6238, 6241)). Relying on this definition, the court logically concluded that gasoline that has leaked from its storage tank into the ground is no longer useful for its intended purpose. *See* Zands v. Nelson, 779 F. Supp. 1254 (S.D.Cal.1992). *See also Connecticut Coastal*, 989 F.2d 1305.

[16] *KFC Western*, 49 F.3d 518.

[17] Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995).

[18] *Id.*

[19] H.R. REP. NO. 616, 98th Cong., 2nd Sess., reprinted in 1984 U.S.C.C.A.N. 5576, 5606.

I. THE CITIZEN SUIT PROVISION[20]

A. Requirement of an "Imminent and Substantial Endangerment"

Under the citizen suit provision, no actual harm must be proven—only the potential for actual harm.[21] However, as previously noted, vital to maintaining an action under the RCRA citizen suit

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[20] RCRA, 42 U.S.C. § 6972. Section 6972 in pertinent part reads:

(a) In General

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present 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; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling , storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928 (a) and (g) of this title.

[21] Dague v. City of Burlington, 732 F. Supp. 458 (D. Vt. 1989). Murray v. Bath Iron Works Corp., 867 F. Supp. 33, 41 (D. Me. 1994) and City of Toledo v. Beazer Materials and Services, Inc., 833 F. Supp. 646 (N.D. Ohio 1993) imply that if this burden is not met the plaintiff will be out of court.

provision is the plaintiff's showing that the hazard "may present an imminent and substantial endangerment."[22] The question remains: when must the imminent and substantial endangerment exist in order to bring an action? Must it exist at the time the action is filed, or will any prior "imminent and substantial endangerment" suffice?[23]

The grounds upon which a citizen suit is brought appear to be closely connected to the remedy that the court will afford.[24] By strictly interpreting this requirement to allow suits only in situations currently presenting an imminent and substantial endangerment, a court ensures a situation easily—though not necessarily exclusively—remedied by the grant of an injunction.[25] In contrast, reading the requirement to include post-cleanup contribution actions for wholly past events that at one time presented, but no longer present, an imminent and substantial endangerment, generates situations where injunctive relief would be illusory, and the only apparent suitable remedy would be either restitution or the payment of damages.[26]

B. "Other Action As May Be Necessary"

The RCRA citizen suit provision's remedial clause empowers courts to order parties to "take other action as may be necessary." The language in pertinent part reads:

> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), *to order such person to take such other action as may be necessary, or both.*[27]

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[22] United States v. Aceto Agric. Chemical Corp., 872 F.2d 1373 (8th Cir. 1989); Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc., 877 F. Supp 476 (D. Minn. 1995); Murray v. Bath Iron Works Corporation, 867 F. Supp. 33, 41 (D. Me. 1994); City of Toledo v. Beazer Materials and Services, Inc., 833 F. Supp. 646 (N.D. Ohio 1993).

[23] KFC Western v. Meghrig, 49 F.3d 518 (9th Cir. 1995).

[24] Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D. N.Y. 1990), stated in reference to § 6972(a)(1)(B), "While this grant of standing is apparently quite broad, its breadth is tempered by the type of relief available."

[25] *Id.* (holding that injunctive relief is available under § 6972(a)).

[26] *KFC Western*, 49 F.3d 518.

[27] RCRA, 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

Presumably, in addition to reading the word imminent in the "imminent and substantial endangerment" requirement to mean anytime, this remedial language could be read as vesting in a court the power to fashion any remedy it feels necessary, including damages.[28] The *KFC Western* decision is the first to do so.[29]

C. Case Law

The courts that have interpreted the imminent and substantial endangerment language of section 6972(a)(1)(b) have generally applied a strict reading. With a few exceptions, courts have held that in order to bring an action under section section 6972(a)(1)(B), the endangerment must exist at the time the action is filed.[30]

In *Murray v. Bath Iron Works Corp.*, citizens sued under RCRA section 6972(a)(1)(B) to force the cleanup of a landfill site that allegedly contaminated their water supply.[31] The plaintiffs alleged that the site continued to pose an imminent and substantial endangerment.[32] True to the language of the statute, the court held:

> although RCRA as a whole is basically prospective in approach, designed to prevent improper disposal of waste in the future, a citizen suit under section 6972(a)(2)(B) does reach past conduct involving the disposal of solid waste, but *only to the extent that such past conduct continues to produce a present endangerment.*"[33]

In *City of Toledo v. Beazer Materials and Services, Inc.*, the city brought a section 6972(a)(1)(B) action against the owners of a coke oven.[34] The court held that, "under the imminent hazard citizen suit, the endangerment must be ongoing, but the conduct that creat-

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[28] H.R. REP. NO. 98-198, 98th Cong. 1st Sess. 1983, *reprinted in* 1984 U.S.C.C.A.N. 5576.

[29] *KFC Western*, 49 F.3d 518. The court relied on this language to conclude that the statute allowed any relief the district court deemed necessary.

[30] Murray v. Bath Iron Works Corporation, 867 F. Supp. 33, 41 (D. Me 1994); City of Toledo v. Beazer Materials and Services, Inc., 833 F. Supp. 646 (N.D. Ohio 1993).

[31] *Murray*, 867 F. Supp. at 41.

[32] *Id.*

[33] *Id.* (citing Connecticut Coastal Fishermen's Ass'n. v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir. 1993) (emphasis added). *See also* Price v. United States Navy, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1400 (D. N.H. 1985).

[34] 833 F. Supp. 646 (N.D. Ohio 1993).

ed the endangerment need not be."[35]

Other than *KFC Western*, cases involving section 6972(a)(1)(B) unanimously hold that restitution is not an available remedy.[36] For example, in *Portsmouth Redevelopment and Housing Authority v. BMI Apartments*, the plaintiff sued several previous owners and operators of a gas producing plant under section 6972(a)(1)(B).[37] Plaintiff sought an injunction to order defendants to pay costs associated with clean-ups and monitoring of the site.[38] After concluding that the prayer for injunctive relief was truly a prayer for damages, the court analyzed the case accordingly,[39] stating:

> [T]he plain language of the statute confers limited jurisdiction on the district courts in citizen suits under RCRA and the determination of liability for, and the allocation of the costs of, the cleanup of abandoned waste sites are not among those powers. [C]onsidering that CERCLA expressly controls the allocation of the remedial and response costs involved in the cleanup of inactive sites, it is not surprising that Congress did not provide for the discharge of those responsibilities by the district courts when it amended RCRA in 1984 to confer injunctive powers on the district courts in dealing with past conduct. BMI is asking for relief

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[35] *Id.* at 654 (quoting *Connecticut Coastal*, 989 F.2d at 1316).

[36] Portsmouth Redev. and Hous. Auth. v. BMI Apartment Assoc., 847 F. Supp. 380 (E.D. Va. 1994); Murry v. Bath Iron Works Corp., 867 F. Supp. 33 (D. Me. 1994); Circuit City Stores, Inc. v. Citgo Petroleum Corp., 1994 WL 483463 (E.D. Pa. 1994); Triffler v. Hopf, 1994 WL 643237 (N.D. Ill. 1994); Furrer v. Brown, 69 F.3d 1092 (8th Cir. 1995); Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc., 877 F. Supp. 476 (D. Minn 1995); PaineWebber Income Properties Three Ltd. Partnership v. Mobil Oil Corp., 902 F. Supp. 1514 (M.D. Fla. 1995); E. 56th Street Corp. v. Mobil Oil Corp., 906 F. Supp. 669 (D.C. 1995).

[37] *Portsmouth*, 847 F. Supp. at 380. In a footnote, the court acknowledged Gache v. Town of Harrison, 813 F. Supp. 1037 (S.D. N.Y. 1993), stating that "the continued presence of hazardous substances which present a threat of harm, even though the act which created the hazard has passed, constitutes a continuing violation of RCRA." *Portsmouth*, 847 F. Supp. at 384. In *Gache*, the plaintiff brought an action under RCRA §§ 6972(a)(1)(A) and 6972(a)(1)(B), alleging the city's past operation of a landfill resulted in a site that presented a continued violation of RCRA. While the *Gache* court used language similar to that which the *Portsmouth* court cited, that language appeared in the discussion of § 6972(a)(1)(A) claims, an analysis that courts have consistently acknowledged as distinguishable from a §6972(a)(1)(B) analysis. Under a § 6972 (a)(1)(A) analysis, the *Gache* court, consistent with Dague v. City of Burlington, 731 F. Supp. 458 (D. Vt. 1989), held only that the harm threatened need not be an "actual harm," but only a potential for harm.

[38] *Portsmouth*, 847 F. Supp at 384.

[39] *Id.* The court relied on Jaffee v. United States, 592 F.2d 712, 715 (3rd Cir. 1984) ("A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money.").

> 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. . . .'[40]

The court went on to hold that a suit for money damages was outside the court's jurisdiction.[41]

In *Commerce Holding Company v. Buckstone*, the EPA and Commerce entered into a consent agreement in which Commerce would conduct response and remediation activities.[42] Commerce sought repayment under RCRA section 6972(a)(1)(B). The court stated that, "[w]hile injunctive relief is available under §6972(a)(1)(B), the statute does not provide a private action for damages."[43] In response to Commerce's claim that its requests were for equitable relief, the court stated:

> If awarded this relief, Commerce would be the direct beneficiary of the substantive relief. Thus, regardless of how the request is denominated, it does not comport with the statute's purpose of allowing private parties to bring suit if "genuinely acting as private attorneys general rather than pursuing a private remedy."[44]

Accordingly, the court disallowed Commerce's claim for restitution.

II. *KFC WESTERN V. MEGHRIG*

A. Facts

In 1975, KFC Western, Inc. purchased from Alan and Margaret

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[40] Portsmouth Redev. and Hous. Auth. v. BMI Apartment Assoc., 847 F. Supp. 380, 385 (E.D. Va. 1994) (quoting Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983)). The Portsmouth court further stated, "The amendment of the citizen-suit provision has not affected this interpretation of RCRA to not allow the claimant to be the direct beneficiary of the relief." *Id.*

[41] *Id. See* Gache v. Town of Harrison, New York, 813 F. Supp. 1037 (S.D. N.Y. 1993) (holding that, "RCRA does not authorize a plaintiff in a citizen suit to recover remediation costs.").

[42] 749 F. Supp. 441 (E.D. N.Y. 1990).

[43] *Id.* at 445.

[44] *Id.* (quoting *Lamphier*, 714 F.2d at 337). Though not followed, a noteworthy case is the ninth circuit's own Kaufman and Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468 (N.D. Cal. 1993). In that case the district court implemented the *Commerce Holding* court's analysis, similarly concluding that § 6972(a)(1)(B) reserves no implied private right of restitution. Most notable is the district court's refusal to grant the plaintiff's wish that the court follow cases interpreting RCRA § 6973, a reading the Ninth Circuit eventually adopted in *KFC Western.*

Meghrig a parcel of property on which KFC planned to establish and operate a Kentucky Fried Chicken Restaurant.[45] The Meghrigs failed to inform KFC that the property contained petroleum product contamination,[46] allegedly caused by the Meghrig's negligent operation of a filling station.[47] In 1988, while conducting improvements on the property, KFC discovered the contamination.[48] The City of Los Angeles Department of Building and Safety ordered construction halted until a soil analysis was completed and the Los Angeles Department of Health Services (DHS) issued clearance.[49] Contamination was confirmed and the DHS mandated a clean-up, which cost KFC $211,000 to complete.[50] Upon the Meghrig's refusal to reimburse the costs, KFC sued in district court under RCRA section 6972(a)(1)(B) seeking restitution.[51]

B. Analysis

1. Interpretation of Imminent and Substantial Endangerment Requirement: Reliance on *United States v. Aceto Agricultural Chemical*[52]

Before the Ninth Circuit reached the remedy issue, the court

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[45] KFC Western v. Meghrig, 49 F.3d 518 (9th Cir. 1995).

[46] *Id.* The contaminants were benzene and lead.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] 872 F.2d 1373 (8th Cir. 1989). *Aceto* similarly involved a past cleanup for which recovery was sought; however, that case involved an action brought by the Iowa state government under § 7003, as amended, RCRA § 6973, a nearly identical provision that allows the Administrator to bring a suit. The *Aceto* court quoted that provision in pertinent part:

> upon receipt of evidence that the past or present handling, storage, [and other activities], of any solid waste or hazardous waste may present an imminent and substantial endangerment. . . the Administrator may bring suit . . . to restrain [any] person [including past or present generator, past or present transporter, past or present owner or operator of a treatment, storage, or disposal facility] who has contributed or who is contributing to such handling, storage. . . .

Id. at 1382. The court then simply stated that, based on the language, section 7003 "specifically applies to past generators and transporters." While this statement is correct, it supplies no answer to the question of whether the "imminent and substantial endangerment" must exist at the time of the suit.

grappled with the Meghrigs' contention that, because the site had already been cleaned up, KFC had not shown there to be an "imminent and substantial endangerment" as required by section 6972(a)(1)(B).[53] Noting that some of the legislative history supported the Meghrigs' contention, the court held that RCRA authorizes citizen suits for contamination that at some point in the past posed an imminent and substantial danger.[54] The *KFC Western* court based its opinion largely on reasoning proffered in *United States v. Aceto Agricultural Chemicals Corp.*, where the Eighth Circuit held in a similar action brought by the EPA under RCRA section 6973[55] that the imminent and substantial endangerment requirement limits RCRA's coverage to cases where the potential for harm is great, but does not in any way limit the temporal relationship between the existence of the imminent and substantial endangerment and the filing of the action.[56]

In *Aceto*, the defendant claimed that because the site already had been cleaned up by the time the action was filed, the EPA could not meet the "imminent and substantial endangerment" re-

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[53] KFC v. Meghrig, 49 F.3d 518 (9th Cir. 1995). Interestingly, the Meghrigs did not challenge the retroactivity of §6972(a)(1)(B) (the sale occurred in 1975, one year before the passage of RCRA), an issue that has yet to be resolved. Portsmouth Redev. and Hous. Auth. v. BMI Apartments Assoc., 847 F. Supp. 380 (E.D. Va. 1994) (holding that the court did not have jurisdiction over a damage suit under RCRA), stated: "Whether RCRA applies to inactive disposal sites would not determine the issue presented in this action because it still would be necessary to determine whether it applies to owners who sold the property before RCRA's enactment. It is not necessary, though, to reach that thorny issue. . . ." *Id.* at 384.

[54] *KFC Western*, 49 F.3d at 520. Finding a cause of action, the court referred to the legislative history and its interpretation of the word imminence. The court stated: "Imminence in this section applies to the nature of the threat. . . . The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment." *Id.* (quoting *Staff of House Subcommittee on Oversight and Investigation, Committee on Interstate and Foreign Commerce*, 96th Cong., 1st Sess., Hazardous Waste Disposal 32 (Comm. Print 96-IFC 31, 1979) ("Eckhardt Report")). The court then cited Dague v. City of Burlington, 935 F.2d 1343, 1356 (2d. Cir. 1991) (imminent hazard requires proof that a risk of harm is present); United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982) (noting that imminent danger existed at the time of the district court's hearing). Despite precedent that points to a contrary conclusion, the 9th Circuit ultimately relied upon the Eighth Circuit's holding in United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989). That case involved a nearly identical provision that provides the Administrator with a cause of action. There the court read the imminent endangerment requirement as "limiting the reach of RCRA to sites where the potential for harm is great" but not as limiting the time for filing an action.

[55] *KFC Western*, 49 F.3d at 521.

[56] United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373, 1383 (8th. Cir. 1989).

quirement.[57] In response, the court stated:

> We agree with the district court, however, that RCRA's 'imminent and substantial endangerment' language does not require the EPA to file and prosecute its RCRA action while the endangerment exists. As the district court aptly noted, in the context of a reimbursement action, this would be an 'absurd and unnecessary' requirement.[58]

The *Aceto* court assumed a reimbursement action to be a proper remedy, then reasoned backward that to allow a reimbursement action and simultaneously require an "imminent and substantial endangerment" be present would be nonsensical.[59] Given that section 6973, like section 6972, expressly requires an "imminent and substantial endangerment," and a reimbursement remedy exists, if at all, only by inference, the court appears to have assumed away the issue of whether reimbursement is proper.[60] This analysis begs the question of how relevant a section 6973 analysis is in the context of a section 6972 discussion.

The *KFC Western* court ultimately applied the section 6973 analysis by analogy to a section 6972(a)(1)(B) case, reversing *Kaufman Broad-South Bay v. Unisys Corp.*, an intra-circuit district court case that declined to apply a section 6973 analysis to a section 6972(a)(1)(B) case.[61]

2. Restitution Granted: Reliance on RCRA section 6973(a)

Relying on the statutory language granting the court the power to order "any other action as may be necessary," the *KFC Western* court concluded restitution was the proper remedy.[62] The court stated, "Because Congress intended that citizen suits be governed by the same standards of liability as governmental actions, and because it worded the provisions almost identically, we choose to interpret

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[57] *Id.*

[58] *Id.*

[59] *See generally*, Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995).

[60] *Aceto*, 872 F.2d 1373. In United States v. Price, 688 F.2d 204 (3d Cir. 1982), the court held that the government is allowed a cause of action for reimbursement under section 6973.

[61] KFC Western v. Meghrig, 49 F.3d 518 (9th Cir. 1995) (reversing Kaufman and Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468 (N.D. Cal. 1993)).

[62] *Id.* The court stated, "KFC's action to collect restitution of clean-up falls within the statutory allowance for district court orders that defendants take 'such other action as may be necessary. . . .'" *Id.* at 521.

similarly the relief available under the two provisions."[63] The court bolstered its position with the observation that Congress granted the right to sue pursuant to the standards of liability established under section 6973.[64] However, the court acknowledged that Congress intended that citizens be given only a "'Limited' right to sue pursuant to . . . § 6973,"[65]and conceded that, "the legislative history cuts both ways."[66]

III. *FURRER V. BROWN*: CLARIFICATION OR CONTRADICTION

A. Facts

The Furrers purchased a parcel of property leased by the previous owners to Shell Oil Company, whereupon Shell operated a service station.[67] In 1991, the Furrers discovered contamination from leaking underground gasoline storage tanks.[68] Shortly thereafter, the Missouri Department of Natural Resouces (DNR) ordered the contamination remediated.[69] The Furrers sought restitution pursuant to RCRA section 6972(a)(1)(B).

B. Analysis

After concluding "[t]he statute does not give the district courts express authority . . . to award money judgments,"[70]the *Furrer* court turned to the Supreme Court's decision in *Cort v. Ash* for guidance in its determination of the presence of an implied cause of action.[71] The *Cort* decision enunciated four factors to analyze when searching for an implied cause of action: (1) Whether the plaintiff is in the statutory class of those to be protected; (2) the statute's legislative history; (3) the sought after remedy in the context of the statutory purpose; and (4) whether the action is traditionally within

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[63] *Id.* at 521-22. The *KFC Western* court, in a footnote, analyzed the legislative history stating, "The legislative history for the 1984 Amendments suggests that when Congress added the endangerment provision it did not intend to grant a narrower right of action to citizens than to the Administrator. . . ." *Id.* at 522 n. 3.

[64] *Id.* at 522 note 3.

[65] *Id.*

[66] *Id.*

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

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1094.

[71] *Id.* (citing Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)).

the province of state law to the extent that inferring a federal remedy would be inappropriate.[72]

The court first sought to determine if the plaintiffs were among the class of persons to be protected. In a succinct analysis, the *Furrer* court noted, "Clearly, the Furrers as 'citizens' are among the 'any persons' who are authorized to bring suit. . . .[T]he 'benefit' of RCRA, however, inures to all citizens of the United States. . . ."[73] The court then concluded that the Furrers sought a "special benefit," and held that RCRA was not enacted to confer such a benefit on those in the Furrer's situation.[74]

As may be expected, the Furrers invoked the section 6972(a)(1)(B) language vesting in courts the power to take "other action as may be necessary" to argue that restitution is a proper remedy.[75] The court, after asserting that this was an overstatement, postulated that the language may authorize the court to order a party to investigate and/or remediate a site.[76] The court then stated, "jurisdiction 'to enforce' or 'to restrain' does not encompass the authority to award monetary relief. '[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'"[77]

Next, the court turned to an analysis of a CERCLA citizen suit provision with similar "to order such action as may be necessary" language.[78] Realizing that the CERCLA citizen suit lacked a cause of action for monetary recovery, Congress enacted section 9613(f)(1) to expressly allow a contribution action.[79] The court observed, "In other federal environmental legislation, Congress authorized suits for similar injunctive relief, but then specifically gave federal courts authority to hear claims for monetary recovery as well."[80] Implicit here is that if Congress intended to allow a cause of action for monetary recovery, it would have expressly done so.[81]

In its discussion of the legislative history of RCRA section

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[72] Furrer v. Brown, 62 F.3d 1092, 1095 (8th Cir. 1995).

[73] *Id.* at 1095.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 1095-96.

[77] *Id.* at 1096 (quoting National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974)).

[78] CERCLA, 42 U.S.C. § 9659 (1988).

[79] Furrer v. Brown, 62 F.3d 1092, 1096 (8th Cir. 1995).

[80] *Id. at 1097.*

[81] *Id.*

6972(a)(1)(B) and its 1984 Amendments, the *Furrer* court remarked that "as is to be expected, because the statute did not 'expressly create or deny' the remedy the Furrers seek, the legislative history is 'equally silent or ambiguous on the question.'"[82] Conceding that the legislative history does not specifically deny a monetary recovery action, the court observed that there is no indication that Congress intended to allow such an action either.[83] The court concluded by warning that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best."[84]

Although inclined to cease there, the *Furrer* court determined whether the remedy sought was "necessary to effectuate the statutory purpose."[85] The court looked to RCRA's stated objective to "promote the protection of health and the environment and to conserve valuable material and energy resources," and the fact that section 6902(a) sets forth eleven objectives of RCRA, none of which pertain to the citizen suit provision, much less sanction private suits for monetary recovery, to conclude that RCRA's purpose is prevention rather than restitution.[86] However, to allow private monetary actions creates a greater possibility of liability, arguably a heightened incentive to not contribute in any way to the contamination of a property. Thus, allowing a private action for restitution is not inconsistent with the goal of prevention.

Finally, having found the Furrers to have failed the first three factors, the court merely noted that its disallowance of a cause of action in no way affected the Furrers' state law remedies.[87]

C. Criticism of *KFC Western*

In an arguably superfluous section, the *Furrer* court criticized the *KFC Western* decision for "summarily stat[ing] that, '[b]ecause Congress intended that citizen suits be governed by the same standards of liability as governmental actions, and because it worded the provisions almost identically, we choose to interpret similarly the

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[82] *Id.* at 1097 (quoting Cannon v. University of Chicago, 441 U.S. 677, 694, 99 S.Ct. 1946, 1955, 69 L.Ed.2d 560 (1979)).

[83] *Furrer*, 62 F.3d at 1097 (8th Cir. 1995).

[84] *Id.* (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979)).

[85] *Id.* (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964)).

[86] *Id.* at 1097-98.

[87] *Furrer*, 62 F.3d at 1099.

relief available under the two provisions.'"[88] The *Furrer* court then turned to the *KFC Western* court's support for their statement that, "[n]othing (in the legislative history) indicates that Congress intended citizen suits to serve a purpose different from that served by governmental actions."[89] The *Furrer* court remarked, "it is a *non sequitur* that the remedies available to the respective plaintiffs must be the same."[90]

D. Inconsistency with *Aceto*

Quite notably, the Eighth Circuit holding in *Furrer* addressed the "imminent and substantial endangerment" requirement by simply stating, "[w]e do not decide that issue."[91] In dicta, however, the court noted that because the defendant in *Aceto* never raised the issue of subject matter jurisdiction, and the fact that both the district and circuit court in that case assumed subject matter jurisdiction *sub silentio*, the case is not stare decisis on the issue.[92]

The *Furrer* court's reasoning is highly inconsistent with the pervasive language of *Aceto* to the effect that, "The purpose of the statute is to give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment."[93] The *Aceto* court continued, "The relevant legislative history supports a broad, rather than narrow construction. . . . RCRA is a remedial statute, which should be liberally construed."[94] The *Furrer* court's narrower interpretation implies that the court would not apply the same reasoning again, at least not to a section 6972(a)(1)(B) case.

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[88] *Id.* at 1100 (quoting KFC Western v. Meghrig, 49 F.3d 518, 521-22).

[89] *Furrer*, 62 F.3d at 1100 (citing *KFC Western*, 49 F.3d at 521 n. 3).

[90] *Id.*

[91] *Id.* at 1095 n. 6.

[92] *Id.* at 1101.

[93] United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) (citations omitted).

[94] *Id.*

COMMENT ADDENDUM

The United States Supreme court recently settled this issue in *Meghrig v. KFC Western, Inc.*,[95] holding that section 6972(a)(1)(B) does not contemplate the award of past cleanup costs upon the allegation that a site posed an imminent and substantial endangerment at some point in the past.[96] After labeling the Ninth Circuit's decision in *KFC Western, Inc. v. Meghrig* a "novel application of federal statutory law,"[97] the Court, not unlike the *Furrer v. Brown* court, focused its inquiry on the statutory language and remedial scheme to reach its conclusion.[98] The Court bolstered its position with an analysis of RCRA's statutory purpose as evidenced by its posture within the federal environmental statutory framework, especially relative to CERCLA.[99]

The Court began by identifying that while RCRA is a comprehensive statute designed to regulate the treatment, storage, and disposal of solid and hazardous waste, 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."[100] RCRA's purpose, according to the Court, is to *ex ante* reduce hazardous waste and to guarantee appropriate treatment, storage and disposal of waste that is generated despite reduction efforts.[101]

The Court then read the statutory language as revealing two textual aspects of RCRA section 6972(a)(2)(B) that support the conclusion that no implied damages right exists.[102] The first is the requirement that the hazardous waste " . . . *may present* an *imminent* and substantial endangerment. . . ."[103] The Court maintained that "the meaning of this timing restriction is plain: An endangerment can only be 'imminent' if it 'threaten[s] to occur immediately,'and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger."[104]

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[95] 64 U.S.L.W. 4135 (Mar. 19, 1996) (To be reported at 116 S.Ct. 1251).

[96] The Court rendered this opinion a short time before this Comment was scheduled to go to print. Consequently, this addendum was prepared after the rest of the paper was completed.

[97] Meghrig v. KFC Western, 64 U.S.L.W. 4135, 4136 (Mar. 19, 1996).

[98] *Supra*, notes 72-77 and accompaying text.

[99] *Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. at 4136.

[100] *Id.*

[101] Meghrig v. KFC Western, Inc., 64 U.S.L.W. 4135, 4136 (Mar. 19, 1996).

[102] *Id. See supra* notes 28-44 and accompanying text.

[103] *Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. at 4136.

[104] *Id.* at 4137 (quoting Webster's New International Dictionary of English Language

Although persuasive, the Court seems to have engaged in the typical analysis: imminence means imminence.[105]

The second limitation of section 6972(a)(1)(B) that the court believed precludes an implied damages action is the remedies section itself. That section, as previously mentioned,[106] confers on the district courts the authority "to restrain any person . . . to order such person to take such other action as may be necessary, or both."[107] The Court read the statutory language in the remedies section to confer on the district court the authority to grant either a mandatory injunction, ordering a party to "take action" in the form of cleaning up a site and/or disposing of waste, or a prohibitory injunction, to "restrain" a party from activity violative of RCRA.[108] The Court stands on strong textual ground here when it states that "neither remedy, however, is susceptible of the interpretation adopted by the Ninth Circuit, as neither contemplates the award of past cleanup costs. . . ."[109]

The Court next compared and contrasted RCRA with CERCLA to provide some insight into congressional intent.[110] Because RCRA and CERCLA address many of the same waste issues,[111] the Court found persuasive the fact that similar CERCLA provisions expressly provide for contribution actions.[112] Also important were two other aspects of the statutes. The first is that the cost-recovery provisions in CERCLA have a statute of limitations and require a showing that one is seeking reasonable response costs; RCRA has neither.[113] The Court characterized the absence of such provisions from RCRA as "striking," if this statute were intended to operate as

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1245 (2d ed. 1934)).

[105] The Court missed its opportunity to clarify this pesky language. The term "imminent" itself adds little to the question of when the imminence must occur, and, therefore, requires some modifier for clarification. The Court intimates that the modifying phrase "may present" adds a temporal element, but that too seems ambiguous. Is that phrase intended to dinstinguish present situations from past ones, or is it intended to distinguish situations in which there is only a probability of a threat from ones that definitely "present" a threat? The Court does not address these ambiguities, but merely concludes that the threat must exist at the time of suit.

[106] *See supra* note 27 and accompanying text.

[107] Meghrig v. KFC Western, Inc., 64 U.S.L.W. 4135, 4136 (Mar. 19, 1996). *See supra* note 20.

[108] *Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. at 4136-37.

[109] *Id.* at 4137.

[110] *Id.*

[111] Meghrig v. KFC Western, Inc., 64 U.S.L.W. 4135, 4137 (Mar. 19, 1996).

[112] *Id. See* CERCLA, 42 U.S.C. § 9613(f)(1).

[113] *Id. See* CERCLA, 42 U.S.C. §§ 9613(g)(2) and 9607(a)(4)(A) and (B).

a cost-recovery mechanism.[114]

Second, and perhaps most persuasive, is the Court's recognition that sections 6972(b)(2)(B) and (C) preclude a citizen from commencing a citizen suit under section 6972(a) when either the EPA or the State has begun, and is prosecuting, a separate enforcement action.[115] In light of this preclusion, application of the citizen suit provision as a cost-recovery mechanism yields an illogical result because less problematic sites that neither the EPA nor the state "feel compelled to address" will remain open to contribution actions, while sites with more serious problems, upon which either the EPA or the state is likely to act, leave parties without a means to recover response costs.[116] Consequently, a party's chances of seeking contribution via section 6972(a)(1)(B) are only as good as the chance that neither EPA nor the state choose to bring an enforcement action.[117]

Finally, the Court dealt with the argument proffered by the Government as *amicus curiae* that a party could seek damages using section 6972(a)(1)(B), so long as the suit were brought concurrently with the existence of an imminent and substantial endangerment.[118] The Government hypothesized a plaintiff who, while a site persists posing an imminent and substantial endangerment, sues a responsible party for restitution. This argument cuts through the conditions precedent issue[119]right to the damages question. The Court responded:

> 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 demonstrate that Congress did not intend for a private citizen to be able to undertake a

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[114] *Id.*

[115] Meghrig v. KFC Western, Inc., 64 U.S.L.W. 4135, 4137 (Mar. 19, 1996).

[116] Meghrig v. KFC Western, Inc., 64 U.S.L.W. 4135, 4137 (Mar. 19, 1996).

[117] *Id.* The Court in Heckler v. Chaney, 470 U.S. 821 (1985), established a presumption of unreviewability of agency decisions not to undertake enforcement actions. The presumption is rebuttable by a showing that the agency is not following enforcement guidlines outlined in the agency enabling statute. This policy of unreviewability translates into substantial deference to agency decisions not to enforce. Thus, as far as the EPA is concerned, whether a plaintiff is barred or allowed and action under § 6972(b)(2)(A) becomes an issue committed to agency discretion.

[118] *Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. at 4137.

[119] Many of the decisions on this issue turn to the fact that there no longer exists an "imminent and substantial endangerment" to disallow an action for previously expended response costs. The bulk of the Unanimous Court's opinion makes the same easy escape.

clean up and then proceed to recover its costs under RCRA.[120]

The Court continued: "where Congress has provided 'elaborate enforcement provisions' . . . 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . . .'"[121] "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'"[122] However, one can only speculate what is left to read in to such a vague statute. It seems plausible that, unsure of how this issue would unfold, and what would be the proper remedies, Congress left the resolution to the courts to superimpose their expertise. Perhaps this case is less concerned with what should not be read in to the statute than it is concerned with what the Court is willing to read out.

CONCLUSION

The unanimous decision in *Meghrig v. KFC Western* underscores the Court's no-nonsense interpretation of the imminent and substantial endangerment requirement. Despite attempts to illuminate ambiguous drafting, a plain reading of this requirement and the statutory injunctive remedies reveals that Congress unambiguously intended that an imminent and substantial endangerment must exist when a section 6972(a)(1)(B) suit is brought. Thus, suits for damages arising from wholly past endangerments are barred because the plaintiff cannot meet this condition precedent -- the danger is no longer imminent and substantial. Less clear, however, is whether a damages suit may be brought simultaneously with an imminently and substantially dangerous situation. The Supreme Court specifically avoided the issue of whether, after a section 6972(a)(1)(B) suit is properly brought,[123] a party could obtain injunctive relief ordering a party to pay response costs.

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[120] Meghrig v. KFC Western, Inc., 64 U.S.L.W. 4135, 4137 (Mar. 19, 1996).

[121] *Id.*

[122] *Id.* (quoting Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 14 (1981)). *See* Furrer v. Brown, 62 F.3d 1092, 1097 (8th Cir. 1995).

[123] One must assume the Court is referring to a suit brought concurrently with the existence of some imminent and substantial endangerment.