MEGHRIG V. KFC WESTERN, INC.: REALIZING THE STATUTORY LIMITS OF RCRA'S CITIZEN SUIT

I. OVERVIEW

In 1975, the respondent, KFC Western, Inc. (KFC) purchased a parcel of real property in Los Angeles, California, from the petitioners, Alan and Margaret Meghrig (the Meghrigs).[1] KFC owns and operates a Kentucky Fried Chicken franchise on the commercially zoned property.[2] When KFC attempted to improve the property in 1988, it discovered that the soil was contaminated with petroleum.[3] Under order from the Los Angeles Department of Health Services (LADHS), KFC spent $211,000 removing and disposing of the contaminated soil.[4] The cleanup concluded in March 1989, and in May, the LADHS authorized KFC to proceed with its improvements.[5] In December of 1991, KFC filed an environmental cost recovery action in the California state courts, but the suit was dismissed.[6] In May of 1992, three years after the cleanup, KFC

---

1. *See* Brief for Respondent at 2, Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996) (No. 95-83). The Meghrigs are siblings. Their father purchased the property in their names in 1963, while they were teenagers. At that time, the lessee of the property operated a gasoline service station on the property dating back to 1917, 45 years prior to the Meghrigs' father's purchase. *See* Brief for Petitioners at 4, Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996) (No. 95-83).

2. *See* Brief for Respondent at 2, *Meghrig* (No. 95-83).

3. *Id.* KFC intended to bulldoze the old restaurant and construct a "two-story, art deco, specially designed store." Record at 4, Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996) (No. 95-83). The soil was allegedly contaminated due to leaking gasoline storage tanks which were located in the ground prior to KFC's purchase of the property. This leakage resulted in an accumulation of high levels of benzene and lead in the soil. *See* Brief for Petitioners at 2, *Meghrig* (No. 95-83).

4. *See* Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1253 (1996). The Los Angeles Department of Building and Safety issued a "stop order" prohibiting KFC from making further improvements. KFC had to satisfactorily clean up the hazard and then obtain a "clearance order" from the Los Angeles Department of Health Services before continuing. *See* Brief for Respondent at 2, *Meghrig* (No. 95-83).

5. *See* Brief for Respondent at 2, *Meghrig* (No. 95-83). The Meghrigs were not notified of the contaminated soil until after KFC completed its remediation. *See* Brief for Petitioners at 5, *Meghrig* (No. 95-83).

6. *See* Brief for Respondent at 1 & n.1, *Meghrig* (No. 95-83). KFC's action requested relief under the state's "environmental cost recovery" statute (Section 25363) and several common-law causes of action including private and public nuisance. The Los Angeles County Superior Court sustained the Meghrig's second demurrer without leave to amend. KFC Western v. Meghrig, No. BCO43874 (unpublished opinion). KFC appealed this ruling to California's Second District Court of Appeals. *See* KFC Western v. Meghrig, 23 Cal. App. 4th 1167 (1994). The appellate court held that KFC had not stated a claim under the state statute, but that it should be granted leave to amend. *Id.* KFC amended its complaint to allege a continuing nuisance and trespass. On

filed suit in the United States District Court for the Central District of California to recover its remediation expenses.[7] KFC's complaint consisted of a single cause of action—a citizen suit under the Resource Conservation and Recovery Act (RCRA).[8] KFC alleged that the petroleum contaminated soil posed an "'imminent and substantial endangerment to health or the environment'" at the time it was removed.[9] Since the Meghrigs were the previous owners of the property, KFC argued that they contributed to the waste's "'past or present handling, storage, treatment, transportation, or disposal'" and were therefore liable for KFC's remediation expenses.[10]

The District Court dismissed KFC's complaint on two grounds: RCRA's citizen-suit provision requires that an "imminent and substantial endangerment" exist when suit is filed and the provision provides only injunctive relief.[11] On appeal, a divided Ninth Circuit reversed the District Court's decision, holding that RCRA's citizen-suit provision does permit restitution for completed cleanup so long as the environmental hazard had been an "imminent and substantial endangerment."[12] Five months later the Eighth Circuit ruled in *Furrer v.*

---

remand, the trial court granted the Meghrig's motion to dismiss based on KFC's failure to show it suffered "actual damages." *Id.*

7. *See* Brief for Petitioners at 5, *Meghrig* (No. 95-83).

8. 42 U.S.C. § 6972(a)(1)(B) (1994). RCRA's citizen suit provision provides in pertinent part:

> (a) In general . . . any person may commence a civil action on his own behalf—
> (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; . . .
> (2) . . .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 . . . .

Id.

9. *See Meghrig*, 116 S. Ct. at 1253.

10. *Id.*

11. *See* Brief for Respondent at 3-4, *Meghrig* (No. 95-83) (citing KFC Western v. Meghrig, No. CV-92 3269-HLH (C.D. Cal. 1992) and 42 U.S.C. § 6972(a)(1)(B), (a)(2) (1994)). KFC's first complaint was dismissed when the Meghrig's motion to dismiss was granted. KFC amended the complaint by further alleging that the pollution presented an "imminent and substantial endangerment" because it threatened the groundwater and the health of those using the property. The District Court again dismissed the complaint on the Meghrig's renewed motion. *Id.*

12. KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995). *But see KFC Western*, 49 F.3d at 524-528 (Brunetti, J., dissenting) (arguing that the majority mistakenly applied the Eighth

Brown that RCRA's plain language, legislative history, and congressional purpose all suggest that RCRA was not meant to provide cost recovery.[13] The Eighth Circuit concluded that the Ninth Circuit "mistakenly reached its result in reliance" on Eighth Circuit cases that do not support the holding in *KFC Western v. Meghrig*.[14] The Supreme Court granted the Meghrigs' petition for a writ of certiorari to resolve this circuit split.[15] The Court unanimously reversed the Ninth Circuit's decision. It held that RCRA Section 7002(a)(1)(B) does not provide for the recovery of past cleanup costs.[16] *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251 (1996).

II. BACKGROUND

RCRA's evolution began with the Solid Waste Disposal Act (SWDA) of 1965.[17] The SWDA authorized "limited research and grant programs" but contained powerful language about the mounting problem of solid waste pollution and the depletion of natural resources.[18] In 1970, Congress attempted to emphasize resource recovery by amending SWDA with the Resource Recovery Act (RRA).[19] Section 212 of the RRA called for a "comprehensive report and plan" regarding hazardous waste storage and disposal.[20] This report's findings led to RCRA's passage in 1976.[21] In adopting RCRA, Congress took a firm stance against

---

Circuit's reasoning in *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989) to *KFC Western*, and that the provision's plain language and legislative history require affirmance of the district court's decision). *See generally* Jean Buo-Lin Chen Fung, KFC Western v. Meghrig*: The Merits and Implications of Awarding Restitution to Citizen Plaintiffs Under RCRA § 6972(A)(1)(B)*, 22 ECOLOGY L. Q. 785 (1995) (discussing the merits of the Ninth Circuit's holding).

13. Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995). The Ninth Circuit decided *KFC Western* on March 1, 1995 and the Eighth Circuit decided *Furrer* on August 12, 1995.

14. *Id.* at 1100.

15. Record at 24-25, *Meghrig* (No. 95-83).

16. *Meghrig*, 116 S. Ct. at 1253; 42 U.S.C. § 6972(a)(1)(B) (1994).

17. Pub. L. No. 89-272, § 202, 79 Stat. 992 (1965); *see* WILLIAM H. RODGERS, JR., 3 ENVIRONMENTAL LAW § 7.1, at 510 (discussing the SWDA).

18. Solid Waste Disposal Act of 1965, § 202, 79 Stat. 992, 997; *see* RODGERS, *supra* note 17, § 7.2, at 523.

19. Pub. L. No. 91-512, § 202(b)(1), 84 Stat. 1227-1228 (1970). The stated purpose of the RRA was "to promote the demonstration, construction and application of solid waste management and resource recovery systems which preserve and enhance the quality of air, water and land resources." *Id.*; *see* RODGERS, *supra* note 17, § 7.2, at 525.

20. Resource Recovery Act of 1970, § 212, 84 Stat. 1227-28 (Oct. 26, 1970). Section 212 called for executive resources to complete "a comprehensive report and plan for the creation of a system of national disposal sites for the storage and disposal of hazardous wastes, including radioactive, toxic chemical, biological, and other wastes which may endanger public health or welfare." *Id.* at § 212. *See* RODGERS, *supra* note 17, § 7.2, at 527.

21. *See* RODGERS, *supra* note 17, § 7.2, at 527.

polluters.[22] Its prohibition on the open dumping of solid and hazardous waste and its "cradle to grave" approach for hazardous waste management were expected to close many environmental regulation loopholes.[23]

In 1980, Congress retreated from its pro-environment posture when it passed the Solid Waste Disposal Act Amendments (SWDA Amendments).[24] These amendments weakened RCRA, exempting major categories of hazardous waste and heightening the culpability requirement for criminal prosecution.[25] That same year, after extensive debate and eleventh-hour politicking, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), also called Superfund.[26] CERCLA was designed to pick up where RCRA left off by remediating abandoned hazardous waste sites.[27] To do so, it created a list of environmentally hazardous locations nationwide that needed cleanup and established a funding mechanism to make cleanup possible.[28] RCRA and CERCLA are considered *"in pari materia,"* because they were designed to work in conjunction with each other.[29] Like the exemptions made in the SWDA

---

22. *See id.* § 7.2, at 528-29.

23. *See* 42 U.S.C. §§ 6922-6924, 6945(c) (1994); RODGERS, *supra* note 17, § 7.2, at 528-529.

24. Pub. L. No. 96-482, 94 Stat. 2334 (1980); *see* RODGERS, *supra* note 17, § 7.2, at 530.

25. *See* RODGERS, *supra* note 17, § 7.2, at 530-31. Four exemptions were made: (1) oil, gas, and geothermal energy wastes, (2) fossil fuel combustion wastes, (3) mining wastes, and (4) cement kiln dust wastes. 42 U.S.C. § 6921(b)(2)-(3)(A)(iii) (1994). During this same period, the EPA was paralyzed with uncertainty over the statute's application and became entrenched in scandal and corruption. *See* RODGERS, *supra* note 17, § 7.1, at 511. The EPA often experienced delays in implementing RCRA, lacked knowledge of industry, and attempted to overperfect rules. *See id.* at 511 n.15 (citing Richard Riley, *Toxic Substances, Hazardous Substances, and the Public Policy: Problems in Implementation in the Politics of Hazardous Waste Management, in* THE POLITICS OF HAZARDOUS WASTE MANAGEMENT 24, 28-29 (James P. Lester & Ann O'M. Bowman eds., Duke University Press 1983)). The corruption included inter alia the misspending of Superfund money, arranged "sweetheart deals" with polluters, tip-offs of enforcement strategies, suppression of documents and deliberate cleanup slowdowns to prove Superfund was unnecessary. *See id.* at 532. As a result of this inaction, Congress suspected that half of the country's hazardous waste sites were escaping EPA control. *See id.* at 512.

26. Pub. L. No. 96-510, 94 Stat. 2627 (1980); H.R. REP. NO. 1016(f), at 17-18, *reprinted in* 1980 U.S.C.C.A.N. 6120; *see* WILLIAM H. RODGERS, JR., 4 ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 8.1, at 473 (1992); 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).

27. *See generally* J. Stanton Curry et al., *The Tug-of-War Between RCRA and CERCLA at Contaminated Hazardous Waste Facilities*, 23 ARIZ. ST. L.J. 359, 362-70 (1991) (explaining that RCRA establishes the "cradle-to-grave" scheme of hazardous waste management, while "CERCLA establishes a comprehensive response program for past hazardous waste activities").

28. *See* RODGERS, *supra* note 26, at § 8.1, 473-74.

29. *See id.*

Amendments, CERCLA's definition of "hazardous waste" exempts petroleum related hazards.[30] Spills and leaks from underground gasoline station storage tanks fall within this exemption.[31]

When Congress again amended RCRA with the Hazardous and Solid Waste Amendments Act of 1984 (HSWA), it attempted to compensate for CERCLA's petroleum exemptions with its provision to regulate underground storage tanks.[32] The HSWA provided coverage for leaking underground gasoline storage tanks by authorizing the EPA and state authorities to clean up such contaminants or to require the owners or operators to do so.[33] In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA) which, in addition to reinvigorating CERCLA, amended RCRA's coverage of underground gasoline storage tanks.[34] In particular, SARA required state environmental agencies to inventory in-state underground storage tanks and report this information to the EPA, and it established a $500 million trust fund for EPA cleanup of such sites.[35] Thus, Congress established RCRA as the instrument in its environmental regime with which citizen

---

30. 42 U.S.C. § 9601(14) ("The term [hazardous substance] . . . does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance. . . .").

31. *See* Robert N. Aguiluz, *Refining CERCLA's Petroleum Exclusion*, 7 TUL. ENVTL. L.J. 41, 46-55 (reviewing the courts' and EPA's interpretations of CERCLA's petroleum exclusion); Buo-Lin Chen Fung, *supra* note 12, at 821 (discussing CERCLA's exemption of "uncontaminated gasoline and other fuels," but noting that when hazardous substances are "added or increased in concentration during use" CERCLA's petroleum exemption may not apply). *See* Southern Pacific Transp. Co. v. California, 790 F. Supp. 983, 986 (C.D. Cal. 1991) (holding that "the union of one nonhazardous substance (petroleum) with another nonhazardous substance ("clean" soil) can only yield a nonhazardous final product of no concern to CERCLA").

32. 42 U.S.C. § 9601(14); *see* Aguiluz, *supra* note 31, at 64-66; RODGERS, *supra* note 17, § 7.5, at 562; *see also* City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1590 (1994); Environmental Defense Fund v. United States Envtl. Protection Agency, 825 F.2d 1316 (D.C. Cir. 1988). HSWA also eliminated many other exemptions such as those provided under the CWA to small-quantity generators of waste that dump in sewers. HSWA eliminated the use of hazardous waste as a fuel as allowed by the CAA, eliminated the Safe Drinking Water Act's inability to prevent disposal of hazardous material by deep well injection, and regulated underground storage tanks. *See* RODGERS, *supra* note 17, § 7.1, at 511-12, 533; *see also id.* at 512-13 (reasoning that HSWA was a "legislative response not to statutory gaps but to administrative lapses," and that Congress "took a more paternalistic posture . . . [treating the EPA] as an institution that had lost not its capacities but its direction, not its heart but its will"); RICHARD C. FORTUNA & DAVID J. LENNETT, HAZARDOUS WASTE REGULATION—THE NEW ERA: AN ANALYSIS & GUIDE TO RCRA AND THE 1984 AMENDMENTS 16 (1987) (citing 130 CONG. REC. 95, S9174 (daily ed. July 25, 1984)).

33. 42 U.S.C. § 6991-6991(i) (1994); *see* Aguiluz, *supra* note 31, at 65.

34. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)).

35. 26 U.S.C. § 9508 (1994); 42 U.S.C. § 6991a(c), b(h)(1); *see* Aguiluz, *supra* note 31, at 65.

plaintiffs are to eliminate hazards caused by leaking underground storage tanks.

The mechanisms available for the enforcement of environmental policies have undergone a concurrent but independent evolution. Most legislation in the 1960s outlined cumbersome EPA-directed enforcement; however, Section 304 of the Clean Air Act Amendments of 1970 (CAA) introduced a new enforcement mechanism—the citizen suit.[36] Citizen suits were designed to supplement the government's attempts to stop violations of environmental laws.[37] They allowed ordinary citizens to act as "private attorneys general," filing suit against polluters who violated environmental statutes or against the EPA Administrator for failing to discharge her or his mandatory duties.[38] After its use in the CAA, citizen suit provisions became commonplace in subsequent environmental legislation, including RCRA in 1976.[39] The 1984 HSWA amendments, however, added to RCRA a third type of citizen suit whereby a private

---

36. Pub. L. No. 91-604, § 304, 84 Stat. 1670 (1970) (codified at 42 U.S.C. § 7604 (1994)); *see* JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3 (1987). The Fourth Circuit described the cumbersome enforcement procedure used to curtail air pollution in *United States v. Bishop Processing Co.*, 423 F.2d 469, 470-72 (4th Cir. 1970). Bishop Processing was a plastics manufacturer in Maryland whose facility emitted a horrible stench. Delaware, the affected state, spent five years trying to remedy the smell. Delaware then requested the Secretary of Health, Education, and Welfare hold an enforcement conference as provided by the statute. After two hearings and two abatement orders from the Secretary, Bishop continued to emit the stench. Finally, the Secretary requested that the Attorney General file suit. Three years after the administrative proceedings began, and more than eight years after Delaware first addressed the issue, the suit went to trial. *Id.* at 3 n.1. *See* Randall James Butterfield, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 VAND. L. REV. 689, 696 (April 1996).

37. *See* MILLER, *supra* note 36, at 4 ("The citizen suit sections were developed as the answer to the government's failure to enforce, whether caused by lack of will or lack of resources."); On September 20, 1970, Senator Muskie noted during Senate debate on the Clean Air Act that "It is clear that enforcement must be toughened . . . [m]ore tools are needed, and the federal presence and backup authority must be increased." *Id.* at 3 n.2.

38. Natural Resources Defense Counsel, Inc. v. United States Environmental Protection Agency, 484 F.2d 1331, 1337 (1st Cir. 1973); *see* Butterfield, *supra* note 36, at 699.

39. *See* MILLER, *supra* note 36, at 3 n.10; *see also* Barry Breen, *Citizen Suits For Natural Resource Damages: Closing the Gap in Federal Environmental Law*, 24 WAKE. FOREST L. REV. 851, 871 (1989) (citing eleven statutes that include citizen suit provisions: the Clean Air Act, 42 U.S.C. § 7604 (1982), the Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1982), the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g) (1982), the Noise Control Act, 42 U.S.C. § 4911 (1982), the Endangered Species Act, 16 U.S.C. § 1540(g) (1982), the Deepwater Port Act, 33 U.S.C. § 1515 (1982), the Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1982), the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1982), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659 (Supp. V 1987), the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046 (Supp. V 1987), the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (1982), and RCRA, 42 U.S.C. § 6972(a)(1)(B)).

person may sue to enjoin "an imminent and substantial endangerment to health or the environment."[40] RCRA is the only environmental statute that provides this authority.[41] This is basically a codification of nuisance remedies, because it allows citizens to abate environmental hazards by enjoining a defendant's actions and/or authorizing the courts to order a defendant to "take such other action as may be necessary."[42] While this seems a broad grant of power, it is tempered by its limited remedies; particularly, as is at issue in *Meghrig*, it fails to expressly authorize the recovery of environmental cleanup costs.[43] In 1986, SARA established CERCLA's citizen suit provision. Unlike RCRA, however, SARA authorizes recovery of all remediation costs and "contribution[s] from any other person who is potentially liable."[44]

III. THE COURT'S DECISION

In the noted case, the Supreme Court identified two issues that undermine KFC's suit: "timing" and "remedies."[45] The Court held that RCRA's citizen suit provision requires that the environmental hazard is occurring immediately and that it does not provide reimbursement for past cleanup costs.[46] Justice O'Connor began the Court's opinion by noting that "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste . . . to 'minimize the present and future threat to human health and the environment.'"[47] The Court reasoned that a plain reading of RCRA Section 7002(a)(2) reveals that two remedies exist: mandatory

---

40. Butterfield*, supra* note 36, at 701.

41. *See id.*

42. *See* Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 64-65 (1995) (contending that RCRA's imminent hazard provision is a codification of common law nuisance doctrines because it allows citizens to remedy hazards caused by the release of pollutants on land, water or in the air); *see also* Joel A. Mintz, *Abandoned Hazardous Waste Sites and the RCRA Imminent Hazard Provision: Some Suggestions for a Sound Judicial Construction*, 11 HARV. ENVTL. L. REV. 247 (1987) (discussing the common law and the *Restatement (Second) of Torts* standards relevant to RCRA's "imminent" hazard provision).

43. 42 U.S.C. § 9673(a); *see* Butterfield, *supra* note 36, at 701; *see also* RODGERS, *supra* note 17, § 7.2, at 549 ("In environmental law, remedy defeats have a way of swallowing substantive victories"); Stuart P. Feldman, Comment, *Curbing the Recalcitrant Polluter: Post Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVIR. AFF. L. REV. 809 (1991) (concluding that the remedies authorized may be as critical as rules that establish the polluter's liability).

44. 42 U.S.C. §§ 9607(a)(4)(A), 9613(f)(1).

45. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1255-56 (1996).

46. *Id.*

47. *Id.* at 1254 (quoting 42 U.S.C. § 6902(b) (1994)).

and prohibitory injunctions.[48] A mandatory injunction orders a defendant to "take action," such as cleaning up the environmental hazard; a prohibitory injunction restrains a defendant who is contributing to an environmental hazard.[49] Neither injunction, however, provides for the reimbursement of cleanup costs.[50] As evidence that past cleanup costs were not intended, the Court then compared RCRA's citizen suit to the similar provision found in CERCLA, its sister legislation.[51] In addition to expressly authorizing cost recovery for citizen plaintiffs, CERCLA also provides supporting provisions such as a statute of limitations and guidelines as to what are reasonable costs.[52] RCRA's citizen suit provision, the Court reasoned, contains no such language.[53] Finally, Justice O'Connor cited the purpose behind RCRA's notice provision—to spur the EPA to action—as demonstrating that RCRA is a "wholly irrational mechanism" for allowing past cleanup cost recovery.[54] This provision requires citizen plaintiffs to give the defendant, the EPA, and the state in which the environmental hazard is located 90 days notice prior to filing suit.[55] Thus, the EPA and the state have preference in bringing suit.[56] If they do, RCRA's citizen suit provision precludes citizen action.[57] If RCRA were to authorize recovery of costs, the Court noted that remediation would be possible only if the hazard was not significant enough to warrant EPA or state attention.[58] The Court concluded that Congress clearly knows how to formulate and support a restitutionary remedy, and that it intentionally did not do so in RCRA's citizen suit provision.[59]

---

48. *Id.*; *see supra* note 8.

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

50. *Id.*

51. *Id.* at 1254-55. *See infra* note 63.

52. *Id.* (citing 42 U.S.C. § 9613(g)(2), which provides a limitations period under 42 U.S.C. § 9607); *see* 42 U.S.C. § 9607(a)(4)(A) and (B) (providing that CERCLA cost recovery must be "consistent with the national contingency plan")).

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

54. *Id.*

55. *Id.* (citing 42 U.S.C. § 6972(b)(2)(A)(i)-(iii)). Justice O'Connor does note the exception to Section 7002's notice provision found in *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-27 (1989). There the Court held that the notice requirement is waived "when there is a danger that hazardous waste will be discharged." *Id.* (citing 42 U.S.C. § 6972(b)(1)(1)).

56. *See Hallstrom*, 493 U.S. at 29 (holding that the purpose of RCRA's notice provision is to allow the government to take responsibility for enforcing the legislation instead of the private citizens). *See also* MILLER, *supra* note 36, at 44-45 (reasoning that the purpose behind the Clean Air Act's 60 day notice provision was "clearly to enable and encourage the government to perform its enforcement role").

57. *Meghrig*, 116 S. Ct. at 1255 (citing 42 U.S.C. § 6972(b)(2)(B), (C)).

58. *Id.*

59. *Id.*

The Court then examined the "timing" of KFC's suit. Again Justice O'Connor reviewed the statute's plain language, stating that "an endangerment can only be 'imminent' if it 'threaten[s] to occur immediately.'"[60] The Ninth Circuit had previously interpreted the statute in this manner in *Price v. United States Navy*.[61] The Court then examined the United States' amicus curiae brief.[62] The U.S. contended that if a citizen such as KFC had waited to clean up the environmental hazard until after it filed a RCRA citizen suit, the court could have awarded the past cleanup costs.[63] The U.S. argued that this authority for cost recovery is found in the inherent power retained by courts to award any equitable remedy not expressly provided in a statute.[64] The Court refused to accept this argument.[65] Citing *Middlesex County Sewerage Authority v. National Sea Clammers Association* (*Sea Clammers*), Justice O'Connor reasoned that it is not for the courts to assume Congress intended a remedy which it did not expressly authorize.[66] "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of

---

60. *Id.* (quoting 42 U.S.C. § 6972(a)(1)(B) and WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 1245 (2d ed. 1934)).

61. *Meghrig*, 116 S. Ct. at 1255 (citing Price v. United States Navy, 39 F.3d 1011, 1019 (1994)).

62. *Id.*

63. *Id.* at 1255-1256 (citing Amicus Curiae Brief for the United States, 22-28, Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996) (No. 95-83)).

64. *Id.* The U.S. borrowed this argument from KFC's brief where it cites *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-314 (1982); *United States v. Moore*, 340 U.S. 616, 618-620 (1951); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); Brief for respondent, at 11-13 *Meghrig* (No. 95-83); and Amicus Curiae Brief for the United States at 22 *Meghrig* (No. 95-83); *see also* Franklin v. Gwinett County Public Schools, 503 U.S. 60, 71 (1992) (holding that when Congress creates a private right of action, it is presumed that courts have the inherent power to authorize any equitable remedy necessary unless Congress says otherwise); Mertens v. Hewitt Associates, 508 U.S. 248, 256-257 (1993) (holding that "'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution. . . .)").

65. *Meghrig*, 116 S. Ct. at 1256. The Court also cited RCRA's savings clause, Section 7002(f), which reserves private citizens' right to sue under state statute or common law theories in addition to a federal RCRA claim. *Id.*; *see generally* Joyce Yeager, *No Remedy for LUST: An Implied Cause of Action and RCRA*, 64 UMKC L. REV. 637, 659-60 (Spring 1996) (reviewing the different common law theories that may accompany a RCRA suit). *But see supra* note 6, (KFC's California state suit was readily dismissed); Amicus Curiae Brief for Massachusetts, Missouri, Alaska, Florida, Guam, Kansas, Kentucky, Louisiana, Nevada, New Jersey, New Mexico, New York, West Virginia, and Wisconsin, at 27-28, Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996) (No. 95-83) [hereinafter Amicus Curiae Brief for Mass. et al.] (arguing that many states, including California, do not have statutes that would provide compensation for petroleum-related environmental hazards such as the one in *Meghrig*).

66. *Meghrig*, 116 S. Ct. at 1256 (citing Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14 (1981)).

reading others into it."[67] The Court concluded that RCRA's plain language and the "stark differences" between its remedies and CERCLA's reflect that Congress did not provide restitutionary relief for the past cleanup of environmental hazards.[68]

IV. ANALYSIS

In *Meghrig*, the Court adopts an unusual method of interpreting Congress's intent. The Court reasoned in *Sea Clammers* that when attempting to determine if a private right of action exists, courts should first look "to the statutory language, particularly to the provisions made therein for enforcement and relief[,] . . . [t]hen . . . [to] the legislative history and other traditional aids of statutory interpretation . . . ."[69] Justice O'Connor reviewed Section 7002's plain language, but did not consider RCRA's legislative history.[70] The Court then compared RCRA to CERCLA to determine congressional intent.[71] CERCLA's citizen-suit provision, however, was enacted in 1986, whereas RCRA's was first put in force in 1976 and then amended in 1984.[72] It is illogical, and indeed impossible, for Congress's intent behind SARA in 1986 to retroactively influence Congress's intent behind HSWA two years earlier. The Court

---

67. *Sea Clammers*, 453 U.S. at 14-15 (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)).

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

69. *Sea Clammers*, 453 U.S. 1, 13 (1981); *see* Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1103 (1991) (holding that congressional intent has been "accorded primacy among the considerations that might be thought to bear on any decision to recognize a private remedy"). *See also* Yeager, *supra* note 65, at 644.

70. This was probably because the legislative history behind RCRA is inconclusive. In their brief, Petitioners cite the debates over the CAA's citizen suit provision in which Senator Hart argued "that the bill makes no provision for damages to the individual . . . [i]t therefore provides no incentive to suit other than to protect the health and welfare of those suing and others similarly situated." Brief for Petitioners at 28-29, *Meghrig* (No. 95-83) (quoting 116 CONG. REC. 33104 (1970) (ellipse and brackets added)). The Petitioners also cite the House Committee report on the 1984 RCRA amendments which stated that RCRA's citizen suit provision "[c]onfers on citizens a limited right under section 7002 to sue to abate an imminent and substantial endangerment . . . ." *Id.* at 30 (quoting H.R. REP. NO. 198, 98th Cong. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612). The Respondents contended that this language is inconclusive since it does not explicitly prohibit past cost recovery. Brief for Respondent at 38-39, Meghrig (No. 95-83). The U.S. in its brief contended that the "legislative history supports the natural reading of the text." Amicus Curiae Brief for the United States at 13 n.8 *Meghrig* (No. 95-83). The *Furrer* court concluded that the legislative history behind RCRA's citizen suit provision is silent as to the question of cost recovery, 62 F.3d at 1097-99. *See also* Yeager, *supra* note 57, at 648-54 (discussing the difficulty in determining congressional intent for implied private rights of action).

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

72. Superfund Amendments and Reauthorization Act of 1986, § 206, Pub. L. No. 99-499, 100 Stat. 1613, 1703 (Oct. 17, 1986) (codified as amended at 42 U.S.C. § 9659 (1994)); *see supra* notes 17-23 and accompanying text.

concluded, however, that had Congress intended for citizen plaintiffs to recover cleanup costs, they would have expressly done so.[73] This is a post hoc rationalization that, while consistent with the statute's purpose, is inconsistent with traditional methods of interpreting congressional intent.

While the Court's interpretation of intent is unusual, the core holding in *Meghrig* is a valid interpretation of RCRA Section 7002(a)(1)(B)'s prospective language and is consistent with Congress's general environmental regime.[74] Congress created CERCLA with the petroleum exclusion and then attempted to fill the gap by providing coverage for such hazards under RCRA. The HSWA was supposed to compensate for CERCLA's petroleum exclusion, but RCRA was not designed to cover such hazards.[75] Subsequently, many innocent property owners are left to clean up the hazards on their own. The *Meghrig* decision, however, does not represent a callous Supreme Court ignoring environmental ramifications. It represents the Court restricting their interpretation to the statute's plain language and sending a clear message to Congress that should the legislature want to protect the environment from petroleum-related environmental hazards, it must do so with additional legislation.

While *Meghrig* represents a judicial call for legislative action, the immediate ramifications of this decision will not be felt until Congress changes the law. Having eliminated what seemed to be the only mechanism for the prompt abatement of petroleum-related environmental hazards, the *Meghrig* decision combined with Congress's oversight has resulted in RCRA no longer adequately satisfying one of its primary purposes—the "*prompt abatement* of environmental hazards."[76] This decision now requires a lengthy court process before an imminent petroleum hazard is abated.[77] Even in the situation proffered by the U.S. where suit is filed prior to cleanup, the Court eliminated the ability of

---

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

74. *See* RODGERS, *supra* note 26, § 7.5, at 562; Butterfield, *supra* note 36, at 751.

75. *See* Buo-Lin Chen Fung, *supra* note 12, at 820-823.

76. H.R. REP. NO. 198, 98th Cong., 2d. Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added). *See* Butterfield, *supra* note 36, at 752. *See also supra*, text accompanying note 35.

77. *See* Butterfield, *supra* note 36, at 752 ("allowing plaintiffs to rehabilitate the waste site at the front end of the litigation would serve the primary objective of RCRA's imminent citizen suit provision—the prompt abatement of imminent endangerments—without abandoning wholesale the provision's preliminary requirements"); Yeager, *supra* note 65, at 658 (arguing that the goals of RCRA are best served by providing citizens with a means of redress for environmental remediation costs).

private citizens and the EPA to promptly abate petroleum hazards, which often require such attention.[78] The Court's holding also places citizens who own petroleum-contaminated property, such as KFC, in between local statutory mandates and federal cost-recovery provisions. Such property owners may be ordered by local governments to remedy the petroleum hazard in compliance with health and safety statutes before they can obtain a court order forcing the responsible party to abate the petroleum hazard.[79]

The Court reasoned that a property owner may sue for remediation costs in state court, a right preserved by RCRA's savings clause.[80] What the Court did not consider is that Alabama, Louisiana, New Mexico, North Dakota, South Dakota, Vermont, Virginia, and Wisconsin's environmental statutes do not provide for citizens to recover past costs spent on cleaning up petroleum-related hazards.[81] Common law claims such as nuisance or trespass are limited by statutes of limitation and require a showing of negligent, intentional, or unreasonable conduct. Satisfying these requirements will be difficult for property owners who do not discover a petroleum hazard until years after it is created.[82] Furthermore, no state may provide this recovery for hazards caused by the United States government, and any action under the Federal Tort Claims Act requires proof of wrongful conduct.[83] In holding that RCRA's remedies do not include recovery of past cleanup costs, the Court eliminated the statute's ability to quickly abate petroleum-related environmental hazards. If Congress wants its environmental regime to effectively prevent and remediate imminent petroleum hazards, it must create legislation to fill this gap.

The holding in *Meghrig* may have also eliminated the EPA Administrator's ability to recover cleanup costs for petroleum related hazards pursuant to RCRA Section 7003.[84] This section's wording is

---

78. *See infra*, text accompanying notes 80-83.

79. *See supra* note 4. In *Meghrig*, KFC was prohibited from making further property improvements by the Los Angeles Department of Health Services until they remedied the petroleum hazard.

80. 42 U.S.C. § 6972(f) (1994); *see supra*, text accompanying notes 63-64.

81. Amicus Curiae Brief for Mass. et al. at 28, *Meghrig* (No. 95-83).

82. *Id.* In their Amicus Brief, the states argued that because of these limitations, "Congress intended Section 7002 . . . to be more liberal than [its] common law counterparts." *Id.* (quoting S. REP. NO. 96-172, 96th Cong., at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023 (1980)).

83. 28 U.S.C. §§ 1346, 2671 et seq. (1994). *See* Amicus Curiae Brief for Massachusetts et al., at 28, *Meghrig* (No. 95-83).

84. 42 U.S.C. § 6973(a) ("[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an

almost identical to that found in RCRA's citizen suit provision. It contains the "imminent . . . endangerment" language and sets forth the same types of remedies.[85] When Congress amended the citizen suit provision in 1984, it intended to make Section 7002's liability identical to that in the EPA's counterpart provision Section 7003.[86] The courts, however, have generally interpreted Section 7003 broadly, allowing the EPA to recover past cleanup costs for both petroleum-related hazards and hazards covered under CERCLA, while concurrently denying private citizens the same right under Section 7002(a)(1)(B).[87] Since the *Meghrig* decision is specific to the language used in both provisions, presumably its holding prohibits the lower courts' broad application of Section 7003, thereby reversing those earlier, lower court decisions.[88] In addition, *Meghrig*'s holding that courts may not infer remedies Congress failed to expressly provide may be applied to other statutes containing citizen suit

---

imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States. . . .")

85. *See* 42 U.S.C. §§ 6972-6973.

86. *See* STAFF OF HOUSE COMM. ON ENERGY & COMMERCE, HAZARDOUS WASTE CONTROL AND ENFORCEMENT ACT OF 1983, H.R. REP. NO. 98-198, 98th Cong., at 53 (Comm. Print 1983), *reprinted in* 1984 U.S.C.C.A.N. at 5612 (explaining that liability under Section 7002(a)(1)(B) mirrors the standards for liability established under Section 7003); STAFF OF SENATE COMM. ON ENV'T & PUBLIC WORKS, SOLID WASTE DISPOSAL ACT AMENDMENTS OF 1983, S. REP. NO. 98-284, 98th Cong., at 56-57 (Comm. Print 1983). "These amendments [adding § 6972(a)(1)(B)] are intended to allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United States under § 7003. Any differences in language between these amendments and § 7003 are not intended to effect a difference in such claims, but merely clarify that citizens will have the same claim presently available to the United States." *Id.* (citations omitted). *See Connecticut Coastal Fisherman's Assn. v. Remington Arms Co., Inc.,* 989 F.2d 1305, 1315 (2d Cir. 1993) (holding that federal regulations that apply to Section 7003 also apply to Section 7002(a)(1)(B) because the provisions are "nearly identical"); *see* Miller, *supra* note 36, at 74, (arguing that if the EPA is given greater injunctive remedies, citizen suit provisions would not perform their intended functions because it would be more advantageous for polluters to be sued by citizens than the government); Butterfield, *supra* note 28, at 705 n.78

87. The clearest example of this comes from the Eighth Circuit Court of Appeals. In *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), the Eighth Circuit held that a district court could award cleanup costs to the EPA under Section 7003 as a matter of law. *Id.* at 734. The Eighth Circuit reaffirmed this decision in *United States v. Aceto Agricultural Chemical Corp.*, 872 F.2d 1373 (8th Cir. 1989), when it held that the EPA could recover ten million dollars from its cleanup of a pesticide plant because the hazard need only be imminent and substantial at the time of cleanup. The Eighth Circuit's decision in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), however, denied a private citizen the right to recover past cleanup costs under Section 7002(a)(1)(B) because Congress did not intend to allow this private right. *See* Butterfield, *supra* note 28, at 707-715.

88. *See* Butterfield, *supra* note 28, at 710, n.110. The Court might have deemed the rights provided under Section 7002(a)(1)(B) public rights instead of private rights as urged by KFC. As a public right, KFC would not be entitled to receive past cost recovery, but the EPA Administrator as a public official would be able to recover costs spent by the public. The Court does not draw this distinction.

provisions. If so, the Court's holding may require Congress not only to fill the CERCLA/RCRA petroleum gap, but also to amend many other environmental statutes that might no longer achieve their intended goals.[89]

While the decision may require congressional action, the Court could have legitimately interpreted Congress's intent and RCRA Section 7002's language as providing cost recovery for petroleum hazards provided suit is filed prior to cleanup. In their briefs, KFC and the U.S. contend that Congress's addition of the "take such other action as may be necessary" language in the 1984 HSWA Amendments represents an attempt to broaden RCRA's remedies beyond prohibitory injunctions.[90] Congress expanded the possible remedies to mandatory injunctions which could entail a court order forcing a defendant to pay for cleanup costs.[91] Justice O'Connor reasoned that RCRA is an "irrational mechanism" for allowing such cost recovery.[92] To allow cost recovery, however, would further the statute's goals of spurring EPA action and promoting the prompt abatement of environmental hazards. The Court could have legitimized restitution using the *Porter v. Warner Holding Co.* line of cases cited by KFC and the U.S.[93] These cases authorize courts to provide any "equitable remedy" necessary to satisfy violations of private rights, unless Congress said otherwise in the statute.[94] Had Congress intended to exclude the recovery of past cleanup costs, it would have expressly done so when it created RCRA's citizen suit provision in 1976 or in any of the subsequent amendments.[95] Since Congress did not, the

---

89. *See supra* text accompanying note 30.

90. Brief for Respondent at 17-18, *Meghrig* (No. 95-83); Amicus Curiae Brief for the United States at 24-25 *Meghrig* (No. 95-83).

91. In doing this, Congress arguably deferred to the courts to decide what cleanup costs were "reasonable" and allowed the doctrine of laches to control ripeness. *See* Wooded Shores Property Owners Ass'n, Inc. v. Mathews, 345 N.E. 2d 186, 189 (Ill. App. 3d 1976) (defining the doctrine of *laches* as when a plaintiff neglects to assert a right or claim, which combined with time and other prejudicial circumstances results in a bar in courts of equity). *See* Amicus Curiae Brief for the United States at 22-23 *Meghrig* (No. 95-83).

92. *Meghrig*, 116 S. Ct. at 1255.

93. Porter v. Warner Holding Co., 328 U.S. 395 (1946) (holding that the "comprehensiveness of . . . equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command"); *see supra* note 53. *But See* Brief for Petitioner at 35-41 *Meghrig* (No. 95-83) (arguing that RCRA Section 7002 does not expressly create a private right of action, and since the provision does not meet the four-part *Cort v. Ash*, 422 U.S. 66 (1975), test it should not be made a private right of action; as a public right of action *Porter* is inapplicable).

94. *See supra* note 82.

95. This is unlike the Court's retroactive interpretation of the intent behind HSWA through the intent behind SARA. Here, the *Porter* line of cases existed when Congress was creating HSWA. Thus, had they wanted to prevent the use of this doctrine, they should have expressly done so.

Court could have held that past cost recovery was a legitimate remedy under RCRA.

V. CONCLUSION

The Supreme Court could have used *Meghrig* to strengthen RCRA's citizen-suit provision and eliminate the gap left by CERCLA's petroleum exclusion. Instead, the Court relied on the plain language Congress provided, supported by an unusual method of interpreting congressional intent, to highlight an inadequacy in Congress's environmental regime. The Court recognized the gap left by CERCLA's petroleum exemption and refused to fill it with RCRA. In doing so, the Court announced to Congress the statutory limits of RCRA's citizen suit provision and its refusal to fill legislative gaps with judicial interpretation. The decision to fill this gap in the environmental regulatory regime now rests fully with Congress.

Brett A. Sago