KFC Western, Inc. v. Meghrig: The Merits and Implications of Awarding Restitution to Citizen Plaintiffs under RCRA 6972(a)(1)(B)

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KFC Western, Inc. v. Meghrig: The Merits and Implications of Awarding Restitution to Citizen Plaintiffs Under RCRA § 6972(a)(1)(B)

Jean Buo-lin Chen Fung*

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In a landmark decision, *KFC Western, Inc. v. Meghrig*,¹ the Ninth Circuit Court of Appeals became the first federal circuit court to allow the remedy of restitution to private plaintiffs under § 6972(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA).² Plaintiffs, primarily owners of contaminated land, may now sue under RCRA to

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¹ KFC Western, Inc. v. Meghrig, 49 F.3d 519 (9th Cir. Mar. 1, 1995).
² 42 U.S.C. § 6972(a)(1)(B) (1988). This note refers to this provision as either § 6972(a)(1)(B) or § 7002(a)(1)(B). Similarly, the government's counterpart imminent hazard suit provision is referred to as either § 6973 or § 7003.
recover their environmental cleanup costs from other liable parties. The *KFC Western* decision has broken the established trend of federal decisions\(^3\) that had allowed injunctive relief but denied recovery of damages under this section of RCRA.

By allowing the remedy of restitution, the *KFC Western* decision greatly increases the attractiveness of causes of action under RCRA § 6972(a)(1)(B) in environmental cleanup cost recovery litigation.\(^4\) In particular, the decision provides relief to the large class of plaintiffs which has been stranded without a remedy by the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) petroleum exclusion. If followed, the *KFC Western* decision may thus "greatly expand environmental cleanup litigation."\(^5\)

However, following the recent Eighth Circuit opinion in *Furrer v. Brown*\(^6\) which expressly denies a restitutionary remedy under RCRA § 6972(a)(1)(B), the United States Supreme Court granted certiorari to resolve the split between circuits.\(^7\) This note argues that the Ninth Circuit approach in *KFC Western*, with some limitations, should be followed.

The court in *KFC Western* based its decision to award restitution upon an analogy with decisions authorizing restitution under 42 U.S.C. § 6973, the government imminent and substantial endangerment provision of RCRA. The court also cited strong policy reasons for its holding, and supported its position as consistent with the language of the statute. This note argues that granting restitution to "innocent landowner" plaintiffs who expend considerable resources to clean up environmental contamination is consistent with the statute and would be based on sound policy. However, the *KFC Western* decision does raise a number of concerns, which are explored in this note. First, the language of the statute does not expressly provide for restitution. Second, awarding restitution under RCRA may be viewed by some as circumventing CERCLA and so contravening legislative intent. Third, the award of restitution, which under most circumstances is viewed as a remedy involving *private* gain, seems in tension with the interpretation of RCRA § 6972(a)(1)(B) as a provision for

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the public benefit. This note analyzes these issues and proposes limits to the restitutionary remedy.

Part I provides background on RCRA imminent hazard suits, emphasizing the RCRA provisions that the *KFC Western* court considered in its analysis. It also describes the remedies that are available under § 6972(a)(1)(B) according to the statutory language and prior court decisions.

Part II details the *KFC Western* decision and the court’s reasoning. It discusses the court’s reliance on policy considerations and the analogy to RCRA § 6973 government imminent hazard suits. This part also details the statutory construction arguments accepted by the *KFC Western* court, as well as the court’s allowance of the restitutionary remedy to plaintiffs who file suit after pollution has been remediated.

Part III provides background on the relevant portions of RCRA and CERCLA, including the statutes’ enforcement provisions and definitions of “hazardous substances.” The cost recovery provisions under CERCLA are also described. Finally, this part examines the litigation implications of the availability of a remedy that so closely resembles the remedies that are available under CERCLA.

Part IV evaluates the *KFC Western* decision. It examines the court’s analogy to § 6973 of RCRA and then analyzes arguments for restitution that were not considered by the *KFC Western* court. It discusses additional statutory authority, how the award of restitution carries out the RCRA-CERCLA enforcement scheme, and policy reasons for restitution. The consistency of the decision with the concept of “private attorneys general” is also discussed. This part examines the nature of the restitutionary remedy and concludes that equitable principles, policy, and the statute point toward limits on what should be recompensed through restitution. This part argues that the *KFC Western* decision went too far, and that a better rule would limit cost recovery under the imminent hazard provision of RCRA to situations in which the plaintiff notifies the Environmental Protection Agency (EPA) and the state of the endangerment while the condition still exists. Additionally, the amount recoverable under RCRA § 6972(a)(1)(B) should be determined under the same equitable apportionment principles that are applied to CERCLA. Finally, this part argues that *KFC Western* should not be interpreted as altering the standards for award of attorney’s fees.

The *KFC Western* court’s decision to provide a restitutionary remedy under RCRA § 6972(a)(1)(B) imminent hazard citizen suits, modified and limited as aforementioned, is consistent with the statutory language and supports the enforcement schemes of CERCLA and RCRA.
I

OVERVIEW OF IMMINENT HAZARD SUITS

A. The Section 6972 Imminent Hazard Citizen Suit

Section 6972(a)(1)(B)\(^8\) of RCRA is directed at the prompt abatement of conditions which "may present imminent or substantial endangerment to health or the environment" due to the disposal of a RCRA solid or hazardous waste. The section authorizes a federal cause of action against any person who causes or contributes to such conditions.\(^9\) These suits are not limited to specific statutory or regulatory violations; rather, they cover a broad range of conditions which may present an imminent hazard to health or the environment.\(^10\)

The § 6972(a)(1)(B) cause of action requires proof of three elements: (i) "disposal of any solid or hazardous waste";\(^11\) (ii) a threat of "an imminent and substantial endangerment to health or the environment"; and (iii) contribution to the endangerment by liable defend-

\(^8\) The statute 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 —

(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 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.

\(^9\) Id.
\(^10\) Id.

\(^11\) Section 1004(3) of RCRA contains a broad definition of "disposal," which encompasses the "leaking" of hazardous wastes. Zands v. Nelson, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991) [hereinafter Zands I]; see KFC Western, Inc. v. Meghrig, 49 F.3d 519, 520 (9th Cir. 1995) (plaintiffs allowed recovery for petroleum contamination under RCRA's citizen suit provision). RCRA "has always provided the authority to require the abatement of present conditions of endangerment resulting from past disposal practices, whether intentional or unintentional." H.R. REP. No. 198 (I and II), May 17 & June 9, 1983 [to accompany H.R. 2867], 98th Cong., 2d Sess., at 48, reprinted in 1984 U.S.C.C.A.N. 5576, 5607 (referring to § 6973). Legislative history states that these endangerments may stem from immediate or long-term problems. Id.

Although the definitions of "solid waste" (see definition at 42 U.S.C. § 6903(27) and related regulations) and "hazardous waste" (see definition at 42 U.S.C. § 6903(5) and 40 C.F.R. pt. 261 (1994)) under RCRA are complex characterizations, section 6972(a)(1)(B) fortunately applies equally to "solid or hazardous waste." 42 U.S.C. § 6972(a)(1)(B). The imminent hazard provision is not limited to any particular media—it applies equally to pollution of land, water, or air. Adam Babich, Environmental Law Reporter, ALI-ABA Course of Study, RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers, C883 ALI-ABA 81, 85-86 (Feb. 17, 1994), available in Westlaw, ALI-ABA library, at 102-03. For a discussion of the definitions of solid and hazardous waste, see infra part III.D.
The following sections describe the elements of a § 6972(a)(1)(B) imminent hazard suit relevant to the KFC Western decision.

1. Imminent and Substantial Endangerment

To be eligible for relief under § 6972(a)(1)(B), a plaintiff must demonstrate that conditions at the site present an "imminent and substantial endangerment to health or the environment." Section 6972(a)(1)(B) purports to address only the most urgent and serious conditions arising from the "past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste."13

Courts interpret the term "imminent and substantial endangerment" expansively. The language of § 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes."14 The Lincoln Properties, Ltd. v. Higgins court interpreted each word. It said "endangerment" means a "threatened or potential..."
harm” which “does not require proof of actual harm.”¹⁵ “[I]mminence” requires only a “risk of threatened harm . . . even though the harm may not be realized for years” and does not require a showing that actual harm will occur immediately.¹⁶ Finally, the Lincoln Properties court interpreted the word “substantial” only as requiring the existence of some cause for concern that someone may be exposed to risk.¹⁷ Similarly, the court in Price v. United States Navy interpreted the “imminent and substantial endangerment” element to require a “threat which is present now, although the impact of the threat may not be felt until later.”¹⁸

Other courts have been more restrictive. In Acme Printing Ink Co. v. Menard, Inc.,¹⁹ the court found that there was insufficient evidence of “imminent and substantial endangerment” despite the fact that “hazardous wastes are present at the site and that the site is not secure from inadvertent or unauthorized entry,” and that the site had been placed on the National Priorities List by EPA.²⁰

Some courts have held that plaintiffs may not bring RCRA imminent hazard suits when the endangerment no longer exists. In States v. BFG Electroplating and Manufacturing Co.,²¹ the court dismissed the suit as moot when the cinder blocks in question were removed from plaintiff’s property, and there was no longer a risk of a future RCRA violation.²²

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¹⁶. Id.; see also Gache v. Town of Harrison, 813 F. Supp. 1037 (S.D.N.Y. 1993) (holding that a landowner could bring a RCRA action if an imminent hazard existed, even though the town’s dumping had ended years earlier, and there was no evidence of further dumping); United States v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985); Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 535 (D.C. Cir. 1972) (“An ‘imminent hazard’ may be declared at any point in a chain of events which may ultimately result in harm to the public.”).
¹⁸. Price v. United States Navy, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992), aff’d 39 F.3d 1011 (9th Cir. 1994). The court held that there was no imminent and substantial endangerment, and no need for an abatement order, despite the fact that contaminants remained in the soil beneath the house. Id. The Price court reasoned that plaintiffs had not proven that the levels of contaminants present were hazardous. Id.
²⁰. Id. at 1478.
²². The court applied the mootness standard set forth in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). According to the rule of Gwaltney (a Clean Water Act (CWA) case), a defendant may have a suit dismissed as moot where there is no reasonable probability that the past wrong will be repeated. States v. BFG, 1989 WL 222722, at *9.
2. **Other Provisions**

Several RCRA features other than the imminent hazard requirement are relevant to arguments the *KFC Western* court considered. These include the notice requirement, the lack of a statute of limitations, and the prohibition on § 6972 suits when the EPA Administrator or the State has already taken action.

a. **Notice Requirement**

Plaintiffs asserting a cause of action under § 6972(a)(1)(B) are required to provide 90-days’ notice to the Administrator, the State, and potential defendants. The notice requirements are inflexible: “The Supreme Court has clearly and emphatically held that the notice and waiting period requirements of section 6972(b) are jurisdictional, and must be strictly followed.” Notice under 42 U.S.C. § 6972(c) must be given in the manner prescribed by regulations codified at 40 C.F.R. § 254. According to one court, however, as long as an amended complaint containing the RCRA claim is filed more than ninety days after notice is given, the notice requirement is satisfied.

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23. The statute provides that:
   
   No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—
   
   (i) the Administrator;
   
   (ii) the State in which the alleged endangerment may occur;
   
   (iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

42 U.S.C. § 6972(b)(2)(A). Note that the statute provides an exception to the notice requirement if a violation of the hazardous waste provisions of SWDA Subchapter III is alleged. *Id.* In that case, plaintiff may bring an action immediately after giving notice.


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b. Statute of Limitations

RCRA does not have a statute of limitations provision. However, certain federal courts have applied the five-year statute of limitations contained in 28 U.S.C. § 2462 to claims under RCRA, usually in cases involving claims by the government.27

c. Actions Prohibited

Actions under subsection (a)(1)(B) are preempted by the actions of the EPA Administrator or a State which are taken "in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment."28 First, plaintiffs may not bring a subsection (a)(1)(B) action if the Administrator is diligently prosecuting an action under § 6973, or under CERCLA is prosecuting an action, engaging in a removal or remedial action, or conducting a Remedial Investigation and Feasibility Study (RI/FS).29 Private actions are also barred if the Administrator has obtained a court order under § 106 of CERCLA or § 6973 of RCRA, under which a responsible party is remediating.30


29. Id. § 6972(b)(2)(B).

30. Plaintiffs may not bring a subsection (a)(1)(B) action if the Administrator:
   (i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of [CERCLA];
   (ii) is actually engaging in a removal action under section 104 of [CERCLA];
   (iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study [RI/FS] under section 104 of [CERCLA] and is diligently proceeding with a remedial action under that Act; or
   (iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of [CERCLA] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, [RI/FS], or proceeding with a remedial action.

Id.

There are certain limits to this rule. The prohibition does not bar actions which allege that an imminent and substantial endangerment exists following the termination of any removal action at a site, where no future remedial action is planned. H. Conf. Rep. No. 98-1133 (Oct. 3, 1984) [to accompany H.R. 2867], 79, 118, reprinted in 1984 U.S.C.C.A.N. 5649, 5689. Moreover, legislative history indicates that the section 6972(b)(2)(B)(iv) prohibition should be limited to the scope and duration of the applicable court or administrative order. "For example, an administrative order issued under section 106 of CERCLA or section 7003 of RCRA for surface cleanup at a site would not bar an action alleging that groundwater contamination at the site may present an imminent and substantial endangerment." H. Conf. Rep. No. 98-1133, 79, 118. Regarding whether RCRA citizen suits may be brought at sites where CERCLA response actions are underway, compare United
Similarly, plaintiffs may not commence an action under § 6972(a)(1)(B) where the state is engaged in certain removal or remedial actions. There are several limits to the state action preclusion. First, unlike EPA administrative orders, state administrative actions do not preclude (a)(1)(B) citizen suits. Moreover, section (a)(1)(B) suits are not precluded where defendants cannot establish that the state was “actually engaged” in a removal action under CERCLA § 104. Where a state agency is not authorized by the President or EPA to carry out a removal action, a RCRA subsection (a)(1)(B) claim is not prohibited by § 6972(b)(2)(C)(ii).

B. The Section 6973 Imminent Hazard Government Suit

Section 6973 is EPA's imminent hazard provision and is similar to § 6972. The scope of this government imminent hazard authority is broad. Persons liable under § 6973 include “any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal” of solid waste or hazardous waste.

31. The statute prohibits subsection (a)(1)(B) actions where the State: (i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section; (ii) is actually engaging in a removal action under section 104 of [CERCLA]; and (iii) has incurred costs to initiate a [RI/FS] under section 104 of [CERCLA] and is diligently proceeding with a remedial action under that Act.

32. Id. § 6972(b)(2)(B).


34. Orange Env't, 860 F. Supp. at 1026.

35. Id. This may be the case where a State has not entered into a cooperative agreement with EPA pursuant to § 9604(d). See id. at 1025. While remediation costs incurred by a State may be recoverable under § 9607, it does not necessarily follow that the State’s actions constitute a removal action under § 9604. Id. at 1028.

36. It provides:

Upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from [such activity], to order such person to take such other action as may be necessary, or both . . . .


37. Id. The legislative history provides that liability is imposed on “anyone who has contributed or is contributing to the creation, existence, or maintenance of an imminent
Examples of such persons are “past and present generators (both off-site and on-site) of hazardous wastes, past and present owners and operators or [sic] waste treatment, storage, or disposal facilities, and past and present transporters of solid or hazardous wastes.”\(^{38}\) Additionally, the legislative history expressly stated that § 6973 “applies to any act, whether past or present, which has resulted in or may result in an imminent and substantial endangerment to public health or the environment.”\(^{39}\)

Congress apparently intended the citizen suit provision to supplement government enforcement under § 6973.\(^{40}\) Legislative history regarding the citizen suit provision explicitly stated: “The Committee believes this expansion of the citizens suit provision will complement, rather than conflict with, the Administrator’s efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources.”\(^{41}\) The primary goal of § 6972(a)(1)(B) was stated to be “the prompt abatement of imminent and substantial endangerments.”\(^{42}\)

C. Remedies Available

1. Statutory Language

Prior to the Ninth Circuit’s decision in *KFC Western*, almost every court to reach the issue denied recovery of damages under RCRA’s imminent hazard citizen suit provision based on statutory language.\(^{43}\) Under § 6972, remedies that are clearly available (but only at the court’s discretion) are (i) injunctive relief, (ii) costs of litigation, (iii) attorney’s fees, and (iv) “such other action as may be necessary.”\(^{44}\) The statute does not expressly authorize restitution.\(^{45}\)

\(^{38}\) 42 U.S.C. § 6973.

\(^{39}\) H.R. REP. NO. 198, supra note 37.

\(^{40}\) Solid Waste Disposal Act Amendments of 1983 (Oct. 28, 1983), S. REP. NO. 284, 98th Cong., 1st Sess. [to accompany S.757], at 5. See also id. at 101-03 (proposing a new § 6972).

\(^{41}\) H.R. REP. NO. 198, supra note 37, at 5612.

\(^{42}\) Id.

\(^{43}\) Triffler v. Hopf, No. 92 C 7193, 1994 U.S. Dist. LEXIS 16158, at *15 (N.D. Ill. Oct. 31, 1994) (“Though numerous courts have expressly addressed the issue, none (to this court’s knowledge) has found a private cause of action for damages under § 6972(a).”)

\(^{44}\) The statute reads as follows:

(a)(2) 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
Neither does the language of § 6972 foreclose awards of restitution; rather, it allows courts equitable discretion in choosing remedies.\textsuperscript{46}

2. Other Court Decisions

a. Prior Decisions

Generally, federal courts have not permitted recovery of response costs in § 6972(a)(1)(B) actions,\textsuperscript{47} although some have held that restitution of costs was available under § 6973, EPA's imminent hazard provision.\textsuperscript{48} Courts have reasoned that the statutory language of § 6972(a) does not explicitly authorize restitution. Additionally, courts have relied on the notion that the statute only allows citizens to "genuinely act[ ] as private attorneys general rather than pursu[e] a private remedy."\textsuperscript{49} The courts believed that recovery of costs was inconsistent with the concept of a "private attorney general."

An often-cited decision holding that restitution is not available under § 6972(a)(1)(B) was rendered in Commerce Holding Co. v. Buckstone.\textsuperscript{50} In Commerce Holding, a landowner brought actions under CERCLA and RCRA to recover costs of past and future remediation against a tenant.\textsuperscript{51} The court denied plaintiff's claim for restitution, finding that while injunctive relief is available under...
§ 6972(a)(1)(B), the statute does not expressly or impliedly provide a private action for damages.\textsuperscript{52}

Plaintiff Commerce Holding had argued that the phrase "such other relief" in the statutory provision should be interpreted to provide for awards of injunctive relief as well as civil penalties.\textsuperscript{53} Commerce Holding made a well-reasoned distinction between legal and compensatory damages, and "equitable relief in the form of reimbursement for costs for remediation of the Site."\textsuperscript{54} The court refused to award reimbursement on the grounds that if it awarded it, Commerce Holding would be the "direct beneficiary of the substantive relief."\textsuperscript{55} The court viewed this as contrary to the statute's intent of allowing private parties to bring suit only if genuinely acting as private attorneys general, rather than pursuing a private remedy.\textsuperscript{56}

A claim for restitution under RCRA was also rejected in Kaufman and Broad-South Bay v. Unisys Corp.\textsuperscript{57} Plaintiff had already cleaned up the site, and no imminent hazard existed at the time of the decision. The district court followed Commerce Holding and denied the plaintiffs both damages and restitution.\textsuperscript{58} In its only independent analysis, the court rejected the plaintiff's argument that restitution should be available under § 6972 because it is available under RCRA § 6973, the government suit provision.\textsuperscript{59}

Despite the general trend, one recent district court decision, Bayless Inv. & Trading Co. v. Chevron U.S.A., Inc.,\textsuperscript{60} did allow restitution as a remedy under § 6972(a)(1)(B). The Bayless court first noted that district courts have "broad power to fashion equitable remedies" pursuant to § 6972.\textsuperscript{61} The court then noted that a district court has the

\textsuperscript{52} Id. (citing Walls v. Waste Resource Corp., 761 F.2d 311, 316 (6th Cir. 1985) and Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-18 (1981)).

\textsuperscript{53} Id. (citing Motion to Dismiss at 21). The court wrote:

The Court notes that in the demand in the complaint Commerce seeks 'an injunction directing defendants to determine the full scope of the soil and water damage due to hazardous waste contamination originating in and around the site, to remove all soil and water contamination and to enter into a comprehensive soil and water testing and monitoring program for an indefinite period of years to detect and prevent reoccurrence of pollution from hazardous waste contamination originating from the site.'

\textsuperscript{54} Id. (citing Complaint at 16).

\textsuperscript{55} Id. at 445 (citing Motion to Dismiss at 21).


\textsuperscript{58} Id. at 1477.

\textsuperscript{59} Id. (citing United States v. Price, 688 F. 2d 204 (3d Cir. 1982) and other cases).


\textsuperscript{61} Id. at *9-11.
power to award a mandatory injunction, requiring the expenditure of money.\textsuperscript{62} The court implicitly reasoned that the authority to grant plaintiffs reimbursement costs naturally followed from its ability to issue mandatory injunctions, and awarded reimbursement of cleanup costs under RCRA \textsuperscript{6}§ 6972(a)(1)(B).\textsuperscript{63}

The Ninth Circuit in \textit{KFC Western} followed a different line of analysis than the court in \textit{Bayless}, but reached the same result, rejecting the reasoning followed by courts in \textit{Commerce Holding} and \textit{Kaufman and Broad-South Bay}. In a recent decision, however, the Eighth Circuit Court of Appeals refused to follow \textit{KFC Western}.

\textbf{b. The Furrer v. Brown Decision}

On August 15, 1995, in \textit{Furrer v. Brown},\textsuperscript{64} the Eighth Circuit held that restitution is not available under § 6972(a)(1)(B). In \textit{Furrer}, the plaintiff landowners became aware of petroleum contamination after their land purchase, and remediated under state order.\textsuperscript{65} The plaintiffs subsequently sued to recover their remediation costs from the prior owners of the land, and also from Shell Oil Company, which had previously operated a service station on the property.\textsuperscript{66} The court found that the citizen suit provision is for the general benefit, that award of remediation costs would be for the "special benefit" of the plaintiffs, and that Congress intended that only injunctive relief be available under this provision.\textsuperscript{67} The Eighth Circuit applied the statutory interpretation test set forth in \textit{Cort v. Ash},\textsuperscript{68} finding that RCRA § 6972(a)(1)(B) does not authorize an implied cause of action for landowner plaintiffs to recover environmental remediation costs.\textsuperscript{69} In so doing, the \textit{Furrer} court explicitly declined to follow the Ninth Circuit’s reasoning in the \textit{KFC Western} decision.\textsuperscript{70}

\textsuperscript{62} \textit{Id.} (citations omitted). The court in \textit{Bayless} cited \textit{Lincoln Properties}:

The court now holds that injunctive relief requiring defendants to participate in monitoring and investigating the [hazardous chemicals] in the groundwater is appropriate in the circumstances of this case. An injunction will determine the existence and extent of the endangerment through further investigation, monitoring, and testing. This will prevent irreparable injury to the environment, regardless of whether such injury is viewed as a statutory or equitable requirement.


\textsuperscript{63} \textit{Id.} at *13.

\textsuperscript{64} 62 F.3d 1092 (8th Cir. 1995).

\textsuperscript{65} \textit{Id.} at 1093.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.} at 1094-96.

\textsuperscript{68} 422 U.S. 66 (1975), cited in \textit{Furrer}, 62 F.3d at 1094. \textit{Cort} involved a private claim under 18 U.S.C. § 610, which in terms provided only for a criminal penalty at the time of filing. The applicability of the \textit{Cort} analysis to RCRA’s citizen suit provision is questionable.

\textsuperscript{69} \textit{Furrer}, 62 F.3d at 1094.

\textsuperscript{70} \textit{Id.} at 1100.
In addition to rejecting the Ninth Circuit's statutory analysis, the 
Furrer court also asserted that the KFC Western opinion misconstrued
two Eighth Circuit cases that the KFC Western court cited as supporting
the proposition that the Administrator may sue for reimbursement under § 6973.71 Furrer, following close on the heels of KFC Western,
has created a split between the circuits. The United States Supreme
Court granted certiorari in KFC Western on September 27, 1995, to
resolve the controversy.72

II
THE KFC WESTERN, INC. V. MEGHRIG DECISION

A. The Facts

KFC Western, Inc. (KFC) purchased property in September of
1975 that was to become the subject of litigation—property on which
a Kentucky Fried Chicken franchise was in operation.73 KFC paid
$152,000 for the property, which was located on Western Avenue in
Los Angeles.74 The prior owners, Alan and Margaret Meghrig, had
operated a gasoline station at the site.75

Thirteen years later, in 1988, while improving the property, KFC
discovered that the site soil contained elevated levels of lead and benzene, allegedly caused by petroleum contamination.76 The City of Los
Angeles Department of Building and Safety issued a corrective notice
ordering all construction on the site to stop pending an assessment
and clearance from the County Department of Health Services.77 Site
assessment and remediation were completed at a cost of over $211,000
to KFC.78 Cleanup was completed in 1989.79 In June 1990, KFC
asked the Meghrigs to reimburse the cost.80 The Meghrigs refused.81

On December 9, 1991, KFC filed a cost recovery action in Cali-
ifornia Superior Court under state environmental, nuisance, and trespas
laws.82 The trial court dismissed all the claims.83 The state
environmental claims were dismissed under a California state legal

71. Id. at 1101. See infra parts II.B.1.b and IV.A.
72. 116 S. Ct. 41 (1995), — U.S. —. The next part discusses the KFC Western decision
in order to provide background for this author's suggested resolution of the issue.
73. KFC Western, 28 Cal. Rptr. 2d 676, 679 (Ct. App. 1994).
74. Id.
75. See id. at 678-79.
76. Id. at 679.
77. Id.
78. Id.
79. KFC Western, 49 F.3d 519 (9th Cir. 1995).
80. Id.
81. Id.
82. KFC Western, 28 Cal. Rptr. 2d at 679.
83. Id. at 678.
provision that excepted refined petroleum from coverage.\textsuperscript{84} The Court of Appeal in 1994 affirmed the dismissal of the state environmental claims. The court noted that the claims for permanent nuisance and trespass might be barred by the three-year statute of limitations, but allowed KFC to amend to include actions in continuing nuisance and trespass, which did not pose a limitations problem.\textsuperscript{85}

In May 1992, while the state law claims were pending and three years after the remediation had been completed, KFC filed suit under RCRA's imminent hazard provision in federal district court.\textsuperscript{86} KFC sought restitution of the expended cleanup costs.\textsuperscript{87} The district court dismissed the complaint on defendants' motion under Federal Rule of Civil Procedure 12(b)(6) on grounds that there was no "imminent and substantial endangerment" because KFC had completed the cleanup three years before filing, and RCRA authorized suits for injunctive relief only, not for damages.\textsuperscript{88} The Ninth Circuit reversed, holding that RCRA § 6972(a)(1)(B) authorizes a restitutioinary remedy and does not bar a post-abatement action such as KFC's.\textsuperscript{89}

\textbf{B. The Decision}

\textit{1. The Majority Opinion}

In its decision, the Ninth Circuit departed from a number of district court opinions that had refused to award restitution under RCRA § 6972(a)(1)(B). In order to justify allowing restitution, the Ninth Circuit relied heavily upon policy considerations.\textsuperscript{90} The decision was primarily based on an analogy to the § 6973 government imminent hazard provision,\textsuperscript{91} which allows the government to recover reimbursement for cleanup costs expended.\textsuperscript{92} The court found specific statutory authority for restitution in § 6972's provision for "such other action as may be necessary."\textsuperscript{93}

\begin{footnotes}
\item 84. See KFC Western, 28 Cal. Rptr. 2d at 683. California Health and Safety Code § 25317 (West 1992) excludes petroleum from the definition of hazardous substances.
\item 85. KFC Western, 28 Cal. Rptr. 2d at 684-86.
\item 86. KFC Western, 49 F.3d at 519.
\item 87. Id.
\item 88. Id.
\item 89. Id. at 519.
\item 90. See id.
\item 92. See KFC Western, 49 F.3d at 521-22.
\item 93. Id. at 521 (holding that "RCRA authorizes a restitutionary remedy," and citing 42 U.S.C. section 6972(a), which provides that "[t]he district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to [an imminent and substantial endangerment], to order such person to take such other action as may be necessary, or both . . . .").
\end{footnotes}
a. Policy

The KFC Western court's reasoning appears to rest largely on policy grounds:94

It would be unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions. By doing so, we would make the citizen suit remedy meaningless in most cases for the very citizens who most deserve the remedy, namely innocent citizens, like KFC, who have a financial stake in the contaminated property as well as potential and actual clean-up liability.95

The court explained that the government often orders "innocent" parties, such as KFC, to remediate contamination discovered on their property, "even though they did not cause the contamination or have any ties to the property when the contamination occurred."96 Upon receiving a government cleanup order, the court said, a citizen must respond promptly. "There is no time to sue for 'other equitable relief' in the form of a mandatory clean-up injunction against past polluters who may or may not still be on the scene."97 Furthermore, the court expressed concern that other avenues of cost recovery, such as tort claims, were often unavailable.98 These practical time constraints and fairness concerns convinced the KFC Western court that reimbursement of cleanup costs should be available as equitable relief under RCRA imminent hazard suits.99

b. Analogy to Section 6973

The court reasoned that relief under § 6972 should be similar to that available under § 6973. Examining congressional intent and statutory language, the court concluded that Congress gave citizen enforcers the same scope of authority under § 6972 as under § 6973.100 It based this conclusion on Congress having worded the provisions "al-

94. See id. at 523.
95. Id.
96. Id.
97. Id.
98. Id. at 523 n.6. The court said, "Even though causes of action for nuisance, trespass, and potential negligence are available to plaintiffs such as KFC, tort remedies are generally inadequate because of the difficulties of proof and attendant court delays." Id.
99. Id. at 524.
100. Id. at 521 n.2. The KFC Western court examined the legislative history:

The legislative history for the 1984 RCRA 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, who is authorized (according to persuasive out-of-circuit case law, discussed infra) to bring reimbursement actions. Nothing indicates that Congress intended citizen suits to serve a purpose different from that served by governmental actions. The House Committee on Energy and Commerce explained in its report that citizens have a limited right to sue in endangerment cases 'pursuant to the standards of liability established under Section 7003 [42 U.S.C. § 6973, Administrator's right of action]' and only if the Administrator, after receiving notice, fails to file an action.
most identically," and on Congress' intention that citizen suits be governed by the same standards of liability as government suits.\(^{101}\) The \textit{KFC Western} court noted, however, that there is legislative history which cuts the other way.\(^{102}\)

The court found that restitution is available to the government under § 6973, and noted that the Third and Eighth Circuits follow this rule.\(^{103}\) The court held that citizen plaintiffs under § 6972 may avail themselves of this remedy. "We are not persuaded by the Meghrigs' contention that material differences exist between the substantially identical citizen suit provisions in § 6972(a)(1)(B) and § 6973, so as to justify affording restitutinary relief only to the Administrator."\(^{104}\) The court accepted the argument that had been asserted by the plaintiffs and rejected by the courts in \textit{Kaufman and Broad-South Bay} and \textit{Commerce Holding}, and explicitly disapproved of those decisions.\(^{105}\)

c. Statutory Basis for Restitution Under Section 6972

The \textit{KFC Western} court reasoned that actions for restitution of cleanup costs under RCRA § 6972 fall within the statutory authorization of district courts to require parties to take "such other action as may be necessary."\(^{106}\) The court apparently interpreted this phrase as providing broad equitable authority. It explicitly rejected the Meghrigs' contention "that the statute entitles citizens to obtain only an injunction or other equitable relief that is not the equivalent of compensatory money damages."\(^{107}\)

d. Requirement of Imminent Hazard and Allowance of Post-Cleanup Suits

Again looking to interpretations of RCRA § 6973, the \textit{KFC Western} court rejected the defendants' arguments that § 6972's notice requirement and its absence of a statute of limitations precluded the

\(^{101}\) KFC Western, 49 F.3d at 521-22.

\(^{102}\) Id. at 522 (citing United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); and United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982)). The Eighth Circuit in \textit{Furrer v. Brown} disagreed with the Ninth Circuit's interpretation of \textit{Aceto and Northeastern Pharmaceutical} as supporting the proposition that the Administrator has a right to sue under § 6973. \textit{Furrer v. Brown}, 62 F.3d at 1101. See also part IV.A., infra.

\(^{103}\) Id. at 522 (citing United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); and United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982)). The Eighth Circuit in \textit{Furrer v. Brown} disagreed with the Ninth Circuit's interpretation of \textit{Aceto and Northeastern Pharmaceutical} as supporting the proposition that the Administrator has a right to sue under § 6973. \textit{Furrer v. Brown}, 62 F.3d at 1101. See also part IV.A., infra.

\(^{104}\) Id. at 521 (citing 42 U.S.C. § 6972(a)).
award of damages under that section.\textsuperscript{108} The court thus allowed recov-
ery of restitution by plaintiffs who file their action after abating the imminently hazardous condition on their property.\textsuperscript{109}

The defendants conceded that the absence of a notice require-
ment under § 6973 led to the conclusion that post-cleanup lawsuits were acceptable under that government imminent hazard provision.\textsuperscript{110} They argued, however, that post-cleanup lawsuits should not be allowed under § 6972, which contains a 90-day notice requirement.\textsuperscript{111} Defendants argued that the notice requirement indicated that the legis-
lation did not intend for plaintiffs to institute actions after abating the conditions that presented an endangerment.\textsuperscript{112} The defendants reasoned that the legislature probably included the notice require-
ment to give polluters a chance to avoid litigation by ceasing their harmful conduct or abating the hazardous condition.\textsuperscript{113} Defendants essentially argued that allowing a § 6972 imminent hazard suit where plaintiffs had already cleaned up the site would strip the notice provi-
sion of its primary functions.

Dismissing the defendants' arguments, the court stated that "there is no inconsistency between a notice requirement and the re-
covery of clean-up costs from past polluters"\textsuperscript{114} because the notice provision would still "serve[ ] certain interests of the EPA and the states by notifying them that endangerment was corrected and that the polluters are being held accountable."\textsuperscript{115} Defendants also argued that the lack of a limitations period for RCRA citizen suits is further evidence that reimbursement is unavailable under RCRA.\textsuperscript{116} They argued that if the court held to the contrary, private citizens would be able to file suit many years after they complete cleanup of once-imminent endangerment, and that this would be improper.\textsuperscript{117} Although the court acknowledged that Congress provided a limitations period in other statutes, such as in CER-
CLA, which expressly authorizes actions to recover cleanup costs,\textsuperscript{118}

\textsuperscript{108} Id. at 522-23.
\textsuperscript{109} Although plaintiffs in \textit{KFC Western} had completed cleanup in 1989, they first filed their actions in state court on Dec. 9, 1991, and in federal court in May 1992. \textit{See supra} part II.A.
\textsuperscript{110} \textit{KFC Western}, 49 F.3d at 522. The Administrator may file § 6973 actions immediately "upon receipt of evidence" of the requisite endangerment," without providing prior notice. \textit{See id.} (citing 42 U.S.C. § 6973(a),(c)); Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1159 (9th Cir. 1989)).
\textsuperscript{111} \textit{KFC Western}, 49 F.3d at 522 (citing 42 U.S.C. § 6972).
\textsuperscript{112} \textit{Id.} at 525 (Brunetti, J., dissenting).
\textsuperscript{113} \textit{See id.} at 522 (majority opinion).
\textsuperscript{114} \textit{Id.}.
\textsuperscript{115} \textit{Id.} (citation omitted).
\textsuperscript{116} \textit{Id.}.
\textsuperscript{117} \textit{Id.}.
\textsuperscript{118} \textit{Id.}.
the court was not troubled by this. The majority's view was that courts can alleviate any unfairness that might be created by the lack of a limitations period for RCRA citizen suits by applying equitable defenses such as laches.\textsuperscript{119}

In \textit{KFC Western}, the court rejected the defendants’ sensible reasons why the remedy of restitution should not be available in a case in which plaintiffs remediated the property prior to giving defendants notice of the action.\textsuperscript{120} The court based its reasoning upon prior decisions interpreting § 6973: “The Eighth Circuit reads the imminent endangerment requirement as ‘limit[ing] the reach of RCRA to sites where the potential for harm is great’ but not as limiting the time for filing the action.”\textsuperscript{121} The \textit{KFC Western} court also cited RCRA’s purpose: to “give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment.”\textsuperscript{122} The \textit{KFC Western} court concluded that RCRA does not require a plaintiff to file her action while the endangerment still exists.\textsuperscript{123}

2. The Dissenting Opinion

Judge Melvin Brunetti dissented to the decision primarily because he objected to allowing actions for restitution when an “imminent and substantial endangerment” no longer exists at the time of suit.\textsuperscript{124}

The dissent echoed defendants’ arguments.\textsuperscript{125} The dissent also argued that the purpose of the § 6972 notice requirement is to give the EPA Administrator the opportunity to bring suit herself, since under § 6972(b)(2)(B), a private citizen cannot bring suit if the Administrator has initiated her own suit.\textsuperscript{126} Additionally, Judge Brunetti cited the imperative phrasing of the statutory language\textsuperscript{127} to support his conclusion that a hazard at the time of suit is required.

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} This issue is further analyzed immediately below, as well as in part IV.F., \textit{infra.}
  \item \textsuperscript{121} \textit{KFC Western}, 49 F.3d at 521 (citing United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989)) (footnote omitted).
  \item \textsuperscript{122} \textit{Id.} The \textit{KFC Western} court also cited legislative history which does not seem to support its position: “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.” \textit{Id.} at 520.
  \item \textsuperscript{123} \textit{See id.} at 521 (citing \textit{Aceto Agric. Chem. Corp.}, 872 F.2d at 1383).
  \item \textsuperscript{124} \textit{See id.} at 524 (Brunetti, J., dissenting).
  \item \textsuperscript{125} \textit{See id.} at 525-26. Judge Brunetti stated, “[I]f reimbursement actions are permitted, private citizens will be able to sue past contributors many years after the contamination and clean-up.” \textit{Id.} at 526.
  \item \textsuperscript{126} \textit{Id.} at 525.
  \item \textsuperscript{127} \textit{Id.} (the “unambiguous language of RCRA] requires that the endangerment must be occurring at the time of filing suit. Only if the statute had read ‘may or may have
Judge Brunetti did agree with the majority that § 6972(a)(1)(B) should be interpreted in the same way as § 6973. However, he argued that the courts in United States v. Aceto Agricultural Chemicals Corp. and United States v. Price, cited by the majority, did not decide whether reimbursement would be available under RCRA § 6973 where the endangerment no longer existed, but only assumed that it was available.

Judge Brunetti’s opposition appears to center around the majority’s holding that an endangerment need not exist at the time of filing suit.

III

COMPARISON OF RESTITUTION UNDER RCRA WITH COST RECOVERY UNDER CERCLA

One effect of KFC Western is that in the Ninth Circuit, a CERCLA-like remedy is newly available under RCRA. An analysis of whether this overlap of remedies contravenes congressional intent is provided in part IV.C. As background for that analysis, this section discusses the relevant provisions of CERCLA and RCRA, and then compares the requirements for and remedies under those provisions.

A. Introduction

Both RCRA and CERCLA attempt to remedy the environmental harm caused by improper disposal of solid and hazardous waste. RCRA regulates solid and hazardous waste throughout its life cycle, from “cradle to grave.” CERCLA, on the other hand, primarily addresses the remediation of inactive waste sites.

The interlocking provisions of RCRA and CERCLA form a comprehensive residuals regulation and enforcement scheme. Congress

presented' would it have implied that § 6972(a)(1)(B) permits reimbursement actions for an endangerment that someone had already cleaned up.”).

128. Id. at 524 n.1.
129. 872 F.2d 1373 (8th Cir. 1989).
130. 688 F.2d 204 (3d Cir. 1982).
131. KFC Western, 49 F.3d at 526-27. See also part IV.A, infra.
132. See Roger C. Dower, Hazardous Wastes, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 151, 177 (Paul R. Portney ed. 1990) (stating that RCRA and CERCLA together address past and present disposal activities, and offer the potential of a life-cycle approach to the generation and disposal of hazardous waste).
enacted RCRA in 1976, amending the Solid Waste Disposal Act (SWDA).\textsuperscript{135} In 1980, Congress enacted CERCLA upon realizing that RCRA was "clearly inadequate" to deal with the problem of inactive hazardous waste sites.\textsuperscript{136} Four years later, Congress found that its hazardous waste program was not progressing; there was increasing public concern about hazardous waste and conflicts regarding CERCLA.\textsuperscript{137} To address these concerns, Congress enacted the 1984 RCRA Amendments.\textsuperscript{138}

Included in these amendments was § 6972(a)(1)(B).\textsuperscript{139} This provision expanded the scope of RCRA citizen suits to include abandoned hazardous waste sites\textsuperscript{140} as well as active ones, thus encroach-


There is perhaps no more telling evidence of the supercharged political atmosphere that begat Superfund than that it was passed by a lame-duck Congress during the transition from a Democratic to a Republican administration. Whereas other environmental programs evolved over many years, Superfund emerged much more rapidly, a monument to public concern that had no precedent in environmental law.

Dower, supra note 132, at 169.

\textsuperscript{137} Dower, supra note 132, at 165; see B. Dan Wood & Richard Waterman, The Dynamics of Political Control of the Bureaucracy, 85 AM. POL. SCI. REV. 801 (1991). Wood and Waterman describe the "saga of the early Reagan Administration's effort to curtail environmental regulation," and note that Congress was especially disillusioned with EPA's management of the hazardous waste program. Wood & Waterman, supra at 819. See also B. Dan Wood, Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement, 82 AM. POL. SCI. REV. 213 (1988) (describing the political responsiveness of agencies to elected institutions).

\textsuperscript{138} James A. Rogers & Dorothy A. Darrah, RCRA Amendments Indicate Hill Distrust of EPA, LEGAL TIMES, Nov. 19, 1984, at 28 (citing H.R. 2867). The pre-1984 problem was described thus:

[O]ne need only recall the big issues of the past several years [to appreciate the impact of the 1984 RCRA amendments]: the sham recycling of the dangerous chemicals (thus, in many situations, allowing the 'recycler' to escape EPA regulations); the almost-daily press accounts of leaking land disposal facilities (even the crème-de-la-crème sites that had been used in some cases for disposal of materials from government-supervised Superfund cleanups); the startling statistics about underground tanks (there are millions of them, they often leak, and most are not regulated because they hold products, not wastes). The 'glaring loophole' of the exemption for small generators of hazardous wastes, which was placed in the 1980 EPA regulations because the agency believed it was not equipped to deal with the hundreds of thousands of facilities that produce less than 1,000 kilograms per month of hazardous wastes, has been eliminated in a dramatic fashion.


\textsuperscript{140} Prior to 1984, RCRA applied primarily to ongoing hazardous waste operations and did not directly address pollution from old, abandoned disposal sites. Rogers & Dar-
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ing on CERCLA territory.141 As a result of the amendments, RCRA became a complex, far-reaching, and inflexible scheme designed “to force the internalization of the costs of improper disposal.”142

RCRA governs the generation, storage, use, transport, and treatment of solid and hazardous waste.143 Subtitle C of RCRA regulates hazardous waste144 and used oil.145 Subtitle D of RCRA regulates solid waste, including municipal solid waste landfills.146 Subtitle I of RCRA creates an underground storage tank regulatory program.147 While RCRA also applies to abandoned waste sites,148 RCRA is pri-


141. However, RCRA’s imminent hazard government suit provision had been used to address inactive waste sites prior to 1984. Solid Waste Disposal Act Amendments of 1983 (Oct. 28, 1983), S. Rep. No. 284, 98th Cong., 1st Sess. [to accompany S.757], at 5. “Though the issue of inactive waste sites is not addressed explicitly in section 7003 [§ 6973], the Congress, most courts and every administration which has administered the Act has construed the section to apply to such sites.” Id. This went beyond the expansion of RCRA that the judiciary had already sanctioned. Prior to 1984, some courts held that RCRA § 6973, like CERCLA, authorized government lawsuits to require remediation of inactive waste sites. See, e.g., United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982) (holding that 42 U.S.C. section 6973 allows the government to address events which took place at some time in the past but continue to threaten public health or the environment because “imminence in [section 6973] applies to the nature of the threat rather than identification of the time when the endangerment initially arose.”).

142. Dower, supra note 132, at 167-68.


144. 42 U.S.C. §§ 6921-6939e (1988) (Subtitle C was codified as Subchapter III of the Solid Waste Disposal Act (“SWDA”)); Babich, supra note 11, at 85.

145. Id. § 6935 (1988); Babich, supra note 11, at 85.

146. Id. §§ 6941-6949a (1988) (subtitle D of RCRA was codified as Subchapter IV of SWDA).

147. Id. § 6991-6991i (1988) (subtitle I of RCRA was codified as Subchapter IX of SWDA); Candace C. Gauthier, The Enforcement of Federal Underground Storage Tank Regulations, 20 Env't L. 261, 264 & n.16 (1990).

148. The 1984 RCRA Amendments closed a loophole in the statute for preexisting contamination, bringing RCRA into the realm of abandoned waste sites primarily covered under CERCLA.

Section 206 of the 1984 amendments ... is designed to remedy the situation in which a landfill owner attempts to demonstrate to EPA that contamination in ground water emanates from 'old' (pre-RCRA) disposal and that therefore remedial action required as part of a RCRA permit is inappropriate. Under EPA's current regulations an owner need not clean up plumes of contamination under a facility when those plumes are attributable to wastes disposed of prior to the effective date of EPA's groundwater clean-up (corrective action) requirements [see 40 C.F.R. §§ 264.90 and 264.98-264.100 (1983)]. Congress now has deemed this dichotomy unacceptable. ... [D]epending upon EPA's policy judgment as to whether the problems from 'old' disposal sites should be handled under RCRA or Superfund, the two programs may begin to overlap. EPA will be forced to confront in a difficult setting (i.e., on the same site) the issue of whether different cleanup standards are appropriate under RCRA and Superfund.

Rogers & Darrah, supra note 138, at 31-32 (footnote omitted) (emphasis added). Allowing restitution as a remedy under § 6972(a)(1)(B) of RCRA will also cause RCRA to overlap with CERCLA’s cost recovery provisions.
marily regulatory, and imposes good hazardous waste management practices.

CERCLA, on the other hand, primarily addresses the remediation of inactive waste sites.\textsuperscript{149} CERCLA establishes a “Superfund” (§ 111)\textsuperscript{150} and authorizes the government to conduct removal and remedial actions (§ 104(a))\textsuperscript{151} and to bring abatement actions in federal district court (§ 106(a)).\textsuperscript{152} The Act provides for broad liability (§ 107(a))\textsuperscript{153} and allows suits for cost recovery (§ 107(a))\textsuperscript{154} and contribution (§ 113(f)).\textsuperscript{155} CERCLA also contains a “citizen suit” provision (§ 310), allowing civil actions against violators or against EPA for failure to perform nondiscretionary duties;\textsuperscript{156} but it has no equivalent of RCRA’s imminent hazard citizen suit.\textsuperscript{157} Section 105\textsuperscript{158} establishes

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\textsuperscript{149} Brown & Hansen, supra note 134, at 648.

\textsuperscript{150} 42 U.S.C. § 9611 (1988). CERCLA established the trust fund, originally set at $1.6 billion, to finance EPA-led environmental cleanups. The cleanup fund was to be financed by private funds from the parties held to be responsible for the dump site; public funds from general tax revenues; and monies raised from a special tax, created in the act, on petroleum and chemical feedstocks. Dower, supra note 132, at 175. In 1986, SARA expanded the fund to $8.5 billion over five years. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 § 111, reprinted in 1986 U.S.C.C.A.N. (100 Stat.) 1642 (codified as amended at 42 U.S.C. § 9611) (“SARA”); Menell & Stewart, supra note 143, at 614. SARA also broadened the Superfund’s sources of income through a general environmental tax on corporate income and increasing petrochemical taxes. \textit{Id.; see 26 U.S.C. § 9507 (1988) (establishing a Hazardous Substance Superfund); 26 U.S.C. § 4611 (1988) (providing for environmental taxes); Dower, supra note 132, at 175.}

\textsuperscript{151} 42 U.S.C. § 9604(a) (1988).

\textsuperscript{152} \textit{Id.} § 9606(a) (1988).

\textsuperscript{153} \textit{Id.} § 9607(a) (1988).

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.} § 9613(f).

\textsuperscript{156} \textit{Id.} § 9659. \textit{See infra} note 195.

\textsuperscript{157} There was debate in 1986 over whether to include an “imminent and substantial endangerment” citizen suit provision in § 310 of CERCLA. The addition to § 310 would have expanded CERCLA suits to include currently active disposal sites, thus blatantly overlapping RCRA’s “imminent hazard” provisions.

One of the main reasons the Committee added this provision to CERCLA is because it is unclear whether citizens can use the citizen suits provision currently contained in RCRA ... to address all waste site threats. ... with this amendment, plaintiffs and the courts will not have to waste time and resources in determining that a non-listed substance is a solid waste under RCRA. Citizens should be able to protect themselves from dangerous chemicals regardless of whether EPA has formally listed the chemical under RCRA.

a National Contingency Plan (NCP) to set forth remediation standards, and a National Priorities List (NPL) of hazardous waste sites needing remediation.159

B. Enforcement Provisions

RCRA and CERCLA both authorize several different forms of government and private responses to releases of hazardous substances and to other conditions that threaten the public health and welfare.

1. RCRA

RCRA provides for two kinds of government enforcement suits. First, § 6973,160 discussed in part I.B, supra, authorizes the federal government to seek court orders to respond to imminent hazards. Second, § 6928161 authorizes the federal government to enforce RCRA Subtitle C hazardous waste requirements. The statute provides for EPA to issue administrative compliance orders assessing civil penalties for past or current violations and to require compliance, or to commence a civil action against a violator.162 It also specifies criminal penalties against any person who knowingly commits violations.163

RCRA also includes provisions for three types of citizen suits to support the Congress's stated goal of "prompt abatement of imminent and substantial endangerments."164 The first citizen suit provision, § 6972(a)(1)(A), allows private plaintiffs to sue persons who are in violation of RCRA requirements.165 The second, § 6972(a)(2), autho-

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159. Id.
161. Id. § 6928 (1988).
162. Id. § 6928(a).
163. Id. § 6928(d). Some of the violations warranting criminal sanctions include transporting hazardous waste to unpermitted facilities (§ 6928(d)(1)); treating, storing, or disposing of any hazardous waste without a permit or in violation of a permit, regulation or standard (§ 6928(d)(2)); and omitting information or making false statements on any document filed, maintained, or used for compliance purposes (§ 6928(d)(3)).
164. H.R. REP. No. 198, supra note 37.
165. That provision states:

Any person may commence a civil action on his own behalf —
rizes suits against the EPA Administrator for failure to perform non-discretionary enforcement duties.\textsuperscript{166} The third type of citizen suit authorized under RCRA is the type filed by the plaintiffs in \textit{KFC Western}, the § 6972(a)(1)(B) imminent hazard suit.\textsuperscript{167}

An additional enforcement mechanism is provided in Subtitle I of RCRA, which mandates an extensive underground storage tank (UST) regulatory program.\textsuperscript{168} Regulations promulgated under Subtitle I require “closure” of UST systems if releases from the tanks have at least threatened the environment.\textsuperscript{169} The major closure tasks include “preparation of the tank for removal, removal and disposal of the tank, and sampling of soil and groundwater.”\textsuperscript{170}

RCRA imposes substantial liability on owners and operators of USTs\textsuperscript{171} who do not comply with Subtitle I’s technical requirements.\textsuperscript{172} Owners and operators may be liable under RCRA for the

\begin{itemize}
  \item[(1)(A)] against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . .
\end{itemize}


\textsuperscript{166.} Id. § 6972(a)(2).

\textsuperscript{167.} Id. § 6972(a)(1)(B). This provision is discussed in detail in part I, supra.


\textsuperscript{170.} Id. at 629. Overall, the remedial costs are significant. The average cost of certain soil remediation technologies (excavation and disposal, excavation and incineration, soil venting, enhanced volatilization, soil flushing, and biodegradation) ranges from $10,000 to $320,000 per five hundred cubic yards of contaminated soil. \textit{Id.} at 631.


\textsuperscript{172.} An owner who knowingly fails to notify the appropriate state or local agency concerning the existence of a UST, or who submits false information with respect thereto, is subject to a civil penalty of up to $10,000 for each tank. 42 U.S.C. § 6991e(d)(1) (1988). Failure of an owner or operator to comply with EPA regulations and standards under approved state programs subjects the owner or operator to a civil penalty of up to $10,000 per tank for each day of violation. \textit{Id.} § 6991e(d)(2) (1988).

Subtitle I also requires that UST owners or operators demonstrate their “financial responsibility” by proving that they have a predetermined amount of insurance coverage. \textit{Id.} § 6991b(d) (1988). Commentators explain:

The amount of coverage is an indication of a UST owner or operator’s ability to pay for cleanup of potential leaks of petroleum. Owners or operators of USTs used for retail sales must have $1,000,000 of coverage; all other owners and operators must have $500,000 of coverage. The Trust Fund, which is financed through a gasoline tax, ensures that sufficient funds will be available for cleanup of spills. However, these funds are not to be used in lieu of the resources to be provided through the 'amount of coverage' required of owners and operators. Instead, these funds are for cleanup costs which exceed the required coverage.
costs of "corrective actions" incurred by the EPA or states.\textsuperscript{173} In the event of a UST leak, the responsibility to respond is shared by EPA, or the analogous state agency in states with EPA-approved UST programs,\textsuperscript{174} and the owner or operator of the UST. The initial "corrective action" upon discovering that a UST is leaking must be undertaken by the owner or operator within twenty-four hours.\textsuperscript{175} EPA, under certain circumstances, may also commence "corrective actions" which are paid for with funds from a trust established for that purpose.\textsuperscript{176} EPA may take these corrective actions only if such action is necessary 'to protect human health and the environment' and one or more of the following circumstances exists: (1) no responsible and able party can be found to clean up the leak, (2) the situation requires prompt attention in order 'to protect human health and the environment,' (3) the owner or operator of the tank refuses to comply with an EPA order to undertake the corrective actions, or (4) '[c]orrective action costs at a facility exceed the amount of coverage required by' Subtitle I and, therefore, 'expenditures from the Leaking Underground Storage Tank Trust Fund are necessary to assure an effective corrective action.'\textsuperscript{177}

\textsuperscript{173} 42 U.S.C. § 6991b(h)(6); Duncan & Bailey, supra note 171, at 253.

\textsuperscript{174} RCRA delegates enforcement authority to the states. 42 U.S.C. § 6926(b). To enforce its own program, a state must submit its hazardous waste management program to EPA for review and approval. Id. A state may operate its own program in lieu of the federal program if the state program (1) is equivalent to the federal program, (2) is consistent with the federal program and other state programs, and (3) provides for adequate enforcement. 42 U.S.C § 6926(b). In the Matter of: CID-Chemical Waste Management of Illinois, Inc., RCRA V-W-86-R-77, RCRA (3008) Appeal No. 87-11, 1988 WL 391528 (E.P.A. Aug. 18, 1988).

EPA retains enforcement authority in an authorized state subject to the procedural requirement that EPA notify the state prior to issuing an order or commencing a civil action in federal court. \textit{CID-Chemical Waste Management}, 1988 WL 391528, at *2 (citing Wyckoff Co. v. EPA, 796 F.2d 1197, 1201 (9th Cir. 1986)). Thus, EPA may bring enforcement actions in authorized states under RCRA § 3008. Id. Additionally, the Agency may exercise a state hazardous waste program authorized under § 3006 of RCRA, 42 U.S.C. §26, if it so chooses. \textit{CID-Chemical Waste Management}, 1988 WL 391528, at *2.

Federally authorized state programs, however, do not displace the citizen suit available under federal hazardous waste laws. See \textit{Lutz v. Chromatex, Inc.}, 725 F. Supp. 262 (M.D. Pa. 1989) (noting that EPA's position is that a RCRA citizen suit is available whether or not a state has an authorized program).

\textsuperscript{175} Duncan & Bailey, supra note 171, at 254.

The response must include reporting the release to the EPA, prevention of further leakage, and identifying and mitigating fire, explosion and vapor hazards. Next, the owner or operator must undertake a series of abatement measures including removal of any petroleum remaining in the tank and cleanup of any free product in order to prevent further potential damage to groundwater. Id.

\textsuperscript{176} Id. at 253 (citing 42 U.S.C. § 6991b(h)(2)).

\textsuperscript{177} Id. at 254.
Because there are often parties other than current landowners who contributed to leaking underground storage tank (LUST) contamination, landowners who are required to conduct cleanup under these RCRA provisions continually seek ways to recover their cleanup costs. Landowners file under RCRA, other federal and state statutes, and various common law causes of action.

Some courts have held that plaintiffs may not bring RCRA citizen suits under subchapter VII because petroleum USTs are regulated exclusively under subchapter IX [Subtitle I], which does not provide for citizen suits. Other courts reject this reasoning. According to these courts, "[c]ivil enforcement suits brought pursuant to Subchapter VII § 6972 (a) would merely supplement the federal enforce-

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179. The decisions in Mangini v. Aerojet General Corp., 281 Cal. Rptr. 827 (1991), and Capogoeannis v. Superior Court, 15 Cal. Rptr. 2d 796 (1993), address common law causes of action in California, including nuisance, trespass, negligence, and strict liability. See generally Brown & Hansen, supra note 134; David R. Hodas, Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm, 16 ECOLOGY L.Q. 883 (1989) (reviewing the public nuisance doctrine and discussing the viability of public nuisance actions in light of existing environmental statutes).

180. See, e.g., Winston v. Shell Oil Co., 861 F. Supp. 713, 716-17 (C.D. Ill. 1994) ("Petroleum USTs are to be regulated solely by subchapter IX of RCRA.") (citing Edison Elec. Institute v. EPA, 2 F.3d 438 (D.C. Cir. 1993)).

The CFR definitions demonstrate that subchapter III is meant to regulate only hazardous waste USTs. Petroleum USTs are expressly excluded from subchapter III's coverage. Accordingly, this Court finds that regulation of petroleum USTs is only available under subchapter IX of RCRA, even though petroleum could be considered both a hazardous and a regulated substance. . . .

Section 6991 contains federal enforcement for subchapter IX. This section contains the only relief available against violators of the subchapter. The Administrator is given the power to bring suit in both § 6991e of subchapter IX and § 6973(a). However, there is no section in subchapter IX which allows citizen suits similar to those allowed by § 6972. Therefore, the Administrator is the only party allowed to bring suit for Defendants' violations of §§ 6991-6991i. Winston, 861 F. Supp. at 718 (citing 40 C.F.R. § 280.12 and 42 U.S.C. § 6991 (1988)).

In contrast to the reasoning of the Winston decision, the existence of a notice exception under § 6972(b) for violations of Subchapter III implies that the § 6972(a) suits apply to imminent hazard conditions beyond those that are hazardous waste violations of Subchapter III. Thus, § 6972 should apply to petroleum UST leaks.

ment provisions of Subchapter IX." In Zands v. Nelson, the court held that plaintiffs could bring RCRA imminent hazard suits based on leaking underground storage tanks containing petroleum. The decision in KFC Western appears to confirm that § 6972 citizen suits are not preempted by the UST provisions.

In sum, RCRA provides for government enforcement through its § 6973 imminent hazard provision, § 6928 civil and criminal compliance provisions, and Subtitle I UST provisions. Citizens may bring suit under § 6972(a)(1)(A) against persons who are in violation of RCRA requirements, under § 6972(a)(2) against the EPA Administrator for failure to perform nondiscretionary duties, and can sue under the § 6972(a)(1)(B) imminent hazard provision.

2. CERCLA

CERCLA takes an "act first, ask questions later" approach towards facilitating the prompt abatement of environmental conditions that pose public health threats. Section 104 of CERCLA authorizes the President to conduct removal or remedial actions when a hazardous substance is released or threatened to be released into the environment, or when the possibility exists that a pollutant or contaminant

182. Id. at *21.
184. Zands involved a suit under RCRA resulting from a leak of petroleum products from USTs. Zands I, 779 F. Supp. at 1257. Plaintiffs, who purchased land that was previously used as a gas station, alleged that they were unaware of the gasoline leakage. Id. They further alleged that they were not in any way responsible for the gasoline contamination, and that all of the contamination occurred prior to their purchase of the property. Id.

Zands I held that soil contaminated by petroleum which has leaked from a UST is not excluded from RCRA. Id. at 1262-63; see Craig Lyle L.P. v. Land O'Lakes, Inc., 877 F. Supp. 476, 482 (D. Minn. 1995) (agreeing with Zands that "spilt or leaked petroleum resulting from commercial operations satisfies RCRA's definition of 'solid waste.'"); Agricultural Excess and Surplus Ins. Co., 1995 U.S. Dist. LEXIS 1871, at *17 (stating that a private citizen may bring a civil enforcement suit pursuant to SWDA Subchapter VII against someone who is contributing to the disposal of petroleum).

The court in Zands II found an imminent hazard to exist under the circumstances. 797 F. Supp. at 807. It relied on this rule: "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public. It is not necessary that the final anticipated injury actually have occurred prior to a determination that an 'imminent hazard' exists." Id. at 809 (quoting United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985); also quoting Environmental Defense Fund v. E.P.A., 465 F.2d 528, 535 (D.C. Cir. 1972)). The court ruled that if the plaintiffs could prove that the contamination occurred prior to the transfer of the property to the plaintiffs, while the defendants as a group owned or operated the gasoline station, then the burden would shift to the individual defendants to prove that they were not responsible. Zands II, 797 F. Supp. at 811-18.
will present an "imminent and substantial danger to the public health or welfare."186 In these circumstances,

the President is authorized to act, consistent with the national contingency plan [NCP], to remove or arrange for the removal of, and provide for remedial action relating to [a CERCLA] hazardous substance, pollutant, or contaminant at any time . . . , or take any other response measure consistent with the [NCP] which the President deems necessary to protect the public health or welfare or the environment.187

CERCLA authorizes the government to expend money from the Superfund to remedy contamination, and then recover its costs from potentially responsible parties (PRPs).188 PRPs are jointly and severally liable for cleanup costs that are consistent with the NCP.189

As an alternative to conducting the action itself, when the President determines that there "may be an imminent and substantial endangerment to the public health or welfare or the environment," the government may bring a court action or issue an administrative order under CERCLA § 106190 to require a responsible party to abate the condition.191 After giving notice to the affected state, the President may also issue "such orders as may be necessary to protect public health and welfare and the environment."192 CERCLA's "imminent

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186. Id. § 9604(a)(1).
187. Id.
188. See id. §§ 9611, 9622.
189. While CERCLA does not explicitly provide for joint and several liability, courts have imposed joint and several liability under that Act. See Price v. United States Navy, 39 F.3d 1011, 1018 (9th Cir. 1994) (stating that although CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm); United States v. Colorado & Eastern R.R. Co., No. 94-1041 & 93-1422, 1995 U.S. App. LEXIS 5562, at *10-13 (10th Cir. Mar. 17, 1995) ("[I]t is now well settled that [CERCLA] § 107 imposes strict liability on PRPs for costs associated with hazardous waste cleanup and site remediation. . . . It is also well settled that § 107 imposes joint and several liability on PRPs regardless of fault."); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 100 (1st Cir. 1994) (stating that CERCLA is silent regarding the extent of a particular PRP's liability and in order to fill this void the courts have read CERCLA as imposing joint and several liability).

However, courts do not impose joint and several liability in all circumstances. Courts will apportion damages in the rare instances where a defendant can show the environmental harm is divisible. Colorado & Eastern R.R. Co., 1995 U.S. App. LEXIS 5562, at *11; see generally In re Bell Petroleum Servs., 3 F.3d 889, 894-902 (5th Cir. 1993) (discussing CERCLA jurisprudence regarding joint and several liability).
191. The statute provides that:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may . . . secure such relief as may be necessary to abate such danger or threat [in a U.S. district court].
192. Id.
and substantial danger" language, and the authority given to the President, are similar to RCRA § 6973.193

Finally, § 310194 of CERCLA authorizes citizen suits against persons violating the requirements of CERCLA, and against the federal government for failure to perform nondiscretionary duties.195

Although some legislators had proposed in 1986 to allow "imminent and substantial endangerment" citizen suits as well under § 310, Congress ultimately omitted such a provision,196 thus leaving citizen enforcement to RCRA.197

193. Id. § 6973.
194. Id. § 9659.

   (1) against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective . . . [under CERCLA]; or

   (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the [Agency for Toxic Substances Disease Registry (ATSDR)] where there is alleged a failure of the President or of such other officer to perform any act or duty . . . which is not discretionary with the President or such other officer.

42 U.S.C. § 9659(a).

   The legislative history gives three reasons for the omission of an "imminent and substantial endangerment" provision from CERCLA. First, a citizen's right to commence an injunctive action was already included under § 6972 of [RCRA]. Second, the omission would not impair the rights of any person to bring an action under federal, state or common law. Third, if citizens were allowed to bring such suits, they might interfere with the EPA cleanup program. H.R. REP. No. 253, 99th Cong., 2d Sess. 4, reprinted in 1986 U.S.C.C.A.N. 99-2835, 2964-65 (1986), cited in Bull, supra note 157, at 656.


   First, . . . CERCLA, in most cases, requires the cleanup of hazardous substances only after the government has first issued a cleanup order. Thus, in the absence of prior government action, citizens may not be able to use the citizen suit provision to compel the cleanup of hazardous substances. Second, although section 310 may authorize challenges to government cleanup decisions, section 113(h), which deals with the 'timing' of judicial review under CERCLA, may prevent those challenges from being brought until after the government has completed the cleanup of a site.

Id. at 931 (footnotes omitted).

Gaba and Kelley suggest injunctive relief should be expanded to CERCLA. Id. at 939. They distinguish the RCRA suit from the provision proposed for CERCLA by stating that CERCLA could cover a wider range of hazardous substance releases. Id. at 937-38. "RCRA would not presumably authorize an action to abate problems caused by hazardous substances that are not classified as wastes but may still be released into the environment." Id. at 938 (emphasis added).
C. Cost Recovery Suits Under CERCLA

Under CERCLA § 107, plaintiffs may recover against a wide range of liable parties\(^\text{198}\) the necessary costs of remediation that are incurred in a manner consistent with the NCP.\(^\text{199}\) In contrast to RCRA, CERCLA § 107 does not authorize injunctive relief.\(^\text{200}\) Damages in addition to the cost of cleanup are not available under CERCLA.\(^\text{201}\) At least one court has held that response costs are not recoverable under CERCLA until the entire remedial action is complete.\(^\text{202}\)

\(^{198}\) Liability under § 107 and § 113 is imposed upon a wide range of persons, described as follows.  
(1) the owner and operator of a vessel or a facility,  
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,  
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility,. . . and  
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .

\(^{199}\) See New York v. Shore Realty Corp., 759 F.2d 1032, 1041-43 (2d Cir. 1985) (holding that inclusion on the NPL is not a requirement under the NCP for plaintiffs to recover response costs); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 289-90 (N.D. Cal. 1984) (holding that a state does not require authorization from the EPA Administrator in order to recover costs); Michael B. Hingerty, Property Owner Liability for Environmental Contamination in California, 22 U.S.F. L. REV. 31, 54 (1987). But see Wickland Oil Terminals v. Asarco, Inc., 590 F. Supp. 283, 289-90 (N.D. Cal. 1984) (holding that response costs of a private party under § 9607(a)(4)(B) cannot be recovered absent supervision by EPA or a state agency that has entered into a cooperative agreement with EPA).

\(^{200}\) Shore Realty, 759 F.2d at 1049-50.

\(^{201}\) Plaintiffs have failed to recover damages under CERCLA for such things as loss of consortium, damage to groundwater wells, punitive damages or damages for lost rental value, or medical monitoring costs. See Milbut v. Hi-Score Plant Food Company, 1992 WL 396774, at *3 (E.D. Pa. Dec. 24, 1992) (holding that plaintiffs cannot recover damages under CERCLA for loss of consortium, damage to groundwater wells, punitive damages or damages for loss of rental value, or medical monitoring costs); Daigle v. Shell Oil Co., 972 F.2d 1527, 1535 (10th Cir. 1992) (holding that medical monitoring costs do not qualify as response costs under CERCLA); Ohio v. United States Dept' of Interior, 880 F.2d 432, 474 (D.C. Cir. 1989) (holding that costs of general research on the biological effects of hazardous substance spills are not compensable under CERCLA); Price v. United States, 39 F.3d 1011, 1017 (9th Cir. 1994) (agreeing with the Daigle court and holding that medical costs are not response costs under CERCLA).

Under § 113(f), "potentially responsible parties" (PRPs) may recover "contribution" from other PRPs. Under both §§ 107 and 113(f), courts undertake to equitably apportion costs according to the relative liabilities of the PRPs.

With the provision of a restitutionary remedy, RCRA § 6972(a)(1)(B) resembles CERCLA’s provisions for private actions under §§ 107 and 113(f).

D. Definitions of Hazardous Substances

1. RCRA

The definitions of solid and hazardous waste under RCRA are extremely complicated. As one commentator notes, "[t]he universe of substances that may give rise to liability under § [6972(a)(1)(B)]—nonexempt, potentially dangerous, discarded material—is probably at least as large as the universe of CERCLA hazardous substances." A few general principles are summarized here.

"Hazardous wastes" under RCRA are a subset of "solid wastes." Additionally, RCRA has two sets of definitions of solid and hazardous waste: statutory definitions and regulatory (Subtitle C) definitions. In order to meet the regulatory definitions for hazardous waste, a substance must first meet the statutory definitions.

204. See In re Bell Petroleum Servs., 3 F.3d 889, 900-02 (5th Cir. 1993).
205. Babich, supra note 11, at 93.
206. See generally Menell and Stewart, supra note 143, at 571-88 (discussing wastes covered under RCRA).
207. 42 U.S.C. § 6903(5),(27) (1988); Babich, supra note 11, at 88. Babich explains: 'Solid waste' is discarded material that does not fall into four relatively narrow exemptions. (Despite its somewhat misleading name, 'solid' waste can include solid, liquid, semisolid, or contained gaseous material. 'Hazardous waste' is solid waste that is potentially harmful to people or the environment. Because § 7002(a)(1)(B) employs these stripped-down, statutory definitions, many of those who are fortunate enough to be exempt from the Subtitle C hazardous waste regulatory program (for example, the mining industry)—or from CERCLA liability for materials meeting the 'hazardous substance' definition—will find they are not immune from RCRA imminent hazard actions.

Id. at 91.
208. Id. § 6903(5),(27).
209. Babich, supra note 11, at 87-88; 42 U.S.C. § 6921. One commentator stated: It is easy to tell when the statutory, as opposed to regulatory, RCRA waste definitions apply. In RCRA § 3001, Congress instructed EPA to (1) list hazardous wastes and (2) identify characteristics of hazardous wastes that 'should be subject to the provisions of this Subchapter [III, i.e., Subtitle C].' Throughout RCRA, when Congress wished to refer to these Subtitle C wastes (e.g., in RCRA §§ 3005(a) and 3010(a)) the statute refers to 'hazardous waste identified or listed under this subchapter' or uses similar language. When RCRA simply addresses 'hazardous' or 'solid waste' (e.g., in §§ 3004(u), 7002(a)(1)(B), and 7003) it is the statutory definitions that apply.

Babich, supra note 11, at 89 (footnotes omitted).
The statutory definitions also "apply with independent force to a variety of situations, including RCRA imminent hazard actions under [§ 6972(a)(1)(B)]."\(^{211}\) Under the regulations, a substance can be deemed to be a hazardous waste if it is listed by EPA, mixed with or derived from a hazardous waste, or exhibits any one of four characteristics: ignitability, corrosivity, reactivity, or toxicity.\(^{212}\)

Although petroleum products, used petroleum products, and petroleum-contaminated media and debris are not listed hazardous wastes under RCRA,\(^{213}\) the complex provisions of RCRA require cleanup of petroleum and other contamination. Such materials may be characterized as hazardous wastes according to the above-mentioned criteria, by applying EPA's Toxicity Characteristic (TC) rule.\(^{214}\) However, EPA has temporarily deferred the applicability of the TC rule to media and debris contaminated with petroleum from USTs which are subject to the corrective action requirements of Subtitle I of RCRA.\(^{215}\) Despite this deferral of the TC Rule, UST petroleum-contaminated media and debris may be regulated as hazardous wastes under RCRA if they fail the TCLP for any of the toxic chemicals which were not added as part of the TC rule, or if the solid waste is a "characteristic" waste.\(^{216}\)

Only certain USTs are regulated under RCRA.\(^{217}\) In addition, Subtitle I only governs certain substances:

211. Id.
213. O'Brien, supra note 212, at 914.
214. Id. (discussing the Toxicity Characteristic rule, 55 Fed. Reg. 11,798 (1990)).

The method adopted by U.S. EPA to determine whether a solid waste is toxic, and thus a hazardous waste, is the Toxicity Characteristic Leaching Procedure, commonly referred to as TCLP. . . .

[A] solid waste is a "TC Waste", and thus a hazardous waste, if any of the chemicals listed in the TC rule, such as benzene, are present in specified concentrations in the waste sample extract (i.e., leachate) resulting from application of the TCLP to that waste. . . . Benzene, which was added as part of the TC rule, is a common constituent of petroleum products. Accordingly, among the wastes that may be characterized as a hazardous waste under the TC rule are petroleum-contaminated media and debris.

Id.

215. Id. at 915 (citing 40 C.F.R. § 261.4 (1992)).
216. Id.
217. Subtitle I governs only USTs which meet RCRA's definition of USTs. Duncan & Bailey, supra note 171, at 251.

For purposes of Subtitle I, a UST is a tank (including the underground pipes connected thereto) of which at least ten percent is beneath the surface of the ground and which is used to contain a 'regulated substance' as defined in Subtitle I. Some USTs are exempted from Subtitle I. Exempt USTs include farm or residential tanks with a capacity of 1100 gallons or less which are used for noncommercial purposes, and tanks used for storing heating oil for use on the premises where the oil is stored. Subtitle I's definition of UST encompasses about 1.4 million tanks nationwide.
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(A) any substance defined in section 9601(14) [CERCLA section 101] of this title (but not including any substance regulated as a hazardous waste under subchapter III of this chapter), and (B) petroleum.' Note that petroleum is specifically regulated by Subtitle I. In addition, substances which are otherwise regulated by RCRA subchapter III—'Hazardous Waste Management'—are excluded from Subtitle I thereby avoiding overlap of these two RCRA chapters.\textsuperscript{218}

2. CERCLA

CERCLA liability hinges upon whether a substance is classified as a "hazardous substance." Hazardous substances under CERCLA include substances and pollutants listed in the Clean Water Act (CWA), the hazardous wastes listed in the Solid Waste Disposal Act (RCRA), hazardous pollutants listed in the Clean Air Act, toxic substances listed in the Toxic Substances Control Act, and other designated substances.\textsuperscript{219} CERCLA's definition of "hazardous substance" is subject to the infamous "petroleum exclusion."\textsuperscript{220}

Successive court decisions have defined the scope of the petroleum exclusion. Generally, releases of uncontaminated gasoline and other fuels are within the petroleum exclusion.\textsuperscript{221} But petroleum products to which hazardous substances have been added or increased in concentration during use may be outside the petroleum exclusion.\textsuperscript{222}

*Id.* (footnotes omitted).

\textsuperscript{218} Id. at 251-52.


\textsuperscript{220} "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 . . . and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel . . . ." 42 U.S.C. § 9601(14). See Duncan & Bailey, supra note 171, at 262-63 (discussing CERCLA's petroleum exclusion); Wilshire Westwood Ass'n v. Atlantic Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989) (holding that CERCLA's petroleum exclusion applies to unrefined and refined gasoline). Note that pursuant to the 1984 amendments, RCRA specifically regulates petroleum. See supra notes 213-16 and accompanying text.

There is not much legislative history behind the petroleum exclusion, except that it may have been a cost of the hurried compromises that ultimately enabled CERCLA to become law. See Roger Armstrong, CERCLA's Petroleum Exclusion: Bad Policy in a Problematic Statute, 27 LOY. L.A. L. REV. 1157, 1171-74 (1994); Christopher D. Knopf, What's Included in the Exclusion: Understanding Superfund's Petroleum Exclusion, 5 FORDHAM ENVTL. L.J. 3, 28 n.158 (1993).

\textsuperscript{221} The current rule appears to be that the petroleum exclusion "applies to both refined and unrefined gasoline despite the fact that certain of its indigenous components and additives introduced during the refining process are designated as hazardous substances under CERCLA." Duncan & Bailey, supra note 171, at 265.

\textsuperscript{222} Duncan & Bailey, supra note 171, at 266 (citing Wilshire Westwood Ass'n v. Atlantic Richfield Corp., 881 F.2d 801, 803 n.3 (9th Cir. 1989)). Petroleum products which contain substances other than their indigenous components and common additives (in excess of their normal occurrence in petroleum) would not be excluded from the reach of CERCLA. Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1384 (E.D. Cal.)

CERCLA and RCRA are alike in many respects, and the legislative development of the two statutes was interwoven.\footnote{223} They contain comparable government and citizen enforcement (and cost recovery) provisions.\footnote{224} Included as liable parties under both CERCLA and RCRA are owners, operators, generators, and transporters.\footnote{225} Following \textit{KFC Western}, the remedies available under CERCLA and RCRA also overlap. The availability of restitution under RCRA § 6972(a)(1)(B) makes that provision parallel CERCLA's provisions for the recovery of response costs (§ 107)\footnote{226} and contribution (§ 113(f)).\footnote{227}

The RCRA imminent hazard provision, however, offers a number of advantages over CERCLA remedies. First, the RCRA provision provides specifically for recovery of attorney's fees by private parties.\footnote{228} Attorney's fees are not recoverable under CERCLA.\footnote{229} Second, RCRA authorizes courts to issue mandatory cleanup orders.\footnote{230} Under CERCLA, costs are not recoverable until the response action is complete.\footnote{231} Third, RCRA allows penalties of up to $25,000 per
day.\textsuperscript{232} The possible imposition of these penalties, and the potential recovery of attorney's fees, makes RCRA more threatening to defendants than CERCLA cost recovery suits. At the least, these provisions give bargaining power to plaintiffs.

In addition, the RCRA imminent hazard suit may be used for substances outside the scope of CERCLA. CERCLA hazardous waste is defined to include those substances listed under regulations promulgated pursuant to RCRA, while RCRA § 6972(a)(1)(B) applies to wastes that merely meet the broader statutory definition in RCRA.\textsuperscript{233} The scope of substances included under RCRA § 6972(a)(1)(B) is thus greater than those included under CERCLA. RCRA may encompass pesticides, which are not covered by CERCLA.\textsuperscript{234}

Perhaps the most significant substance covered by RCRA is petroleum,\textsuperscript{235} which is specifically excluded from CERCLA.\textsuperscript{236} Prior to \textit{KFC Western}, remedial options for property owners whose land was contaminated by petroleum products were unusually limited.\textsuperscript{237} CERCLA's petroleum exclusion left many innocent landowners potentially responsible for cleanup of leaking USTs at current and former gasoline stations across the country and unable to recover their costs.\textsuperscript{238} After \textit{KFC Western}, RCRA provides these plaintiffs with an avenue of cost recovery.

Besides the substances covered, there are other areas where the scope of RCRA's imminent hazard provision is useful. First, RCRA does not require compliance with the national contingency plan (NCP).\textsuperscript{239} In contrast, CERCLA's cost recovery provisions only apply grant declaratory relief for future costs. \textit{Fallowfield Dev. Corp.}, 1993 WL 157723, at *10 (citing 42 U.S.C. § 9613(g)).


233. \textit{See supra} part III.D.

234. CERCLA exempts pesticide products registered under the Federal Insecticide, Fungicide, and Rodenticide Act from reporting requirements and cost recovery liability. 42 U.S.C. §§ 9607(i) and 9603(e).


236. \textit{See supra} part III.D.2.


Many owners of USTs may not be able to afford the cost of cleaning up a petroleum spill from their USTs. The median motor fuel outlet in 1987 had $90,000 in net worth, $210,000 in assets, and $14,000 in annual after-tax profits — hardly a deep pocket. Furthermore, many of these fuel outlets cannot afford pollution liability insurance since the premiums for such insurance have ballooned in the past several years.

Duncan & Bailey, \textit{supra}, at 247 (footnotes omitted).

if cleanup has been undertaken in compliance with the NCP.\textsuperscript{240} Second, imminent hazard suits apply to UST cases where the tanks are not "underground storage tanks" under the statutory definition. Third, plaintiffs may file subsection (a)(1)(B) RCRA citizen actions to remedy comparatively small sources of contamination.

On the other hand, RCRA imminent hazard suits may be more difficult to establish than CERCLA cost recovery suits because RCRA § 6972(a)(1)(B) requires a showing of "imminent and substantial endangerment."\textsuperscript{241} This requirement is the primary disadvantage of the RCRA cause of action, as compared with CERCLA §§ 107 and 113. However, government cleanup orders under CERCLA § 106\textsuperscript{242} require a showing of an imminent and substantial endangerment, so private plaintiffs subject to CERCLA orders should not have difficulty making the RCRA showing.

Following \textit{KFC Western}, plaintiffs have a cause of action for cost recovery under RCRA that is more powerful in certain ways than the provisions of CERCLA. Even with the availability of restitution under RCRA imminent hazard suits, however, plaintiffs will not be entitled to recover duplicative costs.\textsuperscript{243} The merits of allowing a restitutitionary remedy under RCRA are explored below.

\section*{IV \ ANALYSIS OF KFC WESTERN}

The \textit{KFC Western} court based its decision to award restitution to private plaintiffs under RCRA § 6972(a)(1)(B) on an analogy to RCRA § 6973, the government imminent hazard suit provision.\textsuperscript{244}

\textsuperscript{240} CERCLA requires the promulgation of certain standards in the form of the National Contingency Plan. See 42 U.S.C. § 9605 (1988).

The NCP requires that the response and remedial activities be conducted according to 'applicable' or 'relevant and appropriate' methods. The EPA determines which standards and methods are applicable by making an objective determination of whether the standards address the circumstances at the site. The EPA can also use other useful 'advisories, criteria, or guidance' in responding to a particular release.

\textsuperscript{241} This element is discussed supra, part I.A.1. Under CERCLA, hazardous substances also do not need to qualify as "discarded," as they do under RCRA. The "disposal" requirement under RCRA, however, is so lenient that § 6972(a)(1)(B) should apply to most soil and groundwater pollution with "solid wastes." See supra note 11.

\textsuperscript{242} 42 U.S.C. § 9606 (1988); see supra part III.B.2.


\textsuperscript{244} See supra part II.B.1.b.
The court's analysis was mostly reasonable, as I discuss below. This note concentrates on additional arguments for allowing a restitutionary remedy, and proposes limits to the KFC Western rule.

This part addresses the concern that the language of the statute does not expressly provide for restitution, although RCRA enumerates other remedies. Next, it discusses whether the KFC Western ruling merely circumvents CERCLA's express petroleum exclusion, because awarding restitution under RCRA § 6972(a)(1)(B) makes the provision closely resemble CERCLA's cost recovery provisions. It then evaluates whether the provision of a restitutionary remedy under RCRA is consistent with the enforcement purposes of that statute, and the intention that RCRA plaintiffs genuinely act as "private attorneys general." Next, policy concerns are discussed. Finally, this part proposes modifications that would limit the scope of the KFC Western rule.

A. Analogy to Section 6973

The KFC Western court's conclusion that restitution should be allowed under RCRA § 6972 because that remedy is permitted under RCRA § 6973 is reasonable. As the court accurately noted, Congress enacted § 6972 in order to provide for citizen enforcement to supplement government enforcement of the hazardous waste laws of RCRA under § 6973. Congress intended that the same standards of liability apply to §§ 6972 and 6973, and Congress worded the provisions almost identically. Thus, legislative history and the language of the statute support the court's interpretation that relief available under § 6973 is also available to § 6972 plaintiffs, although, as the court acknowledged, there is legislative history cutting the other

245. See infra part IV.A.
246. See infra part IV.B. Prior courts facing this issue had declined to award restitution under RCRA § 6972(a)(1)(B) because of the statutory language. See supra part I.C.2.
247. See supra part III and infra part IV.C.
248. See infra part IV.D.
249. See infra part IV.E.
250. See infra part IV.F.
251. See supra part II.B.1.b.
252. KFC Western, 49 F.3d at 522 n.3 (citing H.R. REP. No. 198, supra note 37); see also supra part I.B.
253. Id.
254. See id. at 521-22; see also 42 U.S.C. §§ 6972, 6973 (1988).
255. However, this conclusion is not indisputable. See Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995) (stating that allowing identical remedies to § 6973 and § 6972 plaintiffs is not supported by legislative history). A full discussion of Furrer is beyond the scope of this note.
The dissent agreed with the majority that § 6973 and § 6972(a)(1)(B) should "be interpreted the same." 257

The Ninth Circuit's decision to follow the cases allowing restitution under RCRA § 6973 258 was reasonable. Several courts have recognized the EPA's right to sue for reimbursement of costs under that section under at least some circumstances 259 although some courts have found that any right the EPA has to restitution under § 6973's government imminent hazard suit would be limited to actions against appropriate defendants. 260

However, the way in which the KFC Western court applied the § 6973 remedy to § 6972 is more open to question. The court concluded that there were no "material differences" between §§ 6972 and 6973 261 because it found unpersuasive the defendants' two arguments that centered around the notice requirement and the lack of a statute

256. See supra note 102.
257. KFC Western, 49 F.3d at 524 n.1 (Brunetti, J., dissenting).
258. See supra note 103.

However, it is worth noting that in its recent decision in Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995), the Eighth Circuit disputed that the two Eighth Circuit cases cited by the KFC Western majority as supporting the proposition that reimbursement is available under § 6973, United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989), and United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), addressed the issue. Rather, the Eighth Circuit asserted that, in these cases, the availability of restitution under § 6973 was merely assumed by the court, apparently because the defendants did not raise the issue. Furrer, 62 F.3d at 1101. In Northeastern, reimbursement to the EPA Administrator under RCRA § 6973 was allowed, but the court made no finding on the issue of whether this was appropriate, apparently because the defendant did not challenge the jurisdiction. Northeastern, 810 F.2d 726. Likewise, in Aceto, the case was reversed in part and remanded, and the suit was allowed to proceed, again apparently because the defendant did not raise the jurisdictional issue. Aceto, 972 F.2d at 1384. These cases appear to indicate that, although it has never so held explicitly, the Eighth Circuit has followed the rule that the EPA may sue for reimbursement.

260. See, e.g., United States v. Wade, 577 F. Supp. 1326, 1330-31 (E.D. Pa. 1983) (holding that even assuming the EPA is entitled to restitution under RCRA in some cases, RCRA does not authorize restitution of cleanup costs from past non-negligent off-site generators).
261. KFC Western, 49 F.3d at 522.
of limitations. Although it is possible to reconcile the notice requirement and the absence of a statute of limitations with the award of a restitutitory remedy, this author finds the defendants' arguments sufficiently persuasive to raise concerns regarding the court's holding. The award of restitution should be subject to certain limits, as discussed in part IV.F.

B. Statutory Language

An analysis of whether restitution is allowed under RCRA should begin with a look at the statutory language. Many lawyers have quoted one Supreme Court pronouncement: "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." This phrase has been cited by courts refusing to award a "private remedy" of damages under RCRA. However, this rule of statutory interpretation does not foreclose the possibility of restitution under RCRA.

In National Sea Clammers, the U.S. Supreme Court refused to award "damages" under the Federal Water Pollution Control Act (FWPCA) because the statute did not expressly provide for such a remedy. The remedy sought in National Sea Clammers was a legal remedy. The plaintiffs in National Sea Clammers harvested fish and shellfish off the coast of New York and New Jersey, and sought $250 million in compensatory damages, punitive damages of $250 million, and injunctive and declaratory relief for what they claimed was damage to their livelihood resulting from the defendants' dumping sewage into the ocean. The Court found the compensatory and punitive damages to be unavailable because these remedies are not implicitly or explicitly authorized by the statute.

In contrast, RCRA authorizes an award of reimbursement of costs expended. Because RCRA specifies certain remedies, including

262. For a discussion of the defendants' arguments, see supra parts II.B.1.d and II.B.2.
266. "[W]e are persuaded that Congress evidenced no intent to authorize by implication private remedies under these Acts apart from the expressly authorized citizen suits." National Sea Clammers, 453 U.S. at 17.
267. Id. at 4-5. The plaintiffs claimed that the sewage devastated commercial fishing by spawning massive algae growth, which in turn suffocated the marine life by depriving the water of oxygen. Id. at 5.
268. Id. at 17.
injunctions, attorney’s fees, and costs, courts pursuant to National Sea Clammers must “be chary of” reading other remedies into RCRA. However, in RCRA, the statutory language additionally authorizes district courts to take “such other action as may be necessary.” This authorizes courts to invoke their equitable powers. Absent congressional instructions to the contrary, statutes that invoke the equitable jurisdiction of the courts are presumed to empower courts to exercise their full equitable powers, which include ordering restitution in appropriate cases.

Statutory authority for restitution also flows from § 6972’s provision for mandatory injunctions. Because the court can order defendants to conduct remediation, the court should also have the power to order reimbursement of costs expended by plaintiff to carry out the same cleanup activities. I will discuss this further in part IV.F below, in which I propose limits to the restitutionary remedy.

Based on these two sources of statutory authority, the National Sea Clammers rule does not prevent a finding that restitution is available under RCRA. In National Sea Clammers, the court held that the FWPCA authorized injunctive relief and “assessment of civil penal-

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270. Id. § 6972(a).
271. “As a general rule—absent express congressional instructions to the contrary—statutes that invoke the equitable jurisdiction of the courts are presumed to empower the courts to exercise their full equitable powers, which includes ordering restitution in appropriate cases.” Babich, supra note 11, at 100 (citing Porter v. Warner Holding Co., 328 U.S. 395, 398-99 (1946)).
273. Cf. AIU Ins. Co. v. Superior Ct., 799 P.2d 1253 (Cal. 1990). In the field of insurance cost recovery, the distinction between injunctive relief and damages is blurring. AIU holds that insurance policies cover the costs of reimbursing government agencies and the costs of remediation, mitigation, and otherwise complying with injunctions ordering cleanup under CERCLA and “similar statutes.” Id. at 1277. However, federal courts are sharply divided over “damages” available from insurance policies. Id.

The court in AIU reasoned that insurance coverage should not “hinge on the ‘mere fortuity’ of the way in which government agencies seek to enforce cleanup requirements, which would unreasonably constrain the agencies’ choice of cleanup mechanisms, and would introduce substantial inefficiency into the cleanup process.” Id. Similarly, allowing injunctive relief under imminent hazard suits but denying restitution would constrain landowner plaintiffs’ choice of cleanup mechanisms and impede remediation.

Finally, AIU distinguishes between “prophylactic costs—incurred to pay for measures taken in advance of any release of hazardous waste” and other costs incurred “because of property damage.” The so-called “prophylactic costs” are not recoverable under AIU. Id. at 1279.
ties."\textsuperscript{274} The court refused to read the remedies of compensatory and punitive damages into the statute. In contrast, in \textit{KFC Western} the plaintiffs requested restitution of already expended cleanup costs, which constituted an equitable remedy, unlike the legal remedy sought in \textit{National Sea Clammers}.\textsuperscript{275} Because the language of RCRA authorizes equitable remedies, the \textit{KFC Western} court properly concluded that restitution may be awarded under RCRA.

\section*{C. Circumvention of CERCLA}

Because restitution under the RCRA imminent hazard suit would mimic cost recovery authorized under CERCLA, the \textit{KFC Western} holding permitting restitution under RCRA may be criticized as allowing plaintiffs to circumvent certain CERCLA restrictions, such as the petroleum exclusion. Defendants might argue that one statute should not be used in order to defeat the prohibitions of another.

The overlap of remedies between CERCLA and RCRA is not objectionable \textit{per se}. For instance, EPA is granted authority under both CERCLA and RCRA to abate imminent hazards.\textsuperscript{276} The availability of the same remedies to citizen plaintiffs under both CERCLA and RCRA may simply mean that the statutes are consistent.\textsuperscript{277} The court in \textit{Lincoln Properties} stated that allowing a RCRA injunction was not unreasonable merely because it "requires of the dry cleaners the same sort of financial contribution as the court could award under CERCLA."\textsuperscript{278} Multiple remedies are in fact commonly available, and

\begin{itemize}
\item \textsuperscript{274} \textit{National Sea Clammers}, 453 U.S. 1, 15 n.25 (1981).
\item \textsuperscript{275} The Bayless court emphasized this distinction:
  
  What \textit{Walls} and \textit{National Sea Clammers} illuminate is that district courts cannot and will not entertain a private cause of action for monetary damages or other legal relief when Congress has not specifically allowed for it. Notwithstanding that rule, the case at bar is clearly distinguishable from those two cases. Here, the plaintiffs are not seeking relief in the form of compensatory, punitive, or 'economic' damages, which were the type sought in \textit{Walls} and \textit{National Sea Clammers}. Rather, they are seeking an Order that would make the defendants responsible for their 'fair share' of the Property clean up.

\item \textsuperscript{276} Compare RCRA § 7003 with CERCLA § 106. 42 U.S.C. §§ 6973, 9606 (1988).
\item \textsuperscript{277} Section 6905(b) of Title 42 provides that EPA must issue regulations to integrate RCRA as much as possible with other existing federal hazardous waste laws. It provides that:
  
  The Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of [the Clean Air Act, the Federal Water Pollution Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, ...] and such other Acts of Congress as grant regulatory authority to the Administrator.

\end{itemize}
RCRA and CERCLA provide two different causes of action, each having different requirements. Even before the *KFC Western* decision, RCRA and CERCLA claims were commonly brought in the same complaint, along with numerous other causes of action for cost recovery.279

Critics of *KFC Western* may further argue that allowing restitution under RCRA essentially circumvents CERCLA, because that statute explicitly excludes petroleum from its cost recovery provisions.280 However, RCRA and CERCLA complement each other. Because it is RCRA that expressly regulates petroleum USTs and imposes broad ranging liability for cleanup of spills,281 it is RCRA that should provide an appropriate remedy to those held liable for cleanup under its provisions. Since RCRA imposes liability upon owners of property contaminated by petroleum, RCRA should also provide adequate relief for those parties. CERCLA's petroleum exclusion does not foreclose other causes of action for cost recovery,282 and should not affect the cause of action under RCRA § 6972(a)(1)(B).283

D. The Concept of a "Private Attorney General"

The most widely-acknowledged purpose of citizen suit provisions is to enable private citizens to influence and direct agency enforcement of laws284 and supplement government enforcement efforts. In

280. See supra part III.D.2.
282. CERCLA's petroleum exclusion merely states that petroleum is not within the definition of "hazardous substance" under CERCLA. 42 U.S.C. § 9601(14) (1988).
283. See supra note 220.
284. Supporters of citizen suit provisions contend that such provisions serve a necessary function as "a participatory, democratic mechanism." Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 339-40 (1990). Citizen suits allow participation in the enforcement of environmental laws, thus giving individuals an active role in choosing regulatory priorities. Since the administrators and staff of some agencies are not chosen by popular election, such suits are a mechanism for democratic participation in government.

Citizen participation is important because a regulatory agency's enforcement strategy or philosophy is at least as important in regulating private behavior as are the particular words of a statute. See Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV. 251, 263 (1993). Schroeder argues that the extremely strict environmental standards found in statutes represent congressional capitulation to political pressure from the "morally outraged," but that Congress may have expected agencies to temper the statutes (and suffer the ensuing political heat) with "cool analysis." Id. Whether or not laws contain stringent standards, "implementation and enforcement are the processes that ultimately count." Id. Indeed, "attempts to improve the rules and rulemaking ability of regulatory agencies will have a limited impact unless enforcement capabilities are also improved." John T. Scholz, *Voluntary Compliance and Regulatory Behavior*, 6 LAW & POL'Y 385, 386 (1984); see also John T. Scholz & Feng Heng Wei, *Regulatory Enforcement in a Federalist System*, 80 AM.
this enforcement role, private plaintiffs in theory should have no incentive for litigation other than public benefit. Critics of citizen suits fear that environmental citizen plaintiffs in practice may act for private gain, like "bounty hunters of the old West, who tracked down outlaws and brought them to justice 'dead or alive.'" Reflecting this concern, citizen suit provisions usually do not authorize plaintiffs to obtain monetary judgments, but only allow such plaintiffs to obtain injunctive relief.

Section 6972 has an enforcement purpose, supplementing government enforcement under § 6973, and so it is appropriate to consider § 6972 within the conceptual framework that supports the theory of "private attorneys general." The district courts that refused to grant restitution under RCRA § 6972(a)(1)(B) relied on the argument that the concept of "private attorneys general" excludes the possibility

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POL. SCI. REV. 1249 (1986). See generally Neil Gunningham, Negotiated Non-Compliance: A Case Study of Regulatory Failure, 9 LAW & POL'Y 69 (1987) (emphasizing that the quality of enforcement determines the success or failure of laws and regulations). Insofar as citizen suits contribute to enhanced enforcement, they are also essential to the regulatory scheme.

Note that certain statutes have allowed private gain. "For much of the nineteenth century, some tax laws and tariff statutes were enforced by so-called private 'informers.' The False Claims Act, which authorizes *qui tam* actions against government contractors suspected of fraud, dates back to the Civil War." Greve, supra, at 343.

285. Greve, supra note 284, at 341-42, 367. This concern is not implicated by providing restitution because the persons able to sue and collect will be restricted to those who are holding contaminated land or have expended money cleaning up such land.

286. Id. at 343.

287. Id.

288. For further discussion, see supra part I.B.

289. The term "private attorney general" refers to citizens who are deputized by government to enforce laws. Greve, supra note 284, at 340.

Since the beginning of the 1970s, Congress has increasingly come to rely upon private law enforcement as a means of attaining public objectives. Private enforcers have been put to work for purposes ranging from consumer protection to the prevention of procurement fraud to curbing insider trading. But the prime field for the expansion of private enforcement has been environmental law.

Id. at 339-40.

of monetary awards.\textsuperscript{290} The \textit{KFC Western} decision overruled these Ninth Circuit district court decisions but did not confront their reasoning. This part argues that thoughtful examination of how the private attorneys general theory applies in RCRA § 6972(a)(1)(B) suits leads to the conclusion that affording restitution is consistent with the concept of private attorneys general.

One example of a provision thought potentially to provide an inappropriate incentive for private gain was the statutory penalty provision under the Clean Water Act.\textsuperscript{291} Under this provision, citizens' environmental groups could sue alleged violators and possibly profit from money paid in settlement of the litigation.\textsuperscript{292} In comparison, the plaintiffs in \textit{KFC Western} sought restitution for costs expended to clean up, under government order, environmental contamination. KFC did not derive any direct or indirect economic benefit from the activities producing the contamination.

Under a statute such as RCRA, which creates liability to clean up out of a sense of expediency rather than from traditional equitable principles, the recovery of expenditures from other parties liable under the statute, in a proper case, is not in a moral or economic sense equivalent to the "gain" sought by a bounty hunter or CWA plaintiff. It is different in a moral sense, because although both the RCRA plaintiff and bounty hunter are recompensed for services, the RCRA plaintiff's service is often not wholly voluntary but triggered by a government order. Though recovery of money is the motivating force behind both the RCRA plaintiff and the bounty hunter, the RCRA plaintiff's recovery is not in a broad economic sense "gain"—the RCRA plaintiff is unlikely to find the cleanup and cost recovery process to be profitable on the whole, and consequently is unlikely to willingly make a practice of hunting "gain" through RCRA suits for restitution.

\textsuperscript{290} See \textit{supra} part I.C.2.
\textsuperscript{291} See Greve, \textit{supra} note 284, at 356-59.
\textsuperscript{292} Greve criticizes the CWA suit program because suits brought by organized environmental groups have often resulted in settlements in which alleged violators paid the environmental groups rather than the government. \textit{Id.} at 356-57. While, as a matter of law, fines are payable only to the United States treasury, money paid in settlement does not fall within this requirement. \textit{Id.} "Economically speaking the requirement that all fines be paid to the Treasury is a 100\% tax on the private enforcer's recovery . . . both the apprehended offender and the enforcer would be better off if they negotiated a private transfer payment that was less than the statutory fine but greater than the fine minus the tax." \textit{Id.} at 357. According to Greve, "[a] review of consent orders entered in 1983 revealed that 'an amount equivalent to about 400 percent of the penalties paid to the federal Treasury was paid to reimburse environmental groups for their attorneys fees.'" \textit{Id.} at 358-59.
Like CERCLA, RCRA imposes broad liability for environmental contamination on a wide range of defendants,\textsuperscript{293} including some who may have derived little or no economic benefit from the offending activities.\textsuperscript{294} CERCLA, however, provides for the allocation of costs among potentially responsible parties (PRPs) through private rights of action.\textsuperscript{295} CERCLA's statutory provisions permitting allocation of costs mitigate the initial imposition of joint and several liability.\textsuperscript{296} In addition to encouraging citizens to aid in enforcement,\textsuperscript{297} cost recovery provisions, such as that provided in CERCLA § 107,\textsuperscript{298} and now RCRA § 6972(a)(1)(B), provide a private right of action to counterbalance liability created by the same statute. Cost recovery is integral to these statutory schemes. Moreover, to the extent that private individuals initially expend money for cleanup in excess of their equitable share, such individuals perform a government enforcement function for the public benefit.

Compared with other possible RCRA plaintiffs, private plaintiffs may derive a greater private benefit from § 6972(a)(1)(B) suits. Citizens' environmental organizations and other groups, and branches of

\textsuperscript{293}See supra note 225.

\textsuperscript{294}RCRA imminent hazard suits also apply to past non-negligent off-site generators. United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 738 (8th Cir. 1986) (construing § 6973(a), which is often used to interpret § 6972). See also supra part III.B.


\textsuperscript{296}Of course, private lawsuits do not necessarily result in an economically efficient or fair allocation of costs.

Under certain conditions, court actions can result in an allocation of resources that replicates that achieved by freely operating markets. A host of studies have concluded that these conditions for achieving a proper allocation of risks and benefits may not exist for negligence actions for health risks involving hazardous wastes and other toxic substances.

\textsuperscript{297}See infra part IV.E.2.

local government, including states, cities, and counties also bring causes of action under § 6972(a)(1)(B). Where a private landowner sues to abate conditions on her own property, private gain may be proportionately greater than where a public plaintiff sues to abate a public hazard. One court objected that providing restitution would make plaintiff a "direct beneficiary" of the lawsuit and thus not a public actor. However, even when a plaintiff is awarded injunctive relief, the plaintiff is the "direct beneficiary." Restitution, if properly limited, would not entail greater private benefit than would the issuance of injunctions clearly available under § 6972(a)(1)(B).

E. Policy Considerations: The Need for Change

1. Efficient Cleanup and Fairness

As the KFC Western court concluded, there are compelling public policy considerations in favor of providing restitution under RCRA § 6972(a)(1)(B). In addition to the fairness concerns, permit-

299. See, e.g., Pine v. Shell Oil Co., Civ. No. 90-2841, 1993 WL 389396, at *2 (D.R.I. Aug. 23, 1993). The Shell Oil court held that a state is a "person" as defined in RCRA, 42 U.S.C. § 6903(15), and thus can bring a citizen suit under § 6972(a). Id. State enforcement of RCRA may result in enhanced enforcement in selected geographical regions.


In one case, a city brought claims under CERCLA and RCRA against current and former owners of a coke producing facility. City of Toledo v. Beazer Materials & Services, Inc., 833 F. Supp. 646 (N.D. Ohio 1993) (holding that the city stated a claim under RCRA and that action by the state environmental agency did not preclude a RCRA citizen suit).

In another case, a city brought an action against oil companies under CERCLA and RCRA arising from the alleged release of hazardous substances at a petroleum storage and disposal facility. See City of Heath v. Ashland Oil, Inc., 834 F. Supp. 971 (S.D. Ohio, 1993) (holding that RCRA citizen suits are not available in a state authorized to carry out its own hazardous waste program for alleged violation of the federal program when it is superseded by state law pursuant to RCRA, and that the city's RCRA citizen suit was barred by a consent order entered into in state litigation). Id. See supra note 174 for discussion of authorized state programs.

301. In Middlesex County Board of Chosen Freeholders v. State of New Jersey, Department of Environmental Protection, a county board sued the state, alleging that there was an imminent and substantial endangerment to health or the environment as a result of conditions at a solid waste landfill in the county, specifically stemming from the diversion of flow of solid waste from other counties into plaintiffs' county. 645 F. Supp. 715 (D.N.J. 1986) (holding that the complaint stated a cause of action).


303. See infra part IV.F.

304. 49 F.3d at 523. The court stated, CERCLA and state law do not provide an adequate substitute source of relief for these innocent citizens. In practice, an interpretation of § 6972(a)(1)(B) that afforded only injunctive relief, not compensation, would make the remedy available only to concerned outsiders, who can never by held responsible for environmental clean-up. We would foreclose a RCRA remedy for the innocent buyers who clean up contaminated property.

Id. at 523-24 (footnote omitted); see also supra part II.B.1.a.
AWARDING RESTITUTION

As Leonard and Betty Strunk are now residents of [another state] the appropriate course for implementing the cleanup of the Property is to allow Fallowfield, and not the Strunks, to coordinate the remedial action. ... Fallowfield is now most capable of supervising the rehabilitation of its property.


"Citizen suits under RCRA may now involve complex technical issues such as whether an endangerment exists and what remedies may be appropriate to reduce or remove the risk of harm. In cases involving such issues, substantial expertise and resources will be needed to develop a persuasive case." Claire Whitney, Citizen Suits in the 1984 RCRA Amendments, 138 PRACTicing LAW INSTITUTE/CRIM 55, PLI Order No. C4-4173, available in Westlaw. For a discussion of the other types of RCRA citizen suits, see supra notes 164-66 and accompanying text.

305. RCRA requires immediate action to abate UST leaks. See supra note 175 and accompanying text; Duncan & Bailey, supra note 171, at 254.

306. For instance, the court in Fallowfield Development Corp. v. Strunk stated that an Order requiring the Strunks to supervise cleanup efforts would contradict the policy goals of RCRA that cleanups take place on a timely basis.

As Leonard and Betty Strunk are now residents of [another state] the appropriate course for implementing the cleanup of the Property is to allow Fallowfield, and not the Strunks, to coordinate the remedial action. ... Fallowfield is now most capable of supervising the rehabilitation of its property.


307. "Citizen suits under RCRA may now involve complex technical issues such as whether an endangerment exists and what remedies may be appropriate to reduce or remove the risk of harm. In cases involving such issues, substantial expertise and resources will be needed to develop a persuasive case." Claire Whitney, Citizen Suits in the 1984 RCRA Amendments, 138 PRACTicing LAW INSTITUTE/CRIM 55, PLI Order No. C4-4173, available in Westlaw. For a discussion of the other types of RCRA citizen suits, see supra notes 164-66 and accompanying text.
should facilitate, and allow citizens to supplement, agency enforce-
ment with minimal negative impact.

First, allowing restitution to landowners who clean up contamina-
tion on their property gives the landowners an incentive to notify pub-
lic agencies once contamination is found. As potentially liable parties themselves, landowners are more likely to notify the govern-
ment of a violation if they perceive that they will not bear the ultimate burden of remediation. Moreover, allowing restitution would give plaintiffs, who would otherwise wait to seek injunctive relief, the in-
centive to respond to an environmental hazard immediately. In addi-
tion, allowing restitution under imminent hazard citizen suits would promote citizen cleanups even in the face of regulatory or judicial backlogs.

Second, private cost recovery suits for restitution under § 6972(a)(1)(B) probably would not directly interfere with enforce-
ment discretion. An often voiced concern is that citizen suits hinder agency enforcement. However, while § 6972(a)(1)(B) suit may skew the allocation of private cleanup resources, unlike citizen suit provisions such as § 6972(a)(2), which allows suits against the EPA, § 6972(a)(1)(B) suits should not interfere with agencies' allocations of enforcement resources.

308. Additionally, government enforcers are sometimes reluctant to take action against other branches of government. "Despite the fact that public facilities represent a substan-
tial proportion of the pollution problem, enforcement of pollution control laws presents special problems for public enforcers. The evidence seems very clear that public enforce-
ment of violations by public polluters has been quite ineffective," due to a reluctance to enforce. Wendy Naysneski & Tom Tietenberg, Private Enforcement of Federal Environ-

309. Regulatory agencies are useful because they provide technical expertise and ongo-
ing administration in areas that require complex regulation. The environmental field re-
quires enormous governmental involvement, and agencies have developed sophisticated approaches to their particular areas of influence. See generally EUGENE BARDACH & ROB-
ERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLE-

310. One commentator, writing when § 6972(a)(1)(B) was first proposed as part of the 1984 RCRA amendments, expressed concern that citizen suits would encourage injudi-

[Citizens] are not likely to be deterred from injudicious invocation of the section because an adverse judicial opinion may prevent future invocation of the provi-
sion by others. Nor are citizens often likely to muster the factual and scientific support necessary to justify full relief under the provision. The probable result is that injudicious use of the provision by citizens will have both immediate and future negative impacts on government cleanup and enforcement efforts, result-
ing in both bad legal precedents and inadequate site cleanups that effectively limit government use of the provision.

Id.
Third, statutory restrictions mitigate the disruptiveness of citizen suits. In the authorization of citizen suits, there is usually a presumption that the government will retain primary responsibility for enforcing environmental laws.\(^{311}\) Section 6972(a)(1)(B) actions are disallowed when certain enumerated EPA- and state-led response actions under CERCLA have already been commenced.\(^{312}\) Additionally, § 6972(a)(1)(B) suits are not allowed when they are collateral attacks on the permitting decisions of the federal and state EPAs.\(^{313}\) Granting a restitutory remedy would not alter the effect of these statutory restraints on citizen suits.

**F. Limiting the Scope of the KFC Rule**

The previous analysis argues that restitution is an appropriate remedy under RCRA imminent hazard suits. Because of the language and structure of RCRA, however, there should be (i) limitations on

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313. Palumbo v. Waste Technologies Indus., 989 F.2d 156, 158-61 (4th Cir. 1993), *aff'd* 1994 U.S. App. LEXIS 29355 (Oct. 20, 1994). In *Palumbo*, the attorney general of West Virginia challenged the EPA's approval of modifications to defendant's hazardous waste site as creating an "imminent and substantial endangerment." *Id.* at 158. The court applied RCRA's judicial review provision, 42 U.S.C. § 6976(b), to hold that such a collateral attack is impermissible. *Id.* at 159.

In *Arkansas Peace Center v. Arkansas Dept. of Pollution Control and Ecology*, a circuit court held that the pre-enforcement review provisions of CERCLA prohibited a federal district court from reviewing the citizens groups' claims regarding the efficiency of an incinerator. 999 F.2d 1212 (8th Cir. 1993), *cert. denied* 114 S. Ct. 1397 (1994) (citing § 113 of CERCLA). In this case, environmental groups brought an action to stop the incineration of hazardous wastes contaminated with dioxin. *Id.* at 1213-16. EPA had already initiated a cleanup of the site. *Id.* at 1213-14.

In *Greenpeace, Inc. v. Waste Technologies Industries*, an environmental group brought an action under RCRA to enjoin test burns at a hazardous waste incinerator. 9 F.3d 1174, 1181-82 (6th Cir. 1993), *reh'g denied* 1994. The court held that, according to § 6972(b)(2)(D), the RCRA citizen suit provision did not give the district court subject matter jurisdiction over a citizen suit claiming that an operator, by operating within the limits of a valid RCRA permit, presented an imminent and substantial endangerment to health or the environment. *Id.* at 1181. The court held that the action was an improper collateral attack on a permitting decision, even if RCRA allowed citizen suits against permit holders. *Id.* at 1182.

On the other hand, *Coalition for Health Concern v. LWD, Inc.*, involved a citizens group suing a permit applicant (for a hazardous waste incinerator and disposal facilities) and the state Secretary of Natural Resources and Environmental Protection. 834 F. Supp. 953 (W.D. Ky. 1993). The court held that § 6928(h) Facility Investigation orders do not bar § 6972(a)(1)(B) actions: "administrative enforcement, however diligent, does not satisfy § 6972(b)(1)(B) because the statute expressly requires that the State must have taken court action." *Id.* at 956-58.
the time for filing the action, (ii) a requirement of constructive notice of the hazard, and (iii) consideration of equitable factors in determining the amount plaintiff may recover. In addition, the *KFC Western* decision should not be interpreted as changing the standards for award of attorney’s fees.

1. **Endangerment at the Time of Filing**

   a. **Section 6972’s Language and Post-Abatement Contribution**

   A key issue in the *KFC Western* dispute was whether the imminent hazard must exist at the time the plaintiff files the complaint. In *KFC Western*, KFC had completed the cleanup of the property three years before commencing the lawsuit. The defendants argued that because of the delay, KFC had no remedy under RCRA. The court disagreed and stated that “RCRA authorizes citizen suits with respect to contamination that in the past posed imminent and substantial danger.”

   This aspect of the *KFC Western* decision may be controversial. The *KFC Western* holding may in fact be consistent with the “primary goal” of § 6972(a)(1)(B), stated in the legislative history, which is “‘the prompt abatement of imminent and substantial endangerments.” However, allowing restitution when a suit has been filed after abatement of the endangerment amounts to a judicially made right to contribution, because it allows plaintiffs who have already repaired environmental harm to sue responsible parties simply for reimbursement. This may be too generous a rule. The defendants’ arguments in *KFC Western* regarding the notice provision and the absence of a statute of limitations in § 6972, considered along with other provisions of § 6972, indicate that using § 6972(a)(1)(B) for post-abatement “contribution” actions does not flow easily from the

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314. *KFC Western*, 49 F.3d at 520. For a discussion of the “imminent and substantial endangerment” element of § 6972, see supra part I.A.1.

315. 49 F.3d at 520.

316. *Id.*

317. *Id.* at 521.

318. *Id.* at 525 (Brunetti, J., dissenting) (quoting H.R. REP. No. 198, supra note 37).

319. Judge Brunetti’s dissent in *KFC Western* is premised upon the fact that, in that case, plaintiffs did not file suit until after the endangerment was abated. He agrees with the defendant’s arguments regarding the notice requirement and lack of a limitations period based upon this situation. *KFC Western*, 49 F.3d at 525-26. Even under Judge Brunetti’s reasoning, timely filing could make reimbursement allowable under RCRA: “I understand the majority’s desire to hold contaminators accountable. In this case, however, in which KFC failed to bring suit before clean-up, RCRA does not offer them a remedy.” *Id.*

320. See supra part II.B.1.d.

321. Section 6972(b)(2)(B) prohibits subsection (a)(1)(B) suits if the Administrator has commenced an action under either RCRA § 7003 or CERCLA § 106. 42 U.S.C. § 6972(b)(2)(B) (1988); see supra part IV.E.2. Also, if EPA has obtained an order for
statutory language. The statutory structure implies that limits to the restitutionary remedy are appropriate.

b. *Statutory Authorization of Injunctions as a Source of Authority*

As discussed earlier, there are two possible sources of statutory authority in § 6972(a)(1)(B) for an award of restitution: (i) analogy to the language authorizing injunctive relief,\(^{322}\) and (ii) the language authorizing "such other action as may be necessary."\(^{323}\)

First, the analogy to statutorily available injunctive relief implies that plaintiffs should only be allowed to sue for restitution under § 6972(a)(1)(B) if they could have sued for an injunction. In order to obtain injunctive relief to abate an imminent hazard, the hazard must necessarily exist at the time the lawsuit is filed. After the condition has been abated, a suit for injunctive relief would usually be moot. Therefore, under this analysis, an implication arises that post-abatement actions for restitution should not be allowed in the general case.

There are some exceptions where post-abatement injunctions would be proper. For example, consistent with the *KFC Western* decision, a court could issue an injunction under § 6972(a)(1)(B) requiring a defendant to complete remediation which has already begun (perhaps requiring ongoing monitoring of soil and groundwater). In such a case an injunctive remedy would have some purpose even where the endangerment is abated. Restitution allowed by analogy to injunctive relief suggests that relief for suits filed after the hazard is abated would be available under quite limited circumstances.

Consistent with the court's authority to award injunctive relief, a court should have the power to issue declaratory relief for restitution of future cleanup costs if the plaintiff files suit at a time when an injunction would be available.\(^{324}\) The plaintiff in this case must file suit before completing cleanup of the contaminated property.

c. *"Such Other Action" Provision as the Source of Authority*

The second source of authority for an award of restitution under § 6972(a)(1)(B) is the "such other action" language. This may be interpreted as authorization of general equitable relief encompassing restitution of costs expended to remediate a condition which, in the past, presented an imminent hazard. In order to support the award of

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\(^{322}\) See *supra* note 272 and accompanying text.

\(^{323}\) See *supra* note 270 and accompanying text.

\(^{324}\) For comparison, under CERCLA, courts may grant declaratory relief for the future costs to be incurred consistent with the NCP. *Fallowfield Dev. Corp. v. Strunk*, Nos. CIV. A. 89-8644, 90-4431, 1993 WL 157723, at *10 (citing 42 U.S.C. § 9613(g) (1988)).
restitution under the facts of \textit{KFC Western}, the court looked to this phrase as its source of authority.\textsuperscript{325} Because of its general terms, however, this phrase provides little guidance regarding limits to timing of the action. Therefore, other provisions that do imply limits on the timing of suits should be given import.

d. \textit{Protecting the Notice Provision's Function by Requiring Constructive Notice}

The \textit{KFC Western} ruling strips the notice function of two of its central functions, namely, (i) allowing the state to preempt the citizen suit, and (ii) permitting government oversight of remediation. Post-abatement actions under § 6972(a)(1)(B) should require that timely notice has been given to the appropriate parties in order to preserve the essential functions of the notice provision.

The \textit{KFC Western} court concluded that allowing post-abatement actions does not make the notice provision meaningless.\textsuperscript{326} The court reasoned that the § 6972 notice provision will be useful even though the endangerment has been abated, because it will alert the State and Administrator that contamination occurred and was cleaned up.\textsuperscript{327}

As the dissent points out, however, this is an unsatisfying explanation,\textsuperscript{328} because an important function of the notice provision appears to be to give the Administrator and State the opportunity to preempt a citizen suit by undertaking their own court actions, or by undertaking removal or remedial action. The requirement also serves to notify defendants of the possibility of government intervention.

In addition, if a private party abates an endangerment before notifying the Administrator and state of its existence, the Administrator and State lose the opportunity to coordinate and conduct remediation on a broader scale. For example, if contamination has spread beyond the boundaries of plaintiff's property, possibly into the groundwater, regulatory oversight may be desirable. An important advantage of the notice provision is thus lost in post-abatement actions without prior notice.

In order to preserve the value of the notice provision, courts should require that notice be given to the EPA and State while the endangerment still exists. Because strong policy considerations favor affording plaintiffs a remedy,\textsuperscript{329} however, notice that is provided even after remediation efforts are begun should satisfy the statute, as long as the notice complies with applicable requirements and is filed within

\begin{itemize}
\item \textsuperscript{325} See supra part II.B.1.c.
\item \textsuperscript{326} \textit{KFC Western}, 49 F.3d at 522.
\item \textsuperscript{327} \textit{Id.}
\item \textsuperscript{328} \textit{Id.} at 525-26 (Brunetti, J., dissenting).
\item \textsuperscript{329} See supra part IV.E.
\end{itemize}
a reasonable time after abatement is started. That is, "constructive notice" as described should satisfy the statute.

This proposed rule would eliminate the unfairness of having a plaintiff lose his cause of action merely because, for instance, he had leaking tanks pulled out of the soil before he could get to the courthouse. Stringent requirements regarding notice of spills or leaks already exist, so this rule would allow many existing plaintiffs to maintain § 6972(a)(1)(B) actions.

A variation on this proposed rule would require § 6972(a)(1)(B) plaintiffs to provide notice to all of the statutorily enumerated parties prior to conducting the remediation itself. Defendant would then have an opportunity, for ninety days, to begin remediation and avoid suit, or to negotiate a cleanup arrangement with the plaintiff. This approach closely approximates the situation in which a plaintiff sues for an injunction to require defendants to clean up the property. However, this rule suffers from the defect that if the defendant is uncooperative, it would require the plaintiff to remain idle for ninety days while the contamination on plaintiff's property spreads.

The rule of allowing imminent hazard suits only when constructive notice is given to EPA is consistent with the goal of swift cleanup of environmental hazards, but also preserves the function of the notice provision.

2. Amount Recoverable

Courts should limit the amount of costs recoverable in restitution under § 6972(a)(1)(B). However, reimbursement should include costs expended before filing the action, in order to emphasize and support prompt cleanup.

Ultimately, cleanup costs under § 6972(a)(1)(B) should be allocated among responsible parties, as under CERCLA. The court in Bayless Investment & Trading Co. v. Chevron U.S.A., Inc. indicated that apportionment of costs was appropriate under RCRA. "Implicit in the Lincoln Properties v. Higgins ruling . . . was a finding that the harm from the contamination was divisible and that the court could later apportion liability in an equitable fashion."
Common law also indicates that plaintiffs should be able to recover the costs expended for which a defendant would have been statutorily and equitably liable. At common\textsuperscript{334} law,\textsuperscript{335} the distinction between restitution and compensatory damages is that restitution "compensate[s] a plaintiff for the cost of performing the duty of another."\textsuperscript{336} The right to restitution is based on unjust enrichment.\textsuperscript{337} "Where one obtains a benefit which he may not justly retain, he is unjustly enriched."\textsuperscript{337}

However, the mere fact that a plaintiff benefits another is not of itself sufficient to require the other to make restitution.\textsuperscript{338} For example, "[o]ne who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution."\textsuperscript{339} Common law implies that a RCRA plaintiff should not recover costs that are incurred for private benefit. Therefore, in a case where the plaintiff also contributed to the disposal of waste, the mere fact that a defendant is within the wide class of liable parties under the statute\textsuperscript{340} should not make the defendant liable for costs beyond his equitable amount of responsibility.

In apportioning liability, courts should consider equitable factors, including (i) whether a landowner plaintiff purchased the property at a discounted price due to the contamination, and (ii) defendants' level of knowledge about the contamination. Plaintiff should be reimbursed only so much as is equitable under principles similar to those used to apportion costs under CERCLA.

3. Attorney's Fees

It may appear to some that under \textit{KFC Western} the strength of the RCRA § 6972(a)(1)(B) cause of action has not only surpassed CERCLA's but has become unduly favorable to plaintiffs. The availa-
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bility of restitution under RCRA is similar to cost recovery under CERCLA,\textsuperscript{341} with the added advantage to plaintiffs that unlike CERCLA, RCRA expressly authorizes the award of attorney’s fees in § 6972(e).\textsuperscript{342} The risk of being forced to pay plaintiffs’ attorney’s fees weakens the defendant’s negotiating position.

Courts have looked to the private attorney general role of citizen plaintiffs in deciding whether to award attorney’s fees.\textsuperscript{343} Some courts consider the degree of public versus private benefit involved in a plaintiff’s remediation activities to determine whether or not to award attorney’s fees.\textsuperscript{344} Although innocent landowners may act as private attorneys general, this theory should not be interpreted as a carte blanche for the award of attorney’s fees to all such plaintiffs. A blanket rule would contravene the traditional American Rule that each party bear its own costs of litigation, absent special circumstances. An extended discussion of when attorney’s fees should be awarded is outside the scope of this note. Suffice it to say that \textit{KFC Western} should not be interpreted as changing the standards governing the award of attorney’s fees. Courts should continue to use traditional principles to determine when the award of attorney’s fees is appropriate.

CONCLUSION

The \textit{KFC Western} decision to provide restitution under RCRA § 6972(a)(1)(B) strengthens the ability of citizens to supplement government enforcement of the solid and hazardous waste enforcement schemes of RCRA and CERCLA, addresses several unsatisfactory aspects of the previously existing state of RCRA-CERCLA law, and produces a fair and equitable result. The holding of \textit{KFC Western} should be modified, however, to restrict imminent hazard suits that are filed after the hazard has been abated. Plaintiffs must have notified EPA and the state of the endangerment while it still existed. Additionally, courts should limit the costs recoverable in restitution under RCRA imminent hazard suits to those that would be recoverable under the apportionment principles of CERCLA. Subject to

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\textsuperscript{341} For a comparison, see supra part III.E.
\textsuperscript{342} 42 U.S.C. § 6972(e) (1988).
\textsuperscript{344} See, e.g., Fallowfield, 1993 WL 157723, at *17. In \textit{Fallowfield}, the plaintiff remediated contamination in a 20-foot by 40-foot trench on a 313-acre piece of land. \textit{Id}. Although the court allowed the plaintiff to recover costs under CERCLA, it held that the action was not sufficiently public in purpose for plaintiff to recover attorney’s fees under RCRA in addition to CERCLA costs. \textit{Id}. “Once the trench area is remediated, Fallowfield will be able to utilize the area for its originally intended purpose, namely residential development. Therefore, there is no evidence that the hazardous substances on the site constitute a present and imminent danger to the community.” \textit{Id}.
\end{small}
these modifications, the authorization of a restitutionary remedy under RCRA § 6972(a)(1)(B) is consistent with the RCRA-CERCLA scheme of requiring private citizens to undertake environmental cleanups for the public benefit.