

4-1996

## Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem

Randall J. Butterfield

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Randall J. Butterfield, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 *Vanderbilt Law Review* 689 (1996)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol49/iss3/4>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem

I.	INTRODUCTION .....	690
II.	ORIGIN AND LEGAL HISTORY OF THE ENVIRONMENTAL CITIZEN SUIT .....	696
III.	RCRA'S CITIZEN SUIT PROVISION .....	701
	A. <i>Private Citizen Enforcement Authority Under Section 7002(a)(1)(A)</i> .....	702
	B. <i>EPA Imminent Hazard Authority Under Section 7003</i> .....	704
	C. <i>Private Citizen Imminent Hazard Authority Under Section 7002(a)(1)(B)</i> .....	709
	1. Early District Court Decisions.....	710
	2. The Ninth Circuit's Decision in <i>KFC Western, Inc. v. Meghrig</i> .....	711
	3. The Eighth Circuit's Decision in <i>Furrer v. Brown</i> .....	714
	4. Resolution of the Circuit Court Split by the Supreme Court.....	717
IV.	ASSESSING THE FUTURE OF SECTION 7002(a)(1)(B).....	718
	A. <i>The Continuing Endangerment Requirement</i> .....	720
	1. Interpreting RCRA's Imminent Citizen Suit Provision .....	721
	a. <i>Linguistic Analysis</i> .....	723
	b. <i>Lack of Statute of Limitations</i> .....	726
	c. <i>Inclusion of a Notice Requirement</i> ..	727
	2. Deciphering RCRA's Legislative History...	729
	3. RCRA's Place in the Comprehensive Regulatory Scheme.....	732
	B. <i>Available Remedies</i> .....	734
	1. Equitable Authority of the Federal Courts Generally .....	737
	2. Equitable Authority of the Federal Courts Under Section 7002(a)(1)(B) .....	739

a.	<i>Wholly Past Endangerments</i> .....	741
b.	<i>Continuing Endangerments</i> .....	741
V.	CONCLUSION .....	751

## I. INTRODUCTION

The rise of environmental concerns in the 1950s and 1960s<sup>1</sup> led Congress to adopt a number of statutes designed to curtail the production of air and water pollution as well as to promote the proper handling, storage, and disposal of those substances capable of contaminating the nation's natural resources.<sup>2</sup> Citizen suit provisions were eventually incorporated into these environmental statutes<sup>3</sup> in an effort to supplement what many perceived to be less than diligent governmental enforcement measures.<sup>4</sup> However, despite early congressional efforts to regulate air and water pollution, disposal of hazardous waste on land went largely unregulated.<sup>5</sup> This legislative

1. One authority has stated:

The shortcomings of the common law as a pollution control system attracted little attention through the first half of the twentieth century. But the postwar explosion of American industry brought increased use of the environment as a dumping ground for industrial by-products. As public disgust with brown skies and befouled waters mounted in the 1950s and 1960s, legal commentators increasingly criticized the common law remedies for pollution. A trickle of federal air and water pollution control statutes in the 1950s swelled to a torrent in the 1960s.

Developments in the Law, *Toxic Waste Litigation*, 99 Harv. L. Rev. 1453, 1469 (1986).

2. See, for example, Clean Air Act ("CAA") Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), codified at 42 U.S.C. § 7401 et. seq. (1988 ed. & Supp. V); Federal Water Pollution Control Act ("Clean Water Act" or "CWA") Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), codified at 33 U.S.C. § 1251 et. seq. (1994 ed.). See generally Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *Bluff L. Rev.* 833, 884-47 (1985); Frederick R. Anderson, Daniel R. Mandelker, and A. Dan Turlock, *Environmental Protection: Law and Policy* 66 (Little, Brown, 2d ed. 1990). See also note 5.

3. For example, in 1970, Congress adopted § 304 of the Clean Air Act, the first environmental citizen suit provision. 42 U.S.C. § 7604. Two years later, Congress included a similar measure in Section 505 of the Clean Water Act. 33 U.S.C. § 1365. Indeed, nearly every environmental statute adopted after 1970 includes a citizen suit provision. See note 45 and accompanying text.

4. Daniel Riesel, *Citizen Suits and the Award of Attorneys' Fees in Environmental Litigation*, in *ALI-ABA Course of Study: Environmental Litigation* 1073, 1078-79 (June 20-24, 1994) ("The environmental movement of the sixties and early seventies was characterized, in part, by citizens seeking legal procedures to give them a role in the enforcement of pollution control standards") (citation omitted); Anderson, Mandelker and Turlock, *Environmental Protection* at 111 (cited in note 2) ("in the early 1970s, at the beginning of the environmental decade, environmentalists relied heavily on the courts to police what were perceived as hostile agencies"). For an examination of the origins and purposes of the first environmental citizen suits, see *Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976).

5. *Toxic Waste Litigation*, 99 Harv. L. Rev. at 1469 (cited in note 1) (concluding that "[t]hroughout this initial flood of environmental legislation, the problems posed by improper

oversight resulted in the widespread transfer of air and water pollution, the disposal of which was highly regulated and incredibly expensive, into land pollution, where unregulated disposal was a relative bargain.<sup>6</sup> Congress soon came to realize that simply transferring pollution from one medium to another did little to reduce the environmental risks of hazardous waste.<sup>7</sup>

In 1976, Congress passed the Resource Conservation and Recovery Act ("RCRA")<sup>8</sup> in an attempt to "eliminate the last

---

disposal of hazardous wastes remained something of a backwater"). See Barry Needleman, *Hazardous Waste Recycling Under the Resource Conservation and Recovery Act: Problems and Potential Solutions*, 24 *Envir. L.* 971, 975 (1994).

Early congressional efforts to abate land pollution resulted in the adoption of the Solid Waste Disposal Act of 1965 ("SWDA"), Pub. L. No. 89-272, 79 Stat 997 (1965), originally codified at 39 U.S.C. § 3251 et seq., now codified at 42 U.S.C. § 6901 et seq. (1988 ed. & Supp. V) (requiring the initiation of a research and development program to promote the proper disposal of solid and hazardous waste), and the Resource Recovery Act of 1970, Pub. L. No. 91-512, 84 Stat. 1227 (1970) (outlining the basic recycling guidelines that would later be adopted in RCRA as well as initiating certain study programs). However, these two statutes sought primarily to restrict unsightly and unsanitary refuse dumping and to promote recycling of waste materials. They neither recognized nor addressed problems caused by improper hazardous waste disposal." *Toxic Waste Litigation*, 99 *Harv. L. Rev.* at 1469 n.18. See generally William H. Redgers, Jr., *Environmental Law* 531-35 (West, 2d ed. 1994). Federal action under SWDA, for example, centered principally on research and development. Although SWDA was amended in 1970 to provide grants towards new solid waste management technology, the regulation of hazardous waste remained primarily the role of state and local government. Robert V. Percival, et al., *Environmental Regulation: Law, Science, and Policy* 214 (Little, Brown, 1992).

Other early responses to the issue of hazardous waste disposal centered around the problem of contaminated groundwater supplies. Congress passed the Safe Drinking Water Act of 1974 ("SDWA"), Pub. L. No. 93-523, 88 Stat. 1660 (1974), codified at 42 U.S.C. § 300F et seq. (1988 ed. & Supp. V), authorizing the EPA to implement drinking water standards, to establish a "regulatory system to ensure compliance," and "to develop guidelines for state regulation of underground injection of hazardous wastes". *Toxic Waste Litigation*, 99 *Harv. L. Rev.* at 1470. The Act, however, proved terribly inadequate. "In focusing on improvement of the water coming out of public drinking water supply systems, the Act did little to protect the public against harm from contaminated groundwater caused by means other than ingestion. Moreover, the Act failed to address unsafe means of hazardous waste disposal other than underground injection." *Id.* at 1470.

6. Needleman, 24 *Envir. L.* at 975 (cited in note 5) (explaining that as a result of this anomaly, "it was easier and cheaper to dispose of solid waste in the unregulated medium of land rather than comply with the extensive and burdensome regulations accompanying waste disposal in the air or water. For example, incinerating wastes might cost anywhere from \$300 to \$1,000 per ton while placing them in a landfill would cost as little as \$50 per ton" (citation omitted)).

7. *Id.* at 974-75.

8. Pub. L. No. 94-580, 90 Stat. 2795 (1976), codified in the Solid Waste Disposal Act at 42 U.S.C. § 6901 et seq. (1988 ed. & Supp. V). RCRA was passed as a set of amendments to SWDA and was signed and enacted October 21, 1976. RCRA has been subsequently amended by the Quiet Communities Act of 1978, Pub. L. No. 95-609, 92 Stat 3079 (1978), the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980), and by the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984). Commentators have described RCRA as "mind-numbing" and as the "most complicated" environmental statute. Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 *Envir. L. Rep.* 10254 (1991). For a general

remaining loophole in environmental law," that of unregulated pollution transfers.<sup>9</sup> RCRA is a comprehensive environmental statute<sup>10</sup> designed to regulate solid and hazardous wastes from "cradle

---

description of RCRA and its various citizen suit provisions, see Christopher Harris and Donavee A. Berger, *Civil Enforcement Authority under the Resource Conservation and Recovery Act*, in Janet S. Kole and Larry D. Espel, eds., *Environmental Litigation* 45, 45-46 (ABA, 1991); Theodore L. Garrett, *Citizen Suits* in Kole and Espel, eds., *Environmental Litigation* 68, 68-70; Adam Babich, *The Federal Law of Environmental Public Nuisance: Citizen Imminent Hazard Suits Under RCRA*, in 2 *ALI-ABA Course of Study: Environmental Litigation*, 987, 989-992 (June 21-25, 1993).

9. Resource Conservation and Recovery Act of 1976, H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 4 (1976) (concluding that "[a]t present the federal government is spending billions of dollars to remove pollutants from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. . . . This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way").

Four years after the adoption of RCRA, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund. Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. § 9601 et seq. (1988 ed. & Supp. V). CERCLA is designed to clean up sites already contaminated with hazardous substances. CERCLA adopted four central mechanisms to achieve this objective:

(1) an information-gathering and reporting system; (2) a specification of federal authority to respond to hazardous waste emergencies and clean up inactive dump sites; (3) the creation of a fund to pay for the cleanup of inactive sites; and (4) the imposition of strict liability on persons contributing to hazardous substance releases at inactive sites.

Rodgers, *Environmental Law* at 685 (cited in note 5). For general background regarding CERCLA, see Alfred R. Light, *CERCLA Law and Procedure* (BNA, 1991).

While CERCLA is designed to remediate hazardous waste sites, RCRA, on the other hand, is designed to prevent the need for such cleanups in the first place. *Toxic Waste Litigation*, 99 Harv. L. Rev. at 1464 (cited in note 1) ("In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA) to regulate prospectively the transportation and disposal of hazardous wastes. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address the problem of waste already generated and stored") (citations omitted). The statutes are designed, at least in theory, to work together as a cohesive regulatory scheme. Rodgers, *Environmental Law* at 683-84 ("The Superfund law came out of the same committees that worked on the 1980 Amendments to RCRA, and the two statutes should be considered *in pari materia*. Thus CERCLA 'picks up where RCRA leaves off. . . .'" (quoting Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envir. L. 1, 35-36 (1982))); *Toxic Waste Litigation*, 99 Harv. L. Rev. at 1540 ("CERCLA's sponsors introduced the legislation primarily to fill a gap left by the Resource Conservation and Recovery Act of 1972").

10. William L. Kovacs and John F. Klucsik, *The New Federal Role of Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 Colum. J. Envir. L. 205 (1977) (concluding that RCRA was the first comprehensive federal approach to waste management). While CAA generally regulates ambient air concentrations and CWA regulates points of emission into water, RCRA regulates the treatment, storage and disposal of solid and hazardous wastes regardless of whether the contamination takes the form of air, water, or land pollution. To put it another way, RCRA is not "media specific." As William K. Reilly, former Administrator of the EPA explains, "[w]hile some emergency power provisions of the six different statutes are media specific, others are not. Media-specific statutes include the CAA (releases affecting air), the CWA (releases affecting water and adjoining shorelines), and SDWA (releases likely to enter a public water system or an underground source of drinking water). In contrast, CERCLA and RCRA apply to releases to all media (i.e., 'the environment' defined broadly)." Environmental Protection Agency, *Clean Air Act; Enforcement Authority Guidance*, 56 Fed. Reg. 24393, 24398 (May 30, 1991).

to grave.”<sup>11</sup> Like nearly every modern environmental statute, RCRA includes a variety of enforcement mechanisms, including a citizen suit provision.<sup>12</sup>

Despite certain unique advantages,<sup>13</sup> RCRA’s citizen suit provision was not thought to provide for the recovery of past environmental cleanup costs. As a result of this limitation, innocent landowners, forced to remediate toxic waste sites before suing those at fault, were occasionally left without a means to recover their environmental cleanup costs.<sup>14</sup> Concerned by this dilemma, the Ninth Circuit, in

---

As evidence of the reach of RCRA’s provisions, recent governmental estimates indicate that a comprehensive RCRA remediation program for private facilities would cover over 5,000 sites at a cost of up to forty-two billion dollars. John Graubert, *Corrective Action Under RCRA*, in *ALI-ABA Course of Study: Environmental Law* 117, 119 (Feb. 17-19, 1994).

11. *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1590, 128 L. Ed. 2d 302 (1994); *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988). See H.R. Rep. No. 94-1491 at 5 (cited in note 9). RCRA was designed with three general goals: (1) “to provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials,” (2) “to provide for the safe disposal of discarded materials,” and (3) “to regulate the management of hazardous waste.” William B. Johnson, *Right to Maintain Citizen Suit Under § 7002 of Resource Conservation and Recovery Act (42 U.S.C.S. § 6972)*, 91 A.L.R. Fed. 436, 445 (1989). See RCRA § 1003, 42 U.S.C. § 6902.

Although RCRA imposes liability for both past and present violations most courts have concluded that RCRA is generally prospective in that those past or present acts must continue to present a regulatory violation or environmental endangerment. See, for example, *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981) (holding that RCRA’s EPA imminent hazard provision, § 7003, “neither punishes past wrongdoing nor imposes liability for injuries inflicted by past acts. Rather, as defendants themselves argue, its orientation is essentially prospective. When construed in this manner, the statute is simply not retroactive. It merely relates to current and future conditions”).

12. RCRA § 7002, 42 U.S.C. § 6972. See note 46.

13. See Theodore L. Garrett, ed., *The RCRA Practice Manual* 234-45 (ABA, 1994) (“In several respects, the citizen suit provisions in RCRA are broader than those found in other environmental statutes. First, actions can be maintained to abate imminent and substantial endangerments as well as to abate violations of regulations and permits. Second, civil penalties can be recovered. Third, there is no lengthy notice period prior to filing for violations of hazardous waste regulations. On the other hand, the RCRA citizen suit provisions are narrower than those found under other statutes, in that they cannot be used to challenge siting and permitting decisions. In addition, the practical evidentiary burdens facing a plaintiff are greater under RCRA because the regulatory program is so much more complex”).

14. This problem is perhaps most evident in the area of water petroleum cleanups. CERCLA provides for the recovery of environmental cleanup costs. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (imposing liability for “any other necessary costs of response incurred by any other person consistent with the national contingency plan”). However, CERCLA liability extends only to hazardous substances. CERCLA § 107(a), 42 U.S.C. § 9601(14) (defining the term hazardous substance so as to exclude petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph . . .”). See *Cose v. Getty Oil Co.*, 4 F.3d 700, 704 (9th Cir. 1993) (holding that CERCLA § 101(14) excludes oil and gas from its definition of a “hazardous substance”); *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989) (holding that the application of the standards governing statutory construction to the words of the petroleum exclusion requires us to exclude gasoline, even leaded

*KFC Western Inc. v. Meghrig*, broke with traditional thinking and held that RCRA's imminent citizen suit provision provides plaintiffs a private right of action to recover their past environmental response

gasoline, from the term 'hazardous substance' for purposes of CERCLA. Any other construction ignores the plain meaning of the statute and renders the petroleum exclusion a nullity").

Conversely, while RCRA does not authorize the recovery of past response costs, see Part IV.A., it does apply to waste petroleum. Under most of RCRA's provisions, a waste must be considered both a solid and a hazardous waste in order to come within RCRA's control. Despite the misleading nature of the term, solid waste can include "any solid, liquid, semisolid, or contained gaseous material." Adam Babich, Comment, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, 24 *Envir. L. Rep.* 10122, 10126 (1994). Solid waste basically includes:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or industrial discharges which are point sources subject to permits under [the Clean Water Act, nor does it include] source, special nuclear, or byproduct materials, as defined by the Atomic Energy Act of 1954, as amended.

RCRA § 1004(27), 42 U.S.C. § 6903(27). RCRA also defines "hazardous waste" in broad terms. The statutory definition of "hazardous waste" includes any solid waste or combination of solid wastes

which because of its quality, concentration, or physical, chemical or infectious characteristics may:

- (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
- (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

*Id.* § 1004(5), 42 U.S.C. § 6903(5).

While RCRA's provisions generally require that a plaintiff go through this process of proving that the waste is both a solid and hazardous waste, this is not true when the basis of the suit is RCRA's imminent citizen suit provision. As Adam Babich explains, for most of RCRA's provisions "a substance cannot be a hazardous waste unless it is a solid waste. As defined in Subtitle C, the term 'solid waste' applies only to substances that also qualify as Subtitle C hazardous wastes. . . . Under § 7002(a)(1)(B), however, the difference between 'solid' and 'hazardous' waste hardly matters because the provision applies equally to 'solid or hazardous waste.'" Babich, 24 *Envir. L. Rep.* at 10124-25 (citation omitted). The potential impact on polluters is significant. As Babich again explains, "[b]ecause § 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 . . . will find they are *not* immune from RCRA imminent hazard actions." *Id.* at 10126-27.

Using this analysis, nearly every court to address the issue has held that waste petroleum is among the types of solid or hazardous waste covered by RCRA § 7002. See, for example, *Nicholas J. Murlas Trust v. Mobil Oil Corp.*, 195 U.S. Dist. LEXIS 12037, \*21 (N.D. Ill. Aug. 17, 1995); *Dydio v. Hesston Corp.*, 887 F. Supp. 1037, 1948 (N.D. Ill. 1995); *Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F. Supp. 476, 482 (D. Minn. 1995); *Zands v. Nelson*, 779 F. Supp. 1254, 1261-64 (S.D. Cal. 1991), modified, 797 F. Supp. 805 (S.D. Cal. 1992); *Dominick's Finer Foods, Inc. v. Amoco Oil Co.*, 1993 U.S. Dist. LEXIS 17668, \*6 (N.D. Ill. Dec. 15, 1993); *Buggsi, Inc. v. Chevron U.S.A., Inc.*, 857 F. Supp. 1427, 431 (D. Or. 1994); *Petropoulos v. Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511, 516 (S.D. Ohio 1993). But see *Winston v. Shell Oil Co.*, 861 F. Supp. 713, 717 (C.D. Ill. 1994) (holding that waste petroleum was not meant to be regulated as a hazardous solid substance," reasoning that waste petroleum should be regulated under RCRA's UST program found in RCRA §§ 9001-10, 42 U.S.C. §§ 6991-91(i).

costs.<sup>15</sup> Shortly thereafter, the Eighth Circuit, in *Furrer v. Brown*, rejected the reasoning of *KFC*, denying the recovery of response costs under similar circumstances.<sup>16</sup> In September 1995, the Supreme Court agreed to hear *KFC* to resolve the circuit court split.<sup>17</sup>

The Supreme Court in *KFC* sought to address two separate but unrelated issues. The first was whether RCRA Section 7002(a)(1)(B) requires the solid or hazardous waste to present a continuing endangerment at the time the law suit is filed.<sup>18</sup> The second was whether RCRA authorizes the recovery of environmental response costs or is simply intended to provide injunctive relief.<sup>19</sup> In a unanimous decision, the Court overruled the Ninth Circuit, holding that RCRA's imminent citizen suit provision not only requires the presence of a continuing endangerment at the time the law suit is filed, but also does not provide plaintiffs a private right of action to recover remediation costs expended to abate wholly past endangerments.<sup>20</sup> The Court, however, expressly reserved the question of whether the provision authorizes plaintiffs to recover response costs expended after the commencement of the lawsuit.<sup>21</sup> This Note will answer this unresolved issue, and assess the continued viability of RCRA's imminent citizen suit provision.

This Note begins, in Part II, by describing the origins and legal history of the environmental citizen suit. Part III examines the efforts of the courts to define the scope of RCRA's various citizen suit provisions, including the conflicting approaches of the Eighth and Ninth Circuits in applying Section 7002(a)(1)(B), RCRA's imminent citizen suit provision. Having constructed the basic analytical framework, Part III proceeds to outline the Supreme Court's resolution of the circuit court split in *Meghriq v. KFC Western, Inc.* Part IV further examines the *KFC* decision, concluding that while the Court correctly held that Section 7002(a)(1)(B) does not provide a private right of action to recover environmental response costs expended to abate "wholly past endangerments,"<sup>22</sup> the Court's decision should not

---

15. 46 F.3d 518, 521 (9th Cir. 1995).

16. 62 F.3d 1092, 1096 (8th Cir. 1995).

17. 116 S. Ct. 41, 132 L. Ed. 2d 922 (1995).

18. 1996 U.S. LEXIS 1955, \*8-9 (Mar. 19, 1996).

19. *Id.* at \*9-10.

20. *Id.* at \*8-10.

21. *Id.* at \*15-16. See Part IV.B.2.

22. It is important to distinguish between three very different types of environmental endangerments potentially covered by RCRA's imminent citizen suit provision. First, the solid or hazardous waste could have presented an endangerment at some time in the past but that has remediated prior to the filing of the suit. Such endangerments, often referred to as "wholly past endangerments," are not covered by RCRA § 7002(a)(1)(B). *KFC*, 1996 U.S. LEXIS 1955 at \*9.



be construed as prohibiting the recovery of response costs under all circumstances. Finally, having examined the Court's analysis in *KFC*, Part V concludes by proposing an interpretation of RCRA's imminent citizen suit provision that would authorize citizen-plaintiffs to recover reasonable response costs under certain proscribed circumstances and yet comply with RCRA's preliminary requirements.<sup>23</sup> The interpretation advanced in this Note not only adheres to the comprehensive regulatory scheme devised by Congress, but also promotes RCRA's primary objective—the prompt abatement of imminent hazards.<sup>24</sup>

## II. ORIGIN AND LEGAL HISTORY OF THE ENVIRONMENTAL CITIZEN SUIT

The federal environmental regulatory scheme as originally designed in the 1950s and 1960s proved largely ineffective due to the failure of Congress to provide federal statutes with workable enforcement mechanisms.<sup>25</sup> As environmental concerns began to achieve widespread support,<sup>26</sup> Congress sought to remedy this glaring problem by enlarging the scope of the federal government's enforcement authority.<sup>27</sup> However, fearful that federal agencies either would not<sup>28</sup>

---

Second, the solid or hazardous waste could present a continuing endangerment throughout the entire litigation process. RCRA's imminent citizen suit provision clearly applies to these types of endangerments. *Id.* at \*9-10. The remaining situation involves solid or hazardous waste which presented an imminent endangerment at the time the suit was filed but which have since been abated. The Supreme Court has not yet addressed this particular situation. *Id.* at \*15-16. It is this final situation that is the focus of this Note.

23. This would include, for example, providing adequate notice to the appropriate parties, as required by RCRA § 7002(b)(2)(A), 42 U.S.C. § 6972(b)(2)(A), and demonstrating the existence of a continuing endangerment at the time the lawsuit was filed.

24. See notes 282-83 and accompanying text.

25. Jeffrey G. Miller, *Citizen Suits: Private Enforcement of Federal Pollution Control Law* 3 (John Wiley & Sons, 1987) (concluding that the "enforcement mechanisms of federal environmental statutes in the 1960s were both cumbersome and ineffective"). This view is supported by Senator Edwin Muskie's observation during the congressional debate over the Clean Air Act that state and federal regulations had failed to adequately enforce the environmental provisions and that "more tools" were needed to guarantee effective enforcement in the future. *Id.* at 4 n.2. See generally H. Edward Dunkelberger, Jr., *The Federal Government's Role in Regulating Water Pollution Under the Federal Water Quality Act of 1965*, 3 Nat. Res. Law 3 (1970); Henry L. Pitts, *The Interaction of the Federal and State Systems: The Experience in the Central U.S.*, 3 Nat. Res. Law 26 (1970); Murray Stein, *The Actual Operation of the Federal Water Pollution Control Administration*, 3 Nat. Res. Law 41 (1970).

26. *Toxic Waste Litigation*, 99 Harv. L. Rev. at 1470 (cited in note 1) (explaining that "[a]s evidence of the risks attending improper disposal of hazardous wastes accumulated throughout the 1960s and 1970s, the pressure for legislative action grew").

27. Having determined that no single enforcement mechanism could ensure compliance with the nation's environmental laws, Congress began to incorporate a variety of new enforcement mechanisms into environmental legislation, including "administrative orders; administratively assessed penalties, easy access to courts for injunctive relief, civil penalties and criminal

or could not<sup>29</sup> successfully ensure compliance with the nation's environmental regulations without additional prodding and assistance,<sup>30</sup> Congress developed the citizen suit as a way to supplement governmental action.<sup>31</sup>

---

sanctions; and a variety of self-help measures for the enforcement agencies such as stop sale orders, seizures, and funds to clean up pollution with recoupment against the responsible party." Miller, *Citizen Suits* at 4 n.2 (cited in note 25). In addition, most major federal anti-pollution laws have for years allowed the Administrator of the EPA to seek injunctions to abate imminent and substantial endangerments. Babich, 24 *Envir. L. Rep.* at 10128 (cited in note 14). See also Rodgers, *Environmental Law* at 540 (cited in note 5) (noting that "[m]ost of the environmental laws contain emergency provisions allowing agency authorities to play leapfrog with the established procedures and move swiftly against obvious hazards"). Currently, at least six environmental statutes contain some form of EPA imminent hazard or emergency provision. CAA § 303, 42 U.S.C. § 7603; CERCLA § 106, 42 U.S.C. § 9606; CWA § 504(a), 33 U.S.C. § 1364; RCRA § 7003, 42 U.S.C. § 6973; SDWA § 1431, 42 U.S.C. § 300i; TSCA § 7, 15 U.S.C. § 2606.

28. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970) ("Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations . . . should motivate governmental . . . enforcement and abatement proceedings"). See also *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981) (concluding that "Congress then believed that the federal Government had been 'restrained' and 'notoriously laggard' in exacting obedience to pollution control requirements") (quoting National Air Quality Standards Act of 1970, S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-37 (1971)); *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 218 (3d Cir. 1979) (noting that "Congress intended citizen suits both to goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained intact, to provide an alternative enforcement mechanism"); *National Resource Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973) (stating that citizen suits were viewed by Congress as one way of resolving the EPA's "lack of aggressiveness" in abating pollution). See generally *National Resource Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975).

29. 116 Cong. Rec. 32927 (1970) (quoting Senator Muskie: "I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations" of the CAA); *id.* at 33104 (quoting Senator Gary Hart: "In legislation of this type, we will find very likely noncompliance which in number or degree are far beyond the capacity of the Government to respond to").

30. Philip Key, Gwaltney of Smithfield v. Chesapeake Bay Foundation: *Subject Matter Jurisdiction and Citizen Suits*, 19 *Envir. L.* 93, 96 (1988) (explaining that "[a]gencies were susceptible to agency capture, lack of funds for enforcement, and a mandate larger than they could manage. Consequently, Congress adopted citizen enforcement as a means of recapturing the country's environmental priorities"). The general fear that the federal agencies had been overly eager to appease industry was due to the perceived failure of the governmental agencies in enforcing environmental provisions. As Miller explains, "[i]t is clear that governmental action against perceived threats to public health from past hazardous waste practices has fallen far short of public and congressional demand and expectation. Miller, *Citizen Suits* at 9 n.32 (cited in note 25).

31. See David S. Mann, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Uses or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 *Envir. L.* 175, 180 (1991) (concluding that although citizen suits were originally intended to guard against the perceived failure of federal agencies to enforce environmental statutes, citizen suit provisions are now viewed by many as essential to supplement federal enforcement capabilities in an age of dwindling governmental resources); Babich, 24 *Envir. L. Rep.* at 10127 (cited in note 14) (explaining that advocates of citizen suits contend that this form of private enforcement serves three general purposes: (1) to prevent the production and spread of pollution, (2) to promote compliance with environmental regulations, and (3) to force federal agencies into taking action against polluters) (citing Hazardous Waste Control and Enforcement Act of 1983, H.R. Rep. No. 98-198, 98th Cong., 2d Sess. at 53 (1983)).

Congress authorized the first citizen suit provision by adopting Section 304 of the Clean Air Act Amendments of 1970.<sup>32</sup> Debate over the adoption of the provision was heated and, as a result, the end product was something of a compromise.<sup>33</sup> Those opposed to the measure feared that citizen suits would flood the federal court system.<sup>34</sup> In the end, however, opponents of Section 304 came to see the political danger of voting against a pro-environmental measure at the "outset of the environmental decade" and eventually supported the adoption of the provision.<sup>35</sup>

As originally designed in the CAA, the citizen suit provision only authorized two types of actions:<sup>36</sup> (1) suits against those in violation of the statute's provisions, regulations or orders,<sup>37</sup> and (2) actions against the Administrator of the EPA for failing to discharge mandatory duties.<sup>38</sup> Although Section 304 provided citizens a private right of action to enforce CAA's provisions and regulations, it did not authorize the recovery of monetary damages.<sup>39</sup> Rather, citizens were to act

---

However, citizen suit provisions are not without their critics. See, for example, Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 Ga. L. Rev. 337 (1988); Harold J. Krent and Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793, 1794-96 (1993). At least one commentator observed that the RCRA's imminent citizen suit provision could have a backlash effect. Miller theorized that RCRA's provision to allow citizens to sue to abate imminent and substantial endangerments would draw the courts into:

uncertain and thorny issues of what constitutes an endangerment and what remedy may be appropriate. In essence, the amendment allows private citizens to bring public nuisance cases under the guise of RCRA. The merits of this amendment are open to debate. The citizen suit sections were not originally designed with this type of action in mind. Efforts to blunt arguments against the amendment lead to anomalous results in its provisions. Indeed, if arguments against are vindicated, a resulting backlash could adversely affect the use of citizen suits for more traditional purposes.

Miller, *Citizen Suits* at 9-10 (cited in note 25) (footnotes omitted).

32. Pub. L. No. 91-604, 84 Stat. 1706 (1970), codified as amended at 42 U.S.C. § 7604 (1988 ed. & Supp. V).

33. Miller, *Citizen Suits* at 5 (cited in note 25).

34. *Id.*

35. *Id.*

36. *Id.* at 7 (explaining that the environmental citizen suit provisions "authorize 'any person' to commence suit to enforce the requirements of the acts against 'any person' alleged to violate them or to require the government to perform a mandatory duty under the acts").

37. Babich, 24 *Envir. L. Rep.* at 10127 (cited in note 14).

38. *Id.* Originally, most citizen suits were brought under the second type of citizen suit provision as large environmental organizations sought to change governmental regulations for entire industries rather than enforce regulations at a single site. In recent years, however, the number of citizen suits of the first type has grown enormously. See Miller, *Citizen Suits* at 10-12 (cited in note 25).

39. Miller, *Citizen Suits* at 7 (cited in note 25) (noting that the primary remedy in environmental citizen suits is injunctive relief). Further evidence supporting this conclusion is found in the congressional debates over adoption of § 304, the first environmental citizen suit provision. When confronted with criticisms that the citizen suit provision of the CAA would

as "private attorneys general."<sup>40</sup> In addition, citizen plaintiffs were required to give notice of the suit to the EPA, the appropriate state authority, and the defendant.<sup>41</sup> Having deprived potential private plaintiffs of much of the incentive to file suit under Section 304, Congress provided for the recovery of attorney's fees, but tempered the provision by creating the risk that fee awards could be imposed against plaintiffs as well as defendants.<sup>42</sup>

Despite contentious congressional debate over the adoption of Section 304, the original environmental citizen suit provision, use of private enforcement mechanisms has become the norm in federal environmental regulations. Shortly after adopting the first citizen suit provision, Congress included a citizen suit provision in the Clean Water Act based nearly entirely on Section 304 of the Clean Air Act.<sup>43</sup> Indeed, during the 1970s, Congress adopted a cut and paste mentality,<sup>44</sup> incorporating citizen suit provisions based on Section 304

---

overburden the courts with countless cases, Senator Muskie responded that "a citizen suit can only be brought to enforce the provisions of the act or the requirements that are established as a result of the operations of the act." 116 Cong. Rec. 32927 (cited in note 29). See also Miller, *Citizen Suits* at 10 n.3.

40. *Natural Resources Defense Council*, 484 F.2d at 1337 (stating that "[t]he Committee realized that federal or state enforcement resources might be insufficient, and that federal agencies themselves might sometimes be polluters; the citizen suit provision created 'private attorneys general' to aid in enforcement"). Most cases interpreting RCRA's citizen suit provision have concluded that the plaintiff must act as a private attorney general. See, for example, *Fallowfield Development Corp. v. Strunk*, 1993 U.S. Dist. LEXIS 6233, \*37 (E.D. Pa. May 11, 1993); *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337 (4th Cir. 1983); *Kaufman and Broad-South Bay v. UNISYS Corp.*, 822 F. Supp. 1468, 1477 (N.D. Cal. 1993); *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993); *Commerce Holding Co., Inc. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990); *Portsmouth Redevelopment and Housing Authority v. BMI Apartments Associates*, 847 F. Supp. 380, 385 (E.D. Va. 1994).

41. CAA § 304(b), 42 U.S.C. § 7604(b). See Miller, *Citizen Suits* at 8-9 (cited in note 25).

42. CAA § 304(d), 42 U.S.C. § 7604(d). See Miller, *Citizen Suits* at 9 (cited in note 25).

43. Miller, *Citizen Suits* at 6 (cited in note 25) (concluding that Congress would basically "lift" the citizen suit provision from the CAA and "transpose it with only the most cursory conforming changes into other environmental statutes").

44. *Id.* at 7 (stating that "[t]he citizen suit sections of the various environmental statutes are virtually identical, being patterned closely after Clean Air Act § 304. There are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others. To the extent the sections differ from statute to statute, the changes reflect differences in the structure or scheme of the statute involved, or a quirk at the time enacted"); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, in 3 *ALI-ABA Course of Study: Environmental Litigation* 997, 1001 (June 26-30, 1995) ("Because of the similarity of the citizen suit provisions in the various environmental statutes and the relative abundance of its legislative history in the CAA compared to the other statutes, the CAA legislative history is used to interpret the provisions in other statutes").

of the Clean Air Act into nearly every environmental statute,<sup>45</sup> including the Resource Conservation and Recovery Act.<sup>46</sup>

45. Act to Prevent Pollution From Ships, 33 U.S.C. § 1910 (1994 ed.); CERCLA § 310, 42 U.S.C. § 9659 (1988 ed.); Deepwater Ports Act ("DPA") § 16, 33 U.S.C. § 1515 (1994 ed.); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427 (1994 ed.); Emergency Planning and Community Right-to-Know Act ("EMPCRTKA") § 326, 42 U.S.C. § 11046 (1988 ed.); Endangered Species Act ("ESA") § 11(g), 16 U.S.C. § 1540(g) (1994); Energy Conservation Act, 42 U.S.C. § 6305 (1988 ed.); Federal Water Pollution Control Act ("CWA") § 505, 33 U.S.C. § 1365 (1994 ed.); Marine Protection, Research, and Sanctuaries Act ("MPRSA") § 105(g), 33 U.S.C. § 1415(g) (1994 ed.); Natural Forests Act, 15 U.S.C. § 544(m)(b) (1994 ed.); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686 (1988 ed.); Noise Control Act ("NCA") § 12, 42 U.S.C. § 4911 (1988 ed.); Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124 (1988 ed.); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349 (1988 ed.); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435 (1988 ed.); RCRA § 7002, 42 U.S.C. § 6972 (1988 ed.); SDWA § 1449, 42 U.S.C. § 300j-8 (1994 ed.); Surface Mining Control and Reclamation Act ("SMCRA") § 520, 30 U.S.C. § 1270 (1988 ed.); Toxic Substances Control Act (TSCA) § 20, 15 U.S.C. § 2619 (1994 ed.).

At least one environmental statute, however, does not contain a citizen suit provision. Federal Insecticide, Fungicide, and Redenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq. (1994 ed.). Miller notes that this apparent anomaly "is explained by the fact that either or both the Senate Environment and Public Works Committee . . . and the House Commerce and Transportation Committee are the authorizing committees for all of this legislation except FIFRA. FIFRA is the exclusive domain of the more conservative Agriculture Committees in both houses of Congress." Miller, *Citizen Suits* at 6 (cited in note 25).

Citizen suit provisions, however, are hardly unique to environmental statutes. Congress has authorized private enforcement action in a number of other statutes. See, for example, Consumer Product Safety Act § 24, 15 U.S.C. § 2073 (1994); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3, 2000e-5 (1988 ed. & Supp. V); Clayton Act, 15 U.S.C. § 15 (1994 ed.), Securities Act of 1933, 15 U.S.C. § 77(k) (1994 ed.). The difference in environmental law is that citizens had never before been "specifically empowered and expected to act as real private attorneys general vindicating the statutory rights of the community at large rather than the plaintiff's own economic losses." Miller, *Citizen Suits* at 1 (cited in note 25). See generally Stephen Fotis, Comment, *Private Enforcement of the Clean Air Act and The Clean Water Act*, 35 Am. U. L. Rev. 127, 132-34 (1985).

46. RCRA's citizen suit provision, § 7002, currently provides in relevant part:

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

(1) (A) against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

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

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

The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), *to order such person to take such other action as may be necessary*, or both, or to order the Administrator to perform the act or duty referred to in

## III. RCRA'S CITIZEN SUIT PROVISION

RCRA's original citizen suit provision, like most environmental statutes adopted during the 1970s, closely parallels CAA Section 304.<sup>47</sup> As a result, when Congress adopted RCRA Section 7002, the provision included the two traditional types of citizen suits: actions against the Administrator of the EPA for failing to discharge mandatory duties,<sup>48</sup> and suits against those in violation of RCRA's provisions, regulations, and orders.<sup>49</sup> In 1984, however, Congress amended Section 7002 to provide a third type of citizen suit authorizing private actions to abate "imminent and substantial endangerments to health or the environment."<sup>50</sup> While at least six environmental statutes, including RCRA, authorize the Administrator of the EPA to bring suit to abate imminent hazards,<sup>51</sup> RCRA is the only environmental statute that extends this power to private citizens.<sup>52</sup>

Although the right granted by RCRA's citizen suit provision is broader than that of any other environmental citizen suit provision,<sup>53</sup> this right is tempered by the limited remedies RCRA authorizes.<sup>54</sup>

paragraph (2), as the case may be, and to apply any appropriate civil penalties under section [3008](a) and (g) of this title.

42 U.S.C. § 6972 (emphasis added).

47. See notes 43-44 and accompanying text.

48. This type of citizen suit is currently located at RCRA § 7002(a)(2), 42 U.S.C. § 6972(a)(2). While acknowledging the importance of RCRA § 7002(a)(2), this Note focuses on those provisions used against polluters rather than those used to prod the EPA into taking action.

49. This type of citizen suit is currently located at RCRA § 7002(a)(2)(A), 42 U.S.C. § 6972(a)(1)(A). The provision was originally located at RCRA § 7002(a), 42 U.S.C. § 6972(a).

50. Pub. L. No. 98-616, 98 Stat. 3269 (1984), RCRA § 7002(a)(1)(B), codified at 42 U.S.C. § 6972(a)(1)(B) (1988 ed. & Supp. V). Congress amended § 7002 under the assumption that "this expansion of the citizens suit provision will complement . . . the [EPA] Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action . . ." H.R. Rep. No. 98-198 at 53 (cited in note 31).

51. See note 27.

52. In so doing, Congress simply extended RCRA's governmental imminent hazard authority in § 7003 to include "any person."

53. Babich, 24 *Envir. L. Rep.* at 10127-28 (cited in note 14).

54. It has been said that in environmental law, "remedy defeats have a way of swallowing substantive victories." Redgers, *Environmental Law* at 549 (cited in note 5). See also Stuart P. Feldman, *Curbing the Recalcitrant Polluter: Post Decree Judicial Agents in Environmental Litigation*, 18 *B.C. Envir. Aff. L. Rev.* 809 (1991) (concluding that "a court's choice of a remedy may be as critical to the litigant's interests and the public weal as the substantive conduct rules that establish polluters' liability").

Professor Redgers explains that this problem has also proven to be true in the context of RCRA. In discussing the government's power under RCRA § 7003 to sue to abate imminent hazards, a provision nearly identical to the imminent citizen suit provision in § 7002(a)(1)(B), Redgers contends that "the strong substance of § 7003 is achieved partially at the expense of the remedy. It is as if the courts pay heed *serialim* to the victims of pollution and then to victims of proposals to clean it up. Even at the preliminary injunction stage, relief sought by the govern-

Under Section 7002(a)(1)(A), RCRA's "enforcement" citizen suit provision, courts may issue an injunction ordering a defendant to comply with RCRA's standards and requirements.<sup>55</sup> Under Section 7002(a)(1)(B), RCRA's "imminent" citizen suit provision, courts may "restrain" a defendant responsible for the "past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" as well as order a defendant "to take such other action as may be necessary."<sup>56</sup> In addition, courts are authorized under both provisions to assess civil penalties consistent with RCRA Sections 3008(a) and (g).<sup>57</sup> However, unlike CERCLA,<sup>58</sup> RCRA does not expressly provide a private cause of action to recover environmental response costs.

The 1984 Amendments undoubtedly expanded the scope of liability under RCRA's citizen suit provision. It is, however, less clear to what extent the Amendments were intended to do so.<sup>59</sup> Resolving this complex question requires close scrutiny of the legislative and judicial history of three provisions within RCRA: (1) Section 7002(a)(1)(A), RCRA's enforcement citizen suit provision; (2) Section 7003, RCRA's governmental imminent suit provision; and (3) Section 7002(a)(1)(B), RCRA's novel addition to the world of private enforcement mechanisms, the imminent citizen suit provision.

#### A. *Private Citizen Enforcement Authority Under Section 7002(a)(1)(A)*

RCRA's enforcement citizen suit provision authorizes any person to file a suit "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."<sup>60</sup> The scope of remedies available to private parties under

---

ment has been qualified, moderated, and shunned." Rodgers, *Environmental Law* at 549 (cited in note 5) (footnote omitted).

55. RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A).

56. *Id.* § 7002(a), 42 U.S.C. § 6972(a). The language used in RCRA's imminent citizen suit provision essentially incorporates the same language as Section 7003, the EPA's imminent hazard authority, and was intended by Congress to impose the same standard of liability. See note 78.

57. RCRA §§ 3008(a) and (g), 42 U.S.C. §§ 6928(a) and (g). In addition to RCRA, only CWA § 309, 33 U.S.C. § 1319 and CAA § 304, 42 U.S.C. § 7604 provide for civil penalties. Plaintiffs have often used the threat of civil penalties as a way to broker monetary settlements. These types of settlements are called Environmentally Beneficial Expenditures ("EBEs"). For discussion of EBEs, see Allison Fisher, *Air and Water Quality*, 21 *Envir. L.* 1117, 1136 (1991); Mann, 21 *Envir. L.* at 178-79 (cited in note 31).

58. Part IV.A.3.

59. *Furrer*, 62 F.3d at 1094 n4.

60. RCRA § 7002(a), 42 U.S.C. § 6972(a).

this provision was first addressed in *Environmental Defense Fund, Inc. v. Lamphier*.<sup>61</sup> There, two private environmental groups sued the owners and operators of an industrial waste disposal site under RCRA's citizen suit provision. They alleged a variety of hazardous waste violations, including violations of RCRA's notification<sup>62</sup> and permit<sup>63</sup> requirements.<sup>64</sup> The district court found for the plaintiffs and issued an injunction ordering the defendants to comply with RCRA's hazardous waste regulations.<sup>65</sup> The Fourth Circuit upheld the injunction, but with the caveat that RCRA authorizes a court to issue such an order only in those cases where plaintiffs are acting as "private attorneys general"<sup>66</sup> for the benefit of the community at large rather than pursuing a purely private remedy. According to the Fourth Circuit in *Lamphier*, this limitation bars plaintiffs from receiving substantive relief<sup>67</sup> under RCRA's citizen suit provision. Although the court did not explain precisely what it meant by substantive relief, the court's ruling strongly implied that monetary relief is not recoverable under Section 7002(a)(1)(A). Indeed, the Court concluded that the plaintiffs were not even entitled to monitor the contaminated site to ensure that the defendants were adhering to the injunction.<sup>68</sup> This function was left to the government alone.

Two years later, the Sixth Circuit directly addressed the issue of whether plaintiffs could recover monetary damages under Section 7002(a)(1)(A). In *Walls v. Waste Resource Corp.*,<sup>69</sup> residents filed a class action law suit against the past and present owners and operators of a local landfill as well as certain generators who had disposed of hazardous waste at the site.<sup>70</sup> The plaintiffs not only requested injunctive relief ordering compliance with RCRA, but also sought monetary relief for damages resulting from the violations of RCRA's hazardous waste regulations.<sup>71</sup> The court held that, while RCRA's enforcement citizen suit provision authorizes the courts to order injunctions, the provision does not provide for monetary relief.<sup>72</sup> The Sixth Circuit affirmed, upholding the order for injunctive relief and

---

61. 714 F.2d 331 (4th Cir. 1983).

62. RCRA § 3010, 42 U.S.C. § 6930.

63. Id. § 3005, 42 U.S.C. § 6925.

64. *Lamphier*, 714 F.2d at 335.

65. Id. at 335.

66. Id. at 337.

67. Id. at 337 n.4.

68. Id.

69. 761 F.2d 311 (6th Cir. 1985).

70. Id. at 313-14.

71. Id. at 314.

72. Id. at 314-15.



concluding that RCRA Section 7002(a)(1)(A) does not permit a private action for damages.<sup>73</sup> The court acknowledged that while the scope of liability under RCRA's original citizen suit provision is broad, the remedies available under the provision are restricted to injunctive and other equitable relief.<sup>74</sup>

Both *Walls* and *Lamphier* help clarify the scope of RCRA's citizen suit provision. Neither, however, directly address the scope of Section 7002(a)(1)(B), RCRA's imminent citizen suit provision. Both cases focus instead on Section 7002(a)(1)(A), RCRA's traditional enforcement citizen suit provision. The 1984 Amendments, however, significantly expanded the type of relief available under RCRA Section 7002. Specifically, the Amendments allow a court to order the defendant to "take such other action as may be necessary" to abate an "imminent and substantial endangerment."<sup>75</sup> Determining when an environmental threat must be "imminent" and what constitutes a "necessary" action remains the primary focus of this Note. Resolving these two questions as they relate to RCRA's imminent citizen suit provision first requires an understanding of RCRA Section 7003, the EPA's imminent hazard authority.

### *B. EPA Imminent Hazard Authority Under Section 7003*

Since its adoption in 1976, RCRA has authorized the Administrator of the EPA to sue to abate an imminent threat to public health or the environment.<sup>76</sup> Section 7003(a) essentially provides that whenever the "handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment," the Administrator may ask a court to restrain the person contributing to the hazard or "to take such other

---

73. *Id.* at 316. The plaintiffs also unsuccessfully sought monetary damages under CWA's citizen suit provision. *Id.* at 314. CWA § 505, 33 U.S.C. § 13675(a). The Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 18 (1981), concluded that Congress did not intend to authorize an implied private remedy under CWA and refused to consider a private action for monetary damages.

74. *Walls*, 761 F.2d at 315. For other cases limiting RCRA § 7002(a)(1)(A) to continuing or intermittent violations, see *Dydio*, 887 F. Supp. at 1043; *City of Toledo v. Beazer Materials & Services, Inc.*, 833 F. Supp. 646, 655 (N.D. Ohio 1993); *Gache*, 813 F. Supp. at 1041; *Fallowfield Dev. Corp. v. Strunk*, 1990 U.S. Dist. LEXIS 4820, \*1, \*20 (E.D. Pa. Apr. 23, 1990); *Chartrand v. Chrysler Corp.*, 785 F. Supp. 666, 669-70 (E.D. Mich. 1992); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 424 (M.D. Pa. 1989).

75. RCRA § 7002(a), 42 U.S.C. § 6972(a).

76. Interestingly, the legislative history of RCRA as originally adopted never mentioned § 7003, leaving the courts to determine its purpose and scope. This apparently had much to do with the haste in which the Congress passed RCRA. See Kovacs and Klucsik, 3 Colum J. Envir. L. at 216-20 (cited in note 10).

action as may be necessary.”<sup>77</sup> The 1984 Amendments to RCRA give this authority to private citizens as well. Indeed, according to RCRA’s legislative history, Congress intended that liability under Sections 7002(a)(1)(B) and 7003 would be identical.<sup>78</sup> However, while most courts have been reluctant to liberally interpret RCRA’s imminent citizen suit provision, the courts have often been lenient when construing the EPA’s imminent hazard authority. Specifically, a number of courts have authorized the Administrator to recover restitutionary damages under RCRA Section 7003,<sup>79</sup> while only a handful have authorized restitution under Section 7002(a)(1)(B).<sup>80</sup>

The Third Circuit, in *United States v. Price*,<sup>81</sup> was the first court to order a defendant to make monetary payments to the EPA to abate an imminent hazard under RCRA’s EPA imminent hazard provision. In *Price*, a New Jersey landfill improperly disposed of approximately nine million gallons of hazardous chemical and industrial waste.<sup>82</sup> Much of the waste leached into the groundwater,

---

77. RCRA § 7003(a), 42 U.S.C. § 6973(a), provides in relevant part:

[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an 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.

78. H.R. Rep. No. 98-198 at 53, reprinted in 1984 U.S.C.C.A.N. at 5612 (cited in note 31) (explaining that “liability under § 7002(a)(1)(B) mirrors the standards of liability established under Section 7003”); Solid Waste Disposal Act Amendments of 1983, S. Rep. No. 98-284, 98th Cong., 1st Sess. 56-57 (1983) (“These amendments [adding § 7002(a)(1)(B)] are intended to allow citizens the same broad substantive and procedural claim for relief which is already available to the United States under § 7003. Any differences in language between these amendments and § 7003 are not intended to effect a difference in such claims, but merely clarify that citizens have the same claim presently available to the United States”). See also *Connecticut Coastal Fishermen’s Assn. v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2d Cir. 1993) (holding that the federal regulations concerning § 7003 must also apply to § 7002(a)(1)(B) because the two provisions are “nearly identical”); *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Authority*, 888 F.2d 180, 187 (1st Cir. 1989) (finding that “[s]ince Congress had not yet enacted § 7002(a)(1)(B) when EPA wrote this regulation, we take § 7003 to stand for the nearly identical § 7002(a)(1)(B) as well”). Indeed, if this were not the case, citizen suits would not perform their intended function. Miller explains:

If citizen enforcers had access to lesser injunctive remedies than government enforcers or were subject to greater burdens to obtain injunctive remedies, citizen suit provisions would not perform their intended functions. Citizen plaintiffs would not be real private attorneys general. Indeed, it would be highly advantageous for violating polluters to be enforced against by citizen enforcers rather than by the government, particularly if the government is subsequently bound by the result of the citizen suit.

Miller, *Citizen Suits* at 25 (cited in note 25).

79. See Part III.B.

80. See Part III.C.

81. 688 F.2d 204 (3d Cir. 1982).

82. *Id.* at 208.

threatening Atlantic City's sole supply of water.<sup>83</sup> The government sued various past and present owners and operators of the landfill, requesting that the court issue a preliminary injunction ordering the defendants to fund a diagnostic study of the threat to the local water supply and to guarantee an alternative water supply to those homeowners whose private wells had already been contaminated.<sup>84</sup> The district court rejected both forms of relief, holding as a matter of law that the remedies were "inappropriate forms of preliminary relief."<sup>85</sup>

The Third Circuit affirmed the result reached by the district court,<sup>86</sup> but held that the court's analysis of the government's requests was unnecessarily restrictive and that the requests were not barred as a matter of law.<sup>87</sup> RCRA's imminent hazard provision, the court explained, authorizes the federal courts to exercise their full equitable authority<sup>88</sup> to abate imminent and substantial environmental hazards, including the authority to order a defendant to fund a diagnostic study.

Although the Third Circuit did take the important step<sup>89</sup> of authorizing monetary payments as a form of equitable relief under RCRA Section 7003, the court was careful to limit its holding, restrict-

---

83. *Id.* at 209.

84. *Id.* at 208.

85. *Id.* at 209. The district court decided that the request for monetary payments to fund the diagnostic study was merely a way to turn a claim for damages into a claim for equitable relief in the form of an injunction mandating monetary payments. *Id.* at 211.

86. *Id.* The Third Circuit declared that the question of appropriate relief was a matter for the district court and that it did not abuse its discretion. The Third Circuit explained that having balanced the relevant factors, the decision to wait to order relief until after a full trial may have been the most reasonable course of action for the district court to take. *Id.*

87. *Id.* The court explained that "[a] request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury, i.e., the contamination of Atlantic City's water supply." *Id.* at 212.

88. *Id.* at 214. The court noted that "[b]y enacting the endangerment provisions of RCRA and SDWA, Congress sought to invoke the broad and flexible equity powers of the federal courts in instances where hazardous wastes threatened human health." *Id.* at 211 (citing Amending the Solid Waste Disposal Act, S. Rep. No. 96-172, 96th Cong., 1st Sess. 5 (1979)). "The expensive language of [RCRA Section 7003] was intended to confer 'overriding authority to respond to situations involving a substantial endangerment to health or the environment.'" *Id.* at 213 (quoting Hazardous Waste Disposal, H.R. Committee Print No. 96-IFC, 96th Cong., 1st Sess. 32 (1979)). Moreover, the court stated that "[c]ourts should not undermine the will of Congress by either withholding relief or granting it grudgingly." *Id.*

89. The court quoted *Columbia Broadcasting Systems, Inc. v. American Soc. of Composers, Authors and Publishers*, 320 F. Supp. 389, 392 (S.D.N.Y. 1970), which concluded that "[a]lthough courts are rarely called upon to issue mandatory injunctions calling for the payment of moneys pendente lite, they have done so when the equities and the circumstances of the case demonstrated the appropriateness of the remedy." *Price*, 688 F.2d at 213.

ing such payments to those situations where payments are needed to abate a continuing endangerment or where payments are needed to reimburse the EPA for action it took to abate the endangerment after the initiation of the lawsuit.<sup>90</sup>

In contrast to this explicit restriction in *Price*, the Eighth Circuit, in *United States v. Northeastern Pharmaceutical & Chemical Co., Inc. ("NEPACCO")*,<sup>91</sup> seemed to extend the authority to order monetary payments under Section 7003 to cases where the threat to public health and the environment has been eliminated prior the filing of the lawsuit. In 1971, NEPACCO arranged for the disposal of eighty-five drums of highly toxic hazardous waste.<sup>92</sup> The waste was disposed of improperly, resulting in dangerously high levels of waste in the surrounding soil and water.<sup>93</sup> Through an anonymous tip, the EPA became aware of the contaminated disposal site and took action to remediate the problem. Having successfully contained the threat, the EPA sought to recover its abatement costs from NEPACCO and certain other defendants under RCRA Section 7003.<sup>94</sup> The district court rejected the request for relief on the grounds that the EPA had failed to demonstrate that the defendants acted negligently.<sup>95</sup> As a result, the district court never considered whether Section 7003 authorizes the EPA to recover costs expended to abate wholly past endangerments.<sup>96</sup>

The Eighth Circuit, however, reversed the district court's decision, holding that RCRA applies to non-negligent off-site generators and transporters.<sup>97</sup> The court concluded that the district court

---

90. *Id.* at 212, 214.

91. 810 F.2d 726 (8th Cir. 1986).

92. *Id.* at 730.

93. *Id.*

94. *Id.*

95. *Id.* at 731, 738. The court relied upon the decisions in *United States v. Waste Industries, Inc.*, 556 F. Supp. 1301, 1308 (E.D.N.C. 1982), reversed, 734 F.2d 159 (4th Cir. 1984) and *United States v. Wade*, 546 F. Supp. 785, 790 (E.D. Pa. 1982). Both cases were later overruled by Congress as inconsistent with the intent of RCRA. See note 97.

96. *NEPACCO*, 810 F.2d at 738.

97. *Id.* at 741-42. The district court filed its decision in January 1984 and therefore did not have the benefit of utilizing the 1984 Amendments to RCRA. *Id.* at 731. The House conference report to those Amendments specifically overruled the district court's decision as well as the cases upon which the court based its decision. Specifically, the Report states:

Section 7003 focuses on the abatement of conditions threatening health and the environment and not particularly human activity. Therefore, it has always reached those persons who have contributed in the past or are presently contributing to the endangerment, including but not limited to generators, regardless of fault or negligence. . . . The amendment reflects the longstanding view that generators and other persons involved in the handling, storage, treatment, transportation or other disposal of hazardous wastes must share in the responsibility for the abatement of the hazards arising from their activities. The section was intended and is intended to abate condi-

was free on remand to award response costs to the government as a matter of equity.<sup>98</sup> The court did not explain the legal basis for its decision but simply assumed that RCRA does in fact authorize such a remedy.

The Eighth Circuit reaffirmed the ability of the EPA to recover restitutionary damages under RCRA Section 7003 in *United States v. Aceto Agr. Chemicals Corp.*<sup>99</sup> There, the EPA and the State of Iowa spent over ten million dollars cleaning up a pesticide plant thoroughly contaminated with hazardous waste.<sup>100</sup> After neutralizing the environmental threat, the government sought to recover its abatement costs from eight pesticide manufacturers who had conducted business with the plant.<sup>101</sup> The defendants responded that, because the site had already been cleaned up, it no longer posed an "imminent and substantial endangerment" as required by RCRA Section 7003.<sup>102</sup> The court rejected this reasoning, concluding that the endangerment need only be imminent and substantial at the time of the cleanup, not at the time the suit is filed.<sup>103</sup> Indeed, the court went so far as to state that requiring the EPA to file its RCRA action while the endangerment exists would be an "absurd and unnecessary" requirement in a reimbursement action.<sup>104</sup> The court, therefore, concluded that the

---

tions resulting from past activities. Hence, the district court decisions in *Wade*, 546 F. Supp. 785 (E.D. Pa. 1982), *United States v. Waste Industries, Inc.*, 556 F. Supp. 1301 (E.D.N.C. 1982), and *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 579 F. Supp. 823 (W.D. Mo. 1984), which restricted the application of section 7003, are inconsistent with the authority conferred by the section as initially enacted and with these clarifying amendments.

Hazardous and Solid Waste Amendments of 1984, H.R. Conf. Rep. No. 98-1133, 98th Cong., 2d Sess. 119 (1984).

98. *NEPACCO*, 810 F.2d at 750. The court's holding, however, does not seem entirely consistent with the cases it cites. The EPA's costs had already been expended and there was no continuing environmental threat, a requirement the court itself seemed to acknowledge was essential to the application of RCRA. For example, the court cited *Price* on a number of occasions, and even concluded that RCRA only "imposes liability for the *present and future* conditions resulting from past acts." *Id.* at 741 (emphasis in original). Despite this apparent inconsistency, the court concluded that the EPA could recover its abatement costs associated with an environmental threat which had ceased to exist as of the time of the trial. The court seemed motivated to reach this conclusion by the fact that not all of the government's costs could be recovered under CERCLA.

99. 872 F.2d 1373 (8th Cir. 1989).

100. *Id.* at 1375.

101. *Id.*

102. *Id.* at 1383.

103. *Id.* ("We agree with the district court, however, that RCRA's 'imminent and substantial endangerment' language does not require the EPA to file and prosecute its RCRA action *while* the endangerment exists").

104. *Id.* (concluding that "[t]he endangerment language is plainly intended by Congress to limit the reach of RCRA to sites where the potential for harm is great"). The court based its decision in part on the fact that "like CERCLA, RCRA is a remedial statute, which should be liberally construed." *Id.* at 1383 (citing *Price*, 688 F.2d at 211, 213-14).

government was eligible to recover its environmental response costs, even though the hazard had been eliminated by the time the government filed suit against the defendants.<sup>105</sup>

*Price*, *NEPACCO*, and *Aceto* demonstrate the trend towards relaxing the requirements of RCRA's EPA imminent hazard provision.<sup>106</sup> Recovery of abatement costs was initially restricted to very narrow circumstances, requiring the presence of a continuing endangerment. However, recovery of such costs eventually came to be seen by many courts as an appropriate form of relief under Section 7003, despite the absence of a continuing endangerment. One might think that this relaxation of the EPA's imminent hazard provision would bode well for private citizens seeking to recover their abatement costs under RCRA Section 7002(a)(1)(B). However, this has not proven to be the case.

### *C. Private Citizen Imminent Hazard Authority Under Section 7002(a)(1)(B)*

RCRA's imminent citizen suit provision, Section 7002(a)(1)(B), closely parallels the EPA's imminent hazard authority, Section 7003. Indeed, Section 7002(a)(1)(B) essentially extends the authority originally given to the EPA to sue to abate an imminent and substantial endangerment to "any person."<sup>107</sup> RCRA's legislative history indicates that Congress intended liability under the two sections to be identical.<sup>108</sup> In practice, however, courts have given a broader choice of remedies to the government than they have given to ordinary citizens. Specifically, while a number of courts have allowed the Administrator

---

105. The EPA specifically alleged that "all eight defendants are liable for the response costs incurred at the Aidex site pursuant to RCRA [section 7003]." *Id.* at 1376. The court held that the "plaintiffs' allegations are sufficient to withstand defendants' motion to dismiss under both CERCLA and RCRA." *Id.* On remand, therefore, the plaintiffs were authorized to seek the recovery of their response costs. *Id.*

106. Recently, a Wyoming district court took the cases one step further, granting private citizens a private right of contribution pursuant to § 7003. *United States v. Valentine*, 856 F. Supp. 627, 632-33 (D. Wyo. 1994).

107. RCRA § 7002(a)(1)(B), 42 U.S.C. § 972(a)(1)(B). RCRA's imminent citizen suit provision provides that any person may file suit, "against any person . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* (emphasis added).

108. See note 78.

of the EPA to recover restitutionary damages under Section 7003,<sup>109</sup> most have been extremely reluctant to extend a similar right to private citizens under Section 7002(a)(1)(B).<sup>110</sup>

### 1. Early District Court Decisions

The first case to squarely address the issue of restitutionary damages in the context of RCRA Section 7002(a)(1)(B) was *Commerce Holding Co. v. Buckstone*.<sup>111</sup> Commerce Holding owned a large industrial park and leased a portion of the property to the defendants. Upon investigation, the EPA discovered that the defendants' activities had seriously contaminated the property with hazardous waste.<sup>112</sup> Realizing that it could be held jointly and severally liable as a "potential responsible party" under CERCLA,<sup>113</sup> Commerce Holding entered into a consent decree with the EPA and agreed to take certain remedial steps to clean up the site.<sup>114</sup> Commerce Holding then sued to recover its abatement costs under both RCRA and CERCLA.<sup>115</sup>

Ruling on the defendants' motion for summary judgment, the court rejected the assertion that remediation costs could be recovered under RCRA.<sup>116</sup> The court first explained that RCRA's imminent citizen suit provision, while authorizing injunctive relief, does not provide a private right of action for monetary damages.<sup>117</sup> This aspect of the court's decision is relatively uncontroversial; no court has ever held that monetary damages, as distinguished from equitable restitution, are recoverable under RCRA Section 7002(a)(1)(B).

The *Commerce Holding* court, however, went further, ruling that RCRA's imminent citizen suit provision does not authorize the courts to award restitution in fashioning appropriate equitable relief.<sup>118</sup> In essence, the court concluded that because Commerce

---

109. Babich, 24 *Envir. L. Rep.* at 10130 (cited in note 14) (explaining that the "[f]ederal courts have ruled that restitution of costs is an appropriate remedy under RCRA § 7003, EPA's imminent hazard provision"). See Part III.B.

110. After the Supreme Court's recent decision in *KFC*, the scope of liability under § 7003 is unclear. Considering the explicit intent of Congress that liability is to be the same under §§ 7003 and 7002(a)(1)(B), it would appear that *Aceto* and *NEPACCO* are no longer good law.

111. 749 F. Supp. 441 (E.D.N.Y. 1990).

112. *Id.* at 442.

113. *Id.* See CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (imposing joint and several liability on the current owners and operators of a contaminated site).

114. *Commerce Holding*, 749 F. Supp. at 442.

115. *Id.* at 443.

116. *Id.* at 445-46.

117. *Id.* at 445.

118. *Id.* (concluding that "regardless of how the request is denominated, it does not comport with the statute's purpose of allowing private parties to bring suit 'genuinely acting as private

Holding would be the “direct beneficiary of the substantive relief,”<sup>119</sup> it was not acting as a private attorney general on behalf of the general public. Importantly, the court chose to rely on prior case law interpreting RCRA’s enforcement citizen suit provision, now codified in Section 7002(a)(1)(A), rather than relying on the line of cases explaining the scope of the EPA’s imminent hazard authority under Section 7003.<sup>120</sup>

Following *Commerce Holding*, federal district courts have consistently denied private parties the right to recover their environmental response costs under RCRA’s imminent citizen suit provision.<sup>121</sup> Many of these courts reached such a conclusion on the basis that RCRA’s imminent citizen suit provision does not authorize relief for wholly past endangerments.<sup>122</sup>

## 2. The Ninth Circuit’s Decision in *KFC Western, Inc. v. Meghrig*

The Ninth Circuit, in *KFC Western, Inc. v. Meghrig*,<sup>123</sup> rejected the approach of *Commerce Holding* and its progeny, concluding that

---

attorneys general rather than pursuing a private remedy” (quoting *Lamphier*, 714 F.2d at 337).

119. *Id.* at 445.

120. Specifically, the court relied upon *Walls*, 761 F.2d at 311 and *Lamphier*, 714 F.2d at 331. *Commerce Holding*, 749 F. Supp. at 445. However, neither *Walls* or *Lamphier* considered the 1984 Amendments to RCRA. The 1984 Amendments created an entirely new type of citizen suit provision, the “imminent” suit provision. Despite the desire of Congress to impose the same standard of liability under § 7002(a)(1)(B) as § 7003, the court apparently did not consider the *Price/NEPACCO/Aceto* line of cases.

121. This has been true regardless of how plaintiffs characterized the relief sought. For example, in an attempt to avoid the prohibition against nonetary damages, the plaintiffs in *Portsmouth Redevelopment and Housing Authority v. BMA Apts. Assocs.*, asked for an injunction ordering the defendant to pay the costs incurred in cleaning up a contaminated site. 847 F. Supp. at 380. The court was not persuaded, ruling that “the prayer for injunctive relief is, in actuality, a prayer for past and present money damages. ‘A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money.’” *Id.* at 385 (quoting *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979)). The court further concluded that “because the availability of a legal remedy [such as money damages] often indicates that an applicant’s injury is not irreparable, courts generally do not issue injunctions to protect legal remedies.” *Id.* at 385 (quoting *F.D.I.C. v. Faulkner*, 991 F.2d 262, 265 (5th Cir. 1993)).

122. For example, in *Gache*, the district court explained that RCRA does not authorize relief for “wholly past violations.” 813 F. Supp. at 1041. Rather, the plaintiff must demonstrate that a defendant’s past or present acts constitute a continuing endangerment. *Id.* Additionally, in *Kaufman*, the court, though acknowledging the *Price/NEPACCO/Aceto* line of cases, agreed with the court in *Gache* that RCRA requires a continuing endangerment and that RCRA’s imminent citizen suit provision does not provide plaintiffs a private remedy for damages or restitution. 822 F. Supp. at 1476-77. The courts in *Fallowfield Development Corp. v. Strunk*, *Envir. Rptr. Cases* (BNA) 1076, 1089 (E.D. Pa. 1993), *Portsmouth Redevelopment*, 847 F. Supp. at 385, and *Triffler v. Hopf*, 1994 U.S. Dist. LEXIS 16158, \*14 (N.D. Ill. Oct. 31, 1994) all reached conclusions similar to those reached in *Commerce Holding*, *Gache* and *Kaufman*.

123. 49 F.3d 518 (9th Cir. 1995).



RCRA Section 7002(a)(1)(B) allows plaintiffs to recover the costs associated with the cleanup of solid or hazardous waste on their property.<sup>124</sup> The dispute in *KFC* originated in September 1975 when Alan and Margaret Meghrig sold a parcel of land to KFC. KFC then proceeded to operate a Kentucky Fried Chicken franchise on the property. In October 1988, KFC discovered in the process of improving the property that underground storage tanks previously located on the property had leaked, contaminating the surrounding soil with gasoline.<sup>125</sup> The City of Los Angeles Department of Building and Safety subsequently issued a "corrective notice" ordering KFC to stop construction pending a soil analysis and clearance from the County of Los Angeles Department of Health Services.<sup>126</sup> KFC conducted such an analysis and proceeded to remediate the property at a cost of more than \$211,000.<sup>127</sup> When the Meghrigs refused to reimburse KFC for the cleanup costs, KFC filed suit.

At trial, KFC sought to recover its cleanup costs under RCRA Section 7002(a)(1)(B).<sup>128</sup> KFC alleged that it was unaware the underlying soil was contaminated when it bought the property, and further claimed that the storage tanks had leaked due to the Meghrigs' negligence.<sup>129</sup> The Meghrigs moved to dismiss the claim on the grounds that the site did not present an imminent hazard because KFC had already cleaned up the property, and that RCRA Section 7002(a)(1)(B) does not authorize the recovery of environmental response costs.<sup>130</sup> The district court granted the Meghrigs's motion to dismiss on both grounds.<sup>131</sup>

The Ninth Circuit, in a split decision, reversed both of the district court's holdings, allowing KFC to recover its cleanup costs from the Meghrigs. The court first addressed the "imminent and substantial endangerment" requirement of RCRA Section 7002(a)(1)(B). The court chose to follow the Eighth Circuit's interpretation in *Aceto* of the phrase "imminent and substantial endanger-

---

124. *Id.* at 521.

125. *Id.* at 519.

126. *Id.*

127. *Id.*

128. *Id.* The plaintiffs here did not file suit under CERCLA because petroleum is specifically excluded from the definition of a hazardous substance in that statute. See CERCLA § 101(14), 42 U.S.C. § 9601(14). See also note 14 and accompanying text.

129. *KFC*, 49 F.3d at 519.

130. *Id.*

131. *Id.* at 519-20 (explaining that RCRA's citizen suit provision only authorizes "injunctive or other equitable relief and only in cases involving an existing, imminent danger to public health or the environment").

ment.”<sup>132</sup> In *Aceto*, the Eighth Circuit concluded that RCRA Section 7003, the source of the EPA’s imminent hazard authority, does not require the presence of a continuing endangerment.<sup>133</sup> Having adopted *Aceto*’s interpretation of RCRA’s “imminent and substantial endangerment” requirement in Section 7003, the Ninth Circuit concluded that KFC could recover its remediation costs under Section 7002(a)(1)(B) despite the fact that the site no longer presented an imminent hazard.<sup>134</sup>

The Ninth Circuit in *KFC* next considered the issue of a proper remedy, holding that RCRA’s imminent citizen suit provision authorizes a court to award equitable restitution, including the recovery of environmental response costs.<sup>135</sup> The court explained that such relief could be granted under the statutory provision allowing a court to order “such other action as may be necessary.”<sup>136</sup> While conceding that no court had ever granted restitutionary relief to a private citizen under Section 7002(a)(1)(B), the Ninth Circuit noted that a restitutionary remedy had been awarded to the EPA under Section 7003.<sup>137</sup> Having concluded that Congress intended to apply the same standards of liability to citizen and governmental imminent hazard suits,<sup>138</sup> the court reasoned that private citizens should have a right to recover environmental response costs identical to the right courts had given the EPA.<sup>139</sup>

---

132. *Id.* at 521.

133. *Aceto*, 872 F.2d at 1383. The court read the imminent hazard requirement as restricting the application of RCRA to sites with great potential for harm rather than requiring the presence of an imminent hazard at the time the suit is filed. *Id.* See notes 99-105 and accompanying text.

134. *KFC*, 49 F.3d at 521.

135. *Id.* at 521-22.

136. *Id.* at 521. RCRA § 7002(a), 42 U.S.C. § 6972(a), provides in relevant part 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.”

137. *KFC*, 49 F.3d at 521-22. In support of this conclusion, the court cited the three cases discussed in Part III.B. The court first noted that the Eighth Circuit in *Aceto* allowed the Administrator to recover its response costs after the government cleaned up the property. *Id.* at 522 (citing *Aceto*, 872 F.2d at 1383). Next, the *KFC* court cited *NEPACCO* in which the Eighth Circuit allowed the Administrator to collect remediation costs from those contributing to the environmental endangerment. *Id.* at 522 (citing *NEPACCO*, 810 F.2d at 741). Finally, the court noted that the Third Circuit had held that “[r]eimbursement could . . . be directed against those parties ultimately found to be liable,” even though the EPA had already funded a study of the contaminated property. *Id.* at 522 (quoting *Price*, 688 F.2d at 214).

138. *Id.* at 521 n.3 (citing H.R. Rep. No. 98-198 at 53 (1984) (cited in note 31)). See note 78.

139. According to the court in *KFC*, “[t]he 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 . . . to bring reimbursement actions.” 49 F.3d at 521 n.3.

The Ninth Circuit's ruling in *KFC* undoubtedly expanded the scope of RCRA Section 7002(a)(1)(B). As one would anticipate, not all courts were as willing as the Ninth Circuit to liberalize RCRA's imminent citizen suit provision.

### 3. The Eighth Circuit's Decision in *Furrer v. Brown*

Refusing to follow the Ninth Circuit's lead, the Eighth Circuit in *Furrer v. Brown*<sup>140</sup> found the analysis of *Commerce Holding* and its progeny persuasive and, therefore, rejected the notion that plaintiffs may recover their response costs under RCRA's imminent citizen suit provision.<sup>141</sup> Decided only five months after *KFC*, *Furrer* concerns remarkably similar facts. Richard and Margaret Furrer became aware in 1991 that leaking underground storage tanks on their property had previously contaminated the surrounding soil with gasoline.<sup>142</sup> Upon investigation, the Missouri Department of Natural Resources ordered the Furrers to clean up the site.<sup>143</sup> Like the plaintiff in *KFC*, the Furrers removed the waste petroleum as ordered and then sued to recover their response costs pursuant to RCRA Section 7002(a)(1)(B). The Furrers claimed that the contamination resulted from the prior owner's negligent operation of a gas station on the property and that those owners ought to be ultimately responsible for the cost of cleaning up the site.<sup>144</sup> The district court dismissed the complaint for lack of subject matter jurisdiction on the grounds that RCRA Section 7002(a)(1)(B) does not authorize monetary relief.<sup>145</sup>

The Eighth Circuit affirmed in a split decision, concluding that Congress did not intend to provide private citizens a mechanism to recover their environmental cleanup costs.<sup>146</sup> Noting that RCRA Section 7002(a)(1)(B) does not explicitly grant a restitutionary remedy, the court reasoned that environmental response costs could only be awarded if Congress intended to create such a right by implication when it authorized the federal courts to order "such other action as may be necessary."<sup>147</sup> To determine whether Congress in-

---

140. 62 F.3d 1092 (8th Cir. 1995).

141. *Id.* at 1101.

142. *Id.* at 1093.

143. *Id.*

144. *Id.*

145. *Id.* Although the issue was before the court, Judge Bowman declined to address the question of whether the "imminent and substantial endangerment" provision requires the environmental threat to be a continuing one. *Id.* at 1095 n.6.

146. *Id.* at 1097.

147. *Id.* at 1094 (quoting RCRA § 7002(a), 42 U.S.C. § 6972(a)).

tended to authorize the recovery of response costs under RCRA's imminent citizen suit provision, the court looked to the four factors set out in *Cort v. Ash*.<sup>148</sup>

Placing the burden of proving that Congress intended to create a restitutionary remedy on the plaintiff, the court first sought to determine whether the statute was enacted for the benefit of citizens such as the Furrers.<sup>149</sup> The court in *Furrer* concluded that while "any person" is entitled to sue under RCRA Section 7002(a)(1)(B), the provision is designed for the benefit of the public at large, not for the "special benefit" of those required to clean up contamination for which they are not responsible.<sup>150</sup>

Moreover, the court noted that an examination of other environmental statutes indicates that Congress understands how to create an express cause of action for the recovery of environmental cleanup costs<sup>151</sup> and purposely declined to do so in RCRA's imminent citizen suit provision.<sup>152</sup> The court further reasoned that the failure of Congress to include a private cause of action for citizens in RCRA's underground storage tank provisions provides strong support for the conclusion that RCRA was not designed to provide environmental response costs to private parties.<sup>153</sup>

---

148. *Id.* at 1094-95 ("The 'familiar test' of *Cort v. Ash* . . . sets out four factors relevant to the search for an implied cause of action. First, we look at the statute to determine if the Furrers are in the class for whose benefit the statute was enacted, and then at the legislative history to see if it explicitly or implicitly shows an intent to create or deny the cause of action. Third, we examine the proposed remedy in the context of the purpose of the statutory scheme, and finally we consider whether the cause of action is one traditionally a matter of state law, so that inferring a federal remedy would be inappropriate" (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975))). The *Furrer* court acknowledged that the four-part test of *Cort v. Ash* has been interpreted as only providing a "guide to discerning" congressional intent." *Id.* at 1100 (quoting *Thompson v. Thompson*, 484 U.S. 174, 179 (1988)). See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) (concluding that "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action"). See generally notes 243-45 and accompanying text.

149. *Furrer*, 62 F.3d at 1095 (citing *Cort*, 422 U.S. at 78).

150. *Id.* Instead, the court noted that "a persuasive argument can be made that the Furrers are in a class of persons that RCRA and § [7002] are directed against—the owners of a storage facility where hazardous waste has presented an imminent and substantial endangerment." *Id.* (emphasis omitted).

151. *Id.* (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 n.11 (1981)).

152. *Id.* As evidence of congressional know-how, the court pointed out that not only did Congress specifically authorize the recovery of response costs in other environmental legislation such as CERCLA, Congress also authorized the EPA and the states to recover response costs from a prior owner or operator "with respect to the release of petroleum" from an underground storage tank. RCRA § 9003(h)(6), 42 U.S.C. § 6991(b)(h)(6).

153. *Furrer*, 62 F.3d at 1097 (quoting *Northwest Airlines v. Transport Workers*, 451 U.S. 77, 93-94 (1981)).

Second, the court examined RCRA's legislative history to determine whether Congress intended to create a private cause of action for response costs under Section 7002(a)(1)(B).<sup>154</sup> The court concluded that the legislative history provided no evidence that Congress intended to either create or prohibit such an action.<sup>155</sup> Lacking legislative guidance, the court was disinclined to create a restitutionary remedy, noting that congressional silence is shaky ground on which to build an implied private right of action.<sup>156</sup>

Third, the court examined the proposed remedy in the context of RCRA's stated purpose.<sup>157</sup> The legislative history of RCRA makes clear that the primary goal of RCRA's citizen suit provision is the "prompt abatement of imminent and substantial endangerments."<sup>158</sup> In light of this objective, the court found that awarding cleanup costs is unnecessary to effectuate the congressional purpose of the provision, indicating that Congress did not intend to authorize a private cause of action.<sup>159</sup> The court noted that the Furrers were properly ordered by the appropriate state authorities to clean up the waste petroleum on their property and they had little choice but to comply with the order.<sup>160</sup> Because remediation was essentially inevitable, the court reasoned that awarding the Furrers their response costs would do little, if anything, to advance RCRA's objectives. According to the court, the issue of awarding restitutionary damages only addresses who must pay for a cleanup, not whether there will be a cleanup at all.<sup>161</sup>

In addition, the court explained that RCRA's imminent citizen suit provision was only intended to give citizens a "limited right . . . to sue to abate an imminent and substantial endangerment."<sup>162</sup> For example, RCRA's notice requirements<sup>163</sup> and prohibition against private enforcement actions when the EPA or the state is diligently prosecut-

---

154. *Id.* at 1097. Although RCRA's legislative history does not expressly bar a cause of action for equitable restitution, it does make clear on many occasions that the imminent hazard provisions are designed to abate continuing endangerments. See Part IV.A.2. It would seem, therefore, that a plaintiff could not recover environmental costs expended to remediate a wholly past endangerment. In other words, the continuing endangerment requirement bars a court from awarding response costs incurred prior to filing of the suit.

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

156. *Id.* (quoting *Touche Ross*, 442 U.S. at 571).

157. *Id.* at 1099.

158. See H.R. Rep. No. 98-198 at 53 (cited in note 31).

159. *Furrer*, 62 F.3d at 1049 (citing *Cort*, 422 U.S. at 84).

160. *Id.*

161. *Id.*

162. *Id.* at 1098 (quoting H.R. Rep. No. 98-198 at 53 (cited in note 31)).

163. RCRA § 7002(b)(1)(A), 42 U.S.C. § 6972(b)(1)(A).

ing" the matter<sup>164</sup> evinces a congressional intent to only authorize use of the provision when the solid or hazardous waste continues to threaten public health or the environment.<sup>165</sup>

Finally, the court considered the fourth *Cort* factor, whether inferring a federal remedy awarding response costs would inappropriately encroach upon matters traditionally left to the states.<sup>166</sup> The *Furrer* court concluded that although a federal private cause of action to recover response costs would not constitute an infringement on state sovereignty, lack of federal encroachment alone could not support the need to grant a monetary remedy.<sup>167</sup>

After examining each of the four guiding factors outlined in *Cort*, the Eighth Circuit concluded that Congress did not intend to create a private cause of action for damages in RCRA's imminent citizen suit provision.<sup>168</sup> In addition, the court stated that *KFC's* reliance on *NEPACCO* and *Aceto*, two prior Eighth Circuit decisions, as evidence that RCRA authorizes restitution was misplaced and inappropriate.<sup>169</sup> Further, having determined that Congress did not intend to create a private cause of action for damages, the court held that the *Furrers* were barred from recovering their response costs under RCRA's imminent citizen suit provision.<sup>170</sup>

#### 4. Resolution of the Circuit Court Split by the Supreme Court

In an effort to clarify the state of the law and to resolve the split of authority between the Eighth and Ninth Circuits, the Supreme Court granted certiorari in *Meghrig v. KFC Western, Inc.*<sup>171</sup> In a decision by Justice O'Connor, the Court unanimously reversed the Ninth Circuit, concluding that RCRA's imminent citizen suit provision requires the existence of a continuing endangerment at the time the lawsuit is filed and does not authorize the courts to grant the recovery of response costs related to past endangerments.<sup>172</sup> The Court first explained that the existence of a cost recovery provision in

---

164. Id. § 7002(b)(1)(B), 42 U.S.C. § 6972(b)(1)(B).

165. *Furrer*, 62 F.3d at 1098.

166. Id. at 1099-1111.

167. Id.

168. Id. at 1100.

169. Id. The court stated that *NEPACCO* and *Aceto* merely assumed, without specifically deciding, that RCRA § 7003 authorizes the EPA to recover its remediation costs, and that, as a result, the *Furrer* court concluded that the decisions had no precedential value as to that particular issue. Id.

170. Id. at 1101-02.

171. 116 S. Ct. 41, 132 L. Ed. 2d 922 (1995).

172. 1996 U.S. LEXIS 1955, \*9-10 (Mar. 19, 1996).

CERCLA, combined with the failure to include a similar provision in RCRA, demonstrates that Congress did not intend to provide citizens a private right of action to recover cleanup costs under RCRA's citizen suit provision.<sup>173</sup> The Court was also persuaded that RCRA requires a continuing endangerment at the time of trial based on the language, structure and context of RCRA Section 7002(a)(1)(B).<sup>174</sup> The Court, however, expressly declined to address the issue of whether citizen-plaintiffs may recover cleanup costs expended after initiation of the lawsuit.<sup>175</sup> As Part IV of this Note explains, this avenue appears to be a promising one for those interested in using RCRA's imminent citizen suit provision.

#### IV. ASSESSING THE FUTURE OF SECTION 7002(a)(1)(B)

The broad concern posed by the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, is whether RCRA's imminent citizen suit provision authorizes private parties to recover from those at fault reasonable costs expended to abate an imminent hazard. Resolution of this question is further broken down into two discrete issues.<sup>176</sup> First, whether the "imminent and substantial endangerment" requirement of RCRA Section 7002(a)(1)(B) may be satisfied by examining the nature of the threat at the time the site is cleaned up rather than at the time the lawsuit is filed.<sup>177</sup> In essence, this question re-

---

173. *Id.* at \*15 (concluding the comprehensive scheme of hazardous waste regulation "amply demonstrat[es] that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA").

174. Specifically, the Court noted that the phrase "may present an imminent and substantial endangerment" indicates that RCRA's imminent citizen suit provision "was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms, not a remedy that compensates for past cleanup efforts." *Id.* at \*11-12. In addition, the Court pointed to the lack of a statute of limitations and inclusion of a notice requirement as indicating a need for an endangerment at the commencement of the litigation. *Id.* at \*12-13.

175. *Id.* at \*15-16.

176. The two questions, however, are not entirely distinct; they intertwine and overlap. For example, should a court find that RCRA's imminent citizen suit provision requires a continuing endangerment, then a plaintiff could not hope to recover costs expended on a hazardous waste site which no longer presents an imminent and substantial threat. Rather the plaintiff would be forced to sue before initiating abatement procedures. Conversely, if the best a plaintiff can hope for is to receive a mandatory or prohibitory injunction, then the environmental endangerment must of necessity be a continuing one. Where the threat from the waste has been eliminated and restitutionary damages are not available, there would be no action for a court to order and the complaint would essentially be moot. See *Acme Printing Ink Co. v. Menard, Inc.*, 881 F. Supp. 1237, 1248 n.8 (E.D. Wis. 1995) (hypothesizing that in circumstances where "only injunctive relief is available to the plaintiff and the hazard alleged has been abated, there may not be a case or controversy present and the action may be moot").

177. *KFC*, 1996 U.S. LEXIS 1955 at \*8-9.

quires a determination as to whether RCRA's imminent citizen suit provision requires a continuing endangerment. Second, whether the statutory language of RCRA's imminent citizen suit provision<sup>178</sup> authorizes the courts to order payment of plaintiffs' environmental response costs.<sup>179</sup> The first issue essentially addresses one of the three elements needed to prove a prima facie case under RCRA's imminent citizen suit provision.<sup>180</sup> The second relates to the type of relief available to a plaintiff once the substantive case has been proved. A determination that RCRA's imminent citizen suit provision requires the presence of a continuing endangerment, or that the provision does not authorize the recovery of restitutionary damages, will prevent citizen plaintiffs from recovering cleanup costs expended to remediate wholly past endangerments.<sup>181</sup>

Resolution of the two issues outlined above is essentially a matter of statutory construction.<sup>182</sup> The ultimate objective is to discern and adhere to the intent of Congress in adopting Section 7002(a)(1)(B), not to hypothesize as to how the provision could be improved.<sup>183</sup> Notably, however, RCRA, as a remedial statute, author-

---

178. RCRA § 7002(a), 42 U.S.C. § 6972(a) (empowering the district courts to order a defendant "to take such other action as may be necessary").

179. *KFC*, 1996 U.S. LEXIS 1955 at \*9-10. Note that this may be further broken down into two types of relief. Reimbursement for past response costs and payment of future response costs. A conclusion that past response costs are not recoverable does not necessarily mandate a determination that future response costs are not recoverable. *Id.* at \*15-16.

180. See note 187 and accompanying text.

181. However, as explained in Part IV.B.2.b, RCRA may authorize the federal courts to order payment of response costs expended after initiation of the lawsuit provided there is a continuing imminent and substantial endangerment at the time the suit is filed.

182. See *Touche Ross*, 442 U.S. at 568 (stating that "[t]he question of the existence of a statutory cause of action is, of course, one of statutory construction"); *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979) (concluding that a determination as to whether a violation of federal law gives rise to a private cause of action requires "careful attention" to the issue of statutory construction).

183. *Touche Ross*, 442 U.S. at 578-79 (refusing to expand the statutory remedy despite the fact that not doing so "sanctions injustice" on the grounds that the federal courts "are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. '[I]t is not for us to fill any hiatus Congress has left in this area'" (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963))). See *Hudson Distributors v. Eli Lilly & Co.*, 377 U.S. 386, 395 (1964) (stating that "[w]hether it is good policy to permit such laws is a matter for Congress to decide. Where the statutory language and the legislative history clearly indicate the purpose of Congress that purpose must be upheld"); *United States v. Gibbens*, 25 F.3d 28, 33 (1st Cir. 1994) (ruling that courts are to act as "interpreters of the words chosen by Congress" rather than "policymakers or enlargers of congressional intent").

Indeed, the preference to defer to Congress grows stronger in those situations where an expansive judicial interpretation could disrupt a comprehensive regulatory scheme. As the Court explained in *Diamond v. Chakrabarty*,

[t]he choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing



izes the courts to construe its provisions broadly to ensure that the remedial nature of the statute is satisfied.<sup>184</sup> The goal, of course, is to construe RCRA's provisions broadly enough to satisfy the statute's remedial purpose without creating causes of action never intended by Congress. Although this line is rarely clear, the language, structure, and context of RCRA Section 7002(a)(1)(B), combined with an understanding of the comprehensive scheme of hazardous waste regulation, indicates that Congress did not intend to extend application of RCRA's imminent citizen suit provision to wholly past endangerments.

#### A. *The Continuing Endangerment Requirement*

Although RCRA has long authorized citizen suits as a private enforcement mechanism, RCRA's citizen suit provision has undergone substantial revisions.<sup>185</sup> Most recently, in 1984 Congress adopted Section 7002(a)(1)(B) in order to provide citizens a private cause of action to abate imminent and substantial endangerments.<sup>186</sup> RCRA's imminent citizen suit provision requires plaintiffs to prove: (1) that the substance in question qualifies as a solid or hazardous waste, (2) that the defendant's past or present activities contributed to handling, storage, treatment, transportation, or disposal of the waste, and (3)

---

values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

447 U.S. 303, 317 (1980). See also *Texas Industries*, 451 U.S. at 646-47 ("The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is 'fair' in this setting calls for the inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases"); *Northwest Airlines*, 451 U.S. at 94 (concluding that it is beyond the competence of the federal courts to "amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress").

184. See *KFC*, 49 F.3d at 521 (observing that "RCRA's purpose is to give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment" (citations omitted)); *Aceto*, 872 F.2d at 1383 (concluding that "like CERCLA, RCRA is a remedial statute, which should be liberally construed"); *Price*, 688 F.2d at 214 (stating that "Congress, in the endangerment provisions of RCRA and SDWA sought to invoke nothing less than the full equity powers of the federal courts in the effort to protect public health, the environment, and public water supplies from the pernicious effects of toxic wastes. Courts should not undermine the will of Congress by either withholding relief or granting it grudgingly"); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 199 (W.D. Mo. 1985) (explaining that the legislative history of RCRA indicates "Congress' clear intent to give broad authority to the courts to grant all relief necessary to ensure complete protection of public health and the environment"); *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1108-10 (D. Minn. 1982).

185. See note 8 and accompanying text.

186. See notes 46 and 50 and accompanying text.

that the waste may present an imminent and substantial endangerment.<sup>187</sup> While the first two requirements have occasionally spawned litigation, controversy has centered primarily around the meaning and scope of RCRA's imminent and substantial endangerment requirement.

RCRA's imminent citizen suit provision is unique among environmental citizen suit provisions in at least two respects. First, it imposes liability for both past and present behavior. Most environmental citizen suit provisions only impose liability for continuing or intermittent acts.<sup>188</sup> Second, RCRA is the only environmental statute that authorizes the public at large to sue those who have contributed to an imminent and substantial endangerment.<sup>189</sup> When combined, these two aspects of RCRA's citizen suit provision unquestionably impose liability for past acts which continue to present an imminent hazard.

The question posed by the split between the Eighth and Ninth Circuits, and ultimately by the Supreme Court's decision in *KFC*, is whether RCRA's imminent citizen suit provision goes further, imposing liability for past activities which no longer present a threat to health or the environment. The language, structure and context of Section 7002(a)(1)(B) strongly supports the Court's conclusion that Congress intended to limit liability to those waste sites which present a continuing environmental endangerment at the time the lawsuit is filed.

### 1. Interpreting RCRA's Imminent Citizen Suit Provision

As the Supreme Court has made clear on numerous occasions, the first step of statutory interpretation is to examine the language of the statute.<sup>190</sup> The plain language of RCRA's imminent citizen suit

---

187. Babich, 24 *Envir. L. Rep.* at 10128 (cited in note 14).

188. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) (holding that those citizen suit provisions which provide a cause of action when a person is "alleged to be in violation" of the statute's regulations, including the Clean Air and Water Acts, require that "citizen-plaintiffs allege a state of either continuing or intermittent violation"). It is important to distinguish, however, between a continuing act and a continuing endangerment. While RCRA applies to wholly past acts, it does not apply to wholly past endangerments.

189. Babich, *Environmental Public Nuisance*, in *Environmental Litigation* at 987 (cited in note 8). Miller, *Citizen Suits* at 2 n.5 (cited in note 25) (noting that RCRA "was the first and remains the only statute" to contain an imminent citizen suit provision).

190. *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989) (stating that "the starting point for interpreting a statute is the language of the statute itself"). For examples of cases using similar language, see *Gwaltney*, 484 U.S. at 56; *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Cannon*, 441 U.S. at 688; *Teamsters v. Daniel*, 439 U.S.

provision provides needed guidance as to the intent of Congress in adopting the provisions.<sup>191</sup> Under Section 7002(a)(1)(B), liability is imposed only when a solid or hazardous waste "may present" an imminent hazard. The phrase "may present" modifies "imminent and substantial endangerment" and strongly indicates that Congress only envisioned liability in those circumstances where the solid or hazardous waste continues to threaten the public health or the environment at the time the lawsuit is filed.<sup>192</sup>

Not all courts, however, have concluded that RCRA Section 7002(a)(1)(B) unambiguously requires a continuing endangerment. For example, the Ninth Circuit in *KFC* held that RCRA's imminent citizen suit provision does not specifically state whether the waste must constitute an imminent endangerment at the time the suit is filed or at the time the cleanup begins. Finding RCRA's imminent citizen suit ambiguous,<sup>193</sup> the Ninth Circuit in *KFC* chose to read the imminent hazard requirement as identifying the nature of the threat rather than as limiting the time in which the suit must be brought.

However, as the Supreme Court has previously noted, the mere presence of ambiguity does not make every interpretation equally plausible.<sup>194</sup> While it may be impossible to state with absolute certainty on the basis of the language of Section 7002 alone that Congress intended to limit RCRA's imminent citizen suit provision strictly to continuing endangerments, the statutory evidence indicates that Congress did, in fact, intend such a limitation.<sup>195</sup> As the Supreme

---

551, 558 (1979); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976).

191. The term "imminent" is defined variously as "near at hand," "impending," "threatening" and "perilous." *Black's Law Dictionary* 750 (West, 6th ed. 1990). Admittedly, these definitions by themselves do not resolve the question as to when the situation must be "impending" or "threatening." However, to argue that the RCRA's imminent citizen suit provision extends to those situations where the threat was "near at hand" or "impending" at some point in the past would be awkward and unnatural. Rather, the very use of the term seems to connote a sense of continuing endangerment. See *KFC*, 1996 U.S. LEXIS 1955 at \*11-12.

192. See *Webster's Ninth New Collegiate Dictionary* 930 (1987) (defining the term "present" as "a verb tense that is expressive of present time or the time of speaking").

193. *Gibbens*, 25 F.3d at 34 (defining a statute as ambiguous if "it can reasonably be read in more than one way" (citing *United States v. O'Neil*, 11 F.3d 292, 297-98 (1st Cir. 1993))).

194. *Gwaltney*, 484 U.S. at 57.

195. The statutory language of RCRA § 7002(a)(1)(B) makes clear that the provision applies to past acts. However, even if this were not the case, some courts have held that the term "disposal" includes passive conduct such as leaking and is not restricted to purely active human conduct. See *City of Toledo*, 833 F. Supp. at 656 (holding that "the disposal of wastes can constitute a continuing violation as long as no proper disposal procedures are put into effect or as long as the waste has not been cleaned up and the environmental effects remain remediable"); *Gache*, 813 F. Supp. at 1041 (concluding that "[i]mproperly discharged wastes which continue to exist unremediated represent a continuing violation of RCRA. . . . The continued presence of illegally dumped waste on plaintiffs property could constitute a continuing violation

Court's decision in *KFC* makes clear, the statutory evidence supporting such a conclusion includes the provision's use of the past and present tense,<sup>196</sup> lack of a statute of limitations,<sup>197</sup> and inclusion of a notice requirement.<sup>198</sup>

*a. Linguistic Analysis*

First, and perhaps most importantly, the use of both the past and present tenses when describing the behavior that may trigger liability under RCRA Section 7002(a)(1)(B), combined with the use of only a present tense verb when describing the type of endangerment required, indicates a desire by Congress to limit the provision to those cases where the solid or hazardous waste constitutes a continuing environmental threat.<sup>199</sup> Congress limited application of Section 7002(a)(1)(B) to those cases where the waste "*may present* an imminent and substantial endangerment."<sup>200</sup> If Congress had intended to broaden the scope of liability to include wholly past endangerments, it could have simply continued its practice of including both possibilities by stating that the provision applies to those situations in which the solid or hazardous waste "may present or may have presented" an imminent hazard.<sup>201</sup> The distinction is especially striking because

---

of RCRA. . . . So long as wastes remain in the landfill threatening to leach into the surrounding soil and water, a continuing violation surely may exist"). *Fallowfield Development*, 1990 U.S. Dist. 4820 at \*35 (concluding that violations "continue to occur simply by allowing the improperly disposed of hazardous waste to remain on the property"); *Acme*, 812 F. Supp. at 1498 (concluding that "leaking of hazardous substances may constitute a continuing or intermittent violation of RCRA"); *Waste Industries*, 734 F.2d at 164 (concluding that "[t]he term 'disposal,' it is true, is used throughout subtitle C in the sense that the Administrator can regulate current disposal of hazardous waste. In this way, the Act regulates current conduct of would-be polluters. But a strained reading of that term limiting its § 7003 meaning to active conduct would so frustrate the remedial purpose of the Act as to make it meaningless. Section 7003, unlike the provisions of the Act's subtitle C, does not regulate conduct but regulates and mitigates endangerments"); *Price*, 523 F. Supp. at 1071 (holding that "[b]y [Section 7003's] plain language, the statute authorizes relief restraining further disposal, *i.e.*, *leaking*, of hazardous wastes from the landfill into the groundwaters . . . . [This] disposal need not result from affirmative action by the defendants but may be the result of passive inaction" (citations omitted)).

196. See Part IV.A.1.a.

197. See Part IV.A.1.b.

198. See Part IV.A.1.c.

199. *KFC*, 1996 U.S. LEXIS 1955 at \*11-12.

200. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

201. See *KFC*, 49 F.3d at 525 (Brunetti, J., dissenting) (concluding that RCRA's unambiguous language requires that the endangerment must be occurring at the time of filing suit. Only if the statute had read 'may or may have presented' would it have implied that § [7002(a)(1)(B)] permits reimbursement actions for an endangerment that someone had already cleaned up" (emphasis added)). The history of § 7002 further supports this conclusion. Prior to the 1984 Amendments to RCRA, some courts had limited the provision to continuing or intermittent acts. Congress sought to overrule these cases by inserting both the past and present tenses into §

Congress demonstrated elsewhere its familiarity with the importance of the past/present tense distinction. Congress used the phrase "past or present" four separate times when describing the type of behavior covered by the provision. Specifically, RCRA's imminent citizen suit provision provides a cause of action against "any *past* or *present* generator, or *past* or *present* transporter, or *past* or *present* owner or operator . . . who has contributed or who is contributing to the *past* or *present* handling, storage, treatment, transportation, or disposal of any solid or hazardous waste."<sup>202</sup> Congress consciously limited application of Section 7002(a)(1)(B) to past or present acts that currently continue to present an environmental endangerment.<sup>203</sup>

The Supreme Court's conclusion that the language of Section 7002(a)(1)(B) extends liability only to those cases in which there is a continuing endangerment is further supported by the Court's reading of a similar statute in *Gwaltney*.<sup>204</sup> The Court in *Gwaltney* addressed the question of whether the citizen suit provision of the Clean Water Act ("CWA") applies to past, as well as continuing, activities. CWA's citizen suit provision,<sup>205</sup> which parallels RCRA's enforcement citizen suit provision,<sup>206</sup> provides a private cause of action against persons "alleged to be in violation" of CWA's requirements. The Court held that the phrase "to be in violation" clearly requires that a plaintiff allege a reasonable likelihood that the polluter will continue to violate the requirements of CWA.<sup>207</sup> In reaching this conclusion, the Court found that the sole use of the present tense throughout CWA Section 505 was strong indication of the "prospective orientation" of the citizen suit provision.<sup>208</sup>

7002. See note 97. Importantly, Congress only inserted both tenses when discussing the activities, not the endangerments covered by the provision.

202. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

203. Justice Scalia made this point at oral argument: "My point is there is no ambiguity, not if you're speaking English. May exist or may have existed is the meaning you say may exist conveys. It does not convey that meaning." *Meghriq v. KFC Western, Inc.*, 1996 WL 14515, \*41 (Jan. 10, 1996) (transcripts of oral argument).

204. 484 U.S. at 49.

205. CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), authorizes citizens to file suit [A]gainst any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of

(A) an effluent standard or limitation under this chapter, or

(B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .

206. RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A). See generally note 44.

207. *Gwaltney*, 484 U.S. at 57.

208. *Id.* at 59. The Court cited a number of examples of the extensive use of the present tense. Specifically, the Court noted:

Although RCRA Section 7002(a)(1)(B) involves a different form of citizen suit than CWA Section 505(a), RCRA's use of the present and past tenses is equally telling. First, *Gwaltney's* conclusion that CWA Section 505 requires a continuing act because Congress defined the type of activity regulated by the provision only in the present tense supports the conclusion that RCRA's imminent citizen suit provision requires a continuing endangerment because Congress defined the type of endangerment regulated by Section 7002(a)(1)(B) only in the present tense. Second, RCRA's imminent citizen suit provision demonstrates that Congress acknowledged the importance of using the past tense when imposing liability for past acts. If Congress wanted to include past endangerments in the scope of the imminent citizen suit provision, there is every reason to believe that it would have again used the past tense to describe the type of endangerments governed by the provision. The selective use of the past tense combined with the importance of the past/present tense distinction indicates that Congress consciously chose not to expand RCRA's imminent citizen suit provision to include wholly past endangerments.<sup>209</sup>

---

A citizen suit may be brought only for violation of a permit limitation "which is in effect" under the Act. 33 U.S.C. § 1365(f). Citizen-plaintiffs must give notice to the alleged violator, the Administrator of EPA, and the State in which the violation "occurs." § 1365(b)(1)(A) . . . . The most telling use of the present tense is in the definition of "citizen" as "a person . . . having an interest which is or may be adversely affected" by the defendant's violations of the Act. § 1365(g). This definition makes plain what the undeviating use of the present tense strongly suggest: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.

Id. Indeed, the Court in *Gwaltney* found that the use of the past and present tenses in RCRA § 7002 demonstrates that Congress "knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." Id. at 57.

209. Some have blasted the Court for its narrow interpretation of CWA's citizen suit provision in *Gwaltney*. One of the most scathing critiques came from Professor Rodgers:

The opinion in *Gwaltney* combines poor lawyering with unconvincing semantics and bad history. The poor lawyering is the Court's failure to explain the role of civil penalties that have long been available in citizen suits under the Clean Water Act. This kind of backwards-looking or punitive relief is at odds with the Court's vision of forward-looking or injunctive relief. The semantical point has to do with the meaning of "in violation." One who commits a homicide surely remains "in violation" of the law of society after the weapon is put aside. What is it about environmental offenses that prompts lawyers to consider the matter over and done with (the wrong is "wholly past") once there is some brief discontinuation of conduct? The piece of history concerns the origins of the past-and-present-tense-distinction in the environmental laws. In *Gwaltney*, the Supreme Court was moved by the intelligence that Section 7002 of RCRA is written clearly to apply to offenses "past or present." But the language was changed in 1984 to overcome an improvident interpretation of the Eastern District of North Carolina. By thus correcting one statute the Congress is supposed to have deliberately unraveled a half dozen others. By this subtle process the drafting paradigm is driven by the worse instincts of the poorest performing judge in the land.

...

b. *Lack of Statute of Limitations*

In addition, RCRA's lack of a statute of limitations provides support, though not necessarily conclusive support, for the conclusion that Congress never intended to extend liability to wholly past endangerments under RCRA's imminent citizen suit provision.<sup>210</sup> When Congress has provided citizens a private right of action to recover response costs in other environmental statutes, it has generally provided a corresponding statute of limitations. Indeed, the inclusion of a limitations period in CERCLA,<sup>211</sup> without a similar statute of limitations for RCRA Section 7002(a)(1)(B), lends further support to the conclusion that Congress only intended RCRA's imminent citizen suit provision as a means to abate continuing endangerments, not as a mechanism to allocate financial responsibility for rehabilitated hazardous waste sites.<sup>212</sup>

However, the failure to include a specific statute of limitations within RCRA is not decisive in itself. When Congress fails to provide a statutory right of action with a specific statute of limitations, courts generally apply the generic federal five year statute.<sup>213</sup> Nevertheless,

---

With the returns rapidly coming in, *Gwaltney* must take its place as one of the most destructive in a sorry series of Supreme Court opinions on environmental law . . . . This unanimous decision shows the Court at its careless, deferential, and literal-minded worst—careless because of the enormous jockeying costs imposed across the spectrum of citizen suits, deferential because the Court buys into restrictions invented by federal agencies for their own convenience, and literal-minded because the inadvertent use of the present tense in Section 505 is seized upon to restrict sharply the reach of citizen suits.

Rodgers, *Environmental Law* § 4.3 at 289-90 (cited in note 5) (footnotes omitted).

However, these criticisms do not seem to apply to an interpretation of RCRA § 7002(a)(1)(B) requiring the existence of a continuing endangerment at the time suit is filed. While it is possible that Congress had no intention of "unraveling" other environmental provisions by including the past and present tenses in RCRA § 7002, one cannot overlook the importance of using both tenses at least as it pertains to RCRA itself. Congress went out of its way to address RCRA's present/past tense "problem," leaving the requirement that the solid or hazardous waste "may present" an imminent hazard firmly in place.

210. See *Harris Bank Hinsdale, N.A. v. Suburban Lawn, Inc.*, 1992 U.S. Dist LEXIS 19737, \*11 (N.D. Ill. Dec. 22, 1992) (dismissing a claim due to the lack of a continuing endangerment at the time of the suit).

211. CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2).

212. *KFC*, 1996 U.S. LEXIS 1955 at \*12-13. See also *KFC*, 49 F.3d at 526 (Brunetti, J., dissenting) (concluding that "the lack of a limitations period in RCRA in contrast to the limitations period in CERCLA and the express authorization for recovery of response costs suggests that Congress did not contemplate reimbursement actions in RCRA").

213. Babich, 24 *Envir. L. Rep.* at 10134 (cited in note 14) (citing *Bodne v. Geo. A. Rheman Co., Inc.*, 811 F. Supp. 218, 221 (D.S.C. 1993) (concluding that the generic "five-year statute of limitations of 28 U.S.C. § 2462 probably applies to citizen RCRA imminent hazard actions"). See *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521-22 (9th Cir. 1987) (concluding that the relevant statute of limitation for citizen suits brought under the Clean Water Act is the generic federal statute of limitations, rather than an analogous state statute of limitations, in or-

this observation misses the point. Admittedly, if Congress truly intended to create a private right of action for restitution in RCRA's imminent citizen suit provision, then the generic five year statute of limitations would probably apply. However, the fact that Congress did not include a statute of limitations in RCRA, combined with the fact that Congress has included such a limitations period in other environmental statutes that provide for the recovery of environmental response costs, indicates that RCRA Section 7002(a)(1)(B) was never truly envisioned as a mechanism to provide a remedy for wholly past endangerments.

*c. Inclusion of a Notice Requirement*

Finally, the Court's conclusion that RCRA's imminent citizen suit provision requires a continuing endangerment is further supported by the inclusion of a mandatory notice requirement.<sup>214</sup> RCRA Section 7002(b)(2)(A) specifies that a private citizen suing under RCRA's imminent citizen suit provision must give the Administrator, the State, and the defendant ninety days' notice before filing suit.<sup>215</sup> Two basic reasons have been given for the notice requirement.<sup>216</sup> First, it gives the government the chance to bring the suit in lieu of the private party.<sup>217</sup> Second, it gives the plaintiff and the defendant

---

der to ensure national uniformity regarding the limitations periods as well as to ensure that citizen plaintiffs are able to act as effective private attorneys general); *Public Interest Research Group of New Jersey, Inc. v. Powell Durrryn Terminals, Inc.*, 913 F.2d 64, 73-75 (3d Cir. 1990) (same); *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120, 1124-25 (D.C. Md. 1985) (same), affirmed, 847 F.2d 1109 (4th Cir. 1988).

214. *KFC*, 1996 U.S. LEXIS 1955 at \*13.

215. RCRA § 702(b)(2)(A), 42 U.S.C. § 6972(b)(2)(A), 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; and
- (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.

216. *Hallstrom*, 493 U.S. at 29. Given the plain language of RCRA's notice provisions and the purposes served behind them, the Court held that "the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion." *Id.* at 31.

217. *Id.* at 29 (holding that RCRA's notice provision "allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits") (citing *Gwaltney*, 484 U.S. at 60). RCRA § 7002(b)(2)(B)(i), 42 U.S.C. § 6972(b)(2)(B)(i), provides that a private party may not bring an imminent hazard suit where the Administrator of the EPA "has commenced and is diligently prosecuting an action" under either RCRA § 7003, the EPA's authority, or CERCLA § 106. See H.R. Rep. No. 98-198 at 53 (cited in note 31) (stating



an opportunity to settle the matter before the adversarial process becomes inevitable and irreversible.<sup>218</sup> These reasons, however, only hold true where there is a continuing endangerment.<sup>219</sup> Citizen suits are designed to ensure that a defendant complies with the appropriate regulations without creating significant endangerments to health or the environment. When a site no longer presents an imminent endangerment, citizen suits are no longer needed.

In addition, where the solid or hazardous waste no longer presents an imminent substantial endangerment, there does not appear to be any reason why the Administrator of the EPA or the state would need notice of a pending suit. The majority in *KFC* stated that the notice requirement would help the EPA and the states determine whether the toxic waste site has been remediated and whether those at fault were held responsible.<sup>220</sup> In reality, however, the notice requirement does little more than give the EPA notice that one party is suing another. The notice provision by itself does not ensure that the appropriate party is being sued or even that the environmental hazard has been properly abated. Moreover, the EPA has little, if any, interest in tracking how private parties allocate responsibility for the remediation of wholly past environmental endangerments. Once the environmental threat has been eliminated, there is simply nothing left for the EPA or the state to do.

Although it is unclear whether the Court held that any one of these three factors individually provides conclusive proof that Section 7002(a)(1)(B) applies only to continuing endangerments, collectively, RCRA's careful use of the past and present tenses, failure to provide a

---

that citizen plaintiffs may only sue "if the Administrator (following notice of the intended litigation) fails to file an action under 7003"). See also Miller, *Citizen Suits* at 44-45 (cited in note 25) (concluding that "[t]he purpose behind the 60-day notice requirements is clearly to enable and encourage the government to perform its enforcement role. The notice requirements were adopted, in part, to counter those who opposed citizen suit provisions, purportedly fearing that citizens would flood courts with suits and interfere with the proper enforcement role of the executive branch").

218. *Hallstrom*, 493 U.S. at 29 (ruling that "notice gives the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit'" (quoting *Gwaltney* 484 U.S. at 60)). For a critique of the notice requirements on environmental citizen suit provisions, see *id.* at 45-51.

219. As the Supreme Court explained in *Gwaltney*:

[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume . . . that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous. Indeed, respondents . . . can think of no reason for Congress to require such notice other than that "it seemed right" to inform an alleged violator that it was about to be sued.

484 U.S. at 60.

220. *KFC*, 49 F.3d at 522.

statute of limitations, and inclusion of a notice requirement, provide a strong argument that RCRA's imminent citizen suit provision was not intended to impose liability for wholly past endangerments.

## 2. Deciphering RCRA's Legislative History

Not only does the statutory evidence support the conclusion that Congress intended to limit application of RCRA's imminent citizen suit provision to continuing endangerments, this determination is further substantiated by the legislative history of RCRA Section 7002(a)(1)(B).<sup>221</sup> It should first be noted that RCRA is essentially a

---

221. Additional evidence indicating a congressional intent to limit RCRA's imminent hazard authority is found in the legislative history of RCRA § 7003, the EPA's imminent hazard provision. RCRA § 7003 is nearly identical to § 7002(a)(1)(B), except that § 7003 gives the Administrator of the EPA the right to sue to abate an imminent and substantial endangerment while § 7002(a)(1)(B) extends this authority to the public at large. The legislative history of § 7003 has important implications for § 7002(a)(1)(B) because Congress has declared that the standards of liability under § 7002(a)(1)(B) are identical "to the standards of liability established under § 7003." H.R. Rep. No. 98-198 at 53 (cited in note 31). See note 78.

Evidence supporting the conclusion that RCRA's imminent hazard authority is limited to abating continuing endangerments can be found in the legislative history of both the 1980 and 1984 RCRA Amendments. Interestingly, § 7003 was not even mentioned in the original committee reports at the time the RCRA was adopted. In discussing the scope of the EPA's imminent hazard authority, the committee report from the 1980 RCRA Amendments notes that "imminence in [§ 7003] applies to the nature of the threat rather than identification of the time when the endangerment initially arose. 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." H.R. Committee Print No. 96-IFC 32 (cited in note 88).

Not only does the legislative history of the 1980 Amendments to § 7003 suggest the need for a continuing endangerment, the House Conference Report concerning the 1984 Amendments reinforces this conclusion. Specifically, the 1984 Report states:

Section 7003 focuses on the *abatement* of conditions threatening health and the environment. . . . The amendment reflects the longstanding view that generators and other persons involved in the handling, storage, treatment, transportation or disposal of hazardous wastes must share in the responsibility for the *abatement* of the hazards arising from their activities. The section was intended and is intended to *abate* conditions resulting from past activities.

Hazardous and Solid Waste Amendments of 1984, H.R. Conf. Rep. No. 98-1133, 98th Cong., 2d Sess. at 119 (1984) (emphasis added). The report continues, explaining that "Section 7003 has always provided the authority to require the *abatement* of present conditions of endangerment resulting from past disposal practices, whether intentional or unintentional" and that "[t]hese amendments [to § 7003]. . . confirm that *abatement* authority vested in EPA and the courts extends to both past and present acts contributing to an imminent and substantial endangerment." H.R. Rep. No. 98-198 at 48 (cited in note 31) (emphasis added). Finally, the House Report explains that "due to the nature of the hazards presented by disposal sites, Section 7003 is 'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.' The section was intended and is intended to *abate* conditions resulting from past activities." *Id.* (quoting *Price*, 688 F.2d at 213-14) (emphasis added). Together, these statements concerning the EPA's "abatement" authority strongly indicate that RCRA only applies where there is a continuing endangerment.

prospective regulatory regime.<sup>222</sup> Congress designed RCRA to act as a "cradle-to-grave regulatory regime,"<sup>223</sup> with the intention that its provisions would apply to those who handle, store, treat, or dispose of any solid or hazardous waste at any point in the waste's lifetime. Consistent with this approach, liability extends only to those situations where the waste continues to threaten public health or the environment.

The legislative history of Section 7002(a)(1)(B) makes clear that RCRA's imminent citizen suit provision was only intended to apply to past or present acts which constitute a continuing endangerment to health or the environment. Although Section 7002(a)(1)(B) is more forgiving than many other environmental citizen suit provisions in that it applies to past acts,<sup>224</sup> and that it only requires an imminent risk or threat of harm rather than actual harm,<sup>225</sup>

222. See note 11 and accompanying text.

223. See note 11.

224. Past activity may trigger liability under RCRA even though the particular conduct has stopped and may never resume. Susan M. Cooke, 3 *The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation*, § 15.01(3)(b) at 15-11 (Matthew Bender, 1995) (explaining that although the law was originally unsettled, "the 1984 amendments made it clear that past activities could trigger liability under Sections 7002 and 7003"). See also note 97.

225. The statute makes clear that an endangerment need not exist if there may be a threat to health or the environment. The court in *Lincoln Properties, Ltd. v. Higgins*, explained the statutory basis for this conclusion at length:

First, it is significant that the word "may" precedes the standard of liability: "[t]his is 'expansive language,' which 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.'" . . .

Second, "endangerment" means a threatened or potential harm and does not require proof of actual harm . . . . When one is endangered, harm is *threatened*; no actual injury need ever occur . . . .

Third, a finding of "imminence" does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present, . . . even though the harm may not be realized for years. Finally, the word "substantial" [does not require quantification of the risk if there is some cause for concern that someone may be exposed to risk]. However, injunctive relief should not be granted "where the risk of harm is remote in time, completely speculative in nature, or *de minimus* in degree."

36 *Envir. Rptr. Cases* (BNA) 1228, 1240 (E.D. Cal. 1993) (citations omitted). See also *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991) (holding that "a finding that an activity may present an imminent and substantial endangerment does not require actual harm" (citing *Waste Industries*, 734 F.2d at 159)) reversed in part, 505 U.S. 557 (1992); *Puerto Rico Aqueduct*, 888 F.2d at 185 (observing that "[a]n endangerment means a risk of a harm, not necessarily actual harm, and proof that the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment is grounds for an action seeking equitable relief" (citation omitted)); *Conservation Chemical*, 619 F. Supp. at 193-94 (holding that "an endangerment need not be an emergency in order for it to be 'imminent and substantial'" and that "an endangerment is 'imminent' if factors giving rise to it are present, even though the harm may not be realized for years"); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985) (explaining that "[e]ndangerment means a threatened or potential harm and does not require proof of actual harm").

the legislative history indicates that RCRA's imminent citizen suit provision requires a continuing endangerment resulting from the defendant's past or present activities.

Initially, the House committee report provides ample evidence supporting the need for a continuing endangerment under Section 7002(a)(1)(B). The report explains that the 1984 Amendments to RCRA's citizen suit provision "confers on citizens a *limited right* under Section 7002 to sue to *abate* an imminent and substantial endangerment."<sup>226</sup> In addition, the report states that the "primary goal" of RCRA Section 7002(a)(1)(B) is "the *prompt abatement* of imminent and substantial endangerments."<sup>227</sup> Moreover, the report notes that "the RCRA regulatory and enforcement program must be conducted in a manner that *controls and prevents present and potential endangerment* to public health and the environment."<sup>228</sup> In addition, the Report explains that the expansion of RCRA's citizen suit provision was designed to "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."<sup>229</sup> These excerpts from RCRA's legislative history support what the plain language and structure of Section 7002(a)(1)(B) already suggest—that RCRA's imminent citizen suit provision applies only to continuing endangerments.<sup>230</sup>

---

This conclusion is further supported by the federal regulations issued by the EPA. See 56 Fed. Reg. 24396 (cited in note 10) ("While the risk of harm must be imminent in order for the EPA to act under section 7003, the harm itself need not be. For example, EPA could act if there exists a likelihood that contaminants might be introduced into a water supply which could cause damage after a period of latency"); Cook, 3 *Law of Hazardous Waste* § 15.01[3][c] at 15-12 (cited in note 224) (explaining that the use of the word "may" was "intended by Congress to provide the courts with broad equitable powers so as to eliminate any risk posed by toxic wastes. Thus Sections 7002 and 7003 are not limited to emergency-type situations" (footnotes omitted)).

226. H.R. Rep. No. 98-198 at 53, reprinted in 1984 U.S.C.C.A.N. at 5612 (emphasis added). Black's Law Dictionary defines "abate" as "[t]o do away with or nullify or lessen or diminish" and defines abatement" as "[a] reduction, a decrease, or a diminution. The suspension or cessation in whole or in part, of a continuing charge, such as rent." *Black's Law Dictionary* 4 (West, 6th ed. 1990). These definitions indicate that something must exist before it may be abated.

227. H.R. Rep. No. 98-198 at 53 (cited in note 31) (emphasis added).

228. *Id.* at 20.

229. *Id.* at 53. See S. Rep. No. 98-284 at 55 (cited in note 78) ("The conditions placed on such suits are intended to assure that they will complement, and not interfere with, Federal regulatory and enforcement programs").

230. The views of the minority regarding the 1984 Amendments also support the conclusion that Congress only intended RCRA's citizen suit provision to apply to continuing endangerments. The minority objected to the adoption of § 7002(a)(1)(B) due to the failure of the committee to amend the provision:

That amendment stated that no district court before which an imminent and substantial endangerment action is brought is empowered to hear related state law claims. That

Finally, Senator George Mitchell, the author of the 1984 Amendments to RCRA's citizen suit provision, made clear the need for a continuing violation during a speech on the senate floor:

Under current law, a citizen may bring suit to enforce a permit or other similar RCRA requirement if EPA fails to do so. However, citizens are not now authorized to sue to *abate* an "imminent and substantial endangerment" to health or the environment. If EPA does not act, the endangerment continues.

In light of the thousands of known hazardous waste sites across this country, this simply does not make sense.

The Environmental Protection Agency clearly does not have the resources to deal with all of these sites, nor do the States.

Citizen suits to *abate* imminent hazards can expand the national effort to minimize these very real threats to our well-being.<sup>231</sup>

Senator Mitchell's repeated use of the term "abate" demonstrates that RCRA's imminent citizen suit provision was only intended to apply to those situations where the solid or hazardous waste continues to threaten public health or the environment.

Together, these excerpts from the legislative history of RCRA Sections 7003 and 7002(a)(1)(B) indicate that while RCRA's imminent hazard authority applies to past or present acts, it applies only to present or future endangerments. RCRA is designed to promote the prompt disposal of solid and hazardous waste, not to allocate financial responsibility where the threat has been eliminated prior to the filing of the lawsuit.

### 3. RCRA's Place in the Comprehensive Regulatory Scheme

When RCRA's imminent citizen suit provision is examined in the context of the comprehensive regulatory scheme Congress constructed, it seems unlikely that Congress intended to create a cause of action for wholly past endangerments under RCRA. If Congress had intended such a result, it would most likely have drafted RCRA's citizen suit provision to provide expressly for past remediation expenses. Indeed, as the Supreme Court explained in *KFC*, the express creation of private rights of action for the recovery of environmental

---

amendment simply clarified what we had understood to be the intention of the citizen suit provision and that is to *give citizens a federal cause of action to abate imminent and substantial endangerments* created by hazardous waste disposal facilities.

Id. at 118-19 (emphasis added). The majority responded to this concern by stating that they expected the courts "to exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the *prompt abatement* of imminent and substantial endangerments." Id. at 53 (emphasis added).

231. 130 Cong. Rec. 20815 (emphasis added).

response costs in other statutes, combined with the failure to do so in RCRA's imminent citizen suit provision, indicates that Congress never intended Section 7002(a)(1)(B) to act as a cost recovery statute.<sup>232</sup>

Like RCRA, CERCLA includes a citizen suit provision.<sup>233</sup> In fact, the remedies provided to citizen-plaintiffs in CERCLA Section 310 closely parallel the remedies authorized in RCRA Section 7002(a).<sup>234</sup> However, CERCLA also authorizes the EPA to recover "all costs of removal or remedial action"<sup>235</sup> and authorizes private citizens to recover any necessary costs of response . . . consistent with the national contingency plan."<sup>236</sup> In addition, CERCLA Section 113(f)(1) provides that "[a]ny persons may seek contribution from any other person who is liable or potentially liable" for past environmental response costs.<sup>237</sup> An examination of RCRA's imminent citizen suit provision in light of CERCLA's cost recovery provisions demonstrates that when Congress intends to create a cause of action for past environmental response costs, it does so expressly.<sup>238</sup> Congress has acknowledged the difference between providing an action for wholly past events and authorizing a mechanism to abate continuing endangerments. In RCRA, Congress simply did not intend to impose liability for actions that no longer present an imminent threat at the time the lawsuit is filed.

Congress has not only expressly authorized actions for past cleanup costs under CERCLA, but has also done so in the context of

---

232. 1996 U.S. LEXIS 1955 at \*10-11 (concluding that CERCLA's use of a cost recovery provision demonstrates that Congress "knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy").

233. CERCLA § 310, 42 U.S.C. § 6959.

234. *KFC*, 1996 U.S. LEXIS 1955 at \*10-11. Compare RCRA § 7002(a), 42 U.S.C. § 6972 (authorizing the federal courts "to order . . . such action as may be necessary"), with CERCLA § 310, 42 U.S.C. § 6959 (authorizing the federal courts "to order such action as may be necessary to correct the violation").

235. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

236. *Id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

237. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) provides that:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [section 107(a)] of this title, during or following any civil action under section 9606 [section 106] of this title under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

238. *Furrer*, 62 F.3d at 1096-97 (concluding that "Congress, knowing its CERCLA citizen suit provision did not extend the available remedies to include a cause of action for monetary recovery from other responsible parties, despite the broad 'other action' language (which is also found in the RCRA citizen suit provision), and wishing to allow such a remedy in certain cases, enacted § 9613(f)(1) [§ 113(f)(1)] to provide expressly for contribution").

RCRA itself.<sup>239</sup> Under RCRA Section 9003(h)(6)(A),<sup>240</sup> the Administrator of the EPA, as well as the state, may recover from the owner or operator of an underground storage tank the costs incurred "for undertaking corrective action or enforcement action with respect to the release of petroleum" from the tank. Section 9003(h)(6)(A), however, does not authorize private citizens to exercise this authority.

When one considers that Congress has, on at least two occasions, imposed liability for wholly past endangerments, it appears that the lack of such a provision in RCRA's imminent citizen suit provision demonstrates congressional reluctance rather than legislative oversight. Together, CERCLA Section 113(f)(1) and RCRA Section 9003(h)(6)(A) demonstrate that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."<sup>241</sup>

In conclusion, the combination of the language, structure, and context of RCRA's imminent citizen suit provision leads to the conclusion that Section 7002(a)(1)(B) does not apply when the environmental endangerment has been eliminated. Rather, a plaintiff must demonstrate that the defendant's past or present actions present an imminent hazard at the time the lawsuit is filed.

### B. Available Remedies

RCRA's imminent citizen suit provision provides federal courts with the authority (1) "to restrain any person who has contributed or who is contributing to" an "imminent and substantial endangerment," and (2) "to order such person to take such other action as may be necessary."<sup>242</sup> The second question posed by *KFC* is whether the

239. In addition, Congress has provided an express provision to recover damages under the Surface Mining Control and Reclamation Act ("SMCRA"). Section 502(f) of SMCRA authorizes "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter may bring an action for damages." 30 U.S.C. § 1270(f) (1994 ed.).

240. RCRA § 9003(h)(6)(A), 42 U.S.C. § 6991(b)(h)(6)(A), provides:

Whenever costs have been incurred by the Administrator, or by a State pursuant to paragraph (7), for undertaking corrective action or enforcement action with respect to the release of petroleum from an underground storage tank, the owner or operator of such tank shall be liable to the Administrator or the State for such costs.

241. *Touche Ross*, 442 U.S. at 572.

242. RCRA § 7002(a), 42 U.S.C. § 6972(a), provides in relevant part:

The district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both.

*Id.* (emphasis added). RCRA § 7002(a) was amended in 1984 to expand the remedies available under the statute. Prior to 1984, district courts were authorized "to enforce such regulation or

power to order "such other action as may be necessary" is limited to granting injunctive, as opposed to monetary, relief. As a preliminary matter, it is important to understand that RCRA Section 7002(a)(1)(B) is not a statute in which a private cause of action arises only by implication. If it were, as the Eighth Circuit mistakenly assumed in *Furrer*,<sup>243</sup> the Supreme Court's four-factored test outlined in *Cort*<sup>244</sup> would undoubtedly apply.<sup>245</sup> RCRA's imminent citizen suit provision, however, expressly authorizes the courts to order any relief they deem appropriate and necessary. The question, therefore, is not whether a private right of action exists under Section 7002(a)(1)(B), but whether the scope of the authority given by Congress empowers the courts to exercise their full equitable jurisdiction, including the power to order restitution, in fashioning appropriate relief.<sup>246</sup>

---

order, or to order the Administrator to perform such act or duty as the case may be." 42 U.S.C. § 6972(a) (1982 ed.). The 1984 Amendment most certainly represents an expansion of the remedies previously available to plaintiffs under RCRA. The difficulty lies in determining the scope of this new authority.

243. 62 F.3d at 1094 (concluding that RCRA "does not give the district courts express authority in citizen suits to award money judgments for costs incurred in cleaning up contaminated sites. Thus, if such a remedy is to be available, we must find either that Congress, by authorizing the district court 'to order . . . such other action as may be necessary,' implicitly created such a remedy, or that the 'cause of action . . . may have become part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct'" (quoting *Northwest Airlines*, 451 U.S. at 90)).

If there were no basis for granting equitable restitution or monetary damages, the Eighth Circuit's analysis and conclusion would be correct. The issue would be whether Congress intended to imply such relief when it adopted RCRA's imminent citizen suit provision to continuing endangerments outlined in Part IV.A., convincing a court that Congress intended to imply a remedy for wholly past endangerments would be highly unlikely.

In addition, while a full discussion of the district courts' authority under the federal common law is beyond the scope of this Note, a court is unlikely to create a federal common law remedy for those seeking environmental cleanup costs in that both RCRA and CERCLA have been held to preempt such judicial authority. *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1147-48 (E.D. Pa. 1982); *Price*, 523 F. Supp. at 1069.

244. See note 148 (outlining the fourth part test of *Cort v. Ash*). It should be noted, however, that at least two supreme court justices, Justices O'Connor and Scalia, would get the federal courts out of the business of implying new federal private rights of action altogether. See *Thompson*, 484 U.S. at 191 (Scalia, J., concurring) ("Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts . . . . When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction" (quoting *Cannon*, 441 U.S. at 730 (Powell, J., dissenting))).

245. Despite the four factors outlined in *Cort*, the Court has made clear that the central inquiry remains "whether Congress intended to create a private right of action," while the four *Cort* factors serve as "criteria through which this intent could be discerned." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (citing *Davis v. Passman*, 442 U.S. 228, 241 (1979)). However, the heavy burden of demonstrating that Congress intended to imply a private cause of action clearly rests with the party asking the court to so interpret the statute. *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992).

246. *Northwest Airlines*, 451 U.S. at 97 (stating that "[i]n almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the



As a general rule, when Congress empowers the federal courts to grant equitable remedies, the courts are presumed to be authorized to exercise their full equitable authority unless Congress clearly indicates otherwise. This equitable authority includes the power to order restitutionary damages.<sup>247</sup> In the context of RCRA's imminent citizen suit provision, Congress has clearly empowered the federal courts to exercise their broad equitable authority by authorizing the courts to order any action they deem necessary and appropriate.<sup>248</sup> However, as previously explained, an examination of the language, structure, and context of RCRA Section 7002(a)(1)(B) indicates that Congress intended to limit the provision to the abatement of continuing endangerments.<sup>249</sup> Because RCRA is designed to provide a cause of action only in those cases where an imminent hazard either presently exists or may in the future exist, federal courts are prohibited from awarding the recovery of response costs expended to abate wholly past endangerments.

---

authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt"). See *Franklin v. Winnett County Public Schools*, 503 U.S. 60, 65-66 (1992) (observing that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place. Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence" (citations omitted)); *Davis*, 442 U.S. at 239 (concluding that "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive").

The federal courts have repeatedly distinguished between interpreting a statute and implying a new cause of action when construing language similar to that used in RCRA. See, for example, *Miener v. State of Missouri*, 673 F.2d 969, 979 (8th Cir. 1982) (stating that in the context of a cause of action pursuant to the Education for All Handicapped Children Act, "Congress has expressly created a cause of action . . . and has empowered the district court to grant 'such relief as the court determines is appropriate.' Accordingly, the question is simply whether damages are within the relief foreseen by Congress" (citation omitted)); *Anderson v. Thompson*, 658 F.2d 1205, 1210 n.7 (7th Cir. 1981) (concluding that "[a] *Cort v. Ash* analysis is not appropriate because the issue is not whether there is an implied private right of action. Here Congress has expressly created a cause of action and empowered the district court to grant such relief as the court determines appropriate" (citations omitted)).

247. Babich, 24 *Envir. L. Rep.* at 10130 (cited in note 14) (concluding that "[a]s 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 the power to order restitution in appropriate cases" (citations omitted)).

248. Indeed, Congress has authorized broad equitable relief for many environmental citizen suit provisions. Garrett, *RCRA Practice Manual* at 237 (cited in note 13) (concluding that "[t]he equitable relief that can be granted in citizen suits is very broad. For example, the court may order compliance with regulations and permanent closure of a facility. As in civil judicial enforcement, the three-pronged test for granting a permanent injunction is less stringent than requests for such injunctions in private actions").

249. See Part IV.A.

## 1. Equitable Authority of the Federal Courts Generally

It is a well known canon of statutory construction that when Congress expressly provides a specific right with a specific remedy, the courts ought to be wary of inferring additional remedies.<sup>250</sup> However, the Supreme Court has long held that courts in their equity jurisdiction are presumptively empowered to order "all appropriate relief."<sup>251</sup> This equitable authority includes the power to order prohibitory and mandatory injunctions, to issue writs of mandamus, and to award restitution, though not the power to order compensatory or punitive damages.<sup>252</sup> Only when Congress clearly and validly indi-

250. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (stating that "where a statute expressly provides a particular remedy or remedies, a court must be wary of reading others into it"). The Court has noted, however, that the expression of one remedy or set of remedies does not necessarily exclude the possibility that other remedies may be implied. As the Court explained, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.*

251. *Franklin*, 503 U.S. at 66 (citation omitted). The justifications for this presumption in favor of the courts' full equity jurisdiction are basically two-fold: first, that Congress generally does not intend to disturb the inherent power of the courts when granting statutory relief, and second, that Congress is passing legislation generally intends to provide plaintiffs with complete relief.

252. *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2069, 124 L. Ed. 2d 161 (1993) (stating that "'equitable relief' can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)"). Although the precise boundary between restitution, an equitable remedy, and monetary damages, a legal remedy, is not always clear, see Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1278-83 (1989), the courts have attempted to distinguish the two forms of relief. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). Restitution seeks to "extract compensation or restore the status quo," while damages are designed to "punish culpable individuals." *Tull v. United States*, 481 U.S. 412, 422 (1987) (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974)). As the Fourth Circuit explained:

The distinction, as we see it, is that "[a] person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money." Damages on the other hand, are determined by reference to the loss sustained by a victim as the result of wrongful conduct on the part of another.

*United States v. Long*, 537 F.2d 1151, 1153-54 (4th Cir. 1975) (quoting Restatement of Restitution § 1, comment a (1937)).

Importantly, the mere fact that a remedy requires monetary payment does not necessarily mean that the remedy is legal in nature. *Bowen*, 487 U.S. at 393. Rather, restitution will often take the form of a monetary payment. *Id.* at 901 (explaining that "[t]he fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states . . . cannot transform the nature of the relief sought—specific relief, not relief in the form of damages" (quoting *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985))); *Teamsters v. Terry* 494 U.S. 558, 570 (1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law.' This Court has not, however, held that 'any award of monetary relief inust necessarily be 'legal relief' (quoting *Curtis*, 415 U.S. at 196)). See generally Robert S. Thompson and John

cates a desire to limit this equitable jurisdiction are the federal courts restrained in the type of equitable relief they may order.<sup>253</sup>

In the seminal case of *Porter v. Warner Holding Co.*,<sup>254</sup> the Supreme Court examined the scope of the federal courts' authority in situations where Congress had authorized the courts to utilize their equitable powers.<sup>255</sup> *Porter* concerned Section 205(a) of the Emergency Price Control Act of 1942, which authorized the district courts, when the Administrator of the Office of Price Administration had demonstrated a price control violation, to order "a permanent or temporary injunction, restraining order, or *other order*."<sup>256</sup> The Supreme Court, in defining the scope of federal judicial authority under the phrase "other order," explained that the federal courts are allowed to invoke "all the inherent equitable powers" when ordering an appropriate remedy, unless Congress clearly intends otherwise.<sup>257</sup> The Court explained that this full equity authority includes the power to order restitution either as "an equitable adjunct to an injunction

A. Sebert, Jr., *Remedies: Damages, Equity and Restitution* (Matthew Bender, 2d ed. 1989); Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65 (1985).

253. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (concluding that "Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles"); *United States v. Moore*, 340 U.S. 616, 618-20 (1951) (finding that, in the absence of a congressional command to the contrary, a court in its equity jurisdiction may order restitution when "reasonably appropriate and necessary"); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (holding that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction"); *Franklin*, 503 U.S. at 66 (holding that "although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise" (citations omitted)); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (explaining that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes").

254. 328 U.S. 395 (1946).

255. "The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction." *Id.* at 398 (quoting *Brown v. Swann*, 35 U.S. (10 Peters) 497, 503 (1836)). The power of the federal courts to exercise their full equity authority was reaffirmed by the Supreme Court in *Moore*, 340 U.S. at 616. *Moore* concerned § 206(b) of the Housing and Rent Act of 1947 which, like the Emergency Price Control Act of 1942 at issue in *Porter*, authorized the courts to issue a permanent or temporary injunction, restraining order, or "other order" when responding to an existing or potential rent control violation. *Id.* at 617-19. The Court again concluded that the provision invoked the full equity powers of the federal courts, including the power to order restitution. *Id.* at 619.

256. *Porter*, 328 U.S. at 397 (emphasis added).

257. *Id.* at 398 (concluding that "[t]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied").

decree" or as a necessary and appropriate means to guarantee compliance with the law.<sup>258</sup>

This well-established approach to defining the scope of the federal courts' equity authority is also supported by the Restatement of Restitution. According to Section 115 of the Restatement, a court may award restitution providing for the reimbursement of costs expended to perform another's public duty.<sup>259</sup> Both state and federal courts have utilized this section of the Restatement to award restitution on a number of occasions.<sup>260</sup> Importantly, according to the Restatement, restitution may not be authorized when the performance of a personal duty only incidentally benefits another party,<sup>261</sup> or when the person who performed the duty was not ordered to do so.<sup>262</sup> Of course, the decision to grant restitution in any particular case is left to the general discretion of the court in light of all the relevant facts and circumstances including the purposes of the statute.<sup>263</sup>

## 2. Equitable Authority of the Federal Courts Under Section 7002(a)(1)(B)

At a minimum, RCRA's imminent citizen suit provision authorizes the federal courts to exercise a portion of their inherent equitable jurisdiction. Specifically, Section 7002(a) empowers the federal courts to restrain those in violation of RCRA's requirements and to order "such other action as may be necessary" to abate an imminent and

---

258. *Id.* at 399-400 (concluding that the "inherent equitable jurisdiction . . . clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress"). Importantly, *Porter* was settled law at the time Congress drafted and adopted RCRA. Thus, the fact that Congress had notice of the presumption favoring the court's full equitable relief when drafting RCRA's imminent citizen suit provision indicates that a strong case could be made favoring the full equitable authority of the courts than existed in *Porter* itself. See *Cannon*, 441 U.S. at 696-97 (explaining that the courts are to presume that Congress understands the state of the law when it legislates).

259. The Restatement of Restitution § 115 (ALI, 1937) states:

A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if

(a) he acted unofficiously and with intent to charge therefor, and  
 (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

260. See, for example, *Wyandotte Transportation Co., v. United States*, 389 U.S. 191, 204 (1967); *State v. Schenectady Chemicals, Inc.*, 479 N.Y.S.2d 1010, 1014 (N.Y. App. Div. 1984); *Brandon Tp. v. Jerome Builders, Inc.*, 80 Mich. App. 180, 263 N.W.2d 326, 328 (1977).

261. Restatement of Restitution § 106 (cited in note 259).

262. *Id.* § 115, comment a.

263. *Id.* introductory note.

substantial endangerment.<sup>264</sup> Under *Porter* and its progeny, this grant of jurisdiction creates a presumption that Congress intended to authorize the federal courts to exercise their full equitable authority, including the power to award restitution.<sup>265</sup> Considering that nearly every court to address the issue has held that suits to recover environmental cleanup costs constitute actions for equitable restitution,<sup>266</sup> RCRA would appear to authorize the recovery of environmental response costs.<sup>267</sup> The Supreme Court has made clear, however, that the presumption favoring the exercise of the federal courts' full equitable authority may be rebutted by contrary congressional intent.<sup>268</sup> It seems apparent that Congress has evinced such an intent with respect to RCRA's imminent citizen suit provision.

---

264. RCRA § 7002(a), 42 U.S.C. § 6972(a). According to the Court's decision in *KFC*, these powers authorize private citizens to "seek a mandatory injunction, i.e., one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that 'restrains' a responsible party from further violating RCRA." 1996 U.S. LEXIS 1955 at \*9-10.

265. See Part VI.B.1.

266. The courts have consistently held that actions to recover environmental response or abatement costs under CERCLA or RCRA constitute claims for equitable restitution. See, for example, *Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 412 (3d Cir. 1995) (CERCLA); *American Cyanamid Co. v. King Industries, Inc.*, 814 F. Supp. 209, 213-14 (D.R.I. 1993) (CERCLA); *United States v. Northernair Plating Co.*, 685 F. Supp. 1410, 1413 (W.D. Mich. 1988) (CERCLA); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987) (CERCLA); *NEPACCO*, 810 F.2d at 749 (RCRA and CERCLA); *Conservation Chemical Co.*, 619 F. Supp. at 201 (RCRA); *United States v. Mottolo*, 605 F. Supp. 898, 912-13 (D.N.H. 1985) (CERCLA); *Price*, 688 F.2d at 213-14 (RCRA). See also *Toxic Waste Litigation*, 99 Harv. L. Rev. at 1492 nn.46 & 47 (cited in note 1) (CERCLA).

In addition, the Supreme Court has had the opportunity to consider the distinction between remedies at law and equity on at least two occasions. First, the Court in *Wyandotte* held that the government was entitled to reimbursement for the costs of cleaning up chlorine that was leaking from the defendants' shipwrecked barge on grounds that the government had provided a service to the defendants in an effort to protect public health and safety. 389 U.S. at 194-95, 204-05. Second, the Court in *Tull* held that the imposition of civil penalties authorized by the Clean Water Act constitutes a legal rather than equitable remedy in that such penalties are designed to punish rather than restore the parties to their original positions. 481 U.S. at 423-24. The distinction drawn by the Court in *Wyandotte* and *Tull* certainly supports the conclusion that the recovery of environmental response costs constitutes restitution. Recovery of such costs are simply designed to restore the parties to their original positions.

267. Indeed, at least one commentator would agree with such a conclusion. See J. Martin Rebertson, *Restitution under RCRA § 7002(a)(1)(B): The Courts Finally Grant What Congress Authorized*, 25 Envir. L. Rep. 10491, 10493 (1995) (concluding that "[u]nless specifically limited, Congress' grant of equitable jurisdiction to the courts is not restricted; in fact, the courts' equitable powers are presumed to include all of the traditional equitable powers that the courts have had historically").

268. *KFC*, 1996 U.S. LEXIS 1955 at \*14-15. See also note 257 and accompanying text.

*a. Wholly Past Endangerments*

Despite the general presumption favoring the full equitable jurisdiction of the federal courts, it does not appear that Congress intended to provide a private right of action to recover costs expended to remediate wholly past endangerments. As discussed at length earlier, the language, structure, and context of RCRA Section 7002(a)(1)(B) indicate that the provision was only intended to impose liability for continuing endangerments.<sup>269</sup> Having made this determination, it seems reasonable, if not inevitable, to conclude that allowing courts to order restitutionary relief relating to endangerments eliminated prior to the filing of the law suit would be inherently inconsistent with RCRA's continuing endangerment requirement.

Indeed, the continuing endangerment requirement was an important factor which led the Supreme Court to conclude that plaintiffs cannot receive restitution for past cleanup costs under RCRA's imminent citizen suit provision.<sup>270</sup> As Justice O'Connor explained, "[t]he meaning of this timing restriction is plain: An endangerment can only be 'imminent' if it 'threatens to occur immediately,' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger."<sup>271</sup> However, having determined that RCRA Section 7002(a)(1)(B) requires the presence of an imminent and substantial endangerment at the time the law suit is filed it remains to be resolved whether the solid or hazardous waste must continue to present an imminent hazard throughout the course of the litigation or whether the provision allows plaintiffs to take affirmative action to remediate the contaminated site after litigation has begun and remain eligible to recover their cleanup costs.

*b. Continuing Endangerments*

Although rejecting the approach of the Ninth Circuit, the Supreme Court in *KFC* expressly declined to consider whether

---

269. See Part IV.A.

270. In addition to reaffirming the necessity of demonstrating continuing endangerment, the Supreme Court held that the remedies authorized under RCRA § 7002(a)(1)(B) do not "contemplate[] the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *KFC*, 1996 U.S. LEXIS 1955 at \*10. Importantly, however, the Court specifically declined to address whether response costs expended after initiation of the law suit are recoverable. *Id.* at \*15-16.

271. *Id.* at \*11-12 (quoting *Webster's New International Dictionary of English Language* 1245 (2d ed. 1934)).

RCRA's imminent citizen suit provision authorizes the courts to order an injunction requiring a defendant to reimburse citizen plaintiffs for response costs expended after the commencement of the litigation.<sup>272</sup> As explained previously, the language, structure, and context of RCRA Section 7002(a)(1)(B) indicates that plaintiffs must demonstrate the existence of an imminent and substantial endangerment at the time a law suit is filed. However, this evidence, when examined in light of RCRA's objectives, does not support the conclusion that the solid or hazardous waste must continue to present an imminent and substantial endangerment throughout the course of the litigation.<sup>273</sup> Having failed to rebut the presumption favoring the full equitable authority of the federal courts on this point, RCRA's imminent citizen suit provision ought to be construed in a manner authorizing the courts to award plaintiffs the recovery of reasonable cleanup costs expended after initiation of the lawsuit. This interpretation of RCRA Section 7002(a)(1)(B) not only complies with the provision's preliminary requirements, but promotes the prompt abatement of imminent hazards by allowing plaintiffs to clean up hazardous waste sites at the front end of the litigation rather than waiting until completion of the law suit years later.<sup>274</sup>

---

272. *Id.* at \*15-16 (citing *Price*, 688 F.2d at 211-13).

273. In order to reach this conclusion, it is important to remember where the analysis begins. According to *Porter* and its progeny, when Congress grants the federal courts the authority to exercise a portion of their equitable authority, the courts are presumed to have the authority to exercise their full equitable authority unless it can be shown that Congress intended otherwise. See Part IV.B.1. Because Congress authorized the courts to exercise at least a portion of their equitable authority under RCRA's imminent citizen suit provision, the courts are presumed to be authorized to award the recovery of response costs as a form of equitable restitution. Although the language, structure and context of § 7002(a)(1)(B) successfully rebut the presumption that the federal courts are authorized to award response costs for wholly past endangerments, the same evidence does not successfully rebut the presumption that the courts may award the recovery of response costs incurred after the initiation of the law suit. See *KFC*, 1996 U.S. LEXIS 1955 at \*10-13, \*15-16 (concluding that § 7002(a)(1)(B) does not authorize the recovery of costs expended to remediate wholly past endangerments, but withholding judgment as to whether the provision authorizes the recovery of abatement costs expended after the "the invocation of RCRA's statutory process").

274. Although interpreting RCRA's imminent citizen suit provision to authorize the recovery of response costs expended after the initiation of the litigation would go a long way to ensure that plaintiffs are adequately compensated, this interpretation is far from a perfect solution. Plaintiffs will still have to wait a minimum of ninety days before filing suit. See RCRA § 7002(b)(2)(A), 42 U.S.C. § 6972(6)(2)(A). If a private party does not have the luxury of waiting ninety days and cannot file a claim under CERCLA's cost recovery provision, he or she may be left to the remedies provided under state law. The Ninth Circuit in *KFC* noted, however, that while potential plaintiffs may occasionally avail themselves of state common law remedies, such opportunities often ring hollow in the face of this particular type of litigation. 49 F.3d at 523 n.6. See Melinda H. Van der Reis, Comment, *An Amendment for the Environment: Alternative Liability and the Resource Conservation Recovery Act*, 34 Santa Clara L. Rev. 1269, 1289 (1994) (concluding that "[i]t may take years, sometimes decades, for the effects of improper handling of hazardous waste to manifest. Plaintiffs bear injuries from acts that occurred years before, and

As previously explained, the use of a notice requirement, lack of a statute of limitations, and utilization of the past and present tenses in RCRA's imminent citizen suit provision indicate that plaintiffs must demonstrate the existence of a continuing endangerment at the time the law suit is filed.<sup>275</sup> However, this evidence does not support the conclusion that the solid or hazardous waste must continue to threaten public health and the environment throughout the course of the litigation.

Initially, RCRA's notice provision gives the EPA an opportunity to file suit in lieu of the private citizen and to provide the defendant with an opportunity to settle the dispute before litigation begins.<sup>276</sup> These objectives are defeated when plaintiffs clean up the site before filing suit—hence the need for the continuing endangerment requirement.<sup>277</sup> However, the objectives of RCRA's notice provision remain fulfilled when a plaintiff waits until after filing the lawsuit before undertaking abatement measures; the EPA and the state will still have ninety days to decide whether to take over the litigation and the defendant will still have ninety days to decide whether to settle the matter out of court. Therefore, while RCRA's notice provision indicates that Section 7002(a)(1)(B) was not intended to apply to wholly past endangerments, it does not support the

---

the lapse of time between cause and effect erects a barrier for plaintiffs' recovery. When the defendants' acts occurred years before the plaintiffs' injuries, recovery under traditional burden rules is almost impossible. 'Because toxic waste pollution injuries do not fit into th[e] common law tort mold, victims are not compensated' (quoting Palma J. Strand, Note, *The Inapplicability of Traditional Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 Stan. L. Rev. 575, 618 (1993)); Kenneth J. Warren, *Emerging Trends in Litigation; Seeking Recovery for Costs of remediating Petroleum Contamination*, Legal Intelligencer 11 (Sept. 11, 1995) (claiming that "[s]tate common law remedies, when not entirely proscribed, often presented difficult evidentiary issues such as fingerprinting the fuel oil to ascertain its source and establishing the time period of disposal" (citing *Peco v. Hercules*, 762 F.2d 303 (3rd Cir. 1985))).

Other commentators, however, have asserted that the common law remedies may prove quite potent. See, for example, Allison Rittenhouse Hayward, *Common Law Remedies and the UST Regulations*, 21 B.C. Envir. Aff. L. Rev. 619 (1994) (concluding that "[a] popular myth in environmental law has maintained that individuals injured by pollution, such as a leaking tank, had little recourse at common law. An examination of common law actions for private nuisance, trespass, public nuisance and strict liability tells a different story. In fact, polluters often found themselves facing a successful plaintiff armed with a court injunction, and thus could choose either to bargain with the neighbor or cease business. Common law provided several remedies for victims of gasoline storage tank contamination" (footnote omitted)). While Hayward admits that the common law remedies contain many problems for potential plaintiffs, she maintains that "the regulatory regime that has generally replaced private law remedies does no better, and perhaps does worse." *Id.* at 620.

275. *KFC*, 1996 U.S. LEXIS 1955 at \*11-13. See Part IV.A.

276. *Hallstrom*, 493 U.S. at 26-27. See notes 215-17 and accompanying text.

277. See note 217 and accompanying text.



conclusion that plaintiffs are precluded from taking action to remediate the site during the course of the litigation.

An examination of RCRA's lack of a statute of limitations further supports the conclusion that plaintiffs are not barred from taking remedial action after commencement of the lawsuit. Even assuming that RCRA's failure to include a statute of limitations for Section 7002(a)(1)(B) provides conclusive evidence that Congress never intended to create a private right of action to recover response costs related to wholly past endangerments,<sup>278</sup> the lack of a limitations period does not indicate that a plaintiff cannot begin abatement measures during the course of the litigation. Statutes of limitation are primarily designed to eliminate stale claims.<sup>279</sup> However, requiring the presence of an imminent and substantial endangerment at the time the lawsuit is filed adequately ensures that stale claims will not be brought under RCRA's imminent citizen suit provision. Having determined that adopting a statute of limitations for Section 7002(a)(1)(B) would be unnecessary, the congressional failure to include a limitations period in no way indicates that plaintiffs should not be able to recover the reasonable costs associated with actions taken to remediate imminent hazards after the litigation begins.

At first glance, RCRA's use of the past and present tense in Section 7002(a)(1)(B) appears to make a stronger case for requiring a continuing endangerment throughout the course of the litigation than does RCRA's inclusion of a notice requirement or failure to include a statute of limitations. As explained previously, use of the phrase "may present" rather than "may have presented" when referring to the type of endangerments covered by RCRA's imminent citizen suit provision strongly suggests that the solid or hazardous waste must continue to present an environmental hazard when the plaintiff files suit.<sup>280</sup> Upon close examination, however, the past/present tense distinction does not support the conclusion that the waste must continue to present an imminent hazard throughout the course of the litigation. Rather, the language of RCRA Section 7002(a) suggests

---

278. See Part IV.A.1.b.

279. *Limitation of Actions* § 17, 51 Am. Jur. 2d (1970) (explaining that "[t]he mischief which statutes of limitation are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert. Thus, while one of the purposes of the statutes of limitation is to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured, there is another element of a more substantive character in the protection of the potential defendants from protracted fear of litigation").

280. See Part IV.A.1.a.

just the opposite—that the imminent and substantial endangerment requirement need only be satisfied at the time the lawsuit is filed.

Section 7002(a) is structurally divided into two parts.<sup>281</sup> The first part describes the conditions plaintiffs must satisfy before initiating a lawsuit under RCRA's various citizen suit provisions.<sup>282</sup> The second part outlines the remedies a court may award once the plaintiff has proven his or her case.<sup>283</sup> Importantly, the requirement that the solid or hazardous waste present an imminent and substantial endangerment is located in the first part of Section 7002(a), which describes the conditions for commencing the lawsuit, and not in the second part, which defines the type of relief a court may award after the case has been won.

The requirement portion of Section 7002(a) states that “any person *may commence*” a suit against anyone “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 . . . .”<sup>284</sup> The critical language is “may commence.” Although RCRA's imminent citizen suit provision requires the presence of a continuing endangerment when the lawsuit is filed, compliance with this requirement is only necessary to *initiate* the lawsuit, not to *maintain* the lawsuit.

The remedy portion of Section 7002(a) says nothing of the need for an imminent endangerment. It provides that a court may “restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste,” or “to order such person to take such other action as may be necessary.” This portion of Section 7002(a) does not attempt to limit the authority of the courts to remediate continuing endangerments. Rather, once the lawsuit is successfully commenced, a court may, within its equitable discretion,

---

281. The first part will be referred to as the “requirement” portion of Section 7002(a). The second part will be referred to as the “remedy” portion.

282. RCRA § 7002(a) provides for three different types of citizen suits. First, § 7002(a)(2), authorizes a citizen to sue the Administrator of the EPA to perform a nondiscretionary act or duty. RCRA § 7002(a)(2), 42 U.S.C. § 6972(a)(2). Second, § 7002(a)(1)(A), authorizes a citizen to sue any person in violation of RCRA's requirements or regulations. RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A). Finally, § 7002(a)(1)(B) authorizes a citizen to sue any person contributing to an imminent and substantial endangerment. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

283. Although § 7002(a) outlines the remedies a court may award under each of the three types of citizen suit provisions, this Part will only address the remedies available under RCRA's imminent citizen suit provision.

284. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

order any relief the court finds necessary and appropriate,<sup>285</sup> including the recovery of environmental cleanup costs expended after initiation of the lawsuit.<sup>286</sup>

Explained differently, the continuing endangerment requirement serves as a threshold issue that must be satisfied before a court considers awarding an appropriate remedy. Should a plaintiff fail to comply with this preliminary requirement, the question of what relief a court may order never becomes relevant—RCRA's imminent citizen suit provision cannot provide a remedy unless the provision's preliminary requirements are satisfied. However, once the hurdle of proving the existence of a continuing endangerment has been overcome and jurisdiction has attached, the federal courts should be presumed to exercise their full equitable authority.

Not only does the statutory evidence fail to prove that the solid or hazardous waste must continue to present an imminent and substantial endangerment throughout the course of the litigation, an examination of RCRA's objectives indicates that such a result should be avoided. RCRA states that its primary purpose is to "promote the protection of health and the environment."<sup>287</sup> Moreover, RCRA declares it to be the national policy of the United States to reduce or eliminate "the generation of hazardous waste . . . as expeditiously as possible" and to treat, store, or dispose of any waste that is generated "so as to minimize the present and future threat to human health and the environment."<sup>288</sup>

---

285. A number of cases have noted that Congress gave the courts broad authority to grant equitable relief under RCRA. See, for example, *Aceto*, 872 F.2d at 1383; *Conservation Chemical*, 619 F. Supp. at 199; *NEPACCO*, 810 F.2d at 739-40; *Reilly Tar*, 546 F. Supp. at 1109-10; *Fallowfield Development*, 1993 U.S. Dist. LEXIS 6233 at \*37 ("RCRA grants this Court broad discretion to fashion an appropriate legal or equitable remedy"); *Price*, 688 F.2d at 211 ("By enacting the endangerment provisions of RCRA and SDWA, Congress sought to invoke the broad and flexible equity powers of the federal courts in instances where hazardous wastes threatened human health" (citing S. Rep. No. 96-172 at 5 (cited in note 88))). See also H.R. Rep. No. 98-198 at 47-49 (cited in note 31) (explaining that "due to the nature of hazards presented by disposal sites, Section 7003 is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes" (quoting *Price* 688 F.2d at 213-14)); H.R. Committee Print No. IFC at 32 (cited in note 88) (concluding that Section 7003 was intended to confer "overriding authority to respond to situations involving a substantial endangerment to health or the environment").

286. See, for example, *Wyandotte Transportation*, 389 U.S. at 204 (concluding that restitution was necessary to avoid "the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequence of his negligence onto his victim").

287. RCRA § 1003(a), 42 U.S.C. § 6902(a).

288. *Id.* § 1003(b), 42 U.S.C. § 6902(b). As the court stated in *Price*, "[p]rompt preventive action [is] the most important consideration." 688 F.2d at 214. See H.R. Conf. Rep. No. 98-1133, at 119 (cited in note 97); S. Rep. No. 96-172 at 5 (cited in note 88). Justice O'Connor states in *KFC* that "RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards"

Construing RCRA's imminent citizen suit provision in such a manner so as to prohibit citizen plaintiffs from taking action to abate environmental threats after commencement of a lawsuit would unnecessarily frustrate the objectives outlined by Congress. Although Section 7002(a)(1)(B) requires the presence of a continuing endangerment at the outset of the litigation, neither the statutory evidence nor the legislative history indicates that the solid or hazardous waste must continue to threaten public health and the environment while the wheels of justice slowly turn. Such a result would not only magnify the risks posed by the waste,<sup>289</sup> but would also exacerbate the

---

but that its "primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated." 1996 U.S. LEXIS 1955 at \*7-8. That said, it seems apparent that Congress was seriously concerned about controlling the impact of hazardous waste on public health and the environment and that the courts ought to encourage citizens, within the regulatory scheme designed by Congress, to take remedial measures as soon as possible.

289. As Anderson, Mandelker, and Tarlock explain:

[c]hemical waste dumps have long been known to be dangerous. Just how dangerous and numerous they are was fully appreciated only in the mid-1970s. For decades, large quantities of dangerous residues, largely from industrial processes, have been accumulating on generators' premises or at dump sites to which the wastes have been transported. . . . As time has passed, storage containers, ponds, and burial grounds have been adversely affected by corrosion, breakage, natural processes, and acts of vandalism, so that the waste material has begun to disperse in ground and surface waters, in the soil, and in the air. . . .

Loosed in the environment, waste chemicals often display a deathly versatility. They may explode, ignite, or bring instant death from inhalation of their fumes. But more often they work indirectly and incrementally, just as other toxic substances do, insinuating themselves slowly, revealing themselves through mild symptoms, which are usually attributable to another, far less offensive, source. Human exposure occurs via direct contact with the skin, inhalation, or ingestion of drinking water and food in which toxicants may be reconcentrated. The numbers of persons and environmental systems threatened are high, although incidents of actual harm are not yet numerous. Potential impacts on human health range from acute and chronic impacts on the respiratory, nervous, alimentary, and urological systems to cancer, infant deformity, and permanent genetic impairment, as in the case of other toxic substances.

*Environmental Protection* at 601-02 (cited in note 2).

Unfortunately, these problems become worse the longer the hazardous waste site goes unremediated. As Roger C. Dower explains:

[A] hazardous waste site may continue to pollute long after it has ceased accepting new wastes. One can stop an industrial facility from polluting the air by shutting down the plant. In a similar fashion, one can stop a plant's production of hazardous wastes. However, environmental and health risks may always be associated with a disposal facility even after it has closed. This characteristic has important implications for the design of effective regulatory and enforcement strategies, as we will see.

Roger C. Dower, *Hazardous Wastes* in Paul R. Portney, ed., *Public Policies for Environmental Protection* 151, 154 (Resources For the Future, 1990). See id. ("[H]azardous wastes can affect all environmental media—air, water, and land. As noted above, wastes placed in metal barrels may begin over time to leak into the ground, and may slowly seep through the soil into underground aquifers or be carried through surface runoff into streams or rivers. Emissions from wastes stored above ground may mix with the surrounding air to pose a health threat to those downwind from or near the site. And with hazardous wastes the relevant linkages

costs of eventual remediation.<sup>290</sup> Considering the detrimental effects that may result from postponing cleanup efforts, it is doubtful that Congress intended to craft such a restriction.<sup>291</sup>

Further evidence supporting the conclusion that plaintiffs may take action after initiation of the law suit can be found in the thoughtful decision of the Third Circuit in *United States v. Price*.<sup>292</sup> There the EPA filed a motion requesting the court to issue a preliminary injunction ordering the defendants to pay for a diagnostic study of the hazardous waste site.<sup>293</sup> The district court denied the motion, concluding

---

between the disposal of wastes and their ultimate effects on health and the environment can be much more numerous and complex than the linkages involved with conventional pollutants. Exposure routes are not often direct and may involve several different avenues simultaneously").

290. Although there is some dispute as to whether remediation of hazardous waste sites is an efficient use of resources, once remedial action becomes inevitable, it certainly makes sense to take action as soon as possible rather than let the site continue to contaminate the environment. National Commission on the Environment, *Choosing a Sustainable Future* 99 (Island Press, 1993) ("There is now widespread recognition that preventing pollution is more effective and efficient than seeking to limit through control mechanisms at the 'end-of-the-pipe.' While end-of-the-pipe approaches have resulted in considerable progress, they do not appear capable of addressing pressing problems successfully").

291. Moreover, plaintiffs under a legal obligation to remediate a contaminated site will often lack the time to seek a mandatory injunction in the courts. Resolution of these cases typically takes years. Requiring citizen plaintiffs to wait for the slow judicial process would effectively make the citizen suit provision useless for those who need it the most—innocent citizens with a financial stake in the property and potential liability for not cleaning up the contamination. As the Ninth Circuit explained in *KFC*, "[w]hen the government orders clean-up, the innocent citizen must respond expeditiously to the order. 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.'" 49 F.3d at 523.

To interpret RCRA's citizen suit provision to prohibit a plaintiff from receiving compensation for actions taken after notice has been given, after the defendant has had an opportunity to remediate the site, and after suit has been filed would substantially diminish the ability of the statute to clean up environmental contamination as expeditiously as possible. *Id.* Moreover, allowing those responsible for creating public health hazards to freely disregard their public duty to abate those hazards, free from any obligation to compensate those who take remedial actions on their behalf, would encourage individuals to evade their legal obligations and would unfairly punish innocent citizens forced to assist with the government's abatement efforts. *Id.*

Indeed, innocent parties have a greater need for restitutionary remedy than does the Administrator of the EPA. The Administrator has the benefit of controlling the timing of the cleanup and of ordering the responsible parties to clean up the site. Conversely, private citizens are often left with no choice but to clean up the hazardous waste site immediately or face sanctions. As the Ninth Circuit in *KFC* explained, "[t]he right to reimbursement becomes important to the Administrator only when contamination requires prompt attention, which is always the case for private citizens who are ordered to remedy contamination." *Id.* at 524.

292. 688 F.2d 204 (3d Cir. 1982). See notes 81-90 and accompanying text.

293. *Id.* at 208. Although the action in *Price* was based on RCRA § 7003, the EPA's imminent hazard authority, the decision is highly relevant to the scope of § 7002(a)(1)(B), RCRA's imminent citizen suit provision, in that liability under the two provisions was designed by Congress to be identical. See note 78 and accompanying text.

that such relief was barred as a matter of law.<sup>294</sup> The Third Circuit reversed this ruling but agreed with the district court that ordering the defendants to pay for the study may not have been an appropriate form of preliminary relief in this particular circumstance.<sup>295</sup> The court, however, proposed another option available to the EPA:

In those circumstances, the most practical and effective solution may well have been to refuse the government's request for a preliminary injunction thereby necessitating the study be undertaken by EPA without delay. Prompt preventive action was the most important consideration. Reimbursement could thereafter be directed against those parties ultimately found to be liable.<sup>296</sup>

In ruling that the EPA could conduct the diagnostic study rather than waiting years for a court to issue a mandatory injunction ordering the defendants to take such action, the Third Circuit acknowledged that RCRA's imminent hazard authority authorizes plaintiffs to take remedial action after commencement of the law suit and, where appropriate, to recover their reasonable response costs.<sup>297</sup>

Finally, although the interpretation of Section 7002(a)(1)(B) advocated by this Note would allow plaintiffs to recover reasonable remediation costs under certain proscribed circumstances, it would not turn RCRA into a watered-down cost recovery statute thereby rendering CERCLA obsolete.<sup>298</sup> Actions governed by RCRA and

---

294. *Price* 688 F.2d at 209. The court reached this conclusion despite the fact that "an extensive geohydrological study of the area around the landfill was 'essential in devising a strategy to contain and mitigate the pollution and to protect Atlantic City's water supply,' and that it was 'imperative that such a study be done immediately.'" *Id.*

295. *Id.* at 214 (concluding that "it may well be that the public interest counseled against the grant of the requested preliminary relief. Very large sums of money were required to pay for the diagnostic study, and there may have been some question about the original defendants' financial ability to fund it").

296. *Id.* This case demonstrates where *NEPACCO* and *Aceto* went wrong. In those cases, the Eighth Circuit should not have allowed the EPA to recover the remediation costs expended prior the filing of the lawsuit. This restriction should not prove to be a problem considering that the EPA is largely able to control when abatement actions must take place. RCRA § 7003(a), 42 U.S.C. § 6973(a) (authorizing the Administrator of the EPA to order those contributing to an imminent and substantial endangerment "to take such other action as may be necessary").

297. Importantly, the mere fact that the EPA took action to remediate the endangerment does not ensure that the government will recover all of its response costs. For example, a court may find that the defendants did not contribute to the environmental endangerment or that certain remedial actions were unnecessary or unreasonable. In the context of abating an imminent hazard, restitution is "limited to the reasonable costs for abatement, not necessarily the amount expended, and does not extend to future costs." *Schenectady Chemicals*, 479 N.Y.S.2d at 1014. Plaintiffs will not be free from risk should they take measures to clean up the hazardous waste site after commencement of the litigation. However, given the importance of taking action as quickly as possible, courts should allow plaintiffs to take action after filing the lawsuit.

298. The Court held in *KFC* that the language and structure of CERCLA when compared with the language and structure of RCRA indicated that RCRA was not intended to extend to wholly past endangerments. 1996 U.S. LEXIS 1955 at \*10-11. Indeed, if RCRA were to be in-

CERCLA would remain fundamentally distinct. Although filing suit under RCRA offers plaintiffs some important advantages,<sup>299</sup> RCRA's imminent citizen suit provision does not provide for the recovery of environmental response costs when a private party cleans up the contaminated waste site before taking the matter to court. Plaintiffs seeking to follow this course of action will have to file suit under CERCLA's cost recovery provisions.<sup>300</sup> Unlike CERCLA, RCRA's imminent citizen suit provision requires that the solid or hazardous waste continue to present "an imminent and substantial endanger-

---

torpreted as applying to past endangerments as the Ninth Circuit's did in *KFC*, the balance between RCRA and CERCLA would be seriously disrupted, rendering CERCLA obsolete. See, for example, *Hazardous Waste: U.S. Supreme Court Agrees to Decide if Cleanup Costs Recoverable Under RCRA*, Daily Rep. for Executives 188 (Sept. 28, 1995) (characterizing the decision as "a significant expansion of RCRA remedies, with procedural and substantive advantages that could virtually subsume the cost recovery and contribution provisions of the superfund law"); *Citizens Can Recover Pollution Cleanup Costs*, Natl. L. J. B2 (March 13, 1995) (stating that the decision "could greatly expand environmental cleanup litigation"); Todd Woody, *Court Broadens Rights for Owners of Polluted Land; Ninth Circuit Ruling Allows Suits for Cleanup Costs Under RCRA*, Recorder (March 2, 1995) (concluding that the decision "could dramatically expand hazardous waste litigation"); Richard M. Kuntz, *Private Parties Gain New Tool to Recover Cleanup Costs*, Chicago Daily L. Bull. 6 (April 17, 1995) (concluding that "[t]aken together, *KFC* and *Valentine* would appear to also allow a right of contribution in RCRA section 7002 citizen suits. Thus, both the Comprehensive Environmental Response, Compensation and Liability Act and RCRA may now provide a seamless web from which private parties can fashion may have surpassed the attractiveness of CERCLA to a private plaintiff").

299. RCRA's citizen suit provision has a number of advantages over CERCLA. First, RCRA covers a larger scope of substances, including waste petroleum, than does CERCLA. Cooke, 3 *Law of Hazardous Waste* § 15.01[3][a] at 15-10 (cited in note 224) (noting that certain distinctions between CERCLA and RCRA "provide Section 7003 and its Section 7002 citizen suit counterpart with a broader scope of coverage than CERCLA for all practical purposes, for although the purview of Section 7003 is limited to waste materials, it is generally waste that have been disposed of or spilled that normally present such a hazard rather than containerized virgin materials"). See *Aceto*, 872 F.2d at 1378 (concluding that "CERCLA's sweep, while broad, is more limited than RCRA's in terms of the substances it covers . . . [with] CERCLA liability . . . attach[ing] only to those responsible for 'hazardous substances' as defined in the statute"). Second, RCRA authorizes the award of litigation costs, "(including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party." RCRA § 7002(e), 42 U.S.C. § 6972(e). Third, under RCRA's citizen suit provision, plaintiffs are authorized to seek civil penalties. RCRA §§ 3008(a) and (g), 42 U.S.C. §§ 6928(a) and (g). Fourth, plaintiffs do not have to comply with the National Contingency Plan. Under CERCLA, a private party must demonstrate that the costs incurred were consistent with the National Contingency Plan. CERCLA §§ 107(a)(4)(A) and (B). See Babich, 24 *Envir. L. Rep.* at 10123 (cited in note 14) ("To name a few of § 7002(a)(1)(B)'s advantages: It provides specifically for recovery of attorneys fees by private parties, it does *not* require compliance with the national contingency plan, and it authorizes courts to issue mandatory cleanup orders. The section's most glaring disadvantages are its failure to provide specifically for restitution of past response costs, and its failure to provide for recovery of private damages"). Despite RCRA's advantages over CERCLA, there is little reason to fear a flood of lawsuits under this interpretation. See *id.* (concluding that RCRA is nothing more than a codification of nuisance law and that "[j]ust as state courts do not appear to have a large backlog of frivolous common law nuisance lawsuits, there is no particular reason to fear that federal courts will entertain frivolous litigation under § 7002(a)(1)(B)").

300. See note 14 and accompanying text.

ment to public health and the environment" at the time the lawsuit is filed.<sup>301</sup> However, after the preliminary requirements of RCRA Section 7002(a)(1)(B) have been satisfied, citizen-plaintiffs ought to be able to clean up the hazardous waste site and, if a court decides that such relief would be appropriate, recover their reasonable response costs.<sup>302</sup>

## V. CONCLUSION

Although expanding RCRA's imminent citizen suit provision to allow private citizens to recover costs expended to remediate past endangerments as the Ninth Circuit did in *KFC* may seem initially appealing, the Supreme Court was correct to reverse the decision for at least two reasons. First, the language, structure, and context of RCRA's imminent citizen suit provision indicates that plaintiffs must demonstrate the presence of a continuing endangerment at the time the lawsuit is filed. Authorizing citizens to recover their response costs for past environmental hazards despite RCRA's continuing endangerment requirement unjustifiably ignores the regulatory scheme devised by Congress. Second, expanding RCRA's imminent citizen suit provision to include past endangerments is unnecessary in that RCRA authorizes the courts to order any action they deem appropriate and necessary provided the technical prerequisites of Section 7002(a)(1)(B) have been satisfied.

---

301. See Part IV.A.

302. Such an approach would not only be more expedient, it may also be more efficient than filing an action under CERCLA. As one commentator has explained:

The strict, joint, several, and retroactive nature of liability under § 7002(a)(1)(B) is remarkably similar to liability under CERCLA. Thus, like CERCLA, § 7002(a)(1)(B) raises the stakes for releases of potentially dangerous pollution, encouraging waste minimization efforts that go beyond bare-minimum compliance with environmental regulations. Unlike CERCLA, however, § 7002(a)(1)(B) is not tied to a potentially wasteful government cleanup program. Indeed, because it allows the private sector to address pollution problems without the need for intervention by the EPA bureaucracy, RCRA's citizen imminent hazard authority may be one of Congress's least complicated, most cost-effective environmental protection initiatives.

Babich, 24 *Envir. L. Rep.* at 10136 (cited in note 14). See *id.* at 10123 (concluding further that "the open-ended nature of provisions like § 7002(a)(1)(B) helps fuel private waste-minimization efforts that, ultimately, may be a more effective check on pollution than traditional, command-and-control government regulation"). See also Beverly McQueary Smith, *Recent Developments in Citizens's Suits Under Selected Federal Environmental Statutes*, in 2 *ALI-ABA Course of Study: Environmental Law* 701, 703 (Feb. 15-18, 1995) (concluding that "[i]n a time of limited resources to fulfill their legislative mandates, when governmental enforcers cannot or will not seek compliance from polluters, citizens' suits remain appealing gapfillers. Citizens' suits provide another vehicle for doing more with less").



Having complied with RCRA's notice and continuing endangerment requirements upon commencement of the lawsuit, plaintiffs should be allowed to take affirmative action to abate imminent hazards and, when appropriate, to recover their reasonable response costs. This approach gives defendants the option of remediating the hazardous waste site themselves rather than compensating plaintiffs for doing so, but at the same time ensures that plaintiffs will have the opportunity to take affirmative action, should a defendant decline the option, without waiting years for the litigation to come to a conclusion. Indeed, allowing plaintiffs to rehabilitate the waste site at the front end of the litigation would serve the primary objective of RCRA's imminent citizen suit provision—the prompt abatement of imminent endangerments—without abandoning wholesale the provision's preliminary requirements.

*Randall James Butterfield\**

---

\* The Author would like to thank Walter Burkley, Courtney Persons, and Greg Wehrer for their editorial assistance. The Author would especially like to thank Cheryl Johnson for the countless hours she spent managing the piece. This Note is dedicated to my wife, Melanie, for her never-ending patience and support.