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Hazardous Waste - The Supreme Court's Interpretation of RCRA: An Inequitable Result - KFC Western, Inc. v. Meghrig

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HAZARDOUS WASTE—The Supreme Court's Interpretation of RCRA: An Inequitable Result. *KFC Western, Inc. v. Meghrig*, 116 S. Ct. 1251 (1996).

INTRODUCTION

Prior to 1975, Alan and Margaret Meghrig negligently operated a gasoline station and contaminated their property with refined petroleum products.¹ In September 1975, the Meghrigs sold this property to KFC Western, Inc. (KFC) to operate a Kentucky Fried Chicken franchise without informing KFC of the soil contamination.² In October 1988, KFC discovered the contamination while upgrading the property. The City of Los Angeles Department of Building and Safety ordered KFC to halt construction on the property until the County of Los Angeles Department of Health Service (DHS) analyzed the soil. When the DHS found high levels of refined petroleum in the soil, the DHS ordered KFC to clean it up. KFC had not known about, nor did it contribute to the contamination.³ In 1989, KFC finished the cleanup, spending over \$211,000. KFC asked the Meghrigs for reimbursement but the Meghrigs refused.⁴ In 1992, KFC sued the Meghrigs in the U.S. District Court for the Central District of California under the Resource Conservation and Recovery Act's (RCRA or the Act) citizen suit provision.⁵ The district court dismissed the case, holding that section 6972(a)(1)(B) requires that an "imminent and substantial endangerment" exist at the time plaintiff files suit and "authorize[s] suits for injunctive relief only, not for damages."⁶

1. *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 519 (9th Cir. 1995), *rev'd*, *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251 (1996).

2. *Id.* KFC learned of the contamination thirteen years after this purchase while improving the property. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* 42 U.S.C. § 6972(a)(1)(B) (1994). This section states:

[A]ny person may commence a civil action . . .

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment

Id.

6. *KFC Western, Inc.*, 49 F.3d at 519; see *supra* note 5 and accompanying text.

KFC appealed to the United States Court of Appeals for the Ninth Circuit, and the Ninth Circuit reversed.⁷ In *KFC Western, Inc. v. Meghrig*, the Ninth Circuit held that RCRA authorizes the payment of restitution to a private citizen.⁸ According to the Ninth Circuit, the hazardous waste does not have to pose an imminent and substantial endangerment *when* the plaintiff files the lawsuit.⁹ In other words, the Act's imminent and substantial endangerment requirement does not limit the time when a plaintiff must file an action.¹⁰

The United States Supreme Court granted *certiorari* to decide whether RCRA's citizen suit provision authorizes a plaintiff to recover past cleanup costs when the hazardous waste no longer poses an imminent and substantial endangerment.¹¹ In *KFC Western, Inc. v. Meghrig*, the Supreme Court reversed the Ninth Circuit decision and held that section 6972(a) does not authorize the "award of past cleanup costs."¹² The Court also held that section 6972(a)(1)(B) requires an imminent and substantial endangerment to be present at the time the plaintiff files a lawsuit.¹³

This case note questions the equity of the *KFC Western Inc.* decision. It begins with a broad overview of RCRA, its citizen suit provision, its petroleum exemption, and also the petroleum exclusion found in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁴ It continues with a review of the circuit courts' conflicting interpretations of the citizen suit provision, which led to a grant of *certiorari* by the Supreme Court. The note expounds on the rationale of the Supreme Court's interpretation of the citizen suit provision and how the Supreme Court ultimately resolved the conflict between the circuits. Finally, the note explains the inequity resulting from the Court's decision, and suggests a possible solution to ameliorate this inequity. It examines repealing or amending the petroleum exclusion found in CERCLA, making CERCLA applicable to the fact pattern in *KFC Western, Inc.*¹⁵

7. *KFC Western, Inc.*, 49 F.3d at 519.

8. *Id.* at 521.

9. *Id.* at 520-21.

10. *Id.* at 520.

11. *KFC Western, Inc. v. Meghrig*, 116 S. Ct. 1251, 1253 (1996). The Eighth and Ninth Circuits were split concerning whether a plaintiff can recover past clean up costs when the hazardous waste no longer poses an imminent and substantial endangerment. See *infra* notes 69-92 and accompanying text.

12. *KFC Western, Inc.*, 116 S. Ct. at 1256.

13. *Id.*

14. See 42 U.S.C. §§ 6901-6992 (1994); 42 U.S.C. § 6972 (1994) (RCRA's citizen suit provision); 42 U.S.C. § 6921(b)(2)(B) (1994) (RCRA's petroleum exemption); 42 U.S.C. § 9601(14) (1994) (CERCLA's petroleum exclusion).

15. See *infra* note 66 and accompanying text.

BACKGROUND

Dissatisfied with the existing hazardous waste regulations,¹⁶ Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976.¹⁷ RCRA was designed to protect human health and the environment by regulating "the generation, transport, and disposal of hazardous wastes."¹⁸ This sweeping, "cradle to grave" legislation regulates hazardous waste from its creation to its disposal.¹⁹

Subsequently, the Environmental Protection Agency's (EPA) inefficient enforcement of RCRA prompted Congress to amend RCRA by passing the Hazardous and Solid Waste Amendments (HSWA) in 1984.²⁰ Congress passed the 1984 amendments to "ensure adequate protection of public health and the environment."²¹ These amendments included a national policy statement, which provides that the main purpose of RCRA is to "minimize the present and future threat to human health and the environment."²² To enforce this and other statutory objectives, Congress also expanded RCRA's citizen suit provision, codified at 42 U.S.C. § 6972(a)(1)(B).

16. Judith M. Nixon, *The Problem With RCRA—Do the Financial Responsibility Provisions Really Work?*, 36 AM. U. L. REV. 133, 137-138 n.27 (1986) (citing H.R. REP. NO. 94-1491, at 11, reprinted in 1976 U.S.C.C.A.N. 6238, 6249). For an example of hazardous waste regulations existing in 1965, see Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, tit. II, 79 Stat. 997 (1965).

17. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 1976 U.S.C.C.A.N. (90 Stat. 2795) 6238, 6239-6240 (codified as amended at 42 U.S.C. §§ 6901-6992 (1994)). This note refers to this provision as either section 6972(a)(1)(B) or section 7002(a)(1)(B).

18. 42 U.S.C. § 6902(a) (1994) (stating that the purpose of the legislation is to "promote the protection of health and the environment"); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 1976 U.S.C.C.A.N. (90 Stat. 2795) at 6240-41. "Unless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment." *Id.* See also Joel A. Mintz, *Abandoned Hazardous Waste Sites and the RCRA Imminent Hazard Provision: Some Suggestions for a Sound Judicial Construction*, 11 HARV. ENVTL. L. REV. 247, 250 (1987) (reinforcing the interpretation that RCRA was designed to regulate the generation, transport and disposal of hazardous wastes).

19. *Chicago v. Env'tl. Defense Fund*, 114 S. Ct. 1588, 1589 (1994); RICHARD C. FORTUNA & DAVID J. LENNETT, *HAZARDOUS WASTE REGULATION THE NEW ERA AN ANALYSIS AND GUIDE TO RCRA AND THE 1984 AMENDMENTS* 9 (1987).

20. Nixon, *supra* note 16, at 141. "The 1984 RCRA amendments were partly a result of Congress' dissatisfaction with the slow pace with which EPA was issuing final operating permits to new and existing facilities." *Id.*; Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S.C.C.A.N. (98 Stat. 3221) 5576, 5579 (codified as amended at 42 U.S.C. §§ 6901-6992 (1994)). "Equally distressing is the inadequate effort by the Agency with respect to criminal and civil enforcement actions. Part of this problem is due to insufficient personnel resources as well as some deficiencies in existing law." Nixon, *supra* note 16, at 141.

21. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S.C.C.A.N. (98 Stat. 3221) at 5576 (recognizing that the current legislation was not achieving its goal and amending it to be more inclusive and readily enforceable).

22. See 42 U.S.C. § 6902(b) (1994) (stating that the national policy of the United States is to reduce the generation of hazardous waste and to minimize present and future threats to human health and the environment).

RCRA's Citizen Suit Provision

In 1976, section 7002 of the Act authorized only two types of citizen suits.²³ The first authorized against the Administrator of the EPA for failing to perform his statutory duties,²⁴ and the second granted private citizens the power to sue anyone alleged to be in violation of RCRA.²⁵ In 1984, Congress expanded RCRA to include a third type of citizen suit.²⁶ Section 7002(a)(1)(B) authorizes a private cause of action against any person who has contributed to hazardous waste contamination.²⁷

Courts have wrestled with the interpretation of section 7002(a)(1)(B) since its passage.²⁸ The two main provisions courts must interpret are whether the statute provides for restitution²⁹ and whether an imminent and substantial endangerment must exist at the time the plaintiff files a lawsuit. To decide these issues, courts often compare RCRA with CERCLA, and are frequently required to interpret RCRA's petroleum exemption and CERCLA's petroleum exclusion.³⁰

Remedies Under RCRA's Citizen Suit Provision

The first section courts are often required to interpret is section 6972(a). This section expressly grants equitable relief in the form of mandatory or prohibitory injunctions.³¹ Congress did not expressly provide for

23. Randall James Butterfield, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 VAND. L. REV. 689, 701 (1996).

24. 42 U.S.C. § 6972(a)(2) (1994); Butterfield, *supra* note 23, at 701.

25. 42 U.S.C. § 6972(a)(1)(A) (1994); Butterfield, *supra* note 23, at 701.

26. Hazardous and Solid Waste Amendments of 1984, *supra* note 20; 42 U.S.C. § 6972(a)(1)(B) (1994).

27. See *supra* note 5 and accompanying text.

28. See, e.g., *KFC Western, Inc. v. Meghrig*, 116 S. Ct. 1251, 1256 (1996); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) (deciding what relief is available to private citizens); *Lincoln Properties, Ltd. v. Higgins*, No. CIV.S-91-760DFL/GGH, 1993 WL 217429, at *11 (E.D. Cal. Jan. 21, 1993) (deciding what constitutes an imminent and substantial endangerment).

29. Restitution is defined as "[a]n equitable remedy under which a person is restored to his or her original position prior to loss or injury." BLACK'S LAW DICTIONARY 1313 (6th ed. 1990). For purposes of this case note, restitution refers to the amount of money that would restore KFC to its original position prior to paying for the cleanup of the petroleum-contaminated soil.

30. See *infra* notes 60-68 and accompanying text.

31. 42 U.S.C. § 6972(a) (1994). This section states:

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past present handling, storage, treatment, transportation, or disposal, of any solid or hazardous waste referred to in paragraph (1)(B),

other equitable remedies, such as restitution, in this section. As a result, courts were left to decide whether the express statutory language in section 6972(a), authorizes courts to imply a private cause of action to recover response costs.

Generally, when Congress passes a statute that specifies what relief is available, courts cannot expand that remedy.³² Consequently, under section 6972(a), a court is expressly authorized to grant only an injunction.³³ However, an opposing view holds that when Congress expressly authorizes the courts to grant equitable relief, courts have broad discretion under their equitable jurisdiction to grant any equitable relief which may be necessary.³⁴ The equitable remedy must be necessary to promote justice to the plaintiff if the plaintiff's lawsuit is successful.³⁵ Under this theory, a court granting a remedy under section 6972(a) could grant an injunction as well as other necessary equitable relief, including restitution.

Imminent and Substantial Endangerment

The second provision courts often interpret is the imminent and substantial endangerment provision. Section 6972(a)(1)(B) applies to a private action involving "any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."³⁶ Unfortunately, Congress did not define "imminent and substantial endangerment" in RCRA's definitions section,³⁷ leaving this interpretation to the courts.³⁸

They have interpreted the word "may" broadly, holding that this is expansive language which does not limit the application of section

to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

Id. (emphasis added).

32. *KFC Western, Inc.*, 116 S. Ct. at 1256; *Furrer v. Brown*, 62 F.3d 1092, 1096-97 (8th Cir. 1995); *Walls v. Waste Corp.*, 761 F.2d 311, 315 (6th Cir. 1985).

33. *KFC Western, Inc.*, 116 S. Ct. at 1256; *Furrer*, 62 F.3d at 1096-97; *Walls*, 761 F.2d at 315.

34. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

35. *Id.*

36. 42 U.S.C. § 6972(a)(1)(B) (1994); see *supra* note 5 and accompanying text.

37. 42 U.S.C. § 6903 (1994). None of the individual terms, "imminent," "substantial," nor "endangerment," is found in RCRA's definitions section.

38. *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 13 (D.C. Cir. 1976); *Lincoln Properties, Ltd. v. Higgins*, No. CIV.S-91-760DFL/GGH, 1993 WL 217429, at *11 (E.D. Cal. Jan. 21, 1993) (citing *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991)); *United States v. Onati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980).

6972(a)(1)(B) to emergency situations.³⁹ Accordingly, section 6972(a)(1)(B) applies where there is only a threat of an imminent and substantial endangerment at the time of the suit, not necessarily a present and immediate harm.⁴⁰

An "endangerment" is something less than an actual harm.⁴¹ For an "endangerment" to be present, there must be potential harm, but proof that actual harm will occur immediately or ever is not required.⁴² Courts have held that "[t]he meaning of 'endanger' is not disputed. Case law and dictionary definitions agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur."⁴³

Likewise, courts have interpreted "imminence" as requiring only a risk of harm.⁴⁴ "Imminence" refers to the nature of the threat rather than identification of the time when the endangerment initially arose.⁴⁵ "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."⁴⁶

Furthermore, an "imminent endangerment" must also be "substantial." "Substantial" requires only a "reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or threatened re-

39. *Waste Indus., Inc.*, 734 F.2d at 165; *Lincoln Properties, Ltd.*, 1993 WL 217429 at *11 (citing *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991)).

40. *KFC Western, Inc. v. Meghriq*, 116 S. Ct. 1251, 1255 (1996). "The RCRA provision implies that there must be a threat which is present now, although the impact of the threat may not be felt until later." *Price*, 39 F.3d at 1019; *Lincoln Properties, Ltd.*, 1993 WL 217429 at *11-12.

41. *Lincoln Properties, Ltd.*, 1993 WL 217429 at *12 (citing *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 13 (D.C. Cir. 1976)); *Jean Buo-Lin Chen Fung, KFC Western, Inc. v. Meghriq: The Merits and Implications of Awarding Restitution to Citizen Plaintiffs Under RCRA § 6972(a)(1)(B)*, 22 *ECOLOGY L.Q.* 785, 789 (1995).

42. *Price*, 39 F.3d at 1019 (stating that "'endangerment' means a threatened or potential harm and does not require proof of actual harm"); see also *Lincoln Properties, Ltd.*, 1993 WL 217429 at *12; *Ottati & Goss, Inc.*, 630 F. Supp. at 1394; *Vertac Chem. Corp.*, 489 F. Supp. at 885.

43. *Lincoln Properties, Ltd.*, 1993 WL 217429 at *12 (quoting *Ethyl Corp. v. Envtl. Protection Agency*, 541 F.2d 1, 13 (D.C. Cir. 1976); see also, *Price*, 39 F.3d at 1018; *Ottati & Goss, Inc.*, 630 F. Supp. at 1394.

44. *KFC Western, Inc.*, 116 S. Ct. at 1255; *Lincoln Properties, Ltd.*, 1993 WL 217429 at *12 (citing *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991)).

45. *Price*, 39 F.3d at 1019 (citing *United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982)).

46. *Waste Indus., Inc.*, 734 F.2d at 166. Compare with *KFC Western, Inc. v. Meghriq*, 49 F.3d 518, 520-21 (9th Cir. 1995) (stating that "we [the court] agree with KFC that RCRA authorizes citizen suits with respect to contamination that in the past posed imminent and substantial danger"). The *KFC* court relied on an Eighth Circuit decision stating that "the imminent endangerment requirement 'limit[s] the reach of RCRA to sites where the potential for harm is great' but [does not] limit the time for filing an action." *Id.* (quoting *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)).

lease of a hazardous substance if remedial action is not taken."⁴⁷ The courts do not need to determine the exact magnitude of the endangerment.⁴⁸ However, relief will not be granted if the harm is remote, speculative, or minuscule.⁴⁹ In other words, courts have interpreted an "imminent and substantial endangerment" as requiring a threat of possible harm and a reasonable cause for concern that this harm may occur at some time in the future.

RCRA and CERCLA Compared

To help determine what remedies are available under RCRA's citizen suit provision, courts have compared RCRA with other environmental legislation, such as CERCLA.⁵⁰ Unlike RCRA, CERCLA's main purpose is to promote the cleanup of inactive hazardous waste sites,⁵¹ so it expressly authorizes a private citizen to sue for past cleanup costs.⁵²

Based on the express language and purpose of CERCLA, citizens have the authority to sue for response costs. There are several provisions in CERCLA which reinforce this authority.⁵³ For example, CERCLA has a statute of limitations which states that a cost recovery action must be commenced within three years of the removal.⁵⁴ In addition, CERCLA limits a plaintiff's recovery to a "reasonable" amount.⁵⁵

Similar provisions are not found in RCRA. RCRA does not contain a statute of limitations, nor does it limit the amount of money that a

47. *Lincoln Properties, Ltd.*, 1993 WL 217429, at *12.

48. *Id.*

49. *Id.*; *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1109 (D. Minn. 1982) (quoting H.R. REP. NO. 93-1185, at 35-36, *reprinted in* 1974 U.S.C.C.A.N. 6454, 6487-88).

50. 42 U.S.C. §§ 9601-9675 (1994).

51. H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. "The reported bill would amend the Solid Waste Disposal Act to provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by such sites." *Id.* Compare CERCLA with RCRA, *supra* note 19 and accompanying text (stating that the purpose of RCRA is to regulate hazardous waste from its creation to its disposal).

52. 42 U.S.C. § 9659(c) (1994) (stating that "the district court shall have jurisdiction in actions brought under subsection (a)(1) of this section to enforce the standard, regulation, condition, requirement, or order concerned . . . , to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation") (emphasis added); compare CERCLA with RCRA, 42 U.S.C. § 6972(a) (1994), (expressly authorizing a court to award private citizens only injunctive relief).

53. See, e.g., 42 U.S.C. § 9613(g)(2)(B) (1994) (statute of limitations); 42 U.S.C. § 9607(a)(4)(A)-(B) (1994) (plaintiffs recovery must be reasonable).

54. 42 U.S.C. § 9613(g)(2)(A) (1994). This section states that "an initial action for recovery of the costs referred to in section 9607 of this title must be commenced . . . (B) for a removal action, within 3 years after completion of the removal action." *Id.*

55. 42 U.S.C. §§ 9607(a)(4)(A)-(B) (1994) (stating that the plaintiff's recovery must be consistent with the national contingency plan).

plaintiff may recover. The absence of these provisions in RCRA creates problems for the courts. They are left to wonder whether the language of 6972(a) implies a remedy like restitution.

Furthermore, the inclusion in RCRA of a mandatory notice requirement, which states that "[n]o action may be commenced . . . prior to 60 days after the plaintiff has given notice of the violation to — the Administrator, the State . . . , and any alleged violator," also poses an interpretation problem for courts.⁵⁶ The EPA and state agencies are RCRA's main enforcers.⁵⁷ To ensure that these mechanisms are employed before a private citizen brings an action, a private citizen must notify the EPA before taking any action. This gives the EPA the chance to initiate a cleanup first.⁵⁸ If the EPA does not act, then a private citizen may sue under section 6972(a).⁵⁹ The purpose of the notice requirement, in other words, is to notify the government and give the government a chance to take action to abate the hazard. The need for a citizen suit is avoided if the government chooses to enforce the statute.

56. 42 U.S.C. § 6972(b)(2)(A) (1994). This section states:

No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—

- (i) the Administrator;
- (ii) the State in which the alleged endangerment may occur;
- (iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section

The interpretation problem that arises from the notice requirement is as follows: Unlike a private citizen, courts have held that § 6973 authorizes the EPA to sue a polluter without notice. The EPA needs only evidence of a violation of RCRA. However, a private citizen must notify the EPA before he can sue. This difference, the reasoning then goes, justifies authorizing the EPA restitution, but not a private citizen.

57. 42 U.S.C. §§ 6972(b)(1)(A)(i)-(ii) (1994). These sections provide:

Actions prohibited

- (1) No action may be commenced under subsection (a)(1)(A) [the citizen suit provision] of this section—
 - (A) prior to 60 days after the plaintiff has given notice of the violation to—
 - (i) the Administrator
 - (ii) the State in which the alleged violation occurs

Id. See *supra* note 56 and accompanying text.

58. H.R. REP. NO. 98-198, pt. 1, at 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

Section 11 confers on citizens a limited right under Section 7002 to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under Section 7003. This right can only be exercised if the Administrator (following notice of the intended litigation) fails to file an action under 7003.

Id.

59. 42 U.S.C. §§ 6972(b)(2)(B)-(C) (1994) (stating that a private action may not be commenced if the Administrator or the State where the alleged site exists has already commenced an action against the alleged offenders).

RCRA's Petroleum Exemption and CERCLA's Petroleum Exclusion

Congress passed RCRA's petroleum exemption and CERCLA's petroleum exclusion "to protect America's oil and gas industry from regulations that were perceived as a threat to the continued existence of domestic producers at a time when America was perceived to be dangerously dependent on foreign oil."⁶⁰ Congress was concerned that increasing regulation on the oil and gas industry would devastate the industry and close numerous sites.⁶¹ Congress also determined that existing federal and state regulations were adequate to protect human health and the environment.⁶² However, many critics argue that the exemption and the exclusion create enormous areas where hazardous wastes and substances, which cause damage to human health and the environment, are excluded from regulation.⁶³

RCRA's petroleum exclusion states that "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy" are not hazardous wastes.⁶⁴ According to Eaton and Wrotenbery, "[e]xempt oil field wastes fall into the following categories:

1. Produced waters — mineralized waters produced with and then separated from oil and gas.
2. Drilling fluids — mixtures of water, clay, barite and other additives used in drilling wells.
3. Associated wastes — other wastes uniquely associated with drilling and production operations, such as crude oil tankbottoms (oil, sediment, and water).⁶⁵

CERCLA's petroleum exclusion is much more inclusive. Section 101(14) of CERCLA provides that "the term [hazardous substance] does

60. Daniel L. McKay, *RCRA's Oil Field Wastes Exemption and CERCLA's Petroleum Exclusion: Are They Justified?*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 41 (1995); Michael M. Gibson and David P. Young, *Oil and Gas Exemptions Under RCRA and CERCLA: Are They Still "Safe Harbors" Eleven Years Later?*, 32 S. TEX. L. REV. 361, 364-65 (1991). For a discussion of RCRA's petroleum exemption and CERCLA's petroleum exclusion see *infra* notes 61-68 and accompanying text.

61. McKay, *supra* note 60, at 41; Gibson and Young, *supra* note 60, at 394-95; Roger Armstrong, Comment, *CERCLA's Petroleum Exclusion: Bad Policy in a Problematic Statute*, 27 LOY. L.A. L. REV. 1157, 1172-73 (1994).

62. McKay, *supra* note 60, at 41.

63. *Id.*; Armstrong, *supra* note 61, at 1186-87.

64. 40 C.F.R. § 261.4(b)(5) (1996).

65. McKay, *supra* note 60, at 53 (citing Terri Eaton & Lori Wrotenbery, *State Environmental Regulation in the Oil Field*, Oct. 1994, at 9).

not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance."⁶⁶ The scope of this exclusion is unclear from the language of the statute. Courts have generally interpreted the exclusion to cover both crude oil and refined oil.⁶⁷ However, the exclusion does not encompass petroleum which has been mixed with hazardous substances outside of the refining process.⁶⁸

The Ninth Circuit's Approach

In *KFC Western Inc. v. Meghri*, the United States Court of Appeals for the Ninth Circuit considered whether RCRA's citizen suit provision authorized a private citizen to collect restitution for hazardous waste cleanup costs.⁶⁹ The court held that section 6972(a) grants the courts broad discretion in ordering equitable remedies.⁷⁰ It also concluded that section 6972(a)(1)(B) did not require that an imminent and substantial endangerment exist when the lawsuit was filed.⁷¹ Finally, the court reasoned that the lack of a statute of limitations and the inclusion of a mandatory notice requirement did not prove that Congress intended to limit the remedies available under RCRA.⁷²

The Ninth Circuit held that section 6972(a) authorizes the courts to order any equitable relief that may be necessary to promote justice.⁷³ To reach this conclusion, the court compared section 6972, the citizen suit provision, with the almost identical wording of section 6973, the govern-

66. 42 U.S.C. § 9601(14) (1994).

67. See, e.g., *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 802-03 (9th Cir. 1989) (holding that CERCLA's petroleum exclusion includes leaded gasoline); *Cose v. Getty Oil Co.*, 4 F.3d 700, 708 (9th Cir. 1993) (stating that "leaded tank bottoms fall within the petroleum exclusion, unless otherwise excluded as a 'hazardous substance'"); *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1498 (E.D. Wis. 1994); *Bunger v. Hartman*, 797 F. Supp. 968, 972 nn.4-5 (S.D. Fla. 1992); *Nieko v. Emro Marketing Co.*, 769 F. Supp. 973, 982 (E.D. Mich. 1991).

68. *United States v. Gurley*, 43 F.3d 1188, 1199 (8th Cir. 1994); *Nieko*, 769 F. Supp. at 881; *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 187 (S.D.N.Y. 1991) (citing the General Counsel's memorandum); McKay, *supra* note 60, at 79. McKay noted that

EPA interprets the petroleum exclusion to apply to materials such as crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products. However, EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion.

Id. (citing 50 Fed. Reg. 13,460 (1985)).

69. *KFC Western, Inc. v. Meghri*, 49 F.3d 518, 519 (9th Cir. 1995).

70. *Id.* at 521.

71. *Id.* at 520. This is the only court to hold that an imminent and substantial endangerment does not have to exist when the plaintiff files suit.

72. *Id.* at 522.

73. *Id.* at 521.

ment enforcement mechanism.⁷⁴ Section 6973 has been interpreted broadly to allow the government to recover restitution.⁷⁵ It gives the EPA the power to order the defendants to take "such action as may be necessary."⁷⁶ This broad grant affords the courts discretion in providing the government any relief necessary to protect health and the environment.⁷⁷

The Ninth Circuit held that, according to legislative history, Congress intended citizen suits and governmental actions to be governed by the same standards of liability.⁷⁸ Since courts have interpreted section 6973 to include restitution for the government's hazardous waste cleanup costs,⁷⁹ the Ninth Circuit held that restitution is available to private citizens under section 6972(a).⁸⁰

The Ninth Circuit also addressed the imminent and substantial endangerment requirement. The court followed an Eighth Circuit decision, which defined the requirement as "'limiting the reach of RCRA to sites where the potential for harm is great' but not as limiting the time for filing an action."⁸¹ As a result, the court reasoned that an imminent and substantial endangerment does not have to exist when the plaintiff files the lawsuit.⁸²

The defendants in *KFC Western Inc.* argued that the lack of a statute of limitations and the inclusion of a mandatory notice requirement were evidence that Congress did not intend a private claim of restitution to be available under RCRA.⁸³ However, the Ninth Circuit

74. *Id.* at 520-21. Section 6972(a) authorizes the court to order "such other action as may be necessary." 42 U.S.C. § 6972(a) (1994). Section 6973 authorizes the Administrator to order "such other action as may be necessary." 42 U.S.C. § 6973 (1994).

75. *KFC Western, Inc.*, 49 F.3d at 521 (citing *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)). See *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 750 (8th Cir. 1986); *United States v. Price*, 688 F.2d 204 (3d Cir. 1982).

76. 42 U.S.C. § 6973 (1994) (stating that the Administrator may order a person to "take such other action as may be necessary").

77. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989); *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 726.

78. *KFC Western, Inc.*, 49 F.3d at 521 (citing H.R. REP. NO. 98-198, pt., at 53 (1983), reprinted in 1984 U.S.C.C.A.N. 5576, 5612 (stating that "Section 11 confers on citizens a limited right under Section 7002 to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under Section 7003")).

79. See, e.g., *Aceto Agric. Chem. Corp.*, 872 F.2d at 1383; *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 750; *Price*, 688 F.2d at 204.

80. *KFC Western, Inc.*, 49 F.3d at 521.

81. *Id.* at 520 (quoting *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)).

82. *Id.* at 521.

83. *Id.* at 522. The defendants argued that the notice requirement, allowing a private citizen to bring a cause of action only if 90 days notice had been given to the Administrator, justifies affording restitutionary relief only to the Administrator who is not required to give notice before suing. The

held that the lack of a statute of limitations was inconclusive because equitable defenses, such as laches, would ensure that RCRA was enforced fairly. Also, the mandatory notice requirement would still serve its main purpose, which is to give the EPA and the offender a chance to take action to abate the problem.⁸⁴

The Eighth Circuit's Approach

Six months after the Ninth Circuit's decision in *KFC Western Inc.*, a private citizen brought a similar suit for damages in the Eighth Circuit.⁸⁵ In *Furrer v. Brown*, the court held that RCRA did not give a private citizen the right to sue for the recovery of hazardous waste cleanup costs.⁸⁶ The court held that the statutory language authorized mandatory or prohibitory injunctive relief but did not give the courts the power to fashion other equitable remedies.⁸⁷

The court explained that when Congress enacts a statute which is specific about the relief it provides, the courts cannot expand that remedy.⁸⁸ The court concluded that section 6972(a) provides only for injunctive relief because Congress did not expressly include response costs.⁸⁹ Therefore, the court held that Congress did not intend to create an implied private cause of action for the recovery of cleanup costs in section 6972.⁹⁰

Furthermore, the court reasoned that Congress did not intend to create the same remedies for private and federal causes of action by wording those sections similarly. According to the court, the legislative history does not support the contention that private citizens should be afforded the same remedies as the government, despite the provisions' similar constructions.⁹¹

defendants claimed that this may encourage the polluter to abate the hazard, thereby avoiding an expensive lawsuit. *Id.*

84. *Id.*

85. *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995).

86. *Id.* at 1092-93.

87. *Id.* at 1096.

88. *Id.* at 1095.

89. *Id.* at 1093.

90. *Id.*

91. *Id.* at 1100. "The language in the legislative history upon which the Ninth Circuit (and the Furrers) rely is this: '[The 1984 amendment to § 6972] confers on citizens a limited right under [§ 6972] to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under [§ 6973].'" *Id.* (quoting H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 5576, 5612).

PRINCIPAL CASE

In *KFC Western, Inc. v. Meghri*, the United States Supreme Court granted *certiorari* to resolve the conflict between the circuit courts.⁹² The issue before the Court was "whether section 6972 authorizes a private cause of action to recover the prior cost of cleaning up toxic waste that does not, at the time of suit, continue to pose an endangerment to health or the environment."⁹³ The Court answered this issue in the negative, for the following reasons.

First, the Court stated that the EPA is RCRA's main enforcer, which is supported by the mandatory notice requirement. Consequently, a private citizen can bring suit only if the EPA does not act after receiving notice.⁹⁴ Because of this statutory restriction on a private cause of action, the Court determined that the remedies available for a private cause of action under section 6972(a) are more limited than an action commenced by the EPA.⁹⁵ The Court concluded that section 6972(a) authorizes a court to grant only injunctive relief.⁹⁶

The Court then compared RCRA to CERCLA. The Court reasoned that CERCLA was designed to abate many of the same hazardous waste problems as RCRA.⁹⁷ However, CERCLA's citizen suit provision authorizes "the recovery of any costs of response, incurred by any . . . person consistent with the National Contingency Plan."⁹⁸ CERCLA also allows contribution for damages from any person who may be liable.⁹⁹ According to the Court, Congress demonstrated its ability to create a private cause of action for the recovery of response costs in CERCLA. The Court further concluded that if Congress had intended such a remedy in RCRA, it would have expressly provided one.¹⁰⁰

92. *KFC Western, Inc. v. Meghri*, 116 S. Ct. at 1253.

93. *Id.* The court did not decide "whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced." *Id.* at 1256.

94. *Id.* at 1255; see also 42 U.S.C. § 6972(b)(1)(A).

95. *KFC Western, Inc.*, 116 S. Ct. at 1253.

96. *Id.* at 1254.

97. *Id.* This reasoning, however, is flawed. The purpose of RCRA is to regulate hazardous waste from "cradle to grave" while the purpose of CERCLA is to promote the clean up of inactive hazardous waste sites. See *supra* notes 18-19, 51 and accompanying text.

98. *Id.* (citing 42 U.S.C. § 9607(a)(4)(B) (1994)).

99. *Id.* (citing 42 U.S.C. § 9613(f)(1) (1994)).

100. *Id.* ("Congress demonstrated in CERCLA that it 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."). *Id.*

Second, the Court interpreted the imminent and substantial endangerment language of section 6972(a)(1)(B) as meaning an endangerment which "threatens to occur immediately."¹⁰¹ The Court stated that the threat must be present at the time of suit even though the impact may not be felt until later.¹⁰² As a result, the Court held that section 6972(a) was designed to regulate present or future imminent harms, not to compensate for past cleanup costs when the threat is no longer present.¹⁰³

Third, the Court noted several other aspects of RCRA which demonstrate that the statute was not designed to compensate for the recovery of past cleanup costs. The Court was persuaded that RCRA's lack of a statute of limitations and a reasonable response cost provision along with the inclusion of notice requirements make RCRA an impracticable statute to authorize the recovery of cleanup costs.¹⁰⁴

ANALYSIS

In *KFC Western, Inc. v. Meghri*, the Supreme Court accurately interpreted RCRA's citizen suit provision.¹⁰⁵ However, the Court's decision is inequitable. In the aftermath of *KFC Western, Inc.*, a plaintiff like KFC, who unknowingly purchases property with petroleum-contaminated soil and cleans up that soil, is responsible for the entire cleanup cost. According to the Supreme Court, RCRA requires that the waste pose an imminent and substantial endangerment when the plaintiff files suit, and RCRA does not authorize a private citizen to recover restitution from the polluter.¹⁰⁶ The solution to this inequity does not lie within state common law or statutory remedies, nor is it through RCRA or the Court's interpretation of RCRA. Congress must repeal or amend CERCLA's petroleum exclusion, so that CERCLA applies to a situation like that in *KFC Western, Inc.*

101. *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 1245 (2d ed. 1934)).

102. *Id.* at 1255 (citing *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994)).

103. *Id.* at 1256.

104. *Id.* at 1255. See *supra* notes 50-59 and accompanying text. The Court stated that, even though restitution is not available under RCRA's citizen suit provision, RCRA does not prohibit a private cause of action under other state or federal statutes. *KFC Western, Inc.*, 116 S. Ct. at 1255-56.

105. *KFC Western, Inc.*, 116 S. Ct. at 1251.

106. *Id.* at 1256.

The Inequitable Result

KFC purchased the Meghrihs' property to operate a Kentucky Fried Chicken franchise with no knowledge of the petroleum contamination. While the plaintiffs operated their business, they never contributed to the contamination of the soil. Thirteen years later, while improving the property, KFC discovered the petroleum-contaminated soil. KFC was ordered to clean it up and immediately did so. Now, as a result of the Court's decision in *KFC Western, Inc.*, KFC is responsible for the entire cleanup cost.¹⁰⁷ In other words, the party responsible for polluting the environment and endangering human health will not be held liable for its negligence.

The inequity arises in several ways. First, a plaintiff in KFC's position may have no state statutory or common law action.¹⁰⁸ "Section 6972(f) of 42 U.S.C. is a savings clause which allows plaintiffs to bring statutory and common law proceedings in addition to a RCRA action."¹⁰⁹ Proponents of the *KFC* decision may argue that there are adequate state law remedies which protect potential plaintiffs from this inequity.¹¹⁰ In KFC's original action, it pleaded nine state causes of action.¹¹¹ Because the waste was not discovered nor removed until thirteen years after KFC purchased the property, six of these actions were barred by the statute of limitations.¹¹² The cause of action based on a state environmental statute was barred because the statute excluded petroleum from its coverage.¹¹³ KFC also argued nuisance and trespass causes of action. However, these actions are rarely applicable to a leaking underground storage tank (LUST) because the defendant does not "engage in acts or omissions which create the nuisance or [trespass] nor does it know of the existence of the nuisance or [trespass]."¹¹⁴

107. *Id.*

108. Joyce Yeager, Note, *No Remedy for LUST: An Implied Cause of Action and RCRA*, 64 UMKC L. REV. 637, 662 (1996) (citing *KFC Western, Inc. v. Meghrih*, 28 Cal. Rptr. 2d 676, 680-82 (Cal. Ct. App. 1994); Brief for Petitioner at *3-*6, *39, *Meghrih v. KFC Western, Inc.*, (No. 95-83) 1995 WL 668003 (U.S. 1995)).

109. Yeager, *supra* note 108, at 659; 42 U.S.C. § 6972(f) (1994).

110. Such state common law and statutory actions may include: "negligence per se, strict liability, waste, public or private nuisance, intentional infliction of emotional distress, contract theories, fraud, personal injury, negligence, inverse condemnation, state wetlands statutory violations, trespass and action for contribution or indemnification." Yeager, *supra* note 108, at 659-60 (citations omitted).

111. Yeager, *supra* note 108, at 662 (citing Brief for Petitioner at *39, *Meghrih v. KFC Western, Inc.*, (No. 95-83) 1995 WL 668003 (U.S. 1995)).

112. Yeager, *supra* note 108, at 662 (citing Brief for Petitioner at *3-*5, *Meghrih v. KFC Western, Inc.*, (No. 95-83) 1995 WL 668003 (U.S. 1995)).

113. *KFC Western, Inc.*, 28 Cal. Rptr. 2d at 680-82.

114. Yeager, *supra* note 108, at 661 (citing Brief for Petitioner at *4-*6, *Meghrih v. KFC Western, Inc.*, (No. 95-83) 1995 WL 668003 (U.S. 1995)); Yeager, *supra* note 108, at 662 (stating that "Michigan, Alabama, California, Florida, Nevada, New Jersey, New York, North Carolina,

Second, KFC could not recover its past cleanup costs from the Meghrips because RCRA was not applicable to KFC's situation. Congress enacted RCRA to regulate hazardous waste from its creation to its disposal.¹¹⁵ RCRA is generally viewed as a prospective statute whose main purpose is not the cleanup of inactive hazardous waste sites.¹¹⁶ The contaminated soil on KFC's property constituted an inactive hazardous waste site. As a result, KFC's situation was outside RCRA's primary scope of coverage.¹¹⁷ This limitation of scope, in addition to the Supreme Court's reasoning, demonstrates RCRA's inapplicability where KFC cleaned up an inactive hazardous waste site and then attempted to sue for restitution.

Third, the relationship between RCRA and CERCLA¹¹⁸ creates a "loophole" in hazardous waste regulation which allows negligent polluters like the Meghrips to escape liability. After Congress passed RCRA, it realized that RCRA was ineffective in dealing with inactive hazardous waste sites. As a result, Congress passed CERCLA to complement RCRA and regulate the areas which RCRA did not address.¹¹⁹ However, under certain factual scenarios like *KFC Western Inc.*, neither statute applies.

In 1986, Congress amended RCRA and added a section strictly regulating underground storage tanks (USTs).¹²⁰ This new section required, among other things, that the owner of a UST notify the EPA of the tank, monitor it, maintain a leak detection system, and take corrective action in response to leaking.¹²¹ This section is comprehensive and impos-

Ohio, Maine, Montana, Pennsylvania, Rhode Island and Wisconsin experienced severe groundwater contamination caused by LUSTs by 1984 and most of these states requested federal regulation to resolve the problem." (citing H.R. REP. NO. 98-198, pt. 1, at 128 (1984), *reprinted in* 1984 U.S.C.A.N. 5576, 5699)). The Ninth Circuit stated that "[e]ven though causes of action for nuisance, trespass, and potential negligence are available to plaintiffs such as KFC, tort remedies are generally inadequate because of difficulties of proof and attendant court delays." *KFC Western, Inc.*, 49 F.3d at 523-24 n.6.

115. See *supra* notes 18-19 and accompanying text.

116. Gibson & Young, *supra* note 60, at 363 (stating that "[a]lthough RCRA could be used to abate an imminent hazard, its orientation was largely prospective").

117. Under certain circumstances, RCRA does apply to inactive hazardous waste sites. See, e.g., *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) (stating that RCRA § 7003 applies to the present and future conditions caused by an inactive hazardous waste site); *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984) (holding that the EPA should use § 7003 for "abandoned sites as well as active ones" (quoting H.R. REP. NO. 96-191, at 5 (1979))).

118. Gibson & Young, *supra* note 60, at 363. "Congress passed CERCLA primarily because RCRA had proven to be inadequate in dealing with inactive or abandoned waste dumps. CERCLA, on the other hand, provided a Superfund to clean up the abandoned or inactive dumps that would not be regulated under RCRA's permitting scheme." *Id.*

119. *Id.*

120. 42 U.S.C. §§ 6991, 6991a(a), 6991b(c) (1994).

121. 42 U.S.C. § 6991 (1994) (defining terms and exemptions); 42 U.S.C. § 6991a (1994) (stating the notice requirements); 42 U.S.C. § 6991b (1994) (providing the monitoring and operating requirements).

es penalties for noncompliance.¹²² However, RCRA's underground storage tank provision did not apply to the Meghrips because they no longer owned the UST when Congress passed these regulations.¹²³ Consequently, the Meghrips were not subject to any statutory civil penalties for negligently maintaining the UST.

Also, CERCLA did not apply because it excludes refined petroleum from its coverage.¹²⁴ The underground storage tank leaked gasoline, which is excluded from CERCLA regulation. Therefore, a plaintiff in the same situation as KFC would have no federal statutory cause of action, under CERCLA or RCRA, to recover its response costs for cleaning up an inactive petroleum-contaminated site. "[T]his group of individuals [the Meghrips] would not be subject to RCRA's registration and reporting requirements; nor would they be subject to CERCLA as long as the petroleum exclusion remains in effect."¹²⁵

In sum, a plaintiff in KFC's position did not have a cause of action under RCRA's citizen suit provision, nor could it pursue state common law and statutory remedies.¹²⁶ In addition, KFC did not have a cause of action under CERCLA because of CERCLA's petroleum exclusion, nor were the Meghrips subject to RCRA's UST regulation.¹²⁷ This result was inequitable because KFC was forced to pay the entire cleanup costs for a hazardous waste site it did not cause and was denied reimbursement from the original polluters, the Meghrips. Fortunately, this inequity can be resolved.

The Solution

To alleviate this inequity, Congress must repeal or amend CERCLA's blanket petroleum exclusion. Congress passed CERCLA's petroleum exclusion hastily because the congressional session was about to close, and a new president was taking office.¹²⁸ Congress wanted to pass CERCLA without delay. As a result, Congress compromised with

122. 42 U.S.C. § 6991e(a)(3) (1994). "If a violator fails to comply with an order under this subsection within the time specified in the order, he shall be liable for a civil penalty of not more than \$25,000 for each day of continued noncompliance." *Id.*

123. The Meghrips sold their property to KFC in 1975, eleven years before Congress enacted the UST provisions. *See supra*, notes 2, 120 and accompanying text.

124. 42 U.S.C. § 9601(14) (1994); *see supra* note 66 and accompanying text.

125. *Armstrong, supra* note 61, at 1191.

126. *See supra* notes 108-14 and accompanying text.

127. KFC's situation may not be unique. Neither RCRA nor CERCLA will be applicable to a situation where the plaintiff was ordered to clean up a petroleum leak years after it purchased the property, and now is attempting to sue the previous landowner for response costs.

128. *Armstrong, supra* note 61, at 1166.

the oil lobby, CERCLA's strongest opponent, and excluded petroleum from its coverage.¹²⁹

Also, when Congress enacted CERCLA in 1980, it was not fully aware of the problem of leaking underground storage tanks (LUSTs). Congress believed then that existing environmental regulations, like the Clean Water Act,¹³⁰ were adequate to protect the environment.¹³¹ Congress did not acknowledge the problem of LUSTs until it amended RCRA in 1986 to regulate USTs.

CERCLA is currently being considered for reauthorization by Congress, and Congress is not under the same time constraints as when it originally enacted CERCLA.¹³² In addition, Congress should be aware of the danger LUSTs pose to the environment. Therefore, Congress should reconsider the petroleum exclusion and repeal the provision entirely. As one commentator noted;

The petroleum exclusion simply creates more needless obstacles to a practical, effective, and efficient response to these hazards. The petroleum exclusion forecloses an important remedy for those suffering from serious potential health consequences resulting from spills of petroleum substances. It is time for Congress to take proper action to strengthen and clarify CERCLA. One significant step in this process is the repeal of the petroleum exclusion.¹³³

This would allow an innocent plaintiff, in the same circumstances as KFC, to recover its response costs from a polluter who contaminates soil with petroleum. The polluter is immune from federal statutory liability under the existing regime.

Opponents claim that repealing this exclusion would devastate the oil and gas industry. They claim that forty to eighty percent of America's oil wells would be forced to shut down.¹³⁴ If these statistics can be substanti-

129. McKay, *supra* note 60, at 41 (stating that Congress passed CERCLA's petroleum exclusion to protect the oil and gas industry); Armstrong, *supra* note 61, at 1171 (quoting President Carter who said that "the influence of the oil companies, both in the legislative process, in the Executive Branch of the government as well, in the economic structure of our country, is enormous" (citing *President: 'Potential War Profiteering' in Energy Crisis*, WASH. POST, Oct. 14, 1977, at A8)).

130. 33 U.S.C. §§ 1251-1387 (1994).

131. Armstrong, *supra* note 61, at 1174.

132. See *supra* note 128 and accompanying text.

133. Armstrong, *supra* note 61, at 1192-93.

134. McKay, *supra* note 60, at 57. "[R]emoving the exemption would cause severe short-term strains on the capacity of Subtitle C Treatment, Storage and Disposal Facilities, and a significant increase in permitting burden for State and Federal hazardous waste programs." *Id.*

ated, perhaps Congress could enact a less drastic measure that would protect the domestic oil and gas industry from devastation while more adequately protecting the environment.¹³⁵

For instance, Congress could amend CERCLA's petroleum exclusion to mirror the petroleum exemption in RCRA. RCRA's exempted petroleum waste is already encompassed by CERCLA's exclusion,¹³⁶ so Congress need only limit CERCLA's exclusion to those wastes that are exempted by RCRA.¹³⁷ If Congress amended CERCLA to exempt only produced waters, drilling fluids, and related wastes, not all petroleum, a plaintiff like KFC would still have a cause of action under CERCLA, and the inequity created by the Supreme Court's decision in *KFC Western, Inc.* would be alleviated.

CONCLUSION

In the aftermath of *KFC Western, Inc. v. Meghriq*, a plaintiff in KFC's situation may have no remedy. State statutory and common law actions may not be available under these circumstances, nor are federal hazardous waste laws applicable. That is, RCRA does not apply to KFC's situation, nor does CERCLA because CERCLA excludes petroleum from its coverage. This result is inequitable. KFC was not at fault. It neither caused nor contributed to the petroleum contamination. However, KFC was required to pay for all of the cleanup cost, and could not sue the actual polluters for restitution. As a result, the polluters avoided paying. In such circumstances, the party responsible for polluting the environment and endangering human health will not be held liable for its negligence. Congress should repeal or amend CERCLA's petroleum exclusion to avoid this inequity.

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135. See *infra* note 137 and accompanying text.

136. See *supra* notes 60-68 and accompanying text. "CERCLA's definition of hazardous substance appears to exclude from CERCLA regulation all wastes exempt from RCRA Subtitle C." McKay, *supra* note 60, at 79.

137. Some opponents of the oil field waste exemption want more stringent regulation of these wastes. McKay discusses some more stringent compliance requirements under RCRA. They are the following:

A modified Subtitle C program for oil and gas wastes might, for example, require that operators: (1) remove organic and radioactive contaminants from produced waters prior to discharging them into surface waters; (2) adopt closed-cycle systems for drilling muds in order to minimize waste production through recycling; (3) place produced waters and drilling muds in lined pits; (4) place associated wastes in more heavily regulated pits; and/or (5) treat produced waters to remove brine before being discharged into streams.

McKay, *supra* note 60, at 60 (citing Alan Kovski, *The Season Arrives for a Compromise on Regulating Oil Field Wastes*, THE OIL DAILY, Jan. 20, 1992, at 4).