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The Permissibility of Actions for Response Costs Arising After the Commencement of a RCRA Citizen Suit: A Post-*Meghrig v KFC Western, Inc.* Analysis

Laura B. Weinberg†

Suppose that Innocent Retail Inc., in developing recently purchased land, discovers small quantities of petroleum in the soil which potentially threaten a nearby water supply. The former landowner, Oil Co., and its lessee, Polluter Gas Station, appear to have caused the contamination. Innocent decides to sue Oil Co. and Polluter under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"),¹ for the costs of conducting further contamination tests and removing any contamination discovered by the testing. The question is whether Innocent has a cause of action.

Congress created RCRA to protect human health, preserve the environment, and conserve resources.² Specifically, RCRA's citizen suit provision allows any person to sue any other person who has, at any time, dealt with the waste in question.³ While the statute allows district courts to enjoin behavior which violates RCRA's conditions and impose civil penalties, it does not provide for damages.⁴ In the landmark case *Meghrig v KFC Western, Inc.*,⁵ the Supreme Court held that one potentially liable party cannot sue another potentially liable party for response costs which arose before the commencement of a RCRA suit.⁶ However, the court expressly left open whether the prohibition on suits for response costs which arise before the commencement of a RCRA suit should extend to cases where the response costs arise after the commencement of a RCRA suit.⁷

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¹ RCRA is codified at 42 USC § 6901 et seq (1994). The citizen suit provision is found at 42 USC § 6972.

² 42 USC § 6902(a).

³ 42 USC § 6972(a).

⁴ Id.

⁵ 116 S Ct 1251 (1996).

⁶ Id at 1256.

⁷ Id. For the purposes of this Comment, "response costs" refer to the amount of

This Comment argues that legislative intent, statutory purpose, and equitable authority indicate that the elements on which the *Meghrig* Court's decision turned are also present where response costs have arisen after the commencement of a RCRA suit. Part I of this Comment examines RCRA's citizen suit provision to determine the status of suits for response costs under RCRA. Part II argues that RCRA's requirement of an "imminent and substantial" danger applies equally to post-commencement response costs, and that recovery of such costs does not serve RCRA's purpose and does not fall within the federal courts' equitable authority.

I. THE LEGALITY OF CITIZEN SUITS FOR RESPONSE COSTS

Whether courts should permit citizen suits for response costs under the Resource Conservation and Recovery Act ("RCRA")⁸ has been debated throughout the last ten years.⁹ The Supreme Court resolved one aspect of this issue in *Meghrig v KFC Western, Inc.*¹⁰ when it held that suits for response costs incurred prior to the commencement of the suit were not permissible. However, whether suits for response costs which arise after the commencement of a RCRA suit are permissible remains an unanswered question.¹¹

A. The RCRA Citizen Suit

RCRA governs the treatment, storage, and disposal of solid and hazardous waste. Congress did not design RCRA to effectuate the cleanup of toxic waste sites or to compensate those who have remedied such environmental hazards;¹² however, RCRA does provide for citizen suits.¹³ The citizen suit provision of RCRA allows any person to bring suit against any other person who has, at any time, dealt with the waste in question.¹⁴ The provision reads, in relevant part:

money necessary to remedy an environmental harm.

⁸ RCRA is codified at 42 USC § 6901 et seq (1994). The citizen suit provision is found at 42 USC § 6972.

⁹ See Part I.B.

¹⁰ 116 S Ct 1251 (1996).

¹¹ *Id.* at 1256.

¹² The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") serves this purpose. 42 USC 9601 et seq (1994).

¹³ 42 USC § 6972(a).

¹⁴ *Id.*

Any person may commence a civil action on his own behalf— . . . against any person . . . who has contributed . . . 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 environment¹⁵

Congress amended the provision in 1984 to stimulate citizen litigation and grant a private means of obtaining relief similar to the relief that the EPA administrator was authorized to seek under RCRA.¹⁶ The statute does not provide for damages; instead, it allows district courts to enjoin any potentially liable party, to order any such party to take other necessary action, to force the EPA to perform mandatory acts or duties, and/or to assess appropriate civil penalties.¹⁷

To understand how citizen suits work under RCRA, it is useful to look to the private suit provision of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").¹⁸ While RCRA does not explicitly provide for suits for response costs, CERCLA quite clearly does. Private suits under CERCLA are designed to gain reimbursement of response costs from responsible parties.¹⁹ CERCLA § 107(a)(4)(B) states that one responsible for a hazardous substance release "shall be liable for any other necessary costs of response incurred by any other person"²⁰ The CERCLA private suit scheme is well defined, with a four point prima facie case limiting its applicability.

¹⁵ Id.

¹⁶ 42 USC § 6928(a). The administrator may order a party to pay a civil penalty for any past or current violation and/or may order the party to come into compliance with the statute. 42 USC § 6928(a)(1).

¹⁷ 42 USC § 6972(a). The forms of relief available to the courts for use with respect to private parties are commonly referred to as the "mandatory injunction" and the "prohibitory injunction." As described by the Supreme Court, a mandatory injunction is "one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste," while a prohibitory injunction is "one that 'restrains' a responsible party from further violating RCRA." *Meghrig v KFC Western, Inc.*, 116 S Ct 1251, 1254 (1996).

¹⁸ 42 USC § 9613(f)(1) (1994). The CERCLA private suit provision referred to throughout this Comment is, in fact, a contribution provision, not a citizen suit provision. In its decision in *Meghrig v KFC Western, Inc.*, 116 S Ct 1251 (1996), the Supreme Court used the CERCLA contribution provision as a point of comparison for the RCRA citizen suit provision. Id. at 1254-55. In following the arguments of the *Meghrig* Court and applying them to unanswered questions, the Comment makes similar comparisons between the CERCLA and RCRA provisions.

¹⁹ 42 USC § 9607(a)(4)(B). See *Meghrig*, 116 S Ct at 1254.

²⁰ 42 USC § 9607(a)(4)(B).

ty.²¹ First, the defendant must be (a) the facility owner and operator, (b) one who owned and operated a disposal facility at the time of disposal, (c) one who contractually arranged for transport, disposal, or treatment, or (d) one who accepts or accepted hazardous material for transport, disposal or treatment.²² Second, a hazardous substance must have been released from the defendant's facility, or such a release must be threatened.²³ Third, the release or threatened release must "cause[] the incurrence of response costs" by the plaintiff.²⁴ Finally, the plaintiff's costs must be "necessary costs of response . . . consistent with the national contingency plan."²⁵

B. The Pre-*Meghrig* Circuit Split

Prior to the Supreme Court's 1996 decision in *Meghrig*, lower courts disagreed over whether a private party could recover the cost of a past cleanup effort under RCRA.²⁶ This disagreement focused on the interpretation of RCRA's goals and text. Courts allowing suits for response costs pointed to the need for a restitutionary remedy to further the general goals of RCRA, as well as to the inherent breadth of the courts' equitable authority.²⁷ On the other hand, courts finding suits for response costs to be impermissible emphasized that RCRA does not provide for such a remedy and that a court cannot infer one in the absence of such a provision.²⁸

Courts argued that suits for response costs furthered both the goals of RCRA and the interests of justice.²⁹ If courts interpret RCRA's citizen suit provision to allow only injunctive relief, only concerned outsiders who themselves face no liability would benefit.³⁰ Consequently, innocent parties who happen to have a

²¹ *Dedham Water Co. v Cumberland Farms Dairy, Inc.*, 889 F2d 1146, 1150 (1st Cir 1989).

²² 42 USC § 9607(a).

²³ 42 USC § 9607(a)(4). See also 42 USC § 9601(14), (22).

²⁴ 42 USC § 9607(a)(4).

²⁵ 42 USC §§ 9607(a)(4)(B), 9601(23)-(25).

²⁶ See *Bayless Investment & Trading Co. v Chevron, U.S.A., Inc.*, 39 Envir Rptr (BNA) 1428, 1432-34 (D Ariz 1994).

²⁷ See, for example, *KFC Western, Inc. v Meghrig*, 49 F3d 518, 523-24 (9th Cir 1995), rev'd, 116 S Ct 1251 (1996); *Bayless*, 39 Envir Rptr (BNA) at 1432.

²⁸ See, for example, *Furrer v Brown*, 62 F3d 1092, 1095-96 (8th Cir 1995).

²⁹ See, for example, *KFC Western*, 49 F3d at 523-24; *Bayless*, 39 Envir Rptr (BNA) at 1432.

³⁰ *KFC Western*, 49 F3d at 523-24.

financial stake in the land are left without recourse.³¹ In its decision in *KFC Western, Inc. v Meghrig*,³² the Ninth Circuit argued that barring restitution actions would make citizen suits implausible for innocent citizens who have both a financial stake in the property and potential or actual cleanup liability.³³ According to the Ninth Circuit, if it were to bar suits for post-commencement response costs where it had ordered a responsible party to remedy contamination, that responsible party would have no choice but to respond immediately, regardless of whether he had the time to seek equitable relief against past polluters.³⁴ In *Bayless Investment & Trading Co. v Chevron, U.S.A., Inc.*,³⁵ the court seemed not to have the same concern about the obligation to respond immediately, but opined that if it were to enjoin another party to clean up the contamination (at the request of the EPA, for instance), but not allow the recovery of costs which the plaintiff had expended in initiating cleanup, that cleanup would be delayed. For if future plaintiffs knew that they were unable to obtain response costs from other potentially responsible parties, they would likely "wait until the conclusion of [the] lawsuit before spending money to commence remediation."³⁶

Courts disallowing suits for response costs responded that regardless of the assistance such suits may provide, RCRA does not provide for citizen suits with restitutionary motives. In *Furrer v Brown*,³⁷ the Eighth Circuit, refusing to infer a cause of action for response costs, found that RCRA's phrase, "to take such action as may be necessary," should not be read too broadly.³⁸ The court stated that it did not think "such other action as may be necessary" contemplates the payment of money to a party who already has cleaned up a contaminated site.³⁹ The *Furrer* court argued that courts should not expand statutes to include other remedies when the legislation at issue expressly provides particular remedies.⁴⁰ The court further argued that had Congress intended to provide such a cause of action, it would have, because "even a cursory look at federal environmental legislation

³¹ Id at 524.

³² 49 F3d 518 (9th Cir 1995).

³³ Id at 523-24.

³⁴ Id at 524.

³⁵ 39 Envir Rptr (BNA) 1428 (D Ariz 1994).

³⁶ Id at 1432.

³⁷ 62 F3d 1092 (8th Cir 1995).

³⁸ Id at 1095-96, citing 42 USC § 6972(a).

³⁹ Id at 1096.

⁴⁰ 62 F3d at 1096.

demonstrates that "Congress knows how to define a right to contribution" in this area of the law.⁴¹ The explicit inclusion of actions for restitution in both the private suit provision of CERCLA and the administrator provision of RCRA shows that Congress was thinking of such actions.⁴²

Likewise, courts argued that, just as RCRA does not explicitly provide for suits for post-commencement response costs, neither should such actions be implied.⁴³ Precedent dictates that where a plaintiff brings an action pursuant to a federal act which does not explicitly provide for a private cause of action for damages, no such cause of action should be implied.⁴⁴ Moreover, the Supreme Court ruled in *Universities Research Assn, Inc. v Coutu*,⁴⁵ that where legislation provides for a particular remedy expressly, "courts should not expand the coverage of the statute to subsume other remedies."⁴⁶ The legislative history of RCRA does not indicate whether Congress intended to permit or deny actions for response costs. As such, the *Furrer* court refused to recognize the right because "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best."⁴⁷

Courts that favored allowing citizen suits for response costs, however, argued that in the absence of a clear statement to the contrary, courts must be given broad equitable authority—including the power to enjoin a party to pay response costs. In *United States v Price*,⁴⁸ the Third Circuit argued that a court of equity traditionally has the authority to provide any remedy which it deems "necessary and appropriate to do justice in the particular case" and that flexibility, not rigidity, should prevail.⁴⁹ The *Price* court further argued that by enacting the endangerment provisions of RCRA, Congress enhanced the courts' traditional equitable powers.⁵⁰ Traditional equitable relief re-

⁴¹ *Id.* at 1096, quoting *Texas Industries, Inc. v Radcliff Materials, Inc.*, 451 US 630, 640 n 11 (1981).

⁴² *Furrer*, 62 F3d at 1096, citing 42 USC § 9607(a)(4)(B) and 42 USC § 6928(a).

⁴³ See *Furrer*, 62 F3d at 1100.

⁴⁴ *Walls*, 761 F2d at 316, citing *Middlesex County Sewerage Authority v National Sea Clammers Association*, 453 US 1, 18 (1981).

⁴⁵ 450 US 754 (1981)

⁴⁶ *Id.* at 773 n 24.

⁴⁷ *Furrer*, 62 F3d at 1097, quoting *Touche Ross & Co. v Redington*, 442 US 560, 571 (1979).

⁴⁸ 688 F2d 204 (3d Cir 1982).

⁴⁹ *Id.* at 211, citing *Hecht Co. v Bowles*, 321 US 321, 329 (1944).

⁵⁰ *Id.*

quires a showing of threatened irreparable harm, but RCRA authorizes injunctions more leniently where there is merely a risk of harm.⁵¹ The Ninth Circuit argued further that, as the citizen suit and administrator provisions of RCRA are virtually identical, it could find no principled reason not to extend the equitable authority granted under the administrator provision to citizen suits.⁵²

C. The Supreme Court Resolves the Conflict?

In its unanimous decision in *Meghrig v KFC Western, Inc.*,⁵³ the Supreme Court reversed the Ninth Circuit, holding that citizen suits for response costs incurred before the suit are impermissible.⁵⁴ The Court analyzed two issues: (1) whether the hazard was an imminent and substantial endangerment and (2) whether a court has the authority to enjoin a party to pay response costs.⁵⁵

The *Meghrig* Court found no imminent and substantial harm where the plaintiff had already alleviated the environmental hazard.⁵⁶ The Court concluded that RCRA was designed to ameliorate present imminent harms or obviate the risk of future imminent harms; it was not designed to compensate for past cleanup efforts.⁵⁷ In reaching this conclusion, the Court looked to the statutory requirement that the waste in question present an "imminent and substantial endangerment."⁵⁸ The Court stated that the meaning of the timing restriction is plain: for an endangerment to be imminent, it must "threaten to occur immediately."⁵⁹ Consequently, waste that has already been removed is not covered. Thus, response costs incurred before the commencement of a RCRA suit cannot be recovered because, under the statutory definition, the alleviated hazards are not imminent.⁶⁰

⁵¹ 688 F2d at 211.

⁵² *KFC Western*, 49 F3d at 523. See note 16.

⁵³ 116 S Ct 1251 (1996).

⁵⁴ *Id.* at 1256.

⁵⁵ *Id.* at 1254.

⁵⁶ *Id.* at 1256.

⁵⁷ 116 S Ct at 1255.

⁵⁸ *Id.*, citing 42 USC § 6972(a)(1)(B).

⁵⁹ *Id.*, quoting *Webster's New International Dictionary of English Language* 1245 (Merriam Webster 2d ed 1934).

⁶⁰ *Id.*

Second, the *Meghrig* Court made it clear that the citizen suit provisions of RCRA do not contemplate restitution of response costs for prior cleanup efforts, no matter whether the costs are termed "damages" or "equitable restitution."⁶¹ The Court looked to the language of RCRA's purpose statement in determining that RCRA's remedial scheme allows a citizen plaintiff to seek either a mandatory injunction or a prohibitory injunction, but does not allow an award of past response costs.⁶²

To support this conclusion, the Court compared RCRA's citizen suit provision to CERCLA's private suit provisions.⁶³ CERCLA permits the government to recover the full cost of removal or remedial action and expressly permits any person to recover any costs necessary for responses which are consistent with the national contingency plan.⁶⁴ The Court noted that CERCLA allows parties to seek contribution from any other person who is deemed "liable or potentially liable" for the costs of response.⁶⁵ By providing a monetary remedy in CERCLA, Congress demonstrated its ability to provide for the recovery of cleanup costs.⁶⁶ As the Court concluded:

[T]he limited remedies described in § 6972(a), along with the stark differences between the language of that section and the cost recovery provisions of CERCLA, amply demonstrate that Congress did not intend for a private citizen to be able to undertake a clean up [sic] and then proceed to recover its costs under RCRA.⁶⁷

After *Meghrig*, it is thus clear that a plaintiff cannot sue for response costs for already remedied environmental harms. However, the Court expressly reserved the question of "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*, or otherwise recover cleanup costs paid out after the invocation of RCRA's statutory process."⁶⁸

⁶¹ 116 S Ct at 1254.

⁶² Id, citing 42 USC § 6902(b).

⁶³ Id at 1254-55.

⁶⁴ Id at 1255.

⁶⁵ 116 S Ct at 1255.

⁶⁶ Id.

⁶⁷ Id at 1256.

⁶⁸ Id (emphasis added) (citation omitted).

D. Citizens Suits for Post-Commencement Response Costs After *Meghrig*

Since the *Meghrig* Court's refusal to consider the validity of actions for post-commencement response costs, little has occurred to clarify the status of such suits. While courts have applied the *Meghrig* holding and followed its dicta, none of the cases have involved response costs which arose after the commencement of a RCRA suit.⁶⁹ This does not mean, however, that the issue has gone unmentioned.

In *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*,⁷⁰ a student commentator concluded that one potentially liable party should be allowed to sue another potentially liable party for response costs arising after the commencement of a RCRA suit.⁷¹ The Note analyzes the language and history of the citizen suit provision to better understand the requirement of an "imminent and substantial harm."⁷² It specifically examines the phrase "any person may commence," and argues that this language proves that the harm need only be "imminent and substantial" at the time the suit is commenced.⁷³ As such, the statements made by the Supreme Court regarding "imminent and substantial" should not apply to a suit where the response costs arise after the suit has begun because the harm would have been imminent at the commencement of the suit.⁷⁴ The Note further argues that allowing such suits complies with the provision's preliminary requirements and promotes the quick alleviation of environmental hazards which would continue to pose a threat were plaintiffs forced to wait until the termination of the litigation to remedy the harm.⁷⁵

With regard to the court's ability to grant an injunction to pay response costs, the student commentator argues that a presumption exists under *Porter v Warner Holding Co.*⁷⁶ that a

⁶⁹ See *Orange Environment, Inc. v County of Orange*, 923 F Supp 529, 539 (S D NY 1996); *Foster v United States*, 922 F Supp 642, 661 n 19 (D DC 1996); *Reynolds Metals Co. v Arkansas Power & Light Co.*, 920 F Supp 991, 999 n 11 (E D Ark 1996).

⁷⁰ Note, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 Vand L Rev 689 (1996).

⁷¹ Id at 747-49.

⁷² Id at 742-51.

⁷³ Id at 745.

⁷⁴ Note, 49 Vand L Rev at 745-46 (cited in note 70).

⁷⁵ Id at 746-48.

⁷⁶ 328 US 395, 398 (1946).

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.”⁷⁷ According to this Note, opponents of post-commencement response cost suits have failed to rebut the presumption of courts’ full equitable authority.⁷⁸ The Note maintains that interpreting the RCRA citizen suit provision as such would not turn RCRA into a “watered-down cost recovery statute” and would not render CERCLA obsolete.⁷⁹

II. THE CASE FOR EXCLUDING POST-COMMENCEMENT RESPONSE COSTS FROM THE RCRA CITIZEN SUIT SCHEME

In *Meghrig v KFC Western, Inc.*,⁸⁰ the Supreme Court interpreted RCRA’s citizen suit provision to exclude a right of action for recovery of already incurred response costs. While the Court expressly left open the availability of citizen suits for post-commencement response costs, the reasoning given by the *Meghrig* Court—specifically dealing with the “imminent and substantial” hazard requirement and the scope of judicial authority—applies equally to such suits. In fact, the *Meghrig* decision should be extended to include all response-cost suits, regardless of when they arise. This conclusion rests upon four arguments: first, an environmental hazard is not necessarily “imminent and substantial” simply because the response costs have arisen since the commencement of a RCRA suit; second, even if the hazard is “imminent and substantial,” it can be dealt with through traditional equitable relief; third, the court’s lack of equitable authority to enjoin a party to pay response costs should not vary simply because of the timing of those response costs; and fourth, allowing suits for post-commencement response costs does not serve the purposes of RCRA.

A. A Hypothetical

To understand how response costs arising after the commencement of a RCRA suit should be dealt with, it is helpful to consider a hypothetical action for response costs which have

⁷⁷ Note, *Recovering Environmental Cleanup Costs*, 49 Vand L Rev at 740 (cited in note 70).

⁷⁸ Id at 742.

⁷⁹ Id at 749.

⁸⁰ 116 S Ct 1251 (1996).

arisen since the commencement of a RCRA suit.⁸¹ Oil Co. owned Blackacre until 1975. From 1965 to 1975, Oil Co. leased Blackacre to Polluter Gas Station. In 1995, Oil Co. sold the property to Innocent Retail, Inc. As Innocent begins to develop Blackacre, it finds small quantities of petroleum, as well as chemicals not clearly the result of the land's use as a gas station, in the soil. These chemicals threaten the nearby county water supply. Innocent sues Oil Co. and Polluter Gas for the response costs it will incur in conducting further tests on the soil and in remedying any contamination discovered through the testing process. Can such an action proceed under the RCRA citizen suit provision?

B. The Hazard is Not Imminent

RCRA requires plaintiffs seeking relief under its citizen suit provision to prove that the waste at issue presents an "imminent and substantial" harm. A hazard is not necessarily imminent just because its response costs have arisen after the commencement of a RCRA suit. As the court explained in *Meghrig*, "[T]he meaning of this timing restriction is plain: An endangerment can only be 'imminent' if it 'threaten[s] to occur immediately,' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger."⁸² While this statement addressed past cleanup efforts, it also applies to response costs arising after the commencement of a RCRA suit. If the hypothetical Innocent spends money to conduct the necessary tests and dispose of the discovered waste, the threat of the waste is no longer imminent.

C. Alternative Relief is Available

Even if hazards giving rise to post-commencement response costs were found to be imminent harms, a RCRA citizen suit for restitution should still be unavailable. It is possible for the dispute over the potentially liable parties' respective liability to be dealt with by an injunction.⁸³ The availability of this remedy,

⁸¹ This hypothetical is based loosely upon the fact pattern set forth in *United States v Price*, 688 F2d 204 (3d Cir 1982).

⁸² 116 S Ct at 1255, quoting *Webster's New International Dictionary of English Language* 1245 (Merriam Webster 2d ed 1934) and 42 USC § 6972(a)(1)(B) (citations omitted).

⁸³ 42 USC § 6972(a).

one clearly provided by RCRA,⁸⁴ makes implying a restitutionary remedy unnecessary and therefore unjustified.⁸⁵ Thus, the question whether Innocent can sue for response costs under RCRA would never have to be reached because the goal of cleaning up the waste could be just as easily reached with an injunction requiring Oil Co. and Polluter Gas to clean up, on their own, whatever portion of the overall waste is found to be their responsibility.

A student commentator replied that, in a system where extensive delay is the rule rather than the exception, relying upon an injunction would delay environmental cleanup even more.⁸⁶ Furthermore, his Note argues that, even if the harm is determined to not be imminent, the cost or difficulty of alleviating the harm may still increase over time.

The use of preliminary injunctions could alleviate these problems.⁸⁷ Using a preliminary injunction would at least partially remedy both the delay inherent in traditional equitable relief and the possibility of increased cleanup costs. Likewise, courts can deal with the added difficulty of having many responsible parties by apportioning the various aspects of cleanup among the parties or by ordering the most responsible party to commence cleanup—leaving the door open for a contribution suit at a later time. Judicial cooperation in issuing such injunctions and supervising their execution, will reduce delay and, in turn, lessen any resulting harm.

D. Courts' Lack of Equitable Authority to Enjoin the Payment of Response Costs Should Not Vary Simply Because of the Time at which Those Response Costs Arise

The language used to define the remedies under RCRA does not explicitly provide for the recovery of cleanup costs.⁸⁸ The Supreme Court in *Meghrig* found the absence of such a remedy

⁸⁴ *Id.*

⁸⁵ *Universities Research Assn, Inc. v. Coutu*, 450 US 754, 773 n 24 (holding that remedies should not be implied where the statute explicitly provides other sufficient remedies). See Part I.B.

⁸⁶ Note, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 Vand L Rev 689, 748 n 291 (1996).

⁸⁷ 42 USC § 6972(a). See note 17 and accompanying text.

⁸⁸ *Id.*

dispositive in light of CERCLA's explicit provision for recovery of cleanup costs.⁸⁹

Although a specifically stated right to private action for response costs does not exist, some argue that such a right should be implied under the presumption of full equitable authority.⁹⁰ The Eighth Circuit's analysis of legislative intent in *Furrer v Brown*⁹¹ suggests that this approach is incorrect. The *Furrer* court reasoned that courts could award environmental response costs only if Congress intended to imply such a right when it authorized the federal courts to order "such other action as may be necessary."⁹² The *Furrer* court concluded that Congress designed RCRA's citizen suit provision for the benefit of the public at large, not for the special benefit of those required to clean up contamination for which they may not be responsible.⁹³ The court further concluded that the legislative history provided no evidence that Congress intended to provide a remedy for cleanup costs and that congressional silence was not a sufficient basis for inferring a separate cause of action.⁹⁴

Meghrig's comparison of RCRA and CERCLA remedies suggests that the lack of a RCRA response cost recovery action was more than congressional silence, but instead was positive inaction. Because Congress consciously decided not to provide a private cause of action for response costs, courts should not read such a remedy into the RCRA citizen suit provision.

Finally, the distinction between equitable relief and actual response costs is rather blurred in practice. It is doubtful that any party would complete its own environmental cleanup; it is much more likely that it would hire a contractor who specializes in the type of cleanup required. As such, the form in which relief is granted—injunction or response costs—matters less.

E. Allowing Suits for Post-Commencement Response Costs Does Not Serve the Purposes of RCRA

In *Meghrig*, the Supreme Court differentiates between the purposes of CERCLA and RCRA.⁹⁵ Congress enacted CERCLA

⁸⁹ 116 S Ct at 1259.

⁹⁰ Note, 49 Vand L Rev at 740 (cited in note 86).

⁹¹ 62 F3d 1092 (8th Cir 1995).

⁹² Id at 1094, citing 42 USC § 6972(a)(1)(B).

⁹³ Id at 1095.

⁹⁴ Id at 1097.

⁹⁵ 116 S Ct at 1254-55.

to provide for prompt cleanup of hazardous waste sites and to impose cleanup costs on responsible parties.⁹⁶ On the other hand, RCRA's principal purpose is neither to effectuate cleanup nor to compensate those who have engaged in past cleanup,⁹⁷ but rather to reduce waste generation and ensure its proper treatment, storage, and disposal "so as to minimize the present and future threat to human health and the environment."⁹⁸

The environment will not benefit from a policy permitting actions for post-commencement response costs. If the environment is in no imminent danger from the petroleum and other chemicals under Blackacre, whether response costs can be awarded does not matter. If the harm to the environment from the petroleum and chemicals under Blackacre is imminent, the environment would seem to benefit equally regardless of who performs the cleanup. It is true that the delay that accompanies equitable relief may impose additional harm on the environment. However, the quick pace of the preliminary injunction should serve to reduce, if not eliminate, such a problem.

More importantly, making response costs nonactionable under RCRA would not endanger the righting of environmental wrongs. If the hazard has not been cleaned up, a court may, at the behest of the EPA or a citizen or citizen group, enjoin a potentially liable party to remedy its portion of the harm.⁹⁹ So, while an individual or a company may be harmed, the environment will not suffer if actions for all types of response costs under the RCRA citizen suit are prohibited.

CONCLUSION

The Supreme Court's holding in *Meghrig v KFC Western, Inc.* should be extended to prohibit actions for response costs which have arisen since the commencement of a RCRA suit. Where response costs arise after the commencement of a RCRA suit, either the harm is no longer imminent or it can be remedied through traditional equitable relief. The Court's rationale that the citizen suit provision of RCRA does not contemplate the payment of response costs for prior cleanup does not rest upon the timing of the cleanup. As such, it appears to apply equally to the case of response costs for cleanups undertaken after a suit has

⁹⁶ Id at 1254.

⁹⁷ Id.

⁹⁸ Id, citing 42 USC § 6902(b).

⁹⁹ 42 USC § 6972(a).

been filed. Requiring equitable relief may cause delay, but the use of the preliminary injunction will at least partially remedy this problem. Finally, allowing citizen suits for post-suit commencement response costs does not further the goals of RCRA. Removal of the hazard is what matters—the manner in which it is removed is inconsequential.

