RCRA §6972(a)(1)(B). (emphasis added). The language of §6972(a)(1)(B) covers *both* "solid or hazardous waste" which may pose an "imminent and substantial endangerment." The language has been liberally interpreted to mean "risk of harm" or "potential harm"—without requiring proof of actual harm. *E.g., United States v. Vertac Chemical Corp.*, 489 F.Supp. 870, 885 (E.D. Ark. 1980).[1] Under RCRA, trial courts can also award costs, including attorneys fees, to a "prevailing or substantially prevailing party." §6972(e).

Summary Of KFC Western Opinion

The Supreme Court decided *Meghrig v. KFC Western* on March 19, 1996. 116 S.Ct. 1251. The Court was confronted with the question of whether RCRA §6972 authorized a private cause of action to recover the *past* cost of a waste cleanup effort which, at the time of suit, did not continue to pose an endangerment to health or the environment. The facts, procedural background and holdings of *KFC Western* are fairly straightforward:

KFC Western ("KFC") owned and operated a Kentucky Fried Chicken restaurant on a parcel of land in Los Angeles which it had purchased in 1975. In 1988, KFC discovered that the land was contaminated with petroleum products. After the discovery, the County of Los Angeles directed KFC to remediate the contamination. KFC did so and spent $211,000 properly removing and disposing of the contaminated soil. In 1991, KFC sued the prior owners of the property, Alan and Margaret Meghrig, seeking recovery of the $211,000 in cleanup costs under RCRA §6972(a). In its pleadings, KFC specifically alleged that:

- The petroleum-tainted soil was a "solid waste" under RCRA § 6903 (27).
- The waste had *previously posed* an "imminent and substantial endangerment" under § 6972(a).
- The defendants Meghrigs were prior owners of the land who had contributed to the waste's "past or present handling, storage treatment, transportation or disposal" (language of §6972(a)(1)(A)).
- The Meghrigs were therefore responsible for "equitable restitution" under 6972(a) (no such language in §6972) for reimbursement of KFC's cleanup costs.

116 S.Ct 1251, 1253.

Judge Harry L. Hupp of the U.S. District Court for the Central District of California dismissed KFC Western's complaint—and correctly as it turns out—on grounds that §6972(a) does not allow recovery for past cleanup activities *and* because §6972(a)(1)(B) requires an "imminent and substantial endangerment" at the time a RCRA suit is filed. On appeal, the Court of Appeals for the Ninth Circuit reversed. It found that a district court could award restitution for past cleanup costs, and that a private litigant could proceed under §6972(a)(1)(B) upon the allegation that the waste involved posed "imminent and substantial endangerment" to health and the environment at the time it was actually cleaned up. *KFC Western Inc. v. Meghrig*, 49 F.3rd 518, 520-521 (9th Cir. 1995).

The Supreme Court granted certiorari because the Ninth Circuit opinion was a novel application of RCRA's citizen suits provision, and because the Ninth Circuit's interpretation conflicted with another recent decision by the Eighth Circuit (*Furrer v. Brown*, 62 F.3rd 1092, 1100 - 1101 (8th Cir. 1995)). *Id.* at 1253-1254. The *KFC Western* opinion clarifies existing ground rules for private cost recovery actions under RCRA §6972(a). The opinion can be divided into three parts:

1. *Timing Requirement.* RCRA's citizen suits provision does not authorize a private cost recovery action if the waste involved does not pose an "imminent and substantial endangerment to health or the environment" *at the time the suit is filed;*

2. *No Past Costs.* RCRA does not permit compensation for *past* cleanup activities; and

3. *"Possible" Future Costs.* The Court left open the question of whether a private party could attempt to obtain a mandatory "injunction requiring another party to pay cleanup costs" if the costs arose *after* a RCRA citizen suits had been commenced.

(See RCRA RECOVERY on page 5)

Justice O'Connor, writing for the Court, based the first two parts of the Court's opinion on the policy and language differences between RCRA and CERCLA/Superfund (which also contains a citizen suits provision). She pointed out that RCRA, governing active facilities, does not have the same objectives of the later-enacted CERCLA/Superfund, governing inactive facilities. "RCRA," her opinion stated, "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." *Id.* at 1254. (emphasis added). RCRA is geared, rather, to address the generation of hazardous waste "so as to minimize the *present* and *future* threat" to human health and the environment (*quoting* 42 U.S.C. § 6902(b) (congressional objections and national policy)). (emphasis added). *Id.* Although both RCRA and CERCLA/Superfund have a citizen suits provision, RCRA's provisions, she suggested, are by RCRA's own language limited and permits private entities to enforce its provisions only "in some circumstances." *Id.*

Justice O'Connor's primary rationale for holding that a private cost recovery action must allege a *present* solid waste threat and does not include "past costs" was the language of the RCRA citizen suits provision itself. Section 6972(a)(1)(B) permits actions in circumstances where contamination "may present" an imminent threat. Section 6972(a) also authorizes district courts "to restrain any person" responsible for contamination and "order such person to take such other actions as may be necessary." 116 S.Ct at 1254-55. She also pointed out that, unlike that of CERCLA/Superfund, the citizens suits provision of RCRA: (1) has no statute of limitations; (2) does not require a showing of "reasonable costs;" and (3) allows an action only if the government is not pursuing enforcement. She concluded that these differences were further evidence that RCRA is not generally designed for private recovery of past costs. *Id.* at 1255.

However, Justice O'Connor, in *dicta*, did raise the question of whether a private party could obtain "an injunction under §6972(a) requiring another party to pay cleanup costs which arise *after* a RCRA citizen suits has been commenced." In this connection, she cited a 1982 Third Circuit decision, *United States v. Price*, 688 F.2d 204, 211-213 (3rd Cir. 1982), in which a private party was required to fund an environmental study in a suit brought by the EPA Administrator under RCRA §6973.