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Brief for the Appellant State of Rocky Mountain: Thirteenth Annual Pace National Environmental Moot Court Competition

MEASURING BRIEF*

Civ. App. No. 00-1436

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FRIENDS OF THE LUSTRA, INC.,
and
STATE OF ROCKY MOUNTAIN,
Appellants

v.

MAGMA MINING CO.,
Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ROCK MOUNTAIN

Brief for the Appellant
STATE OF ROCKY MOUNTAIN

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* This brief has been reprinted in its originally submitted form.

QUESTIONS PRESENTED

1. Did the court below correctly hold that, in light of the State of Rocky Mountain's administrative enforcement action against Magma Mining Company, the Clean Water Act citizen suit initiated by Friends of the Lustra, Inc. against Magma Mining Company for civil penalties and injunctive relief is subject to the diligent prosecution bars established in sections 309 and 505 of the Act?
2. Did the court below err in finding that it lacked jurisdiction due to the absence of a continuing violation under the Clean Water Act, given that Magma Mining Company's illegally discharged overburden remains in Lustra Creek and continually introduces additional suspended solids into the water, and that Magma Mining Company's previous intermittent violations and history of noncompliance demonstrate a distinct possibility that similar violations will recur?
3. Did the court below correctly hold that the Consent Administrative Order agreed to by the State of Rocky Mountain and Magma Mining Company barred the citizen suit initiated by Friends of the Lustra, Inc. under the doctrine of res judicata?
4. Did the court below err in finding this case to be moot, when Magma Mining Company's cessation of violations may or may not have been voluntary and the conditions under which the company has violated in the past will recur in the relatively near future?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

United States Constitution

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

Statutes

State Statutes

Legislative Materials

RELEVANT STATUTES AND REGULATIONS

The federal statutes relevant to the determination of this case are the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (1994), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (1994). Relevant sections are reprinted in Appendix B. The Rocky Mountain Solid Waste Act is also pertinent to the determination of this case. Specific details on this state statute are provided in the district court opinion, which is reprinted in its entirety in Appendix A.

STATEMENT OF THE CASE

Procedural History

This is an appeal from an order entered by Judge Remus in the United States District Court for the District of Rocky Mountain, rendered September 1, 2000, on the defendant's motion for summary judgment. The district court, in its decision below, dismissed an action initiated by Appellant Friends of the Lustra, Inc. ("FOL") against Appellee Magma Mining Company ("MMC"), seeking civil penalties and injunctive relief under the citizen suit provision of the Clean Water Act ("CWA"). (R. at A-2). The district court justified its dismissal of FOL's suit on four grounds. Specifically, the district court opined that FOL's action was statutorily precluded by the diligent prosecution of MMC by the State of Rocky Mountain ("the State"); inadequate because it failed to allege a continuing violation of the CWA; barred by the principle of res judicata; and ultimately moot. (R. at A-2).

The district court previously granted the State's motion for permissive intervention, and the State acts now as an Appellant in this case, challenging both the district court's refusal to find a continuing violation of the CWA and the court's insistence that the case is moot. The State, however, supports the ultimate result reached by the district court and has thus briefed arguments in support of the court's judgment that FOL's suit is barred by the State's administrative enforcement action and res judicata. The State's split position is properly differentiated from Appellant FOL's, which opposes all four facets of the district court's ruling, and Appellee MMC's, which supports the district court's judgment in its entirety. (R. at A-1, A-2).

Statement of the Facts

FOL is a non-profit corporation organized for the protection of Lustra Creek. (R. at A-1). The creek, located in the State of Rocky Mountain, flows into the Roaring River, which is a tributary of the Columbia River, a navigable water of the United States. Lustra Creek lies at the base of Magic Mountain. (R. at A-2).

MMC is a mining company that operates an open-pit opal mine on the slope of Magic Mountain. In order to reach the mountain's opal deposits, MMC must remove large quantities of overburden rock. From January 1980 until January 1998, during three phases of operation, MMC intermittently deposited this overburden in Lustra Creek. As a result, the creek now flows underground for a half-mile beneath the overburden. (R. at A-2).

In 1993, the Rocky Mountain Department of Environment and Natural Resources ("RMDENR") deemed the overburden dumped in Lustra Creek to be an unpermitted landfill. RMDENR issued a notice of violation against MMC for violating the Rocky Mountain Solid Waste Act (RMSWA), which forbids the disposal of overburden in a landfill without a state-issued permit. In August 1994, RMDENR and MMC agreed upon the issuance of a Consent Administrative Order. Negotiated pursuant to the RMSWA, the Order required MMC to cease dumping overburden in the creek and to plant the landfill with native vegetation so as to prevent further pollution of the creek. The Order required MMC to nurture the vegetation so it would be indistinguishable from native vegetation within three years. The Order's preamble noted that this remedial strategy was chosen because removal of landfill from the creek would result in massive disruption of water quality. MMC graded the landfill and planted native vegetation in 1998. Scant rainfall since then, however, has prevented the plants from growing sufficiently to resemble the native vegetation in adjacent areas. State studies have found the concentration of suspended solids in Lustra Creek to be greater below the landfill than above it. (R. at A-2).

Although MMC has not placed any overburden in the creek since January 1998, MMC is planning a fourth phase of operation that will necessitate the removal of additional overburden. This fourth phase of the operation is not scheduled to commence for at least one year, and MMC has not reached a decision on the method of disposal for this final phase. Placement of overburden in the creek, however, is the cheapest means of disposing overburden. (R. at A-2).

More than sixty days prior to the filing of its complaint with the district court, FOL gave notice to MMC, the Environmental Protection Agency, and RMDENR of the violations it alleges and its intention to sue MMC. (R. at A-3). In its suit, subsequently filed pursuant to section 505 of the CWA, 33 U.S.C. § 1365 (1994), FOL alleges that MMC has violated section 301(a) of the CWA, 33 U.S.C. § 1311(a) (1994), by discharging pollutants into Lustra Creek without a permit. FOL seeks an injunction forbidding MMC from discharging more pollutants into the creek and requiring it to remove the pollutants it has already discharged into the creek. FOL also seeks both the assessment of civil penalties of $25,000 a day for every day the fill was placed or allowed to remain in the creek and attorneys' fees. (R. at A-1).

Following the initiation of FOL's suit, the State was granted permissive intervention to defend the actions it has taken to secure compliance with state and federal law. (R. at A-1). As noted in the procedural history above, the State supports FOL's position that a continuing violation of the CWA exists and rejects any assertion that the pollution of Lustra Creek is a moot issue, but wholly supports the district court's decision that FOL's suit is nonetheless precluded by the state's diligent administrative enforcement action and the principle of res judicata.

SUMMARY OF THE ARGUMENT

This Court should affirm those portions of the district court's holding that found FOL's CWA citizen suit barred by both the State's diligent prosecution of MMC's violations and the doctrine of res judicata. This Court should reverse those portions of the district court's holding that found no continuing or intermittent violation and that declared the case moot.

First, the State's diligent prosecution of MMC bars FOL's suit. *See* 33 U.S.C. §§ 1319, 1365 (1994). RMDENR's Order was issued under the RMSWA, a state law comparable to the CWA. Although the statutes are not identical, all that is required is that both allow for the assessment of civil penalties and pursue closely related goals. *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1992). Tempering the statutory comparison is the requirement that state enforcement measures must be given great deference because of the limited role for citizen suits envisioned by Congress and overriding public policy considerations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). FOL bears the burden of

showing that the State has not diligently prosecuted MMC yet lacks strong evidence that the State has exercised its enforcement function dilatorily, collusively, or in bad faith. *See Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). FOL's suit is thus barred by the State's diligent prosecution.

Second, although the State is diligently prosecuting MMC's violation, the State believes that the district court erred in finding that no continuing violation exists. MMC discharged mining overburden, a non-particulate solid pollutant, into Lustra Creek without a permit under the CWA. This discharge did not instantly pollute the creek with all of its substance, as would a liquid discharge; rather, the pollution occurs as the solid discharge erodes, perpetuating the addition of pollutants to the water. Therefore, as long as MMC's unpermitted fill remains unremediated in Lustra Creek, a continuing violation of the CWA exists. At the very least, an intermittent violation exists, which was an important part of the Supreme Court's interpretation of the CWA's "to be in violation" requirement. *Gwaltney of Smithfield Ltd.*, 484 U.S. at 57. MMC's history of intermittent violations in the prior phases of the operation and its previous noncompliance with the State's Order establish at least a "reasonable likelihood" of a resumed violation during the fourth and final phase of overburden removal. *Id.* As such, the district court erred in granting this portion of MMC's motion for summary judgment.

Third, in addition to being barred by the State's diligent prosecution of MMC, FOL's suit is also precluded by res judicata. In determining what has preclusive effect, the Rocky Mountain Supreme Court has held that res judicata applies to administrative orders in the same manner as court orders. *State v. Williams*, 118 R.M. 36, 39 (1999). Accordingly, since the State's Order and FOL's suit arise from a common nucleus of operative fact, have identical causes of action, and target MMC, and since FOL and the State are in privity because both represent the public interest, the district court properly held that FOL's suit is barred by res judicata.

Finally, the district court erred in finding this case to be moot. The error is most obvious if this Court agrees that a continuing or intermittent violation exists. If not, however, the case still is not moot under the applicable tests for mootness. If MMC's cessation is considered to be voluntary, since it occurred more than three years after RMDENR ordered MMC to stop dumping, then the

burden is on MMC to show that it is "absolutely clear" that its wrongful behavior could not reasonably be expected to recur. *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998). Given MMC's past noncompliance, the existence of a fourth phase of mining, and the fact that dumping overburden in Lustra Creek remains the cheapest and easiest method of disposal, MMC's mere averments that it does not intend to dump in the creek in the future clearly fail to meet MMC's heavy burden of persuasion. If MMC's cessation is considered instead to stem from RMDENR's Order and thus to be involuntary, then the burden is on FOL and the State to show a realistic prospect of repetition of the wrongful behavior during the fourth phase of the operation. *See id.* FOL and the State have clearly met this burden. Again, given MMC's actions during the first three phases, its previous noncompliance with RMDENR's Order, and the convenience of the creek for disposal, FOL and the State have demonstrated substantial reason to doubt MMC's statements expressing a lack of intent to dump there in the future. Under either interpretation of the mootness standard, therefore, the district court's finding of mootness is in error.

This Court should therefore affirm the portion of the district court's opinion barring FOL's suit because of the State's diligent prosecution and res judicata. However, the district court's decision was not correct in its entirety, and this Court should therefore reverse the district court's holdings with respect to the existence of a continuing or intermittent violation and mootness.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT RMDENR'S ADMINISTRATIVE ORDER PRECLUDES FOL'S ACTION UNDER THE "DILIGENT PROSECUTION" BARS OF 33 U.S.C. §§ 1319(g)(6)(A) AND 1365(b)(1) AND THAT THESE STATUTORY BARS APPLY EQUALLY TO FOL's REQUESTS FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES.

Two provisions of the federal Clean Water Act preclude the maintenance of citizen suits in instances where the government has initiated enforcement proceedings on its own. Section 505 of the CWA bars a citizen suit if the state "has commenced or is diligently prosecuting a civil or criminal action in court." 33 U.S.C.

§ 1365(b)(1)(B) (1994). Section 309 of the CWA goes a step farther in recognizing the primacy of state enforcement authority, instituting a bar against citizen suits in instances where the state "has commenced and is diligently prosecuting an action" under "comparable" state law. 33 U.S.C. § 1319(g)(6)(A)(ii) (1994). The district court justifiably found that both section 309 and section 505 of the CWA barred FOL's suit in the instant case. (R. at A-5). However, given the broader range of state actions contemplated and protected by section 309, the analysis herein will focus on the construal of this provision alone.[1] With respect to section 309, the district court correctly ruled that the enforcement action undertaken by RMDENR against MMC constitutes diligent prosecution under a comparable state law and that said state action precludes FOL from pursuing a suit for civil penalties as well as injunctive relief against Appellee MMC. (R. at A-5).

A. The RMDENR Action Against MMC, Per CWA Section 309(g)(6)(A)(ii), Was Commenced Under "Comparable" State Law And Diligently Prosecuted.

Under section 309(g)(6)(A)(ii) of the CWA, a citizen suit is barred if the state can demonstrate that, with respect to the violations claimed in the citizen suit, (1) governmental action has commenced under a federal or comparable state statute; and (2) said governmental action is being prosecuted diligently. *Sierra Club v. Colorado Ref. Co.*, 852 F. Supp. 1476, 1481 (D. Colo. 1994). In the case at bar, FOL has not challenged the fact that the notice of violation issued by RMDENR and the Consent Administrative Order subsequently signed by RMDENR and MMC constitute the commencement of an action. Accordingly, it only remains to be seen whether RMDENR's enforcement action was undertaken pursuant to a "comparable state law" in a manner that may be characterized as "diligent." *See* 33 U.S.C. § 1319(g)(6)(A)(ii) (1994).

1. This focus does not suggest that the district court's section 505 ruling was incorrect. Agency proceedings may be equivalent to court actions for purposes of section 505(b)(1)(B). *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 217-18 (3rd Cir. 1979); *Student Pub. Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427 (D.N.J. 1985). RMDENR's action in this case could therefore qualify as a preclusive "court" action.

1. RMDENR's administrative actions undertaken pursuant to the Rocky Mountain Solid Waste Act constitute an action commenced under "State law comparable" to CWA section 309.

At the outset, it is important to note that "there is a wide range of judicial opinion concerning the parameters of administrative preclusion under [section 1319](g)(6)(A)(ii), especially insofar as the diligence of state prosecution and comparability of state legal regimes are concerned." *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, 67 F. Supp. 2d 302, 308 (S.D.N.Y. 1999). That said, courts have consistently ruled that section 309's comparability requirement "does not mean that the state's regulatory authority or processes must be identical to the federal provisions." *Sierra Club v. Colorado Ref. Co.*, 838 F. Supp. 1428, 1435 (D. Colo. 1993). *See also Saboe v. Oregon*, 819 F. Supp. 914, 917 (D. Or. 1993); *Sierra Club v. Port of Townsend Paper Corp.*, No. C87-316C, 1988 U.S. Dist. LEXIS 17137, at *5-6 (W.D. Wash. May 2, 1988). The focus of the comparability analysis is "not on state statutory construction." *N. & S. Rivers Watershed Ass'n, Inc v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1992). Rather, the bottom line for comparability analysis amounts to an assessment of whether or not, "taken as a whole, [state] law contains an adequate mechanism for assessing civil penalties against polluters." *Colorado Ref. Co.*, 838 F. Supp. at 1436. It is uncontested that under Rocky Mountain State law, specifically the Rocky Mountain Solid Waste Act, RMDENR is entitled to seek the assessment of civil penalties against polluters who contaminate navigable waters. (R. at A-2 to A-3).

Beyond this initial approximation of comparability, further reasons exist to consider RMDENR's action against MMC to be "comparable" to CWA section 309. Consider, for example, the standard for section 309 comparability stated in *North & South Rivers Watershed Ass'n.*, 949 F.2d 552. In that case, the First Circuit assessed the preclusory effect of a state administrative order that required a city to begin engineering plans for the design and construction of an improved sewage treatment plant. *Id.* at 553-54. The order did not mandate the ultimate construction of the plant, it did not command the cessation of sewage discharge in the interim, nor did it assess any civil penalties. *Id.* In fact, although one section of the state pollution control statute authorized the assessment of civil penalties, the state administrative order did not itself issue under the penalty-authorizing section of the stat-

ute. *Id.* at 555-56. Nonetheless, the First Circuit still deemed the order to be an action prosecuted under comparable state law, stating: "It is enough that the Massachusetts statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals." *Id.* at 556.

The *North & South Rivers Watershed Ass'n* analysis leads to the clear conclusion that the actions undertaken by RMDENR against MMC have been done pursuant to a state law sufficiently comparable to CWA section 309. First, like the CWA, the RMSWA permits RMDENR to pursue the assessment of civil penalties against polluters. As the district court below aptly noted, "The RMDENR may issue administrative orders to persons who violate the RMSWA requiring them to comply with the statute or file a civil action in state court seeking an injunction requiring compliance and/or assessing a civil penalty of up to $2,500 per violation." (R. at A-2 to A-3). Although the CWA authorizes civil penalties of a greater maximum amount, 33 U.S.C. § 1319(d) (1994), the maximum penalty amount permitted under the two provisions is irrelevant to their status as comparable. *See Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 842 F. Supp. 1140, 1145 (E.D. Ark. 1993), *aff'd* 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995). Second, and more importantly, the CWA and the RMSWA pursue closely related goals. The goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1994). Moreover, "The [CWA's] thrust is to provide society with a remedy against polluters in the interest of protecting the environment." *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997) (*citing Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 184 (D. Conn. 1991)). In the case at bar, there can be no doubt that by forbidding the continued dumping of overburden and mandating the remedial planting of native vegetation, the administrative action pursued by RMDENR under the RMSWA was intended to enhance the chemical, physical, and biological integrity of Lustra Creek.[2] The Order also clearly provided a societal remedy for this instance of pollution and advanced the interest of

2. Planting native vegetation, by fostering the growth of a root system within the landfill, helps to anchor the overburden and reduce erosion of suspended solids. Vegetation may also filter the solids and reduce contamination of the creek. Although

environmental protection. Therefore, to the extent that the RMSWA contains penalty provisions comparable to, and tracks the goals pursued by, the CWA, the district court appropriately deemed the RMSWA and the CWA to be "comparable."

Although the above case law and analysis support the conclusion that RMDENR conducted its enforcement action under a comparable state law, several courts have made much of public notice and participation requirements and have refused to find comparability in instances where the state provision does not provide mandatory public notice and participation rights. *See, e.g., Pub. Interest Research Group of New Jersey, Inc. v. New Jersey Expressway Auth.*, 822 F. Supp. 174, (D.N.J. 1992); *Pub. Interest Research Group of New Jersey, Inc. v. GAF Corp.*, 770 F. Supp. 943 (D.N.J. 1991); *Atl. States Legal Found. v. Universal Tool*, 735 F. Supp. 1404 (N.D. Ind. 1990). The RMSWA does not require public notice or intervention in administrative enforcement actions, but it does provide a mechanism for public intervention in court actions initiated by RMDENR for enforcement purposes. (R. at A-3).

The case law dwelling on the technicalities of public notice and participation is not controlling in the case at bar, and strong case law has convincingly argued to the contrary. For example, in *North & South Rivers Watershed Ass'n*, the First Circuit did not allow the absence of mandatory public notice and participation clauses to derail a finding that the state statute was "comparable" for the purposes of CWA section 309. 949 F.2d 552. The statute at issue in that case, like the RMSWA here, did not guarantee public notice or participation in administrative enforcement proceedings and only permitted citizen intervention in state-initiated enforcement suits. *Id.* at 556 n.7. Nonetheless, the First Circuit declared that, "so long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable." *Id.* Many courts have followed the First Circuit's lead on this point and have discounted the importance of mandatory public notice and participation clauses. *See, e.g., Colorado Ref. Co.*, 838 F. Supp. at 1435-36 (stating that, "although the Colorado regulatory scheme does not mandate prior public notice of enforcement proceedings, overall, the scheme adequately protects the public interest in enforcement actions");

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these measures will not fully restore the creek to its prior condition, they will improve water quality and prevent further harm.

Saboe, 819 F. Supp. at 917 ("[D]espite the lack of mandatory public notice and participation rights, state of Oregon procedures adequately protect the substantive interest of citizens in enforcement actions and are comparable to the CWA."); *Port of Townsend Paper Corp.*, 1988 U.S. Dist. LEXIS 17137, at *5-6 (noting "the absence of public notice and participation" but finding the state law comparable because "Congress only required that the state law be 'comparable,' not 'identical' to the federal provisions"). Given that the RMSWA provides for public intervention in RMDENR civil enforcement actions, bears great similarity to the public notice and participation provisions upheld as "comparable" in *North & South Rivers Watershed Ass'n*, and was clearly invoked in a manner that safeguards the public interest, the district court appropriately deemed it "comparable" to CWA section 309.

Tempering the analysis of statutory differences, many courts, including the district court in this case, have paid special attention to the importance of maintaining the limited role for citizen suits that was intended by Congress and identified by the Supreme Court. *See, e.g., N. & S. Rivers Watershed Ass'n*, 949 F.2d at 556; *Williams Pipeline Co.*, 964 F. Supp. at 1324; *Colorado Ref. Co.*, 852 F. Supp. at 1481; *New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 164 (S.D.N.Y. 1991). (R. at A-3 to A-4). This limited role for citizen suits, discussed by the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987), is necessary because a specific goal of the CWA is to "recognize, preserve and protect the primary responsibility and rights of the States to prevent, reduce, and eliminate pollution." *See also Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998) (*quoting* 33 U.S.C. § 1251(b) (1994)). In accordance with this congressional goal, the Court noted, "the citizen suit is meant to supplement rather than to supplant governmental action" and is "only proper" in instances where "the Federal, State and local agencies fail to exercise their enforcement responsibility." *Gwaltney of Smithfield*, 484 U.S. at 60 (*citing* S. REP. No. 92-414, at 64 (1971)). In the case at hand, FOL cannot contend that RMDENR has failed to act; rather, FOL only contends that the State has failed to act in a manner satisfactory to FOL's personalized interests. However, given the supplementary role of citizen suits afforded by Congress and the Supreme Court, the narrow interests pursued by FOL in this case must be rejected in favor of the broader interests promoted by the State.

It is important to note that state enforcement measures are properly given great deference in the comparability context because of weighty public policy considerations. First, the institution of a citizen suit that merely duplicates a prior, state-initiated action undermines the legitimacy and credibility of the state. Second, and more importantly, if citizens are permitted to file suit in order to seek the civil penalties that a state agency has chosen to forego, then the agency's discretion to act in the public interest is curtailed considerably. *See Gwaltney*, 484 U.S. at 60-61. This curtailment of discretion occurs because "[a]n administrator unable to make concessions is unable to obtain them." *Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992). In other words, the ability of the state to resolve environmental problems through informal means or negotiation will be eroded because polluters will be unwilling to negotiate with the state if they nonetheless remain vulnerable to duplicative citizen suit prosecution. *Comfort Lake Ass'n*, 138 F.3d at 357. In circumstances where state discretion is limited and the state's enforcement authority lacks finality, state enforcement will be limited to formal, litigation-based measures that significantly raise the costs of environmental enforcement for the state, the parties subject to enforcement and, indeed, the state's citizenry as a whole. *Id.*

2. RMDENR's administrative actions taken pursuant to the Rocky Mountain Solid Waste Act were "diligently prosecuted" within the meaning of section 309 of the CWA.

For a state action under a comparable state statute to bar a citizen suit under section 309(g)(6)(A)(ii) of the CWA, the state action must be "diligently prosecuted." The plaintiff in a citizen suit bears the burden of proving that the state agency's prosecution is not diligent. *Williams Pipeline Co.*, 964 F. Supp. at 1324 (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC)*, 890 F. Supp. 470, 486-87 (D.S.C. 1995)). "The burden is heavy, because the enforcement agency's diligence is presumed." *Id.* The presumption of diligence may only be overturned with "persuasive evidence that the state is currently engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith." *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). Moreover, "[d]iligent prosecution is not limited to ordering compliance with the CWA by a date certain, according to a timetable, and providing civil penal-

ties for violations. Rather, the CWA calls for a more deferential approach." *Williams Pipeline Co.*, 964 F. Supp. at 1324.

In the instant case, RMDENR's diligence is clear. RMDENR exercised its enforcement authority against MMC by issuing a notice of violation for the disposal of MMC's overburden and subsequently negotiating a Consent Administrative Order that forbids additional dumping and requires remediation of the site. It is notable that MMC is now in substantial, albeit not full, compliance with RMDENR's enforcement goals. MMC has not dumped in the creek for over two years and has graded the site and planted it with native vegetation. Although scant rains have kept the plants from growing sufficiently to achieve full remedial effect, RMDENR continues informal negotiations with MMC on this matter. Certainly, this review of RMDENR's actions reveals that FOL can adduce no strong evidence that the State has exercised its enforcement function dilatorily, collusively, or in bad faith. Since the burden is on FOL to disprove diligence, and since said burden is particularly heavy, the district court appropriately deemed RMDENR's enforcement actions to be "diligent."

Additionally, although FOL initiated this suit in order to pursue a more formal proceeding and a different remedy than RMDENR, this is immaterial to whether RMDENR's actions have been diligent. As the Eighth Circuit noted in *Comfort Lake Ass'n*, 138 F.3d at 357, for a government agency's actions to be considered diligent, the agency need not succeed by the private party's definition of success. *See also Williams Pipeline Co.*, 964 F. Supp. at 1324. FOL is not entitled to any "personalized" remedy given that the State is "representative of society as a whole." *See United States Envtl. Prot. Agency v. City of Green Forest*, 921 F.2d 1394, 1404-05 (8th Cir. 1990). In this case, RMDENR "intentionally and advisedly ordered compliance with state requirements to return the completed landfill to its natural state by grading to natural contours and growing native vegetation rather than risking further environmental damage by removing the landfill." (R. at A-4). While RMDENR has chosen to pursue enforcement actions not preferred by FOL, this is merely indicative of the State's consideration of broader issues and interests. Accordingly, the largely informal means used and the specific ends attained by RMDENR in this case are a rightful exercise of the State's prosecutorial discretion.

B. The RMDENR Action Against MMC, Commenced Under "Comparable" State Law And Diligently Prosecuted, Bars FOL's Actions For Both Civil Penalties And Injunctive Relief Under CWA Section 309(g)(6)(A)(ii).

In its opinion below, the district court correctly ruled that the citizen suit bar established by section 309(g)(6)(A)(ii) of the CWA applies equally to FOL's actions for civil penalties and injunctive relief. (R. at A-5). The text of section 309(g)(6)(A) provides that a violation being prosecuted by the state in an administrative enforcement action cannot be the subject of a "civil penalty action" brought pursuant to section 505 of the Act; however, section 309(g)(6)(A) makes no specific mention of a bar to a citizen-initiated claim for injunctive relief. *See* 33 U.S.C. § 1319(g)(6)(A) (1994). Accordingly, at least one court has ruled that section 309 creates no bar to a citizen suit for injunctive relief. *See Coalition for a Liveable West Side v. New York City Dep't of Envtl. Prot.*, 830 F. Supp. 194, 196-97 (S.D.N.Y. 1993).

Significantly, however, the analysis of the court in *Coalition for a Liveable West Side* was explicitly and persuasively rejected by the First and Eighth Circuits. In *North & South Rivers Watershed Ass'n*, the First Circuit held that, despite the plain statutory language, it would be "undesirable" and ultimately "absurd" to preclude citizens' claims for civil penalties but not injunctive relief. 949 F.2d at 557-58. This conclusion was premised, in part, on the First Circuit's reading of the Supreme Court's language in *Gwaltney*, which did not contemplate "civil penalties separately from injunctive relief." *See N. & S. Rivers Watershed Ass'n*, 949 F.2d at 558 (*citing* 484 U.S. at 58). Further, the First Circuit reasoned, given the "high degree of deference" accorded to diligently enforced state action, "it is inconceivable . . . that the Section 309(g) ban is only meant to extend to civil penalty actions." *Id.* Finally, the First Circuit noted, "if the limitation on civilian suits is to have any beneficial effect on the enforcement of clean water legislation, the section 309(g) ban must cover all civil actions." *Id.* The Eighth Circuit similarly interpreted section 309(g), declaring that to permit citizen suits for injunctive relief where claims for civil penalties are barred would be "unreasonable" and "would undermine, rather than promote, the goals of the CWA." *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d at 376, 383 (8th Cir. 1994).

In the immediate case, the First and Eighth Circuits' analyses ring true. Congress clearly meant for the control of water pollu-

tion to be primarily the province of states, not private attorneys general. *Gwaltney of Smithfield*, 484 U.S. at 60. RMDENR's enforcement action against MMC should thus be spared citizen suit interference, irrespective of the form of relief prayed for in the suit. As previously discussed, there are strong public policy justifications for preventing citizen suits from overriding state enforcement efforts. Presumably, the public policy considerations that would bar citizen suits for civil penalties in the face of diligently prosecuted state administrative actions would also bar citizen suits for injunctive relief. This is particularly compelling in the case at bar, where FOL's requested relief would not only levy penalties in a situation in which RMDENR has chosen to forego them, but would also entirely nullify the State's selected remediation strategy. FOL seeks an injunction for removal of the existing overburden from Lustra Creek, an approach rejected by the experts at RMDENR as counterproductive and harmful. FOL thus clearly seeks to supplant the State's administrative enforcement action with its own judgment. This is incompatible with the role that Congress intended citizen suits to play, defiant of the citizen suit limitations espoused by the Supreme Court, and contrary to the goals of the CWA.

II. THE DISTRICT COURT ERRED IN HOLDING THAT IT HAD NO JURISDICTION DUE TO THE ABSENCE OF A CONTINUING VIOLATION, SINCE A CONTINUING OR INTERMITTENT VIOLATION AS REQUIRED BY 33 U.S.C. § 1365(a)(1) DOES EXIST.

Although the State agrees with the district court that a citizen suit should not be permitted in this case because of the State's diligent prosecution of MMC and because of res judicata,[3] the State believes that the court erred in finding that it had no jurisdiction under section 505(a)(1) due to the absence of a continuing violation. The court appropriately referred to *Gwaltney* in order to ascertain the scope of section 505(a)(1)'s authorization for citizens to sue any person "alleged to be in violation" of the CWA. (R. at A-5). *See also Gwaltney of Smithfield*, 484 U.S. 49. In *Gwaltney*, the Supreme Court held that citizen suits could not proceed for wholly past violations but required citizen-plaintiffs to "allege a state of

3. The State's arguments about res judicata barring FOL's citizen suit are discussed in Section III.

either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57. MMC's pollution of Lustra Creek does constitute a continuing violation, or at the very least an intermittent violation. The district court, however, misconstrued the *Gwaltney* requirement and the lessons of other jurisdictions' cases, under both the CWA and RCRA, similar to the one at bar. The State is quite concerned, as a matter of public policy, about the message this sends to MMC and other future polluters.

A. The District Court Erred By Declining To Hold That A Continuing Violation Exists So Long As Unpermitted Fill Material Remains In And Continues To Add Pollution To Lustra Creek.

The district court erred in denying that when fill material is discharged without a section 404 permit, the violation continues as long as the unpermitted fill remains in navigable water. Justice Scalia's concurrence in *Gwaltney* is quite instructive on this point: "The phrase in section 505(a), 'to be in violation,' unlike the phrase 'to be violating' or 'to have committed a violation,' suggests a state rather than an act – the opposite of a state of compliance. . . . When a company has violated an effluent standard or limitation, it remains, for purposes of section 505(a), 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." 484 U.S. at 69. MMC has failed to fully institute remedial measures that clearly eliminate the cause of the violation, contrary to RMDENR's Order; the native vegetation planted on the landfill has grown insufficiently to be healthy and indistinguishable from the vegetation in the surrounding area. MMC's fill, in its current unremediated state, therefore constitutes a continuing violation. The district court, however, dismissed as irrelevant the numerous cases submitted to it supporting the proposition that the violation continues as long as the unpermitted, unremediated fill remains, but the distinctions it drew between those cases and the one at bar were erroneous, irrelevant, or both.

In *United States v. Ciampitti*, 669 F. Supp. 684 (D.N.J. 1987), the court imposed a fine of $1000 for each day that the defendant violated the CWA, defining a day of violation to be "every day that a violator allows illegal fill material [dumped without a section 404 permit] to remain in federally regulated wetlands." *Id.* at 700 (*citing United States v. Cumberland Farms of Connecticut*, 647 F.

Supp. 1166 (D. Mass. 1986)). The district court below correctly noted that *Ciampitti* was about assessing penalties and that the United States is not jurisdictionally required to show a continuing violation. (R. at A-5). Those facts do not meaningfully distinguish the case, however. In order to assess penalties, and regardless of who the plaintiff is, a court must first determine the violation's duration, and the *Ciampitti* court determined that the violation continued as long as the illegal fill remained in the wetland. Although the case at bar is not at the penalty assessment phase, and although the United States is not a party, the logic of determining how long a violation lasts is no different here than in *Ciampitti*. Essentially, the violation continues as long as the illegal fill remains. *See, e.g., Sasser v. Administrator*, 990 F.2d 127, 129 (4th Cir. 1993) ("Dr. Sasser's violation of the Act is a continuing one. Each day the pollutant [dredged and fill materials] remains in the wetlands without a permit constitutes an additional day of violation."). Therefore, every day that MMC's unpermitted fill remains unremediated in Lustra Creek, it is violating the CWA. MMC's fill is still in the creek and is still polluting it. Accordingly, this constitutes a continuing violation that would authorize a citizen suit in the absence of the State's diligent prosecution.

The district court's dismissal of the instructive value of *North Carolina Wildlife Federation v. Woodbury*, No. 87-584-CIV-5, 1989 U.S. Dist. LEXIS 13915 (E.D.N.C. Apr. 24, 1989), is even more curious, as the case is not what the court declares it to be. First, it was not a case brought by the United States, as the district court claimed, (R. at A-5), but rather by several environmental organizations; as stated above, however, the presence of the United States as a party is of no relevance to the logical determination of how long a violation lasts. Second, *Woodbury* did not concern the assessment of penalties, (R. at A-5), but rather dealt with determining citizen suit jurisdiction, making it directly relevant to the case at hand.

Like *Ciampitti*, the *Woodbury* court, as well as the *Woodbury* defendants, agreed that the defendants' failure to remove illegally discharged fill material from a wetland constituted a continuing violation. 1989 U.S. Dist. LEXIS 13915, at *5. Citing Justice Scalia's concurrence in *Gwaltney*, the *Woodbury* court remarked that "[t]reating the failure to take remedial measures as a continuing violation is eminently reasonable. This is because it is not the physical act of discharging dredge wastes itself that leads to the injury giving rise to citizen standing, but the consequences of

the discharge in terms of lasting environmental degradation." *Id.* Similarly, MMC's failure to take successful remedial action should constitute a continuing violation.

In addition to unpersuasively attempting to distinguish *Ciampitti* and *Woodbury* on the facts, the district court also declined to follow these section 404 cases because it believed that finding a continuing violation "merely because of the continuing presence of materials disposed of years ago would undermine the continuing violation requirement of § 505." (R. at A-5). The case the district court cited to support this proposition, *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2nd Cir. 1993), concerned lead shot dissolving in Long Island Sound. In that case, the Second Circuit held that including "the mere decomposition of pollutants" as a violation would undermine the "present violation" requirement. 989 F.2d at 1313. The State disagrees with both the district court and the Second Circuit in this regard.

Considering a discharge of a solid pollutant – such as dredged material, lead shot, or overburden rock – that continues to deteriorate and pollute the environment to be a continuing violation would not make the continuing violation doctrine meaningless. The district court observed that the CWA prohibits "the *addition* of the pollutant to navigable waters, not the *maintenance* of the pollutant in navigable waters." (R. at A-5) (emphasis in original). The court erred, however, in stating that "[a]ddition occurs only at one time, when the rocks enter the river, not on a daily basis as long as the rocks remain there." (R. at A-5). It is uncontested that the concentration of suspended solids in Lustra Creek is greater below the landfill than above it. The constant running of the creek through the landfill continually adds to that concentration of solids, altering the "chemical, physical, and biological integrity" of the creek. 33 U.S.C. § 1251(a) (1994). As such, a continuing violation exists as long as the pollution remains unremediated.

This is not to say that all past violations can be considered continuing violations; although their effects upon the environment may still be felt, the majority of past violations of the CWA do not involve the continuous addition of new pollutants to navigable water. As the *Woodbury* court explicitly stated, considering a defendant's failure to take remedial measures to be a continuing violation would not effectively nullify the continuing violation doctrine. 1989 U.S. Dist. LEXIS 13915, at *7. This is because only violations having persistent effects that are amenable to cor-

rection would constitute continuing violations. *Id.* CWA suits involving a past discharge of a liquid or some other soluble pollutant that dissipates and disperses in the water could not be considered a continuing violation. Such discharges do not continue to add pollutants to the navigable water; they dissipate in the water and become part of it when the discharge occurs. Remediation is thus impossible.

In the instant case, MMC discharged overburden into the creek. This non-particulate solid, like the lead shot pellets in *Connecticut Coastal Fishermen's Ass'n*, did not instantly pollute the water with all of its substance. Rather, the pollution occurs perpetually as the overburden wears down or otherwise erodes. Since MMC's discharge does not disperse and dissipate like liquids, remediation is possible. RMDENR determined that removal of the overburden was not feasible, due to mud and silt erosion during the removal process, so RMDENR ordered MMC to grade the landfill and to plant native vegetation in an attempt to restore the area and to reduce the flow of suspended solids into the creek. Since MMC has not fully complied with the vegetation portion of RMDENR's Order, MMC is in violation as long as the unpermitted fill remains unremediated.

The RCRA continuing violation cases support this conclusion. For example, in *Gache v. Town of Harrison*, 813 F. Supp. 1037 (S.D.N.Y. 1993), the court reasoned that a continuing violation of RCRA existed because the harms stemmed from the contamination of soil and water as waste materials seeped into the ground, not from the act of dumping itself. "So long as wastes remain in the landfill threatening to leach into the surrounding soil and water, a continuing violation surely may exist." 813 F. Supp. at 1040. In the case at hand, the harm similarly comes not from the dumping of the overburden per se, but from the "seepage" of suspended solids into the creek. In many ways, the violation of the CWA in this case is more akin to a typical RCRA violation than a typical CWA violation. CWA violations are usually irreversible and evanescent, since the pollutant disperses or dissipates, so little would be gained by allowing a citizen suit in those cases because the damage had already been done. In contrast, the harms resulting from the improper disposal of hazardous waste typically remain remediable because the waste remains on or adjacent to the initially contaminated property. *See Fallowfield Dev't Corp. v. Strunk*, No. 89-8644, 1990 U.S. Dist. LEXIS 4820, at *10 (E.D. Pa. Apr. 23, 1990).

The district court attempted to distinguish the line of continuing violation RCRA cases from the case at hand by declaring that, unlike the CWA, the RCRA statutory scheme – specifically sections 7002(a)(1)(B) and 7003 – is aimed at previously disposed wastes that pose a present danger. (R. at A-5). *See also* 42 U.S.C. §§ 6972, 6973 (1994). Granted, these sections of RCRA do appear to encompass more of a connection between past contributions and present dangers. The courts in most of the RCRA cases cited for support, however, were not analyzing past violations causing present dangers, as defined by section 7002(a)(1)(B); rather, they were defining "continuing violations" under section 7002(a)(1)(A), which contains the identical "alleged to be in violation" language as is found in the Clean Water Act. *See, e.g., Fallowfield Dev't Corp*, 1990 U.S. Dist. LEXIS 4820; *Gache*, 813 F. Supp. 1037; *Briggs & Stratton Corp. v. Concrete Sales & Services*, 20 F. Supp. 2d 1356 (M.D. Ga. 1998). Cases that did involve section 7002(a)(1)(B) analyses also involved completely distinct analyses under section 7002(a)(1)(A). *See L.E.A.D. v. Exide Corp.*, No. CIV 96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999); *Aurora Nat'l Bank v. Tri Star Mktg., Inc.*, 990 F. Supp. 1020 (N.D. Ill. 1998). The district court thus erred in dismissing these RCRA cases as inapposite. The RCRA cases are clearly quite relevant, especially given the RCRA-like violation in the case at bar.

Public policy considerations also support the construction of the continuing violation requirement advocated by the State in this case. The *Woodbury* court noted that the failure to define the continuing presence of illegally discharged material as a continuing violation would create incentives for violators to hide their activities from public and private scrutiny. "If citizen-suits were barred merely because any illegal ditching and drainage of a wetland tract was completed before it might reasonably be discovered, violators would have a powerful incentive to conceal their activities from public and private scrutiny – which would lead to serious problems in public and private enforcement of the Clean Water Act." *Woodbury*, 1989 U.S. Dist. LEXIS 13915, at *8. In contrast, construing unremediated fill to be a continuing violation as long as it remains in and continues to pollute navigable water would allow the prospect of State-sought penalties – or in the absence of State action, citizen suits – to serve as a deterrent to MMC and other potential polluters. Such a result is clearly in the public interest.

B. The District Court Incorrectly Focused Solely On Whether There Was A "Continuous" Violation Under *Gwaltney*, Ignoring The "Intermittent Violation" Part Of The Holding.

In its opinion, the district court cited *Gwaltney* as requiring "that the violation be ongoing at the time the complaint is filed," (R. at A-5). Its analysis indicates that the court interpreted "ongoing" to require a continuous violation. (R. at A-5). This is an overly narrow reading of the case, however. In *Gwaltney*, the Supreme Court declared that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57. The Court held that section 505 of the CWA confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation, formed after reasonable inquiry and "well grounded in fact", of continuous or intermittent violation. *Id.* at 64-65. On remand from the Supreme Court, the Fourth Circuit remanded *Gwaltney* to the district court, instructing it that one of the ways that citizen-plaintiffs could prove an ongoing violation was "by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693 (4th Cir. 1989). Other circuits have adopted this standard, including the Third, Fifth, Sixth, and Ninth. *See Natural Res. Def. Council v. Texaco Ref. and Mktg., Inc.*, Nos. 92-7494, 92-7521, 92-7522, 92-7527, 1993 U.S. App. LEXIS 20919, at *24-25 (3rd Cir. Aug. 12, 1993); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1062 (5th Cir. 1991); *Allen County Citizens for the Env't, Inc. v. BP Oil*, No. 91-3698, 1992 U.S. App. LEXIS 14906, at *4 (6th Cir. June 18, 1992); *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667, 669-71 (9th Cir. 1988).

The burden of showing "no real likelihood of repetition" falls squarely on MMC. The *Woodbury* court declared that "[i]f defendants fail to show that plaintiffs' [good-faith] allegations [of continuous or intermittent violations] are a sham, which raise no genuine issue of fact, after plaintiffs offer some evidence to support their allegations, the motion for summary judgment will be denied. Defendants' burden of proof is a heavy one. Defendants

'must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 1989 U.S. Dist. LEXIS 13915, at *4-5 (*quoting Gwaltney*, 484 U.S. at 66).

MMC has patently failed to meet this heavy burden. MMC's development of the opal mine requires four phases. It is uncontested that during each of the first three phases, MMC stripped overburden from the slope of Magic Mountain and deposited it in the creek. Even though RMDENR issued its Administrative Order in August 1994, MMC continued to place overburden in the creek intermittently until January 1998. While MMC has since complied with the Administrative Order's requirement that no additional overburden be placed in the creek, the fourth and final phase will require the removal of more overburden, and the creek remains the easiest and cheapest means of disposal possible. Indeed, with regard to phase four, MMC still has not decided where to place the overburden. These facts are the basis of the citizens' good-faith allegation of an intermittent violation. MMC states that it has no intention of placing rocks in Lustra Creek in the future. However, MMC's actions in the previous three phases and its intermittent disposal of overburden in the creek for three and a half years after RMDENR ordered it to cease doing so indicate at least a reasonable likelihood that the intermittent disposals of overburden in the creek will continue during the fourth phase.

Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc. provides a good example of the sort of situation in which no likelihood of repetition would be found. In that case, Remington Arms' closure of the shooting range four months before suit was filed and, about a year later, its actual removal of the facilities necessary for skeet shooting, were sufficient to show no reasonable likelihood of repetition. 989 F.2d at 1312. Here, we have only MMC's statements, and a history of behavior that does not lend much credibility to those averments. There is, at the very least, a "real likelihood of repetition," *Gwaltney of Smithfield*, 890 F.2d at 693, and MMC clearly has failed to "demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield*, 484 U.S. at 66. Accordingly, while the State maintains that FOL's citizen suit is barred by the State's diligent prosecution and the principle of res judicata, it is nonetheless the position of the State that the district court erred in granting the portion of MMC's motion

for summary judgment regarding continuing or intermittent violations.

III. RES JUDICATA BARS FOL FROM BRINGING ITS CWA SUIT BECAUSE THE STATE'S ADMINISTRATIVE ORDER HAS THE SAME PRECLUSIVE EFFECT AS A COURT ORDER AND BECAUSE FOL AND THE STATE ARE IN PRIVITY AND HAVE ESSENTIALLY IDENTICAL CLAIMS.

The district court correctly found that the State's enforcement action against MMC precludes FOL's citizen suit under the doctrine of res judicata. Res judicata is a doctrine, derived from state law but universal in American law, that disallows the relitigation of claims where an order or judgment has already issued.[4] Prior to FOL's suit, the State had already negotiated a Consent Administrative Order with MMC to address the identical violations upon which FOL focuses its current claim. This suit should therefore be barred by the doctrine of res judicata.

The district court correctly stated that "[p]rinciples of res judicata embedded in the Full Faith & Credit Act, 28 U.S.C. § 1738 (1982), *see also* U.S. Const. Art. 4 § 1, require federal courts to give preclusive effect to the judgments of state courts whenever the state court from which the judgment emerged would give such effect." (R. at A-6) (quoting *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999)). In determining what has preclusive effect, the Rocky Mountain Supreme Court held that res judicata applies to "orders of administrative agencies in the same manner as orders of courts." (R. at A-6) (quoting *State v. Williams*, 118 R.M. 36, 39 (1999)). RMDENR's Order, therefore, precludes FOL's suit if it satisfies the test for res judicata laid out by the Rocky Mountain Supreme Court. "Res Judicata requires (1) [i]dentity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the actions; and (4) identity of the quality of the persons for or against whom the claim is made." (R. at A-6) (quoting *State v. Williams*, 118 R.M. 36 (1999)). As the district court accurately concluded, applying this test to the case at bar clearly shows that the doctrine of res judicata precludes FOL's suit.

4. Clearly, therefore, the district court was correct in holding that res judicata in CWA citizen suits is not limited to actions allowed under sections 309(g) and 505(b). The principle of res judicata is not confined to one statute, much less only portions of one statute.

A. FOL And Rocky Mountain "Sued" For Identical Things.

The district court correctly found that the first prong of the res judicata test is satisfied here because FOL and the State "sued" for identical things. The State, of course, has not "sued" with its Administrative Order, but the Order has the same preclusive effect as a court order, as explained above. The relevant inquiry, therefore, is whether FOL's suit and RMDENR's Order are about the same incident and pursue the same goals. In application, "claims are identical when they are based upon the same transaction, or when they involve the same subject matter and require the same evidence in order to be sustained." *Citizens Legal Environmental Action Network, Inc. (CLEAN) v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 U.S. Dist. LEXIS 1990, at *14 (W.D. Mo. Feb. 23, 2000) (internal quotations omitted). Under this standard, the first prong is clearly satisfied.

Both FOL's and the State's current claims are based on a common nucleus of operative fact –MMC's ongoing pollution of Lustra Creek. FOL seeks in its present suit what the State sought in its Consent Order, namely to stop MMC from continuing its pollution of Lustra Creek and from discharging future mining overburden into the creek. RMDENR's Consent Administrative Order required MMC to cease dumping overburden into Lustra Creek. FOL seeks the exact same thing in this suit in the form of injunctive relief. FOL and the State also both seek to rehabilitate Lustra Creek. RMDENR's Order required MMC to revegetate the existing mining overburden to stop erosion and siltation and to aid the creek's return to a natural state. FOL seeks instead to require MMC to remove the mining overburden in the creek, a misguided approach but with an identical goal: returning the creek to a natural state. The claims of both FOL and the State thus not only have the same factual basis, but also the same goals of stopping future dumping and remediating the present pollution. Since their claims therefore are clearly "based upon the same transaction," the "thing sued for" is the same and the first prong satisfied.[5]

5. That the claims are "based upon the same transaction" is all that is required under *CLEAN*, 2000 U.S. Dist. LEXIS 1990, at *14. However, it is self-evident that the claims also "involve the same subject matter", and because of that fact, would likely "require the same evidence." Under both constructions of the first prong of the res judicata test, "the thing sued for" by FOL and the State thus appear to be identical.

The "identity of the thing sued for" is not changed merely because particular elements of FOL's claim, such as the proposed remediation method, may differ from the State's. The Supreme Court has held that specific claims may differ, but if they arise from a common nucleus of operative fact, claims in the later action are precluded. *Migra v. Warren City Sch. Dist. Bd. of Educ., et al.*, 465 U.S. 75, 77 (1984). The Court explained that res judicata therefore "foreclos[es] litigation of matters that should have been raised in an earlier suit." *Id.* Since the actions of both the State and FOL clearly arise from a common nucleus of operative fact, claims that RMDENR could have raised in its Order, but chose not to, are barred to FOL now.[6]

Similarly, the fact that FOL seeks civil penalties while RMDENR declined to do so does not make "the thing sued for" different. The Eighth Circuit found that citizens who were not allowed to pursue civil penalties "are no more aggrieved than citizens who are precluded from commencing an action in the first instance because of pending agency action." *City of Green Forest*, 932 F.2d at 1404. The courts have held that civil penalties in CWA citizen suits are paid into the United States Treasury and merely serve to deter future pollution. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC)*, 120 S.Ct. 693, 706 (2000); *Comfort Lake Ass'n*, 138 F.3d at 356. Civil penalties and injunctive relief both therefore serve the function of deterrence. In the case at bar, civil penalties are merely a tactic by which FOL seeks to deter MMC from future discharges, a goal that was clearly reflected in the State's issuance of its Administrative Order. The "thing sued for" thus remains the same.

B. The Causes Of Action In FOL's And The State's Claims Are Identical.

The district court correctly found the second prong of the res judicata test satisfied because the causes of action in FOL's and the State's claims are identical. Generally, "[t]he first and second elements of res judicata are largely overlapping," implying that satisfaction of one likely means satisfaction of the other. *CLEAN*, 2000 U.S. Dist. LEXIS 1990, at *9. In *CLEAN*, the court explained that, "[t]wo causes of actions are identical, for purposes of

6. This would not be true but for the fact that FOL and the State are in privity, as discussed below in subsection C, and thus are treated as the same entity for the purposes of res judicata.

res judicata, when they arise from the same nucleus of operative fact." *Id.* at *14. The Eighth Circuit honed this test, finding the second prong satisfied when "both actions involved the enforcement of regulations based upon identical facts and legal principles." *Harmon Industries*, 191 F.3d at 902. As explained above, the State's and FOL's actions are based on the same operative facts and are intended to effectuate the goals of the CWA by eliminating the threat of additional pollution and restoring the damage already done to the creek. The second prong is therefore satisfied.

C. FOL And The State Are In Privity In Their Actions Against MMC.

The district court correctly found that FOL and the State are in privity, satisfying the test's third prong. In *Harmon*, the Eighth Circuit found the test for privity satisfied "when the two parties represent the same legal right." 191 F.3d at 903. The court explained that privity exists where a party could act "in lieu of" and with "the same force and effect" as the other party. *Id.* The Eighth Circuit also held that a CWA citizen suit "casts the citizen in the role of a private attorney general," giving citizens the same ability as the state to enforce the Act in the public interest. *City of Green Forest*, 921 F.2d at 1403. The CWA, by allowing citizens to become "private attorneys general," thus allows them to act with the "same force and effect" and "in lieu of" the state, assuming the state has not acted first. In the case at bar, both FOL and the State represent the public interest in their actions to prevent MMC from discharging future overburden into the creek and to require MMC to restore the affected portion of the creek. FOL, acting as a private attorney general, clearly represents the same legal right and could have acted with the "same force and effect" and "in lieu" of the State had the State not already pursued its enforcement efforts. Thus, FOL and the State are in privity, thereby satisfying the third prong.

D. FOL's And The State's Enforcement Actions Are Both Against MMC.

The fourth prong of the test is easily met in this case, since it requires only that the parties' enforcement actions target the same defendant. *See, e.g., Barrington v. Florida Dep't of Health*, 112 F. Supp. 2d 1299, 1305 (M.D. Fla. 2000). The district court correctly found that FOL and the State satisfy this prong because their actions are both indisputably against MMC. Having satis-

fied this fourth prong, in addition to the other three, FOL's citizen suit under the Clean Water Act should therefore be barred by res judicata.

IV. THE DISTRICT COURT ERRED IN FINDING THE CASE TO BE MOOT, AS THERE IS AT THE VERY LEAST A REASONABLE EXPECTATION THAT THE VIOLATION WILL RECUR.

Much of the analysis involving intermittent violations in Section II of this brief is directly relevant to the mootness question as well. Most obviously, if this Court agrees that there is indeed a continuing or intermittent violation, then the case clearly is not moot. If this Court does not recognize such a violation, then there are two possible tests for what evidence of cessation must be presented and by whom in order to settle the question of mootness, depending upon one's interpretation of the facts in the present case. Under either test, this case is not moot.

The Supreme Court in *Laidlaw* explained that a defendant's voluntary conduct might make a case moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 120 S.Ct. at 708 (citing *United States v. Concentrated Phosphate Exp. Ass'n., Inc.*, 393 U.S. 199, 203 (1968)).[7] *Laidlaw* further declared that the burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again is a heavy one and lies with the party asserting mootness. *Id.* In *Comfort Lake*, the Eighth Circuit qualified this standard, holding that the "absolutely clear" test applied only to voluntary cessation, not to involuntary compliance. 138 F.3d at 355. The court then stated another test for involuntary compliance, holding that the burden was then on the plaintiffs to show a "realistic prospect" of repetition. *Id.*

Since MMC did not cease dumping until three and a half years after RMDENR issued its Order, one could argue that the Order was not what led to MMC's compliance and that MMC's cessation was thus voluntary. If so, as explained in *Laidlaw*, MMC

7. The district court stated that "FOL and Rocky Mountain argue that it is only voluntary cessation of a violation that can render a violation moot[.]" (R. at A-7). The court appears to have misunderstood the State's position in this regard, since it is "well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . If it did, the courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *Laidlaw Envtl. Services*, 120 S.Ct. at 708.

would have the heavy burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 120 S.Ct. at 708. As stated in Section II, all that MMC has done is proclaim that it does not know what it will do with the overburden in the fourth phase, but that it "has no intention of ever placing rocks in the Creek in the future." (R. at A-6). MMC's past behavior, however, gives every reason to suspect illegal behavior in the future. Its statements that it will not do so "cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes." *Concentrated Phosphate Exp. Ass'n.*, 393 U.S. at 203. Since MMC did not cease dumping until three and a half years after RMDENR's Order, and since a fourth phase remains in the mining operation, this Court should have little confidence in MMC's statements that MMC's illegal behavior will not resume during the fourth phase. There thus appears to be sound reason to expect that MMC's violations will recur, and MMC has offered little to make "absolutely clear" that that is not the case.

If one interprets MMC's cessation of dumping as stemming from RMDENR's Order and thus being involuntary, then the burden would shift to FOL and the State to show a "realistic prospect" of repetition, as explained by the Eighth Circuit in *Comfort Lake*. 138 F.3d at 355. FOL and the State have clearly shown that there is a "realistic prospect" that MMC will repeat its behavior during the fourth phase of the mining operation. As previously noted, MMC dumped mining overburden in the creek intermittently during the first three phases, including for more than three years after RMDENR ordered the company to stop. Dumping in the creek remains the cheapest and easiest means of disposing of the overburden during the fourth phase. Given MMC's actions in the previous phases and its history of noncompliance, substantial reason exists to doubt its averments of a lack of intent to dump in the future. There is clearly a "reasonable prospect" of renewed dumping. Under either test, therefore, the district court erred in granting the mootness portion of MMC's motion for summary judgment.

CONCLUSION

For the reasons stated in this brief, the State of Rocky Mountain respectfully requests that this Court affirm in part and reverse in part the district court's grant of summary judgment in favor of Magma Mining Company. With respect to the citizen suit bars erected by the State's diligent prosecution of MMC and the

principle of res judicata, the State encourages affirmance and the dismissal of the suit initiated by Friends of The Lustra, Inc. With respect to the district court's refusal to find a continuing violation and its declaration of mootness, the State encourages reversal. In the event that this Court should find against the State on the application of the bars in CWA sections 309 and 505 and on the invocation of res judicata, but finds for the State on the remaining issues, the State respectfully requests that this Court award injunctive relief in a form that effectuates the requirements of the State's Consent Administrative Order.

APPENDIX A**

[R, 3] [A-1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ROCKY MOUNTAIN

FRIENDS OF THE LUSTRA, INC.,
Plaintiff,

STATE OF ROCKY MOUNTAIN,
Intervenor, Civ. No. 00-1436

v.

MAGMA MINING COMPANY,
Defendant.

ORDER

Remus, Judge.

Friends of the Lustra, Inc. (FOL), a not-for-profit corporation, brought suit against Magma Mining Co. (MMC) under § 505 of the Clean Water Act, 33 U.S.C. § 1365, the so-called "citizen suit" provision of that Act (CWA). FOL alleges that MMC has violated § 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants into Limpid Creek without a permit issued under either §§ 402 or 404 of the CWA, 33 U.S.C. §§ 1342, 1344, and further alleges that MMC has violated § 301(a) every day thereafter by allowing the pollutants to remain in the Creek without a permit. FOL seeks an injunction forbidding MMC from discharging more pollutants into the Creek and requiring it to remove the pollutants it has already discharged from the Creek. FOL also seeks the assessment of civil penalties of $25,000 a day for every day the fill was placed or allowed to remain in the Creek, and attorneys fees. The court granted a motion by the State of Rocky Mountain for permissive intervention in the action. MMC has brought a motion for summary judgement on four grounds: 1) the State of Rocky Mountain has already brought and diligently prosecuted an

** Editors Note: Appendix A contains a reproduction of the original hardcopy record. References to the record that refer to pages in Appendix A are indicated by [A-1], [A-2], etc. References made in the other briefs published in this volume refer to page numbers in the original hardcopy record, which can be found in Appendix A by the symbols [R. 3], [R. 4], etc. which have been inserted into Appendix A by the editorial staff of the Pace Environmental Law Review.

enforcement action against MMC for the same violations, thus barring a citizen suit under § 505(b)(1)(B); 2) if MMC ever discharged pollutants into Lustra Creek, it ceased doing so, thus depriving the court of jurisdiction over FOL's citizen suit under § 505(a)(1) because there is no **[R. 4]** ongoing violation as required by that provision; 3) the State of Rocky Mountain has already brought and concluded an enforcement action against MMC for the same violations, thus barring actions under § 505 by res judicata; and 4) if MMC ever discharged pollutants into Lustra Creek, it has ceased doing so, thus rendering both FOL's citizen suit action and further action by Rocky Mountain moot. Rocky Mountain did not side with FOL in opposing the first and third grounds for summary judgement, believing that its earlier enforcement against MMC was sufficient to resolve the dispute. If FOL's suit survives **[A-2]** these attacks, however, Rocky Mountain argued that the suit should also survive the second and fourth attacks and that Rocky Mountain would then join with FOL to the extent of seeking injunctive relief against further dumping of overburden in the Creek without a permit. The court finds for the defendant MMC on all grounds and dismisses the action.

The Facts.

The following facts are uncontested. MMC operates an open pit opal mine on the slope of Magic Mountain. To reach the opal bearing deposit, MMC first had to remove overburden rock. It placed the overburden at the base of the slope, covering the bed of Lustra Creek for approximately half a mile. Lustra Creek flows into Roaring River, which flows in to the Columbia River, a navigable water of the United States. As a result of the placement of the overburden in the Creek's bed, the Creek flows underground for half a mile beneath the overburden. MMC developed the mine in three segments along the Creek, initially stripping overburden from each segment on the slope and placing it in the Creek. MMC placed overburden in the Creek intermittently between January 1980 and January 1998, and has placed no overburden there since January, 1998. There is a fourth, final phase planned for the mine, for which it will be necessary to remove more overburden. MMC will not reach that phase for an unspecified period of time, at least more than a year. Placement of overburden in the Creek bed is the easiest and cheapest means of disposing of the overburden for MMC. MMC has not presently decided where to place the overburden that it removes in phase four.

In 1993 the State of Rocky Mountain Department of Environmental and Natural Resources (RMDENR) considered the overburden pile on top of Lustra Creek to constitute an unpermitted landfill and issued a notice of violation (NOV) against MMC for violating the Rocky Mountain Solid Waste Act (RMSWA) by disposing of overburden waste in a landfill without the permit required by RMSWA. In August of 1994 RMDENR and MMC agreed upon the issuance of a consent administrative order under RMSWA. The order required MMC immediately to cease dumping waste overburden in the Creek landfill without a RMSWA permit and to immediately plant the landfill with native vegetation, and to nurture the vegetation so that it was indistinguishable from vegetation on adjacent areas within three years. The preamble to the order recited that "The RMDENR finds that removal of the landfill from the Creek would result in massive disruption of water quality by mud and silt erosion during the removal process." The RMDENR gave no public notice of the NOV, of its intent to issue the consent order, or of the issuance of the order. MCC graded and planted the landfill with native vegetation in 1998. Scant rains since then have prevented the plantings from growing sufficiently to resemble vegetation on adjacent areas. The concentration of suspended solids in Limpid Creek is greater below the landfill than above the landfill. The concentration of **[R. 5]** suspended solids below the landfill never has been found to be greater than in other streams in the area during spring snow melt off.

The RMSWA establishes a comprehensive scheme for regulating the disposal of solid waste. Solid waste may be disposed only in landfills to which permits have been issued by RMDENR under the RMSWA. The RMDENR may issue administrative orders to persons who violate the RMSWA requiring them to comply with the statute or file a civil action in state court seeking an injunction requiring compliance and/or assessing a civil penalty of up to $2,500 per **[A-3]** violation. Interested parties may intervene in a state court action under a practice rule virtually identical to Federal Rule of Civil Procedure 24. No public notice or intervention is provided for administrative enforcement actions.

FOL gave notice to MMC, EPA and the RMDENR of the violations it alleges and of its intent to sue MMC more than sixty days before filing its complaint. MMC does not contest the adequacy of the notice. FOL never previously complained to the RMDENR of alleged violations by MMC or of MMC's alleged violations of the

RMDENR order by continuing to place overburden in the landfill after the order or failing to grow equivalent to native vegetation by the date required in the order.

Understandably, Rocky Mountain has entered the case to defend the actions it has taken to secure compliance with state and federal law. Nevertheless, Rocky Mountain notes that MMC did not obey the RMDENR's order in its entirety, and the state seeks to enforce its order against further unpermitted dumping by MMC under § 505(a)(1)(B). Curiously MMC does not challenge the court's jurisdiction under the CWA to enforce an order issued pursuant to the state's solid waste statute. The court need not reach that issue, however, since it grants MMC's motion for summary judgement in its entirety.

DILIGENT PROSECUTION

Section 505(b)(1)(B) bars a citizen suit if EPA or the "State has commenced and is diligently prosecuting an action in a court of. . .a State to require compliance." Section 309(g)(6)(A) augments this by barring the assessment of civil penalties in a citizen suit action if the State either 1) "has commenced and is diligently prosecuting an action under [comparable] State law" or 2) the defendant has actually "paid a penalty assessed under . . . [comparable] State law." MCC and Rocky Mountain argue that the RMDENR's consent order bars FOL's action under either of these provisions. FOL argues that the § 505 bar does not apply because the order was not issued by a court and was not issued to require compliance with the requirements of the CWA. It further argues that the § 309 bar does not apply because the State's authority under the RMSWA is not comparable to EPA's authority under § 309(g), as required by that subsection, on three grounds: 1) it is not contained in a water pollution control statute; 2) it does not provide for citizen intervention; and 3) it does not authorize RMDENR to assess penalties. FOL also argues that even if the § 309(g) bar applies, it bars only the assessment of penalties in a citizen suit, not injunctive relief, and only bars the assessment penalties for the violations occurring before the order was issued.

[R, 6] On the bare face of the two cited provisions, FOL's arguments are plausible. *Citizens for a Better Environment-California v. Union Oil Company of California,* 83 F.3d 1111 (9th Cir. 1996). But its arguments utterly fail to give weight to the intended place of citizens suits in the enforcement universe. That place is definitely subordinate to government enforcement. As ex-

plained at length by the Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987), citizen enforcement is subordinate to and does not supplant government enforcement. The Court cites legislative history that Congress intended most enforcement actions to be brought by states and citizen suits to be proper only if federal, state and local enforcement agencies failed to carry out their enforcement responsibilities. *Id.* As an **[A-4]** example, the Court hypothesized that citizens should not be able to bring an action for penalties if EPA had already issued the violator a compliance order in which EPA "agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 61. No violator would agree to such an undertaking if a citizen could later sue for penalties for the same violation. To allow a citizen suit to proceed under such circumstances, would interfere with EPA's enforcement discretion. The Court stated the same would be true whether the enforcer was EPA or a State. *Id.* at 61. Rocky Mountain argues forcefully that its earlier enforcement action was ultimately successful in stopping MMC from dumping more overburden in the Creek and should not be second-guessed at this point by either FOL or this court.

The Court's lesson in *Gwaltney* is elaborated by *North & South Rivers Watershed Assn., Inc. v. Town of Scituate,* 949 F.2d 552 (1st Cir. 1992). There the state issued an administrative order requiring a city to begin engineering plans for the design and construction of a sewage treatment plant. The order did not require actual construction of the plant or even cessation of the discharge until the plant was built. The order assessed no penalties. Indeed, although one section of the state statute authorized the assessment of penalties, the state issued the order under a different section of the statute that did not. Nonetheless, the court held that the order barred a citizen suit under § 309(g). The court reasoned that the purpose of the citizen suit provision was only to enable citizens to enforce the CWA when the government was unwilling to do so. "Presumably, then, when it appears that government action. . .begins and is diligently prosecuted, the need for citizens suits disappears." *Id.* at 555. Technical objections, such as those raised by FOL would merely "undermine the supplemental role for section 505 citizen's suits." *Id.* at 556. Pursuing "logistical happenstance of statutory drafting, ignores. . .[the fact

that]. . . [t]he focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative citizen action." *Id.* at 556.

With the correct focus of the bar in mind, it is plain the RMDENR order addresses the very violations targeted by FOL. The RMDENR has exercised the enforcement function assigned primarily to it by the CWA. It could have chosen a judicial remedy for the assessment of penalties, but it did not. It could have ordered the removal of the landfill, but it did not. Instead, it intentionally and advisedly ordered compliance with state requirements to return the completed landfill to its natural state by grading to native contours and growing native vegetation rather than risking further environmental damage by removing the landfill. These are the sorts of choices entrusted to the state in exercising its normal enforcement **[R. 7]** discretion. The choice of compliance over penalties is a reasonable one for the enforcer, after all, the purpose of the CWA is clean water, not money in the Treasury. To allow citizens to second guess the state's choice would allow citizens, not the state, to exercise the state's prosecutorial discretion, a result cautioned against by both *Gwaltney* and *Town of Scituate.*

The question is not whether the state has chosen the exact procedural or substantive remedy which the citizen would have chosen, but whether the state has enforced. *Town of Scituate*, 949 F.2d at 555-6; *Sierra Club v. Colorado Refining Co.,* 852 F. Supp. 1476 (D.Colo. 1994). The fact that the RMSWA is not primarily a water pollution statute is of no account, since **[A-5]** one of its purposes is to protect water quality, EPA has approved RMDENR's water pollution program pursuant to CWA § 402(c), and the permitting and enforcement programs under the Rocky Mountain Clean Water Act (RMCWA) and the RMSWA both require coordinated implementation. *Sierra Club v. Colorado Refining Co.,* 852 F.Supp. at 1481-3. Finally, the state's action bars citizen suit injunctive relief as well as penalties, since the bar operates to protect the state's exercise of its enforcement discretion. *Town of Scituate,* at 557-8, *Arkansas Wildlife Federation v. ICI Americas, Inc.,* 842 F.Supp. 1140, 1150 (E.D.Ark. 1993). And it bars citizen suit relief for dumping violations after issuance of the order as well as violations before issuance of the order, since the RMDENR required compliance with grading and vegetation requirements

for the subsequent dumping by informal means, and MCC has complied. *Williams Pipeline v. Bayer,* 964 F. Supp. 1300, 1321-3 (S.D.Iowa 1997).

CONTINUING VIOLATION

Section 505(a)(1) authorizes citizens to sue any person "alleged *to be in* violation." (Italics added.) The Court in *Gwaltney* held that this present tense language required a good faith allegation that the violation be ongoing at the time the complaint is filed. The last discharge of rocks into the Creek alleged by FOL was in 1998, three years before the complaint was filed. FOL and Rocky Mountain argue that where fill material is discharged to navigable water without a § 404 permit, the violation continues as long as the unpermitted fill remains in navigable water. *United States v. Ciampitti,* 669 F.Supp. 684, 700 (D.N.J. 1987); *United States v. Woodbury,* 19 E.L.R (Envtl. L. Inst.) 21, 308 (E.D.N.C. 1989). But these cases consider the issue for the purposes of determining how many days a violation lasts for purposes of assessing a penalty in actions brought by the United States, for whom a continuing violation is not a jurisdictional requirement. Rocky Mountain evidently sides with FOL on this issue to protect its position in a similar contexts that it may seek a penalty for each day fill remains. FOL and Rocky Mountain also cite a line of cases with similar holdings under RCRA. *L.E.A.D. v. Exide Corp.,* 1999 WL 124473, pp 9-10, 23 (E.D.Pa.); *Briggs & Stratton Corp. v. Concrete Sales & Services,* 20 F.Supp. 2d 1356, 1372 (M.D.Ga. 1998); *Aurora National Bank v. Tri Star Marketing, Inc.,* 990 F.Supp. 1020 (N.D.Ill. 1998).

But these CWA § 404 decisions are not persuasive. To keep such cases alive merely because of the continuing presence of materials disposed of years ago would undermine the continuing violation requirement of § 505. *Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc.*, 989 F. 2d 1305, 1313 (2nd Cir. 1993). Moreover, it ignores the essence of CWA violations. The basic prohibition of the CWA is: the 1) addition of 2) a pollutant 3) to navigable waters from 4) a point source 5) without or in violation of a permit. It **[R. 8]** is the *addition* of the pollutant to navigable waters, not the *maintenance* of the pollutant in navigable waters that is prohibited. Addition occurs only at one time, when the rocks enter the river, not on a daily basis as long as the rocks remain there. The RCRA decisions are inapposite, for the RCRA statutory scheme is clearly aimed, at least in part, at

wastes that have been disposed of in the past but pose a present danger, RCRA §§ 7002(a)(1)(B) and 7003. Therefore the allegations of FOL and Rocky Mountain that the contemporary presence of rocks placed long ago in the Creek is insufficient to invoke jurisdiction under the "alleged to be in violation" language of § 505(a)(1).

[A-6] RES JUDICATA

"Principles of res judicata embedded in the Full Faith & Credit Act, 28 U.S.C. § 1738 (1982), see also U.S.Const. art. 4, § 1, require federal courts to give preclusive effect to the judgements of state courts whenever the state court from which the judgement emerged would give such effect." *Harmon Industries, Inc. v. Browner,* 191 F.3d 894, 902 (8th Cir. 1999). FOL argues that Congress limited the application of res judicata in citizen suits to the state enforcement actions specially mentioned in §§ 309(g) and 505(b). This argument is unavailing because it ignores the supplementary nature of citizen suit enforcement and the primary nature of state enforcement, as discussed above.

Just last year the Rocky Mountain Supreme Court held that res judicata applies to "orders of administrative agencies in the same manner as orders of courts." *State v. Williams,* 118 R.M. 36, 39 (1999). Since it had earlier held that consent decrees entered by courts have res judicata effect, *State v. Venessa*, 94 R.M. 412, 417 (1975), consent administrative orders have res judicata effect as well.

In *Williams* the Court adopted the four part test for res judicata set forth in *Prentzler v. Schneider,* 411 S.W. 2d 135, 138 (Mo. 1966)(en banc). "Res Judicata requires (1) [i]dentity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the actions; and (4) identity of the quality of the persons for or against whom the claim is made."

As in *Harmon* the only dispute here is whether the plaintiff parties are identical. FOL is obviously a different entity than RMDENR. But parties are considered identical for res judicata purposes if they are in privity. Privity means that they have a close enough relationship to be considered identical. It has been held under both the CWA and RCRA that EPA and a state are in privity when it comes to EPA enforcement of permits issued by the state pursuant to permit programs approved by EPA. *Harmon*; *U.S. v. ITT Rayonier, Inc.,* 627 F.2d 996 (9th Cir. 1980). As MMC and Rocky Mountain point out, citizens seeking to enforce such

statutes under citizen suit provisions are not suing on their own behalf for damages done to them, but as "private attorneys general" vindicating the public's interest, and thus are in the same position as EPA. *Chespeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Inc.*, 890 F.2d 690, 695 (4th Cir. 1989). Citizens, therefore, are also in privity with the state in the same manner that EPA is in privity with it. It follows that FOL and RMDENR are the same party for purposes of res judicata. Any controversy between that party and MMC was resolved when **[R. 9]** RMDENR issued the administrative order. In constitutional terms, no case or controversy remains to justify federal jurisdiction.

MOOTNESS

MMC argues, if it ever violated the CWA, that: it voluntarily ceased that violation five years ago; that it has no intention of ever placing rocks in the Creek in the future; and there is no indication that it will do so ever again. MMC argues this renders the violation moot as to both FOL and Rocky Mountain. If the violation ceased long ago and there is no reason to believe that it will recur, there is simply no present controversy and the actions are moot as a constitutional **[A-7]** matter, for there is no longer a case or controversy. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, ___ U.S. ___, 120 S.Ct. 693 (2000).

FOL and Rocky Mountain argue that it is only voluntary cessation of a violation than can render a violation moot and MMC's cessation of its filling activity was not voluntary, rather it was ordered by the RMDENR. They further argue that there is every reason to believe that MMC will fill again without a permit since there is a final phase left in the mine, the final phase requires the removal of overburden, the cheapest place to place the overburden is in the Creek, MMC repeatedly placed overburden in the Creek before without a permit, even after the RMDENR had ordered it not to do so, and even now MMC does not represent that it will never again place fill in the Creek without a permit. They have strong arguments. But they concede that MMC has not placed fill in the Creek for over three years and it does not overtly threaten to do so in the immediate future. Neither the court, FOL nor Rocky Mountain should assume that MMC will behave in an illegal manner in the future. If it does, the overburden cannot be moved to the Creek overnight. In the past that operation lasted for months at a time and there is no evidence that it would be a shorter operation in the future. This is not a situation that quali-

fies for the capable of repetition yet evading review exception to mootness, *Sierra Club v. Martin,* 110 F.3d 1551 (11th Cir. 1997), for if MMC resumes filling the Creek, its conduct will last long enough for the plaintiffs to seek meaningful injunctive relief.

The motion of MMC is granted and the case is dismissed.

APPENDIX B

Full Faith & Credit Act
28 U.S.C. §1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Federal Water Pollution Control Act
33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act [*33 USCS § § 1342,* 1344]. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [*33 USCS § § 1312,* 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319. Enforcement

(d) Civil penalties. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [*33 USCS § 1311,* 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under sec-

tion 402 of this Act [*33 USCS § 1342]* by the Administrator, or by a State, or in a permit issued under section 404 of this Act [*33 USCS § 1344]* by a State[,], or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act [*33 USCS § 1342*(a)(3) or (b)(8)], and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $ 25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(g) Administrative penalties.

(6) Effect of order.

(A) Limitation on actions under other sections. Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this Act [*33 USCS § 1321*(b) or 1365].

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [*33 USCS § § 1328,* 1344], the Administrator may, after opportunity

for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [*33 USCS § 1311*(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [*33 USCS § § 1311,* 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [*33 USCS § 407],* shall be deemed to be permits issued under this title [*33 USCS § § 1341* et seq.], and permits issued under this title [*33 USCS § § 1341* et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [*33 USCS § 407],* and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [*33 USCS § 407],* after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [*33 USCS § 407],* pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day

after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [*33 USCS § 1314*(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

33 U.S.C. § 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Resource Conservation and Recovery Act
42 U.S.C. § 6972. Citizen suits

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

(1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act [*42 USCS § §* et seq.]; or

(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; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [*42 USCS § § 6901* et seq.] which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. 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 or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g) [*42 USCS § 6928*(a) and (g)].

(b) Actions prohibited.

(1) No action may be commenced under subsection (a)(1)(A) 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; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act [*42 USCS § § 6921* et seq.]; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) in a court of the United States, any person may intervene as a matter of right.

(2) (A) 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),

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act [*42 USCS § § 6921* et seq.].

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 7003 of this Act [*42 USCS § 6973]* or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 USCS § 9606],*[;]

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 USCS § 9604];*

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 USCS § 9604]* and is diligently proceeding with a remedial action under that Act [*42 USCS § § 9601* et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [1980] [*42 USCS § 9606],* or section 7003 of this Act [*42 USCS § 6973]* pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B);

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 USCS § 9604];* or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 USCS § 9604]* and is diligently proceeding with a remedial action under that Act [*42 USCS §§ 9601* et seq.].

(D) No action may be commenced under subsection (a)(1)(B) by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice. No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act [*42 USCS §§ 6921* et seq.]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this Act [*42 USCS §§ 6901* et seq.] may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention. In any action under this section the Administrator, if not a party, may intervene as a matter of right.
(e) Costs. The court, in issuing any final order in any action brought pursuant to this section or section 7006 [*42 USCS § 6976],* may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.
(f) Other rights preserved. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).
(g) Transporters. A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

42 U.S.C. § 6973. Imminent hazard

(a) Authority of Administrator. Notwithstanding any other provision of this Act [*42 USCS § § 6901* et seq.], upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such per-

son to take such other action as may be necessary, or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractural [contractual] arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

(b) Violations. Any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $ 5,000 for each day in which such violation occurs or such failure to comply continues.

(c) Immediate notice. Upon receipt of information that there is hazardous waste at any site which has presented an imminent and substantial endangerment to human health or the environment, the Administrator shall provide immediate notice to the appropriate local government agencies. In addition, the Administrator shall require notice of such endangerment to be promptly posted at the site where the waste is located.

(d) Public participation in settlements. Whenever the United States or the Administrator proposes to covenant not to sue or to forbear from suit or to settle any claim arising under this section, notice, and opportunity for a public meeting in the affected area, and a reasonable opportunity to comment on the proposed settlement prior to its final entry shall be afforded to the public. The decision of the United States or the Administrator to enter into or not to enter into such Consent Decree, covenant or agreement shall not constitute a final agency action subject to judicial review under this Act [*42 USCS § § 6901* et seq.] or the Administrative Procedure Act.