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Brief for the Appellant, Friends of Lustra, Inc.: 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 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 ROCKY MOUNTAIN

Brief for the Appellant

FRIENDS OF LUSTRA, INC.

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

QUESTIONS PRESENTED

I. Whether the administrative order issued by a state agency under a state solid waste act was a "diligent prosecution" sufficient to bar a citizen suit under the Clean Water Act (CWA) where the state act did not provide for citizen participation, did not address water pollution and did not authorize the state agency to assess penalties?

II. Whether mining overburden that remains in a creek bed and has not been remedied is a continuing violation of the CWA sufficient to grant a court jurisdiction over a citizen suit?

III. Whether a non-profit organization is in "privity" with a state enforcement agency sufficient to be barred from filing a citizen suit where they have different enforcement objectives and seek to enforce against different violations?

IV. Whether an "order" issued by a state enforcement agency is sufficient to render a citizen suit moot?

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OPINION BELOW

The opinion of the United States District Court for the District of Rocky Mountain is unpublished and appears in the record on appeal reproduced in Appendix A.

RELEVANT STATUTES AND REGULATIONS

The relevant Constitutional provision is the Due Process Clause, U.S. Const. amend. XIV, which is reproduced in Appendix B. The relevant statutes are the Federal Water Pollution Control Act, or the Clean Water Act § 101 *et seq.*, 33 U.S.C. § 1301 *et seq.*, pertinent provisions of which are provided in Appendix C. The relevant federal rules are provided in Appendix D. The relevant regulations are 33 C.F.R. §323.2, and §328.3(a)(1) the text of which is provided in Appendix E.

STATEMENT OF THE CASE**

Statement of the Facts

Magma Mining Company (MMC) operated an open pit opal mine on the slope of Magic Mountain intermittently between January 1980 and January 1998. (R. 4). Friends of Lustra (FOL) is a not-for-profit organization created for the protection of the interests of Lustra Creek located in the State of Rocky Mountain. (R. 3). It is uncontested that MMC placed the overburden removed from their open pit opal mine at the base of the slope of Magic Mountain. (R. 4). Lustra Creek, which flows into Roaring River, which flows into Columbia River, and is a navigable water, has been covered by overburden for approximately a half a mile. (R. 4). As a result, Lustra Creek flows underground for half a mile beneath the overburden. (R. 4).

MMC plans a fourth phase of mining, for which it will be necessary to remove more overburden. (R. 4). MMC has yet to decide what to do with the overburden that they remove in the future, and have not secured landfill space for disposal. (R. 4). Placing the overburden in the Creek bed is the easiest and cheapest means of disposal. (R. 4).

The State of Rocky Mountain Department of Environmental and Natural Resources (RMDENR) issued a notice of violation

** Editors Note: References to the Record may be found reprinted in Appendix A of the Yale Law School Brief. The original page number of the Record has been indicated within Appendix A of the Yale Brief by bracketed page numbers, e.g. **[R. n]**.

(NOV) against MMC for violating the Rocky Mountain Solid Waste Act (RMSWA) by disposing of waste without a proper permit. (R. 4). RMDENR then issued a Consent Order without any notice to the public or a public hearing in August of 1994. (R. 4). MMC continued to place overburden in the Creek bed until January of 1998. (R. 4).

Procedural History

FOL filed suit against MMC under the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365. (R. 3). The suit alleged violations of 33 U.S.C. §§1311, 1342, and 1344. (R. 1). The District Court for the District of Rocky Mountain granted the State of Rocky Mountain permissive intervention in the action. (R. 3).

MMC moved for summary judgment, which the court subsequently granted. FOL and Rocky Mountain have appealed this decision, seeking an injunction preventing MMC from discharging additional pollutants into Lustra Creek and requiring appellee to remove the pollutants it has discharged into the Creek thus far. (R. 3). The appellants further seek the assessment of civil penalties of $25,000 per day for each day the fill remains in the Creek. (R. 3).

Standard of Review

FOL, on appeal, seeks review of the district court's dismissal of their original action. The district court dismissed the action on summary judgment, thus the court of appeal must apply the de novo standard of review. *Andrews v. Ohio*, 104 F.3d 803, 806 (6th Cir. 1997).

SUMMARY OF ARGUMENT

The State of Rocky Mountain's action did not meet the requirements of "diligent prosecution" in order to preclude FOL from filing a citizen suit. The RMSWA enforcement action provision giving the state enforcement authority is not comparable to §1319(g) of the CWA. The state statute does not address water pollution, it does not provide for proper notice and comment, and it does not assess penalties. Not only is the statutory provision insufficiently comparable, the state did not diligently prosecute MMC under that statute. Furthermore, RMDENR did not diligently prosecute where the actions have been ongoing for 18

years, the enforcement actions taken to date have been wholly unsuccessful, and have not deterred MMC from further actions.

FOL is not precluded from bringing a citizen suit action because the violations are continuing. There were sufficient grounds to grant the court jurisdiction because FOL made good a faith allegation of a continuing violation. Additionally, MMC's violation was continuing and, alternatively, MMC was likely to violate the CWA again by disposing of more overburden into Lustra Creek.

The doctrine of res judicata does not bar FOL's suit because FOL and RMDENR are not in privity. Additionally, a consent decree does not invoke the application of the res judicata doctrine since it is not a final judgment rendered by a court of competent jurisdiction. A consent decree does not provide for the proper adversarial proceedings that are required by procedural due process of the Fourteenth Amendment of the Constitution. Furthermore, res judicata does not apply where FOL did not receive proper notice of the Consent Order.

FOL's case is not moot because MMC's violations are continuing. MMC will most likely violate the CWA again and the disposal period will not be long enough to fully litigate and cease the detrimental harm to Lustra Creek and the bodies of water it flows into. In addition, if this Court upholds the lower court's decision that the MMC's cessation was voluntary, MMC will not be able to overcome the heightened standard required, as it is reasonably certain that their previous violations will recur. Assuming *arguendo* that the injunctive relief is moot, the civil penalties sought are not, because MMC participated in wholly past violations.

ARGUMENT

I. FOL'S ACTION WAS NOT "DILIGENTLY PROSECUTED," BECAUSE THE STATE STATUTORY PROVISION APPLIED WAS NOT SUFFICIENTLY COMPARABLE.

The State of Rocky Mountain brought an enforcement action against Magma Mining Co. (MMC) for its disposal of mining overburden in Lustra Creek. (R. 4). The district court of Rocky Mountain precluded a subsequent Clean Water Act citizen suit because the state had diligently prosecuted MMC under the appropriate state administrative procedures. (R. 4). However, the State of Rocky Mountain's action did not meet the requirements of "dili-

gent prosecution" in order to preclude FOL from filing a citizen suit.

The citizen suit provision of the Clean Water Act was promulgated in 1972. S. REP. No. 92-414 (1972). The provision's purpose was to "enable private parties to assist in enforcement efforts where Federal and State authorities appear *unwilling to act.*" (emphasis added). *North and South Rivers Watershed Assoc. v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir. 1991). In 1987, citizens seized this opportunity with unbridled enthusiasm. As a result, Congress enacted legislation to create safeguarding provisions to prevent unreasonable burdens on the courts and industry. The legislation promulgated was ambiguous, stating that once an action has been taken by a State, a citizen suit may be precluded, as long as one of three exceptions has been met: 1) the Administrator or Secretary of the USEPA is currently "diligently prosecuting" an action under this subsection; 2) a State is currently "diligently prosecuting" an action under the state law that is "comparable" to this subsection; or 3) there has been a final order issued either by the USEPA or the State authority and a penalty has been assessed, provided the state law is comparable. 33 U.S.C. §1319(g)(6).

The RMSWA enforcement action provision cannot preclude a citizen suit by FOL because the RMSWA provision giving the state enforcement authority is not comparable to §1319(g) of the CWA. The state statute does not address water pollution, it does not provide for proper notice and comment, and it does not assess penalties. Not only is the statutory provision insufficiently comparable, the state did not diligently prosecute MMC under that statute.

A. The RMSWA is not sufficiently "comparable" to the applicable provisions of the Federal Clean Water Act to preclude FOL's Citizen Suit.

Citizen suits are precluded where the "State has commenced and is diligently prosecuting an action under a State law comparable to this subsection." 33 U.S.C. §1319(g)(6). The first step in determining whether the state has brought an action that can properly preclude a citizen's right, is to determine if the state law is "comparable" to the CWA. When comparing the state statute to the CWA, the particular provision is examined, not the statutory scheme as a whole. *See Hoy v. Sears, Roebuck & Co.*, 861 F. Supp. 881 (N.D. Cal. 1994). In the case at hand, we would determine

whether the enforcement provision of the RMSWA is similar to the enforcement provision of the CWA.

There are several requirements that must be met in order for a state law to be considered comparable within the context of §1319(g) of the CWA. First, the courts have overwhelmingly held that there must have been an adequate opportunity for public participation. Second, the RMSWA statutory provision that RMDENR acted under is not "comparable" because it does not authorize RMDENR to assess penalties, and in the alternative, if §1319(g) does bar the assessment of penalties, it does not bar the assessment of injunctive relief. Finally, the state law must be a law concerning water protection and water pollution abatement. The statute that MMC is regulated under is the RMSWA, which is a solid waste act and not a water pollution control act.

(1) The RMSWA is not "comparable" because citizens were not provided proper notice and opportunity for comment.

In promulgating the CWA, Congress included provisions for the "rights of interested persons." Section 1319(g)(4) provides for 1) "public notice" 2) "notice of any hearing" and "reasonable opportunity to be heard," and 3) the right to petition for hearing if one is not held. In addition, according to § 1319(g)(8), the administrator must provide notice and reasons for denial of hearing and commentators have the right to contest the penalty assessment. Furthermore, private citizens must be able to intervene on state actions as a matter of right. §1365(b)(1)(B).

It is uncontested that RMDENR did not provide public notice of the notice of violation, of its intent to issue the Consent Order, or of the issuance of the order. (R. 4). Furthermore, the RMSWA provided no provision for public notice or intervention regarding administrative enforcement actions. (R. 5).

The courts have upheld this reasoning on numerous occasions and in several jurisdictions. *See U.S. v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D. Va. 1997) (where the recipient of a special order could waive formal hearing, the public was denied the opportunity for hearing before the issuance of the special order); *Public Interest Group of New Jersey v. GAF Corp.*, 770 F. Supp. 943 (D.N.J. 1991); *National Resource Defense Council v. Vygen*, 803 F. Supp. 97 (N.D. Ohio 1992) (the state law was not comparable because the law did not include mandatory public participation safeguards); *Arkansas Wildlife Federation v. ICI Americas,*

Inc., 29 F.3d 376, 381 (8th Cir. 1994) (a statute is comparable if it "provides interested citizens a meaningful opportunity to participate in significant stages of the decision-making process,"). Even where the courts have read the citizen suit preclusion broadly, they have stated that "so long as the provisions of the State Act adequately safeguard the substantive interests of the citizens," then the act is comparable. *North and South Rivers Watershed Association, Inc., v. Town of Scituate*, 949 F.2d at 556 & n.7.

Lack of notice provisions is enough to render the RMSWA incomparable to federal law. *See L.E.A.D. v. Exide*, 1999 WL 124473 (E.D. Pa. 1999). The statute being compared to the CWA must not only have provisions for public notice and opportunity for hearing, but the facts of the case must further "demonstrate that the state denied an interested party a meaningful opportunity to participate in the administrative enforcement process." *L.E.A.D.* 1999 WL 124473 at *31 (citing *Arkansas Wildlife* 29 F.3d at 382). RMDENR provided no means of notice or opportunity for comment. (R. 5). This fact alone creates the presumption that the RMSWA is not comparable and therefore would create a gross injustice if it were to preclude concerned citizens from filing a civil suit under § 1365.

(2) The statutory provision that RMDENR acted under is not "comparable" because it did not authorize RMDENR to assess penalties and, in the alternative, it does not bar the assessment of injunctive relief.

The court below noted that under the state act, RMDENR may issue administrative orders or, alternatively, file a civil action in state court seeking injunctive relief or civil penalties. (R. 5). The statute, however, does not provide for administrative penalties. (R. 5). Payment made in response to a court proceeding (a civil penalty) does not meet the scrutiny of an administrative penalty that will assure that the purposes of the sanction have been met (deterrence, disgorging benefit, etc.). *See Citizens for a Better Environment-California v. Union Oil Company of California*, 83 F.3d 1111 (9th Cir. 1996).

When determining the meaning of a statute, the first and most obvious place to look is the statute itself. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102 (1980). Under strict interpretation, §1319(g)(6)(A)(iii) requires that without payment of a "penalty" under comparable state law, the citi-

zen suit cannot be precluded. *UNOCAL*, 83 F.3d at 1115. An administrative penalty must be assessed, and a court assessed civil penalty or settlement is not sufficient to meet this requirement. *See U.S. v. Smithfield*, 965 F. Supp. at 792 (E.D. Va. 1997); *UNOCAL*, 83 F.3d at 1118, *Friends of Sante Fe v. LAC Minerals*, 892 F.Supp.1333 (D.N.M. 1995).

Furthermore, one should give preference to the language of the statute, and less discretion to congressional intent. *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993) ("General arguments about congressional intent. . .cannot persuade us to abandon the clear language that Congress used when it drafted the statute. The most persuasive evidence of. . .[congressional] intent is the words selected by Congress, not a court's sense of the general role of citizen suits in the enforcement of the Act"). The courts have frequently admonished the heavy reliance on policy reasons, which has essentially read policy into statutory language that is not apparent. *LAC Minerals*, 892 F. Supp. at 1346. Thus, *Gwaltney* is inapposite. The Supreme Court in *Gwaltney*, did not look to literal translation of the statute, but added loaded policy concerns which seemed to influence their entire interpretation. The Court's decision read, "Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result." *Gwaltney*, 484 U.S. at 61.

A state law is only comparable to §1319(g) if it authorizes the state to assess *administrative penalties* for violations of the CWA or of a permit. *U.S. v. Smithfield* 965 F. Supp. at 792. RMSWA authorizes *civil* penalties, not *administrative* penalties. The enforcement agency cannot assess the penalties, it can only refer the problem to civil court, which may or may not assess penalties. Administrative penalties are distinguishable from civil penalties, and a citizen suit cannot be barred when the enforcement agency has not instituted an administrative penalty action. *See Old Timer v. Blackhawk-Central City Sanitation District*, 51 F. Supp. 2d 1109 (D. Colo. 1999); *Washington Public Interest Research Group (WashPIRG) v. Pendleton Woolen Mills*, 11 F.2d 883 (9th Cir. 1993).

However, assuming *arguendo* this Court feels that a citizen suit seeking penalties is precluded, then alternatively, FOL should retain their right to bring a citizen suit seeking injunction. The clear language of the citizen suit preclusion act precludes only

citizen suits seeking civil penalties, not injunctions. *Coalition for a Livable West Side, Inc. v. New York City Dep't of Envtl Protection*, 830 F. Supp. 194, 196 (S.D.N.Y. 1993), (citing *New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 169 (S.D.N.Y. 1991)). "[S]parse but relevant legislative history generally supports this conclusion. The Conference Committee Report states that, . . . 'This limitation would not apply to (1) an action seeking relief other than civil penalties (e.g. an injunction or declaratory judgment). . .'" *Coalition for a Livable West Side*, 803 F. Supp. at 196 & n.1. (citing H.R. CONF. REP. No. 99-1004, at 133 (1986). §309(g)(6)(A); *See also United States v. Smithfield Foods*, 965 F. Supp. 769.

(3) The statutory provision that RMDENR acted under is not "comparable" as required by § 1319(g)(6) because it does not address water pollution.

The court below stated that "the fact that the RMSWA is not primarily a water pollution statute is of no account, since 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 and the RMSWA both require coordinated implementation." *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1481-83 (D. Colo. 1994). This suit was originally filed under the RMSWA, the state statute created to prevent harm created by the disposal of solid wastes. The purpose of the RMSWA and the CWA are fundamentally different.

B. RMDENR's enforcement action should not be given deference where their action did not "diligently prosecute" MMC.

When a state has been ineffective in taking action against a violator, interested citizens should not be precluded from bringing a civil suit to force action on the violator or by the state.

> "'Inaction by the state or federal government is not a justification for dismissing a citizen suit; instead, it is the principal justification for allowing such a suit to go forward.'"

Friends of the Earth v. Laidlaw at 495 (quoting amicus brief of the Department of Justice).

Regardless of whether a state has instituted an action under a state law that is comparable the CWA, the action must still meet a certain level of diligence. *See Connecticut Fund for the Environment v. Contract Plating Co, Inc.*, 631 F. Supp.1291 (D. Conn. 1986). *See also* S. REP. No. 1196, at 37 (1970) (Legislative history of adding citizen suit provisions to the Clean Air Act). If this level of diligence is not met, then the court must consider the citizen suit. *Id.* From the proceedings below, it is evident that the State of Rocky Mountain has not met this level of diligence.

The court must presume diligence absent a showing of persuasive evidence that they have engaged in a pattern of conduct that could be considered "dilatory, collusive, or otherwise in bad faith." *Connecticut Fund* 631 F. Supp. at 1293. *Friends of the Earth v. Laidlaw Envtl. Services*, 890 F. Supp. 470, 486-487 (D.S.C. 1995). However, this discretion can be overcome where the facts show that the agency has not held up its end of the bargain. *Connecticut Fund* 631 F. Supp. at 1294. *Cf. Arkansas Wildlife*, 842 F. Supp. 1140, 1149 (E.D. Ark. 1993) (great deference should be given to the agency's proceeding, however, this is distinguishable because the violator made continuing efforts to remedy the violation).

Several aspects of an agency's action should be reviewed to determine whether the agency's action was diligent or not. First, the length of time that has elapsed between the agency's first enforcement action and the filing of the citizen suit is significant if the action has not resulted in significant remedy. *New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. at 168. Second, the court should look to whether there has been successful enforcement of the Consent Order, and whether there has been substantial relief. *Id.*; *Laidlaw* 890 F. Supp. at 490; *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. at 1159, 1164 (S.D.N.Y. 1980). Finally, the remedy or penalty assessed should be sufficient to deter the violator and vitiate any economic benefit that the company may have received. *Laidlaw,* 890 F. Supp. at 491.

The first agency action taken by RMDENR was in 1993 when it issued a Notice of Violation (NOV) against MMC for disposing of the overburden in Lustra without a permit. (R. 4). Seven years later, there has been no significant remedy to the area. (R. 5). MMC's attempts at remediation have failed miserably. (R. 4). The vegetation planted has not propagated significantly, in direct violation of the Consent Order, which required MMC to "nurture the

vegetation so it was indistinguishable from vegetation on adjacent areas within three years." (R. 4). The concentration of suspended solids below the landfill is greater than above the landfill. (R. 4). The record indicates that this is a substantial increase from the previous years. (R. 4 – 5). This presence of suspended solids in the river threatens to affect the rivers downstream as well. (R. 4). The lack of action and failure to reach an adequate remedy over the past seven years is not diligent prosecution. *New York Coastal Fishermen's Ass'n*, 772 F. Supp. at 168.

Furthermore, RMDENR has taken no subsequent action to require MMC to meet the requirements of the Consent Order. (R. 4-5). The action that MMC did take in compliance with the Consent Order has not been successful and has provided no relief. (R. 4). Thus, the state did not diligently prosecute MMC. *Laidlaw*, 890 F. Supp. at 490 ("the lack of substantial relief in a settlement is properly considered by the court in determining whether the state action was diligently prosecuted."); *See Gardeski v. Colonial Sand and Stone Co., Inc.*, 501 F. Supp. at 1166 ("However, diligent these settlement efforts may have been, they were unsuccessful and cannot be equated with the prosecution of an enforcement action.").

The fact that MMC has not paid a penalty is significant in determining if the prosecution by the state was diligent. *Laidlaw,* 890 F. Supp. at 491 (held that the prosecution against Laidlaw that imposed $100,000 was not enough to recover the economic benefit that Laidlaw received from their violation in order to serve as a successful deterrent). RMDENR's consent order required only that MMC plant native vegetation over the waste. (R. 4). The cost of the landscaping will not be sufficient to act as a deterrent. The cost of obtaining a permit and proper disposal of the overburden may be significantly more expensive and the penalties required to be assessed will have more of a deterrent effect.

As a final note, RMDENR's lack of diligent prosecution is even more egregious because the lack of notice to the plaintiffs curtailed their opportunity to intervene. This should lead to a heightened scrutiny of the actions taken by RMDENR and MMC. *Laidlaw*, 890 F. Supp. at 490.

It is evident that the court below abused its discretion by disregarding the following facts: 1) the length of time these actions have been ongoing; 2) the lack of success of the enforcement proceedings to date; and 3) the lack of deterrent effect on MMC. Thus, it is respectfully suggested that the lower court's summary

judgment should be overruled and remanded for further fact finding, since the court abused its discretion.

II. THE COURT BELOW ERRED IN DENYING JURISDICTION OVER FOL'S CLAIM WHERE MMC'S VIOLATION WAS CONTINUING AS WELL AS SUBSTANTIALLY LIKELY TO RECUR IN THE FUTURE.

The court below held that FOL had no subject matter jurisdiction to bring suit under the CWA citizen suit provision because the violation was not continuing. This was an error on two separate grounds. First, there were sufficient grounds to grant the court jurisdiction because FOL made a good faith *allegation* of a continuing violation. Second, MMC's violation was continuing and, alternatively, MMC was likely to violate the CWA again by disposing of more overburden into Lustra Creek.

The lower court primarily relied on the decision in *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, Inc.* 484 U.S. 49, 64 (1987), where the Supreme Court concluded that 33 U.S.C. § 1365(a) confers jurisdiction over citizen suits when a plaintiff makes a good faith allegation of continuous or intermittent violations. Unfortunately, the Rocky Mountain District Court decided whether the violation was actually continuing, and disregarded the fact that the jurisdictional question was based solely on whether there was a good faith *allegation*. (R. 7-8). In fact, the district court in quoting *Gwaltney* emphasized the words "to be in" rather than "alleged" in the phrase "alleged to be in violation." *Gwaltney* pointed out that citizen-plaintiffs are not required to prove their allegations of ongoing noncompliance before jurisdiction attaches under the citizen suit provision. *Gwaltney,* 484 U.S. at 64. "The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be 'alleged to be in violation.'" *Id. See also Ohio Public Interest Research Group v. Laidlaw Environmental Services, Inc.,* 963 F. Supp. 635, 640, (S.D. Ohio 1996). ("This holding reflects the sensitivity to the fact that proving on-going violations of environmental standards at the pleading stage, without the benefit of discovery, would often be an insurmountable obstacle to the initiation of a citizen suit.").

For these reasons, this court has jurisdiction to decide whether the violation meets one or both of the two prong test certified in *Gwaltney*: that it is either ongoing, or likely to recur.

Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, Inc, 890 F.2d 690, 693 (4th Cir. 1989), on remand from, *Gwaltney*, 484 U.S. 49. MMC's violations are ongoing because the overburden remains without being remedied and potentially causes increased sedimentation in the rivers down stream. MMC has demonstrated their tendency to disregard state authority by continuing to dispose of overburden into Lustra Creek after the issuance of the Notice of Violation. (R. 9). Additionally, MMC has dumped overburden into Lustra Creek intermittently for eight years, and still has a phase of mining to complete, creating a sufficient allegation that the dumping has not ceased and in fact will occur again. (R. 5).

A. The presence of mining overburden in Lustra Creek is a continuing violation of 33 U.S.C. §§ 1311, 1342 and 1344.

MMC deposited waste overburden into Lustra Creek. The overburden remains in the Creek bed and any attempts at remediation have been wholly unsuccessful. These actions taken by MMC constitute a violation of the CWA that continues as long as the overburden remains in the Creek. (R. 4). MMC cannot be allowed to escape responsibility solely because they were not "caught in the act" of depositing the overburden. Such a conclusion is in direct contradiction to the clear language and purpose of the CWA as well as other federal environmental statutes. In fact, the CWA opens with the statement that, "The objective of this chapter [CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251.

The fundamental purpose of the CWA is to prohibit the discharge of pollutants without a permit. *See* 33 U.S.C. §§ 1311, 1342, and 1344. To date, MMC has yet to obtain a CWA permit, however, MMC deposited large amounts of mining overburden into a navigable water, to the point of filling the entire creek bed to dry land. (R. 4). MMC violated the CWA and they have virtually avoided any retribution.

(1) MMC has violated, and continues to violate the CWA by discharging without a § 1342 permit and allowing the discharge to remain in the Creek bed.

Rocky Mountain is federally approved under the § 1342 permitting program. (R. 7). Section 1342 of the CWA regulates

"point-source" pollution into the "navigable waters" of the United States. 33 U.S.C. § 1362 (12). ("The discharge of a pollutant is any addition of any pollutant [as broadly defined under 33 U.S.C. §1362(6)] to navigable waters from any point source."). The overburden, once removed from the mine, is dumped, presumably from dump trucks, directly into the riverbed. As such, the dump truck acts as a "point-source," and Lustra Creek is the "navigable-water." As long as the overburden remains in the riverbed, it is continually releasing sediment that is carried downstream into the tributaries of Roaring and Columbia Rivers. Therefore, the sediment remaining in the riverbed acts as the "point-source" whose continual outflow is polluting the "navigable waters" of Lustra, Roaring and Columbia. ". . . [A] discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself." *Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc.,* 962 F. Supp. 1312, 1322 (D. Or. 1997) (An abandoned brine pit was discharging residues through groundwater to surface waters, and the discharge constituted an "ongoing violation" of the CWA. Based on these facts, the court held that jurisdiction under *Gwaltney* was proper). *See also Werlein v. United States,* 746 F. Supp. 887, 896-97 (D. Minn. 1990), class cert. vacated 793 F. Supp. 898 (D. Minn. 1992) (Toxic waste that migrates to a waterway over time is an ongoing pollution of that waterway for CWA purposes, even though all of the contaminants were dumped years before).

The continuing presence of the overburden without a permit is a continuing violation as well. *See Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389 (D. Haw. 1995) (operating without a NPDES permit was a present, not a past violation). "[A] discharger operating without a permit 'remains in a continuing state of violation until it either obtains a permit or no longer meets the definition of a point source.'" *Id.* at 1400 (citing *Carr v. Alta Verde Industries, Inc.,* 931 F.2d 1055, 1062 (5th Cir.1991)).[1]

1. *See also Sierra Club v. Simkins*, 847 F.2d 1109, cert. Denied, 491 U.S. 904, (The lack of monitoring reports were held to be an "ongoing violation"); *Patterson Farm Inc. v. City of Britton, South Dakota,* 22 F. Supp. 2d 1085 (D.S.D. 1998). (The court found the "plaintiff alleged in good faith continuous violations of the CWA by the City, including the failure to abide by the inspection and record keeping provisions of the NPDES permits."); *Ohio Public Interest Research Group v. Laidlaw Environmental Services, Inc.,* 963 F. Supp. 635, 640 (S.D. Ohio 1996) (Court found a continuing

MMC's failure to get a permit is a procedural violation of § 1342 of the CWA and its dumping of overburden is a substantive violation of 33 U.S.C. § 1311(a) that is continuous in nature. Furthermore, the integrity of the self-reporting system of regulation is at stake if CWA violators, without a permit, are allowed to undermine the system by escaping liability under a court's narrow interpretation of *Gwaltney*.

(2) In the alternative, MMC has also violated the CWA by filling wetlands without a § 404 permit and allowing the fill material to remain.

MMC is continually violating the CWA by "discharging" "fill material" into a "water of the United States" without a §404 permit. Section 404 of the CWA regulates "the discharge of dredge and fill materials into navigable waters." 33 U.S.C. § 1344. Code of Federal Regulation § 323.2(e) defines a "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e). The definition specifically excludes any pollutant discharged into the water "primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act." 33 C.F.R. § 323.2(e). MMC's disposal has filled the creek bed. (R. 4). The filled Creek bed is no longer being treated by the state of Rock Mountain as a water body. Their proposed remedy is to plant the area with vegetation that is native to the surrounding area. (R.4). So the "fill" added by MMC has replaced an aquatic area with dry land, subjecting MMC's activities to §404 of the CWA.

Section 323.2(f) defines "discharge" as "addition of fill material into the waters of the United States." 33 C.F.R. § 323.2(f). The term "waters of the United States" is defined under 33 C.F.R. 328.3(a)(1) as "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," 33 C.F.R. § 328.3(a)(1). After adducing that the overburden is a fill material, it is clear that MMC's addition of these materials is in violation of § 404 permits.

MMC's violation of §404 is continuing as long as the illegally dumped material remains, or is not remedied. *See Informed Citizens United, Inc. v. USX Corp.*, 365 F. Supp. 2d 375 (S.D. Tex

violation and a likelihood of continuance because defendant did not implement adequate treatment measures).

1999) (Court noted that several courts have found *Gwaltney* inapplicable under a § 404 violation), citing *Sasser v. EPA*, 990 F.2d 127, 129 (4th Cir. 1993), *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996), *North Carolina Wildlife Fed'n v. Woodberry*, No. 87-584-Civ-5 1989 WL 106517 (E.D.N.C. 1989); *United States v. Tull*, 615 F. Supp. 610, (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir.1985), *rev'd on other grounds*, 481 U.S. 412 (1987).

Sound policy supports allowing jurisdiction because "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 CWA." *Informed Citizens*, 365 F. Supp. 2d 375, (citing, *Woodberry*, 1989 WL 106517) (Held discharge of fill material is continuing violation is reasonable "because it is not the physical act of discharging dredged wastes itself that leads to the injury giving rise to citizen standing, but the consequences of the discharge in terms of lasting environment degradation.").

The continued presence of fill material in Lustra Creek and its migration down stream is a continuing violation under § 404 of the CWA. The "forward looking interests" as seen in *Gwaltney* seems to overlook the present interest in preventing future dumping without a 404 or 402 permit. Additionally, potential citizen suits will serve as a deterrent to those contemplating violations.

B. A reasonable trier of fact could find a significant likelihood of a recurrence of intermittent or sporadic violations of 33 U.S.C. § 1311(A) and 33 U.S.C. § 1342 by MMC.

If the Court finds that MMCs disposal of the overburden into Lustra Creek is not a "continuing violation" per se, the facts adduced by the trial court indicate that there is a substantial likelihood, sufficient for a good faith allegation, that MMC may violate the CWA in the future. The district court itself stated that MMC placed overburden in the Creek "*intermittently* between January 1980 and January 1998." (emphasis added) (R. 4). Furthermore, there is a fourth phase of mining planned which will require MMC to remove more overburden, and the cheapest means of disposal is into the Creek bed. (R. 4).

Intermittent or sporadic violations which are likely to occur in the future are sufficient allegations to grant jurisdiction under the CWA. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, LTD.,* 890 F.2d 690 (4th Cir. 1989) (there was a good faith allegation that future violations were likely to occur and therefore found there was evidence of ongoing violations).

The test to determine if the violations are ongoing that were certified to the district court by the Supreme Court states:

> "(1) by proving violations that continue on or after the date the complaint is filed;
> (2) or 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**. . . .The district court **may** wish to consider whether remedial actions were taken to cure violations, the ex ante probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on whether the risk of defendant's continued violation had been **completely eradicated** when citizen-plaintiffs filed suit. 844 F.2d at 171-72." (emphasis added).

Id. at 693.

The plaintiff's burden of proof in the *Gwaltney* test is not stringent. *Concerned Area Residents for the Environment v. Southview Farm*, 834 F. Supp. 1410, 1416 (W.D.N.Y 1993). On the other hand, the defendant's burden "is a heavy one," of proving that it is "absolutely clear" that the discharges will not happen again. *Gwaltney,* 484 U.S. at 66. *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.,* 989 F.2d 1305 (2d Cir. 1993). MMC has not made it clear that this final phase of mining will not result in further deposits of overburden into Lustra Creek.

It is for this reason that the holding in the case cited by the district court, *Connecticut Coastal,* 989 F.2d 1305 is distinctly different. (R. 7). In *Connecticut Coastal,* the gun club made a "final irrevocable decision" never to reopen the gun club to trap and skeet shooting at any time in the future, and they offered support by showing they dismantled and threw away the skeet houses in 1986. Furthermore, the state Department of Environmental Protection had already issued stringent orders in 1986 to deal with this issue, including ordering Remington to cease discharges of

lead shot or get a permit. *Id.* at 1309. Plaintiffs did not bring suit until April 1987. The court stated "no fair-minded juror could find that there was a likelihood in April 1987 that Remington would discharge lead shot in the future." *Id.* at 1312.

RMDENR did not issue stringent administrative orders to demand cessation of any future harm and MMC admits that there is a plan for a fourth stage of overburden dumping within the next year. Thus, there is no "final irrevocable decision" to cease future activities as seen in *Connecticut Coastal* nor is there any evidence that they are closing down the work site.

The *Connecticut Coastal* case is distinct for several other important reasons. First, our judge states that RCRA and CWA decisions are "inapposite" in that RCRA "statutory scheme is clearly aimed, at least in part, at waste that have been disposed of in the past but pose a present danger, RCRA § 7002(a)(1)(B) and 7003." This is in direct conflict with *Connecticut Coastal,* where the court cites *Gwaltney* stating,

> "The Supreme Court acknowledged that the language in the citizen suit provisions of the CWA and § 7002(a)(1)(A) of RCRA is identical, yielding the same requirement that plaintiff allege an ongoing or intermittent violation of the relevant statute."

Gwaltney, 484 U.S. at 57 & n.2; *see Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d. 1149 (9th Cir. 1989) (applying requirement of ongoing or intermittent violation to citizen suit brought under § 7002(a)(1)(A)).

Furthermore, the district court erred where they compared FOL's citizen suit to the "imminent and substantial endangerment" provision of RCRA, RCRA § 7002(a)(1)(B), and not the RCRA provision under § 7002(a)(1)(A) which is virtually identical to the CWA citizen suit provision. RCRA § 7002(a)(1)(A) provides for citizen suits against persons who are "alleged to be in violation of any permit, standard, regulation,. . ." which can be compared to the citizen suit language of the CWA § 1365(a)(1) which authorizes citizen suits against any person "alleged to be in violation." The purpose of RCRA §7002(a)(1)(B) is for "imminent and substantial" endangerments. *See Aurora National Bank v. Tri Star Marketing, Inc.,* 990 F. Supp. 1020 (N.D. Ill. 1998); *see also L.E.A.D. v. Exide Corp.,* 1999 WL 124473 at *9-10 (E.D. Pa.).

The application of this prong of the test is the same for a § 402 violation as it would be for a § 404 violation. As was adduced above, there is a violation of § 404 of the CWA.

III. THE TRIAL COURT ERRED IN HOLDING THAT FOL'S SUIT WAS BARRED BY THE DOCTRINE OF RES JUDICATA BECAUSE FOL WAS NOT IN PRIVITY WITH RMDENR AND IT WAS NOT A FINAL JUDGMENT ON THE MERITS.

FOL is not barred from bringing this suit, as FOL's interests in the instant case is not aligned with the former administrative action as to be in privity with RMDENR. The consent administrative order entered into by RMDENR and MMC does not preclude FOL's claim because RMDENR did not adequately represent FOL by "virtual representation." RMDENR, in its capacity as a state agency, had substantially different objectives in seeking to enforce violations against MMC. FOL, by bringing an action against MMC, sought to address issues that were separate and beyond RMDENR's concerns. In addition, FOL and RMDENR do not have the same legal right because they are authorized to bring an action under and are seeking to enforce two separate and distinct laws.

Furthermore, a consent decree does not invoke the application of the res judicata doctrine, as it is not a final judgment rendered by a court of competent jurisdiction. Thus, FOL has the right to insure RMDENR complied with proper procedure under the Clean Water Act. Not only was FOL improperly represented in the consent decree, but FOL was also not provided with notice or the opportunity to voice their comments in a public hearing prior to the issuance of the administrative consent order. Based on the foregoing, it is evident that it would be a violation of the Due Process Clause of the Fourteenth Amendment to bar FOL from bringing suit against MMC, as they have a legal right to an equitable remedy.

As this Court has jurisdiction over the instant case because there is a federal statute involved, federal procedural rules apply. *See Aerojet-General Corp v. Askew*, 511 F.2d 710, 715 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84 (5th Cir.), *cert. Denied*, 434 U.S. 832 (1977).

A. FOL is not precluded from bringing an action against MMC because they were not virtually represented by RMDENR's administrative consent order.

Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. U.S.*, 440 U.S. 147, 153 (1979). Courts have recognized that a non-party may be bound by a final judgment rendered in an earlier action if they are so aligned with its interests as to be its "virtual representative." *U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir.1980); *Aerojet Gen'l Corp v. Askew*, 511 F. 2d 710, 719 (5th Cir. 1975) *cert. denied* 423 U.S. 908 (1975); *see also, People Who Care v. Rockford Bd. Of Educ.*, 68 F.3d 172 (7th Cir. 1995) (holding that the interests of the party in the second suit must be "so parallel" to the interests of the party in the first suit so that the first party becomes the second party's virtual representative).

FOL is a not-for-profit corporation for the protection of Lustra Creek that flows into the Roaring River, which then flows into the Columbia River, a navigable body of water of the United States. (R. 4). FOL has an interest in preserving the environment and natural resources particular to their area that may be affected by surrounding pollutants or threats. Not only do they seek to protect the Lustra Creek, but they also have an interest in protecting the water that flows from the Creek to other bodies of water. RMDENR is a state agency that is authorized to issue permits to companies that seek to dispose of solid waste. (R. 5). Their interests include an underlying policy of placing the State of Rocky Mountain in the most profitable situation. It is within their best interest to issue as many permits as feasible, as it will bring businesses to the State of Rocky Mountain, which in return will bring money to the state. Their economic concern for the state is substantially different from FOL's interest in protecting natural resources.

FOL could not be virtually represented by RMDENR in the consent decree because RMDENR did not address any of the substantive issues that FOL seeks review over in this Court. FOL has a legal right to move forward with their action and seek relief due to the malfeasance of MMC, as such relief was not granted or even considered in the administrative order.

It is arguable that privity is not dependent upon the subjective interests of the individual parties alone, but is satisfied when

the two parties in question represent the same *legal right*. *Harmon Industries, Inc. v. Browner,* 191 F.3d 894, 903 (8th Cir. 1999) (citing *Hickman v. Electronic Keyboarding, Inc.,* 741 F.2d 230 (8th Cir. 1984)). In applying this heightened standard to the case at bar, FOL remains separate and distinct from RMDENR and is not in privity with the state agency.[2]

FOL and RMDENR did not represent the same legal right. RMDENR was authorized to issue administrative orders to persons who violate the Rocky Mountain Solid Waste Act. (R. 5). They have a legal right under this act to enforce against those who dispose of overburden waste in a landfill without a permit. In contrast, FOL's legal right stems from the citizen suit provision in § 1365 of the CWA, which allows them to file suit for MMC's violation of § 1311(a) which prohibits the "discharge of any pollutant by any person." They also seek sanctions against MMC because they discharged pollutants without a mandatory permit issued under either §§ 1342 or 1344 of the CWA. RMDENR's legal right comes from state law, while FOL's legal right stems from federal law under the CWA. Thus, they do not represent the same legal right and FOL is not precluded from bringing this action.

B. A consent decree does not invoke the application of the res judicata doctrine as it is not a final judgment rendered by a court of competent jurisdiction.

The application of res judicata is not warranted in the instant case since there has not been a final adjudication by a court of law. In August of 1994, rather than seeking judicial review of MMC's violations, RMDENR chose to negotiate with MMC, thereafter issuing a consent administrative order under RMSWA. (R. 4). In *Annaco, Inc. v. Hodel*, 675 F. Supp. 1052, 1058 (E.D. Ky. 1987), the court recognized that a settlement agreement was an administrative action, rather than a final judgment, and thus, res judicata did not preclude a suit on the matter. The settlement agreement was not achieved through a decision by an impartial judge, rather

2. The EPA in *Harmon* was seeking an enforcement action based on the exact same issue that the state agency had already addressed in their judicially approved consent decree. Thus, the two parties were representing the same legal right, which was to cease the companies' waste disposal and require them to comply with RCRA regulations. The EPA authorized the state agency to administer and enforce a hazardous waste program pursuant to RCRA. *Harmon*,191 F.3d at 897. By giving states this authorization, the federal agency relinquished its legal right to administer and enforce hazardous waste programs among the states.

it was achieved through discussion of the two parties. Therefore the issues did not receive a full and fair litigation and are not barred by the doctrine of res judicata. The court distinguishes the agency settlement in *Annaco* from a State Supreme Court decision in *U.S. v. ITT Rayonier, Inc.*, 627 F.2d at 1003 (9th Cir. 1980). *See also Martin v. Wilks*, 490 U.S. 755 (1989) (a consent decree between one group of employees and their employer cannot possibly settle the conflicting claims of another group of employees who do not join in the agreement).

RMDENR's and MMC's consent decree is not a final judgment on the merits as is required to preclude a suit on the basis of the doctrine of res judicata. *Montana v. United States,* 440 U.S. at 153. The consent order was entered into pursuant to negotiations between RMDENR and MMC. An impartial judge did not hear arguments of fact and law from RMDENR and MMC and thus a final judgment was not rendered on the merits of the case.

FOL was denied the right to intervene in the negotiations of the parties as they would have been able to in litigation under Fed. R. Civ. P. 24. The court in *Martin* noted that it is easier to settle claims among a disparate group of affected persons if they are all before the court, which joinder and mandatory intervention would accomplish. *Martin v. Wilks*, 490 U.S. at 768.

FOL would have been able to pursue its position vigorously if there had been an adversarial proceeding. There was no opportunity for examination of witnesses and no opportunity for discovery. All aspects of the adjudicatory process that increase the chances of rendering an equitable remedy were not present. It is respectfully requested that because of the absence of a full and fair litigation, there was not a final judgment on the merits and, thus, the doctrine of res judicata does not preclude FOL from bringing this suit.

C. FOL did not receive proper notice and opportunity for hearing comment on the administrative proceeding therefore, FOL's citizen suit should not be precluded.

Assuming *arguendo* that the consent decree is a final judgment as to invoke the doctrine of res judicata, precluding FOL from bringing this suit would impinge on their fundamental right to due process. FOL has a fundamental right to voice their interests about action that may adversely affect them. RMDENR and MMC did not provide FOL with this opportunity. Instead they

entered into an agreement without providing notice to anyone about MMC's illegal action of discharging pollutants into Lustra Creek. (R. 4). MMC was not sanctioned for this, but was ordered to stop and correct the situation. (R. 4). However, the damage was not corrected and RMDENR did nothing to insure the damage was undone. (R. 4).

FOL was entitled by law to notice of RMDENR's intent to compromise with MMC and of the proposed administrative consent order before issuance. Furthermore, they were entitled to a public hearing on the issues posed in the administrative order. Not only did RMDENR not give public notice of the intent or the issuance of the consent order, but they also did not notify the public of the notice of violation they issued against MMC for the unpermitted landfill. (R. 4).

While FOL was not provided with notice of the proposed administrative order issued by RMDENR, they were likewise not provided with the opportunity to voice their comments regarding the agreement in a public hearing. FOL was not provided with the opportunity to demonstrate why their interests of protecting Lustra Creek should be considered in the administrative consent order. Had RMDENR notified FOL of its intent to issue a consent order to MMC, FOL would have been able to gather evidence for presentation at a public hearing targeted to demonstrating that the state agency should consider other important aspects related to discharging pollutants in Lustra Creek and issue their administrative order accordingly.

The disposal of pollutants in Lustra Creek adversely affects their objectives of protecting the environment and preserving natural resources. RMDENR prevented FOL from demonstrating their interests in the consent order agreement between RMDENR and MMC. Since FOL was not adequately represented in the Consent Order Agreement and was prevented from having ample notice and opportunity for hearings, it is respectfully suggested that precluding FOL from bringing their citizen suit it is a violation of procedural due process under the Due Process Clause of the Fourteenth Amendment.

IV. THE TRIAL COURT ERRED IN HOLDING THAT FOL'S SUIT IS MOOT WHERE MMC FAILED TO PROVE THAT THE VIOLATIONS WILL NOT OCCUR AGAIN.

FOL's case is not moot because MMC's violations are continuing. (See Part II). Furthermore, it is substantially likely that MMC will dispose of pollutants in Lustra Creek again. (See Part II). If this Court fails to issue an injunctive order in this case, MMC will most likely violate the CWA again and the disposal period will not be long enough to fully litigate and cease the detrimental harm that will result to Lustra Creek and the bodies of water it flows into. Postponing this suit will only lead to an irreparable injustice where FOL and MMC would be subjected to the same action for a second time.

Furthermore, if this Court upholds the lower court's decision that the cessation by MMC was voluntary, MMC will be required to prove that their wrongful behavior could not reasonably be expected to recur. *United States v. W.T. Grant Co.,* 345 U.S. 629, 633-36; *see, e.g., United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290, (1897). (R. 9). MMC will not be able to overcome this stringent standard because it is reasonably expected that their previous violations will recur.

Additionally, assuming *arguendo* that the injunctive relief is moot, the civil penalties sought are not. MMC participated in past violation of permits under the CWA and therefore should be penalized accordingly.

A. By applying the "capable of repetition, yet evading review" exception, FOL's case is not moot.

The Supreme Court in *Murphy v. Hunt*, 455 U.S. 478, 482-83 (1982) requires two objectives to be met in order to satisfy the "capable of repetition, yet evading review" exception to mootness. *See also National Solid Wastes Mgmt. Ass'n v. Alabama Dep't of Envtl. Mgmt*, 924 F.2d 1001, 1003 (11th Cir.), *cert. denied*, 501 U.S. 1206. They are as follows:

(1) there be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party,

(2) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration.

FOL meets both requirements and, thus, their civil suit should not be rendered moot.

(1) There is a reasonable expectation that MMC will dispose of pollutants in Lustra Creek again and thus FOL will be forced to bring this suit yet a second time.

MMC's previous wrongful conduct occurred three times when they stripped the overburden and thereafter placed it in Lustra Creek. (R. 4). Completion of the project requires a fourth, final phase of removing overburden. (R. 4). If this Court does not issue injunctive relief to FOL, it is reasonably certain that MMC will, for the fourth time, place the overburden on top of Lustra Creek. Not only is the placement of overburden in the Creek bed the easiest method, but it is also the cheapest. (R. 4). To date, they have not secured landfill space to dispose of the overburden from the fourth phase. (R. 4).

The administrative order issued by RMDENR did order MMC to cease dumping waste overburden in the Creek landfill. In addition, it did not penalize MMC for disposing of the overburden, nor did it contemplate future disposals. (R. 4). Additionally, RMDENR ordered MMC to plant vegetation in the landfill and to nurture the vegetation so that it is indistinguishable from those on adjacent areas, yet RMDENR has not proceeded to force compliance with this order. (R. 4).

The record does not reflect that the consent administrative order contemplated future violations. (R. 4). It did require MMC to cease disposal immediately. (R. 4). However, the record further reflects that MMC continued to violate the Consent Order after it was issued. (R. 4). Since it is reasonably certain that MMC will dispose of pollutants in Lustra Creek again, there is a demonstrated probability that the same controversy, as in the case sub judice, will recur. MMC will again violate the CWA by dumping pollutants in the Creek and FOL will be forced to file suit again seeking injunctive relief ordering MMC to cease disposal.

Furthermore, FOL seeks injunctive relief ordering MMC to remove all overburden placed on the Creek bed. RMDENR has not enforced compliance with their attempt to remedy the situation caused by MMC. (R. 4). Thus, FOL has an interest in forcing MMC to return the Creek bed to the most natural state possible, with the least harm. If this Court declares this case moot, it is probable that MMC will continue non-compliance with the consent decree and the situation will only worsen. Thus, there is a reasonable expectation that this same controversy will recur as FOL will be forced to bring suit to protect further damage to the Creek and to correct the damage that has already occurred.

(2) The duration of MMC's removal of overburden and subsequent disposal in Lustra Creek is too short to be able to fully litigate prior to cessation.

MMC removed and placed overburden in Lustra Creek intermittently between January 1980 and January 1998. (R. 4). The overburden disposed of was divided into three separate segments. (R. 4). Thus, three times during the period from 1980 to 1998, MMC dumped pollutants into Lustra Creek. These disposals were not made overnight, however, the exact length is undetermined. (R. 9). Furthermore, because of the nature of the activity, to predict a specific period of time is not easily ascertainable. It could depend on extrinsic circumstances, such as weather conditions, amount of overburden on the fourth segment, and availability of workers and equipment to dispose of the overburden.

While the duration remains undetermined, it is clear that the disposal will not happen over night as appellee contends. However, it is also evident that the duration will be too short in order to fully litigate on the problem before MMC ceases disposal. In the instant case, the issues involved are quite complex and would require a lengthy trial. *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997) (a four month period for an injunction would not be sufficient time in order to fully litigate prior to the expiration, and the litigation of the problem would be too lengthy and complex to be able to litigate in such a short time). The number of possible parties and complexity of the issues indicate that the duration of the trial could be lengthy.

Consequently, the complete fourth phase of disposal could take place before an injunction is rendered. It is not likely that RMDENR will take immediate action, as MMC was able to dis-

pose of pollutants in Lustra Creek for 18 years before RMDENR decided to exercise its authority. The creek and surrounding area will only be damaged further.

An injunction should be issued prior to the commencement of the project because as soon as they begin dumping wastes, harm to the environment begins. It is respectfully suggested, that this Honorable Court take into consideration the nature of MMC's violation, and grant injunctive relief. It is not possible that final judicial resolution could be obtained before MMC completes their disposal of the overburden.

B. MMC's cessation was not voluntary, in the alternative, if it was, FOL's case is not moot, as the wrongful behavior is reasonably certain to recur.

It is well established that voluntary cessation of a challenged practice does not moot the issue de facto. *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167 (2000); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). If the federal court did not contain its power to determine the legality of the practice, the defendant would be "free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Accordingly, the courts have established a heightened standard, which requires the party asserting mootness to prove that the allegedly wrongful behavior could not reasonably be expected to recur. *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968). The lower court failed to apply this heightened standard, rather they held that because MMC ceased disposal voluntarily and the "capable of review yet evading repetition" exception did not apply FOL's suit was moot. (R. 9).

MMC certainly would not be able to overcome this heavy burden of proof, as they have not yet made disposal plans for the fourth phase, their location is conducive to dumping in Lustra, and it would be the cheapest and easiest means of disposing of the wastes. (R. 4). Based on the foregoing, MMC would not be able to prove that their wrongful conduct could not reasonably be expected to recur.

C. If the court determines that FOL's claim for injunctive relief is moot, their claim for civil penalties is not moot because the violations are "wholly past."

FOL seeks civil penalties against MMC. Under the CWA, civil penalties attach as of the date a violation occurs. The statute states, "Any person who violates any permit condition or limitation . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Thus, FOL's suit seeking penalties is intrinsically incapable of being rendered moot by MMC's cessation because civil penalties are based on past violations, which are present in the case *sub judice*. Consequently, if this court finds that FOL's claim for injunctive relief is moot, this does not warrant a finding that the claim for civil penalties is also moot. *See United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980) (when the EPA brings suit for injunctive relief and civil penalties, an appeal is not mooted even if injunctive relief becomes inappropriate); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 442 (civil penalties under the CWA may still be available for past violations of permits).

FOL seeks civil penalties for every day the fill was placed or allowed to remain in Lustra Creek. The overburden has remained on the bed of the Creek since 1980, when they first began disposing in the area. (R. 4). These violations are the type of actions the CWA seeks to punish so as to deter future harmful conduct. MMC should be penalized for each day they remained in non-compliance with the CWA. It is for these reasons that FOL's claim for civil penalties is not moot.

CONCLUSION

It is for the foregoing reasons that FOL respectfully requests that this Court: 1) find that the administrative order issued by RMDENR was not sufficient diligent prosecution to preclude FOL from bringing a citizen suit; 2) find that the continuing presence of overburden in Lustra Creek is a continuing violation and that it is substantially likely that they will violate the CWA again; 3) find that FOL cannot be precluded by the doctrine of res judicata; and 4) find that a consent order issued by a state enforcement agency is insufficient to render a citizen suit moot.