Pace Environmental Law Review

Volume 19
Issue 1 *Winter 2001*

Article 9

January 2001

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

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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 ROCKY 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. Does a state administrative order issued under a coordinated environmental enforcement scheme that both required the state to consider water quality concerns and targeted the identical violations that the citizens sought to remedy preclude a Clean Water Act citizen suit under the "diligent prosecution" bars of 33 U.S.C. §§ 1319(g)(6)(A) and 1365(b)(1)(B)?

2. Does Rocky Mountain's doctrine of res judicata bar a Clean Water Act citizen suit when the plaintiff's interest in protecting natural resources has been represented by the state in a prior enforcement action under its environmental statutes?

3. Does the District Court have subject matter jurisdiction under 33 U.S.C. § 1365(a)(1) when previously dumped mining overburden continues to discharge pollutants into a creek, the defendant can remediate the violations, and intermittent violations are likely in the future?

4. Does the fact that a mining company ceased dumping pollutants in 1998 render a case moot when the company has planned another phase of mining for the near future and meaningful relief is available?

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STATEMENT OF THE CASE**

Procedural History

This action is before the Court on appeal from an order of the District Court for the District of Rocky Mountain granting Magma Mining Company ("MMC") summary judgment in the citizen suit brought against it by Friends of the Lustra ("FOL") under the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251 et seq. (1994). The District Court held that Rocky Mountain's version of res judicata precluded the suit and that section 309 of the CWA, 33 U.S.C. § 1319 (1994), barred the citizen suit because of the state's diligent prosecution under a comparable state law. (R. 3-4). In addition, the court ruled that the absence of a "continuing violation" deprived it of subject matter jurisdiction under section 505, 33 U.S.C. § 1365 (1994), the citizen suit provision of the CWA. (*Id.*). Finally, the court held that the case was moot because MMC had ceased dumping materials into Lustra Creek. (R. 4).

FOL has appealed the District Court's grant of summary judgment on all four grounds. Rocky Mountain joins MMC in opposing FOL's appeal of the res judicata and citizen suit preclusion holdings, arguing that its enforcement action was sufficient. Rocky Mountain also joins FOL in appealing the District Court's holding on the continuing violation and mootness issues.

Statement of the Facts

MMC operates an open pit opal mine on the slope of Magic Mountain. (R. 4). In three phases between January 1980 and January 1998, MMC stripped overburden rock from the slope to reach the opal-bearing deposit and then dumped the overburden in Lustra Creek. (*Id.*). As a result, the Creek now flows underground for half a mile beneath the overburden. (*Id.*). MMC has planned a fourth and final mining phase for the near future. (*Id.*). Although MMC has not presently decided where to place the overburden it removes in phase four, dumping it in the Creek remains the most cost-effective means of disposal. (*Id.*).

Rocky Mountain operates an environmental enforcement scheme in which the state is required to implement two statutes, the Rocky Mountain Solid Waste Act ("RMSWA") and the EPA-approved Rocky Mountain Clean Water Act ("RMCWA"), in coordi-

** 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]**.

nation with each other. (R. 7). In 1993, the Rocky Mountain Department of Environmental and Natural Resources ("RMDENR") commenced an administrative action against MMC by issuing a notice of violation under the RMSWA for creating an unpermitted landfill on top of Lustra Creek. (R. 4). In August 1994, RMDENR and MMC agreed to a consent administrative order ("CAO") that required MMC to cease all unpermitted dumping of overburden immediately and to grade and plant the landfill with native vegetation so that it would be indistinguishable from the surrounding area within three years. (*Id.*). As indicated in the CAO preamble, RMDENR found that removal of the overburden "would result in massive disruption of water quality by mud and silt erosion during the removal process." (*Id.*)

Despite the fact that the RMSWA is the state's comprehensive statutory scheme for regulating the disposal of solid waste (R. 5), one of its purposes is also to protect water quality, and it must be implemented in coordination with the RMCWA (R. 7). The RMSWA empowers Rocky Mountain to issue administrative compliance orders, such as the CAO, and to bring a civil action in state court for injunctive relief or for civil penalties of up to $2,500 per violation. (R. 5). Although interested parties may intervene in a state court action under the RMSWA, the statute provides no public notice or participation for administrative actions. (R. 5).

MMC ceased overburden dumping in January 1998. (*Id.*). It graded the landfill and planted native vegetation in 1998, but scant rainfall has prevented any significant growth. (*Id.*) Studies of Lustra Creek show more suspended solids below the mine than above it, but the concentration has never exceeded that in other streams in the area during the spring melt-off. (R. 5-6). FOL properly filed a notice of intent to sue and later filed a complaint under the CWA's citizen suit provision, alleging that MMC continues to violate section 301 of the CWA, 33 U.S.C. § 1311(a) (1994), and seeking both injunctive relief and civil penalties. (R. 3). Rocky Mountain intervened to defend its administrative action as well as to enforce its order against further illegal dumping by MMC. (R. 4-5). The District Court granted MMC's motion for summary judgment, and this appeal followed.

SUMMARY OF THE ARGUMENT

Rocky Mountain urges that the decision of the District Court for the District of Rocky Mountain barring FOL's citizen suit be upheld, because the prior state enforcement action under the RM-

SWA served as both a statutory bar under the CWA, and a doctrinal bar under res judicata. In order to enforce its order against MMC, Rocky Mountain urges this Court to reverse the decision of the District Court to grant MMC's motion for summary judgment on the issues of continuing violation and mootness, because MMC remains in violation of the CWA, future unpermitted dumping in Lustra Creek is likely to recur, and meaningful relief is available.

Section 309(g)(6)(A)(ii) of the CWA precludes citizen suits seeking civil penalties when "a state has commenced and is diligently prosecuting an action under a State law comparable to this subsection." One of the primary goals of the RMSWA is the protection of water quality, and the statute is required to be implemented in coordination with the EPA-approved RMCWA. The CAO issued by Rocky Mountain under the RMSWA remedies the same violations targeted by FOL's citizen suit, and the statute offers a penalty assessment scheme comparable to section 309 of the CWA. The coordinated enforcement scheme under the RMSWA, and included in the CAO, adequately safeguarded the citizens' substantive interests, obviating the need for public notice, hearing, and intervention. Since the primary enforcement responsibility of the CWA rests with the states, deference to the Rocky Mountain's enforcement approach is proper.

Furthermore, Rocky Mountain is diligently prosecuting its enforcement action against MMC. The primary concern of the CAO has been achieved, as MMC has placed no overburden in Lustra Creek since 1998. Although the defendant has planted the area with native vegetation, full realization of this objective has been frustrated solely by a lack of rainfall. Rocky Mountain also seeks to enforce its order against MMC in court to prevent any further violations. When a state undertakes an enforcement action, diligent prosecution is presumed, and deference to the agency's plan of attack is particularly favored. Because citizen suits are meant to supplement rather than supplant governmental action, section 309(g) should bar both the civil penalties and injunctive relief sought by FOL.

The substantial identity between FOL and Rocky Mountain in this case creates a privity relationship between the parties and bars FOL's citizen suit under the doctrine of res judicata. Acting in its parens patriae capacity to protect the sovereign interests of the state, Rocky Mountain is presumed to represent the interests of FOL and the rest of its citizens in addressing harm to the state's natural resources. FOL was adequately represented in the

prior state enforcement action forbidding any further unpermitted dumping in Lustra Creek, and thus is in privity with Rocky Mountain for purposes of res judicata.

Furthermore, FOL's role as a private attorney general in bringing a citizen suit under the CWA renders it substantially identical to Rocky Mountain as a public enforcer of the law, making a final judgment in the agency action a res judicata bar to this suit. The primary goals of res judicata to conserve judicial resources, to protect litigants from the expense and vexation attending multiple lawsuits, and to foster certainty, reliability, and respect in the legal system by minimizing the possibility of inconsistent decisions can only be achieved by precluding FOL's action.

Although FOL's action is precluded, the District Court must have subject matter jurisdiction over this case in order to allow Rocky Mountain to enforce its CAO against MMC for ongoing violations of the CWA. Section 301(a) of the CWA prohibits the discharge of pollutants from a point source into waters of the United States, and mining waste constitutes a point source as water flows through the waste and carries away pollutants. Since Lustra Creek flows underneath the mining waste dumped by MMC for half a mile, the presence of overburden in the Creek is a continuing violation of the CWA. The fact that the harm to the environment caused by MMC's overburden is remediable also makes it a continuing violation. In order to address the CWA's principle goals of restoring the nation's waters and eliminating the discharge of pollutants, the presence of overburden rock in Lustra Creek should be considered a continuing violation of the Act.

Ongoing violations of the CWA also exist because there is a continued likelihood of recurrence in intermittent or sporadic violations by the defendant. Not only has MMC failed to put effective measures in place to ensure that future dumping of mining overburden into Lustra Creek will not occur, but they have already violated the CAO. A fourth stage of mining has been planned by MMC, requiring the removal of more overburden rock for which MMC has yet to locate an alternative site. Given the continued presence of overburden in Lustra Creek and the reasonable likelihood of future overburden discharges into the Creek, MMC remains in violation of the CWA.

Finally, MMC's actions since the issuance of the CAO by Rocky Mountain cannot render this case moot. As a defendant asserting that its voluntary conduct moots a case, MMC has presented no evidence to meet the formidable burden of making it

absolutely clear that future unpermitted dumping in Lustra Creek will not occur. On the contrary, Rocky Mountain has established that MMC's dumping of overburden rock in the Creek is likely to recur if injunctive relief is not granted. The fourth phase of mining will require the removal of more overburden rock, and since placing the overburden in Lustra Creek is the cheapest and easiest means of disposal and MMC has no alternative plans for the rock, there is a realistic prospect that the Creek will serve as the disposal site. MMC has already violated the CAO with Rocky Mountain and has made no assurances that it will not fill the Creek again without a permit.

Mootness is improper when meaningful relief can be granted in a suit. Since the court may grant an injunction to prevent any further unpermitted dumping in Lustra Creek, meaningful relief is available. There is a reasonable expectation that MMC will place more overburden in the Creek, and the act of unpermitted dumping is too short in duration to be fully litigated prior to its completion, making this case "capable of repetition, yet evading review." Even a temporary restraining order may not be available before additional overburden is added to the Creek, given MMC's remote location and the uncertainty surrounding the fourth phase of mining. Holding this case to be moot would frustrate the purpose of the CWA, RMSWA, and RMCWA to prohibit the unpermitted discharge of pollutants and protect water quality.

ARGUMENT

I. THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION OVER FOL'S CITIZEN SUIT BECAUSE ROCKY MOUNTAIN DILIGENTLY PROSECUTED MMC'S VIOLATIONS OF THE CLEAN WATER ACT BY ISSUING A CONSENT ADMINISTRATIVE ORDER UNDER ITS COORDINATED ENVIRONMENTAL ENFORCEMENT SCHEME.

The Clean Water Act ("CWA" or "Act") precludes citizen suits seeking civil penalties when "a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . . ." 33 U.S.C. § 1319(g)(6)(A)(ii) (1994). In 1994, Rocky Mountain entered into a consent administrative order ("CAO") with Magma Mining Company ("MMC") regarding its placement of mining overburden in Lustra Creek, and MMC

ceased all overburden dumping in January 1998. (R. 4). In issuing the CAO, the Rocky Mountain Department of Environment and Natural Resources ("RMDENR") acted under the authority of the state's Solid Waste Act ("RMSWA"), a statute that requires coordinated implementation with the EPA-approved Rocky Mountain Clean Water Act ("RMCWA"). (R. 4, 7). As a result of the state's administrative action, section 309 of the CWA bars the citizen suit brought by Friends of the Lustra ("FOL").

A. Deference to Rocky Mountain's choice of enforcement mechanisms is proper, as the Clean Water Act emphasizes states as the primary enforcers of the Act.

From its enactment in 1972, the CWA has placed the primary enforcement responsibility with the states. In its opening section, the Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities of the States* to prevent . . . pollution . . . ." 33 U.S.C. § 1251(b) (1994) (emphasis added). In addition to the plain language, both the structure and legislative history of the Act support this emphasis. The Senate Report noted Congress' intent for "the great volume of enforcement actions [to] be brought by the State." S. REP. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730. Section 402 of the CWA allows EPA-approved state discharge programs to administer the Act, and states have the initial enforcement obligation under section 309. *See* 33 U.S.C. §§ 1319(a)(1), 1342(b) (1994).

The Supreme Court has recognized the CWA's prioritization of governmental action, particularly over citizen suits. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60-61 (1987) ("*Gwaltney I*"). Citizen suits, despite playing an important role in the enforcement of the Act, are limited by the fundamental principle that they "are meant to *supplement* rather than supplant governmental action." *Id.* at 60 (emphasis added). Such a principle is vital to preserve the "discretion of the state enforcement authorities," and to maintaining the intended role of the citizen as "interstitial" rather than "potentially intrusive." *Id.* at 61. As a result, the Act bars citizen suits "to avoid subjecting violators of the law to dual enforcement actions or penalties for the *same* violation." S. REP. No. 99-50, at 28 (1985) (emphasis added).

The CWA's preference for state action over citizen suits is most prevalent when the two enforcement actions simultaneously address the same violation. If a state agency has already addressed the identical violation targeted by the citizen suit, "deference to the agency's plan of attack should be particularly favored." *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991). In the present case, Rocky Mountain has chosen to address MMC's overburden dumping through its administrative process. Proper deference to the state's "plan of attack" under the RMSWA is appropriate particularly because of RMDENR's coordinated implementation of its environmental statutory scheme. Here, the state has chosen its enforcement mechanism from multiple applicable statutes. Both the mechanism and the specific approach embodied in the CAO should be afforded substantial latitude in order to achieve the CWA's stated goal of preserving the primacy of state enforcement. *See Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998); *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994); *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1321 (S.D. Iowa 1997).

B. The coordinated implementation of Rocky Mountain's environmental laws governing solid waste and clean water constitutes an enforcement scheme comparable to section 309(g) of the Clean Water Act.

The section 309 bar to citizen suits is triggered when the state takes enforcement action under a "State law comparable to [section 309(g)]." 33 U.S.C. § 1319(g)(6)(A)(ii). The comparability requirement does not mandate an identity of clauses between the state act and section 309. *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 793 (E.D. Va. 1997). Furthermore, at least one court of appeals has prioritized deference to state enforcement over the comparability analysis. *See Comfort Lake Ass'n*, 138 F.3d at 357 (holding that the state's informal, but diligent, prosecution barred a citizen suit under section 309). Properly deferring to Rocky Mountain's choice of enforcement alternatives, the CAO issued under the RMSWA is an administrative action pursuant to a comparable state law.

1. The overall statutory scheme remedies the same violations targeted by the citizen suit.

As the CWA's bar of citizen suits is aimed at preventing duplicative proceedings, the court's focus is properly placed "not on state statutory construction, but on whether corrective action . . . seeks to remedy the same violations as duplicative civilian action." *Town of Scituate*, 949 F.2d at 556. Courts have also emphasized whether the "overall state regulatory scheme" seeks to address the violation in question. *Jones v. City of Lakeland*, 224 F.3d 518, 523 (6th Cir. 2000) (en banc); *see also ICI Americas*, 29 F.3d at 381. In the present case, the CAO was promulgated specifically under the RMSWA. (R. 4). Although the primary focus of this statute is solid waste and landfills, one of its guiding principles is the protection of water quality. (R. 5, 7). In addition, RMDENR is required to coordinate implementation of RMSWA with the EPA-approved RMCWA (R. 7), thus ensuring that RMDENR's decision to issue the CAO incorporated the water protection objectives of the latter statute. Most importantly, the CAO addressed the identical violations that are the subject of FOL's suit: the dumping of overburden into Lustra Creek. (R. 1, 3). The state evaluated its options under the total environmental enforcement scheme and ultimately selected a remedy under RMSWA. Not only are the injunctive and penalty remedies sought by FOL duplicative, but the state's coordinated implementation approach ensures that the organization's water quality concerns were considered in the issuance of the CAO.

2. RMSWA offers a penalty assessment scheme comparable to section 309 of the Act.

Several courts have rejected the requirement that a state impose a monetary penalty on the defendant in order for section 309(g) to bar a subsequent citizen suit. *See, e.g., Town of Scituate*, 949 F.2d at 555-56; *N.Y. Coastal Fishermen's Ass'n v. N.Y. City Dep't of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991). In *Town of Scituate*, the court looked at the overall state statutory scheme and found ample authorization for the assessment of civil penalties. 949 F.2d at 556. Even though the state agency did not enter an order under the specific section with a penalty assessment provision, it was "enough that the overall scheme of the [federal and state] acts [was] aimed at correcting the same violations, thereby achieving the same goals." *Id.* In the present case, Rocky Mountain *is* authorized to assess a monetary penalty under RM-

SWA but must proceed in state court in order to do so. While the state chose to order MMC's compliance through administrative means rather than court action, its *overall* penalty assessment scheme is nonetheless comparable to section 309.

3. The CAO issued under Rocky Mountain's coordinated enforcement scheme adequately safeguarded citizens' substantive interests, thus obviating the need for public notice, hearing, and intervention.

Although courts often look to the specific public notice and participation requirements of a state statutory scheme, *see, e.g., Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1133 (D. Haw. 1994); *Natural Res. Def. Council v. Vygen Corp.*, 803 F. Supp. 97, 101 (N.D. Ohio 1992), ("mandatory public notice is not necessarily the sine qua non of comparability,"); *Saboe v. Oregon*, 819 F. Supp. 914, 918 (D. Or. 1993). The purpose of this comparability inquiry is to determine whether the state law in question adequately protects the substantive interests of concerned citizens. *See Town of Scituate*, 949 F.2d at 556 n.7. If a court is satisfied that this fundamental safeguard exists, the notice and participation rights are "satisfactorily comparable." *Id.* In *Town of Scituate*, the First Circuit was satisfied that the status of state administrative orders as public documents and the opportunity both for intervention in a subsequent penalty action and an individual hearing were adequate to safeguard citizens' substantive interests. *Id.* In the present case, while perhaps only the first of these notice and intervention opportunities was available to FOL, the organization was hardly a model of diligent pollution monitoring. This citizen suit is FOL's first public complaint regarding MMC's mining activities. (R. 5). Despite the RMSWA's limited notice and intervention requirements, FOL's substantive rights are nonetheless safeguarded by the dual statutory enforcement scheme employed by Rocky Mountain. The coordinated enforcement scheme requires the state to consider the goals of the RMCWA when enforcing the RMSWA (R. 7), ensuring that concerns about water quality are fully weighed in any legal action.

C. Rocky Mountain's issuance of a Consent Administrative Order that successfully halted MMC's dumping of overburden in Lustra Creek surpasses the standard of diligent prosecution required by the Clean Water Act.

When a state undertakes an enforcement action, diligent prosecution is presumed, and the plaintiff has the burden of proving the state's efforts were not diligent. *Williams Pipeline*, 964 F. Supp. at 1324 (citing *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 486-87 (D.S.C. 1995)) ("*Laidlaw I*"). Here, too, a broad view of the enforcement scheme is appropriate because "[t]he thrust of the CWA is to provide society with a remedy against polluters in the interest of protecting the environment." *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 184 (D. Conn. 1991) ("*Remington Arms I*") (quoting *Hudson River Fishermen's Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988)). Even if the state's chosen remedy is less stringent than that desired in a citizen suit, such a discrepancy cannot be read as a lack of diligence, but rather as a reminder that plaintiffs are not entitled to a "personalized" remedy. *See id.*

The majority of courts limit the finding of insufficient diligence to situations where there is "persuasive evidence that the state has engaged in a pattern of conduct in its prosecution . . . that could be considered dilatory, collusive or otherwise in bad faith." *Remington Arms I*, 777 F. Supp. at 183 (quoting *Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986)). Conferring the proper latitude on states in their choice of enforcement mechanisms inherently sets the diligent prosecution standard so that it bars citizen suits except upon a showing of extreme agency laxity or bad faith. *See, e.g., Jones*, 224 F.3d at 522-23 (holding that the state's "administrative enforcement action over a ten-year period" was not diligent); *Laidlaw I*, 890 F. Supp. at 474-79 (state's extensive cooperation with defendant to preclude citizen suit contributed to finding of no diligent prosecution); *N.Y. Coastal Fishermen's Ass'n*, 772 F. Supp. at 168 (during state's eight-year awareness of problem, it "was acting as a pen pal, not a prosecutor").

In the present case, the CAO required both a cessation of overburden dumping and the growth of native vegetation on the existing overburden piles. The first, and primary, objective was achieved in less than four years, while the second has been frus-

trated by lack of rainfall. (R. 4). FOL seeks removal of the overburden covering Lustra Creek, yet the state declined this remedy because it would be more injurious to the Creek at the present time than maintaining the status quo. (*Id.*) Rocky Mountain also seeks to enforce its order in court to prevent any further unpermitted dumping by MMC. (R. 5). As the primary enforcement agent of the CWA, Rocky Mountain must have the necessary discretion to carry out its enforcement scheme, even if this means achieving a result that does not match FOL's definition of success. Slow progress in reaching total compliance with the CAO does not mean the state's action was not diligent. *See Williams Pipeline*, 964 F. Supp. at 1325.

D. Section 309(g) bars both the civil penalties and injunctive relief sought by FOL because an incomplete bar would interfere with the state's ability to enforce its environmental laws.

Although the Act appears to limit the section 309 bar to citizen suits seeking civil penalties, *see Coalition for a Liveable West Side v. N.Y. City Dep't of Envtl. Prot.*, 830 F. Supp. 194, 196-97 (S.D.N.Y. 1993), the Act's preference for governmental enforcement over supplemental citizen action requires that suits for injunctive relief under section 505 also be precluded. First, the Supreme Court has recognized the "connection between injunctive relief and civil penalties" in the CWA citizen suit provision. *Gwaltney I*, 484 U.S. at 58. Such a connection indicates that section 309 bars not only civil penalties but also all other citizen suit remedies. Second, allowing citizens to seek injunctive relief directly conflicts with the Supreme Court's admonition regarding citizen suits as "potentially intrusive." *Gwaltney I*, 484 U.S. at 61. Exposing defendants to possible litigation even after committing to a CAO will greatly impair Rocky Mountain's efforts to negotiate with polluters like MMC. *See Comfort Lake Ass'n*, 138 F.3d at 357. Furthermore, it defies the overall policy objective of avoiding duplicative citizen suits and deferring to state enforcement discretion.

II. THE SUBSTANTIAL IDENTITY BETWEEN FOL AND ROCKY MOUNTAIN CREATES A PRIVITY RELATIONSHIP BETWEEN THE PARTIES AND BARS FOL'S CITIZEN SUIT UNDER THE DOCTRINE OF RES JUDICATA.

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. United States*, 440 U.S. 147, 153 (1979). This principle requires federal courts to give preclusive effect to judgments entered by state courts of competent jurisdiction. *See Harmon Indus. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1002 (9th Cir. 1980). Since 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), and consent decrees entered by courts, *State v. Venessa*, 94 R.M. 412, 417 (1975), the CAO between Rocky Mountain and MMC has res judicata effect. *Friends of the Lustra v. Rocky Mountain*, Civ. No. 00-1436 (D.R.M. 2000).

In *Williams*, the Rocky Mountain Supreme Court adopted a four-part test for res judicata requiring "(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." 118 R.M. at 39 (quoting *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. 1966)). The only dispute in this case is whether the plaintiff parties are identical. Although FOL is a different entity than Rocky Mountain, parties are considered identical for res judicata purposes if they are in privity. *Harmon Indus.*, 191 F.3d at 903; *United States v. Gurley*, 43 F.3d 1188, 1197 (8th Cir. 1994). The doctrine of privity extends the conclusive effect of a judgment to nonparties who are in privity with parties to an earlier action. *ITT Rayonier*, 627 F.2d at 1003.

The Supreme Court has characterized the privity relationship as one of "substantial identity" between parties. *Montana*, 440 U.S. at 153; *see also Gurley*, 43 F.3d at 1197 (finding that privity exists when two parties to two separate suits have a "close relationship bordering on near identity"). Privity is not dependant upon the subjective interests of the individual parties, but instead represents a legal conclusion that the relationship between the party of record and the non-party is "sufficiently close" to afford application of the principle of preclusion. *Harmon Indus.*, 191 F.3d at 903 (holding that EPA and a state are in privity under the

CWA regarding EPA enforcement of permits issued by the state pursuant to programs approved by EPA); *Southwest Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977). The substantial identity between Rocky Mountain and FOL, based on Rocky Mountain's parens patriae capacity to represent the interests of its citizens, and FOL's role as a private attorney general in bringing a citizen suit, establishes a privity relationship and bars FOL's action under the doctrine of res judicata.

A. Acting in its parens patriae capacity to protect the sovereign interests of the state, Rocky Mountain represents the interests of FOL and establishes a privity relationship between the parties.

Among the relationships that federal courts have found "sufficiently close" to justify preclusion by res judicata are those where the interests of the non-party were adequately represented by another party in a prior action. *Southwest Airlines*, 546 F.2d at 95. Under the parens patriae doctrine, a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens. *See New Jersey v. New York*, 345 U.S. 369, 372 (1953); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *Envtl. Def. Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). This principle is a necessary recognition of sovereign dignity and a working rule for good judicial administration. Without it, a state might be judicially impeached on matters of policy by its own citizens, and there would be no practical limit on the number of plaintiffs entitled to be made parties. *New Jersey*, 345 U.S. at 372.

Traditional parens patriae lawsuits have involved "a government suing to enjoin alleged nuisances caused by water or air pollution." *United States v. Olin Corp.*, 606 F. Supp. 1301, 1305 (N.D. Ala. 1985). In *Alaska Sport Fishing*, a group of sportfishers sought injunctive relief and monetary damages from the defendant "to provide for an environmental mitigation and monitoring fund" in the aftermath of the Exxon Valdez oil spill. 34 F.3d at 771. The complaint asserted a variety of causes of action, including violation of a state statute imposing strict liability for release of hazardous substances. *Id.* Almost two years after the action was filed, the United States and the state of Alaska filed suit against Exxon in their capacity as "trustees for the public" and entered into a settlement agreement and consent decree requiring defendants to pay at least $900 million in natural resource and

other damages. *Id.* The court recognized the principle that state governments may act in their "parens patriae capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest," including harm to natural resources within its boundaries. *Id.* at 773 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)); *see also Menzel v. County Utilities Corp.*, 501 F. Supp. 354, 357 (E.D. Va. 1979) (finding the discharge of pollutants into state waters to be a "sovereign interest" under the doctrine of parens patriae). The sportfishers, as members of the public, were held to be "parties" to the prior suit and were thus precluded by res judicata. *Alaska Sport Fishing*, 34 F.3d at 773; *see also Olin Corp.*, 606 F. Supp. at 1304 (holding that "once a state represents its citizens in a parens patriae suit, a consent decree or final judgment entered in such a suit is conclusive upon those citizens and is binding upon their rights").

1. <u>The interests of FOL in protecting the natural resources of the state were adequately represented by Rocky Mountain in the state enforcement action against MMC.</u>

Although the specific enforcement measures sought by FOL and Rocky Mountain differ somewhat, the overarching objective of both parties is to address damage to the state's natural resources resulting from MMC's dumping of overburden rock into Lustra Creek. *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 778 (9th Cir. 1994). FOL brought suit under section 505 of the CWA, alleging that MMC violated section 301 of the Act by dumping overburden into Lustra Creek and allowing those pollutants to remain in the Creek without a permit. (R. 3). Although it did not take the action currently sought by FOL, Rocky Mountain has previously addressed the discharges by considering the overburden pile on top of Lustra Creek to constitute an unpermitted landfill and issuing a notice of violation against MMC under the RMSWA. (R. 4). FOL also seeks injunctive relief to forbid MMC from discharging more pollutants into the Creek and to require the company to remove the overburden it has already placed there. (R. 3). However, the state has already issued a CAO under the RMSWA, requiring MMC to cease dumping in the Creek without a permit, and has found that removal of overburden from the Creek would result "in a massive disruption of water quality." (R. 4). In taking action under the RMSWA, Rocky Mountain acted in

its parens patriae capacity as trustee of the state's natural resources on behalf of FOL and the rest of the public. *See Alaska Sport Fishing*, 34 F.3d at 773. FOL has failed to show that its interest is different and will not be represented by Rocky Mountain in the state's enforcement action. *See Higginson*, 631 F.2d at 740.

2. Since FOL was adequately represented in the prior enforcement action by Rocky Mountain, the parties are in privity for purposes of res judicata and FOL's suit should be precluded.

Where the State is a party to relevant proceedings, its citizens are represented in those proceedings and are bound by the judgment. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-93 n.32 (1979), *modified on other grounds* 444 U.S. 816 (1979); *Eyak Native Village*, 25 F.3d at 777 (holding that citizens represented by the plaintiff seeking to protect area from environmental harm, after state reached consent decree with defendant, were "more than in privity with the State; they were identical"); *EPA v. City of Green Forest*, 921 F.2d 1394, 1403-05 (8th Cir. 1990) (holding that intervening citizen's CWA action was precluded by consent decree entered into by EPA and defendant); *United States v. Pa. Envtl. Hearing Bd.*, 584 F.2d 1273, 1276 n.15 (3rd Cir. 1978) (earlier state administrative determination under NPDES has res judicata effect in federal court action). There is an express or implied legal relationship by which the state in the first suit is accountable to its citizens who file a subsequent suit with identical issues. *See ITT Rayonier*, 627 F.2d at 1003.

Acting in its parens patriae capacity, Rocky Mountain has the legal right to represent the interests of its citizens in taking enforcement action against MMC to prevent further degradation of Lustra Creek. The persons for whose benefit and at whose discretion a cause of action is litigated cannot be said to be "strangers to the cause . . . One who prosecutes or defends a suit in the name of another to establish and protect his own right . . . is as much bound . . . as he would be if he had been a party to the record." *Montana*, 440 U.S. at 154 (quoting *Souffront v. La Compagnie des Sucreries de Porto Rico*, 217 U.S. 475, 486-87 (1910)); *see also ITT Rayonier*, 627 F.2d at 1002 ("[W]e do not believe [the CWA] manifests countervailing policy reasons to abrogate the doctrine

known generically as res judicata."). Section 41 of the Restatement (Second) of Judgments provides:

> (1) A person who is not a party to an action but who is represented by a party is bound and entitled to the benefits of the rules of res judicata as though he were party. *A person is represented by a party who is*:
> . . . (d) *An official or agency invested by law with authority to represent the person's interests*;
> (2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1980) (emphasis added). Since the interests of FOL have already been represented by Rocky Mountain's enforcement action, the parties are substantially identical and in privity for purposes of res judicata, and FOL is precluded from bringing a citizen suit against MMC.

B. The substantial identity between FOL in its role as a private attorney general and Rocky Mountain as a public enforcer of the law is sufficient to establish privity between the parties.

Citizens seeking to enforce CWA regulations 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. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695 (4th Cir. 1989) ("*Gwaltney II*"). Acting as a private attorney general of the state, FOL alleges violations of the CWA and seeks injunctive relief and civil penalties against MMC for the discharge of mining overburden into Lustra Creek. (R. 3). However, the state itself has already undertaken its own public enforcement action against MMC to address the discharge of mining overburden, choosing instead to find violations and issue a CAO under the RMSWA. (R. 4). Furthermore, the civil penalty sought by FOL under section 505(a) of the Act, 33 U.S.C. § 1365(a) (1994), will go to the United States Treasury and not to the plaintiff, as in a private claim for damages. In its role as a private attorney general, FOL is substantially identical to Rocky Mountain, establishing a privity relationship and barring FOL's action by res judicata. *See ITT Rayonier*, 627 F.2d at 1003; *Southwest Airlines*, 546 F.2d at 98.

As discussed in Part I.A., the express intent of Congress under the CWA was "to recognize, preserve, and protect the primary responsibilities and rights of the *states* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b) (emphasis added). The principles of res judicata are promoted in the CWA, as the right to maintain a citizen suit is limited and may not be brought if appropriate state regulatory agencies have undertaken their own enforcement action to correct a violation. 33 U.S.C. §§ 1319(g)(6), 1365(b)(1)(B) (1994). Since " '[t]he great volume of enforcement actions are intended to be brought by the State,'" citizens may only act as private attorneys general "'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" S. REP. No. 92-414, at 64). Since Rocky Mountain "has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *Town of Scituate*, 949 F.2d at 557; *see also County of Westchester*, 686 F. Supp. at 1052 (finding that "as representative of society as a whole," the government is usually "in the best position to vindicate societal rights and interests"). As a result, final judgment in the agency's action will serve as a res judicata bar to the citizen suit. *Comfort Lake Ass'n*, 138 F.3d at 356; *see also City of Green Forest*, 921 F.2d at 1402-05.

C. Precluding FOL's citizen suit against MMC serves the primary goals of res judicata.

Res judicata is designed to conserve judicial resources, protect litigants from the expense and vexation attending multiple lawsuits, and foster certainty, reliance, and respect in the legal system by minimizing the possibility of inconsistent decisions. *Montana*, 440 U.S. at 153-54; *see also Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) ("The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water."). It also supports several private interests, including protection from harassment or coercion by lawsuits and avoidance of conflicting rights and duties from inconsistent judgments. *Southwest Airlines*, 546 F.2d at 94. Res judicata is a rule of "fundamental and substantial justice, of public policy and of private peace, and should be cordially regarded and enforced by the courts." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981).

Allowing FOL's citizen suit to proceed would defeat these fundamental principles of res judicata. First, it would add uncer-

tainty to the actions that MMC must take in order to comply with the law. If FOL succeeds, the decision will be inconsistent with the CAO between MMC and Rocky Mountain. In addition, reliance and respect in the legal system would be lost if Rocky Mountain's CAO is questioned and undermined in a subsequent court action. A citizen suit by FOL would also be a waste of judicial resources, as a CAO is already in place to address the dumping of overburden rock into Lustra Creek. Finally, MMC will suffer the harassment and expense of another court action and of attempted compliance with inconsistent judgments. For these reasons, the District Court was correct in holding that the state's version of res judicata applied to bar FOL's citizen suit because FOL was in privity with Rocky Mountain.

III. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION UNDER SECTION 505(A)(1) OF THE CWA BECAUSE MMC REMAINS IN VIOLATION OF SECTION 301(A) DUE BOTH TO THE CONTINUING PRESENCE OF OVERBURDEN IN LUSTRA CREEK AND MMC'S FAILURE TO ENSURE THAT FUTURE DISCHARGES WILL NOT OCCUR.

For a court to assert subject matter jurisdiction under section 505(a) of the CWA, 33 U.S.C. § 1365(a), a party must demonstrate that MMC remains "in violation" of the Act through its "unlawful" "discharge of any pollutant" into "the waters of the United States." 33 U.S.C. §§ 1311(a), 1362(7), 1365(a) (1994). A showing of violation can be made "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988) ("*Gwaltney III*"); *see also Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1063 (5th Cir. 1991); *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988). The ability to remediate the cause of pollution must also be considered a substantial factor in determining whether or not a polluter remains in violation. *Gwaltney I*, 484 U.S. at 69. As the record indicates, MMC remains in violation of the CWA on a continuing basis due to the current discharges of pollutants from the mining overburden pile in Lustra Creek. In addition, MMC is violating the Act on an intermittent basis, because the operations that led to the initial dis-

posal of overburden in Lustra Creek have not been altered so as to eliminate the likelihood of further dumping.

A. The presence of overburden in Lustra Creek constitutes a continuing violation of section 301(a) of the CWA.

The CWA prohibits the discharge of pollutants, including rock, sand, and industrial wastes, from a point source into waters of the United States without, or in violation of, a permit. 33 U.S.C. §§ 1311(a), 1362(6), 1362(12) (1994). MMC's overburden pile is a point source for the continual unpermitted discharge of rock, sand, and industrial waste into Lustra Creek. MMC does not dispute evidence that the pile continues to discharge pollutants into the Creek. Studies have shown both that the concentration of suspended solids in the stream remains greater upstream than downstream and that the concentration below the pile year-round is matched by other nearby streams only during the heavy flows of the spring snow melt-off. (R. 4-5). Applying the *Gwaltney I* standard illustrates the continuing nature of MMC's violation, as the overburden remains a remediable threat to the overall ecological health of the Lustra and the waterways into which it flows. *See* 484 U.S. at 69. Failure to recognize the overburden's presence in Lustra Creek as a continuing violation would contravene not only established case law but also the intent of Congress.

1. Mining refuse is a point source from which any water flow constitutes a discharge.

In citizen suits alleging violation of section 301(a) of the CWA, courts have recognized that solid mining wastes pose a continuing threat to water quality and the aquatic environment. The District Court for the Eastern District of Washington held that former tailing ponds, now filled with soil, remained point sources for the discharge of pollutants into nearby waters: "[E]ven though runoff may be caused by rainfall or snow melt percolating through a pond or refuse pile, the discharge is from a point source because the pond or refuse pile acts to collect and channel contaminated water." *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994). Another district court has held that water flowing from mine shafts and pits, where mining wastes remained, into several Montana creeks constituted the addition of pollutants to navigable waters. *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1172 (D. Mont. 1995); *see*

also Trs. for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984) (holding that "mining activities [that] release pollutants through a confined, discernable conveyance" are point sources). In both district court cases, the courts found a continuing violation because discharges continued to occur due to the regular flow of water through mining wastes. In neither case did the plaintiffs claim that the defendants were willfully discharging pollutants from their properties. *See Crown Butte Mines*, 904 F. Supp. at 1173; *Hecla Mining*, 870 F. Supp. at 988. Although MMC has presently ceased polluting Lustra Creek through the direct addition of overburden (R. 4), MMC remains in violation because the overburden continues to discharge pollutants into the water.

2. The overburden in Lustra Creek remains a remediable problem and thus a continuing violation under the Gwaltney I standard.

In ruling that the continued presence of overburden does not constitute a continuing violation, the District Court failed to address the remediable nature of MMC's offense. In *Gwaltney I*, the Court recognized that violations continue until such time as the cause of the violation is remediated. 484 U.S. at 69. In the classic case of water pollution, an industrial plant discharges liquid wastes into a body of water. Once the plant ceases releasing wastes into the water, its previous discharges are rendered wholly past, not only because the discharge of pollutants has come to an end but also because the previous discharges have so thoroughly intermixed with the water or sediment as to be unremediable. The present case, however, does not fit the mold of such a "classic" CWA violation. Here, the discharge of solid waste into the water has created a point source from which discharges will continue as long as the overburden remains in the streambed. In fact, the overburden more closely resembles wetlands fill violations specified in section 404 of the CWA, 33 U.S.C. § 1344 (1994), or solid waste violations under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.* (1994), both of which have been found to constitute continuing violations based upon the continued presence of pollutants. *See, e.g., Informed Citizens United v. USX Corp.*, 36 F. Supp. 2d 375, 377 (S.D. Tex. 1999) (applying section 404 of the Act); *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1041 (S.D.N.Y. 1993) (applying RCRA). While the RMDENR has noted that significant erosion would occur during the overburden removal process (R. 4), the record is silent as to

long-term health of the Lustra Creek, which might be improved through remediation of the overburden.

a. The overburden in Lustra Creek is comparable in effect to wetlands fill, the presence of which has been held to be a continuing and remediable violation of section 404 of the CWA.

A number of courts have had the opportunity to review cases of wetlands fill following the Supreme Court's decision in *Gwaltney I*, and have determined that a violation continues until the effects of the fill are remediated. Although mining overburden does not fall within the statutory definition of "fill" under the Act, 33 C.F.R. § 323.2(e) (2000) (defining "fill" 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"), the presence of overburden in Lustra Creek is analogous in its effects to that of fill in wetlands. In both situations, a quantity of soil and rock pollutes the ecosystem, in the present case forcing Lustra Creek into subterranean exile for more than half a mile. (R. at 4). In a citizen suit brought against USX over the filling of wetlands, the District Court for the Southern District of Texas held that it had jurisdiction, because "a violation is 'continuing' for purposes of the statute until illegally dumped fill material has been removed." *USX Corp.*, 36 F. Supp. 2d at 377; *see also N.C. Wildlife Fed'n v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, at *3 (E.D.N.C. Apr. 25, 1989). The Fourth Circuit has also held, in a wetlands fill case, that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Sasser v. EPA*, 990 F.2d 127, 129 (4th Cir. 1993) (citing *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987)). In both *USX* and *Sasser*, the defendants had ceased active filling operations prior to the filing of the plaintiffs' claims. *See USX*, 36 F. Supp. 2d at 376; *Sasser*, 990 F.2d at 129. However, the courts noted not only that the actual discharge of fill materials into wetlands constituted a violation but also that the *presence* of the fill materials was a continuing violation until its removal. In the present case, the District Court's exclusive focus on the act of dumping ignores the continuing effects of the overburden as well as MMC's ability to remediate it through removal.

b. The overburden in Lustra Creek is analogous to the ongoing presence of solid waste, which is a continuing violation under RCRA.

Solid waste claims are strongly analogous to the situation presented by the mining overburden in Lustra Creek, especially considering the application of the *Gwaltney I* "continuing violation" standard by courts deciding RCRA citizen suit claims. *See Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1311 (2d Cir. 1993) ("*Remington Arms II*"); *Aurora Nat'l Bank v. Tri-Star Marketing, Inc.*, 990 F. Supp. 1020, 1025 (N.D. Ill. 1998); *Gache*, 813 F. Supp. at 1041. The District Court in the present case did correctly observe that the statutory language of RCRA provides for greater latitude in the citizen prosecution of past acts of dumping than does the CWA. *See* 42 U.S.C. § 6972(a) (1994) (providing for citizen suits where defendant is "alleged *to be in violation*" in the district "in which the alleged violation *occurred*" (emphasis added)); *Gache*, 813 F. Supp. at 1041. However, the *Gache* court emphasized the logical inconsistency of a finding that the continued presence of polluting materials does not constitute a continuing *present* violation:

> The environmental harms do not stem from the act of dumping when waste materials slide off the dump truck but rather after they land and begin to seep into the ground, contaminating the soil and water. 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 1041; *see also Aurora Nat'l Bank*, 990 F. Supp. at 1025; *City of Toledo v. Beazer Materials and Servs., Inc.,* 833 F. Supp. 646, 656 (N.D. Ohio 1993). As with the section 404 decisions on wetlands fill, these RCRA cases conclude that, where a pollutant's threat to the environment is remediable, its presence is a continuing violation of statutory requirements.

3. The continuing presence of overburden in Lustra Creek violates the basic purposes of the Clean Water Act.

Congress passed the CWA expressly "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1994). To achieve these goals, Congress mandated the elimination of all non-permitted discharges of pollutants into navigable waters. 33 U.S.C. § 1251(a)(1). Rules of

statutory construction indicate that, where clear, the plain meaning of a statute carries the most "weight" in its interpretation. *Browder v. United States*, 312 U.S. 335, 338 (1941); *see also Aaron v. SEC*, 446 U.S. 680, 700 (1980).

A number of courts, including the District Court in this case, however, have ignored the broader purposes of the Act, as expressed in plain language by Congress. These courts have stated that holding a continued presence of pollutant materials to equal a continuing violation would effectively eviscerate *Gwaltney I* and would permit citizens to sue for wholly past violations. *Remington Arms II*, 989 F.2d at 1313; *see also Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995). In fact, the *LAC Minerals* court faced a fact situation quite similar to the present case and held that the presence of mining overburden in an arroyo did not constitute a point source for the discharge of pollutants in continuing violation of the CWA. 892 F. Supp. at 1354. *Contra Crown Butte Mines*, 904 F. Supp. at 1172; *Hecla Mining Corp.*, 870 F. Supp. at 988. In each of these cases, though, the courts failed to address the substantial difference between remediable and non-remediable violations, a concept central both to the holding in *Gwaltney I* and to the CWA's overall goals of *restoration* of the Nation's waters and *elimination* of the discharge of pollutants. 484 U.S. at 69; 33 U.S.C. § 1251(a). While these courts attempted to follow *Gwaltney I* on the issue of continuing violation, they were actually unfaithful to the Supreme Court's language finding that a remediable discharge is a continuing violation. In doing so, these courts not only contravened the *Gwaltney* holding itself but ignored the fundamental purposes of the CWA as well.

B. MMC has failed to ensure that future discharges of overburden will not occur.

MMC also remains out of compliance due to intermittent violations of the CWA. As noted previously, the Fourth Circuit held that "a continuing likelihood of a recurrence in intermittent or sporadic violations" renders a polluter in violation. *Gwaltney III*, 844 F.2d at 171-72. "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* In finding that a defendant remains in violation due to a reasonable likelihood of intermittent discharges, courts have focused upon the methods used by the defendants to control

discharges and whether such methods have "completely eradicated" the risk of future violations at the time of the citizen suit's filing. *Id.* In *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1401 (D. Haw. 1995), the court held that a construction company remained in violation as long as the possibility existed for silt and dirt to runoff from their earthworks into neighboring waters. *See also Carr*, 931 F.2d at 1060 (finding that the capacity of a feedlot runoff holding pond would be unable to prevent overflow during average heavy rains); *Gwaltney II*, 890 F.2d at 694-95 (finding that an anaerobic lagoon and other measures were insufficient to prevent TKN (total Kjeldahl nitrogen) violations during winter); *Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Facility*, 769 F. Supp. 739, 745-46 (M.D. Pa. 1991) (finding the method for treating waste water insufficient to deal with climate fluctuations); *Sierra Club v. Union Oil Co.*, 716 F. Supp. 429, 435 (N.D. Cal. 1988) (finding storm basins to be of inadequate capacity to prevent discharges during heavy rains).

MMC, like the defendants in the above cases, has failed to put into place effective measures to ensure that future dumping of mining overburden into Lustra Creek will not occur. MMC has already proven its inability to comply with the CAO issued by RMDENR. In fact, its feeble attempts to comply with the agreement only began in 1998, more than three years after issuance of the CAO and a year after the date by which the proposed measures were to have been completed. (R. 4). While the district court failed to consider the possibility of intermittent violations by MMC, the record provides ample evidence that a strong likelihood of future violations by MMC remains. MMC has already indicated that it has planned a fourth phase of mining excavations and currently has found no other site for disposal of the overburden except Lustra Creek. (*Id.*) In fact, the record shows that "[p]lacement of overburden in the Creek bed is the easiest and cheapest means of disposing of the overburden for MMC," even though the illegality of such disposal has already been determined through administrative action by Rocky Mountain. (*Id.*)

Although MMC indicates that the fourth phase will not commence for at least a year, the interval between likely violations cannot relieve MMC of current liability, since "there is no statutory exemption for de minimis or 'rare' violations." *Natural Res. Def. Council v. Outboard Marine Corp.*, 692 F. Supp. 801, 815 (N.D. Ill. 1988). There is no evidence to indicate that the policies,

procedures, and mechanisms used during previous phases of the mine to manage disposal of overburden have even been reconsidered let alone amended or replaced. In short, MMC is in intermittent violation of the CWA because of the reasonable likelihood of future overburden discharges into Lustra Creek.

IV. THE LIKELIHOOD OF FURTHER UNPERMITTED DUMPING OF OVERBURDEN IN LUSTRA CREEK AND THE AVAILABILITY OF MEANINGFUL RELIEF PREVENT A FINDING OF MOOTNESS.

The doctrine that federal courts may not decide moot cases "derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). If the violation at issue has ceased and there is no reasonable expectation that the wrong will be repeated, long-standing principles of mootness prevent the maintenance of a suit. *Gwaltney I*, 484 U.S. at 66. However, a claim is not moot if it can be shown that the court can "theoretically grant" relief. *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1446 (5th Cir. 1991). Since the dumping of overburden into Lustra Creek is likely to recur, and meaningful relief can be granted by this Court, the case should not be rendered moot.

A. MMC has failed to show that it is absolutely clear that future unpermitted dumping of overburden in Lustra Creek will not occur.

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." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 708 (2000) ("*Laidlaw II*"). The Supreme Court has set out a "stringent" standard for determining whether a case has been mooted by the defendant's *voluntary* conduct: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw II*, 120 S. Ct. at 698 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Thus, a defendant claiming that its voluntary conduct moots a case bears the "formidable burden" of making it "absolutely clear"

that such behavior could not reasonably be expected to recur. *Laidlaw II*, 120 S. Ct. at 698-99.

In the court below, MMC claimed that its "voluntary" conduct rendered the violation moot, yet offered no supporting evidence other than stating that it has no intention of ever placing rock in Lustra Creek in the future. (R. 9). This statement is clearly insufficient to meet the formidable burden the Supreme Court has placed on a defendant attempting to establish a mootness claim resulting from defendant's voluntary conduct. *See Concentrated Phosphate Export Ass'n*, 393 U.S. at 203 (holding that defendant's own statement that it would be uneconomical for them to engage in further operations "cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in defendants' shoes"). A fourth phase of mining has been planned by the defendant, which will require the removal of more overburden from Magic Mountain. (R. 4). MMC has not decided where to place the rock that it removes, and placement of overburden in the Creek remains the cheapest and easiest means of disposal. (*Id.*) Since MMC has not made it "absolutely clear" that no further unpermitted dumping will occur in Lustra Creek, this case is not moot. *See Laidlaw II*, 120 S. Ct. at 710-11 (finding that defendant's substantial compliance with permit requirements and closure of the facility at issue did not automatically moot plaintiff's claim, as defendant had not made it absolutely clear that permit violations could not reasonably be expected to recur).

B. MMC's unpermitted dumping of overburden into Lustra Creek is likely to recur if injunctive relief is not granted.

A different standard for mootness applies, however, when the defendant has not voluntarily ceased its allegedly wrongful behavior. In a lawsuit brought to force compliance, it is the plaintiff's burden to establish that, "if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the 'threatened injury is certainly impending.'" *Laidlaw II*, 120 S. Ct. at 699. When action is taken under the threat of enforcement activities, plaintiff's claim for injunctive relief is moot unless it proves that "there is a realistic prospect that the violations alleged in [its] complaint will continue notwithstanding" the CAO between MMC and Rocky Mountain. *See Comfort Lake Ass'n*, 138 F.3d at 355; *Atlantic States Legal Found. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991).

In the present case, Rocky Mountain has presented evidence sufficient to meet this burden. MMC has plans for a fourth phase of mining in the near future that *will require the removal of more overburden rock* from Magic Mountain. (R. 4). Placement of overburden in Lustra Creek remains the easiest and cheapest means of disposal, creating a "realistic prospect" that the Creek will be the final resting place for the rock. Furthermore, MMC has already violated the CAO by failing to nurture vegetation on the landfill so that it would be indistinguishable from vegetation on adjacent areas within the designated time period. (R. 4). Rocky Mountain seeks to enforce its order against MMC to prevent any further unpermitted dumping, which is likely to occur shortly if the court does not intervene.

C. Mootness is improper when meaningful relief can be granted in a suit.

It is undisputed that a request for injunctive relief may be moot when the event sought to be enjoined has occurred, *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1989), or even when a substantial portion of the project is completed. *See Fla. Wildlife Fed'n v. Goldschmidt*, 611 F.2d 547, 548 (5th Cir. 1980). In such cases, there is no meaningful relief that a court could grant to satisfy plaintiffs' concerns. *See Bayou Liberty Ass'n v. United States Army Corps of Eng'rs*, 217 F.3d 393, 397 (5th Cir. 2000); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (holding that an action becomes moot if the controversy is no longer live, because an event occurs that precludes the court from ordering effective relief). The law is clear that a claim is moot if it can be shown that the court cannot even "theoretically grant" relief. *Vieux Carre*, 948 F.2d at 1446; *see also Harris*, 151 F.3d at 190 (defining theoretical as giving the plaintiff "the benefit of the doubt as to whether certain relief requested would in fact ease or correct the alleged wrong").

In this case, however, injunctive relief is meaningful since the event sought to be enjoined has not even begun. MMC is preparing for the fourth stage of mining but will not begin removing overburden for an unspecified period of time. (R. 4). Since the court may grant an injuction to prevent any further unpermitted dumping by MMC and keep additional overburden rock out of Lustra Creek, meaningful relief is available, and the case should not be found moot. *See Bayou Liberty Ass'n*, 217 F.3d at 398 (holding that because completion of construction of a retail complex

foreclosed any meaningful relief that would flow from granting plaintiff's request, the action had become moot).

D. This case should not be found moot since it is "capable of repetition, yet evading review."

A classic exception to the mootness doctrine exists for disputes which are "capable of repetition, yet evading review." *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997). The exception applies if (1) there is a reasonable expectation that the complaining party will be subject to the same action again; and (2) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration. *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). This case fits well within the exception and should not be rendered moot.

First, there is a reasonable expectation that MMC will place more overburden in Lustra Creek. *See Mo. Coalition for the Env't v. United States Army Corps of Eng'rs*, 866 F.2d 1025, 1029-30 (8th Cir. 1989) (holding that conflict over a wetlands fill permit for construction of a stadium fit within the mootness exception, even though the team for which the stadium was intended had moved to another state; county still owns the proposed stadium site and is seeking an expansion franchise to locate there). Between January 1980 and January 1998, MMC stripped overburden rock from the slope of Magic Mountain in three phases and placed it at the base of the slope, covering Lustra Creek for half a mile. (R. 4). MMC continues to operate the mine, and a fourth phase is planned in which it will be necessary to remove more overburden. (*Id.*) Although MMC has not decided where to place the overburden, they admit that dumping it in the Creek remains the easiest and cheapest means of disposal. (*Id.*) While the CAO between Rocky Mountain and MMC prohibits the dumping of overburden into the Creek without a permit, MMC has already violated the requirements of that order. (*Id.*)

Second, the unpermitting dumping by MMC is too short in duration to be fully litigated prior to its completion. The court below found that "if MMC resumes filling the Creek, its conduct will last long enough for the plaintiffs to seek meaningful injunctive relief" since past operations "lasted for months at a time and there is no evidence that it would be a shorter operation in the future." (R. 9). However, this mischaracterizes the relief that the state is seeking. Rocky Mountain is not asking to enjoin MMC from completing its fourth phase of mining but instead to enforce its order

against *any further unpermitted dumping* by MMC. It would be impossible for Rocky Mountain to seek out any meaningful injunctive relief or fully litigate the case before MMC resumes dumping overburden without a permit, unless there was continuous monitoring of Magic Mountain and MMC's operations. Even a temporary restraining order may not be available before additional overburden is added to the Creek, given MMC's remote location and the uncertainty surrounding the fourth phase of mining it has planned. Effective monitoring and enforcement of the CAO against MMC may only be accomplished by a finding that this case is not moot and allowing Rocky Mountain to enforce its order against MMC through the courts.

E. Holding this case to be moot would frustrate the purpose of both the CWA and RMSWA.

A finding of mootness would frustrate the purpose of both the CWA and RMSWA. The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by prohibiting the unpermitted discharge of pollutants. 33 U.S.C. §§ 1251(a), 1311(a). Similarly, the RMSWA establishes a comprehensive scheme for regulating the disposal of solid waste by forbidding any discharges other than to permitted landfills. (R. 5). In addition, one of RMSWA's guiding principles is the protection of water quality. (R. 7). Companies in violation of these laws would become complacent knowing that future sanctions could be avoided simply by ceasing their illegal conduct by the time the suit comes to trial. *See United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952) (finding that the mootness doctrine must protect plaintiffs from those who seek to evade sanctions "by predictable protestations of repentance and reform"); *Atlantic States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1137 (11th Cir. 1990). More importantly, companies going out of business for commercial reasons would have little incentive to comply with the law if monetary penalties could be avoided once the company dissolves. As long as MMC operates, it must know that it will be liable under federal and state law, even on the last day of operation. *See Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200, 1203 (11th Cir. 1997).

CONCLUSION

For the foregoing reasons, Rocky Mountain urges that the decision of the United States District Court for the District of Rocky

Mountain to preclude FOL's citizen suit under the diligent prosecution bars of the Clean Water Act and the doctrine of res judicata be affirmed. However, Rocky Mountain urges this Court to reverse the District Court's decision to grant summary judgment on the issues of continuing violation and mootness.

Respectfully Submitted,
Counsel for Appellant,
State of Rocky Mountain

APPENDIX

33 U.S.C. § 1251(a) (1994):

Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective
The objective of this chapter 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 chapter—
(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 chapter to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. § 1251(b) (1994):

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 chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. 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(a) (1994):

Illegality of pollutant discharges except in compliance with law
Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319(a)(1) (1994):

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(g)(6) (1994):

(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 chapter; 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 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

33 U.S.C. § 1342(b) (1994):

State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;
(B) are for fixed terms not exceeding five years; and
(C) can be terminated or modified for cause including, but not limited to, the following:
(i) violation of any condition of the permit;
(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
(D) control the disposal of pollutants into wells;
(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or
(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;
(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;
(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;
(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;
(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;
(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;
(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a

program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and
(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

33 U.S.C. § 1344 (1994):

(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.
(b) Specification for disposal sites
Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.
(c) Denial or restriction of use of defined areas as disposal sites
The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a

disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,
is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).
(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.
(g) State administration
(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wet-

lands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.
(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.
(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.
(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.
(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.
(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.
(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.
(H) To assure continued coordination with Federal and Federal-State water- related planning and review processes.
(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—
(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such au-

thority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain

a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill mate-

rial in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, 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.

(5) Redesignated (4)

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

33 U.S.C. § 1362(6) (1994):

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(7) (1994):

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(12) (1994):

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollu-

tant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1365(a) (1994):

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
(1) against any person (including (i) the United States, and (ii) 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 (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(b) (1994):

No action may be commenced—
(1) under subsection (a)(1) of this section—
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, 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 the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

42 U.S.C. § 6972(a) (1994):

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 chapter; 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 chapter 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 6928(a) and (g) of this title.

33 C.F.R. 323.2(e) (2000):

The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.