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Brief for the Appellant State of New Union: Twelfth Annual Pace National Environmental Moot Court Competition

Civ. No. 99-7030

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FRIENDS OF LAKE TOKAY, INC.,
and
STATE OF NEW UNION,

Appellants,

v.

BUENA VISTA POWER CO.,
Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for the Appellant
STATE OF NEW UNION*

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QUESTIONS PRESENTED

1. Did the lower court properly rule that mercury is a solid for purposes of RCRA § 7002(a)(2)(B), 42 U.S.C. § 6972(a)(2)(B)?
2. Did the lower court err in holding that Friends of Lake Tokay, Inc. lacks standing to bring suit against Buena Vista?
3. Did the lower court properly rule that New Union has standing to bring suit against Buena Vista?
4. Did the lower court erroneously hold that the Clean Air Act, §§ 7401 et seq., justifies refusal to exercise its equitable authority under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B)?

* This brief has been reprinted in its original form. No revisions, other than minor technical revisions, have been made by the editorial staff of the Pace Environmental Law Review.

5. Should the court rule on whether the Appellants are barred from bringing action under RCRA § 7002(b), 42 U.S.C. § 6972(b), or the doctrines of res judicata or collateral estoppel? If so, should it hold that the Appellants are precluded?

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PRELIMINARY STATEMENT

Friends of Lake Tokay, Inc. (hereinafter FLT), a non-profit organization, brought a citizen suit pursuant to the Resource Conservation and Recovery Act (hereinafter RCRA) against Buena Vista Power Company (hereinafter Buena Vista). The State of New Union intervened pursuant to RCRA § 7002(b)(2)(E), 42 U.S.C. § 6972(b)(2)(E). The United States Court for the District of New Union granted a motion of summary judgment against both plaintiffs, concluding that their claims were barred by the Clean Air Act, §§ 7401 et seq. The court further held that FLT lacked standing. The Court withheld judgment on the issue of whether such suit is barred under RCRA, or the doctrines of res judicata and collateral estoppel. FLT and New Union now appeal the summary judgment decision. Buena Vista cross appeals the court's finding that New Union has standing and that mercury emissions are solid waste.

STATEMENT OF THE CASE

FLT is a not-for-profit environmental advocacy group formed to protect Lake Tokay in the State of New Union. (R. at 3, 6.) Buena Vista operates two coal fired power plants, specifically mine-mouth plants, within the State of Blue Skies. (R. at 3.) Mercury particles are produced as a by product of the combustion of

the coal. (R. at 3.) Buena Vista admits that these mercury particles travel up the smoke stacks and are released into the atmosphere, escaping its pollution control equipment. (R. at 3.)

FLT sent notice of the alleged endangerment and its intent to sue under RCRA § 7002(b)(2)(E), 42 U.S.C. § 6972(b)(2)(E), to the Environmental Protection Agency (hereinafter EPA), the State of Blue Skies, and Buena Vista. (R. at 3.) "Ninety-five days thereafter, FLT filed this action under RCRA § 7002(a)(1)(B) against Buena Vista, seeking an injunction requiring Buena Vista to cease all emissions of mercury from its plants." (R. at 3.) Following the commencement of this action, the State of New Union intervened pursuant to RCRA § 7002(b)(2)(E) and FED. R. CIV. P. 24. (R. at 3.)

Both the State of New Union and FLT contend that the particles of mercury are carried through the air into the territory of New Union, where they later fall to the surface. (R. at 3.) These mercury particles fall directly into Lake Tokay and the watershed surrounding the area. (R. at 3-4.) As a result of the mercury poisoning, the New Union Department of Public Health "issued a health advisory," which has banned the sale of all fish caught in Lake Tokay. (R. at 4.) Further, the Department of Public Health has warned the public that the fish, "if eaten on a weekly basis, could cause mercury poisoning in humans," and has advised against any consumption of such fish. (R. at 4.)

EPA has performed studies of Lake Tokay and its watershed. (R. at 4.) These studies have indicated that Buena Vista's power plants are the direct cause of the poisoning of Lake Tokay. (R. at 4.) Buena Vista admits that according to EPA, most of the mercury pollution of Lake Tokay comes from its power plants. (R. at 4.) However, Buena Vista denies the validity of EPA studies and the conclusions drawn. (R. at 4.)

Buena Vista currently operates its power plants under regulations promulgated under the Clean Air Act (hereinafter CAA). (R. at 4.) Such regulations provide for Buena Vista to operate under valid permits, which were issued by the State of Blue Skies. (R. at 4.) However, such "permits did not contain limitations on mercury emission." (R. at 4.) The permits merely require "Buena Vista to conduct weekly monitoring of mercury in its emissions and of mercury deposition, from its plants' emissions, at various locations in Blue Skies." (R. at 8.) The record is devoid of any indication that Buena Vista applied for, or is currently operating

under, a valid RCRA permit, and therefore one could assume no permit was issued.

SUMMARY OF THE ARGUMENT

This case involves a violation of RCRA. The case begins with a determination of whether the mercury poison discarded into Lake Tokay is a solid. In order for RCRA to apply, an affirmative determination of this issue is required. A detailed examination of RCRA indicates that Congress agreed with the "advancements of modern science" when it treated mercury as a solid pursuant to RCRA. *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959). Such a determination means that RCRA is the applicable statute.

The next issue is whether FLT should have standing to sue Buena Vista. A positive determination of this issue should be reached by closely examining the national intent in adding citizen suit provisions to environmental statutes during the early 1970s. Congress has added very broad citizen suit amendments to the CAA and RCRA in recognition of the fact the government was doing an inadequate job of enforcement. Members of FLT have been directly injured from the mercury emissions from Buena Vista's power plants. Therefore, to deny standing to FLT would directly contradict Congress's intent.

New Union, similar to FLT, should have standing because it was injured by the mercury emitted from Buena Vista's power plants. A state has standing when "the injury alleged affects the general population of a state in a substantial way . . . ." *Maryland v. Louisiana*, 451 U.S. 725, 767 (1981). There is a grave risk to the people in New Union because the mercury has affected their land and waters. The food they eat and the water they drink has been contaminated. A warning has been placed on the consumption of fish in Lake Tokay, however, that is not sufficient in that it does not stop the animals or the unknowing public from eating the fish. (R. at 4.) The injury is traceable to the mercury, which is released from the coal burned in Buena Vista's two plants. Buena Vista admits that "EPA had conducted studies which conclude that most of the mercury in Lake Tokay originates from Buena Vista's two power plants in Blue Skies." (R. at 4.) The lower court held that "as a state, it does not need to plead standing." (R. at 7.) The court further held that New Union automatically has standing to sue for injuries that occur within its boundaries, specifically Lake Tokay. (R. at 7.) RCRA § 7002 offers protection to health and the environment, therefore, New Union's injuries are within the zone

of interests sought to be protected. RCRA § 7002, 42 U.S.C. § 6972. "RCRA § 7002 vests this court with the authority to grant injunctive relief . . . ." (R. at 6.) Therefore, the injuries sustained by New Union are redressable under RCRA. *See* RCRA § 7002, 42 U.S.C. § 6972.

Simply because Buena Vista was operating under a Clean Air Act permit should not bar Appellant's suit under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). The purpose of the RCRA citizen suit provision is to allow any person to commence an action against parties disposing of hazardous waste, which may impose a "substantial endangerment" to that party. 42 U.S.C. § 6972(a)(1)(B). New Union was directly injured by the poisoning of its land from Buena Vista's power plants.

In *Dague v. City of Burlington*, the court looked at the intent of the statute and determined that its enactment was designed to provide equitable relief for those injured by polluters. 935 F.2d 1343, 1355 (2d Cir. 1991). A permit issued under RCRA would presumptively preclude any suit under such statute. *See Greenpeace, Inc. v. Waste Technologies Indus.*, 9 F.3d 1174, 1180 (6th Cir. 1993). However, there is nothing in RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) which prevents suit under other federal regulations. Buena Vista was never issued a RCRA permit for the disposal of mercury, and therefore, New Union should not be precluded from equitable relief.

The Appellants are not barred from bringing this action solely based upon RCRA § 7002 or the doctrine of res judicata or collateral estoppel for a number of reasons. The court cannot rely on *Bluepeace, Inc. v. Buena Vista Power Co.*, as a reason to bar the Appellants. First, there was no judgment on the merits of the case, it was simply a grant of summary judgment. Secondly, an obvious difference is that the plaintiffs in *Bluepeace* are not parties of interest in the present case. New Union is a state, and along with FLT, the citizens group, they should have the right to bring this suit. Additionally, New Union had no notice of the issuance of the permits or notice of the prior lawsuit against Buena Vista (R. at 9). The lawsuit, which the Appellee relies on, fails to sufficiently meet the requirements of the doctrines of res judicata and collateral estoppel. *See Nevada v. United States*, 463 U.S. 110, 130 (1983); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). If the court should choose to rule on this issue, it should hold that Buena Vista is not precluded from answering this suit.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT MERCURY EMITTED IN PARTICLE FORM FROM BUENA VISTA'S COAL BURNING POWER PLANTS IS A SOLID WASTE FOR PURPOSES OF RCRA § 7002(a)(2)(B), 42 U.S.C. § 6972(a)(2)(B).

The district court accurately interpreted the law in ruling that mercury is a solid waste under RCRA § 7002(a)(2)(B), 42 U.S.C. § 6972(a)(2)(B). Their decision was based on a detailed examination of existing statutory law. The court read the applicable statute defining solid waste. The court then scoured the list for exceptions. Mercury particles are not one of the listed exceptions. For that reason, the court correctly ruled that mercury is a solid waste.

A. *The Solid Waste Discarded from Buena Vista's Power Plants is a Hazardous Waste for Purposes of RCRA § 7002(a)(2)(B), 42 U.S.C. § 6972(a)(2)(B).*

Solid waste is defined as "any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31." 40 C.F.R. §§ 260.30, 260.31, 261.2 (1999). Those sections do not exclude mercury. *See* 40 C.F.R. § 261.2 (1999). Congress granted EPA the power to promulgate such regulations. *See* 42 U.S.C. § 6912(a)(1). The Code further states in § 261.2(a)(2) that a discarded material is one that is "abandoned," "recycled," or "inherently waste-like."

The term "inherently waste-like" is defined in paragraph (d) of the same section. Specifically, it states that materials listed in Appendix VIII of Part 261 which are not reused or recycled and which "may pose a substantial hazard to human health and the environment," meet the criteria of being "inherently waste-like materials." 40 C.F.R. § 261.2(d)(3)(B)(ii). It is uncontested that mercury is hazardous to both health and the environment, therefore it meets the criteria set forth in the regulation. *See* 40 C.F.R. § 261.2(d)(3)(B)(ii).

RCRA § 1004(5) defines hazardous waste as "a solid waste which has characteristics that are hazardous" (R. at 5). More specifically, "[a] solid waste . . . is a hazardous waste if . . . it is listed in subpart D of this part and has not been excluded from the lists in subpart D of this part under §§ 260.20 and 260.22 of this chapter." 40 C.F.R. § 261.3(a)(2)(ii) (1999).

Compounds of mercury are listed three separate times in subpart D. The three forms are (1) "Mercury", (2) "Mercury, (acetato-O) phenyl-", and (3) "Mercury fulminate." 40 C.F.R. § 261.33 (1999). The corresponding EPA Hazardous Waste Numbers are U151, P092, and P065, respectively. *See id.* These forms of mercury are not excluded as hazardous waste by any other section of the Code.

These lists have been promulgated by EPA in accordance with 42 U.S.C. § 6921. In fact, in passing the Code, the legislature paid particular attention to by-products of coal burning power plants, specifically, "[f]ly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels." 42 U.S.C. § 6921(b)(3)(A)(i). As a by-product of coal burning, the mercury emitted by Buena Vista is one of the poisons Congress intended to regulate.

B. Even if Mercury Particles Were not Specifically Listed in Subpart D, a Reasonable Interpretation of the Code Would Emphasize the Importance of Preventing Mercury Pollution.

Considering that mercury is listed in three separate forms in subpart D, there should not be a question that the legislature perceived it to be a hazardous solid waste that society should be protected from. Such intent is further emphasized in 40 C.F.R. § 261.4, the section which lists the exclusions and exceptions of hazardous waste. For example, § 261.4(a)(14)(ii) indicates that shredded circuit boards that are being recycled are not hazardous waste, "provided they are: [f]ree of mercury switches," and "mercury relays." The specific inclusion of mercury further underscores the legislative intent to prevent the proliferation of mercury pollution.

Buena Vista concedes that it emits mercury particles into the atmosphere. (R. at 3.) Buena Vista's only contention is that those particles are not solids. Under RCRA, a reasonable interpretation of the statute includes mercury particles as a solid hazardous waste. Another reasonable definition of a "particle" is provided by Webster's dictionary. It defines "particle" as "a minute part or portion of matter, the aggregation of which parts constitutes the whole mass." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1307 (2d ed. 1978). In other words, the minuteness of the particles is irrelevant to the issue of whether they are solids. As the district court accurately noted, any argument that mercury is not

a solid "ignores the advancements of modern science" (R. at 5) (citing *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959)).

II. THE DISTRICT COURT ERRED IN HOLDING THAT FRIENDS OF LAKE TOKAY, INC. LACKS STANDING.

The district court's decision in *Friends of Lake Tokay, Inc v. Buena Vista Power Co.* accurately stated the law. The error arose from the way it applied the facts to that law in reaching its conclusion.

For an individual to have standing, the individual must show three things. First, he or she must have personally suffered some injury as a result of the action in question. *See Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). Second, the injury must be fairly traceable to the complained of action. Third, the injury must be redressable by judicial action. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-41 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Additionally, the plaintiff must show that his or her injury is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). It is uncontested that two members of FLT meet these requirements.

"As an environmental advocacy group, FLT cannot have standing on its own, but may have standing to represent its members who have standing." (R. at 6.) In order for an association to have standing it must meet a three part representational test. First, some of its members must possess standing in their own right. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Second, the interests the group is seeking to protect must be germane to the purpose of the organization. *See id.* Third, "neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members." *Id.*

The citizen suit provision of RCRA provides the framework for appellant's claim of standing. *See* RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). When examined alongside existing caselaw, a conclusion that FLT possesses standing in this matter should be reached.

A. Two Members of FLT Have Been Injured.

Buena Vista does not contest that Steven Jones and Artimus Winfred have been injured, but the full extent of FLT's injuries should not be overlooked. Appellee and the lower court have greatly oversimplified the nature of Appellant's injury. When presented with evidence that the fish of Lake Tokay are poisoned by mercury from Buena Vista's power plant, the company's archaic advice to avoid contamination is "don't eat the fish." While the simplicity of this rationale is somewhat appealing, it is inaccurate and impossible. In fact, the Agency for Toxic Substances and Disease Registry acknowledges that "[b]reathing vapors in air from spills, incinerators, and industries that burn mercury-containing fuels" can also lead to exposure. Agency for Toxic Substances and Disease Registry, *ToxFAQs* (last modified Apr. 20, 1999) <http://www.atsdr.cdc.gov/tfacts46.html>. Furthermore, mercury exposure can have deleterious effects on the brain, kidneys and developing fetuses. *See id.* Other symptoms include "lung damage, nausea, vomiting, diarrhea, increases in blood pressure or heart rate, skin rashes, and eye irritation." *Id.* In short, cessation of fish consumption will not completely prevent Appellants from further injury should Buena Vista continue to pollute the lake and surrounding environment.

Even if it were possible, as Appellee contends, to completely avoid mercury poisoning by means of not eating the fish, Jones and Winfred still have a significant legal interest in the lake. One court addressed such interests when it found that individuals can be "aggrieved" by "aesthetic, conservational, recreational aspects," as opposed to strictly economic injuries. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965). The Supreme Court later mentions those same injuries "to emphasize that standing may stem from them as well as from . . . economic injury . . . ." *Association of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 154 (1970). Additionally, as any fisherman will testify, the loss of a good fishing hole is a serious "aesthetic, conservational, and recreational" injury.

B. Friends of Lake Tokay, Inc. Meets the Supreme Court's Test for Representational Standing.

Having established that at least two members of FLT possess standing in their own right, one must examine whether FLT meets the other two parts of the Supreme Court's test for repre-

sentational standing. Those two parts being whether the interests at stake are "germane" to the purpose of the organization and that "neither the claim asserted nor relief requested requires the participation of the individual members." *Hunt*, 432 U.S. at 342.

As "a not-for-profit corporation organized for the protection of Lake Tokay," this suit falls squarely within FLT's charter (R. at 3.) In fact, the poisoning of Lake Tokay is the exact type of scenario, which the group was formed to prevent. With regard to the third part of the Supreme Court's representational test, neither the claim of endangerment, nor the request for an injunction to cease all mercury emissions from Buena Vista's power plants require individualized proof. *See Hunt*, 432 U.S. at 344. For these reasons, FLT's claims are "properly resolved in a group context." *Id.*

C. The Injuries are Within the "Zone of Interests" of RCRA.

The fact that Buena Vista concedes an injury is only part of the injury requirement. The injury must also be within the "zone of interests" of the statute. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150,153 (1970). "The overriding interest of RCRA is clear: to prevent generation of hazardous waste in the first place, and to dispose of and treat properly that which is produced." *Furrer v. Brown*, 62 F.3d 1092, 1098 (8th Cir. 1995). In fact, "RCRA itself states that the objectives of the Act 'are to promote the protection of health and the environment and to conserve valuable material and energy resources . . . .'" *Id.* at 1097.

Given that language, there should be no question that a resident's concern regarding the poisoning of their lake by out of state power plants falls directly within the statute's zone of interests.

D. The Injuries of FLT's Members are Traceable to Buena Vista's Actions.

The district court states that "[i]t remains to be proven whether the injury is fairly traceable to Buena Vista's emissions . . . ." (R. at 6.) This statement is inconsistent with the court's earlier finding that the mercury in the lake came from the smokestacks of Buena Vista Power Company. (R. at 5.) Considering the court's language in Part I of their decision regarding the particulate emissions as solid or hazardous waste; "[t]his seems a good description of what happens to the mercury particles; they are discharged out of the plants' stacks and end up in the Lake or the

surrounding land, from which they eventually enter the Lake." *Id.*

While Buena Vista denies that the mercury in Lake Tokay originated from its power plants, its denial ignores the findings of EPA, a non-partisan party. The evidence uncovered by EPA directly implicates Buena Vista's power plants as the source of the mercury poison in the Lake. (R. at 4). Buena Vista responds with a technical argument saying mercury is not a solid waste. (R. at 5.) Should the court decide that mercury is a solid, then there should be no question that the mercury poisoning is traceable to Buena Vista.

E. The Injuries are Redressable.

The district court erred in deciding FLT's injuries were not redressable by pigeon-holing multiple serious injuries into "inconveniences" that "may have a modest economic value." (R. at 6.) The court explained that "[o]ne of the bedrock requirements for the equitable remedy of injunction is that relief is not available in an action at law." *Id.* Its decision appears to have been based primarily upon *Davies v. National Coop. Refinery Ass'n*, 963 F.Supp. 990 (D. Kan. 1997).

The court below relies on a non-binding lower court decision, which disregarded the Congressional intent. Consider the underlying facts in the *Davies* case. There, the case involved serious groundwater contamination by the defendant. The district court's solution to what it concedes to be serious pollution of drinking water is "the threat of exposure can always be avoided by evacuating property where hazardous waste is found or by taking other extraordinary measures." *Davies*, 963 F.Supp. at 999. The *Davies* court further states that the plaintiffs "must use bottled water instead of groundwater," admitting that is "an inconvenience and an economic burden," but suggesting that such is an injury is one that can be settled in an action at law. *Id.*

Such rationale is in direct conflict with the legislative intent of prevention, as noted in RCRA and other environmental legislation. The district court suggests that money damages are available to FLT for the loss of being able to eat the fish. This response misses the point, RCRA is designed to be a proactive statute. "RCRA's goal is to prevent the creation of hazardous waste sites, rather than to promote the cleanup of existing sites." *Furrer v. Brown*, 62 F.3d 1092, 1098 (8th Cir. 1995).

F. This Case Illustrates the Rationale of Congress Enacting Citizen Suit Provisions in the First Place.

In order to fully appreciate the reason why FLT should have standing in this case, one must examine the rise of citizen suit provisions in environmental statutes. Their first appearance was in the 1970 CAA, shortly after the first Earth Day. At the time, there existed a widespread belief that the government was not doing an effective job of enforcing antipollution statutes. Consider the language used in House Report 91-1146 when describing Congressional efforts to improve the environment. It states that "[a] review [of the previous laws] make[s it] abundantly clear that the strategies which we have pursued in the war against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been." H.R. REP. No. 1146 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356. The Senate was more forthright one year later when discussing the addition of a citizen suit provision to the Water Pollution Control Act when it states; "[t]he record shows an almost total lack of enforcement." S. REP. No. 414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672.

After appearing in the CAA, the citizen suit provisions were quickly added to nearly all other environmental legislation. In fact, most of the citizen statutes were remarkably similar, if not identical, causing courts to use prior judicial treatment of one to help interpret another. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981); *Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir. 1979); *Student Pub. Interest Research Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1136 n.4 (3d Cir. 1985).

By enacting the citizen suit provisions, Congress hoped to "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings." S. REP. No. 1196 (1970), *reprinted in* 1970 U.S.C.C.A.N. 36, 37. The self-described purpose of the legislation was "to speed up, expand, and intensify the war against air pollution in the United States . . . ." H.R. REP. No. 1146 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356. One court accurately summarized the legislative intent by stating that "Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards, and if the agencies remained inert, to provide an alterna-

tive enforcement mechanism." *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1978).

This language highlights the importance of reversing the district court's "no standing" ruling. This is an example of good government and a healthy legislative process. Buena Vista's power plants have been polluting the State of New Union. New Union was not doing anything about it, so the citizens of the state, in the form of FLT, sought an "alternative enforcement mechanism" provided to them by their representatives in Washington. By doing so, FLT "goad[ed]" a previously "inert" state into acting. Preventing them from doing so quashes the very basis of our environmental laws and ignores the intent of our nation's Congress.

III. NEW UNION HAS STANDING TO BRING SUIT AGAINST BUENA VISTA BECAUSE INJURIES OCCURRED WITHIN ITS BOUNDARIES, THEREFORE, THE APPELLATE DIVISION SHOULD UPHOLD THE LOWER COURT'S DECISION.

The lower court held that New Union has standing "because a state need not prove standing." (R. at 4.) New Union is a state, not a private party. (R. at 7.) "As a state, it does not need to plead standing"; it automatically has standing to sue for injuries allegedly occurring within its boundaries. (R. at 7.) New Union claims that Lake Tokay is within its boundaries and within its public domain. (R. at 7.) "A State is a . . . 'person' under RCRA and is thus entitled to sue under these provisions." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 616 (1992).

The Supreme Court, in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 51 (1986), found that a state has standing when it alleges "a judicially cognizable interest in the preservation of its own sovereignty, and a diminishment of that sovereignty by the alleged interference . . . ." *Id. (citing Public Agencies Opposed to Social Security Entrapment v. Heckler*, 613 F.Supp. 558, 567 (E.D. Cal. 1985)). Standing reflects a due regard for the autonomy of those most likely to be affected by the judicial decision. "The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends." *Valley Forge Christian College v. Americans United for Separation of Church and State,* Inc., 454 U.S. 464, 473 (1982).

To meet standing requirements, one must show that: (1) they suffered actual injury from the complained of action, (2) the injury

is fairly traceable to the complained of action, and (3) the injury is redressable by judicial action. *See id.* The injury must also be within the zone of interests sought to be protected by the statute. *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

It has become a settled doctrine that "a State has standing to sue only when it's sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976).

To have standing to sue under the parens patriae doctrine, a state must assert an injury to a quasi-sovereign interest. "'Parens patriae,' literally 'parent of the country', refers traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

Therefore, in order to maintain a standing action, the state must articulate an interest apart from the interests of particular private parties, (i.e. the state must be more than a nominal party), and the state must express a quasi-sovereign interest. A state's quasi-sovereign interests "consist of a set of interests that the state has in the well-being of its populace," and "must be sufficiently concrete to create an actual controversy between the State and the defendant." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982).

A. New Union has Suffered Actual Injury from the Mercury Emitting from Buena Vista's Power Plants.

Buena Vista has created an imminent and substantial endangerment to the public's health from the pollution and contamination in the state of New Union. A State has standing to sue when "the injury alleged affects the general population of a State in a substantial way . . . ." *Maryland v. Louisiana*, 451 U.S. 725, 767 (1981).

The lower court stated that New Union "automatically has standing to sue for injuries alleged to occur within its boundaries." (R. at 7.) New Union claims that Lake Tokay is within its boundaries and public domain. (R. at 7.) Lake Tokay has been poisoned with mercury emanating from Buena Vista's power plants (R. at 4.) Mercury is universally known as a dangerous substance, with potentially fatal effects. Lori Haugen, *The Mercury Menace* (last modified Jan. 15, 1999) <http://www.portland.com/mercury/mercl inx.htm>. Rather than resolving the problem, Buena Vista's so-

lution is to ignore the situation, whereby denying direct responsibility for their actions. New Union's Health Department has issued a health advisory ordering a ban on the sale of fish for consumption. (R. at 4.)

New Union contends that the mercury contamination in Lake Tokay poses a health risk to the public, both residents and nonresidents. If humans consume the fish from Lake Tokay, there exists a great risk to their health. Once mercury is ingested, it attacks various organs and biological systems such as the brain, peripheral nerves, pancreas, immune systems, and kidneys. Lori Haugen, *The Mercury Menace* (last modified Jan. 15, 1999) <http://www.portland.com/mercury/merclinx.htm>. Mercury can affect one's vision, hearing, and speech; it can also lead to numbness of the limbs and possibly lead to coma or death. *See id.* Mercury poisoning continues for years after exposure, even after having been excreted from the body. *See id.*

Despite health advisory warnings, the public often remains ignorant. Relying on advisory warnings is not sufficient to prevent the dangerous effects of mercury in the environment. Even if the public is warned from eating the fish in Lake Tokay, nothing is stopping other animals from eating the fish and plant life in the area, further contaminating the food chain. A state's economy can be dependent on the fishing industry as a means of income and nutrition. This ban on fish can and will affect more than the local sportsmen.

The mercury emitted from Buena Vista's power plants is a hazardous solid waste. The lower court did not reach the issue of whether the waste caused an endangerment to Lake Tokay (R. at 4.) However, based on the evidence and studies conducted by EPA, one can reasonably conclude that the risk mercury imposed on the public is sufficient to allow an injunction, thus preventing further mercury pollution and contamination.

B. The Injuries Suffered by New Union are Traceable to Buena Vista's Mercury Pollution.

Buena Vista concedes that "EPA had conducted studies which conclude that most of the mercury in Lake Tokay originates from Buena Vista's two power plants in Blue Skies." (R. at 4.) Buena Vista, however, chooses to deny the validity of the health advisory which warns the public about mercury poisoning in humans. (R. at 4.) Buena Vista admits that its power plants release "some" mercury into the atmosphere. (R. at 3.)

"The mercury bioaccumulates in the flesh of fish to levels sufficient enough to cause a ban on eating or selling fish from the lake." (R. at 1.) Therefore, Buena Vista has created a dangerous situation in New Union, threatening human beings as well as wildlife.

The injury needs to be "within the zone of interests to be protected or regulated by the statute . . . ." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). RCRA § 7002 offers the protection of health and the environment. This statute is designed to protect and prevent the improper disposal of hazardous waste. *See* RCRA § 7002, 42 U.S.C. § 6972. Mercury is a hazardous solid waste, which is poisoning the land and water in New Union. Therefore, New Union's injuries are within the "zone of interests" of the statute.

C. The Injury Suffered by New Union is Redressable by Judicial Action.

New Union's injuries are redressable under RCRA § 7002. "The purpose of RCRA § 7002(a)(1)(B) is to redress endangerments." (R. at 6.) RCRA aims to prevent the creation and furtherance of hazardous waste sites. *See* RCRA §7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B); *Furrer v. Brown*, 62 F.3d 1092, 1098 (8th Cir. 1995). A warning is insufficient to protect the public or the environment from a hazardous substance such as mercury.

"When Congress enacted RCRA in 1976, it . . . used the word 'may' to preface the standard of liability: 'present an imminent and substantial endangerment to health or the environment.'" *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (citing *United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982). RCRA § 7002 is designed to prevent improper disposal of hazardous wastes in the future. *See United States v. Waste Indus. Inc.*, 734 F.2d 159, 166 (4th Cir. 1984). The language in RCRA is seen as expansive, intending to give "the courts the authority to grant affirmative equitable relief to . . . eliminate any risks posed by toxic wastes." *Price*, 688 F.2d at 213-14.

Imminency does not require a showing that actual harm will occur, only that there is risk of threatened harm present. *See Environmental Defense Fund v. Environmental Protection Agency*, 465 F.2d 528, 535 (D.C. Cir. 1972). "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." *Id.* In the present case, New Union has suffered actual injury to its land and is threatened with future

harm to its public. Mercury is a hazardous substance, and when ingested causes serious effects on the body, some of which may not develop for years. Courts have held that "endangerment" means a threatened or potential harm and there is no requirement of proof of actual harm. *Dague v City of Burlington*, 935 F.2d 1343, 1356 (citing *Ottati & Goss*, 630 F.Supp. 1361, 1394 (D.N.H. 1985); *United States v. Vertac Chem. Corp.*, 489 F.Supp. 870, 885 (E.D. Ark. 1980); *see also Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 13 (D.C. Cir. 1976)).

New Union is seeking an injunction "requiring Buena Vista to cease all emissions of mercury from its plants." (R. at 3.) Mercury has imposed a great endangerment upon life in New Union, particularly in the Lake Tokay watershed. "RCRA § 7002 vests this court with the authority to grant injunctive relief . . . ." (R. at 6.) Therefore, the injury suffered by New Union is redressable. There is sufficient evidence demonstrating imminent and substantial endangerment to health and the environment in New Union, thus, the court properly concluded that New Union has standing.

IV. THE COURT BELOW ERRED IN HOLDING THAT THE ISSUANCE OF PERMITS, UNDER THE CLEAN AIR ACT, JUSTIFIED THE COURT'S REFUSAL TO EXERCISE ITS EQUITABLE AUTHORITY UNDER RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

RCRA permits any person to commence a suit against any "past or present generator . . . 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." RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). Upon enactment of this legislation, Congress's intent was to provide an avenue for citizen action against companies who discard waste-like materials. H.R. REP. No. 1491 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238. Buena Vista's power plants are emitting mercury particles that are being disposed of on New Union's land and waters, therefore, the trial judge should have exercised his equitable authority by granting the injunction sought by New Union.

New Union was directly injured by the mercury poison emitted from Buena Vista's power plants. RCRA allows any party to intervene when an action filed and such disposition may "impair

or impede his ability to protect [his] interest." RCRA § 7002(b)(2)(E), 42 U.S.C. § 6972(b)(2)(E). In this case, EPA has determined "that most of the mercury in Lake Tokay originates from Buena Vista's two power plants in Blue Skies." (R. at 4.) From this study, it can be reasonably inferred that Buena Vista has deposited mercury particles on New Union's territory. Therefore, New Union has a cause of action under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

Buena Vista was never issued a permit for the disposal of its hazardous waste under RCRA, 42 U.S.C. §§ 6901 *et seq*. If such a permit was issued, and Buena Vista has not violated it, then the State would not be able to sue under 42 U.S.C. § 6972(a)(1)(B) if such activities are specifically permitted. *See Greenpeace, Inc. v. Waste Technologies Indus.*, 9 F.3d 1174, 1180 (6th Cir. 1993). A RCRA permit is necessary for "each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste." 42 U.S.C. § 6925(a). Buena Vista was disposing of hazardous waste in New Union without a valid permit authorizing them to do so. Mercury particles, a known hazardous waste, are emitted from the burnt coal, and travel through the air and are deposited on the soil and watersheds of New Union (R. at 3-4.) These particles of mercury represent "solid waste" which is regulated under RCRA.

A. New Union is not Precluded from an Equitable Remedy Simply Because Buena Vista was Operating Under a Valid Clean Air Act Permit, and the Trial Court's Decision Should be Reversed.

The trial court erroneously ruled that RCRA standards do not apply to Buena Vista because it does not "treat, store or dispose of hazardous waste," but rather Buena Vista emits it into the atmosphere (R. at 8.) The activities of Buena Vista are specifically included in RCRA, where Congress authorized a plan for research of hazardous waste "generated from the combustion of coal and other fossil fuels." RCRA § 8002(n), 42 U.S.C. § 6982(n). This section shows Congressional concern pertaining to emissions of hazardous waste from the burning of coal, and its possible implementation under RCRA.

While Buena Vista did not obtain a RCRA permit under 42 U.S.C. §§ 6901 *et seq.*, it was issued a CAA permit, which provided for specific emission limits for sulfur oxides and nitrogen oxides (R. at 8.) The permit issued did not specify a limitation on mer-

cury emissions produced by Buena Vista, but merely necessitated the monitoring of its emissions in Blue Skies, the state in which it operates. (R. at 8.) If a company complies with the CAA permit under 42 U.S.C. § 7661(a), the permit will shield the company from civil action. *See* 42 U.S.C. § 7661(f). While a company acting under a valid CAA permit may not be subject to civil action under that statute, it does not preclude civil action under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

In 42 U.S.C. § 7412(n)(7) Congress went further by stating that if RCRA applies to the polluter, then EPA should take into consideration such regulations "to the maximum extent practicable and consistent with the provisions of this section, [to] ensure that the requirements of such subtitle and this section are consistent." This statute demonstrates the intent of Congress, that RCRA is applicable and should be taken into account by EPA and polluters. This language does not preempt RCRA statutes or civil actions that could be commenced under one of its provisions. Therefore, action taken under RCRA should not be barred by a permit shield that does not specifically address out-of-state mercury pollution.

The trial court mistakenly relies on *Chemical Weapons Working Group, Inc. v. Department of the Army*, 111 F.3d 1485 (10th Cir. 1997), in which the plaintiffs were precluded from a civil action because a permit was issued. That case is significantly distinguishable from the case at bar, being that there was in fact a hazardous waste disposal permit issued, and that the "Environmental Protection Agency authorized the State of Utah to administer and enforce . . . the program." *Id.* at 1319. The other cases cited, including *Greenpeace* and *Palumbo*, involved actions barred because the defendant's acted under valid RCRA permits. *See Greenpeace*, 9 F.3d at 1181; *Palumbo*, 989 F.2d at 162. In this case, Buena Vista was not acting under any type of hazardous waste permit, from either the State of Blue Skies, or EPA.

In *Glazer v. American Ecology Envtl. Services Corp.*, the defendant claimed that a suit under 42 U.S.C. § 6972(a)(1)(B) was precluded because it was operating under a valid RCRA permit. 894 F.Supp. 1029, 1039 (E.D. Tex. 1995). In *Glazer*, the defendant relied upon *Greenpeace*, to argue that § 6976 and § 6972(b)(2)(D) did not permit such suit. *See id.* However, the court stated that this "holding does not necessarily compel the conclusion that, because defendant Gibraltar holds a valid permit, plaintiffs' claims against it under § 6972(a)(1)(B) are barred." *Id.* The court further

explained that § 6972(a)(1)(B) does not expressly prohibit an action against a permitted entity, stating that such a restriction was inappropriate considering "the expansive language of § 6972(a)(1)(B)." *Id.*

In *Dague v. City of Burlington*, the Second Circuit stated that the language of 42 U.S.C. § 6972(a)(1)(B) suggests the Congressional intent in 1976 was "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." 935 F.2d 1343, 1355 (2d Cir. 1991) (*quoting United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982)). 42 U.S.C. § 6972(a)(1)(A) provides for suits against persons who violate a permit, but in the case at bar, the Appellants have filed under 42 U.S.C. § 6972(a)(1)(B), which makes no mention of the need for a permit violation, seemingly allowing broader civil action. Following the court's reasoning in *Dague*, New Union would have a valid claim against Buena Vista under RCRA.

Finally, the trial court relies on *General Motors v. EPA*, 168 F.3d 1377 (D.C. Cir. 1999), and *United States v. Gulf States Steel Inc.*, 54 F.Supp.2d 1233 (N.D. Ala. 1999) in which the courts have rejected "attempts to use federal enforcement or citizen suit provisions to attack the terms of state issued permits." (R. at 8.) However, *General Motors* involved a company challenging the validity of a permit issued concerning its own discharge under the Clean Water Act, which was precluded. *See* 168 F.3d at 1379-80. *Gulf States Steel* involved EPA suing the manufacturer for violations of a Clean Water Act permit. *See* 54 F.Supp.2d at 1240. New Union is not challenging the permit issued by Blue Skies, only that they were directly affected by the disposal of hazardous waste, which is governed by RCRA. The cases the trial court cites involve situations in which the "actors" are challenging the permits. The case at bar involves an injured party not involved in the permitting decision of Buena Vista. Here, New Union is a state which is being subjected to hazardous waste disposal within its territory, and it should have the right to use the statutory provisions of RCRA to prevent further disposal.

B. The Clean Air Act Permit Should not Preclude Suit Under RCRA, Because of the Lack of Notice Provided to Those Injured by the Issuance of Such Permit.

The purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health

and welfare" of the population of the United States. 42 U.S.C. § 7401. This is to say, that the legislative intent was to discourage air and ground pollution, regardless of whether the specific toxin was mentioned in their permit.

While the trial court finds that barring suit simply based on a separate permit being issued, "is not on all fours with the cited cases," it nevertheless erroneously continues to justify its holding, as if the permit issued under the CAA is binding on potential RCRA violations. (R. at 8.) The action that New Union asserts is a violation of RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), not a violation of the current permit that Buena Vista holds. The trial court relies on cases where "citizen suit provisions do not grant jurisdiction to the district courts for judicial review of state permit issuance" (R. at 8.) However, in *Dague v. City of Burlington*, the court did not agree with the defendant's claim that it was operating under a valid state permit, and thus, the suit would be barred. *See* 935 F.2d 1343, 1352 (2d Cir. 1991). The court gives a thorough explanation of RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), demonstrating how it should be applied. *See id.* at 1352-56. They went on to explain that "a state's own hazardous waste program affects only those actions brought pursuant to subsection A" of 42 U.S.C. § 6972(a)(1), but "[s]ubsection B, on the other hand, is more general, and allows a direct cause of action against those whose activities [are listed]." *Id.* at 1352. Therefore, the action by New Union is not a review of the permit itself, but rather a suit against the polluter as allowed under federal statute.

EPA can issue permits to polluters, through applications that include public notice and hearings, offering opportunities for the public to comment regarding the affected parties. *See* 42 U.S.C. § 7661(a)(C)(6). Neither New Union, nor FLT had notice of the permits being issued by Blue Skies to Buena Vista. It had no opportunity to comment on the permit issuance nor was it given an opportunity to be heard. Blue Skies argues that it met its notification requirement to New Union and all other parties through notification in newspapers, and to contiguous states through express notification. (R. at 9.) However, New Union is not contiguous to Blue Skies and it does not have a duty to read out-of-state newspapers. Therefore, it cannot be held as a party with notice of the issuance of the permit. (R. at 9.) Since New Union had no chance to comment about the emissions permit, and it was directly af-

fected by the mercury emissions, it should be able to seek relief under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

42 U.S.C. § 7661(d)(a)(2) requires that the permitting authority "notify all States (A) whose air quality may be affected and that are contiguous to the state in which the emission originates, or (B) that are within 50 miles of the source." Notice is an essential element of this act, allowing the potentially poisoned parties a chance to voice their opinion, prior to the pollution. New Union was not notified, but its air quality and soil were adversely affected by the pollution allowed under the permit granted. Therefore, New Union deserves its day in court.

V. APPELLEE CANNOT RELY ON RCRA § 7002(b), RES JUDICATA, OR COLLATERAL ESTOPPEL AS A DEFENSE TO BAR THE APPELLANTS FROM BRINGING THIS SUIT, THEREFORE, THIS COURT SHOULD NOT RULE ON WHETHER THE APPELLANTS ARE PRECLUDED.

The Appellants should not be barred from bringing this action against Buena Vista based upon RCRA § 7002, res judicata, or collateral estoppel. The lower court chose not to rule on this issue (R. at 9.) Buena Vista relies upon a default decision to grant summary judgment as a basis to prevent the Appellants from pursuing this action. It would be unreasonable for the court to rely solely upon the first suit, *Bluepeace, Inc. v. Buena Vista Power Co.*, No. Civ. 98-27 (Coughlin Co. Sup. Ct., Jan. 5, 1999), brought against Buena Vista. New Union was not given notice of this previous suit in Blue Skies, being that it was an in-state action. Consequently, the state's interest was not adequately represented. Moreover in *Bluepeace*, the court did not rule on the merits, and there was no final judgment. *See id.* The court offered the plaintiffs the option to amend their complaint, but failure to do so resulted in the court granting summary judgment to Buena Vista. It would be unconscionable to hold New Union liable for the actions taken by the plaintiffs in *Bluepeace*.

A. The Appellants are not Prohibited from Bringing this Action Based Upon the Requirements in RCRA § 7002(b), U.S.C. § 6972(b).

According to RCRA § 7002(b)(2)(A), no action may be commenced "prior to ninety days after . . . notice of the endangerment"

has been given to the administrator, the state where the endangerment occurred, and to the violator. RCRA § 7002(b)(2)(A), 42 U.S.C. § 6972(b)(2)(A). The Supreme Court in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), explained that "requiring citizens to comply with the notice and delay requirements furthers Congress' goal of striking a balance between encouraging citizen suits and avoiding burdening the federal courts with excessive numbers of such suits . . . ." *Hallstrom,* 493 U.S. at 20 (1989). FLT gave Buena Vista notice. Ninety-five days later this action was filed. In the interim, Buena Vista did not cease its polluting activities. RCRA § 7002 does not specify whether the State, as an intervenor, is required to give notice to Buena Vista. The statute states that "any person may intervene as a matter of right . . . ." RCRA § 7002(b)(2)(E), 42 U.S.C. § 6972(b)(2)(E).

In the prior suit, *Bluepeace, Inc. v. Buena Vista Power Co.*, Buena Vista did not give New Union notice of the issuance of the permits. (R. at 9.) Notice was given to EPA and the contiguous states. (R. at 9.) However, New Union is not a contiguous state, but was in fact injured by Buena Vista's pollution. (R. at 9.) Buena Vista admits that according to EPA, most of the mercury pollution of Lake Tokay and the surrounding area are a direct result of the mercury emissions from Buena Vista's power plants. (R. at 4.)

The present case differs from the facts in *Bluepeace*. To begin with, New Union did not have notice. New Union was not involved with the first suit brought against Buena Vista. They had no notice, and they failed to meet the prerequisite time period, thus they were precluded from challenging the permit. It would be unfair to hold New Union liable. New Union had no opportunity to join the parties in the action to sue Buena Vista, and therefore, is estopped from challenging this suit. New Union is not a contiguous state, but it was directly injured by Buena Vista's pollution within its state boundaries. (R. at 9.) In *Bluepeace*, the only plaintiff is a citizens group, whereas, here, a state is also involved. (R. at 10.) New Union's interests were not represented in *Bluepeace*. *Bluepeace* deals with an intrastate problem, whereas here, we are addressing a federal issue, therefore New Union cannot be precluded solely on the decision in *Bluepeace*. Buena Vista will be the windfall beneficiary because New Union had no notice, and therefore, was not represented in the prior litigation. There is no mention in RCRA that New Union, a lawful intervenor, is obligated to follow the notice provision. RCRA § 7002, 42 U.S.C.

§ 6972. Therefore, New Union should not be barred as a matter of law.

B. The Appellants are not Barred Under the Doctrine of Res Judicata.

Res judicata prevents plaintiffs from bringing an action that has already been decided, whereby preventing a defendant from raising new defenses to defeat the conclusions of the earlier judgment. BLACK'S LAW DICTIONARY 1174 (5th ed. 1979). "Two claims are not necessarily the same cause of action merely because they arose out of the same general transaction or set of facts." *Fountas v. Breed*, 455 N.E.2d 200 (Ill. App. Ct. 1983).

For the doctrine of res judicata to apply, three requirements must be satisfied: (1) The parties in the subsequent action are the same or in privity with the parties to the prior action; (2) the claims in the subsequent litigation are, in substance, the same as those in the prior litigation; and (3) the earlier litigation resulted in a final judgment on the merits. *See Nevada v. United States*, 463 U.S. 110, 130 (1983); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

Bluepeace, the case on which the Appellee relies to preclude the Appellant from bringing suit, lacks the requirements to bar them from bring their suit. *See Bluepeace,* No. Civ. 98-27 (Coughlin Co. Sup. Ct., Jan. 5, 1999). First, the parties are not the same, nor are they in privity with one another. Secondly, there was no judgment on the merits of the case. While the issue in the lawsuit is similar, it is not sufficient to bar subsequent lawsuits.

C. The Appellants are not Precluded from Bringing this Action Based Upon the Rule of Collateral Estoppel.

Collateral estoppel precludes the re-litigation of any issue on the same claim as the first. BLACK'S LAW DICTIONARY 237 (5th ed. 1979). The defense of collateral estoppel arises when "an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral estoppel operates only when an issue has been fully litigated. *See id.* The purpose is to protect litigants from the burden of re-litigating the identical issue with the same party and to promote judicial economy by preventing needless litigation.

Blonder-Tongue Lab., Inc. v. University of Illnois Found., 402 U.S. 313, 328-29 (1971).

The rationale for issue preclusion is that the "victim" had a full and fair opportunity to litigate the matter in the first suit. *See* BLACK'S LAW DICTIONARY 746 (5th ed. 1979). Nevertheless, the Appellee relies on *Bluepeace*, to preclude the Appellants from bringing this action further. (R. at 9.) If a plaintiff could have easily joined in the earlier action, the use of collateral estoppel should be used to bar the plaintiff. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). New Union had no notice, thus was precluded from challenging the permit and participating in the prior lawsuit.

The Supreme Court, in *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963), found that if the previous case has not been "fully litigated" the doctrine of collateral estoppel does not bar a subsequent trial. *See Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555 (1963). Additionally, that issue cannot be re-litigated between the same parties in any future lawsuit. *See Harris v. Washington*, 404 U.S. 55, 56 (1971). However, in the present case, the *Bluepeace* court never went further than granting summary judgment. Furthermore, the parties are not the same, and there was no privity between Bluepeace Inc., FLT, and New Union. There was no final judgment, and thus, the Appellants are not precluded under collateral estoppel.

D. If the Court Does Rule on This Issue, Then it Should Hold That the Cross-Appellees are not Precluded.

There was no final judgment issued, nor was there sufficient notification given to New Union. Therefore, the Appellant (New Union) is not precluded by RCRA § 7002(b), res judicata, or collateral estoppel. The plaintiff in *Bluepeace*, was a distinctively different party than the ones bringing the present suit. *Bluepeace*, No. Civ. 98-27 (Coughlin Co. Sup. Ct., Jan. 5, 1999). A requirement of both res judicata and collateral estoppel is that the parties in both suits need to be identical or in privity. *See Nevada v. United States*, 463 U.S. 110, 130 (1983); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Furthermore, it is unfair to hold New Union responsible for the failure of Bluepeace Inc. to amend its complaint. There was no judgment on the merits, therefore, it would be unlawful to bar the Appellants from bringing this action forward. New Union is not prohibited from entering this suit under RCRA § 7002(b)(2)(A). New Union had no notice of the prior lawsuit, nor

was its interest fairly represented. If the court rules on the issue, it should hold that Buena Vista is not precluded from answering this suit.

CONCLUSION

Based on the foregoing reasons, the court should find for the State of New Union in all respects.