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Brief for the Appellant Friends of Lake Tokay, Inc.: 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
FRIENDS OF LAKE TOKAY, INC.*

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QUESTIONS PRESENTED

I. WHETHER PARTICULATE MERCURY EMITTED FROM BUENA VISTA'S SMOKE STACKS IS SOLID WASTE.

II. WHETHER FRIENDS OF LAKE TOKAY, INC. HAS STANDING TO FILE SUIT AGAINST BUENA VISTA UNDER RCRA SECTION 7002 AND ARTICLE III FOR VIOLATIONS OF THE CLEAN AIR ACT, WHEN ITS MEMBERS CAN NO LONGER EAT THE FISH FROM LAKE TOKAY BECAUSE MERCURY EMISSIONS FROM BUENA

* 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.

VISTA'S PLANTS CAUSED MERCURY BIOACCUMULATION IN THE FISH AND THE THREAT OF FUTURE INJURY EXISTS FROM EXPOSURE TO MERCURY IN THE LAKE.

III. WHETHER THE STATE OF NEW UNION HAS STANDING TO INTERVENE IN THE CITIZEN SUIT FILED BY FRIENDS OF LAKE TOKAY, WHEN THE CITIZEN SUIT PROVISIONS EXPRESSLY PROVIDE FOR INTERVENTION AS A MATTER OF RIGHT, THE STATE OF NEW UNION MEETS THE REQUIREMENTS OF RCRA SECTION 7002(b)(2)(E), AND FED. R. CIV. P. 24 PROVIDES FOR STATE INTERVENTION.

IV. WHETHER THE DISTRICT COURT HAS THE AUTHORITY TO ORDER ABATEMENT OF BUENA VISTA'S MERCURY EMISSIONS, WHEN THE CITIZEN SUIT PROVISIONS OF RCRA PROVIDE FOR INJUNCTIVE RELIEF, THE CLEAN AIR ACT IS NOT SO DETAILED AND PERVASIVE AS TO PRECLUDE RECOVERY UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, AND BUENA VISTA EMITS SOLID WASTE THAT FALLS WITHIN THE DEFINITION OF HAZARDOUS WASTE.

V. WHETHER THE CIRCUIT COURT HAS THE AUTHORITY TO RULE ON BUENA VISTA'S MOTION TO DISMISS WHEN ITS MOTION FOR SUMMARY JUDGMENT WAS DISPOSITIVE AND THE DISTRICT COURT DID NOT RENDER A DECISION.

VI. WHETHER FRIENDS OF LAKE TOKAY'S SUIT IS BARRED BY SECTION 7002 OF RCRA OR THE DOCTRINES OF PRECLUSION WHEN A CONCLUDED STATE COURT ACTION AGAINST THE SAME DEFENDANT DECIDED A SIMILAR CASE WITH SIMILAR FACTS UNDER STATE LAW, BOTH THE ADMINISTRATOR OF EPA AND THE STATE OF NEW UNION FAILED TO FILE SUIT, AND CONGRESS INTENDED CITIZEN SUITS TO BE FILED IN FEDERAL COURT.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations relevant to the determination of the present case are listed in the Table of Authorities.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

This is an appeal from an order entered by Judge R. N. Remus in the United States District Court for the District of New Union, rendered September 1, 1999, on the parties' cross motions for summary judgment. Appellant, Friends of Lake Tokay, Inc. ("FLT"), appeals the district court decision in favor of Buena Vista Power Company ("Buena Vista"), barring FLT's claim under the Clean Air Act ("CAA") and denying it standing. (R. at 5.) Buena Vista cross appeals the district court decision in favor of FLT, holding that the particulate mercury emitted by the Buena Vista plants is solid waste. (R. at 4.) In granting Buena Vista's motion for summary judgment, the district court did not reach its motion to dismiss and Buena Vista requests the Circuit Court to rule on its motion. (R. at 1, 5.) Appellant challenges the findings of the district court on both the standing issue and the proscription of FLT's suit by the CAA.

Statement of the Facts

FLT is a not-for-profit corporation organized for the protection of Lake Tokay ("Lake"), located in the State of New Union. (R. at 1, 3.) For over twenty years its members have enjoyed fishing on the Lake and dining on their catch. (R. at 4.) However, the New Union Department of Public Health issued a health advisory advising the public against eating the fish and banning the sale of fish from the Lake after it determined that fish from the Lake contained unacceptable levels of mercury. (R. at 4.) Although FLT's members are still able to fish there for pleasure, health risks associated with the mercury level in the fish make the consumption of any Lake fish untenable. (R. at 4.)

Buena Vista owns two coal-fired power plants in the nearby state of Blue Skies that emit particles of mercury from its smoke stack into the atmosphere. (R. at 3.) Buena Vista denies the mercury particles are transported through the air from Blue Skies to New Union where they fall directly into the Lake and onto land in the watershed of the Lake. The record is silent as to any other major source of mercury in the area, and does not speak to whether or not the mercury particles generated by Buena Vista stay within the state of Blue Skies. (R. at 3.) Nonetheless, EPA studies conclude that most of the mercury in the Lake is generated from Buena Vista's two power plants in Blue Skies. (R. at 4.)

Two of FLT's members complained that they were no longer able to eat fish from the lake, and FLT filed suit against Buena Vista under the citizen suit provision of section 7002 of the Resource Conservation and Recovery Act ("RCRA"), alleging that Buena Vista's emissions were causing an imminent and substantial endangerment to health and the environment. (R. at 4.) FLT sought an injunction to stop all mercury emissions from Buena Vista's plants, and New Union intervened. (R. at 3.) In considering the parties' cross motions for summary judgment, the district court held that even though the mercury particles are solid waste as defined by RCRA, FLT lacked standing to sue Buena Vista, and that the State of New Union need not prove standing. (R. at 5.) The district court further held that FLT and New Union's suit under RCRA was barred by the CAA. (R. at 5.) Buena Vista's motion to dismiss, alleging the concluded state action in *Bluepeace, Inc. v. Buena Vista Power Co.,* No. 98-27, slip op. (Coughlin Co. Sup. Ct. Jan 5, 1999), barred the present litigation under RCRA or the preclusion doctrines, was not considered or decided by the district court, since it deemed the motion for summary judgment dispositve. (R. at 5.)

SUMMARY OF THE ARGUMENT

The mercury emitted from Buena Vista's smoke stacks constitutes solid waste as defined under RCRA. The plain language of the statute indicates that the mercury particles are solid waste and are covered under RCRA. According to RCRA section 1004(3), waste which is eventually discharged or placed into or on any land or water may be regulated. Although the mercury emitted from the power plants is emitted into the air first, its resting place is on the land surrounding Lake Tokay and in the Lake itself.

The trial court incorrectly determined that FLT lacked standing to bring suit under section 7002 of RCRA. FLT meets all the requirements, both statutorily and constitutionally, to achieve standing in this case. EPA conducted studies which conclude that mercury particles contained in the emissions from Buena Vista's power plants in the state of Blue Skies are the source of most of the mercury found in the Lake. FLT brought this action in equity against Buena Vista under the citizen suit provision of section 7002 of RCRA because mercury levels in the Lake rose to the point that the New Union Department of Health issued a health advisory banning the sale of fish and cautioning against consum-

ing any fish from the Lake due to the potential of mercury poisoning. This prevents members of FLT from continuing their twenty-year tradition of eating the fish they catch from the Lake. Thus, Buena Vista's power plants are the source of an imminent and substantial endangerment, for which the only remedy under RCRA is in equity, and FLT meets the RCRA requirements to bring a citizen suit as well as organizational standing to represent its members.

Additionally, FLT has satisfied all of the Article III constitutional requirements for standing. FLT suffered an injury in fact which is fairly traceable to the mercury emitted by Buena Vista's smoke stacks. The injury is redressable by judicial action and is within the zone of interest sought to be protected by the statute.

The State of New Union has a dual right of intervention under RCRA section 7002(b)(2)(E) and Rule 24 of the Federal Rules of Civil Procedure because it is protecting the interest of its citizens who are affected by the mercury pollution. Its exclusion from this litigation would impair or impede its ability to protect this interest.

The lower court incorrectly determined that it did not have the equitable power to grant an injunction because the CAA was pervasive and preempted RCRA. The CAA is not comprehensive in all situations. The CAA only regulates air pollution that threatens ambient air quality standards. This leaves gaps in the Act's regulations, which are exemplified in cases such as this one. The CAA does not regulate power plants nor does it contain specific limitations on mercury emissions. Both of these factors are present in this case. RCRA, on the other hand, grants citizens and courts broader coverage and remedies. If there is a situation that presents an imminent and substantial endangerment, then a citizen may bring suit. The mercury emitted from the smoke stacks presented this endangerment when it contaminated the water and the fish in the Lake. Congress intended to make available a course of action in circumstances such as this. Therefore, the lower court did have the equitable authority to grant an injunction under RCRA.

Moreover, the Circuit Court is precluded from considering Buena Vista's motion to dismiss because the district court did not render a decision on it. It is well settled within Title 28 of the U.S. Code that courts of appeals only have jurisdiction to review decisions rendered by the trial court. Thus, when no decision has been

rendered by the district court, the circuit court has nothing to review.

However, in the event this Court determines that it does have the authority to review the pending motion, FLT's claim is not barred under section 7002 of RCRA or the doctrines of collateral estoppel or res judicata. When Congress enacted RCRA, it intended that citizens have the right to bring a private cause of action against polluters when both the Administrator of the EPA and the state fail to diligently prosecute polluters for causing imminent and substantial endangerment to health or the environment. Moreover, this is a federal claim brought in federal court by a plaintiff who was unable to intervene in the state suit in Blue Skies. The state action, based on a state claim for trespass and nuisance, is not based on imminent and substantial endangerment, and thus the doctrines of collateral estoppel and res judicata do not apply.

Consequently, FLT requests the circuit court affirm the district court's ruling that mercury is a solid waste. Since the district court erred in determining that FLT has no standing to bring this claim and that the CAA prevents courts from granting injunctive relief, FLT respectfully requests that this Court reverse the judgment entered by the district court and remand for a full trial on the merits of the case. FLT further requests this Court to deny Buena Vista's petition to review its pending motion to dismiss.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PARTICULATE MERCURY EMITTED FROM BUENA VISTA'S SMOKE STACKS IS SOLID WASTE BECAUSE THE PLAIN LANGUAGE OF RCRA AND CONGRESSIONAL INTENT INDICATE THE MERCURY PARTICLES ARE SOLID WASTE.

Friends of Lake Tokay, Inc. brought this claim under the citizen suit provision of the Resource Conservation Recovery Act, which has been codified in Title 42, § 6972(a)(1)(B) of the United States Code. This section provides in pertinent part that "[a]ny person may commence a civil action on his own behalf . . . against any person . . . who has contributed . . . 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). The district court correctly held that mercury was a solid waste under section 7002 of RCRA. The determination of whether mercury is a solid waste under RCRA and EPA regulations is one of statutory construction and legislative intent.

The issue of whether mercury emissions are solid waste under RCRA is solved by looking at the statutory construction employed by Congress. The first step in statutory interpretation is analysis of the language itself. As the Supreme Court explained, "[t]he starting point in every case of statutory construction is the language employed by Congress." *Zands v. Nelson*, 779 F.Supp. 1254, 1261 (S.D. Ca. 1991) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). Under RCRA, hazardous waste is a subset of solid waste. *See* RCRA § 1004(5), 42 U.S.C. § 6903(5). For a waste to be classified as hazardous it must first qualify as a solid waste. *See id.* Therefore, before deciding whether Buena Vista's mercury emissions are covered under RCRA, it must be proven that the particles are solid waste.

RCRA defines the term solid waste as "any . . . discarded material." *Id.* The statute does not define "discarded" but the Code of Federal Regulations defines "discarded" as any material that is abandoned. *See* 40 C.F.R. § 261.2(a)(2) (1999). The Code also states that materials are solid wastes if they are "abandoned" by being "disposed" of. *See* 40 C.F.R. § 261.2(b) (1999). The statutory definition of disposal is synonymous with "discarded," and is the "discharge . . . or placing of any solid waste or hazardous waste into or on any land or water." RCRA § 1004(3), 42 U.S.C. § 6903(3).

Despite the apparent ambiguity in these circuitous definitions of solid and hazardous waste, it is clear that solid waste has a very broad definition. In the present case, the lower court held that the mercury particles emitted from Buena Vista's plants fit into the broad definition of solid waste. The district court correctly reasoned that the mercury particles are discharged out of the plants' stacks, come to rest on the land surrounding the Lake, and eventually enter the Lake. (R. at 5.) As such, the mercury particles at issue here clearly fit the statutory definition of solid waste. Statutory analysis indicates that mercury particles are a discarded material because they are abandoned. Next, they are abandoned because they are disposed of. Finally, they are disposed of because the mercury particles from Buena Vista's plants' comport with the requirement of RCRA section 1004(a); they are "discharged or

placed onto or on land or water such that they enter the environment, air or water," which in this case is the land surrounding Lake Tokay and the Lake itself. RCRA § 1004(a), 42 U.S.C. § 6903(a).

The District Court for the Southern District of California has dealt with the issue of defining and determining what constitutes solid waste. *See Zands,* 779 F.Supp. 1254. The court in *Zands* had to decide whether leaking gas was a solid waste. *See id.* at 1257. The plaintiffs alleged that during the time the defendants owned the property in question, large amounts of gasoline leaked into the soil and groundwater. *See id.* at 1262. The defendants argued that gasoline was a useful product and, thus, was not a discarded material. Since it was not discarded, it was not a solid waste. *See id.* However, the court held that gasoline is no longer a useful product after it leaks into, and contaminates, the soil. *See id.* As a result, the court determined that the gasoline was abandoned via the leakage into the soil and fit the broad definition of solid waste as a discarded material. *See id.*

The courts dealt with a comparable situation when the federal government brought suit against owners and operators of a metal refinishing facility for improper treatment, disposal, and storage of hazardous waste. *See United States v. Power Eng'g Co.,* 10 F.Supp. 2d 1145 (D. Colo. 1998). The court was faced with the issue of whether hexavalent chromium condensate mist was solid waste under RCRA. The defendants contended that because the air scrubbers discharge the condensate into the air, the discharge does not constitute placement of solid waste "into or on any land or water." *Id.* at 1158. The court did not agree with the defendant's argument. *See id.* The court reasoned that the condensate eventually settled onto the land and, thus, fit the broad definition of disposal. *See id.* Additionally, because the facility "disposed" of the condensate, it constitutes "discarded material" and, therefore, "solid waste." *See id.*

Although the courts in *Zands* and *Power Engineering Company* did not deal with mercury, the methodology the courts used in determining what constitutes solid waste is analogous to the facts in the present case. The mercury particles emitted from the smoke stacks and discarded onto the surrounding ground and water are no longer "useful products." The *Zands* court recognized that solid waste is defined broadly and that "solid waste is 'any discarded material.'" *Zands* at 1252. By this definition alone, the mercury was clearly discarded from the smoke stacks. Addi-

tionally, the facts in *Power Eng'g Company* are similar to the facts presented in this case. The mercury found on the ground was emitted from Buena Vista's smoke stacks just as the condensate was emitted from Power Engineering Company's air scrubbers. *See Power Eng'g Co.* at 1149. The court ruled that eventually the condensate made it to the ground and was thus discarded. *See id.* at 1165. The scenario is identical here. Although the mercury particles were discharged into open air, they were eventually discarded onto the soil surrounding the Lake. (R. at 4.)

Statutory interpretation indicates that mercury particles are solid waste. The regulations and statutes are dense, turgid, and circuitous. However, a careful reading of the chain of definitions indicates that a material is a solid waste if it is discharged or placed onto land or water. *See* RCRA § 7002(a)(1)(B).

Beyond statutory interpretation, Congress intended to have a strict regulatory regime in place for people who dealt with hazardous waste, so they created the "cradle to grave" concept. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331 (1994). Once a showing has been made that a material is a solid waste under section 7002 of RCRA, a person can also prevail by demonstrating that the defendant handled, stored, treated or transported solid waste from its cradle to its grave. *See id.* Buena Vista's mercury emissions violate the "cradle to grave" concept intended by Congress.

Case law also indicates that solid waste is defined very broadly and is left to statutory interpretation. *See Zands,* 779 F.Supp. at 1262. For this reason, the Court should uphold the lower court's ruling that mercury particles emitted from Buena Vista's smoke stacks are solid waste for purposes of RCRA.

II. THE DISTRICT COURT ERRED IN HOLDING THAT FRIENDS OF LAKE TOKAY, INC. HAS NO STANDING TO FILE SUIT AGAINST BUENA VISTA BECAUSE FRIENDS OF LAKE TOKAY FALLS WITHIN THE CITIZEN SUIT PROVISIONS OF RCRA AS WELL AS ARTICLE III STANDING REQUIREMENTS OF THE CONSTITUTION.

In order to establish a prima facie case for a citizen suit under RCRA, a plaintiff must demonstrate that the alleged endangerment stems from solid or hazardous waste as defined by RCRA, that the endangerment is imminent and substantial, and that the defendant has contributed to, or is contributing to, the handling,

storage, treatment, transportation, or disposal of the waste at issue. *See* RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

A. FLT Meets the Requirements to Bring a Citizens Suit Under RCRA Section 7002.

FLT is an environmental advocacy group and has standing to bring this action by virtue of its members. Organizations such as FLT may assert standing if they can show that (1) the organization's members would have standing to sue on their own; (2) the interest the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires individual participation by its members. *See L.E.A.D. v. Exide Corp.,* No. CIV. 96-3030, 1999 WL 124473, at *20 (E.D. Pa. Feb. 19, 1999) (quoting *Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 70 (3d Cir. 1990)).

The Eastern District of Pennsylvania similarly dealt with this issue when Exide argued that the plaintiff environmental organizations had no standing to sue for alleged water and air pollution claims. *See id.* at *20. However, the organizations each had members who had standing to sue in their own right. These members lived by the facility and attested to offensive odors and visibility problems stemming from the facility emissions, which constrained their outdoor recreational activities. *See id.* at *13. The district court in that case found that the organizations had standing to sue because members of the organizations had a sufficient connection to the dispute and would have standing to sue in their own right. *See id.* at *20.

In this case, the affidavits of FLT members Steven Jones and Artimus Winfred demonstrate that they both had standing to sue in their own right because they were no longer able to enjoy their long standing tradition of eating the fish they caught from the Lake due to the risk of mercury poisoning. (R. at 4.) Their enjoyment from fishing on the Lake has been diminished, establishing a sufficient connection to the dispute to assert standing. Thus, FLT satisfies the first prong of the organizational standing test set forth in *L.E.A.D.*, because its members have suffered an injury in fact and would have standing to sue in their own right. Since FLT was organized solely for the protection of the Lake, the interest it seeks to protect is germane to its purpose, and the second prong of the *L.E.A.D.* test is satisfied. Finally, the asserted claims do not require the participation of individual members. Since FLT meets the three-prong test set forth in *L.E.A.D.*, this Court should

hold it has organizational standing to sue on behalf of its members who have standing.

Secondly, Buena Vista contributes to the disposal of solid waste by virtue of the cradle-to-grave concept. When Congress enacted RCRA, it sought to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. REP. NO. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. Once it has been shown that a material is a solid waste under section 7002 of RCRA, a person can also prevail by showing the defendant improperly handled, stored, treated or transported solid waste. *See id.* As previously discussed, Buena Vista's mercury emissions violate the cradle-to-grave concept intended by Congress because it disposes of solid waste through its emissions into the air, with its resting place in the Lake and its surrounding land.

Finally, to assert standing in a RCRA citizen suit case, the plaintiff must show that the solid waste presents an imminent and substantial endangerment to health or the environment. *See* RCRA § 7002(a)(1)(B). RCRA's waste management criteria for facilities are designed not only to prevent but also to mitigate endangerments to public health and the environment. *See* H.R. REP. NO. 94-1491, at 4 (1976).

A finding of "imminency" does not require a showing that a concrete harm will occur immediately so long as the risk of threatened harm is present. *See Environmental Defense Fund v. EPA,* 465 F.2d 528, 535 (D.C. Cir. 1972). Moreover, the word "may" was intended by Congress to provide the courts with broad equitable powers that are not limited to emergency situations, but rather extend to eliminating any risk posed. *See United States v. Price,* 688 F.2d 204, 214 (3d Cir. 1982).

In considering whether to grant injunctive relief to the government against the owners of a former landfill to correct hazards created by past chemical dumping, the Third Circuit reviewed the Eckhardt Report (H.R. COMM. PRINT NO. 96-IFC, at 3 (1979)) to assess whether the hazardous waste was an imminent and substantial endangerment. *See Price* at 213. The *Price* court relied on the Eckhardt Report's definition of "imminent" as pertaining to the "nature of the threat" rather than "identification of the time" when the endangerment initially arose, and held that Congress intended RCRA to authorize the cleanup of a site if that action is necessary to abate a present threat to the public health or the environment. *See id.* at 214.

In 1999, the Eastern District Court in Pennsylvania held that the risk for harm should be great, but neither the term "imminent" nor "endangerment" required a showing of actual harm. *See L.E.A.D. v. Exide Corp.,* No. Civ. 96-3030, 1999 WL 124473, at *8 (E.D. Pa. Feb. 19, 1999) (citing *Dague v. City of Burlington,* 935 F.2d 1343, 1356 (2d Cir. 1991) (*rev'd in part on other grounds,* 505 U.S. 557 (1992)). In *L.E.A.D.*, the Pennsylvania court determined that the ongoing presence of lead in the soil around Exide's facility was at least sufficient to leave an issue of material fact for the court to consider as to ongoing endangerment. *See id.* at *6.

Courts have consistently held that "endangerment" means a threatened or potential harm and does not require proof of actual harm. *See Dague* at 1356. In *Dague*, the Second Circuit upheld the district court's finding that a landfill presented an imminent and substantial endangerment to health and environment. The district court reasoned that hazardous chemicals leaking into the soil and into groundwater which was toxic to freshwater aquatic life impacted water quality. *See id.* The court further affirmed that toxic chemicals found in groundwater wells had increased over time, were bio-accumulating in another area, and were an imminent endangerment, even though the actual harm threatened had not yet occurred. *See id.* By citing *Environmental Defense Fund v. EPA,* 465 F.2d 528, 535 (D.C. Cir. 1972), the *Dague* court reiterated that an "imminent hazard may be declared at any point in a chain of events which may ultimately result in harm to the public." *Dague* at 1356.

In the case at hand, the New Union Department of Health issued a health advisory notifying the public that regularly eating fish in the Lake would cause mercury poisoning. (R. at 4.) Moreover, the health department banned the sale of fish, and advised against consumption of any fish from the Lake. *See id.* Even though no reported cases of mercury poisoning have arisen, the threat of mercury poisoning and risk for harm from mercury poisoning creates an imminent and substantial endangerment to public health. Additionally, the environment has already been affected because mercury has bioaccumulated in fish in the Lake.

The EPA report concluded that most of the mercury in the Lake originated from Buena Vista's plants and that the air pollution emissions from Buena Vista's two power plants emit particulate mercury. (R. at 4.) Mercury has been held to be a solid waste. Buena Vista disposes of the mercury into the Lake, and mercury bioaccumulates in the fish from the Lake and is hazardous to peo-

ple's health if they eat it. Therefore, FLT's members have diminished use and enjoyment of the Lake because an imminent and substantial endangerment exists. Thus, the elements to assert standing and a prima facie case under RCRA section 7002 have been met.

B. FLT Satisfies Article III Constitutional Requirements for Standing.

Under the Constitution, Article III limits the jurisdiction of the federal courts to an actual "case or controversy." *Allen v. Wright,* 468 U.S. 737, 750 (1984). The Supreme Court has defined the constitutional requirements for standing through case law. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The three requirements FLT members must meet to assert standing are actual injury, causation, and redressability. *See id.* The relevant test to determine standing is whether the interest to be protected is arguably within the zone of interest contemplated by the statute.

1. A member must suffer actual injury.

Members of FLT suffered actual injury from the complained-of action. A diminished use and enjoyment of a natural resource constitutes an injury that satisfies standing. *See Sierra Club v. Chemical Handling Corp.*, 778 F.Supp. 24 (D. Colo. 1991). *Sierra Club* held that the "[s]tanding requirement for [an] environmental organization's citizen suit under Resource Conservation and Recovery Act was satisfied by [the] alleged injury diminishing organization members' use and enjoyment of air and soils in [the] neighborhood of defendant's facility and threatening members' health and welfare." *Id.*

FLT members Steven Jones and Artimus Winfred can no longer keep and eat the fish they catch from Lake Tokay due to health risks associated with mercury pollution. Their use and enjoyment of the Lake, a natural resource, has been substantially diminished even though they continue to fish. Therefore, FLT members have suffered an injury. This is an actual injury to the members of FLT because they live near and use the Lake that has been directly affected by Buena Vista's mercury pollution. Diminished use and enjoyment is sufficient to meet the standing requirement in *Sierra Club* and is sufficient in this case as well.

Likewise, the potential threat of future harm or injury is also a factor in determining standing. The court in *Supporters to Oppose Pollution, Inc. v. Heritage Group,* 973 F.2d 1320 (7th Cir. 1992), held that a "citizens group representing persons living close to the landfill, which had at least the potential to injure them, was constitutionally permitted to litigate to enforce RCRA." *Id.* Moreover, the citizen suit provision of RCRA implies that there must be a threat that is present now, although the impact of that threat may not be felt until later. *See Raytheon Co. v. McGraw-Edison,* 979 F.Supp. 858 (D. Wis. 1997).

Congress recognizes the potential for injury from mercury poisoning and is diligently attempting to establish regulations concerning the operation of fossil-fuel fired electric utility steam generating units, among other units, to reduce emissions of mercury into the environment. *See* Omnibus Mercury Emissions Reduction Act of 1999, H.R. REP. NO. 2667 (Aug. 2, 1999). New standards for mercury emissions and the potential risks to the environment and to human health from mercury pollution are being set. *See id.* Congress has specifically recognized that mercury pollution is harmful to children and pregnant women, including their fetuses, in contracting neurotoxicity, and that exposure can occur through eating mercury contaminated fish, drinking water or other contaminated food sources, dermal uptake through soil and water, or from inhalation of contaminated air. *See id.*

There is current injury and the potential of future injury in the present case. FLT members have the potential to be harmed from eating the fish or from some future injury. Potential risks to their health and environment include exposure through drinking contaminated water, coming in contact with the soil surrounding the Lake and water in the Lake, or from inhalation of contaminated air. All of these are possible injuries which pose a present and future threat to FLT members. Based on the holdings in *Supporters to Oppose Pollution* and *Raytheon,* this Court should find that current injury and the potential for future injury exist in the case at hand and that FLT meets the standing requirement of actual injury.

2. The injury must be fairly traceable to the challenged act.

The injury in this case is fairly traceable to the challenged act. The case or controversy limitation of Article III of the Constitution requires that a court act only to redress injury that can be

fairly traced to the challenged action of the defendant. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, (1976). A plaintiff does not need to prove causation with absolute scientific rigor because the "fairly traceable" requirement is not the same requirement as the one in tort causation. *See Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990). The court simply requires that the plaintiffs demonstrate that they are more than "concerned bystanders" and that there is a "substantial likelihood" that the defendants' conduct caused the plaintiff's harm. *See id.* (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 (1978)).

Buena Vista owns and operates two mine-mouth, coal-fired power plants in Blue Skies. (R. at 3.) The coal burned in the plants contains mercury that, after combustion, is partially released into the air and atmosphere. *See id.* FLT and New Union assert that these mercury particles are transported through the atmosphere where they fall into the Lake or the watershed of the Lake. (R. at 4.) The EPA conducted studies which conclude that most of the mercury in the Lake originates from Buena Vista's two power plants in Blue Skies. *See id.* Additionally, the New Union Department of Public Health issued a health advisory, giving notice that the fish living in the Lake contain levels of mercury that could eventually cause mercury poisoning in humans. *See id.* Thus, the EPA report and the New Union health advisory indicate the mercury in the Lake is "fairly traceable" to Buena Vista's coal-fired power plant emissions.

3. The injury must be redressable by judicial action.

The injury in this case is redressable by judicial action. A plaintiff must show that his injury is "likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). FLT filed an action to abate the endangerment under section 7002 of RCRA, which gives this Court the authority to grant injunctive relief. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996).

The Supreme Court analyzed whether a defendant could be held responsible for monetary damages associated with past cleanup efforts under the citizen suit provisions of RCRA. *See id.* The Court interpreted the plain meaning of the statute to imply that a citizen suit brought under RCRA could seek a "mandatory injunction, one that orders the responsible party to 'take action' by

attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, one that 'restrains' a responsible party from further violating RCRA," but that RCRA did not contemplate the award of monetary damages. *Id.*

The lower court held that FLT's injuries were redressable in an action at law based on *Davies v. National Coop. Refinery Ass'n.*, 963 F.Supp 990 (D. Kan. 1997) (ruling that the plaintiffs did not have standing because having to use bottled water instead of ground water was redressable in an action at law and therefore not redressable through injunctive relief). However, under the Supreme Court's holding in *Meghrig*, FLT's injuries are redressable through injunctive relief. According to *Meghrig*, it is the only relief allowed under the citizen suit provisions of RCRA. Thus, FLT's injuries are redressable by the court.

4. The Injury Must be Within the 'Zone of Interest' Sought to be Protected or Regulated by the Statute.

Another relevant test in determining standing is whether the plaintiff alleged that the challenged action caused him injury in fact and whether the interest to be protected is arguably within the zone of interest sought to be regulated by the statute. *See Association of Data Processing Serv. Org. v. Camp,* 397 U.S. 150 (1970).

The purpose of section 7002 of RCRA is to protect against persons contributing to the past or present handling or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. Buena Vista is disposing of a solid waste that presents an imminent and substantial endangerment to health and the environment through the mercury levels in the fish from Lake Tokay. *Camp* further held that such interest "may reflect aesthetic, conservational and recreational as well as economic values." *Id.* FLT's members have lost their long-time recreational use of sport fishing because they are not allowed to keep and eat the fish themselves nor share it with friends, due to the health risks associated with eating mercury-laden fish. Furthermore, the potential of future injury may result from mercury inhalation or consumption of the lake water.

Therefore, the injury in this case is within the zone of interest sought to be protected by the statute and the Court should redress this endangerment. Conclusively, FLT and its members meet all of the requirements to achieve standing under RCRA and Article III. It has suffered an injury from the complained action, the in-

jury is fairly traceable to the defendant's emissions, the injury is redressible by judicial action and the injury is within the zone of interest sought to be protected by the statute. Accordingly, FLT requests that it be granted standing and the lower court's judgment on this issue reversed.

III. THE DISTRICT COURT CORRECTLY HELD THAT NEW UNION HAS STANDING TO INTERVENE IN THIS CASE.

The State of New Union has a dual right of intervention under both section 7002 of RCRA and FED. R. CIV. P. 24 because it is protecting the interest of its citizens in New Union, who are affected by the mercury pollution, and its exclusion from this litigation would impair or impede its ability to protect this interest.

A. A State Has Standing to Intervene in a Citizen Suit to Protect the Rights of its Citizens via RCRA Section 7002 (b)(2)(E).

New Union has a right of intervention under RCRA section 7002 (b)(2)(E), which states in pertinent part that:

> [I]n any action under subsection (a)(1)(B) of this section . . ., any 'person' may intervene as a matter of right when the applicant claims an interest relating to the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest . . ..

Id.

A state has been held to be a person and its right of intervention as a person under RCRA has been established through case law. In 1992, the Supreme Court held that "A [s]tate is a . . . 'person' under [the] Resource Conservation and Recovery Act (RCRA) and is thus entitled to sue under the citizen suit sections of those Acts." *United States Dep't. of Energy v. Ohio,* 503 U.S. 607, 616 (1992). Therefore, based on this definition of "person," New Union is entitled to intervene in the present case because "any person may intervene as a matter of right when the applicant claims an interest relating to the action." RCRA § 7002(b)(2)(E).

Additionally, case law has interpreted the primary purpose and policy behind the notice and delay provision of RCRA as a method of providing government agencies with the opportunity to intervene in cases. *See Zands,* 779 F.Supp. at 1259. A state's

right to intervene is an essential one that has been protected through the use of statutory requirements and case law interpretation of those statutes.

B. A State Has Standing to Intervene in a Citizen Suit as a Matter of Right Under FED. R. CIV. P. 24.

Similar to the RCRA intervention statute, FED. R. CIV. P. 24(a) states that New Union may intervene as a matter of right in this case. Specifically, FED. R. CIV. P. 24(a)(1) states that "upon timely intervention anyone shall be permitted to intervene in an action when a statute of the United States confers an unconditional right to intervene . . . ." As previously discussed, the RCRA statute confers a right to intervene in cases brought under RCRA.

Furthermore, New Union has an interest in the affected property. The Lake is located within its boundaries and is a natural resource to be protected by the State. FLT's present interest is limited to its members' injuries and protecting the Lake. On the other hand, New Union's interest is inherent in protecting all of its citizens and maintaining its natural resources for its citizens. The district court in this case affirmed that a state automatically has standing to sue for any injuries alleged to occur in the public domain within its boundaries and, therefore, New Union does not need to plead standing. (R. at 4, 7.) New Union asserts in its complaint that the Lake is within the public domain and is wholly within its boundaries. (R. at 7.) Thus, New Union is within the scope of FED. R. CIV. P. 24(a)(2) and has a sufficient basis to assert standing.

Conclusively, New Union has a right to intervene in this case under section 7002(b)(2)(E) of RCRA and FED. R. CIV. P. 24 because it has standing to protect its citizens and natural resources from injury. Furthermore, excluding New Union from this litigation would impair or impede its ability to protect this interest. Therefore, FLT respectfully requests this Court to affirm the lower court's judgement on this issue and affirm New Union's standing.

IV. THE DISTRICT COURT HAS THE AUTHORITY UNDER RCRA TO ORDER ABATEMENT OF BUENA VISTA'S MERCURY EMISSIONS WHEN RCRA AUTHORIZES CITIZEN SUITS IN RESPONSE TO IMMINENT AND SUBSTANTIAL ENDANGERMENT.

A. Buena Vista Disposes of Hazardous Waste as Indicated in RCRA section 3004.

RCRA, also known as the Solid Waste Disposal Act, is a comprehensive environmental statute that gives the EPA the power to regulate the treatment, storage and disposal of solid and hazardous waste "from cradle to grave." *City of Chicago v. Environmental Defense Fund,* 511 U.S. 328, 331 (1994). Although Buena Vista's power plants emit mercury from its smoke stacks, these emissions also constitute the disposal of hazardous waste.

As previously argued, and correctly decided by the lower court, mercury is a solid waste governed under RCRA. The Code of Federal Regulations ("C.F.R.") states that materials are solid wastes if they are "abandoned" by being "disposed" of. *See* 40 C.F.R. § 261.2(b) (1999). Disposal is defined as the "discharge, deposit, . . . or placing of any solid waste or hazardous waste into or on any land or water." RCRA § 1004(3), 42 U.S.C. § 6903(3). Therefore, Buena Vista's plants not only emit hazardous waste into the atmosphere, but they also dispose of hazardous waste when mercury particles are discharged onto the surrounding land and water. It is clear from the plain language of RCRA that Congress intended RCRA to regulate circumstances where hazardous waste is disposed of, as is the case here.

B. Regulation of Buena Vista's Plants Under the CAA, Is Not Detailed and Pervasive.

The CAA only regulates those sources of air pollution that threaten national ambient air quality standards. *See* Todd Westersund, *Are Insignificant Emissions Significant? The Air Operating Permit Program of the Clean Air Act*, 27 ENVTL. L. 991, 992 (1997); *see also* 42 U.S.C. § 7401 *et. seq.* Because the CAA specifically regulates national ambient air quality standards, it does not allow for comprehensive coverage of hazardous waste issues such as the ones presented in this case.

One area the CAA does not presently regulate is the emission limitation of mercury applicable to power plants. The EPA has

promulgated mercury emission limitations under the CAA, however, they do not apply to power plants. "The provisions of this subpart are applicable to those *stationary sources* which process mercury ore to recover mercury . . . ." 40 C.F.R. § 61.50 (1999) (emphasis added). FLT brought suit because air pollution emissions from Buena Vista's two power plants are the source of mercury on the surrounding land and in Lake Tokay. However, the CAA does not provide for the appropriate regulation in this case.

Another example of the CAA's non-pervasive regulation of air pollution is in the promulgated standards for fossil-fueled power plants that do not contain limitations on mercury emissions. *See* 40 C.F.R. §§ 60.40, 60.40(a) (1999). Mercury is the waste at issue in the present case. The CAA may be comprehensive in other situations but it does not provide for the appropriate comprehensiveness in this situation. In this case, the CAA does not establish a complete regulatory procedure whereby mercury emission limitations are identified and air quality standards are set and enforced.

The Supreme Court of the United States dealt with a similar issue concerning the pervasiveness of regulatory environmental acts in comparison to other methods of regulation in the *City of Milwaukee v. Illinois,* 451 U.S. 304 (1981). The *Milwaukee* case dealt with the need for lawmaking of federal courts when Congress addressed the issue of pollution in the Federal Water Pollution Control Act ("FWPCA"). *See id.* at 312-317. Illinois sued the City of Milwaukee and the sewage commission alleging that untreated sewage overflows and inadequately treated sewage discharged into Lake Michigan from its treatment plants caused a threat to the health of Illinois citizens when transported by the lake currents to Illinois water. *See id.* at 304. Illinois filed its claim seeking abatement under federal common law for the public nuisance allegedly created by the discharge. *See id.* After Illinois brought its claim, Congress passed the FWPCA Amendments of 1972 that established a system of regulation that made it illegal for anyone to discharge pollutants into the nation's water unless they have a permit. *See id.* The Supreme Court held that no federal common law remedy was available to Illinois to seek abatement of the nuisance caused by water pollution from the defendant's facilities. *See id.* at 312-317. The Court felt in this specific case, that where the statutory scheme occupies the specific field of pollution with a comprehensive regulatory program that addresses the problem, a federal common law remedy for the abatement is not available. *See id.*

The test developed in the Milwaukee case led to courts contemplating whether a federal common law cause of action for nuisance is, under the circumstances, pre-empted by the CAA. *See New England Legal Found. v. Costle* 666 F.2d 30 (2d Cir. 1981); *United States v. Kin-Buc, Inc.,* 532 F. Supp. 699 (D.N.J. 1982) (ruling that the Clean Air Act does not flatly pre-empt actions in the area of air pollution based upon the federal common law of nuisance; however, under these specific circumstances, Congress had directly addressed the problem at hand).

Additionally, courts have held that actions under the federal common law of nuisance were not precluded by the CAA. The court in *California Tahoe Reg'l Planning Agency v. Jennings,* 594 F.2d 181 (9th Cir. 1979), *cert. denied,* 444 U.S. 864, ruled that the federal common law of nuisance was not precluded by the CAA. *See id.* at 194. There, the Regional Planning Agency appealed the district court's grant of Jennings' motion to dismiss and denial of its motions for temporary injunction and for summary judgment to prevent the construction of four hotel-casinos on the shore of Lake Tahoe. *See id.* at 184. The Regional Planning Agency asserted that the Jennings' projects would create a nuisance by attracting more cars and people to the Basin. *See id.* at 193. Although the court ruled that the building of high rise hotels did not constitute a nuisance, the court did determine that federal common law nuisance actions are valid and not precluded by the CAA or the FWPCA. *See id.* The court looked to the language of the statutes and reasoned that "the CAA and the FWPCA each have citizen suit provisions professing not to restrict any right which any person . . . may have under any statute or common law." *Id.* at 192. The court recognized that Congress did intend for other actions under statute or common law to be available to citizens. *See id.*

Similarly, a court held that, in enacting the CAA, Congress did not divest the right to sue for injunctive relief under the common law of nuisance in air pollution cases. *See United States v. Atlantic-Richfield, Co.,* 478 F.Supp. 1215 (D. Mont. 1979). In *Atlantic,* the United States brought an action against alleged air polluters seeking damages for past injury to trees and wildlife and an injunction ordering defendants to reduce fluoride emissions to a level that would not cause further death or injury to vegetation and wildlife. The defendants argued that common law relief was not available because the congressional act preempted common law remedies. *See id.* at 1218. The court ruled that there was no

express language in the Act divesting the plaintiff of its injunctive remedies; nor was there a clearly manifested intent to make the CAA remedy the exclusive remedy. *See id.* at 1219.

The present case is analogous to the issues and arguments presented above. RCRA is a statutory regulation enacted by Congress. *See* 42 U.S.C § 6901. This Act empowers the federal government to regulate activities concerning solid and hazardous waste. *See id.* The lower court incorrectly reasoned that Congress intended the CAA to preclude RCRA. The *Milwaukee* court held that the specific circumstances in that case led to the FWPCA overriding a common law remedy. *See City of Milwaukee,* 541 U.S. at 312-317. Courts have also affirmed that the CAA does not preempt other remedies in all circumstances. Thus, courts have recognized that the CAA is not a comprehensive scheme to regulate air pollution. Congress intended for people to have the ability to seek various remedies, whether it is a common law remedy or it is a statutory remedy such as RCRA.

In the present case, the CAA does not specifically deal with the circumstances involved. The CAA does not contain regulation for mercury emissions that come from power plants; nor does it contain limitations on mercury emissions. The CAA does not address all the specific circumstances in the present case and, thus, it is not comprehensive and pervasive. Although Congress did intend to avoid duplication within the regulatory statutes, Congress also indicated that "such integration shall be affected only to the extent that it can be done in a manner consistent with the goals and polices expressed in this chapter and in the other acts . . . ." RCRA § 1006, 42 U.S.C. § 6905. This is a case where duplication is avoided. It is apparent that the CAA does not provide for complete coverage in this situation. Therefore, as case law and Congress indicate, other remedies are available and should be sought out in order to achieve the overall policy of environmental statutes. For this reason, courts do have equitable discretion under RCRA to grant injunctive relief.

C. The Broad Language in Section 7002(a)(1)(B) Authorizes District Courts to Exercise Equitable Authority to Order Injunctive Relief.

RCRA was enacted in 1976 to provide technical and financial assistance for the development of management plans and facilities to regulate the management of hazardous waste. *See* 135 A.L.R. Fed. 197 (1996). In 1984, RCRA was amended to assure adequate

protection of public health and the environment. *See id.* Specifically, section 7002(a)(1)(B) of RCRA confers upon private plaintiffs a right to obtain relief from a federal district court. The lower court erred in concluding that it did not have the equitable authority under RCRA to order abatement of mercury emissions. The broad language of section 7002 requires district courts "to take such other action as may be necessary" in cases where private plaintiffs establish the liability of other parties for conditions that may present an endangerment to the environment or health. RCRA § 7002(a)(1)(B). RCRA authorizes the federal government to regulate activities concerning solid waste and hazardous waste.

RCRA also contains citizen suit provisions that authorize private parties to commence civil action in response to waste activities that present an "imminent and substantial endangerment." RCRA § 7002(a)(1)(B). Section 7002 allows private citizens and other "persons" to bring a civil suit against any person alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order under the Act. *See* RCRA § 7002(a)(1)(A). However, unlike other environmental statutes, RCRA also authorizes citizen actions to address imminent hazards. *See* RCRA § 7002(a)(1)(B).

The Supreme Court has observed in cases involving citizen suit provisions, "the starting point for interpreting a statute is the language of the statute itself." *Hallstrom v. Tillamook County,* 493 U.S. 20, 25 (1989); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 56 (1987). The language of RCRA states that any person may commence a suit against any person who is contributing to "the past or present handling, . . . or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or environment." RCRA § 7002(a)(1)(B). The legislative history supports the natural reading of the statute. For example, Congress broadened the scope of section 7002(a)(1)(B) of RCRA in the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401(a)-(b), 98 Stat. 3268-3269. The House committee report explaining those amendments states that RCRA "confers on a citizen a limited right to sue to abate an imminent and substantial endangerment" pursuant to liability standards under § 7003 of RCRA, which "will complement, rather than conflict with, the Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources." H.R. REP. NO. 98-

198, at 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5612; *see also* S. REP. NO. 98-284 (1983). The committee report makes it clear that Congress used broad language in the statute in order to avoid restricting a citizen's right to sue.

RCRA authorizes a citizen suit whenever hazardous waste activities "may present an imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B). Courts have recognized that this language provides relief in a broad variety of circumstances. *See, e.g., Dague v. City of Burlington,* 935 F.2d 1343 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *Comite Pro Rescate de La Salud v. Puerto Rico Aqueduct & Sewer Authority,* 888 F.2d 180 (1st Cir. 1989) (dealing with factory waste), *cert. denied*, 494 U.S. 1029 (1990). Through the courts' recognition of certain statutory terms, they have held that the phrase "may present an imminent and substantial endangerment" indicates that a citizen may bring suit if there is a reasonable possibility of imminent danger. *Dague,* 935 F.2d at 1355-1456 (holding that the language does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present) (quoting *Environmental Defense Fund v. Envtl. Protection Agency,* 465 F.2d 528, 535 (D.C. Cir. 1972)). Additionally, courts have indicated that while the threat of danger must be "substantial," that requirement will be satisfied if "there exists a concern for the integrity of the public health or the environment." *United States v. Valentine,* 856 F.Supp. 621, 626 (D. Wyo. 1994); *See also United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 194 (W.D. Mo. 1985) (holding that the word "substantial" does not require quantification of endangerment). The facts in the present case easily fit into the broad language of RCRA. Buena Vista admits that the coal burned in its power plants contains mercury, and particles of mercury are released up the plants' stacks. (R. at 3.) Buena Vista also admits that the mercury that is not captured in the air pollution equipment is emitted into the atmosphere. *See id.* The EPA conducted studies of the mercury in the Lake and found that it originated from Buena Vista's two power plants. (R. at 4.) As a result of the mercury emitted from Buena Vista's smoke stacks, the water and fish have become contaminated. This is the exact endangerment that RCRA was designed to address. As indicated in the above cases, courts have held that a citizen may bring suit as long as there is a reasonable possibility of imminent danger. *See Dague,* 935 F.2d at 1355-1356. The possibility of imminent danger in this case is people eating the contaminated fish from the

Lake or drinking the contaminated water. This does satisfy, as courts have held, "a reasonable cause for concern for the integrity of the public health or the environment." *Valentine*, 856 F.Supp. 626. For these reasons, the broad language of RCRA covers the mercury emissions from Buena Vista's smoke stacks and, thus, the lower court has the equitable authority under RCRA to order abatement of the emissions.

V. THE CIRCUIT COURT LACKS THE AUTHORITY TO DETERMINE IF FLT IS PRECLUDED FROM BRINGING THIS CLAIM UNDER RCRA § 7002, THE DOCTRINES OF RES JUDICATA, OR COLLATERAL ESTOPPEL BECAUSE THE DISTRICT COURT DID NOT RULE ON BUENA VISTA'S MOTION TO DISMISS.

Under the provisions of 28 U.S.C. § 1331, "[t]he *district courts* shall have *original jurisdiction* of all civil actions arising under the . . . laws . . . of the United States." (emphasis added). Accordingly, the district court has original jurisdiction to decide a federal question.

The courts of appeals have jurisdiction over appeals from all *final decisions* of the district courts of the United States. *See* 28 U.S.C. § 1291. The legislative history of section 1291 has remained substantially the same since the codification of Title 28 in 1948, and its relevant predecessor section, 28 U.S.C. § 225(a) (1940), stated that "[t]he circuit courts of appeal shall have appellate jurisdiction to review by appeal *final decisions*." (emphasis added). "Decision" is defined by *Black's Law Dictionary* (6th ed. 1990), as "a judgment, decree, or order pronounced by a court in settlement of a controversy submitted to it."

In this case, FLT filed suit against Buena Vista on the theory that the air pollution emissions from its two power plants are an imminent and substantial endangerment, pursuant to RCRA section 7002(a)(1)(B). (R. at 1, 3). Because the district court granted Buena Vista's motion for summary judgment, it did not even address the issue, much less render a decision, on Buena Vista's motion to dismiss. (R. at 9). Inasmuch as there is no decision rendered by the district court for this Court to review, the Circuit Court lacks jurisdiction to review it.

VI. FLT's CLAIM IS NOT PRECLUDED UNDER SECTION 7002 OF RCRA OR THE PRECLUSION DOCTRINES, WHEN CONGRESS INTENDED IT BE BROUGHT IN FEDERAL COURT, AND NEITHER THE ADMINISTRATOR OF EPA NOR THE STATE FILED SUIT.

A. Section 7002 of RCRA Does Not Preclude FLT From Bringing This Action.

FLT is not precluded from bringing this action under section 7002 of RCRA because neither the Administrator of EPA nor the State of New Union were actively engaged or diligently prosecuting Buena Vista for its failure to contain mercury emissions so as to avoid imminent and substantial endangerment to the citizens of New Union at the time FLT filed its citizen suit. There are only two reasons a citizen suit is barred under RCRA: either (1) the Administrator of the EPA is actively engaged and diligently prosecuting an action against the violator; or (2) the State is actively engaged and diligently prosecuting an action to stop the activity or correct the condition causing the alleged endangerment. *See* 42 U.S.C. § 6972 (b)(2)(B) and (b)(2)(C). The citizen suit provisions has taken broad steps to facilitate the individual citizen's role in the enforcement of federal environmental statutes. *See Natural Resources Defense Council v. Train,* 510 F.2d 692, 700 (D.C. Cir. 1974). However, as set forth in *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987), Congress intended citizen suits to play an "interstitial" rather than a "potentially intrusive" role. Recognizing the obvious danger that unlimited citizen suits would overburden the courts, Congress limited a plaintiff's right to bring a section 7002 RCRA citizen suit against a defendant in certain circumstances. *See Friends of the Earth v. Consolidated Rail Corp.,* 768 F.2d 57, 63 (2d Cir. 1985). Accordingly, a citizen suit is proper only when the state and federal authorities have declined to utilize their enforcement authority. *See Arkansas Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994).

The Eastern District of Texas dealt with a similar issue when it concluded that an inquiry must be made to determine whether a pending action in State court was an "action under subsection (a)(1)(b), so as to bar the plaintiff's imminent and substantial endangerment claim." *Glazer v. American Ecology Envtl. Services Corp.,* 894 F.Supp. 1029, 1035 (E.D. Tex. 1995). The Texas court

followed the two-part analysis developed in *Connecticut Fund for the Env't v. Contract Plating Co.* 631 F.Supp. 1291, 1293 (D. Conn. 1986) and inquired whether (1) the action by the state of Texas was pending in state court on the date the citizen suit was filed; and if so, whether it was seeking to require compliance with the same standards and RCRA regulation, for the same violations the citizen suit was based on; and (2) whether there was diligent prosecution. *See id.* The *Glazer* court explained that the federal court would have jurisdiction if a different CAA standard or a different RCRA regulation was at issue, and that to "conclude otherwise would defeat the purpose of the citizen suit provisions, which is to provide a mechanism for a private plaintiff to enforce CAA and RCRA." *Id.* The district court held that plaintiffs could enforce Texas' hazardous waste program by bringing a citizen suit under RCRA after comparing the pleadings and finding the citizen suit addressed other violations of the CAA and RCRA not in question in the state case. *See id.* at 1036. Thus, for purposes of the statute, no action was pending at the time the citizen's suit was commenced. *See id.*

In this case, the *Bluepeace* suit was filed by an environmental group from the State of Blue Skies in state court based on state claims of trespass and nuisance. (R. at 10.) Even though the state court decision was not rendered until after FLT commenced its suit, the claims were not brought under section 7002 of RCRA, nor were they claims for imminent and substantial endangerment. (R. at 11.) Moreover, neither the Administrator nor the State filed an action prior to or after FLT gave notice. Rather, New Union intervened after FLT filed suit. (R. at 1.)

Therefore, even though a state court action involving the same defendant was pending at the time FLT filed its suit, RCRA was not an issue in the state action, rendering the limitations set forth in the citizen suit provisions of section 7002 of RCRA inapplicable. Consequently, this Court should determine that no relevant action was pending and that FLT is authorized to bring this action under section 7002 of RCRA.

B. The Doctrines of Res Judicata and Collateral Estoppel Do Not Preclude FLT from Bringing This Action.

The fundamental policy underlying the doctrines of res judicata and collateral estoppel is that a "right, question[,] or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit

between the same parties or their privies . . . ." *Montana v. United States,* 440 U.S. 147, 153 (1979). The doctrines of res judicata and collateral estoppel do not bar FLT from bringing suit against Buena Vista because violations of RCRA were not previously litigated in the *Bluepeace* case filed against Buena Vista in the state court of Blue Skies.

The doctrine of *res judicata* provides a complete bar to relitigation of the same claim, demand, or cause of action between the same parties which has been previously decided by a court. *See Black's Law Dictionary* (6th ed. 1990). It does not affect the rights of those who are neither parties, nor in privity with a party to the action and is "part of our deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilkes,* 490 U.S. 755, 760 (1989). The doctrine of collateral estoppel also prevents relitigation between the same parties of a particular issue or ultimate fact which has been previously decided by a court. *See* BLACK'S LAW DICTIONARY (6th ed. 1990). Furthermore, a citizen suit under RCRA is not barred, even though the suit duplicates actions pending or already decided in state courts, because the plaintiff could not have raised its RCRA claim in state court. *See Middlesex Co. Bd. of Chosen Freeholders v. State of New Jersey, Dep't of Envt'l Protection,* 645 F.Supp. 715 (D.N.J. 1986).

The District Court for New Jersey examined a similar issue in an action brought by the county under RCRA alleging imminent and substantial endangerment to health or environment as a result of conditions at a landfill. *See id.* at 717. The defendants moved to dismiss the suit because it duplicated actions pending or already decided in the state courts. *See id.* at 718. In holding the action was not barred under collateral estoppel, the court reasoned that the plaintiff could not have raised its RCRA claim in the state courts because 42 U.S.C. § 6972(a) grants exclusive jurisdiction over citizen suits to the United States Courts. *See id.* at 719.

It was contemplated by the legislative plan that state proceedings could be pending relating to a solid or hazardous waste facility and a citizen suit relating to the same facility could proceed under RCRA in federal court. *See* 42 U.S.C. § 6972(f). A careful examination of the legislative history reveals that while Congress did not prohibit "a citizen from raising claims under state law in a § 7002 action, the Committee expects courts to exercise their discretion concerning pendent jurisdiction . . ." H.R. REPORT No. 98-198 at 53, *reprinted in* 1984 U.S.C.C.A.N. 5612.

Because pendant jurisdiction refers to federal courts accepting state law claims, the court reasoned that Congress did not envision RCRA suits would be brought in state courts. *See Middlesex* at 720. Thus, the doctrine of collateral estoppel did not apply. *See id.*

The issue litigated in *Bluepeace* was whether plaintiffs had the right to bring an action seeking an injunction under state law based on trespass, public nuisance or private nuisance, due to excessive mercury emissions. (R. at 11.) The Blue Skies court concluded that the claim for equitable relief was not within the state court's power to grant because a review of the permits' failure to contain emission limitations or a determination of emission limitations on mercury was more properly determined by either the legislative or administrative process. (R. at 13.)

In this case, FLT and New Union are bringing a federal claim for abatement under RCRA based on imminent and substantial endangerment to public health. (R. at 1, 3.) Buena Vista urges this Court to believe that this precise issue has already been decided by the state court in Blue Skies and therefore, FLT is precluded from pursuing further litigation. (R. at 1, 5.) However, *Bluepeace* was an action in equity under the Blue Sky Clean Skies Act ("BSCS") for trespass, public nuisance and private nuisance, a state claim, whereas the case at hand is an action seeking an injunction based on an imminent and substantial endangerment to public health under RCRA, a federal claim. Furthermore, while the court in *Bluepeace* determined that the provisions of BSCS prohibited the court from granting an injunction, RCRA allows only injunctive relief, prohibiting damages in any form. Moreover, it has been determined that RCRA claims are to be brought in federal court and not in state court. Thus, FLT is not attempting to relitigate the same issue or claim previously litigated in the state courts.

Furthermore, res judicata requires the same parties to the relitigated action. The prior action against Buena Vista Power Company was brought by Bluepeace, a Blue Skies corporation, whereas this case is brought by Friends of Lake Tokay, Inc., which was organized to protect Lake Tokay in the State of New Union. FLT was not a party, was located in a different state, and not in privity with Bluepeace.

FLT's claim for imminent and substantial endangerment is a federal claim, not a state claim, involving a different plaintiff, who was not a party or privy to the previous suit filed by Blue Peace.

Furthermore, neither the Administrator of EPA nor the State of New Union were actively engaged or diligently prosecuting any action to stop or reduce the cause of the endangerment, Buena Vista's power plants' mercury emissions. Thus, if this Court determines it has jurisdiction or that it should decide the issue, it should conclude that section 7002 of RCRA authorizes FLT's citizen suit, and the preclusion doctrines of res judicata and collateral estoppel are inapplicable.

CONCLUSION

The district court correctly denied Buena Vista's motion for summary judgment when it determined that the mercury found in the Lake constitutes solid waste. The mercury becomes solid waste when Buena Vista disposes of it because the particles are abandoned in and around the Lake. While it correctly held that New Union has standing to intervene on behalf of its citizens, the district court incorrectly denied FLT's standing to sue. Since mercury particulates are solid waste disposed of by Buena Vista, and creates an imminent and substantial endangerment by bioaccummulating in the fish in the Lake, FLT's members have suffered an actual harm that is traceable to Buena Vista's mercury emissions, redressible by judicial action, and within the zone of interest sought to be protected by RCRA.

Moreover, the CAA is not so pervasive as to prevent injunctive relief under RCRA because the CAA does not address mercury emission limitations from power plants. Additionally, the Circuit Court should not review Buena Vista's motion to dismiss because it does not fall within its jurisdiction since the district court did not render a decision on it. However, if this Court should determine it has the authority to do so, Buena Vista's motion to dismiss should be denied. Inasmuch as Congress intended RCRA claims to be brought in federal court, FLT's claim is not barred under the preclusion doctrines because it could not have been brought in the state court action. Nor is FLT's claim barred under RCRA since neither the Administrator of the EPA nor the State of New Union were actively pursuing a claim against Buena Vista.

For the reasons stated in this brief, Friends of Lake Tokay, Inc. respectfully requests this Court to affirm the district court's holding that mercury is a solid waste and that New Union has standing to intervene. FLT further requests the Circuit Court to vacate so much of the judgment entered by the district court hold-

ing that FLT has no standing to sue and its claim is barred under the CAA, and remand for a full trial on the merits of the case, while denying Buena Vista's petition to review its pending motion to dismiss.