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## Judges' Bench Memorandum: Thirteenth Annual Pace National Environmental Moot Court Competition

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# **THIRTEENTH ANNUAL PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION**

## **Judges' Bench Memorandum**

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EXECUTIVE SUMMARY .....	200
SUGGESTED QUESTIONS FOR THE JUDGES .....	202
QUESTIONS PRESENTED .....	204
I. IS THE CITIZEN SUIT BY FOL UNDER CLEAN WATER ACT SECTION 505 BARRED UNDER SECTION 505 (b)(1)(B) BY THE ADMINISTRATIVE ORDER ISSUED BY RMDENR? .....	204
A. IS RMDENR DILIGENTLY PROSECUTING MMC? .....	204
1. FOL argues that to determine if an agency is diligently prosecuting you look at the result .....	204
2. MMC and RM argue that to determine if an agency is diligently prosecuting you look at the process .....	206
B. WAS THE ACTION BY RMDENR 'IN A COURT'? .....	207
1. FOL will argue that the plain meaning of the statute is that 'in a court' means just that, in a judicial court proceeding.....	207

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2.	MMC and RM will argue that an administrative agency may be a court .....	208
II.	IS THE CITIZEN SUIT BY FOL BARRED BY THE ADMINISTRATIVE ORDER ISSUED BY RMDENR UNDER CWA SECTION 309(g)(6)(A)? ..	209
A.	IS RMDENR DILIGENTLY PROSECUTING MMC? .....	209
1.	FOL will argue that if an enforcement action is completed, assessment of civil penalties is necessary for an agency action to be considered diligent prosecution .....	210
2.	MMC and RM will argue that assessment of civil penalties is not needed in order for agency action to be considered diligent prosecution .....	211
B.	IS THE LAW UNDER WHICH MMC WAS PROSECUTED A 'COMPARABLE STATE LAW'? .....	211
1.	FOL will argue that the state statute does not sufficiently provide for citizen participation and that it is not comparable to CWA section 309(g) because it is in a solid waste statute, not a water pollution statute .....	212
2.	MMC and RM argue that the state statute sufficiently provides for citizen participation and is comparable to CWA section 309(g) even though it is a solid waste statute .....	213
C.	UNDER SECTION 309(G)(6)(A), DOES THE STATE ACTION BAR CITIZEN SUITS FOR INJUNCTIVE AND DECLARATORY RELIEF OR ONLY FOR CIVIL PENALTIES? .....	215
1.	FOL argues that the Section 309 bar only applies to actions for civil penalties .....	215
III.	DOES THE CONTINUED PRESENCE OF OVERBURDEN IN the CREEK AFTER IT WAS DISCHARGED THERE WITHOUT A PERMIT, CONSTITUTE A CONTINUING VIOLATION OF CWA SECTION 301(A)? .....	216
A.	THE STATUTE .....	216

B.	DOES 'ALLEGED TO BE IN VIOLATION' MEAN ONLY THE ORIGINAL ADDITION OF THE POLLUTANT TO NAVIGABLE WATER OR ALSO THE CONTINUED PRESENCE OF THE POLLUTANT IN NAVIGABLE WATER? .	216
1.	FOL and RM argue that the continued presence of the overburden in the creek amounts to a continuing violation under section 505(a) .....	216
2.	MMC argues that since it is no longer adding the mining overburden to the creek, it is not currently in violation of CWA section 301(a) .....	218
IV.	DOES THE STATE'S ADMINISTRATIVE ORDER PRECLUDE THE CITIZEN SUIT BY RES JUDICATA? .....	219
A.	THE FULL FAITH AND CREDIT ACT .....	219
1.	Does the FFCA apply to state administrative proceedings? .....	219
B.	IS THE ACTION BY FOL PRECLUDED BY RES JUDICATA UNDER ROCKY MOUNTAIN STATE LAW? .....	221
1.	Is the thing sued for identical?.....	221
2.	Is the cause of action identical?.....	222
3.	Are the parties to both actions identical? ..	223
4.	Is the quality of persons for or against whom the claim is made identical?.....	224
C.	IS THERE AN IMPLIED OR EXPRESS STATUTORY EXCEPTION TO THE FFCA THAT WARRANTS A SUSPENSION OF THE FFCA AND STATE LAW IN FAVOR OF FEDERAL PRECLUSION DOCTRINE? .....	224
1.	Does CWA section 505(b)(1)(B) create an implied exception to the FFCA?.....	224
2.	Does CWA section 309(g)(6)(A)(ii) create an implied exception to the FFCA ? .....	225
D.	IS THERE A FULL AND FAIR OPPORTUNITY EXCEPTION THAT WARRANTS A SUSPENSION OF THE FFCA AND STATE LAW IN FAVOR OF FEDERAL PRECLUSION DOCTRINE? .....	226
V.	IS THE SUIT BY FOL AGAINST MMC MOOT? ..	227

- A. HAS THE CLAIM BY FOL THAT MMC IS IN VIOLATION OF THE CWA CEASED TO BE A LIVE CONTROVERSY? ..... 227
- B. DOES FOL HAVE A COGNIZABLE INTEREST IN THE RESULT OF THE SUIT?. 228

## EXECUTIVE SUMMARY

This appeal involves several issues relating to the preclusion of a citizen suit under the Clean Water Act (CWA). The first issue addresses whether the citizen suit by Friends of Lustra (FOL) is barred under CWA section 505 by the administrative order issued by the Rocky Mountain Department of Environmental and Natural Resources (RMDENR). The second issue addresses whether the citizen suit by FOL is barred under CWA section 309(g)(6)(A) by the administrative order issued by RMDENR. The third issue addresses whether the continued presence of overburden in Lustra Creek (or "Creek") after it was discharged there without a permit, constitutes a continuing violation of CWA section 301(a). The fourth issue addresses whether the state's administrative order precludes the citizen suit by res judicata. Finally, the fifth issue addresses whether the suit by FOL against Magma Mining Co. (MMC) is moot. This brief provides arguments on both sides of the issues.

The focus of the instant case is the discharge of overburden by MMC into Lustra Creek in the state of Rocky Mountain (RM). FOL, a non-profit organization dedicated to protecting Lustra Creek, brought a citizen suit against MMC for alleged violations of the CWA. FOL appeals the opinion of the United States District Court for New Union, which held that the state's action was diligent prosecution and bars the citizen suit by FOL for both civil penalties and injunctive relief. Moreover, the Court held that the suit by FOL is also barred by res judicata and is also moot since no case or controversy remains to justify federal jurisdiction. RM entered the case to defend the actions it has taken and to secure future compliance with state and federal law.

MMC placed overburden in Lustra Creek intermittently between January 1980 and January 1998, but has not placed any there since 1998. There is however, a final phase planned for the mine for which it will be necessary to remove overburden and MMC does not have a plan in place for how it will dispose of such overburden. In 1993, RMDENR issued a notice of violation (NOV) against MMC for violating the Rocky Mountain Solid Waste Act

(RMSWA) by disposing of overburden into a landfill without a permit. RMDENR and MMC agreed to a consent order in 1994, in which MMC was required to cease dumping waste overburden in the Creek without a permit and to plant the Creek landfill with native vegetation. RMDENR found that the removal of the overburden from the Creek would cause more harm than leaving it in the Creek and therefore did not require its removal as part of the consent agreement. RMDENR did not give any public notice of the NOV, its intent to issue the consent order, or its issuance of the order.

FOL argues that in order to determine if a prosecution is diligent, the court must look at the result of the prosecution. Because the prosecution did not result in penalties or removal of the overburden, it is therefore not diligent, and the holding by the District Court should be overturned.

MMC and RM argue that to determine if a prosecution is diligent, the court must look at the process of the prosecution. Moreover, they argue that state agencies have been given prosecutorial discretion to reach agreements with polluters, and citizens groups should not be permitted to second guess the decisions of the state agencies in enforcement matters. Therefore, the court should affirm the decision of the lower court.

FOL and RM maintain that the continued presence of the overburden in the Creek amounts to a continuing violation of the CWA. They argue that where fill material is discharged into a navigable water without a permit, the violation continues until the fill is removed. They cite many CWA cases involving the fill of wetlands and similar RCRA cases assessing penalties for as long as the fill or waste remains.

MMC argues that since it is not currently adding overburden into the Creek, it is not currently in violation of the CWA. MMC relies on the plain meaning of the statute, as well as the *Gwaltney* case.

FOL also claims that its suit is not barred by res judicata. It claims that the Full Faith and Credit Act does not apply to determinations by an administrative body. FOL further argues that under state law the claims are different because the thing sued for is different, the causes of action are different, and they are not in privity with RM, and therefore, should not be held to the consent agreement reached between RM and MMC. Moreover, FOL claims that the CWA has carved out an exception to full faith and credit, and therefore, even if FOL would be precluded under state

law from bringing its suit, it should not be precluded here unless the Court determines there is diligent prosecution, which FOL claims there is not.

MMC and RM claim that the suit by FOL is barred by res judicata. They claim that full faith and credit does apply to administrative bodies and, under state law, the suit by FOL would be precluded because they are suing for the same thing as RMDENR, the causes of action are the same, and FOL is in privity with RM. Moreover, they claim that the CWA does not evince any exception to full faith and credit and the Court should follow state law as to its res judicata determination.

Finally, FOL will argue that the case is not moot because the overburden remains in the Creek and FOL has a cognizable interest in having it removed. In the alternative, if the Court does not agree that MMC is still in violation, FOL argues that this falls under the voluntary cessation doctrine, and the Court is not deprived of jurisdiction because there is a danger that MMC will recommence its illegal activity.

MMC and RM will argue that the case is moot because MMC is no longer in violation of the CWA. Moreover, the voluntary cessation doctrine does not apply because its compliance was not voluntary, but instead a result of a consent agreement between itself and RM.

## SUGGESTED QUESTIONS FOR THE JUDGES

### SAMPLE QUESTION ON THE DILIGENT PROSECUTION ISSUE

#### Questions for FOL:

1. How can this Court allow their suit to continue when the Supreme Court in *Gwaltney*, specifically stated that the role of citizen suits is to supplement not supplant government action?
2. If "diligent" is defined in terms of the effort injected into a process, how can the result matter in determining diligent prosecution?
3. How can an administrative order not bar a citizen suit when the court in *Baughman v. Bradford Coal Co.* held that it could?
4. Why does the state statute under which MMC was prosecuted, matter in determining diligent prosecution when the results obtained were the same as they would have been under the CWA?

Questions for MMC and RM:

1. How can there be diligent prosecution when RMDENR did not even achieve compliance with the statute by requiring removal of the overburden?
2. How can an administrative order meet the qualification of 'in a court' when CWA section 505 is so clear that only action in court will bar a citizen suit?
3. How can the state solid waste statute qualify under CWA section 309 as a state statute comparable to the CWA?
4. How can FOL's suit be barred when the state is no longer prosecuting MMC and assessed no penalty against MMC?

SAMPLE QUESTIONS ON THE CONTINUING VIOLATION ISSUE

Question for FOL and RM:

1. How can MMC be in violation of the CWA when it is no longer placing overburden in the Creek?

Question for MMC:

1. How can MMC not be in violation of the statute when the overburden remains in the Creek?

SAMPLE QUESTIONS ON THE RES JUDICATA ISSUE

Questions for FOL:

1. How can the things sued for not be identical when the goal of the citizen suit is to obtain compliance with the statute, which was also the goal of the action by RMDENR?
2. How can the cause of action in the citizen suit be different from that in the action by RMDENR when both arose out of the dumping of the overburden into the Creek?
3. How can FOL not be in privity with RMDENR when plaintiffs prosecuting citizen suits are merely acting as private attorneys general?
4. How can the CWA contain an exception to full faith and credit when there is nothing in the statute that clearly demonstrates this intent by Congress?

Questions for MMC and RM:

1. How can the things sued for be identical when FOL is suing for penalties and the removal of the fill, neither of which RMDENR sought?
2. How can the causes of action be the same when one was brought under a solid waste statute and one is brought under the CWA?
3. How can the CWA not contain an exception to full faith and credit when the statute speaks specifically to when a citizen suit should be precluded?

SAMPLE QUESTIONS ON THE MOOTNESS ISSUE

Question for FOL and RM:

1. How can there still be a live controversy when MMC is no longer in violation of the statute?

Question for MMC:

1. How can the case be moot when the overburden remains in the Creek?

QUESTIONS PRESENTED

- I. Is the Citizen Suit by FOL Under Clean Water Act Section 505 Barred Under Section 505(B)(1)(B) by the Administrative Order Issued by RMDENR?

CWA section 505(b)(1)(B) states: “[n]o action may be commenced . . . if the Administrator or State has commenced and is *diligently prosecuting* a civil or criminal action *in a court* of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.” (emphasis added).

A. IS RMDENR DILIGENTLY PROSECUTING MMC?

1. FOL argues that to determine if an agency is diligently prosecuting, look at the result.

FOL will likely argue that in order to determine if an agency has diligently prosecuted and therefore barred a citizen suit, one looks at the result of the government action. Some courts hold that whether a completed government enforcement action has been diligently prosecuted depends on whether it protects citizens

or the environment, or the degree to which it protects them. See *Hudson River Scoop Clearwater, Inc. v. Consol. Rail Corp.*, 591 F. Supp. 345 (N.D.N.Y. 1984). In *Atlantic States Legal Fund, Inc. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990), the court held that there was no diligent prosecution where compliance with the CWA was not obtained, there was an apparent willingness by the state agency to “bend its procedures on [polluter’s] behalf,” and an insubstantial penalty was assessed. Similarly here, RMDENR did not obtain compliance with the CWA since the overburden remains and no penalty was assessed on MMC for its violations. Therefore, there is no diligent prosecution. See also *Frilling v. Village of Anna*, 924 F. Supp. 821 (S.D. Ohio 1996) (citizen suit barred only if state commences civil action to require compliance with the same standard, limitation, or order referenced in plaintiff’s 60-day notice letter); *Friends of the Earth v. Laidlaw*, 890 F. Supp. 470 (D.S.C. 1995) (state’s failure to require compliance with the permit is some evidence that its prosecution was not diligent; assessment of \$100,000 penalty when economic benefit of non-compliance was far higher, is evidence prosecution was not diligent); *Public Interest Research Group of N.J. v. Rice*, 774 F. Supp. 317 (D.N.J. 1991) (EPA’s failure to require compliance with effective permit is evidence that prosecution was not diligent); *New York Coastal Fisherman’s Ass’n v. New York City Dep’t of Sanitation*, 772 F. Supp. 162 (S.D.N.Y. 1991) (court held that state’s allowance of the discharge of leachate into the bay for twelve years, until defendant submitted a proposal for its elimination, was not diligent prosecution).

FOL also may make a somewhat different statutory interpretation argument. CWA section 505(b)(1)(B) uses the word “prosecuting”, as a present tense verb. The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987), reasoned that the use of tenses is decisive in interpreting section 505, holding that the section’s use of the present tense “alleged to be in violation” in conferring jurisdiction, limits jurisdiction to cases in which the defendant is in continuing violation. Applying the Supreme Court’s reasoning, here, the agency is no longer prosecuting MMC and therefore the statutory bar for diligently “prosecuting” can no longer apply. See *Knee Deep Cattle Co., Inc. v. Bindana Inv. Co.*, 94 F.3d 514 (9th Cir. 1996).

2. MMC and RM argue that to determine if an agency is diligently prosecuting, look at the process.

MMC and RM will argue that the state agency has prosecutorial discretion, including the right to settle if it sees fit. Moreover, as the Supreme Court stated in *Gwaltney*, "the citizen suit is meant to supplement rather than to supplant government action." 484 U.S. at 60. Therefore, the agency is entitled to deference in the way it chooses to enforce. So here, even if FOL does not agree with the result of the prosecution by RMDENR, it is not for them to substitute their judgment for that of the agency. See *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991) (state issued administrative order requiring town to begin construction of a sewage plant, requiring cessation of the violation until the plant was built, and assessing no penalty, held to be diligent prosecution).

The plain meaning of the word "diligent" is "characterized by steady, earnest, and energetic effort." WEBSTER'S DICTIONARY 378 (3d ed. 1995). Therefore, diligent prosecution is litigation pursued steadily, earnestly and energetically. As long as the proper effort is injected into the process, it is diligent prosecution, regardless of the outcome. After all, even if the state diligently prosecutes a case, it could lose if pressed to a trial on the merits. *United States v. ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980). MMC and RM will argue that the state agency entered into a negotiation process with MMC to obtain compliance. Although the result obtained may not be satisfactory to FOL, the agency did go through the enforcement process and entered into an agreement with MMC to ensure future compliance. Although FOL may not agree with the result obtained by RMDENR, it failed to show the state's effort was not steady, earnest, and energetic. Moreover, it is not the role of citizens' suits under the CWA to question the result of the enforcement action by the state. The purpose of the bar is to allow the state to do its enforcement job without interference by citizen groups. This not only applies during the enforcement action, but after as well. If it did not apply after the enforcement action was over, there would not be any incentive for polluters to settle with the state agency. See *Gwaltney*, 484 U.S. 49 (stating citizen suit not to interfere with EPA or state discretion in settling a case not to seek a civil penalty); *Supporter's to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320 (7th Cir. 1992) (Resource Conservation and Recovery Act citizen suit diligent prosecution bar does not require that EPA succeed, but only that it try diligently; col-

lateral attack on agency's strategy or tactics is not authorized). *See also William Pipeline Co. v. Bayer Co.*, 964 F. Supp. 1300 (S.D. Iowa 1997) (CWA citizen suit diligent prosecution bar applies to state order even though injured landowner asserting CWA claim may have preferred a more vigorous enforcement and remediation program).

## B. WAS THE ACTION BY RMDENR 'IN A COURT'?

1. FOL will argue that the plain meaning of the statute is that 'in a court' means just that, in a judicial court proceeding.

FOL argues that under the plain meaning of the statute, the administrative consent order issued by RMDENR was not enforcement 'in a court' and thus does not bar the action by FOL. Many courts have held that the language of the CWA section 505 "unambiguously and without qualification refers to an action in a Court of the United States, or a State," and thus an administrative enforcement action by a federal or state agency does not preclude a citizen suit. *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985). *See also Jones v. City of Lakeland*, 175 F.3d 410 (6th Cir. 1999); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987); *Illinois Public Interest Research Group v. PMC, Inc.*, 835 F. Supp. 1070 (N.D. Ill. 1993); *Lykins v. Westinghouse Elec. Corp.*, 715 F. Supp. 1357, 1359 (E.D. Ky. 1989). Moreover, it is clear elsewhere in the statute that Congress knows how to write a provision which gives administrative orders preclusive effect over citizen suits, when it wants to, as it did in CWA section 309(g). By contrast, when Congress established preclusive effect in CWA section 505 only for actions in court, it did not mean to do so for administrative actions.

FOL also argues that even if an administrative body can be a court, it can be so only if it possesses full remedial powers inherent in traditional courts, and it must allow for citizens to intervene. *See Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120 (D. Md. 1985). *See also Student Public Interest Research Group of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131 (3d Cir. 1985) (EPA's informal enforcement procedure was not a proceeding in court which bars a section 505 citizen suit, when it consisted entirely of negotiations between EPA and the violator and did not incorporate independent decision maker or administrative law judge to weigh evidence; did not allow for opposing parties to pre-

sent such evidence; did not provide for calling of witnesses, for a hearing, or for formal transcripts or records of decisions to be maintained; and did not allow participation of student interest group); *Baughman v. Bradford*, 592 F.2d 215 (3d Cir. 1979) (Pennsylvania Environmental Hearing Board was not a 'court' because it had limited penalty power, did not have the power to enjoin violations, and did not allow citizen's to intervene); *Atlantic Legal Foundation v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990) (state agency lacked power to provide relief sought by citizen group, and did not allow for citizen intervention in administrative enforcement action; citizen suit allowed). Therefore, since FOL was not permitted to intervene in the negotiations between RMDENR and MMC, and there was not any independent decision maker involved, it would seem that the processes that led to the consent order would not be sufficient to be defined as a court under the CWA. Since RMDENR does not have the power to enforce the civil penalties it assesses without resort to a court, under the holding in *Simkins*, 617 F.Supp. 1120, the action by the state agency is not the functional equivalent to a court proceeding. Moreover, as in *Universal Tool*, 735 F.Supp. 1404, the state statute here does not provide for citizen intervention in the administrative enforcement action.

2. MMC and RM will argue that an administrative agency may be a court.

MMC and RM will argue that an administrative agency may be a court if its powers and characteristics are sufficiently like those of a court and such a classification is necessary to achieve statutory goals. *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 217 (3d Cir. 1979). An administrative agency may be a court if "the state agency ha[s] coercive powers to compel compliance with effluent limitations and there [are] procedural similarities to a suit in federal court with citizens having the right to intervene." *Atlantic Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990). MMC will argue that the state agency has the power to compel compliance with effluent limitations and, in fact, did so.

## II. IS THE CITIZEN SUIT BY FOL BARRED BY THE ADMINISTRATIVE ORDER ISSUED BY RMDENR UNDER CWA SECTION 309(G)(6)(A)?

Section 309(g) of the CWA was added by Congress in 1987 giving the EPA authority to assess penalties administratively. Included in the new authority was CWA section 309(g)(6)(A) which pertains to limitation on actions under other sections and states:

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation -

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

or

- (iii) for which the Administrator, the Secretary, or the State *has issued a final order* not subject to further judicial review and the violator *has paid a penalty* assessed under this subsection, or such *comparable State law*, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title. (emphasis added).

### A. IS RMDENR DILIGENTLY PROSECUTING MMC?

The arguments regarding diligent prosecution made under CWA section 505(b)(1)(B) can also be made under CWA section 309(g)(6)(a)(ii). But, the argument that the failure to assess penalties denotes a failure to diligently prosecute is made in a different statutory context under CWA section 309(g)(6), since section 309(g)(6)(A)(iii) specifically provides a bar when penalties are assessed and paid. This strengthens the argument that "diligently prosecuting" applies only to ongoing prosecutions, not completed ones.

1. FOL will argue that if an enforcement action is completed, assessment of civil penalties is necessary for an agency action to be considered diligent prosecution.

FOL will argue that since RMDENR only sought compliance in its action against MMC, and did not seek or assess penalties and none were paid, its action is not barred under CWA section 309(g)(6)(A)(iii). *Molokai Chamber of Commerce v. Kukui*, 891 F. Supp. 1389 (D. Haw. 1995) (in order for a state enforcement action to bar citizens suits under the CWA, state enforcement must seek penalties, not mere compliance). *See also Citizens for a Better Environment v. Union Oil Co.*, 861 F. Supp. 889, 906 (N.D. Cal. 1994) ("Only where a state has proceeded (and assessed a penalty) under a state enforcement provision comparable to 33 U.S.C. § 1319(g) is the preclusive bar triggered."); *Public Interest Research Group v. N.J. Expressway Auth.*, 822 F. Supp. 174, 184 (D.N.J. 1992) (section 1319(g) held inapplicable because, inter alia, "no penalties were assessed."); *Ark. Wildlife Fed'n. v. Bekaert Corp.*, 791 F. Supp. 769, 775 (W.D. Ark. 1992) ("Congress has not provided that citizen suits are barred whenever an administrative action is underway or simply because there may be some duplication with a government proceeding.").

Moreover, FOL will argue that neither part of CWA section 309(g) (6)(A) applies to the facts of this case. The plain meaning of the statutory language is that unless an action is "still being prosecuted," CWA section 309(g)(6)(A)(ii), and "penalty was assessed," section 309(g)(6)(A)(iii), then section 309(g)(6)(A) does not apply and thus the citizen suit is not barred under this section. Here, the case is not still being prosecuted and no penalty was assessed, or even sought. Therefore, CWA section 309 does not apply. *See Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996) (under section 309(g), a citizen suit is precluded if a state is currently and diligently prosecuting the action under state law comparable to federal enforcement provision; state enforcement action no longer being prosecuted following settlement with alleged polluter and thus the citizen suit was not precluded). *See also Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995) (court held that to bar a citizen civil penalty action, the state must be diligently pursuing a penalty action comparable to section 309(g), since the NMED was not currently seeking penalties, administrative or otherwise, court held section 309(g) did not apply).

2. MMC and RM will argue that assessment of civil penalties is not needed in order for agency action to be considered diligent prosecution.

MMC and RM will argue that even a final state order that does not assess penalties can bar a subsequent citizen suit under CWA section 309(g)(6)(A). In *North & South Rivers Watershed Association v. Town of Scituate*, 949 F.2d at 557, the First Circuit examined an administrative order issued by the Massachusetts Department of Environmental Protection (DEP) to the Town of Scituate. DEP ordered Scituate to upgrade its sewage treatment facility, which discharged pollutants into a coastal estuary without a permit, and report to DEP periodically. The North and South Rivers Watershed Association brought suit to obtain financial penalties and injunctive relief under the CWA after issuance of the order. The court reasoned that the main goal of the CWA is to restore and protect the integrity of the water, and further stated that the "primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act." *Scituate*, 949 F.2d 552. The *Scituate* court decided that "[d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal. They are, in fact, impediments to environmental remedy efforts." *Scituate*, 949 F.2d 552. The court held that a state order that did not assess penalties was still considered diligent prosecution since "the state order represented a substantial, considered and ongoing response to the violation, and DEP's enforcement action does in fact represent diligent prosecution." 949 F.2d at 556. *See also Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173 (D. Conn. 1994) (section 1319(g)(6) "bars citizen suits where a state agency conducting enforcement proceedings against the defendant has authority to assess civil penalties, regardless of whether the agency has actually assessed such penalties"); *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476 (D. Colo. 1994) (state action need not entail monetary penalties to have preclusive effect).

#### B. IS THE LAW UNDER WHICH MMC WAS PROSECUTED A 'COMPARABLE STATE LAW'?

Under CWA section 309(g)(6)(A) the state law under which the polluter is being prosecuted must be comparable to subsection

(g) of section 309. This means that it must provide for administrative penalties, section 309(g)(2); provide public notice, section 309(g)(4)(A); and provide interested parties a hearing, section 309(g)(4)(C).

1. FOL will argue that the state statute does not sufficiently provide for citizen participation and that it is not comparable to CWA section 309(g) because it is in a solid waste statute, not a water pollution statute.

FOL will argue that CWA section 309 requires the state statute to provide for the public's right to participate in the administrative enforcement process and therefore, the state statute is not comparable for the purposes of section 309. *See Natural Resources Defense Council v. Vygen Corp.*, 803 F. Supp. 9 (N.D. Ohio 1992). Here, since the state statute lacks public notice and comment provisions regarding the issuance of the consent order, that is enough to make the state statute inapposite under section 309 of the CWA. *See Public Interest Research Group v. GAF Corp.*, 770 F. Supp. 943 (D.N.J. 1991) (court allowed a citizen suit to proceed regardless of a previous action by NJDEP because the consent order was issued without public notice and comment). *See also Frilling v. Village of Anna*, 924 F. Supp. 821 (S.D. Ohio 1996) (holding that a state's denial of citizen's opportunity to intervene or comment upon consent order in state's civil enforcement action provided basis for holding that civil action was not diligently prosecuted); *Atlantic Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990) (holding Indiana law not comparable because it does not provide for public notice and participation, penalty assessment, judicial review and other matters required by Clean Water Act).

FOL will also argue that since RMDENR sought enforcement against the overburden in the stream under its solid waste law instead of under its clean water law, it did not seek enforcement under a statute comparable to the CWA. In *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33 (D. Me. 1994), the court held that Maine's administrative action relating to a landfill site did not bar a CWA citizen suit against the shipyard facility operator, which used a landfill site to dispose of hazardous waste. In that case, Maine had not undertaken administrative action under its clean water legislation, but it had declared the site a threat to public health and mandated abatement actions under another statute.

The abatement, however, was ordered with no specific emphasis on protection of waterways, and its administrative action related to the general management of the site as a hazardous substance site and not to concerns surrounding discharge of pollutants into water. In the instant case, there was similarly no emphasis on the protection of the waterway in RM's solid waste order since it contained no request to remove the overburden in the stream. Therefore, there is obviously no evidence that the purpose of the action by RMDENR was related to concern over the discharge of pollutants into the water.

Since environmental statutes protect different parts of the environment, FOL will argue that the action brought under the state solid waste statute cannot sufficiently protect the waters of the state. Under *Chemical Weapons Working Group v. United States Department of Army*, 111 F.3d 1485 (10th Cir. 1997), each environmental statute protects separate and distinct parts of the environment and therefore, an action to protect water should be brought under a clean water statute, not a solid waste statute, or in the case of *Chemical Weapons*, a clean air statute.

MMC and RM will rely heavily on the *Scituate* case in making their arguments. 949 F.2d 552. There is a distinction between the instant case and *Scituate* however, since RM's order not only fails to assess penalties, but also fails to force removal of the overburden from the stream. Therefore, *Scituate*, may not apply.

2. MMC and RM argue that the state statute sufficiently provides for citizen participation and is comparable to CWA section 309(g) even though it is a solid waste statute.

MMC and RM will argue that it is not necessary for the state statute to provide for citizen participation for it to be comparable to the CWA. In *North & South Rivers Watershed Association, Inc. v. Town of Scituate*, 949 F.2d 552, the court held that the interests of affected citizens were protected where the state statute provided that orders were public records; therefore, public notice is not necessary to make statutes comparable. Following *Scituate*, even though there was no public notice of the consent order issued by RMDENR, the statutes can be comparable. See also *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997) (state law comparable to CWA as long as it contains comparable penalty provisions which state is authorized to enforce, has same overall enforcement goals as CWA, provides interested citizens a

meaningful opportunity to participate at significant stages of decision making process, and adequately safeguards their legitimate substantive interests); *California Sportfishing Prot. Alliance v. City of West Sacramento*, 905 F. Supp. 792 (E.D. Cal. 1995) (holding mandatory public notice and participation was not essential to a finding of comparability); *Save Our Bays and Beaches v. City of Honolulu*, 904 F. Supp. 1098 (D. Haw. 1994) (comparable state law does not mean that statute's regulatory authority or processes must be identical to federal government's); *Pape v. Menominee*, 911 F. Supp. 273 (W.D. Mich. 1994) (state water resources statute that required water resources commission to conduct business at public meetings, provided for assessment of penalties and lists of factors to be considered in imposing penalties for violations of statute, and provided for judicial review of actions under statute, was comparable to CWA for purposes of determining whether consent order between violator and state agency prohibited citizens' suits under CWA); *Saboe v. Oregon*, 819 F. Supp. 914 (D. Or. 1993) (while mandatory public notice and participation rights have been held to be indispensable elements in determining comparability of state remedy with remedy under CWA, for purposes of availability of citizen suit, mandatory public notice is not sine qua non of comparability; it is important to avoid subjecting a violator to dual enforcement actions for the same violation).

MMC and RM will argue that when determining whether an action was brought under a comparable state statute, the focus should not be on the portion of the environment that the statute primarily protects, but on whether the corrective action that has already been taken and diligently pursued by the government seeks to remedy the same violations as the duplicative civilian action. Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well under way do not further the remedial goal of this statute. *Scituate*, 949 F.2d at 556. MMC and RM will argue that since the state has already issued an order with regard to the same polluting offense as the citizens are now attempting to enforce, and the action by the FOL would be duplicative in nature, FOL's action should be barred. See *Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assoc.*, 917 F. Supp. 251 (S.D.N.Y. 1996) (the court concluded that the pending state court action was the equivalent of one brought under RCRA, because as a matter of New York State jurisdiction and procedure, all cases brought in the New York Supreme Court are, as a matter of law, brought

under all applicable federal statutory provisions applicable by their terms to the “occurrence or transaction” sued on, except where Congress has reserved exclusive jurisdiction to a federal court). *See also Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146 (1st Cir. 1989) (the court held that actions by the Massachusetts Department of Environmental Quality Engineering in which it entered a stipulated agreement with the polluter for improper disposal of hazardous waste, not under the state’s water statute, was a bar to a citizen’s suit action under CWA section 309(g)(6)).

C. UNDER SECTION 309(G)(6)(A), DOES THE STATE ACTION BAR CITIZEN SUITS FOR INJUNCTIVE AND DECLARATORY RELIEF OR ONLY FOR CIVIL PENALTIES?

1. FOL argues that the section 309 bar only applies to actions for civil penalties.

FOL will argue that the plain language of section 309(g)(6)(A) is clear and that it only precludes citizen suits for civil penalties. *See Coalition for a Livable West Side, Inc. v. New York City DEC*, 830 F. Supp. 194 (S.D.N.Y. 1993) (held civil penalty portion of citizen suit was barred by administrative order issued by NYS-DEP). *See also Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003, 1018 (S.D.N.Y. 1994) (rejecting the *Scituate* holding as to injunctive relief and ruling that section 1319(g) bars only civil penalties).

2. MMC and RM argue that the section 309 bar applies not only to actions for civil penalties, but also actions for injunctive and declaratory relief.

MMC and RM’s argument that section 309 bars not only actions for civil penalties, but also for injunctive and declaratory relief will rely heavily on the court’s decision in *North & South Rivers Watershed Association, Inc. v. Town of Scituate*, in which it held that the section 309(g) bar applies to all claims filed under section 505, including claims for injunctive and declaratory relief. 949 F.2d at 555. The court stated that “when it appears that government action . . . begins and is diligently prosecuted, the need for citizen suit disappears.” *Id.* The court further reasoned that because section 505’s diligent prosecution bar does not distinguish between suits for civil penalties and suits for injunctive relief,

courts applying section 309(g)'s diligent prosecution provision should also not distinguish between the two. It stated, "the focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violation as duplicative citizen action." *Id.* at 556. *See also Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 842 F. Supp. 1140 (E.D. Ark. 1993).

### III. DOES THE CONTINUED PRESENCE OF OVERBURDEN IN THE CREEK AFTER IT WAS DISCHARGED THERE WITHOUT A PERMIT CONSTITUTE A CONTINUING VIOLATION OF CWA SECTION 301(A)?

#### A. The Statute

CWA section 301(a) prohibits the discharge of any pollutant without a permit. CWA section 502(12) defines the discharge of a pollutant as any addition of any pollutant to navigable waters from any point source. CWA section 505(a) gives jurisdiction to the courts over a suit by a citizen against an alleged polluter that is 'alleged to be in violation' of section 301(a).

#### B. DOES 'ALLEGED TO BE IN VIOLATION' MEAN ONLY THE ORIGINAL ADDITION OF THE POLLUTANT TO NAVIGABLE WATER OR ALSO THE CONTINUED PRESENCE OF THE POLLUTANT IN NAVIGABLE WATER?

1. FOL and RM argue that the continued presence of the overburden in the Creek amounts to a continuing violation under section 505(a).

FOL and RM will argue that the failure to take remedial measures to remove illegally discharged material from navigable water is a continuous violation for the purpose of determining citizen suit jurisdiction because the injury arises not only from the discharge of the waste into navigable water, but also from the continuing environmental degradation as long as the waste remains there. *See North Carolina Wildlife Fed'n v. Woodbury*, 1989 WL 106517 (E.D.N.C. 1989). Here, the overburden remains in the Creek and, thus, the violation is continuing. *See also United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla. 1996) (unpermitted discharge of dredged or fill materials into wetlands on the site is a

continuing violation for as long as the fill remains). Moreover, they will argue that cases to the contrary deal with discharges which are not susceptible to remediation because they are soluble and naturally disperse. This case is distinguishable because this fill is amenable to remediation and because it is solid and not soluble. *Woodbury*, 1989 WL 106517 (E.D.N.Y. 1989).

FOL and RM will also argue that since there have not been any remedial measures put in place and the fill remains in place, MMC is still in a state of noncompliance. In Justice Scalia's concurrence in *Gwaltney* he states that 'to be in violation' does not suggest an action but rather suggests a state of violation, the opposite of a state of compliance. 484 U.S. 49 (1987). He further states that "[w]hen a company has violated an effluent standard or limitation, it remains 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." *Gwaltney* 484 U.S. at 69. Since MMC has not put in place remedial measures to remove the fill, and determined another means of disposing of overburden from another phase of the project which it plans to conduct, it remains in a state of violation because it has not eliminated the cause of violations.

FOL and RM also will argue that courts have held that defendants found in violation of CWA section 404 for filling wetlands without a permit violate the statute every day until the fill is removed. *United States v. Ciampitti*, 669 F. Supp. 684 (D.N.J. 1987). There is also support for the proposition that the violation continues until the overburden is removed in RCRA cases. Similarly to CWA, RCRA does not permit citizen suits for wholly past violations of the statute, however, the continued presence of illegally dumped materials generally constitutes a "continuing violation of RCRA." *Aurora Nat'l Bank v. TriStar Mktg., Inc.*, 990 F. Supp. 1020 (N.D. Ill. 1998). See *Briggs & Stratton Corp. v. Concrete Sales & Serv.*, 20 F. Supp. 2d 1356 (M.D. Ga. 1998) ("Although there is some authority that § 6972(a)(1)(A) does not apply to past violations, citizen suits have been allowed against prior owners and operators to remedy continuing violations resulting from past disposal practices"); *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 656 (N.D. Ohio 1993) (disposal of wastes in violation of the RCRA can constitute a continuing violation for purposes of a citizen suit as long as the waste has not been remediated and the environmental effects remain remediable); *Gache v. Town of Harrison, N.Y.*, 813 F. Supp. 1037, 1041

(S.D.N.Y.1993) ("The environmental harms do not stem from the act of dumping when waste materials slide off the dump truck but rather after they land and begin to seep into the ground, contaminating the soil and water."); *Fallowfield Development Corp. v. Strunk*, 1990 WL 52745 (E.D. Pa. 1990) (violation continues until proper disposal procedures are put into effect or the hazardous waste is remediated).

2. MMC argues that since it is no longer adding the mining overburden to the creek, it is not currently in violation of CWA section 301(a).

MMC will argue that under the plain meaning of the statute, since "to be" in violation is in the present tense, the polluter must currently be in violation of the statute in order for a court to have jurisdiction over the citizen's claim. The Court in *Gwaltney*, 484 U.S. at 64, held that the present tense of the language of CWA section 505(a)(1) required a good faith allegation that the violation is ongoing when the complaint is filed. See also *United States v. Telluride*, 884 F. Supp. 404 (D. Colo. 1995) (holding that the defendant was not presently discharging pollutants into the wetlands, and thus no present or continuing violation existed for the purpose of the statute of limitations; the fact that a continuing impact existed from polluter's past violations did not render the violation continuing); *Friends of Santa Fe County v. LAC Minerals*, 892 F. Supp. 1333 (D.N.M. 1995) (mine overburden pile was not itself "ongoing discharge" of pollutant for purposes of CWA; failure to retrieve pollutants which had already been discharged was not continuing violation).

For a party to show that continuous or intermittent violations exist, it must: 1) prove violations that continue on or after date complaint is filed, or 2) adduce evidence from which a reasonable trier of fact could find continuing likelihood of recurrence in intermittent or sporadic violations. *Natural Resources Defense Council, Inc. v. Texaco Refining and Mktg., Inc.*, 2 F.3d 493 (3d Cir. 1993). MMC will argue that since it is not continuing to add the overburden into the creek, nor is there evidence that it will add any more overburden to the creek in the future, the violation cannot be considered continuous or intermittent. Indeed, the evidence is to the contrary. MMC entered into an agreement with the state in which it specifically agreed to not place overburden into the creek in the future.

#### IV. DOES THE STATE'S ADMINISTRATIVE ORDER PRECLUDE THE CITIZEN SUIT BY RES JUDICATA?

##### A. THE FULL FAITH AND CREDIT ACT

The Full Faith and Credit Act (FFCA), 28 U.S.C. § 1738 (1994), “require[s] [federal] courts to give preclusive effect to the judgments of state courts whenever the state court from which the judgment emerged would give such effect.” *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999). The FFCA states: “such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” 28 U.S.C. § 1738 (1994).

The Supreme Court has constructed a two-part test for determining the preclusive effect of state court judgments in federal courts: 1) the federal court should examine and then apply state preclusion law to the judgment unless, 2) either there is an implied or express statutory exception or the full and fair opportunity exception warrants a suspension of the FFCA and state law in favor of federal preclusion doctrine. *See Marresse v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373 (1985); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

##### 1. Does the FFCA apply to state administrative proceedings?

FOL will argue that the FFCA only applies to state administrative proceedings if they are subject to later state judicial action. Since the administrative action by RMDENR was not subject to any state judicial action, the FFCA does not apply. *See Univ. of Tenn. v. Elliott*, 478 U.S. 788, 794 (1986) (the FFCA does not apply to administrative agency decisions that have not been first reviewed by a state court). In the alternative, if this Court believes that the preclusive effect of state administrative actions under the FFCA depends on congressional intent, FOL will argue that Congress is clear when a state administrative action should preclude a federal action under the CWA. It should only be precluded when the action is complete and a penalty was assessed, section 309(g)(6)(A)(iii), or the action is ongoing and, therefore, it is in these sit-

uations that the FFCA should apply to state administrative orders.

Moreover, MMC and RM's arguments will rely heavily on *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999), which held that a state enforcement action had res judicata effect, precluding a subsequent EPA enforcement action under RCRA. This case is different from *Harmon* because the action by FOL is under the CWA and in *Harmon* the action was under RCRA. The *Harmon* court relied on the language of RCRA to reach its decision that the EPA was precluded from a RCRA enforcement action where the state had brought one. 191 F.3d 894. However, CWA lacks language of RCRA which states in its state permit program authorizing section that an authorized state program operates "in lieu of" the federal program and that any action taken by the state in such a program has the "same force and effect of an action taken by the EPA." RCRA § 3006(b), (d) (2001). By contrast, the CWA states in its state permit authorization section that "nothing in this section shall be construed to limit authority of the administrator to take action." CWA section 402(b). See *City of Youngstown v. United States*, 109 F. Supp. 2d 739 (N.D. Ohio 2000) (CWA enforcement case distinguishes *Harmon* because of these differences in language in CWA and RCRA). These structural differences between the CWA and RCRA are underscored by the fact that under RCRA section 3006(b), the states submit programs "to administer and enforce" the statute, while under CWA § 402(b), the states submit applications only "to administer. . .[a] permit program." The structure of RCRA, thus, is much more amenable to argument that state enforcement supplants EPA enforcement and, thus, has more of a res judicata effect than under the CWA. Citizens and EPA are in the same position in enforcing the CWA when it comes to the res judicata effect of a state administrative order. If EPA is not precluded from enforcement by a state order, neither is FOL.

MMC will argue that the FFCA does apply to state administrative proceedings if there is evidence in the federal statute being enforced in the federal action that Congress intended the state action to have preclusive effect. See *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (unless a federal statute specifically indicates that state agency decisions should not be considered conclusive, factual findings of state agencies should be given the same preclusive effect they would be accorded in the courts of that state). MMC would argue that it is clear that the

CWA was set up to have citizen suits merely supplement not supplant state and federal administrative enforcement, and therefore, it would seem that Congress intended that state administrative actions should have preclusive effects in federal actions and the FFCA should apply.

**B. IS THE ACTION BY FOL PRECLUDED BY RES JUDICATA UNDER ROCKY MOUNTAIN STATE LAW?**

The first question is whether or not the state would give preclusive effect to an administrative order issued by RMDENR. The Rocky Mountain Supreme Court held that res judicata applies to “orders of administrative agencies in the same manner as orders of courts.” *State v. Williams*, 118 R.M. 36, 39 (1999). The first question having been answered in the affirmative, the second question is what analysis the state of RM uses in determining whether or not res judicata applies. The RM Supreme Court has adopted Missouri law on that issue. *Williams*, 118 R.M. 36. The Missouri Supreme Court has adopted the following four-part test for determining preclusion by res judicata: 1) identity of the thing sued for; 2) identity of cause of action; 3) identity of persons and parties to the action; and, 4) identity of the quality in persons for or against whom claim is against. *Prentzler v. Schneider*, 411 S.W.2d 135 (Mo. 1966). The parties differ on how each of these four factors apply to our case.

**1. Is the thing sued for identical?**

a. FOL will argue that the thing sued for is not identical since FOL seeks different remedies than RM. FOL is seeking penalties and RM was not. FOL is seeking an injunction for removal of the fill and RM did not. *See State ex rel. J.E. Dunn v. Fairness Board of Kansas City*, 960 S.W.2d 507 (Mo. App. 1998) (court held identity of the thing sued for was not present, because the first action sought an injunction, and the second action sought a declaratory judgment).

b. MMC and RM will argue on the other hand that the thing sued for is identical because both actions seek compliance with the statute. Penalties and an injunction are both means of obtaining compliance under the CWA. “We have recognized on numerous occasions that ‘all civil penalties have some deterrent effect.’” *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 184 (2000) (quoting *Hudson v. United States*, 522 U.S. 93, 102 (1997)).

2. Is the cause of action identical?

a. FOL will argue that the causes of action are different because FOL is suing for violations after the consent agreement was issued, which were not covered by the consent order. *See Old Timer v. Blackhawk Cent. Sanitation*, 51 F. Supp. 2d 1109, 1117 (D. Colo. 1999) ("because the permit violation gives rise to a separate cause of action, res judicata bars only those violations covered by the penalty order"). *See also WEA Crestwood Plaza, LLC v. Flamers Charburgers, Inc.*, 24 S.W.2d 1 (Mo. App. 2000) (party can bring successive claims on the same contract for damages that have not accrued as of the time of entry of judgment in the prior action). FOL also will argue that the causes of action are different because FOL is suing under the CWA for water pollution and the state brought enforcement action for improper disposal of hazardous waste under its solid waste statute. Finally, FOL will argue the causes of action are different because the first claim was under a state statute and the second was brought under a federal statute.

b. MMC and RM will argue that the causes of action are the same because they arose out of the same act, contract, or transaction. *See Citizens Legal Envtl. Network, Inc. v. Premium Standard Farms, Inc.*, 2000 WL 220464 (W.D. Mo. 2000) (citing *Missouri Real Estate v. St. Louis*, 959 S.W.2d 847 (Mo. App. 1987)). Since both the action by RM and the action by FOL arose from the act of MMC placing overburden in the Creek, they are identical causes of action for the purposes of res judicata.

The fact that the actions were brought under two different statutes is irrelevant to a determination of identity of causes of action. If this were not true, defendants would be forced to litigate the same claims in different forums simply because of differences in statutes. To determine whether the present claim and the prior claim constitute the same claim, we consider "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. . . ." *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990) (quoting Restatement (Second) of Judgments § 24(2) (1980)). This case is similar to *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), in which a previous action was brought under the CWA and the current action was brought under CERCLA. The court determined the present action and the prior action focused on the same underlying facts. The court stated, "[a] litigant cannot attempt to relitigate the same claim

under a different legal theory of recovery.” *Gurley*, 43 F.3d at 1195. Each action concerned the appellants’ disposal of hazardous waste in a borrow pit on the Caldwell property in the 1970s and the later release of those wastes. Thus, they are closely “related in time, space, and origin.” Furthermore, they “form a convenient trial unit” because each action depends on the same evidence of appellants’ actions. 43 F.3d at 1195. Therefore, since, as in *Gurley*, the facts in our case are closely related in time, space and origin, the actions of RM and FOL are identical for res judicata purposes regardless of the statute under which the actions were brought. See also *Siesta Manor, Inc. v. Cmty. Fed. Sav. and Loan Ass’n*, 716 S.W.2d 835, 839 (Mo. App.1986) (quoting Restatement (Second) of Judgments § 24 cmt. C (1982)) (“Separate legal theories are not to be considered as separate claims, even if ‘the several legal theories depend on different shadings of the fact, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.’”); *Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 468 (3d Cir. 1950) (“While the rule may not have been clear at one time, we think it is now clear that the fact that different statutes are relied on does not render the claims different ‘causes of action’ for purposes of res judicata.”).

### 3. Are the parties to both actions identical?

FOL will argue that RM and FOL are not in privity with one another and thus res judicata does not apply. Privity has been based on an express or implied legal relationship that makes the party accountable to the person sought to be estopped. *Favivh v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2000). In our case neither party is accountable to the other, therefore it cannot be said that they are in privity.

b. MMC and RM will argue that the state and FOL are in privity and thus the action by FOL is barred by res judicata. They will argue that the relationship between governmental authorities as public enforcers of environmental statutes and citizen suit enforcers of the same statutes as private attorneys general is virtually identical. See *Southwest Airlines v. Texas*, 546 F.2d 84 (5th Cir. 1977); *Harmon*, 191 F.3d 894; *US v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980). MMC and RM will make a similar argument that a state and its citizens are in privity when the state, acting as *parens patriae*, brings an action for damage to a public

resource. *Old Timer*, 51 F. Supp. 2d 1109 (citing *Satsky v. Paramount Communications*, 7 F.3d 1464 (10th Cir. 1993)).

4. Is the quality of persons for or against whom the claim is made identical?

There is no dispute here. MMC was the defendant in both suits.

#### C. IS THERE AN IMPLIED OR EXPRESS STATUTORY EXCEPTION TO THE FFCA THAT WARRANTS A SUSPENSION OF THE FFCA AND STATE LAW IN FAVOR OF FEDERAL PRECLUSION DOCTRINE?

FOL will argue generally that the FFCA does not apply to state court judgments in federal court where a later federal statute contains an express or implied partial repeal of the FFCA, and the CWA contains such an implied partial repeal of the FFCA. Its argument falls into three sub-arguments: do section 505(b)(1)(B), section 309(g) (6)(ii) or section 309(g)(6)(iii) of the CWA create implied exemptions to the FFCA?

MMC will argue generally, however, that the Supreme Court has reviewed other statutes as possible exceptions to the full faith and credit statute and has rejected all but one. *See Migra v. Warren City School Dist.*, 465 U.S. 75 (1994) (42 U.S.C. § 1983 is not an exception and thus res judicata precludes litigation of federal claim omitted from state claim); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982) (Title VII, 42 U.S.C. § 2000(e) *et seq.*, is not an exception and thus collateral estoppel precludes employment discrimination claim); *U.S. Fidelity & Guaranty Co. v. Hendry Corp.*, 391 F.2d 13 (5th Cir. 1968) (Miller Act, which is concerned with the granting of federal contracts, vests exclusive jurisdiction of Miller Act suits in the United States District Court for any district where contract is to be performed and executed and not elsewhere; state judgment in a suit between subcontractor and prime contractor did not bind surety in subcontractor's suit against it).

1. Does CWA section 505(b)(1)(B) create an implied exception to the FFCA?

- a. FOL will argue that section 505(b)(1)(B) is an implied exception to full faith and credit because it specifies that state action bars a citizen suit when a state diligently prosecutes an enforcement action in court. When Congress bars suit in one specific sit-

uation, its implied intent is not to bar suit in other situations. Similarly, the Supreme Court held that the presence of a citizen suit provision to enforce against violations of the CWA was evidence Congress intended no implied right of action to enforce against violations of the CWA. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) (Court held that where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute;" it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)).

b. MMC and RM will argue that the language of section 505(b)(1)(B) does not imply anything for situations other than that covered by the statute. There is a strong presumption of full faith and credit, and Congress must be clearer in its intention in order to override that presumption. The Court in *Kremer*, 456 U.S. at 468 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)), noted that it is "a cardinal principle of statutory construction that repeals by implication are not favored." Moreover, if FOL is right in its earlier argument that the bar under section 505(b)(1)(B) only applies to ongoing prosecutions, then it implies nothing about *res judicata*, since *res judicata* concerns only the preclusive effect of final judgments.

2. Does CWA section 309(g)(6)(A)(ii) create an implied exception to the FFCA?

a. FOL will argue that this section creates an implied exception for the same reasons that section 505(b)(1)(B) does.

b. MMC and RM will argue that this section does not create an exception to FFCA for the same reasons that section 505(b)(1)(B) does not.

3. Does CWA section 309(g)(6)(A)(iii) create an implied exception to the FFCA?

a. FOL will argue that this section was clearly intended to create an exception to *res judicata*. Congress intended that a state administrative order preclude a citizen suit *only* if the state assessed a civil penalty in its order and then only if the penalty is

paid. If the provision is not read as an exception to *res judicata*, and the application of *res judicata* would have the effect of precluding citizen suits even if the state issued an administrative order without assessing a civil penalty; section 309(g)(6)(A)(iii) would have no meaning. All state administrative orders would preclude citizen suits by reason of *res judicata* and this specific preclusion would be redundant. Therefore, since there was no penalty assessed by the state in the instant case, the suit by FOL should not be precluded.

b. MMC will argue that section 309(g)(6)(A)(iii) does not create an implied exception. It rebuts FOL's argument by pointing out that some states do not give preclusive effect to administrative orders. In those states, *res judicata* would not apply to state administrative orders, even in situations where an administrative agency assessed a civil penalty. The FFCA would not change this. Therefore section 309(g)(6)(A)(iii) is not redundant, but was necessary for Congress to ensure that all state administrative orders assessing civil penalties would have preclusive effect regardless of whether the state accords them such effect.

#### D. IS THERE A FULL AND FAIR OPPORTUNITY EXCEPTION THAT WARRANTS A SUSPENSION OF THE FFCA AND STATE LAW IN FAVOR OF FEDERAL PRECLUSION DOCTRINE?

According to the Supreme Court, "what a full and fair opportunity to litigate entails is the procedural requirements of due process." *Kremer*, 456 U.S. at 483 n.24. The Court added that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 482.

1. FOL will argue that since it did not have the right to intervene in the state action, it did not have the opportunity to be heard, and thus is not precluded from bringing suit now.

2. MMC will argue that the full and fair opportunity exception applies only when the state proceeding does not satisfy the minimum procedural protections of the Fourteenth Amendment's Due Process Clause. That clause applies when a state deprives a person of life, liberty, or property. *Kremer*, 456 U.S. at 467. The exception does not apply here since the state is not depriving FOL of life, liberty, or property. The party with property at stake is

MMC, and they do not assert that their Due Process rights were violated by the State.

## V. IS THE SUIT BY FOL AGAINST MMC MOOT?

A case is moot where the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923 (5th Cir. 1998). The issue presented by FOL is that MMC is in violation of the Clean Water Act.

### A. HAS THE CLAIM BY FOL THAT MMC IS IN VIOLATION OF THE CWA CEASED TO BE A LIVE CONTROVERSY?

1. FOL will argue that the case is not moot because MMC is still in violation of the CWA, since the overburden that they discharged into the wetland has not been removed. *See Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375 (S.D. Tex. 1999). MMC is in violation, because the violation arises not only from the act itself of discharging the waste into navigable water, but also from the continuing environmental degradation as long as the waste remains there. *See North Carolina Wildlife Fed'n v. Woodbury*, 1989 WL 106517 (E.D.N.C. 1989). If this Court does not agree that the failure to remove overburden from the creek amounts to a continuing violation, FOL will argue in the alternative that this situation falls under the voluntary cessation doctrine exception to mootness. The Supreme Court has consistently held that "voluntary cessation" of the challenged conduct does not automatically deprive a court of the power to decide the case. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). The Court was concerned that, if this were the case, the result would leave defendants free to simply recommence the illegal conduct after the case was concluded. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (citing *W. T. Grant Co.*, 345 U.S. at 633-36). Under this doctrine the defendant bears the burden to demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *See Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167 (2000) (holding that the correct standard for determining when a defendant's voluntary conduct renders a case moot is whether "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur;" a test Justice Ginsburg describes as a "formidable burden."). *See also, Texas Oil & Gas Ass'n*, 161 F.3d 923.

Since MMC has not decided to dispose of the materials in another way when it reaches the next phase of its project, it is reasonably likely that the violation will recur.

FOL will make a similar argument that this case falls under the 'capable of repetition yet evading review' exception to mootness. FOL will argue that if the court holds that the case became moot when MMC stopped placing overburden into the creek, MMC will be able to stop dumping into the creek whenever a suit is brought and evade review of its actions. See *Sierra Club v. Martin*, 10 F.3d 1551 (11th Cir. 1997).

2. MMC and RM will argue that the case is moot because MMC has ceased discharging fill into the wetlands. See *Prisco v. New York*, 902 F. Supp. 374 (S.D.N.Y. 1995). Moreover, they will argue that the voluntary cessation doctrine does not apply because MMC did not come into compliance voluntarily, but as a result of a state enforcement action. It did not come into compliance as a means to avoid suit, but as a result of enforcement. Finally, this does not fall under the 'capable of repetition yet evading review' exception to mootness. In order to satisfy this exception, it is required that: 1) there is a reasonable expectation or demonstrated probability that the same controversy will recur with the same complaining party and 2) the challenged action is too short in duration to be fully litigated prior to cessation. See *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Since the conduct of MMC will last for a period of time, the plaintiffs will be capable of seeking an injunction and penalties if its actions recur. This is not a situation like a pipe discharging into a stream that can be turned off in a second; this is process that will take some time to shut down.

## B. DOES FOL HAVE A COGNIZABLE INTEREST IN THE RESULT OF THE SUIT?

1. FOL will argue that it has a cognizable interest in the outcome of the suit. It needs an injunction in order to force MMC to remove the fill from the creek. Even if the court holds that MMC is in compliance, and thus, the claim for an injunction is moot, FOL will argue it still has a cognizable interest in civil penalties to deter future violating conduct, and therefore, that claim is not moot. See *Atlantic States Legal Found. v. Strooh Dies Casting Co.*, 116 F.3d 351 (7th Cir. 1995). See also *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167 (2000) (reasoning that the deterrent effect of a civil penalty would redress plaintiffs' injury by making the

defendant more likely to meet its permit limitations in the future, resulting in a cleaner river and environment).

2. MMC will argue that since they are in compliance, FOL's claim for an injunction is moot, and therefore so is its accompanying claim for civil penalties. Because the civil penalties are paid to the US treasury, not to FOL, it is not a remedy to them. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). It will also point out that in *Laidlaw* 528 U.S. 167, the Court made no definitive ruling on mootness when a violation came into compliance subsequent to the filing of a citizen suit complaint, but remanded the case for a mootness determination. Moreover, even under *Laidlaw*, the Court could have found a case moot where the violation ceased before the complaint was filed, as was the case here.