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Brief of Appellee, Magma Mining Co.: Thirteenth Annual Pace National Environmental Moot Court Competition

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MEASURING BRIEF*

Civ. App. No. 00-1436

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
AT WHITE PLAINS

FRIENDS OF THE LUSTRA, INC.,
AND
STATE OF ROCKY MOUNTAIN
Appellants
v.
MAGMA MINING CO.
Appellee

On appeal from the United States District Court
for the District of Rocky Mountain

BRIEF OF APPELLEE
MAGMA MINING CO.

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ORAL ARGUMENT REQUESTED

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

QUESTIONS PRESENTED

1. Was the court below correct in holding that FOL's action is subject to the "diligent prosecution" bars of 33 U.S.C. §§ 1319(g)(6)(A) & 1365(b)(1)(B) because the Rocky Mountain Department of Environment and Natural Resources (RMDENR) issued an administrative order directing MMC to cease activity, even though the statutory provision under which the RMDENR acted did not address water pollution, provide for citizen participation, or authorize RMDENR to assess penalties? If not, was the court correct in holding that the order barred both injunctive relief and monetary civil penalties?

2. Was the court below correct in holding that it had no jurisdiction under 33 U.S.C. § 1365(a)(1) because the non-permitted overburden remaining in Lustra Creek does not constitute a continuing violation under 33 U.S.C. § 1311(a)?

3. Was the court below correct in holding that the case is moot because MMC ceased violating the Clean Water Act more than three years ago, either voluntarily or involuntarily, and MMC does not threaten to do so again in the indefinite future?

4. Was the court below correct in holding that the State's version of res judicata barred FOL's suit because FOL was in privity with the State, even though the two have different enforcement objectives and FOL seeks enforcement against violations not addressed by the State?

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TO THE HONORABLE COURT OF APPEALS:

Appellee Magma Mining Co. (MMC) respectfully files this Brief of Appellee.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the U.S. Constitution provides in pertinent part that "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States . . . to Controversies . . . between a State, or the Citizens thereof."

Relevant statutory provisions of the Clean Water Act (the "Act") are addressed in the text. Other statutes include the Resource Conservation and Recovery Act, 42 U.S.C. 6901, 6972 (1994). The full text of all relevant statutory provisions are laid out in the attached Appendix.

Relevant regulatory provisions are laid out in the attached Appendix and include: 33 C.F.R. § 323.2(c) (1999), 33 C.F.R. § 323.2(e) (1999), and 43 C.F.R. § 23.3(d) (1983).

STATEMENT OF THE CASE***

Facts

The following facts are uncontested. Magma Mining Co. (MMC) operates an open pit opal mine on the side of Magic Mountain. (R. 4). During mining operations, MMC must remove overburden rock lying above the opal deposit. *Id.* As it developed the mine in three separate phases, MMC intermittently removed this overburden from January 1980 through January 1998 and placed the overburden at the base of the mountain, covering the Lustra Creek for about half a mile. *Id.* Since January 1998, MMC has not placed any additional overburden on top of the creek bed. *Id.* While MMC has planned a phase four to the mine, MMC has not decided to place the overburden in the creek, even though it is the easiest and cheapest method of disposal. *Id.* Nor has MMC decided when the planned phase will begin; however, it will be at least over one year from now before the new phase begins. *Id.*

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

In 1993, the State of Rocky Mountain Department of Environmental and Natural Resources (RMDENR) determined that the overburden on top of Lustra Creek constituted an unpermitted landfill. *Id.* The RMDENR issued a notice of violation (NOV) against MMC for disposing of the overburden rock in a landfill without the permit required by the Rocky Mountain Solid Waste Act (RMSWA). (R. 4). In August 1994, MMC and the RMDENR agreed upon the issuance of an administrative consent order under RMSWA which required MMC to immediately cease placing additional overburden on top of the creek without a permit, immediately plant with native vegetation, and nurture the vegetation so that it would become indistinguishable from the adjacent vegetated areas within three years. *Id.* In 1998, MMC graded and planted the overburden with native vegetation. *Id.* Since 1998, little rain has fallen in the area, stunting the growth of the plantings and preventing them from resembling the vegetation in adjacent areas as required by the order. *Id.* The RMDENR did not give public notice of the issuance of the administrative order, of its intention to issue the consent order, or of the NOV. *Id.*

The RMDENR stated in the preamble of the order that "[t]he RMDENR finds that removal of the landfill from the Creek would result in massive disruption of water quality by mud and silt erosion during the removal process." *Id.* Currently, the concentration of suspended solids in the Lustra Creek is greater below the landfill than above it; however, the concentration of suspended solids below the landfill has never exceeded that found in other streams in the area during spring snow melt off. (R. 4-5). The Lustra Creek now flows beneath the overburden before resurfacing to flow into the Roaring River, which, in turn, flows into the Columbia River, a navigable water of the United States. *Id.*

The administrative consent order was issued under the RMSWA which details a comprehensive regulatory scheme for the disposal of solid waste. (R. 5). Solid waste only may be disposed of in permitted landfills. *Id.* The permits are issued by RMDENR under the RMSWA. *Id.* In the absence of a permit, RMDENR may issue administrative orders to persons in violation of the RMSWA that require the persons to comply with the statute, be assessed a civil penalty of up to $2,500 per violation, or face a civil action in state court, which seeks an injunction requiring compliance, or both. *Id.* While interested parties are allowed to intervene in the state court actions under a practice rule that is virtually identical

to FED. R. CIV. P. 24, no public notice or intervention is provided for in the administrative enforcement actions. *Id.*

RMDENR, MMC, and the U.S. Environmental Protection Agency (EPA) were each given notice more than sixty days before the complaint was filed by the Friends of the Lustra, Inc. (FOL) that FOL intended to sue MMC for alleged violations. *Id.* FOL had never complained to the RMDENR before about any alleged violations by MMC, let alone, about MMC's alleged violations of the administrative order of placing overburden on the creek bed until 1998 and not successfully causing the plantings on the overburden to resemble the surrounding vegetation within a three year period. (R. 5).

The State of Rocky Mountain has intervened in this case to defend its enforcement actions, which are designed to secure compliance with both the federal and state statutes. *Id.* The State has noted that MMC did not comply with the RMDENR order in its entirety and seeks to enforce its order against MMC under § 1365(a)(1)(B) of the Clean Water Act [the Act] to prevent the recurrence of overburden being placed in the creek bed without a permit. *Id.* MMC has not challenged the State's attempt to invoke federal jurisdiction by using the Act to enforce an order that was actually issued pursuant to the state's solid waste act. *Id.*

Procedural History

Summary judgment for MMC on all issues was entered by the Honorable Judge Remus of the United States District Court for the District of Rocky Mountain. (R. 3-9). Both FOL and the State appealed to the United States Court of Appeals for the Twelfth Circuit. Appeal was granted September 1, 2000. (R. 2).

SUMMARY OF ARGUMENT

FOL's citizen suit is barred by the State's diligent prosecution of MMC. The State diligently prosecuted MMC by issuing a consensual administrative consent order which required MMC to cease placing overburden in the Lustra Creek and remediate the area or risk facing an injunction, monetary penalties, or both. In response to the administrative consent order, MMC ceased the activity, made good faith efforts to remediate the overburden, and has shown no intent to resume the complained of activity. To allow this citizen suit to continue is not in keeping with the policy of the Clean Water Act; for states to be the primary authority re-

sponsible for deciding which kind of enforcement action to bring and when to implement it.

Because FOL has failed to make a good faith allegation that MMC has continued to violate the administrative consent order, this Court lacks subject matter jurisdiction. A citizen suit cannot be brought for wholly past violations. At the time that this suit was filed, MMC was not in violation of the order nor had MMC threatened to violate it. In fact, MMC has made overt, good faith efforts to remediate the affected area and has stated that it does not intend to violate the order in the future. Both FOL and the State have failed to show the existence of any active, ongoing violations, or that MMC threatens to violate the order in the future. Mere allegations are insufficient to meet the Appellants burden of showing that subject matter jurisdiction is present.

This case is moot because MMC ceased violation of the administrative consent order over three years ago. Not only did MMC cease the activity, MMC complied with the order by making good faith efforts to remediate the area well before FOL even gave notice of its complaint. Neither Appellant has offered sufficient evidence that MMC has continued its prior activity. Nor can the Appellants reasonably rely on the capable of repetition, yet evading review, exception to mootness, because it is absolutely clear from the undisputed facts that there is no reasonable expectation that MMC threatens to violate the order in the future. Even if MMC did not voluntarily cease violation, this case is still moot because at the time of filing there was no active violation of the order and, therefore, there was no actual case or controversy.

Finally, both FOL and the State of Rocky Mountain are barred from bringing this action by res judicata. The causes of action of this case and the administrative consent order are identical. FOL and the State are in privity, and MMC is the party named in both this case and the order. Thus, all elements of res judicata are present. Res judicata is afforded to consent decrees such as the administrative consent order issued by the Rocky Mountain Department of Environmental and Natural Resources because they may be agreed to as a form of settlement. Consequently, these orders are similar to judicial proceedings in substance and only differ as to their manner of form. Because all elements of res judicata are present, the administrative consent order precludes this case from continuing under the doctrine of res judicata.

STANDARD OF REVIEW

As this appeal is from the district court's grant of summary judgment, the standard of review is de novo. *New York Dep't. of Soc. Servs. v. Shelala*, 21 F.3d 485, 491 (2d Cir. 1994). On appeal, the evidence and its reasonable inferences must be viewed in the light most favorable to the non-movant. *See Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir. 1988); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). "However, where the nonmoving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim." *Brady*, 863 F.2d at 210, (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

ARGUMENT

I. This court should uphold the judgment of the district court that FOL's action is barred by the State's diligent prosecution of MMC because it is against the statutory goals and policy of the Clean Water Act to allow citizen suits that are duplicative of the State's enforcement actions.

A citizen suit for penalties under the Act is barred if the state is enforcing the state law "to the fullest extent possible." *Love v. New York State Dept. of Envtl. Conserv.*, 529 F. Supp. 832, 844 (S.D.N.Y. 1981). The state is assumed to be acting diligently when a suit is brought pursuant to the Act, and the citizens must prove the contrary. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 486-87 (D.S.C. 1995) (*Laidlaw I*). It is not enough for the citizens to claim that the state is not pursuing the actions desired by the citizens in the timeline the citizens deem proper. *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997). The state must fail to pursue enforcement of the Act. In determining due diligence, the court must consider the purpose behind the statutes at issue, 33 U.S.C. §§ 1365, 1319(g)(6)(A) (1987), and their application in this context.

A. The State's enforcement actions meet the goals and policy of the Act and thus meet the federal "diligent prosecution" standard.

Congress statutorily declared that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pol-

lution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b) (2000). The policy that states rights are primary is supported by the legislative history of the citizen suit provision of the Act, which indicates that Congress intended to only allow a citizen suit if the enforcement action is inadequate. Federal Water Pollution Control Act Amends. of 1972, S.REP. No. 414, 92d Cong., 1st Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746.

As long as the state law contains comparable penalty provisions that the state is authorized to enforce, has the same overall enforcement goals as the Act, provides interested citizens a meaningful opportunity to participate in significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests, the state's administrative enforcement action is comparable to federal action. *See Arkansas Wildlife Fed'n. v. ICI Americas Inc.*, 29 F.3d 376, 381 (8th Cir. 1994); *North & South Rivers Watershed Ass'n., v. Town of Scituate*, 949 F.2d 552, 556 n.7 (1st Cir. 1991). Under those circumstances, the state statute should be presumed comparable unless the facts of the specific case demonstrate that the state denied an interested party a meaningful opportunity to participate in the administrative enforcement process. *ICI Americas Inc.*, 29 F.3d at 382. FOL has not demonstrated that it was denied a meaningful opportunity to intervene at the time that the administrative action was taken.

The courts have consistently weighed the circumstances of a case against the Congressional intent and concluded that only if "the government cannot or will not command compliance" should a citizen suit be allowed to proceed. *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987) (*Gwaltney I*); *see also Citizens for a Better Env't v. Union Oil Co.*, 83 F.3d 1111, 1115 (9th Cir. 1996) (finding that § 1319(g)(6)(A) was written to prevent suits that were merely duplicative of action already taken by the government); *cf. Laidlaw I*, 890 F. Supp. at 486 ("the critical issue presently before the court is whether [the state's lawsuit] constitutes diligent prosecution sufficient under [§ 1365(b)(1)(B)] to bar the plaintiffs' citizen suit"); *North & South Rivers Watershed Ass'n*, 949 F.2d at 555. Thus, citizen suits only serve an "interstitial" role to a government action rather than a "potentially intrusive" one. *Gwaltney I*, 484 U.S. at 60-61; *North & South Rivers Watershed Ass'n,* 949 F.2d at 556.

Additionally, the courts have recognized "that the states are afforded some latitude in selecting the specific mechanisms of

their enforcement program" and which remedies to pursue. *ICI Americas Inc.*, 29 F.3d at 380; *see also Gwaltney I*, 484 U.S. at 60-61; 33 U.S.C. §§ 1319(g)(6)(A) (1987) and 1365(b)(1)(B) (1972). Here, the state imposed an administrative consent order (CAO), required MMC to correct the violations, imposed a compliance schedule, and reserved the right to assess additional penalties or pursue further action if MMC failed to comply with the administrative consent order. (R. 4). MMC, in turn, ceased placing overburden in Lustra Creek, and implemented a comprehensive remedial action plan in compliance with the order. *Id.* The action taken by the state reasonably reflects the history and seriousness of MMC's past violation.

The First Circuit has suggested that courts must afford appropriate deference to the expertise of the agency enforcing the state's environmental laws and that "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 violations as duplicative civilian action." *North & South Rivers Watershed Ass'n,* 949 F.2d at 556-57. In short, the court recognized that there was no point in allowing a suit to go forward if the court could not provide any meaningful relief because the remedy was already being diligently pursued. It would be unreasonable and inappropriate to find failure to diligently prosecute simply because MMC's restoration efforts failed to perfectly mimic the surrounding watershed or because a compromise was reached. *Cf. Connecticut Fund for the Env't v. Contract Plating Co.,* 631 F. Supp. 1291, 1294 (D. Conn. 1986).

B. FOL's action is duplicative of the State's enforcement action and is not allowed by the Act.

Congress recognized that a large number of cases would likely be pursued if citizen suits were allowed despite a state's diligent prosecution, and the result would needlessly clog court dockets due to this discrepancy. *See* Leonard O. Townsend, *Hey You, Get Off [of] My Cloud: An Analysis Of Citizen Suit Preclusions Under The Clean Water Act*, 11 FORDHAM ENVTL. L.J. 75 (1999). Thus, Congress added § 1319(g) to the Act to preclude such suits. *Id.* Section 1365(a) includes § 1319(g)(6) as a bar to citizen suits. 33 U.S.C. § 1365(a).

Section 1319(g)(6)(A) bars the civil penalty awards in citizen suits if the state "has commenced and is diligently prosecuting an

action under a State law comparable to this subsection" or the defendant has "paid a penalty assessed under this section, or such comparable state law." 33 U.S.C. § 1319(g)(6)(A) (1987).

FOL has argued that § 1365 does not apply here because the order was not issued through a traditional judicial proceeding pursuant to the Act. This argument cannot be correct because it rejects Congress's intent to ensure that citizen suits serve a supplementary role to governmental enforcement of pollution provisions. Permitting a citizen suit when the state chooses not to enforce pollution controls in court will result in "[e]lected officials [being] entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., (Laidlaw II)*, 120 S.Ct. 693, 720 (1972) (Scalia, J., dissenting).

The RMDENR issued a consent administrative order to enforce MMC's compliance with state law regarding waste disposal. (R. 4). Such orders constituting the commencement of an action under § 1319 need not be defined as a judicial proceeding and can bar citizen suits. *See Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1483 (D. Colo. 1994); *North & South Rivers Watershed Ass'n*, 949 F.2d at 555-56. "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 violations as duplicative civilian action." *Colorado Refining Co.*, 852 F. Supp. at 1483, (quoting *North & S. Rivers Watershed Ass'n*, 949 F.2d at 556). Furthermore, merely because the order is consensual does not alter the conclusion that the order constitutes the commencement of an action. *See ICI Americas, Inc.*, 29 F.3d at 380.

In contrast, the Ninth Circuit has focused on the "plain reading" of the statutory provision of § 1319 to provide the appropriate participation safeguards and prevent states from precluding citizen suits more than the federal government. *Citizens for a Better Env't v. Union Oil Co.*, 83 F.3d 1111, 1118 (9th Cir. 1996). Though the Ninth Circuit claims to look to the "plain language" of the statute it ignores the goals and policy explicitly stated in the Act. *Id. contra* 33 U.S.C. § 1251(b) (1972). Consistent with the purpose of § 1319, Congress chose to use the word "identical" instead of "comparable" to describe state enforcement actions and thereby allows states discretion and limited citizen suits to supplement not replace governmental enforcement actions. *See* 33

U.S.C. § 1251(b) (1972). Here, the state statute is the RMSWA. (R. 4). The purpose of the RMSWA, to protect water quality, is a purpose consistent with that of § 1319. (R. 7). The RMSWA cannot be implemented without the RMCWA which has been approved by the EPA under the Act section 402(c). *Id.*

FOL argues that the RMSWA does not allow for citizen intervention. The statutory scheme as a whole, however, does provide for citizen intervention. The RMSWA details two methods of enforcement, administrative orders and lawsuits. (R. 5). The State's statute is similar to FED. RULE CIVIL P. 24, which provides for citizens' intervention in state court actions pursuant to the RMSWA. *Id.* It is at the state's discretion to choose the initial step in the process, and the State selected an administrative consent order. *Id.* The specific statutory provision need not provide for intervention if the overall enforcement scheme does provide for such intervention. *North & South Rivers Watershed Ass'n*, 949 F.2d at 556. If states were denied such discretionary powers, then citizen suits would be elevated from a supplemental role to a "potentially intrusive" one. *Id.*

FOL argues that the RMSWA does not allow for penalty assessment as the Act does. On the contrary, the RMSWA does allow for similar penalty assessments. The RMDENR may utilize its power to issue an administrative order to force compliance or may opt to pursue an injunction or monetary penalties in court. (R. 5). "Citizen suits are barred where a state agency conducting enforcement proceedings has the authority to assess financial penalties, regardless of whether the agency actually assesses or seeks penalties." *Williams Pipe Line Co.*, 964 F. Supp. at 1323 (assessing state law for enforcement authority comparable to the federal Clean Water Act).

C. Section 1319 bars the issuance of injunctions for violations subsequent to the administrative consent order.

FOL argues that, if applicable, § 1319 only bars penalties prior to the order and does not bar the issuance of injunctions. On the contrary, § 1319(g)(6)(A) bars "a civil penalty action under subsection (d) of this section or . . . section 1365 of this title." 33 U.S.C. § 1319(g)(6)(A) (1990). Section 1365 does not distinguish between civil penalties and injunctions. *North & South Rivers Watershed Ass'n*, 949 F.2d at 557. Therefore, § 1319 does bar both civil penalties and injunctions by incorporation.

The bar on both types of civil penalties is consistent with the Congressional intent behind both statutes. *ICI Americas Inc.*, 29 F.3d at 383 ("Allowing suits for declaratory and injunctive relief in federal court despite a state's diligent efforts at administrative enforcement, could result in undue interference with or unnecessary duplication of the legitimate efforts of the state agency."). An agency's discretion must not be hindered or proper enforcement efforts may be thwarted. *Williams Pipe Line Co.*, 964 F. Supp. at 1324. The RMDENR had the power to issue administrative orders to require compliance and to seek injunctive, or punitive relief, or both. (R. 5). The RMDENR found that an administrative consent order would be the most effective means to achieve successful compliance in this case. Allowing FOL to pursue this suit would only result in duplicating a legitimate state action. Thus, this Court should conclude that the State's due diligence bars FOL from pursuing this case.

II. The lower court correctly granted summary judgment on the grounds that it lacked subject matter jurisdiction because the FOL failed to make a good faith allegation of an intermittent or continuing violation.

A. Section 505(a) of the Act does not confer jurisdiction for wholly past violations.

Section 505(a) of the Act states that a citizen suit may be brought against a party alleged "to be in violation" of the Act. 33 U.S.C. § 1365(a) (1982). The phrase "to be in violation" requires that there be an intermittent or continuing violation for the suit to be brought. *Gwaltney I*, 484 U.S. at 57 ("[T]he most natural reading of 'to be in violation' is a requirement of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future."). A citizen suit under section 505(a) of the Act cannot be brought to challenge wholly past violations. *Id.* at 64. In short, without a continuing or intermittent violation, the court does not have subject matter jurisdiction. *Id.*

To establish jurisdiction, a plaintiff must make a good faith allegation of a continuing or intermittent violation and demonstrate its existence by presenting sufficient allegations of fact. *Id.* at 64, 66; *Frilling v. Village of Anna*, 924 F. Supp. 821, 843 (S.D. Ohio 1996). Once a violation ceases to be intermittent, there is no

real likelihood of repetition. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 172 (4th Cir. 1988) (*Gwaltney II*). If the defendant presents evidence showing there is no genuine factual dispute that the defendant will continue a violation, then the plaintiff must demonstrate more than just good faith. *Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co.*, 989 F.2d 1305, 1312 (2d Cir. 1993).

Accordingly, a plaintiff can establish the court's jurisdiction by showing one of the following: 1) that violations continued on or after the date the complaint was filed; or 2) that there is evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence of violation. *Gwaltney II*, 844 F.2d at 171; *Natural Res. Def. Council v. Texaco Corp.*, 2 F.3d 493, 501 (3rd Cir. 1993); *L.E.A.D. v. Exide Corp.*, No CIV.96-3030, 1999 WL 124473, at *32 (E.D. Pa. Feb. 19, 1999). FOL has not shown the existence of any ongoing violations. The evidence clearly demonstrates that there were no violations on or after the day FOL filed suit. Further, the evidence clearly demonstrates that there is no reasonable likelihood that MMC will continue to engage in intermittent or sporadic violations. Therefore, MMC's alleged violations are wholly past and the court lacks subject matter jurisdiction.

B. MMC did not violate section 301(a) of the Act on or after the day FOL filed suit.

FOL alleges that MMC violated section 301 of the Act by discharging overburden into Lustra Creek without a permit issued under section 402 or section 404 of the Act. (R. 3). Section 301 prohibits the discharge of a pollutant unless otherwise authorized by section 402, section 404, and other sections. *See* 33 U.S.C. § 1311(a) (1995) ("Except in compliance with this section and sections . . . 402 and 404 of this title, the discharge of a pollutant by any person shall be unlawful."). Sections 402 and 404 authorize the EPA or a state to issue a permit for the discharge of any pollutant and the Army Corps of Engineers to issue permits for the discharge of fill or dredged material into navigable water. 33 U.S.C. § 1342(a) (1995) and § 1344(a) (1987). Accordingly, MMC must "discharge a pollutant" to violate section 301 of the Act. Furthermore, MMC must continuously or at least intermittently discharge overburden, a pollutant under section 502(6) to be in violation. *See* 33 U.S.C. § 1362(6) (1996) (stating the term pollutant includes rock and sand). FOL has failed to demonstrate that

MMC continuously discharged overburden into the Lustra. The record is clear that MMC last discharged overburden into the creek in 1998. (R. 4). Thus, there is no continuing violation because overburden was not discharged into the Lustra on or after the day FOL filed suit.

1. Under the Act, to "discharge" is to "add" a pollutant, and MMC did not "add" a pollutant to the Lustra on or after the day FOL filed suit.

Section 502(12) states that a discharge is defined as the "addition" of any pollutant into navigable water from a point source. 33 U.S.C. § 1362(12) (1996). The use of the word "addition" invokes the continuous violation requirement. Thus, to violate section 301 one must continually or intermittently "add" a pollutant to navigable water. Under the clear and plain language of the Act, to discharge is to add a pollutant. *Gwaltney I*, 484 U.S. 49, 56 (1987) ("It is well settled that the starting point for interpreting a statute is the language of the statute itself."). Yet, neither the Act nor the Code of Federal Regulations defines "addition" or "add." A common definition of addition is "the process of adding" and to "add" is to "increase by attaching more." WEBSTER HANDY COLLEGE DICTIONARY (A. Morehead & L. Morehead, eds. 1980). Since 1998, MMC has not added any overburden to the creek. (R. 4).

The Seventh Circuit has held that the addition of a pollutant requires "active conduct." *Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) ("[A] permit is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever."). The addition of dredged material cannot be a passive activity; thus, any defendant not actively engaged in adding a pollutant does not need a permit under section 404. *Id.* at 938. (stating that plaintiff claimed that silt was being discharged because a dam was removed causing silt to be picked up off the bottom of the remaining impoundment and deposited downstream). Rather, the court in *Froebel* noted that if the defendant had piled silt on the riverbank and deliberately allowed rainfall to wash it into the river, then section 404 would have been violated. *Id.* at 939.

Like the defendant in *Froebel*, MMC is not actively engaged in adding overburden to the Lustra. Here, MMC has done "nothing whatsoever" by allowing the overburden to remain in the Lustra. MMC only placed overburden on top of the Creek between 1980 and 1998. (R. 4). MMC is not actively engaged in the erosion of

the overburden, so it is not actively adding a pollutant. *See Connecticut Coastal*, 989 F.2d at 1313 ("The present violation requirement of the [Act] would be completely undermined if a violation included the mere decomposition of pollutants."). Moreover, MMC did not deliberately pile the overburden in the Lustra to allow the creek water to wash suspended solids into the Lustra. Therefore, MMC was not and is not in violation of section 301 on, or after the date, FOL filed suit.

2. While pollutants discharged without a section 404 permit are generally continuous violations of the Act, this view is inapplicable because the overburden does not meet the § 404 definition of fill or dredge material.

In general, fill or dredge material illegally discharged without a permit under section 404 constitutes a continuing violation until the material is removed. *Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 377 (S.D. Tex. 1999); *Sasser v. EPA*, 990 F.2d 127, 129 (4th Cir. 1993); *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987); *North Carolina Wildlife Fed'n v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, at *2 (E.D.N.C. April 25, 1989); *see also United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla. 1996); *United States v. Tull*, 615 F. Supp. 610 (E.D. Va. 1983), *aff'd* 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987). Only one case has held that illegal fill or dredging activity that occur prior to filing a citizen suit did not constitute a continuing violation for purposes of citizen suit jurisdiction. *Bettis v. Town of Ontario*, 800 F. Supp. 1113, 1115 (W.D.N.Y. 1992). But, several of the majority view cases do not deal with citizen suit subject matter jurisdiction, instead, they consider the assessment of penalties or the tolling of a statute of limitations. *See, e.g., Ciampitti*, 669 F. Supp. at 700; *Reaves*, 923 F. Supp. at 1534. Here, the majority view is inapplicable because the overburden at issue is not fill or dredge material. Further, this line of cases cannot be applied because the overburden pile cannot be removed without causing even greater environmental damage.

a. Under section 404, the overburden is not fill or dredged material.

Overburden is defined as "all the earth and other materials which lie about a natural deposit of minerals and such earth and

other materials after removal from their natural state in the process of mining." 43 C.F.R. § 23.3(d) (1983). Dredge material is "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (1999). The overburden at issue does not fall under the definition of fill or dredge material. The overburden on top of the Lustra is what lies above the opal ore inside of Magic Mountain. (R. 4). Because it is not taken from a river or a stream, the overburden is not dredge material.

Fill material is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] water body." 33 C.F.R. § 323.2(e) (1999). It does not include "any pollutants discharged into the water primarily to dispose of waste." *Id.* At most the overburden has only incidentally replaced an aquatic area with dry land and altered the bottom elevation of the Lustra. (R. 4). In reality, however, it has not replaced the stream or actually changed the elevation of the bottom of the Lustra because the creek continues to flow beneath the overburden. *Id.* The overburden does not meet the definition of fill material because it was not used for the *primary purpose* of replacing the Lustra or changing the bottom elevation of the Lustra.

Furthermore, overburden is waste material, and as such, it is not fill material. *Bragg v. Robertson*, 72 F. Supp. 2d 642, 656 (S.D. W.Va. 1999); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1342 (D.N.M. 1995) (holding that gold mine overburden was not fill material subject to section 404); *West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1286-87 (S.D. W.Va. 1989), *aff'd without op.*, 932 F.2d 964 (4th Cir 1991) (holding that coal mining overburden in a stream is waste, not dredge or fill material subject to section 404). Therefore, section 404 does not apply to the overburden, and MMC does not need a section 404 permit.

b. Public policy prevents the overburden from being classified as a § 404 violation.

"[O]nly violations having persistent effects that are amenable to correction, [can] constitute continuing violations." *Woodbury*, 1989 WL 106517, at *2. "When a company has violated an effluent standard or limitation, it remains . . . 'in violation' . . . so long as it has not put into place remedial measures." *Gwaltney I*, 484 U.S. at 69 (Scalia, J., concurring). In general, fill or dredge material deposited in a navigable water is considered a continuing vio-

lation until removed because the presence of the material is viewed as a correctable situation. *See, e.g., Informed Citizens,* 36 F. Supp. 2d at 377.

But, the overburden pile in Lustra Creek is not "amenable to correction" by removal because the environmental damage and associated costs far outweigh any benefits of removal. Courts have frequently considered such ramifications in environmental cases. *See ,e.g., Aberdeen & Rockfish R.R. v. SCRAP*, 409 U.S. 1207 (1972) ("The decisional process for judges is one of balancing and it is often a most difficult task."); *Reserve Mining Co., v. EPA*, 514 F.2d 492 (8th Cir. 1975). The overburden has not significantly degraded the water quality of the Lustra. (R 4-5). Yet, it is likely that removal of the overburden will degrade the water quality. Such a result must be considered before ordering removal of the overburden because a "remedy should be fashioned which will serve the ultimate public weal by insuring clean. . .water." *Reserve Mining Co.*, 514 F.2d at 535. Removing the overburden would not serve the "ultimate public weal" because it would not ensure clean water. In fact, removing the overburden pile would cause greater harm to the water quality of the Lustra. Removing an overburden pile that has been in one location for over twenty years would involve significant costs, not only to MMC, but to the environment and people of Rocky Mountain.

Furthermore, contrary to the cases stating the majority view, the overburden pile has not substantially endangered the Lustra or the surrounding environment. Currently, the only documented degradation of water quality allegedly due to the overburden pile is the increased presence of suspended solids in the Lustra below the overburden pile. (R. 4). Yet, the concentration of suspended solids has never been greater than the levels found in other streams in the area during spring snow melt off. (R. 4-5). Thus, the use and enjoyment of the Lustra is not significantly affected downstream by the overburden. Further, individuals who wish to use the Lustra for recreation are only restricted from doing so for about half a mile where the Creek runs below the overburden. (R. 4). Other than this half mile, individuals can enjoy the Lustra in its entirety.

Because the overburden has been present for twenty years, the equilibrium that has developed between the presence of the overburden and the flow and use of the Lustra would be completely disrupted if the overburden were removed. The RMDENR determined that "removal of the [overburden] from the Creek

would result in massive disruption of water quality by mud and silt erosion during the removal process." (R. 4). Thus, it is likely that an even greater environmental problem and increased costs to both MMC and the people of Rocky Mountain would likely result. Therefore, the overburden is not "amenable to correction" and the overburden cannot be remaining fill or dredge material that violates section 404 of the Act.

3. The overburden does not constitute a continuing violation of the Resource Conservation and Recovery Act either.

Under the Resource Conservation and Recovery Act (RCRA), materials that remain after the initial act of discharging have been interpreted to constitute continuing violations. *See L.E.A.D.*, 1999 WL 124473; *Powttstown Indus. Complex v. P.T.I. Servs.*, No. CIV.91-5660, 1992 WL 50084 (E.D. Pa. Mar. 10, 1992); *Briggs & Stratton Corp. v. Concrete Sales & Servs.*, 20 F. Supp. 2d 1356 (M.D. Ga. 1998); *Aurora Nat'l Bank v. Tri Star Mktg.*, 990 F. Supp. 1020 (N.D. Ill. 1998). These cases do not apply here because RCRA has entirely different purposes and goals than the Act. More importantly, the rationale behind these RCRA decisions is that the environmental harm is "amenable to correction" by removal.

The harm resulting from an illegal discharge under the Act is not the same as the improper disposal of hazardous wastes under RCRA. Damage done by an illegal discharge under the Act is often irreversible, and little is gained by allowing a citizen suit over what cannot be returned to its earlier pristine state. *Fallowfield Dev. Corp. v. Strunk*, No. CIV.89-8644, 1990 WL 52745, at *10 (E.D. Pa. Apr. 23, 1990) ("[T]he discharge of a pollutant into the water or air normally disperses or dissipates, making cleanup difficult or impossible."). Although the discharge in this case did not disperse or dissipate, the overburden is impossible to remove without causing greater environmental damage. Currently, the overburden is not "insidiously infecting" the environment. *Id.* The environmental impact of the remaining overburden is low; whereas, its removal may pose greater environmental problems. Therefore, RCRA does not apply to the present case because the overburden is not "amenable to correction."

C. There is no reasonable likelihood that MMC will engage in intermittent violations.

In *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, the defendant had previously violated the Act on a monthly basis, and the fact that no violations occurred one month before the suit was filed did not mean that there were no continuing violations. 890 F.2d 690, 694 (4th Cir. 1989) (*Gwaltney III*). The court held that, because of the history of monthly violations and no other evidence indicating that violations had ceased, there was a reasonable likelihood that the defendant would again violate the Act. *Id.* Whereas, in *Allen County Citizens for the Environment v. B.P. Oil Co.*, a forty-one month gap between exceedence reported prior to the complaint and an exceedence reported after the complaint was filed made the latter exceedence an isolated incident rather than a continuing violation. 762 F. Supp. 733, 740 (N.D. Ohio 1991), *aff'd,* 966 F.2d 1451 (6th Cir. 1992).

The last time MMC allegedly violated the Act was in January of 1998. (R. 4). Since 1998, MMC has not placed any overburden onto or into the Lustra and has made good faith efforts to plant the overburden with native vegetation as agreed to by the State in its administrative order. *Id.* Thus, there has been a three year gap between the last violation and the filing of the suit. The evidence does not denote a pattern in intermittent violations that makes it reasonably likely that MMC's will recur in the future. Under *Allen County* and the reasoning used in *Gwaltney III*, this large gap in time and MMC's good faith efforts show that it is not reasonably likely that MMC will again intermittently violate the Act.

FOL can only speculate about what will happen in MMC's planned Phase Four, which does not have an estimated start date. (R. 4, 9). By the time Phase Four is implemented and overburden is discharged, there will be at least a four year gap between this hypothetical future violation and the last pre-complaint violation that occurred in January of 1998. (R. 4). Furthermore, because it takes four months to remove the overburden to the creek, the Appellants would have ample opportunity to renew their complaint during Phase Four if it became apparent that MMC threatened to violate the Act. (R. 9).

III. Because there is no reasonable expectation that violations will continue or recur, MMC's voluntary cessation and compliance with the administrative consent order moots the Appellants' case.

The question of mootness is reviewed de novo because it is a question of law. *Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994).

Federal courts may adjudicate only actual, on-going cases or controversies. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); U.S. CONST. art. III, § 3, cl. 1. While the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Laidlaw II*, 120 S.Ct. at 708, it is the non-moving parties' burden to demonstrate that the defendant's allegedly wrongful behavior will likely continue or recur or that impending injury threatens. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Furthermore, to satisfy Article III, it must be "likely," as opposed to "merely speculative," that a favorable decision will redress the plaintiffs' injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

It is understood that "voluntary cessation of allegedly illegal conduct" does not of its own force moot a case. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *City of Mesquite*, 455 U.S. at 289. Rather, a case is only moot if the parties do not possess a "legally cognizable interest in the outcome," *Powell v. McCormack*, 395 U.S. 486, 496 (1969), or it is "said with assurance" that there is no reasonable expectation that the "alleged violation will recur" and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *see Princeton University v. Schmid,* 455 U.S. 100, 103 (1982) (per curiam). The standard to determine whether voluntary cessation moots a case is stringent and requires that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *see Laidlaw II,* 120 S.Ct. at 708.

A. MMC's actions clearly demonstrate that there is no reasonable basis to expect a violation to recur, and the Appellants have failed to demonstrate otherwise.

The Appellants mistakenly argue that MMC's good faith pre-complaint efforts to achieve compliance were not voluntary and, thus, do not moot this case. On the contrary, the actions taken by MMC provide a sound basis for concluding that this case is moot. MMC's conformity with the standard for mootness is readily demonstrated by comparing MMC's actions to those of other defendants in "voluntary compliance" cases. For example, in *Davis,* the defendant's good faith efforts to comply, permanence of the changes made to achieve compliance, defendant's history of compliance (or attempted compliance) prior to suit, and the defendant's consistent compliance thereafter, even though remediation post-dated the filing of the complaint, persuaded the U.S. Supreme Court to find the case moot. 440 U.S. at 631-33. In *Connecticut Coastal*, the court was persuaded the case was moot by the defendant's declaration "that it made a 'final irrevocable decision' never to reopen the Gun Club to trap and skeet shooting at any time in the future," which was bolstered by the actual dismantling and removal of the trap and skeet houses. 989 F.2d 1305, 1312 (2d Cir. 1993). In *Iron Arrow Honor Society v. Heckler*, the case was moot because there was no reasonable likelihood that the university, having reversed its position that gave rise to the controversy, would later change its mind. 464 U.S. 68, 72 (1983) (per curiam).

In contrast, voluntary cessation does not moot a case when the facts demonstrate post-suit cessation only, significant possibilities for backsliding, solely cosmetic changes, partial reform, or a combination of at least two of these factors. *See, e.g., W.T. Grant Co.*, 345 U.S. at 634 (showing defendant previously refused to terminate the illegal actions at issue "despite five years of administrative attempts to persuade him of their illegality," and defendant would not agree to avoid similar violations in the future); *City of Mesquite*, 455 U.S. at 289, n.11 (city's repeal of objectionable ordinance did not preclude it from reenacting the provision if judgment were vacated, and city announced its intention to do so).

Here, MMC's actions to address the overburden in Lustra Creek were well underway prior to FOL giving its statutorily-required notice. MMC had ceased placing rock in the creek, had planted vegetation as required by the administrative consent or-

der, and was well on its way to full compliance prior to FOL's complaint. (R. 4). Thus, MMC's actions were taken independent of this suit, and this Court should conclude that MMC met its burden of demonstrating mootness through the cessation of violation three years ago and its overt, good faith efforts to achieve compliance.

The Appellants' allegations and the fact that placing overburden in the creek is the cheapest and easiest disposal method are insufficient bases to meet the Appellants' burden of persuasion. (R. 4). Neither Appellant has offered sufficient evidence to establish that the alleged wrongful behavior is continuing or that the allegedly "threatened injury [is] certainly impending." *Whitmore*, 495 U.S. at 158 (citations and internal quotation marks omitted). There is no reasonable expectation that MMC will violate the administrative consent order. It would be an immense and unacceptable stretch to allow a presumption to substitute for such an expectation. MMC's voluntary efforts in achieving compliance provide a sound basis for affirming the district court's judgment.

B. Assuming that MMC did voluntarily cease activity, the "capable of repetition, yet evading review" exception to mootness does not apply in this case.

The "capable of repetition, yet evading review" or "voluntary cessation" doctrine is nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist. *Laidlaw II*, 120 S.Ct. at 721 (Scalia, J., dissenting), (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998)). "The required showing that it is absolutely clear that the conduct could not reasonably be expected to recur is not the threshold showing required for mootness, but the heightened showing required in a particular category of cases where there is reason to be skeptical that cessation of violation means cessation of live controversy." *Laidlaw II*, 120 S.Ct. at 721-22 (internal quotation marks omitted).

Satisfying the "capable of repetition, yet evading review" exception to mootness, requires that (1) there be a reasonable expectation or a demonstrated probability that the same controversy, involving the same complaining party, will recur and (2) the challenged action is too brief to be fully litigated prior to its cessation or expiration. *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997); Murphy v. Hunt, 455 U.S. 478, 482-83 (1982); *Wein-*

stein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam); *National Solid Wastes Mgmt. Ass'n v. Alabama Dep't of Envtl. Mgmt.*, 924 F.2d 1001, 1003 (11th Cir. 1991), *cert. denied*, 501 U.S. 1206 (1991). A mere physical or theoretical possibility of recurrence is insufficient to satisfy these requirements. *Murphy*, 455 U.S. at 482. Rather, there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur. *Weinstein*, 423 U.S. at 149. Here, there is no such demonstrable probability. The record only shows that Phase Four is planned and that the prior overload remains in the creek bed per the consensual administrative consent order issued by the State. Based on these facts, there does not exist a "reasonable expectation" or "demonstrated probability" that MMC intends to violate the Act.

C. Even if this Court concluded that MMC did not voluntarily cease violation, the policies underlying the Act dictate that this Court find this case moot.

1. If MMC did not voluntarily cease violation, then MMC meets the less stringent standard for mootness.

"For claims of mootness based on changes in circumstances other than voluntary cessation, the showing [required by the defendant] is less taxing, and the inquiry is indeed properly characterized as one of 'standing set in a time frame.'" *Laidlaw II*, 120 S.Ct. at 722 (Scalia, J., dissenting); *see Arizonans,* 520 U.S. at 67, 68 n.22 (stating that the case mooted where plaintiff's job change deprived case of "still vital claim for prospective relief"); *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (stating that case mooted by petitioner's completion of his sentence, since "throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision") (internal quotation marks omitted); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478-80 (1990) (stating that case mooted by change in federal law that eliminated parties' "personal stake" in the outcome).

At the time of filing, MMC was already in compliance with the State's administrative consent order and had taken no action that threatened Lustra Creek. (R. 4). Thus, there was no controversy at the time of filing. Citizens lack statutory standing under § 1365(a) of the Act to sue for violations that have ceased by the

time the complaint is filed. *Gwaltney I*, 484 U.S. at 56-63 (1987). Therefore, this Court should uphold the district court's ruling that this case is moot because MMC was in compliance prior to the suit being filed.

2. A determination of mootness supports the goals and policy of the Act.

The statutory goals and policy of the Act must be considered when weighing whether to allow a citizen suit to proceed. As the court in *Gwaltney I* noted,

> [i]f citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the [Clean Water] Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.

484 U.S. at 61. To allow citizen suits to proceed despite ongoing state enforcement efforts provides "citizens and federal judges the opportunity to re-litigate and second-guess the enforcement and permitting actions of [the] States." *Laidlaw II,* 120 S.Ct. at 720 n.4 (Scalia, J., dissenting). Elected officials would be entirely deprived of their discretion to decide which violation should or should not be the object of suit, or that the enforcement decision should be postponed. *See id.* at 719. It is not the intent of Congress or in the public's interest to allow the use of public remedies for private wrongs.

The State and MMC worked together to resolve the problem for approximately a year before agreeing on a specific administrative order. (R. 4). MMC has pursued and currently is pursuing a vigorous effort to successfully achieve full compliance with that order. *See id.* Allowing FOL to maintain an entirely duplicative enforcement action in these circumstances disregards the U.S. Supreme Court's admonition that states have primary authority and discretion to enforce the Act. *See Gwaltney I*, 484 U.S. at 60-61. Defendants in MMC's position will be less likely to agree to administrative orders and the associated corrective measures if they will face the specter of a duplicative citizen suit that rides the coattails of comprehensive state enforcement. *See ICI Americas, Inc.*, 29 F.3d at 383 (allowing duplicative citizen suit "despite a state's diligent efforts at administrative enforcement, could result in . . . unnecessary duplication of, the legitimate efforts of the

state agency. . . . [S]uch a result would undermine, rather than promote, the goals of the [Act], and is not the intent of Congress."); *North & South Rivers Watershed Ass'n.*, 949 F.2d at 556 ("Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [that] goal. They are, in fact, impediments to environmental remedy efforts.").

In this case, FOL's citizen suit is not only entirely duplicative of the State's earlier action, but is an attempt to force MMC to violate the State's order by removing the overburden and destroying the remedial measures already taken. The record clearly reflects that such removal will damage the environment by "massive disruption of water quality." (R. 4). No public interest would be served by allowing a citizen to force MMC to further damage the environment. This Court should find that the goals and policy of the Act, to allow the states to decide which type of enforcement action to take in the public interest, require that this case be found moot.

IV. Res judicata bars FOL from bringing this suit because the administrative consent order effectively adjudicated the same parties or privies and cause of action.

Under Rocky Mountain law, 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). Consent decrees are also afforded res judicata effect under state law. *State v. Venessa*, 94 R.M. 412, 417 (1975). Therefore, the administrative consent order (CAO) between the State and MMC has res judicata effect. *See, e.g., Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464, at *3 (W.D. Mo. Feb. 23, 2000) (stating that Missouri courts accord the same res judicata effect to consent judgments as to litigated ones). The administrative consent order at issue in this case is the product of what can be characterized as a settlement because it was consensual. (R. 4). With the consent order in place, the RMDENR did not have to pursue any other enforcement action. Therefore, the CAO equates to a judicial order under the doctrine of res judicata and should be afforded preclusive effect by this Court because a state court would be obliged to give the order preclusive effect. *Harmon Industries, Inc. v. Browner*, 191 F.3d

894, 902 (8th Cir. 1999). Under res judicata, the CAO effectively bars FOL from bringing this subsequent action.

The test to determine whether res judicata applies involves a comparison of the actions. If the "(1) [i]dentity of the thing sued for; (2) identity of the cause of action; (3) identity of the person and parties to the actions; and (4) identity of the quality of person for or against whom the claim is made" are the same in each case, res judicata bars the subsequent action. *Williams*, 118 R.M. at 39 (1999) (adopting the four part test for res judicata set forth in *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. 1966) (en banc)). These four overlapping elements determine whether the parties or privies and the cause of action are the same between the two suits. *Citizens Legal Envtl. Action Network, Inc.,* 2000 WL 220464, at *3 (referring to how Missouri implements the four part res judicata test); *see also Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (stating that a judgment on the merits in a prior suit bars a subsequent suit involving the same parties or their privies based on the same cause of action or relief sought). The identity of the thing sued for and the cause of action are the same in the CAO and this case, and because FOL and the State are in privity, they are essentially the same party. Therefore, res judicata bars FOL from bringing this action, and this Court should affirm the ruling of the court below.

A. FOL and the State of Rocky Mountain are in privity; therefore, they are the same party in this suit as in the prior action.

In filing a citizen suit under section 505 of the Act, FOL is attempting to act in place of Rocky Mountain or the federal government. FOL is, in essence, acting as a "private attorney general" in filing the suit to protect the public's interest in Lustra Creek and the environment in general. *EPA v. City of Green Forest*, 927 F.2d 1394, 1402 (8th Cir. 1990); *Citizens Legal Envtl. Action Network, Inc.,* 2000 WL 220464, at *3, *11. Because the State diligently prosecuted the public's interest in Lustra Creek, a public resource, FOL has the same agenda and interests as the State; therefore the two are in privity. *Id.* at *11 ("[C]itizens. . .are the same party as the State only as to that which the State has diligently prosecuted."). The State of Rocky Mountain effectively acted as a parens patriae by issuing the CAO to protect and to preserve the Lustra for the citizens of Rocky Mountain; therefore, FOL and the State are the same party. *Old Timer, Inc. v.*

Blackhawk Central City Sanitation Dist., 51 F. Supp. 2d 1109, 1118 (D. Colo. 1999) (citing *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469-70 (10th Cir. 1993)).

B. The identity of the thing sued for and the causes of action are the same in this suit as in the prior action.

The purpose of res judicata is to prevent duplicative adjudication to save judicial time and resources and to promote reliance on adjudication. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). This citizen suit is duplicative of the CAO because it attempts to accomplish what the CAO has already done. The CAO prohibited MMC from placing overburden into Lustra Creek to protect water quality and the environment. (R. 4). These are the same results that FOL wants from this second action.

The causes of action are the same for several reasons. First, this subsequent suit threatens rights and interests established by the CAO. *See National Coal Ass'n v. Hodel*, 675 F. Supp. 1230, 1237 (D. Mont. 1987) (stating that res judicata should take into account whether the rights or interests established in the first action would be destroyed or impaired by the second action). FOL wants the overburden pile removed from the Lustra. This is in direct conflict with the State's interest in maintaining the overburden in the creek. The CAO issued by the State specifically states that the overburden should not be removed because removal would cause "massive" damage to the Lustra's water quality. (R. 4). Moreover, the CAO grants MMC the right to maintain the overburden in the creek without repercussion. *Id.* Thus, this citizen suit infringes upon Rocky Mountain's interest as well as MMC's interest and right to maintain the pile in the Creek.

Second, the two actions arise out of the same transactional nucleus of material facts. *See National Coal Ass'n v. Hodel*, 675 F. Supp. at 1237 (stating that whether the two suits arise out of the same transactional nucleus of facts should be considered); *Citizens Legal Envtl. Action Network, Inc.,* 2000 WL 220464, at *4 (stating that two causes of action are identical for purposes of res judicata when they arise from the same nucleus of operative fact). Both actions involve the same "wrong" — MMC placing overburden into Lustra Creek without a permit. CR.3-4. The facts that demonstrate that "wrong" have not been altered or added to; therefore, the "wrong" alleged in this case is the same. *Citizens Legal Envtl. Action Network, Inc.,* 2000 WL 220464, at *4 ("[R]es judicata bars

separate suits for the same wrong, but not for two or more distinct wrongs."). The CAO and this suit deal with the same alleged "continuos violations." The only difference is that the State framed MMC's actions as a violation of the Rocky Mountain Solid Waste Act (RMSWA) instead of the Clean Water Act. Overall, both actions involve MMC's alleged infringement upon the right of Rocky Mountain citizens to enjoy the Lustra and the environment. *See National Coal Ass'n v. Hodel*, 675 F. Supp. at 1237 (stating that res judicata should consider whether the two suits involve infringement of the same right). Finally, the essential substance of the suits must be measured and not the form of each action. *Id., citing Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983)). Despite the fact that the State pursued MMC's actions as a violation of the RMSWA, the core of the actions is essentially the same.

Each action is designed to 1) prohibit MMC from placing more overburden into the Creek without a permit, 2) protect water quality, and 3) protect the overall environment. (R. 3-5). Therefore, the essential substance of the two suits is practically identical. Both suits involve identical facts and issues. This citizen suit does not raise one issue that is different from those raised under the CAO. The only difference between the two actions is the *approach*. To say that the two actions are not the same is to elevate form over substance.

The State of Rocky Mountain, specifically the Rocky Mountain Department of Natural and Environmental Resources (RMDENR), corrected the problem – placing overburden in Lustra Creek – under RMSWA. (R. 4). FOL is taking the same steps as RMDENR, but in a different *form*. FOL has brought an action under the Act and has framed the issue as a water problem rather than a solid waste problem. This is redundant because the difference between a water problem and a solid waste problem, in this case, is superficial. The solid waste problem is a water problem. In prohibiting the disposal of solid waste (the overburden), the RMDENR protected Lustra water quality.

As noted by the court below, the Rocky Mountain Solid Waste Act is only one part of an enforcement regime. (R. 7). The State's statutes are aimed at improving the environment and preventing degradation. *Id.* Just as the Resource Conservation and Recovery Act (RCRA) is a back up to the Clean Air Act and the Act, RMSWA is also a net for any holes in the Rocky Mountain web of environmental law. H.R. REP. No. 94-149,1 at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. (stating that RCRA was intended to

close "the last remaining loophole in environmental law . . . [the] disposal of discarded material and hazardous waste.").

Although the RMDENR did not seek penalties with the CAO, it could have. The overall statutory framework under which the CAO was issued provides the state the option of seeking penalties. (R. 6). The State of Rocky Mountain, in exercising its prosecutorial discretion decided not to enforce penalties against MMC. FOL is seeking penalties in this subsequent action. (R. 3). FOL is still barred because res judicata prevents re-litigation of all claims that were or could have been raised. *Citizens Legal Envtl. Action Network, Inc.,* 2000 WL 220464, at *6 .

Res judicata blocks this action because the parties or privies and causes of action in this action are the same as those involved with the CAO. Therefore, FOL's citizen suit is barred.

CONCLUSION AND PRAYER

For the foregoing reasons, that the State's due diligence bars FOL from bringing this citizen suit; that subject matter jurisdiction is not present; that this case is moot because there was no controversy at the time this action was filed; and that both FOL and the State are barred from bringing this action by res judicata, Magma Mining Co. prays that this Court find that the trial court properly rendered summary judgment in favor of MMC and affirm the judgment.

Respectfully submitted,
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APPENDICES

33 U.S.C. § 1311(a) (1972)

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

33 U.S.C. § 1342(a) (1987)

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

> (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or
>
> (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a per-

mit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

33 U.S.C. § 1344(a) (1977)

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1251(b) (1972)

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1319(g)(6)(A) (1987)

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.

33 U.S.C. § 1362 (12) (1972)

The term "discharge of a pollutant" and the term "discharge of pollutants" each means

(A) any addition of any pollutant to navigable waters from any point source,

(B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362 (6) (1996)

The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean

(A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or

(B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association

with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1365(a) (1987)

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of

(A) an effluent standard or limitation under this chapter or

(B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33. U.S.C. § 1365(b)(1) (1972)

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation

(i) to the Administrator,

(ii) to the State in which the alleged violation occurs, and

(iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the stan-

dard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

33 C.F.R. § 323.2(c) (1993)

The term "dredged material" means material that is excavated or dredged from waters of the United States.

33 C.F.R. § 323.2(e) (1993)

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

43 C.F.R. § 23.3(d) (1983)

"Overburden" means all the earth and other materials which lie above a natural deposit of minerals and such earth and other materials after removal from their natural state in the process of mining.