Pace Environmental Law Review

Volume 17
Issue 2 *Summer 2000*

Article 5

June 2000

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

Follow this and additional works at: https://digitalcommons.pace.edu/pelr

 Part of the Energy and Utilities Law Commons, Environmental Law Commons, and the Natural Resources Law Commons

Recommended Citation
, *Judges' Bench Memorandum: Twelfth Annual Pace National Environmental Moot Court Competition*, 17 Pace Envtl. L. Rev. 393 (2000)
DOI: https://doi.org/10.58948/0738-6206.1287
Available at: https://digitalcommons.pace.edu/pelr/vol17/iss2/5

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

TWELFTH ANNUAL PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Judges' Bench Memorandum

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CODE

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

OTHER SOURCES

EXECUTIVE SUMMARY

An environmental group seeking to protect a state lake from toxic mercury pollution. . . a power company faced with the prospect of being shut down, even though it has complied with all applicable environmental laws. . . these are the dilemmas presented in the instant appeal. At the heart of this dispute lie several unresolved issues in modern environmental jurisprudence. The following memorandum will address and explore both sides of every issue, with the intent of clarifying the arguments as they are presented by the respective parties.

First, this appeal requires the determination of whether smokestack emissions fall under the definition of "solid waste" found in the Resource Conservation and Recovery Act ("RCRA") of 1976. The statute is silent with respect to this particular form of waste discharge. However, certain provisions of the statute, its regulations, the congressional record, and case law shed some light on the legislative intent with respect to such emissions. This article will identify those arguments which best support the interpretation advanced by each party.

Second, this appeal addresses the nature of standing in environmental actions. In the past several decades, standing to bring a citizen suit under an environmental statute has undergone an evolution with varying degrees of strictness and expansiveness in relation to who may bring an action. In its current incarnation, standing requires the basic constitutional requirements, plus the satisfaction of the "zone-of-interest" test, which mandates that prospective plaintiffs be within the zone of interest intended to be protected by the applicable statute. Whether a particular plaintiff falls into that zone of interest is open to debate, but the Supreme Court gave a green light, perhaps unintentionally, in its *Bennett v. Spear*, 520 U.S. 154 (1997), decision to a very expansive reading of zone of interest standing to include, in certain circumstances, "any person." The task in this case is to determine whether the plaintiffs can establish standing under current standing jurisprudence.

Third, this appeal highlights the potential conflict between environmental statutes, when one authorizes an activity that the other strictly forbids. In this case, the conflict arises when Buena Vista's air emissions, which are permitted under both state and federal clean air laws, are alleged to have caused environmental degradation on the scale of a public nuisance under RCRA. The resolution of this issue will hinge primarily on an assessment of the policy considerations involved in either tolerating environmental pollution in order to uphold regulatory consistency, or sacrificing industry's confidence in the uniformity of environmental enforcement for the sake of better protecting natural resources.

Finally, this appeal addresses whether the plaintiffs' action in this case is barred under either section 7002(b) of the statute or the doctrines of res judicata and collateral estoppel. Under section 7002(b), the question arises whether the intervention of the State of New Union constitutes diligent prosecution for the purpose of prohibiting a citizen suit, since it is commonly stated that citizen suit provisions are intended to authorize private attorneys

general in circumstances where the government neglects its duty to act. Res judicata and collateral estoppel are evaluated in relation to the previous action brought against Buena Vista by Bluepeace, Inc., and the question raised in this section of the appeal depends on whether the two actions against Buena Vista involve the same parties or their privy and the same set of operative facts.

Suggested Questions for Judges

1. Are mercury emissions from coal burning utility plants "solid waste" as defined by RCRA?

In what way does the holding in *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.* impact on the propriety of the district court's reliance on the regulatory definition of "solid waste" to support its conclusion that Buena Vista's mercury emissions are solid waste?

What support is there in the congressional history of RCRA for the proposition that smokestack emissions should or should not be considered solid waste?

Are emissions in a smokestack "contained" for the purposes of RCRA?

How does the fact that smokestack emissions are comprehensively regulated under the Clean Air Act impact on the district court's ruling that they are also regulated under RCRA?

What are the policy reasons for or against having smokestack emissions regulated as "solid waste" under RCRA?

Does the EPA's regulatory exclusion of certain coal-burning utility plant emissions from the definition of hazardous waste support the conclusion that Buena Vista's emissions are solid waste, since something cannot be a hazardous waste under RCRA without being a solid waste?

2. Did the court below err in holding that Friends of Lake Tokay, Inc. has no standing to bring the instant case?

What is "zone-of-interests" standing and how does it differ from constitutional standing?

Is the voluntary decision of the members of Friends of Lake Tokay to stop eating Lake Tokay fish adequate to establish an injury-in-fact for standing purposes?

- Is Friends of Lake Tokay within the zone of interests to be protected by RCRA?
- If the members of Friends of Lake Tokay are no longer eating the fish that they catch, what is the "imminent and substantial endangerment" which the plaintiffs seek to abate?

What was the holding of the Supreme Court in *Bennett v. Spear* with respect to zone-of-interests standing, and how does that holding impact on this case?

Is the environmental or aesthetic degradation of Lake Tokay an injury-in-fact sufficient to grant standing to Friends of Lake Tokay?

3. Did the court below err in holding that New Union has standing to bring this case?

What is the doctrine of *parens patriae*, and how does it apply in this case?

Do the provisions of the statute support or argue against a reading which allows states to sue under the "imminent and substantial endangerment" citizen suits provision?

What "imminent and substantial endangerment" is the State of New Union seeking to abate?

Is New Union in effect attempting to litigate the private claims of a few of its citizens?

4. Did the court below err in holding that regulation of mercury emissions from major air pollution sources, including fossil fuel fired power plants, by the Clean Air Act, coupled with the regulation of emissions from Buena Vista's plants by permits issued under the Clean Air Act, justified the court's refusal to exercise its equitable authority under RCRA to order abatement of Buena Vista's mercury emissions?

Would regulation of Buena Vista's emissions under both the Clean Air Act and RCRA be in compliance with section 1006(b) of RCRA, which directs the EPA to avoid duplication of the two statutes?

What is the significance in this case of RCRA's specific exclusion from the definition of "solid waste" of discharges authorized by a permit under the Clean Water Act?

How does the fact that the EPA has not yet issued regulations governing the release of mercury emissions from coal-burning

utility plants under the Clean Air Act impact on Friends of Lake Tokay's argument in this case?

Is the suit brought by Friends of Lake Tokay an impermissible end-run around the statutory limitations on the judicial review of permits under the Clean Air Act? Why or why not?

What are the policy implications of allowing an "imminent and substantial endangerment" suit under RCRA to abate activities which are authorized by permits issued under other environmental statutes?

> 5(i). Should this court rule on whether appellants are precluded by RCRA § 7002(b) or the doctrines of res judicata or collateral estoppel from pursuing this action?

Would judicial economy be better served by disposing of Buena Vista's motion in this court rather than leaving it for the District Court on remand? Why or why not?

Does the resolution of Buena Vista's motion involve substantial issues of fact, such that it would be best left for the trial court to evaluate and determine?

> 5(ii). Are the appellants precluded by RCRA § 7002(b), or the doctrines of res judicata or collateral estoppel from pursuing this action because of the state court decision in *Bluepeace, Inc. v. Buena Vista Power Co.*?

Is a citizen suit proper only when a governmental authority has not responded to an environmental threat or violation?

Does the State of New Union's intervention in this case make the Friends of Lake Tokay's action duplicative and unnecessary?

Are the State of New Union and Friends of Lake Tokay parties in privity with Bluepeace, Inc?

Do both the instant case and *Bluepeace, Inc. v. Buena Vista Power Co.* arise out of the same set of operative facts or series of connected transactions?

What effect does the statutory language providing that "[n]o action may be commenced under subsection (a)(1)(B) of this section if the State. . . *has commenced*. . . an action under subsection (a)(1)(B) of this section" have on Buena Vista's argument, since the State of New Union commenced its action after the citizen suit was initiated?

QUESTIONS PRESENTED

I. ARE MERCURY EMISSIONS FROM COAL BURNING UTILITY PLANTS "SOLID WASTE" AS DEFINED BY RCRA?

A. The definition of "solid waste" under the Resource Conservation and Recovery Act (hereinafter "RCRA") cannot be construed to include the mercury emissions discharged from the smokestacks of coal burning utility plants for the following reasons. First, the terms of the statute itself do not include discharges into the air within the definition of "solid waste." The definition of "solid waste" in RCRA states that "[t]he term 'solid waste' means any . . . solid, liquid, semi-solid, or contained gaseous material." 42 U.S.C. § 6903(27) (1995). Non-contained gaseous materials, such as the air emissions at issue in this case, are not listed in the definition of solid waste. Following the maxim of statutory interpretation *'inclusio unius est exclusio alterius,'* or 'the inclusion of one thing is the exclusion of another,' given the inclusion of contained gaseous material in the definition of "solid waste" and the exclusion of non-contained gaseous material from that definition, the term "solid waste" can never include non-contained gases such as air emissions. Accordingly, the mercury emissions released through Buena Vista's smokestacks are not solid waste under RCRA.

Second, the gaseous mercury emissions cannot be conveniently deemed "solids" by the district court in an effort to create the authority to regulate Buena Vista under RCRA. The court below placed reliance on its misconception that mercury "particles" are actually solids, and therefore not limited by the contained gaseous material definition. This finding ignores the physics of mercury, which have been recently documented by the United States Environmental Protection Agency (hereinafter "EPA"). *See* Potential Revisions to the Land Disposal Restrictions Mercury Treatment Standard, 64 Fed. Reg. 28,949, 28,958 (1999). The EPA found that

> [m]ercury is slightly volatile at ambient temperatures but is quite volatile at temperatures common to thermal treatment devices. It boils at approximately 356 degrees Celsius and typically escapes with other stack gases from incineration. With respect to mercury behavior in combustion systems and existing control techniques, mercury is volatilized and converted into elemental mercury in the high temperature regions of furnaces.

Id.

Thus, mercury vaporizes into mercury molecules in the same way that water vaporizes into water molecules when heated. The district court's holding that "particles" are solids for RCRA purposes could conceivably apply to all true gases, i.e. those found in gaseous form at normal temperatures, because all true gases consist of individual elemental particles. However, it is obvious that a gas, although composed of molecules, is a *gas* and not a *solid*. In interpreting a statute, one must give meaning to all the terms contained therein. If "solid waste" is defined as "solid, liquid, semi-solid, or contained gaseous material," gaseous material must necessarily be something other than a solid, and vice versa. In the instant case, the district court equated gaseous material with solid material merely because both are composed of "particles." That conclusion negated the separate meanings of each term. Accordingly, it was error for the district court to conclude that gaseous "particles" are solids for the purposes of RCRA.

Third, the regulatory definition of "solid waste" cannot support a finding that the mercury emissions are solid waste. The court below held that since the regulatory definition of solid waste defined it as a material that has been "disposed of," and since "disposal" is defined by the statute to mean "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water so that such solid waste . . . or any constituent thereof may enter the environment or be emitted into the air or discharged into any water," the mercury emissions are allegedly solid waste. 40 C.F.R. § 261.2(b)(1) (1999); 42 U.S.C. § 6903(3) (1995). However, the regulatory definition cannot extend EPA's jurisdiction beyond the jurisdiction inherent in the statutory definition, and it is clear that the words of the statute do not support such a finding. Disposal occurs, according to RCRA, only when a material has been discharged or in some other way released "into or on any land or water." 42 U.S.C. § 6903(3) (1995). Thus, a prerequisite to a finding of disposal requires a release into or on land or water. In the instant case, the release of the mercury emissions was into the air, and therefore cannot be considered to be disposed of under RCRA. The fact that such mercury may have eventually entered a water body, an allegation on which the court placed great importance, is an irrelevant inquiry since the threshold finding of a release into water or land has not been satisfied. Accordingly, because the mercury emissions were

not "disposed of" as contemplated by the statute, they cannot be considered solid waste under the regulations.

In any event, the regulatory definition of "solid waste" is inapplicable to an action under the "imminent and substantial endangerment" citizen suits provision of RCRA, section 7002. *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314-5 (2d Cir. 1993). In *Remington Arms*, citizens brought an action against owners and operators of a trap and skeet shoot club for alleged violations of the Clean Water Act and RCRA. When confronted with both the statutory and regulatory definitions of "solid waste," the Second Circuit was forced to interpret EPA's understanding of the regulatory definition. It found that "the statutory definition of solid waste . . . applies to 'imminent hazard' lawsuits . . . under § 7003." *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1314. Holding that "regulatory language referring to § 7003 must also apply to § 7002(a)(1)(B) [imminent and substantial endangerment suits] because the two provisions are nearly identical," the court concluded that "the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment." *Id.* at 1315. Therefore, the district court in the instant case erred in applying the regulatory definition of "solid waste" to a suit brought under the "imminent and substantial endangerment" citizen suits provision of RCRA.

Finally, the EPA has explicitly limited its authority under RCRA not to extend to air emissions. Specifically, the EPA has stated that its "authority to identify or list a waste as hazardous under RCRA is limited to containerized or condensed gases (i.e., Section 1004(27) of RCRA excludes all other gases from the definition of solid wastes and thus cannot be considered hazardous wastes)." Hazardous Waste Management System: Identification and Listing of Hazardous Waste CERCLA; Hazardous Waste Designation; Reportable Quantity Adjustment, 54 Fed. Reg. 50,968, 50,973 (1989) (emphasis added). Since the mercury emissions released through the Buena Vista smokestacks are not containerized or condensed gases, according to the EPA, they are not solid wastes and, accordingly, there exists no authority under RCRA to regulate the emissions. Similarly, the EPA has determined that gases within an exhaust or emissions system are not "containerized" for the purposes of RCRA. *See In re Chemical Waste Management of Indiana, Inc.*, 1995 WL 523542, at 12 (E.P.A.) (holding that "[t]he agency has interpreted this explicit inclusion of con-

tainerized gaseous materials as constituting an explicit exclusion of uncontainerized gases," and therefore air emissions generated by on-site macroencapsulation operations are not subject to RCRA regulation.); *see also* The Hazardous Waste Management System, 47 Fed. Reg. 27,520 (1982) (stating that fume incinerators used to destroy gaseous emissions from industrial processes are subject to regulation under the Clean Air Act, but are not subject to regulation under RCRA). As outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), when a statute is ambiguous, the administering agency's reasonable interpretation may not be displaced by an alternative interpretation of the reviewing court. Because the EPA's interpretation of its own authority under RCRA is a permissible construction of the statute, its finding that such authority does not extend to air emissions must be upheld. *See Chevron*, 467 U.S. at 843.

B. Buena Vista's mercury emissions are subject to regulation under RCRA for the following reasons. First, the statute defines "solid waste" as "discarded material," which includes the mercury waste that is "discarded" in Buena Vista's smokestack emissions. The statutory definition of "solid waste" includes "any garbage, refuse . . . and other discarded material, *including* solid, liquid, semi-solid, or contained gaseous material. . ." 42 U.S.C. § 6903(27) (1995) (emphasis added). Because the term "including" in the above-quoted provision *expands* the term "discarded material," it is clear that solid, liquid, semi-solid and contained gaseous wastes are only some examples of the kinds of discarded material that are included under the RCRA "solid waste" definition. Therefore, the definition of "solid waste" is not limited to "solid, liquid, semi-solid, and contained gaseous material." It is well established that a statute shall be construed in accordance with the plain meaning and common understanding of the terms contained therein, unless a term is otherwise defined by the statute itself. The term "discard" is not defined in RCRA. However, it is defined in the dictionary as meaning "to throw away; reject." The smokestack emissions released by Buena Vista are clearly "discarded" in the common sense of the word, in that Buena Vista rejected the mercury waste by throwing it away via the smokestacks. Therefore, the mercury emissions fall within the statutory definition of solid waste as "discarded material." 42 U.S.C. § 6903(27) (1995).

Second, the regulatory definition of "solid waste" includes "any discarded material." 40 C.F.R. § 261.2(a)(1) (1999). A "discarded material" is any material which is "abandoned." 40 C.F.R.

§ 261.2(a)(2) (1999). A material is "abandoned" when it has been "disposed of." 40 C.F.R. § 261.2(b)(1) (1999). Finally, "disposal" is defined by the statute to mean "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water so that such solid waste . . . or any constituent thereof may enter the environment or be emitted into the air or discharged into any water." 42 U.S.C. § 6903(3) (1995). Because the mercury leaves the smokestack and is deposited on and in the surrounding land and water, it is disposed of as defined by the regulations and is therefore solid waste. The fact that it passes through air first is of no moment: no one would make the claim that you are watering the air when your sprinkler waters your lawn just because the water passes through the air on its way down to the lawn. Finally, RCRA regulations state: "The following *solid wastes* are not hazardous wastes: . . . [f]ly ash waste, bottom ash waste, slag waste, and flue gas emission control waste, generated primarily from the combustion of coal or other fossil fuels. . ." 40 C.F.R. § 261.4(b)(4) (1999) (emphasis added). Although this provision relates to the regulation of hazardous waste, and is therefore inapplicable to an "imminent and substantial endangerment action," it is highly relevant to the EPA's categorization of coal smokestack emissions. Section 261.4(b)(4) of the RCRA regulations explicitly states that combustion by-products of coal are *solid* wastes, but they will be exempted from the definition of *hazardous* waste. *See id.* Therefore, since emissions from the combustion of coal are clearly stated to be solid wastes by the very terms of the regulation, they are accordingly subject to RCRA regulation.

II. DID THE COURT BELOW ERR IN HOLDING THAT FRIENDS OF LAKE TOKAY, INC. HAS NO STANDING TO BRING THE INSTANT CASE?

A. Every plaintiff in a case or controversy must establish that he or she has standing to bring the action. In simple terms, the doctrine of standing can be defined as "whether a litigant is entitled to have the court decide the merits of the dispute." 32A AM. JUR. 2D *Federal Courts* § 675 (1995). In determining whether a plaintiff has standing, courts are limited both by constitutional restraints on federal jurisdiction, and by prudential constraints on the exercise of that jurisdiction. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 498

(1975)) ("The term 'standing' subsumes a blend of constitutional requirements and prudential considerations. . ."). The constitutional limits on standing emanate from the Article III "case or controversy" clause, and require that a plaintiff establish 1) an injury-in-fact, 2) a causal connection between the injury and the challenged conduct, and 3) the redressability of the injury by a favorable decision. *See Valley Forge Christian College*, 454 U.S. at 471-2; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976); *see also* 32A AM. JUR. 2D *Federal Courts* § 676 (1995). In order to establish an injury-in-fact, the plaintiff must demonstrate "an invasion of a legally protected interest which is concrete and particularized" and that is "traditionally thought to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819 (1997); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is not sufficient to assert an interest that is indistinguishable from the interests of the general public. *See Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

In the instant case, Friends of Lake Tokay, Inc. have not established an injury-in-fact because they have failed to demonstrate "an invasion of a legally protected interest which is concrete and particularized." *Raines v. Byrd*, 521 U.S. at 819. The only "injury" alleged by the plaintiff is that certain of its members have *voluntarily* discontinued eating fish caught in Lake Tokay due to concerns over the health advisory issued by the state. While the members may have a right to fish in Lake Tokay and to eat the fish they catch, neither Buena Vista nor the state have invaded that right since the members may continue to fish and enjoy their catch without interference. However, they have voluntarily decided to forego eating Lake Tokay fish due to their own health concerns. The mere self-imposed discontinuance of a particular activity is not "an invasion of a legally protected interest" sufficient to establish standing.

The members' claim of "injury" is analogous to the injury suffered by someone who decides one day to stop drinking diet soda because of health concerns over saccharine, and then the next day files an action against the soda maker for the loss of his ability to enjoy diet soda. Clearly, any injury suffered is self-inflicted. "No [plaintiff] can be heard to complain about damage inflicted from its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Accordingly, since no injury can be established, Friends of Lake Tokay, Inc. has no standing to bring the instant action.

In addition to the constitutional injury-in-fact, causation, and redressability limitations on standing, prudential doctrine mandates that when suit is brought under a statutory citizen suits provision, the particular plaintiff must be within the "zone of interests" protected or regulated by the statute. *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). In *Association of Data Processing*, the plaintiff association of data processors sought to prevent banks from making data processing services available to other banks and customers. The district court and court of appeals had both dismissed the suit for lack of standing. *Association of Data Processing*, 397 U.S. at 151. In reversing the lower courts' decisions on the issue of standing, the Supreme Court held that "apart from the 'case' or 'controversy' test, the question [of standing is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. The Court concluded by ruling that the statute at issue "arguably brings a competitor within the zone of interests protected by it." *Id.* at 156.

The zones of interest protected by section 7002(a)(1)(B) of RCRA are those threatened by an "imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B) (1995). It has been held that if a potential plaintiff is able to avoid the hazard at relatively little inconvenience, the danger posed may no longer be imminent as contemplated by the citizen suits provision. *See Davies v. National Coop. Refinery Ass'n*, 963 F.Supp. 990, 999 (D. Kan. 1997). In *Davies*, the plaintiffs brought an "imminent and substantial endangerment" suit under RCRA, alleging that the defendants had contaminated the groundwater underlying the plaintiffs' property with cancer-causing agents. Under the circumstances of the case, the District Court for the District of Kansas ruled that abstention was appropriate to allow the state Department of Health and Environment to complete its investigation and develop a remedial plan. *See Davies*, 963 F.Supp. at 999. However, the court went on to state that it had considered the nature of the threat posed by the contamination to the groundwater. It found that the facts as presented did "not establish or address the likelihood that any person will actually be exposed to" the endangerment because the "plaintiffs have been warned of the danger and are able to occupy the property without serious risk to their health by using an alternate water supply. . ." *Id.* The district court found further that the "fact that [the plaintiffs] must use bottled water instead of

groundwater is undoubtedly an inconvenience and an economic burden, but it is the type of injury for which an action at law [as opposed to the equitable injunctive relief available under section 7002] provides an adequate remedy." *Id.* Accordingly, the plaintiffs' action would not have been sustained under RCRA section 7002.

In the instant case, even if Friends of Lake Tokay, Inc. could be found to have established an injury-in-fact, the loss of the ability to eat fish is not an injury within the "zone of interests" protected or regulated by the statute. Section 7002(a)(1)(B)'s application is limited only to creating an equitable cause of action to abate an "imminent and substantial endangerment." Since the plaintiff's members have in effect removed themselves from the path of harm by ceasing to eat potentially tainted fish, they cannot assert that they are exposed to an imminent danger. *See Davies*, 963 F.Supp. at 999. Because there is no imminent danger to abate, the members do not fall within the zone of interests protected by section 7002(a)(1)(B). Therefore, they cannot establish zone-of-interests standing to bring this case.

B. The court below erred when it found that Friends of Lake Tokay, Inc. did not have standing to bring the instant action. It is well established that noneconomic injuries to environmental or aesthetic interests are "injuries-in-fact" sufficient to confer standing on a plaintiff. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Actions that "impair the [plaintiff's] enjoyment of" a natural resource can amount to an injury-in-fact. *Sierra Club v. Morton*, 405 U.S. at 734. Moreover, the injury asserted need not be great or substantial, and an "identifiable trifle" may give rise to standing. *See Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498 (4th Cir. 1974).

In this case, the plaintiff's members have clearly suffered an injury to their aesthetic interest in Lake Tokay. Specifically, the pollution caused by Buena Vista has impaired the members' enjoyment of their fishing activities. *See Sierra Club v. Morton*, 405 U.S. at 734. If the members can no longer eat their catch, the fruit of their labor cannot be enjoyed. Even if one considers the loss of the ability to eat fish to be an "identifiable trifle," it is an injury nonetheless. Accordingly, the plaintiff has established a cognizable injury-in-fact by demonstrating the diminishment of its members' fishing enjoyment.

Additionally, the zone-of-interests doctrine does not preclude Friends of Lake Tokay from bringing the instant action. The zone-of-interests doctrine is a prudential limitation, and it is applicable to all cases unless expressly negated or expanded by an act of Congress. *See Bennett v. Spear*, 520 U.S. 154, 163-64 (1997).

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court held that when a citizen suit provision in an environmental statute states that "any person" may commence a civil suit, the provision shall be interpreted "at face value" as negating the zone-of-interest requirement for standing. *Bennett v. Spear*, 520 U.S. at 165. The specific statute in that case was the Endangered Species Act, in which the citizen suits provision stated that "any person may commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A) (1985). Since the terms of the statute explicitly allowed "any person" to bring an action, "any person" would necessarily be included in the zone-of-interest of the statute. The Court deduced that since the purpose of citizen suits provisions is to encourage enforcement actions by "private attorneys general," "the [congressional] intent to permit enforcement by *everyman*" would further that goal. *Bennett v. Spear*, 520 U.S. at 165-66 (emphasis added).

In the instant case, the plaintiff's action is brought under the citizen suits provision of an environmental statute, which states that "any person may commence a civil action on his own behalf" to abate an imminent and substantial endangerment. 42 U.S.C. § 6972(a)(1)(B) (1995). Since the language in the instant statute is identical to the language at issue in *Bennett v. Spear*, the holding in that case is directly applicable. Accordingly, the effect of this broad provision is to negate the zone-of-interest tests of prudential standing. *See Bennett v. Spear*, 520 U.S. at 164. As in *Bennett v. Spear*, the plaintiff in an "imminent and substantial endangerment" suit is not required to demonstrate zone-of-interest standing due to the clear mandate from Congress that "any person" may bring an action under section 7002(a)(1)(B) of RCRA. Therefore, the court below erred in holding that Friends of Lake Tokay, Inc. did not have standing because its injury was not within the zone of interest of the statute.

III. DID THE COURT BELOW ERR IN HOLDING THAT NEW UNION HAS STANDING TO BRING THIS CASE?

A. The district court erred in holding that the State of New Union has standing to intervene in this case. The State of New Union is the trustee for the public benefit of the navigable waters within its boundaries, and as such it has no proprietary interest in the waters and fish of the state. The State's trusteeship is merely an expression of the State's power to regulate in order to protect and preserve the trust. *See Geer v. Connecticut*, 161 U.S. 519 (1896); *Toomer v. Witsell*, 334 U.S. 385 (1948) ("The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." 334 U.S. at 402). If the State of New Union wants to protect its natural resources, it may do so through the exercise of its police powers by adopting protective legislation.

Because the State has no proprietary interest in Lake Tokay and its fish, it cannot aver that it has suffered an injury caused by Buena Vista's air emissions. Accordingly, as a trustee, New Union may not bring a civil suit to redress an injury to its waters and fish.

A state may have standing to bring an action as *parens patriae* on behalf of its citizens, but "only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). When the state's claim consists of nothing more than a collectivity of private suits, the *parens patriae* standing of the state will be denied. *See Pennsylvania v. New Jersey*, 426 U.S. at 666. Because New Union has failed to establish an injury to its sovereign interests, the purpose of its intervention in this case must necessarily be to help litigate the private claims of plaintiff Friends of Lake Tokay, Inc. Therefore, its intervention must be denied.

B. The State of New Union has *parens patriae* standing to intervene in the action against Buena Vista. It is well established that a state has standing to bring an action as *parens patriae* on behalf of its citizens, but only when its sovereign or quasi-sovereign interests are implicated. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *United States v. Reserve Mining Co.*, 394 F.Supp. 233, 241-2 (D. Minn. 1974). Specifically, a state has been

held to have standing when it seeks injunctive relief to abate the discharge of noxious gases into the state's territory, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1906), the discharge of oil and other pollutants into state waters, *Maine v. M/V Tomano*, 357 F.Supp. 1097 (D. Me. 1973), *Maryland Dep't of Natural Resources v. Amerada Hess Corp.*, 350 F.Supp. 1060 (D. Md. 1972), and the disposal of sewage or garbage, *New York v. New Jersey*, 256 U.S. 296 (1921). As trustee, the State has a duty to protect and preserve its natural resources for the public benefit. Therefore, "[t]he conclusion seems inescapable . . . that if the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered to bring suit to protect the corpus of the trust . . . ." *Maryland Dep't of Natural Resources*, 350 F.Supp. at 1067.

IV. DID THE COURT BELOW ERR IN HOLDING THAT REGULATION OF MERCURY EMISSIONS FROM MAJOR AIR POLLUTION SOURCES, INCLUDING FOSSIL FUEL FIRED POWER PLANTS, BY THE CLEAN AIR ACT, COUPLED WITH THE REGULATION OF EMISSIONS FROM BUENA VISTA'S PLANTS BY PERMITS ISSUED UNDER THE CLEAN AIR ACT, JUSTIFIED THE COURT'S REFUSAL TO EXERCISE ITS EQUITABLE AUTHORITY UNDER RCRA TO ORDER ABATEMENT OF BUENA VISTA's MERCURY EMISSIONS?

A. Section 1006(b) of RCRA states

> [t]he Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act, the Federal Water Pollution Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act of 1972, and such other Acts of Congress as grant regulatory authority to the Administrator.

42 U.S.C § 6905(b)(1) (1995).

This provision indicates a congressional intent that activities which are regulated under the Clean Air Act, as well as other statutes administered by the EPA, should not be regulated in a duplicative manner under RCRA. In *United States v. Burns*, 512

F.Supp. 916 (W.D. Penn. 1981), the District Court for the Western District of Pennsylvania analyzed section 1006 as it related to allegedly duplicative regulation under the Toxic Substances Control Act (hereinafter "TSCA"). In that case, the government brought an action against the defendants under TSCA regarding the inappropriate storage of Polychlorinated Biphenyls (PCBs). An order was issued in the first action, to which the defendants consented. The government then brought a subsequent action under RCRA seeking injunctive relief. The defendants countered that RCRA section 1006(b) barred the duplicative regulation of PCBs under RCRA because PCBs were already regulated under TSCA. Finding that "[u]nder TSCA the EPA Administrator has promulgated regulations dealing with disposal of PCBs, as well as the handling and storage of PCBs" and "TSCA adequately addresses the problems of disposal of PCBs and pollution of groundwater, . . .[a]llowing the Government to proceed under both TSCA and RCRA would permit the kind of duplication that section 1006(b) of RCRA is designed to prevent." *Burns*, 512 F.Supp. at 919. The court rejected the government's argument that there should be "a broad overlap of enforcement mechanisms in environmental law," *id.* at 918, and dismissed the government's claim under RCRA.

The instant case is analogous to the attempted double-regulation in *United States v. Burns*. Pursuant to the Clean Air Act, the EPA has commissioned studies and promulgated comprehensive regulations addressing mercury air emissions discharged from utility plants. Since air emissions are adequately and comprehensively regulated under the Clean Air Act, allowing regulation under both the Clean Air Act and RCRA "would permit the kind of duplication that section 1006(b) of RCRA is designed to prevent." *United States v. Burns*, 512 F.Supp. at 919. Accordingly, an action under RCRA for activities that are already comprehensively regulated under the Clean Air Act should be barred.

In *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 111 F.3d 1485, 1490 (10th Cir. 1997), the Court of Appeals for the Tenth Circuit directly addressed the issue of whether a permit for stack emissions authorized under the Clean Air Act bars an action against the emissions under a different environmental statute. It found that it did. In that case, the plaintiff citizen groups attempted to bring an action under section 301(f) of the Clean Water Act, which declares "it shall be unlawful to discharge any radiological, chemical, or biological warfare agent. . . into the navigable waters," 33 U.S.C. § 1311(f) (1999),

against the Army to prevent it from incinerating chemical weapons pursuant to a valid Clean Air Act permit. The plaintiffs maintained that the emissions would eventually find their way into the navigable waters, thereby constituting a "discharge" into those waters. *Chemical Weapons Working Group, Inc.*, 111 F.3d at 1490. The Court of Appeals rejected that argument, stating that it "would lead to irrational results" and that "common sense dictates that . . . stack emissions constitute discharges to air—not water—and are therefore beyond" the Clean Water Act's reach. *Id.* The court also rejected the plaintiffs' Clean Water Act claim because "it would create a regulatory conflict between the Clean Water Act and Clean Air Act." *Id.* It found that "[b]ecause [the] Clean Air Act permit specifically allows the discharges that Plaintiffs claim are barred under [the] Clean Water Act. . ., applying [the Clean Water Act] to [the] stack emissions would create an irreconcilable conflict between the two regulatory schemes." *Id.* at 1490-1. Accordingly, the court refused to apply the restrictions of the Clean Water Act on the activities authorized by the Clean Air Act.

In this case, Buena Vista was issued Clean Air Act permits for its emissions under Blue Skies' approved permit program. The permit provides for the regulation of mercury through monitoring, and provides for modification if and when EPA promulgates limitations under the Clean Air Act. Sustaining a RCRA challenge to an activity that is expressly authorized by a permit issued under the Clean Air Act "would create an irreconcilable conflict between the two regulatory schemes." *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 111 F.3d 1485, 1491 (10th Cir. 1997). Therefore, the restrictions of RCRA in the instant action should not be applied to Buena Vista's air emissions, which are explicitly authorized under the Clean Air Act.

The EPA has expressly refused to establish standards under the Clean Air Act for mercury emissions emitted by fossil fuel fired utility plants. Despite the Clean Air Act's dominant role in reducing hazardous air emissions, and despite the EPA's continued regulation of other hazardous air emissions from utility plants, it has refrained from regulating mercury emissions from utility plants. The EPA's refusal has been driven by its determination that additional information and research must be gathered with respect to mercury air emissions from coal-burning utility plants before standards can be imposed on the industry. Therefore, since the EPA has determined that there is insufficient data

at the present time to regulate Buena Vista's mercury emissions under the Clean Air Act, it must similarly be EPA's determination that there is insufficient data at the present time to regulate Buena Vista's mercury emissions under RCRA.

Finally, Buena Vista has been operating with an approved permit issued by the State of Blue Skies pursuant to the Clean Air Act. This permit was subject to judicial review for a 60 day period after its issuance. *See* 42 U.S.C. § 7607(b)(1) (1995). After the period allowed for review passes, judicial review of the terms of the permit cannot be sought in an enforcement proceeding such as a citizens suit. *See* 42 U.S.C. § 7607(b)(2) (1995). Thus, an objector to a permit cannot get around his failure to challenge the permit within the applicable time period by initiating a citizens suit to attack the permit provisions. *See Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 111 F.3d 1485 (10th Cir. 1997); *Greenpeace, Inc. v. Waste Technologies Indus.*, 9 F.3d 1174 (6th Cir. 1993); *Palumbo v. Waste Technologies Indus.*, 989 F.2d 156 (4th Cir. 1993); *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256 (3d Cir. 1991). In the instant case, the plaintiffs now seek to end-run this prohibition on judicial review of the Blue Skies Clean Air Act permits by attacking the terms of the permits through an enforcement action under RCRA. Accordingly, the instant action against Buena Vista should be dismissed as a prohibited end-run of the statutory limitations on permit review. *See* 42 U.S.C. § 7607(b) (1995).

B. RCRA section 1006(b) provides:

> The Administrator shall integrate all provisions of this Act . . . and shall avoid duplication, to the maximum extent practicable, with the appropriate provision of the Clean Air Act . . . Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this Act.

42 U.S.C § 6905(b) (1995) (emphasis added).

The second sentence suggests that the provision "creates no rights in defendants to resist regulation; rather it constitutes an exhortation to the EPA to avoid unnecessary and overlapping regulation." *United States v. Vineland Chem. Co., Inc.*, 692 F.Supp. 415, 420 (D.N.J. 1988). The purpose of section 6905(b) is to instruct the EPA to guard against wasteful regulation. It is error to construe the section to invent "a right enforceable by the regu-

lated" to avoid abiding by the requirements of RCRA. *Vineland Chem. Co., Inc.*, 692 F.Supp. at 421.

Moreover, when Congress does not want activities which are authorized by provisions from other statutes to be regulated under RCRA, it expressly provides so. For example, certain discharges which have been duly permitted under the Clean Water Act are explicitly exempted from RCRA's definition of "solid waste." See 42 U.S.C. § 6903(27) (1995) ("The term 'solid waste' . . . does not include . . . industrial discharges which are point sources subject to permits under section 1342 of [the Clean Water Act]."). Significantly, this provision does not exempt air emissions which are subject to permits under the Clean Air Act. Thus, Congress declined to exempt emissions permitted under the Clean Air Act despite the opportunity to do so. Since activities authorized by a Clean Air Act permit are not exempted from regulation under RCRA, while activities authorized by other specified statutes are exempted, it can only be deduced that Congress intended for air emissions permitted by the Clean Air Act to be regulated under RCRA.

The instant action should not be misconstrued as an impermissible end-run around the limitations on the permit review process for the simple reason that this action involves two different statutes. The permits were issued under the state's Clean Air Act program, while this action was brought pursuant to the "imminent and substantial endangerment" provision of RCRA. There exists absolutely no support, either in the case law or statutes, for the trial court's contention that a plaintiff may not initiate a citizens suit proceeding under one statute because such proceeding would constitute an end-run around the permit review limits of a second statute. Buena Vista's "end-run" argument is simply not supported by existing law under the facts in this case.

Finally, rather than being an alternative source of judicial review, the "imminent and substantial endangerment" provision of RCRA is really a statutory version of common law public nuisance. The plaintiffs in this case are not seeking a review of the Clean Air Act permits; they are seeking an injunction against an imminent and substantial endangerment. The court below mischaracterized the objectives and intentions of the plaintiffs in this case, and its decision is therefore based in error.

V(i). SHOULD THIS COURT RULE ON WHETHER APPELLANTS ARE PRECLUDED BY RCRA § 7002(b) OR THE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL FROM PURSUING THIS ACTION?

A. The court below did not rule on Buena Vista's motion that plaintiffs are barred from bringing the instant action on statutory and res judicata/collateral estoppel grounds because it found other grounds dispositive to dismiss the suit. However, it is undisputed that these issues were properly raised below for the court to decide, and were fully argued in the motion below.

In *Bennett v. Spear*, the Supreme Court held that "[a] respondent is entitled . . . to defend the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997); *see also Ponte v. Real*, 471 U.S. 491, 500 (1985). Justice Scalia stated that it was "an appropriate exercise of [the Court's] discretion" to decide issues that neither the District Court nor the Court of Appeals had reached "rather than leave them for disposition on remand." *Bennett v. Spear*, 520 U.S. at 166-7.

Similarly, in this case judicial economy would be better served by disposing of Buena Vista's motion in this court rather than leaving it for the District Court on remand. The nature of the questions presented in the motion are purely legal. The relevant facts have already been found either by the court below or the state court in *Bluepeace, Inc. v. Buena Vista*. Because the issues of section 7002(b) and res judicata/collateral estoppel were properly raised below, the appellee, Buena Vista, is entitled to defend the District Court's judgment on those grounds. *See Bennett v. Spear*, 520 U.S. at 166. Therefore, this court should rule on the issues presented.

B. The parties in the instant action are not identical to the parties in the state action. Accordingly, one of the crucial issues that must be decided with respect to Buena Vista's motion will be whether the parties in both actions are in privity, such that a judgment against one will bar the other from bringing its own action. This inquiry will be one of fact, best suited to the trial court.

An appellate court does not generally have the power to review the evidence and make its own findings of fact. *See Kelley v. Everglades Drainage Dist.*, 319 U.S. 415 (1943). Because the District Court did not reach the issues presented in the motion, it never engaged in fact finding with respect to the privity of the par-

ties. When, as in this case, the trial court's findings of fact are insufficient to permit adequate review, the appellate court should remand the case and direct the lower court to make the necessary findings. *See Icicle Foods, Inc. v. Worthington*, 475 U.S. 709 (1986); *United Shoe Mach. Corp. v. Kamborian*, 160 F.2d 461 (1st Cir. 1947); *Lamelson v. Kellogg Co.*, 440 F.2d 986 (2d Cir. 1971). Therefore, this court should not decide the appellee's motion, but instead should remand the motion to the district court for decision.

V(ii). ARE THE APPELLANTS PRECLUDED BY RCRA § 7002(b), OR THE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL FROM PURSUING THIS ACTION BECAUSE OF THE STATE COURT DECISION IN *BLUEPEACE, INC. V. BUENA VISTA POWER CO.*?

A. 1. Diligent Prosecution

Section 7002(b)(2)(C) of RCRA provides that

> [n]o action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment . . . has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section.

42 U.S.C. § 6972(b)(2)(C) (1995).

Thus, once the state is "diligently prosecuting" an action to abate the endangerment, citizen suits are barred. The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), reviewed a similar 'diligent prosecution' provision under the Clean Water Act and held that this "bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60. The Court further noted that the legislative history of the 'diligent prosecution' provision indicated that "citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" *Id.* (quoting S. REP. NO. 92-414, at 64 (1971)). Thus, it follows that if the federal, state and local agencies *do* exercise their enforcement responsibility, citizen suits are *not* proper. Given the minimal, "interstitial" role of citizen suits in

the Supreme Court's *Gwaltney* decision, it is clear that once the state diligently engages in enforcement proceedings against the defendant, the citizen suit becomes superfluous and should be dismissed. *Id.* at 61.

In the instant action, the State of New Union has intervened in order to exercise its enforcement responsibility under RCRA. Both New Union and Friends of Lake Tokay are now prosecuting identical enforcement proceedings, and therefore it cannot even be claimed that the citizen suit is supplemental to the state's action. Rather, the citizen suit is merely duplicative of the state's diligent prosecution. Since New Union is now diligently prosecuting this action, the citizen suit initiated by Friends of Lake Tokay has become an unnecessary substitute for government action and should be dismissed.

2. Res Judicata

The doctrine of res judicata holds that "a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955).

In the instant case, both Friends of Lake Tokay, Inc. and the State of New Union, while not actually parties in the state action, are in privity with Bluepeace, Inc., the plaintiff in that suit. In *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975), the Court of Appeals for the Fifth Circuit held:

> [u]nder the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

Aerojet-General Corp., 511 F.2d at 719-20.

The "virtual representation" theory in its broadest form precludes "relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interests with a nonparty." 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4457.

In the state court action, Bluepeace brought suit against Buena Vista, inter alia, to abate a public nuisance, namely the emission of mercury from Buena Vista's power plants. When a private citizen alleges a public nuisance, the citizen stands in the position of a "private attorney general." As a private attorney gen-

eral, the private plaintiff necessarily represents the interests of the state in order to protect public health. In the first case, Bluepeace represented the interests of Blue Skies. The interests of the State of Blue Skies in protecting public health would be identical to the interests of the State of New Union in protecting public health. Therefore, Bluepeace's action to abate Buena Vista's mercury emissions as a private attorney general shares a "substantial identity of interests" with New Union's claims under the instant action.

Similarly, Bluepeace and Friends of Lake Tokay, both not-for-profit environmental groups dedicated to protecting natural resources, share a substantial identity of interests. Because Bluepeace shares Friends of Lake Tokay's purpose and seeks to prevent the same harm, Bluepeace is clearly a virtual representative of Friends of Lake Tokay. Accordingly, Friends of Lake Tokay should be bound by the action brought against Buena Vista by Bluepeace. *See Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719-20 (5th Cir. 1975).

Moreover, for purposes of res judicata, a cause of action, or "claim" as it is referred to in Restatement (Second) Judgments, includes "all rights of the plaintiff to remedies against the defendant arising out of the same transaction or 'series of connected transactions.'" 1b MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.410[1] (*citing* RESTATEMENT (SECOND) JUDGMENTS § 24(a)). The Supreme Court has held that different claims which "derive from a common nucleus of operative fact" may not be relitigated between the parties or their privies. *United Mineworkers v. Gibb*, 383 U.S. 715 (1966). This rule is often understood simply as prohibiting a plaintiff from splitting his claim.

The instant action under RCRA section 7002(a)(1)(B) arises out of the same nucleus of operative facts which formed the basis of the action in *Bluepeace*, namely the discharge of mercury from the Buena Vista power plants and its subsequent entry into surface water. Under res judicata, the plaintiff must seek in the first suit all the relief to which he believes he is entitled because the decision in that case bars a second action alleging alternative relief. In this case, the parties in privity failed to assert the cause of action under RCRA in the state court action, and the res judicata prohibition on claim-splitting bars them from litigating it now.

3. Collateral Estoppel

The instant action is also barred by collateral estoppel. The doctrine of collateral estoppel precludes the relitigation of the same issue between parties or their privies. One of the issues finally decided by the state court was that regulation of mercury air emissions in the absence of federal standards under the Clean Air Act should be accomplished through legislative or administrative processes, not through judicial processes. The parties in privity are now attempting to relitigate this very same issue by asking the district court to regulate mercury air emissions in the absence of federal standards under the Clean Air Act. Accordingly, they should be estopped from seeking relitigation of the decision reached on that issue in *Bluepeace v. Buena Vista*.

B. 1. Diligent Prosecution

Section 7002(b)(2)(C) of RCRA provides that

> [n]o action may be *commenced* under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment . . . *has commenced* and is diligently prosecuting an action under subsection (a)(1)(B) of this section.

42 U.S.C. § 6972(b)(2)(C) (1995).

As the terms of the statute make clear, citizen suits are barred under section 7002 (b)(2)(C) only when the state has already commenced and is diligently prosecuting a similar action. It is well established that the citizen suit must be filed *after* the state action is filed in order to fall under the 'diligent prosecution' rule of the Clean Water Act. *See, e.g., Connecticut Fund for the Env't v. Job Plating Co.*, 623 F.Supp. 207 (D. Conn. 1985) (holding that "[o]n its face, the diligent prosecution provision of [the Clean Water Act] does not apply to a case in which the state did not take any enforcement action until after the citizen suit was filed." *Id.* at 215.); *Sierra Club v. Simkins Indus., Inc.*, 617 F.Supp. 1120 (D. Md. 1985) (holding that the citizen suit "was instituted prior to the state's institution of administrative proceedings . . . and, therefore, is not barred by [the 'diligent prosecution' provision] of the Clean Water Act.") Because the language of RCRA's 'diligent prosecution' provision follows that of the Clean Water Act, the holdings of these cases apply to RCRA section 7002(b)(2)(C) as

well. Therefore, section 7002(b)(2)(C) does not apply to bar citizen suits initiated prior to the filing of the state action.

Friends of Lake Tokay in this case duly gave notice to the State of New Union of its intention to bring an imminent and substantial endangerment suit as required by the statute. After New Union failed to act within the prescribed period of time, Friends of Lake Tokay filed its complaint. The State of New Union then later intervened in the action. The statute in this case only bars citizens suits commenced *after* the filing of a state action. *See* 42 U.S.C. § 6972(b)(2)(C) (1995). Therefore, the action commenced by Friends of Lake Tokay may not be dismissed on the grounds that the State of New Union was diligently prosecuting an action against Buena Vista.

2. Res Judicata – Collateral Estoppel

The doctrines of res judicata and collateral estoppel cannot be asserted against the plaintiffs in this case because they were not in privity with the parties in the first action, and cannot be bound by the court's decision in that case. It is well established that individual litigation ordinarily does not preclude litigation by the government. *See City of Richmond v. United States*, 422 U.S. 358 (1975); *Durfee v. Duke*, 375 U.S. 106 (1963). While private litigation may be barred by an action by the government, it is "the general principle of law that the [government] will not be barred from independent litigation by the failure of a private plaintiff." *United States v. East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58-9 (5th Cir. 1979). Accordingly, even if it was held that Friends of Lake Tokay was bound by the state court decision in *Bluepeace* as a party in privity, the State of New Union is clearly not bound by that holding, and therefore the instant action is not barred.

Additionally, res judicata does not bar the action in this case because the claims in both actions do not arise from the same set of operative facts. The claims in *Bluepeace, Inc. v. Buena Vista* arose from mercury contamination in the waters of Lake Mordred, a lake in the state of Blue Skies. In contrast, the instant action arises from mercury contamination in Lake Tokay, which is located in New Union. Moreover, since the mercury pollution occurred at a different time and in a different state, it cannot be said to arise "out of the same transaction or 'series of connected transactions.'" Because the two actions are not based in the same "claim," the resolution of one does not preclude the litigation of the other.