Pace Environmental Law Review

Volume 17
Issue 2 *Summer 2000*

Article 6

June 2000

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

Mateo Davis
Vermont Law School

Fritz Ganz
Vermont Law School

Brandon Jensen
Vermont Law School

Civ. No. 99-7030

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

Appellants,

v.

BUENA VISTA POWER CO.,

Appellee.

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

Brief for the Appellant
STATE OF NEW UNION*

Counsel for the Appellant
Mateo Davis
Fritz Ganz
Brandon Jensen
Vermont Law School

QUESTIONS PRESENTED

I. Whether mercury emitted in particle form from a coal burning power plant is a solid waste for purposes of the Resource Conservation and Recovery Act's (RCRA) citizen suit provision?

II. Whether a non-profit organization has standing under RCRA's citizen suit provision when it alleges two of its members can no longer keep the fish they catch from a contaminated lake due to Buena Vista's mercury emissions?

III. Whether a state has standing under RCRA's citizen suit provision when a coal burning power plant pollutes its waters in

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

a manner that requires a ban on the consumption of fish caught from the lake?

IV. Whether the emission of mercury from a coal burning power plant, permitted under the Clean Air Act (CAA), is a violation of RCRA?

V. Whether the doctrines of res judicata and collateral estoppel, and RCRA section 7002(b) are unavailable to preclude the present litigation due to a prior state court opinion?

TABLE OF CONTENTS

LIST OF CITATIONS

Cases

Statutes

Regulations

Legislative History

Other Authorities

OPINION BELOW

The opinion of the United States District Court for the District of New Union is unreported, but is published in full in the record. (R. at 1- R. at 9).

STATEMENT OF THE CASE

Friends of Lake Tokay, Inc. (FLT) is a not-for-profit corporation organized for the protection of Lake Tokay in the State of New Union (R. at 3). Buena Vista Power Co. (Buena Vista) owns and operates two coal-fired power plants in the State of Blue Skies (R. at 3). FLT brought suit against Buena Vista under the citizen suit provision of RCRA to abate further emission of mercury from Buena Vista's plants which allegedly presents an imminent and substantial endangerment to health and the environment (R. at 3). The State of New Union has intervened (R. at 3). Appellants FLT and New Union seek an injunction requiring Appellee Buena Vista to cease all emissions of mercury from its two plants (R. at 3).

It is undisputed that Appellee's coal burning plants emit minute particles of mercury by escaping the plants' pollution control equipment and entering the atmosphere (R. at 3). Appellants allege that many of these mercury particles are transported to the airstream over New Union where they fall to the surface (R. at 3). It is further alleged that some of these particles enter Lake Tokay and its watershed (R. at 3-4).

Due to elevated mercury levels in the fish population of Lake Tokay, the New Union Department of Public Health has issued a health advisory, banning the sale of fish from the lake and advising the public against consumption of the fish for fear of mercury poisoning (R. at 4). In response to the advisory, two members of FLT have stopped consuming their catch after twenty years of recreational fishing on Lake Tokay (R. at 4). EPA studied the Lake Tokay region and concluded that most of the mercury entering the lake originates at Appellee's plants in Blue Skies (R. at 4).

Appellants contend that the mercury contamination of Lake Tokay's fish, coupled with the health risks associated with human consumption of the fish, presents precisely the type of endangerment that RCRA's citizen suit provision was designed to address (R. at 4). Appellee argues that its emissions are fully regulated under the CAA and not subject to RCRA jurisdiction (R. at 4). Appellee's permits specifically state that the permitting authority re-

viewed every provision of federal and state law applicable to the plants and determined that the permits reflect all applicable requirements of such law (R. at 7).

On the parties' cross motions for partial summary judgment, the United States District Court for the District of New Union held that the particulate mercury emitted by Appellee's plants is a solid waste and therefore regulated under RCRA (R. at 6). The court also found that while FLT failed to demonstrate standing, New Union was properly before the court (R. at 4). Ultimately, the court held that Appellees' emissions are regulated under the CAA and not RCRA.

The district court, ruling to dismiss on other grounds, did not reach the complicated issue of whether a prior state court action between Appellee and Bluepeace, Inc., a not-for-profit organization incorporated in the State of Blue Skies, precludes the present action (R. at 5).

SUMMARY OF ARGUMENT

The district court's holding that mercury emitted in particle form from coal burning power plants is a solid waste subject to regulation under RCRA should be upheld. RCRA's statutory definition of solid waste is very broad and includes the provision "discarded material." Under general common usage of the terms, mercury emissions are discarded and disposed of. They are no longer used in the commercial process, no longer useful, and are no longer wanted by the Appellee.

Furthermore, the comprehensive regulatory definitions of solid waste, promulgated by EPA, are not applicable to citizen suits brought to abate the harm from a solid waste. The regulations themselves provide that only the statutory definition is to apply to such cases. This is significant because the regulatory definition of solid waste is narrower than the statutory definition. However, if this Court utilizes the narrow regulatory definitions, mercury emissions are still considered to be solid wastes. The regulatory definitions provide that the material must be abandoned to be considered a solid waste. Undoubtedly, the mercury emissions in the present case have been abandoned, and have migrated from their original location. In any event, the district court's holding that the mercury emissions are in fact solid waste should be upheld.

The district court's holding that FLT lacks standing should be reversed. The Supreme Court requires three factors to satisfy standing requirements: an injury in fact, a causal connection between the alleged action and the injury, and redressability. FLT meets all three of these requirements. First, FLT's members' inability to eat the fish they catch is a concrete and particularized injury in fact. Second, EPA's study establishes a causal connection between Appellee's mercury discharge and the fish poisoning. Third, an injunction may be issued to protect the public welfare, making FLT's injuries redressable. Therefore, the district court should have granted standing to FLT.

The State of New Union, as parens patriae, also has standing to bring suit. New Union acquires parens patriae status because it is bringing suit to protect the public health and welfare of its citizens. Therefore, it must satisfy the injury in fact test. This is accomplished by the concrete harm of having its fish poisoned and its citizens inability to use the fish they catch. Therefore, this Court should uphold New Union's standing.

Air emissions resulting in mercury deposition present an imminent and substantial endangerment to health and the environment and are properly enjoined by a citizen suit under RCRA section 7002(a)(1)(B). This action is precluded by neither regulation of these air emissions under the CAA nor compliance with mercury standards in a state-issued permit. The plain language of the CAA and RCRA establishes a statutory scheme that offers dual regulation of activities impacting air quality. By considering joint CAA and RCRA standards for air emissions, EPA clearly envisions dual regulation of air emissions. Indeed, it is sound public policy to regulate air emissions under both the CAA and RCRA and provide a seamless statutory scheme with the flexibility required for efficient regulation of the nation's air resources.

Furthermore, compliance with state-issued permits under the CAA does not shield dischargers from citizen suits brought under RCRA section 7002(a)(1)(B). The language of Appellee's permits is too broad to offer a shield against the present action. Additionally, the legislative history of RCRA makes it clear that the citizen suit provision is to be interpreted as a codification of the federal common law of nuisance. Actions brought under RCRA section 7002(a)(1)(B) are not properly characterized as collateral attacks on permits issued under other statutes. The district court erred in dismissing Appellants' action to enjoin Appellee from continued emission of mercury.

Finally, this Court should not rule on the issue of preclusion, since the district court decided the case on other grounds and chose to forgo any preclusive effect analysis of a prior state court case. This Court has discretion on whether or not to hear the issue, and should allow the case to be heard on its merits in the interests of public policy.

The doctrines of res judicata and collateral estoppel do not bar the present litigation. For res judicata purposes, the claims and the parties are not the same with the prior state court action, and the parties are not in privity. Under collateral estoppel, the RCRA issues were not litigated, actually decided, nor necessary to the prior court's decision. In addition, RCRA section 7002(b) does not bar Appellant's present litigation because Appellants here could only intervene in a federal court action. Since the prior action was in a state court, RCRA section 7002(b) should not preclude Appellant's present suit.

ARGUMENT

I. MERCURY EMITTED IN PARTICLE FORM FROM COAL BURNING POWER PLANTS IS A SOLID WASTE SUBJECT TO REGULATION UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT.

Under RCRA, for waste to be classified as "hazardous waste" it must first qualify as "solid waste." RCRA § 1004(5), 42 U.S.C. § 6903(5) (1994). However, for purposes of the RCRA citizen suit provision, a civil action may be commenced against any person or corporation, "who is contributing to . . . [the] disposal of any solid *or* hazardous waste which may present an imminent and substantial endangerment to health or the environment." RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Initially, the issue of whether mercury emissions are covered under RCRA is limited to the statutory and regulatory definitions of "solid waste," thereby removing any need to explore the complicated statutory and regulatory definitions of "hazardous waste."

This Court's analysis of the definition of solid waste entails a detailed interpretation of the statutory and regulatory definitions that are governed by the rules of construction as defined in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). First, this Court must address "whether Congress has directly spoken to the precise question at issue by focusing on the

language and structure of the statute itself." *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993). While a clear legislative purpose and definition ends the court's inquiry, if the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In the present case, both the statutory and regulatory definitions clearly indicate that mercury emissions are "solid waste" for purposes of RCRA section 7002(a)(1)(B), 42 U.S.C. section 6972(a)(1)(B).

A. RCRA's statutory definition of solid waste is sufficiently broad to encompass mercury emissions in particle form from coal burning power plants.

The statutory definition of solid waste, as defined in RCRA, is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . ." RCRA § 1004(27), 42 U.S.C. § 6903(27) (1994) (emphasis added).

While the statute offers no definition of the term "discarded material," the ordinary plain-English meaning of the word discarded is "disposed of, thrown away, or abandoned." *American Mining Congress v. United States Envtl. Protection Agency*, 824 F.2d 1177, 1183-1184 (D.C. Cir. 1987). The court in *American Mining Congress* (hereinafter "*AMC*") provided further insight by stating that "the dictionary definition of 'discard' is to drop, dismiss, let go, or get rid of as no longer useful, valuable, or pleasurable." *AMC*, 824 F.2d at 1184 n.7.

Furthermore, while construing the same statutory language, the Second Circuit stated that Congress intended for the reach of RCRA to be broad. *See Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1314. Relying on legislative history, the court found that Congress intended to include products within the term "discarded material," which no longer serve their purposes and are no longer wanted by consumers. *See id.* (*quoting* H.R. REP. NO. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241). In addition, the legislative history specifically states that the term discarded material "is meant to *expand*, not limit, the common meaning of the term solid waste." Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed.

Reg. 33084, 33091 (1980) (to be codified at 40 C.F.R. Pt. 261) (emphasis in original).

The statutory language is clear on its face and unambiguous as to the definition of solid waste. The mercury emissions in this case, by virtue of being emitted into the airstream with no intent of ever being reclaimed, captured, or sought after in any manner, clearly have been discarded, abandoned, gotten rid of, and obviously no longer serve any purpose.

Despite the fact that "discarded material" is not defined in RCRA, it does define the term "disposal" which is clearly synonymous with the term discard. Disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . . ." RCRA § 1004(3), 42 U.S.C. § 6903(3). Again, the definition of "disposal" serves to broaden the statutory definition of solid waste even further. *See Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1314. The act of allowing the mercury particles to escape into the atmosphere constitutes disposal due to the fact that the particles must eventually return to the surface, and in effect have been "placed" into or on any land or water.

The statutory language is clear and unambiguous on its face. Without question, mercury particles emitted from coal burning power plants are disposed of and discarded material that no longer serve any purpose and are considered to be a solid waste under RCRA.

B. The regulatory definitions of solid waste promulgated by EPA are not applicable to solid wastes defined for purposes of the citizen suit provision.

If the court finds that RCRA is silent or ambiguous with respect to the definition of solid waste and its applicability to mercury emissions, the court must look to the agency's determination and decide whether the agency's "answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In this case, the "RCRA regulations create a dichotomy in the definition of solid waste. EPA distinguishes between RCRA's regulatory and remedial purposes and offers a different definition of solid waste depending upon the statutory context in which the term appears." *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1314.

The regulations define solid waste as "any discarded material." Identification and Listing of Hazardous Waste, 40 C.F.R. § 261.2(a)(1) (1999). "Discarded material" is defined as any mate-

rial which is abandoned. *See* 40 C.F.R. § 261.2(a)(2)(I). Finally, abandoned materials are those that are "disposed of." *See* 40 C.F.R. § 261.2(b)(1). Though at first glance the regulations do not seem to differ with significant degree from the statutory definition, EPA has stated that its definition of solid waste is "narrower than its statutory counterpart." *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1314.

According to RCRA regulations, the regulatory definition of solid waste "applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA." 40 C.F.R. § 261.1(b)(1). The regulation further states that EPA's definition "does not apply to materials . . . that are not otherwise hazardous." *Id.* Finally, the regulation states that "[a] material which is not defined as a solid waste in this Part . . . is still a solid waste . . . for purposes of these sections if . . . in the case of Section 7003, the statutory elements are established." 40 C.F.R. § 261.1(b)(2)(ii). As such, EPA has determined that the regulatory definition of solid waste is not to apply to solid wastes defined for purposes of a citizen suit under RCRA section 7002. *See Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Auth.*, 888 F.2d 180, 187 (1st Cir. 1989). EPA did not specifically mention Section 7002 because Congress had not yet enacted that provision when EPA promulgated the regulation. *See id.*

Since EPA's regulatory definitions are reasonably related to a permissible construction of the statute, the broader statutory definition of solid waste applies to citizen suits brought to abate an imminent and substantial endangerment, while the narrower regulatory definition does not apply to citizen suits.

C. In the alternative, mercury emissions are solid wastes as defined by the regulations promulgated by EPA.

As stated above, the regulations promulgated by EPA define solid waste as any discarded material that is abandoned by being disposed of. *See* Identification and Listing of Hazardous Waste, 40 C.F.R. § 261.2 (1999). Although this definition is allegedly narrower than the statutory definition, mercury emissions still meet the regulatory definition of solid waste. In the ordinary sense of the words, mercury emissions are abandoned because they are never again sought after. The legislative history of the term "abandoned" suggests a simple meaning of "thrown away." Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614, 627 (1985) (to be codified at 40 C.F.R. § 261.2(b)).

The emissions are free to enter the atmosphere and are never collected, re-used, or captured at any point in time. They are released into the airstream and, as a result, are thrown away.

In any event, this Court should uphold the district court's holding that mercury emitted in particle form from Appellee's smoke stacks of coal burning power plants is a solid waste for purposes of RCRA section 7002(a)(1)(B), 42 U.S.C. section 6972(a)(1)(B) (1994).

II. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT FLT LACKS STANDING BECAUSE IT CONSTRUED *LUJAN* TOO NARROWLY.

In *Lujan v. Defenders of Wildlife*, the Supreme Court developed three criteria by which to determine standing:

> First, the plaintiff must have "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent. Second, there must be a causal connection between the injury and the conduct complained of –the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Because FLT satisfies all three of these criteria, the district court must be reversed.

A. FLT has standing because it satisfies the three requirements of *Lujan*: injury in fact, a causal connection, and redressability.

1. *Lujan*'s first requirement is satisfied because FLT has suffered an injury in fact by its members' inability to keep the fish they catch.

FLT roots its injury in two of its members' inability to eat or give as gifts the fish they catch. As slight as this injury may be, it nonetheless is an injury in fact. The district court explicitly recognized plaintiffs' inability to use their catch as an injury in fact, stating that FLT has modest economic damages suitable for a tort action (R. at 6). The Court in *Sierra Club v. Morton* held that even

unquantifiable injuries, such as aesthetic and environmental well being, are injuries in fact. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). The district court acknowledged the existence of such a harm, yet erroneously denied standing.

Lujan requires a concrete and particularized harm. *See Lujan*, 504 U.S. at 560. FLT's two members have been injured because they can not keep the fish they catch. This is a concrete economic injury because they are forced to purchase fish, where before they acquired fish by their labor. The relatively small monetary value of their efforts in no way diminishes the concreteness of their injury. Furthermore, it is necessary that the concrete injury be "actual or imminent." *See id.* FLT's members have an actual injury because the fish are presently contaminated with mercury, and since Appellee continues to discharge mercury, the actual injury will continue indefinitely.

FLT's injuries are also particularized. The *Lujan* Court defined particularity by stating that "the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1. FLT's members are two of only a relatively small number of fishermen who use Lake Tokay on a regular basis, and the injury personally affects their ability to utilize the lake to catch fish. FLT suffered an injury in fact and this Court should reverse the district court's denial of standing.

2. EPA's study shows a causal connection between FLT's injury and the actions of Appellee, satisfying the second requirement of the *Lujan* test.

The second element of *Lujan* requires that the injury be "fairly traceable" to Appellee, and "not the result of some third party." *Lujan*, 504 U.S. at 560. This second element is easily satisfied by EPA's independent studies linking most of the mercury in Lake Tokay to Appellee's two power plants. This Court is not concerned with the actual validity of the allegation, but rather whether a reasonable fact finder could find Appellee responsible for the mercury contamination. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883-84 (1990) (reviewing the standard for summary judgement under FED. R. CIV. P. 56(c)). FLT's members' inability to fish is directly caused by Appellee's pollution. It is this mercury contamination that created a danger if the fish were consumed, and caused the fishing ban to be enacted. Therefore, FLT has standing because its members have suffered a concrete injury that is fairly traceable to Appellee.

3. Since FLT's injury is redressable by an injunction, *Lujan*'s third standing requirement is met.

Redressability will be determined by the possibility of any remedies if the plaintiffs are successful. Once in court, FLT may argue that an injunction should be granted to benefit the public at large. *See Sierra Club*, 405 U.S. at 740 n.15. Indeed, an environmental harm favors the issuance of an injunction over money damages. *See Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Not only is an injunction available, it is a likely result if Appellants succeed on the merits. Therefore, the district court should have granted standing.

B. Because the three elements of *Lujan* are satisfied, the district court's additional zone of interest analysis is flawed and superfluous.

The district court added to its standing analysis another factor which was not included in *Lujan*. This was the zone of interest analysis. *See Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970). *Data Processing* dealt with challenges under the Administrative Procedure Act (APA), which "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute'" *Id.* at 153 (quoting 5 U.S.C. § 702 (1964)). From this specific language of the APA the Supreme Court demanded that the complaint be "arguably within the zone of interests to be protected or regulated by the statute." *Data Processing*, 397 U.S. at 153.

However, the present case stems from the citizen suit provision of RCRA which states: "any person may commence a civil action on his own behalf against any person who is contributing to the disposal of solid waste that may present an imminent and substantial endangerment to the health or environment." RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (1994). Consequently, *Data Processing*'s APA analysis is inappropriate when Congress has explicitly conferred the privilege of standing.

The Court in *Bennett v. Spear* dealt with this distinction, coming to the conclusion that a citizen suit provision "expands" the zone of interest. *See Bennett v. Spear*, 117 S.Ct. 1154, 1161-62 (1997). In light of *Lujan* and *Bennett* it is apparent that the zone of interest test is an insignificant hurdle for citizen suits under RCRA. The district court falsely applied a *Data Processing* analysis to the present controversy. *Data Processing* demands a broad

view of a statute, stating that "the trend is toward enlargement of the class of people who may protest administrative action." *Data Processing*, 397 U.S. at 154. The purposes of RCRA range from preserving and enhancing the quality of air, water, and land resources to protecting human health. *See* RCRA § 7002, 42 U.S.C. § 6902 (1994). Thus, even under *Data Processing*'s "zone of interest" analysis, FLT has standing.

III. THE STATE OF NEW UNION, AS PARENS PATRIAE, HAS STANDING BASED ON EVEN THE MOST RESTRICTIVE INTERPRETATION OF THE STANDING REQUIREMENTS.

The district court's holding that Appellant New Union satisfies standing requirements, should be upheld. A state does not automatically satisfy the standing requirements simply by the very nature of being a state. Rather, it is treated as a "person" under the RCRA citizen suit provision. *See Ohio v. United States Department of Energy*, 503 U.S. 607, 614 n.5 (1992). As such, New Union must satisfy an Article III analysis. However, it meets even the most restrictive test due to its status as parens patriae. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). Parens patriae refers to the role of the state as parent of the country and guardian of its citizens. *See id.* at 600. A state must have a quasi-sovereign interest, such as protecting the health and well being of its citizens, in order to have standing as parens patriae. *See id.* at 607.

New Union has a quasi-sovereign interest in protecting the health of its citizens and environment from the dangers of mercury poisoning. Parens patriae clearly incorporates such injuries, since it is frequently used in public nuisance suits. *See Missouri v. Illinois*, 180 U.S. 208 (1901) (Parens patriae standing against sewage discharges); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (Parens patriae standing against noxious gases). A state may rely on parens patriae to establish standing under a citizen suit provision. *See Maryland People's Counsel v. Federal Energy Regulatory Comm.*, 760 F.2d 318, 321 (D.C. Cir. 1985). Once a state has established parens patriae, only an injury in fact is required. *See id.* at 321. The high levels of mercury in the fish and the subsequent ban clearly create an injury in fact that is "concrete" and "actual." *See Lujan*, 504 U.S. at 560.

In addition, New Union satisfies the other requirements of particularity, causal connection, and redressability. *See Lujan*,

504 U.S. at 560. Particularity is satisfied because parens patriae considers all injuries within the state to have occurred against the state as an individual entity. *See Alfred L. Snapp*, 458 U.S. at 602. The causal connection and redressability factors are satisfied by EPA's study and the possibility of an injunction, as discussed above. Therefore, New Union has standing to bring suit.

Even if this Court should choose to deny the existence of parens patriae, New Union has standing based solely on its injuries as a state. New Union satisfies the standing requirements of *Lujan*, as described above. First, the injury in fact is created by the necessity of having to enforce a ban in order to minimize the harmful effects of Appellee's contamination. Second, the injury is fairly traceable to Appellee's actions according to the study done by EPA. Third, the injury is redressable by an injunction. *See Lujan*, 504 U.S. at 560. An injunction would diminish New Union's need to create and enforce the fishing ban, as it would halt the mercury rain contaminating the lake and surrounding watershed. Consequently, the district court's grant of standing to New Union should be upheld.

IV. A CITIZEN SUIT UNDER RCRA SECTION 7002(a)(1)(B) TO ENJOIN AIR EMISSIONS RESULTING IN MERCURY DEPOSITION PRESENTING AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH AND THE ENVIRONMENT IS NOT PRECLUDED BY EITHER REGULATION OF MERCURY EMISSIONS UNDER THE CAA, OR COMPLIANCE WITH MERCURY STANDARDS IN A STATE-ISSUED PERMIT.

Appellee operates its fossil fuel fired power generating plants under permits issued under the CAA. While these permits regulate emissions to air, subsequent deposition of pollutants is properly regulated under RCRA. The plain language of the two statutes calls for dual, but not duplicative, regulation of activities impacting air quality. Therefore, compliance with the terms of their CAA permits cannot shield Appellee from further regulation under RCRA. Furthermore, the citizen suits brought by Appellants under RCRA are not properly characterized as collateral attacks on the CAA permits held by Appellee. Appellants use of RCRA section 7002(a)(1)(B) is consistent with Congress' intent to

codify the federal common law of nuisance. The district court erred in its decision to dismiss the present action.

A. The CAA regulates mercury air emissions from major stationary sources as a hazardous air pollutant but does not prohibit regulation of mercury air emissions by other means, so long as such means do not conflict with the CAA.

1. Air emissions are, according to the plain language of the statutes, regulated by both the CAA and RCRA.

The rules of statutory construction are well established. The plain language of a statutory provision controls absent an irrational result. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 258-59 (1992). Where a statute is susceptible to two meanings, the one that gives full effect to all of its provisions is chosen. *See Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). Conflicting statutes must be construed harmoniously where possible. *See Weinberger v. Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973).

The purpose of the CAA is "to protect and enhance the quality of the Nation's *air resources* so as to promote the public health and welfare and the productive capacity of its population." CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1) (1994) (emphasis added). At the outset, Congress found that "air pollution prevention (that is, the reduction or elimination, through any measures, of the ambient pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3). Subject to approval by the Administrator, states establish implementation plans and administer the CAA within their boundaries. *See* CAA § 110(a), 42 U.S.C. § 7410(a). It is under this authority that Blue Skies administers its clean air program.

The Administrator is required to develop, and transmit to Congress, a comprehensive, national strategy to control emissions of hazardous air pollutants from area sources in urban areas. *See* CAA § 112(k)(3)(A), 42 U.S.C. § 7412(k)(3)(A). That strategy "shall include a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this *or other laws (including, but not*

limited to . . . the Resource Conservation and Recovery Act) . . . ." CAA § 112(k)(3)(C), 42 U.S.C. § 7412(k)(3)(C) (emphasis added).

The CAA is "not to be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of the Administrator or any other Federal officer, department, or agency." CAA § 310(a), 42 U.S.C. § 7610(a). Indeed, RCRA authorizes the Administrator to avoid regulatory duplication, to the maximum extent practicable, with the appropriate provisions of the CAA, in a manner consistent with the goals and policies of RCRA. *See* RCRA § 1006(b)(1), 42 U.S.C. § 6905(b)(1).

Among the objectives of RCRA is "promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which *preserve and enhance the quality of air*, water, and land resources." RCRA § 1003(a)(10), 42 U.S.C. § 6902(a)(10) (emphasis added). Furthermore, "[t]he Administrator shall promulgate such regulations for the monitoring and control of air emissions at hazardous waste treatment, storage, and disposal facilities . . . as may be necessary to protect human health and the environment." RCRA § 3004(n), 42 U.S.C. § 6924(n).

Just as the CAA authorizes EPA to delegate administrative responsibility to the states, RCRA establishes procedures by which states gain federal approval for their solid waste management programs. The Administrator must promulgate guidelines to assist the states in developing solid waste management plans which must consider "the varying regional, geologic, hydrologic, climatic, and other circumstances under which different solid waste practices are required in order to insure the reasonable protection of the quality of . . . ambient air quality." RCRA § 4002(b) & (c)(1), 42 U.S.C. § 6942(b) & (c)(1).

Both the CAA and RCRA authorize EPA to regulate air quality. RCRA's regulation of air quality is consistent with the language of the CAA. Read together, RCRA fills in gaps left by the CAA. Regulation of air emissions under one statute does not preclude regulation under the other. Since mercury is regulated as a solid waste under RCRA and a hazardous air pollutant under the CAA, it should be anticipated that air emissions of mercury would be subject to regulation under both statutes. *See* CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1). Included in this regulation is the availability of equitable relief to citizens pursuant to RCRA section 7002(a)(1)(B).

2. Congress intended that pollution arising from air emissions be regulated under both the CAA and RCRA.

There can be no doubt that the CAA was intended to address air emissions of mercury. The question is whether Congress intended to regulate air pollution under RCRA as well as the CAA.

The legislative history of RCRA indicates the breadth of Congress' intent. "[T]he Committee believes the RCRA regulatory and enforcement program must be conducted in a manner that controls and prevents present and potential endangerment to public health and the environment." H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576. This is consistent with the notion that RCRA closes loop holes in environmental regulation for activities which did not fall squarely within the framework of media-specific statutes such as the CAA and the Clean Water Act (CWA). *See* Enforcement Authority Guidance, 56 Fed. Reg. 24393, 24396 (1991).

By providing the Administrator of EPA with the regulatory combination of the CAA and RCRA, Congress increased the flexibility, and arguably the efficiency, of environmental regulation in the United States. The broad language of RCRA fosters the "cradle to grave" theme, consistent with the expansive liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the counterpart to RCRA which addresses inactive sites.

By regulating air quality under RCRA, Congress recognized that releases of solid particles to the air can ultimately, as in the present case, result in deposition of solid particulate matter. The focus of the CAA is the effects of airborne pollutants. While Subchapter IV-A (Acid Deposition Control) of the CAA deals with deposition of air pollutants from the atmosphere, the scope of the regulation is restricted to "acidic compounds and their precursors." CAA § 401, 42 U.S.C. § 7651. "The purpose of [Subchapter IV-A] is to reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide . . . and . . . nitrogen oxides . . . ." CAA § 401(b), 42 U.S.C. § 7651(b). Mercury deposition is not regulated under the CAA. Therefore, while the initial release might be permitted under the CAA, the end result is a solid waste problem and is solely regulated under RCRA.

3. As the agency charged with the administration of both the CAA and RCRA, EPA interprets both statutes to regulate air emissions.

Where the statutory language and Congress' intent is clear, the question for the courts is whether the interpretation and application chosen by the agency charged with administering the statute is reasonable. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). The Administrator of EPA is authorized to "prescribe . . . such regulations as are necessary to carry out his functions under [the CAA and RCRA]." CAA § 301(a)(1), 42 U.S.C. § 7601(a)(1); RCRA § 2002(a)(1), 42 U.S.C. § 6912(a)(1). In exercising its discretion, however, EPA must keep in mind that RCRA is not limited to particular media, but rather regulates releases to all media. *See* 56 Fed. Reg. at 24395; *See also* 40 C.F.R. §§ 266.104-07 (1993) (RCRA emission standards to control organic emissions, particulate matter and metals emissions).

EPA recognized the broad reach of RCRA when it considered joint standards for air emissions with the CAA. In guidance concerning the coordination of RCRA and CAA permitting processes, EPA proposed that "standards would only be written out in the CAA regulations, but they would legally be part of both the CAA and RCRA regulations." Revised Technical Standards for Hazardous Waste Combustion Facilities, 62 Fed. Reg. 24212, 24248 (1997). Thus, both programs would have an obligation to address the standards in permits issued under their authority. "EPA proposed this approach to provide the maximum amount of flexibility for state permitting authorities to coordinate the issuance of permits and enforcement activities in a way which most effectively addresses their particular situation." *Id.*

4. Regulation of air emissions under both the CAA and RCRA provides a seamless statutory scheme and is justified as a matter of public policy.

Viewed in the context of environmental regulation on a nationwide basis, it is sound policy to regulate air emissions under RCRA in addition to the CAA. Environmental pollution problems do not always fit nicely into the media-based regulatory programs of the CAA and the CWA. Solid wastes may be emitted to the air, transported great distances, absorbed by precipitation, and intro-

duced to surface waters and land. Through its life-cycle, a pollutant can invade all facets of the environment.

The CAA clearly addresses the health and environmental concerns relating to airborne pollutants. The CAA fails, however, to address the health and environmental consequences of that pollution once it leaves the nation's air resources. As a matter of public policy, it is imperative that the broad language of RCRA be read to assume regulatory authority over pollutants which make the transition from air to either water or land.

B. Appellee's compliance with the mercury standards in its state-issued permit does not shield it from citizen suits brought under RCRA section 7002(a)(1)(B).

1. The language in Appellee's state-issued CAA permit, which purports to incorporate all applicable law, does not serve as a shield against citizen suits brought under RCRA.

In its regulation of state clean air programs EPA established a "permit shield" which protects permit holders from subsequent enforcement actions based on provisions directly addressed in the CAA permit. *See* 40 C.F.R. § 70.6(f) (1999). The provision was designed to provide the permit holder with certainty that compliance with the terms of its permits would necessarily put it in compliance with the CAA.

Appellee asserts, and the district court agreed, that mercury emissions addressed in its CAA permit activates the "permit shield" provisions that EPA established in its regulations. The preamble to Appellee's permit specifically states that the permitting authority "reviewed every provision of federal and state law applicable to emissions from this facility and has determined that such law contains no requirements applicable to it that are not reflected in this permit" (R. at 7). The question is whether this language is sufficient to invoke the protections of the regulatory permit shield established by EPA.

EPA has stated that if the permit expressly provides that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements, such applicable requirements must be *specifically identified in the permit*. *See* 40 C.F.R. § 70.6(f). This permit shield has been interpreted as preventing courts from finding liability under provisions of the CAA which were directly addressed by the permit, but does not

serve to preclude a finding of liability under other statutes such as RCRA. *See* Roy S. Belden, *Preparing for the Onslaught of Clean Air Act Citizen Suits: A Review of Strategies and Defenses*, 1 ENVTL. LAW 377, 420 (1995). The CAA permit shield adopted by EPA is a narrow one. *See id.* at 420.

The mercury standard in Appellee's permit adopts the standard promulgated by EPA. At present (and at the time of permitting) EPA has promulgated national emission standards for mercury, but those standards do not apply to fossil fuel fired power plants such as those operated by Appellee. *See* 40 C.F.R. § 61.50 (1999). As the regulations stand, Appellee is in compliance with applicable national standards for mercury under the CAA. Appellants concede that the permit shields Appellee from action under regulatory provisions addressed in its permit. However, the broad language of the preamble is insufficient to shield Appellee from enforcement actions based on violations of statutory provisions outside the scope of the CAA.

2. The citizen suits brought to enjoin Appellee's emissions of mercury are authorized by RCRA as regulation of solid waste and cannot be characterized as an improper collateral attack on the state-issued CAA permit.

The district court erroneously adopted Appellee's contention that the use of the citizen suit provision of RCRA is an impermissible collateral attack on Appellee's CAA permit. The district court's theory rested on a line of cases involving citizen suits brought under an environmental statute to challenge permits issued under the same statute.

In *Palumbo v. Waste Technologies Industries*, the Fourth Circuit held that a collateral attack on a CAA permit was precluded by the facility's compliance with a valid RCRA permit. *See Palumbo v. Waste Technologies Industries*, 989 F.2d 157, 159 (4th Cir. 1993). The court found that citizen suit provisions were not a legitimate means of challenging EPA permitting decisions. *See id.* The Sixth Circuit supported this conclusion and held accordingly in *Greenpeace, Inc. v. Waste Technologies Indus.*, a case involving the same facility and permitting issue addressed in *Palumbo*. *See Greenpeace, Inc. v. Waste Technologies Indus.*, 9 F.3d 1174, 1181 (6th Cir. 1993). The CAA's provisions for direct appeal of EPA permit decisions to the circuit courts of appeals was discussed at length by the *Palumbo* court. *See Palumbo*, 989 F.2d at 159. The

court refused to give plaintiffs two bites at the proverbial apple. Ultimately, the court saw "no evidence that Congress intended to eviscerate the very permitting process that Congress itself set up, and [would] not do so by entertaining [a citizen] suit." *Palumbo*, 989 F.2d at 162.

As the *Greenpeace* court stated, the legislative history of the RCRA judicial review provisions indicates that citizen suits "are prohibited . . . with respect to siting and permitting of hazardous waste facilities." *Greenpeace*, 9 F.3d at 1180-81 (quoting H.R. CONF. REP. NO. 98-1133, at 117-18 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5688-89). By precluding collateral attacks on permitted activity, the *Palumbo* and *Greenpeace* courts concluded they were merely prohibiting what amounts to an "end run" around the limitations of the RCRA citizen suit provision. *See Palumbo*, 989 F.2d at 161-62; *See Greenpeace*, 9 F.3d at 1181. Similarly, the Third Circuit prohibited the use of the CAA citizen suit provision to launch a collateral attack on provisions of a CAA permit. *See Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 267 (3d Cir. 1991).

These cases are distinguishable from the present case. The facility in *Palumbo* and *Greenpeace* held a valid permit, issued under RCRA, to operate as a hazardous waste incineration facility. The plaintiffs in each case were seeking to enjoin activity specifically addressed in the permit. The courts held that the plaintiffs failed to take advantage of the ample opportunity to raise their concerns throughout the permit process.

In the case at bar, the Appellants are seeking to enjoin Appellee's activities which present an imminent and substantial endangerment to health and the environment. Appellee was never issued a permit under RCRA. The facilities at issue are power plants rather than hazardous waste facilities. There are no issues with regard to siting or permitting under the RCRA and the holdings of *Palumbo* and *Greenpeace* do not apply. This action has been brought to address a solid waste problem which persists despite Appellee's compliance with the CAA.

The line of cases precluding the use of citizen suit provisions to bring collateral attacks upon permits deals with plaintiffs suing under the citizen suit provisions of the same statute under which the permit was issued. Here, Appellants' action is authorized by the citizen suit provision of RCRA. Appellee seeks to use compliance with a CAA permit to dismiss an action brought under RCRA. The unique nature of the RCRA citizen suit provision au-

thorizes its use to enjoin an otherwise legal activity which presents an imminent and substantial endangerment to health and the environment. The district court acknowledged the flaws inherent in characterizing the present action as an impermissible collateral attack on Appellee's permits: "To be sure, the situation here is not on all fours with the cited cases. They all concerned attempts to use the enforcement or citizen suit provisions of a statute to circumvent limitations on judicial review in the same statute" (R. at 8). Appellants' action is properly brought under RCRA section 7002(a)(1)(B) and cannot be characterized as an improper collateral attack upon Appellee's CAA permit.

3. The district court has jurisdiction over the present action because it arises under RCRA, a federal statute, and does not seek review of Appellee's CAA permit.

The district court dismissed the present action for lack of jurisdiction. The court based this decision in part on the theory that "citizen suit provisions do not grant jurisdiction to the district courts for judicial review of state permit issuance" (R. at 8). The court relied upon *General Motors v. Environmental Protection Agency* as its principal authority. *See General Motors v. Environmental Protection Agency*, 168 F.3d 1377 (D.C. Cir. 1991). *General Motors* is a case in which EPA determined that a permit violation had occurred under the CWA and imposed a penalty. General Motors (GM), the holder of a state-issued CWA permit, contested the administrative ruling and attacked the terms of its permit. GM had not taken advantage of opportunities to contest the terms of its permit prior to the initiation of enforcement action by EPA. In denying GM's petition for federal review of its permit, the D.C. Circuit reasoned that

> had GM pursued its state remedies and prevailed, then there would have been no permit for the EPA to enforce; had GM done so and lost, then it would have been prevented, under the doctrine of res judicata, from relitigating the validity of its permit in a later enforcement proceeding before EPA.

Id. at 1381.

The district court cited a long line of cases in support of its contention that state permits cannot be reviewed in federal courts (R. at 8). *See Public Interest Research Groups of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990); *United States*

v. Gulf States Steel Co., 54 F.Supp.2d 1233 (N.D. Ala. 1999); *Natural Resources Defense Council v. Outboard Marine Corp.*, 702 F.Supp. 690 (D. Ill. 1988); *Connecticut Fund for the Environment v. Job Plating Co.*, 623 F.Supp. 207 (D. Conn. 1985). These cases are distinguishable from the present case. Each of these cases dealt with actions brought under the CWA. Here we are dealing with RCRA. The cited cases all involved challenges to specific provisions of a CWA permit, raised in the context of an enforcement action brought by either the state permitting authority or a citizen group under the citizen suit provisions of the CWA. *See General Motors*, 168 F.3d at 1381 (permittee challenges validity of NPDES permit as defense in enforcement action); *PIRG*, 913 F.2d at 77-78; *NRDC*, 702 F.Supp. at 692 (NRDC contests monitoring procedure required by NPDES permit); *Connecticut Fund for the Environment*, 623 F.Supp. at 209 (permittee challenges validity of NPDES permit as improperly promulgated).

No attempt is made to challenge the validity of Appellee's CAA permits. This action seeks to supplement the requirements of the CAA permits by compelling compliance with the terms of the RCRA imminent hazard provisions. Questions of federal law are raised and a serious interstate pollution problem must be addressed. The present action was properly brought in the District Court of New Union.

4. The citizen suit provisions of RCRA preserve the federal common law of nuisance when brought to address activity presenting an imminent and substantial endangerment to health or environment.

The final rationale set forth by the district court as grounds for dismissal of plaintiffs' complaint raises a continuing debate over the propriety of a federal common law public nuisance action to abate air pollution (R. at 9). The court makes a vague reference to legislative history in an apparent attempt to perform a brief *Chevron* analysis. Without citation to any authority, the court states that "Congress spoke in the Clean Air Act to the precise problem plaintiffs raise here" (R. at 9). If Congress has spoken to the precise issue before the court, the inquiry comes to an end. *See Chevron*, 467 U.S. at 842-43. Where Congress is silent or ambiguous with regard to its intent, the question is whether the agency's interpretation is reasonable. *See id.*

The legislative history of RCRA makes it clear that "the primary goal of [RCRA section 7002 is] the prompt abatement of im-

minent and substantial endangerments." H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. RCRA is unique in authorizing citizen enforcement suits to abate potential imminent hazards. *See generally*, Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcer*, 24 ENVTL. L. REP. 10122 (Mar. 1994) (Analysis of RCRA's citizen suit provision as an effective enforcement tool).

There is considerable debate over the broad reach of the citizen suit provision of RCRA. The Hon. James Sensenbrenner, Jr., while acknowledging the availability to citizens of remedies if a permit is later found to be deficient, argued that "[t]he federal common law, if applied under RCRA, would subject businesses and municipalities to the unbridled and uncontrolled imposition of what an individual judge might dictate in the case." H.R. CONF. REP. NO. 98-198, pts. 1 and 2, at 20-21 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5648-49. Indeed, the availability of similar citizen enforcement has been substantially limited under the CAA. "The suggestion of a separate federal common law of nuisance applicable to the field of air pollution has been rejected." Matthew Bender, 2 ENVTL. LAW § 2.03(2) (1999). Congress has not given courts the power to develop federal substantive law in the air pollution field. *See id.* § 2.03(2) n.2.

Despite opposition, it seems clear that broad citizen enforcement is precisely what Congress contemplated. "[E]xpansion of the citizens suit provision will complement, rather than conflict . . . efforts to eliminate threats as to public health and the environment." H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. "Section 7003, therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance . . . and to determine appropriate remedies in common law. . . . Some terms and concepts, such as persons 'contributing to' disposal resulting in a substantial endangerment, are meant to be more liberal than their common law counterparts." S. REP. NO. 96-172, pt. 1, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023.

The district court was satisfied that Congress' enactment of the CAA "as a comprehensive, detailed and pervasive scheme to regulate air pollution" precludes a federal common law of nuisance to abate interstate pollution. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). In *City of Milwaukee v. Illinois*, the States of Illinois and Michigan brought a common law public nuisance suit

against the City of Milwaukee, seeking abatement of the city's discharges into Lake Michigan. The Court held that Congress intended to fully occupy the field of water pollution control when it enacted the CWA and thus displaced the federal common law of nuisance. *See Milwaukee*, 451 U.S. at 332.

Appellee argues the *Milwaukee* analysis extends to the CAA and the field of air pollution. The district court followed their lead and blindly applied *Milwaukee* without addressing the differences between the citizen suit provisions of the CAA, CWA and RCRA. As the Supreme Court noted, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Injunctive relief is specifically authorized under RCRA to fill in the gaps and abate precisely the type of harm presented by Appellee's mercury emissions. As the legislative history indicates, this type of action is exclusively available in RCRA and is not precluded by the holding of *Milwaukee*.

Barring nuisance-type suits under RCRA section 7002(a)(1)(B) would ignore the legislative history of the RCRA citizen suit provision and Congress' clear intent to codify, in RCRA section 7002(a)(1)(B), the very federal common law of nuisance it arguably displaced by *Milwaukee* in the CWA context. The legislative history underscores the difference between the scope of the RCRA citizen suit provision and that of the CAA and the CWA. RCRA section 7002(a)(1)(B) should be interpreted broadly to give force to Congress' intent to codify the law of nuisance as an action to abate environmental hazards.

The court also interprets *Weinberger v. Romero-Barcelo* as giving the court discretion to deny equitable remedies to regulate air pollution. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). *Romero-Barcelo* involved a suit to enjoin Naval weapons training resulting in discharges of ordnance to waters off the coast of Puerto Rico. *See id.* at 307. The district court ordered the Navy to obtain a CWA permit but refused to enjoin the Navy's operations during the permit process. *See id.* at 308. The Supreme Court upheld the district court's order, ruling that refusal to issue an injunction did not frustrate the purpose of the CWA. *See id.* at 314. The Court pointed to Congress' apparent intent that the statutory scheme not "deny courts the discretion to rely on remedies other than an immediate prohibitory injunction." *Id.* at 316. The Court in *Romero-Barcelo* did not establish a bar on actions seek-

ing injunctions under the CWA, but rather clarifies that the courts are authorized and expected to exercise their discretion when issuing prohibitory injunctions. *See id.* at 320.

It has been noted that "RCRA . . . is primarily a liability provision directed at endangerments that persist despite other environmental regulations." Babich, 24 ENVTL. L. REP. at 10131. The First Circuit concurs with this expansive interpretation of RCRA's regulatory provisions "to prevent case-specific situations that threaten harm without creating a complex regulatory program." *Id.* at 10131 (citing *Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Authority*, 888 F.2d 180, 187 (1st Cir. 1989)). In *Connecticut Coastal Fisherman's Ass'n*, the Second Circuit followed suit by affirming the issuance of an injunction to abate pollution while making no ruling on whether a regulatory violation had occurred. *See Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1309, 1316 (2d Cir. 1993).

Use of RCRA section 7002(a)(1)(B) to enjoin otherwise legal activity to abate endangerments to health and environment is consistent with the public nuisance-like character of the provision. As one commentator suggests, "[i]t may not be a coincidence that Congress enacted § 7002(a)(1)(B) during the mid-1980s, when it was turning its attention to imposing retroactive liability for cleanup of CERCLA and RCRA corrective action sites, many of which were contaminated as a result of conduct that was not necessarily illegal." Babich, 24 ENVTL. L. REP. at 10131 n.108.

While opponents to the establishment of a public nuisance-like action under RCRA section 7002(a)(1)(B) argue that such a provision will only serve to clog the dockets with frivolous suits, proponents dismiss this fear and point to the lack of such a backlog of common law nuisance suits in state courts. *See* Babich, 24 ENVTL. L. REP. at 10133. Citizen suits under RCRA section 7002, which require no action on the part of EPA, may be the least complicated and most cost-efficient means of protecting the environment. *See id.* at 10136.

For the foregoing reasons, the district court erred in finding that regulation and permitting of Appellee's facilities under the CAA preclude the use of RCRA section 7002(a)(1)(B) to abate pollution that presents an imminent and substantial endangerment to health and the environment. Injunctive relief is authorized by federal statute and appropriately sought in this case. The district court's order dismissing the present action should be reversed.

V. THIS COURT SHOULD NOT RULE ON THE ISSUE OF PRECLUSION, BUT IF IT CHOOSES TO DO SO, IT SHOULD HOLD THAT THE PRIOR STATE COURT LITIGATION DOES NOT PRECLUDE APPELLANTS FROM INITIATING THE CASE AT BAR.

This Court should not rule on the issue of preclusion. The general rule is that a federal appellate court does not consider an issue not passed upon below. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This is a rule "of discretion rather than jurisdiction, and in the past we have heard issues not raised in the district court when prompted by exceptional circumstances." *Selected Risks Ins. Co. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983).

The district court did not pass upon the issue. It chose not to decide the issues on their merits and granted summary judgment due to other issues within the case (R. at 9). Furthermore, there are ample public policy considerations justifying consideration of the case on its merits and no circumstances dictate that it is essential that the issue be determined by this Court. The Appellee is not unduly harmed by having to forgo any preclusive effect of the decision in *Bluepeace, Inc. v. Buena Vista Power Co.*, No. Civ. 98-27 (Coughlin Co. Sup. Ct., Jan. 5, 1999).

In the alternative, if this Court chooses to rule on the issue of preclusion, the Court should not hold that the doctrines of res judicata or collateral estoppel, or RCRA section 7002(b) preclude Appellants' present litigation.

A. The doctrine of res judicata does not preclude cross-Appellees from litigating their claims.

Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). However, this bar is limited to cases arising out of the same cause of action or claim. *See Manego v. Orleans Board of Trade*, 773 F.2d 1, 5-6 (1st Cir. 1985). Finally, the doctrine of res judicata is limited to those cases where the parties are identical, or subsequent litigation involves parties that are in privity to parties in the prior litigation. *See Montana v. United States*, 440 U.S. 147, 153 (1979).

Even though the court in *Bluepeace, Inc. v. Buena Vista Power Co.* made a final judgment on the merits (R. at 10-14), the

claims and the cause of action in *Bluepeace* are not the same as the present case. In *Bluepeace*, the mercury contaminated lake was Lake Mordred, located in the State of Blue Skies (R. at 10-11). In the present case, the mercury contaminated lake is located in the State of New Union, which is not contiguous to Blue Skies (R. at 9). Appellants are making claims under RCRA, while in *Bluepeace*, the plaintiffs were relying on common law principles of trespass, public and private nuisance, and were dealing with different state laws concerning air pollution permits and the like. Even though RCRA is thought of as a federal codification of the common law of nuisance, there are different legal theories relied upon to prove prima facie cases. RCRA principles cannot be protected by plaintiffs seeking claims under nuisance laws.

In addition, the parties to the two cases are not the same. In *Bluepeace*, the plaintiff was a non-profit organization incorporated in Blue Skies (R. at 10). In the present case, Appellants are a non-profit organization incorporated in New Union and organized for the protection of Lake Tokay in the State of New Union (R. at 3).

Finally, the parties to the two disputes are neither identical, nor in privity: "Res judicata will not operate to preclude a subsequent suit unless there is an identity of parties or privity." *Virginia Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1247 (9th Cir. 1998). While Buena Vista Power Co. has been a party to the two disputes, different citizen groups and different states have been involved as plaintiffs in the two actions. However, "privity exists between parties who adequately represent the same legal interests." *Id.* None of the parties between these two disputes are in privity to one another. The legal interests at stake are different. The claims involve "mercury contamination" of two different lakes situated in two different states. Finally, the present suit involves claims regarding RCRA and cannot be integrated so easily with claims of tort law.

B. The doctrine of collateral estoppel does not preclude cross-Appellees from litigating the case at bar.

The doctrine of collateral estoppel, also known as issue preclusion, states that when a particular issue has already been litigated, further litigation of the same issue is barred. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). There are four requirements that must be met to preclude certain issues from subsequent litigation. The first requirement is that the issue in the second case must be the same as the issue in the first. Second, the

issue must have been actually litigated. Third, even if an issue was litigated in a prior action, collateral estoppel will not bar relitigation unless the issue was actually decided in that action. Finally, collateral estoppel will not apply unless the decision on the issue in the prior action was necessary to the court's judgment. *See id.*

The same problems arise in the present case with collateral estoppel as with res judicata. The issues are not the same. Furthermore, since RCRA was not a part of the *Bluepeace* litigation, the RCRA issue was neither actually litigated in that case, nor actually decided. Of even greater importance, any determination concerning RCRA was not necessary to the court's judgment in *Bluepeace*. The court made its determination without discussing, much less relying on, any provisions of RCRA. Appellee can not bar Appellants' present case by virtue of the doctrine of collateral estoppel.

C. RCRA section 7002(b) does not preclude cross-Appellees from litigating the case at bar.

Appellee claims that RCRA section 7002(b) should bar cross-Appellees' claims in the present suit because RCRA section 7002(b)(2)(E) allows parties to intervene in suits "when the applicant claims an interest relating to the subject of the action and he is so situated that the dispostion of the action may, as a practical matter, impair or impede his ability to protect his interest." RCRA § 7002(b)(2)(E), 42 U.S.C. § 6972(b)(2)(E) (1994). RCRA section 7002(b) is inapplicable here for two reasons. First, there is no reason to believe that Appellants in the present case could have known about a similar law suit taking place in another state. Furthermore, there is no claim that the two lakes were polluted at the same time, or that the Appellants here had become aware of the pollution at the time of the *Bluepeace* litigation. Second, and more importantly, RCRA section 7002(b)(2)(E) specifically authorizes intervention only in federal cases. *See id.* There is no mention in the statute of allowing intervention in a state action. Since the prior litigation was in a state court, and did not involve the same interests, claims, facts, or legal theories, RCRA section 7002(b)(2)(E) is unavailing.

The doctrines of res judicata and collateral estoppel, and RCRA section 7002(b), cannot be used to preclude Appellants from bringing their claims or causes of action. The specific requirements of both res judicata and collateral estoppel have not been

met. In addition, the statutory requirements of RCRA section 7002(b) have not been met. Therefore, the present litigation should not be precluded.

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that the decision by the United States District Court for the District of New Union be reversed with respect to parts II and IV, and upheld with respect to parts I and III.

APPENDIX A - RCRA STATUTORY & REGULATORY PROVISIONS

STATUTORY PROVISIONS

42 U.S.C. § 6902. Objectives and national policy

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

* * *

42 U.S.C. § 6903. Definitions

As used in this chapter:

* * *

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

* * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * *

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

* * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

* * *

42 U.S.C. § 6905. Application of chapter and integration with other Acts

(b) Integration with other Acts

(1) The 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 [42 U.S.C.A. § 7401 et seq.], the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.], the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [33 U.S.C.A. § 1401 et seq.], and such other Acts of Congress as grant regulatory authority to the Administrator. 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 chapter and in the other acts referred to in this subsection.

* * *

42 U.S.C. § 6912. Authorities of Administrator

(a) Authorities

In carrying out this chapter, the Administrator is authorized to—

(1) prescribe, in consultation with Federal, State, and regional authorities, such regulations as are necessary to carry out his functions under this chapter;

* * *

42 U.S.C. § 6924. Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities

* * *

(n) Air emissions

Not later than thirty months after November 8, 1984, the Administrator shall promulgate such regulations for the monitoring and control of air emissions at hazardous waste treatment, storage, and disposal facilities, including but not limited to open tanks, surface impoundments, and landfills, as may be necessary to protect human health and the environment.

* * *

42 U.S.C. § 6942. Federal guidelines for plans

* * *

(b) Guidelines for State plans

Not later than eighteen months after October 21, 1976, and after notice and hearing, the Administrator shall, after consultation with appropriate Federal, State, and local authorities, promulgate regulations containing guidelines to assist in the development and implementation of State solid waste management plans (hereinafter in this chapter referred to as "State plans"). The guidelines shall contain methods for achieving the objectives specified in section 6941 of this title. Such guidelines shall be reviewed from time to time, but not less frequently than every three years, and revised as may be appropriate.

(c) Considerations for State plan guidelines

The guidelines promulgated under subsection (b) of this section shall consider—

(1) the varying regional, geologic, hydrologic, climatic, and other circumstances under which different solid waste practices are required in order to insure the reasonable protection of the quality of the ground and surface waters from leachate contamination, the reasonable protection of the quality of the surface waters from surface runoff contamination, and the reasonable protection of ambient air quality;

* * *

42 U.S.C. § 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) 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 any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter,

or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

* * *

(b) Actions prohibited

* * *

(2)(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

* * *

REGULATORY PROVISIONS

40 C.F.R. § 261.1 Purpose and scope.

(a) This part identifies those solid wastes which are subject to regulation as hazardous wastes under Parts 262 through 265, 268 and Parts 270, 271, and 124 of this chapter and which are subject to the notification requirements of section 3010 of RCRA. In this part:

(1) Subpart A defines the terms "solid waste" and "hazardous waste", identifies those wastes which are excluded from regulation under Parts 262 through 266, 268 and 270 and establishes special management requirements for hazardous waste produced by conditionally exempt small quantity generators and hazardous waste which is recycled.

(2) Subpart B sets forth the criteria used by EPA to identify characteristics of hazardous waste and to list particular hazardous wastes.

(3) Subpart C identifies characteristics of hazardous waste.

(4) Subpart D lists particular hazardous wastes.

(b)(1) The definition of solid waste contained in this Part applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA. For example, it does not apply to materials (such as non- hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled.

(2) This Part identifies only some of the materials which are solid wastes and hazardous wastes under Sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this Part, or is not a hazardous waste identified or listed in this Part, is still a solid waste and a hazardous waste for purposes of these sections if:

(i) In the case of Sections 3007 and 3013, EPA has reason to believe that the material may be a solid waste within the meaning of Section 1004(27) of RCRA and a hazardous waste within the meaning of Section 1004(5) of RCRA; or

(ii) In the case of Section 7003, the statutory elements are established.

(c) For the purposes of Sections 261.2 and 261.6:

(1) A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing;

(2) "Sludge" has the same meaning used in § 260.10 of this Chapter;

(3) A "by-product" is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process.

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents.

(5) A material is "used or reused" if it is either:

(i) Employed as an ingredient (including use as an intermediate) in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process). However, a material will not satisfy this condition if distinct components of the material are recovered as separate end

products (as when metals are recovered from metal-containing secondary materials); or

(ii) Employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

(6) "Scrap metal" is bits and pieces of metal parts (e.g.,) bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled.

(7) A material is "recycled" if it is used, reused, or reclaimed.

(8) A material is "accumulated speculatively" if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled; and that—during the calendar year (commencing on January 1)—the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (e.g., slags from a single smelting process) that is recycled in the same way (i.e., from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under § 261.4(c) are not be included in making the calculation. (Materials that are already defined as solid wastes also are not to be included in making the calculation.) Materials are no longer in this category once they are removed from accumulation for recycling, however.

(9) "Excluded scrap metal" is processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal.

(10) "Processed scrap metal" is scrap metal which has been manually or physically altered to either separate it into distinct materials to enhance economic value or to improve the handling of materials. Processed scrap metal includes, but is not limited to scrap metal which has been baled, shredded, sheared, chopped, crushed, flattened, cut, melted, or separated by metal type (i.e., sorted), and, fines, drosses and related materials which have been agglomerated. (Note: shredded circuit boards being sent for recycling are not considered processed scrap metal. They are cov-

ered under the exclusion from the definition of solid waste for shredded circuit boards being recycled (§ 261.4(a)(13)).

(11) "Home scrap metal" is scrap metal as generated by steel mills, foundries, and refineries such as turnings, cuttings, punchings, and borings.

(12) "Prompt scrap metal" is scrap metal as generated by the metal working/fabrication industries and includes such scrap metal as turnings, cuttings, punchings, and borings. Prompt scrap is also known as industrial or new scrap metal.

40 C.F.R. § 261.2 Definition of solid waste.

(a)(1) A solid waste is any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.

(2) A discarded material is any material which is:

(i) Abandoned, as explained in paragraph (b) of this section; or

(ii) Recycled, as explained in paragraph (c) of this section; or

(iii) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(iv) A military munition identified as a solid waste in 40 CFR 266.202.

(b) Materials are solid waste if they are abandoned by being:

(1) Disposed of; or

(2) Burned or incinerated; or

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(c) Materials are solid wastes if they are recycled—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (c)(4) of this section.

(1) Used in a manner constituting disposal.

(i) Materials noted with a "*" in Column 1 of Table I are solid wastes when they are:

(A) Applied to or placed on the land in a manner that constitutes disposal; or

(B) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste).

(ii) However, commercial chemical products listed in § 261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(2) Burning for energy recovery.

(i) Materials noted with a "*" in column 2 of Table 1 are solid wastes when they are:

(A) Burned to recover energy;

(B) Used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste).

(ii) However, commercial chemical products listed in § 261.33 are not solid wastes if they are themselves fuels.

(3) Reclaimed. Materials noted with a "*" in column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR 261.4(a)(17)). Materials noted with a "—" in column 3 of Table 1 are not solid wastes when reclaimed (except as provided under 40 CFR 261.4(a)(17)).

(4) Accumulated speculatively. Materials noted with a "*" in column 4 of Table 1 are solid wastes when accumulated speculatively.

* * *

(d) Inherently waste-like materials. The following materials are solid wastes when they are recycled in any manner:

(1) Hazardous Waste Nos. F020, F021 (unless used as an ingredient to make a product at the site of generation), F022, F023, F026, and F028.

(2) Secondary materials fed to a halogen acid furnace that exhibit a characteristic of a hazardous waste or are listed as a hazardous waste as defined in subparts C or D of this part, except for brominated material that meets the following criteria:

(i) The material must contain a bromine concentration of at least 45%; and

(ii) The material must contain less than a total of 1% of toxic organic compounds listed in appendix VIII; and

(iii) The material is processed continually on-site in the halogen acid furnace via direct conveyance (hard piping).

(3) The Administrator will use the following criteria to add wastes to that list:

(i)(A) The materials are ordinarily disposed of, burned, or incinerated; or

(B) The materials contain toxic constituent listed in Appendix VIII of Part 261 and these constituents are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in smaller concentrations) and are not used or reused during the recycling process; and

(ii) The material may pose a substantial hazard to human health and the environment when recycled.

(e) Materials that are not solid waste when recycled.

(1) Materials are not solid wastes when they can be shown to be recycled by being:

(i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or

(ii) Used or reused as effective substitutes for commercial products; or

(iii) Returned to the original process from which they are generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at § 261.4(a)(17) apply rather than this paragraph.

(2) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process (described in paragraphs (e)(1) (i)-(iii) of this section):

(i) Materials used in a manner constituting disposal, or used to produce products that are applied to the land; or

(ii) Materials burned for energy recovery, used to produce a fuel, or contained in fuels; or

(iii) Materials accumulated speculatively; or

(iv) Materials listed in paragraphs (d)(1) and (d)(2) of this section.

(f) Documentation of claims that materials are not solid wastes or are conditionally exempt from regulation. Respondents in actions to enforce regulations implementing Subtitle C of RCRA who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that

they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so.

APPENDIX B - CAA STATUTORY & REGULATORY PROVISIONS

STATUTORY PROVISIONS

42 U.S.C. § 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

42 U.S.C. § 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions- related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic author-

ity), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

* * *

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect

sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

* * *

42 U.S.C. § 7412. Hazardous air pollutants

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number Chemical name

* * *

0 Mercury Compounds

* * *

(e) Schedule for standards and review

(1) In general

The Administrator shall promulgate regulations establishing emission standards for categories and subcategories of sources ini-

tially listed for regulation pursuant to subsection (c)(1) of this section as expeditiously as practicable, assuring that—

(A) emission standards for not less than 40 categories and subcategories (not counting coke oven batteries) shall be promulgated not later than 2 years after November 15, 1990;

(B) emission standards for coke oven batteries shall be promulgated not later than December 31, 1992;

(C) emission standards for 25 per centum of the listed categories and subcategories shall be promulgated not later than 4 years after November 15, 1990;

(D) emission standards for an additional 25 per centum of the listed categories and subcategories shall be promulgated not later than 7 years after November 15, 1990; and

(E) emission standards for all categories and subcategories shall be promulgated not later than 10 years after November 15, 1990.

(2) Priorities

In determining priorities for promulgating standards under subsection (d) of this section, the Administrator shall consider—

(A) the known or anticipated adverse effects of such pollutants on public health and the environment;

(B) the quantity and location of emissions or reasonably anticipated emissions of hazardous air pollutants that each category or subcategory will emit; and

(C) the efficiency of grouping categories or subcategories according to the pollutants emitted, or the processes or technologies used.

(3) Published schedule

Not later than 24 months after November 15, 1990, and after opportunity for comment, the Administrator shall publish a schedule establishing a date for the promulgation of emission standards for each category and subcategory of sources listed pursuant to subsection (c)(1) and (3) of this section which shall be consistent with the requirements of paragraphs (1) and (2). The determination of priorities for the promulgation of standards pursuant to this paragraph is not a rulemaking and shall not be subject to judicial review, except that, failure to promulgate any standard pursuant to the schedule established by this paragraph shall be subject to review under section 7604 of this title.

(4) Judicial review

Notwithstanding section 7607 of this title, no action of the Administrator adding a pollutant to the list under subsection (b) of this section or listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 of this title when the Administrator issues emission standards for such pollutant or category.

(5) Publicly owned treatment works

The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatment works (as defined in title II of the Federal Water Pollution Control Act [33 U.S.C.A. § 1281 et seq.]) not later than 5 years after November 15, 1990.

* * *

(k) Area source program

* * *

(3) National strategy

(A) Considering information collected pursuant to the monitoring program authorized by paragraph (2), the Administrator shall, not later than 5 years after November 15, 1990, and after notice and opportunity for public comment, prepare and transmit to the Congress a comprehensive strategy to control emissions of hazardous air pollutants from area sources in urban areas.

* * *

(C) The strategy shall include a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this or other laws (including, but not limited to, the Toxic Substances Control Act [15 U.S.C.A. § 2601 et seq.], the Federal Insecticide, Fungicide and Rodenticide Act [7 U.S.C.A. § 136 et seq.] and the Resource Conservation and Recovery Act [42 U.S.C.A. § 6901 et seq.]) or by the States. The strategy shall achieve a reduction in the incidence of cancer attributable to exposure to hazardous air pollutants emitted by stationary sources of not less than 75 per centum, considering control of emissions of hazardous air pollutants from all stationary sources and resulting from measures implemented by the Administrator or by the States under this or other laws.

42 U.S.C. § 7610. Other authority

(a) Authority and responsibilities under other laws not affected

Except as provided in subsection (b) of this section, this chapter shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of the Administrator or any other Federal officer, department, or agency.

(b) Nonduplication of appropriations

No appropriation shall be authorized or made under section 241, 243, or 246 of this title for any fiscal year after the fiscal year ending June 30, 1964, for any purpose for which appropriations may be made under authority of this chapter.

42 U.S.C. § 7601. Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

* * *

42 U.S.C. § 7651. Findings and purposes

(a) Findings

The Congress finds that—

(1) the presence of acidic compounds and their precursors in the atmosphere and in deposition from the atmosphere represents a threat to natural resources, ecosystems, materials, visibility, and public health;

(2) the principal sources of the acidic compounds and their precursors in the atmosphere are emissions of sulfur and nitrogen oxides from the combustion of fossil fuels;

(3) the problem of acid deposition is of national and international significance;

(4) strategies and technologies for the control of precursors to acid deposition exist now that are economically feasible, and improved methods are expected to become increasingly available over the next decade;

(5) current and future generations of Americans will be adversely affected by delaying measures to remedy the problem;

(6) reduction of total atmospheric loading of sulfur dioxide and nitrogen oxides will enhance protection of the public health and welfare and the environment; and

(7) control measures to reduce precursor emissions from steam-electric generating units should be initiated without delay.

(b) Purposes

The purpose of this subchapter is to reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide of ten million tons from 1980 emission levels, and, in combination with other provisions of this chapter, of nitrogen oxides emissions of approximately two million tons from 1980 emission levels, in the forty-eight contiguous States and the District of Columbia. It is the intent of this subchapter to effectuate such reductions by requiring compliance by affected sources with prescribed emission limitations by specified deadlines, which limitations may be met through alternative methods of compliance provided by an emission allocation and transfer system. It is also the purpose of this subchapter to encourage energy conservation, use of renewable and clean alternative technologies, and pollution prevention as a long-range strategy, consistent with the provisions of this subchapter, for reducing air pollution and other adverse impacts of energy production and use.

REGULATORY PROVISIONS

40 C.F.R. § 60.2 Definitions.

The terms used in this part are defined in the Act or in this section as follows:

"Act" means the Clean Air Act (42 U.S.C. 7401 et seq.)

"Administrator" means the Administrator of the Environmental Protection Agency or his authorized representative.

"Affected facility" means, with reference to a stationary source, any apparatus to which a standard is applicable.

"Alternative method" means any method of sampling and analyzing for an air pollutant which is not a reference or equivalent method but which has been demonstrated to the Administrator's satisfaction to, in specific cases, produce results adequate for his determination of compliance.

"Approved permit program means" a State permit program approved by the Administrator as meeting the requirements of

part 70 of this chapter or a Federal permit program established in this chapter pursuant to title V of the Act (42 U.S.C. 7661).

"Capital expenditure" means an expenditure for a physical or operational change to an existing facility which exceeds the product of the applicable "annual asset guideline repair allowance percentage" specified in the latest edition of Internal Revenue Service (IRS) Publication 534 and the existing facility's basis, as defined by section 1012 of the Internal Revenue Code. However, the total expenditure for a physical or operational change to an existing facility must not be reduced by any "excluded additions" as defined in IRS Publication 534, as would be done for tax purposes.

"Clean coal technology demonstration project" means a project using funds appropriated under the heading 'Department of Energy-Clean Coal Technology', up to a total amount of $2,500,000,000 for commercial demonstrations of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency.

"Commenced" means, with respect to the definition of "new source" in section 111(a)(2) of the Act, that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

"Construction" means fabrication, erection, or installation of an affected facility.

"Continuous monitoring system" means the total equipment, required under the emission monitoring sections in applicable subparts, used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters.

"Electric utility steam generating unit" means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

"Equivalent method" means any method of sampling and analyzing for an air pollutant which has been demonstrated to the Administrator's satisfaction to have a consistent and quantita-

tively known relationship to the reference method, under specified conditions.

"Excess Emissions and Monitoring Systems Performance Report" is a report that must be submitted periodically by a source in order to provide data on its compliance with stated emission limits and operating parameters, and on the performance of its monitoring systems.

"Existing facility" means, with reference to a stationary source, any apparatus of the type for which a standard is promulgated in this part, and the construction or modification of which was commenced before the date of proposal of that standard; or any apparatus which could be altered in such a way as to be of that type.

"Isokinetic sampling" means sampling in which the linear velocity of the gas entering the sampling nozzle is equal to that of the undisturbed gas stream at the sample point.

"Issuance" of a part 70 permit will occur, if the State is the permitting authority, in accordance with the requirements of part 70 of this chapter and the applicable, approved State permit program. When the EPA is the permitting authority, issuance of a title V permit occurs immediately after the EPA takes final action on the final permit.

"Malfunction" means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

"Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

"Monitoring device" means the total equipment, required under the monitoring of operations sections in applicable subparts, used to measure and record (if applicable) process parameters.

"Nitrogen oxides" means all oxides of nitrogen except nitrous oxide, as measured by test methods set forth in this part.

"One-hour period" means any 60-minute period commencing on the hour.

"Opacity" means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

"Owner or operator" means any person who owns, leases, operates, controls, or supervises an affected facility or a stationary source of which an affected facility is a part.

"Part 70 permit" means any permit issued, renewed, or revised pursuant to part 70 of this chapter.

"Particulate matter" means any finely divided solid or liquid material, other than uncombined water, as measured by the reference methods specified under each applicable subpart, or an equivalent or alternative method.

"Permit program" means a comprehensive State operating permit system established pursuant to title V of the Act (42 U.S.C. 7661) and regulations codified in part 70 of this chapter and applicable State regulations, or a comprehensive Federal operating permit system established pursuant to title V of the Act and regulations codified in this chapter.

"Permitting authority" means:

(1) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under part 70 of this chapter; or

(2) The Administrator, in the case of EPA-implemented permit programs under title V of the Act (42 U.S.C. 7661).

"Proportional sampling" means sampling at a rate that produces a constant ratio of sampling rate to stack gas flow rate.

"Reactivation of a very clean coal-fired electric utility steam generating unit" means any physical change or change in the method of operation associated with the commencement of commercial operations by a coal-fired utility unit after a period of discontinued operation where the unit:

(1) Has not been in operation for the two-year period prior to the enactment of the Clean Air Act Amendments of 1990, and the emissions from such unit continue to be carried in the permitting authority's emissions inventory at the time of enactment;

(2) Was equipped prior to shut-down with a continuous system of emissions control that achieves a removal efficiency for sulfur dioxide of no less than 85 percent and a removal efficiency for particulates of no less than 98 percent;

(3) Is equipped with low-NO subx burners prior to the time of commencement of operations following reactivation; and

(4) Is otherwise in compliance with the requirements of the Clean Air Act.

"Reference method" means any method of sampling and analyzing for an air pollutant as specified in the applicable subpart.

"Repowering" means replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990. Repowering shall also include any oil and/or gas-fired unit which has been awarded clean coal technology demonstration funding as of January 1, 1991, by the Department of Energy.

"Run" means the net period of time during which an emission sample is collected. Unless otherwise specified, a run may be either intermittent or continuous within the limits of good engineering practice.

"Shutdown" means the cessation of operation of an affected facility for any purpose.

"Six-minute period" means any one of the 10 equal parts of a one-hour period.

"Standard" means a standard of performance proposed or promulgated under this part.

"Standard conditions" means a temperature of 293 K (68 <<degrees>> F) and a pressure of 101.3 kilopascals (29.92 in Hg).

"Startup" means the setting in operation of an affected facility for any purpose.

"State" means all non-Federal authorities, including local agencies, interstate associations, and State-wide programs, that have delegated authority to implement: (1) The provisions of this part; and/or (2) the permit program established under part 70 of this chapter. The term State shall have its conventional meaning where clear from the context.

"Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

"Title V permit" means any permit issued, renewed, or revised pursuant to Federal or State regulations established to implement title V of the Act (42 U.S.C. 7661). A title V permit issued by a State permitting authority is called a part 70 permit in this part.

"Volatile Organic Compound" means any organic compound which participates in atmospheric photochemical reactions; or which is measured by a reference method, an equivalent method, an alternative method, or which is determined by procedures specified under any subpart.

40 C.F.R. § 61.50 Applicability.

The provisions of this subpart are applicable to those stationary sources which process mercury ore to recover mercury, use mercury chlor-alkali cells to produce chlorine gas and alkali metal hydroxide, and incinerate or dry wastewater treatment plant sludge.

40 C.F.R. § 70.6 Permit content.

* * *

(f) Permit shield.

(1) Except as provided in this part, the permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A part 70 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

(3) Nothing in this paragraph or in any part 70 permit shall alter or affect the following:

(i) The provisions of section 303 of the Act (emergency orders), including the authority of the Administrator under that section;

(ii) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(iii) The applicable requirements of the acid rain program, consistent with section 408(a) of the Act; or

(iv) The ability of EPA to obtain information from a source pursuant to section 114 of the Act.

* * *