Pace Environmental Law Review

Volume 17
Issue 2 *Summer 2000*

Article 9

June 2000

Brief for the Appelle Buena Vista Power Co.: Twelfth Annual Pace National Environmental Moot Court Competition

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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 Appellee
Buena Vista Power Co.*

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QUESTIONS PRESENTED

Has Friends of Lake Tokay, Inc. ("FLT") failed to establish standing to bring a citizens' suit under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), for failing to set forth facts establishing injury in fact, redressability and an injury that is within the "zone of interests" protected by the RCRA?

Does the State of New Union ("New Union") lack standing to bring a citizens' suit under § 6972(a)(1)(B) for failing to set forth

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

facts establishing standing as *parens patriae* and similarly failing to establish redressability and an injury within the zone of interests of the RCRA?

Are FLT and New Union barred from bringing this RCRA citizens' suit by the doctrines of res judicata and collateral estoppel because of the earlier case, *Bluepeace, Inc. v. Buena Vista Corp.*, or by § 6972(b) since they failed to serve copies of their complaints to the Administrator of the Environmental Protection Agency ("EPA") and the U.S. Attorney General?

Are Buena Vista's airborne emissions of particulate mercury "solid waste" for purposes of § 6972(a)(1)(B) even though the Clean Air Act ("CAA") pervasively regulates air pollution, and the RCRA explicitly excludes "uncontained gaseous matter" from the meaning of "solid waste"?

Are FLT and New Union barred from bringing this RCRA citizens' suit because of the CAA's pervasive regulation of air pollution, as well as Blue Skies and Federal law that restricts the venue and timeliness for judicial review of a permit?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Decisions

United States Court of Appeals Decisions

United States District Court Decisions

State Court Decisions

Environmental Protection Agency Decisions

Constitution, Statutes and Regulations

OPINION BELOW

The unpublished opinion of the United States District Court for the District of New Union appears in Appendix A.

STATUTES AND REGULATIONS INVOLVED

The statutes relevant to the determination of this case are the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992(k) (1994); the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671(q) (1994); and the Clean Skies Act ("CSA"), B.S.R.C. 15: § 1900 *et seq.* Relevant sections are reprinted in Appendix C. Regulations relevant to this case are 40 C.F.R. §§ 70.6, 61.50-.55, and 60.40-40a. Relevant sections are also reprinted in Appendix C.

STATEMENT OF THE CASE

Buena Vista Power Co. ("Buena Vista") operates two coal-fired power plants in the State of Blue Skies ("Blue Skies"). (R. at A-1.) When these plants burn coal, their stacks emit gaseous pollutants containing minute particles of mercury. (R. at A-1.) Most of the mercury particles are captured in air pollution control equipment, but a small fraction of the particles escape into the atmosphere. (R. at A-1.)

Pursuant to sub-chapter V of the CAA, Blue Skies has promulgated a permit program, the CSA, that was approved by the Environmental Protection Agency ("EPA"). (R. at A-2.) The Blue Skies Department of Environmental Conservation ("DEC"), Blue Skies' approved permitting authority, issued a permit for each of Buena Vista's power plants. (R. at A-5.)

Buena Vista's permits are over fifty pages long, containing numerous requirements. (R. at B-3.) Sulfur oxide emissions limitations result in a large reduction of Buena Vista's mercury emissions. (R. at A-5.) Buena Vista's permits also require weekly monitoring of each plant's mercury emissions from the stacks, as well as fifty down wind ground stations throughout Blue Skies. (R. at A-5) . In addition, the permit includes a specific provision that Buena Vista will incorporate a mercury emissions limitation for coal-fired power plants as soon as the EPA promulgates one. (R. at A-6.) Buena Vista is in full compliance with all limitations within its permits. (R. at B-2.)

Friends of Lake Tokay, Inc. ("FLT") is a non-profit corporation organized for the protection of Lake Tokay in the State of New Union ("New Union"). (R. at A-1.) FLT has brought a citizens' suit action, under RCRA, 42 U.S.C. § 6972(a)(1)(b), seeking an injunction requiring Buena Vista to cease all mercury emissions from its two power plants. (R. at A-1.) New Union filed a motion to intervene pursuant to section 6972(b)(2)(e) and Federal Rule of Civil Procedure 24, which was granted by the U.S. District Court for the District of New Union ("District Court"). (R. at A-1.)

FLT and New Union ("Appellants") allege that mercury particles emitted from Buena Vista's power plants travel through the atmosphere to airspace over New Union, and contaminate Lake Tokay. (R. at A-1.) The EPA has conducted a study indicating that most of the mercury in Lake Tokay comes from Buena Vista's power plants. (R. at A-2.) The New Union Department of Public Health ("NUDPH") issued a health advisory, giving notice that

fish living in Lake Tokay contain levels of mercury that, if eaten on a weekly basis, could be unhealthy. (R. at A-1.) Buena Vista denies the validity of both the EPA's study and the accuracy of the health advisory. (R. at A-2.)

Two members of FLT submitted affidavits averring that they have fished recreationally in Lake Tokay for over two decades. (R. at A-4.) Both affiants allege that after the health advisory was issued they discontinued eating fish from the Lake or giving fish to their friends. (R. at A-4.) However, they still recreationally fish in the Lake at apparently the same frequency.

The parties filed cross motions for partial summary judgment. (R. at A-1.) The District Court granted Buena Vista's motion for partial summary judgment against both Appellants, holding that their citizens' suit was implicitly barred by the CAA section 7404. (R. at A-7.) Both Appellants appeal that decision. Additionally, FLT appeals the District Court's finding that it lacked standing. (R. at A-4.) Buena Vista cross appeals the District Court's denial of its motions for summary judgment based on New Union's lack of standing and the fact that Buena Vista's mercury emissions are not "solid waste" for purposes of RCRA section 6972(a)(1)(B). (R. at A-3.) Finally, Buena Vista appeals the District Court's decision not to address the issue of whether FLT and New Union's claims are barred by the doctrines of res judicata or collateral estoppel in light of the earlier decision, *Bluepeace, Inc. v. Buena Vista Corp.*, No. Civ. 98-27, slip. op. (Coughlin Co. Sup. Ct., Jan. 5 1999), or whether they are barred for not complying with RCRA section 6972(b)(2)(F). (R. at A-7.)

STANDARD OF REVIEW

This Court must review *de novo* a district court's grant of summary judgment. See *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1361 (Fed. Cir. 1999).

SUMMARY OF THE ARGUMENT

The District Court properly ruled that FLT lacks standing. This Court should affirm the District Court based on FLT's failure to set forth facts establishing that it has suffered an injury in fact, that such injury would be redressable by RCRA section 6972(a)(1)(B), and that this injury is within the "zone of interests" protected by section 6972(a)(1)(B).

The District Court erred, however, in holding that New Union has standing. New Union has not alleged facts establishing injury to a quasi-sovereign interest sufficient to have standing as *parens patriae*. Moreover, New Union, just as FLT, fails to establish that its alleged injury is redressable and within the "zone of interests" protected by section 6972(a)(1)(B).

Even if this Court finds that either FLT or New Union has standing, the District Court should have determined that the decision in *Bluepeace, Inc. v. Buena Vista Power Co.*, No. Civ. 98-27, slip. op. (Coughlin Co. Sup. Ct., Jan. 5 1999), renders the Appellants' claim res judicata. Furthermore, the Appellants' are collaterally estopped from relitigating the issue of whether enjoining Buena Vista is appropriate. The court in *Bluepeace, Inc.* held that injunctive relief was inappropriate, and since the Appellants are required to show that injunctive relief is appropriate to obtain relief under section 6972(a)(1)(B), the court should grant Buena Vista's motion for summary judgment.

This Court should also grant Buena Vista's motion for summary judgment against the Appellants based on their failure to comply with the citizens' suit service requirements under section 6972(b)(2)(F).

In addition, the District Court erred when it held that Buena Vista's airborne mercury emissions are "solid waste" for purposes of § 6972(a)(1)(B). These emissions are essentially uncontained gaseous matter and therefore are excluded from being "solid waste."

Finally, this Court should affirm the District Court's holding that the Appellants' claims are barred by the CAA, and CSA. RCRA is inapplicable because the CAA pervasively regulates air pollution. Furthermore, since the Appellants are essentially challenging the terms of Buena Vista's CSA permits, they are barred by federal and state law for violating judicial review time and venue restrictions.

ARGUMENT

I. FRIENDS OF LAKE TOKAY HAS NOT ESTABLISHED STANDING BECAUSE IT HAS FAILED TO SATISFY BOTH CONSTITUTIONAL AND PRUDENTIAL LIMITATIONS.

Article III, section 2 of the United States Constitution limits the federal courts' jurisdiction to actual "Cases" and "Controver-

sies." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). The *Steel Co.* court restated the "'inflexible and without exception'" requirement that standing "be established as a *threshold* matter. . . ." 188 S. Ct. at 1012 (quoting *Mansfield, C. & L.M.R.Y. Co. v. Swan*, 111 U.S. 379, 382 (1884)) (emphasis added) (reasoning further that addressing the merits of a case before standing, even where the prevailing party would be the same as the prevailing party were standing denied, "carries the courts beyond the bounds of authorized judicial action"). Therefore, this Court must first examine whether FLT has standing to bring this RCRA citizens' suit.

As an environmental group, FLT "may have standing to sue in federal courts based either on an injury to the organization in its own right, or as the representative of its members who have been harmed." *NRDC v. Watkins*, 954 F.2d 974, 978 (4th Cir. 1992). A generous interpretation of FLT's position offers, at best, an allegation of general injury to its interest in protecting Lake Tokay. Such an allegation does not amount to a showing of injury to the organization in its own right. *See Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997) ("[W]here an organization is suing on its own behalf, it must establish concrete and demonstrable injury to the organization's activities — with a consequent drain on the organization's resources — constituting more than simply a setback to the organization's abstract social interests."). FLT has introduced affidavits of two of its members and therefore attempts to assert representational standing. *See Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984).

To have representational standing, FLT must set forth facts showing that it has members who would individually have standing to sue. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). An individual must meet three requirements to satisfy the constitutional limitations on standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the individual must allege "an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotations omitted). Second, "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal quotations omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotations omitted). In addition

to these constitutional limitations, the plaintiff must satisfy judicially-imposed prudential limitations. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997) (stating that standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise"). Specifically, the plaintiff must demonstrate that its claim falls within the "zone of interests" protected by the law invoked. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982).

At the summary judgment phase, FLT bears the burden of alleging specific facts that establish its standing. *See Lujan*, 504 U.S. at 561. This Court must affirm the District Court's order of summary judgment against FLT since FLT has failed to set forth facts satisfying both constitutional and prudential standing limitations. Moreover, this Court's determination that FLT lacks standing precludes the Court from proceeding to the merits of their case. *See Ex parte McCardle*, 7 Wall. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause.").

A. FLT Has Not Alleged Facts Showing An Injury In Fact.

The affidavits of FLT members, Steven Jones and Artimus Winfred, fail to show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The affiants state that they live near, but not on Lake Tokay, and use the Lake only for sports fishing. (R. at A-4.) Both members kept some of the fish they caught to eat or give friends to eat and returned others to the Lake. (R. at A-4.) The NUDPH issued a health advisory banning the sale of fish from the Lake and advising the public against consuming fish from the Lake. (R. at A-1.) The advisory warned that the fish contained levels of mercury that, if eaten on a weekly basis, could cause mercury poisoning in humans. (R. at A-2.) After release of the advisory both affiants discontinued eating any fish from the Lake, or giving any to their friends. (R. at A-4.)

The only cognizable injury alleged by the members is their fear of eating or having their friends eat the fish they catch. This injury cannot be characterized "concrete and particularized" without an indication of, at minimum, approximately the number of fish this injury prevents these affiants from eating or giving to friends to eat. Moreover, they cannot base their fear on the

NUDPH warning without an allegation of the approximate number of fish the affiants do not eat or choose not to give to their friends to eat, as well as how often both members fish at Lake Tokay. The warning states that the fish pose a health risk only if eaten on a weekly basis. (R. at A-2.) Therefore, the members' fear is unsubstantiated if they did not eat fish on a weekly basis or did not fish frequently enough to support eating fish from the Lake on a weekly basis. *See, e.g., Ecological Rights Found. v. Pacific Lumber Co.*, No. C-97-0292 MHP, 1999 WL 668583, *16 (N.D. Cal., Aug. 19, 1999) (holding that the environmental organization members' "spatial and temporal contacts with [the affected waterway] are too sporadic or attenuated to satisfy the injury in fact prong of the standing analysis") *Id.* at 1057.

For an injury in fact to be "particularized," the injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560-61 & n.1 (internal quotations omitted). Affiants Jones and Winfred have not sufficiently plead facts that show they are affected in a personal and individual way. At the summary judgment stage, FLT "can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." *Id.* at 561 (reasoning that general factual allegations of injury may suffice at the *pleading stage*, but not at the summary judgment stage) (internal quotations omitted). Members of FLT may have suffered injury in fact under Article III. However, FLT has not set forth affidavits of any other members demonstrating such an injury, and the affidavits of Jones and Winfred fall short. FLT's failure to set forth these specific facts in response to Buena Vista's motion for summary judgment requires the Court to affirm the District Court's grant of summary judgment against FLT.

B. FLT's Alleged Injury Is Not Redressable By A Favorable Judicial Ruling.

The redressability component is satisfied where it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). FLT asks the Court to enjoin Buena Vista from further emitting mercury from its two Blue Skies power plants. (R. at A-1.) This injunction will not redress FLT's alleged injury since it is unlikely that FLT members would thereafter be able to eat fish from the Lake. In addition, FLT has not shown that an injunction is warranted here according to traditional rules of equity.

1. Enjoining Buena Vista from future mercury emissions is not likely to make the fish in Lake Tokay safer to eat and therefore cannot redress FLT members' fear of eating the fish they catch.

FLT's requested relief cannot redress FLT members' fear of eating fish from Lake Tokay since it has not been shown that FLT members would be able to eat the fish they catch following issuance of the injunction. Mercury would still be present in the Lake's ecosystem, indefinitely affecting the concentration of mercury within the Lake's fish population. Furthermore, mercury circulating in the atmosphere from unidentifiable sources will continue to contaminate the Lake. The legislative history to the Clean Air Act specifically remarks on this inherent characteristic of mercury pollution stating that, "[w]hat little is known of mercury movement in the biosphere, suggests that its long residence time makes it a long-range transport problem of international or worldwide dimensions." 1990 CAA Leg. Hist. 731, *779. It is therefore unlikely that enjoining Buena Vista will redress FLT members' fear of eating fish from Lake Tokay. *See Wademan v. Concra*, 13 F.Supp.2d 295, 305 (N.D.N.Y. 1998) (holding that where plaintiffs were no longer associated with the site containing solid waste, they "lack[ed] standing because any remedial action . . . would not effect or assist the plaintiffs").

2. FLT's injury is not redressable since the RCRA citizens' suit provision prohibits actions for damages and an injunction is not warranted here under traditional rules of equity.

RCRA certainly provides the District Court *discretion* to award injunctive relief upon a showing of the disposal of a solid or hazardous waste which may present an imminent and substantial endangerment. *See* 42 U.S.C. § 6972(a) ("The district court shall have jurisdiction to restrain any person who has contributed or who is contributing to . . . disposal of any solid waste . . . which may present an imminent and substantial endangerment to health or the environment" and "to order such person to take such other action as may be necessary, or both . . . ."). However, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."

Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (citations omitted).

Just as the Clean Water Act ("CWA") was interpreted in *Romero-Barcelo*, RCRA does not limit this Court's exercise of its traditional equitable discretion. *See id.* at 320. Although Congress may limit a court's equitable discretion, RCRA should be construed "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices." *Id.* at 320 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944)). In light of this principle of statutory construction, the court in *Romero-Barcelo* held that the plain language of the CWA, specifically the Act's provision for not only injunctive relief, but civil fines and criminal penalties as well, indicated a legislative intent to leave intact the courts' equitable discretion. RCRA similarly authorizes enforcement by injunctive relief, civil penalties, and criminal penalties. *See* 42 U.S.C. §§ 6972(a), 6928. Therefore, FLT must satisfy traditional grounds for injunctive relief under RCRA.

The traditional basis for injunctive relief "has always been irreparable injury and the inadequacy of legal remedies." *Romero-Barcelo*, 456 U.S. at 312 (citations omitted). Furthermore, "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

FLT has not shown to a substantial likelihood that its members are injured, or face imminent injury. In *Amoco Prod. Co. v. Village of Gambell*, the Court reasoned that "[i]f [environmental] injury is *sufficiently likely*. . . the balance of harms will *usually* favor the issuance of an injunction to protect the environment." 480 U.S. at 545 (emphasis added). However, neither affiant eats or distributes fish from Lake Tokay at this time, nor do they indicate an imminent likelihood that they will eat or distribute fish from the Lake in the future. Based on the facts set forth by FLT, it is impossible to conclude a *sufficient likelihood* of irreparable injury.

The court in Gambell correctly reasoned that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages." However, unlike the general environmental injuries comprehended by the Gambell court, FLT's alleged injury has an adequate remedy at law. In *Davies v. National Coop. Ref. Ass'n*, the court reasoned that despite evidence that contaminated

wells posed a health risk to people, the fact that the plaintiffs had been warned of the danger and could occupy the property by using an alternative water supply precluded the issuance of an injunction. 963 F.Supp. 990, 999 (D. Kan. 1997) ("The fact that [the plaintiffs] must use bottled water instead of groundwater is undoubtedly an inconvenience and an economic burden, *but it is the type of injury for which an action at law provides an adequate remedy*.") (emphasis added).

An injunction against Buena Vista would require the company to cease all operations in light of the fact that it has already invested and is using air pollution control equipment to capture most of the mercury emissions. Shutting down the plants would not only be catastrophic for Buena Vista, but also for the region it services. Consequently, the balance of harms resulting from granting or denying this injunction heavily favors a denial of injunctive relief. *See Gambell*, 480 U.S. at 545 (holding that the balance of harms favored defendant oil company where it had already committed approximately $70 million to oil exploration and injury to subsistence resources from exploration was not at all probable); *see also Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 872-73 (N.Y. 1970) (holding that injunctive relief was not proper since the legislature is better suited to address the difficult problem of balancing the amelioration of pollution against the economic impact of close regulation).

RCRA does not authorize private actions for damages. *See, e.g., Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985). Since FLT's alleged injury does not warrant an injunction under traditional rules of equity, its claim cannot be redressed by section 6972(a)(1)(B) and consequently must be dismissed for lack of standing.

C. FLT Has Not Demonstrated That Its Members' Injury Is Within The "Zone Of Interests" Protected By 42 U.S.C. § 6972(a)(1)(B).

The "zone of interests" test is a prudential limitation that asks "whether the complainant is arguably within the 'zone of interests' to be protected or regulated by the statute . . . in question." *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). Since the test is a prudential limitation, it may be modified or abrogated by Congress. *See Bennett*, 520 U.S. at 1161. However, Congress has not shown an intent to modify or abrogate application of the prudential "zone of interests" test under RCRA

section 6972(a)(1)(B). Therefore, this Court should affirm the District Court's order of summary judgment against FLT, since FLT has not demonstrated that its alleged injury of not being able to eat fish from Lake Tokay is within the "zone of interests" of section 6972(a)(1)(B).

1. Congress did not intend to modify or abrogate use of the "zone of interests" test under 42 U.S.C. § 6972(a)(1)(B).

In *Bennett*, the Court stated that "Congress legislates against the background of our prudential standing doctrine, which applies unless it is *expressly* negated." 520 U.S. at 163 (emphasis added) (citations omitted). Congress intended to leave untouched all constitutional *and* prudential standing limitations under RCRA section 6972(a)(1)(B). As the legislative history poignantly states, "[section 6972(a)(1)(B)] does not affect recognized requirements regarding legal standing to bring a case." H.R. No. 98-198, Part I, at 53, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612; see *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921 (D.C. Cir. 1989) (holding that the "zone of interests" test applies in RCRA's citizen suit context). The Court's finding in *Bennett* is therefore distinguishable based on the absence of similar legislative intent under the citizens' suit provision of the Endangered Species Act. *See* 16 U.S.C. § 1540(g).

2. Only injuries that may present an imminent and substantial endangerment are within the "zone of interests" protected by 42 U.S.C. § 6972(a)(1)(B).

FLT must show that its alleged injury "arguably falls within the 'zone of interests' to be protected or regulated" by section 6972(a)(1)(B). *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998).

In *Federal Election Comm'n v. Akins*, the Court held that "[t]he injury of which respondents complain — their failure to obtain relevant information — is injury of a kind that the [Federal Election Campaign Act] seeks to address." 524 U.S. 11 (1998). Here, the injury FLT members complain of — their fear of eating fish caught while recreationally fishing Lake Tokay — is *not* injury of a kind that section 6972(a)(1)(B) seeks to address. RCRA's citizen suit provision is quite specific in the types of injuries it seeks to address — only those that "may present an imminent and substantial endangerment . . . ." 42 U.S.C. § 6972(a)(1)(B).

Furthermore, a comparison of RCRA to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") justifies limiting the "zone of interests" protected by RCRA to only those injuries that may present imminent and substantial endangerments. Both CERCLA and RCRA deal with hazardous wastes. However, to recover under CERCLA, the plaintiff only has to show the occurrence of a release or a threatened release of a hazardous substance. *See id.* § 9607(a). In contrast, section 6972(a)(1)(B) "requires more than a mere showing that solid or hazardous wastes are present at the Site." *Foster v. United States*, 922 F.Supp. 642, 661 (D.D.C. 1996) (citing *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 184 (W.D. Mo. 1985)). Therefore, FLT must allege an injury that "may present an imminent and substantial endangerment" to be within RCRA's zone of protected interests. 42 U.S.C. § 6972(a)(1)(B).

3. FLT has not shown that the mercury in Lake Tokay may present an imminent and substantial endangerment.

FLT's asserted injury does not indicate the existence of a potential imminent and substantial endangerment, and therefore is not within the "zone of interests" protected by section 6972(a)(1)(B). The Jones and Winfred affidavits indicate quite the opposite, that there is *no danger* of becoming sick from eating fish because both men have discontinued eating or distributing any fish from the Lake. See *Rose v. Union Oil Co. of California*, No. C 97-3808 FMS, 1999 WL 51819, *3 (N.D. Cal., Feb. 1, 1999) (holding that absence of proof that contamination might migrate to a regional water supply failed to show an imminent and substantial endangerment); *see also Foster*, 922 F.Supp. at 662 (holding that site owner failed to establish imminent and substantial endangerment where he acknowledged that ground water under site was not used for drinking or other purposes).

As the District Court reasonably noted below, "[t]he mercury in the fish may endanger health, but only if the fish are eaten. These plaintiffs do not eat the fish and therefore are not endangered by the contamination." (R. at A-4); *see Price v. United States Navy*, 39 F.3d 1011, 1020 (9th Cir. 1994) (holding that plaintiffs failed to allege existence of solid waste that may present an imminent and substantial endangerment where wastes were located in soil beneath cement slab of plaintiff's house); *Davies*, 963 F.Supp. at 999 (holding that despite evidence contaminated wells posed a

significant health risk to people, the fact that the plaintiffs had been warned of the danger and could occupy the property without serious risk to their health by using an alternative water supply precluded a finding of a "substantial and imminent endangerment"). FLT's alleged injury is far from being an imminent and substantial endangerment and thus does not come within the "zone of interests" protected by RCRA. FLT's failure to satisfy this prudential standing limitation requires this court to affirm the District Court's order of summary judgment against FLT.

II. NEW UNION HAS NOT ESTABLISHED STANDING BECAUSE IT HAS SIMILARLY FAILED TO SATISFY CONSTITUTIONAL AND PRUDENTIAL LIMITATIONS.

New Union, just as FLT and any "person" within the meaning of RCRA section 6972(a)(1)(B), must satisfy constitutional and prudential limitations on standing in order to bring an action in federal court. A state fulfills the injury in fact requirement only where it alleges injury to a proprietary interest, or injury to a quasi-sovereign interest under the *parens patriae* doctrine. *See Hawaii v. Standard Oil*, 405 U.S. 251, 257-66 (1972). New Union has not established injury in fact under either basis. Similar to FLT, even assuming that New Union can establish injury in fact, it fails to fulfill both redressability and the prudential "zone of interests" test. New Union's failure to satisfy the constitutional limitations of injury in fact and redressability, in addition to the prudential "zone of interests" test, requires this Court to reverse the District Court's denial of summary judgment for Buena Vista.

A. New Union Has Not Alleged Standing Based On An Injury To A Proprietary Interest.

Alleged injuries to the health, safety, or welfare of a state's people "clearly implicate the *parens patriae* rather than the proprietary interest of the state." *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976). New Union alleges only that mercury from Buena Vista's power plants have contaminated fish in Lake Tokay posing a health risk to humans consuming the fish on a weekly basis. (R. at A-1.) Therefore, for New Union to have standing it must be as *parens patriae*. *See id.* (reasoning where injuries "involve no harm to the state beyond the individualized harms to her citizens" that standing "must be on the theory of the state as representative"); *see generally Hawaii*, 405 U.S. at 260-66

(reasoning that the state must allege damages to its own "business or property" to have proprietary standing under section 4 of the Clayton Act).

B. New Union Does Not Have Standing As *Parens Patriae*.

In limited circumstances a state may "sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests." *Hawaii*, 405 U.S. at 258; *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) ("[T]o have [*parens patriae*] standing the State must assert an injury to what has been characterized as a 'quasi-sovereign' interest."). The Court has found state standing as *parens patriae* in the public nuisance context. *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (involving air pollution in Geogia caused by the discharge of noxious gasses from the defendant's plant in Tennessee); *Missouri v. Illinois*, 180 U.S. 208 (1901) (involving water pollution in the Mississippi River in Missouri caused by upstream discharges by Illinois). However, the Court has been clear that the alleged injury must be "sufficiently concrete to create an actual controversy between the State and the defendant." *Alfred L. Snapp & Son*, 458 U.S. at 602; *see also Kleppe*, 533 F.2d at 675 ("Injury to a state's economy or health and welfare of its citizens, *if sufficiently severe and generalized*, can give rise to a quasi-sovereign interest in relief as will justify a representative action by the state.") (emphasis added).

For New Union to demonstrate a "sufficiently concrete" and "quasi-sovereign" interest, it must show "(i) that a substantial number of the state's inhabitants have been injured, and (ii) that the state's injury is somehow separate and distinct from the injury to the individual plaintiff." *Pennsylvania v. Philadelphia Psychiatric Ctr.*, 356 F.Supp. 500, 505 (E.D. Pa. 1973); see *Prince George's County v. Levi*, 79 F.R.D. 1, 4 (D. Md. 1977).

New Union has not shown that a substantial number of the state's inhabitants have been injured. There are no allegations of the number of fish consumed, or potentially consumed, by citizens of the State. Furthermore, New Union fails to allege the potential number of citizens affected by mercury in Lake Tokay. Absent such allegations, New Union cannot properly show that it has suffered injury to a quasi-sovereign interest.

Additionally, New Union has not set forth any facts indicating that the activity of eating fish recreationally caught from Lake Tokay is an interest that is separate and distinct from the injuries suffered by individual members of FLT. The *Kleppe* court found

that, "the presence or absence of a more appropriate party or parties capable of bringing the suit" has significant influence over whether an injury is "sufficiently severe and generalized." 533 F.2d at 675 n.42 ("The arguments in favor of allowing [*parens patriae*] standing become less compelling, as it becomes more feasible to achieve complete relief through suits by the parties actually aggrieved."). In *Jones ex rel. Louisiana v. Bowles*, the court held that Louisiana lacked a separate and distinct interest in the strawberry industry to sue as *parens patriae*. 322 U.S. 707, 707 (1944), discussed in *Land O'Lakes Creameries v. Louisiana State Bd. of Health*, 160 F.Supp. 387, 388 (E.D. La. 1958). Similarly, in *Land O'Lakes Creameries v. Louisiana State Bd. of Health*, the court found that Minnesota's interest in dried milk was not separate and distinct from the interests of individual citizens in the dried milk industry. *Id.* (finding that Minnesota's dairy industry is not the largest industry in Minnesota, and that statistics failed to show that the dried milk sales are "of such pervasive importance to [the dairy industry] and to Minnesota citizens generally that restrictions on the interstate distribution of dried milk would directly and materially affect the 'welfare of the people of Minnesota'"). New Union's failure to set forth estimates of the number of people not eating fish recreationally caught from Lake Tokay precludes a finding that the State's interest is separate and distinct from the interest asserted by FLT. Therefore, New Union cannot demonstrate that its interest in protecting its citizens' ability to eat fish recreationally caught from Lake Tokay is of such pervasive importance to justify standing as *parens patriae*.

C. Even Assuming New Union Satisfies The Requirements For Standing As *Parens Patriae*, It Still Fails To Satisfy Redressability And The "Zone Of Interests" Test.

Beyond demonstrating injury to a quasi-sovereign interest, New Union, like FLT, must satisfy the remaining constitutional and prudential standing requirements. New Union, for the same reasons faced by FLT,[1] cannot redress the injury alleged under section 6972(a)(1)(B). New Union seeks to enjoin Buena Vista from emitting mercury from its Blue Skies power plants. However, as discussed with respect to FLT, this requested relief will not redress New Union citizens' fear of eating fish from Lake Tokay. In addition, RCRA does not permit actions for money dam-

1. *See supra*, Part I-B.

ages, and since New Union, similar to FLT, cannot justify injunctive relief, the injury alleged cannot be redressed by RCRA section 6972(a)(1)(B).

Moreover, resting upon the same allegations made by FLT, New Union has not sufficiently shown that Buena Vista's mercury emissions "may present an imminent and substantial endangerment. . . ."[2] 42 U.S.C. § 6972(a)(1)(B). The alleged facts indicate the opposite: that there is no imminent and substantial endangerment because no one is eating contaminated fish from the Lake, nor has anyone discontinued sport fishing in the Lake. (R. at 4.) Therefore, the injury alleged by both Appellants is outside of the "zone of interests" protected by section 6972(a)(1)(B). New Union's failure to satisfy either redressability or the "zone of interests" test requires this Court to reverse the District Court's denial of Buena Vista's motion for summary judgment against New Union.

III. FLT AND NEW UNION ARE BARRED FROM BRINGING THIS CITIZENS' SUIT BY THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL, AND 42 U.S.C. § 6972(b).

A. The Court Must Rule on Whether The Doctrines Of Res Judicata Or Collateral Estoppel, Bar FLT and New Union From Bringing Their 42 U.S.C. § 6972(a)(1)(B) Action.

The District Court erred by not determining whether the Appellant's claim was precluded by res judicata or whether any issues were collaterally estopped. "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata is that a right, question of fact, distinctly put in issue and directly determined by a court of competent jurisdiction *cannot be disputed in a subsequent suit between the same parties or their privies* . . . ." Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897) (emphasis added).

Res judicata and collateral estoppel protect defendants "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153 (1979). A court must first decide

2. *See supra*, Part I-C.

whether res judicata or collateral estoppel bar a litigant's claim or issues within a claim before addressing the merits of an action. To do otherwise is in direct conflict with these policies. Therefore, the lower court was in error in deciding not to address the issues of res judicata and collateral estoppel.

B. The Doctrine Of Res Judicata Bars FLT And New Union From Bringing This 42 U.S.C. § 6972(a)(1)(B) Action.

The Appellants' claim is res judicata in light of the Blue Skies decision, *Bluepeace, Inc. v. Buena Vista Power Co.*, No. Civ. 98-27, slip. op. (Coughlin Co. Sup. Ct., Jan 5, 1999).

> When a court of competent jurisdiction has entered a final judgement on the merits of a cause of action, the parties to their suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). The savings clause of the RCRA, while preserving statutory or common law rights, does not abrogate the doctrine of res judicata. See 42 U.S.C. § 6972(f). After bringing a section 6972(a)(1)(B) action, a party may not bring a subsequent common law action, or vice-versa, without first overcoming the preclusive barrier of res judicata.

A subsequent claim is precluded by res judicata if the prior decision was "(1) a final judgement on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or privies, and (4) in a case involving the same cause of action." *Herendeen v. Champion Int'l Corp.*, 525 F.2d 130, 133 (2d Cir. 1975). *Bluepeace, Inc.* satisfies each of these four requirements and therefore bars the Appellants from bringing this RCRA section 6972(a)(1)(B) suit.

1. A final judgement on the merits was rendered in the case of *Bluepeace, Inc v. Buena Vista Corp.*

In *Bluepeace, Inc.*, Buena Vista's motion for summary judgement was granted on the merits. (R. at A-2.) Accordingly, the decision of the Blue Skies Superior Court was a final judgment on the merits.

2. The Blue Skies Superior Court of Coughlin County is a court of competent jurisdiction.

RCRA citizens' suits are not the exclusive jurisdiction of federal courts. *See Davis v. Sun Oil Co.*, 148 F.3d 606, 612 (6th Cir. 1998). The citizens' suit section provides that "[a]ny action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the . . . alleged endangerment may occur." 42 U.S.C. § 6972(a). However, the term "shall" "does not affirmatively divest the state courts of their presumptive jurisdiction." *Davis*, 148 F.3d at 612 (citing *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (holding that the language "shall have" in Title VII was not sufficient evidence that Congress intended to divest the state courts of their presumptive jurisdiction)). Therefore, the action brought by FLT and New Union could have been brought in Blue Skies Superior Court, making that court a court of competent jurisdiction.

Simply because *Bluepeace, Inc.* was a Blue Skies decision, does not reduce the case's preclusive effect in federal court. Federal statute requires that federal courts give full faith and credit to state court decisions. *See* 28 U.S.C. § 1738 ("[J]udicial proceedings [of any State] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."); *Migra v. Warren City Bd. of Educ.*, 465 U.S. 75, 81 (1984). Therefore, pursuant to federal statute, this Court must give the judgment in *Bluepeace, Inc.* the same preclusive effect that it would have in Blue Skies.

3. FLT and New Union are privy to Bluepeace under the doctrine of virtual representation.

A person may be bound by a prior judgment, even though not a party, if one of the parties to the prior judgment is so closely aligned with that person's interests as to be his "virtual representative." *See Aerojet Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975); *see also People Who Care v. Rockford Bd. of Educ.*, 68 F.3d 172, 177 (7th Cir. 1995) ("[T]he interests of the party in the second suit must be 'so parallel' to the interests of the party in the first suit so that the first party becomes the second party's virtual representative."); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980) (holding that a strict agency relationship is not necessary). Just as the doctrines of res judicata and

collateral estoppel, virtual representation "conserve[s] judicial resources, protect[s] litigants from multiple lawsuits, and foster[s] certainty and reliance in legal relations." *ITT Rayonier*, 627 F.2d at 1000.

FLT and New Union's interest in the present suit parallels Bluepeace's interest in the prior suit. New Union, FLT, and Bluepeace are each concerned over mercury contamination of fish in their respective lakes. FLT and Bluepeace members recreationally fish and allege that the mercury contamination prevents them from eating fish they catch. (R. at A-4, B-2.) Similarly, New Union's interest is to protect the interests of its citizens in being able to eat the fish they catch sport fishing. All three parties alleged that the contamination is caused by emissions from Buena Vista's power plants. (R. at A-1, B-1.) Furthermore, the fact that each party has requested identical relief is indicative of their parallel interests. Whether the Appellants had notice of Bluepeace's action is irrelevant since the Appellants' interests are so closely aligned with Bluepeace's interests. Bluepeace adequately represented the interests of FLT and New Union in its lawsuit, vigorously trying their suit against Buena Vista. Therefore, FLT and New Union are sufficiently privy to Bluepeace under the doctrine of virtual representation.

4. *Bluepeace, Inc. v. Buena Vista Corp.* involved the same cause of action.

A party is barred from relitigating any rights against a defendant "with respect to all or any part of the transaction, or series of connected transactions, out of which the initial action arose." Restatement (Second) of Judgments § 24 (1982). Courts must weigh "whether the facts are related in time, space, origin, motivation, and whether they form a convenient trial unit." *Nevada v. United States*, 463 U.S. 110, 131 n.12 (1983).

FLT and New Union have raised the same claim that was already litigated by Bluepeace in the Blue Skies Superior Court. Bluepeace attempted to enjoin Buena Vista from continuing to emit mercury from its two power plants, just as FLT and New Union attempt now. (R. at B-2.) The RCRA is a federalization of the common law of public nuisance. *See* S. Rep. No. 96-172, at 5, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023; *Middlesex City Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715, 721-22 (D.N.J. 1986). The fact that one party is bringing the claim under RCRA, and the other under basic tort law, does not distinguish

these claims for purposes of res judicata. *See Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1326-27 (7th Cir. 1992) (barring a RCRA citizens' suit where the violations alleged were grounded in the same set of operative facts as those of a previous, and finally terminated common law action).

The Appellants alleged facts essentially identical in "time, space, origin, and motivation" to those raised in *Bluepeace, Inc. Nevada*, 463 U.S. at 130 & n.12. Bluepeace claimed that mercury particles emitted from Buena Vista's two power plants enter the waters of Lake Mordred contaminating fish in the lake. (R. at B-1.) FLT and New Union bring virtually the identical cause of action, claiming that mercury particles emitted from Buena Vista's power plants contaminated fish in Lake Tokay. (R. at A-1.) All parties requested a court to enjoin Buena Vista, believing that this relief would allow them to subsequently eat fish from the lakes. Furthermore, the interests of FLT, New Union, and Bluepeace are sufficiently compatible that each claim could easily have been combined to form a "convenient trial unit." *Nevada*, 463 U.S. at 130 n.12. Therefore, FLT and New Union's citizens' suit is the same cause of action brought previously by Bluepeace.

C. Even If FLT And New Union's Action Is Not Res Judicata, The Court Should Grant Buena Vista's Motion For Summary Judgment Because The Appellants Are Collaterally Estopped From Relitigating The Issue Of Whether Injunctive Relief Is Appropriate.

The Blue Skies Superior Court held that enjoining Buena Vista from continuing to emit mercury from its two power plants was not appropriate. (R. at B-4.) The decision in *Bluepeace, Inc.* collaterally estops the Appellants from relitigating this issue.

"[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana*, 440 U.S. at 153. Collateral estoppel bars a litigant where:

(1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

United States v. Gurley, 43 F.3d 1188, 1198 (8th Cir. 1995) (citations omitted). While the elements of collateral estoppel

closely mirror those of *res judicata*, its focus is not on whether the *causes* of action are the same, but whether the *issues* being argued are the same. *See Next Level Communications LP v. DSC Communications Corp.*, 179 F.3d 244, 250 (5th Cir. 1999).

All four requirements needed to collaterally estop the Appellants from relitigating the issue of whether Buena Vista should be enjoined from emitting mercury from its two Blue Skies coal-fired power plants are satisfied. The *Bluepeace, Inc.* court held that injunctive relief was not appropriate. (R. at B-4.) Since the RCRA does not allow private actions for monetary damages, the Appellants' claim is not redressable under section 6972(a)(1)(B). *See Walls*, 761 F.2d at 316. Therefore, Buena Vista's motion for summary should be granted.

1. The issue of whether injunctive relief is appropriate has already been litigated in *Bluepeace, Inc. v. Buena Vista, Corp.*

FLT and New Union both seek injunctive relief, just as Bluepeace had. (R. at A-1.) Bluepeace fully litigated the issue of whether it was appropriate to enjoin Buena Vista from continuing to emit mercury from its two power plants. The Blue Skies Superior Court held that injunctive relief was not appropriate since balancing the harms of granting or denying the injunction required extensive scientific knowledge and technical prowess not possessed by the judiciary. (R. at B-4) (reasoning that the task of balancing these concerns is "better suited to legislative or administrative than to judicial processes") (citing *Boomer*, 257 N.E.2d at 870).

Even though FLT and New Union base their action on section 6972(a)(1)(B) and not common law nuisance, they still have to argue the same issue already litigated in Bluepeace, Inc. — that injunctive relief is appropriate. *See Romero-Barcelo*, 456 U.S. at 312.

2. *Bluepeace, Inc. v. Buena Vista, Corp.* was a final judgment on the merits.

The issue of whether injunctive relief is appropriate was decided by the Blue Skies Superior Court and was necessary to the court's final order granting Buena Vista's motion for summary judgment. Addressing this issue, the *Bluepeace, Inc.* court concluded, "the fact that establishing [emissions] standards is clearly more appropriately done with legislative or administrative

processes than judicial processes, compels this court to refrain from exercising its equitable powers to frame the sort of injunctive relief sought by the plaintiffs in this case." (R. at B-4). Therefore, the Blue Skies court's decision not to issue an injunction was a final judgment on the merits.

3. FLT and New Union are privy to Bluepeace under the doctrine of virtual representation.

The interests of FLT and New Union are so closely aligned to those of Bluepeace that both were virtually represented in *Bluepeace, Inc.* Collateral estoppel, like res judicata, not only bars the same parties from relitigating issues already decided, but their privies as well. As discussed in Part III-B-3, FLT and New Union are privy to Bluepeace under the doctrine of virtual representation.

4. FLT and New Union had a full and fair opportunity to be heard.

"A party does not have an opportunity for a full and fair hearing when 'procedures fall below the minimum requirements of due process.'" *Witkowski v. Welch*, 173 F.3d 192, 205 (3d Cir. 1999) (quoting *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1074 (3d Cir. 1990)). Bluepeace certainly had a full and fair hearing in *Bluepeace, Inc.* that comported with minimal due process requirements. Since FLT and New Union are virtually privy to Bluepeace, they similarly had a full and fair opportunity to be heard. *See, e.g., Monfils v. Taylor*, 165 F.3d 511, 521 (7th Cir. 1998) (holding that police detective was in privity with the city, and thus had a full and fair opportunity to be heard in the initial trial).

D. The Court Must Rule On Whether 42 U.S.C. § 6972(b) Bars FLT And New Union's Citizens' Suit, And Should Hold That FLT And New Union Are Barred.

42 U.S.C. § 6972(b) specifies the "actions prohibited" under section 6972(a). The court lacks jurisdiction to address the merits of the Appellants' complaint where they have failed to overcome the actions prohibited by section 6972(b). Therefore, the court must address the Appellants' failure to satisfy these prohibitions.

Section 6972(b)(2)(F) states that "Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the

United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator." Neither FLT nor New Union has indicated fulfilment of this requirement. The fact that the Record explicitly states the parties complied with the notice requirements under section 6972(c) and the time restrictions imposed by section 6972(b)(2)(A), further indicates that both Appellants violated the service requirement under section 6972(b)(2)(F). (R. at A-1.) Failure to comply with § 6972(b)(2)(F) deprives the court of subject matter jurisdiction over the Appellants' § 6972(a)(1)(B) suits. *See Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). Therefore, this court should grant Buena Vista's motion for summary judgment against the Appellants for failing to comply with the service requirement in section 6972(b)(2)(F).

IV. THE MERCURY EMITTED FROM BUENA VISTA'S POWER PLANTS IS NOT "SOLID WASTE" FOR PURPOSES OF 42 U.S.C. § 6972(a)(1)(B).

Buena Vista's mercury emissions are essentially uncontained gaseous matter and therefore not "solid waste" for purposes of the RCRA. In addition, airborne mercury emissions are regulated under the CAA, not RCRA. Thus, this court should reverse the District Court's ruling and grant Buena Vista's motion for summary judgment.

A. Buena Vista's Mercury Emissions Are Uncontained Gaseous Matter.

The mercury emissions from Buena Vista's coal-burning power plants are not "solid waste" because they fall within the implicit exclusion of uncontained gaseous materials. RCRA's citizen suit provision regulates the "disposal of any solid or hazardous waste . . . ." 42 U.S.C. § 6972(a)(1)(B). The term "solid waste" incorporates all "hazardous wastes." *See id.* § 6903(5). Thus, a pollutant classified as a "solid waste" may be within the scope of section 6972(a)(1)(B). "Solid waste" is defined by RCRA as "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 . . . .". *Id.* § 6903(27) (emphasis added).

The plain language of the statute excludes *uncontained* gaseous matter from the definition of "solid waste." Even assuming that this legislative definition is ambiguous, the EPA interprets "solid waste" to exclude uncontained gaseous material. *See In re: Chem. Waste Management of Indiana, Inc., Permittee*, IND 078 911 146, 1995 WL 523542, * 12 (E.P.A., Aug. 23, 1995) ("Thus, a substance in gaseous form is not considered a solid waste under the RCRA unless it is containerized.") (citing *In re BP Chems. of America, Lima Ohio*, OHD 042 157 644, 1991 WL 208971, *4 (E.P.A., Aug. 20, 1991)). This EPA interpretation of "solid waste" is not arbitrary and capricious and therefore must be given deference. *See Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

A gaseous material by definition, is a substance that tends to expand indefinitely when unconfined. *See* Webster's New World Dictionary 598 (12th ed. 1968). This is precisely the characteristic embodied by the emissions coming from the smoke stacks of Buena Vista's power plants. These smoke stack emissions containing microscopic particles of mercury immediately expand in volume upon leaving the smoke stack. Furthermore, once in the atmosphere, winds, rain, and other atmospheric conditions change the composition of the gaseous matter transporting it across great distances. Even though the mercury itself may be considered a solid particle, the emissions coming from the smoke stacks, treated as a whole, are uncontained gaseous matter that is not actionable under section 6972(a)(1)(B).

B. Congress Intended The CAA, Not The RCRA, To Regulate Uncontained Gaseous Matter Such As Buena Vista's Mercury Emissions.

Congress' implicit exclusion of uncontained gaseous matter reflects its intention that such emissions be regulated under the CAA. The CAA is a pervasive environmental regulatory scheme under which Buena Vista's emissions are admittedly covered. In fact, the numerous limitations contained in Buena Vista's CSA permits have the effect of limiting mercury emissions. (R. at B-2.) These permits require weekly testing and establish fifty downwind ground stations to measure and monitor Buena Vista's mercury emissions. (R. at B-2.) Moreover, Buena Vista's permit includes a provision to add a mercury emissions limitation as soon as the EPA promulgates one. (R. at B-2.) The fact that the EPA has yet to promulgate a mercury emissions limitation applicable to coal-fired power plants is not a proper basis for subjecting

Buena Vista to a RCRA citizens' suit. Quite the opposite, the actions taken by Blue Skies DEP and the EPA indicate a recognition of Congress' intention that uncontained gaseous emissions such as Buena Vista's be regulated under the CAA, and not section 6972(a)(1)(B).

V. FLT AND NEW UNION ARE BARRED FROM BRINGING THIS ACTION SINCE THE CAA IS INTENDED TO REGULATE ALL AIR POLLUTION, AND EVEN IF THEIR ACTION IS NOT PREEMPTED, THE APPELLANTS ARE BARRED BY BLUE SKIES AND FEDERAL LAW FROM CHALLENGING BUENA VISTA'S PERMITS IN AN ENFORCEMENT ACTION.

A. Congress Intended The CAA, Not The RCRA, To Regulate Air Pollution.

RCRA was enacted to regulate ground disposal of solid and hazardous wastes, not air pollution. *See* 94 Cong. House Debates 1976, at 32597, reprinted in RCRA Leg. Hist. 11 (stating that the RCRA is intended to "protect health and the environment from . . . [solid wastes] . . . which are dumped on the land indiscriminately or disposed of in the nearest landfill"). The CAA, on the other hand, regulates air pollution under a complex and pervasive federal-state scheme. *See* 42 U.S.C. §§ 7401-7671(q) (1994). RCRA specifically requires the EPA to "avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act." *Id.* § 6905(b)(1).

Allowing FLT and New Union to bring this action under section 6972(a)(1)(B) is duplicative and contrary to Congress' intent that the CAA regulate airborne mercury emissions such as Buena Vista's. *See Chemical Weapons Working Group, Inc. v. United States Army*, 111 F.3d 1485, 1490-91 (10th Cir. 1997) (rejecting the plaintiffs' CWA suit where the defendants had a CAA permit allowing the stack emissions the plaintiffs sought to enjoin). The 1990 CAA amendments specifically require the completion of power plant mercury emissions studies. *See id.* § 7412(n)(1)(B). In addition, Congress required the completion of a study determining the threshold for mercury concentrations in fish which may be consumed without adverse health effects. *See id.* § 7412(n)(1)(C).

Buena Vista's CSA permits recognize Congress' intent that airborne mercury emissions be regulated under the CAA. Each permit is over fifty pages long, containing numerous requirements effectively limiting mercury emissions. (R. at B-3.) Moreover, each permit requires testing for mercury emissions on a weekly basis and measuring mercury contamination from fifty ground stations downwind of each power plant. (R. at B-2.) Finally, section 13, note a, of each CSA permit provides that the permits are subject to revision if and when the EPA promulgates mercury emissions limitations for coal-fired power plants. (R. at B-2.) The fact is Buena Vista's mercury emissions are already heavily regulated. The EPA's failure to promulgate a specific regulation for mercury emissions from coal-fired power plants does not remove this type of pollution from the purview of the CAA. The numerous mercury-related requirements recognize Congress' intent that such emissions be regulated under the CAA, consequently preempting the Appellants' RCRA citizens' suit.

B. FLT And New Union Are Barred By Blue Skies And Federal Law From Challenging The Terms Of Buena Vista's Permits In An Enforcement Action.

Each of Buena Vista's CSA permits states, "[t]he [DEC] has reviewed every provision of federal and state law applicable to emissions from this facility and had determined that such law contains no requirements applicable to it that are not reflected in this permit." (R. at A-5.) This language effectively shields Buena Vista from suit. *See* 42 U.S.C. § 7661c(f); 40 C.F.R. § 70.6(f)(1) ("[T]he permitting authority may expressly include in a . . . permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements. . . ."). Buena Vista cannot be expected to do anything more than comply with the numerous requirements included in their CSA permits, and the permit shield provision provides that they are not required by law to do anything more. The Appellants' desire for more stringent mercury emissions limitations should have been voiced in a judicial review proceeding, not an enforcement action. Moreover, the Appellants' petition for review must comply with time and venue restrictions applicable to the judicial review of permits. This Court should affirm the District Court's order of summary judgment against the Appellants for failing to comply with the time and venue restrictions under both Blue Skies and federal law.

1. FLT and New Union are challenging the terms of Buena Vista's Clean Skies Act Permits.

"[P]roper disposition . . . requires precise characterization of the action sought to be reviewed." *District of Columbia v. Train*, 533 F.2d 1250, 1252 (D.C. Cir. 1976). The Appellants claim that airborne mercury emissions from Buena Vista's two power plants are ending up in Lake Tokay resulting in their inability to eat fish from the Lake. (R. at A-2.) Buena Vista's permits already contain numerous limitations effectively reducing the amount of mercury emitted. Additionally, each permit contains terms requiring the monitoring and reporting of mercury emissions, as well as a provision to incorporate a mercury emission limitation specific to coal-fired power plants as soon as one is promulgated by the EPA. (R. at B-2.) While couched in terms of a RCRA "imminent and substantial endangerment" suit, the Appellants are challenging the terms of Buena Vista's CSA permits.

The Appellants are essentially arguing that Buena Vista's mercury emissions limitations are insufficient in an attempt to end-run Blue Skies and federal law that would prohibit such a challenge. The Court cannot allow the Appellants to artfully plead around the explicit review provisions of the CSA and the CAA. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 833 (1976) (holding under Title VII that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading"); *Waste Management of Illinois, Inc. v. EPA.*, 714 F.Supp. 340, 346 (N.D. Ill. 1989) ("[R]estrictions on [a court's] subject matter jurisdiction cannot be circumvented by artful pleading. 'To view the matter otherwise would be to allow the complainant's own description of its theory to determine the forum with jurisdiction.'") (quoting *United Trans. Union v. Norfolk & Western R.R. Co.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987). The CAA contains a complex and detailed scheme for the judicial review of permits, placing an emphasis on the finality of administrative decisions. *See Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985). Allowing the Appellants to artfully plead around this scheme is wholly incongruous with Congress' intent.

2. FLT and New Union are barred by Blue Skies law which restricts the time and venue for judicial review of CSA permits.

The CSA, requires that: "A petition to review a permit issued under this chapter may be filed only *in the Superior Court of Goodview County* within *sixty days* after the permit is issued. A permit shall not be subject to judicial review or challenge *in civil or criminal proceedings for enforcement.*" B.S.R.C. 15: § 1963(b)(2) (emphasis added).

This Court is required to defer to Blue Skies' judicial review provision. *See Action for Rational Transit v. West Side Highway Project by its Exec. Dir. Bridwell*, 699 F.2d 614, 616-17 (2d Cir. 1983) (holding that plaintiffs were barred from challenging a final action of the New York State Department of Environmental Control under the CAA, where plaintiffs could have sought review under New York law but did not); *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1173 (9th Cir. 1979) (holding that plaintiffs failed to state a claim under the CAA section 304(a)(1) since the "challenge to the [permit] . . . should have been pursued through the administrative review procedures set forth as part of the [Nevada SIP]"); *see also* 42 U.S.C. § 7661a(b)(6) (requiring a state air pollution permit program to include "an opportunity for judicial review in State court of the final permit action by . . . any . . . person who could obtain judicial review of that action under applicable law").

Courts must strictly adhere to statutory time limits for judicial review of environmental permits in order to ensure the finality of complex administrative decisions and to prevent sparse administrative resources from being wasted eternally litigating the terms of a permit. *See, e.g., Texas Mun. Power Agency v. EPA*, 799 F.2d 173, 175 (5th Cir. 1986) ("The requirements show a [legislative] decision to impose statutory finality on agency actions that we, as a court may not second-guess.") (citing *Eagle-Picher Indus.*, 759 F.2d at 911; *Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979)). Failure to meet this statutory time limit strips the court of jurisdiction to review the challenged permit. *See Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1445 (9th Cir. 1984).

The Appellants' section 6972(a)(1)(B) suit is in direct violation of Blue Skies law. Not only have the Appellants brought this action in the wrong venue and well beyond the sixty day time limit, but they have raised their permit challenge in a civil enforcement

proceeding. Therefore, this Court should affirm the District Court's order of summary judgment for Buena Vista. *See, e.g., Homestake Mining Co. v. EPA*, 584 F.2d 862, 863 (8th Cir. 1978) (dismissing petition for review regarding issuance of a CWA permit brought four days after the statutory time limit elapsed).

3. FLT and New Union's citizens' suit is also barred by federal law restricting the time and venue for judicial review of a permit.

The CAA judicial review provision allows for review in the United States Court of Appeals for the appropriate circuit of "any . . . final action . . . within sixty days from the date notice of such . . . action appears in the Federal Register, except that if such petition is based *solely on grounds arising after such sixtieth day*, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1) (emphasis added). Just as under Blue Skies law, the CAA prohibits judicial review of a final action in a civil or criminal enforcement action. *See id.* § 7607(b)(2). Blue Skies' issuance of two permits to Buena Vista constituted a "final action" by the DEC. *See Hawaiian Elec. Co.*, 723 F.2d at 1445 (reasoning that the EPA's issuance of a CAA Prevention of Significant Deterioration permit constituted a final action from which the plaintiffs had sixty days to seek review). Just as this Court must conclude under Blue Skies law, the Appellants are prohibited from challenging Buena Vista's permits in a civil enforcement action, and similarly have failed to raise their challenge in the correct venue and within the required time limit prescribed by the CAA.

In addition, the Appellants may not claim that the "belated review" provision within section 7607(b)(1) allows this action because its grounds do no arise solely after sixty days from the issuance of Buena Vista's permits. In promulgating these judicial review provisions, "Congress . . . struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties." *National Mining Assoc. v. United States Dept. of Interior*, 70 F.3d 1345, 1350 & n.2 (D.C. Cir. 1995). Review of a petition based on grounds clearly available within sixty days of the permits' issuance is not allowed under section 7607(b)(1). *See id.* (holding that permitting review under similar circumstances "would thwart Congress' well-laid plan"); *In re: Woodkiln, Inc.*, CAA-HQ-111-001, 1997 WL 406530, n.13 (E.P.A., July 17, 1997) (holding that appel-

lant failed to show "how or why the current state of knowledge is so fundamentally different as to represent new grounds for review" that could not have been asserted within sixty days of the EPA's final action).

Buena Vista obtained its CSA permits in 1998. (R. at B-1.) They have been in compliance with all mercury-related terms since issuance of the permits. (R. at B-2.) In late 1998, Bluepeace unsuccessfully brought suit against Buena Vista based on grounds nearly identical to the Appellants'. (R. at B-1.) Bluepeace based its suit on tests conducted by DEC indicating that mercury from Buena Vista's power plants was contaminating fish in Lake Mordred. (R. at B-1.) The EPA's study, allegedly indicating that mercury from Buena Vista's plants is also contaminating fish in Lake Tokay, does not significantly add to the current state of knowledge concerning Buena Vista's mercury emissions. *See American Assoc. of Meat Processors v. Costle*, 556 F.2d 875, 876 (8th Cir. 1977) (citations omitted); 1990 CAA Leg. Hist. 731, 779. Since FLT and New Union fail to allege grounds *solely arising* after sixty days, this Court must affirm the District Court's granting of Buena Vista's motion for summary judgment.

CONCLUSION

For the foregoing reasons, Buena Vista respectfully requests that this Court affirm the District Court's decisions that FLT lacks standing, and that both Appellants are barred by the CAA and Blue Skies law from bringing this citizens' suit. Buena Vista respectfully requests that this Court reverse the District Court's decisions that New Union has standing, and that Buena Vista's mercury emissions are "solid waste" for purposes of 42 U.S.C. § 6972(a)(1)(B). Finally, Buena Vista respectfully requests that this Court reverse the District Court's decision not to address whether the Appellants are barred by the doctrines of res judicata, collateral estoppel, and section 6972(b), and find that the Appellants are barred.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
FRIENDS OF LAKE TOKAY, INC.,
Plaintiff
STATE OF NEW UNION,
Civ. No. 99-7030
Intervenor
ORDER
v.
BUENA VISTA POWER CO.,
Defendant.

Friends of Lake Tokay, Inc. (FLT), a not-for-profit corporation organized for the protection of Lake Tokay in the State of New Union, sent a notice to Buena Vista Power Co. (Buena Vista), the Administrator of the United States Environmental Protection Agency (EPA), and the State of Blue Skies of the endangerment FLT alleges originates from two power plants owned and operated by Buena Vista in Blue Skies, and of FLT's intention to file an action against Buena Vista to abate the endangerment under section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), 40 U.S.C. § 6972. Ninety-five days thereafter, FLT filed this action under RCRA section 7002(a)(1)(B) against Buena Vista, seeking an injunction requiring Buena Vista to cease all emissions of mercury from its plants. The State of New Union filed a motion to intervene in the action pursuant to RCRA section 7002(b)(2)(E) and FRCP Rule 24, which motion was granted.

The complaints allege, and Buena Vista admits, that Buena Vista owns and operates two mine-mouth, coal-fired power plants in Blue Skies. The complaints allege, and Buena Vista admits, that the coal burned in the plants contains mercury, and that after combustion of the coal, minute particles of mercury are released up the plants' stacks in smoke and stack gases. The complaints allege, and Buena Vista admits, that most of the mercury particles are captured in air pollution control equipment operated by Buena Vista, but that some of those particles escape into the atmosphere. The complaints allege, and Buena Vista denies, that many of those particles are transported through the atmos-

phere to airspace over the State of New Union, where they fall to the surface. The complaints allege, and Buena Vista denies, that some of the particles fall directly into Lake Tokay and that others fall onto land in the watershed of Lake Tokay, from which they eventually are washed into Lake Tokay.

The complaints allege, and Buena Vista admits, that the New Union Department of Public Health has issued a health advisory, giving notice that fish living in Lake Tokay contain levels of mercury that, if eaten on a weekly basis, could cause mercury poisoning in humans. The health advisory bans the sale of fish from the Lake and advises the public against consumption of fish from the Lake. While Buena Vista admits the health advisory was issued and admits its contents, Buena Vista denies the validity of the advisory, the conclusions reached by it and the acts alleged in it. The complaints allege, and Buena Vista admits, that EPA has conducted studies which conclude that most of the mercury in Lake Tokay originates from Buena Vista's two power plants in Blue Skies. Although Buena Vista admits EPA's conduct of the studies and the contents of the published results of the studies, it denies the validity of the studies and the truth of the published results of the studies.

FLT and New Union contend that the mercury contamination of fish in Lake Tokay and the health risk it poses, if fish from the Lake are consumed by humans, are just the sort of endangerments that RCRA section 7002(a)(1)(B) was designed to address. Two members of FLT submitted affidavits averring that they have fished recreationally in Lake Tokay for over two decades and still fish there for pleasure. They aver they no longer eat the fish there because of the health advisories.

The parties filed cross motions for partial summary judgment. FLT and New Union request summary judgment that the particulate mercury that is emitted by the Buena Vista plants is a hazardous waste. Buena Vista requests summary judgment that both FLT and New Union lack standing; that relief is precluded under RCRA section 7002(a)(1)(B) because emissions from the plants are regulated under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; and because litigation already concluded between Buena Vista and Bluepeace, Inc. precludes this action.

Based on evidence adduced by FLT and New Union, and not contested by Buena Vista, at the summary judgment hearing, I hold that the particulate mercury emitted by the Buena Vista plants is solid waste, as that term is used in RCRA section

7002(a)(1)(B), and accordingly grant their motion for summary judgment. It should be emphasized, however, that their motion did not address whether that waste ever reached Lake Tokay or caused an endangerment there, conclusions which Buena Vista steadfastly contests as a factual matter and which were not resolved at the summary judgment stage.

Because the only two members of FLT who presented evidence on their injuries from the alleged acts of Buena Vista admitted that they were in no danger from mercury in the Lake, I find that FLT has no standing to sue Buena Vista under RCRA section 7002(a)(1)(B) and grant Buena Vista's motion for summary judgment to that extent. Because a state need not prove standing, I deny Buena Vista's motion to that extent.

Emissions from Buena Vista's two plants are extensively regulated under the Clean Air Act. Indeed, Blue Skies has recently issued Title V permits for those plants under that Act. Those permits did not contain limitations on mercury emissions. Plaintiffs here could have sought judicial review of those permits and they did not. Under Blue Skies law those who could, but did not, seek judicial review of permits may not contest their terms in subsequent enforcement or other litigation. The present litigation is merely an attempt to end run this basic limitation of administrative law. Accordingly, I grant Buena Vista's motion for summary judgment on this basis against both FLT and New Union.

Buena Vista also contends that concluded litigation in the case of *Bluepeace, Inc. v. Buena Vista Power Co.*, No. Civ. 98-27, slip. op. (Coughlin Co. Sup. Ct., Jan. 5, 1999), attached hereto as Appendix I, bars this litigation under RCRA section 7002(b) or the doctrines of res judicata or collateral estoppel. Because I have already granted Buena Vista's motion for summary judgment on dispositive issues, I do not reach this motion.

I. The Particulate Emissions as Solid or Hazardous Waste

In order for the mercury particles emitted from Buena Vista's plants to be subject to suit under RCRA section 7002(a)(1)(B), they must be solid or hazardous waste, as defined under RCRA. RCRA section 1004(5) defines hazardous waste as a solid waste which has characteristics that are hazardous. EPA's regulations also define hazardous waste as a solid waste exhibiting hazardous characteristics or contained on a list of hazardous waste in EPA's regulations. 40 CFR § 261.3. The basic question, then, is whether the particles are solid waste EPA defines solid waste in 40 CFR

§ 261.2. A solid waste is discarded material. 40 CFR § 261.2(a)(1). A material is discarded if it is abandoned, recycled or inherently waste-like. 40 CFR § 261.2(a)(2). The mercury particles are not recycled or, in terms of EPA's regulations, inherently waste-like. 40 CFR § 261.2(c) and (d). They are abandoned, however, if they are disposed of. 40 CFR § 261.2(b)(1). They are disposed of if they are discharged or placed onto or on land or water such that they enter the environment, air or water. RCRA § 1004(3). This seems a good description of what happens to the mercury particles; they are discharged out of the plants' stacks and end up in the Lake or the surrounding land, from which they eventually enter the Lake.

Buena Vista protests that RCRA section 1004(27) defines "solid waste" to include only "solid, liquid, semisolid, or contained gaseous material." It argues this means air pollutants are a solid waste only if they are discharged into enclosed air, and not if they are discharged into open air. Its argument ignores the plain meaning of the statute. The only material that must be discharged to enclosed space to be a solid waste is gas. The mercury particles at issue are particles; solids, not gas. To contend they are not solid particles ignores the advancements of modern science. *Martin v. Reynolds Metals Co.*, 221 Or. 86, 342 P.2d 790 (1959).

Buena Vista also advances here the same arguments that it uses to assert that the pervasive regulatory scheme for controlling air pollution under the federal Clean Air Act occupies the field of air pollution, leaving no room for RCRA's public nuisance-type endangerment provision to operate in that field. These arguments don't depend on whether the mercury emissions are solid waste under RCRA. And those arguments aren't relevant to whether mercury emissions are solid waste under RCRA. That question is purely a matter of statutory interpretation, one that is relevant, among other issues, to whether EPA can use RCRA to regulate air emissions.

Because endangerments caused by solid waste are actionable under RCRA section 7002, it is unnecessary to determine if the mercury particles are hazardous.

II. Standing.

As an environmental advocacy group, FLT cannot have standing on its own, but may have standing to represent its members who have standing. For its members to have standing, they must

1) suffer actual injury from the complained of action; 2) the injury must be fairly traceable to the complained of action; and 3) the injury must be redressible by judicial action, *Valley Forge Christian College, v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Finally, the injury must be within the "zone of interest" sought to be protected by the statute, *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

To meet this test, FLT submits the affidavits of two of its members, Steven Jones and Artimus Winfred. Their affidavits are similar in relevant regards. They both live near, but not on the Lake. They have both used the Lake for sports fishing for many years. Until the Department of Public Health issued the health advisory, they kept some of the fish they caught and returned others to the Lake. The fish they kept they ate or gave to their friends to eat. After the health advisory they have continued to fish, but they no longer keep or eat any of the fish. They were afraid to eat or have their friends eat the fish because of the mercury contamination discussed in the health advisory. The only thing they complain about in their affidavits is their inability to eat fish from the Lake.

Jones and Winfred suffer an injury here; their enjoyment in fishing has been diminished because they can no longer eat the fish they catch in the Lake. Buena Vista does not contest this. It remains to be proven whether the injury is fairly traceable to Buena Vista's emissions and whether the injury is redressable by court order. The problem is that the injury is not within the "zone of interest" protected by the statute. The purpose of RCRA section 7002(a)(1)(B) is to redress endangerments. The mercury in the fish may endanger health, but only if the fish are eaten. These plaintiffs do not eat the fish and therefore are not endangered by the contamination. Their loss of enjoyment in fishing is not the interest protected by section 7002 or even by other parts of RCRA. It may be that Jones and Winfred, or even other members of FLT, could aver injuries within the zone of interests protected by section 7002, but they did not.

Alternatively, the injuries suffered by Jones and Winfred are not redressable under RCRA section 7002. The injuries they complain of are not being able to eat or distribute fish they catch in the Lake. Those inabilities are undoubtedly inconveniences and even may have a modest economic value. That makes them redressable in an action at law for money damages. One of the

bedrock requirements for the equitable remedy of injunction is that relief is not available in an action at law. Since these plaintiffs have a rather minor claim for money damages, they have an adequate remedy at law in a traditional tort suit and may not be granted injunctive relief. RCRA section 7002 vests this court with authority to grant injunctive relief, but not to award money damages. Their injuries are not redressable under RCRA section 7002. *Davies v. National Cooperative Refinery Association*, 963 F.Supp. 990, 999 (D. Kan. 1997).

New Union, on the other hand, is the state and not a private party. As a state it does not need to plead standing; it automatically has standing to sue for any injuries alleged to occur in the public domain within its boundaries. New Union avers in its complaint that Lake Tokay is within the public domain and is wholly within its boundaries. Buena Vista does not contest this.

III. The Effect of Regulation under the Clean Air Act

Plaintiffs seek to use the citizen suit provision of RCRA to address an air pollution problem. This raises the important question of whether Congress intended to supplant detailed and pervasive regulation of air pollution under the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*, with the general, public nuisance-type RCRA section 7001(a)(1)(B). Regulation of Buena Vista's plants under the CAA is real, detailed and pervasive. It starts with the Blue Skies state implementation plan provisions regulating emissions from power plants to meet the national ambient air quality standards for particulate matter. See CAA § 109 and 110, 42 U.S.C. § 7409 and 7410. Particulate matter includes particles composed of or containing mercury. CAA sections 401 to 416, 42 U.S.C. § 7451 to 7451o, regulate sulfur oxide emissions from over one hundred coal fired power plants, including Buena Vista's two plants, with the intention of controlling the long range transport of pollutants from state to state. Although this regulation is directed at reduction in sulfur oxide emissions, Buena Vista's expert testified at the summary judgment hearing that reduction in sulfur oxide emissions would normally also lead to a reduction in mercury emissions. FLT and New Union did not present evidence to the contrary. Finally, CAA section 112, 42 U.S.C. § 7412, directs EPA to promulgate emissions standards for hazardous air pollutants, including mercury. That section specifically directs EPA to study the public health impact of fossil fuel fired power plant emissions, CAA section 112(n)(1), and directs The National

Institute of Environmental Health Sciences to determine a threshold for mercury concentrations in fish to protect public health, CAA section 112(n)(2). Moreover, CAA section 112(m) requires EPA to study the effects of the deposit in large water bodies of hazardous air pollutants from long range transport of such pollutants, which would include mercury, and to promulgate further limitations on emissions of such pollutants, if necessary to protect public health. EPA has promulgated emissions limitations for mercury under CAA section 112, but they do not apply to power plants. 40 CFR § 61.50 to .55. EPA has also promulgated standards governing emissions from fossil fueled power plants constructed after the 1970s, under CAA section 111, 42 U.S.C. § 7411. Because Buena Vista's plants were built in the 1980s, they are governed by these standards, but the standards contain no limitations on mercury emissions. 40 CFR § 60.40 to 40a. Finally, all requirements established under the CAA are to be included in permits issued to particular sources of air pollution, CAA § 501 to 507, 42 U.S.C. §7661 to 7661f. Such permits may be issued by EPA or a state with an approved permit program. For a state to have an approved program, it must provide the opportunity for judicial review of permits by interested parties, section 502(b)(6). Moreover, section 504(f) authorized EPA to promulgate regulations establishing that compliance with a permit constitutes compliance with the CAA itself. EPA regulations provide for activation of this so-called "permit shield" provision if the permit issuing authority determines that no requirements, other than those placed in the permit, are applicable. 40 CFR § 70.6(f). Blue Skies included in the preambles to the Buena Vista permits the following language: "The Department has 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"

EPA has approved Blue Skies' CAA permit program. The first two CAA permits that Blue Skies issued were to the Buena Vista power plants. Those permits contain detailed emission limitations on particulate matter, sulfur oxides, and nitrogen oxides. They require Buena Vista to conduct weekly monitoring of mercury in its emissions and of mercury deposition, from its plants' emissions, at various locations in Blue Skies. They note that they will be modified to contain any limitations of mercury emissions that may be necessary to implement any emissions limitations of mercury that EPA may promulgate under CAA section 112.

In contrast, RCRA contemplates standards for regulation of air pollution emissions from facilities that treat, store or dispose of hazardous waste, not from facilities that emit hazardous waste into the atmosphere. RCRA § 3004(n). Buena Vista's plants do not treat, store or dispose of hazardous waste. Moreover, RCRA section 1006(b)(1) directs EPA to integrate the administration and enforcement of RCRA and the CAA to avoid duplication.

Under both RCRA and the CAA, permits issued by EPA are subject to judicial review, but only if a petition for review is filed within 90 days after permit issuance. Moreover, the terms of a permit cannot be challenged in a judicial enforcement proceeding. RCRA § 7006 (b) and CAA § 307, 42 U.S.C. § 6976(b) and 7607(b). It is not surprising that efforts to use RCRA section 7002(a)(1)(B) to challenge the terms of a RCRA permit, in an end run around these limitations, have been roundly rejected. *Chemical Weapons Working Group, Inc. v. Department of the Army*, 111 F.3d 1485 (10th Cir. 1997); *Greenpeace, Inc. v. Waste Technologies Industries*, 3 F.3d 1174 (6th Cir. 1993); *Palumbo v. Waste Technologies Industries*, 989 F.2d 156 (4th Cir. 1993). Attempts to use enforcement or citizen suit provisions to attack the terms of EPA issued permits, in end runs around limitations on judicial review in other environmental statutes, have been similarly rejected. *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256 (3rd Cir. 1991) (CAA). Finally, attempts to use federal enforcement or citizen suit provisions to attack the terms of state issued permits have been rejected. *General Motors v. EPA*, 168 F.3d 1377 (D.C. Cir. 1999); *United States v. Gulf States Steel Co.*, 1999 WL 381075 (N.D. Ala.).

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. Here plaintiffs attempt to use the judicial review provisions to circumvent limitations on judicial review in a different statute. This difference is immaterial, however, for three reasons. First, the citizen suit provisions do not grant jurisdiction to the district courts for judicial review of state permit issuance. This is well established. *General Motors v. EPA*, 168 F.3d 1377 (D.C. Cir. 1999); *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3rd Cir. 1990); *United States v. Gulf States Steel Co.*, 1999 WL 381075 (N.D. Ala.); *NRDC v. Outboard Marine Corp.*, 702 F.Supp. 690 (D. Ill. 1988); *Connecticut Fund for the Environment v. Job Printing Co.*, Inc., 623 F.Supp. 207 (D. Conn.

1985). Second, the Blue Skies air pollution statute, modeled on the CAA, provides for judicial review of the permits and bars challenge to their terms thereafter. (1) Plaintiffs could have sought judicial review of the permits after they were issued. Plaintiffs did not do so and are barred by the state statute from doing so now. The same result would be reached if EPA had issued the permits under the CAA. *See* CAA § 307(b)(2), 42 U.S.C. § 7607(b)(2). Plaintiffs argue that because neither Buena Vista nor Blue Skies gave plaintiffs notice of the issuance of the permits, Buena Vista is estopped from arguing they are barred from challenge at this time. They cite no requirement that Buena Vista or Blue Skies give them notice of the permit issuance. Indeed, Blue Skies gave public notice of its proposal by publication in newspapers of general circulation in the state and by sending notices to those requesting them, as required in its regulations approved by EPA as meeting the requirements of CAA section 502(b)(6). 42 U.S.C. § 7661a(b)(6). Blue Skies also provided notification to EPA and contiguous states, as required in CAA section 505(a). 42 U.S.C. § 7661d(a). New Union is not contiguous to Blue Skies. Third, Congress intended to regulate air pollution under the Clean Air Act, not under the public nuisance provision of RCRA. Indeed, Congress spoke in the Clean Air Act to the precise problem plaintiffs raise here. It may be plaintiffs' wish to use RCRA because EPA has not acted yet under the CAA or they are not satisfied with EPA's actions. If so, the CAA citizen suit provision gives them recourse against EPA. CAA § 304(a)(2) or 307(b), 42 U.S.C. § 7604(a)(2) or 7607(b).

For all these reasons, it seems clear that Congress has enacted the CAA as a comprehensive, detailed and pervasive scheme to regulate air pollution. It certainly occupies the field of air pollution to the extent of precluding the existence of any federal common law of nuisance for interstate air pollution. *City of Milwaukee v. Illinois*, 450 U.S. 304 (1981). By the same token it also seems clear that Congress intended the CAA to preclude use of the nuisance-like provision of RCRA section 7002(a)(1)(B) to regulate air pollution. At the very least, it prevents courts from using their equitable discretion to fashion injunctive relief under that provision to regulate air pollution. *Wienberger v. Romero Barcelo*, 456 U.S. 305 (1982).

IV. Effect of State Court Action.

Buena Vista moves to dismiss this action because the issue has already been litigated in a state court action, *Bluepeace, Inc. v. Buena Vista Power Co.*, No. Civ. 98-27, slip op. (Coughlin Co. Sup. Ct., Jan 5, 1999), attached hereto as Appendix I. It argues that RCRA section 7002(b) and the doctrines of res judicata and collateral estoppel bar the state court action bars this action. I do not reach this complicated issue, since I have dismissed the action on other grounds.

Romulus N. Remus
District Court Judge

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1. "A petition to review a permit issued under this chapter may be filed only in the Superior Court of Goodview County within sixty days after the permit is issued. A permit shall not be subject to judicial review or challenge in civil or criminal proceedings for enforcement." B.S.R.C. 15: § 1963(b)(2).

APPENDIX B

SUPERIOR COURT
COUGHLIN COUNTY
STATE OF BLUE SKIES
Bluepeace, Inc.,
Plaintiff,
FINDINGS OF FACT
v.
Buena Vista Power Co.,
Defendant.

1. Bluepeace, Inc. is a not-for-profit corporation organized under the laws of Blue Skies for the purpose of protecting the natural resources and environment of the state for the good of its members and of the citizens of the state.

2. Buena Vista Power Co. is a public utility corporation organized under the laws of Blue Skies for the purpose of generating electricity and distributing it to the citizens of the state.

3. Buena Vista owns and operates two coal mines in the state. At each coal mine it also owns and operates a power plant, which burns coal from the mine to generate electricity.

4. The coal burned by Buena Vista has been found to contain trace amounts of mercury in tests conducted both by Buena Vista and by the Blue Skies Department of Environmental Conservation. The stack emissions from both of its plants have also been found to contain trace amounts of mercury in tests conducted by Buena Vista and by the DEC.

5. Tests conducted by the DEC also establish that mercury emitted from the stacks of Buena Vista's two power plants enters the waters of Lake Mordred, the largest lake in Blue Skies, both by falling from the atmosphere directly into the Lake and by falling on land in the Lake's watershed, from which it is washed into the Lake. A study of Lake Mordred conducted by the DEC concluded that emissions from the two Buena Vista plants were the major sources of mercury in the Lake. The study also concluded that mercury bioaccumulated in fish in the Lake, reaching levels unsafe for human consumption. Based on the results of the Study, the Blue Skies Department of Public Health issued a health advisory, banning sale and consumption of fish from the Lake.

6. In 1998 the DEC issued air pollution permits to Buena Vista's two plants pursuant to the Blue Sky Clean Skies Act, B.S.R.C. 15: § 1900 *et seq*. The permits are each over fifty pages in length, containing numerous requirements, including emission limitations on particulate matter, sulfur oxides and nitrogen oxides. Compliance with these limitations has the effect of also limiting emissions of mercury. The permits require weekly testing of the stacks for mercury emissions and establish fifty ground stations downwind from each plant to measure ground deposition of mercury and other emissions from the plant. Five of these stations are on and around Lake Mordred. Section 13, note a, in each permit provides that they will be modified to add an emissions limitation on mercury if and when EPA promulgates mercury limitations applicable to coal fired power plants.

7. The permits issued to Buena Vista require it to conduct both periodic and continuous testing to determine whether the plants comply with the emissions limitations contained in the permits. The results of those tests indicate that it has been in compliance with those limitations since the permits were issued.

8. Bluepeace has 58 members who live adjacent to or near Lake Mordred. All of them have fished in Lake Mordred and/or eaten fish from the Lake. Seventeen of them have continued to eat fish from the Lake after the Department of Public Health issued its health advisory banning the eating of fish from the Lake.

9. Bluepeace filed a complaint on behalf of its members, alleging that Buena Vista's mercury emissions constituted trespass, public nuisance and private nuisance and seeking an injunction banning further emissions of mercury from the plants or limiting them to levels that will protect public health.

10. Neither Bluepeace nor its members sought judicial review of the permits issued to the Buena Vista plants, authorized by B.S.R.C. 15: § 1963(b)(2).

ANALYSIS OF LAW AND EQUITY

Buena Vista moves for summary judgment for two reasons. First, Bluepeace's action, although sounding in tort, is in reality a challenge to the failure of the permits issued by the DEC to Buena Vista to contain emission limitations on mercury. Because judicial review of permits cannot be had in enforcement actions, Buena Vista contends it cannot be had in this tort action. Second, regulation of air pollution under the Clean Skies Act is so pervasive, detailed, and technical that it displaces the common law of torts as it might otherwise apply to air pollution.

B.S.R.C. 15: section 1963(b)(2) is quite specific: "A petition to review a permit issued under this chapter may be filed only in the Superior Court of Goodview County within sixty days after the permit is issued. A permit shall not be subject to judicial review in civil or criminal proceedings for enforcement." If this action seeks judicial review, it is in the wrong court and is barred by the sixty day statute of limitations. While the action is not styled as one seeking judicial review, it does ask the court to act in place of the DEC to establish emission limitations for mercury at the two Buena Vista facilities. Other courts have found similar actions to be end runs around limitations placed on judicial review and have accordingly dismissed the actions. *See Palumbo v. Waste Technologies Industries*, 989 F.2d 156 (4th Cir. 1993). Bluepeace argues that it is not contesting the terms of the permits and that its action is not an enforcement action because it does not seek to enforce the permits. Indeed, Bluepeace does not mention the permits in its complaint. Bluepeace argues further that holding that its action is one seeking judicial review would be tantamount to holding that the air pollution permit system replaces tort law with regard to damages created by air pollution. There is a good deal of sense in this argument. Before deciding the judicial review issue, then, it may be profitable to examine the issue of whether the Clean Skies Act permit program does displace tort law with regard to air pollution caused damage.

The regulation of air pollution is a complicated, technical and expensive business. It requires reconciling many competing public interests. State and federal legislatures have labored mightily for four decades to develop an appropriate regulatory framework for the endeavor. The result is literally hundreds of pages of statute and thousands of pages of regulations. They lead to permits for each of the plants at issue here with over fifty pages of requirements, prohibitions, and limitations. The permits are detailed and intrusive. For instance, they specify to the gallon how much water must be sprayed each day on a two hundred foot gravel road at one of the plants. Expecting a court to regulate on its own in such a context without doing damage to this interwoven regulatory scheme may be expecting too much of a court.

Reviewing the considerations that go into the establishment of emission limitations puts this into the perspective of this action. Emissions limitations reflect the reduction in pollution emission that can be achieved by specific technologies. Thus fashioning an emission limitation requires an understanding of the technologies

and the extent to which they can be utilized by coal fired power plants. It also requires evaluation of the economic consequences of using the technology. This could be quite different if the technology is required only of one plant or of all plants. If an expensive technology is required of one plant and not other plants, the one plant would be at a competitive disadvantage and might be put out of business. If an expensive technology is required of all plants, it could raise the price of electricity beyond the reach of some segments of the consuming public, with reverberating consequences. Pollution reduction technology also has secondary effects that must be understood and evaluated. They use electricity or reduce electric generating capacity; they produce solid or liquid waste byproducts; they may use hazardous materials. Technologies vary in their operational reliability, requiring different amounts of downtime for maintenance. Sorting out all of these factors to determine an optimum technology is a task much better suited to legislative or administrative processes than to judicial processes. And the task does not end with choosing an optimum technology. Once a technology has been chosen, its performance level must be established by testing and analysis that can be duplicated by public and private samplers and laboratories. This requires an understanding of analytical chemistry as well as the subtleties of sampling, sample preparation and sample preservation. Again, this task is better suited to legislative or administrative than to judicial processes.

Bluepeace reminds us there is another side to the equation: the adverse effects that mercury emissions have on the public health. While Bluepeace is correct, the evaluation of the public health effects of these emissions and balancing that effect against the costs and burdens of corrective technology is yet another set of scientific, medical, economic, and social factors that is more suited to legislative or administrative than to judicial processes.

Under just such circumstances the court in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), concluded that it would be improvident to grant an injunction requiring adequate air pollution controls on a cement plant causing damage to its neighbors' property, as long as the company paid them the cost of permanent damage to their property.

> It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation;

> and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.
>
> A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepare to lay down and implement an effective policy for the elimination of air pollution.
>
> *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

There is another reason here to reach that result. The Clean Skies Act prohibits the DEC from establishing technology standards more stringent than required by the federal Clean Air Act for Blue Skies' permitting and other air pollution programs to be approved to operate in lieu of federal programs. B.S.R.C. 15: 1925(a) ("In fulfilling its duties to promulgate standards for classes and categories of air pollution sources based on technological feasibility or other such grounds, the Department shall not require that air pollution sources meet standards that are more stringent or costly than standards such class or category of air pollution sources are required to meet nationally under regulations promulgated by the United States Environmental Protection Agency.") There is no requirement in the federal act that Blue Skies regulate mercury emissions in advance of rulemaking by the federal EPA to do so under section 112 of the federal statute. That, of course, is no prohibition on the courts doing so. But it suggests a legislative policy of not pushing air pollution control requirements on Blue Skies industry beyond the national norm. That, coupled with the fact that establishing such standards is clearly more appropriately done with legislative or administrative processes than with judicial processes, compels this court to refrain from exercising its equitable powers to frame the sort of injunctive relief sought by plaintiffs in this case.

At the close of the summary judgment hearing, the court informed plaintiffs of its inclination to deny injunctive relief and invited them within ten days to amend their complaint to request money damages. Ten days have passed and the plaintiffs have filed no motion to amend their complaint. Accordingly, defendant's motion for summary judgment is granted on the grounds discussed above.

APPENDIX C

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 6903. Definitions.

As used in this chapter:

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quality, 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. § 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. § 6928. Federal enforcement.

(d) Criminal penalties.

Any person who—

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 *et seq.*],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 *et seq.*]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, main-

tained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter—

(A) in knowing violation of any material condition or requirement of a permit under this subchapter; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(g) Civil penalty.

Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

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

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

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or dispo-

sal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited.

(1) No action may be commenced under subsection (a)(1)(A) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to—

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate

acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980. 42 U.S.C.A. § 9606.

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980. 42 U.S.C.A. § 9604.

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act. 42 U.S.C.A. § 9601 *et seq.* or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980. 42 U.S.C.A. § 9606 or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. § 9604 or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980. 42 U.S.C.A. § 9604 and is diligently proceeding with a remedial action under that Act, 42 U.S.C.A. § 9601 *et seq.*

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local govern-

ment) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(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.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice.

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention.

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs.

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved.

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common

law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters.

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising

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

(a) Definitions.

For purposes of this section, except subsection (r) of this section—

(6) Hazardous air pollutant.

The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(8) Electric utility steam generating unit.

The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(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

NOTE: For all listings above which contain the word "compounds" and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

(n) Other provisions.

(1) Electric utility steam generating units.

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

42 U.S.C. § 7607. Administrative proceedings and judicial review.

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section

7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

42 U.S.C. § 7661c. Permit requirements and conditions.

(a) Conditions.

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis.

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting.

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits.

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources.

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or

visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) Permit shield.

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if—

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

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.

B.S.R.C. 15 § 1963(b)(2).

A petition to review a permit issued under this chapter may be filed only in the Superior Court of Goodview County within sixty days after the permit is issued. A permit shall not be subject to judicial review or challenge in civil or criminal proceedings for enforcement.