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6 IN THE UNITED STATES DISTRICT COURT  
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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10 NORTHERN CALIFORNIA RIVER  
11 WATCH, a non-profit corporation,

12 Plaintiff,

13 v.

14 REDWOOD OIL COMPANY, INC.,  
15 and DOES 1–10, inclusive,

16 Defendants.  
17

No. C 08-02141 WHA

**ORDER GRANTING  
DEFENDANT'S  
MOTION TO DISMISS**

**INTRODUCTION**

18 In this environmental action brought under the Resource Conservation and Recovery  
19 Act (“RCRA”), defendant moves to dismiss on the ground of res judicata. Because this order  
20 finds that the subject of the complaint is the same as a prior complaint that was merged into a  
21 consent decree, defendant’s motion must be **GRANTED**.

**STATEMENT**

22  
23 Plaintiff first filed suit against defendant in 1999. Plaintiff sued under the Clean Water  
24 Act (“CWA”), 33 U.S.C. 1251 et. seq., RCRA, 42 U.S.C. 6901 et. seq., and state environmental  
25 regulations for discharges of petroleum chemicals from defendant’s facilities and underground  
26 storage tanks. That action resulted in a settlement agreement that was incorporated in a consent  
27 decree. The decree was signed by this Court on November 29, 2000. The decree provided that  
28 defendant would remediate environmental contamination at many of its facilities. The decree

1 provided a monitoring and discovery procedure so that plaintiff could keep abreast of progress  
2 (or lack thereof) in the remediation effort. It had a termination date of November 1, 2007.

3 Pursuant to the consent decree, plaintiff eventually requested from defendant copies  
4 of documents relevant to progress in the remediation efforts. That request was made on  
5 February 12, 2007. In May, defendant provided some of the relevant documents. Plaintiff then  
6 made a determination that “much of the remediation work had not been initiated at many of the  
7 sites, and that the provisions and requirements of the consent decree had not been met”  
8 (Silver Decl. ¶ 4). Defendant disagreed with plaintiff’s assessment. The parties were not able  
9 to resolve their dispute before the consent decree terminated. Nor did plaintiff petition this  
10 Court to enforce the consent decree. The consent decree expired.

11 Plaintiff gave notice on November 29 to defendant of alleged current and ongoing  
12 RCRA violations at four of its facilities. (The “Notice of Violation” is fully incorporated into  
13 plaintiff’s complaint.) Those four facilities had been covered by the consent decree.  
14 Defendant did not respond. Plaintiff filed a new complaint on April 24, 2008, alleging that the  
15 four facilities are still in violation of RCRA and state and local environmental regulations.

16 Defendant now moves to dismiss under the doctrine of res judicata on the ground that  
17 the consent decree precludes plaintiff’s action.

## 18 ANALYSIS

### 19 1. RULE 12(b)(6).

20 Ordinarily, a Rule 12(b)(6) motion cannot be used to raise an affirmative defense.  
21 Res judicata is an affirmative defense. “However, when all relevant facts are shown by the  
22 court’s own records, of which the court takes notice, the defense may be upheld on a Rule  
23 12(b)(6) motion without requiring an answer.” *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir.  
24 1992). Here, the plaintiff’s complaint and the consent decree disclose sufficient facts and  
25 allegations to determine whether the consent decree precludes the present action because those  
26 documents reveal whether the elements of res judicata are satisfied.

27 The consent decree resolved plaintiff’s claims against defendant under 42 U.S.C.  
28 6901–7000 for alleged contamination of drinking water and groundwater at numerous sites.

The decree provided, *inter alia*, that defendant would clean up environmental contamination at many of its facilities. It also provided that plaintiff could obtain documents related to defendant's remediation efforts and could inspect defendant's facilities:

Each Redwood Oil site listed in Exhibit B will be examined and a schedule to address site remediation will be prepared and presented by Redwood Oil to the applicable lead agency for approval within four years. (i) Redwood Oil shall make available for inspection by River Watch, within twenty days of a written notice, any and all files requested relating to the facilities' underground tank clean up, ground water pollution, storm water pollution and/or associated pollution issues of the facilities. (ii) Redwood Oil shall provide copies at their cost, of any and all reasonable requests for documents by River Watch relating to underground tank clean up, ground water pollution, storm water pollution and associated pollution issues of the facilities. (iii) Redwood Oil shall make any and all facilities available for inspection by River Watch, within twenty days of written notice to [defendant].

Exhibit B listed the four sites at issue in this action. The consent decree terminated on November 1, 2007.

Plaintiff's new complaint seeks relief under the citizen-suit enforcement provisions of RCRA. Specifically, plaintiff alleges that defendant is liable under Sections 6972(a)(1)(A) and 6972(a)(1)(B). Section 6972 (a)(1)(A) provides that:

any person may commence a civil action on his own behalf against any person 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.

Plaintiff alleges that defendant is in violation of permits, standards, and regulations because the company "has failed to comply with the statutory and regulatory leak prevention, leak detection, monitoring, and remediation requirements imposed under the RCRA and described in the RCRA Notice" (Compl. ¶ 23). The RCRA notice stated that plaintiff would commence a civil action against Redwood Oil at the expiration of the RCRA notice period on the following ground:

Redwood Oil's use and storage of petroleum products at its gasoline station sites as identified in this Notice, has and continues to violate permits, standards, regulations, conditions, requirements and/or prohibitions effective pursuant to RCRA regarding storage of petroleum in *underground storage tanks*.

(Emphasis added.)

1 Because the question of whether plaintiff's claims are precluded turns on whether the  
2 source of contamination in the present action is the same as the source of contamination in the  
3 first action it is useful to briefly discuss the history of the four facilities at issue. The facilities  
4 will be referred to as "site A," "site B," "site C," and "site D"\* both for simplicity sake and to  
5 correspond with plaintiff's complaint.

6 *Site A:* Two underground storage tanks were removed in 1990. An unauthorized  
7 hydrocarbon release was detected at that time. Petroleum contamination was detected in  
8 soil and groundwater in 1991. In August of 1995, another hydrocarbon leak was detected.  
9 Ten underground storage tanks were removed in 1999 and 2000. Plaintiff relies on data from  
10 groundwater monitoring that was done in January of 2007 for its allegation that environmental  
11 contamination continues at site A.

12 *Site B:* Petroleum contamination was detected in the soil and groundwater in 1991.  
13 One underground storage tank was removed in 1991. The site's remaining four tanks were  
14 removed in 1995. New underground storage tanks were installed in 1995. Plaintiff's notice  
15 of violation does not specify how many tanks were installed. Plaintiff relies on data from  
16 groundwater monitoring in April of 2007 for the allegation that environmental contamination  
17 continues at site B.

18 *Site C:* Petroleum contamination was detected in the soil and groundwater in 1991.  
19 Four underground storage tanks were removed in 1999. New tanks were installed in 2000.  
20 The notice of violation does not state how many tanks or exactly when in 2000 they were  
21 installed. Plaintiff relies on data from groundwater monitoring in December 2006 for its  
22 allegation that environmental contamination continues at site C.

23 *Site D:* Petroleum contamination was detected in soil and groundwater in 1990.  
24 Plaintiff provides no information as to when, if ever, underground storage tanks were removed,  
25 or when, if ever, new underground storage tanks were installed. Plaintiff relies on data from  
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28 \* Site A is located at 455 Yolanda Avenue, Santa Rosa. Site B is located at 9120 Old Redwood Highway, Windsor. Site C is located at 7716 Old Redwood Highway, Cotati. And, Site D is located at 1100 Bennet Valley Road, Santa Rosa.

1 groundwater monitoring in December 2006 for its allegations that environmental contamination  
2 continues at site D.

3 Plaintiff also alleges that defendant is in violation of numerous state health and safety  
4 codes.

5 Section 6972(a)(1)(B) provides that:

6 any person may commence a civil action on his own behalf against  
7 any person, including the United States and any other  
8 governmental instrumentality or agency, to the extent permitted by  
9 the eleventh amendment to the Constitution, and including any  
10 past or present generator, past or present transporter, or past or  
11 present owner or operator of a treatment, storage, or disposal  
12 facility, who has contributed or who is contributing to the past or  
13 present handling, storage, treatment, transportation, or disposal of  
14 any solid or hazardous waste which may present an imminent and  
15 substantial endangerment to health or the environment.

16 Plaintiff alleges that it is entitled to relief under Section 6972(a)(1)(B) because “[b]etween  
17 approximately January of 1990 and [November 29, 2007], Redwood Oil used and stored, and  
18 continues to use and store, petroleum products at the sites identified in this notice in a manner  
19 which has allowed significant quantities of hazardous petroleum constituents to be discharged  
20 to soil and groundwater beneath each of the sites and adjacent properties” (Opp. Exh. A).

21 **A. Plaintiff’s Claims for Alleged Violations**  
22 **During the Consent Decree Period.**

23 The consent decree precludes plaintiff’s claims for defendant’s alleged violations that  
24 were the subject of the remediation provisions of the consent decree and which occurred *during*  
25 *the period when the consent decree was in effect*. The preclusive effect of the consent decree on  
26 plaintiff’s claims for alleged violations that occurred *after* the consent decree terminated raises  
27 a different question. “It is well established that a judgment based on the parties’ stipulation is  
28 only res judicata as to the period covered by the action, and is not entitled to collateral estoppel  
effect in an action for a later period.” *United States v. California Portland Cement Company*,  
413 F. 2d 161, 163 (9th Cir. 1969).

With respect to sites A, B, and D, plaintiff’s claims for alleged violations occurring  
during the consent-decree period are the same claims plaintiff made in its first complaint.  
Plaintiff alleged in its first complaint that defendant’s facilities polluted nearby waterways in

1 violation of CWA, RCRA, and state and local environmental regulations. The factual basis for  
2 plaintiff's allegations was detection of petroleum hydrocarbon contamination from defendant's  
3 current and former underground storage tanks, bulk fuel storage and distribution facilities  
4 (Opp. Br. 1). Plaintiff alleges in its new complaint that defendant violated RCRA and  
5 California law governing the underground storage of hazardous substances. The factual basis  
6 for its new allegations is the "discharge of pollution from its current and/or former fuel  
7 dispensing facilities and its properties" (Compl. 1). The source of the alleged discharges is  
8 underground storage tanks.

9 The factual bases for the first suit and the new suit are the same. There can be no new  
10 source of contamination because underground storage tanks were removed from the facilities  
11 between 1990 and 2000. Plaintiff does not allege that any new underground storage tanks have  
12 been installed at sites A, B, and D (Compl. Exh. A). Furthermore, the allegations are based on  
13 testing that was conducted *during* the consent-decree period. Because the complaint does not  
14 allege a new factual basis for the asserted environmental violations, these are the same claims  
15 that were covered by the consent decree.

16 Plaintiff contends that these are new claims because they concern violations that  
17 occurred after it filed its first action. Plaintiff cites two decisions for the proposition that each  
18 new violation gives rise to a separate cause of action which is not barred by res judicata.  
19 *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 739–740  
20 (9th Cir. 1984). *The Old Timer, Inc. v. Blackhawk-Central City Sanitation District*,  
21 51 F. Supp. 2d 1109, 1118 (D. Colo. 1999).

22 Plaintiff's argument misses the mark. Although it is true that "[t]raditional principles  
23 of preclusion allow additional litigation if some new wrong occurs," *Supporters to Oppose*  
24 *Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1325 (7th Cir. 1992), that is only part of the  
25 story. To defeat a claim preclusion defense, the new wrong cannot be related in origin to the  
26 pre-settlement violations. *Friends of Milwaukee's River v. Milwaukee Metropolitan Sewerage*  
27 *Dist.*, 382 F.3d 743, 758 (7th Cir. 2004). In *Friends*, the parties reached a court settlement  
28 which provided for remediation of local waterways that were contaminated with raw sewage.

1 The court held that even though there were continuing violations after the settlement, those new  
2 violations did not provide the plaintiff with new causes of action because they were barred by  
3 res judicata.

4 The 2002 Stipulation was intended to address the underlying  
5 causes of the continuing violations by implementing remedial  
6 measures some of which, due to their large scale, will take several  
7 years to complete. The State unquestionably was aware that  
8 violations would continue while the projects mandated by the  
9 2002 Stipulation are being implemented. Even though the 2002  
10 Stipulation does not release [the defendant] from liability for  
11 post-Stipulation violations, those post-Stipulation violations are  
12 clearly related in origin to the pre-Stipulation violations and have  
13 the same factual basis. Thus, the August 2002 violation (and other  
14 post-Stipulation violations not specifically mentioned in the 2002  
15 Stipulation) are not separate and distinct causes of action, and the  
16 element of res judicata requiring an identity of causes of action is  
17 met here.

18 *Ibid.*

19 Here, the same reasoning applies. Even though plaintiff alleges that environmental  
20 violations continued after the first suit was filed, the violations are related in origin to the  
21 pre-consent decree violations and have the same factual basis. All alleged violations are the  
22 result of defendant's underground storage tanks that existed before plaintiff's first suit was  
23 filed, and were the subject of the remediation efforts specified in the consent decree. Plaintiff  
24 makes no allegation that new operations or new underground storage tanks are the causes of  
25 new violations at sites A, B, and D. For res judicata purposes, these claims are the same as  
26 those made in the first action and are, thus, precluded by the consent decree.

27 Plaintiff further contends that the consent decree does not preclude the present claims  
28 because the claims are brought under different statutes. This argument must also fail. "A prior  
judgment is binding 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." *United States v. Gurley*, 43 F.3d 1188, 1195 (8th Cir. 1994).

The court stated a test for claim preclusion:

Whether the present action is the same cause of action as the prior  
action depends on whether it arises out of the same nucleus of  
operative facts as the prior claim. The legal theories of the two  
claims are relatively insignificant because a litigant cannot attempt  
to relitigate the same claim under a different legal theory of

recovery. To determine whether the present claim and the prior claim constitute the same claim we consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations.

*Id.* at 1195–1196.

Here, the claims for alleged violations that occurred during the consent decree period are the same claims made in the first complaint because they arise out of the same nucleus of operative facts. Bringing the present action under different statutes than the first action does not change the fact that the claims are the same.

Alleged contamination at site C presents a different issue. According to the notice of violation, at least one new underground storage tank was installed in 2000. If a storage tank was installed after November 29, 2000, when the consent decree went into effect, then alleged contamination from that storage tank may present a new cause of action because that cause of action would not arise out of the same nucleus of operative facts as the prior claim. If plaintiff can sufficiently allege in an amended complaint that contamination at site C is from a new source that was not covered by the consent decree, then that complaint would not be barred by *res judicata*.

**B. Plaintiff's Claims for Alleged Violations  
After the Termination of the Consent Decree.**

Plaintiff alleges that defendant continued to be in violation of RCRA and state and local environmental regulations after the consent decree terminated. The consent decree cannot preclude plaintiff from bringing new claims for new wrongs after the termination of the consent decree unless the decree itself provides for such preclusion. "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of [issue preclusion] does not apply with respect to any issue in a subsequent analysis. The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention." *In re Daley*, 776 F.2d 834, 838 (9th Cir. 1985).

There was not an express provision in the consent decree that precluded plaintiff from bringing another action against defendant. But, its dispute resolution and enforcement indicate



1 that the parties intended that plaintiff would be precluded from taking action against defendant  
2 for contamination from sources covered by the consent decree if plaintiff could have brought that  
3 action during the seven-year consent decree period. The dispute resolution clause stated  
4 (Request for Judicial Notice Exh. A):

5 In the event River Watch believes Redwood Oil is in violation of  
6 this Consent Decree, River Watch shall notify Redwood Oil of the  
7 alleged violation(s) in writing. Redwood Oil shall then have  
8 twenty days from receipt of the notice to respond to the  
9 allegations. If Redwood Oil consents to the claim of violation and  
10 proceeds to commence remedial actions within twenty days of  
11 acknowledging a violation and diligently pursues completion,  
12 River Watch shall take no further action against Redwood Oil. In  
13 the event Redwood Oil denies or does not acknowledge the claim  
14 of violation, within thirty days of the notice the parties shall meet  
15 and confer in an effort to mediate the dispute. If the parties cannot  
16 informally resolve the conflict the parties shall submit the matter to  
17 mediation within thirty days or as soon as reasonable [sic] possible  
18 after the date they informally met and conferred . . . Should  
19 mediation fail, either party may apply to this Court for declaratory  
20 relief and possible further action, including injunction, fees, costs,  
21 and penalties.

22 The consent decree also established that this Court would retain jurisdiction to enforce it:

23 This Court shall retain jurisdiction from the date of entry of this  
24 Consent Decree through the date of termination of this Decree for  
25 the purposes of this Decree. In addition, following the date of  
26 termination of this Consent Decree, this Court shall retain  
27 jurisdiction for the purposes of (1) resolving any dispute of this  
28 Decree, and (2) disposing of any motion to enforce this Decree, or  
of any contempt petition, filed on or before the date of termination.

This Consent Decree shall terminate as to each of its provisions on  
November 1, 2007.

29 The terms of the consent decree plainly indicated that plaintiff could seek court  
30 enforcement of the consent decree during its duration. Plaintiff determined no later than May of  
31 2007 that “much of the remediation work had not been initiated” at the four sites at issue, more  
32 than five months prior to the termination of the decree (Silver Decl. ¶ 4). There is no indication  
33 that plaintiff attempted to reach its assessment at any other time during the seven-year period  
34 when the consent decree was in effect. Plaintiff waited until last September 18 to meet with  
35 defendant to try and resolve the dispute. That was unsuccessful. No attempts at mediation were  
36 made, and plaintiff did not petition this Court for enforcement. Plaintiff could have brought an  
37 enforcement action as early as September. Instead, plaintiff let the consent decree lapse, gave

1 defendant a new notice of violation under the RCRA in November, and then filed this action in  
2 April 2008.


3 The consent decree did not forever immunize defendant from the issue of non-  
4 compliance with environmental standards. Third parties not in privity with plaintiff, for  
5 example, have every right to sue without regard to the settlement. But, the consent decree  
6 clearly set to rest all contamination from the sources at play in the first suit if that issue could  
7 have been raised during the consent-decree period. Plaintiff had ample opportunity to resort to  
8 its remedies under the decree but spurned the opportunity until the calendar ran out. It is now  
9 precluded from doing so.

### 10 CONCLUSION

11 For the foregoing reasons, defendant's motion to dismiss is **GRANTED**. The cited  
12 troubles with plaintiff's complaint as to site C may be cured. Plaintiff may move by  
13 **NOVEMBER 4, 2008**, for leave to amend. Any such motion should be accompanied by a  
14 proposed pleading and the motion should explain why the foregoing problems are overcome by  
15 the proposed pleading. Plaintiff must plead its best case. Failing such a motion, all inadequately  
16 pled claims as to site C will be dismissed.

17  
18 **IT IS SO ORDERED.**

19  
20 Dated: October 15, 2008.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE