93 1 F.2d 1055, 1065 n.9 (5th Cir. 1991); *Atlantic States Legal Found. v. Tyson Foods Inc., 897* F.2d *1128* (11th Cir. 1990); *Pawtuxet Cove Marina Inc. v. Ciba-Geig Corp., 807* F.2d 1089, 1094 (1st Cir. 1986), cert. denied, 484 U.S. 975 (1987). Cf. *PIRG of New Jersey Inc. v. Magnesium Elektron Inc.,* 123 F.3d 111 (3rd Cir. 1997)..

Dismissing an entire citizen suit once a citizen plaintiffs claim for injunctive relief becomes moot runs contrary to the CWA. As the Second Court of Appeals has stated:

> A rule requiring dismissal of a citizen suit in its entirety based on a defendant's post-complaint compliance appears to conflict with the language of the Act. Under such a rule, a penalty suit would always become moot and a defendant would escape all liability if it could show, at any time before judgment, "that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney I, 484 U.S. at 66, 108 S.Ct. at 386. Yet, as the Fourth Circuit noted in Gwaltney III, $13 19(d) of the Act provides that any person who violates effluent limitations or permit conditions "shall be subject o a civil penalty." 890 F.2d at 697. Allowing a discharger to escape all liability by virtue of its post-complaint compliance cannot be squared with this mandatory language.

Atlantic States Legal Foundation v. Pan American Tanning Corp., 993 F.2d at 1020-1021. Furthermore, the Court recognized that the CWA would be undermined by a policy of mooting a citizen suit after a defendant achieves post-complaint compliance: "mooting an entire suit based on post-complaint compliance would weaken the deterrent effect of the Act by diminishing the incentives for citizen plaintiffs to sue and by encouraging defendants to use dilatory tactics in litigation." *Id.* at 1021.

The Eighth Circuit has also held that a citizen plaintiffs request for civil penalties for on-going violations will satisfy Article III standing requirements even after a defendant has achieved post-complaint compliance:

> Congress has granted the citizen suit plaintiff standing to seek civil penalties as well as injunctive relief against on-going violations. See 33 U.S.C. §§ 1319(d) and 1365(a). Plaintiff retains "a concrete interest" in enforcing its penalties claim, even if any penalties recovered from the polluter go to the United States Treasury. When there is no agency enforcement action in the picture, a polluter should not be able to avoid otherwise appropriate civil penalties by dragging the citizen suit plaintiff into costly litigation and then coming into compliance before the lawsuit can be resolved.

Comfort Lake Association, Inc. v. Dresel Contracting, Inc., 138 F.3d at 356. See *also Pan American Tanning,* 993 F.2d at 1021 ("Citizen plaintiffs often initiate suit not to recover monetary awards for their own benefit, but rather to ensure that penalties are imposed so as to deter future violations.")

Similarly, the Eleventh Circuit Court of Appeals, recognizing the importance of citizen plaintiff enforcement given the limited enforcement resources of the government, has stated that:

> Perhaps the most dangerous result of the district court's holding [that a citizen plaintiffs request for civil penalties becomes moot once a request for injunctive relief becomes moot] is that it encourages violators to delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial or is decided on summary judgment. Under such a holding, dischargers could intentionally violate the Clean Water Act until they are sued and then obtain a stay while continuing their violations until they eventually are in compliance with the law. At this point, the case would be dismissed and they would have escaped all penalties. The district court's understanding of mootness reads the civil penalties provision out of the Clean Water Act. Further, under the district court's opinion, whether or not a suit is mooted may depend on when the district court happens to set the case down for trial or rule on summary judgment motions.

Tyson Foods, 897 F.2d at 1136-1137.

Furthermore, in Tyson *Foods* just as in the case at bar, the district court granted an extended stay of the proceedings. This stay allowed the defendant time to take actions that the defendant then

argued mooted the citizen plaintiffs case. However, the court rejected this strategy:

> Given the stays imposed by the court, it was impossible for the plaintiffs to have the merits of their suit decided while the violations were ongoing. Indeed, the second stay was imposed for the precise purpose of giving Tyson time to come into full compliance. We cannot believe that Gwaltney allows a district court to determine the outcome of citizen suit litigation by staying the proceedings. Here, the district court's actions served to assist the defendant in having the case dismissed as moot. (footnote omitted). ...

Id. Likewise, a stay of over two years was granted in this action to allow Southdown and USX to evaluate the landfill site and to propose a settlement. However, unlike Tyson Foods, neither a settlement nor compliance was achieved during this stay. Instead, Southdown sold the landfill to third parties in an attempt to escape liability for the on-going violations. Southdown's actions in this regard must not be sanctioned by this Court, and, therefore, Southdown's Motion for Summary Judgment must be denied.

It is also important to note that these cases, as well as *Steel Co.,* all involved defendants who achieved *compliance,* either after a 60-day notice was filed or after a complaint was filed. In the case at bar, however, Southdown has never even attempted to obtain compliance for its illegal discharges from Landfill No. 1. In fact, the violations upon which this litigation is based are on-going to this very day. But, instead of correcting these violations, Southdown is attempting to escape responsibility for these on-going illegal discharges by merely selling the landfill to a third party. If this conduct is ultimately sanctioned by this Court through a dismissal of this case, both the letter and the spirit of the Clean Water Act will be violated, and the vital role of citizen plaintiffs in environmental enforcement envisioned by Congress will be severely undermined. Consequently, Southdown's Motion for Summary Judgment must be denied.

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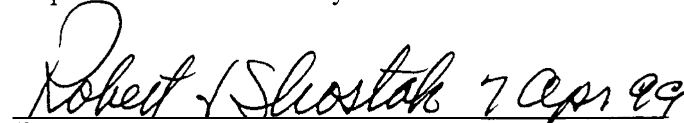
IV. CONCLUSION

Southdown's post-complaint transfer of Landfill No. 1 does not moot this litigation. Rule 25(C) of the Federal Rules of Civil Procedure squarely addresses Southdown's attempt to escape responsibility for the violations upon which this litigation is based and allows this litigation to continue against Southdown despite the transfer of the landfill. Furthermore, the violations are still on-going today, over six years after this litigation was commenced, therefore, GEC's request for injunctive relief is still viable. However, even if it is assumed that Southdown's post-complaint transfer of the landfill does make GEC's request for injunctive relief moot, GEC's request for civil penalties, declaratory relief and attorneys' fees and costs are not moot. Dismissing this action on these grounds and thereby condoning Southdown's attempt to escape liability for its illegal discharges at the landfill by transferring the landfill over four years after the Complaint in this cask was filed would be contrary to the language and purpose of the Clean Water Act and its citizen suit provision. Consequently, Southdown's Motion for Summary Judgment must be denied.

Prepared and submitted by:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7 day of April, 1999 a true copy of the foregoing Response in Opposition to Motion of Defendant Southdown, Inc., for Summary Judgment was served by first-class U.S. mail on the following:

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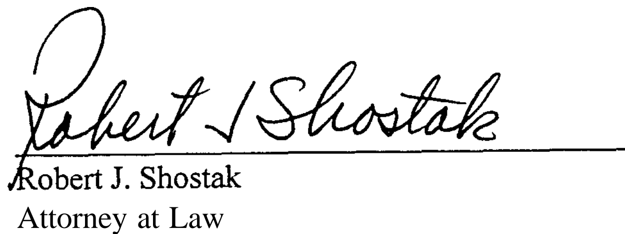

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