UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Ernest Brod, Robert DeMarco, Beverly Peterson and Residents Concerned about Omya Plaintiffs,	:	
v.	:	File No. 2:05-CV-182
Omya, Inc., and Omya Industries, Inc. Defendants.	:	

OPINION & ORDER
(Documents 23, 34, 37)

Plaintiffs Ernest Brod, Robert DeMarco, Beverly Peterson and the association Residents Concerned about Omya (collectively as "RCO") have filed this citizen suit against Omya, Inc. and Omya Industries, Inc. (collectively as "Omya") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972(a)(1)(A) and (B). RCO alleges that Omya is violating RCRA's prohibition on open dumping, and creating an imminent and substantial endangerment to health or the environment. The case is currently before this Court on Omya's motion to dismiss Count I for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and failure to state a claim under Fed. R. Civ. P. 12(b)(6), and

Omya's motion for summary judgment on both Counts. RCO has also filed a motion for partial summary judgment on Count I.

For the following reasons, Omya's motion to dismiss is DENIED and motion for summary judgment is DENIED. RCO's motion for partial summary judgment is also DENIED.

BACKGROUND

For the purposes of the pending motions, the following facts are undisputed.[1]

Omya's Business

Omya is a wholly owned subsidiary of Omya Industries, Inc., a Vermont corporation. Omya Industries, Inc. is a wholly owned subsidiary of Omya, AG, a privately held Swiss corporation. (Doc. 25-1, ¶ 1). Since 1979, Omya has operated a 385 acre calcium carbonate processing facility in Florence, Town of Pittsford, Rutland County, Vermont, known as the Verpol Plant or Florence Facility. ("Facility" or "Plant") (Doc. 25-1, ¶¶ 2, 3). Calcium carbonate is used in a variety of products including paper, paint, plastic, food, and pharmaceuticals. (Doc. 1, ¶ 14).

[1]At the motion hearing on May 16, 2006, the parties acknowledged that each of their Statements of Undisputed Facts had not been contested.

Calcium Carbonate Processing

Omya produces calcium carbonate by grinding marble ore and processing it to remove impurities. (Doc. 25-1, ¶ 4; Doc. 1, ¶ 40). The impurities, and any chemicals used to remove them or otherwise added during processing, are sent to settling ponds. (Doc. 25-1, ¶ 5; Doc. 1, ¶ 40, 41; Doc. 35, ¶ 37). These settling ponds are used to reclaim process water prior to disposal. (Doc. 35, ¶ 37). Omya has a National Pollutant Discharge Elimination System ("NPDES")[2] permit to discharge such process water under certain conditions. (Doc. 35, ¶ 37). The settled material, referred to as "tailings," is then removed from the settling ponds and placed in open, unlined, former rock quarries, referred to as Tailings Management Areas ("TMA"). (Doc. 25-1, ¶ 5; Doc. 1, ¶ 40, 41). The tailings placed in the quarries is in direct contact with fractured bedrock, allowing for the release of contaminants into groundwater flowing through the bedrock. (Doc. 25-1, ¶ 8).

[2]The Clean Water Act "prohibits the discharge of a pollutant by any person from any point source to navigable waters except when authorized by a permit issued under the [NPDES]." Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 491 (2d Cir. 2005)(citing 33 U.S.C. §§ 1311(a), 1342). "NPDES permits are issued either by the EPA, itself, or by the states in a federally approved permitting system." Id. (citing 33 U.S.C. § 1342).

According to Omya's estimates, the Facility produces approximately 150,000 tons of tailings every year. (Doc. 25-1, ¶ 6). Chemicals found in the tailings include: Tall Oil hydroxyethyl imidazoline ("TOHI"), ortho phenyl phenol, stearic acid, acetone, isopropyl alcohol, methyl isothiocyanate, methylamine, barium and toluene. (Doc. 25-1, ¶ 7). Some of these chemicals have been detected in the groundwater at the Facility, including TOHI, acetone, ortho phenyl phenol and toluene. (Doc. 25-1, ¶ 9; Doc. 1, ¶ 48).

Groundwater Testing

Omya uses a variety of methods to test for chemical constituents in the groundwater. (Doc. 35, ¶ 19). Omya uses the AG24 method to test for TOHI, and a number of EPA approved methods, including the 8260, 8270, 8015, 8032 and other methods, to test for chemical constituents other than TOHI. (Doc. 35, ¶ 19). Over the last three years, Omya regularly has sampled and tested groundwater for contaminants associated with the tailings product at seven locations outside the Facility perimeter using the AG24, 8260, 8270, 8015, 8032 methods. (Doc. 35, ¶ 25). The results from these tests show that none of the

chemical constituents associated with the tailings product are present in the groundwater outside the Facility at levels that exceed applicable standards.[3] (Doc. 35, ¶ 26).

Local Impact

The bedrock groundwater formations at the Plant site are interconnected and discharge to surface water at various locations across the Plant site. (Doc. 25-1, ¶ 10). The principal surface water in the vicinity of the Plant is Otter Creek, a tributary of Lake Champlain. (Doc. 25-1, ¶ 11). Two tributaries to Otter Creek collect groundwater discharge from the Plant site and "may receive discharge from the settling pond/quarry flow process." (Doc. 25-1, ¶ 11).

Many of the residents of Florence and the town of Pittsford rely on the Pittsford-Florence public water system, consisting of two gravel wells, both of which are supplied by a gravel aquifer that is recharged by Otter Creek. (Doc. 25-1, ¶ 12). Some members of RCO use the Pittsford-Florence public water supply for all of their

[3]According to the testing summary, the applicable standards are set by the Vermont Water Supply Rules, Groundwater Enforcement Standards, EPA Drinking Water Standards, and/or Vermont Drinking Water Standards, depending on the compound in question. (Doc. 72, Exhibit B).

household needs. (Doc. 25-1, ¶ 13). Plaintiffs and RCO members Brod, DeMarco and Peterson live within 300 feet of the Facility. (Doc. 25-1, ¶¶ 14, 15, 16). RCO member Susan Shaw lives on Smith Pond, approximately one-quarter mile from the Facility. (Doc. 25-1, ¶ 17). Plaintiffs are concerned about the public health and environmental effects of Omya's disposal of its chemically contaminated mining waste at the Facility. (Doc. 25-1, ¶ 18). Plaintiffs are particularly concerned that chemicals from Omya's waste may be leaching into the groundwater and contaminate the public water supply, nearby streams, Smith Pond and Otter Creek, as well as private wells and springs. (Doc. 25-1, ¶ 19). Plaintiffs are also concerned about Omya's growing waste piles and the impacts they may have on the aesthetics and acoustics of the valley, the enjoyment of their property, and the value of their homes. (Doc. 25-1, ¶ 20).

State Certification Process

The Vermont Solid Waste Management Rules ("SWMR"), adopted by the Vermont Agency of Natural Resources[4]

[4]The agency of natural resources is an executive agency consisting of: (1) the department of fish and wildlife, (2) the department of forests, parks and recreation, (3) the board of forests, parks and recreation, (4) the department of environmental conservation, (5) the state natural resources conservation council, and (6) division of geology and mineral resources. Vt. Stat. Ann.

("VANR") under the authority of Vt. Stat. Ann. tit. 10, chapter 159, "establish procedures and standards to protect public health and the environment by ensuring the safe, proper and sustainable management of solid waste in Vermont." 12-036-003 Vt. Code R. § 6102. The SWMR outline the process a solid waste management facility must follow to be certified by VANR and also set forth the standards VANR employs in making certification determinations. (Doc. 1-1, ¶¶ 25, 29).

In 2002, as part of an effort to obtain Act 250 approval for the impoundment of an additional 40 million cubic-feet of mine waste, Omya requested a determination from the Vermont Department of Environmental Conservation[5] ("VDEC") that the tailings "remain exempt" from state solid waste regulation. (Doc. 25-1 at ¶ 21). On September 30, 2002, the VDEC issued an initial determination that the tailings remained exempt. (Doc. 35, ¶ 1).

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tit. 3, § 2802.

[5]"The department of environmental conservation is created within the agency of natural resources. The department . . . shall administer the water resources programs contained in Title 10; air pollution control and abatement as provided in chapter 23 of Title 10; waste disposal as provided in chapter 159 of Title 10; and subdivision and trailer and tent sites as provided in subsection (c) of this section." Vt. Stat. Ann. tit. 3, § 2873(a).

In December 2002, two months after the initial determination, two individuals requested that VANR reconsider the initial determination. (Doc. 35, ¶ 2). In connection with this reconsideration, Omya submitted extensive evidence in support of its contention that the tailings product was an earth material exempt from regulation under the SWMR. A significant part of that evidence consisted of AG24, 8260, 8270, 8015, and 8032 method test results. All of the tests performed indicated that there was no contamination of groundwater outside the facility. (Doc. 35, ¶ 20). In materials submitted to the VDEC, Plaintiffs' witness challenged the validity of the AG24 method, contending it had not been independently validated and could not be relied upon. (Doc. 35, ¶ 21). After reconsideration, the VDEC issued a preliminary determination in October 2003 restating that the tailings were exempt. (Doc. 35, ¶ 3).

On November 21, 2003, the VDEC reversed its position and ruled that Omya's mining waste was "solid waste" within the Vermont Solid Waste Management Act, Vt. Stat. Ann. tit. 10, § 6602(2), that the "additives within Omya's tailing may pose a threat to human health or

safety, the environment or create a nuisance," and therefore that Omya's waste disposal is subject to the state's solid waste rules. (Doc. 25-1, ¶ 22; Doc. 35, ¶ 4). The VDEC found that "Omya is placing the tailings in quarries that are no longer operational, grading the material, covering the tailings with sediment and then planting vegetation to control erosion" such that the tailings are discarded with the meaning of Vt. Stat. Ann. tit. 10, § 6602(a). (Doc. 25-1, ¶ 23). The VDEC ruled that speculative future reuse of the tailings material by Omya does not constitute "reuse" and does not prohibit the VDEC from reaching the conclusion that Omya "has in fact discarded its tailings." (Doc. 25-1, ¶ 24).

In December 2003, Omya requested that VANR reconsider the November 2003 determination. (Doc. 35, ¶ 5). On February 3, 2004, VANR directed the VDEC to reconsider the November 2003 determination and issue a final determination. (Doc. 35, ¶ 6). The VDEC adopted procedures for this reconsideration on January 5, 2005. (Doc. 35, ¶ 7). These procedures did not include an opportunity for the parties to examine or cross examine witnesses. (Doc. 35, ¶ 7). On January 18, 2005, Omya

voiced its opposition to the procedure the VDEC adopted. (Doc. 35, ¶ 8). The parties made only written submissions; there was no formal hearing and no oral testimony. (Doc. 35, ¶¶ 7, 9).

The VDEC issued a final determination on April 29, 2005. (Doc. 35, ¶ 10). According to this ruling, Omya's tailings are earth materials, but the groundwater contains TOHI and acetone at levels above groundwater enforcement standards, suggesting that "Tall Oil and acetone . . . may pose a threat to the public safety and health and the environment." (Doc. 25-1, ¶ 25, 27; Doc. 35, ¶ 10). The VDEC noted that "[i]t is estimated that over a twenty year span approximately 40 million cubic feet of tailings material containing thousands of tons of TOHI will be placed in the tailings facility." (Doc. 25-1, ¶ 27). Therefore, the VDEC decided that the Facility must be certified. (Doc. 25-1, ¶ 25, 26; Doc. 35, ¶ 10, 12). The Final Determination also concluded that "[t]he AG24 method is not an accepted laboratory method and has been criticized by technical reviews for a number of reasons." (Doc. 35, ¶ 22).

On June 20, 2005, the VDEC informed Omya that:

> The Department is amenable, under the circumstances presented, to granting Omya a limited period of time to prepare an application for certification . . . The Commissioner reserves the right to seek enforcement if the Commissioner discovers any new information that requires that immediate action be taken, determines that Omya is not working in good faith with the Department to apply for certification, determines that Omya has not complied with the terms of this letter, or upon any other reasonable basis. The Department is aware that Omya has ongoing management of waste tailings taking place at the Florence facility. Omya shall immediately confine its waste management operations to the Dolomite Quarry, the Kane and Drake Quarry, and the Settling Cells.

(Doc. 25-1, ¶ 12). This letter also included the condition that Omya arrange for independent validation of the AG24 method. (Doc. 35, ¶ 23).

On August 11, 2005, Gerald DiVincenzo, Director of the VDEC LaRosa Laboratory, recommended that, for water samples, the DEC accept analytical data generated using Method AG24. (Doc. 35, ¶ 24).

On August 15, 2005, Omya timely submitted to VDEC an application for solid waste disposal certification. (Doc. 35 at ¶ 13). The proposed revisions of the Vermont's SWMR eliminated the earth materials exemption. (Doc. 35, ¶ 35). Also, the Vermont Legislature amended

Vt. Stat. Ann. tit. 32, § 5953 to require that any certification issued to Omya include a condition that Omya finance and complete a study of the effects of its processing on human health and the environment. (Doc. 35, ¶ 11).

On November 12, 2004, Plaintiffs served a notice of violation on the Administrator of the United States Environmental Protection Agency ("EPA"), the Regional Administrator of EPA Region 1, VANR, and Omya, pursuant to 42 U.S.C. § 6972(b)(2)(A). (Doc. 25-1, ¶ 28). When neither the EPA nor VANR commenced a civil or criminal action against Omya within 90 days, Plaintiffs filed this action on June 24, 2005. (Doc. 25-1, ¶¶ 29, 30).

On October 11, 2005, the VDEC deemed Omya's certification application administratively complete, (Doc. 35, ¶ 15), and is now conducting its technical review of the application. (Doc. 35, ¶ 16). Omya has a VDEC air pollution control permit for the Facility. (Doc. 35, ¶ 39). This permit covers airborne emissions and particulate matter, including silica. (Doc. 35, ¶¶ 40, 41). The Act 250 proceeding and review of Omya's application to construct an engineered and enlarged

Tailings Management Area ("TMA") has been suspended pending resolution of the Facility's compliance with the SWMR. (Doc. 35, ¶ 41). No Act 250 permit amendment has been issued for the construction of the TMA. (Doc. 35, ¶ 42). Omya plans to continue to manage its tailings product and dispose of its tailings product in existing on-Facility quarry areas rather than construct the TMA as proposed in the Act 250 amendment application. (Doc. 35, ¶ 43).

DISCUSSION

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996). "Chief responsibility for the implementation and enforcement of RCRA rests with the Administrator of the [EPA], but like other environmental laws, RCRA contains a citizen suit provision, § 6972, which permits private citizens to enforce its provisions in some circumstances." Id. at 483-84. Section 6972(a)(1)(A) provides that "any person may commence a civil action . . . 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." 42 U.S.C. § 6972(a)(1)(A). RCO has brought a claim under this section alleging that Omya is violating the prohibition on open dumping ("Count I").

Alternatively, a citizen suit is available under Section 6972(a)(1)(B) against, "any 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 or substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). RCO has also brought a claim under this section alleging that the solid waste from the Florence Facility may present an imminent and substantial endangerment to health or the environment ("Count II").

I. Omya's Motion to Dismiss Count I

Omya argues that RCO's open dumping claim should be dismissed because this Court lacks subject matter jurisdiction and RCO has failed to state a claim.

A. Subject Matter Jurisdiction

A Rule 12(b)(1) motion can challenge the subject matter jurisdiction of the court either by (1) contesting the sufficiency of the complaint on its face, or (2) disputing the factual allegations. Hayden v. N.Y. Stock Exch., Inc., 4 F. Supp. 2d 335, 337 (S.D.N.Y. 1998). Generally, on a Rule 12(b)(1) motion the Court reads the plaintiff's complaint with generosity and accepts the allegations as true. Hinesburg Sand & Gravel Co., Inc. v. Chittenden Solid Waste Dist., 959 F. Supp. 652, 656 (D. Vt. 1997) (citing Atl. Mut. Ins. Co. v. Balfour Maclaine Intern., 968 F.2d 196, 198 (2d Cir. 1992)). However, when the jurisdictional facts are disputed, the court "may engage in fact-finding," Fisher v. F.B.I., 94 F. Supp. 2d 213, 216 (D. Conn. 2000), and look to evidence outside the pleadings. Filetech S.A. v. Fr. Telecom S.A., 157 F.3d 922, 932 (2d Cir. 1998). The burden of proof is on the party asserting jurisdiction. Linardos v. Fortuna, 157 F.3d 945, 947 (2d Cir. 1998).

Omya argues that this Court lacks subject matter jurisdiction over RCO's open dumping claim because RCO cannot enforce state solid waste regulations in a RCRA

citizen suit. RCO counters that its open dumping claim is premised solely on federal law.

As noted above, RCRA provides that "any person may commence a civil action . . . 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." 42 U.S.C. § 6972(a)(1)(A). Accordingly, RCO has alleged that Omya is violating RCRA's prohibition on open dumping, 42 U.S.C. § 6945(a). However, RCO's claim also states that Omya's disposal practices violate Vt. Stat. Ann. tit. 10, § 6605(a)(1), which prohibits the operation of a solid waste management facility without a permit. RCO claims that the relevance of state law to the open dumping claim is limited to showing that Omya does not qualify as a sanitary landfill because it does not have a state permit.

Relying on Dague v. City of Burlington, 732 F. Supp. 458, 465 (D. Vt. 1989), aff'd, 935 F.2d 1343 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992), Omya argues that violations of state solid waste regulations are not actionable in a RCRA citizen suit in

federal court. In Dague, this Court noted that:

> a plaintiff seeking to challenge the operation of a hazardous waste site in an EPA authorized state may bring an action under state law, not federal law, or may seek revocation of the EPA's authorization; a direct action to enforce the RCRA permit requirement under § 6925(a) is not available.

However, this Court's opinion in Dague does not directly address the issue in this case. First, this Court's holding does not prohibit a citizen suit under § 6972(a)(1)(A) based on state law violations. Rather, it prohibits a RCRA citizen suit in federal court based on federal law violations when there is an EPA approved state hazardous waste program that supersedes the federal law. This Court did not, and did not have to, consider whether a plaintiff could bring a RCRA citizen suit based on the superseding state law. Moreover, although the Second Circuit affirmed this Court's Dague decision, that question was not at issue in the appeal. Dague, 935 F.2d 1343 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992).

Omya also relies on Thompson v. Thomas, 680 F. Supp. 1, 3 (D.D.C. 1987), which held that alleged violations of the EPA-approved Wisconsin hazardous waste program

"should be brought in the Wisconsin state court pursuant to Wisconsin law." However, other courts have disagreed with Thompson. For example, in Lutz v. Chromatex, Inc., 725 F. Supp. 258, 260-261 (M.D. Pa. 1989), the court relied on Thompson to dismiss the plaintiff's RCRA claims that were based on violations of federal regulations. However, the court declined to decide whether the same claim based on the state approved program would survive. The plaintiffs then amended the complaint to allege violations of the EPA-approved state program. The court looked to the language of § 6926(b) and § 6972(a)(1)(A) and decided that because the state approved program operated "in lieu" of the federal program it had "become effective" under RCRA, § 6972(a)(1)(A). Therefore, the court concluded that violations of the state approved program were enforceable in a RCRA citizen suit in federal court. Courts in several districts have preferred the Lutz decision and its reasoning over Thompson. See e.g. Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029, 1040 (E.D. Texas 1995); Acme Printing Ink Co. v. Menard, Inc., 881 F. Supp. 1237, 1244 (E.D. Wisconsin 1995); Murray v. Bath Iron Works Corp.,

867 F. Supp. 33, 43 (D. Maine 1994); Sierra Club v. Chem. Handling Corp., 824 F. Supp. 195, 197-198 (D. Colo. 1993). Unlike the Dague and Thompson decisions, the Lutz line of cases squarely and convincingly addresses whether violations of a state approved hazardous waste program can be enforced in a RCRA citizen suit.

Despite the fact that this Court finds the Lutz reasoning more convincing, the problem with following any of these cases is that they all deal with hazardous waste regulations. This case is a SOLID WASTE case. The RCRA solid waste regulations are not identical to the hazardous waste regulations. The logic underlying the Lutz conclusion relies on the language of the hazardous waste regulations whereby the state program operates "in lieu" of the federal program. Neither this language, nor similar language, appears in the RCRA solid waste regulations. Therefore, none of the hazardous waste cases discussed above is helpful in deciding the question before this Court.

It appears that only the Ninth Circuit has squarely addressed the question whether violations of an EPA-approved state solid waste program can be enforced in a

RCRA citizen suit. In Ashoff v. City of Ukiah, 130 F.3d 409 (9th Cir. 1997), the court explicitly rejected the argument that a RCRA citizen suit is not available once the EPA approves the state program. The court focused on the language of 6972(a)(1)(A) and reasoned that "if state standards 'become effective pursuant to' RCRA, a citizen can sue in federal court to enforce the standard." Id. at 411. Accordingly, the court concluded that because "the federal criteria give the state standards legal effect under federal law", a RCRA citizen suit is available to enforce state approved programs based on these minimum federal criteria. Id. at 411-12. The court went further, however, and decided that once the state standards exceed the federal minimum criteria created under RCRA, a citizen suit is no longer available because those more stringent standards are not "effective" under RCRA. Id. at 412. In other words, "When a state elects to create more stringent standards, nothing in RCRA gives them legal effect. Their legal effect flows from state law." Id.; see also Covington v. Jefferson County, 358 F.3d 626, 644 (9th Cir. 2004).

Notwithstanding the foregoing, this Court need not

endeavor to compare the state and federal standards because RCO has not made a claim that Omya is violating state permitting regulations. The Court does not need to read RCO's complaint generously to find that it has alleged an open dumping claim under 42 U.S.C. § 6945(a). Despite the reference in Count I that Omya lacks state sanitary landfill certification, RCO's first claim is labeled an open dumping claim and explicitly refers to the prohibition in § 6945(a). Omya has not argued that RCO cannot advance an open dumping claim when there is an EPA-approved state solid or hazardous waste plan. (Doc. 38 at 7). In fact, other courts have found exactly the opposite. Ashoff, 130 F.3d at 411 n.3; Covington, 358 F.3d at 642; Cf. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1012 (11th Cir. 2004); Long Island SoundKeeper Fund, Inc. v. N.Y. Athletic Club of the City of N.Y., 94 Civ. 0436, 1996 U.S. Dist. LEXIS 3383 at *28 (S.D.N.Y. March 22, 1996); Orange Env't, Inc. v. Orange County, 860 F. Supp. 1003, 1022 (S.D.N.Y. 1994). Therefore, pursuant to §§ 6972(a)(1)(A) and 6945(a) of RCRA, this Court has subject matter jurisdiction over RCO's open dumping claim.

B. Failure to State a Claim

On a motion to dismiss under Rule 12(b)(6), the Court must read the plaintiff's complaint with generosity. See King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999). Taking the allegations in the complaint as true, the court must construe the complaint in the light most favorable to the plaintiff, and draw all inferences in plaintiff's favor. Bolt Elec., Inc. v. City of New York, 53 F.3d 465, 469 (2d Cir. 1995). The complaint must not be dismissed unless "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. (quoting Walker v. City of New York, 974 F.2d 293, 298 (2d Cir. 1992)). Indeed, there is an important difference between "disposing of a case on a 12(b)(6) motion and resolving the case later in the proceedings, for example by summary judgment. Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998). "The issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims." Id. (citations and internal quotation marks omitted).

Omya contends that RCO has failed to state a claim because it has not alleged a violation of the RCRA regulations, 40 C.F.R. §§ 257.1-.4 ("Open Dump Criteria").

Open Dump Criteria

According to RCRA, "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes open dumping of solid waste or hazardous waste is prohibited." 42 U.S.C. § 6945(a). The EPA Administrator is responsible for developing and publishing guidelines that "provide minimum criteria to be used by the States to define those solid waste management practices which constitute the open dumping of solid waste or hazardous waste and are to be prohibited under Subtitle (D) of this Act [42 U.S.C. § 6941 et seq.]." 42 U.S.C. § 6907(a)(3). These guidelines are found at 40 C.F.R. Part 257.

Additionally, under RCRA an open dump is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 4004 [42 U.S.C. § 6944] and which is not a facility for the disposal of hazardous

waste." 42 U.S.C. § 6903(14). Accordingly, a sanitary landfill is defined as "a facility for the disposal of solid waste which meets the criteria published under section 4004 [42 U.S.C. § 6944]." 42 U.S.C. § 6903(26). Section 6944 of RCRA requires the Administrator to

> promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this Act [42 U.S.C. § 6901 et seq.]. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.

42 U.S.C. § 6944(a). These criteria are also found at 40 C.F.R. Part 257.

In Part 257, the criteria listed in §§ 257.1 - .4 "are adopted for determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment under sections 1008(a)(3) [42 U.S.C. § 6907(a)(3)] and 4004(a) [42 U.S.C. § 6944(a)] of [RCRA]." 40 C.F.R. § 257.1(a). Accordingly, "Facilities failing to satisfy . . . the criteria in §§ 257.1 through 257.4 . . . are considered open dumps, which are prohibited under section 4005 [42

U.S.C. § 6945] of the Act." 40 C.F.R. § 257.1(a)(1). Therefore, an open dump is defined in these regulations as "a facility for the disposal of solid waste which does not comply with this part," while a sanitary landfill is "a facility for the disposal of solid waste which complies with this part." 40 C.F.R. § 257.2.

Omya argues that pursuant to this statutory and regulatory scheme, RCO has failed to state a claim because it has not alleged any violations of the Open Dump Criteria. RCO argues that it does not need to allege or prove a violation of the criteria. RCO argues that it has sufficiently alleged that Omya violates § 6944 because there is a "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility."

Without deciding whether a plaintiff must explicitly allege a violation of the Open Dump Criteria to maintain a RCRA open dump claim, this Court is persuaded that RCO has sufficiently alleged that Omya's disposal practices violate the RCRA open dump prohibition.

One of the open dump criteria found under Part 257 specifically deals with groundwater. The regulation

requires that "a facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary." 40 C.F.R. § 257.3-4. First, RCO recognizes in its complaint that Part 257 regulations set out the minimum criteria for open dumping. (Doc. 1 at ¶ 22). Then RCO alleges that "Chemical leachate" from Omya's mining waste has been detected in the groundwater. (Id. at ¶¶ 48, 49, 52). Reading the complaint generously, RCO has alleged that Omya is violating the open dump prohibition of RCRA by contaminating the groundwater. This Court is persuaded that these allegations are sufficient to state a claim because they create a set of facts which, if proven, would entitle RCO to relief under RCRA.

II. RCO's Motion for Partial Summary Judgment - Count I

RCO has moved for partial summary judgment on Count I arguing that the undisputed facts establish a violation of the open dumping statute.[6]

[6] Omya has not challenged plaintiffs' contention that they have standing. Based on these unchallenged contentions, this Court is persuaded that the plaintiffs have standing to advance their claims. The named individual plaintiffs have standing if each (1) has suffered a concrete and particularized, and actual or imminent (not conjectural or hypothetical) injury in fact, (2) that is traceable to the defendant's challenged conduct, and (3) that is likely to be redressed by a favorable decision by the court. Bldg. and Constr. Trades Council v. Downtown Dev., Inc., No. 04-4865-CV, 2006 WL 1211166 *3 (2d Cir. May 5, 2006). The named plaintiffs have submitted affidavits stating (1) concerns and uncertainty about the effect of Omya's

A. Standard of Review

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), or "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 97 (2d Cir. 2000) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). "A fact is 'material' if it 'might affect the outcome of the suit under the governing law.'" O'Hara v. Weeks Marine, Inc., 294 F.3d 55, 61 (2d Cir. 2002) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" where "the evidence is such that a

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disposal practices on their health, the environment the use and enjoyment of their property, and their recreational and aesthetic interests, see N.Y. Public Interest Research Group v. Whitman, 321 F.3d 316, 325-26 (2d Cir. 2003), based on (2) discoloration in the water at discharge points from the facility and the presence of contaminants in the groundwater monitoring wells, see Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 257 (3d Cir. 2005). Certainly the plaintiffs claimed injuries based on Omya's handling of its waste allegedly in violation of RCRA would be ameliorated by requiring compliance with RCRA. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185-86 (2000). RCO as an association has standing if (1) its members would have standing, (2) the interests in question are germane to the association's purpose, and (3) neither the claim nor the relief requires any individual members of the association to participate. Bldg. and Constr. Trades Council, 2006 WL 1211166 at *2. First, the named plaintiffs are members of RCO and have individual standing. Second, RCO was formed in 2002 to address concerns that Omya was not properly regulated. Lastly, the claim and relief do not depend on "individualized proof" because RCO is seeking declaratory and injunctive relief, not money damages. See Id. at *8.

reasonable jury could return a verdict for the nonmoving party." Id.

The moving party bears the initial burden of showing an absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once that burden is met, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). "When determining whether there is a genuine issue of fact to be tried, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought." Winter v. United States, 196 F.3d 339, 346 (2d Cir. 1999) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). As to any claim or essential element for which the non-moving party bears the burden of proof at trial, the non-moving party must make a showing sufficient to establish the existence of that claim or element. Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 (2d Cir. 1998) (citing Celotex, 477 U.S. at 324; DiCola v. SwissRe Holding, Inc., 996 F.2d 30, 32 (2d Cir. 1993)). "Credibility assessments, choices between conflicting

versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment." Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997).

B. Parker Test

In support of its motion, RCO relies on the four part test laid out by the Eleventh Circuit in Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004). RCO argues that Parker decided that the defendant operated an open dump because it did not have a state solid waste permit. RCO argues that this Court should apply the same reasoning to find that Omya is an open dump. However, RCO's analysis and claimed analogy to Parker are not convincing.

Parker decided that to establish open dumping, the plaintiff must prove: "(1) solid waste, (2) is disposed at [the site], (3) that [the site] does not qualify as a landfill under § 6944, and (4) that [the site] does not qualify as a facility for the disposal of hazardous waste." Id. at 1012. This test mimics the language of § 6945(a), RCRA's open dump prohibition. Applying this test, Parker first decided that the defendant, which was

operating a junk yard, "'disposed of' solid waste" as defined by RCRA. Id. at 1013. Moving on to the next element, the court noted, "[t]he defendants make no contention that the . . . facility was a sanitary landfill; thus, the only issue is whether [it] was a 'facility for the disposal of hazardous waste.'" Id. The court then reasoned that

> a facility for the disposal of hazardous waste must have a permit. In order to obtain such a permit, a facility for the disposal of hazardous waste must meet many specific criteria. Undisputedly, [the facility] did not satisfy these requirements and, therefore, it could not have been a 'facility for the disposal of hazardous waste.' Thus, because the defendants disposed of solid waste at the . . . facility and because the facility was not a sanitary landfill or a facility for the disposal of solid waste, [the facility] was an open dump.

Id. Despite what appears to be Parker's inadvertent use of "solid waste" instead of "a facility for the disposal of hazardous waste," this Court is not persuaded that this holding supports RCO's argument that Omya is an open dump simply because it does not have a state solid waste permit. RCO argues that the plaintiff in Parker alleged that the defendant violated RCRA's open dump prohibition because it did not have a solid waste handling permit.

RCO further argues that the court decided that the defendants were required to have a solid waste handling permit and therefore could not qualify as a sanitary landfill as required by the aforementioned test. These arguments are based on a selective reading of the case.

Parker actually made two different findings based on two different claims predicated on two different statutory requirements. As the court noted, "the plaintiffs alleged six independent violations of state and federal RCRA regulations, standards and prohibitions."[7] Id. at 1010. The alleged state violations were predicated on Georgia's Comprehensive Solid Waste Management Act ("SWMA"), Ga. Code Ann. §§ 12-8-20 through 12-8-59.2. The court found that the defendants discarded solid waste and therefore were required to have a state solid waste handling permit. Parker, 386 F.3d at 1012. The court then addressed the plaintiff's federal open dumping claim. The finding that the defendant violated the state SWMA permit requirements

[7]The defendants in Parker argued that the court did not have subject matter jurisdiction over a RCRA citizen suit "alleging a violation of state law that has become effective due to EPA approval under the RCRA." Parker, 386 F.3d at 1008. However, the court declined to decide that question because it decided that it had supplemental jurisdiction over the RCRA claims based on its jurisdiction over the Clean Water Act claims. Id.

was a separate finding that did not impact the subsequent finding that the defendant was operating an open dump. Moreover, as noted above, the court specifically stated that it did not address the sanitary landfill question because the defendant made no argument that it was a sanitary landfill. Therefore, Parker is simply inapposite as to whether Omya qualifies as an open dump or a sanitary landfill.

C. Open Dump Criteria

RCO's analysis also ignores the plain language of the statute and the Parker test, which both require that the defendant not qualify as a sanitary landfill under § 6944 in order to be an open dump. 42 U.S.C. § 6903(14); Parker, 386 F.3d at 1012. RCO argues that the standard created by § 6944 requires only that there is "no reasonable probability of adverse effects on health or the environment from disposal of solid waste." RCO argues that Omya does not meet this standard because the VDEC found that Omya "may pose a threat to human health and safety or to the environment." (Doc. 1-10 at 1). Accordingly, RCO argues that because Omya has been found to pose a threat RCO need not rely on or establish any

violation of the Open Dump Criteria. This Court is not persuaded by this argument.

RCO's statutory argument relies on the plain language of § 6944 to find that Omya is an open dump. However, this argument creates a hierarchy between statutes and regulations that is inappropriate in this case. A regulation can have the same force and effect as a statute. As the Supreme Court explained in a case that challenged regulations implementing the Tariff Act of 1930 adopted by Secretary of the Treasury:

> An administrative regulation, of course, is not a 'statute.' . . . Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of its command. . . . Once promulgated, these regulations, called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force.

United States v. Mersky, 361 U.S. 431, 437-38 (1960) (emphasis added); see also Batterton v. Francis, 432 U.S. 416, 425 (1977) ("Congress in § 407(a) expressly delegated to the Secretary the power to prescribe

standards for determining what constitutes 'unemployment' for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect."); Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471, 472-73 (1937) ("Section 3 requires the Interstate Commerce Commission, within a time fixed, to designate the number, dimensions, location and manner of application of the appliances provided for in the foregoing section. . . . The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute.").

In this case, § 6945 states: "Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste or hazardous waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited . . . ." 42 U.S.C. 6945(a).

> Congress thus did not in section [6945] define what specific practices constitute

> prohibited open dumping practices. The statutory prohibition in section [6945] references criteria to be promulgated by the EPA under section [6907]. Through section [6945], Congress explicitly delegated authority to the EPA to develop criteria for determining what will constitute open dumping practices prohibited by RCRA.

Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club of the City of N.Y., No. 94 Civ. 0436, 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996); Jones v. E.R. Snell Contractor, Inc., 333 F. Supp. 2d 1344, 1350 (N.D. Ga. 2004)("The Recovery Act itself does not spell out what amounts to an 'open dumping' violation, but instead leaves this to be determined by the Environmental Protection Agency."). To this end, the statute defines an open dump as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 4004 [42 USCS § 6944] and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14). "Thus, both the statutory prohibition on open dumps and dumping (§ 6945(a)) and the statutory definition (§ 6903(14)) define 'open dump' by reference to regulatory criteria promulgated by the [EPA]." South Road Assocs. v. IBM Corp., 216 F.3d 251, 256 (2d Cir.

2000).

Section 6944 also expressly delegates authority to the Administrator of the EPA to adopt criteria for classifying a sanitary landfill, and by contrast an open dump. Accordingly, the statute defines a sanitary landfill as "a facility for the disposal of solid waste which meets the criteria published under section 4004 [42 USCS § 6944]." 42 U.S.C. § 6903(26). Specifically, § 6944 states: "[T]he Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this Act." 42 U.S.C. § 6944(a). "In passing [this statute], Congress recognized that it was leaving a gap for the agency to fill and expressly directed the agency to promulgate regulations to fill that gap." Yankton Sioux Tribe v. U.S. E.P.A., 950 F. Supp. 1471, 1481 (D.S.D. 1996).

A proper delegation of authority by Congress requires that Congress provide the Administrator with "an intelligible principle" by which to create the criteria. Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So

long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (citation omitted)). The intelligible principle provided by Congress in § 6944 is that "at a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 U.S.C. § 6944(a). The EPA promulgated the Criteria for Classification of Solid Waste Disposal Facilities and Practices, 40 C.F.R. Part 257, on the authority of 42 U.S.C. §§ 6907(a)(3) and 6944(a). Id. The regulation states:

> Unless otherwise provided, the criteria in §§ 257.1 through 257.4 are adopted for determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment under sections [6907(a)(3)] and [6944(a)] . . . . (1) Facilities failing to satisfy either the criteria in §§ 257.1 through 257.4 or §§ 257.5 through 257.30 are considered open dumps, which are prohibited under section [6945] of the Act. (2) Practices failing to satisfy either the

> criteria in §§ 257.1 through 257.4 or §§ 257.5 through 257.30 constitute open dumping, which is prohibited under section [6945] of the Act.

40 C.F.R. § 257.1(a). These regulations define the criteria for identifying what is a sanitary landfill and what is an open dump. Under this statutory and regulatory scheme, as in Mersky, RCRA's prohibition on open dumping is not complete without the regulations that provide the defining characteristics of an open dump and a sanitary landfill. Hence, this Court is not persuaded that it is appropriate to limit the open dump analysis to the delegation language in § 6944 as RCO suggests.

Accordingly, RCO must establish that Omya has violated at least one of the Open Dump Criteria in order to prove that Omya is violating RCRA's prohibition on open dumping. At this point, RCO has neither alleged nor provided any evidence that Omya fails to meet any of the Open Dump Criteria. Therefore, RCO is not entitled to summary judgment on Count I.

D. Collateral Estoppel

In lieu of arguing that Omya has violated any of the Open Dump Criteria, RCO relies on the administrative decision of the VDEC to show that Omya has violated RCRA.

On April 29, 2005, the VDEC affirmed its earlier decision that Omya's tailings are "earth materials" as defined by the SWMR, but do not qualify for the earth materials exemption from certification because the tailings may pose a threat to public health and safety and the environment. (Doc. 1-10). RCO argues that Omya is collaterally estopped from challenging VDEC's findings in this Court, and therefore, VDEC's decision has preclusive effect on the issue of whether Omya's tailings pose a threat to health or the environment.

"[W]hen a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) (quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)). The Vermont Supreme Court has acknowledged that "an administrative judgment can have preclusive effect in a judicial proceeding." Trickett v. Ochs, 176 Vt. 89, 94 (2003). Hence, in this case, VDEC's decision

can have preclusive effect if (1) the agency acted in a judicial capacity, (2) the agency resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, (3) Omya was a party in the proceedings, (4) the issue raised is identical, (5) the issue was resolved by a final judgment on the merits, and (6) applying preclusion would be fair. Id. Moreover, Omya bears the burden of showing that the issue should be relitigated. In re Tariff Filing of Cent. Vt. Pub. Serv. Corp., 172 Vt. 14, 31 (2001).

The parties do not dispute that VDEC was acting in a judicial capacity, that the issue was properly before the agency, that Omya was a party to the prior proceedings or that VDEC's decision was a final judgment on the merits. Rather, Omya argues that it did not have a full and fair opportunity to litigate.

To decide whether a party had a full and fair opportunity to litigate, a court must review the circumstances of the particular case. Scott v. City of Newport, 177 Vt. 491, 495 (2004). The relevant factors for the court to consider include: (1) choice of forum, (2) incentive to litigate, (3) foreseeability of future

litigation, (4) legal standards and burdens, (5) procedural opportunities, and (6) the possibility of inconsistent determinations. In re Tariff, 172 Vt. at 31.

Omya argues that collateral estoppel is not appropriate in this case because it did not have an opportunity to conduct direct or cross examination of live witnesses, the agency did not follow any standards for admitting evidence, the legal standard and burden of proof differ, and it had little incentive to litigate the issue. RCO argues that Omya had ample opportunity to "flesh out" the issue by presenting evidence and argument to the agency over the course of multiple proceedings spanning several years.

By written stipulation with VDEC, Omya and RCO agreed, *inter alia*, that (1) they "have been afforded the opportunity to present evidence and argument before the secretary", (2) "the Omya declaratory ruling - limited review is governed by a set of guidelines set forth by the Commissioner[] . . . on May 20, 2004,"[8] (3) the Vermont Rules of Evidence and Civil Procedure apply to

[8]These guidelines have not been provided to the Court.

any issue not covered by VDEC's guidelines, and (4) VDEC reviewed "data and technical information" that "has been discussed, finalized and agreed to [by the parties] in the mediation process." (Doc. 53-2). Now the parties dispute the adequacy of these procedures.

Without delving into the disputed fairness of every step of the administrative process, evidence of which has not been fully provided, this Court finds nonetheless that it is not appropriate to give VDEC'S decision preclusive effect. First, for Count I the legal standards are not the same. As discussed above, RCO cannot establish an open dumping violation by showing only that Omya's waste presents a "reasonable probability of adverse effects on health or the environment." Moreover, even if this Court accepts the legal standard proposed by RCO, it is a stricter standard than that applied by VDEC. RCO would face a higher burden in this Court by having to show that Omya's waste presents a "reasonable probability of adverse effects" than VDEC established by finding that there is "a reasonable potential of a threat presented by the additives." (Doc. 1-10). See In re J.R., 164 Vt. 267, 270 (1995) ("Our

cases as far back as 1862 hold that verdicts resting on a lower burden of proof should not be conclusive in subsequent actions requiring a more stringent burden of proof."). Moreover, unlike VDEC which put the burden on Omya to prove that its waste is exempt from certification, (Doc. 1-10), in this Court the burden is on RCO to establish a RCRA violation.

With respect to Count II, there is arguably little difference between the applicable legal standards, however, there is a difference in who carries the burden. This factor is particularly compelling in light of Omya's incentive to litigate the issue with VDEC. An adverse ruling by VDEC on this issue would only require Omya to submit to having its waste regulated by permit. Although this process certainly involves certain financial costs and responsibilities, there is no immediate potential for liability for civil penalties. Moreover, the pending proposed amendments to the regulations included removing the permitting exemption on which Omya was relying. Under these circumstances, this Court is persuaded that it would not be fair to preclude Omya from relitigating whether its waste poses a threat to health or the

environment.

IV. Omya's Motion for Summary Judgment

A. Count I - Open Dumping

1. Paragraph 53

RCO has alleged that "chemically contaminated waste water has overflowed its settling cells and other storage basins and discharged into Smith Pond, which flows into Otter Creek, in violation of the Clean Water Act." (Doc. 1, ¶ 53). Omya argues that RCO cannot premise its open dumping claim on this allegation because it is a past violation. Omya also contends that this Court lacks subject matter jurisdiction over any claim based on this allegation because the RCRA definition of solid waste excludes certain permit violations.

RCRA's definition of solid waste explicitly excludes "industrial discharges which are point sources subject to permits under section 1342 of Title 33 . . . ." 42 U.S.C. § 6903(27). Section 1342 of Title 33 outlines permitting under NPDES. Omya argues that industrial discharges described in paragraph 53 were subject to its NPDES permit. RCO does not dispute this contention. In fact, paragraph 53 cites letters between Omya and the

Wastewater Management Division of the Vermont Agency of Natural Resources that confirm Omya violated its NPDES discharge permit on December 8, 1999 and March 4-21, 2000. (Doc. 1-10 thru 1-13). Because these discharges are not solid waste they are not actionable under RCRA and cannot be the basis for RCO's suit.

2. Open Dump Criteria

As discussed above, RCO must establish that Omya has violated one of the Open Dump Criteria in order to establish that Omya has violated RCRA's prohibition on open dumping. Because RCO has not provided any evidence on this issue to date, Omya argues that it is entitled to summary judgment.

According to the stipulated discovery order on record, the parties agreed to delay discovery until the pending motions were resolved. To date, the parties have only made initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1). Omya is correct that at summary judgment the non-moving party bears the burden of making "a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Berger v. United States, 87 F.3d 60, 65 (2d Cir. 1996)(changes

in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). However, "[t]he nonmoving party must have 'had the opportunity to discover information that is essential to his opposition' to the motion for summary judgment." Id. (quoting Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506, 511 (2d Cir. 1989)). In Berger, the district court granted summary judgment because the nonmoving party had not made sufficient showing on essential elements. The Second Circuit reversed the decision as premature because no discovery had taken place since the parties had agreed to a stay. This case is identical. Therefore, granting summary judgment for Omya on Count I at this point of the proceedings would be premature. There has been virtually no discovery to date and this ruling directly impacts the necessary elements of RCO's claim.

3. State Regulations

Omya argues that RCO's open dumping claim must fail because the Vermont solid waste regulations are not enforceable in a RCRA citizen suit since they are more stringent than the federal regulations.

As discussed above, this Court need not compare the

state and federal regulations because RCO is making a federal open dumping claim independent of state regulations.

B. Count II - Imminent and Substantial Endangerment

1. Paragraph 53

As discussed above, NPDES discharges do not qualify as solid waste and cannot be the basis for RCO's suit.

2. Imminent and Substantial Danger

Omya argues that it is entitled to summary judgment on Count II because RCO has failed to present any evidence to support its claim that Omya presents an imminent and substantial endangerment.

RCRA authorizes citizen suits against

> any 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 or substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). The Second Circuit has interpreted this language broadly and instructed that RCRA uses "expansive language, which is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any*

risk posed by toxic wastes." Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991)(internal quotes and citations omitted)(emphasis in original) rev'd in part on other grounds, 505 U.S. 557 (1992).

Accordingly, endangerment does not necessarily mean actual harm. It is enough to show that there exists a "threatened or potential harm." Id. at 1356. Additionally, although the harm envisioned by RCRA must be imminent, a plaintiff need not prove that the "harm will occur immediately so long as the risk of threatened harm is present." Id. Imminence can exist "at any point in a chain of events which may ultimately result in harm to the public." Id. In other words, finding imminence requires evaluating the "nature of the threat rather than . . . the time when the endangerment initially arose." Id. Despite this expansive reading, "[a]n imminent and substantial danger for purposes of a RCRA claim does not exist 'if the risk of harm is remote in time, speculative in nature, and de minimis in degree.'" Massone v. Reyna, No. 01 Civ. 9726, 2002 WL 31016643, *3 (S.D.N.Y. Sept. 10, 2002) (quoting Christie-Spencer Corp. v. Hausman Realty Co., 118 F. Supp. 2d 408, 420 (S.D.N.Y. 2000); Me.

People's Alliance v. Holtrachem Mfg. Co., LLC, 211 F. Supp. 2d 237, 247 (D. Me. 2002).

Omya asserts that RCO has only alleged certain fears and concerns without any evidence that there is actually any threatened harm. Omya also argues that RCO improperly relies on evidence from Omya's expert. RCO argues that it has presented sufficient undisputed evidence to support its claim that Omya's practices pose a risk to the groundwater in Florence.

Omya relies primarily on its expert reports that conclude that Omya's facility does not pose a risk to public health or the environment. RCO also relies on Omya's expert report. RCO argues that certain factual information from the report shows that Omya poses a potential threat. Omya argues that RCO has misconstrued the information from Omya's expert reports, and has not provided any evidence from its own experts. However, the facts presented by RCO are supported by the record even though Omya's expert reaches a different conclusion regarding the impact of those facts. Omya has not disputed RCO's statement of facts and RCO is not required "to present expert testimony to survive summary judgment

in a RCRA case." 87th St. Owners Corp. v. Carnegie Hill - 87th St. Corp., 251 F. Supp. 2d 1215, 1218 (S.D.N.Y. 2002). RCO has presented an alternative interpretation of the facts and it is for the fact finder to weigh the evidence.

RCO also relies on VDEC's conclusion that the additives in Omya's tailings "may pose a threat to human health and safety or to the environment." (Doc. 1-10 at 1). Specifically, VDEC found that "TOHI is present at levels of concern and potentially at levels that would result in contamination of groundwater above groundwater enforcement standards." (Id. at 5). VDEC also found that "existing groundwater on-site has had levels of acetone in excess of the Groundwater Enforcement Standard." (Id.) Although this Court has already found VDEC's decision does not bind this Court, the fact that VDEC was persuaded that Omya's tailings may pose a threat convinces this Court that a reasonable fact finder might interpret the evidence as RCO does. Accordingly, there is a genuine issue of material fact whether Omya poses an imminent and substantial endangerment. Therefore, summary judgment for the defendant on Count II is not

appropriate.

E. Mootness

Omya argues that RCO's claims are moot because Omya has voluntarily applied for certification from VDEC.

Typically, a defendant's voluntary cessation of the challenged conduct is not enough to moot a plaintiff's claims. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000). Rather, the defendant has the heavy burden of showing the court that "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Id. Accordingly, the Second Circuit recently found that a plaintiff's suit was not mooted by a letter from the defendant New York Department of Environmental Conservation "identifying both the actual changes made by the State as well as the changes it intended to make" that brought the challenged program into compliance. N.Y. Public Interest Research Group v. Whitman, 321 F.3d 316, 327 (2d Cir. 2003). The court reasoned that the letter was "indicative of a degree of good faith" but not enough to carry "the formidable burden of making absolutely clear that the problems

identified by [the plaintiffs] could not reasonably be expected to recur." Id. (internal quotation marks and citations omitted).

Omya argues that since the VDEC issued its final determination, Omya has applied for a permit that would regulate the management of its tailings at the facility. As in N.Y. Public Interest Research Group, Omya's compliance with state regulators is commendable, but as RCO points out, there is no guarantee that the permit will be granted or will fully address RCO's open dumping and imminent endangerment claims. Hence, this Court is not persuaded that it is absolutely clear that the alleged RCRA violations could not reasonably be expected to recur.

F. Aesthetics and Acoustics

Omya argues that allegations regarding the aesthetic and acoustic impacts of the Facility cannot support RCO's imminent and substantial endangerment claim because they are too speculative. As discussed above, an imminent and substantial endangerment claim can fail if the alleged harm is "remote in time, speculative in nature, and de minimis in degree." Massone, 2002 WL

31016643 at *3 (quoting Christie-Spencer Corp. v. Hausman Realty Co., 118 F. Supp. 2d 408, 420 (S.D.N.Y. 2000)); Me. People's Alliance, 211 F. Supp. 2d at 247. However, RCO has argued that the allegations regarding the aesthetic and acoustic impact of Omya's conduct simply support standing and are not the basis of its imminent and substantial endangerment claim. (Doc. 54 at 13, n.4). Moreover, the parties agreed in proceedings before this Court on January 13, 2006 that the statements by the named plaintiffs are only for the purposes of standing and will not be presented as evidence. Accordingly, at this time, this Court declines to address the issue whether any acoustic or aesthetic impacts of Omya's disposal practices are too speculative to support an imminent and substantial endangerment claim under RCRA.

CONCLUSION

For the reasons set forth above, Omya's motions to dismiss and for summary judgment are DENIED. RCO's motion for partial summary judgment is also DENIED.

Dated at Burlington, in the District of Vermont, this 22nd day of June, 2006.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge