

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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

OPINION AND ORDER

(Papers 139, 150, 153, & 181)

Plaintiffs Ernest Brod, Robert DeMarco, Beverly Peterson, and Residents Concerned about Omya, bring this action pursuant to 42 U.S.C. § 6972(a), for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq. Defendants Omya, Inc. and Omya Industries, Inc. ("Omya") operate a calcium carbonate production plant in Florence, Vermont. Plaintiffs allege that Omya has violated RCRA by practicing "open dumping" as defined by 42 U.S.C. § 6945(a) and "presenting an imminent and substantial endangerment to health or the environment" under 42 U.S.C. § 6972(a)(1)(B).

The case is currently before the Court on cross motions for summary judgment and Omya's motions to strike. For the reasons set forth below, Omya's motion for summary judgment on the open dumping claim is GRANTED, Plaintiffs' motion for summary judgment on the endangerment claim is GRANTED, and Omya's motions to strike are DENIED as moot.

I. Background

Since 1979 Omya has operated a calcium carbonate processing facility in Florence, Vermont, known as the Florence Facility. (Paper 139-3, ¶¶ 1-2). In processing raw ore at the facility, Omya uses chemicals to remove impurities. (Exh. Q, ¶ 3). After processing, the chemicals and the impurities ("tailings") are disposed of on-site in old marble quarries. (Paper 139-3, ¶¶ 9-10).

Plaintiffs are members of the community group Residents Concerned about Omya ("RCO"), some of the members use the Pittsford-Florence public water supply for their household needs. (Paper 25-1, ¶ 13). Plaintiffs and RCO members Brod, DeMarco, and Peterson live within 300 feet of the Florence Facility. (Id. at ¶¶ 14-16). Plaintiffs are concerned about the public health and environmental effects of Omya's on-site disposal. (Id. at ¶ 17). Plaintiffs

claim that the waste in the quarries contains arsenic and other harmful organic chemicals. Plaintiffs allege that these chemicals seep into the groundwater below the quarries, contaminating the groundwater and Plaintiffs' nearby properties.

Test wells below the Florence Facility have shown arsenic levels over 10 parts per billion ("ppb") in the groundwater. (Paper 190-3 at 51). Plaintiffs have produced expert testimony that the arsenic in the groundwater is due to arsenic seeping from Omya's waste. Omya has challenged Plaintiffs' experts' conclusions and offered alternative explanations for the presence of arsenic, such as farm runoff or natural sources.

Plaintiffs' experts have also concluded that organic chemicals from the waste have seeped into the groundwater. The experts have not identified these chemicals, and Omya's experts claim that there is not enough evidence to show that the chemicals came from the waste site.

In 2005 Omya sought solid waste disposal certification from the State for its disposal of the tailings in the quarries.¹ During the certification process, the Vermont

¹ For a full discussion of the certification process see the Court's prior opinion, Paper 83, 6-12.

Legislature passed a law requiring the certification to be conditioned on Omya financing and completing a study of the effects of its processing on human health and the environment. 32 V.S.A. § 5953. Omya then hired a consultant to conduct the study and produce a report. A preliminary report was released in October 2007 and the final report, entitled the Section 5 Report, was released on February 15, 2008. The Report found that the groundwater on site at the Florence Facility contained elevated levels of iron, manganese, arsenic, and aminoethylethanolamine (AEEA). The Report also found that spring water off-site had a small amount of AEEA and stearic acid, both of which came from the Florence Facility. However, the parties agree that the spring water is not used for drinking water. Tests of the drinking water wells around the Florence Facility did not find any contaminants from the processing at the Florence Facility. The Section 5 Report found no immediate danger to drinking water from Omya's operations; however, the Report recommended expanded monitoring and testing of the groundwater and springs in the area to ensure safety.

Plaintiffs move for summary judgment on the issue of Omya's liability under both 42 U.S.C. § 6945(a), RCRA's open

dumping prohibition, and 42 U.S.C. § 6972(a)(1)(B), for creating an imminent and substantial endangerment to human health and the environment. Omya moves for summary judgment on the open dumping count, arguing that the applicable open dumping limit for arsenic under RCRA is 50 ppb and that no test has detected arsenic at that level. Omya also moves to strike portions of the Plaintiffs' experts' affidavits, the preliminary version of the Section 5 Report and all affidavits based on the preliminary report.

II. Discussion

A. Summary Judgment Standard

Summary judgment should be granted only when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party has the initial burden of demonstrating that there is no genuine issue of material fact. See Marvel Characters, Inc. v. Simon, 310 F.3d 280, 286 (2d Cir. 2002); Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995) (stating that movant may meet burden by "point[ing] to an absence of evidence to support an essential element of the nonmoving party's claim."). Once

the movant satisfies this burden, the non-moving party must respond by setting forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In determining whether summary judgment is appropriate, a court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant."

Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 126 (2d Cir. 2004).

B. Open Dumping

Plaintiffs' first count against Omya alleges violations of the Environmental Protection Agency's ("EPA") open dumping regulations under 40 C.F.R. § 257.3-4(a). The EPA has established maximum levels of contaminants allowable for groundwater; open dumping liability results when a party exceeds the maximum level. The groundwater below Omya's disposal pits has recorded arsenic readings up to 24 ppb. Plaintiffs argue that the maximum allowable arsenic level is 10 ppb; Omya argues that 50 ppb is the maximum allowable level.

The EPA has promulgated criteria for which a citizen suit can be filed for open dumping under RCRA, 42 U.S.C. §

6972. See 40 C.F.R. § 257.1(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 4005 of the Act."). The EPA has found that disposal facilities that violate the open dumping criteria "pose a reasonable probability of adverse effects on health or the environment." 40 C.F.R. § 257.3. The open dumping criteria relating to groundwater reads: "A facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary...". 40 C.F.R. § 257.3-4(a). "Contaminate" is defined in the regulations as "introduc[ing] a substance that would cause ... [t]he concentration of that substance in the groundwater to exceed the maximum contaminant level specified in Appendix I." 40 C.F.R. § 257.3-4(c). Appendix I of § 257 lists the "Maximum Contaminant Levels (MCLs)" for arsenic to be .05 mg/l, which is approximately equivalent to 50 ppb.

Plaintiffs do not contest that 50 ppb is the stated maximum arsenic level. However, they argue that this level is outdated and the standard is actually a reference to the EPA's drinking water standard of 10 ppb located at 40 C.F.R.

§ 141.62.² Section 141.62 sets forth the maximum contaminant levels of inorganic compounds in community water systems and the listed arsenic level is 10 ppb. Plaintiffs base this assertion on the fact that the open dump criteria was developed by the EPA under the Safe Drinking Water Act, 42 U.S.C. § 300g-1 *et seq.*, and the open dumping criteria were originally drawn from the drinking water standards, which are found in the same Act. Plaintiffs' arguments are unavailing.

Plaintiffs submit that the term "Maximum Contaminant Level" found in Appendix I is a reference to the drinking water maximum contaminant level. The open dumping regulation, 40 C.F.R. § 257.3-4(c)(2)(i), explicitly references the table in Appendix I, and neither the regulation nor the Appendix mention the drinking water standard. There would be no purpose in having a table in Appendix I of the open dumping regulation if it were not a separate standard from the drinking water standard. Instead, the open dumping regulation would merely directly reference the drinking water standard.

² Section 141.62 sets forth the maximum contaminant levels of inorganic compounds in community water systems; the listed arsenic level is 0.010 mg/l (approximately 10 ppb).

Plaintiffs essentially argue that there can only be one allowable level of contaminants for all situations. The inclusion of a specific table unique to the open dumping regulations demonstrates that the EPA has decided that different situations can allow different levels of contaminants. While water fit for human consumption would require the most stringent levels, groundwater not used for human consumption, such as the water below Omya's site, need not be as restricted.

Plaintiffs further assert that Appendix I was intended to be updated with the drinking water standard, which was changed from 50 ppb of arsenic to 10 ppb, but it was overlooked. Plaintiffs argue that the values in Appendix I were originally derived from the drinking water standard and have been updated along with the drinking water standard in the past, and now the EPA intended to update the values in Appendix I but merely neglected to do so.

Even though Appendix I values mirrored the drinking water standard in the past, it does not necessarily follow that the EPA intended to do so now. Rulemaking is a strict process with procedures that must be followed. Even if the EPA intended to update the open dumping values, the EPA

would need to follow these procedures to change the regulation's language, including the values in Appendix I. See Riverkeeper, Inc. v. EPA, 475 F.3d 83, 117 (2d Cir. 2007) ("An agency may modify a regulation ... only through the process of notice and comment rulemaking"). Just as the Court cannot draw inferences from Congress's failure to act, the Court cannot draw an inference from the EPA's failure to change its regulations. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988) ("As a general matter, we are 'reluctant to draw inferences from Congress' failure to act.'").

Finally, Plaintiffs argue that because Appendix I was not updated with the drinking water standard there is ambiguity that must be interpreted in a more protective way to be consistent with the Safe Drinking Water Act's purposes. Plaintiffs submit that the drinking water standard was changed because the EPA found 10 ppb of arsenic harmful and therefore must have intended that dumping sites not contaminate above that level.

There is no ambiguity on the face of the open dumping regulation and the Court cannot create ambiguity by postulating that the EPA intended a result that is not

evinced by the regulation's language. Where there is no ambiguity, the Court cannot second-guess the meaning of a regulation, and therefore the values listed in Appendix I must control. While the Safe Drinking Water Act's main purpose may have been to make safe the nation's groundwater and the EPA may have found that arsenic over 10 ppb is dangerous, the purpose cannot override the plain language. The Court cannot presume that the EPA intended to set the same standard on groundwater not used for human consumption. We are left only with an unambiguous reference to a .05 mg/l standard currently listed in Appendix I.

Therefore, the arsenic standard under the open dumping regulations is as listed in Appendix I, .05 mg/l. No test has detected arsenic at that level anywhere in the area, and therefore the plaintiffs have not demonstrated that OMYA has violated the open dumping regulation.

C. Endangerment

Plaintiffs also move for summary judgment on the issue of liability under 42 U.S.C. § 6972(a)(1)(B). "Section 6972(a)(1)(B) authorizes citizens to sue an owner or operator of a disposal facility which has contributed or is contributing to the past or present 'disposal of any solid

or hazardous waste which may present an imminent and substantial endangerment to health or the environment.'”

Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). Courts are authorized “to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes.” Id. (citing United States v. Price, 688 F.2d 204, 213-214 (3d Cir. 1982)). The Second Circuit in Dague emphasized the statute’s broad boundaries by pointing to the use of “may” in the standard of liability and emphasizing the need to eliminate “any risk”. Id. at 1355-56. The statute “is not specifically limited to emergency-type situations.” Id. “A finding of ‘imminency’ does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: ‘An ‘imminent hazard’ may be declared at any point in a chain of events which may ultimately result in harm to the public.’” Id. at 1356 (citing Environmental Defense Fund v. EPA, 465 F.2d 528, 535 (D.C. Cir. 1972)). Also, there is no requirement of actual harm. Id.

Since the hearing on the motions, the parties have stipulated to the admissibility of the final Section 5

Report. Omya does not dispute the Report's findings, but argues that the Report shows that there is no threat to health or the environment.

The only chemical that the Report states is definitely from Omya's tailings and presents a potential hazard is AEEA. (Paper 190-2, 3-4, 8, 27, 51, 65). According to the Report, "AEEA is a potent cause of a specific and rare birth defect in laboratory rats and, at sufficiently high exposures, might cause such a defect in human fetuses as well." (Id. at 8). The birth defect is known as dissecting aortic aneurysms. (Id. at 4).

AEEA has been found in groundwater wells immediately downgrade of Omya's waste disposal areas. (Id. at 6-7). AEEA has also been detected in a spring near the site. (Id. at 28). The AEEA levels found have been lower than the Vermont drinking water guideline for AEEA of 20 ppb and AEEA has not been found in any water currently used as drinking water. (Id. at 6, 29). The Report concludes that the measured AEEA levels in the spring water are too small to threaten humans or wildlife. (Id. at 29). The Report suggests that Omya could recycle its tailing solids to reduce the AEEA level in the tailings slurry to reduce the

potential threat to drinking water. (Id. at 12). The Report also suggests that the spring should be tested regularly for AEEA. (Id. at 10). However, the Report does not believe remediation is necessary. (Id. at 8).

While the groundwater is not contaminated currently to an unsafe level, the uncontraverted evidence shows that there is at least some risk of harm to the environment and humans. While AEEA levels may currently be lower than a dangerous level, there are the risks that those levels will rise as operations continue or that the chemicals will spread to drinking water sources. This is evidenced by the Report's recommendation that further testing and monitoring be performed.

The Court is faced with a chemical seeping into the groundwater from Omya's tailings that studies have shown to cause birth defects in high enough concentrations. Because of the very low standard required for a finding of liability there is no genuine dispute that there is "any risk". Therefore, the Court finds that Omya has violated § 6972(a)(1)(B) by creating a risk to the environment and

human health.³

While liability is clear, the remedy is far from clear. The Court is tasked with delivering equitable relief, and it would be inappropriate to decide the appropriate relief without a further hearing.

D. Motions to Strike

The findings above in no way rely on the Plaintiffs' experts' affidavits or the preliminary Section 5 Report. Therefore, the motions to strike are moot and need not be addressed here.

³ While the Court's analysis of the risk presented here has focused on the presence of AEEA, the finding of "any risk" is reinforced by the possibility that Omya has introduced arsenic into the ground water, even if the levels are below those required for open dumping liability.

IV. Conclusion

For the reasons stated above the Court GRANTS Omya's motion for summary judgment on the open dumping count and GRANTS the Plaintiffs' motion for summary judgment on liability on the endangerment count. Omya's motions to strike are DENIED as moot. The Court will schedule a hearing to determine the appropriate relief.

Dated at Burlington, in the District of Vermont, this 1st day of July, 2008.

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