09-4551-cv

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United States Court of Appeals
FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS

Ernest Brod, Robert DeMarco, Beverly Peterson, Residents Concerned about Omya, an unincorporated association under Vermont law, on behalf of its members who are residents of Pittsford, Vermont living in close proximity to Defendants' Florence Facility,

Plaintiffs-Appellants,

v.

Omya, Inc., Omya Industries, Inc.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Vermont

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure (Fed. R. App. P.), the undersigned for Appellants Residents Concerned about Omya ("RCO"), Ernest Brod, Robert DeMarco, and Beverly Peterson certifies that Appellants are a group of individuals and an unincorporated organization of citizens. Therefore, Rule 26.1 does not apply.

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JURISDICTIONAL STATEMENT

This is an action for violations of the Resource Conservation and Recovery Act ("RCRA"), brought pursuant to 42 U.S.C. §§ 6945(a) and 6972(a)(1)(B). Subject matter jurisdiction is vested in the United States District Court for the District of Vermont pursuant to RCRA's citizen suit provision at 42 U.S.C. § 6972(a).

The District Court issued its decision and entered a final judgment on September 30, 2009. Appellants Ernest Brod, Robert DeMarco, Beverly Peterson, and Residents Concerned About Omya ("RCO") filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(A) on October 30, 2009. This Court has appellate jurisdiction under 28 U.S.C. § 1291, as the appeal is from a final judgment disposing of all claims by all parties.

STATEMENT OF THE ISSUES

1. Did the District Court err by granting, without explanation and in the face of countervailing authority, Omya's motion to dismiss alleging a failure by RCO to comply with the notice requirements of RCRA's citizen suit provision, 42 U.S.C. § 6972(b)(2)(A)?

2. Did the District Court apply an incorrect legal standard in holding that Omya's contamination of on-site groundwater above the current Safe Drinking Water Act Maximum Containment Level for arsenic (10 parts per billion) did not violate the Environmental Protection Agency's Open Dumping Criteria, 40 C.F.R. § 257?

3. Did the District Court apply an incorrect legal standard in holding that Omya's unauthorized disposal of contaminated industrial waste into open, unlined pits in direct contact with groundwater did not violate the statutory prohibition on the open dumping of solid waste, 42 U.S.C. § 6945?

4. Did the District Court apply an incorrect legal standard for determining an "imminent and substantial endangerment" under RCRA, 42 U.S.C. § 6972(a)(1)(B), by failing to consider evidence of arsenic contamination when vacating the District Court's own July 1, 2008 ruling on liability and by failing to address the threat to the "environment" posed by the contamination of

5. Did the District Court apply an incorrect legal standard by excluding evidence of arsenic contamination at the remedy trial where this evidence is directly relevant to establishing that Omya's waste disposal practices "present an imminent and substantial endangerment to health or the environment" under RCRA, 42 U.S.C. § 6972(a)(1)(B)?
6. Did the District Court err by ruling that the hearing was limited to evidence related to remedy and then vacating the court's prior liability ruling after allowing Omya to present evidence at the remedy hearing relating to liability without providing RCO with notice and an opportunity to respond?

STATEMENT OF THE CASE

1. NATURE OF THE CASE

Residents Concerned about Omya ("RCO") brought this citizen enforcement suit under 42 U.S.C. § 6972 against Appellees Omya, Inc. and Omya Industries, Inc. ("Omya"). RCO's claims are in response to Omya's improper waste disposal practices. (Joint Appendix ("JA") 88-89)[1]. Specifically, Omya's act of placing chemically contaminated industrial waste into unlined pits in direct contact with fractured bedrock, allowing for the release of contaminants into groundwater, qualifies as "open dumping" in violation of 42 U.S.C. § 6945(a) of the Resource Conservation and Recovery Act ("RCRA"). (JA 91-92). In addition, these waste disposal practices "may present an imminent and substantial endangerment to health or the environment" in violation of 42 U.S.C. § 6972(a)(1)(B) of RCRA. (JA 92).

2. COURSE OF PROCEEDINGS

On November 12, 2004, RCO sent a detailed notice of its intent to file a citizen enforcement suit to Omya, the United States Environmental Protection Agency ("EPA"), the Vermont Department of Environmental Conservation

[1] Pursuant to Local Rule 32.1(c), Special Appendix ("SP") contains orders, opinions, and judgments being appealed, and the Joint Appendix ("JA") contains other relevant parts of the record to which the parties wish to direct the Court's attention. Pursuant to Fed. R. App. P. 28(f), Appellants' Addendum ("AA") contains relevant statutes, regulations, etc.

("VDEC"), and the Vermont Agency of Natural Resources ("VANR") as required by the citizen suit provision of RCRA, 42 U.S.C. § 6972(b)(2)(A). (JA 59-63). In the notice, RCO clearly stated that Omya's practice of dumping contaminated waste into open, unlined pits constitutes "open dumping" in violation of 42 U.S.C. § 6945(a) and presents an "imminent and substantial endangerment to health or the environment" in violation of 42 U.S.C. § 6972(a)(1)(B). (JA 59). On June 24, 2005, well after the statutorily required ninety days following the Notice of Violation, RCO filed a complaint based upon the same claims described in the Notice in the United States District Court for the District of Vermont. (JA 45-57).

The first round of summary judgment motions occurred during the 2005 to 2006 time period. On June 22, 2006, the District Court ruled in favor of RCO and denied Omya's motion for summary judgment on RCO's imminent and substantial endangerment claim, reasoning that "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." (Special Appendix ("SA") 54). The District Court, however, ruled against RCO in its motion for partial summary judgment on the open dumping claim as alleged in the original complaint, holding that "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." (SA 42).

On April 9, 2007, in response to the District Court's ruling, and in light of newly obtained sampling evidence showing arsenic contamination in the groundwater, RCO filed an amended and supplemental complaint alleging that Omya has violated 40 C.F.R. § 257.3-4 of the Open Dumping Criteria, and thus, the open dumping prohibition in 42 U.S.C. § 6945(a). (JA 91-92).

The second round of summary judgment motions occurred during the 2007 to 2008 time period. On July 1, 2008, the District Court ruled against RCO and granted Omya's motion for partial summary judgment on RCO's open dumping claim. (SA 60). The District Court, however, granted RCO's motion for partial summary judgment on the imminent and substantial endangerment claim and found Omya liable under 42 U.S.C. § 6972(a)(1)(B). (SA 72-73). The District Court focused primarily on contamination by a chemical used by Omya called aminoethyl-ethanolamine ("AEEA") in its order, although noting that its "finding of 'any risk' is reinforced by the possibility that Omya has introduced arsenic into the ground water . . . ." (SA 73). The District Court concluded its analysis by stating, "[w]hile 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." (Id.)

After the District Court issued its liability decision, but before the court had scheduled a remedy hearing, Omya objected to the adequacy of RCO's Notice and

filed a motion to dismiss all claims pertaining to AEEA on July 28, 2008. Docket Entry ("Docket") 197. In addition, on October 8, 2008, Omya filed a motion to vacate the District Court's partial summary judgment regarding liability. Docket 204. The District Court declined to decide Omya's motions to dismiss and to vacate and instead ordered a hearing to determine the appropriate remedy for the violation of 42 U.S.C. § 6972(a)(1)(B). Docket 220.

At the March 23-25, 2009 evidentiary hearing, RCO presented testimony from three experts regarding the appropriate remedy for the violation found in the liability decision. (Transcript 1-161). During the trial, RCO sought to introduce evidence of arsenic contamination relevant to a determination of the remedy, but the District Court sustained Omya's objections to this testimony. (JA 237-239). In response, RCO filed an Offer of Proof for the excluded testimony. (JA 315-320). The District Court ultimately ruled that the testimony was immaterial because it had previously determined that RCO had not demonstrated that arsenic was present at the facility in sufficient quantities to violate the prohibition on open dumping under 42 U.S.C. § 6945. (SA 79). The District Court did not explain why a ruling on arsenic under the open dumping claim would be automatically applicable to RCO's imminent and substantial endangerment claim, given that the imminent and substantial endangerment standard set forth in 42 U.S.C. § 6972(a)(1)(B) is different than the open dumping standard in 42 U.S.C. § 6945.

Omya called two toxicologists, Dr. Michael Greenberg and Dr. Jeffrey Brent, who testified about the toxicity of AEEA. (Transcript 167-243, 414-460). Additionally, Omya presented testimony from two witnesses concerning changes to the company's waste management disposal system and groundwater monitoring program. (Transcript 248-342, 346-398). RCO chose not to introduce evidence relating to the toxicity of AEEA because of its understanding that liability was established in the July 1, 2008 order and the hearing was limited to determining an appropriate remedy.

Despite stating that the scope of the hearing would be limited to finding an adequate remedy, the District Court reversed course at the end of the hearing. (JA 233, 243-245). Specifically, the District Court indicated that it would consider the evidence introduced by Omya regarding the toxicity of AEEA in the context of Omya's pending motion to vacate the District Court's liability ruling in July 2008. (JA 243-245). At the close of the hearing, the District Court also ordered the parties to submit a proposed remedy based on their proposed findings of fact. (JA 245). The parties filed such findings on April 24, 2009. (JA 419-464). RCO also filed a Motion for Injunctive Relief and Attorneys' Fees. (JA 335-496); Docket 241.

Because of the court's closing remarks at trial, on April 24, 2009, after the remedy trial, RCO filed a motion for leave to present testimony of Dr. William

Bress, the Vermont State Toxicologist, to supplement their opposition to Omya's motion to vacate. (JA 327-334). On information and belief, Dr. Bress would have testified, in contrast to the toxicologists called by Omya, that a human health based drinking water guideline for AEEA was necessary. (JA 332). The District Court denied RCO's request. (SA 81-82). Specifically, the court held that this proposed testimony would be immaterial because he stated that he would "consider the testimony of Defendants' experts only on the issue of remedy, as the Court indicated was the sole purpose of the hearing." (SA 81).

On September 30, 2009, despite previously ruling that the purpose of the March 2009 hearing was solely to determine the appropriate remedy, the District Court granted Omya's motion to vacate the summary judgment that held Omya liable for creating an imminent and substantial endangerment. (SA 94). The District Court based its decision upon examination of the appendices of the Section 5 Study and the testimony of Omya's toxicologists at the remedy hearing. (SA 90-93). The court concluded that the harm Omya created was not sufficient for the trier of fact to find that the alleged potential harm claimed constitutes a serious endangerment. (SA 84, 94). Additionally, without any analysis or explanation, the District Court granted Omya's motion to dismiss all claims pertaining to AEEA for failure to meet the notice requirements for a RCRA citizen suit. (SA 94).

3. DISPOSITION BELOW

Magistrate Judge Jerome J. Niedermeier of the United States District Court for the District of Vermont granted Omya's motion for summary judgment on RCO's open dumping claim on July 1, 2008. (SA 74). On September 30, 2009, the District Court granted Omya's motion to vacate the Court's decision that found Omya liable under 42 U.S.C. § 6972(a)(1)(B) and granted Omya's motion to dismiss for failure to meet the notice requirements under 42 U.S.C. § 6972(b)(2)(A). (SA 94). In addition, the District Court denied RCO's motions for permanent injunction, injunctive relief, and costs and attorneys' fees. (Id.)

STATEMENT OF FACTS

A group of concerned community members in Florence, Vermont, calling themselves Residents Concerned about Omya, or RCO, seek the regulation and remediation of Omya's waste disposal practices. (JA 82). Omya owns and operates a calcium carbonate plant in Florence, Vermont ("Florence Facility"). (SA 84). The geology underlying the Florence Facility is a complex karst formation, created as a result of mineral dissolution of the bedrock by groundwater and characterized by fractures in the bedrock. (JA 87).

For over thirty years, Omya has generated and disposed of approximately 2.5 million tons of industrial waste into open, unlined pits. (JA 107). Omya crushes ore supplied from marble quarries and uses a flotation reagent, which contains among other chemicals the teratogen aminoethyl-ethanolamine ("AEEA"), to remove mineral impurities during its processing. (SA 60,85). After partially draining this waste using settling cells, Omya dumps the waste into open and unlined former quarries. (SA 85). These practices have caused or contributed to the concentration of arsenic in groundwater above local background levels. (JA 109).

The waste in the unlined pits is hydrogeologically connected to and in direct contact with the fractured bedrock. (JA 90). Groundwater, flowing through the fractured bedrock aquifer, further contributes to the release of contaminants into

the environment. (Id.) The residents (RCO) live in close proximity to Omya's Florence Facility and are concerned about the impact of chemical leaching from Omya's waste pits on groundwater, the Pittsford-Florence public water supply, Otter Creek, Smith Pond, as well as on anyone who uses and enjoys these public resources. (JA 82).

In 2005 the Vermont Legislature required Omya to complete a study ("Section 5 Study") of the human health and environmental effects posed by the groundwater contamination and migration. Vt. Leg. Act No. 65 § 5 (2005). The Section 5 Study, which took several years to complete and was published in final form on February 2, 2008, found that Omya's waste management practices contaminated groundwater beneath the pits and in other locations at the Florence Facility with AEEA, manganese, iron, and arsenic, among other chemicals. (JA 95-197). Admission of the Section 5 Study into evidence was stipulated to by both parties. (SA 86).

In April 2005, VDEC issued a declaratory ruling, concluding that Omya's waste disposal practices pose a reasonable potential of a threat to the public health, safety, and the environment and were subject to Vermont's Solid Waste Management Act. (JA 69-74). VDEC, however, subsequently stated in a June 2005 letter to Omya that it would exercise its enforcement discretion and would allow Omya to continue dumping waste into the unlined pits pending a decision on

Omya's application for a solid waste certification. (JA 75-78). On October 21, 2008, VDEC issued Omya an Interim Solid Waste Certification authorizing continued disposal of waste into its open, unlined pits but providing deadlines for closure of some of the pits over time. (JA 404-417).[2]

Groundwater samples taken by Omya's consultants for the October 2008 monitoring report confirm that Omya's waste management practices have contaminated groundwater with arsenic, AEEA, and other chemicals. (JA 261-265). For example, a review of the monitoring results in the record shows five samples of groundwater in which arsenic exceeds 10 parts per billion (ppb) at levels ranging from 10 to 22.8 ppb. (JA 263, 313). The sampling results from Well V, located off-site, reveal groundwater arsenic contamination of 10 ppb. (Id.) AEEA levels have been found in groundwater on-site at levels ranging from 3 to 70 ppb. (JA 269).

RCO first notified Omya that the company's waste disposal practices violated RCRA in RCO's Notice of intent to sue dated November 12, 2004. (JA 59-63). RCO then sought the assistance of the federal courts by filing a complaint in the District Court on June 24, 2005 to stop the contamination of groundwater by Omya. (JA 45-67). Despite clear evidence that Omya has contaminated

[2] In a separate but related permitting action by the State of Vermont, which took place after close of proceedings before the District Court, VDEC issued a Draft Final Certification addressing future waste disposal that would authorize Omya to construct and begin using a new lined disposal facility for its waste disposal.

groundwater under the Florence Facility, Omya has continued dumping its waste into unlined, open pits during the entire period of this litigation.

SUMMARY OF THE ARGUMENT

RCO satisfied the notice requirement in RCRA's citizen suit provision, codified at 42 U.S.C. § 6972(b)(2)(A). RCO provided Omya with clear notice that its practice of placing chemically contaminated industrial waste into unlined, uncovered pits in direct contact with groundwater was a violation of RCRA's open dumping and imminent and substantial endangerment provisions. This Court should find that the District Court erred in granting Omya's motion to dismiss for failure to provide notice of the contaminant AEEA and allow RCO to pursue its imminent and substantial endangerment claim.

RCO is entitled to summary judgment on both its open dumping and imminent and substantial endangerment claims. Omya's waste disposal practices have contaminated groundwater with arsenic at levels above 10 ppb in violation of EPA's Open Dumping Criteria. 40 C.F.R. § 257 (2009) (Appellants' Addendum ("AA") 39-46). While not the exclusive means of establishing a violation of the open dumping prohibition, proof of a violation of the Open Dumping Criteria establishes a per se violation. Additionally, by disposing of solid waste into open, unlined pits at the Florence Facility without a permit from the State of Vermont, Omya is operating an "open dump." Omya is violating the statutory prohibition on open dumping under 42 U.S.C. § 6945(a) because the Florence Facility is not a sanitary landfill or a facility for the disposal of hazardous waste. 42 U.S.C. §

6903(14) (2006) (AA 22). Further, Omya's waste disposal activities pose a "reasonable probability of adverse effects on health or the environment," so Omya's unlined pits are not eligible for treatment as a sanitary landfill pursuant to 42 U.S.C. § 6944. Accordingly, this Court should reverse both of the District Court's decisions, granting Omya's motion for summary judgment and denying RCO's motions for partial summary judgment, issue an order finding Omya liable for violating the prohibition on open dumping, and remand this case to the District Court for a determination of the appropriate remedy.

If this Court does not rule in RCO's favor on the open dumping claims, it should find that the District Court misapplied the imminent and substantial endangerment standard contained in 42 U.S.C. § 6972(a)(1)(B) for failure to consider evidence of arsenic contamination and to address the risks posed to the environment from Omya's waste disposal practices. In interpreting this standard, the Second Circuit has determined that the use of the words "may present," "imminent," and "substantial" reflects Congressional intent to give courts broad authority to "eliminate any risk" of harm. Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 210 (2d Cir. 2009) (quoting Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991)). RCRA's imminent and substantial endangerment provision requires an analysis of all risks of harm to the environment as well as public health impacts and makes no distinction between on-site and off-site harms.

Similarly, this Court should find that the District Court abused its discretion by denying RCO the opportunity to present evidence of AEEA toxicity and arsenic contamination before issuing its final decision, in which the District Court (1) vacated its prior opinion finding Omya liable for an imminent and substantial endangerment and (2) denied RCO's motions for injunctive relief and attorneys' fees. Although the District Court limited the evidentiary hearing to a determination of the appropriate remedy, it used the evidence at this hearing to decide Omya's motion to vacate its earlier liability finding of an imminent and substantial endangerment. RCO did not have notice that the District Court would use evidence relating to AEEA toxicity to revisit its liability decision. The District Court abused its discretion by not allowing RCO to present evidence of AEEA toxicity to rebut Omya's witnesses' testimony. The District Court should have allowed this testimony from RCO after the close of the remedy hearing in order to

preserve the fairness of the trial. Furthermore, the District Court abused its discretion by excluding evidence of arsenic contamination at trial despite concluding that its decision finding Omya liable for presenting an imminent and substantial endangerment was reinforced by the possibility of arsenic contamination. At a minimum, if this Court does not find that RCO is entitled to summary judgment, this Court should remand the imminent and substantial endangerment claim to the District Court with instructions that allow RCO to present evidence of AEEA toxicity and arsenic contamination.

ARGUMENT

I. RCO SATISFIED RCRA'S CITIZEN SUIT NOTICE REQUIREMENTS.

On November 12, 2004, RCO sent a RCRA notice of intent to sue ("Notice") with eleven exhibits to Omya, the Environmental Protection Agency ("EPA"), and the appropriate Vermont state environmental agencies. (JA 59-63). In the Notice, RCO alleged that Omya's waste disposal practices at the West (Verpol) and East Plants at the Florence Facility are in violation of RCRA. (JA 59). Specifically, RCO stated that Omya's disposal practices violate the prohibition on open dumping under 42 U.S.C. § 6945 and present an imminent and substantial endangerment to health and the environment in violation of 42 U.S.C. § 6972. (Id.)

In a motion to dismiss filed on July 28, 2008, almost four years after receiving the Notice, Omya raised, for the first time, its objection to RCO's adequacy of notice regarding RCO's imminent and substantial endangerment claim. Docket 197. The basis of Omya's objection was that RCO had failed to specifically identify AEEA as a contaminant in its Notice.[3] Id. On September 30, 2009 the District Court improperly granted Omya's motion to dismiss without

[3] Omya did not challenge the sufficiency of notice regarding any other contaminant forming the basis of RCO's imminent and substantial claim or the sufficiency of notice regarding the open dumping claim.

considering whether RCO's factually specific Notice satisfied RCRA's notice requirements. (SA 94).

The Second Circuit reviews de novo a district court's grant of a motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. Flores v. S. Peru Copper Corp., 414 F.3d 233, 241 (2d Cir. 2003). The Notice RCO provided to Omya was sufficiently specific and adequate to satisfy the requirements delineated at 42 U.S.C. § 6972(b)(2)(A). (AA 34). The Notice provided by RCO is consistent with the statute, the purpose of the notice requirement, and applicable case law. Therefore, the District Court's decision to grant Omya's motion to dismiss should be reversed.

A. Notice for an Imminent and Substantial Endangerment Claim Is Reasonably Specific if It Identifies the Activity Causing the Endangerment.

RCO's Notice meets the statutory requirements under RCRA's citizen suit provision, codified at 42 U.S.C. § 6972(b)(2)(A). (Id.) The statute provides that no action may be commenced until ninety days after the plaintiff has given notice to the state, EPA, and the alleged violator. (Id.) The statute also requires that "notice of the endangerment" should be given to "any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . ." (Id.)

In Hallstrom v. Tillamook County, the Supreme Court required compliance with the mandatory pre-suit requirements of the citizen suit notice provisions so that the EPA Administrator can "take responsibility for enforcing environmental regulations" and to give the alleged violator the "opportunity to bring itself into complete compliance with the Act." 493 U.S. 20, 29 (1989). This Court has found that the purpose of notice under the imminent and substantial endangerment provision is to put the defendant sufficiently on notice to allow them to "promptly rectify the problem." Bldg. Trades, 448 F.3d at 158 (citing Catskill Mountains, 273 F.3d at 488).[4]

In this case, RCO put Omya on notice of the violations at the Florence Facility in a manner clearly sufficient for Omya to rectify the problem. (JA 59-63). RCO identified dumping contaminated waste into open unlined pits in direct contact with groundwater as the activity causing the endangerment. (JA 59, 61). RCO specified that chemical leachate from the pits had been detected in

[4] In Building Trades, a case involving a RCRA imminent and substantial endangerment claim, this Court also quoted language from Catskill Mountains that Omya relied upon below in its challenge to the sufficiency of RCO's notice. Specifically, Building Trades quotes a statement from Catskill Mountains that the plaintiff "must identify with reasonable specificity each pollutant that the defendant is alleged to have discharged unlawfully." Bldg. Trades, 448 F.3d at 158. The sufficiency of notice must be construed in the context of the statute and the violation alleged in the notice. For this reason, this language from Catskill Mountains, a Clean Water Act effluent limitation case, is not the applicable rule for imminent and substantial endangerment claims, and a careful reading of Building Trades makes it clear that this Court did not rule otherwise.

groundwater. (JA 61). Further, RCO noted that "[r]unoff from the site finds its way into Otter Creek and numerous wetlands . . . ." (Id.) Given that RCO identified the activity causing the endangerment, and that Omya had the opportunity to bring itself into compliance by ceasing to dump into open, unlined pits, RCO's Notice was adequate. Therefore, the District Court's ruling regarding sufficiency of notice should be reversed.

B. Identifying Categories of Pollutants Is Sufficient to Satisfy RCRA's Notice Provision for an Imminent and Substantial Endangerment Claim.

Courts have found that notice is sufficient when the plaintiffs identify categories of pollutants that are being discharged. In this case, RCO specifically stated that Omya was dumping waste that included its flotation reagent. (JA 60). AEEA is a residual component of Omya's flotation agent. (JA 107-108; SA 85). Omya was in the best position to know what chemicals constituted its flotation agent. Therefore, Omya's contention that it was not provided adequate notice is without merit.

Other courts addressing this issue have concluded that identifying categories of contaminants in a notice letter is sufficient to provide the necessary notice. In Evco Assocs., Inc. v. C.J. Saporito Plating Co., the court found that when a plaintiff included categories of pollutants, the notice was sufficient under both 42 U.S.C. § 6972(a)(1)(A) and 42 U.S.C. § 6972(a)(1)(B) because it provided

1995 WL 571438 at 4 (N.D. Ill. Sept. 25, 1995). The court did not require that the notice list each and every contaminant at issue. Id. In Pinoleville Pomo Nation v. Ukiah Auto Dismantlers, the defendant attempted, as Omya did in this case, to use the Catskill Mountains opinion to argue that plaintiffs must specify each pollutant unlawfully discharged by the defendant for their notice to be sufficient. No. C-07-02468 SI, 2007 WL 4259404 at 5 (N.D. Cal. Dec. 3, 2007). The Pinoleville court held that even under the Catskill Mountains standard the notice provided in that case was sufficient. Id. Specifically, the court found that a notice that identifies "oils, solvents, gasoline, anti-freeze, detergents and like pollutants known to be associated with [auto] dismantling operations" as the pollutants causing the violation was sufficient because the "defendants are in a far better position than plaintiffs to know what other pollutants are discharged during automobile dismantling operations." Id.

In this case RCO exceeded the basic notice requirements for an imminent and substantial endangerment claim by listing several specific contaminants as well as categories of contaminants that were causing the endangerment. RCO informed Omya that the company was wrongfully dumping waste which was "contaminated with a variety of chemicals including but not limited to [a list of 21 chemicals]." (JA 59-60) (emphasis added). RCO also specifically stated that

__ 60). Lastly, RCO included a detailed description of how dumping this waste into open, unlined pits, which was contaminated with "numerous chemicals," was actually causing an endangerment to health and the environment in violation of 42 U.S.C. § 6972(a)(1)(B). (JA 61). This description of the activities causing the endangerment and the list of identified waste (both specific contaminants and categories of contaminants) were sufficient to put Omya on notice and provide it with the opportunity to rectify the problem.

Given that RCO clearly put Omya on notice of the endangerment, as required by 42 U.S.C. § 6972(b)(2)(A), the District Court's ruling granting Omya's motion to dismiss should be reversed.

II. OMYA'S DISPOSAL OF SOLID WASTE VIOLATES RCRA'S PROHIBITION ON OPEN DUMPING.

Omya's long history of dumping chemically contaminated waste into open, unlined pits has contaminated the groundwater under the Florence Facility with arsenic at levels above 10 ppb in violation of EPA's Open Dumping Criteria. While not the exclusive means of establishing an open dumping claim, proof of a violation of the Open Dumping Criteria is a per se violation of RCRA's prohibition on open dumping. In addition, even apart from the violation of the criteria, the fact that Omya is dumping waste in a manner that has contaminated groundwater under the site with arsenic and other chemicals makes clear that Omya is violating the

plain statutory language establishing a prohibition against open dumping in 42 U.S.C. § 6945(a).

For the purpose of determining the appropriate standard of review, it is important to note that RCO's appeal includes an appeal of the District Court's decisions both (1) to grant Omya's motion for summary judgment and (2) to deny RCO's motions for partial summary judgment. (SA 42, 74). Summary judgment should be granted only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). 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). The Second Circuit reviews a district court's grant of summary judgment de novo. Id.

In considering the District Court's decision to grant Omya's motions for summary judgment, this Court should construe the facts in the light most favorable to RCO and find that the District Court erred by granting Omya summary judgment. Further, even construing the facts in the light most favorable to Omya, this Court should find that RCO met its burden to show that no genuine issues of material fact exist and that Omya is liable for operating an open dump as a matter

of law. This Court should reverse the District Court's decisions to grant Omya's motion and deny RCO's motions, issue an order finding Omya liable for violating RCRA's prohibition on open dumping, and remand this case to the District Court for a determination of the appropriate remedy.

A. Omya's Waste Disposal Practices Have Contaminated Groundwater with Arsenic in Violation of EPA's Open Dumping Criteria.

EPA uses the Maximum Contaminant Levels ("MCLs") adopted under the Safe Drinking Water Act ("SDWA") when developing the Open Dumping Criteria. EPA upgraded the SDWA's MCL for arsenic to 10 ppb after it determined that a concentration of 50 ppb was insufficient to protect human health. This Court should find that the District Court improperly relied upon the outdated MCL in its July 1, 2008 order. Therefore, this Court should determine (1) that the District Court erred by granting Omya summary judgment and (2) that the District Court also erred in denying RCO's motion for partial summary judgment. (SA 74). Instead, this Court should find Omya liable for operating an open dump.

1. Omya's dumping of chemically contaminated industrial waste into open, unlined pits has contaminated the groundwater with arsenic at concentrations exceeding the Maximum Contaminant Levels set in the Safe Drinking Water Act.

Omya's waste disposal practices have contaminated groundwater with arsenic. (JA 109-110). Although arsenic can occur naturally in groundwater in New England, background levels of arsenic in groundwater in the area surrounding

the Florence Facility are either below the analytical detection limit or at least well below the SDWA's MCL of 10 ppb for arsenic. (JA 178). The arsenic in the groundwater under the Florence Facility however, is elevated due to either facility-induced changes in bedrock chemistry or releases of arsenic from the contaminated waste itself. (Id.) In either case, the contamination is attributable to Omya's operations at the site. (Id.)

Arsenic is a chemical metalloid regulated under the SDWA and EPA's Open Dumping Criteria. 42 U.S.C. § 300g-1 (2006) (AA 7-17); National Primary Drinking Water Regulations, Maximum contaminant levels for inorganic contaminants, 40 C.F.R. § 141.62 (2009) (AA 37-38); Criteria for Classification of Solid Waste Disposal Facilities and Practices, Appendix I to Part 257—Maximum Contaminant Levels (MCLs), 40 C.F.R. § 257 app. I (2009) (AA 45-46). On January 22, 2001, EPA updated the MCL for arsenic under the SDWA by establishing a health-based, non-enforceable Maximum Contaminant Level Goal ("MCLG") for arsenic of zero and an MCL for arsenic of 0.01 mg/L (10 ppb). National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6976, 7020-7021 (Jan. 22, 2001) (AA 61-63). The public health risks associated with arsenic contamination were a crucial factor in EPA's decision to lower the MCL for

arsenic to 10 ppb. Id. at 7021 (AA 63) (The "SWDA clearly places a particular focus on public health protection afforded by MCLs.").

When developing the new MCL under the SDWA, EPA relied on a report conducted by the National Research Council ("Council") on the health risks of ingested arsenic. Id. at 7028 (AA 64). The Council reported that "ingestion of arsenic in drinking water poses a hazard of cancer of the lung and bladder, in addition to cancer of the skin." Subcommittee on Arsenic in Drinking Water, National Research Council, Arsenic in Drinking Water 299 (National Academy Press) (1999) available at http://www.nap.edu/openbook.php?isbn=0309063337 (last visited Mar. 25, 2010). Given the Council's findings and "thousands of pages of comments," EPA determined that lowering the MCL to 10 ppb was necessary to protect public health.[5] National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. at 7020 (AA 62).

Due to Omya's waste disposal practices, any person who would otherwise drink the groundwater under the Florence Facility (a potential drinking water supply) is now facing the same risks EPA anticipated. Groundwater samples taken

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[5] EPA's decision to lower the MCL of arsenic to 10 ppb is further supported by the World Health Organization ("WHO"). World Health Org., United Nations, Guidelines for Drinking Water Quality 306 (3d ed. 2006), available at http://www.who.int/water_sanitation_health/dwq/gdwq0506.pdf (last visited Mar. 25, 2010). WHO found that arsenic "is one of the few substances shown to cause cancer in humans through consumption of drinking water." Id. at 307.

by Omya's consultants show levels of arsenic over 10 ppb at multiple monitoring wells. (JA 269-270, 313). A review of the monitoring results in the record shows five samples of groundwater in which arsenic exceeds 10 ppb at levels ranging from 10 ppb to 22.8 ppb. (JA 263). These results confirm that Omya's waste disposal practices are causing or contributing to the presence of arsenic in groundwater on-site and off-site at concentrations exceeding the federal drinking water standard set by EPA under the SDWA.

2. Because Omya has contaminated groundwater with arsenic at concentrations exceeding the Maximum Contaminant Levels set in the Safe Drinking Water Act, it has violated the Open Dumping Criteria and is operating an open dump.

This Court should find that Omya is operating an illegal open dump because its waste disposal practices have contaminated groundwater with arsenic in violation of EPA's Open Dumping Criteria. 40 C.F.R. § 257 (2009). "Facilities failing to satisfy . . . the criteria in §§ 257.1 through 257.4 . . . are considered open dumps, which are prohibited under section 4005 of [RCRA]." Criteria for Classification of Solid Waste Disposal Facilities and Practices, Scope and Purpose, 40 C.F.R. § 257.1(a)(1) (2009) (AA 39). Any violation of the Open Dumping Criteria is a per se violation of RCRA's open dumping prohibition. South Rd. Assocs. v. IBM Corp., 216 F.3d 251, 256 (2d Cir. 2000). The Open Dumping Criterion relating to groundwater reads: "A facility or practice shall not

contaminate an underground drinking water source[6] beyond the solid waste boundary[7] . . . ." Criteria for Classification of Solid Waste Disposal Facilities and Practices, Groundwater, 40 C.F.R. § 257.3-4 (2009) (AA 42-43). Because Omya has failed to satisfy this criterion, it is operating an open dump and violating RCRA's open dumping prohibition.

Congress made protection of groundwater for human consumption a high priority in RCRA, as recognized by EPA in the preamble to the 1979 regulations adopting the Open Dumping Criteria: "[RCRA] and its legislative history clearly reflect Congressional intent that the protection of groundwater is to be a prime concern of the criteria." Criteria for Classification of Solid Waste Disposal Facilities and Practices, 44 Fed. Reg. 53,438, 53,445 (Sept. 13, 1979) (AA 52). For this reason, EPA's first objective in groundwater protection under the criteria is protecting the public from drinking contaminated groundwater. Id. at 53,446 (AA 53). The preamble to the regulations adopting the Open Dumping Criteria states that: "[S]olid waste activities should not be allowed to cause underground drinking water sources to exceed established drinking water standards." (Id.)

[6] As a matter of law, an underground drinking water source is "[a]n aquifer in which the ground water contains less than 10,000 [milligrams per liter] total dissolved solids." 40 C.F.R. § 257.3-4(c)(4)(ii) (2009) (AA 43). It is undisputed that total dissolved solids in the aquifer underlying Omya's facility are well below the 10,000 milligrams per liter threshold, so this issue is not discussed.
[7] Similarly, there is no dispute that arsenic contamination of 10 ppb extends beyond the boundary of Omya's waste disposal units, so this issue is not discussed.

(emphasis added).[8] MCLs adopted under the SDWA are the benchmark against which the Open Dumping Criteria should be measured.

In line with this approach, EPA has defined "contaminate" in the open dumping regulations to mean to "introduce a substance that would cause [t]he concentration of that substance in the ground water to exceed the maximum contaminant level specified in appendix I." 40 C.F.R. § 257.3-4(c)(2)(i) (AA 42). The title of the relevant regulation, "Maximum Contaminant Levels (MCLs) Promulgated Under the Safe Drinking Water Act," also supports this understanding. 40 C.F.R. § 257 app. I (2009) (AA 45-46). Further, EPA chose to assign the MCLs contained in the SDWA as the standard that, if exceeded in drinking water, would "pose a reasonable probability of adverse effects on health or the environment." Criteria for Classification of Solid Waste Disposal Facilities and Practices, Criteria for classification of solid waste disposal facilities and practices, 40 C.F.R. § 257.3 (2009) (AA 41). When EPA established Appendix I in 1979, the MCL for arsenic under the SDWA was 0.05mg/L (50 ppb). Maximum Contaminant Levels for Inorganic Chemicals, 40 Fed. Reg. 59,566, 59,570 (Dec.

[8] A preamble, "while not controlling over the regulation itself, . . . is evidence of [an] agency's contemporaneous understanding of its proposed rules." Wyoming Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 53 (D.C. Cir. 1999). Further, although "the preamble . . . was not part of the regulation[ ] . . . [it] [i]s a significant indication of intent in the drafting of regulations and . . . is persuasive authority." U.S. Dept. of Labor v. Wolf Run Mining Co., 446 F.Supp. 2d 651, 654 (N.D.W.Va. 2006).

24, 1975) (AA 48). The numerical standard for arsenic currently listed in Appendix I is outdated because EPA has since determined that a concentration of 50 ppb of arsenic is insufficient to protect human health. National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. at 7020 (AA 62).

In addition, since the criteria were formed, EPA has drawn directly from the MCLs adopted pursuant to the SDWA when updating Appendix I as it relates to other contaminants. For example, EPA defined "contamination" in 40 C.F.R. § 257.3-4 as "concentrations of substances exceeding maximum contaminant levels, contained in appendix I to part 257, developed by EPA under section 1412 of the Safe Drinking Water Act." Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,998 (Oct. 9, 1991) (AA 56). When EPA updated the criteria, it used the tools and standards developed under other media-specific statutes (such as the SDWA) to create consistency for regulation and enforcement. Standards for the Use and Disposal of Sewage Sludge, 58 Fed. Reg. 9248, 9252 (Feb. 19, 1993) (AA 58). Because "the pollutant limits are designed to protect ground water, the Agency used the drinking water standards (maximum contaminant levels—MCLs), where available." (Id.) EPA's intent was clear: "When the objective is to protect sources of drinking water, pollutant limits were developed which would ensure that

drinking water MCLs established under the Safe Drinking Water Act are not violated." Id. at 9254 (AA 59).

EPA made the point even clearer by stating that "for purposes of these criteria, EPA will rely only on established drinking water standards." Criteria for Classification of Solid Waste Disposal Facilities and Practices, 44 Fed. Reg. at 53,446 (AA 53). Recognizing there could be inconsistencies between the Open Dumping Criteria and other regulatory programs, EPA used other existing federal standards, noting that "[t]he use of other Federal Standards in responding to this broad mandate is, in fact, quite desirable in order to minimize duplicative, overlapping and conflicting policies and programs." Id. at 53,440 (AA 51). To now interpret the Open Dumping Criteria to ignore updates to MCLs would lead to exactly the kind of "conflicting policies and programs" that EPA wanted to avoid.

Furthermore, EPA made plain that the criteria were to be "applied to a variety of situations and that there is a need for flexibility in the standard to allow them to be applied to particular circumstances." Id. at 53,439 (emphasis added) (AA 50). EPA recognized that it had "not written more stringent standards because existing information does not indicate that such standards are needed to protect public health. Future research results might, of course, justify changing the criteria." Id. at 53,447 (AA 54). Thus, EPA expressly anticipated the need for amending the criteria to reflect changes in knowledge regarding safe levels for

drinking water. In light of the approach taken by EPA to the Open Dumping Criteria, it would make little sense to apply a standard for arsenic that EPA has since found insufficient to protect human health. Using such an outdated standard would not protect against "a reasonable probability of adverse effects on health or the environment," as required by 42 U.S.C. 6944(a) and 40 C.F.R. § 257.3.

Finally, to the extent that the MCLs cited in the Open Dumping Criteria have not yet been updated that, at most, creates some ambiguity regarding the interpretation of the criteria. If this Court finds any ambiguity, such ambiguity should be resolved in light of the purpose of the relevant statute. See United Telecomms., Inc. v. C.I.R., 589 F.2d 1383, 1390 (10th Cir. 1978) ("Where there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred."). In this case, given the fundamental goal of Congress in enacting RCRA to protect groundwater, the ambiguity should be resolved in favor of the more stringent standard. 42 U.S.C. §§ 6902(a)(3), 6949a (2006) (AA 19, 31-32). Therefore, for the purpose of determining a violation of the Open Dumping Criteria for arsenic, the current drinking water standard of 10 ppb should apply.

Despite, however, EPA's explicit mention of the SDWA's MCLs in the Open Dumping Criteria and EPA's updating of the SDWA's MCL to 10 ppb, the District Court applied the outdated 50 ppb standard currently listed in Appendix I.

(SA 69). By doing so, the District Court elevated form over substance. This Court should find that the District Court erred by using the outdated MCL in applying the Open Dumping Criteria and by granting Omya summary judgment. Therefore, this Court should determine that the District Court erred in denying RCO's motion for partial summary judgment and find Omya liable for operating an open dump.

B. Omya's Waste Disposal Practices Violate the Clear Language of RCRA's Prohibition on Open Dumping.

Although proof of a violation of the Open Dumping Criteria is a per se violation of RCRA's prohibition on open dumping, it is not the exclusive means of establishing an open dumping claim under 42 U.S.C. § 6945(a). Omya is violating the plain statutory prohibition against open dumping because the Florence Facility is not a sanitary landfill or a facility for the disposal of hazardous waste. By disposing solid waste without a permit from the State of Vermont, Omya is operating an "open dump" in violation of RCRA section 6945(a). Furthermore, Omya's waste disposal activities pose a "reasonable probability of adverse effects on health or the environment," and as a result, Omya's unlined pits are not eligible for treatment as sanitary landfills pursuant to 42 U.S.C. § 6944. (AA 27).

Courts that review statutory interpretation de novo begin with the language of the statute. United States v. Figueroa, 165 F.3d 111, 114 (2d Cir. 1998). When a court finds the terms of a statute unambiguous, "judicial inquiry is complete, except 'in rare and exceptional circumstances.'" Rubin v. United States, 449 U.S.

424, 430 (1981) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 188 (1979)). In this case, it is also where the inquiry should end, for where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). Therefore, because Omya's unlined waste disposal pits constitute "open dumps" that pose a "reasonable probability of adverse effects on health or the environment" under a plain reading of RCRA, this Court should grant RCO's motion for partial summary judgment and remand this case to the District Court for a determination of the appropriate remedy.

1. Omya's act of placing chemically contaminated industrial waste into open, unlined pits without a permit from the State of Vermont constitutes open dumping under RCRA section 6945(a).

Omya's unlined waste disposal pits are not sanitary landfills, so they are illegal open dumps. RCRA defines "open dump" by process of elimination: "[A]ny facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14) (2006) (AA 22). Thus, any facility which disposes of solid waste is an open dump unless it falls within one of two exceptions: (1) a sanitary landfill meeting the section 6944 criteria, or (2) a facility for hazardous waste disposal (which is regulated under Subtitle C of RCRA). Parker v. Scrap Metal Processors, Inc., 386

F.3d 993, 1012 (11th Cir. 2004). Since the unlined waste disposal pits are not facilities for disposal of hazardous waste[9] or sanitary landfills meeting the section 6944 criteria, Omya's practice of placing chemically contaminated industrial waste into open, unlined pits constitutes "open dumping" in violation of 42 U.S.C. § 6945(a).

The Eleventh Circuit squarely addressed this issue and held that a facility cannot be a sanitary landfill under RCRA if it is not in compliance with state or federal regulations, has no state permit to operate as a sanitary landfill, and is not authorized in any other way to dispose of its solid waste. Parker, 386 F.3d at 1012. The plaintiffs in Parker alleged that defendant SMP was operating an open dump in violation of section 6945(a) of RCRA because it did not have a solid waste handling permit from the State of Georgia. Id. at 1011. The court found that defendant's site was an open dump because it could neither qualify as a sanitary landfill since the defendant did not have a waste handling permit from the State of Georgia, nor a hazardous waste facility since it did not meet the criteria under state or federal law. Id. at 1013. The court concluded: "Because SMP did not have the permit required to operate an open dump, it was in violation of the open-dumping provisions of the RCRA." Id.

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[9] Omya has not argued that its unlined waste disposal pits are "facilit[ies] for the disposal of hazardous waste," so that issue is not discussed.

The Parker decision demonstrates the straightforward nature of statutory analysis required in this case. Here, Omya is disposing of solid waste without the solid waste disposal facility certificate required by Vermont law and does not claim that it is operating a licensed hazardous waste facility. Thus, under the Eleventh Circuit's clear and persuasive analysis in the Parker case, Omya is operating an open dump in violation of 42 U.S.C. § 6945(a).

The Eleventh Circuit's reasoning in Parker is consistent with RCRA's statutory scheme. RCRA establishes an explicit framework for federal, state, and local government cooperation in controlling the management of nonhazardous solid waste. Subtitle D was enacted to cover nonhazardous solid waste, which Congress intended to be primarily regulated by the states. 42 U.S.C. § 6946 (2009) (AA 29). States are required to prohibit open dumps and to minimize potential health hazards. 42 U.S.C. §§ 6944(a), 6945(a) (2006) (AA 27-28). RCRA directs EPA to develop "suggested guidelines" to "provide minimum criteria to be used by the States to define those solid waste management practices which constitute the open dumping of solid waste . . . ." 42 U.S.C. § 6907(a)(3) (2006) (AA 25). These provisions indicate that Congress intended that solid waste be disposed of only in state-approved facilities. See Ringbolt Farms Homeowners Ass'n v. Hull, 714 F.Supp. 1246, 1259 (D. Mass. 1987) ("Congress contemplated that states would carry the main burden of regulating open dumping of solid wastes."). Accordingly,

states have the main responsibility for ensuring that solid waste disposal practices do not pose a "reasonable probability of adverse effects on health or the environment." 42 U.S.C. § 6944(a) (AA 27); 40 C.F.R. § 257.3 (2009) (AA 41).

A review of the relevant Vermont statute confirms that Omya's waste disposal pits are not eligible to be treated as sanitary landfills. Vermont passed its own comprehensive solid waste legislation in 1987, modeled after and enacted to comply with RCRA. State v. Ben-Mont Corp., 652 A.2d 1004, 1007 (Vt. 1994). VDEC is the agency in charge of implementing and enforcing Vermont's Solid Waste Management Rules ("SWMR"). See Vermont Agency of Natural Res., Dep't Envtl. Conservation, Envtl. Prot. Rules, Solid Waste Management Rules (2006), available at http://www.anr.state.vt.us/dec/wastediv/solid/pubs/swruleadopted6-23-02.pdf (last visited Mar. 25, 2010). For the disposal pits at the Florence Facility, currently in use by Omya, to qualify as a sanitary landfill under RCRA, VDEC would have to issue a final certification under 10 V.S.A. § 6605 that would meet the SWMR standards. (See AA 67-69). Omya has, however, only received interim certification for these open, unlined pits.[10] (JA 404-417).

[10] Omya has applied for a final certification for a new lined disposal facility. In December 2009 after the District Court proceeding concluded, VDEC issued a Draft Final Certification. RCO has objected to the issuance of this final certification as proposed because the draft fails to provide fixed deadlines and procedures for the closure of all of the unlined pits and because the new lined

The disposal pits currently in use by Omya could not qualify for a final solid waste management facility certification under Vermont law, 10 V.S.A. § 6605b(a) (2009) (see AA 71-72), because Omya's disposal of contaminated waste into unlined pits in direct contact with fractured bedrock allows for the release of contaminants into groundwater. (SA 7). This is a clear violation of Vermont's SWMR and the purpose of the regulations, which is to ensure the safe, proper, and sustainable management of solid waste in Vermont.[11] Because Omya is violating Vermont's SWMR, VDEC cannot grant a final certification for the disposal pits currently being used for disposal of mineral processing waste at the Florence Facility. Therefore, because it does not qualify for a solid waste management facility under Vermont law, the disposal pits at the Florence Facility cannot qualify as sanitary landfills under RCRA.

The Court should follow the reasoning of the Eleventh Circuit in Parker and reject the District Court's holding that a facility which disposes solid waste without a state permit cannot qualify as a sanitary landfill under RCRA. In this case, Omya

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facility will be constructed on top of one or more of the existing waste disposal pits.

[11] For example, Omya does not meet the requirements of a minimum isolation distance to the seasonal high water table or to the underlying bedrock. Vermont Agency of Natural Res., Dep't Envtl. Conservation, Envtl. Prot. Rules, Solid Waste Management Rules § 6-503 (2006), available at http://www.anr.state.vt.us/dec/wastediv/solid/pubs/swruleadopted6-23-02.pdf (last visited Mar. 25, 2010).

has not received a permit from VDEC. The fact that Omya has only qualified for an interim certification illustrates, however, that Omya cannot qualify for a final certification under Vermont law for its waste disposal practices into the open, unlined pits. Since Omya does not have such a permit, the Florence Facility cannot be a sanitary landfill. Therefore, as in Parker, Omya is operating an open dump.

2. Omya's waste disposal practices pose a reasonable probability of adverse effects on health or the environment under RCRA section 6944(a).

Omya's act of dumping chemically contaminated waste into open, unlined pits, causing or contributing to the presence of arsenic in groundwater above 10 ppb, poses a "reasonable probability of adverse effects on health or the environment." 42 U.S.C. § 6944(a) (AA 27). As discussed in Section III(A), this Court should find Omya liable for violating EPA's Open Dumping Criteria. However, if the Court finds Omya did not violate the criteria, it is clear that these levels of arsenic violate the statutory prohibition in 42 U.S.C. § 6944(a). For this reason, the Court should grant RCO's motion for partial summary judgment because Omya's waste disposal practices constitute a clear violation of RCRA's prohibition on open dumping.

RCRA's open dumping provision is clear: "[A]ny solid waste management practice or disposal of solid waste . . . which constitutes the open dumping of solid

waste . . . is prohibited." 42 U.S.C. § 6945(a) (AA 27-28). Although Congress directed EPA to promulgate regulations containing criteria determining which facilities can be classified as open dumps, it limited EPA's discretion by explicitly stating: "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) (emphasis added) (AA 27). Therefore, because EPA has determined that concentrations of arsenic above 10 ppb present an unacceptable risk to human health, this Court should find that Omya's disposal practices qualify as open dumping under the plain language of the statute.

Congress intentionally wrote the prohibition on open dumping to avoid creating loopholes that would create risks to human health or the environment, such as Omya's practice of disposing chemically contaminated waste into open, unlined pits. The use of the word "any" to modify "solid waste management or disposal of solid waste" in the first sentence of 42 U.S.C. § 6945(a) indicates that Congress intended to create an open dumping prohibition that included the widest breadth of solid waste disposal practices. Where a facility's disposal of solid waste has been shown to pose a reasonable probability of adverse effects on health or the environment, the statute has been violated. 42 U.S.C. § 6944(a) (2006) (AA 27).

In this case, Omya's contamination of groundwater with arsenic at levels above the federal drinking water standard poses a definite and significant threat to public health and the environment.

Courts have strictly enforced this statutory limitation. See Envtl. Def. Fund v. EPA, 852 F.2d 1309, 1310 (D.C. Cir. 1988) ("Facilities can be classified as sanitary landfills only if there is no possibility of danger to health or environment from deposits at those sites."). Any other reading of RCRA would defeat Congress' intent of requiring the safe disposal of waste in a manner that protects the environment. Instead of giving effect to these clear statements of Congressional intent, the District Court focused on the language of section 6945 authorizing EPA to promulgate criteria under section 6907(a)(3) and found that RCO's argument creates "a hierarchy between statutes and regulations that is inappropriate."[12] (SA 37). The District Court improperly concluded that section 6945(a) invested EPA with unbridled discretion to define what constitutes open dumping without regard to the limitations placed on EPA's discretion in section

[12] The District Court cited United States v. Mersky, for the proposition that "RCRA's prohibition on open dumping is not complete without the regulations that provide the defining characteristics of an open dump." 361 U.S. 431, 437-38 (1960); (SA 42). However, the statute at issue in Mersky was very different from RCRA because the statute contained no definition of key terms and did not impose any limitations on the exercise of agency discretion such as the "no reasonable probability" language in 42 U.S.C. § 6944. Further, the effect of the ruling in Mersky was to broaden, not narrow, the scope of offenses chargeable under the statute. In short, Mersky is inapposite.

6944(a). (SA 42) ("[T]his Court is not persuaded that it is appropriate to limit the open dump analysis to the delegation language in § 6944 as RCO suggests."). There are several problems with the District Court's approach.

First, under accepted canons of statutory construction, courts must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous. See Sutherland Stat. Const. §§ 46.05, 46.06 (4th ed. 1984); see also United States v. Freeman, 44 U.S. 556, 565 (1845); Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991). There is nothing in the statute or legislative history to suggest that Congress intended for these criteria to be the exclusive means of enforcing RCRA's prohibition on open dumping. By so holding, the District Court's decision reads the statutory definition of open dump out of the law and renders the language in § 6944(a) limiting EPA's rulemaking authority superfluous.

Second, EPA's regulatory criteria merely serve as guidelines to assist states' regulation of open dumping of solid waste. 42 U.S.C. § 6907(a)(3) (2006) (AA 25). They do not, as the District Court held, provide the only way plaintiffs can bring a claim under RCRA. The criteria serve two purposes. First, pursuant to section 6907(a)(3), they are a trigger for states to enforce the Open Dumping prohibition: "Upon promulgation of criteria under section 6907(a)(3) of this title,

any solid waste management practice or disposal of solid waste . . . which constitutes the open dumping of solid waste . . . is prohibited." 42 U.S.C. § 6945(a) (2006) (AA 27-28). The criteria establish "a point in the calendar at which the statute now says a solid waste management practice or disposal is prohibited." O'Leary v. Moyer's Landfill, Inc., 523 F.Supp. 642, 650 (E.D. Pa. 1981).

Also, pursuant to section 6944(a) of RCRA, the Open Dumping Criteria are guidelines to help states classify and permit facilities as sanitary landfills. Chem. Mfrs. Ass'n v. EPA, 673 F.2d 507, 510 (D.C. Cir. 1982). Nothing in the statute or legislative history suggests that these were anything other than minimum guidance for states to permit sanitary landfills. They do not establish prerequisites for enforcing the Open Dumping prohibition.

It is unreasonable to interpret EPA's regulatory criteria, as the District Court held, as preempting enforcement of the express statutory prohibition on open dumping in situations that meet the clear statutory definition of an open dump. For instance, section 257.3-4, "Ground water," only lists a small subset of twenty-four chemicals that would be considered as groundwater contaminants for purposes of that section, despite the fact that there are thousands of chemicals and pollutants that can pose a "reasonable probability of adverse effects on health or the environment from the disposal of solid waste." Under the District Court's reading of the criteria, a person contaminating groundwater with a toxic chemical not listed

in section 257.3-4, such as AEEA, could still escape RCRA liability, despite the statute's and EPA's clear intent to regulate and prevent groundwater contamination. See Davis v. Liberty Mut. Ins. Co., 19 F.Supp. 2d 193, 198 (D. Vt. 1998) ("[T]he interpretation of the statute should not go so far as to make [it] ineffective or lead to irrational consequences."). And yet, if applied to the entire universe of open dumps, the practical effect of the District Court's interpretation would allow any solid waste disposal activity not specifically in violation of these eight narrow criteria to escape regulation.

This case is an excellent example of the risk of creating such a large and unintended loophole in RCRA. The chemical AEEA, a teratogen in mammals, has been found in groundwater under the Florence Facility at levels exceeding the Vermont Health Advisory level for AEEA in groundwater. (JA 261, 269). AEEA poses a threat to human health, yet EPA has not adopted an MCL for this chemical. It is unreasonable to think that a company disposing of waste containing a contaminant, known to be harmful, could escape liability under the open dumping provision simply because EPA had not taken the formal step of adopting an MCL or updating the Open Dumping Criteria. The District Court's narrow interpretation of RCRA contravenes the clear intent of Congress to prohibit the kind of waste disposal practices that Omya is engaged in. See Garcia-Villeda v. Mukasey, 531 F.3d 141, 147 (2d Cir. 2008) ("There is a presumption against construing a statute

as containing superfluous or meaningless words or giving it a construction that would render it ineffective.").

The Court should find that the District Court erred by granting Omya summary judgment and find Omya liable for violating RCRA's prohibition on open dumping as a matter of law. If this Court holds that Omya engaged in the prohibited act of open dumping, then no further analysis is required; the Court may simply remand this case to the District Court for a determination of the appropriate remedy. Omya's practice of placing industrial process waste contaminated with chemicals into unlined pits in direct contact with groundwater, however, also constitutes an imminent and substantial endangerment in violation of 42 U.S.C. § 6972(a)(1)(B).

III. THE DISTRICT COURT MISAPPLIED THE IMMINENT AND SUBSTANTIAL ENDANGERMENT STANDARD.

The District Court improperly narrowed the scope of the imminent and substantial endangerment standard and applied it in a manner inconsistent with RCRA's expansive language requiring courts to consider a broad range of risks to human health and the environment. The District Court improperly analyzed Omya's disposal practices under the imminent and substantial endangerment standard in section 6972(a)(1)(B) for two reasons. First, the District Court failed to consider available information about arsenic contamination in determining whether Omya's waste disposal practices constitute an imminent and substantial

In reviewing the District Court's application of the imminent and substantial endangerment standard, this Court applies "a de novo standard of review to ensure that the substantive law was correctly applied." Motor Vehicles Mfrs. Ass'n of U.S. v. N.Y. State Dep't. of Envtl. Conservation, 79 F.3d 1298, 1304 (2d Cir. 1996); Travellers Int'l, A.G. v. Trans World Airlines, Inc., 41 F.3d 1570, 1575 (2d Cir. 1994) ("District Court's application of . . . facts to draw conclusions of law, including a finding of liability, is subject to de novo review.").

In its September 2009 decision, the District Court misapplied the expansive imminent and substantial endangerment standard and failed to consider relevant and material facts in its analysis. (SA 90-94). If this Court does not rule in RCO's favor on the open dumping or imminent and substantial endangerment claims, this case should at least be remanded with instructions that the District Court apply the imminent and substantial endangerment standard using the full and proper scope of relevant evidence.

A. The Imminent and Substantial Endangerment Standard Requires Consideration of the Full Extent of the Risk.

This Court continued a long line of cases broadly interpreting RCRA's imminent and substantial endangerment provision in its recent decision, Cordiano

v. Metacon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009). In Metacon, relying on Dague v. City of Burlington and other Circuit Court cases, this Court carefully analyzed each word of the relevant statutory provision. 935 F.2d 1343, 1355 (2d Cir. 1991), rev'd on other grounds City of Burlington v. Dague, 505 U.S. 557 (1992); Metacon, 575 F.3d at 209-11.

The standard for determining an imminent and substantial endangerment under RCRA is set forth in section 6972(a)(1)(B), which holds polluters responsible for contamination if their disposal practices "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (2006) (AA 33-34). Under this standard, polluters are liable under RCRA if (1) it is a past or present generators, (2) it contributed to the past or present disposal of solid or hazardous waste, and (3) the waste may present an imminent and substantial endangerment to health or the environment.[13] Id.

In interpreting this standard, this Court determined that the use of the words "may present," "imminent," and "substantial" reflects Congressional intent to give broad latitude to citizens bringing suit. Metacon, 575 F.3d at 210. The District Court appears to have based the reversal of its original finding that Omya was liable for an imminent and substantial endangerment (the July 1, 2008 Order), at

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[13] The only issue in this case is the third element, namely whether Omya's present disposal of solid waste "may present an imminent and substantial endangerment to human health or the environment." 42 U.S.C. § 6972(a)(1)(B) (AA 33-34).

_______ "more clearly defin[ed] the appropriate standard that plaintiffs must meet to satisfy their burden." (SA 89-90). Nothing in Metacon, however, suggests that this Court elevated the evidentiary burden for citizen suit plaintiffs over that required in prior imminent and substantial endangerment cases. Instead, this Court held that the use of "may" in "may present" means that the imminent and substantial endangerment standard "is a broad one," which confers on courts "the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." Metacon, 575 F.3d at 210; Dague, 935 F.2d at 1355; see also Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 287 (1st Cir. 2006) ("Pertinently we think, Congress later loosened the standard for liability under section 7003 . . . by substituting the words 'may present' for the words 'is presenting.'").

Further, courts have clarified that a finding that a harm is "imminent" requires only that a risk of harm be present, and constitutes "imminent harm" even if its impacts will not be felt until later. Meghrig v. KFC Western, Inc., 516 U.S. 479, 485-86 (1996). "Substantial" has been interpreted to mean simply that the harm is "serious" and there is "reasonable cause for concern."[14] Metacon, 575 F.3d at 210-11; Burlington N. & Santa Fe Ry. v. Grant, 505 F.3d 1013, 1021 (10th

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[14] This Court has declined to quantify the level of harm necessary to qualify as a "substantial" harm. Instead, the Court in Metacon adopted the standard for "substantial" that is used in four other Circuits, and which the Court "did not specifically comment on in Dague." Metacon, 575 F.3d at 210-11.

Cir. 2007). Finally, an imminent and substantial endangerment exists if a polluter causes harm to either "health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added) (AA 33-34); Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 259 (3d Cir. 2005). In imminent and substantial endangerment cases when error is made, it "must be made in favor of protecting public health, welfare, and the environment." Interfaith, 399 F.3d at 259. Had the District Court properly applied this standard and considered evidence of arsenic contamination and groundwater contamination under Omya's Florence Facility, the court would have found that Omya's disposal practices constitute an imminent and substantial endangerment.

B. The District Court Failed to Consider Evidence that Omya's Disposal Practices Have Caused Arsenic to Leach into Groundwater at Levels Above Federal Drinking Water Standards.

The District Court improperly narrowed the scope of RCO's imminent and substantial endangerment claim to exclude consideration of evidence showing that Omya's waste disposal activities have caused or contributed to arsenic contamination in groundwater. Despite the broad scope of section 6972(a)(1)(B) to protect health and the environment from "any risk" presented by solid waste, the District Court improperly focused solely on contamination from one chemical, AEEA, and appears to have ignored evidence of arsenic in groundwater at levels above the federal drinking water standard. (SA 86, 88-94) (noting that

"groundwater . . . contained elevated levels of . . . arsenic" in the background facts, but making no mention of arsenic in the court's analysis of the imminent and substantial endangerment standard). This Court should, at least, remand this claim to the District Court to conduct a complete imminent and substantial endangerment analysis that incorporates all relevant evidence of human health and relevant harm, including the threat to health and the environment from arsenic in groundwater.

Courts have interpreted section 6972(a)(1)(B) to give broad authority to courts to "eliminate any risk" of harm. Dague, 935 F.2d at 1355. This analysis requires looking at all of the risks associated with Omya's waste disposal practices. As such, the District Court should have evaluated the risks associated with all of the chemicals present rather than limiting the evaluation to analysis of a single contaminant. See Burlington N., 505 F.3d at 1022 (concluding that the multiple carcinogenic chemicals in the "tar-like material" waste collectively constituted a "potential threat to stormwater runoff"); Parker v. Scrap Metal Processors, Inc., 386 F.3d at 1015 (analyzing the impacts of multiple harmful chemicals in liquid waste, such as lead, PCBs, and other heavy metals). The District Court noted that the groundwater below and around Omya's site contains multiple harmful chemicals, including "iron, manganese, arsenic and [AEEA]." (SA 86). The Court, however, only included evidence regarding AEEA in its analysis of the harm. (SA 90-94).

It is, however, the presence of arsenic which poses perhaps the most alarming threat and, for this reason, the District Court's failure to discuss or analyze this threat is clearly erroneous. EPA has determined that arsenic is not safe at any level. See supra section II(A). As discussed in detail above in Section II(A)(1) of this brief, the Section 5 Study found that Omya's disposal practices have caused the groundwater to be contaminated with arsenic at levels above 10 ppb. Because Omya's disposal practices render the groundwater undrinkable from arsenic contamination, the District Court should have included, at a minimum, an assessment of arsenic impacts in its imminent and substantial endangerment analysis.

Further, in analyzing the risks of arsenic contamination in groundwater, the District Court is not limited to evaluating whether the levels exceed the SDWA MCL and Open Dumping Criteria for arsenic. Unlike other sections in RCRA and other environmental laws, section 6972(a)(1)(B) does not "necessitate quantification" of harms, let alone specific contaminants. Burlington N., 505 F.3d at 1021. This approach is particularly appropriate in this case since there are no safe levels of arsenic. National Primary Drinking Water Regulations: Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. at 7021 (AA 63). The fact that arsenic levels in groundwater under Omya's

facility are above the MCL set by EPA under the SDWA is good evidence of a substantial and serious risk.[15] 40 C.F.R. § 141.62 (2009) (AA 37).

With this in mind, it is not clear why the District Court did not consider the risk to human health and the environment from arsenic in groundwater under Omya's Florence Facility in its September 30, 2009 Order ruling on RCO's imminent and substantial endangerment claim. In contrast, the court recognized in its now vacated July 1, 2008 Order, that its "finding of 'any risk' is reinforced by the possibility that Omya has introduced arsenic into the ground water." (SA 73). The word "arsenic" does not, however, appear in the Court's September 30, 2009 Order's analysis of the imminent and substantial endangerment claim. (SA 88-94). While it is unclear why the District Court excluded arsenic from the analysis, its absence is clear error. If the District Court had truly "based [its determination] upon a review of the entire record," (SA 84), evidence of arsenic at levels at or above the federal drinking water standard should have entered the analysis.

In sum, the District Court erred by failing to include any analysis of the risk presented by arsenic in the groundwater. Section 6972(a)(1)(B) requires the court

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[15] Although, as the District Court noted, "state environmental standards do not define a party's federal liability under RCRA," (SA 93), drinking water standards are "relevant and useful in determining the existence of an imminent and substantial endangerment." Interfaith Cmty. Org., 399 F.3d at 261 n.6. The fact that arsenic has been found at levels at or above the federal MCL for drinking water, therefore, at least provides a relevant measurement of a risk factor in determining whether Omya's waste disposal practices create an imminent and substantial endangerment. (JA, 269-70, 313).

to view all harms, and therefore all contaminants, that impact health or the environment. The Court should reverse the District Court and find Omya liable for causing or contributing to an imminent and substantial endangerment or at least remand this case to the District Court to apply the imminent and substantial endangerment standard in light of the arsenic contamination resulting from Omya's disposal practices.

C. The District Court Failed to Assess Whether Omya's Waste Disposal Practices Created a Risk of Imminent and Substantial Endangerment to the "Environment."

The District Court also failed to analyze the risk to the "environment" from Omya's waste disposal practices, instead only considering risks to "health" in determining whether Omya was liable for an imminent and substantial endangerment. Courts have found that the disjunctive phrasing of section 6972(a)(1)(B), that a polluter is liable under section 6972(a)(1)(B) if its waste "may present an imminent and substantial endangerment to health or the environment," indicates that proof of harm to "a living population is not required for success on the merits[.]" 42 U.S.C. 6972(a)(1)(B) (2006) (emphasis added) (AA 33-34); Interfaith Cmty. Org., 399 F.3d at 259. Congress expressed a clear intent to protect both human health and the environment by using the word "or." Therefore, a court cannot foreclose a finding of liability before considering impacts to the "the environment."

Cases in other circuits have held that a "District Court erred by limiting its consideration to only injury to persons when § 6972(a)(1)(B) also requires consideration of imminent and substantial endangerment to the environment." Burlington N., 505 F.3d at 1021; see also id. ("[T]he District Court . . . held plaintiffs to a higher than needed showing" by requiring a living population and quantifying the "substantial" element.). For this reason, in both Burlington Northern and Interfaith, the appeals court reversed because the District Court "read [section 6972(a)(1)(B)] too narrowly." Burlington N., 505 F.3d at 1021-22; Interfaith Cmty. Org., 399 F.3d at 261. Like these cases, the District Court applied section 6972(a)(1)(B) too narrowly in the present case, examining Omya's disposal practices only in terms of the impact of AEEA contamination on human health and only where AEEA, or any contaminant, was found in ground or surface water outside of the boundaries of Omya's Florence Facility.

It is undisputed that the groundwater, a public trust resource in Vermont, underneath the Florence Facility is contaminated.[16] See 10 V.S.A. § 1390(5) (2009) (AA 65); (JA 348-402). This fact alone may be sufficient, to trigger liability under section 6972(a)(1)(B). Interfaith Cmty. Org., 399 F.3d at 259 (Section 6972(a)(1)(B) "imposes liability for endangerments to the environment,

[16] Private contamination of a public resource, regardless of whether contamination occurs on private or public property, violates the public trust. State v. Cent. Vt. Ry., 571 A.2d 1128, 1132 (Vt. 1989).

including water in and of itself.”). Omya has dumped contaminated waste into open pits that have direct contact with groundwater for over thirty years, causing the groundwater to become undrinkable. Polluting otherwise pristine groundwater was particularly important to the court’s reasoning in Wilson v. Amoco Corp., where the court found the threat of further groundwater contamination, alone, sufficient to constitute an imminent and substantial endangerment because “[i]f left unabated, migration of the contamination may impact what is currently uncontaminated, pristine groundwater.” 989 F.Supp. 1159, 1176 (D. Wyo. 1998).

Under federal as well as state law, the groundwater below Omya’s facility is intended to be protected for drinking water. EPA’s definition, enacted pursuant to RCRA and Congressional intent to protect groundwater as a drinking water source, explicitly identifies groundwater, such as that under the Florence Facility, as an “underground drinking water source.” 40 C.F.R. § 257.3-4 (2009) (AA 42-43); see supra section II(A)(2). The groundwater under the Florence Facility is undoubtedly contaminated. The Section 5 Report revealed that because of Omya’s disposal practices the groundwater both on- and off-site contained AEEA, arsenic, iron and manganese and a surficial spring contained AEEA. (JA 145-47, 178). Subsequent groundwater samples taken by Omya’s consultants show contamination both on- and off-site, including arsenic at levels above the maximum contaminant level for drinking water. (JA 269-270, 313). Even though

present groundwater contamination and the threat of continued contamination by these chemicals should be considered in applying the imminent and substantial endangerment standard, these facts were not considered in the District Court's analysis.

Instead, the District Court framed its entire analysis on AEEA's proximity to current drinking water springs and impacts on humans. (SA 90-94). The District Court found that AEEA did not "threaten . . . wildlife," based on its presence in low doses at a surficial spring. (SA 93). The District Court, however, did not analyze whether the contamination of groundwater under the site constitutes an imminent and substantial endangerment to the environment. The District Court relied entirely on an analysis of studies of human health impacts resulting from AEEA and based its conclusion that there is no imminent and substantial endangerment on the "absence of AEEA in any water currently used as drinking water." (SA 90-93). Such a limited analysis of impacts on the environment is insufficient to satisfy RCRA's imminent and substantial endangerment standard.

In addition to limiting its analysis to solely human health impacts, the District Court considered only contamination beyond the boundaries of Omya's property. (SA 93). Contaminating a public resource such as groundwater, a resource that is not constrained by property lines, constitutes an environmental harm. Moreover, the fact that Omya's disposal practices contaminated otherwise

___ 65). The District Court should not have stopped its analysis at the property's edge and instead should have considered the significant contamination of groundwater under Omya's Florence Facility in its analysis.

Based upon the District Court's failure to consider evidence of groundwater contamination under the Florence Facility, this case should at least be remanded for proper application of the imminent and substantial endangerment standard articulated in Metacon.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION AND UNFAIRLY DENIED RCO AN OPPORTUNITY TO PRESENT EVIDENCE ON ARSENIC CONTAMINATION AND AEEA TOXICITY.

The District Court abused its discretion by not allowing RCO to present evidence of arsenic and AEEA contamination directly relevant to its imminent and substantial endangerment claim before the court revisited and vacated its prior ruling that Omya was liable. RCO sought to present evidence at the remedy hearing of arsenic contamination that was clearly relevant and admissible to RCO's imminent and substantial endangerment claim, but, based on an apparent misunderstanding of the law, the District Court did not allow RCO to present this evidence.

Similarly, the District Court erroneously denied RCO's request to rebut testimony provided by Omya relating to the toxicity of AEEA. After considering the testimony provided by Omya during the remedy hearing, the District Court revisited its liability ruling on RCO's imminent and substantial endangerment claim and vacated its liability judgment. The District Court failed to give notice to RCO in advance of the trial that it would reconsider its prior liability ruling based on the trial testimony. It was not until closing arguments at trial, after the opportunity for RCO's witnesses to testify had passed, that the Court indicated that it might revisit Omya's motion to vacate the liability finding. When RCO sought to respond after the hearing, the District Court denied RCO's request to present such testimony based on the court's determination, at least at that time, that the court would be issuing a final decision relating only to remedy. Both of these decisions, to exclude evidence of arsenic contamination and to preclude testimony related to the toxicity of AEEA, constitute an abuse of discretion and should be reversed.

A trial court's evidentiary rulings are reviewed only for abuse of discretion. Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 136 (2d Cir. 2008). A District Court's ruling excluding evidence "may be reversed for abuse of discretion and if the ruling affected a party's substantial rights (i.e., was clearly prejudicial)." Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of

Contemporary Dance, Inc., 466 F.3d 97, 101 (2d Cir. 2006). In the Second Circuit, a District Court should be found to have abused its discretion if it has based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence or rendered a decision that cannot be located within the range of permissible decisions. Green v. Mattingly, 585 F.3d 97, 104 (2d Cir. 2009) (citing Sims v. Blot, 534 F.3d 117, 132 (2d Cir. 2008)).

In this case, the District Court's decisions to exclude evidence of arsenic during the trial and the exclusion of evidence concerning the toxicity of AEEA with regard to the motion to vacate was clearly prejudicial to RCO, based on an erroneous view of the law and therefore an abuse of discretion. For these reasons, RCO requests that this court remand this case to the District Court for a liability hearing that includes evidence of arsenic and the toxicity of AEEA.

A. The District Court Abused Its Discretion When It Refused to Allow Evidence Relating to Arsenic Contamination in the Remedy Hearing.

The District Court abused its discretion when it excluded testimony regarding arsenic contamination in the groundwater from the remedy hearing even though evidence of arsenic contamination was already in the record before the court and was relevant to RCO's proposed remedy. Specifically, the District Court improperly denied RCO's attempt to offer evidence related to arsenic contamination at trial (and also improperly denied RCO's Offer of Proof) that was

relevant to a determination of remedy. (JA 237); (JA 315-20). RCO was unfairly prejudiced by this decision because (1) the evidence was relevant to a determination of remedy; and (2) the court did not have the benefit of the arsenic evidence when reconsidering and vacating its ruling on liability.

While the focus of the court's July 1, 2008 decision that Omya was liable for an imminent and substantial endangerment was on AEEA contamination, the District Court recognized that the groundwater below Omya's disposal pits has recorded arsenic readings up to 24 ppb. (SA 64). In footnote three of its July 2008 opinion the District Court stated, "[w]hile 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." (SA 73). After finding Omya liable for creating an imminent and substantial endangerment based on AEEA and the possibility of arsenic contamination, the court stated, "[w]hile liability is clear, the remedy is far from clear" and ordered a hearing to determine the appropriate relief. (Id.) In spite of these rulings, the District Court refused to allow RCO to present evidence at the hearing relating to arsenic contamination that was relevant to the determination of an appropriate remedy to address the imminent and substantial endangerment he found in his July 2008 order.

Prior to the hearing, RCO had sought to ensure that evidence of arsenic could be presented at the remedy hearing. On March 18, 2009, RCO filed a motion to clarify the scope of the proposed hearing on remedy, arguing that a complete remedy should take arsenic contamination into account. (JA 199, 201-07). The District Court denied the motion, stating in a text order in the docket that "[t]he Court will take evidence at the hearing on the appropriate remedy for the violation found [in the Court's July 1, 2008 Order.]" (SA 77). Even though the "violation found" was in part dependent on the possibility of arsenic contamination, at the hearing, the court refused to allow RCO to introduce expert witness testimony related to arsenic.

Specifically, at the remedy hearing, RCO sought to introduce testimony at trial from expert Dr. James Smith regarding evidence of arsenic contamination relevant to determining a proper groundwater monitoring program. (JA 237). The Magistrate Judge upheld Omya's objection to this testimony and precluded the admission of any evidence relating to arsenic. (Id.). In response to the court's ruling, RCO filed an Offer of Proof regarding the evidence RCO would have introduced if allowed. (JA 315-20). According to the excluded testimony of Dr. Smith, arsenic is present in groundwater under the Florence Facility at elevated levels under the site as a result of Omya's waste disposal practices and a remedy that did not include an evaluation of and monitoring for arsenic was not a complete

remedy. (JA 315-16). Further, the Offer of Proof noted that Dr. Smith would have testified that on-going monitoring for arsenic was needed both on-site and off of the Florence Facility. (JA 317-18). This excluded testimony directly supported RCO's proposed remedy for the imminent and substantial endangerment presented by Omya's waste disposal practices.

On June 19, 2009, the District Court denied RCO's Offer of Proof for Dr. Smith's testimony concerning, among other issues, arsenic. (SA 79-80). The District Court found that Dr. Smith's testimony was immaterial because "the Court had previously determined that Plaintiffs had not demonstrated that arsenic was present at the facility in sufficient quantities to violate federal environmental laws." (SA 79). The Magistrate Judge's decision to exclude evidence of arsenic appears to have been based on his erroneous assumption that the court's prior ruling relating to open dumping precluded the consideration of evidence of arsenic contamination with regard to the imminent and substantial endangerment claim. See supra Section III(B). As discussed above on pages 53-55, this finding was erroneous as a matter of law – the presence of arsenic at levels above safe drinking water levels in groundwater may constitute a violation of RCRA's imminent and substantial endangerment provision even if it was found not to violate the open dumping prohibition. Furthermore, this decision contradicted the District Court's

own ruling that the presence of arsenic contamination reinforced its finding of an imminent and substantial endangerment. (SA 73).

As a result of this error, RCO was precluded from presenting evidence to the court that was relevant to determining the remedy and, significantly, given that the District Court reconsidered its July 2008 decision, was also directly relevant to the question of whether Omya was responsible for causing an imminent and substantial endangerment. The District Court abused its discretion by denying this offer of evidence regarding arsenic. Evidence of arsenic contamination was relevant to both liability and the hearing on remedy and RCO was prejudiced when this relevant evidence was excluded.

B. The District Court Abused Its Discretion by Denying RCO the Opportunity to Present Evidence on AEEA Toxicity to Rebut Omya's Testimony.

The District Court abused its discretion when it failed to allow RCO the opportunity to counter the evidence that Omya had presented regarding AEEA toxicity at the remedy hearing. The District Court indicated that liability was established but it would hear evidence on the nature and extent of the risk. However, the District Court did not indicate until the closing arguments of the remedy hearing that it might use evidence at the hearing to re-visit its liability decision. After it did so, RCO sought to introduce evidence to counter this testimony after the trial, but the District Court denied RCO's motion to present this

evidence. Although the trial was supposed to be limited to evidence in support of remedy, the District Court used the evidence at the remedy hearing regarding the toxicity of AEEA to vacate its July 1, 2008 liability decision without giving RCO notice and the opportunity to be heard on this issue. The District Court's denial of this motion (see SA 81-82), thereby refusing to permit RCO the opportunity to rebut Omya's evidence regarding liability, was unfair and prejudicial to RCO.

After the July 2008 liability decision, and prior to the March 2009 remedy hearing, Omya sought to overturn the liability decision through a motion to vacate based on "newly discovered evidence" concerning the extent of AEEA off-site. Omya requested that the liability decision be overturned and that the matter be set for trial. Docket 204 at 2. Omya argued that there was new evidence establishing that there was no AEEA contamination off-site. Id. at 1-2. RCO opposed this motion. Docket 206. The District did not hear argument on this motion nor rule on this motion. Instead, the District Court ordered a hearing to determine the remedy for the imminent and substantial endangerment created by Omya. Docket 220.

A hearing was scheduled for March 23 to March 25, 2009 to determine the appropriate remedy. Docket 221. RCO filed a pre-trial motion to exclude the testimony of Omya's proposed expert toxicologists, Drs. Greenberg and Brent, because it was not relevant to remedy. (JA 221-29). The District Court denied this

motion without any explanation. (SA 75). However, as the record indicates, the hearing began on March 23, 2009 with the District Court stressing that the scope of the hearing would be limited to finding an appropriate remedy. (JA 233-34).

During trial, RCO put on three witnesses to testify in support of their proposed remedy.[17] (Transcript 1-161). Because liability was already established in the July 2008 order, RCO presented testimony about what could be done to remedy the endangerment. (Id.) In response, Omya provided testimony by toxicologists Dr. Michael Greenberg and Dr. Jeffrey Brent as well as two witnesses to testify about what Omya had done to improve its waste disposal practices. (Transcript 167-243; 414-60). At the hearing, the toxicologists testified about the toxicity of AEEA without limitation. (Transcript 169).

It was not until closing arguments that the Court indicated that it would consider Omya's evidence at the remedy hearing to reconsider liability. Specifically, the court stated:

> "[t]he Court can certainly, based on the hearing, has the option of finding that, in fact, the plaintiffs have met the burden or haven't met the burden [to show that Omya's actions created an imminent and substantial endangerment to the health or the environment]. It doesn't

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[17] Dr. Pitkin testified in support of the need for continued and improved groundwater monitoring. (Transcript 16-76). Dr. Smith testified in support of more accurate testing for AEEA and would have provided testimony concerning the need to address arsenic contamination (if allowed). (Transcript 80-124). Gregory Johnson testified that dumping into unlined pits must cease and a study should be conducted to determine what should be done with regard to the waste that was left in the pits. (Transcript 126-61).

> prevent the Court from, based on the evidentiary hearing we've had, to determine the validity of the Court's prior conclusion based on a summary [Section 5] report."

(JA 243-45). Based on this comment by the Magistrate Judge, RCO filed a motion for leave to present testimony in opposition to Omya's motion to vacate after the close of the trial. (JA 323-33).

Specifically, RCO sought to introduce testimony from the State of Vermont's Toxicologist, Dr. William Bress, to rebut Omya's toxicologists' testimony that AEEA was not toxic. In order to do so, RCO filed a motion seeking to subpoena Dr. William Bress, to compel his expected testimony that a drinking water guideline for AEEA in groundwater is necessary to protect human health since AEEA is a potential teratogen, a substance that may cause birth defects. (JA 328, 332). Further, RCO's counsel, the undersigned, understood that Dr. Bress would have confirmed that he stood by his opinion regarding the toxicity of AEEA despite the testimony from Omya's toxicologists, testimony which he had an opportunity to review. (Id.)

The District Court denied this motion and thereby prevented RCO from presenting testimony to rebut the testimony by Omya's toxicologists. (SA 81-82). The District Court reiterated that it had decided on liability and the only issue before it in the hearing was determination of the proper remedy. (SA 81). The District Court stated: "The Court will consider the testimony of Defendants'

experts only on the issue of remedy, as the Court indicated was the sole purpose of the hearing." (SA 81) (emphasis added).

In its final decision on September 30, 2009, however, the District Court changed its course and ruled in Omya's favor regarding liability. (SA 83-94). Contradicting its former rulings, the District Court used the evidence at the remedy hearing to decide on Omya's October 8, 2008 motion to vacate. (SA 86-92). Based on its review of the appendices and the testimony of Drs. Brent and Greenberg, the District Court revisited Omya's liability under 42 U.S.C. § 6972(a)(1)(B) and reversed its July 1, 2008 decision. The District Court found that AEEA did not pose an imminent and substantial endangerment based largely on the testimony about AEEA toxicity presented by Omya's unrebutted expert testimony. (SA 94).

RCO was significantly prejudiced by the District Court's about face on this critical issue. RCO was barred from introducing key testimony on liability, while the court allowed Omya to present its evidence unopposed. The District Court's inconsistent actions resulted in an unfair and prejudicial advantage in Omya's favor by precluding evidence clearly relevant to the District Court's ultimate ruling on liability.

CONCLUSION

For these reasons, RCO respectfully requests the Court hold that Omya is liable for engaging in the prohibited act of open dumping, reverse the District Court and remand to the District Court for determination of an appropriate remedy. Alternatively, RCO requests the Court to reverse the District Court's decision on RCO's imminent and substantial endangerment claim and either grant RCO's motion for injunctive relief or remand for a liability hearing with instructions to include and consider relevant evidence.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, David K. Mears, hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that according to the word count feature of Microsoft Word 2003 the foregoing Appellant brief contains ____ words (exclusive of the corporate disclosure statement, table of contents, table of authorities, and this certificate) and therefore conforms with the 16,000 word limit agreed to in the stipulated motion to extend signed on February 2, 2010 and the Federal Rules of Appellate Procedure for the Second Circuit.

Dated: April 6, 2010

David K. Mears

CERTIFICATE OF SERVICE

I, David K. Mears, hereby certify that on April 7, 2010, I served a true and correct copy of the foregoing Appellants' brief and the related Appendices by first class mail on:

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