

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Ernest Brod, Robert DeMarco, Beverly Peterson, and Residents Concerned about Omya	Civil No. <u>2:05-cv-182</u>
Plaintiffs,	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
vs.	BY <u>WJP</u> DEPUTY CLERK 2005 JUN 24 AM 9:45
Omya, Inc., and Omya Industries, Inc.	
Defendants.	

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

INTRODUCTION

1. This is a Citizen Suit brought under sections 7002(a)(1)(A) & (B) of the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 6972(a)(1)(A) & (B). Plaintiffs Ernest Brod, Robert DeMarco, Beverly Peterson, and Residents Concerned about Omya ("RCO") seek a declaratory judgment, injunctive relief, the imposition of civil penalties, and the award of costs, including attorneys' and expert witness' fees, for Defendants' "open dumping" of chemically contaminated solid waste in violation of 42 U.S.C. § 6945(a), which is creating an "imminent and substantial endangerment to health or the environment" in violation of RCRA. 42 U.S.C. § 6972(a)(1)(B).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 42 U.S.C. § 6972(a).
3. On November 12, 2004, Plaintiffs served a notice of violation on the Administrator of the United States Environmental Protection Agency ("EPA"), the Regional Administrator of EPA Region 1, the Vermont Agency of Natural Resources

("VANR"), and Defendant Omya, Inc., pursuant to 42 U.S.C. § 6972(b)(2)(A). Exhibit A attached.

4. More than 90 days have passed since the notice was received and neither EPA nor VANR has commenced and is diligently prosecuting a civil or criminal action in a court to redress the violations.

5. Venue is proper in the United States District Court for the District of Vermont pursuant to 42 U.S.C. § 6972(a)(2) because the violations are occurring in Vermont.

PARTIES

Plaintiffs

6. Plaintiff Ernest Brod is a resident of Florence, Vermont and a member of RCO who lives at 460 Humphrey Road. Mr. Brod's property lies to the east, approximately 300 feet from Defendant's mineral processing plant in Florence, Vermont ("Florence Facility"), and is downgradient of the Florence Facility. Mr. Brod and his family rely on a groundwater well for all domestic water needs, including drinking water for his family and his animals. Mr. Brod raises sheep and maintains a groundwater-fed spring as a secondary source of water for his animals. Declaration of Ernest Brod, Exhibit B attached.

7. Plaintiff Brod is concerned about the chemicals leaching out of Defendants' mining waste piles at the Florence Facility and what impact those chemicals may have on his well and spring. He is also concerned about the impacts Defendants' growing waste pile may have on the acoustics of the valley and on the aesthetics of the area surrounding his property. Brod Decl.

8. Plaintiff Robert DeMarco is a resident of Florence, Vermont and a member of RCO who lives at 1925 West Creek Road. Mr. DeMarco resides with his family on property that is adjacent to the Florence Facility. There is a stream along the southerly portion of Mr. DeMarco's property, which is adjacent to the train trestle that emerges from Defendants' waste settling ponds. This stream leads to Otter Creek and is frequently a cloudy white color. Declaration of Robert DeMarco, Exhibit C attached.
9. Plaintiff DeMarco is concerned about the chemicals that may be leaching into the environment from Defendants' operation. Mr. DeMarco and his family rely on the Pittsford-Florence public water supply for all of their domestic needs. Mr. DeMarco is concerned that the water is contaminated and may be harmful to his family's health. He is also concerned about the visual impact of the Florence Facility and fears that Defendants' growing waste piles may have a negative effect on the value of his home and property, as well as his enjoyment of the property. DeMarco Decl.
10. Plaintiff Beverly Peterson is a resident of Florence, Vermont and a member of RCO who lives at 2527 West Creek Road. Ms. Peterson's property abuts Defendants' Hogback quarry. Her property contains a seasonal stream that fills with water from a spring at the base of Hogback Mountain. Ms. Peterson has a garden and raises chickens. She and her animals rely on the Pittsford-Florence water supply for most of their domestic needs. Declaration of Beverly Peterson, Exhibit D attached.
11. Plaintiff Peterson is concerned about the impact the chemicals from Defendants' Florence Facility are having on her health and the health of her animals, as well as on the Pittsford-Florence public water supply and the seasonal stream on her property. Ms. Peterson is afraid to drink her water and to bathe in it because she is worried that she is

inhaling chemicals in the water vapor. Ms. Peterson is concerned that the eggs laid by her chickens and the vegetables from her garden are not safe to consume. She is also concerned about the impacts that Defendants' growing waste pile may have on the acoustics of the valley and on the aesthetics of the community. Peterson Decl.

12. Plaintiff Residents Concerned about Omya, an unincorporated association under Vermont law, sues on behalf of its members who are residents of Pittsford, Vermont living in close proximity to Defendants' Florence Facility. RCO formed in 2002 to seek regulation and remediation of Defendants' onsite waste disposal practices.

13. Members of Plaintiff RCO are also concerned about the potential impacts of the chemicals in Defendants' waste on the Pittsford-Florence public water supply wells, as well as on Otter Creek, Smith Pond, and the people who use and enjoy these public resources. Brod Decl.; DeMarco Decl.; Peterson Decl.; Declaration of Susan Shaw, Exhibit E attached. Otter Creek, and its tributary streams and associated wetlands, are located on the eastern side of, and downgradient from, Defendants' waste disposal areas. According to Heindel and Noyes, Defendants' consultant, Otter Creek and the associated water bodies may receive surface and groundwater discharge from Defendants' waste settling ponds. The Pittsford-Florence public water supply is primarily fed by a gravel aquifer recharged by Otter Creek.

Defendants

14. Omya Inc. is a Vermont corporation. It is a subsidiary of Omya AG, a large, multi-national, privately held corporation, based in Oftringen, Switzerland. Omya AG and its subsidiaries operate six North American plants for the production of calcium

carbonate for use in paper, paint, plastic, food products, pharmaceutical products, and numerous other industrial applications.

15. Omya Industries, Inc. is a Vermont corporation. It is also a subsidiary of Omya AG.

STATUTORY AND REGULATORY FRAMEWORK

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (“RCRA”)

16. In section 1002(b) of RCRA, Congress finds that “disposal of solid waste... in or on the land without careful planning and management can present a danger to human health and the environment;” and that “open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land....” 42 U.S.C. § 6901(b) (2004).

17. In section 1003(a), Congress declares the purpose of RCRA is “to promote the protection of health and the environment” and seeks to accomplish this by “*prohibiting future open dumping on the land* and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health....” 42 U.S.C. § 6902(a) (emphasis added).

18. Section 4005(a) prohibits “any solid waste management practice or disposal of solid waste... which constitutes the open dumping of solid waste....” 42 U.S.C. § 6945(a).

19. Under section 1004(3), “The term ‘disposal’ means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste... into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including

ground waters.” 42 U.S.C. § 6903(3).

20. Under section 1004(27), “The term ‘solid waste’ means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, *mining*, and agricultural operations....” 42 U.S.C. § 6903(27) (emphasis added).

21. Under section 1004(14), “The term ‘open dump’ means any 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).

22. The EPA administers the federal RCRA program. EPA regulations provide minimum criteria, subject to states setting stricter criteria, for determining what constitutes open dumping. 40 C.F.R. Part 257.

23. RCRA’s citizen suit provisions, sections 7002(a)(1)(A) and (B), entitle Plaintiffs to seek relief against Defendants in Federal District Court. 42 U.S.C. § 6972(a)(1)(A) & (B). Under section 7002(a)(1)(A) and (B), “any person may commence a civil action on his own behalf” against a person who is “in violation of any permit, standard, *regulation*, condition, requirement, *prohibition*, or order which has become effective pursuant to this chapter,” 42 U.S.C. § 6972(a)(1)(A) (emphasis added); or “any person... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment,” 42 U.S.C. § 6972(a)(1)(B).

The Vermont Solid Waste Management Act, 10 V.S.A. §§ 6601-6612 (2004)

("SWMA")

24. In response to the growing problem of solid waste disposal in Vermont, the Vermont Legislature enacted the SWMA in 1987.
25. The SWMA prohibits the unpermitted disposal of any solid waste: "No person may construct, substantially alter, or operate any solid waste management facility without first obtaining certification from the secretary for such facility, site or activity...." 10 V.S.A. § 6605(a)(1).
26. The SWMA defines the term "solid waste" as any "discarded material . . . resulting from industrial, commercial, *mining*, or agricultural operations...." 10 V.S.A. § 6602(2) (emphasis added).
27. VANR administers the SWMA and oversees the Vermont Solid Waste Management Program. *Id.* § 6603.
28. VANR has the authority to regulate solid waste disposal in Vermont.
29. Pursuant to 10 V.S.A. § 6603, VANR promulgated Solid Waste Management Rules ("SWMR") to implement the SWMA. Vt. Solid Waste Mgt. R. §§ 6-101 to 6-1209 (2004). The SWMR outline the process a solid waste management facility must follow to be certified by VANR and also set forth the standards VANR employs in making certification determinations.
30. Section 6-303 of the SWMR requires that "[a]ny person wishing to store, treat or dispose of solid waste or otherwise construct, substantially alter or operate a solid waste facility . . . shall file for and obtain certification." Vt. Solid Waste Mgt. R. § 6-303(a).

31. State law solid waste disposal requirements are enforceable by citizens under RCRA. 44 Fed. Reg. 53438 (Sept. 13, 1979).

STATEMENT OF FACTS

Site Description

32. Defendants' Florence Facility is located in Florence, Vermont, a village of approximately 600 residents in the town of Pittsford, near Rutland, Vermont.

33. The geology underlying the Florence Facility is a complex karst formation. Heindel and Noyes Site Map of 8/18/04, Exhibit F attached; Heindel and Noyes, Geologic Cross Section Location Map of 8/18/04, Exhibit G attached.

34. Karst geology, created over time as a result of mineral dissolution of the bedrock by groundwater, is characterized by fractures, or voids, in the bedrock.

35. According to Heindel and Noyes, Defendant Omya, Inc.'s consultant, there are two bedrock aquifers in the area of the Florence Facility. One bedrock aquifer underlies the "Dolomite Quarry" area of the Florence Facility, which contains some of Defendants' mining waste, and is linked to surface runoff and groundwater discharges to the east. The other bedrock aquifer runs through the valley to the northeast of the Florence Facility.

36. Surface water runoff from the Florence Facility flows from west to east into Otter Creek.

37. Many of the residents of Florence and the town of Pittsford rely on the Pittsford-Florence public water system, consisting of two gravel wells, both of which are supplied by a gravel aquifer that is recharged by Otter Creek.

38. The gravel wells are located east of the Florence Facility. Many members of Plaintiff RCO use the Pittsford-Florence public water supply for all of their household

needs.

39. According to Defendants' consultant, Heindel and Noyes, the two gravel wells produce up to 600,000 gallons on peak days. Average production of the wells is 200,000 gallons to 350,000 gallons per day. Demand depends significantly upon Defendants' contractual use of municipal water to supplement its own sources.

Defendants' Operations

40. Defendants' production process includes the mining of raw ore, which is then crushed and purified through the addition of chemicals intended to remove natural impurities and contaminants from the ore.

41. These impurities, and the chemicals used to remove them, are then separated from the purified calcium carbonate, and disposed of as mining waste, sometimes called "tailings."

42. The purified calcium carbonate is then subjected to further processing and finishing, where it can be used in the manufacture of the products described in ¶ 14.

43. Defendants use significant amounts of water from the Pittsford-Florence public water supply described in ¶¶ 37-39 in their industrial operations.

44. Defendants' ground water pumping may be creating a "cone of depression" causing chemicals from Defendants' waste to contaminate the Pittsford-Florence public water supply.

45. Since approximately 1979, Defendants have been dumping their chemically contaminated mining waste into the depleted quarries at the Florence Facility, which quarries are unlined, uncovered, open pits with little or no separation from the exposed underlying bedrock.

46. Defendants have never obtained a certification from VANR under Vermont's SWMA and Vermont's SWMR to dispose of their mining waste at the Florence Facility.

47. The Dolomite Quarry, located at the Florence Facility, is approximately 100 feet deep and currently has a footprint of approximately eight acres. Ex. F. Defendants have filled the Dolomite Quarry with waste and have proposed to expand the quarry to cover an area of 32 acres. Commissioner's Determination-Omya Declaratory Ruling Limited Reconsideration, 4/28/05, Exhibit H attached.

48. Chemical leachate from Defendants' waste has been detected in the groundwater in Wells 96-1, 96-2, 2, B and C. Wells 96-1 and 96-2 are abandoned bedrock wells located at the Florence Facility. Wells B and C are bedrock wells drilled specifically for monitoring purposes, and are also located at the Florence Facility. Ex. F.

49. The Commissioner of the Department of Environmental Conservation of VANR determined that leachate from the mining waste, or tailings, is present in groundwater and that the mining waste "may pose a threat to public health and safety and the environment." Ex. H at 4.

EFFECTS OF DEFENDANTS' WASTE DISPOSAL PRACTICES

50. Defendants' solid waste is contaminated with numerous chemicals, some of which are listed as hazardous chemicals under Subchapter III of RCRA, 42 U.S.C. § 6921, as well as with pesticides registered under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y.

51. The chemicals in Defendants' waste pose an imminent and substantial endangerment to health or the environment because Defendants are dumping the

chemical wastes into unlined, open pits with little or no separation from exposed bedrock, overlying aquifers contained within a fractured karst formation.

52. Chemical leachate from the waste is leaching into the groundwater. Ex. H.

53. Defendants' chemically contaminated waste water has overflowed its settling cells and other storage basins and discharged into Smith Pond, which flows into Otter Creek, in violation of the Clean Water Act. Letter from Jordan to Dickson of 12/13/99, Exhibit I, attached; Letter from Davis to Jordan of 4/14/00, Exhibit J, attached; Letter from Jordan to Dickson of 4/26/00, Exhibit K, attached.

54. Defendants' uncovered waste is exposed to the elements, allowing for the movement of contaminants off-site and creating an imminent and substantial endangerment to humans and the environment. Ex. H.

55. Dust from Defendants' operations blows onto adjoining areas, including Plaintiffs properties, creating nuisance conditions and potential health threats from fine particles that may contain silica, a human carcinogen, and the other chemicals that bind themselves to the particles.

CLAIMS

56. Plaintiffs restate and reallege the foregoing allegations.

First Claim: Defendants Are in Violation of the RCRA Open-Dumping Ban

57. RCRA prohibits "any solid waste management practice or disposal of solid waste... which constitutes the open dumping of solid waste...." 42 U.S.C. § 6945(a).

58. The SWMA and the SWMR prohibit the disposal of solid waste, except into facilities that have been certified by VANR under 10 V.S.A. § 6605(a)(1) and Vt. Solid Waste Mgt. R. § 6-303.

59. Defendants' do not have any certification from VANR to dispose of their waste and do not dispose of their waste into a sanitary landfill or a hazardous waste facility.

60. As described in ¶¶ 32-55 above, Defendants' waste disposal practices constitute "open dumping" in violation of 10 V.S.A. § 6605(a)(1) and 42 U.S.C. § 6945(a), and applicable EPA regulations.

Second Claim: Defendants' Unlawful Waste Disposal Practices Pose an Imminent and Substantial Endangerment to Health or the Environment

61. RCRA prohibits a "past or present owner or operator of a treatment, storage, or disposal facility" from disposing of solid waste in a manner that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

62. As described in ¶¶ 32-55 above, Defendants operate an illegal solid waste disposal facility that may present an imminent and substantial endangerment to health or the environment in violation of 42 U.S.C. § 6972(a)(1)(B).

RELIEF REQUESTED

Plaintiffs seek a judgment from this Court against Defendants as follows:

- A. A declaration that Defendants are violating the prohibition on open dumping under section 4005(a) of RCRA;
- B. A declaration that Defendants are operating a solid waste disposal facility that may present an imminent and substantial endangerment in violation of section 7002 of RCRA;
- C. An order directing Defendants to cease the unlawful open dumping of solid waste.
- D. An order directing that Defendants conduct a comprehensive investigation and study to determine the characteristics of the waste, and the fate and transport

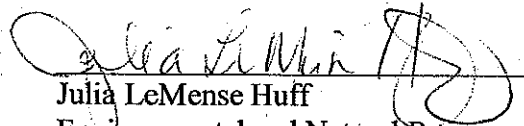
of chemicals leaching from the waste; and to identify alternative waste disposal practices available and the procedures necessary to remediate the problem.

E. Plaintiffs be awarded their costs, including reasonable attorneys fees and expert witness fees, as provided for under RCRA, 42 U.S.C. § 6972(e), and the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), and other applicable laws; and

F. Such other and further relief as the Court may deem just and proper.

Dated: June 23, 2005 at South Royalton, Vermont.

Respectfully Submitted,



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