UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Ernest Brod, Robert DeMarco, Beverly Peterson, and Residents Concerned about Omya Plaintiffs, vs. Omya, Inc., and Omya Industries, Inc. Defendants.	Civil No. 2:05-CV-182 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs Residents Concerned about Omya (RCO) have filed a complaint alleging two claims: (1) that Defendants (Omya) have violated the Resource Conservation and Recovery Act (RCRA) Section 4005(a), 42 U.S.C. § 6945(a), prohibition on open dumping (Open Dumping claim); and (2) that Defendants' waste disposal practices may present an imminent and substantial endangerment to health or the environment in violation of RCRA Section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (Imminent and Substantial Endangerment claim).

Omya has filed three pleadings requiring a response: (1) a motion to dismiss RCO's open dumping claim; (2) a memorandum in opposition to RCO's motion for partial summary judgment on the open dumping claim; and (3) a motion for summary judgment on a hodgepodge of issues relating to both the open dumping and imminent and substantial endangerment claims.

This memorandum is second in a series of three memoranda responding to Omya's simultaneous filings. The first memorandum is RCO's Opposition to

Defendants' Motion to Dismiss (RCO Opp. to Motion to Dismiss) which presents legal argument regarding the open dumping claim, namely whether RCO has a legally cognizable claim that Omya is violating the RCRA prohibition on open dumping.

This second memorandum also relates to the open dumping claim. The primary issue addressed in this second memorandum is whether the State of Vermont's findings with regard to the threat to public safety and the environment posed by Omya's waste disposal practices should be given preclusive effect in this Court's evaluation of whether Omya has violated the RCRA prohibition on open dumping. The other issues raised in Omya's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Open Dumping are addressed in RCO's Opposition to Defendant's Motion to Dismiss.

The third memorandum is RCO's Opposition to Defendants' Motion for Summary Judgment (RCO Opp. to Motion for S.J.) which responds to those issues not already addressed in the first two briefs.

SUMMARY OF ARGUMENT

The Court should find that there are no genuine issues of material fact and that RCO is entitled to judgment as a matter of law on its Open Dumping claim. Omya dumps chemically-contaminated industrial waste from its processing plant into open and unlined pits and quarries, where it is in direct contact with fractured bedrock and leaches into the groundwater. Statement of Material Facts Not in Dispute (SMF) ¶¶ 5-12. Omya does not dispute these material facts. Further, Vermont Department of Environmental Conservation (VDEC) has found that Omya's waste disposal "may pose a threat to public health or safety, and the environment," and therefore must be certified pursuant to

Vermont's Solid Waste Management Rules (SWMR). Again, it is undisputed that Omya's waste disposal facilities are not certified. SMF ¶¶ 22-27.

Further, VDEC's findings were made as part of a contested proceeding in which Omya was a full party and so has preclusive effect in the instant case. Collectively, these undisputed facts and the VDEC's determination should prove that Omya's waste disposal practices constitute "open dumping" within the meaning of RCRA and that RCO is entitled to summary judgment on this claim as a matter of law.

For ease of reference in tracking RCO's reply to Omya's Opposition to Plaintiffs' Motion for Partial Summary Judgment, the following summary of argument tracks the headings used by Omya is its Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment:

A through E. As discussed in RCO's Opposition to Omya's Motion to Dismiss, RCRA does not require RCO to allege a violation of EPA's sanitary landfill criteria to enforce RCRA's Open Dumping prohibition (RCO Opp. to Motion to Dismiss at pp. 19-28), South Road and Dague do not limit open dumping claims to violations of EPA's landfill criteria (Id. at pp. 23-24), Parker held that an unpermitted solid waste disposal practice was an "open dump" not a "sanitary landfill" (Id. at pp. 15-17), and Omya's unpermitted waste disposal practices constitute "open dumping" under RCRA Section 4005(a), 42 U.S.C. § 6945(a), because their actions pose a "reasonable probability of adverse effects on health and the environment." (Id. at pp. 9-17).

F. The VDEC Commissioner's findings must be given preclusive effect because Omya had a fair opportunity to litigate the question of whether its waste was subject to

state solid waste permitting requirements or posed a threat to public safety or the environment. This argument is addressed more fully below.

ARGUMENT

The remainder of this memorandum will focus on why this Court should find that the VDEC's determination should be given preclusive effect.[1] A brief recitation of RCRA's open dumping prohibition may be, however, helpful as context for an evaluation of this issue.

RCRA provides a clear statutory path for determining whether Omya is an "open dump," as prohibited by section 4005 (Open Dumping prohibition). Under the statute there are only two types of non-hazardous solid waste disposal facilities: sanitary landfills and open dumps. Omya cannot meet the requirements for a sanitary landfill for two reasons. First, the statute defines a sanitary landfill as a facility that does not pose a "reasonable probability of adverse effects on health or the environment." 42 U.S.C. § 6944. Omya's waste disposal has been found to pose just such a threat. Second, a facility can operate as a sanitary landfill if it has a permit from the state which is designed to ensure that facility does not pose a threat to health or the environment. Again, Omya has no state permit to dump its waste into open pits. Thus, by process of elimination, Omya is an open dump, not a sanitary landfill.

The VDEC Commissioner's April 29, 2005 Final Determination (Final Determination), referenced above, has preclusive effect in this proceeding for the purpose of determining whether Omya is operating a sanitary landfill approved by the state. Prior unreviewed administrative decisions can have preclusive effect in a subsequent suit in

[1] The other arguments raised in Omya's Opposition memorandum are fully addressed in RCO's Opposition to Defendants' Motion to Dismiss.

federal court under certain circumstances. Univ. of Tenn. v. Elliot, 478 U.S. 788, 799 (1986). In Elliott, the Supreme Court found that "[w]hen a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give that agency's fact finding the same preclusive effect to which it would be entitled in the state's courts." Id.

Omya argues that it did not have a full and fair opportunity to litigate the issue of whether its waste may pose a threat, asserting (1) that "significant new evidence" was developed and (2) that Omya's procedural rights were not protected. Omya Opp. to P.S.J. at 19-20. Assuming these arguments had any merit, this Court is not the proper forum to raise them. Rather, since these are matters of state law and administrative procedures, Omya must pursue whatever remedies it may have through the state courts and administrative tribunals. In any event, these arguments are insufficient to determine that the VDEC Commissioner's findings should not be given preclusive effect.

I. THE INFORMATION THAT OMYA ALLEGES TO BE 'SIGNIFICANT NEW AND ADDITIONAL EVIDENCE" WOULD NOT HAVE ALTERED THE VDEC'S DECISION

Omya argues that the validation of its AG24 testing method for TOHI is "significant new and additional evidence" which would alter the VDEC Commissioner's final determination that Omya's waste may pose a potential threat to public health or safety, and the environment. Omya Opp. to P.S.J. at 19. The Supreme Court in Montana v. United States, established the rule for when new or additional evidence may overcome the presumption against relitigation of the same issues: "changes in facts essential to a judgment will render [issue preclusion] inapplicable in a subsequent action raising the same issues." 440 U.S. 147, 159 (1979)(emphasis added). In this case, the "new and

significant" evidence that Omya presents, must be "essential" to VDEC's judgment. Omya's evidence does not, however, rise to this level.

The fact that the VDEC declined to rely on Omya's groundwater testing method because it had not been independently validated does not present a change in facts "essential" to VDEC's determination. Omya now contends that had the VDEC possessed information that its testing method, AG24, was validated in the prior proceeding, the VDEC Commissioner might "have reached a different conclusion." Omya Opp. to P.S.J. at 19, 20. This is not so. Omya ignores the following critical statement in the VDEC Commissioner's decision:

> Even if the analytical data is viewed most favorably from the perspective of Omya, the data provided by Omya indicates that TOHI is present: (1) in the tailings material, (2) in leachate that is generated under laboratory conditions in excess of standards developed for comparison, and (3) in groundwater on-site.

Final Determination at 5 (emphasis added). In light of this express language, it is clear that the validation of Omya's testing method, or lack thereof, was not the controlling fact upon which the Commissioner based his decision. Rather, the Commissioner considered the mere presence and ability of TOHI to leach into groundwater sufficiently controlling facts to determine that Omya's waste could pose a potential threat to public health or safety, and the environment. Final Determination at 4-5. The Commissioner went even further and considered as part of his decision the effect of accepting Omya's testing method, were it validated: "Omya argues that environmental sampling demonstrates that the facility does not currently pose a threat, but this is not the appropriate determinant in this matter, even if the data were acceptable." Id. (emphasis added).

Omya's subsequent validation of its testing method does not change any of the controlling facts relied upon by the Commissioner. The Commissioner has already spoken to this issue and said "even if the data were acceptable," it would not change the ultimate determination that Omya's waste could pose a potential threat to public health or safety, and the environment. Thus, Omya's statement that the Commissioner may "have reached a different conclusion" ignores the plain wording of the Final Determination.

Further, if Omya believes the Commissioner relied on the wrong controlling facts, Omya's remedy is with the VDEC, not this court. See Ossman v. Diana Corp., 825 F. Supp. 870, 876 (D. Minn. 1993) ("Even though a case may have been 'decided incorrectly, this is an insufficient basis to defeat the application of collateral estoppel.' . . . Assuming . . . [that the prior order] is not free from legal error, the way to correct that error was by appeal. . . .") (quoting Bates v. Union Oil Co. of Cal., 944 F.2d 647, 650 (9th Cir. 1991). As is discussed below, Omya had the opportunity to appeal VDEC's determination and did not. Omya also retains the ability to file a new petition with VDEC based upon this new evidence. VDEC is the appropriate forum for Omya to raise this argument, not this Court.

II. OMYA HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THESE ISSUES BEFORE THE VDEC

Omya cannot point to any deprivation of any procedural right in the VDEC proceeding. "Redetermination of issues is warranted [only] if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Montana, 440 U.S. at 164, n. 11. Courts in the Second Circuit hold that the opportunity to "flesh out" one's arguments satisfies the "full and fair opportunity" to litigate. Kendall v. Avon Products, Inc., 711 F. Supp. 1178, 1185 (S.D.N.Y. 1989) (citing DeCinto v.

Westchester County Med. Ctr., 821 F.2d 111, 118 (2d Cir. 1987) ("plaintiff's ability to 'flesh out' issues at Division of Human Rights hearing represents 'full and fair opportunity' to litigate").

In the Final Determination proceeding, Omya was afforded numerous procedural protections (such as notice and service requirements) and afforded the opportunity to present evidence and argument and complete its own administrative record. Stipulation By Core Parties In The Omya Declaratory Ruling, 8/12/2004 (Attached). In this case, Omya had ample opportunity to "flesh out" the issues and its arguments.

Omya has been the primary party since the beginning of this process. Omya initiated the entire process by petitioning the VDEC in August 2002 for a declaration that its industrial waste "remain exempt" from solid waste regulation under the "historic exemption." SMF ¶ 21. Further, the proceeding which Omya claims did not provide a full and fair opportunity, the VDEC Commissioner's Final Determination of April 29, 2005, was the concluding determination in a long proceeding spanning several years and reconsiderations and involving numerous parties.

In addition, Omya's petition led to a fully contested hearing, having the same force and effect of a court adjudication. See 3 V.S.A. § 808 ("[agency] [r]ulings disposing of petitions have the same status as agency decisions or orders in contested cases"); see also Town of Cavendish v. Vt. Public Power Supply Auth., 446 A.2d 792, 794 (Vt. 1982) ("Administrative declaratory judgments are essentially procedures similar to declaratory judgments in courts"). Omya had a chance to appeal pursuant to Vermont's statutes governing the appeal of final agency determinations, 3 V.S.A. § 815(a) ("A person who has exhausted all administrative remedies available within the

agency and who is aggrieved by a final decision in any contested case may appeal that decision to the supreme court."), but chose not to do so. Instead, Omya "undertook to apply for certification rather than file an appeal." Omya Motion for P.S.J. at 19.

In a case with similar opportunities, the Vermont Supreme Court in Berlin Convalescent Ctr. v. Stoneman, 159 Vt. 53, 60, 615 A.2d 141 (1992), found that there was a full and fair opportunity to litigate. There, Plaintiffs, a group of nursing homes, were barred by collateral estoppel from relitigating rate increases by the State of Vermont. The Court held that Plaintiffs had a full and fair opportunity to litigate because: (1) Plaintiffs had "opened the merits" of the issue by pursuing their enforcement action in the prior proceeding, (2) the record was held open to allow Plaintiffs the opportunity to present evidence, and (3) Plaintiffs failed to appeal the enforcement decisions at the end of the proceeding. In this case, Omya opened the proceeding by filing its petition, had ample opportunity to and did present evidence, and failed to appeal the final determination. VDEC's determination should thus be given preclusive effect.

The following three factors are all present, further justifying a finding of preclusion: (1) the VDEC held a contested hearing on the merits resulting in an appealable final determination; (2) the issue of whether Omya's waste disposal may pose a threat to public health or safety, and the environment and should thus be regulated is wholly within the agency's authority and expertise; and (3) as discussed *supra*, the VDEC proceeding was several years, involving several reconsiderations, and providing numerous procedural protections to all parties throughout. Thus, the VDEC Commissioner's findings must be given preclusive effect.

In sum, VDEC's decision was a final determination on the merits, by the agency charged with the authority and expertise to regulate all solid waste in Vermont, which found: (1) Omya's tailings material in the waste piles of its Florence facility may pose a reasonable threat to the public health or safety, and the environment, and (2) Omya is not exempt from obtaining certification pursuant to section 6605 of Vermont's Solid Waste Management Act. VDEC's decision has preclusive effect and establishes that Omya's waste disposal pits are not permitted sanitary landfills within the meaning of RCRA but are instead open dumps, prohibited under RCRA Section 4005(a). 42 U.S.C. § 6945(a).

CONCLUSION

For the foregoing reasons, RCO's Motion for Partial Summary Judgment on Count One of its Complaint should be granted.

Dated this 14th day of December, 2005.

By _____

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