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 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY ON THE FIRST CLAIM OF THE COMPLAINT**

INTRODUCTION

This is a citizen suit brought under sections 7002(a)(1)(A) and (B) of the Resource Conversation 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") have asserted two claims against Defendants ("Omya"). The first claim is for violation of the "open dumping" prohibition in section 4005(a) of RCRA, which states that "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). The second claim is for disposing solid waste in a manner "which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

In this Motion for Partial Summary Judgment, Plaintiffs are seeking a judgment as to liability on the first claim only. The second claim will require discovery. As to the first claim, there are no material facts in dispute and the issues are purely legal. Therefore, Plaintiffs are entitled to judgment as a matter of law. Plaintiffs will seek injunctive relief following a determination of liability on the first claim.

Plaintiffs believe this bifurcation of the claims will allow for the most efficient use of the Court's and the parties' time and may create an opportunity for settlement.

SUMMARY OF ARGUMENT

There are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law. First, this Court has jurisdiction over Plaintiffs' open dumping claim under the Citizen Suit provisions of RCRA. 42 U.S.C. § 6972(a)(1)(A). Plaintiffs have satisfied the notice requirements in Section 7002(b) of RCRA. 42 U.S.C. § 6972(b). Further, neither the Environmental Protection Agency (EPA) nor the State of Vermont has taken any enforcement action that might bar this action. 42 U.S.C. § 6972(b)(1)(B).

Second, the individual plaintiffs as well as Plaintiff RCO satisfy the requirements to establish standing to sue under RCRA. Plaintiffs have suffered injury in fact fairly traceable to Omya's operations. Plaintiffs are exposed to and reasonably concerned about the threats to their health, their homes, and to the environment in which they live from the documented contamination of groundwater and pollution of surface waters caused by Omya's operations. This Court can redress Plaintiffs' injuries by ordering Omya to cease operating an illegal open dump and to remediate any contamination that has occurred.

Finally, Omya's dumping of chemically contaminated mining waste into unlined, open pits without the permit required under state law, is a per se violation of Section 4005(a) of RCRA. 42 U.S.C. § 6945(a). Section 4005(a) defines an "open dump" as any facility or site where "solid waste" is "disposed" and which is not a sanitary landfill or a facility for the disposal of hazardous waste.[1] Id. The open pits and old quarries where Omya has been dumping its waste are neither a "sanitary landfill" nor a "hazardous waste facility." Thus, Omya is in direct violation of RCRA's open dumping prohibition.

[1] See 42 U.S.C. § 6903 (3)("disposal"), (14)("open dumping"), (27)("solid waste").

STATEMENT OF FACTS

Plaintiffs Ernest Brod, Robert DeMarco, Beverly Peterson, and other members of Plaintiff, RCO, an unincorporated association, are residents of Vermont living in close proximity to Omya's calcium carbonate processing plant in Florence, Vermont (Verpol Plant or Florence Facility). Statement of Material Facts Not In Dispute (SMF) ¶¶ 14-17. Omya's facility is 385 acres in size and has been in operation since 1979. SMF ¶¶ 2, 3. The Verpol Plant produces calcium carbonate by grinding marble ore and processing it to remove impurities. SMF ¶ 4. The impurities, and any chemicals used to remove them or otherwise added during processing, are sent to settling cells. The settled material, referred to by Omya as tailings product, is then removed from the settling cells and placed in open, unlined, former rock quarries, referred to by Omya as Tailings Management Areas. SMF ¶ 5. Plaintiffs refer to the settled material or tailings product as "waste," and the quarries as either "dumps" or "pits."

Omya generates massive quantities of waste and estimates that production of this waste is in the neighborhood of 150,000 tons per year. SMF ¶ 6. A variety of contaminants have been found in Omya's tailings. Among the chemicals in the material placed in the quarries are the following: Tall Oil hydroxyethyl imidazoline (TOHI); Ortho Phenyl Phenol; Stearic Acid; Acetone; Isopropyl Alcohol; Methyl Isothiocyanate; Methylamine; Barium; and, Toluene. SMF ¶ 7. The contaminated waste placed in the quarries is in direct contact with fractured bedrock, allowing for the release of contaminants into groundwater flowing through the bedrock. SMF ¶ 8.

Not surprisingly, given that the waste is in direct contact with fractured bedrock, contaminants found in the waste have also been found in the groundwater at the site. Chemicals found in groundwater at the Verpol Plant site include acetone, ortho phenyl phenol, Tall Oil

hydroxyethyl imidazoline and toluene. SMF ¶ 9. Further, the bedrock groundwater formations at the Verpol Plant site are interconnected and discharge to surface water at various locations across the site, increasing the potential for this contamination to spread off site. SMF ¶ 10.

The principal surface water in the vicinity of the Verpol Plant is Otter Creek, a tributary of Lake Champlain. Two tributaries to Otter Creek collect groundwater discharge from the plant site and "may receive discharge from the settling pond/quarry flow process." SMF ¶ 11. Otter Creek recharges the gravel aquifer that is relied upon by the Pittsford and Florence communities for their public water system. SMF ¶ 12.

Omya has been dumping its waste since 1979, yet it has never obtained the solid waste disposal certification required by the Vermont Solid Waste Management Act, 10 V.S.A. § 6605. It was not until 2002, in order to support its effort to obtain Act 250 approval for disposing of an additional 40 million cubic feet of waste, that Omya sought a determination that its waste "remain[s] exempt" under the "historic exemption." SMF ¶ 21. In a declaratory ruling dated April 29, 2005, the Vermont Commissioner of the Department of Environmental Conservation ("VDEC Commissioner") found that "[t]he nature and quantity of contaminants in Omya's tailings material are at levels of concern that pose a reasonable potential of a threat to the public health, safety and the environment." SMF ¶ 25. Therefore, the VDEC Commissioner held that Omya was not entitled to the exemption and was required to obtain a certification pursuant to section 6605 of Vermont's Solid Waste Management Act. SMF ¶ 26.

The VDEC Commissioner's April 29, 2005 ruling was based upon concerns about two chemicals in Omya's tailings material: Tall Oil (TOHI); and Acetone. The Commissioner found that TOHI "is present at levels of concern and potentially at levels that would result in contamination of groundwater above groundwater enforcement standards." The Commissioner

noted that "[i]t is estimated that over a twenty year span approximately 40 million cubic feet of tailings material containing thousands of tons of TOHI will be placed in the tailings facility." The Commissioner also found that groundwater at the Florence facility had levels of Acetone in excess of groundwater enforcement standards. SMF ¶ 27. Acetone is a listed hazardous substance under regulations adopted by the United States Environmental Protection Agency (EPA) under the authority of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund). 40 C.F.R. § 302.4. Section 102(a) of CERCLA requires the EPA to list those substances "which, when released into the environment may present substantial danger to the public health or welfare or the environment." 42 U.S.C. § 9602(a).

Plaintiffs' are directly affected by Omya's unregulated disposal of chemically contaminated mining waste on a daily basis. Plaintiffs and other RCO members live in close proximity to the Florence Facility, SMF ¶¶ 14-17, and are deeply concerned about their potential exposure to contaminants in Omya's unregulated and uncontrolled mining waste. SMF ¶¶ 18-19.

In particular, Plaintiffs are concerned about the public health and environmental effects of Omya's uncertified disposal of chemically contaminated mining waste into unlined, uncovered pits and quarries at the Florence Facility. SMF ¶¶ 18-19. Most significantly, they are concerned that chemicals from Omya's waste are leaching into the groundwater and contaminating private wells and streams, the public water supply, nearby streams, Smith Pond, and Otter Creek, putting them and their families at risk. SMF ¶ 19. Further, Plaintiffs are concerned about Omya's growing waste piles and the impacts they may have on the aesthetics and acoustics of the valley, the use and enjoyment of their property, and their property values. SMF ¶ 20.

ARGUMENT

I. This Court has Jurisdiction over Plaintiff's Open Dumping Claim

Plaintiffs bring this claim under section 7002(a)(1)(A). 42 U.S.C. § 6972(a)(1)(A). Under section 7002(a)(1)(A) "any person may commence a civil action on his own behalf" against any person who is "in violation of any permit, standard, regulation...prohibition or order which has become effective pursuant to this chapter." 42 U.S.C. § 6972(a)(1)(A) (emphasis added). Plaintiffs are suing for an ongoing violation of the prohibition against open dumping contained in section 4005(a) of RCRA. 42 U.S.C. § 6945(a); see also South Road Assocs. v. Intl. Bus. Machines Corp. 216 F.3d 251, 252 (2d Cir. 2000) (South Road Assoc.) ("Citizen suits under RCRA can be brought only against persons engaged in RCRA violations that are ongoing."). The language contained in section 4005(a) of RCRA, falls squarely within the reach of a citizen suit under section 7002(a)(1)(A) because it is a prohibition. 42 U.S.C. § 6972(a).

Courts routinely take jurisdiction over open dumping claims brought by citizens pursuant to section 7002(a)(1)(A) of RCRA. Hallstrom v. Tillamook County, 493 U.S. 20, 22 (1989) ("The citizen suit provision of the Resource Conservation and Recovery Act of 1976...permits individuals to commence an action in district court to enforce waste disposal regulations promulgated under the Act.") (citations omitted); Ashoff v. City of Ukiah, 130 F.3d 409, 411 n.3 (9th Cir. 1997) ("RCRA specifically provides that any person violating the open dumping standards is subject to citizen suit under section 6972."). The Second Circuit, and this Court in particular, have granted jurisdiction over open dumping claims brought by citizens pursuant to section 7002(a)(1)(A) in several cases. South Road Assocs., 216 F.3d at 252; June v. Town of Westfield, New York, 370 F.3d 255, 259 (2d Cir. 2004); Dague v. City of Burlington, 935 F.2d 1343, 1346 (2d Cir. 1991). In Dague, the court granted jurisdiction over a citizen suit in which

the plaintiff landowners alleged that the City of Burlington operated a landfill "in violation of prohibitions against open dumping practices found in 42 U.S.C. § 6945(a) . . ." 935 F.3d at 1346. Similarly, in South Road Assocs., the court granted jurisdiction over a citizen suit brought by a landlord alleging that a former lessee's "storage of chemical wastes on the site resulted in contamination of the surrounding soil, bedrock and groundwater, and amounted to a violation of RCRA's open-dumping provisions." 216. F.3d at 252.

On June 26, 2005, Plaintiffs filed this citizen suit seeking redress for Omya's ongoing violation of the open dumping prohibition. The Supreme Court has held that fulfillment of the notice requirements in RCRA Section 6972(b)(1)(A) are "mandatory conditions precedent to commencing suit under the RCRA citizen suit provision." Hallstrom 493 U.S. at 31. Plaintiffs have complied with these notice requirements. On November 12, 2004, Plaintiffs served notice of violation on Omya and on the Administrator of the EPA, the Regional Administrator of EPA Region 1, and VANR. SMF ¶ 28. More than 90 days have passed since the notice was properly served. SMF ¶ 29. Omya did not respond, and neither the EPA, nor VANR "has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance" with the open dumping prohibition. 42 U.S.C. § 6972(b)(1)(B); SMF ¶ 29. Therefore, this Court is authorized to enjoin these violations and order compliance.

II. Plaintiffs Have Standing to Sue

A. Standing Requirements

Article III of the U. S. Constitution requires that any person bringing an action in Federal court have a sufficient stake in the outcome to establish a right to seek redress in Federal court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (Defenders). In order to satisfy the Constitution's standing requirements, a party must show that he "(1) suffered an 'injury in fact'

that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 180-181 (2000) (Laidlaw). If there is more than one plaintiff, once the court determines that one of the plaintiffs has standing, it need not decide the standing of the other plaintiffs. Carey v. Population Servs. Int'l, 431 U.S. 678, 682 (1977).

The individual Plaintiffs have prepared and attached declarations to Plaintiffs' complaint to demonstrate that they have individual standing as well as providing organizational standing for RCO. These declarations are from Plaintiffs who live in Florence, in many cases right next to Omya's Florence Facility. Plaintiffs satisfy each element of the standing requirements, as described below.

B. Individual Plaintiffs Satisfy the Article III Standing Requirements

1. Plaintiffs Have Demonstrated Injury in Fact

The "injury in fact" requirement in an environmental case is satisfied if a party adequately shows a "reasonable concern" as to the effects of discharged pollutants on aesthetic, recreational, or economical interests as a result of the Defendants' conduct. Laidlaw, 528 U.S. at 184. In addition, the Second Circuit has held that health-related uncertainty resulting from failure to enforce an environmental statute is adequate to meet the injury in fact standing requirement. New York Public Interest Research Group v. Whitman, 321 F.3d 316, 325-27 (2d Cir. 2003). Further, the Second Circuit has said that "marginal differences [between certainty and uncertainty] are not meaningful in assessing allegations of injury-in-fact since 'the injury-in-

fact necessary for standing need not be large, an identifiable trifle will suffice.'" Id. at 326 (quoting LaFleur v. Whitman, 300 F.3d 256, 270-71 (2d Cir. 2002)).

Plaintiffs have demonstrated injuries far greater than an "identifiable trifle." Plaintiffs live in daily fear that Omya's failure to manage its solid waste in accordance with state and federal may be harming their health and the health of the surrounding environment. Plaintiffs Brod, DeMarco, Peterson, and RCO member Shaw are all concerned that the chemicals from Omya's mining waste that have leached into the groundwater may eventually contaminate their private wells and the Town of Pittsford's public water supply, as well as continue to generate runoff that may further pollute Smith Pond and Otter Creek. Declaration of Ernest Brod Attached as Exhibit B to Plaintiffs' Complaint (Brod Decl.) ¶¶ 7, 11; Declaration of Robert DeMarco Attached as Exhibit C to Plaintiffs' Complaint (DeMarco Decl.) ¶ 8; Declaration of Beverly Peterson Attached as Exhibit D to Plaintiffs' Complaint (Peterson Decl.) ¶ 4; and Declaration of Susan Shaw Attached at Exhibit E to Plaintiffs' Declaration (Shaw Decl.) ¶ 4. Plaintiff Peterson is so concerned about the presence of chemicals in the groundwater that she has stopped using the town water supply. Peterson Decl. ¶ 4. Similarly, concerns about town water led RCO member Shaw to install a "state-of-the-art" water filter. Shaw Decl. ¶ 4. Plaintiff Peterson and RCO member Shaw are also afraid to shower using town water because they fear inhaling chemically-contaminated water vapor. Peterson Decl. ¶ 4; Shaw Decl. ¶ 4. Similar concerns have also led Plaintiff DeMarco and RCO member Shaw to forego engaging in various recreational activities in nearby streams and ponds, including swimming and fishing. DeMarco Decl. ¶ 7; Shaw Decl. ¶¶ 7-8.

Plaintiffs Brod, DeMarco and Peterson are also concerned about Omya's growing waste piles and the negative impacts that they are having on the aesthetics and acoustics of the valley,

the use and enjoyment their property, and their property values. Brod Decl. ¶ 15, 16; DeMarco Decl. ¶ 14; Peterson Decl. ¶¶ 9, 10. Plaintiff Brod, in particular is concerned that one proposed waste pile will eventually "project above its surroundings, the nearby areas, including my property" and that these areas will also be subject to "increased air pollution under windy conditions." Brod Decl. ¶ 16.

Plaintiffs' concerns stem from a variety of incidents, including well-documented chemical spills by Omya and frequent discoloration of local streams and ponds. For example, RCO member Shaw lives adjacent to Smith Pond and says "the water is known to change colors, sometimes to a milky-white color or to a bright emerald green." Shaw Decl. ¶ 6. Plaintiffs' concerns also originate from knowledge that Defendants are dumping chemically contaminated waste into unlined open pits which directly overlay their local aquifers. Brod Decl. ¶ 7, 8, 12; DeMarco Decl. ¶ 8; Peterson Decl. ¶ 9. Finally, Plaintiffs concerns were heightened when the VDEC Commissioner ruled that Omya's mining waste "may pose a threat to public health and safety, and the environment." SMF ¶ 25.

These reasonable concerns injure Plaintiffs by causing fear and health-related uncertainty, and limit Plaintiffs' use and enjoyment of their property and surrounding community. The Supreme Court has expressly held that such "threatened injury" will satisfy the "injury in fact" requirement for standing. Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). By continuing to violate state and federal law, Defendants have created an atmosphere in which Plaintiffs feel threatened with injury at every turn. In a case that contained an open dumping claim similar to this one, the Ninth Circuit found that violations of RCRA create threatened harms that are more than adequate to satisfy standing requirements:

> If the landfill is not run as required by RCRA, the Covingtons are directly confronted with the risks that RCRA sought to minimize: Fires, explosions, vectors, scavengers, and groundwater contamination, if such occur, threaten the Covingtons enjoyment of life and security of home. Violations of RCRA increase the risks of such injuries to the Covingtons. Such risks from improper operation of a landfill are in no way speculative when the landfill is your next-door neighbor.

Covington v. Jefferson County, 358 F.3d 626, 638 (9th Cir. 2004).

Here, the open pits are the Plaintiffs' next-door neighbors. The standing doctrine does not require that Plaintiffs wait until they are actually ingesting industrial chemicals before they have a right to require Omya to comply with laws designed to prevent the harm from happening in the first place. As this Court has noted in another context, "a legal standard intended to distinguish real from conjecture [should not be used] to deny what we know from common experience, that more than readily visible changes in our immediate environment can threaten us directly and concretely with imminent and personal harm." Vermont Public Interest Research Group v. U.S. Fish & Wildlife Service, 247 F.Supp.2d 495, 511 (D.Vt. 2002).

Individual Plaintiffs Brod, DeMarco, and Peterson, and RCO member Shaw have described in specific detail how Omya's unregulated waste disposal continues to affect their health, the use and enjoyment of their property, their recreational and aesthetic interests, and the local environment, each and every day. Therefore, based on their cognizable interest in seeking to ensure that Omya manages its solid waste in accordance with state and federal law so that they may not be further harmed, Plaintiffs meet the first prong of the Constitutional requirement of "injury in fact."

2. Plaintiffs' Injuries Are Fairly Traceable to Omya's Violation of RCRA's Open Dumping Prohibition

The second prong of the Constitutional requirements for standing requires a showing that a plaintiff's injuries are "fairly traceable" to the challenged action of the defendants "rather than

to that of some other actor not before the court." Defenders, 504 U.S. at 560. The "fairly traceable" requirement "does not mean that plaintiffs must show to a scientific certainty that defendant's [actions], and defendant's [actions] alone, cause the precise harm suffered by plaintiffs...The fairly traceable requirement...is not equivalent to a requirement of tort causation." Interfaith Cmty Org. v. Honeywell Inter., Inc., 399 F.3d 248, 257 (3d. Cir. 2005) (quoting Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn, 913 F.2d 64, 72 (3d. Cir. 1990).

Plaintiffs harm is "fairly traceable" to Omya's open dumping. Plaintiffs have directly observed discoloration in Smith Pond and Otter Creek, two known surface water discharge points for Omya. DeMarco Decl. ¶ 7; Shaw Decl. ¶ 6. Similarly, groundwater monitoring wells situated on Omya's property have detected harmful contaminants in the water. SMF ¶ 9. Finally, the VDEC Commissioner found that Omya's mining waste maybe harmful to public health. SMF ¶ 25. All of these facts have lead to Plaintiffs' reasonable concerns, and indicate that their injuries are fairly traceable to Omya's operations.

3. Plaintiffs' Injuries Are Likely to Be Redressed by a Favorable Decision from this Court.

The third prong of the Constitutional requirements for standing is an inquiry into whether Plaintiffs' injuries are likely to be redressed by a favorable decision from the Court. In a RCRA case, "any violation can be redressed by requiring...compliance with RCRA or by creating a credible deterrent against future violations via the imposition of fines." Covington, 358 F.3d at 639. A favorable decision in this case would cause Defendants to stop open dumping in a manner that is injurious to the Plaintiffs and the surrounding environment. A favorable decision would also order Defendants to convert the solid waste areas into a sanitary landfill. These

actions, if taken by the Court, would ensure that protections are in place to prevent further contaminants from leaching into the environment, thereby redressing Plaintiffs' injuries.

C. RCO Has Standing

If the party that brings suit is an organization or association, it must also show that (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose; and" (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). "[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." Int'l Union, United Automobile Workers v. Brock, 477 U.S. 274, 290 (1986).

1. Representational Capacity

The first requirement for associational standing requires that the association's members have standing to sue in their own right, and is "grounded on Article III as an element of 'the constitutional requirement of a case or controversy.'" United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 555 (1996). The first requirement of standing for an association is met if "any one" of the association's members satisfies the Constitutional requirements referenced above. Warth v. Seldin, 422 U.S. 490, 511 (1975). Plaintiff RCO meets the first requirement for an association based on the individual standing of its members as set out above. RCO members Brod, DeMarco, Peterson and Shaw all meet the individual standing requirements.

2. Germaneness

Plaintiffs meet the second requirement for associational standing because the interests Plaintiffs seek to protect are germane to the organization's purposes. Nat'l Lime Ass'n v. U.S. EPA, 233 F.3d 625, 636 (D.C. Cir. 2000). RCO was formed by a group of local citizens in 2002 due to concerns by its members that Omya was not being properly regulated. The subject of this claim is the failure of Omya to comply with federal law which forbids open dumping. Seeking compliance with the law is germane to the central purpose of RCO.

3. Individual Members Not Necessary

Although individual members of RCO are a part of the lawsuit by choice, neither the open dumping claim, nor the relief requested, requires the participation of any individual RCO members. Therefore, through its members, Plaintiffs have standing to bring this suit.

III. Standard for Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure provides that "[a] party seeking to recover upon a claim...or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action...move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. 56(a) (emphasis added). Summary judgment is appropriate when there is "no genuine issue as to any 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) (Celotex).

Summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that no genuine issue of material facts exists. VT Electric Power Co. v.

Hartford Steam Boiler Inspection and Ins. Co., 72 F.Supp.2d 441, 444 (D. Vt. 2002) (citing Gallo v. Prudential Residential Servs., 22 F.3d 82, 86 (2d Cir. 1998).

Once the moving party has met its burden, the burden shifts to the non-moving party to show that genuine issues remain for trial. Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). If the non-moving party alleges that genuine issues remain, that party "may not rest upon mere allegations or denials" in its pleadings, instead, the non-moving party's response, by affidavits or as otherwise provided...must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A "genuine" issue in dispute requires more than a "mere scintilla" of evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). "The trial court's function in deciding such a motion is not to weigh the evidence or resolve the issues of fact, but to decide instead whether, after resolving all the ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." City of Burlington v. Hartford Steam Boiler Inspection and Ins. Co., 190 F.Supp.2d 663, 669 (D. Vt. 2002) (citing Celotex Corp., 477 U.S. at 322). In the case at bar, there are no material facts in dispute as to the first claim regarding Omya's violation of the open dumping ban; therefore, Plaintiffs are entitled to judgment.

IV. Omya is Operating an Illegal Open Dump in Violation of the Express Terms of RCRA Section 4005(a)

Throughout the course of Omya's twenty-six year operation at the Florence Facility in Vermont, Omya has completely disregarded federal solid waste management law by dumping solid waste into unlined, open pits. Omya's disposal practices constitute a clear violation of RCRA's prohibition against opening dumping. Section 4005(a) of RCRA states that "any solid waste management practice or disposal of solid waste...which constitutes open dumping of solid waste...is prohibited...." 42 U.S.C. § 6945(a) (emphasis added). A plain reading of RCRA

demonstrates that Defendants' ongoing waste disposal practices fall squarely within the contours of this ban on open dumping.

The United States Supreme Court has consistently held that statutes must be interpreted according to their plain meaning. If the meaning is clear from the text, then the inquiry ends. Barnhart v. Sigmon Coal Co, Inc., 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'") (citations omitted); Hughes Aircraft Co. v. Jacobson 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well.") (citations omitted).

The language of section 4005(a) indicates that Congress left no uncertainty regarding its intent to ban open dumping of solid waste. 42 U.S.C. § 6945(a). The use of the word "any" to modify "solid waste management or disposal of solid waste" indicates that Congress intended to create an open dumping prohibition that included the widest possible breadth of solid waste disposal practices when it enacted section 4005(a). The use of the word "prohibition" indicates that Congress intended to create a total ban on the unregulated dumping of all solid waste.

A. Omya is Operating an "Open Dump"

RCRA defines the term "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14). In a case with facts similar to those in the one before this court, the Eleventh Circuit construed the open dumping provisions of RCRA to require a showing of the following four elements: (1) that the defendant's waste is solid waste within the meaning of 42 U.S.C. §

6903(27); (2) that this solid waste is being "disposed of" within the meaning of 42 U.S.C. § 6903(3) at the defendant's facility; (3) that the facility does not qualify as a sanitary landfill under section 6944; and (4) that the facility does not qualify as a facility for the disposal of hazardous waste. Parker v. Scrap Metal Processors, Inc. 386 F.3d 993, 1012 (11th Cir. 2004) (Parker).

The facts and holding of the Parker case are particularly relevant to this case. There, the plaintiffs brought suit against an adjoining owner who was operating a scrap metal recovery/junkyard business. The material included drums and tanks that contained residues of hazardous substances, some of which had leaked or spilled onto the ground. Inspections by state and federal agencies concluded that the site presented a threat of environmental contamination, similar to the situation presented here. Id. at 1000-1001.

The plaintiffs in Parker alleged that defendant SMP was operating an open dump in violation of section 4005 of RCRA because it did not have a solid waste handling permit from the State of Georgia. Id. at 1011. The court found that SMP was "disposing of solid waste" by accumulating scrap metal and junk for speculative purposes. Id . The Eleventh Circuit then said that this waste disposal would constitute open dumping unless the facility qualified as either a sanitary landfill or a hazardous waste facility. The court concluded that the defendant's site could neither qualify as a sanitary landfill, because the defendant did not have a waste handling permit from the State of Georgia, nor a hazardous waste facility because the defendant did not meet the criteria under state or federal law. Id at 1013. The court concluded:

> Thus, because the defendants disposed of solid waste at the [Scrap Metal Processors (SMP)] facility and because the facility was not a sanitary landfill or a facility for the disposal of solid waste, SMP was an open dump. 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.

The Parker decision demonstrates the straightforward nature of the 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, persuasive analysis in the Parker case, Omya is operating an open dump in violation of RCRA Section 4005(a), a provision expressly enforceable through the statute's citizen suit provision. 42 U.S.C. § 6945(a) ("The prohibition [against open dumping] shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.").

1. Omya is "disposing" of "solid waste" within the meaning of RCRA

First, section 1004(27) of RCRA defines 'solid waste' as "any...discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities...." 42 U.S.C. § 6903(27). Omya places the waste byproducts of its calcium carbonate process in unlined, open pits and has been doing so for twenty-six years. SMF ¶¶ 3-10. Defendants' waste is thus a discarded solid or semisolid material from a mining operation, and falls squarely within the statutory definition of solid waste under state and federal solid waste law. See also SMF ¶¶ 21-26.

Second, section 1004(3) of RCRA defines the term 'disposal' to mean "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent therefore may enter the environment or be emitted into the air or discharged into any waster, including ground waters." 42 U.S.C. § 6903(3). Defendants are dumping solid waste

contaminated with a variety of chemical contaminants in open pits. There can be no question that these wastes, or constituents of these wastes, may enter the surface water and ground water. SMF ¶¶ 5-12. In light of these facts, it is clear that Omya's practice of dumping its waste in open pits constitutes the disposal of solid waste under RCRA.

2. Omya's disposal practices do not fall within either of the two exceptions to the open dumping prohibition

Once the Court determines that Omya is disposing of solid waste, the next question is whether the facility fits within either of the two exceptions described in RCRA Section 4005(a) because it is either, (1) a sanitary landfill, or (2) a hazardous waste facility – two types of facilities that require certification under other sections of RCRA.

a. Omya is not a permitted sanitary landfill

In Vermont, a sanitary landfill may qualify to be certified as a solid waste management facility only if it meets the criteria in Vermont's Solid Waste Management Act. 10 V.S.A. § 6605(a)(1). Under Vermont's solid waste law, "solid waste is defined as "any discarded . . . material including . . . semi-solid . . . materials resulting from . . . mining . . . operations. 10 V.S.A. § 6602(2). Disposal occurs when a person places the solid waste on land such that it may enter the environment or be discharged into ground or surface waters. 10 V.S.A. § 6602(12). Any land used to dispose of waste is considered a facility and a person disposing of waste must obtain a solid waste certification. 10 V.S.A. § 6602(10); 6605(a).

The Vermont Commissioner of the Department of Environmental Conservation ("VDEC Commissioner") ruled that Omya's mining waste is "solid waste" within the Vermont Solid Waste Management Act, 10 V.S.A. § 6602(2), that the "additives within Omya's tailings may pose a threat to human health or safety, the environment or create a nuisance," and therefore that Omya's waste disposal is subject to the state's solid waste rules. SMF ¶ 22. He found that

"Omya is placing the tailings in quarries that are no longer operational, grading the material, covering the tailings with sediment and then planting vegetation to control erosion" such that the tailings are "discarded" within the meaning of 10 V.S.A. §§ 6602(a). SMF ¶ 23.

The VDEC Commissioner further ruled that speculative future reuse of the tailings material by Omya does not constitute "reuse" and does not allow the VDEC to reach the conclusion that Omya "has in fact discarded its tailings." SMF ¶ 24. Finally, the VDEC Commissioner recently confirmed his earlier ruling that Omya's solid waste "may pose a threat to public health and safety, the environment" and is therefore not exempt from the Vermont Solid Waste Management Rules. SMF ¶ 25. In so ruling, he determined that "Omya's disposal of tailings constitutes a solid waste disposal facility" and that it "must be certified under 10 V.S.A. Chapter 159," Vermont's statute governing the regulation of solid waste. SMF ¶ 26. Because Omya's disposal pits are not certified under Vermont's solid waste laws, they are not sanitary landfills; therefore, Omya is operating in violation of the ban on open dumping.

b. Omya is not a permitted hazardous waste facility

Similarly, Omya is not operating a hazardous waste facility. Under RCRA, operation of a facility for the management or disposal of hazardous waste also requires a permit. 42 U.S.C. § 6925. Omya does not have a hazardous waste permit authorizing the disposal of its waste material into open pits. Therefore, Omya's disposal practices in Florence constitute open dumping.

V. Congress Intended the Open Dumping Prohibition to be Construed Broadly

The stated purposes of RCRA further demonstrate Congress' clear intent to prohibit all open dumping of solid waste can be found in the purposes of RCRA. One of the primary stated purposes of RCRA is to "promote the protection of health and the environment and to conserve

valuable material and energy resources 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)(3). This policy is grounded on the Congressional finding 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(a)(2), 6901(a)(4). Omya's open dumping of solid waste presents precisely these kinds of dangers and harms. It is thus is in direct contravention of a stated purpose of RCRA and Congressional findings.

While the open dumping prohibition of RCRA is plain on its face, the legislative history of RCRA provides further support that Congress meant exactly what it said in the text of section 4005(a) of RCRA. The House Interstate and Foreign Commerce Committee, one of two Congressional committees that held extensive hearings on proposed solid waste disposal legislation during the 93rd Congress, reported that "[t]his bill suggests that the first step in preserving the land is to end those practices which are most harmful. . . .[T]he bill requires an end to open dumping and the upgrading of discarded materials disposal facilities to standards which provide real protection for the environment." H.R. Rep. No. 94-1491, at 11 (1976). Importantly for this case, the Senate Public Works Committee noted "[t]he only Federal Requirement concerning general, non-hazardous solid wastes and landfills is the ban on open dumping in section 211 [enacted as section 4005(a)]." S. Rep. No. 94-988, at 15-16 (1976).

In addition to the clear legislative intent to ban open dumping, the prohibition itself is the keystone feature of RCRA's Subtitle D[2] Solid Waste Management Program—from the ban

[2] Subtitle D of RCRA encompasses the statutory scheme for development and implementation of state solid waste management plans. 42 U.S.C. §§ 6941-6949(a).

springs a statutory scheme that encompasses all of Subtitle D. For example, section 1008(a)(3) directs the Administrator of the EPA to promulgate minimum guidelines which the states may use as to define which practices constitute the open dumping of solid waste that are prohibited. 42 U.S.C. § 6907(a)(3). Further, in order for a state solid waste management plan to be approved by the EPA, the plan must provide a mechanism by which the state will implement the prohibition on open dumping, for example, a permit or certification program. 42 U.S.C. § 6943(a)(2). Read together, these provisions make plain that Congress did not intend to allow for continued disposal of waste in open dumps, but instead intended that solid waste be disposed of only in approved facilities. Omya has completely avoided this obligation and avoided the costs of properly disposing of its waste for over two decades in contravention of RCRA.

VI. RCRA Is a Strict Liability Statute

The only relevant question before this Court in determining whether to grant Plaintiffs' motion is whether Omya has violated Section 4005(a) of RCRA. Courts construing RCRA have found that its civil enforcement provisions impose strict liability and require only a showing that the statute has been violated. See e.g. U.S. v. Domestic Industries, Inc., 32 F.Supp 2d 855, 866-67 (E.D. Va 1999) (rejecting defendant's lack of knowledge defense in a case involving violation of RCRA based on used oil regulations); U.S. v. Allegan Metal Finishing Co., 696 F.Supp.275, 287-288 (W.D. Mich. 1988) (rejecting "state of mind" requirement and impossibility defense in RCRA enforcement case).

RCRA's enforcement regime is modeled after the Clean Water Act and Clean Air Act which the courts have consistently found to be strict liability statutes. U.S. v. Liviola, 605 F.Supp 96, 100 (D. Ohio 1985) see also U.S. v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979) (rejecting defendant's contentions that the Clean Water Act only makes intentional

discharges unlawful). As one example of this reasoning, in Connecticut Fund for Environment, Inc. v. Upjohn Co., the court rejected an array of defenses raised by the defendants in a Clean Water Act enforcement case. 660 F.Supp. 1397 (D.Conn. 1987). The defendant sought to be excused for its non-compliance based upon arguments that it had relied upon agency representations, that the enforcement action was unreasonably delayed, and that the violations were small or unintentional. Id. at 1409-1417. The court ruled that "under the [Clean Water Act], compliance is a matter of strict liability and defendant's intention to comply or good-faith attempt to do so does not excuse a violation," Id. at 1409, and held that the act had been violated. Id. at 1417.

In the present case, Omya is violating RCRA's prohibition against open dumping by disposing of solid waste in a facility that does not have a permit, and therefore does fall within one of the two statutory exceptions, a sanitary landfill or a hazardous facility. For this reason, Omya is strictly liable under RCRA and subject to the authority of this Court to enforce the prohibition on open dumping under Section 4005(a), 42 U.S.C. § 6945(a).

VII. Conclusion

For these reasons, Plaintiffs ask the Court to grant its Motion for Partial Summary Judgment on Liability.

Respectfully Submitted this 30th day of September 2005,

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