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TWENTY-SECOND ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

2010 Judges' Edition Memorandum

Hana Heineken*

SUMMARY

This is a suit brought by Friends of Responsible Trade (FRT) and two of its members, Ace Ventura and Juan Valdez, against the Green Recycling Group, Inc. and the Newtown Parent Teachers Association (together appellees, GRG, or Newtown PTA). The complaint alleges violations of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (RCRA), by the export of used electronic devices (UEDs) in violation of RCRA requirements pertaining to the disposal of hazardous waste. The United States Environmental Protection Agency (EPA) has intervened.

The action at issue in this case involves GRG's export of UEDs from the United States to Sud-Americano, a developing country, for purposes of salvage and recycling. GRG is in the business of collecting UEDs for sale to foreign salvagers and recyclers. R4.[1] It collects these materials by entering into partnerships with community organizations, such as Newtown PTA, who in turn solicit UEDs from neighborhood households. R4. GRG requires anyone seeking free collection of UEDs to execute a form acknowledging that the particular devices collected were owned by them and used in their households. R4. After collecting sufficient UEDs to fill a shipping container, GRG

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1. "R" refers to the Record in this case.

ships the container to a salvage and recycling company abroad to salvage still useable UEDs and components and to reclaim precious metals and plastics from the remaining unusable UEDs. R4.

On June 19, 2008, Newtown PTA solicited members of local households in the town of Newtown, State of New Union, to bring their UEDs to the parking lot of Newtown High School for recycling purposes. R5. Newtown PTA told the residents that their devices would either be reused or recycled to put their components to good use. R5. GRG supplied the shipping container for the UEDs, container #VS2078, and Newtown PTA's members supervised the collection of the materials. R5. The Newtown PTA members placed devices in the container only after a visual examination showed that all of the UEDs were intact and after residents signed a form, supplied by GRG, acknowledging that the particular devices collected were owned by them, used in their households, remained intact, and were being disposed for purposes of reuse or recycling. R5. A significant number of the UEDs were MyPhones, a larger, less versatile version of the Apple iPhone. R5. Unlike the iPhone, MyPhones use a mercury-lithium battery and contain more lead and other toxic materials, albeit in small quantities. R5, SR.[2]

FRT member Ventura, a freelance photojournalist and citizen of the United States, photographed many of the UEDs that Newtown PTA's members placed in container simply labeled #VS2078 in the Newtown PTA High School Parking lot on June 19, 2008. R5, SR. Ventura ascertained that container #VS2078 was entirely filled with material collected at Newtown PTA on two successive Saturdays and was sent by GRG a week later to Geraldo Garcia, in the city of Pacifica, located in the nation of Sud-Americano. Sud-Americano is a party to the Basel Convention but is not a member of the OECD. SR. It has no regulatory scheme governing the recycling of UEDs or the pollution resulting from such activities. R5. No paperwork, aside from generic customs documents, was used by GRG in its export to Sud-Americano. R5. FRT is a tax-exempt 501(c)(3) membership organization that advocates for responsible trade practices on behalf of its members. SR.

2."SR" refers to the Supplemental Record derived from the NELMCC Q&A.

Upon receiving container #VS2078, Garcia sorted the UEDs and their components in order to separate out those still useful in the Sud-Americano market. R5. Garcia, who only operates in Pacifica, had been conducting these operations over a period of six years prior to receipt of #VS2078. R5, SR. Garcia hired local residents, including FRT member Juan Valdez, to reclaim heavy metals and other valuable materials from the remaining unusable UEDs. R5. Valdez has worked in Garcia's operations from their inception. R6. Because Garcia failed to supply his workers with protective devices, such as gloves and masks, or equipment designed for safe removal of materials from the UEDs, the workers, including Valdez, have been directly exposed to mercury, lead, cadmium, chromium, and other toxic materials, endangering their health. R6. In addition, because Garcia failed to properly collect, contain and manage waste from his operations, mercury, lead, and other heavy materials have entered into the water and land of the local environment, further endangering local inhabitants (including FRT member Valdez) and potentially endangering anyone encountering the local environment (including FRT member Ventura, who visited the area during the making of a documentary). R6.

Ventura made a documentary film of the activities of GRG, Newtown PTA, and Garcia, highlighting the exposure of Valdez and other workers and residents to the toxic materials sourced in recycling UEDs supplied by GRG and others, and the injuries possibly caused by those exposures. R6. Ventura's film, "Toxic Recycling," was awarded prizes for the best documentary film at three different film festivals, aired on public television, and earned a net profit of over $100,000 for Ventura. R6.

FRT and two of its members, Ace Ventura and Juan Valdez, brought this suit under RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(A), with all notice obligations fulfilled, alleging that GRG and Newtown PTA violated RCRA by exporting UEDs in violation of RCRA requirements pertaining to the disposal of hazardous waste. SR. FRT and its two members seek civil penalties for the violations, an injunction against further violations of RCRA, and compensatory damages for injuries suffered by the two members as a result of the violations. R3. FRT member Valdez (as a citizen of Sud-Americano) also bases

jurisdiction for his claim for personal injury on the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA). R3.

EPA filed a motion to intervene pursuant to 42 U.S.C. § 6972(d). R3.

After full discovery, FRT, joined by the United States, filed a motion for partial summary judgment against GRG and Newtown PTA, asking the District Court to find that GRG and Newtown PTA had violated RCRA and to leave the remedial portion of this action for disposition after trial. R3.

Thereafter, GRG and Newtown PTA filed a countermotion in the District Court for summary judgment against FRT and EPA, asking for a ruling either (1) that the District Court has no jurisdiction to entertain the action by FRT and its members (and that EPA would then be prevented from carrying on litigation without the original parties) or (2) that GRG and Newtown PTA have not violated RCRA. R4.

In its Order of August 31, 2009, the District Court:

1) **Held**, that FRT and its members lack constitutional standing to bring this case. FRT's argument for representational standing fails because neither of its individual members has constitutional standing: FRT member Ventura had no injury in fact that is fairly traceable to GRG's action, and FRT member Valdez had no proof that his injuries were caused by GRG and Newtown PTA.

2) **Held**, that FRT and its members lack statutory standing to sue GRG and Newtown PTA for RCRA violations. FRT and its members lack statutory standing under RCRA because there is no ongoing violation by GRG and Newtown PTA, plaintiff Valdez is not a citizen of the United States, and the harms suffered by the plaintiffs were caused by the actions of a negligent recycling factory operator, Garcia, instead of the actions of defendants. If GRG and Newtown PTA violated RCRA, they did so in the United States, but their activities in the United States did not cause the injuries claimed by the plaintiffs.

3) **Held**, that FRT member Valdez has constitutional standing to proceed with his ATCA claim against GRG and Newtown PTA for personal injury, but this Court does not have

jurisdiction to hear the ATCA claim. Plaintiff does not have ATCA jurisdiction because the tortious action allegedly responsible for his injury was not "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

4) **Held**, that despite plaintiff's lack of standing to continue the litigation, EPA as intervenor has proper basis to continue the litigation. Because the issue of RCRA violation falls within the direct purview of EPA agency authority and EPA has shown that it has independent ability to enforce RCRA against GRG and Newtown PTA, EPA has sufficient interest, basis, and standing to continue the suit absent the original plaintiffs.

5) **Held**, that plaintiffs did not violate the RCRA provisions pertaining to the export of hazardous waste because the waste collected by GRG and Newtown PTA was exempt from the hazardous waste classification due to its household nature. The waste collected constituted solid waste under RCRA jurisdiction while the container was in the United States, but once the materials left the United States, they were neither solid waste nor hazardous waste for the purposes of RCRA applicability to Garcia's operations.

Following the issuance of the District Court's Order, all parties filed Notices of Appeal with the Court of Appeals for the Twelfth Circuit.

The parties are directed to brief the following issues:

1) Whether Appellant FRT has sufficient constitutional or statutory standing to bring any action against GRG and Newtown PTA for violations resulting from the export of container #VS2078 to Geraldo Garcia's recycling plant. (GRG and Newtown PTA argue that FRT and its members have no standing to sue over the exported materials; FRT argues that there is standing under ATCA and RCRA; EPA argues that RCRA applies but ATCA does not).

2) Whether the ATCA provides an alternate basis for FRT's standing. (GRG and Newtown PTA argue that the court properly dismissed the applicability of the statute; EPA

argues that, as a matter of policy, its regulations are sufficient to protect the interests of foreign citizens and that expansion of ATCA claims would be an impediment to the administrative process; FRT argues that the international custom and Congressional action on the issue supports a claim of jurisdiction under ATCA).

3) Whether a dismissal of the suit as between FRT and GRG and Newtown PTA (the original parties) ends the action with respect to the intervenor EPA's claims. (GRG and Newtown PTA argue that it does as EPA can bring its own enforcement actions at any time; EPA argues that justice would best be served by allowing the action to continue with EPA as a party and that EPA has an independent, jurisdictional basis for its involvement in the action; FRT agrees that in the interests of justice, if its case is dismissed, EPA should still be allowed to continue litigation in order to resolve the situation at hand).

4) Whether the lower court properly analyzed the facts in terms of the solid waste nature of the exported materials, and, whether the export of container #VS2078 in the manner described subjects GRG and Newtown PTA to RCRA liability. (GRG and Newtown PTA argue that they are not subject to RCRA liability as their goods cease to be "solid waste" once they are sent outside the United States for recycling; FRT and EPA argue that RCRA nonetheless applies to the exported waste).

5) Whether the materials exported are considered hazardous for the purposes of RCRA; and, therefore, whether GRG and Newtown PTA are liable for violating the testing and reporting provisions of RCRA's hazardous waste sections. (GRG and Newtown PTA argue that the materials in container #VS2078 are not hazardous as defined under RCRA; EPA and FRT argue that because no exceptions apply and these types of materials are known to be toxic, the materials are hazardous for the purposes of RCRA).

This bench brief discusses each of these five issues in turn, outlining the positions of the parties and the applicable law. Sample questions for the oralists are presented for each issue.

STANDARD OF REVIEW

The standard of review is traditionally divided into three categories of "questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion")." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

A District Court's grant or denial of a motion for summary judgment is reviewed *de novo*, using the same standard as that applied by the district court. *Sanders-Burns v. City of Plano*, 578 F.3d 279, 290 (5th Cir. 2009). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists when there are "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient [to defeat a motion for summary judgment]; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252.

The Court of Appeals determines *de novo* whether plaintiffs have standing under Article III to proceed to the merits of their lawsuit. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000). For review of the ATCA and RCRA statutory standing, the Second Circuit Court of Appeals noted that the court should only "set aside findings of fact only when they are clearly erroneous" but that there is "*de novo* [review of] the district court's conclusions of law and its resolution of mixed questions of law and fact." *Phansalkar v. Anderson Weinroth & Com, L.P.*, 344 F.3d 184, 199 (2d Cir. 2003).

ISSUE I: Constitutional or RCRA Statutory Standing

Whether Appellant FRT has sufficient constitutional or RCRA statutory standing to bring any action against GRG and Newtown PTA for violations resulting from the export of container #VS2078 to Geraldo Garcia's recycling plant.

A. **Positions of the Parties**

- Appellees GRG and Newtown PTA argue that FRT has no standing.
- Appellant FRT argues that it has standing.
- Intervenor-Appellee EPA argues that FRT has standing.

B. **Discussion**

FRT's claim for constitutional standing is based on theories of representational standing as outlined in *Sierra Club v. Morton,* 405 U.S. 727 (1972). R6. FRT asserts representational standing based on two contentions: (1) because its member, Juan Valdez, was injured by exposure to mercury, lead and other substances from GRG's and Newtown PTA's activities violating RCRA and (2) because its member Ace Ventura, was exposed to and injured by the same substances while filming in Pacifica and is afraid to return to Pacifica because he would suffer further exposure to toxic contamination. R6. In this regard, Valdez and Ventura claim standing on the same basis: the environmental degradation and pollution resulting from GRG and Newtown PTA's export activities. R6.

FRT will also argue that it has statutory standing under the citizen suit provision of RCRA, 42 U.S.C. § 6972.

The District Court determined that FRT and its members have neither constitutional nor statutory standing to sue GRG and Newtown PTA. The Court determined that FRT lacked constitutional standing because it failed to establish the merits of representational standing. R6. The Court found that neither of its members, Valdez nor Ventura, had made the requisite showing of suffering an injury-in-fact that is fairly traceable to the alleged violation and which is redressable by the court. R6. It also found that FRT had no RCRA standing on grounds that

there was no ongoing violation, FRT member Valdez was not a US citizen, and the harm suffered was caused by the activities of a negligent recycling operator, Garcia. R7.

Overview of Constitutional Standing

Article III of the U.S. Constitution limits federal court jurisdiction to deciding 'cases' and 'controversies.' *U.S. Const. Art. III, 2, cl. 1.* Because the constitutional standing doctrine stems directly from Article III's 'case or controversy' requirement, a plaintiff's constitutional standing must be determined as a threshold matter in order to establish the jurisdiction of the Court to hear the case and reach its merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96, 104 (1998). In order to have Article III standing, FRT must satisfy the three elements established by the Supreme Court as the "irreducible constitutional minimum" for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). R6. First, the plaintiff must suffer an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent." *Id.* Second, the injury must be "fairly traceable" to the challenged action of the defendant and not the result of the "independent action of some third party not before the court." *Id.* Third, the injury must be redressable, that is, it must be "likely" rather than merely "speculative" that the injury will be "redressed by a favorable decision." *Id.* at 561. The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.* However, "[a] suit will not be dismissed for lack of standing if there are sufficient 'allegations of fact'—not proof—in the complaint or supporting affidavits." *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987).

Analysis of FRT's Constitutional Standing

1) ***Injury-in-Fact***

The issue presented here is whether the injuries suffered by Juan Valdez and Ace Ventura qualify as "injury-in-fact." In environmental cases, the requisite injury for Article III standing purposes is not necessarily injury to the environment but injury to the plaintiff. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*

(TOC), Inc., 528 U.S. 167, 182 (2000). The injury must be "concrete and particularized" and "actual or imminent." *Defenders of Wildlife,* 504 U.S. at 560. For an injury to be "particularized," the injury "must affect the plaintiff in a personal and individual way." *Defenders of Wildlife,* 504 U.S. at 561. The plaintiff cannot be merely a "concerned bystander." *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State,* 454 U.S. 464, 473 (1982). The plaintiff must also point to a cognizable harm. *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004). The requirement is satisfied if the plaintiff has an economic, aesthetic, or recreational interest in the particular place and that interest will be impaired by the defendant's conduct. *Laidlaw,* 528 U.S. at 183.

Additionally, the injury must be "actual or imminent." Speculative or conjectural injuries do not satisfy this requirement. *Defenders of Wildlife*, 504 U.S. at 564 (holding that plaintiff members' "some-day" intentions to return to the habitats of certain endangered species were not enough to show that damage to the species' habitat would produce imminent injury to themselves. Intentions must be concrete plans to support a finding of actual or imminent injury). The potential threat of future harm or injury is sufficient to meet this requirement. *See Opposing Pollution, Inc. v. Heritage Group,* 973 F.2d 1320 (7th Cir. 1992) (holding that a citizens group representing persons living close to the landfill, which had at least the potential to injure them, was constitutionally permitted to litigate to enforce RCRA). *See also Mass. v. E.P.A.*, 549 U.S. 497, 521 (2007) (holding that EPA's refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent"). Even a small probability of injury is sufficient to create a case or controversy so long as the relief sought, if granted, would reduce the probability. *Vill. of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). Where a plaintiff seeks prospective injunctive relief, it must demonstrate a "real and immediate threat" of future injury in order to satisfy the "injury in fact" requirement. *Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263, 1272 (11th Cir. 2003) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103-04 (1983)).

FRT's Argument

FRT will argue that it has standing on grounds that both Valdez and Ventura suffered an injury-in-fact. FRT will argue that Valdez clearly suffered a "concrete and particularized" and "actual" injury. Expert medical deposition testimony established that Valdez suffers from memory and neurological losses "of the type caused by lead and mercury poisoning." R6. Garcia's workers, including Valdez, were directly exposed to mercury, lead, cadmium and other toxic materials, endangering their health. R5-6. In addition, because Garcia failed to properly collect, contain, and manage waste from the operations, mercury, lead, and other heavy metals entered into the water and land of the local environment, further endangering local inhabitants including Valdez. R6. The fact that the injury occurred overseas does not negate the existence of an "injury-in-fact." *See Whaling Assn. v. Am. Cetacean Society*, 478 U.S. 221, 230 (1986) (injury-in-fact established for American whale watchers from Japanese whaling activities).

FRT will argue that Ventura was exposed to and injured by the same substances as Valdez while filming in Pacifica and is afraid to return for fear of exposure. R6. In contrast to Valdez, Ventura has no present physical manifestations from exposure to toxic material, R6, and alleged no particular physical injury from such exposure. R7. However, Ventura testified that because he was so emotionally upset by seeing the pollution and the workers, such as Valdez, who were 'obviously' injured by such pollution, he was afraid to return. R7. Here, Ventura must prove the elements set out in *Lujan v. Defenders of Wildlife*, that the injury is 'concrete and particularized' and 'actual or imminent.' Plaintiffs can have standing to sue without actual injury, *Laidlaw*, 528 U.S. 167, 169 (2000) (holding that plaintiffs can be 'injured' by reasonable perceptions of danger, even though the violations do not injure the environment). Ventura's potential injury from the exposure is defensible without scientific proof if he can show a direct nexus between his injury and the area of environmental impairment. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 159 (4th Cir. 2000) (en banc) (citing *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) which held that citizens' concern about water quality and fear that it will impair their enjoyment of recreational

activities in the bay sufficed as injury-in-fact). Threats or increased risk can constitute cognizable harm. *Gaston Copper Recycling Corp.,* 204 F.3d at 160 (citing *Valley Forge,* 454 U.S. at 472).

The lower court found the injury-in-fact element satisfied with respect to Valdez, and this court should affirm. However, Ventura's injury from his fear of return cannot suffice as an injury-in-fact if Ventura is merely a "concerned bystander." *Valley Forge,* 454 U.S. at 473. In *Lujan v. Defenders of Wildlife*, Justice Scalia required the plaintiff to show that an injury to that cognizable interest be proven and that the plaintiff be himself among the injured. The lower court found that Ventura had not been injured by the sights in Pacifica but rather had benefited from them. However, "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006). If Ventura can show a cognizable interest in Pacifica, concrete plans to return to Pacifica, and refusal to do so because of his fear of exposure, he may claim an injury-in-fact that passes the test laid out in *Lujan v. Defenders of Wildlife.*

2) ***'Fairly Traceable' Causation***

The 'fairly traceable' requirement for causation ensures that the injury was in fact caused by the alleged action. This requirement "does not mean that plaintiffs must show to a scientific certainty" that defendant alone "caused the precise harm suffered by the plaintiffs." *Natural Res. Def. Council, Inc. v. Watkins,* 954 F.2d 974, 980 n.7 (4th Cir. 1992) (quoting *Public Interest Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)). It is not the same requirement as in tort causation. *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002). However, it requires proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact. *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (quotations and citations omitted.) Where the injury was caused by the independent action of a third party, the Supreme Court has held that it does not meet the 'fairly traceable' requirement. *Defenders of Wildlife*, 504 U.S. at 560.

Courts have found the injury to be 'fairly traceable' where it was produced by determinative or coercive effect upon the defendant's action of someone else. *See Bennett v. Spear*, 520 U.S. 154, 168-169 (1997) (holding that the injury was fairly traceable to the defendant agency's actions where the defendant had some "determinative or coercive" effect upon the actions of a third party agency who was responsible for the plaintiff's injury. *See also Tozzi v. U.S. Dept. of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001) (rejecting tort standard of causation: "[w]hen, as here, the alleged injury flows not directly from the challenged agency action, but rather from independent actions of third parties, we have required only a showing that the agency action is at least a substantial factor motivating the third parties' actions."). The issue presented here is whether there was a substantial likelihood that defendant's conduct caused the plaintiffs' injuries.

FRT's Argument

FRT will argue that the 'fairly traceable' requirement is met because the appellees' actions were a substantial factor motivating Garcia's actions. Alternatively, FRT may argue that Garcia was an agent of the defendant, and therefore its actions are attributable to the appellees.

Based on the case law and the facts, the fairly traceable requirement for causation will continue to present a difficult obstacle for appellants in proving constitutional standing. As the facts show, Garcia runs an independent salvage and recycling company with customers other than GRG. R5. Injuries to both Valdez and Ventura were directly caused by Garcia's negligence in operating the recycling activities. R5-6. There is no evidence that GRG's actions had a substantial effect on GRG's actions to negligently handle the shipment. The lower court found Valdez had failed to demonstrate that his injuries were fairly traceable to the complained-of action, as there was no evidence that his injuries were actually caused by lead and mercury poisoning nor that they were caused by lead and mercury from material in appellees' container. R6. The lower court also found that causation was lacking because it was Garcia's negligence that exposed Valdez to lead and mercury, not the collection and shipment of material by the appellees. R7. The lower court held

that the activities of GRG and Newtown PTA in the United States did not cause Valdez or Ventura's exposures to lead and mercury in Pacifica. R8. This court should affirm.

3) ***Redressability***

Redressability requires that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 561. "A plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 225, n.15 (1982) (cited favorably in *Mass. v. EPA*, 547 U.S. 497, 525).

The question presented here is whether the relief sought will redress the plaintiffs' injuries.

FRT's Argument

FRT will argue that the relief sought—civil penalties for the violations, an injunction against further violations of RCRA, and compensatory damages for injuries suffered by the two members as a result of the violations—satisfies the redressability requirement.

The lower court did not rule on whether this element is satisfied, having found that the other elements of standing were not met. However, it may be argued that none of the remedies requested will redress the appellants' injuries. Since both the civil penalties and the injunction will be directed toward GRG and Newtown PTA rather than toward Garcia, such measures will not stop further injury to the appellants unless the enjoining of appellees' activities will also put a stop to Garcia's dangerous recycling activities. Furthermore, civil penalties under RCRA are payable to the U.S. Treasury under 42 U.S.C. § 6928(g), and therefore they will not compensate the appellants for their injuries. On the other hand, compensatory damages may redress the appellants' injuries by helping to cover treatment costs or lost wages, but such private actions for damages are not permitted under RCRA citizen suits. R7. *See, e.g., Walls v. Waste Resource Corp.,* 761 F.2d 311, 316 (6th Cir. 1985). While Valdez' citizen suit claim may be susceptible to a claim for personal injury by

way of pendant jurisdiction, the lower court has explained that that is not the case here. Instead, the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA) governs jurisdiction over such actions and does not grant jurisdiction to entertain such actions. R7.

Compensatory damages for personal injury may be permissible for an action under the ATCA brought by Valdez (discussed below). R8. However, if Valdez continues to work for Garcia and Garcia's operations continue to harm its workers and pollute the surrounding environment, Valdez's injuries will not be abated, and therefore the redressability requirement will not be met.

Overview of Representational Standing

An association may have standing to sue in federal courts based either on an injury to the organization in its own right or as the representative of its members who have been harmed. *Gaston Copper Recycling Corp.,* 204 F.3d at 155. This case is only concerned with the latter. R6. For a group to have standing on behalf of its members, it must show that: (1) at least one member would have standing to sue; (2) interests of the organization are germane to the subject matter of the suit; and (3) neither the claim nor the relief requires the participation of the individual members in the litigation. R6. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that Sierra Club lacked standing to enjoin the federal government's allowance of a skiing development proposed by the Disney Company for the Mineral King Valley, because it failed to allege that it or its members would suffer an injury to a cognizable interest).

The lower court found that FRT's representational argument failed because it rested upon the standing of Valdez and Ventura and neither had constitutional standing to bring this case. R7. As shown in the analysis above, the plaintiff's satisfaction of the three prongs for constitutional standing is tenuous. If FRT fails to argue that either Ventura or Valdez has standing, it will not be able to bring this case on the basis of representational standing.

Overview of Statutory RCRA Standing

Standing rests on three grounds: Constitutional standing (discussed above); statutory standing, by which Congress establishes statutory limitations on who may access the federal courts; and judicially imposed prudential standing. In addition to meeting the constitutional requirements, the plaintiff must satisfy judicially imposed prudential limitations. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (stating that standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise"). In order to satisfy statutory standing, the plaintiff must demonstrate that its claim falls within the "zone of interests" protected by the statute in question. *See Valley Forge,* 454 U.S. 464, 474-75 (1982). "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Courts have held that the use of the term "any person" in environmental laws such as RCRA and CERCLA implies that Congress intended to confer standing to the full extent permitted by Article III and therefore abrogated the prudential standing requirements under these statutes. *DMJ Associates, L.L.C. v. Capasso*, 288 F.Supp.2d 262, 267 (E.D.N.Y. 2003).

The appellants brought this action under RCRA citizen suit provision 42 U.S.C. § 6972(a)(1)(A)(1998), which states that:

> [A]ny person may commence a civil action on his own behalf—against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged ***to be in violation*** of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter. (*Emphasis added*)

The issue here is whether the appellants' claims fall within the "zone of interest" protected by 42 U.S.C. § 6972(a)(1)(A).

Analysis of FRT's RCRA Standing

GRG and Newtown PTA's Argument

GRG and Newtown PTA will argue that RCRA does not allow noncitizens, such as Valdez, to bring citizen suits. Under RCRA, the term "person" means "an individual, trust, firm, joint stock company, corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. § 6903(15). The citizen suit provision states that the district court "shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A)" "without regard to . . . the citizenship of the parties." 42 U.S.C. § 6972(a). However, it does not explicitly confer to noncitizens the right to bring a citizen suit. GRG will argue that the section heading of 42 U.S.C. § 6972 is "Citizen Suits," and where the statute is ambiguous, as it is here in its application to noncitizens, "they are [. . .] tools available for the resolution of a doubt." *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947). As the heading indicates, only "citizens" can sue under 42 U.S.C. § 6972.

GRG and Newtown PTA will also argue that a citizen suit would not be allowed in this case because it would require the extraterritorial application of RCRA. There is a presumption against extraterritorial application of laws; in order to apply RCRA beyond the borders of the United States, Congressional intent to do so must be clearly stated. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949). In *Amlon Metals, Inc. v. FMC Corp.,* the Court addressed whether RCRA's citizen suit provision for "imminent and substantial endangerment," 42 U.S.C. 6972(a)(1)(B), applies to hazardous waste located overseas. 775 F.Supp. 668, 674 n.8 (S.D.N.Y. 1991). The *Amlon* Court dismissed the case upon finding "considerable legislative history supporting the view that Congress intended an entirely domestic focus for RCRA's citizen suit provision." *Id.* Appellees will argue that where Congress intended to allow a foreign claimant, they explicitly included that in the statute, *see* 42 U.S.C. § 9611(l), and this is not the case here.

FRT's Argument

FRT will argue that it satisfies the definition of a "person" because "person" has been interpreted to include an organization and FRT is an organization. *See Bldg. & Const. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138 (2d Cir. 2006) (labor organization). FRT will argue that this is not undermined by the presence of a noncitizen in the suit, and that, in its view, Ventura's and FRT's (representational) standing is sufficient to defeat an extraterritoriality claim. *See Dugong v. Gates*, 543 F.Supp.2d 1082 (N.D.Cal. 2008) (plaintiffs consisting of Japanese and American parties). FRT will also point out that headings and titles "cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen,* 331 U.S. at 528–29. Valdez is a "person." The Supreme Court has held that "any person" should be taken at face value. *Bennett v. Spear*, 520 U.S. 154, 165 (1997). Appellants are therefore qualified to bring a citizen suit and the lower court erred in limiting such authority to citizens. R7. If, however, FRT's only basis for standing is representational standing based on the injury to Valdez (and if Ventura's claim is dismissed as being without standing), it is unclear whether appellants' claim will still satisfy the RCRA citizen suit requirements.

FRT will also argue that this case is distinguishable from *Amlon* in that the citizen suit was brought under 42 U.S.C. § 6972(a)(1)(A). FRT will also argue that the alleged RCRA violation, namely a violation of RCRA's regulations governing paperwork pertaining to the export of hazardous waste, occurred domestically, and therefore the issue of extraterritoriality does not apply. *See* Lisa T. Belenkey, *Cradle to Border: US Hazardous Waste Export Regulations and International Law*, 17 BERKELEY J. INT'L L. 95, 116 (1999) (stating that even if citizen suits are limited to domestic issues, that limitation should not categorically bar a citizen suit under RCRA § 3017 (Export of Hazardous Wastes) because the actual violation of § 3017 export requirements occurs domestically). The lower court found this to be true—if GRG and Newtown PTA violated RCRA, they did so in the United States. R8.

Lastly, a RCRA citizen suit brought under 42 U.S.C. § 6972(a)(1)(A) requires the defendant "to be in violation." The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake*

Bay Found., Inc., 484 U.S. 49 (1987) held that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future. Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option." *Id.* at 57. The *Gwaltney* court's interpretation has been applied to cases brought under RCRA. *See Bd. of County Comm'rs of County of La Plata, Colo. v. Brown Group Retail, Inc.*, 598 F.Supp.2d 1185 (D.Colo. 2009). The Supreme Court went on to state that in adding a civil remedy under Section 6972(a)(1)(B), "Congress has demonstrated . . . that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." *See Gwaltney*, 484 U.S. at 57.

The violation here occurred in 2008 and involved one shipment of one container (container #VS2078). R8. FRT alleges that GRG sent other containers of similar material abroad for recycling and will do so again. R8. It did not make such allegations with regard to Newtown PTA, and as far as Newtown PTA is concerned, this was a one-time, isolated activity. R8. GRG has admitted that it exported containers of similar material for salvage and recycling, though this was the first export to Sud-Americano. R8. GRG has also admitted that it has an open-ended contract with Garcia for potential future containers of UEDs to be sent to Pacifica, but it has made no such shipments to date, presumably because of the pendency of litigation. R8.

The lower court found the likelihood of GRG having further dealings with Garcia as purely speculative, and therefore held that GRG failed to satisfy the "to be in violation" requirement under § 6972(a)(1)(A). R8. The lower court cites to *Basel Action Network v. Maritime Admin.*, 370 F.Supp.2d 57 (D.D.C. 2005). In *Basel,* the District Court dismissed an environmental organization's action to bar the Maritime Administration (MARAD) from exporting defunct naval vessels containing toxic substances to the United Kingdom for disposal. The action was similarly based on § 6972(a)(1)(A). Because MARAD had stated its intent to abide by the statutory obligations for export of hazardous waste, the court found that there was no current and

ongoing violation. *Basel*, 370 F.Supp.2d at 79. Here, GRG has not made any such statement and is therefore distinguishable.

Violations are ongoing if there is evidence from which a reasonable trier of fact could find the likelihood of a recurrence of intermittent or sporadic violations when the complaint was filed. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir.1988) ("Gwaltney II"). "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* Here, GRG had an open-ended contract with Garcia for future shipments of UEDs, which FRT may argue suggests a likelihood of a recurrence of the violation.

C. **Questions**

1) Initially, this court should question parties as to the standard of review applicable in this litigation.

2) For constitutional standing, consider whether:
   a) Injury to Valdez or Ventura was "actual and imminent" and "concrete and particularized."
      i. Does Ventura's intent to return qualify as "actual and imminent"? Even if there has been no physical manifestation of his injuries?
   b) Injury was fairly traceable to the actions of the defendants.
      i. Were the injuries the result of actions by GRG and Newtown PTA in collecting the MyPhones?
      ii. Would Ventura have documented the plight of the local Sud-Americano workers even if no MyPhone collection had occurred?
      iii. Would Valdez have been injured but for the GRG shipment?
   c) The complained-of conduct is redressable by the courts.
      i. Will a favorable decision here remedy the environmental degradation at Garcia's Sud-Americano operation?
      ii. If not, how do FRT and its members have standing without redressability?

iii. Would a cessation of GRG and Newtown PTA's efforts to recycle electronics devices lead to a healthier city of Pacifica?

iv. Would such an outcome allow Ventura to return to the scene of the toxicity without fear of injury?

3) Is there RCRA statutory standing?

a) Does a citizen suit under RCRA need to be brought by a citizen of the United States, as the district court held?

b) If FRT only has representational standing due to a foreign citizen's injuries, isn't this de facto extraterritorial application of RCRA? Does the simple retention of U.S. counsel defeat the presumption against extraterritorial application?

c) What did the lower court decide as to the interest "the entire world has" with respect to enforcing RCRA?

d) If "person" expressly allows non-citizens such as trusts, corporations, and states to sue, why wouldn't this be read to include rights for non-citizens such as foreign citizens?

e) If RCRA grants jurisdiction to Valdez or Ventura, and the case is decided against GRG/Newtown, the money from any judgment will be paid to the U.S. Treasury: would this not mean that the injuries suffered in Sud-Americano are not redressed and there is no standing under RCRA for the present facts?

f) How does the single shipment of electronics constitute an "ongoing violation"?

g) Does a contract like the one between GRG and Garcia establish "ongoing violation"?

h) Does the location of the injury change the RCRA standing analysis? Does the location where GRG violated the RCRA have to be the same as the location at which the plaintiffs are injured?

i) Is the protection of workers in Sud-Americano (and filmmakers documenting toxic exposure there) within the "zone of interest" of RCRA? Should all environmental statutes be read to be supportive of global environmental protection?

ISSUE II: Standing under the Alien Tort Claims Act

Whether the Alien Tort Claims Act (ATCA) provides an alternate basis for FRT's standing.

A. **Positions of the Parties**

- Appellees GRG and Newtown PTA argue that the ATCA does not apply.
- Appellant FRT argues that it has standing under the ATCA.
- Intervenor Appellee EPA argues that FRT does not have standing under the ATCA.

B. **Discussion**

FRT member Valdez brought a claim under the ATCA on grounds that appellees' tortious actions directly led to the same concrete actual injuries discussed in the earlier analysis. R8. FRT argues that international custom and Congressional action on the issue supports a claim of jurisdiction under ATCA. GRG and Newtown PTA argue that the court properly dismissed ATCA claim. EPA argues that, as a matter of policy, its regulations are sufficient to protect the interests of foreign citizens and that expansion of the ATCA in this situation would be an impediment to the administrative process.

The lower court found that Valdez had constitutional standing to proceed with his ATCA claim, as the ATCA allows for compensatory damages, and therefore he was not hampered by the redressability problems associated with the RCRA claim. R8. However the court concluded ATCA did not confer jurisdiction in this case because no tort was committed "in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. R8.

Overview of ATCA

The ATCA, also known as the Alien Tort Statute (ATS), was enacted in 1789 as a clause of the Judiciary Act of 1789. In its current form it reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only,

committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000).

In order to state an ATCA claim, plaintiffs must (i) be "aliens," (ii) claiming damages for a "tort only," (iii) resulting from a violation "of the law of nations" or of "a treaty of the United States." *Id.*

ATCA has not been limited to suits against states but has also been successfully applied to suits against multinational corporations where they acted under "color of [state] law" or committed certain private acts such as piracy and slave trading. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F.Supp.2d 331 (S.D.N.Y. 2005) (finding cause of action for violations of *jus cogens* norms including genocide); *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (finding cause of action for genocide). *See also Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 348 (C.D.Cal. 1997) (citing *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring)).

An issue that has divided courts is whether ATCA permits private causes of action for recently identified violations of customary international law. *See Abeje-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (recognizing private cause of action under ATCA against ex-officials of Ethiopia for torture); *Hilao v. Estate of Marcos* (*In re Estate of Ferdinand Marcos),* 25 F.3d 1467 (9th Cir. 1994) (recognizing private cause of action against former President of the Philippines for torture, execution, and disappearance); *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring that ATCA is purely jurisdictional and does not create a private cause of action against the Palestinian Labor Organization for torture).

This issue was recently decided by the Supreme Court in *Sosa v. Alvarez*, 542 U.S. 692 (2004). In *Sosa,* the plaintiff Alvarez, a Mexican national acquitted of murder after being abducted and transported to the U.S. to face prosecution, brought suit under ATCA and Federal Tort Claims Act (FTCA) against the U.S., Drug Enforcement Agency (DEA) agents, former Mexican policemen, and Mexican civilians. Alvarez brought claims for false arrest against the U.S. and DEA agents under the FTCA, and claims for arbitrary detention against Sosa under ATCA for a violation of the law of nations. *Id.* at 697. Alvarez

argued that ATCA was intended not only as a jurisdictional grant but also as authority for the creation of a new cause of action for torts in violation of international law. *Id.* at 713. The Supreme Court declined to extend ATCA jurisdiction to cover arbitrary detention, holding that "the statute is in terms only jurisdictional," but that "at the time of enactment, the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.* at 712.

The Supreme Court offered several reasons for ATCA's strictly jurisdictional nature. First, the Court noted the placement of the statute in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction. *Id.* at 713. Second, the Court made several inferences from the statute's history, while acknowledging the difficulty of discerning its Congressional intent due to the scant legislative history. The Supreme Court reasoned that "Congress did not pass the [ATCA] as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners", and that "Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 719. The Supreme Court concluded that "the statute was intended to have practical effect the moment it became law," on the understanding that "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 724.

In *Sosa*, the Supreme Court limited the category of claims that can be brought under ATCA when based on the present-day law of nations. It held that federal courts could recognize a claim under the law of nations as an element of common law, but that the claim must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [the Court has] recognized." *Id.* at 725. The Court recognized three such claims: "a violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 714, 724. The Court went on to state that in determining "whether a norm is

sufficiently definite to support a cause of action," the court must consider "the practical consequences of making that cause available to litigants in the federal courts, which entails gauging the claim against the current state of international law. *Id.* at 732. In the absence of a treaty, controlling executive or legislative act, or a controlling judicial decision, the Court recommended examining the following sources of international law: "the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.* at 734.

One issue that has remained unanswered is what constitutes "a violation of safe conducts." Legal scholars have suggested that "safe conduct" at the time of ATCA's enactment encompassed both explicit safe conducts granted under the authority of the United States (i.e., a passport) and implied safe conducts based on either a treaty or a law of nations. *Id.* at 879. A safe-conduct violation constituted "a noncontract injury to an alien's person or property – an alien tort." *Id.* The ATCA allowed for such injuries to be addressed in domestic court for reasons of political expedience, in order to "[d]iminish the risk that the offended sovereign would exercise its lawful right to make war." *Id.* at 881. *See also Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 782 (D.C. Cir. 1984).

ATCA Application to the Export of Hazardous Waste

As explained above, ATCA can apply only where the injury arises from a violation of the "law of nations" or "a treaty of the United States." Thus, this section reviews the relevant treaties and agreements relating to the export of hazardous waste for the purpose of determining the application of ATCA claims for injuries arising from the export of hazardous waste.

There is a large body of international law regulating the transboundary movement of hazardous wastes. The most comprehensive global environmental treaty on hazardous and other wastes is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("Basel Convention"), Mar. 22, 1989, U.N. Environment Programme, Agenda Item 3, U.N.E.P. Doc. IG 8013, *reprinted in*

28 I.L.M. 649 (entered into force in 1992). There are currently 172 parties to the Convention (2009). The United States signed the Convention in 1990 and the Senate gave its advice and consent to ratification in 1992, but it has yet to ratify it.

The key objectives of the Basel Convention are (1) to reduce transboundary movements of hazardous wastes to a minimum consistent with their environmentally sound management; (2) to treat and dispose of hazardous wastes as close as possible to their source of generation in an environmentally sound manner; and (3) to minimize the generation of hazardous wastes and other wastes in terms of quantity and hazardousness. *See* website of the Basel Convention, *available at* http://basel.int/convention/basics (last visited Nov. 30, 2009). The Convention regulates two categories of waste. The first are "hazardous wastes" which are either listed in Annex I of the Convention and display the characteristics contained in Annex III, including explosivity, flammability, toxicity, and corrosivity; or they are wastes that are not listed in Annex I but considered hazardous by domestic legislation of the Party of export, import, or transit. The second category of wastes is "other wastes" and includes household wastes and residues arising from the incineration of household wastes. *Basel Convention*, art. 1, 28 I.L.M. at 659.

The Convention achieves its objectives via three approaches. First, the Convention controls the transboundary movement of hazardous wastes by establishing a global notification and consent regime as well as a tracking system for the transboundary shipment of hazardous and other wastes among Parties. *Id.,* art. 4(1)(c), 4(7)(c), and 6(9), 28 I.L.M. at 661, 663, 665. Shipments made without prior informed consent are considered illegal traffic and criminal. *Id.*, art. 4(3) and 9(1), 28 I.L.M. at 662, 666. Second, the Convention requires Parties to manage and dispose of waste in an environmentally sound manner. *Id.,* art. 4(2)(b) and (c), 28 I.L.M. at 662, and Parties are prohibited from exporting or importing wastes if they have reason to believe that it would not comply with environmentally sound management (ESM). *Id.,* art. 4(1)(e) and (g), 4(8), 28 I.L.M. at 662, 663. Third, the Convention encourages the minimization of hazardous waste generation and national self-sufficiency in waste management. *Id.,* art. 4(2)(a) and (b), 28 I.L.M. at 662. Parties are required to ensure that shipments are allowed only if (a) the

State of export does not have the capacity to dispose of the waste in an environmentally sound and efficient manner; or (b) the waste is required as a raw material in the State of import; or (c) the transboundary movement is consistent with criteria decided by the Parties and the objectives of the Convention. *Id.,* art. 4(9), 28 I.L.M. at 663.

The Convention also has an effect on non-Parties. Parties are prohibited from shipping to and from non-Parties, *Id.,* art 4(5), 28 I.L.M. at 662, unless it is under a bilateral, multilateral, or regional agreement that does "not derogate from the environmentally sound management of hazardous wastes and other wastes as required by [the] Convention." *Id.*, art. 11, 28 I.L.M. 668. The Convention explicitly states that it does not affect the transboundary movement of hazardous waste and other wastes that take place pursuant to such agreements. *Id.*

In addition to the global regime established by the Basel Convention, there are various bilateral and multilateral treaties and corresponding national implementing regulations regulating the transboundary movements of hazardous waste. The Organization for Economic Co-operation and Development (OECD) (then comprised of 24 industrialized nations, including the U.S.) paved the way for the Basel Convention by mandating a prior notice and consent system for shipments between OECD member states. The Decision and Recommendation on Transfrontier Movements of Hazardous Waste, OECD Doc. C (83) 180 (Feb. 13, 1984), *reprinted in* 23 I.L.M. 214 (1984). This was followed by a requirement of prior notice and consent for shipments between OECD member and non-member states and a prohibition on exports to non-member states that lack the proper disposal facilities. Council Decision-Recommendation on Exports of Hazardous Wastes from the OECD Area, OECD Doc. C (86) 64 (June 5, 1986), *reprinted in* 25 I.L.M. 1010 (1986). In 1992, the OECD adopted a decision establishing a control system for the transfrontier movements among OECD member countries of wastes destined for recovery. Council Decision Concerning the Control of Transfrontier Movements of Hazardous Waste Destined for Recovery Operations, Doc. C (92) 39/FINAL (Mar. 30, 1992) (as amended and replaced by C (2001) 107/Final). Other multilateral agreements at the regional level include the Bilateral Agreement Between the Government of the United

States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste (1986); the Bilateral Agreement of Cooperation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances (1986), 22 I.L.M 1025; North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (North America); Regulation (EC) No. 1013/2006 of the European Parliament and of the Council on shipments of waste, June, 14, 2006, 2006 O.J. (L 190) (Europe); Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 30, 1991, 30 I.L.M. 773 (Africa); and the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movements of Hazardous Wastes within the South Pacific Region, Oct. 21, 2001, 2161 U.N.T.S. 91 (the South Pacific).

Many of these agreements and treaties contain similar provisions to regulate the transboundary movement of hazardous waste. The most common provisions include the requirements of prior informed consent from the importing country and the assurance of environmentally sound management. *See generally* Theodore Waugh, *Where do we go from here: Legal Controls and Future Strategies for Addressing the Transportation of Hazardous Wastes across International Borders*, 11 FORDHAM ENVTL. L.J. 477, 518-519 (2000) (commenting that the international agreements governing the transboundary movement of hazardous wastes indicate a growing interest in regulating and restricting hazardous waste trading). There are also significant differences, particularly in the scope of the wastes subject to regulation and in the regulation of shipment for recovery or recycling. *See, e.g., Bamako Convention* (defining "hazardous waste" as any waste that is listed in its Annex I (similar to Annex I of the Basel Convention) *or* that possesses any hazardous characteristic enumerated in its Annex II (similar to the Basel Convention); and banning the import of hazardous material into Africa for purposes of disposal and recycling but not for purposes of recovery); see *generally* Kenneth D. Hirschi, *Possibilities for a Unified International Convention on the*

Transboundary Shipments of Hazardous Wastes, 10 GEO. INT'L ENVTL. L. REV. 169 (1997).

Analysis of FRT's Standing under ATCA

In order to bring a suit under the ATCA, the claimant, in this case FRT, must allege a violation of a treaty or law of nations; allege a conduct constituting a tort against the person or property; bring the case by an alien; and meet all other jurisdictional threshold requirements for suits in federal courts, including standing. *See* Lisa T. Belenkey, *Cradle to Border: US Hazardous Waste Export Regulations and International Law*, 17 BERKELEY J. INT'L L. 95, 133 (1999).

GRG and Newtown PTA's Argument

GRG and Newtown PTA will argue that this court cannot recognize a claim under the ATCA because the U.S. has not ratified the Basel Convention and there is no law of nations regulating the export of hazardous wastes. They will argue that the existence of the Basel Convention and other treaties do not indicate customary international law since the U.S. remains a non-party to the Basel Convention and yet generates the largest amount of municipal solid waste per person on a daily basis among industrialized nations. *See* U.S. EPA., 2008 Report on the Environment (Final Report) ch. 4.4.

GRG and Newtown PTA will further argue that plaintiffs do not have standing under ATCA because although the injury-in-fact and redressability requirements may be satisfied, the element of causation has not. They will point to the fact that they were not responsible for Garcia's operations in Sud-Americano, the source of plaintiff's injury.

FRT's Argument

Because the U.S. has not ratified the Basel Convention, FRT will argue that the illegal export and dumping of hazardous waste in developing countries constitutes a violation of the law of nations. FRT will argue that the existence of international, bilateral, and multilateral treaties in addition to domestic legislation addressing the transboundary movement of hazardous

waste demonstrates the existence of a customary international law against the export of hazardous waste without prior informed consent or in contradiction to environmentally sound management.

In order to respond to Appellees' argument that the U.S. position on the Basel Convention negates any indication that it represents a law of nations, FRT will rely on the District Court case of *Sarei v. Rio Tinto PLC,* in which the Court held that the United Nations Convention on the Law of the Sea (UNCLOS) established customary international law, even though the United States had not ratified it. 221 F.Supp.2d 1116 (C.D.Cal. 2002), *aff'd in part, vacated in part, rev'd in part,* 456 F.3d 1069 (9th Cir. 2006), *aff'd in part, vacated in part, rev'd in part,* 487 F.3d 1193 (9th Cir. 2007), *hearing en banc granted*, 499 F.3d 923 (9th Cir. 2007), *aff'd*, 550 F.3d 822 (9th Cir. 2008). In *Sarei*, the residents of Papua New Guinea brought a class action under ATCA against an international mining company for environmental destruction, harm to human health, and incitement of a civil war. They based their ATCA claim on several theories including violations of UNCLOS. The District Court held that plaintiffs can base an ATCA claim on UNCLOS because UNCLOS reflects customary international law. *Id.,* at 1162. The Court reasoned that even though the United States has only signed but not ratified the treaty, the United States has recognized that the treaty's baseline provisions reflect customary international law. *Id.* at 1161 (quoting *U.S. v. State of Ala*ska, 503 U.S. 569, 588, n.10 (1992)).

FRT will not have a strong argument. Although UNCLOS is similar to the Basel Convention in its number of state parties, they are distinguishable in the sense that the U.S. Government has not publicly recognized the Basel Convention as reflecting customary international law. It has stated instead that "the United States voluntarily complies with the provisions of the Basel Convention to the extent that they do not conflict with U.S. domestic law." *See SYMPOSIUM: ENVIRONMENTAL LAW AND BUSINESS IN THE 21ST CENTURY: Trash or Treasure? Industrial Recycling and International Barriers to the Movement of Hazardous Wastes,* 22 IOWA J. CORP. L. 507, 528 (1997).

In the alternative, FRT may argue that congressional action in response to OECD Decisions regulating the shipments of hazardous waste evidence the U.S. recognition of the Basel

Convention as customary international law. U.S. exports of hazardous wastes for recycling to any of the other OECD nations is bound by the OECD Council Decision C (92) 39 "Concerning the Control of Transfrontier Movements of Hazardous Waste Destined for Recovery Operations." *Id.* at 525. EPA has acknowledged the Decision's binding nature, stating that the Decision "imposes legally binding commitments on the United States pursuant to Articles 5(a) and 6(2) of the OECD Convention." *Id.* This conclusion is also supported by EPA's promulgation of regulations implementing the Decision. *Id.* Accordingly, EPA's regulations require (1) the export of hazardous waste only for purposes of recovery or recycling, except in the presence of a bilateral agreement; (2) notification to and consent of the importing country; and (3) additional labeling of the hazardous waste for export on a tracking document using the OECD labeling system: red, amber, green listings. 40 C.F.R. §§ 262.80-262.89 (1998).

GRG and Newtown PTA's Argument

GRG will argue that the OECD Decision above is limited to the transboundary movement of hazardous waste within the OECD area and therefore does not equate to compliance with the Basel Convention. Furthermore, it will argue that Article 11 of the Basel Convention allows for bilateral and multilateral treaties to supersede the Convention. GRG will argue that the U.S. is simply fulfilling its obligation as a signatory, but as its domestic legislation indicates, it does not recognize the Basel Convention as a customary international law. EPA's regulations do not regulate wastes that are considered hazardous by other OECD members if not considered a RCRA hazardous waste. 40 C.F.R. § 262.80(a).

FRT's Response to EPA's Argument

Finally, FRT must counter EPA's argument that, as a matter of policy, EPA's regulations are sufficient to protect the interests of foreign citizens and that expansion of ATCA claims would be an impediment to the administrative process.

FRT may argue that EPA's regulations in fact do not sufficiently protect the interests of foreign citizens, in that EPA's

export requirements do not cover many of the waste regulated under the Basel Convention because they are exempt from the RCRA hazardous waste regime. For example, household wastes, including electronic wastes, are exempted from RCRA's export regulations, while they are regulated under the Basel Convention. Additionally, FRT may point out that the export requirements are satisfied once the importing country consents to the export, 40 C.F.R. § 262.52, and there are no obligations by the exporter to ensure that the importer will manage the waste in an environmentally sound manner. For a more detailed explanation, see Sections IV and V.

On the question of whether the ATCA claims would be an impediment to the administrative process, the issue is whether ATCA requires an exhaustion of national remedies before it may be applied. This question has been answered in the negative, on grounds that Congress' inclusion of an exhaustion of remedies provision in the Torture Victim Protection Act (TVPA) was not intended to impose a similar requirement on ATCA claims that fall outside the scope of the TVPA statute, namely, claims other than for torture or summary executions. *See Sarei v. Rio Tinto, LLC.*, 221 F.Supp.2d at 1135 (citing *Kadic*, 70 F.3d at 241).

C. **Questions**

1) ATCA—generally
   a. What was the congressional intent behind the enactment of the ATCA?
   b. Does the ATCA apply to torts committed by private actors?
   c. Does the ATCA permit private causes of action for recently identified violations of customary international law?
   d. What constitutes "a violation of safe conducts"?

2) Does the ATCA confer jurisdiction for torts related to the export of hazardous waste?
   a. Is there a law of nations governing the export of hazardous waste?
   b. Must the US have signed the Basel Convention in order for the Convention to be treated as a law of nations?

c. What are the implications of US compliance with OECD regulations on the export of hazardous waste?

3) ATCA jurisdiction versus standing.
   a. Does jurisdiction under ATCA automatically give one standing?

4) Does EPA have a valid argument against ATCA jurisdiction?
   a. Are EPA's regulations sufficient to protect the interests of foreign citizens?

5) Must national remedies be exhausted before ATCA may be applied?

ISSUE III: Continuing Litigation without an Original Party

Whether a dismissal of the suit between FRT and GRG and Newtown PTA (the original parties) ends the action with respect to intervenor EPA's claims.

A. Positions of the Parties

- Appellees GRG and Newtown PTA argue that dismissal of the suit ends the action with respect to the intervenor EPA's claims.
- Appellant FRT argues that dismissal of the suit does not end the action with respect to the intervenor EPA's claims.
- Intervenor-Appellee EPA argues that dismissal of the suit does not end the action with respect to the intervenor EPA's claims.

B. Discussion

The issue here is the procedural effect of Plaintiffs' lack of jurisdiction on the ability of EPA to continue the action. R10. GRG and Newtown PTA argue that dismissal of the original action on jurisdictional grounds ends the action with respect to EPA's intervenor claims. R10. They argue that because EPA is free to bring its own separate civil or criminal enforcement action

at any time, EPA should have done so separate from this suit. R11, n3. FRT argues EPA's intervention should continue in the interests of justice, in order to allow EPA to enforce RCRA. R10. EPA similarly argues that it has an interest in the potential RCRA violations and therefore should be allowed to continue. R10. EPA argues that justice would best be served by allowing the action to continue with EPA as a party and that EPA has an independent, jurisdictional basis for its involvement in the action. R2.

The District Court held that because of EPA's agency authority to enforce RCRA violations, it has sufficient interest, basis, and standing to continue the suit in absence of the original plaintiffs. R10-11. It dismissed the appellees' argument for the need for a separate enforcement suit, on grounds that RCRA, in 42 U.S.C. § 6972(d), allows the Administrator to intervene in whichever citizen suit it likes. R11, n3. The Court interpreted the broad discretion in this provision to indicate that Congress intended to allow EPA to make the decision as to when and where to act towards RCRA enforcement. *Id.* The Court gave deference to the agency's decision under *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Id.*

Overview of Intervention

Intervention is authorized under Federal Rules of Civil Procedure (FRCP) Rule 24. A nonparty may request to intervene as of right under Rule 24(a) or seek permissive intervention under Rule 24(b). *Fed. R. Civ. P. 24.* Intervention allows nonparties to protect their interests from being impaired by a court's adjudication of a dispute between original parties; improves the court's decision-making by allowing the presentation of different viewpoints; and contributes to judicial economy. *See* Karastelev, *Note: On the Outside Seeking in: Must Intervenors Demonstrate Standing To Join a Lawsuit?* 52 DUKE L.J. 455 (2002).

The United States may intervene in any citizen suit as a matter of right under all of the statutes, subject to the conditions of FRCP Rule 24(a). *See* Loyd, *Citizen Suits and Defenses Against Them*, ALI/ABA Course of Study in Environmental Litigation (June 25-28, 2008), SN085 ALI-ABA 847, 872. Under FRCP Rule 24(a)(1) governing the procedures for intervention as

of right, "on timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

In the alternative, the government may seek permissive intervention under FRCP Rule 24(b)(2). Under this provision, "on timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order."

Intervenor Standing

The Supreme Court has not explicitly decided whether FRCP Rule 24 intervenors require Article III standing. *See Diamond v. Charles*, 476 U.S. 54, 68-69, 69 n.21 (1986) (concluding it need not decide today whether an intervenor under Rule 24(a)(2) requires Article III standing). Circuit Courts are currently split as to this issue owing to disagreement over whether standing is a requirement on the court or a requirement on every party. *See* Stradling & Doyle, *Notes & Comments: Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 B.Y.U.L. REV. 419, 424-425. *Diamond* may be interpreted to require standing on the court, not on each party. *Id.* at 440-42. In *Diamond*, private plaintiffs challenged the constitutionality of a state abortion law, and Diamond, a private physician, intervened on behalf of the State. Because the State had decided not to appeal, the Court decided that an intervening private citizen must independently show Article III standing in order to continue without the original plaintiff. *Diamond*, 476 U.S. at 64.

Intervention after Dismissal of the Original Claim

The majority of cases have found that the intervenor is allowed to continue, despite the dismissal of the action. "The

weight of authority in the United States Courts of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action." *U.S. Steel Corp. v. EPA*, 614 F.2d 843, 845 (3d Cir. 1979) (allowing private non-party to continue intervention in industry challenge of EPA's regulations, in that his interests were related but not identical to the industry's interests and such allowance served both judicial economy and prompt disposition of the litigation).

Analysis of EPA's Intervenor Claims

EPA's Argument

EPA will argue that it can intervene as of right under FRCP Rule 24(a)(1) and RCRA § 7002(d), 42 U.S.C. § 6972(d), which states, "in any action under (section § 6972), the Administrator, if not a party, may intervene as a matter of right." RCRA § 7002(b)(1) also grants such authority, stating "in any action under subsection (a)(1)(A). . . any person may intervene as a matter of right." FRCP Rule 24(a)(2) does not apply here because it is for when there is no statute directly addressing the right to intervene. *See generally* Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 930 (1989).

GRG and Newtown PTA's Argument

GRG and Newtown PTA will argue that the use of "may" in the statutory authority to intervene is equivalent to a permissive intervention and therefore the court can and should prohibit EPA's intervention. In that appellees' defense is based on RCRA, EPA may intervene under FRCP Rule 24(b)(2)(A). Appellees will argue that the Court has the discretion whether or not to allow EPA to intervene. They may argue that due to the dismissal of the original action, EPA's intervenor claims should not be continued.

The case law is unclear as to whether or not "may" in such situations is equivalent to permissive intervention. *See* Greenbaum, 21 ARIZ. ST. L.J. at 928-930. Cases which have interpreted "may" to imply an unconditional right of intervention have looked at the provision's legislative history, *see Carter v.*

Sch. Bd. of W. Feliciana Parish, 569 F. Supp. 568, 571, n295 (M.D.La. 1983), or at the statutory construction, namely, the availability of other provisions in the same statute which authorize intervention but use explicit mention of "in [the court]'s discretion." *See Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969). Using the same analysis, it can be argued that "may" in § 6972(d) refers to intervention as of right because it is not conditioned as the "may" in § 6972(b)(2)(E), permitting intervention only "when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties." This interpretation is supported by legislative history, which shows Congress chose "may" in order to not overburden EPA with oversight responsibilities. *See Interfaith Cmty. Org. v. Honeywell Intern. Inc.*, 2007 WL 576343, *6 (D.N.J. 2007).

The District Court reasoned that the broad discretion to intervene under § 6972 indicates Congress' intent to allow EPA to make the decision as to when and where to act towards the enforcement of RCRA, and such decision-making should be afforded Chevron deference. R11, n3. Affording such deference requires a two-step process. "First . . . is whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear. . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984). As explained above, the statute is not clear as to whether the provision allows EPA to intervene "in whichever suits it likes."

EPA's Argument

EPA, in its defense, will argue that courts have generally allowed the government to intervene in such circumstances. *See, e.g., Blowers v. Lawyers Coop. Publ'g Co.*, 527 F.2d 333, 334 (2d Cir. 1975) ("District courts should not be niggardly in allowing a Government agency to intervene in cases involving a statute it is

required to enforce; indeed a hospitable attitude is appropriate."). Courts have been more likely to allow intervention where: (1) the Government's interest is particularly strong, *see, e.g., Group Health, Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887, 892 (S.D.N.Y. 1984); (2) the Government can provide special information or expertise which will help the ultimate resolution of the issues, *see, e.g., In re Estelle*, 516 F.2d 480, 487 n.5 (5th Cir. 1975); or (3) the Government's presence and position will not overly confuse the proceeding or expand its scope, *see, e.g. Blowers,* 527 F.2d at 334 (denying intervention), but within the scope of the basic lawsuit the government will provide something unique, *see e.g., Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) (denying intervention). *See* Greenbaum, 21 ARIZ. ST. L.J. at 970. EPA will argue that all of these factors come into play here, particularly the fact that it is has a strong interest in enforcing the statue and has special expertise in the management of hazardous waste.

GRG and Newtown PTA's Argument

GRG and Newtown PTA will also argue that contrary to the District Court's decision, EPA does not have standing to continue the litigation and therefore should not be permitted to continue without the original parties because the standing requirement must be satisfied at all stages of the case. *Burke v. Barnes,* 479 U.S. 361, 362-64 (1987).

EPA's Argument

EPA will argue that sufficient interest, basis, and standing are established by its authority to enforce the laws and by the explicit authority to intervene under § 6972(d).

As stated above, the case law is unclear whether or not EPA would require standing to intervene. However, this case presents a situation where the original plaintiffs have been dismissed. The District Court cites to *Diamond v. Charles* to argue that intervenors must satisfy Article III Standing. R10. EPA may argue that this case is distinguishable from *Diamond* in that here all parties appealed. The District Court also cites to *Ruotolo v. Ruotolo* for the proposition that in order for a U.S. agency to continue litigation the government "must possess some independent basis as a party apart from its status as intervenor."

572 F.2d 336, 339 (1st Cir. 1978). R10. In *Ruotolo*, the plaintiff, who had originally sought disqualification, dropped his objection and withdrew from the case. *Id.* at 338. The Court therefore held that "there could only be a continuing case or controversy if the United States, in its own right, apart from [plaintiff], had standing to continue." *Id.* As in *Diamond,* this case is distinguishable because all parties appealed. Nevertheless, distinguishing this case from *Diamond* and *Ruotolo* are immaterial because EPA has standing.

The District Court properly held that EPA has standing in this case on grounds that the RCRA violation falls within the direct purview of its agency authority. R10-11. Where Congress has explicitly authorized the government to sue, the government has an "interest," and injury-in-fact and prudential concern requirements are satisfied. Greenbaum, 21 ARIZ. ST. L.J. at 909. Therefore, regardless of whether FRT remains a party to this litigation, EPA can continue its enforcement of the alleged RCRA violations.

C. <u>Questions</u>

1) In *Rutolo v Ruotolo*, the 1st Circuit found that once the initial parties had settled their differences, the government intervenor needed an independent basis to maintain an action (apart from its status as intervenor); how does that case apply here?

2) How does EPA's ability to intervene "as a matter of right" impact the analysis as to the continuation of this litigation? The ability of EPA to intervene was already decided when the District Court allowed the intervention—continuation of litigation absent the initial plaintiff is an entirely different issue, isn't it?

3) If this court dismisses FRT as a party and finds that EPA must then re-file claims against GRG and Newtown PTA, would any res judicata or estoppel issues arise? How about any discovery issues?

4) If the basis of this controversy is between FRT and GRG/Newtown PTA, and this Court dismisses FRT's

claims, wouldn't it make logical sense to have EPA re-file as a plaintiff?

5) Is this analysis as simple as: RCRA allows EPA to sue at any time, and EPA chose now?

6) How is this case distinguishable from *Diamond*? Does the fact that all parties appealed change our analysis under relevant case law?

7) If this court finds that the test for continuation should be independent basis as laid out in *Ruotolo*, can there be any conclusion other than that the case must go on? How could a court have allowed an intervenor to intervene in the first place without independent basis for their interest in the litigation?

8) Isn't the point of intervention to "protect the interests" of the intervenor? Should this noble purpose be dropped due to jurisdictional/standing miscalculations by another party?

ISSUE IV: Solid Waste and RCRA Liability

Whether the lower court properly analyzed the facts in terms of the solid waste nature of the exported materials, and, whether the export of container #VS2078 in the manner described subjects GRG and Newtown PTA to RCRA liability.

A. Positions of the Parties

- Appellees GRG and Newtown PTA argue that RCRA does not apply to their exported waste.
- Appellant FRT argues that RCRA applies to the exported waste.
- Intervenor-Appellee EPA argues that RCRA applies to the exported waste.

B. Discussion

GRG and Newtown PTA argue that they are not liable under RCRA because their goods ceased to be "solid waste" once they were sent outside the United States for recycling. R2. Both FRT and EPA argue that the exported wastes do qualify as "solid waste" and therefore appellees are subject to RCRA liability.

The District Court found that when the citizens of New Union gave their UEDs to the appellees, they were disposing of those devices, and therefore the materials qualified as solid waste under EPA definition. R11. The Court held that the materials in appellees' container #VS2078 were solid waste under RCRA jurisdiction while the container was in the United States. R12. However, once the materials left the United States, the materials were neither solid waste nor hazardous waste for purposes of RCRA applicability to Garcia's operations. R11-12.

The issues before this court are whether the exported waste is in fact 'solid waste' as defined in RCRA and whether Appellees' export was subject to RCRA liability.

Overview of RCRA Definition of 'Solid Waste' and Exceptions

RCRA regulates the disposal of solid waste, 42 U.S.C. § 6901 *et seq.* (1998), for purposes of "promot[ing] the protection of health and the environment and [conserving] valuable material and energy resources." *Id.* at § 6902(a). The statute establishes four environmental programs, each governed by a different subtitle – specifically, hazardous waste management (Subtitle C) and solid waste management (Subtitle D). In order to be regulated under RCRA, the waste must satisfy the statutory definition of "solid waste."

The statutory definition of solid waste is broader than the regulatory definition. EPA regulations define solid waste as 'discarded material' not otherwise excluded. 40 C.F.R. § 261.2(a)(1). R11. "Discarded material" is material that is "abandoned," "recycled," "inherently waste-like," or "a military munition." 40 C.F.R. § 261.2(2)(i). R11. In contrast, the statutory definition contains the concept of "discarded material" but it does not contain the terms "abandoned" or "disposed of" as required by the regulatory definition. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,* 989 F.2d 1305, 1316 (2d Cir. 1993). RCRA

defines solid waste as "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, and from community activities," with some exclusions. RCRA § 1004(27).

This difference can affect the reach of citizen suits. A citizen suit brought under RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A), to enforce EPA's hazardous waste regulations must use the regulatory definition of solid waste according to 40 C.F.R. § 261.1(b)(1); however, citizen suits brought under § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), to abate an "imminent and substantial endangerment to health or the environment" may use the broader statutory definition. *See Conn. Coastal Fishermen's Ass'n, 989 F.2d at 1315* (holding spent lead shot to be a solid waste under the statutory definition but not under the regulatory definition, and therefore allowing citizen suit under RCRA § 7002(a)(1)(B) for abatement of an imminent or substantial endangerment from solid waste but not for enforcement under RCRA § 7002(a)(1)(A) against the treatment, storage, or disposal of the same material without a RCRA permit).

Unlike the statutory definition, the regulations detail which solid wastes remain solid wastes when reused or recycled. *See* 40 C.F.R. §§ 261.2, 261.4. Material is "abandoned" if it is "disposed of; or burned or incinerated; or accumulated, stored, or treated (but not recycled) before or in lieu of being disposed of, burned, or incinerated." 40 C.F.R. § 261.2(b). A material is "recycled" if it is "used, reused, or reclaimed." 40 C.F.R. § 261.1(c)(7). Specifically, a material is "recycled" if "used in a manner constituting disposal"; "burning for energy recovery"; "reclaimed"; or "accumulated speculatively." 40 C.F.R. § 261.2(c). However, materials are *not solid wastes* when recycled when "used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or used or reused as effective substitutes for commercial products; or returned to the original process from which they are generated, without first being reclaimed or land disposed." 40 C.F.R. § 261.2(e).

Analysis of whether Appellees' Exported Materials are 'Solid Waste'

GRG and Newtown PTA's Argument

GRG and Newtown PTA may argue that their materials are not solid wastes while in the US because they are "recycled." Because a material must be 'discarded' in order to be 'solid waste,' they will argue that their export for sale to foreign salvagers and recyclers for purposes of reuse or reclamation of heavy metals and other valuable materials constitutes recycling. In particular, they will argue that the exported materials do not qualify as "used or reused" because "distinct components of the material are recovered as separate end products." In the alternative, they will argue that their activities qualify for the exemption for "used or reused as effective substitutes for commercial products." 40 C.F.R. § 261.2(e)(ii). They will insist that their interpretation is consistent with the purpose of RCRA, which is "to conserve valuable material and energy resources." 42 U.S.C. § 6972 (a). They will argue that such objectives would not be achieved by subjecting their legitimate recycling activities to onerous regulations pertaining to the disposal of waste.

FRT and EPA's Argument

FRT and EPA will argue that the 'recycling' exemption does not apply to the Appellees' activities. They will argue that it is precisely their kind of dangerous recycling activity that RCRA sought to regulate in order "to promote the protection of health and the environment." *Id.* They will point out that the statute seeks to minimize the generation of hazardous waste and the land disposal of hazardous waste "by encouraging process substitution, materials recovery, *properly* (emphasis added) conducted recycling and reuse, and treatment." *Id.* at § 6972 (a)(6). They will argue that Appellees' materials satisfy the definition of 'reclaimed," which includes materials "processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents." 40 C.F.R. § 261.1(c)(7)."

Case law supports the positions of FRT and EPA. In order for the exemption in 40 C.F.R. § 261.2(e)(1)(ii) to apply, "the

material must not first be "reclaimed" (processed to recover a usable product or regenerated)." *Am. Mining Cong. v. E.P.A.*, 824 F.2d 1177, 1180 (D.C. Cir. 1987). The materials which are sent for reclamation of heavy metals and other valuable materials are therefore "solid waste" for RCRA purposes.

The same analysis does not apply to the still useable UEDs, which are sold in the Sud-Americano market or donated to local schools. In *American Mining Congress*, the Court of Appeals determined that "Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *Am. Mining Cong.*, 824 F.2d at 1193. This conclusion was based on considerations of the language and structure of RCRA and Congress' objective in enacting RCRA, namely "to help States deal with the ever-increasing problem of solid waste disposal." *Id.* at 1185. The Court ultimately held that byproducts of an ongoing industrial process are not solid waste when reused in that process because "these materials have not yet become part of the waste disposal problem." Based on this analysis, the useable UEDs should not be classified as 'solid waste.' Where the useable UEDs are used as intended and not discarded, they are not to be classified as 'solid waste' for RCRA purposes. *See Otay Land Co. v. U.E. Ltd., L.P.*, 440 F.Supp.2d 1152 (S.D.Cal. 2006) (holding clay target debris and lead shot from ammunition used as intended at a shooting range is not discarded and therefore not "solid waste" under RCRA).

Overview of RCRA Export Requirements

RCRA imposes procedural requirements for the export of hazardous waste. *See* RCRA § 3017, 42 U.S.C. § 6938 and 40 C.F.R. § 262.50-58. Prior to the scheduled export, the primary exporter must notify EPA Administrator with information including "the types and estimated quantities of hazardous waste to be exported," "the ports of entry," "a description of the manner in which such hazardous waste will be transported to and treated, stored, or disposed in the receiving country," and "the name and address of the ultimate treatment, storage, or disposal facility." 42 U.S.C. § 6938(c). Within 30 days of receipt of such notification, the Secretary of State acting on behalf of the

Administrator must "forward a copy of the notification to the government of the receiving country" and request written consent for the importation of waste. *Id.* at § 6938(d). The Secretary of State must forward the receiving country's written consent or objection to the exporter within 30 days of its receipt. *Id.* at § 6938(e). At the time of export, the exporter must attach a copy of the receiving country's consent to the manifest accompanying each waste shipment, and the shipment must conform to the terms of the consent. *Id.* at § 6938(a). Where there is a special international agreement between the United States and the receiving country establishing notice, export, and enforcement procedures, the export need only conform to the terms of the agreement. *Id.* at § 6938(f).

These export regulations do not apply to the export of RCRA-exempt hazardous waste. (See Section V for an analysis on hazardous waste exemptions). In order for the export regulations to apply, the waste must be a hazardous waste under RCRA and subject to Federal RCRA manifesting procedures or to Federal (or State equivalent) universal waste management standards under Part 273. *See* EPA Guide to the Imports and Exports of Hazardous Waste, Ch. 4, Sec. B, *available at* http://www.epa.gov/waste/hazard/international/guide2.htm. Materials that are not defined as solid wastes or hazardous wastes are not subject to the export regulations. This includes domestically generated household wastes, as long as "the waste is generated by individuals on the premises of a temporary or permanent residence for individuals; and the waste stream is composed primarily of materials found in the wastes generated by consumers in their homes (§ 261.4(b)(1))." *Id.* at Ch. 4, Sec. D.

Overview of Extraterritorial Application of RCRA

Extraterritorial application of domestic law consists of a country's application of its laws and regulations to activities outside its territory. There is a presumption in the United States against the extraterritorial application of statutes. *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). The presumption is based on the assumption that Congress legislates primarily to address domestic concerns and seeks to avoid infringement upon foreign sovereignty. *See* Lauren Levy, *Stretching Environmental*

Statutes to Include Private Causes of Action And Extraterritorial Application: Can It Be Done?, 6 DICK. J. ENVTL. L. & POL'Y 65, 87. However, courts have indicated three general categories of cases where this presumption does not apply: where "there is an 'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations"; "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States"; and "when the conduct regulated by the government occurs within the United States." *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C.Cir. 1993).

Courts have consistently held that RCRA does not apply extraterritorially. *See Amlon Metals, Inc., v. FMC Corp.,* 775 F.Supp. 668 (S.D.N.Y. 1991) (dismissing citizen suit on grounds that that RCRA's citizen suit provision for "imminent and substantial endangerment," 42 U.S.C. § 6972(a)(1)(B), does not apply to hazardous waste located overseas). The *Amlon* Court found "considerable legislative history supporting the view that Congress intended an entirely domestic focus for RCRA's citizen suit provision." *Id.* at 674, n.8. RCRA liability has been called a cradle-to-border liability, as opposed to cradle-to-grave liability, owing to the fact that the hazardous waste generator can avoid RCRA export restrictions and liability by exporting at the stage when the waste is exempt as a hazardous waste. *See generally* Lisa T. Belenkey, *Cradle to Border: US Hazardous Waste Export Regulations and International Law*, 17 BERKELEY J. INT'L L. 95 (1999).

Analysis of whether Appellees' Export was Subject to RCRA Liability

GRG and Newtown PTA's Argument

GRG and Newtown PTA will argue that the export requirements under RCRA § 3017, 42 U.S.C. § 6938, did not apply to their shipment because the container did not contain hazardous waste. They will argue that shipments of RCRA-exempt hazardous waste are not subject to hazardous waste export restrictions under § 3017. (The validity of this argument will be examined in Section V). GRG and Newtown PTA will argue that the § 3017 requirements clearly indicate that they do

not apply to RCRA-exempt hazardous waste. They will point to the fact that § 3017 requires a manifest to accompany each shipment, *Id.* at § 6938(a)(1)(C), and the Secretary of State must "forward to the receiving country a description of the Federal regulations which would apply to the treatment, storage, and disposal of the hazardous waste in the United States." *Id.* at § 6938(d). They will argue that because these requirements cannot be fulfilled in the case of the exempted wastes, § 3017 requirements do not apply. In fact, EPA made a similar argument during the public comment period when it promulgated regulations for § 3017 in 1986. 51 Fed. Reg. 28,670 (1986). *See* Belenkey, 17 BERKELEY J. INT'L L. at 109.

On the issue of whether RCRA applies extraterritorially, GRG and Newtown PTA will argue that RCRA liability does not apply to their export activities because RCRA does not apply extraterritorially.

FRT and EPA's Argument

FRT and EPA will argue that GRG and Newtown PTA violated the export requirements under RCRA § 3017. They will point to the fact that no other paperwork, aside from customs documents, was used by GRG in the international shipment of the container to Sud-Americano. R5.

If the Court determines that the exported materials are RCRA-exempt hazardous waste, FRT and EPA may argue that § 3017 requirements should still apply to all waste subject to RCRA hazardous waste regulations, including those that are specifically exempt. They will argue that these exemptions were instituted to promote responsible recycling and recovery operations, *see* Belenkey, 17 BERKELEY J. INT'L L. at 107, and that without compliance with the § 3017 requirements there is no guarantee that such purposes will be furthered overseas. They will argue that their interpretation is more consistent with the statute's objective of promoting "the protection of health and the environment" as well as with the Basel Convention, which includes household wastes among "other wastes," Basel Convention, art. 1(2), 28 I.L.M. 649, and includes wastes exported for "recycling/reclamation of metals and metal compounds" among the regulated disposal operations. *Id.,* art. 2(4) and Annex IV.

On the issue of the extraterritorial application of RCRA, FRT and EPA will argue that the alleged RCRA violation occurred domestically and therefore the issue of extraterritoriality does not apply. *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C.Cir. 1993). FRT and EPA may also argue that the *Amlon* court was in error and that Congress intended RCRA to apply extraterritorially. If the presumption against the extraterritorial application of laws is in part based on a desire to avoid international friction by infringing upon foreign sovereignty, then ensuring that one's own waste is regulated properly overseas so as not to injure foreign citizens is a better guarantee of avoiding international conflict.

C. **Questions**

1) Whether the exported waste is RCRA "solid waste."
   i. What is the difference between the statutory and regulatory definitions of "solid waste"?
   ii. Does the above distinction have any effect on this case?
   iii. Does it matter whether a material is disposed for recycling purposes?
   iv. Do any of the solid waste exceptions apply to the exported materials?

2) Whether Appellees' export was subject to RCRA liability.
   i. How does EPA regulate the export of waste?
   ii. Do the export requirements apply to waste that is exempted as either a solid waste or hazardous waste?

3) Extraterritorial Application of RCRA.
   i. What is the rationale behind extraterritorial application?
   ii. Does RCRA allow for extraterritorial application? Why or why not?
   iii. Are appellants' claims jeopardized if RCRA cannot be applied extraterritorially?

ISSUE V: Hazardous Waste and RCRA Liability

Whether the materials exported are considered hazardous for the purposes of RCRA; and, therefore, whether GRG and Newtown PTA are liable for violating the testing and reporting provisions of RCRA's hazardous waste sections.

A. **Positions of the Parties**

- Appellee GRG and Newtown PTA argue that the materials in container #VS2078 are not hazardous under RCRA.
- Appellant FRT argues that the materials are hazardous under RCRA.
- Intervenor-Appellee EPA argues that the materials are hazardous under RCRA.

B. **Discussion**

FRT and EPA argue that appellees' materials are hazardous. Although the materials in the container are no longer available for testing, plaintiffs argue that the UEDs meet the toxicity test because UEDs such as the MyPhone have routinely been found to fail the toxicity test. R12. Plaintiffs also argue that appellees, as generators of solid waste, were required to determine whether their wastes are hazardous, and the failure to do so is a criminal offense under 40 C.F.R. § 262.11. R12. In defense of its designation of the appellees as a generator, EPA argues that it is bringing an enforcement action under similar circumstances, *In the matter of EarthEcycle, LLC*, EPA Docket No. RCRA-HQ-2009-0001, and the Court should therefore defer to its interpretation. R12. Finally, plaintiffs argue that the presence of three laptops in the container with a label indicating former property of the U.S. Government as well as the presence of MyPhones in the container with their original packaging defeats the appellees' reliance on the household waste exemption. R13.

GRG and Newtown PTA argue that its wastes qualify as household wastes, which are exempted from the hazardous waste classification under 40 C.F.R. § 261.4(b)(1).

The District Court declined to find that appellees' materials failed the toxicity test based on circumstantial evidence. R12. Furthermore, the Court did not find GRG in violation of determination requirements because it was merely a collector, not a generator of solid waste. R12. It dismissed EPA's argument for deference on grounds that it was merely a litigation position. The Court also agreed with the appellees that its wastes qualified for the household waste exemption, particularly in light of their considerable care to ensure that the UEDs derived from households. R13. The Court dismissed the plaintiffs' argument that the presence of three laptops defeated the household waste exemption, on grounds that there was no evidence that they came directly from the government and that the appellees' precautions were sufficient to prevent such anomalies from changing the character of the whole container to non-household waste. The Court also dismissed plaintiffs' argument that the presence of the MyPhones in their original packaging defeated the household waste exemption, on grounds that the appellees exercised diligence in excluding non-household items. R13. it was sufficient that these items had been purchased or acquired for its utility as a household item. R13.

The issues before this court are whether appellees' exported materials are hazardous and whether plaintiffs violated the testing and reporting provisions of RCRA.

Overview of RCRA "Hazardous" Waste Classification

Hazardous waste is regulated by Subtitle C of RCRA, 42 U.S.C. §§ 6901-6939b. The statutory definition of "hazardous waste" is "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may— (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." RCRA § 1004(5), 42 U.S.C. § 6903(5). Congress charged EPA with "identifying the characteristics of hazardous waste and listing particular hazardous wastes within the meaning of Section 1004(5)." *Id.* at § 3001(b)(1).

In order to determine whether a material is a "hazardous waste," it must first be determined whether the material is a "solid waste," and if so, whether it is hazardous under criteria established by EPA. R11. After determining that a waste is "solid waste," the person or persons responsible for the waste must determine if any solid or hazardous waste exclusions apply. If no exclusions apply, then one looks at whether the waste exhibits a hazardous waste characteristic or fits into EPA's category of listed hazardous wastes, 40 C.F.R. Part 261. The four established characteristics are ignitability, § 261.21; corrosivity, § 261.22; reactivity, § 261.23; and toxicity, § 261.24. There are hundreds of listed hazardous wastes, §§ 261.31-33.

A solid waste which exhibits either a hazardous waste characteristic or constitutes a listed waste may still be excluded from the regulatory scheme. *See* 40 C.F.R. § 261.4(b). The exemptions that are relevant for this case are the Conditionally Exempt Small Quantity Generator (CESQG) exception, 40 C.F.R. § 261.5, and the household waste exclusion, RCRA § 3001(i) and 40 C.F.R. § 261.4(b)(1). The CESQG exception exempts from hazardous waste regulation all generators of less than 1kg of acute hazardous waste and 100kg of hazardous waste in a calendar month. CESQGs are not subject to substantial hazardous waste regulation provided the waste is in compliance with the standards in 40 C.F.R. § 261.5(e)-(j). The household waste regulatory exemption is replicated in full below:

> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas). A resource recovery facility managing municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle, if such facility:
>
> (i) Receives and burns only

> (A) Household waste (from single and multiple dwellings, hotels, motels, and other residential sources) and
>
> (B) Solid waste from commercial or industrial sources that does not contain hazardous waste; and
>
> (ii) Such facility does not accept hazardous wastes and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

EPA regulations also provide special requirements for "recyclable" hazardous wastes. 40 C.F.R. § 261.6. In general, hazardous wastes that are recycled are subject to the requirements for generators, transporters, and storage facilities under § 261.6(b) and (c). Under § 261.6(b), "generators and transporters of recyclable materials are subject to the applicable requirements of parts 262 (generators) and 263 (transporters) of this chapter and the notification requirements under section 3010 of RCRA, except as provided in paragraph (a) of this section." One such exception that may be applicable to this case is § 261.6(a)(2)(iii), which states, "recyclable materials from which precious metals are reclaimed (40 C.F.R. part 266, subpart F)." However, this provision only applies to the reclamation of "*economically significant* amounts of gold, silver, platinum, palladium, iridium, osmium, rhodium, ruthenium, or any combination of these." *Id.* § 266.70 (emphasis added). Another exception applies to "recyclable materials used in a manner constituting disposal," § 261.6(a)(2), referring to wastes such as fertilizer that are applied to or placed on land. *See United States v. Marine Shale Processors*, 81 F.3d 1361, 1364-65 (5th Cir. 1996) (limiting the exception to products made for the general public's use, used in a manner that constitutes disposal, and legitimately made out of recyclable hazardous wastes).

Analysis of Whether Exported Materials are "Hazardous"

GRG and Newtown PTA's Argument

GRG and Newtown PTA will argue that, if the exported materials are deemed to be "solid waste," those materials qualify for the household waste exclusion under RCRA § 3001(i) and 40 C.F.R. § 261.4(b)(1), because all of the UEDs came directly from households. They will claim that Newtown PTA members had placed the UEDs in the container only after a visual examination showed that they were intact, and only after the residents signed a form acknowledging that they came from the household and were intact. R5. They will argue that it does not matter that some items originally came from EPA, because the regulation only requires that the material be "derived from households." They will also argue that their activities are covered by the exclusion because they were engaged in the collection, transportation, and reuse of household waste. They will argue that their operations do not constitute a resource recovery facility managing municipal solid waste and therefore they do not have to meet the requirements of § 261.4(b)(1)(i) and (ii). However, were FRT or EPA to successfully argue that appellees qualify as a resource recovery facility, appellees can claim that they have satisfied those requirements.

FRT and EPA's Argument

FRT and EPA will argue that appellees' exported materials do not qualify for the household waste exclusion because excluding all electronic waste from the hazardous waste classification is inconsistent with Congress' intent behind the exclusion. They will argue that the exclusion was based on a practical necessity but also premised on the understanding that the toxicity of household waste would be minimal. This is implied from the various regulations and statements by EPA defining the scope of the exclusion. *See* § 261.4(b)(1)(i) and (ii); *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 342, n.3 (1994)(quoting statement by EPA in 45 Fed. Reg. 33099 (1980), that the mixing of household waste with hazardous waste produced by a generator larger than a small quantity generator qualifies as a hazardous waste).

FRT and EPA will argue that although specific tests have not been performed on MyPhones, MyPhones will display a toxicity characteristic (TC) if tested by the commonly used Toxicity Characteristic Leaching Procedure (TCLP). Appellants will argue that a government –sponsored comprehensive testing of other models of cell phones has already shown the concentration of lead in leachate to exceed the TC limit for lead. *See RCRA Toxicity Characterization of Computer CPUs and Other Discarded Electronic Devices*, Section 4.8. (July 15, 2004) (finding the leaching results for more than half of the cell phones tested to exceed the TC limit). In light of the toxicity characteristics of cell phones and electronic devices in general and their rapid increase in recent years, they will argue that RCRA's purpose can only be served by excluding electronic waste from household waste. Because Congress delegated to EPA the task of identifying what is hazardous, RCRA § 3001, the Court should defer to EPA's interpretation.

GRG and Newtown PTA's Response

GRG and Newtown PTA will argue that where congressional intent to exclude household waste is clear from the language of the statute, the court need not defer to EPA's interpretation. *Chicago v. Envtl. Def. Fund*, 511 U.S .at 338-339. They will also argue that waste containing toxic materials is deemed hazardous only if they leach toxic chemicals at concentrations dangerous to public health, 40 C.F.R. § 261.24, but their exported materials were intact and contained the waste well enough to avoid danger to public health.

Overview of RCRA Testing and Reporting Provisions for Hazardous Waste

Hazardous waste is managed from its generation to its disposal, a system which is often called a 'cradle to grave' regulatory scheme. Subtitle C of RCRA establishes the requirements for generators, transporters, and Treatment, Storage, and Disposal facilities (TSDFs) that handle hazardous waste.

Generator means, "Any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this

chapter or whose act first causes a hazardous waste to become subject to regulation." *See* RCRA § 3002 and 40 C.F.R. § 260.10. Generators are regulated differently depending on the amount of waste generated, and small quantity generators, producing less than 1000kg/month of waste, are subject to lesser requirements. § 3001(d). Generators are required to determine the hazardousness of their waste by determining first whether "the waste is excluded from regulation under 40 C.F.R. 261.4" and then whether the waste is a listed hazardous waste or a characteristic waste. 40 C.F.R. § 262.11.

Transporter means "a person engaged in the offsite transportation of hazardous waste by air, rail, highway, or water." *See* RCRA § 3003 and 40 C.F.R. § 260.10. Transporters are regulated under RCRA § 3003, in coordination with Department of Transportation (DOT) regulations under the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (HMTA). The regulations set forth various requirements, most important of which is compliance with the manifest system and the transportation of hazardous waste to a designated TSDF. The manifest is a form prepared by the generator for each shipment, and it serves as the paper trail linking the generator, transporter and TSDF for every shipment of hazardous waste off-site. The transporter may not accept for shipment any waste that is not accompanied by a manifest.

Finally, owners and operators of Treatment, Storage, and Disposal facilities are regulated under § 3004 and C.F.R. Parts 264 and 265. TSDfs must obtain a permit in order to operate and abide by recordkeeping and reporting requirements; compliance with the manifest system; location, design, and construction standards; emergency and contingency plans; financial responsibility standards; and facility permit standards.

Analysis of Violation of Testing and Reporting Provisions

GRG and Newtown PTA's Argument

GRG and Newtown PTA will argue that they have no obligation to test the exported materials nor to report to EPA regarding their export, as required under 40 C.F.R. § 262.55 (exception report) and § 262.56 (annual report), because the exported materials are not hazardous. Appellees will rely on the

household waste exclusion and/or the conditionally exempt small quantity generator exception, explained above.

FRT and EPA's Argument

FRT and EPA will argue that appellees' failure to test the toxicity of their exported materials amounts to a criminal offense. R12. They will point out that under 40 C.F.R. § 262.11, generators of hazardous waste are required to determine if their wastes are hazardous. The failure to do so is a criminal offense under RCRA § 3008(d), and ignorance of the law is not an excuse. *See United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990) (holding that defendants' awareness that substances were hazardous chemicals and waste are sufficient to assign criminal liability for violating a statute which requires knowing violation of RCRA). FRT and EPA may also point out that even if appellees are more appropriately categorized as transporters, because of their role in collecting the waste from the households and exporting them overseas, GRG and Newtown PTA are still subject to the generator's requirements because appellees are mixing hazardous wastes of different DOT shipping descriptions by placing them into a single container. 40 C.F.R. § 263.10(c)(2).

Appellees are correct that the testing and reporting provisions only apply to substances categorized as hazardous, and there is no such regulation for the handling of solid waste. If the household waste exclusion applies and the exported materials are deemed to not be hazardous waste, then no testing or reporting provisions apply

The Court need not defer to EPA's interpretation as applied in its ongoing enforcement action, *In the matter of EarthEcycle, LLC*, because the language of the regulation is unambiguous. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (holding that an agency's interpretation of its own regulations is entitled to substantial deference, even when the interpretation is adopted as a litigation position, so long as it represents the agency's "fair and considered judgment" rather than a position that is merely convenient in a given dispute). *See also Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (holding that no deference is due under *Auer* where the underlying regulation is unambiguous).

C. **Questions**

1) Whether appellees' exported materials are hazardous
   i. Do appellees' exported materials fall under any of the exemptions? (Consider: Household waste, Conditionally Exempt Small Quantity Generators, or Recyclables)
   ii. Is the household waste exclusion defeated by the inclusion of some non-household items?
   iii. Does the presence of original packaging, indicating non-use, defeat the exclusion?
   iv. Does appellees' diligence in excluding non-household items mitigate the occasional presence of non-household items?
   v. Would congressional intent favor exclusion or inclusion of electronic waste as a hazardous waste?

2) Testing and Reporting requirements
   i. How should the appellees be classified under the regulations? As a Generator; Transporter; Treatment, Storage and Disposal facility?
   ii. Does the mixture rule subject the appellants to the testing and reporting requirements of a transporter? *See* 40 C.F.R. § 263.10(c)(2)
   iii. Where a hazardous waste generator or transporter misinterprets the exclusions and mistakenly believes that they were not subject to the hazardous waste regulations, what are the consequences?
   iv. Do these requirements apply to RCRA-exempt hazardous waste?

3) What deference must the court show to EPA's litigation position?