Pace Environmental Law Review

Volume 27
Issue 3 *Summer 2010*

Article 11

July 2010

David Sive Award Best Brief Overall Intervenor-Appellee

Alexander Casnocha
University of California Hasitngs College of Law

Juliette McCullough
University of California Hasitngs College of Law

Gabriel McWhirter
University of California Hasitngs College of Law

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

David Sive Award for Best Brief Overall*
Intervenor–Appellee

UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF LAW
ALEXANDER CASNOCHA, JULIETTE MCCULLOUGH
& GABRIEL MCWHIRTER

C.A. No. 09-1001
IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FRIENDS OF RESPONSIBLE TRADE,
and two of its members, ACE VENTURA and JUAN VALDEZ
Appellants,
v.
GREEN RECYCLING GROUP, INC.,
and
NEWTOWN PARENT TEACHERS ASSOCIATION, INC.,
Appellees,
v.
LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency,
Intervenor-Appellee.

On Appeal from The United States District Court
For The District of New Union

Brief for LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency, Intervenor-Appellee

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction over any civil action arising under the laws of the United States, including the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. §§ 1291, 1294(1) (2006).

STATEMENT OF THE ISSUES

I. Whether Valdez and Ventura have demonstrated standing under both Article III and RCRA and shown that they have suffered concrete personal and aesthetic injuries directly traceable to container #VS2078, and whether Friends of Responsible Trade has representational standing based on the injuries suffered by its two members.

II. Whether this court has jurisdiction to hear Valdez's ATCA claim, despite Congress and the Environmental Protection Agency's extensive regulation of the export of hazardous waste under RCRA.

III. Whether the district court abused its discretion in allowing the Environmental Protection Agency to continue this lawsuit after dismissing Appellants' claims for lack of standing.

IV. Whether the district court was correct in holding that the contents of container #VS2078 were solid waste, and whether the contents of container #VS2078 remained solid waste regardless of the container's final destination.

V. Whether the contents of container #VS2078 were hazardous waste under RCRA, thereby subjecting Green Recycling Group and Newtown Parent Teachers Association to liability for violating RCRA's hazardous waste export regulations.

STATEMENT OF THE CASE

Friends of Responsible Trade ("FRT") and two of its members, Juan Valdez and Ace Ventura, filed a complaint against Green Recycling Group, Inc. ("GRG") and Newtown Parent Teachers Association ("Newtown PTA") in the United States District Court for the District of New Union. (R. at 3.) FRT, Valdez, and Ventura (together, "Appellants") alleged that GRG and Newtown PTA (together, "Appellees") exported used electronic devices to Sud-Americano in violation of RCRA's hazardous waste regulations. (R. at 3.) Appellants sought civil penalties, an injunction against further RCRA violations and damages for injuries resulting from GRG and Newtown PTA's export of hazardous waste. (R. at 3.) Valdez also sought compensation under the federal courts' ATCA jurisdiction. (R. at 3.) The United States Environmental Protection Agency ("EPA") intervened in the suit as a matter of right. (R. at 3.)

On August 31, 2009, the district court issued an order granting Appellees' motion for summary judgment on all but one ground. (R. at 13.) The district court held that: (1) FRT and its two individual members lacked standing to challenge GRG's export of hazardous waste; (2) the court did not have jurisdiction under the ATCA to decide Valdez's personal injury claim; (3) despite FRT and its members' lack of standing, the EPA had an independent jurisdictional basis to continue the suit against GRG and Newtown PTA; and (4) GRG and Newtown PTA's export of hazardous waste did not violate RCRA. (R. at 4.)

The EPA and Appellants filed a timely appeal from the district court's decision. (R. at 1.) The EPA appeals the district court's dismissal of Appellants for lack of constitutional and statutory standing. (R. at 4, 13.) The EPA also appeals the district court's grant of summary judgment on the question of Appellees' liability under RCRA for the illegal export of hazardous waste. (R. at 4, 13.) The EPA requests that this court affirm the district court's decision denying jurisdiction over Valdez's claims under the ATCA, and the district court's discretionary choice to allow the EPA to continue this litigation in Appellants' absence. (R. at 4, 13.) This court granted review on September 29, 2009. (R. at 2.)

STATEMENT OF THE FACTS

GRG, in connection with Newtown PTA, collects used electronic devices ("UEDs") from individuals, and then sells these devices to foreign salvagers and recyclers. (R. at 4.) GRG ships these materials abroad to foreign countries like Sud-Americano, a non-OECD developing country that has no regulatory scheme governing the recycling of UEDs. (R. at 5, R. Attach., Oct. 16, 2009.) GRG collects UEDs in the United States and then ships them to facilities such as those owned by Geraldo Garcia, where they are salvaged or disassembled under unsafe and environmentally unsound working conditions. (R. at 4-5.) While half of the UEDs sent by GRG, by volume, are re-used in Sud-Americano, the other half are dismantled in facilities such as Garcia's. (R. at 5.) GRG has an open-ended contract with Garcia calling for potential future containers of UEDs to be sent to Garcia's plant at Pacifica, Sud-Americano. (R. at 8.)

Garcia, whose plant received the toxic materials shipped by GRG in container #VS2078, hires local residents to dismantle those UEDs not salvaged in order to reclaim heavy metals, plastics, and other valuable materials. (R. at 5.) Garcia does not provide his workers, including Juan Valdez, with basic protective gear such as gloves and masks. (R. at 5.) As a result, Garcia's workers were directly exposed to mercury, lead, cadmium, chromium, and numerous other toxins. (R. at 5-6.) Moreover, Garcia's inadequate processing facilities, and his failure to properly collect, contain and manage the waste at his processing plants caused lead and other heavy metals to enter the ground and local water supply, endangering Valdez, all other local residents and any visitors to the area. (R. at 6.)

Newtown PTA collected the UEDs in container #VS2078 from local residents of Newtown, State of New Union, on two consecutive Saturdays in early June 2008. (R. at 5.) No money was exchanged when Newtown PTA collected the UEDs. (R. at 4.) Newtown PTA members performed no more than a visual examination of the UEDs they collected before accepting them from local residents. (R. at 5.) Individuals disposing of their UEDs signed a form indicating that they had used the electronic devices in their homes and that those devices were no longer useful. (R. at 5.) After collecting enough UEDs to fill container #VS2078, GRG shipped them to Garcia's plant in Pacifica, Sud-

Americano. (R. at 5.) GRG's shipment did not comply with RCRA's export requirements and the company filled out nothing more than customs documents pertaining to container #VS2078. (R. at 5.)

The UEDs in container #VS2078 included normal cell phones, pagers, televisions and computers. (R. at 5.) The bulk of the container was comprised of MyPhones, a product similar to the Apple iPhone. (R. at 5.) Newtown is the home of the MyPhone headquarters, and the company used Newtown as an early test-market for its product. (R. at 5.) The product performed poorly, and many local residents disposed of their MyPhones with Newtown PTA and GRG. (R. at 5.) In fact, many MyPhones were still in their original packaging when Newtown PTA accepted them as UEDs that had supposedly been "used" in the donor's homes. (R. at 5.) In addition to performing poorly, MyPhones contain toxic materials. (R. at 5.) They are more toxic than iPhones, as they contain a mercury-lithium battery, lead and other toxins. (R. at 5.)

After learning that GRG's business practice was to send UEDs to unregulated recycling facilities abroad, Ace Ventura, a United States citizen and member of FRT, investigated the harm affecting Pacifica and fellow-FRT member Valdez. (R. at 4.) FRT is an organization that advocates for "Responsible Trade" practices. (R. Attach., Oct. 27, 2009.) Ventura took photographs of the UEDs in container #VS2078 before it was exported to Sud-Americano, including one showing three laptops labeled "Property of the United States Government." (R. at 5.) He also filmed a documentary about GRG's activities and the resulting environmental damage to Pacifica. (R. at 6.) The documentary highlighted the exposure of Sud-Americano workers to toxic waste and their resultant injuries. (R. at 6.) Valdez's injuries, as shown in the film, include memory loss and neurological damage that medical experts indicate are "of the type caused by lead and mercury poisoning." (R. at 6.) Lead and mercury were both present in the MyPhones shipped in container #VS2078 and processed at Garcia's plant. (R. at 5.)

In addition to FRT member Valdez's physical injuries, Ventura suffered significant emotional injuries. (R. at 7.) He has extensive experience with the town of Pacifica and is distraught by the gross pollution emanating from Garcia's plant, damaging

the local environment and injuring Garcia's employees, including Valdez. (R. at 7.) This emotional injury, as well as the significant environmental damage caused by Garcia's plant, prevents Ventura from returning to Pacifica. (R. at 7.)

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This court reviews questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Thus, this court's jurisdiction to decide Appellants' claims under RCRA and the ATCA and whether GRG and Newtown PTA have violated RCRA by exporting hazardous waste to Sud-Americano must be reviewed *de novo*. The district court's decision to allow the EPA to remain a party to this lawsuit after Appellants' dismissal was within its discretion and should be reviewed for abuse of that discretion. *Atkins v. State Bd. of Ed. Of N.C.*, 418 F.2d 874, 875-76 (4th Cir. 1969).

SUMMARY OF THE ARGUMENT

The district court erred in holding that FRT and its two members, Valdez and Ventura, did not have standing to challenge GRG and Newtown PTA's illegal activities. Valdez and Ventura have both suffered an injury-in-fact as required to show standing under Article III of the Constitution. Valdez's injury is concrete and directly traceable to container #VS2078. Ventura suffered an aesthetic injury resulting from the environmental damage to Pacifica and emotional harm from witnessing the injuries suffered by Garcia's workers, including Valdez. Furthermore, Valdez and Ventura both have standing under RCRA's citizen suit provisions. The high probability that future harm will occur under GRG's export arrangements satisfies the "to be in violation" requirement of 42 U.S.C. § 6972(a)(1)(A). Under RCRA's "cradle to grave" structure, Newtown PTA is liable for GRG's handling of container #VS2078. FRT also satisfied the *Hunt* representational standing requirements and rightfully brings its claim as an association.

The district court correctly held that Valdez cannot use the ATCA to seek compensation for injuries caused by GRG and

Newtown PTA's export of hazardous waste to Sud-Americano. Valdez failed to show that GRG and Newtown PTA's actions violated any treaty ratified by the United States or any widely-followed "law of nations." Furthermore, recognizing a new cause of action under the ATCA will interfere with Congress and the EPA's extensive regulation of hazardous waste under RCRA and the Executive Branch's management of foreign affairs.

Even if FRT and its members do not have standing, the district court acted appropriately within its discretion in allowing the EPA to continue this litigation. The EPA has an independent basis for jurisdiction under RCRA's enforcement provisions. In light of the EPA's ability to sue independently, dismissing the EPA in this action will cause unnecessary delay and expense.

The district court properly found that the contents of container #VS2078 were solid waste. The UEDs in container #VS2078 did not lose their status as solid waste merely because they were shipped across international borders. Furthermore, the UEDs are known to be toxic, and thus must be considered hazardous waste under RCRA. The contents of container #VS2078 did not qualify for the household waste exception. GRG and Newtown PTA failed to properly test the contents of container #VS2078, label the shipment as hazardous waste and report the shipment to the EPA, all in violation of RCRA. They should be held liable for their actions.

ARGUMENT

I. VALDEZ AND VENTURA HAVE BOTH DEMONSTRATED LEGAL COGNIZABLE INJURIES ESTABLISHING CONSTITUTIONAL AND STATUTORY STANDING, AND HENCE FRT HAS REPRESENTATIONAL STANDING TO BRING THIS CLAIM.

Article III of the Constitution limits the judicial power of federal courts to the resolution of "cases" and "controversies." U.S. Const. art. III, § 2. To bring a suit in federal court, a plaintiff must allege three elements: (1) a personal injury-in-fact that is (2) fairly traceable to the defendant's allegedly unlawful conduct and (3) likely to be redressed by the requested relief.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). RCRA permits any individual to commence an action in district court seeking enforcement of its waste disposal regulations. 42 U.S.C § 6972 (2006). A private party may bring suit against any person or entity responsible for solid or hazardous waste which may present an imminent and substantial danger to health or the environment. *Meghrig v. Kfc W.*, 516 U.S. 479, 484 (1996). The district court improperly concluded that Valdez and Ventura failed to demonstrate an injury-in-fact and therefore lacked constitutional standing or statutory standing under RCRA. As FRT members Valdez and Ventura have demonstrated injuries-in-fact sufficient to satisfy both Article III and RCRA requirements, they, and FRT, have standing to pursue its claims.

A. Valdez and Ventura Have Article III Standing Because They Have Demonstrated Concrete Injuries-In-Fact Directly Traceable To Container #VS2078.

An "injury-in-fact" must be concrete and particularized, actual or imminent, and not conjectural or hypothetical. *Defenders of Wildlife*, 504 U.S. at 560. Further, a plaintiff's injury must be directly traceable to the defendant, and the line of causation between his injury and the defendant's illegal conduct must not be overly attenuated. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

1. Ventura's use and enjoyment of Pacifica has been impaired, and he suffered an aesthetic injury as a result of the hazardous waste emitted from Garcia's plant.

The Supreme Court has held that a plaintiff suffers an injury-in-fact when his aesthetic enjoyment of natural resources is impaired by damage wrought by environmental pollution. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Environmental plaintiffs can adequately show an injury-in-fact by demonstrating that they use the affected area and that their aesthetic and recreational enjoyment of the area has or will be lessened by the challenged activity. *Id.* at 183.

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Supreme Court recognized that a broad conception of standing is accorded to environmental plaintiffs. 412 U.S 669 (1973). In *SCRAP*, a group of students brought suit against the federal government. *Id.* at 678. The students used forests in the metropolitan Washington, D.C. area for recreational purposes. *Id.* They alleged that a proposed increase in rail freight rates would lead to environmental degradation. *Id.* at 687. As a result, the students' use and enjoyment of the local area would be impaired by the "adverse environmental impact [to] all the natural resources of the country." *Id.* at 687. The Supreme Court held that the students had standing. *Id.* at 686.

In *Laidlaw*, the plaintiffs filed a citizen suit against the owner of a South Carolina hazardous waste incinerator facility, alleging that the facility's activities did not comply with a clean water statute regulating the discharge of pollutants. 528 U.S at 176-77. The defendant moved for summary judgment on the grounds that the plaintiffs lacked Article III standing. *Id.* at 177. The plaintiffs submitted affidavits and testimony arguing that due to the defendant's actions, they were unable to freely enjoy a nearby river for recreational purposes as they might have without the alleged harm. *Laidlaw*, 528 U.S. at 184. The Supreme Court held that these statements documented an injury-in-fact sufficient to support the plaintiffs' standing. *Id.* at 177.

Under *Laidlaw* and *SCRAP*, Ventura's alleged injuries are sufficient to establish an injury-in-fact. Similar to the plaintiffs in *Laidlaw*, Ventura avers that the aesthetic and recreational value of Pacifica was greatly diminished by the damage caused by toxins that seeped into the area surrounding Garcia's plant. (R. at 6-7.) Ventura also testified that the gross pollution emanating from Garcia's operations and the sight of workers such as Valdez who were "obviously" injured by that pollution has caused him such emotional distress that he can no longer return to Pacifica. (R. at 7.) As in *SCRAP*, Ventura is no longer able to freely use Pacifica as he was before Garcia's activities damaged the local environment.

Furthermore, the district court erred in asserting that Ventura's tears were "crocodile tears" merely because he received monetary compensation as a result of his documentary about Pacifica. (R. at 7.) Any money amassed does nothing to remove

or lessen the constitutional injury that he has suffered. The impairment of Ventura's aesthetic enjoyment of Pacifica persists, and he remains unable to return there without the constant reminder of the personal injuries suffered by Garcia's workers. These injuries suffice to satisfy the injury-in-fact requirement.

2. Valdez's memory loss and neurological damage are concrete injuries directly traceable to GRG and Newtown PTA's shipment of container #VS2078.

The requirement that a plaintiff's injury be "fairly traceable" to the defendant's conduct does not mean that he must show to a scientific certainty that the defendant's actions alone caused the precise harm he suffered. *Pub. Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990); *cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). A plaintiff need not prove causation with absolute scientific rigor in order to defeat a motion for summary judgment, and the "fairly traceable" requirement is not equivalent to the standard necessary to show tort causation. *Powell Duffryn*, 913 F.2d at 72. Additionally, if several parties are responsible for the alleged harm, a plaintiff need not sue every party in one action, as each has caused some part of the injury suffered. *Id.* The size of the injury is not germane to the standing analysis, and a "mere trifle" may suffice to satisfy the injury-in-fact standard. *SCRAP*, 412 U.S. at 689 n.14 (1973) (citation omitted).

In *Powell Duffryn*, the Third Circuit addressed a bulk storage facility operating on the banks of a water channel in New Jersey. 913 F.2d at 68-69. The facility allegedly operated in violation of a permit required by the Federal Water Pollution Control Act ("FWCPA") and as a result caused harm to plaintiffs who used the channel. *Id.* While the permits allowed a limited amount of pollution, the plaintiffs alleged that the facility had repeatedly exceeded these limits. *Id.* at 69. In holding that the plaintiffs' injuries were traceable to the pollutants emitted from the defendant's storage facility, the court noted that the plaintiffs only needed to show that the defendants had discharged some pollutant in concentrations greater than allowed by its permit. *Id.* at 72. As the plaintiffs had an interest that was or might be adversely affected by the pollutant, and the pollutant contributed

generally to the kinds of injuries the plaintiffs suffered, the court held that they had standing. *Id.*

Here, like the effluent originating from the bulk storage facility in *Powell Duffryn*, container #VS2078 contained high levels of mercury, lead and other toxic materials which contributed to both Valdez and Ventura's injuries. (R. at 5.) Container #VS2078 entered a "waterway" of containers all handled by Valdez. (R. at 5-6.) Valdez was directly exposed to mercury, lead, cadmium, chromium and other toxins originating from the containers he handled on a daily basis, including container #VS2078. (R. at 5-6.) Container #VS2078 was managed and processed by Garcia's plant and its employees. (R. at 5-6.) The fact that Valdez's injuries are of a type usually caused by lead and mercury poisoning creates a strong inference that his injuries were caused in part by GRG and Newtown PTA's shipment of hazardous waste. (R. at 6.) As the standing causation threshold is lower than that required for a tort, Valdez has satisfied the Article III causation requirement.

B. Valdez and Ventura Have Standing To Pursue Their Claims Under The Citizen Suit Provision of RCRA.

42 U.S.C. § 6972(a)(1)(A) ("section 6972") provides that "any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this Act." 42 U.S.C. § 6972(a)(1)(A). A defendant's current and ongoing activity at the site is not a prerequisite for finding a current and ongoing violation. *South Rd. Assocs. v. IBM*, 216 F.3d 251, 255 (2d Cir. 2000). Rather, the central question is whether the defendant's actions, past or present, cause an ongoing violation of RCRA. *Id.*

1. GRG and Newtown PTA violated RCRA, and therefore Valdez has the right to bring a claim under RCRA's citizen suit provision.

Congress intended through use of the term "any person" to confer RCRA standing to the full extent permitted by Article III. *DMJ Assocs., LLC v. Capasso*, 288 F. Supp. 2d 262, 267 (E.D.N.Y.

2003). Section 6972 does not explicitly limit so-called citizen suits to United States citizens. 42 U.S.C. § 6972(a)(1)(A). In the absence of any such limitation, Article III extends standing to foreign citizens bringing claims against United States citizens. U.S. Const. art. III. Moreover, standing is designed to ensure that a plaintiff has a personal stake in the outcome of a controversy. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Foreign nationals like Valdez have a significant interest in seeing that RCRA is enforced, as RCRA explicitly regulates the export of hazardous waste to foreign countries whose citizens may be harmed by individuals who violate its requirements. As a foreign citizen who has been harmed by GRG and Newtown PTA's conduct, Valdez has standing to bring his claim under RCRA.

2. GRG and Garcia's actions satisfy the "to be in violation" requirement of 42 U.S.C. § 6972(a)(1)(A).

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, the Supreme Court interpreted the Clean Water Act's citizen suit provision, which contains identical "to be in violation" language as that found in RCRA. 484 U.S. 49, 57 (1987). While the Court held that the Clean Water Act's provision could not apply to "wholly past actions," it acknowledged that the language is ambiguous and that the reasonable prospect of future pollution can impact the interpretation of the statute. *Id.* The most natural reading of "to be in violation" is that it requires citizen plaintiffs to allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will pollute in the future and that the conduct complained of is continuing in nature. *Id.*; *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182, 1187 (E.D. Cal. 1988).

In *South Road*, South Road Associates ("SRA"), as landlord, sued IBM, the former lessee of its property, under the citizen suit provisions of RCRA, alleging that IBM's storage of chemical wastes on the landlord's property resulted in contamination of the surrounding soil, bedrock and groundwater, and amounted to a violation of RCRA's open-dumping provisions. 216 F.3d at 252. However, because IBM was no longer the lessee of the property and therefore could not possibly effect any continuing violations,

the court held that SRA did not allege sufficient facts to satisfy RCRA's causation requirement. *South Rd.*, 216 F.3d at 252. Similarly, in *Weinberger*, citizens who lived near an air force base owned by the Department of Defense alleged that the base's practices and procedures with respect to industrial and domestic wastes violated various environmental laws. 707 F. Supp. at 1185. However, the conduct complained of, in particular the use of treated wastewater in the cooling towers, was discontinued one month prior to the filing of the complaint. *Id.* at 1188. With the conduct having officially ended, the court held that there was no reason to believe that the base intended to use treated wastewater in the cooling towers at any time in the future. *Id.* The court held that the plaintiffs did not have standing. *Id.*

Here, Garcia's extensive history of negligent waste operations and endangerment of employees makes it likely that he will continue to pollute in the future. (R. at 6, 8.) The facts in this case are distinguishable from *South Road* and *Weinberger* because GRG's on-going contract with Garcia creates a real possibility that future containers of UEDs will be shipped to Pacifica in violation of RCRA. The plaintiffs in *South Road* based their claims on violations that occurred entirely in the past, during the time when IBM was their lessee. GRG and Garcia maintain an on-going relationship, evidenced by a contract with specified terms. (R. at 8.) Similarly, unlike the clear termination of the alleged unpermitted conduct in *Weinberger*, the contract between GRG and Garcia has not been terminated, only suspended due to the pendency of the current litigation. (R. at 8.) An "open-ended contract" with a chronic polluter that has only halted operations due to litigation is not strong evidence that that polluter will stop violating RCRA. Rather, it is a testament to the present and potential harm imposed on Valdez and Ventura due to GRG and Newtown PTA's actions.

Further, the ambiguity surrounding "to be in violation" allows this court to look at the statute in its entirety as additional means of interpretation. Unlike the "to be in violation" language of the Clean Water Act discussed in *Gwaltney*, the language and structure of the rest of the citizen suit provisions in section 6972 bolster the notion that the interest of the citizen plaintiff is not primarily forward-looking and can include past and present violations. *See* 42 U.S.C. § 6972(a)(1)(B) (An

individual may bring a suit "against any person, including any . . . past or present transporter . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste."). The reasonable probability of future violation is the tipping point in qualifying GRG's conduct as causing an injury-in-fact under RCRA.

3. RCRA's "cradle to grave" structure creates liability for all parties involved in the export of hazardous waste, linking GRG and Newtown PTA directly to Ventura and Valdez's injuries.

RCRA establishes a "cradle to grave" regulatory structure for the treatment, storage and disposal of solid and hazardous waste which governs the handling of the waste even at its most infant stages. *City of Chi. v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994). Under RCRA, the EPA has promulgated standards governing hazardous waste generators *and* transporters. *Id.* Numerous sections of RCRA focus on regulating the responsibilities of parties involved in the export of hazardous waste. *See e.g.* 42 U.S.C. § 6938 (2009) (requiring an exporter to "forward to the government of 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").

Here, GRG had a duty to see that its exported waste was handled with the same care and under the same regulatory structure as required by RCRA. FRT and its members can bring a claim against GRG and Newtown PTA because the chain of causation leads directly from them to Garcia's plant. Had GRG and Newtown PTA not failed to comply with their legal obligations under RCRA's export, notification and testing requirements, Ventura and Valdez would not have been harmed.

4. The district court erred in holding that Valdez and Ventura's injuries are not redressable by a favorable ruling from the court.

The district court erred in holding that FRT and its members lacked standing because their injuries are not redressable by the

relief sought. To satisfy the third prong of standing, it is necessary to prove that relief from the injury alleged is likely to follow from a favorable decision. *Wright*, 468 U.S. at 751. Here, above all, FRT seeks an injunction against further violations of RCRA. An injunction will prevent any possible future injuries suffered by Valdez and Ventura and satisfy the redressability concerns. Furthermore, at no point does RCRA explicitly set forth that compensatory damages cannot be sought in a citizen suit. However, even if this court were to hold that compensatory damages are not authorized under RCRA, FRT and its members' request for injunctive relief satisfies the redressability standing requirement.

C. FRT Has Representational Standing to Bring Suit Based on the Injuries Suffered By Valdez and Ventura.

Like the organizational plaintiffs in *SCRAP*, FRT relies on the alleged injuries flowing from the toxic waste of Garcia's plant to its members who both worked directly within the plant and enjoyed Pacifica's natural beauty. The Supreme Court has recognized that an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). [1] Although the first two prongs of the test are constitutional in nature, the third is prudential. *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 555 (1996). Further, the third prong is "best seen as focusing on matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id.* at 557.

1. The first prong of *Hunt* was outlined by the Supreme Court in *Sierra Club v. Morton*. 405 U.S. 727, 739 (1972) (holding that an organization whose members are injured may represent those members in a proceeding for judicial review). Since *Sierra Club*, the Supreme Court has refined its requirements of representational standing and the *Hunt* factors therefore control here.

Here, both Valdez and Ventura have demonstrated sufficient injuries-in-fact to have standing to sue in their own right, thereby satisfying the first prong. Moreover, FRT's attempt to remedy these injuries is central to its purpose of protecting and enhancing responsible trade practices. (R. Attach., Oct. 27, 2009). Both Ventura and Valdez are additional members of this suit and explicitly named as such, so the prudential concerns discussed in *Brown Group* do not exist here. Dismissing FRT will not serve administrative efficiency, and so FRT has representational standing to bring this suit.

II. THERE IS NO CAUSE OF ACTION UNDER THE ALIEN TORT CLAIMS ACT FOR INJURIES RESULTING FROM THE EXPORT OF HAZARDOUS WASTE.

The Alien Tort Claims Act states in full: "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 (2006). A personal injury claim under the ATCA can be based on a defendant's violation of a treaty which the United States has ratified. *Id.*; *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 118 (2d Cir. 2008) (holding that as the United States had not ratified the 1925 Geneva Protocol at the relevant time, the Protocol was not a "treaty" under the ATCA). Alternatively, an ATCA claim can be based on a defendant's violation of the "law of nations." 28 U.S.C. § 1350. The Supreme Court held in *Sosa v. Alvarez-Machain* that the few international laws which may subject a defendant to ATCA tort liability consist mainly of proscriptions widely followed by the international community when the ATCA was enacted in the eighteenth century. 542 U.S. 692, 720, 725 (2004) (noting that these violations included piracy, offenses against ambassadors and violation of safe conduct). "[A]ny claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity" comparable to the eighteenth century violations. *Sosa*, 542 U.S. at 725.

A. The Illegal Export of Hazardous Waste Does Not Constitute a Violation of the Law of Nations or a Treaty of the United States.

According to the Second Circuit, the law of nations "is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003). Parties must practice these rules out of a sense of legal obligation, not for moral or political reasons. *Id.* The international community must also be at least partially successful in implementing the legal regime in question, and any obligation "must be more than merely professed or aspirational." *Id.* at 248.

Treaties and agreements can provide evidence of widely-practiced international legal obligations. *Beanal v. Free-port-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999). However, treaties that impose obligations on state actors cannot be used as evidence of a private party's individual liability under the ATCA. *See Flores*, 414 F.3d at 258 (holding that even if the International Covenant on Economic, Social and Cultural Rights created a rule of customary international law, "the rule would apply only to state actors because the provision addresses only 'the steps to be taken *by the State Parties*'"). The Fifth Circuit has also held that "the more States that have ratified a treaty, and the greater the relative influence of those States in international affairs, the greater the treaty's evidentiary value." *Flores*, 414 F.3d at 257. Thus, a treaty that has not been ratified or enforced by the United States provides weaker evidence of United States adherence to international law than would a ratified or executed treaty. *Id.*[2]

2. Appellees' reliance on *Sarei v. Rio Tinto plc* is misplaced. 221 F. Supp. 2d 1116, 1161 (C.D. Cal. 2002) ("*Sarei I*"), *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). The original district court in *Sarei* held that the United Nations Convention on the Law of the Sea ("UNCLOS"), a treaty not ratified by the United States but ratified by 166 other countries, established a "law of nations" under the ATCA. *Sarei*'s long and convoluted history undermines this holding, and in fact, when the district court finally revisited its decision in 2009, it held that, at least for purposes of exhaustion under the ATCA, the plaintiffs' "international environmental rights claims,

Most courts have refused to find environmental torts specific or universal enough to serve as the foundation for an ATCA claim. *See In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 129 (E.D.N.Y. 2005) ("In the developing area of international environmental law . . . nations have tended to treat protection of the environment on an ad-hoc . . . basis."). For instance, the Fifth Circuit in *Beanal* rejected the plaintiff's contention that the defendant's mining activities, which allegedly violated international environmental standards, gave rise to ATCA liability. 197 F.3d at 166-67. That court noted that the international agreements the plaintiff relied on were primarily aspirational, reflecting "a general sense of environmental responsibility and [stating] abstract rights and liberties." *Id.* at 167; *see also Flores*, 414 F.3d at 256 (holding that plaintiff's citation to aspirational environmental international treaties, conventions and covenants did not show that those instruments established a "law of nations").

Here, the district court correctly concluded that GRG and Newtown PTA did not violate any treaty of the United States so as to create ATCA liability. (R. at 9-10.) Valdez incorrectly cited to the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Disposal ("Basel Convention"), a treaty that the United States has not ratified. (R. at 9.)[3] Also, although the OECD Hazardous Waste Decision-Recommendation cited by Valdez directs member countries' governments to implement controls on the export of hazardous waste, it does not impose any legal obligations on private parties. (R. at 9.)[4] Thus, GRG and Newtown PTA could not violate the OECD's requirements. Furthermore, these documents by themselves do not create a "law of nations" which either GRG or Newtown PTA could violate. The district court acted consistently

including those premised on the UNCLOS, involve norms 'where aspiration has not yet ripened into obligation.'" *Sarei v. Tio Tinto plc*, No. CV 00-11695 MMM (MANx), 2009 WL 2762635, at *14 (C.D. Cal. July 31, 2009) (citation omitted).

3. *See* United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, http://treaties.un.org/Pages/ ParticipationStatus .aspx (follow "Chapter XXVII" hyperlink; then follow "Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Basel, 22 March 1989" hyperlink).

4. *See* Decision-Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area, 5 June 1986 – C(86)64/Final, http://webdomino1. oecd.org/horizontal/oecdacts.nsf/linkto/C(86)64.

with *Beanal* in holding that any potential "law of nations" created by the OECD Hazardous Waste Decision-Recommendation would apply only to state actors rather than private parties. (R. at 9) Under the reasoning in *Flores*, the United States' refusal to ratify the Basel Convention, despite its ratification by 121 countries, significantly undermines any claim that the Convention creates widely-followed international obligations. (R. at 9.) The *Sosa* court strongly emphasized its hesitation to expand ATCA liability in the absence of a clear violation of well-settled international law. Valdez has failed to show that his claim implicates any such well-settled law.

B. RCRA, and the EPA's Implementation Thereof, Regulates the Export of Hazardous Waste So Extensively that Recognizing an ATCA Cause of Action Would Be Improper.

The *Sosa* Court instructed federal courts to exercise restraint when deciding whether to recognize a new cause of action under the ATCA, emphasizing the importance of looking for "legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 724-26. The ATCA authorizes federal courts in very limited circumstances to use well-established customary international law as the basis for an ATCA cause of action. *Sosa*, 542 U.S. at 725. Courts must be careful, however, not to override or interfere with properly enacted and executed federal law dealing with the same subject matter. *Id.* at 731 (noting that Congress may remove ATCA jurisdiction "explicitly, or implicitly by treaties or statutes that occupy the field").

The Supreme Court has shown deference to congressionally-enacted and EPA-executed environmental regulations when deciding whether to recognize a cause of action outside of the enacted regulatory scheme. *See Middlesex County Sewerage Auth. V. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981). The plaintiffs in *Sea Clammers* were fishermen and clammers who sued several governmental entities under the Federal Water Pollution Control Act, claiming that those entities were discharging sewage into New York Harbor and the Hudson River. The *Sea Clammers* Court held that the FWCPA's enforcement provisions, which were "unusually elaborate," supplanted "any

remedy that might otherwise be available under [section] 1983," which authorizes citizens to sue municipalities for violating federal law. *Id.* at 13, 19-21. The FWCPA's regulatory framework allows the EPA to "respond to violations of the Act with compliance orders and civil suits," and it empowers the Administrator to "seek a civil penalty of up to $10,000 per day," as well as criminal penalties. *Id.* at 13-14. These direct enforcement mechanisms are "supplemented by express citizen-suit provisions." *Id.* Individuals invoking the citizen-suit provisions must comply with specified procedures, in particular a requirement of sixth days' prior notice to defendants. *Sea Clammers*, 453 U.S. at 13-14.[5]

RCRA's regulations governing the export of hazardous waste are nearly identical to the FWCPA regulations at issue in *Sea Clammers*. Under RCRA, the EPA Administrator may directly issue compliance orders and assess civil penalties of $25,000 per day as long as the violation continues. 42 U.S.C. § 6928(a)(1) (2006). The Administrator may also sue in federal court seeking these civil penalties or an injunction. 42 U.S.C. § 6928(a)(1). Furthermore, like the FWCPA regulations in *Sea Clammers*, RCRA authorizes citizen suits, but imposes strict procedural limitations on those suits. 42 U.S.C. § 6972. Any citizen suing under RCRA must notify the EPA, the state in which the violation occurred and the violator sixty days prior to serving a complaint. 42 U.S.C. § 6972(b)(1)(A). The EPA may intervene as a matter of right in any such lawsuit. 42 U.S.C. § 6972(d). Furthermore, no citizen may sue under section 6972 if the EPA or a state has already commenced an action against an alleged violator. 42 U.S.C. § 6972(b)(1)(A). On top of all this, the EPA

5. The Court in *Smith v. Robinson* also precluded a section 1983 cause of action to enforce handicapped childrens' constitutional right to a public education "in light of the comprehensive nature of the procedures and guarantees set out" in the Education of the Handicapped Act. 468 U.S. 992, 1011-13 (1984). The Supreme Court has applied similar reasoning to SEC antitrust regulations. The doctrine of implied immunity shields regulated entities from liability under general antitrust laws when Congress grants "pervasive supervisory authority" to the SEC to implement a regulatory scheme, and the SEC approves activities normally banned by the antitrust laws. *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 733-34 (1975). This rule insures "that the federal agency entrusted with regulation in the public interest [can] carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *Id.* at 734-35.

itself has issued extensive regulations governing the export of hazardous waste. *See* 40 C.F.R. §§ 262.50-58 (2009); 40 C.F.R. §§ 262.80-262.89 (2009). As in *Sea Clammers*, this extensive and procedurally detailed set of regulations strongly indicates that Congress intended for RCRA to occupy the field of hazardous waste exports. This court should follow *Sea Clammers* and *Sosa* and refuse to create a duplicative and potentially disruptive ATCA cause of action.

C. Recognizing an ATCA Cause of Action for the Illegal Export of Hazardous Waste Would Interfere with the Executive Branch's Management of Foreign Affairs.

The need for courts to exercise caution in recognizing a new cause of action is particularly important in the context of the ATCA, in order that they avoid "impinging on the discretion of the Legislative and Executive branches in managing foreign affairs." *Sosa,* 542 U.S. at 727; *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (counseling that expansion of ATCA liability would be "contrary . . . to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs").

The EPA's regulations categorically prohibit the export of hazardous waste to non-OECD countries such as Sud-Americano unless the receiving country has agreed to accept that waste, and the hazardous waste shipment conforms to the terms of the receiving country's written consent. 40 C.F.R. § 262.50. (R. Attach., Oct. 16, 2009). Furthermore, nothing in RCRA prevents a foreign national from suing a United States entity that violates its export requirements. Recognizing an ATCA cause of action based on an injury caused by the shipment of hazardous waste to a non-OECD country, however, could lead a foreign national to bring a claim in federal court even though the shipment in question was approved by that individual's government. Providing a federal forum that allows foreign nationals to circumvent the policies of their home governments would undermine the United States' international relationships. As the Supreme Court emphasized in *Sosa*, this court should hesitate before extending ATCA liability when doing so would interfere with the Executive Branch's management of foreign affairs.

III. EVEN IF VALDEZ AND VENTURA DO NOT HAVE STANDING, RCRA PROVIDES THE EPA WITH A SEPARATE AND INDEPENDENT BASIS FOR JURISDICTION THAT JUSITIFIES ITS CONTINUED INVOLVEMENT IN THIS ACTION.

District courts have discretion to treat an intervenor's pleading as a separate action. *Atkins*, 418 F.3d at 875-76. For example, the Fourth Circuit in *Atkins* allowed the parents of school children to intervene in a lawsuit attempting to compel North Carolina to provide a racially integrated school system, even after the district court dismissed the original plaintiff's complaint for lack of standing. *Id.*; *see also Fuller v. Volk*, 351 F.3d 323 (3d Cir. 1965) (remanding for inquiry into whether intervening plaintiff parents had standing to challenge a plan to redraw school attendance lines after finding that original plaintiffs did not). The district court, before exercising its discretion, must show that the intervenor has a "separate and independent basis for jurisdiction." *Fuller*, 351 F.3d at 329; *cf. Diamond v. Charles*, 476 U.S. 54, 68 (1986). Once this is done, allowing the intervenor to continue the lawsuit is appropriate where "failure to adjudicate the claim will result only in unnecessary delay." *Fuller*, 351 F.3d at 329.

A. The EPA Has an Independent Basis for Jurisdiction.

To determine whether a federal agency has a separate and independent basis for jurisdiction, this court must look to that agency's governing statute. *See Harris v. Amoco Prod. Co.*, 768 F.2d 669, 677 (5th Cir. 1985). In *Amoco*, the Fifth Circuit held that the Equal Employment Opportunity Commission ("EEOC"), after intervening in a lawsuit brought by four African American employees against Amoco, could continue litigating against the company even after the employees settled. *Id.* at 672, 674. The *Amoco* court reasoned that the 1972 amendments to the Civil Rights Act of 1964 expressly granted the EEOC a right to bring

suit under its own name under certain conditions, which the court held had been met. *Id.* at 677.

The First Circuit dealt with the opposite situation in *Ruotolo v. Ruotolo*. 572 F.2d 336 (1st Cir. 1978). In *Ruotolo*, the United States intervened in a bankruptcy proceeding after a creditor moved to disqualify the debtor's counsel under section 39b of the Bankruptcy Act ("section 39b"). 572 F.2d at 337. The United States intervened pursuant to 28 U.S.C. § 2403 and Federal Rule of Civil Procedure 24(b), which gives district courts discretion to allow an agency to intervene "when a party's claim or defense is based on . . . a statute or executive order administered by the . . . agency." *Id.* at 338; 28 U.S.C. § 2403 (2006); Fed. R. Civ. P. 24(b). The United States argued that the Administrative Office of the United States Courts (the "Office of the Courts") satisfied the Rule 24(b) criteria. *Ruotolo*, 527 F.3d at 338 n.2. Several months before the district court handed down its decision, however, the creditor withdrew its objection, leaving the United States as the only party disputing section 39b's application. *Id.* at 338. The court subsequently held that because nothing in the statutory provisions establishing the Office of the Courts authorized it to enforce bankruptcy laws, the United States did not have standing to challenge the application of section 39(b). *Id.* at 338 n.3, 339. In fact, the United States was unable "to point to [any] independent source of authority permitting it to sue on behalf of itself or on behalf of others, in order to enforce the provisions of [s]ection 39b." *Id.* at 338 n.2, 339.

Here, Congress expressly authorized the EPA Administrator to file an enforcement action in federal courts under RCRA. 42 U.S.C. § 6928(a)(1). The *Ruotolo* court rejected the Office of the Court's standing in large part because the agency as intervenor was unable to show any statutory authority permitting it to sue anyone. However, as in *Amoco*, the EPA here has explicit statutory authorization to sue private parties. It may sue for injunctive relief and civil damages. 42 U.S.C. § 6928(a), (g). As RCRA expressly authorizes the EPA to sue GRG and Newtown PTA, the EPA has a separate and independent basis for jurisdiction.

B. The District Court's Decision to Allow the EPA to Continue this Litigation Avoids Unnecessary Delay and Expense.

In exercising their discretion to allow an intervenor to remain after the initial parties have stopped litigating, courts emphasize the need to avoid unnecessary delay and expense. *See Fuller*, 351 F.3d at 329. As the *Fuller* court aptly stated, "[b]y allowing the suit to continue with respect to the intervening party, the court can avoid the senseless 'delay and expense of a new suit, which at long last will merely bring the parties to the point where they are now.'" *Id.* (quoting *Hackner v. Guaranty Trust Co.*, 117 F.2d 95, 98 (2d Cir. 1941)). The Fifth Circuit has also noted how unreasonable dismissing a lawsuit would be when the intervenor can simply file a new lawsuit. *Amoco*, 768 F.2d at 678. That court said that the EEOC, after "having devoted the resources of five and one-half years to adjudicating its own claims of employment discrimination against Amoco, would be returned to square one." *Id.* The *Amoco* court also emphasized that given the length of the already transpired litigation, Amoco was not "without notice of the charges upon which the Commission's claims [were] based." *Id.*

Here, Congress authorized the EPA to intervene in RCRA citizen suits "as a matter of right." 42 U.S.C. § 6972(d). Courts must "permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a). This authorization evidences Congress' intent to give the EPA a strong mechanism to enforce RCRA. A dismissal of this lawsuit would impede the EPA's enforcement efforts and would come at the expense of the public, wasting the resources of both the United States, as intervenor, and the courts. Like the defendant in *Amoco*, GRG and Newtown PTA are well aware of the EPA's claims, and allowing the EPA to continue this suit would not result in prejudice against them. Furthermore, GRG and Newtown PTA in this case appear to concede that the EPA has an independent basis to bring suit against them, as they argued before the district court that the EPA was "free to bring its own separate civil or criminal enforcement actions at any time." (R. at 3.) If GRG and Newtown PTA know that the United States will be able to bring a new action if dismissed from this

one, they can only be trying to buy themselves time and perhaps a settlement. As the *Amoco* and *Fuller* courts noted, this would simply return the parties to where they were prior to the district court's order. Such a result is manifestly inefficient and unjust.

IV. THE DISTRICT COURT PROPERLY FOUND THAT THE CONTENTS OF CONTAINER #VS2078 WERE SOLID WASTE UNDER RCRA.

RCRA is a "comprehensive environmental statute that governs the treatment, storage and disposal of solid and hazardous waste." *Meghrig*, 516 U.S. at 483. RCRA carefully regulates all stages in the life of hazardous waste in order to prevent harm to the environment and humans from toxic substances. *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1178-79 (D.C. Cir. 1987). Specifically, RCRA prohibits the export of hazardous waste unless the requirements of 42 U.S.C. § 6938 are met. *Amlon Metals, Inc. v. FMC Corp.,* 775 F. Supp. 668, 674 (S.D.N.Y. 1991). Section 6938 requires that an exporter notify the EPA prior to exporting hazardous waste and that the receiving country consent in writing to the proposed export. 42 U.S.C. §§ 6938(c), (a)(1)(B); 40 C.F.R. §§ 262.52(a), (c). These constraints pertain to any export of hazardous waste as defined by RCRA. *Id.* Under 40 C.F.R. § 261 ("section 261"), a two-pronged test is employed to determine if material is hazardous waste: (1) the material must be solid waste, and (2) the material must be toxic. 40 C.F.R. § 261 (2009); *Amlon Metals,* 775 F. Supp. at 674; *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,* 989 F.2d 1305, 1313 (2d Cir. 1993).

A. The Contents of Container #VS2078 Were Solid Waste Under the Test Promulgated by the EPA.

According to the Second Circuit, dual definitions of solid waste are suggested by RCRA, and the EPA's regulations "reasonably interpret the statutory language." *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199, 206 (2d Cir. 2009). Where Congress has not directly addressed a precise question in drafting

legislation, a court should defer to the appropriate agency's permissible construction of that statute. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). Under the EPA's implementation of RCRA, solid waste is defined as "discarded material," meaning any material that is "'abandoned' by being '[d]isposed of.'" *Cordiano*, 575 F.3d at 206 (citing 40 C.F.R. § 261.2(b)). Material recycled in a manner that amounts to disposal is solid waste. 40 C.F.R. § 261.2(c)(1) .

RCRA does exempt certain toxic solid waste from regulation. *Am. Mining Cong.,* 824 F.2d at 1180; 40 C.F.R. § 261. This exemption applies where "materials are used to manufacture new products," such as in the case of a manufacturing plant with on-site recycling. *Am. Mining Cong.*, 824 F.2d at 1180; 40 C.F.R. § 261.6. The EPA also explicitly exempts certain items from RCRA, including cathode ray tubes ("CRTs"). 40 C.F.R. § 261.39-41. CRTs have a similar composition to UEDs, specifically with regards to their toxic makeup, but are not considered solid waste under RCRA. 40 C.F.R. § 261.39. However, even those CRTs exempt under section 261.39 are considered solid waste when they are "speculatively accumulated." 40 C.F.R.§ 261.4(a)(22)(i). According to section 261, material is "speculatively accumulated" if it is "accumulated before being recycled." 40 C.F.R. § 261.1(c)(8). Finally, a company accumulating such materials must meet EPA notification standards in order to be exempt from RCRA's solid waste regulations. *Id.*

Here, the contents of container #VS2078 qualify as solid waste under RCRA because they were "disposed of." The UEDs in container #VS2078 are discarded materials because they were given to GRG for no compensation when the owners no longer wanted them. (R. at 4-5.) While GRG calls itself a recycling service, not all UEDs that it ships abroad are recycled or even usable. (R. at 4.) Only half of the UEDs, by volume, are salvaged. (R. at 5.) That half are salvaged indicates that the other half are disposed of and qualify as solid waste. (R. at 5.) In fact, some of the salvaged UEDs are mined for small amounts of precious metals, which is use constituting disposal. (R. at 5.) Thus, the UEDs donated to GRG and Newtown PTA are solid waste under the regulatory definition of 40 C.F.R. § 261.2. (R. at 5-6.)

Furthermore, even if the contents of container #VS2078 are considered "recycled," they qualify as solid waste. The recycling exception set out in 40 C.F.R. § 261.6 is inapplicable here. Garcia is not in the business of manufacturing, and therefore the contents of container #VS2078 do not qualify for the manufacturing exception for recyclable material. (R. at 5.) In fact, the absence of an explicit exemption for UEDs under RCRA, while CRTs with a similar composition are exempt, is strong evidence that UEDs fall within the scope of RCRA's regulations. (R. at 5.) Finally, even if the CRT exemption applied to the contents of container #VS2078, the UEDs were "speculatively accumulated" materials, because GRG accumulated them before shipment. (R. at 5.) GRG did not communicate with the EPA about container #VS2078 as required, so made no showing to the EPA that might exclude the UEDs from being classified as "speculatively accumulated." (R. at 5.) Thus, even if the UEDs in container #VS2078 are given the same preferential treatment as CRTs, or are construed to be recycled, they were speculatively accumulated and must be solid waste.

B. GRG and Newtown PTA Are Liable for the Contents of Container #VS2078 Regardless of the Location to Which the Container Was Shipped.

The contents of container #VS2078 did not lose their classification as solid waste simply because they were shipped abroad. "RCRA . . . empowers [the] EPA to regulate hazardous wastes from cradle to grave." *City of Chi.,* 511 U.S. at 331. In holding otherwise, the court below erroneously relied on *EEOC v. Arabian American Oil Company,* in which the Supreme Court evaluated whether claims of employment discrimination could be brought under the Civil Rights Act of 1964 for discriminatory conduct that took place in Saudi Arabia. 499 U.S. 244, 246 (1991). The Court indicated that the extraterritorial application of United States civil rights laws in a foreign workplace could create conflicts with foreign law. *Id.* at 256-57. Because the conduct complained of occurred entirely outside of the United States, the Court deferred to the law of Saudi Arabia. *Id.* at 246, 257-58.

Similarly, the District Court for the Southern District of New York held that when a RCRA violation occurs entirely outside of the United States, liability should not be extended under RCRA. *Amlon Metals*, 775 F. Supp. at 675-76. In that case, Amlon Metals, a New York based corporation, shipped toxic materials to a corporation in the United Kingdom for drying and other processing. *Amlon Metals*, 775 F. Supp. at 669. The plaintiffs in *Amlon Metals* sought injunctive relief to prevent the imminent and substantial danger from toxic chemicals leaking out of Amlon Metals' containers, which were stored in the United Kingdom. *Id.* at 672. As the violation occurred entirely outside of the United States, the district court held that "RCRA [did] not extend to waste located within the territory of another sovereign nation." *Id.*

The Second Circuit's *Leasco* test, on the other hand, is applicable where the majority of the activities that are the subject of the complaint occur within the United States. *See Leasco Data Processing Equip. Corp. v. Maxwell,* 468 F.2d 1326, 1334 (2d Cir. 1972). Under the *Leasco* test, if sufficient violative conduct occurs within the United States, the fact that some conduct occurred outside of the country will not preclude the application of federal law. *Id.*

The analysis used in *Arabian American Oil* does not apply here. While this court should not impose regulations on Sud-Americano, the RCRA violations occurred within the United States before container #VS2078 was shipped to Sud-Americano. (R. at 5.) Moreover, Sud-Americano has no regulatory scheme governing UED recycling or the pollution from such recycling, so there is no conflict of laws. (R. at 5.) Unlike the potential international conflict the *Arabian American Oil* Court sought to avoid, here, international relations will likely be improved if solid waste exports from the United States are regulated.

Although the *Leasco* test has not been widely applied subsequent to its creation by the Second Circuit, it is the appropriate standard under this specific set of facts. Unlike *Amlon Metals*, GRG and Newtown PTA's liability arises directly from their failure to comply with RCRA requirements pertaining to the disposal of hazardous waste. (R. at 5.) Where solid waste is created and gathered for disposal or recycling in the United States in a manner that violates RCRA, the location of its

ultimate disposal should not preclude the application of federal law. Solid waste simply does not change its fundamental nature when it crosses a man-made border.

The district court appropriately held that the contents of container #VS2078 were solid waste under RCRA jurisdiction while the container was in the United States. (R. at 12.) That *Amlon Metals* does not extend RCRA to waste entirely outside of the United States does not preclude liability in this case, because GRG's permitting and regulatory violations occurred within United States borders. (R. at 5.) RCRA is designed to control hazardous waste from "cradle to grave," and should not be circumvented merely because the ultimate destination of that illegally handled solid waste is outside of the United States. The regulation is cradle to grave, not cradle to border.

V. THE SOLID WASTE IN CONTAINER #VS2078 WAS HAZARDOUS WASTE, AND GRG AND NEWTOWN PTA ARE THUS LIABLE FOR FAILURE TO COMPLY WITH RCRA'S EXPORT REGULATIONS.

After establishing that material is solid waste, the next step in evaluating if material is hazardous waste subject to RCRA is to determine whether that waste is toxic. *Conn. Coastal,* 989 F.2d at 1313. 40 C.F.R. § 261.24 provides the minimum concentrations of contaminants for solid waste to qualify as toxic, and therefore hazardous, waste. 40 C.F.R. § 261.24.

A. The Contents of Container #VS2078 Were Toxic.

40 C.F.R. § 262.11 requires that a generator of solid waste must determine if that waste is hazardous. 40 C.F.R. § 262.11. In *United States v. Dee*, the Fourth Circuit held that failing to label hazardous waste was a crime under RCRA, and that knowledge of RCRA regulations was not a prerequisite for guilt. 912 F.2d 741, 745 (4th Cir. 1990). As the court aptly stated, "[i]gnorance of the law is no defense." *Id.* (citation omitted). Furthermore, the EPA recommends that when an entity fails to test solid waste according to RCRA standards, and that solid

waste is known to contain toxins, the solid waste should be presumed hazardous. *See* Complaint, Compliance Order and Notice of Opportunity for Hearing, *In the matter of Earthecycle, LLC*, EPA Docket No. RCRA-HQ-2009-0001 (July 5, 2009) ("*Earthecycle*").

GRG and Newtown PTA were required by section 262.11 to determine if the material in container #VS2078 was toxic, and their failure to do so should not benefit them. Before placing UEDs in a container for shipment, Newtown PTA members performed no more than a visual examination to make sure the UEDs were intact. (R. at 5.) GRG failed to make the required determination whether the contents of container #VS2078 were hazardous. (R. at 5.)

In addition to MyPhones, many other UEDs photographed in container #VS2078 have tested as toxic.[6] In a study performed by the Department of Environmental Engineering Sciences at the University of Florida, UEDs were tested specifically to see if they met the RCRA regulatory definition of toxic to qualify as hazardous waste. *Townsend*, at viii. Computers, computer components, cell phones and televisions of different brands were tested. *Townsend*, at viii. Every laptop computer, computer monitor and computer mouse tested as toxic, as well as at least half of the cell phones and desktop computers. *Townsend*, at 5-1.

This court should follow the EPA's recommendation and hold that when an entity fails to test solid waste for toxicity, that solid waste should be presumed hazardous. GRG's failure to abide by RCRA's regulatory standards sufficiently creates civil liability. If untested solid waste were not presumed to be toxic, entities that know or have reason to believe solid waste is toxic would have incentive to violate RCRA and fail to test that solid waste. According to the tests performed in the *Townsend* study, the UEDs that filled container #VS2078 would fail the toxicity test of section 261.24. (R. at 5.) A significant number of MyPhones were shipped in container #VS2078. (R. at 5.) MyPhones would likely fail RCRA's toxicity test due to their toxic mercury-lithium batteries and the presence of lead and other toxins. (R. at 5.)

6. *See* Timothy G. Townsend, RCRA Toxicity Characterization of CPUs and Other Discarded Electrical Devices (2004), http://www.ees.ufl.edu/ (search "RCRA Toxicity Characterization of CPUs"; then follow "RCRA Toxicity Characterization of CPUs and Other..." hyperlink.) ("*Townsend*").

Although the contents shipped in container #VS2078 are no longer available for testing, that the items shipped are known to regularly fail RCRA toxicity tests strongly implies that the contents of container #VS2078 would qualify as toxic.

B. The Contents of Container #VS2078 Did Not Qualify for the EPA's "Household Waste" Exclusion.

Regardless of the toxicity, some solid waste is not considered hazardous waste under RCRA. 40 C.F.R.§ 261.4(b)(1). Section 261.4 provides that material "derived from households" is not hazardous waste. *Id.* In *City of Chicago*, the Supreme Court explained this exception: "[A]lthough most household waste is harmless, a small portion—such as cleaning fluids and batteries—would [qualify] as hazardous waste." 511 U.S. at 332-33.

Here, container #VS2078 was filled entirely with the "small portion" of household waste that would otherwise qualify as hazardous waste. (R. at 5.) GRG officials indicated that "the bulk of the container" was comprised of toxic MyPhones. (R. at 5.) In addition to the toxic MyPhones, container #VS2078 included intact pagers and laptops, which very likely contained toxic batteries. (R. at 5.) Household waste is excluded under section 261.4 because of the typically low concentration of toxic materials. Here, the entire container was filled with UEDs, which the Supreme Court acknowledged would otherwise qualify as hazardous waste. (R. at 5.) Section 261.4 should not be misconstrued to allow exclusion for the disposal of such a high concentration of toxic materials.

Furthermore, the UEDs in container #VS2078 do not qualify as household waste, because they were not used in homes. (R. at 5.) A photograph of the contents from container #VS2078 shows three laptops labeled "Property of the United States Government." (R. at 13.) The United States Government does not meet the definition of "household" provided by section 261.4. Moreover, many of the MyPhones in container #VS2078 were still in their original packaging. (R. at 5.) MyPhones that have not been removed from their packaging were not *used* in homes and cannot be classified as household waste. The MyPhone corporate headquarters is in Newtown, so it is likely that, in addition to not

being used in a home, these MyPhones were never even in a home at all. (R. at 5.)

Individuals leaving their UEDs with Newtown PTA signed a form indicating that the UEDs had been used in their homes and were no longer useful. (R. at 5.) Given the presence of government laptops and unopened MyPhones in container #VS2078, this form seems to have been no more than a formality. The district court mistakenly relied on this meaningless form in finding that the character of the container as a whole was household waste. (R. at 13.) In fact, the extremely high concentration of hazardous waste in container #VS2078, combined with the fact that it was not purely household waste, indicates that the exclusion provided by the EPA for household waste is inapplicable to container #VS2078. The character of container #VS2078 was non-household hazardous waste.

C. GRG and Newtown PTA Must Abide By RCRA's Regulations Regardless of Whether GRG Is a Collector or a Generator of Waste.

"Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and [to] the principle of deference to administrative interpretations." *Chevron,* 467 U.S. at 844. Understanding that the Supreme Court requires that deference be afforded to administrative agencies, this court should carefully examine enforcement actions by the EPA in factually similar matters. *See* Complaint, *Earthecycle*, EPA Docket No. RCRA-HQ-2009-0001. In *Earthecycle*, the EPA asserted its authority to regulate hazardous waste "generators, transporters, and the owners and operators of hazardous waste treatment, storage, and disposal facilities." *Id.* at 2. Even though Earthecycle did not generate solid waste, but merely collected and exported it for recycling, the EPA asserted that Earthecycle was liable for failure to determine if the waste it processed, which was typically hazardous, met RCRA's toxicity test. *Id.* at 7-8. The EPA also alleged that Earthecycle was liable for unauthorized export of hazardous waste, failure to provide notice of intent to export and for failure to package, label and mark the hazardous waste according to RCRA's requirements. *Id.* at 8-10.

Here, GRG did no more than fill out customs documents for the contents of container #VS2078. (R. at 5.) As in *Earthecycle*, GRG failed to satisfy any of the export requirements imposed by the EPA's regulations and RCRA. The EPA's enforcement of RCRA's regulations in *Earthecycle* should be granted deference. Just like Earthecycle, even though GRG was not the generator of hazardous waste, GRG and Newtown PTA accumulated hazardous waste and shipped it abroad. (R. at 5.) GRG and Newtown PTA are liable for their failure to comply with RCRA's export requirements regarding the shipment of container #VS2078 to Sud-Americano.

CONCLUSION

Valdez, Ventura, the FRT and the EPA have properly brought this claim against GRG and Newtown PTA for their flagrant violation of RCRA's restrictions on the export of hazardous waste. Their violations should not go unpunished based on the district court's improper interpretation of both Article III and RCRA. However, this court should not create a cause of action under the ATCA when none has previously been recognized. RCRA and the EPA's implementing regulations suffice, and an ATCA cause of action would be inappropriate and duplicative. Moreover, while the district court appropriately found the contents of container #VS2078 to be solid waste, it failed to properly identify that solid waste as hazardous waste under RCRA. For the foregoing reasons, the EPA respectfully requests that this court AFFIRM the decision of the district court rejecting Valdez's claim under the ATCA, and REVERSE the decision of the district court with respect to GRG and Newtown PTA's liability under RCRA.