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2010 Moot Court Problem

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2010 National Environmental Law Moot Court Competition Problem*

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, U.S. Environmental Protection Agency, *Intervenor-Appellee*	CIVIL ACTION Civ. 09-1001

ORDER

Following the issuance of the Order of the District Court dated August 31, 2009, in the above-captioned matter; all parties filed a Notice of Appeal. Appellant Friends of Responsible Trade (FRT), along with two of its members, take issue with the decision of the lower court with respect to (1) its standing as a membership organization and as individuals, (2) the dismissal of all Alien Tort Claims Act claims for the injuries to Appellant

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Juan Valdez, (3) the denial of relief under RCRA citizen suit provisions due to lack of ongoing violations by the Appellees Green Recycling Group Inc. (GRG) and Newtown Parent Teachers Association, Inc. (Newtown PTA), and (4) the determination as to the non-hazardous nature of the exported solid waste. The Environmental Protection Agency (and Lisa Jackson as Administrator) (EPA or United States) takes issue with (1) the determination as to the inapplicability of RCRA to the contents of container #VS2078.

Therefore, it hereby ordered that the parties brief all of 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 the ATCA does not.)[**]
2. Whether the ATCA provides an alternate basis for plaintiffs' 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 the 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 the EPA has an

[**] Grayed out text was added or changed in response to official NELMCC Q&A period and can be used by all teams.

independent, jurisdictional basis for its involvement in the action; FRT agrees that in the interests of justice, if its case is dismissed, the 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).

SO ORDERED

Entered this 29th day of September, 2009.

[NOTE: No cases decided after September 1, 2009 may be cited either in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

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, U.S. Environmental Protection Agency, *Intervenor-Appellee*	CIVIL ACTION Civ. 08360-2008

ORDER

Friends of Responsible Trade (FRT) and two individual members of that organization filed a complaint (*with all notice obligations fulfilled*) against the Green Recycling Group, Inc. and the Newtown Parent Teachers Association (together defendants, GRG, or GRG and Newtown PTA), pursuant to 42 U.S.C. §6972(a)(1)(A), alleging that GRG and Newtown PTA violated the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 *et seq*. (RCRA), by sending used electronic devices (UEDs) abroad for salvage and recycling without complying with the requirements of RCRA pertaining to the disposal of hazardous waste. 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. One of FRT's members also bases jurisdiction for his claim for personal injury on the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA). The United States Environmental Protection Agency (EPA or United States) filed a motion to intervene pursuant to 42 U.S.C. § 6972(d). After full

discovery, FRT, joined by the United States, filed a motion for partial summary judgment against GRG and Newtown PTA, asking this Court to find that they have violated RCRA, and leaving the remedial portion of this action for disposition after trial. Thereafter, GRG and Newtown PTA filed a countermotion for summary judgment against FRT and the United States, asking for a ruling either 1) that this court has no jurisdiction to entertain the action by FRT and its members (and that the EPA would then be prevented from carrying on litigation without the original parties) or 2) that GRG and Newtown PTA have not violated RCRA. The United States agreed with GRG and Newtown PTA that this court does not have jurisdiction to hear the case brought by FRT and its members under the Alien Tort Claims Act (arguing that the agency's regulations sufficiently address the environmental concerns of international transport of hazardous and solid waste and that to confer jurisdiction under the ATCA would arbitrarily circumvent EPA administrative procedure), but argued that the court does have jurisdiction to hear the claim of the United States that GRG and Newtown PTA have violated RCRA.

Plaintiff FRT and its members lack standing to sue GRG and Newtown PTA for RCRA violations under all theories of standing. As member Ventura has no injury in fact that is fairly traceable to GRG's actions, and as member Valdez cannot prove that his injuries were the result of actions by GRG and Newtown PTA, membership organization FRT and its members lack constitutional standing. Under RCRA, no plaintiff has standing because there is no ongoing violation, plaintiff Valdez is not a citizen of the United States, and because the harms suffered by the plaintiffs were caused by the actions of a negligent recycling factory operator, RCRA does not afford the plaintiffs statutory standing. Plaintiff Valdez does not have ATCA jurisdiction as that law does not allow for hazardous pollution concerns of one nation's citizen to be voiced in the United States absent a law of nations or customary international law. As the plaintiff has no standing to continue litigation, intervenor EPA must, and did, show that there is a proper basis for continuing the litigation without the original plaintiffs—namely, EPA's independent ability to enforce RCRA against GRG and Newtown PTA. Upon an examination of the facts, however, this Court concludes that

the waste collected by GRG and Newtown PTA was household in nature and thus exempt from hazardous classification under RCRA, and accordingly, are exempt from RCRA.

The Factual Background

The following facts are not contested. GRG is in the business of collecting UEDs for sale to foreign salvagers and recyclers. It collects these materials by entering into partnerships with community organizations, such as Newtown PTA, who, in turn, solicit UEDs from neighborhood households. 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. After collecting sufficient UEDs to fill a shipping container, GRG 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. *All items in the container are from the Newtown PTA event.*

Ace Ventura and Juan Valdez are both members of FRT. *FRT is a tax-exempt 501(c)(3) membership-based organization that advocates for Responsible Trade practices on behalf of its members, which include citizens from all parts of the United States, and in some cases, foreign nations.* Ventura, a freelance photojournalist and citizen of the United States, learned that UEDs were often sent abroad to unregulated recycling facilities whose activities sometimes injured employees, neighbors, and the environment. He identified an effort by GRG and Newtown PTA to collect UEDs in the town of Newtown, State of New Union. Newtown PTA solicited members of local households to bring their UEDs to the parking lot of the Newtown High School on two particular Saturdays for recycling. Newtown PTA told the residents that their devices would either be reused for their original purposes in a less developed country or recycled to put their components to good use. GRG supplied the shipping container for the UEDs and Newtown PTA's members supervised the collection of the material. 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) stating that "I (we) have used the electronic devices identified below in my (our) home and wish to have them used by

others or recycled because they are no longer useful to us. All UEDs placed into the container are intact." The form included spaces to identify the particular electronic device(s) rendered. A significant number of the UEDs were MyPhones. MyPhones are a larger, less versatile, version of the popular Apple iPhone. Unlike the Apple iPhone (which has taken steps to use only environmentally friendly materials), the MyPhone uses a mercury-lithium battery and small quantities of other toxic materials, including lead. *The significant difference between the two devices is that the MyPhone contains a mercury-lithium battery, and more lead and other toxic materials than the iPhone*. Newtown, which is the home to the MyPhone corporate headquarters, was chosen as one of many test-run audiences for the device, but the concurrently-released iPhone quickly ran the MyPhone market to the ground. The MyPhone, while able to play music, connect to the internet, and even act as a walkie-talkie, could not adequately make phone calls. As such, most Newtown residents found themselves with a heavy, useless device. Newtown PTA and GRG thereafter developed the recycling program that led to the litigation at hand.

Ventura photographed many of the UEDs that Newtown PTA's members had placed in container *simply labeled* #VS2078 in the Newtown PTA High School parking lot on June 19, 2008, including used normal cell phones, pagers, televisions, computers and computer components, all intact. The MyPhones shown in the photographs appear to be intact, some even in their original packaging. Affidavits from GRG officials state that most of the bulk of the container was comprised of MyPhones from the Newtown residents. 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, Sud-Americano. Sud-Americano is a developing country with no regulatory scheme governing the recycling of UEDs or the pollution resulting from such activities. *Sud-Americano is a NON-OECD nation, but has ratified the Basel Convention.* No other paperwork, aside from customs documents, was used by GRG in the international shipment of the container to Sud-Americano.

Garcia sorts UEDs and their components, including those in container #VS2078, to separate out those still useful in the Sud-

Americano market, either selling them in that market or donating them, particularly the laptops and computers, to local schools. *He operates only in the city of Pacifica.* He hires local residents to reclaim heavy metals and other valuable materials from the remaining unusable UEDs, including those in container #VS2078. He salvages approximately half of the devices or their components by volume for reuse in Sud-Americano. He had conducted these operations over a period of six years prior to receipt of container #VS2078 from GRG. Because Garcia failed to supply the workers with protective devices, including gloves and masks, or equipment designed for safe removal of material from the UEDs, the workers, including appellant and FRT member Juan Valdez, were directly exposed to mercury, lead, cadmium, chromium and other toxic materials, endangering their health. Valdez had worked in Garcia's operations from their inception. 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 Juan Valdez) and potentially endangering anyone encountering the local environment (including Ace Ventura).

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 recycled UEDs supplied by GRG and others, and the injuries possibly caused by those exposures. Indeed, expert medical deposition testimony established that Valdez suffers from memory and neurological losses "of the type caused by lead and mercury poisoning." Ventura's film, "Toxic Recycling," has been awarded prizes for the best documentary film at three different film festivals, has aired on public television, and has earned over $100,000 for Ventura, net of expenses. Ventura has no present physical manifestations of injury from exposure to toxic material.

Constitutional Standing

Plaintiffs in this case are FRT, Ventura, and Valdez, bringing suit under RCRA's citizen suit provision, 42 U.S.C. §6972. FRT argues that it has standing to bring this case based on theories of representational standing as outlined in *Sierra Club v. Morton*. For an organization to show standing under *Morton*, as a

threshold matter that organization must demonstrate that it has individual members who would have standing. 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. 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.

Standing, of course, requires that the plaintiff have suffered an injury-in-fact that is fairly traceable to the alleged violation and which is susceptible to remedy by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). Neither Valdez nor Ventura can make this showing. Therefore, FRT is unable to demonstrate it merits representational standing. Valdez has not established that GRG's and Newtown PTA's alleged violations of RCRA caused him an injury for a number of reasons. Although there is no doubt that Valdez is suffering injuries, he cannot demonstrate that his injuries are fairly traceable to the complained-of action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561. First, he has presented no evidence that his injuries were actually caused by lead and mercury poisoning, just that they were consistent with lead and mercury poisoning. Second, assuming Valdez' injuries were caused by lead and mercury poisoning, he has presented no evidence they were caused by lead and mercury from material in container #VS2078. Indeed, because Valdez had done similar work, with similar exposures for six years prior to the arrival of that container, it is far more likely that his injuries were caused by previous exposures to similar material than by exposure to #VS2078 material. Third, it was the failure of Garcia to properly conduct his recycling operations that exposed Valdez to lead and mercury, not the collection and shipment of the material by GRG and Newtown PTA.

Ventura alleges no particular physical injury from GRG's and Newtown PTA's activities. He testified that he was so emotionally upset by seeing gross pollution emanating from

Garcia's operations and by seeing workers, such as Valdez, who were "obviously" injured by such pollution, that he is afraid to return to Pacifica. He testified that the sights in Pacifica brought him to tears. If so, they were crocodile tears. Ventura was not injured by these sights; to the contrary, they benefitted him enormously, literally bringing him fame and fortune.

As neither Ventura nor Valdez has demonstrated an injury-in-fact, neither one has Constitutional standing to bring the case now before the Court. Furthermore, as FRT's representational standing argument rests upon the standing of Ventura and Valdez, it also fails. None of the Plaintiffs therefore have standing to bring this case and it must be dismissed in favor of the defendants GRG and Newtown PTA. Given, however, the potential for alternative bases of jurisdiction for the plaintiffs under RCRA and the Alien Tort Claims Act, and the potential continuation of litigation by the EPA, the analysis does not end here.

Statutory Standing: RCRA

Plaintiffs' claims fail to establish jurisdiction under RCRA. In a so-called RCRA "citizen suit," citizens are empowered to enforce the statute when the government fails to do so. Valdez cannot bring a citizen suit because simply put, Valdez is not a citizen of the United States. Citizens of the United States have an interest to see that the laws of their country are enforced. Resident aliens or even visiting aliens may have a lesser interest in doing so. But it is difficult to see how a citizen of another country who has never been in the United States and manifests no intention of visiting it has an interest to see that the laws of the United States are complied with. Nothing in RCRA or its legislative history suggests that Congress meant to empower the world to enforce RCRA when it enacted 42 U.S.C. §6972.[1]

1. Even if Valdez had a legitimate citizen suit claim, 42 U.S.C. § 6972, authorizes as relief for violations of RCRA only injunctive relief for compliance and assessment of civil penalties payable to the United States Treasury. Payment of compensatory damages for physical injuries is not authorized. Thus, this court could not redress his physical injury under 42 U.S.C. § 6972, and therefore Valdez has no standing to pursue that claim under that section. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 88 (1998). While his claim might be susceptible to a claim for personal injury by way of pendant

The RCRA citizen suit provision does not confer jurisdiction in this case even if Valdez or Ventura could themselves establish standing and even if GRG's and Newtown PTA's actions constituted a violation of RCRA. That follows from the wording of 42 U.S.C. §6972(a)(1)(A), which authorizes suit against persons alleged "*to be in violation* of RCRA." The statute does not enable actions based on wholly past actions. The violation here occurred in 2008 and involved one shipment of one container (container #VS2078). FRT alleges that GRG sent other containers of similar material abroad for recycling and will do so again.[2] GRG admits that it sent other containers of similar material abroad for salvage and recycling on several previous and subsequent occasions, but never to Pacifica or anywhere else in Sud-Americano. It also admits that it has an open-ended contract with Garcia for potential future containers of UEDs to be sent to Pacifica under specified terms, but GRG states that no such shipments have occurred to date, presumably because of the pendency of this litigation. Whether GRG has further dealings with Garcia in Pacifica, therefore, is purely speculative. Under these circumstances, there is no present or imminent future violation by either Newtown PTA or GRG to confer standing under §6972(a)(1)(A). *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57 (D.D.C. 2005).

Valdez has presented no evidence that GRG or Newtown PTA participated in or even knew of Garcia's disregard of the safety of his workers or the environment. Finally, if GRG and Newtown PTA violated RCRA, they did so in the United States. Their activities in the United States, however, did not cause Valdez' or Ventura's exposures to lead and mercury in Pacifica. The only basis for jurisdiction left to FRT and its members is potential jurisdiction under the ATCA.

jurisdiction, that is not the case here, for the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA) governs jurisdiction over such actions. The ATCA does not grant jurisdiction to entertain any such action, as analyzed in some detail below. To allow such an action in tort by an alien under pendant jurisdiction would subvert the restrictions on the jurisdiction of federal courts to entertain tort claims by aliens established by the ATCA.

2. It did not make such allegations with regard to Newtown PTA. As far as Newtown PTA is concerned, this was a one-time, isolated activity.

Statutory Standing: ATCA

Valdez also brings a claim under the ATCA based on the same injuries discussed above. While Valdez's injuries were not fairly traceable to a RCRA violation, Valdez argues that defendants' tortious actions directly led to his concrete actual injuries. Further, as ATCA enables plaintiffs to recover compensatory damages, a successful ATCA claim is not hampered by the redressability problems associated with the RCRA claim above. Thus, this Court finds that Valdez has standing to proceed with his ATCA claim based on the constitutional requirements outlined in *Lujan.*

Demonstration of Article III standing, however, does not automatically confer jurisdiction on this Court to hear the ATCA claim. The ATCA provides jurisdiction for civil actions brought by aliens "for a tort only" and then only if the tort was "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Torts giving rise to ATCA jurisdiction are few and far between, because treaties and the law of nations normally create obligations for countries, not for their citizens. Valdez first cites the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Disposal, Mar. 22, 1989, I.L.M. 657 (the Basel Convention). As its name implies, this treaty deals specifically with the activities at issue here. However, although this treaty has been ratified by 121 countries, the United States has not ratified it; it has only signed the treaty. Hence, even if GRG could have and did violate the Basel Convention, that violation would not constitute a violation of a treaty of the United States. Valdez next cites the Convention on the Organization for Economic Co-operation and Development of December 14, 1960 (the OECD Convention), which the United States did ratify. The OECD Convention is only a framework convention, and it does not deal directly with the export of hazardous waste. The OECD Council, however, has issued a set of requirements dealing with such export. Decision-Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area, 5 June 1986-C(86)64/Final (the OECD Hazardous Waste Decision). But the OECD Hazardous Waste Decision directs member countries—not their individual citizens—to take action to implement control of the export of hazardous wastes. Hence GRG could not violate the Decision,

only the United States could. The United States has indeed taken actions to control such exports, including the enactment of RCRA, the promulgation of EPA regulations on hazardous waste export, and in the promulgation of OECD obligation regulations. 42 U.S.C. §6939, 40 C.F.R. §§262.50–58, and 40 C.F.R. §§262.80–.89. However, RCRA and EPA's regulations apply only to hazardous waste and, as concluded below, the UEDs at issue are not hazardous waste under RCRA.

Valdez also argues that the Basel Convention and the OECD Hazardous Waste Decision Treaty establish the law of nations with regard to the export of hazardous waste. Because the ATCA was enacted as part of the Judiciary Act of 1789, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004), some argue that the only tortious actions recognized under the ATCA are those that violated the law of nations as it was understood in 1789, virtually limiting such actions to piracy. *See Alvarez-Machain,* 542 U.S. at 739-740 (Scalia, J. concurring); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-827 (D.C. Cir. 1984) (Bork, J. concurring). The Supreme Court recently rejected this crabbed interpretation of the statute in *Sosa v. Alvarez-Machain*. But the Court held that the ATCA creates no cause of action; it only creates jurisdiction and it does so only for a narrow range of torts: those resulting from violations of international law as widely recognized and well defined today as piracy was in 1789. Valdez argues that the shipment of UEDs by GRG and Newtown PTA to recyclers in a third world country without that country's consent violates the a well-defined norm of customary international law established by the Basel Convention and the OECD Hazardous Waste Decision. Use of the Basel Convention in this regard is suspect because the United States has not ratified it. Valdez points to a holding that the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N.T.S. 397 (UNCLOS), established customary international law, even though the United States had not ratified UNCLOS, *Sarei v. Rio Tinto PLC,* 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). The strength of that precedent is lost in its subsequent history and uncertain ultimate resolution. Nor is that precedent

persuasive, as it fails to note that the ATCA juxtaposes the "law of nations" and a "treaty of the United States," treating them as separate, distinct, and different authorities. If the ATCA may be invoked for violation of international law based on a treaty among nations other than the United States, the limitation of invoking the ATCA for violation of a treaty of the United States loses all vitality. In any event, the Supreme Court in *Sosa v. Alvarez-Machain* cautions us to construe the ATCA narrowly, limiting it to violations of the law of nations that are well defined and well established, like piracy. There is surely nothing well defined about regulations dealing with the export of hazardous waste. Even the determination of whether materials are hazardous waste is a mind-numbing journey, as is evident from our discussion below of whether the UEDs at issue here are hazardous waste. There is simply no parallel between the then-well-established crime of piracy and the commercial shipment abroad of used computers and cell phones.

Continuation of Litigation by Intervenor

At oral argument, the parties differed on the procedural effect that Plaintiffs' lack of jurisdiction would have on the ability of the United States to continue the action. GRG and Newtown PTA argued that dismissal of the Plaintiffs' action on jurisdictional grounds was the end of the action, leaving no action in which the United States can continue as an intervenor. The FRT and the EPA disagreed. FRT argued that in the event that the case is dismissed, the United States EPA should be allowed to continue its action to enforce RCRA. The EPA argued that it has an interest in the underlying controversy, namely, the potential RCRA violations. As the plaintiffs have already been found to be lacking standing, it is incumbent upon this court to determine whether the EPA, in its own right, has an interest in the litigation.

According to one court, there is "a difference between permitting the United States to play an active role during the pendency of private litigation, and permitting it to go forward with the litigation in its own right after the private parties have composed their differences." *Ruotolo v. Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978). Here, the parties have not "composed their differences", as such, but the question remains. The *Ruotolo*

court continues to note that in order to decide whether to permit an intervening United States agency to continue litigation, the government "must possess some independent basis as a party apart from its status as intervenor". *Id.*, *quoting* Boston Tow Boat Co. v. United States, 321 U.S. 632, 88 L. Ed. 975, 64 S. Ct. 776 (1944). The need for an intervening appellant to have its own basis of standing to continue litigation in the absence of the original plaintiff was discussed by the Supreme Court in *Diamond v. Charles*, 476 U.S. 54 (1986), but in a manner not directly applicable here. In Diamond, the Court decided that an intervening private citizen, to continue without the original plaintiff, needed to show Article III standing. *Id.*, at 69. This Court concludes that EPA's authority to intervene under 42 U.S.C. § 6972(d) is analogous to the need for Article III standing articulated by the Court in *Diamond*. Because the issue of RCRA violation falls within the direct purview of the EPA agency authority, it has sufficient interest, basis, and standing to continue the suit in absence of the original plaintiffs.[3]

RCRA Violations

RCRA establishes a so-called "cradle to grave" regulatory system to assure that hazardous waste is properly managed to avoid damage to persons or the environment. It requires that most hazardous waste be treated, stored, or disposed of only at facilities with RCRA permits to handle that waste, in accordance with strict facility and operating requirements. It prohibits the export of hazardous waste, except in compliance with 42 U.S.C. §6938, which requires that persons proposing to export hazardous waste notify EPA, obtain the written consent of the country to which the proposed export will be sent, and ensure compliance with any applicable treaties. EPA has promulgated regulations

3. Defendants GRG and Newtown PTA argue that because the EPA is free to bring its own separate civil or criminal enforcement actions at any time, the proper place for any RCRA suit by the Administrator of EPA is there, not here. This contention is without merit as, under 42 U.S.C. § 6972(d), the EPA can intervene in whichever citizen suits it likes. Such broad discretion indicates that Congress intended to allow the EPA to make the decision as to when and where to act towards the enforcement of RCRA. Because it could intervene, and it did, this Court will not hold that decision against the agency. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

to implement these requirements, 40 C.F.R. §262.50–.58. Whether particular material is subject to the RCRA regulatory scheme depends on whether that material meets the definition of "hazardous waste" that EPA has crafted in 40 C.F.R. Part 261. A court more learned than this one has described navigating that definition to be a "mind-numbing journey." *Am. Mining Cong. v. U.S. Envtl. Prot. Agency*, 824 F.2d 1177 (D.C. Cir. 1987). Unfortunately, EPA has subsequently amended the definition to make it even longer and more complicated. As both Congress and EPA have charted it, determining whether a material is a hazardous waste is a two-step process. First, it must be determined if the material is a solid waste. Second, if the material is a solid waste, it must be determined if the material is hazardous under criteria established by EPA.

The EPA defines solid waste as "discarded material" not otherwise excluded, 40 C.F.R. §261.2(a)(1). "Discarded material" is material that is "abandoned," "recycled," "inherently waste-like," or "a military munition," 40 C.F.R. §261.2(2)(i). Material is "abandoned" if it is "disposed of," 40 C.F.R. §261.2(b). When the citizens of New Union gave their UEDs to GRG and Newtown PTA, they were disposing of those devices, hence the devices became solid waste under this definition. Materials are also abandoned if they are "recycled." 40 C.F.R. §261.2(2)(i). Even though some of the Newtown PTA-sourced UEDs that were not salvaged for reuse were recycled (possibly making them solid waste under this definition) they were recycled abroad and there is no indication in RCRA that Congress intended to extend the jurisdiction of RCRA to activities abroad. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). Thus, 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. This does not mean, of course, that they were not solid waste in the United States or that the actions of GRG and Newtown PTA in the United States to ship the materials out of the United States were not subject to RCRA jurisdiction. In fact, the very purpose of the Newtown PTA collection event was to collect "abandoned" and "disposed of" material—the MyPhone. The materials in the container were

solid waste under RCRA jurisdiction while the container was in the United States.[4]

Having established that the material is solid waste within the United States because it was disposed of here, we would normally continue to determine if the solid waste is hazardous, using the various tests and lists contained in the remainder of Part 261. Neither UEDs nor used intact CRTs are contained in the lists of hazardous waste in Part 261. EPA argues, however, that MyPhones test as hazardous under the toxicity test in 40 C.F.R. §261.24. The material that had been in container #VS2078, of course, is no longer available for testing. Plaintiffs and EPA argue that is no matter for two reasons. First, UEDs such as the MyPhone have routinely been found to fail the toxicity test. Hazardous Waste Management System; Modification of the Hazardous Waste Program; Cathode Ray Tubes and Mercury-Containing Equipment, 67 Fed. Reg. 40,508-510 (June 12, 2002) and TIMOTHY G. TOWNSEND ET AL., RCRA TOXICITY CHARACTERIZATION OF CPUS AND OTHER DISGARDED ELECTRICAL DEVICES (2004), *available at* http://www.ees.ufl.edu /homepp/townsend/Research/ElectronicLeaching/UF%20EWaste% 20TC%20Report%20July%2004%20v1.pdf. This, however, is only circumstantial evidence that the MyPhones in container #VS2078 were hazardous by the toxicity test. Second, Plaintiff and EPA argue that EPA's regulations, 40 C.F.R. §262.11, require generators of solid waste to determine if their wastes are hazardous, and failure to make that determination is a criminal offense, 40 C.F.R. §262.11, *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990). If GRG did not make this determination, Plaintiffs and EPA argue, GRG violated RCRA and its solid waste should be deemed to be hazardous. The problem with their argument is that GRG is not a generator of solid waste and hence is not subject to the determination requirement. It is a mere collector of such material, generated by others. EPA argues it is bringing enforcement actions under similar circumstances, *In the matter of EarthEcycle, LLC*, EPA Docket No. RCRA-HQ-2009-0001, and that this Court should defer to its interpretation.

4. Unlike cathode ray tubes (similarly considered to contain toxic materials), there are no provisions of EPA regulations that exempt UEDs such as MyPhones from hazardous or solid waste RCRA applicability. *See* 40 C.F.R. § 261.39-.41.

EPA's other enforcement action, of course, is not before this Court and EPA's position there, and here, are just litigation positions, not entitled to much, if any, deference.

GRG and Newtown PTA also point out 40 C.F.R. §261.4(b)(1), which provides that solid wastes are not hazardous wastes if they are "household waste." This section defines, without much additional illumination, "household waste" as "material derived from households." GRG and Newtown PTA took considerable care to assure that they accepted only UEDs that were derived from households. In short, while the UEDs at issue are solid waste, EPA's exclusion of "household [solid] waste" from hazardous wastes removes it from the hazardous waste regulatory scheme. *Chicago v. Envtl Defense Fund*, 511 U.S. 328 (1994).

EPA and Plaintiffs further argue that some of the UEDs at issue were not actually derived from households. They point to one of Ventura's pictures of three laptops in container #VS2078, each with a label reading "Property of the United States Government," with a bar code beneath. An affidavit from a federal security officer states that the bar code indicates the laptops were used, ironically, in the EPA office in New Union. EPA and Plaintiffs argue that however you characterize "Property of the United States Government," it is not a household. While EPA's regulations are silent on that issue, EPA and Plaintiffs are correct on the point. However, neither the labels nor the affidavit establish that the laptops came to the container directly from EPA rather than from a household. Moreover, the extensive precautions taken by GRG and Newtown PTA to confine the UEDs collected to household material were sufficient to prevent three laptops from changing the character of the whole container from household waste to non-household waste. Similarly unpersuasive is the argument that because some of the MyPhones in the container were in their original packaging, they could not be household waste. Again, the diligence with which GRG and Newtown PTA cautioned against any inclusion of non-household items proves significant. While some community members may not have opened their MyPhones before discarding them, they no doubt purchased or acquired the item for its utility as a household phone. That word spread about the dismal performance of the item and some people chose to

discard their MyPhones without inspection is not relevant to the household nature of the phone.

Order

The motion for partial summary judgment by FRT, its two members and EPA is denied on all grounds propounded. The motion for summary judgment by GRG and Newtown PTA and EPA on the lack of jurisdiction of FRT and its members is granted. The motion for summary judgment by GRG with respect to the intervenor's rights on appeal is denied, but the remainder of the motion by GRG and Newtown PTA is granted as to all other grounds.

SO ORDERED.

Romulus N. Remus
United States District Judge

August 31, 2009