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CERCLA Liability for Air Emissions?: Federal Court Ruling Could Supersize Superfund

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On December 31, 2014, the United States District Court for the Eastern District of Washington issued an order that has potential to significantly broaden the already-sizeable reach of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In *Pakootas v. Teck Cominco Metals, Ltd.*,[1] the court held direct air emissions that eventually settle on land or water can create CERCLA "arranger" liability. While the Washington district court appears to be the first to have taken up this important question, it will not be the last: on March 25, 2015, the Ninth Circuit granted Teck Cominco Metals' (Teck) petition for permission to appeal on an interlocutory basis.

Background. Teck, a Canadian mining company, operates a smelter situated along the Columbia River approximately ten miles north of the United States border. Teck concedes that it discharged nearly 10 million tons of slag and other effluent materials directly into the Columbia from the early 1900s to 2005.[2] Owing to the hydrology of the Columbia, virtually all of this material traveled downstream and into the U.S. where it eventually settled in what has come to be known as the Upper Columbia River (UCR) Site.[3]

CERCLA provides strict liability for certain classes of persons, including those who "arranged for disposal . . . of hazardous substances" at a "facility" at which there has been an actual or threatened "release" of hazardous substances. [4] The last decade and a half has seen a number of orders, negotiations, agreements, citizen suits, and court decisions with regard to releases at the UCR Site, a CERCLA "facility." Of particular relevance is a 2006 Ninth Circuit decision[5] wherein the court embraced a legal fiction in holding that the "release" of hazardous substances took place not when Teck discharged slag and effluent into the Columbia in Canada, but when, after settling in the UCR Site, these substances leached into the environment.[6]

In its recent order, the district court doubled down on this legal fiction. By this time, the plaintiffs had amended their complaint to allege that Teck arranged for disposal of hazardous substances it emitted into the air where those substances settled in the UCR Site. The district court agreed that such emissions could support CERCLA arranger liability. Subsequently, the Ninth Circuit held in *Center for Community Action and Environmental Justice v. BNSF Railway Company* [7] (*CCAEJ*) that under the Resource Conservation and Recovery Act (RCRA), air "emission of diesel particulate matter does not constitute 'disposal' of solid waste" and therefore will not sustain a claim under that act.[8] Because CERCLA defines "disposal" solely by reference to the RCRA definition,[9] Teck filed a motion for reconsideration.

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[1] CV-04-256-LRS, 2014 WL 7408399 (E.D. Wash. Dec. 31, 2014).
[2] *Pakootas v. Teck Cominco Metals, Ltd.*, 2012 WL 6546088, at *2-*3 (E.D. Wash. Dec. 14, 2012).
[3] *See id*.
[4] 42 U.S.C. § 9607(a).
[5] *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006).
[6] *Id*. at 1077-1078.
[7] 764 F.3d 1019, 1020 (9th Cir. 2014). For analysis of a March 15, 2015 Ohio federal trial court decision conflicting with *CCAEJ*, *see* Samuel B. Boxerman and Benjamin E. Tannen, *Ohio Court Embraces Use of Federal Solid Waste Disposal Law to Challenge Air Emissions*, Legal Opinion Ltr. (Wash. Lgl. Fndt.), April 10, 2015, available at http://www.wlf.org/upload/legalstudies/legalopinionletter/BoxermanTannenLOL_041015.pdf.
[8] *Id*. at 1020-21.
[9] 42 U.S.C. § 9601(29).

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The court denied Teck's motion, distinguishing *CCAEJ* in large part on the ground that the court there "had no reason to consider how its interpretation of 'disposal' relates to the additional CERCLA definitions of 'facility' and 'release.'"[10] Taking a page from the Ninth Circuit, the court conceptually bifurcated Teck's air emissions: disposal occurred not when Teck emitted substances into the air, but when those substances subsequently "were deposited 'into or on any land or water' of the UCR Site."[11] The court certified its order for interlocutory appeal to the Ninth Circuit;[12] and the appeals court has decided to hear the case.

Analysis. The Ninth Circuit has several grounds on which it can reverse the trial court's holding. First, the district court's order is in obvious tension with *CCAEJ*. The *CCAEJ* court relied primarily on RCRA's text, which defines "disposal" as:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment or be emitted into the air or discharged into any waters . . .[13]

As the Ninth Circuit recognized, the text compels the conclusion that "'disposal' occurs where the [] waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted into the air.'"[14] The *CCAEJ* court also observed that RCRA defines "release" to include both "emitting" and "disposing," indicating that "Congress knew how to define 'disposal' to include emissions, but nevertheless chose not to."[15] The same is true of CERCLA: it defines "disposal" by incorporating the RCRA definition, and defines "release" to include "emitting." Ultimately, the *CCAEJ* court did not mince words: "Reading [the definition] as Congress has drafted it, 'disposal' does not extend to emissions of [] waste directly into the air."[16]

Second, the district court's reading of "disposal" is problematic when considered in the context of CERCLA jurisprudence. In order to distinguish *CCAEJ*, the district court emphasizes that CERCLA applies only where there is disposal at a "facility," whereas RCRA applies to disposals on any land or water. As a result, the court claims, a "CERCLA disposal" occurs only when hazardous substances are deposited into any land or water *at a CERCLA facility*. While perhaps useful in treating the particular case at bar, considerable side effects accompany such a reading.

As the Supreme Court held in *Burlington Northern*, in order to establish CERCLA "arranger" liability, a plaintiff must show that the defendant took "intentional steps to dispose of a hazardous substance."[17] It is not enough that the plaintiff possess *knowledge* that such a disposal would occur: the party must *intend* that a "disposal" result from its arrangement.[18] Applying the district court's definition of "disposal" to these established principles, a party would only be liable as an arranger if it took intentional steps to dispose of a hazardous substance *at a CERCLA "facility."*

Third, and perhaps most obviously, the district court's holding could lead to a significant expansion of CERCLA's scope, one that Congress seemingly could not have intended. Already it is no easy feat to determine responsibility for a given Superfund site. Given that air pollutants can be transported thousands of miles before settling on land or water, widespread adoption of the district court's holding would exacerbate matters, to say the least. Moreover, given that defendants in a CERCLA action "seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists,"[19] the impact on parties whose operations include air emissions might be significant.

To be sure, factors like personal jurisdiction limit plaintiffs' ability to rope air-emitting parties into faraway disputes, and unlike the Canadian Teck Cominco, many U.S.-based air emitters may be able to take advantage of the "federally-permitted release" defense, but there is little doubt that the *Pakootas* holding has potential to alter the CERCLA landscape significantly.

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[10] *Pakootas*, 2014 WL 7408399, at *2.
[11] *Id*.
[12] *Id*. at 4.
[13] 42 U.S.C. § 6903(3).
[14] *CCAEJ*, 764 F.3d at 1023 (emphasis in original).
[15] *Id*. at 1024-1025.
[16] *CCAEJ*, 764 F.3d at 1024.
[17] *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 611 (2009).
[18] *Id*. at 612.
[19] *Id*. at 614.

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