Chapter 4

Cross-Border Air Emissions May Give Rise to CERCLA Liability

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The latest Pakootas v. Teck decision appears to be the first in which any U.S. court has directly addressed this issue.

On December 31, 2014, in a matter of first impression, Judge Lonny Suko of the U.S. District Court for the Eastern District of Washington concluded that air emissions that contain hazardous substances alone are not considered "disposals" under the *Comprehensive Environmental Response, Compensation, and Liability Act* of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, but if these substances later settle onto land or water, they have been "disposed" of at a "facility", thereby creating "arranger" liability.[1]

Background

Joseph Pakootas (Pakootas) and the State of Washington (collectively, the plaintiffs) initiated suit against Teck Cominco Metals, Ltd. (Teck) under CERCLA, seeking to recover response costs and natural resource damages for Teck's contamination of Washington's Upper Columbia River Basin (UCRB) from its lead-zinc smelter. Although Teck's smelter is in Canada (Trail, British Columbia), hazardous substances from Teck's slag and effluent were discharged into the Columbia River, crossed the national border into the United States, and eventually came to rest in the UCRB, all of which Teck had stipulated to in an earlier phase of the case. The smelter is located "a mere 10 miles north of the international border

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[1] *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399 (E.D. Wash., Dec. 31, 2014).

which comprises the northern boundary of the UCR Site."[2] When the plaintiffs filed their fourth amended complaint in 2010, they added allegations pertaining to air emissions:

> From 1906 to the present time, Teck Cominco emitted certain hazardous substances . . . into the atmosphere through the stacks at the Cominco Smelter. The hazardous substances, discharged *into the atmosphere* by the Cominco Smelter *travelled through the air into the United States resulting in the deposition of airborne hazardous substances into the Upper Columbia River Site*.[3]

Thus, according to the plaintiffs, Teck was liable as an arranger under CERCLA.[4] Under CERCLA, arranger liability arises when:

> [A]ny person who by contract, agreement or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another entity and containing such hazardous substances . . . from which there is a release[5] or threatened release . . . of a hazardous substance . . .[6]

Teck moved to strike the plaintiffs' new allegations, arguing that under CERCLA's definition of "disposal", defendants can be liable for air emissions only if those emissions followed the initial disposal of hazardous substances "into or on any land or water". Because Teck's emissions from its stacks were not "into or on any land or water", Teck argued there had been no disposal for which it could be held liable as an arranger under CERCLA.

The district court denied the motion to strike in July 2014, agreeing with the plaintiffs that "[t]here is . . . no meaningful distinction between discharge of wastes into the water at Trail and discharge of waste into the air at Trail, as long as they result in disposal at the site in the United States".[7] Rather, for arranger liability to attach, the disposal simply must have occurred at a "facility" which CERCLA defines, in part, as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located".[8] In this case, the "facility" was the UCRB, not the smelter in Trail, as one might initially think.[9]

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2 *Pakootas v. Teck Cominco Metals, Ltd.*, Nos. CV-04-256-LRS, 2115, Slip Op. at 9 (E.D. Wash., July 29, 2014).

3 Docket Nos. 2098 & 2099, ¶ 4.2 (emphasis added).

4 "CERCLA creates four categories of [potentially responsible parties]: current owners or operators, owners or operators at the time of a disposal, arrangers, and transporters." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir., 2001) at p. 881.

5 Under CERCLA, "the term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . .". 42 U.S.C. § 9601(22).

6 *Ibid.* § 9607(a)(3).

7 *Supra*, footnote 2 at 3.

8 42 U.S.C. §9601(9)(B). The Ninth Circuit had so held with respect to slag waste during an

The court dismissed Teck's argument that the statute requires disposal "into or on any land or water" *first* before the air emissions are discharged, finding nothing in the language of the statute that imposed such a requirement.[10] Thus,

> [t]he fact there was also a disposal which occurred in Canada is irrelevant because that was not a disposal at a CERCLA facility. The relevant "disposal" alleged by Plaintiffs is the one which occurred "into or on any land or water" at the UCR Site, be that hazardous substances from Defendant's slag and liquid effluent, or from its aerial emissions.[11]

The court concluded that so long as there was a causal link between Teck's aerial emissions and a release of hazardous substances at the UCR Site, then the plaintiffs were entitled to recovery of response costs.[12] Furthermore, citing the broadly remedial purpose of CERCLA, Judge Suko opined that if Congress had intended to exclude air emissions from CERCLA, it easily could have worded the statute that way, but "[i]t obviously did not do so."[13] Finally, the court pointed out that in the decades since CERCLA was enacted in 1980, "no judicial decision has expressly held CERCLA cannot be used to remedy contamination resulting from aerial emissions. Indeed, there are recent decisions which assume the contrary".[14]

Following the U.S. Court of Appeals for the Ninth Circuit's August 2014 decision in *Center for Community Action and Environmental Justice v. BNSF R. Co.* (CCAEJ)[15] which held that air emissions do not constitute a "disposal" under the *Resource Conservation and Recovery Act* (RCRA), Teck moved for reconsideration. RCRA defines "disposal" as:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the

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earlier phase of the litigation, and Teck had not contested the point.

> The slag has "come to be located" at the [UCR] Site, and the Site is thus a facility under § 9601(a). *See 3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1360 n. 10 (9th Cir.1990) ("[T]he term facility has been broadly construed by the courts, such that in order to show that an area is a facility, the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." (internal quotation marks omitted)). . . . *Teck does not argue that the Site is not a CERCLA facility*. Because the CERCLA facility is within the United States, this case does not involve an extraterritorial application of CERCLA to a facility abroad.

Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir., 2006) at p. 1074 (emphasis added).

9 *Supra*, footnote 2 at 3.
10 *Ibid.* at 4.
11 *Ibid.* at 5.
12 *Ibid.* at 6.
13 *Ibid.* at 7.
14 *Ibid.* (citing cases).
15 764 F.3d 1019 (9th Cir. 2014).

> environment or be emitted into the air or discharged into any waters, including ground waters.[16]

The Ninth Circuit reasoned that the definition of "disposal" does not explicitly include "emitting", and instead "includes only conduct that results in the placement of solid waste 'into or on any land or water'. That placement, in turn, must be 'so that such solid waste . . . may enter the environment or be emitted into the air, or discharged into any waters.' . . . [T]herefore 'disposal' occurs where the solid waste is first placed 'into or on any land or water' and is thereafter 'emitted into the air'."[17] According to Teck, the Ninth Circuit's decision meant that the plaintiff's allegations of harm from inhaling airborne emissions of solid waste particulates from the defendant's diesel engines could not create RCRA liability.[18]

Relying on *CCAEJ*, Teck argued that because CERCLA expressly adopts the definition of "disposal" from RCRA,[19] *CCAEJ* controlled, and Teck's air emissions from its smelter likewise could not constitute "disposals" under CERCLA. The district court rejected this argument by distinguishing *Pakootas* as a CERCLA case, whereas *CCAEJ* had been a RCRA case, which made "no mention of CERCLA".[20] That is, the plaintiffs in *CCAEJ* were suing for the harm they allegedly suffered from inhaling the diesel particulate matter (*i.e.*, under RCRA), not necessarily for the cleanup of defendants' railyard (*i.e.*, under CERCLA). Because the aims of the two statutes are different, the outcome of *CCAEJ* did not necessarily control in *Pakootas*.[21]

Because *Pakootas* and *CCAEJ* involved two different statutes, the district court declined to rely on *CCAEJ* alone and analyzed Teck's arranger liability under CERCLA. As before, it determined that Teck's "CERCLA disposal" is not the discharge of hazardous substances directly into the air, "because what gives rise to arranger liability under the plain terms of 42 U.S.C. § 9607(a)(3) is 'disposal . . . of hazardous substances . . . *at any facility*

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16 42 U.S.C. § 6903(3).

17 *CCAEJ*, 764 F.3d at 1024 (internal citations omitted).

18 Following *Pakootas*, only one other court has addressed the Ninth Circuit's rationale in *CCAEJ* and declined to follow it in the RCRA context. See *Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours and Co.*, No. 2:09-CV-1081, 2015 WL 1038082 (S.D. Ohio, Mar. 10, 2015) ("This Court declines to follow the Ninth Circuit's narrow reading of RCRA's text and legislative history, and finds *BNSF Railway* factually distinguishable from the case *sub judice*.").

19 Under CERCLA, "[t]he terms 'disposal', 'hazardous waste', and 'treatment' shall have the meaning provided in section 1004 of the *Solid Waste Disposal Act* [42 U.S.C. 6903]." 42 U.S.C. § 9601(29).

20 2014 WL 7408399, at *1.

21 Teck also had pointed out that CERCLA's purpose was in remediating contaminated sites, not necessarily in addressing air emissions. *See Carson Harbor*, 270 F.3d at 885 ("CERCLA's primary targets included spills and leaks from abandoned sites — sites at which there was no longer any affirmative human activity.").

. . . from which there is a release . . . of a hazardous substance . . .'."[22] Liability under RCRA, on the other hand, does not depend on there being a disposal at a "facility".[23]

In *CCAEJ*, the Ninth Circuit also had examined the legislative histories of both RCRA and the *Clean Air Act* and concluded "they make clear that RCRA, in light of its purpose to reduce the volume of waste that ends up in our nation's landfills, governs 'land disposal'. The *Clean Air Act*, by contrast, governs air pollutants."[24] Teck likewise argued that air emissions are governed by the *Clean Air Act*, not RCRA or CERCLA. *See, e.g.*, S. Rep. No. 94-988, 94th Cong., 2nd Sess. (1976) (citing EPA report indicating that "legislative controls over land disposal of hazardous wastes are inadequate" but "air and water pollution control authorities are adequate"); U.S. EPA, Report to Congress: Disposal of Hazardous Wastes, Pub. No. SW-115 (1974) ("The Clean Air Act of 1970 . . . provide[s] the necessary authorit[y] for the regulation of the emission of hazardous compounds and materials to the air . . ."). Yet, surprisingly, the district court did not address this argument in either the decision denying Teck's original motion to strike or the one denying Teck's motion for reconsideration.

Although Judge Suko felt that his decision was consistent with *CCAEJ*, he also recognized that no U.S. federal court had previously "addressed this issue head-on".[25] Realizing the import of his decision, he immediately certified the matter for interlocutory appeal to the Ninth Circuit. On March 25, 2015, the Ninth Circuit granted the petition for permission to appeal.[26]

Teck filed its brief on August 4, 2015,[27] and on August 11, 2015, two amicus briefs were filed by the Government of Canada and four national trade organizations (the National Mining Association, the United States Chamber of Commerce, the National Association of Manufacturers, and the American Chemistry Council), both in support of Teck. As of the date of this writing, the plaintiffs had not yet filed their opposition brief.

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22 2014 WL 7408399 at *2 (emphasis added).
23 *Ibid.*
24 *CCAEJ*, 764 F.3d at 1029.
25 2014 WL 7408399 at *4.
26 After the Ninth Circuit granted the petition for interlocutory appeal, on March 30, 2015, Judge Suko stayed all proceedings related to the plaintiffs' air claims pending the outcome of the appeal. The remaining claims related to recovery of river pathway response costs have continued to proceed.
27 Br. of Pet'r , ECF No. 13-1.

Amicus Briefs: Cross-Border Environmental Liabilities and Other Concerns

In its amicus brief, the Government of Canada (Canada) raised several concerns. It particularly focused on the issue of comity between the United States and Canada, citing several treaties and other bilateral agreements pertaining to air quality between the two nations, and the impingement on Canada's sovereignty resulting from the district court's ruling.[28] Furthermore, it argued that because the two nations share a "5,525-mile border",[29] having a uniform method of resolving transboundary pollution disputes was necessary, rather than leaving the courts to create a patchwork of (potentially inconsistent) case law.

Specifically, Canada cited the U.S.-Canada Air Quality Accord[30] and an "exclusive bilateral regime" that it termed the Permanent Regime that dated back to 1935, "to reduce and remedy damages caused by cross-border air emissions from the Trail Smelter facility."[31] Moreover, it pointed out that both countries had exchanged diplomatic notes on multiple occasions relating to the Trail smelter, and once air emissions became a part of the *Pakootas* litigation, the Embassy of Canada sent to the United States a "Diplomatic Note stat[ing] that 'the Canadian Government opposed any unilateral compulsory measure imposed against a Canadian-incorporated company'."[32] Therefore, according to Canada, by subjecting Teck to CERCLA liability for air emissions originating from Canada and landing in the United States, the district court had "clearly impinge[d] on Canada's sovereignty" and "undermine[d] the long history of cooperation between the United States and Canada in controlling transboundary pollution".[33]

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28 Br. of Amicus Curiae Government of Canada, ECF No. 25-1. Canada also provided copies of air quality permits issued to Teck under various Canadian statutes.

29 *Ibid.* at 2.

30 Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, March 13, 1991, T.I.A.S. No. 11783, 30 ILM 678.

31 Br. of Amicus Curia Government of Canada 4, ECF No. 25-1 (citing Convention for the Establishment of a Tribunal To Decide Questions of Indemnity Arising from the Operation of the Smelter at Trail, British Columbia, April 15, 1935 (ratified June 5, 1935, entered into force August 3, 1935), 4 U.S.T. 4009, T.S. No. 893, 49 Stat. 3245, 162 L.N.T.S. 73) (the "Ottawa Convention"); Trail Smelter Arbitral Tribunal Decision (U.S. v. Can.), 3 R.I.A.A. 1911, 33 AM J. INT'L L. 182 (Trail Smelter Arb. Trib. 1938); Trail Smelter Arbitral Tribunal Decision (U.S. v. Can.), 3 R.I.A.A. 1938, 35 AM. J. INT'L L. 684 (Trail Smelter Arb. Trib. 1941) .

32 *Ibid.* at 5.

33 *Ibid.* at 5-6. Canada further observed that the Permanent Regime had not been implicated in prior appeals in *Pakootas*, because at that time, the plaintiffs' allegations had been limited to water-borne pollution. It was not until the plaintiffs added allegations pertaining to air emissions in the fourth amended complaint that the Permanent Regime became relevant to *Pakootas*. *Ibid.* at 9.

Furthermore, Canada argued that the district court's interpretation of CERCLA violated canons of construction that require federal statutes to be read in harmony with international law. "If CERCLA had expressed an unambiguous intent to redress air emissions and displace the exclusivity of the Permanent Regime, it would, as a subsequently enacted statute, supersede the Ottawa Convention and the obligations following therefrom."[34] However, because CERCLA contains no such unambiguous intent to supersede the Permanent Regime (or any other international conventions) governing air emissions, the district court had erred in concluding, "[h]ad Congress intended that CERCLA not apply to remediating contamination resulting from aerial emissions, it would have made something that significant abundantly clear in the statute".[35]

In addition, in their amicus brief, the four national trade organizations argued that many members of each organization emit substances that are within the broad definition of "hazardous substance" used in CERCLA but are regulated by various air quality statutes in the United States and/or Canada.[36] Like Teck's emissions, "some of these regulated emissions can travel hundreds of miles before touching ground", with the operators having no control over where these emissions will land.[37] Yet, under the district court's rationale, even if the emissions comply with permits issued under air quality statutes, such as the CAA, "they could still lead to massive liability if they allegedly happen to alight at a location — perhaps hundreds of miles away — that has been polluted for years through disposals by others".[38]

Moreover, if these emissions do land at already-contaminated areas, it would be extremely difficult, if not impossible, to distinguish between one operator's emissions versus another's. Therefore, although the United States Supreme Court has held that apportionment of CERCLA liability is permitted and appropriate so long as there is a "reasonable basis" for apportionment,[39] in practice, courts would not (and could not) so divide liability.

Thus, both amicus briefs raised significant concerns about the impact of *Pakootas* on cross-border environmental liabilities between Canada and the United States, as well as the expansion of CERCLA liability generally.

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34 *Ibid.* at 28 (citing *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557 (9th Cir., 2011) at p. 568 ("a later-in-time self-executing treaty supersedes a federal statute and . . . a later-in-time federal statute supersedes a treaty").

35 *Ibid.*

36 Br. of Amici Curiae Trade Associations 1, ECF No. 26.

37 *Ibid.* at 3.

38 *Ibid.*

39 *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599 (U.S., 2009) at p. 614.

Conclusion

If Judge Suko's ruling is upheld, air emissions originating outside the United States (e.g., Canada or Mexico) that land in the United States, could give rise to arranger liability under CERCLA.[40] This ruling potentially has far-reaching implications if its reasoning is adopted by other courts because of the significant distance air emissions may travel before depositing hazardous substances onto land or water. Because CERCLA is such a broadly remedial statute with few exemptions, the decision could, in addition to expanding the geographic reach of CERCLA, expand the universe of entities subject to arranger liability under CERCLA and/or provide an additional basis for holding companies with both air emissions and direct discharges to land or water liable under CERCLA.

[40] Or as the trade organizations succinctly wrote: "The District Court's interpretation would literally leave arranger liability without any limit: wherever an air emission lands, a CERCLA facility is formed." Br. of Amici Curiae 4, ECF No. 26.