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Ninth Circuit Holds Air Emissions Not Covered by CERCLA

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Decision finds operator of a lead and zinc smelter not liable as an “arranger” under CERCLA for aerial deposition of heavy metals.

On July 27, a panel of the US Court of Appeals for the Ninth Circuit unanimously held in *Pakootas v. Teck Cominco Metals*[1] that aerial deposition of hazardous substances does not constitute a “disposal” giving rise to arranger liability under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] Relying heavily on precedent and textual analysis, the court concluded that the statutory term “disposal” does not include a scenario in which hazardous substances end up in soil or water after being initially discharged into the air. The court therefore dismissed claims by the State of Washington and Native American tribes alleging that Teck Cominco Metals, the operator of a lead and zinc smelter in Canada, was liable for heavy metal contamination in the Upper Columbia River basin in Washington caused by its aerial emissions.

Background

CERCLA imposes liability on several different categories of individuals or entities, one of which is “any person who. . .arranged for disposal. . .of hazardous substances.[3] So-called “arranger liability” is a nebulous concept that has been explored in many judicial opinions, but no previous opinion had addressed the precise question of whether aerial emissions constitute a disposal. “Disposal” under CERCLA is defined by cross-reference to the Resource Conservation and Recovery Act (RCRA), which defines the term 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 environment or be emitted into the air or discharged into any waters, including ground waters.[4]

Teck owns a lead and zinc smelting facility in British Columbia, Canada. As part of its regular operations, Teck discharged a heavy-metal-containing waste product referred to as “slag” from the facility into the Columbia River, and components of that slag traveled downstream to the United States. It also emitted heavy metals into the air, which were carried by air currents into the United States. The plaintiffs initially brought an action seeking to hold Teck liable for contamination caused by its discharge of slag, but later amended their complaint to add liability based on air emissions.

Teck moved to dismiss the air emissions portion of the complaint, arguing that CERCLA imposes no liability for the discharge of hazardous substances through air. The plaintiffs countered that their complaint properly alleged "deposition" of hazardous substances, thus meeting CERCLA's definition of a disposal. The district court agreed with the plaintiffs and denied Teck's motion, reasoning that a disposal giving rise to arranger liability occurred when the hazardous substances emitted into the air were deposited onto land or water in the Upper Columbia River Basin. Noting the novelty and importance of the issue, however, the district court certified it for interlocutory appeal to the Ninth Circuit.

The Ninth Circuit's Decision

In reversing the district court, the Ninth Circuit relied heavily on two prior Ninth Circuit opinions. The first such precedent, *Center for Community Action & Environmental Justice v. BNSF Railway*[5] held that particulate emissions into the air from diesel fuel did not constitute disposal of waste under RCRA. The *Center for Community Action* court reasoned that air emissions did not meet the regulatory definition of "disposal" in part because the definition requires substances to be introduced to a "land or water" through "discharge, deposit, injection, dumping, spilling, leaking, or placing." The court found it particularly significant that the definition did not include the word "emit." The court noted that the US Congress knew how to use "emit" to refer to air emissions, as it did later in the same definition when it noted that materials first disposed onto a land or water may later be "emitted into the air." Given that CERCLA incorporates RCRA's definition of "disposal," Teck had emphasized *Center for Community Action* in its briefing and had unsuccessfully moved for the district court to reconsider its opinion in light of that ruling. The *Pakootas* court found that *Center for Community Action*'s interpretation did not "absolutely foreclose" a different interpretation for CERCLA purposes. But it nonetheless found *Center for Community Action*'s analysis of RCRA's identical statutory language persuasive and did not identify any grounds for distinguishing the analysis under CERCLA.

The second precedent relied upon by the Ninth Circuit, *Carson Harbor Village, Ltd. v. Unocal Corp.*[6] did not involve air emissions—instead, it addressed the migration of substances in previously contaminated soil onto another property through natural processes. The *Carson Harbor* court held that such passive migration did not constitute a disposal under CERCLA. The *Pakootas* court considered that holding dispositive, finding that treating air emissions as a disposal would be inconsistent with *Carson Harbor*'s conclusion that the term "deposit" in the statutory definition is "akin to 'putting down' or 'placement'" and its statement that "nothing in the context of the statute or the term 'disposal' suggests that Congress meant to include chemical or geologic processes or passive migration." The *Pakootas* court also found that accepting aerial depositions as "disposals" would implicate the *Carson Harbor* court's concern with creating a definition of disposal so broad that it would erode defenses under CERCLA, such as the innocent landowner defense.

The Ninth Circuit in *Pakootas* also used dictionaries to analyze the plaintiffs' argument that aerial deposition of metals could properly be considered the "deposit" of hazardous substances. The court found that the plaintiffs' interpretation was "reasonable enough" under dictionary definitions of the term and even observed that it "might be persuaded to adopt it" if the court was "writing on a blank slate." But the court did not consider the dictionary analysis strong enough to depart from *Center for Community Action* and *Carson Harbor*. Likewise, the court found nothing in legislative history that justified a different interpretation. It therefore concluded that it was compelled by precedent to hold that air emissions do not give rise to arranger liability under CERCLA.

Implications

The Ninth Circuit's decision is a significant development in CERCLA law that changes how many practitioners and courts have seemingly understood arranger liability for aerial emissions. As the *Pakootas* district court observed, "it appears to have been treated as a given" in prior cases that CERCLA liability attaches when "hazardous substances from aerial emissions are disposed of into or on any land or water of a CERCLA facility." And, as the State of Washington further pointed out in its brief before the Ninth Circuit, CERCLA liability has already been imposed at a number of smelter sites where nearby land has been contaminated at least in part by aerial deposition.

Going forward, potentially responsible parties (PRPs) at CERCLA sites will be able to rely on *Pakootas* to contest their liability for response costs or natural resource damages related to contamination caused by aerial deposition. A potential challenge with such arguments is that, in the Upper Columbia River and many other sites, contamination deposited through air emissions may have commingled with contamination discharged through the dumping of slag or other means. It will be interesting to see how courts, including the *Pakootas* district court, deal with delineating the contamination resulting from aerial deposition and the contamination stemming from other disposals.

The *Pakootas* decision will also affect several other provisions of CERCLA in addition to arranger liability. As the Ninth Circuit observed, the term "disposal" appears throughout CERCLA, including in the definition of a "facility," the definition of a "release," and the definition of other categories of PRPs. The Ninth Circuit's ruling could therefore impact, for example, whether a site that has been contaminated by aerial emissions is considered to be a facility within the meaning of CERCLA.

Given the significant impacts of the *Pakootas* decision, it seems likely that the plaintiffs will petition the US Supreme Court for certiorari. If the Supreme Court ultimately decides to hear the case, it will represent the Court's first consideration of arranger liability under CERCLA since its 2009 landmark decision in *Burlington Northern & Santa Fe Ry. Co. v. United States*,[7] in which the Supreme Court both limited the scope of arranger liability and recognized the divisibility defense to CERCLA liability.

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[1] No. 15-35228 (9th Cir. 2016)

[2] 42 U.S.C. § 9607

[3] 42 U.S.C. § 9607(a)(3) (emphasis added)

[4] 42. U.S.C. § 6903

[5] 764 F.3d 1019 (9th Cir. 2014)

[6] 270 F.3d 863 (9th Cir. 2001)

[7] 556 U.S. 599 (2009)

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