# CERCLA/Superfund: Federal Appellate Court Addresses Whether Smelter Emissions Constitute the Disposal of Hazardous Substances?

## Arkansas Environmental, Energy, and Water Law Blog

**Walter Wright, Jr.**
wwright@mwlaw.com
(501) 688.8839

08/02/2016

The United States Court of Appeals ("Court") for the 9th Circuit issued a July 27th opinion addressing whether the owner-operator of a smelter could be held liable for cleanup costs and natural resource damages under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). See *Pakootas v. Teck Cominco Metals, LTD.* No. 15-35228.

The answer to this question depended on whether the smelter's air emissions constituted the arranging for the "disposal" of hazardous substances within the meaning of CERCLA.

Defendant Teck Cominco Metals, Ltd. ("Teck") is a smelter in British Columbia. It has been the subject of multiple damage claims and appellate opinions. This decision involves a claim by the Confederated Tribes of the Colville Reservation and Plaintiff-Intervenor State of Washington. (Collectively, "Plaintiffs") which alleged that Teck emitted hazardous substances into the air that were carried by air currents to the Upper Columbia River Site ("Site").

The Plaintiffs initial lawsuit focused on Teck's dumping of slag into the Columbia River. They subsequently sought to amend their Complaint to add CERCLA claims for cost recovery from natural resources damages resulting from Teck's air emissions.

The Plaintiffs Amended Complaint alleged the emission of CERCLA hazardous substances including but not limited to lead compounds, arsenic compounds, cadmium compounds and mercury compounds into the atmosphere through the stacks at the Defendant's smelter. These emissions allegedly traveled through the air into the United States resulting in the deposition of airborne hazardous substances into the Site. Such emissions (and hazardous substances contained therein) are alleged to have caused continuing impact to the surface water and groundwater, sediments, upland areas and biological resources which comprise the Site.

Teck moved to strike or dismiss these claims arguing that CERCLA imposes no liability when hazardous substances travel through the air and then "into or on any land or water" (as opposed to when hazardous substances are directly deposited into or on land or water and are then emitted into the air). The District Court rejected Teck's argument and denied the motion. However, the District certified what it deemed a novel question for interlocutory appeal. It noted that:

. . .in 30 years of CERCLA jurisprudence, no court impliedly or expressly addressed the issue of whether aerial emissions leading to the disposal of hazardous substances "into or on any land or water" are actionable under the statute.

The 9th Circuit Court of Appeals in addressing the issue noted that it was:

. . .Bound by a previous en banc case's interpretation of "deposit" – the only theory of "disposal" urged by Plaintiffs in the interlocutory appeal – as not including the gradual spread of contaminants without human intervention, we must answer no.

Therefore, the Court reversed and remanded the Federal District Court decision and held that Teck did not arrange for the "disposal" of hazardous substances within the meaning of CERCLA.

The Court noted that the District Court had discussed *Center for Community Action* & *Environmental Justice v. BNSF Railway Co. 764 F.3d 1019 (9th Cir. 2014).* That decision held that emitting diesel particulate matter into the air and allowing it to be "transported by wind and air currents onto the land and water" did not constitute "disposal" of waste within the meaning of the Resource Conservation Recovery Act ("RCRA"). Despite the holding in *Center for Community Action* the District Court had held that the actionable CERCLA "disposal" in the Teck case occurred when the hazardous substances emitted by Teck were emitted when the smelter entered the land or water at the UCR site, not when the substances were initially released into the air.

The 9th Circuit Court of Appeals decision also discussed the primary goals of CERCLA and reviewed the relevant definitions. It noted that CERCLA does not define "disposal" but cross references RCRA's language for the term. The opinion also discusses the CERCLA definitions "facility" and "release".

The Plaintiffs argued that they properly alleged the "deposit" of hazardous substances into land or water at the site. The term "deposit" is one of the verbs used to define "disposal" in the Resource Conservation Recovery Act.

The Court described the Plaintiffs' theory as "aerial deposition" and considered it a "reasonable" construction of Section 9607(a)(3) of CERCLA. However, it noted that prior decisions have held the term "deposit" (as used in CERCLA) "is akin to 'putting down', or placement" by someone and that "[n]othing" in the context of the statute or the term 'disposal' suggests that Congress meant to include chemical or geological processes or passive migration," i.e., the gradual spread of contaminants without human intervention citing *Carson Harbor* 270 F. 3d at 879 & n.7.

The Court acknowledged that the Plaintiffs presented an "arguably plausive construction of 'deposit' and 'disposal'". It further noted that neither *Carson Harbor* nor *Center for Community Action* compel rejection of the Plaintiffs' argument. Nevertheless, the Court held that a textual analysis of 42 U.S.C. § 6903(3) was persuasive. Therefore, it reversed the District Court's order denying Teck's Motion to Strike and/or Dismiss and Motion for Reconsideration, and Remand for the processing of Plaintiffs' remaining claims.

A copy of the opinion can be downloaded here.