

**FILLING HOLES IN THE AIR: WHY THE NINTH
CIRCUIT IN PAKOOTAS V. TECK COMINCO
SHOULD DECLINE TO OPEN UP A NEW HOLE IN
COVERAGE THAT WOULD CIRCUMVENT
CERCLA ARRANGER LIABILITY FOR SITES
CONTAMINATED BY AERIAL EMISSIONS**

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I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹ commonly but imprecisely referred to as “Superfund,”² for the dual purposes of promoting “timely cleanup of hazardous waste sites, and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.”³ Conversely, Congress enacted the Clean Air Act⁴ to, among other things, “protect and enhance the quality of the Nation’s air resources so as to promote the public health”⁵ and encourage “the development and operation of regional air pollution prevention and control programs.”⁶ Thus, CERCLA generally provides for the cleanup of land and water at sites that have already been contaminated to such a degree that they pose a threat to human health or the environment, while the Clean Air Act regulates ongoing emissions for the purpose of improving or maintaining ambient air quality. Because the two laws have very different aims and are implemented differently, judicial

1. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2012).

2. The term “Superfund” more precisely refers to the trust fund created by CERCLA that the Environmental Protection Agency can use to clean up contaminated sites and pursue contributions from responsible parties. *See* 42 U.S.C. § 9611 (2015).

3. *Burlington N. & Santa Fe Ry. Co. v. United States (Burlington Northern)*, 556 U.S. 599, 602 (2009) (internal quotations omitted).

4. Clean Air Act, 42 U.S.C. § 7401–7671q (2012).

5. *Id.* § 7401(b)(1).

6. *Id.* § 7401(b)(4).

decisions that do not properly account for these differences could open a hole in coverage where one did not previously exist. Specifically, recent court decisions narrowly interpreting the key CERCLA terms “arrange” and “disposal,”⁷ if construed too broadly, could render entities that aerially emit hazardous substances that contaminate a site immune from liability. This potential hole in coverage could result in the failure to clean up contaminated sites, threatening human health and the environment, and in taxpayers or other innocent parties paying for the cleanup—either result would frustrate congressional intent.

Two cases in the Ninth Circuit, one decided recently and the other pending on appeal, place the issue in sharp relief. In the first case, the Ninth Circuit Court of Appeals in *Center for Community Action & Environmental Justice v. BNSF Railway Co. (CCA EJ)*⁸ held that diesel particulate matter emitted from defendant’s rail yards did not result in the “disposal”⁹ of solid waste, and therefore was not subject to the Resource Conservation and Recovery Act (RCRA).¹⁰ While RCRA, “our nation’s primary law governing the disposal of solid and hazardous waste,”¹¹ and CERCLA, independently regulate existing and former facilities, respectively, the two are related. In imposing liability on “any person who . . . arranged for

7. See *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1020–21 (9th Cir. 2014) (holding that “emission of diesel particulate matter does not constitute ‘disposal’ of solid waste”); *Burlington Northern*, 556 U.S. at 600 (holding that “an entity may qualify as an arranger [only] when it takes intentional steps to dispose of a hazardous substance”); *United States v. Gen. Elec.Co.*, 670 F.3d 377, 384 (1st Cir. 2012) (stating that “*Burlington Northern* clarified that § 9607(a)(3) liability may only attach in cases where a person or entity has the distinctly apparent objective of disposing of its hazardous substances”); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (finding that the passive migration of contamination did not amount to disposal).

8. *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF Ry. Co. (CCA EJ)*, 764 F.3d 1019, 1030 (9th Cir. 2014).

9. The Resource Conservation and Recovery Act 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 environment or be emitted into the air or discharged into any waters, including ground waters.” 42 U.S.C. § 6903(3) (2012).

10. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2012).

11. *History of RCRA*, EPA, <http://www.epa.gov/rcra/history-resource-conservation-and-recovery-act-rcra> (last visited Feb. 15, 2016) (stating that RCRA is “our nation’s primary law governing the disposal of solid and hazardous waste”).

disposal . . . of hazardous substances . . . at any facility,”¹² CERCLA relies on RCRA’s definition of “disposal.”¹³ While the RCRA definition of disposal applies to both laws, it must be construed in the different contexts of each regulatory scheme. A broad reading of *CCA EJ* as holding that aerial emissions can never result in disposal of hazardous substances, without considering the differences between RCRA and CERCLA, could open a hole in coverage between the Clean Air Act and CERCLA. Under this interpretation, if a facility’s hazardous gas emissions do not violate the Clean Air Act, and yet contaminate a site, parties affected by the contamination would have no recourse in federal court against those responsible, and the federal government may not be able to replenish site cleanup costs taken from the Superfund.¹⁴

In the second case, *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas II)*,¹⁵ Teck Resources Limited (Teck), a mining and smelting company operating in the state of Washington and across the border in Canada, is currently advancing this theory in the Ninth Circuit. In *Pakootas II*, the United States District Court for the Eastern District of Washington recently ruled against Teck, narrowly interpreting *CCA EJ* in the CERCLA context. The district court held that hazardous substances emitted into the air from defendant’s smelter, which is not subject to the Clean Air Act because it is located in Canada, were “disposed” at a CERCLA “facility” not when they were discharged into the air, but when they were deposited on land and water on plaintiffs’ site in the Upper Columbia River in Washington.¹⁶ The district court, therefore, concluded that Teck was responsible for its pollution of the Upper Columbia River site as arrangers for disposal of hazardous substances

12. 42 U.S.C. § 9607(a)(3) (2012) (emphasis added to highlight CERCLA terms of art).

13. *Id.* § 9601(29) (2012) (“disposal . . . shall have the meaning provided in section 1004 of” RCRA).

14. *See generally*, 42 U.S.C. § 9607(a) (2012) (listing covered person from whom costs can be recovered).

15. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas II)*, No. CV-04-256-LRS, 2014 WL 7408399 (E.D. Wash. Dec. 31, 2014) (to distinguish the different issues at play, and to highlight similarities, this paper uses the short form *Pakootas II* when referring to the subject of this paper—Teck’s aerial emissions from the Trail Smelter, and the short form *Pakootas I* when referring to Teck’s discharge of slag and other hazardous waste directly into the Columbia River. *See infra* note 93.).

16. *Pakootas II*, No. CV-04-256-LRS, slip op. at 2.

under CERCLA §107(a)(3).¹⁷ At Teck's request, the district court certified its order for interlocutory appeal.¹⁸ Teck timely appealed the order to the Ninth Circuit Court of Appeals, arguing that there is no disposal, as the Court of Appeals interpreted that term in *CCA EJ*, and hence no CERCLA liability "when waste is initially emitted to the air, and then is transported by wind into land or water."¹⁹ If the Court of Appeals overrules the district court's order in *Pakootas II*, plaintiff tribes may have no recourse under federal law for the contamination of their land and water by defendant's long term aerial emissions of hazardous substances, and Teck may escape liability for contaminating the tribes' land.

Pakootas II is a case of first impression because in "over 30 years of CERCLA jurisprudence, no court has impliedly or expressly addressed the issue of whether aerial emissions"²⁰ that contaminate a site give rise to CERCLA arranger liability; rather, "it appears to have been treated as a given" that CERCLA liability attaches.²¹ Moreover, according to the EPA, there are hundreds of sites similar to Teck's, where a smelter's aerial emissions result in the release of hazardous substances that contaminate a site;²² smelters and other industrial facilities may escape federal liability for the contamination they cause if the Ninth Circuit reads a hole in coverage into the law.

In order to frame the legal controversy, Part II of this comment provides background information on the relevant provisions of CERCLA, RCRA, and the Clean Air Act, and presents a brief summary of the physical and legal history of the Teck Cominco smelter and the Upper Columbia River site. Part III of this comment analyzes the controversy by examining the statutes themselves, as well as recent

17. *Id.* (holding that Teck's "arranger liability" arose from the release "of a hazardous substance" not from its smelter but from wastes deposited on "the UCR Site located in the United States.").

18. *Id.* at 4.

19. Petition for Permission to Appeal at 14, *Joseph Pakootas, et al v. Teck Cominco Metals, Ltd.*, No. 1 (9th Cir. Jan. 9, 2015).

20. *Pakootas II*, No. CV-04-256-LRS, slip op. at 3.

21. *Id.*

22. Memorandum of the United States as Amicus Curiae as to Defendant's Motion for Reconsideration at 1, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399 (E.D. Wash. Dec. 31, 2014) (No. 2140).

developments in the case law regarding arranger liability. While the statutes and the case law establish liability on their own, Part III also looks to the legislative history and finds confirmation that Congress intended for entities such as Teck to face liability under CERCLA for their releases of hazardous substances.

This comment develops the argument that aerial emissions of hazardous substances that contaminate sites should be subject to CERCLA's remediation and liability provisions, in accordance with the language of the statutes, the overall statutory framework, the courts' interpretation of the statutes, and congressional intent. Part IV concludes that proper construction of CERCLA arranger liability fills this potential hole in the law, allowing injured parties or the government to remediate sites contaminated by the otherwise legal emission of air pollutants, and placing the costs where they belong, on the responsible party.

II. BACKGROUND

To frame the issues, this section first outlines the purpose, scope, and select provisions of the Clean Air Act, CERCLA, and, to a lesser degree, RCRA. Next, this background section provides an overview of the Teck Cominco smelter and the Upper Columbia River site, and briefly summarizes the long history of litigation between the parties, leading to the current controversy.

A. *Statutory Provisions*

To appreciate the controversy, it is important to understand the overall reach of the complicated statutes involved, as well as the relevant statutory terms and provisions that frame the specific issue of CERCLA arranger liability in the context of sites contaminated by aerial emissions. As with many federal environmental statutes, a plethora of terms of art are defined in the statutes and through common use; the key terms are described below. The statutes are discussed below in the order they were enacted—because CERCLA was enacted last, this progression gives context to the congressional intent underlying CERCLA, and informs the present controversy.

1. *The Clean Air Act*

On December 31, 1970, Congress enacted the modern Clean Air Act²³ as a major amendment to the Air Pollution Control Act of 1955.²⁴ Passage of the Clean Air Act was prompted by recognition that “the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare.”²⁵ The express purpose of the Clean Air Act was therefore to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”²⁶ Because “the Clean Air Act was enacted and amended for the purpose of protecting public health,”²⁷ its focus was naturally on limiting emissions to improve or maintain ambient air quality.

The U.S. Environmental Protection Agency (EPA) administers the Clean Air Act.²⁸ EPA describes the “key elements”²⁹ of the Clean Air Act as:

[R]educing outdoor, or ambient, concentrations of air pollutants that cause smog, haze, acid rain, and other problems;

[R]educing emissions of toxic air pollutants that are known to, or are suspected of, causing cancer or other serious health effects; and

[P]hasing out production and use of chemicals that destroy stratospheric ozone.³⁰

Thus, two of the major prongs of the Clean Air Act are aimed at protecting overall ambient air quality, which is measured with reference to “criteria air pollutants,”³¹ and

23. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

24. Pub. L. No. 84-159, 69 Stat. 322 (1955).

25. 42 U.S.C. § 7401(a)(2) (2012).

26. *Id.* § 7401(b)(1).

27. *Lloyd A. Fry Roofing Co. v. U.S. E.P.A.*, 415 F. Supp. 799, 805 (W.D. Mo. 1976), *aff’d sub nom.*, *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977).

28. *See* 42 U.S.C. § 7402 (2012).

29. EPA OFFICE OF AIR QUALITY PLANNING AND STANDARDS, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT, Publication No. EPA-456/K-07-001, 1, 4 (2007), <https://www.epa.gov/sites/production/files/2015-08/documents/peg.pdf>.

30. *Id.*

31. Criteria air pollutants are those pollutants “emissions of which, in [the EPA

reducing emissions of “hazardous air pollutants.”³² The Clean Air Act protects ambient air quality by directing the EPA to enumerate criteria air pollutants³³ and develop national ambient air quality standards³⁴ (NAAQS) that “define the levels of air quality that must be achieved to protect public health and welfare.”³⁵ Furthermore, the EPA must promulgate NAAQS at concentrations protective enough to ensure “an adequate margin of safety.”³⁶ Related provisions require states to develop “implementation plans,”³⁷ to achieve “attainment,”³⁸ or “prevent significant deterioration,”³⁹ of ambient air quality.

The Clean Air Act, as amended, also lists 190 hazardous air pollutants and directs the EPA to promulgate National Emission Standards for Hazardous Air Pollutants (NESHAPS) for these chemicals.⁴⁰ NESHAPS limit the concentration of pollutants emitted at the source to reduce hazardous “air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.”⁴¹ To enforce the standard, the EPA must first “promulgate technology-based emission standards for categories of sources that emit”⁴² hazardous air pollutants. Every eight years thereafter, EPA must “review, and revise as necessary . . . emission standards promulgated under this section.”⁴³

Administrator’s] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7408(a)(1)(A) (2012). Criteria air pollutants are the subject of *id.* §§ 7408–7409.

32. Hazardous air pollutants are those pollutants that “present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects” other than criteria air pollutants. *Id.* § 7412(b)(2). Hazardous air pollutants are enumerated and described in *id.* § 7412.

33. “There are currently six criteria air pollutants: carbon monoxide, lead, nitrogen oxides, ozone, particulate matter, and sulfur oxides.” *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 n.8 (D.C. Cir. 2014).

34. 42 U.S.C. § 7408.

35. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 469 (2004); *accord* 42 U.S.C. § 7409(b)(1) (2012).

36. 42 U.S.C. § 7409(b)(1).

37. *Id.* § 7424.

38. *Id.* §§ 7501–7515.

39. *Id.* §§ 7470–7492.

40. *Id.* § 7412.

41. *Sierra Club v. EPA*, 353 F.3d 976, 979 (D.C. Cir. 2004).

42. *Id.* at 980.

43. 42 U.S.C. § 7412(d)(6) (2012).

Both the NESHAPS and the NAAQS provisions require the EPA and the states, respectively, to regulate and control the emission of air pollutants based on health and welfare effects associated with the resultant concentration of pollutants in the ambient air. The risk calculations used to set the allowable emission limits are based on concentrations of pollutants in the localized⁴⁴ and regional ambient air,⁴⁵ respectively.

2. *The Resource Conservation and Recovery Act*

On October 21, 1976, Congress enacted the Resource Conservation and Recovery Act of 1976 as a major amendment to the Solid Waste Disposal Act.⁴⁶ Congress enacted RCRA to close a “loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes.”⁴⁷ As relevant here, “RCRA’s primary purpose is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, so as to minimize the present and future threat to human health and the environment.”⁴⁸ RCRA, which “is a sweeping statute intended to regulate solid waste from cradle to grave,”⁴⁹ “empowers EPA to regulate hazardous wastes . . . with the rigorous safeguards and waste management procedures of Subtitle C,”⁵⁰ and to regulate nonhazardous solid waste “much more loosely under Subtitle D.”⁵¹ RCRA is administered by the EPA, which notes that RCRA primarily covers “active and future facilities and does not address abandoned or historical sites.”⁵²

44. See, e.g., 42 U.S.C. § 7412(f)(1)(c) (instructing EPA to evaluate “the actual health effects with respect to persons living in the vicinity of sources”).

45. See 42 U.S.C. § 7409(b)(1) (instructing EPA to set “ambient air quality standards the attainment and maintenance of which . . . are requisite to protect the public health” (emphasis added)).

46. Pub. L. No. 89–272, 79 Stat. 997 (1965).

47. H.R. REP. No. 94-1491, 2d Sess. at 4 (1976).

48. Titan Wheel Corp. of Iowa v. EPA, 291 F. Supp. 2d 899, 903-04 (S.D. Iowa 2003), *aff’d sub nom.*, Titan Wheel Corp. of Iowa v. EPA, 113 F. App’x 734 (8th Cir. 2004).

49. C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 408 (1994).

50. City of Chicago v. Env’tl. Def. Fund, 511 U.S. 328, 331 (1994).

51. *Id.*

52. *History of the Resource Conservation and Recovery Act (RCRA)*, EPA, <http://www.epa.gov/rcra/history-resource-conservation-and-recovery-act-rcra> (last visited Feb. 15, 2016).

In addition to its overall purpose and reach, the following RCRA definitions are relevant to the issue at hand. RCRA defines “disposal” as:

[T]he 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.⁵³

RCRA defines a “hazardous waste” as a:

[S]olid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) [C]ause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) [P]ose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.⁵⁴

As noted above, a material can only be a RCRA hazardous waste if it is first a “solid waste,” which RCRA defines as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.”⁵⁵ Thus defined, RCRA contains provisions for active solid and hazardous waste generation, treatment, storage, and disposal facilities to ensure proper management of such waste.

3. *The Comprehensive Environmental Response, Compensation, and Liability Act*

Both RCRA and the Clean Air Act were already in place when, in the late 1970s, “public attention [focused] on a series of past improper hazardous waste disposal incidents such as

53. 42 U.S.C. § 6903(3) (2012).

54. *Id.* § 6903(5).

55. *Id.* § 6903(27) (emphasis added).

the tragedy of Love Canal, New York,”⁵⁶ which has been described as “one of the most appalling environmental tragedies in American history.”⁵⁷ Love Canal was “a municipal and industrial chemical dumpsite”⁵⁸ located in a residential community that was “originally meant to be a [suburban] dream community.”⁵⁹ Before nearby residents understood that contamination was present, children “returned from play with burns on their hands and faces,”⁶⁰ and there was an abnormally high rate of birth defects, miscarriages, and “high white-blood-cell counts, a possible precursor of leukemia.”⁶¹ At the time the nature and extent of the problem became apparent, the federal government did not have statutory authority or a funding mechanism to address Love Canal, and the parties that contaminated it were not liable under any then-existing federal laws.⁶²

In response to this and other previously-contaminated sites, Congress ultimately enacted CERCLA to fill a hole in coverage “in then existing law by creating the authority and liability for cleanup of abandoned facilities contaminated with hazardous substances.”⁶³ On December 11, 1980, Congress enacted CERCLA, as modified in 1986 by the Superfund Amendments and Reauthorization Act (“SARA”),⁶⁴ for two primary purposes: “to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.”⁶⁵ The Congressional intent behind CERCLA must be inferred both because the

56. Arnold & Porter LLP, *Arnold & Porter LLP Legislative History: P.L. 96-510*, Dec. 11, 1980 [hereinafter A&PLH], 1980 WL 356126.

57. Eckardt C. Beck, *The Love Canal Tragedy*, EPA JOURNAL, <http://www.epa.gov/aboutepa/love-canal-tragedy> (last visited Feb. 15, 2016).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (EPA Region 2 Administrator, in the year before CERCLA was enacted, noting that Love Canal was ultimately cleaned up by the taxpayer using “the first emergency funds ever to be approved for something other than a ‘natural’ disaster,” lamenting “the missing link of liability,” and asking, generally, “Who’s going to pick up the tab” for cleaning up legacy contaminated sites?).

63. J. B. Ruhl, *The Plight of the Passive Past Owner: Defining the Limits of Superfund Liability*, 45 SW. L.J. 1129, 1129 (1991).

64. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

65. *Burlington Northern*, 556 U.S. 599, 602 (2009).

statute does not contain an explicit statement of purpose and because of the lack of a legislative history such as committee reports or congressional debate. The lack of legislative history results from the fact that CERCLA was hastily drafted in the “waning days of the lame-duck session of the 96th Congress,”⁶⁶ before both the presidency and control of the Senate passed from the Democrats to the Republicans. As a result, “some of CERCLA’s provisions are vague and its legislative history sparse.”⁶⁷ This has led the Ninth Circuit Court of Appeals to note that “neither a logician nor a grammarian will find comfort in . . . [CERCLA’s] baffling language”⁶⁸ and the Supreme Court to wryly suggest that CERCLA is “not a model of legislative draftsmanship.”⁶⁹ CERCLA has been heavily litigated. Nevertheless, it is well established and oft repeated by the courts that Congress enacted CERCLA for two primary purposes: “prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.”⁷⁰

a. Authority to Act under CERCLA

Upon a finding that “that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened *release* of a *hazardous substance* from a *facility*,”⁷¹ CERCLA authorizes the President to take “action . . . necessary to protect public health and welfare and the environment.”⁷² The statutory terms release, hazardous substance, and facility, all of which courts have interpreted broadly, are critical to the authority to act and the imposition of liability under CERCLA.

CERCLA defines a “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . but excludes . . . emissions from the engine

66. *Exxon Corp. v. Hunt (Exxon Corp.)*, 475 U.S. 355, 380 n.5 (1986).

67. *CPC Int’l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 571 (W.D. Mich. 1991).

68. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 883 (9th Cir. 2001).

69. *Exxon Corp.*, 475 U.S. at 363.

70. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (quoting *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990)).

71. 42 U.S.C. § 9606(a) (2012) (emphasis added, highlighting some key CERCLA terms of art).

72. *Id.*

exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine.”⁷³ As developed below, this exclusion may be significant for stationary sources of aerial emissions such as Teck’s smelter.

CERCLA defined a “hazardous substance” broadly, by reference to substances designated under then-existing environmental laws including the Clean Water Act,⁷⁴ RCRA, the Clean Air Act, and the Toxic Substances Control Act (TSCA),⁷⁵ plus additional provisions that authorize EPA to designate “any element, compound, mixture, solution, or substance”⁷⁶ as hazardous. While the definition of hazardous substances is wide-ranging, CERCLA specifically excludes “petroleum, including crude oil . . . natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”⁷⁷

CERCLA also defines a “facility” quite broadly, to include “*any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located*”; but does not include any consumer product in consumer use or any vessel.”⁷⁸

The President is authorized to perform “abatement actions”⁷⁹ to control a release of a hazardous substance at a facility in accordance with the National Contingency Plan, which sets forth “procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants.”⁸⁰ Abatement actions are defined quite broadly as securing “such relief as may be necessary to abate such danger or threat . . . [and] issuing such orders as may be necessary to protect public health and welfare and the environment.”⁸¹ The EPA may recover all costs of the “removal or remedial action”⁸² and “natural resources”⁸³ damages, from

73. 42 U.S.C. § 9601(22).

74. Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012).

75. Toxic Substances Control Act, 15 U.S.C. §§ 2601–2697 (2012).

76. 42 U.S.C. § 9601(14).

77. *Id.* (“the petroleum exclusion”).

78. *Id.* § 9601(9) (emphasis added).

79. *Id.* § 9606.

80. *Id.* § 9605(a).

81. *Id.* § 9606(a).

82. *Id.* § 9607(a)(4)(A).

potentially responsible persons (PRPs), the customary term of art for those potentially liable under CERCLA.

b. Arranger Liability Under CERCLA

Courts have held that CERCLA “is a strict liability statute”⁸⁴ that “defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs.”⁸⁵ CERCLA imposes liability for response actions and natural resource damages on four sets of “persons.”⁸⁶ current and former facility owners, operators, and hazardous substance transporters, and “arrangers.”⁸⁷ Because the class of owners, operators, and transporters is typically relatively straightforward, the interpretation of who may be an arranger has broad ramifications that define the ambit of CERCLA liability.

CERCLA defines an arranger as “*any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility.*”⁸⁸ CERCLA does not define “otherwise arranged for,” but the plain meaning of the phrase, without textual limitation, suggests broad application. In some cases, whether a party arranged for disposal is unambiguous, as when a generator of hazardous substances pays a treatment facility to receive and manage the hazardous waste; however, in many cases it is not so clear whether a party is an “arranger” under CERCLA. Arranger liability is a high stakes game because those liable under Section 107 of CERCLA face potential “joint and several liability”⁸⁹ for investigations and response actions that frequently amount to millions of dollars in expenses.

83. *Id.* § 9607(a)(4)(C).

84. *United States v. Atl. Research Corp.*, 551 U.S. 128, 136 (2007).

85. *Id.*

86. CERCLA defines “persons” broadly, as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” 42 U.S.C. § 9601(21).

87. 42 U.S.C. § 9607(a).

88. *Id.* § 9607(a)(3) (emphasis added).

89. *Atl. Research Corp.*, 551 U.S. at 140.

B. A Smelter, a River, Two Tribes, and a Controversy

The current controversy surrounding arranger liability for sites contaminated by aerial emissions of hazardous substances is well framed in a case currently pending before the Ninth Circuit Court of Appeals, which could have wide-ranging repercussions. The case involves a Canadian smelter near the border with the State of Washington, the Columbia River, and two tribes located in Washington.

1. Physical and Sociological Setting

Teck Cominco Metals, Ltd., a Canadian corporation, owns and operates a smelter in Trail, British Columbia (the “Trail Smelter”), which is located “approximately 10 miles upstream from the U.S.-Canada border.”⁹⁰ The Trail Smelter operations began over a hundred years ago, and between “1906 and 1995, Teck generated and disposed of hazardous materials, in both liquid and solid form, into the Columbia River.”⁹¹ These wastes, “including granulated slag, liquid effluent, and other discharges,”⁹² contained “arsenic, cadmium, copper, mercury, lead, and zinc,”⁹³ and other hazardous materials. Teck historically made no efforts to downplay the prominence of its smelter’s smokestacks in the town of Trail, as evidenced by the name and logo of the company-sponsored, two-time World Ice Hockey Championship “Trail Smoke Eaters” hockey club.⁹⁴

The hazardous substances Teck released directly into the Columbia River from the Trail Smelter crossed the U.S. border and impacted “approximately 150 river miles of the Columbia River, extending from the U.S.-Canadian border to the Grand

90. EPA, WORK PLAN FOR THE REMEDIAL INVESTIGATION AND FEASIBILITY STUDY, VOLUME I OF II 4-2 (2008), <http://yosemite.epa.gov/r10/cleanup.nsf/sites/upperc>.

91. *Id.* at 1-1.

92. *Id.*

93. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas I)*, 452 F.3d 1066, 1069 (9th Cir. 2006).

94. The former Trail Smoke Eater’s logo prominently featured the twin smokestacks of the Trail Smelter, rising above the surrounding (company) town of Trail. For information surrounding the discovery of valuable minerals near Trail, the development of the smelter and town, and information about the “Smokies” hockey team, see the Trail Historical Society’s websites: <http://www.trailhistory.com/> and <http://www.historicsmokeeaters.ca/> (last visited April 25, 2015).

Coulee Dam”⁹⁵ (the “UCR Site”). The Grand Coulee Dam created “Lake Roosevelt, a large reservoir extending [up to 133 miles north of the dam] and bordered by over 600 miles of shoreline, approximately 312 miles of which are part of the Lake Roosevelt National Recreation Area.”⁹⁶ The remainder of the Lake Roosevelt shoreline is “managed by the Confederated Tribes of the Colville Reservation . . . and the Spokane Tribe of Indians”⁹⁷ (collectively, the “Tribes,” and, along with the State of Washington, “Plaintiffs”). The general public uses Lake Roosevelt for recreational activities including “boating, fishing, swimming, wading, camping, canoeing, and hunting,”⁹⁸ and the River also “provides a subsistence fishery for Native American populations.”⁹⁹ Named plaintiff Joe Pakootas is the elected Chairman of the Colville Tribe.¹⁰⁰

In 1999, the Tribes petitioned EPA to evaluate the UCR Site.¹⁰¹ EPA and its environmental consultants conducted several rounds of site investigations, including extensive records review, sediment sampling, and fish tissue sampling.¹⁰² In 2003, EPA’s consultant completed a CERCLA Site Inspection report summarizing the investigations, and EPA determined that “the Upper Columbia River site was eligible for inclusion on CERCLA’s National Priorities List” (NPL).¹⁰³ The NPL, commonly referred to as the “Superfund List,” designates those sites that EPA determines are “top priorities for cleanup and are eligible for CERCLA-financed remedial

95. EPA, *supra* note 90, at 1-2.

96. *Id.*

97. *Id.*

98. *Id.* at 1-3.

99. *Id.*

100. Joe Pakootas is currently also a candidate for the U.S. House of Representatives, who touts his “efforts to clean up the Columbia River which has suffered from heavy metal pollutants from a Canadian mining operation. The case is a landmark effort to protect international boundary and downstream waters and habitat.” PAKOOTAS FOR CONGRESS, <http://www.pakootasforcongress.com> (last visited April 25, 2015).

101. *Upper Columbia River Site Study*, EPA, <https://yosemite.epa.gov/r10/cleanup.nsf/sites/upperc> (last visited June 7, 2016).

102. *See generally* EPA, REGION 10: THE PACIFIC NORTHWEST, *Technical Documents*, <http://yosemite.epa.gov/R10/Cleanup.NSF/UCR/Technical+Documents> (last visited June 7, 2016) (containing links to several technical investigation reports and related documents).

103. *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d at 1216 (9th Cir. 2011).

action.”¹⁰⁴ Courts would later confirm that, “waste from the Trail Smelter [that came to rest] in the UCR Site adversely affects the surface water, ground water, sediments, and biological resources of the Upper Columbia River and Lake Roosevelt.”¹⁰⁵

2. *Pakootas I*

On July 12, 2004, the Tribes filed a “Complaint for Injunctive and Declaratory Relief and for Civil Penalties” in the United States District Court for the Eastern District of Washington’s Spokane Court, which the State of Washington later joined.¹⁰⁶ The Plaintiffs alleged that: (1) Teck “Released Slag Containing Hazardous Substances into the Columbia River;”¹⁰⁷ (2) the slag was “toxic to humans and to aquatic life;”¹⁰⁸ (3) Plaintiffs suffered damages; (4) the EPA had issued a Unilateral Administrative Order (UAO) under CERCLA compelling Teck to conduct a detailed “Remedial Investigation/Feasibility Study”¹⁰⁹ to investigate the environmental impacts and potential remedial measures; (5) Teck had not complied with the UAO; and (6) EPA “failed to enforce the UAO.”¹¹⁰ Plaintiffs sought declaratory and injunctive relief, civil penalties, and attorneys’ fees. On November 8, 2004, the circuit court denied Teck’s motion to dismiss.¹¹¹ While the case was on appeal, EPA and Teck settled.¹¹² On July 3, 2006, in *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas I)*,¹¹³ the Ninth Circuit Court of Appeals affirmed the circuit court’s denial of Teck’s motion for dismissal, holding that:

104. *Id.*

105. *Pakootas I*, 452 F.3d 1066, 1070 (9th Cir. 2006) (internal quotations omitted).

106. Complaint for Injunctive and Declaratory Relief and for Civil Penalties at 1, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM (E.D. Wash. July 12, 2004), 2004 WL 2646770.

107. *Id.* at 3.

108. *Id.* at 4.

109. *Id.* at 5.

110. *Id.* at 6.

111. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at *17 (E.D. Wash. Nov. 8, 2004) *aff’d*, 452 F.3d 1066 (9th Cir. 2006).

112. *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1217 (9th Cir. 2011).

113. *Pakootas I*, 452 F.3d 1066, 1082 (9th Cir. 2006).

- 1) The UCR Site is a CERCLA “facility” because the slag has “come to be located’ there”;¹¹⁴
- 2) The “leaching of hazardous substances from the slag at the Site is a CERCLA release,”¹¹⁵ and that release is “domestic”;¹¹⁶
- 3) Teck, despite being a Canadian corporation, qualified as “any person”¹¹⁷ within the meaning of CERCLA; and
- 4) “Teck is potentially liable . . . [as an arranger] for disposal of its slag.”¹¹⁸

Thus, *Pakootas I* settled several fundamental issues of Teck’s CERCLA liability for the release resulting from the slag that came to rest in the river at the UCR Site, including: the UCR Site was a CERCLA facility; Teck was a CERCLA person; the court had personal subject matter jurisdiction over the Canadian company; and Teck “could be liable as [an] arranger under CERCLA even though it had disposed of slag itself,”¹¹⁹ originally from the Trail Smelter in Canada. *Pakootas I* also held, in a “case of first impression,” that the CERCLA release occurred at the UCR Site when hazardous substances leached from the slag in the river into the site sediments and waters.¹²⁰ In other words, the CERCLA release occurred from the material deposited in the river, not from the original release of slag from the Trail Smelter into the Columbia River, more than 10 miles upstream from the UCR Site and outside of U.S. jurisdiction.¹²¹ The Supreme Court denied Teck’s Petition for writ of certiorari.¹²² The litigation, though, had just begun.¹²³

114. *Id.* at 1074.

115. *Id.* at 1075.

116. *Id.*

117. *Id.* at 1076.

118. *Id.* at 1082.

119. *Id.* at 1066 (internal quotations omitted).

120. Richard Du Bey et al., *CERCLA and Transboundary Contamination in the Columbia River*, 21 NAT. RESOURCES & ENV’T 8, 8 (2006).

121. *Pakootas I*, 452 F.3d 1066, 1074 (9th Cir. 2006) (holding that the “Upper Columbia River Site is” the CERCLA “facility”).

122. *Teck Cominco Metals, Ltd. v. Pakootas*, 552 U.S. 1095 (2008).

123. As of April 25, 2015, there have been 14 additional court decisions or orders, and the *Pakootas* docket now contains more than 2000 items. Litigation remains ongoing. Washington, U.S. District Court (Spokane), Civil Docket for Case #: 2:04-cv-00256-LRS.

On December 14, 2012, the district court ultimately held Teck liable as an arranger under CERCLA for releases at the UCR Site resulting from Teck's disposal of slag and other material into the river.¹²⁴ Relevant findings included: "Teck knew its disposal of hazardous waste into the UCR was likely to cause harm;"¹²⁵ there "have been releases and threatened releases of hazardous substances into the environment from slag . . . [that is] located at the UCR Site;"¹²⁶ and, "when a waste (rather than a useful product or potentially useful product) is discarded, intent to dispose need not be proved."¹²⁷ Additionally, the district court concluded that disposal occurred not when the slag was released from Teck's Canadian smelter into the river (which would not give rise to CERCLA liability due to extra-territoriality), rather, disposal occurred when "at least some portion of [Teck's] slag and effluent came to a point of repose at the UCR Site."¹²⁸ In other words, the court found Teck liable for their waste material after it had been transported by natural processes to the water bodies at the UCR Site, where it released contaminants into the water and sediment.

3. *Pakootas II*

On March 17, 2014, Plaintiffs amended their Complaint alleging that the UCR site was impacted not only by slag transported via the river, but also that:

From approximately 1906 to the present time, Teck Cominco emitted certain hazardous substances, including, but not limited to, lead compounds, arsenic compounds, cadmium compounds and mercury compounds 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

124. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2012 WL 6546088, at *1 (E.D. Wash. Dec. 14, 2012).

125. *Id.* at *12.

126. *Id.* at *16 (internal quotations omitted).

127. *Id.* at *17 (citing *Burlington Northern*, 556 U.S. 599, 609-10 (2009)).

128. *Id.* at *18.

substances into the Upper Columbia River Site.¹²⁹

Plaintiffs argued that Teck’s “discharges into the atmosphere . . . travelled through the air and resulted in disposal into the [UCR] Site of . . . hazardous substances,”¹³⁰ which then were released into the environment at the UCR Site. Plaintiffs requested relief under CERCLA for reimbursement of investigation and clean-up costs, as well as natural resource damages.¹³¹

On April 3, 2014, Teck filed a motion to strike or dismiss the claims related to the aerial emissions.¹³² Teck argued that “aerial emissions do not constitute *disposal* under CERCLA,”¹³³ “Teck did not *arrange* to dispose of its aerial emissions,” and therefore, Teck was not liable under CERCLA for the uncontested release of hazardous substances at the UCR Site traceable to Teck’s aerial emissions at the Trail Smelter.¹³⁴ On July 29, 2014, the district court denied Teck’s motion.¹³⁵ On Sept 24, 2014, Teck filed a Motion for Reconsideration in light of the Court of Appeals’ holding in *CCA EJ* that diesel particulate matter emitted into the air from a rail yard did not result in the “disposal” of solid waste under RCRA.¹³⁶ Teck argued that its aerial emissions similarly did not constitute disposal, and therefore, Teck was not liable under CERCLA.¹³⁷ On November 19, 2014, the United States filed an *amicus curia*, arguing that Teck’s Motion was “based on an erroneous, overbroad reading of [*CCA EJ*] . . . and ignores

129. The Confederated Tribes of the Colville Reservation’s Fourth Amended Complaint at 4, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399 (E.D. Wash. Dec. 31, 2014) (No. 2099).

130. *Id.* at 8.

131. *Id.* at 4.

132. Teck Metals Ltd.’s Motion to Strike, or in the Alternative Dismiss the New Allegations in Plaintiffs’ Fourth Amended Complaints Pursuant to Federal Rules of Civil Procedure 12(f) and 12(b)(6) at 4, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399 (E.D. Wash. Dec. 31, 2014) (No. 2104).

133. *Id.* at 2 (internal quotations omitted and emphasis added).

134. *Id.* at 12 (emphasis added).

135. Order Denying Motion to Strike or Dismiss, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at *3 (E.D. Wash. Dec. 31, 2014) (No. 2115).

136. Teck Metals Ltd.’s Motion for Reconsideration of Order Denying Motion to Strike or Dismiss (Oral Argument Requested), *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at *3 (E.D. Wash. Dec. 31, 2014) (No. 2118).

137. *Id.* at *1.

the unique circumstances of [*CCA EJ*] – a citizen suit under . . . [RCRA] that was primarily aimed at controlling air emissions.”¹³⁸ On December 31, 2014, the district court denied Teck’s motion and certified its order for appeal.¹³⁹ Teck timely appealed the order to the Ninth Circuit Court of Appeals,¹⁴⁰ which recently agreed to hear the case and granted Teck’s Motion to Appeal.¹⁴¹

4. *The Nature and Breadth of the Controversy*

According to the amicus brief filed by the United States in *Pakootas II*, there are hundreds of sites similar to Teck’s, where a smelter’s aerial emissions result in the release of hazardous substances that contaminate a site.¹⁴² Presumably, there may be many more non-smelter industrial facilities that discharge hazardous substances into the air, and threaten public health, and may warrant CERCLA response action.¹⁴³ In certifying for interlocutory appeal its order finding Teck liable, the district court noted that in “over 30 years of CERCLA jurisprudence, no court has impliedly or expressly addressed the issue of whether aerial emissions leading to disposal of hazardous substances . . . are actionable under CERCLA.”¹⁴⁴ The court opined that, historically, “it appears to have been treated as a given.”¹⁴⁵ Because, as discussed below, the current Supreme Court may be receptive to arguments for scaling back the reach of CERCLA, the outcome of this case could determine whether Congress’ dual purpose in enacting CERCLA could be frustrated for sites such as these, by hampering the cleanup of contaminated sites and failing to hold the polluters accountable.

138. Memorandum of the United States as Amicus Curiae, *supra* note 22, at 1.

139. *Pakootas II*, No. CV-04-256-LRS, 2014 WL 7408399, slip op. at 4 (E.D. Wash. Dec. 31, 2014).

140. Petition for Permission to Appeal at 14, Joseph Pakootas, et al v. Teck Cominco Metals, Ltd., No. 1 (9th Cir. Jan. 9, 2015).

141. Order, Joseph Pakootas, et al v. Teck Cominco Metals, Ltd., No. 5 (9th Cir. Mar. 25, 2015).

142. Memorandum of the United States as Amicus Curiae, *supra* note 22, at 1.

143. *Id.*

144. *Pakootas II*, 2014 WL 7408399, slip op. at 3.

145. *Id.*

III. ANALYSIS

As relevant here, a *prima facie* case for recovery of expenses or natural resources damages under Section 107 of CERCLA¹⁴⁶ requires a plaintiff to establish that: (1) the waste disposal site is a “facility” as defined in CERCLA,¹⁴⁷ (2) “a release or threatened release of any hazardous substance from the facility has occurred,”¹⁴⁸ (3) the release or threatened release caused the plaintiff to either “incur response costs that are consistent with the national contingency plan,”¹⁴⁹ or suffer natural resources damages,¹⁵⁰ and (4) the “defendant is within one of four classes of persons subject to” CERCLA’s liability provisions.¹⁵¹

Often the first element is not disputed, because a “facility” is broadly defined to include sites controlled by defendants or their contractors: “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.”¹⁵² It is less clear, however, whether a contaminated site that the defendant did not own or operate and at which defendant did not contract for disposal is a CERCLA facility. Whether such a site is a CERCLA facility is a fact-specific inquiry, and similar cases have been decided differently.¹⁵³ Ultimately, most courts have historically set a low bar for finding that a site is a facility. The Ninth Circuit

146. Teck Metals Ltd.’s Motion for Reconsideration of Order Denying Motion to Strike or Dismiss (Oral Argument Requested), *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at *3 (E.D. Wash. Dec. 31, 2014) (No. 2118).

147. *3550 Stevens Creek Associates v. Barclays Bank of California (Stevens Creek)*, 915 F.2d 1355, 1358 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2014 (1991).

148. *Id.* (citing 42 U.S.C. § 9607(a)(4)) (internal quotations omitted).

149. *Id.* (citing 42 U.S.C. §§ 9607(a)(4), 9607(a)(4)(B)) (internal quotations omitted).

150. *See* 42 U.S.C. § 9607(a)(4)(C).

151. *Stevens Creek*, 915 F.2d at 1358.

152. 42 U.S.C. § 9601(3).

153. *See, e.g.*, *Kane v. United States*, 15 F.3d 87, 89 (8th Cir. 1994) (holding that a building with asbestos materials installed inside is not a CERCLA facility because “Congress intended to provide recovery only for releases or threatened releases from inactive and abandoned waste sites, not releases from useful consumer products in the structure of buildings” (internal quotations omitted)); *but see, Stevens Creek*, 915 F.2d 1355, 1360 (9th Cir. 1990) (a similar asbestos-in-a-building case where liability did lie and the court stated that “the 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 quotations omitted).

Court of Appeals set a particularly undemanding standard when it held 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.”¹⁵⁴ The UCR Site certainly passes this low bar, as would other similar sites where hazardous aerial emissions settle.

While evaluating the slag and other material that flowed down the Columbia River and eventually contaminated the UCR Site, the appeals court in *Pakootas I* found that “the passive migration of hazardous substances into the environment *from where hazardous substances have come to be located* is a release under CERCLA.”¹⁵⁵ In other words, the CERCLA facility was the site where the materials that caused the release came to rest, not necessarily the place from which the materials were originally discharged (the Trail Smelter). This logic applies no less to material transported through the air (the aerial emissions in *Pakootas II*) than material transported through the water (the slag and other discharges in *Pakootas I*).

The second element, a release or threatened release of any hazardous substance from the facility, is a factual finding that a plaintiff must establish. This is typically accomplished by conducting a Preliminary Assessment and Site Inspection, and, if warranted, a Remedial Investigation.¹⁵⁶ These CERCLA investigations most often involve reviewing historical records, investigating sites, including collecting environmental samples and submitting them to laboratories for analysis, and modeling of the fate and transport of the hazardous substances.¹⁵⁷ The *Pakootas I* court specifically found that the CERCLA release from waterborne materials occurred at the UCR Site, not at the smelter where the materials were first discharged.¹⁵⁸ The

154. *Stevens Creek*, 915 F.2d at 1360.

155. *Pakootas I*, 452 F.3d 1066, 1075 (9th Cir. 2006) (emphasis added).

156. See Superfund Cleanup Process, EPA, <https://www.epa.gov/superfund/superfund-cleanup-process> (last visited Apr. 29, 2016).

157. *Id.*

158. *Pakootas I*, 452 F.3d at 1075, *cert. denied*, 552 U.S. 1095 (2008) (affirming the lower court’s Order that described the CERCLA facility as the “[UCR] Site, not the Trail Smelter in Canada or the Columbia River in Canada” where the hazardous substances were first released, and concluding that “[w]e hold that the leaching of hazardous substances from the slag at the [UCR] Site is a CERCLA release. That release—a release into the United States from a facility in the United States—is entirely domestic,” and therefore subject to CERCLA.).

exact same reasoning should apply in *Pakootas II* to the putative CERCLA release at the UCR Site resulting from the deposition of airborne materials. Indeed, the parties do not dispute that there was a release of hazardous substances at the UCR Site traceable to Teck's aerial emissions at the Trail Smelter.¹⁵⁹

The third element, necessary response costs (and possibly natural resources damages), is also primarily a factual inquiry. Generally, a plaintiff must show that remediation costs were "necessary,"¹⁶⁰ a standard that "requires that an actual and real threat to human health or the environment exist before initiating a response action."¹⁶¹ This element was not in dispute in *Pakootas I*, and is not in dispute in *Pakootas II*.¹⁶²

Therefore, as is often the case for releases from industrial facilities such as the Teck Smelter, the first three elements of CERCLA liability are not disputed. Here, the UCR Site is a CERCLA "facility," and, at this stage of litigation, the parties neither dispute whether there was a release nor whether a response is warranted. Therefore, because Teck does not own or operate the contaminated UCR Site, the dispositive issue for CERCLA liability is the fourth element of the *prima facie* case: whether the defendant *arranged for disposal* of hazardous substances. The Ninth Circuit's ruling on Teck's *arranger* defense could have enormous consequences.¹⁶³

A. *In Purposefully Discharging Hazardous Substances from the Trail Smelter Stacks, Teck Arranged for Disposal Under CERCLA*

Historically, courts widely held that "a liberal judicial interpretation of the term [arranger] is required in order that

159. See generally *Pakootas I*, 452 F.3d at 1069 (discussing whether a CERCLA "disposal" occurred, but silent on whether there was a release and whether the release was traceable to Teck's emissions, because these issues were not raised by the parties).

160. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001).

161. *Id.*

162. See generally *Pakootas I*, 452 F.3d 1066, and *Pakootas II*, No. CV-04-256-LRS, 2014 WL 7408399 (E.D. Wash. Dec. 31, 2014) (discussing several legal questions, but not the necessity of response actions nor the existence of natural resource damages, because these issues were not raised by the parties).

163. See text accompanying note 142, *supra*.

we achieve CERCLA's 'overwhelmingly remedial' statutory scheme."¹⁶⁴ The oft-cited opinion by the Eighth Circuit Court of Appeals in *United States v. Aceto Agricultural Chemicals Corp.* is typical: "Congress used broad language in providing for liability for persons who 'by contract, agreement, or otherwise arranged for' the disposal of hazardous substances."¹⁶⁵ The *Aceto* court declined to interpret arranger liability "in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise."¹⁶⁶ The First Circuit Court of Appeals similarly held that "arranger liability was intended to deter and, if necessary, to sanction parties seeking to evade liability by contracting away responsibility."¹⁶⁷ Traditionally, courts overwhelmingly employed a liberal interpretation of arranger liability even though CERCLA liability is "strict, joint, and several,"¹⁶⁸ which might otherwise engender restraint in imposing liability.

Against this backdrop of liberal interpretation of "arranger" in the courts of appeals, the Supreme Court considered the reach of arranger liability "for the first time"¹⁶⁹ in *Burlington Northern & Santa Fe Railway Co. v. United States*,¹⁷⁰ on appeal from the Ninth Circuit. *Burlington Northern* involved Brown & Bryant, Inc. ("B&B"), an agricultural chemical distributor that purchased pesticides and other chemicals from Shell Oil Company and others.¹⁷¹ B&B began its operations in 1960 and eventually expanded its operations onto Burlington Northern's adjacent property.¹⁷² B&B mixed, stored, and transported pesticides and other chemicals that were released

164. Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); accord *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H. 1985).

165. *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (emphasis in original).

166. *Id.*

167. *United States v. Gen. Elec. Co.*, 670 F.3d 377, 382 (1st Cir. 2012) (internal quotations omitted).

168. *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989).

169. Peter J. McGrath Jr., *Burlington Northern & Santa Fe Railway Co., et al. v. United States: Defining Environmental Law or Changing It?*, 3 CHARLOTTE L. REV. 85, 89 (2011).

170. *Burlington Northern*, 556 U.S. 599, 599 (2009).

171. *Id.*

172. *Id.*

over time into the environment and contaminated the groundwater aquifer beneath the sites with hazardous substances.¹⁷³ By 1989, B&B became insolvent, and the site was added to the NPL.¹⁷⁴ The State of California and the EPA (the “Governments”) exercised their authority under CERCLA and analogous State law to undertake cleanup efforts at the site.¹⁷⁵ By the time of trial, the Governments had already spent more than \$8 million and Burlington Northern had incurred more than \$3 million performing remediation.¹⁷⁶

Burlington Northern brought suit for recovery under Section 107 of CERCLA against B&B, and the Governments brought suit both against Burlington Northern as an owner and against Shell as an arranger for disposal.¹⁷⁷ The Governments’ suits were consolidated.¹⁷⁸ At the conclusion of a four-year trial, the district court held¹⁷⁹ that both Burlington Northern and Shell were liable “under CERCLA—the Railroads because they were owners . . . and Shell because it had arranged for the disposal of hazardous substances through its sale and delivery of¹⁸⁰ pesticides and chemicals that B&B released during their routine commercial operations. On appeal, the Ninth Circuit Court of Appeals first recognized that Shell was not “a traditional arranger”¹⁸¹ who contracted for disposal. However, the court held that Shell was liable “under a broader category of arranger,”¹⁸² because Shell’s disposal of hazardous wastes was “a foreseeable byproduct of”¹⁸³ its activities. The court stated further that “arranger liability was not precluded by the fact that the purpose of Shell’s action had been to transport a

173. *Id.*

174. *Id.* at 605.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. In addition to the arranger liability issue, *Burlington Northern* is also frequently cited for its other landmark holding that liberalized the ability of courts, which previously primarily imposed joint & several liability, to apportion costs under CERCLA. The apportionment issue is not analyzed in this paper.

180. *Burlington Northern*, 556 U.S. 605 (internal quotations omitted).

181. *Id.* at 606.

182. *Id.*

183. *Id.* at 606–07.

useful and previously unused product to B & B for sale.”¹⁸⁴ The Court of Appeals stated that broadly construed arranger liability “accords with the statutory language and structure as a whole,” and specifically held that the CERCLA definition of disposal includes unintentional activities and “need not be purposeful.”¹⁸⁵

The Supreme Court granted certiorari, and went on to issue its seminal *Burlington Northern* decision on May 4, 2009.¹⁸⁶ The Court began by agreeing with the Court of Appeals that analysis of arranger liability “is fact intensive and case specific,”¹⁸⁷ but signaled a reluctance to interpret the statute broadly when it stated that, “such liability may not extend beyond the limits of the statute itself.”¹⁸⁸ The Court therefore held that “mere knowledge that spills and leaks continued to occur”¹⁸⁹ was not enough to establish liability. Finding no statutory definition for the CERCLA term “arrange,” the Court looked to the ordinary (dictionary) meaning, and concluded that arrange “implies action directed to a specific purpose.”¹⁹⁰ The Court acknowledged that “in some instances an entity’s knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes,”¹⁹¹ but went on to hold that “knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.”¹⁹² The Court thus absolved Shell of arranger liability.¹⁹³

184. *Id.* at 607 (internal quotations and brackets omitted).

185. *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 949 (9th Cir. 2008), *rev’d*, 556 U.S. 599 (2009) (internal quotes and brackets omitted) (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001)).

186. *Burlington Northern*, 556 U.S. 599 (2009).

187. *Id.* at 610.

188. *Id.*

189. *Id.* at 613.

190. *Id.* at 611 (finding a requirement of intent to dispose in the definition of arrange: “to make preparations for: plan; to bring about an agreement or understanding concerning” (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 64 (10th ed. 1993))).

191. *Id.* at 612.

192. *Id.*

193. *Burlington Northern*, 556 U.S. 599, 619 (2009).

Justice Ginsberg dissented, explaining that Shell’s activities “necessarily and immediately resulted in the leakage of hazardous substances.”¹⁹⁴ The dissent agreed with the Court of Appeals that relieving “Shell of any obligation to pay for the cleanup . . . is surely at odds with CERCLA’s objective—to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public.”¹⁹⁵

The *Burlington Northern* Court’s interpretation of the statutory language threatens to change the landscape for CERCLA arranger liability if it is understood to universally require a showing of “intent . . . to dispose of a hazardous substance”¹⁹⁶ in what was widely and uniformly regarded as a strict liability scheme. Furthermore, the holding appears to require specific “intent to dispose of . . . hazardous wastes”¹⁹⁷ rather than an entity’s mere “knowledge that its product will be leaked, spilled, dumped, or otherwise discarded.”¹⁹⁸ This change in the landscape “heighten[s] the burden for establishing arranger liability.”¹⁹⁹

Indeed, many PRPs have escaped arranger liability since the Court’s decision in *Burlington Northern*.²⁰⁰ However, while the Supreme Court has narrowed arranger liability in general, even the most demanding construction of this new test should not establish a hole in coverage big enough for a PRP such as Teck to slip through. As a threshold matter, the discharge of

194. *Id.* at 622 (Justice Ginsberg, dissenting) (brackets omitted).

195. *Id.*

196. *Id.* at 611.

197. *Id.* at 612.

198. *Id.*

199. Greg DeGulis, Sarah Gable, *Burlington Northern: CERCLA and Its Ever-Changing, Unpredictable Landscape*, 28 NAT. RESOURCES & ENV’T 40, 40 (2014).

200. *See, e.g.*, *Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312, 318 (5th Cir. 2015) (finding no arranger liability for a supplier of dry cleaning chemicals who knowingly but unintentionally discharged chemicals in its wastewater); *Team Enterprises, LLC v. W. Inv. Real Estate Trust*, 647 F.3d 901, 906 (9th Cir. 2011) (finding a “manufacturer of a machine used in the dry cleaning process” not an arranger when their customer, a dry cleaner, “disposed of this wastewater by pouring it down the sewer drain”); *City of Merced Redevelopment Agency v. Exxon Mobil Corp.*, No. 1:08-CV-714-LJO-GSA, 2015 WL 471672, slip op. at 26 (E.D. Cal. Feb. 4, 2015) (finding no arranger liability when oil companies sold “MTBE-containing gasoline” that contaminated a city’s groundwater because the buyer stored the gasoline in leaking underground storage tanks because the PRPs “did not intend to dispose of a hazardous substance”).

pollutants from an industrial stack cannot be described as unintentional, in any sense of the word. Indeed, such stacks are purposefully designed to extend far above ground precisely in order to disperse hazardous substances and other industrial waste products over great distances, thereby decreasing their concentrations at any given point near the stack. Similarly, facilities are purposefully operated to ensure that airborne emissions are delivered into the stacks. The design, permitting, construction, and continued operation of industrial stacks can only be described as “intentional steps to dispose of a hazardous substance.”²⁰¹ These intentional acts should easily satisfy the *Burlington Northern* test for arranger liability.

Furthermore, while a number of PRPs have cited *Burlington Northern* to successfully evade arranger liability,²⁰² a significant number of these successful defendants escaped under the well-established “useful products doctrine,” which pre-dates *Burlington Northern*.²⁰³ Under the useful product doctrine, a PRP is not liable for transactions involving a commercial product before it becomes waste subject to CERCLA,²⁰⁴ when it was the subsequent owner of the useful product who caused the release of hazardous substances.²⁰⁵

201. *Burlington Northern*, 556 U.S. 599, 600 (2009).

202. *See, e.g.*, *United States v. Fed. Res. Corp.*, No. 2:11-CV-00127-BLW-RC, 2014 WL 3400477 (D. Idaho July 14, 2014) (holding that the U.S. was not an arranger for the disposal of mine waste when it encouraged the plaintiff to establish a mine at a site, permitted the mine, and “knew the tailings were dumped on-site and could have but failed to direct proper disposal of the tailings to prevent pollution”); *Gregory Vill. Partners, L.P. v. Chevron U.S.A., Inc.*, No. C 11-1597 PJH, 2012 WL 832879, at *9 (N.D. Cal. Mar. 12, 2012) (finding that a county sanitary district was not an arranger when it “installed and maintained a sewer line, and imposed a fee on property owners for access to the sewer line” that conveyed and discharged hazardous substances.); *Celanese Corp. v. Martin K. Eby Const. Co.*, 620 F.3d 529, 530 (5th Cir. 2010) (finding that a construction company was not an arranger when its employee accidentally and unknowingly struck and damaged a pipeline with a backhoe, when years later the pipeline broke and released methanol). *But see* *United States v. Dico, Inc.*, 892 F. Supp. 2d 1138, 1157 (S.D. Iowa 2012) (holding a company that sold PCB-contaminated buildings liable as an arranger, dismissing defendant’s useful products doctrine argument because the products were actually sold “for the purpose of disposing of hazardous waste”).

203. *Compare supra* note 200.

204. *A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998); *accord* *State of Cal. on Behalf of State Dep’t of Toxic Substances v. Summer Del Caribe, Inc.*, 821 F. Supp. 574, 581 (N.D. Cal. 1993).

205. *See, e.g.*, *Team Enterprises, LLC v. W. Inv. Real Estate Trust*, 647 F.3d 901, 913 (9th Cir. 2011); *Hinds Investments, L.P. v. Team Enterprises, Inc.*, No. CV F 07-0703 LJO GSA, 2010 WL 1663986, at *8 (E.D. Cal. Apr. 22, 2010).

One could argue that the Court should have decided *Burlington Northern* on the basis of the useful products doctrine alone and need not have read additional requirements into CERCLA arranger liability. Indeed, many of the post-*Burlington Northern* defendants who *failed* to escape arranger liability were those who were not covered by the useful product doctrine.²⁰⁶

Industrial polluters such as Teck, who operate their smokestacks in a manner that contaminates downwind properties, should not escape the repercussions of their actions based on *Burlington Northern's* apparent departure from CERCLA's well-established strict liability scheme. Such a result would thwart the very purpose for which Congress included arranger liability within CERCLA. However, if such a defendant has a colorable case, they may wish to press the issue to a potentially receptive Supreme Court. As noted above, while the Court could have simply decided *Burlington Northern* on the well-established useful products doctrine, the Court went further and stated that "under the plain language of the statute, an entity *may qualify* as an arranger . . . when it takes intentional steps to dispose of a hazardous substance."²⁰⁷ Despite this apparent limitation, one could reasonably interpret the phrase "may qualify" as merely identifying sufficient cause for arranger liability in useful product cases, i.e., "when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product."²⁰⁸ Therefore, although many courts appear to have interpreted *Burlington Northern's* intent to arrange for disposal as a necessary finding,²⁰⁹ *Burlington Northern's* intent requirement should be

206. See, e.g., *United States v. Gen. Elec. Co.*, 670 F.3d 377, 385 (1st Cir. 2012) (finding arranger liability when defendant "viewed scrap Pyranol as waste material and that any profit it derived from selling scrap Pyranol to Fletcher was subordinate and incidental to the immediate benefit of being rid of an overstock of unusable chemicals"); *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 764–65 (6th Cir. 2014) (accepting the lower court's holding that companies who sent materials to a landfill "arranged to have contaminants placed on the Site"); *Arkema Inc. v. Anderson Roofing Co.*, 719 F. Supp. 2d 1318, 1324 (D. Or. 2010) (denying defendants motion to dismiss for "dispos[al] of wastes at a common oil sump disposal facility" when "such wastes are present in the sediments at the Portland Harbor Site").

207. *Burlington Northern*, 556 U.S. 599, 611 (2009) (emphasis added).

208. *Id.* at 612.

209. See, e.g., *Team Enterprises, LLC v. W. Inv. Real Estate Trust*, 647 F.3d 901, 909 (9th Cir. 2011); *Consolidation Coal Co. v. Georgia Power Co.*, 781 F.3d 129, 155 (4th Cir. 2015); *Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312, 317 (5th Cir. 2015);

limited to its facts, and applied only to cases involving arranger liability for the seller of useful products. Accordingly, because Teck intentionally released hazardous substances through stacks constructed and operated for the express purpose of transporting its airborne industrial waste far away from the smelter, Teck's argument that it did not "arrange" for disposal of hazardous substances via aerial emissions should fail.

B. Teck's Deposition of Airborne Hazardous Substances upon the Land and Water at the UCR Site Constitutes Disposal Under CERCLA

Teck should not evade liability under CERCLA for contaminating the UCR Site merely because it first discharged the pollutants into the air. In the district court, Teck argued that the CERCLA definition of disposal, "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water,"²¹⁰ omitted aerial emissions from the ambit of CERCLA disposal. Teck further contended that the *CCA&J* holding confirms that "emissions of solid waste directly into the air"²¹¹ cannot comprise disposal. Relatedly, Teck also argued that Congress did not intend CERCLA to address contamination resulting from aerial emissions both because "the [Clean Air Act] addressed air emissions"²¹² and because CERCLA relied on RCRA's definition of disposal, and RCRA had not "sought to address"²¹³ air pollution. As demonstrated below, however,

NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 706 (7th Cir. 2014), *reh'g denied* (Nov. 5, 2014).

210. 42 U.S.C. § 6903(3) (2012).

211. Teck Metals Ltd.'s Motion for Reconsideration of Order Denying Motion to Strike or Dismiss at 3, *Pakootas v. Teck Cominco Metals, Ltd.* (No. 2118), 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

212. Teck Metals Ltd.'s Motion to Strike, or in the Alternative Dismiss the New Allegations in Plaintiffs' Fourth Amended Complaints Pursuant to Federal Rules of Civil Procedure 12(f) and 12(b)(6) at 8–9, *Pakootas v. Teck Cominco Metals, Ltd.* (No. 2104), 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004) (citing S. Rep. No. 94-988, 94th Cong., 2d Sess. (1976), in turn referencing an EPA report that indicated "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)).

213. Teck Metals Ltd.'s Motion to Strike, or in the Alternative Dismiss the New Allegations in Plaintiffs' Fourth Amended Complaints Pursuant to Federal Rules of

these arguments miss the mark and should not absolve Teck of responsibility for contaminating the UCR Site.

1. *Teck's Reliance on the Ninth Circuit's Rejection of a RCRA Suit to Enforce Ambient Air Quality Standards is Misplaced; the Deposition of Airborne Contaminants on the UCR Site Constitutes Disposal*

In *CCA EJ*, the Ninth Circuit was called on to decide “whether the citizen-suit provision of . . . RCRA . . . may be used to enjoin the emission from Defendants’ railyards of particulate matter found in diesel exhaust.”²¹⁴ *CCA EJ* plaintiffs argued that “particles are inhaled by people both directly and after the particles have fallen to the earth and then have been re-entrained into the air by wind,”²¹⁵ causing “elevated cancer risk”²¹⁶ to the surrounding community. *CCA EJ* plaintiffs sought injunctive and declaratory relief under RCRA, arguing that “diesel particulates constitute solid waste and hazardous waste, the handling, storage, treatment, transportation, or disposal of which Defendants have contributed or are contributing to.”²¹⁷ *CCA EJ* defendants countered that air emissions and ambient air quality are subject to the Clean Air Act,²¹⁸ not RCRA, because “even if Congress had intended RCRA to apply in this context . . . Defendants did not emit diesel exhaust into or on any land or water, and therefore were not disposing of solid waste within the meaning of RCRA.”²¹⁹

The *CCA EJ* court analyzed the legislative history of RCRA and the Clean Air Act, and concluded 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

Civil Procedure 12(f) and 12(b)(6) at 8, *Pakootas v. Teck Cominco Metals, Ltd.* (No. 2104), 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

214. *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF Ry. Co. (Ctr. for Cmty. Action)*, 764 F.3d 1019, 1020 (9th Cir. 2014).

215. *Id.* at 1021.

216. *Id.* (brackets omitted).

217. *Id.* at 1021–22.

218. The Clean Air Act’s citizen suit provisions only apply to air permitting decisions and violations of air permits, which would not have helped the *Ctr. for Cmty. Action* plaintiffs. See 42 U.S.C. § 7604.

219. *Ctr. for Cmty. Action*, 764 F.3d at 1022.

contrast, governs air pollutants.”²²⁰ Furthermore, the court concluded that “railyards, as indirect sources of air pollution, are excluded from regulation under both statutory schemes.”²²¹ The court therefore found that Congress intentionally left this hole in coverage,²²² and concluded that “emissions such as those at issue here—emissions from indirect sources like railyards—fall entirely outside the ambit of federal regulation.”²²³ Teck argues that the holding of the *CCA EJ* court that aerially “emitting diesel particulate matter from [Defendants] railyards and intermodal facilities . . . [does not amount to disposal] of solid waste in violation of RCRA,”²²⁴ immunizes Teck from CERCLA liability due to the purported lack of disposal associated with Teck’s air emissions.

However, *CCA EJ* must be understood in the contexts of its facts and the aims of its parties. *CCA EJ* plaintiffs, left with no recourse under the Clean Air Act,²²⁵ sought to use RCRA’s citizen suit provision to remedy emissions “discharged into the air . . . [containing] particles [that] are inhaled by people.”²²⁶ Therefore, *CCA EJ* plaintiffs used the fact that some of the particles were deposited on the ground prior to being “re-entrained into the atmosphere”²²⁷ in order to ground their citizen suit in RCRA. However, *CCA EJ* plaintiffs’ goal was to enjoin the defendant’s pollution *of the ambient air*; they did not allege a disposal or release at any site.²²⁸ The *CCA EJ* court concluded that RCRA “disposal does not extend to emissions of

220. *Id.* at 1029 (internal quotations omitted).

221. *Id.* (internal quotations omitted).

222. *Id.* at 1029 (Noting that that “statutory and legislative histories . . . make clear that RCRA . . . governs ‘land disposal.’ The Clean Air Act, by contrast, governs air pollutants,” and that “the histories further clarify that Defendants’ railyards, as ‘indirect sources’ of air pollution, are excluded from regulation under both statutory schemes”). Note that neither the *Ctr. for Cmty. Action* parties nor the court mentioned CERCLA.

223. *Id.*

224. *Id.* at 1030.

225. The Clean Air Act authorizes citizen suits only for: violation of air emission standards, EPA orders enforcing emissions standards, failure of the EPA to perform non-discretionary duties, and permit violations. 42 USCS § 7604(a) (2012). None of these situations applied to *CCA EJ*.

226. *Ctr. for Cmty. Action*, 764 F.3d at 1019.

227. *Id.*

228. The *Ctr. for Cmty. Action* parties did not mention and the court did not consider CERCLA.

solid waste directly into the air.”²²⁹ While it could be argued that the *CCA EJ* court improperly applied the definition of disposal,²³⁰ its overall conclusion was sound: “the regulation of emissions from locomotives and railyards was governed solely by the Clean Air Act,”²³¹ and the Clean Air Act specifically exempted “regulation of [indirect] sources like Defendants’ railyards.”²³² The *CCA EJ* court thus found a congressionally considered and intended hole in coverage for these indirect sources and declined to stretch RCRA to address ambient air quality impacts.

This hole in coverage for aerial emissions from railyards under the Clean Air Act and RCRA, however, should not be widened by allowing a facility like Teck’s industrial smelter to avoid CERCLA liability for contaminating the UCR Site. Unlike the situation in *CCA EJ*, which was an attempt to enjoin activities that affected ambient air quality, the situation in *Pakootas II* involves a contaminated site, including land and water. This is precisely the hole in coverage in then-existing federal law that CERCLA was enacted to fill, and the release of hazardous substances at the UCR Site lies squarely within the ambit of CERCLA. The RCRA definition of disposal includes depositing “any solid waste or hazardous waste into or on any land or water.”²³³ The deposition of airborne hazardous substances on the UCR Site falls within the plain meaning of deposit: to “let fall or drop by a natural process: foster the accretion or accumulation of . . . to become precipitated: settle .

229. *Ctr. for Cmty. Action*, 764 F.3d at 1024.

230. The *Ctr. for Cmty. Action* court held that:

The text of § 6903(3) is also very specific: it limits the definition of disposal to particular conduct causing a particular result. By its terms, disposal 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, including ground waters. We therefore conclude that disposal occurs where the solid waste is *first* placed into or on any land or water and is *thereafter* emitted into the air.

Ctr. for Cmty. Action, 764 F.3d at 1024 (9th Cir. 2014) (quotations, citations, and ellipses removed; emphasis in original). The court cited no authority for its conclusion that waste must *first* be placed into or on any land for RCRA to apply. This judicial reconstruction of the statute, though arguably improper, was not required for the court to hold that the Clean Air Act and not RCRA, governs ambient air quality, and may therefore be considered dicta (if not erroneous).

231. *Ctr. for Cmty. Action*, 764 F.3d 1019, 1027 (9th Cir. 2014).

232. *Id.*

233. 42 U.S.C. § 6903(3) (2012).

. . . something laid, placed, or thrown down; esp matter deposited by some natural process . . . a natural accumulation.”²³⁴ The deposition (or precipitation) of airborne solid particles upon the land is a natural process, scientifically driven by differences in density and temperature, that results in the accumulation (or deposition) of the solid material. Teck constructed and operated its stacks precisely in order to dispose of its hazardous industrial waste at a site far distant from Teck’s smelter. The hazardous substances were no less disposed at the UCR Site because they were first discharged into the air and then deposited upon the land then had Teck directly dumped its hazardous substances at the UCR Site.

2. *Congress Crafted CERCLA to Cover Contamination at Sites Such as UCR*

The limitations imposed on polluters under the Clean Air Act were crafted to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”²³⁵ The Clean Air Act does not address contaminated sites in any way. Similarly, RCRA was crafted to assure “that hazardous waste management practices are conducted in a manner which protects human health and the environment,”²³⁶ not to address previously-contaminated sites. Thus, in the first part of the *CCAËJ* decision the court found that RCRA “governs land disposal . . . [while the] Clean Air Act, by contrast, governs air pollutants.”²³⁷ The court found that “emitting diesel particulate matter into the air does not constitute disposal as that term is defined under RCRA.”²³⁸ Rather than stopping there, in the second part of the *CCAËJ* decision, the court nevertheless considered plaintiffs’ argument that RCRA and the Clean Air Act should be “harmonized”²³⁹ to fill the hole in coverage that left the railyards emissions unregulated. However, the court

234. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 605 (3d ed. 2002).

235. 42 U.S.C. § 7401(b).

236. *Id.* § 6902(4).

237. *Ctr. for Cmty. Action*, 764 F.3d 1019, 1029 (9th Cir. 2014).

238. *Id.* at 1025.

239. *Id.* at 1022.

noted that during the “1977 overhaul”²⁴⁰ of the Clean Air Act, which was enacted a year after the passage of RCRA and three years before CERCLA, EPA and Congress expressly considered air emissions from both the general class of indirect sources and the specific subclass of railyards, and declined to regulate them under the Clean Air Act. The *CCA EJ* court declined to fill this hole in coverage, reasoning “any ‘gap’ was the product of a careful and reasoned decision made by Congress that we are not at liberty to disturb.”²⁴¹ Congress crafted CERCLA, however, to fill just such a hole in coverage, when it results in contamination of a site that threatens human health and the environment.²⁴²

CERCLA was enacted precisely to enable remediation of sites contaminated by industrial hazardous waste, such as the UCR Site. Thus, as the district court held in *Pakootas II*, the CERCLA disposal occurred not at the point of “aerial emissions from Teck’s smelter.”²⁴³ Rather, the CERCLA disposal occurred when the hazardous substances in the air were “deposit[ed] . . . into or on any land or water . . . [where it could] enter the environment or be emitted into the air or discharged into any waters, including ground waters.”²⁴⁴ This is in accord with the RCRA definition of disposal, which includes depositing. The ensuing CERCLA release²⁴⁵ occurred when the hazardous substances emitted, discharged, leached, or otherwise escaped into the environment from the materials deposited on the UCR Site.

3. *The Statutory Language Confirms that Congress Intended CERCLA to Address Sites Contaminated by Aerial Emissions from Stationary Industrial Sources*

It is particularly noteworthy that CERCLA, like the Clean Air Act as discussed above, expressly excludes liability for

240. *Id.* at 1027.

241. *Id.* at 1030.

242. See Part III.C., *infra* (detailing how the congressional history confirms that Congress intended CERCLA to address contaminated sites by filling in the holes in coverage left by RCRA, the Clean Water Act, and the Clean Air Act).

243. *Pakootas II*, No. CV-04-256-LRS, 2014 WL 7408399, slip op. at 2 (E.D. Wash. Dec. 31, 2014).

244. 42 U.S.C. § 6903(3) (2012).

245. See the CERCLA definition of “release” at 42 U.S.C. § 9601(22).

releases due to “emissions from the engine exhaust of . . . rolling stock.”²⁴⁶ This CERCLA exclusion for liability stemming from emissions from rolling stock (railroad cars), as well as certain other categories of aerial emissions, i.e. “a motor vehicle, . . . aircraft, vessel, or pipeline pumping station engine,”²⁴⁷ conclusively shows that Congress *did* consider aerial emissions as potential sources of hazardous substances. Moreover, the fact that Congress expressly exempted a few categories of aerial emissions from CERCLA clearly evidences Congress’ conscious decision that other categories of aerial emissions do fall squarely within the ambit of CERCLA. To hold otherwise would offend logic and fundamental canons of statutory construction.

First, the familiar canon *expressio unius est exclusio alterius*²⁴⁸ applies here—because Congress expressly excluded *some classes* of aerial emissions from CERCLA liability, it logically and necessarily follows that Congress considered the issue of aerial emissions in the CERCLA context and that Congress intended *other classes* of aerial emissions to give rise to CERCLA liability. Furthermore, because each enumerated exemption relates to vehicles or petroleum (the latter of which enjoys a blanket exclusion from CERCLA), it can be reasonably inferred that industrial point sources of hazardous air emissions, such as the Trail Smelter, are precisely the kind of emissions *not excluded* from CERCLA liability. Second, if, as Teck argues, *all* sources of aerial emissions are categorically immune from CERCLA liability despite their contamination of sites, then the exemption in 42 U.S.C. § 9601(22)(B) for *certain classes* of aerial emissions becomes mere surplusage, a result that the Supreme Court has recognized should be avoided in order to give effect to congressional intent.²⁴⁹ Finally, as the

246. 42 U.S.C. § 9601(22)(B).

247. *Id.*

248. BLACK’S LAW DICTIONARY (9th ed. 2009) (Defining *expressio unius est exclusio alterius* as a “canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative”). The Supreme Court recognized this canon when it “accept[ed] the proposition that when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.” *Christensen v. Harris Cnty.*, 529 U.S. 576, 582–83 (2000) (internal brackets and quotations omitted) (quoting *Raleigh & G.R. Co. v. Reid*, 80 U.S. 269, 270 (U.S. 1871)). For more recent Supreme Court affirmations of this well-established canon, see *Arizona v. United States*, 132 S. Ct. 2492 (2012), and *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014).

249. *Corley v. United States*, 556 U.S. 303, 304 (2009) (stating that “a statute should

Supreme Court recently held, provisions should be constructed with reference to their “wider statutory context;”²⁵⁰ it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”²⁵¹ Here, CERCLA’s liability provisions should be read with reference to the whole act,²⁵² which is structured to ensure “prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.”²⁵³ Exclusions in CERCLA coverage should not be read into that act,²⁵⁴ absent clear indications of congressional intent, which are not present here.

C. The Congressional History Confirms that Congress Intended CERCLA to Address Contaminated Sites by Filling in the Holes in Coverage left by RCRA, the Clean Water Act, and the Clean Air Act

While the language and structure of the statute are sufficient to establish that CERCLA was intended to cover releases of hazardous substances due to aerial emissions of industrial waste, the sparse legislative history also confirms this intent. On June 13, 1979, President Carter transmitted to Speaker O’Neill draft legislation intended to fill holes in coverage in existing environmental law to “address some of the most significant environmental and public health problems facing our Nation.”²⁵⁵ This proto-CERCLA legislation was

be construed to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant” (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

250. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2448 (U.S. 2014).

251. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

252. *Richards v. United States*, 369 U.S. 1, 11 (1962) (stating: “We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy”).

253. *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 n.6 (1994).

254. This should be particularly true for CERCLA cases, which have historically been understood to fall under the long-established canon that “remedial statutes are to be liberally construed,” Michael Sinclair, *TRADITIONAL TOOLS OF STATUTORY INTERPRETATION* 96 (2013). However, plaintiffs should not unduly rely on this long-established canon, as discussed *infra* in the text accompanying note 277.

255. A&PLH, *supra* note 54, CERCLA-LH 2, at 1979 WL 211356 (Westlaw) (Communication From The President Of The United States Transmitting A Draft Of Proposed Legislation To Amend The Federal Water Pollution Control Act, As

envisioned as an amendment to RCRA and the Clean Water Act.²⁵⁶ In the ensuing year, the House considered, but did not pass, several related bills.²⁵⁷ The stalemate ended shortly after the 1980 elections when the Republicans won control of the presidency and the Senate from the Democrats, and the “bill which became CERCLA passed the Senate on November 24, 1980, after only a few days of debate.”²⁵⁸ The Senate bill that would become CERCLA was a complete rewrite of (although presented as an amendment to) House Bill 7020.²⁵⁹ The compromise bill “was hurriedly put together by a bipartisan leadership group of senators”²⁶⁰ during the waning days of the lame duck Congress. The House subsequently passed the Senate bill with “very limited debate, under a suspension of the rules, in a situation which allowed for no amendments.”²⁶¹ The Senate offered the bill to the House “on a take it-or-leave it basis,”²⁶² with only forty minutes allotted for debate, much of which was taken by the bill’s sponsors.²⁶³ As such, CERCLA’s legislative history is relatively sparse. The information that is in the record, however, confirms Congress’ intent to pass “a

Amended, And The Solid Waste Disposal Act, As Amended, To Provide A System Of Response, Liability, And Compensation For Releases Of Oil, Hazardous Substances, And Hazardous Wastes, To Establish A Response And Liability Fund, And For Other Purposes (June 13, 1979)).

256. *Id.*

257. *See, e.g.*, H.R. 5790, the putative “Hazardous Waste Response Fund Act of 1979,” A&PLH, *supra* note 56, CERCLA-LH 38, at 1979 WL 211371 (Westlaw); *and* S. 1480, A&PLH, *supra* note 56, CERCLA-LH 65, 1979 WL 211383 (a bill to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites”).

258. Peter J. McGrath Jr., *Burlington Northern & Santa Fe Railway Co., et al. v. United States: Defining Environmental Law or Changing It?*, 3 CHARLOTTE L. REV. 85, 85 n.2 (2011).

259. Alfred R. Light, *Clean Up of a Legislative Disaster: Avoiding the Constitution Under the Original CERCLA*, 37 ENVIRONS ENVTL. L. & POL’Y J. 197, 199 (2014) (describing “an entirely different ‘compromise bill,’” which was drafted in a few days, during which time “no committee or subcommittee hearings, open or closed, were held. No committee reports or bill drafts were printed. Nothing resembling the usual process of congressional debate occurred. All discussions and negotiations took place behind closed doors”).

260. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

261. *Id.* at 1.

262. *Id.*

263. *Id.*

good bill which filled a legislative void,”²⁶⁴ and without which there was “no authority . . . [or] funding to deal with certain types of hazardous waste spills and hazardous waste dangers to health and to the environment.”²⁶⁵ As one commentator noted, “the congressional committees which [sic] worked on the Superfund legislation were the same committees which [sic] worked on the 1980 amendments to RCRA,”²⁶⁶ and posited that “the two legislative enactments are continuous and should be read in this fashion.”²⁶⁷ The fact that the same congressional committees amended RCRA and drafted CERCLA, the statement that CERCLA fills a void, and the accelerated passage of the bill, combine to suggest that RCRA terms were adopted for convenience in the rushed drafting session. Reference to RCRA definitions were not intended to limit the broad aim of CERCLA, considering there is ample evidence that CERCLA was intended to fill any void or hole left by RCRA and other environmental laws regarding previously-contaminated sites.

While nothing in the legislative history indicates that aerial emissions as a whole do not fall under the ambit of CERCLA, the Senate compromise bill did expressly limit “the liability of vessels, trucks, trains and aircraft.”²⁶⁸ This concession was deemed necessary to ensure passage of the bill, but, as discussed above, also tends to indicate that other (particularly stationary) aerial hazardous substance releases *were* intended to give rise to liability, just like any other release of hazardous substances.²⁶⁹ Indeed, during debate of a predecessor Senate bill, the bill was described as a response to “staggering losses to our Nation and to our economy from toxic poisons, whether the medium involved was the air, surface waters, or ground waters. The sources of these toxins included industrial accidents, intentional releases through smokestacks and discharge pipes, and seeps from abandoned dumps.”²⁷⁰

264. *Id.* at 33.

265. J.P. Sean Maloney, *A Legislative History of Liability Under CERCLA*, 16 SETON HALL LEGIS. J. 517, 538–39 (1992).

266. Grad, *supra* at 35.

267. *Id.*

268. Maloney, *supra* note 260, at 533.

269. *Id.* at 537.

270. A&PLH, *supra* note 56, CERCLA-LH 84, at 1980 WL 356067 (Westlaw) (Proceedings and Debates of the 96th Cong., 2d Sess., July 25, 1980).

The Senate rewrote House Bill 7020 in part because the House bill was “too narrow because it dealt only with abandoned hazardous waste sites.”²⁷¹ The Senate bill, conversely “provides authority to respond to more kinds of releases than the House passed version,”²⁷² and “did address the broader problem of hazardous waste spills generally.”²⁷³ The Senate compromise bill “added response authority for hazardous substances which are not hazardous wastes . . . [and] in doing this the Senate had expanded the scope of H.R. 7020.”²⁷⁴ Thus, CERCLA was concerned with more than simply disposal sites covered by RCRA. Any disposal limitation in RCRA, therefore, should be loosely interpreted in the CERCLA context, in light of the clear congressional intent to address sites contaminated by hazardous substances.

Finally, “it was the intent of the bill that the federal government’s cleanup and containment capability be viewed as something of an appeal of last resort, in the absence of any other adequate and timely response”²⁷⁵ under other existing laws. The bill therefore was aimed at “assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions . . . [and] providing ample Federal response authority to help clean up hazardous chemical disasters.”²⁷⁶ The very purpose of CERCLA was to fill in the holes in then-existing environmental law, providing authority for federal action and ensuring that polluters pay. Absent clear congressional intent, a new hole in coverage should not be read into our environmental laws to allow the unmitigated contamination of sites via the air pathway and allow polluters to shirk their responsibility.

IV. CONCLUSION

Hundreds of smelters like Teck’s, and an unknown number of other industrial facilities, have discharged toxic industrial

271. Grad, *supra* at 22.

272. Maloney, *supra* note 265, at 537.

273. Grad, *supra* at 22.

274. *Id.* at 31.

275. *Id.* at 27.

276. *Id.* at 8.

pollutants into the air in a manner that contaminated downwind sites. Congress enacted CERCLA to fill just such a hole in coverage left by other major federal environmental laws, to enable governments and innocent parties to remediate contaminated sites, and to make sure that the polluters pay. Reading an atextual hole in coverage into CERCLA that would allow polluters to evade responsibility for their actions would thwart the will of Congress and leave the rest of us holding the bill.

Absent clear indication of Congressional intent to the contrary, our environmental statutes must be interpreted in a manner that is consistent with their terms and overall structure, and achieves their goals. Congress enacted the Clean Air Act to address the problem of ambient air pollution, not to address—and certainly not to thwart—efforts to respond to the serious problem of sites contaminated by hazardous substances. Congress enacted CERCLA to ensure prompt response to clean up contaminated sites and ensure that the responsible parties pay for the required remediation. Allowing a company to escape liability, when it discharges toxic industrial contaminants into the air that later deposit onto and contaminate land or water, is in direct contradiction of the legislative intent in enacting CERCLA and does not conform to its provisions. Until recently, PRPs never raised such a claim in court, and CERCLA has properly addressed many such sites. Many more similar sites continue to threaten human health and the environment, and a new hole in coverage should not be opened up to thwart federal response authority under CERCLA. In *Pakootas II*, the Ninth Circuit should give effect to CERCLA's plain meaning, its overall structure, and the congressional intent to provide the means to clean up contaminated sites and ensure that the polluters pay.

Finally, Plaintiffs in *Pakootas II* should recognize that some recent Supreme Court decisions suggest that some members of the Court may be willing to consider scaling CERCLA back. Therefore, Plaintiffs should take care to frame their arguments within the four corners of the statute and the plain meaning of the statutory terms. For example, Justice Kennedy recently penned an opinion for the Court expressing distaste for the “proposition that remedial statutes should be interpreted in a

liberal manner,”²⁷⁷ even though that proposition was well established during the first thirty years of CERCLA jurisprudence. The Court went on to find the lower court “in error when it treated this [proposition] as a substitute for a conclusion grounded in the statute’s text and structure.”²⁷⁸ Similarly, the Court recently warned that CERCLA “liability may not extend beyond the limits of the statute itself.”²⁷⁹ In this case, there is ample support in the statute and in the common meaning of its terms to support CERCLA liability for persons that purposefully discharge hazardous substances into the air through industrial stacks, when those hazardous substances settle on and contaminate a site, threatening human health and the environment.

277. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014).

278. *Id.*

279. *Burlington Northern*, 556 U.S. 599, 609 (2009).