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Superfund Aerial Deposit Ruling: Did Court Get it Right?

BY PETER HAYES

A ruling that cleared a Canadian smelter of Superfund liability for aerial emissions has sparked criticism and accolades in the legal community (*Pakootas, et al v. Teck Cominco Metals, Ltd.*, 2016 BL 241292, 9th Cir., No. 15-35228, 7/27/16).

Aerial emissions carried by the wind onto land or water don't constitute ''disposal'' under the Superfund law, the Ninth Circuit ruled July 27.

The court ruled in favor of Teck Cominco Metals Ltd., which operates a smelter ten miles north of the border between the U.S. and Canada.

The state of Washington, the Confederated Tribes of the Colville Reservation, and the Department of Justice as amicus alleged Teck is a liable arranger for disposal of contaminants that traveled by air from its smokestacks to the Upper Columbia River Superfund Site.

'Quite Distinguishable.' ''The case is wrong,'' Professor Craig Johnston at Lewis & Clark Law School in Portland, Ore., told Bloomberg BNA.

Professor Johnston teaches environmental and hazardous waste law, and was formerly assistant regional counsel with the Environmental Protection Agency in Boston, where he worked on major enforcement matters under Superfund and the Resource Conservation and Recovery Act.

''The strangest thing is that the court cites *Carson Harbor Vill Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) as dispositive. But it's quite distinguishable,'' he said.

''In that case, a party bought contaminated land and the contamination further migrated. But here, Teck was an emitter—it wasn't passive movement. That should be adequate to be disposal,'' he said.

''But the strongest evidence as to why this is incorrect is the 'federally permitted release' provision,'' Johnston said.

The ''federally permitted release'' exception, 42 U.S.C. § § 9601(10)(H), relieves parties of their Superfund notification duty for certain releases that are permitted or controlled under several environmental statutes including the Clean Air Act.

''The negative inference is that if you don't have a Clean Air Act permit and you emit hazardous substances, you should face liability,'' Johnston said.

RCRA Case. The U.S. District Court for the Eastern District of Washington denied Teck's motion to dismiss the claims.

The lower court declined a motion to reconsider when the Ninth Circuit issued a Resource Conservation and Recovery Act ruling in *Ctr. for Cmty. Action and Envtl. Justice v. BNSF Rwy. Co.*, 764 F.3d 1019 (9th Cir. 2014), defining ''disposal'' under RCRA (42 U.S.C. § 6903(3)) as solid waste discharged directly onto land or into water.

Rejecting Teck's argument, the trial court said Teck became a CERCLA ''arranger'' once airborne contaminants from its smelter touched down in the water and on the ground at the site—not when they were initially released.

Teck appealed.

No Human Intervention. The Ninth Circuit, citing *Carson Harbor*, said the term ''deposit,'' as used in CERCLA, ''is akin to 'putting down,' or placement'' by someone and that ''[n]othing in the context of the statute or the term 'disposal' suggests that Congress meant to include chemical or geologic processes or passive migration.''

Under that interpretation, the *Pakootas* court said, ''deposit'' does not include ''the gradual spread of contaminants without human intervention.''

''While plaintiffs present an arguably plausible construction of ''deposit'' and ''disposal,'' *Carson Harbor* compels us to hold otherwise, the court said.

''Air pollution is controlled under the Clean Air Act and state law through a carefully designed regulatory scheme. The unwarranted attempt to expand CERCLA to cover those regulated emissions would have done mischief to that scheme . . .''

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Attorney Peter Hsiao with Morrison & Foerster LLP, however, applauded the ruling.

Hsiao handles complex environmental litigation. He was a senior trial lawyer for the Department of Justice and an Assistant U.S. Attorney for the Central District of California, and was lead trial counsel representing the EPA and other federal agencies in major environmental and chemical litigation.

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''The Ninth Circuit correctly reversed a surprising district court decision, and held that air emissions that later fall to earth are not a 'disposal' within the meaning of CERCLA,'' he said.

''The court's decision followed its prior precedent and is consistent with the understanding of the majority of environmental law experts.''

''Air pollution is controlled under the Clean Air Act and state law through a carefully designed regulatory scheme. The unwarranted attempt to expand CERCLA to cover those regulated emissions would have done mischief to that scheme and was properly rejected by the Ninth Circuit,'' he said.

Nips the Bud. Attorney Daniel W. Wolff, an environmental litigator with Crowell & Moring in Washington, said the ruling is ''a good decision for industry.''

''It nips this sort of arranger theory in the bud,'' he said.

''However, it's unclear how big a deal this case is because even if the Ninth Circuit had affirmed in the meaning of disposal, the plaintiff would have a difficult time proving that the emitter 'arranged' for the disposal within the meaning of that term as interpreted by the courts.''

Judge Michael Daly Hawkins wrote the opinion.

Short Cressman & Burgess PLLC represents Pakootas.

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Full text of the opinion available at http://www.bloomberglaw.com/public/document/Pakootas_v_State_No_1535228_2016_BL_241292_9th_Cir_July_27_2016_C.

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