AN AIR OF CHANGE IN CERCLA LIABILITY? *PAKOOTAS V. TECK COMINCO* AND CERCLA'S FEDERAL PERMIT SHIELD

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I. INTRODUCTION

A case recently argued before the Ninth Circuit, *Pakootas v. Teck Cominco Metals, Ltd.*, 9th Cir., No. 15-35228, could pave the way for a new theory of liability for parties who release air emissions during the course of industrial or other operations. Specifically, on review before the Ninth Circuit is a district court decision holding that parties who release air emissions can be liable under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") if those substances later settle on another party's property. The district court's decision was the first of its kind -- we are aware of no prior reported decision holding that CERCLA could be used to assert claims related to hazardous substances released into the air as emissions -- and a decision by the Ninth Circuit affirming the district court's decision could open the door to a variety of new claims against those who release air emissions that contain even minute levels of hazardous substances.

II. BACKGROUND

The *Pakootas* case was originally filed in 2004, and included a number of claims relating to Teck Cominco Metals, Ltd.'s ("Teck") alleged discharge of solid and liquid hazardous substances from its Canadian smelter into the Columbia River. Plaintiffs alleged that those hazardous substances traveled downriver into the United States and settled at what is now referred to as the Upper Colombia River Site (the "UCR Site") in Washington. Many of the claims were resolved early in the litigation; however, in 2013 the plaintiffs sought leave to amend their complaint to add an additional CERCLA claim. Specifically, plaintiffs asserted that Teck's release of hazardous substances in air emissions in Canada that later settled in the United States made Teck an "arranger" under CERCLA, and thus liable for any contamination that eventually settled onto land and water at the UCR site. Teck moved to strike or dismiss the new allegations on the basis that emissions to the air are not actionable under CERCLA. In a decision that was the first of its kind, the district court denied the motion, finding instead that "[s]o long as [Teck's] hazardous substances were disposed of 'into or on any land or water' of the UCR Site - whether via the Columbia River or by air - [Teck] is potentially liable as an 'arranger' under CERCLA."

Shortly after the lower court's decision in *Pakootas*, the Ninth Circuit decided a separate but similar case, *Center for Community Action & Environmental Justice v. BNSF Railway Co.*,_ftn1in which the Ninth Circuit found that releases directly to the air did not create liability under the Resource Conservation and Recovery Act ("RCRA"),

which also regulates the disposal of hazardous substances when they are wastes._ftn2 Based upon what it believed to be an inconsistency between the two opinions, Teck sought interlocutory appeal of the district court's order denying its motion to strike, arguing that because CERCLA adopts RCRA's definition of a "disposal," the Ninth Circuit's opinion in *Center for Community Action* is controlling law with respect to the question of whether air emissions constitute a "disposal" under CERCLA. The district court certified the order for interlocutory appeal, and it is now before the Ninth Circuit.

III. ISSUE BEFORE THE COURT AND ORAL ARGUMENT

The sole question facing the Ninth Circuit is whether the release of air emissions that later settle on another's property constitutes "disposal" under CERCLA. At oral argument, the three-judge panel focused on whether the *Center for Community Action* decision was controlling on the issue and, if not, how the *Pakootas* decision could be distinguished. As expected, Teck took the position that the *Center for Community Action* decision creates a bright-line rule with respect to whether air emissions can constitute disposal under RCRA and CERCLA. Specifically, Teck argued that only where "solid waste is first placed on land or water" can it be considered disposal under CERCLA or RCRA, and thus there could be no liability under CERCLA for hazardous substances first released into the air. In contrast, plaintiffs tried to distinguish the *Pakootas* case from *Center for Community Action*, arguing that structural distinctions between RCRA and CERCLA require that the statutes be read differently, and that it was appropriate to allow liability under CERCLA for air emissions regardless of whether such liability exists under RCRA. The Department of Justice ("DOJ") appeared as a friend of the court and sided with the plaintiffs, arguing that Congress intended to include liability for air emissions in CERCLA. Of note, one judge on the panel asked why the court, if otherwise unable to reach a decision, should not just take the federal government's position as the "tie-breaker."

IV. POTENTIAL IMPLICATIONS - EFFECT OF THE FEDERAL PERMIT SHIELD

Although the Ninth Circuit argument centered on varying interpretations of CERCLA, both the parties and the panel addressed the potential impacts of the decision and the interplay between CERCLA and the Clean Air Act, including with respect to the federal permit shield. As background, the federal permit shield provisions of CERCLA provide that costs incurred remediating hazardous substances released in accordance with a federal permit may only be recoverable in accordance with the provisions of the permitting statute, not CERCLA._ftn3 As relevant to the *Pakootas* case, the shield would exempt emitters from liability under CERCLA for remediation costs resulting from "any emission into the air subject to a permit or control regulation under" various sections of the Clean Air Act._ftn4 Thus, to the extent a party's emissions are released into the air in compliance with a valid Clean Air Act permit, if substances in those emissions later settle on another's property, the property owner would be prohibited from seeking cleanup costs related to those settled substances under CERCLA.

At oral argument, plaintiffs asserted that the existence of the federal permit shield in CERCLA, and CERCLA's specific reference to emissions released under the Clean Air Act, demonstrates Congress' intent to regulate at least some air emissions under CERCLA. In addition, plaintiffs argued that the federal permit shield would protect the regulated industry from increased liability for air emissions under CERCLA, and that regulated entities would be largely unaffected by a decision in favor of the district court. At first blush, it appears that the federal permit

shield would, in fact, provide broad protections for certain categories of emitters if the Ninth Circuit were to affirm the lower court's decision. However, upon further review, informal guidance released by EPA has arguably narrowed the scope of the defense. Indeed, the fact that DOJ has asserted a position on behalf of plaintiffs in this case suggests that EPA plans to use CERCLA to expand its authority to regulate air emissions under the Clean Air Act.

Although it is not clear whether or how the courts or EPA will define the contours of the federal permit shield in this context, or EPA's non-binding interpretations related thereto, *amicus* briefs submitted to the Ninth Circuit highlight several key grey areas that may lead to litigation going forward.

First, under current EPA guidance, an emission may be "federally permitted" only if it is actually compliant with Clean Air Act regulations and permits, not merely "subject to" regulations and permits as the statute states. Therefore, if a party's emissions exceed limits set forth in a permit by only a small amount, that party could arguably be liable for response costs at any location at which the release later comes to be located. By contrast, under the Clean Air Act, even if EPA chose to seek penalties for such a minor violation, such penalties would be subject to strict limits. *See* 42 U.S.C. § 7413(d)(1). Second, EPA guidance states that federally permitted releases shielded from liability under CERCLA include only releases of those substances specifically identified in a Clean Air Act regulation or permit. Under this interpretation, where a party's emissions include a constituent that is not identified in the permit or otherwise regulated by the Clean Air Act, even if that party's emissions (including the unregulated substance) are in full compliance with the permit and other regulatory requirements, that party could arguably be liable under CERCLA if the constituent later settles on property elsewhere and results in the incurrence of costs recoverable under CERCLA. Finally, it is important to note that the federally permitted release defense is an affirmative one, meaning that a party seeking to fend off allegations under CERCLA has the burden to demonstrate that the releases were, in fact, permitted. Under any of these scenarios, industrial facilities could find themselves being sued by parties at clean up sites resulting from emissions that, prior to *Pakootas*, may not have been considered a risk.

Of course, emitters would have a variety of defenses available to them to protect themselves from the types of claims described above, including that any plaintiff would be required to demonstrate that the particular defendant's emissions resulted in the deposition of hazardous substances on their property, and that such substances are present in an amount sufficient to require a clean up action. Finally, because such litigation can be both costly and time consuming, plaintiffs may be cautious to test the boundaries of potential liability where a particular emitter's contribution at a site could be demonstrated to be non-consequential.

CONCLUSION

The Ninth Circuit is not expected to render a decision for several months, and when it does it likely will not be the end of the *Pakootas* litigation; even if the Ninth Circuit affirms the district court's opinion, the district court must still consider each of the other elements required under CERCLA to establish liability. However, should the Ninth Circuit affirm the district court's opinion, those who release air emissions will need to pay close attention to ensuring permit compliance, and consider putting in place new mechanisms to decrease risk of CERCLA claims stemming from air emissions.

NOTES:

[1] 764 F.3d 1019 (9th Cir. 2014).

[2] *Id.* at 1024.

[3] 42 U.S.C. § 9607(j).

[4] 42 U.S.C. 9601(10)(H).

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