Teck in its Tweens: An Update on 12 Years of Litigation Over The Canadian Smelter

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Just over the border from Northeast Washington, in the town of Trail, B.C., the Teck Metals (formerly Teck Cominco) smelter hovers over the Columbia River like a bird of prey. In 2002 and 2003, swimmer Christopher Swain swam the length of the Columbia—from its Canadian headwaters to the Pacific Ocean—in an effort to bring attention to pollution and blockage issues. Passing the Teck smelter, Swain recalled the sight as he took slow freestyle-swim breaths beneath the smelter: "Water. Mordor. Water. Mordor. Water. Mordor . . ."

The Trail smelter is currently the largest lead/zinc smelter in the world, a title it recently regained after a downturn in emerging markets caused the prices of metals to take a dive, and a number of other smelters to close, in the early 2010s.

For a period of 100+ years, Teck discharged hazardous byproducts from its smelting operations into the Columbia River, both liquid effluent and granulated slag. Up to 145,000 tons of slag went into the Columbia on an annual basis, the vast majority of which was dutifully carried downstream the 10 river miles to Washington. So much slag (millions of tons) washed downstream from the Trail smelter, that a "black sand" beach formed in a backwater eddy north of the town of Northport. Over time, Teck slag physically decays in the river, leaching heavy metals to the surrounding environment. And, other metals in Teck's liquid effluent discharges also adsorbed to river sediment and settled into the quiescent waters of Lake Roosevelt.

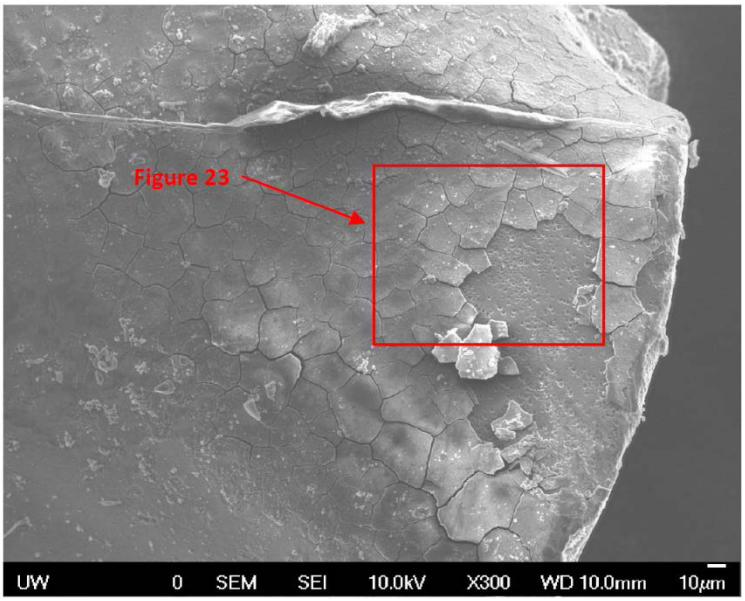
Photo by K. Wood

In addition to direct discharges to the Columbia, Teck also discharged hazardous substances into the air from its Trail Smelter stacks, including heavy metals such as lead, arsenic, cadmium, and mercury. Prevailing winds in the river valley carried Teck's aerial discharges along the same corridor bearing Teck's river discharges. By the 1920s, smelter smoke, containing large amounts of sulphur dioxide, had denuded vegetation in and around Trail and into the Columbia River Valley in Washington State. Indeed, the dispute over vegetative damage from the Trail smelter became a landmark trans-boundary pollution dispute and arbitration in the late 1920s and early 1930s.

Phase I Litigation

By the 1990s, concerns regarding Teck's operations turned from the air to the river. In the early 1990s, the Canadian government began looking into Teck's discharges. And, in 1992, the Canadian Department of Fisheries and Oceans published a report on a series of bioassays conducted on Teck's slag, a byproduct Teck had long cited as being benign. Essentially everything put in contact with Teck slag (from zooplankton to trout fingerlings) exhibited significant mortality.

Concerns also sprang up on the south side of the border. In 1999, and based on longstanding concerns about Teck's discharges, the Confederated Tribes of the Colville Reservation petitioned EPA to conduct an assessment of contamination in and along the Columbia River, from the Grand Coulee Dam to the border. The EPA completed its assessment in 2003, and concluded that the UCR Site was eligible for listing on the National Priorities List (i.e., Superfund). Also in 2003, the EPA issued a Unilateral Administrative Order requiring Teck to conduct a remedial investigation at the UCR Site in order to determine the nature and extent of the contamination and establish feasible means of cleaning it up. After EPA's Order languished for a year, two members of the Confederated Tribes of the Colville Reservation filed a CERCLA citizen suit seeking to enforce the Order. The State of Washington moved (and was granted the right) to intervene on the side of the named citizens.



Teck immediately moved to dismiss the Complaint(s) for failing to state a claim, arguing that CERCLA could not apply extraterritorially to its discharges in Canada. Both the District Court, and later the 9th Circuit, disagreed. The 9th Circuit determined that, while

Teck's initial discharges to the Columbia occur in Canada, the actionable CERCLA releases alleged occur in the United States. Thus, if the Plaintiffs could show that hazardous substances discharged in Canada are shown to have been released from a CERCLA facility within the United States, the application of CERCLA is domestic. Thus, in 2006, with the Supreme Court denying Teck's Petition for cert, the 9th Circuit remanded the case back to the District Court for trial.

In the meantime, EPA and Teck entered into a contractual agreement whereby EPA withdrew its Order in return for Teck's American subsidiary conducting the RI/FS work (but with no promise on any work to follow). As a result, in 2008 the Tribes and the State amended their complaints from enforcement of the Order to a cost recovery action under CERCLA Sec. 107. The case was bifurcated (actually *trifurcated*), with "Phase I" limited to establishing Teck's CERCLA liability for releases to the River.

After four more years of litigation, including nearly 100 fact and expert depositions, on the eve of trial, Teck stipulated that its slag and liquid effluent travelled to the UCR Site, that its slag leached hazardous substances into water and sediment, and that its releases caused the State and the Tribes to incur response costs. This left the issues of whether Teck was an "arranger" under CERCLA and whether the Court had personal jurisdiction over Teck.

The Court ruled against Teck on both counts, thus authorizing the State and Tribes to recover response costs related to the river pathway.

Air Pathway

Following the Court's ruling on the river pathway and Teck's CERCLA liability, and simultaneously with litigation of response costs for the river pathway, the State and Tribes amended their complaints to add a claim for liability via another pathway: aerial deposition at the UCR Site. Specifically, and based upon emerging work performed in the UCR Site uplands, the amended complaints alleged that Teck's discharges into the atmosphere from Trail travelled through the air into the United States, resulting in disposal of airborne contaminants at the UCR Site.

The District Court granted the motions amending the complaints. Teck again immediately moved to dismiss the air pathway claims based upon the argument that aerial deposition does not constitute a "disposal" under CERCLA. The District Court again disagreed with Teck, reasoning that a disposal had occurred at a CERCLA "facility" (i.e., the UCR Site). Similar to the

arguments regarding extraterritorial application, the Court reasoned that CERCLA does not require that there be a disposal "into or on any land or water" in the first instance. Rather, "so long as Defendant's hazardous substances were disposed of 'into or on any land or water' of the UCR Site—whether by the Columbia River or by air—[Teck] is potentially liable as an 'arranger.'"

BNSF Decision

Given Teck's Phase I push for "divisibility" (up-front apportionment of Teck's liability), a 2009 Supreme Court decision with the *BNSF* moniker featured prominently in the litigation. Teck ultimately lost its divisibility defense via summary judgment in 2011. However, less than a month from the Court's decision on the air pathway, the 9th Circuit announced a new decision involving BNSF as a party and that has played another central role in the Teck litigation: *Center for Community Action v. BNSF Railway*, 764 F.3d 1019 (9th Cir. 2014).

This *BNSF* decision came under RCRA rather than CERCLA. Specifically, an environmental group filed suit against BNSF under RCRA's citizen suit provisions claiming that particulates emitted from its idling diesels at a BNSF railyard constituted an imminent and substantial endangerment to human health. On review from the trial court, the 9th Circuit tossed the citizen suit on the grounds that RCRA's definition of "disposal" did not include the emission of solid waste directly into the air. Instead, the Circuit concluded that disposal occurs where the solid waste (i.e., the particulates in the diesel emissions) is first placed "into or on any land or water" and thereafter "emitted into the air." Because Plaintiffs in *BNSF* had not alleged anything beyond the first emission "into the air," the Circuit held that there was no cognizable RCRA "disposal."

Teck immediately seized on the *BNSF* decision and filed a motion for reconsideration with the District Court. Because CERCLA merely adopts by reference RCRA's definition of "disposal," Teck argued that CERCLA arranger liability cannot reach to a party that arranged for the disposal of materials that are first discharged to the air. In other words, Teck argued that *BNSF* requires any CERCLA disposal of hazardous substances to be via first direct contact with land or water. Because its aerial emissions first contact is with the airshed, rather than land or water at the UCR Site, Teck asserted that CERCLA cannot reach the hazardous substances leaving its stack.

The District Court disagreed. Siding with the Tribes and the State, the Court distinguished *BNSF* and concluded that the CERCLA disposal alleged by the Plaintiffs "occurred when the hazardous substances from Teck's aerial emissions . . . were deposited 'into or on any land or water' of the UCR Site." As a result, such a disposal occurs "in the first instance" onto land or water. Teck appealed, and the 9th Circuit granted interlocutory review. The District Court stayed litigation of Teck's liability for aerial discharges pending the 9th Circuit's decision.

Yet Another Trip to the 9th Circuit

For the fourth time in the case, the 9th Circuit heard oral argument on April 6, 2016. Teck's arguments were simple and hewed closely to its assertions at the District Court: *BNSF* creates a bright-line rule that any discharges which travel through the air *first* and then eventually fall onto land or water are not CERCLA (or RCRA) disposals and thus not actionable under the statute.

The Tribes and State (and the U.S. Government as *amici*) argued that Teck's position would create a gaping hole in CERCLA's broad remedial purpose, contrary to decades of government and industry assumptions regarding the statute's scope (not to mention the *billions* of dollars of settlements and judgments based upon such liability). And, as noted above, the governments asserted that the actionable "disposal" in this case (unlike *BNSF*) occurred only when solids from Teck's stack make their way across the border and come to be located in upland soils and lakes.

It will be months before any decision is expected from the Circuit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiffs-Appellees, and THE STATE OF WASHINGTON, Plaintiff-Intervenor-Appellee, vs. TECK COMINCO METALS LTD., a Canadian corporation, Defendant-Appellant.	No. 15-35228 (Eastern District of Washington No. CV-04-0256-LRS)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellant Teck Metals Ltd., formerly known as Teck Cominco Metals Ltd., is a Canadian corporation; the parent corporation of Teck Metals Ltd. is Teck Resources Limited, also a Canadian corporation.

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INTRODUCTION

Appellant Teck Metals Ltd. ("Teck") is a Canadian company. It operates a smelter in Trail, British Columbia, Canada, located adjacent to the Columbia River, approximately ten miles north of the United States-Canada border. In 2004, Teck was sued by two members of the Confederated Tribes of the Colville Reservation ("Tribes") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in a lawsuit seeking to enforce a later withdrawn order of the Environmental Protection Agency ("EPA"). The Tribes and the State of Washington joined the suit and added claims for response costs and declaratory relief in connection with contamination of the Upper Columbia River Site ("UCR Site") in the United States. The UCR Site consists of the Columbia River and adjacent areas above the Grand Coulee Dam in northeastern Washington State.

In recently amended complaints, Plaintiffs added allegations that Teck is liable under CERCLA as an "arranger for disposal" under CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3), because the stacks at Teck's smelter in Canada emitted hazardous substances into the atmosphere and some of those substances allegedly traveled through the air into the United States, eventually landing at the UCR Site. The issue presented on appeal is whether the definition of "disposal," as that term is used in CERCLA section 107(a)(3), is

satisfied by those allegations. This question is controlled by this Court's recent decision in *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1019 (9th Cir. 2014). In *Center for Community Action*, this Court held that the definition of "disposal" in the Resource Conservation and Recovery Act ("RCRA") does not include conduct where waste is "first emitted into the air," then travels through the air and eventually falls onto land or water. *Id*. at 1024. Because CERCLA expressly incorporates the RCRA definition of "disposal," the holding in *Center for Community Action* controls here.

Notwithstanding this Court's decision in *Center for Community Action*, the District Court concluded that Plaintiffs' allegations satisfied the definition of "disposal." The District Court's ruling is irreconcilable with *Center for Community Action*. Under the District Court's view, a "disposal" occurs when hazardous substances eventually fall onto land or water, regardless of the fact that they were emitted to air in the first place. Under this Court's holding in *Center for Community Action*, "disposal" does not occur in such circumstances.

This Court should reverse and direct the District Court to strike Plaintiffs' allegations pertaining to emissions into air.

STATEMENT OF JURISDICTION

The district court has found that there is a federal question in this case, which is the basis for subject matter jurisdiction in the district court pursuant to 28 U.S.C. § 1331. Appellant's Excerpts of Record ("ER"), p. 220.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1292(b).

This Court granted the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) on March 25, 2015.

ISSUE PRESENTED FOR REVIEW

The District Court concluded that Plaintiffs may pursue a CERCLA claim against Teck as an "arranger for disposal" based on allegations that emissions to the air from Teck's smelter in Canada, which allegedly travel miles through the air before eventually falling to land or water in the United States, constitute a "disposal" of hazardous substances under CERCLA.

The issue presented is whether in light of this Court's decision in *Center for Community Action*, the definition of "disposal" in CERCLA is satisfied by allegations that hazardous substances were emitted into the air and then transported by wind, eventually settling onto land or water. In other words, did the District Court err in construing "disposal" under CERCLA to cover Plaintiffs' allegations, where: (a) CERCLA expressly incorporates the definition of

"disposal" from RCRA, and (b) this Court has already determined that "disposal" under RCRA does not include emissions to the air in the first instance that eventually fall to land or water?

STATEMENT OF THE CASE

The Lawsuit. In 2003, EPA issued a Unilateral Administrative Order directing Teck to conduct a remedial investigation and feasibility study of the UCR Site. ER 255. Teck and the EPA engaged in negotiations, yet in 2004, Joseph A. Pakootas and Donald R. Michel, individual members of the Tribes, sued Teck under CERCLA's citizen-suit provision (42 U.S.C. § 9659) to enforce EPA's order. ER 255.

The State filed a Complaint in Intervention, containing claims mirroring those of Michel and Pakootas. ER 246. In 2005, Pakootas and Michel filed an Amended Complaint, which the Tribes joined. ER 205. The Tribes sought declaratory relief, response costs and natural resource damages pursuant to CERCLA section 107(a), 42 U.S.C. § 9607(a). ER 216.

These plaintiffs claimed that Teck was liable under CERCLA for contamination at the UCR Site resulting from the discharge of solid and liquid hazardous substances into the Columbia River in Canada.

The *Pakootas I* Decision. Teck moved to dismiss on the grounds that the application of CERCLA to a Canadian company

based on its discharges into a river in Canada was an impermissible extraterritorial application of the statute and that the court lacked jurisdiction over Teck. In 2004, the District Court denied the motion to dismiss, and certified that decision for immediate appeal. ER 244-245.

In *Pakootas v. Teck Cominco Metals Ltd.,* 452 F.3d 1066, 1068-69 (9th Cir. 2006) (*"Pakootas I"*), this Court addressed whether a citizen-suit based on Teck's alleged non-compliance with the Unilateral Administrative Order was an impermissible extraterritorial application of CERCLA. This Court affirmed the District Court, finding that because the alleged *release* of hazardous substances occurred in the United States (i.e., alleged leaching of contaminants from slag located inside the United States), there was no extraterritorial application of CERCLA.

Settlement with EPA. Prior to that decision, EPA and Teck had entered into a Settlement Agreement, under which Teck and its American subsidiary agreed to perform and/or fund a remedial investigation and feasibility study of the UCR Site under EPA oversight. In exchange, EPA withdrew the Unilateral Administrative Order.

In 2008, Plaintiffs filed Second Amended Complaints dropping the claims related to the Unilateral Administrative Order, but maintaining the CERCLA section 107 claims. ER 172.

Bifurcation. In 2008, the District Court bifurcated the trial so that "[t]he cost recovery declaratory relief claims will be determined as part of Phase I of this litigation, with the remaining claims to be determined thereafter in Phase II." ER 171.

Plaintiffs' Initial Motion to Add Air Claims. In 2010, six years after initiating suit, Plaintiffs moved for permission to amend their complaints again to add allegations that Teck was liable under CERCLA as an "arranger" based on air emissions from the Trail smelter. ER 162. Teck objected to the belated addition of these air claims, and the District Court agreed that it was too late to add such claims to the case. ER 160-161.

Phase I Trial. The parties stipulated to certain facts relating to the discharge of slag and effluent to the Columbia River in Canada, the movement of some of that material to the UCR Site, and the release of hazardous substances from that material, causing Plaintiffs to incur at least one dollar of response costs. The District Court entered Phase I Findings of Fact and Conclusions of Law, and found Teck liable under CERCLA section 107(a)(3) on these facts. ER 34-43. The Court did not address the extent to which Plaintiffs are entitled to recovery of response costs under section 107(a)(3) and it did not address natural resource damages. The Court also did not address CERCLA liability attributable to air emissions:

> "The following questions are not at issue in Phase I and this Court makes no finding of fact or conclusion of law regarding . . . whether a release or threatened release of hazardous substances to the environment has occurred as the result of aerial emissions from the Trail Smelter. . . ."

ER 64.

Plaintiffs' Air Claims and Teck's Motion to Strike or Dismiss Those Claims. In 2013, the Tribes sought "clarification" that the Phase I Findings included a finding that Teck is liable for air emissions, or alternatively, permission to add allegations regarding aerial emissions into Phase II. ER 135. The District Court again stated that it had made no findings in Phase I with regard to air emissions, but then granted Plaintiffs leave to amend to add allegations relating to air emissions in Phase II. ER 123, 133.

In March 2014, Plaintiffs filed Fourth Amended Complaints adding allegations that Teck was an "arranger for disposal" because it emitted hazardous substances into the atmosphere through the stacks at the Trail smelter in Canada, which traveled through the air into the United States and deposited on soil or water at the UCR Site. ER 84, 88, 98, 102.

In April 2014, Teck moved to strike, or in the alternative dismiss, the new air allegations on the basis that emissions to air which later fall to the ground do not constitute a "disposal" as that

term is defined by CERCLA, 42 U.S.C. § 9601(29) (incorporating the definition of "disposal" from RCRA, 42 U.S.C. § 6903(3)). Because Teck's emissions to air that allegedly subsequently settle on land or water do not constitute a "disposal," Plaintiffs failed to allege Teck "arranged for disposal," and therefore failed to allege a required element of CERCLA liability under section 107(a)(3).

42 U.S.C. § 9607(a)(3). The District Court disagreed, finding:

> "The plain language of Section 9607(a)(3) does not require, as Defendant suggests, that there be a disposal 'into or on any land or water' in the 'first place' or in the 'first instance.' So long as Defendant'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- Defendant is potentially liable as an 'arranger.'"

ER 12-13.

***Center for Community Action* and Teck's Motion for Reconsideration**. On August 20, 2014, this Court issued its opinion in *Center for Community Action.* At issue in *Center for Community Action* was whether emissions to the air from locomotive, truck and other heavy duty vehicle engine exhaust, which eventually fell to land, constituted a "disposal" of solid waste under RCRA, subject to the imminent and substantial endangerment provisions of RCRA. After

evaluating the definition of "disposal" under RCRA—which definition is statutorily adopted in CERCLA—this Court held that: (1) the "definition of 'disposal' does not include the act of 'emitting'" to the air; (2) "'disposal' includes only conduct that results in the placement of solid [or hazardous] waste 'into or on any land or water'"; and (3) "'disposal' occurs where the solid [or hazardous] waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted into the air.'" *Center for Community Action,* 764 F.3d at 1024 (emphasis in original). To adopt a contrary interpretation of disposal would "effectively be to rearrange the wording of the statute—something that … a court, cannot do." *Id.*

In September 2014, Teck moved for reconsideration of the District Court's order denying the motion to strike (ER 10), on the basis that this Court's opinion in *Center for Community Action* is controlling law on the question of whether emissions to the air constitute a "disposal" under RCRA and therefore a "disposal" under CERCLA. ER 67-77. On December 31, 2014, the District Court denied Teck's request for reconsideration, but certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). ER 7-8.

STATEMENT OF FACTS

In their Fourth Amended Complaints, Plaintiffs allege the following "facts":

> "From approximately 1906 to the present time, Teck Cominco emitted certain hazardous substances . . . 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 substances into the Upper Columbia River Site."

ER 84, 98. Plaintiffs contend that Teck's emissions into the atmosphere in Canada, some of which allegedly fall to land or water at the UCR Site, make Teck a "covered person" as an "arranger for disposal" under 42 U.S.C. § 9607(a)(3). ER 88, 102.

SUMMARY OF ARGUMENT

When Congress enacted CERCLA, it defined the term "disposal" in CERCLA by expressly incorporating the definition of that term in RCRA. 42 U.S.C. § 9601(29). Under the RCRA definition, a "disposal" is a discharge of solid or hazardous waste "into or on any land or water." 42 U.S.C. § 6903(3). For CERCLA, Congress "chose to import the meaning" of "disposal" provided in RCRA. *3550 Stevens Creek Assocs. v. Barclays Bank of California,*

915 F.2d 1355, 1362 (9th Cir. 1990).

In *Center for Community Action*, this Court held that "disposal" requires that waste be *first* placed into or on land or water. *Center for Community Action*, 764 F. 3d at 1024. This Court rejected the view that there is a "disposal" when waste is initially emitted into the air, and then is transported by wind onto land or water. *Id*.

This Court's analysis in *Center for Community Action* is dispositive here. Plaintiffs allege that "Teck Cominco emitted certain hazardous substances . . . into the atmosphere" which "travelled through the air . . . resulting in the deposition of airborne hazardous substances into the Upper Columbia River Site." ER 84, 98. As explained by this Court in *Center for Community Action*, construing such allegations as "disposal" would impermissibly "rearrange the wording of the statute." *Center for Community Action*, 764 F. 3d at 1024. The statutory definition requires disposal of solid or hazardous waste to land or water in the first place, so that waste then may enter the environment or be emitted to air. Given CERCLA's specific statutory adoption of the definition of "disposal" from RCRA, Plaintiffs do not allege a disposal.

Because Plaintiffs' allegations regarding air emissions do not come within the definition of "disposal" under CERCLA, this Court should reverse and direct the District Court to strike those allegations. *See infra,* pp. 27-29.

STANDARD OF REVIEW

The standard of review is de novo. The issue presented—whether the definition of "disposal" under CERCLA is satisfied by allegations that hazardous substances were emitted into the air and then transported by wind, eventually settling onto land or water—is a question of law that is reviewed de novo. *See Torres-Lopez v. May,* 111 F.3d 633, 638 (9th Cir. 1997); *Schleining v. Thomas,* 642 F.3d 1242, 1246 (9th Cir. 2011).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE DEFINITION OF "DISPOSAL" UNDER CERCLA IS SATISFIED BY ALLEGATIONS THAT HAZARDOUS SUBSTANCES WERE EMITTED INTO THE AIR AND THEN TRANSPORTED BY WIND, EVENTUALLY SETTLING ONTO LAND OR WATER.

It is a required element of CERCLA liability that the defendant is within one of four classes of persons subject to the liability provisions of section 107(a). *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870-71 (9th Cir. 2001) (en banc). Here, Plaintiffs allege that Teck is a responsible party pursuant to CERCLA section 107(a)(3); Plaintiffs claim that Teck's air emissions at the Trail smelter in Canada constitute a CERCLA "arrangement for disposal." However, Plaintiffs have not alleged facts demonstrating

that Teck "arranged for disposal" pursuant to CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3). Section 107(a)(3) states:

> "Any person who by contract, agreement, or otherwise arranged for disposal or treatment, . . . , of hazardous substances owned or possessed by such person by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such substances . . . shall be liable for . . ."

Pakootas I, 452 F.3d at 1079 (quoting 42 U.S.C. § 9607(a)(3)). As discussed below, the emissions to atmosphere in Canada, which purportedly traveled through the air before settling onto land or water in the United States, did not constitute a "disposal" under CERCLA. Because there was no "disposal" under CERCLA, Teck cannot be held liable as an "arranger for disposal" based on emissions to air.

"Disposal" Under CERCLA. When Congress enacted CERCLA in 1980, it defined the term "disposal" in CERCLA by expressly incorporating the definition of that term in the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (collectively referred to as "RCRA"). CERCLA states: "The terms 'disposal', 'hazardous waste', and 'treatment' shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. 6903]." 42 U.S.C. § 9601(29). Congress' incorporation of

the RCRA definition of "disposal" must be interpreted to mean what it says:

> "In examining the statutory language, [the courts] follow the Supreme Court's instruction and adhere to the 'Plain Meaning Rule': [¶] 'It is elementary that the meaning of a statute must, in the first instance, be sought by the language in which the act is framed, and if that is plain, … the sole function of the courts is to enforce it according to its terms.'"

Carson Harbor, 270 F.3d at 878 (citations omitted).[1] RCRA defines the term "disposal" to mean:

> "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

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[1] In *Carson Harbor*, this Court applied a plain meaning approach to the interpretation of "disposal." In the context of a claim under CERCLA section 107(a)(2) alleging that defendant was a "prior owner at the time of disposal," this Court construed the term "disposal" based on its plain meaning. The Court concluded that the passive migration of contamination through soil did not constitute a CERCLA "disposal." *Id.* at 879. In order to trigger liability as an arranger for disposal under CERCLA, passive migration must fit "within the plain meaning of the terms used to define 'disposal.'" *Id*. at 881; *see also, id.* at 885 ("[T]he public, the EPA, and drafters of the legislation used and understood the words 'discharge, deposit, injection, dumping, spilling, leaking, or placing' in their ordinary, plain-meaning sense").

> environment or be emitted into the air or discharged into any waters, including ground waters."

42 U.S.C. § 6903(3) (emphasis added).

The trigger for "disposal" under the RCRA definition—which is incorporated, without change, into CERCLA—is a discharge, deposit, injection, dumping, etc., of solid or hazardous waste *into or on land or water*. The definition specifically does not list the act of emitting into the *air* or *atmosphere* as an act of "disposal." Nor does this definition include aerial emissions that may later fall to land or water, as this Court found in *Center for Community Action*. The plain statutory language underscores this by contemplating that once solid or hazardous waste has been disposed to land or water (not air), it thereafter may "enter the environment or be emitted to the air." 42 U.S.C. § 6903(3). In other words, while a disposal to land or water may later result in a dispersion of waste into the air, initial emission into the air followed by falling to land or water is not itself an act of disposal.

Thus, as this Court recently held, the plain language of RCRA's definition of "disposal" reflects a deliberate decision to include only those discharges which occur to land or water in the first instance. The definition does not include emissions into the air which may subsequently settle onto land or water at some point.

CERCLA expressly incorporates RCRA's definition of "disposal." "Congress could have defined 'disposal' for purposes of CERCLA any way it chose; it chose to import the meaning provided in SWDA [the Solid Waste Disposal Act, commonly known as RCRA]. That meaning is clear." *3550 Stevens Creek Assocs.*, 915 F.2d at 1362.

This Court's Decision in *Center for Community Action*. In *Center for Community Action*, several environmental organizations (the "CCA plaintiffs") filed a RCRA imminent and substantial endangerment[2] claim against the country's two largest freight railroads (collectively, "Railroads"). The CCA plaintiffs sued the Railroads for injunctive relief, contending that diesel exhaust emissions from locomotives and trucks emitted into the air in and around rail yards created an imminent and substantial endangerment. The CCA plaintiffs alleged that the Railroads "'have allowed and are allowing [diesel particulate matter] to be discharged into the air, from which it falls into the ground and water nearby, and is re-entrained into the atmosphere.'" *Center for Community Action*, 764 F.3d at 1021. The CCA plaintiffs "acknowledge[d] that diesel particulate

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[2] RCRA's citizen-suit provision authorizes private parties to sue "any person . . . who has contributed or who is contributing to the past or present . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

matter is initially emitted into the air as diesel exhaust." *Id.* They contended that the Railroads "'dispose' of solid waste—specifically diesel particulate matter—by allowing the waste to be 'transported by the wind and air currents into the land and water near the railyards.'" *Id.* at 1023. The Railroads moved to dismiss the complaint for failure to state a claim on several grounds, including that the Railroads "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." *Id.* at 1022. The district court granted the Railroads' motion to dismiss. On appeal, this Court affirmed dismissal of the CCA plaintiffs' citizen-suit complaint, on the basis that emissions to air that then fall to land or water do not meet the definition of disposal under RCRA. *Id.* at 1020-21.

In making its decision, this Court looked at the plain language of RCRA section 6903(3) (the definition of "disposal") and concluded that the list of actions which constitute "disposal" does not include "emitting." This Court said:

> "RCRA's definition of 'disposal' does not include the act of 'emitting.' Instead, it includes only the acts of discharging, depositing, injecting, dumping, spilling, leaking and placing. That 'emitting' is not included in that list permits us to assume, at least preliminarily, that

> 'emitting' solid waste into the air does not constitute 'disposal' under RCRA."

Id. at 1024. This Court then held that "disposal" requires that waste be *first* placed into or on land or water:

> "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.' 42 U.S.C. § 6903(3). 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 groundwaters.' *Id.* 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.'"

Id. (italics in original).

This Court rejected the view that there is a "disposal" when waste is initially emitted to the air, and then is transported by wind onto land or water:

> "The solid waste at issue here, however, at least as it is characterized in Plaintiffs' complaint, is not first placed 'into or on any land or water'; rather, it is first emitted into the air. Only after the waste is emitted into the air

> does it then travel 'onto the land and water.' To adopt Plaintiffs' interpretation of § 6903(3), then, would effectively be to rearrange the wording of the statute—something that we, as a court, cannot do."

Id. Thus "disposal" under RCRA does not include situations where solid or hazardous waste is emitted to the air and later falls to land or water. *Id.* If waste first is emitted to air and thereafter travels through air and eventually falls to land or water, such conduct does not constitute disposal. *Id*. In the CERCLA context, where the nomenclature focuses on "hazardous substances" rather than "solid or hazardous wastes," the result is the same. Emissions of hazardous substances into the air do not constitute a "disposal" under CERCLA.

This Court's analysis in *Center for Community Action* is dispositive here. Plaintiffs allege that "Teck Cominco emitted certain hazardous substances . . . into the atmosphere" which "travelled through the air . . . resulting in the deposition of airborne hazardous substances into the Upper Columbia River Site." ER 84, 98. As explained by this Court in *Center for Community Action*, construing such allegations as "disposal" would impermissibly "rearrange the wording of the statute." The statutory definition requires disposal of solid or hazardous waste to land or water in the first place, so that waste then may enter the environment or be emitted to air. Given

CERCLA's specific statutory adoption of the definition of "disposal" from RCRA, Plaintiffs do not allege a disposal.

The District Court's View. The District Court acknowledged that "CERCLA borrows RCRA's definition of 'disposal'." ER 2. The District Court also acknowledged that "'emitting' solid waste into the air does not constitute 'disposal' under RCRA" (ER 2, quoting *Center for Community Action* at 1024) and that in *Center for Community Action* this Court held that there was no "disposal" under RCRA where a complaint alleged that waste "is first emitted into the air [and] [o]nly after the waste is emitted into the air does it then travel 'onto the land and water.'" ER 3, quoting *Center for Community Action*, 764 F.3d at 1024.

Nevertheless, the District Court concluded that the term "disposal" could apply where emissions were made into the air in the first instance, as long as they eventually deposited to land or water:

> "[T]he 'CERCLA disposal' alleged by Plaintiffs occurred when hazardous substances from Teck's aerial emissions . . . were deposited 'into or on any land or water' of the UCR Site. This disposal occurred in the 'first instance' into or on land or water of the UCR Site and therefore, does not run afoul of RCRA's definition of 'disposal' as interpreted by the Ninth Circuit in [*Center for Community Action*]."

ER 4.

The District Court's interpretation is directly contrary to this Court's decision in *Center for Community Action*. Under the District Court's reasoning, a disposal would have occurred in *Center for Community Action* when diesel particulate matter from the locomotives and trucks at the railyards was "first" deposited on land near the railyards, despite having been emitted to air before depositing on the ground. The District Court's view is irreconcilably inconsistent with this Court's decision in *Center for Community Action*, and would allow a plaintiff to assert, under RCRA or CERCLA, that a "disposal" occurs whenever any hazardous substance is initially emitted into the air, transported by wind, and eventually falls to land or water, however remotely.

The District Court also suggests that "[h]ad Congress intended that CERCLA not apply to remediating contamination resulting from aerial emissions, it would have made something that significant abundantly clear in the statute." ER 16. In fact, Congress did make "abundantly clear" how the term "disposal" should be defined under CERCLA. Congress expressly provided that the term "disposal" shall have the same meaning in CERCLA as in RCRA. This Court has directed a "plain meaning" approach to this definition. Further, this Court in *Center for Community Action* confirmed that this statutorily defined term does not include emissions to air in the first instance that

later travel and fall onto land or water. Thus, "any 'gap' is the product of a careful and reasoned decision made by Congress that [this Court is] not at liberty to disturb." *Center for Community Action,* 764 F.3d at 1029.

The District Court attempted to distinguish *Center for Community Action* on the grounds that "RCRA is not concerned with cleanup." That is inaccurate. *See* 42 U.S.C. § 6928(h)(1) (RCRA provision authorizing orders "requiring corrective action or other such response measure …necessary to protect human health or the environment"); *see also* 42 U.S.C. § 6924(u) (RCRA provision requiring permit standards to include "corrective action" for releases of hazardous waste from solid waste management units). Moreover, even where statutes include "remedial" elements, the Supreme Court has emphasized that "'no legislation pursues its purposes at all costs.' [Citation omitted]. Congressional intent is discerned primarily from the statutory text." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014).

The District Court further overlooked the interrelationship between federal environmental laws which Congress considered in drafting RCRA and CERCLA. Congress enacted RCRA six years after the adoption of the Clean Air Act Amendments of 1970, to "solv[e] the problems associated with the 3-4 billion tons of discarded materials generated each year" and "unregulated land disposal of

discarded materials and hazardous waste." *Center for Community Action*, 764 F.3d at 1026 (citations omitted); *see also, Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (quoting H.R. Rep. No. 1491, 94th Cong., 2nd Sess. 4). Several years after enacting RCRA, Congress enacted CERCLA for a purpose closely related to land disposal—to target "spills and leaks from abandoned sites." *Carson Harbor*, 270 F.3d at 885. Neither RCRA nor CERCLA was intended as a general mechanism for addressing the issues of air pollutants, which are under the broad purview of the Clean Air Act. *Center for Community Action*, 764 F.3d at 1029.

In summary, this Court in *Center for Community Action* has addressed the definition of "disposal" under RCRA, which is the definition that Congress chose to adopt in CERCLA. Accordingly, this Court's decision in *Center for Community Action* is dispositive in this case as well.

II. UNLESS REVERSED, THE DISTRICT COURT'S HOLDING WOULD RESULT IN INCONSISTENCIES BETWEEN CERCLA AND THE CLEAN AIR ACT, AS WELL AS WITHIN CERCLA ITSELF.

A. The District Court's Holding Results in an Inconsistency Between CERCLA and the Clean Air Act.

While CERCLA and the Clean Air Act address different environmental issues, in this case the District Court's holding creates serious inconsistency between CERCLA and the Clean Air Act.

Under the Clean Air Act (Subchapter 1, 42 U.S.C. §§ 7401, *et seq*.), EPA comprehensively regulates the emissions of particulate matter and other contaminants. Stationary source aerial emissions in the United States (as under Canada's Clean Air Act of 1971, now the Canadian Environmental Protection Act, 1999, S.C. 1999, c.33) are subject to permitting limitations designed to reduce the impact of such emissions on human health and ensure that the regulated regions of the United States attain air quality standards adopted pursuant to a complex interaction between the states and EPA. Congress has determined that the "complex balancing" of policy interests required for designing regulation of air emissions is best entrusted under the Clean Air Act to EPA, which possesses the expertise and resources to undertake the necessary analysis and weighing of these competing

concerns. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011). Courts are ill suited to carry out the task Congress conferred upon EPA under the Clean Air Act. *See id.* at 2539-40. If, as the District Court holds, "disposal" under CERCLA includes emissions into the air that are transported by wind and settle onto land or water, CERCLA could be used to contradict the reasoning of Congress in vesting the EPA with the duty to regulate air emissions under the Clean Air Act.

In contrast to the limited citizen-suit provisions of the Clean Air Act, CERCLA section 107 permits a private right of action to recover response costs against a responsible party that triggers CERCLA's liability standard. 42 U.S.C. § 9607(a). Interpreting "disposal" to include emissions into the air thus would open the door to CERCLA cost recovery suits that would undermine the broad regulatory scheme created by the Clean Air Act for addressing emissions. Further, the Clean Air Act does not, on its face, prohibit many types of air emissions—rather it serves to limit such emissions—thus reducing potential impacts upon human health. In contrast, CERCLA may impose liability for essentially any hazardous substances which may be present at a facility, regardless of quantity or risk. If a party is held responsible for air emissions that deposit on property, such a result would be contrary to the decision by Congress to address risks posed by air pollution chiefly under the Clean Air Act. When a regulatory

scheme is designed to address specific conduct in a comprehensive way, other more general statutes should not be interpreted to create remedies undermining the balance struck by that scheme. *See United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 742 (5th Cir. 1980) (rejecting action for recovery of oil spill costs under the Refuse Act which would undermine "the balanced and comprehensive scheme" for recovery of such costs established under the Federal Water Pollution Control Act).

B. The District Court's Holding Also Results in Inconsistencies Within CERCLA Itself.

The gist of the District Court's holding is that "disposal" under CERCLA includes emissions into the air that are transported by wind and eventually settle onto land or water. Under the District Court's holding, the "disposal" would be a perpetual process that goes on as wind-blown substances continue to settle. If, as the District Court holds, such wind-blown passive migration through the air that settles on land is a CERCLA "disposal," the result would be an unwarranted expansion of CERCLA liability, and an equally improper inconsistency with the innocent landowner defense.

Under CERCLA section 107(a), persons liable for response costs include current owners of property from which there is a release. Current owners may invoke section 101(35)(A), the innocent landowner defense, which can be asserted by a defendant only if the

property was "acquired by the defendant after the disposal or placement of the hazardous substance." 42 U.S.C. § 9601(35)(A), 9607(b)(3). Under the District Court's holding, current landowners could not invoke the innocent landowner defense because the "disposal" would be a perpetual process that goes on as wind-blown substances continue to settle, including after current owners acquired the property. *See Carson Harbor*, 270 F.3d at 882-883.

The District Court's holding also would expand liability for past owners of land simply because they owned land when wind-blown mercury or other hazardous substances had settled on it. This Court previously has rejected an interpretation of "disposal," because it was not consistent with the innocent landowner defense and would make disposal "nearly always a perpetual process." *Carson Harbor,* 270 F.3d at 881. The District Court's holding thus results in inconsistencies within CERCLA itself.

III. BECAUSE PLAINTIFFS' ALLEGATIONS REGARDING AIR EMISSIONS DO NOT COME WITHIN THE DEFINITION OF DISPOSAL UNDER CERCLA, THIS COURT SHOULD REVERSE AND DIRECT THE DISTRICT COURT TO STRIKE THOSE ALLEGATIONS.

Because Plaintiffs' allegations regarding air emissions do not come within the definition of "disposal" under CERCLA, those

allegations are immaterial and not pertinent. This Court should reverse and direct the District Court to strike Plaintiff's allegations regarding air emissions.

Rule 12(f) of the Federal Rules of Civil Procedure provides that the "court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "'The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. . . .'" *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (quotation marks, citation, and first alteration omitted), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). "[W]here the motion may have the effect of making the trial of the action less complicated, or have the effect of otherwise streamlining the ultimate resolution of the action, the motion to strike will be well taken." *California ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 39 (N.D. Cal. 1981).

This Court has interpreted "immaterial" to mean "that which has no essential or important relationship to the claim for relief or the defenses being pled." *Fogerty*, 984 F.2d at 1527 (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706-007 (1990)). Similarly, "'[i]mpertinent' matter

consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* (quoting Miller & Wright at 711).

Prior to this appeal, the District Court had issued a scheduling order. Under this order, the parties would have proceeded with expert analysis and discovery on the air emission issues, and ultimately trial on those issues. Clerk's Record, ECF No. 2101, 2133 & 2134. After this Court granted Teck permission to appeal, the District Court stayed proceedings on the air emission issues.

Because Plaintiffs' allegations do not come within the definition of "disposal" under CERCLA, it would make no sense to allow the air emission claims to proceed. Directing the District Court to strike those allegations would avoid lengthy discovery and trial relating to air emissions. Indeed, the District Court recognized this in finding that an immediate appeal may materially advance the ultimate termination of the litigation:

> "If the air pathway is eliminated from this case, it will undoubtedly reduce the time necessary to bring this case to a conclusion because it will leave only the recovery of response costs and natural resource damages resulting from Teck's discharges of slag and effluent into the river."

ER 8. The air emission allegations should be eliminated from this case.

CONCLUSION

For the reasons stated above, appellant Teck Metals Ltd. respectfully submits that the District's Order Re Motion to Strike and the District Court's Order Denying Motion for Reconsideration should be reversed, with directions to grant Teck's Motion for Reconsideration and Teck's Motion to Strike the allegations in Plaintiffs' Fourth Amended Complaint pertaining to air emissions.

Dated: August 4, 2015.

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STATEMENT OF RELATED CASES

This Court's decision on a previous interlocutory appeal under 28 U.S.C. § 1292(b) from the District Court's denial of Teck's Motion to Dismiss the action for lack of personal and subject matter jurisdiction and for failure to state a claim upon which relief could be granted (No. 05-35153) is reported at *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006).

An appeal (No. 08-35951), pursuant to Fed. R. Civ. P. 54(b), from the District Court's order dismissing plaintiffs' and the State's claims for civil penalties for lack of subject matter jurisdiction under 42 U.S.C. § 9613(h) is reported at *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214 (9th Cir. 2011).

An appeal (No. 10-35045), pursuant to Fed. R. Civ. P. 54(b), from the District Court's order awarding plaintiffs and the State their attorneys' fees is the subject of an unreported Memorandum Disposition at *Pakootas v. Teck Cominco Metals, Ltd.*, 563 Fed. Appx. 526, 2014 U.S. App. LEXIS 3831 (9th Cir. 2014).

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points and contains 6,302 words.

Dated: August 4, 2015.

s / Kevin M. Fong
Kevin M. Fong

Addendum

ADDENDUM

42 U.S.C. § 6903

§ 6903. Definitions

As used in this chapter: …

(3) The term "disposal" means 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. § 9601
(CERCLA section 101)

§ 9601

For purposes of this subchapter—…

(29) The terms "disposal," "hazardous waste", and "treatment" shall have the meaning provide in section 1004 of the Solid Waste Disposal Act [42 U.S.C. 6903].

*****

42 U.S.C. § 9607
(CERCLA section 107)

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) 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 or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest

shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

*****

NO. 15-35228

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

Plaintiffs-Appellees,

and

STATE OF WASHINGTON,

Plaintiff/Intervenor-Appellee,

v.

TECK COMINCO METALS, LTD, a Canadian corporation,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

No. CV-04-0256-LRS
The Honorable Lonny R. Suko
United States District Court Judge

RESPONSE BRIEF OF APPELLEE STATE OF WASHINGTON

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I. INTRODUCTION

Teck Metals, Ltd. (Teck) and its predecessors have been arranging for the disposal of hazardous substances in the United States for some 100 years. Teck has used both the Columbia River and aerial deposition from its smelter stacks as pathways for this disposal. Both pathways lead to the Upper Columbia River Site (UCR Site) in the United States, which Teck has contaminated with lead, arsenic, cadmium, copper, mercury and zinc. These metals are toxic to humans, animals and plants.

The State of Washington (State) and Confederated Tribes of the Colville Reservation (Tribes) initiated this lawsuit more than ten years ago to hold Teck accountable for this contamination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The district court has already found Teck liable under CERCLA for the contamination caused by Teck's discharge of toxic slag and liquid effluent into the Columbia River (the river pathway), which deposited in the water and sediments of the UCR Site. What is at issue before this Court is whether Teck can likewise be held liable for its aerial deposit of toxic heavy metals onto the land and water of the UCR Site.

Teck argues, based solely on this Court's ruling in *Center for Community Action v. BNSF Railway,* 764 F.3d 1019 (9th Cir. 2014) (BNSF Railway), that the definition of "disposal" precludes being held responsible for this century-long practice of depositing hazardous substances through an air

pathway. Teck's argument is based entirely on the fact that the material "disposed" of passed first through the air before depositing onto land and water. Teck's reading of *BNSF Railway* is overly narrow and was rejected by the district court. The district court's conclusion was correct.

This case is readily distinguished from *BNSF Railway*, in which the plaintiffs sought to enjoin emissions into the air from railyards, not the consequences of "disposal" of hazardous substances onto land or water. Under CERCLA, a "disposal" requires that hazardous substances be discharged, deposited, injected, dumped, spilled, leaked or placed "into or on any land or water…" That is exactly what occurred here. Under the plain terms of CERCLA's definition, the facts alleged constitute a "disposal." To interpret otherwise would be to read the word "deposit" out of the definition of "disposal" and allow entities such as Teck to escape liability simply because they disposed of their hazardous substances through the air.

II. STATEMENT OF JURISDICTION

The Appellee State agrees with the Appellants' statement of jurisdiction.

III. STATEMENT OF THE ISSUES

Did the district court correctly conclude that a "disposal" occurred under CERCLA when hazardous substances originating from a smelter operated by Appellant Teck were deposited onto the land and water at the Upper Columbia River Site, where they are further released to the environment?

IV. STATEMENT OF THE CASE

This ongoing case concerns whether Teck is liable under CERCLA for releases of hazardous substances at a "facility" in the United States: the Upper Columbia River Site. *See Pakootas v. Teck Cominco Metals, Ltd.,* 452 F.3d 1066, 1078 (9th Cir. 2006), *certiorari denied by* 552 U.S. 1095 (Jan. 7, 2008) (*Pakootas I*). The State and the Tribes allege that Teck is responsible under CERCLA for disposing of hazardous contaminants through an "air pathway" originating from Teck's lead smelter. ER 98 ¶ 4.2, ER 84 ¶ 4.2. Teck moved to dismiss the "air pathway" claim, which the district court denied on July 29, 2014. ER 10.

Teck later moved for reconsideration on the basis that the district court's decision was contrary to this Court's August 20, 2014 opinion in *BNSF Railway*. The district court denied the Motion for Reconsideration and certified the issue for interlocutory appeal to this Court. Teck then filed a Petition seeking Permission to Appeal, which this Court granted.

V. STATEMENT OF FACTS

A. Historical Discharge of Contaminants

For approximately 100 years, Teck has owned and operated what is now the world's largest integrated lead-zinc smelting and refining complex. ER 97 ¶ 2.3. This complex is located on the Columbia River in Trail, British

Columbia, which is approximately ten miles north of the border between the United States and Canada. *Id.*

During this 100-year period, Teck discharged hazardous byproducts of its smelting operations directly into the Columbia River, which were carried downstream into the United States. ER 97–8 ¶ 4.1. These byproducts included up to 145,000 tons of slag annually — more than ten million tons total, which ended up in the UCR Site. *Id*. This slag contains toxic heavy metals, including, but not limited to, arsenic, cadmium, copper, mercury, lead, and zinc. *Id.*

In addition to direct discharges into the Columbia River, Teck has also discharged hazardous substances into the air from its Trail Smelter stacks, including heavy metals such as lead, arsenic, cadmium and mercury. ER 98 ¶ 4.2. These hazardous substances have traveled through the air into the United States, where they have been deposited into and on the land and water at the UCR Site. *Id.*

The slag, liquid waste, aerial deposits, and hazardous substances contained therein have contaminated Washington's water, land and natural resources. ER 98 ¶ 4.3. For instance, the slag that Teck discarded in the Upper Columbia River and Lake Roosevelt physically and chemically decays over time, releasing hazardous substances (including arsenic, cadmium, copper, zinc

and lead) into the surrounding environment. ER 98–9 ¶ 4.4. These contaminants are toxic to humans, animals, and plants. ER 99 ¶ 4.5.

Based on these facts, in 2003, EPA issued Teck a Unilateral Administrative Order (the "Order"). ER 250 ¶ 4.6. The Order required Teck to conduct a remedial investigation to determine the nature and extent of contamination at the site and produce a feasibility study to identify ways to clean up the contamination caused by Teck's Trail Smelter. *See* ER 250–51 ¶ 4.7.

B. Commencement of the Lawsuit and the *Pakootas I* Decision

In 2004, the original Plaintiffs, Joseph Pakootas and Donald R. Michel (collectively Pakootas), filed a complaint under CERCLA's citizens' suit provision in the United States District Court for the Eastern District of Washington. ER 255. The complaint asked the district court for declaratory and injunctive relief, including enforcement of the EPA issued Order against Teck. ER 261 § VII. The State moved to intervene as of right pursuant to 42 U.S.C. § 9659(g), and filed a Complaint in Intervention, which was granted. ER 246.

Teck immediately filed a Motion to Dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Teck argued that CERCLA could not apply because it discharged its wastes in Canada. Both the district court and this Court disagreed. This Court held that a

CERCLA release occurred in the United States, and CERCLA was thus being applied domestically, if hazardous substances from Teck could be shown to have been released from a CERCLA "facility" within the United States (i.e., the Upper Columbia River Site): an area where "hazardous substances have been deposited, stored, disposed of, placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B); *Pakootas I*, 452 F.3d at 1074. The Court stated: "[I]n the case of an actual release, the plaintiff need only prove that the defendant's hazardous substances were deposited at the site, [and] there was a release at the site and that the release caused it to incur response costs." *Id.* at 1078 n.18. The Supreme Court declined to accept review. *Pakootas v. Teck Cominco Metals, Ltd.* 552 U.S. 1095 (Jan. 7, 2008).

C. Back at the District Court: Phase I – CERCLA Liability for Teck's Discharge Into the Columbia River

The Plaintiffs' lawsuit alleged that Teck contaminated the UCR Site through its discharges of slag and liquid effluent into the Columbia River, i.e. the "river pathway." Before going to trial on its CERCLA liability for the river pathway, Teck stipulated to numerous facts, including that it discharged slag and liquid effluent into the Columbia River, some of which ended up at the UCR Site; that its slag leached and continues to leach hazardous substances into the water and sediment; and that this release or threatened release of hazardous substances has caused the State and the Tribes to incur response costs.

ER 21–22. The only issues left for trial were whether Teck was within one of the four classes of persons subject to CERCLA liability; specifically, whether it was an "arranger" and whether the court had personal jurisdiction over Teck. ER 22–23.

The court ruled for the State and Tribes on both of these issues (the Phase I decision). ER 21. CERCLA requires that there be a "release or threatened release of . . . hazardous substances from a facility…such [that the] release has caused the plaintiff to incur response costs that were necessary and consistent with the national contingency plan…and that the defendant is one of four classes of [covered] persons." ER 57; see also 42 U.S.C. § 9607(a). Here, the district court held that Teck's century-long practice of intentionally discharging slag and liquid effluent into the Columbia River in Canada, which then crossed into the United States and was deposited and re-released at the UCR Site, meant that Teck was liable as an "arranger" for the "disposal" of hazardous substances at a CERCLA "facility" under 42 U.S.C. § 9607(a)(3). ER 37–39.

The Phase I decision authorized the State and Tribes to recover their past response costs related to the river pathway in what is referred to by the Parties as the Phase II proceeding.

D. Phase II – Recovery of Past Response Costs and the Air Pathway

After the district court found Teck liable for the river pathway, the State and Tribes moved forward with their claims for response costs associated with the river pathway contamination.

The Tribes then moved to amend their complaint to add a claim for liability via another pathway: an "air pathway" related to aerial deposition at the UCR Site. ER 81, 135. The State similarly amended its complaint. ER 94. The State's Fourth Amended Complaint alleged that:

> Teck Cominco's discharges into the atmosphere from the Cominco Smelter travelled through the air into the United States, resulting in the disposal of airborne contaminants at the Upper Columbia River Site.

ER 102 ¶ 5.4. The district court granted the motions, indicating that CERCLA liability for the air pathway would be litigated together with past response costs in Phase II. Trial was scheduled for December 2015. ER 133–134.

Teck then moved to dismiss the Plaintiffs' claims regarding the air pathway. Teck moved based on the argument that aerial deposition does not constitute a "disposal" under CERCLA. The district court denied the motion. The court held that air depositions are within the scope of CERCLA's definition of "disposal," reasoning that CERCLA requires there to be a disposal at a "facility," and the UCR Site is a "facility." The district court held that "[t]he plain language of Section 9607(a)(3) does not require…that there be a

disposal 'into or on any land or water' in the 'first place' or in the 'first instance.'" Instead, "[s]o long as Defendant'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- Defendant is potentially liable as an 'arranger.'" ER 12–13.

Approximately one month after the district court denied Teck's motion to dismiss, this Court issued its opinion in *BNSF Railway*. *BNSF Railway* held that the definition of "disposal" under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903(3), did "not extend to emissions of solid waste directly into the air" in the case of a citizen suit brought to enjoin emissions of diesel particulates from railyard operations. *Id.* at 1024. Based on this holding applying RCRA, Teck filed a motion for reconsideration, arguing that this Court had already decided the issue contrary to the district court:

> (1) the "definition of 'disposal' does not include the act of 'emitting'" to the air; (2) "'disposal' includes only conduct that results in the placement of solid [or hazardous] waste 'into or on any land or water'"; and (3) 'disposal' occurs when the solid [or hazardous] waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted into the air.'

ER 69. Teck argued that based on *BNSF Railway*, the district court should reconsider and reverse its prior decision. *Id*.

The district court declined. It distinguished this case from *BNSF Railway*, concluding that the "'CERCLA' disposal alleged by Plaintiffs occurred when hazardous substances from Teck's aerial emissions…were deposited 'into or on any land or water' of the UCR Site. This disposal occurred in the 'first instance' into or on any land or water of the UCR Site and therefore, does not run afoul of RCRA's definition of 'disposal' as interpreted by the Ninth Circuit in [*BNSF Railway*]." ER 4.

Teck then filed its Petition for Permission to Appeal to this Court, which was granted on March 26, 2015.

VI. SUMMARY OF ARGUMENT

This Court analyzed the definition of "disposal" under CERCLA in *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 881 (9th Cir. 2001). Distilled to its essential terms, "disposal" requires that waste be discharged, deposited, injected, dumped, spilled, leaked, or placed "into or on any land or water" so that the waste may thereafter enter the environment.

In *Carson Harbor*, the Court construed each of the actions associated with "disposal" in accordance with its common, ordinary meaning and examined each meaning to determine whether it "fit the hazardous substance contamination at issue." One of the terms used to define "disposal" is to "deposit." The common dictionary definition of "deposit" includes "to precipitate; settle" or to "place, especially in a layer or layers, by a natural

process." These common meanings "fit the hazardous substance contamination at issue"—which is the deposit into or on the land and water of the UCR Site of hazardous substances from Teck's smelter operation. Under the plain terms of CERCLA's definition, the facts alleged in this case thus constitute a "disposal."

The *BNSF Railway* case does not change this approach to CERCLA. *BNSF Railway* was focused on emissions into the air from railyards. The plaintiffs sought declaratory judgment that the emissions themselves violated RCRA and an order controlling the emissions under RCRA's citizen suit provision, which allows for the abatement of a "disposal" which may present an "imminent and substantial endangerment." This Court's holding that a "disposal" does not occur at the point waste is emitted directly into the air thus resolved the RCRA citizen suit.

Unlike *BNSF Railway*, this case does not turn on the allegation that "disposal" occurs when waste is simply emitted to air. Instead, the Plaintiffs allege that "disposal" occurs only after waste is "deposited" into or on the land and water of the UCR Site. Teck reads *BNSF Railway* to preclude a "disposal" where waste travels first through the air, for any distance, before settling onto the land or water. That reading is incorrect because it both ignores the plain meaning of "deposit" and requires the Court to read qualifying words into the definition.

Further, adopting Teck's overly narrow interpretation of *BNSF Railway* is inconsistent with CERCLA's broad remedial purpose and would create a liability loophole for two of the four types of "covered persons" who may be subject to CERCLA liability. Liability under CERCLA for both "arrangers" and "past owners/operators" is triggered upon the act of "disposal." The narrow reading of "disposal" advocated by Teck would impose a "must not first pass through the air" qualifier and eliminate liability for both classes of liable persons related to any aerial deposition of hazardous substances, upsetting the manner in which CERCLA has been applied for more than thirty years. This type of narrow reading of the "disposal" definition was already rejected by this Court in *Voggenthaler v. Maryland Square LLC,* 724 F.3d 1050 (9th Cir. 2013), as contrary to CERCLA's remedial purposes.

Moreover, contrary to Teck's arguments, interpreting "disposal" to include hazardous substances that settle onto land or water is consistent with CERCLA's "innocent purchaser" defense. It is also consistent with the Clean Air Act. The Clean Air Act and CERCLA do not overlap. CERCLA includes a specific limitation on liability related to "federally permitted releases," which include authorized air emissions. Neither the Clean Air Act nor CERCLA allow a party to avoid CERCLA liability for air emissions not authorized by a permit.

Finally, Amicus Government of Canada's newly raised issues regarding the 1935 Ottawa Convention are not properly before this Court. An amicus brief cannot raise new issues on appeal. Further, the issue was not properly raised at the trial court level, and therefore cannot be raised on appeal. Even if the Court were to consider the issue, Canada's argument should be rejected because the tribunal established by the 1935 Ottawa Convention is discretionary and only involves sulfur dioxide fumes, which are hazardous substances not at issue in this case.

VII. STANDARD OF REVIEW

This Court reviews *de novo* the District Court's denial of Teck's motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). With respect to the denial of Teck's 12(b)(6) motion, the Court's review is limited to the contents of the Tribes' and the State's complaints. *Id.* The Court must accept all allegations in those complaints as true, and view the allegations in the light most favorable to the Tribes and the State. *Id.* The Court must affirm the District Court's denial of Teck's motion to dismiss unless it appears "beyond doubt" that the Tribes' and the State can prove no set of facts in support of their claims that would entitle them to relief. *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995). In addition, the interpretation of a statute is a question of law reviewed *de novo*. *Hanford Downwinders*

Coalition, Inc. v. Dowdle, 71 F.3d 1469, 1475 (9th Cir. 1995)(*citing Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995)). "All of the district court's factual findings on jurisdictional issues must be accepted as true unless clearly erroneous." *Id.* (*citing Stone v. Travelers Corp.,* 58 F.3d 434, 436-37 (9th Cir. 1995)).

VIII. ARGUMENT

A. The Facts Alleged Meet the Plain Language of CERCLA's "Disposal" Definition and are not Controlled by the Holding in *BNSF Railway*.

1. This case involves the "deposit" of hazardous substances to land or water and is therefore a "disposal" under CERCLA

This case centers on the definition of "disposal" as used in CERCLA, which borrows its definition from RCRA. 42 U.S.C. § 9601(29). When interpreting a statute, "our task is to construe what Congress has enacted." *Duncan v.* Walker, 533 U.S. 167, 172, 121 S.Ct. 2120, 2124, 150 L.Ed.2d 251 (2001). The court begins with the language of the statute. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 56, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987); *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.,* 299 F.3d 1007, 1015 (9th Cir. 2002). "We look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 877 (9th Cir. 2001) (en banc) (*citing Northwest Forest Res. Council v. Glickman,* 82 F.3d 825, 830 (9th Cir.

1996) (internal quotation marks and citation omitted)). It is also "a fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120,133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting *Davis v. Michigan Dep't of Treasury,* 489 U.S. at 809 (1989)); *see also United States v. Lewis,* 67 F.3d 225, 228–29 (9th Cir.1995). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (quoting *The Wilderness Soc'y v. United States Fish & Wildlife Serv.,* 353 F.3d 1051, 1060 (9th Cir.2003) (en banc)).

CERCLA defines disposal "to have the meaning provided in section 1004 of the Solid Waste Disposal Act [RCRA]." 42 U.S.C. § 9601(29). That definition, in turn, provides that "disposal" is:

> 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) (emphasis added).

This Court previously construed RCRA's disposal definition, as applied through CERCLA, in the *Carson Harbor* case. *See Carson Harbor,* 270 F.3d at 874-887. Since neither RCRA nor CERCLA defines the individual terms used to define "disposal"—discharge, deposit, injection, dumping, spilling,

leaking or placing—the Court focused on the plain meaning of each term to determine whether any of the terms "fit the hazardous substance contamination at issue." *Id*. at 879; *see also*, *Safe Air for Everyone*, 373 F.3d at 1041 (turning to dictionary to determine "ordinary, contemporary common meaning").

One of those statutory terms is "deposit." The common, dictionary definition of "deposit" includes the following actions:

- To put down or place, *especially in a layer or layers, by a natural process*;
- To become deposited; *to precipitate; settle*

The American Heritage Dictionary of the English Language, New College Edition at 355 (1981). (emphasis added).[1] The actions captured by the term "deposit"—i.e., to "settle" or "precipitate"—distinguish "deposit" from other words in the "disposal" definition that connote direct and even purposeful action to put waste in contact with land or water, such as "placing." Where Congress has used seven distinct words to define "disposal," we can presume that Congress intended to capture a different, distinct action with each term. To construe the statute differently would be to "read out" Congress's words and frustrate its intent. *See Asarco, LLC v. Celanese Chemical Co.*, 792 F.3d

[1] The remaining actions defining "deposit" do not fit the statutory context of RCRA and CERCLA, since they do not involve material being introduced to the environment. They include:

To place carefully or safely in the proper repository

To entrust (money) to a bank

The American Heritage Dictionary of the English Language, New College Edition at 355 (1981).

1203, 1210 (9th Cir. 2015) (*quoting United States v. Nordic Vill., Inc.* 503 U.S. 30, 35-36 (1992)) ("[W]e 'construe a statute to give every word some operative effect.'").

Indeed, in *Carson Harbor*, this Court recognized that the terms defining "disposal" carry different meanings. Being "mindful that the statute will be applied in a myriad of circumstances, many of which we cannot predict today," the Court examined each term individually (e.g., ". . .'leaking' and 'spilling' may not require affirmative human conduct, [although] neither word denotes the gradual spreading of contamination alleged here") and rejected strict readings that would confine the terms to only "active" meanings or affirmative human conduct. *Carson Harbor*, 270 F.3d at 880; *see also*, *id*. at 882. The Court declared that this approach to applying the definition "*is consistent with the purpose of CERCLA*." *Id*. at 879 (emphasis added).

Applying this approach, and borrowing the words of *Carson Harbor*, the common meaning of "deposit" "fit[s] the hazardous substance contamination at issue." *Id.* at 879. The hazardous substances from the Teck's Smelter and were "…deposit[ed] . . . into or on any land or water"; specifically, to the land and water of the UCR Site. 42 U.S.C. § 6903(3). Once so deposited at the facility, Teck's toxic metals became free to "enter the environment or be emitted into the air or discharged into any waters, including ground waters."

42 U.S.C. § 6903(3). Under the plain terms of CERCLA, the aerial deposit of toxic metals to land and water in the UCR Site constitutes a "disposal."

2. The "disposal" definition includes situations where hazardous substances pass first through the air before depositing onto the land or water

Teck relies on *BNSF Railway* to argue that a "plain language" interpretation of "disposal" requires that waste must first make direct contact with land or water, which Teck argues negates all scenarios where waste might first pass through air before settling onto land or water. Dkt 13-1 at 15-20. To hold otherwise, Teck argues, "would effectively be to rearrange the wording of the statute." Dkt 13-1 at 19; *BNSF Railway*, 764 F.3d at 1024.

The State agrees that this Court held that a "disposal" cannot occur based solely on emission into the air. *See* 42 U.S.C. § 6903(3); *BNSF Railway*, 764 F.3d at 1025. Under the plain language of the "disposal" definition, "disposal" can only occur when material is discharged, deposited, injected, dumped, spilled, leaked, or placed "*into or on any land or water*"; *i.e.*, not simply into the air. 42 U.S.C. § 6903(3). The State disagrees, however, that any passage through the air *before* waste comes into contact with land or water negates a "disposal." Neither *BNSF Railway* nor any "plain language" of the statute supports such a reading.

Teck bases its argument on three passages in *BNSF Railway*. In the first, this Court stated that the fact "emitting" is not included among the terms listed

in the "disposal" definition "permits us to assume . . . that 'emitting' solid waste into the air does not constitute 'disposal' under RCRA." Dkt No. 13-1 at 17–18, quoting *BNSF Railway*, 764 F.3d at 1024. This creates no inconsistency with this case, however. As pointed out by the district court, the Plaintiffs have not alleged that the act of emitting toxic metals into the air from Teck's smelter—which occurs in Canada, and not the United States—constitutes a disposal. ER 4. Instead, we have alleged that the deposit of these metals into or on the land and waters of the UCR Site constitutes the disposal.

In the second passage Teck cites, this Court stated that "disposal occurs where the solid waste is *first* placed 'into or on any land or water and is thereafter emitted into the air.'" Dkt No. 13-1 at 18, quoting *BNSF Railway*, 764 F.3d at 1024. This again creates no inconsistency with this case. The Plaintiffs do not allege that "disposal" occurs at any point *before* Teck's waste first makes contact with the land and water of the UCR Site. As noted by the district court:

> The 'CERCLA' disposal alleged by Plaintiffs occurred when hazardous substances from Teck's aerial emissions…were deposited 'into or on any land or water' of the UCR Site. *This disposal occurred in the 'first instance' into or on land or water of the UCR Site* and therefore, does not run afoul of RCRA's definition of 'disposal' as interpreted by the Ninth Circuit.

ER 4 (emphasis added).

Finally, Teck quotes from a passage in which this Court discusses the fact that, as alleged in the *BNSF Railway* complaint, the solid waste at issue was not "first placed 'into or on any land or water,'" but rather was "first emitted into the air." Dkt 13-1 at 18–19, quoting *BNSF Railway*, 764 F.3d at 1024. Teck reads this passage to preclude "disposal" where waste has traveled first through the air before reaching the ground or water. That reading, however, is dictum.

BNSF Railway involved a suit brought by environmental groups whose members lived near railyards. The suit was brought under RCRA's citizen suit provision, which provides a cause of action against any person who has "contributed or ... is contributing to the past or present ... *disposal* of any solid or hazardous waste *which may present an imminent and substantial endangerment to health or the environment*." *BNSF Railway*, 764 F.3d at 1024 at 1020; 42 U.S.C. § 6972(a)(1)(B) (emphasis added). The complaint, however, asked the district court to declare that the defendants' failure to "'limit or control the amount of [diesel particulate matter] *generated on and by the railyards*'" violated RCRA, *id*. at 1023 (emphasis added), and to order that the defendants "take certain control measures *to reduce diesel particulate emissions from their railyards*." *Id*. at 1022 (emphasis added). Thus, while the complaint alleged that diesel particulate matter from the railyards was transported by wind and air currents to land and water, the compliant did not

request relief to redress an imminent and substantial endangerment created by this potential "disposal." The case instead focused entirely on controlling initial points of emission into the air—which Congress had specifically excluded from Clean Air Act regulation. *See Id.* at 1022, 1023. Indeed, this Court framed the issue in the case as whether RCRA "may be used to enjoin *the emission from Defendant's railyards* of particulate matter found in diesel exhaust." *Id.* at 1020 (emphasis added).

The *BNSF Railway* citizen's suit failed, therefore, because of this Court's holding that the plain language of RCRA's disposal definition is not triggered by direct aerial "emissions" and is only triggered upon solid or hazardous waste coming into contact with land or water. *See Id*. at 1024. Any reading that further qualifies the manner in which contact with the land or water must occur—i.e., only through direct contact with land or water, without any passage through the air—is thus not necessary to the holding and is dictum. *See Bradley v. Henry*, 428 F.3d 811, 817 (9th Cir. 2005) ("Dicta in normal judicial parlance are statements of a court not necessary to its resolution of the case before it...")

Reading the Court's passage as narrowly as Teck suggests is contradicted by other text in the *BNSF Railway* opinion. This Court noted that the holding in *United States v. Power Eng'g Co.,* 191 F.3d 1224 (10th Cir. 1999), was "not to the contrary" with its opinion. *BNSF Railway*, 764 F.3d at

1025. *Power Engineering*, however, involved the aerial emission of a "mist" from "air scrubbers" for which the state of Colorado had issued an "air pollution emission permit." *United States v. Power Eng'g Co*., 10 F.Supp.2d 1145, 1150 (Col. 1998). This mist, which included hexavalent chromium, lead, mercury and arsenic, passed first through the air before condensing on the ground adjacent to the air scrubbers, with aerial deposition extending some thirty feet from the facility's main building. *Id*. at 1150-51.

The defendants in *Power Engineering* made the same argument Teck makes in this case: "because the air scrubbers discharge the condensate into the air, the discharge does not constitute placement of solid waste 'into or on any land or water.'" *Id*. at 1158. In reasoning affirmed by the Tenth Circuit, *United States v. Power Eng'g Co.* 191 F.3d at 1231,[2] the district court rejected this argument. The district court held that the evidence demonstrated that the Facility's scrubbers "currently *deposit*, and have *deposited* for several years, a mist or 'suspended liquid' of hexavalent chromium condensate onto Facility land." *Power Eng'g*, 10 F.Supp.2d at 1158 (emphasis added). It added that accepting the defendants' "overly narrow interpretation of the definition" would "exclude recognized acts of disposal, such as the dumping of waste by a dump-truck and the discharge of liquid waste by an effluent pipe situated

[2] "For substantially the same reasons discussed thoroughly in the district court's opinion, we find that Defendants are currently disposing of hazardous wastes . . ."

several inches or feet above land, merely because the hazardous waste becomes airborne briefly before contacting the land." *Id*.

There is no basis in the plain language of the "disposal" definition to distinguish between material that passes only a few feet through the air before depositing onto land or water versus passing any greater distance before such deposit. Drawing any such distinction requires doing exactly what Teck (incorrectly) accuses the Plaintiffs of doing: re-wording the statute. In Teck's case, it would require adding a qualifier to the statute that in order for "disposal" to occur, solid or hazardous waste "must not first pass through air" (or "must not first pass some [undetermined] distance through the air") before being "discharged," "dumped," "spilled," "leaked," "placed," or as in this case, "deposited" into or on land or water.

Congress, however, included no such qualifier in the "disposal" definition. The circumstances alleged in this case fit squarely within the plain language of RCRA's disposal definition: they match the common, ordinary meaning of the word "deposit" and they involve a deposit "into or on any land or water." 42 U.S.C. § 6903(3). Further, the circumstances alleged in this case do not conflict with the central holding of *BNSF Railway*: that "disposal" does not occur when waste is simply emitted into the air, and may only occur when waste comes into contact with land or water.

This distinction between an emission to air alone versus a disposal to the land or water (after passing through the air) was recently highlighted in *The Little Hocking Water Ass'n, Inc. v. E.I. du Pont de Nemours and Co.*, ___F.Supp.3d___ (S.D. Ohio, 2015), 2015 WL 1038082. In that case, particulate matter in air emissions was transported by the wind and deposited onto land. *Id.* at *17. Citing *BNSF Railway*, the defendant argued that the deposit of these air emissions did not constitute a "disposal" under RCRA. The Ohio District Court disagreed. It held that a hazardous substance that was emitted into the air, fell to the ground, and remained there to cause contamination was "precisely the type of harm RCRA aimed to remediate in its definition of 'disposal:' 'the deposit . . . or placing of any solid . . . waste into or on any land or water so that such solid waste or hazardous waste . . . may enter the environment . . .'" *Id*. at *19. The district court also pointed out that "[i]f the same waste entered the soil and groundwater via seeps or dumping directly from a waste treatment plant or industrial Facility, a . . . citizen . . . would have standing to sue"—something the court called a "distinction without difference." *Id* at *20.

As a matter of law, the circumstances alleged in this case constitute a "disposal" under the plain terms of RCRA and CERCLA.

B. Holding that "Disposal" Includes Aerial Deposition is Consistent with CERCLA's Broad Remedial Purposes, Consistent with Ninth Circuit Precedent, and does not Create Statutory Conflicts

1. As a remedial statute, CERCLA is to be interpreted broadly

In statutory analysis, the Court looks at the statute as a whole in order to confirm that its interpretation is consistent with the statute's purpose and to minimize or avoid any internal inconsistencies. *Carson Harbor*, 270 F.3d at 880 (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). CERCLA is a remedial statute whose sole purpose is to "impose[ ] liability for the cleanup of sites where there is a release or a threatened release of hazardous substances into the environment." *Pakootas I*, 452 F.3d 1066, 1073 (9th Cir. 2006) (*citing Carson Harbor,* 270 F.3d at 881); *see also United States v. Best Foods*, 524 U.S. 51, 55 (1998).

CERCLA's provisions are to be construed liberally to "avoid frustration of the beneficial legislative purposes," *Hanford Downwinders Coalition,* 71 F.3d 1469, 1481 (9th Cir. 2008) (internal citations omitted), and to be "consistent with…[the] overwhelming remedial statutory scheme." *Pakootas I*, 452 F.3d at 1081 (*quoting Cadillac Fairview/California I v. U.S.*, 41 F.3d 562, 565 n.4 (9th Cir. 1994) (internal citations omitted)). CERCLA's statuary scheme is designed to provide for the cleanup of hazardous waste disposal sites and ensure that responsible person(s) pay for that cleanup. *Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp.,* 976 F.2d 1338, 1340 (9th Cir. 1992); *see also* S. Rep. No 96–848, p. 6119 (1980).

These purposes and goals must be considered when interpreting the definition of "disposal" as used in CERCLA's liability provisions. *See FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 809 (1989)) ("a 'fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'"). The word "disposal" anchors two of CERCLA's four categories of "covered persons" — those who may be subject to cleanup and other liability under the statute. The first category addresses those persons who are former, but not current, "owners or operators" of a facility: "any person who *at the time of disposal* of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ..." 42 U.S.C. § 9607(a)(2) (emphasis added). The second category addresses persons who, as alleged with respect to Teck in this case:

> . . . 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* or incineration vessel *owned or operated by another party or entity and containing such hazardous substances* . . .

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

A narrow reading of the term "disposal," that ignores the common meaning ascribed the word "deposit" and, without any basis in plain language, imposes a "must not first pass through the air" qualifier, would eliminate

liability in both of the above categories for the aerial deposition of hazardous substances. Such a reading runs contrary to the overwhelming precedent of this Court that CERCLA's liability provisions should be liberally construed. Without any basis in plain language, legislative history, or policy, it would create a loophole for the persons who "arranged" to put contamination at a facility, and for persons who are past owner or operators of the facility. Congress, however, would have no reason to create an arbitrary loophole that benefits only those two categories of "covered persons," but not the other covered persons who are liable under CERCLA. It would create a perverse incentive to dispose of hazardous substances through the air — for example, by burning waste. It would fundamentally impede the cleanup of sites contaminated by aerial deposition by creating an exception to liability not previously recognized. *See e.g., Center for Community Action & Environmental Justice v. BNSF Railway Co.,*128 Harv. L. Rev. 1272 (Feb 10, 2015).

This Court has already rejected narrow readings of the "disposal" definition as applied through CERCLA. In *Voggenthaler v. Maryland Square LLC,* 724 F.3d 1050 (9th Cir. 2013), the defendant challenged its CERCLA liability on the basis that it did not operate the facility "at the time of disposal" because it leaked contaminant onto the floor of its building, not into the natural environment. *Voggenthaler*, 724 F.3d at 1064. The defendant argued that

spilling a contaminant onto the floor, rather than directly onto the land or water, did not constitute a "disposal," thereby implying that CERCLA requires the disposal to occur directly into the groundwater or directly onto the land. *See Voggenthaler*, 724 F.3d at 1064. This Court held that because the phrase "enter the environment" is qualified by the word "may," the "disposal" definition cannot be interpreted to only cover spills that go directly and immediately into the environment. *Id*. at 1064. Of note to this case, the Court declared that "[The defendant's] interpretation *conflicts with our practice of construing CERCLA liberally to achieve the goals of cleaning up hazardous waste sites promptly and ensuring that the responsible parties pay the costs of the clean up*." *Id.*, citing *Carson Harbor*, 270 F.3d at 881 (emphasis added).

Tellingly, Teck fails to cite a single case holding — or even entertaining the argument — that aerial deposition is not a "disposal" under CERCLA. This is not surprising, given the plain meaning of the word "deposit." As noted by the district court, "it appears to have been treated as a given that if hazardous substances from aerial emissions are 'disposed' of 'into or on any land or water' of a CERCLA 'facility,' response costs and natural resource damages can be recovered for cleaning up those hazardous substances and compensating for harm caused." ER 6. For well over thirty years, CERCLA has been applied throughout the United States to further the cleanup of sites contaminated by aerial deposition. This includes smelter-generated

contamination in Washington state (the Asarco Ruston Smelter site, with surface soil in residential areas contaminated by arsenic, lead, and other heavy metals[3]); Montana (the Anaconda Smelter Site[4]); Texas (the El Paso County Metals Site[5]); and Nebraska (the Omaha Lead Site[6]), to name only a few.

Construing "disposal" to include the aerial deposition of particulates onto the ground and water is consistent with CERCLA's remedial purposes. It ensures that entities responsible for hazardous substances so deposited are responsible for paying for and cleaning up the contamination caused by their direct actions. An arranger should not be able to avoid liability simply because it chose to emit its hazardous substances into the air, versus placing or injecting hazardous substances directly onto the land or water. Similarly, a current owner/operator should not be able to avoid liability it would otherwise incur by selling its operation to a new owner/operator and taking advantage of an unduly narrow reading of "disposal."

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[3] *See* http://yosemite.epa.gov/r10/cleanup.nsf/sites/asarco

[4] *See* http://www2.epa.gov/region8/anaconda-co-smelter

[5] *See* http://www.epa.gov/region6/region-6/tx/tx_asarco_el_paso.html

[6] *See* *h*ttp://www.epa.gov/region07/cleanup/npl_files/index.htm#Nebraska ("During the operational period, lead and other heavy metals were emitted into the atmosphere through smoke stacks and fugitive emissions from plant activities. The pollutants were transported downwind in various directions *and deposited on the ground surface*." "Omaha Lead Site Information," March 26, 2010 at 1 [emphasis added].).

2. Holding that there is "disposal" in this case is consistent with the innocent landowner defense

Teck argues that by adopting the district court's interpretation of "disposal," CERCLA liability is "expanded" to create an inconsistency with the statute's innocent-landowner defense and that just such an "expansion" was rejected by this Court in *Carson Harbor*. Dkt 13-1 at 26–27. But the position taken by the Plaintiffs and adopted by the district court represents the accepted status quo, and is thus not an "expansion" of CERCLA's reach. Moreover, Teck misinterprets and misapplies *Carson Harbor's* analysis of the innocent landowner defense.

In order to have CERCLA liability, there must be:

> (1) a "facility" where hazardous substances have come to be located;
> (2) a release or threatened release of hazardous substances from that facility;
> (3) that release must cause plaintiff to incur response costs; and
> (4) the defendant must fall within one of the four categories of covered persons.

See 42 U.S.C. § 9607(a); *see also Carson Harbor*, 270 F.3d at 870–71. Once these elements are met, CERCLA liability attaches unless the defendant qualifies for one of CERCLA's defenses.

One of these defenses is the innocent landowner defense. The innocent landowner defense allows current property owners to be absolved from CERCLA liability if they can prove that:

> the real property on which the facility concerned is located was acquired by the defendant *after the disposal or placement of the hazardous substance on, in, or at the facility*…and at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

42 U.S.C. § 9601(35)(A). Teck correctly notes that under the statute, the defense can only be asserted if the "disposal or placement" occurred before the subject property was acquired by a defendant. Dkt 13-1 at 27. It then points to *Carson Harbor*, in which the Court determined that if it were to construe "disposal" to include all ongoing subsoil passive migration of hazardous substances after their initial placement in the environment, "the innocent landowner defense would be essentially eliminated" because disposal would be a "never-ending process." Carson Harbor, 270 F.3d at 882.

Teck's argument has no relevance to this case. This case turns on whether the deposit of airborne hazardous substances *in the first instance* counts as a "disposal," not whether the subsequent passive movement of those substances after deposit so qualifies. If Teck continues to emit hazardous substances from ongoing operations, and those emissions continue to deposit in the neighboring UCR Site each day, there will be new acts of active disposal each day, no different than someone dumping a new barrel of waste onto a neighbor's property each day.

There is no reason for the Court to be concerned with the fact that the innocent purchaser defense would not apply to disposal that post-dates the neighbor's purchase. This is not a statutory inconsistency; it just means that a different CERCLA defense would potentially apply. That defense is CERCLA's "third party defense," which is provided under 42 U.S.C. § 9607(b)(3). Subject to certain qualifications, this defense relieves persons who would otherwise be liable under the statute (e.g., owners of contaminated property) if they can show that the release of hazardous substances was caused solely by "an act or omission of a third party" not connected with the defendant.[7] *Id*.

When the two defenses are considered in harmony, there is no difficulty created by construing "disposal" to include aerial emissions deposited onto land or water.

3. Holding that there is "disposal" in this case is consistent with the Clean Air Act

Teck also argues that by interpreting "disposal" to include air emissions that are deposited on the land or water, there is a conflict with the Clean Air Act's mandate to regulate air quality. Teck again overreaches.

The Clean Air Act governs the ongoing regulation of air pollutants. In contrast, CERCLA governs the "expeditious and efficient cleanup of hazardous

[7] To wit, Teck cites no evidence that either the Environmental Protection Agency or the State of Washington have looked to individual landowners in the UCR Site as potentially responsible persons under CERCLA.

waste sites." *Carson Harbor*, 270 F.3d at 880 (quoting *Pritkin v. DOE*, 254 F.3d 791, 794–95 (9th Cir. 2009)). There is no overlap and no inconsistency between the statutes.

In fact, the opposite is true. CERCLA contains an explicit exemption for the recovery of response costs from Clean Air Act "federally permitted releases," "[r]ecovery…for response costs…resulting from a federally permitted release shall be pursuant to existing law in lieu of this section." 42 U.S.C. § 9607(j); *United States v. Iron Mountain Mines Inc.*, 812 F.Supp. 1528, 1540 (E.D. Calif. 1992). "Federally permitted releases…are not considered hazardous and are therefore not subject to the provisions of CERCLA." *Lincoln Properties, Ltd. v. Higgins,* CIV. No. S–91–760DFL/GGH, 1993 WL 217429, * 21 (E.D.Cal. Jan.21, 1993). "Federally permitted releases" is defined in pertinent part as:

> …any emission into the air subject to a permit or control regulation under . . . [42 U.S.C. 7411], . . . [42 U.S.C. 7412], . . . [42 U.S.C. 7470 et seq.], . . . [42 U.S.C. 7501 et seq.], or State implementation plans submitted in accordance with . . . [42 U.S.C. 7410]…

42 U.S.C. § 9601(10)(H).

Amici National Mining Association, et al. argue that the federal permitted release defense will not adequately protect Clean Air Act regulated entities from CERCLA liability for aerial emissions. Dkt 26 at 20–24. But it is not meant to. It covers only very specific "federally permitted releases." To

be "federally permitted" the release must be expressly permitted and not exceed the limits of that permit. *See United States v. Iron Mountain Mines, Inc.* 812 F.Supp. 1528, 1541 (E.D. Calif. 1992) (*citing Idaho v. Bunker Hill*, 635 F.Supp. 665, 673-74 (D.Idaho 1986)). If those criteria are met, then the Amici's fears of being held liable for contamination to land or water caused by permitted aerial emissions are unfounded. *See* Dkt 26 at 17. What Amici seemingly want is to be absolved from any and all potential CERCLA liability resulting from aerial emissions, a result that would be contrary to CERCLA's language and stated purposes.

In short, the district court's interpretation of "disposal" does not contravene the Clean Air Act, nor does it constitute an attempt to regulate air quality or air emissions. Instead, the district court's decision properly addresses the contamination caused to the land or water by the air emission, not whether the air emission itself should have occurred in the first place and not whether the air emissions meets or exceeds the air quality standards of a validly issued permit. There is no conflict with the Clean Air Act.

C. The 1935 Ottawa Convention is not Properly Before this Court, and Even if it was, it is not Applicable to this Case.

For the first time, Amicus Government of Canada raises the issue of the applicability of the 1935 Ottawa Convention, and the associated Tribunal Awards, addressing "fumes" from the Teck Smelter. *See* Dkt 25-1 at 7–11. This issue is not properly before the Court. Even if it was properly before the

Court, the 1935 Ottawa Convention is permissive and only addresses sulfur dioxide fumes.[8] It is therefore not controlling

1. New issues cannot be raised on appeal

Amicus Government of Canada appears to suggest that federal court, including the Ninth Circuit, does not have jurisdiction in this case because it involves air emissions from Teck's smelter, and the "exclusive forum" is the Permanent Regime created by the 1935 Ottawa Convention. *See* Dkt 25-1 at 7–22. The Court should not entertain this argument, since it is raised for the first time on appeal by an amicus and not a party.

An amicus brief cannot raise a new issue on appeal. *Turnacliff v. Westly*, 546 F.3d 1113, 1120 (9th Cir. 2008). For this reason alone, the Court can decline to address the arguments by Amicus.

Second, Teck never raised, nor even briefed, the argument that the 1935 Ottawa Convention somehow divests the Court of jurisdiction, or that another forum is more properly suited to resolve Teck's liability under CERCLA for aerial emissions. Because it failed to properly raise or brief this issue in the district court, Teck has abandoned any argument regarding the applicability of the Ottawa Convention.

[8] *See* Convention for the Establishment of a Tribunal to Decide Questions of Indemnity Arising from the Operation of the Smelter at Trail, British Columbia, April 15, 1935 (ratified June 5, 1935, entered into force August 3, 1935), 4 U.S.T. 4009, T.S. No. 893, 49 Stat. 3245, 162 L.N.T.S. 73 (the "Ottawa Convention')

Teck mentioned the International Joint Commission in footnote 4 to its original Motion to Strike or Dismiss the Fourth Amended complaints, arguing that the International Joint Commission is better situated to hear issues related to cross-boundary air pollution, SER 11, n.4. But, Teck did not brief or otherwise argue the issue, nor did it even specifically mention the 1935 Ottawa Convention in its arguments. "Issues raised in a brief, which are not supported by argument are deemed abandoned…We will only review an issue not properly presented if our failure to do so would result in manifest injustice." *Acosta-Herta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (*quoting Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

> In limited circumstances, the Court can review an issue that has been raised for the first time on appeal: (1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law. But for any of these factors, this Court's decision to consider an issue not raised below is discretionary and this Court does not decide an issue first raised on appeal if it would prejudice the other party.

MacDonald v. Grace Church Seattle, 457 F.3d 1079, 1086 (9th Cir. 2006) (internal quotation marks and citations omitted). This principle applies here. Deciding this new issue would be prejudicial to the State. The State has not had an opportunity to fully research and brief the issue of the applicability of the 1935 Ottawa Convention. Moreover, the State and Tribes have not coordinated with the federal government, including the State Department, to

ascertain its level of involvement in country-to-country bilateral negotiations on transboundary air pollution issues. Nor should this Court accept the Amicus brief's argument as if it were fact. If this issue is to be raised by Teck, then the details and facts surrounding the 1935 Ottawa Convention and the subsequent tribunal awards for sulfur dioxide fumes to the United States should be heard before the district court as part of an evidentiary hearing, not as part of this appeal.

2. CERCLA is not in conflict with the 1935 Ottawa Convention

If the Court decides the issue is properly raised, the merits still favor the Plaintiffs, since CERCLA does not conflict with the 1935 Convention.[9] First, the 1935 Convention is discretionary. It specifically states that after the Tribunal issues its reports on damages, "the Governments *may* make arrangements for the disposition of claims for indemnity for damage, if any, which may occur subsequently to the period of time covered by such report..." *See* Ottawa Convention, supra, Art XI, 49 Stat. 3245 at *4 (emphasis added).[10] The plain language of the Convention is thus clearly permissive, which would allow the Plaintiffs in this case to seek redress under CERCLA.

Second, while both the 1935 Convention and CERCLA seek redress for past harm, the 1935 Convention solely addressed damages caused by sulfur

[9] There is no language in the Ottawa Convention that expressly deprives the Ninth Circuit of jurisdiction in this case.

[10] The report covered damages caused by sulfur dioxide fumes through 1941.

dioxide fumes, a hazardous air pollutant that is not alleged as a contaminant of concern in this case. *See* Injury to Property in the State of Washington by Reason of the Drifting of Fumes from the Smelter of the Consolidated Ming and Smelting Company of Canada, in Trail, British Columbia: Report and Recommendations of the International Joint Commission, 29 R.I.A.A. 365, 368-69 (International Joint Commission 1931) *compare to* ER 94 ¶ 4.2.[11] This case is concerned with the deposition of heavy metals at the UCR Site, and the contamination caused by such deposition since circa 1906. Any sums paid to the United States under the 1938 and 1941 Tribunal Awards did not address contamination or damage caused by heavy metals, so there can be no conflict between CERCLA and the 1935 Convention.

Third, as a matter of international law, a later enacted statute may trump a treaty or agreement. In this case, CERCLA is such a later enacted statute that applies to accessing and remediating the harm to natural resources caused by Teck's contamination of the UCR Site.

A later modified statute supersedes a treaty. *United States v. Kelly*, 676 F.3d 912, 916 (9th Cir. 2012) (*citing Cook v. United States*, 288 U.S. 102, 118-119, 53 S.Ct. 305, 77 L.Ed.641 (1933). In addition, a ratified self-executing

[11] *See also* Trail Smelter Arbitral Tribunal Decisions, 3 R.I.A.A. 1911, 1915, 1919, 33 AM J. INT'L L. 182 (Trail Smelter Arb. Trib. 1938); Trail Smelter Arbitral Tribunal Decision, 3 R.I.A.A. 1938, 1945, 35 AM. J. INT'L L. 684 (Trail Smelter Arb. Trib. 1941); both available at http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (last visited September 29, 2015).

treaty generally stands on the same footing as a federal statute, that is, a later-in-time self-executing treaty has the same effect on an existing federal statute as a later-in-time act of Congress. *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash*, 634 F.3d 557, 568 (9th Cir. 2011) (citing *Medellin v. Texas*, 552 U.S. 491, 509 n.5 & 518, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008).

The Ottawa Convention was ratified in 1935. CERCLA was enacted in 1980. CERCLA is more recent, and therefore provides the cause of action being pursued by the Plaintiffs. The Court should, therefore, disregard Amicus Government of Canada's jurisdictional argument.

IX. CONCLUSION

For the foregoing reasons and the reasons stated in the Tribes' response brief, the decision of the District Court should be upheld.

RESPECTFULLY SUBMITTED this _____ day of October, 2015.

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X. STATEMENT OF RELATED CASES

Plaintiff/Intervenor–Appellee is not aware of any case that may be deemed releated to this case pursuant to Ninth Circuit Local Rule 28-2.6.

XI. CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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Dated: October 5, 2015

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9th Circuit Case Number(s) 15-35228

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No. 15-35228

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiff-Appellees.

and

THE STATE OF WASHINGTON,

Plaintiffs-Intervenor-Appellee,

v.

TECK COMINCO METALS LTD., a Canadian corporation

Defendant-Appellant.

ON APPEAL FROM THE EASTERN DISTRICT OF WASHINGTON
(NO. CV-0256-LRS)

RESPONSE BRIEF OF APPELLEE THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

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I. INTRODUCTION

Appellant, Teck Cominco Metals Ltd. ("Teck") owns and operates the largest lead-zinc smelter in the world in Trail, British Columbia ten miles north of the United States border. For more than 100 years Teck discharged its wastes from its smelter operation into the Columbia River and into the air. ER 24 (¶ 3). South of the border, the Columbia River forms Lake Roosevelt above the Grand Coulee dam. Teck's wastes flowed south in the river and on air currents and were deposited in Lake Roosevelt. ER 25 (¶f 6). As Teck put it in internal correspondence and as the district court later found, Teck has "been using Lake Roosevelt as a 'free' 'convenient disposal facility' for its wastes." ER 33 (¶ 22).

In 2003, the United States Environmental Protection Agency ("EPA") issued a Unilateral Order ("UAO") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") requiring Teck to participate in a remedial investigation and feasibility study of hazardous substances in the Upper Columbia River Site[1] ("UCR Site"). Teck refused and after the EPA did not act to enforce its order, the Confederated Tribes of the Colville Reservation (the "Tribes") funded citizen suit litigation by its Chairman, Joseph Pakootas and the

[1] The UAO defined the site as "the areal extent of contamination in the United States associated with the Upper Columbia River and all suitable areas in proximity to the contamination necessary for implementation of response action." *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 n.3 (9th Cir. 2006) (*Pakootas I*) (quoting UAO at 2).

Chairman of its Natural Resources Committee, Donald R. Michel to enforce the EPA's order. ER 255.[2] Teck moved to dismiss arguing that it was not subject to CERCLA because it had discharged its wastes in Canada. The district court denied Teck's motion and this Court affirmed. *Pakootas I,* 452 F. 3d at 1066. Responding to Teck's argument that CERCLA did not apply extraterritorially and it acted only in Canada, the Ninth Circuit reasoned that Teck's discharges in Canada had led to alleged releases in the Upper Columbia Site and that CERCLA applied to such domestic releases. *Pakootas I,* 452 F. 3d at 1075.

After Teck lost in the district court, it settled with EPA and its American affiliate, Teck Cominco American Incorporated ("TCAI"), agreed to conduct a non-CERCLA remedial investigation and feasibility study ("Teck American RI/FS") concerning hazardous substances in the UCR Site. This litigation continued, however, as Teck had not conceded CERCLA liability and the State of Washington and the Tribes filed Second Amended Complaints alleging claims for declaratory relief, cost recovery and natural resources damages. ER 181-184. Initially, Teck refused to admit its liability under CERCLA, Supplemental Excerpts of Record ("SER") SER 22-26, but after extended litigation, Teck stipulated that it discharged more than 9.97 tons of slag and effluent into the Columbia River and that more than 8 million tons had moved into the UCR Site

[2] The State of Washington joined this suit as a plaintiff.

and some of these hazardous substances had released to the environment. ER 25 (¶ 6). Based on this stipulation and adjudication of Teck's personal jurisdiction defense, in December, 2012, the district court entered Findings of Fact and Conclusions of Law determining that Teck is liable under CERCLA as an "arranger" 42 U.S.C. § 9607(a)(3). ER 63 (¶ 19).

In 2013, the State and Tribes were granted leave to file a Fourth Amended Complaint expanding their CERCLA claims to include Teck's discharges via the air pathway—particulates from its smelter that moved by air and were deposited in the UCR Site—leading to releases of hazardous substances to the environment. ER 81 (¶¶ 4.2-4.4, 5.4). Teck again moved to dismiss, arguing that its discharges of particulates in Canada leading to deposit in the UCR did not satisfy the "disposal" element of section 9607(a)(3) arranger liability because they were discharged into the air in Canada before they were deposited to land or water in the UCR. SER 1-14. The district court denied Teck's motion, reasoning that "there is…no meaningful distinction between discharge of wastes into the water at Trail and discharge of waste into the air at Trail, as long as they result in disposal at the site in the United States." ER 12. Citing this Court's decision in *Pakootas I*, the district court concluded that the initial discharge of wastes from the trail smelter was irrelevant because it was not a disposal at the CERCLA facility. ER 13-14. "The relevant 'disposal' alleged by Plaintiffs is the one which occurred 'into or on any

land or water' at the UCR Site, be that hazardous substances from Defendant's slag and liquid effluent, or from its aerial emissions. ER 14. As these allegations meet the elements of arranger liability under CERCLA, the motion was denied. ER 19.

After this Court's decision in *Center for Community Action & Environmental Justice v. BNSF Railway Company,* 764 F.3d 19 (9th Cir. 2014) (*BNSF)*, analyzing application of the Resource Conservation and Recovery Act ("RCRA") to railyard emissions, Teck moved for reconsideration of the district court's order denying its motion to strike or dismiss. ER 67-80. It argued that after *BNSF,* a CERCLA arranger's discharges must go first to "land or water" regardless of any subsequent disposal to land or water, thereby exempting wastes originating from air emissions from remediation under CERCLA. There is no precedent for or logic in adding a "first" before "land or water" in the CERCLA disposal definition because the statute targets disposal at a Site and there is no need to address events that precede the disposal. Thus, unlike *BNSF* which discussed whether railyard emissions, themselves, should be restricted under RCRA, in this case emissions from the smelter were not the operative disposal and certainly are not the harm that the case addresses. CERCLA requires proof of disposal at a facility and Plaintiffs' complaint alleged deposit at a facility—the UCR Site—directly to land or water. The district court recognized this and denied Teck's motion, again reasoning based

on *Pakootas I* that the operative disposal occurred at the UCR site and it met the CERCLA requirement of disposal to land or water. ER 5-6.

Teck appeals, but discusses "disposal" in isolation as if this were a RCRA case. It has no answer for the district court's conclusion that the operative disposal occurred when its particulates deposited at the UCR Site, not when they were emitted at the Trail smelter. Teck's arguments that its deposits of particulate hazardous substances at the UCR site are exempt from liability do not square with *Pakootas I*, this Court's jurisprudence on CERCLA disposal, or the remedial goals of CERCLA. The district court's decision should be affirmed.

II. STATEMENT OF JURISDICTION

Appellee, the Tribes, agrees with Appellant's statement of jurisdiction.

III. STATEMENT OF ISSUES

Did the district court correctly conclude that Plaintiffs' allegations that Teck had disposed of airborne hazardous wastes at the UCR Site resulting in releases to the environment met the "disposal" requirement of CERCLA, 42 U.S.C. § 9607(a)(3)?

IV. STANDARD OF REVIEW

The Tribes joins in the State's explication of the Standard of Review.

V. STATEMENT OF THE CASE

A. EPA Requires Teck To Participate In CERCLA RI/FS And Teck Refuses; Pakootas Citizen Suit Ensues And Teck Denies Liability Under CERCLA For Its Discharges Of Wastes From Its Trail Smelter.

In 1999, the Tribes petitioned the EPA pursuant to Section 105 of CERCLA to conduct an assessment of hazardous substance contamination along the Columbia River extending 150 river miles south from the United States-Canadian border ("Upper Columbia River Site" or "UCR Site"). EPA determined that Teck had discharged slag and effluent containing hazardous substances into the Columbia River and those materials are now found in the UCR. It then issued a UAO determining that Teck is a responsible party under CERCLA and requiring its participation in a remedial investigation and feasibility study under CERCLA. *Pakootas I,* 452 F.3d at 1069-70.

In July, 2004, after EPA did not act to enforce the UAO, the Tribes funded a citizen suit by its Chairman, Joseph Pakootas, and the Chair of its Natural Resources Committee, D. R. Michel. Their Complaint alleged that Teck was liable pursuant to 42 U.S.C. section 9607(a) based on its discharges of slag and effluent to the Columbia River resulting in deposit of such hazardous substances in the UCR Site and subsequent release to the environment. ER 255-62. The State of Washington intervened as a plaintiff in that suit. ER 246-54. Teck then moved to dismiss that action, claiming extra-territorial application of United States law

because its Trail operations—the alleged source of hazardous substances in the UCR—were located in Canada. Its motion was denied and Teck appealed. ER 219-45.

While appeal was pending, Teck's American subsidiary, TCAI entered into the Teck American RI/FS Agreement, a non-CERCLA agreement to conduct a remedial investigation and feasibility study patterned after CERCLA. Notably, Teck, the defendant in this case and the owner/operator of the Trail smelter, offered only a guaranty in the event of TCAI's inability to perform the agreement. After the Teck American RI/FS Agreement was executed, EPA withdrew its UAO, but Teck continued with its appeal of the district court's order denying its motion to dismiss and specifically told the Ninth Circuit that the appeal was not moot. *Pakootas I,* 452 F.3d at 1071 n.10. The Tribes then joined the suit alleging claims for declaratory relief, cost recovery and natural resource damages. ER 205-218.

B. Ninth Circuit Holds Plaintiffs' Allegations That Teck Discharged Wastes In Canada Resulting In Deposit and Release In The Upper Columbia River In The United States Were Actionable Under CERCLA.

On Appeal, Teck argued that Plaintiffs were alleging an impermissible extra territorial application of CERCLA because its discharges occurred wholly within Canada. The Ninth Circuit took up the question of whether "the act of arranging in Canada for disposal of the slag makes this an extra territorial application of CERCLA." *Pakootas I,* 452 F.3d at 1075. The Court reasoned that the operative

event creating liability under CERCLA "is the release or threatened release of a hazardous substance." *Id.* at 1077. That meant that "[a]rranging for disposal of such substances, in and of itself, does not trigger CERCLA liability, nor does actual disposal of hazardous substances." *Id.* The Court explained that "a party that "arranged for disposal" of the hazardous substance under § 9607(a)(3) does not become liable under CERCLA until there is an actual or threatened release of that substance into the environment." *Id.* at 1077-78. The Court recognized that multiple discharges might form the basis for a finding of release:

> First, there is the discharge of waste from the trail smelter into the Columbia River in Canada. Second, there is the discharge or escape of the slag from Canada when the Columbia River enters the United States. And third, there is the leaching of heavy metals and other hazardous substances from the slag into the environment at the site.

Id. at 1075. In isolation, none of these events are actionable. The Court reminded though that "CERCLA liability does not attach unless the 'release' is from a CERCLA facility." *Id.* Thus, the operative allegation is the disposal and release at the UCR Site.

The panel was satisfied that application of CERCLA to releases of hazardous substances at the UCR Site was "a domestic, rather than an extra territorial application of CERCLA, even though the original discharge of the hazardous substance occurred in a foreign country." *Id.* at 1079.

C. Tribes and State Prove Teck's CERCLA Liability.

After return of the mandate, the Tribes and State filed Second Amended Complaints clarifying their allegations. ER 172-187, 188-204. Teck answered, but did not admit that its hazardous wastes had been deposited in the UCR or that its deposits led to releases to the environment and denied liability under CERCLA. SER 18-19 (¶ ¶ 15-20) and SER 23 (¶ ¶ 48-50). After extensive litigation, and one month before trial, Teck stipulated to the elements of arranger liability—that it discharged over 9.97 million tons of slag and liquid effluent, more than 8 million tons had moved to the UCR, some are found there and those wastes had released hazardous substances to the environment. ER 25 (¶ A. 6), ER 43 (¶ C.1) (citing ECF 1928, Order on Parties' Stipulations). Based on that stipulation and adjudication of Teck's personal jurisdiction defense, on December 14, 2012, the district court entered Findings of Fact and Conclusions of Law establishing Teck's liability under CERCLA. ER 21-65.

D. Motion Practice Regarding Air Pathway Claims.

In 2010, Plaintiffs first moved for permission to amend their complaint to add allegations that Teck was liable as an arranger based on its emissions of particulates from the Trail Smelter resulting in disposal at the UCR Site. The Court initially declined to allow amendment. ER 156-161. After the Phase I trial in which Teck was found liable under CERCLA as an arranger based on its

discharges of waste by a river pathway resulting in disposal and release in the UCR, Plaintiffs renewed their request to add air pathway claims. ER 135-155. In 2013, the Court granted leave to add air pathway allegations and in March 2014, Plaintiffs filed a Fourth Amended Complaint adding allegations that Teck was liable as an arranger based on its air discharges resulting in disposal and release in the UCR, paralleling its allegations of Teck's liability for river discharges resulting in disposal and release in the UCR. ER 87-88 (¶ ¶ 5.1-5.6).

E. District Court Denies Teck's Motion to Strike or Dismiss.

Teck moved to dismiss Plaintiffs' air pathway claims, arguing that its discharges from its stacks were not "into or on any land or water" because they went to air before land or water, so there was no disposal for which it could be held liable under CERCLA as an arranger. Plaintiffs answered that their allegations stated a disposal at the UCR site "into or on land or water" and, thus, judged on the pleadings, their allegations met the requirements of arranger liability under 42 U.S.C. § 9607(a)(3). The district court looked to the Ninth Circuit's decision in *Pakootas I* and noted that the Circuit had identified more than one instance of discharge:

> First there is the discharge of waste from the trail smelter into the Columbia River into Canada. Second, **there is the discharge or escape of the slag from Canada where the Columbia River enters the United States.**

ER 13 (quoting *Pakootas I,* 452 F.3d at 1075) (emphasis added by District Court). The district court reasoned that the discharge or disposal that occurred in Canada when particulate was emitted from the Trail Smelter was irrelevant because that was not a disposal at a CERCLA facility and therefore was not actionable under CERCLA. The Court explained that "the relevant 'disposal' alleged by Plaintiffs is the one which occurred 'into or on any land or water' at the UCR Site, be that hazardous substances from Defendant's slag or liquid effluent, or from its aerial emissions." ER 14. Thus, the Court was satisfied that the elements of CERCLA liability had been adequately pleaded. The Court also reviewed case law concerning CERCLA's remedial purpose and found that liability under the circumstances met the goals of CERCLA. ER 15-18. In the end, the district court was satisfied that Teck's air emissions paralleled its water emissions and that the same legal principles applied. For both aerial emissions and slag and effluent, disposal did not occur until they were deposited at the UCR site. ER 18.

F. Teck Moves to Reconsider Invoking the *BNSF* Decision.

Following the Ninth Circuit's decision in *BNSF* addressing injunctive relief for railyard emissions under RCRA, Teck moved to reconsider the district court's earlier Order Denying Motion To Strike Or Dismiss, arguing that *BNSF* supported its view that its discharges to air were exempt from liability even though they were subsequently deposited in the UCR and lead to releases to the environment. ER 67-

80. The district court reviewed the *Pakootas I* treatment of discharge and release under CERCLA. It then compared the Ninth Circuit's treatment of "disposal" in the context of RCRA and noted that RCRA has decidedly different goals. While CERCLA has in mind "liability for the cleanup of a 'facility' . . . RCRA is not concerned with cleanup of a 'facility' and that term is not defined in RCRA." ER 5. The district court regarded that distinction as informing the Ninth Circuit's treatment of disposal in *BNSF*:

> Recognizing as much, the Ninth Circuit and its decision framed the issue as whether RCRA "may be used to enjoin the emission from Defendant's rail yard and particular matter found in diesel exhaust." The Ninth Circuit in [*BNSF*] had no reason to consider how its interpretation of "disposal" relates to the additional CERCLA definition of a "facility" and "release."

ER 5 (quoting *BNSF,* 764 F.3d at 1020) (internal citations omitted). In the context of CERCLA, the district court was satisfied that

> [e]missions into the air and river discharges in Trail, B.C. are disposals in an ordinary sense, but they do not constitute "CERCLA disposals." And, for that matter, they do not constitute RCRA disposals because there is no authority of which this Court is aware that RCRA can be applied extra-territorially to regulate generation and disposal of hazardous waste in Canada. Emissions into the air alone do not constitute a "CERCLA disposal."

ER 6. The Court concluded that in 30 years of CERCLA jurisprudence, "it appears to have been treated as a given that if hazardous substances from aerial emissions are 'disposed' of 'into or on any land or water' of a CERCLA 'facility,' response costs and natural resources damages can be recovered for cleaning up those

hazardous substances and compensating for harm caused," and nothing in *BNSF* suggests a change in course. ER 6. The district court was right and this Court should affirm.

VI. SUMMARY OF ARGUMENT

This Court has already decided in *Pakootas I* that Teck's discharges of wastes to the Columbia River at its Trail, B.C. facility resulting in disposal and release of hazardous substances at the UCR Site satisfy the elements of arranger liability under CERCLA, and that decision is well anchored in this circuit's CERCLA case law. There is no basis in CERCLA for a different outcome in the case of Teck's air emissions from Trail resulting in deposit and release at the UCR Site.

Teck's reliance on the *BNSF* decision is misplaced because in that case this Court was principally concerned with the intersection of the regulatory requirements of the Clean Air Act and RCRA. Its discussion of "disposal" did not consider use of that term in CERCLA. Nor did its analysis provide justification for modifying CERCLA's disposal requirement to require, as Teck proposes, that no discharge to air may precede actionable disposal to land or water. Placed in context of the elements of CERCLA arranger liability, the *BNSF* Court's formulation of the order of disposal and release is satisfied here by allegations of deposit of Teck's hazardous substances at the UCR Site. In any event, nothing in

BNSF undermines application of *Pakootas I* to conclude that arranger liability is adequately pleaded here.

VII. LEGAL ARGUMENT

A. Plaintiffs' Allegations That Teck Deposited Its Hazardous Wastes in The Land And Water At The UCR Site Meet the Elements of Arranger Liability.

CERCLA addresses cleanup of hazardous waste sites. That is reflected in the elements of § 9607(a)(3) liability, which requires proof of disposal and release of hazardous substances at a facility. Thus, the initial form of a polluter's discharges has no bearing on CERCLA liability. Regulation of discharges is left to RCRA. Review of the elements of CERCLA liability and applicable authority demonstrates that Plaintiffs' air pathway allegations sufficiently pleaded CERCLA liability.

1. The operative inquiry under CERCLA section 107(a)(3) is whether Plaintiffs alleged a "disposal" at the UCR Site.

CERCLA arranger liability applies to instances in which a "disposal" occurs at a "facility." 42 U.S.C. section 9607(a) provides liability for:

> [A]ny person who by contract, agreement or otherwise **arranged for disposal** or treatment . . . of hazardous substances owned or possessed by such person . . . **at any facility** . . . owned or operated by another entity and containing such hazardous substances . . . **from which there is a release** or threatened release . . . of a hazardous substance. . . .

42 U.S.C. § 9607(a)(3) (emphasis added). A disposal gives rise to liability only if it occurs at a CERCLA facility. *Pakootas I,* 452 F.3d 1075 ("Although [multiple]

events can be characterized as a release, CERCLA liability does not attach unless the 'release' is from a CERCLA facility."). The UCR Site is the only relevant "facility" at issue in this case. The Tribes' Fourth Amended Complaint alleges unlawful deposition and disposal of hazardous substances at the UCR Site. Excerpts of Record (ER) 88 (¶ 5.4).[3] The district court previously determined that the UCR Site, which encompasses the "areal extent of contamination *in the United States* associated with the Upper Columbia River," is a CERCLA "facility." ER 43 (¶ 2) (emphasis added). The Tribes has never sought to characterize the Trail Smelter as a facility, nor attempted to impose liability for disposals or releases that occurred at the Trail Smelter. Thus, from the outset, the relevant inquiry has always been whether Teck disposed of hazardous substances at the UCR Site—not the Trail Smelter.

CERCLA's focus on events at the UCR Site does not change based upon the manner by which contaminants reached the facility. CERCLA examines liability at the point where a disposal occurs at a facility; it does not analyze how contaminants came to be located at the facility. *Pakootas I,* 452 F.3d at 1078 n.18. The pathway by which hazardous substances are transported to a facility is therefore irrelevant for liability. Indeed, many cases impose CERCLA liability on

[3] Likewise, the Tribes' previous complaints all alleged Teck's unlawful disposal occurred at the UCR Site. ER 88 (¶ 5.4); ER 181 (¶ 5.3); ER 213 (¶ 8.2).

parties who do not know how their waste got to the relevant facility. *Id.* at 1078 n.18. It matters not whether the substances travelled through air or water before reaching the facility from which they are disposed. Nor is there a meaningful distinction between wind and water currents that transport hazardous substances. Whether carried by wind or water currents, Teck's liability for hazardous waste turns on whether a "disposal" occurred at the UCR Site, and whether that disposal resulted in release directly to land or water.

In contrast, liability under RCRA has no facility component. RCRA's citizen suit provision authorizes private party suits when three elements are met: (1) the defendant is a person; (2) the defendant has contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) the solid or hazardous waste may present an imminent and substantial endangerment to human health or the environment. 42 U.S.C. § 6972(a)(1)(B). Liability under this provision is not premised on conduct occurring at a facility. Thus, unlike CERCLA, RCRA does not require disposal to occur at a "facility" for liability to attach.

2. A "disposal" occurred when hazardous substances were deposited at the UCR Site.

CERCLA incorporates the definition of "disposal" contained in RCRA. 42 U.S.C. § 9601(29). RCRA defines "disposal" to mean:

> [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.

42 U.S.C. § 6903(3). *Pakootas I* teaches that Plaintiffs' allegations that Teck arranged for disposal at the UCR Site by discharging wastes from its Trail, B.C. smelter which subsequently deposited in the UCR Site satisfy CERCLA's arranger elements. *Pakootas I,* 452 F.3d at 1078-79. As the district court noted, there is no difference for arranger purposes between discharging wastes to the river or emitting them to air. ER 12. Each is alleged to have resulted in deposit in the UCR and that is sufficient under CERCLA. ER 12. Any event of "disposal" in Canada was not actionable, so necessarily the operative disposal occurred at the UCR Site directly to land or water.

It is plain after *Pakootas I* that under CERCLA the intervening movement of waste from the Trail smelter, whether by water current or wind current, does not prevent an actionable subsequent disposal at the UCR Site. This conclusion is fatal to Teck's argument.

This is consistent with this circuit's CERCLA case law. In *Carson Harbor Vill., Ltd. v. County of Los Angeles,* 270 F. 3d 863 (9th Cir. 2001), the Court rejected a narrow interpretation of "disposal" and instead adopted a contextual approach whereby each term in the definition is examined in relation to the facts at

issue. *Id.* at 878-79. It defined "deposit," one of the statute's examples of "disposal," much as it is used here, stating that "the term is akin to 'putting down,' or placement." *Id.* at 879 n.7. There is no requirement that "disposal" be direct to land or water at the facility. *Vogenthaller v. Maryland Square, LLC.,* 724 F. 3d 1050, 1064 (9th Cir. 2013) (CERCLA coverage not limited to spills directly to land or water). Any such argument could not be reconciled with *Pakootas I*, in which CERCLA liability was approved based on movement of hazardous substances ten miles from the Trail facility before being deposited at the UCR Site.

B. *BNSF* Does Not Foreclose Application of CERCLA Liability Where, as Here, There is Disposal to Land and Release to the Environment.

Teck anchors its efforts to exempt its air emissions from CERCLA cleanup in this Court's application of RCRA in *BNSF*. The allegations in *BNSF* have little resemblance to CERCLA cleanup cases because plaintiffs sought to regulate emissions based on harm resulting from inhalation—not contamination of land or water. Plaintiffs targeted railyard emissions of diesel particulate from 16 facilities which emissions they alleged would cause, if inhaled, increased cancer risk for 1.8 million people. Plaintiffs were forced to sue under RCRA because the independent source rules applicable to Clean Air Act claims precluded Clean Air Act-based regulation of railyard emissions and prevented suit under the Clean Air Act citizen suit provisions. *See Ctr. for Comty. Action & Envt'l Justice v. Union Pac., et. al.,* 2012 U.S. Dist. LEXIS 83051 at *4-5 (C.D. Cal. May 29, 2012); *BNSF,* 764 F.3d

at 1022 n.3. This was a doomed exercise; the trial court rejected it without reaching the RCRA "disposal" definition, reasoning that the indirect source rules barred Clean Air Act-based challenges to railyard emissions and demonstrated Congress' intent that RCRA did not apply either. *Ctr. for Comty. Action & Envt'l Justice,* 2012 U.S. Dist. LEXIS 83051, at *12-17.[4]

The court of appeals was equally skeptical. The panel framed the question as "whether the citizen suit provision of [RCRA] may be used to enjoin the emission[s] from Defendants' railyards...," *BNSF,* 764 F.3d at 1020, and answered the question in the same way: "We conclude that Defendants' emission of diesel particulate matter does not constitute 'disposal' of solid waste within the meaning of RCRA...." *Id.* at 1020-21. From beginning to end, the court regarded the disposal at issue as emissions and nothing more. Thus, its analysis offers no guidance on the application of CERCLA to allegations of subsequent disposal at a facility.

Teck cites *BNSF* for the panel's interpretation of RCRA's definition of "disposal" which is also used in CERCLA. In *BNSF,* plaintiffs' complaint for injunctive relief attempted to fit within RCRA by alleging that some of defendants'

[4] In applying RCRA, the trial court did not reach the disposal definition as it concluded that the particulates in question were not a solid waste and thus not actionable under RCRA. *Ctr. for Comty. Action & Envt'l Justice,* 2012 U.S. Dist. LEXIS 83051, at *25-26.

emitted particulates reached land before being re-entrained in the air (and inhaled by California citizens). The panel noted that RCRA's definition of "disposal" "does not plainly state whether such emissions of solid waste *into the air* fall within its scope." *Id.* at 1023 (emphasis in original). Thus, among other things, "depositing" or "placing" is required and "'disposal' occurs where the solid waste is *first* placed 'into or on any land or water'...'" *Id.* at 1024 (emphasis in original). This parsing of the definition is consistent with, and does not change, existing law. Applied here, disposal occurred when Teck's wastes were deposited to land or water in the UCR.[5] This is Plaintiffs' allegation in this case, and the district court found it sufficient.

The *BNSF* panel balked at application of these elements to railyard emissions resulting in injury from inhalation of such emissions. It regarded plaintiffs' allegations of release via emissions as impermissibly re-ordering the "disposal" definition and read RCRA's "disposal" definition to require that Defendant's disposal go "first" to "land or water" before being emitted (released) to air. *BNSF,* 764 F.3d at 1024. There is no precedent for this interpretation nor does it bind this Court in applying the elements of CERCLA.[6] It does not apply easily

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[5] Plaintiffs here claim subsequent release to the environment, not emission to air like the plaintiffs in *BNSF*.

[6] CERCLA and RCRA address hazardous waste contamination in fundamentally different respects, *see infra* sec. VII.C.4, and the *BNSF* Court's interpretation of "disposal" in the RCRA context therefore does not control this Court's analysis of

in any circumstance involving a release other than an emission because many forms of release also fit the definition of disposal. *See Carson Harbor Vill.,* 270 F. 3d at 878 ("'release' is broader than 'disposal'"), *cited in Pakootas I,* 542 F. 3d at 1077, n.17. In CERCLA, there is no reason why the form of release should disqualify otherwise actionable disposal.

This ordering of events in the disposal definition is irrelevant in CERCLA because the actionable disposal must occur at a facility which necessarily is land or water. Applied in this case, the original discharge at the smelter cannot qualify as a disposal. As § 9607(a)(3) arranger liability depends on "disposal…at a facility," whatever precedes disposal (deposit of hazardous wastes at the UCR Site) has no significance. After all, it is the disposal at the facility that leads to need for cleanup. There is no reason under CERCLA to exempt any form of action leading to such disposal.

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its meaning in the context of CERCLA. A Court's "duty…is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, __ U.S. __, 135 S. Ct. 2480, 2489 (2015). Thus, when deciding whether statutory language is plain, courts "must read the words 'in their context and with a view to their place in the overall statutory scheme." Id. The Supreme Court has "rejected the notion that using the [same phrase in discrete contexts] can, standing alone, 'compel symmetrical construction.'" *Envt'l Def. v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007); *see also King*, __ U.S. __, 135 S. Ct. at 2490 (interpreting definition of "State" in light of its place in overall statutory scheme). Simply put, "[c]ontext counts." *Duke Energy*, 549 U.S. at 576. This principle applies with equal force to statutory provisions that refer back to a common definitional section. *Id.* The meaning of "disposal" must be read in its CERCLA context, and the same definition may take on different meanings in the distinct statutory contexts of CERCLA and RCRA.

The *BNSF* panel's discussion of *United States v. Power Eng'g Co.*, 191 F.3d 1224 (10th Cir. 1999) confirms this understanding. The defendants in *Power Eng'g* emitted condensate that formed a *mist* of hexavalent chromium from scrubbers several feet off the ground and created thirty feet of ground contamination. The soil contaminated by this disposal had not been remediated and was a likely source of groundwater contamination. *United States v. Power Eng'g,* 10 F. Supp.2d 1145, 1158 (D. Colo. 1998). In the district court, defendants—like Teck—argued that because they discharged waste into the air, "the discharge does not constitute placement of solid waste 'into or on any land or water.'" *Id.* The district court rejected this argument finding that the definition of "disposal " "has broad scope" and that these facts proved "disposal." *Id.* The Tenth Circuit agreed with the district court's analysis and concluded that "disposing of the hazardous *mist* [from the facility's air ducts] onto the soil constituted illegal 'disposing of hazardous wastes.'" *Power Eng'g,* 191 F.3d at 1231 (emphasis added).

The court in *BNSF* distinguished *Power Eng'g,* claiming that disposing of a "mist" of hexavalent chromium by emitting it from scrubbers did not involve disposal "through air." It labeled such discharges as disposing the "mist" on soil where it leaked into the groundwater. Indisputably, however, the hexavalent chromium mist was emitted from air duct scrubbers into the air and then traveled to the soil where it condensed. Thus, its treatment of the case, and statement that it

does not conflict with its own ruling, indicates the distinction that the claims in *Power Eng'g* arose out of emission to air resulting in deposit on land, and the claims in *BNSF* arose solely out of emission to air and allegations of emissions that never reached land or water. If the language in *BNSF* on disposal is taken literally, any disposal that begins even a short distance above the ground will never be actionable under CERCLA. The panel's treatment of *Power Eng'g* demonstrates that it does not intend this extreme result.

C. CERCLA Assesses Liability Based Upon Circumstances Existing When a "disposal" Occurs, Not Upon Preceding Events.

Decisions from this and other courts similarly demonstrate CERCLA liability assessments focus on the results caused by potentially responsible parties' actions. That a party does not intend for its hazardous waste to come to rest in a particular location is inconsequential for liability analyses. *Pakootas I,* 452 F.3d at 1078 n.18 (citing *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 287 F. Supp. 2d 1118, 1186 (C.D. Cal. 2003), *aff'd sub nom. Carson Harbor Vill., Ltd. v. County of Los Angeles,* 433 F.3d 1260 (9th Cir. 2006)). Likewise, that a PRP does not know how its hazardous waste came to be located at a facility from which a release occurs is similarly irrelevant. *Pakootas I,* 452 F.3d at 1078 n.18 (citing *O'Neil v. Picillo,* 883 F.2d 176, 183 & n.9 (1st Cir. 1989)). Conduct preceding that which is necessary to impose liability under CERCLA is therefore irrelevant for liability purposes.

1. CERCLA's definition of "disposal" must be liberally construed in accordance with the statute's remedial nature; Teck's interpretation would frustrate Congressional intent to hold liable all parties responsible for hazardous waste contamination.

Teck's attempts to exclude its air pathway disposals from CERCLA cleanup cannot be squared with the history of U.S. efforts to address contaminated sites. Congress enacted CERCLA in response to serious environmental and public health threats posed by widespread use and disposal of hazardous substances. *Pinal Creek Group v. Newmont Mining Corp.,* 118 F.3d 1298, 1300 (9th Cir. 1997). CERCLA's two primary purposes are to "ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances b[ear] the cost of remedying the conditions they created." *Id.* Because CERCLA is a remedial statute, courts are "obligated to construe its provisions liberally" to avoid frustrating its beneficial legislative purposes. *Hanford Downwinders Coalition v. Dowdle,* 71 F.3d 1469, 1481 (9th Cir. 1995); *accord Pinal Creek,* 118 F.3d at 1363 (CERCLA must be given a "broad interpretation to accomplish its remedial goals"). The term "disposal" must therefore be liberally construed to accomplish CERCLA's twin goals of environmental cleanup and polluter responsibility. Interpreting "disposal" to encompass hazardous substances emitted to the air and deposited into or on land or water ensures waste disposal sites are cleaned up and places responsibility on the polluter who created the unsafe conditions.

To hold that aerial emissions do not constitute CERCLA disposals would result in a liability scheme contrary to CERCLA's fundamental purpose. "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *United States v. Bestfoods,* 524 U.S. 51, 56 n.1 (quoting *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 21 (1989) (plurality opinion of Brennan, J.)). Excluding hazardous substances deposited at CERCLA facilities after being emitted and transported through the air would frustrate that purpose.

2. CERCLA's statutory structure and legislative history confirm that CERCLA "disposals" include aerially emitted hazardous substances; Significant statutory inconsistencies result from Teck's reading.

a. Teck's interpretation of CERCLA renders meaningless CERCLA's federally permitted release exemption.

Teck's reading of CERCLA's disposal definition renders meaningless the statute's federally permitted release exception. In lieu of liability under CERCLA section 107, costs incurred responding to contaminants released in accordance with a federal permit are recoverable pursuant to provisions of the permitting statute. 42 U.S.C. § 9607(j). This exemption presupposes that liability otherwise attaches under CERCLA absent application of the exemption. Relevant here, CERCLA exempts from liability "any emission into the air subject to a permit or control regulation under [various sections] of the Clean Air Act." 42 U.S.C. §

9601(10)(H). By necessary implication, any aerial emission of hazardous substances not permitted by the Clean Air Act is subject to liability under CERCLA. One of the "most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Carley v. United States,* 556 U.S. 303, 314 (2009) (internal quotations omitted). Teck's interpretation of "disposal" would exempt unpermitted air emissions from CERCLA liability, effectively rendering 42 U.S.C. § 9607(j) meaningless. Teck's position is therefore untenable.

Legislative history demonstrates Congress intended the federally permitted release exemption to function as a limited exception to CERCLA's general coverage of hazardous substances emitted to the air and deposited to land or water. The federally permitted release exemption was enacted to prevent conflicts with environmental regulatory statutes. Congress explained that the exemption must not compromise CERCLA's ability to protect public health and the environment:

> While the exemptions from liability for federally permitted releases are provided to give regulated parties clarity in their legal duties and responsibilities, these exemptions are not to operate to create gaps in actions necessary to protect the public or the environment.

126 Cong. Rec. 30897, 30933 (Nov. 24, 1980) (statement of Sen. Randolph). Congress disavowed any construction of CERCLA that would create a liability gap between the Clean Air Act and CERCLA.

b. Teck attempts to raise the specter of statutory inconsistency with the Clean Air Act where Congress already considered and remedied any danger of inconsistency.

Teck alleges that affirming the district court will result in unintended conflicts between CERCLA and the Clean Air Act, but Teck fails to grasp that Congress enacted the federally permitted release exemption to alleviate precisely these same concerns. Teck asserts that the Clean Air Act allows pollution up to certain thresholds, whereas CERCLA could impose liability for pollution concentrations below those marks. ECF 13-1, at 25. This is plainly false. The federally permitted release exemption defers to the Clean Air Act for releases in compliance with their Clean Air Act permit—liability is prohibited under CERCLA. 42 U.S.C. § 9607(j). CERCLA liability could be imposed for response costs attributable to aerially emitted wastes that *exceed* permitted emission levels, but in that case the polluter is also in violation of the Clean Air Act. In that case, CERCLA would not "undermine" the Clean Air Act by imposing liability inconsistently. *See* ECF 13-1, at 25.

Teck misunderstands a fundamental difference between the two statutes when it argues that applying CERCLA remedies to aerially emitted substances would undermine the balance struck by the Clean Air Act's regulatory scheme. *See* ECF 13-1, at 25-26. The Clean Air Act is a prospective regulatory statute, similar to the Clean Water Act ("CWA") and RCRA. By contrast, CERCLA is a

retrospective statute designed to remedy harms caused by past conduct. *See infra,* § VII.C.4. Because they promote different goals, application of both statutes does not undermine the Clean Air Act's regulatory scheme. As this Court stated in *United States v. Phillips*,

> The areas of coverage of the major federal environmental laws overlap. CERCLA is the primary federal statute under which cleanups of contaminated sites proceed. Thus, for an individual convicted under one statute, such as the CWA or [RCRA], the Government may clean up the mess he made under CERCLA. Because of this overlap, depriving the Government of cleanup costs because it proceeded under CERCLA, not the statute of conviction, would undermine the congressional scheme of environmental laws.

United States v. Phillips, 356 F.3d 1086, 1096-97 (9th Cir. 2004); *see also United States v. Waste Industries, Inc.,* 734 F.2d 159, 168 (enjoining conduct under RCRA and rejecting argument that CERCLA is an "adequate remedy at law" sufficient to preclude action under RCRA). To not, as Teck proposes, hold a polluter liable for response costs under CERCLA simply because alternative penalties are available under the Clean Air Act would in fact "undermine the congressional scheme of environmental laws"—not the other way around.

c. Legislative history reveals that Congress intended for CERCLA to apply to air emissions.

CERCLA's legislative history shows that Congress contemplated and endorsed the statute's application to air emissions. Specifically, it was understood that under CERCLA, "a party could be held responsible for those wide-ranging

effects, specifically: Cleanup of a release of a toxic substance into the **air**, water or land. . . . " 126 Cong. Rec. 30897, 30941 (Nov. 24, 1980) (statement of Sen. Mitchell) (emphasis added). Additionally, the Library of Congress issued a report at the request of the Environmental Pollution Subcommittee, which, as highlighted by one Senator, indicated that "no region of the country is free of at least one single serious incident of long-term economic damage attributable to airborne toxics." 126 Cong. Rec. 30897, 30948 (Nov. 24, 1980) (statement of Sen. Cohen). Moreover, the Senate Committee on Environment and Public Works published its Committee Report and cited one example of "careless manufacturing and disposal practices [that] also resulted in atmospheric emissions which settled on surface soils." S. Rep. No. 96-848, at 7 (July 11, 1980).

3. Events constituting the disposal at issue in this case are consistent with all other CERCLA case law; No court has held CERCLA cannot encompass aerial emissions since its passage over three decades ago.

Teck does not cite a single CERCLA case that absolves a potentially responsible party of liability on the basis that contamination was emitted directly to the air. This lack of authority is telling.[7] Not only does no such precedent exist,

[7] Other courts outside this Circuit were not persuaded by the BNSF decision and declined to adopt its reasoning. In *The Little Hocking Water Association, Inc. v. E.I. DuPoint de Nours and Co.*, __ F. Supp.3d __, 2015 U.S. Dist. LEXIS 29200 (S.D. Ohio 2015), aerially emitted hazardous particulates were carried by wind before being deposited onto land. *Id.* at 43-44. The district court rejected the defendant's attempt to invoke BNSF, holding that "this type of soil and

existing case law demonstrates CERCLA's applicability to hazardous substances emitted to air and deposited in or on land or water. Several courts have imposed CERCLA liability for aerial emissions of hazardous substances deposited at a facility. In *New York v. Solvent Chem. Co.,* 685 F. Supp. 2d 357 (W.D.N.Y. 2010), a chlor-alkali producer was found liable for mercury contamination at a nearby site. Mercury used in chlor-alkali production "commonly escaped into the environment as a vented gas…or through other fugitive releases." *New York v. Solvent Chem. Co.,* 685 F. Supp. 2d 357, 377 (W.D.N.Y. 2010), *reversed in part & vacated in part on other grounds,* 664 F.3d 22 (2d Cir. 2011), 453 Fed. Appx. 42 (2d Cir. 2011). The court held the chlor-alkali producer liable for mercury contamination that "resulted from air emissions" associated with the chlor-alkali production process. *Id.* at 438. In *Asacrco LLC v. CEMEX, Inc.,* 21 F. Supp. 3d 784 (2014), CERCLA liability was imposed for air emissions from a cement production plant. Cement kiln dust produced during cement production contained arsenic. *Id.* at 794. The district court was convinced by expert testimony that the cement plant was a "source of arsenic released into the environment via both stack emissions and windblown CKD [cement kiln dust] emissions." *Id.* at 798, 810 (internal quotation omitted). In *Courtlands Aerospace v. Huffman,* the court found

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groundwater contamination is precisely the type of harm RCRA aims to remediate in its definition of 'disposal.'"

CERCLA arranger liability applied to ash containing hazardous substances that was "vented through a smoke stack" and carried by wind onto a neighbor's property. *Courtlands Aerospace v. Huffman,* 826 F. Supp. 345, 347 (E.D. Ca. 1993). Similarly, another district court imposed arranger liability when paint containing a hazardous substance flaked off a building and was carried through the air onto another's property. *National R.R. Passenger Corp. v. New York Hous. Auth.,* 819 F. Supp. 1271, 1277 (S.D.N.Y. 1993).

4. Unlike RCRA, CERCLA is a purely retrospective statute enacted to effectuate fundamentally different purposes; Application of CERCLA to Sites contaminated by aerial deposition is consistent with the statute's purpose and does not result in regulatory conflict.

A foundational distinction between CERCLA and RCRA alleviates the concerns underlying this Court's decision in *BNSF*. CERCLA occupies a unique place within the constellation of our country's environmental laws. *Pakootas I,* 452 F.3d at 1078. This Court in *Pakootas I* noted that the "foundation of the distinction between RCRA and CERCLA" is that they serve fundamentally different purposes. *Id.* at 1079. RCRA is a prospective statute designed to regulate ongoing conduct.[8]

[8] RCRA was passed in 1976 to regulate improper disposal practices for hazardous wastes. The law established standards to ensure that waste disposal facilities would be designed to prevent future leaks or releases of contaminants. Congress quickly realized, however, that deficiencies in RCRA left "important regulatory gaps." H.R. Rep. No. 96-1016 pt. 1, at 22 (May 16, 1980). Chief among the problems Congress sought to remedy by passing CERCLA was the inability under RCRA to deal with dangers posed by past hazardous waste disposals. 126 Cong.

CERCLA is a retrospective statute "principally designed to effectuate the cleanup of toxic waste sites." *Id.* at 1078. As this Court recognized, prospective statutes like RCRA, the Clean Water Act, and the Clean Air Act regulate current conduct. However, such "prospective regulation [is] legally distinct from a finding of CERCLA liability for cleanup of actual or threatened releases of the hazardous substances into the environment from the disposal site...." *Id.* at 1079.

CERCLA claims predicated on air emissions share none of the problems that animated this Court's decision in *BNSF.* As noted in *Pakootas I,* prospective statutes like RCRA and the Clean Air Act are "legally distinct from a finding of CERCLA liability." *Pakootas I,* 452 F.3d at 1079. This conclusion derives from CERCLA's "overwhelmingly remedial statutory scheme," which is purely retrospective and designed to clean up sites contaminated by hazardous waste. *Id.* at 1079, 1081. Unlike RCRA and the facts presented in *BNSF,* applying CERCLA to sites contaminated with hazardous substances deposited aerially will not result in unworkable regulatory conflicts. Indeed, Congress purposefully "structured

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Rec. 30897, 30930-31 (Nov. 24, 1980) (statement of Sen. Randolph). Whereas RCRA was prospective in nature, CERCLA was designed to be retrospective. *See* H.R. Rep. No. 96-1016 pt. 1, at 22 (May 16, 1980). CERCLA would therefore do what RCRA could not: "establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. Rep. No. 96-1016 pt. 1, at 22 (May 16, 1980).

[CERCLA] to complement these laws," including the Clean Air Act and RCRA. S. Rep. NO. 96-848, at 12 (July 11, 1980).[9]

D. Arguments that the Ottawa Convention is the Proper Forum for Remedying Trail Smelter Air Emissions Claims are Procedurally Flawed; Even if Procedurally proper, the Ottawa Convention Does Not Remove or Impede this Court's Jurisdiction.

1. Teck failed to preserve arguments related to the Ottawa Convention issue for appeal.

Teck made only passing reference to the International Joint Commission (IJC) in its Motion to Strike or Dismiss below, but now the Government of Canada invokes the Ottawa Convention as reason why the district court's decisions should be reversed. *See* SER 11, at n.4; ECF 25-1, at 8. Importantly, the IJC was established by an entirely separate treaty and is a completely distinct tribunal from the one formed under the Ottawa Convention. Teck's reference in its motion is inadequate to preserve arguments related to the IJC forum, yet alone the Ottawa Convention. *See* SER 11, at n.4. An issue is preserved for purposes of appeal if the lower court was "fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 469 (2000). This standard is satisfied when a

[9] "The bill [CERCLA] is not intended to replace other laws which aim to correct a variety of toxic chemical concerns. The Clean Air Act, the Clean Water Act, the Toxics Substances Control Act, the Solid Waste Disposal Act [which includes RCRA], and other statutes are only beginning to build regulatory foundations to address the wide range of toxic contamination incidents. The reported bill, S. 1480, is structured to complement these laws." S. Rep. NO. 96-848, at 12 (July 11, 1980).

party sufficiently apprises the court of its argument such that the court had an opportunity to rule on it. *Mercury Interactive Corp. Secs. Litig. v. Mercury Interactive Corp.,* 618 F.3d 988, 992 (9th Cir. 2010). In a footnote, Teck argued that the "proper forum for dealing with cross-border air issues is not this Court, but pursuant to treaty before the International Joint Commission." SER 11, at n.4. The district court made passing reference to this assertion but did not consider it substantively or render a decision on its merit. ER 16. Teck's perfunctory argument was presented without legal analysis or support and is therefore forfeited on appeal. *See In re Tamen,* 22 F.3d 199, 205 (9th Cir. 1994) (defense waived when only briefly raised in defendant's the answer without argument or citation to authority, and where district court did not make express findings of fact or conclusions of law on the matter).

Furthermore, Amicus Government of Canada relies on an entirely different international agreement than the treaty that established the IJC. Teck argued below that the proper forum for adjudicating air emissions was the IJC, which was created by the Boundary Waters Treaty of 1909. *See* Boundary Waters Treaty, *supra,* Art. IX, 36 Stat. 2448; SER 11, at n.4 ("The proper forum for dealing with cross-border air issues [is] pursuant to treaty before the International Joint Commission."). Amicus now argues that a Tribunal created pursuant to the 1935 Ottawa Convention—a separate international agreement—offers the proper forum

for resolving Trail Smelter emission damages. ECF 25-1, p. 8. Teck made no mention of the Ottawa Convention below and is barred from raising this new issue on appeal. *United States v. Alisal Water Corp.,* 370 F.3d 915, 923 (9th Cir. 2004) (issue is waived if neither argued nor passed upon by district court). So too is Amicus Government of Canada. To hold otherwise would permit a party to preserve for appeal arguments flowing from every potentially applicable international agreement by citing to only one such agreement.

2. Amicus the Government of Canada may not raise new legal arguments not addressed by the parties.

The Canadian amicus brief improperly raises a new issue on appeal and is therefore inappropriate for consideration. As a general rule, the Ninth Circuit "does not review issues raised only by an amicus curiae." *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998); *Santiago v. Rumsfeld,* 435 F.3d 549, 552 n.1 (9th Cir. 2005). Directly relevant to the present case, where "no claims based upon…international law were raised before the [lower court], this issue is not properly before [the Ninth Circuit] on appeal." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1581 n.9 (9th Cir. 1986). As the Government of Canada candidly acknowledges, it seeks to offer a "*separate basis* under international law for excluding Trail Smelter emissions from CERCLA's scope of application." ECF 25-1, p. 7 (emphasis added). Canada argues the Ottawa Convention provides the "appropriate and exclusive forum" for addressing

the Tribes' air emission claims. *Id.* However, Teck did not raise issues related to the Ottawa Convention at the trial court or in its opening appellate brief. This Court should therefore ignore the separate issue raised only by Amicus Government of Canada. *Russian River Watershed Protection Comm.,* 142 F.3d at 1141.

Additionally, whether the Ottawa Convention is the proper forum for resolving the Tribes' claims is wholly unrelated to the particular issue of statutory interpretation presented to this Court. Amici curiae "may not frame the questions to be resolved in an appeal" by asserting arguments reliant on international law where "petitioners' opening brief did not raise any issue of…international law in the questions [presented] to this Court." *Sanchez-Trujillo v. INS,* 801 F.2d at 1581 n.9. As framed by Teck, this Court is presented with the following issue:

> [W]hether in light of this Court's decision in *Center for Community Action*, the definition of 'disposal' in CERCLA is satisfied by allegations that hazardous substances were emitted into the air and then transported by wind, eventually settling onto land or water."

ECF 13-1, p. 3. Teck articulated no issues of international law in in its presentation to this Court. Amicus Government of Canada is prohibited from reframing the issues to take up that mantle.

3. The parties intended for the Ottawa Convention to address only damage caused by sulfur dioxide fumes.

The U.S. and Canadian governments only intended for the Ottawa Convention to resolve claims for damages caused by sulfur dioxide fumes. The 1931 IJC decision only addressed sulfur dioxide-caused damages;[10] diplomatic exchanges negotiating the Convention spoke only of damages caused by sulfur dioxide fumes;[11] and the Tribunal's 1938 and 1941 decisions addressed only sulfur dioxide fumes.[12] Furthermore, this Court previously acknowledged that the Trail Smelter Arbitration only "concerned sulfur dioxide emissions from the Trail Smelter that migrated into the United States in the early twentieth century." *Pakootas I,* 452 F.3d at 1069 n.5. The governments clearly intended for the Ottawa Convention to address only damages caused by sulfur dioxide fumes.

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[10] *See* 29 R.I.A.A. 365, 369-70 at §§ 5(a), (c) (the "IJC Report").

[11] For instance, President Roosevelt sent a letter to the Canadian government stating that "The continued drifting of sulphur [sic] dioxide into the State of Washington, with its consequent injury to the interests of a large number of American citizens, is a matter to which I cannot remain indifferent." 1 *Papers Relating to the Foreign Relations of the United States* 954 (1934), *available at* http://images.library.wisc.edu/FRUS/EFacs/1934v01/reference/frus.frus1934v01.i0009.pdf.

[12] *See* 3 R.I.A.A. 1911, 1917 (the "1938 Decision"); 3 R.I.A.A. 1938, 1974 § 3 (the "1941 Decision").

4. The Ottawa Convention is not the exclusive forum for remedying Trail Smelter Air Emissions.

International agreements to engage in optional procedures for resolving disputes involving foreign parties do not deprive U.S. courts of jurisdiction to apply U.S. law to those same disputes. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.,* 482 U.S. 522, at 539-40 (1987). In *Societe Nationale,* the Supreme Court noted that the Hague Convention employed "permissive rather than mandatory language"—specifically, repeated uses of the word "may"—which indicated the Convention was "intended to establish optional procedures." *Id.* at 535-38. Similarly, the dispute resolution procedures established by the Ottawa Convention are strictly optional. The Ottawa Convention speaks permissively of its application to transboundary disputes, stating in relevant part that, "the Governments *may* make arrangements for the disposition of claims for indemnity for damage" occurring after the Tribunal's final 1941 report. *See* Ottawa Convention, *supra,* Art. XI, 49 Stat. 3245. The Ottawa Convention's plain language reveals its permissive rather than exclusive nature.

The context leading to formation of the Ottawa Convention demonstrates the signatories' repudiation of an exclusive forum for resolving transboundary air emissions. In 1928, the governments referred their dispute to the IJC. *See* 1938 Decision, *supra,* 3 R.I.A.A. at1918. In 1931, the IJC issued a report that recommended that for future claims the "Governments of the United States and

Canada *shall* determine the amount of such damage, if any, and the amount so fixed shall be paid by the company forthwith." IJC Report, *supra,* at 368-69 (emphasis added). As the Ottawa Convention's arbitration Tribunal noted, "this recommendation, apparently, did not commend itself to the interested parties." *See* 1938 Decision, *supra,* 3 R.I.A.A. at 1919. Instead, the parties created an optional forum for adjudicating future claims. The United States and Canada rejected the mandatory language proposed by the IJC and instead adopted the Ottawa Convention's optional regime. As an optional dispute resolution mechanism, the Ottawa Convention allows parties to pursue national judicial remedies separate and apart from its terms.

VIII. CONCLUSION

For the reasons stated above, the district court's rulings should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of October, 2015.

SHORT CRESSMAN & BURGESS PLLC

By: /s/ Paul J. Dayton
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points and contains 9,546 words, excluding the Table of Contents, Table of Authorities, and Certificates of Service and of Compliance.

Dated this 5th day of October, 2015.

/s/ Paul J. Dayton

Addendum

ADDENDUM

42 U.S.C. § 6972

§ 6972. Citizen Suits

(a) Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)

(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste

referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

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42 U.S.C. § 9601

(CERCLA section 101)

§ 9601. Definitions

For purposes of this subchapter—…

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 402 of the Federal Water Pollution Control Act [33 U.S.C. 1342], (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Federal Water Pollution Control Act and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Federal Water Pollution Control Act, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 404 of the Federal Water Pollution Control Act [33 U.S.C. 1344], (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C. 6925(a)–(d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of title 33 of [1]section 1413 of title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C. 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111

[42 U.S.C. 7411], section 112 [42 U.S.C. 7412], title I part C [42 U.S.C. 7470 et seq.], title I part D [42 U.S.C. 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C. 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 307(b) or (c) of the Clean Water Act [33 U.S.C. 1317(b), (c)] and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 402 of such Act [33 U.S.C. 1342], and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

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Boundary Waters Treaty of 1909

Article IX

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and

recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

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Convention for Settlement of Difficulties Arising From Operation of Smelter at Trail, B.C.

(Ottawa Convention)

Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,

Considering that the Government of the United States has complained to the Government of Canada that fumes discharged from the smelter of the Consolidated Mining and Smelting Company at Trail, British Columbia, have been causing damage in the State of Washington, and

Considering further that the International Joint Commission, established pursuant to the Boundary Waters Treaty of 1909, investigated problems arising from the operation of the smelter at Trail and rendered a report and recommendations thereon, dated February 28, 1931, and

Recognizing the desirability and necessity of effecting a permanent settlement,

Have decided to conclude a convention for the purposes aforesaid, and to that end have named as their respective plenipotentiaries:

The President of the United States of America :

PIERRE DE L. BOAL, Chargé d'Affaires ad interim of the United States of America at Ottawa;

His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, for the Dominion of Canada : The Right Honorable RICHARD BEDFORD BENNETT, Prime Minister, President of the Privy Council and Secretary of State for External Affairs ;

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles :

ARTICLE I.

The Government of Canada will cause to be paid to the Secretary of State of the United States, to be deposited in the United States Treasury, within three months after ratifications of this convention have been exchanged, the sum of three hundred and fifty thousand dollars, United States currency, in payment of all damage which occurred in the United States, prior to the first day of January, 1932, as a result of the operation of the Trail Smelter.

ARTICLE II.

The Governments of the United States and of Canada, hereinafter referred to as "the Governments", mutually agree to constitute a tribunal hereinafter referred to as "the Tribunal", for the purpose of deciding the questions referred to it under the provisions of Article III. The Tribunal shall consist of a chairman and two national members.

The chairman shall be a jurist of repute who is neither a British subject nor a citizen of the United States. He shall be chosen by the Governments, or, in the event of failure to reach agreement within nine months after the exchange of ratifications of this convention, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article 49 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on October 18, 1907.

The two national members shall be jurists of repute who have not been associated, directly or indirectly, in the present controversy. One member shall be chosen by each of the Governments.

The Governments may each designate a scientist to assist the Tribunal.

ARTICLE III.

The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

ARTICLE IV.

The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned.

ARTICLE V.

The procedure in this adjudication shall be as follows :

1. Within nine months from the date of the exchange of ratifications of this agreement, the Agent for the Government of the United States shall present to the Agent for the Government of Canada a statement of the facts, together with the supporting evidence, on which the Government of the United States rests its complaint and petition.

2. Within a like period of nine months from the date on which this agreement becomes effective, as aforesaid, the Agent for the Government of Canada shall present to the Agent for the Government of the United States a statement of the facts, together with the supporting evidence, relied upon by the Government of Canada.

3. Within six months from the date on which the exchange of statements and evidence provided for in paragraphs 1 and 2 of this article has been completed, each Agent shall present in the manner prescribed by paragraphs 1 and 2 an answer to the statement of the- other with any additional evidence and such argument as he may desire to submit.

ARTICLE VI.

When the development of the record is completed in accordance with Article v. hereof the Governments shall forthwith cause to be forwarded to each member of the Tribunal a complete set of the statements, answers, evidence and arguments presented by their respective Agents to each other.

ARTICLE VII.

After the delivery of the record to the members of the Tribunal in accordance with Article VI the Tribunal shall convene at a time and place to be agreed upon by the two Governments for the purpose of deciding upon such further procedure as it may be deemed necessary to take. In determining upon such further procedure and arranging subsequent meetings, the Tribunal will considei the individual or joint requests of the Agents of the two Governments.

ARTICLE VIII.

The Tribunal shall hear such representations and shall receive and consider such evidence, oral or documentary, as may be presented by the Governments or by interested parties, and for that purpose shall have power to administer oaths. The Tribunal shall have aulhority to make such investigations as it may deem necessary and expedient, consistent with other provisions of this convention.

ARTICLE IX.

The Chairman shall preside at all hearings and other meetings of the Tribunal and shall rule upon all questions of evidence and procedure. In reaching a final determination of each or any of the Questions, the Chairman and the two members shall each have one vote, and, in the event of difference, the opinion of

the majority shall prevail, and the dissent of the Chairman or member, as the case may be, shall be recorded. In the event that no two members of the Tribunal agree on a question, the Chairman shall make the decision.

ARTICLE X.

The Tribunal, in determining the first question and in deciding upon the indemnity, if any, which should be paid in respect to the years 1932 and 1933, shall give due regard to the results of investigations and inquiries made in subsequent years.

Investigators, whether appointed by or on behalf of the Governments, either jointly or severally, or the Tribunal, shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the properties upon which damage is claimed to have occurred or to be occurring, and their reports may, either jointly or severally, be submitted to and received by the Tribunal for the purpose of enabling the Tribunal to decide upon any of the Questions.

ARTICLE XI.

The Tribunal shall report to the Governments its final decisions, together with the reasons on which they are based, as soon as it has reached its conclusions in respect to the Questions, and within a period of three months after the conclusions of proceedings. Proceedings shall be deemed to have been concluded when the Agents of the two Governments jointly inform the Tribunal that they have nothing additional to present. Such period may be extended by agreement of the two Governments.

Upon receiving such report, the Governments may make arrangements for the disposition of claims for indemnity for damage, if any, which may occur subsequently to the period of time covered by such report.

ARTICLE XII.

The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal.

ARTICLE XIII.

Each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal and the expenses of its national member and scientific assistant.

All other expenses, which by their nature are a charge on both Governments, including the honorarium of the neutral member of the Tribunal, shall be borne by the two Governments in equal moieties.

ARTICLE XIV.

This agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place at Ottawa as soon as possible.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this convention and have hereunto affixed their seals.

Done in duplicate at Ottawa this fifteenth day of April, in the year of our Lord, one thousand, nine hundred and thirty-five.

9th Circuit Case Number(s) 15-35228

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) October 5, 2015 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Linda F. Sutton

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

No. 15-35228

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Washington
No. CV-04-0256-LRS, Sr. Judge Lonny R. Suko

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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GLOSSARY

CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
DPM	Diesel Particulate Matter
EPA	United States Environmental Protection Agency
FACs	Fourth Amended Complaints
IJC	International Joint Commission
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
UCR Site	Upper Columbia River Superfund Site

INTEREST OF THE UNITED STATES AND ARGUMENT SUMMARY

Defendant-Appellant Teck Cominco Metals, Ltd. ("Teck") asks this Court to reverse the district court's finding that hazardous substances from Teck's smelter stacks were "disposed" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, upon being deposited on the ground at the Upper Columbia River Superfund Site ("UCR Site"). Teck's argument that hazardous substances that travel through the air *any distance* before contaminating land or water are categorically outside the meaning of "disposal," and thus not subject to CERCLA, creates a new requirement that is unsupported by the statutory text, extremely narrow, and would severely undermine Congress' objectives. No CERCLA case has *ever* adopted Teck's interpretation.

Teck relies almost entirely on an erroneous reading of this Court's decision in *Center for Community Action and Environmental Justice v. BNSF*, 764 F.3d 1019 (9th Cir. 2014) ("*CCAEJ*"), which does not control here and should not be extended in any event, because it arose under unique factual circumstances under a different federal statute, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*.

Additionally, the new issue that amicus curiae Government of Canada ("Canada") attempts to raise in its brief, which this Court should not even consider, misinterprets the 1935 Ottawa Convention and identifies no international obligation of the United States that prevents applying CERCLA here.

The United States Environmental Protection Agency ("EPA") has primary enforcement authority under RCRA and CERCLA and the United States, on behalf of EPA, participates as amicus curiae to urge the proper interpretation of the statutory term "disposal." EPA has performed CERCLA response actions and pursued administrative or judicial enforcement under CERCLA at numerous sites similar to the UCR Site, where discharges to the air of CERCLA hazardous substances from industrial operations such as smelters have been deposited (i.e., disposed) elsewhere and required clean up. Properly interpreting CERCLA is paramount to EPA's interests in implementing CERCLA, cleaning up sites contaminated by aerial deposition, and ensuring that polluters pay for contamination they cause.

ISSUE PRESENTED

Under CERCLA, "disposal" occurs whenever hazardous substances are "discharge[d or] deposited . . . into or on any land or water" and may enter the environment. This definition, to be construed consistent with CERCLA's remedial purposes, does not specify that hazardous substances be *directly* applied to land or water. Did the district court correctly conclude that "disposal" occurs where hazardous substances from Teck's smelter stacks were deposited to land or water at the UCR Site?

STATEMENT OF THE CASE

I. Statutory Background

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA "both provides a mechanism for cleaning up hazardous-waste sites and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citation omitted). A prima facie case under CERCLA requires a plaintiff to show that a "release" or "threatened release"[1] of a "hazardous substance" from a "facility" has caused it to incur cleanup costs. 42 U.S.C. § 9607(a). The defendant must fall within at least one of four classes of covered persons: (1) the owner or operator of the facility, (2) the owner or operator of the facility "at the time of disposal" of hazardous substances, (3) persons who "arranged for disposal" or treatment of hazardous substances, and (4) certain transporters of hazardous substances. *Id.*

This case concerns alleged "arranger" liability under 42 U.S.C. § 9607(a)(3), which requires application of the term "disposal," which CERCLA defines, 42 U.S.C. § 9601(29), by cross-referencing this RCRA definition:

[1] "[R]elease" means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22).

> 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.

Id. § 6903(3). RCRA was enacted in 1976 in response to growing concern about practices for the previously unregulated waste disposal business. *See* H.R. Rep. No. 94-1491, at 2-4 (1976), 1976 U.S.C.C.A.N. 6238, 6239-41. While RCRA and CERCLA share some attributes in addressing waste disposal problems, the Supreme Court has explained that CERCLA focuses on cleaning up contaminated sites, while RCRA regulates the generation and disposal of solid and hazardous wastes. *See Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 483 (1996).

Finally, under CERCLA broad categories of responsible parties are potentially liable for a release or threatened release of a hazardous substance, *see* 42 U.S.C. § 9607; but in a RCRA citizen suit like *CCAEJ*, parties who manage or dispose of solid or hazardous waste may only be liable when their management or disposal "may present an imminent and substantial endangerment to health or the environment." *Id.* § 6972(a)(1)(B).

II. Factual and Procedural Background

The factual background is described in the Plaintiffs' briefs. This appeal concerns allegations in the Plaintiffs' Fourth Amended Complaints ("FACs"; ER81 and ER94) that discharges from Teck's smelter stacks resulted in "disposal" of CERCLA hazardous substances (including lead, cadmium, and mercury) at the UCR

Site rendering Teck liable under 42 U.S.C. § 9607(a)(3). ER88 and ER102. Teck moved to strike these claims (SER1-13), arguing that they are not "disposal" under CERCLA. The district court denied Teck's motion, finding that Plaintiffs adequately alleged "disposal" at the UCR Site because they alleged that Teck's "aerial emissions have been deposited at the UCR Site" and that the CERCLA-relevant "disposal at the UCR Site" occurs when hazardous substances "came to a point of repose at the UCR Site." ER14.

Shortly thereafter, this Court decided *CCAEJ*, which considered "whether [RCRA's] citizen-suit provision . . . may be used to enjoin the emission from Defendants' railyards of particulate matter found in diesel exhaust." 764 F.3d at 1020. The complaint's only claim for relief under RCRA alleged endangerment resulting solely from inhalation of diesel particulate matter ("DPM"), specifically, that DPM from the railyards is "transported by wind and air currents onto the land and water near the railyards . . [and] is inhaled by people both directly and after the particles have fallen to the earth and then have been re-entrained into the air." *Id.* at 1023. The district court had dismissed the complaint, rejecting the plaintiffs' call to fill a "big gap" or "loophole" in the interplay between RCRA, under which diesel-locomotive emissions are not regulated, and the federal Clean Air Act ("CAA"), under which locomotive emissions *are* regulated but railyards, as "indirect sources," are exempt from federal regulation. *Ctr. for Cmty. Action & Envtl. Justice v. Union Pac. Corp.*, 2012 WL 2086603, at *4 (C.D. Cal. May 29, 2012).

This Court affirmed, but on different grounds. The Court first applied several interpretive tools and addressed whether "emissions of solid waste *into the air*" fall within RCRA's definition of "disposal." *CCAEJ,* 764 F.3d at 1023. The Court found that the absence of "emitting" from the list of actions that constitute disposal under RCRA "preliminarily" indicated that "'emitting' solid waste into the air does not constitute 'disposal' under RCRA." *Id.* The Court addressed any ambiguity in the definition of disposal by examining the legislative histories of RCRA and the CAA. The Court declined to fill a "regulatory 'gap'" between RCRA and the CAA, finding that Congress made a "reasoned decision" to exclude "indirect sources" like railyards from federal regulation. *Id.* at 1030. The Court found that the locomotive exhaust at issue "is not first placed 'into or on any land or water'; rather it is first emitted into the air," and stated that "'disposal' does not extend to emissions of solid waste directly into the air." *Id.* at 1024.

Based on *CCAEJ*, Teck moved for reconsideration of the district court's earlier order denying Teck's motion to strike, ER67-80, which the district court denied. ER1-9. The district court discussed the different statutory "contexts" of RCRA and CERCLA, which *CCAEJ* had "no reason to consider," and explained that RCRA citizen-suit liability does not depend on there being a "disposal" at a "facility." ER5. However, under CERCLA, the UCR Site is the relevant "facility," i.e., where "a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." ER4 (quoting 42 U.S.C. § 9601(9)). Accordingly, "'CERCLA

disposal' . . . occurred when hazardous substances from Teck's aerial emissions and its river discharges were deposited 'into or on any land or water' of the UCR Site." *Id.* Moreover, disposal occurred "in the 'first instance'" on the land or water of the UCR Site and does not "run afoul" of *CCAEJ*. *Id.* The court also clarified that "[e]missions to the air alone do not constitute a 'CERCLA disposal.'" ER6.

The district court certified for immediate appeal its orders denying Teck's motion to strike and Teck's motion for reconsideration. This Court granted Teck's petition to appeal under 28 U.S.C. § 1292(b).

ARGUMENT

I. Plaintiffs Adequately Alleged Disposal Under CERCLA

The district court's finding that the Plaintiffs sufficiently alleged "disposal" under CERCLA not only accords with CERCLA's text and remedial purposes, but it is consistent with other decisions of this Court interpreting CERCLA and "over 30 years of CERCLA jurisprudence" in which no court has found that such circumstances do not constitute disposal. *Id.* By contrast, Teck's interpretation conflicts with CERCLA's text and purposes and relies entirely on an extreme reading of *CCAEJ,* which does not control here because it is factually and legally distinguishable.

A. "Disposal" Is Alleged Under CERCLA When Hazardous Substances Have Been "Discharged" or "Deposited" into or on Land or Water.

Plaintiffs' CERCLA arranger liability claim requires a showing that Teck "arranged for disposal . . . of hazardous substances" at a "facility," and that a "release, or a threatened release" of hazardous substances caused them to incur response costs. 42 U.S.C. § 9607(a)(1)-(4). The central question on appeal is the meaning of "disposal" under CERCLA (defined *supra* at 4). When interpreting a statute, this Court "look[s] first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Carson Harbor Village, Ltd. v. Unocal Corp.,* 270 F.3d 863, 877 (9th Cir. 2001) (en banc) (citation omitted). This Court is also guided by the "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." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted).

CERCLA's purposes that inform this Court's review are "ensur[ing] the prompt and effective cleanup of waste disposal sites . . . to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir.1997). CERCLA's remedial authorities are "sweeping," *Bestfoods*, 524 U.S. at 55, and courts are to "construe CERCLA liberally to achieve [its] goals." *Kaiser Alum. &*

Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992) (citation omitted).

As noted, "disposal" under CERCLA occurs when hazardous substances have been discharged, deposited, injected, dumped, spilled, leaked or placed into or on land or water such that they may enter the environment. 42 U.S.C. § 6903(3). The sheer number of terms Congress used to describe disposal suggests an intent to capture multiple possible actions, and this Court has remarked that "disposal" applies "in a myriad of circumstances." *Carson Harbor*, 270 F.3d at 880. Thus, "consistent with the overall remedial purpose of CERCLA, 'disposal' should be read broadly," and this Court previously has rejected "a crabbed interpretation [that] would subvert Congress's goal" in enacting CERCLA. *Kaiser Aluminum*, 976 F.2d at 1342-43 (spreading of contaminated soils constitutes CERCLA disposal); *see also Voggenthaler v. Maryland Square LLC,* 724 F.3d 1050, 1064 (9th Cir. 2013) (rejecting interpretation "requiring 'disposal' [under CERCLA] to be directly onto the land or into the water").

Unlike the RCRA citizen suit claim at issue in *CCAEJ,* showing arranger liability under CERCLA's scheme requires that a "disposal" occur at a particular location, namely "at any facility . . . owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607(a)(3). CERCLA defines a "facility" as a "site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." *Id.* § 9601(9)(B). This

Court previously has held that the UCR Site is a CERCLA "facility." *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074 (9th Cir. 2006) ("*Pakootas I*").

The definitions of "facility" and "disposal" share the term "deposit," and the district court naturally focused its analysis on whether hazardous substances from the Trail Smelter had been deposited at the UCR Site. ER4-5. Because "deposit" is not defined by the statute, the common meaning of that term applies. *See Carson Harbor*, 270 F.3d at 878-79. Webster's defines "deposit" as "to let fall (as sediment)." Webster's Collegiate Dictionary 310 (10th ed. 1999). The Plaintiffs allege the "*disposal* of airborne hazardous substances into the [UCR] Site" and the "*deposition* of air emissions" containing various metals at the UCR Site. ER98 and ER99 (emphasis added). Clearly, then, "disposal" is sufficiently alleged within the meaning of CERCLA as the "deposit [i.e., letting fall] . . . of any solid or hazardous waste into or on any land or water" at the UCR Site from Teck's smelter. 42 U.S.C. § 9601(9)(B). Just like Teck's slag discharges had "come to be located," at the UCR Site, making it a CERCLA "facility," *see Pakootas I*, 452 F.3d at 1074, metals from Teck's smelter stacks have also been "deposited," i.e., let fall, upon the land and water of the UCR Site. Thus, the UCR Site is both a CERCLA "facility" as to those hazardous substances and the location of a CERCLA "disposal." ER5.

B. Teck's Interpretation of "Disposal" Relies on *CCAEJ,* Which Is Not Controlling.

Teck contends that *CCAEJ*'s interpretation of "disposal" in a RCRA case is controlling circuit law that, if followed, compelled the district court to strike or dismiss Plaintiffs' CERCLA claims based on aerial deposition. *See* Teck Br. at 2, 9. Teck is wrong, and *CCAEJ* is inapposite.

Of course, "case law on point is the law" and binds a later court "even if it considers the rule unwise or incorrect." *Hart v. Massanari*, 266 F.3d 1155, 1170-71 (9th Cir. 2001). But the issue decided must actually be "on point"; and, in deciding whether it is bound by an earlier decision, this Court will consider, at least, "the facts giving rise to the dispute" and the "precise language . . . [and] contours and scope of the rule announced" in the earlier decision. *Id.*

Teck's assertion that *CCAEJ* controls relies almost exclusively on the fact that "CERCLA expressly incorporates the RCRA definition" of "disposal." Teck Br. at 2. However, Supreme Court guidance on the interpretation of shared statutory terms refutes Teck's argument. First, no rule "require[s] uniformity when resolving ambiguities in identical statutory terms." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007). Rather, "[c]ontext counts," and in *Duke Energy* the Supreme Court held that, even though the same statutory definition of "modification" expressly applied to two different CAA programs (via a cross-reference, as here), "[a] given term . . . may take on distinct characters from association with distinct statutory objects calling for

different implementation strategies." *Id.* at 574, 576. Furthermore, a "[statutory] cross-reference alone is certainly no unambiguous congressional code for eliminating the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term." *Id.* at 576.

King v. Burwell, 135 S. Ct. 2480 (2015), similarly explained that an interpretation of the phrase "established by the State" in one section of the Affordable Care Act would not necessarily apply as a matter of law to other sections of the Act using that phrase because "'the presumption of consistent usage readily yields to context,' and a statutory term may mean different things in different places." *Id.* at 2493 (citation omitted).

A searching and independent contextual analysis of "disposal" is also necessary because, as *CCAEJ* notes, the definition of "disposal" is not "plainly state[d]" in the statute, and interpreting it warrants reference to "contextual clues." 764 F.3d at 1023, 1026. Thus, *CCAEJ* is not "judicial precedent holding that the statute *unambiguously* forecloses" different interpretations. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 982 (2005) (emphasis added). Also critically important is that *CCAEJ* does not discuss CERCLA *at all*, let alone indicate that the Court contemplated or intended that its ruling would apply to CERCLA.

1. *CCAEJ* Is Factually Distinguishable.

CCAEJ's interpretation of disposal under RCRA was driven by several case-specific considerations with no application here. *See Hart,* 266 F.3d at 1170-71. This

Court saw the case as essentially an end-run – an attempt to use a RCRA citizen suit to address what the Court viewed as the CAA problem of 1.8 million people allegedly inhaling air pollution from sixteen railyards spanning southern California. *See CCAEJ*, 764 F.3d at 1021. The *CCAEJ* plaintiffs appear to have sued under RCRA because the CAA citizen-suit provision is "more limited than RCRA's." *See id.* at 1022 n.3. With limited exception, the opinion focuses on, and found inadequate, the allegation of "direct" inhalation of DPM that never reached land or water. The Court framed the question before it as whether a RCRA citizen suit "may be used to enjoin the emission from Defendants' railyards" of DPM, *id.* at 1020, and observed that the disposal definition "does not plainly state whether emissions of solid waste *into the air* fall within its scope." *Id.* at 1023. It answered the question by saying, "as Congress has drafted it, 'disposal' does not extend to emissions of solid waste *directly* into the air." *Id.* at 1024 (emphasis added).

The pleadings in *CCAEJ* showed that the case sought to solve an air pollution/inhalation problem. The Court twice noted that the complaint alleged DPM from the railyards "is inhaled by people . . . *directly*." *Id.* at 1021, 1023 (emphasis added). The plaintiffs also alleged that the defendants were violating RCRA by failing "to limit or control the amount of DPM generated on and by the railyards." *Id.* at 1023 (citation omitted). Consistent with this emphasis on controlling air emissions, the *CCAEJ* plaintiffs requested an injunction that the defendants "take certain control measures to reduce diesel particulate emissions from their railyards." *Id.* at 1022.

The sole operative paragraph of the complaint alleging "disposal" also contained an allegation of inhalation of DPM "particles [that] have fallen to the earth and then have been re-entrained into the air." *Id.* at 1023. While the United States believes this validly alleges "disposal," it was fatally comingled with the invalid allegation of "directly" inhaled air pollutants (i.e., that never reached land or water). The United States agrees with *CCAEJ* and the district court that "emissions to the air alone," i.e., without reaching land or water, do not constitute "disposal" for the purposes of RCRA or CERCLA.[2] ER6. So, the complaint failed to allege that DPM that *did* reach land or water was, by itself, a source sufficiently contributing to endangerment to support the plaintiffs' RCRA claim.[3] Nor did the complaint identify or seek remediation of any specific property allegedly contaminated by DPM. In

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[2] A broader reading of *CCAEJ* – holding that there is never "disposal" if wastes travel through the air before reaching land or water – would be erroneous. *CCAEJ*'s principal textual argument is that the "disposal" definition "does not include the act of 'emitting,'" 764 F.3d at 1024, apparently assuming that Congress would use only "emit" to describe discharges to the air. This fails to account for the breadth of the term "disposal," which RCRA defines to include "discharge," one definition of which is "to give outlet or vent to: EMIT." Webster's Collegiate Dictionary 330 (10th ed. 1999). Other terms in the definition not examined by *CCAEJ*, such as "inject[]" or "leaking," just as comfortably encompass emissions to the air. Congress is not nearly as precise in using these terms as the *CCAEJ* panel assumed; Congress used "discharge" as a synonym for "emit" even in the CAA. *See, e.g.,* 42 U.S.C. § 7403(k) ("an air pollution problem . . . may result from discharge or discharges into the atmosphere"); *id.* § 7418(a) ("the discharge of air pollutants").

[3] Here, however, the FACs allege that hazardous substances from Teck's smelter stacks "have come to be located in, and cause continuing impacts to, the surface water and ground water, sediments, upland areas, and biological resources that comprise the [UCR] Site." ER98.

short, the case was fundamentally about controlling defendants' emissions of air pollutants directly at the locomotive stack to prevent inhalation, which the Court viewed as an air quality problem for the CAA, not RCRA.

CCAEJ also turned partly on the unique legal status of the alleged source of pollution: locomotive railyards that the Court found to be "entirely outside the ambit of federal regulation," owing to an express CAA exemption from federal regulation for "indirect sources." *Id.* at 1027-30. The Court explicitly rejected the *CCAEJ* plaintiffs' stated strategy of using a RCRA citizen suit to "fill the regulatory gap" the plaintiffs contended was created by this exemption. *Id.* at 1030; *see also id.* at 1029 (RCRA "governs 'land disposal'" while the CAA "governs air pollutants"). The Court found that "RCRA, as we interpret it, does not extend to *these emissions*," i.e., emissions otherwise regulated by the CAA. *Id.* (emphasis added).[4]

Another court, in a RCRA citizen suit, reads *CCAEJ* similarly. In *Little Hocking Water Association v. E.I. DuPont De Nemours & Co.*, 2015 WL 1038082 (S.D. Ohio Mar. 10, 2015), the court rejected the same argument Teck makes here and found that stack

[4] Teck's argument that applying CERCLA to address aerial deposition would somehow be "inconsistent" with the CAA (Br. at 24-26) ignores the careful balance Congress struck by exempting from CERCLA liability "federally permitted releases," 42 U.S.C. § 9607(j), including emissions "subject to a permit or control regulation under [various sections] of the [CAA]." *Id.* § 9601(10)(H). CERCLA defines "release" to include "emitting," *id.* § 9601(22), and presumptively applies to air emissions, a logical arrangement as the CAA is not a remedial statute with provision for addressing such contamination to ground or water.

emissions of chemical particulate matter, which later was deposited onto the ground of a wellfield and entered the groundwater, constituted RCRA "disposal." The court declined to follow *CCAEJ*'s "narrow" reading, in part because, while *CCAEJ* may have turned on an "intentional regulatory gap over locomotive and indirect source emissions," no such gap existed as to the chemical emissions at issue. *Id.* at *19. Rather, "this type of soil and groundwater contamination is precisely the type of harm RCRA aims to remediate in its definition of 'disposal.'" *Id.*

2. *CCAEJ* Is Legally Distinguishable.

Even if *CCAEJ* were not factually distinct from this case, it arose under a different statute and there is no indication that the Court intended or contemplated that its interpretation of "disposal" would apply to CERCLA. As the district court aptly put it, *CCAEJ* is a RCRA case that "makes no mention of CERCLA"; and this Court "had no reason to consider" how its interpretation would apply in light of CERCLA's elements or the "potential CERCLA ramifications." ER2, 5, 6. This Court, too, has recognized that the two statutes occupy a different "place in the constellation of our country's environmental laws," *Pakootas I*, 452 F.3d at 1078, and has offered by way of comparison that "regulating disposal activities is in the domain of RCRA," *id.* at 1079, while CERCLA is "concerned with imposing liability for cleanup . . . [and] does not obligate parties . . . liable for cleanup costs to cease the disposal activities . . . that made them liable for cleanup costs." *Id.*

Liability under RCRA and CERCLA is premised on meeting distinct statutory elements. Therefore, understanding disposal under each statute demands distinct and independent interpretive analysis. Plaintiffs' CERCLA claims require that a "release or threatened release" of "hazardous substances" from a "facility" cause the incurrence of "response costs," and that Teck is in a class covered by CERCLA, such as a person who "arranged for disposal." 42 U.S.C. § 9607(a). We have already discussed the centrality under CERCLA of evaluating "disposal" with reference to a specific "facility." With the exception of "disposal," there is no overlap between the elements required for Plaintiffs' CERCLA claim and the RCRA endangerment claim at issue in *CCAEJ*. *Compare id.* § 9607(a)(3) *with id.* § 6972(a)(1)(B).

C. Teck Engrafts a Requirement that Hazardous Substances *Directly* Hit Land or Water, Which Is Not in the Statute and Would Undermine CERCLA's Objectives.

Teck's reading of *CCAEJ* and the definition of "disposal" adds an element to the definition that does not appear in the statute's text. According to Teck, "'disposal' . . . does not include conduct where waste is 'first emitted into the air,' then travels through the air and eventually falls onto land or water." Teck Br. at 2 (quoting *CCAEJ*, 764 F.3d at 1024). As such, polluters will avoid federal cleanup liability under CERCLA if their hazardous substances travel through the air *any distance* before reaching land or water. Teck cites no statutory language or CERCLA case law to support this requirement that waste immediately and directly hit land or water. While the statutory definition expressly accounts for the situation where waste may be

"emitted into the air" after first having been on the land or in the water, nothing supports the premise that waste that reaches land or water could not first have traveled through some other medium.

Teck's crabbed interpretation would negate "disposal" in countless cases, put many polluters beyond CERCLA's reach, and lead to absurd results that cannot be squared with CERCLA's text and purposes. For instance, in rejecting the same argument Teck makes here, the district court ruling affirmed by the Tenth Circuit in *Power Engineering* (which *CCAEJ* discusses favorably) explained that an "overly narrow interpretation" of "disposal" would "exclude recognized acts of disposal, such as the dumping of waste by a dump-truck and the discharge of liquid waste by an effluent pipe situated several inches or feet above land, merely because the hazardous waste becomes airborne briefly before contacting the land." *United States v. Power Eng'g Co.*, 10 F.Supp.2d 1145, 1158 (D. Colo. 1998), *aff'd,* 191 F.3d 1224 (10th Cir. 1999). That court held that air scrubber discharges that travel through the air up to 30 feet are RCRA "disposal." *Id.* Insulating these circumstances from CERCLA responsibility as Teck advocates would frustrate Congress' objectives and stretch *CCAEJ* beyond recognition.

The extreme application of *CCAEJ* that Teck advocates could place beyond CERCLA's reach real-world sites, like the UCR Site, where "disposal" is an element of the United States' CERCLA claim and where contamination from aerial deposition

of hazardous substances has serious consequences and requires remediation.[5] Historically, smelters, refineries, and other industrial enterprises have discharged into the air untold amounts of hazardous substances that have been deposited into or on land or water – a source of extensive contamination at CERCLA sites around the country.

To take just one example, the Omaha Lead Site at issue in *In re ASARCO LLC,* 2009 WL 8176641 (Bankr. S.D. Tex. 2009), where the bankruptcy court approved a settlement resolving the United States' CERCLA claims against an owner and operator at the time of disposal of a massive lead smelter. The court observed that the "facility emitted lead from several stacks" for nearly a century and that the airborne discharges contributed substantially to "a serious health threat [that] exists at the site[,] and that thousands of Omaha children have elevated blood lead levels

[5] Teck's passing claim of "an unwarranted expansion of CERCLA liability," Teck Br. at 26-27, conflates and confuses two CERCLA exemptions from liability that negate Teck's concerns. The innocent-landowner defense, 42 U.S.C. § 9601(35)(A), exempts current property owners from CERCLA liability if they acquired the property after the disposal of hazardous substances and did not know or have reason to know that hazardous substances had been disposed. Teck offers no reason why this defense would be less available to a qualifying owner of property where hazardous substances that travelled through the air (as opposed to, for example, soil) are disposed. Teck's reliance on *Carson Harbor* is misplaced, as that case concerned "disposal" under various scenarios of passive migration through soils over time, which says nothing about what constitutes "disposal" of Teck's wastes at the UCR Site in the first instance. CERCLA's third-party defense further mitigates Teck's concerns and is available to otherwise liable property owners if they can show, *inter alia*, that the release of hazardous substances was caused solely by "an act or omission of a third party" unconnected to them. 42 U.S.C. § 9607(b)(3).

above the national average." *Id. at* *14; *see also American International Specialty Lines Insurance Co. v. United States*, 2010 WL 2635768, *23 (C.D. Cal. June 30, 2010) (in case alleging arranger liability against United States, as a matter of law, "[t]here were disposals of perchlorate at the [facility] when excess perchlorate was discharged into the air," among other disposal pathways).

These cases are not outliers. Hundreds of smelter sites alone are contaminated by the aerial deposition of hazardous substances that are being or have been cleaned up under CERCLA.[6] Nothing in *CCAEJ* suggests that this Court was even aware, let alone intended, that its decision could be caricatured and deployed to shield so many polluters from CERCLA liability and leave the Superfund and the American taxpayer to pay for the cleanup. *CCAEJ* simply does not apply.

II. No International Legal Obligation Prevents Applying CERCLA to Address the Trail Smelter Contamination at Issue Here

Amicus Canada urges this Court to eschew applying CERCLA in favor of a "bilateral mechanism" established by the 1935 Convention for the Establishment of a

[6] Additional sites include: Libby Asbestos Site, Libby, Montana (2003) (CERCLA removal action to address severe wind-blown asbestos contamination); Palmerton Zinc Pile Site, Pennsylvania (Civ. No. CV-98-0654, M.D. Pa.) (ongoing CERCLA remedial action for metals contamination from zinc smelter discharges, including at 188 residences); Anniston Lead/PCB Site, Anniston, Alabama (Civ. No. 1:02-00749, N.D. Ala.) (CERCLA cleanup of widespread lead and PCB contamination from aerial deposition across commercial and residential areas); Bunker Hill Mining and Metallurgical Complex Superfund Site, Coeur d'Alene Basin, Idaho and Washington (CERCLA remediation of, *inter alia*, soils at over 2500 residences and commercial properties contaminated by air discharges from lead smelter).

Tribunal to Decide Questions of Indemnity Arising from the Operation of the Smelter at Trail (the "Ottawa Convention") and related arbitration decisions in 1938 and 1941.[7] Canada Br. at 2, 10. Canada's arguments are improperly raised by an amicus and are erroneous; they should be disregarded or rejected.

A. As An Amicus, Canada Cannot Raise a New Issue.

This is an entirely new issue that is improperly raised by an amicus and should not be considered. Teck's opening brief makes no mention of *any* international law or treaty issue. As an amicus, Canada may not introduce this issue on appeal. *See, e.g.*, *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009). Moreover, Canada does *not* argue that the Ottawa Convention regime has any effect on this Court's jurisdiction or bars the application of CERCLA as a matter of law. Nor will Teck be allowed to address this issue in its reply brief (if it is even properly preserved for appeal) because "appellants cannot raise a new issue for the first time in their reply briefs." *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (citation omitted).[8]

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[7] April 15, 1935 (*ratified* June 5, 1935, *entered into force* August 3, 1935), 4 U.S.T. 4009, T.S. No. 893, 49 Stat. 3245, 162 L.N.T.S. 73; Trail Smelter Arbitral Tribunal Decision, 3 R.I.A.A. 1911, 33 AM J. INT'L L. 182 (the "1938 Decision"); Trail Smelter Arbitral Tribunal Decision, 3 R.I.A.A. 1938, 35 AM. J. INT'L L. 684 (the "1941 Decision").

[8] Teck did not argue before the district court that the Ottawa Convention applies to Plaintiffs' claims. Instead, Teck's initial motion to strike asserted in a footnote that the "proper forum is pursuant to treaty before the International Joint Commission ["IJC"]." SER11. The IJC is a creature of the 1909 Boundary Waters Treaty, not the Ottawa Convention. In fact, it was the Governments' inability to accept the IJC's

Cont.

B. The Ottawa Convention Does Not Apply to the Cleanup of Trail Smelter Metals at the UCR Site.

If the Court were to address Canada's argument, the argument lacks merit and misinterprets the Ottawa Convention. Canada identifies *no* applicable international obligation, let alone one that conflicts with CERCLA. At most, Canada has pointed to a binding arbitration that resolved a narrow set of questions, and a wholly discretionary process, based on the mutual consent of the Governments, that the United States potentially could use to raise additional damage claims arising from the Trail Smelter.

1. The United States Is Not Obligated to Bring *Any* Claims Under the Ottawa Convention, Which Cannot Be Invoked Without U.S. Consent.

The United States often attempts to achieve diplomatic solutions to transborder pollution issues and is committed to fulfilling its international obligations when they apply. Here, Canada cites nothing under the Ottawa Convention mandating that the Governments refer to arbitration *any* dispute concerning the Trail Smelter. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (internal quotation marks and citation omitted). Furthermore, an Executive Branch interpretation of treaty

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1931 report and recommendations on Trail Smelter damages from sulfur dioxide that led to the Ottawa Convention. 1941 Decision at 1946.

provisions is entitled to great weight and deference. *See id.* at 15; *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982).

The Ottawa Convention referred to the Tribunal four specific questions concerning whether the Trail Smelter caused damage in Washington state after January 1932 and, if so, what indemnity should be paid and what preventative operational measures (or "regime") should be implemented. Ottawa Conv., Art. III. The convention also prescribed a procedure for litigating those questions and specified that the proceedings would conclude when the Governments "inform the Tribunal they have nothing additional to present."[9] *Id.*, Arts. IV-XI. It also provided that the Tribunal's report reflecting its "final decisions" on the questions would be the concluding step. *Id.* Art. XI. The issuance of the 1941 Decision concluded the Tribunal's work and was the extent of the Governments' commitment to submit to the outcome of an arbitration process.

Under the Ottawa Convention, the Tribunal would have no competence over further claims relating to the Trail Smelter unless and until the Governments, in their discretion, "*may* make arrangements" to address "claims for indemnity for damage" arising after the timeframe covered by the 1941 Decision. *Id.* Art. XI (emphasis

[9] The Governments did this on January 2, 1938. 1941 Decision at 1912.

added); *see also* 1941 Decision at 1980 (same). The United States has not invoked this process, and has no present intention of invoking it here.[10]

The 1941 Decision reiterates the voluntary and discretionary nature of this process, expressing "the strong *hope* that any investigations which the Governments *may* undertake in the future, in connection with the matters dealt with in this decision, shall be conducted *jointly*." 1941 Decision at 1981 (emphasis added). Because the 1941 Decision concluded the matters before the Tribunal and the United States has no present intention to consent to refer *any* new matter under Article XI, the Ottawa Convention has no provisions for this Court to apply or enforce.

2. The Ottawa Convention Applies Only to Government Claims, Not the Claims of Individuals.

Canada also errs in asserting that the "Permanent Regime is fully capable of redressing" Plaintiffs' claims. Canada Br. at 8. The Ottawa Convention is available only to resolve a dispute between the Governments, subject to their agreement to invoke it. "The controversy is between two Governments . . .; the Tribunal did not sit and is not sitting to pass upon claims presented by individuals or on behalf of one or

[10] Canada claims that it "aimed" to invoke the Ottawa Convention through two diplomatic notes. Canada Br. at 5, 16. The first, dated March 20, 2015, did not mention the Ottawa Convention, vaguely complained of a "unilateral compulsory measure" against a Canadian company, and urged a non-specific "government to government" process to address Teck's "air deposition." The second, dated August 10, 2015, expressly raised the Ottawa Convention, but asserted only that the Ottawa Convention "could effectively address future claims."

more individuals by their Government." 1941 Decision at 1038. The Ottawa Convention simply is not available to Plaintiffs to recover response costs in the way that CERCLA is, nor is it a substitute for their CERCLA claims. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) ("The background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'") (citation omitted).

3. The Regime Mandated by the Tribunal Applied to Claims for Damage from Sulfur Dioxide and Is Not Available Here.

Plaintiffs' CERCLA claims concern natural-resource damages and recovery of their costs to clean up from the UCR Site various metals from the Trail Smelter's stacks. However, the regime of preventative operational measures mandated by the Tribunal (e.g., maximum hourly sulfur dioxide emissions and placement of sulfur dioxide recorders) was devised "to solve the sulphur dioxide problem presented to the Tribunal." 1941 Decision at 1973, 1974 (purpose of the regime is "to prevent the occurrence of sulphur dioxide in the atmosphere in amounts . . . capable of causing damage in the State of Washington"); *see also Pakootas I*, 452 F.3d at 1069 n.5 (noting that Trail Smelter arbitration "concerned sulfur dioxide emissions from the Trail Smelter.").

Canada offers no textual support for the suggestion that the regime applies much more broadly to any "transboundary air emissions passing from the Trail

Smelter." Canada Br. at 12. And even Canada acknowledges that the regime would need to undergo "modification," based on consultation between the Governments, to address the effects of Trail Smelter contamination at issue in this case (*i.e.*, metals and other non-sulfur-dioxide pollutants). *See id.* at 23.

Given the weight of evidence of the treaty's meaning outlined above and the deference owed to the Executive Branch's interpretation, there is no basis for the Court to conclude that the Ottawa Convention prevents the consideration of Plaintiffs' CERCLA claims.

C. There Is No Conflict for This Court to Avoid or Resolve.

Because the Ottawa Convention regime does not apply here, there is no risk that Plaintiffs' CERCLA claims against Teck will "undermine" any bilateral agreements between the Governments, "judicially extinguish" the Ottawa Convention, or lead to any of the other bilateral complications about that Canada raises in its brief. *See id.* at 30. Nor is there a risk of impinging upon Canada's "sovereign environmental regulatory authority" to regulate the Trail Smelter under Canada's equivalent of the CAA. *Id.* at 2-3. This Court previously has held that, as applied to address the effects at the UCR Site of Teck's slag discharges to the Columbia River, "CERCLA does not obligate parties (either foreign or domestic) liable for cleanup costs to cease the disposal activities such as those that made them

liable for cleanup costs." *Pakootas I,* 452 F.3d at 1079. Similarly, CERCLA is not being applied here to regulate air-pollutant emissions from the Trail Smelter.[11]

The Ottawa Convention and the regime under the arbitration decisions also present no cause for this Court even to consider construing CERCLA in a way that avoids a conflict with international law, thus rendering irrelevant the so-called *Charming Betsy* canon upon which Canada relies so heavily. Canada Br. at 27-30; *see Munoz v. Ashcroft,* 339 F.3d 950, 958 (9th Cir. 2003) (citing *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (Feb. Term 1804)).

Finally, if this Court were to disagree and find that the Ottawa Convention applies, is directly enforceable without a new agreement by the Governments to refer additional damage claims under the convention, and conflicts with CERCLA, then CERCLA still would have to be applied. "[A] later-in-time federal statute supersedes inconsistent treaty provisions," *Medellin*, 552 U.S. at 509 n.5, and will apply if the federal statute and the provision of the earlier international agreement cannot be fairly reconciled. Restatement (Third) of Foreign Relations Law § 115(1)(a). As Canada concedes (Br. at 27-28), this Court consistently has recognized this bedrock principle.

[11] Rather, CERCLA appropriately applies here to remediate the domestic effects of decades of metals deposition from Teck's smelter stacks because "a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory." Restatement (Third) of Foreign Relations Law § 402(1)(c) at 227-28.

See, e.g., *United States v. Kelly,* 676 F.3d 912, 916 (9th Cir. 2012). The legally correct interpretation of CERCLA is that metals from Teck's smelter stacks deposited at the UCR Site constitute "disposal." Canada's reading of the Ottawa Convention cannot fairly be reconciled with CERCLA; attempting to do so would utterly frustrate and distort Congress' intent in enacting CERCLA. And even if Canada's interpretation of the Ottawa Convention were correct – which it is not – this Court may not give it effect in the face of a later inconsistent statute.

CONCLUSION

The district court's orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (for amicus briefs as provided by Fed. R. App. P. 29(d)) because it contains 6,982 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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DATED: October 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

S/ David S. Gualtieri
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DATED: October 13, 2015

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiffs-Appellees, and THE STATE OF WASHINGTON, Plaintiff-Intervenor-Appellee, vs. TECK COMINCO METALS LTD., a Canadian corporation, Defendant-Appellant.	No. 15-35228 (Eastern District of Washington No. CV-04-0256-LRS)

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INTRODUCTION

The District Court's ruling is irreconcilable with *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1109 (9th Cir. 2014). Under this Court's holding in *Center for Community Action*, there is no "disposal" where waste is "first emitted into the air," then travels through the air and eventually falls onto land or water. *Id*. at 1024.

Plaintiffs argue that CERCLA is different from the Resource Conservation and Recovery Act ("RCRA"), the statute at issue in *Center for Community Action*. But CERCLA expressly incorporates the RCRA definition of "disposal."

Plaintiffs also argue that *Center for Community Action* "focused entirely on controlling initial points of emission into the air." That is wrong. The plaintiffs in *Center for Community Action* specifically alleged that the railroad defendants in that case disposed of solid waste by allowing it to be "transported by the wind and air currents into the land and water near the railyards." 764 F.3d at 1023. This Court concluded that those allegations do not meet the definition of "disposal" under RCRA.

This case is controlled by *Center for Community Action*. This Court should reverse and direct the District Court to strike Plaintiffs' allegations pertaining to airborne emissions.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE DEFINITION OF "DISPOSAL" UNDER CERCLA IS SATISFIED BY ALLEGATIONS THAT HAZARDOUS SUBSTANCES WERE EMITTED INTO THE AIR AND THEN TRANSPORTED BY WIND, EVENTUALLY SETTLING ONTO LAND OR WATER.

A. "Disposal" Under CERCLA.

When Congress enacted CERCLA, it defined the term "disposal" in CERCLA by expressly incorporating the definition of that term in RCRA. 42 U.S.C. § 9601(29). Under the RCRA definition, a "disposal" is a discharge of solid or hazardous waste "into or on any land or water." 42 U.S.C. § 6903(3). For CERCLA, Congress "chose to import the meaning" of "disposal" provided in RCRA. *3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1362 (9th Cir. 1990). More specifically, Congress chose to provide in CERCLA that the term "'disposal' . . . shall have the meaning provided" in RCRA. 42 U.S.C. § 9601(29).

Plaintiffs argue that these words must be interpreted in context of the overall statutory scheme, even where statutory provisions "refer back to a common definitional section." Tribes Br., p. 21; citing *Envt'l Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007). But here, there is no need to guess or infer how Congress intended to define

"disposal" in CERCLA—Congress provided that the term "shall have the meaning provided" in RCRA. 42 U.S.C. § 9601(29).[1]

Plaintiffs concede that "CERCLA incorporates the definition of 'disposal' contained in RCRA." Tribes Br., p. 16. Nonetheless, Plaintiffs suggest that CERCLA is different than RCRA, because "unlike CERCLA, RCRA does not require disposal to occur at a 'facility' for liability to attach." Tribes Br., p. 16.

Plaintiffs miss the point: Whatever differences there might be between CERCLA and RCRA, there is no difference in the definition of "disposal" in the two statutes. For CERCLA, disposal "shall have the meaning" provided in RCRA. "Congress could have defined 'disposal' for purposes of CERCLA any way it chose; it chose to import the meaning provided in SWDA [the Solid Waste Disposal Act, commonly known as RCRA]. That meaning is clear." *3550 Stevens Creek Assocs*., 915 F.2d at 1362; *see Sycamore Industrial Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 853 (7th Cir. 2008)

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[1] Thus, this case does not present the issue addressed by the Supreme Court in *Envt'l Def.*—whether the presumption that the same term has the same meaning throughout a single statute is rebuttable or irrebuttable. *See Envt'l Def.*, 549 U.S. at 574. Nor does this case involve the procedural setting presented in *Envt'l Def.*, where an agency had adopted regulations interpreting a statute, and those regulations were thus entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The filing of an amicus brief by the United States is not a formal agency action that may be the subject of "*Chevron* deference." *See Christensen v. Harris County*, 529 U.S. 576 (2000).

("The definition of 'disposal' is the same under RCRA and CERCLA… Because the definition of 'disposal' is the same, our reasoning that established that there is no disposal under CERCLA applies to a RCRA analysis as well.").

Plaintiffs suggest that CERCLA and RCRA are different because "RCRA is a prospective statute designed to regulate ongoing conduct." Tribes Br., p. 31. However, by its terms, RCRA applies to any entity which "*has contributed* or … is contributing to the *past* or present handling … or disposal of any solid or hazardous waste…." 42 U.S.C. § 6972(a)(1)(B) (emphasis added).[2] RCRA requires corrective action for such past or current conduct. *See* 42 U.S.C. § 6928(h)(1) (RCRA provision authorizing orders "requiring corrective action or other such response measure … necessary to protect human health or the environment"). Indeed, RCRA specifically provides that standards and permits under RCRA shall require "corrective action" for releases of hazardous waste. 42 U.S.C. § 6924(u); *see* 42 U.S.C. § 6903(29) (defining "solid waste management unit" to include any facility for the collection or disposal of solid waste). *See, e.g., City of Chicago v. Environmental Defense Fund,* 511 U.S. 328, 332 (1994) (noting corrective action for releases

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[2] Both RCRA and CERCLA address the liability of owners, operators, transporters, and generators or arrangers. *See* 42 U.S.C. § 6972(a)(1)(B) (persons who may be sued under RCRA) and 42 U.S.C. § 9607(a) (persons covered under CERCLA).

of hazardous substances under RCRA); *Mardan Corp. v. C.G.C. Music,* 804 F.2d 1454, 1461-1462 (9th Cir. 1986) (noting that corrective action may be required under RCRA, including cleanup of a settling pond).

The trigger for "disposal" under the RCRA definition—which is incorporated, without change, into CERCLA—is a discharge, deposit, injection, dumping, etc. of solid or hazardous waste "into or on any land or water." 42 U.S.C. § 6903(3). The definition specifically does not list the act of emitting into the air or atmosphere as an act of "disposal." As this Court found in *Center for Community Action,* the definition does not include emissions into the air which subsequently may settle onto land or water at some point.

B. This Court's Decision in *Center for Community Action*.

In *Center for Community Action*, this Court held that the definition of "disposal" requires that waste be *first* placed into or on land or water. *Center for Community Action*, 764 F.3d at 1024. This Court rejected the view that there is a "disposal" when waste is initially emitted into the air, and then transported by wind onto land or water:

> "The solid waste at issue here, however, at least as it is characterized in Plaintiffs' complaint, is not first placed 'into or on any land or water'; rather, it is first emitted into the air.

> Only after the waste is emitted into the air does it then travel 'onto the land and water.' To adopt Plaintiffs' interpretation of §6903(3), then, would effectively be to rearrange the wording of the statute—something that we, as a court, cannot do."

Id. Thus, "disposal" under RCRA does not include situations where solid or hazardous waste is emitted to the air and later falls to land or water. *Id*.

Plaintiffs attempt to characterize this statement by the Court as "dictum." State Br., p. 20. According to Plaintiffs, *Center for Community Action* "focused entirely on controlling initial points of emission into the air" (State Br., p. 21) and "[f]rom beginning to end, the court regarded the disposal at issue as emissions and nothing more," (Tribes Br., p. 19). That crabbed reading cannot be squared with the decision. The plaintiffs in *Center for Community Action* alleged that the railroad defendants "'have allowed and are allowing [diesel particulate matter] to be discharged into the air, from which it falls into the ground and water nearby. . . .'" *Center for Community Action*, 764 F.3d at 1021. They contended that the railroad defendants "'dispose' of solid waste—specifically diesel particulate matter—by allowing the waste to be 'transported by the wind and air currents onto the land and water near the railyards.'" *Id*. at 1023. These allegations were at the core of this Court's analysis in *Center for Community Action*; this Court specifically noted that "[i]ndeed, in opposing

Defendants' motion to dismiss, Plaintiffs stated that '[t]he heart of this case is that Defendants' railyards contribute to the *disposal* of a solid hazardous waste.'" *Id*. at 1023, n.4. Whether there was a "disposal" was a threshold issue for the plaintiffs in *Center for Community Action*—in order to bring a citizen-suit under RCRA, a plaintiff must show that the defendant has contributed to the "handling, storage, treatment, transportation, or disposal of any solid or hazardous waste…." 42 U.S.C. § 6972(a)(1)(B).

Under Plaintiffs' view of the law, a disposal would have occurred when diesel particulate matter from the railyards was "first" deposited on land near the railyards, despite having been emitted to air before settling on the ground. That is the exact opposite of what this Court held in *Center for Community Action*. Plaintiffs' view that there is a "disposal" whenever airborne waste comes into contact with land or water (State Br., p. 20; Tribes Br., p. 21) is irreconcilably inconsistent with *Center for Community Action*. Contrary to this Court's decision, Plaintiffs would allow a RCRA or CERCLA plaintiff to assert that a "disposal" occurs whenever a hazardous substance falls to land or water after being emitted into the air and transported by wind. *Center for Community Action* decision rejects that position.

Plaintiffs go on to claim that *Center for Community Action* is not binding because "whatever precedes disposal (deposit of

hazardous waste at the UCR Site) has no significance" under CERCLA. Tribes Br., p. 21. Plaintiffs would ignore the specific activity this Court focused on in *Center for Community Action* — that waste "is first emitted into air." 764 F.3d at 1072. Plaintiffs make the bold assertion that: "After all, it is the disposal at the facility that leads to need for cleanup. There is no reason under CERCLA to exempt any form of action leading to such disposal." Tribe Br., p. 21. But Teck cannot be held liable as an "arranger for disposal" unless there has indeed been a "disposal." 42 U.S.C. § 9607(a)(3). Congress expressly provided that the term "disposal" shall have the same meaning in CERCLA as in RCRA, and this Court has confirmed that this statutorily defined term does not include emissions to air that travel and fall onto land or water. *Center for Community Action*, 764 F.3d at 1024.

Undeterred, Plaintiffs assert that their position is confirmed by *Center for Community Action's* discussion of the Tenth Circuit's decision in *United States v. Power Engineering Co.*, 191 F.3d 1224 (10th Cir. 1999). Tribes Br., p. 22. That case involved a liquid condensate mist from air scrubbers, which discharged the condensate just above the ground. *See United States v. Power Engineering Co.*, 10 F.Supp.2d 1145, 1150 (D. Colo. 1998). According to Plaintiffs, "the claims in *Power Eng'g* arose out of emission to air resulting in deposit on land, and the claims in *Center for Community Action* arose

solely out of emission to air and allegations of emissions that never reached land or water." Tribe Br., p. 23. Plaintiffs are wrong on both counts. *Power Engineering* did not involve allegations of emissions into the atmosphere—the mist and liquid in that case was directed straight onto the ground from a pipe suspended just above the soil. In *Center for Community Action*, this Court expressly noted that "*Power Engineering* did not involve disposal of solid waste 'through the air'". 764 F.3d at 1025. In contrast, this case, like *Center for Community Action*, clearly involves allegations that waste was emitted to air and then reached land and water.

Finally, Plaintiffs point to a lone district court decision in Ohio and argue that "[o]ther courts outside this Circuit were not persuaded by the [*Center for Community Action*] decision and declined to adopt its reasoning." Tribes Br., p. 29, n. 7. That underscores what Plaintiffs are urging this Court to do here—reject its prior reasoning and conclusion in *Center for Community Action*.

C. Plaintiffs' Attempts to Avoid *Center for Community Action*.

Plaintiffs' attempts to avoid this Court's decision in *Center for Community Action* are without merit.

Carson Harbor. Citing this Court's decision in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), Plaintiffs argue that "disposal" includes "deposit" and that, in turn, "the term is

akin to 'putting down,' or placement." Tribes Br., p. 18 (quoting *Carson Harbor*, 270 F.3d at 879, n. 7); *see also* State Br., p.17-18. Plaintiffs ignore two crucial observations by this Court in *Carson Harbor*: (1) the term deposit does not "encompass the gradual spread of contaminants" (270 F.3d at 879) ; and (2) the courts "must examine each of the terms [in the definition of 'disposal'] in relation to the facts of the case and determine whether the movement of contaminants is, under the plain meaning of the terms, a 'disposal.'" *Id*. That is what this Court did in *Center for Community Action*, and held there is no "disposal" where waste is "first emitted into the air," then travels through the air and eventually falls onto land or water. *Center for Community Action*, 764 F.3d at 1024. Thus, *Carson Harbor* does not support Plaintiffs' position.

CERCLA's Purposes. Plaintiffs recite the maxim that "[a]s a remedial statute, CERCLA is to be interpreted broadly." State Br., p. 25; *see* Tribes Br., p. 24. However, RCRA also has remedial aspects, and even where statutes include "remedial" elements, the Supreme Court has emphasized that "'no legislation pursues its purposes at all costs.' [Citation omitted]. Congressional intent is discerned primarily from the statutory text." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014). Congress enacted RCRA to address "unregulated land disposal of discarded materials and hazardous waste" (*Center for Community Action*, 764 F.3d at 1026)

and later CERCLA to target "spills and leaks" (*Carson Harbor*, 270 F.3d at 885). The authorities cited by Plaintiffs are consistent with this. *See Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050, 1064 (9th Cir. 2013) (applying CERCLA to a spill on a floor that drained to soil).

Indeed, Plaintiffs in this case do not have a claim to compel cleanup of the Upper Columbia River Site—that citizen-suit claim was brought by separate plaintiffs and was long ago dismissed when EPA withdrew its CERCLA order to Teck. *See Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1218 (9th Cir. 2011). For nearly ten years, Teck has been undertaking the necessary Remedial Investigation and Feasibility Studies under a Settlement Agreement with EPA. *Id*. at 1217-18. Rather than seeking cleanup, Plaintiffs seek a declaration of Teck's liability for Plaintiffs' alleged response costs and natural resource damages. *See* ER 91-92, 106-107.

Prior Cases. Plaintiffs assert that "[s]everal courts have imposed liability for aerial emissions of hazardous substances deposited at a facility." Tribes Br., p. 30. However, none of the cases cited by Plaintiffs actually addressed or analyzed the issue of whether there is a "disposal" under CERCLA when hazardous substances are first emitted into the air before traveling and falling onto land at a

facility.[3] *See* Tribes Br., pp. 30-31. Similarly, none of the smelter sites mentioned in the amicus brief filed by the United States involved judicial decisions addressing whether there was a "disposal" under CERCLA when hazardous substances were first emitted into air. *See* U.S. Amicus Br., p. 20, n.6. At each of these sites, CERCLA liability could be asserted against the current owner or operator of the facility under Section 107(a), which does not require a disposal, or because there were "disposals" onto land or water, unrelated to any air emissions. *See* Clerk's Record, ECF No. 2146, at 12-13.[4]

Federally Permitted Release Exemption. Plaintiffs erroneously assert that "Teck's interpretation of CERCLA renders meaningless CERCLA's federally permitted release exemption." Tribes Br., p. 25. That exemption contained in Section 107(j) of CERCLA, provides that recovery "for response costs or damages resulting from a federally permitted release shall be pursuant to existing law," (that is, pre-CERCLA law) rather than Section 107. 42 U.S.C. § 9607(j).

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[3] For example, *Natural R.R. Passenger Corp. v. New York Housing Auth.*, 819 F. Supp. 1271 (S.D.N.Y. 1993), dealt with paint and asbestos that flaked off a building directly onto the ground. 819 F. Supp. at 1275.

[4] The "additional sites" referred to by the United States in its amicus brief involved settlements, with no admission of liability by the defendants. *See* EPA's Model Remedial Design/Remedial Action Consent Decree, available at http://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81.

Plaintiffs are wrong in arguing that Teck's reading of "disposal" renders Section 107(j) meaningless. To begin with, Section 107(j) deals with "release" not "disposal." "Release" is a much broader term than "disposal." *Carson Harbor*, 270 F.3d at 878. Regardless of how "disposal" is interpreted, the federally permitted release exemption in Section 107(j) serves to protect current owners of a facility from liability under Section 107 for response costs or damages resulting from a federally permitted release. Unlike arranger liability under Section 107(a)(3), there is no "disposal" requirement for "current owner" liability under Section 107(a)(1). *See* 42 U.S.C. § 9607(a)(1); *People v. Blech,* 976 F.2d 525, 527 (9th Cir. 1992). Far from being "meaningless" (*see* Tribes Br., p. 26), the federally permitted release exemption in Section 107(j) serves the purpose of protecting current owners, apart from the issue of whether there is a "disposal" in this case.

Pakootas I. Citing this Court's prior decision in *Pakootas I*, Plaintiffs erroneously argue that "[i]t is plain after *Pakootas I* that under CERCLA the intervening movement of waste from the Trail smelter, whether by water current or wind current, does not prevent an actionable subsequent disposal at the UCR Site." Tribes Br., p. 17 (discussing *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006)). In *Pakootas I*, this Court addressed the issue of whether application of CERCLA to Teck was an extraterritorial

application of U.S. law. Finding that "[t]he operative event creating liability under CERCLA is the release or threatened release of a hazardous substance," this Court held that "[t]he location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially, because CERCLA imposes liability for releases and threatened releases of hazardous substances, and not merely for disposal or arranging for disposal of such substances." 452 F.3d at 1077-1078 (emphasis added). This Court held the fact that the disposal was in Canada did not matter as long as there was a release at a facility in the United States, because release from a CERCLA facility is the trigger for CERCLA liability. None of this bears on the question here, which is whether emissions to air in Canada that allegedly deposit in the U.S. constitute disposal such that Teck meets CERCLA's responsible party requirements as an arranger for disposal of aerial emissions.

Legislative History. This Court has previously characterized CERCLA's legislative history as "somewhat of a snark hunt" with "few truly relevant documents." *Carson Harbor*, 270 F.3d at 885. Plaintiffs' attempt to invoke CERCLA's legislative history is a good example of such a hunt.

Plaintiffs argue that "CERCLA's legislative history shows that Congress contemplated and endorsed the statute's application to air

emissions," citing snippets of statements made in 1980 that mention "air," "airborne," or "atmospheric." Tribes Br., pp. 28-29. Each of the items cited by Plaintiffs pertained to S. 1480. *See* S. 1480 as Reported by Senate Environment and Public Works and Finance Committees, Nov. 18, 1980 (96 Cong. Senate Reported S. 1480; CERCLA Leg. Hist. 32). S. 1480 contained a statement in its Section 2 that "It is the intent of the Congress that this Act shall apply to hazardous substance disposal sites, facilities, and areas and to *releases of hazardous substances from vessels and facilities* (including rolling stock) into the navigable waters, groundwater, public water supply, or air, or onto land." *Id.* (emphasis added). Thus, to the extent that S. 1480 mentioned "air," it was intended to address "releases" from facilities into the air, not deposits from the air. Cf. 42 U.S.C. § 6924(n), (q) (RCRA provisions governing air emissions from facilities subject to RCRA).[5]

Definition of "Facility." Finally, the amicus brief filed by the United States makes the point that "[t]he definition of 'facility' and 'disposal' share the term "deposit.'" Brief of the United States as

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[5] The legislation ultimately enacted by Congress as CERCLA ended up being significantly different from the initial version of S. 1480 that was being considered at the time of the statements cited by Plaintiffs. *See* Maloney, *A Legislative History of Liability Under CERCLA,* 16 Seton Hall Legis.J. 517 (1992). The legislation ultimately enacted by Congress as CERCLA did not contain the above-quoted statement from Section 2 of the original S. 1480. *See* Public Law 96-510, 94 Stat. 2767.

Amicus Curiae, p. 10. It is true that the term "deposit" appears in both the definition of "facility" in CERCLA and the definition of "disposal" in CERCLA (incorporated from RCRA). *See* 42 U.S.C. §§ 6903(3), 9601(9), 9601(29) . But the definition of "facility" is quite distinct from the definition of "disposal." CERCLA defines "facility" as including "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located.*" 42 U.S.C. § 9601(9) (emphasis added). The definition of "disposal" does not include the "or otherwise come to be located" language. *See* 42 U.S.C. §§ 6903 and 9601(29). If Congress had intended the sweeping definition of "disposal" advocated by the United States, Congress could have included the "or otherwise come to be located" language that it used in the definition of "facility." Instead, Congress chose to provide that "disposal" shall have the meaning provided in RCRA. 42 U.S.C. § 9601(29) .

Plaintiffs' allegations do not meet the definition of "disposal."

II. UNLESS REVERSED, THE DISTRICT COURT'S HOLDING WOULD RESULT IN INCONSISTENCIES BETWEEN CERCLA AND THE CLEAN AIR ACT, AS WELL AS WITHIN CERCLA ITSELF.

A. CERCLA and the Clean Air Act.

As explained in Appellant's Opening Brief, when a regulatory scheme is designed to address specific conduct in a comprehensive

way (such as the Clean Air Act's regulation of emissions of particulate matter and other contaminants), other more general statutes should not be interpreted to create remedies undermining the balance struck by that scheme. *See United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 742 (5th Cir. 1980). Here, Congress has determined that the "complex balancing" of policy interests required for designing regulation of air emissions is best accomplished under the Clean Air Act, pursuant to which the Environmental Protection Agency applies the expertise and resources to undertake the necessary weighing of these competing concerns. *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527, 2539 (2011). Interpreting "disposal" to include air emissions that travel to and settle on property, as Plaintiffs urge, would open the door to private cost recovery suits that would undermine the broad regulatory scheme created by the Clean Air Act for addressing emissions.

Plaintiffs argue that there is no potential for inconsistency between the two statutes because CERCLA addresses the cleanup costs for hazardous waste sites and does not attempt to regulate air emissions. State Br., pp. 32-33; Tribes Br., pp. 27-28. However, a private cost recovery action under CERCLA could indeed have the effect of regulating air emissions. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (an award of damages could, in effect, regulate and be "a potent method of governing

conduct and controlling policy"). Thus, Plaintiffs' characterization of CERCLA as a "cleanup" statute does not eliminate the potential for inconsistency between CERCLA and the Clean Air Act arising from the District Court's holding. And, the cases cited by Plaintiffs do not address the inconsistencies between CERCLA and the Clean Air Act inherent in Plaintiffs' position. *See United States v. Phillips*, 356 F.3d 1086, 1096-1097 (9th Cir. 2004) (holding that a district court must include costs of cleanup under CERCLA in calculating cleanup expenses to enhance a sentence for violation of the Clean Water Act).

Plaintiffs also point to the federally permitted release exemption in Section 107(j) of CERCLA, arguing that the exemption ensures that "CERCLA would not 'undermine' the Clean Air Act by imposing liability inconsistently." Tribes Br., p. 27; *see* State Br., pp. 33-34. That argument is disingenuous. Plaintiffs have alleged that a "release" of hazardous substances into the environment "has occurred at the Upper Columbia River Site." ER 88, 99. Plaintiffs have not alleged that a "release" occurred when emissions into the air were made at Teck's smelter in Canada. Under Plaintiffs' view, a "release" apparently occurs when, or after, emissions settle onto land or water at a CERCLA site, rather than when air emissions are made. But, if that is true, then a defendant could never invoke the federally permitted release exemption — a plaintiff could simply avoid the exemption by pleading that the "release" occurred when emissions

settled onto land or water. Thus, Plaintiffs are in no position to argue that the federally permitted release exemption prevents any inconsistency between CERCLA and the Clean Air Act.

B. CERCLA's Innocent Landowner Defense.

As discussed in Appellant's Opening Brief, under the District Court's holding, "disposal" would be a perpetual process that goes on as wind-blown substances continue to settle. App. Opn. Br., pp. 26-27. This Court has rejected interpretations that would make disposal "nearly always a perpetual process" and thus inconsistent with the innocent landowner defense in CERCLA. *Carson Harbor*, 270 F.3d at 881.

Plaintiffs do not dispute that the District Court's holding would result in making "disposal" a perpetual process as wind-blown substances continue to settle. *See* State Br., pp. 31-32. In fact Plaintiffs apparently concede that current landowners could not invoke the innocent landowner defense—under the District Court's holding, "disposal" would always continue as wind-blown substances settle after current owners acquired their properties. *See* State Br., p. 31.

Plaintiffs assert that the inconsistency with the innocent landowner defense would not matter much because landowners could instead invoke "CERCLA's 'third party defense,' under 42 U.S.C. § 9607(b)(3)." State Br., p. 32. This defense applies where a

landowner proves that a release, not a disposal, was "caused *solely* by … an act or omission of a third party." 42 U.S.C. § 9607(b) (emphasis added). But the potential availability of a different, statutory defense does not eliminate the underlying inconsistency created by the District Court's holding, which would make disposal "nearly always a perpetual process." *See Carson Harbor*, 270 F.3d at 881.

Moreover, the practical problem with Plaintiffs' argument is that it would impose the burden on a landowner to prove that after wind-blown substances settled on the owner's property (which in Plaintiffs' view is a disposal), the subsequent release from the facility was "caused *solely* by . . . a third party." Undoubtedly, a landowner attempting to invoke the third-party defense would be met by the plaintiff's argument that the "release" from the facility was caused, at least in part, by the landowner's failure to promptly remediate the wind-blown substances once they settled on the property. *See Franklin County Convention Facilities v. American Premier Underwriters, Inc.,* 240 F.3d 534, 548 (6th Cir. 2001).

III. BECAUSE PLAINTIFFS' ALLEGATIONS REGARDING AIR EMISSIONS DO NOT COME WITHIN THE DEFINITION OF DISPOSAL UNDER CERCLA, THIS COURT SHOULD REVERSE AND DIRECT THE DISTRICT COURT TO STRIKE THOSE ALLEGATIONS.

As discussed in Appellant's Opening Brief, this Court should reverse and direct the District Court to strike Plaintiffs' allegations regarding air emissions. App. Opn. Br., pp. 27-29. Because the air emission allegations do not come within the definition of "disposal" under CERCLA, those allegations should be eliminated from the case.

CONCLUSION

For the reasons stated above and in Appellant's opening brief, Appellant Teck Metals Ltd. respectfully submits that the District's Order Re Motion to Strike and the District Court's Order Denying Motion for Reconsideration should be reversed, with directions to grant Teck's Motion for Reconsideration and Teck's Motion to Strike the allegations in Plaintiffs' Fourth Amended Complaint pertaining to air emissions.

Dated: November 18, 2015.

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points and contains 4725 words.

Dated: November 18, 2015.

s/ Kevin M. Fong
Kevin M. Fong

9th Circuit Case Number(s) 15-35228

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