UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

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,

and

THE STATE OF WASHINGTON,

Plaintiff-Intervenor,

vs.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant.

No. CV-04-256-LRS

ORDER DENYING MOTION TO STRIKE OR DISMISS

BEFORE THE COURT is Defendant's Motion To Strike, Or In The Alternative, Dismiss The New Allegations In Plaintiffs' Fourth Amended Complaints Pursuant To Federal Rules Of Civil Procedure 12(f) And 12(b)(6) (ECF No. 2104). Telephonic argument was heard on July 2, 2014.

Plaintiffs' Fourth Amended Complaints contain new allegations regarding aerial emissions from the stacks of Defendant's smelter located in Trail, British

Columbia. Assuming this is not a new legal claim, but new factual allegations in support of an existing CERCLA claim for recovery of response costs and natural resource damages, Defendant requests the new allegations be stricken pursuant to Fed. R Civ. P. 12(f). If, however, the allegations are treated as a new clam, Defendant requests that claim be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

The Tribes and the State seek to hold Defendant liable under CERCLA as an "arranger." 42 U.S.C. Section 9607(a)(3) provides there is 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** . . . .

(Emphasis added).

CERCLA, at 42 U.S.C. Section 9601(29), defines the term "disposal" with reference to the Solid Waste Disposal Act (SWDA). The SWDA is a part of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Section 6901 *et seq*. In 42 U.S.C. Section 6903(3), "disposal" is defined as:

> [T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste **into or on any land or water** so that such solid waste or hazardous waste or any constituent thereof may enter the environment or **be emitted into the air** or discharged into any waters, including ground waters.

(Emphasis added).

Defendant contends that because the emissions from its stacks were not "into or on any land or water," there is no "disposal" for which it can be held liable under CERCLA as an "arranger." Defendant contends the plain language of Section 6903(3) permits it to be held liable for emissions to the air only after there

has first been a disposal "into or on any land or water." Defendant contends this is distinguishable from its discharges of slag and liquid effluent from its Trail smelter into the Columbia River which constituted a disposal "into or on any land or water."

Plaintiffs contend the relevant "disposal" is not anything which occurred in Canada, but that which took place in the United States at the UCR Site (the "facility"). In its Fourth Amended Complaint (ECF No. 2099 at Paragraph 5.4), the Tribes alleges:

> Teck Cominco's discharges into the atmosphere from the Cominco Smelter travelled [sic] through the air and resulted in **disposal into the Upper Columbia River Site** of contaminants including lead, cadmium and mercury, which are "hazardous substances" as that term is defined in 42 U.S.C. §9601(14).

(Emphasis added).

In its Fourth Amended Complaint (ECF No. 2098 at Paragraph 5.4), the State similarly alleges:

> Teck Cominco's discharges into the atmosphere from the Cominco Smelter traveled through the air into the United States, resulting in **disposal of airborne contaminants at the Upper Columbia River Site**. These contaminants include but are not limited to, lead compounds, arsenic compounds, cadmium compounds and mercury, which are "hazardous substances" as that term is defined in 42 U.S.C. §9601(14).

(Emphasis added).

Clearly, Plaintiffs' allegations are that the "disposal" which occurred at the UCR Site was "into or on to any land or water." The court agrees with Plaintiffs that "[t]here 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." Section 9607(a)(3) requires there be a disposal of hazardous substances "at any facility." Here, the "facility" is the UCR Site. 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."

Nothing in the Ninth Circuit's decision in *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1006 (9th Cir. 2006) ("*Pakootas I*") suggests otherwise, even though that decision involved only the river pathway. It cannot be assumed the circuit found the only relevant "disposal" was the initial discharge of slag and effluent into the river in Canada. Indeed, the circuit recognized there was more than one 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 when the Columbia River enters the United States.**

452 F.3d at 1075 (emphasis added). While it is true the circuit was discussing events that could be characterized as "releases," the term "discharge" is used in both CERCLA's definition of "release," 42 U.S.C. Section 9601(22)[1], and its definition of "disposal."[2] The circuit noted that while each of these "discharges" could be characterized as a "release," CERCLA liability does not attach unless the "release" is from a CERCLA facility. *Id*. So too, CERCLA liability does not attach unless there has been a "disposal" of Defendant's hazardous substances into

---

[1] "Release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ."

[2] See *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 882 (9th Cir. 2001), concluding that terms "disposal" and "release" are not mutually exclusive.

the CERCLA "facility," that being the UCR Site. "Arranger" liability under 42 U.S.C. Section 9607(a)(3) requires there be a "disposal . . . of hazardous substances . . . at any facility." Because Plaintiffs allege there was a "disposal" of Defendant's hazardous substances "into or on any land or water" at the UCR Site and there was then a "release" of hazardous substances into the environment, an extraterritorial application of CERCLA is not involved. The fact there was also a disposal which occurred in Canada is irrelevant because that was not a disposal at a CERCLA facility. 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. As Plaintiffs note, one of this court's "Conclusions Of Law" regarding "CERCLA Liability" for response costs was that "[d]isposal **at the UCR Site** occurred when, after Teck actively and intentionally discarded its slag and effluent as waste into the Columbia River at Trail, at least some portion of that slag and effluent came to a point of repose at the UCR Site." (Paragraph 18 at pp. 42-43, ECF No. 1955)(emphasis added).

The Plaintiffs' burden of proof with regard to aerial emissions from the stacks at the Trail smelter is the same as for recovery of response costs with regard to discharges of slag and effluent from the smelter into the river. Plaintiffs proved Defendant's slag and effluent were deposited at the UCR Site and there was then a release of hazardous substances from the Site. They must now prove Defendant's aerial emissions have been deposited at the UCR Site and there has subsequently

///

///

///

///

been a release of hazardous substances from the Site.[3] If the requisite causal link between Defendant's aerial emissions and a release of hazardous substances from the UCR Site is established, recovery of response costs for those releases is warranted under CERCLA's "overwhelmingly remedial statutory scheme" which is intended to allow the government to respond promptly and effectively to problems resulting from hazardous waste disposal and to allow recovery of clean-up costs from those responsible for creating the problem. *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373, 1379-80 (8th Cir. 1989). See also *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997).

Allowing the Plaintiffs to recover response costs from Defendant, if Plaintiffs establish that hazardous substances have been deposited at the UCR Site via Defendant's aerial emissions and hazardous substances have then been released from the UCR Site, is not contrary to CERCLA or its legislative history. Arranger liability "may attach even though the defendant did not know the substances would be deposited at a particular site or in fact believed they would be deposited elsewhere." *Pierson Sand & Gravel Inc. v. Pierson Township*, 851 F.Supp. 850, 855 (W.D. Mich. 1994). "[C]ontrol is not a necessary factor in every arranger case [and] [t]he Court must consider the totality of the circumstances . . . to determine whether the facts fit within CERCLA's remedial scheme." *Coeur*

---

[3] The definition of "disposal" in Section 6903(3) recognizes it is the "disposal" which creates the potential for "release" of hazardous substances and that a "release" occurs when hazardous substances "enter[] the environment or [are] emitted into the air or discharged into any waters . . . ." "Disposal" precedes "release" and this is what Plaintiffs have pled in their Fourth Amended Complaints.

d'Alene Tribe v. Asarco, Inc., 280 F.Supp.2d 1094, 1131 (D. Idaho 2003). Congress did not limit the definition of "disposal" to the initial introduction of hazardous material into the environment. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992).

Plaintiffs contend that "[f]or Teck to prevail, CERCLA must be read to give polluters immunity for air emissions- or any disposal not directly to land or water- regardless of whether they lead to disposal that is otherwise actionable." Defendant does not dispute that, but asserts there are other remedies. Thus, for "cross-border air issues," Defendant says the "proper forum" is the "International Joint Commission" pursuant to treaty. Had 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. It obviously did not do so. Instead, CERCLA's definition of "hazardous substance" in 42 U.S.C. Section 9601(14) includes "any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. §7412]." Furthermore, in the thirty plus years since CERCLA first came into existence, no judicial decision has expressly held CERCLA cannot be used to remedy contamination resulting from aerial emissions. Indeed, there are recent decisions which assume the contrary.

In *New York v. Solvent Chemical Co., Inc.*, 685 F.Supp.2d 357, 438 (W.D.N.Y. 2010), Solvent sought from Olin Corporation "19.74% of the costs associated with remediating the contaminated soils at the Solvent Site based on the conclusion that at least 90% of the mercury detected in the soils resulted from air emissions associated with Olin's 90-plus year history of chlor-alkali production." Based on the preponderance of the evidence, and because Olin did not dispute that the air emissions associated with its chlor-alkali production may have been responsible for at least some of the mercury contamination addressed by the soil

remedy at the Solvent Site, the court found Solvent established Olin's liability under CERCLA for a share of response costs incurred in implementing the remedy required by the Solvent ROD (Record of Decision) which would be determined in accordance with application of appropriate equitable factors in the court's allocation analysis.[4]

More recently, in *Asarco LLC v. CEMEX, Inc.*, _____ F.Supp.2d _____, 2014 WL 2112121 (W.D. Tex. 2014), the plaintiff asserted a CERCLA contribution claim against the defendant, claiming the defendant contributed arsenic to contamination at the site and was therefore responsible for a portion of the settlement amount plaintiff had paid the United States for clean up costs. The district court considered whether "fugitive emissions" from defendant's quarry and plant contained an appreciable amount of arsenic such that the emissions could have contributed to the contamination at the site. The court found plaintiff failed to meet its burden of demonstrating that arsenic could have plausibly migrated from the quarry to the site, *Id*. at 16, but that it "established a plausible migration pathway for fugitive emissions from the Plant to land on the soil of the USIBWC Site." *Id*. at 18. The court noted that "[t]he two locations are close in proximity, and Ketterer- an air-emissions expert on whose data both parties' experts relied- testified it would not be scientifically reasonable to say the Plant did not

[4] On appeal, the district court's judgment was vacated in part, and reversed in part, *New York v. Solvent Chemical Co., Inc.,* 664 F.3d 22 (2nd Cir. 2011), 453 Fed. Appx. 42 (2nd Cir. 2011), but there is no indication the vacation and reversal pertained to this portion of the district court's decision or had anything to do with the availability of CERCLA to remedy contamination resulting from aerial emissions.

contribute to the contamination at the USIBWC Site via air emissions." *Id*.

It is assumed that Plaintiffs in the captioned case intend to present testimony from air-emission experts demonstrating that emissions from the Trail smelter contributed to contamination of the soil of the uplands of the UCR Site. It is noted that these two locations- the smelter and the UCR Site- are "close in proximity," the smelter being a mere 10 miles north of the international border which comprises the northern boundary of the UCR Site.

It strikes the court that if air currents carrying emissions from Defendant's smelter into the UCR Site constitute "passive migration," so do river currents carrying Defendant's slag and effluent into the UCR Site.[5] And yet this apparently did not cause the Ninth Circuit any concern in *Pakootas I*. An arranger's liability under Section 9607(a)(3) requires there be a "disposal" at a "facility." Such a "disposal" did not occur until aerial emissions and slag and liquid effluent were deposited in the UCR Site.[6]

In any event, this court is not persuaded that the Ninth Circuit's discussion of "passive migration" in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d

---

[5] Defendant points out it is not responsible for wind currents. It also, however, is not responsible for river currents.

[6] Defendant acknowledges that in *Pakootas I*, the Ninth Circuit rejected its argument that it is not liable under Section 9607(a)(3) because it did not arrange for disposal of hazardous substances "by any other party or entity." 452 F.3d at 1082. As Defendant acknowledges, the only reason this holding would not also apply to aerial emissions is if those emissions cannot constitute a "disposal." For the reasons provided herein, this court finds the emissions can constitute a disposal at the "facility," that being the UCR Site.

863 (9th Cir. 2001), prohibits Plaintiffs from recovering response costs for any contamination contributed to by Defendant's aerial emissions. *Carson Harbor* was limited to the particular facts of that case involving liability of owners for passive soil migration of contaminants already onsite at the "facility" after disposal or placement of the same had occurred. It did not involve intentional aerial emissions or river discharges originating offsite. And it did not involve arranger liability under 42 U.S.C. Section 9607(a)(3)("we hold that in light of the plain meaning of the terms used to define 'disposal' in [42 U.S.C.]§6903(3), the alleged passive migration of contaminants through soil during the Partnership Defendants' ownership was not a 'disposal' under §9607(a)(2)"). *Id*. at 887. Furthermore, the Ninth Circuit commented that the overlap between the definitions of "disposal" and "release" in CERCLA "defeats the notion that the two terms are mutually exclusive, or that subtle differences between them mean that 'disposal' always requires affirmative human conduct and 'release' does not." *Id*. at 882. According to the circuit:

> With five terms in common, the definitions compel the conclusion that there is at least a substantial overlap between "disposal" and "release," and the overlap includes some of those terms whose definitions do not necessarily require human conduct, such as "spilling" and "leaking." Thus, we reject the interpretation that the difference in the definitions requires us to put a gloss on "disposal" that would make the terms mutually exclusive.

Id.

For all of the reasons set forth above, Defendant's Motion To Strike, Or In The Alternative, Dismiss The New Allegations In Plaintiffs' Fourth Amended Complaints Pursuant To Federal Rules Of Civil Procedure 12(f) And 12(b)(6) (ECF No. 2104) is **DENIED**. Whether or not the allegations regarding aerial emissions constitute a new claim, Defendant's motion is denied.

///

IT IS SO ORDERED. The District Court Executive is directed to enter this order and forward copies to counsel of record.

DATED this 29th day of July, 2014.

s/Lonny R. Suko

LONNY R. SUKO
Senior United States District Judge