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Environmental Response, Compensation, and Liability Act ("CERCLA") in a lawsuit seeking to enforce a later withdrawn order of the Environmental Protection Agency ("EPA").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].

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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.

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