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# Trial to Perdition: the Ninth Circuit's "Emission" Omission Disposition

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**TRAIL TO PERDITION: THE NINTH CIRCUIT’S “EMISSION”  
OMISSION DISPOSITION**

***Jordan Luebke***<sup>\*</sup>

*A protracted case in the Ninth Circuit, Pakootas v. Teck Cominco Metals, Ltd., has pitted numerous stakeholders, including two national governments, against one another in a battle to define the meaning of “disposal” within the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). At issue were one hundred years of aerial emissions of heavy metals and other hazardous substances that were produced in Canada by a lead smelting and refining operation, but had accumulated on an Indian reservation in the state of Washington. Relying on two key Ninth Circuit cases, and the lack of the word “emission” among the statutorily enumerated methods of “disposal,” a panel of the Ninth Circuit held in July that aerial emissions of hazardous materials could not give rise to CERCLA liability.*

*This holding is problematic for a number of reasons. Most fundamentally, it misapplied the circuit’s earlier precedent, which did not require the result announced in Pakootas. In doing so, the court excluded an entire media of pollution from a remedial statute that Congress intended to be construed expansively. As a practical matter, the court’s Pakootas holding provides a strong argument for industrial polluters seeking to evade CERCLA liability, and possibly removes the only judicial means of addressing transnational air pollution entering the United States from neighboring countries and beyond.*

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<b>I.</b>	<b>INTRODUCTION</b> .....	<b>147</b>
<b>II.</b>	<b>FACTUAL HISTORY</b> .....	<b>149</b>
	<i>A. Upper Columbia River Site and the Trail Smelter</i> .....	150
	<i>B. Procedural History of the Pakootas Saga</i> .....	151
<b>III.</b>	<b>STATUTORY OVERVIEW</b> .....	<b>154</b>
	<i>A. Comprehensive Environmental Response, Compensation, and Liability Act</i> .....	154
	<i>B. Resource Conservation and Recovery Act</i> .....	157
<b>IV.</b>	<b>THEORIES OF “DISPOSAL”</b> .....	<b>157</b>
	<i>A. Carson Harbor Village, Ltd. v. Unocal Corp.</i> .....	158
	<i>B. Center for Community Action and Environmental Justice v. BNSF R. Co.</i> .....	160
	<i>C. Structure of the 2016 Pakootas Decision</i> .....	164
	<i>D. A Better Reading: The Court Should Have Distinguished Carson Harbor and CCAEJ</i> .....	166
<b>V.</b>	<b>AERIAL FALLOUT: PROSPECTIVE IMPLICATIONS</b> .....	<b>173</b>
	<i>A. Effects on Remainder of Pakootas Litigation</i> .....	174
	<i>B. Potential Effects Across CERCLA Litigation</i> .....	174
	<i>C. Un Ejemplo: las Maquiladoras</i> .....	176
<b>VI.</b>	<b>CONCLUSION</b> .....	<b>178</b>

## I. INTRODUCTION

One early morning in 1969, an assistant dean at the University of Southern Mississippi set out fishing near Hattiesburg, but was later found dead in his boat.<sup>1</sup> Upon investigation, it was discovered that the unlucky man had asphyxiated after drifting into an invisible pocket of propane gas emitted by a wash pipe from a nearby petroleum refinery and into the river.<sup>2</sup> Several years later, the United States House of Representatives offered this particular anecdote alongside a litany of other examples that demonstrated “actual instances of damage caused by current hazardous waste disposal practices” and the necessity of a new regulatory scheme to address discarded wastes.<sup>3</sup> Congress enacted this new legislation,

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<sup>1</sup> H.R. REP. NO. 94-1491, pt. 1, at 23 (1976).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* pt.1 at 17.

the Resource Conservation and Recovery Act (“RCRA”),<sup>4</sup> after the Clean Air Act and Clean Water Act<sup>5</sup>, seeking to eliminate the last remaining loopholes in environmental law: unregulated land disposal, discarded materials, and hazardous wastes.<sup>6</sup> The purview of RCRA addresses “not only solid wastes,” but it also includes “liquid and contained gaseous wastes, semi-solid waste, and sludges.”<sup>7</sup>

Subsequently, RCRA lent its definition of “disposal” to a new environmental regulatory scheme.<sup>8</sup> The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”)<sup>9</sup> was enacted to provide a framework for cleaning up hazardous waste sites and shifting the costs of that work and any damages to responsible parties.<sup>10</sup> CERCLA features, in the words of one commenter, “a radical liability scheme that with only a little exaggeration can be summarized thus: liability is strict, joint, several, retroactive and perpetual.”<sup>11</sup> Although CERCLA borrows several of its definitions from other statutes,<sup>12</sup> its importation of RCRA’s “disposal” has been the subject of considerable contention. A protracted case in the Ninth Circuit, *Pakootas v. Teck Cominco Metals, Ltd.*,<sup>13</sup> has pitted a private company, a tribe,

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<sup>4</sup> Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2016).

<sup>5</sup> *See generally* 33 U.S.C. §§1251-1387.

<sup>6</sup> H.R. REP. NO. 94-1491, pt. 1, at 4.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> 42 U.S.C. § 9601(29) (2016).

<sup>9</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2016).

<sup>10</sup> Walter E. Mugdan, *Superfund: Still Super, Still Fun* 323 (Am. Law Inst., 2015),

[http://files.alice.org/thumbs/datastorage/skoobesruoc/pdf/CX010\\_chapter\\_09\\_tumb.pdf](http://files.alice.org/thumbs/datastorage/skoobesruoc/pdf/CX010_chapter_09_tumb.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> *See, e.g.*, 42 U.S.C. § 9601(29)–(30) (importing definitions for “disposal”, “hazardous waste”, “treatment”, “territorial sea”, and “contiguous zone” from the Solid Waste Disposal Act [Resource Conversation and Recovery Act] and the Federal Water Pollution Control Act [Clean Water Act]).

<sup>13</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016). This decision represents the latest of many accruing over this case’s tumultuous twelve year history of amended complaints and appeals. For the purposes of this

a state, and two national governments against each other to define this term and its application, while the resulting decision will generate potentially far-reaching implications for CERCLA litigation.

This Recent Development examines the *Pakootas* decision within the dual social and legal contexts of air pollution. Part II introduces the factual backdrop of the Trail Smelter and particular hazards posed to public health by smelting technologies, while Part III presents the regulatory frameworks at issue. Part IV analyzes the Ninth Circuit's recent decision, arguing that the court misapplied its precedent in *Carson Harbor Village, Ltd. v. Unocal Corp.*,<sup>14</sup> and *Center for Community Action and Environmental Justice v. BNSF Railroad Co.* (“*CCA EJ*”).<sup>15</sup> Part V concludes with an examination of the (im)practical repercussions of the decision as written.

## II. FACTUAL HISTORY

How did a small settlement, overlooking the Columbia River in the Canadian wilderness, come to have significant effects on humans, the environment, and international law? This part traces the social and legal background of the Trail Smelter and the Upper Columbia River (“UCR”).<sup>16</sup> Section A establishes the origins of the smelter and its long shadow, while Section B considers a brief procedural overview of the present controversy.

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recent development, all mentions of “*Pakootas*” or “the *Pakootas* court” will refer solely to the Ninth Circuit’s ruling on July 27, 2016.

<sup>14</sup> *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001).

<sup>15</sup> *Ctr. for Cmty. Action & Envntl. Justice v. BNSF R.R. Co.*, 764 F.3d 1019 (9th Cir. 2014).

<sup>16</sup> This Recent Development adopts the EPA’s definition for 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.” U.S. ENVTL. PROT. AGENCY, UNILATERAL ADMINISTRATIVE ORDER FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY (IN THE MATTER OF: UPPER COLUMBIA RIVER SITE), § II, ¶ 1 (2003), [https://yosemite.epa.gov/R10/CLEANUP.NSF/82751e55bf4ef18488256ecb00835666/f0e551fb8a69dcd288256fac00064739/\\$FILE/TeckComincoUAOscan.pdf](https://yosemite.epa.gov/R10/CLEANUP.NSF/82751e55bf4ef18488256ecb00835666/f0e551fb8a69dcd288256fac00064739/$FILE/TeckComincoUAOscan.pdf) [hereinafter “EPA UAO”].

*A. Upper Columbia River Site and the Trail Smelter*

For more than 9000 years, indigenous peoples have made their home in the UCR region, where in 1872, the United States government granted a reservation to the Colville Tribes by treaty.<sup>17</sup> Although subsequent agreements limited the extent of this territory, the Colville Tribes maintain a reservation along a portion of the Columbia River known as Lake Roosevelt<sup>18</sup> and retain certain rights over “hunting, fishing, boating, and cultural resources” along parts of the former territory.<sup>19</sup>

In 1896, some ten miles north of Washington State, a smelter was erected along the Columbia River in Trail, British Columbia, to refine copper and gold.<sup>20</sup> Over time, the Trail Smelter grew in size and output, shifting its production to lead and zinc, and adding 400-foot tall smokestacks to disperse the thousands of tons of sulfur dioxide it released monthly.<sup>21</sup> These higher stacks may have marginally eased local tensions in Trail, where citizens suffered damage to crops and livestock, but they also contributed to increased pollution in Washington’s Colombia Valley.<sup>22</sup> Ultimately, it took an international arbitration tribunal and well over a decade to resolve claims of Washington citizens and the smelter operators.<sup>23</sup> Although the tribunal ordered that the Trail Smelter “should avoid air emissions that harm Washington,” and

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<sup>17</sup> Gerald F. Hess, *The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA*, 18 GEO. INT’L ENVTL. L. REV. 1, 9 (2005).

<sup>18</sup> A reservoir created by the creation of the Grand Coulee Dam in 1942.

<sup>19</sup> Hess, *supra* note 17, at 9.

<sup>20</sup> Michael J. Robinson-Dorn, *The Trail Smelter: Is What’s Past Prologue? EPA Blazes A New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233, 243 (2006).

<sup>21</sup> *Id.* at 244. The process of lead refining comprises three basic steps: (1) sintering, (2) reduction, and (3) refining. Because lead naturally occurs as a sulfide ore, the primary goal of the sintering phase is to reduce sulfur content of the ore, which is burned off and leaves the plant as sulfur dioxide. However, in addition to aerial emissions of sulfur dioxide, “nearly every process” involved in primary lead smelting and refining emits lead fumes and particulate matter. *Background Report: AP-42 Section 12.6: Primary Lead Smelting and Refining*, U.S. ENVTL. PROT. AGENCY, <https://www3.epa.gov/ttn/chief/ap42/ch12/bgdocs/b12s06.pdf>.

<sup>22</sup> Robinson-Dorn, *supra* note 20, at 245–46.

<sup>23</sup> *Id.*

that Canada would be liable for damages resulting from future emissions, the smelter continued to discard waste products into the air and water around its plant.<sup>24</sup> Throughout the twentieth century, the Smelter passed through several mergers and iterations of management before coming to rest with Teck Cominco Metals, Ltd. (“Teck”), which currently operates the site.<sup>25</sup>

Today, Teck boasts that the facility is one of the “world’s largest fully integrated zinc and lead smelting complexes,” producing 307,000 tons of refined zinc<sup>26</sup> and 117,600 tons of lead concentrate<sup>27</sup> in 2015. However, in addition to refined ore, the smelter continued to produce immense quantities of waste product. In particular, each year until 1995, its operations discharged up to 145,000 tons of slag, a heavy-metal laden by-product of the smelting processes, directly into the Columbia River.<sup>28</sup> From its introduction in Trail, the Columbia carried the slag downriver into the UCR, where it accumulated along the shores and sediments of Lake Roosevelt.<sup>29</sup> This contamination ultimately set in motion the proceedings that culminated in the Ninth Circuit’s July 2016 *Pakootas* decision.

### *B. Procedural History of the Pakootas Saga*

After a half century of continued emissions, the Colville Tribes petitioned the Environmental Protection Agency (“EPA”) in 1999 to study the UCR for alleged hazards to human health and environmental contamination from Teck’s discharges.<sup>30</sup> These preliminary assessments found “elevated levels of arsenic, lead, mercury and other contaminants in the lake,” with contamination

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<sup>24</sup> Hess, *supra* note 17, at 4–5.

<sup>25</sup> “Consolidated Mining purchased [the Trail Smelter] in 1906, renamed itself Cominco in 1966, and merged with Teck Ltd., becoming Teck Cominco Metals, Ltd., in 2001.” *Id.* at 5.

<sup>26</sup> *Trail Operations*, TECK COMINCO, <http://www.teck.com/operations/canada/operations/trail-operations/> (last visited Oct. 1, 2016).

<sup>27</sup> *Other Metals*, TECK COMINCO, <http://www.teck.com/products/other-metals/> (last visited Oct. 1, 2016).

<sup>28</sup> EPA UAO, *supra* note 16 § II, ¶ 9.

<sup>29</sup> *Id.*

<sup>30</sup> Robinson-Dorn, *supra* note 20, at 267–68.

levels severe enough to render the UCR eligible for listing as a Superfund site.<sup>31</sup> As discussed in greater length in Part III, Superfund listing recognizes a particular site as one of the most contaminated in the United States and raises extensive funding to clean up that site.<sup>32</sup>

Following the breakdown of an informal negotiation process with the Canadian smelter operators,<sup>33</sup> the EPA issued a Unilateral Administrative Order (“UAO”) to Teck, requiring the company to complete a Remedial Investigation and Feasibility Study (“RI/FS”).<sup>34</sup> The purpose of the RI/FS is to determine the extent of contamination at the UCR site and to “develop and evaluate potential remedial alternatives that prevent, mitigate, or otherwise respond to or remedy any release of . . . hazardous substances” at the site.<sup>35</sup>

Two individual enrolled members of the Confederated Tribes of the Colville Reservation brought the original *Pakootas*<sup>36</sup> suit in 2003 against Teck to enforce the previously disregarded UAO.<sup>37</sup> This suit brought CERCLA claims for Teck’s contamination of the Columbia River for direct discharge of hazardous materials in both

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<sup>31</sup> Matthew Preusch, *Pollution Dispute in Northwest Straddles the Border*, N.Y. TIMES (Mar. 20, 2004), [http://www.nytimes.com/2004/03/20/us/pollution-dispute-in-northwest-straddles-the-border.html?\\_r=1](http://www.nytimes.com/2004/03/20/us/pollution-dispute-in-northwest-straddles-the-border.html?_r=1). See *infra* Part III.A for a discussion of Superfund listing under CERCLA.

<sup>32</sup> See *infra* Part III.A.

<sup>33</sup> Robinson-Dorn, *supra* note 20, at 267–68.

<sup>34</sup> EPA UAO, *supra* note 16, § V, ¶¶ 1–5(a).

<sup>35</sup> *Id.* § V, ¶ 5(a).

<sup>36</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004), *aff’d*, 452 F.3d 1066 (9th Cir. 2006).

<sup>37</sup> Following the 2006 Ninth Circuit decision, Teck and its separately incorporated American counterpart, Teck Cominco American, Inc. (“TCAI”), entered into a settlement with the EPA, in which the companies agreed to complete the RI/FS for the UCR Site. U.S. ENVTL. PROT. AGENCY, SETTLEMENT AGREEMENT FOR IMPLEMENTATION OF REMEDIAL INVESTIGATION AND FEASIBILITY STUDY AT THE UPPER COLUMBIA RIVER SITE (June 2, 2006), [https://yosemite.epa.gov/R10/CLEANUP.NSF/7780249be8f251538825650f0070bd8b/f0e551fb8a69dcd288256fac00064739/\\$FILE/TeckCominco\\_SettlementAgreement.pdf](https://yosemite.epa.gov/R10/CLEANUP.NSF/7780249be8f251538825650f0070bd8b/f0e551fb8a69dcd288256fac00064739/$FILE/TeckCominco_SettlementAgreement.pdf).



solid and liquid form.<sup>38</sup> After a truly byzantine case history, which is beyond the scope of this paper,<sup>39</sup> the Plaintiffs sought, and ultimately were granted leave to file a fourth amended complaint, which added an airborne theory of CERCLA liability for Teck's aerial emissions "including, but not limited to, lead compounds, arsenic compounds, cadmium compounds and mercury compounds," which had come to be located in, and cause harm at the UCR.<sup>40</sup>

When Teck moved to strike or dismiss the aerial-disposition claims, the district court denied the motion.<sup>41</sup> Shortly thereafter, the Ninth Circuit ruled in *Center for Community Action and Environmental Justice v. BNSF* ("CCA EJ") that RCRA could not reach diesel exhaust from idling railyard locomotives,<sup>42</sup> prompting Teck to file a motion to reconsider with the district court.<sup>43</sup> Specifically, Teck sought reconsideration of the court's decision to allow Plaintiffs to amend their complaint to include aerial claims, as well as for the court's rejection of Teck's motion to dismiss those claims.<sup>44</sup>

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<sup>38</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 (9th Cir. 2006).

<sup>39</sup> The early phases of the litigation concerned numerous objections to jurisdiction by Teck, during which the Canadian smelter stipulated that it had discharged slag into the Columbia River in Canada, with the result that some of that slag arrived at the UCR Site in the United States, "where it has leached and continues to leach hazardous substances into the water and sediment of the Columbia River," causing "at least \$1" in damages. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 979 n.2 (9th Cir. 2016). Despite Teck's claims that it was beyond the reach of American law, after determining jurisdiction satisfied, the court found Teck liable as a CERCLA "arranger" on Plaintiffs' "river pathway" claims, because it "had intentionally disposed of waste into the Columbia River knowing that at least some of it would flow across the border." *Id.* For greater treatment of the early procedural history and the international law issues, see generally Libin Zhang, *Pakootas v. Teck Cominco Metals, Ltd.*, 31 HARV. ENVTL. L. REV. 545 (2007).

<sup>40</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 979 (9th Cir. 2016).

<sup>41</sup> *Id.* at 980.

<sup>42</sup> See discussion of *Ctr. for Cmty. Action & Envtl. Justice v. BNSF R.R. Co.*, 764 F.3d 1019 (9th Cir. 2014), *infra* Part IV.B.

<sup>43</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at \*1 (E.D. Wash. Dec. 31, 2014).

<sup>44</sup> *Id.*

Although the district court distinguished the *Pakootas* aerial claims from earlier Ninth Circuit precedent, it recognized that with respect to how RCRA's "disposal" is to be applied in the context of CERCLA, "no court ha[d] addressed this issue head-on."<sup>45</sup> Consequently, the court certified its order for an immediate interlocutory appeal to the Ninth Circuit,<sup>46</sup> leading to the *Pakootas* decision considered herein. This Recent Development now examines key provisions of CERCLA and RCRA as a foundation for analyzing the errors of the *Pakootas* decision.

### III. STATUTORY OVERVIEW

If the general stereotype is that national environmental regulatory statutes are dense and complicated, neither CERCLA nor RCRA represent a deviation from that rule. The Ninth Circuit has previously observed that, "neither a logician nor a grammarian will find comfort" in CERCLA's "maze" of regulations.<sup>47</sup> This part seeks to explain the basic thrust and relevant requirements of (A) CERCLA and (B) RCRA, before turning to the Ninth Circuit's recent application of these statutes in Part IV.

#### A. *The Comprehensive Environmental Response, Compensation, and Liability Act*

Enacted in 1980, CERCLA has two principle goals: "(1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances bear the cost of remedying the conditions they created."<sup>48</sup> To

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<sup>45</sup> *Id.* at \*4.

<sup>46</sup> *Id.*

<sup>47</sup> *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880, 883 (9th Cir. 2001). The court went on to liken a search through CERCLA's legislative history akin to a "snark hunt." *Id.* at 885.

<sup>48</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 981 (9th Cir. 2016) (quoting *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 968 (9th Cir. 2013) (alteration omitted)).

empower the act to complete these purposes, courts have generally interpreted CERCLA's definitions and mandates liberally.<sup>49</sup>

To meet the costs of cleaning up contaminated sites around the country, CERCLA created the "Superfund" Program as a trust to cover the formulation and execution of decontamination plans.<sup>50</sup> As there are thousands of waste sites scattered across the country, the EPA created the National Priority List in 1983 to prioritize response action under Superfund.<sup>51</sup> In turn, a combination of Congressional appropriations and CERCLA penalties paid by responsible parties finances Superfund.<sup>52</sup>

To establish liability under CERCLA, the Act requires a plaintiff to meet each of four elements:

- (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, Section 101(9), 42 U.S.C. § 9601(9);
- (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred, 42 U.S.C. § 9607(a)(4);
- (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. §§ 9607(a)(4) and (a)(4)(B); and

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<sup>49</sup> See, e.g., *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992) ("We construe CERCLA liberally to achieve these goals."). See also *infra* note 115.

<sup>50</sup> *What is the "Superfund" Program?*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, <http://toxmap.nlm.nih.gov/toxmap/faq/2009/08/what-is-the-superfund-program.html> (last visited Sept. 20, 2016).

<sup>51</sup> *Superfund History*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/superfund/superfund-history> (last visited Sept. 20, 2016).

<sup>52</sup> *This is Superfund: A Community Guide to EPA's Superfund Program 3*, U.S. ENVTL. PROT. AGENCY, <https://semspub.epa.gov/work/HQ/175197.pdf>.

(4) the defendant is within one of four classes of persons subject to the liability provisions of Section 107(a).<sup>53</sup>

Regarding the first element, in addition to buildings and structures that might be contemplated by lay use of the word “facility,” under CERCLA, the term encompasses “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.”<sup>54</sup> For the second element, a “release” of a “hazardous substance” means “any spilling, leaking, pumping, pouring, *emitting*, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment” of any substance designated as hazardous by any of several other federal regulatory schemes.<sup>55</sup> As to the fourth element, the classes of liable persons<sup>56</sup> (“potentially responsible parties” or “PRPs”) include, *inter alia*, “any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility.”<sup>57</sup> Although the terms “dispose,” “disposal,” and “disposing” appear throughout these provisions, to add to the challenges of this dense recovery scheme, CERCLA does not itself define the term, but rather adopts its definition from RCRA.<sup>58</sup>

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<sup>53</sup> 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1358 (9th Cir. 1990) (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152 (9th Cir. 1989)).

<sup>54</sup> 42 U.S.C. § 9601(9) (2016).

<sup>55</sup> *Id.* § 9601(14), (22) (emphasis added). The definition specifically enumerates the CWA, CAA, RCRA, and TSCA (the Toxic Substances Control Act).

<sup>56</sup> *Id.* § 9601(21). A “person” as defined by CERCLA includes “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. *Id.*

<sup>57</sup> *Id.* § 9607(a)(1)–(4).

<sup>58</sup> *See id.* § 9601(29).

### *B. Resource Conservation and Recovery Act*

The first objective of RCRA is to “promote the protection of health and the environment.”<sup>59</sup> The statute enumerates eleven strategies to reach this objective, including the “application of solid waste management, resource recovery, and resource conservation systems which *preserve and enhance the quality of air, water, and land resources.*”<sup>60</sup> Thus, while RCRA may properly be considered a regulatory scheme for solid waste, it does not follow that aerial disposition of solid waste is beyond its contours.<sup>61</sup> Within this context, the RCRA “disposal” refers to 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.<sup>62</sup>

Notably, the word “emitting” is absent from this definition of “disposal.”<sup>63</sup> As described herein, the Ninth Circuit attached great significance to this omission in *Pakootas*. The following section analyzes the Ninth Circuit’s “disposal” jurisprudence across several RCRA and CERCLA cases.

## IV. THEORIES OF “DISPOSAL”

This part examines the recent evolution of the body of law construing RCRA and CERCLA “disposal” in the Ninth Circuit leading to the *Pakootas* decision here at issue. Section A focuses on the 2001 en banc decision in *Carson Harbor*, while Section B unpacks the Ninth Circuit’s 2015 holding in *CCA EJ*. After examining these two primary decisions on which *Pakootas* relies,

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<sup>59</sup> *Id.* § 6902(a).

<sup>60</sup> *Id.* § 6902(a)(10) (emphasis added).

<sup>61</sup> See *supra* text accompanying notes 1–6.

<sup>62</sup> 42 U.S.C. § 6903(3) (2016).

<sup>63</sup> See *id.* Compare to CERCLA definition for “release,” which includes “disposing,” “emitting,” “emptying,” “escaping,” “leaching,” “pouring,” and “pumping,” in addition to “discharging,” “dumping,” “injecting,” “leaking,” and “spilling”—forms that overlap the RCRA/CERCLA definition for “disposal.” *Id.* § 9601(22).

Section C turns to that decision itself to analyze its weaknesses. Finally, Section D suggests how the court could have arrived at a better decision, and why Supreme Court review is important to protect Congress' intent for CERCLA.

*A. Carson Harbor Village, Ltd. v. Unocal Corp.*

*Carson Harbor Village, Ltd. v. Unocal Corp.* provides the basis for the Ninth Circuit's *Pakootas* holding that Congress could not have intended passive migration to trigger liability under CERCLA.<sup>64</sup> A closer look at this case demonstrates *Carson Harbor*'s far more nuanced final holding, including the rejection of a bright-line rule for passive migration liability.<sup>65</sup>

*Carson Harbor Village, Ltd.* ("Carson") operated a mobile home park in southern California.<sup>66</sup> The land, which Carson previously acquired from another mobile home operator ("Partnership defendants"), had been leased to the Unocal Corporation from 1945 to 1983, during which Unocal used the property in oil exploitation, operating numerous wells, pipelines, storage tanks, and other elements of petroleum production.<sup>67</sup> When Carson attempted to refinance the property in 1993, the operation discovered hazardous tar-like and slag materials in an open-flow wetland covering a part of the property.<sup>68</sup> Carson was required to remove the materials and brought suit to seek recovery of its \$285,000 in expenses from Unocal, the Partnership defendants, and several other parties.<sup>69</sup>

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<sup>64</sup> See *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 983 (9th Cir. 2016).

<sup>65</sup> See *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) ("We therefore reject the absolute binary "active/passive" distinction used by some courts.").

<sup>66</sup> *Id.* at 868.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* Further investigation confirmed the hazardous materials were by-products and wastes from petroleum production, which had remained on the property since well before the mobile home park was developed. *Id.*

<sup>69</sup> See *id.* at 868–70. The complaint also identified the County of Los Angeles, Cities of Compton and Carson, and Caltrans (the California Department of Transportation), which operates an adjacent freeway, a three-mile section of

The district court granted summary judgment to all defendants on the CERCLA claims,<sup>70</sup> from which Carson appealed. The Ninth Circuit affirmed that there was no liability for the Partnership defendants, but reversed the lower court, finding summary judgment inappropriate as to Unocal and the Government defendants.<sup>71</sup>

Within the four requirements of a CERCLA claim,<sup>72</sup> the final element requires a showing that the defendant is a PRP, which in this case, turned on whether or not a “disposal” had occurred during each defendant’s successive tenure of the property.<sup>73</sup> Based on its interpretation of the statute, the Ninth Circuit concluded that despite the “passive migration” of contaminants through the soil concurrent with the Partnership defendants’ ownership, no “disposal” took place during that time.<sup>74</sup>

Relying on the plain meaning of RCRA’s definition of disposal, the court found significant that within the same statute “release” was defined by a list that included “disposal,” as well as several other forms, indicating it is a broader term than “disposal.”<sup>75</sup> Limiting its attention to the plain meaning of the terms defining “disposal,” the court determined that none of the plain meanings of “discharge,” “deposit,” “injection,” “dumping,” “spilling,” “leaking,” or “placing” was applicable to the migration of hydrocarbons through the wetlands during the ownership of the Partnership defendants.<sup>76</sup>

However, the court was careful to “reject the absolute binary ‘active/passive’ distinction used by some courts,”<sup>77</sup> engaging

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which drains into the wetlands. *Id.* at 868. Collectively, the court referred to this group as the “Government defendants.” *Id.*

<sup>70</sup> *See id.* at 870. Originally, Carson also brought additional RCRA and CWA claims which it did not pursue on appeal. *Id.* at 870 n.2.

<sup>71</sup> *See Carson Harbor*, 270 F.3d at 888.

<sup>72</sup> *See supra* text accompanying note 53.

<sup>73</sup> *See Carson Harbor*, 270 F.3d at 874.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.* at 878; *see also supra* note 63.

<sup>76</sup> *See Carson Harbor*, 270 F.3d at 879–80.

<sup>77</sup> *See id.* There is a multi-tiered circuit split regarding both (1) whether CERCLA liability is available for “passive” migration of hazardous materials and (2) how to determine what constitutes active, versus passive, migrations. *See*

instead in a more factual, case-specific analysis. In fact, the court explicitly states that while “‘disposal’ does not include passive soil migration . . . it may include other passive migration,” recognizing that “[h]olding passive owners responsible for migration of contaminants that results from their conduct *and* for passive migration ensures the prompt and effective cleanup” intended by Congress enactment of CERCLA.<sup>78</sup> Thus, *Carson Harbor* does not stand for the proposition that CERCLA forecloses liability for any passive migration, despite attempts by the *Pakootus* court to shoehorn it in to that position. Section C develops the flaw of this mischaracterization.

*B. Center for Community Action and Environmental Justice v. BNSF R. Co.*

In addition to *Carson Harbor*, the Court in *Pakootas* drew heavily on *Center for Community Action and Environmental Justice* in rejecting the Plaintiffs’ aerial-based CERCLA claims. *CCA EJ* featured a RCRA claim to enjoin two defendant rail yard operating companies from emitting diesel particulate matter (“DPM”) via sixteen railyards across California.<sup>79</sup> Environmental groups sued the two organizations on the basis that the defendants allow DPM to be “discharged into the air, from which it falls onto the ground and water nearby” before becoming “re-entrained into the air by wind, air currents and passing vehicles,” causing harm at each step, as people inhale the airborne particles.<sup>80</sup> The district court granted defendants’ motion to dismiss for failure to state a claim.<sup>81</sup> On appeal, the Ninth Circuit affirmed the order, strictly

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generally Khara Coleman, *Disposing of Leaks and Spills: Passive Disposal of Hazardous Wastes Under CERCLA*, 80 Wash. U. L.Q. 945 (2002).

<sup>78</sup> *Carson Harbor*, 270 F.3d at 881.

<sup>79</sup> See *Ctr. for Cmty. Action & Env’tl. Justice v. BNSF R. Co.*, 764 F.3d 1019, 1021 (9th Cir. 2014).

<sup>80</sup> *Id.* Plaintiffs cite to California Air Resources Board, which has conducted studies finding over 1.8 million Californians subject to increased risks for cancer precisely due to railyard operations. *Id.*

<sup>81</sup> FED. R. CIV. P. 12(b)(6).



construing the definition of “disposal” based on its statutory and legislative history.<sup>82</sup>

By rephrasing the requirements of the RCRA citizen suit provision<sup>83</sup> to address plaintiffs’ claim, the Ninth Circuit stated that, in order to survive summary judgment, plaintiffs would have to plausibly allege “that Defendants have contributed to the past or are contributing to the present handling, treatment, transportation, or disposal of diesel particulate matter.”<sup>84</sup> The Ninth Circuit once again turned to a textual analysis of RCRA’s definition of “disposal,” first finding that the lack of reference to “emitting,” despite its inclusion within the definition of “release,” meant that Congress had intended to exclude it.<sup>85</sup>

Secondly, the court determined RCRA’s “disposal” definition—referring to enumerated means of introducing solid “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”<sup>86</sup>—to create a temporal requirement whereby solid waste must be “*first* placed into or on any land or water and is *thereafter* emitted into the air.”<sup>87</sup> To buttress this conclusion, the Ninth Circuit visited the legislative history of RCRA, highlighting its purpose as a system of solid waste control and its lack of any provision to regulate airborne emissions, and “even

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<sup>82</sup> *Ctr. for Cmty. Action & Envtl. Justice*, 764 F.3d at 1030.

<sup>83</sup> 42 U.S.C. § 6972(a)(1)(B) (2016).

<sup>84</sup> *Ctr. for Cmty. Action & Envtl. Justice*, 764 F.3d at 1023. They did not reach the second and third prongs “that diesel particulate matter is a “solid waste,” and that the solid waste that Defendants emit “may present an imminent and substantial endangerment to health or the environment,” *id.*, because plaintiffs failed the first. *Id.* at 1030 n.10.

<sup>85</sup> *Id.* at 1024–25 (“[E]xpressio unius est exclusio alterius stands for the proposition that when Congress expresses meaning through a list, a court may assume that what is not listed is excluded.”); *see also supra* text accompanying note 63.

<sup>86</sup> 42 U.S.C. § 6903(3) (2016).

<sup>87</sup> *Ctr. for Cmty. Action & Envtl. Justice*, 764 F.3d at 1024 (internal quotations omitted) (emphasis in original).

contemplat[ion] [of] the disposal of material into the air” in its original form.<sup>88</sup>

This premise is factually mistaken.<sup>89</sup> In fact, Congress includes an anecdote of a purely gaseous discharge in the legislative history underlying the original enactment of RCRA.<sup>90</sup> Moreover, the 1984 Amendments expanded RCRA into regulatory jurisdiction that had previously been the exclusive purview of the Clean Air Act, expressly due to Congress’ frustration with the EPA’s “appallingly slow” performance under the latter.<sup>91</sup>

As another scholar has observed, RCRA was conceived to “supplement” the media-based regimes—such as the CAA, the CWA, and the Endangered Species Act (“ESA”)—to prevent “simply chasing toxic pollutants from one media to the next.”<sup>92</sup> The Supreme Court has previously confirmed that RCRA “empowers EPA to regulate hazardous wastes *from cradle to grave*.”<sup>93</sup> Thus, in the face of statutory ambiguity, the Ninth Circuit should have been more wary of endorsing such a narrow reading of the statute, which is concerned not with the media by which solid waste may be disposed, but the very disposal of the waste itself.

The court’s “order-of-disposal” rule<sup>94</sup> needlessly creates a bright line that may function to exclude citizen suits that Congress

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<sup>88</sup> *Id.* at 1026–28.

<sup>89</sup> *See supra* notes 1–6 and accompanying text.

<sup>90</sup> *See id.*

<sup>91</sup> S. REP. NO. 98-284, at 63 (1983). The report continued on to note that a full quarter of sites on the Superfund National Priority List were at that time had been added “at least in part because of potential threats to health and the environment from emissions of hazardous pollutants into the air.” *Id.*

<sup>92</sup> *See* Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law’s First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 83 (2001).

<sup>93</sup> *City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 331 (1994) (holding ash generated by municipal solid waste incinerators is not exempt from RCRA) (emphasis added).

<sup>94</sup> In essence, that RCRA “disposal” exclusively treats waste that is *first* disposed either onto the ground or into the water, from which it may *then* be re-introduced to the air. *See CCAEJ*, 764 F.3d at 1024.

intended in enacting RCRA.<sup>95</sup> On a practical level, the rule provides relatively little guidance for borderline cases. Certainly, the Ninth Circuit cannot mean to suggest that hazardous waste generators may evade RCRA liability by directing their employees to “fling” hazardous waste over the property line, guaranteeing that it reaches ground or water only after *first* passing through the air.<sup>96</sup>

Other jurisdictions have avoided the pitfall of this type of rule by explicitly engaging in a case-by-case analysis of the facts. In *United States v. Power Engineering Co.*, the Tenth Circuit determined that a refurbishing facility whose air scrubbers<sup>97</sup> sprayed a condensate mist of hexavalent chromium into the air did “dispose” within the meaning of RCRA.<sup>98</sup> The lower court had previously rejected defendant’s contention that the scrubbers did not place “solid waste into or on any land or water,” despite the spray’s origin several feet above the ground.<sup>99</sup>

A case in the Sixth Circuit reached a similar result in the Southern District of Ohio in *Citizens Against Pollution v. Ohio Power Co.*<sup>100</sup> There, flue gas from a coal plant was seen to touch

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<sup>95</sup> Recent Case, *Environmental Law—Particulate Matter Emissions—Ninth Circuit Holds that the Emission of Pollutants from Rail Yards is Not “Disposal” of Solid Waste Under the Resource Conservation and Recovery Act*, Center for Community Action & Environmental Justice v. BNSF Railway Co., 128 HARV. L. REV. 1272, 1276–79 (2015) [Hereinafter “HARV. L. REV. CCAEJ”].

<sup>96</sup> See Appellants’ Reply Brief at 5–6, Ctr. For Cmty. Action & Envtl. Justice v. BNSFR Co., 764 F.3d 1019 (9th Cir. 2014) (No. 12-56086) (“From the standpoint of [a] neighbor, the result, and the injury, is exactly the same” whether hazardous materials enter her by land or air.).

<sup>97</sup> Air pollution scrubbers remove heavy metals (such as lead and mercury), volatile organic compounds (such as sulfur dioxide and nitrogen oxides), and particulate matter from aerial emissions through chemical and physical processes. While scrubbers reduce air pollution, they concurrently increase solid and liquid waste streams due to the collected contaminant sludges and process water. See U.S. ENVTL. PROT. AGENCY, *Air Pollution Control Technology Factsheet* 1–4, <https://www3.epa.gov/ttnacat1/dir1/fsprytwr.pdf> (last visited Oct. 26, 2016).

<sup>98</sup> See *United States v. Power Eng’g Co.*, 191 F.3d 1224, 1231 (10th Cir. 1999).

<sup>99</sup> See *United States v. Power Eng’g Co.*, 10 F. Supp. 2d 1145, 1157–58 (D. Colo. 1998) (internal quotations omitted), *aff’d*, 191 F.3d 1224 (10th Cir. 1999).

<sup>100</sup> See *Citizens Against Pollution v. Ohio Power Co.*, No. C2-04-CV-371, 2006 WL 6870564 (S.D. Ohio July 13, 2006).

down on land in visible blue plumes, during which time nearby residents experienced headaches and a constellation of respiratory problems.<sup>101</sup> The court held that the flue gas meets RCRA's definition of solid waste.<sup>102</sup> Secondly, despite travelling through the air from the top of the coal plant's 830-foot tall stacks, the observed contact of the blue plumes with the ground was sufficient to the court to find that such solid waste was discharged onto the ground.<sup>103</sup>

Although the Ninth Circuit rejected *Citizens Against Pollution* in a footnote as “contrary to RCRA’s text and legislative history” without further explanation, it applied the better test. What this Recent Development will term the “demonstrable contact” standard of *Citizens Against Pollution* and *Power Engineering Co.* relies on a more fact-specific inquiry, namely (1) whether a discharge of a solid waste occurred, and (2) whether there was some demonstrable contact between the waste and the ground or water. While the first prong considers the expansive definitions for solid/hazardous waste under RCRA and CERCLA, the second would limit “disposal” liability to circumstances where some form of evidence—such as eyewitness observation, as with the blue plumes, or chemical testing, as with the hexavalent chromium spray—could demonstrate a tangible land or water contact of defendant’s specific discharges.<sup>104</sup> This test could have facilitated a better outcome for the *Pakootas* case, which is considered below in sections C and D.

### C. Structure of the 2016 *Pakootas* Decision

As previously outlined, the Ninth Circuit heard *Pakootas* as an interlocutory appeal of the district court’s refusal to grant Teck’s

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<sup>101</sup> See *id.* at \*1–2.

<sup>102</sup> “The term ‘solid waste’ means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.” 42 U.S.C. § 6903(27) (2016).

<sup>103</sup> See *Citizens Against Pollution*, 2006 WL 6870564, at \*4–5.

<sup>104</sup> See, e.g., *Power Eng’g Co.*, 10 F. Supp. 2d at 1157; *Citizens Against Pollution*, 2006 WL 6870564 at \*2.

motion to reconsider allowing Plaintiffs to amend their complaint to include claims for aerially-deposited waste and denying Defendants' motion to dismiss those charges.<sup>105</sup> Despite being "confident in its analysis" of the question of first impression, the Eastern District of Washington certified its order for immediate appeal to the Ninth Circuit to review its findings, noting the "substantial ground for difference of opinion" on whether CERCLA could reach Teck's aerial emissions.<sup>106</sup> In July 2016, the Ninth Circuit overturned the district court, relying in large part on its previous decisions in *Carson Harbor* and *CCA EJ*.<sup>107</sup>

The court's legal analysis proceeds through a statutory construction peppered with references to *Carson Harbor* and *CCA EJ*. Confronted with Plaintiffs' aerial disposition theory that (1) Teck "deposited" hazardous substances onto the land or water of the UCR site and that (2) "deposit" is one of the words used to define "disposal" by 42 U.S.C. § 6903(3), the court seized on what it saw as the passive implications of that theory.<sup>108</sup> Because Plaintiffs' aerial disposition theory appeared to be that Teck "allow[ed] hazardous substances to be 'deposit[ed]' at the UCR Site by the wind," rather than by depositing the waste there directly, the Ninth Circuit determined it must reject their claim based on a *Carson Harbor* footnote.<sup>109</sup> The note contends, "as used in the statute, the term [deposit] is akin to 'putting down,' or placement. Nothing in the context of the statute or the term 'disposal' suggests that Congress meant to include chemical or geologic processes or passive migration."<sup>110</sup> Section D, below, discusses the error of treating this one-off statement as dispositive.

In addition, the *Pakootas* court leaned heavily on the recent *CCA EJ* decision, which by its understanding "involved essentially

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<sup>105</sup> See *supra* Part II.B.

<sup>106</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at \*4 (E.D. Wash. Dec. 31, 2014).

<sup>107</sup> See *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 (9th Cir. 2016).

<sup>108</sup> See *id.* at 983.

<sup>109</sup> See *id.*

<sup>110</sup> *Id.* (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d at 879 & n.7 (9th Cir. 2001)).

the same facts.”<sup>111</sup> Namely, both cases involved airborne emissions of hazardous substances that caused harm first through direct inhalation, and then by being later “re-entrained into the air” after landing on the ground.<sup>112</sup> *Pakootas* adopted *CCA EJ*’s analysis of the emission omission, paraphrasing that “Congress knew how to use the word ‘emit’ when it wanted to,” and suggesting that this absence demonstrated Congress’ intent to exclude “emission” from the definition of “disposal.”<sup>113</sup> However, the court also conceded that *CCA EJ*’s construction of “disposal” within the context of RCRA “does not absolutely foreclose a different interpretation of ‘disposal’ for CERCLA purposes,” instead, that its analysis is merely “persuasive.”<sup>114</sup>

*D. A Better Reading: The Court Should Have Distinguished Carson Harbor and CCA EJ*

The Ninth Circuit’s self-constrained opinion in *Pakootas* disappoints the intent of the environmental frameworks it interprets, while embellishing distinguishable holdings into a novel construction of “disposal” that creates an arbitrary gap in the CERCLA field. The court hinted several times that it could be persuaded to embrace Plaintiffs’ argument, were it writing on a “blank slate” and not constrained to its holdings in *CCA EJ* and *Carson Harbor*.<sup>115</sup> Although the court is correct to note the writing on its slate, a more careful examination of the earlier precedent reveals that those decisions left the court with plenty of blank space in which to scribe a better opinion.

This part begins by arguing that these cases were distinguishable and should not have been applied to prevent

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<sup>111</sup> *Id.* at 983–84 (citing *Ctr. for Cmty. Action & Env’tl. Justice v. BNSF R. Co.*, 764 F.3d 1019, 1021 (9th Cir. 2014)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 984 (citing *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 562 (2007)) (“The natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation . . . as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.”).

<sup>115</sup> *See id.* at 984, 986.

Plaintiffs' theory. However, looking past the shortcomings of the Ninth Circuit's decision, it also contends that the Supreme Court should review this case for two principle reasons. Namely, it should repudiate the Ninth Circuit's 2016 *Pakootas* decision and should also address the circuit split over passive and active disposal, which has confused CERCLA litigation nationally.

It is axiomatic that RCRA and CERCLA require expansive—though not unlimited—interpretation, and any analysis of a claim based on these statutes must begin by recognizing their broad mandates.<sup>116</sup> The Ninth Circuit has previously recognized this guidance,<sup>117</sup> even paying lip service to it in *Pakootas*, but its strenuous work to narrow the reach of “disposal” in recent decisions runs counter to this general principle. However, despite the similarities of sweeping breadth of RCRA and CERCLA, the two schemes do serve different purposes.

First, notwithstanding the fact that CERCLA borrows its definition of “disposal” from RCRA, the two Acts serve distinct ends through distinct means.<sup>118</sup> The Supreme Court has made it clear that “CERCLA differs markedly from RCRA . . . in the remedies it provides.”<sup>119</sup> Thus, investigation into the legislative history and statutory context of either Act may have only limited application to the other. The Supreme Court has previously noted that the usage of an identical term in different parts of the same act may overcome the presumption that “they are intended to have the

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<sup>116</sup> See, e.g., *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (“Because it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals.”); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992) (“As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals.”); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) (“We note that a liberal judicial interpretation of the term [“arrange”] is required in order that we achieve CERCLA’s ‘overwhelmingly remedial’ statutory scheme.”).

<sup>117</sup> See *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992) (“We construe CERCLA liberally to achieve these goals.”).

<sup>118</sup> See *Alcan Aluminum*, 964 F.2d at 263 (“Thus we agree with the Government’s contention that RCRA’s goals differ from those of CERCLA.”).

<sup>119</sup> *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996).

same meaning” where it is clearly demonstrated that the terms were “employed in different parts of the act with different intent.”<sup>120</sup>

An amicus brief to the *Pakootas* court on behalf of the United States argued for such a conclusion regarding “disposal” as it relates to the different contexts of RCRA and CERCLA.<sup>121</sup> From this perspective, the Ninth Circuit should have announced that the same statutory and legislative analysis of RCRA that excluded diesel particulate matter from the discharging, depositing, injecting, dumping, spilling, leaking, and placing<sup>122</sup> that constitute “disposal” did not yield the same result for the litany of contaminants spewed by the Teck Smelter, considered in light of the purposes<sup>123</sup> and history of CERCLA.

Moreover, the Ninth Circuit’s strong reliance on *CCA EJ* was imprudent because that case can be legally and factually distinguished from *Pakootas* on several grounds. First, the *CCA EJ* decision weighs heavily that the plaintiffs in that case could have relied on the CAA to bring a citizen enforcement suit, but resorted instead to the less demanding, less on-point standard under RCRA’s citizen suit provision.<sup>124</sup>

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<sup>120</sup> *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

<sup>121</sup> See Brief of the United States as Amicus Curiae in Support of Appellees at 11–12, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016) (No. 15-35228). Furthermore, as the *Pakootas II* district court notes, *CCA EJ* is a RCRA case which “makes no mention of CERCLA.” *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at \*1 (E.D. Wash. Dec. 31, 2014). That CERCLA was never contemplated in construing one of its central terms underlines the impropriety of letting *CCA EJ* speak for it. See Brief of the United States as Amicus Curiae in Support of Appellees at 16, *Pakootas*, 830 F.3d 975 (No. 15-35228).

<sup>122</sup> See 42 U.S.C § 6903(3) (2016) (defining “disposal”).

<sup>123</sup> *Meghrig*, 516 U.S. at 483 (citing *Gen. Electric Co. v. Litton Industrial Automation Sys., Inc.*, 920 F.2d 1415, 1422 (C.A. 8 1990)) (“[T]he two . . . main purposes of CERCLA . . . prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.”).

<sup>124</sup> See Brief of the United States as Amicus Curiae in Support of Appellees at 13, *Pakootas*, 830 F.3d 975 (No. 15-35228); see also *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF R. Co.*, 764 F.3d 1019, 1022 & n.3 (9th Cir. 2014) (describing the much more limited scope of CAA citizen suit provisions than those of RCRA).



Specifically, *CCA EJ* took issue with plaintiffs' attempt to make RCRA do the work of the CAA,<sup>125</sup> for which there is no factual analogy to *Pakootas*. For the *CCA EJ* court, the crux of case concerned controlling defendants' aerial emissions of pollutants to prevent their inhalation, which it regarded as an "air quality problem for the CAA, not RCRA."<sup>126</sup> The court went on to find that "RCRA, as we interpret it, does not extend to *these emissions*," i.e., emissions otherwise regulated by the CAA.<sup>127</sup> On the contrary, in *Pakootas*, the CAA would be barred as an extraterritorial application of domestic law precisely because it controls emissions—which occur in Canada—but CERCLA is not, because it is only concerned with retroactive cleanup for the contaminated site—which is located in the United States.<sup>128</sup>

Additionally, while the *CCA EJ* plaintiffs indicated concerns primarily with the airborne effects of DPM as a respiratory antagonist, the *Pakootas* plaintiffs highlight that hazardous substances contained within Teck's aerially-released waste "have come to be located in . . . the surface water and ground water, sediments, upland areas, and biological resources which comprise the Upper Columbia River Site."<sup>129</sup> Because these claims focus on the accumulation of deposits in the ground, rather than in the air, it is clear they do not violate *CCA EJ*'s order-of-deposit rule.<sup>130</sup>

Rather than apply the temporal requirement shakily articulated in *CCA EJ*, the court should have recognized the previous panel had "implicitly performed a case-specific analysis into the nature of the pollution" and should have done the same here.<sup>131</sup> Similar to the so-called "demonstrable contact" standard articulated in this

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<sup>125</sup> See *Ctr. for Cmty. Action & Envtl. Justice*, 764 F.3d at 1022 & n.3.

<sup>126</sup> See Brief of the United States as Amicus Curiae in Support of Appellees at 14–15, *Pakootas*, 830 F.3d 975 (No. 15-35228).

<sup>127</sup> *Id.* at 11–12 (emphasis in original) (quoting *Ctr. for Cmty. Action & Envtl. Justice*, 764 F.3d at 1029).

<sup>128</sup> See *infra* discussion of extraterritoriality and CERCLA, Part V.B.

<sup>129</sup> *Pakootas*, 830 F.3d at 979.

<sup>130</sup> See *supra* note 95.

<sup>131</sup> HARV. L. REV. *CCA EJ*, *supra* note 95, at 1279 (noting the court could have analyzed such factors as "the density of aerosolized waste, breadth of fallout area, concentration of contamination, site of emission, and relevant legislative history").

paper,<sup>132</sup> a fact-intensive analysis better serves the purpose of CERCLA by not excising entire media of transmission from its ambit. Had the Ninth Circuit undertaken this type of inquiry in *Pakootas*, weighing factors such as the enormous quantity and extensive timeline of Teck’s aerial emissions, their demonstrated presence in the soils and waters of the UCR,<sup>133</sup> and the extent to which other sources were or were not sufficient to account for the contamination, the court may have reached a different conclusion.

Furthermore, as the *Pakootas* court acknowledged, there may be a basis for “deviating” from earlier cases where a rigid application “‘would thwart the overall statutory scheme or lead to an absurd result’ in some way not considered by those cases.”<sup>134</sup> Intuitively, the wholesale exclusion of airborne contamination from a regulatory scheme designed to efficiently address pollution and protect public health would seem to be an absurd result, as it thwarts CERCLA’s guiding purposes.<sup>135</sup> After all, the *Pakootas* court neither claims nor furnishes evidence to suggest that aerial contamination represents a somehow negligible effect on human and environmental health as compared to water or ground-based discharges.

The Ninth Circuit’s reliance on *Carson Harbor* was equally misguided. Like *CCA EJ*, that case should have been distinguished from *Pakootas* on both factual and legal grounds. Asserting that *Carson Harbor* stands for the proposition that no passive migration of contaminants can qualify as a RCRA or CERCLA “disposal”<sup>136</sup> was the *Pakootas* court’s major error with respect to the former case. Instead, the earlier en banc hearing announced a more limited holding, in which it “reject[ed] the absolute binary ‘active/passive’

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<sup>132</sup> See *supra* Part IV.B.

<sup>133</sup> EPA UAO, *supra* note 16, § II, ¶¶ 4–6.

<sup>134</sup> *Pakootas*, 830 F.3d at 985 (quoting *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013)).

<sup>135</sup> As discussed earlier, CERCLA was designed to (1) rapidly and efficiently rehabilitate contaminated sites and (2) ensure that the entities responsible for creating the pollution pay the clean-up costs. See *supra* text accompanying notes 48–49, Part III.A.

<sup>136</sup> *Pakootas*, 830 F.3d at 983 (9th Cir. 2016) (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 862, 879 & n.7).

distinction” employed in other jurisdictions,<sup>137</sup> concluding only that “‘disposal’ does not include passive soil migration but that it may include other passive migration.”<sup>138</sup> There the court reasoned that even while Congress would not have intended all passive migration to qualify as a CERCLA “disposal,” if disposals “include only releases directly caused by affirmative human conduct,” then CERCLA’s strict liability scheme for “any person who at the time of disposal . . . owned or operated any facility” would “make no sense.”<sup>139</sup> Thus, the *Pakootas* panel’s notion that *Carson Harbor* eliminated liability for passive migration is not only misleading, but also mistaken.

Instead, even if Teck’s aerial deposits were “passive,” the court should have considered whether they were similar enough in character to the subset of passive migration excluded under *Carson Harbor* to compel the finding that Teck’s contamination, too, was the excluded kind. Although the earlier en banc holding stopped short of elucidating which types of passive migration still may trigger CERCLA liability, the numerous and material factual disparities between the two cases should have guided the *Pakootas* court to distinguish the former. *Carson Harbor* concerned the decades-long migration of hydrocarbons through soil, which continued after the conclusion of the petroleum production that unleashed it, rather than the highly mobile, and ongoing, aerial contamination of Teck’s smelter. The *Carson Harbor* court also worried that if it announced an interpretation of “disposal” embracing “all subsoil passive migration” it would virtually eliminate the innocent landowner defense.<sup>140</sup> There is no such

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<sup>137</sup> *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 879–80 (9th Cir. 2001).

<sup>138</sup> *Id.* at 881.

<sup>139</sup> *Id.*

<sup>140</sup> *Carson Harbor*, 270 F.3d at 882. The innocent landowner defense prevents CERCLA liability where “[a]t 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). The court worried the already narrow defense would disappear by adopting a “never-ending” theory of disposal. *Id.*

concern in *Pakootas*, as Teck has been, and continues to be, responsible for the discharges of its plant.<sup>141</sup>

Furthermore, even if *Carson Harbor* had eliminated the liability for passive migration, the *Pakootas* court could have simply recognized that Teck's aerial emissions were anything but passive. Unlike the "gradual spread" of spilled chemicals,<sup>142</sup> Teck unleashed direct and affirmative discharges from its smelting process, through a 400-foot tall stack built precisely to carry the hazardous waste gases away from the plant.<sup>143</sup> After discharge, the contained solid wastes from Teck's flue gas settle out across both the land and water of the UCR, bringing Plaintiff's aerial disposition theory well within the intent of RCRA/CERCLA "disposal."<sup>144</sup>

It would be difficult, even disingenuous, to argue that continuously burning an array of fuels and metals in a tightly orchestrated chemical equation for over one hundred years would result in the kind of unexpected discharge one might ascribe to a leaky barrel. To the extent the court appears to consider a time requirement, even allowing that the cumulative deposits accrued in the UCR over a long time, it is unlikely that any particular day's worth of discharges hung in the atmosphere for decades before falling back to the earth.

Finally, there were significant policy reasons for the Ninth Circuit to reject Teck's arguments and find its aerial emissions

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<sup>141</sup> Teck Cominco Metals, Ltd. is the product of a 2001 merger between Teck, Ltd. and Cominco (formerly Consolidated Mining), which had operated the smelter since 1906. *See Hess, supra* note 17, at 5. Due to the "strict, joint, several, retroactive and perpetual" nature of CERCLA liability, Mugdan, *supra* note 10, Teck is a potentially responsible party for the entirety of the smelter's emissions during the last century and beyond. *See also* discussion of CERCLA liability, *supra* Part III.A. Moreover, the "innocent landowner" defense contemplates an unknowing secondary purchaser, such as the Partnership defendants in *Carson Harbor, supra* Part IV.A. This defense would be unavailable in a merger between one PRP and another mining company familiar with the impacts of the first's operation, and that continued the site's operation jointly after the merger.

<sup>142</sup> *Carson Harbor*, 270 F.3d at 879.

<sup>143</sup> Robinson-Dorn, *supra* note 20, at 244.

<sup>144</sup> *See* 42 U.S.C. § 6903(3) (2016).

within the reach of CERCLA. Since the enactment of the major national environmental legislation and increasingly in recent years, citizen suits have been instrumental tools in enforcing the missions of the major environmental regulatory schemes, given that:

The cooperative framework, which presupposes diligent and uniform state regulation, has broken down. State and federal enforcement budgets are being slashed, reducing government oversight and potentially allowing more violations of law to go unpunished. Moreover, political considerations--including interstate competition and pressure from industry to minimize regulation--threaten to further compromise the states' ability to enforce the laws. As government enforcement becomes increasingly less reliable, citizen enforcement of environmental law is more necessary than ever.<sup>145</sup>

Against this backdrop, one might expect the Ninth Circuit's decision to exclude an entire media of pollution from the reaches of the most important environmental remediation statute would have only resulted from restrictive precedent leaving no other option. As this review of the Ninth Circuit's earlier holdings has shown, that was not the case. Despite numerous reasons to distinguish *CCA EJ* and *Carson Harbor*, the court failed to do so, creating a regulatory gap further considered below.

## V. AERIAL FALLOUT: PROSPECTIVE IMPLICATIONS

The Ninth Circuit was correct to note its decision will provoke "ripple effects,"<sup>146</sup> which are considered here. Specifically, this part analyzes the narrower effects on the remainder of the *Pakootas* saga in Section A, before attempting to diagnose the far larger implications for CERCLA litigation in the United States—and beyond—in Section B. To demonstrate the potential restrictions in

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<sup>145</sup> Will Reisinger et. al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 3 (2010).

<sup>146</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 982–83 (9th Cir. 2016).

CERCLA's reach, Section C studies the airborne health threats accruing from the maquiladora system of the Mexican Borderlands through the lens of the *Pakootas* decision.

*A. Effects on Remainder of Pakootas Litigation*

The Ninth Circuit's July 2016 decision in *Pakootas* has the potential to limit the outcomes of not only the case at hand, but also all future CERCLA and RCRA suits. In the current case, the effects may be more limited. The *Pakootas* Plaintiffs developed a number of theories of CERCLA liability,<sup>147</sup> of which aerial disposition was only one approach. Even by limiting "disposal" to hazardous waste that is "first placed 'into or on any land or water,'"<sup>148</sup> the Plaintiffs will be able to proceed with their "river pathway" theory. These claims are based on the up to 145,000 tons annually (until 1995) of heavy metal-laden slag the Trail Smelter discharged directly into the Columbia River, where it flowed into the UCR.<sup>149</sup> Although the Ninth Circuit has previously determined that Teck may be subject to CERCLA liability under this theory of disposition,<sup>150</sup> excluding the aerial claims may prevent restoration of damage caused by Teck's operations, but not directly attributable to its waterborne discharges. Whatever its impact to these facts on remand, the application of this holding to the wider CERCLA field has the potential to cause far greater havoc.

*B. Potential Effects Across CERCLA Litigation*

As the Ninth Circuit notes, "disposal" recurs throughout CERCLA provisions.<sup>151</sup> Indeed, the term appears, among other places: to define a "facility;"<sup>152</sup> within the enumerated varieties of "release;"<sup>153</sup> and in the definitions of three out of the four classes of

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<sup>147</sup> *Id.* at 978–80.

<sup>148</sup> *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF R. Co.*, 764 F.3d 1019, 1024 (9th Cir. 2014).

<sup>149</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069–70 (9th Cir. 2006).

<sup>150</sup> *Id.* at 1082.

<sup>151</sup> *Pakootas*, 830 F.3d 975, 982–83.

<sup>152</sup> 42 U.S.C. § 9601(9) (2016).

<sup>153</sup> *Id.* § 9601(22).

“responsible persons,”<sup>154</sup> within which a defendant must fall for CERCLA liability to attach. The result is to arm potentially responsible parties at any CERCLA site involving a question of airborne contamination with a powerful precedent to argue against their liability.

Moreover, this decision may eliminate a promising and unique avenue for reaching the entry of transnational air pollution into the United States. Trans-border pollution presents a thorny problem for modern nations, as a receiving country will be unable to enforce its substantive law against the producing country.<sup>155</sup> While CERCLA is no exception to this anti-extraterritorial doctrine,<sup>156</sup> the Ninth Circuit’s first *Pakootas* decision in 2006 demonstrated that imposing liability on an extraterritorial polluter who causes damage *within* the United States is not an extraterritorial application of the law.<sup>157</sup> Comparatively, the same court was clear that applying United States laws governing the *production* of pollution abroad (as opposed to its *effects* domestically), would be impermissible as an extraterritorial application of law.<sup>158</sup> This suggests that other national regulatory schemes such as the CAA and CWA will be unavailable for any cross-border suits. Instead, CERCLA would be uniquely poised to deal with the trans-border contamination. The latest *Pakootas* decision eliminates CERCLA’s ability to reach threats of aerial pollution such as the maquiladoras just across the United States’ southern border.

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<sup>154</sup> *Id.* § 9607(a)(1)–(4).

<sup>155</sup> In the United States, there is a “presumption against extraterritoriality” as it relates to the reach of domestic law. *See, e.g.*, *Small v. United States*, 544 U.S. 385, 388–89 (2005) (“[Common sense] has led Court to adopt the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.”).

<sup>156</sup> *Hess*, *supra* note 17, at 24–25.

<sup>157</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074 (9th Cir. 2006) (“Because the CERCLA facility [i.e., the UCR site of contamination,] is within the United States, this case does not involve an extraterritorial application of CERCLA to a facility abroad.”).

<sup>158</sup> *Id.* at 1078 (noting that the “Canadian equivalent of RCRA” is applicable to Teck’s disposals *within* Canada).

### C. *Un Ejemplo: las Maquiladoras*

The Maquiladora Program began in 1965 as an economic initiative by the Mexican government and incentivized foreign companies to open “maquiladoras,” or manufacturing plants in the region bordering the United States.<sup>159</sup> In 1990 there were 1,700 maquiladoras, but following the passage of NAFTA, that number had grown to 2,810 by 2006, over 80% of which were located in states bordering the United States.<sup>160</sup> However the significant economic and industrial growth spurred by the program has outpaced measures to manage industrial waste, leading to failing air and water quality.<sup>161</sup> This problem spans both sides of the border, as the United States and Mexico share a number of common airsheds.<sup>162</sup> The U.S. and Mexican governments are working together on a program to curb sources of trans-border pollution from both countries through a non-binding bottom up plan called Border 2020, authorized under the La Paz agreement between the two countries.<sup>163</sup>

Although the overall scheme offers the opportunity to reduce airshed-wide pollution, CERCLA suits have the flexibility to swiftly identify and penalize the worst polluters, provided their discharges of hazardous materials could be traced into the United States. Should the well-intentioned process break down or advance too slowly, after the Ninth Circuit’s 2006 *Pakootas* decision,

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<sup>159</sup> U.S. ENVTL. PROT. AGENCY & SECRETARÍA DE MEDIO AMBIENTE Y RECURSOS NATURALES, BORDER 2020: U.S. MEXICO ENVIRONMENTAL PROGRAM 10, [https://www.epa.gov/sites/production/files/documents/border2020summary\\_0.pdf](https://www.epa.gov/sites/production/files/documents/border2020summary_0.pdf) (last visited Oct. 26, 2016) [hereinafter EPA BORDER 2020].

<sup>160</sup> *Id.*

<sup>161</sup> Eileen Zorc, *The Border 2012 U.S.-Mexico Environmental Program: Will A Bottom-Up Approach Work?*, 16 GEO. INT’L ENVTL. L. REV. 533, 544 (2004). See also EPA BORDER 2020, *supra* note 159, at 11.

<sup>162</sup> EPA BORDER 2020, *supra* note 159, at 11. An airshed is conceptually analogous to a watershed, but deals with the body of air above a specific geography that, due to “topography, meteorology, and/or climate, is frequently affected by the same air mass.” U.S. FOREST SERV., *Glossary of National Fire and Air Workshop Terms* 1, <http://www.fs.fed.us/eng/rsac/airQ/Glossary.pdf> (last visited Nov. 19, 2016).

<sup>163</sup> *Id.*



which clarified that CERCLA does apply to domestic deposits of internationally-generated contamination, citizens could have brought suit to compel either remediation or reimbursement for undertaking the cleanup themselves.

This backstop is desirable for two reasons. First, it is elegant to apply U.S. law to reach border maquiladoras that “dispose” waste into the United States because historically, a majority of the plants have been owned by U.S. companies.<sup>164</sup> Secondly, and more importantly, where the courts of Country A permit suits to reach a foreign corporation in Country B that has caused “direct harm to the sovereign through transnational pollution,” the principle of comity<sup>165</sup> suggests that the foreign nation, B, now open to suits, will embrace a similar policy as to corporations in Country A.<sup>166</sup>

In theory, the specter of being exposed to unlimited liability in a foreign country for allowing waste products to pollute there is a powerful incentive to self-regulate. In practice, the first phase of the *Pakootas* litigation provoked the U.S. National Mining Association to send letters to then-Secretary of State Colin Powell, Attorney General John Ashcroft, and EPA administrator Michael Leavitt, “imploring the administration to try and resolve the issue through diplomatic means, as a resort to litigation could be ‘devastating’ if U.S. corporations were forced to defend suit in either Canada or Mexico.”<sup>167</sup>

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<sup>164</sup> EPA BORDER 2020, *supra* note 159, at 10.

<sup>165</sup> A fundamental principle of international law, comity concerns foreign states’ mutual recognition of one another’s acts and laws, and the reciprocity of jurisdictional limits to “maintain[] amicable and workable relationships between nations.” See Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 2–4 (1991) (quoting Harold Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 589 (1983)).

<sup>166</sup> Bret Benedict, *Transnational Pollution and the Efficacy of International and Domestic Dispute Resolutions Among the NAFTA Countries*, 15 L. & BUS. REV. AM. 863, 886 (2009). Importantly, even in the absence of a foreign CERCLA equivalent, Superfund itself authorizes foreign claimants to “assert a claim to the same extent” as a U.S. citizen under particular circumstances. 42 U.S.C. § 9611(l)(1)–(4).

<sup>167</sup> Bret Benedict, *Transnational Pollution and the Efficacy of International and Domestic Dispute Resolutions Among the NAFTA Countries*, 15 L. & BUS. REV. AM. 863, 886 (2009).

Thus, the *Pakootas* decision effectuates a twofold affront to the border region. By wholly restricting claims based on the noxious aerial emissions across the southern border it creates a regulatory gap which subjects U.S. citizens to air pollution beyond redress, but it also deprives Mexican citizens of the benefits that would accrue from U.S. companies acting to minimize environmental liability to their southern neighbors.

## VI. CONCLUSION

As the first case to consider this specific question of CERCLA liability,<sup>168</sup> the Ninth Circuit missed an opportunity to reaffirm CERCLA's broad mandate to protect environmental and human health through quick and effective cleanup of hazardous wastes. The *Pakootas* opinion painted the circuit's earlier precedents in *CCA EJ* and *Carson Harbor* as creating a narrow and clearly defined box into which the current controversy must fit precisely. However, a cursory review of *Carson Harbor* contradicts the court's announcement in *Pakootas* that it was bound to a rule against passive migration. In spite of some similarities, *CCA EJ* was likewise distinguishable on several legal and factual grounds, including the unavailability of the CAA as an extraterritorial application of U.S. law and the focus of the *Pakootas* claims on the land deposition of Teck's contamination, as opposed to airborne effects alone, saving the theory from the court's order-of-disposal rule.

Instead, by reading a media-based restriction into "disposal," its holding creates a dangerous new precedent in the federal circuits and provides a springboard for industry arguments against liability for aerial contamination. Although the Clean Air Act may independently reach some of these claims, both the *Pakootas* case and the maquiladoras example demonstrate the gaps in protection that will accrue through widespread adoption of the Ninth Circuit's

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<sup>168</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 980 (9th Cir. 2016) ("In over 30 years of CERCLA jurisprudence, no court has impliedly or expressly addressed the issue of whether aerial emissions leading to disposal of hazardous substances 'into or on any land or water' are actionable under CERCLA.").

reasoning. Given the potentially major impacts of this decision, the *Pakootas* Plaintiffs will almost certainly seek certiorari. The Supreme Court should grant that petition and dispose with the Ninth Circuit's limited definition for good.