CLIENT ALERTS & INSIGHTS

Superfund Defenses That The Government Hopes You Don't Know About, Part 3

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The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[1] also known as the Superfund law, imposes strict, joint and several, and retroactive liability. Over time, many companies and their legal counsel have concluded that fighting a CERCLA claim, particularly one asserted by the government, is in most instances a waste of time and resources, and that therefore litigation resources are better allocated to settlement. While the CERCLA case law is indeed very plaintiff-friendly, the scope of liability is not as limitless as the government would like potential defendants to believe. There are certain types of activity that may contribute to the contamination of a site, but nevertheless do not give rise to CERCLA liability.

This piece is the third in a series of three installments focusing on little-known legal defenses to CERCLA allegations that a defendant "arranged for the disposal or treatment" of a hazardous substance at a site. 42 U.S.C. §9607(a)(3). Part 1 discussed the legal basis for asserting that legitimate recycling transactions are not arrangements for disposal. Part 2 outlined the legal basis for the argument that CERCLA liability does not attach to most wastewater discharges subject to the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program, including discharges that violate permit requirements.

This final installment will address the legal basis for the defense that emission of airborne hazardous substances is not an arrangement for disposal of those substances at the sites where they ultimately land. CERCLA plaintiffs have alleged such liability for many years, particularly with respect to air emissions from primary or secondary metal smelters. However, the legal strength of this liability theory was not squarely addressed by a court until relatively recently. As explained below, in *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016), the U.S. Court of Appeals for the 9th Circuit held that hazardous substances deposited at a Superfund site via aerial deposition from a remote source have not been disposed of within the meaning of CERCLA.

CERCLA "Disposal" is Based on Concepts of Hazardous Waste Management

In determining whether a defendant "arranged for disposal" of hazardous substances at a Superfund site, CERCLA expressly directs the courts to apply the definition of "disposal" that appears in Section 1004 of the Solid Waste Disposal Act[2] (aka the Resource Conservation and Recovery Act or "RCRA").[3] RCRA is the primary federal statute directed to the management of "solid wastes," including a subset deemed "hazardous wastes," by both waste generators and the facilities that treat, store or dispose of such wastes. The term "solid waste" is a misnomer, as that term's statutory definition encompasses "solid, liquid, semisolid, or contained gaseous material. . . ."[4]

Under RCRA, "'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."[5] The legal argument for CERCLA liability is that emission of hazardous substances into the atmosphere is CERCLA disposal when it results in such substances being "deposited . . . into or on the land or water" of a Superfund site. In practice, however, the RCRA program generally does not regulate routine air emissions from industrial operations as disposal, as such emissions are not "contained gaseous materials."

Pakootas v. Teck Cominco Metals, Ltd.

In *Pakootas,* Court of Appeals was called on to decide whether a Canadian smelter located 10 miles north of the United States' border "arranged for disposal" of hazardous substances by emitting those substances from its on-site smokestacks, after which they allegedly traveled through the air and were deposited at the Upper Columbia River Superfund Site in Washington state. The court characterized the plaintiff's argument, which was based on the inclusion of "deposit" in the definition of "disposal," to be "a reasonable enough construction" of the statutory definition and one that the court "might be persuaded to adopt,"[6] but ultimately concluded that the theory was incompatible with the 9th Circuit's prior CERCLA and RCRA precedents on the meaning of "disposal."

Specifically, the court found in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (en banc), the holding that CERCLA "deposit" connotes the physical act of putting down or placing a waste, and does not include the passive environmental migration of the waste after it has been put down or placed. In *Center for Community Action and Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1019 (9th Cir. 2014), the court found the holding that emissions of waste into the air only constitute RCRA "disposal" if the emitted waste was first placed on land or water.

In *Carson Harbor*, the owner of a contaminated mobile home park sued, among others, the preceding owner of the property to recover cleanup costs under CERCLA. Although the hazardous substances were present on the site when the preceding owner acquired the property, the current owner alleged that the contamination's subsurface migration during the prior owner's tenure constituted a new act of "disposal" for purposes of CERCLA. The 9th Circuit disagreed, holding "that the gradual passive migration of contamination through the soil . . . was not a 'discharge, deposit, injection, dumping, spilling, leaking, or placing' and, therefore, was not a 'disposal'" within the term's meaning for CERCLA purposes.[7]

With respect to the term "deposit," the court noted "the term 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. Indeed, where Congress intended such a meaning, it employed specific terminology, such as 'leaching'. . . ."[8] The *Pakootas* court apparently viewed the passive migration of contaminants in the air as legally equivalent to the passive migration of contaminants below the ground, which *Carson Harbor* held was not CERCLA disposal.

In *Center for Community Action*, an environmental advocacy organization brought a RCRA citizen suit against the owners of railroad yards at which the exhaust from diesel-fueled railroad engines included fine particulate matter. The plaintiff alleged that these particulates were "solid wastes" that were "disposed of" when the defendants permitted air currents to transport them to off-site land or water.

The 9th Circuit disagreed. At the outset of its analysis, the court noted that RCRA's drafters had included "emitting" in that statute's definition of "release," but not in its definition of "disposal," indicating that Congress clearly knew how to include air emissions within the scope RCRA disposal, but chose not to do so.[9] The court also found that its textual interpretation was supported by RCRA's legislative history, as well as that of the Clean Air Act. Therefore, the court held that "by emitting diesel particulate matter from their railyards and intermodal facilities, Defendants do not 'dispose' of solid waste in violation of RCRA."[10] To the *Pakootas* court, *Center for Community Action* "involved essentially the same facts" as its case.[11]

Pakootas treated the en banc decision in *Carson Harbor* as binding precedent and *Center for Community Action* as nonbinding, but persuasive, precedent. Finding nothing in CERCLA's legislative history and no agency interpretations that supported a different outcome,[12] the court held that the defendant smelter was entitled to dismissal of plaintiff's CERCLA "arranged for disposal" claim.

Is *Pakootas* Inconsistent With the "Federally Permitted Release" Exemption?

As discussed in Part 2 of this series, CERCLA includes an exemption from cleanup liability for contamination that arises from one of eleven enumerated categories of "federally permitted releases." *See* 42 U.S.C. §9607(j). One of those exemptions addresses air emissions, namely:

> any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these section[13]

One might ask why, if Congress did not intend for aerial deposition to constitute CERCLA disposal, the drafters bothered to include any air emissions among the categories of federally permitted releases. While the *Pakootas* court found no evidence in CERCLA's legislative history that its drafters had ever considered the issue of liability based on aerial deposition,[14] the inclusion of certain regulated air emissions within the scope of federally permitted releases is clearly neither surplusage, nor inconsistent with the court's holding.

In addition to imposing cleanup liability based on "disposal," CERCLA imposes other enforceable obligations related to "releases" of hazardous substances. In contrast to the definition of "disposal," CERCLA's definition of "release" expressly encompasses "emitting . . .into the environment. . . ."[15] Release reporting obligations are imposed under both CERCLA,[16]

and the Emergency Planning and Community Right-to-Know Act,[17] which was enacted as part of the 1986 amendments to CERCLA. However, both of these reporting requirements include exemptions for federally permitted releases. Thus, the exemption for certain air emissions regulated under the Clean Air Act serves a substantive purpose in defining the scope of CERCLA's reporting requirements, even if such releases are not separately deemed disposal.[18]

Practical Considerations

While *Pakootas* is binding precedent in the district courts of the 9th Circuit, outside that circuit (and possibly the Southern District of Ohio) the question of whether air emissions constitute CERCLA disposal remains largely unaddressed.[19] Given the federal courts' general inclination to construe CERCLA liberally to facilitate the imposition of liability, the defense is far from settled law. Nevertheless, the issue clearly presents litigation risk for potential plaintiffs and thus should, at a minimum, provide potential defendants with a measure of settlement leverage that they may not have known they had.

The air emission defense will likely have less value for defendants who contributed to contamination at a Superfund site via an indisputable form of CERCLA disposal (such as the dumping of smelter slag) along with aerial deposition. The CERCLA disposal would be enough to render the emitter liable and a court would likely impose on the emitter the substantial technical burden of delineating where, if anywhere, site contamination was solely attributable to aerial deposition. Moreover, even if not treated as the basis for liability, an otherwise liable defendant's aerial contributions could be deemed an "equitable factor" considered by the court in allocating liability among defendants. *See* 42 U.S.C. §9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

Conclusion

Many Superfund cases are settled before they are even filed. The *Pakootas* case provides another example of why potential CERCLA defendants should fully understand and carefully review their alleged connection to a site in light of CERCLA's specific liability criteria before engaging in settlement discussions. Not all conduct that results in contamination at a Superfund site falls within the statute's liability provisions.

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[1] 42 U.S.C. §9601, *et seq.*

[2] 42 U.S.C. §6903.

[3] *See* 42 U.S.C. §9601(29).

[4] See 42 U.S.C. §6903(27).

[5] *Id.* §6903(3) (emphasis added).

[6] 830 F.3d at 983.

[7] 270 F.3d at 879.

[8] *Id.* at 879 & n.7 (emphasis added).

[9] 764 F.3d at 1024-25.

[10] *Id.* at 1030. The court had no need to reach the separate issue of whether diesel particulates even constituted "solid waste" under RCRA.

[11] The U.S. District Court for the Southern District of Ohio declined to adopt the 9th Circuit's construction of RCRA disposal, holding that the term encompassed the aerial deposition of perfluorinated compounds emitted from stacks at a chemical manufacturing facility. *See Little Hocking Water Association, Inc. v. E.I. du Pont Nemours & Co.*, 91 F.Supp.3d 940, 964-65 (S.D. Ohio 2015). There were no CERCLA claims in the case, so the court did not opine on the scope of CERCLA disposal.

[12] Notwithstanding CERCLA's express direction that disposal "shall have the meaning provided in" RCRA, *see* 42 U.S.C. §9601(29), the court treated this as only a "presumption" that disposal would mean the same thing under both statutes in all cases. *See* 830 F.3d at 984 & n.9. The court, however, found "no compelling reason to override the presumption of consistent usage in this case." *Id.*

[13] 42 U.S.C. §9601(10)(H).

[14] 830 F.3d at 985.

[15] 42 U.S.C. §9601(22).

[16] See 42 U.S.C. §9603(a).

[17] *See* 42 U.S.C. §11004(a).

[18] *See United States v. Gibson Wine Co.*, No. 1:15-cv-1900-AWI-SKO, 2017 WL 1064658 at *9 & n.9 (E.D. Cal. March 20, 2017) (Pakootas did not address liability for failure to report airborne releases).

[19] In *Cyprus Amax Minerals Co. v. TCI Pacific Communications, Inc.*, No. 11-cv-0252-CVE-PJC, 2017 WL 2662195 at *8 (N.D. Okla. June 20, 2017), the court opined that the 10th Circuit would follow *Pakootas*, but found that factual disputes precluded summary judgment at that time.