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**Luncheon Briefing: Keeping Up with Real Time Liability
Developments: CERCLA Air Emissions, Waters of the US and More**

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Recent Developments with Respect to Industrial Air Emissions and the Scope of Jurisdictional Waters

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Can Air Emissions From Industrial Operations Trigger NRD Liability?

Pakootas v. Teck Cominco Metals, Ltd., No. 15-35228 (9th Cir.)

- Briefing Almost Completed
- No Argument Date Set

Factual Background

- Teck Smelter in Trail, B.C.
- Allegedly emits gaseous stream containing CERCLA hazardous substances (e.g., lead, arsenic, cadmium, mercury)
- Particles land in U.S. at Upper Columbia River Superfund Site
- Is Teck an “Arranger for Disposal” under CERCLA §107(a)(3)?

Statutory Standard for Arranger Liability

“[A]ny person who . . . arranged for **disposal** . . . of hazardous substances . . . at any **facility** . . . from which there is a **release** or threatened release . . . of a hazardous substance.”

CERCLA § 107(a)(3)

Key Terms

- Disposal:** “the discharge, deposit, . . . spilling, leaking, or placing of any [hazardous substance] into or on any **land or water** so that such [substance] or any constituent thereof may enter the environment or be **emitted into the air** or discharged into any waters, including ground waters.” CERCLA § 101(29); RCRA § 1004(3).
- Facility:** “any site or area where a hazardous substance has been deposited, stored, **disposed of**, or placed, or otherwise come to be located.” CERCLA §101(9).
- Release:** “any spilling, leaking, . . . **emitting**, . . . discharging, . . . leaching, . . . or **disposing** into the environment.” CERCLA § 101(22).
- Environment:** includes “ambient air.” CERCLA § 101(8).

Legal Position of Parties

Tech Position

- Emission into the ambient air is not a “disposal” – not a discharge to land or water
- CERCLA distinguishes throughout between “disposal” and “emitting” to air. “Release” includes air emissions; “disposal” does not
- Disposal does not include substances that come to be located at a site due to passive migration through ambient air
 - Otherwise all emissions are disposals, contrary to statutory definitions

Teck position is supported by several national trade associations (NMA, NAM, U.S. Chamber, ACC)

Legal Position of Parties

Policy/Consistency Arguments of Teck

- Innocent Purchaser
- Bona Fide Prospective Purchaser
- Interference with CAA regulation

Legal Position of Parties

Plaintiffs' Position

- When heavier than air particles hit ground, that is a disposal – plain and simple
- No provision of statute states that disposal must occur immediately upon person losing possession of the substance
- No difference between slag disposal in Canada, and air emissions in Canada, so long as the materials come to be located at the UCR site

Many courts (and private parties) have assumed this to be correct interpretation

Plaintiffs' position supported by U.S.

Open Issue

Differing views in RCRA context:

CCA EJ v. BNSF Railway, 764 F.3d 1019 (9th Cir. 2014)

Little Hocking Water Ass'n v. E.I. DuPont de Nemours & Co.,
No. 2:09-CV-1081, 2015 WL 1038082 (S.D. Ohio Mar. 10, 2015)

Passing Statements in CERCLA Cases

New York v. Solvent Chemical Co., 685 F. Supp. 2d 357, 438
(W.D.N.Y. 2010), *rev'd in part, vacated in part*, 664 F.3d 22 (2d Cir. 2011)

ASARCO LLC v. CEMEX, 21 F. Supp. 3d 784 (W.D. Tex. 2014)

Am. Int'l Specialty Lines Ins. Co. v. United States, No. CV 09-1734,
2010 WL 6235768 (C.D. Cal. June 30, 2010)

Consequences of Ruling in Favor of Plaintiffs

- Potential NRD liability at sites hundreds of miles away from the actual emissions site that have been contaminated by others
 - No control over where substances land
- Potential liability at multiple sites due to same emission
- Deep pocket target
- Issues:
 - Proof of “disposal”/source
 - Federally Permitted Release
 - Compliance/exceedance
 - Specifically identified substance
 - Burden of proof
 - Causation/contribution to NRD
 - Divisibility

Does New CWA Rule Defining Navigable Waters Impact Potential NRD Liability?

June 29, 2015: EPA and Army Corps publish rule defining “navigable waters” for purposes of Clean Water Act

Industry: Greatly expands EPA/Corps jurisdiction

- All “tributaries” of Traditional Navigable Waters, including ditches and ephemeral/intermittent drainages
- “Adjacent” (including “neighboring”) wetlands and isolated waters
- “Significant Nexus” waters

Many Lawsuits:

Rule preliminarily enjoined in 13 States

Significance for NRD Liability Unclear

- Natural resources, as defined in CERCLA and Oil Pollution Act, includes all surface waters – not just “navigable waters” as defined in CWA
 - OPA § 1001(20)
 - CERCLA § 101(16)
- At first glance, new CWA Rule may therefore not alter ability of **some** Trustee to pursue NRD with respect to any surface water, whether or not jurisdictional under the CWA
- Or perhaps, it may

Possible Impact on NRD Liability Due to Discharges of Oil

- NRD caused by discharges/spills of oil
 - Not governed by CERCLA
 - Trigger for NRD Liability under OPA and CWA is a discharge into a “***navigable water***”, or natural resources belonging to or under exclusive management authority ***of U.S.***
 - CWA §§ 311(f)(4), (b)(3)
 - OPA § 1002
 - Arguably no ability of U.S. or States/Tribes to sue for NRD under CWA or OPA due to discharges of oil to non-navigable waters
 - New CWA rule may therefore increase instances where NRD liability may be triggered due to discharges of oil
 - e.g., oil spill in ephemeral drainageway in arid area, or in isolated pond

Potential Impact on NRD Trustee

- Federal NRD Trustee arguably has concurrent jurisdiction with States/Tribal Trustees for Injured “Navigable Waters”
 - › CERCLA § 101(16) (resources “managed by” or “otherwise controlled by” the United States)
- Federal NRD Trustee definitely has concurrent jurisdiction with State Trustee over navigable **or** non-navigable waters on federal land
 - › 40 C.F.R. §300.600(b)(3)
- But no role for Federal NRD Trustee over non-navigable waters that are **not** on federal lands, unless “special” resource is injured – e.g., migratory bird
- Arguably, “navigable waters” rule would create more waters on non-federal lands over which Federal Trustee has jurisdiction

Potential Impact on NRD Trustee

But perhaps not.

Appropriate Trustee for Non-federal lands

- Department of Commerce (*i.e.*, NOAA) if water is navigable by deep draft vessels (40 CFR § 300.600 (b)(1))
- Otherwise: agency authorized to “manage or control” the resource (40 CFR § 300.600 (b)(4))
- Unclear if Federal Trustee has ever sought to recover NRD for navigable waters not on federal land, or who Trustee would be

Significance for NRD Liability

Science Underlying Rule

- Discharges to headwaters, isolated ponds, ephemeral drainages significantly impacts water quality and aquatic habitat hundreds of miles downstream
- Could be used to expand persons whose releases are deemed to contribute to NRD
 - Each case will depend on its particular facts, but EPA/Corps background scientific papers may be used by Trustees to bolster their position