AIR DUD: EMITTERS OF HAZARDOUS SUBSTANCES NOT LIABLE UNDER CERCLA

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Environmental, Land and Natural Resources Alert

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The Ninth Circuit recently ruled in *Pakootas v. Teck Cominco Metals, LTD* (2016 WL 401119) that a facility was not arranging for "disposal" of hazardous substances by emitting them into the air. The facility, therefore, was not liable under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) ("CERCLA").

Pakootas is good news for emission sources, but not such good news for responsible parties seeking cost recovery under CERCLA from companies whose air emissions may have contributed to contamination at CERCLA sites.

In *Pakootas*, the State of Washington and several Native American tribes sought cost recovery and natural resources damages resulting from deposition of air emissions from a smelter into the Columbia River. The District Court denied the smelter's motion to dismiss these claims but then certified the question for review by the Ninth Circuit.

The Ninth Circuit reversed the District Court, premising its decision on a recent prior case under the Resource Conservation and Recovery Act (42 U.S.C. 6901) ("RCRA") in which it held that the definition of "disposal" under RCRA did not include the emission and subsequent deposition of airborne waste materials. (*Center for Community Action and Environmental Justice v. BNSF Railway Company,* 764 F.3d 1019 (9th Cir. 2014)). Since CERCLA incorporates the RCRA definition of "disposal" by reference, the Ninth Circuit reasoned that the facility in *Pakootas* did not "arrange for disposal" of the substances it emitted. The Ninth Circuit acknowledged that CERCLA is to be interpreted broadly to allow for the remediation of contamination but also stated that liability still had to be tied to the language of the statute, which in this case did not provide for liability for parties not engaged in an act of disposal.

From the perspective of operators of stationary sources within the Ninth Circuit, this decision is very good news. Stationary sources have been the subject of state law nuisance claims and should be relieved to see another means of expanding their liability beyond Clean Air Act requirements eliminated. The decision is also positive in that it continues the trend in recent years of courts interpreting the plain language of CERCLA rather than stretching the statute in order to find industrial operations liable regardless of their connection to a given site.

That said, the Environmental Protection Agency ("EPA") and responsible parties have often considered facilities that caused contamination by virtue of their emissions liable under CERCLA, and there are any number of negotiated settlements and consent decrees involving such parties. The decision may complicate such settlements in the future, and it could yield confusing differences in liability at sites where air emissions have caused contamination.

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Liability under CERCLA extends to any person (i) who is the owner or operator of a site, (ii) who owned or operated the site at the time that hazardous substances were "disposed" at the site, (iii) who arranged for the "disposal" or treatment of hazardous substances at the site, or (iv) who transported hazardous substances for "disposal" or treatment at the site. The liability of parties in categories (ii), (iii), and (iv) is expressly tied to "disposal," while the liability of parties in category (i) is not.

Under the logic of the decision, an owner or operator of a facility with an emissions source could be held liable for contamination on its own property under category (i), but not for the contamination on adjacent properties. Liability for contamination on adjacent properties would turn on whether the party was arranging for "disposal" on those properties under category (iii), which is the premise for liability that the Ninth Circuit rejected. Persons who owned or operated a site at the time of "disposal" of hazardous substances, but who are not currently the owner or operator of the site, also should not face liability because their liability also is premised on "disposal" under category (ii).

Another complication is that the RCRA definition of "disposal" specifically includes windblown materials from solid waste placed on land. As a result, a party with both an emission source and waste piles on their property could be liable for contamination on another property under category (iii) for hazardous substances blown from its waste piles, but not for hazardous substances emitted from the emissions source.

The Ninth Circuit also rejected the opportunity to elide the definitions of "release" and "disposal." The Ninth Circuit acknowledged that CERCLA actually addresses air emissions in connection with the term "release," but found that this was not sufficient to modify the strict definition of "disposal." CERCLA's definition of "release" includes "emitting" but specifically excludes emissions from engine exhaust from mobile sources, which implies that non-mobile emissions are "releases." CERCLA also exempts persons responsible for "federally permitted releases" from cost recovery liability and defines such releases to include emissions permitted under the Clean Air Act.

As a result, the Ninth Circuit's decision creates a gap between parties that are factually responsible for creating conditions that require a CERCLA response and those parties that are legally responsible for the costs of addressing that response. EPA's authority to initiate or require action to address contaminated sites is premised on the "release" of hazardous substances, whereas the ability of the government or a private party to recover its cost of responding to a release is premised, in most instances, on "disposal." Accordingly, EPA and other parties could take action and incur costs to respond to releases caused by air emissions, but, under the court's interpretation, liability would not attach to certain categories of responsible parties for those same emissions. Given this disparity, it is unclear that Congress intended to exclude from liability parties who caused contamination on another property as a result of air emissions that are not federally permitted.

For these reasons, *Pakootas* is likely to be debated and questioned in future cases in other circuits. It is, however, now the law of the Ninth Circuit.

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