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Hazardous Substance Emitters in *Pakootas v. Teck Cominco Metals, Ltd.* Are on Cloud Nine: Ninth Circuit Determines that Airborne Emissions Are Not Within the Purview of CERCLA Liability

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2017]

HAZARDOUS SUBSTANCE EMITTERS IN *PAKOOTAS V. TECK
COMINCO METALS, LTD.* ARE ON CLOUD NINE:
NINTH CIRCUIT DETERMINES THAT
AIRBORNE EMISSIONS ARE NOT
WITHIN THE PURVIEW OF CERCLA LIABILITY

“Yes, and how many times can a man turn his head? And pretend that he just doesn’t see? The answer, my friend, is blowin’ in the wind. The answer is blowin’ in the wind.”

-Bob Dylan¹

I. INTRODUCTION

For many years, companies could release hazardous waste from their production facilities directly into the environment.² It was not until the late 1970s that the nation became aware of the detrimental environmental effects of such activity.³ In 1978, when tons of toxic industrial waste buried by the Hooker Company in the 1940s began bubbling up in the backyards of residents of Niagara Falls, New York, it became clear that the government needed to establish a way to hold emitting parties accountable.⁴ Approximately thirty years ago, Congress enacted The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which provided the legal basis to hold hazardous waste emitters accountable for the remediation costs of their damage to the environment.⁵ Since its enactment, personally responsible parties (PRPs) have spent millions of dollars cleaning up hazardous waste sites.⁶ CER-

1. BOB DYLAN, *BLOWIN’ IN THE WIND* (Columbia Recording Studios) (1962).

2. For a further discussion of the reasons for the enactment of CERCLA, see *infra* notes 44-45 and accompanying text.

3. For a further discussion of the reasons for the enactment of CERCLA, see *infra* notes 44-45 and accompanying text.

4. See Gilbert Cruz, *Top 10 Environmental Disasters*, TIME (May 3, 2010), http://content.time.com/time/specials/packages/article/0,28804,1986457_1986501_1986441,00.html (providing background on Love Canal disaster); see also Associated Press, *‘Love Canal’ still oozing poison 35 years later*, NEW YORK POST (Nov. 2, 2013), <http://nypost.com/2013/11/02/love-canal-still-oozing-poison-35-years-later/> (describing need for government intervention).

5. For a further discussion of CERCLA, see *infra* notes 42-58 and accompanying text.

6. For a further discussion of CERCLA, see *infra* notes 42-58 and accompanying text.

284 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

CLA has had far-reaching liability and holds emitters accountable for years following their emitting activity.⁷

Numerous PRPs have been held liable for remediation costs when their activity involved “disposing” of hazardous wastes directly into the air or water; it was unclear, however, whether aerial emissions, which later settle on land or water, were within the purview of CERCLA liability.⁸ In July 2016, the Ninth Circuit addressed this question.⁹ A Native American tribe brought suit against the operators of a smelter plant located in Canada.¹⁰ After years of successful litigation that resulted in finding Teck Cominco Metals, Ltd. liable for solid hazardous emissions, the latest decision discussed whether Teck’s smokestacks’ aerial emissions, which float in the air and later settle on the water, should also be included within this liability.¹¹ The court discussed its reliance on precedent and the persuasive arguments therein, and ultimately held that aerial emissions are not “disposed” of by PRPs in such a way that would hold those parties liable under CERCLA.¹²

First, Section II of this Casenote discusses the underlying facts and the extensive procedural history of *Pakootas v. Teck Cominco Metals, Ltd.*¹³ Section III of this Note discusses CERCLA, the Resource Conservation and Recovery Act (RCRA), the Clean Air Act (CAA), and pertinent cases discussing various interpretations of these acts.¹⁴ Next, Section IV of this Note discusses the majority’s reasoning in *Pakootas*.¹⁵ Section V of this Note touches on the court’s incorrect reliance on precedent, disregard for the broad remediation purposes of the statute, and the creation of a “gap” in coverage be-

7. For a further discussion of the importance of *Pakootas*, see *infra* notes 9-12 and accompanying text.

8. For a further discussion on the background of *Pakootas*, see *infra* notes 18-41 and accompanying text.

9. For a further discussion on the background of *Pakootas*, see *infra* notes 18-41 and accompanying text.

10. For a further discussion on the background of *Pakootas*, see *infra* notes 18-41 and accompanying text.

11. For a further discussion on the background of *Pakootas*, see *infra* notes 18-41 and accompanying text.

12. For a further discussion of the court’s analysis, see *infra* notes 104-126 and accompanying text.

13. For a further discussion of the facts of *Pakootas*, see *infra* notes 18-41 and accompanying text.

14. For a further discussion of important background information regarding *Pakootas*, see *infra* notes 42-103 and accompanying text.

15. For a further discussion of the majority opinion in *Pakootas*, see *infra* notes 104-126 and accompanying text.

tween the CAA and CERCLA.¹⁶ Lastly, Section VI of this Note examines the impact of the *Pakootas* court's holding on hazardous substance emitter's liability, or lack thereof.¹⁷

II. FACTS

The defendant, Teck Cominco Metals, Ltd. (Teck), operated a smelter plant located ten miles north of the United States-Canadian border in Trail, British Columbia.¹⁸ Plaintiffs, the Confederated Tribes of the Colville Reservation (Tribes), owned a reservation that borders the Upper Columbia River Site (UCR Site) and a portion of the riverbed.¹⁹ In addition to the reservation site, the Tribes maintain rights to resources located at the northern end of the UCR Site and neighboring land.²⁰

The Tribes and the state of Washington, as a plaintiff-intervenor, brought an action under CERCLA against Teck for cost recovery and natural resource damage, alleging Teck dumped "slag" into the Columbia River from its smelter operations.²¹ Plaintiffs then amended their complaint to include claims for aerial hazardous substance emissions.²² According to the Plaintiffs, the emitted substances traveled by air currents from the smelter stacks into the UCR Site, which is located in the United States.²³ After traveling through the air, these emissions settled onto either land or water at the UCR Site.²⁴

16. For a further discussion of the issues with the *Pakootas* majority's rationale, see *infra* notes 127-159 and accompanying text.

17. For a further discussion of the potential implications of the *Pakootas* decision, see *infra* notes 160-186 and accompanying text.

18. *See Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 978 (9th Cir. 2016) (providing information regarding defendant party). Smelting is the process by which metal is heated to high temperatures in order to separate the metal from any impurities. *See Smelting*, POLLUTION ISSUES, <http://www.pollutionissues.com/Re-Sy/Smelting.html> (last visited Jan. 13, 2017) (defining smelting). The waste product of smelting includes both "slag" and "contaminant laden air emissions." *See id.*

19. *See Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-LRS, 2016 U.S. Dist. WL 4258929, at *1 (E.D. Wash. 2016) (providing information regarding plaintiff party). The Confederated Tribes of the Colville Reservation is "a sovereign Indian Tribe whose government is recognized by the United States." *See id.*

20. *See id.* (providing context for how Tribes are affected by defendant's emissions).

21. *See Pakootas*, 830 F.3d at 978-79 (explaining premise of action).

22. *See id.* at 979 (explaining procedural posture). The district court originally denied the plaintiff's untimely leave to amend; it then, however, modified its position and permitted the amendment. *See id.*

23. *See id.* (explaining plaintiff's argument for imposing liability).

24. *See id.* (detailing plaintiff's theory of hazardous substances transportation to Columbia UCR Site).

286 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

The emitted substances included “lead compounds, arsenic compounds, cadmium compounds and mercury compounds.”²⁵ These hazardous substances continuously affect “surface water and ground water, upland areas, sediments, and the biological resources [that] comprise the [UCR] Site.”²⁶ Over time, these hazardous substances, whether traveling through air or water, congregate and cause built-up slag at the UCR Site.²⁷ Slag can have detrimental environmental effects, such as bioaccumulation, toxicity problems in animal and plant life, erosion of fish gills, and smothering of habitats.²⁸ Further, humans regularly have direct contact with the slag through traversing the beaches, inhaling the airborne particles, and consuming the fish, agricultural crops, and native plants that digest the contaminated water.²⁹

Teck moved to dismiss the claim, arguing that CERCLA does not impose liability when the hazardous substances are emitted into the air rather than directly into water or land.³⁰ In opposition, the Plaintiffs argued that Teck “deposited” the hazardous substances into the UCR Site by wind, thus meeting the definition of “disposal” within CERCLA.³¹ The Plaintiffs cited several dictionary definitions, all of which referenced the deposition of layers of substance over time.³²

The United States District Court for the Eastern District of Washington rejected Teck’s argument and subsequently denied the motion.³³ Shortly thereafter, the Court of Appeals for the Ninth Circuit issued *Center for Community Action & Environmental Justice v. BNSF Railway Co. (CCAEF)*,³⁴ which held that “emitting diesel particulate matter into the air and allowing it to be ‘transported by wind and air currents onto the land and water’ did not constitute ‘disposal’ of waste within the meaning of the Resource Conservation and Recovery Act [RCRA].”³⁵ Teck subsequently filed a motion for re-

25. *See id.* (naming types of hazardous substances defendant allegedly emitted).

26. *See Pakootas*, 830 F.3d at 979 (explaining negative environmental impacts from emissions).

27. *See id.* (discussing process for slag accumulation).

28. *See id.* at 980 (stating specifically harmful effects of accumulation).

29. *See id.* (discussing human exposure to effects of accumulation).

30. *See id.* (providing defendant’s argument for motion to strike).

31. *See Pakootas*, 830 F.3d at 983 (explaining premise behind plaintiff’s argument).

32. *See id.* (providing plaintiff’s support for argument).

33. *See id.* (noting district court’s denial of motion).

34. 764 F.3d 1019 (9th Cir. 2014).

35. *See Pakootas*, 830 F.3d at 980 (discussing important Ninth Circuit decision, which immediately followed *Pakootas*).

consideration, arguing that the *CCA EJ* court's interpretation should apply because of the cross-reference to RCRA's definition of "disposal."³⁶ The United States District Court for the Eastern District of Washington denied the motion, stating that Teck's "disposal" of emitted wastes occurred when the substances entered the land or water at the UCR Site, as opposed to when the substances were released into the air.³⁷

Because the issue of whether aerial emissions leading to the disposal of hazardous substances into land or water are actionable under CERCLA has never been addressed before, the Ninth Circuit granted the district court's certification of the issue for interlocutory appeal.³⁸ The Ninth Circuit granted permission to appeal, and subsequently reversed and remanded.³⁹ The Ninth Circuit relied on precedent from *Carson Harbor, Ltd. v. Unocal Corporation (Carson Harbor)*,⁴⁰ defining "deposit" akin to "putting down" or placement, which consequently excluded aerial emissions from the purview of CERCLA.⁴¹

III. BACKGROUND

A. CERCLA

1. *The Statute*

CERCLA, also known as the Superfund, was enacted in 1980 and amended in 1986.⁴² This Act provides "strict liability for any person found responsible for depositing hazardous substances in such a way as to endanger human health or safety."⁴³ CERCLA was passed in response to the discovery of a series of toxic waste sites such as Love Canal.⁴⁴ The purpose of CERCLA was to create a

36. *See id.* (discussing Teck's argument for motion for reconsideration).

37. *See id.* (discussing district court's consideration when issuing order).

38. *See id.* (explaining why district court certified issue for interlocutory appeal).

39. *See id.* at 980 (providing appellate court's holding).

40. 270 F.3d 863 (9th Cir. 2001).

41. *See Pakootas*, 830 F.3d at 983 (discussing court's rationale).

42. *See* John L. Ropiequet, *Environmental Law Litigation under CERCLA*, 47 AM. JUR. TRIALS 1 (1993) (providing background for CERCLA enactment).

43. *See id.* (providing language of statute to demonstrate expansive coverage).

44. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-380, *EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels, and More Sites Are Expected to Be Added to the National Priorities List 10* (2010), available at <http://www.gao.gov/assets/310/304124.pdf> (hereinafter referred to as "EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels") (providing context for passage of CERCLA). The Love Canal tragedy involved many years of toxic waste dumping, which resulted in drastic harmful effects, such as the destruction of the local environment and birth defects. *See* Eckardt C. Beck, *The Love Canal Tragedy*,

288 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

mechanism for responding to already existing contamination and to shift the remediation costs from taxpayers to the parties who ultimately benefit from such disposal.⁴⁵ Under CERCLA, potentially responsible parties (PRPs) are liable for either conducting cleanups or reimbursing other parties, including relevant federal agencies, who conduct cleanups on their behalf.⁴⁶ Potentially responsible parties comprise owners and operators of a site, as well as several other parties.⁴⁷

The Environmental Protection Agency (EPA) is responsible for carrying out the Superfund program.⁴⁸ CERCLA authorizes the EPA to fund cleanups using the Hazardous Substance Superfund, which is a trust fund that was financed originally by taxes, but is now financed by appropriations from general revenues.⁴⁹ The process begins when the state notifies the EPA of possible releases of hazardous substances, which may pose a threat to human safety.⁵⁰ The EPA then utilizes a screening mechanism, known as the Hazard Ranking System, to assess the potential threat to human life at the site.⁵¹ If the site hits sufficiently high scores, it is eligible for proposal to the National Priorities List (NPL).⁵² After a site is listed, the EPA or a responsible party will begin the remediation process.⁵³ Following cleanup, the EPA seeks reimbursement from the PRPs if none have yet been identified by the EPA.⁵⁴

Liability under CERCLA is expansive; even if a company disposed of hazardous materials in accordance with statutes enacted at that time in the past, but later is found to have created an environ-

U.S. ENVTL. PROT. AGENCY (Jan. 1979), *available at* <https://www.epa.gov/aboutepa/love-canal-tragedy> (providing background of Love Canal Tragedy).

45. *See* EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels, *supra* note 44, at 10 (discussing purpose behind CERCLA enactment); *see also* Ropiequet, *Environmental Law Litigation under CERCLA*, *supra* note 42 (discussing other rationale for CERCLA enactment).

46. *See* U.S. ENVTL. PROT. AGENCY, EPA-330-F-11-003, *CERCLA Liability and Local Government Acquisitions and Other Activities* (2011), *available at* <https://www.epa.gov/sites/production/files/documents/local-gov-liab-acq-fs-rev.pdf> (providing process for recovering cleanup costs).

47. *See id.* (discussing potentially responsible parties).

48. *See* EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels, *supra* note 44, at 3 (discussing administrative agency in charge of enforcing CERCLA regulations).

49. *See id.* (discussing funding of remediation costs).

50. *See id.* at 2 (describing initial steps of CERCLA remediation procedure).

51. *See id.* (detailing CERCLA screening mechanism).

52. *See id.* (outlining requirements to qualify as hazardous site).

53. *See* EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels, *supra* note 44, at 2 (detailing CERCLA remediation procedure).

54. *See id.* (detailing CERCLA remediation procedure).

mental hazard, it will be liable for cleanup costs.⁵⁵ In addition, Congress has delegated broad authority to the EPA to determine the criteria for listing hazardous waste, demonstrating Congress' desire to allow the EPA to use its expertise in making this determination.⁵⁶

Within the group of PRPs who may be held liable for cleanup costs are those persons "who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed."⁵⁷ This provision allows current owners of a contaminated property to seek remediation costs from previous owners, even many years later.⁵⁸

2. Cases

In *Carson Harbor*, the owner of a mobile home park brought an action against the previous owners, operators of a petroleum production facility, for reimbursement of costs associated with hazardous material removal under several federal statutes, including CERCLA.⁵⁹ The environmental assessment found tar-like and slag materials within the wetlands of the property, indicating that such substances had been on the property for several decades prior to becoming a mobile home park.⁶⁰ Plaintiffs sought to recover the remediation costs, totaling \$285,000.⁶¹

The Ninth Circuit held that the fourth element of cost recovery, which requires a showing that the defendant falls into one of the four categories of persons subject to liability under CERCLA, was not met.⁶² The plaintiffs had to establish that the defendants

55. See Ropiequet, *Environmental Law Litigation under CERCLA*, *supra* note 42 (explaining expansive coverage within CERCLA). "CERCLA provides for strict liability once a PRP [potentially responsible party] is found to be responsible for a release or threatened release of hazardous substance into the environment. Issues of fault, negligence, or compliance with prior existing law therefore are not relevant." See *id.* CERCLA also applies retroactively. See *id.*

56. See *Natural Res. Def. Council v. United States EPA*, 25 F.3d 1063, 1070 (D.C. App. 1994) (discussing congressional intent behind CERCLA).

57. See William B. Johnson, *What Constitutes "Disposal" for Purposes of Owner or Operator Liability Under § 107(a)(2) Of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.A. § 9607(a)(2)), 136 A.L.R. FED. 117 (1997) (providing legal basis for CERCLA recovery suits).

58. See *id.* (expanding scope of coverage of statute).

59. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (detailing background behind action).

60. See *id.* at 868 (providing factual findings).

61. See *id.* at 869 (discussing desired remediation cost recovery).

62. See *id.* at 874 (explaining court's rationale for disposition). The types of "potentially responsible parties" include:

290 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

“disposed” of hazardous materials.⁶³ The court relied upon the plain meaning in the statute, which defines disposal as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water”⁶⁴ The court held that the gradual, passive migration of the hazardous substances through the soil did not comport with the listed activities defined under disposal.⁶⁵ In addition, most of the activities included in the definition require active conduct, with the exception of “spilling” or “leaking.”⁶⁶ Including passive migration of hazardous substances essentially eliminates the innocent landowner defense for subsequent purchasers of property.⁶⁷

B. RCRA

1. *The Statute*

The Resource Conservation and Recovery Act (RCRA), enacted in 1976, is a waste management program that gives the EPA the authority to establish regulations to maintain a system of solid waste control.⁶⁸ Subtitle D of the RCRA governs the regulation of non-hazardous solid waste, which includes the banning of open dumping and regulations regarding the operation of municipal

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . .

42 U.S.C. 9607(a)(1-4) (providing language of statute).

63. *See Carson Harbor*, 270 F.3d at 874 (detailing court’s rationale regarding establishing liability).

64. *Id.* at 875 (citing language from CERCLA).

65. *See id.* at 879 (providing exceptions to “disposal”).

66. *See id.* (reviewing rationale for exception).

67. *See id.* at 893 (discussing holding’s potential repercussions).

68. *See Resource Conservation and Recovery Act (RCRA) Overview*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview> (last visited Jan. 13, 2017) (providing background of RCRA enactment).

waste and landfills.⁶⁹ Subtitle C of the RCRA governs the regulation of hazardous solid waste, which includes a comprehensive program to handle wastes from the moment it is generated to its disposal (“cradle-to-grave”).⁷⁰ Under Subtitle C, the EPA may either authorize a state to implement provisions of hazardous waste requirements or directly implement requirements itself if a state program does not exist.⁷¹ The RCRA sets criteria for “hazardous waste generators, transporters, and treatment, storage and disposal facilities.”⁷² The RCRA also authorizes individuals to sue “any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”⁷³

2. Cases

In *Center for Community Action and Environmental Justice v. BNSF Railway Company*,⁷⁴ several environmental organizations brought an action against the operators of a rail yard, declaring that the operator’s activities were in violation of RCRA.⁷⁵ Specifically, the defendants emitted particulate matter, consisting of solid and liquid particles suspended in air, from their diesel exhaust engines.⁷⁶ Although the matter was deemed to be a “toxic air contaminant with the potential ‘to cause cancer and other adverse health problems, including respiratory illnesses and increased risk of heart disease,’” the court determined that the emission of the matter did not constitute “disposal” within the meaning of RCRA.⁷⁷

The Ninth Circuit reasoned that the definition of disposal did not include the word “emitting,” and because of its exclusion from the list, the court preliminarily concluded that emitting solid waste into the air did not fall within the purview of RCRA.⁷⁸ In addition, Congress included “emitting” within the definition of “release,” and thus, it could be presumed that Congress intentionally left off emit-

69. *See id.* (outlining sections of RCRA).

70. *See id.* (detailing provisions of RCRA).

71. *See id.* (discussing enforcement of RCRA).

72. *Id.* (explaining coverage of RCRA).

73. 42 U.S.C. § 6972(a)(1)(B) (providing language included within RCRA).

74. 764 F.3d 1019 (9th Cir. 2014).

75. *Ctr. for Cmty. Action and Env'tl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1020 (9th Cir. 2014) (detailing information regarding action).

76. *See id.* at 1021 (discussing facts of case).

77. *Id.* (stating court’s holding).

78. *See id.* at 1024 (providing rationale for court’s holding regarding statutory construction).

292 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

ting from the definition of disposal.⁷⁹ The list included terms that result in specific conduct, namely, placement of solid waste “into or on any land or water.”⁸⁰ The court ultimately concluded “that ‘disposal’ occurs where the solid waste is first placed ‘into or on any land or water’ and is thereafter ‘emitted into the air.’”⁸¹

In opposition to the *CCA EJ* decision, another circuit decision stressed that RCRA is a “remedial statute that is to be interpreted broadly.”⁸² In *Little Hocking Water Association, Inc. v. Dupont (Little Hocking)*,⁸³ the United States District Court for the Southern District of Ohio, Eastern Division addressed whether aerial emissions of the toxic chemical perfluorooctanoic acid (C8), which contaminated soil and ground water in the plaintiff’s well field, would be included within the purview of RCRA.⁸⁴ The *Little Hocking* court determined the facts of *CCA EJ* to be greatly distinguishable.⁸⁵ Specifically, *CCA EJ* addressed the harms of inhalation of aerial emissions; in contrast, the case at hand deals with the harm resulting in direct contamination of the land.⁸⁶ The *Little Hocking* court did not find the “intentional gap” made by Congress in regard to aerial emissions that the *CCA EJ* court found.⁸⁷ The *Little Hocking* court ultimately concluded that the C8 aerial emissions that contaminated the soil and groundwater constituted “disposal” within the meaning found in the RCRA provision.⁸⁸

C. The Clean Air Act

In order to protect public health, Congress enacted the Clean Air Act (CAA) in 1970, and has since made revisions in 1977 and

79. See *CCA EJ*, 764 F.3d at 1020 (discussing question of congressional intent regarding scope of RCRA).

80. See *id.* at 1024 (elaborating on majority’s rationale).

81. *Id.* (explaining court’s holding).

82. See *Little Hocking Water Ass’n, Inc. v. E.I. du Pont Nemours and Co.*, 91 F. Supp. 3d 940, 963 (D.C. 2015) (providing basis for conflicting circuit decisions).

83. 91 F. Supp. 3d 940 (D.C. 2015).

84. *Little Hocking Water Ass’n, Inc. v. Dupont*, 91 F. Supp. 3d 940, 965 (D.C. 2015) (establishing grounds for action).

85. See *id.* (stating court’s opinion regarding *CCA EJ*).

86. See Michael S. Balster & Robert P. Hoffman, *Well, How Did It Get Here? Recent “Air Disposal” Cases Create Liability Uncertainty*, PAUL HASTINGS (Apr. 21, 2015), <https://www.paulhastings.com/publications-items/details/?id=0503e469-2334-6428-811c-ff00004cbded> (discussing court’s holding).

87. See *id.* (expounding on gap between CAA and CERCLA).

88. See *Little Hocking Water Ass’n*, 91 F. Supp. 3d at 965 (discussing court’s holding).

1990.⁸⁹ The CAA “authorizes [the] EPA to establish national ambient air quality standards.”⁹⁰ The EPA is authorized to control the quantity of emissions pollutants from sources, such as chemical plants, steel mills, and utility production facilities.⁹¹ Individual states are required to monitor air quality and inspect facilities within their limits to ensure enforcement of the CAA regulations.⁹² By nature of the regulations established by the EPA, some level of emissions are allowed, specifically levels of emissions falling below the threshold set by the EPA.⁹³

The CAA requires the EPA to set the National Ambient Air Quality Standards (NAAQS).⁹⁴ The NAAQS directs the EPA Administrator to “identify and list ‘air pollutants’ that ‘in his judgment, may reasonably be anticipated to endanger public health and welfare’ and whose ‘presence . . . in the ambient air results from numerous or diverse mobile or stationary sources’ and to issue air quality criteria for those that are listed.”⁹⁵ Specifically, the EPA sets permissible standards for six principal pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide.⁹⁶ In addition, the EPA is authorized to issue “operating permits,” called Title V permits, to “major sources” that have “actual or potential emissions” at levels above the regulatory threshold.⁹⁷ Businesses with Title V permits must measure the quantity of pollutants released into the air, minimize these numbers, and peri-

89. See *Summary of the Clean Air Act*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-air-act> (last visited Jan. 13, 2017) (providing history of CAA).

90. *Id.* (noting authorization provided by Act).

91. See *The Plain English Guide to the Clean Air Act*, U.S. ENVTL. PROT. AGENCY 3 (Apr. 2007), available at <https://www.epa.gov/sites/production/files/2015-08/documents/peg.pdf> (providing extent of EPA authority).

92. See *id.* (providing extent of EPA authority).

93. See *id.* (explaining emission thresholds of CAA). “[The] EPA sets limits on certain air pollutants, including setting limits on how much can be in the air anywhere in the United States.” *Id.*

94. See *NAAQS Table*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/criteria-air-pollutants/naaqs-table> (last visited Jan. 13, 2017) (explaining how NAAQS functions).

95. See *Integrated Review Plan for the National Ambient Air Quality Standards for Particulate Matter* U.S. ENVTL. PROT. AGENCY, EPA 452/R-08-004 3 (Mar. 2008), https://www3.epa.gov/ttn/naaqs/standards/pm/data/2008_03_final_integrated_review_plan.pdf (demonstrating expansive authority granted to EPA).

96. See *NAAQS Table*, *supra* note 94 (listing types of pollutants covered within scope of CAA).

97. See *Who Has to Obtain a Title V Permit?*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit> (last visited Jan. 13, 2017) (listing facilities required to obtain permits).

294 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

odically report findings.⁹⁸ Facilities with these permits must annually report their compliance with the applicable standards, and must notify the EPA of any failure.⁹⁹

Although the EPA establishes the air quality standards, enforcement occurs at mostly local and state levels.¹⁰⁰ The EPA approves state, local, and tribal agency air pollution reduction plans.¹⁰¹ If a state fails to meet the requirements of the Act, the EPA may take control.¹⁰² Additionally, the 1990 amendments increased the sanctions the EPA can impose on violators.¹⁰³

IV. NARRATIVE ANALYSIS

The *Pakootas* court first considered principles of statutory interpretation, reviewing the text of the statute in question.¹⁰⁴ When the court analyzes whether the language of the statute is to be interpreted plainly, it must read the words “in their context and with a view to their place in the overall statutory scheme.”¹⁰⁵ The court determined that with a statute such as CERCLA, reviewing the entire statutory scheme is especially important.¹⁰⁶ The court found this review important because the statute contains “a web . . . of sections, subsections, definitions, exceptions, defenses, and administrative provisions.”¹⁰⁷

The court acknowledged CERCLA’s two primary 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.”¹⁰⁸ More importantly, the court pointed out that CERCLA itself does not define the

98. See *Major Sources of Air Pollution*, NORTHWEST CLEAN AIR AGENCY, <http://nwcleanairwa.gov/permits-and-services/major-sources-of-air-pollution/> (last visited Jan. 13, 2017) (explaining requirements of businesses with Title V permits).

99. See *id.* (discussing reporting requirements).

100. See *Clean Air Act*, U.S. LEGAL, INC., <http://environmentallaw.uslegal.com/federal-laws/clean-air-act/> (last visited Jan. 13, 2017) (explaining scope of EPA authority).

101. See *id.* (discussing how EPA regulates in area).

102. See *id.* (explaining when EPA can become involved).

103. See *id.* (highlighting potential liability).

104. See *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 980 (9th Cir. 2016) (explaining court’s preliminary analysis).

105. See *id.* (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)) (discussing how language within statute should be interpreted in light of placement within entire statutory scheme).

106. See *id.* (discussing why interpretation of entire statutory scheme is particularly important in context).

107. See *id.* (providing explanation of detailed network of provisions within CERCLA).

108. See *id.* at 981 (explaining purposes of statute).

word “disposal,” but instead relies on the definition within RCRA.¹⁰⁹ RCRA defines “disposal” as, “[t]he 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 any constituent thereof may enter the environment or be emitted into the air or discharged into any waters”¹¹⁰

Among other elements, one must have “disposed” of, or arranged for “disposal” of, hazardous substances in order to be found liable for CERCLA remediation.¹¹¹ The issue before the court was ultimately whether Teck arranged for “disposal” of hazardous substances by emitting substances into the air.¹¹² The Plaintiffs argued various definitions of the term “deposit,” which the RCRA includes in its definition of “disposed.”¹¹³ The court, despite acknowledging the Plaintiff’s reasonable argument, pointed out that it was not “writing on a blank slate.”¹¹⁴

The *Carson Harbor* court interpreted the terms “deposit” and “disposal” to be “akin to ‘putting down,’ or placement by someone.”¹¹⁵ Further, the *CCA EJ* court noted that Congress could have used the word “emit,” but chose not to.¹¹⁶ In addition, Congress included the term “emitting” alongside “disposing” within the definition of “release” in RCRA, suggesting that Congress did not intend to interpret “emission” as “disposal.”¹¹⁷

Although the *CCA EJ* court’s interpretation of “disposal” within RCRA did not foreclose a potentially different interpretation within CERCLA, the *Pakootas* court nonetheless found the *CCA EJ* court’s

109. *See Pakootas*, 830 F.3d at 981 (including definition found within another statute).

110. *See id.* (defining “disposal”).

111. *See id.* at 981 (explaining elements that must be proven to be found liable under CERCLA). In order to prevail plaintiffs must prove that the site is a “facility” within the meaning of CERCLA, a “release” from that facility occurred, and the defendant falls within one of the four broad classes of “potentially responsible parties.” *See id.*

112. *See id.* at 983 (describing main issue for court to decide).

113. *See id.* (reiterating plaintiff’s argument for defining “disposal”).

114. *See Pakootas*, 830 F.3d at 983 (explaining premise for court’s rejection of plaintiff’s argument).

115. *See id.* (quoting *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 879, 879 n. 7 (9th Cir. 2001)) (explaining another court’s interpretation). “[N]othing in the context of the statute or the term ‘disposal’ suggests that Congress meant to include chemical or geologic processes or passive migration.” *See id.*

116. *See id.* at 984 (citing *CCA EJ*, 764 F.3d at 1021) (discussing another court’s rationale for interpretation).

117. *See id.* (addressing Congress’ placement of words within statute).

296 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

interpretation of “disposal” persuasive.¹¹⁸ Although the Plaintiffs stressed the broad remedial purpose of CERCLA, the court pointed out that its interpretation of the language must “still be grounded in the statute’s text and structure.”¹¹⁹

The court also addressed the Plaintiff’s argument pointing out that Teck’s interpretation of the word would render the federally permitted release provision to be surplusage.¹²⁰ The court acknowledged the possibility that Congress intended for CERCLA to apply to emissions up until the point where it ran into the CAA; federally permitted “release,” however, could also be read as referring to emissions as releases, and not as a form of disposal.¹²¹ The court relied on the latter argument.¹²²

Lastly, the court noted that the Plaintiff’s interpretation of “disposal” would produce problematic results.¹²³ If aerial depositions are considered disposals, then it essentially eliminates the innocent landowner defense, which allows defendants to argue that the disposal or placement of the hazardous substance took place before the “potentially responsible party” (PRPs) acquired the property.¹²⁴ Specifically, PRPs are liable for “disposal” or “contamination” that takes place while they own the property.¹²⁵ Conversely, innocent landowners face liability for aerial emissions that float and finally deposit on the land or water while they are in possession of the

118. *See id.* (explaining plaintiffs offered no reason to interpret “disposal” differently).

119. *See Pakootas*, 830 F.3d at 985 (citing *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014)) (explaining why court should not divert from statutory analysis).

120. *See id.* (explaining premise of plaintiff’s “federally permitted release” argument). The statute provides:

(10) The term “federally permitted release” means . . . (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I part C [42 U.S.C.A. § 7470 et seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections.

42 U.S.C. 9601(10)(H) (providing language of statute in question).

121. *See Pakootas*, 830 F.3d at 985 (explaining alternative interpretation).

122. *See id.* (providing court’s accepted argument).

123. *See id.* (discussing plaintiff’s problematic interpretation).

124. *See id.* (explaining rationale).

125. *See id.* (clarifying explanation).

property, even if a different party initially emitted the hazardous substances.¹²⁶

V. CRITICAL ANALYSIS

A. Incorrect Reliance on Precedent

1. *Carson Harbor*

The court premised its holding primarily on the theory that the *Carson Harbor* decision was dispositive; therefore, that holding bound the *Pakootas* court's decision.¹²⁷ The *Carson Harbor* facts, however, differ substantially from the case at hand.¹²⁸ In *Carson Harbor*, the plaintiffs discovered "tar-like and slag materials," which was "a by-product of petroleum production," on their property by previous owners.¹²⁹ The court ultimately concluded that passive migration of the substances would not constitute disposal, and, thus, current owners would not be liable.¹³⁰ Instead, the previous owners, who "discharge[d], deposit[ed], inject[ed], dump[ed], spill[ed], leak[ed], or plac[ed]" the hazardous substances on the property would be liable.¹³¹ The court included a number of opinions holding that absent direct human involvement, passive or gradual spread of a contaminant would not be considered "disposal" within the meaning of CERCLA.¹³²

In contrast, *Pakootas* involved actual emission of hazardous substances from the Teck smokestacks, not a passive and accidental migration of the substance through the ground due to a spill or leakage.¹³³ The court in *Pakootas* was not looking to relieve a subsequent owner of remediation costs from an uninvolved movement of substances, but instead, it was looking to hold responsible a current

126. See *Pakootas*, 830 F.3d at 985 (explaining how interpretation is problematic).

127. See *id.* at 983 (explaining court's rationale). The court stated, "Our en banc court in *Carson Harbor* and a prior panel in [*CCAEE*] earlier interpreted the terms 'deposit' and 'disposal.'" See *id.*

128. See generally *Carson Harbor*, 270 F.3d at 867-70 (providing background for action).

129. See *id.* at 868 (discussing underlying facts).

130. For a further discussion of the court's rationale in *Carson Harbor*, see *supra* notes 62-67 and accompanying text.

131. See *Carson Harbor*, 270 F.3d at 875 (quoting 42 U.S.C. § 6903(3)) (expanding on holding).

132. See *id.* at 875-76 (providing cases with similar holdings).

133. Compare *Pakootas*, 830 F.3d at 978, with *Carson Harbor*, 270 F.3d at 868 (demonstrating different facts between two cases).

298 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

owner who directly emitted the substances into the air, which later settled on land.¹³⁴

In addition, the *Pakootas* court relied on the *Carson Harbor* court's interpretation of "disposal," describing it as "'akin to putting down.'"¹³⁵ As the court held, because aerial emissions were not "placed" or "put down" under the definition provided by *Carson Harbor*, they should be excluded from the purview of CERCLA.¹³⁶ The *Pakootas* court inappropriately analogized passive migration of hazardous substances to those substances that float through the air from aerial emissions.¹³⁷ In sum, the *Carson Harbor* court premised their interpretation of "disposal" based on facts involving a passive, and likely accidental, migration of hazardous substances.¹³⁸ In this case, Teck was the ultimate "emitter" of the substances, and there was no "passive" conduct on their part.¹³⁹

2. CCAEJ

While the facts in *Carson Harbor* are substantially different from *Pakootas*, the facts in *CCA EJ* are very similar.¹⁴⁰ *CCA EJ* involved an interpretation of "disposal" within the context of RCRA, rather than CERCLA.¹⁴¹ It is important to distinguish the differences between the two statutes: RCRA involves management of solid and hazardous wastes while owners and operators are actively using or disposing of hazardous wastes, while CERCLA is used for remediation from past contamination.¹⁴² The court in *CCA EJ* opined that where RCRA fails to cover aerial emissions, the CAA will make up for the lack of coverage depending on whether the substance will be included within the defined hazardous air pollutants in the

134. See *Pakootas*, 830 F.3d at 978 (explaining differences between positions of parties in two cases).

135. See *id.* at 983 (providing rationale for relying on precedent).

136. See *id.* (applying *Carson Harbor* interpretation to case at issue).

137. See Peter Hayes, *Superfund Aerial Deposit Ruling: Did Court Get it Right?*, BLOOMBERG BNA 1,1 (Aug. 4, 2016), <http://law.lclark.edu/live/files/22242-superfund-aerial-deposit-ruling-did-court-get-it> (discussing difference between passive migration and active emission).

138. For a further discussion of "passive" migration, see *supra* notes 65-67 and accompanying text.

139. See Hayes, *supra* note 137, at 1 (demonstrating different level of culpability). "Teck was an emitter—it wasn't passive movement. That should be adequate to be disposal." See *id.* (internal quotation marks omitted).

140. Compare *Carson Harbor*, 270 F.3d at 868, with *CCA EJ*, 764 F.3d at 1020 (discussing differences and similarities in underlying facts between cases).

141. See *CCA EJ*, 764 F.3d at 1020 (providing context of action).

142. For a further discussion on RCRA and CERCLA, see *supra* notes 42-73 and accompanying text.

CAA.¹⁴³ In some instances, the CAA will not cover certain air pollutants.¹⁴⁴ Ultimately, *CCA EJ* is not binding on the *Pakootas* court's decision, as it is an interpretation of a word found in an entirely different statute, with an entirely different purpose.¹⁴⁵

B. Disregard for Purpose of the Statute

1. Broad Remediation

The purpose of the enactment of CERCLA is clear: “to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination.”¹⁴⁶ Due to its remedial nature, CERCLA is known for its all-encompassing liability coverage.¹⁴⁷ The purpose is ultimately to prevent the release of hazardous substances through the long-lasting potential for liability on the responsible parties.¹⁴⁸ In addition, CERCLA “provides a strict, joint and several, and retroactive liability scheme.”¹⁴⁹ By not subjecting aerial emissions of hazardous substances to CERCLA liability, the court undermined the intent of the legislature to prevent releases of hazardous substances, and, instead, encourages emitters to continue to release substances in airborne ways.¹⁵⁰

2. Federal Permit Shield

In *CCA EJ*, the court held that aerial emissions were not within the purview of RCRA.¹⁵¹ As mentioned, the *Pakootas* court specifi-

143. See generally *CCA EJ*, 764 F.3d at 1026-29 (providing overview of amendments to CAA and RCRA, and coverage of both acts).

144. See *id.* (explaining scope of coverage).

145. For a further discussion on differences between CERCLA and RCRA, see *supra* notes 140-144 and accompanying text.

146. See Dyke, *Tracing The Supreme Court's Treatment of CERCLA*, LAW360 (June 24, 2015), <http://www.law360.com/articles/671890/tracing-the-supreme-court-s-treatment-of-cercla> (quoting *Burlington Northern & Santa Fe Railway v. U.S.*, 556 U.S. 599 (2009)) (providing purpose of CERCLA).

147. See *id.* (highlighting expansive effect of CERCLA).

148. See *CERCLA Liability as a Pollution Prevention Strategy*, 4 MD. J. CONTEMP. LEGAL ISSUES 131, 132 (1993) (describing preventative nature of CERCLA).

149. See *id.* (explaining expansive scope of CERCLA liability).

150. See McCall and Hastings, *Ninth Circuit Holds Air Emissions Not Covered by CERCLA*, MORGAN LEWIS & BOCKIUS LAWFLASH (July 29, 2016), <https://www.morganlewis.com/pubs/ninth-circuit-holds-air-emissions-not-covered-by-cercla> (demonstrating exclusion of aerial emissions contradicts congressional intent). “Going forward, potentially responsible parties (PRPs) at CERCLA sites will be able to rely on *Pakootas* to contest their liability for response costs or natural resource damages related to contamination caused by aerial deposition.” See *id.*

151. For a further discussion of the *CCA EJ* holding, see *supra* notes 74-77 and accompanying text.

300 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

cally excludes from CERCLA liability, any aerial emissions that later settle on land.¹⁵² CERCLA, however, explicitly defines “hazardous substances” to include “any hazardous air pollutant listed under section 112 of the Clean Air Act.”¹⁵³ In addition, CERCLA defines “federally permitted release[s]” to include “any emission into the air subject to a permit or control regulation under section[s] . . . of the Clean Air Act.”¹⁵⁴ This definition suggests that CERCLA does not cover emissions that are permitted by federal regulations, but, instead, covers prohibited emissions.¹⁵⁵ The language of the statute implies that so long as the party’s emissions comply with a CAA permit and later settle on another’s property, the owner of said property cannot seek cleanup remediation costs from the emitter.¹⁵⁶ While non-permitted aerial emissions of hazardous substances could be subject to CERCLA liability, it is difficult to identify these emissions after finally settling.¹⁵⁷ Failure to include this type of circumstance within the coverage of CERCLA can ultimately have detrimental effects on the environment and any subsequent owners of land.¹⁵⁸ Unfortunately, these owners will not be able to seek remediation costs from the original emitters.¹⁵⁹

152. For a further discussion on the *Pakootas* court’s holding, see *supra* notes 104-126 and accompanying text.

153. See 42 U.S.C. § 9601 14(E) (defining “hazardous substances”).

154. See 42 U.S.C. § 9601 10(H) (providing exceptions to CERCLA liability).

155. See *id.* (clarifying scope of definition to specify prohibited emissions); see also Barry M. Hartman, Perrin Q. Dargan, III, Christopher A. Jaros, & Elizabeth M. Elliott, *An Air of Change in CERCLA Liability? Pakootas v. Teck Cominco and CERCLA’s Federal Permit Shield*, K&L GATES (June 27, 2016), <http://www.klgates.com/an-air-of-change-in-cercla-liability-ipakootas-v-teck-cominco-and-cercla-federal-permit-shield-06-27-2016/> (describing implications of language in statute).

156. See Hartman, et al., *supra* note 155 (describing how “Federal Permit Shield” works within context of CERCLA).

157. See *id.* (addressing difficulties with distinguishing between federally permitted deposits and federally prohibited deposits). The authors state:

Under this interpretation, where a party’s emissions include a constituent that is not identified in the permit or otherwise regulated by the Clean Air Act, even if that party’s emissions (including the unregulated substance) are in full compliance with the permit and other regulatory requirements, that party could arguably be liable under CERCLA if the constituent later settles on property elsewhere and results in the inurrence of costs recoverable under CERCLA.

Id. The Ninth Circuit ultimately undermines this argument by excluding *all* aerial emissions from CERCLA liability. See *Pakootas*, 830 F.3d at 978 (explaining court’s disregard for permitted versus non-permitted aerial emissions).

158. See *generally Pakootas*, 830 F.3d at 980 (explaining environmental impacts of aerial emissions that later settle on land and water).

159. For a further discussion on the limited scope of CERCLA liability, see *supra* notes 154-157 and accompanying text.

VI. IMPACT

When *Pakootas* was brought before the Ninth Circuit, the court had the power to pave a new path for a theory of liability for hazardous waste emitters or to ignore aerial emissions altogether.¹⁶⁰ The court chose the latter, creating a new option for firms to dispose of wastes in a less expensive way.¹⁶¹ By denying aerial emissions coverage within CERCLA, firms that emit wastes into the air no longer need to worry about potential remediation costs when those wastes later settle onto land or water.¹⁶² While slag waste from smelting creates both solid and gaseous byproducts, other types of hazardous waste may come in only gaseous form.¹⁶³ These emitters will never have to pay for remediation costs, so long as their emissions abide by the requirements set forth in the CAA.¹⁶⁴ In the event their emissions do not abide by the requirements set forth in the CAA, it will be nearly impossible to separate the emissions that were federally permitted from the emissions that surpassed the allotted amount when examining the deposits after settling.¹⁶⁵ There is potential for hazardous waste emitters to seek out new forms of disposal that result in aerial emissions, rather than solid emissions.¹⁶⁶

The court determined that “passive migration” of aerial emissions would not fit the definition of “disposal” within CERCLA.¹⁶⁷ Emitters will only be held liable for “sudden” aerial emissions, regardless of whether the emissions are purposeful or accidental.¹⁶⁸ As long as an emitter can alter the process, so that the emissions are slow in nature or “passive,” they will not be held liable for later remediation costs.¹⁶⁹ This interpretation disregards the culpability

160. See Hartman et al., *supra* note 155 (discussing potential results of court’s interpretation).

161. See *id.* (expanding on effects of court’s decision).

162. See *id.* (discussing federal permit shields impact of limiting liability).

163. See *Learn the Basics of Hazardous Waste*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/hw/learn-basics-hazardous-waste> (last visited Jan. 13, 2017) (describing various forms of hazardous waste).

164. For a further discussion of the federal permit shield created by the CAA and CERCLA, see *supra* notes 151-157 and accompanying text.

165. See McCall and Hastings, *supra* note 150 (discussing difficulties court will face).

166. For a further discussion on the limits of liability due to aerial emissions, see *supra* notes 160-165 and accompanying text.

167. For a further discussion on the court’s interpretation of “passive migration,” see *supra* notes 127-139 and accompanying text.

168. See *Aerial Deposition of Hazardous Substances – A Look at Pakootas v. Teck Cominco Metals, Ltd.*, BICK LAW LLP (Sept. 12, 2016), <http://www.bicklallp.com/our-insights/aerial-deposition-hazardous-substances-look-pakootas-v-teck-cominco-metals-ltd/> (summarizing effects of court’s decision).

169. See *id.* (clarifying interpretation).

302 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 283

of emitters and undermines the court's reasoning in *Carson Harbor*, a case in which the emissions were likely accidental.¹⁷⁰

By creating this gap between CERCLA liability and requirements of the CAA, the court ignores potential detrimental effects on the environment.¹⁷¹ Individuals suffering from a destroyed habitat due to slag build-up, or other similar wastes from these aerial emissions, will not only have to find the capital to clean up their environments, but will also be exposed to further contamination by the growth of firms seeking to avoid remediation costs by utilizing aerial emission of wastes.¹⁷²

In addition, legal scholars have noted that the term "disposal" appears several times throughout CERCLA, thus, the interpretation in this context will likely affect the interpretation of "disposal" within the rest of the statute.¹⁷³ Specifically, "'disposal'" can be found in the definitions of "'facility'" and "'release.'"¹⁷⁴ This clarified definition could ultimately impact whether a facility will be deemed a "CERCLA facility."¹⁷⁵ Extensive litigation regarding designation of CERCLA liability will likely follow.¹⁷⁶

Further, this decision contradicts agency designations of "CERCLA facilities."¹⁷⁷ CERCLA liability has already been imposed on a number of facilities where disposal of hazardous substances has been, at least in part, due to aerial emissions.¹⁷⁸ In previous cases, aerial emissions have already been treated as hazardous waste

170. For a further discussion on active or accidental conduct by emitters, see *supra* notes 135-139 and accompanying text.

171. For a further discussion on environmental effects of slag build-up, see *supra* notes 25-29 and accompanying text.

172. For a further discussion on victim property owners' inability to seek remediation costs from emitters, see *supra* note 151 and accompanying text.

173. See McCall and Hastings, *supra* note 150 (discussing appearance of "disposal" within CERCLA). "The Court noted that its interpretation of the term 'disposal' for 'purposes of whether Teck can be held liable for arranging for the disposal of hazardous substances 'has ripple effects' throughout the rest' of CERCLA, given the use of that term in multiple provisions in the statute." Meline G. MacCurdy, *Pakootas v. Teck Cominco Metals, Ltd.*, AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY AND RESOURCES (Sept. 11, 2016), http://www.americanbar.org/groups/environment_energy_resources/committees/snrdl_regional_updates/20160811_pakootas_v_teck_cominco_metals_ltd.html (describing ripple effect of interpretation).

174. See McCall and Hastings, *supra* note 150 (discussing where "disposal" can be found within CERCLA).

175. See *id.* (discussing impact of clarifying "disposal").

176. See *id.* (expanding on impact).

177. See *id.* (describing decision's effect on previous cases).

178. See *id.* (discussing previous treatment of aerial emissions in designating CERCLA facilities).

disposals within the purview of CERCLA.¹⁷⁹ The PRPs in those cases are more likely to seek reimbursement of expenditures dedicated to remediation costs of cleanups for aerial emissions.¹⁸⁰ It will be extremely difficult for courts to develop a method of distinguishing between solid slag emissions and aerial emissions at the deposited sites.¹⁸¹

Due to contradicting interpretations of arranger liability in interpreting “disposal,” it is likely that the Plaintiffs will petition to the Supreme Court for certiorari.¹⁸² In the event the Supreme Court decides to hear the case, it will be the first time the Court interprets an aspect of arranger liability since 2009.¹⁸³ Given the Supreme Court’s history of limiting the liability of emitting parties, it is likely that the Court will find the Ninth Circuit’s opinion persuasive.¹⁸⁴ While originally drafted as a far-reaching piece of legislation, CERCLA continues to be limited in scope.¹⁸⁵ As polluting parties continue to create ways to bypass cleanup responsibilities, a response by the legislature will be necessary to hold them accountable.¹⁸⁶

*Holly J. Sofield**

179. See McCall and Hastings, *supra* note 150 (discussing previous treatment of aerial emissions within CERCLA liability prior to *Pakootas*).

180. See *id.* (describing how PRPs will contest previously held liability).

181. See *id.* (noting difficulty courts will face in distinguishing types of slag).

182. Compare *Pakootas*, 830 F.3d at 981, with *Little Hocking*, 91 F. Supp. 3d at 961 (demonstrating two interpretations of “disposal”).

183. See McCall and Hastings, *supra* note 150 (discussing recent history of Supreme Court CERCLA decision). In the 2009 decision, *Burlington Northern & Santa Fe Ry. Co. v. United States*, the Supreme Court limited the scope of arranger liability, and created the “divisibility defense” to liability when a CERCLA action is brought against a party. *Id.*

184. For a further discussion of the judicial limitations of CERCLA scope, see *supra* notes 160-165 and accompanying text.

185. See *id.* (discussing *Pakootas* decision effects on CERCLA liability).

186. See *id.* (detailing aerial emissions loophole and further necessary action).

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