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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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 Dylan

I. INTRODUCTION

For many years, companies could release hazardous waste from their production facilities directly into the environment. It was not until the late 1970s that the nation became aware of the detrimental environmental effects of such activity. 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. 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. Since its enactment, personally responsible parties (PRPs) have spent millions of dollars cleaning up hazardous waste sites.

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.
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.
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. Lastly, Section VI of this Note examines the impact of the Pakootas court’s holding on hazardous substance emitter’s liability, or lack thereof.

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. 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. In addition to the reservation site, the Tribes maintain rights to resources located at the northern end of the UCR Site and neighboring land.

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. Plaintiffs then amended their complaint to include claims for aerial hazardous substance emissions. 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. After traveling through the air, these emissions settled onto either land or water at the UCR Site.
The emitted substances included “lead compounds, arsenic compounds, cadmium compounds and mercury compounds.” These hazardous substances continuously affect “surface water and ground water, upland areas, sediments, and the biological resources [that] comprise the [UCR] Site.” Over time, these hazardous substances, whether traveling through air or water, congregate and cause built-up slag at the UCR Site. Slag can have detrimental environmental effects, such as bioaccumulation, toxicity problems in animal and plant life, erosion of fish gills, and smothering of habitats. 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.

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. 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. The Plaintiffs cited several dictionary definitions, all of which referenced the deposition of layers of substance over time.

The United States District Court for the Eastern District of Washington rejected Teck’s argument and subsequently denied the motion. Shortly thereafter, the Court of Appeals for the Ninth Circuit issued Center for Community Action & Environmental Justice v. BNSF Railway Co. (CCAЕ), 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].” 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 CCAEJ court’s interpretation should apply because of the cross-reference to RCRA’s definition of “disposal.” 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.

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. The Ninth Circuit granted permission to appeal, and subsequently reversed and remanded. The Ninth Circuit relied on precedent from Carson Harbor, Ltd. v. Unocal Corporation (Carson Harbor), defining “deposit” akin to “putting down” or placement, which consequently excluded aerial emissions from the purview of CERCLA.

III. BACKGROUND

A. CERCLA

1. The Statute

CERCLA, also known as the Superfund, was enacted in 1980 and amended in 1986. 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.” CERCLA was passed in response to the discovery of a series of toxic waste sites such as Love Canal. 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,
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-

\(^{45}\) 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 Kopiequet, Environmental Law Litigation under CERCLA, supra note 42 (discussing other rationale for CERCLA enactment).


\(^{47}\) 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{57} This provision allows current owners of a contaminated property to seek remediation costs from previous owners, even many years later.\textsuperscript{58}

2. Cases

In \textit{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.\textsuperscript{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.\textsuperscript{60} Plaintiffs sought to recover the remediation costs, totaling $285,000.\textsuperscript{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.\textsuperscript{62} The plaintiffs had to establish that the defendants

\begin{itemize}
  \item \textsuperscript{55} See Ropiequet, \textit{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 \textit{id.} CERCLA also applies retroactively. See \textit{id.}
  \item \textsuperscript{58} See \textit{id.} (expanding scope of coverage of statute).
  \item \textsuperscript{59} Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 870 (9th Cir. 2001) (detailing background behind action).
  \item \textsuperscript{60} See \textit{id.} at 868 (providing factual findings).
  \item \textsuperscript{61} See \textit{id.} at 869 (discussing desired remediation cost recovery).
  \item \textsuperscript{62} See \textit{id.} at 874 (explaining court’s rationale for disposition). The types of “potentially responsible parties” include:
\end{itemize}
“disposed” of hazardous materials. 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 . . . .” 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. In addition, most of the activities included in the definition require active conduct, with the exception of “spilling” or “leaking.” Including passive migration of hazardous substances essentially eliminates the innocent landowner defense for subsequent purchasers of property.

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. 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
waste and landfills. 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”). 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. The RCRA sets criteria for “hazardous waste generators, transporters, and treatment, storage and disposal facilities.” 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.”

2. Cases

In Center for Community Action and Environmental Justice v. BNSF Railway Company, several environmental organizations brought an action against the operators of a rail yard, declaring that the operator’s activities were in violation of RCRA. Specifically, the defendants emitted particulate matter, consisting of solid and liquid particles suspended in air, from their diesel exhaust engines. 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.

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. In addition, Congress included “emitting” within the definition of “release,” and thus, it could be presumed that Congress intentionally left off emitt
ting from the definition of disposal.\textsuperscript{79} The list included terms that result in specific conduct, namely, placement of solid waste “into or on any land or water.”\textsuperscript{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.’”\textsuperscript{81}

In opposition to the \textit{CCAEJ} decision, another circuit decision stressed that RCRA is a “remedial statute that is to be interpreted broadly.”\textsuperscript{82} In \textit{Little Hocking Water Association, Inc. v. Dupont (Little Hocking)},\textsuperscript{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.\textsuperscript{84} The \textit{Little Hocking} court determined the facts of \textit{CCAEJ} to be greatly distinguishable.\textsuperscript{85} Specifically, \textit{CCAEJ} 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.\textsuperscript{86} The \textit{Little Hocking} court did not find the “intentional gap” made by Congress in regard to aerial emissions that the \textit{CCAEJ} court found.\textsuperscript{87} The \textit{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.\textsuperscript{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

\textsuperscript{79} See \textit{CCAEJ}, 764 F.3d at 1020 (discussing question of congressional intent regarding scope of RCRA).
\textsuperscript{80} See id. at 1024 (elaborating on majority’s rationale).
\textsuperscript{81} Id. (explaining court’s holding).
\textsuperscript{82} See \textit{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).}
\textsuperscript{83} 91 F. Supp. 3d 940 (D.C. 2015).
\textsuperscript{85} See id. (stating court’s opinion regarding \textit{CCAEJ}).
\textsuperscript{87} See id. (expounding on gap between CAA and CERCLA).
\textsuperscript{88} See \textit{Little Hocking Water Ass’n}, 91 F. Supp. 3d at 965 (discussing court’s holding).
The CAA “authorizes [the] EPA to establish national ambient air quality standards.” The EPA is authorized to control the quantity of emissions pollutants from sources, such as chemical plants, steel mills, and utility production facilities. Individual states are required to monitor air quality and inspect facilities within their limits to ensure enforcement of the CAA regulations. 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.

The CAA requires the EPA to set the National Ambient Air Quality Standards (NAAQS). 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.” Specificaly, the EPA sets permissible standards for six principal pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. 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. Businesses with Title V permits must measure the quantity of pollutants released into the air, minimize these numbers, and per-
Facilities with these permits must annually report their compliance with the applicable standards, and must notify the EPA of any failure.

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

IV. NARRATIVE ANALYSIS

The Pakootas court first considered principles of statutory interpretation, reviewing the text of the statute in question. 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.” The court determined that with a statute such as CERCLA, reviewing the entire statutory scheme is especially important. The court found this review important because the statute contains “a web . . . of sections, subsections, definitions, exceptions, defenses, and administrative provisions.”

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.” More importantly, the court pointed out that CERCLA itself does not define the

99. See id. (discussing reporting requirements).
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.\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{111}  The issue before the court was ultimately whether Teck arranged for “disposal” of hazardous substances by emitting substances into the air.\textsuperscript{112}  The Plaintiffs argued various definitions of the term “deposit,” which the RCRA includes in its definition of “disposed.”\textsuperscript{113}  The court, despite acknowledging the Plaintiff’s reasonable argument, pointed out that it was not “writing on a blank slate.”\textsuperscript{114}

The Carson Harbor court interpreted the terms “deposit” and “disposal” to be “akin to ‘putting down,’ or placement by someone.”\textsuperscript{115}  Further, the CCAEJ court noted that Congress could have used the word “emit,” but chose not to.\textsuperscript{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.”\textsuperscript{117}

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

\textsuperscript{109} See Pakootas, 830 F.3d at 981 (including definition found within another statute).

\textsuperscript{110} See id. (defining “disposal”).

\textsuperscript{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.

\textsuperscript{112} See id. at 983 (describing main issue for court to decide).

\textsuperscript{113} See id. (reiterating plaintiff’s argument for defining “disposal”).

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

\textsuperscript{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.

\textsuperscript{116} See id. at 984 (citing CCAEJ, 764 F.3d at 1021) (discussing another court’s rationale for interpretation).

\textsuperscript{117} See id. (addressing Congress’ placement of words within statute).
interpretation of “disposal” persuasive.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{121} The court relied on the latter argument.\textsuperscript{122}

Lastly, the court noted that the Plaintiff’s interpretation of “disposal” would produce problematic results.\textsuperscript{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.\textsuperscript{124} Specifically, PRPs are liable for “disposal” or “contamination” that takes place while they own the property.\textsuperscript{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

\textsuperscript{118. See id. (explaining plaintiffs offered no reason to interpret “disposal” differently).}
\textsuperscript{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).}
\textsuperscript{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).}
\textsuperscript{121. See Pakootas, 830 F.3d at 985 (explaining alternative interpretation).}
\textsuperscript{122. See id. (providing court’s accepted argument).}
\textsuperscript{123. See id. (discussing plaintiff’s problematic interpretation).}
\textsuperscript{124. See id. (explaining rationale).}
\textsuperscript{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 [CCAEJ] 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).
In addition, the Pakootas court relied on the Carson Harbor court's interpretation of “disposal,” describing it as “‘akin to putting down.’”\footnote{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.\footnote{136} The Pakootas court inappropriately analogized passive migration of hazardous substances to those substances that float through the air from aerial emissions.\footnote{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.\footnote{138} In this case, Teck was the ultimate “emitter” of the substances, and there was no “passive” conduct on their part.\footnote{139}

2. \textit{CCAEJ}

While the facts in Carson Harbor are substantially different from Pakootas, the facts in CCAEJ are very similar.\footnote{140} CCAEJ involved an interpretation of “disposal” within the context of RCRA, rather than CERCLA.\footnote{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.\footnote{142} The court in CCAEJ 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

\begin{footnotesize}
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\item 134. See Pakootas, 830 F.3d at 978 (explaining differences between positions of parties in two cases).
\item 135. See id. at 983 (providing rationale for relying on precedent).
\item 136. See id. (applying Carson Harbor interpretation to case at issue).
\item 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).
\item 138. For a further discussion of “passive” migration, see supra notes 65-67 and accompanying text.
\item 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).
\item 140. Compare Carson Harbor, 270 F.3d at 868, with CCAEJ, 764 F.3d at 1020 (discussing differences and similarities in underlying facts between cases).
\item 141. See CCAEJ, 764 F.3d at 1020 (providing context of action).
\item 142. For a further discussion on RCRA and CERCLA, see supra notes 42-73 and accompanying text.
\end{itemize}
\end{footnotesize}
CAA. In some instances, the CAA will not cover certain air pollutants. Ultimately, CCAEJ 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.

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.” Due to its remedial nature, CERCLA is known for its all-encompassing liability coverage. The purpose is ultimately to prevent the release of hazardous substances through the long-lasting potential for liability on the responsible parties. In addition, CERCLA “provides a strict, joint and several, and retroactive liability scheme.” 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.

2. Federal Permit Shield

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

143. See generally CCAEJ, 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.
147. See id. (highlighting expansive effect 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 CCAEJ holding, see supra notes 74-77 and accompanying text.
CERCLA liability, any aerial emissions that later settle on land. CERCLA, however, explicitly defines “hazardous substances” to include “any hazardous air pollutant listed under section 112 of the Clean Air Act.” 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.” This definition suggests that CERCLA does not cover emissions that are permitted by federal regulations, but, instead, covers prohibited emissions. 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. While non-permitted aerial emissions of hazardous substances could be subject to CERCLA liability, it is difficult to identify these emissions after finally settling. 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. Unfortunately, these owners will not be able to seek remediation costs from the original emitters.

152. For a further discussion on the Pakootas court’s holding, see supra notes 104-126 and accompanying text.
154. See 42 U.S.C. § 9601 10(H) (providing exceptions to CERCLA liability).
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 incurrence 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. The court chose the latter, creating a new option for firms to dispose of wastes in a less expensive way. 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. While slag waste from smelting creates both solid and gaseous byproducts, other types of hazardous waste may come in only gaseous form. These emitters will never have to pay for remediation costs, so long as their emissions abide by the requirements set forth in the CAA. 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. There is potential for hazardous waste emitters to seek out new forms of disposal that result in aerial emissions, rather than solid emissions.

The court determined that “passive migration” of aerial emissions would not fit the definition of “disposal” within CERCLA. Emitters will only be held liable for “sudden” aerial emissions, regardless of whether the emissions are purposeful or accidental. 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. 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).
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.
169. See id. (clarifying interpretation).
of emitters and undermines the court’s reasoning in *Carson Harbor*, a case in which the emissions were likely accidental.  

By creating this gap between CERCLA liability and requirements of the CAA, the court ignores potential detrimental effects on the environment. 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.  

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. Specifically, “‘disposal’” can be found in the definitions of “‘facility’” and “‘release.’” This clarified definition could ultimately impact whether a facility will be deemed a “CERCLA facility.” Extensive litigation regarding designation of CERCLA liability will likely follow.  

Further, this decision contradicts agency designations of “CERCLA facilities.” 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. 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.  
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).
HAZARDOUS SUBSTANCE EMITTERS

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

Due to contradicting interpretations of arranger liability in interpreting “disposal,” it is likely that the Plaintiffs will petition to the Supreme Court for certiorari. 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. 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.

While originally drafted as a far-reaching piece of legislation, CERCLA continues to be limited in scope. As polluting parties continue to create ways to bypass cleanup responsibilities, a response by the legislature will be necessary to hold them accountable.

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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