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RESILIENCE



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Pacific Northwest. It was listed as threatened in 2013. The lark requires wide open, sparsely vegetated habitats such as those of the Puget Sound prairies and the large sandbars of the Columbia River. Much natural habitat comprising the lark's ecological niche has been destroyed over the past century, but as the natural habitat disappeared, new suitable habitat has been inadvertently created by humans. Today, larks thrive in heavily impacted spaces—most notably dredge-spoil disposal sites, airports, and agricultural lands. Given the lark's reliance on heavily impacted land, many property owners find themselves facing an odd problem: by using their land, they actually attract protected species whose arrival might shut down the operation that created the species' habitat.

Take for example the many ports along the Columbia River. Routine dredging is needed to facilitate commercial shipping along the river. The river's bank and islands are dotted with historic dredge disposal sites where larks thrive. These deposits mimic the lark's natural habitat because they are open, sparsely vegetated areas. While these deposits are critical to lark survival, once the ground-nesting lark makes a particular disposal site its home, it essentially puts a stop to the dredge disposal activity that has created and maintained the lark's habitat. This is because continued disposal poses significant risk to the birds, particularly nesting females and fledgling chicks. Thus, ports find themselves in a catch-22 where their operations create ideal lark habitat, but if a lark utilizes that habitat the port is forced to shut down the habitat creating operation. To an extent this issue can be addressed by not dredging during the lark's nesting and fledging seasons, but that often is not possible because dredging already is prohibited for most of the year to protect migratory fish, dredge deposits need to be actively managed to prevent erosion, and dredging equipment and disposal site capacity are limited. From a business strategy perspective, this presents a much more difficult problem than has been traditionally posed by endangered species in the Pacific Northwest. For example, spotted owls rely on wilderness habitats and avoid human interaction. By mapping spotted owl nesting sites and establishing habitat buffers around them, it is relatively easy to plan logging activity in a manner that protects the owls. With the lark, there is no easy way to separate the human activity from the species because the lark is attracted to impacted lands.

Landowners can obtain some assurances by protecting larks through habitat conservation plans (HCPs) that provide incidental take permits. To date, several lark HCPs have been pursued. However, given the costs associated with HCPs, many landowners continue to operate with no assurances that their operations will not be jeopardized by the arrival of a lark. Furthermore, endangered species are not on the radar of many small industrial land-users in the Pacific Northwest who continue to view endangered species as a "wilderness" issue.

The lark and Eulachon are just two examples of recently listed species that present new regulatory problems in the Pacific Northwest, but they are not alone. The Fish and Wildlife Service has scheduled listing decisions on at least 23 species in Oregon and Washington in the coming years. See United States Fish and Wildlife Service, National Listing Workplan (Sept. 2016), available at https://www.fws.gov/endangered/improving_esa/pdf/Listing%207-Year%20Workplan%20Sept%202016.pdf. Like the lark and Eulachon, many of these proposed species present very difficult management issues because of their unique ecological niches. It is becoming

clear that the ESA is no longer a law that applies in the wilderness. Instead, with greater frequency, it is beginning to impact urban areas where "easy" solutions are hard to find. 🌳

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CERCLA: Liability Is Not Blowin' in the Wind

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When does airborne material constitute a "disposal," triggering enforcement action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)? A recent decision of the U.S. Court of Appeals for the Ninth Circuit, *Pakootas v. Teck Cominco Metals, Ltd.*, <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/27/15-35228.pdf>, D.C. No. 2:04-cv-00156-LRS (9th Cir. July 27, 2016), held that the emission of constituents into the air—and indirectly into the water and onto the land—does not constitute a disposal under CERCLA. While *Pakootas* appears consistent with recent case law, it remains to be seen whether this decision settles environmental liability for disposal or passive migration in water or soil that stems from wind dispersal. The following reviews the background, precedent involved, and likely effect of *Pakootas*.

Parties can be held liable for emitting, releasing, discharging, and disposing (these are statutorily defined terms) regulated substances into the air under the Clean Air Act (CAA) or to land and water under CERCLA, the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act (CWA). Yet courts have long grappled with the assessment of liability associated with the imprecisely defined legal terms; seemingly reasonable words like "dispose" are instead difficult to define in the context of fact-intensive disputes and natural processes.

CERCLA, specifically, establishes liability for parties that arrange for "disposal" of hazardous substances. 42 U.S.C. § 9607(a)(3). "Disposal" under CERCLA is defined as RCRA's definition of "disposal" which includes "deposit." 42 U.S.C. § 9601(29) (RCRA defines "disposal" in 42 U.S.C. § 6903(3) as "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."). "Deposit" is not further defined in either statute. The U.S. District Court for the Eastern District of Washington (Washington district court) tackled the definition of "deposit" and "disposal" in the context of a 12-year dispute between Teck Cominco Metals Ltd. (Teck), the Confederated Tribes of the Colville Reservation (Confederated Tribes) and the state of Washington, over alleged CERCLA liability

for Teck's historic Trail Smelter emissions, originating 10 miles north of the U.S. border in Canada.

Plaintiffs brought several claims against Teck in 2004 to address transboundary pollution. In 2008 the Washington district court bifurcated the issue of cost recovery for CERCLA "releases" from slag Teck discharged into the Columbia River from the other remaining issues in the case. Plaintiffs then successfully sought amendment of their complaint against Teck, adding an allegation of CERCLA arranger liability for air emissions, for the wind carrying and depositing hazardous substances to land and water in Washington. On a motion to dismiss, Teck asserted CERCLA "disposal" requires contaminants to first be placed on land, not into the wind. The Washington district court denied the motion, finding no meaningful distinction between Teck's water and air discharges. Subsequently the Ninth Circuit issued *Center for Community Action & Environmental Justice v. BNSF Railway*, 764 F.3d 1019 (9th Cir. 2014), affirming that emission of hazardous substances into the air does not constitute a "disposal" under RCRA, and Teck filed a motion asking the Washington district court to reconsider the motion to dismiss. The Washington district court denied reconsideration, distinguishing *Center for Community Action*, but certified the issue for interlocutory appeal.

The Ninth Circuit on appeal held instead that "deposit" under CERCLA does not include the gradual spread of hazardous substances into land and water through aerial pathways without human intervention. *Pakootas* at 22–23. The court found *Center for Community Action* persuasive and relied on previous Ninth Circuit precedent from *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), a decision affirming that passive soil migration of hazardous substances through a wetland does not fall within the statutory definition of "disposal" under CERCLA. The court acknowledged that Teck could be liable under CERCLA by "allowing" the wind to "deposit" the hazardous substances but for *Center for Community Action* and *Carson Harbor* authority. In briefing, Teck and amici curiae argued that refuting these two cases would create an extraordinarily broad scope of CERCLA and RCRA liability. The Ninth Circuit agreed and reasoned that there must be some limit to arranger liability for fugitive dust.

Review of these two precedents illustrates the context in which the Ninth Circuit analyzed the facts in *Pakootas*. First, the Ninth Circuit in *Carson Harbor* distinguished passive migration from active human conduct, holding the latter would constitute a "disposal." In *Carson Harbor*, a landowner brought claims against a previous landowner for reimbursement of cleanup costs resulting from slag and petroleum waste spills when the land was used for petroleum development. Later, when the land was used as a mobile home park, contamination gradually spread from the spill sites to a wetland area. The Ninth Circuit first referred to the CERCLA principle establishing that when contamination moves as a result of human conduct, it constitutes a disposal. The court affirmed, though, that the previous landowner was not liable for a disposal because the movement of contamination during its ownership was entirely passive. The court noted that the analysis is not whether there is active human conduct, but where facts concerning contaminant migration fall along a spectrum of liability.

In *Center for Community Action*, the Ninth Circuit further reasoned that aerosolized disposal onto land is different

from subsequent movement of contaminants "through the air." 764 F.3d 1019, 1020–21 (9th Cir. 2014). Here plaintiffs sued railway companies for diesel particulate matter from exhaust generated in railyards. Similar to *Pakootas*, the particulate—solid particles in the exhaust emissions—was transported by the wind to land and water. The Ninth Circuit analyzed whether such a conveyance met RCRA's "disposal" definition. Referring to *Carson Harbor*, the court noted that the statutory definition of "disposal" does not include the act of "emitting," but instead includes acts such as "depositing." The Ninth Circuit concluded that "'disposal' occurs when the solid waste is first placed 'into the or on any land or water' and is thereafter 'emitted into the air.'" *Id.* at 1024. The diesel emissions were instead emitted, then moved by air currents to land.

Pakootas expressly upholds these precedents but again raises issues that have been the subject of appellate disagreements for some time. A circuit split remains regarding whether "disposal" includes passive human conduct or if it requires active conduct. Allowing wind to move hazardous substances passively without further human involvement may trigger CERCLA liability in the Fourth Circuit. See *Nurad, Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992) (holding "disposal" includes passive migration from abandoned underground storage tanks because CERCLA is a strict liability statute and the "requirement of active participation [only] would frustrate the statutory policy of encouraging" remediation). Since *Nurad*, the Second, Third, and Sixth Circuits also have weighed in and concluded that "disposal" is defined as only active, affirmative conduct. See *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000); *ABB Indus. Sys, Inc. v. Prime Tech., Inc.*, 120 F.3d 351 (2d Cir. 1997); and *United States v. CMDG Realty*, 96 F.3d 706 (3rd Cir. 1996). The Ninth Circuit in *Carson Harbor* directly disputes whether these cases evidence a circuit split between active and passive conduct requirements, again stating these cases instead fall along a spectrum of facts that may evidence a "disposal." With *Pakootas*, the Ninth Circuit requires evidence of active human conduct and a deposit onto land before the wind transports anything further. The dispute between passive or active conduct requirements has not been before the Supreme Court yet.

Pakootas may provide the Supreme Court opportunity to harmonize the definition. A writ of certiorari was previously denied, concerning Teck's bifurcated liability for dumping slag into the Columbia River, after the parties reached a settlement. See *Pakootas*, 522 U.S. 1095 (June 4, 2007) (No. 06-1188). Continued litigation of *Pakootas* eventually could lead to Supreme Court review of the definition of "disposal" in the context of wind transport.

Most immediately, *Pakootas* may be reheard in the Ninth Circuit. On August 24, 2016, the state of Washington and the Confederated Tribes filed separate petitions for rehearing or *en banc* rehearing. The state argues that the Ninth Circuit misconstrued *Carson Harbor*, distorting the decision to a hard line rule that "deposit" cannot include the movement of contamination without human intervention, and ignored the decision's rejection of the passive/active binary analysis in favor of factual analysis along a spectrum. The state also argues that *Center for Community Action* was misapplied in conflict with the holding, previous decisions in this matter, and *United States v. Power Engineering Co.*, 191 F.3d 1224 (10th Cir. 1999), finding RCRA liability for disposal of hexavalent chromium moved by mist through air scrubbers to land. The

Confederated Tribes also dispute the Ninth Circuit's interpretation of *Carson Harbor*, asserting it is inconsistent for Teck to be liable for movement of slag by river current downriver but not movement of slag by wind current downwind. They also argue that the Ninth Circuit misconstrued reliance on *Center for Community Action* to hold "emissions" are not a "disposal." Meanwhile, on August 12, 2016, the Washington district court awarded the Confederated Tribes over \$8.25 million for response costs associated with bifurcated release of slag in water. Teck is likely to appeal this judgment as well.

A writ of certiorari may also allow analysis of the transnational nature of *Pakootas*. Importantly, judicial decisions regarding the Trail Smelter have long skirted the extraterritorial application of CERCLA. See, e.g., *Pakootas v. Teck Comico Metals, Ltd.*, 452 F.3d 1066, 1073, 1077–79 (9th Cir. 2006) (focusing on the domestic clean-up site in Washington and not the smelter in Canada to avoid—some argue speciously—applying CERCLA internationally). The transboundary facts are inescapable, though. And this case will likely continue to define CERCLA liability for passive migration of regulated substances, internationally or nationally.

Ultimately, there must be a limit to defining "disposal" too expansively. The *Pakootas* decision expressly seeks to establish that limit, even in light of legislative intent to afford broad environmental protections. See *W.R. Grace & Co.*, 429 F.3d 1224, 1240–41 (9th Cir. 2005) ("CERCLA was designed

and enacted to prevent illness and death resulting from exposure to hazardous substances, not wait for its occurrence to prove a threat.") (internal quotation omitted). Where wind is concerned, as *Pakootas* clarifies, the definition is necessarily narrow; "if aerial depositions are accepted as disposals, disposals would be a never-ending process, essentially eliminating the innocent landowner defense," abrogating the statutory scheme. *Pakootas*, at 19–20 (internal quotations omitted). At some point regulation of aerial depositions under other statutes will interfere with the CAA. *Id.* Plaintiffs in *Pakootas* still dispute how narrow the definition of "disposal" should be. But for now, fugitive dust that contains hazardous substances blowing through the air and depositing on land downwind does not trigger liability under CERCLA and there is no "disposal" in this scenario, summoning "Wind on the Hill" by A.A. Milne:

" . . . So then I could tell them

Where the wind goes . . .

But where the wind comes from

Nobody knows." 🌳

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