Pakootas v. Teck Cominco Metals, Ltd.: When Outside the Borders Isn't Extraterritorial, or, Canada Is in Washington, Right?

I. OVERVIEW OF THE CASE

Teck Cominco Metals, Ltd. (Teck), a Canadian corporation, owns and operates a lead-zinc smelter in Trail, British Columbia (Trail smelter).[1] Between 1906 and 1995, Teck disposed of liquid and solid hazardous waste into the Columbia River.[2] The type of waste disposed of was known as "slag" and contained harmful heavy metals such as "arsenic, cadmium, copper, mercury, lead, and zinc, as well as other unspecified hazardous materials."[3] Until mid-1995, the Trail smelter discharged up to 145,000 tons of slag per year into the Columbia River.[4] After the slag was discharged, it traveled with the river's current until it settled in slower, quieter areas.[5] These areas happened to be within the United States, in northeastern Washington State.[6] The Confederated Tribes of the Colville Reservation petitioned the United States Environmental Protection Agency (EPA) in August of 1999 to perform an assessment of contamination in the Columbia River area, and the site assessment began in October of that year.[7] The EPA found contamination from "heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc" as well as the presence of slag, such as that produced as a by-product of smelting furnaces.[8] It was apparent from technical evidence that the major source of contamination at the Upper Columbia River Site

1. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1068-69 (9th Cir. 2006).
2. *Id.* at 1069.
3. *Id.*
4. *Id.*
5. *Id.* at 1069-70.
6. *Id.* at 1069.
7. *Id.*
8. *Id.*

(Site) was the Trail smelter in British Columbia.[9] When the EPA finished its site assessment in 2003, it concluded that the Site was eligible to be listed on the National Priorities List (NPL), the main consequence being that only NPL listed sites are eligible for future Superfund-financed remedial action.[10] After this finding, Teck Cominco American, Inc. (TCAI), a wholly owned American subsidiary of Teck, offered to undertake a limited human health study of the site on the condition that the EPA delay proposing the site for NPL listing.[11] This offer fell through, however, when TCAI and the EPA were unable to agree on the extent of TCAI's investigation; the EPA decided that TCAI's plan would not provide enough information for the EPA to choose an appropriate remedy for the contamination at the site.[12] Because of this, the EPA issued Teck a Unilateral Administrative Order (Order) on December 11, 2003, in which Teck was ordered to conduct a remedial investigation/ feasibility study (RI/FS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[13] At the time of appeal, Teck had not complied with, nor had the EPA attempted to enforce compliance with that order.[14] Joseph Pakootas, an individual and member of the Confederated Tribes of the Colville Reservation, filed a citizen suit under CERCLA to enforce the EPA's order requiring Teck to undertake the RI/FS.[15] Teck moved to dismiss the complaint, but Teck's motion was denied by the district court, and this interlocutory appeal followed.[16]

Teck's motion to dismiss was made under *Federal Rules of Civil Procedure* 12(b)(1) and 12(b)(6) for failure to state a claim under which relief could be granted and a lack of subject matter jurisdiction, on the ground that the Order was unenforceable by the district court because it was based upon activities Teck undertook outside of the United States.[17] The district court found that because the case arose under CERCLA, there was a federal question that would confer subject matter jurisdiction on the court, so a Rule 12(b)(1) motion was inappropriate; the United States Court of Appeals for the Ninth Circuit was similarly convinced.[18]

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9. *Id.* at 1070.
10. *Id.* at 1069 & n.4.
11. *Id.* at 1070.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1066, 1070.
16. *Id.* at 1069.
17. *Id.* at 1070.
18. *Id.* at 1071, 1082.

The district court then analyzed Teck's argument regarding the extraterritorial application of CERCLA and determined, after assuming the application was extraterritorial in this instance, that the extraterritorial application of CERCLA in this case was appropriate.[19] Therefore, the court denied Teck's Rule 12(b)(6) motion to dismiss.[20] While the Ninth Circuit similarly dismissed Teck's 12(b)(6) motion, they did so for different reasons.[21] The Ninth Circuit *held* that because "CERCLA liability is triggered by an actual or threatened release of hazardous substances, and because a release of hazardous substances took place within the United States, this suit involves a domestic application of CERCLA." *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1068-69 (9th Cir. 2006).

II. BACKGROUND

While Congress is able to enforce its laws outside the borders of the United States, it is nonetheless a firmly established principle of law in the United States "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[22] Further, "Congress legislates against the backdrop of the presumption against extraterritoriality,"[23] so that view can be used as a "valid approach whereby unexpressed congressional intent may be ascertained."[24]

Because Congress is principally concerned with conditions within the borders of the United States, it can be assumed that, lacking evidence of *specific* intent otherwise, Congress intended its legislation to apply within the United States and not extraterritorially.[25] This presumption serves to guard against unforeseen or unintended conflicts between our laws and the laws of other countries "which could result in international discord."[26] Therefore, unless the "affirmative intention" of Congress to have the legislation extend beyond the borders of the United States is "clearly expressed," it can be assumed that the legislation is concerned solely with domestic conditions.[27]

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19. *Id.* at 1071.
20. *Id.*
21. *Id.* at 1082.
22. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).
23. E.E.O.C. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).
24. *Foley Bros.*, 336 U.S. at 285.
25. *Id.*
26. *Arabian Am. Oil*, 499 U.S. at 248.
27. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

The standard set by the United States Supreme Court to determine whether a statute can be enforced extraterritorially has changed from the earlier requirement of a "clear statement" of congressional intent, to the slightly relaxed "clear evidence" of congressional intent.[28] This modest change to the required statutory language standard has allowed courts more room in which to avoid the presumption against the extraterritorial application of congressional legislation.[29] In addition to the specific language of the statute itself, other factors to be considered include the structure of the act, the legislative history, and other nontextual sources.[30]

The Ninth Circuit has followed the line of reasoning that courts must assume that Congress legislates with the knowledge that a statute is principally concerned with domestic conditions and must restrictively resolve any doubts regarding the extraterritorial applicability of the statute.[31] In *ARC Ecology v. U.S. Department of the Air Force*, another case considering the extraterritorial application of CERCLA, the Ninth Circuit found that no evidence existed either in the language of CERCLA itself, or other sources, to indicate a congressional intent of extraterritorial enforceability in that case.[32]

Despite the presumption against the extraterritorial application of congressional legislation, no one debates that when there is express intent, Congress has the ability to implement its laws beyond the territorial boundaries of the United States.[33] Notwithstanding the presumption against extraterritorial application of congressional legislation, it is firmly engrained in American law that, when "failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States," the presumption against extraterritoriality is not applied.[34]

In order for CERCLA to apply, however, certain conditions must be met. CERCLA is different than other environmental laws such as the Clean Air Act,[35] Clean Water Act,[36] and Resource Conservation and Recovery Act (RCRA),[37] because "CERCLA is not a regulatory statute."[38]

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28. ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1098 n.2 (9th Cir. 2005) (citing Smith v. United States, 507 U.S. 197, 204 (1993)).
29. *Id.*
30. *Id.* (citing *Smith*, 507 U.S. at 201-03).
31. *Id.* at 1097.
32. *Id.* at 1098.
33. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1071 (9th Cir. 2006).
34. *Id.*
35. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).
36. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000).
37. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2000).
38. *Pakootas*, 452 F.3d at 1073.

Rather, CERCLA "imposes liability for the cleanup of sites where there is a release or threatened release of hazardous substances into the environment."[39] Once it is determined whether the necessary conditions are met in order for CERCLA to apply, it must still be determined whether the application of CERCLA in this instance would be extraterritorial.[40] If it was determined that the situation was actually a domestic, rather than extraterritorial, application of CERCLA, the presumption against extraterritorial application of congressional legislation would be of no consequence.[41]

CERCLA liability depends upon the satisfaction of three factors.[42] First, the site at which the release or threatened release of hazardous substances occurred must be a "facility" under § 9601(9); second, a "release" or "threatened release" of hazardous substances must have occurred at the facility under § 9607(a)(4); and third, the party is contained "within one of the four classes of persons subject to liability under § 9607(a)."[43]

A "facility" under CERCLA is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[44] The term "facility" has been very loosely construed by courts; for an area to qualify as a facility, "the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there."[45]

The second factor that must be met in determining liability under CERCLA is that there must be a "release" or "threatened release" of hazardous substances into the environment from the facility determined in factor one.[46] In order to determine whether a release or threatened release occurred from the facility, courts look to the statutory definition of "release."[47] CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."[48] In addition to whether a release occurred, an important factor that must be considered

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39. *Id.*
40. *Id.*
41. *See id.*
42. *Id.* at 1073; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601(9), 9607(a), (a)(4) (2000).
43. 42 U.S.C. §§ 9601(9), 9607(a), (a)(4) (2000).
44. *Id.* § 9601(9).
45. *Pakootas*, 452 F.2d at 1074.
46. 42 U.S.C. § 9607(a)(4).
47. *Pakootas*, 452 F.3d at 1074.
48. 42 U.S.C. § 9601(22).

is whether the release occurred from the CERCLA facility.[49] Even if a release occurred, liability under CERCLA does not attach unless the release took place at the facility described under factor one of the liability test.[50] Precedent in the Ninth Circuit and elsewhere make it clear that the leaching or passive migration of hazardous substances into the environment from where they have come to be located constitutes a "release" for the purposes of attaching CERCLA liability.[51]

The final element for liability to attach under CERCLA is that the party must be a "covered person."[52] In order to be a covered person, CERCLA requires that one arrange for the disposal of hazardous substances, "by any other party or entity."[53] The wording of the statute is ambiguous on its face, thus, the question becomes how it has been interpreted by the court. The Ninth Circuit has adopted a reading that supports liability for one who arranges for disposal of waste they own, as well as for the disposal of other's waste.[54] The United States Court of Appeals for the Sixth Circuit has adopted a similar approach.[55]

A question exists as to whether the same elements required in § 9607(a) of CERCLA are required for an order issued under § 9606(a).[56] Section 9606(a) allows the issuance, from the EPA, of orders necessary to protect public health and the environment,[57] but it fails to delineate what the EPA must actually allege before it is allowed to issue those orders. The EPA is allowed to seek fines for noncompliance with these orders unless the person refusing to obey has "sufficient cause" to disregard the order.[58]

The United States Court of Appeals for the Eighth Circuit is the only federal court of appeals that has expressly considered the issue of what constitutes "sufficient cause," and has determined that "sufficient cause" includes a defense that "the applicable provisions of CERCLA, EPA regulations and policy statements, and any formal or informal hearings or guidance the EPA may provide, [can] give rise to an

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49. *Id.* § 9607(a)(4).
50. *Id.* § 9601(9).
51. *See, e.g.*, A & W Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107, 1111 (9th Cir. 1998); United States v. Chapman, 146 F.3d 1166, 1169-70 (9th Cir. 1998); Coeur d'Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094, 1113 (D. Idaho 2003).
52. 42 U.S.C. § 9607(a).
53. *Id.* § 9607(a)(3).
54. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1080 (9th Cir. 2006).
55. *See* Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 659 (6th Cir. 2000).
56. *Pakootas*, 452 F.3d at 1074 n.13.
57. 42 U.S.C. § 9606(a).
58. *Id.* § 9606(b)(1).

objectively reasonable belief in the invalidity or inapplicability of the clean-up order."[59] An interesting determination would have to be made, then, if a party not liable under § 9607(a) would have the requisite "sufficient cause" to refuse compliance with an order issued under § 9606(a).[60] Luckily for the court in the noted case, that determination did not need to occur as Teck was found to be potentially liable under § 9607(a).[61]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit held Teck liable under CERCLA, but neatly sidestepped the thorny issue of congressional intent regarding the extraterritorial application of CERCLA by holding that this case involved a *domestic* application of the law.[62] No determination of congressional intent needed to occur because the fact that the Trail smelter was located in British Columbia was irrelevant to determining whether the application of CERCLA was, in this case, foreign or domestic.[63] Teck's release of hazardous waste into the Columbia River was found to meet the requirements set forth for liability under CERCLA.[64] Further, Teck's releasing of the hazardous substances qualified by itself as "arranging for" the disposal of the waste, and therefore could not be used as a shield from liability.[65]

The threshold question the court considered in determining whether a finding of congressional intent was needed was whether the application of CERCLA in the noted case was, in fact, extraterritorial.[66] If the application was domestic, the presumption against extraterritoriality would necessarily not come into play, and the court would only need to look at the specific factors for determining liability under CERCLA.[67] That is, whether (1) the site at which the release or threatened release of hazardous substances occurred is a "facility," (2) the release or threatened release occurred *at that* facility, and (3) the party is contained within one of the four classes subject to liability.[68]

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59. Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 392 (8th Cir. 1987).
60. *Pakootas*, 452 F.3d at 1074 n.13.
61. *Id.*
62. *Id.* at 1068-69.
63. *See id.* at 1069.
64. *Id.* at 1082.
65. *See id.*
66. *Id.* at 1073.
67. *See id.*
68. *Id.* at 1073-74.

The first CERCLA liability element the court looked at was whether the site qualified as a facility under CERCLA.[69] The EPA order defines the facility in the noted case as the "Site," which is the "extent of contamination *in the United States* associated with the Upper Columbia River."[70] Because Teck did not contest the Site's status as a CERCLA facility, the question was limited to whether the site was foreign or domestic.[71] As the Site is entirely within the United States, the court held that Pakootas' attempt to enforce the Order does not involve an extraterritorial application of U.S. law because it involved a domestic facility.[72]

The second element necessary to develop liability under CERCLA at which the court looked was whether a release or threatened release of hazardous substances occurred at the facility described in factor one.[73] In order to determine whether a release, as defined by CERCLA, had occurred, the court looked to the wording of the statute and to its previous interpretations.[74] Using the wording of CERCLA, a release can be defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."[75] In the noted case, many events could constitute releases under this definition: the discharge from the Trail smelter into the Columbia River in British Columbia, the discharge of the slag from Canada into the United States when the Columbia River enters Washington, and the release of hazardous substances (including heavy metals) from the slag at the location where it came to rest (the Site).[76] Since CERCLA liability does not attach unless the release occurs at the CERCLA "facility," the leaching of heavy metals from the slag resting at the Site constituted the release for the purposes of the noted case.[77]

The Ninth Circuit turned to precedent in determining that the passive leaching of hazardous material into the environment constituted a CERCLA release.[78] In previous cases, the Ninth Circuit held that both wind blown particles of hazardous substances from a pile of waste[79] and

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69. *Id.* at 1074.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *See id.* at 1075.
75. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(22) (2000).
76. *Pakootas*, 452 F.3d at 1075.
77. *Id.*
78. *Id.*
79. A & W Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107, 1111 (9th Cir. 1998).

hazardous substances leaking into the soil from corroding containers[80] constituted CERCLA releases. Using these findings as guidance, the court determined that the passive leaching of heavy metals from the slag constituted a CERCLA release. Finally, because in the noted case the hazardous substances were released into the United States from a facility entirely within the United States, the release was found to be entirely domestic, and as such, no extraterritorial application of CERCLA applied.[81]

The third factor the court looked at in determining liability under CERCLA was whether the party was a "covered person."[82] Teck argued two alternative theories to show that they were not a covered person under the CERCLA guidelines; both ultimately failed.[83] Teck first argued that they were not a covered person because they had not "arranged for disposal" of hazardous material "by any other party or entity."[84] In the alternative, Teck contested that if they were an arranger under CERCLA, assigning them CERCLA liability would amount to an impermissible extraterritorial application of CERCLA, since the arranging for the disposal of the slag occurred in Canada.[85]

The court looked at, and dismissed, Teck's argument that holding them liable under CERCLA for arranging disposal of hazardous substances in Canada would amount to an unwarranted extraterritorial application of CERCLA without clear congressional intent for the statute to so apply.[86] The first step taken by the court was to determine that corporations in general can be considered covered persons under CERCLA because the term "person" includes "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity."[87] The second step was to determine if foreign as well as domestic corporations were included.

Teck's argument was based on *Small v. United States*, where the Supreme Court held that the term "any court" did not include foreign courts.[88] By analogy, Teck urged the Ninth Circuit to read "any person" in CERCLA to not include foreign persons.[89] In denying this argument,

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80. United States v. Chapman, 146 F.3d 1166, 1170 (9th Cir. 1998).
81. *Pakootas*, 452 F.3d at 1075.
82. *Id.*
83. *Id.* at 1075, 1082.
84. *Id.* at 1075.
85. *Id.*
86. *Id.*
87. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601(21) (2000).
88. Small v. United States, 544 U.S. 385, 390-91 (2005).
89. *Pakootas*, 452 F.3d at 1076.

the Ninth Circuit looked to the basis of that decision and determined the test came out differently in the noted case.[90] The Supreme Court's decision in *Small* was based in part on *United States v. Palmer*, where then-Chief Justice Marshall held that the term "any persons" did not include "a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state."[91] However, although the Court did not specifically define foreign parties as included in the phrase "any person," the statute did work to punish foreign parties for acts committed against U.S. citizens.[92]

The Court in *Palmer* relied upon two factors to be used in determining whether a term such as "any person" would be applicable to foreign persons, and these factors were picked up by the Ninth Circuit in the noted case.[93] The first factor is that the state must have jurisdiction over the party, and the second factor is the legislature must intend for the term to apply.[94] In the noted case, the district court determined that there was personal jurisdiction over Teck, and Teck did not raise this issue on appeal.[95] Furthermore, personal jurisdiction over Teck could be found in either Washington's long-arm statute, due to Teck's tortious act in the State of Washington,[96] or in case law where "personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state."[97] Therefore, the Ninth Circuit found the first of the *Palmer* factors to be met in the noted case.[98] This decision stands in contrast with the court's finding in another CERCLA application case, where it was determined that the foreign company in question had insufficient independent contacts with the United States to establish personal jurisdiction.[99] This creates no problem in the noted case, however, as it was established that Teck had enough independent contacts with Washington State to justify specific personal jurisdiction.[100]

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90. *See id.* at 1077.
91. United States v. Palmer, 16 U.S. (3 Wheat.) 610, 633-34 (1818).
92. *Pakootas*, 452 F.3d at 1076 (discussing *Palmer*, 16 U.S. at 633-34).
93. *Palmer*, 16 U.S. at 630-31.
94. *Id.* at 631.
95. *Pakootas*, 452 F.3d at 1076.
96. WASH. REV. CODE ANN. § 4.28.185 (West 1988).
97. Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993).
98. *Pakootas*, 452 F.3d at 1076.
99. A T & T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 590-91 (9th Cir. 1996).
100. *Pakootas*, 452 F.3d at 1076.

The second *Palmer* factor, that the legislature intends the statute to apply to the situation, was also determined to have been met in the noted case.[101] In finding the second *Palmer* factor satisfied, the court turned to *what* was covered under CERCLA, rather than *who* was covered.[102] The court reasoned that since CERCLA liability attaches upon the release or threatened release of harmful substances into the environment, and that the environment defined by CERCLA included "any . . . surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States,"[103] the legislature intended CERCLA to apply to cleanup of sites within the United States.[104] Because the legislature intended the application of CERCLA to assign responsibility for the release of hazardous waste in the United States, the second *Palmer* factor was found to have been met.[105]

The court went on to draw an analogy between the second *Palmer* factor, and the "domestic effects" exception to the presumption against extraterritoriality.[106] In the analogy, the court relied upon the fact that liability under CERCLA does not attach until there is a release or threatened release of hazardous substances into the environment.[107] For purposes of CERCLA liability, the arranging of the disposal is irrelevant until the disposal takes place.[108] The location that matters, according to the Ninth Circuit, is the location of the release (the effect in the United States); the location where the arranging for the release took place is not apposite to the determination of attaching CERCLA liability, and the two events are entirely distinct for CERLA purposes.[109]

The final holding in the noted case was that Teck could not shield itself from liability by claiming that they disposed of the waste themselves, and did not "arrange" for the hazardous substances to be disposed.[110] The court determined that the wording of the statute was imprecise and ambiguous in determining whether liability could attach to

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101. *Id.* at 1077.
102. *Id.*
103. *Id.* (citing Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601(8) (2000)).
104. *Id.* (citing ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1096-98 (9th Cir. 2005)).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1078.
110. *Id.* at 1082.

the disposal of one's own waste.[111] Two readings of the statute were possible; one supported Pakootas's argument while the other supported Teck's position.[112] Each reading required a change to the actual wording of the statute, either by the addition of an "or" or by the deleting one of two commas.[113]

In deciding to favor the "add an or" approach, the Ninth Circuit relied on some precedent,[114] while rejecting other implied precedent.[115] In so deciding, the court noted that to prevent CERCLA liability from attaching in a case where one disposes of their own waste would result in a "gaping and illogical hole in the statute's coverage, permitting argument that generators of hazardous waste might freely dispose of it themselves and stay outside the statute's cleanup liability provisions."[116] The court concluded that this could not be the outcome intended by the legislature.[117]

IV. ANALYSIS

The policy behind the court's decision in the noted case was sound. It is in the public interest to attach CERCLA liability when a release occurs within the United States. Further, closing the "gaping and illogical" loophole that would have resulted if Teck were allowed to escape liability by disposing of the waste itself (and therefore not being an arranger for the purposes of CERCLA), not only benefits the public interest, but also brings the enforcement of the statute in line with what the legislature must have been trying to accomplish. A statute aimed at assigning liability for the cleanup of hazardous waste sites in the United States would lose its teeth if foreign companies were allowed to escape scot-free. As the Ninth Circuit noted, the area of importance is solely the location where the release occurred, because that is the location the statute is attempting to protect.[118]

The court in the noted case sidestepped the issue of congressional intent of extraterritorial application of CERCLA by determining that this

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111. *Id.* at 1080.
112. *Id.*
113. *Id.*
114. Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 566 (9th Cir. 1994).
115. *Pakootas*, 452 F.3d at 1081 (discussing Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341 (9th Cir. 1992) (implying one who disposed of their own waste was not a CERCLA arranger)).
116. *Id.*
117. *Id.*
118. *Id.* at 1077-78.

case involved a purely domestic application of the statute.[119] While it is difficult, if not impossible, to argue that the noted case should not have been decided in this manner, it is also hard to ignore the logic of the district court in its determination of CERCLA liability based on finding congressional intent for the statute to apply extraterritorially. In this case, it is clear that CERCLA expresses a clear congressional intent to remedy conditions within the "territorial jurisdiction" of the United States.[120] When this is coupled with the fact that failure to extend CERCLA to a foreign setting in this instance would clearly result in adverse effects within the country, the district court found that an extraterritorial application was warranted.[121] While calling the distinction between release sites a legal fiction[122] might be stretching the point a bit, the initial disposal of the waste into the Columbia River in Canada seems to have at least some bearing on where the disposal and release occurred.[123]

In explaining why the disposal of the waste into the river and the release of the hazardous substances at the Site must be considered as two distinct events, the Ninth Circuit claimed that the "legal fiction" described by the district court provides the foundation for the differences between CERCLA and RCRA.[124] The court noted that if the Trail Smelter would have been located in the United States as opposed to Canada, the disposal of the slag into the river would possibly be governed by RCRA, while the release of hazardous materials at the Site would still be governed by CERCLA.[125] This argument is not entirely persuasive, however, because the Ninth Circuit determined in their own analysis that the original release of the slag into the river could constitute a CERCLA release.[126] If both the original disposal of the waste into the river and the eventual leaching of hazardous materials from that slag into the river constituted CERCLA releases, it seems reasonable to determine that the noted case could be viewed as an extraterritorial application of CERCLA.

The same result reached in the noted case could be reached by a holding relying on the "domestic effects" exception to the presumption against extraterritoriality. Furthermore, a holding based on the "domestic effects" exception would make the application of CERCLA more clear

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119. *Id.* at 1068-69.
120. *Id.* at 1071.
121. *Id.*
122. *Id.* at 1079.
123. *See id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1075.

and would better align itself with the congressional intent of CERCLA. The Ninth Circuit determined that it was the location of the release rather than the location of the "arranging" that determined whether CERCLA liability would apply.[127] It makes sense to go one more step, and decide that it is the location of the *effects* of the disposal/release that determines CERCLA liability. Because the congressional intent of CERCLA is to provide for the cleanup of hazardous sites within the United States,[128] the most logical outcome is to base liability on the location of the effects of the release. It is easy to imagine a situation not very different from the one in the noted case where both the disposal and the CERCLA release took place in a foreign country, but, because of the current or prevailing winds, the effect of the release was entirely domestic. This hypothetical should be a clear candidate for CERCLA liability when one looks at the congressional intent behind the statute. However, under the decision in the noted case, it is unclear whether liability would attach. The court in the noted case, however, could be commended for using a "slam-dunk" approach. Because the outcome demanded by justice was clear, the court clearly picked a strategy of determination that left no doubt as to whether CERCLA would apply.

The "domestic effects" approach can also fit with precedent that, at first glance, appears not to support extraterritorial application of CERCLA; however, *ARC Ecology* is easily distinguishable from both the noted case and my hypothetical. *ARC Ecology* dealt with foreign claimants attempting to use CERCLA to enforce liability against the United States Air Force for contamination outside the United States,[129] while in the noted case, the party attempting to enforce CERCLA was a U.S. citizen, and the contamination, at the very least, affected land within U.S. borders.[130] This is no way affects the use of the "domestic effects" test.

The policy decisions behind the court's closing of the "gaping and illogical hole" in CERCLA liability are likewise sound.[131] Denying the attachment of liability to one who both creates hazardous materials and disposes of them into the environment without the services of a middleman would be to spit in the face of CERCLA. The proper holding regarding this situation was made in the noted case. One who disposes of waste he creates himself is necessarily an "arranger" under CERCLA;

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127. *Id.* at 1077.
128. *Id.*
129. *Id.*
130. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1070 (9th Cir. 2006).
131. *See id.* at 1081.

he merely arranges with himself to dispose of the waste instead of a third party. This reading of the statute not only makes more sense in regard to the statute itself, it also puts the Ninth Circuit in accord with the Sixth Circuit.[132]

While the correct decision was ultimately reached on the issue of determining CERCLA liability, it would be equally in line with the congressional intent behind the statute, as well as more helpful to future cases, to hold that an extraterritorial application of CERCLA was warranted in this instance because the effects from the release were domestic.

V. CONCLUSION

While the correct outcome was reached in the noted case, the Ninth Circuit's dancing around the issue of extraterritorial application of CERCLA did not help to clarify the issue. No matter which method was used to determine the outcome, however, justice demanded a finding of CERCLA liability. The pollution of the American environment by the disposal of hazardous waste into the air and water should not go unpunished, let alone unnoticed. Where the court slipped, though, was in not providing a clear standard under which future foreign parties could be held responsible for pollution in the United States. The adoption of a standard in which the location of the *effects* of the release of hazardous materials in the environment was used to determine CERCLA liability would not only result in the same outcome in the noted case, it would also provide a workable standard under which foreign parties could be held liable for actions that result in pollution in the United States.

Such a standard would also be more in line with the legislative intent behind enacting CERCLA. Because the congressional intent was to assign liability for the cleanup of hazardous material in sites in the United States, the only location of relevance should be where the hazardous material affects the environment. While the noted case was quick to find a domestic application of CERCLA, it left uncertainty about cases in which it seems just as clear that CERCLA liability should attach. In a hypothetical case quite similar to the noted case, where the initial disposal and release of hazardous waste occurred across a border, but the effects, due to current or wind, were domestic, it is still not clear whether CERCLA liability could attach. The best ruling in the noted case would have provided a rule that one could use to determine the

132. *See* Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 659 (6th Cir. 2000).

outcome of such a hypothetical situation. The noted case falls just short in this respect.

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