

2018

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### Recommended Citation

Ryan K. Sullivan, *ENVIRONMENTAL LAW—HOW IT GOT THERE MATTERS: TRAIL SMELTER EVADES CERCLA RESPONSIBILITY FOR THE AERIAL DEPOSITION OF HAZARDOUS WASTE*, 40 W. New Eng. L. Rev. 299 (2018), <http://digitalcommons.law.wne.edu/lawreview/vol40/iss2/5>

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ENVIRONMENTAL LAW—HOW IT GOT THERE  
MATTERS: TRAIL SMELTER EVADES CERCLA  
RESPONSIBILITY FOR THE AERIAL DEPOSITION OF  
HAZARDOUS WASTE

Ryan K. Sullivan\*

*The Trail Smelter, operated by Teck Cominco Metals, Ltd., is an integrated smelting and refining complex in Trail, British Columbia. It is situated approximately ten miles north of the United States-Canadian border. In the early 1900s, the smelter was at the center of an international lawsuit that led to a landmark decision of international environmental law. Now, almost a century later, the smelter, still in operation, is responsible for widespread contamination on tribal lands located within Washington State. Once again, the smelter is embroiled in a protracted legal battle, this time facing liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).*

*While Teck Cominco, which operates the Trail Smelter, suffered several defeats throughout the legal proceedings, it recently scored a significant victory. In 2016, the Ninth Circuit ruled in favor of the smelter operator, holding that emissions of hazardous waste do not constitute “disposal” for the purposes of CERCLA liability. This Note will argue that despite the Ninth Circuit’s conclusion that it was bound by prior precedent, there were important factual differences that distinguished the Pakootas case from the preceding case law. Furthermore, the decision in Pakootas is incongruous with CERCLA’s legislative history and administrative enforcement. This Note will argue that a definition of disposal that includes the aerial deposition of hazardous waste is consistent with CERCLA’s statutory language*

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and conducive to its broad, remedial purpose.

#### INTRODUCTION

Streaming out of Canada, the Columbia River makes its course into the northeast corner of Washington State.<sup>1</sup> The Upper Columbia River is renowned for its fishing, particularly salmon, which make a yearly anadromous journey upstream from the Pacific.<sup>2</sup> This region is home to the Colville Indian Reservation (established in 1872 by the federal government),<sup>3</sup> but, “since time immemorial,” indigenous tribes have traditionally resided in this region and have relied on subsistence fishing and hunting.<sup>4</sup> The Columbia River forms an important cultural nexus between the various tribes confederated under the Colville name (Tribes).<sup>5</sup>

In the 1980s, concerns began to grow over the declining water quality in the Columbia River. Environmental studies of the Columbia River, its tributaries, and nearby Lake Roosevelt reported elevated concentrations of arsenic, cadmium, lead, and zinc.<sup>6</sup> Later, in 1992, the

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1. Marion E. Marts, *Columbia River*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Columbia-River> [https://perma.cc/RW79-GY68]. Prehistoric lava flows and glacial migration carved the Columbia River’s course. *Id.* In northern Washington, these geological processes created a topography marked by steeped-walled ravines. *Id.* The largest of these ravines is Grand Coulee. *Id.*

2. *Id.* The area is also a popular tourism locale, which recently became an increasing source of revenue for the tribal economy. Rich Landers, *Fishing the Colville Indian Reservation: More Fish, Less Competition*, SPOKESMAN-REVIEW (May 11, 2014), <http://www.spokesman.com/stories/2014/may/11/fishing-the-colville-indian-reservation-more-fish/#/0> [https://perma.cc/XHN9-4HLG].

3. Letter from Richard A. Du Bey, Special Envtl. Counsel to the Confederated Tribes of the Colville Reservation, to Reg’l Adm’r U.S. Envtl. Prot. Agency (Aug. 5, 1999) (on file with EPA).

4. *Id.* The Tribes also derive considerable revenue from three casinos located on their reservation. Treva Lind, *Colvilles Get Back in Black*, J. BUS. SPOKANE (July 14, 2011), <https://www.spokanejournal.com/local-news/colvilles-get-back-in-black/>. In 2010, Joe Pakootas (the named plaintiff in the case that is the subject of this Note) was appointed CEO of the company that manages these tribal casinos. *Id.*

5. See Susan Staiger Gooding, *Place, Race, and Names: Layered Identities in United States v. Oregon, Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor*, 28 L. & SOC’Y REV. 1181, 1206–12 (1994). The Colville Reservation is comprised of eleven different indigenous groups, each with their own distinct language and culture. *Id.* at 1206. These tribes share a unique historical relationship with the region and the Columbia River, gathering for an annual fishing ceremony during the yearly salmon runs. *Id.*

6. See A. Johnson et al., *Transboundary Metal Pollution of the Columbia River (Franklin D. Roosevelt Lake)*, 45 BULL. ENVTL. CONTAMINATION & TOXICOLOGY 703, 706 (1990). The concentrations of zinc, copper, and mercury were two orders of magnitude higher than levels detected in nearby tributaries and waterways. *Id.* Lake Roosevelt is located in the

U.S. Geological Survey found dioxins and furans in the Columbia River's sediment.<sup>7</sup> In 1994, mercury concentrations found in sportfish required Washington's Department of Health to issue a consumption advisory to the public.<sup>8</sup>

The source of the contamination was all too familiar to residents in the region.<sup>9</sup> A Canadian smelter, located just a few miles north of the border, stands starkly against the surrounding bucolic valley.<sup>10</sup> The smelter is among the largest employers in Trail, British Columbia, and provides vital economic support for the area; it also happens to boast an infamous environmental résumé.<sup>11</sup> At the turn of the twentieth century, the smelter's fumes led to an international environmental lawsuit between the United States and Canada.<sup>12</sup> Ultimately, the smelter company was found responsible for transboundary pollution, but succeeded in paying little compensation for its widespread environmental harm.<sup>13</sup>

The same smelter—which a century earlier strangled crops and livestock throughout the region—was now responsible for extensive pollution within the Colville Reservation.<sup>14</sup> The Tribes petitioned the Environmental Protection Agency (EPA) to investigate and determine

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Columbia River Basin and provides irrigation for much of the surrounding agriculture. Marts, *supra* note 1.

7. Du Bey, *supra* note 3, at para. 4.5.

8. *Id.* at para. 4.2. Along with mercury, the results demonstrated that fish were consuming significant amounts of lead, cadmium, zinc, and other trace substances during their annual spawning migrations. M. D. MUNN ET AL., U.S. DEP'T. OF INTERIOR, U.S. GEOLOGICAL SURVEY, CONCENTRATIONS OF MERCURY AND OTHER TRACE ELEMENTS IN WALLEYE, SMALLMOUTH BASS, AND RAINBOW TROUT IN FRANKLIN D. ROOSEVELT LAKE AND THE UPPER COLUMBIA RIVER, WASHINGTON, 1994 21 tbl.10 (1995), <https://pubs.usgs.gov/of/1995/0195/report.pdf> [<https://perma.cc/2MGC-P854>].

9. See Johnson et al., *supra* note 6. “The high metals concentrations in Lake Roosevelt sediments are thought to be primarily due to discharges from the Cominco Limited lead-zinc smelter and refinery at Trail, BC, approximately ten miles above the international border.” *Id.* at 708.

10. See George A. Shipman, *The Columbia River Basin*, 15 W. POL. Q. 34, 34–36 (Sept. 1962).

11. See generally *Trail Operations*, TECK, <https://www.teck.com/operations/canada/operations/trail-operations-5672/> [<https://perma.cc/SCM7-NVGK>]; see also John D. Wirth, *The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution, 1927–41*, 1 ENVTL. HIST. 34 (1996).

12. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1908, 1917–19 (Apr. 1938), [http://legal.un.org/riaa/cases/vol\\_III/1905-1982.pdf](http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf) [<https://perma.cc/3JHB-SSVA>].

13. *Id.* at 1931.

14. See Toby Kruger, *Trail Smelter II: A Prudent Approach? From Extraterritoriality to Non-Discrimination*, 43 U.B.C. L. REV. 109, 109–10 (2010) (“The amount of pollution released by the smelter is, by all accounts, staggering.”).

the extent of the contamination.<sup>15</sup> The results were alarming to say the least.<sup>16</sup> The site was quickly placed on the National Priorities List (NPL), which is comprised of contaminated locations in need of emergency environmental remediation.<sup>17</sup> The EPA also verified that the Trail Smelter was the primary source of the hazardous waste contaminating the Columbia River and, thus, responsible for the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>18</sup>

The operator of the Trail Smelter is Teck Cominco, a Canadian company.<sup>19</sup> Teck argued that it was not responsible for the cleanup costs because, as a foreign corporation, it was not subject to the provisions of CERCLA.<sup>20</sup> Teck Cominco did not deny, however, that it had been dumping hazardous waste into the Columbia River for almost a century.<sup>21</sup> The Ninth Circuit Court of Appeals was not receptive to Teck Cominco's jurisdictional defense.<sup>22</sup> The court found CERCLA could be enforced against the company because the "release" of the hazardous waste occurred within the domestic border of the United States.<sup>23</sup>

Along with dumping toxic metals into the Columbia River, Teck Cominco was allegedly contaminating the area through aerial deposition of particulate matter.<sup>24</sup> The Tribes claimed that the smelter's emissions contained small particles of hazardous waste (e.g., mercury, lead, cadmium, etc.); these particles are carried by wind currents and

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15. Letter from Colleen Cawston, Chair, Colville Bus. Council, to Reg'l Adm'r U.S. Envtl. Prot. Agency (July 30, 1999) (on file with EPA); Du Bey, *supra* note 3.

16. Upper Columbia River Site, No. CERCLA-10-2004-0018, at 2-3 (EPA Dec. 11, 2003), <https://semspub.epa.gov/work/10/1167995.pdf> [<https://perma.cc/ALZ4-WTTY>].

17. See 42 U.S.C. § 9605 (2012).

18. *Upper Columbia River Site*, CERCLA-10-2004-0018 at 3-6.

19. See *Trail Operations*, *supra* note 11. The Trail Smelter has changed hands a number of times during its operation: first it was owned by "Consolidated Mining and Smelting Company of Canada Limited (CM&S), later Cominco Ltd., and now Teck Cominco Metals Ltd., a subsidiary of Teck Cominco Limited." Richard Fish, *Trail Operations at 100*, CANADIAN MINING J. (June 1, 2006), <http://www.canadianminingjournal.com/features/trail-operations-at-100/> [<https://perma.cc/4VHF-P7RM>].

20. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1073 (9th Cir. 2006).

21. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 979 n.2 (9th Cir. 2016) ("Teck stipulated that it had dumped slag into the Columbia River in Canada, that some of the slag came to be located in the United States, where it has leached and continues to leach hazardous substances into the water and sediment of the Columbia River and Lake Roosevelt . . .").

22. *Pakootas*, 452 F.3d at 1079.

23. *Id.*

24. *Pakootas*, 830 F.3d at 979.

deposited throughout the Colville Reservation.<sup>25</sup> Over time, this continuous process results in high levels of soil contamination that present serious long-term consequences for the environment.<sup>26</sup>

Teck Cominco challenged the legal sufficiency of the Tribes' claim. It argued that the aerial deposition of particulate matter did not constitute "disposal" for the purposes of CERCLA.<sup>27</sup> The issue was litigated extensively and, ultimately, the Ninth Circuit agreed with Teck Cominco that aerial deposition of hazardous waste is not a form of disposal under CERCLA.<sup>28</sup> Accordingly, Teck Cominco was not legally responsible for the particulate matter contamination located on the Colville Reservation.<sup>29</sup> While the Tribes could still proceed with their other claims against the company, this ruling dramatically curtailed the scope of potential CERCLA liability in the Ninth Circuit's jurisdiction.<sup>30</sup>

First, this Note will explore the history of the Trail Smelter, and the contamination that it has caused in Washington State. Next, it will discuss the modern legal issues presented by the Trail Smelter's contamination of the Colville Reservation. To fully understand the context of these legal issues, this Note will examine the history and purpose of CERCLA, which is at the heart of the *Pakootas* case. Then, this Note will explain the basis of the *Pakootas* court's ruling, and will argue that the decision was incorrect on several grounds.

As will be explained in the Analysis section of this Note, the court failed to consider the factual context of the cases that were viewed as binding and persuasive precedent. Further, the legislative history and administrative enforcement of CERCLA supports the conclusion that the aerial deposition of hazardous waste is a form of disposal. Accordingly, the *Pakootas* court should have found that Teck Cominco was legally

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25. *Id.*

26. In one scientific study, researchers found that contaminated soil caused plants to grow slower, produce lower yields, and experience elevated toxicity symptoms like chlorosis and necrosis. Michael Komárek et al., *Bioavailability of Lead and Cadmium in Soils Artificially Contaminated with Smelter Fly Ash*, 83 BULL. ENVTL. CONTAMINATION & TOXICOLOGY 286, 287–89 (2009).

27. *Pakootas*, 830 F.3d at 980.

28. *Id.* at 986.

29. *See id.*

30. *See id.*; *Environmental Law—Particulate Matter Emissions—Ninth Circuit Holds That the Emission of Pollutants from Rail Yards Is Not "Disposal" of Solid Waste Under the Resource Conservation and Recovery Act*.—Center for Community Action & Environmental Justice v. BNSF Railway Co., 764 F.3d 1019 (9th Cir. 2014), 128 HARV. L. REV. 1272, 1275 (2015) [hereinafter *Particulate Matter Emissions*] ("[I]f applied strictly, [this ruling] may exempt from citizen suits some disposals of solid substances through the air . . . even though they contribute to hazardous waste contamination of land or water.").

responsible for the emitted waste that subsequently contaminated the Colville Reservation.

I. HISTORY OF THE TRAIL SMELTER AND ITS LEGAL BATTLE  
WITH THE CONFEDERATED TRIBES OF THE COLVILLE  
RESERVATION

This section examines the history of the Trail Smelter dating back to its original construction at the turn of the twentieth century and its involvement in a legal battle between the United States and Canada. Next, this section traces the facts that led to the recent Ninth Circuit decision and discusses the legal arguments that were presented by both sides. Lastly, this section provides a brief synopsis of CERCLA, including its purpose and application, and how the law differs from similar remedial statutes.

A. *How It All Started: Smoke from the North*

When silver ore was discovered in British Columbia in 1889, “[t]he nearest smelter was . . . 500 miles away in Montana.”<sup>31</sup> Noticing a business opportunity, an engineer named E.S. Topping purchased a silver mine and constructed a smelter in Trail, British Columbia.<sup>32</sup> The operations at Trail quickly expanded, and in 1906 the Consolidated Mining and Smelting Company of Canada, Limited (Consolidated) acquired the facility.<sup>33</sup> Although the silver mines eventually stopped production in the 1920s, zinc and lead ore discovered in the neighboring

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31. Keith A. Murray, *The Trail Smelter Case: International Air Pollution in the Columbia Valley*, 15 BC STUD. 68, 68 (1972). Smelting is “to melt or fuse (as ore)” in order to change the chemical composition of the material and separate the metal. *Smelt*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003). Ironically, the nearest smelter was in the unincorporated community of Black Eagle, which is now a recognized superfund site itself. Press Release, Env’tl. Prot. Agency, EPA Proposes Adding Anaconda Copper Mining Co. Smelter and Refinery to Superfund Site List (Mar. 4, 2010), <https://www.epa.gov/sites/production/files/documents/PressRelease4Mar2010.pdf> [<https://perma.cc/QCY6-LT4M>]. In fact, the contamination and CERCLA enforcement action taken against the Black Eagle smelter was cited in the *Pakootas* plaintiffs’ Rule 28(j) letter to the Ninth Circuit. See *infra* Subpart II.C.

32. Murray, *supra* note 31, at 69.

33. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1908, 1917–19 (Apr. 1938), [http://legal.un.org/riaa/cases/vol\\_III/1905-1982.pdf](http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf) [<https://perma.cc/3JHB-SSVA>]. The Consolidated Mining and Smelting Company of Canada, Ltd. had recently received its charter from the Canadian government. *Id.* at 1917. Shortly thereafter, the corporation sold half of its stock to the Canadian Pacific Railway, which immediately began construction of a spur line to Trail. Murray, *supra* note 31, at 70.

town of Kimberly intensified the operation at Trail.<sup>34</sup> In 1925 and 1927, two smoke stacks were erected at the Trail Smelter (both standing at 409 feet in height).<sup>35</sup> The stacks were designed to disperse the smelter fumes away from Trail, but neighboring mountains funneled the fumes south toward the United States.<sup>36</sup>

Farmers in Stevens County, Washington, watched “[t]heir crops wither[] and their cattle sicken[]” amidst the miasma.<sup>37</sup> Desperate, they sought any relief available. While some farmers entered into settlements with Consolidated, others banded together and petitioned the local and federal governments for assistance.<sup>38</sup> After diplomatic discussion, the United States and Canada agreed to have the International Joint Commission (IJC) review the matter.<sup>39</sup> The IJC’s official report concluded that Consolidated was responsible for the environmental issues in Stevens County, but only awarded \$350,000 in total damages.<sup>40</sup> Neither the United States nor Canada found this figure acceptable.<sup>41</sup> The case remained mired in international politics for several years until, in 1935, both countries signed the Ottawa Convention, thereby creating a special tribunal to arbitrate the issue.<sup>42</sup>

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34. Murray, *supra* note 31, at 71–72.

35. *Trail Smelter Case*, 3 R.I.A.A. at 1917. The design of the stacks evidences an intention to disperse hazardous waste over great distances. *Infra* Section II.A.2.

36. Murray, *supra* note 31, at 72–73; Wirth, *supra* note 11, at 35 (“Prevailing air currents caused a marked increase in diurnal downdrafts, which scorched crops, accelerated forest loss, and filled the Columbia River Valley below with choking, noxious fumes.”).

37. Murray, *supra* note 31, at 73.

38. Wirth, *supra* note 11, at 35. At the time, the Washington Constitution prohibited any foreign person from holding interest in land; this prevented the Trail Smelter from purchasing “smoke easements,” in an effort to settle claims with the local farmers. *Id.* at 35. The farmers in Stevens County could not bring their claims in Canadian courts because trespass on foreign land was non-justiciable in the common law courts. *See* *British S. Afr. Co. v. Companhia De Moçambique* [1893] AC 602 (Eng. & Wales), 604, <http://www.uniset.ca/other/cs6/1893AC602.html>. “Hence it was because of this domestic legal limitation that . . . pollution by a private company affecting individuals was elevated to an international dispute.” TIM STEPHENS, *INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION* 127 (2009).

39. Murray, *supra* note 31, at 75. The IJC was created in 1909 through the Boundary Waters Treaty between the United States and Canada, which was drafted to address all issues “involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise.” Treaty Between the United States and Great Britain Relating to Boundary Waters between the United States and Canada, Gr. Brit.-U.S., Jan. 11, 1909, 36 Stat. 2448, T.S. 548.

40. *Trail Smelter Case*, 3 R.I.A.A. at 1918–19.

41. *See id.*; Murray, *supra* note 31, at 76–77. The claimants had sought more than three times the awarded sum. Murray, *supra* note 31, at 76–77.

42. *Trail Smelter Case*, 3 R.I.A.A. at 1907.

The tribunal ultimately ruled in favor of the farmers, but again the total damages awarded were small.<sup>43</sup> Conversely, Consolidated escaped with its business and reputation unscathed.<sup>44</sup> In fact, based on evidence it presented during the proceedings, Consolidated was commended for implementing a progressive mitigation strategy at Trail.<sup>45</sup> However, the tribunal did issue a valuable precedent that cautioned states against permitting unbridled pollution within their borders.<sup>46</sup> While this decision was not revolutionary, it did underscore a fundamental ideology that is now codified in many environmental regulatory models.<sup>47</sup>

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43. *Id.* at 1931 (awarding the United States \$78,000). The United States advocated that while there was a conspicuous lack of visible destruction directly attributable to the smelter fumes, research revealed bioaccumulation in plants, “which in some cases results in destruction.” Wirth, *supra* note 11, at 44. The tribunal was not receptive to this “invisible injury” theory and consequently awarded damages only for the harm that was evidently quantifiable. *Id.* at 45. *But see* William K. Stevens, *The Forest That Stopped Growing: Trail is Traced to Acid Rain*, N.Y. TIMES (Apr. 16, 1996), <http://www.nytimes.com/1996/04/16/science/the-forest-that-stopped-growing-trail-is-traced-to-acid-rain.html> (finding that sulfur dioxide emitted from power plants leaches nutrients away from the soil and dramatically affects the growth rates of neighboring forests).

44. Wirth, *supra* note 11, at 37. In fact, the tribunal did not consider the impact on the environment itself; this is perhaps most indicative of the “limited environmental consciousness of the time,” which could only quantify damages in terms of real economic loss. STEPHENS, *supra* note 38, at 135.

45. Wirth, *supra* note 11, at 37. In the years following the decision, Consolidated claimed that it removed more sulfur dioxide from its emissions than all other smelters in North America combined. Murray, *supra* note 31, at 84.

46. *Trail Smelter Case*, 3 R.I.A.A. at 1965.

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

*Id.*; *see also* *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907) (finding that it was reasonable for a state to enjoin a foreign business for transboundary pollution). The facts underlying *Georgia v. Tennessee Copper Co.* were quite similar to the issues confronted in Washington. *See Tenn. Copper Co.*, 206 U.S. at 238. The Ducktown Basin in Georgia was located between a series of Appalachian Mountains, the topographic dynamics caused smoke from the Tennessee copper smelter to stagnate over the town “in a highly concentrated state, causing damage too severe and too pervasive for Georgia authorities to ignore.” DUNCAN MAYSILLES, *DUCKTOWN SMOKE: THE FIGHT OVER ONE OF THE SOUTH’S GREATEST ENVIRONMENTAL DISASTERS* 102 (2011).

47. *See* JAMES BARROS & DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF POLLUTION* 75 (1974). Some argue that the Trail Smelter case advocates for strict liability against the polluter (a key concept within CERCLA, *see infra* Subpart I.C), while others contend it only invokes the principle of *sic utere tuo ut alienum non laedas* (“use your property in such a manner as not to injure that of another”). *Id.* Regardless of this academic

### B. *The Modern Trail Smelter Dilemma*

Over the next several decades, the owners of the Trail Smelter expanded their operations. Soon, it was among the largest lead-zinc smelters in the world.<sup>48</sup> But, this rapid expansion was not without environmental consequences.<sup>49</sup> In 1999, the Tribes living on sovereign territory in Washington state petitioned the EPA to conduct a preliminary assessment of their land.<sup>50</sup> The Tribes were concerned that the neighboring Trail Smelter was, once again, contaminating the region.<sup>51</sup> The EPA's preliminary study found heavy metals, including "arsenic, cadmium, copper, lead, mercury and zinc," in addition to slag (a known smelting byproduct) throughout the assessment zone.<sup>52</sup> The EPA concluded that the site was eligible for the NPL and ordered Teck Cominco, the current owner of the Trail Smelter, to conduct a Remedial Investigation/Feasibility Study (RI/FS).<sup>53</sup>

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debate, the decision's principles were incorporated into the Stockholm Declaration on the Human Environment: a landmark document that recognized the intrinsic need for more international environmental regulation. *See id.* at 299–303; *see also* Martijn van de Kerkhof, *The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute*, 27 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 68, 74 (2011); *cf.* CAROLYN ABBOT, ENFORCING POLLUTION CONTROL REGULATION, STRENGTHENING SANCTION AND IMPROVING DETERRENCE 43 (2009) (noting that strict legal consequences can bring about dramatic changes in "corporate policy and management").

48. *See Trail Operations*, *supra* note 11.

49. *See generally* *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006); *see also* Upper Columbia River Site, No. CERCLA-10-2004-0018, (EPA Dec. 11, 2003), <https://semspub.epa.gov/work/10/1167995.pdf> [<https://perma.cc/ALZ4-WTTY>].

50. *See* Cawston, *supra* note 15; Du Bey, *supra* note 3. The petition stated that the Upper Columbia River Basin was of "central importance to the Colville Tribes' subsistence and culture." Du Bey, *supra* note 3, at para. 2. Evidence of water and soil contamination, along with bioaccumulation in wildlife, presented a discernable risk to the health and well-being of local residents and tourists. *See* Cawston, *supra* note 15.

51. *See* Cawston, *supra* note 15; *see also* Du Bey, *supra* note 3.

52. *Upper Columbia River Site*, CERCLA-10-2004-0018 at 2 para. 4. Carcinogenic contaminants in the soil and groundwater of an assessment site typically result in a high score on the Hazard Ranking System (HRS) index, which is a "quick-and-dirty estimate of the potential for exposure to hazardous substances." Shreekant Gupta et al., *Do Benefits and Costs Matter in Environmental Regulation? An Analysis of EPA Decisions Under Superfund*, in *ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW* 91 (Richard L. Revesz & Richard B. Stewart eds., 1995).

53. *Upper Columbia River Site*, CERCLA-10-2004-0018 at 9 para. 4. The NPL is comprised of sites with the highest HRS scores; these sites are eligible for long-term remedial action from the CERCLA trust fund. *See* 42 U.S.C. § 9605(g)(2) (2016). The RI/FS is a vital stage in the cleanup process; it is a detailed study that outlines a site's overall risk to the community and presents a plan for remediation. *See* 40 C.F.R. § 300.430 (2011); James T. Hamilton & W. Kip Viscusi, *The Magnitude and Policy Implications of Health Risk from*

Teck Cominco never fulfilled its obligation to perform the RI/FS, nor did the EPA attempt to enforce its order.<sup>54</sup> The matter might have ended there but the Tribes brought a private action against Teck Cominco under 42 U.S.C. § 9659(a)(1).<sup>55</sup> The Tribes' complaint was predicated on the EPA's preliminary findings, alleging that Teck Cominco was responsible for cleanup costs at the Upper Columbia River (UCR) site based on CERCLA "arranger" liability.<sup>56</sup>

Originally, the *Pakootas* case focused only on Teck Cominco's disposal of hazardous waste directly into the Columbia River.<sup>57</sup> During the proceedings, however, the Tribes amended their complaint to include allegations that the smelter's emissions had caused contamination at the UCR site.<sup>58</sup> In response, Teck Cominco filed a motion to strike, arguing that "CERCLA imposes no liability when hazardous substances travel through the air and then 'into or on any land or water.'"<sup>59</sup> The district court denied the defendant's motions to strike and to reconsider, but the matter was certified for interlocutory appeal to the Ninth Circuit Court of

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*Hazardous Waste Sites*, in ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 91 (Richard L. Revesz & Richard B. Stewart eds., 1995).

54. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1070 (9th Cir. 2006).

55. *Id.* The Tribes also sought "penalties for [Teck Cominco's] noncompliance and recovery for costs and fees." *Id.* Section 9659(a)(1) permits a private action to enforce an administrative order. 42 U.S.C. § 9659(a)(1) (2016). At the time the action was initiated, Joseph Pakootas was the CEO of the Confederate Tribes of the Colville Reservation; he ran for Congress as a Democrat in 2016. See generally *Pakootas for Congress*, FACEBOOK, <https://www.facebook.com/pakootasforcongress/> [<https://perma.cc/R2N4-GF2S>].

56. Plaintiff's Amended Complaint, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016) (No. CV-04-256), at 10 para. 8.5; see *infra* Subpart II.C. There are four ways that a party can be liable under CERCLA, one of which is as an "arranger." 42 U.S.C. § 9607(a)(3) (2016). Under this classification, if a party arranges for the disposal of hazardous waste, it can be liable for any damage caused by the arranged disposal. 42 U.S.C. § 9607(a)(3) (2016); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2008). See generally Daniel J. DePasquale, Note, *Environmental Law—CERCLA Enforcement: Terminology and Meaning of "Treatment" Arranger Liability*, 38 W. NEW ENG. L. REV. 425 (2016) (analyzing CERCLA arranger liability for contamination caused by "treatment" of a hazardous waste). Arrangement is a nebulous concept that has been analyzed in numerous cases, and a full discussion of arranger liability exceeds the narrow scope of this Note.

57. See *Pakootas*, 452 F.3d at 1069–70. Teck Cominco eventually admitted that between 1906 and 1995, it annually dumped more than 145,000 tons of industrial waste directly into the Columbia River. *Id.* at 1069–70. The river pathway claims have proceeded separately from the claims alleging aerial deposition of hazardous waste. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 979 (9th Cir. 2016).

58. *Pakootas*, 830 F.3d at 979.

59. *Id.* at 980.

Appeals.<sup>60</sup> The Ninth Circuit overturned the district court's ruling.<sup>61</sup>

The court of appeals' decision was based on two prior cases that specifically addressed the term "disposal" for the purposes of environmental liability.<sup>62</sup> The first, and perhaps more influential case, *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, was a 2014 opinion regarding diesel emissions at rail yards.<sup>63</sup> This case introduced a controversial "order-of-disposal" rule that seemingly required hazardous waste to *first* be physically placed on the ground before any emissions thereof could constitute disposal.<sup>64</sup> The *Pakootas* ruling was also guided by a prior *en banc* opinion, *Carson Harbor Village, Ltd. v. Unocal Corp.*, that addressed the scope of CERCLA liability when applied to the passive migration of contaminants through soil and other media.<sup>65</sup>

Together these two cases (*BNSF* and *Carson Harbor*) form the vital legal basis for the Ninth Circuit's decision in *Pakootas*.<sup>66</sup> But, in reaching its decision, the court ignored factual and legal issues that distinguished the *Pakootas* claim from those presented in the case law. As this Note will argue, this error led to a decision that is incongruous with CERCLA's purpose, legislative history, and prior administrative application.

### C. CERCLA's Origins and Legislative History

To understand the Ninth Circuit's decision, it is necessary to understand CERCLA liability. CERCLA was enacted in response to a community health crisis in Niagara Falls, New York, that garnered national media attention and collective public outcry.<sup>67</sup> But, as

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60. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at \*4 (E.D. Wash. Dec. 31, 2014), *rev'd*, 830 F.3d 975 (9th Cir. 2016).

61. *Pakootas*, 830 F.3d at 986.

62. *See id.* at 983–84.

63. *See generally* *Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019 (9th Cir. 2014). It should be noted that *BNSF* involved the Resource Conservation and Recovery Act (RCRA) and not CERCLA, but disposal has the same meaning under both laws. *Id.* at 1020; *see* 42 U.S.C. § 9601 (2016).

64. *See Particulate Matter Emissions*, *supra* note 30, at 1274–75.

65. *See generally* *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (*en banc*).

66. *See Pakootas*, 830 F.3d at 983–84.

67. ROGER C. HERDMAN ET AL., DEP'T OF HEALTH, LOVE CANAL: PUBLIC HEALTH TIME BOMB 3 (Sept. 1978), [https://www.health.ny.gov/environmental/investigations/love\\_canal/lctimbmb.pdf](https://www.health.ny.gov/environmental/investigations/love_canal/lctimbmb.pdf) [<https://perma.cc/CP7B-YMT6>]. Over a thirty-year period, "[c]hemicals of unknown kind and quantity were buried at the site." *Id.* "After 1953, the site

lawmakers investigated the issue, they discovered the problems confronted in Niagara Falls were also occurring throughout the United States.<sup>68</sup> Congress wanted a law that would enable the government to respond swiftly to locations in need of dire assistance and pass the cleanup costs onto the responsible party.<sup>69</sup>

Unfortunately, when it came to drafting CERCLA, political conflict hampered the legislative process.<sup>70</sup> The bill that would eventually become CERCLA was originally introduced in the House as the “Hazardous Waste Containment Act” and was designed to address “oil or other pollution of navigable waters.”<sup>71</sup> Contemporaneously, Senator Edmund Muskie (D-ME) introduced Senate bill 1480, which contained many provisions that are fundamental to CERCLA today.<sup>72</sup> However, both bills encountered difficulties in their respective legislative bodies.<sup>73</sup> Concerned that a change in the political balance of Congress might doom the endeavor entirely, a compromise bill was introduced in the Senate and rushed through the House during a lame-duck session in 1980.<sup>74</sup> Unsurprisingly, the final draft was written haphazardly and many key provisions were defined by cross-reference to existing laws.<sup>75</sup>

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was covered with earth.” *Id.* Ignorant to the danger below, a school and neighborhood were built on the vacant land. *Id.* In the 1970s, residents noticed strange odor emanating through their basement floors. *Id.* Later identified as toxic chemicals, these substances were found to cause serious harm, including miscarriages, birth defects, and liver damage. *Id.* at 12.

68. S. REP. NO. 96-848, at 7–8 (1980) (the report documents instances that preceded the Love Canal incident, including cases of widespread contamination in Michigan, Virginia, and elsewhere in New York). “Not only are water supplies being contaminated, but untold numbers of innocent persons are exposed to extremely toxic and hazardous chemicals. Some places, such as Love Canal, have become environmental ghettos.” *Id.* at 10.

69. 126 CONG. REC. 26,334, 26,339 (Sept. 19, 1980) (statement of Rep. Staggers) (“Existing law . . . does not authorize cleanup action or provide for an assured source of funding for such action if persons responsible for the hazard cannot be located, are insolvent, or refuse to take remedial action.”).

70. A full examination of CERCLA’s legislative history exceeds the scope of this Note. For a more detailed discussion, see generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

71. *Id.* at 4. Pursuant to the “[United States] Constitution, bills that establish taxes or address revenue” must have their origins in the House. CAROLYN STERN SWITZER & PETER GRAY, *CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (SUPERFUND)* 8 (2d ed. 2002).

72. See Grad, *supra* note 70, at 6–8. In particular, the law enabled the government to take quick action on contaminated sites and recover the costs later. *Id.* at 8.

73. ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* 1–8 (2006 ed.).

74. See *id.*

75. SWITZER & GRAY, *supra* note 71, at 5–8.

This method of defining by cross-reference to another law is not uncommon, but occasionally presents problems during future statutory interpretation—as this Note will soon explore.<sup>76</sup>

### 1. Liability Under CERCLA and the Definition of “Disposal”

There are four ways that a party can be liable for cleanup costs under CERCLA. For the purposes of this Note, the focus will be on § 9607(a)(3):

[A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.<sup>77</sup>

Based on this statutory language, if a party has arranged for the disposal of a hazardous substance, it can be potentially liable under CERCLA for any harm caused by the arranged disposal.<sup>78</sup>

CERCLA does not define “disposal” for its own purposes.<sup>79</sup> Rather, the term is defined according to § 6903 of the Resource Conservation and Recovery Act (RCRA).<sup>80</sup> RCRA was enacted two years before CERCLA.<sup>81</sup> Whereas CERCLA is a remediation statute that is “designed to impose *liability* for past conduct with present effects,”<sup>82</sup> RCRA is intended “to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of [that] waste which is nonetheless generated.”<sup>83</sup> Based on RCRA and CERCLA’s divergent

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76. *Infra* Subpart II.C.

77. 42 U.S.C. § 9607(a)(3) (2016).

78. *Id.* See generally *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). Prior to *Santa Fe Railway*, the Ninth Circuit found Teck Cominco to be an “arranger,” even though it did not contract with a third-party to dispose of its hazardous waste. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1081 (9th Cir. 2006). “We hesitate to endorse a statutory interpretation that would leave 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.” *Id.*

79. See 42 U.S.C. § 9601(v)(29) (2016).

80. *Id.*

81. JOHN S. APPLGATE & JAN G. LAITOS, ENVIRONMENTAL LAW: RCRA, CERCLA, AND THE MANAGEMENT OF HAZARDOUS WASTE 129 (2006).

82. *Id.* RCRA is a regulatory statute that adopts a “cradle-to-grave” strategy for controlling the production and, ultimately, disposal of hazardous waste. *Id.* at 18–19.

83. *Meghriq v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Pursuant to RCRA, a hazardous waste must be a “solid waste.” 42 U.S.C. § 6901(a) (2016).

goals, the definition of disposal should not be applied uniformly to the separate statutes.<sup>84</sup> Nevertheless, interpretations of disposal for the purposes of RCRA are considered influential in CERCLA cases.<sup>85</sup>

Section 6903 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.”<sup>86</sup> While this definition is relatively self-explanatory, not all conduct fits neatly within the provided terms.<sup>87</sup> Consequently, as was the case in *Pakootas*, courts are often tasked with parsing the statutory language for answers.<sup>88</sup> Naturally, this form of judicial inquiry is ripe for controversy, regardless of the outcome.<sup>89</sup>

#### D. *The Pakootas Court’s Interpretation of Disposal*

The Ninth Circuit’s opinion in *Pakootas* (2016) is remarkably short considering the vast implications of the decision. The court essentially defers to the legal analysis provided in two Ninth Circuit opinions: *BNSF*<sup>90</sup> and *Carson Harbor*.<sup>91</sup> While these cases were certainly relevant to deciding the merits of the *Pakootas* claim, they were not necessarily dispositive.<sup>92</sup> Nevertheless, the court seemingly declared *Pakootas* dead on arrival, without ever checking for a pulse.

##### 1. *BNSF’s* Holding and Its Relevance to *Pakootas*

In *BNSF*, the plaintiffs brought suit under RCRA, claiming that diesel particulate matter (DPM) emitted from rail yards presented “an imminent and substantial endangerment” to citizens throughout

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84. See *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at \*2 (E.D. Wash. Dec. 31, 2014), *rev’d*, 830 F.3d 975 (9th Cir. 2016).

85. See *Pakootas*, 830 F.3d, at 983–86.

86. 42 U.S.C. § 6903 (2016).

87. See, e.g., *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351 (2d Cir. 1997) (finding that the passive migration of chemicals, which a prior landowner spilled, did not constitute disposal under CERCLA or RCRA).

88. See, e.g., *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 876–87 (9th Cir. 2001) (en banc).

89. See *TOPOL & SNOW*, *supra* note 73, at 580 (“[T]hrough the liability scheme is strict, [Potentially Responsible Parties] are left with plenty of room to argue that some aspect of their activities related to the sites . . . do not fit within the defined categories, and thus that they are not liable under the statute.”).

90. *Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1021 (9th Cir. 2014).

91. *Carson Harbor*, 270 F.3d at 876–87.

92. See *BNSF*, 764 F.3d at 1021 (analyzing the definition of disposal for the purposes of RCRA); see also *Carson Harbor*, 270 F.3d at 876–87 (holding that disposal does not include the passive migration of contaminants under CERCLA).

California.<sup>93</sup> The complaint was brought by a group of local environmental advocates who argued that over 1.8 million residents in the San Bernardino valley faced an increased risk of cancer due to the rail yard emissions.<sup>94</sup> Invoking RCRA, the plaintiffs argued that DPM was released from idling locomotives and dispersed throughout the surrounding environment.<sup>95</sup> Thereafter, the DPM was swept up and “re-entrained into the air by wind, air currents and passing vehicles,” and inhaled.<sup>96</sup>

The Ninth Circuit dismissed the case on appeal. The court found that the plaintiffs’ case was not cognizable under RCRA because the DPM was emitted *prior* to its contact with the ground.<sup>97</sup> The court’s decision was based on its analysis of the terms that comprise the definition of “disposal.”<sup>98</sup> The court found it particularly informative that the definition of “release”<sup>99</sup> for the purpose of RCRA included the term “emitting,” whereas the definition of “disposal” did not.<sup>100</sup> The court interpreted this omission as evidence that Congress must have intended to exclude emissions from the definition of disposal.<sup>101</sup>

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93. *BNSF*, 764 F.3d at 1021 (Researchers in California found that DPM “caus[ed] cancer and other adverse health problems, including respiratory illnesses and increased risk of heart disease.”). *Id.*

94. *Id.* Center for Community Action and Environmental Justice (CCA EJ) is a grassroots organization in California. *See About Us*, CTR. FOR CMTY. ACTION & ENVTL. JUST., <http://ccaej.org/about-us/> [<https://perma.cc/GR3P-WBF7>]. Its overall mission is to address local environmental issues, particularly in areas of poverty where abuses are more prevalent and attract less public attention. *Id.*

95. *See BNSF*, 764 F.3d at 1021.

96. *Id.*

97. *Id.* at 1025. This has been called the “order-of-disposal rule.” *Particulate Matter Emissions*, *supra* note 30, at 1276. Under *BNSF*’s holding, once a hazardous waste is “aerosolized” and emitted, any subsequent contamination or harm from that waste is not subject to a RCRA claim. *See id.* at 1276–77.

98. *BNSF*, 764 F.3d at 1024 (“By its terms, ‘disposal’ includes only conduct that results in the placement of solid waste ‘into or on any land or water.’”) (quoting 42 U.S.C. § 6903(3)) (2016). Intriguingly, when attempting to distinguish a Tenth Circuit decision that found an aerosolized mist of hexavalent chromium was a form of disposal under RCRA, the *BNSF* court concluded that this technically did not constitute disposal through the air, because the mist was sprayed directly on the land. *Id.* at 1025; *see United States v. Power Eng’g Co.*, 191 F.3d 1224, 1231 (10th Cir. 1999).

99. A release, in the context of arranger liability, occurs once the hazardous waste has already been disposed. *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078 (9th Cir. 2006). For the purposes of CERCLA, there must be a release, or threatened release, of hazardous waste in order to impose liability on a PRP. *See* 42 U.S.C. § 9607 (2016).

100. *BNSF*, 764 F.3d at 1024.

101. *See id.* at 1024–25 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)) (“[W]hen Congress includes particular language in one section of a statute but omits it

The plaintiffs argued, however, that obviating liability in this circumstance would run counter to congressional intent because it would create an inconceivable regulatory gap between RCRA and the Clean Air Act (CAA), through which rail yards could pollute with impunity.<sup>102</sup> The court demurred, and dismissed any potential regulatory gap as an intended exception.<sup>103</sup> Needless to say, the *BNSF* claim failed because the plaintiffs were unable to convince the court that RCRA was a valid means of addressing what was, essentially, an air quality issue.<sup>104</sup>

Intriguingly, the *Pakootas* plaintiffs do not challenge the *BNSF* holding, but rather contend it is inapplicable to the merits of their claim.<sup>105</sup> Unlike *BNSF*, the *Pakootas* case addresses a specific parcel of land that suffered quantifiable harm as a result of the defendant's industrial practices.<sup>106</sup> The parties were not making an air quality claim; the law was not being expanded beyond its intended purpose.<sup>107</sup> While this thesis might have convinced the court to rule in the plaintiffs' favor, the Ninth Circuit also found other concerns that ostensibly supported dismissal of the claim.<sup>108</sup>

## 2. Whether Emissions Constitute a Passive Migration of Contaminates

*Carson Harbor* is a landmark Ninth Circuit case involving the leaching of toxic waste through soil stratifications and whether such passive migration constitutes disposal for the purposes of CERCLA.<sup>109</sup> Contamination is commonly not an acute event—for example, Teck Cominco contaminated the Columbia River over the course of several decades before any legal action was finally taken.<sup>110</sup> While imposing liability on direct contamination—like dumping toxic waste into a

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in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

102. *See id.* at 1029–30.

103. *Id.* at 1026–29 (discussing legislative developments with regard to RCRA and the CAA).

104. *Id.* at 1029–30.

105. *See Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 984 (9th Cir. 2016).

106. *See id.* at 978–80. For a detailed discussion of the harm suffered, see Cawston, *supra* note 15.

107. *See Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at \*2 (E.D. Wash. Dec. 31, 2014), *rev'd*, 830 F.3d 975 (9th Cir. 2016).

108. *Pakootas*, 830 F.3d at 983–86.

109. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 868–70 (9th Cir. 2001) (en banc).

110. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069–72 (9th Cir. 2006).

river—is intuitive, when a natural environmental process spreads the contamination, the courts have been more reluctant to attach responsibility to the polluter.<sup>111</sup>

In *Carson Harbor*, a mobile home park was built on land formerly used for petroleum production.<sup>112</sup> During a financing reappraisal, toxic slag was discovered on the trailer park premises.<sup>113</sup> The contamination required extensive cleanup and remediation.<sup>114</sup> In an attempt to recoup their costs, the proprietor brought suit against prior owners of the land, alleging *inter alia* that they were responsible for cleanup costs under CERCLA.<sup>115</sup> The court found that the claims against Unocal (the petroleum producer) might be cognizable under CERCLA; however, the plaintiff's allegations against a general partnership—which owned the land after Unocal and sold it to the current tenants—presented a thornier legal issue.<sup>116</sup>

The partnership's argument was simple: it was not liable under CERCLA because it did not dispose of any hazardous waste during its ownership.<sup>117</sup> The plaintiff posited that under CERCLA's seemingly expansive definition of disposal, the partnership fit the requirements for a Potentially Responsible Party (PRP). The plaintiff asserted that because the toxic slag continued to spread through the soil while the partnership owned the land, the defendant had technically committed disposal as defined by CERCLA.<sup>118</sup> In weighing decisions from several federal jurisdictions and analyzing CERCLA's statutory language, the Ninth Circuit concluded that this natural permeation was not a form of disposal under the law.<sup>119</sup> Otherwise, disposal could become a never-ending process of passive proliferation that imputes liability against all prior landowners, regardless of the contaminant's latency.<sup>120</sup>

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111. See *Carson Harbor*, 270 F.3d at 877–78; *Bob's Beverage, Inc. v. Acme, Inc.*, 264 F.3d 692, 697 (6th Cir. 2001) (finding disposal requires active human conduct); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358–59 (2d Cir. 1997) (finding that the gradual spread of contaminants through the ground did not constitute disposal). *But see* *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (finding contaminants leaking out of discarded drums does constitute disposal for the purposes of CERCLA).

112. *Carson Harbor*, 270 F.3d at 868.

113. *Id.* at 868–69.

114. *Id.*

115. *Id.* at 869.

116. *Id.*

117. *See id.*

118. *Id.*

119. *Id.* at 875–84.

120. *See id.* The court was also concerned that creating liability in this circumstance

In applying this reasoning, the *Pakootas* court found that aerial disposal of hazardous waste presented the same issue as passive soil migration: as a natural geological process, there was no discernable point at which the disposal could have stopped.<sup>121</sup> In the court's view, to extend liability in this context would implicitly disagree with a central tenet of *Carson Harbor*.<sup>122</sup> As a three-judge panel cannot overrule an en banc decision, the *Pakootas* court was resigned to follow precedent on this issue.<sup>123</sup>

## II. THE *PAKOOTAS* COURT WAS NOT BOUND BY PRECEDENT AND IT FAILED TO CONSIDER CERCLA'S LEGISLATIVE HISTORY AND ADMINISTRATIVE ENFORCEMENT

The argument section of this Note first analyzes the distinguishable factors between the *Pakootas* case and the decisions the Ninth Circuit cited as binding precedent. Second, this section contends that the remedial purpose behind CERCLA supports a broader interpretation of the term "disposal." Finally, this section concludes by arguing that the legislative history and administrative enforcement of CERCLA buttresses the Tribes' position that liability can be imposed on PRPs for causing the aerial deposition of hazardous waste.

### A. *The Decisions in BNSF and Carson Harbor Are Distinguishable from the Pakootas Case*

The *Pakootas* court's reliance on *BNSF* and *Carson Harbor* is misplaced because these decisions should be analyzed within their factual context.<sup>124</sup> In this regard, the *Pakootas* court could have concluded that the Trail Smelter's emissions were a form of disposal, without disrupting the holdings in either of the preceding cases.<sup>125</sup> It is

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could potentially undermine the viability of the "innocent landowner defense." *Id.* at 883; *see infra* Section III.A.2. Under the "innocent landowner defense," a PRP can escape potential CERCLA liability provided it can show that "the release of hazardous substances was caused solely by 'an act or omission of a third party.'" *Id.* at 871 (quoting 42 U.S.C. § 6907(b)(3)).

121. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 983 (9th Cir. 2016).

122. *Id.*

123. *Id.*

124. *Cf.* *Little Hocking Water Ass'n, Inc., v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 966 (S.D. Ohio 2015) ("[W]hen interpreting what constitutes land disposal of solid waste under RCRA, the Court should proceed on a case-by-case basis").

125. *See* Jordan Luebke, *Trail to Perdition: The Ninth Circuit's "Emission" Omission Disposition*, 18 N.C. J. L. & TECH. 146, 166-73 (2016) ("Although the court is correct to note the writing on its slate, a more careful examination of the earlier precedent reveals that those decisions left the court with plenty of blank space in which to scribe a better

evident from the *Pakootas* opinion and the court's comments during oral argument<sup>126</sup> that the Ninth Circuit felt constrained by *BNSF*'s order of disposal rule.<sup>127</sup> However, the *Pakootas* court should have noted that the plaintiffs in *BNSF* only brought suit under RCRA because the CAA was inapplicable to rail yards.<sup>128</sup> The parties were not claiming that DPM was contaminating a specific parcel of land or body of water.<sup>129</sup> Rather, they were arguing that DPM was emitted from rail yards and directly inhaled by the general populace.<sup>130</sup> This is technically an air quality claim within the purview of the CAA.<sup>131</sup> Consequently, the Ninth Circuit was understandably reluctant to recognize an unintended legislative overlap between RCRA and the CAA.<sup>132</sup>

Conversely, the plaintiffs' claim in *Pakootas* fits squarely within the provisions of CERCLA.<sup>133</sup> The salient fact in reaching this determination is that the plaintiffs seek remediation of the environment, specifically the soil and water within the UCR site.<sup>134</sup> This is distinct from the claims presented in *BNSF*, which focused on the human health risks associated with inhaling ambient DPM.<sup>135</sup> It would seem that *BNSF* should only apply when the basis of the claim is the "emission" of hazardous waste.<sup>136</sup> However, if the emitted waste has been introduced into the physical environment, and the "deposition" is the basis of the

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opinion.”).

126. Oral Argument at 12:12–13:27, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016) (No. 15-35228), [www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000009390](http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009390). Judge Callahan notes that the *BNSF* court did not need to establish the order of disposal rule, nevertheless the case does require physical placement of hazardous waste onto land or water in order to constitute disposal. *Id.* at 12:12–13:50; *see infra* Section III.A.1. The court questioned counsel on whether a contrary ruling in *Pakootas* would require the panel to classify the order of disposal rule as a statement of dicta. Oral Argument at 11:13–11:40, *Pakootas*, 830 F.3d 975 (No. 15-35228).

127. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 (9th Cir. 2016).

128. *See* Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co., 764 F.3d 1019, 1022 (9th Cir. 2014).

129. *Id.*

130. *Id.* at 1021.

131. *Id.* at 1021–22. However, locomotives are “indirect sources” of pollution under the CAA and not subject to federal regulation. *Id.* at 1027.

132. *See id.* at 1030 (finding that the omission of DPM from the CAA “[was] the product of a careful and reasoned decision made by Congress”).

133. *See* Brief for the United States, as Amici Curiae Supporting Appellees at 8–10, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016) (No. 15-35228).

134. *See* Response Brief for the Appellee State of Washington at 8–10, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016) (No. 15-35228).

135. *See* Brief for the United States, *supra* note 133, at 12–16.

136. *See id.* at 14–15.

claim, then the *BNSF* rule should be inconsequential.<sup>137</sup>

1. The *BNSF* Court's "Order of Disposal" Statement Is Not a Bright-Line Rule

The vast majority of arguments presented in *Pakootas*<sup>138</sup> focused on a single statement in the *BNSF* opinion: "[w]e therefore conclude that 'disposal' occurs where the solid waste is first placed 'into or on any land or water' and is thereafter 'emitted into the air.'"<sup>139</sup> Teck's argument was that regardless of this statement's logic, it nevertheless creates a rule that emissions are not a form of disposal under CERCLA.<sup>140</sup> The Tribes argued that the rule in *BNSF* should be interpreted as only addressing the ambient aspect of contamination; it was not intended to address contamination that causes harm to the physical environment.<sup>141</sup>

Teck's argument interprets the "order of disposal" rule as presenting a two-stage requirement for disposal: the hazardous waste must first be placed "into or on any land or water," then "emitted into the air."<sup>142</sup> However, Teck fails to explain how this rule operates for land contaminated by subsequent emissions. If aerial pathway claims have no merit according to *BNSF*, then the second stage in this rule is not just superfluous, it is wrong.<sup>143</sup> To follow this argument to its logical end, if the subsequently emitted waste travels onto a neighboring parcel, the contamination would not constitute "disposal" because the hazardous waste was not directly placed on the *locus in quo*.<sup>144</sup>

Alternatively, if the *BNSF* statement is read as addressing only the aerial aspect of the contamination, the subsequent emissions requirement does not undermine the rule. In examining this concept further, it is helpful to view it within *BNSF*'s factual context. In *BNSF*, the plaintiffs

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137. See *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1024 (9th Cir. 2014).

138. See Response Brief for the Appellee, *supra* note 134, at 20–24; Brief for the United States, *supra* note 133, at 18–20; Oral Argument, *supra* note 126, at 1:24–10:45.

139. *BNSF*, 764 F.3d at 1024.

140. See Oral Argument, *supra* note 126, at 0:30–10:31; *Particulate Matter Emissions*, *supra* note 30, at 1272.

141. See Response Brief for the Appellee, *supra* note 134, at 20–24; see also *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2014 WL 7408399, at \*2 (E.D. Wash. Dec. 31, 2014), *rev'd and remanded*, 830 F.3d 975 (9th Cir. 2016) (finding that disposal should be examined in the context of the "facility" that it contaminates).

142. See *BNSF*, 764 F.3d at 1024; Oral Argument, *supra* note 126, at 1:24–1:45.

143. See *BNSF*, 764 F.3d at 1024.

144. See *id.*

claimed that the defendant's disposal was a three-stage process: (1) the DPM was emitted from rail yards; (2) it fell to the ground; and (3) the DPM was, subsequently, swept up by wind and air currents and inhaled by humans.<sup>145</sup> To succeed in their RCRA claim, the *BNSF* plaintiffs were required to show that the defendant's disposal "present[ed] 'an imminent and substantial endangerment to health or the environment.'"<sup>146</sup> RCRA 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 so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air.*"<sup>147</sup> In *BNSF*, the "imminent and substantial endangerment" was not the affect rail yard emissions had on the environment, but rather the inhalation of ambient DPM.<sup>148</sup> By its very nature, such a claim is not consistent with the overall purpose of RCRA, which is meant to address disposal and storage of hazardous waste.<sup>149</sup>

The *Pakootas* claim escapes this pitfall because it seeks remediation of the UCR site—the medium of transport should be inconsequential to the merits of the case.<sup>150</sup> The court is not examining whether "emissions" constitute disposal, but whether "deposition" of hazardous waste falls within CERCLA's definition. As advocated by the plaintiffs, the Ninth Circuit should have examined the factual underpinnings of the *BNSF* decision. In so doing, the court may have found that the issues

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145. *Id.* at 1020–21.

146. *Id.* at 1020 (quoting 42 U.S.C. § 6972(a)(1)(B) (2018)).

147. 42 U.S.C. § 6903 (2016) (emphasis added).

148. *BNSF*, 764 F.3d at 1020–21.

149. *APPLEGATE & LAITOS*, *supra* note 81.

150. *See BNSF*, 764 F.3d at 1024; *Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 966 (S.D. Ohio 2015) (finding that RCRA could be invoked to address aerial deposition of particulate matter when it causes soil and groundwater contamination). In *Little Hocking*, the court declined to follow a narrow reading of RCRA that would require a two-stage order of disposal; "solid C8 particles are emitted into the air, fall onto the ground, remain there, and then contaminate the soil and groundwater . . . this type of soil and groundwater contamination is precisely the type of harm RCRA aims to remediate." *Id.* at 965; *cf. Citizens Against Pollution v. Ohio Power Co.*, No. C2-04-CV-371, 2006 WL 6870564, at \*4–5 (S.D. Ohio July 13, 2006) (finding that flue gas emissions could be considered disposal under RCRA because there was evidence that the flue gas came into physical contact with the ground). Curiously, the *BNSF* opinion also states (without articulation) that the holding in *United States v. Power Eng'g Co.* is not contradictory to the Ninth Circuit's order of disposal rule. *BNSF*, 764 F.3d at 1025; *see United States v. Power Eng'g Co.*, 191 F.3d 1224, 1231 (10th Cir. 1999) (holding that the aerial spraying of hexavalent chromium was disposal for the purposes of RCRA). Perhaps, the court found it inapposite because there was "demonstrable contact" with the environment. *See* Response Brief for the Appellee, *supra* note 134, at 20–24; Luebkekmann, *supra* note 125, at 164.

between the cases, while conceptually similar, were markedly incomparable.<sup>151</sup> In adopting the defendant's argument, the court declined to issue a more nuanced explication of the "order of disposal" rule<sup>152</sup>—one that reconciled the logical inconsistencies of *BNSF* when applied to cases like *Pakootas*.

## 2. Aerial Deposition of Hazardous Waste Is Consistent with *Carson Harbor*'s Definition of Disposal

Even if the *Pakootas* plaintiffs had convinced the court to find the *BNSF* decision inapposite, the *Carson Harbor* case presented an additional hurdle. The court's opinion makes it clear that it was concerned that if CERCLA liability was determined to include the aerial deposition of hazardous waste, disposal "would be a never-ending process"—a concept inconsistent with the Ninth Circuit's ruling in *Carson Harbor*.<sup>153</sup> However, the court's conclusion is misguided because the *Carson Harbor* decision chiefly focused on limiting disposal to those modes that are provided within CERCLA's definition (e.g., discharge, deposit, injection, dumping, spilling, leaking, etc.).<sup>154</sup> Thus, this explains the finding in *Carson Harbor* that the passive migration of contaminants through subsurface soil was not disposal because such "movement" was more aptly described as "'seeping,' 'oozing,' and possibly 'leaching.'"<sup>155</sup> None of those terms are found in CERCLA's definition of disposal; consequently, the passive movement of contaminants was not considered disposal pursuant to the statute's language.<sup>156</sup>

Conversely, "depositing" is a form of disposal according to CERCLA.<sup>157</sup> Furthermore, for decades, the term "depositing" has been

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151. See Frank Cioffi, *Filling Holes in the Air: Why the Ninth Circuit in Pakootas v. Teck Cominco Should Decline to Open up a New Hole in Coverage That Would Circumvent CERCLA Arranger Liability for Sites Contaminated by Aerial Emissions*, 6 WASH. J. ENVTL. L. & POL'Y 28, 58–62 (2016) (arguing that the plaintiffs' goal in *BNSF* was to "enjoin the defendant's pollution of the ambient air" and that the *Pakootas* case is factually dissimilar).

152. See *BNSF*, 764 F.3d at 1024.

153. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 985 (9th Cir. 2016); see *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 882–83 (9th Cir. 2001) (en banc) (finding that passive migration is a never ending geological process and it would be contrary to CERCLA's statutory language to extend liability in this regard).

154. See *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 882–83; see also 42 U.S.C. § 6903 (2016).

155. See *Carson Harbor*, 270 F.3d at 879.

156. See 42 U.S.C. § 6903.

157. *Id.*

synonymous with the aerial transfer of hazardous chemicals—“dry acid deposition” or “dry deposition” is the means by which emitted waste particles and particulate matter “precursors” come to be located in the natural environment.<sup>158</sup> Moreover, the innocent landowner issue that influenced the *Carson Harbor* court should not be implicated in cases involving the aerial deposition of hazardous waste. With this concern addressed, there is no policy basis that vitiates the merits of the *Pakootas* claim.<sup>159</sup> Ultimately, the central tenet of *Carson Harbor* is not whether an indeterminate geological process can constitute disposal, but whether the process is consistent with the plain meaning of “disposal,” or any of its provided terms.<sup>160</sup>

B. *CERCLA Was Intended to Address the Aerial Deposition of Hazardous Waste*

The Ninth Circuit concluded that CERCLA’s legislative history was unavailing in the *Pakootas* case “because Congress did not appear to consider a fact pattern like this one.”<sup>161</sup> Although the court acknowledged that Congress did discuss emissions during the bill’s passage, it was unclear if these statements were addressing the issue of disposal.<sup>162</sup> The court implicitly concedes, however, that if the legislative history was clear it would be considered, especially given the ambiguities in the statute’s language.<sup>163</sup>

Courts often deride CERCLA for being an abomination of linguistic construction.<sup>164</sup> In part, the blame falls upon the final draft that was the

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158. See CAN.–U.S. AIR QUALITY COMM., CANADA–UNITED STATES TRANSBOUNDARY PARTICULATE MATTER SCIENCE ASSESSMENT 4–7 (Dec. 2004), [https://www.epa.gov/sites/production/files/2015-07/documents/canada-u.s.\\_transboundary\\_pm\\_science\\_assessment.pdf](https://www.epa.gov/sites/production/files/2015-07/documents/canada-u.s._transboundary_pm_science_assessment.pdf) [<https://perma.cc/FS88-MAZJ>]; see also Stevens, *supra* note 43.

159. *Carson Harbor*, 270 F.3d at 878–80; see Oral Argument, *supra* note 126, at 28:29–28:50.

160. *Carson Harbor*, 270 F.3d at 887.

161. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 979, 985 (9th Cir. 2016).

162. *Pakootas*, 830 F.3d at 985. CERCLA’s definition of release includes the term “emitting.” See 42 U.S.C. § 9601 (2016). As mentioned above, one of the requirements for prevailing in a private action under CERCLA liability is to demonstrate that a hazardous substance has been “released,” from the contaminated site. *Pakootas*, 830 F.3d at 981. The definition of release is broader than the definition of disposal. Compare 42 U.S.C. § 9601, with 42 U.S.C. § 6903 (2016).

163. *Pakootas*, 830 F.3d at 985 (citing *Tides v. Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011)).

164. See *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) (“It has become *de rigueur* to criticize CERCLA as a hastily passed statute that is far from a paragon of legislative clarity.”); *Carson Harbor*, 270 F.3d at 883 (“Clearly, neither a logician

result of last minute revisions and concessions, which were made on the House and Senate floors.<sup>165</sup> In the end, the final draft bore almost no resemblance to previous versions of the bill.<sup>166</sup> Despite this problem, most courts still acknowledge the fundamental intentions of the law: (1) provide a prompt and effective response to environmental calamities; and (2) shift the burden of cleanup costs to the responsible parties.<sup>167</sup>

The Tribes stressed CERCLA's broad and remedial purpose in framing their argument, but the Ninth Circuit found this contention insipid.<sup>168</sup> While some courts are willing to interpret CERCLA's provisions liberally, the Ninth Circuit has been historically reluctant to follow this model.<sup>169</sup> It would seem that more concrete legislative history—beyond conclusory platitudes—is necessary to impart an expansion of CERCLA liability in this jurisdiction.<sup>170</sup>

Although CERCLA's direct legislative history is sparse, foundational elements of the law can be found in House and Senate bills that were never passed.<sup>171</sup> Some of these bills were incorporated into CERCLA's final draft, for example Senate bill 1480,<sup>172</sup> which introduced many of the cleanup and financing provisions that are synonymous with CERCLA today.<sup>173</sup> The legislative history of this bill

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nor a grammarian will find comfort in the world of CERCLA. . . . Transported to Washington, D.C. in 1980 or 1986, armed with a red pen and a copy of Strunk & White's Elements of Style, we might offer a few clarifying suggestions.”)

165. TOPOL & SNOW, *supra* note 73; *see also* United States v. Conservation Chem. Co., 619 F. Supp. 162, 204 (W.D. Mo. 1985) (“[A] hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law.”). The compromised law was passed under a suspension of the rules that prohibited subsequent amendments. TOPOL & SNOW, *supra* note 73. Consequently, “there are no committee or conference reports addressing the version of the legislation that ultimately became law.” *Id.* at 4.

166. Compare Hazardous Waste Contamination Act of 1980, H.R. 7020, 96th Cong. (1980), with The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat., 2767 (1980).

167. TOPOL & SNOW, *supra* note 73; *see, e.g.*, Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 599 (2009).

168. *Pakootas*, 830 F.3d at 985.

169. *See, e.g.*, Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001) (en banc) (finding that CERCLA's definition of disposal does not encompass the passive migration of contaminants through the soil). *But see* *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006) (finding that Teck Cominco “arranged for disposal” even though it did not contract with a third-party).

170. *Pakootas*, 830 F.3d at 985.

171. SWITZER & GRAY, *supra* note 71, at 5–8.

172. *See* Environmental Emergency Response Act, S. 1480, 96th Cong. (1979).

173. *See* SWITZER & GRAY, *supra* note 71, at 5–8.

has been helpful in discerning the drafters' intent for some of CERCLA's more intricate issues.<sup>174</sup>

### 1. History of the El Paso Smelter

Within the legislative history for Senate bill 1480 is a report from the Senate Environmental and Public Works Committee, which delineates some of the underlying congressional concerns that led to the bill's creation.<sup>175</sup> The Committee Report references a research study that examined six cases of environmental contamination.<sup>176</sup> The study, conducted by the Congressional Research Service (CRS), concluded that victims in these six cases were undercompensated for their injuries—in part, due to the lack of legal remedies available.<sup>177</sup>

One of the cases examined in the CRS Report involved a smelter in El Paso, Texas.<sup>178</sup> The smelter operator employed a significant number of migrant workers, some of whom lived in a nearby community that was colloquially called “Smelertown.”<sup>179</sup> It was a squalid neighborhood; it lacked running water, electricity, and basic social

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174. *See, e.g.*, Ninth Ave. Remedial Grp. v. Fiberbond Corp., 946 F. Supp. 651, 664 (N.D. Ind. 1996) (finding that the legislative history of S. 1480 supported the argument that CERCLA was intended to be applied retroactively).

175. S. REP. NO. 96-848 (1980).

176. *Id.* at 13–14.

177. *Id.* The CRS Report reached three basic conclusions: (1) the common law is generally not conducive to prevailing on toxic tort claims; (2) proving injuries from pollution and contamination is difficult and expensive; and, consequently, (3) the compensation afforded to victims is incommensurate with their damages. *Id.*; *see* CONG. RESEARCH SERV., SER. NO. 93-13, SIX CASE STUDIES OF COMPENSATION FOR TOXIC SUBSTANCES POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI, NEW JERSEY, AND TEXAS, (1980) [hereinafter SIX CASE STUDIES].

178. SIX CASE STUDIES, *supra* note 177, at 51. Founded in 1887, the smelter specialized in copper, lead, and zinc. *Id.* at 51. In 2008, the smelter operator ASARCO entered into a landmark bankruptcy settlement, which required it to pay fifty-two million in cleanup costs pursuant to its liabilities under CERCLA and RCRA. *In re ASARCO LLC*, No. 05-21207, 2009 WL 8176865 (Bankr. S.D. Tex. July 21, 2009). The contamination from the El Paso smelter presents an analogous transboundary pollution issue to the Trail Smelter problem. *See infra* Section III.B.2; John Burnett, *A Toxic Century: Mining Giant Must Clean Up Mess*, NPR (Feb. 4, 2010, 12:50 AM) <https://www.npr.org/templates/story/story.php?storyId=122779177> (“It is very clear that a majority of what came out of that flue and was deposited over 100 years landed in Mexico.”); *El Paso Smelter Still Poses Lead-Poisoning Peril to Children in Juarez*, N.Y. TIMES (Nov. 28, 1977), <http://www.nytimes.com/1977/11/28/archives/el-paso-smelter-still-poses-leadpoisoning-peril-to-children-in.html> (Mexican health authorities concluded that approximately 8000 children, living within a half-mile of the El Paso smelter, were suffering the effects of lead pollution).

179. The community housed roughly 120 Chicano families. SIX CASE STUDIES, *supra* note 177, at 51.

services.<sup>180</sup> Situated in the smelter's shadow, residents would watch as toxic slag poured into a molten pile right beside their homes.<sup>181</sup>

Many children living in Smelertown were found to have elevated levels of lead in their blood.<sup>182</sup> In 1972, thirty-five children were hospitalized due to lead poisoning.<sup>183</sup> Shortly thereafter, health officials evicted Smelertown's residents and relocated the families across the city.<sup>184</sup> Environmental investigations found disturbing levels of toxic metals throughout the area.<sup>185</sup> Given the scope and scale of the dispersion, investigators agreed that the smelter's emissions were the primary source of the contamination.<sup>186</sup>

Despite knowledge of the contamination, ASARCO, the smelter operator, did not warn residents in Smelertown.<sup>187</sup> Consequently, for more than seven years, ASARCO silently observed as residents inhaled and ingested toxic levels of lead on a daily basis.<sup>188</sup> In 1972, the city of El Paso brought a lawsuit against the smelter operator under state environmental laws.<sup>189</sup> The parties settled and ASARCO agreed to implement new pollution control measures over a period of several years.<sup>190</sup> Many of the private lawsuits that followed also settled but, due to evidentiary difficulties, most parties were undercompensated for their damages.<sup>191</sup>

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180. See SIX CASE STUDIES, *supra* note 177, at 406 (describing the town as "substandard housing, dusty unpaved roads, chipped and peeling paint; in close proximity to a major highway").

181. *Id.*

182. Philip J. Landrigan et al., *Epidemic Lead Absorption Near an Ore Smelter: The Role of Particulate Lead*, 292 NEW ENG. J. MED. 123, 128–29 (1975). Among children studied, roughly forty-three percent had abnormal lead absorption levels; environmental particulate lead was determined to be the leading cause of exposure. *Id.* "[T]he more mobile fractions of environmental particulate lead—that is, the lead in dust and air—were those most closely associated with human uptake." *Id.* Although there are recognized thresholds for determining a potentially toxic level of lead, most researchers agree there is no safe level for lead. Kate J. Darby, *Lead Astray: Scale, Environmental Justice and the El Paso Smelter*, 17 LOC. ENVTL. 797, 798–99 (2012).

183. SIX CASE STUDIES, *supra* note 177, at 406.

184. *Id.* at 51. Prior to the relocation of the Smelertown families, ASARCO sprayed plastic chemicals on the ground to keep dust levels down. *Id.* at 418.

185. Landrigan et al., *supra* note 182, at 123–25.

186. SIX CASE STUDIES, *supra* note 177, at 417–18; Landrigan, *supra* note 182, at 129.

187. ASARCO did warn local ranchers, however, that the area was unsafe for cattle grazing. SIX CASE STUDIES, *supra* note 177, at 417–18.

188. *Id.* at 420–22.

189. *Id.* at 422–24.

190. *Id.*

191. Texas law requires "more than a suspicion that such health effects will occur." *Id.*

## 2. The El Paso Smelter is Part of CERCLA's Past and Present

While it is unclear how influential this report was in the final version of CERCLA, its existence alone contradicts the *Pakootas* court's contention that "Congress did not appear to consider a fact pattern like this one."<sup>192</sup> The similarities are uncanny, even to the point that the CRS Report references the Trail Smelter during its discussion of the El Paso incident.<sup>193</sup> Moreover, the focus of the CRS Report was on the smelter's emissions.<sup>194</sup> Although there was some discussion that hazardous waste was released from the smelter's facility through other pathways, the particulate matter primarily escaped in the form of emissions.<sup>195</sup> Therefore, if we infer from the CRS Report that Congress intended to address environmental disasters like Smelertown, then it is reasonable to conclude that the legislative history supports the argument that aerial deposition of particulate matter was intended to constitute disposal under

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at 449. Most diseases have multiple causes; therefore, the latent health risks associated with lead poisoning typically are established through epidemiological studies. *See* CARL F. CRANOR, TOXIC TORTS: SCIENCE, LAW, AND THE POSSIBILITY OF JUSTICE 38 (2006). To this end, litigants can show that compared to the general population, the individuals in the exposed cohort were at an elevated risk for the chronic conditions attributed to lead poisoning. *See id.* However, there are pragmatic difficulties in obtaining helpful epidemiological studies. *Id.* at 155–56; *see also* *Cancer Clusters: The Hunt for a Killer*, CBS NEWS (Mar. 12, 2017, 9:57 AM), <https://www.cbsnews.com/news/cancer-clusters-the-hunt-for-a-killer/> [<https://perma.cc/X3HN-5FGT>] (noting that the occurrence of rare cancers in an isolated geographic area (i.e. "cancer clusters") often times cannot be directly linked to any environmental contamination).

192. *See* *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 985 (9th Cir. 2016). It should be acknowledged that Senate bill 1480 originally contained a personal injury provision, which was not included in the final version of the law. *See* Grad, *supra* note 70, at 19. It could be argued that the CRS report was directly aimed at supporting this omitted provision and, thus, it should be given less legal weight. *See* SUPERFUND: A LEGISLATIVE HISTORY ix (Helen Cohn Needham & Mark Menefee, eds., 1982) ("[E]xplanations of a bill that did not pass the Congress are generally less important than explanations of a bill that did pass."). *But cf.* 126 CONG. REC. 30,943 (1980) (statement of Rep. Heinz) (arguing that the El Paso Smelter incident was, in part, the basis for imposing a fee on zinc smelters).

[The] EPA document, 'Fees on Zinc' . . . has been cited as justification for imposing Superfund fees on zinc. . . . [I]ncriminating zinc in connection with the El Paso smelter is intentionally misleading. It has never been suggested that zinc emissions from that smelter have caused any adverse human health effects and the effects which were noted have been subsequently discredited by reputable scientists. In addition, the smelting of zinc has not been shown to cause the release of hazardous quantities of other pollutants.

*Id.*

193. SIX CASE STUDIES, *supra* note 177, at 449 ("Similar damage to cattle and horses was reported near a lead smelter in Trail, British Columbia.").

194. *Id.* at 407.

195. *Id.*; *see also* S. REP. NO. 96-848, at 7 (1980) (discussing environmental disasters that precipitate the drafting of S. 1480) ("The careless manufacturing and disposal practices also resulted in atmospheric emissions which settled on surface soils.").

## CERCLA.

Unsurprisingly, despite “onerous” environmental regulations, the El Paso Smelter continued to pollute the surrounding area for many more years.<sup>196</sup> Finally, in July of 2002, the EPA sent a Notice of Potential Liability to ASARCO, which informed the company that it was potentially liable under CERCLA for numerous contaminated sites throughout the city.<sup>197</sup> While initial negotiations were unproductive, ASARCO eventually agreed to pay more than fifty million dollars in cleanup costs.<sup>198</sup> However, since its liability under CERCLA and RCRA was largely predicated on the aerial deposition of particulate matter, a similar settlement agreement might have been unlikely had the contamination occurred in the Ninth Circuit’s jurisdiction.<sup>199</sup> Accordingly, not only is the El Paso Smelter case indicative of the issues that CERCLA was intended to address, it also demonstrates CERCLA’s effectiveness when the law is broadly applied.

### C. *EPA Decisions Should Be Given Skidmore Deference*

In a letter of supplemental authority, the United States argued to the *Pakootas* court that the EPA “has for decades used CERCLA to respond to contamination from the aerial deposition of hazardous substances.”<sup>200</sup> The plaintiffs posited that these administrative documents might be entitled to *Skidmore* deference.<sup>201</sup> The Ninth Circuit declined to address

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196. U.S. ARMY CORPS OF ENGINEERS, EL PASO AND DONA ANA COUNTY METALS SURVEY SAMPLING REPORT (Aug. 17, 2001), [https://d32ogoqmya1dw8.cloudfront.net/files/integrate/teaching\\_materials/map\\_sense/el\\_paso\\_dona\\_ana.pdf](https://d32ogoqmya1dw8.cloudfront.net/files/integrate/teaching_materials/map_sense/el_paso_dona_ana.pdf) [https://perma.cc/9MMZ-9D2A]. The report prepared for the EPA found elevated levels of arsenic and lead in locations throughout El Paso, including parks, schools, and college campuses. *Id.* The report also found levels of arsenic and lead more than two orders of magnitude greater than permitted threshold levels. Letter from Myron O. Knudson, P.E., Dir. Superfund Div., to ASARCO Inc. (Jul. 16, 2002) (on file with EPA).

197. Knudson, *supra* note 196.

198. *In re ASARCO LLC*, No. 05-21207, 2009 WL 8176865 (Bankr. S.D. Tex. July 21, 2009).

199. *See Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 (9th Cir. 2016). If ASARCO had wanted to challenge the EPA’s determination that it was a PRP, its strongest argument would be a definitional defense based on whether it “disposed” of any hazardous waste. *See generally* 42 U.S.C. § 9607 (2016).

200. Letter of Supplemental Authority at 1, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016) (No. 15-35228). *See, e.g., In re Gulf Res. & Chem. Corp. & Hecla Mining Co.*, EPA1090-10-01-106, 1990 WL 10532643, at \*1 (E.P.A. Oct. 1, 1990).

201. *See United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (“*Chevron* did not eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency.”) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139

this argument in its opinion because the issue was not fully briefed during oral argument.<sup>202</sup> However, assuming future litigants present this argument in a timely manner, courts should be receptive to its merits.

The EPA has been responsible for administering and enforcing CERCLA since the law was enacted.<sup>203</sup> This familiarity with the intricacies and practicalities of the law should warrant some deference from the courts.<sup>204</sup> The Supreme Court first articulated this concept in *Skidmore v. Swift & Co.*, which addressed whether an agency's interpretation of a provision within the Fair Labor Standards Act should warrant any consideration from the courts.<sup>205</sup> The Court found that based on the agency's "body of experience and informed judgment," its opinions, while not controlling, were a proper source of guidance.<sup>206</sup> Since *Skidmore* was decided, courts have deferred to agency determinations promulgated in letters, settlement agreements, unilateral orders, and various other legal memoranda.<sup>207</sup> It is worth noting, however, that *Skidmore* deference is only persuasive and, unlike *Chevron* deference (normally afforded to agency promulgated regulations),<sup>208</sup> does not require the court to deviate from prior judicial interpretation.<sup>209</sup>

Therefore, when it comes to the issue of defining "disposal" under CERCLA, courts should be willing to consider the EPA's historical

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(1944)).

202. *Pakootas*, 830 F.3d at 986 n.12 ("Arguments raised for the first time in 28(j) letters are ordinarily considered waived. . . . We decline to reach such a complex issue on less than full briefing.").

203. *See generally* Executive Order No. 12580, 52 Fed. Reg. 2921, FR 2923 (Jan. 23, 1987).

204. *See Mead Corp.*, 533 U.S. at 218; *Skidmore*, 323 U.S. at 140.

205. *Skidmore*, 323 U.S. at 140.

206. *See id.*

207. *See Mead Corp.*, 533 U.S. at 235–39 (finding that a "ruling letter" regarding a customs classification was due deference dependent on its "thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight"); *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 681–82 (9th Cir. 2016) (affording *Skidmore* deference to an internal memoranda regarding the endangered species list), *cert. denied*, No. 17-133, 2018 WL 491542, at \*1 (U.S. Jan. 22, 2018); *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, 799 F.3d 468, 479 (6th Cir. 2015), *cert. granted in part sub nom. Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 136 S. Ct. 1823 (2016) ("Copyright Office's determination that design is protectable under the Copyright Act is entitled to *Skidmore* deference."); *cf. Siwe v. Holder*, 742 F.3d 603, 607 (5th Cir. 2014) (reviewing one-member Board of Immigration (BIA) decisions under the *Skidmore* deference standard).

208. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984). Neither side in *Pakootas* argued that *Chevron* deference applied. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 n.12 (9th Cir. 2016).

209. *Pakootas*, 830 F.3d at 986.

application of the law.<sup>210</sup> For example, the EPA's letter to ASARCO stated that the company was a PRP under CERCLA, impliedly because it emitted hazardous waste, which was subsequently deposited throughout the city.<sup>211</sup> However, this is far from the only example of the EPA applying CERCLA in cases that involved emissions of hazardous waste.<sup>212</sup>

In a letter of supplemental authority, counsel for the United States cited three instances where the EPA had determined that emissions were a form of disposal under CERCLA.<sup>213</sup> For example, *In re Gulf Resources*, years of mining and smelting had caused significant contamination in the Silver Valley of Idaho.<sup>214</sup> The location was placed on the NPL and identified as the Bunker Hill Mining and Metallurgical Site.<sup>215</sup> The respondent companies entered an agreement with the EPA to initiate remedial action in the area.<sup>216</sup> The agreement specifically stated that the "respondents and their predecessors in interest have released large quantities of a variety of waste products, including airborne emissions."<sup>217</sup> Other cases include *In re ACM Smelter & Refinery Site*<sup>218</sup> and *In re Anniston Lead Site, & Anniston PCB Site*.<sup>219</sup> In both locations, the EPA concluded that aerial deposition of hazardous waste was a significant contamination pathway, and that CERCLA liability could be imposed on the respondents based on this activity.<sup>220</sup>

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210. See Letter of Supplemental Authority, *supra* note 200; Oral Argument, *supra* note 126, at 22:05–22:16 ("There have been thirty years of CERCLA practice of addressing smelter sites, refineries . . . hundreds of sites across the country where allegations are based on the aerial deposition of hazardous substance.").

211. Knudson, *supra* note 196.

212. See, e.g., *In re Gulf Res. & Chem. Corp. & Hecla Mining Co.*, No.1090-10-01-106, 1990 WL 10532643, at \*1 (E.P.A. Oct. 1, 1990).

213. Letter of Supplemental Authority, *supra* note 200.

214. U.S. ENVTL. PROTECTION AGENCY, REGION 10, MINE CONTINGENCY PLAN FOR THE BUNKER HILL MINE KELLOGG, IDAHO, 2-1-2-2 (1999), [https://www3.epa.gov/region10/pdf/sites/bunker\\_hill/cda\\_basin/bunker\\_hill\\_mine\\_contigency\\_plan.pdf](https://www3.epa.gov/region10/pdf/sites/bunker_hill/cda_basin/bunker_hill_mine_contigency_plan.pdf).

215. *Id.*

216. See generally *In re Gulf Res.*, 1990 WL 10532643, at \*7.

217. *Id.* at \*3 (emphasis added).

218. CERCLA-04-2005-3777, (E.P.A. Jul. 27, 2005), [https://www.epa.gov/sites/production/files/2014-03/documents/anniston\\_pcb\\_12.pdf](https://www.epa.gov/sites/production/files/2014-03/documents/anniston_pcb_12.pdf) [<https://perma.cc/UYY5-XKWD>].

219. CERCLA-08-2011-0017, (E.P.A. Sept. 8, 2011), [http://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/734256DA6DAC2D5385257907001B7F19/\\$File/CERCLA0820110017%20AO.pdf](http://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/734256DA6DAC2D5385257907001B7F19/$File/CERCLA0820110017%20AO.pdf) [<https://perma.cc/7EUG-LWHT>].

220. *In re Anniston Lead Site, & Anniston PCB Site*, CERCLA-08-2011-0017, (E.P.A. Sept. 8, 2011), <https://www.epa.gov/sites/production/files/2014-03/documents/>

Given the breadth and thoroughness of these administrative orders, courts should be willing to defer to the EPA's interpretation of disposal.<sup>221</sup> While this deference might not be dispositive, it is important that courts at least consider the EPA's opinions.<sup>222</sup> Although any decision must be sound in legal precedent, pragmatism should have its day in court as well.

#### CONCLUSION

The recent Ninth Circuit holding in *Pakootas* dramatically curtails the scope of CERCLA liability. It is a ruling that is inconsistent with CERCLA's broad remedial purpose, legislative history, administrative enforcement, and interpretation. The court erroneously concluded that it was bound by prior precedent because it failed to consider the factual context of *BNSF* and the distinguishable issues that the *Pakootas* case presented. Future litigants in other jurisdictions should be swift to argue that the aerial deposition of hazardous waste fits squarely within the definition of disposal under CERCLA. Otherwise, polluters like Teck Cominco will continue to escape responsibility for their environmental contamination through linguistic contortion.

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anniston\_pcb\_12.pdf [https://perma.cc/UYY5-XKWD] ("Millions of pounds of PCBs were released from the plant through disposal of . . . [polychlorinated biphenyl] through air and fugitive emissions."); *In re* ACM Smelter & Refinery Site, CERCLA-04-2005-3777, (E.P.A. Jul. 27, 2005), [http://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/734256DA6DAC2D5385257907001B7F19/\\$File/CERCLA0820110017%20AO.pdf](http://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/734256DA6DAC2D5385257907001B7F19/$File/CERCLA0820110017%20AO.pdf) [https://perma.cc/7EUG-LWHT] ("Contaminant transport to the community of Black Eagle occurred via several pathways, including primarily airborne particulate contamination from the smelter stack, which settled on neighborhood soils, buildings and other surfaces.").

221. See *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J. dissenting) ("The majority's approach . . . sets forth a sliding scale of deference . . . dependent 'upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'") (alteration in original) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

222. See *Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1243 (10th Cir. 2003) (finding the EPA's characterization of a CERCLA action as either removal or remedial under CERCLA was entitled to *Skidmore* deference).