

TRANSBOUNDARY POLLUTION AND CERCLA LIABILITY: INTERNATIONAL MANUFACTURERS' ABILITY TO EXPLOIT AERIAL DEPOSITIONS

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[N]o 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 therein¹

ABSTRACT

The Trail Smelter has a long and extensive history of pollution issues. The most recent claim against the Trail Smelter is the aerial deposition of hazardous waste theory. The Ninth Circuit has rejected attaching Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability to the Trail Smelter under the aerial deposition theory, but this holding cannot be accepted if the goal is to control pollution. Many issues arise with controlling transboundary pollution, including the enforcement of international agreements on the matter. In the absence of establishing an enforceable international treaty between the United States and Canada, CERCLA presents a viable option to help control transboundary air pollution. "Disposal's" definition under CERCLA includes the term "deposit," which promotes attaching CERCLA liability to foreign manufacturers for pollution harms that occur within the United States' territorial boundaries. In order to reduce the harm caused by transboundary air pollution, and to promote CERCLA's purpose, there is a need to recognize that CERCLA liability can attach to the aerial depositions of hazardous waste.

TABLE OF CONTENTS

ABSTRACT	145
I. INTRODUCTION	146
II. THE TRAIL SMELTER.....	149
A. A Brief Recount of the Trail Smelter Arbitration	150
B. <i>Pakootas v. Teck Cominco Metals</i> Line of Litigation	151
i. The Extraterritorial Application of CERCLA	152
ii. <i>Pakootas v. Teck Cominco Metals</i> and the Theory of Aerial Deposition	153
III. INTERNATIONAL ISSUES AND RELATIONS BETWEEN CANADA AND THE UNITED STATES	154

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1. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1938, 1965 (1941) [hereinafter Trail Smelter II].

IV. STATUTORY INTERPRETATION AND DISPOSAL'S DEFINITION UNDER CERCLA	156
A. CERCLA's Statutory Language and Disposal's Definition	157
B. CERCLA's Statutory Scheme and the Aerial Deposition Theory	164
C. The Lack of Guidance from CERCLA's Legislative History	170
D. EPA's Interpretation and the Aerial Deposition Theory	172
V. CONCLUSION	176

I. INTRODUCTION

It is unquestionable that pollution does not respect international borders.² Pollution is everywhere. Pollution does not recognize territorial sovereignty, and thus pollution is its own master.³ Air pollution is the most omnipresent pollution form because it is not confined to a defined boundary, such as water pollution. Air fills every unoccupied space, and when the air is polluted there is no stopping where the pollution will end up. Hazardous waste pollution, once placed into an environmental pathway, can be deposited many miles away from its originating location.⁴ For example, a manufacturer's emissions can place hazardous waste into the air, and that hazardous waste can be carried by air currents for many miles before the hazardous waste is finally deposited into an environmental medium.⁵

Environmental regulation is a relatively new concept in the United States.⁶ It was not until the 1970s that the modern environmental regulation regime's foundation was established.⁷ These early environmental statutes set forth "the ground rules for national environmental protection efforts."⁸ These ground rules established methods to control air and water pollution and hazardous waste management.⁹ With the enactment of the Resource Conservation and Recovery Act (RCRA), Congress sought to "eliminate[] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes."¹⁰ By the late 1970s, the threats presented by hazardous waste sites were placed in the national spotlight after the disasters at Love Canal¹¹ and Kentucky's Valley of

2. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L. J. 233, 235 (2006).

3. *Id.*

4. *Id.*

5. *Id.*

6. Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 164 (1997).

7. *Id.*

8. *Id.*

9. See generally The Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2012); The Clean Air Act, 42 U.S.C. §§ 7401–7626 (2012).

10. H.R. REP. NO. 94-1491, pt. 1, at 4 (1976).

11. Beginning in 1942 Hooker Chemical and Plastic Corporation dumped over 20,000 tons of hazardous waste into the Love Canal site, covered the site, and sold the property to Niagara Falls Board of Education for one dollar. In the 1970's heavy precipitation caused the hazardous waste to leach from the ground creating a state of emergency in the surrounding community. See generally THOMAS H. FLETCHER, FROM LOVE CANAL TO ENVIRONMENTAL JUSTICE: THE POLITICS OF HAZARDOUS WASTE ON THE CANADA-U.S. BORDER 46–54 (2003).

Drums¹² were highly publicized.¹³ In response to the Love Canal and the Valley of Drums disasters, Congress quickly passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to clean up hazardous waste sites and make the responsible parties pay.¹⁴ Although RCRA was thought to have eliminated the last loophole in environmental regulation, CERCLA's enactment presented a new loophole—how to hold a party responsible for their aerial emissions of hazardous waste that are deposited across international borders.

Aerial emissions rates have increased significantly worldwide as countries are rapidly becoming more industrialized.¹⁵ With rapid, global industrialization there exists an increased risk for hazardous waste to be aerially deposited across international borders. Unintentionally, manufacturers located next to international borders may not recognize the harms their hazardous waste emissions are causing to the neighboring countries. For example, heavy metals such as lead can precipitate from a manufacturer's emissions into a neighboring country's ground or water. With an increased likelihood that hazardous waste emissions are to become more prominent because of the global increase in industrialization, there is an imperative need to establish a solution to this problem. Now is the time to hold manufacturers liable for the harm their aerial depositions of hazardous waste cause to neighboring countries and to make the responsible party pay for the cleanup.

The Ninth Circuit was presented with an opportunity to solve this issue in *Pakootas v. Teck Cominco Metals, Ltd. ("Pakootas III")*.¹⁶ However, the Ninth Circuit refused to allow the aerial deposition of hazardous waste to fall under CERCLA's definition for disposal.¹⁷ In *Pakootas III*, the Ninth Circuit's interpretation of disposal's definition under CERCLA will inflict significant restraints on CERCLA's ability to impose liability. "Disposal," as defined under RCRA and cross-reference by CERCLA, does not require that hazardous waste must first be deposited into the ground or water.¹⁸ Rather, the Ninth Circuit, on its own initiative, read the word "first" into disposal's definition.¹⁹ The verbs used to define disposal, specifically the verb "deposit," allows for the aerial deposition of hazardous waste to fall within "disposal's" definition. When reading CERCLA as a whole, the statute's purpose is

12. Tens of thousands of unlabeled, discarded barrels of waste were discovered on a five-acre site, leaking their hazardous contents into the nearby river. See Paul W. Heiring, *Private Cost Recovery Actions Under CERCLA*, 69 MINN. L. REV. 1135, 1136 n.7 (1985).

13. *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 246 (5th Cir. 1998).

14. Emile Mooney Scott, *Bona Fide Protection: Fulfilling CERCLA's Legislative Purpose by Applying Differing Definition of "Disposal"*, 42 CONN. L. REV. 957, 958 (2010).

15. See, e.g., Elena L. Zvereva et al., *Changes in Species Richness of Vascular Plants Under the Impact of Air Pollution: A Global Perspective*, 17 GLOBAL ECOLOGY & BIOGEOGRAPHY 305, 306 (2008).

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

17. *Id.* at 986.

18. See 42 U.S.C. § 6903(3) (2012); § 9601(29) (noting that the word "first" does not appear in the definition).

19. *Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1024 (9th Cir. 2014).

to hold manufacturers liable and to provide compensation for the cleanup of hazardous waste that has been released into the environment and inflicted harm.²⁰ The Ninth Circuit's "disposal" interpretation does not fully advance the purpose behind CERCLA's enactment and creates a new gap in the environmental regulatory regime.

Under the Ninth Circuit's "disposal" interpretation, liability and compensation provided under CERCLA for hazardous waste disposal would only be allowed when the hazardous waste is first placed into the ground or water.²¹ As a result, international manufacturers are able to exploit aerial pathways to avoid liability and compensation under CERCLA. Under the current "disposal" interpretation, there exists a statutory gap in the international context for hazardous waste disposal that allows for the aerial deposition of hazardous waste to go unpunished under CERCLA. In future scenarios, applying the Ninth Circuit's "disposal" interpretation will lead to abuse by international manufacturers who first place their hazardous waste into the air, and then allow the hazardous waste to precipitate from the air into the ground or water. Allowing for the aerial disposal of hazardous waste to go unpunished and unregulated will result in major ecological hazards, health ramifications, and abuse by international manufacturers.

To address the aerial disposal of hazardous waste and CERCLA, this article explores both the extensive history of the Trail Smelter and CERCLA's interpretation. Part II of this article starts with a brief discussion of the Trail Smelter's litigation history, beginning with the Trail Smelter Arbitration and ending with the State of Washington asserting the aerial deposition theory.²² Part III of this article explores the current international agreements between the United States and Canada and recognizes that the Air Quality Agreement needs to be revisited to solve future aerial disposals between the two countries.²³ Part IV of this article walks through the statutory interpretation of CERCLA, assessing the language, overall statutory scheme, legislative history, and the United States' Environmental Protection Agency's (EPA) disposal interpretation under CERCLA.²⁴ Finally, Part V concludes by declaring that CERCLA does allow for the aerial deposition of hazardous waste as a disposal form.²⁵ The need to address aerial depositions as a disposal method under CERCLA is of the utmost importance. Accepting aerial depositions as a disposal under CERCLA will tighten the United States' environmental regulatory scheme and ensure that manufacturers are paying for the harm and cleanup that their pollution causes.

20. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

21. *Ctr. for Cmty. Action & Env'tl. Justice*, 764 F.3d at 1024; *Pakootas III*, 830 F.3d at 983–84 (prohibiting the aerial deposition theory).

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part V.

II. THE TRAIL SMELTER

The Trail Smelter, located in Trail, British Columbia, "stands like an industrial fortress on the bank of the Columbia River, [ten] miles north of the border between Canada and the United States."²⁶ Built in the late 1890s, the Trail Smelter began its life as a processing station for the Rossland mines.²⁷ After receiving substantial support from the Canadian Pacific Railway, the Trail Smelter quickly "became an industrial center for the entire region."²⁸ As the operations at the Trail Smelter expanded because of increased access to ore in the region, the emissions produced from the smelter dramatically increased.²⁹ The sulfur dioxide emissions from the Trail Smelter numbered in the thousands of tons per month, causing harmful impacts to animals and vegetation in the surrounding Trail, British Columbia community.³⁰ Beginning in 1916, the Trail Smelter was immersed in litigation concerning the damage done to crops and forests within the smelter's vicinity.³¹ As litigation continued in the Canadian tribunals, farmers from the American side of the border provided testimony supporting the Trail Smelter, stating that their "animals, and crops had not been smoke-damaged."³² In 1924, a Canadian judge ruled against the Trail Smelter and ordered the Trail Smelter to pay damages from harms caused in the Trail community.³³ In response to the lawsuits brought by Canadian land owners, and in part to improvements, the smokestacks at the Trail Smelter were increased to a height just over four hundred feet to help disperse the smelter's air emissions.³⁴ The increased smokestack heights would only present new problems, brought by American farmers, to the Trail Smelter.³⁵

As the emissions from the Trail Smelter increased, the emissions were carried by the wind into Washington State's Columbia Valley.³⁶ With emissions from the Trail Smelter becoming more prominent in the Columbia Valley, farmers of Stevens

26. Gerald F. Hess, *The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA*, 1018 GEO. INT'L ENVTL. L. REV. 1, 2 (2005).

27. Robinson-Dorn, *supra* note 2, at 243. In 1906, the Consolidated Mining and Smelting Company of Canada, Ltd. purchased the Trail Smelter, but would later rename itself to Cominco in 1966. Hess, *supra* note 26, at 2, 5. It was not until a 2001 merger with Teck Ltd. that the Trail Smelter would be owned by Teck Cominco Metals, Ltd. *Id.* at 5.

28. Robinson-Dorn, *supra* note 2, at 244.

29. *Id.*

30. *Id.*

31. JOHN D. WIRTH, *SMELTER SMOKE IN NORTH AMERICA: THE POLITICS OF TRANSBOUNDARY POLLUTION* 14 (2000).

32. *Id.* The Trail Smelter asserted the defense that the damage to the surrounding crops and forests was probably caused by natural condition and improper farming methods rather than the smelter's emissions. *Id.* But, the Trail Smelter did agree that if the damage could be linked to the smelter's emissions the Trail Smelter would pay for the damage caused. *Id.*

33. Robinson-Dorn, *supra* note 2, at 245.

34. WIRTH, *supra* note 31, at 14.

35. *Id.* at 14-15.

36. Robinson-Dorn, *supra* note 2, at 245.

County, Washington, brought the first United States claim against the Trail Smelter.³⁷ With more and more American farmers bringing claims against the Trail Smelter, the stage was set for the notorious Trail Smelter Arbitration.³⁸

A. A Brief Recount of the Trail Smelter Arbitration

The Trail Smelter Arbitration,³⁹ has become “a landmark decision in international environmental law.”⁴⁰ To resolve the Trail Smelter’s pollution issues, a special arbitral panel,⁴¹ was appointed to reach answers for the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the two preceding questions?⁴²

With respect to the first question, the panel concluded that the Trail Smelter’s emissions had caused damage to the State of Washington, and thus the Trail Smelter must compensate the State of Washington for the damage caused in the amount of \$78,000.⁴³ The panel went on to answer question two by stating that “the Trail Smelter shall refrain from causing damage in the State of Washington in the future to the extent set forth in” the adopted régime.⁴⁴ However, the information provided during the 1938 arbitration prohibited the panel from implementing a permanent régime to avoid future damage to the State of Washington.⁴⁵ Instead, the panel did implement a temporary régime to help reduce future damages to the State of

37. *Id.* at 246.

38. *Id.*

39. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938) [hereinafter Trail Smelter I]; Trail Smelter II, *supra* note 1, at 1938.

40. Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 364 (2005).

41. The Canadian and United States governments first turned to the International Joint Commission (“IJC”) to resolve the dispute. WIRTH, *supra* note 31, at 3. The IJC issued an award of \$350,000 that was subsequently turned down by the United States because of pressure from the State of Washington desiring a higher award. *Id.* at 4. In rejecting the IJC’s award, a three-member special arbitration panel was established to resolve the dispute. *Id.*

42. Trail Smelter I, 3 R.I.A.A. at 1911.

43. *Id.* at 1933.

44. *Id.* at 1934.

45. *Id.*

Washington.⁴⁶ Two years after the temporary regime was laid out by the panel, the panel obtained the adequate information and data to impose a permanent regime.⁴⁷ In the 1940 arbitration, the panel answered question four stating that the permanent regime would likely remove the causes that have damaged the State of Washington and will likely prevent future damage.⁴⁸

The Trail Smelter Arbitration allowed the operations at the smelter's facility to continue, provided that it operated under the permanent regime prescribed by the panel.⁴⁹ However, the panel did provide one caveat to the Trail Smelter's continued operations—if landowners in the State of Washington experienced damage from the future operations, the Trail Smelter could be required to pay a maximum amount of \$7,500 per year.⁵⁰ The Trail Smelter Arbitration was only the starting point in a long line of litigation concerning the Trail Smelter's pollution.

B. Pakootas v. Teck Cominco Metals Line of Litigation

After the Trail Smelter Arbitration, Teck Cominco Metals⁵¹ ("Teck Cominco") continued to pollute by discharging hazardous waste directly into the Columbia River.⁵² The EPA stated, in an assessment on the Upper Columbia River (UCR), that the discharge into the Columbia River by Teck Cominco included an average of "18 kilograms per day (kg/d) of arsenic, 62 kg/d of cadmium, 200 kg/d of lead, and 7,400 kg/d of zinc . . . [other] operations contributed up to 4 kg/d of total mercury and 350 kg/d of dissolved zinc."⁵³ After the assessment's completion, the EPA found that the UCR Site qualified "as one of the nation's most contaminated sites."⁵⁴ The assessment induced settlement discussion between the EPA and Teck Cominco and caused the EPA to determine the necessary remedial action for the hazardous waste released from Teck Cominco's facility.⁵⁵ In attempts to avoid litigation, the EPA sought to enter an Unilateral Administrative Order requiring Teck Cominco to conduct a Remedial Investigation and Feasibility Study.⁵⁶

When attempts to get Teck Cominco to comply with the Unilateral Administrative Order failed, two members of the Colville Tribe brought suit under CERCLA's

46. See *id.* at 1934–37 (describing the temporary regime).

47. Trail Smelter II, *supra* note 1, at 1966; see Trail Smelter I, 3 R.I.A.A. at 1974–78 (describing the permanent regime).

48. Trail Smelter II, *supra* note 1, at 1980.

49. Robinson-Dorn, *supra* note 2, at 253.

50. *Id.*

51. Hess, *supra* note 26, at 4 (The owner and operator of the Trail Smelter facility in the twenty-first century).

52. *Id.*

53. U.S. EPA, EPA 910-R-02-001, UPPER COLUMBIA RIVER EXPANDED SITE INSPECTION NORTHEAST WASHINGTON 2-11 (2003).

54. Robinson-Dorn, *supra* note 2, at 268 ("[P]ursuant to CERCLA's Hazard Ranking System found that the Site was eligible for listing on the National Priority List").

55. See Upper Columbia River Site, EPA No. CERCLA-10-2004-0018 (Dec. 11, 2003).

56. *Id.* at 4, ¶13.

citizen suit provision.⁵⁷ In response, Teck Cominco sought to have the lawsuit dismissed claiming that CERCLA did not apply to Teck Cominco's activities in Canada because such application "would be an impermissible extraterritorial application of United States law."⁵⁸ When addressing the extraterritorial application issue of CERCLA outside the United States' boundaries, the United States Supreme Court has stated, "that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."⁵⁹

i. The Extraterritorial Application of CERCLA

The presumption for courts within the United States is that domestic statutes only apply to persons or conduct within the territorial boundaries, thus applying a domestic statute outside territorial boundaries is presumed invalid.⁶⁰ There are two exceptions to this presumption—congressional intent⁶¹ and domestic adverse effects.⁶² Congress can, on its own initiative, expressly state that a statute is intended to apply extraterritorially.⁶³ Under the congressional intent exception, the requirement that Congress expressly state its intent has become more relaxed, and Congress need only provide clear evidence of an intent for a domestic statute to apply extraterritorially.⁶⁴ Since CERCLA is widely known as an ambiguous statute that lacks legislative history,⁶⁵ the congressional intent expectation is inapplicable for CERCLA's extraterritorial application.

The domestic adverse effects exception presents a more viable option for CERCLA's extraterritorial application to Teck Cominco. Domestic statutes are permitted to attach liability to foreign entities when the conduct or effects largely occur within the United States' territorial boundaries.⁶⁶ The Ninth Circuit's opinion, on its face, side stepped the issue of whether CERCLA can apply extraterritorially.⁶⁷ However, when applying the domestic adverse effects exception, Teck Cominco's conduct took place within the United States' territorial boundaries, and had adverse effects on the State of Washington and the United States.⁶⁸

57. *Pakootas v. Teck Cominco Metals, Ltd.*, No. 04-256-AAM, 2004 WL 2578982, at *1 (E.D. Wash. Nov. 8, 2004) (seeking to have Teck Cominco comply with the Administrative Order on Consent).

58. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas I)*, 452 F.3d 1066, 1072 (9th Cir. 2006).

59. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

60. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW §§ 402, 403 cmt. g (AM. LAW INST. 1987).

61. *See generally Arabian Am. Oil Co.*, 499 U.S. 244.

62. *See, e.g., F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

63. *Arabian Am. Oil Co.*, 499 U.S. at 248.

64. *Smith v. United States*, 507 U.S. 197, 204 (1993); *see also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993) (requiring that courts need to look at all available evidence to determine congressional intent).

65. John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1406 (1997).

66. *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

67. *See Pakootas v. Teck Cominco Metals, Ltd. (Pakootas I)*, 452 F.3d 1066, 1073–79 (9th Cir. 2006).

68. The extraterritorial application of CERCLA is beyond the scope of this article. For a more in-depth discussion, see Jennifer S. Addis, *A Missed Opportunity: How Pakootas v. Teck Cominco Metals, Ltd., Could Have Clarified the Extraterritorial Doctrine*, 32 SEATTLE U. L. REV. 1011 (2009).

The Ninth Circuit, in determining whether CERCLA can be applied extraterritorially, relied upon the language set out in section 107(a)(3) of CERCLA⁶⁹—“any person who . . . arrange[s] for disposal.”⁷⁰ The United States Supreme Court has set forth a two-part inquiry to determine whether the phrase “any person” applies to a foreign entity.⁷¹ In order for a foreign entity to fall under the phrase “any person” used in statutory language, a court must first have jurisdiction over the party and, additionally, Congress must have intended for the phrase to apply to a foreign entity who has a presence within the United States’ territorial boundaries.⁷² The Ninth Circuit found that the first requirement was established on the grounds that the Eastern District Court of Washington had personal jurisdiction over Teck Cominco because there was an “alleged[] tortious act aimed at the State of Washington.”⁷³ Next, in the second part of the inquiry, the Ninth Circuit reasoned that CERCLA is only concerned with imposing liability for hazardous waste cleanup, and CERCLA is not concerned with regulating the manner in which an entity disposed of hazardous waste.⁷⁴ Therefore, since the CERCLA is only concerned with the hazardous waste disposal site, the application of CERCLA to Teck Cominco’s conduct in the UCR Site is a domestic issue—even though the source is located outside the United States.⁷⁵

ii. *Pakootas v. Teck Cominco Metals* and the Theory of Aerial Deposition

After the setting forth of the river pathway claims⁷⁶, the Colville Tribe members and the State of Washington amended their complaint to allege the aerial deposition theory.⁷⁷ The new complaint stated that in 1906 Teck Cominco had begun discharging hazardous waste into the atmosphere, and the discharged hazardous waste traveled through the air and was deposited at the UCR Site.⁷⁸ In response to the new aerial deposition theory, Teck Cominco moved to have these claims stricken or dismissed because CERCLA does not impose liability when hazardous waste travels through the air.⁷⁹ A month after Teck Cominco’s motion to dismiss was denied, the Ninth Circuit issued the decision for *Center for Community Action & Environmental Justice v. BNSF Railway Company* (“BNSF”),⁸⁰ holding that diesel particulate matter transported by air currents did not qualify as a disposal.⁸¹ In re-

69. *Pakootas I*, 452 F.3d at 1075.

70. 42 U.S.C. § 9607(a)(3) (2012) (emphasis added).

71. *United States v. Palmer*, 16 U.S. 610, 631 (1818).

72. *Id.*

73. *Pakootas I*, 452 F.3d at 1076.

74. *Id.* at 1079.

75. *Id.*

76. See *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas II)*, 646 F.3d 1214, 1216 (9th Cir. 2011); *Pakootas I*, 452 F.3d at 1069–71.

77. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 979 (9th Cir. 2016).

78. *Id.*

79. *Id.* at 980.

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

81. *Pakootas III*, 830 F.3d at 980.

sponse to the *BNSF* decision, Teck Cominco filed a motion to reconsider the question of “whether aerial emissions leading to disposal of hazardous substances ‘into or on any land or water’ are actionable under CERCLA.”⁸²

The Ninth Circuit, on interlocutory appeal, answered the question in the negative, stating that allowing for such disposal would create inconsistencies within CERCLA, and would destroy the innocent land owner defense.⁸³ The Ninth Circuit incorrectly answered the question presented on interlocutory appeal. Each proceeding section of this article will illustrate how the Ninth Circuit has created a new loophole in environmental statutes for foreign manufacturers and how the language and statutory structure of CERCLA permits the aerial deposition theory.

III. INTERNATIONAL ISSUES AND RELATIONS BETWEEN CANADA AND THE UNITED STATES

The situation in *Pakootas III* presents a unique problem that arises when a smelter is near an international border. Teck Cominco’s smelter is located only ten miles north of the United States and Canada border.⁸⁴ The relationship between the United States and Canada has been described as one of the most effective and oldest environmental collaborations.⁸⁵ Over forty international agreements between the United States and Canada have been made to protect and manage the ecosystems along the international border and to safeguard environmental quality.⁸⁶ Some of the most significant environmental agreements between the United States and Canada include the Boundary Waters Treaty and International Joint Commission, the Great Lakes Water Quality Agreement, the United States-Canada Air Quality Agreement, and the Columbia River Agreement.⁸⁷ The main focus of this section will be on the United States-Canada Air Quality Agreement.

Prior to the United States-Canada Air Quality Agreement, the 1972 Stockholm Declaration “marked the beginning of a heightened consciousness of international environmental issues worldwide.”⁸⁸ However, the Stockholm Declaration was faced with four difficulties in effectively controlling transboundary air pollution: (1) not providing nations with guidance as to what was considered unacceptable conduct, (2) there was no effective enforcement method for violations, (3) the declaration did not provide adequate preventive actions, and (4) the declaration did not solve the issue of causation for air pollution injuries.⁸⁹ In 1991, the United States and Canada signed the bilateral Air Quality Agreement reaffirming and strengthening their commitments under the Stockholm Declaration.⁹⁰ The Air Quality Agreement rec-

82. *Id.*

83. *See id.* at 983–86.

84. *Id.* at 978.

85. *International Cooperation*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/international-cooperation/epa-collaboration-canada> (last updated Dec. 8, 2017).

86. *Id.*

87. *Id.*

88. Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT’L L. J. 421, 430 (1993).

89. *Id.* at 430–31.

90. *Id.* at 444.

ognizes "that transboundary air pollution can cause significant harm to natural resources of vital environmental, cultural, and economic importance, and to human health in both countries."⁹¹ Although the Air Quality Agreement provides more commitments between the United States and Canada, such as the exchange of information regarding air pollution, the Air Quality Agreement still suffers from the same four difficulties as the Stockholm Declaration. The Air Quality Agreement does not provide for an effective enforcement method should one country fail to limit its transboundary air pollution.⁹² Lacking an enforcement mechanism, the Air Quality Agreement is a mere instrument that shows the United States and Canada have reached a consensus not to cause significant environmental harm to one another.

International treaties operate on the basic principle that nations are only bound by the treaty through their voluntary consent.⁹³ Once a treaty has been consented to, issues can arise concerning the clarity of the treaty's obligations and the treaty's inability to effectively sanction noncompliance.⁹⁴ The Prisoner's Dilemma⁹⁵ illustrates why collective agreements do not work to their full potential.⁹⁶ The concept of the Prisoner's Dilemma is used to show "that rational decisions can be detrimental to the satisfaction of self-interest and the achievement of mutual good."⁹⁷ As the Prisoner's Dilemma demonstrates, "nations may do better under mutual cooperation but will face incentives to free-ride and defect from the cooperative solution."⁹⁸ In the context of climate change, free-riding allows a country to reap the "benefits from the environmental public good of less climate change that is created by other countries" while still polluting.⁹⁹ Thus, a country that sacrifices not polluting to control climate change shares the benefit with countries that are free-riding and still polluting.¹⁰⁰

The Prisoner's Dilemma concept shows that international environmental treaties are only effective if all the parties to the treaty are committed to following the obligations set forth by the treaty. When a treaty lacks an enforcement mechanism, countries are more likely to become free-riders because they are not in danger of consequences for their noncompliance. Here, any agreement between the United

91. Agreement on Air Quality, Can.-U.S., Mar. 13, 1991, 30 I.L.M. 676.

92. See *id.* (lacking an enforcement provision).

93. Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1314 (1997).

94. *Id.*

95. "[T]he Prisoner's Dilemma . . . assumes that every actor solely acts individualistically to maximize his or her instrumentally salient rewards, therefore making defection the only rational choice." S.M. AMADAE, *PRISONERS OF REASON: GAME THEORY AND NEOLIBERAL POLITICAL ECONOMY* 31 (2016). For the standard narrative of the Prisoner's Dilemma, see *id.* at 28–29.

96. Marvin S. Soroos, *Global Change, Environmental Security, and the Prisoner's Dilemma*, 31 J. OF PEACE RES. 317, 325 (1994).

97. MAX BLACK, *PERPLEXITIES: RATIONAL CHOICE, THE PRISONER'S DILEMMA, METAPHOR, POETIC AMBIGUITY, AND OTHER PUZZLES* 113 (1990).

98. Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L. J. 749, 762 (1999).

99. Soroos, *supra* note 96, at 326.

100. *Id.*

States and Canada will likely present a Prisoner's Dilemma issue. Under the Air Quality Agreement, either the United States or Canada may find it more beneficial to not comply with the agreement and pollute the air while taking part in the benefits from the other country complying with the Air Quality Agreement. Since there is no enforcement provision within the Air Quality Agreement, either the United States or Canada can free-ride on the other country's compliance without fear of consequences. Thus, there is a need to revisit the Air Quality Agreement to incorporate some enforcement mechanism to avoid free-riding. Revisiting the Air Quality Agreement could present a possible solution to the aerial deposition theory presented by *Pakootas III*, and therefore avoid the application of United States law to Canadian entities.

IV. STATUTORY INTERPRETATION AND DISPOSAL'S DEFINITION UNDER CERCLA

"Clearly, neither a logician nor a grammarian will find comfort in the world of CERCLA."¹⁰¹ Generally, hazardous waste statutes operate in a manner to provide remedies for parties from the consequences that stem from hazardous waste pollution.¹⁰² Specifically, "CERCLA sets forth a comprehensive scheme for the cleanup of hazardous waste sites, and imposes liability for cleanup costs on the parties responsible for the release or potential release of hazardous substances into the environment."¹⁰³ Many hazardous waste statutes operate prospectively, however, CERCLA is unique and has been constructed and interpreted to operate retroactively.¹⁰⁴ Applying CERCLA retroactively stems from the presumption that when Congress has intended for a statute to only apply prospectively, Congress expressly states such intention.¹⁰⁵ CERCLA's text does not expressly "limit or deny liability for response costs incurred" prior to CERCLA's enactment, and therefore, CERCLA is not limited to only prospective remedies.¹⁰⁶ Further, CERCLA's purpose and statutory scheme illustrates that CERCLA was created in a manner that would impose retroactive liability.¹⁰⁷ When attempting to understand CERCLA, the overall scheme must be assessed. Statutory provisions are not constructed in a vacuum, and CERCLA is no exception to this notion.¹⁰⁸ Moreover, CERCLA is a difficult statute to navigate, and is "a [complex] maze—of sections, subsections, definition, exceptions, defenses, and administrative provisions."¹⁰⁹ To determine if CERCLA offers a solution for aerial disposals of hazardous waste, the daunting task of interpreting CERCLA must be done.

101. Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001).

102. NORMAN SINGER & SHAMBIE SINGER, 3B SUTHERLAND STATUTORY CONSTRUCTION § 77:5 (Westlaw, 7th ed. 2017) [hereinafter SINGER].

103. Pakootas v. Teck Cominco Metals, Ltd. (*Pakootas I*), 452 F.3d 1066, 1072 (9th Cir. 2006).

104. SINGER, *supra* note 102, at § 77:5.

105. United States v. Shell Oil Co., 605 F. Supp. 1064, 1079 (D. Colo. 1985). Except for CERCLA, most statutes imposing liability for natural resource damages were intended to apply in a prospective manner. *Id.*

106. *Id.*

107. *Id.*

108. Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001).

109. *Id.*

Courts are tasked with interpreting what Congress has enacted.¹¹⁰ To begin, courts first look to the statute's language.¹¹¹ Next, courts move on to interpreting the statute as a whole, including assessing the statute's policy and objectives.¹¹² Reviewing a statute's words and language requires that the words and language be placed in context of the entire statute.¹¹³ No statutory provision should be reviewed in solitude.¹¹⁴ If the statute is still ambiguous, courts may look to the legislative history to determine the congressional intent behind the statute's enactment.¹¹⁵ Further, if the statute is still ambiguous after reviewing the statute's legislative history, the administrative agency in charge of administering the statute can provide an interpretation that is persuasive to the courts.¹¹⁶ Lastly, since there are multiple hazardous waste statutes, interpreting a single hazardous waste statute must be done in a manner that produces a "harmonious statutory scheme" among all hazardous waste statutes governing the same subject matter.¹¹⁷

A. CERCLA's Statutory Language and Disposal's Definition

When examining a statute's language courts must follow the United States Supreme Court's guidance "and adhere to the 'Plain Meaning Rule.'"¹¹⁸ Unless the statute's plain meaning "leads to an unreasonable result or a result contrary to legislative intent," the statute's plain meaning is controlling.¹¹⁹ The United States Supreme Court has articulated the "Plain Meaning Rule" as:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meaning need no discussion.¹²⁰

Further, "[w]hen a statute includes an explicit definition . . . [courts] must follow that definition, even if it varies from that term's ordinary meaning."¹²¹ At issue

110. *Duncan v. Walker*, 533 U.S. 167, 172 (2001).

111. *E.g.*, *Watt v. Energy Atomic Educ. Found.*, 454 U.S. 151, 162 (1981).

112. *Carson Harbor*, 270 F.3d at 877.

113. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

114. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

115. *SINGER*, *supra* note 102, at § 77.5.

116. *Id.*

117. *Id.*

118. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir. 2001).

119. Steven Wisotsky, *How to Interpret Statutes --Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 325 (2009); *see also Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000) (indicating that if a statute's plain meaning is still ambiguous legislative history can be consulted).

120. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citations omitted).

121. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

in *Pakootas III* is disposal's definition, which CERCLA derives by cross-referencing RCRA.¹²² With regards to hazardous waste statutes, such as CERCLA, "the language used in the statute is given its natural, plain, ordinary, and commonly understood meaning, unless the term has acquired a peculiar or technical meaning as a result of statutory definition."¹²³ Here, the term disposal is not given a technical meaning under CERCLA,¹²⁴ rather disposal's technical definition is provided under RCRA.¹²⁵ Disposal's definition under CERCLA presents an issue in attaching CERCLA liability to manufacturers for the aerial deposition of hazardous waste.¹²⁶

Prior to reaching what the term "disposal" encompasses, there are a number of prerequisites that must be established for governmental response under CERCLA.¹²⁷ Before any action under CERCLA can occur there must first be a release or a threat of release.¹²⁸ Once a release, or threat of release, of hazardous waste has been identified, the term "disposal" becomes operative.¹²⁹ To recover response costs under CERCLA, the term "disposal" is used to identify who caused the hazardous waste to be placed into the environment.¹³⁰ Then, the terms used to define release allow a plaintiff to point to when the release occurred and to establish when the party's liability began.¹³¹ In *Pakootas III*, the release occurred when Teck Cominco "emitted hazardous substances into the air."¹³² After the hazardous waste was emitted into the air, the hazardous waste was allowed to precipitate out of the air and be deposited into the UCR Site, thus, as argued by the State of Washington, constituting a disposal.¹³³ The aerial deposition theory presented by the State of Washington was, however, rejected by the Ninth Circuit.¹³⁴

CERCLA does not provide its own definition for disposal, or any clarification for what disposal means.¹³⁵ Instead, CERCLA cross-references RCRA for the definition of "disposal."¹³⁶ Under RCRA the term "disposal" is defined as:

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter

122. 42 U.S.C. § 9601(29) (2012).

123. SINGER, *supra* note 102, at § 77.5.

124. § 9601(29).

125. *Id.*; § 6903(3).

126. *See Pakootas III*, 830 F.3d at 985–86.

127. PETER L. GRAY, *THE SUPERFUND MANUAL: A PRACTITIONER'S GUIDE TO CERCLA LITIGATION* 4 (2016).

128. § 9604(a); *see also* GRAY, *supra* note 127; § 9601(22) (defining the term release).

129. § 9604(a); § 9601(22).

130. GRAY, *supra* note 127, at 123.

131. 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1358 (9th Cir. 1990); *see also* § 9601(22) (defining release).

132. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 979 (9th Cir. 2016).

133. *Id.*

134. *See id.* at 986.

135. § 9601(29).

136. *Id.*

the environment or be emitted into the air or discharged into any waters, including ground waters.¹³⁷

The definition provided by RCRA consists mainly of a list of verbs that describe the act of disposing hazardous waste into water or the ground.¹³⁸ The list of verbs used to define disposal are not further defined under CERCLA.¹³⁹ Some insight into the meaning of the words used to define disposal can be gained by examining CERCLA's definition for release.¹⁴⁰ The term release is defined under CERCLA as "any *spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing* into the environment . . ."¹⁴¹ Including the term disposing in CERCLA's definition for release suggests that release is meant to be construed broader than the definition of disposal.¹⁴² With the understanding that release determines when a party becomes liable under CERCLA, the broader interpretation of release is required to comport with CERCLA's purpose of holding responsible parties liable.¹⁴³ The definition of release also includes terms that are not present in disposal's definition.¹⁴⁴ Given that the term release is used to establish when liability under CERCLA occurs, the broader definition promotes CERCLA's broad reach to establish liability.¹⁴⁵

In addition, the broader interpretation of release is supported by Congress's decision to include the term "emitting" in defining release and omitting it from disposal's definition.¹⁴⁶ Although it is not conclusive, the omission of the term "emitting" from RCRA's definition of disposal suggests that hazardous waste emissions

137. § 6903(3). The definition of disposal under CERCLA is not required to be identical to the definition given to disposal under RCRA. See *Pakootas III*, 830 F.3d at 984 n.9. Although CERCLA cross-references RCRA for the definition of disposal, the United States Supreme Court states that when "the same word is used in different statutes employing different strategies for protecting the environment, '[c]ontext [also] counts.'" *Id.* (alteration in original) (quoting *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575–76 (2007)). Both, "CERCLA and RCRA both address hazardous waste disposal but in different ways." *Pakootas III*, 830 F.3d at 984 n.9. "RCRA regulates the generation of hazardous waste primarily by requiring generators to comply with handling, record-keeping, storage, and monitoring requirements." *Id.*; see also *City of Chi. v. Env'tl. Def. Fund*, 511 U.S. 328, 332 (1994) (discussing the EPA's promulgation of standards that govern hazardous waste owners and operators, generators, and transporters). In comparison, CERCLA "is not a regulatory statute." *Pakootas III*, 830 F.3d at 984 n.9 (quoting *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas I)*, 452 F.3d 1066, 1073 (9th Cir. 2006)) (internal quotation marks omitted). CERCLA is concerned with making hazardous waste generators financially responsible for hazardous waste cleanup, although both RCRA and CERCLA can be used to compel the cleanup of hazardous waste, only CERCLA allows for the recovery of the cost already incurred. *Pakootas III*, 830 F.3d at 984 n.9

138. See § 6903(3).

139. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir. 2001).

140. *Id.*

141. § 9601(22) (emphasis added).

142. *Carson Harbor*, 270 F.3d at 878.

143. See *id.*

144. *Id.*

145. See *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1363 (9th Cir. 1990).

146. *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1024 (9th Cir. 2014). The inclusion of the term emitting in the definition of release relates to CERCLA's federally permitted release exception, §§ 9601(10)(H), 9607(j), where Congress seemed to intend for "CERCLA to apply to emissions of

would not constitute a disposal.¹⁴⁷ Given that there seems to be an indication that the term disposal was not meant to cover aerial emissions that precipitate into surrounding water or ground, disposal's definition does include the term deposit, which provides support for the inclusion of aerial emission. The indication that the term disposal was not intended to include the aerial disposition of hazardous waste can be explained by CERCLA's use of RCRA's definition for disposal. RCRA's definition for disposal is focused on "any solid or hazardous waste . . ." that is disposed "into or on any land or water . . ."¹⁴⁸ Additionally, RCRA defines hazardous waste as "solid waste, or combination of solid wastes. . ."¹⁴⁹ RCRA further defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material . . ."¹⁵⁰ RCRA's statutory scheme is concerned with the management of solid hazardous waste, and once the hazardous waste is placed into the air the hazardous waste is no longer a solid waste.¹⁵¹ However, aerial depositions of hazardous waste are not beyond RCRA's regulatory scheme.¹⁵² CERCLA, on the other hand, seems to include the notion that air emissions fall within the scope of CERCLA's liability provisions. In support, when Congress enacted CERCLA, the legislative history suggests that CERCLA was intended to apply to emissions up to the point the Clean Air Act would take over.¹⁵³ However, the Ninth Circuit in *Pakootas III* points out that the federally permitted release exception could be read as only applying to emissions as a form of release and not as a form of disposal.¹⁵⁴

The Ninth Circuit has expressly set forth its own theory on how a term used to define another term will be interpreted.¹⁵⁵ In doing so, the Ninth Circuit has rejected the use of the "absolute binary 'active/passive' distinction used by some courts."¹⁵⁶ Many of the terms used to define disposal have both an active and passive definition, and the Ninth Circuit has held that the facts of the case determine whether the active or passive definition is applied.¹⁵⁷ Therefore, instead of focusing on whether the terms used to define disposal have an active or passive definition, the facts of each case must be assessed to determine whether the hazardous waste's

hazardous substances up to the point where it ran into the Clean Air Act." *Pakootas v. Teck Cominco Metals, Ltd.* (*Pakootas III*), 830 F.3d 975, 985 (9th Cir. 2016).

147. *Ctr. for Cmty. Action & Env'tl. Justice*, 764 F.3d at 1024.

148. 42 U.S.C. § 6903(3) (2012).

149. § 6903(5).

150. § 6903(27).

151. *See generally Ctr. for Cmty. Action & Env'tl. Justice*, 764 F.3d 1019 (9th Cir. 2014). RCRA does recognize burning hazardous waste as a form of treatment. 1 RCRA AND SUPERFUND: A PRACTICE GUIDE 3D § 2:25 (Westlaw 2017).

152. § 6902(a)(10); *see generally* H.R. REP. NO. 94-1491, pt. 1 (1976).

153. *Pakootas III*, 830 F.3d 975, 985 (9th Cir. 2016) (noting the federally permitted release exception).

154. *Id.*

155. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878–79 (9th Cir. 2001).

156. *Id.* at 879. Active verbs used to define disposal are ones that require some form of human conduct to occur, whereas passive verbs do not require affirmative human conduct. *See United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996).

157. *Carson Harbor*, 270 F.3d at 878–79.

movement falls within the plain meaning of a term used to define disposal.¹⁵⁸ When looking at the list of words used to define disposal, the term deposit provides an answer to encompass hazardous waste precipitating from aerial emissions into the surrounding land or water as a form of disposal.

The term deposit is not provided any further meaning in either CERCLA or RCRA, and the courts have not provided their own definition.¹⁵⁹ Since no further definition of deposit is provided, the common meaning and understanding of the term should, and can be, used.¹⁶⁰ When terms are not given any further definition, courts must “construe a statute to give every word some operative effect.”¹⁶¹ The term deposit is defined as “[t]o put or set down; place. To lay down or leave behind by a natural process.”¹⁶² The term deposit, which is used to define disposal, encompasses the aerial disposal of hazardous waste theory. Once the hazardous waste is placed into the air by a smokestack, the hazardous waste particulates are carried by the natural process of air currents and allowed to precipitate out of the air.¹⁶³ None of the other terms used to define disposal are similar to the term deposit, and thus deposit presents the only viable option for the aerial deposition theory. Although the Ninth Circuit has rejected the definition of deposit to encompass the gradual spread of hazardous waste through passive soil migration, the definition still allows for the aerial deposition of hazardous substances.¹⁶⁴

Based on the common understanding of deposit, hazardous waste that is placed, put down, or left behind would fall within the statutory definition of disposal under CERCLA.¹⁶⁵ The hazardous waste at issue in *Pakootas III* was first placed into the air via Teck Cominco’s smokestacks, then the hazardous waste was allowed to fall, or precipitate, from the air into the land and water of the UCR Site.¹⁶⁶ The Ninth Circuit, in rejecting the State of Washington’s aerial deposition theory, stated that Washington’s “interpretation appears a reasonable enough construction of § 9607(a)(3), and if we were writing on a blank slate, we might be persuaded to adopt it.”¹⁶⁷ The common definition of deposit, as the Ninth Circuit recognizes, is likely to incorporate the aerial deposition theory presented by the State of Washington.

158. *Id.* at 879; *see also* *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 178 (2d Cir. 2003) (quoting *Carson Harbor*, 270 F.3d at 879); *Uniroyal Chem. Co., Inc. v. Deltech Corp.*, 160 F.3d 238, 252 (5th Cir. 1998) (stating that in arranger-liability cases courts must focus on the type of activity that allowed the hazardous waste to enter the environment).

159. 42 U.S.C. §§ 6901–6992 (2012); §§ 9601–9628; *Carson Harbor*, 270 F.3d at 878.

160. SINGER, *supra* note 102, at § 77:5.

161. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

162. *Deposit*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) [hereinafter AMERICAN HERITAGE]. To provide further clarification the Oxford English Dictionary defines deposit as “[t]o lay, put, or set down; to place in a more or less permanent position of rest. To be laid down or precipitated, to settle.” *Deposit*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

163. *Deposit*, AMERICAN HERITAGE, *supra* note 162. The process of being left behind by air currents would qualify as a passive definition of the term deposit.

164. *Carson Harbor*, 270 F.3d at 879 (holding that the petroleum production by-product’s passive soil migration was only remotely akin to the term leaking and still did not constitute a leaking).

165. *Deposit*, AMERICAN HERITAGE, *supra* note 162.

166. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 979 (9th Cir. 2016).

167. *Id.* at 983.

The Ninth Circuit articulated one attenuated reason why the aerial deposition theory does not fall within the definition of deposit, and is, therefore, outside the boundaries of disposal's definition.¹⁶⁸ In a prior decision, *Carson Harbor Village, Ltd. v. Unocal Corporation* ("*Carson Harbor*"),¹⁶⁹ the Ninth Circuit suggested that allowing for the term "deposit" to include the passive soil migration of hazardous waste, would virtually cause all hazardous waste contaminations to fall under the definition of disposal, therefore opening up a floodgate of liability under CERCLA.¹⁷⁰ The majority in *Carson Harbor*, which provides the Ninth Circuit the support for not allowing the aerial deposition theory in *Pakootas III*, stated that although the common definition of deposit includes placement through geological processes, Congress did not intend for disposal to cover the geological process or migration of hazardous waste.¹⁷¹ Rather, geological migration of hazardous waste was covered when Congress included the term "leaching" in the definition of release.¹⁷² However, the reasoning in *Carson Harbor* is problematic. The term "leaching" only covers the migration of hazardous waste through "the action of percolating liquid."¹⁷³ In *Pakootas III*, liquid was not the vehicle used to migrate the hazardous waste.¹⁷⁴ Instead, air currents were the vehicle used to migrate the hazardous waste across the border.¹⁷⁵

In *Pakootas III*, the Ninth Circuit relies upon the interpretation of disposal set forth in *Carson Harbor*.¹⁷⁶ Judge Fletcher, dissenting in *Carson Harbor*, recognized that by failing to allow for soil migration to fall within the meaning of deposit, and therefore not be encompassed by disposal's definition, would frustrate and contradict the purpose behind CERCLA's enactment.¹⁷⁷ More recently, the Ninth Circuit in *BNSF* held that under RCRA disposal occurs when the "solid waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted into the air.'"¹⁷⁸ However, *BNSF*, as observed by the Ninth Circuit, is an interpretation on RCRA's definition of disposal, and therefore only offers persuasive textual analysis for CERCLA's definition of disposal.¹⁷⁹ The distinction between CERCLA and RCRA can be explained by using canons of construction.

168. *Id.*

169. *Carson Harbor*, 270 F.3d at 863.

170. *Id.* at 879 n.7. Judge Fletcher in her dissent in *Carson Harbor* stated that the majority did not look to the ordinary and common meaning of the terms used to define disposal, and if the majority had done so, it would have found that the term deposit covered the soil migration at issue. *See id.* at 889–90 (Fletcher, J., dissenting).

171. *Pakootas III*, 830 F.3d at 983; *Carson Harbor*, 270 F.3d at 879 n.7.

172. *Carson Harbor*, 270 F.3d at 879 n.7.

173. *Leaching*, AMERICAN HERITAGE, *supra* note 162.

174. *Pakootas III*, 830 F.3d at 977.

175. *Id.*

176. *Id.* at 983–84; *see also* *Ctr. for Cmty. Action & Env'tl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1023–24 (9th Cir. 2014) (interpreting the definition of disposal under RCRA).

177. *Carson Harbor*, 270 F.3d at 889 (Fletcher, J., dissenting).

178. *Ctr. for Cmty. Action & Env'tl. Justice*, 764 F.3d at 1024 (quoting 42 U.S.C. § 6903(3)) (emphasis in original). Provided that liability under RCRA and CERCLA is not coterminous, the Ninth Circuit "hesitate[s] to assume that *Center for Community Action's* construction of 'disposal' in the RCRA context controls the construction of 'disposal' in the CERCLA context in all cases." *Pakootas III*, 830 F.3d at 984 n. 9 (noting that there is no compelling reason to disregard the presumption of consistent usages of the term disposal).

179. *Ctr. for Cmty. Action & Env'tl. Justice*, 764 F.3d at 1024.

Canons of construction are “judge-created tools” use to derive and define the meaning of a statute’s language.¹⁸⁰ Although canons of construction are judge-created, they are not mandatory rules. But, they have been used as important determinants in some cases.¹⁸¹ Canons of construction cannot be used side by side with other statutory interpretation theories because statutory interpretation theories can “rely on canons of construction or reject them.”¹⁸² However, canons of construction are helpful in providing a basis “of supposed actual legislative intent and are, therefore, modestly useful in carrying legislative meaning.”¹⁸³ This basis provided by canons of construction prompts “the mind to a vision comparable to that possessed by the legislature.”¹⁸⁴ Through the tools provided by canons of construction, disposal’s definition should provide for the inclusion of Washington State’s aerial deposition theory.

Provided that both CERCLA and RCRA concern hazardous waste, the whole statute rule, *in pari materia*, provides that statutes regarding the same subject matter are to be read in relation to one another.¹⁸⁵ However, given that both CERCLA and RCRA deal with the same subject matter, the “[c]haracterization of the [statute’s] object or purpose is more important than [the] characterization of subject matter to determine whether different statutes are closely enough related to justify interpreting one in light of the other.”¹⁸⁶ Courts have generally held that statutes are not *in pari materia* when multiple statutes concern the same subject matter but have different objectives and purposes.¹⁸⁷ The purpose and objectives behind CERCLA’s enactment, which is “[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites,” differs from RCRA.¹⁸⁸ RCRA’s purpose and objectives are “[t]o provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials and for the safe disposal of discarded materials, and to regulate the management of hazardous waste.”¹⁸⁹ A quick glance at the purposes and objectives behind both CERCLA and RCRA shows that each is focused on different goals. While RCRA is concerned with the development of waste

180. FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 85 (2014).

181. *Id.*

182. *Id.*

183. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 228 (1975).

184. James M. Landis, *A Note on “Statutory Interpretation”*, 43 HARV. L. REV. 886, 892 (1930).

185. DICKERSON, *supra* note 183, at 233.

186. NORMAN SINGER & SHAMBIE SINGER, 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:3 (Westlaw, 7th ed. 2017).

187. *Id.*

188. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

189. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976).

management plans and the safe disposal of hazardous waste,¹⁹⁰ CERCLA is concerned with holding parties liable for the cleanup and any damage done after the hazardous waste is placed into the environment.¹⁹¹

Given the two distinct purposes and objectives behind CERCLA and RCRA, there is a justification to interpret both statutes separately. Although CERCLA cross-references RCRA to define “disposal,”¹⁹² the differing purposes behind each allows for a different reading of the definition of “disposal” under CERCLA. The Ninth Circuit in *Pakootas III*, notes that the interpretation of disposal for the purposes of RCRA in *BNSF* does not foreclose a different interpretation of the term “disposal” for CERCLA purposes.¹⁹³ Such a statement by the Ninth Circuit shows an understanding that CERCLA and RCRA have differing purposes and objectives, and thus CERCLA may require a different interpretation of the term “disposal” to help further advance CERCLA’s purpose and objectives. The following section explores CERCLA’s purposes in further detail.

B. CERCLA’s Statutory Scheme and the Aerial Deposition Theory

To avoid any conflicts among a statute’s sections, all sections of the statute must be construed together.¹⁹⁴ In addition, related statutes must be construed together to avoid any conflicts.¹⁹⁵ In order to determine if CERCLA is the proper statutory source to hold a manufacturer liable for polluting the water and soil at the UCR Site, CERCLA’s statutory scheme must be assessed alone and in conjunction with other hazardous waste statutes.

The statutory scheme of CERCLA can be broken down into three parts.¹⁹⁶ First, CERCLA was constructed to implicate a range of manufacturing operators and owners, and transporters as potentially responsible parties.¹⁹⁷ Second, CERCLA was created to offer affirmative defenses to certain potentially responsible parties, thus allowing potentially responsible parties to avoid liability under CERCLA.¹⁹⁸ Lastly, CERCLA seeks to provide judicial or administrative methods to limit a potentially responsible party’s liability, or if liability is established, to encourage early settlement.¹⁹⁹

CERCLA’s statutory construction seeks to promote the purpose for which CERCLA was enacted.²⁰⁰ The purpose of CERCLA is “[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released

190. *Id.*

191. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767.

192. 42 U.S.C. § 9601(29) (2012).

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

194. SINGER, *supra* note 102, at §77:5.

195. *Id.*

196. See *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001).

197. *Id.* For a detailed definition of owners and operators see 42 U.S.C. § 9601(20) (2012). For a list of potentially responsible parties who are subject to liability under CERCLA, see § 9607(a).

198. *Carson Harbor*, 270 F.3d at 880. CERCLA allows for a third-party defense, see § 9607(b)(3), and an innocent landowner defense, see § 9601(35)(A).

199. *Carson Harbor*, 270 F.3d at 880. For settlements under CERCLA, see § 9622.

200. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

into the environment and the cleanup of inactive hazardous waste disposal sites.²⁰¹ Courts have also implied a secondary purpose behind the enactment of CERCLA, "to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created."²⁰² In order to achieve CERCLA's purposes, CERCLA must be construed liberally.²⁰³

If disposal is to encompass the aerial deposition of hazardous waste from manufacturers, all occurrences of the term disposal in CERCLA must allow for such inclusion.²⁰⁴ The manner in which the term disposal is defined "has ripple effects on the applicability and effectiveness of the available defenses and administrative tools that complete the statutory structure" of CERCLA.²⁰⁵ Disposal, and its derivatives, appear in multiple locations throughout CERCLA.²⁰⁶ The first appearance of the term disposal is in the definition of facility, "any site or area where a hazardous substance has been deposited, stored, *disposed* of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."²⁰⁷ The next occurrence of the term disposal is within the definition for release, "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or *disposing* into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)."²⁰⁸ Additionally, disposal appears throughout the definition of the four potentially responsible parties:

- (1) [T]he owner and operator of a vessel or a facility,
- (2) any person who at the time of *disposal* of any hazardous substance owned or operated any facility at which such hazardous substances were *disposed of*,
- (3) any person who by contract, agreement, or otherwise arranged for *disposal* or treatment, or arranged with a transporter for transport for *disposal* or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to *disposal* or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened

201. *Id.*

202. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1989).

203. *Carson Harbor*, 270 F.3d at 881.

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

205. *Carson Harbor*, 270 F.3d at 880.

206. *Pakootas III*, 830 F.3d at 981.

207. 42 U.S.C. § 9601(9)(B) (2012) (emphasis added).

208. § 9601(22) (emphasis added).

release which causes the incurrence of response costs, of a hazardous substance²⁰⁹

Lastly, the term “disposal” also appears in the bona fide prospective purchaser defense²¹⁰ and the innocent landowner defense.²¹¹ The bona fide prospective purchaser defense does not seem to be affected in the amount that the innocent landowner defense would be affected if disposal was to encompass the aerial deposition theory. The bona fide prospective purchaser defense seeks to promote the purchase of lightly contaminated property from prior hazardous waste disposal, known as brownfields, and prevent the purchaser from being held liable for the harm caused by the prior disposal.²¹² Since the disposal of the hazardous waste has already occurred, under the bona fide prospective purchaser defense, the new landowner must “exercise the appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to – (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”²¹³ The term “disposal” only appears in the bona fide prospective purchaser defense when stating that the disposal of hazardous waste must have occurred prior to the purchaser’s acquisition of the land.²¹⁴ The remaining language of the bona fide prospective purchaser defense uses the term “release,” which is due to the definition of release including the abandonment or discharge of receptacles.²¹⁵

209. 9607(a) (emphasis added). Section 107(a) to CERCLA sets forth the “[c]overed persons; scope; recoverable costs and damages; interest rate; “comparable maturity” date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of [section 107].” *Id.*

210. The bona fide prospective purchaser defense was added to CERCLA with the Small Business Liability Relief and Brownfield Revitalization Act of 2002. Pub. L. No. 107-118, 115 Stat. 2356 (2002). The purpose behind the bona fide prospective purchaser defense was to encourage the purchase and development of property that had been lightly contaminated. GRAY, *supra* note 127, at 131. *See also* § 9601(39) (defining brownfield sites). The bona fide prospective purchaser defense is extremely elusive in practice, even with the interpretative assistance of the EPA. GRAY, *supra* note 127, at 132. *See also* § 9601(40) (discussing the criteria to establish the bona fide prospective purchaser defense); § 9607(r) (discussing the limitations on liability and the applicability of windfall liens).

211. The innocent land owner defense, a third-party defense, is the most commonly used defense to CERCLA liability. GRAY, *supra* note 127, at 128. The criteria to establish an innocent land owner defense are illustrated in section 107(b)(3) to CERCLA, and further a contractual relationship is defined in section 101(35) to CERCLA. §§ 9601(35), 9607(b)(3). In essence, the innocent land owner defense was established to prevent a landowner from being liable to a trespasser “who disposes of hazardous waste on the landowner’s property without permission.” GRAY, *supra* note 127, at 128–29. Currently, the most frequent use of the innocent land owner defense is by potentially responsible parties for when the party purchased the property without the knowledge that the property was contaminated by hazardous waste. *Id.* at 129 (stating that there is currently a split among circuits about whether Congress intended for the innocent land owner defense to apply in such a situation).

212. *See* § 9601(40); *see also* GRAY, *supra* note 127, at 131 (discussing the applicability of the bona fide prospective purchaser defense).

213. § 9601(40)(D)(i)–(iii).

214. § 9601(40)(A).

215. § 9601(22). The relevant language of release reads “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)” *Id.* (emphasis added).

Although a derivative of the term "disposal" is included in the definition of release, the disposal would have already occurred for the bona fide prospective purchaser defense to be applicable.²¹⁶ Given that the definition of release is interpreted to be broader than the definition of disposal,²¹⁷ it makes sense for the application of the bona fide prospective purchaser defense to make sure the appropriate steps are exercised to prevent any further or future release of the hazardous waste that has already been disposed on the property.²¹⁸

The innocent land owner defense allows a landowner to avoid liability when "the real property on which the facility concerned is located was acquired by the defendant after the *disposal* or placement of the hazardous substance" onto the real property.²¹⁹ To succeed under the innocent landowner defense for prior disposal of hazardous waste, the landowner-defendant must also show that "at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was *disposed of* on, in, or at the facility."²²⁰ The Ninth Circuit has expressed concerns regarding the innocent land owner defense and the inclusion of aerial depositions under disposal.²²¹ The innocent landowner defense arises when the hazardous waste has already been disposed on the property prior to the innocent landowner-defendant gaining title.²²² Congress intended the innocent landowner defense to be construed narrowly, and the innocent landowner defense would not be available to anyone who passively or actively disposed of, or released hazardous waste, into the environment.²²³ The Ninth Circuit's concerns about including the aerial deposition theory as a form of disposal, thus creating a never-ending process and eliminating the innocent land owner defense, are attenuated. If aerial depositions are included as a form of disposal the innocent land owner defense would not be eliminated. Rather, the innocent land owner would have to trace the hazardous waste that is aerielly deposited on the property to the hazardous waste's owner in order to avoid liability. Aerial depositions would only create an issue of traceability and causation that the innocent land owner would have to show, and establish, in order to assert the defense.

Neither the bona fide prospective purchaser nor the innocent landowner defense was at issue in *Pakootas III*. Rather, the only portion of CERCLA at issue was whether Teck Cominco "arranged for disposal" under section 107(a)(3) of

216. *Id.*

217. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir. 2001).

218. § 9601(40)(C).

219. § 9601(35)(A) (emphasis added). Additionally, the defendant must also establish one or more of the circumstances described in section 101(35)(A)(i)-(ii) to CERCLA. *Id.*

220. § 9601(35)(A)(i) (emphasis added).

221. *See Carson Harbor*, 270 F.3d at 882 (stating that the inclusion of subsoil passive migration of hazardous waste into the definition of disposal would eliminate the innocent landowner defense).

222. *See United States v. 150 Acres of Land*, 204 F.3d 698, 704 (6th Cir. 2000). *See generally* L. Jager Smith, Jr., *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155 (1993) (discussing the early application of the innocent landowner defense and how the defense does not provide a shelter from liability for real estate purchasers).

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

CERCLA.²²⁴ Given the use of the term disposal, and any derivatives thereof in both defenses, it does not follow that allowing for the inclusion of the aerial deposition theory would eliminate or alter either defense. The bona fide prospective purchaser defense only uses the term “disposal” when referring to how and when the hazardous waste arrived on the property, otherwise the defense uses the term “release.”²²⁵ Since the bona fide prospective purchaser defense seeks to prevent liability, if the landowner acts to prevent any ongoing or future release of the hazardous waste, such action is likely to already cover any new interpretation of disposal.

As for the innocent landowner defense, the Ninth Circuit, in an attenuated manner, states that allowing for the definition of disposal to encompass the passive migration of hazardous waste would result in a perpetual process where every landowner after the initial owner would be liable.²²⁶ This statement seems to remove the aspect of the defense that requires the innocent landowner to “not know [or have] no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at” the property.²²⁷ Since the innocent landowner defense requires that the innocent landowner not have any knowledge, or not have reason to know that the hazardous waste was disposed of on the property, the passive method of disposal does not seem to eliminate the defense. Under the innocent landowner, defense the term “disposal” only concerns the manner in which the hazardous waste arrived on the property. Therefore, the definition of disposal would revert to the party that actually disposed of the hazardous waste, and the current landowner could still assert the innocent landowner defense by tracing the hazardous waste to the party responsible for the hazardous waste’s disposal.

Concern is also expressed that a wider interpretation of the term disposal would create even broader potentially responsible party categories.²²⁸ A broader definition of disposal, which would encompass passive migrations, would not affect the first category of potentially responsible parties, as the term disposal, nor any derivatives thereof, do not appear in the first category.²²⁹ The second potentially responsible party category concerns any party who owned or operated a facility at the time of the hazardous waste disposal, or where hazardous waste was disposed, therefore, the second category seeks to place liability on past owners.²³⁰ Therefore,

224. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 982 (9th Cir. 2016) Section 107(a)(3) reads as:

[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

§ 9607(a)(3) (emphasis added).

225. See *Pakootas III*, 830 F.3d at 982 (citing § 9601(40)).

226. *Carson Harbor*, 270 F.3d at 882.

227. § 9601(35)(A)(i).

228. *Carson Harbor*, 270 F.3d at 881.

229. “[T]he owner and operator of a vessel or a facility” § 9607(a)(1).

230. “[A]ny person who at the time of *disposal* of any hazardous substance owned or operated any facility at which such hazardous substances were *disposed of*” § 9607(a)(2) (emphasis added).

a broader definition of disposal would not drastically affect the second category. The third potentially responsible party category concerns parties who arrange for hazardous waste to be disposed through some form of agreement or arrange for the hazardous waste to be transported for disposal.²³¹ The third category would remain unaffected by a broader definition of disposal because it only concerns those parties that are arranging for the disposal of hazardous waste. Lastly, the fourth potentially responsible party category only concerns those parties who accept and transport hazardous waste for disposal.²³² Each potentially responsible party category concerns a party that knows they are in possession of hazardous waste, therefore, a broader definition would only affect the precautions each potentially responsible party category would have to take to assure that the hazardous waste is disposed of properly.

Overall, the purpose behind CERCLA's enactment supports construing the definition of disposal to encompass the passive migrations in accordance with the common definition of deposit.²³³ Congress enacted CERCLA with the purpose to hold responsible parties liable for the release of hazardous waste into the environment and to provide compensation, as well as the cleanup of hazardous waste sites.²³⁴ The fundamental principle that CERCLA is centered on is making the polluter pay for any harm caused by the disposal of hazardous waste.²³⁵ In order to uphold the polluter pay principle and follow the purpose that CERCLA was enacted for, a broader definition of disposal is required. Based upon the Ninth Circuit's refusal to allow Washington's aerial deposition theory to fall within the definition of disposal, foreign manufacturers can now exploit a loophole by placing hazardous waste into the air and allow the waste to then precipitate from the air into the ground or water.²³⁶ Although the Clean Air Act would govern aerial emissions that first occur in the United States, the Ninth Circuit's refusal to hold Teck Cominco liable under CERCLA for the aerial deposition of hazardous waste in the Upper Columbia River Site presents a gap between CERCLA and the Clean Air Act.

Therefore, the purpose behind CERCLA does support the notion that liability could be placed on foreign manufacturers for their aerial depositions of hazardous waste that end up in the United States. To uphold CERCLA's purpose, it is necessary that aerial depositions qualify as a form of disposal. To hold otherwise would permit

231. "[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 . . ." § 9607(a)(3) (emphasis added).

232. "[A]ny person who accepts or accepted any hazardous substances for transport to *disposal* or treatment facilities . . ." § 9607(a)(4) (emphasis added).

233. *Carson Harbor*, 270 F.3d at 889 (Fletcher, J., dissenting).

234. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

235. MICHAEL B. GERRARD & JOEL M. GROSS, AMENDING CERCLA: THE POST-SARA AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT 1 (2006).

236. See *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 983–85 (9th Cir. 2016). The broader definition would only affect international manufacturers whose waste travels into the United States via aerial pathways due to CERCLA's federally permitted release exception, which would place manufacturers within the United States under the Clean Air Act's authority when hazardous waste is placed into the air. See § 9601(10).

manufacturers to avoid disposing of their hazardous waste by other, safer means, and instead place their hazardous waste into the air unconcerned about what ramifications the hazardous waste will have when it precipitates out of the air. An additional place to support a possible solution to hold Teck Cominco, and other future foreign manufacturers, liable is to assess whether Congress intended CERCLA to apply in such circumstances.

C. The Lack of Guidance from CERCLA's Legislative History

CERCLA's legislative history "gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of [CERCLA] . . . than it does helpful hints on the intent of the legislature."²³⁷ Congress had worked on creating "Superfund" hazardous waste bills for three years before finally enacting CERCLA.²³⁸ The process of passing a federal hazardous waste statute quickened after the Love Canal disaster and "the prospect of a transfer of political power in the presidency and in the Senate."²³⁹ President Ronald Reagan's election, coupled with a shift in the Senate to a Republican majority, created a new sense of urgency for the Carter Administration and Congress to enact a new hazardous waste statute.²⁴⁰ Fear spread that the new President and Senate would disregard all the prior work done on creating a federal hazardous waste management statute and all progress would be lost.²⁴¹ As a result, Congress acted with great speed after the election to enact CERCLA.²⁴² Although there were three years of prior work before CERCLA's enactment, when CERCLA was finally enacted there was "virtually no legislative history at all."²⁴³ Congress's final product has been described as follows:

The bill which became law was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all other pending measures on the subject. It was then placed before the House, in the form of a Senate amendment of the earlier House bill. It was considered [by the House] on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take-it-or-leave-it basis, the House took it, groaning all the way.²⁴⁴

237. *HRW Sys., Inc. v. Wash. Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993).

238. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982).

239. Nagle, *supra* note 65, at 1407.

240. *Id.* at 1408.

241. *Id.* at 1407-08.

242. *Id.* at 1408.

243. Grad, *supra* note 238, at 1.

244. *Id.*

The search for relevant documents within CERCLA's legislative history has been described as something similar to a "snipe hunt."²⁴⁵ The lack of legislative history is likely due to the speed at which CERCLA was enacted.²⁴⁶ CERCLA was a "hastily assembled bill and a fragmented legislative history add[s] to the unusual difficulty of discerning [CERCLA's] full meaning."²⁴⁷ As a basic rule, courts will only turn to a statute's legislative history if the statute's language is ambiguous or to determine if Congress intended something other than what the statute plainly states.²⁴⁸ The Ninth Circuit's review of CERCLA's legislative history in *Carson Harbor* revealed that there is no indication that Congress meant for nothing more than what disposal's plain meaning suggests.²⁴⁹ Disposal's plain meaning in *Carson Harbor* is addressed under CERCLA's former owner liability, whereas in *Pakootas III*, disposal is used for a different CERCLA subsection, arranger liability.²⁵⁰

The primary goal when CERCLA was enacted was to cleanup abandoned sites that were leaking and spilling hazardous waste into the environment.²⁵¹ Although CERCLA's liability scheme was created to be comprehensive, as the name of the act indicates, "the provisions of the statute imposing the liability were not so comprehensive . . . [leaving] many issues" to be resolved by the courts.²⁵²

CERCLA's final form prefers a broad scope of liability, specifically strict liability, and only allowing for a few defenses.²⁵³ During hearing testimony both the EPA and legislators understood that CERCLA would concern itself with a vast range of disposal methods, but at the time of CERCLA's enactment, the vast range of disposal was mainly focused on abandoned waste sites.²⁵⁴ At the time of enactment, CERCLA was mainly designed to provide a remedy for past hazardous waste disposal, in hopes of preventing hazardous waste catastrophes like the Love Canal incident and the Valley of Drums in Kentucky.²⁵⁵ CERCLA's lack of legislative history makes it impossible to determine Congress's intent for what conduct would constitute a disposal.

245. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 892 (9th Cir. 2001) (Fletcher, J., dissenting) (quoting the majority opinion). A snipe hunt is defined as "[a]n elaborate practical joke in which an unsuspecting person takes part in a bogus hunt for a snipe, typically being left alone in the dark with instructions not to move until the snipe appears. A futile search or endeavor." *Snipe Hunt*, AMERICAN HERITAGE, *supra* note 162.

246. *Grad*, *supra* note 238, at 2.

247. *Id.*

248. *See Carson Harbor*, 270 F.3d at 877.

249. *Id.* at 885. The Ninth Circuit concluded that the plain meaning of disposal did not include the "gradual passive migration of contamination through the soil." *Id.* at 879.

250. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 985 (9th Cir. 2016). Section 107(a)(2) to CERCLA addressed former owner liability, while section 107(a)(3) addresses arranger liability. 42 U.S.C. § 9607(a)(2)–(3) (2012).

251. *Carson Harbor*, 270 F.3d at 885.

252. GERRARD & GROSS, *supra* note 235, at 1.

253. *See Grad*, *supra* note 238, at 9; *See also* § 9607(b)(1) (allowing for a defense if the release or threatened release was caused by "an act of God"); § 9607(b)(2) (allowing for a defense if the release or threatened release was caused by "an act of war"); § 9607(b)(3) (allowing for third party defenses).

254. *Carson Harbor*, 270 F.3d at 886.

255. *Id.* at 885–86, n.15.

The lack of legislative history can be used in two ways. First, the silence on disposal definition can be interpreted as an express indication that Congress meant for the definition to be the same for CERCLA as it is for RCRA. Second, and the better interpretation, is that Congress did not imagine CERCLA would be used to hold manufacturers liable for the aerial deposition of hazardous waste. CERCLA was enacted as a response to clean up the sites where hazardous waste was being disposed.²⁵⁶ At the time, for Congress to contemplate that CERCLA would hold foreign manufacturers responsible for the harm caused by their aerial depositions would be absurd since *Pakootas III* is the first time CERCLA has been used in such a manner.²⁵⁷ Therefore, to uphold Congress's intent that CERCLA will seek broad liability, it is necessary for the courts to hold that aerial depositions are encompassed in the definition of disposal.

D. EPA's Interpretation and the Aerial Deposition Theory

A full statutory interpretation analysis would look to an agency interpretation, and, in this case, the EPA would be the agency providing an interpretation of CERCLA.²⁵⁸ The President of the United States is granted authority to administer CERCLA;²⁵⁹ however, the President can delegate this power.²⁶⁰ Acting pursuant to section 115 to CERCLA, President Regan delegated the power to administer CERCLA to the EPA.²⁶¹ Courts typically give deference to the EPA for any interpretation regarding how the statute is to be construed and enforced.²⁶² Currently, the EPA has not provided any reference or interpretation to the terms disposal or deposit, therefore *Chevron* deference is inapplicable.²⁶³ Although these circumstances do not warrant *Chevron* deference, the EPA has issued multiple consent orders applying CERCLA's disposal definition to matters similar to *Pakootas III*.²⁶⁴ Administrative documents, such as the EPA's consent orders, have been granted some deferential respect when presented to the courts.²⁶⁵ The absence of providing *Chevron* deference does not foreclose the courts from considering an agency's interpretation, "[i]t

256. *Id.* at 885.

257. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 930 (9th Cir. 2016).

258. *Carson Harbor*, 270 F.3d at 877 n.5.

259. *See* 42 U.S.C. § 9604(a)(1) (2012).

260. § 9615.

261. Exec. Order No. 12580, 3 C.F.R., 1987 Comp., p. 193 (1987).

262. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984) (requiring that the agency be granted authority by Congress to interpret the legislation it is charged with administering and that the interpretation is regarding a matter Congress has not clearly addressed and that the agency's interpretation is reasonable).

263. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 986 (9th Cir. 2016); *see also id.* at 986 n.12 (discussing that none of the briefs presented argued that deference was due, only after oral arguments did the United States present a letter under Federal Rules of Appellate Procedure 28(j) arguing that *Skidmore* deference may be due because the EPA allowed for aerial deposits to fall under the definition of disposal for manufacturers similar to Teck Cominco).

264. *See, e.g.*, ACM Smelter & Refinery Site Great Falls, Cascade Cty., Mont., EPA No. CERCLA-08-2011-0017, at 2–3 (Sept. 8, 2011) [hereinafter ACM Smelter]; Anniston Lead Site, EPA No. CERCLA-04-2005-3777, at 4, 9–10 (July 27, 2005) [hereinafter Anniston Lead]; *United States v. Union Pac. R.R. Co.*, EPA No. 8:11CV195, at 3 (D. Neb. June 01, 2011) [hereinafter Omaha Lead]; Gulf Res. & Chem. Corp., EPA No. 1090-01-106, 1990 WL 10532643 (Oct. 1, 1990) [hereinafter Bunker Hill].

265. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"²⁶⁶ The United States' Department of Justice has noted that "[h]undreds of smelter sites alone are contaminated by the aerial deposition of hazardous substances that are being or have been cleaned up under CERCLA."²⁶⁷ Here, the EPA has issued several administrative orders dealing with the aerial deposition of hazardous waste on distant properties.²⁶⁸ The most comparable circumstance where the EPA identified aerial depositions as a form of disposal was at the Bunker Hill facility.

The Bunker Hill facility, located in Northern Idaho, began smelting in 1917.²⁶⁹ As a result from the smelting and mining activities, several adverse environmental and human health issues arose.²⁷⁰ Since smelting and mining operations began, large amounts of hazardous waste including lead, arsenic, and mercury were released into the air and contaminated the soil within the vicinity of the Bunker Hill smelting facility.²⁷¹ Additionally, the EPA held, as a finding of fact, that the six thousand people residing "within the Bunker Hill Superfund site boundaries" are at risk of health complications from inhaling or ingesting the hazardous waste.²⁷² The EPA also concluded that animals, including aquatic life, and plant species within the Bunker Hill Superfund site boundaries were at risk of consequences resulting from the hazardous aerial emissions.²⁷³ As a result, the EPA held that Gulf Resource and Chemical Corporation, along with other parties, were liable "for all costs of removal or remedial actions . . . incurred" pursuant to section 107(a) to CERCLA.²⁷⁴

Remedial action within the Bunker Hill site presented many dead ends since various environmental statutes that would have provided remedies were not applicable in this circumstance.²⁷⁵ RCRA was largely excluded from providing a solution to the Bunker Hill site by the Beville Amendment.²⁷⁶ Additionally, the Clean Air Act

266. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore*, 323 U.S. at 140); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

267. Brief of the United States as Amicus Curiae in Support of Appellees at 20, *Pakootas v. Teck Cominco Metals, LTD.*, 830 F.3d 975 (9th Cir. 2016) (No. 15-35228). *See generally* *Am. Int'l Specialty Lines Ins. Co. v. United States*, No. 09-01734 AHM (RZx), 2010 WL 2635768 (C.D. Cal. June 30, 2010) (alleging liability for the disposing of perchlorate through multiple pathways including discharging into the air); *In re ASARCO LLC*, No. 05-21207, 2009 WL 8176641 (Bankr. S.D. Tex. June 5, 2009) (emitting lead from smoke stacks).

268. *See* *ACM Smelter*, *supra* note 264; *Anniston Lead*, *supra* note 264; *Omaha Lead*, *supra* note 264; *Bunker Hill*, *supra* note 264.

269. *Bunker Hill*, *supra* note 264, ¶ 16.

270. *Id.* ¶ 17.

271. *Id.* ¶ 16.

272. *Id.* ¶ 18.

273. *Id.*

274. *Id.* ¶ 33.

275. *See* Clifford J. Villa, *Superfund vs. Mega-Sites: The Coeur d'Alene River Basin Story*, 28 COLUM. J. ENVTL. L. 255, 267-68 (2003).

276. *Id.* at 268. The Beville Amendment excluded "[s]olid waste from the extraction, beneficiation, and processing of ores and minerals" from RCRA, leaving this excluded waste to be regulated under other

was inapplicable after the Bunker Hill smelter ceased operation in 1981 and was no longer emitting hazardous waste.²⁷⁷ Lastly, the Clean Water Act provided little help since a majority of the heavy metals released into the Coeur d'Alene River came from "contaminated soils and sediments and other nonpoint sources."²⁷⁸ With three of the major environmental statutes that could provide remedies largely inapplicable to the Bunker Hill Site, CERCLA assumed a primary role in establishing a solution to the contamination in the Coeur d'Alene Basin.²⁷⁹ Thus, the United States Department of Justice, Department of Agriculture, and Department of the Interior brought a lawsuit against the owners and operators of the mining operations within the Coeur d'Alene Basin for natural resource damages, pursuant to CERCLA.²⁸⁰

The Bunker Hill Superfund site provides a great comparison to the risks Teck Cominco's smelter presents to the communities downwind in Washington. Similar to Teck Cominco's smelter that produced aerial emissions of hazardous waste,²⁸¹ the Bunker Hill smelter released aerial emissions containing hazardous waste such as sulfur dioxide and lead particulates.²⁸² The aerial emissions from the Bunker Hill smelter were found to cause elevated blood-lead levels in a significant number of children within the vicinity of the Bunker Hill smelter.²⁸³ The high blood-lead levels in children within the Bunker Hill smelter vicinity was connected to children unintentionally ingesting contaminated soil and ground water, along with other possible ingestion methods such as the inhalation of particulate matter and the consumption of contaminated, locally grown produce and fish.²⁸⁴ The risk presented to the community surrounding the Bunker Hill smelter can be extrapolated to the communities downwind from Teck Cominco's smelter. The UCR Superfund Site, which is the area downwind from Teck Cominco's smelter, is the portion of the Columbia River upstream from the Grand Coulee Dam to the United States-Canada border.²⁸⁵ The communities within the boundaries of the UCR Site are presented with the same risks that were present in the Bunker Hill communities.

Teck Cominco's smelting operations in Trail, British Columbia, have resulted in highly unnatural levels of heavy metals, including lead and arsenic, in the UCR

applicable law. 42 U.S.C. § 6921(b)(3)(A)(ii) (2012). For more information on the Bevill Amendment see *Env'tl. Def. Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988).

277. Villa, *supra* note 275, at 268.

278. *Id.*; see generally Robin Kundis Craig & Anna M. Roberts, *When Will Governments Regulate Nonpoint Source Pollution? A Comparative Perspective*, 42 B.C. ENVTL. AFF. L. REV. 1 (2015) (discussing nonpoint source water pollution not directly regulated by the Clean Water Act).

279. Villa, *supra* note 275, at 268–69.

280. See generally *United States v. ASARCO Inc.*, No. CV 96-0122-N-EJL, 1999 WL 33313132, at *1 (D. Idaho Sept. 30, 1999).

281. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 979 (9th Cir. 2016).

282. Villa, *supra* note 275, at 260.

283. U.S. EPA, BUNKER HILL MINING AND METALLURGICAL COMPLEX, 08.02.00.00.1002, ADMIN. RECORD OF DECISION, 2-2, (1992), <https://semspub.epa.gov/work/10/61515.pdf>.

284. *Id.* at 6-1.

285. U.S. EPA, UPPER COLUMBIA RIVER/LAKE ROOSEVELT EXPANDED SITE INSPECTION SAMPLING AND QUALITY ASSURANCE PLAN 1-2 (2001), <https://semspub.epa.gov/work/10/1133388.pdf>. "[T]he Upper Columbia River Site consists of the areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination necessary for implementation of [a] response action." *Teck Cominco Metals, Ltd., CERCLA-10-2004-0018*, at 2 ¶1 (U.S. EPA Dec. 11, 2003) (Unilateral Administrative Order).

Site's soil.²⁸⁶ The high levels of heavy metals in the UCR Site have been attributed to the smokestack emissions and past direct hazardous waste releases into the Columbia River from Teck Cominco's smelter.²⁸⁷ Given that the UCR Site's circumstances are sufficiently similar to the Bunker Hill site, the application of CERCLA to seek natural resource damages from Teck Cominco should be permitted for the aerial deposition of hazardous waste. The only possible road block to establishing CERCLA liability against Teck Cominco is CERCLA's federally permitted release exemption.²⁸⁸ CERCLA's federally permitted release exemption provides that any damage resulting for a permitted release shall be recovered under the applicable federal or state law.²⁸⁹

In the case of *Pakootas III*, if Teck Cominco's smelter was located within the borders of the United States the aerial emissions of hazardous waste would fall under the Clean Air Act's authority.²⁹⁰ Since Teck Cominco's smelter is located outside the borders of the United States, the Clean Air Act provides no solution to the aerial deposition of hazardous waste in the UCR Site.²⁹¹ The lack of a remedy under the Clean Air Act is again sufficiently similar to CERCLA's use at the Bunker Hill site.²⁹² Since the Clean Air Act is inapplicable to establishing liability against Teck Cominco for the aerial deposition of hazardous waste in the UCR Site, CERCLA should assume primary authority and hold Teck Cominco liable for the natural resource damages its smelter has caused in the UCR Site.

Additional scenarios where the EPA found smelters liable under CERCLA include the ASARCO smelter in Omaha, Nebraska,²⁹³ the Anniston Lead and PCB site in Anniston, Alabama,²⁹⁴ and the ACM smelter and refinery site in Great Falls, Montana.²⁹⁵ The ASARCO smelter in Omaha emitted lead particles that in turn were deposited into residential yards.²⁹⁶ Soil samples conducted by the EPA found that high levels of lead were present in residential yards within the vicinity of the ASARCO smelter, and thus presented a health risk to children.²⁹⁷ Polychlorinated biphenyls and lead were released from the Anniston smelter through aerial emissions,²⁹⁸ and being deposited into residential properties.²⁹⁹ The ACM smokestack emissions contained lead and other metals, some of which had been deposited over six miles

286. *Upper Columbia River Lake Roosevelt Site*, STATE OF WASH. DEP'T OF ECOLOGY, <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=12125#field> (last visited Jan. 5, 2018).

287. *Id.*

288. 42 U.S.C. § 9601(10)(H) (2012); § 9607(j).

289. § 9607(j).

290. *See* *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas III)*, 830 F.3d 975, 985 (9th Cir. 2016).

291. *See* § 7407.

292. *See* Villa, *supra* note 275, at 267–68.

293. Omaha Lead, *supra* note 264, at 9, ¶ 23.

294. Anniston Lead, *supra* note 264, at 11, ¶ 10(d).

295. ACM Smelter, *supra* note 264, at 15, ¶ 25.

296. Omaha Lead, *supra* note 264, at 5, ¶ 5.

297. *See id.* at 6, ¶ 10(a)–11.

298. Anniston Lead, *supra* note 264, at 9, ¶ 9(c).

299. *Id.* ¶ 9(a).

away via aerial emission.³⁰⁰ Similarly, soil samples conducted in Black Eagle, Montana, revealed that residential yards had high levels of lead, and the aerial emissions from the ACM smelter contributed to the contamination of over seventy-eight acres in the Black Eagle community.³⁰¹

The above smelter consent orders illustrate that the EPA has on multiple occasions found smelters to be liable under CERCLA for the aerial emissions of hazardous waste. When other solutions to fix the problems a smelter's aerial emissions cause to its surrounding communities are absent, CERCLA should be used to address and remedy the damage caused. The Ninth Circuit in *Pakootas III* should have recognized that neither the Clean Air Act nor any other remedial environmental statute was applicable to solve the problems caused by Teck Cominco in the UCR Site. Applying CERCLA to the aerial deposition of hazardous waste by Teck Cominco presents a viable solution previously employed by the EPA on multiple occasions, and thus should be employed again here.

V. CONCLUSION

CERCLA can no longer shy away from attaching liability to the aerial depositions of hazardous waste. The issue of aerial emissions containing hazardous waste crossing international borders will likely become more prominent with increased global industrialization. Canada and the United States now have the opportunity to solve this transboundary pollution issue, and to present a solution that other neighboring countries worldwide can adopt to avoid the harms associated with hazardous waste emissions. Failing to recognize that CERCLA presents a remedy to the aerial deposition dilemma leaves a statutory gap in environmental regulation that manufacturers can exploit.

Although it may seem uncharacteristic to apply CERCLA to a foreign entity, now is the time for courts to accept that foreign manufacturers can harm the environment and citizens close to territorial borders. First, the United States and Canada should revisit the Air Quality Agreement to impose some form of enforcement mechanism that will hold the polluting country's manufacturers liable for the harm caused by their pollution. In addition, courts should now recognize that CERCLA is not barred from reaching hazardous waste aerial emissions. The term "deposit" illustrates that aerial emissions are a form of disposal under CERCLA.

There is a need to take a second look at the Ninth Circuit's holding in *Pakootas III*, and acknowledge that the Ninth Circuit was incorrect. The occurrence of transboundary air pollution is likely to arise again in the United States judicial system, and when it does the Ninth Circuit's holding should be scrutinized. To control pollution and help preserve the environment, courts should not shy away from applying CERCLA's expansive liability power to foreign manufacturers.

300. ACM Smelter, *supra* note 264, at 9, ¶ 14(g).

301. *Id.* at 10, ¶ 15(b).