No. 15-35228

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs-Appellees,

and

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Washington
No. CV-04-0256-LRS, Hon. Lonny R. Suko, presiding

BRIEF FOR THE NATIONAL MINING ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL AS AMICI CURIAE SUPPORTING APPELLANT AND REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES: **Page**

STATUTES:

LEGISLATIVE HISTORY:

OTHER AUTHORITIES:

INTEREST OF THE *AMICI CURIAE*[1]

Amici are four national trade organizations whose members have a vital interest in the issue now before the Court. As part of their industrial operations, members of each *amicus* lawfully and safely emit varying amounts of substances that are within the broad definition of "hazardous substance" used in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), but are regulated under other statutes such as the Clean Air Act (CAA).

The National Mining Association is a national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. A core mission of NMA is to work with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. NMA also participates in litigation raising issues of concern to the mining community.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and

[1] All parties have consented to the filing of this brief. No party's counsel authored any part of this brief. No party and no party's counsel contributed money intended to fund this brief. No person other than amici, their members, and their counsel has made such a monetary contribution.

indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, such as this one, raising issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. NAM represents manufacturers of all sizes in every industrial sector and has members in all 50 states. Part of its mission is to enhance the competitiveness of American manufacturers through legislative and regulatory advocacy.

The American Chemistry Council is a nonprofit trade association that represents the leading companies engaged in the business of chemistry. The business of chemistry is an $801 billion industry and a key component of the nation's economy. The Council's members apply the science of chemistry to provide innovative products that enhance people's everyday lives in a safe and healthy manner.

As part of their day-to-day industrial operations, many of *amici*'s members may emit into the air varying amounts—sometimes only trace amounts—of so-called "hazardous substances" in the very broad sense in which CERCLA defines

that term. Those companies devote great effort and significant financial resources to ensuring that their emissions are in full compliance with all applicable federal, state, and local regulations, including the CAA, and the implementing regulations promulgated by the U.S. Environmental Protection Agency (EPA) and state authorities. Depending on the type of emission and the meteorological conditions, some of these regulated emissions can travel hundreds of miles before touching ground. Operators have no control over where these emissions will land.

Under the District Court's decision, *amici*'s members could be threatened with liability—strict, joint and several liability—under CERCLA at any distant spot or spots where their airborne emissions may touch land or water. Even though their emissions are lawful and have been determined to be at levels protective of human health and the environment, under the District Court's theory they could still lead to massive liability if they allegedly happen to alight at a location—perhaps hundreds of miles away—that has been polluted for years through disposals by others. And because the original polluters often have exhausted their financial resources long before a cleanup is paid for, plaintiffs searching for a new deep pocket will have every incentive to use the District Court's reasoning aggressively. *Amici*'s members who are air emitters could be left with the entire cleanup bill, even if their actions are not subject to any liability under the CAA framework for regulating air emissions.

As Teck explains well, the District Court's rationale is irreconcilable with this Court's decision in *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1019 (9th Cir. 2014). *Amici* submit this brief to explain why adopting the District Court's rationale as the law of this Circuit would also be contrary to the statutory text, legislative history, and purpose.

SUMMARY OF THE ARGUMENT

The District Court erred by interpreting CERCLA in a way that eliminates the first element of arranger liability: the disposal. Both the plain text of CERCLA and this Court's controlling precedent make clear that the statutory definition of "disposal" is not satisfied by the mere emission of hazardous substances into the ambient air, even if portions of the emissions later come to rest at a facility. The District Court conflated the "disposal" requirement with the next step of the analysis: "com[ing] to be located at" a "facility." It essentially concluded that emission into the *air*, rather than "into or on any land or water," still results in a "disposal" so long as the hazardous substance eventually makes its way to land or water. This conclusion is belied by both sound principles of statutory interpretation and CERCLA's legislative history.

The District Court's interpretation would literally leave arranger liability without any limit: wherever an air emission lands, a CERCLA facility is formed. And if a trace air emission lands at a site polluted by someone else (such as the

owner or operator of that site), the trace emitter could be strictly, jointly, and severally liable for the entire cost of cleaning up the site. Depending on wind currents, each emission could result in multiple "disposals," hundreds or even thousands of miles away from the place of emission.

The District Court's interpretation also fails to fit with other aspects of CERCLA and other federal environmental laws. For instance, if the District Court's expansive approach to "disposal" were exported to other contexts, it could disrupt the CERCLA defense for bona fide prospective purchasers: the availability of that defense turns on whether a "disposal" occurs after a bona fide purchaser acquires a facility; the bona fide purchaser is supposed to put a stop to any further disposals and cooperate with regulatory authorities in exchange for liability protection. Yet landowners have no control over the novel type of incoming airborne "disposal" the District Court saw here.

Emitters in this country could attempt to raise a statutory defense unavailable to Teck, for "federally permitted release[s]," but EPA has sought to erode that provision through agency interpretations. The result is that even law-abiding emitters still face the threat that a private plaintiff hunting for a deep pocket will seek to hold them liable under the District Court's theory.

This long-running litigation may have some unique aspects, but far from being narrow, the District Court's novel interpretation of CERCLA does not turn

on any unique or case-specific facts. Under that interpretation, *amici*, their members, and every air emitter in the nine Western states might be threatened with a broad and disproportionate form of liability that Congress never intended. This Court should swiftly and decisively reject the District Court's reasoning.

ARGUMENT

I. THE DISTRICT COURT READ THE ELEMENT OF "DISPOSAL" OUT OF THE STATUTE.

Liability under the provision of CERCLA at issue here requires a plaintiff to prove each of three key elements. Specifically, for an entity to be liable as an "arranger," (1) that entity must "dispos[e]" of or arrange for disposal of a hazardous substance, 42 U.S.C. § 9607(a)(3); (2) the hazardous substance must have been "deposited," "disposed of," or "otherwise come to be located" at a place that thereby becomes a CERCLA "facility," *id.* § 9601(9); and (3) there must be a "release" of hazardous substances from the "facility" into the environment, *id.* § 9601(22). *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1073–74 (9th Cir. 2006) ("*Pakootas I*"). Plaintiffs have alleged that hazardous substances emitted by Teck's smelter in Trail, British Columbia, came to be located at the UCR Site, and that there was a subsequent release of hazardous substances from the UCR Site. But they have failed to allege the first element—that Teck "dispos[ed] of" hazardous substances through aerial emissions from its smelter *before* the emitted substances allegedly came to rest at the UCR Site. Interpreting

the defined term "disposal" as the District Court did, to encompass the falling of air emissions onto the land or water at the UCR Site, reads that element right out of the statute.

A. The District Court Conflated Two Distinct Elements Of CERCLA Liability Into One.

"Disposal" under CERCLA does not include emitting a hazardous substance into the air. As Teck explains, the statutory definition of "disposal" is explicitly limited to "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste *into or on any land or water*." 42 U.S.C. § 6903(3) (emphasis added); *see id.* § 9601(29). Therefore, to qualify as a "disposal," the waste must be "*first* placed 'into or on any land or water,'" not emitted into the air. *Center for Community Action*, 764 F.3d at 1024. *See generally* Teck Br. 9. By contrast, a different defined term under CERCLA, "release," does encompass "emitting" into the air. 42 U.S.C. § 9601(22).

The District Court concluded that Plaintiffs' allegations nonetheless satisfied the "disposal" element of § 9607(a)(3) because Plaintiffs alleged that the hazardous substances *eventually* made it "into . . . water." The court noted that Plaintiffs' original complaint, which produced a prior appeal in this case (*Pakootas I*), had involved hazardous substances that were discharged into the Columbia River at Trail, Canada, and eventually were carried by the river into the United States and to the UCR Site. The District Court saw "no meaningful distinction between

discharge of wastes into the water at Trail and discharge of waste into the air at Trail, as long as they result in disposal at the site in the United States.'" Order at 3, ECF No. 2115. The court reasoned that it "did not cause the Ninth Circuit any concern in *Pakootas I*" that "river currents carr[ied] Defendant's slag and effluent into the UCR Site," and that it therefore should cause no concern that "air currents carrying emissions from Defendant's smelter into the UCR Site constitute 'passive migration.'" *Id.* at 9.

As to this, the District Court was clearly incorrect. In *Pakootas I*, both this Court and Plaintiffs recognized that there was an alleged disposal, but not at the UCR Site. Rather, *before* any migration to the UCR Site, the disposal occurred in *Canada*, where Teck discharged slag into water. *See* 452 F.3d at 1069 ("Teck . . . disposed of hazardous materials . . . into the Columbia River"); Resp. Brief of Appellees Pakootas and Michel, No. 05-35153, 2005 WL 3134344, at *4 (9th Cir. July 20, 2005) (Teck "disposed of hundreds of thousands of tons of liquid effluent and 'slag,' a byproduct of the smelting process, by sending it down a chute directly into the Columbia River"). What distinguishes the case at hand is that Teck's alleged air emissions were never initially "disposed of" in British Columbia.

Contrary to the District Court's holding, not everything that is "deposited" or "come[s] to be located at" the UCR Site is necessarily the result of a "disposal"

as that term is defined in CERCLA.[2] The District Court erred in conflating two separate elements of the cause of action to find Teck liable for the deposition of alleged air emissions from its smelter at the UCR Site. Plaintiffs here are not suing Teck as an "owner and operator" of the UCR facility, 42 U.S.C. § 9607(a)(1), but instead under provisions of CERCLA that apply only after there is a "disposal" of a hazardous substance. Yet there was no prior disposal. Reading the statute as Plaintiffs do reads an element of the cause of action out of the statute.

B. Plaintiffs' Theory, And The District Court's Rule, Could Impose CERCLA Liability On Anyone Who "Releases" A Hazardous Substance Into The Atmosphere.

Furthermore, the District Court's approach to the disposal element cannot stand because it creates potential liability for *any* entity that *releases* hazardous substances into the air, contrary to clear congressional intent. Congress used the broader concept of "release" elsewhere in § 9607, but it required the more specific language of "disposal" as an element of arranger liability.

If, as Plaintiffs propose and the District Court held, the mere landing of emitted hazardous substances at a CERCLA facility constitutes "disposal" of those

[2] As Teck notes in its brief, this Court held in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) (en banc), that the "gradual passive migration of contamination through the soil . . . was not a 'disposal' within the meaning of § 9607(a)(2)." Like the passive migration at issue in *Carson Harbor*, Plaintiffs here allege that Teck's emissions passively migrated through the atmosphere and happened to land at the UCR Site. Passive migration may qualify as a *release*, but as discussed in Section I.B, "'release' is broader than disposal." *Id.* at 878.

substances, then *every* release of heavier-than-air emissions into the air will result in a "disposal" because those emitted substances have to land somewhere, and anywhere in the United States that emissions ultimately land is by definition a CERCLA "facility." *See* 42 U.S.C. § 9601(9).[3] But if Congress had wanted every release of emissions into the air to constitute disposal, it could have simply done so directly, by including in the definition of "disposal" the emission of hazardous substances into the air (as it did when it included this concept in the broader definition of "release," *id.* § 9601(22)). But it did precisely the opposite: it specified "land or water," but conspicuously omitted "air." And if there were any doubt that Congress's omission was a conscious one, the *same definition* of disposal later mentions "air." As this Court held in *Center for Community Action*, § 9601(22) "provide[s] sufficient contextual clues for us to conclude" that emissions of waste into the air does not fall within the scope of the term "disposal." 764 F.3d at 1023-24; *see also id.* at 1024-25 ("That Congress knew

[3] While under the District Court's theory an emitter can be liable under CERCLA only when hazardous substances are further "released" from the "facility" into the environment, this requirement is satisfied in many cases. "Release" is broadly defined to include virtually any way that substances escape into the environment from a facility, and once response costs are generated, under the district court's rule a company whose emissions contributed only minor contaminants to the site could be liable for all response costs at the site. If the contaminants from those emissions happened to travel for miles, fall onto land or water, and combine with millions of gallons of toxic wastes intentionally dumped at a facility by an entity that is now insolvent, the minor emitter who never "disposed" of hazardous substances (as contemplated by Congress through its definition of disposal) would be unable to obtain contribution for those response costs. *See* Section II.A, *infra*.

how to define 'disposal' to include [air] emissions, but nonetheless chose not to, counsels against our reading into the definition of 'disposal' conduct that Congress must have intended to exclude from its reach.").

A contrary holding would contravene not only basic general principles of statutory construction, but also the specific intent of the drafters of both CERCLA and RCRA. Congress enacted RCRA to address "improper disposal" practices. S. Rep. No. 96-848, 96th Cong., 2d Sess. 2 (1980); *see also id.* ("[T]he potential impact of" releases from "unsound hazardous *disposal sites* and other releases of chemicals is tremendous." (emphasis added)). Indeed, in enacting CERCLA, Congress recognized that "hazardous wastes" were disposed of using "unsound disposal methods," such as "haphazard land disposal, improper storage of dangerous substances and illicit dumping," and noted that "[t]he effects of *poor disposal methods* and abandoned waste disposal sites" were significant. *Id.* at 3-4 (emphasis added); *see also id.* at 5 (noting the problems caused by "chemical waste dumps"). And, although the Senate Report accompanying CERCLA acknowledged that the problem addressed by CERCLA was not simply improper waste disposal but also "spills and other releases of dangerous chemicals," it also carefully noted the types of disposals and contaminations leading to releases that Congress had in mind in passing CERCLA, all of which similarly reference unsound waste disposal practices. *See id.* at 5 ("When confronted with an incident

of toxic chemical contamination, it is often difficult to distinguish whether *it is the result of a spill, a continuing discharge, an intentional dumping, or a waste disposal site*." (emphasis added)). Both from the RCRA definition of "disposal" that CERCLA incorporated, and from the Senate Report accompanying CERCLA, it is evident that emissions into the atmosphere that may, someday and somewhere, make their way to land or water simply do not constitute an arrangement for disposal of a hazardous substance.

II. THE DISTRICT COURT'S RULE CREATES A NEW SOURCE OF LIABILITY WITH AN EXTRAORDINARILY BROAD SCOPE.

A. Because Emissions Can Travel Long Distances by Air, Adopting The District Court's Rule Would Create A Form Of Unforeseeable, Yet Incredibly Expansive, Liability.

There are important differences between hazardous substances that are "leaked" or "discharged" into waterways or onto land, and substances that are emitted into the atmosphere. Substances that are deposited into water or on land are relatively easy to document and track to locations where they may come to rest. Substances that are emitted into the atmosphere, in contrast, pose extremely difficult proof issues: how could an emitter prove that a substance found in nearby (or not-so-nearby) land or water did not come from its emissions? Under Plaintiffs' theory, an emitter potentially could be jointly and severally liable for each site on which its emissions are deemed to have landed, *see Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956–57 (9th Cir. 2013), and

because emissions can travel great distances, each emitter could well be exposed to CERCLA liability at multiple, widely dispersed sites. And the plaintiffs presumably would seek to impose strict liability, taking no account of fault.

While the emitter could assert that its share of the harm is divisible from the harm caused by others,[4] in practice, arguing divisibility is difficult and, according to one lower court, "nearly impossible." *Raytheon Constructors, Inc. v. ASARCO Inc.*, No. CIV. A. 96 N 2072, 2000 WL 1635482, at *11 n.1 (D. Colo. Mar. 31, 2000). "[T]he commingling of wastes, the migration of contamination over time, and other complex fact patterns" would make it difficult, if not impossible, for an emitter to successfully argue that there is a "reasonable basis" for apportionment. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 482 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013) (quotation marks and citation omitted); *see also* Bruce C. Jenkins, *Divisibility of Injury Under CERCLA: Reaching for the Unreachable Goal*, 5 BYU J. Pub. L. 195, 195 (1991). Indeed, even after *Burlington Northern*'s holding that apportionment of CERCLA liability

[4] *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 289 (5th Cir. 2010) (citing *Burlington N. & Sante Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009)).

is proper so long as there is a "reasonable basis" for divisibility, *see* 556 U.S. at 614, courts have (rightly or wrongly) been reluctant to grant apportionment.[5]

The following scenario illustrates the problems that Plaintiffs' theory of disposal would create under current law on CERCLA liability. An emission, containing a hazardous substance at trace levels, travels by air across the country and lands on a site (or multiple sites) already contaminated with the same hazardous substance, or even different hazardous substances. Under Plaintiffs' approach, the emitter would potentially be jointly and severally responsible for the costs associated with cleaning up each and every site where the emitted hazardous substance lands, even if the emitter produced only a trivial share of the contamination at each of those sites.[6]

Given the realities of joint-and-several CERCLA liability, Plaintiffs' unreasonable theory could have grave financial consequences for regulated

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[5] *See* Christopher D. Thomas, *Tomorrow's News Today: The Future of Superfund Litigation*, 46 Ariz. St. L.J. 537, 560 (2014) (explaining that "there appears to be no published [district court] opinion finding a basis for reasonable apportionment subsequent to *Burlington Northern*" and that "the two courts of appeals that have addressed the issue have both affirmed district court determinations rejecting apportionment theories").

[6] Section 107(o) of CERCLA excepts from liability certain arrangers for disposal who contribute extremely small amounts of hazardous substances to a facility, but only at sites listed by the United States on the National Priorities List as one of the worst sites in the nation, and only if part or all of the disposal occurred prior to April 1, 2001. *See* 42 U.S.C. § 9607(o).

entities. CERCLA actions can involve tens, if not hundreds, of millions of dollars in response costs. *See, e.g.*, Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements Under CERCLA Section 108(b), 75 Fed. Reg. 816, 830 (Jan. 6, 2010) (coal ash cleanup costs "estimated to range from $933 million to $1.2 billion"); *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1186–87 (9th Cir. 2000) (cleanup of contaminated aquifer with multiple PRPs cost $18.4 million); *City of Wichita v. Trs. of APCO Oil Corp. Liquidating Tr.*, 306 F. Supp. 2d 1040, 1076 (D. Kan. 2003) (cleanup costs owed by multiple potentially responsible parties (PRPs) for chlorinated solvent releases is more than $13 million to date, with costs rising).

Consequently, deep-pocketed companies whose lawful emissions may represent, at most, a tiny fraction of the hazardous substances present at sites (where other companies have dumped, leaked, or otherwise disposed of toxic waste) may find themselves targets for joint-and-several-liability actions. Because proving divisibility is an extremely difficult task in the typical case, these entities may find themselves exposed to tens or hundreds of millions of dollars in damages as a result of small amounts of lawfully emitted hazardous substances that can travel long distances. Congress could not have intended such expansive liability when it passed legislation that targeted "haphazard land disposal, improper storage of dangerous substances and illicit dumping." S. Rep. No. 96-848, at 3-4.

B. The District Court's Rule Could Create Liability For Bona Fide Prospective Purchasers On Whose Land Or Water Air Emissions Come To Rest.

In 2002, Congress created a new defense to CERCLA liability, exempting "bona fide prospective purchasers" of properties, or "facilities" from which hazardous substances are later released (the "BFPP defense"). *See* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 222, 115 Stat. 2356, 2370-72 (2002) (codified as amended at 42 U.S.C. §§ 9601(40), 9607(r)). Pursuant to this defense, an individual or entity that purchases a known contaminated facility, exercises due care, and cooperates with responders cannot be held liable for response costs as an owner/operator of that facility—provided that, among other things, "[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility." 42 U.S.C. § 9601(40)(A). This new exception was widely praised for recognizing that "[i]nnocent parties who have neither caused nor worsened environmental hazards should not be subject to liability under Superfund," 147 Cong. Rec. 6236-37 (2001) (statement of the American Bar Association); addressing barriers to redevelopment that existed due to prospective purchasers' fears of liability for cleanup costs, *id.* at 6242-43 (statements of Sens. Carnahan and Baucus); and likely encouraging more cleanups by private parties seeking to redevelop, *id.* at 6233-35, 6238-41 (statements of Sens. Smith (NH), Chafee, Reid, and Boxer).

The District Court's rule is in significant tension with the BFPP defense. Under the District Court's decision, any time emitted hazardous substances fall to the earth on U.S. soil, a CERCLA "disposal" occurs, and thus anywhere that the substances land can be a CERCLA "facility." *See* 42 U.S.C. § 9601(9); *see supra* at 9–10. Because the BFPP defense applies only if no disposals occur after the purchaser acquired the facility, under the District Court's decision CERCLA plaintiffs could argue that the defense completely disappears the moment emitted materials fall onto the purchaser's property. The falling of emissions from the atmosphere is, of course, entirely outside of the purchaser's control and completely unpreventable by the building of fences, hiring of security, or close monitoring of the property.

The robust BFPP defense is intended to encourage private parties to purchase and redevelop blighted properties without fear of additional CERCLA liability. The likelihood that aggressive plaintiffs will seek to export the District Court's misreading of "disposal" to the BFPP context is a further reason to reject that misreading now.

C. Existing Settlements Or Consent Decrees Purportedly Involving Aerial Emissions Do Not Warrant Affirmance.

In an *amicus* brief filed in the District Court, the United States argued that a determination that aerial emissions do not constitute disposal would undermine

various settlements and consent decrees addressing aerial discharges of hazardous substances. That argument lacks any merit.

As an initial matter, the United States appears to have overstated the extent to which these cases, settlements, or consent decrees relied upon aerial emissions as disposals. For example, in *American International Specialty Lines Insurance Co. v. United States*, No. 09-CV-01734, 2010 WL 2635768 (C.D. Cal. June 30, 2010), the court did not find as a matter of law, as the United States contended below, that disposal of perchlorate occurred when excess perchlorate was discharged into the air. Instead, the court held as a matter of law that "[t]here were disposals of hazardous substances at the GFE" and then stated that "[t]here were disposals of perchlorate at the GFE when excess perchlorate was discharged into the air, deposited on the floor, washed out of buildings, removed to the baghouse, *or* placed in drums for burning as waste." *Id.* at *23 (emphasis added)). And the other types of discharges notably mentioned by the court *in the disjunctive* unequivocally qualify as CERCLA disposals.

In re ASARCO LLC, No. 05-21207, 2009 WL 8176641 (Bankr. S.D. Tex. June 5, 2009), similarly involved numerous potential types of disposal, including lead-based paint that seeped into the soil at the CERCLA facility. *Id.* at *14. And the complaint in the Anniston Lead/PCB Site case, which the United States points to as an example of a CERCLA cleanup of contamination from aerial lead and

PCB contamination, included no allegations of arrangement for disposal of hazardous substances via aerial emissions. Instead, the complaint alleged that two unlined landfills were "used for the disposal of hazardous wastes" by a PCB manufacturing plant. Compl. ¶ 12, *United States v. Pharmacia Corp.*, No. CV 02-C-0749-E, ECF No. 1 (N. D. Ala. filed Mar. 25, 2002).

In any event, even if there are settlements or consent decrees that involve aerial emissions of hazardous substances that later fall to land or water, that still would not warrant a countertextual reading of the term "disposal." There are many reasons why a party that aerially emitted hazardous substances might choose to enter into a CERCLA consent decree or settlement agreement: It may have engaged in direct discharges to land and water that would indisputably fit the definition of "disposal" and on that basis could be jointly and severally liable for response costs. Disputing the aerial emissions point (particularly where contamination due to aerial emissions was minor compared with the party's direct discharges) would provide no benefit to such a party. Or, as with any settlement context, a party may have decided that the risk of challenging the aerial emissions issue was simply not worth the cost in light of a favorable settlement that involved payment of significantly lower response costs than the party could ultimately be subject to given CERCLA's joint and several liability scheme.

This Court should not adopt an erroneous, countertextual reading of the statutory term "disposal" just because the government has been able to convince parties in the past to settle rather than fight. Settlement resolves no legal issue, just the outcome of a dispute between two parties. And it would be absurd for the government—which is not subject to nonmutual issue preclusion even when it loses a case *as a party*, *see United States v. Mendoza*, 464 U.S. 154, 162 (1984)—to suggest that everyone else is bound by decrees to which they are *not parties*. This Court should interpret CERCLA according to its own precedent, not the government's past practice in negotiating settlements.

III. THE "FEDERALLY PERMITTED RELEASE" DEFENSE MIGHT NOT ADEQUATELY PROTECT REGULATED ENTITIES FROM LIABILITY.

Plaintiffs might argue that emitters with CAA permits will be largely unaffected by the District Court's decision because CERCLA precludes recovery of damages and response costs resulting from a "federally permitted release." 42 U.S.C. § 9607(j). But this argument fails to account for EPA interpretations that have limited the potency of the defense.

Whether a release is "federally permitted" under the statutory definition depends on the type of release and the statutory scheme that regulates it. An aerial "federally permitted release" is:

> any emission into the air subject to a permit or control regulation under [specific sections of the Clean Air Act], or State

> implementation plans submitted in accordance with section 110 of the Clean Air Act . . . (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections.

Id. § 9601(10)(H).[7] At first glance, the defense appears on its face to be broad—so long as an entity has the proper permit or is regulated under certain provisions of the CAA, its emissions are exempt from CERCLA liability.[8] But several EPA interpretations have narrowed the scope of this defense. *Amici* maintain that most of these interpretations are incorrect and that they do not warrant deference, *e.g.*, because they were provided through informal agency guidance rather than notice-and-comment rulemaking. Nevertheless, a regulated entity must consider them in assessing its risk of liability, because these interpretations reflect the EPA's current position.

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[7] The fact that the definition of federally permitted release includes certain air emissions does not mean that Congress believed such emissions were "disposals" and therefore needed to be excepted from the CERCLA liability scheme. Such emissions are identified as federally permitted to ensure that permitted air emissions *from* a facility do not subject a person to liability under CERCLA—liability that does not require a "disposal." *See* 42 U.S.C. § 9607(a)(1). In addition, the same "federally permitted release" exemption applies to other provisions of CERCLA and other statutes. *See* 42 U.S.C. § 9603(a), (b)(1)-(3) (CERCLA notification provision); *id.* § 11004(a)(2)(A) (emergency notification provision of the Emergency Planning and Community Right-to-Know Act, incorporating CERCLA definition).

[8] *See* Rochelle M. Sharp, *CERCLA, Sara and the Federally Permitted Release: An "Aired" Interpretation?*, 38 Hous. L. Rev. 683, 687-88 (2001) (noting that the definition of this exception is "broad in scope").

First, under current EPA guidance, an emission may be "federally permitted" only if it is actually *compliant with*—not merely "subject to," as the statute expressly states[9]—CAA regulations and permits.[10] Therefore, should an entity's emissions exceed the permitted limits by just a small fraction, that entity could be liable for response costs and damages at a site at which *any portion* of the release comes to be located—even if the same amount of the same substance would have come to the same spot, irrespective of the minor variance from the permit.[11] By contrast, under the CAA, even if EPA chose to seek penalties for such a minor violation, such penalties would be subject to strict limits. *See* 42 U.S.C. § 7413(d)(1).

Second, EPA maintains that an air emission may be "federally permitted" only if it is specifically identified as a covered substance in a CAA regulation or

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[9] This interpretation conflicts with the text of § 9601(10)(H). If Congress had intended for the provision to apply only if an entity was in compliance with CAA regulations and permitting requirements, it would have said so, as it did with other definitions of "federally permitted release" related to other federal statutes. *See* § 9601(10)(A), (10)(F), (10)(K).

[10] *See, e.g.*, Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions, 67 Fed. Reg. 18,899, 18,902 (Apr. 17, 2002) ("Air Emissions Guidance"); Proposed Rule, Reporting Exemptions for Federally Permitted Releases of Hazardous Substances, 53 Fed. Reg. 27,268, 27,273 (July 19, 1988).

[11] *In re Mobil Oil Corp.*, 5 E.A.D. 490, 505–06, 1994 WL 544260, at *12 (1994); *see also id.* at 505-06, 1994 WL 544260, at *11 (limiting decision to federally permitted release defense "in the context of emergency reporting").

permit.[12] Under this interpretation, an entity could comply with all of EPA's regulatory impositions and still be liable under CERCLA for releasing trace amounts of a substance not selected for regulation by the agency. The CAA itself constrains plaintiffs' ability to hold an emitter responsible under that statute for releases not addressed by the permit; for instance, plaintiffs cannot assert in a CAA citizen suit "that [the defendant] is complying with the terms of its permit but that those terms are themselves a violation of the CAA." *E.g.*, *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 754 (9th Cir. 2008); *see id.* at 756 (no collateral attacks on permit in district court). Under Plaintiffs' theory here, however, the emitter can nonetheless be liable under CERCLA.

Third, under EPA's interpretation of § 9601(10)(H), not all "permit[s] or 'control regulation[s]'" listed in the statute can absolve an entity of CERCLA liability. EPA requires that the permit or regulation also be "specifically designed to limit or eliminate emissions." Air Emissions Guidance, 67 Fed. Reg. at 18,901.

Fourth, EPA has not only issued the limiting interpretations identified above, it has also stated that the "federally permitted release" defense is not amenable to bright-line rules and is subject to case-by-case, fact-specific analysis. *See, e.g.*, Air

[12] *See* Air Emissions Guidance, 67 Fed. Reg. at 18,902 ("When evaluating whether a release qualifies for the federally permitted release exemption, you should consider whether your federally enforceable CAA permit limit or the applicable control regulations limit or eliminate the release of the designated hazardous substance . . . .").

Emissions Guidance, 67 Fed. Reg. at 18,899-900; Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Clean Air Act "Grandfathered Sources," 67 Fed. Reg. 19,750, 19,751 (Apr. 23, 2002). This tack makes the defense an unreliable one, leaving a CAA-regulated entity unable to determine in advance of litigation whether its emissions are exempt from CERCLA liability.

Finally, the "federally permitted release" defense is an affirmative one; to stave off liability, an entity must show that the release was, in fact, permitted. *See United States v. Freter*, 31 F.3d 783, 788 (9th Cir. 1994). As explained above, permits do not cover every possible hazardous substance that could be emitted. But EPA's guidance requires that the hazardous substance be covered by a permit and that the permit be fully complied with in order for an entity to assert that a release was "federally permitted." Entities could therefore be tasked with an impossible defense—full compliance with permit terms that need not and do not exist.

For these reasons, any argument that the "federally permitted release" defense will adequately protect CAA-regulated entities from the absurd results of Plaintiffs' theory is incorrect. At bottom, Plaintiffs' contorted reading of CERCLA will unreasonably and unfairly expose these entities to costly litigation and potential damages running in the high millions.

CONCLUSION

For the foregoing reasons and the reasons stated in Teck's brief, the decision of the District Court should be reversed.

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Respectfully submitted,

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains **5,977** words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 11, 2015.

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