Superfund

Ninth Circuit OKs Appeal in Superfund Case; Liability for Air Pollutant 'Disposal' at Issue

An appellate court has agreed to hear a case that may decide whether airborne pollutants transmitted from a smelter to a superfund site constitute an actionable "disposal" for which the smelter owner is liable as an "arranger" (*Pakootas v. Teck Cominco Metals Ltd.*, 9th Cir., No. 15-80005, 3/25/15).

The U.S. Court of Appeals for the Ninth Circuit agreed to hear the case March 25.

"This decision could have a dramatic impact on cost recovery and allocation at Superfund sites—it could be a big win for industrial [potentially responsible parties]," Mindy DeYoung, an attorney with Riddell Williams in Seattle, told Bloomberg BNA in a March 27 e-mail.

The case presents a question no federal court has addressed "head-on" and for which there is a "substantial ground for difference of opinion," the U.S. District Court for the Eastern District of Washington said in authorizing the interlocutory appeal.

The district court agreed with the Confederated Tribes of the Colville Reservation that Teck Cominco Metals Ltd. became an "arranger" under the Comprehensive Environmental Response, Compensation, and Liability Act once airborne contaminants from its Canadian smelter touched down in the water and on the ground of the Upper Columbia River superfund site in Washington State (42 U.S.C. §9607(a)(3)) (24 EDDG 1, 1/15/15).

However, the court also noted that "[i]n over 30 years of CERCLA jurisprudence, no court has impliedly or expressly addressed the issue of whether aerial emissions leading to disposal of hazardous substances 'into or on any land or water' are actionable under CERCLA."

Ninth Circuit Precedent

Teck Cominco Metals Ltd. argued in its petition that the district court incorrectly concluded it is a CERCLA "arranger" and in doing so created an "irreconcilable" conflict with Ninth Circuit precedent (*Ctr. for Cmty. Action and Envtl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 78 ERC 2085, 2014 BL 231106 (9th Cir. 2014)).

DeYoung, however, said the Ninth Circuit precedent is distinguishable because it was a Resource Conservation and Recovery Act case. "The Ninth Circuit in [*Center for Community Action*] wasn't looking at how CERCLA defines disposal, and wasn't being asked to. RCRA regulates waste management, and CERCLA imposes clean up liability once hazardous substances are released into the environment."

"If the Ninth Circuit omits aerial discharges as outside the net of liability, litigants throughout the nation will have authority to demand an exclusion from CERCLA liability for those types of releases," DeYoung said.

Expanding Superfund Liability

Peter Hsiao, an attorney who isn't involved in the litigation but handles complex environmental litigation for Morrison Foerster in Los Angeles, said in a March 27 e-mail that "the case presents a creative attempt to dramatically expand the scope of Superfund liability."

Other superfund lawyers have varying opinions about the nature of that expansion and its potential effects on CERCLA litigation.

"It's a frightening construct if you're advising a client, but my sense is that the Ninth Circuit will agree with the district court's interpretation because it isn't an arbitrary one," Daniel Wolff, an environmental litigator with Crowell Moring in Washington, D.C., said March 27.

Wolff also noted that the Justice Department supported the plaintiffs in the district court through an amicus brief.

Wolff added, however, that even if the Ninth Circuit rules petitioners can be CERCLA arrangers based on airborne pollutants, it may be at best a "pyrrhic victory" because of the difficulty in proving Teck did anything to "arrange" for the disposal of hazardous material at the superfund site.

'Irreconcilable' Conflict Asserted

In *Center for Community Action*, the court held that a "disposal" under RCRA excludes aerial emissions (42 U.S.C. §6903(3)). The same result is warranted here, Teck argued, because CERCLA specifically adopted the definition of "disposal" already used in RCRA.

The Confederated Tribes told Bloomberg BNA March 27 in an e-mail that it "invoked CERCLA to require Teck to clean up the results of 100-plus years of air emissions that have deposited in the Upper Columbia River site and looks forward to Ninth Circuit's confirmation of the reach of CERCLA."

The tribes had the support of an amicus brief filed by the U.S. Department of Justice that argued *Center for Community Action* was distinguishable because it involved the overlap between RCRA and the Clean Air Act, not CERCLA.

CERCLA, RCRA Distinguished

The district court concurred, adding that another distinction was that once the pollutants reached a superfund "facility"—here the Upper Columbia River site—CERCLA makes no distinction between waste discharged from the smelter into the water or the air.

However, the court also acknowledged that *Center for Community Action* was an intervening decision that unsettled the law and warranted Teck's interlocutory appeal.

The Ninth Circuit gave Teck 14 days within which to file its appeal.

For More Information

The Ninth Circuit order is available at http://www.bloomberglaw.com/public/document/Joseph_Pakootas_et_al_v_Teck_Cominco_Metals_Ltd_Docket_No_1580005.

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