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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

and

THE STATE OF WASHINGTON,

Plaintiff-Intervenor,

vs.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant.

No. CV-04-256-LRS

ORDER DENYING MOTION FOR RECONSIDERATION, INTER ALIA

BEFORE THE COURT are Defendant's Motion For Reconsideration Of Order Denying Motion To Strike Or Dismiss (ECF No. 2118), and Defendant's Motion To Modify Phase II Schedule Regarding Aerial Emission Allegations (ECF No. 2119). Telephonic argument was heard on December 16, 2014.

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1 Defendant asks the court to reconsider its order which declined to strike or
2 dismiss Plaintiffs' allegations concerning aerial emissions as a basis for recovery
3 of response costs and natural resource damages. (See "Order Denying Motion To
4 Strike Or Dismiss" at ECF No. 2115). Defendant asks for reconsideration on the
5 basis of the Ninth Circuit's August 20, 2014 decision in *Center For Community
6 Action and Environmental Justice v. BNSF Railway Company*, 764 F.3d 1019
7 (2014) ("*CCA EJ*"). On October 20, 2014, the Ninth Circuit denied a petition for
8 rehearing en banc and its mandate issued on October 30.

9
10 **I. DISCUSSION**

11 *CCA EJ* is a Resource Conservation and Recovery Act (RCRA) case, 42
12 U.S.C. §§ 6901-6992k. It is not a Comprehensive Environmental Response,
13 Compensation, and Liability Act (CERCLA) case, 42 U.S.C. §9601 *et seq.*, and
14 makes no mention of CERCLA. That said, CERCLA borrows RCRA's definition
15 of "disposal" which is as follows:

16 [T]he discharge, deposit, injection, dumping, spilling,
17 leaking, or placing of any solid waste or hazardous
18 waste **into or on any land or water** so that such solid
19 waste or hazardous waste or any constituent thereof
20 may enter the environment or **be emitted into the air**
or discharged into any waters, including ground waters.

21 42 U.S.C. § 6903(3). (Emphasis added).

22 In *CCA EJ*, the Ninth Circuit had this to say about § 6903(3):

23 We note first that RCRA's definition of "disposal" does not
24 include the act of "emitting." Instead, it includes only acts
25 of discharging, depositing, injecting, dumping, spilling,
leaking, and placing. That "emitting" is not included in
that list permits us to assume, at least preliminarily, that
"emitting" solid waste into the air does not constitute
"disposal" under RCRA.

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1 The text of §6903(3) is also very specific: it limits the
2 definition of “disposal” to particular conduct causing a
3 particular result. By its terms, “disposal” includes only
4 conduct that results in the placement of solid waste
5 “into or on any land or water.” 42 U.S.C. §6903(d). That
6 placement, in turn, must be “so that such solid waste
7 . . . may enter the environment or be emitted into the air
8 or discharged into any waters, including ground waters.”
9 *Id.* We therefore conclude that “disposal” occurs where
10 the solid waste is *first* placed “into or on any land or water”
11 and is *thereafter* “emitted into the air.”

12 *Id.* at 1024. (Emphasis in original).

13 In their complaint, the *CCA EJ* plaintiffs alleged the defendants “dispose” of
14 solid waste (diesel particulate matter) by allowing the waste to be “transported by
15 wind and air currents onto the land and water near the railyards.” Plaintiffs
16 alleged the particulates are then “inhaled by people both directly and after the
17 particles have fallen to the earth and then have been re-entrained into the air by
18 wind, air currents, and passing vehicles.” *Id.* at 1023. According to the Ninth
19 Circuit:

20 The solid waste at issue here . . . at least as it is characterized
21 in Plaintiffs’ complaint, is not first placed “into or on any
22 land or water”; rather, it is first emitted into the air. Only
23 after the waste is emitted into the air does it then travel
24 “onto the land and water.” To adopt Plaintiffs’ interpretation
25 of §6903(3), then, would effectively be to rearrange the
26 wording of the statute- something that we, as a court,
27 cannot do. Reading §6903(3) as Congress has drafted it,
28 “disposal” does not extend to emissions of solid waste
directly into the air.

29 *Id.* at 1024.

30 Defendant Teck Cominco Metals, Ltd. (“Teck”) says this court “denied [its]
31 motion [to strike or dismiss], agreeing with Plaintiffs that emissions to air could
32 constitute a CERCLA disposal.” This court, however, did not find that aerial
33 emissions from Teck’s smelter constitute a “CERCLA disposal.” Indeed, they
34 cannot be a “CERCLA disposal” because what gives rise to arranger liability

1 under the plain terms of 42 U.S.C. § 9607(a)(3) is “disposal . . . of hazardous
2 substances . . . at any facility . . . from which there is a release . . . of a hazardous
3 substance” Defendant’s Trail, B.C. Smelter is not a “facility” under
4 CERCLA, nor are the skies above the smelter, nor is the river running alongside
5 the smelter. The “facility” is the UCR Site located in the United States. “Facility”
6 is a term of art under CERCLA, defined at 42 U.S.C. § 9601(9) as “any site or area
7 where a hazardous substance has been deposited, stored, **disposed of**, or placed,
8 **or otherwise come to be located**” (Emphasis added). Liability under
9 RCRA, on the other hand, does not depend on there being a disposal at a
10 “facility.” RCRA’s citizen suit provision authorizes private parties to sue “any
11 person who has contributed or who is contributing to the past or present . . .
12 disposal of any solid or hazardous waste which may present an imminent and
13 substantial endangerment to health or the environment.” 42 U.S.C. §
14 6972(a)(1)(B).

15 As this court explained in its “Order Denying Motion To Strike Or
16 Dismiss,” the “CERCLA disposal” alleged by Plaintiffs occurred when hazardous
17 substances from Teck’s aerial emissions and its river discharges were deposited
18 “into or on any land or water” of the UCR Site. This disposal occurred in the
19 “first instance” into or on land or water of the UCR Site and therefore, does not
20 run afoul of RCRA’s definition of “disposal” as interpreted by the Ninth Circuit in
21 *CCA EJ*.

22 RCRA’s definition of “disposal” is colored by how that term is used in the
23 CERCLA context. And in the CERCLA context, it means disposal “into or on any

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1 land or water” of the “facility,” that being the UCR Site.¹ RCRA’s definition of
2 “disposal” cannot be viewed apart from what § 9607(a)(3) of CERCLA has in
3 mind regarding liability for the cleanup of a “facility.” RCRA is not concerned
4 with cleanup of a “facility” and that term is not defined in RCRA. The harm
5 sought to be remedied in the *CCA EJ* case was inhalation of diesel particulate
6 matter by humans. (See Plaintiff’s First Amended Complaint, ECF No. 10 in CV-
7 11-08608-SJO). Recognizing as much, the Ninth Circuit in its decision framed the
8 issue as whether RCRA “may be used to enjoin the emission from Defendant’s
9 railyards of particulate matter found in diesel exhaust.” *CCA EJ*, 764 F.3d at 1020.
10 The Ninth Circuit in *CCA EJ* had no reason to consider how its interpretation of
11 “disposal” relates to the additional CERCLA definitions of “facility” and
12 “release.”

13 This court has analytically treated Defendant’s discharge of slag and liquid
14 effluent into the Columbia River in the same fashion. The CERCLA disposal
15 “into or on any land or water” was not the discharge of slag and liquid effluent
16 into the Columbia River at the Trail Smelter. Rather, it was the disposal of
17 hazardous substances contained in that slag and effluent which occurred when the
18 slag and effluent were deposited “into or on any land or water” of the UCR Site.
19 Accordingly, as this court quoted in its “Order Denying Motion To Strike Or
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22 ¹ In *CCA EJ*, the Ninth Circuit acknowledged the importance of context in
23 determining what “disposal” means under RCRA:

24 Thus, we preliminarily conclude- based on the statute’s
25 wording considered alone **and in context**- that emitting
26 diesel particulate matter into the air does not constitute
27 “disposal” as that term is defined under RCRA.

26 764 F.3d at 1025. (Emphasis added).

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1 Dismiss,” one of its “Conclusions of Law” regarding Defendant’s CERCLA
2 liability for river pathway response costs was that:

3 Disposal **at the UCR Site** occurred when, after Teck actively
4 and intentionally discarded its slag and effluent as waste into
5 the Columbia River at Trail, at least some portion of that slag and
6 effluent came to a point of repose at the UCR Site.

7 (Paragraph 18 at pp. 42-43, ECF No. 1955). (Emphasis added).

8 Emissions into the air and river discharges in Trail, B.C. are disposals in an
9 ordinary sense, but they do not constitute “CERCLA disposals.” And for that
10 matter, they do not constitute RCRA disposals because there is no authority of
11 which this court is aware that RCRA can be applied extraterritorially to regulate
12 generation and disposal of hazardous waste in Canada. Emissions to the air alone
13 do not constitute a “CERCLA disposal.”

14 In over 30 years of CERCLA jurisprudence, no court has impliedly or
15 expressly addressed the issue of whether aerial emissions leading to disposal of
16 hazardous substances “into or on any land or water” are actionable under
17 CERCLA. A reasonable explanation is that the issue simply has not been raised in
18 any CERCLA case. Instead, it appears to have been treated as a given that if
19 hazardous substances from aerial emissions are “disposed” of “into or on any land
20 or water” of a CERCLA “facility,” response costs and natural resource damages
21 can be recovered for cleaning up those hazardous substances and compensating
22 for harm caused.

23 This court ascribes no particular significance to the fact the United States
24 decided not to submit an *amicus* brief in support of a petition for rehearing *en*
25 *banc* in the *CCA EJ* case. A reasonable explanation is the United States recognized
26 the circuit was unlikely to grant a petition to address the CERCLA ramifications
27 of a decision that did not involve CERCLA. Instead, the United States opted to

1 file an *amicus* brief with this court in this CERCLA case. Likewise, this court
2 ascribes no particular significance to the circuit’s declining the *CCA EJ* plaintiffs’
3 petition for rehearing *en banc*. A reasonable explanation is the circuit was
4 unwilling to undertake an examination of potential CERCLA ramifications from a
5 decision that did not involve CERCLA.

6 7 **II. CONCLUSION/CERTIFICATION**

8 Fed. R. Civ. P. 60(b)(6) permits a court to relieve a party from an order for
9 “any reason that justifies relief.” It “is to be used sparingly as an equitable remedy
10 to prevent manifest injustice and is to be utilized only where extraordinary
11 circumstances exist.” *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008).
12 “A motion for reconsideration should not be granted, absent highly unusual
13 circumstances, unless the district court is presented with newly discovered
14 evidence, committed clear error, or if there is an intervening change in the
15 controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*,
16 571 F.3d 873, 880 (9th Cir. 2009).

17 For the reasons set forth above, this court’s “Order Denying Motion To
18 Strike Or Dismiss” is not clearly contrary to the Ninth Circuit’s decision in
19 *CCA EJ* and therefore, is not clearly erroneous so as to warrant reconsideration.
20 Nor does *CCA EJ*, on its face at least, represent an “intervening change in the
21 controlling law” with regard to CERCLA and indeed, it is not apparent it even
22 represents an “intervening change in the controlling law” with regard to RCRA.
23 Accordingly, Teck’s Motion For Reconsideration (ECF No. 2118) is **DENIED**.

24 While this court is confident in its analysis of how RCRA’s definition of
25 “disposal” is to be interpreted in a CERCLA context, it again acknowledges that
26 apparently no court has addressed this issue head-on. Therefore, the court hereby

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1 **CERTIFIES** its “Order Denying Motion To Strike Or Dismiss” and this “Order
2 Denying Motion For Reconsideration” for an immediate interlocutory appeal to
3 the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). Because of
4 the Ninth Circuit’s decision in *CCA EJ*, in particular its interpretation of the term
5 “disposal” as defined in RCRA, there is a “substantial ground for difference of
6 opinion” on the “controlling question of law” of whether Teck’s aerial emissions
7 are actionable under CERCLA if they result in a “disposal” of hazardous
8 substances “into or on any land or water” of the UCR Site (a CERCLA “facility”).
9 A decision from the Ninth Circuit on this issue will “materially advance the
10 ultimate termination of this litigation.” If the air pathway is eliminated from this
11 case, it will undoubtedly reduce the time necessary to bring this case to a
12 conclusion because it will leave only the recovery of response costs and natural
13 resource damages resulting from Teck’s discharges of slag and effluent into the
14 river.

15 Of course, this court does not have the final say on whether there will be an
16 interlocutory appeal. Within ten (10) days after this court’s certification, Teck will
17 have to file a petition with the circuit seeking permission to appeal. Fed. R. App.
18 P. 5. This court has discretion to stay the air pathway portion of the case while
19 that petition is pending. The parties have already stipulated to a three months
20 extension of certain Phase II pretrial dates pertaining primarily to air allegations
21 (ECF Nos. 2133 and 2142).² Lest there be any misunderstanding as to precisely
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23 ² It is the court’s understanding that the parties have not stipulated to alter
24 any of the Phase II Schedule dates as they pertain to the river pathway portion of
25 the case in Phase II (determination of recoverable response costs), with the
26 exception of the date pertaining to completion of fact discovery.

1 which dates are impacted, the parties may wish to file an additional stipulation
2 which clarifies the same. Depending on the length of time it takes for the circuit
3 to determine whether it will entertain an interlocutory appeal, this court will, upon
4 motion by the Defendant or stipulation of the parties, consider whether that time
5 should be added to the extension to which the parties have already stipulated.

6 Resolution of Defendant's Motion To Modify Phase II Schedule (ECF No.
7 2119) is **STAYED** pending the Ninth Circuit's determination of whether it will
8 entertain an interlocutory appeal in this matter. Should the circuit deny permission
9 to appeal, the court will proceed to resolve the motion. Should the Ninth Circuit
10 permit the appeal, this court will stay the air pathway portion of the case pending
11 resolution of the appeal, seemingly rendering moot Defendant's Motion To
12 Modify Phase II Schedule.

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter
14 this order and forward copies to counsel of record.

15 **DATED** this 31st day of December, 2014.

16 *s/Lonny R. Suko*

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18 LONNY R. SUKO
19 Senior United States District Judge

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