

Environment/Litigation

U.S. Superfund Law and Cross-Border Environmental Liability

by

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Introduction

A recent decision of the U.S. District Court for the Eastern District of Washington (*Pakootas v. Teck Cominco Metals, Ltd.*) in a long simmering dispute between a U.S. First Nations group, the U.S. Environmental Protection Agency ("EPA") and a large Canadian mining company raises the prospect of liability for environmental impacts in the U.S. caused by activities carried out outside the U.S. The basis of the decision was a certain reading of the U.S. superfund law (also known as the *Comprehensive Environmental Response, Compensation and Liability Act* or "CERCLA").

Background

Teck Cominco Metals, a Canadian company, owned and operated one of the largest lead and zinc smelters in the world at Trail, British Columbia within a few miles of the U.S. border with the State of Washington and along the upper reaches of the Columbia River. For several decades pollutants (mostly heavy metals) from the smelter had been discharged into the River within Canadian territory and migrated into U.S. territory where they had contributed to contamination in Lake Roosevelt in Washington State. The company ceased discharging these pollutants in 1994.

The EPA sought certain investigative and remedial action from Teck with respect to the impacts on Lake Rosevelt. The Canadian company was willing to undertake a voluntary program of investigation and remediation but was unwilling to accept the EPA's jurisdiction. After lengthy negotiations failed, the EPA issued an Unilateral Administrative Order under CERCLA ("Order") requiring Teck to investigate the impacts (and to undertake further work as may be required by the EPA). The company refused to comply. The Canadian government through

diplomatic channels also indicated that in its opinion CERCLA does not apply in the circumstances and asked that the Order be rescinded.

Decision

Members of the Confederated Tribes of the Colville Reservation, along with the State of Washington as intervenor, sued Teck under the citizen-suit provisions of CERCLA seeking enforcement of the Order. The main argument presented was that given the obvious potential of environmental pollution to cross national borders, CERCLA must be read to provide a remedy against foreign persons for discharges of pollutants having their origin outside U.S. soil where the adverse impact occurs on U.S. territory. The defendant moved to dismiss arguing that the EPA had no jurisdiction to impose an order against a Canadian company based on conduct in Canada.

U.S. District Judge Alan A. MacDonald denied the defendant's motion finding that there was "some question" whether the case really involved extraterritorial application of CERCLA in that the release of pollutants in the U.S. "would not exist" without the activities at the smelter in Canada. In its view, to hold that CERCLA cannot have extraterritorial effect in this case "would require reliance on legal fiction that the release of hazardous substances . . . are wholly separate from the discharge"

The Court also considered in this context Washington's "long-arm" statute which gives personal jurisdiction over any person who commits a tort within the territorial boundaries of that State. The Plaintiffs alleged in their complaint an intentional act expressly aimed at the State of Washington and that the defendant knew or ought to have known that the discharges were likely to cause harm downstream and upon individuals such as the individual Plaintiffs who fished in the lower Columbia River.

Nevertheless, on the issue of extraterritoriality the Court said that it was clear that the intent of CERCLA was to remediate domestic conditions. Congress has the power to enforce its laws extraterritorially in the right case. While there is in U.S. law a presumption that national laws do not apply outside national territory (unless there is a clear intention to provide otherwise)

the presumption can be displaced where, as here, the failure to apply national laws outside the territory would result in adverse effects in the U.S going unremedied, contrary to CERCLA's purpose. The extraterritorial application of CERCLA was justified in this case as necessary to address these domestic impacts.

The Court went to some lengths to stress that the result of its holding was not to regulate the company's discharge in Canada nor to supercede Canada's environmental regulation. The focus of CERCLA was to regulate the *effects* of polluting activity. In this case Canadian law had been unsuccessful in preventing the adverse impacts upon U.S. territory. That the result of the decision was to indirectly affect the way the company operated in Canada was considered irrelevant.

Comment

The EPA has long maintained the position that the U.S. enjoys a right to protect its property under its own laws regardless of most other considerations. The decision can be regarded as a particularly strong manifestation of that position. While not yet final and currently under appeal, having been certified for an immediate appeal to the U.S. Court of Appeals for the 9th Circuit, *Pakootas* raises issues that may significantly affect the nature and scope of environmental (and perhaps other) liability of any corporation or business whose operations impact upon U.S. interests.

Given the broad potential implications of the case and the interested it garnered from both national governments, there is a strong likelihood that the case will be resolved without a final judicial determination. Both the Canadian and U.S. governments have expressed concern about the effect the ruling, if upheld, might have on traditional notions of national sovereignty and the extraterritorial limitations of national legislation.

Whether it is in *Pakootas* or in a case yet to come, it is clear that a new type of cross-border environmental liability is developing. Given the nature of large industry located near national borders, this is perhaps inevitable. This new type of liability will in time have far-reaching implications for corporations on *both* sides of a national border (or near rivers that flow

across national borders) whose operations have the potential to inflict environmental damage across those borders. If we consider the potential for air pollution, for example, to migrate and manifest its effects at great distances from its source, this will remain an issue between the U.S. and Canada only for a short time.