

No. 15-35228

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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; CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant-Appellant.

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

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**BRIEF OF THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF APPELLEES**

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## GLOSSARY

CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
DPM	Diesel Particulate Matter
EPA	United States Environmental Protection Agency
FACs	Fourth Amended Complaints
IJC	International Joint Commission
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
UCR Site	Upper Columbia River Superfund Site

## INTEREST OF THE UNITED STATES AND ARGUMENT SUMMARY

Defendant-Appellant Teck Cominco Metals, Ltd. (“Teck”) asks this Court to reverse the district court’s finding that hazardous substances from Teck’s smelter stacks were “disposed” under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, upon being deposited on the ground at the Upper Columbia River Superfund Site (“UCR Site”). Teck’s argument that hazardous substances that travel through the air *any distance* before contaminating land or water are categorically outside the meaning of “disposal,” and thus not subject to CERCLA, creates a new requirement that is unsupported by the statutory text, extremely narrow, and would severely undermine Congress’ objectives. No CERCLA case has *ever* adopted Teck’s interpretation.

Teck relies almost entirely on an erroneous reading of this Court’s decision in *Center for Community Action and Environmental Justice v. BNSF*, 764 F.3d 1019 (9th Cir. 2014) (“*CCA EJ*”), which does not control here and should not be extended in any event, because it arose under unique factual circumstances under a different federal statute, the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*

Additionally, the new issue that amicus curiae Government of Canada (“Canada”) attempts to raise in its brief, which this Court should not even consider, misinterprets the 1935 Ottawa Convention and identifies no international obligation of the United States that prevents applying CERCLA here.

The United States Environmental Protection Agency (“EPA”) has primary enforcement authority under RCRA and CERCLA and the United States, on behalf of EPA, participates as amicus curiae to urge the proper interpretation of the statutory term “disposal.” EPA has performed CERCLA response actions and pursued administrative or judicial enforcement under CERCLA at numerous sites similar to the UCR Site, where discharges to the air of CERCLA hazardous substances from industrial operations such as smelters have been deposited (i.e., disposed) elsewhere and required clean up. Properly interpreting CERCLA is paramount to EPA’s interests in implementing CERCLA, cleaning up sites contaminated by aerial deposition, and ensuring that polluters pay for contamination they cause.

### **ISSUE PRESENTED**

Under CERCLA, “disposal” occurs whenever hazardous substances are “discharge[d or] deposited . . . into or on any land or water” and may enter the environment. This definition, to be construed consistent with CERCLA’s remedial purposes, does not specify that hazardous substances be *directly* applied to land or water. Did the district court correctly conclude that “disposal” occurs where hazardous substances from Teck’s smelter stacks were deposited to land or water at the UCR Site?

## STATEMENT OF THE CASE

### I. Statutory Background

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA “both provides a mechanism for cleaning up hazardous-waste sites and imposes the costs of the cleanup on those responsible for the contamination.” *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citation omitted). A prima facie case under CERCLA requires a plaintiff to show that a “release” or “threatened release”<sup>1</sup> of a “hazardous substance” from a “facility” has caused it to incur cleanup costs. 42 U.S.C. § 9607(a). The defendant must fall within at least one of four classes of covered persons: (1) the owner or operator of the facility, (2) the owner or operator of the facility “at the time of disposal” of hazardous substances, (3) persons who “arranged for disposal” or treatment of hazardous substances, and (4) certain transporters of hazardous substances. *Id.*

This case concerns alleged “arranger” liability under 42 U.S.C. § 9607(a)(3), which requires application of the term “disposal,” which CERCLA defines, 42 U.S.C. § 9601(29), by cross-referencing this RCRA definition:

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<sup>1</sup> “[R]elease” means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” 42 U.S.C. § 9601(22).

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

*Id.* § 6903(3). RCRA was enacted in 1976 in response to growing concern about practices for the previously unregulated waste disposal business. *See* H.R. Rep. No. 94-1491, at 2-4 (1976), 1976 U.S.C.C.A.N. 6238, 6239-41. While RCRA and CERCLA share some attributes in addressing waste disposal problems, the Supreme Court has explained that CERCLA focuses on cleaning up contaminated sites, while RCRA regulates the generation and disposal of solid and hazardous wastes. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

Finally, under CERCLA broad categories of responsible parties are potentially liable for a release or threatened release of a hazardous substance, *see* 42 U.S.C. § 9607; but in a RCRA citizen suit like *CCA EJ*, parties who manage or dispose of solid or hazardous waste may only be liable when their management or disposal “may present an imminent and substantial endangerment to health or the environment.” *Id.* § 6972(a)(1)(B).

## **II. Factual and Procedural Background**

The factual background is described in the Plaintiffs’ briefs. This appeal concerns allegations in the Plaintiffs’ Fourth Amended Complaints (“FACs”; ER81 and ER94) that discharges from Teck’s smelter stacks resulted in “disposal” of CERCLA hazardous substances (including lead, cadmium, and mercury) at the UCR

Site rendering Teck liable under 42 U.S.C. § 9607(a)(3). ER88 and ER102. Teck moved to strike these claims (SER1-13), arguing that they are not “disposal” under CERCLA. The district court denied Teck’s motion, finding that Plaintiffs adequately alleged “disposal” at the UCR Site because they alleged that Teck’s “aerial emissions have been deposited at the UCR Site” and that the CERCLA-relevant “disposal at the UCR Site” occurs when hazardous substances “came to a point of repose at the UCR Site.” ER14.

Shortly thereafter, this Court decided *CCA EJ*, which considered “whether [RCRA’s] citizen-suit provision . . . may be used to enjoin the emission from Defendants’ railyards of particulate matter found in diesel exhaust.” 764 F.3d at 1020. The complaint’s only claim for relief under RCRA alleged endangerment resulting solely from inhalation of diesel particulate matter (“DPM”), specifically, that DPM from the railyards is “transported by wind and air currents onto the land and water near the railyards . . . [and] is inhaled by people both directly and after the particles have fallen to the earth and then have been re-entrained into the air.” *Id.* at 1023. The district court had dismissed the complaint, rejecting the plaintiffs’ call to fill a “big gap” or “loophole” in the interplay between RCRA, under which diesel-locomotive emissions are not regulated, and the federal Clean Air Act (“CAA”), under which locomotive emissions *are* regulated but railyards, as “indirect sources,” are exempt from federal regulation. *Ctr. for Cmty. Action & Emtl. Justice v. Union Pac. Corp.*, 2012 WL 2086603, at \*4 (C.D. Cal. May 29, 2012).

This Court affirmed, but on different grounds. The Court first applied several interpretive tools and addressed whether “emissions of solid waste *into the air*” fall within RCRA’s definition of “disposal.” *CCA EJ*, 764 F.3d at 1023. The Court found that the absence of “emitting” from the list of actions that constitute disposal under RCRA “preliminarily” indicated that “‘emitting’ solid waste into the air does not constitute ‘disposal’ under RCRA.” *Id.* The Court addressed any ambiguity in the definition of disposal by examining the legislative histories of RCRA and the CAA. The Court declined to fill a “regulatory ‘gap’” between RCRA and the CAA, finding that Congress made a “reasoned decision” to exclude “indirect sources” like railyards from federal regulation. *Id.* at 1030. The Court found that the locomotive exhaust at issue “is not first placed ‘into or on any land or water’; rather it is first emitted into the air,” and stated that “‘disposal’ does not extend to emissions of solid waste directly into the air.” *Id.* at 1024.

Based on *CCA EJ*, Teck moved for reconsideration of the district court’s earlier order denying Teck’s motion to strike, ER67-80, which the district court denied. ER1-9. The district court discussed the different statutory “contexts” of RCRA and CERCLA, which *CCA EJ* had “no reason to consider,” and explained that RCRA citizen-suit liability does not depend on there being a “disposal” at a “facility.” ER5. However, under CERCLA, the UCR Site is the relevant “facility,” i.e., where “a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” ER4 (quoting 42 U.S.C. § 9601(9)). Accordingly, “CERCLA

disposal’ . . . occurred when hazardous substances from Teck’s aerial emissions and its river discharges were deposited ‘into or on any land or water’ of the UCR Site.” *Id.* Moreover, disposal occurred “in the ‘first instance’” on the land or water of the UCR Site and does not “run afoul” of *CCA EJ*. *Id.* The court also clarified that “[e]missions to the air alone do not constitute a ‘CERCLA disposal.’” ER6.

The district court certified for immediate appeal its orders denying Teck’s motion to strike and Teck’s motion for reconsideration. This Court granted Teck’s petition to appeal under 28 U.S.C. § 1292(b).

## ARGUMENT

### I. Plaintiffs Adequately Alleged Disposal Under CERCLA

The district court’s finding that the Plaintiffs sufficiently alleged “disposal” under CERCLA not only accords with CERCLA’s text and remedial purposes, but it is consistent with other decisions of this Court interpreting CERCLA and “over 30 years of CERCLA jurisprudence” in which no court has found that such circumstances do not constitute disposal. *Id.* By contrast, Teck’s interpretation conflicts with CERCLA’s text and purposes and relies entirely on an extreme reading of *CCA EJ*, which does not control here because it is factually and legally distinguishable.

**A. “Disposal” Is Alleged Under CERCLA When Hazardous Substances Have Been “Discharged” or “Deposited” into or on Land or Water.**

Plaintiffs’ CERCLA arranger liability claim requires a showing that Teck “arranged for disposal . . . of hazardous substances” at a “facility,” and that a “release, or a threatened release” of hazardous substances caused them to incur response costs. 42 U.S.C. § 9607(a)(1)-(4). The central question on appeal is the meaning of “disposal” under CERCLA (defined *supra* at 4). When interpreting a statute, this Court “look[s] first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.” *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (en banc) (citation omitted). This Court is also guided by the “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.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted).

CERCLA’s purposes that inform this Court’s review are “ensur[ing] the prompt and effective cleanup of waste disposal sites . . . to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created.” *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir.1997). CERCLA’s remedial authorities are “sweeping,” *Bestfoods*, 524 U.S. at 55, and courts are to “construe CERCLA liberally to achieve [its] goals.” *Kaiser Alum. &*

*Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992) (citation omitted).

As noted, “disposal” under CERCLA occurs when hazardous substances have been discharged, deposited, injected, dumped, spilled, leaked or placed into or on land or water such that they may enter the environment. 42 U.S.C. § 6903(3). The sheer number of terms Congress used to describe disposal suggests an intent to capture multiple possible actions, and this Court has remarked that “disposal” applies “in a myriad of circumstances.” *Carson Harbor*, 270 F.3d at 880. Thus, “consistent with the overall remedial purpose of CERCLA, ‘disposal’ should be read broadly,” and this Court previously has rejected “a crabbed interpretation [that] would subvert Congress’s goal” in enacting CERCLA. *Kaiser Aluminum*, 976 F.2d at 1342-43 (spreading of contaminated soils constitutes CERCLA disposal); *see also Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050, 1064 (9th Cir. 2013) (rejecting interpretation “requiring ‘disposal’ [under CERCLA] to be directly onto the land or into the water”).

Unlike the RCRA citizen suit claim at issue in *CCA EJ*, showing arranger liability under CERCLA’s scheme requires that a “disposal” occur at a particular location, namely “at any facility . . . owned or operated by another party or entity and containing such hazardous substances.” 42 U.S.C. § 9607(a)(3). CERCLA defines a “facility” as a “site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” *Id.* § 9601(9)(B). This

Court previously has held that the UCR Site is a CERCLA “facility.” *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074 (9th Cir. 2006) (“*Pakootas P*”).

The definitions of “facility” and “disposal” share the term “deposit,” and the district court naturally focused its analysis on whether hazardous substances from the Trail Smelter had been deposited at the UCR Site. ER4-5. Because “deposit” is not defined by the statute, the common meaning of that term applies. *See Carson Harbor*, 270 F.3d at 878-79. Webster’s defines “deposit” as “to let fall (as sediment).” Webster’s Collegiate Dictionary 310 (10th ed. 1999). The Plaintiffs allege the “*disposal* of airborne hazardous substances into the [UCR] Site” and the “*deposition* of air emissions” containing various metals at the UCR Site. ER98 and ER99 (emphasis added). Clearly, then, “disposal” is sufficiently alleged within the meaning of CERCLA as the “deposit [i.e., letting fall] . . . of any solid or hazardous waste into or on any land or water” at the UCR Site from Teck’s smelter. 42 U.S.C. § 9601(9)(B). Just like Teck’s slag discharges had “come to be located,” at the UCR Site, making it a CERCLA “facility,” *see Pakootas I*, 452 F.3d at 1074, metals from Teck’s smelter stacks have also been “deposited,” i.e., let fall, upon the land and water of the UCR Site. Thus, the UCR Site is both a CERCLA “facility” as to those hazardous substances and the location of a CERCLA “disposal.” ER5.

**B. Teck’s Interpretation of “Disposal” Relies on *CCA EJ*, Which Is Not Controlling.**

Teck contends that *CCA EJ*’s interpretation of “disposal” in a RCRA case is controlling circuit law that, if followed, compelled the district court to strike or dismiss Plaintiffs’ CERCLA claims based on aerial deposition. *See* Teck Br. at 2, 9. Teck is wrong, and *CCA EJ* is inapposite.

Of course, “case law on point is the law” and binds a later court “even if it considers the rule unwise or incorrect.” *Hart v. Massanari*, 266 F.3d 1155, 1170-71 (9th Cir. 2001). But the issue decided must actually be “on point”; and, in deciding whether it is bound by an earlier decision, this Court will consider, at least, “the facts giving rise to the dispute” and the “precise language . . . [and] contours and scope of the rule announced” in the earlier decision. *Id.*

Teck’s assertion that *CCA EJ* controls relies almost exclusively on the fact that “CERCLA expressly incorporates the RCRA definition” of “disposal.” Teck Br. at 2. However, Supreme Court guidance on the interpretation of shared statutory terms refutes Teck’s argument. First, no rule “require[s] uniformity when resolving ambiguities in identical statutory terms.” *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007). Rather, “[c]ontext counts,” and in *Duke Energy* the Supreme Court held that, even though the same statutory definition of “modification” expressly applied to two different CAA programs (via a cross-reference, as here), “[a] given term . . . may take on distinct characters from association with distinct statutory objects calling for

different implementation strategies.” *Id.* at 574, 576. Furthermore, a “[statutory] cross-reference alone is certainly no unambiguous congressional code for eliminating the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term.” *Id.* at 576.

*King v. Burwell*, 135 S. Ct. 2480 (2015), similarly explained that an interpretation of the phrase “established by the State” in one section of the Affordable Care Act would not necessarily apply as a matter of law to other sections of the Act using that phrase because “‘the presumption of consistent usage readily yields to context,’ and a statutory term may mean different things in different places.” *Id.* at 2493 (citation omitted).

A searching and independent contextual analysis of “disposal” is also necessary because, as *CCA EJ* notes, the definition of “disposal” is not “plainly state[d]” in the statute, and interpreting it warrants reference to “contextual clues.” 764 F.3d at 1023, 1026. Thus, *CCA EJ* is not “judicial precedent holding that the statute *unambiguously* forecloses” different interpretations. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (emphasis added). Also critically important is that *CCA EJ* does not discuss CERCLA *at all*, let alone indicate that the Court contemplated or intended that its ruling would apply to CERCLA.

### **1. CCA EJ Is Factually Distinguishable.**

*CCA EJ*’s interpretation of disposal under RCRA was driven by several case-specific considerations with no application here. *See Hart*, 266 F.3d at 1170-71. This

Court saw the case as essentially an end-run – an attempt to use a RCRA citizen suit to address what the Court viewed as the CAA problem of 1.8 million people allegedly inhaling air pollution from sixteen railyards spanning southern California. *See CCAEJ*, 764 F.3d at 1021. The *CCAIEJ* plaintiffs appear to have sued under RCRA because the CAA citizen-suit provision is “more limited than RCRA’s.” *See id.* at 1022 n.3. With limited exception, the opinion focuses on, and found inadequate, the allegation of “direct” inhalation of DPM that never reached land or water. The Court framed the question before it as whether a RCRA citizen suit “may be used to enjoin the emission from Defendants’ railyards” of DPM, *id.* at 1020, and observed that the disposal definition “does not plainly state whether emissions of solid waste *into the air* fall within its scope.” *Id.* at 1023. It answered the question by saying, “as Congress has drafted it, ‘disposal’ does not extend to emissions of solid waste *directly* into the air.” *Id.* at 1024 (emphasis added).

The pleadings in *CCAIEJ* showed that the case sought to solve an air pollution/inhalation problem. The Court twice noted that the complaint alleged DPM from the railyards “is inhaled by people . . . *directly*.” *Id.* at 1021, 1023 (emphasis added). The plaintiffs also alleged that the defendants were violating RCRA by failing “to limit or control the amount of DPM generated on and by the railyards.” *Id.* at 1023 (citation omitted). Consistent with this emphasis on controlling air emissions, the *CCAIEJ* plaintiffs requested an injunction that the defendants “take certain control measures to reduce diesel particulate emissions from their railyards.” *Id.* at 1022.

The sole operative paragraph of the complaint alleging “disposal” also contained an allegation of inhalation of DPM “particles [that] have fallen to the earth and then have been re-entrained into the air.” *Id.* at 1023. While the United States believes this validly alleges “disposal,” it was fatally comingled with the invalid allegation of “directly” inhaled air pollutants (i.e., that never reached land or water). The United States agrees with *CCA EJ* and the district court that “emissions to the air alone,” i.e., without reaching land or water, do not constitute “disposal” for the purposes of RCRA or CERCLA.<sup>2</sup> ER6. So, the complaint failed to allege that DPM that *did* reach land or water was, by itself, a source sufficiently contributing to endangerment to support the plaintiffs’ RCRA claim.<sup>3</sup> Nor did the complaint identify or seek remediation of any specific property allegedly contaminated by DPM. In

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<sup>2</sup> A broader reading of *CCA EJ* – holding that there is never “disposal” if wastes travel through the air before reaching land or water – would be erroneous. *CCA EJ*’s principal textual argument is that the “disposal” definition “does not include the act of ‘emitting,’” 764 F.3d at 1024, apparently assuming that Congress would use only “emit” to describe discharges to the air. This fails to account for the breadth of the term “disposal,” which RCRA defines to include “discharge,” one definition of which is “to give outlet or vent to: EMIT.” Webster’s Collegiate Dictionary 330 (10th ed. 1999). Other terms in the definition not examined by *CCA EJ*, such as “inject[]” or “leaking,” just as comfortably encompass emissions to the air. Congress is not nearly as precise in using these terms as the *CCA EJ* panel assumed; Congress used “discharge” as a synonym for “emit” even in the CAA. *See, e.g.*, 42 U.S.C. § 7403(k) (“an air pollution problem . . . may result from discharge or discharges into the atmosphere”); *id.* § 7418(a) (“the discharge of air pollutants”).

<sup>3</sup> Here, however, the FACs allege that hazardous substances from Teck’s smelter stacks “have come to be located in, and cause continuing impacts to, the surface water and ground water, sediments, upland areas, and biological resources that comprise the [UCR] Site.” ER98.

short, the case was fundamentally about controlling defendants' emissions of air pollutants directly at the locomotive stack to prevent inhalation, which the Court viewed as an air quality problem for the CAA, not RCRA.

*CCA EJ* also turned partly on the unique legal status of the alleged source of pollution: locomotive railyards that the Court found to be “entirely outside the ambit of federal regulation,” owing to an express CAA exemption from federal regulation for “indirect sources.” *Id.* at 1027-30. The Court explicitly rejected the *CCA EJ* plaintiffs' stated strategy of using a RCRA citizen suit to “fill the regulatory gap” the plaintiffs contended was created by this exemption. *Id.* at 1030; *see also id.* at 1029 (RCRA “governs ‘land disposal’” while the CAA “governs air pollutants”). The Court found that “RCRA, as we interpret it, does not extend to *these emissions*,” i.e., emissions otherwise regulated by the CAA. *Id.* (emphasis added).<sup>4</sup>

Another court, in a RCRA citizen suit, reads *CCA EJ* similarly. In *Little Hocking Water Association v. E.I. DuPont De Nemours & Co.*, 2015 WL 1038082 (S.D. Ohio Mar. 10, 2015), the court rejected the same argument Teck makes here and found that stack

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<sup>4</sup> Teck's argument that applying CERCLA to address aerial deposition would somehow be “inconsistent” with the CAA (Br. at 24-26) ignores the careful balance Congress struck by exempting from CERCLA liability “federally permitted releases,” 42 U.S.C. § 9607(j), including emissions “subject to a permit or control regulation under [various sections] of the [CAA].” *Id.* § 9601(10)(H). CERCLA defines “release” to include “emitting,” *id.* § 9601(22), and presumptively applies to air emissions, a logical arrangement as the CAA is not a remedial statute with provision for addressing such contamination to ground or water.

emissions of chemical particulate matter, which later was deposited onto the ground of a wellfield and entered the groundwater, constituted RCRA “disposal.” The court declined to follow *CCA EJ*’s “narrow” reading, in part because, while *CCA EJ* may have turned on an “intentional regulatory gap over locomotive and indirect source emissions,” no such gap existed as to the chemical emissions at issue. *Id.* at \*19.

Rather, “this type of soil and groundwater contamination is precisely the type of harm RCRA aims to remediate in its definition of ‘disposal.’” *Id.*

## **2. *CCA EJ* Is Legally Distinguishable.**

Even if *CCA EJ* were not factually distinct from this case, it arose under a different statute and there is no indication that the Court intended or contemplated that its interpretation of “disposal” would apply to CERCLA. As the district court aptly put it, *CCA EJ* is a RCRA case that “makes no mention of CERCLA”; and this Court “had no reason to consider” how its interpretation would apply in light of CERCLA’s elements or the “potential CERCLA ramifications.” ER2, 5, 6. This Court, too, has recognized that the two statutes occupy a different “place in the constellation of our country’s environmental laws,” *Pakootas I*, 452 F.3d at 1078, and has offered by way of comparison that “regulating disposal activities is in the domain of RCRA,” *id.* at 1079, while CERCLA is “concerned with imposing liability for cleanup . . . [and] does not obligate parties . . . liable for cleanup costs to cease the disposal activities . . . that made them liable for cleanup costs.” *Id.*

Liability under RCRA and CERCLA is premised on meeting distinct statutory elements. Therefore, understanding disposal under each statute demands distinct and independent interpretive analysis. Plaintiffs' CERCLA claims require that a "release or threatened release" of "hazardous substances" from a "facility" cause the incurrence of "response costs," and that Teck is in a class covered by CERCLA, such as a person who "arranged for disposal." 42 U.S.C. § 9607(a). We have already discussed the centrality under CERCLA of evaluating "disposal" with reference to a specific "facility." With the exception of "disposal," there is no overlap between the elements required for Plaintiffs' CERCLA claim and the RCRA endangerment claim at issue in *CCA EJ*. Compare *id.* § 9607(a)(3) with *id.* § 6972(a)(1)(B).

**C. Teck Engrafts a Requirement that Hazardous Substances *Directly* Hit Land or Water, Which Is Not in the Statute and Would Undermine CERCLA's Objectives.**

Teck's reading of *CCA EJ* and the definition of "disposal" adds an element to the definition that does not appear in the statute's text. According to Teck, "disposal" . . . does not include conduct where waste is 'first emitted into the air,' then travels through the air and eventually falls onto land or water." Teck Br. at 2 (quoting *CCA EJ*, 764 F.3d at 1024). As such, polluters will avoid federal cleanup liability under CERCLA if their hazardous substances travel through the air *any distance* before reaching land or water. Teck cites no statutory language or CERCLA case law to support this requirement that waste immediately and directly hit land or water. While the statutory definition expressly accounts for the situation where waste may be

“emitted into the air” after first having been on the land or in the water, nothing supports the premise that waste that reaches land or water could not first have traveled through some other medium.

Teck’s crabbed interpretation would negate “disposal” in countless cases, put many polluters beyond CERCLA’s reach, and lead to absurd results that cannot be squared with CERCLA’s text and purposes. For instance, in rejecting the same argument Teck makes here, the district court ruling affirmed by the Tenth Circuit in *Power Engineering* (which *CCAIEJ* discusses favorably) explained that an “overly narrow interpretation” of “disposal” would “exclude recognized acts of disposal, such as the dumping of waste by a dump-truck and the discharge of liquid waste by an effluent pipe situated several inches or feet above land, merely because the hazardous waste becomes airborne briefly before contacting the land.” *United States v. Power Eng’g Co.*, 10 F.Supp.2d 1145, 1158 (D. Colo. 1998), *aff’d*, 191 F.3d 1224 (10th Cir. 1999). That court held that air scrubber discharges that travel through the air up to 30 feet are RCRA “disposal.” *Id.* Insulating these circumstances from CERCLA responsibility as Teck advocates would frustrate Congress’ objectives and stretch *CCAIEJ* beyond recognition.

The extreme application of *CCAIEJ* that Teck advocates could place beyond CERCLA’s reach real-world sites, like the UCR Site, where “disposal” is an element of the United States’ CERCLA claim and where contamination from aerial deposition

of hazardous substances has serious consequences and requires remediation.<sup>5</sup>

Historically, smelters, refineries, and other industrial enterprises have discharged into the air untold amounts of hazardous substances that have been deposited into or on land or water – a source of extensive contamination at CERCLA sites around the country.

To take just one example, the Omaha Lead Site at issue in *In re ASARCO LLC*, 2009 WL 8176641 (Bankr. S.D. Tex. 2009), where the bankruptcy court approved a settlement resolving the United States’ CERCLA claims against an owner and operator at the time of disposal of a massive lead smelter. The court observed that the “facility emitted lead from several stacks” for nearly a century and that the airborne discharges contributed substantially to “a serious health threat [that] exists at the site[,] and that thousands of Omaha children have elevated blood lead levels

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<sup>5</sup> Teck’s passing claim of “an unwarranted expansion of CERCLA liability,” Teck Br. at 26-27, conflates and confuses two CERCLA exemptions from liability that negate Teck’s concerns. The innocent-landowner defense, 42 U.S.C. § 9601(35)(A), exempts current property owners from CERCLA liability if they acquired the property after the disposal of hazardous substances and did not know or have reason to know that hazardous substances had been disposed. Teck offers no reason why this defense would be less available to a qualifying owner of property where hazardous substances that travelled through the air (as opposed to, for example, soil) are disposed. Teck’s reliance on *Carson Harbor* is misplaced, as that case concerned “disposal” under various scenarios of passive migration through soils over time, which says nothing about what constitutes “disposal” of Teck’s wastes at the UCR Site in the first instance. CERCLA’s third-party defense further mitigates Teck’s concerns and is available to otherwise liable property owners if they can show, *inter alia*, that the release of hazardous substances was caused solely by “an act or omission of a third party” unconnected to them. 42 U.S.C. § 9607(b)(3).

above the national average.” *Id.* at \*14; *see also American International Specialty Lines Insurance Co. v. United States*, 2010 WL 2635768, \*23 (C.D. Cal. June 30, 2010) (in case alleging arranger liability against United States, as a matter of law, “[t]here were disposals of perchlorate at the [facility] when excess perchlorate was discharged into the air,” among other disposal pathways).

These cases are not outliers. Hundreds of smelter sites alone are contaminated by the aerial deposition of hazardous substances that are being or have been cleaned up under CERCLA.<sup>6</sup> Nothing in *CCA EJ* suggests that this Court was even aware, let alone intended, that its decision could be caricatured and deployed to shield so many polluters from CERCLA liability and leave the Superfund and the American taxpayer to pay for the cleanup. *CCA EJ* simply does not apply.

## **II. No International Legal Obligation Prevents Applying CERCLA to Address the Trail Smelter Contamination at Issue Here**

Amicus Canada urges this Court to eschew applying CERCLA in favor of a “bilateral mechanism” established by the 1935 Convention for the Establishment of a

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<sup>6</sup> Additional sites include: Libby Asbestos Site, Libby, Montana (2003) (CERCLA removal action to address severe wind-blown asbestos contamination); Palmerton Zinc Pile Site, Pennsylvania (Civ. No. CV-98-0654, M.D. Pa.) (ongoing CERCLA remedial action for metals contamination from zinc smelter discharges, including at 188 residences); Anniston Lead/PCB Site, Anniston, Alabama (Civ. No. 1:02-00749, N.D. Ala.) (CERCLA cleanup of widespread lead and PCB contamination from aerial deposition across commercial and residential areas); Bunker Hill Mining and Metallurgical Complex Superfund Site, Coeur d’Alene Basin, Idaho and Washington (CERCLA remediation of, *inter alia*, soils at over 2500 residences and commercial properties contaminated by air discharges from lead smelter).

Tribunal to Decide Questions of Indemnity Arising from the Operation of the Smelter at Trail (the “Ottawa Convention”) and related arbitration decisions in 1938 and 1941.<sup>7</sup> Canada Br. at 2, 10. Canada’s arguments are improperly raised by an amicus and are erroneous; they should be disregarded or rejected.

**A. As An Amicus, Canada Cannot Raise a New Issue.**

This is an entirely new issue that is improperly raised by an amicus and should not be considered. Teck’s opening brief makes no mention of *any* international law or treaty issue. As an amicus, Canada may not introduce this issue on appeal. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009). Moreover, Canada does *not* argue that the Ottawa Convention regime has any effect on this Court’s jurisdiction or bars the application of CERCLA as a matter of law. Nor will Teck be allowed to address this issue in its reply brief (if it is even properly preserved for appeal) because “appellants cannot raise a new issue for the first time in their reply briefs.” *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (citation omitted).<sup>8</sup>

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<sup>7</sup> April 15, 1935 (*ratified* June 5, 1935, *entered into force* August 3, 1935), 4 U.S.T. 4009, T.S. No. 893, 49 Stat. 3245, 162 L.N.T.S. 73; Trail Smelter Arbitral Tribunal Decision, 3 R.I.A.A. 1911, 33 AM J. INT’L L. 182 (the “1938 Decision”); Trail Smelter Arbitral Tribunal Decision, 3 R.I.A.A. 1938, 35 AM. J. INT’L L. 684 (the “1941 Decision”).

<sup>8</sup> Teck did not argue before the district court that the Ottawa Convention applies to Plaintiffs’ claims. Instead, Teck’s initial motion to strike asserted in a footnote that the “proper forum is pursuant to treaty before the International Joint Commission [“IJC”].” SER11. The IJC is a creature of the 1909 Boundary Waters Treaty, not the Ottawa Convention. In fact, it was the Governments’ inability to accept the IJC’s

*Cont.*

**B. The Ottawa Convention Does Not Apply to the Cleanup of Trail Smelter Metals at the UCR Site.**

If the Court were to address Canada's argument, the argument lacks merit and misinterprets the Ottawa Convention. Canada identifies *no* applicable international obligation, let alone one that conflicts with CERCLA. At most, Canada has pointed to a binding arbitration that resolved a narrow set of questions, and a wholly discretionary process, based on the mutual consent of the Governments, that the United States potentially could use to raise additional damage claims arising from the Trail Smelter.

**1. The United States Is Not Obligated to Bring *Any* Claims Under the Ottawa Convention, Which Cannot Be Invoked Without U.S. Consent.**

The United States often attempts to achieve diplomatic solutions to transborder pollution issues and is committed to fulfilling its international obligations when they apply. Here, Canada cites nothing under the Ottawa Convention mandating that the Governments refer to arbitration *any* dispute concerning the Trail Smelter. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (internal quotation marks and citation omitted). Furthermore, an Executive Branch interpretation of treaty

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1931 report and recommendations on Trail Smelter damages from sulfur dioxide that led to the Ottawa Convention. 1941 Decision at 1946.

provisions is entitled to great weight and deference. *See id.* at 15; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

The Ottawa Convention referred to the Tribunal four specific questions concerning whether the Trail Smelter caused damage in Washington state after January 1932 and, if so, what indemnity should be paid and what preventative operational measures (or “regime”) should be implemented. Ottawa Conv., Art. III. The convention also prescribed a procedure for litigating those questions and specified that the proceedings would conclude when the Governments “inform the Tribunal they have nothing additional to present.”<sup>9</sup> *Id.*, Arts. IV-XI. It also provided that the Tribunal’s report reflecting its “final decisions” on the questions would be the concluding step. *Id.* Art. XI. The issuance of the 1941 Decision concluded the Tribunal’s work and was the extent of the Governments’ commitment to submit to the outcome of an arbitration process.

Under the Ottawa Convention, the Tribunal would have no competence over further claims relating to the Trail Smelter unless and until the Governments, in their discretion, “*may* make arrangements” to address “claims for indemnity for damage” arising after the timeframe covered by the 1941 Decision. *Id.* Art. XI (emphasis

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<sup>9</sup> The Governments did this on January 2, 1938. 1941 Decision at 1912.

added); *see also* 1941 Decision at 1980 (same). The United States has not invoked this process, and has no present intention of invoking it here.<sup>10</sup>

The 1941 Decision reiterates the voluntary and discretionary nature of this process, expressing “the strong *hope* that any investigations which the Governments *may* undertake in the future, in connection with the matters dealt with in this decision, shall be conducted *jointly*.” 1941 Decision at 1981 (emphasis added). Because the 1941 Decision concluded the matters before the Tribunal and the United States has no present intention to consent to refer *any* new matter under Article XI, the Ottawa Convention has no provisions for this Court to apply or enforce.

## **2. The Ottawa Convention Applies Only to Government Claims, Not the Claims of Individuals.**

Canada also errs in asserting that the “Permanent Regime is fully capable of redressing” Plaintiffs’ claims. Canada Br. at 8. The Ottawa Convention is available only to resolve a dispute between the Governments, subject to their agreement to invoke it. “The controversy is between two Governments . . . ; the Tribunal did not sit and is not sitting to pass upon claims presented by individuals or on behalf of one or

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<sup>10</sup> Canada claims that it “aimed” to invoke the Ottawa Convention through two diplomatic notes. Canada Br. at 5, 16. The first, dated March 20, 2015, did not mention the Ottawa Convention, vaguely complained of a “unilateral compulsory measure” against a Canadian company, and urged a non-specific “government to government” process to address Teck’s “air deposition.” The second, dated August 10, 2015, expressly raised the Ottawa Convention, but asserted only that the Ottawa Convention “could effectively address future claims.”

more individuals by their Government.” 1941 Decision at 1038. The Ottawa Convention simply is not available to Plaintiffs to recover response costs in the way that CERCLA is, nor is it a substitute for their CERCLA claims. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (“The background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”) (citation omitted).

**3. The Regime Mandated by the Tribunal Applied to Claims for Damage from Sulfur Dioxide and Is Not Available Here.**

Plaintiffs’ CERCLA claims concern natural-resource damages and recovery of their costs to clean up from the UCR Site various metals from the Trail Smelter’s stacks. However, the regime of preventative operational measures mandated by the Tribunal (e.g., maximum hourly sulfur dioxide emissions and placement of sulfur dioxide recorders) was devised “to solve the sulphur dioxide problem presented to the Tribunal.” 1941 Decision at 1973, 1974 (purpose of the regime is “to prevent the occurrence of sulphur dioxide in the atmosphere in amounts . . . capable of causing damage in the State of Washington”); *see also Pakootas I*, 452 F.3d at 1069 n.5 (noting that Trail Smelter arbitration “concerned sulfur dioxide emissions from the Trail Smelter.”).

Canada offers no textual support for the suggestion that the regime applies much more broadly to any “transboundary air emissions passing from the Trail

Smelter.” Canada Br. at 12. And even Canada acknowledges that the regime would need to undergo “modification,” based on consultation between the Governments, to address the effects of Trail Smelter contamination at issue in this case (*i.e.*, metals and other non-sulfur-dioxide pollutants). *See id.* at 23.

Given the weight of evidence of the treaty’s meaning outlined above and the deference owed to the Executive Branch’s interpretation, there is no basis for the Court to conclude that the Ottawa Convention prevents the consideration of Plaintiffs’ CERCLA claims.

**C. There Is No Conflict for This Court to Avoid or Resolve.**

Because the Ottawa Convention regime does not apply here, there is no risk that Plaintiffs’ CERCLA claims against Teck will “undermine” any bilateral agreements between the Governments, “judicially extinguish” the Ottawa Convention, or lead to any of the other bilateral complications about that Canada raises in its brief. *See id.* at 30. Nor is there a risk of impinging upon Canada’s “sovereign environmental regulatory authority” to regulate the Trail Smelter under Canada’s equivalent of the CAA. *Id.* at 2-3. This Court previously has held that, as applied to address the effects at the UCR Site of Teck’s slag discharges to the Columbia River, “CERCLA does not obligate parties (either foreign or domestic) liable for cleanup costs to cease the disposal activities such as those that made them

liable for cleanup costs.” *Pakootas I*, 452 F.3d at 1079. Similarly, CERCLA is not being applied here to regulate air-pollutant emissions from the Trail Smelter.<sup>11</sup>

The Ottawa Convention and the regime under the arbitration decisions also present no cause for this Court even to consider construing CERCLA in a way that avoids a conflict with international law, thus rendering irrelevant the so-called *Charming Betsy* canon upon which Canada relies so heavily. Canada Br. at 27-30; see *Munoz v. Ashcroft*, 339 F.3d 950, 958 (9th Cir. 2003) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (Feb. Term 1804)).

Finally, if this Court were to disagree and find that the Ottawa Convention applies, is directly enforceable without a new agreement by the Governments to refer additional damage claims under the convention, and conflicts with CERCLA, then CERCLA still would have to be applied. “[A] later-in-time federal statute supersedes inconsistent treaty provisions,” *Medellin*, 552 U.S. at 509 n.5, and will apply if the federal statute and the provision of the earlier international agreement cannot be fairly reconciled. Restatement (Third) of Foreign Relations Law § 115(1)(a). As Canada concedes (Br. at 27-28), this Court consistently has recognized this bedrock principle.

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<sup>11</sup> Rather, CERCLA appropriately applies here to remediate the domestic effects of decades of metals deposition from Teck’s smelter stacks because “a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.” Restatement (Third) of Foreign Relations Law § 402(1)(c) at 227-28.

*See, e.g., United States v. Kelly*, 676 F.3d 912, 916 (9th Cir. 2012). The legally correct interpretation of CERCLA is that metals from Teck’s smelter stacks deposited at the UCR Site constitute “disposal.” Canada’s reading of the Ottawa Convention cannot fairly be reconciled with CERCLA; attempting to do so would utterly frustrate and distort Congress’ intent in enacting CERCLA. And even if Canada’s interpretation of the Ottawa Convention were correct – which it is not – this Court may not give it effect in the face of a later inconsistent statute.

### CONCLUSION

The district court’s orders should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (for amicus briefs as provided by Fed. R. App. P. 29(d)) because it contains 6,982 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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DATED: October 13, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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