FILED
MAY 02 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1188

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Petitioner,

v.

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; STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOSEPH A. PAKOOTAS AND DONALD R. MICHEL

RICHARD A. DU BEY
PAUL J. DAYTON*
DANIEL F. JOHNSON
SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104
(206) 682-3333

Counsel for Respondents Joseph A. Pakootas and Donald R. Michel

* *Counsel of Record*

208464

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Statutes:

Cited Authorities

SUMMARY OF REASONS TO DENY THE PETITION

The Ninth Circuit decided a narrow question: Whether an action to enforce an EPA order for remediation of hazardous waste that was released into the environment in the United States was a domestic application of law even though the object of the order was a Canadian company. Petitioner Teck Cominco has cited no case or authority that contradicts the court's conclusion on that question. The only argument it offers now—that CERCLA requires a "disposal" of hazardous substances at the same facility from which they were ultimately "released," and that the only "disposal" in this case occurred solely in Canada—was never even considered by the Ninth Circuit because Teck Cominco has never asserted it before, in any court; nor is it supported by any case authority. The thrust of Teck Cominco's Petition—that CERCLA does not apply to it because it commenced its disposal of hazardous waste in Canada—does not answer the Ninth Circuit's analysis or take account of the harm to U.S. territory its mining waste has caused. Because the EPA's order concerns solely domestic conditions, Congress clearly intended CERCLA to apply.

Teck Cominco's alternative argument—that by its terms CERCLA does not apply to generators of hazardous substances who unilaterally dump their waste on another person's property—was also poorly developed below. Teck Cominco did not seek dismissal on this basis in the district court, and cited no authority for its position in the Court of Appeals until just before oral argument, in a letter to the panel. That authority does not conflict with the Ninth Circuit's decision, and no case supports Teck Cominco's position, which would create an illogical and clearly unintended loophole in CERCLA's comprehensive liability scheme.

There is no basis to grant certiorari in this case.

STATEMENT OF THE CASE

For at least 100 years, Teck Cominco and its predecessors have owned and operated an integrated mining, minerals processing, smelting, refining, and metals marketing operation located on the banks of the Columbia River in Trail, British Columbia, just ten river miles north of the Canadian border with Washington State. The Trail smelter is the largest lead smelting facility in the world. For most of its history, through at least the mid-1990s, Teck Cominco disposed of the byproduct of the smelting process, known as "slag," by simply dumping it into the Columbia River. Teck Cominco's "slag" includes many substances considered hazardous to human health and the environment, including arsenic, cadmium, copper, mercury, lead, and zinc. Teck Cominco dumped hundreds of thousands of tons of raw slag into the Columbia every year for approximately 90 years, and that slag flowed south over the border into the United States. Appendix to Petition (Pet. App.) at 72a.

About 15 river miles south of the border, the Columbia River becomes characteristic of a lake or reservoir due to the Grand Coulee Dam, and is known as Franklin D. Roosevelt Lake, or "Lake Roosevelt." Pet. App. at 69a-70a. Spanning approximately 130 miles in length, Lake Roosevelt attracts more than a million recreational visitors per year and comprises a major economic resource for the surrounding area. Pet. App. at 70a. The lake is used for fishing, boating, and swimming and is habitat to a variety of fish, plant, and other aquatic species. *Id.*

Respondents Pakootas and Michel are members of the Confederated Tribes of the Colville Reservation ("Colville Tribes") and live within the exterior boundaries of the reservation, which includes land along the Upper Columbia River. Pet. App. at 70a. They fish and recreate in the Upper Columbia River and Lake Roosevelt, and as members of the Colville Tribes they have expressly reserved hunting, fishing, and gathering rights and entitlements to use the Upper Columbia River and Lake Roosevelt. *Id.* Their use of the River and Lake

are of central importance to their subsistence, culture, and spiritual well-being. Pet. App. at 109a.

After state and federal agencies issued several studies and health advisories concerning the presence of hazardous substances in the Upper Columbia and Lake Roosevelt (the "Site"), the Colville Tribes in August 1999 petitioned the U.S. Environmental Protection Agency ("EPA") to assess the threat of these substances to human health and the environment. Pet. App. at 70a. EPA conducted a site assessment at the Site from October 1999 to March 2003. Pet. App. at 70a-71a. It concluded that the Site contained numerous substances that are known to be hazardous to human health and the environment. Pet. App. at 71a. EPA determined Teck Cominco to be a "responsible person" under CERCLA. The evidence showed with scientific certainty that Teck Cominco was the predominant source of contaminants at the Site. Pet. App. at 72a. EPA considered the contamination sufficiently serious to warrant ranking on the National Priorities List. *Id.* Teck Cominco has cited no Canadian environmental law that applies to the Site, and no entity or government has sought to invoke Canadian law or any treaty to remedy the conditions at the Site.

Based on its site assessment results, EPA determined that Teck Cominco was responsible for the costs of further investigation and remediation at the Site. Pet. App. at 76a. It further found that the presence of Teck Cominco's hazardous waste at the Site constituted actual or threatened releases of hazardous substances into the environment for which it was responsible under CERCLA. *Id.* Teck Cominco's United States subsidiary had extended discussions concerning the required investigation and clean up at the Site. Pet. App. at 73a. After "months of inconclusive discussions and ambiguous commitments" from Teck Cominco and its subsidiary, EPA concluded that Teck Cominco would not voluntarily cooperate, ended the negotiations and, in December 2003, issued a Unilateral Administrative Order ("Order") under CERCLA ordering Teck Cominco to prepare a remedial investigation and

feasibility study ("RI/FS") for the Site. Pet. App. at 73a, 80a-81a; 42 U.S.C. § 9606(a). In issuing the Order, the United States determined that CERCLA applies to Teck Cominco's contamination of the Site.

Teck Cominco refused to comply with the Order. On July 21, 2004, respondents filed suit in the United States District Court for the Eastern District of Washington, seeking declaratory and injunctive relief requiring Teck Cominco to comply with the EPA's Order. Pet. App. at 73a-75a, 105a-112a; *See* 42 U.S.C. § 9659. The State of Washington intervened as of right on the side of respondents. Pet. App. at 113a-119a. Neither the United States nor Canada intervened.

On August 26, 2004, Teck Cominco filed a motion to dismiss, claiming the district court (a) lacked subject matter jurisdiction because CERCLA does not apply to a Canadian polluter; and (b) lacked personal jurisdiction over Teck Cominco. Teck Cominco did not directly challenge application of the "arranger" provision in CERCLA and did not argue, as it does here, that "disposal" must occur at the same "facility" from which there is a "release." After briefing and oral argument, the district court denied Teck Cominco's motion in an order dated November 8, 2004. Pet. App. at 59a.

The district court held that it had personal jurisdiction over Teck Cominco based on the allegations that Teck Cominco's pollution of the Site "is an intentional act aimed at the State of Washington," which "causes harm which defendant knows is likely to be suffered downstream by the State of Washington and those individuals, such as [respondents], who fish and recreate in the Upper Columbia River and Lake Roosevelt." Pet. App. at 31a-35a. Teck Cominco has not challenged this ruling of the district court.

The district court also ruled that it had subject matter jurisdiction and that CERCLA applied because Congress intended that CERCLA provide a means of addressing hazardous waste sites within the United States, and Teck Cominco's hazardous substances created such a site within the United

States. Pet. App. at 37a. It found Teck Cominco could be liable as an "arranger" under CERCLA section 107(a)(3) without having utilized a third party to dispose of its waste. Pet. App. at 47a-50a. Teck Cominco sought and was granted interlocutory review by the United States Court of Appeals for the Ninth Circuit.

The appeal was extensively briefed to the Ninth Circuit with multiple amicus briefs filed on behalf of each side. The United States did not seek leave to file an amicus brief. Again, Teck Cominco never made the argument that "arranger" liability requires disposal at the same facility from which there is a release. Nor did it cite any cases in its brief supporting its assertion that "arranger" liability requires disposal "by [an] other party or entity." Teck Cominco first cited *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004), on which it now relies for evidence of a circuit split on this issue, in a November 22, 2005 letter to the Ninth Circuit – less than two weeks before oral argument.

After oral argument, and just two months before the panel issued its decision affirming the district court, EPA and Teck Cominco entered into a private agreement under which Teck Cominco agreed to a CERCLA-like investigation and feasibility study and EPA agreed to withdraw its Order. Respondents are not party to the agreement. Teck Cominco has not sought any relief in the district court based on that agreement and it advised the Ninth Circuit that the settlement did not moot the case or the appeal. Pet. App. at 9a, n.10.

A panel of the Ninth Circuit issued a unanimous decision on July 3, 2006, affirming the district court. Pet. App. at 1a-28a. The panel held that EPA's Order did not involve extraterritorial application of CERCLA because it concerned a facility located entirely within the United States and a CERCLA release – the leaching of hazardous substances from Teck Cominco's slag – occurred at the Site in the United States. Pet. App. at 15a. In addition, the Ninth Circuit panel reasoned that Teck Cominco could be liable as an "arranger" under

42 U.S.C. § 9607(a)(3), rejecting Teck Cominco's argument that CERCLA requires the involvement of another party. 42 U.S.C. § 9607(a)(3). Pet. App. at 28a.

On July 17, 2006, Teck Cominco filed a petition for panel rehearing and rehearing *en banc*, asserting that the panel decision (a) conflicted with a First Circuit opinion regarding "arranger" liability under CERCLA section 107(a)(3); and (b) raised a question of exceptional importance regarding the application of CERCLA to a foreign corporation. On October 30, 2006, after briefing by respondents, the State of Washington, and amici for both sides, the Ninth Circuit denied Teck Cominco's petition: "The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing *En Banc*." Pet. App. at 61a.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals Correctly Held That an Action to Remedy Domestic Conditions at a Domestic Site Is a Domestic Application of CERCLA.

This case concerns responsibility for the domestic cleanup of a domestic hazardous waste Site. Teck Cominco generated, owned, and disposed of hazardous waste which, in the President's considered judgment, poses a threat to the domestic environment. App. At 75a-76a. Teck Cominco's focus on the "disposal activities" it commenced in Canada misconceives the scope and application of CERCLA. Congress enacted CERCLA to ensure prompt and effective *cleanup* of hazardous waste that threatens human health and the environment, not to regulate *disposal* of such waste. The waste and the cleanup at issue in this case are in the United States, not in Canada. If U.S. law does not govern, no law does. The Ninth Circuit correctly found CERCLA's application in this case was a domestic application of the law. Pet. App. at 22a.

1. EPA's Remediation of a Domestic Waste Site Is a Domestic Application of CERCLA.

CERCLA's two main objectives are to ensure "prompt cleanup" of hazardous waste sites and to "impos[e] all cleanup costs on the responsible party." *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *quoted in Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). CERCLA's liability regime focuses on the site, or "facility," at which hazardous wastes have "come to be located," not the place where the wastes were originally produced. *See* 42 U.S.C. §§ 9607(a), 9601(9). The statute does not even mention the location from which the hazardous substances originated, because the location of the source is irrelevant to its remediation goal. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (CERCLA applies "primarily to the cleanup of leaking inactive or abandoned sites and to emergency responses to spills.") (quoting F. Anderson, *et al.*, Environmental Protection: Law and Policy 568 (1984)). Its remedial scheme is not concerned with environmental regulation, but with environmental remediation. *See Meghrig*, 516 U.S. at 483 (contrasting CERCLA's focus on cleaning up waste with RCRA's focus on ongoing and future releases). The sole concern of CERCLA is to hold the responsible parties accountable to clean up the Site at issue. That Site is in the United States.

The fact that Teck Cominco happens to reside in Canada is incidental to the application of CERCLA in this case. Had Teck Cominco sent its hazardous substances across the border by rail or truck and dumped them into the Upper Columbia River Site on the U.S. side of the border, there is no doubt that CERCLA would apply and Teck Cominco would be responsible for the costs of investigation and remediation at the Site. *See, e.g., Canron, Inc. v. Federal Ins. Co.*, 918 P.2d 937, 939 (Wash. App. 1996) (describing case in which CERCLA was applied to Canadian company to recover cleanup costs at property in Washington State to which it had "shipped" its waste products from Canada); *United States v. Ivey*, 747 F. Supp. 1235

(E.D. Mich. 1990) (Canadian former owner of Michigan waste Site liable under CERCLA); *see also United States v. Ivey*, 26 O.R. 533 (Gen. Div. 1995) *aff'd* 30 O.R. 3d 370 (C.A. 1996) (Canadian court enforced U.S. judgment against Canadian actor under CERCLA). Teck Cominco does not deny that application of CERCLA in such a situation is appropriate.[1] Teck Cominco's use of an international waterway to dispose of its wastes in the United States should be treated no differently. The natural and inevitable consequence of Teck Cominco's discharge of hazardous substances into the river in Canada was that they would be released into the environment in the United States. The Ninth Circuit correctly concluded that CERCLA applies to this domestic release.

The Ninth Circuit has confronted a case which *did* call for application of CERCLA to foreign territory, and rejected such application. *Compare Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1098 (9th Cir. 2005) (addressing extraterritorial reach of CERCLA in context of case seeking cleanup of former military base located in Philippines). In that case, as party defendant, the United States confirmed the position it has taken in the EPA's Order in this case, Pet. App. at 75a-76a, that when a foreign party releases a hazardous substance across the Canadian border into the United States, as Teck Cominco did here, EPA's imposition of liability under CERCLA "is not an extraterritorial application of CERCLA because EPA is addressing a release into the environment in the United States." Brief of Federal Appellees at 18 n.2, *Arc Ecology v. U.S. Dep't of the Air Force*, 2004 WL 1935956 (9th Cir. 2004) (No. 04-15031).

---

1. For this reason, its reliance on *Small v. United States*, 544 U.S. 385 (2005), for the proposition that CERCLA's express application to "any person" who meets the requirements for liability should not be construed to include "foreign persons" is illogical. CERCLA undoubtedly applies to foreign persons who place their hazardous substances in the U.S. environment, and *Small*'s analysis is inapplicable.

2. CERCLA Liability Is Triggered by a Release, not by Disposal.

The Ninth Circuit correctly found that the trigger for application of CERCLA is a "release" (or threatened release) of hazardous substances into the "environment."[2] Pet. App. at 19a-20a; *see also* 42 U.S.C. §§ 9604(a) (authorizing President to take action in response to "release" of hazardous substances into the "environment"); 9606(a) (authorizing President to issue orders or file suit in response to "release" of hazardous substance from a "facility"); 9607(a) (describing persons liable for costs incurred in response to "release" of hazardous substances).

Teck Cominco's contrary contention that CERCLA liability is triggered by certain "conduct" is based on a backwards reading of section 107(a), and is fundamentally inconsistent with CERCLA's sweeping, strict liability scheme. Petition at 15. A party is liable if it falls within one or more of the classes of "covered persons" in section 107(a)(1)-(4). However, liability is not triggered unless there is a "release" at a facility which requires "response costs." *See* 42 U.S.C. § 9607(a); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990); *see also Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146, 1151 (1st Cir. 1989) (section 107(a) describes persons who "may be held liable if there is a release or threatened release of a hazardous substance."); *Containerport Group, Inc. v. Am. Fin. Group, Inc.*, 128 F. Supp. 2d 470, 474 (S.D. Ohio 2001) (CERCLA liability analysis commences with whether a "release" has occurred). Indeed, the mere "disposal" of hazardous substances does not implicate CERCLA at all, until

---

2. "Release" is defined broadly to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . ." 42 U.S.C. § 9601(22). "Environment" is defined to include the water, land, and air within or under the jurisdiction of the United States. 42 U.S.C. § 9601(8). Teck Cominco does not dispute that its hazardous waste has been released, and threatens to continue to be released, into the environment in Washington State.

and unless the hazardous substances are "released" into the "environment," i.e., the water, soil, or air. *See* 42 U.S.C. § 9601(22). Once such a release occurs, the classes of "covered persons" who may be liable is sweeping; liability reaches back to anyone with any relationship or "nexus" to that release. *See New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999); *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992).

"Conduct" is neither sufficient nor even necessary to impose liability under CERCLA. The first two categories of covered persons listed in section 107(a) include current and former owners of the property where the release occurs, regardless of whether they have engaged in any "conduct" at all. *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 168-71 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (liability extends to owners regardless of their degree of participation in subsequent disposal of hazardous waste); *Shore Realty Corp.*, 759 F.2d at 1043-44 (Site owner liable even though he did not contribute to presence or cause release of hazardous substances at facility). CERCLA liability is triggered not by any "conduct" with respect to hazardous substances but by the "release" of those substances into the "environment." Teck Cominco does not dispute the latter occurred entirely within the United States.[3]

---

3. Teck Cominco's use of the crime of murder to illustrate the importance of "conduct" in imposing CERCLA liability is, ironically, only half wrong. The law prohibiting murder, of course, is the quintessential opposite of a strict liability statute such as CERCLA because it turns solely on state of mind. Thus, while death occurs every day without a murder, the very purpose of CERCLA is to ensure that every hazardous waste Site be cleaned up by a responsible party.

On the other hand, as a jurisdictional matter, the analogy supports the Ninth Circuit's conclusion because, under well-settled jurisdictional principles, an act occurring in one nation (such as a shot fired across a border or slag dumped in a river) which produces harm (such as death or destruction) in another nation subjects the actor to the laws of the latter nation. *See Laker Airways, Ltd. v. Sabena, Belgian World Airlines,*

(Cont'd)

3. Petitioner's New Argument on Disposal Was Not Presented to the Courts Below and Is Not Supported by Any Precedent.

In its petition to this Court, Teck Cominco offers a wholly new argument: It contends that, but for a "printer's error," section 107(a)(3) would contain an additional clause at the end, "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . ." *See* Petition at 18-19 (combining portions of 42 U.S.C. §§ 9607(a)(3) & (4)). According to Teck Cominco, this modification "makes absolutely clear" that a person who "disposes" at one facility is not responsible for subsequent "releases" at another facility. Petition at 19.

Absolute clarity is an attribute rarely, if ever, given to the language of CERCLA in general, or section 107(a)(3) in particular. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 n.5 (3d Cir. 1992) (CERCLA is "riddled with inconsistencies and redundancies"); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995) (definition of "arranger" is "inartful"). Moreover, the interpretation Teck Cominco advances has never been adopted by any court, ever. Indeed, this interpretation, which Teck Cominco now says is "indisputably compel[ed]" by the statutory language, is one that *it did not even think of* until it reached this Court. Petition at 18. Teck Cominco did not advance this argument in the district court, or in the Court of Appeals, or in its petition for rehearing *en banc*. Teck Cominco now states the Ninth Circuit "badly misapprehend[ed] the statutory text" for

---

(Cont'd)

731 F.2d 909, 922 (D.C. Cir. 1984) (conduct outside the territorial boundary which has or is intended to have a substantial effect within the territory subject to jurisdiction of the territory); *Restatement (Second) of Foreign Relations Law* § 18, cmt. c, illus. 2 (1965) (a person taking action in State B which causes a homicide in State A becomes subject to prosecution under the jurisdiction and laws of State A).

failing to adopt this new interpretation, yet it failed to even argue this interpretation in that court.

Teck Cominco's new argument depends on another proposition, also never raised in any court below (and barely mentioned in its petition to this Court): that its "disposal" of hazardous waste occurred exclusively in Canada, even though it dumped the waste into a river, *knowing* it would be carried into the Upper Columbia River Site in the United States. Petition at 20 n.4.

In Teck Cominco's view, its disposal ended when its slag splashed into the river, not when it came to rest downstream in the United States. Yet, "disposal" under CERCLA is not a discrete, isolated event that can be severed from the ultimate repose of the substances concerned. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992) ("the term 'disposal' should not be limited solely to the initial introduction of hazardous substances onto property") (citing *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988)). If it were, then a person standing in his own yard who rolled barrels of hazardous waste down a hill into his neighbor's yard would have "disposed" of it only in his yard, and he would bear no responsibility for it under CERCLA.[4]

In support of its position, Teck Cominco cites no cases on point; its cases held only that so-called "innocent owners"—people who were not even aware that there was hazardous waste on their property—cannot be held liable under CERCLA based merely on "the gradual passive migration of contamination

---

4. *Compare, e.g., Dent v. Beazer Materials and Servs., Inc.*, 993 F. Supp. 923, 929, 946 (D.S.C. 1995), *aff'd*, 133 F.3d 914 (4th Cir. 1998) (defendant who dumped chemicals on his own property, which drained onto neighbor's, liable under CERCLA); *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir. 1994), *cert. denied, Kahn v. Juniper Dev. Grp.*, 510 U.S. 914 (1993) (neighboring landowner may assert right of action against PRP for response costs incurred from migration of hazardous substances from adjoining property).

through the soil." *Carson Harbor Village, Ltd., v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) (*en banc*).[5] As the Third Circuit explained in *CDMG Realty*, holding such innocent owners liable would be inconsistent with CERCLA's purpose to hold "polluters" responsible for the costs of remediation:

> Those who owned previously contaminated property where waste spread without their aid cannot reasonably be characterized as "polluters"; excluding them from liability will not let those who cause pollution off the hook.

96 F.3d at 717.

By contrast, this case involves neither an "innocent owner" nor a "passive disposal"; Teck Cominco actively dumped millions of tons of raw contaminants into a moving river, and that act of "disposal" continued until the contaminants came to rest in the Upper Columbia River, in the United States.[6] The

5. *See also United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 n.3 (2d Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706, 722 (3d Cir. 1996). Contrary to Teck Cominco's assertion, its cases recognized that "disposal" may include "passive" movement of contamination; they merely found passive soil migration did not constitute "disposal." *See Carson Harbor*, 270 F.3d 863, 879, 881 (rejecting the "binary 'active/passive' distinction" and concluding that "disposal" may include passive migration); *ABB Indus. Sys.*, 120 F.3d at 358 n.3 (holding that passive soil migration is not a disposal; "we express no opinion" whether leaking barrels could constitute passive "disposal"); *CDMG Realty Co.*, 96 F.3d at 714 (observing that "leaking" and "spilling" could constitute "disposal" without affirmative human conduct). Many courts have concluded, in other circumstances, that "passive" movement of hazardous substances may constitute a "disposal" under CERCLA. *See, e.g., Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992) (leaking storage tanks constitute "disposal"); *see also CDMG Realty*, 96 F.3d at 713 (citing additional cases).

6. Contrary to Teck Cominco's assertions, Petition at 19-20, the EPA's findings support the conclusion that Teck Cominco "disposed" (Cont'd)

district court recognized this when, in its analysis of personal jurisdiction, it concluded that plaintiffs had adequately alleged that Teck Cominco's disposal was "an intentional act expressly aimed at the State of Washington." Pet. App. at 34a.

B. The Ninth Circuit's Application of United States Law to This Domestic Condition Does Not Raise Any Comity Concerns.

The principle of international comity is not violated unless application of CERCLA to Teck Cominco makes it impossible for Teck Cominco to comply with United States and Canadian law. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (quoting *Restatement (Third) of Foreign Relations Law of the United States*, § 415, *cmt. e* (1987) (hereinafter Restatement (Third) of Foreign Relations Law); *see*, *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 555 (1987) (comity concern not raised unless there is "a true conflict between domestic and foreign law"). This Court has explained that application of U.S. law to foreign conduct causing domestic injury does not violate comity principles. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). Having failed to explain how remediation of its hazardous substances in the United States will impair its compliance with Canadian law, Teck Cominco has not established any comity concern.[7]

(Cont'd)
of its waste "into" the facility in the United States: EPA found Teck Cominco had "*arranged for disposal* of its hazardous substances from the Trail Smelter *into* the Upper Columbia River *by* directly *discharging* up to 145,000 tonnes of slag annually." Pet. App. 72a.

7. Although Teck Cominco identifies no clash between United States and Canadian law, it does not claim that it has complied with Canadian law. That claim is not based on any evidence in the record. Indeed, the only evidence regarding Canadian law in the record was submitted by the State of Washington through the Declaration of Richard Kyle Paisley, a professor of law at the University of British Columbia. In a Declaration filed in the Court of Appeals he explained that there is
(Cont'd)

Teck Cominco suggests that comity concerns are implicated because the government of Canada has opposed application of CERCLA in an amicus brief filed in the Ninth Circuit.[8] Canada's objection, that it prefers negotiation over litigation, is even less compelling than the British government's unsuccessful objection in *Hartford*. There, this Court applied the Sherman Act, 15 U.S.C. § 1, to British insurance companies based on foreign conduct that had effects in the United States, even though the British government objected that the private lawsuit interfered with its comprehensive regulatory scheme permitting such practices. That the insurers' conduct was consistent with British law and policy was not enough to state a conflict. 509 U.S. at 799. "No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* (quoting *Restatement (Third) of Foreign Relations Law* § 403, *cmt. e*); *see also Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921-26, 931-45 (D.C. Cir. 1984).

The government of Canada expressed interest in "preserving from interference, by private litigation in U.S. courts, its sovereign right to regulate Canadian persons and companies operating in Canada." Petition at 13. "Private litigation" is a misnomer because this lawsuit is based on an order issued by

---

(Cont'd)
no clash between United States and Canadian law and that Canadian law does not provide for remediation of any site located in the United States.

8. Teck Cominco also cites and relies upon a diplomatic note which the district court struck from the record on Respondents' Motion. Teck Cominco has not appealed the district court's order, nor explained why it may now cite this document. EPA may not, as Teck Cominco urges here, decline to apply CERCLA out of concern that the Canadian government may not support the United States' military efforts in Afghanistan. Petition at 22. This Court has clearly stated that "[i]n particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Massachusetts v. EPA*, ___U.S. ___, 127 S. Ct. 1438, 1463 (2007).

the United States government that CERCLA applies to Teck Cominco. That order reflects the President's judgment that comity concerns should not prevent application of CERCLA to this domestic site, and answers any comity concern here. *See Pravin Banker Assocs. Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("extending comity to Peru's debt negotiations is only appropriate if it is consistent with United States government policy"). It is not for this court to second guess the Executive's decision. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The President is best suited to make the comity judgment and this Court should defer to it.

Despite the fact that only U.S. law applies to remediate this site in the United States, Teck Cominco suggests that CERCLA should not be applied because there are "bilateral mechanisms" for resolving trans-boundary environmental issues, principally the Boundary Waters Treaty of 1909 ("BWT"). This argument is not based on any principled analysis of abstention, or other ground to decline to exercise jurisdiction. *Turner Entn't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1521-1523 (11th Cir. 1994) (discussing the standards for deference to a foreign proceeding). The BWT does not create a binding or exclusive dispute resolution mechanism. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 494, 500-01 (1971) (holding State of Ohio could sue Canadian company under state common law for dumping mercury into streams which flowed across the border into Lake Erie, despite the existence of a related proceeding under the BWT), *rev'd by implication on other grounds, see Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *see also id.* at 506-07 (Douglas, J., dissenting on other grounds) (BWT "does not evince a purpose on the part of the national governments of the United States and Canada to exclude their States and Provinces from seeking other remedies for water pollution").[9] The BWT provides a non-binding, consensual

9. During negotiation of the BWT, the United States specifically (Cont'd)

procedure by which the U.S. and Canadian governments can submit certain trans-boundary water disputes to arbitration. Neither government has attempted to commence such a process regarding the Site at issue here, and the BWT is literally beside the point.

C. Application of United States Law to Remedy Domestic Conditions Does Not Implicate the Presumption Against Extraterritorial Enforcement of U.S. Law.

Teck Cominco relies heavily on the presumption against extraterritorial application of U.S. law. This rule of statutory construction is a useful guide when applying U.S. regulatory laws to foreign conditions.[10] In a case in which a plaintiff sought to apply U.S. labor law to work place conditions in Saudi Arabia, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (*ARAMCO*), this Court explained that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Teck Cominco concedes that the "presumption against extraterritoriality flows naturally from the 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" Petition at 12 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)). Teck Cominco's Rule 12(b)(6)[11] motion

(Cont'd)
rejected the idea of vesting exclusive jurisdiction over trans-boundary water pollution disputes in an international tribunal. *See F.J.E. Jordan, Great Lakes Pollution: A Framework for Action*, 5 Ottawa L. Rev. 65, 67 (1971-72).

10. The presumption against extraterritoriality is a canon of construction "whereby unexpressed congressional intent may be ascertained." *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). As with any interpretive tool, it is not applicable "where it is not a reliable guide to congressional intent." *United States v. Corey*, 232 F.3d 1166, 1170-71 (9th Cir. 2000).

11. Teck Cominco's motion also challenged subject matter jurisdiction. As the district court recognized, Pet. App. 31a, it had subject
(Cont'd)

presented the question of whether Congress intended to apply CERCLA to this domestic site and the parties responsible for the hazardous substances released there. Nothing about such application of U.S. law raises the concerns underlying the presumption against extraterritorial application of law.

Teck Cominco argues that the extraterritorial presumption reflects Congressional intent in CERCLA because application of CERCLA here will result in a clash of law between the United States and that of another sovereign, which Congress generally seeks to avoid. Petition at 12-13. *See ARAMCO*, 499 U.S. at 248. No clash of law is alleged here, though. Teck Cominco has alleged only Canada's interest in regulating its citizens, and no clash regarding laws applicable to remediation of this Site.[12] This is no clash at all because U.S. law is not being applied to regulate Teck Cominco's Canadian operations or to remediate conditions at a Canadian site. *See Empagran*, 542 U.S. at 165, (application of U.S. antitrust laws to redress domestic antitrust injury caused by foreign conduct is reasonable even though it conflicts with foreign nation's regulation of its commercial affairs).[13]

Teck Cominco's claim that the extraterritoriality presumption is implicated is ultimately grounded in its allegation that its disposal of hazardous substances occurred exclusively in Canada and Congress did not intend CERCLA to reach such

---

(Cont'd)
matter jurisdiction pursuant to 42 U.S.C. § 9613(b) and § 9659 (c). Teck Cominco's motion challenging application of CERCLA to its conduct is analyzed under Fed. R. Civ. P. 12(b)(6). *See Hartford Fire Ins.* 509 U.S. at 813. (J. Scalia dissenting.)

12. Teck Cominco fails to cite any Canadian law whatsoever. *See* Petition at 13. The record shows there is no conflict between Canadian law and U.S. law on this point. Declaration of Professor Richard Kyle Paisley.

13. *Compare Microsoft Corp. v. AT&T Corp.*, 550 U.S. __, No. 05-1056, slip op. at 16 (Apr. 30, 2007) (Foreign law governs rights in inventions manufactured and soled solely in foreign countries).

conduct even when it causes substantial harm in the United States.[14] Teck Cominco's argument on this point relied substantially on *American Banana Company v. United Fruit Company*, 213 U.S. 347, 356 (1909), which it cites for the proposition that U.S. courts should refrain from applying U.S. law to foreign acts. Petition at 12-13. Such reliance is misguided because to the extent that *American Banana* has been read to reject application of U.S. law to foreign conduct causing domestic injury, as Teck Cominco alleges, it has been repudiated. *Hartford Fire Ins.*, 509 U.S. at 796. This Court has embraced effects-based application of U.S. law to foreign conduct causing injury in the United States. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952).[15]

Whether the conduct in question is a murder in which the bullet is shot across the border or an antitrust conspiracy conducted in Canada but causing injury in the United States, United States laws are reasonably applied to the conduct causing domestic injury.[16] *Empagran*, 542 U.S. at 164-65; *see also Hartford Fire Ins.*, 509 U.S. at 796; *Laker Airways*, 731 F.2d at 922. ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory"). *See also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-444 (2d Cir. 1945). This is not

14. Teck Cominco's claim that it acted exclusively in Canada is not supported by any authority or reason, see pp. 11-14, *supra*.

15. Although the proposition was perhaps not always free from doubt, *see American Banana Company v. United Fruit Company*, 213 U.S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial affect in the United States.

Hartford Fire Ins. Co., 509 U.S. at 795.

16. Rudimentary principles of personal jurisdiction indicate that Teck Cominco's purposeful conduct directed toward U.S. territory gave the U.S. courts jurisdiction over its conduct. *See* District Court opinion, Pet. App., 31a-32a.

an extraterritorial assertion of jurisdiction, because such jurisdiction is premised on the effects that occurred within U.S. territory. *Laker Airways*, 731 F.2d at 923.

Many courts have found the extraterritorial presumption unhelpful or inapplicable when examining application of U.S. law to remedy domestic injury or injury to lands over which the U.S. has territorial sovereignty. *See United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000). The Courts of Appeal have consistently noted that the presumption is not applicable when the conduct in question is "intended to, and results in, substantial effects within the United States." *In re Simon*, 153 F.3d 991, 995 (9th Cir. 1998) (quoting *Laker Airways*, 731 F.2d at 925); *see also Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. 1984); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968). This is because in cases involving substantial domestic injury, there is little or no reason to believe Congress intended to exclude foreign actors from liability. The district court cited the Seventh Circuit's reasoning in *Tamari* on this principle:

> Reliance on [on the extraterritoriality] presumption is misplaced, however, when the conduct under scrutiny has not occurred wholly outside the United States, or when conduct outside the United States could otherwise affect domestic conditions. In these cases, courts have looked at this nature of the conduct or effects in the United States to determine whether extraterritorial application would be consistent with the purposes underlying the statute.

Tamari, 730 F.2d at 1108 (citation omitted).

Application of CERCLA to a foreign polluter whose hazardous substances are released in a domestic site is indisputably necessary to accomplish the purposes of CERCLA: Remediation of hazardous substances which have been released in the domestic environment. *Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d at 1094 (CERCLA's primary objectives are

"to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created." (citation omitted). *See Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) ("CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites"). The breadth of the U.S. focus of CERCLA is expressed in 42 U.S.C § 9601(8) (defining "environment to include all land, air and water within the United States or under its jurisdiction"). If CERCLA cannot reach the hazardous substances found in this Site, Congress' objectives in passing CERCLA cannot be accomplished.

Teck Cominco ignores the above-cited authority and focuses on one case, *Steele v. Bulova*, which it attempts to distinguish by noting that it involved some domestic conduct. Teck Cominco's discharges into the territorial U.S. are at least as substantial as the domestic acts in *Steele*, so this argument gains Teck Cominco nothing. More fundamentally, the Court's reasoning in *Steele* was based on "[u]nlawful domestic effects" and the purposes of the statute; the same considerations suggest application of U.S. law here. 344 U.S. at 288.

In its recent decision in *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119 (2005), the Court similarly focused on territorial injury in determining whether a "clear statement" was necessary to permit application of U.S. law to actions on foreign flag ships in U.S. territorial waters. Its formulation distinguishes between statutes of general application and those targeting domestic concerns, for which application of U.S. law is self-evident:

> Our cases hold that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations, *as contrasted with statutory requirements that*

> *concern the security and well-being of United States citizens or territory.*

545 U.S. at 125 (emphasis added). Thus, a "clear statement" of legislative intent is not necessary for application of U.S. law to matters aboard a foreign flag vessel that affect the peace and tranquility of the U.S. Such matters have never "by comity or usage been entitled to any exemption from the operation of the local laws." *Id.* at 130 (quoting *Wildenhus's Case*, 120 U.S. 1, 12 (1887)).

This approach to assessment of Congressional intent applies with equal force here. This Court has never held that U.S. law does not apply to foreign conduct causing domestic harm, and Teck Cominco does not attempt to cite such a case. This is because the clash of law and interference with sovereignty that is presented when U.S. law is applied to foreign actions with exclusively foreign impact is not presented when U.S. law is applied to remedy a domestic condition and such application is consistent with Congress' presumed focus on domestic conditions.

Teck Cominco cites *Hartford Fire Ins.* and *Murray v. Schooner The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), for the proposition that American statutes should not be read as transgressing the law of nations. Teck Cominco does not explain, however, what law of nations is violated by application of CERCLA to this domestic condition. The effects-based application alleged here is well grounded in international law. As stated in the *Restatement (Third) of Foreign Relations Law*, "a state has jurisdiction to prescribe law with respect to ... conduct outside of its territory that has or is intended to have substantial effect within its territory, so long as such exercise is reasonable." *Restatement (Third) of Foreign Relations Law* §§ 402, 403; *see Empagran*, 542 U.S. at 165. Teck Cominco has not attempted to rebut this proposition. Nor has it cited any

law in Canada, provincial or federal, which is inconsistent with CERCLA's application in this case.[17]

Instead, Teck Cominco complains that EPA's application of CERCLA to this domestic condition would "wreck the elegant bilateralism that has distinguished U.S.-Canadian environmental relations for the past century" and usurp the foreign-relations powers of the political branches. Petition at 21. The existence of treaties and other agreements between Canada and the United States does not demonstrate conflict with principles of international law. Nor can Teck Cominco seriously argue that EPA, acting for the President, interfered in the President's foreign relations power by issuing the Unilateral Order in this case. Respondents' suit based on that order is grounded in the same authority.

D. Teck Cominco's Argument On Arranger Liability Is Not Ripe For Supreme Court Review.

Teck Cominco claims the Ninth Circuit's decision creates a "direct conflict of federal appellate authority in one of CERCLA's core liability provisions"—arranger liability under § 107(a)(3), 42 U.S.C. § 9607(a)(3). Petition at 25. Teck Cominco contends that "arranger" liability requires concerted action with an "other party or entity," and does not reach polluters who dispose of their own waste themselves.

Teck Cominco's district court motion mentioned arranger liability as it pertained to the question of whether CERCLA

---

17. This case is almost as paradigmatic of effects-based jurisdiction as the trans-boundary homicide. *See Laker Airways*, 731 F.2d at 922. Indeed, the Restatement provides the following prescient example:

> X operates a refinery in state A near the border of state B that emits fumes generally known to be injurious to plant life. The fumes pollute the air in B, and Y's trees in B stop bearing fruit as a result. B has jurisdiction to prescribe a civil remedy for damages.

Restatement (Second) of Foreign Relations Law § 18, *cmt. g*, ex. 6 (1965).

applied extraterritorially, but cited no case authority explaining its application. Teck Cominco's appeal to the Ninth Circuit also focused on the extraterritoriality question. Its petition for permission to appeal under 28 U.S.C. § 1292(b) said: "the issue presented is whether the district court erred in holding that Congress intended to allow CERCLA to be applied to conduct in foreign countries." Appellant's Opening Brief in the Ninth Circuit described the issue presented for review as follows: "the issue presented is whether the district court erred in holding that Congress intended to allow CERCLA to be applied to conduct in foreign countries."

Teck Cominco's Ninth Circuit brief mentioned arranger liability as part of its argument that CERCLA was being improperly applied extraterritorially, but again it cited no cases supporting its position and did not suggest that failure to allege the elements of arranger liability required reversal. Teck Cominco first mentioned the *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 23-25 (1st Cir. 2004) case, based on which it now claims a circuit split, in a letter to the Ninth Circuit panel, less than two weeks before oral argument. Even then, Teck Cominco provided only one sentence describing the significance of the case and no analysis of the Ninth Circuit's decision in *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 565 (9th Cir. 1994).

E. The Court of Appeals' Decision Creates No Circuit Split.

The Ninth Circuit's decision did not create a conflict among federal courts on CERCLA's definition of "arranger." Teck Cominco argues that a person who disposes of hazardous substances on someone else's property, without the aid of a third party, cannot be liable as an "arranger" under CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3). The Court of Appeals rejected this novel argument, and there is no case that holds to the contrary.[18]

---

18. *But see Kaiser Aluminum & Chem. Corp. v. Catellus Dev.*, (Cont'd)

Teck Cominco attempts to conjure a "conflict" by citing cases that addressed an entirely different question—whether a person must have "owned or possessed" the hazardous substances in order to be potentially liable as an "arranger." *See American Cyanamid*, 381 F.3d at 24-25 (holding that a "broker" of hazardous substances was liable on the theory of "constructive possession"). The Circuits that have addressed *that* question, including the Ninth, are in general agreement, albeit by employing different analyses to varying factual situations. For example, the Sixth Circuit, like the First, has held that a party may be liable as an "arranger" if it exercised control over hazardous waste, even if it did not actually own or physically possess it. *GenCorp, Inc., v. Olin Corp.*, 390 F.3d 433, 449 (6th Cir. 2004). The Eighth and Ninth Circuits are in accord. *See United States v. Shell Oil Co.*, 294 F.3d 1045, 1055 (9th Cir. 2002) (control of the process that produces hazardous substances is crucial in determining whether a party is an "arranger"); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) ("*NEPACCO*") ("We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA § 107(a)(3) . . . would be inconsistent with the broad remedial purposes of CERCLA"). The Third Circuit has indicated that "arranger" liability requires proof of ownership or possession and knowledge or control of the

(Cont'd)

976 F.2d 1338, 1341 (9th Cir. 1992). There, the court found the defendant could be liable under CERCLA both as a "former operator" and as a "transporter." The plaintiff had not even alleged that the defendant could be held liable as an arranger, but the court offhandedly stated: "Nor has [plaintiff] alleged that Ferry arranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3). Ferry disposed of the soil itself by spreading it over the uncontaminated areas of the property." *Id.* The panel in this case unanimously agreed that this comment was "offhand, unreasoned, and ambiguous" and did not state the law on "arranger" liability. Pet. App. at 28a.

hazardous substances. *Morton Int'l, Inc., v. A. E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003) (discussing various cases and concluding that the circuits are "virtually unanimous" on broad principles for arranger liability but disagree about specific factors).

Only one of these courts even *mentioned* the phrase in section 107(a)(3) upon which Teck Cominco's argument in this case depends, "any other party or entity," and that mention is clearly a *dictum*. In *American Cyanamid*, the defendants had brokered the disposal of the plaintiff's hazardous waste on the property of a third person, and the plaintiff sued for a contribution to the remediation costs under CERCLA. 381 F.3d at 10. Following a bench trial in which the district court found the brokers liable under three of CERCLA's four categories of responsible parties—as "operators," "transporters," and "arrangers"—the brokers appealed, and the First Circuit affirmed. *See id.* at 21-24. First, the court held that the brokers were "transporters" under section 107(a)(4) because they actively participated in deciding where the waste would be dumped. *Id.* at 22. Second, the court held that the brokers were liable as "operators" under section 107(a)(2) because they "developed the idea for using the Site, prepared the Site for dumping, arranged for waste to be dumped at the Site, showed the transporters where to dump on the Site, and collected payment and transmitted a share to" the owner of the Site. *Id.* at 23. Finally, the court held the brokers were liable as "arrangers" under section 107(a)(3) because they exercised control over the waste, such that they "constructively possessed" it. *Id.* at 25. The court remarked that the clause in section 107(a)(3) "'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here." *Id.* at 24. This statement was not necessary to the

court's holding and did not affect the outcome of the case.[19] Teck Cominco has cited no case that decided the question the Ninth Circuit decided here, whether a person who disposes of its own waste on the property of another must have utilized another party or entity in order to be liable as an arranger.[20]

As the Ninth Circuit noted below, no effort to assign the phrase, "by any other party or entity" in section 107(a)(3) is entirely satisfactory. Pet. App. at 24a. If, for example, the Court were to accept Teck Cominco's position, then the second, disjunctive clause of the section serves no purpose. That clause provides two categories of potentially liable persons: those who "arranged for disposal or treatment" and those who "arranged with a transporter for disposal or treatment." 42 U.S.C. § 9607(a)(3).[21] In Teck Cominco's

---

19. The offhanded nature of the First Circuit's treatment of the phrase "by any other party or entity" may explain why Teck Cominco did not even think to cite *American Cyanamid* to the Court of Appeals until two weeks before oral argument.

20. Respondents cited cases in which owners or generators of hazardous substances disposed of their own hazardous substances on someone else's property and the courts held them liable as arrangers. *See, e.g., Nat'l R.R. Passenger Corp. v. New York City Hous. Auth.*, 819 F. Supp. 1271, 1277 (S.D.N.Y. 1993) (natural flaking of substances from railroad tunnel onto tracks constitutes "arrangement for disposal"); *State of Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227, 1241, *amended by* 735 F. Supp. 368 (D. Colo.), *rev'd on other grounds*, 916 F.2d 1486 (10th Cir. 1990) (defendant "arranged" for disposal of mine tailings by dumping them into river, which brought them downstream to a "facility").

21. Section 107(a)(3) reads, with emphasis added, as follows:

> any person who by contract, agreement, or otherwise **arranged for disposal or treatment,** *or* **arranged with a transporter for disposal or treatment**, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. . . .

analysis, the latter group is necessarily embraced in the former because an "arrangement" with a transporter would always constitute an "arrangement" with an "other party or entity." Why would Congress need to impose liability on *both* those who "arranged for disposal or treatment" and those who "arranged with a transporter for disposal or treatment" if *no* arranger was liable unless he involved an "other party or entity"?

Ultimately, the Ninth Circuit correctly recognized that Teck Cominco's reading of arranger liability would produce "a gaping and illogical hole" in CERCLA's coverage, Pet. App. at 26a, which Congress could not have intended and no court has ever adopted: That a person who knowingly, intentionally, and actively disposed of his own hazardous substances onto the property of another would not be responsible for those substances under the federal cleanup statute.[22] The so-called "midnight dumper" was expressly targeted by the drafters of CERCLA. *See* Michael Robinson-Dorn, *Trail Smelter: Is the Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. Envtl. L.J. 2, 51-52 & n. 275 (2005) (quoting legislative history expressing "Congress's well known and oft-expressed concern" with "midnight dumpers" who dispose of hazardous substances on the property of others). Congress could not have intended to exclude such polluters from CERCLA's reach.

Not only has no case so held, but the cases upon which Teck Cominco relies for its position strenuously resisted similarly restrictive interpretations. The First Circuit in *American Cyanamid*, for example, embraced the concept of "constructive possession" of hazardous substances in order to *avoid* "a loophole through which brokers and middlemen could escape liability." 381 F.3d at 25; *see also Gencorp*,

22. None of the other categories of responsible persons—owner/operators of facilities, former owner/operators of facilities, and transporters—would apply. 42 U.S.C. § 9607(a).

390 F.3d at 448-49 (same, citing other cases). The cases cited by Teck Cominco as evidence of a circuit "split" over the meaning of "arranger" embraced a broad reading of section 107(a)(3). *See, e.g., Morton Int'l*, 343 F.3d at 676; *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 810 (8th Cir. 1995) (quoting *NEPACCO*, 810 F.2d at 743). The interpretation Teck Cominco seeks, by contrast, would *narrow* CERCLA's coverage and give immunity to a group of plainly culpable polluters whom Congress clearly meant to reach.

To the extent that the lower appellate courts have analyzed the substance of "arranger" liability under CERCLA, they are generally in agreement. The Ninth Circuit's holding in this case that a party can be an arranger by disposing of its own waste on the property of another does not conflict with the holding of any other Circuit. It is not an issue deserving of certiorari.

CONCLUSION

This case does not meet the standard for certiorari. Teck Cominco has not shown a true conflict between the Circuits, much less a conflict concerning "an important matter" that should be reviewed by this Court in this case. S. Ct. Rule 10(a). A conflict that is merely "academic or [] episodic" is insufficient to justify certiorari. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). The Court often denies review in cases in which there is some acknowledged conflict over an issue of insufficient importance or has been insufficiently developed for a full and considered decision by this Court. *See, e.g., Beaulieu v. United States*, 497 U.S. 1038 (1990) (noting 56 petitions denied in 1989 term despite conflicts with other courts). As Justice Stevens has observed, the Court often serves its role best by waiting for a conflict to ripen in the lower courts before accepting review of the issue. "[E]xperience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally

resolved and thus may play a constructive role in the lawmaking process." Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982). The issues Teck Cominco raises are not ripe for Supreme Court review.

For the foregoing reasons, the Petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD A. DU BEY
PAUL J. DAYTON*
DANIEL F. JOHNSON
SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104
(206) 682-3333

Counsel for Respondents Joseph A. Pakootas and Donald R. Michel

* *Counsel of Record*