
**PAKOOTAS, ET AL., V. TECK COMINCO:
A CASE STUDY IN TRANSBOUNDARY POLLUTION ENFORCEMENT**

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SUMMARY

On Monday, January 7, 2008, quietly sandwiched among the hundreds of routine orders issued by the United States Supreme Court on pending requests for review, without comment beyond the simple heading, "CERTIORARI DENIED," appeared case No. 06-1188 *TeckCominco Metals, Ltd. V. Pakootas, Joseph A., et al.*¹ The Court's sparse order, however, betray both the environmental significance and the adversarial vigor of the underlying battle to which it brought successful conclusion. The complex case demonstrates how multiple environmental enforcement and diplomatic tools can be effectively integrated to address environmental harm in one country resulting from activities by a company located in a different country.

1 BACKGROUND ON TECK COMINCO CASE

1.1 Contamination of the Upper Columbia River

The Teck Cominco story begins on the banks of the Upper Columbia River in Trail, British Columbia, approximately 10 miles north of the U.S.-Canadian border. Here, for over 100 years, Teck Cominco has owned and operated the world's largest lead and zinc smelter. From the 1890s to 1995, the Trail smelter discharged approximately 15 million tons of contaminated slag directly into the river. In 1991, EPA sent a letter to British Columbia officials expressing concern about the continued slag disposal, requesting that any future permit extensions for the company be conditioned on addressing the slag discharge.² A response the following month indicated that British Columbia officials were trying to develop a timetable of improvements to resolve environmental concerns, "taking into account Cominco's current economic and technological uncertainties."³

Concern with the contamination remained a topic of senior-level meetings between the two countries over the next two years before the Canadian Government notified EPA in January 1994 that no future permit amendments would allow slag discharge beyond December 31, 1995.⁴ For nearly a century, however, the slag, a black, sandy, metal-laden needle-like particulate, abrasive to fish gills and absorbed by fish, was transported by the swift-flowing waters of the Upper Columbia across the border into the United States. Once in the U.S., the river slows into a more lake-like environment, due to the presence of the Grand Coulee Dam, located 150 miles

downstream. The reduced flow caused the slag to settle throughout 150 miles of slow-flow deposition areas, including stream banks, sediments and recreational beaches, north of the dam. This area of the river, also known as Lake Roosevelt, is a popular national recreation area, providing recreational opportunities including swimming, fishing, boating and hunting to an estimated 1.3 million visitors per year.

1.2 Efforts to Study the Contamination

In August 1999, the Confederated Tribes of the Colville Reservation (“Colvilles”), subsistence users of the Upper Columbia, which flowed through their reservation lands, petitioned the U.S. Environmental Agency (“EPA”) under the Comprehensive Environmental Response, Compensation, and Liability Act to assess the threat of contamination in and along the river. Comprehensive Environmental Response, Compensation, and Liability Act is the U.S. law that addresses remediation of environmental contamination caused by releases or threatened releases of hazardous substances into the environment. This law authorizes EPA to study and take cleanup actions at polluted sites, and uses a “polluter pays” principle to impose strict liability on several classes of persons who caused or contributed to the contamination - site owners and operators, and persons who arranged for disposal or transported hazardous substances for disposal. These classes of persons are liable for conducting site cleanup and for reimbursing costs incurred by EPA for site investigation or cleanup. The Colvilles had the right under Comprehensive Environmental Response, Compensation, and Liability Act to request that EPA conduct a site investigation.⁵ EPA completed its initial site assessment work in March 2003, concluding that site contamination, including arsenic, lead, copper, cadmium, zinc and mercury, was significant enough to merit more comprehensive study in the form of a formal “remedial investigation and feasibility study to evaluate the risks posed by the contamination to human health and the environment.”⁶

EPA notified Teck Cominco, the smelter’s owner and operator, of its potential liability under Comprehensive Environmental Response, Compensation, and Liability Act, offering it the opportunity to perform the study.⁷ The company responded that as a Canadian corporation, it was not subject to personal jurisdiction in the United States nor was it subject to its environmental law, Comprehensive Environmental Response, Compensation, and Liability Act. Despite its jurisdictional objections, the company agreed to enter negotiations with EPA through its American subsidiary, Teck Cominco American, Inc., to attempt to reach an agreement guiding the site investigation. After almost a year of negotiations, it was clear that the company was unwilling to enter an agreement providing the scope and depth of investigation required by U.S. law and which EPA believed appropriate for the site.

2 COORDINATION WITH FEDERAL, STATE, AND LOCAL AUTHORITIES

EPA recognized the transboundary issues raised by pursuing a Canadian corporation under U.S. environmental law to address pollution in the United States, but which originated in Canada. By the time negotiations with the company broke down in November 2003, EPA had begun what would become an unprecedented degree of legal analysis and coordination with other stakeholders. Prior to entering negotiations with the company, EPA regional representatives in Seattle⁸ had initiated consultations with senior officials in EPA Headquarters. In addition, the regional office brought the U.S. Department of State and Department of Justice into early discussions. Because the site involved lands and resources owned and managed by other federal agencies, the U.S. Department of Interior⁹ was consulted as well.

Nor was interest in the site limited to the federal government. The Colvilles were joined by the Spokane Tribe of Indians, whose reservation also bordered on the Upper Columbia, the State of Washington and several environmental groups, all of which expressed strong support for an investigation of contamination at the site consistent with Comprehensive Environmental Response, Compensation, and Liability Act requirements. On the other hand, the seven local counties surrounding the Upper Columbia had, at Teck Cominco's urging, formed a working group, which separately approached EPA with a proposal to negotiate a voluntary human health assessment of the river. Their proposal was designed to answer 3 basic questions: was the water safe to drink; were the fish safe to eat; and were the beaches safe to use. Their approach would not require strict adherence to the Comprehensive Environmental Response, Compensation, and Liability Act process or standards.

3 BREAKDOWN IN NEGOTIATIONS

The breakdown in negotiations with Teck Cominco left EPA with several options:

3.1 Accept the limited investigations proposed by Teck or the counties. In EPA's opinion, however, these studies would not ensure protectiveness of human health and the environment. Moreover, because they would not be performed under Comprehensive Environmental Response, Compensation, and Liability Act, consistent with the National Contingency Plan¹⁰, EPA might jeopardize its ability to ensure future implementation of whatever cleanup might ultimately be determined necessary at the site.¹¹ The legal mechanisms under which the investigations were offered to be performed also raised a number of concerns about enforceability of those agreements.

3.2 List the site on Comprehensive Environmental Response, Compensation, and Liability Act's National Priorities List, EPA's list of most contaminated sites, use U.S. government funds to perform the necessary investigations and pursue the

company for reimbursement. However, EPA policy is to have the polluter pay for investigation and cleanup when there is a financially viable party to perform the work. In addition, Teck Cominco and the counties were strongly opposed to NPL listing,¹² arguing that listing would stigmatize the area, harming its recreational economy. Other stakeholders also preferred a resolution short of listing.

3.3 Ask the State of Washington to use its state authorities to secure the investigation and cleanup.¹³ Similarly, EPA could look to the tribes or environmental groups to use their respective legal authorities to compel performance of the work. Earlier discussions along these lines, however, had encountered resistance because the local authorities had limited resources, and felt that federal mechanisms were more appropriate.

3.4 Utilize the 1909 Boundary Waters Treaty¹⁴ between the United States and Great Britain, which recognized an obligation not to pollute waters flowing between Canada and the United States, and established an International Joint Commission to resolve disputes over transboundary waters. Issues raised by using the treaty process to address the situation, included how well it would address a dispute involving cleanup of large contaminated areas, rather than point source discharges; concern that the International Joint Commission referral process involved less certain timeframes; and concern that unless both Canada and the U.S. Senate consented to referring the matter to the International Joint Commission for a binding decision, any determination would be in the form of a nonbinding recommendation.

3.5 Request the U.S. Department of Justice file a court action against Teck Cominco, asking the court to order the company to perform the study, issue a declaratory judgment establishing its liability and require payment of all costs. Any action filed by the Department of Justice would be on behalf of the United States, and would require close coordination of all federal agencies' interests at the site. This course of action also would require resolution of the legal question of the U.S. courts' jurisdiction to require Teck Cominco to perform this work under U.S. law.

3.6 Issue a unilateral administrative order to Teck Cominco under Comprehensive Environmental Response, Compensation, and Liability Act, ordering it to perform the study.¹⁵

4 EXTRATERRITORIAL OR DOMESTIC LEGAL AUTHORITIES

Filing an enforcement action against Teck Cominco in U.S. courts would raise the legal question of whether a judicial enforcement action against Teck Cominco would be considered a "domestic" or "extraterritorial" application of U.S. law. EPA would have to argue either that application of U.S. law in this situation is a "domestic" application of Comprehensive Environmental Response, Compensation, and Liability Act or that it is a permissible "extraterritorial"

application under U.S. law. Longstanding U.S. law provides that Congressional legislation, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.¹⁶ However, an important exception to this general principle, holds that U.S. courts may apply U.S. law extraterritorially where the actions of a foreign entity outside the U.S. have significant adverse impacts within the United States and are contrary to the U.S. national public interest.¹⁷

5 UNILATERAL ORDER AND SUBSEQUENT COURT ACTION

5.1 EPA's Unilateral Administrative Order and Diplomatic Objections

Having analyzed its options, on December 11, 2003, EPA issued Teck Cominco a unilateral administrative order, requiring it to conduct a study for the Upper Columbia River Site within United States territory.¹⁸ The Canadian Government responded with a Diplomatic Note to the Department of State on January 8, 2004, objecting to EPA's attempt to enforce its laws against a Canadian company, and encouraging EPA to rescind the order and re-examine Teck Cominco's earlier offer.¹⁹ Teck Cominco responded four days later, notifying EPA of its intent not to comply with the order and resubmitting its previously rejected proposal.²⁰ U.S. officials met with a Canadian Government delegation in February 2004 to discuss the impasse. That meeting was followed a month later with a Canadian Government proposal that the two governments negotiate a Memorandum of Understanding to address the site through a joint scientific process bearing many similarities to Teck Cominco's last proposal. The Canadian Government's proposal launched the beginning of many months of negotiations between the two countries in an attempt to reach a diplomatic resolution concerning the site. With no agreement concluded, however, EPA initiated its own remedial investigation and feasibility study at the site in 2004.

5.2 Tribe and State Obtain Court Enforcement of EPA's Order

While diplomatic discussions between the U.S. and Canada continued alongside separate intermittent negotiations with the company, two members of the Colvilles filed an action in federal district court for the Eastern District of Washington on July 21, 2004, seeking enforcement of EPA's order. Washington State intervened in the lawsuit. Teck Cominco moved to dismiss the suit based upon lack of jurisdiction. On November 8, 2004, the district court denied Teck Cominco's motion to dismiss.²¹ While the court recognized that the case involved applying a domestic law to clean up a site located entirely within the United States, for purposes of its analysis, it went on to assume the case involved an extraterritorial application of Comprehensive Environmental Response, Compensation, and Liability Act to conduct occurring outside of U.S. borders. The court held that though extraterritorial, the application of Comprehensive Environmental Response, Compensation, and Liability Act was appropriate in the case given Comprehensive Environmental Response, Compensation, and Liability Act's

purpose to remedy domestic conditions and the well-established principle that the presumption against extraterritorial application is not applied where failure to do so will result in adverse effects within the United States.

Teck Cominco appealed to the Ninth Circuit Court of Appeals. The appeal was extensively briefed, with multiple amicus briefs being filed on behalf of each side of the jurisdictional issue.²² A unanimous 9th Circuit panel affirmed the district court ruling, holding that the case did not involve an extraterritorial application of Comprehensive Environmental Response, Compensation, and Liability Act. Rather, the court reasoned, it involved a domestic application of Comprehensive Environmental Response, Compensation, and Liability Act to a facility located entirely within the United States and the release, leaching from the slag, also occurred in the U.S.²³ When Teck Cominco's Petition for Rehearing to the Ninth Circuit was denied, it sought United States Supreme Court review.

5.3 Settlement With Company and Supreme Court Review

While the citizens' suit litigation was winding its way through the courts, settlement discussions between the U.S., Canada, Washington State, Tribes and Teck Cominco continued. On June 2, 2006, in the time between the 9th Circuit oral argument and the court's decision, the United States and Teck Cominco reached a settlement agreement under which Teck Cominco agreed to conduct the remedial investigation, consistent with Comprehensive Environmental Response, Compensation, and Liability Act's National Contingency Plan, in return for EPA's withdrawal of its unilateral administrative order.

As the case went before the Supreme Court, EPA had Teck Cominco's commitment to perform the investigation and an appellate ruling that the company was subject to Comprehensive Environmental Response, Compensation, and Liability Act. When the Supreme Court asked the U.S. for its position before ruling on Teck Cominco's petition for review, the U.S. government first argued the case was moot given the settlement with Teck Cominco and withdrawal of the administrative order. Second, it argued the questions presented by the case did not merit Supreme Court review, as there was no conflict among the appellate courts on those issues. Finally, given the interlocutory nature of the appeal, it argued that the lack of factual development in the district court made the case a poor vehicle to develop law on any of the questions raised in the petition.

6 CONCLUSION

The Supreme Court had several choices for ruling on Teck Cominco's petition. It could grant review, and upon review proceed to affirm the 9th Circuit's application of Comprehensive Environmental Response, Compensation, and Liability Act to transboundary pollution or overturn that finding. It could decline review, with or without additional ruling. For example, the court could deny review but vacate the 9th Circuit opinion, in effect erasing that precedent and sending the parties back to the beginning in district court.

On January 7, 2008, the Supreme Court denied the Petition for Certiorari without comment. Therefore, Teck Cominco remains subject to Comprehensive Environmental Response, Compensation, and Liability Act jurisdiction and responsible for evaluating the environmental damage it caused and the feasibility of remedies to address it. Through effective coordination and application of a creative mix of enforcement and diplomatic tools, federal, state and local stakeholders were able to achieve the best results for the environment in and around the Upper Columbia River.

(The views expressed herein are those of the author and do not represent the views of the USEPA)

REFERENCES

¹ 552 U.S. ____, (January 7, 2008).

² November 20, 1991 letter from Robert S. Burd, Director, Intergovernmental Liaison, to Jim McLaren, Regional Waste Manager.

³ December 17, 1991 letter from Rick Crozier, Assistant Regional Waste Manager to Robert Burd, Manager, Water Programs.

⁴ January 10, 1994 letter from E.D. Anthony, Regional Director General, to Gerald A. Emison, Acting Regional Administrator.

⁵ See 42 U.S.C. Sec. 9605(d): "Any person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated with such release or threatened release."

⁶ Under the Comprehensive Environmental Response, Compensation, and Liability Act process, following the initial assessment finding contamination at a site, the RI/FS is the usual next step in the cleanup process. The RI is intended to determine the nature and extent of the problem presented by the release. The FS develops and evaluates options for cleanup of the contamination.

⁷ See 42 U.S.C. Sec. 9604(a): "When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title."

⁸ Although headquartered in Washington, D.C., EPA has 10 regional offices located throughout the United States. The regional office in Seattle has been delegated much of the responsibility for environmental matters arising in Alaska, Washington, Idaho and Oregon.

⁹ In addition to the Bureau of Reclamation, other federal agencies under the Department of Interior with interests impacted by the site included United States Geological Survey, Bureau of Indian Affairs, U.S. Fish & Wildlife Service, National Parks Service and Bureau of Land Management. In addition, the Department of Energy was consulted because of Bonneville Power Administration involvement in dam operations.

¹⁰ The National Contingency Plan, located at 40 CFR Part 300, is the EPA rule promulgated under Comprehensive Environmental Response, Compensation, and Liability Act which lays out in great detail the framework for implementing the Comprehensive Environmental Response, Compensation, and Liability Act statute, including the process by which contaminated sites are investigated and ultimately cleaned up. American courts have given great deference to EPA in challenges to its decisions and actions as long as they were determined to be “consistent with the National Contingency Plan.”

¹¹ Under Comprehensive Environmental Response, Compensation, and Liability Act’s structure, EPA separately negotiates with, or can legally require, responsible parties to perform the RI/FS, or site investigation, and RD/RA, remedial design/remedial action or site cleanup. In this case, if EPA entered into an agreement for a site investigation not consistent with the National Contingency Plan, and later brought an enforcement action to require site cleanup, it might subject itself to a defense that the selected cleanup it was seeking to require was unenforceable on the ground that the process leading to its selection was not consistent with the National Contingency Plan.

¹² Only sites listed on EPA’s National Priorities List can receive remedial action funding from the government.

¹³ In fact, Washington has a cleanup law modeled on Comprehensive Environmental Response, Compensation, and Liability Act, known the Model Toxics Control Act, RCW 70.105D.010 et seq.

¹⁴ Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448.

¹⁵ 42 U.S.C. Sec. 106(a) provides: “In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.”

¹⁶ See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

¹⁷ See *U.S. v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).

¹⁸ December 11, 2003 Unilateral Administrative Order, Docket. No. CERCLA-10-2004-0018.

¹⁹ January 3, 2004 Diplomatic Note from the Ambassador of Canada, Note No. 0001.

²⁰ January 12, 2004 letter from G. Leonard Manuel, Vice President & General Counsel, to Michael Gearheard, Director, Environmental Cleanup Office.

²¹ *Pakootas v. Teck Cominco Metals, Ltd.*, 2004 U.S. Dist. LEXIS 23041 (E.D. Wash. 2004).

²² As it did in the district court litigation, the United States did not participate in the appellate proceedings.

²³ 452 F.3d 1066 (9th Cir. 2006).

Excerpt from the Proceedings of the International Network for Environmental Compliance and Enforcement's (INECE) Eighth International Conference, Linking Concepts to Actions: Successful Strategies for Environmental Compliance and Enforcement, held 5-11 April 2008, in Cape Town, South Africa.

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