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2016 OSB Environmental & Natural Resource Section Annual CLE

CERCLA Update

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AIRBORNE RELEASE / CERCLA ARRANGER LIABILITY

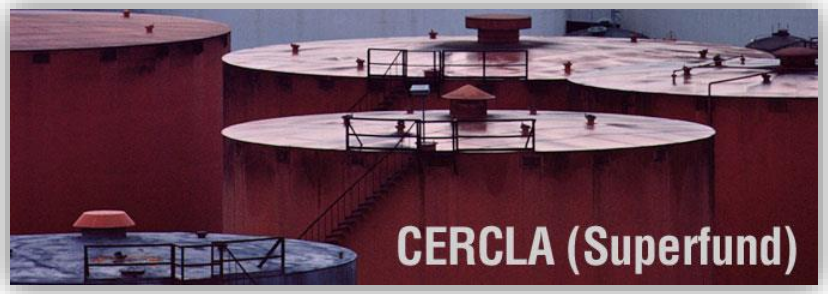
***Pakootas, et al. v. Teck Cominco Metals, Ltd.*, No. 15-35228 (9th Cir. Jul. 27, 2016).**

- **Issue**
  - Can a party that releases contaminants to the air that ultimately settles onto land and water be liable under CERCLA as someone who arranged for the disposal of a hazardous substance?

AIRBORNE RELEASE / CERCLA ARRANGER LIABILITY

***Pakootas, et al. v. Teck Cominco Metals, Ltd.*, No. 15-35228 (9th Cir. Jul. 27, 2016).**

- **Facts/Procedural History**
  - Plaintiffs - Confederated Tribes of the Colville Reservation, in NE Washington. Defendant Teck Cominco Metals Ltd. (“Teck”)
  - Plaintiffs alleged Teck emitted hazardous substances into the air that were ultimately deposited in the Upper Columbia River and lands within their Reservation/Arranger liability
- **Ruling**
  - Aerial emissions are not a “disposal” under CERCLA.



***Pakootas, et al. v. Teck Cominco Metals, Ltd.*, No. 15-35228 (9th Cir. Jul. 27, 2016).**

- **Rationale**
  - Plaintiff's theory was Teck allowed hazardous substances to be deposited by wind, as opposed to a direct deposit.
  - Because of the intervention of this natural source, the Court held that it was not a disposal.
  - "Deposit", a term included in the definition of "disposal", means "putting down" or "placement," not "the gradual spread of contaminants without human intervention."

***Pakootas, et al. v. Teck Cominco Metals, Ltd.*, No. 15-35228 (9th Cir. Jul. 27, 2016).**

- **Significance**
  - Departure from past practice by EPA in dealing with airborne emissions of hazardous substances.
  - Supports the notion that passive migration of hazardous substances or hazardous wastes does not constitute disposal under CERCLA or RCRA.

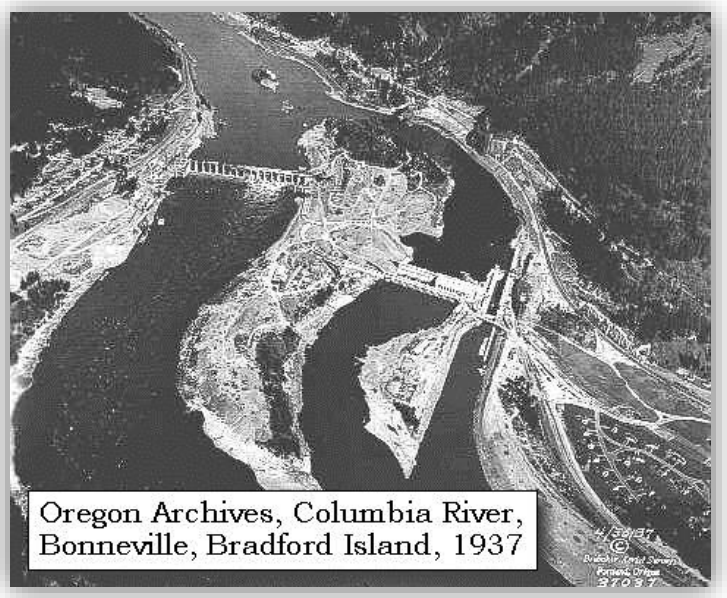
NATIVE AMERICAN TRIBE RECOVERY OF OVERSIGHT COSTS UNDER CERCLA

***Confederated Tribes and Bands of the Yakama Nation v. United States*, No. 3:14-CV-01963, 2016 (D. Or.)**

- **Refresher**
  - PRPs are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan". 42 U.S.C. § 9607(a)(4)(A)
- **Issue**
  - Can a Native American tribe recover costs of overseeing a remedial action (oversight costs)?

***Confederated Tribes and Bands of the Yakama Nation v. United States*, No. 3:14-CV-01963, 2016 (D. Or.)**

- **Facts/History**
  - Bradford Island Superfund Site in Oregon, owned and operated by federal PRPs.
  - The Bradford Island area is a historic fishing site for Yakama tribal members. And the Yakama Nation's largest archeological collection comes from the island area.



NATIVE AMERICAN TRIBE RECOVERY OF OVERSIGHT COSTS UNDER CERCLA

***Confederated Tribes and Bands of the Yakama Nation v. United States*, No. 3:14-CV-01963, 2016 (D. Or.)**

- **1997** - The Corps of Engineers began cleanup efforts.
- **2014** - Yakama Nation sued the government for cost recovery; sought to recover approximately $100,000 in response costs for “oversight of the response actions taken by the [government].”
  - The Corps of Engineers argued the tribe trying to recover "oversight" costs when it was really just an interested party with no oversight authority.
  - Magistrate Judge rejected this argument: “Yakama Nation was not required to have express authority to engage in oversight activities in relation to the Bradford Island cleanup.”
  - District Court, adopted the magistrate’s conclusion that CERCLA “does not contain an authority requirement.”

NATIVE AMERICAN TRIBE RECOVERY OF OVERSIGHT COSTS UNDER CERCLA

***Confederated Tribes and Bands of the Yakama Nation v. United States*, No. 3:14-CV-01963, 2016 (D. Or.)**

- **Ruling**
  - Yes, Native American tribe can recover costs of overseeing a remedial action
- **Significance**
  - Puts Indian tribes on equal sovereign footing with the federal government and states when it comes to recovery of cleanup oversight costs from PRPs.
  - Increases the financial feasibility of tribes participating in cleanups.

Confederated Tribes and Bands of the Yakama Nation v. United States, No. 3:14-CV-01963, 2016 (D. Or.)

- **One other point**
  - Magistrate Judge had ruled the Army Corps responsible for response costs associated with the dumping of hazardous materials, but did not grant declaratory judgment for future response costs.

    District Court disagreed, ruling that when a plaintiff has successfully established liability for response costs, plaintiff is also entitled to a declaratory judgment that is binding on future cost-recovery actions.

COST RECOVERY VS. CONTRIBUTION

***Whittaker Corp. v. United States*, No. 14-55385, 2016 WL 3244838, ---F3d.---**
(9th Cir. June 13, 2016).

- **Refresher**
  - Cost recovery / Section 107(a)
    - Available to PRPs who voluntarily incur cleanup costs
    - Statute of limitations for a remedial action – six years after initiation of physical on-site remediation.
  - Contribution / Section 113(f):
    - Available to PRPs who have been sued in a Section 107(a) cost recovery action or after a PRP has settled its CERCLA liability with the government and have paid more than their fair share
    - Statute of limitations – three years after: a) date of judgment in any cost recovery action or b) date of administrative order or entry of judicially approved settlement

Whittaker Corp. v. United States, No. 14-55385, 2016 WL 3244838, ---F3d.--- (9th Cir. June 13, 2016).

- **Refresher (cont.)**
  - *Atlantic Research* – costs incurred voluntarily only available under cost recovery action. Costs of reimbursement to another party pursuant to a judgment or settlement only recoverable under a contribution action.
  - Since *Atlantic Research* - a party who may bring a contribution action must bring a contribution action, even if it could also bring a cost recovery action.

Whittaker Corp. v. United States, No. 14-55385, 2016 WL 3244838, ---F3d.--- (9th Cir. June 13, 2016).

- **Facts**
  - **Whittaker**: a defense contractor that manufactures and tests munitions for the United States military.
  - **1967 – 1987**: Whittaker owned and operated property in Santa Clarita, CA (the Bermite Site). 90% of work was under contracts with the U.S. military.

Whittaker Corp. v. United States, No. 14-55385, 2016 WL 3244838, ---F3d.--- (9th Cir. June 13, 2016).

- **Facts**
  - **2000**: Whittaker was sued by the Castaic Lake Water Agency and other water providers under CERCLA.
  - **2003**: District Court granted summary judgment to plaintiffs. Whittaker liable for plaintiffs' costs to remove perchlorate contamination from the water wells and the cost to purchase replacement water.

Whittaker Corp. v. United States, No. 14-55385, 2016 WL 3244838, ---F3d.--- (9th Cir. June 13, 2016).

- **Facts (cont.)**
  - **2013**: Whittaker initiated a CERCLA cost recovery against the United States seeking to recover Whittaker's costs to investigate and clean up the Bermite Site.
    - United States moved to dismiss: argued: a) Whittaker could only bring a contribution claim and b) statute of limitations on contribution claim had passed.
    - District Court agreed and dismissed Whittaker's case.

Whittaker Corp. v. United States, No. 14-55385, 2016 WL 3244838, ---F3d.--- (9th Cir. June 13, 2016).

- **Issue 1**
  - Where a party is sued in a cost recovery action, must it bring a contribution claim for remediation costs related to the same site but which were not subject of the cost recovery action in which it was a defendant?
- **Ruling**
  - No. A party is limited to a contribution action only when seeking to recover those costs for which its liability is established or pending in a cost recovery action.

Whittaker Corp. v. United States, No. 14-55385, 2016 WL 3244838, ---F3d.--- (9th Cir. June 13, 2016).

- **Issue 2**
  - Does a party's right to contribution for some of its expenses trigger the statute of limitations for other expenses at the same site?
- **Ruling**
  - No. CERCLA's statute of limitations for contribution claims bases the timeliness of the claim on the date of judgment (or settlement with the government) in any action for recovery of the same costs sought in the contribution claim.
- **Significance**
  - Don't need to promptly bring a contribution claim for remedial action costs incurred at a site that are separate from costs paid in a cost recovery action or settlement.

CERCLA SECTION 108(b) FINANCIAL RESPONSIBILITY (HARDROCK MINING)

- **Background**
  - When Congress adopted CERCLA in **1980**, it included section 108, requires EPA to develop financial responsibility rules:
    - Facilities to establish and maintain evidence of financial responsibility consistent with the risk associated with hazardous substances produced at, transported to/from, treated at, stored on, or disposed of at the facility.
  - **2009** - Sierra Club and other NGOs filed suit to require EPA to promulgate the CERCLA section 108(b) financial responsibility rules.
  - EPA issued a "Priority Notice" on **July 28, 2009**, identifying classes of facilities within the hardrock mining industry as those for which it would first develop requirements.

CERCLA SECTION 108(b) FINANCIAL RESPONSIBILITY (HARDROCK MINING)

- **Background (cont.)**
  - On January 29, 2016, the U.S. Court of Appeals for the District of Columbia Circuit issued an order establishing a schedule for EPA proceedings under CERCLA 108(b).
    - Requires EPA to sign a notice of proposed rulemaking for the hardrock mining industry by **December 1, 2016**, and to take **final action by December 1, 2017**.
    - Requires EPA to make a determination on whether the Agency will issue a notice of proposed rulemaking for the (a) chemical manufacturing industry; (b) petroleum and coal products manufacturing industry; and (c) electric power generation, transmission, and distribution industry by December 1, 2016.

INFORMATION FROM EPA WEBINAR RE: PENDING PROPOSED RULE

- **Scope**
  - Section 108(b) rules complement, but do not change or substitute for existing Superfund cost recovery and enforcement procedures.
  - EPA is considering an approach requiring financial responsibility instruments to cover all Section 107 liabilities – response costs, natural resource damages, and covered health assessment costs.

INFORMATION FROM EPA WEBINAR RE: PENDING PROPOSED RULE

- **Instruments**
  - EPA anticipates consideration of at least the following financial responsibility instruments:
    - Letter of Credit
    - Insurance
    - Trust Fund
    - Surety bond
    - Credit rating-based financial test/ corporate guarantee

INFORMATION FROM EPA WEBINAR RE: PENDING PROPOSED RULE

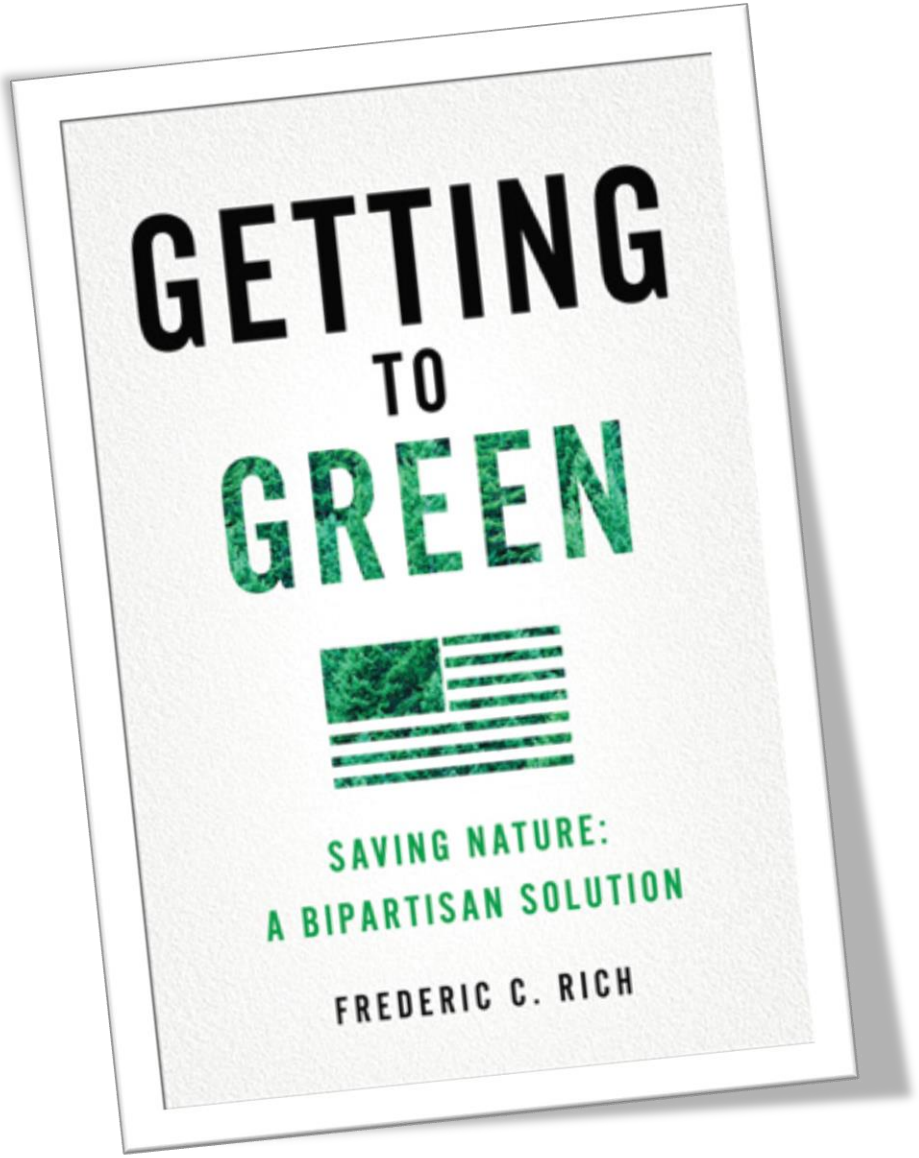
- **Amount**
  - EPA is developing a formula that would identify the amount of financial responsibility required based on the relative risk.
  - Facility-specific factors would be used to generate a baseline level of financial responsibility
  - The baseline could then be reduced by demonstrating current controls at the facility are in place.
  - The Agency is considering a fixed amount of financial responsibility for health assessment costs and a fixed percent for natural resource damages that would be required at all facilities.

INFORMATION FROM EPA WEBINAR RE: PENDING PROPOSED RULE

- **Cost of Compliance**
  - EPA provided examples in the webinar re: possible annual costs of the financial assurance instruments, ranging from $1 million to $19 million
- **Recovering Funds**
  - EPA would use existing Superfund enforcement processes first (settlements, orders, and cost recovery actions against potentially responsible parties) to effect clean up.
  - Other parties could also make claims against the owner or operator, payable from the instruments.
  - Under CERCLA Section 108(c), parties (including EPA) could also bring a “direct action” claim against the instrument provider.

INFORMATION FROM EPA WEBINAR RE: PENDING PROPOSED RULE

- **Concerns Expressed by Industry**
  - Duplicative of existing bonding/financial assurance requirements.
  - Financial assurance instruments may not be available at an affordable cost
  - Cost will result in job losses, mine closures, and adverse community impacts
- **Commenting on the Proposed Rule**
  - The “CERCLA 108(b) Financial Responsibility Requirements for Facilities in the Hard Rock Mining Industry; Proposed Rule”, is due to be published by December 1, 2016 in the *Federal Register* and available for public review.
  - The proposed rule will provide instruction on how to comment and the duration of the public comment period.


GETTING
TO
GREEN
SAVING NATURE:
A BIPARTISAN SOLUTION
FREDERIC C. RICH

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Questions?

Thank you for your time!

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