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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 TECK METALS, LTD.,

9 Plaintiff,

10 vs.
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12 CERTAIN UNDERWRITERS AT
13 LLOYD'S, LONDON AND
14 CERTAIN LONDON MARKET
INSURANCE COMPANIES,

15 Defendants.
16

) No. CV-05-411-LRS

) **ORDER RE MOTIONS FOR**
) **SUMMARY JUDGMENT RE**
) **ENVIRONMENTAL RESPONSE**
) **COSTS AS "DAMAGES"**

17 **BEFORE THE COURT** are Plaintiff's and Defendants' Cross-Motions For
18 Summary Judgment Re Environmental Response Costs As "Damages" (Ct. Rec.
19 374 and 419). These motions were heard with oral argument on July 22. Mark J.
20 Plumer, Esq., argued for the Plaintiff. Barry N. Mesher, Esq., argued for
21 Defendants.
22

23 **I. BACKGROUND**

24 The parties agree there is no conflict between Washington and British
25 Columbia (B.C.) law on this issue and therefore, Washington law applies. In
26 Washington, as a general rule, Comprehensive Environmental Response,
27

28 **ORDER RE SUMMARY JUDGMENT MOTIONS**
RE ENVIRONMENTAL RESPONSE COSTS AS "DAMAGES"- 1

1 Compensation and Liability Act (CERCLA)¹ response costs constitute “damages”
2 under liability insurance policies. *Boeing Co. v. Aetna Cas. And Sur. Co.*, 113
3 Wn.2d 869, 887-88, 784 P.2d 507(1990); *Weyerhaeuser Co. v. Aetna Cas. and Sur.*
4 *Co.*, 123 Wn.2d 891, 900-01, 874 P.2d 142 (1994). Teck Metals, Ltd. (Teck)
5 asserts the same holds true in the captioned matter, and the court should rule as a
6 matter of law that the response costs Teck has incurred pursuant to its Settlement
7 Agreement with the Environmental Protection Agency (EPA) fall within the
8 meaning of the term “damages” contained in the London Market Insurance
9 policies. London Market Insurers (LMI) assert, however, that considering the
10 particular factual circumstances here, in conjunction with the particular language
11 contained in the policies at issue here, the response costs for which Teck seeks
12 reimbursement are not compensable as “damages.”

13 The London Market Insurance policies provide:

14 The Company hereby agrees, subject to the limitations, terms
15 and conditions hereinafter mentioned, to **indemnify** the Assured
16 for all sums which the Assured shall be **obligated** to pay by **reason**
17 **of the liability**

18 (a) imposed upon the Assured by law, or
19 (b) **assumed under contract or agreement by the Named Assured**

20
21 for **damages**, direct or consequential[,] and **expenses**, all as more
22 **fully defined by the term “ultimate net loss”** on account of:-

23 (i) Personal injuries, including death at any time resulting therefrom,

24 (ii) Property Damage,

25 (iii) Advertising Liability,

26 caused by or arising out of each occurrence happening anywhere in
27 the world.

28 (Emphasis added).

¹ 42 U.S.C. §9601 *et. seq.*

1 “Ultimate Net Loss” is defined as follows:

2 The term “Ultimate Net Loss” shall mean the total sum which the
3 Assured, or any company as his insurer, or both, become obligated
4 to pay by reason of personal injury, **property damage** or advertising
5 liability **claims, either through adjudication or compromise**, and
6 shall also include . . . expenses for doctors, lawyers, nurses and
7 investigators and other persons, and for litigation, settlement,
8 adjustment and investigation of **claims and suits** which are paid
9 as a consequence of any occurrence covered hereunder

10 The Company shall not be liable for expenses as aforesaid when
11 such expenses are included in other valid and collectible insurance.

12 (Emphasis added).

13 In June 2006, Teck (aka “Teck Canada,” formerly known as TCML (Teck
14 Cominco Metals Limited)) reached a Settlement Agreement with the EPA
15 regarding Upper Columbia River (UCR) Site investigation activities in such a
16 manner that Teck preserved the argument that it was not subject to jurisdiction
17 under CERCLA. Teck agreed that its United States subsidiary, Teck American,
18 Inc., (formerly Teck Cominco American, Inc.), would perform a RI/FS (Remedial
19 Investigation/Feasibility Study) at the UCR Site “consistent” with CERCLA
20 requirements, specifically consistent with the National Contingency Plan, 40
21 C.F.R. Part 300. In exchange, the EPA agreed to withdraw its UAO (Unilateral
22 Administrative Order) against Teck. The Settlement Agreement calls for Teck
23 American to carry out the investigation work, but Teck, via a separate “Services
24 Agreement” with Teck American, is obligated to bear all of the costs of complying
25 with the Settlement Agreement. Furthermore, pursuant to the Settlement
26 Agreement, Teck is required to perform all of Teck American’s obligations in the
27 event that Teck becomes insolvent or is otherwise unable to perform under the
28 Settlement Agreement.

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RE ENVIRONMENTAL RESPONSE COSTS AS “DAMAGES”- 3

1 **II. DISCUSSION**

2 **A. Pursuant to the Settlement Agreement with EPA, is Teck “obligated**
3 **by reason of liability” to pay “damages” for “property damage?”**

4 LMI assert that per the terms of the Settlement Agreement, Teck’s liability
5 for RI/FS costs is wholly contingent and depends on whether Teck American
6 “files for bankruptcy protection, is declared insolvent, or otherwise is unable to
7 fulfill its obligations under the Settlement Agreement.” According to LMI, Teck
8 American is the only entity “legally obligated” to pay the RI/FS costs as required
9 by the policies. LMI contend that any payment by Teck to Teck American is
10 voluntary and falls outside the scope of the policies.

11 At the time Teck entered into the Settlement Agreement with EPA,
12 it was still awaiting the outcome of its Ninth Circuit appeal from this court’s
13 decision which found that it was appropriate to apply CERCLA extraterritorially
14 to Teck’s smelting operation in Trail, B.C.. When Teck entered into the
15 Settlement Agreement, it did not know what the outcome of the appeal would be.
16 Understandably, Teck was only willing to enter into an arrangement with EPA that
17 would not be construed as a concession to what was then understood to be an
18 extraterritorial application of CERCLA to Teck’s Trail operation. Of course, the
19 Ninth Circuit ultimately ruled that Teck was subject to liability, not because of its
20 activity in B.C., but because of the releases occurring in the U.S. at the UCR Site.
21 Absent the Settlement Agreement, the Ninth Circuit’s decision would have paved
22 the way for EPA to enforce the UAO against Teck and compel it to perform and
23 fund an RI/FS at the UCR Site.

24 LMI take a very narrow, and ultimately unjustified, view of what constitutes
25 an obligation to pay damages by “**reason of the liability . . . assumed under**
26 **contract or agreement by the Named Assured.**” While Teck American is

1 clearly the primary obligor under the EPA Settlement Agreement, Teck is also a
2 party to the agreement as the secondary obligor (guarantor) and, by virtue of its
3 separate agreement with Teck American, is the entity ultimately paying the costs
4 of the RI/FS. Teck's guaranty represents a legal obligation by reason of liability
5 assumed under the EPA Settlement Agreement. The Settlement Agreement does
6 not, as asserted by LMI, absolve Teck of "any legal liability for the RI/FS."

7 LMI contend insurance coverage for the RI/FS costs is "potentially
8 available" from Teck American's insurers. One must ask if it would be realistic
9 for Teck American to expect to obtain compensation from its insurers for
10 assuming a liability that is unrelated to any conduct on its part. Teck American is
11 not responsible for any of the property damage alleged to have occurred at the
12 UCR Site. Under the circumstances, it is reasonable for Teck to seek coverage
13 from its insurers considering it is Teck's activity which is alleged to have caused
14 the damage at the UCR Site and which gives rise to potential CERCLA liability.
15 Furthermore, it is ultimately Teck which is paying the RI/FS costs.

16 There is no basis for application of judicial estoppel against Teck. This
17 court never made a finding in any of its orders entered in *Pakootas v. Teck*
18 *Cominco Metals Ltd.*, CV-04-256-LRS, that Teck was not legally liable for RI/FS
19 costs. Teck denied liability under CERCLA in the Settlement Agreement with
20 EPA but again, this was understandable considering the posture of the case.
21 Teck's actual liability under CERCLA has yet to be adjudicated. All the Ninth
22 Circuit did was affirm this court's decision that the plaintiffs in *Pakootas* have
23 stated claims upon which relief can be granted. Actual adjudication of Teck's
24 liability to the *Pakootas* plaintiffs is not necessary for there to be insurance
25 coverage, and the language of the policies recognizes as much.

26 The EPA Settlement Agreement represents a settlement of a "property

1 damage **claim**” through “adjudication or compromise.” The Settlement
2 Agreement is an attempt to minimize Teck’s exposure to CERCLA liability and in
3 that regard, it is beneficial to LMI. Teck’s efforts to defend itself cannot be used
4 by LMI against Teck in seeking to deny coverage. Although the Settlement
5 Agreement may have allowed Teck to avoid conceding jurisdiction under
6 CERCLA and to avoid assuming liability under CERCLA, it did not, as asserted
7 by LMI, allow Teck to avoid assuming any legal liability to perform or fund the
8 RI/FS.

9 The fact this court awarded attorneys’ fees to the *Pakootas* plaintiffs based
10 on a conclusion they were “prevailing parties” against Teck because of the EPA
11 Settlement Agreement, and in spite of the UAO having been withdrawn, shows
12 this court considered Teck to be liable for RI/FS costs under the agreement. In
13 concluding the *Pakootas* plaintiffs were “prevailing parties,” this court found the
14 EPA Settlement Agreement was the equivalent of a judicial judgment and that it
15 was judicially enforceable against Teck. (Ct. Rec. 295 and 359 in CV-04-256-
16 LRS).

17
18 **B. Is the RI/FS being performed under CERCLA such that the RI/FS**
19 **costs are covered?**

20 Based on the *Boeing* and *Weyerhaeuser* cases, LMI contend the RI/FS costs
21 are not covered “damages” because they were not incurred “under CERCLA.”

22 It is true the RI/FS is not being conducted pursuant to an order from the
23 EPA. It is not being conducted pursuant to the UAO previously issued by EPA. It
24 is nonetheless being carried out consistent with CERCLA’s National Contingency
25 Plan and therefore, the costs of the RI/FS are being paid as the result of action
26 taken “under CERCLA.” The RI/FS is not being performed wholly outside of

1 CERCLA authority.² Moreover, the EPA Settlement Agreement represents
2 compromise of a CERCLA liability property damage **claim**. The sums which
3 Teck has obligated itself to pay in settlement of that claim constitute “damages”
4 pursuant to the language of the policies. The policies require that the response
5 costs consist of sums which Teck “shall be **obligated** to pay by **reason of . . .**
6 **liability assumed under contract or agreement by [Teck] . . .** for
7 **damages . . .** on account of . . . Property Damage . . . caused by or arising out of
8 each occurrence happening anywhere in the world.” (Emphasis added). They are
9 sums which Teck has “become obligated to pay by reason of . . . **property**
10 **damage . . . claims . . . either through adjudication or compromise . . .**”
11 (Emphasis added).³

12 The *Boeing* and *Weyerhaeuser* cases do not dictate otherwise. In the *Boeing*
13 case, the policyholders were sued by the EPA in federal district court. Eventually,
14 the court entered a Consent Decree between EPA and the policyholders for
15 cleanup of the site at issue. The policyholders then sued their insurers for
16 indemnification of their response costs. In answer to a certified question from the
17 Western District of Washington, the Washington Supreme Court concluded that
18 response costs in response to actual releases of hazardous wastes were “damages”
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20 ² In its June 25, 2009 order in *Pakootas*, this court noted it was undisputed
21 that EPA’s UAO and the EPA Settlement Agreement require essentially the same
22 basic action, that being the completion of an RI/FS in conformity with EPA’s
23 Statement of Work (SOW). (Ct. Rec. 359 at p. 4).

24 ³ The fact that EPA is not a plaintiff in *Pakootas* is irrelevant. Teck
25 assumed liability for the RI/FS costs to effectively settle the CERCLA claim
26 asserted by the *Pakootas* plaintiffs seeking to enforce EPA’S UAO. The
27 settlement rendered moot the claims for declaratory and injunctive relief asserted
28 by the *Pakootas* plaintiffs regarding the UAO.

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1 within the meaning of the CGL (Comprehensive General Liability) policies at
2 issue. 113 Wn.2d at 888. Since the response costs were paid pursuant to a
3 Consent Decree, they were clearly paid as a result of liability “imposed by law.”
4 The case at bar obviously does not involve a Consent Decree. It involves a
5 Settlement Agreement.

6 *Weyerhauser* involved neither a Consent Decree or a formal Settlement
7 Agreement. *Weyerhauser* voluntarily engaged in the cleanup of pollution damages
8 in cooperation with governmental environmental agencies. There was never an
9 overt threat of formal legal action from these agencies. The Washington Supreme
10 Court held the response costs incurred by *Weyerhauser* were covered under the
11 CGL policies because they were sums which it was obligated to pay by reason of
12 the liability “imposed by law” for damages on account of property damage. The
13 court concluded that “[s]uch policies can reasonably be read to provide coverage
14 for actions to clean up pollution damages required under environmental statutes
15 which impose strict liability for such cleanup.” 123 Wn.2d at 896-97.⁴ In the case
16 at bar, the operative provision is not the obligation to pay sums by reason of the
17

18 ⁴ According to the Washington Supreme Court:
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20 The insurance contracts provide coverage when the policyholder
21 becomes obligated to pay by reason of the liability “imposed by law.”
22 The policy language does not specify whether this liability must be
23 imposed by formal legal action (or threat of such) or by a statute
24 which imposes liability. In the case where there has been property
25 damage and where a policyholder is liable pursuant to an
environmental statute, a reasonable reading of the policy language is
that coverage is available, if it is not otherwise excluded.

26 *Weyerhauser*, 123 Wn.2d at 913.

1 liability “imposed by law” for damages on account of property damage, but rather
2 the obligation to pay sums by reason of the liability “ **assumed under contract or**
3 **agreement.**” (Emphasis added).

4 Weyerhaeuser had not been sued, had not been threatened with suit, and was
5 never the subject of any type of administrative order from a government
6 environmental agency. The court concluded that did not matter, relying on a
7 Maryland case, *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625
8 A.2d 1021 (1993), wherein the company (Bausch & Lomb) had worked in a
9 cooperative arrangement with the state in order to avoid being subjected to an
10 administrative order to perform the work. A similar situation exists here in that
11 Teck entered into a Settlement Agreement with EPA in order to avoid being
12 subjected to the UAO already issued. On the other hand, while Teck had not been
13 immediately threatened with legal action by EPA, it was, at the time of its
14 settlement with EPA, facing legal action by the *Pakootas* plaintiffs who were
15 seeking to judicially enforce the UAO. Unlike Weyerhaeuser, Teck was facing, and
16 continues to face, legal action. This legal action prompted Teck to reach a
17 settlement with EPA.

18 19 **C. Are the RI/FS costs “on account” of “property damage?”**

20 LMI assert that before RI/FS costs may be covered under the policies, it
21 must first be determined whether there has been “property damage” caused by an
22 “occurrence” as those terms are defined in the policies.⁵ According to LMI, the
23

24 ⁵ The policies define “Property Damage” as follows:

25 The term “Property Damage”, wherever used herein shall
26 mean loss or direct damage to or destruction of tangible property

27 **ORDER RE SUMMARY JUDGMENT MOTIONS**

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1 “property damage” issue will be decided in *Pakootas* and the “occurrence” issue-
2 whether Teck did not expect and intend contamination at the UCR Site- will be
3 decided at a later date in the captioned litigation.

4 LMI maintain that *Boeing* and *Weyerhaeuser* require proof of actual property
5 damage before there can be recovery of environmental response costs. According
6 to LMI, Teck cannot meet this burden at this time because there has been no
7 judicial determination in *Pakootas* of property damage, only allegations. While
8 allegations may be adequate to trigger a duty to defend, LMI say they are not
9 enough to trigger a duty to indemnify. This court disagrees.

10 Neither *Boeing* or *Weyerhaeuser* require proof of actual property damage as a
11 condition precedent to insurance coverage for RI/FS costs which the insured has
12 agreed to pay as part of a settlement. The language in the LMI policies sets forth
13 no such requirement. Instead, “damages,” as defined by the term “ultimate net
14 loss,” is “[t]he total sum which the Assured, or any company as his insurer, or
15 both, become obligated to pay by reason of . . . **property damage . . . claims,**
16 **either through adjudication or compromise . . .**” (Emphasis added). A settled
17 **claim** of property damage is sufficient. “The plain text of the policies . . . belies
18 [the insurer’s] insistence on litigated proof of injury.” *Uniroyal, Inc. v. Home Ins.*
19 *Co.*, 707 F.Supp. 1368, 1378 (E.D. N.Y. 1988).

20 *Woo v. Fireman’s Fund Insurance Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007),
21 relied upon by LMI, did not involve a settlement. As stated in *Woo*, “the duty to
22 indemnify ‘hinges on the insured’s *actual liability* to the claimant and actual
23 *coverage* under the policy.” *Id.* at 53 (emphasis in text). Here, Teck has assumed,
24 through a settlement agreement with EPA, liability for RI/FS costs by reason of

25 _____
26 (other than property owned by the Named Assured).

1 the property damage **claim** asserted by the EPA and/or the *Pakootas* plaintiffs.
2 Teck is actually liable to the EPA and hence, the RI/FS costs constitute “damages”
3 under the policies.

4 “Property Damage” must be “caused by or aris[e] out of each occurrence
5 happening anywhere in the world.” Teck acknowledges that whether there has
6 been an “occurrence” is a question for a later time and is not something it seeks to
7 resolve now on summary judgment. Whether there was a qualifying “occurrence”
8 depends on whether there was a “happening” which “unexpectedly and
9 unintentionally” resulted in property damage.⁶ The question for future resolution
10 is whether, assuming there was property damage, Teck did not expect or intend the
11 same to occur from any activity for which it is responsible.

12
13 **D. Are the RI/FS costs “expenses” (defense costs) as opposed to**
14 **“damages?”**

15 As noted above:

16 The term “Ultimate Net Loss” shall mean the total sum which the
17 Assured, or any company as his insurer, or both, become obligated
18 to pay by reason of personal injury, property damage or advertising
19 liability claims, either through adjudication or compromise, **and**
20 **shall also include . . . expenses for doctors, lawyers, nurses and**
investigators and other persons, and for litigation, settlement,
adjustment and investigation of claims and suits which are paid

21 ⁶ According to the policies:

22 The term “Occurrence” wherever used herein shall mean an accident or a
23 happening or an event or a continuous or repeated exposure to conditions
24 which unexpectedly and unintentionally results in personal injury,
25 property damage, or advertising liability during the policy period. All
26 such exposure to substantially the same general conditions existing or
emanating from one premises location shall be deemed one occurrence.

1 **as a consequence of any occurrence covered hereunder**

2 The Company shall not be liable for **expenses** as aforesaid when
3 such **expenses** are included in other valid and collectible insurance.

4 (Emphasis added).

5 As discussed previously, RI/FS costs represent “damages” as opposed to
6 “expenses.” The payment of RI/FS costs represents settlement of a claim in itself,
7 that being a CERCLA liability property damage claim. The RI/FS costs are not
8 “expenses . . . for settlement” of a claim. They are not expenses incurred in the
9 process of settling a claim.

10 Nothing in Washington Administrative Code (WAC) 284-30-930(3)
11 purports to classify payment of RI/FS costs pursuant to a settlement with EPA as
12 defense costs, including investigation costs incurred in defense of a claim. When
13 a particular claim is settled, it is no longer being defended. The RI/FS costs being
14 paid pursuant to the Settlement Agreement with EPA are not being paid in defense
15 of a claim because the claim has been settled. The RI/FS costs do not represent
16 investigation costs incurred in defense of a claim. They are costs to be paid as
17 settlement of a claim. At that stage, it is no longer the investigation of a claim, but
18 the settlement of a claim. Consequently, there is no inconsistency in Teck having
19 previously alleged that its primary insurer (Lombard) was “obligated, at its own
20 expense, to defend the Environmental Claims, including the obligation to pay
21 investigation costs and legal expenses incurred by TCML in connection with the
22 Environmental Claims (the ‘duty to defend’).” To the extent Teck obtained
23 defense costs from Lombard, including investigative costs, prior to its Settlement
24 Agreement with EPA, that appears to have been proper and any such costs appear
25 distinct from the RI/FS costs which Teck has now obligated itself to pay as part of
26 the Settlement Agreement. The same result holds true whether the insured is a

1 Washington resident (to which WAC 284-30 specifically applies), or a non-
2 Washington resident like Teck.

3 Because the payment of RI/FS costs represents “damages” as opposed to
4 “expenses,” it is not necessary to consider whether “expenses are included in other
5 valid and collectible insurance.”

7 **III. CONCLUSION**

8 The court finds as a matter of law that the response costs Teck has incurred
9 pursuant to its Settlement Agreement with the EPA fall within the meaning of
10 “damages” contained in the LMI policies. Teck acknowledges it is not requesting
11 a ruling that LMI have a present duty to indemnify Teck, and the court is not
12 ruling as such.

13 Teck suggests the court’s ruling will dispose of several of the affirmative
14 defenses asserted by LMI and asks that those defenses be dismissed. While that
15 may be true as to some of the defenses, or may ultimately turn out to be true with
16 regard to other defenses, the court declines to formally dismiss particular defenses
17 at this time. Not dismissing certain affirmative defenses should not detract from
18 the court’s ruling and appears unnecessary.

19 Plaintiff’s Motion For Summary Judgment On Environmental Response
20 Costs As “Damages” (Ct. Rec. 374) is **GRANTED** and Defendants’ Motion For
21 Summary Judgment On Environmental Response Costs As “Damages” (Ct. Rec.
22 419) is **DENIED**. A Fed. R. Civ. P. 56(f) continuance is not necessary as the
23 court’s ruling is based solely on the language of the policies, certain documents
24 related to the RI/FS Settlement Agreement, prior court orders in *Pakootas*, and the
25 applicable law. Defendants’ request for a Rule 56(f) continuance is **DENIED** as
26 moot.

27 **ORDER RE SUMMARY JUDGMENT MOTIONS**

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4 **IT IS SO ORDERED.** The District Court Executive is directed to enter
5 this order and to provide copies to counsel of record.

6 **DATED** this 9th day of August, 2010.

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s/ Lonny R. Suko

LONNY R. SUKO
Chief United States District Court Judge

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