United States District Court,
E.D. Washington.
Joseph A. **PAKOOTAS,** an individual and enrolled member of the Confederated Tribes of the Colville Reservation and Donald R. Michel, an individual and and enrolled member of the Confederated Tribes of the Colville Reservation,
Plaintiffs,
v.
TECK COMINCO METALS, LTD., a Canadian corporation, Defendant.
**No. CV-04-256-AAM.**

Nov. 8, 2004.

Beth M. Prieve, Constance Susan Manos Martin, Paul J. Dayton, Richard Allan Dubey, Short Cressman & Burgess PLLC, Seattle, WA, for Plaintiffs.

Eugene I. Annis, Lukins & Annis PS, Spokane, WA, Gerald F. George, Campbell George & Strong LLP, Oakland, CA, Thomas A. Campbell, Campbell George & Strong LLP, Houston, TX, for Defendants.

Kristie Carevich, Attorney General of Washington, Olympia, WA, for Plaintiffs and Intervenor.

ORDER DENYING MOTION TO DISMISS

MCDONALD, Senior J.

BEFORE THE COURT is the defendant's Motion To Dismiss (Ct.Rec.6). The motion was heard with oral argument on November 4, 2004. Paul J. Dayton, Esq., argued on behalf of plaintiffs Pakootas and Michel. Steven J. Thiele, Esq., argued on behalf of intervenor-plaintiff, State of Washington. Gerald F. George, Esq., and Thomas A. Campbell, Esq., argued on behalf of defendant.

## I. BACKGROUND

Plaintiffs Joseph A. Pakootas and Donald R. Michel are enrolled members of the Confederated Tribes of the Colville Reservation who, under the "citizen suit" provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9601 et seq., have commenced this action to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility Study (UAO) issued to defendant Teck Cominco Metals, Ltd., (TCM), on December 11, 2003 by the United States Environmental Protection Agency (EPA). The State of Washington is also a plaintiff, having intervened in the litigation as a matter of right under CERCLA.

The defendant TCM is a Canadian corporation which owns and operates a smelter in Trail, British Columbia, located approximately 10 Columbia River miles north of the United States-Canada border. The UAO directs TCM to conduct a Remedial Investigation/Feasibility Study (RI/FS) to investigate and determine the full nature of contamination at the "Upper Columbia River Site" due to materials disposed of into the Columbia River from defendant's smelter. The "Upper Columbia

River Site" includes "all areas within the United States where hazardous substances from [defendant's] operations have migrated or materials containing hazardous substances have come to be placed." (UAO at p. 7, Ex. A to Defendant's Memorandum).

Defendant moves to dismiss this action, contending the court does not have subject matter jurisdiction (Fed.R.Civ.P. 12(b)(1)), does not have personal jurisdiction (Fed.R.Civ.P. 12(b)(2)), and that plaintiffs' complaints fail to state claims upon which relief can be granted (Fed.R.Civ.P. 12(b)(6)). Specifically, defendant contends the provisions of CERCLA cannot be applied to a Canadian corporation for actions taken by that corporation which occur within Canada.

## II. DISCUSSION

### *A. Subject Matter Jurisdiction*

This case arises under CERCLA and therefore, there is a federal question which confers subject matter jurisdiction on this court. See 42 U.S.C. § 9613(b) and § 9659(c).

A claim that a right exists under federal law is enough for jurisdiction unless the claim is insubstantial or frivolous. A substantial claim that a remedy may be implied from a federal statute is enough for jurisdiction. If it is held that federal law does not provide for the remedy, the dismissal should be on the merits rather than for want of jurisdiction. *ARC Ecology,* 294 F.Supp.2d 1152, 1156 (N.D.Cal.2003). Whether the complaint states a cause of action upon which relief could be granted is a question of law and just like issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. *Id.* In *ARC Ecology,* the district court found it had subject matter jurisdiction to adjudicate the novel claim that CERCLA applies extraterritorially. *Id.*

Plaintiffs' CERCLA claims are not insubstantial or frivolous. This court has subject matter jurisdiction to determine whether plaintiffs' claims seek to apply CERCLA extraterritorially and if so, whether that is permissible under CERCLA. That determination is made *infra* under Fed.R.Civ.P. 12(b)(6).

### *B. Personal Jurisdiction*

Absent one of the traditional bases for personal jurisdictionpresence, domicile, or consentdue process requires a defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The forum state must have a sufficient relationship with the defendants and the litigation to make it reasonable to require them to defend the action in a federal court located in that state. The purpose of the "minimum contacts" requirement is to protect a defendant against the burdens of litigating at a distant or inconvenient forum and insure that states do not reach out beyond the limits of their sovereignty imposed by their status in a federal system. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

The extent to which a federal court can exercise personal jurisdiction, absent the traditional bases of consent, domicile or physical presence, depends on the nature and quality of defendant's

"contacts" with the forum state. If defendant's activities in the forum state are "substantial, continuous and systematic," a federal court can, if permitted by the state's long-arm statute, exercise jurisdiction as to any cause of action, even if unrelated to defendant's activities within the state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952)

Even if a non-resident defendant's "contacts" with the forum state are not sufficiently "continuous and systematic" for general jurisdiction, the defendant may still be subject to jurisdiction on claims related to its activities there. This "limited" or "specific" personal jurisdiction requires a showing that: (1) the out-of-state defendant purposefully directed its activities toward residents of the forum state or otherwise established contacts with the forum state; (2) plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) the forum's exercise of personal jurisdiction in the particular case must be reasonable in that it must comport with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473-76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The defendant must have purposefully directed its activities at forum residents, or purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of local law. *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). This protects against a non-resident defendant being haled into local courts solely as the result of "random, fortuitous or attenuated" contacts. *Burger King,* 471 U.S. at 475. "[T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen,* 444 U.S. at 297.

Washington's long-arm statute, found at RCW 4.28.185, provides: [FN1]

> FN1. A federal district court must look to the law of the forum state in determining whether it may exercise personal jurisdiction over an out-of-state defendant. *MacDonald v. Navistar International Transp. Corp.,* 143 F.Supp.2d 918 (S.D.Ohio 2001).

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person ... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:
> (b) The commission of a tortious act within this state;
> ...
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

If a non-resident, acting entirely outside of the forum state, intentionally causes injuries within the forum state, local jurisdiction is presumptively reasonable. Under such circumstances, the defendant must "reasonably anticipate" being haled into court in the forum state. *Calder v. Jones,* 465 U.S. 783, 790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Personal jurisdiction can be established based on: (1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered in the forum state. *Core-Vent Corp. v. Nobel Inds. AB,* 11 F.3d 1482, 1486 (9th Cir.1994). The "express aiming" requirement is satisfied when it is alleged the non-resident engaged in "wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.,* 223 F.3d 1082, 1087 (9th Cir.2000).

The facts alleged in the individual plaintiffs' complaint and the State of Washington's complaint-in-intervention satisfy this three-part test. [FN2] The complaints allege that from approximately 1906 to mid-1995, defendant generated and disposed of hazardous substances directly into the Columbia River and that these substances were carried downstream into the waters of the United States where they have eventually accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise the Upper Columbia River and Franklin D. Roosevelt Lake. The allegation is that disposing of hazardous substances into the Columbia River is an intentional act expressly aimed at the State Washington in which the Upper Columbia River and Franklin D. Roosevelt Lake are located. This disposal causes harm which defendant knows is likely to be suffered downstream by the State of Washington and those individuals, such as Pakootas and Michel, who fish and recreate in the Upper Columbia River and Lake Roosevelt.

> FN2. Although defendant is the moving party on a motion to dismiss for lack of personal jurisdiction, plaintiffs are the ones who invoked the court's jurisdiction and bear the burden of proving the necessary jurisdictional facts. *Flynt Distrib. Co., Inc., v. Harvey,* 734 F.2d 1389, 1392 (9th Cir.1984). Motions to dismiss under Rule 12(b)(2) may test either the plaintiff's theory of jurisdiction or the facts supporting the theory. In evaluating plaintiffs' jurisdictional theory, the court need only determine whether the facts alleged, if true, are sufficient to establish jurisdiction. No evidentiary hearing or factual determination is necessary. *Credit Lyonnais Securities (USA), Inc. v. Alcantara,* 183 F.3d 151, 153 (2nd Cir.1999).

The burden is on the defendant to prove the forum's exercise of jurisdiction would not comport with "fair play and substantial justice." *Amoco Egypt Oil Co. v. Leonis Navigation Co.,* 1 F.3d 848, 851-52 (9th Cir.1993). If a non-resident has deliberately engaged in significant activities within the forum state, "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King,* 471 U.S. at 476. Furthermore, if defendant "purposefully had directed his activities at forum residents ... he must present a compelling case" that the exercise of jurisdiction would in fact be unreasonable. *Id.* at 477.

In determining the "reasonableness" of exercising personal jurisdiction, the following factors must be considered: (1) the extent of defendant's purposeful interjection; (2) the burden on defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution to the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent,* 11 F.3d at 1487-88. No one factor is dispositive and the court must balance all of the factors. *Id.* at 1488. The "reasonableness" requirement may defeat local jurisdiction even if defendant has purposefully engaged in forum-related activities. *Burger King,* 471 U.S. at 477-78.

The exercise of jurisdiction over defendant TCM does not offend traditional notions of fair play and substantial justice. The burden on defendant in defending in this forum is not great. Trail, B.C. is located approximately 10 miles from the Eastern District of Washington. For reasons discussed below, the court finds the exercise of personal jurisdiction over defendant does not create any conflicts with Canadian sovereignty. It is obvious the State of Washington has a significant interest

in adjudicating this dispute, as evidenced by its intervention as a plaintiff, and venue is proper here under CERCLA (42 U.S.C. § 9613(b) and § 9659(b)(1)).

The facts alleged in plaintiffs' complaints establish this court's specific, limited personal jurisdiction over the defendant.

*C. Failure To State A Claim*

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir.1990). In reviewing a 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from such allegations. *Mendocino Environmental Center v. Mendocino County,* 14 F.3d 457, 460 (9th Cir.1994); *NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir.1986). The sole issue raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support a claim for relief; therefore, no matter how improbable those facts alleged are, they must be accepted as true for purposes of the motion. *Neitzke v. Williams,* 490 U.S. 319, 326-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

Defendant contends the UAO cannot be enforced against a Canadian corporation based on conduct which occurred in Canada. At the outset, there is some question whether this case really involves an extraterritorial application of CERCLA, notwithstanding that defendant is a Canadian corporation and its Trail, B.C. smelter is allegedly the source of hazardous substances which have by means of the Columbia River migrated into the Upper Columbia River and Lake Roosevelt. "CERCLA's legislative history reflects a decidedly domestic focus." *ARC Ecology v. U.S. Dept. of the Air Force,* 294 F.Supp.2d at 1156. CERCLA provides a mechanism for cleaning up hazardous waste sites and imposes the cost of clean-up on those responsible for the contamination. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 7, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). "CERCLA ... addresses the cleanup of hazardous substances released into the environment...." *Westfarm Assoc. Ltd. P'ship v. Int'l Fabricare,* 846 F.Supp. 422, 434 (D.Md.1993).

The Upper Columbia River Site, including Lake Roosevelt, is entirely within the United States. "The Site will include all areas in the United States where hazardous substances from Respondent's Trail operations have migrated or materials containing hazardous substances have come to be placed." (UAO at pp. 7-8). CERCLA is concerned with the "release" of hazardous substances into the Upper Columbia River Site. According to the UAO at pp. 5-6: "The presence of hazardous substances at the Site or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and or threatened 'releases." ' Under CERCLA, a "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment...." 42 U.S.C. § 9601(22). CERCLA's definition of "environment" is limited to waters, land, and air under the management authority of the United States, within the United States, or under the jurisdiction of the United States. 42 U.S.C. § 9601(8).

It is of course true, however, that these "releases" in the United States would not exist without the activity at the smelter located in British Columbia, prompting defendant to argue that what plaintiffs

effectively seek to do here with CERCLA is regulate the discharge of hazardous substances from the Trail smelter. To find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the "releases" of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into the Columbia River at the Trail smelter. The court is hesitant to do that and therefore, will assume this case involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders. In doing so, however, the court does not find that said application is an attempt to regulate the discharges at the Trail smelter, but rather simply to deal with the effects thereof in the United States.

Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. *Equal Employment Opportunity Commission v. Arabian American Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (*"Aramco"* ). It is, however, a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.,* quoting *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949). This "canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained." *Id.,* quoting *Foley Bros.,* 336 U.S. at 285. "It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.*

In applying this canon of construction, courts look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Id.,* quoting *Foley Bros.,* 336 U.S. at 285 (emphasis added). It is assumed Congress legislates "against the backdrop of the presumption against extraterritoriality." *Id.* Unless the affirmative intention of Congress is clearly expressed, it must be presumed Congress "is primarily concerned with domestic conditions." *Id.,* quoting *Foley Bros.,* 336 U.S. at 285 (emphasis added).

In *Aramco,* the Supreme Court held Title VII of the 1964 Civil Rights Act did not apply extraterritorially to regulate the employment practices of U.S. firms that employ American citizens abroad. 499 U.S. at 259. The discriminatory conduct that allegedly violated Title VII occurred within the jurisdiction of another sovereign (Saudi Arabia), although perpetrated by a U.S. firm. Since the petitioners advanced a construction of Title VII that would have logically resulted in the statute's application to foreign as well as American employers, the Supreme Court held the presumption against extraterritoriality was necessary to avoid the inevitable clash between foreign and domestic employment laws. *Id.* at 255-56.

"Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders ." *Environmental Defense Fund v. Massey,* 986 F.2d 528, 530 (D.C.Cir.1993). The extraterritoriality principle provides that "[r]ules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States." *Id.,* quoting *Restatement (Second) of Foreign Relations Law of the United States* § 38 (1965), and *Restatement (Third) of Foreign Relations Law of the United States* § 403, Com. (g) (1987). (Emphasis added).

In *Massey,* the D.C. Circuit discussed those situations when the presumption against extraterritorial application of a statute does not apply. According to the court, the Supreme Court's decision in *Aramco* made explicit that the presumption does not apply where there is an " 'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations." 986 F.2d at 531. Second, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.* The court noted that two prime examples of this exception are the Sherman Anti-Trust Act, 15 U.S.C. § § 1-7 (1976), and the Lanham Trade-Mark Act, 15 U.S.C. § 1051 et seq. (1976), which "have both been applied extraterritorially where the failure to extend the statute's reach would have negative economic consequences within the United States." *Id.* The presumption against extraterritoriality also does not apply when the conduct regulated by the government occurs within the United States. *Id.* [FN3] "By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders." *Id.*

> FN3. These "conduct" and "effects" tests are fundamental principles of foreign relations law. See *Tamari v. Bache & Co.,* 730 F.2d 1103, 1107-08 and n. 11 (7th Cir.1984), citing *Restatement (Second) Foreign Relations Law* § § 17 and 18 (1965).

In *Massey,* the D.C. Circuit concluded there was no issue of "extraterritoriality" regarding the application of the National Environmental Policy Act (NEPA) to agency actions in Antarctica. The court found that "since NEPA is designed to regulate conduct occurring within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption against extraterritoriality" did not apply. 986 F.2d at 533. Antarctica's unique status in the international arena as a "global commons" rather than a sovereign foreign nation supported the circuit's conclusion. The court noted that where the U.S. "has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker." *Id.* And where there is no potential for conflict between U.S. laws and the laws of other nations, the purpose behind the presumption is eviscerated, and the presumption against extraterritoriality applies with significantly less force. *Id.* According to *Massey:*

> Applying the presumption against extraterritoriality here would result in a federal agency being allowed to undertake actions significantly affecting the human environment in Antarctica, an area over which the United States has substantial interest and authority, without ever being held accountable for its failure to comply with the decisionmaking procedures instituted by Congresseven though such accountability, if it was enforced, would result in no conflict with foreign law or a threat to foreign policy. NSF [National Science Foundation] has provided no support for its proposition that conduct occurring within the United States is rendered exempt from otherwise applicable statutes merely because the effects of its compliance would be felt in the global commons.

*Id.* at 536-37.

Although defendant TCM takes a dim view of *Massey,* contending much what is says is mere dicta, the Ninth Circuit apparently does not share that view. In *In re Simon,* 153 F.3d 991, 995 (9th Cir.1998), the Ninth Circuit noted that "[i]f Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case." [FN4] First, "the presumption is generally not applied where the failure to extend the scope

of the statute to a foreign setting will result in adverse effects within the United States." *Id.*, quoting *Massey,* 986 F.2d at 531. Furthermore, the presumption against extraterritoriality is not applicable when the regulated conduct "is intended to and results in, substantial effects within the United States." *Id.*, quoting *Laker Airways, Ltd., v. Sabena Belgian World Airlines,* 731 F.2d 909, 925 (D.C.Cir.1984). In *Simon,* the Ninth Circuit found the district court had properly concluded that as to actions against a bankruptcy estate, Congress had clearly intended extraterritorial application of the Bankruptcy Code. *Id.* at 996.

> FN4. Intent is analyzed by first examining the language of the act for indications of intent regarding extraterritorial application. In addition to the plain statutory words, intent may be discerned with reference to similarly phrased legislation or the overall statutory scheme. If these inquiries are inconclusive, examination of legislative history is appropriate. Resort to administrative interpretations of the law may be employed if the legislative history is inconclusive. *Simon,* 153 F.3d at 995, citing *Aramco,* 499 U.S. at 248, 250-51, and *Foley Bros.,* 336 U.S. at 286-88.

In *Subafilms v. MGM-Pathe Communications Co.,* 24 F.3d 1088 (9th Cir.1994), the Ninth Circuit considered whether a claim for infringement can be brought under the Copyright Act when the assertedly infringing conduct consists solely of the authorization within the territorial boundaries of the United States of acts that occur entirely abroad. The circuit held that such allegations did not state a claim for relief under the copyright laws of the United States.

The plaintiffs in *Subafilms* contended the copyright laws extended to extraterritorial acts of infringement when such acts result in adverse effects within the United States. The circuit disagreed. It noted there was an "undisputed axiom" that the copyright laws of the United States had no application to extraterritorial infringement, that said axiom predated the 1909 Copyright Act, that this principle of territoriality had been consistently reaffirmed, and that there was no clear expression of congressional intent in either the 1976 Copyright Act or other relevant enactments to alter the preexisting extraterritoriality doctrine. *Id.,* at 1095-96. Furthermore, in 1976, Congress chose to expand one specific extraterritorial application of the Act by declaring that the unauthorized importation of copyrighted works constitutes infringement even when the copies lawfully were made abroad. Thus, "[h]ad Congress been inclined to overturn the preexisting doctrine that infringing acts that take place wholly outside the United States are not actionable under the Copyright Act, it knew how to do so." *Id.* at 1096. Accordingly, the presumption against extraterritoriality was fortified by the language of the statute as set against its consistent historical interpretation. *Id.* Obviously, because the case at bar presents a legal issue of first impression, there is not an "undisputed axiom," consistently reaffirmed by the courts, that CERCLA does not apply to extraterritorial conduct.

The *Subafilms* court discussed the fact that the "presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in [adverse] domestic effects." *Id.,* quoting *Massey,* 986 F.2d at 531. The Ninth Circuit observed that "[i]n each of the statutory schemes discussed by the *Massey* court, the ultimate touchstone of extraterritoriality consisted of an ascertainment of congressional intent; courts did not rest solely on the consequences of a failure to give a statutory scheme extraterritorial application." *Id.* And the circuit further observed that even "[m]ore importantly, as the *Massey* court conceded, ... application of the presumption is particularly appropriate when 'it serves to protect against unintended clashes between

our laws and those of other nations which could result in international discord." *Id.* at 1096-97, quoting *Aramco,* 499 U.S. at 248. In a footnote, however, the circuit also conceded that this was not the sole source of the presumption against extraterritorial application because the presumption "is rooted in a number of considerations, not the least of which is the common-sense notion the Congress generally legislates with domestic concerns in mind." *Id.* At 1097, n. 13, quoting *Smith v. United States,* 507 U.S. 197, 113 S.Ct. 1178, 1183 n. 5, 122 L.Ed.2d 548 (1993)(emphasis added).

In *Subafilms,* the circuit found the "international discord" factor decisive in the case of the Copyright Act, fully justifying application of the presumption against extraterritoriality, even assuming *arguendo* that "adverse effects" within the United States "generally" would require a plenary inquiry into Congressional intent. *Id.* at 1097. According to the circuit:

> [B]ecause an extension of the extraterritorial reach of the Copyright Act by the courts would in all likelihood disrupt the international regime for protecting intellectual property that Congress so recently described as essential to furthering the goal of protecting the works of American authors abroad ... we conclude that the *Aramco* presumption must be applied.

*Id.* at 1098.

Here, defendant TCM contends the presumption against extraterritorial application is not defeated because CERCLA is "bare of any language affirmatively evidencing any intent to reach foreign sources." There is no dispute that CERCLA, its provisions and its "sparse" legislative history, do not clearly mention the liability of individuals and corporations located in foreign sovereign nations for contamination they cause within the U.S. At the same time, however, there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy "domestic conditions" within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case. [FN5]

> FN5. This case is distinguishable from the situations in *Aramco* and *Asplundh Tree Expert Company v. National Labor Relations Board,* 365 F.3d 168 (3rd Cir.2004), involving American employees working and physically located in foreign lands (Saudi Arabia and Canada).

Under CERCLA, a "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. 42 U.S.C. § 9601(21). Defendant notes that "State" is expressly defined to include the "several States of the United States" and other possessions or territories of the United States, § 9601(27), and that "Indian tribe" is defined as a tribe recognized by the United States, § 9601(36). Plaintiffs, however, are not seeking to enforce the UAO against the Canadian government. They are attempting to enforce it against a "corporation," albeit a Canadian corporation. "Corporation" is defined generically. There is no language which excludes foreign corporations from the definition. [FN6]

> FN6. There is no question that a Canadian corporation can be held liable under CERCLA for conduct occurring in the United States. See *United States v. Ivey,* 747 F.Supp. 1235 (E.D.Mich.1990).

42 U.S.C. § 9607(a) lists the categories of persons who can be liable under CERCLA for response costs and damages. They include: (1) "the owner and operator of a vessel or a facility;" (2) "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;" (3) "any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport 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;" and (4) "any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release which causes the incurrence of response costs, of a hazardous substance."

The "Conclusions Of Law And Determinations" section of the UAO (at p. 5) says the "Upper Columbia River Site is a 'facility' as defined in Section 101(9) of CERCLA, 42 U.S.C. § 6901(9)." The definition of "facility" under that section includes "(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located...." Because the "Upper Columbia River Site" is the "facility" in this case, that would appear to rule out 42 U.S.C. § 9607(a)(1) or (2) as a basis for defendant's potential liability under CERCLA. Clearly, the defendant is not the "owner and/or operator" of the Upper Columbia River Site. Furthermore, no one argues that defendant has "transporter" liability under § 9607(a)(4). That leaves "generator" or "arranger" liability under § 9607(a)(3) with defendant being "any person who ... otherwise arranged for disposal ... of hazardous substances owned or possessed by such person ... at any facility [the Upper Columbia River Site including Lake Roosevelt] owned or operated by another party or entity [the United States] and containing such hazardous substances." [FN7]

> FN7. "To accord CERCLA's liability provisions any meaning at all, the language 'containing such hazardous substances found in Section [9607(a)(3) ] must be construed as referring to facilities that have been, by a depositor's actions, contaminated by waste." *State of New York v. General Elec. Co.,* 592 F.Supp. 291, 296 n. 9 (N.D.N.Y.1984).

Defendant points out that the UAO does not specifically cite § 9607(a)(3) as the basis for defendant's potential liability under CERCLA. This is not surprising, however, since the UAO was issued pursuant to § 9606(a). [FN8] This is an "abatement action" which directs defendant to conduct a "Remedial Investigation/Feasibility Study" regarding the Upper Columbia River Site. The UAO reserves EPA's right to bring an action against defendant under § 9607 for recovery of any response costs incurred by the United States related to the Site and not reimbursed by the defendant. (UAO at p. 18). [FN9] If defendant were to comply with the UAO, it could seek reimbursement from the United States for doing so, provided it established by a preponderance of the evidence that it was not liable for response costs under § 9607(a). See 42 U.S.C. § 9606(b)(2)(A) and (C). § 9606(b)(2)(A) refers to "any person." As noted, the definition of "person" in § 9601(21) does not distinguish between domestic and foreign corporations or individuals.

> FN8. § 9606(b)(1) provides:
> Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought

in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues. Of course, this is precisely what plaintiffs are attempting to do in this case.

FN9. The individual plaintiffs could also seek response costs under the "citizen suit" provision at 42 U.S.C. Section 9659(a).

Defendant asserts it could not be an "arranger" because it did not "otherwise arrange" for disposal of hazardous substances "by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances...." (Emphasis added). The "plain language" of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances. [FN10] Defendant, however, does not cite a single case or any legislative history that has held that the involvement of another party or entity in the disposal is required for there to be "generator" or "arranger" liability. Indeed, defendant acknowledges that case law has declared the definition of "arranger" in CERCLA to be "inartful." *U.S. v. Iron Mountain Mine, Inc.*, 881 F.Supp. 1432, 1451 (E.D.Cal.1995). "Arranger" is undefined in CERCLA. [FN11]

FN10. Another party will be involved when there is a "contract" or an "agreement" for disposal. There is, however, the catch-all phrase "otherwise arranged for disposal."

FN11. "Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability." *United States v. New Castle County*, 727 F.Supp. 854, 871 (D.Del.1989). Legislative history "sheds little light" on the intended meaning of the phrase. *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir.1989).

There is authority supporting the proposition that a third-party is not required for "arranger" liability. In *State of Colorado v.. Idarado Mining Co.*, 707 F.Supp. 1227 (D.Colo.1989), the defendants were held liable because they "otherwise arranged ... for disposal" of hazardous waste by placing their contaminated tailings in the San Miguel River and those tailings "[had] come to be located" at the Society Turn area. *Id.* at 1241. In *National Railroad Passenger Corp. v. New York Housing Authority*, 819 F.Supp. 1271, 1277 (S.D.N.Y.1993), the court found there was "arranger" liability where asbestos-containing material was flaking from the defendant's buildings onto the railroad tracks located below.

Courts have construed "generator" and "arranger" liability expansively. Thus, in *EPA v. TMG Enterprises*, 979 F.Supp. 1110, 1122-23 (W.D.Ky.1997), the court stated:

> Although the phrase 'arranged for' is not defined in the statute and CERCLA's legislative history sheds scant light on its intended meaning, courts have concluded that a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme. [Citation omitted]. Furthermore, courts consistently have construed this phrase so as to promote CERCLA's dual goals: to allow the government to respond promptly and effectively to problems resulting from hazardous waste disposal and to allow recovery of clean-up costs from those responsible for creating the problem.

To that end, "[i]n the absence of a contract or agreement, the court must look to the totality of the circumstances, including any 'affirmative acts to dispose' to determine whether a transaction involved an arrangement for disposal." *Id.* at 1123. A defendant cannot escape generator liability simply because it does not choose the ultimate destination of its waste. *Acme Printing Ink Co. v. Menard,* 881 F.Supp. 1237, 1250 (E.D.Wis.1995). Furthermore, arranger liability "may attach even though the defendant did not know the substances would be deposited at a particular site or in fact believed they would be deposited elsewhere." *Pierson Sand & Gravel Inc. v. Pierson Township,* 851 F.Supp. 850, 855 (W.D.Mich.1994). "[C]ontrol is not a necessary factor in every arranger case [and][t]he Court must consider the totality of the circumstances ... to determine whether the facts fit within CERCLA's remedial scheme." *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1131 (D.Idaho 2003). Congress did not limit the definition of "disposal" to the initial introduction of hazardous material into the environment. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir.1992). Based on these authorities, "generator" and/or "arranger" liability under CERCLA cannot be ruled out for defendant. That, however, is, not a finding this court needs to make at this time and which can be litigated, if necessary, at a later date.

Defendant contends that if plaintiffs' "arranger" interpretation is extended to foreign corporations, it would produce the "absurd" result that the same conduct by the same corporation would, while not resulting in liability to that corporation as an "owner or operator," result in liability as an "arranger" and no coverage for that corporation under the "federally permitted release" provision of CERCLA at 42 U.S.C. § 9607(j). The court is not persuaded that the language of CERCLA or its legislative history is conclusive that a foreign corporation cannot be liable as an owner and/or operator under either § 9607(a)(1) and /or § 9607(a)(2). Nor is the court persuaded that the lack of coverage under § 9607(j) for a foreign corporation manifests congressional intent that CERCLA was not intended to apply to foreign corporations whose conduct has adverse effects within the United States.

§ 9607(a)(1) refers to "the owner and operator of a vessel or a facility." The term "owner or operator" means "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." § 9601(20)(A). "Offshore facility" means "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a pubic vessel." § 9601(17). "Onshore facility" means "any facility of any kind located in, on, or under, any land or non-navigable waters within the United States." § 9601(18). Although § 9607(a)(1), pertaining to current owners and operators, does not contain the "any person" language, § 9607(a)(2), pertaining to past owners or operators, contains that language and also refers to "any facility" ("any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"). Defendant concedes the definition of "facility" at § 9601(9) includes no geographical limitation, but asserts its component terms "on-shore facility" and "offshore" facility "appear to exhaust the possibilities for that category" and are separately defined in the statute as being limited to facilities located in or subject to the jurisdiction of the United States" (emphasis added). One has to ask that if "on-shore facility" and "offshore facility" are the only possible "facilities" under § 9607(a)(1) and/or (2), why have a separate definition of "facility" at § 9601(9) which makes no reference to the definitions of "offshore facility" and "on-shore facility" found at § § 9601(17) and (18) and instead broadly defines "facility" without geographical limitation?

Even assuming Congress intended a geographic limitation on "facility" for current owner/operator liability under § 9607(a)(1) and perhaps also for past owner/operator liability under § 9607(a)(2), while not for "arranger" liability under § 9607(a)(3), the court is not convinced that is an "absurd" result considering CERCLA is concerned with "domestic conditions" in the United States. [FN12] The case at bar is a prime example. What plaintiffs seek to remedy by way of the UAO is not what is happening right now and what has happened in the past at defendant's "facility" in Canada with regard to the disposal of hazardous substances into the Columbia River at that location. What plaintiffs seek to remedy is the result of that practice which has manifested itself at a "facility" within the territorial boundaries of the United States. Certainly, it is true this remedy may have the incidental effect of altering defendant's future disposal practices at its "facility" in Trail, B.C., but that does not change the essential fact that what plaintiffs are attempting to do is remedy an existing condition at a "facility" (the Upper Columbia River Site) wholly within the U.S. In other words, plaintiffs are not attempting to tell Canada how to regulate defendant's disposal of hazardous substances into the Columbia River, simply that they expect defendant to assist in cleaning up a mess in the United States which has allegedly been caused by those substances. Plaintiffs' use of CERCLA is not intended to supercede Canadian environmental regulation of the defendant. Canada's environmental laws are intended to protect Canadian territory, including the 10 miles from Trail, B.C. to the U .S. border. Those laws do nothing to remedy the damage that has already occurred in U.S. territory as a result of defendant's disposal of hazardous substances into the Columbia River.

> FN12. This is quite a large assumption considering CERCLA's language and sparse legislative history.

Plaintiffs assert Congress' intent that foreign polluters of U.S. territory be held liable under CERCLA is apparent from legislative history of amendments made to the definition of liable parties. Plaintiffs note that as originally enacted, CERCLA provided that the owner and operator of a vessel was liable under CERCLA only if "otherwise subject to the jurisdiction of the United States," but that the Superfund Amendments and Reauthorization Act of 1986 ("SARA") deleted the language "otherwise subject to the jurisdiction of the United States.," "making it clear that liability under CERCLA applies to releases from foreign vessels." *A & P H.R. Conf. Rep.* 99-962 (Oct. 3, 1986). "[F]oreign flag vessels not otherwise under United States jurisdiction are subject to liability under section 107 of CERCLA." *A & P House. Rep.* 99- 253(I) (August 1, 1985). Defendant notes, however, that the amendment simply clarified that "foreign vessels not otherwise under United States jurisdiction that release hazardous substances in areas subject to United States jurisdiction are subject to liability under section 107 of CERCLA." *SARA Leg. History 32, Section by Section Analysis at 72 (House Energy and Commerce Committee Report,* 99-253, Part I)(emphasis added). According to defendant, the amendment made it clear that a foreign ship in U.S. waters could be held liable under CERCLA for a spill which "is no different than the liability finding for the Canadian owner of a Michigan waste site."

Defendant, however, cites no legislative history indicating Congress specifically limited liability to foreign vessels in U.S. waters that spill hazardous substances in those waters, as opposed to foreign vessels located outside U.S. waters who spill hazardous substances which eventually make their way into U.S. waters. The language quoted above ("foreign vessels not otherwise under United

States jurisdiction that release hazardous substances in areas subject to United States jurisdiction") could just as logically refer to a foreign vessel outside U.S. waters that releases hazardous substances which eventually make their way into "areas (waters) subject to United States jurisdiction." That is no different than the situation here with a facility located on Canadian soil dumping hazardous substances into the Columbia River which eventually make their way downstream into an area (the "Upper Columbia River Site") subject to United States jurisdiction.

42 U.S.C. § 9607(j), the "federally permitted release" provision, addresses a situation where the release of contaminants is the subject of regulation under another federal statute (i.e., the Clean Air Act, the Clean Water Act, etc.) and provides that if a facility is operating in compliance with its permit, recovery of response costs or damages, if any, with respect to such releases will be dealt with under existing law (the permit regime rather than CERCLA). § 9607(j) states: "Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."

Defendant notes that its Trail smelter is not and could not be regulated under U.S. statutes (such as the Clean Air Act, the Clean Water Act, etc.) and therefore, would not be able to obtain an EPA permit for discharges to the Columbia River. Instead, the Trail smelter is regulated by Canadian environmental agencies under permits issued by Canadian statutes, and CERCLA does not provide for recognition of the regulatory regime governing the operation of the smelter or any other regulatory regime adopted by a foreign country. Thus, defendant asserts that under CERCLA, a U.S. facility discharging metal-bearing waste into a river in the U.S. in compliance with its Clean Water Act permit "could avoid any CERCLA liability," while a facility in Canada or Mexico, "even if operating under the same or more stringent permit standards, would continue to be subject to CERCLA joint and several liability for the whole cleanup if even a small amount of its discharges should reach the same river in the United States." According to defendant, "the vast net of CERCLA liability would supplant the source country's regulation of its industrial and municipal waste, wherever and however, such waste reached or threatened to reach the U.S. side of the United States/Canada border."

Plaintiffs observe that having a "federally permitted release," while a defense to an action for response costs and damages, is not a defense to a CERCLA clean-up order such as in the case at bar. With regard to liability for response costs and damages under CERCLA, there may indeed be circumstances where there is unequal treatment of a facility in the U.S. discharging waste into the river versus a facility located in Canada discharging waste in the river which happens to make its way to the U.S. [FN13] There is not, however, unequal treatment as a general matter because even if the U .S. facility with the "federally permitted release" is not subject to CERCLA liability, it still is potentially liable under another statute such as the Clean Air Act or the Clean Water Act. As defendant admits, 42 U.S.C. 9607(j) is not a "free pass to pollute." The facility located in Canada is rightly subject to liability under CERCLA to clean up contamination it has caused within the United States because Canada's own laws and regulations will not compel the Canadian facility to clean up the mess in the United States which it has created. As plaintiffs aptly put it: "EPA is not, through issuance of the UAO, attempting to control [defendant's] ongoing operations, or address any hazardous substances attributable to its operations which may be found in Canadian soil, water, air or sediment." Furthermore, "[a]ny Canadian discharge permit issued to [defendant] for its Trail operations necessarily considers only the impact on the approximately ten miles of river between

[defendant's] facility and the Canadian border, and not the impacts on territory located in the US, where the impacts of [defendant's] past releases [are] most significant."

> FN13. As the amici point out, there would not be unequal treatment with regard to hazardous waste deposited before the existence of the permit regime. Plaintiffs allege defendants' discharge of hazardous waste since 1906 has resulted in the contamination of the Upper Columbia River Site.

Defendant asserts that CERCLA treats foreign claimants to the Superfund less favorably than domestic claimants and therefore, this evidences that Congress did not intend extraterritorial application of CERCLA. As noted above, 42 U.S.C. § 9606(b)(2)(A) provides that "any person" who complies with an order issued under § 9606(a) may petition for reimbursement from the Superfund for the reasonable costs of such action, plus interest. [FN14] The definition of "person" in CERCLA (§ 9601(21)) does not distinguish between foreign and domestic individuals or corporations.

> FN14. If the petition is not granted, the "person" can sue the President in the appropriate United States district court seeking reimbursement from the Superfund. 42 U.S.C. § 9606(b)(2)(B).

Defendant submits that foreign claimants are limited to submitting their claims pursuant to 42 U.S.C. § 9611(1), but the court is not persuaded. § 9611(1) provides:

> To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if-
> (1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;
> (2) the claimant is not otherwise compensated for his loss;
> (3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended ... or the Deepwater Port Act of 1974, as amended ...; and
> (4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials certifies that such country provides a comparable remedy for United States claimants.

§ 9611(1) pertains to a different situation than under § 9606(b)(2). § 9611(1) provides a mechanism for foreign claimants, who are not in any way "responsible" for a release of hazardous substances, to seek reimbursement from the Superfund for costs incurred in responding to the release of such substances in the navigable waters or in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident, where the release was from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under U.S. law (the Outer Continental Shelf Lands Act or the Deepwater Port Act). § 9611(1) pertains to releases outside the U .S. as opposed to releases within the U.S. which, of course, is the situation in the case at bar. See *ARC Ecology*, 294 F.Supp.2d at 1158.

Defendant observes that CERCLA's "citizen suit" provision did not require the individual plaintiffs to give notice to Canada or British Columbia of intent to sue, although it did require them to give such notice to the United States and the State of Washington. 42 U.S.C. § 9659(d)(1). Furthermore, pursuant to § 9659(g), only the United States or the State, if not a party, may intervene as a matter of right in a "citizen suit." [FN15] The court does not consider that significant in determining whether Congress intended extraterritorial application of CERCLA. There is no dispute that Canada and British Columbia have been made aware of the subject UAO and this subsequent litigation, presumably because defendant told them of these matters. While CERCLA does not allow British Columbia or Canada to intervene as a matter of right, they could seek permissive intervention. CERCLA's limiting intervention as a matter of right to the United States and the States makes sense because the contamination at issue is within the United States and the State of Washington.

> FN15. "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction. 42 U.S.C. § 9601(27).

There is no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States. There is also no direct evidence that Congress did not intend such application. There is, however, no doubt that Congress intended CERCLA to clean up hazardous substances at sites within the jurisdiction of the United States. That fact, combined with the well-established principle that the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States, leads the court to conclude that extraterritorial application of CERCLA is not precluded in this case. The Upper Columbia River Site is a "domestic condition" over which the United States has sovereignty and legislative control. Extraterritorial application of CERCLA in this case does not create a conflict between U.S. laws and Canadian laws.

In *Tamari v. Bache & Co.*, cited *supra* at fn. 3, the Seventh Circuit found nothing in the Commodities Exchange Act (CEA) or its legislative history to indicate Congress did not intend the CEA to apply to foreign agents, but recognizing there also was no direct evidence that Congress intended such application, relied on the "conduct" and "effects" tests in discerning whether it had subject matter jurisdiction over the dispute. The court concluded it did have jurisdiction over causes of action arising from trading on U.S. exchanges, even though the parties were nonresident aliens (Lebanese) and the contacts between them occurred in a foreign country (Lebanon). Said the court:

> The transmission of commodity future orders to the United States would be an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges. Further, when transactions initiated by agents abroad involve trading on United States exchanges, the pricing and hedging functions of the domestic markets are directly implicated, just as they would be by an entirely domestic transaction. If transactions are the result of fraudulent representations, unauthorized trading or mismanagement of trading accounts, prices and trading volumes in the domestic marketplace will be artificially influenced, and public confidence in the markets could be undermined.
>
> By asserting jurisdiction under the conduct and effects rationales, the purposes of the Act are advanced. Were we to construe the CEA as inapplicable to the foreign agents of commodity exchange members when they facilitate trading on domestic exchanges, the domestic commodity

> futures market would not be protected from the negative effects of fraudulent transactions originating abroad. Because the fundamental purpose of the Act is to ensure the integrity of the domestic commodity markets, we expect that Congress intended to proscribe fraudulent conduct associated with any commodity future transactions executed on a domestic exchange, regardless of the location of the agents that facilitate the trading.
> 730 F.2d at 1108.

The same rationale applies here. Because the fundamental purpose of CERCLA is to ensure the integrity of the domestic environment, we expect that Congress intended to proscribe conduct associated with the degradation of the environment, regardless of the location of the agents responsible for said conduct.

**III. CONCLUSION**

The court has subject matter jurisdiction under CERCLA. The court has personal jurisdiction over the defendant and the exercise of said jurisdiction is reasonable. Plaintiffs' complaints state claims under CERCLA upon which relief can be granted. Therefore, defendant's Motion To Dismiss (Ct.Rec.6) is DENIED.

THE COURT CERTIFIES THIS MATTER FOR AN IMMEDIATE APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS ON THE BASIS THAT THE ORDER ISSUED BY THIS COURT "INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THAT AN IMMEDIATE APPEAL FROM THE ORDER MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION." 28 U.S.C. § 1292(b).

IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.