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January 7, 2005

By Federal Express

Ms. Cathy Catterson
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Joseph A. Pakootas v. Teck Cominco Metals, Ltd.*, No. 04-80091
Letter Brief in Support of Petition for Permission to Appeal Under 28 U.S.C. § 1292(b)

Dear Ms. Catterson:

The Chamber of Commerce of the United States (the "Chamber") respectfully submits this letter brief as *amicus curiae* in support of Teck Cominco Metals, Ltd.'s ("TCM") Petition for Permission to Appeal Under 28 U.S.C. § 1292(b). The order issued by the United States District Court for the Eastern District of Washington on November 8, 2004, that Petitioner seeks to appeal is an unwarranted extraterritorial expansion of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") which will have significant negative consequences for many U.S. businesses, particularly those operating in areas close to our nation's borders. The *amicus* urges this Court to hear this interlocutory appeal, and to provide businesses and lower courts with guidance on the proper application of CERCLA.

Both Fed. R. App. P. 5 and this Circuit's Local Rules governing appeals by permission are silent as to the procedure by which an *amicus* may offer the Court its views in connection with a petition for permission to appeal under 28 U.S.C. § 1292(b). The Chamber has therefore followed the guidance offered in this Circuit's Advisory Note to Rule 29-1, which permits an *amicus* who wishes to join in a party's arguments to file a short letter in lieu of a formal brief. In conformance with that guidance, the Chamber hereby offers the Court the benefits of its views and experience, to assist the Court in deciding whether to exercise its discretion to hear this important appeal.[1]

[1] The Chamber began work on this submission as soon as this important case was brought to its attention, and it has completed the work as expeditiously as possible given the intervening holidays. In any event, the timing

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Interests of the *Amicus Curiae*

The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations from every region of the country. An important function of the Chamber is to advocate its members' interests in matters of national concern before all branches and at all levels of government, including filing briefs as *amicus curiae* before federal and state courts. Many members of the Chamber conduct business operations in the border regions of the United States, and on the U.S.-Canadian border in particular. They are likely to suffer from the district court's expansive interpretation of CERCLA and the retaliation it may engender from foreign governments.

The *amicus* agrees with the reasons given by TCM in its Petition for Permission to Appeal as to why this case satisfies the requirements of 28 U.S.C. § 1292(b), and joins in its request that the Court exercise its discretion to hear the interlocutory appeal. Because the district court's decision is of a jurisdictional nature, and has been issued prior to any discovery or evidentiary submissions, a prompt appellate review of the order will conserve scarce judicial resources and may lead to a speedy termination of the litigation. The Court's review would also ensure uniform application of CERCLA by the district courts and provide necessary guidance to industry as to the permissible reach of the statute. The *amicus* seeks to assist the Court by highlighting the importance of the issue presented in TCM's Petition to U.S. businesses, and by explaining how the district court's interpretation of CERCLA contradicts settled expectations of the business community and risks disrupting existing diplomatic mechanisms for resolving cross-border environmental problems.

The District Court's Ruling Is An Erroneous and Unwarranted Expansion of CERCLA

This Court's review of the district court order is warranted because that order rests on a novel and unsupported interpretation of CERCLA. This is the first time that any court in the United States has permitted a suit which seeks to apply CERCLA to business conduct taking place solely abroad. Respondents argue, relying on two cases from the U.S. District Court for the Eastern District of Michigan and the State of Washington Court of Appeals, that this case presents merely a routine application of CERCLA to foreign companies. Answer to the Petition for Permission to Appeal at 13 (citing *United States v. Ivey*, 747 F. Supp. 1235 (E.D. Mich., 1990), and *Canron, Inc. v. Federal Insurance Co.*, 918 P.2d 937 (Wash. Ct. App. 1996)). These cases, however, are inapposite, as both concern conduct of Canadian individuals or companies that occurred within the territory of the United States. *See Ivey*, 747 F. Supp. at 1236-37 (allegedly polluting conduct occurred at a Superfund site in Michigan); *Canron*, 918 P.2d at 939 (allegedly polluting conduct took place at a Superfund site in Washington State). In neither instance was a foreign company subjected to potential CERCLA liability on the basis that the

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requirement of Fed. R. App. P. 29(e), which is tailored to filings on the merits, should not govern filings under Fed. R. App. P. 5, where the briefing schedule is not known to *amici* in advance.

effects of allegedly polluting behavior that took place exclusively abroad have been felt, through the intercession of natural causes, in the United States.

The district court's decision is contrary to settled precedent from the Supreme Court and this Circuit. The Supreme Court has repeatedly cautioned, most recently last year in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004), that a court must construe federal statutes to avoid interference with the sovereign authority of other nations, and must therefore presume that, absent Congress's clear and affirmative indication otherwise, a federal statute operates only within the territorial jurisdiction of the United States. *See also Smith v. United States*, 507 U.S. 197, 204 (1993); *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). This Court has similarly reiterated the importance of the presumption again extraterritorial application of U.S. law as a crucial tool for avoiding unnecessary and dangerous conflicts with laws of other nations and ensuring that Congress and the Executive enjoy appropriate freedom of action in the sensitive area of foreign relations. *See Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1095-96 (9th Cir. 1994) (en banc).

The district court has acknowledged that neither the language of CERCLA nor its legislative history contains any indication that Congress intended for the Act to be applied extraterritorially. Order at 14. The district court nevertheless refused to apply the presumption against extraterritorial application to CERCLA. The district court's sole justification for disregarding the Supreme Court's and this Court's guidance was its observation that the "failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.*

As this Court explained in *Subafilms*, however, a court's decision on whether to extend the reach of a federal statute abroad must not "rest *solely* on the consequences of a failure to give a statutory scheme extraterritorial application." 24 F.3d at 1096 (emphasis in original). Rather, as the Court made clear, this decision must always be rooted in congressional intent, and the presumption against extraterritorial application applies even where adverse effects are present. *Id.* at 1097. The presence of domestic effects is a necessary condition to the operation of U.S. law extraterritorially but it is clearly not enough by itself to show that Congress intended CERCLA to operate beyond the borders of the United States. This case clearly satisfies the requirement of 28 U.S.C. § 1292(b) that there be "substantial ground for difference of opinion" on the question presented, as illustrated by Respondents' and the district court's reliance on misleading dicta by the District of Columbia Circuit in *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), and a restatement of that dicta, without discussion, in *In re Simon*. Given this Circuit's clear explanation in *Subafilms* that the *Massey* dicta is not sufficient to defeat the application of the traditional presumption against extraterritoriality and to bypass the required inquiry into congressional intent, these unreasoned statements are not sufficient to support the district court's unprecedented conclusion. A consideration of the issue by the Ninth Circuit will bring clarity to the case law, thereby aiding the work of the lower courts charged with the application of CERCLA.

The District Court's Ruling Risks Substantial Adverse Consequences for the Business Community

Many of the Chamber's members and affiliates, as well as the business community in general, will be detrimentally affected by the district court's erroneous ruling. United States companies and individuals are actively engaged in business activity in the regions bordering Canada. These companies will bear substantial risk if, in response to this and similar suits against its nationals, Canada retaliates by extending its own environmental legislation to U.S. companies operating on the U.S. side of the border. As evidenced by the diplomatic protest that Canada delivered to the U.S. over the EPA action in this case, the Government of Canada is watching this case closely, and it is becoming a point of friction in the U.S.-Canadian relationship.

If private suits become a significant factor in trans-border environmental issues, Canada could very well try to "level the playing field" between companies on either side of the border by imposing liability on companies operating within the U.S. territory whenever their operations produce consequences that are felt in Canada. For example, power plants and smelters located in the United States could be charged with responsibility for acid rain and other air pollution in Canada. *See, e.g.*, Erik K. Moller, Comment, *The United States-Canadian Acid Rain Crisis: Proposal for an International Agreement*, 36 UCLA L. Rev. 1207, 1212 (1989) (Congressional studies indicating that approximately 50% of the acid rain falling in Canada may have originated in the United States). The United States government has openly acknowledged this concern, and the two countries have sought to resolve the problem through diplomatic negotiations, bilateral and multilateral agreements, and consensual arbitration. *See id.* at 1221-27 (discussing the 1909 Boundary Waters Treaty and the 1972 and 1978 Great Lakes Water Quality Agreements between the U.S. and Canada; the 1979 multilateral Convention on Long-Range Transboundary Air Pollution; and the 1935-1941 Trail Smelter Arbitration).

Furthermore, the district court's rationale for applying CERCLA extraterritorially is potentially unbounded. The district court concluded that the statute could apply whenever any adverse effects of foreign activity manifest themselves in the United States, even if these effects are insignificant and their connection to the source of alleged pollution is remote. Likewise, nothing in the district court's analysis restricts its application to alleged polluters operating on the U.S. border, and it could be easily extended to cover air and water pollution emanating from non-border countries. *Cf.* Rebecca Renner, *Asia Pumps Out More Mercury than Previously Thought*, Environmental Science and Technology, Science News, Jan. 5, 2005 (discussing scientific investigation of long-range transport of atmospheric pollutants to U.S. from Asia). The risk of retaliation against U.S. companies thus extends beyond Canada and Mexico.

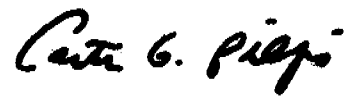
The problem of cross-border pollution has always been dealt with, quite often successfully, through bilateral or multilateral diplomatic mechanisms. The 1909 Boundary

Waters Treaty between the U.S. and Canada, for example, has established a bilateral International Joint Commission which is charged with resolving disputes concerning the control of boundary water quality, including transboundary pollution, and is vested with quasi-judicial, investigative and arbitral functions. The subsequent Great Lakes Water Quality Agreements have expanded the powers of the Commission, and over the years the Commission has successfully resolved a number of disputes between the two countries. *See* L.H. Legault, *The Roles of Law and Diplomacy in Dispute Resolution: The IJC as a Possible Model*, 26 Can-U.S. L.J. 47, 49-54 (2000). A similarly extensive diplomatic system of dispute resolution has been established to address the problem of pollution on the U.S. and Mexican border. *See* Elia V. Pirozzi, *Resolution of Environmental Disputes in the United States-Mexico Border Region and the Departure from the Status Quo*, 12 J. Envtl. L. & Litig. 371, 373-86 (1997) (discussing dispute resolution under NAFTA, North American Agreement on Environmental Cooperation and Environmental Dispute Resolution, "La Paz" Agreement Between the U.S. and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area, and Integrated Environmental Border Plan for the Mexican-United States Border Area). The extraterritorial application of CERCLA, which the district court here allowed, risks disrupting this well-functioning diplomatic scheme. It places a matter traditionally handled as a concern of U.S. foreign policy in the hands of individual private litigants who can pursue CERCLA citizen suits, or even contribution actions, without any regard for the foreign policy and international environmental consequences for the nation as a whole.

The potentially unlimited and unclear holding of the district court will cause concern and confusion for many businesses, both domestic and foreign. Prompt review by this Court is needed to clarify whether Congress intended to extend CERCLA's reach beyond the nation's borders. If the Court agrees with Petitioner and the *amicus* that CERCLA reveals no clear intent to operate extraterritorially, that conclusion will bring this litigation to an end. If, in the alternative, the Court were to agree with the Respondents that CERCLA applies to this case, that holding still would provide valuable guidance concerning the extraterritorial reach of the statute, so that businesses can attempt to order their primary conduct to take into account the kind of connection between a company's foreign activity and its domestic effects that may trigger potential liability under CERCLA. In either event, prompt appellate review of this important issue will fulfill the aim of 28 U.S.C. § 1292(b) by conserving judicial resources and materially advancing the ultimate termination of the litigation.*

* This letter brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), read in light of Fed. R. App. P. 29(d), as it contains 2278 words, excluding portions exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted,



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