**CASE NO. 05-35153**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

JOSEPH A. PAKOOTAS and Donald R. Michel, individual and enrolled members of the Confederated Tribes of the Colville Reservation,

*Plaintiffs / Appellees,*

and

STATE OF WASHINGTON,

*Intervenor / Appellee,*

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

*Defendant / Appellant.*

Appeal from the U.S. District Court for the Eastern District of Washington
Case No. CV-04-00256-AAM

# BRIEF OF *AMICI CURIAE* WASHINGTON ENVIRONMENTAL COUNCIL, WASHINGTON PUBLIC INTEREST RESEARCH GROUP, and CITIZENS FOR A CLEAN COLUMBIA IN SUPPORT OF PLAINTIFFS / APPELLEES

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## RULE 26.1 CERTIFICATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Washington Environmental Council and Washington Public Interest Research Group state that they are not-for-profit corporations, and Citizens for a Clean Columbia states that it is a not-for-profit organization. Washington Environmental Council, Washington Public Interest Research Group, and Citizens for a Clean Columbia have no parent corporations and are not owned in whole or part by any other entity.

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### MISCELLANEOUS

## I. INTRODUCTION

The Upper Columbia River Site ("Site") encompasses the Columbia River Basin in northeast Washington, including the Lake Roosevelt National Recreation Area ("Lake Roosevelt"). Lake Roosevelt is 140 miles long, covers over 100,000 acres of land, and maintains over 300 miles of publicly-owned shoreline available for recreational use.

The Site is severely contaminated.[1] The contamination resulted from the discharge of millions of tons of metal-bearing slag waste into the Columbia River by Teck Cominco Metals Ltd. ("Teck Cominco"). Teck Cominco's toxic wastes have come to be located within the United States. The continuing breakdown and release of contaminants contained in the sediments and shorelines of the Site poses an imminent and substantial threat to human health and the environment. ER 30-31 at ¶¶3-4.

Teck Cominco is responsible for the investigation and remediation of the Site. Resolution of this case requires a full understanding of the severity of the toxic conditions at the Site, and the ramifications of allowing Teck Cominco to avoid its legal responsibility to investigate and remediate the Site.

The Washington Environmental Council ("WEC"), Washington Public Interest Research Group ("WashPIRG"), and the Citizens for a Clean Columbia ("CCC") respectfully submit this brief as *amici curiae*.[2] The Amici ask that this Court reject the arguments of Teck Cominco and affirm the decision of the U.S. District Court.

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[1] The "Site" encompasses "the areal extent of contamination in the United States associated with the Upper Columbia River." ER 27 (emphasis added). The Site does not encompass any territory in Canada. ER 66; SER 3.

[2] The brief of the *amici curiae* is submitted pursuant to Federal Rule of Appellate Procedure 29(a) and with the consent of all parties. The Amici submitted an amicus brief before the U.S. District Court. ER 108-109; 212-214.

## II. INTERESTS OF THE AMICI CURIAE

WEC has over 3,500 member households and over 60 organizational members in the State of Washington. ER 113-114. WEC members live and recreate in the vicinity of Lake Roosevelt and the Upper Columbia River Basin. ER 113-114. For the past decade, WEC has participated in the oversight and management of toxic and hazardous waste sites in Washington, including the development of implementing regulations and the pursuit of legal action to interpret and enforce applicable statutes. ER 113-114. WEC members will be directly and adversely affected if the investigation and cleanup of the Site is delayed or otherwise undermined by Teck Cominco. ER 113-114.

WashPIRG is a non-partisan, public interest advocacy organization with over 20,000 members across Washington State. SER 6-8. Many of WashPIRG's members fish, swim, and recreate in the Columbia River and Lake Roosevelt. SER 6-8. Over the last 2 years, WashPIRG has advocated for strong federal action in pursuit of an adequate investigation and cleanup of the Site. SER 6-8. WashPIRG members have an interest in protecting the health and welfare of Washington's citizens, and ensuring that polluters, rather than Washington taxpayers, are held responsible for the cleanup of toxic waste that has been released into the environment. SER 6-8.

CCC is a coalition of community members who live along the banks of the Columbia River or within the Upper Columbia River Basin. ER 110-112. An all-volunteer group, CCC was founded in the mid-1990s in response to concerns over toxic contamination discharged into the Columbia River by Teck Cominco. ER 110-112. CCC members swim in the Columbia River, consume fish caught in its waters, irrigate their farms with its waters, and recreate on the black-sand beaches created by the slag discharged by Teck Cominco. ER 110-112. CCC members will be directly and adversely affected if Teck Cominco is allowed to escape

responsibility for investigating and remediating the toxic contamination that has come to be located throughout the Upper Columbia River Basin. ER 110-112.

## III. ARGUMENT

The Comprehensive Environmental Response Compensation and Liability Act ("CERCLA")[3] provides for investigation and cleanup of "hazardous substances" that have been "released" by a "potentially responsible party" at a designated "facility." 42 U.S.C. §§ 9601(14); 9601(22); 9607(a); 9601(9). Each of these four elements is present in this case. ER 30-31 at ¶1-7. CERCLA therefore governs the investigation and cleanup of the Site. Original jurisdiction for any disputes regarding a CERCLA case, including citizen suits, resides with the United States District Courts.[4] 42 U.S.C. §§ 9613(b); 9659(c).

### A. Procedural Background

On December 11, 2003, the United States Environmental Protection Agency ("EPA") issued a Unilateral Administrative Order ("UAO") to Teck Cominco. ER 26-65. The UAO ordered Teck Cominco to investigate the extent of contamination throughout the Site and develop alternatives to remediate the contamination. ER 27. Teck Cominco has refused to comply with the UAO. ER 5, 104.

Members of the Confederated Tribes of the Colville Reservation ("Colville Tribe") filed a citizen suit to enforce the UAO. ER 1-8; 42 U.S.C. § 9659(a)(1). The State of Washington intervened as a matter of right in support of the Colville Tribe. ER 95-97.

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[3] CERCLA is designed to address the most serious hazardous waste sites in the United States. *See About Superfund, at* www.epa.gov/superfund/about.htm. The Upper Columbia River Site is perhaps one of the largest and most complex of EPA's hazardous waste sites in Washington. ER 26-30.

[4] "[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. § 9613(b).

Teck Cominco moved to dismiss the citizen suit. ER 12-13. The Honorable Judge Alan McDonald of the U.S. District Court for the Eastern District of Washington denied the motion. ER 215-241. This Court granted interlocutory review of the District Court's decision. 28 U.S.C. § 1292(b).

### B. Teck Cominco Dumped Over Ten Million Tons of Toxic Waste into the Columbia River

Since the turn of the century, Teck Cominco has used the Columbia River as the repository for its highly contaminated toxic wastes.[5] ER 3 at ¶4.1, 28 at ¶¶9, 102 at ¶4.2. Teck Cominco is one of the most prominent polluters in U.S. history, and its extensive discharges of toxic contamination into the Columbia River are well-documented.[6]

From the early 1900's through 1995, Teck Cominco discharged approximately 145,000 metric tons of slag[7] annually into the Columbia River. ER 3 at ¶4.1; ER 28 at ¶9; ER 102 at ¶4.2.[8] From 1980 through 1995, the average daily discharges of metals from Teck Cominco's operations were as high as 18 kg of arsenic, 62 kg of cadmium, 200 kg of lead, 7,750 kg of zinc, and 4 kg of

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[5] Prior to 1995, Teck Cominco's discharges of toxic waste into the Columbia River were not, as Teck claims, "regulated by the environmental laws of the Province of British Columbia." Teck Cominco Brief at 10. Teck Cominco did not even apply for a Canadian permit until at least 1990. ER 190.

[6] The United States has contacted Teck Cominco and the Canadian Government on several occasions to express concerns about the "continued slag disposal into the river." ER 190, 192.

[7] Slag is a by-product created in the furnaces of a smelter. Slag consists of glassy ferrous granules and contains heavy metals such as copper, lead, and zinc. ER 27-28 at ¶¶4, 9. As slag weathers and breaks down, it releases contamination into the environment.

[8] All facts alleged in the Complaints and in the UAO must be taken as true, with all inferences drawn in favor of the Appellees. *In re Stac Electronics Securities Lit.*, 89 F.3d 1399, 1403, 1405 n.4 (9th Cir. 1996).

mercury. *U.S.E.P.A., Upper Columbia River Expanded Site Inspection Report – Northeast Washington*, TDD: 01-02-0028 (2003) ("2003 ESI Report") at 2-11.[9] In total, Teck Cominco produced and then discharged over ten million tons of toxic waste into the Columbia River. ER 28 at ¶9; Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 371 (2005).[10]

In 1994 alone, Teck Cominco dumped over 91,000 pounds of arsenic into the Columbia River – more than ten times the amount of arsenic discharged into all U.S. waters from all U.S. industries combined. ER 194-202. In that same year, Teck Cominco discharged seven times more zinc and almost five times more lead into the Columbia River than all U.S. smelters, oil refineries, mills and other industries. ER 194-202. In 1994 and 1995, copper discharges from Teck Cominco into the Columbia River exceeded the cumulative total of copper discharges for all U.S. companies. Parrish, *supra* at 371. And in 1997, the mercury discharges from Teck Cominco were equal to 57% of all mercury discharged into U.S. waters.[11] Parrish, *supra* at 371-72. All of these contaminants (arsenic, zinc, lead, copper,

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[9] The 2003 EPA Expanded Site Inspection Report is available on-line at http://www.epa.gov/region10/offices/oec/UCR_Mines_Mills/Appendix%20A.pdf.

[10] *See also* Majewski et al, *Concentrations and Distribution of Slag-Related Trace Elements and Mercury in Fine-Grained Beach and Bed Sediments of Lake Roosevelt Washington, April-May 2001*, USGS Water-Resources Investigations Report 03-4170 (2003) (determining that the Trail Smelter discharged slag directly into the Columbia River at a rate of about 397 tons per day from 1930 until the early 1990's); ER 313. This report is available on-line at http://water.usgs.gov/pubs/wri/wri034170/pdf/wri034170_ver1.10.pdf.

[11] The Trail smelter dumped between 1.6 and 3.6 tons of mercury into the river each year since the 1940s. Parrish, *supra* at 371, n.33.

and mercury) have been detected throughout the Site at concentrations exceeding applicable clean-up levels. ER 27-28.

### C. Teck Cominco Spilled Thousands of Tons of Toxic Waste into the Columbia River

In addition to direct discharges of slag, Teck Cominco has allowed unpermitted spills of thousands of additional tons of contamination into the Columbia River.[12] ER 203-207; ER 252-280. On over 80 separate occasions between September 1987 and May 2001, Teck Cominco spilled toxic waste into the Columbia River. ER 203-207. These spills included massive discharges of granulated slag, as well as direct discharges of thousands of tons of zinc, mercury, cadmium, lead, fuel oils, ammonia, chlorine, and even sulfuric and phosphoric acids.[13] ER 203-207; ER 252-280. Recently obtained documents from the British Columbia Ministry of Water, Land and Air Protection confirm additional spills by Teck Cominco into the Columbia River, including 129 kg of thallium in July of 1998, 18.18 kg of dissolved cadmium over four days in September and October of

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[12] Teck Cominco switched to a land-based slag disposal system in 1995-96, but only after being pressured into action by the Canadian Government. Parrish, *supra* at 375, n.33.

[13] These multiple spills moot any claims by Teck Cominco that it is, by virtue of its nationality, deprived of access to CERCLA's "federally permitted release" exemption. Teck Cominco Brief at 42. To qualify for the exemption, a party must prove that all of the contamination introduced into the environment arose from discharges allowed by permit. *In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 893, 901 (D. Mass. 1989). Nearly all of Teck Cominco's discharges into the Columbia River from the early 1900's through 1995 occurred without a permit. ER 190; ER 236, n.13. Since 1995, Teck Cominco's multiple unpermitted spills would similarly preclude application of the "federally permitted release" exemption. *See Acushnet*, 722 F. Supp. at 901; *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp 1528, 1541 (E.D. Cal. 1992); 126 Cong. Rec. S14964-65 (1980).

1999, 108 kg of thallium over three days in October of 2000, and 529.7 kg of zinc in January of 2001. ER 252-280.

### D. Toxic Waste Discharged by Teck Cominco Has Come to Be Located in the United States

The Site has been extensively studied over the past two decades. ER 28 at ¶5. The studies confirm that Teck Cominco is the primary source of contamination throughout the Site. ER 287.

There is widespread contamination in the sediments of Lake Roosevelt and the Upper Columbia River Basin. ER 292; 2003 ESI Report at 8-1. From 1999 to 2003, the EPA investigated the nature and extent of the contamination by collecting 58 sediment samples from locations along 70 miles of the Upper Columbia River and Lake Roosevelt.[14] ER 27 at ¶4; 2003 ESI Report at 3-1 to 3-5.

- 97% of locations contained significant elevated levels of copper;
- 95% of locations contained significant elevated levels of zinc;
- 88% of locations contained significant elevated levels of lead;
- 88% of locations contained significant elevated levels of arsenic;
- 69% of locations contained significant levels of cadmium; and
- 48% of locations contained significant elevated levels of mercury.

2003 ESI Report at 6-1 to 6-2. Granulated slag from Teck Cominco was observed on beaches throughout Lake Roosevelt and other depositional areas. ER 27-28 at ¶4.

Elevated concentrations of contamination were also detected in the sediments of Lake Roosevelt in a more recent investigation by the United States

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[14] The EPA 2003 ESI Report measured contaminant concentrations against background reference levels. A contaminant concentration is "elevated or significant" if it is at least three times greater than the detectable background reference level. 2003 ESI Report at 5-1.

Geological Survey ("USGS"). ER 281-294; Cox, *et.al.*, *Vertical Distribution of Trace-Element Concentrations and Occurrence of Metallurgical Slag Particles in Accumulated Bed Sediments of Lake Roosevelt, Washington, September 2002,* U.S. Geological Survey Scientific Investigations Report 2004-5090 (2005) ("2005 USGS Report") at 5.[15] The USGS collected sediment cores from representative locations throughout the Columbia River and Lake Roosevelt to measure the concentrations of six (6) particular contaminants - arsenic, cadmium, copper, lead, mercury, and zinc.[16] 2005 USGS Report at 7-9. All six target contaminants were detected at all locations, at levels exceeding clean-up guidelines. ER 293. The contaminant concentrations range from 4 to 220 times higher than concentrations in background reference sediments. 2005 USGS Report at 2.[17]

The liquid metal waste and granulated slag dumped into the Columbia River by Teck Cominco are the primary sources of the elevated concentrations of zinc, lead, cadmium, mercury and arsenic in the sediments of Lake Roosevelt.[18] ER

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[15] The 2005 USGS Report is available on-line at: http://water.usgs.gov/pubs/sir/2004/5090/pdf/sir20045090.pdf.

[16] Antimony, arsenic, barium, chromium, iron, and manganese are also associated with slag dumped into the river. 2005 USGS Report at 6. Dioxins and furans have not been analyzed at the Site, but the potential presence of these contaminants remains a concern. ER 21 at n.5; ER 27 at ¶4.

[17] For zinc, 80% of all samples exceeded the upper range of reference concentrations by a factor of three. 2005 USGS Report at 15. For lead, all samples exceeded the upper reference range, with some samples up to 30 times larger. *Id.* For cadmium, concentrations in all samples exceeded the upper range of reference sediments by a factor of three or more. *Id.* at 22. For mercury, concentrations were consistently larger than reference thresholds at 100% of sites along the Columbia River. *Id.* And for copper and arsenic, concentrations were larger than the respective thresholds at nearly all locations. *Id.*

[18] The Trail smelter had been previously identified by the British Columbia Ministry of Environment in 1976 & 1979, and Environment Canada in 1987, as a source of metals contamination of water, sediment, and biota in the Columbia

287-289; 2005 USGS Report at 2, 5. Granulated slag particles from Teck Cominco, which can easily be transported the length of the reservoir, are present in the riverbed and along the banks of the upper reach of Lake Roosevelt. ER 287-89; 2005 USGS Report at 46. Characteristics of liquid metal waste are present in the sediments of the lower reach of Lake Roosevelt. ER 289. And characteristics of both liquid metal waste and granulated slag are present in the contaminated sediments in the middle reach of Lake Roosevelt. ER 289.

### E. Teck Cominco's Toxic Waste is Being Actively Released in the United States

Slag is not inert. The slag which has come to be located at the Site is not chemically stable. The slag is undergoing active hydration, breakdown, and chemical weathering, which makes the contaminants within the slag subject to migration and distribution throughout the Site. ER 3 at ¶4.3; ER 290; 2005 USGS Report at 37. In other words, "[r]eleases of trace elements at toxic concentrations from sediments of Lake Roosevelt are ongoing." ER 30-31 at ¶¶3-4; ER 287-289.

The contamination at the Site can be broken down into two categories: (1) eroding slag particles which release dissolved metals; and (2) contamination in the sediments. 2005 USGS Report at 1. Fourteen of eighteen (78%) slag grains from Lake Roosevelt examined by the USGS showed signs of surface weathering through the development of exfoliation flakes. *Id.* at 37. The physical decay of these slag particles is an ongoing process which continually redistributes the contamination. ER 3 at ¶4.3.

The sediments of Lake Roosevelt act as a "secondary source" of contamination. ER 292. Releases of contamination from sediments at concentrations toxic to living organisms are active and ongoing of the Site.

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River. 2005 USGS Report at 5.

ER 292. Most of the contamination in the sediments of Lake Roosevelt is associated with the surface of the sediment particle, which is more amenable to physical, chemical, and biological processes that remobilize and release the contaminants into the lake water. ER 290; 2005 USGS Report at 47. Copper, lead, cadmium, and zinc are particularly accessible and susceptible to leaching and remobilization from sediments, as 85-90 percent of these contaminants are found on the surface, rather than the interior, of sediment particles. ER 290-291; 2005 USGS Report at 34. Organisms which maintain direct surface contact with the contaminated sediments of Lake Roosevelt have developed high toxicity levels.[19] ER 292.

Pore water (*i.e.* the water within sediments) in Lake Roosevelt also contains elevated levels of contamination. ER 290; ER 293. This contamination results from the leaching or remobilization of contamination from the sediment phase to the pore water phase. ER 290-91. Copper, lead, zinc, and other contaminants at the Site are readily leached from metallurgical slag. ER 290.

The Bureau of Reclamation ("BOR") undertakes flood control measures in late winter through early summer, releasing water from the Grand Coulee Dam which results in seasonal water level fluctuations of Lake Roosevelt in excess of 80 feet. ER 4 at ¶4.4.1; ER 291. In August, the BOR again draws down the water level of Lake Roosevelt in order to comply with rules regarding fisheries management. 2003 ESI Report at 2-5. Pressure changes which occur during the draw down of the water level create a hydraulic effect which pulls contaminated pore water out of the sediments and releases additional contamination into the

[19] *See also* Era & Serdar, *Quality Assurance Project Plan - Reassessment of Toxicity of Lake Roosevelt Sediments*, Washington State Department of Ecology Publ. No. 01-03-073 (May 2001). This report is available on-line at http://www.ecy.wa.gov/pubs/0103073.pdf.

surrounding water column. ER 291. The contaminated sediments exposed during the draw down of the water level are then subject to scouring by tidal currents and marine turbulence, which releases the contamination from the sediments and transports it throughout the Site. 2003 ESI Report at 2-6; Richard A. Du Bey & Jennifer Sanscriante, *The Role of the Confederated Tribes of the Colville Reservation in Fighting to Protect and Clean-Up the Boundary Waters of the United States: A Case Study of the Upper Columbia River and Lake Roosevelt Environment*, 12 Penn St. Envtl. L. Rev. 335, 347 (2004).

The continuing release of secondary contamination from sediments and the active breakdown of granulated slag represents "past, present, or potential migration of hazardous substances currently located at or emanating from the Site." ER 30 at ¶3. Active "releases" of Teck Cominco's toxic waste are therefore occurring within United States territory. ER 30-31 at ¶3.

### F. Teck Cominco's Toxic Waste Poses an Imminent Threat to Human Health and the Environment

The contamination discharged by Teck Cominco has resulted in a wide variety of direct adverse impacts to human health and the environment.

#### 1. *Fish & Wildlife Resources Have Been Adversely Affected*

The Site possesses diverse natural resources. Many endangered species, including the peregrine falcon, and threatened species, such as the bald eagle, bull trout, and white sturgeon, live on the waters of the Columbia River. ER 4 at ¶4.5; ER 27 at ¶2; Parrish, *supra* at 370. Twelve separate species of threatened or endangered salmonids are present in the Columbia River. Du Bey, *supra* at 343.

The contamination in the sediments of Lake Roosevelt is toxic to aquatic life. ER 28 at ¶6-7. The toxic effects include chemical components such as bioaccumulation of toxins in tissue and biota, and physical components such as

severe erosion of fish gills and smothering of habitat.[20] ER 4 at ¶4.4.2; ER 28 at ¶7.

The Canadian Department of Fisheries and Oceans tested the toxicity of slag from the Trail Smelter on five species of aquatic organisms representing different levels of the food chain. ER 192; 2003 ESI Report at 2-12. Teck Cominco's slag affected all species studied. ER 192; Parrish, *supra* at 372; 2003 ESI Report at 2-12. The U.S. Fish & Wildlife Service ("USFWS") has separately detected elevated concentrations of arsenic, lead, cadmium, and zinc in fish from Lake Roosevelt. Du Bey, *supra* at 345, n.60 & 61. The toxic slag discharged by Teck Cominco is the primary source of these elevated concentrations. *Id.*

Slag discharged by Teck Cominco is toxic to aquatic species due to the leaching of significant amounts of copper and zinc from sediments and due to direct physical abrasion of vital tissues such as gills. Parrish, *supra* at 373; 2003 ESI Report at 2-13. The Washington State Department of Health (WSDOH) issued an advisory against consumption of walleye from the Upper Columbia River Basin due to elevated levels of mercury, which could adversely impact pregnant women, women of childbearing age, and children under six years old.[21] Parrish, *supra* at 373, n.49; 2003 ESI Report at 2-13. The fish advisory remains in effect today. ER 293; ER 300-302.

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[20] Testing performed on rainbow trout indicated that prolonged exposure to slag caused death through abrasions of delicate exposed surfaces such as gills. 2003 ESI Report at 2-12.

[21] See Fish and Shellfish Consumption Advisories in Washington State, Washington State Department of Health website, available at http://www.doh.wa.gov/eh/oehas/EHA_fish_adv.htm.

Benthic organisms[22] have been adversely affected by frequent contact with the contaminated sediments within Lake Roosevelt. ER 293. The accumulation of contamination in aquatic sediments causes death, reproductive failure, growth impairment, and other detrimental changes in benthic organisms.[23] ER 28 at ¶7; 2003 ESI Report at 8-2. Organisms that are not killed by the toxic contamination tend to accumulate toxins in tissue and then transfer the contamination up the food chain to higher predators such as fish. ER 28 at ¶7.

Benthic invertebrate communities in the Upper Columbia River Basin are relatively low in abundance and diversity, and demonstrate characteristics often associated with contaminated or habitat-degraded areas. 2003 ESI Report at 8-2. An analysis of benthic invertebrate communities throughout the Site confirmed environmental stress due to the contamination in sediments and the loss of physical habitat from slag deposition. ER 293; 2003 ESI Report at 2-19.

2. ***Human Health and Welfare Has Been Adversely Affected***

The Lake Roosevelt National Recreation Area is Washington State's largest reservoir, with an abundance of shoreline accessible to the public for recreational use. 2003 ESI Report at 2-3. The area attracts over one million visitors annually for a variety of recreational activities including boating, waterskiing, swimming, camping, hiking, picknicking, wildlife watching, and sightseeing. ER 27 at ¶2; 2003 ESI Report at 2-3.

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[22] A benthic invertebrate community includes the different types of invertebrates that reside in or on the bottom of rivers and lakes. 2003 ESI Report at 2-19. Benthic invertebrates in Lake Roosevelt include snails, midges, caddisflies, worms, and scuds.

[23] Lethal and sub-lethal effects were observed in laboratory toxicity tests of selected aquatic organisms exposed to the contaminated sediments collected from the Site. 2003 ESI Report at 2-19.

The Site is mostly inhabited by members of Native American tribes and local farmers. Parrish, *supra* at 370; 2003 ESI Report at 2-3. Tribal members depend upon the natural resources of the area for their "subsistence, culture, and spiritual well-being." ER 4 at ¶4.6. Teck Cominco's discharges of contamination over the past 100 years have damaged the tribes' hunting, fishing, and gathering rights, as well as their cultural and spiritual well-being. ER 5 at ¶4.7; Parrish, *supra* at 374.

Humans are directly exposed to the toxic contamination on the multiple "black sand beaches" of Lake Roosevelt, which are composed wholly or substantially of metal-bearing slag discharged by Teck Cominco. ER 4 at ¶4.4.1; ER 193. These beaches are above the waterline nearly year-round, which increases opportunities for human contact with contamination through dermal contact and through airborne dispersion and inhalation. ER 4 at ¶4.4.1. During draw down periods, additional contaminated sediments are exposed to the air, leading to additional wind-borne distribution of contaminants through fugitive air emissions. ER 4 at ¶4.4.1; Du Bey, *supra* at 347; 2003 ESI Report at 2-5.

The ingestion and consumption of local water, fish, native plants, and agricultural crops increases human exposure to toxic contamination. ER 4 at ¶4.4.1. Local residents claim that illnesses, such as cancer, colitis, and leukemia, have resulted from or been exacerbated by the contamination of Lake Roosevelt. Parrish, *supra* at 373. Statistics from the WSDOH support this assertion. *Id.*

### G. Teck Cominco is Responsible for Contaminating U.S. Territory

CERCLA serves two key purposes: (1) to identify and clean up sites which have been contaminated by historic releases of hazardous substances; and (2) to fund those clean-up activities through the application of a retroactive "polluter pays" liability scheme. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).

Granting Teck Cominco's request and dismissing the citizen suit would undermine both of these remedial goals.

Unless Teck Cominco is forced to accept responsibility for its actions, the investigation and cleanup of the Site will become the responsibility of the EPA. The EPA has limited personnel and resources. Forcing the EPA to undertake the investigation and cleanup of the Site would guarantee, at best, extensive delays. The inevitable result would be that the Site will remain contaminated for decades. CERCLA was enacted to ensure that the citizens of Washington, including the tribal members and residents of the Upper Columbia River Basin, would not be forced to wait indefinitely for the Site to be restored.

The fundamental objective of the "polluter pays" principle is to prevent polluters, such as Teck Cominco, from profiting from behavior that contaminates our environment. A dismissal of the citizen suit would permit Teck Cominco to profit from its behavior by transferring its hazardous waste disposal and restoration costs to U.S. taxpayers. Relieving Teck Cominco of its legal responsibility will force the citizens of Washington, including the members of the Colville Tribe and the residents of the Upper Columbia River Basin, to subsidize the cost of investigating and remediating the Site.

1. ***There is No "Foreign Source Defense" Under CERCLA***

The application of CERCLA does not depend on the nationality of the polluter. Teck Cominco is essentially asking this Court to create a new "foreign source" defense.[24] But, there are no authorities which support the proposition that

[24] There is no "foreign source" defense under CERCLA. CERCLA provides a very limited set of defenses to liability. 42 U.S.C. § 9607(b). To date, the courts have been reluctant to create new CERCLA defenses through case law. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2nd Cir. 1985); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1445 (W.D. Mich. 1989).

Teck Cominco is immune from CERCLA liability simply because of its status as a foreign corporation. Acceptance of Teck Cominco's proposed "foreign source" defense would allow Teck Cominco to avoid responsibility for 100 years of discharging slag and toxic contamination into U.S. territory by hiding behind the international border. ER 69. The fact that Teck Cominco is a Canadian company, or the fact that the Trail Smelter is located in Canadian territory, does not make the toxic conditions at the Site any less an imminent threat to human health and the environment. ER 26-31.

Teck Cominco used the Site as a dumping ground for its toxic waste for nearly a century. Nothing in CERCLA permits Teck Cominco to use its foreign status to immunize itself from legal responsibility for its actions. Teck Cominco is not requesting fair application of international legal principles. Rather, Teck Cominco is requesting complete legal exoneration for a century of polluting our land and water resources.

2. ***There is No "Indifference" Defense under CERCLA***

Teck Cominco also suggests that the Court adopt another new CERCLA defense – the "indifference" defense.

> COURT: I do think that it's a lead pipe cinch that if they dumped it into this river ten miles away from this huge American repository, that that's where it's going to wind up. What conceivably could be the difference between that and their hauling it down here by some other means?
>
> MR. GEORGE: The difference is that if they put it in a truck to be hauled down there, they intended to haul it down here. <u>If they dump it into this river, they don't really</u>

care if it stops in Canada or goes anywhere else.

SER 9-11 (emphasis added).

The fact that Teck Cominco does not care about where its wastes have come to be located does not vitiate its legal responsibility to clean it up. Liability under CERCLA is strict. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir. 1986). Teck Cominco's indifference to the results of its behavior is irrelevant.

In contrast, the members of WEC, WashPIRG, and CCC care about where Teck Cominco dumps its waste, especially because that waste has come to be located, and continues to be released, throughout the Upper Columbia River Basin. The EPA, the Colville Tribe, and the State of Washington care as well, and their combined efforts to require Teck Cominco to investigate and remediate the Site are factually and legally justified. ER 215-241.

## IV. CONCLUSION

Teck Cominco discharged of millions of tons of contamination into the Columbia River. Teck Cominco's contamination has come to be located and continues to be released throughout hundreds of square miles of northeast Washington. Teck Cominco is now responsible for the investigation and remediation of the resulting Site. The citizen suit filed by the Colville Tribe and the State of Washington to enforce the UAO states a valid and viable claim under CERCLA. The U.S. District Court agreed, and the *amici curiae* ask that the Court's sound decision be affirmed.

Respectfully submitted this 27th day of July, 2005.

RIDDELL WILLIAMS P.S.

By: _____

Loren R. Dunn, WSBA #17135
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**Certificate Of Compliance With Type-Volume Limitation, Typeface Requirements, And Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,172 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

Dated this 27th day of July, 2005.

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CERTIFICATE OF SERVICE

I, Angela M. Tiernan, certify as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal secretary by the law firm of Riddell Williams P.S.

2. I certify that on this 27th day of July, 2005, I caused a copy of the foregoing document, **BRIEF OF *AMICI CURIAE* WASHINGTON ENVIRONMENTAL COUNCIL, WASHINGTON PUBLIC INTEREST RESEARCH GROUP, AND CITIZENS FOR A CLEAN COLUMBIA IN SUPPORT OF PLAINTIFF'S/APPELLEES,** to be served via the method(s) listed below on the following parties:

| | |
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this certificate was executed on July 27, 2005, at Seattle, Washington.

Angela Tiernan

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U.S. Court of Appeals
Ninth Circuit
Attn: Gabriella
PO Box 193939
San Francisco, CA 94119-3939

**Re: Pakootas, et al. v. Teck Cominco Metals, Ltd.**

Dear Gabriella:

This letter will confirm that all parties have consented to the filing of an amicus brief by Washington Environmental Council, WashPIRG, and Citizens for a Clean Columbia. I have attached a copy of the stipulation signed by all of the parties in support of our filing. Reference to the stipulation is also made in our amicus brief on page 1, footnote 2, a copy of which I have also attached.

Please don't hesitate to contact me if you have any further questions.

Sincerely,

Loren R. Dunn
of
RIDDELL WILLIAMS P.S.

LRD/cs
Enclosures

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