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Legal Sidebar

When One Door Closes, Another One Opens: Supreme Court Ruling Restricts Challenges to CERCLA Cleanup But Could Expand State-Law Claims

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The Comprehensive Environmental Response, Compensation, and Liability Act, also known as CERCLA or Superfund, places limits on how parties may challenge the scope of a plan to remediate hazardous waste contamination. On April 20, 2020, the Supreme Court ruled in *Atlantic Richfield v. Christian* that owners of property located within a Superfund site may not pursue restoration of their property in a manner that conflicts with a plan approved by the U.S. Environmental Protection Agency (EPA) without EPA's approval. The *Atlantic Richfield* decision also addressed complicated questions regarding the jurisdiction of federal and state courts, holding that litigants can, subject to certain limitations, assert state-law claims that challenge an EPA-approved CERCLA cleanup plan in state courts.

This Sidebar explains CERCLA's framework for developing and seeking review of cleanup plans, discusses the *Atlantic Richfield* decision, and considers the implications of the decision. As discussed below, the majority's decision may result in an increase in state-court litigation regarding Superfund sites, particularly in the early stages of the cleanup planning process. It may also complicate the settlement negotiation process for EPA and parties that are liable for response costs at Superfund sites.

Background

CERCLA

Congress enacted CERCLA to clean up sites contaminated with hazardous substances, pollutants, or contaminants across the United States and to hold the parties connected to those sites responsible for cleanup costs. EPA administers the Superfund program and maintains the National Priorities List (NPL), a prioritized list of some of the most hazardous sites (often called "Superfund sites"). While EPA cleans some sites itself, it may also compel certain entities, which the statute refers to as both "potentially responsible parties" (PRPs) and "covered persons," to perform or pay for the cleanup.

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Section 107 of CERCLA identifies four categories of PRPs connected with a site who could be liable for costs of response actions. One such category includes the owner of a "facility," which is defined in turn to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." EPA may recover from PRPs the cleanup costs it incurs, and PRPs may seek contribution from other responsible parties.

CERCLA establishes a complex process for developing a cleanup plan. Before EPA selects a plan, the agency conducts a remedial investigation and feasibility study (RI/FS), or orders a PRP to conduct one, to evaluate site conditions and remedy options. EPA must provide public notice and opportunity for comment on proposed cleanup plans. The statute also provides for extensive state government involvement when EPA initiates, develops, and selects cleanup actions, and generally requires that the remedial action comply with "legally applicable or relevant and appropriate" standards under state law.

The Litigation

Atlantic Richfield involves the cleanup of a Superfund site at the former Anaconda copper smelter in Butte, Montana. From 1884 to 1977, the Anaconda Company refined millions of tons of copper, emitting up to 62 tons of arsenic and 10 tons of lead every day. This resulted in heavy metal contamination across several hundred square miles. In 1983, a 300-square-mile area around the smelter was among the first sites to be designated a Superfund NPL site. Over the past 35 years, EPA has managed an extensive cleanup at the site. Atlantic Richfield, which purchased the Anaconda Smelter in 1977, has been carrying out the cleanup. Active remediation work is ongoing and has been projected to continue until at least 2025.

EPA has selected several remedies to address soil, groundwater, and surface water contamination at most of the site. In its current form, EPA's residential soil remediation plan calls for cleaning up residential yards with soil arsenic concentrations in excess of 250 parts per million (ppm), by removing one foot of the existing soil, replacing it with clean soil, and capping the soil with a protective barrier. Additionally, EPA's groundwater and surface-water remedy currently requires remediation where arsenic levels exceed 10 parts per billion (ppb). EPA considered but rejected a plan that would have required constructing an underground permeable barrier to capture and treat shallow groundwater.

In 2008, a group of 98 property owners within the Anaconda Superfund site sued Atlantic Richfield in Montana state court, asserting state common-law claims for trespass, nuisance, and strict liability. Among the forms of relief sought by the landowners were "restoration damages," which, under Montana law, would have to be used for restoration of the property. To support their claim of restoration damages, the landowners proposed a plan that included removing a greater depth of soil from residential yards, setting a lower arsenic soil cleanup threshold level, installing an underground permeable barrier, and other remedies beyond those selected by the EPA.

Atlantic Richfield argued that CERCLA Sections 113(b) and 113(h) barred the landowners' claim for restoration damages. (The company "concede[d] that the Act preserves the landowners' claims for other types of compensatory damages under Montana law, including loss of use and enjoyment of property.") Section 113(b) of the statute gives federal district courts "exclusive original jurisdiction over all controversies arising under [CERCLA]." Section 113(h) provides that "[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action" except in several limited circumstances. The company also alleged that the landowners were barred by CERCLA Section 122(e)(6) from implementing their proposed cleanup plan. Section 122(e)(6) provides that, once the remedial investigation and feasibility study has begun for an NPL-listed site, "no potentially responsible party may undertake any remedial action" at the site without EPA's approval.

The Montana trial court granted judgment for the landowners on the restoration damages issue. The Montana Supreme Court affirmed, ruling that the landowners could proceed to trial because neither

Section 113(b) nor Section 113(h) stripped the Montana state court's jurisdiction over that claim. According to the Montana Supreme Court, the landowners' restoration damages claim did not implicate Section 113(b) because it arose under *state* law and not CERCLA. The court also held that the claim did not implicate Section 113(h) because it did not interfere with and was not a "challenge" to EPA's cleanup plan. The state supreme court further held that the landowners were not PRPs under CERCLA, and therefore were not required to obtain EPA's consent pursuant to Section 122(e)(6) before proceeding with their restoration plan. Finally, the court ruled that the landowners' state claim did not otherwise conflict with CERCLA and therefore was not preempted.

Atlantic Richfield petitioned for certiorari, and the Supreme Court granted review to consider three questions: (1) whether CERCLA Section 113 "strips the Montana courts of jurisdiction over the landowners' claim for restoration damages"; (2) whether Section 122(e)(6) barred the landowners' claim because the landowners are PRPs who cannot implement restoration plans without EPA's consent; and (3) whether CERCLA preempted the landowners' restoration remedy.

The Supreme Court's Decision

In an opinion authored by Chief Justice Roberts, the Court affirmed in part and vacated in part the Montana Supreme Court's judgment, and remanded for further proceedings. Five additional justices joined the majority opinion in its entirety, which held that the Montana state courts had jurisdiction over the landowners' restoration damages claim, but that restoration could not take place without EPA's approval because the landowners were PRPs and therefore subject to the requirements of Section 122(e)(6). The Court declined to reach the issue of whether CERCLA otherwise preempts the landowners' proposed cleanup plan. Justices Alito and Gorsuch each wrote separate opinions concurring in part and dissenting in part; and Justice Thomas joined Justice Gorsuch's opinion.

In a portion of the opinion joined by the entire Court except for Justice Alito, the majority ruled that Section 113 of CERCLA did not strip the Montana state courts of jurisdiction over the landowners' claim. Rejecting Atlantic Richfield's arguments as well as those raised in the United States' amicus brief, the Court held that the landowners' claim for restoration damages arose under Montana law and not CERCLA, and therefore those claims did not constitute "controversies arising under" CERCLA for purposes of Section 113(b). The Court also concluded that "[t]here is no textual basis for Atlantic Richfield's argument that Congress precluded *state* courts from hearing a category of cases in § 113(b) by stripping *federal* courts of jurisdiction over those cases in § 113(h)." As a result, the Court held that the state courts retained jurisdiction over the landowners' claim for restoration damages.

As to the Section 122(e)(6) bar to remedial actions not approved by EPA, the Supreme Court reversed the Montana Supreme Court's holding. Looking to the list of "covered persons" in Section 107 of CERCLA, the Court ruled that the landowners were PRPs and therefore needed EPA's approval for their restoration plan. Specifically, the landowners were the "owners" of "a facility," which under CERCLA is "any site or area where a hazardous substance [here, arsenic and lead] . . . has come to be located."

According to the Court, landowners retain their PRP status even if they are not liable for the payment of response costs. The majority noted that this approach is consistent with CERCLA's overall purpose, which is to "ensure the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones." Otherwise, EPA would be forced to monitor every property on a Superfund site and even preemptively file lawsuits to ensure that landowners do not interfere with a cleanup by, for instance, digging up contaminated soil without notifying EPA.

Justice Alito agreed that the landowners could not bring their restoration damages claim without EPA's consent, but did not believe it was necessary to reach the issue of whether state courts have jurisdiction to hear challenges to EPA-approved cleanup plans. Writing for the majority, Chief Justice Roberts responded

that it was necessary to decide the jurisdictional question in order to resolve uncertainty about the forum in which the litigation should continue. Justice Alito further cautioned that neither he, nor the parties, nor the majority had succeeded in clearing up the issues surrounding the relationship between Sections 113(b) and (h).

Justice Gorsuch also wrote a separate opinion, in which Justice Thomas joined, agreeing with the majority's ruling on jurisdiction but disagreeing with its ruling on Section 122(e)(6). Justice Gorsuch would have held that the landowners are not PRPs because EPA never notified them of their PRP status as required by Section 122(e)(1) and because CERCLA's statute of limitations for holding them responsible for cost-recovery actions "has long since passed." The majority, however, concluded that landowners can be PRPs even if they can no longer be held liable for cleanup costs.

Implications of the Court's Decision

While *Atlantic Richfield*'s interpretation of Section 122(e)(6) of CERCLA is consistent with longstanding practice and keeps the door closed to some attempts to change the contours of cleanups, the Court's interpretation of Section 113 opens the door to some state-law claims that target the scope of an already agreed-upon cleanup plan. As discussed below, the Court's ruling may result in additional litigation, and litigation at earlier stages of the cleanup process. The prospect of that litigation, in turn, may affect the substance and complexity of future settlement negotiations between EPA and PRPs.

The Court's decision leaves in its wake an uncertain landscape of options for challenging a cleanup. Previously, some courts have broadly limited challenges allowed to be brought in state court under Section 113(h). For instance, lower courts have held that an action is a "challenge" arising under the statute if it contests what measures are necessary to clean up the site or is "related to the goals," "calls into question," or "impact[s] the implementation" of the cleanup. While litigants could instead bring citizen suits to challenge the adequacy of a cleanup, such suits are allowed only after the cleanup has been completed.

The extent of potential claims challenging cleanup actions post-*Atlantic Richfield* would depend on several factors. First, litigants at other Superfund sites may only seek restoration damages if such a remedy is available under state law, and it is unclear how many states beyond Montana provide such a remedy. Even in states that allow for restoration remedies, the extent to which EPA will approve PRP-proposed restoration plans under Section 122(e)(6) also is unclear. Here, the fact that EPA considered and rejected the restoration plan the landowners proposed makes it less likely that the landowners will now obtain EPA's approval to obtain restoration damages. But the fact pattern at other sites may be different.

Another unknown is the extent to which defendants may invoke other bases for removing CERCLA-related state-law claims to federal court. For example, Atlantic Richfield recently succeeded in removing a state-law tort claim to federal court by invoking a government contractor defense in an unrelated case regarding a Superfund site in Indiana. Moreover, because the Court sidestepped the preemption issue, lower courts will likely have to confront the question of whether CERCLA preempts state law challenges to EPA-approved cleanups in future litigation.

Additionally, while the Supreme Court's interpretation of Section 122(e)(6) preserves EPA's gatekeeper role, that role is not absolute. First, Section 122(e)(6) does not apply to plaintiffs who are not PRPs. Additionally, because Section 122(e)(6) only bars suits by PRPs after the RI/FS process has begun, there may be an increase in lawsuits by landowners seeking to remediate a site to their preferred standard before a cleanup plan has been established. Moreover, the requirement that PRPs obtain EPA approval before undertaking remedial action is limited to NPL-listed sites. Response actions under CERCLA at non-NPL sites—which comprise the vast majority of cleanups under the statute—may therefore be the subject of more litigation.

The specter of additional litigation, and litigation early in the process of developing and implementing a cleanup plan, might complicate settlement negotiations between EPA and PRPs. As the *Atlantic Richfield* majority recognized, settlements "are the heart" of the CERCLA framework. In accordance with the statute's directive to settle "[w]henever practicable and in the public interest," the majority of cleanups are resolved through negotiated agreements. An important benefit of settlements to PRPs is the certainty that further liability beyond the agreed-upon terms will be limited. In amending CERCLA to add Section 113(h), Congress made note of the concern that pre-enforcement judicial review of EPA response actions "would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups." The ability of landowners to assert state-law claims that implicate a cleanup may introduce additional uncertainty into that negotiation process. Significantly, EPA may also find it necessary to monitor and intervene in state-court litigation in order to preserve its position in settlement negotiations.

As a result, PRPs may push EPA, as part of a settlement agreement, to commit to disallowing any additional cleanup work by outside parties in accordance with Section 122(e)(6). But whether EPA would agree in advance not to consider future requests to undertake a different cleanup is unclear.

Atlantic Richfield may also have implications beyond CERCLA, potentially including in climate change-related litigation. Plaintiffs in several climate change-related lawsuits against fossil-fuel energy companies argued that the Court's rejection of federal jurisdiction under CERCLA in *Atlantic Richfield* supports their position that their state-law nuisance claims do not arise under federal law, and therefore may proceed in state court. The Ninth Circuit upheld state-court jurisdiction in a pair of those cases, but did not expressly address *Atlantic Richfield*. A similar case is pending in the First Circuit. While the defendant energy companies have consistently contested *Atlantic Richfield*'s relevance in the climate change litigation, lower courts may look to *Atlantic Richfield* as they consider the relationship between federal environmental statutes and state common law.

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