

CLIENT ALERT

No, the Supreme Court's Decision in *Atlantic Richfield Co. v. Christian* Will Probably Not Open Pandora's Box, But...

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On April 20, 2020, the Supreme Court of the United States issued its opinion in *Atlantic Richfield Co. v. Christian, et al.*, allowing Montana landowners to pursue state law claims for damages within an EPA-managed Superfund site, but requiring EPA approval of any remedial work beyond the originally selected remedy. Many commentators and legal scholars have suggested the case opens a veritable Pandora's Box of new litigation. We submit that the consequences will likely be less dramatic, in part because of the unusual legal remedy under Montana law for a landowner whose property becomes contaminated by another party is not widely available outside Montana.

Summary of Case

The case arises out of the Anaconda Superfund site, a 300 square mile abandoned mining site in Butte, Montana, which became contaminated with arsenic and lead from historic copper smelting operations that began in 1884 and continued for most of the last century. An EPA-supervised cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) began in 1983, when the site became one of first to be placed on the Agency's National Priorities List. Since then, over 800 residential and commercial properties have been remediated, with \$470 million dollars spent to date by the owner of the former smelter, Atlantic Richfield, to implement EPA's chosen remedial action.

Many of the residential property owners were dissatisfied with EPA's chosen remedial action. In 2008, a group of 98 landowners sued Atlantic Richfield under a variety of state common law theories for additional damages related to the property contamination – one of which eventually was presented to the U.S. Supreme Court for review. Specifically, under Montana state law a plaintiff asserting a property damage claim for a personal residence may seek restoration damages in tort, even if the restoration costs exceed the property's diminution in value, where the proceeds will be used to remediate the property.

Based on that concept, the plaintiffs sought to recover not only damages for diminution in property value, but also "restoration" costs to implement additional cleanup actions with more stringent remedial requirements than those deemed necessary by EPA. For example, the landowners' proposed restoration calls for a soil cleanup target of arsenic to preindustrial levels, rather than the 250 parts per million level set by EPA, and for far more soil excavation than EPA had ordered. The landowners also sought to capture and treat groundwater through a large underground permeable barrier, a measure that EPA regarded as costly and unnecessary, and which moreover risked impacting groundwater quality and flow. In total, the landowners' restoration cleanup plan would cost Atlantic Richfield an additional \$50 million to \$58 million.

We [previously summarized](#) Atlantic Richfield's petition to the Supreme Court, which requested review of a Montana Supreme Court decision allowing the landowners' common law claims for restoration damages to proceed. The Supreme Court first held that the CERCLA does not deprive Montana state courts of jurisdiction over the landowners' state law restoration claims. Specifically, Section 113(b) of CERCLA, which grants federal courts exclusive jurisdiction over cases "arising under" CERCLA, does

not deprive state courts of jurisdiction to hear state law claims for restoration damages, because those claims do not "arise under" CERCLA.

Our focus, however, is the Court's decision to reverse the Montana Supreme Court's holding that the landowners could pursue a claim for the costs of restoration, leaving for Montana jurors the task of deciding whether the restoration would conflict with EPA's remedial action. Specifically, the Supreme Court ruled that the Montana Supreme Court was wrong when it held that the plaintiff landowners were not "potentially responsible parties" under CERCLA and thus not required to comply with Section 122(e)(6) of CERCLA. That section bars a PRP from undertaking any remedial action at a federal Superfund site (i.e., a site that is listed on EPA's National Priorities List or "NPL") without first receiving EPA approval.

Instead, the Court determined that because the plaintiffs were included within the broad category of "covered persons" under Section 107 — they own a facility where hazardous substances have "come to be located" — the plaintiffs were "potentially responsible parties" subject to Section 122(e)(6). The Court's majority rejected landowners' arguments and Justice Gorsuch's dissent, under which the breadth of the term PRP would depend on the enforcement status for each landowner, such as whether a landowner has received a notice letter from EPA or whether a statute of limitations has run. The Court likewise rejected arguments that the property owners may qualify for CERCLA's contiguous landowner defense, because they could not satisfy the elements of that defense. For instance, the landowners would have "had reason to know" that their property could have been contaminated when they acquired the property, and could not show that they provided the required cooperation with EPA given their current demands for additional remediation.

The Court remanded the case back to Montana state court, opining that an approval process with EPA "could ameliorate any conflict between the landowners' restoration plan and EPA's Superfund cleanup, just as Congress envisioned." Accordingly, the ruling affirms EPA's decision-making authority in federally led cleanup actions under CERCLA.

Significance of the Case and Unanswered Questions

Numerous observers have stated that the decision likely opens up an entirely new category of state law actions challenging EPA-approved clean-ups, and have predicted a new wave of litigation by property owners, as well as environmental groups. There are at least two reasons why we believe such predictions are overstated. First, the *Atlantic Richfield* decision centers on an unusual legal remedy permitted under Montana law — that if a landowner's property has been the subject of a CERCLA cleanup, the landowner is not limited to recovery of diminution in property value for residual contamination, but instead may seek the added costs of cleaning up the property to pre-contamination conditions (i.e., background levels). We are not aware of other state laws that authorize such restoration damages, although there may be such remedies available under tribal law. Many states do not go beyond diminution of property value for landowners. Thus, such restoration claims at Superfund sites likely will be few and far between.

Second, even if such claims are viable under other state or tribal laws, plaintiffs, as PRPs, must overcome a second hurdle of convincing EPA to approve the remedy. That hurdle is a formidable one. EPA has a very detailed process under the National Contingency Plan (NCP) for selecting remedial actions for sites, which provides for a significant degree of input from citizens and interested parties. If EPA disagreed with a commenter's suggestion to make a remedy more stringent during the remedy selection process, the Agency seems unlikely to thereafter change its mind when presented with the same proposal after the fact.

That said, there are unanswered questions that may give rise to additional litigation. What standard should EPA apply in evaluating and approving a restoration plan? Does EPA need to follow the NCP when making this evaluation? Also, the case concerned cleanup of an NPL site. The Court states that the requirement for EPA approval of additional cleanup is limited to NPL sites. Would a PRP landowner have an easier pathway to recovery of restoration costs for a non-NPL site?

Also unanswered are a host of questions that relate to parties considering whether to voluntarily perform remedial action pursuant to an administrative order on consent (AOC) or consent decree (CD) settlement with EPA. Such settlements typically provide contribution protection, but those provisions may not insulate the settlor from restoration claims as they would not be “matters addressed by” the settlement. Thus, PRPs may wish to consider seeking to expand the “matters addressed by” language in EPA’s model settlement documents to encompass site restoration. Indeed, depending on the specific facts of a site subject to EPA cleanup, EPA and private parties should each scrutinize model AOC and CD language to ensure the questions and uncertainties of potential future state law claims by site neighbors and downstream property owners are addressed and eliminated (or at least minimized), so that this recent Supreme Court decision does not disrupt CERCLA’s framework of settlement, certainty, and repose.

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