Justices Weigh Property Rights Against Superfund Plans

By **Joshua Frank and Martha Thomsen**

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In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, to "promote the timely cleanup of hazardous waste sites and ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."[1]

Nearly four decades later, serious questions persist regarding the various statutory provisions by which CERCLA accomplishes those twin goals. On Dec. 3, the U.S. Supreme Court heard oral argument in Atlantic Richfield Co. v. Christian,[2] a case poised to address one such lingering question: the extent to which CERCLA prevents collateral challenges to agency-selected cleanup plans.

The case has major implications for the parties, which include Montana landowners within the Anaconda Smelter Superfund site on one side, and Atlantic Richfield, the company that has been conducting cleanup of the site for several decades, on the other side. The impacts of the case, however, may spread far beyond Montana to the hundreds of other Superfund and hazardous waste sites in the country.

What's at Stake

There are three legal questions presented in Atlantic Richfield, but they all drive toward the ultimate question of what it means to challenge a U.S. Environmental Protection Agency cleanup decision, and when such challenges are barred.

According to petitioner Atlantic Richfield, allowing property owners and similarly situated parties to bring tort suits that effectively seek additional cleanup activities beyond those required by an EPA-selected remedy should be treated as a prohibited challenge under CERCLA. Allowing such claims to persist, Atlantic Richfield argues, would undermine decades of work by Atlantic Richfield and the EPA.

More broadly, allowing courts to hear such claims would destabilize the finality of EPA cleanup decisions, and the ability of potentially responsible parties, or PRPs, conducting cleanups to rely on those decisions — and the releases of liability that are generally a part of PRP commitments to conduct agency-selected remedies.

The respondent property owners assert in response that CERCLA expressly protects from preemption state law tort claims, and that they are not challenging the EPA's remedy, but rather seeking additional cleanup measures, such as additional soil excavation. According to the property owners, Atlantic Richfield's position would effectively and indefinitely prohibit the property owners from addressing hazardous waste on their own properties.

The Anaconda Smelter Superfund Site and the Montana Supreme Court's Decision

The Anaconda Smelter site was added to the National Priorities List by the EPA in the 1980s. Atlantic Richfield has undertaken substantial cleanup work at the site since at the EPA's direction. This work included remediating residential yards within the Superfund site where arsenic exceeded specified levels in soil or groundwater.

In 2008, landowners within the site sued Atlantic Richfield in state court under a variety of tort theories. The landowners sought restoration damages under Montana law, and proposed that the amount of damages be based on what actions would be necessary to restore the properties to precontamination levels.

To prevent windfalls, Montana law requires that an award of restoration damages must actually be used to repair the affected property. The landowners' experts concluded that restoration would require removal of the top two feet of soil and installation of permeable wells. Whereas the EPA had set the soil action level for arsenic (i.e., the concentration above which the EPA required remediation at residential yards) at 250 parts per million, the landowners proposed 15 ppm as a basis for their damages.

Atlantic Richfield argued in state court that various provisions of CERCLA preempted the property owners claims. First, Atlantic Richfield argued that CERCLA Sections 113(b) and (h), when read together, vest exclusive jurisdiction over CERCLA controversies in the federal courts, and prohibit federal courts from reviewing "any challenges to removal or remedial action selected" by EPA under CERCLA while the cleanup is ongoing.[3]

The property owners' pursuit of restoration damages — and particularly their proposal to set cleanup levels lower than those selected by the EPA and excavate additional contaminated areas — constituted a challenge to the EPA's selected cleanup, according to Atlantic Richfield.

The Supreme Court of Montana disagreed, concluding that the tort suit was not a challenge to the EPA's selected cleanup. The court reasoned:
In this case, the restoration damages Property Owners seek are to be placed in a trust account and used to further restore affected properties beyond the levels required by EPA, and the restoration work would be completed by the Property Owners themselves. To the extent that EPA's work is ongoing, the Property Owners are not seeking to interfere with that work, nor are they seeking to stop, delay, or change the work EPA is doing. The Property Owners' claim is exactly the sort contemplated in CERCLA's savings clauses,[4] and does not present a "challenge" to EPA's selected remedy. Absent a "challenge" to removal or remedial action selected in the CERCLA cleanup process, §§ 113(h) and (b) do not deprive Montana courts of jurisdiction to entertain state-law restoration claims.[5]

Atlantic Richfield also argued that that the property owners themselves were PRPs under CERCLA, and that PRPs are explicitly prohibited under CERCLA Section 122(e)(6) from undertaking "any remedial action at a facility unless such remedial action has been authorized by" the EPA.

While the term "potentially responsible party" is not explicitly defined under CERCLA, courts have typically treated it as coterminous with the "covered persons" identified in CERCLA Section 107. Covered persons are those that are liable for the costs of cleanup, and include both current and former owners of a contaminated property.

The Montana Supreme Court disagreed with that as well, and concluded that the property

owners were not PRPs, because neither the EPA nor Atlantic Richfield had ever treated or designated them as such.

Seeking review of the court of 's decision, petitioner Atlantic Richfield advances three legal arguments. First, Atlantic Richfield asserts that the court took an overly constricted view of what it means to challenge an EPA-selected cleanup decision, and that CERCLA Section 113 does in fact prohibit suits like this that seek a cleanup different than that selected by the EPA.

Second, Atlantic Richfield argues again that the property owners are PRPs under CERCLA, irrespective of fault or actual liability, because they are owners of property within the bounds of the Superfund site.

Third, Atlantic Richfield argues that the restoration damages claim is constitutionally preempted under the doctrine of impossibility preemption. Specifically, Atlantic Richfield "is subject to EPA orders" requiring it to carry out the cleanup as the EPA directs, and a state court order demanding the company fund a different cleanup would force the company to defy EPA orders — making it impossible for Atlantic Richfield to comply with both state and federal law.[6]

Atlantic Richfield also warns of dire consequences at the Anaconda Smelter site and elsewhere — most notably, that the decision if left uncorrected would provide "a roadmap for courts around the country to subvert the finality and efficiency that are CERCLA's principal goals" and open the door to "thousands of unforeseen plaintiffs-landowners to sue companies to implement expensive and contradictory remedies at each site."[7]

Even more troubling, the lack of finality could discourage companies from agreeing to conduct cleanup in exchange for a release from the EPA, because there would be no protection from suits by private parties seeking additional cleanup.

Notably, the United States weighed in largely supporting Atlantic Richfield. According to the federal government, CERCLA Sections 113(b) and (h) should indeed be read together to prohibit challenges to remedial actions selected by the EPA under CERCLA; the property owners' claims would physically undo the EPA's selected remedy in this case, and should therefore be treated as prohibited challenges.

Further, the United States argued that the property owners' claims do give rise to both impossibility and conflict preemption, because the restoration they seek would "require physically reversing parts of EPA's cleanup, thereby making it impossible to execute respondents' proposed remedy while also maintaining the CERCLA-directed remedy."[8]

Finally, the United States agreed that the property owners have PRP status under CERCLA, even if the EPA would not seek to recover costs from them, and under Section 122(e)(6) they must therefore seek authorization from the EPA to conduct any additional cleanup, even on their own properties.

Highlights From Oral Argument

The U.S. Supreme Court focused on three key issues at oral argument on Dec. 3. First, does CERCLA set a ceiling as well as a floor? Second, can this case be narrowly decided on the property owners' PRP status? Third, if the property owners are PRPs, can and should CERCLA be read to indefinitely prohibit property owners from cleaning up (or seeking cleanup of) their own property?

A floor and a ceiling?

Without diving deeply into the various statutory provisions, numerous justices questioned both counsel regarding the comprehensiveness of CERCLA cleanups and EPA mandates. The pressing question was whether CERCLA sets both upward and downward limits — that is, there may be general agreement that CERCLA (with limited exceptions) prohibits parties from seeking to roll back the cleanup selected by the EPA, but what if a party is seeking supplemental work?

Ultimately, the justices seemed wary of the idea that a private party could unilaterally supplement an EPA-led cleanup, even if the EPA itself has the authority to order additional cleanup. Chief Justice John Roberts questioned whether the property owners' request — excavation of additional soil areas to lower depths — could have "significant adverse impacts." Counsel for the government argued that indeed it could: For instance, additional excavation could "kick up arsenic into the air."

Some justices did wonder, however, if they could remand the property owners' restoration claim to the state court with instructions that the property owners could recover only if the EPA authorized additional cleanup.

Are current property owners PRPs?

Perhaps the simplest way for the U.S. Supreme Court to resolve the case in Atlantic Richfield's favor would be to determine that the current property owners are PRPs. The justices explicitly queried whether such a ruling would resolve the matter, at least for Atlantic Richfield Co. v. Christian.

Legally, this would be a narrow ruling by the court, because it only involves interpretation of one undefined term — potentially responsible party — and Section 122(e)(6) would then prevent PRPs like the property owners from undertaking remediation without EPA authorization.

Practically speaking, however, such an approach could impact landowners at Superfund sites across the country. This concern was the subject of the justices' third principal line of questions, regarding restraints on property owners' ability to remediate their property.

Indefinite restraints on property usage?

Faced with the property owners' argument that prohibiting their claim would render them unable to so much as build a sandbox on their own property without obtaining approval from the EPA until the cleanup is complete, Justices Neil Gorsuch and Sonia Sotomayor both questioned whether property owners might have a constitutional takings claim.

Counsel for Atlantic Richfield responded that "this is really a question for EPA," in the event the landowners seek permission from the EPA and permission is denied. More broadly, however, several justices grappled with the question of who should have the burden to ensure that individual landowner uses of their property do not impact the overall Superfund site or the selected EPA remedy.

Should the EPA have the burden to monitor all properties and seek injunctive relief if, for instance, it determines that a particular landowner's activities could threaten the integrity of the cleanup? Or should property owners have the burden to seek approval from the EPA for

proposed remedial activities?

Counsel for the property owners responded that if Congress had meant for property owners to seek permission from the EPA regarding the administration of their own property in perpetuity, Congress would have been clearer in the statutory text.

Practical Takeaways and Implications

If the respondent property owners are correct, overturning the Montana Supreme Court's decision will have significant consequences: Private landowners will be effectively prohibited from obtaining funding from polluting parties to restore of their property to its precontamination state. It could also prevent landowners from undertaking other property improvement projects, including any form of construction that would require excavation of soil.

If petitioner Atlantic Richfield and the United States are correct, leaving the Montana Supreme Court's decision in place will have similarly significant consequences. The decision allows any private party to second-guess the EPA's cleanup decisions, even where the EPA may have concluded that additional work would harm the environment.

Further, because the decision allows any private party to sue a PRP for further cleanup work, it negates the release from further liability provided by the EPA, and potentially "threatens the integrity of every future CERCLA settlement EPA enters."[9] In effect, the decision could disincentivize future cleanup commitments and slow down hazardous waste cleanup at other sites across the country.

While the imposition of federal restraints on private property is troubling, it is worth remembering that even if the Montana Supreme Court decision is overturned, property owners would retain the right to seek authorization from the EPA for further remedial action. Conversely, Atlantic Richfield is undoubtedly right that, if the Montana Supreme Court's decision is affirmed, companies will have to reassess if and how they can obtain some finality at Superfund sites.

It has always been the case that agencies and companies conducting cleanups should reach out to neighboring landowners early and often. Stakeholder input is valuable — and in some instances mandatory — under CERCLA, and obtaining buy-in of other stakeholders could result in finality that companies may require.

Crucially, however, property owner buy-in may be harder to obtain if the Montana decision stands, because property owners could gain significant leverage to demand additional remediation of their specific properties by threatening tort suits seeking the same remediation if their demands are not met. In addition to bogging down the process, this sort of leverage could drive up costs and make it more difficult for companies to agree to undertake remedial actions.

Thus, a ruling upholding the Montana Supreme Court decision ultimately may be more injurious to CERCLA's goal of promoting timely cleanup of hazardous waste sites than one requiring further procedure before property owners can undertake additional remedial action.

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[1] Burlington N. and Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009).

[2] No. 17-1498.

[3] This prohibition has limited exceptions, none of which are applicable in Atlantic Richfield v. Christian. One of the exceptions, post-remedial action citizen suits arguing that a response action violated CERCLA, are permitted under 42 U.S.C. §§ 9613(h)(5) and 9659.

[4] "Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d).

[5] Atlantic Richfield Co. v. Montana, Second Judicial Dist. Court, 408 P.3d 515, 520-21 (Mont. 2017), cert. granted sub nom. Atl. Richfield Co. v. Christian, 139 S. Ct. 2690, 204 L. Ed. 2d 1089 (2019)

[6] Brief for Petitioner at 24 (Aug.21, 2019).

[7] Atlantic Richfield Co. Petition for a Writ of Certiorari at 4 (April 27, 2018).

[8] Brief for the United Sates as Amicus Curiae Supporting Petitioner at 14-15 (Aug. 28, 2019).

[9] Atlantic Richfield Co. Petition for a Writ of Certiorari at 4 (Apr. 27, 2018).