

SCOTUS Will Review EPA's Authority to Control Superfund Cleanups at Company's Request



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Everyone knows that environmental cleanups are complicated. Sites can be geographically vast and varied, involve operations that have released chemicals over decades, and goal posts for how and what should be investigated, characterized, and – if necessary – remediated can change over time. The U.S. Supreme Court recently granted certiorari in a case that could potentially throw remediation efforts at Superfund sites around the country – as Atlantic Richfield (the petitioner) put it – into “chaos.”

Atlantic Richfield Co. v. Gregory Christian, now pending before the Supreme Court, involves one of the largest and oldest Superfund sites in the country—the Anaconda Smelter Superfund in western Montana. The site, which was designated a Superfund site 36 years ago, spans over 300 square miles and has over 9,000 people living within its borders.

Twenty-five years after the site was designated as a Superfund site, a group of these Anaconda landowners sued Atlantic Richfield Company, Anaconda’s largest landowner, for damages related to its role in the pollution. Among other things, the

landowners seek restoration damages. Restoration damages claims seek damages that would pay to restore property sufficient for plaintiffs' intended use. In the Anaconda context, that means that the landowners must prove they will use a damages award from Atlantic Richfield, which would be set by the state court jury hearing the case, to clean up the Anaconda site.

Typically, statutes that address cleanups give regulatory agencies primacy and autonomy to sort through this complexity. As an example, the federal CERCLA statute forecloses private court actions challenging cleanup decisions until the cleanup is complete. This statutory structure allows cleanups to proceed in an orderly and coordinated way without the added complexity and delay caused by court challenges. Courts have viewed the CERCLA bar broadly and have barred *most* potential court actions, whether filed in federal or state court that could collaterally attack a regulatory agency's remedial decision. The thinking goes that cleanup actions should have one "decider" and that court action simultaneous with ongoing environmental work could increase both cleanup costs and timeframes. *Atlantic Richfield*, could potentially change this thinking.

The Montana Supreme Court disagreed with Atlantic Richfield's position that CERCLA barred the landowners' restoration damages claims and allowed them to move forward. It ruled that the restoration damages claims could proceed in large part because the landowners' restoration plans do not specifically seek to stop, delay, or change the EPA's remediation efforts. According to the Montana Supreme Court, the landowners seek only "to present their own plan to restore their own private property to a jury of 12 Montanans who will then assess the merits of that plan."

Atlantic Richfield took issue with the Montana Supreme Court's conclusion for obvious reasons. It argues that by allowing a state court jury to evaluate a remediation site, the court would allow the landowners to interfere with regulators' traditional autonomy in making investigation, characterization, and remediation decisions. Atlantic Richfield's cert. petition argued that allowing the landowners' claim is impermissible for three reasons:

1. The landowners' restoration claim is a de facto challenge to EPA's cleanup jurisdiction, which is barred by CERCLA.
2. By virtue of owning land in the Superfund site, the landowners are "potentially responsible parties" barred as a matter of law under CERCLA from remediating a Superfund site without the EPA's prior approval.
3. CERCLA preempts state common-law claims that seek cleanup remedies that conflict with the EPA-ordered cleanup.

Superfund site decision making is complex, and if private parties and state courts have an additional role in decision making, it could become even more so. We will keep our eye on this case as Supreme Court proceedings occur.

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