

CERCLA/Superfund: U.S. Supreme Court Addresses State Court Jurisdiction/Restoration Plan Issues



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The United States Supreme Court ("SCT") addressed in an April 20th Opinion two issues arising under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA or Superfund") that include:

1. Whether the federal statute excludes state court's jurisdiction over a landowner's claim for restoration damages
2. Whether landowners are required to seek United States Environmental Protection Agency ("EPA") approval for a restoration plan

The issues arose out of the former Anaconda Copper Smelter in Butte, Montana ("Site"). The Site is described as an area of over 300 square miles that operated for a number of years. The Site is stated to be contaminated with arsenic and lead.

The Site has been on the Superfund National Priority List for many years. As a result, EPA is stated to have worked with the current owner of the Site for over 35 years. Superfund driven activity has included implementation of a cleanup plan for remediation.

The SCT's Opinion describes the remediation that EPA has managed with Site owner Atlantic Richfield ("ARCO") as an "extensive cleanup" of the Site involving:

... more than 800 residential and commercial properties; remove 10 million cubic yards of tailings, mine waste, and contaminated soil; cap in place 500 million cubic yards of waste over 5,000 acres; and reclaim 12,500 acres of land.

Work at the Site is stated to be likely to continue until 2025 and involve:

... cleanup of more than 1,000 additional residential yards, re-vegetation of 7,000 acres of uplands, removal of several waste areas, and closure of contaminated stream banks and railroad beds.

Ninety-eight property owners within the Superfund Site filed a lawsuit against ARCO in 2008 in Montana state court. Causes of action asserted under state common law included:

- Trespass
- Nuisance
- Strict liability

The damages sought by the landowners included "restoration" and other forms of relief.

The property owners proposed a restoration plan. Their remediation goals are described as more stringent than EPA's. It is further noted that EPA determined its own cleanup standards were "protective of human health and the environment."

By way of example, the SCT cited the property owners proposed the maximum soil contamination level of 15 parts per million of arsenic. EPA set a maximum soil contamination level of 250 parts per million. The property owners plan also varied in terms of excavation depth in the residential yards and their desire to capture and treat shallow groundwater with an underground permeable barrier (rejected as too costly and unnecessary by EPA).

Property damages are described under Montana common law as being generally measured by the "difference between the value of the property before and after the injury, or the diminution in value." However, it is also noted that:

. . . when the damaged property serves as a private residence and the plaintiff has an interest in having the property restored, diminution in value will not return the plaintiff to the same position as before the tort. . . .

As a result, the plaintiff is stated to be able to seek restoration damages even if they exceed the property's diminution in value. Further, to collect such damages the plaintiff must demonstrate:

- "reasons personal" for restoring the property
- injury is temporary and abatable
- the award actually will be used for restoration

The SCT first notes that CERCLA does not "strip the Montana courts of jurisdiction over this lawsuit." It differentiates the common law actions from those brought pursuant to CERCLA. Because the common law claims arise under Montana law (as opposed to CERCLA) the state court retains jurisdiction over the lawsuit. The SCT states this is the case:

. . . notwithstanding the channeling of Superfund claims to federal courts in § 113(b).

The SCT does reject the argument that landowners do not need EPA approval to undertake remedial action at the Site. This is premised on its conclusion that the landowners are CERCLA "responsible parties." Section 122(e)(6) of CERCLA is cited which states:

. . . when either the President, or a potentially responsible party. . . has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President."

The SCT undertakes an analysis of the phrase "potentially responsible party," reviewing the list of "covered persons" in Section 107. It rejects arguments that the landowners are not potentially responsible parties because CERCLA's six-year limitations period for recovery of remedial costs has expired and that they are "innocent landowners whose land has been contaminated by another" . . . (referencing CERCLA's innocent landowner defense).

The appropriate interpretation of "potentially responsible party" is stated to include those who simply own polluted property. In other words, the fact that arsenic and lead are hazardous substances and are located on the landowners' properties renders them potentially responsible parties.

Consequently, the landowners must obtain EPA's approval to undertake remedial action.

Potential responsible parties such as ARCO that have worked with the agency pursuant to an agreed remediation plan were obviously concerned that the opposite result would create uncertainty as to whether they were undertaking a final remedy. Nevertheless, the SCT leaves open the possibility that ARCO could be potentially liable under state common law for certain compensatory damages such as:

- Loss of use and enjoyment of property
- Diminution of value
- Incidental and consequential damages
- Annoyance and discomfort

The catch noted by Justice Roberts is found in this quote:

The damages issue before the Court is whether Atlantic Richfield is also liable for the landowners' own re-mediation beyond that required under the Act. Even then, the answer is yes—so long as the landowners first obtain EPA approval for the remedial work they seek to carry out. . . .

A copy of the Opinion can be downloaded [here](#).