Superfund Neighbors Come Knocking

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A case currently pending before the United States Supreme Court may significantly impact legal rights of potentially responsible parties (PRPs) involved in the cleanup of Superfund Sites. The case was brought in Montana State Court by owners of properties near the Anaconda Smelter Superfund Site near Opportunity, Montana.

The issue in the case concerns the extent to which the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) preempts the ability of private parties to sue PRPs for the costs they incur to implement cleanup remedies that are at odds with the remedies selected by EPA. The facts showed that arsenic and other hazardous substances were deposited on the property owners' land by emissions from a nearby copper smelter operated by Anaconda Company (now Atlantic Richfield Company). The Montana Supreme Court held the property owners could bring claims for property restoration under state common law. Atlantic Richfield then appealed to the U.S. Supreme Court, and the Court in June 2019 decided to hear the case.

If upheld by the United States Supreme Court, the Montana decision would allow residents whose property is impacted by contamination from a neighboring Superfund Site to bring state common law restoration claims against PRPs for cleanup costs incurred. This would be contrary to the majority of courts' interpretation of CERCLA § 122(e)(6), which provides "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by" EPA. Atlantic Richfield contends these private landowners are themselves PRPs because the term "potentially responsible party" includes the "owner" of "any site or area where a hazardous substance has ... come to be located." It says the definition extends even to landowners "not responsible for contamination," *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 n.2, 136 (2007), which in turn means the private landowners cannot undertake any remedy that has not been approved by EPA.

The decision by the Montana Supreme Court also allows the residents to perform cleanup of their property in excess of and in addition to the remedy selected by EPA and then sue the PRPs for the costs. Atlantic Richfield says this conflicts with CERCLA § 113(h) which bars any "challenges" to EPA cleanups. It notes that section 113 "protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (emphasis omitted).

If upheld, the decision by the Montana Supreme Court could lead other state high courts to allow owners of neighboring properties on which contamination was released to control the cleanup remedy on their property regardless of EPA's chosen remedy. If owners of these properties choose to restore their properties in a more stringent manner than EPA's remedy, the Montana Supreme Court's decision may mean PRPs have to pay twice: once to implement EPA's remedy and once to pay landowners who decide to go beyond EPA's remedy and do more.

Several amicus curiae briefs have been filed in support of Atlantic Richfield's position. PRPs involved in Superfund cleanups should closely monitor this case as its outcome could be significant. A decision is expected by June 2020.

Atlantic Richfield Company v. Christian, Docket No. 17-1498 (U.S. Sup. Ct.)

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