Supreme Court Ruling Creates CERCLA Uncertainty

05.08.2020

The United States Supreme Court recently decided a case that will create considerable uncertainty for companies involved with cleanups under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, also known as “Superfund”). The question they will now have to ask is this: Who controls the level of cleanup that must be performed? Is it EPA or state judges?

The case involved a smelting site near Butte, Montana that is contaminated with arsenic and lead and is listed on the National Priorities List as a Superfund Site. The lateral extent of contamination at the site is immense, covering an area of approximately 300 square miles. More than 800 residential and commercial properties are within the boundaries of the site. Atlantic Richfield, the successor to the company that owned the now-closed smelter, has worked with EPA for more than 35 year to implement the remedial plan EPA selected in its Record of Decision (ROD) for the site.

In 2008, 98 landowners within the 300-square mile site sued Atlantic Richfield in Montana state court seeking damages to restore their properties under trespass, nuisance and strict liability causes of action. Under Montana state law, these plaintiffs first had to show that their properties could be restored and what the costs would be before they could be entitled to collect any such damages. The remediation plan they proposed was more stringent than the ROD that EPA approved, and the total cost of the plan was estimated at $50 to $58 million. In sum, the extent of cleanup their plan proposed went far beyond EPA’s plan, which the agency had already determined was “protective of human health and the environment.”

Atlantic Richfield moved to dismiss the case and said the plaintiffs were barred from pursuing these state court actions because of the interplay between CERCLA § 113(b) and (h). Without going into detail, Atlantic Richfield claimed CERCLA § 113(h) limits the ability of a plaintiff to challenge EPA’s cleanup decisions in federal court, and that CERCLA § 113(b) extended that limitation to state court. The Montana trial court and, ultimately, the Montana Supreme Court disagreed and allowed the case to proceed. Atlantic Richfield then appealed to the U.S. Supreme Court.

The U.S. Supreme Court overturned the decision by the Montana Supreme Court, but not on the basis that such state court actions are absolutely barred. In a 7-2 decision, Chief Justice Roberts writing for the Court began by saying that, while CERCLA § 113(h) deprives federal courts of jurisdiction to review certain challenges to EPA’s cleanup plans, it has no effect on the ability of state courts to hear state law claims that may have an effect on those plans. He then turned to whether that meant the plaintiffs’ claims could proceed. The Court’s answer was no, at least not yet.

Atlantic Richfield argued the plaintiffs were themselves “potentially responsible parties” (PRPs) under

CERCLA because they are “owners” of contaminated land within the Superfund site even though they did not cause the contamination. This issue was significant because CERCLA § 122(e)(6) prohibits PRPs from taking remedial action without EPA approval. The Montana Supreme Court did not agree the plaintiffs were PRPs, but the U.S. Supreme Court said the mere fact that contamination had come to be located on their properties made the plaintiffs PRPs.

Accordingly, the U.S. Supreme Court sent the case back to the Montana courts to determine whether the plaintiffs’ proposed cleanup plan had been approved by EPA. In sum, the Court determined that Atlantic Richfield could be held liable to pay for the plaintiffs’ own remediation beyond that required by CERCLA “so long as the landowners first obtain EPA approval for the remedial work they seek to carry out.”

For environmental attorneys and companies involved with Superfund cleanups, the case opens doors long believed to be closed and raises a host of questions. First and foremost, it creates a “lawyer’s playground” for plaintiffs’ lawyers to file lawsuits. Second, it creates an “end around” for parties who own land on or near a Superfund site. Rather than engaging in the public participation process provided by CERCLA to influence the remedy EPA chooses, parties can instead seek to pursue state law claims for additional cleanup later. Third, the certainty about cleanup remedies previously provided by a Consent Decree will no longer exist. Henceforth, companies will have to take into account that third parties can use state litigation to broaden the cleanup obligations they have already agreed upon with EPA. Finally, the court gave no guidance on how plaintiffs are to obtain EPA “approval.” Exactly how is that to happen, and what form must it take?

By opening this door, the Supreme Court has significantly changed how EPA and parties cleaning up sites will proceed. Among other things, how Consent Decrees are negotiated and structured will change. And the ruling will no doubt encourage more litigation by landowners on or near Superfund sites. Where previously such claims would be dismissed on grounds that the claim sought to impermissibly challenge EPA’s decision-making authority, the ruling makes that much less likely to happen.

What was once thought to be clear is no longer clear. It’s a safe bet this ruling will lead to multiple lawsuits in the lower courts and an inevitable trip back to the Supreme Court.

Atlantic Richfield Co. v. Christian, Docket No. 17-1498 (U.S. Sup. Ct. Apr. 20, 2020).

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