

## Atlantic Richfield v. Christian: Despite Initial Concerns, SCOTUS Decision Does Not Open Floodgates for State Court Challenges to EPA-Approved CERCLA Remedies

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Prior to April 2020, it seemed clear under prevailing federal case law that a disgruntled person could not use a state court lawsuit to change an environmental remedy approved by the U.S. Environmental Protection Agency (EPA) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA's approval of a remedy under CERCLA is the result of a very extensive process involving a rigorous remedial investigation and feasibility study and consideration of several factors, including the protectiveness and reliability of the proposed remedial options as well as their cost effectiveness. Any attempt by a neighbor to invoke a state statute or tort claim to compel the person conducting a CERCLA remediation to perform remedial work beyond that approved by EPA would be dismissed under prevailing federal case law because EPA's selection of a remedy under CERCLA is a matter "preempted" by a federal statute.

This prevailing view on CERCLA preemption, however, appeared to be placed in jeopardy when the Supreme Court of the United States (SCOTUS) announced its April 20, 2020 decision in *Atlantic Richfield v. Christian*. The case involved a CERCLA remediation of contamination caused by a now-closed smelter facility located in Montana. Arsenic and lead emitted from the facility smokestack during its 78 years of operation reportedly impacted a 300 square-mile area. Not satisfied with the remedy approved by EPA, neighbors of the smelter initiated a lawsuit against Atlantic Richfield, the legal successor to the company that operated the smelter, seeking, among other things, "restoration damages" under Montana state law. If the neighbors were successful, Atlantic Richfield would be required to place \$50 to \$58 million in escrow to be used by the neighbors to complete additional remedial work.

The Montana trial and appellate courts held that the restoration damages claim was not precluded by CERCLA, which cleared the way for the neighbors to present their restoration plan to a jury for a decision on the merits. To reach this conclusion, the state courts had to dispense with two key CERCLA provisions. The first precludes federal and state courts from reviewing challenges to an EPA cleanup plan. The state courts found the provision inapplicable because the neighbors' plan would not "stop, delay, or change the work EPA was doing." The second prohibits a "potentially responsible party" (PRP) from taking remedial action on a CERCLA site without first obtaining EPA approval. Although owners of contaminated land are, with limited exceptions, "responsible parties" under CERCLA, the Montana Supreme Court concluded that since the neighboring landowners had never been "treated as PRPs" during the 30 years that the site had

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been under a CERCLA investigation, the statute of limitations had run and they were no longer considered PRPs.

On appeal, SCOTUS overruled the Montana Supreme Court on the PRP status of the neighbors. Finding that they are PRPs, SCOTUS held that a state-law claim for the landowners' proposed remediation was possible (even though it exceeded the remedy required by CERCLA) but the neighbors would first need to obtain EPA approval. Since the process of obtaining EPA approval should resolve any concern that the remedy pursued by the neighbors would conflict with the decision EPA made in approving the CERCLA remedy, SCOTUS found it unnecessary to decide whether the state-law remedy was preempted by CERCLA. SCOTUS remanded the case to the Montana state courts so the proceedings could continue consistent with the SCOTUS ruling.

Upon deeper analysis, the SCOTUS decision does not appear to have opened a floodgate for state-law-based modifications to EPA-approved CERCLA remedies. If the state-law plaintiff is a PRP, it will have to first obtain the approval of EPA for the additional remedial work. Presumably, if EPA believed that the additional work requested by the state-law plaintiff were warranted, the agency would have already incorporated it in the remedy. Moreover, even if EPA approval is obtained, the courts would still have to address the preemption issue, which was left undecided in the SCOTUS opinion.

It is possible that a state-law plaintiff would not be a PRP, in which case the CERCLA requirement of preapproval by EPA would not apply. For example, a state or local government may not be satisfied with the EPA-approved CERCLA remedy and might seek to compel the responsible party to undertake additional remedial action based on a state-law version of CERCLA. This is a classic situation that federal courts have found to be preempted by CERCLA. The SCOTUS opinion did not purport to eliminate the preemption defense for this second category of state-law plaintiffs. Such plaintiffs would have to overcome the prevailing federal case law on preemption before they could prevail.

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