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INSIGHT: Industry Groups Seek to Clean Up a Challenging Interpretation of CERCLA

By John McGahren and Justin Rand

The smokestack from a former copper smelter still towers over the landscape in Anaconda, Mont.
Photographer: Sylvia Carignan

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A major CERCLA case before the U.S. Supreme Court will determine whether landowners have the right to bring a lawsuit in state court while the EPA is overseeing remediation of a Superfund site. The Montana Supreme Court ruled for the landowners, and without a reversal, the business community will be loathe to willingly participate in the federal scheme that has functioned for decades, Morgan Lewis attorneys explain.

Montana's Anaconda Smelter began refining copper ore in the late 19th century. After Atlantic Richfield Company (ARCO) purchased the smelter in 1977, it shuttered and began to dismantle the facility in 1980. By that time, the smelter's century of operations

left the soil, groundwater, and surface water around the site contaminated with hazardous chemicals.

That same year, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which governs the management and cleanup of hazardous-waste sites, also known as "Superfund" sites. In 1983, the Environmental Protection Agency designated the Anaconda Smelter site a Superfund site and identified ARCO as a potentially responsible party (PRP) for the costs of cleaning up the site under a comprehensive remediation plan.

Massive Superfund Site

The Anaconda Smelter site became one of the largest and most expensive Superfund sites in the county. The site comprises five towns and thousands of homes in a New York City-sized area, leading ARCO to spend nearly a half-billion dollars carrying out the EPA's remediation plan. ARCO completed the work mandated by the EPA's remediation plan in 2016.

Despite ARCO's efforts to comply with the EPA's plan, a subset of landowners within the Anaconda Smelter site brought a Montana state-court action against ARCO in 2008. The plaintiffs—landowners living downwind from the smelter on properties where metals emitted from the smelter's smokestacks landed—alleged various common-law torts and sought to have ARCO restore their properties to their original conditions. Plaintiffs ' sought nearly $60 million in "restoration damages" to fund this additional remediation work.

ARCO countered that CERCLA barred the plaintiffs' claims for restoration damages. In particular, ARCO contended that CERCLA Section 113 prevented Montana state courts from reviewing plaintiffs' claims because those claims constituted a "challenge to a CERCLA cleanup" over which federal courts have exclusive jurisdiction.

ARCO also argued that much of the work the plaintiffs demanded would risk uncovering long-buried arsenic in the soil and contaminating additional groundwater.

State Court Ruling

In 2017, the Montana Supreme Court rejected ARCO's interpretation of CERCLA Section 113(h). The court reasoned that a barred challenge under CERCLA Section 113 "must be more than merely requiring [ARCO] to spend more money to clean up the land of the property owners."

Because the plaintiffs' claims were not a "challenge" under Section 113, the landowners could rely on state law to force ARCO to fund additional cleanup work beyond the EPA's plan.

ARCO filed a petition for certiorari to the U.S. Supreme Court, which the court granted in June 2019.

Before the Supreme Court, ARCO argued that Congress enacted CERCLA "to place the federal government in charge of remediating hazardous-waste sites across America from start to finish." While cleanups under CERCLA are costly, companies are willing to participate because "they are securing a global resolution of their responsibility for cleanup" and "buying into just one comprehensive remediation effort," ARCO contended.

ARCO Asserts Need for Stability, Clarity

Section 113 serves that policy, ARCO asserted, by protecting EPA cleanup efforts from challenges in the form of competing lawsuits and demands. In particular, Section 113(b) vests federal courts with exclusive jurisdiction over disputes arising under CERCLA, and Section 113(h) limits the types of CERCLA disputes that federal courts may review.

These provisions combine to jurisdictionally bar the landowners' state-court action, ARCO argued, because it was a prohibited "challenge" to the EPA's action under CERCLA. An alternative interpretation would allow private parties to "impose different, and potentially detrimental, multimillion-dollar cleanups" on companies already participating in the federal scheme.

ARCO separately argued that:

1. the landowners' claims are prohibited by CERCLA Section 122(e)(6)—which bars PRPs from doing their own remediation without EPA permission—because the landowners are "classic" PRPs as the owners of land containing hazardous waste; and
2. the Constitution's supremacy clause shields against the state-law obligations the landowners seek to impose because they violate EPA cleanup orders.

Landowners Respond

In response, the landowners claimed that the Montana Supreme Court's decision was an interlocutory order that the U.S. Supreme Court lacked jurisdiction to review.

Turning to Section 113, the landowners contended that it does not deprive state courts of the power to review state-law claims. Although Section 113(b) gives federal courts exclusive jurisdiction for cases "arising under" CERCLA, the landowners countered that their state-law claims are not CERCLA claims covered under that provision.

Further, the purpose of Section 113(h), the landowners said, is to prevent premature review of EPA orders in federal courts, not to bar state-law claims from proceeding in state court. Because their state-court action did not ask for review of the EPA's orders, the landowners claimed that it is not a "challenge" barred by Section 113.

As to ARCO's other arguments, the landowners responded that: they cannot be PRPs under CERCLA Section 122 because they do not (and will not) face liability under to the EPA; and ARCO could comply with the EPA plan *and* restore the landowners' properties by requesting EPA permission for the additional restoration work.

The U.S. Supreme Court heard arguments on Dec. 3, 2019, and a decision is expected in the summer, with the business community eagerly anticipating the result.

Industry groups have cautioned that the state court decision:

- subjects the business community to unlimited liability beyond CERCLA cleanups; and
- deprives the EPA of the power to enter into meaningful settlements that fix remediation obligations.
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Without a reversal, these groups argue, the business community will be loathe to willingly participate in the federal scheme that has functioned for decades. Whether CERCLA will continue to promote expeditious and effective remediation of Superfund sites seemingly hangs in the balance.

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