Atlantic Richfield v. Christian: Can a Property Owner Use State Law to Compel Further Remediation of a Site Remediated Pursuant to Federal EPA Standards?

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This article assesses the issues being argued before the U.S. Supreme Court in *Atlantic Richfield Company v. Christian,* and predicts an outcome based on a combination of analysis of the Supreme Court of Montana decision and the trend in recent Supreme Court decisions regarding environmental issues.

The U.S. Supreme Court granted a writ of certiorari, agreeing to review the Supreme Court of Montana decision in *Atlantic Richfield Company v. Christian.*[1] The case raises significant issues regarding the relationship between federal law and state law. More importantly, the case raises environmental issues that affect all buyers and sellers of real property, issues such as how clean is clean, when is a completed remediation subject to being reopened and what relief is available to a property owner whose property contains post-remediation residual contamination. This article will assess the issues being argued before the Supreme Court and predict an outcome based on a combination of analysis of the Supreme Court of Montana decision and the trend in recent Supreme Court decisions regarding environmental issues.

Factual Background

Plaintiffs are property owners whose properties are within the boundaries of an inactive hazardous waste site known as the Anaconda Smelter Site (the "Site").[2] The Site was operated for more than 100 years by the Anaconda Copper Mining Company, who processed copper ore at the Site. In 1983, the Environmental Protection Agency ("EPA") ordered Atlantic Richfield, the owner of the facility, to begin a remedial investigation at the Site. In 1988, EPA selected the remedy for the Site and issued an order requiring remediation.[3]

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EPA required Atlantic Richfield to remediate soil on residential properties within the Site and groundwater associated with the Site. The remedy for soil on residential properties required the remediation of soil contaminated with arsenic at levels exceeding 250 parts per million.[4] By way of comparison, the New York State unrestricted use soil cleanup objective for arsenic is 13 parts per million.[5] A group of property owners retained experts to determine the cost of restoring the properties to pre-contamination conditions and sued Atlantic Richfield claiming common law trespass, nuisance, and strict liability.[6] Plaintiffs sought the following types of damages:

(1) Injury to and loss of use and enjoyment of property;

(2) Incidental and consequential damages (including relocation expenses and loss of rental income);

(3) Loss of the value of real property;

(4) Annoyance, inconvenience, and discomfort; and

(5) Expenses for and cost of restoration of real property.

Atlantic Richfield moved for summary judgment arguing that the claims were preempted[7] by CERCLA (the Comprehensive Environmental Response, Compensation and Liability Act).[8] After years of motion practice, Atlantic Richfield petitioned the Montana Supreme Court solely on the issue of restoration damages and the Montana Supreme Court held that the claim could proceed.[9]

The petition for certiorari addresses only the restoration damages issue.[10] Thus, the issue to be addressed by the Court is not whether a property owner whose property is remediated pursuant to an EPA-supervised remedy selection process can sue for damages caused by contamination that remains after the remediation. Atlantic Richfield conceded that such claims could proceed.[11] The issue is whether a party whose property has residual contamination after an EPA-supervised remedy selection process or is expected to have such residual contamination after the remediation, can require the party responsible for the remediation to perform or fund additional remediation to make the site cleaner than was required by EPA.

Legal Background

The Montana Supreme Court viewed plaintiffs' claim as essentially a property damage claim. CERCLA does not preempt common law property damages claims, so from the court's perspective, there was no reason to spend a lot of time on the background of CERCLA. The petition for certiorari viewed plaintiffs' claim as essentially an attack on a CERCLA remediation and therefore included a significant amount of background on the CERCLA remedial scheme. From Atlantic Richfield's perspective, CERCLA controls the remediation process. There is a remedial investigation followed by a feasibility study that assesses the remedial options and EPA issues a Record of Decision based on the feasibility study.[12] The remediation described in the Record of Decision is implemented and that is the end of the story. No other remediation occurs.

Each background section is reflective of how the parties framed the issues. From the plaintiffs' perspective — Atlantic Richfield damaged their property by releasing contaminants including arsenic, and it would be unfair to al-

low Atlantic Richfield to damage property and not pay to remove the damaging contaminants. From Atlantic Richfield's perspective, it went through the EPA-required remedy selection process and spent millions of dollars cleaning up the site, so it would be unfair to them to allow someone other than EPA to require more. Atlantic Richfield also argued that it would be disruptive to the CERCLA remedial system if responsible parties could not rely on EPA as the arbiter of how clean is clean.

While that clash of values is interesting, this article will examine the case from a third perspective. Congress has already addressed that clash of values. Indeed, CERCLA has several provisions that address the relationship between CERCLA and state law. Therefore, the real issue before the Court is not how to resolve that clash of values, but rather, how did Congress instruct courts to deal with the clash between CERCLA cleanups and common law claims.

CERCLA contains three provisions that address the relationship between CERCLA remediation and common law claims: one that expressly allows common law claims (Section 114)[13] and two that expressly prohibit certain common law claims (Sections 113(h)[14] and 122(e)(6)).[15]

Section 114 states:

> Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional requirements with respect to the release of hazardous substances within such State.

If that is all CERCLA said about state law claims, there is no doubt that plaintiffs would prevail. A state can impose additional requirements and the State of Montana is imposing an additional requirement.

Section 113(h) states:

> No federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title . . .

Section 113(b) gives the federal courts exclusive jurisdiction over claims arising under CERCLA. Section 113(h) then removes jurisdiction for challenges to CERCLA remedies. The remedy being implemented by Atlantic Richfield was selected pursuant to Section 9604. Thus, if plaintiffs' claim is a "challenge" to the remedy, then federal courts do not have jurisdiction. We need to examine how subsections (b) and (h) interact to see if (i) exclusive federal jurisdiction combines with the removal of federal jurisdiction to mean that no court has jurisdiction or (ii) the combination leaves some room for state court jurisdiction. That analysis will require us to examine what it means for a case to arise under CERCLA and what it means for a case to be a "challenge" to a CERCLA remedy.

Section 122(e)(6) states:

> When either the President or a potentially responsible party pursuant to an administrative order or consent decree pursuant to this chapter, has initiated a remedial investigation or 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.

Atlantic Richfield is a potentially responsible party ("PRP") and they were acting pursuant to an administrative order. Thus, if plaintiffs are potentially responsible parties and a suit for restoration damages is a remedial action, then plaintiffs' claim is barred by this Section.

The Decision Below

The Montana Supreme Court held that the

claim was not barred. It examined three arguments made by Atlantic Richfield: (1) an argument based on Section 113(h); (2) an argument based on Section 122(e)(6); (3) and an argument based on federal preemption. The starting point for the court's discussion was Section 114[16] as a basic rule providing that CERCLA does not preempt state law claims related to hazardous substances. Section 114 means that plaintiffs' claim may proceed unless specifically prohibited.[17]

Section 113(b) grants federal courts "exclusive jurisdiction over all controversies arising under [CERCLA]." Section 113(h) then removes jurisdiction from the federal courts over claims that challenge a removal or remedial action. The court noted that Section 113(h) does not say anything about state courts. Thus, state courts must have jurisdiction.[18] The court recognized that under Section 113(b) a state court would not have jurisdiction over a challenge to a removal or remedial action if the claim arose under CERCLA. The court explained that plaintiffs' claim is not a claim arising under CERCLA and not a challenge to a removal or remedial action. Thus, plaintiffs' claim may proceed in state court because neither 113(b) nor 113(h) apply.

The court began its analysis with Atlantic Richfield's argument that the two parts of Section 113 must be read as a unit, such that the key is 113(h).[19] That is, if a claim is a challenge to a removal or remedial action and jurisdiction is removed pursuant to 113(h), then it must necessarily be a claim that arises under CERCLA, pursuant to 113(b). The court stated that even if it accepts that argument, the instant action is not barred because it is not a challenge to a removal or remedial action.[20]

The court noted several definitions of "challenge" to a remedial action, including that stated by the U.S. Court of Appeals for the Ninth Circuit, in *Arco Remediation Services v. Dep't of Health and Environmental Quality*[21] — a claim is a challenge to a remedial action if it is "related to the goals of the cleanup." The court concluded that plaintiffs' claim is merely a claim for damages and not a challenge to a removal or remedial action.[22] The factors relevant to determining damages, the court explained, are different from the factors relevant to selecting a CERCLA remedy; therefore, the damages claim does not interfere with the remediation and it is therefore, not a challenge to a remedial action.[23]

Next, the court examined Section 122(e)(6), which prohibits PRPs from performing unauthorized remedial action.[24] The court started by noting that there are four categories of PRPs and current owners are PRPs.[25] The court then discussed how a party is "designated" as a PRP. And, since plaintiffs were never formally designated as a PRP, they must not be PRPs for purposes of Section 122(e)(6).[26] Thus, Section 122 does not bar the action.

How Well Did the Court Put Sections 114, 113(b), 113(h), and 122(e)(6) Together?

Among the primary rules of statutory construction are: (1) a statute is to be read as a unit;[27] and (2) a statute is not to be interpreted in a manner that renders any part meaningless or superfluous.[28] The Supreme Court of Montana may have violated both rules. It looked at each provision as an independent unit, not as a whole, and its interpretation rendered Section 122 mostly superfluous.

The first step in putting the provisions

together as a unit is to address the relationship between 113(b) and 113(h). Section 113(b) gives the federal courts exclusive jurisdiction over CERCLA claims. Section 113(h) removes jurisdiction from federal courts for "challenges" to a removal or remedial action. If all challenges to removal or remedial actions are CERCLA claims, then Sections 113(b) and (h) combine to bar all challenges to remedial actions. The case could only be brought in federal court (exclusive jurisdiction) and Section 113(h) says no federal court shall have jurisdiction. Thus, no court has jurisdiction to hear the case. That is essentially Atlantic Richfield's argument.

On the other hand, if there can be challenges to removal or remedial actions that do not arise under CERCLA, Sections 113(b) and 113(h) combine to mean that all such cases must be brought in state courts. Such suits would not be subject to the exclusive jurisdiction of the federal courts and federal jurisdiction would be removed. A proper analysis of how those two provisions fit together, therefore, would include a discussion of what it means for an action to arise under CERCLA.

Some courts have taken a broad view of what it means for an action to arise under CERCLA. For example, in *New Mexico v. General Electric Co.*,[29] the court affirmed the removal of state court state law actions (nuisance and negligence in causing groundwater contamination) to federal court because federal law (CERCLA) is central to plaintiffs' claims. The state law claims were dismissed on preemption grounds, with the court applying a fact-based analysis to determine that the state common law claims were really federal law claims because they were based on the alleged inadequacy of the EPA-selected remedy.[30]

This broad view of what it means to arise under CERCLA suggests that the state law claims should be barred. The claims arise under CERCLA only because they are a challenge to the CERCLA remedy. Or, looked at from another view, challenges to the removal or remedial action (Section 113(h)) would be a subset of actions arising under CERCLA and the two provisions work together to remove all jurisdiction for such claims.

On the other hand, there is material in the legislative history that suggests a different view of the relationship between Sections 113(b) and (h). For example, Senator Stafford, in a statement entitled "Further Clarification of Superfund Provisions" stated that "New section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases of hazardous substances. . . ."[31] The statement of Senator Mitchell at the signing ceremony goes even further, stating "Clearly preserved, for example, are challenges to the selection or adequacy of remedies based on State nuisance law."[32] While these statements suggest the possibility of a narrow reading of Section 113(h), the better read of these statements is that they preserve damages claims and not claims that challenge the remedy.

The Montana Supreme Court largely avoided discussion of Section 113(b) by focusing on whether the claims were a challenge to a removal or remedial action pursuant to Section 113(h). The court reasoned that if the claim was not a challenge, then regardless of whether it arose under CERCLA and was subject to the exclusive jurisdiction of the

federal courts, Section 113(h) did not bar the claim. The claim could be brought in either state court because it did not arise under CERCLA or it could be brought in federal court because it arose under CERCLA but was not barred by Section 113(h). Thus, because the court concluded that the claim did not directly interfere with EPA's work and was not a challenge to the remedy, the claim could proceed.

A problem with that reasoning is that it lines up "arises under" CERCLA (113(b)) with "challenge" to a remedial action (113(h)) too closely and makes the arises under language almost superfluous. Congress set up a system whereby federal courts have exclusive jurisdiction over CERCLA litigation and in subsection (h) took a subset of CERCLA cases, those that challenge a removal or remedial action and removed all jurisdiction. The Montana Supreme Court took the narrowest view of what is a challenge and conflated "challenge" with "arises under" so that if a case is not a challenge to a removal or remedial action, it does not arise under CERCLA. That reasoning raises a question about why we need two provisions. A better read of the statute would suggest that the different language implies that they are different things and "challenge" is a subset of "arises under."

The cases cited by the Montana Supreme Court to support its position that the claim does not challenge the removal or remedial action are not closely analogous to the instant action. What is a challenge to a removal or remedial action is largely a fact-based analysis and the court could have done better at finding analogous cases. For example, the court discussed the Ninth Circuit case of *Arco Remediation, LLC v. Department of Health and Environmental Quality*,[33] Arco, a PRP at a superfund site was seeking documents related to an agreement between federal EPA and the state environmental agency related to remediation of the site.[34] The court discussed whether this was barred as a challenge to the removal or remedial action and decided it was not.[35] It was not, the court reasoned "related to the goals" of the cleanup. Defendant argued that Arco intended to use the documents in a proceeding challenging the cleanup standards, but at its heart, it was a claim seeking documents, not a challenge to the remedy.[36]

It is difficult to see how that decision suggests that the claim in *Atlantic Richfield* is not a challenge to the removal or remedial action. Even if the test was "related to the goals," one could easily see the instant action as based solely on dissatisfaction with the goals of the cleanup and an attempt to change those goals. The *Arco* decision, because it was a claim seeking documents, does not help to determine whether that is or is not the correct read.

A second case discussed in detail by the Montana Supreme Court was *Taylor Farm Limited Liability Company v. Viacom, Inc.*[37] *Taylor Farm* was a suit by a property owner whose property was located near a superfund site, to require the responsible party at that site to remediate or fund the remediation of its property.[38] The claim was not, the court reasoned, an attempt to delay or prevent implementation of the remediation.[39] It wanted a new remediation at its property.[40] The court viewed plaintiff's claim as analogous to a claim for response costs under Section 107 or contribution under Section 113(f).[41] Because neither of those claims would be barred by Section 113(h), this case would not be barred.[42]

The argument that *Taylor Farms* is analo-

gous is based on the fact that it involved a private property owner suing a responsible party at a superfund site for cleanup costs. What cuts against that analogy is that in the instant action, EPA required remediation of plaintiffs' properties to a specified level and plaintiffs want the property cleaned beyond the EPA-required level. In *Taylor*, on the other hand, the status was that Viacom was investigating to determine whether additional remedial action should be performed. At that point, a suit to require further remediation was not necessarily inconsistent with the required cleanup plan. One could easily argue that asking a responsible party to clean up an additional location, does not interfere with the remedial action, but asking the responsible party to make my property that was cleaned up to a particular level, cleaner, would. This is a close call.

The petition for certiorari uses a whole different set of cases, each of which also has issues regarding the extent to which it is analogous. In *Pakootas v Teck Cominco Metals, Ltd.*[43] for example, plaintiffs brought a citizen's suit seeking penalties for violation of an EPA cleanup order. After EPA and Teck Cominco settled, Teck Cominco moved to dismiss the citizen's suit.[44] The suit was found to be a challenge to the cleanup because the agreement between EPA and Teck Cominco did not require the payment of penalties and any requirement of penalties may delay the remediation because the responsible party may not have the money to both cleanup and pay the penalty.[45] On the one hand, the case is not so analogous to Atlantic Richfield because it seeks penalties for past violations and does not seek any additional remediation. On the other hand, if it is analogous, the court's reasoning seems to prove too much, as it implies that any claim against the party remediating the property is likely to affect that party's ability to fund the remediation and is, therefore, a challenge to the remediation.

The petition for certiorari also relied on *McClellan Ecological Seepage Situation v. Perry*,[46] and *Razore v. Tulalip Tribes of Washington*,[47] to support its position that the suit against Atlantic Richfield interferes with the cleanup. Both cases examined whether a claim was "related to the goals of the cleanup."[48] Both also provided a detailed factual analysis of the claims to make a determination of what "related to" means.[49] Both were citizens suits, one under RCRA and one under the Clean Water Act.[50] Both held that the attempt to require further remediation as compliance with another statute did interfere with the cleanup because it related to the goals of the cleanup.[51] These cases are more analogous to Atlantic Richfield than the above cases. In each case a party is seeking additional remediation based on some law other than CERCLA. Whether that other law is state common law or some other federal law should not make a difference in determining whether the claim is a challenge to a removal or remedial action.

Courts in other states have looked at situations that appear to be more closely analogous to *Atlantic Richfield* and dealt with them differently than the Montana Supreme Court did. For example, in *Bartlett v. Honeywell*,[52] the court addressed a suit by homeowners who live near a superfund site alleging claims for negligence and nuisance. The court held that to the extent the actions challenged the adequacy of a CERCLA consent decree, they were preempted.[53] Conflict preemption, the court said, occurs where it is impossible for a

party to comply with both federal and state law.

While *Bartlett*, on its face, looks a lot like *Atlantic Richfield*, the procedural setting makes the cases very difficult to compare. Bartlett, like many of these cases, started in state court and was removed to federal court by the defendants. The remand motion then dealt with issues of federal jurisdiction which are related to, but not the same as the issues dealt with in *Atlantic Richfield*. In those cases, a federal court needs to find jurisdiction in order to dismiss the cases. In *Atlantic Richfield*, on the other hand, federal jurisdiction was not at issue. Thus, the difference in the procedural setting may have made the factual similarities between the cases irrelevant.

Section 122(e)(6)

The Montana Supreme Court concluded that the plaintiffs were not potentially responsible parties and therefore, Section 122(e)(6) did not bar the claim. The court started by noting that there are four classes of PRPs and that Section 107(a) is the source of that list. A current owner is a PRP under Section 107. The court then stated that plaintiffs had never been designated as PRPs in any proceeding and therefore, they were not PRPs. The court did not cite anything to support the notion that one needs to be designated as a PRP in some proceeding. The court did cite some cases for that proposition, but none that suggest that there is such a thing as being designated as a PRP. They cited to *Taylor Farm*, but that case was distinguishing between responsible parties and potentially responsible parties and did not suggest that there needed to be some PRP designation. Then it cited *Pneumo Abex Corp. v. High Point*,[54] but again there's nothing in that case to suggest the need to be designated as a PRP. Indeed, the footnote and the cases cited in it suggest the opposite, i.e., that one is a PRP if they "may be covered by the statute."[55] However, having decided that plaintiffs were not PRPs because there was no designation, the court concluded that Section 122(e)(6) did not apply.[56]

The notion that there needs to be a designation seems inconsistent with another line of cases in which being a PRP is significant. A PRP can bring a contribution claim, but cannot bring a Section 107 cost recovery action. That line of cases often deals with volunteers, people who have never been designated as PRPs, but who are PRPs by virtue of being owners. In such cases, there is never a discussion of a need for designation. The owner cannot bring a Section 107 action because, without any designation, the owner is a PRP.[57]

Moreover, one can be a PRP for purposes of bringing a contribution action without having potential liability. In *Bedford Affiliates v. Sills*,[58] a property owner remediated a site and sued former tenants for contribution alleging that they had contributed to the contamination. The court held that because they were a PRP, they could not bring a Section 107 claim.[59] At that point however, no one had sued plaintiff or otherwise "declared" them to be a potentially responsible party.

Defendant argued that plaintiff could not bring a contribution claim because it had not alleged compliance with the National Contingency Plan ("NCP"). NCP compliance is a required part of the plaintiff's case in a Section 107 action, but the court decided that it would be unfair to require a contribution plaintiff to prove NCP compliance. That means that if a

party settles a Section 107 action without challenging NCP compliance and that party brings a Section 113 contribution action, defendant's argument that the contribution claim should be dismissed because lack of NCP compliance will fail, even if it means that the claimant had no liability. It will fail because the claimant is a PRP, even though lack of NCP compliance means that they would have no liability.

While the Montana Supreme Court's conclusion that the plaintiffs were not PRPs seems to be without support, there is a more important reason to question the result. The court never asked how Section 122 fits into the statute. It is not part of the "litigation" provisions set forth in Section 113. It is not about who can bring a claim and who cannot. It is more properly about who can remediate and who cannot. The Montana Supreme Court never inquired about why Section 122 prevents PRPs from interfering with a remediation when we already know that pursuant to Section 113(h), no one can bring a claim that interferes with the remediation. The answer is that Section 122(e)(6) does not address who can bring a claim. It says that a PRP cannot remediate unless authorized by EPA, and it says so because PRPs have a unique incentive. The property owner may want the property cleaner and it may remediate and then sue for contribution. The point of this Section is to prevent such claims. This provision takes away that incentive by providing that such costs would be inconsistent with the NCP.[60]

In short, had the court examined how Section 122 fits into the statute, the court would have held that for purposes of this Section, these plaintiffs are PRPs because they have a unique incentive to remediate and sue for damages.

The Supreme Court and CERCLA

There is a trend in the Supreme Court's CERCLA jurisprudence that gives an important clue regarding how it will decide this case. The last five times the Supreme Court addressed a CERCLA issue, it reversed the lower court decision, each time, admonishing the courts to focus on the wording in the statute, not policies assumed to be underlying CERCLA.

The Court's most recent CERCLA decision was *CTS Corporation v Waldburger*,[61] The Court addressed whether CERCLA preempts state statutes of repose. Plaintiffs' claim was dismissed based on the North Carolina statute of repose. The U.S. Court of Appeals for the Fourth Circuit reversed, allowing the case to proceed, reasoning that the explicit preemption of state statutes of limitations in CERCLA[62] impliedly preempted state statutes of repose. The Court noted that the Court of Appeals supported its interpretation of CERCLA by noting that "remedial statutes should be interpreted in a liberal manner."[63] In rejecting that reasoning, the Court stated that "The Court of Appeals was in error when it treated this as a substitute for a conclusion grounded in the statute's text and structure."[64] The Court pointed out additional support for their "exclusion of the statutes of repose" from CERCLA based on statutory "language describing the covered period in the singular."[65] Finally, the Court noted "another and altogether unambiguous textual indication" that CERCLA does not "pre-empt statutes of repose" when discussing the presence of tolling for "minor or incompetent plaintiffs" as a critical distinction between the two.[66]

The next most recent Supreme Court CERCLA decision was *Burlington Northern and*

Santa Fe Railroad v. United States,[67] The court below held that Shell could have liability as a person who arranged for disposal of hazardous substances, based on sales of chemicals to the owner of the facility at which the disposal occurred. The court held that Shell could have liability because it was foreseeable that disposal of hazardous material would occur. The Court's reason for reversing sounds a lot like the Court's reasoning in *Waldburger.* The Court started by stating that to determine whether Shell may be held liable, "we begin with the language of the statute."[68] The Court noted further, that "liability may not extend beyond the limits of the statute itself."[69] The Court then looked at the definition of "arrange," citing Webster's dictionary. Because arrange means to make a plan, the Court concluded that the "plain language of the statute" could not support arranger liability based merely on the fact that disposal was foreseeable.[70] Again, the Court focused its analysis on the statutory language, not policies underlying CERCLA.

In *Cooper Industries v Aviall Services, Inc.,* the Court addressed the issue of whether a property owner could clean up a contaminated site and bring a CERCLA contribution action pursuant to Section 113(f)(1) to recover its costs from other responsible parties.[71] The unanimous view of the lower federal courts was that such a claim was consistent with all the policies underlying CERCLA, particularly encouraging parties to remediate properties prior to government intervention. The Court reversed, holding that a party who has not been sued under CERCLA could not bring a CERCLA contribution action. In reversing, the Court reasoned that the Court of Appeals' decision ignored or rendered meaningless the language of the statute, which provided a right of contribution "during or following" a claim under CERCLA Section 106 or 107.[72] Because the plaintiff had not been sued under either of those provisions, its claim could not be during or following the claim. Consistent with its direction to lower courts in all recent CERCLA cases, the Court looked to the "natural meaning" of the statutory language in reversing.[73]

The Court decided *United States v. Atlantic Research Corp*.[74] addressing an issue explicitly left open in *Aviall,* an issue related to the relationship between CERCLA 107 (the basic liability section) and Section 113(f) (the contribution provision).[75] Before *Aviall*, it was generally thought that a PRP could bring a contribution claim, but not a claim under section 107(a). *Aviall* concluded that certain PRPs could not bring a contribution claim. That left open the issue of whether such PRPs could bring a Section 107 claim. Thus, while the Court affirmed a lower court decision, it was in effect, confirming that the understanding of the statutory language in *Aviall*, implied a different result regarding Section 107 claims. Again, the Court noted that "the plain terms" of CERCLA allow PRPs "to recover costs from other PRPs."[76] Thus, it fits the Court's pattern of focusing on the wording of the statute to reverse lower court decision.

Since its decision in *Key Tronic Corp. v. United States*,[77] the Court has focused on the plain language of CERCLA in each case. In *Key Tronic*, the Court addressed whether attorneys' fees were within the "cost of response" as defined in CERCLA.[78] As it has done in each case described above, the Court's analysis began "by considering the statutory basis for the" claim for attorney fees.[79] *Key Tronic* concluded that the costs of searching for other PRPs were within the "cost of re-

sponse," however certain attorneys' fees were not. In denying certain attorneys' fees, the Court noted the statute explicitly provides as a cause of action for individuals "to seek recovery of cleanup costs" but neither relevant section "expressly calls for the recovery of attorney's fees."[80] The Court viewed these omissions as a purposeful "decision not to authorize such awards."[81] While the Court affirmed in part and reversed in part, *Key Tronic* started the Court's pattern of examining the plain language of CERCLA before instructing lower courts to do the same.

Putting Sections 114, 113(b) and (h), and 122(e)(6) Together

Based on the above, it is likely that the Supreme Court will start by instructing courts to pay attention to the language and structure of the statute. Only an interpretation that gives effect to all of the provisions will be acceptable.

Respondents will be pressed on a number of issues. The first is likely to be Section 122(e)(6). The Montana Supreme Court stated that the plaintiffs were PRPs because the section 107(a) responsible parties are PRPs. Then, the court decided that they were not PRPs because they had not been designated as PRPs in any proceeding. This requirement that there be a designation as a PRP is not in the statute and unless respondents can find some statutory basis for this requirement or some other statutory basis for finding that these PRPs are not PRPs, the Court is likely to find for petitioners.

Respondents will also be pressed on the relationship between subsections (b) and (h) of Section 113. Subsection (b) addresses cases that arise under CERCLA and subsection (h) addresses challenges to CERCLA removal or remedial actions. The correct reading of the statute will need to give independent meaning to those phrases. That is, Congress used two phrases and set subsection (h) as an exception to (b). Therefore, there must be cases that do not arise under CERCLA and are a challenge to a CERCLA removal or remedial action. The Montana Supreme Court described the category of cases that are not a challenge so broadly as to almost erase the distinction between those two. It is not clear from the decision what type of case would be a challenge, but petitioners will need to draw that boundary better than the Montana Supreme Court did if they are to prevail.

Conclusion

The trend in the Supreme Court decisions suggests that the Court will reverse and advise the courts that they need to pay attention to the language and structure of the statute. The most likely scenario is an analysis of Section 122(e)(6) that concludes that petitioners' claim cannot proceed because petitioners are PRPs seeking to do a remediation that has not been approved by EPA. Another possible avenue is for the court to define what it means to be a challenge to a removal or remedial action in a manner that leads to the conclusion that cases such as this, where plaintiffs want their property to be cleaner than required by EPA are a challenge to the EPA-approved remediation.

NOTES:

[1] *Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 517, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019).

[2] *Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408

P.3d 515, 517, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019).

[3]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 517, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019).

[4]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 517, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019). The Record of Decision meant that properties could be left with residual arsenic contamination at levels of up to 249 ppm.

[5]6 NYCRR § 375-6.8. New York has separate cleanup goals for residential, commercial, and industrial properties and the unrestricted use goals are used primarily for residential properties.

[6]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 517–18, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019).

[7]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 518, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019).

[8]42 U.S.C.A. § 9601 (2012).

[9]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019). An earlier decision addressing some of the motion practice is published ad *Christian v. Atlantic Richfield Co.*, 2015 MT 255, 380 Mont. 495, 358 P.3d 131 (2015).

[10]*Atlantic Richfield Co. v. Christian*, 2019 WL 2412911 (U.S. 2019).

[11]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 518, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 2019 WL 2412911 (U.S. 2019).

[12]This process is described in detail in regulations codified at 40 CFR Part 300.

[13]42 U.S.C.A. § 9614 (2012).

[14]42 U.S.C.A. § 9613(h) (2012).

[15]42 U.S.C.A. § 9622(e)(6) (2012).

[16]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 519, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019).

[17]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 519, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019), noting a presumption against preemption.

[18]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 519, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019), noting that any reference to state law claims in Section 113 is "conspicuously absent."

[19]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 520, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019).

[20]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 520, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019), noting that the claim is not related to the goals of the CERCLA cleanup.

[21]*ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1115, 51 Env't. Rep. Cas. (BNA) 1147, 30 Envtl. L. Rep. 20574 (9th Cir. 2000).

[22]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 521, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019), stating that plaintiffs' claim is essentially "a common law claim for damages."

[23]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 521, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019), stating "Put simply, the Property Owners are not asking the Court to interfere with the EPA plan."

[24]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 522, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019).

[25]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 522, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019).

[26]*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515, 522, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690 (2019). The court also discussed possible defenses the property owners may have to avoid being PRPs.

[27]*King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578, 14 Employee Benefits Cas. (BNA) 1990, 138 L.R.R.M. (BNA) 2977, 120 Lab. Cas. (CCH) P 11024 (1991).

[28]*Corley v. U.S.*, 556 U.S. 303, 314, 129 S. Ct. 1558, 173 L. Ed. 2d 443 (2009).

[29]*New Mexico v. General Elec. Co.*, 467 F.3d 1223, 63 Env't. Rep. Cas. (BNA) 1225, 36 Envtl. L. Rep. 20219 (10th Cir. 2014).

[30]*New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1250, 63 Env't. Rep. Cas. (BNA) 1225, 36 Envtl. L. Rep.

20219 (10th Cir. 2006).

[31]132 Cong. Rec.S17136-01 (Oct. 17, 1986).

[32]Cong. Rec at 17136-0-3.

[33]*ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 51 Env't. Rep. Cas. (BNA) 1147, 30 Envtl. L. Rep. 20574 (9th Cir. 2000).

[34]*ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1111, 51 Env't. Rep. Cas. (BNA) 1147, 30 Envtl. L. Rep. 20574 (9th Cir. 2000).

[35]*ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1115, 51 Env't. Rep. Cas. (BNA) 1147, 30 Envtl. L. Rep. 20574 (9th Cir. 2000).

[36]*ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1115, 51 Env't. Rep. Cas. (BNA) 1147, 30 Envtl. L. Rep. 20574 (9th Cir. 2000).

[37]*Taylor Farm Ltd. Liability Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 56 Env't. Rep. Cas. (BNA) 1366 (S.D. Ind. 2002).

[38]*Taylor Farm Ltd. Liability Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 953, 56 Env't. Rep. Cas. (BNA) 1366 (S.D. Ind. 2002).

[39]*Taylor Farm Ltd. Liability Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 975, 56 Env't. Rep. Cas. (BNA) 1366 (S.D. Ind. 2002).

[40]*Taylor Farm Ltd. Liability Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 957, 56 Env't. Rep. Cas. (BNA) 1366 (S.D. Ind. 2002).

[41]*Taylor Farm Ltd. Liability Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 968, 56 Env't. Rep. Cas. (BNA) 1366 (S.D. Ind. 2002).

[42]*Taylor Farm Ltd. Liability Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 977, 56 Env't. Rep. Cas. (BNA) 1366 (S.D. Ind. 2002).

[43]*Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 73 Env't. Rep. Cas. (BNA) 1233 (9th Cir. 2011).

[44]*Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1217, 73 Env't. Rep. Cas. (BNA) 1233 (9th Cir. 2011).

[45]*Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1223, 73 Env't. Rep. Cas. (BNA) 1233 (9th Cir. 2011).

[46]*McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 39 Env't. Rep. Cas. (BNA) 2089, 25 Envtl. L. Rep. 20628 (9th Cir. 1995).

[47]*Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 41 Env't. Rep. Cas. (BNA) 1701, 32 Fed. R. Serv. 3d 1451, 26 Envtl. L. Rep. 20063 (9th Cir. 1995).

[48]*McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 331, 39 Env't. Rep. Cas. (BNA) 2089, 25 Envtl. L. Rep. 20628 (9th Cir. 1995); *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239, 41 Env't. Rep. Cas. (BNA) 1701, 32 Fed. R. Serv. 3d 1451, 26 Envtl. L. Rep. 20063 (9th Cir. 1995).

[49]*See ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 51 Env't. Rep. Cas. (BNA) 1147, 30 Envtl. L. Rep. 20574 (9th Cir. 2000).

[50]*See* cases cited *supra*.

[51]*McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 331, 39 Env't. Rep. Cas. (BNA) 2089, 25 Envtl. L. Rep. 20628 (9th Cir. 1995); *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 241, 41 Env't. Rep. Cas. (BNA) 1701, 32 Fed. R. Serv. 3d 1451, 26 Envtl. L. Rep. 20063 (9th Cir. 1995).

[52]*Bartlett v. Honeywell International Inc.*, 737 Fed. Appx. 543 (2d Cir. 2018), cert. denied, 139 S. Ct. 343, 202 L. Ed. 2d 225 (2018). *Bartlett v. Honeywell International Inc.*, 737 Fed. Appx. 543, 545 (2d Cir. 2018), cert. denied, 139 S. Ct. 343, 202 L. Ed. 2d 225 (2018).

[53]*Bartlett v. Honeywell International Inc.*, 737 Fed. Appx. 543, 549 (2d Cir. 2018), cert. denied, 139 S. Ct. 343, 202 L. Ed. 2d 225 (2018).

[54]*Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.*, 142 F.3d 769, 773 n.2, 46 Env't. Rep. Cas. (BNA) 1481, 28 Envtl. L. Rep. 21261 (4th Cir. 1998).

[55]*Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.*, 142 F.3d 769, 773 n.2, 46 Env't. Rep. Cas. (BNA) 1481, 28 Envtl. L. Rep. 21261 (4th Cir. 1998).

[56]*Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.*, 142 F.3d 769, 776, 46 Env't. Rep. Cas. (BNA) 1481, 28 Envtl. L. Rep. 21261 (4th Cir. 1998).

[57]*See, e.g. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 70 Env't. Rep. Cas. (BNA) 1001 (2d Cir. 2010). *See*, *e.g.*, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 70 Env't. Rep. Cas. (BNA) 1001 (2d Cir. 2010).

[58]*Bedford Affiliates v. Sills*, 156 F.3d 416, 47 Env't. Rep. Cas. (BNA) 1449, 29 Envtl. L. Rep. 20229 (2d Cir. 1998). The decision is no longer good law based on the distinction between Sections 107 and 113 discussed *infra* at notes 71 through 75 and accompanying text. Those cases, however, do not affect the PRP or NCP aspects of the decision.

[59]*Bedford Affiliates v. Sills*, 156 F.3d 416, 432, 47 Env't. Rep. Cas. (BNA) 1449, 29 Envtl. L. Rep. 20229 (2d Cir. 1998).

[60]*See, Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 19 Envtl. L. Rep. 21254 (N.D. Ill. 1988) and *U.S. v. Hardage*, 750 F. Supp. 1460, 1511, 21 Envtl. L. Rep. 20721 (W.D. Okla. 1990), judgment aff'd, 982 F.2d 1436, 37 Env't. Rep. Cas. (BNA) 1289, 23

Envtl. L. Rep. 20624 (10th Cir. 1992).

[61]*CTS Corp. v. Waldburger*, 573 U.S. 1, 134 S. Ct. 2175, 189 L. Ed. 2d 62, 78 Env't. Rep. Cas. (BNA) 1505, 86 A.L.R. Fed. 2d 665 (2014).

[62]42 U.S.C.A. § 9658.

[63]*CTS Corp. v. Waldburger*, 573 U.S. 1, 12, 134 S. Ct. 2175, 189 L. Ed. 2d 62, 78 Env't. Rep. Cas. (BNA) 1505, 86 A.L.R. Fed. 2d 665 (2014).

[64]*CTS Corp. v. Waldburger*, 573 U.S. 1, 12, 134 S. Ct. 2175, 189 L. Ed. 2d 62, 78 Env't. Rep. Cas. (BNA) 1505, 86 A.L.R. Fed. 2d 665 (2014).

[65]*CTS Corp. v. Waldburger*, 573 U.S. 1, 13, 134 S. Ct. 2175, 189 L. Ed. 2d 62, 78 Env't. Rep. Cas. (BNA) 1505, 86 A.L.R. Fed. 2d 665 (2014) (noting the text of 42 U.S.C.A. § 9658 repeated use of the word "period" not "periods").

[66]*CTS Corp. v. Waldburger*, 573 U.S. 1, 14, 134 S. Ct. 2175, 189 L. Ed. 2d 62, 78 Env't. Rep. Cas. (BNA) 1505, 86 A.L.R. Fed. 2d 665 (2014) (emphasizing that tolling periods apply to statutes of limitations, not statutes of repose).

[67]*Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 129 S. Ct. 1870, 173 L. Ed. 2d 812, 68 Env't. Rep. Cas. (BNA) 1161 (2009).

[68]*Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 609, 129 S. Ct. 1870, 173 L. Ed. 2d 812, 68 Env't. Rep. Cas. (BNA) 1161 (2009).

[69]*Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 610, 129 S. Ct. 1870, 173 L. Ed. 2d 812, 68 Env't. Rep. Cas. (BNA) 1161 (2009).

[70]*Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 611, 129 S. Ct. 1870, 173 L. Ed. 2d 812, 68 Env't. Rep. Cas. (BNA) 1161 (2009).

[71]*Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548, 59 Env't. Rep. Cas. (BNA) 1545, 34 Envtl. L. Rep. 20154 (2004); 42 U.S.C.A. §§ 9607, 9613.

[72]*Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166, 125 S. Ct. 577, 160 L. Ed. 2d 548, 59 Env't. Rep.Cas. (BNA) 1545, 34 Envtl. L. Rep. 20154 (2004).

[73]*Cooper Indus., Inc.* at 166. (Indicating the "natural meaning" of § 113(f)(1) permits contribution during or following a civil action.)

[74]*U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331, 168 L. Ed. 2d 28, 64 Env't. Rep. Cas. (BNA) 1385, 22 A.L.R. Fed. 2d 735 (2007).

[75]*U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331, 168 L. Ed. 2d 28, 64 Env't. Rep. Cas. (BNA) 1385, 22 A.L.R. Fed. 2d 735 (2007).

[76]*U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 141, 127 S. Ct. 2331, 168 L. Ed. 2d 28, 64 Env't. Rep. Cas. (BNA) 1385, 22 A.L.R. Fed. 2d 735 (2007).

[77]*Key Tronic Corp. v. U.S.*, 511 U.S. 809, 114 S. Ct. 1960, 128 L. Ed. 2d 797, 38 Env't. Rep. Cas. (BNA) 1633, 24 Envtl. L. Rep. 20955 (1994).

[78]*Key Tronic Corp. v. U.S.*, 511 U.S. 809, 811, 114 S. Ct. 1960, 128 L. Ed. 2d 797, 38 Env't. Rep. Cas. (BNA) 1633, 24 Envtl. L. Rep. 20955 (1994).

[79]*Key Tronic Corp. v. U.S.*, 511 U.S. 809, 816, 114 S. Ct. 1960, 128 L. Ed. 2d 797, 38 Env't. Rep. Cas. (BNA) 1633, 24 Envtl. L. Rep. 20955 (1994).

[80]*Key Tronic Corp. v. U.S.*, 511 U.S. 809, 817, 114 S. Ct. 1960, 128 L. Ed. 2d 797, 38 Env't. Rep. Cas. (BNA) 1633, 24 Envtl. L. Rep. 20955 (1994).

[81]*Key Tronic Corp. v. U.S.*, 511 U.S. 809, 819, 114 S. Ct. 1960, 128 L. Ed. 2d 797, 38 Env't. Rep. Cas. (BNA) 1633, 24 Envtl. L. Rep. 20955 (1994).