Don't Try to Hide an Elephant in a Mousehole: *Atlantic Richfield v. Christian*

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The authors analyze from a real estate perspective the recent decision by the U.S. Supreme Court holding that property owners may sue persons responsible for damage to their property even after the property has been remediated under the Environmental Protection Agency's supervision.

In *Atlantic Richfield v. Christian*,[1] the U.S. Supreme Court held that a property owner may bring a property damage claim against the persons responsible for cleaning up a Superfund Site, even if the cleanup has already been completed under the supervision of the Environmental Protection Agency ("EPA").[2] The Superfund Law[3] does not bar such claims and the party who performed the cleanup may be held liable for residual contamination, even if EPA determined that it was acceptable for some contamination to remain. In such cases, the property owner is limited to a damages claim and cannot demand that further remediation be performed, unless EPA agrees that further remediation is required.

This article assesses the Supreme Court's decision and provides an analysis from the real estate law perspective. The issues discussed by the Court were procedural issues affecting what claims a state court may hear, not substantive issues such as whether any further remediation is necessary. Thus, our analysis examines the impact of these procedural issues on property owners' substantive rights. The key conclusions of the Court are:

- Section 113 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[4] does not bar state courts from hearing state law claims regarding residual contamination, and
- Plaintiffs are potentially responsible parties under CERCLA. Thus, the claim for restoration of the property can proceed only if EPA agrees.[5]

Background

Atlantic Richfield is the successor in interest to the Anaconda Copper Mining Company, who contaminated an area of more than 300 square miles in Montana, starting in the

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1880s.[6] The main contaminants at the site are arsenic and copper. In 1983, EPA ordered Atlantic Richfield to begin a remedial investigation at the site. In 1988, EPA selected the remedy for the site and issued an order requiring remediation. Atlantic Richfield has been working with EPA to remediate the site. Atlantic Richfield estimated that by 2018, it had spent approximately $450 million on remediation.[7]

The suit against Atlantic Richfield was brought by a group of property owners whose properties are within the boundaries of the Anaconda Smelter site. EPA had 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. By way of comparison, the New York State unrestricted use soil cleanup objective for arsenic is 13 parts per million.[8] Thus, the remediation allowed a potentially significant amount of residual contamination. Plaintiffs' claims were based on common law trespass, nuisance and strict liability.[9] 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 CERCLA preempted the claims. The trial court granted judgment for the plaintiffs and the Supreme Court of Montana affirmed.[10] The Supreme Court granted certiorari to decide the procedural issue of whether the litigation provisions of CERCLA prevent a state court from hearing plaintiffs' claims.[11]

Section 113 Does Not Bar Plaintiffs' Claims

Most of the U.S. Supreme Court's opinion discussed Section 113 of CERCLA. Section 113(b) provides that federal courts "have exclusive original jurisdiction over all controversies arising under this chapter."[12] Simply put, if the claim is a CERCLA claim, it must be brought in federal court and cannot be brought in state court. Section 113(h) provides that no federal court shall have jurisdiction "to review any challenges to removal or remedial action."[13] The simple meaning is that if the claim is a "challenge" to a CERCLA remedy, it cannot be brought in federal court. Atlantic Richfield argued that these two provisions work together to bar plaintiffs' claims, reasoning that any claim that includes "challenges to removal or remedial actions" (113(h)) is a claim "arising under this chapter" (113(b)).[14] Therefore, no court would have jurisdiction over such claims — Section 113(b) would remove jurisdiction from the state courts and Section 113(h) would remove jurisdiction from the federal courts.

The Montana Supreme Court disagreed with Atlantic Richfield's interpretation of both clauses of Section 113.[15] It reasoned that common law property damage claims arise out of state common law, not out of CERCLA. Thus,

Section 113(b) does not say anything about them. It further reasoned that state common law property law claims are not "challenges" to removal or remedial actions.[16] Thus Section 113(h) also says nothing about these claims. If neither clause addresses plaintiffs' claims, then the two cannot combine to bar plaintiffs' claims.

The U.S. Supreme Court started its discussion by examining the meaning of "arise under" in Section 113(b).[17] That phrase, the Court said, is analogous to the phrase in 28 U.S.C. 1331, the basic federal jurisdiction provision, which says "all civil actions arising under the Constitution, laws or treaties of the United States."[18] Under Section 1331, a suit "arises under the law that creates the cause of action."[19] Claims for nuisance, trespass and strict liability are created by, and therefore arise under, state tort law and not out of CERCLA. Thus, even though Superfund claims must go through the federal courts, plaintiffs' claims are not Superfund claims.

The Court noted that Atlantic Richfield attempted to use Section 113(h) to expand the scope of Section 113(b) so that any challenge to a removal or remedial action would be deemed to arise under CERCLA.[20] Such reasoning, the Court explained, faced several "insurmountable hurdles."[21]

First, the Court explained there is no textual basis for stating that Section 113(h) was intended to expand the scope of Section 113(b). The Court noted that if Congress intended to deprive state courts of jurisdiction over cases arising under CERCLA, it would have done so more directly than by first depriving federal courts of jurisdiction under Section 113(b) and then taking away state court jurisdiction in Section 113(h).[22]

The Court noted another reason to reject Atlantic Richfield's argument that CERCLA bars state courts from hearing these state law claims. There is a "deeply rooted presumption," the Court stated, "in favor of concurrent state court jurisdiction."[23] This presumption can only be overcome by "explicit statutory directive," "unmistakable implication from legislative history," or "a clear incompatibility between state-court jurisdiction and federal interests."[24] In other words, to take away state court jurisdiction over state law claims is extraordinary and a court cannot do so unless Congress has clearly required it.

Rejecting all the arguments about how Sections 113(b) and (h) interrelate, the Court concluded that the sections are not intended to interrelate.[25] Section 113(b) says that state courts cannot hear claims that arise under CERCLA (exclusive federal jurisdiction). Section 113(h) prohibits federal courts from hearing challenges to removal or remedial actions, without regard to what law those claims arise under. Thus, while there may be an overlap, i.e., there may be challenges to removal or remedial actions that arise under CERCLA, all Section 113(h) does is deprive federal courts of jurisdiction over certain "challenges."[26]

Section 122(e)(6)

Next, the Court examined whether Section 122(e)(6) of CERCLA bars plaintiffs' claims. Section 122(e)(6) provides that once the investigation/remediation process has begun under CERCLA, "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been approved by the President."[27] Atlantic Richfield argued that this provision barred plaintiffs' claim for restoration damages be-

cause restoration damages would require the property owners to undertake remedial action without the permission of EPA.[28]

The key to this issue, the Court reasoned, was whether plaintiffs are potentially responsible parties.[29] The Montana Supreme Court concluded that they were not and the Supreme Court disagreed. The term potentially responsible party ("PRP") is defined, the Court explained, in Section 107 of CERCLA, which explains that four parties may be held liable for response costs:

(1) The current owner or operator of the facility;

(2) A person who owned or operated the facility at the time of the disposal or release of hazardous substances;

(3) A person who arranged for disposal of hazardous substances at the facility; and

(4) A transporter, if the transporter selected the site.[30]

Plaintiffs are owners of a portion of the facility and they are, therefore, PRPs.

Plaintiffs argued that because the statute of limitations had run on any claim against them, they had no potential liability and could not be considered potentially responsible parties.[31] The Court explained that the issue of status as a PRP is different from the issue of liability and that one can be a PRP with no potential for liability, citing *United States v. Atlantic Research Corp.*[32]

The Court further reasoned that interpreting PRP to include people who no longer have potential liability is consistent with the goal of CERCLA to create a "comprehensive" remedy.[33] There should be one remedy per site, not several competing remedies. Section 122 is one of the means provided by CERCLA to ensure there would be only one remedy per site.

Justice Gorsuch noted that Section 107 uses the term "covered persons" and not "potentially responsible parties" and the statute's use of the two phrases in different parts of CERCLA implied that one could be a "covered persons" under Section 107 without being a potentially responsible party.[34] The Court disagreed, reasoning that by using the phrase "covered persons" in Section 107 and then "potentially responsible parties" throughout the statute (in seven other subsections), Congress must have intended that the two phrases mean the same thing.[35]

The plaintiffs argued that Section 122(e)(6) could not have the meaning attributed to it by the Court because the provision is buried in a section addressing settlement negotiations. Congress does not, they argued "hide elephants in mouseholes."[36] The Court's response was essentially that Section 122(e)(6) is indeed an elephant, but Section 122 is not a mousehole. Section 122 is an essential tool for orderly cleanups and it is therefore, exactly the place you might find an elephant.[37]

While the Court agreed with Atlantic Richfield regarding the application of Section 122(e)(6) and therefore reversed the decision of the Montana Supreme Court, the Court disagreed with Atlantic Richfield regarding the consequences of applying this section.[38] Atlantic Richfield argued that plaintiffs' claims should be dismissed because plaintiffs were seeking to affect the remediation without EPA approval. The Court, however, remanded the case for further review, giving the plaintiffs the opportunity to try to obtain EPA approval.[39]

Impact of the Decision on Property Rights

Justice Gorsuch concluded his dissenting opinion by saying that this decision "strips away the ancient common law rights from innocent property owners and forces them to suffer toxic waste in their backyards, playgrounds, and farms."[40] This section of the article assesses the extent to which there is any truth to that conclusion.

CERCLA and State Law Property Rights

The starting point for any discussion of the relationship between CERCLA and state law property claims is Section 114 of CERCLA, which 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.[41]

CERCLA does not preempt state law claims and states may impose whatever additional requirements they want regarding releases of hazardous substances.[42] Justice Gorsuch argues that the Court violated that rule by, in effect, preempting certain state law claims, i.e. the plaintiffs can only bring their claim for restoration damages if they first obtain permission,[43] and plaintiffs cannot obtain that permission because EPA made court submissions in this case in favor of Atlantic Richfield.

The Court's response to this argument is that plaintiffs brought common law claims for nuisance and strict liability and those claims can proceed. Further, plaintiffs sought damages for five types of injury:

(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.[44]

The Court's decision allows the claims to proceed and allows plaintiffs the opportunity to recover all damages, except for restoration damages.[45]

How significant that difference is depends on the difference between item 3 (loss of value of property) and item 5 (restoration damages) because if the damages for item 3 are close to the cost of restoration, a property owner does not lose much by being denied a claim for restoration costs. In most cases, the reduction in value will be measured as the difference between the current market value of the property and the market value of the property if it was clean.[46] The cost to clean up will be a key indicator of that difference in value if the contamination is such that a purchaser is likely to clean it up. On the other hand, if the contamination is something that a purchaser would not clean up, then the cost of cleanup will not be a good indicator of the difference in market value.

For example, assume that the property being sold is a commercial building and that a prior remediation left metal contamination under the parking lot. As long as the purchaser intends to use the parking lot as a parking lot, the metal contamination presents no risk of harm to anyone at the site and there is little

incentive to remediate. In such a case, there is a diminution of the value of the property because the contamination will make the property more difficult to sell and because the current owner will incur additional costs if it wants to change the use of the parking lot. The cost of remediation, however, will not be a good measure of the reduction in value because the purchaser is not likely to incur those costs.

At a residential property, however, if the contamination presents a risk of harm to residents, owners will have a significant incentive to remediate and thus, the cost to remediate may be a good measure of the diminution in value. The more contaminated the site is, the more likely it is that the cost of remediation will approximate the reduction in value of the property.

More importantly, the Court's treatment of restoration costs as different from other damages will not be relevant to the vast majority of property owners. The Supreme Court only treated restoration costs as different from other claims because plaintiffs were PRPs, as owners of part of the Superfund Site. Section 122(e)(6) provides that PRPs cannot remediate a site without the approval of EPA.[47] Someone who is not a PRP is not limited by Section 122(e)(6), so that a neighbor of a Superfund Site, whose property has been affected by contamination from the site, will have a claim for restoration damages because this property owner is not a PRP.[48]

It is rare for someone to purchase a part of a Superfund Site without some assurances regarding remediation because every owner of any part of a Superfund Site may be held liable for cleanup costs. There may be reasons that the government may not bring a claim against such an owner, but the potential for liability is so significant that most purchasers would not proceed. In that regard, the plaintiffs are somewhat unique. They purchased a portion of a Superfund Site without receiving any assurances regarding remediation. Justice Gorsuch is bothered by the limitation on the claims these plaintiffs may bring, but a good argument can be made that plaintiffs accepted that limitation when they knowingly purchased a portion of a Superfund Site.[49]

In sum, does the Court use CERCLA to take away state law property rights? The answer is — no — it only takes one element of a possible damages recovery from persons who are PRPs. This limitation on damages will not be significant at most sites and it will not affect most property owners.

Federal Power Over Local Land

Justice Gorsuch argues that this decision inappropriately alters the federal/state balance with regard to land use issues. Land use has traditionally been a matter of state and local law and this decision gives the federal government a new role. Protection of natural resources has also been traditionally a state and local concern. He notes that the federal government may intervene only consistent with the Commerce Clause or some other "constitutionally enumerated power."[50]

While Justice Gorsuch is correct that the federal government's powers with regard to local issues are limited, it is difficult to see where that argument might take him. It is unlikely that he is challenging the constitutionality of CERCLA. CERCLA has stood up to a number of constitutional challenges and if Justice Gorsuch was challenging use of the Com-

merce Clause for this purpose, he would be challenging numerous federal laws. Indeed, in *United States v. Lopez*,[51] where the Supreme Court addressed the issue of federal power to regulate activities near schools, the Court's reasoning takes as a given that Congress has power pursuant to the Commerce Clause to regulate environmental protection.

He further notes that states have long allowed landowners to redress environmental problems using common law theories such as nuisance, trespass and negligence and plaintiffs' use of those theories here is consistent with that practice.[52] Again, it is not clear where Justice Gorsuch thinks this argument goes. Most who are familiar with environmental regulation believe that CERCLA was needed because these common law theories were inadequate as a means of redress for landowners and as a means of protecting public health and the environment. If there is a choice to be made between federal protection of the environment and the state interest in enforcing its common law remedies, it is difficult to believe that anyone who cares about the environment would choose state remedies.

Neither CERCLA nor the Court's decision questions whether state common law claims can proceed. Indeed, one of the major takeaways from this case is that property owners can bring these common law property damage claims and recover damages, even when an EPA-approved remediation is being or has been performed.

Does the Decision Regulate Use of Private Property?

Justice Gorsuch says that the Court unduly restricts how plaintiffs, who are innocent landowners, can use their property.[53] The theory is that if a property owner did not sue to try to require Atlantic Richfield to pay for additional remediation, but instead, hired a contractor to remove contaminated soil from his or her property, that activity would be prohibited by Section 122(e)(6). That could be, because Section 122(e)(6) prohibits a PRP from performing remedial work without EPA approval.[54]

As a practical matter, however, it seems very unlikely that anyone would prevent a property owner from improving his or her property. The holding of the case is that Section 122(e)(6) prevents property owners (who are PRPs) from using state common law to compel remediation without the approval of EPA.[55] The Court was not faced with an attempt to prevent a private party from improving his or her property.

The Court's discussion of Section 122(e)(1) may be instructive on this point. Section 122(e)(1) requires EPA to notify PRPs of settlement negotiations.[56] EPA did not notify plaintiffs and was therefore in violation of this section. Plaintiffs cite this failure to provide notice as evidence that EPA did not view them as PRPs.[57] The Court, however, said that this section does not determine who is a PRP; it merely says what PRPs are entitled to.[58] For our purposes, however, it is instructive that the Court's response to EPA's violation of this provision was essentially — so what? The Court could very well have intended the same thing about a private party improving his or her own property. It may be a technical violation, but it is not a threat to the functioning of the CERCLA remedial system. Compelling an additional remediation against the will of EPA would, however, threaten the system, as the CERCLA remedial system requires a PRP who

is remediating under EPA supervision to listen to EPA and no one else. Thus, it is likely that the owner will be able to do whatever he or she wants to the property.

The Court addresses this issue directly and says that CERCLA does not limit people's use of their property.[59] The Court noted that Justice Gorsuch suggests that Section 122(e)(6) "creates a permanent easement on their land" requiring the property owners to obtain EPA approval "if they want to dig out part of their backyard to put in a sandbox for their grandchildren."[60] The Court scoffed at that, stating that the only restriction is "remedial action" and very few things that a property owner may want to do constitute remedial action.[61] Additionally, the Court noted, as soon as the remediation is complete, EPA delists sites.[62] Thus, even the restriction on remedial action is not permanent; it is not even long term.

Justice Gorsuch's description of these property owners as innocent also bears some analysis. None of these people caused the contamination or contributed to its presence on their property. In that sense, they are innocent. However, CERCLA defines "innocent" in a manner that makes very few property owners innocent. Essentially, one needs to have no knowledge of the contamination at the time of acquiring the property and one needs to have performed "all appropriate inquiries" regarding whether there is contamination.[63] This Superfund Site and this contamination have been well known in the area for a long time such that it is unlikely that, from a CERCLA perspective, many of these innocent plaintiffs are really innocent.

Even if a property owner could prove lack of knowledge, it is very unlikely that this lack of knowledge will be based on having performed "all appropriate inquiries." This smelter site was so well known, that even minimal investigation would have alerted purchasers to its presence.

Does Justice Gorsuch's argument suggest that residential purchasers should perform additional environmental inquiry? While "all appropriate inquiries" in the commercial setting has been defined by both ASTM[64] and EPA, it is less clear what inquiry is required in the residential setting. For the most part, residential purchasers do not perform an environmental investigation before purchasing. Justice Gorsuch thinks plaintiffs are innocent and are not PRPs. Thus, he must have concluded that they do not need to perform additional inquiry.

The Court, however, disagreed with Justice Gorsuch on this point and held that plaintiffs were PRPs. The Court's disagreement does not suggest that their inquiry was inadequate.

Indeed, the Court did not suggest that the plaintiffs were not innocent. The Court's discussion of the CERCLA process is that first a court examines status — is the person in one of the four classes of persons identified in Section 107(a)? If so, the person has the status of a PRP. The next step would be to examine defenses such as the innocent landowner defense. That examination may lead to a finding of non-liability. It could not, however, lead to a finding that the person was not a PRP.

That conclusion highlights the part of the Court's decision that will be most criticized. PRP is short for "potentially responsible party." Plaintiffs argued that they have no potential liability and cannot therefore be PRPs. The Court responded that everyone in one of the

four classes of persons identified in Section 107(a) is a PRP.[65] To the Court, innocence or the running of the statute limitations might eliminate the potential liability; it does not, however, remove the status of a PRP. To others, however, the concept of a potentially liable party with no potential liability is a contradiction.

Is It Unfair to Deprive Innocent Property Owners of a Remedy for Contamination They Did Not Cause?

When I was in law school, we were taught that every well written brief does two things. First, it arranges cases and statutes into an argument intended to show that holding for your client is required by or consistent with all the cases and statutes. Second, a brief should try to convince a court that holding for your client is good, fair, just and something everyone should feel comfortable with. From the plaintiffs' perspective, the fairness argument could have been made with ease:

(1) There is something potentially harmful on my property;

(2) It was put there by a large corporate entity, who profited from the activity that created this harmful material;

(3) I want the corporate entity that contaminated my property to remove this from my property; and

(4) As between a corporate entity that caused the problem and a homeowner who did not cause or contribute to the problem, it is unfair to make the homeowner bear the burden.

It is difficult to find anything in the Court's decision that addresses fairness. Even when responding to Justice Gorsuch's arguments that discuss fairness, the Court responds by using the statute and the caselaw.[66] The lesson may be the CERCLA is not about fairness. That may, indeed be a take-away from the case. After all, the Court could have addressed fairness by explaining that Atlantic Richfield had spent hundreds of millions of dollars following a process required by EPA and it would be unfair to them to allow Montana to tell them to start that process over again.

This brings us to Justice Alito's opinion, concurring in part and dissenting in part. His opinion is as much a critique of CERCLA as anything else. He notes that this issue depends on some "devilishly difficult statutory provisions."[67] Section 113, he says, "is like a puzzle with pieces that are exceedingly difficult, if not impossible, to fit together."[68] Then, after listing a number of questions about Section 113 that the Court did not or perhaps cannot answer, he concludes that "Section 113 may simply be a piece of very bad draftsmanship, with pieces that cannot be made to fit together."[69] His solution, would have been for the Court to decide based on Section 122(e)(6) and omit the discussion of Section 113 as it was not necessary for the decision.

Conclusion

The dissenting and concurring opinions describe a decision based almost entirely on statutory analysis, whose statutory analysis leaves much to be desired. From the perspective of real property law, however, the rules are now quite clear with regard to how state common law remedies relate to CERCLA. The basic rules are:

- CERCLA does not preempt state common law remedies.

- A property owner may recover damages based on state common law remedies for contamination that is subject to a CERCLA remedial process.
- A property owner may recover damages based on state common law remedies even if the CERCLA process has concluded in a manner that allows residual contamination on plaintiff's property.
- CERCLA does not limit private parties use of their own property, unless that use would interfere with a CERCLA-required remedy.
- The primary (and perhaps only) limitation on a property owner's ability to recover damages for contamination on his or her property, is that if the property owner is a PRP, he or she cannot require the party responsible for the remediation to clean up his or her property.

NOTES:

[1]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020).

[2]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1357, 206 L. Ed. 2d 516 (2020).

[3]Comprehensive Environmental Response, Compensation and Liability Act (referred to herein as CERCLA or the Superfund Law), 42 U.S.C.A. §§ 9601 et seq. (2012).

[4]42 U.S.C.A. § 9601 (2012).

[5]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020).

[6]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1346, 206 L. Ed. 2d 516 (2020).

[7]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1347, 206 L. Ed. 2d 516 (2020). As of the date of the decision, Atlantic Richfield is still required to remediate thousands of acres of property.

[8]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.

[9]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1347, 206 L. Ed. 2d 516 (2020).

[10]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1348, 206 L. Ed. 2d 516 (2020); *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, 139 S. Ct. 2690, 204 L. Ed. 2d 1089 (2019) and aff'd in part, vacated in part, remanded, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020).

[11]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1349, 206 L. Ed. 2d 516 (2020). *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, 139 S. Ct. 2690, 204 L. Ed. 2d 1089 (2019) and aff'd in part, vacated in part, remanded, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020).

[12]42 U.S.C.A. 9613(b) (2012).

[13]42 U.S.C.A. 9613(h) (2012).

[14]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1348, 206 L. Ed. 2d 516 (2020); *Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 83, 408 P.3d 515, 521, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690, 204 L. Ed. 2d 1089 (2019) and aff'd in part, vacated in part, remanded, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020).

[15]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1348, 206 L. Ed. 2d 516 (2020); *Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 83, 408 P.3d 515, 521, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690, 204 L. Ed. 2d 1089 (2019) and aff'd in part, vacated in part, remanded, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020).

[16]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1348, 206 L. Ed. 2d 516 (2020); *Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 83, 408 P.3d 515, 521, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690, 204 L. Ed. 2d 1089 (2019) and aff'd in part, vacated in part, remanded, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020) noting that landowner's claim was not such a challenge as it would not "stop, delay, or change the work EPA is doing."

[17]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1349, 206 L. Ed. 2d 516 (2020).

[18]28 U.S.C.A. § 1331 (2012).

[19]28 U.S.C.A. § 1331 (2012); *Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1350, 206 L. Ed. 2d 516 (2020) (citing *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 60 L. Ed. 987 (1916)).

[20]*Atlantic Richfield Company v. Christian*, 140 S. Ct.

1335, 1350, 206 L. Ed. 2d 516 (2020) noting that Atlantic Richfield claimed "§ 113(h) implicitly broadens the scope of actions precluded from state court jurisdiction under § 113(b)."

[21]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1350, 206 L. Ed. 2d 516 (2020).

[22]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1350-1351, 206 L. Ed. 2d 516 (2020).

[23]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1351, 206 L. Ed. 2d 516 (2020).

[24]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1351, 206 L. Ed. 2d 516 (2020) (citing *Tafflin v. Levitt*, 493 U.S. 455, 460, 110 S. Ct. 792, 107 L. Ed. 2d 887, Fed. Sec. L. Rep. (CCH) P 94880, R.I.C.O. Bus. Disp. Guide (CCH) P 7403 (1990)).

[25]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1351, 206 L. Ed. 2d 516 (2020).

[26]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1351–1352, 206 L. Ed. 2d 516 (2020).

[27]42 U.S.C.A. § 9622(e)(6) (2012).

[28]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1351, 206 L. Ed. 2d 516 (2020).

[29]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1351, 206 L. Ed. 2d 516 (2020).

[30]42 U.S.C.A. § 9607(a) (2012); *Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1351, 206 L. Ed. 2d 516 (2020).

[31]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1348, 206 L. Ed. 2d 516 (2020) (citing *Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 86, 408 P.3d 515, 522, 85 Env't. Rep. Cas. (BNA) 2304 (2017), cert. granted, 139 S. Ct. 2690, 204 L. Ed. 2d 1089 (2019) and aff'd in part, vacated in part, remanded, 140 S. Ct. 1335, 206 L. Ed. 2d 516 (2020)).

[32]*U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 136, 127 S. Ct. 2331, 168 L. Ed. 2d 28, 64 Env't. Rep. Cas. (BNA) 1385, 22 A.L.R. Fed. 2d 735 (2007).

[33]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1353, 206 L. Ed. 2d 516 (2020).

[34]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1365, 206 L. Ed. 2d 516 (2020) (Gorsuch, J. dissenting) noting that these terms "use different language, appear in different statutory sections, and address different matters."

[35]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1354, 206 L. Ed. 2d 516 (2020).

[36]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1354, 206 L. Ed. 2d 516 (2020) (citing *Whitman v. American Trucking Associations*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1, 51 Env't. Rep. Cas. (BNA) 2089, 31 Envtl. L. Rep. 20512 (2001).

[37]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1355, 206 L. Ed. 2d 516 (2020).

[38]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1355, 206 L. Ed. 2d 516 (2020).

[39]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1357, 206 L. Ed. 2d 516 (2020).

[40]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1367, 206 L. Ed. 2d 516 (2020) (Gorsuch, J., dissenting).

[41]42 U.S.C.A. § 9614(a) (2012).

[42]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1363, 206 L. Ed. 2d 516 (2020) (Gorsuch, J., dissenting) (quoting 42 U.S.C.A. § 9614(a)).

[43]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1367, 206 L. Ed. 2d 516 (2020) (Gorsuch, J., dissenting) stating "departing from CERCLA's terms in this way transforms it from a law that supplements state environmental restoration efforts into one that prohibits them."

[44]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1355, 206 L. Ed. 2d 516 (2020).

[45]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1357, 206 L. Ed. 2d 516 (2020).

[46]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1347, 206 L. Ed. 2d 516 (2020) (*citing Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 269, 165 P.3d 1079, 1086, 223 Ed. Law Rep. 368 (2007)).

[47]42 U.S.C.A. § 9622(e)(6) (2012).

[48]42 U.S.C.A. § 9622(e)(6) (2012).

[49]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1356, 206 L. Ed. 2d 516 (2020) (citing *Christian v. Atlantic Richfield Co.*, 2015 MT 255, 380 Mont. 495, 529, 358 P.3d 131, 155 (2015) "Evidence of public knowledge of contamination was almost overwhelming."

[50]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1362, 206 L. Ed. 2d 516 (2020) (Gorsuch, J., dissenting).

[51]*U.S. v. Lopez*, 514 U.S. 549, 565, 115 S. Ct. 1624, 131 L. Ed. 2d 626, 99 Ed. Law Rep. 24 (1995).

[52]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1362, 206 L. Ed. 2d 516 (2020) (Gorsuch, J., dissenting) noting that "landowners here proceeded as landowners historically have: They sought remedies for the pollution on their lands in state court under state law."

[53]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1365, 206 L. Ed. 2d 516 (2020) (Gorsuch, J., dissenting.

[54]42 U.S.C.A. § 9622(e)(6) (2012).

[55]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1355, 206 L. Ed. 2d 516 (2020).

[56]42 U.S.C.A. § 9622(e)(1) (2012).

[57]*Atlantic Richfield Company v. Christian*, 140 S. Ct.

1335, 1354, 206 L. Ed. 2d 516 (2020).

[58]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1354, 206 L. Ed. 2d 516 (2020).

[59]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1363, 206 L. Ed. 2d 516 (2020).

[60]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1354, 206 L. Ed. 2d 516 (2020).

[61]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1354, 206 L. Ed. 2d 516 (2020).

[62]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1354, 206 L. Ed. 2d 516 (2020).

[63]42 U.S.C.A. § 9607 (2012).

[64]ASTM International Standards E2018-15, Standard Guide for Property Condition Assessments: Baseline Property Condition Assessment Process, ASTM International, West Conshohocken, PA, 2015, www.astm.org.

[65]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1354, 206 L. Ed. 2d 516 (2020) (citing *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 136, 127 S. Ct. 2331, 168 L. Ed. 2d 28, 64 Env't. Rep. Cas. (BNA) 1385, 22 A.L.R. Fed. 2d 735 (2007)).

[66]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1353–1354, 206 L. Ed. 2d 516 (2020).

[67]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1358, 206 L. Ed. 2d 516 (2020) (Alito, J., dissenting).

[68]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1358, 206 L. Ed. 2d 516 (2020) (Alito, J., dissenting).

[69]*Atlantic Richfield Company v. Christian*, 140 S. Ct. 1335, 1361, 206 L. Ed. 2d 516 (2020) (Alito, J., dissenting).