

Supreme Court hears arguments in CERCLA case that could have widespread ramifications

March 04, 2020

On December 3, 2019, the U.S. Supreme Court heard oral arguments in a CERCLA case that could have ramifications for industry around the country. The case, *Atlantic Richfield Co. v. Christian* (the Christian case), involves challenges to EPA's authority to determine and approve remedial plans and cleanup goals in the face of state laws which provide for more stringent cleanup standards and the federal courts' exclusive jurisdiction to determine disputes arising under CERCLA. The case pits private landowners in Montana against the federal government and the Atlantic Richfield Company (ARCO) in a fight over toxic waste cleanup costs.

The Christian case involves the Anaconda Smelter Site, an old copper smelter in Montana that was declared a superfund site in 1983 that is owned by ARCO, a Potentially Responsible Party (PRP). EPA has overseen remediation efforts by approving all remedial plans and cleanup standards for the Site to clean up the tailings, furnace slag, and flue dust that permeate the five towns encompassed within the site. To date, ARCO has spent about \$470 million on the cleanup so far.

Respondents, a group of landowners in the towns of Opportunity and Crackerville that live within the superfund site, want a more stringent cleanup plan. They want the site to return to its natural condition prior to a century of mining. Despite EPA's approval of ARCO's cleanup plan, the nearby landowners want to be compensated for the nuisance the superfund site caused and the devaluing of their property, and implement a more stringent cleanup standard than what EPA agreed was acceptable. ARCO contends the additional cleanup alone will cost another \$50 million on top of the \$470 million they spent, not including the potential damages for Plaintiff's state law tort claims. The requested relief creates one of the central issues in this case since the landowners' restoration plans would require more remediation than provided by EPA and ARCO.

If the Supreme Court allows the landowners to proceed in state court, it could unleash a host of new litigation that could force PRP's to pay for additional remedial work that goes well beyond EPA remediation plans, not to mention damages for state law claims such as nuisance, negligence, trespass, strict liability, and the like. This raises the prospect that every settling PRP in any Superfund case could be dragged back into court to defend state law tort claims for trespass, nuisance, negligence, and strict liability, and to conduct additional environmental remediation beyond what EPA deems acceptable.

While the case was argued in December 2019, and a decision has yet to be issued, companies should be taking a proactive approach now should the U.S. Supreme Court rule in favor of the landowners. A decision will be issued

in the coming months. So what can a PRP do on either an active or closed Superfund site to limit its costs and minimize its exposure and liability?

Here are the 7 steps you should take now as part of your ARCO Preparedness Plan:

1. **Determine the current regulatory status of the site and obtain the most current information.** Is the site undergoing removal? Has it completed the RI/FS, implemented the remediation under the ROD, or is the site closed? Is the site undergoing long term sampling and monitoring? Get the documents. Be prepared.
2. **Obtain and organize all public comments submitted by the nearby landowners.** The public comments can be obtained through an FOIA Request from U.S. EPA, and in some cases, off U.S. EPA's portal. Also, submit an FOIA request to state and local governments. Who are the landowners? When did they first learn and complain about the site? Are their complaints based upon property damage, bodily injury, or both? What types of hazardous waste are the landowners claiming created their damages?
3. **Research the landowners who submitted public comments.** Do the landowners rent or own their homes? When did the landowners buy their homes? Did they come into the nuisance? What is the fair market value of landowner property as established by the county tax records? Has the landowner ever tried to reduce their taxes based on the proximity to the Superfund site? Have the homes ever been on the market and the sale lost due to the Superfund site? Do the landowners have a history of filing lawsuits? Learn what you can now.
4. **Review the PRP Group Agreement.** Is there a mechanism for exploring common defense strategies and sharing of costs? If the site is closed and the PRP Group disbanded, or you were never a member of a PRP Group, consider organizing and forming a PRP Group to address potential claims of landowners.
5. **Know the Manifests.** Segregate the manifests that resulted in your company being named a PRP. Organize other PRP's manifests by characterization, toxicity, and volume. Who are the other PRP Members who contributed the same hazardous waste as your company? If you are a Generator, who was the Transporter, Arranger, or Broker?
6. **Incorporate specific language into contribution protection agreements and settlement agreements.** Companies should be careful not to release other PRPs from contribution claims without obtaining the proper indemnities should the landowners file a suit. Alternatively, do not let anyone out until the U.S. Supreme Court issues its decision.
7. **Contact your insurance broker.** Now is the time to price out insurance products for potential third-party claims.

Please reach out to the author of this alert or any member of McGlinchey's [Environmental](#) team with any questions you may have regarding the CERCLA case or any other environmental issue.

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