

# U.S. SUPREME COURT RULES CERCLA DOES NOT PRECLUDE STATE LAW CLAIMS FOR CONTAMINATED SITES: SUPERFUND AND EPA ARE NOT THE ONLY GAME IN TOWN FEATURED

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The ARCO copper smelter tower overlooks the town of Opportunity, Montana.

In a recent decision with far-reaching implications for owners of contaminated property, the U.S. Supreme Court ruled that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, often referred to as the federal Superfund law) does not preclude claims under state laws for further cleanup of contaminated sites.

The takeaway point is that Superfund does not prevent state court lawsuits over the same real estate that is a designated public or private federal Superfund site. EPA is not the only game in town, and the game is played not just in the federal courts.

In a split decision (7-2) dated April 20, 2020, the Supreme Court decided that CERCLA does not preclude claims in state courts seeking additional cleanup of Superfund sites beyond what the federal Environmental Protection Agency (EPA) has required, and/or damages or other relief under common-law torts like nuisance, trespass, and strict liability.

It is nuanced about Superfund not precluding state court jurisdiction over state law claims for more cleanup or larger damages than EPA has ordered or agreed, but there is a catch (extra cleanup of the

same property within the Superfund site needs EPA prior approval) and the Court did not deal yet with whether Superfund preempts the Montana statute allowing such claims. Non-preclusion principles are not same as non-preemption precepts.

The case, cited as [\*Atlantic Richfield, Co. v. Christian\*](#), *et. al.*, Docket No. 17-1498, 590 U.S. \_\_\_\_ (April 20, 2020), involved arsenic and lead contamination of more than 300 square miles of land in Montana by a smelter operated by Atlantic Richfield Company (ARCO). For 35 years, EPA worked with ARCO to clean up the site.

In 2008, 98 landowners within the ARCO Superfund site sued in state court, under Montana law, seeking damages and other relief for trespass, nuisance and strict liability claims. The plaintiffs' proposed a restoration plan that went beyond the cleanup efforts being implemented by ARCO.

Montana law allows a landowner to seek "restoration damages" or a monetary award to be used to finance the landowner's plan for remediating the contaminated property.

The Supreme Court held that, although CERCLA §113(b) provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter," the landowners' case against ARCO does not "arise under" CERCLA. Because it arises under state law, and CERCLA does not "strip[] state courts of jurisdiction to hear their own state claims", jurisdiction in the state courts is appropriate.

Therefore, state law claims may go forward in state court against a responsible party under Superfund. The upshot is that owners of contaminated property liable under Superfund also may be liable under state common law principles for remediation beyond what EPA has required, provided that the plaintiffs obtain EPA approval for the extra remedial work.

The Montana state courts rejected ARCO'S arguments that CERCLA precludes state courts from hearing such restoration damages claims and prohibits landowners from taking any remedial actions without EPA approval.

On review, the Supreme Court agreed that the Montana courts had jurisdiction to hear the state-law claims, but held that ARCO would be liable for the landowners' remediation plan only if the landowners had obtained EPA approval to implement it. Because of the posture of this remedy, the Court left open an issue of whether Superfund preempts the type of state statute the plaintiffs were using for their claims.

Lawsuits over cleanups of contaminated sites – whether litigated under state or federal law – are typically complex matters in which parties spend great effort and expense to identify who is responsible, how much each responsible party must pay for remediation, and just how "clean" the site ultimately should be.

Prior to this decision, it was unclear whether state law claims could be used to challenge cleanups overseen by EPA under CERCLA. In addition, EPA settlements usually have set a limit on the responsible party's liability under CERCLA.

Consequently, this Supreme Court ruling likely will lead to more – and more complicated – cleanup and cost recovery litigation. It will encourage owners of properties within or near Superfund sites to sue under state law, in state courts, for additional or different remedial actions, monetary obligations, and natural resource damages where previously that was not seen as a viable option.

The Supreme Court's decision also may encourage citizen groups, without ownership interest in affected properties, to sue in state courts to enforce state Superfund and other pollution laws. In Massachusetts – as in some other states – resident groups can sue alleged violators to enforce state environmental requirements, such as in M.G.L. c. 21E, using the so-called 10-citizen-suit statute. M.G.L. c. 214, §7A.

To summarize, the ARCO case holds that, while CERCLA does grant federal courts exclusive jurisdiction to hear claims brought under the federal Superfund law, federal courts do not have exclusive jurisdiction over all lawsuits concerning Superfund sites.

State courts have jurisdiction to entertain state-law claims involving Superfund sites that are under EPA's purview, such as landowner claims for traditional legal wrongs, additional types of remedies, and even money damages related to a landowner's own EPA-approved remediation plan.

Stay tuned to learn what such a new EPA approval process may look like, what discretionary authority EPA may have in weighing requests for additional state remediation, what new litigation the ARCO case prompts over this federal-state legal relationship, and how the federal courts deal with preemption issues the Supreme Court left open.



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LUKE H. LEGERE, Esq. is a Partner with McGregor & Legere, P.C. He helps clients with a broad range of environmental, land use, and real estate issues including coastal and inland wetlands and waterways, zoning, subdivision, development agreements, conservation restrictions, state and local enforcement actions, stormwater, solid waste, hazardous waste, air pollution, site remediation, regulatory takings, affordable housing, and energy facility siting.

Mr. Legere routinely represents clients in permitting matters before conservation commissions, planning boards, zoning boards of appeals, boards of health, and other local environmental and land use boards and officials. He frequently represents clients in administrative enforcement proceedings and adjudicatory hearings before state agencies such as the Department of Environmental Protection (“DEP”). He regularly handles litigation in state and federal courts at both the trial and appellate levels.

Mr. Legere often writes and speaks on topics such as the Wetlands Protection Act, Chapter 91, Watershed Protection Act, Article 97, water pollution control, non-zoning wetlands bylaws, zoning and land use, regulatory takings, and brownfields. He has had articles published in newsletters for the Massachusetts Association of Conservation Commissions (“MACC”), Real Estate Bar Association (“REBA”), and Association of Massachusetts Wetlands Scientists (“AMWS”). He is the author of the Water Pollution Control chapter of the Massachusetts Continuing Legal Education’s (“MCLE”) treatise on Environmental Law.

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Mr. Legere has served as co-chair of the Boston Bar Association’s Wetlands, Waterways, and Water Quality Committee. He served two terms on the Board of Directors for the Queechey Lake Club, a non-profit corporation dedicated to the preservation and protection of Queechey Lake in Canaan, NY.

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