

Atlantic Richfield Co. v. Christian

In *Atlantic Richfield Co. v. Christian*, a group of landowners within a Superfund site (“Plaintiffs”) brought common law claims against Atlantic Richfield Co. (“ARCO”) in state court seeking remediation beyond that which the EPA deemed appropriate. *Atlantic Richfield Co. v. Christian*, No. 17-1498, 2020 WL 1906542 (U.S. Apr. 20, 2020). The Court held that Plaintiffs could proceed in state court against ARCO, but because they were potentially responsible parties (PRPs), they would have to receive EPA approval of any remedial plan.



CASE OVERVIEW

For nearly a century, Anaconda Copper Mining smelted copper ore in Butte, Montana and in the process made billions of dollars, employed thousands of people, and contaminated hundreds of square miles with arsenic and lead. *Id.* at *4. In the 1970s, ARCO purchased Anaconda Copper Mining. A few years after the merger, Congress enacted CERCLA, and ARCO faced liability for Anaconda Copper’s historic contamination. *Id.* By 1983, the EPA designated 300 square miles around the smelters as a Superfund site. *Id.* Since that time, ARCO has spent more than \$450 million remediating more than 800 properties, and much work remains to be done. The EPA estimates that remedial work will continue through 2025. *Id.* at *5.

In 2008, amidst the EPA-led cleanup, Plaintiffs sued ARCO in Montana state court. *Id.* Plaintiffs made several common law claims. As part of their relief, Plaintiffs sought restoration damages to remediate their properties to levels that far exceeded what the EPA deemed protective of human health and the environment. *Id.*¹

ARCO argued that CERCLA precluded Plaintiffs’ claim for restoration damages and, alternatively, that even if it did not, Plaintiffs were PRPs prohibited from taking remedial action without EPA approval under Section 122(e)(6) of CERCLA. The Montana Supreme Court disagreed with both arguments, finding that CERCLA did not preempt Plaintiffs’ claims for restoration damages and that Plaintiffs did not need EPA approval for the remedial plans because they were not PRPs. *Id.* at *6. The Supreme Court granted certiorari.

¹ For example, Plaintiffs proposed a maximum soil contamination level of 15 parts per million (ppm) of arsenic rather than the 250 ppm set by the EPA.

QUESTIONS PRESENTED

The case presented the Court with two questions:
(1) whether CERCLA strips state courts of jurisdiction over state law claims for restoration damages and, if not,
(2) whether CERCLA requires plaintiffs who are also PRPs to seek EPA approval of restoration plans.

HOLDING

The Court affirmed the Montana Supreme Court's ruling on the jurisdictional issue, but reversed on the PRP issue.

On the jurisdictional issue, the Court found that Section 113(b) of CERCLA only deprived state courts of claims "arising under" CERCLA. *Id.* at *7. Because Plaintiffs' common law claims arose under Montana law and not CERCLA, Montana courts retained jurisdiction over them. *Id.* In sweeping language, the Court added that CERCLA "permits federal courts and state courts alike to entertain state law claims, including challenges to cleanups." *Id.* at *8.

On the PRP issue, the Court held that Plaintiffs were PRPs. The Court found that PRPs include owners of sites on which hazardous substances have been deposited. *Id.* at *9. Because hazardous substances had been deposited on Plaintiffs' properties, the Court found them to be PRPs.

Id. As such, Plaintiffs were barred by Section 122(e)(6) of CERCLA from taking remedial action within a Superfund site without EPA approval. *Id.*

The Court's ruling amounted to a split decision, allowing Plaintiffs to proceed on their state law claims, but requiring them to obtain EPA approval of their remedial plan. As such, the Court remanded for further proceedings consistent with the Court's opinion.

KEY TAKEAWAYS

It will take years of litigation to determine the full impact of the Court's ruling, but some things are immediately clear. The holding will make it easier for landowners to bring common law claims in state court that challenge cleanups. However, it is not all good news for plaintiffs, at least for those who are also PRPs. The ruling makes clear that plaintiffs who are PRPs must get EPA approval of any remedial plans, likely as a precondition to recovering restoration damages. But the opinion is less clear as to non-PRP plaintiffs. The Court's ruling leaves open the question of whether non-PRP plaintiffs must also seek EPA approval of remedial plans. This open question exposes PRPs who perform remedial work at Superfund sites to potentially costly litigation in the future. ■

County of Maui, Hawaii v. Hawaii Wildlife Fund

In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, several environmental groups (“Respondents”) brought a citizens’ suit under the Clean Water Act (CWA) against the County of Maui (“Petitioner”), alleging that Petitioner’s wastewater reclamation facility was a point source discharging pollutants to navigable waters without an appropriate permit. The Court rejected both Petitioner’s and Respondents’ competing interpretations of the CWA and remanded the case to determine whether Petitioner’s discharge of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.

CASE OVERVIEW

Petitioner operates a wastewater reclamation facility, which collects sewage from the surrounding area, partially treats it and pumps the treated water into the ground through four wells. This effluent, amounting to about four million gallons each day, then travels approximately another half mile, through groundwater, to the ocean. *Id.* at *3.

In 2012, several environmental groups brought a citizens’ lawsuit against the County of Maui, claiming that the County was “discharging” a “pollutant” to “navigable waters” without a permit from the EPA. *Id.* The CWA, Section 301, forbids “any addition” of any pollutant from “any point source” to “navigable waters” without an appropriate permit from the EPA. *Id.* at *1.

The District Court found that the discharge from Petitioner’s wells into the nearby groundwater was “functionally one into navigable water,” and granted summary judgment to Respondents. The Ninth Circuit affirmed, stating that a permit is required when “pollutants are fairly traceable from the point source to a navigable water.” *Id.* at *3. The Supreme Court, seeking to resolve a Circuit-split regarding the interpretation of this Section of the CWA, granted certiorari. *Id.* at *4.

QUESTIONS PRESENTED

The case presented the question of whether the CWA “requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source” – in this case, “groundwater.”

HOLDING

The Court held that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters. *Id.* at *1.

The Court reasoned that the primary issue of the case was the scope of the word “from” in the context of the statute. *Id.* at *4. Respondents adopted the Ninth Circuit’s test, arguing that the permitting requirement applied, so long as the pollutant is “fairly traceable” to a point source, even if it traveled long and far (through groundwater) before it reached navigable waters. They clarified, however, that the release from the point source must be “a proximate cause of the addition of pollutants to navigable waters.” *Id.*

The Court rejected Respondents’ test, reasoning that Congress did not intend the point source-permitting requirement to provide the EPA with such broad authority as the “fairly traceable” rule would allow. The Court provided four reasons for rejecting Respondents’ rule, including that:

- (1) Respondents’ rule would require permitting in “surprising” circumstances;
- (2) The structure of the statute indicated that Congress intended to leave substantial responsibility and autonomy to the states for issues relating to groundwater pollution and nonpoint source pollution;

- (3) The legislative history demonstrated that Congress did not accept requests for general EPA authority over groundwater; and
- (4) Longstanding regulatory practice showed that the EPA had previously utilized a different test to regulate pollution discharges from point sources that reached navigable waters through groundwater (the “direct hydrologic connection”). *Id.* at *6-9.

Petitioner contended that the CWA creates a bright-line test and that a point source or series of point sources must be “the means of delivering pollutants to navigable waters” rather than the pollutants’ point of origin. *Id.* at *4-5.

The Court also rejected the Petitioner’s proposed rule, reasoning that its interpretation was too narrow and would risk serious interference with the EPA’s ability to regulate ordinary point source discharges. *Id.* at *10. The Court supported this rejection with three reasons:

- (1) Petitioner’s rule would create a large and obvious loophole in the regulatory framework that Congress did not intend;
- (2) Respondents’ argument that the use of the word “from” in the statute is meant to relate to how the pollutant arrived into the navigable waters, rather than where the pollutant originated, is inconsistent with the rest of the statutory provision since “point source” connotes an origin; and
- (3) While Congress did not require a permit from the EPA for all discharges to groundwater, nowhere in the statute does Congress prohibit the EPA from requiring a permit for *some* discharges. *Id.* at *10-13.

The Court, having rejected both Petitioner’s and Respondents’ proposed rules, decided that for the purposes of the CWA, “an addition falls within the

statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.” *Id.* at *15. The Court included a non-exhaustive list of factors to be considered in determining whether an addition would fall within the scope of this test, including:

- (1) Transit time;
- (2) Distance traveled;
- (3) The nature of the material through which the pollutant travels;
- (4) The extent to which the pollutant is diluted or chemically changed as it travels;
- (5) The amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
- (6) The manner by, or area in which, the pollutant enters the navigable waters; and
- (7) The degree to which the pollution (at that point) has maintained its specific identity. *Id.* at *15-16.

KEY TAKEAWAYS

The Supreme Court’s ruling on the scope of the EPA’s permitting authority presents two main takeaways:

- (1) Activities that were previously considered to be outside the scope of the CWA’s Section 301 permitting requirements may now be regarded as regulated activities requiring an EPA permit; and
- (2) Persons discharging pollutants without an EPA permit risk criminal fines and penalties, and they should assess whether their actions fall within the Supreme Court’s new framework for interpreting the CWA. ■