THE SUPREME COURT OPENS A DOOR IN *ARCO V. CHRISTIAN*, PART TWO

by Charles Openchowski

Charles Openchowski is a Senior Attorney in the Office of General Counsel at the U.S. Environmental Protection Agency.

SUMMARY

In its *Atlantic Richfield Co. v. Christian* opinion, the U.S. Supreme Court addressed the timing of judicial review in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as well as landowners' status as potentially responsible parties for property within the boundaries of a Superfund site. The Court, however, left preemption issues raised by the parties for another day. This Article analyzes the opinion in light of the site's long history, and offers insights on how it might affect the federal cleanup program going forward. The first part, last issue, described the response actions that have been taken, as well as the litigation brought by landowners seeking more remediation. The second part, below, focuses on the role of state law and how it can serve as a platform for enhancing CERCLA cleanups.

Part One of this Article, last issue, traced the cleanup history of the Anaconda Copper Smelter site in Montana, which was the subject of the U.S. Supreme Court's decision in *Atlantic Richfield Co. v. Christian*.[1] It then described the extensive litigation involving this site since 2008, culminating in the Court's April 2020 opinion. This part will examine potential preemption of state law in the context of federal environmental law, first as a general matter and then with regard to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[2] specifically post-*Atlantic Richfield Co.* (*ARCO*). In addition to the role of state law under the statute, including how state law can provide a basis for enhancing a CERCLA cleanup, it delves into how conflict preemption might play out at a Superfund site.

Author's Note: This Article is not a product of the U.S. government or the U.S. Environmental Protection Agency (EPA). The author is not doing this work in any governmental capacity. The views expressed are his own and do not necessarily represent those of the United States or EPA.

1. 140 S. Ct. 1335, 50 ELR 20101 (2020).
2. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.

I. Preemption and Federal Environmental Law

In evaluating potential preemption of state law in the context of a federal environmental law, the recent decision in *Virginia Uranium, Inc. v. Warren*[3] provides some useful initial guideposts. There, the Court preserved the applicability of a state law prohibiting uranium mining even in the face of a federal statute—the Atomic Energy Act (AEA)—that provides the federal government with a great deal of authority to regulate (sometimes exclusively) activities related to nuclear energy. A few rules of the road from the opinion are worth highlighting.

For example, "[i]n this, as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write."[4] In addition, "[w]e examine these arguments about the AEA's preemptive effect much as we would any other about statutory meaning, looking to the text and context of the law in question and guided by the traditional tools of statutory construction."[5] Further, "[t]he preemption of state laws

3. 139 S. Ct. 1894, 49 ELR 20104 (2019).
4. *Id.* at 1900.
5. *Id.* at 1901. As pointed out in the opinion, the AEA "grants the [Nuclear Regulatory Commission] NRC extensive and sometimes exclusive authority to regulate nearly every aspect of the nuclear fuel life cycle *except* mining." *Id.* at 1902. CERCLA, on the other hand, contains very little regulatory authority (e.g., reporting requirements under §103), mainly is a statute providing broad, discretionary response authority, and says nothing about

represents 'a serious intrusion into state sovereignty.'"[6] And finally, "[h]efty inferences may be required, as well, when trying to estimate whether Congress would have wanted to prohibit States from pursuing regulations that may happen to touch, in various degrees and different ways, on unenacted federal purposes and objectives."[7]

More guidance appears in this summary found in the late Justice Ruth Bader Ginsburg's dissent in *Riegel v. Medtronic, Inc.*:

> The "purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted). Courts have "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Preemption analysis starts with the assumption that "the historic police powers of the States [a]re not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).
>
> The presumption against preemption is heightened "where federal law is said to bar state action in fields of traditional state regulation." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Given the traditional "primacy of state regulation of matters of health and safety," *Lohr*, 518 U.S., at 485, courts assume "that state and local regulation related to [those] matters . . . can normally coexist with federal regulations," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985).
>
> Federal laws containing a preemption clause do not automatically escape the presumption against preemption. See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Lohr*, 518 U.S., at 485. A preemption clause tells us that Congress intended to supersede or modify state law to some extent. In the absence of legislative precision, however, courts may face the task of determining the substance and scope of Congress' displacement of state law. Where the text of a preemption clause is open to more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Bates*, 544 U.S., at 449.[8]

The Supreme Court has addressed preemption in the context of federal environmental laws on a few occasions. For example, in *International Paper Co. v. Ouellette*,[9] the Court analyzed the federal Clean Water Act's (CWA's)[10] saving clause and found that "[t]he Act pre-empts state law to the extent that the state law is applied to an out-of-state point source." However, the statute "specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state" for discharges occurring in that state.[11] The *Ouellette* opinion noted that "Congress intended the 1972 Act amendments to 'establish an all-encompassing program of water pollution regulation'"; however, even in light of "the fact that the control of interstate pollution is primarily a matter of federal law," the statute did leave room for state causes of action.[12]

A more recent decision made in the context of federal environmental law, *Bates v. Dow Agrosciences LLC*,[13] dealt with §136(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[14] a provision that addresses the authority of states. In *Bates*, mentioned above in Justice Ginsburg's *Riegel* dissent, the Court held that the language in this subsection—"Such state shall not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under this subchapter"—preempted state "requirements" as well as common-law actions.

And in *American Electric Power Co. v. Connecticut*,[15] the Court found that the Clean Air Act (CAA)[16] did displace federal common law, but then chose not to address whether the Act preempts the availability of a claim under state nuisance law because the issue had not been properly briefed. Subsequently, in an unrelated case, *Merrick v. Diageo Americas Supply, Inc.*,[17] the U.S. Court of Appeals for the Sixth Circuit found the CAA does not preempt state common-law negligence, nuisance, and trespass claims. The Sixth Circuit opinion relies in part on the saving clause in CAA §116, which mirrors a similar provision in the CWA:

> When Congress acts to preempt state law—especially in areas of longstanding state concern—it treads on the states' customary prerogatives in ways that risk upsetting the traditional federal-state balance of authority. *See Geib*

granting exclusive cleanup authority to the federal government; to the contrary, Congress has made it clear that CERCLA is not the exclusive authority available to clean up contaminated sites; *see, e.g.*, CERCLA §104(k) and §128. In any event, the approach to analyzing the preemptive effect of federal law on state law should be largely the same whether the federal statute is regulatory or remedial in nature.

6. *Virginia Uranium*, 139 S. Ct. at 1904 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 488 (1996)).
7. *Id.* at 1908.
8. Riegel v. Medtronic, Inc., 552 U.S. 312, 335 (2008).
9. 479 U.S. 481, 500, 17 ELR 20327 (1987).
10. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
11. *Int'l Paper*, *supra* note 9, at 497. The opinion also points out that "[a]lthough New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable." *Id.* at 499.
12. *Id.* at 492. One potential ramification of recent administrative efforts to reduce the regulatory scope of the CWA's jurisdiction could be to influence how courts view the federal law in terms of providing an "all-encompassing program"; this, in turn, could create expanded opportunities for filing state-law actions to address discharges into certain water bodies and wetlands to the extent they are no longer deemed to be "waters of the United States."
13. 544 U.S. 431, 35 ELR 20087 (2005).
14. 7 U.S.C. §§136-136y, ELR Stat. FIFRA §§2-35.
15. 564 U.S. 410, 41 ELR 20210 (2011).
16. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
17. 805 F.3d 685, 45 ELR 20209 (6th Cir. 2015).

> *v. Amoco Oil Co.*, 29 F.3d 1050, 1058 (6th Cir. 1994). This is why there is a strong presumption against federal preemption of State law, one that operates with special force in cases "in which Congress has legislated . . . in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Environmental regulation is a field that the states have traditionally occupied. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960). Accordingly, even if the express language of the states' rights saving clause here did not preserve state common law claims, principles of federalism and respect for states' rights would likely do so in the absence of a clear expression of such preemption.[18]

The court of appeals in *Merrick* applied the reasoning of the Supreme Court's *Ouellette* decision in coming to the following conclusion:

> The bare fact that Kentucky law may impose more stringent requirements than the Clean Air Act does not mean that the Act preempts Kentucky law. "The fact that a state has more stringent regulations than a federal law does not constitute conflict preemption." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013). "[S]tates frequently, and without preemption by federal law, create more stringent laws regarding minimum wage, employment discrimination, educational standards, gambling, and highway safety, to name a few." *Id*. Nor is Kentucky law preempted simply because it is the product of a less sophisticated or expert-driven process than that of the Clean Air Act. The question, for preemption purposes, is whether compliance with the state law defeats the purposes and objectives of the federal law, not whether the two laws impose different standards by different means. *There is no evidence that Congress intended that all emissions regulation occur through the Clean Air Act's framework, such that any state law approach to emissions regulation would stand as an obstacle to Congress's objectives*.[19]

II. Preemption and CERCLA

The U.S. Congress did specifically include express preemption language in CERCLA when the statute was first enacted in 1980 and again when it was amended in 1986. For example, CERCLA §114(b) prohibits double recovery for cleanup costs incurred under CERCLA §107 and preempts a state law that provides a basis for seeking compensation for those same response costs.

Similarly, as originally enacted, CERCLA §114(c) expressly preempted states from requiring private parties to contribute to overlapping federal and state trust funds to pay for *the same* costs or damages, reflecting a congressional concern about the potential for double taxation. States, however, were allowed to collect taxes or fees to set up a state fund for reimbursing *different* costs or damages, and the specific scope of this provision clearly did not extend to state-law or common-law claims brought by private parties (e.g., providing a cause of action for recovery of damages for personal injuries resulting from releases of hazardous substances). In the 1986 amendments, however, Congress purposefully chose to eliminate that narrowly drafted preemption provision in the original law, thereby lifting the restriction on possible double taxation.[20] As the U.S. Court of Appeals for the Third Circuit noted in *Manor Care, Inc. v. Yaskin*, "the language of §114(a), the repeal of the original language of §114(c), and the legislative history of that repeal *demonstrate clearly that Congress did not intend for CERCLA to occupy the field or prevent the states from enacting laws to supplement federal measures relating to the cleanup of hazardous wastes.*"[21]

In the 1986 Superfund Amendments and Reauthorization Act (SARA), Congress added a different provision expressly preempting state law. As clearly provided in new CERCLA §121(e)(1), "[n]o Federal, state or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." This express preemption provision is codified in the National Contingency Plan (NCP) at 40 C.F.R. §300.400(e)(1).[22] Similar to CERCLA §113(h), Congress

18. *Id.* at 694.
19. *Id.* at 695 (emphasis added).

20. For example:
> The reported bill strikes section 114(c) of the Act to clarify that States are not preempted from imposing taxes for purposes already covered by CERCLA . . . The primary effect of the amendment [striking the preemption provision originally in CERCLA §114(c)] will be to remove a potential barrier to the creation of State superfund programs. The amendment may result in an increase in the number and pace of hazardous substance response actions undertaken or partially funded by States, since States will be able to raise funds to assist such hazardous substance response.

S. Rep. No. 11, at 59-60 (1985).

21. 950 F.2d 122, 125-26, 22 ELR 20320 (3d Cir. 1991) (emphasis added). *See also* Witco Corp. v. Beekhuis, 38 F.3d 682, 687, 25 ELR 20007 (3d Cir. 1994) (citing *Manor Care*, 950 F.2d 122 ("Congress has not explicitly preempted all state law on environmental subject matter, nor has Congress enacted such a comprehensive scheme of regulation as to provide no room for supplementation by the states.")). In *Manor Care*, then-Judge Samuel Alito also determined that "CERCLA expressly does not pre-empt state law," citing to *New York v. Shore Realty*, 759 F.2d 1032, 1041, 15 ELR 20358 (2d Cir. 1985).

22. The preamble to the proposed NCP explains the U.S. Environmental Protection Agency's (EPA's) view that
> [t]he purpose of this exemption is to allow CERCLA response actions to proceed expeditiously without the delays that could result while waiting for other offices or agencies to issue a permit. *The substantive requirements that would be imposed by a permit still must be stated in Superfund documents, but the redundancy of stating such standards in a permit issued by another office or agency is avoided.*

53 Fed. Reg. 51394, 51443 (Dec. 21, 1988) (emphasis added). *See also* 55 Fed. Reg. 8666, 8756 (Mar. 8, 1990):
> These subsections reflect Congress' judgment that CERCLA actions should not be delayed by time-consuming and duplicative administrative requirements such as permitting, although the remedies should achieve the substantive standards of applicable or relevant and appropriate laws . . . Accordingly, it would be inappropriate to formally subject CERCLA response actions to the multitude of administrative requirements of other federal and state offices and agencies.

Thus, for example, if a CERCLA remedial action involves a point source discharge of treated wastewater into a navigable water of the United States, the

intended the application of this provision to be limited to *ongoing CERCLA* cleanup actions to allow them to be carried out more efficiently and quicker; the preemptive effect does not apply to remediation work done under a different authority (e.g., corrective action authority under a state hazardous waste law), or to a CERCLA remedial action that has already been completed.[23]

In a recent case involving the state of Colorado's attempt to require a post-closure permit pursuant to its U.S. Environmental Protection Agency (EPA)-approved Resource Conservation and Recovery Act (RCRA)[24] program for a hazardous waste landfill at the U.S. Department of Defense's Rocky Mountain Arsenal, the district court adopted a magistrate judge's conclusion that "the CERCLA permit waiver does not preempt permitting requirements for units that are being regulated under RCRA/[Colorado Hazardous Waste Act] CHWA at the time the CERCLA action commences."[25] In other words, if there is a preexisting requirement pursuant to state law for a permit for a regulated unit at the moment a CERCLA response action begins, the exemption in CERCLA §121(e)(1) does not apply to that regulated unit. While other units and actions (e.g., the creation of a new landfill for purposes of disposing of CERCLA-related wastes generated during a cleanup) may be covered within the scope of the permit exemption to the extent they are part of the actual ongoing CERCLA response action, that exemption's preemptive scope is narrow.[26] As with an earlier decision involving the same facility where the U.S. Court of Appeals for the Tenth Circuit found that the arsenal is subject to the state's approved RCRA program,[27] the district court relied in part on the saving clauses in CERCLA §114(a) and §302(d).

With regard to field preemption, the text and context of CERCLA's saving clauses do not reflect a congressional intent to put in place a pervasive federal scheme that leaves no room for state law to supplement it, especially for sites where EPA has finished its CERCLA response action.[28]

In the absence of express or field preemption,[29] there is still the issue of conflict preemption. By virtue of the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2, state laws may be preempted if they "interfere with, or are contrary to the laws of [C]ongress, made in pursuance of the [C]onstitution."[30] If a state law makes it impossible to comply with both the federal and state laws, or the state law is an obstacle to accomplishing congressional objectives, the state law may be preempted.[31]

A key question in resolving the conflict preemption issue specifically raised by the language of the *ARCO* opinion is whether the multiple saving clauses in CERCLA can be reconciled with §122(e)(6).[32] To answer this question, it

---

Agency's documentation in the administrative record would provide data and information showing how the cleanup-related discharges are needed to achieve the remedial action objectives.

In addition, the remedial investigation (RI)/feasibility study (FS) and possibly other documents in the administrative record would discuss how those discharges will comply with the identified substantive requirements of the CWA and its regulations (e.g., water quality standards, water quality criteria, state-promulgated use designation) qualifying as applicable or relevant and appropriate requirements (ARARs) so that the public would have a meaningful opportunity to understand and comment on the Agency's proposed plan incorporating the proposed effluent discharge limits associated with the cleanup. In this case, there would be no need for a separate CWA §402 state-run permit process (e.g., notice of draft permit by the regulatory agency, public hearing, finalization of the permit) running in parallel with the CERCLA remedy selection process outlined in the NCP (e.g., issuance of a proposed plan, request for comments and a public meeting, response to comments submitted, final cleanup decision in the record of decision (ROD)) serving the functionally equivalent purpose where the duplication of efforts could lead to delays.

23. For example, a Resource Conservation and Recovery Act (RCRA) corrective action that impacts a navigable water of the United States would still be subject to any applicable permitting requirements under the CWA and §10 of the 1899 Rivers and Harbors Act, since RCRA does not have a permit exemption provision like CERCLA §121(e)(1). Similarly, a cleanup carried out pursuant to state law (e.g., as part of a state voluntary cleanup program) would not be excused from having to obtain a CWA §404 permit if the work involves a covered discharge into a wetland.
24. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
25. Colorado Dep't of Pub. Health & Env't v. United States, 381 F. Supp. 3d 1300, 1308 (D. Colo. 2019).
26. Thus, for example, effluent discharges covered by a CWA §402 permit in existence before a CERCLA remedial action starts would not be within the scope of the permit exemption unless those discharges were to be integrated into the cleanup itself; similarly, a requirement to obtain a §402 permit would apply to discharges at a site after an on-site response action has been completed (e.g., once construction is complete and the remedy becomes operational and functional for purposes of beginning the operation and maintenance phase) as discussed in the NCP at 40 C.F.R. §300.435(f).
27. United States v. Colorado, 990 F.2d 1565, 23 ELR 20800 (10th Cir. 1993).
28. *See* Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996). The Agency has interpreted CERCLA to operate as an implied repeal of state environmental laws. *See, e.g.*, 55 Fed. Reg. at 8742:

    > The position that on-site CERCLA response actions are not independently subject to other federal or state environmental laws is a longstanding one, based on a theory of implied repeal or preemption. See, e.g., 50 FR 47912, 47917-18 (Nov. 20, 1985); 50 FR 5862, 5865 (Feb. 12, 1985); 'CERCLA Compliance With Other Environmental Laws' Opinion Memorandum, Francis S. Blake, General Counsel, to Lee M. Thomas, Administrator, Nov. 22, 1985.

    However, SARA's legislative history does not support this interpretation. See, e.g., 132 Cong. Rec. S17136-01 (daily ed. Oct. 17, 1986) (statement of Sen. Stafford): "The bill approved by the committee of conference continues and confirms this policy of nonpreemption . . . *Nowhere in section 121 is there authority for the Federal Government to preempt, for good reason or bad, applicable and appropriate State laws*." (emphasis added). Importantly, "an implied repeal must ordinarily be evident from the language or operation of the statute." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 470 (1982). *See also* Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1908, 49 ELR 20104 (2019) ("The only thing a court can be sure of is what can be found in the law itself. And every indication in the law before us suggests that Congress elected to leave . . . [some of the traditional health and safety functions to the states].").
29. *See, e.g.*, Manor Care, Inc. v. Yaskin, 950 F.2d 122, 125-26, 22 ELR 20320 (3d Cir. 1991).
30. Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)).
31. *See Barnett Bank*, 517 U.S. 25. *See also* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (whether "compliance with both federal and state regulations is a physical impossibility"); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ("Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania' law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").
32. *See* Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1355, 50 ELR 20101 (2020) ("Interpreting the Act's saving clauses to erase the clear mandate of §122(e)(6) would allow the Act 'to destroy itself.'"). Other Court decisions also have grappled with the tension that can exist between statutory saving provisions and conflict preemption principles. For example, in *Geier v. American Honda Co.*, 529 U.S. 861, 869 (2000), the Court concluded "that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles. Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." And, the opinion notes:

is important to identify the main purpose of CERCLA and how §122(e)(6) serves that purpose. As pointed out by Justice Ginsburg in her dissent in *Medtronic*, "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case. See, e.g., *Cipollone*, 505 U.S., at 516."[33]

Unlike other federal environmental laws,[34] CERCLA itself does not include an explicit congressional statement describing the overall policy or objectives of the legislation. However, the law's overarching goal and purpose—the protection of human health and the environment—is made evident by the inclusion of that phrase (or slight variations to it) on multiple occasions in the statute.[35] For example, in §104(a):

> [T]he President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

Similarly, under §106(a), the president has authority to issue administrative orders "as may be necessary to protect public health and welfare and the environment." Further, §121(b) requires selection of remedial actions by the president (whether implemented by the federal government or a potentially responsible party (PRP)) that are "protective of human health and the environment,"[36] and §121(c) obligates the president to review those selected remedial actions every five years to "assure that human health and the environment are being protected." While EPA (or another federal agency acting as the president pursuant to the delegations of authority in Executive Order No. 12580) has discretion when deciding whether to use CERCLA's broad cleanup authority, once the Agency undertakes a response action, the duty to ensure protectiveness of human health and the environment is mandatory.

CERCLA's purpose is also reflected in the NCP:

> The national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste.[37]

And the preamble to the final NCP confirms EPA's interpretation of that statutory purpose on numerous occasions. For example:

> Section 121 of CERCLA makes clear, and the legislative history confirms, that the overarching mandate of the Superfund program is to protect human health and the environment from the current and potential threats posed by uncontrolled hazardous waste sites. This mandate applies to all remedial actions and cannot be waived.[38]

To help implement this overall objective expeditiously, Congress has established a trust fund to allow the federal government to first carry out cleanups on its own, and then recover its costs later. As an alternative financing mechanism separate and apart from the trust fund, Congress also has provided powerful enforcement authority to issue administrative orders and/or seek injunctive relief in court to compel polluters to perform the cleanup. And as part of the 1986 amendments, Congress added a new §122 providing discretionary authority to enter into set-

---

> [T]his Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, *ante*, at 106-107; see American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 227-228 (1998) (AT&T); Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

Id. at 870. In addition:

> The Court has thus refused to read general "saving" provisions to tolerate actual conflict *both* in cases involving impossibility, see, *e.g.*, AT&T, 524 U.S., at 228, *and* in "frustration-of-purpose" cases, see, *e.g.*, *Locke*, *ante*, at 103-112; *International Paper Co. v. Ouellette*, 479 U.S. 481, 493-494 (1987); see also *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331 (1981).

Id. at 873-74.

33. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). *See also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) ("In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.").
34. *See, e.g.*, CWA §101; CAA §101(b); RCRA §1003.
35. *See* H.R. Rep. No. 1016, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119 (CERCLA's purpose is "to provide for a national inventory of inactive hazardous waste sites and . . . to protect public health and the environment from the dangers posed by such sites."). *See also* EPA's preamble to the 1985 NCP revisions (50 Fed. Reg. 47912, 47917 (Nov. 20, 1985) (emphasis added)):

    > These [other federal environmental and public health] laws were enacted with the goal of protecting public health and the environment. Regulations developed under these laws have imposed requirements that EPA and other Federal agencies deemed necessary to protect public health and the environment. *Because protection of public health and the environment is also the goal of CERCLA response actions,* other Federal environmental and public health laws will normally provide a baseline or floor for CERCLA responses.

36. Section 121(b) also includes a number of other "general rules," and requires consideration of a number of factors when selecting a protective remedial action. These factors largely have been translated in the NCP's nine criteria for evaluating alternatives prior to publishing the Agency's preferred alternative in a proposed plan. 40 C.F.R. §300.430(e)(9) (2020). Enforcement and settlement considerations (including a PRP's willingness to enter into a settlement) are not included as statutory or NCP factors in the remedy selection process. This reflects the fact that ensuring protectiveness of human health and the environment in making a cleanup decision is separate and apart from enforcement and settlement considerations, and should not be influenced by them.
37. 40 C.F.R. §300.430(a)(1).
38. 55 Fed. Reg. at 8725. *See also id.* at 8703 ("Today EPA confirms the statement in the preamble to the proposal that the overarching mandate of the Superfund program is to protect human health and the environment from the current and potential threats posed by uncontrolled hazardous waste sites."); *id.* at 8700 ("The remedy selection process promulgated today is founded on CERCLA's overarching mandate to protect human health and the environment."). EPA's preamble to the 1985 NCP revisions (50 Fed. Reg. at 47917) also discusses CERCLA's statutory purpose. For example,

    > [t]hese [other federal environmental and public health] laws were enacted with the goal of protecting public health and the environment. Regulations developed under these laws have imposed requirements that EPA and other Federal agencies deemed necessary to protect public health and the environment. *Because protection of public health and the environment is also the goal of CERCLA response actions,* other Federal environmental and public health laws will normally provide a baseline or floor for CERCLA responses.

    (emphasis added).

tlements to secure work or obtain cash-outs. Even though these enforcement and settlement authorities are important and powerful tools to help secure cleanups, they are not in and of themselves the primary goal or objective of the statute. Rather, they are the means "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination."[39]

Unlike the mandatory language requiring that any CERCLA response actions that the federal government chooses to undertake or oversee be done in a manner that ensures protectiveness of human health and the environment, the enforcement and settlement authorities are couched in more discretionary language. In fact,

> [t]his section [§122] explicitly authorizes EPA to enter into settlement agreements with responsible parties in limited circumstances. This authority is discretionary, signifying a change from the Senate version which required EPA to explore the settlement option . . .
>
> *The purpose is to clarify the limited circumstances in which settlements are appropriate*; the purpose is not to encourage EPA to settle as many cases as possible.[40]

Thus, while CERCLA provides settlement authority to further the polluter-pays principle in an open, fair, and transparent manner, and to facilitate the use of arguably more-efficient private-party resources to clean up sites, that authority is not the stated, underlying purpose or overarching objective of the statute—protection of human health and the environment through cleanup is. When the majority opinion in *ARCO* characterizes CERCLA settlements as "the heart of the Superfund statute," and finds that §122(a) "commands EPA to proceed by settlement,"[41] it appears to be reading out the plain language describing the discretionary nature of the authority provided in this section, which starts out with: "The President, in his discretion, may enter into an agreement . . . ."[42] Cautioning against inappropriately elevating the importance of an unenacted goal, the Court in *Virginia Uranium* stated that "we may only wind up displacing perfectly legitimate state laws on the strength of 'purposes' that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme."[43]

The basic cooperative federalism approach embedded in the major federal laws enacted to achieve Congress' articulated purpose of protecting human health and the environment allows states to set more stringent standards and requirements than those established by EPA. As discussed in *Merrick*:

> Diageo suggests that allowing state common law claims would "disrupt the CAA's balance of authority between federal and state law and conflict with the mechanism by which the CAA allows states to impose more stringent standards than the 'floor' established by federal law." The Supreme Court disposed of an identical argument in *Ouellette*, remarking that:
>
> > An action brought against [a polluter] under [source-state] nuisance law would not frustrate the goals of the CWA as would a suit governed by [affected-state] law. Application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system.
>
> 479 U.S. at 498-99, 107 S. Ct. 805. What was true for the Clean Water Act holds true for the Clean Air Act.[44]

Some courts similarly have described CERCLA as providing a floor, not a ceiling.[45]

With this in mind, a conflict preemption analysis in this case should examine whether the saving clauses' preservation of state-law and common-law claims to secure more cleanup would undermine CERCLA's overarching goal of protecting human health and the environment when EPA has determined that the use of the statute's discretionary response authorities is warranted to respond to the release of hazardous substances into the environment at some, but not all, portions of this site.

39. CTS Corp. v. Waldburger, 573 U.S. 1, 4, 44 ELR 20125 (2014). To the extent restoration damages recovered from a PRP under state law are spent on remediation, they similarly help promote cleanup and "ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination," especially in situations where EPA has decided the use of CERCLA response authority is not warranted.
40. 132 Cong. Rec. S14895, S14918 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell).
41. Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1355, 50 ELR 20101 (2020).
42. Section 104(a) further reflects the discretionary nature of the statute's settlement authority: "When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the *President may allow* such person to carry out the action . . ." (emphasis added).
43. Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1908, 49 ELR 20104 (2019) (citations omitted).
44. Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685, 695, 45 ELR 20209 (6th Cir. 2015).
45. *See, e.g.*, United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1454, 22 ELR 20405 (6th Cir. 1991) ("In this case, the use of the term preemption is misleading, for CERCLA sets only a floor, not a ceiling, for environmental protection."); New Mexico v. General Elec. Co., 467 F.3d 1223, 1246, 36 ELR 20219 (10th Cir. 2006) ("CERCLA sets a floor, not a ceiling."). In *New Mexico v. General Electric Co.*, the Tenth Circuit found the state's natural resource damages claim to be in conflict with federal law and thereby preempted because the amount to be recovered under state law for damage to its groundwater resource would not necessarily be spent on restoration, rehabilitation, or acquisition of equivalent resources, as would be required by CERCLA; further, the CERCLA cleanup at the site was not yet completed, so it was not clear what, if any, impairment to natural resources giving rise to compensable damages would actually remain post-remediation. Under Montana tort law, by contrast, amounts recovered by the landowners would have to be spent on cleanup.

III. The Role of State Law in CERCLA

The statute recognizes in a number of places the important part that states play as partners in achieving cleanup of contaminated sites. For example, in 2002, Congress included a new CERCLA §128 authorizing the president to award grants to states and Indian tribes "to establish or enhance" response programs that include specified elements (e.g., "oversight and enforcement authorities or other mechanisms, and resources, that are adequate to ensure that—(i) a response action will—(I) protect human health and the environment"). For the most part, the "eligible response" sites covered by this section are the ones subject to state voluntary cleanup programs, not the national priorities list (NPL)-caliber sites addressed by the federal Superfund program.

Another, more prominent role for states was added by Congress in the 1986 amendments. In new §121(d), attaining federal and more stringent state standards that are applicable or relevant and appropriate requirements (ARARs) represents one of several, independent mandates that have to be met when selecting CERCLA remedies.[46] As described in the preamble to the final NCP, the statute "requires that state standards are also potential ARARs for CERCLA remedial actions when they are promulgated, more stringent than federal standards, and identified by the state in a timely manner."[47]

The statute, the NCP (40 C.F.R. §300.400(g)(4)), and the preamble to the final rule all make it clear that a standard based on state law must be more stringent than a federal standard in order to be considered a potential ARAR[48]; the preamble also makes it clear that the most stringent ARAR identified is to be used when selecting a remedial action.[49] In the context of cleaning up contaminated sites, this is one way in which CERCLA mirrors other major environmental laws by providing a federal floor that states can build on.[50]

Congress also recognized that there may be disagreements between EPA and states over the ARAR status of state laws and regulations, and it provided a mechanism in §121(f)(2) for resolving such disputes. Thus, by statute, a state may seek to impose a more stringent or more comprehensive cleanup at a CERCLA site than the one EPA believes is needed, even where the state law driving the additional work does not qualify as an ARAR (or has been waived by EPA).[51] In part reflecting CERCLA §121(f)(2), the NCP includes a specific mechanism in 40 C.F.R. §300.515(f) enabling states to pursue enhancements of CERCLA remedies in certain circumstances. The preamble to the final NCP highlights one example of such an enhancement where "the state may want the cleanup of ground water to attain water quality levels beyond those required under CERCLA, and thus may wish to maintain a pump-and-treat system longer than deemed necessary in the [record of decision] ROD."[52]

46. The statute in §121(d)(4) also includes several limited ARARs waivers that potentially may be available in appropriate circumstances; waivers are not made available for other statutory requirements pertaining to remedy selection, such as ensuring protectiveness of human health and the environment. It is also important to note, however, that the statute limits the scope of the ARARs provision to only on-site cleanup activities undertaken pursuant to CERCLA response authority; CERCLA cleanups often have an off-site component that is not governed by ARARs (or their potential waiver) but may fall within the scope of CERCLA §121(d)(3) and EPA's off-site regulations (40 C.F.R. §300.440 (2020)). ARARs, and their possible waiver, are not available for cleanups undertaken pursuant to response authority under other statutes (e.g., RCRA corrective action).
47. 55 Fed. Reg. at 8741. ARARs serve a key function in the remedy selection process and allow states to engage directly in EPA's decisionmaking, starting at an early stage. For example, available ARARs—including more stringent state laws and regulations—are used to develop preliminary remediation goals (PRGs), a first step in establishing remedial action objectives and thereafter evaluating alternatives. Based on an administrative record that includes an RI and an FS (e.g., risk assessments, site characterization, alternatives evaluation using nine criteria derived from specified factors found in CERCLA §121(b)), the Agency then identifies a preferred alternative that is made available for public comment in a published proposed plan. The PRGs are finalized into cleanup levels that are protective of human health and the environment and meet ARARs after the Agency responds to public comment and issues an ROD.
48. *Id.* at 8742. Not all state laws are potential ARARs. For example, the underlying Montana tort law in this case requiring that funds recovered for property damage must be used for cleanup does not itself have off-the-shelf numbers that represent standards that can be used to establish cleanup levels. Similarly, depending on the wording used, a state regulation that establishes a stream's use designation (e.g., recreational use) for purposes of a state's delegated CWA §402 program technically might not be "enforceable" (e.g., civil penalties available for noncompliance) in a manner that is contemplated when identifying ARARs but still might be subject to a claim for injunctive relief in a state court action brought under state law.
49. *Id.* at 8741 ("CERCLA requires that remedial actions comply with all requirements that are applicable or relevant and appropriate. Therefore, a remedial action has to comply with the most stringent requirement that is ARAR to ensure that all ARARs are attained. In addition, CERCLA requires that the remedies selected be protective of human health and the environment *and* attain ARARs.").
50. Another example can be human health toxicity values developed by a state that are not promulgated or enforceable (and therefore would not qualify as an ARAR) but are nonetheless used to help determine protectiveness of human health and the environment at a CERCLA site; as such, they may fall into the "to be considered" category (*see* 40 C.F.R. §300.400(g)(3) (2020)). While EPA's Integrated Risk Information System (IRIS) provides health assessment information that is often used for carrying out CERCLA risk assessments when an ARAR is not available for developing PRGs, and subsequently when selecting cleanup levels, Agency guidance explicitly recognizes that there may be other sources of reliable toxicological information, including more stringent state-generated toxicity values, that can also be used. *See* U.S. EPA, Human Health Toxicity Values in Superfund Risk Assessments (2003) (OSWER Directive No. 9285.7-53). In a recent federal facility dispute resolution decision involving the South Air Force Research Laboratory site at Edwards Air Force Base in California, the EPA Administrator ratified a CERCLA remedy selection decision based on the state's toxicity value for tetrachloroethene (PCE), which is more stringent than EPA's IRIS toxicity value for PCE. Letter from Andrew Wheeler, U.S. EPA Administrator, to John W. Henderson, Assistant Secretary of the Air Force for Installations, Environment, and Energy (May 13, 2019).
51. Consistent with this section, a state is responsible for the additional cost associated with the extra cleanup work being required as a matter of a non-ARAR state law; this represents one possible scenario for how the saving provision in CERCLA §114(a) may come into play.
52. 55 Fed. Reg. at 8784. A situation quite similar to this example did arise in *Town of Acton*. There, the town sought an injunction to prevent W.R. Grace from shutting down a groundwater pump-and-treat system installed by W.R. Grace as part of a CERCLA remedy overseen by EPA. Although the system had achieved cleanup levels established by EPA and agreed to by the state, those levels exceeded ones established by the town through a local bylaw. The town wanted to keep the system running longer, which it argued would lead to achievement of its more stringent cleanup standards. Ironically, notwithstanding the discussion in EPA's own preamble, the United States intervened on the side of Grace and successfully persuaded the district court that operating the pump-and-treat system for a longer period of time would displace EPA's remedy selection judgment and that the town's bylaw was preempted, even though the district court also determined that "there

There are other ways for states and state law to be involved in cleanup. As explained in the preamble to the final NCP, response actions undertaken pursuant to CERCLA authority are not the exclusive mechanism available to clean up sites: "EPA has modified §300.515(e)(2)(i) to explicitly acknowledge the authority of states to conduct response actions at NPL sites under state law . . . Such actions are conducted under authority of state law, not CERCLA."[53]

Thus, even where EPA places a site on the NPL, assists a state in following the NCP to help that state obtain full cost recovery under §107(a)(4)(A), and even adds its signature on a state-prepared decision document, that involvement would not necessarily mean that the federal government is using its CERCLA response authority to carry out or secure the cleanup.

A good example of this arrangement is the Onondaga Lake NPL site. In 1989, the state of New York filed an action in federal district court alleging that Allied Signal's actions constituted a public nuisance under New York State law, and that the company was liable "pursuant to the State common law of public nuisance and the Real Property Actions and Proceedings Law, Section 841, for the abatement of the public nuisance and for all costs, damages and restitution arising from the creation and maintenance of this public nuisance." A separate cause of action alleged that Allied was liable to the state "pursuant to [Environmental Conservation Law] ECL §17-0501, for its acts and omissions which caused or contributed to conditions in contravention of the groundwater and surface water standards promulgated by the New York State Department of Environment Conservation at 6 [New York Codes, Rules, and Regulations] NYCRR Parts 701 and 703."[54] On March 16, 1992, the state entered into a consent decree with Honeywell International (formerly Allied Signal) under which the company carried out field investigations and sampling under the state's oversight.

In 2007, a new consent decree between the state and Honeywell was entered in federal district court. It stated:

> Pursuant to ECL Article 27, Title 13; ECL Article 71, Title 27; and ECL §3-0301, the State has the responsibility and authority to establish the terms and conditions under which Honeywell will design and implement the remedy selected in the ROD for the Onondaga Lake Bottom subsite, and Honeywell would be obligated pursuant to ECL §27-1313 to design and implement the selected remedy in compliance with the terms and conditions established by the State.[55]

Recognizing that "[p]ursuant to ECL, article 27, the State can implement the selected remedy for the Lake Bottom subsite and, pursuant to CERCLA, 42 U.S.C. §§9607(a), 9613(g)(2), can recover all related response costs incurred or to be incurred by the State from Honeywell," the parties "agreed to the terms and conditions pursuant to which Honeywell will design, subject to State approval, and implement, under State oversight, the remedy selected in the ROD for the Onondaga Lake Bottom subsite."[56]

The 2007 consent decree made it clear that "[t]he Court does not have jurisdiction pursuant to this Consent Decree over any claims of the United States pursuant to Sections 106 and 107 of CERCLA." In fact, in late 2017, the United States filed its own lawsuit against Honeywell under CERCLA §107 in federal district court to seek recovery for its natural resource damage claims and to recover costs it had incurred over the years supporting the state's enforcement-led cleanup; that lawsuit was settled in 2018. The 2018 consent decree did not address or resolve any CERCLA §106 claims on behalf of the United States.[57]

---

is no concern that operation of the Treatment System would exacerbate the groundwater contamination problems at the Site." *See* Town of Acton v. W.R. Grace, No. 13-12376-DPW, 2014 WL 7721850, at n.11 (D. Mass. Sept. 22, 2014).

53. 55 Fed. Reg. at 8779. Other portions of the preamble also discuss cleanup performed under the authority of state law, as distinct from response actions conducted pursuant to CERCLA authority. For example: "In such cases [non-fund-financed state-lead enforcement sites], the state is proceeding under the authority of state law and could take a similar action whether or not the site was the subject of CERCLA action." *Id.* at 8783. Similarly, the preamble states:

    > However, this does not prevent a state from attempting to proceed with the response action using their own funds or enforcement authorities, except as limited by CERCLA section 122(e)(6). If a state decides to pursue this avenue . . . the state action may be subject to possible preemption under CERCLA section 122(e)(6) if the state uses its own enforcement authorities to implement such action.

    Id. To the extent §122(e)(6) applies only to CERCLA PRPs, it is not clear why the Agency would consider the state to be a PRP when it is using its own funds to take a cleanup action under state law (unless the state is otherwise a covered person for purposes of CERCLA §107(a)). Also, a state-law liability framework could, in theory, cast a wider net than CERCLA §107(a) when identifying parties who may be responsible for paying for cleanup; such parties might be subject to a state enforcement action even though they might not be covered persons under CERCLA §107(a) and, therefore, not PRPs subject to §122(e)(6).

54. The complaint also included a CERCLA §107 claim seeking to recover costs incurred at the site and seeking to recover natural resource damages caused by the release of hazardous substances (including mercury and benzene) by Allied Signal that contaminated soil, sediment, surface water, and groundwater. CERCLA §107 does not provide enforcement authority for states to issue administrative orders, seek injunctive relief, or enter into settlements to secure remediation.

55. Consent Decree at 4, New York v. Honeywell Int'l, Inc., No. 89-CV-815 (N.D.N.Y. Jan. 4, 2007).

56. *Id.* at 5.

57. A year after EPA added Onondaga Lake and adjacent contaminated areas to the NPL in 1994, the state and EPA entered into a cooperative agreement pursuant to CERCLA §104(d) that identified the state as the lead agency for all enforcement actions to "ensure that responsible parties commit to undertake necessary work to investigate and remediate" the site. As stated on EPA's website, "[i]nvestigations and long-term remedial actions at the various subsites are being performed by the site's PRPs, pursuant to enforcement agreements between the PRPs and the State of New York." U.S. EPA, *Superfund Site: Onondaga Lake Syracuse, NY Cleanup Activities*, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0203382#bkground (last visited Mar. 9, 2021).

    In contrast to other federal environmental laws (e.g., CWA §402), CERCLA §104(d) does not delegate CERCLA authority to states, tribes, or local governments, nor does it authorize EPA to grant a state the federal enforcement authorities under §106, federal settlement authorities under §122, or features from other sections of the statute, such as ARARs waivers or the permit exemption. *See* Colorado v. Idarado Mining Co., 916 F.2d 1486, 1489, 21 ELR 20270 (10th Cir. 1990), *cert. denied*, 499 U.S. 960 (1991) ("However, §106(a) does not allow a state, with or without a [§104(d)] cooperative agreement to seek injunctive relief against responsible parties."). This is because EPA's "authority to act, as with the exercise

While EPA and the state have worked closely together on the cleanup, the $400 million-plus in work is not being taken by EPA pursuant to §104 (i.e., this is not a fund-financed cleanup) or secured by EPA pursuant to an administrative order or judicial action using §106 injunctive authority (or §122 settlement authority) to make the company perform it.[58] The state, not EPA, is directing and overseeing the PRP's actions, and it is doing so based on state-law authority to compel the company's compliance with its directives; as a federal government agency, EPA cannot draw upon state law as authority to carry out its response actions, it can only act pursuant to the authority provided to it by Congress. Based on the court filings, it is clearly a state-law enforcement-led cleanup, not a CERCLA one.[59]

As evidenced by the Court's textual analysis of CERCLA §113(b), the underlying authority for a claim—or for that matter, for taking or securing a cleanup—is important. Not only is proper identification of the authority critical for purposes of determining federal court jurisdiction and whether the timing of judicial review restrictions under §113(h) apply, it also controls the availability of other features of the CERCLA statute, such as the potential waiver of federal ARARs pursuant to §121(d)(4) and the permit exemption in §121(e)(1). For a cleanup undertaken pursuant to state law, applicable federal requirements (including permits) must be complied with. These may include a CWA §402 permit containing effluent limits that meet water quality standards in situations involving a discharge from a point source into a water of the United States, or a §404 permit if a discharge impacts a wetland. This might be an important consideration for the landowners' restoration plan (e.g., at Willow Creek) since courts cannot expand on what Congress has provided in CERCLA to cover work done under a different federal statute (e.g., RCRA) or state law.[60]

IV. The Landowners' Proposed Restoration Plan

As discussed above, the NCP addresses state enhancement of CERCLA remedies. Consistent with EPA guidance, states are not the only entities that can seek to enhance a CERCLA remedial action by performing additional cleanup.[61] For example, in its 2016 "Guidance Regarding Remedy Enhancements and Betterments at Superfund Remedial and Removal Sites," the Agency states that "[a]lthough the NCP regulations do not explicitly address other stakeholders' opportunities to provide enhancements, EPA policy recommends other entities implement enhancements provided the other parties both conduct and pay for the enhancements."[62]

The "other entities" referred to in this guidance can include landowners. In its 1995 "Land Use in the CERCLA Remedy Selection Process" guidance, EPA states:

> If landowners or others decide at a future date to change the land use in such a way that makes further cleanup necessary to ensure protectiveness, CERCLA does not

of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" Medellín v. Texas, 552 U.S. 491, 524 (2008) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Dames & Moore v. Regan, 453 U.S. 654 (1981)). *See also*, *e.g.*, Utility Air Regulatory Group v. Environmental Prot. Agency, 134 S. Ct. 2427, 2446, 44 ELR 20132 (2014) ("Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them."); Angelus Milling Co. v. Commissioner, 325 U.S. 293, 296 (1945) ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of [executive branch] officials."); National Audubon Soc'y, Inc. v. Watt, 678 F.2d 299, 307-08, 12 ELR 20690 (D.C. Cir. 1982):

> It is well established that a government official may not bind the United States by entering into a contract to perform unauthorized acts. Utah Power & Light Co. v. United States, 243 U.S. 389, 409, 37 S. Ct. 387, 391, 61 L. Ed. 791 (1917); United States ex rel. Hoehn v. Shaughnessy, supra, 175 F.2d at 118 (applying general principle to stipulation allegedly made by government official). A party contracting with a government agency may not rely on the agent's assertion of authority if such authority does not exist. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384, 68 S. Ct. 1, 3, 92 L. Ed. 10 (1947).

58. One reason for engaging in this kind of cooperation at a state enforcement-led site is to help ensure that at the end of the cleanup process, the site will be eligible for delisting from the NPL. As set forth in 40 C.F.R. §300.425(e), one of the criteria that has to be met before a site may be deleted from the NPL is a determination that no further fund-lead or PRP-lead response is needed. Since deletion is accomplished by an EPA formal notice-and-comment rulemaking under the Administrative Procedure Act, it is important for the administrative record and rulemaking docket to contain sufficient data and information supporting the "no further response action" finding. Helping the state to ensure that the cleanup has been done in a manner that is consistent with the NCP and EPA's extensive CERCLA guidance can provide such support for EPA's delisting rulemaking.

59. *See also* Village of DePue v. Exxon Mobil Corp., 537 F.3d 775, 787, 38 ELR 20209 (7th Cir. 2008):

> Exxon's sole argument is that section 113(h) bars the Village's claims because those claims challenge a CERCLA remedy—the Consent Order previously entered by the state court. The Consent Order was instituted by the *Illinois* EPA, however, not by the federal government, and the IEPA's role in the lawsuit and Consent Order was conducted "pursuant to its own authority under the [Illinois Act]."

60. *See, e.g.*, *National Audubon Soc'y*, 678 F.2d at 308 n.18 ("the general authority of the Justice Department over the conduct of . . . litigation . . . does not compensate for the Secretary's lack of authority under [the National Environmental Policy Act] NEPA"); Morrison v. Olson, 487 U.S. 654, 680-81 (1988) (a federal judge "may not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches").

61. *See* Office of Emergency and Remedial Response, U.S. EPA, Reusing Superfund Sites: Commercial Use Where Waste Is Left On Site 5 (2002) (EPA 540-K-01-008) [hereinafter Reusing Superfund Sites] ("An enhancement is not a remedial feature or activity. It is not necessary for the effectiveness of the remedy, even though it may make some contribution to its effectiveness.").

62. U.S. EPA, Guidance Regarding Remedy Enhancements and Betterments at Superfund Remedial and Removal Sites 5 (2016) (OSWER Directive No. 9200.3-110). As is the case with state-sponsored enhancements under the NCP:

> EPA cannot fund, nor require PRPs or others, to fund certain "betterments" or "enhancements" of a remedy. Generally, a prohibited enhancement is an action that is not necessary to support the effectiveness of a remedy in protecting human health or the environment. Examples of actions that typically may not be funded include the installation of lights for a parking lot and the addition of extra clean fill beyond that required to make a remedy protective.

See Office of Solid Waste and Emergency Response, U.S. EPA, Reusing Cleaned Up Superfund Sites: Ecological Use Where Waste Is Left On Site §1.4.3 (2006) (OSWER Directive No. 9202.1-27-D). *See also* U.S. EPA, Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-Lead Superfund Remedial Sites (2010) (OSWER Directive No. 9355.7-19).

> prevent them from conducting such a cleanup as long as protectiveness of the remedy is not compromised. (EPA may invoke CERCLA section 122(e)(6), if necessary, to prevent actions that are inconsistent with the original remedy.) In general, EPA would not expect to become involved actively in the conduct or oversight of such cleanups. EPA, however, retains its authority to take further response action where necessary to ensure protectiveness.[63]

Enhancements have been pursued by private parties at CERCLA sites. At the Jacobsville Neighborhood Soil Contamination Superfund site in Evansville, Indiana, EPA Region 5 provided a detailed comfort/reasonable steps letter in 2017 to facilitate redevelopment of property at an NPL site undergoing cleanup. As part of the remedial action selected in the Agency's 2009 ROD, residential properties at the site with soil arsenic concentrations above 30 parts per million (ppm) and lead concentrations above 400 ppm are to be addressed by excavation and offsite disposal. The property to be redeveloped for residential use had soil concentrations that exceeded these levels. The redeveloper submitted a "conceptual remedial plan" (CRP) with specific steps designed to control dust and other waste materials during excavation. EPA's letter noted that while the work proposed by the redeveloper was not exactly the same as the remedy selected in the ROD, it was not incompatible with the ROD's goal of protecting human health and the environment; the letter then authorized the work proposed in the CRP, subject to certain additional conditions spelled out in the letter.

In its opinion's conclusion, the Montana Supreme Court observed that "ARCO is not precluded at trial from contesting the merits of the Property Owners' restoration plans. However, that is an issue of fact to be resolved at trial."[64] As such, the restoration plan currently is a proposed one and could be modified as the landowners' state-law claims are tried in state court. Presumably, only after that trial has concluded in the landowners' favor would there be a final restoration plan available for EPA to evaluate for purposes of CERCLA §122(e)(6) to the extent this provision might be applicable, or for a court to evaluate applying conflict preemption principles.

In the meantime, there are elements of the CERCLA cleanup at this site reflected in the RODs, the explanation of significant differences (ESDs), and supporting administrative record documents that provide helpful information vis-à-vis the landowners' proposed restoration plan. These include the action levels for residential soils, sitewide institutional controls (ICs), and the potential use of a permeable reactive barrier (PRB) to treat contaminated groundwater.

A. Action Levels for Residential Soils

When interpreting CERCLA §122(e)(6), the Montana District Court cited to *Interfaith Community Organization v. Honeywell International, Inc.*, which quoted Sen. George Mitchell's (D-Me.) explanation[65] of the underlying purpose for that particular provision:

> Under CERCLA §122(e)(6), Congress only forbade remedial actions by PRPs that are inconsistent with the ROD without EPA's approval. "This provision is to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem."[66]

The 1996 ROD, the 2013 ROD amendment, and the 2017 ESD provide information for evaluating whether the residential soil cleanup work the landowners would like to perform would prejudge or be inconsistent with EPA's selected remedy, or would exacerbate the contamination that has been determined to pose an unacceptable risk to human health and the environment at this site. In these decision documents, the Agency has determined that use of CERCLA response authority at this site is warranted to address unacceptable risk to human health and the environment when specified action levels for arsenic (250 ppm) and lead (400 ppm) are exceeded in residential soils.[67]

As described in the *ARCO* opinion, "the landowners propose a maximum soil contamination level of 15 parts per million of arsenic, rather than the 250 parts per million level set by EPA."[68] As pointed out by Justice Neil Gorsuch, "the federal government itself has elsewhere set a threshold of 25 ppm."[69] Removing contamination from the environment to meet a more stringent cleanup level on its face seems quite consistent with the basic protection of human health purpose of CERCLA, especially for areas of the site that have effectively been *screened out* by EPA from the scope of the cleanup; and, it is hard to see how doing so prejudges the selected remedy for the other properties that EPA *has* decided to include within

63. U.S. EPA, Land Use in the CERCLA Remedy Process 10 (1995) (OSWER Directive No. 9355.7-04).
64. Atlantic Richfield Co. v. Montana Second Jud. Dist. Ct., 408 P.3d 515, 523, 48 ELR 20000 (Mont. 2017).
65. 132 Cong. Rec. S14919 (daily ed. Oct. 3, 1986).
66. Christian v. Atlantic Richfield Co., No. DV-08-173 BN, at 15 (Mont. Dist. Ct. Aug. 30, 2016).
67. EPA guidance (e.g., U.S. EPA, Role of the Baseline Risk Assessment in Superfund Remedy Selection Decisions (1991) (OSWER Directive No. 9355.0-30)) discusses when use of CERCLA remedial action authority typically is warranted due to actual or potential exposures to hazardous substances (like arsenic and lead) that pose or may pose an unacceptable risk to human health.
68. Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1348, 50 ELR 20101 (2020).
69. *Id.* at 1363. Similarly, at the Colorado Smelter NPL site, EPA "determined that the risks related to lead and arsenic contamination from the historic smelter are unacceptable and action is warranted under Superfund"; the Agency in a 2017 ROD selected a cleanup level for arsenic contamination in residential soil of 61 ppm and 350 ppm for lead. U.S. EPA, Early Interim Action Residential Property Cleanups, Operable Unit 1—Community Properties, Record of Decision, September 2017 at 30 (2017), https://semspub.epa.gov/work/08/1888168.pdf. *See also* EPA's 2009 ROD for the Jacobsville site, which selected a soil arsenic cleanup level of 30 ppm. U.S. EPA, Jacobsville Neighborhood Soil Contamination Site—Record of Decision (2009), https://semspub.epa.gov/work/05/352479.pdf.

the scope of that cleanup, or how it could exacerbate the problem at those properties.

As noted in the Supreme Court's opinion, ARCO has cleaned up more than 800 residential and commercial properties in this large site, and about another 1,000 properties are slated for cleanup over the next few years.[70] However, based on sampling data included in the administrative record, not all properties contain arsenic and lead in the soil at concentrations above the identified action levels. The 1996 ROD, for example, describes how samples were taken and includes tables with summaries of the data collected. For the town of Opportunity, the ROD states that "No blocks [out of the 360 three-acre blocks sampled] exceeded the soil arsenic concentration level of 250 ppm."[71]

In her August 2016 opinion denying ARCO's motion for summary judgment, Judge Katherine Bidegaray noted the following:

> As a result of the filing of this lawsuit, ARCO conducted additional sampling on every Plaintiffs' property, and now acknowledges contamination exceeding the regulatory level for arsenic in soil remains on some of the Plaintiffs' properties. At oral argument, the Court was informed that ARCO plans to remove contaminated soil on twenty-four of the Plaintiffs' properties, however, none of the Plaintiffs will have the entirety of their yards cleaned up. The work began in June, 2016 and is scheduled to be finished before the start of trial in November, 2016.[72]

During oral argument before the Supreme Court, the landowners' attorney stated that "[t]he vast majority of my clients have had zero work done on their land. And if you put all their land together, the work has been done on only 5 percent, okay? So, on 95 percent of the land, literally nothing has been done."[73] As Justice Gorsuch then pointed out in his dissent:

> Yet, only 24 of their 77 properties had been remediated, and only about 5 percent of the total acreage had been touched. *Id*., at 9. Soil near Tammy Peters's daycare playground, for example, still shows an arsenic level of 292 ppm. But because the "weighted average" for her yard is below 250 ppm, Atlantic Richfield performed no cleanup of the playground at all. *Id*., at 10.[74]

As explained in an EPA fact sheet, the scope of the CERCLA remedial action at this site does not include yards with an area weighted average contaminant concentration of 249 ppm (or less) of arsenic contamination in the soil.[75] In the Agency's opinion, "[i]t is rare that a yard would require a total clean up," and it has given its assurance that "[h]aving arsenic above the 250 ppm cleanup levels in your yard is *not a concern*, if the area weighted average is below the cleanup level of 250 ppm."[76]

For purposes of CERCLA §122(e)(6), as well as conflict preemption analysis, one important factor is whether a landowner's actions might interfere with the selected CERCLA remedial action being implemented or pose an obstacle to the achievement of the statutory purpose of protecting human health and the environment. For such an evaluation, a consistent, accurate, and transparent approach to sampling, risk assessment, and risk management decisions is critically important.

Where the Agency has essentially screened out certain parcels of land and determined they do not pose an unacceptable risk to human health and the environment (i.e., "not a concern" per the EPA fact sheet) based on the concentrations of hazardous substances present in the soil,[77] it is unclear how disturbing that soil would result in unacceptable risk (any more than disturbing soil that is clean or at background levels).[78] If an area weighted average approach is used—as indicated by Justice Gorsuch's example and the EPA fact sheet—to decide whether there is an unacceptable risk to human health that warrants the use of CERCLA authority in the first place, that same approach presumably is valid in evaluating whether the

---

70. *Atlantic Richfield Co.*, 140 S. Ct. at 1347.
71. U.S. EPA, EPA Superfund Record of Decision: Anaconda Company Smelter DS-15 (1996) [hereinafter EPA 1996 ROD]. *See also* U.S. EPA & Montana Department of Environmental Quality, Record of Decision Amendment, Community Soils Operable Unit, Anaconda Smelter National Priorities List Site, Anaconda, Montana §2.2.4 (2013).
72. Christian v. Atlantic Richfield Co., No. DV-08-173 BN, at 16 (Mont. Dist. Ct. Aug. 30, 2016).
73. Transcript of Oral Argument at 34, Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) (No. 17-1498).
74. Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1362, 50 ELR 20101 (2020).
75. EPA's May 2017 fact sheet states:
    > Each yard is split into components for sampling and clean up (boulevards, front lawns, flower gardens, back yards, and earthen drives). It is rare that a yard would require a total clean up. Which components are cleaned up depends on if the 400 ppm cleanup level for lead is exceeded or if the area weighted average for arsenic is exceeded.
    >
    > Exposure depends on how much contamination is present and how often contact is made. For lead, the main risk is to pregnant women or children 7 years old and younger who ingest or inhale lead through play. All yard components that exceed 400 ppm of lead will be replaced. For arsenic [sic] elevated arsenic to be significant, exposure has to occur over an extended period over an entire yard, not just a single component. Having arsenic above the 250 ppm cleanup levels in your yard is not a concern, if the area weighted average is below the cleanup level of 250 ppm.
    >
    > The example . . . shows how a property can have one or more components with concentrations above the arsenic cleanup level . . . and still not require cleanup. Depth of cleanup is to 12 inches and to 24 inches for gardens.

    Region 8, U.S. EPA, Community Soils Update: Anaconda Smelter Superfund Site 2 (2017) [hereinafter EPA May 2017 Fact Sheet].
76. *Id.* (emphasis added). As noted in the fact sheet, lead contamination is handled differently ("All yard components that exceed 400 ppm of lead will be replaced.").
77. Typically, EPA risk assessments examine various pathways for human health exposure, including the dermal contact, inhalation, and ingestion/food-chain pathways. *See, e.g.*, 40 C.F.R. §300.430(d)(2) (2020); Office of Emergency and Remedial Response, U.S. EPA, Risk Assessment Guidance for Superfund (1989) (EPA/540/1-89/002). *See* EPA 1996 ROD, *supra* note 71, which discusses exposure pathways in §6-3, starting at DS-21.
78. Consistent with long-standing policy, the CERCLA program generally does not clean up contamination that is found at concentrations below natural background levels for constituents that are not associated with site-related releases. *See, e.g.*, Office of Solid Waste and Emergency Response, U.S. EPA, Role of Background in the CERCLA Cleanup Program (2002) (OSWER Directive No. 9285.6-07P).

contamination left in place may pose an unacceptable risk if disturbed thereafter through excavation activities.[79] To the extent contaminated soils do not pose a risk sufficient to trigger a CERCLA cleanup on the theory that "[f]or arsenic [sic] elevated arsenic to be significant, exposure has to occur over an extended period over an entire yard, not just a single component,"[80] then a one-time, discrete disturbance or excavation of certain soils in that yard should not pose an unacceptable risk by exacerbating the contamination, and should not undermine the CERCLA remedial actions taken at other properties.[81]

Nor would allowing that excavation to go forward pursuant to state law necessarily "erase the clear mandate of §122(e)(6)"—which is confined to remedial actions and PRPs—and "allow the Act 'to destroy itself.'"[82] If EPA has decided to not perform or require a CERCLA remedial action on a parcel, it is unclear how an individual landowner removing contaminated soil from that parcel would necessarily be carrying out a CERCLA remedial action for purposes of §122(e)(6).[83] Not all cleanups are CERCLA remedial actions[84]; even at NPL sites, cleanup is often carried out through removal actions.[85]

As described in EPA's own decision documents, a substantial number of yards at the Anaconda NPL site actually have been cleaned up using CERCLA removal action authority. Since not all "excavations" are done as remedial actions, an individual landowner whose property has been screened out of the CERCLA cleanup could well be doing work that more closely resembles the removal action thresholds in §104(c) of less than $2 million and shorter than 12 months,[86] and that landowner might well be able to reasonably characterize the work as a removal action outside the reach of §122(e)(6).

There is no bright line between removal actions and remedial actions.[87] In a recent opinion, the U.S. Court of Appeals for the Seventh Circuit examined the difference between these two types of CERCLA response actions:

> Given the potential for overlap between the two characterizations, courts decide the removal-or-remediation question on a case-by-case basis. No one characteristic of the cleanup is usually dispositive. *See Pub. Serv. Co. of Colorado v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999) ("Elements of either response action may overlap and semantics often obscure the actual nature of the cleanup performed.").[88]

And carrying out that cleanup work at a site that has been screened out by EPA from the scope of its selected remedial action would seem to put it out of reach of CERCLA §106, as well.[89] That abatement authority requires a

79. Instead of an area weighted average approach, an alternative approach based on specific data points in a yard can be used. If this kind of sampling reveals the presence of "hot spots" with concentrations higher than the action level, then those soils in the yard can be determined to pose a risk to the property owner (or to a neighbor if the owner digs them up) such that they are within the scope of the CERCLA remedial action and need to be addressed (e.g., removed from the yard and replaced with clean backfill).
80. *See* EPA May 2017 Fact Sheet, *supra* note 75.
81. This should be especially true if the excavation activities need a local government permit, as most construction activities do, and are undertaken with proper supervision by the local government entity. For example:
    > If you have a project that could disturb soil (such as tree planting or fence or underground sprinkler installation) or you'd like to renovate your house or have a garden, please contact the Anaconda-Deer Lodge County Coordinator at 406-563-7019. Anaconda-Deer Lodge County will assist residents in making sure that activities are done in a way that does not recontaminate a property or house.

    Id.
82. Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1355, 50 ELR 20101 (2020).
83. With regard to considering the property owner as a PRP, it is important to remember that CERCLA is meant "to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." CTS Corp. v. Waldburger, 573 U.S. 1, 44 ELR 20125 (2014). Consistent with the Supreme Court's logic in *Burlington Northern*, the harm created by the contamination at this site seems quite capable of apportionment. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 614, 39 ELR 20098 (2009) ("In other words, apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.' Restatement of Torts §433A(1)(b), p. 434 (1963-1964)"). Apportioning CERCLA liability to a residential property owner whose lot has been contaminated by *upwind* smelter emissions (i.e., the owner's actions have not caused or contributed to the site's pollution problem) would appear to run counter to that logic, especially when CERCLA costs have not been incurred to clean up any contamination on that property because EPA has determined that the contaminated soils in the yard do not pose an unacceptable risk to human health and the environment sufficient to warrant taking or securing a removal or remedial action. Similarly, given these facts, allocating any responsibility for paying response costs pursuant to CERCLA's liability scheme to that owner using the Gore (or other factors) would hardly seem equitable or reasonable, as well.
84. For example, RCRA authorities (e.g., corrective action, closure permits) frequently are used to address some of the contamination at NPL sites (*see, e.g.*, Westlake Land Fill in Missouri; Eastern Michaud Flats in Idaho; Tyndall Air Force Base in Florida; Rocky Mountain Arsenal in Colorado).
85. While EPA can only spend fund money to carry out remedial actions when a site is on the NPL, removal actions can be carried out at any site, both NPL and non-NPL (*see* 40 C.F.R. §300.425(b)(1) (2020)); *see also* 40 C.F.R. §300.415(b)(1) (2020)). As to what is fund money, funds obtained in a settlement with a PRP and placed into a special account based on CERCLA §122(b)(3) retain and use authority (which is considered to be a permanent, indefinite appropriation) are treated the same as annual appropriations made by Congress to replenish the fund. *See* Comptroller Gen. Op. No. B-275669.2 (1997); Comptroller Gen. Op. No. B-212484 (1984).
86. The NCP codifies these dollar and time limitations in 40 C.F.R. §300.415(b)(5).
87. For example, at the Libby Asbestos NPL site in Montana, the cleanup of more than 2,500 properties involving more than one million cubic yards of contaminated soil has been accomplished through CERCLA removal actions selected in EPA action memoranda dated May 2000, July 2001, May 2002, May 2006, June 2006, and June 2009 (*see, e.g.*, Memorandum from Robert E. Roberts, Regional Administrator, U.S. EPA, to Susan Parker Bodine, Assistant Administrator, Office of Solid Waste and Emergency Response re: Action Memorandum Amendment Requesting Formal Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site—Libby, Lincoln County, Montana (May 15, 2006), https://semspub.epa.gov/work/08/1020713.pdf).
88. Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., 934 F.3d 553, 564 (7th Cir. 2019), *cert. denied*, 590 U.S. ___ (2020). The court decided that a concrete cap over a portion of the site was more accurately characterized as a removal action, not a remedial action.
89. Footnote 7 of the *ARCO* opinion points out that "EPA does have other tools to address serious environmental harm. Under §106, for example, EPA can initiate an injunctive abatement action if it finds an 'imminent and substantial endangerment to the public health or welfare or the environment.'

finding that an actual or threatened release of a hazardous substance may present an imminent and substantial endangerment to the public health or welfare or the environment; determining that a yard with contaminated soil poses no unacceptable risk to human health and the environment makes an argument that the same soil represents a potential imminent and substantial endangerment difficult, at best.[90] Where the Agency has determined that the use of CERCLA response authority is not warranted for a portion of a Superfund site because the contamination there does not pose an unacceptable risk to human health and the environment, it is not clear in the context of the specific facts of this case what the opinion means when it states "[b]ut EPA may have good reasons to preserve the status quo of a cleanup site even absent an imminent threat,"[91] or how those reasons would be grounded in the statute or NCP.

B. *Sitewide Institutional Controls*

As indicated in Justice Gorsuch's dissent, 24 landowners with arsenic and lead concentrations in their residential soils have had some cleanup done pursuant to the CERCLA remedial action. Presumably referring to those landowners, the opinion indicates "the Government has represented that the landowners' restoration plan, if implemented, would interfere with its cleanup by, for example, digging up contaminated soil that has been deliberately capped in place."[92] The U.S. amicus brief supporting the petitioner (quoting from the amicus brief the United States filed with the Montana Supreme Court in 2016) states that "[t]earing up that protective cap or layer of soil . . . could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion." Those risks, and ways to safely mitigate them, were identified in EPA's decision documents calling for excavation and removal of contaminated residential soils above the action levels[93]; those same mitigation measures normally should work for the additional cleanup sought by the landowners in their restoration plan.

An individual landowner in this group seeking to excavate more contaminated soil to a greater depth might escape the reach of §122(e)(6) if the work is done as a removal action, not as a remedial action; 68 other properties were similarly addressed at this site earlier through a removal action. However, there is still the possible conflict preemption angle. As noted in the *ARCO* opinion, "the landowners seek to excavate offending soil within residential yards to a depth of two feet rather than EPA's chosen depth of one."[94] Thus, in doing so, such a landowner might excavate contaminated soils at concentrations above the action levels left below the original 18-inch excavation depth for arsenic selected in the 1996 ROD and the 12-inch excavation depth for lead in the 2013 ROD amendment, which could pose a human health risk and potentially run afoul of the conflict preemption principles discussed earlier.

For these landowners, seeking a direct EPA approval through §122(e)(6) may be an option, but might not be necessary. Another approach—which should take care of both §122(e)(6) and conflict preemption considerations—would be to use the IC mechanism EPA has already incorporated repeatedly into the remedial actions selected in its decision documents at this site since the 1996 ROD: the Anaconda-Deer Lodge County (ADLC) Development Permit System (DPS). As described in more detail above, the DPS is an important component of the ICs at this site that

> are a necessary supplement to reclamation and engineering controls when waste is left in place or where ground water will continue to exceed standards, as it will with this response action. There, EPA and [Montana Department of Environmental Quality] MDEQ expect ICs to play an integral part in the Selected Remedy to assure future protection of human health and the environment.[95]

Significantly, for purposes of the §122(e)(6) and conflict preemption analysis, the 1998 ROD discusses the county's master plan as a vehicle to "assure that land use is consistent with the Superfund remedies implemented," and to "protect human health and the environment from any remaining unacceptable risks posed by waste left in place."[96] Implementation of that master plan is done through the DPS, which requires "a permit for any subdivision of land, clearing, grading, *excavating*, construction, reconstruction, or any development or building activity,

42 U.S.C. §9606(a)." Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1353 n.7, 50 ELR 20101 (2020).

90. If excavation of soil with contaminant concentrations below the action levels poses an imminent and substantial endangerment, that would suggest that the action levels for the selected CERCLA remedy have been set too high.
91. *Id.*
92. *Id.* at 1356.
93. While the 1996 ROD does discuss the possibility of short-term risks that might be caused by the cleanup activities to be implemented—including the "potential to generate arsenic-laden dust, to leave soils exposed for short periods of time, and to increase traffic of heavy vehicles in a residential area"—it then goes on to state: "However, EPA believes that any short-term risks associated with Alternatives 3 and 4, although minimal, can be effectively managed through careful planning and implementation." EPA 1996 ROD, *supra* note 71, at DS-36.

    In that vein, the ROD identifies several state regulations (Administrative Rules of Montana §26.4.761(2)(a), (e), (j), and (k)) that "specify fugitive dust control measures which will be employed during excavation and construction activities to minimize the emission of fugitive dust in the CS OU [Community Soils Operable Unit]," including "watering," "stabilization," "minimizing area of disturbed land," and "revegetation." *Id.* at 109-10. Fugitive dust control mitigation measures are also discussed in ARCO's 2015 "Final Residential Soils/Dust Remedial Action Work Plan/Final Design Report," which has been approved by EPA. ARCO, Anaconda Smelter NPL Site Community Soils Operable Unit, Final Residential Soils/Dust Remedial Action Work Plan/Final Design Report (RAWP/FDR) (2015).
94. *Atlantic Richfield Co.*, 140 S. Ct. at 1348. In theory, however, some of these landowners might be covered by EPA's 2017 ESD (U.S. EPA, Explanation of Significant Differences: Community Soils Operable Unit—Anaconda Smelter NPL Site (2017)), which modified the EPA 1996 ROD to remove more arsenic-contaminated soils in residential gardens to a maximum depth of 24 inches (increased from the original 18-inch depth).
95. U.S. EPA, EPA Superfund Record of Decision: Anaconda Company Smelter (ARWW&S) OU DS-89 (1998) [hereinafter EPA 1998 ROD].
96. *Id.* at DS-90.

with certain exceptions."[97] There are performance standards, and "[t]he DPS generally requires a grading plan, an erosion and runoff control plan, and requires a remediation plan."[98] The "arsenic trigger levels" for the DPS mirror the selected remedy's action levels: 250 ppm for residential use, 500 ppm for commercial/industrial use, and 1,000 ppm for recreational use.[99]

The DPS is designed to

> [r]equire that future development at the site employ construction practices that are consistent with the protection of public health and the environment, as determined by Superfund remedial actions; [a]s development occurs at the site, implement the remediation of soil arsenic contamination at levels appropriate for the intended use, as determined by Superfund remedial actions.[100]

In implementing the DPS, the county can draw on the extensive 2015 "Community Soils Operable Unit Final Residential Soils/Dust Remedial Action Work Plan/Final Design Report," prepared by ARCO and approved by EPA, which contains approximately 500 detailed pages describing how to carry out various aspects of the cleanup (such as fugitive dust control) safely, including an appendix devoted to a "residential soils/dust construction quality assurance plan."

The DPS mechanism that is built into the selected remedy for the site is designed to allow a landowner to do more cleanup work on his or her property to accommodate a change in the property's use.[101] For example, if someone wants to clean up contaminated soils from the 1,000 ppm action level for recreational use to achieve the 250 ppm action level for residential use, the DPS regulates how that additional cleanup work is done in a manner that ensures the integrity of the CERCLA remedial action and ensures continued protection of human health and the environment over the long term.[102]

For someone who wants to clean up contaminated soils from the 250 ppm action level for residential use achieved under the CERCLA remedial action to a more stringent level as part of a restoration plan arising under Montana law, the same procedures and requirements could be used to ensure the work is done properly. If a DPS permit can ensure protection of human health when arsenic-laden soil at 1,000 ppm is being excavated and removed, it presumably can also do so when the soil is contaminated with arsenic at only 250 ppm. The DPS mechanism is consistent with Agency guidance, which states:

The following are some considerations for designing effective institutional controls.

> • Excavating into Contaminated Materials. A site owner who intends to excavate into a containment system must obtain prior written approval from the EPA Region and use a contractor certified to handle hazardous materials if the materials are classified as a RCRA hazardous waste, or if the requirement is specified in the remedy. This requirement could mean costly delays for the developer. *The process can be simplified by including excavation procedures in the institutional controls* and other site agreements. *This approach could preclude the need for special approvals, as long as the contractor follows the established procedures and notifies EPA or a state regulatory authority.*[103]

A review of the DPS regulations reveals a comprehensive framework that addresses the various activities associated with excavating contaminated soil safely.[104] For example, a county "Superfund coordinator" is responsible for working with state and EPA officials in administering and enforcing detailed requirements found in the published regulations. That county official "shall not exercise the powers and duties set forth in subsection (1) in a manner that will result in adverse impacts to Protective Covers or Storm Water Controls or will result in any failure to meet the Superfund action levels set forth in Articles XXX and XXXI." The regulations and two appendices require "construction practices that are consistent with the protection of public health and the environment as determined by Superfund."

Permit applications must include a site plan, a detailed grading plan showing the depth of all proposed excavations and the volume of soil to be moved, an erosion and surface runoff control plan, and a revegetation plan showing "the measures which will be undertaken to re-establish disturbed vegetative protective covers." There is also a requirement that for excavation of contaminated soil,

97. *Id.* (emphasis added). The DPS process might be characterized as an example of "the statute's presumption in favor of cooperative federalism" between federal, state, and local governments referred to by Justice Gorsuch in his dissent. *Atlantic Richfield Co.*, 140 S. Ct. at 1367.
98. EPA 1998 ROD, *supra* note 95, at DS-90.
99. *Id.* at DS-89.
100. *Id.* A 2018 health department assessment stated:
> In addition to the cleanup activities, individuals who desire to conduct an activity that requires excavation of soils, renovate their houses or wish to have a garden need to contact the [ADLC] Superfund Program. Our program helps residents make sure that activities are done in a manner that does not cause recontamination to their property.

Anaconda-Deer Lodge County Community Health Department Assessment (2018), https://www.adlc.us/DocumentCenter/View/254/ADLC-Community-Health-Needs-Assessment-2018-PDF. This ADLC program assistance should ensure that soil excavation and removal involving even "hot spots" of contamination can be done safely.
101. It also represents an effective way to address the Court's concern that "[m]ore importantly, the landowners' interpretation would require EPA to monitor tens of thousands of properties across 1,335 Superfund sites nationwide to ensure landowners do not derail an EPA cleanup." *Atlantic Richfield Co.*, 140 S. Ct. at 1353 n.7.
102. Like other local government building permits, each landowner presumably would need to get a separate permit for his or her property for the work to be done and the specific conditions to be met, which might vary depending on volume of the contaminated soil to be removed, physical impediments, sampling needs based on lot size and shape, and so on.
103. Reusing Superfund Sites, *supra* note 61, at 27 (emphasis added). *See also* Office of Solid Waste and Emergency Response, U.S. EPA, Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (2012) (EPA 540-R-09-001) (discussing the role of local government controls such as permitting and zoning in ensuring long-term integrity of CERCLA remedial actions).
104. *See* Anaconda-Deer Lodge County, Mont. Code of Ordinances ch. 24 (2020).

"dust suppression measures and storm water Best Management Practices may be required by the Superfund Coordinator, and will be included within the Development Permit." Further:

> If it is necessary to breach an existing protective cover as part of a Development, the Superfund Coordinator will develop an ICWP [work plan] to guide the developer in the proper soils handling required for the Development. Any protective cover material must be segregated from the underlying material and stockpiled in such a way that the protective cover material can be reused to reconstruct the protective cover to its full depth.[105]

In his *ARCO* opinion, Chief Justice John Roberts explained:

> Section 122(e)(6) is one of several tools in the Act that ensure the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones. Yet under the landowners' interpretation, property owners would be free to dig up arsenic-infected soil and build trenches to redirect lead-contaminated groundwater without even notifying EPA, so long as they have not been sued within six years of commencement of the cleanup.[106]

The long-standing DPS mechanism incorporated by EPA into the original 1996 CERCLA ROD's soil remedy, and subsequently ratified a number of times, is designed to ensure the integrity of the EPA-led cleanup effort at this site, relying on reliable local government-based ICs. As such, the DPS should obviate the need for a separate EPA approval process under CERCLA §122(e)(6) for the landowners who have had their residential soils remediated but who want additional cleanup done.[107] Further, since it is a sanctioned part of EPA's cleanup plan and incorporates coordination between the county government and EPA, approval of a landowner's cleanup through the DPS process should not interfere with the CERCLA remedial action or pose an obstacle to accomplishing the CERCLA cleanup at the Anaconda Smelter site.

In fact, because it was specifically chosen by the Agency, this approach seems particularly well-suited to address Chief Justice Robert's concern about ensuring "the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones,"[108] and potentially requiring "EPA to monitor tens of thousands of properties across 1,335 Superfund sites nationwide to ensure landowners do not derail an EPA cleanup."[109] And as an added benefit, a properly designed and implemented DPS should reduce potential litigation seeking more cleanup in the form of either a state-law claim in state court or a possible "challenge" under CERCLA §113(h).

To the extent the Agency guidance envisions and even encourages enhancements of CERCLA remedies by states and other stakeholders in order to promote reuse and redevelopment, a DPS-type approach here (and elsewhere) can allow private-property owners to get the additional cleanup they want in a manner that ensures the integrity of CERCLA remedies and protects human health and the environment at the same time.

C. *Permeable Reactive Barrier*

The *ARCO* opinion also describes one part of the restoration plan that addresses a portion of the contaminated aquifers at the site. "The landowners also seek to capture and treat shallow groundwater through an 8,000-foot long, 15-foot deep, and 3-foot wide underground permeable barrier, a plan the agency rejected as costly and unnecessary to secure safe drinking water."[110] This configuration for a PRB would be shorter than the one discussed at length in a May 2010 technical impracticability evaluation report prepared for EPA in connection with issuing the 2011 ROD amendment.[111]

With regard to the cost of a PRB, the 2010 report makes a number of statements, including the following: "For cost estimation purposes, the PRB was assumed to be a continuous barrier between the Willow Creek crossing at Crackerville Road downstream to Highway 1, and then parallel to Highway 1"; "The length was estimated at 15,000 feet and the depth of active media was 10 feet . . . This assumes a thickness of 3 feet"[112]; "Capital costs are significantly higher for construction of a PRB than for an active treatment plant, but significant savings in [operation and maintenance] O&M costs should be gained";

> The capital cost was estimated at $48 million. Using the [Interstate Technology and Regulatory Council] ITRC recommendation for O&M, the 50-year present value cost (at 7 percent discount rate) is $59 million . . . *Because this cost estimate is calculated primarily on length, significant savings may be gained by targeting the areas of highest arsenic loading.* Further investigation would be necessary to identify such areas.[113]

In addition, the report states: "The treatment alternatives require construction of collection systems and a very large

105. *Id.*
106. *Atlantic Richfield Co.*, 140 S. Ct. at 1353.
107. Even though the landowners whose properties were screened out of the CERCLA remedial action might not need to go through a §122(e)(6) process for the reasons discussed above, they might still have to obtain county-required construction permits under the DPS or other set of rules as a matter of local law.
108. *Id.*
109. *Id.* at 1353 n.7.
110. *Id.* at 1348.
111. CDM Federal Program Corporation, Technical Impracticability Evaluation Report, Achievement of Arsenic Human Health Standards in Surface Water and Ground Water in the South Opportunity Area of Concern, Anaconda Regional Water, Water & Soils Operable Unit, Anaconda Smelter NPL Site (2010) [hereinafter 2010 TI Evaluation Report].
112. *Id.* app. C. The appendix, titled Summary of Cost Estimates, has footnotes as follows: "Dimensions of PRB length—15,000 linear feet, Depth 10 feet, Thickness 3 feet" and "PRB composition: 50/50 mixture of zero valent iron and sand." *Id.*
113. *Id.* §6.4.1 (emphasis added).

treatment plant, or a very large PRB. While challenging because of the large scale, the treatment alternatives could be implemented."[114]

In fact, as mentioned earlier in the report:

> One recent pilot scale PRB installation at the Asarco East Helena smelter site has been reported to successfully treat arsenic. Preliminary results indicate that arsenic concentrations as high as 20 [milligrams per liter] mg/L in ground water entering the PRB are reduced to concentrations to near or below 10 mg/L within the barrier (EPA 2008). These arsenic concentrations are orders of magnitude greater than those found in South Opportunity ground water.[115]

The report also states that "[b]ecause PRBs constructed of [zero-valent iron] ZVI have been successful in removing arsenic at other sites, this alternative is retained for evaluation."[116]

In the amended 2011 ROD amendment's responsiveness summary (Part III), a comment relating to PRBs submitted by the Clark Fork Coalition (CFC) is summarized as follows:

> CFC feels that other alternatives instead of the [technical impracticability (TI)] waiver for the arsenic human health standard should be explored for Willow Creek, such as a permeable reactive barrier using zero valent iron to remove arsenic from shallow ground water discharging in the stream (a permeable reactive barrier (PRB) was analyzed in the TI evaluation, but CFC believes a shallower, less expensive alternative should be considered).[117]

EPA's response acknowledges that "[t]hese measures may lead to lower arsenic concentrations in lower Willow Creek and the Clark Fork River . . ."

EPA states in the 2011 ROD amendment:

> It would be possible to collect and treat ground water just prior to its entry into Willow Creek. Treating ground water at the downgradient edge of the plume would not change the extent, magnitude, or mobility of the ground water plume. *This action would benefit the surface water receptors and thus is not a strict ground water RA [remedial action]*. On this basis, ground water treatment at the edge of the plume is considered a surface water action.[118]

However, the ROD amendment goes on to say that "EPA has concluded that water treatment provides no appreciable benefit to the environment due to the inefficiency of the collection systems, as well as the additional reasons set forth in the South Opportunity TI Evaluation Report."[119] Interestingly, there is no specific language or discussion in the TI report indicating that a PRB would not provide an appreciable benefit to the environment; in fact, to the contrary, the report states that PRBs have worked to remove arsenic from contaminated groundwater to the level of the arsenic Safe Drinking Water Act[120] maximum contaminant level of 10 mg/L, even in situations where the arsenic concentrations are much higher (i.e., "orders of magnitude greater than those found in South Opportunity ground water").[121]

The TI evaluation report and the 2011 ROD amendment explain how PRBs are a known treatment technology with an existing track record that can help further the purpose of protecting human health and the environment. As a treatment technology, a PRB falls within the intended reach of CERCLA §121(b), which clearly expresses a preference for selecting a remedial action that "utilizes permanent solutions and *alternative treatment technologies* or resources recovery technologies *to the maximum extent practicable*" (emphasis added).[122] Although the 2011 ROD amendment

114. *Id.* §7.3.2.3.
115. *Id.* §6.3.2.3.
116. *Id.*
117. U.S. EPA & MDEQ, Record of Decision Amendment: Anaconda Regional Water, Waste, and Soils Operable Unit—Anaconda Smelter National Priorities List Site 9 (2011) (Responsiveness Summary). While generally an accurate summary, CFC's letter actually says: "The option of a permeable reactive barrier using zero-valent iron shouldn't be ruled out at this point, especially since groundwater is shallow and it seems likely that the reactive wall could be much shorter than shown in this report."
118. *Id.* §6.4.4.1 (emphasis added).
119. *Id.*
120. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.
121. 2010 TI Evaluation Report, *supra* note 111, §6.3.2.3. As Justice Alito points out in his dissent, "the EPA has submitted multiple filings indicating that it believes that the landowners' plan presents serious environmental risks." Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1357, 50 ELR 20101 (2020). As an example, the United States' amicus brief supporting ARCO states that "[t]he remedial measures that respondents contemplate are inconsistent with, and indeed would *physically undo*, significant aspects of EPA's response actions." Brief for the United States as Amicus Curiae Supporting Petitioner at 21, Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) (No. 17-1498). In addition, the amicus brief states that "the underground 'barriers proposed by [respondents'] experts * * * could unintentionally contaminate groundwater and surface water.' *Id.* at 74a." And, "respondents' experts proposed . . . (4) to capture and treat shallow groundwater through a series of underground trenches and barriers that EPA had determined could upset a balance that currently protects human health and the environment." Similarly, the United States amicus brief filed with the Montana Supreme Court on December 9, 2016, includes the following statement: "Landowners' experts also propose to construct a series of underground barriers that would divert groundwater in several areas of concern. These barriers could disturb EPA's ongoing groundwater monitoring efforts—efforts required by the Agency's selected cleanup plan." Brief for the United States as Amicus Curiae Supporting Petitioner, Atlantic Richfield Co. v. Montana Second Jud. Dist. Ct., 408 P.3d 515, 523 (Mont. 2017) (No. OP 16-0555).

    The 2010 TI evaluation report and the 2011 ROD amendment that relies on that report, however, do not include any language reflecting these specific concerns. In fact, it is unclear what if any data or information in the administrative record for this site serves as the basis for those specific statements, and the briefs do not include any page or section reference to supporting studies or other technical background documents in the administrative record. *See* Owner-Operator Indep. Drivers Ass'n Inc. v. Federal Motor Carrier Safety Admin., 494 F.3d 188, 204 (D.C. Cir. 2007) ("We cannot affirm [the agency decision] on the basis of a post-hoc explanation by agency counsel.").
122. A complementary provision to this one is found in CERCLA §122(f)(2)(B), which provides for a covenant not to sue without reopeners as part of a consent decree with the United States when a remedial action "involves the treatment of hazardous substances so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances such that, in the judgment of the President, the substances no longer present any cur-

concludes that a PRB would not achieve cleanup of the contaminated aquifer at this site sufficient to meet drinking water standards, that same decision document indicates that a PRB would benefit surface water and surface water receptors; that beneficial impact appears quite consistent with CERCLA's purpose of protecting human health and the environment. The fact that it might be expensive does not mean it is not practicable, to some extent at least; and, instead of being an obstacle to achieving CERCLA's objectives, it would appear to further them, at least for surface water and its receptors.

In her August 2016 opinion, Judge Bidegaray pointed out that "[n]o restoration of groundwater is contemplated."[123] This, in effect, is the end result of the 2011 ROD amendment's waiver of groundwater ARARs for this portion of the contaminated aquifer. As noted in Chief Justice Roberts' opinion, a larger version of the PRB was "a plan the agency rejected as costly and unnecessary to secure safe drinking water." Under the site-specific circumstances here, the CERCLA-based reasons EPA used for rejecting the PRB (e.g., not worth the cost; groundwater would not meet drinking water standards) might not be determinative, however, for purposes of implementing a more stringent state-law remedy obtained in state court that seeks to enhance a CERCLA remedy that in the end calls for no active cleanup measures to be taken at this portion of the site.[124]

Applying the Court's approach to apportionment in the *Burlington Northern* opinion discussed earlier to the facts here, it is unclear how the landowners could be considered PRPs for contamination in an upgradient aquifer resulting from releases that were not caused or contributed to by their actions, or by the arsenic and lead in their downgradient residential yard soils. In fact, the 1998 ROD identifies waste materials such as tailings, waste rock, and irrigated fields with soil contaminated by the former smelter—not residential soils in the town of Opportunity—as potential sources of the arsenic groundwater contamination.[125]

For purposes of CERCLA §122(e)(6), even if those landowners were to be considered PRPs, however, it is unclear how a PRB's active treatment of the contaminated groundwater as described in the TI evaluation report and associated ROD amendment would be inconsistent with CERCLA's purpose of protecting human health and the environment and its preference for treatment to the maximum extent practicable when selecting remedial actions. It is also unclear, given the data and information in the administrative record for this site, how a PRB would interfere with, prejudge, or be inconsistent with the 1998 and 2011 groundwater RODs that contemplate no restoration (or any other active steps) as a final CERCLA remedial action.

Similarly, for purposes of conflict preemption, it is not clear how a PRB enhancement would interfere with or pose an obstacle to achieving CERCLA's purpose of protecting human health and the environment. In fact, it appears that ARCO could comply with both state law (restoration plan calling for a PRB) and federal law (EPA ROD providing no active restoration of groundwater) for this portion of the site.

However, a CERCLA §122(e)(6) process or preemption analysis would not necessarily be needed for this aspect of the landowners' restoration plan where, as discussed earlier, the CERCLA remedy at the site (as reflected in multiple RODs) already includes a DPS process that could be used to review, approve, and put into place appropriate permitting requirements on the construction of a PRB, along the same lines as other construction-related activities (e.g., clearing, grading, excavation, reconstruction, or any development or building activity) within the site. The DPS process is incorporated in EPA's RODs related to groundwater and surface water as a way to help ensure protectiveness of human health and the environment, and it is designed specifically to oversee the excavation of highly contaminated soils (1,000 ppm of arsenic). As such, that local government permitting process presumably would ensure that any contaminated soils disturbed to build a PRB could be safely and properly managed through appropriate conditions (e.g., the remedial action work plan procedures prepared by ARCO and approved by EPA).

V. Conclusion

People living in or near Superfund sites often face real-life, actual risks to their health from contamination in the soil, groundwater, and air around their homes. Polychlorinated biphenyls in Anniston, Alabama. Powerful solvents like trichloroethylene in aquifers migrating from neighboring military installations across the country. Radioactive materials left over from the Manhattan Project dumped near the surface or partially buried under a subsequently created mound of trash outside St. Louis, at an unlined quarry with a history of fires that mobilize and volatilize hazardous materials. Lethal phosphine gas lurking in huge hazardous waste sludge ponds.

Some private-property owners in and around such communities may face a palpable threat to their well-being: living in a home they want to stay in, but surrounded by contamination they have good reason to believe is not safe for them and their children. Those property owners now may have a way to pursue more cleanup, thanks to the recent *ARCO* decision.

---

rent or currently foreseeable future significant risk to public health, welfare, or the environment."

123. Christian v. Atlantic Richfield Co., No. DV-08-173 BN, at 16 (Mont. Dist. Ct. Aug. 30, 2016).

124. CERCLA's purpose is ensuring protection of human health and the environment, not shielding PRPs from additional cleanup expenses incurred under state law that EPA might consider unnecessarily costly under federal law; in fact, PRP acceptance or willingness to enter into a §122 settlement is not one of the factors Congress included in CERCLA §121(b)'s "General Rules" for remedy selection, nor is it one of the NCP's nine criteria for evaluating alternatives codifying those rules in 40 C.F.R. §300.430(e)(9). To the contrary, the saving provisions appear to have been included in part to allow for an outcome where a PRP might have to spend more money on cleanup due to a more stringent non-ARAR state-law remedy obtained in state court. As the Court stated in *Virginia Uranium*, "[n]o more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law." Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1907, 49 ELR 20104 (2019).

125. EPA 1998 ROD, *supra* note 95, at DS-22.

By recognizing that not all cleanups are CERCLA response actions and that not all state laws are potential ARARs, the Supreme Court has opened a door for certain state-law claims in state court to proceed. Some parties will no longer have to wait until the United States says it is done and ready to litigate, although the timing of a state-law claim brought in state court may still be an important consideration. In addition, conflict preemption principles often may still be in play to ensure that any additional work done by private parties does not undermine the integrity of the "floor" provided by the federal government's response actions designed to ensure protectiveness of human health and the environment. Still, EPA's cleanup may end up being the first step, not necessarily the last word.

Depending on the claims that can be made under state law and the remedies available to prevailing parties, a CERCLA cleanup might be enhanced in several ways. It might end up being more responsive to public comments made during the CERCLA remedy selection process, or more complete in terms of scope, or quicker in achieving overall protectiveness of human health and the environment in the long run. For example, where EPA has balanced various factors from CERCLA §121(b) and the NCP and determined that treatment to the maximum extent practicable will not be a component of a selected remedial action, a state law that does not require consideration of those factors might provide a basis for undertaking a more aggressive approach that accelerates source reduction and permanent destruction of at least some of the contamination, where a treatment technology with a successful track record is in fact feasible (even if expensive).

It is difficult to see how CERCLA's purpose of protecting human health and the environment would be adversely affected at a site where additional remediation leads to greater volumes of contaminated media being taken care of more definitively by meeting a more stringent cleanup level; in fact, conceptually, additional remediation should fit squarely within the whole point of an enhancement as contemplated on some level by the statute, the NCP, and existing EPA guidance. This would be especially true where the Agency has decided in its discretion that the use of CERCLA response authority is not warranted to address some of the risks to human health and the environment posed by contamination at a site.

Much as CERCLA's joint, several, and strict liability scheme acts as a deterrent to improper waste management practices—sometimes more effectively than the cradle-to-grave regulatory approach of RCRA—the potential availability of state-law claims in state court might serve as an incentive for PRPs to do more in tandem with an EPA-selected remedial action; once the backhoe is in the neighborhood, it might be cheaper to dig out more for additional landowners than bringing the equipment back to do extra work after litigation runs its course. This might make it easier for EPA to address the concerns of landowners who are not getting the same cleanup levels implemented at other similarly situated CERCLA sites, or those who are not getting any cleanup at all. It also should help promote more expeditious attainment of the Agency's stated reuse and redevelopment goals and policies, in addition to improving the value of properties located in or near Superfund sites.

The source of funding for undertaking additional cleanup work should not matter. Whether it is based on a damages award from a common-law tort claim, a bank loan, or a landowner's savings account, the key considerations should be the same. The question is, can the work be done in a manner that does not exacerbate the contamination problems at the site, and does not interfere with, or pose an obstacle to, CERCLA's purpose of protecting human health and the environment? Can it be done in a manner that is not inconsistent with, or does not undermine the integrity of, EPA's selected remedy?

While the remand in this case appears designed to let EPA initially resolve any potential conflict preemption issues by approving or disapproving a request under CERCLA §122(e)(6), that approach assumes this subsection in the statute applies. As it turns out, there may not necessarily be both a PRP and a remedial action in the picture. For example, if an individual homeowner wants to undertake additional cleanup in his or her own backyard, the scale of the work may well be more appropriately considered as a removal action, not a remedial action.

Further, achieving the underlying objective of a CERCLA §122(e)(6) review—characterized by the Supreme Court's opinion as ameliorating "any conflict between the landowners' restoration plan and EPA's Superfund cleanup, just as Congress envisioned"[126]—appears to be satisfied by following the DPS process. EPA has already built in a mechanism as part of its selected remedial action at the Anaconda Smelter NPL site, which relies on the county government's permitting requirements to ensure that any additional cleanup work will be done in a safe manner that is consistent with the CERCLA remedial action. Like other local government permits, a property owner obtaining the permit is subject to oversight to make sure the project is done right.

Such an arrangement could provide a template for other CERCLA sites, one that promotes cooperative federalism by leveraging state and local government resources to help EPA ensure continued protection of human health and the environment at Superfund sites, balances private-property rights with the Agency's interests in maintaining the integrity of its cleanup efforts, and allows landowners to seek the fullest possible use and enjoyment of their land.

126. *Atlantic Richfield Co.*, 140 S. Ct. at 1357.