A Landowner Walks into a Bar: Using State Common Law to Encourage Efficient CERCLA Cleanups

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In 2020, the Supreme Court decided Atlantic Richfield v. Christian, *a case that asked the Court to reconcile ostensibly competing concerns in the Comprehensive Environmental Response, Compensation, and Liability Act: the jurisdictional bar that limits challenges to the Environmental Protection Agency's ongoing cleanup plans and the savings clause that makes room for state restoration claims which are not available under the Act. The case arose when landowners on a Superfund site in Montana sought restoration damages under Montana state law during an ongoing Environmental Protection Agency-led cleanup. The Court ultimately held that the landowners could seek damages in state court during ongoing cleanups, but with one significant caveat: landowners must obtain Environmental Protection Agency approval before commencing with any action, even if they choose to pay for the cleanup themselves. As a matter of policy, the Court reasoned that a single Environmental Protection Agency-led cleanup was more efficient than numerous and simultaneous individual cleanups.*

This Note considers whether the holding of Atlantic Richfield *aligns with the Comprehensive Environmental Response, Compensation, and Liability Act's goals of promoting cooperative federalism and efficient cleanups of hazardous waste sites and suggests a modest congressional amendment to put the Act back on track. This Note argues that persons owning contaminated land should have the ability to use every legal tool—under state and federal law—to remediate their land as expeditiously as possible. Additionally, this Note contextualizes this proposal against the backdrop of current debates regarding the regulation of emerging contaminants, such as per- and polyfluoroalkyl*

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substances, which may drastically impact the Superfund program in the coming years.

INTRODUCTION

As the residents of Opportunity, Montana will tell you, toxic cleanup is slow.[1] And they should know—they have been living through a hazardous waste cleanup for the past thirty-seven years.[2] But even as this project approaches the half-century mark—with an estimated $450 million already spent on remediation[3]—some property owners accuse the Environmental Protection Agency (EPA) of conducting a bargain-rate cleanup.[4] They claim that even when the project is completed, the arsenic and lead levels on their property will still exceed limits sufficient to protect human health.[5]

1. For Superfund sites expected to cost $50 million or more to complete ("mega sites"), the median duration is 14.8 years to reach the "construction complete" phase. For non-mega sites, the average duration of cleanup activities is 10.1 years. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-656, SUPERFUND: LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS 70 tbl.15 (2009) [hereinafter GAO 2009 REPORT].

2. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1347 (2020).

3. *Id.*

4. Response Brief for Gregory A. Christian, et al. at 7–10, *Atl. Richfield Co.*, 140 S. Ct. 1335 (No. 17-1498).

5. *Id.* at 8.

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 in response to the problem of toxic waste. CERCLA, also known as "Superfund," aimed to encourage the expedient cleanup of hazardous waste and to establish liability and allocate costs among responsible parties, rather than among the taxpayers.[6] To date, however, CERCLA is not known for encouraging "swift" cleanups. In February 2021, over forty years after CERCLA's enactment, only 25 percent of CERCLA sites had even been delisted.[7] Today, there are more than 1300 active Superfund sites and approximately 73 million people—roughly 22 percent of the U.S. population—live within three miles of a Superfund site.[8] And despite the ongoing need, Congress has routinely underfunded EPA's work cleaning up contaminated sites.[9]

Theoretically, state common law can be a tool to advance the cleanup of a contaminated site. In the case of Superfund cleanups in particular, state law can require that polluters conduct more extensive remediation and pay more in damages than is required under CERCLA.[10] By 2008, the Montana landowners were frustrated with the length and quality of the Superfund cleanup on their land. As a result, they proceeded as private landowners historically have and sought remedies for pollution in state court under state law. The landowners sought restoration damages from the polluter, Atlantic Richfield Company (ARCO), for trespass, nuisance, and strict liability claims.[11] Their goal was to compel a more extensive cleanup than federal regulators had required under CERCLA.

The looming question, however, was whether the landowners' claim could proceed in state court, or if their claim was blocked by CERCLA's jurisdictional bar, which precludes federal courts' ability to hear challenges to

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6. *See* Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENV'T L. REV. 339, 339–340 (1996).

7. *Superfund National Priorities List (NPL)*, EPA, https://www.epa.gov/superfund/superfund-national-priorities-list-npl (last visited Feb. 25, 2021). Under CERCLA, EPA "delists" Superfund sites once responsible parties have taken all appropriate remedial action and the pollutant no longer poses a significant threat to public health or the environment. *See* 40 C.F.R. § 300.425(e) (2021).

8. OFF. OF LAND & EMERGENCY MGMT., EPA, POPULATION SURROUNDING 1,857 SUPERFUND SITES (2020), https://www.epa.gov/sites/default/files/2021-02/documents/population-surrounding-superfund-remedial-sites.pdf.

9. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-812, SUPERFUND: TRENDS IN FEDERAL FUNDING AND CLEANUP OF EPA'S NONFEDERAL NATIONAL PRIORITIES LIST SITES 11 (2015) (noting a declining trend in EPA appropriations from $2 billion in 1999 to $1.1 billion in 2013 and finding that as a result EPA delayed work at some sites).

10. *See* New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1246 (10th Cir. 2006) ("CERCLA sets a floor, not a ceiling. Section 9614(a) preserves state environmental regulations which in some instances set more stringent cleanup standards.") (citing United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1454–58 (6th Cir. 1991)); *see also* Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 92–93 (2d Cir. 2000) (noting that future remediation costs are recoverable under New York negligence law); Levy v. Versar, Inc., 882 F. Supp. 736, 741 (N.D. Ill. 1995) (noting that previously uncompensated future cleanup costs are recoverable under state tort claim).

11. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1347 (2020).

cleanup plans during ongoing remediation.[12] Over the years, academics and courts alike have wrestled over CERCLA's jurisdictional bar.[13] Courts have generally declined jurisdiction to hear challenges to ongoing remediation on the basis that prolonged litigation interferes with CERCLA's legitimate goal of encouraging a swift cleanup.[14] However, in *Atlantic Richfield Company v. Christian*—handed down in April 2020—the U.S. Supreme Court held that the landowners could seek damages in state court, but with one significant caveat: landowners must obtain EPA approval *before* commencing with any action, even if they choose to pay for the cleanup themselves.[15] So while *Atlantic Richfield* did not bar the landowners from seeking restoration damages per se, by requiring EPA approval first, the holding still deterred landowners from bringing their claims.

In this Note, I argue that Congress should amend CERCLA to allow parties seeking a more comprehensive cleanup to proceed with claims for restoration damages in state court without first receiving EPA approval. This modest proposal will help put CERCLA back on track to achieve its original goal of cleaning up hazardous waste sites. Additionally, this amendment reorients CERCLA back to its original presumption in favor of cooperative federalism. Recently, there has been a lot of attention paid to the importance of state common law in areas like climate change, where federal government action has been limited or entirely absent.[16] However, even in areas where the federal government has commanded a key role for decades—such as CERCLA—it is valuable to recognize the power of state law to augment federal responses.[17] Persons living in toxic waste sites should be able to employ every legal tool available—under state and federal law—to clean up their contaminated properties.

This Note begins, in Part I, with a discussion of the relevant sections of CERCLA: liability,[18] settlement agreements,[19] the role of states,[20] and the

12. 42 U.S.C. § 9613(h).

13. *See, e.g.*, Michael P. Healy, *Judicial Review and CERCLA Response Actions Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENV'T L. REV. 1 (1993); Margot J. Pollans, *A "Blunt Withdrawal"? Bars on Citizen Suits for Toxic Site Cleanup*, 37 HARV. ENV'T L. REV. 441 (2013); Silecchia, *supra* note 6.

14. *See* Pollans, *supra* note 13, at 443 ("[F]ederal courts have almost uniformly read this provision—CERCLA section 113(h), 42 U.S.C. § 9613(h)—broadly to bar suits related to any site where any CERCLA remediation is ongoing.").

15. *See Atl. Richfield Co*., 140 S. Ct. at 1349–58.

16. *See, e.g.*, Tracy D. Hester, *A New Front Blowing in State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENV'T L.J. 49 (2012); Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49 (2018).

17. *See* Alexandra B. Klass, *CERCLA, State Law, and Federalism in the 21st Century*, 41 SW. L. REV. 679, 685 (2012); *see also* Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 925 (1999) (arguing "that most federal pollution control efforts are fundamentally misguided. The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly.").

18. 42 U.S.C. § 9607.

jurisdictional bar that applies during ongoing remediation.[21] Part II discusses the *Atlantic Richfield* decision and its implications for state court plaintiffs. Part III argues that the Supreme Court's holding in *Atlantic Richfield* is inconsistent with CERCLA's goal of promoting a swift cleanup, and suggests a modest proposal that better reflects CERCLA's framework of cooperative federalism. Under this proposal, parties who seek a more extensive cleanup than the EPA-prescribed remedy can proceed directly to state court without begging EPA for permission. Lastly, Part IV continues with a brief discussion of the implications of the proposal set forth in this Note on the ongoing debates surrounding emerging contaminants, specifically per- and polyfluoroalkyl (PFAS), in CERCLA cleanups.

I. CERCLA BACKGROUND

In order to understand the impacts of the Court's ruling in *Atlantic Richfield* on future state court plaintiffs, it is helpful to first discuss the origin of CERCLA as well as examine a few key sections of the Act. This Part will first provide a brief background of CERCLA and then examine provisions and limitations of CERCLA relevant for understanding the impact of *Atlantic Richfield.*

A. CERCLA's Origin and Basic Structure

Congress enacted CERCLA in 1980 in response to a number of high-profile environmental disasters brought on by improper hazardous waste disposal.[22] While the goals are not expressly stated in the statute, courts infer that CERCLA has two main purposes: (1) to encourage the prompt cleanup of hazardous waste sites and (2) to ensure that the parties responsible for the contamination pay for the cleanup.[23] Unlike other environmental laws which

19. *Id.* § 9622.

20. *Id.* §§ 9614(a), 9652(d), 9659(h).

21. *Id.* § 9613(h).

22. The contamination at Love Canal, New York—a neighborhood contaminated with carcinogenic toxic chemicals in the 1970s—is often cited as the site that spurred Congress to act. *See, e.g.*, Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 826–27 (7th Cir. 2007). For details on the Love Canal site, see generally A. Theodore Steegmann, Jr., *History of Love Canal and SUNY at Buffalo's Response History, the University Role, and Health Research*, 8 BUFF. ENV'T L.J. 173 (2001). Additionally, in 1980, Congress also received estimates that there were approximately 30,000–50,000 contaminated sites across the country further spurring CERCLA's enactment. Ronald G. Aronovsky, *Federalism and CERCLA Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1, 7 (2006).

23. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 559, 602 (2009) ("[CERCLA] was designed to promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."); *see also* New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1244 (10th Cir. 2006) ("CERCLA's principle [sic] aims are to effectuate the cleanup of hazardous waste sites and impose cleanup costs on responsible parties."); Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995) ("CERCLA's dual goals are to

govern the generation, management, and disposal of hazardous waste, CERCLA provides a legislative vehicle for the government and private parties to recover cleanup costs associated with past contamination.[24] Congress also created the Superfund, a trust fund financed by taxes on crude oil and certain chemicals, to pay for cleanups for which no solvent responsible parties could be located.[25]

CERCLA, however, is not known for its clarity.[26] Many blame CERCLA's inadequate draftsmanship on the haste with which Congress passed it. The story goes that the 96th Congress was in a rush to address hazardous waste pollution before President-elect Reagan and a Republican Senate majority assumed office. As a result, the lame-duck Congress cut corners while drafting the statute to pass the bill expediently.[27] Since then, and without much clarifying assistance from Congress or the Supreme Court, commentators[28] and courts[29] have struggled with the law's meaning and occasional contradictions. But, for all its errors, CERCLA remains a tremendously important piece of legislation for the prevention and cleanup of hazardous waste.[30]

CERCLA directs the president—who has delegated authority to EPA—to respond to releases of hazardous substances through removal and remedial actions.[31] EPA compiles and annually revises the National Priorities List (NPL), a priority ranking of the most hazardous sites identified for EPA-led

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encourage quick response and to place the cost of that response on those responsible for the hazardous condition.").

24. *See* Klass, *supra* note 17, at 682; *see also Superfund CERCLA Overview,* EPA, https://www.epa.gov/superfund/superfund-cercla-overview (last visited Dec. 14, 2020).

25. *See* 42 U.S.C. § 9611. The tax on petroleum and chemical feedstock producers, which largely funded the program, expired in 1995 and has never been reauthorized, although EPA receives annual appropriations to fund its efforts. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-380, SUPERFUND: EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST 3 (2010). However, President Biden's "American Jobs Plan" seeks to reinstate Superfund Trust Fund taxes on polluting industries. *Fact Sheet The American Jobs Plan*, THE WHITE HOUSE (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

26. *See* John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1410 (1997) ("CERCLA confounds every theory of statutory interpretation.").

27. *See id.* at 1410; *see also* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENV'T L. 1, 1–2 (1982).

28. *See, e.g.*, Nagle, *supra* note 26.

29. *See* CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432, 435 (D.N.H. 1991) ("Depending on what definitions are accorded to various words and phrases within the statute, sections, subsections, and even sentences within CERCLA seem to contradict themselves with little or no internal consistency.").

30. Despite the large number of current Superfund sites, many credit Superfund's liability scheme as deterring parties from polluting in the first place, a much more difficult metric to quantify. *See* Mary E.S. Raivel, Comment, *CERCLA Liability as a Pollution Prevention Strategy*, 4 MD. J. CONTEMP. LEGAL ISSUES 131 (1993).

31. 42 U.S.C. § 9604(a).

cleanup.[32] In CERCLA's first thirty years, over 40,000 potential hazardous release sites were reported to the Superfund program.[33] There are currently over 1300 sites on the NPL.[34] Notably, a vast majority of contaminated sites are addressed under state authority or private action rather than by EPA authority and therefore do not appear on the NPL.[35]

CERCLA distinguishes a "remedial action" from a "removal action."[36] A "removal action" is a short-term response to a release intended "to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release" of a hazardous substance.[37] By contrast, a "remedial action" is a long-term cleanup designed to permanently eliminate any threat to a site.[38] Because remedial action reflects a more permanent solution that can take many decades to complete, CERCLA requires that EPA (or a private party) conduct an extensive investigation and feasibility study to assess the contamination and evaluate cleanup options.[39]

Once EPA asserts jurisdiction over a NPL site, EPA may clean that site itself[40] or compel the responsible parties to perform the cleanup.[41] If the government executes the cleanup, the government may retroactively recover costs from responsible parties—even if contamination occurred decades ago when there were few laws governing the disposal of hazardous substances.[42]

Deciding "how clean is clean" is a complex determination in the Superfund remediation process. The level of cleanup required can vary widely from site to site depending on the contaminants present and the applicable

32. *Id.* § 9605.

33. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-633T, HAZARDOUS WASTE CLEANUP: OBSERVATIONS ON STATES' ROLE, LIABILITIES AT DOD AND HARDROCK MINING SITES, AND LITIGATION ISSUES 3 (2013).

34. *Superfund National Priorities List (NPL), supra* note 7.

35. *See* Aronovsky, *supra* note 22, at 7 (noting that EPA has estimated that approximately 90 percent of current and future sites will likely either be managed under state cleanup programs or underground storage tank sites); *see also* Robin Kundis Craig, *Federalism Challenges to CERCLA An Overview*, 41 SW. L. REV. 617, 622 (2012) ("EPA will defer listing specific sites on the National Priorities List for cleanup if the state is adequately remediating the site pursuant to state authority and requests the deferral.") (citing 42 U.S.C. § 9605(h)(1)); Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 STAN. L. REV. 191, 204–08 (2018) (citing Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 164 (2004)) (noting that at some sites, private parties will clean up contaminants themselves, sometimes in consultation with government agencies and sometimes without alerting any government agency at all).

36. 42 U.S.C. § 9601(23)–(24).

37. *Id.* § 9601(23).

38. *Id.* § 9601(24).

39. *See* 40 C.F.R. §§ 300.435–300.440 (2021).

40. 42 U.S.C. § 9604.

41. *Id.* § 9606; *see also* Craig, *supra* note 35, at 623 ("As a practical matter, the primary difference between a section 104 cleanup and a section 106 cleanup is that under section 104, governments perform the cleanup and seek reimbursement, while under section 106, potentially responsible parties (PRPs) perform (and generally pay for) the cleanup themselves, subject to federal and/or state supervision.").

42. *See* 42 U.S.C. § 9607(a)(4)(A); *see also* Klass *supra* note 17, at 683.

cleanup standards.[43] Rather than specifying standards or criteria for individual hazardous substances, section 121(d) of CERCLA broadly requires that cleanup comply with federal and state applicable, relevant, and appropriate requirements (ARARs) to protect human health and the environment.[44] One important consideration in determining the cleanup level is the anticipated future use of the site (for example, industrial or residential).[45] CERCLA also establishes a process for public participation.[46] Before adopting a remediation plan, EPA must publish a notice and brief analysis of the proposed plan and make such plan available to the public.[47] EPA must then provide a reasonable opportunity to receive and review feedback regarding the proposed plan.[48]

B. Broad Liability and Notable Limitations

Section 107 is "the heart of CERCLA's liability scheme."[49] It imposes liability for cleanup on four broadly defined classes of "covered persons"[50]

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43. *See* DAVID M. BEARDEN, CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT 10 (2012).

44. 42 U.S.C. § 9621(d). ARARs are identified on a site-specific basis based on whether a state and or federal environmental law is "applicable" or "relevant and appropriate." ASS'N OF STATE & TERRITORIAL SOLID WASTE MGMT. OFFICIALS, ASTSWMO POSITION PAPER: STATE CONCERNS WITH THE PROCESS OF IDENTIFYING COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA) APPLICABLE, OR RELEVANT AND APPROPRIATE REQUIREMENTS 1 (2018), http://astswmo.org/files/policies/Position_Papers/ARARs-Position-Paper-Feb-2018.pdf.
Under CERCLA, state ARARs must be properly promulgated, more stringent than federal standards, legally applicable or relevant and appropriate, and timely identified. *Id.* Practitioners argue this broad statutory language has led to inconsistences in ARAR determination from one site to another and the confusion regarding what is an ARAR has resulted in delaying site cleanups. *Id.*

45. *See generally* OSWER Directive No. 9355.7-04, Land Use in the CERCLA Remedy Selection Process (EPA 1995), https://www.epa.gov/sites/default/files/documents/landuse.pdf.

46. For a discussion of how to increase public participation, see generally Kaela Shiigi, Comment, *A Proposal to Increase Public Participation in CERCLA Actions Through Notice*, 45 ECOLOGY L.Q. 461 (2018).

47. 42 U.S.C. § 9617(a).

48. *Id.* § 9617(b), (d).

49. *See* Craig, *supra* note 35, at 623.

50. The four classes of covered persons are:

> (1) the owner and operator of a vessel or a facility; (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

42 U.S.C. § 9607(a)(1)-(4). *See also* Pidot & Ratliff, *supra* note 35, at 202–03 ("[B]y sweeping in broad classes of former owners and operators and those arranging for the disposal of hazardous substances, the statute was transformative, making 'liability for environmental contamination . . .

with only three possible defenses.[51] Spoiler alert: the most relevant category for the purposes of the landowners in *Atlantic Richfield* is the second, which provides that a "covered person" is any person who owns a "facility"[52] where hazardous waste "has come to be located."[53] For all covered persons, liability extends to response costs, damage to natural resources, and certain health assessments.[54] But here is the real kicker: courts interpret CERCLA to follow a strict liability scheme where all covered persons are jointly and severally liable for the entire cost of the cleanup.[55]

Despite CERCLA's broad liability provisions, CERCLA has significant limitations. For example, CERCLA liability does not allow plaintiffs to recover damages associated with personal injury, diminution in property value, lost profits, or other damages typically associated with contaminated property.[56] CERCLA also does not allow for plaintiffs to recover attorney's fees or expert fees associated with the cost-recovery litigation.[57] Although state Superfund statutes are beyond the scope of this Note, it is notable that a number of states do provide for more damages in their analogue Superfund statutes. Alaska, Minnesota, and Washington, for example, all allow recovery for personal injury, lost profits, diminution in value to property, attorney's fees, expenses, or other losses stemming from the contamination of property or harm to human health and the environment.[58]

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everyone's problem.'") (quoting RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 109 (2004)).

51. Under section 107, covered persons cannot be held liable for the release of a hazardous substance if it was caused by:

> (1) an act of God; (2) an act of war; or (3) by the act or omission of a third party with whom the defendant has no contractual relationship and if the covered person exercised due care with respect to the hazardous substance.

42 U.S.C. § 9607(b). This last provision is commonly referred to as the "innocent landowner defense." *See, e.g.,* Bearden, *supra* note 43, at 18.

52. *Id.* § 9607(a)(2).

53. *Id.* § 9601(9)(B).

54. *Id.* § 9607(a)(4)(A)–(D).

55. *See, e.g.*, Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486 (D. Colo. 1985) ("Other courts have similarly held that joint and several liability may be imposed on § 107 responsible parties."); *see also* Martha L. Judy & Katherine N. Probst*, Superfund at 30*, 11 VT. J. ENV'T L., 191, 195 (2009) (describing CERCLA as an "expansive liability scheme" in which "a responsible party is liable even if it was not negligent.").

56. *See* Klass, *supra* note 17, at 686; *see also* Pidot & Ratliff, *supra* note 35, at 201 (observing that CERCLA liability does not include damage to property, personal health, or economic interests).

57. *See* Klass, *supra* note 17, at 682.

58. *See id.* at 686 (citing ALASKA STAT. §§ 46.03.422(a), 46.03.822(m), 46.03.824 (allowing cost recovery and broadly defined damages as well as costs of containment and cleanup in connection with the release of hazardous substances); MINN. STAT. §§ 115B.05, 115B.14 (allowing recovery for personal injury, lost profits, diminution in value to property and other damages associated with the release of hazardous substances as well as reasonable costs and attorneys' fees); WASH. REV. CODE § 70.105D.080 (allowing recovery of expenses and reasonable attorney's fees in connection with cost recovery actions)).

Another limitation of CERCLA pertains to the scope of contaminants regulated by the statute. CERCLA liability only extends to "hazardous substances." CERCLA defines the term "hazardous substance" to include chemicals designated for regulation under the certain parts of the Clean Water Act, the Resource Conservation and Recovery Act, the Clean Air Act, and the Toxic Substances Control Act.[59] Significantly, Congress defined the term "hazardous substance" to exclude petroleum and natural gas.[60] As a result, contamination resulting from activities such as natural gas pipeline leaks are not covered by CERCLA. Under section 102(a), EPA also has the authority to designate additional chemicals as "hazardous substances" for CERCLA liability even if they are not listed under existing statutory provisions.[61] As discussed more completely in Part V, there is significant debate regarding if and when EPA should designate "emerging contaminants," which are only *suspected* to cause adverse ecological or human health effects, as hazardous substances under CERCLA.[62] Although CERCLA liability only extends to hazardous substances, EPA can still consider and respond to contaminants not designated as "hazardous" in the cleanup plan.[63]

Yet another CERCLA provision with notable limitations is the Act's Natural Resource Damages (NRDs).[64] Under this provision, CERCLA authorizes the United States, the states, and Indian tribes to act on behalf of the public as trustee of natural resources to recover for "injury to, destruction of, or loss of natural resources resulting from such a release of [a hazardous substance]."[65] Damages recovered under CERCLA's NRD provision must be made available to restore, replace, or acquire the equivalent of the natural resource damaged.[66] However, CERCLA does not express a preference for

59. 42 U.S.C. § 9401(14).

60. *Id.* § 9601(14).

61. *Id.* § 9602(a). Section 102(a) authorizes EPA to promulgate regulations designating chemicals as a hazardous substance if the chemical may present substantial danger to the public health or welfare or the environment when released into the environment. *Id.*

62. *See infra* Part V.

63. 42 U.S.C. § 9621(d).

64. For a discussion of the limitations of CERCLA's NRD scheme, see generally Patrick E. Tolan, Jr., *Natural Resource Damages under CERCLA Failures, Lessons Learned, and Alternatives*, 38 N.M. L. REV. 409 (2008) and Allan Kanner, *Tribal Sovereignty and Natural Resource Damage*s, 25 PUB. LAND & RES. L. REV. 93, 109–11 (2004).

65. 42 U.S.C. § 9607(a)(4) (Natural resources is broadly defined as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, any foreign government, [or] any Indian tribe . . . ."). As noted by one court, natural resource damages are customarily viewed as "the difference between the natural resource in its pristine condition and its post-cleanup condition, together with the lost use value and the cost of assessment." *In re* Acushnet River & New Bedford Harbor Proc. re Alleged PCB Pollution, 712 F. Supp. 1019, 1035 (D. Mass. 1989).

66. 42 U.S.C. § 9607(f)(1).

physically restoring resources over acquiring comparable resources.[67] In other words, damages recovered do not necessarily need to be spent on the cleanup of the contaminated site. Indeed, in the first twenty years after CERCLA's enactment, $61 million was collected in NRDs, but only $8.8 million was actually spent on restoration.[68] Ultimately, it is the decision of trustees to choose between (1) returning the resources to their previous condition (through restoration or rehabilitation), or (2) to substitute resources that provide substantially similar services. An example of the latter includes acquiring land next to a damaged property to serve as a preventative buffer from further harm to the injured property.[69] NRDs have been called the "Sleeping Giant" because their potential for massive damage recovery remains largely untapped.[70] Despite the moniker, most often NRD claims are treated as "residual claims" because these claims are ordinarily filed after EPA has completed its work at a Superfund site,[71] although courts have held that trustees can seek NRDs in court *prior* to the completion of the remedial work.[72] Finally, and particularly pertinent to this Note, CERCLA does not create a private right of recovery for natural resource or other damages.[73] As a result, private landowners seeking to recover such damages must rely on state law remedies.

C. To Settle or Not to Settle

Because Superfund cleanups can be an expensive affair, parties often resort to litigation to avoid paying for costly cleanups.[74] This was especially true in CERCLA's early years.[75] Critics subsequently argued that critical cleanups were being delayed by extensive litigation and that parties were wasting money on attorney's fees that would have been better spent on remedying a site.[76] In an attempt to remedy this trend, Congress amended CERCLA in 1986 to add, among other things, section 122, which governs

67. Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1230–31 (D.C. Cir. 1996) ("In light of the ambiguous statutory language and the absence of legislative history directly on point, we conclude that Congress has not clearly expressed a preference for restoration and replacement over the acquisition of equivalent resources.").

68. Kanner, *supra* note 62, at 110.

69. *Kennecott Utah Copper Corp.*, 88 F.3d at 1230.

70. Tolan, *supra* note 62, at 410.

71. *See* Utah v. Kennecott Corp., 801 F. Supp. 553, 568 (D. Utah 1992).

72. *See* New York v. Next Millennium Realty, LLC, 160 F. Supp. 3d 485, 520–21 (E.D.N.Y. 2016) (holding that state's natural resource damages claim against past owners of contaminated site was ripe for review, despite owners' assertion that damages could not be measured until EPA completed its remedial work in approximately thirty years).

73. *See* Lutz v. Chromatex, Inc., 718 F. Supp. 413, 419 (M.D. Pa. 1989).

74. *See* Pidot & Ratliff, *supra* note 35, at 201.

75. *Id.*

76. *Id.*

settlement agreements between potentially responsible parties (PRPs).[77] Notably, section 122 does not define PRPs.

Section 122 instructs EPA to proceed with settlement agreements "whenever practicable and in the public interest . . . in order to expediate effective remedial actions and minimize litigation."[78] In fact, EPA estimates that nearly 70 percent of current Superfund cleanups are the result of such settlement agreements and issue orders.[79] CERCLA encourages such settlements by protecting settling parties from contribution claims brought by other PRPs.[80] However, section 122 presumptively makes settlements subject to unending uncertainty through mandated reopeners.[81] Additionally, settlement agreements can be amended to reflect the current state of knowledge with respect to remediation science and technology.[82] Section 122(e)(6) is crucial to any discussion of challenges to ongoing cleanups. It provides that once PRPs have entered into a settlement agreement, "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized" by EPA.[83] As a result, if any PRP wants to pursue additional remediation at the site, they must first receive EPA approval.

D. Cooperative Federalism: CERCLA as Floor, Not a Ceiling

Prior to CERCLA's enactment, hazardous contamination was addressed, if at all, by common law causes of action such as nuisance, trespass, and strict liability for ultra-hazardous activities.[84] When CERCLA was signed into law,

77. 42 U.S.C. § 9622(a) ("The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be done properly by such person.").

78. *Id.*; *see also* Pidot & Ratliff, *supra* note 35, at 205 ("Because settlements cost far fewer taxpayer dollars than EPA-led cleanups, reduce litigation risks, and promote cooperation between the EPA and PRPs, they are often the agency's preferred approach.").

79. *See* Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1355 (2020).

80. For discussion of how recent doctrinal developments threaten this settlement incentive, *see* Pidot & Ratliff, *supra* note 35.

81. Section 122(f)(6)(A) provides that, even where settlements contain a covenant not to sue after the cleanup, EPA may "sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time . . . that remedial action has been completed at the facility concerned." 42 U.S.C. § 9622(f)(6)(A).

82. See generally Memorandum from Stephen D. Luftig, Director of the Office of Emergency and Remedial Response, and Barry N. Breen, Director of the Office of Site Remediation Enforcement to Regional Counsel, Office of Regional Counsel, Regions I – X et al. (Sept. 27, 1996).

83. 42 U.S.C. § 9622(e)(6).

84. *See* Atl. Rsch. Corp. v. United States, 459 F.3d 827, 830 (8th Cir. 2006) ("CERCLA effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others."); *see also* Judy & Probst, *supra* note 55, at 192 (citing Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970)).

Congress neither expressly nor impliedly displaced state law or occupied the field of hazardous waste remediation.[85] Indeed, states play a significant role in the development of cleanup plans. For example, CERCLA requires that states be afforded opportunities for "substantial and meaningful involvement" in initiating, developing, and selecting cleanup plans.[86] Generally, CERCLA mandates that remedial action comply with the ARARs of state environmental law.[87] This requirement, however, can be waived[88] and in some cases there might be debate regarding what actually constitutes an ARAR.[89] Nevertheless, courts have rejected the notion that CERCLA completely preempts state laws. Instead, courts have held that the "spirit of cooperative federalism run[s] throughout CERCLA and its regulations."[90]

CERCLA contains three savings clauses regarding state regulation in the field of hazardous substance remediation.[91] In fact, Congress specifically considered and then failed to enact more preemptive language.[92] As then-Judge Alito observed, the presence of the savings clause and the legislative history "demonstrate clearly that Congress did not intend for CERCLA to occupy the field or to prevent the states from enacting laws to supplement federal measures relating to the cleanup of hazardous wastes."[93] Other courts have similarly observed that "CERCLA sets a floor, not a ceiling."[94]

Because CERCLA liability only goes so far, one of CERCLA's savings clauses—the citizen suit provision—explicitly provides that those costs not recoverable under CERCLA could still be recovered under other statutes and

85. *See* Ronald G. Aronovsky, *A Preemption Paradox Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENV'T L.J. 225, 277 (2008); ARCO Env't Remediation, L.L.C. v. Dep't of Health & Env't Quality, 213 F.3d 1108, 1114 (9th Cir. 2000) ("CERCLA does not completely occupy the field of environmental regulation."); Bedford Affiliates v. Sills, 156 F.3d 416, 426 (2d Cir. 1998) (observing that Congress did not intend to occupy field by enacting CERCLA), *overruled on other grounds by* W.R. Grace & Co.–Conn. v. Zotos Int'l, Inc., 559 F.3d 85 (2d Cir. 2009).

86. 42 U.S.C. § 9621(f)(1).

87. *Id.* § 9621(d).

88. *Id.*

89. *See* U.S. v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1442–45 (finding that Michigan's antidegradation law can be an enforceable ARAR despite defendant's contention that the law is "unenforceably vague."); *see also* Kyle Bagenstose & Jenny Wagner, *States, Military Clash on Cleanup of Toxic Chemicals*, AP NEWS (Apr. 6, 2019), https://apnews.com/article/e1ea9b09c6eb486b999c2318a8093669 (discussing the ongoing difficulty of determining ARARs for unregulated chemicals, such as PFAS, and noting "[o]fficials have commonly cited the need to do more studies [on PFAS] before they reach the point of selecting an ARAR.").

90. New Mexico v. Gen. Elec. Corp., 467 F.3d 1223, 1244 (10th Cir. 2006).

91. 42 U.S.C. §§ 9614(a), 9652(d), 9659(h).

92. Brief Amici Curiae of the Commonwealth of Va. et al. in Support of Respondents at 6–13, Atl. Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) (No. 17-1498).

93. Manor Care, Inc. v. Yaskin, 950 F.2d 122, 126 (3d Cir. 1991).

94. *Gen. Elec. Co.*, 467 F.3d at 1246; *see also* CTS Corp. v. Waldburger, 573 U.S. 1, 18 (2014) (holding that CERCLA "does not provide a complete remedial framework," but rather supplements state efforts).

common law.[95] Some costs might be recoverable under CERCLA if, for example, the contamination is not a "hazardous substance" as defined by CERCLA or because the plaintiff is seeking damages which are unavailable under CERCLA, such as punitive damages or damages for property or personal injury caused by contamination.[96] As a result, plaintiffs continue to rely heavily on common law claims of trespass, nuisance, negligence, and strict liability to obtain damages and injunctive relief in addition to or instead of CERCLA claims.[97]

E. CERCLA's Jurisdictional Bar During Ongoing Remediation

The text of CERCLA restricts litigants' ability to bring claims arising under the Act during ongoing remediation—and for a seemingly good reason. Especially in CERCLA's early years, a substantial amount of time and money was spent "lawyering" rather than actually addressing hazardous contamination.[98] Parties concerned with overpaying their fair share of the cleanup spent more time in court than actually cleaning up. So, in 1986, in addition to adding the settlement provision,[99] Congress responded by adding provisions which limit the jurisdiction of the federal district courts to review removal or remedial actions before those actions are completed.[100] Congress feared that "[w]ithout such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment."[101]

In order to reduce dilatory litigation and encourage swift cleanups, section 113(b) of CERCLA grants federal district courts "exclusive original jurisdiction over all controversies arising under" the Act.[102] Then, section 113(h) of the Act strips federal courts of the jurisdiction "to review any

95. 42 U.S.C. § 9659(h) ("[CERCLA] does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of this title or as otherwise provided in section 9658 of this title (relating to actions under State law).").

96. *See* Ronald G. Aronovsky, *Back from the Margins An Environmental Nuisance Paradigm for Private Cleanup Cost Disputes*, 84 DENV. U. L. REV. 395, 418 (2006); *see also* Artesian Water Co. v. Gov't of New Castle Cnty., 659 F. Supp. 1269, 1285 (D. Del. 1987) ("Congress in enacting CERCLA clearly manifested an intent not to provide compensation for economic losses or for personal injury resulting from the release of hazardous substances.").

97. *See* Klass, *supra* note 17, at 691–92.

98. *See* Pidot & Ratliff, *supra* note 35, at 201; Judy & Probst, *supra* note 55, at 237 ("Researchers found that for the years 1984–89, on average, transaction costs accounted for twenty-one percent of the industrial firms' total hazardous waste expenditures.").

99. *See infra* Subpart I.C.

100. Congress passed the Superfund Amendments and Reauthorization Act (SARA) in 1986. *The Superfund Amendments and Reauthorization Act (SARA))*, EPA, https://www.epa.gov/superfund/superfund-amendments-and-reauthorization-act-sara (last visited Sept. 18, 2021). For a more detailed coverage of CERCLA's jurisdictional bar, see generally Healy, *supra* note 13; Silecchia, *supra* note 6; Pollans, *supra* note 13.

101. H.R. REP. NO. 99-253, pt. 5, at 25 (1985).

102. 42 U.S.C. § 9613(b).

challenges to removal or remedial action[s]" once the remediation plan is selected, except in a few narrow circumstances.[103] This "clean up first, litigate later" philosophy aims to ensure that cleanups are actually initiated, rather than delayed by litigation.[104] However, the jurisdictional bar has sparked criticism that it unduly limits litigants' ability to challenge potentially harmful cleanup plans.[105]

In *Atlantic Richfield*, landowners sought to compel remediation beyond what federal regulators required while the cleanup was still ongoing. As a result, the Supreme Court was faced with reconciling ostensibly competing CERCLA provisions: the jurisdictional bar that limits challenges to EPA's ongoing cleanup plans, and the savings clause that makes room for state restoration claims which are not available under CERCLA. While the landowners argued that they should be allowed to proceed with their state law restoration claims in accordance with CERCLA's savings clauses, ARCO asserted that CERCLA preempts these kind of state-level claims that might disrupt EPA's work.

II. *ATLANTIC RICHFIELD V. CHRISTIAN*

A. Background

The controversy in *Atlantic Richfield* stemmed from a century-old copper smelting production near Butte, Montana. The Anaconda Copper Mining Company built three copper smelters near Butte, Montana that operated from 1885 to 1977.[106] Together these three smelters refined tens of millions of pounds of copper ore and employed thousands of workers.[107] However, these smelters also emitted sixty-two tons of arsenic and ten tons of lead each day for the nearly one hundred years they were operational.[108] In 1973, Anaconda was

103. *Id.* § 9613(h)

104. *See* Craig, *supra* note 35, at 631; Gen. Elec. Co. v. EPA, 360 F.3d 188, 194 (D.C. Cir. 2004) (noting "Congress' overriding goal of preventing delays in the cleanup of hazardous waste sites" in enacting § 9613(h)).

105. *See* Healy, *supra* note 13, at 95 ("[D]istrict court review should be available when plaintiffs claim that the process of implementing a remedial plan will itself significantly threaten public health and the environment, and when other statutory or constitutional policies outweigh the interest in foreclosing CERCLA review prior to implementation or enforcement."); *see also* Silecchia, *supra* note 6, at 343 ("[T]here may be instances in which avoiding judicial intervention could actually undermine CERCLA's goal of environmental protection. This possibility exists in those cases where the cleanup procedures ordered may themselves cause irreparable harm to health or to the environment.").

106. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1348 (2020).

107. *Id.* at 1346.

108. *Id.* at 1361 (Gorsuch, J., concurring in part and dissenting in part). According to the Agency for Toxic Substances and Disease Registry, the two highest-priority contaminants—based on a combination of their prevalence, toxicity, and potential for human exposure—are arsenic and lead. *ATSDR's Substance Priority List*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY (Jan. 17, 2020), https://www.atsdr.cdc.gov/spl/.

in a squeeze and sold its operations to ARCO.[109] ARCO was ultimately unable to turn around the operation and closed the facility in 1980.[110]

In 1983, EPA designated the 300-square-mile area around the smelters as a Superfund site.[111] Since then, EPA has worked with ARCO to clean up the site. As part of ARCO's cleanup responsibility, EPA required ARCO to remove eighteen inches of soil in residential yards with a "weighted average" arsenic levels above 250 parts per million (ppm).[112] For so-called "pasture lands"—that is, nearly everything else—EPA required the removal of soil for lands above a 1000 ppm arsenic level.[113]

A group of landowners, however, argued that this plan, even when complete, would not adequately protect human health.[114] They asserted that the EPA-selected action levels for arsenic were far too high.[115] The EPA-selected action level of 250 ppm was significantly higher than other residential sites where the federal government previously selected a threshold of twenty-five ppm.[116] For reference, the landowners also argued that arsenic levels over 100 ppm are too toxic even for local landfills.[117] Amici further presented recent studies which concluded that "further remediation is required to protect human health."[118]

Despite the presence of toxic metals on their land, however, many landowners did not want to abandon their property and their homes. One landowner stated that he "did not want to move" because he and his wife had lived in Opportunity for over forty years and raised their daughters there.[119] As another landowner put it, "I couldn't find a kitchen door that's got all my kids' heights on it."[120]

In September 2016, ARCO had completed all the EPA-ordered remediation work on the landowners' properties, yet in other corners of the

109. *Atl. Richfield Co.*, 140 S. Ct. at 1346.

110. *Id.* at 1346–47 (noting that Fortune Magazine dubbed this merger as one of the "Decade's Worst Mergers").

111. *Id.* at 1347.

112. *Id.* at 1362 (Gorsuch, J., concurring in part and dissenting in part).

113. *Id.*

114. Response Brief for Gregory A. Christian, et al. at 8–10, *Atl. Richfield Co.*, 140 S. Ct. 1335 (No. 17-1498).

115. *See id.* at 7.

116. *Id.* at 8.

117. *Id.*

118. Brief of the Clark Fork Coal. & Mont. Env't Info. Ctr. as Amici Curiae in Support of Respondents at 9, *Atl. Richfield Co.*, 140 S. Ct. 1335 (No. 17-1498) (citing B. Davis et al., *Population-Based Mortality Data Suggests Remediation is Modestly Effective in Two Montana Superfund Counties*, 41 ENV'T GEOCHEMISTRY & HEALTH 803 (2019)) ("Between 2000 and 2016—*i.e.*, many years into EPA's work in the area—'[c]ancers, cerebro- and cardiovascular diseases (CCVD), and organ failure were elevated' for one county within the Anaconda Co. Smelter site and a contiguous county within the Silver Bow Creek/Butte Area Superfund site.").

119. Response Brief for Gregory A. Christian, et al. at 8, *Atl. Richfield Co.*, 140 S. Ct. 1335 (No. 17-1498).

120. *Id.* at 8.

300-square-mile site, some cleanup was still ongoing.[121] At this point, only twenty-four of the total seventy-seven properties had ever even been remediated by ARCO, an area comprising only about 5 percent of the landowners' total acreage.[122] The landowners argued this cleanup left much to be desired. Soil near one property owner's day care playground, for example, still had an arsenic level of 292 ppm.[123] But because the "weighted average" for her entire yard was below 250 ppm, ARCO did not perform any level of cleanup of her playground area.[124] The landowners asserted that "[t]he vast majority of the Landowner's land thus remains unremediated and covered in ARCO's toxic metals."[125] Yet in EPA's view, the 250 ppm threshold would "reduce the level of overall risk" to human health "close to" a tolerable level.[126]

Frustrated by the slow progress, starting in 2008, ninety-eight landowners sought to compel additional cleanup on their land. The landowners sued ARCO in Montana state court for common law nuisance, trespass, and strict liability.[127] As for remedies, the landowners sought various types of damages; however, only the "restoration" damages were at issue on appeal.[128]

Restoration damages to real property were expressly addressed in the Restatement (Second) of Torts published in 1979—one year prior to the enactment of CERCLA.[129] In the case of Superfund sites, restoration damages are damages paid to plaintiffs that are reasonably necessary to restore the property to the condition it would have been absent hazardous contamination.[130] Courts grant restoration damages in an attempt to more fully compensate landowners for their losses.[131]

And in 2007, Montana adopted restoration damages as a remedy for certain common law nuisance claims in *Sunburst School District No. 2 v.*

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121. *Id.* at 9.

122. *Id.*

123. *Id.* at 9–10.

124. *Id.*

125. *Id*. at 9.

126. *Id.* at 8.

127. Atl. Richfield Co. v. Mont. Second Jud. Dist. Ct, 408 P.3d 515, 518 (Mont. 2017).

128. Response Brief for Gregory A. Christian, et al. at 10, *Atl. Richfield Co.*, 140 S. Ct. 1335 (No. 17-1498); *see* Atl. Richfield Co. v. Mont. Second Jud. Dist. Ct., 408 P.3d 515, 518 (Mont. 2017) ("The Property Owners bring several claims against ARCO: (1) injury to and loss of use and enjoyment of real and personal property; (2) loss of the value of real property; (3) incidental and consequential damages, including relocation expenses and loss of rental income and/or value; (4) annoyance, inconvenience, and discomfort over the loss and prospective loss of property value; and (5) expenses for and cost of investigation and restoration of real property. ARCO concedes that the Property Owners may move forward on their first four claims, but contend that the claim for restoration damages is preempted by CERCLA.").

129. *See* RESTATEMENT (SECOND) OF TORTS § 929 cmt. b (AM. L. INST. 1979).

130. Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1088 (Mont. 2007).

131. For a discussion of restoration damages, see generally Christopher E. Brown, *Dump It Here, I Need the Money Restoration Damages for Temporary Injury to Real Property Held for Personal Use*, 23 B.C. ENV'T AFFS. L. REV. 699 (1996).

Texaco. Under *Sunburst*, Montana plaintiffs may seek an award for damages to real property when diminution in value fails to provide an adequate remedy.[132] To get restoration damages after *Sunburst*, plaintiffs must prove they have "reasons personal" for restoring the property and that their injury is "temporary" and "abatable."[133]

In that circumstance, plaintiffs may seek restoration damages, even if the cost of repairing the land exceeds the market value of the property.[134] Following *Sunburst*, plaintiffs in Montana have recovered restoration damages in varied circumstances, including when the damages sought exceeded the value of the injured property.[135]

CERCLA, however, does not provide a cause of action for private plaintiffs to recover restoration claims. As one amicus put it, "restoration damages are available to compensate plaintiffs for a variety of tortious acts under Montana law and—because they guarantee greater environmental protections than CERCLA alone can provide—they are precisely the type of common law obligations that CERCLA's savings clauses were designed to preserve."[136] As a result, if a party seeks restoration damages, they must do so under state law.

Key to this case, however, is that under Montana law, restoration damages *must* be spent on rehabilitation of the property.[137] To support their claim of restoration damages, the landowners proposed a plan that included removing a greater depth of soil from residential yards, setting a lower arsenic soil cleanup threshold level, installing an underground permeable barrier, and other remedies beyond those selected by EPA.[138] All in all, the landowners predicted the additional remediation would cost ARCO an additional $50 to $58 million.[139] If the landowners were successful, ARCO would be required to place that sum in a trust only for restoration work.[140]

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132. *Sunburst Sch. Dist. No. 2*, 165 P.3d at 1088.

133. Lampi v. Speed, 261 P.3d 1000, 1005–06 (Mont. 2011) (applying *Sunburst* to hold that plaintiffs seeking restoration damages must show "(1) temporary injury and (2) reasons personal in order to establish restoration damages as the appropriate measure of damages in his case;" and finding that in order satisfy the "reasons personal" component, plaintiff "must genuinely intend to restore his property").

134. *Sunburst Sch. Dist. No. 2*, 165 P.3d at 1088 (noting that other courts have similarly held that "the loss in market value is a poor gauge of damage" when property's principal value lies primarily in personal use rather than pecuniary gains).

135. *See* McEwen v. MCR, LLC, 291 P.3d 1253, 1269 (Mont. 2012).

136. Brief of the Clark Fork Coal. & Mont. Env't Info. Ctr. as Amici Curiae in Support of Respondents at 15, Atl. Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) (No. 17-1498).

137. *Lampi*, 261 P.3d at 130.

138. *Atl. Richfield Co.*, 140 S. Ct. at 1348.

139. *Id.*

140. *Id.*

B. Procedural History

As the landowner's action moved through the courts, there were three main questions at issue: (1) whether CERCLA section 113 stripped Montana courts of jurisdiction over the landowner's claim for restoration damages; (2) whether section 122(e)(6) barred the landowner's claim because the landowners are PRPs; and (3) whether CERCLA preempted the landowners' restoration remedy.[141]

In 2017, the Montana Supreme Court handed down a victory to the landowners. The court found that the landowners could proceed to trial for restoration damages because neither section 113(b) nor section 113(h) stripped the Montana state courts' jurisdiction over the landowner's state law restoration claim.[142] The court held that nothing in the landowners' state claim was preempted by CERCLA because the landowners' remedy does not "seek[] to stop, delay, or change the work EPA is doing."[143] Rather, the court noted that "any restoration will be performed by the Property Owners themselves and will not seek to force the EPA to do, or refrain from doing, anything."[144] Next, the Montana Supreme Court held that the landowners were not PRPs under section 122—CERCLA's settlement section. Because the landowners were not PRPs, they did not require EPA's consent prior to undertaking remedial action.[145] The court observed that the landowners had "never been treated as PRPs for any purpose—by either EPA or ARCO—during the entire thirty-plus years" since the Superfund designation and that the statute of limitations for such a claim had long passed.[146] "Put simply" the court put it, "the PRP horse left the barn decades ago."[147] As a result, the court held that the landowners could proceed and "be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan."[148]

C. An Unsatisfactory Resolution at the Supreme Court

ARCO successfully petitioned for certiorari. The U.S. Supreme Court, in an opinion authored by Chief Justice Roberts affirmed in part, vacated in part, and remanded the decision of the Montana Supreme Court.

First, in a portion of the opinion joined by the entire Court except for Justice Alito, the majority agreed with the Montana Supreme Court and ruled

141. Petition for Writ of Certiorari at i, *Atl. Richfield Co.*, 140 S. Ct. 1335 (No. 17-1498).

142. Atl. Richfield Co. v. Mont. Second Jud. Dist. Ct., 408 P.3d 515, 520–21 (Mont. 2017).

143. *Id.* at 521 ("The Property Owners are simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan. If the jury awards restoration damages, those damages will be placed in a trust for the express purpose of effectuating the Property Owners' restoration plan.").

144. *Id.*

145. *Id.* at 522–23.

146. *Id.* at 522.

147. *Id.* at 522.

148. *Id.* at 521.

that section 113 of CERCLA did not strip Montana courts of jurisdiction over the landowners' claims.[149] The Court concluded that the landowners common law claims for nuisance, trespass, and strict liability arose under Montana law[150] and not under CERCLA.[151] As a result, these claims are not subject to section 113(b) whereupon federal courts have exclusive jurisdiction over claims arising under CERCLA.[152]

For his part, Justice Alito argued that it was unnecessary for the Court to even address this question in the first place. He asserted that the "prudent course is to hold back" on deciding whether or not Montana state courts retain jurisdiction given the "bad draftsmanship" and unclear goals of section 113.[153]

In addressing the second question—the landowners' status as PRPs—Chief Justice Roberts then dealt a setback for the landowners.[154] Reversing the decision of the Montana Supreme Court, the majority concluded that the landowners were PRPs and as a result they must have EPA approval before bringing their claims to state court.[155] To determine who is a PRP for the purposes of settlement under section 122, the Court turned to section 107(a)(1), the liability portion of CERCLA, which states that a "covered person" includes any "owner" of "a site or area where a hazardous substance has . . . come to be located."[156] The Court concluded that the landowners were "covered persons" because they own property where lead and arsenic has come to be located, even though they themselves were not actually responsible for the contamination on their own land.[157] Then, the Court then held that a "covered person" under section 107 is a "potentially responsible party" under section 122(e)(6)—the settlement section. By essentially treating a "covered person" under section 107 as a stand-in for a PRP under section 122, the Court held that essentially every person who owns land on a Superfund site must receive EPA approval of their plan before they can proceed in state court for restoration damages.[158]

Next, the Court flatly reject the landowners' argument that they were not PRPs because they had never been treated like PRPs. Section 122(e) lays out a

149. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1349–52 (2020).

150. *Id.* at 1350 (citing Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)) ("A suit arises under the law that creates the cause of action.").

151. *Id.* at 1350 n.4 ("No element of the landowners' state common law claims necessarily raises a federal issue.").

152. *Id.* at 1350–52. The majority rejected ARCO's argument that section 113(h) implicitly broadens the scope of action precluded from state jurisdiction under section 113(b). The Court concluded that "[t]here is no textual basis for Atlantic Richfield's argument that Congress precluded *state* courts from hearing a category of cases in section 113(b) by stripping *federal* courts of jurisdiction over those cases in § 113(h)." *Id.* at 1350.

153. *Id.* at 1361 (Alito, J., concurring in part and dissenting in part).

154. All justices, except Justices Alito, Gorsuch, and Thomas, joined in the majority. *See id.* at 1344 (majority opinion), 1357 (Alito, J., concurring in part and dissenting in part), 1361 (Gorsuch, J., concurring in part and dissenting in part).

155. *Id*. at 1352–58 (majority opinion).

156. *Id.* at 1352 (citing 42 U.S.C. § 9607(a)).

157. *Id.* at 1356.

158. *Id.*

set of procedural requirements which, among other things, require that PRPs receive notice that they might be held responsible for remedial measures and also receive a list of names of all other parties designed as PRPs.[159] The landowners contended that since they never received such treatment, and the statute of limitations had expired, they could not possibly be PRPs. In rejecting this argument, the Court pointed to EPA's longstanding policy of not seeking to recover costs from residential landowners who are not responsible for contamination, even though EPA has the statutory right to do so.[160] As a result of this policy, the Court noted, EPA did not originally include the landowners in settlement negotiations under section 122(e).[161] The Court held that "even if EPA ran afoul of § 122(e)(1) by not providing the landowners notice of settlement negotiations, that does not change the landowners status as potentially responsible parties."[162]

As a matter of policy, the majority reasoned that this centralized system ensures the "careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones."[163] Chief Justice Roberts said this more centralized cleanup led by EPA reflects "the spirit of cooperative federalism [that] run[s] throughout CERCLA and its regulations."[164]

Chief Justice Roberts, however, sought to allay the landowners' concerns by noting that this ruling did not absolve ARCO of additional responsibility. Landowners may still seek compensatory damages under state tort law—they just cannot seek restoration damages without first obtaining EPA approval for the remedial work.[165] ARCO could still be liable for restoration damages in this case, provided that EPA approves of the landowners' proposed remediation plan.[166] The Court declined to reach the ultimate issue of whether CERCLA otherwise preempts the landowners' proposed remediation plan.[167]

Justice Gorsuch dissented and rejected ARCO's underlying policy argument that "things would be so much more orderly if the federal government ran everything."[168] Instead, he noted that the cleanup has already taken thirty-five years and is far from complete.[169] At the crux of his dissent,

159. 42 U.S.C. § 9622(e).

160. *Atl. Richfield Co*., 140 S. Ct. at 1349–52 (citing OSWER Directive No. 9834.6, Policy Towards Owners of Residential Property at Superfund Sites (EPA 1991), https://www.epa.gov/sites/production/files/documents/policy-owner-rpt.pdf).

161. *Id.* at 1354 (holding that the decision by EPA to exclude some PRPs from the section 122(e) notice based on its 1991 policy does not determine who is a PRP in the first instance). "In short, even if EPA ran afoul of § 122(e)(1) by not providing the landowners notice of settlement negotiations, that does not change the landowners' status as potentially responsible parties." *Id.*

162. *Id.*

163. *Id.* at 1353.

164. *Id.* at 1356 (citing New Mexico v. Gen. Elec. Corp., 467 F.3d 1223, 1244 (10th Cir. 2006)).

165. *Id.* at 1354–55.

166. *Id.* at 1355.

167. *Id.* at 1356.

168. *Id.* at 1365 (Gorsuch, J., concurring in part and dissenting in part).

169. *Id.* at 1366–67.

Justice Gorsuch argued that requiring landowners to obtain EPA approval for remedial work would "transform CERCLA from a tool to aid cleanups into a ban on them."[170]

As a matter of statutory interpretation, Justice Gorsuch rejected the notion that the landowners could conceivably be called PRPs. He argued that since "potentially responsible party" is not defined under 122(e)(6), the term's original meaning should apply here, rather than the section 107 definition of "covered person."[171] When CERCLA was drafted in 1980, to be "potentially responsible" for something meant then, as it does today, "that a person could *possibly* be held accountable for the outcome of it."[172] As such, under the ordinary meaning of PRP, "there is simply no way the landowners here are potentially, possibly, or capable of being held liable by the federal government for anything."[173] The mere fact that landowners own land where pollution "has come to be located," does not make them "responsible" for the high levels of arsenic and lead that has contaminated their land for decades.[174] Moreover, unlike the majority, Gorsuch, a self-proclaimed textualist,[175] agreed with the landowners' argument that they were not PRPs because they had not received notice of EPA settlement negotiations under section 122. According to Justice Gorsuch, because the landowners should not be called PRPs, they should not be required to seek EPA approval before bringing their claims for restoration damages to state court.

Next, as a matter of federalism, Justice Gorsuch argued that the majority opinion did not pay proper heed to the CERCLA's numerous commitments "to add to, not detract from, state law remedial efforts."[176] He noted that by reading section 122 to bar nearly all parties from undertaking remedial action without federal permission, the Court "renders CERCLA's many and emphatic promises about protecting existing state law rights practically dead letters."[177] He even went so far as to say that CERCLA's restrictions on "innocent"[178] landowners restoring their own land essentially amounts to a government taking, despite that fact that "[e]verything in CERCLA suggests that it seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land."[179]

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170. *Id.* at 1363.

171. *Id.* at 1363–65 (citing Wis. Central Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018)).

172. *Id.* at 1364 (citing American Heritage Dictionary 1025 (1981) and Webster's New Collegiate Dictionary 893 (1980)).

173. *Id.*

174. *Id.* (citing 42 U.S.C. § 9601(9)(B)).

175. *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP It 131–32 (2019) ("[T]extualism offers a known and knowable methodology for judges to determine impartially . . . what the law is.").

176. *Atl. Richfield Co.*, 140 S. Ct. at 1367 (Gorsuch, J., concurring in part and dissenting in part).

177. *Id.* at 1364.

178. *Id.*

179. *Id.* at 1362.

In all, the holding from *Atlantic Richfield* is a narrow one.[180] On one hand, the Court preserves the landowners' state law remedies that apply to CERCLA sites.[181] It permits dissatisfied landowners to sue in state court for common law damages, so long as the damages are limited to pecuniary ones. But what the majority gives with one hand, it takes away with the other. By finding that the landowners are PRPs, the Court insulates EPA decisions from judicial review during an ongoing remediation.[182] At a first glance, this holding sounds very reasonable: EPA gets the first stab at the cleanup, and when EPA is finished, state law can fill in the gaps to ensure the injured parties are made whole. But, as Justice Gorsuch noted, this distinction makes little sense in the context of EPA-led cleanups, which span decades and are subject to ongoing reviews for continued protectiveness.[183] In all, the Court's attempt to thread the needle on this issue may unintentionally discourage the expedient cleanup of hazardous waste in direct contravention of CERCLA's purpose.

III. A MODEST PROPOSAL: AMEND CERCLA TO ALLOW STATE LAW TO EXPEDITE CLEANUPS DURING ONGOING REMEDIATION

In light of the Court's holding in *Atlantic Richfield*, I propose that Congress amend CERCLA section 122—the settlement section—to allow *certain* PRPs to pursue state law remedies in state court during the course of ongoing remediation without first receiving EPA approval.[184] Under this scheme, the burden would be on EPA to seek an injunction if they believe the additional cleanup would create adverse impacts to the environment or human health. While the risk of dilatory litigation and uncertainty regarding settlement agreements is a reason to retain the requirement that PRPs first receive EPA approval, concern about potential environmental and human health consequences associated with the status quo is a reason to create this modest exception.[185]

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180. Although not within the purview of this note, it is notable that this holding only applies to NPL sites. It does not, therefore, apply to vast majority of cleanups led by states. *See supra* note 35.

181. *Atl. Richfield Co*., 140 S. Ct. at 1355 ("What is more, Atlantic Richfield remains potentially liable under state law for compensatory damages, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort. The damages issue before the Court is whether Atlantic Richfield is also liable for the landowners' own remediation beyond that required under the Act. Even then, the answer is yes—so long as the landowners first obtain EPA approval for the remedial work they seek to carry out.").

182. *Id.* at 1346 ("[O]nce a [cleanup] plan is selected, the time for debate ends and the time for action begins.").

183. *Id.* at 1366–67 (Gorsuch, J., concurring in part and dissenting in part) ("The government has been on site since 1983; work supposedly finished around the landowners' homes in 2016; the completion of 'primary' cleanup efforts is 'estimated' to happen by 2025. So, yes, once a Superfund site is 'delisted,' the restrictions on potentially responsible parties fade away. But this project is well on its way to the half-century mark and still only a 'preliminary' deadline lies on the horizon.").

184. Inspiration for this proposal was drawn from Silecchia, *supra* note 6, at 382–87.

185. *See id.* at 394–95 ("As a general rule, delaying judicial review will advance the improvement of the environment by expediating necessary—and often long overdue—remedial measures. However,

This proposal—which would allow PRPs who seek more comprehensive cleanups to proceed directly in state court during ongoing remediation—advances CERCLA's goal of promoting a swift cleanup. Rather than waiting potentially decades until EPA removes the site from the NPL list,[186] litigants can proceed directly in state courts. Essentially, this proposed amendment is limited in scope to the timing of landowners' state law claims; it does not substantively enlarge litigants' rights to bring a lawsuit, but simply allows landowners to bring their cases earlier and during ongoing remediation. Additionally, the likelihood of any future plaintiff's claim for restoration damages will vary by state law, but will, at minimum, require proof of harm beyond diminution of property values.

An amendment of this nature requires delicate balancing. First, this narrow exception should only be available to PRPs who are seeking a more *comprehensive* cleanup under applicable state law and standards, such as the landowners in *Atlantic Richfield*. The jurisdictional bar should remain intact for the polluting PRPs, who seek to avoid liability by delaying or preventing cleanup altogether. Since the initial passing of CERCLA, many scholars have broadly suggested that CERCLA should treat parties differently based on their divergent underlying interests.[187] The Court's ruling in *Atlantic Richfield* provides a clear example of the harms of lumping together both innocent landowners and industrial polluters—parties with surely divergent interests—into the same "PRP" category.[188] Congress should consider amending CERCLA to account for these different interests. As Congress considers this amendment, it should focus on strategies that remove innocent landowners from categorical inclusion under section 122.

Next, under this proposal EPA would retain the right to seek injunctive relief if the jury approves a plan that EPA considers to be dangerous to human and environmental health.[189] Indeed, Congress has already authorized EPA to seek injunctive relief in court if there is a threat to public health, welfare, or the

like all 'general rules,' there are circumstances in which the jurisdictional bar poses a potential threat to the environment when it requires a 'remedy' to be pursued that irrevocably harms health or the environment.").

186. *See* GAO 2009 REPORT, *supra* note 1, at 70 tbl.15.

187. *See, e.g.*, Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA A Sheep in Wolf's Clothing?*, 43 SW. L.J. 929, 952–53 (1990) ("[D]istinctions between citizen suits by responsible parties and other citizens are warranted. PRPs can satisfy their concerns with being held responsible for unnecessary costs of cleanups through post-cleanup challenges. Citizens challenges to the environmental adequacy of cleanups cannot effectively be satisfied by post-cleanup litigation."); Silecchia, *supra* note 6, at 385 (advocating for health and environmental harm exception to the section 113(h) jurisdictional bar).

188. *See Atl. Richfield Co*., 140 S. Ct. at 1364 (Gorsuch, J., concurring in part and dissenting in part) (asserting that section 122(e) "says nothing about the rights and duties of individuals who, like the landowners here, have nothing to settle because they face no potential liability").

189. *Id.* at 1367 (citing 42 U.S.C. § 9606(a)).

environment.[190] And by requiring that EPA seek injunctive relief—rather than requiring the landowners to beg the federal government for permission—this proposal reorients CERCLA to be in line with its presumption of cooperative federalism by allowing state law remedies to proceed alongside federal efforts.[191]

Of course, the best way to prevent this kind of litigation from happening in the first place is to have a top-notch remediation plan that altogether eliminates the need of future landowners to invoke restoration remedies. But it is, of course, unreasonable to expect that every remediation plan will perfectly predict the changing science, unexpected circumstances, and future desires of landowners.[192] As discussed in Part IV, this is particularly true with "emerging containments" or harmful chemicals that might have been unknown at the start of remediation, but have since been determined to be harmful to human health or the environment.[193] Moreover, current EPA procedures for providing notice and soliciting feedback on remediation plans are inadequate to effectuate the public participation goals of CERCLA.[194] This is especially problematic given that a significant proportion of NPL sites are located near underserved communities and communities of color.[195] Research has further shown that the government is slower to respond to demands from communities of color than to predominately white communities' demands.[196] Because the current remedy-selection process does not adequately encourage public participation and cannot account for unknown risks, a jurisdictional bar preventing landowners

190. 42 U.S.C. § 9606(a) ("In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.").

191. *Atl. Richfield Co*., 140 S. Ct. at 1366–67. (Gorsuch, J., concurring in part and dissenting in part).

192. Marc L. Frohman, *Rethinking the Partial Settlement Credit Rule in Private Party CERCLA Actions An Argument in Support of the Pro Tanto Credit Rul*e, 66 U. COLO. L. REV. 711, 785–86 (1995) ("Environmental remediation is, by nature, long-term, and remedial plans encompassing decades are not uncommon . . . . [T]he cost and effectiveness of both present-day and long-term remediation are inherently difficult to predict.").

193. *See infra* Part V.

194. *See* Shiigi, *supra* note 46, at 467.

195. *See* EMILY COFFEY ET AL., POISONOUS HOMES: THE FIGHT FOR ENVIRONMENTAL JUSTICE IN FEDERALLY ASSISTED HOUSING 2 (2020) (noting that 70 percent of hazardous waste sites officially listed on the NPL are located within one mile of federally assisted housing); *see also* OFF. OF LAND & EMERGENCY MGMT., *supra* note 8, at 2 tbl.1 (reporting that 49.8 percent of people living within one mile of a Superfund site are minorities).

196. *See generally* ROBERT D. BULLARD & BEVERLEY WRIGHT, THE WRONG COMPLEXION FOR PROTECTION: HOW THE GOVERNMENT RESPONSE TO DISASTER ENDANGERS AFRICAN AMERICAN COMMUNITIES (2012).

from seeking more comprehensive cleanups is altogether harsh.[197] As a result, allowing PRPs—who did not contribute to, but nevertheless suffer from hazardous waste on their land—to promptly invoke their state law right to seek restoration damages is important to effectuate CERCLA's goals of protecting public and environmental health.

The subsequent subparts explore two key reasons for adopting the proposal advocated herein. First, allowing landowners to promptly exercise their state common law rights of restoration advances CERCLA's goals of encouraging a swift cleanup. Second, this proposal reorients CERCLA back in favor of cooperative federalism. Although for decades the federal government has commanded a central role in CERCLA, this section argues that state law should be used to augment federal responses.

A. Encouraging a Swift Cleanup

The requirement that landowners must either wait for remediation to be complete or ask for EPA approval in order to bring their restoration damage claims to court does not serve CERCLA's goal of effectuating a swift cleanup and delisting NPL sites. The majority in *Atlantic Richfield* concluded that a single, unified, EPA-led remedy implementation process is the best way to promote an efficient cleanup.[198] However, EPA does not have a great track record of swift cleanups as is. As of September 2021, only 447 sites had been delisted, out of a total of 1,769 final NPL sites.[199] Indeed, some of these sites were listed early in the program and required little, if any, cleanup activity.[200] Interestingly, as of the end of Fiscal Year 2007, according to the U.S. Government Accountability Office (GAO), eighty of the sites listed in 1983—the year CERCLA was enacted—were still not construction complete.[201] And in the 2019 budget year, EPA wrapped up cleanups at only six Superfund sites around the country—the fewest since 1986, during which only three cleanups

197. *See* Silecchia, *supra* note 6, at 348 n.39 ("The harsh impact of [the jurisdictional bar] is, perhaps, offset in part by the fact that CERCLA does provide for extensive participation by citizens and potentially responsible parties in the initial creation of the remedy. Thus, ideally, potential health and environmental risks will be considered at that early stage. However, there are circumstances where those harms are either undiscovered, unremedied, or underestimated in the development stage and must be addressed later on.") (citations omitted); *see also* 132 CONG. REC. 29,736 (1986) (statement of Rep. Dan Glickman) ("To balance this restriction on judicial review of the remedy selected by the EPA, the conferees included provisions that require EPA to develop extensive procedures for public participation in the selection of the cleanup plan and the compilation of an administrative record.").

198. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1356 (2020).

199. *Superfund National Priorities List (NPL), supra* note 7.

200. *See* Judy & Probst, *supra* note 55, at 208.

201. *See* GAO 2009 REPORT, *supra* note 1, at 68 fig.11. Construction completion is a milestone that indicates all physical construction required for the cleanup of the entire site has been completed (even though final cleanup levels may not have been achieved). *Superfund Remedial Action Project Completion and Construction Completions*, EPA, https://www.epa.gov/superfund/superfund-remedial-action-project-completion-and-construction-completions (last visited Sept. 19, 2021).

were completed.[202] To give credit where credit is due, since its enactment, CERCLA helped spark dramatic improvement in the management of hazardous waste.[203] However, the current state of the cleanup effort can hardly be called "swift."

Over the years, Congress has not shown much of an appetite for strengthening CERCLA. CERCLA was, of course, hurried into law in 1980. The 1986 Superfund Amendments and Reauthorization Act meaningfully clarified the applicability of the statute's requirements to federal facilities and modified various response, liability, and enforcement provisions.[204] Since then, however, the Congressional Research Service has identified only six major amendments clarifying or expanding CERCLA.[205] This lack of legislative touch-ups should not suggest that CERCLA is a perfect model of clarity or an efficient tool for encouraging cleanups. Indeed, as Justice Alito wrote in his dissent for *Atlantic Richfield* regarding a specific CERCLA section, "[it] may simply be a piece of very bad draftsmanship, with pieces that cannot be made to fit together."[206]

The majority opinion in *Atlantic Richfield* stresses that, by requiring landowners to receive EPA approval for their remediation plan, PRPs will be more likely to enter into settlement agreements, thereby effectuating a faster cleanup.[207] The majority's reasoning is that by requiring PRPs to obtain federal approval before cleaning up a Superfund site, PRPs will have a greater sense of finality and assurance that if they enter into a settlement, they will not be liable for thousands of unapproved individual landowner remedial actions.[208] The majority notes that settlements are the heart of CERCLA given that 69 percent of all cleanup work currently underway is the product of settlement agreements.[209] While the amendment proposed here might create some uncertainty and have the impact of delaying settlements, it is hard to predict the impact of such an amendment with any such certainty. And given that most settlement agreements contain reopener provisions, there will always be some

202. Ellen Knickmeyer, *Toxic Superfund Cleanups Decline to More Than 30-Year Low,* AP NEWS (Feb. 19, 2020), https://apnews.com/article/c1d827364ac630d53848ac3ec489788d.

203. *See* Pidot & Ratliff, *supra* note 35, at 261–62; OFFICE OF SUPERFUND REMEDIATION AND TECHNOLOGY INNOVATION, EPA, BENEFICIAL EFFECTS OF THE SUPERFUND PROGRAM 20 (2011), https://semspub.epa.gov/work/HQ/175526.pdf ("The reporting requirements and liability provisions of CERCLA, serve as powerful incentives to deter risky industrial and commercial practices that can result in releases . . . .").

204. *See* Bearden, *supra* note 43, at 3.

205. *See id.* at 3–4.

206. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1361 (2020) (Alito, J., concurring in part and dissenting in part) (referring to section 113).

207. *Id.* at 1355 (majority opinion).

208. *Id.* at 1353 ("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.").

209. *Id.* ("Settlements are the heart of the Superfund statute. EPA's efforts to negotiate settlement agreements and issue orders for cleanups account for approximately 69% of all cleanup work currently underway.").

degree of uncertainty in CERCLA settlements regardless.[210] Ultimately, however, it is up to Congress to balance these competing policy interests.[211]

However, as Congress balances these competing concerns, time is of the essence.[212] Recent GAO data suggest that about 60 percent of Superfund sites overseen by EPA are in areas that may be impacted by wildfires and different types of flooding—natural hazards that are exacerbated by climate change.[213] In 2017, for example, Hurricane Harvey dumped an unprecedented amount of rainfall over the greater Houston area.[214] As a result, several Superfund sites that contain hazardous substances were damaged, potentially exposing neighboring communities to the damaging effects of hazardous waste exposure.[215] At one site on the San Jacinto River in Texas—a site added to the NPL in 2008—floodwater eroded part of the structure containing substances that included dioxins, which are highly toxic and can cause cancer and liver and nerve damage.[216] Altogether, news outlets estimated that hurricanes Harvey, Maria, and Irma resulted in the flooding of more than 252 Superfund sites—all in 2017.[217]

Wildfires are another concern that underscore the need for CERCLA reform. Recently, EPA responded to public comments on its proposed Record of Decision—the document that details the scope of the cleanup—at the Anaconda site.[218] Two members of the public expressed concern over EPA's failure to include a filtration basin, which would mitigate the effects of future forest fires.[219] In response, EPA stated that since 2011 it has "required evaluation of the effects of climate change on Superfund remedies . . . ."[220] EPA went on to say that, as result of the comments, it would include a step for

210. 42 U.S.C. § 9622(f)(6)(A).

211. *Atl. Richfield Co*., 140 S. Ct. at 1367 (Gorsuch, J., concurring in part and dissenting in part) ("The real problem, of course, is that Congress, not this Court, is supposed to make judgments between competing policy arguments like these.").

212. For a discussion regarding how to update CERCLA to prioritize climate threats, see generally Lindsey Dundas, Comment, *CERCLA It's Time to Prioritize Climate Threats*, 91 U. COLO. L. REV. 283 (2020).

213. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-73, SUPERFUND: EPA SHOULD TAKE ADDITIONAL ACTIONS TO MANAGE RISKS FROM CLIMATE CHANGE 18 (2019) [hereinafter GAO 2011 REPORT].

214. *Id.* at 1.

215. *Id.* at 18.

216. *Id.* at 18.

217. David Hasemyer & Lise Olsen, A Growing Toxic Threat – Made Worse by Climate Change, NBC NEWS (Sept. 24, 2020), https://www.nbcnews.com/specials/superfund-sites-climate-change/index.html.

218. EPA & MONT. DEP'T OF ENV'T QUALITY, RECORD OF DECISION AMENDMENT FOR THE ANACONDA REGIONAL WATER, WASTE & SOILS OPERABLE UNIT, ANACONDA SMELTER NATIONAL PRIORITIES LIST SITE, ANACONDA – DEER LODGE COUNTY, MONTANA 2-12 (2020), https://semspub.epa.gov/work/08/100007997.pdf.

219. *Id.*

220. *Id.*

re-opening the remedy if "waived-to standards" cannot be achieved, but fell short of actually committing to a mitigation plan.[221]

Despite the threat climate change poses to Superfund sites, GAO reported that EPA "has not provided direction to ensure that officials consistently integrate climate change information into site-level risk assessments and risk response decisions."[222] EPA's reluctance to consistently integrate climate change data into response decisions is cause for concern, and yet another reason to look to state law. Encouraging maximally efficient cleanups will become even more important as the threat of natural caused by climate change grows.[223]

While Congress demonstrates a reluctance to amend CERCLA, ultimately, it is communities, like Opportunity, Montana, who have to pay the price of living with toxic waste. At this point it bears repeating that EPA has been cleaning up the Anaconda Smelter site for nearly forty years, and "no one . . . will even hazard a guess when the work will finish and a 'delisting' might come."[224] And while the landowners wait for the site to be delisted, pervasive pollution continues to impose environmental harms and threaten public health.[225] Indeed, it is worth asking: if Congress is not up to the task of meaningfully executing Superfund cleanups, why don't we allow state law to hurry the cleanup process along? Amending CERCLA to allow landowners to seek restoration damages during ongoing cleanups will potentially be disruptive—but because of EPA's poor track record of cleaning up sites, it seems that CERCLA needs to be disrupted.

B. Amending CERCLA Advances Cooperative Federalism

Allowing landowners to proceed with state law restoration claims in state court without EPA approval is consistent with CERCLA's vision of cooperative federalism. As courts have noted, state remedies must remain part of the cleanup enterprise because CERCLA sets a floor, not a ceiling.[226] Congress included numerous anti-preemption provisions that preserve state-law

221. *Id.*

222. GAO 2011 REPORT, *supra* note 213, at 49.

223. Vann R. Newkirk II, *The Looming Superfund Nightmare*, THE ATLANTIC (Sept. 12, 2017), https://www.theatlantic.com/health/archive/2017/09/the-looming-super-fund-nightmare/539316/ ("As unprecedented hurricanes assault coastal U.S. communities, residents and experts fear the storms could unleash contamination the EPA has tried to keep at bay.").

224. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1367 (Gorsuch, J., concurring in part and dissenting in part).

225. David McCumber, *Fish Kill on Clark Fork Prompts Concern over Pace of Cleanup*, MONT. STANDARD (Sept. 10, 2019), https://mtstandard.com/news/local/fish-kill-on-clarkfork-prompts-concern-over-pace-of/article_babb87ad-0dc4-50e0-a62a-33aa5576da2e.html ("Ground near this reach of the Upper Clark Fork is still heavily contaminated with metals. Areas called 'slickens,' so contaminated that they are devoid of plant life, are a known source of metals washing into the river.").

226. *See* New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1246 (10th Cir. 2006); *see also* CTS Corp. v. Waldburger, 573 U.S. 1, 18 (2014) (noting that CERCLA "does not provide a complete remedial framework").

remedies, making clear "[n]othing in the [Act] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."[227] Indeed, CERCLA's only express preemption provision *expands* the scope of state-law tort actions by barring polluters from invoking restrictive statutes of limitations.[228]

It is true, however, that CERCLA and its subsequent amendments express a general disfavor for legal challenges to ongoing environmental cleanups, particularly when the challenges are brought by PRPs.[229] This is true even for health-based claims.[230] Yet from the beginning, the legislative history shows that Congress was concerned about the possibility that a broad jurisdictional bar would prevent lawsuits which were legitimately motivated by health and safety concerns from proceeding in court.[231] Congress's primary purpose in adding section 113(h)—the ban on bringing claims *under* CERCLA during ongoing remediation—was to prevent polluting parties who are financially responsible for cleanup from slowing down or delaying the cleanup.[232] The intent of jurisdictional bar was not to undermine state law remedies which would have the effect of encouraging more substantial cleanups.[233]

Persons living in toxic waste sites should be able to employ every legal tool available under both state and federal law to clean up their contaminated properties. In the case of *Atlantic Richfield*, in particular, Montana state law is particularly suitable to the task. Montana's Constitution guarantees Montanans a "clean and healthful environment"[234] and has been interpreted by the courts

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227. 42 U.S.C. § 9614(a).

228. *Id.* § 9658; *see generally* Craig, *supra* note 35 (discussing how CERCLA's only express preemption provision, 42 U.S.C § 9658, *expands* the scope of state-law tort actions by barring polluters from invoking restrictive statutes of limitations).

229. *See* Silecchia, *supra* note 6, at 346.

230. *See* Healy, *supra* note 13, at 55–56.

231. Statement of Senator Robert Stafford:

> To avoid such results, the courts must draw appropriate distinctions between dilatory or other unauthorized lawsuits by potentially responsible parties involving only monetary damages and legitimate citizens' suits complaining of irreparable injury that can be only addressed only if a claim is heard during or prior to response action . . . . The crucial distinction between these two types of suits is that plaintiffs concerned with the monetary consequences of a response can be made whole after the cleanup is completed . . . . But citizens asserting a true public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed . . . .

132 Cong. Rec. 28,409 (1986).

232. H.R. REP. NO. 99-253, pt. 1, at 266 (1985) ("The purpose of [section 113(h)] is to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA's cleanup activities."); *see also* United States v. Colorado, 990 F.2d 1565, 1576 (10th Cir. 1993).

233. H.R. REP. NO. 99-962, at 224 (1986) (Conf. Rep.) ("New section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants.").

234. MONT. CONST. art. IX, § 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

to be among the strongest environmental protections of state constitutional provisions.[235] The Montana Supreme Court has explained the necessity for such a constitutional provision, particularly given Montana's long history with extractive industries:

> For better and for worse, many companies in the business of natural resource development leave evidence of their practices in Montana long after such companies cease to exist.
>
> Montana's unique governing body of law reflects the value that Montanans place on protection, promotion, and restoration of the environment. The Montana Constitution provides that all persons have a "right to a clean and healthful environment." . . . The right to a clean and healthful environment constitutes a fundamental right.[236]

In recent decades, Montana courts have built off of this constitutional provision and have accepted that the cost of making a plaintiff whole may very well exceed the market value of the property itself.[237] In the Montana case establishing this precedent, *Sunburst*, the plaintiffs sought restoration damages under state law because they wanted to continue to use the contaminated property, but believed the state-led cleanup was insufficient. The plaintiffs—a school district—sought restoration damages to remediate the property because Montana's CERCLA analogue, the Montana Comprehensive Environmental Cleanup and Responsibility Act, merely required that defendants monitor underground pollutants rather than conduct any remedial work.[238] Ultimately, the Montana Supreme Court awarded restoration damages to the district. The court concluded that since landowners wanted to continue to use the damaged property, "restoration of the property constitutes the only remedy that affords a plaintiff full compensation."[239]

The majority in *Atlantic Richfield*, however, denied landowners access to Montana's state-specific solutions until the federal cleanup is complete.[240] While CERCLA is intended to provide a comprehensive scheme for mitigating environmental harms of national concern, state restoration damages should be permitted to augment the CERCLA when the federal response proves too slow or insufficient. By amending CERCLA to allow landowners to proceed with their restoration claims during ongoing remediation, rather than beg EPA for

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235. *See generally* Barton H. Thompson, Jr., *Constitutionalizing the Environment The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157 (2003).

236. State *ex rel.* Dep't of Env't Quality v. BNSF Ry. Co., 246 P.3d 1037, 1046 (Mont. 2010) (citing MONT. CONST. art. II, § 3) (internal citations omitted).

237. *See* Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1093 (Mont. 2007) ("We . . . allow for the recovery of restoration damages . . . [which] would restore a private party back to the position that it occupied before the tort. An award of restoration damages serves to ensure a clean and healthful environment."); *see also* Lampi v. Speed, 261 P.3d 1000, 1004 (Mont. 2011) ("Certain cases warrant an award of restoration damages in excess of the property's diminution in market value.").

238. *See Sunburst*, 165 P.3d at 1087.

239. *Id*.

240. *See* Brief of the Clark Fork Coal. & Mont. Env't Info. Ctr. as Amici Curiae in Support of Respondents at 3, Atl. Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) (No. 17-1498).

approval, Congress can recast the statute's presumption in favor of cooperative federalism. As the Supreme Court held in *Massachusetts v. E.P.A.*, states in their sovereign capacity have "an interest independent of and behind the titles of [their] citizens, in all the earth and air within [their] domain. [They have] the last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air."[241]

IV. THE PROPOSAL IN CONTEXT: IMPLICATIONS FOR THE PFAS DEBATE

Against the backdrop of this proposal is a growing debate and concern among CERCLA practitioners regarding CERCLA's treatment of so called "emerging contaminants."[242] Emerging contaminants can refer to many different types of chemicals that have the potential to enter the environment and cause suspected adverse ecological or human health effects.[243] Unlike a "hazardous substance" designation, which triggers potential CERCLA liability, a "pollutant or contaminant" designation does not trigger liability. While EPA can still consider such chemicals in selecting and updating a cleanup plan, the contaminants must be shown to pose an "imminent and substantial engagement" to public health before the site can be investigated and cleaned up.[244] Even then, EPA has considerable discretion over whether to pursue the cleanup—and to what level.[245]

PFAS are some of the most talked about emerging contaminants, and for good reason. PFAS, and their other chemical family members perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA), have recently gained widespread attention because of their prevalence and impact on human health.[246] PFAS were widely used in industry for their water-and-grease

241. Massachusetts v. EPA, 549 U.S. 497, 518–19 (2007) (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

242. *See* Glenn G. Lammi, *Consequences Must be Carefully Assessed Before PFAS Are Pushed into the Superfund Quagmire*, FORBES (Sept. 26, 2019, 3:47 PM), https://www.forbes.com/sites/wlf/2019/09/26/consequences-must-be-carefully-assessed-before-pfas-is-pushed-into-the-superfund-quagmire/; *see also* John Gardella, *PFAS Water Cleanup . . . Have You Bought Yourself a Multi-Million Dollar Superfund Issue?*, NAT'L L. REV. (Aug. 11, 2020), https://www.natlawreview.com/article/pfas-water-cleanup-have-you-bought-yourself-multi-million-dollar-superfund-issue.

243. *Emerging Contaminants,* USGS, https://www.usgs.gov/mission-areas/water-resources/science/emerging-contaminants?qt-science_center_objects=0#qt-science_center_objects (last visited Sept. 19, 2021); *Superfund National Priorities List (NPL)*, *supra* note 7.

244. 42 U.S.C. § 9606(a).

245. *See* 42 U.S.C. §§ 9606(a), 9621; *see also* Judy & Probst, *supra* note 55, at 201 ("Based on these somewhat loose criteria, EPA selects a remedy at each site. In sum, section 121 of CERCLA provides some guidance to EPA, but still leaves much room for discretion—and controversy.").

246. *See* Kevin Loria, *Should You Be Concerned About PFAS Chemicals?,* CONSUMER REPS. (Apr. 8, 2019), https://www.consumerreports.org/toxic-chemicals-substances/pfas-chemicals-should-you-be-concerned; Liza Gross, *These Everyday Toxins May Be Hurting Pregnant Women and Their Babies*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/parenting/pregnancy/pfas-toxins-chemicals.html.

repellency, resistance to chemical degradation, and flame retardance.[247] These man-made chemical compounds have been used in non-stick cookware, stain resistant fabrics, and firefighting foam, to name just a few uses.[248] All known PFAS are believed to be toxic, even in low doses.[249] PFAS are often called "forever chemicals" because they are very slow to leave the human body, leading to bioaccumulation.[250] And, as a result, even small PFAS exposures can cause long-term health problems.[251] Moreover, PFAS are widespread. PFAS contamination of soil, groundwater and surface water has been documented at hundreds of sites across forty-nine states, and the number of known contaminated sites continues to grow.[252] Their widespread use has left nearly everyone exposed.[253] While the full extent of PFAS at Superfund sites is unknown, EPA has currently identified over 180 NPL sites with confirmed or suspected PFAS contamination.[254]

Despite the implications to human health and prevalence at NPL sites, PFAS do not trigger CERCLA liability because they are not "hazardous substances."[255] In 2019, EPA released a multi-pronged PFAS Action Plan which details EPA's intentions to declare PFAS a "hazardous substance" at some point in the future.[256] Such a designation will likely result in the reopening of previously closed Superfund sites for more testing and remediation.[257] In the meantime, however, EPA released Interim Recommendations for Addressing Groundwater Contaminated with PFOA and

247. *See* William S. Dean et al., *A Framework for Regulation of New and Existing PFAS by EPA*, 16 J. SCI. POL'Y & GOVERNANCE 1, 1 (2020).

248. *See Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, NAT'L INST. OF ENV'T HEALTH SCIS., https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm (last visited Apr. 27, 2021).

249. *See* Dean et al., *supra* note 243, at 1–3 (Noting that researchers have linked PFAS exposure to a variety of health issues, including certain types of cancer and endocrine dysfunction. PFAS also harm pregnant women and their developing babies by altering both mothers' and babies' thyroid hormone levels, which play a role in immunity, brain development, and growth.).

250. *See id.* at 1.

251. *Id.*

252. *PFAS Contamination Site Tracker*, NE. UNIV. SOC. SCI. ENV'T HEALTH RSCH. INST: THE PFAS PROJECT LAB, https://pfasproject.com/pfas-contamination-site-tracker/ (last visited Nov. 14, 2020).

253. *See* Loria, *supra* note 246.

254. *See Superfund Sites Identified by EPA to Have PFAS Contamination*, U.S. SENATE COMM. ON ENV'T & PUB. WORKS, https://www.epw.senate.gov/public/index.cfm/superfund-sites-identified-by-epa-to-have-pfas-contamination (last visited Aug 25, 2021).

255. *See* Giovanni v. U.S. Dep't of the Navy, 433 F. Supp. 3d 736 (E.D. Pa. 2020) (finding that plaintiffs could not maintain their PFAS claim because PFAS had not been designated as hazardous by either the federal or state government, as required Pennsylvania's CERCLA analogue, Pennsylvania's Hazardous Sites Cleanup Act).

256. *See generally* EPA, EPA 823R18004: EPA'S PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) ACTION PLAN (2019), https://www.epa.gov/sites/default/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf.

257. *See* John Gardella, *PFAS Considerations from a Supreme Court Decision*, NAT'L L. REV. (Aug. 6, 2020), https://www.natlawreview.com/article/pfas-considerations-supreme-court-decision.

PFAS.[258] Under this plan, EPA set a voluntary maximum contaminant level (MCL) of seventy parts per trillion (ppt) "as the preliminary remediation goal for contaminated groundwater that is a current or potential source of drinking water, where no state or tribal [MCL] . . . [is] available or sufficiently protective."[259] At the same time, states are beginning to take action and set their own mandatory or voluntary PFAS remediation levels, resulting in what is increasingly becoming a patchy national regulatory framework.[260] Some of these state levels are far stricter than the voluntary EPA level.[261] And in March 2021, the Biden administration indicated its intention to aggressively regulate PFAS.[262]

PFAS present a conundrum to say the least. On one hand, they have been proven to be toxic and dangerous to human health. On the other hand, EPA has not declared PFAS as a "hazardous substance" nor determined a federally enforceable MCL. And until PFAS are declared a hazardous substance under CERCLA, they will not trigger PRP liability, although they can be considered when selecting a remedial action.[263] As is, under *Atlantic Richfield,* if a private landowner at a Superfund site discovers PFAS on their land, and wants to clean up to levels above and beyond what EPA has recommended for their site, the landowner would retain the right to seek pecuniary damages where state law allows it. However, under that same holding, the landowner must obtain EPA approval *before* filing their state law claim.

The proposal advocated here—allowing landowners to proceed in state court for restoration damages without first seeking EPA approval—would likely have consequences for remediation of so called "emerging

258. *See* Memorandum from Peter C. Wright, Assistant Administrator, EPA, to Regional Administrators, EPA (Dec. 19, 2019), https://www.epa.gov/sites/default/files/2019-12/documents/epas_interim_recomendations_for_addressing_groundwater_contaminated_with_pfoa_and_pfos_dec_2019.pdf.

259. *Id.*

260. *See PFAS*, SAFER STATES, https://www.saferstates.com/toxic-chemicals/pfas/ (last visited Dec. 15, 2020).

261. For example, in July of 2020, Michigan set a limit on PFOA at eight ppt in drinking water and on PFOS at sixteen ppt. *Michigan Adopts Strict PFAS in Drinking Water Standards*, MICHIGAN.GOV (July 22, 2020), https://www.michigan.gov/som/0,4669,7-192-47796-534660—,00.html. Also in July of 2020, New York set PFOA and PFOS MCLs both at ten ppt. Press Release, Governor Cuomo Announces First in the Nation Drinking Water Standard for Emerging Contaminant 1,4-dioxane (July 30, 2020) (on file with the author). See *PFAS*, SAFER STATES, https://www.saferstates.com/toxic-chemicals/pfas/ (last visited Dec. 15, 2020) for an overview of state action regarding PFAS legislation.

262. Kaitlyn R. Maxwell & Bernadette M. Rappold, *Biden EPA Moving Forward with National Drinking Water Regulations for PFOA and PFOS*, NAT'L L. REV. (Mar. 18, 2021), https://www.natlawreview.com/article/biden-epa-moving-forward-national-drinking-water-regulations-pfoa-and-pfos.

263. 42 U.S.C. § 9621(d)(1) ("Remedial actions selected under this section or otherwise required or agreed to by the President under this chapter shall attain a degree of cleanup of hazardous substances, pollutants, and *contaminants* released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.") (emphasis added).

contaminants." While landowners at Superfund sites do not currently have a cause of action for PFAS remediation under CERCLA, they might have a cause of action under state law. Should Congress take up an amendment to allow litigants to pursue additional state law cleanups during ongoing CERCLA cleanups, Congress will have to balance concerns about emerging contaminants, like PFAS, in which some states have regulated far more aggressively than EPA.[264]

CONCLUSION

The goal of CERCLA was to effectuate a swift cleanup of hazardous waste sites. However, in 2019, the number of successful toxic Superfund cleanups declined to a thirty-year low.[265] Yet the holding of *Atlantic Richfield* seeks to preserve the status quo by preventing landowners from using state law to pursue an expediated cleanup. Congress should speed cleanup progress by amending CERCLA to allow landowners to seek this relief earlier, while still preserving the right of EPA to seek an injunction when necessary for human health and the environment. In this way, Congress can reorient CERCLA in favor of its presumption of cooperative federalism and encourage the swift cleanup of contaminated sites.

264. *See supra* note 261.
265. *See* Knickmeyer, *supra* note 202.